Case No: C3/2011/1683

Neutral Citation Number: [2012] EWCA Civ 1051
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
1146/3/3/09

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2012

Before :

LORD JUSTICE RIX
LORD JUSTICE ETHERTON
and
LORD JUSTICE LEWISON

- -

Between :

BRITISH TELECOMMUNICATIONS PLC	**Appellant**
-and-	
OFFICE OF COMMUNICATIONS	**Respondent**
-and-	
(1) CABLE AND WIRELESS UK **(2) VIRGIN MEDIA LIMITED** **(3) GLOBAL CROSSING (UK) TELECOMMUNICATIONS LTD** **(4) VERIZON UK LIMITED** **(5) COLT TECHNOLOGY SERVICES**	**Interveners**

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Mr Christopher Vajda QC, Professor Andrew Burrows QC, Ms Sarah Lee and Mr Ben Lynch (instructed by **Bird & Bird LLP**) for the **Appellants**
Mr Pushpinder Saini QC, Mr James Segan and Mr Hanif Mussa (instructed by **Ofcom**) for the **Respondents**
Ms Dinah Rose QC and Mr Tristan Jones (instructed by **Olswang LLP**) for the **Interveners**

Hearing dates : 19th, 20th, 21st June 2012

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Judgment

Lord Justice Etherton :

1. British Telecommunications plc ("BT") seeks permission to appeal two judgments of the Competition Appeal Tribunal ("the Tribunal") dated respectively 11 June 2010 ("the Preliminary Issues Judgment") and 22 March 2011 ("the Main Judgment"). By those judgments the Tribunal dismissed an appeal by BT under section 192 of the Communications Act 2003 ("the Act") against a determination dated 14 October 2009 ("the Determination") of the Respondent, the Office of Communications ("Ofcom"), resolving disputes between BT and certain communication providers concerning the charges levied by BT for partial private circuits ("PPCs"). The Determination and those judgments of the Tribunal affect, among others, Cable and Wireless UK, Virgin Media Limited, Global Crossing (UK) Telecommunications Limited, Verizon UK Limited and Colt Technology Services, who were interveners before the Tribunal and are interveners in this Court ("the Interveners").

2. On 20 October 2011 Rimer LJ ordered that the two applications for permission to appeal be adjourned to a full court, with the appeals to follow immediately on such grounds (if any) as the court may permit to be argued. In view of the full written skeleton arguments, we decided for reasons of efficient case management to permit the parties to the appeal, that is BT, Ofcom and the Interveners, to present their full arguments, without taking the applications for permission as a separate preliminary matter.

3. All references in this judgment to paragraphs in the Tribunal's judgment are references to paragraphs in the Main Judgment.

The background

PPCs

4. PPCs are described in detail in paragraphs 18 to 27 of the Main Judgment. The following is a brief summary. A PPC is a set of network components that a communications provider (a "CP") is able to buy from BT in order to provide a private circuit to a third party (the third party typically being a customer of the CP in question). The PPC runs from the point of connection between the CP's own network and BT's network, across the BT network to the third party, to supply a transmission path at the appropriate bandwidth. "PPC" is, therefore, a name that describes the network elements that are used to provide connectivity between that point of connection and the third party. A PPC enables a CP to extend its network. CPs purchase PPCs to provide connectivity between their existing core network and their end-user customers in locations where they have no direct access network.

5. A PPC is made up of either trunk and terminating segments or terminating segments alone. Put simply, terminating segments are all PPC services excluding trunk. What is ordered from BT by a purchasing CP is a circuit from one site to another. There is no dispute that, when trunk segments are sold, they are always sold with terminating segments as part and parcel of the circuit. Trunk segments are never sold individually.

6. BT offers PPCs with a range of bandwidths; for example, 64 Kbit/s, 1 Mbit/s, 2 Mbit/s, 34 Mbit/s, 45 Mbit/s, 140 Mbit/s and 155 Mbit/s. The Determination related to 2 Mbit/s trunk segments of PPCs.

The relevant regulatory framework

7. Anti-competitive conduct is prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). Article 102 TFEU prohibits the abuse by an undertaking of a "dominant position" on a given market.

8. EU authorities have long recognised that in certain sectors of the economy reliance upon the application and enforcement of competition rules after the event (*ex post* regulation) may be insufficient to stimulate effective competition. That is particularly true of sectors, such as telecommunications and postal services, which were historically dominated by state-owned monopolies. In such sectors the historical incumbent, or other dominant undertaking, may possess such advantages that it is necessary to impose specific rules controlling its behaviour on a particular market in advance (*ex ante* regulation).

9. The EU has therefore put in place regulatory frameworks for such sectors which allow the Member States' national regulatory authority ("the NRA") to impose in certain circumstances specific *ex ante* obligations on undertakings which are in a dominant position (that is, which have significant market power ("SMP")) in particular markets, with the aim of stimulating competition more effectively than would be achieved by the mere *ex post* application of competition rules.

10. The present EU regulatory framework for telecommunications is the result principally of five Directives, known as the Common Regulatory Framework ("the CRF"), of which the two most relevant to the present appeal are Directive 2002/21/EC, known as the Framework Directive ("the FD"), and Directive 2002/19/EC, known as the Access Directive ("the AD").

11. Under the CRF the NRA is obliged to conduct periodic market reviews in the telecommunications sector in order to identify undertakings with SMP in particular markets, and to impose appropriate *ex ante* obligations upon such undertakings. A helpful and detailed review of the European and domestic legislative framework for the imposition of SMP conditions in the telecommunications industry was given by Lloyd LJ in *Hutchison 3G UK Ltd v The Office of Communications* [2009] EWCA Civ 683. It is unnecessary, therefore, for me to say more about it here.

12. The Act is intended to give effect to the CRF.

13. The provisions of the CRF and the Act most relevant to this appeal are set out in Appendix 1 and Appendix 2 to this judgment.

The regulatory history of the present dispute

14. In 2003 and 2004 Ofcom, which is the UK's NRA and which replaced Oftel, conducted, as part of its market review function under the CRF, a review of leased lines, including PPCs. Ofcom's decision statement was released on 24 June 2004 ("the LLMR Statement").

15. In the LLMR Statement Ofcom identified distinct markets in respect of: (1) high bandwidth PPC terminating segments, (2) low bandwidth PPC terminating segments, and (3) trunk segments at all bandwidths. Ofcom concluded that BT had SMP in each of those three distinct markets.

16. This appeal is concerned with the PPC trunk segments market. In relation to that market Ofcom was satisfied that (1) excessively high pricing of wholesale inputs distorts allocation of resources and leads to inefficiency for retail competitors who may be forced into using less efficient alternative technologies, and the imposition of a "cost orientation condition" would promote competition and thereby promote the interests of end-users (para. 8.62); (2) there was a risk of BT fixing and maintaining some or all of its prices at an excessively high level, so as to have adverse consequences for end-users (para. 8.64); (3) trunk segments were priced significantly above cost (para. B.99); and (4) BT's trunk prices in general were significantly above the competitive level (para. 3.74, 3.88-3.89).

17. Ofcom satisfied itself, in respect of each of the three distinct markets which it had identified (paras. 8.40-8.64), that there was a risk that BT might fix and maintain some or all of its prices at an excessively high level, or impose a price squeeze, with adverse consequences for end-users of public electronic communications services (sections 88(1)(a) and 88(3) of the Act); and that the setting of SMP conditions was appropriate for the purposes of promoting efficiency and sustainable competition and conferring the greatest possible benefits on the end-users of public electronic communications services (section 88(1)(b) of the Act).

18. All of the relevant statutory tests having been satisfied, Ofcom decided to impose on BT: (1) an interim charge control plus a cost orientation obligation in respect of certain PPC terminating segments (Conditions G3, G4, GG3 and GG4); and eight SMP conditions in respect of trunk segments (Conditions H1-H8), including a cost orientation obligation.

19. The charge control imposed by Condition G4.3 in respect of terminating segments provided that BT "shall charge no more than the amounts set out in Annex A to this Schedule for each of the products set out in that Annex."

20. This appeal concerns the cost orientation obligation in respect of trunk segments in Condition H3.1. It is as follows:

> "Condition H3 – Basis of Charges
>
> 3.1 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."

21. Ofcom also imposed accounting obligations upon BT which were intended to enable BT to demonstrate that the obligations of cost orientation and the charge control were being met (para. 10.10).

22. In 2005 Ofcom commenced an "own initiative" investigation pursuant to section 105 of the Act into whether BT's prices for trunk segments (at all bandwidths) were consistent with Condition H3. It closed its investigation on 15 December 2005 without reaching any definitive view. In its case closure notice Ofcom identified a number of concerns with the accounting treatment and allocation of core transmission costs between trunk and terminating segments. It concluded as follows:

> "Ofcom has decided to close this own investigation into BT's prices for its wholesale trunk segments because the concerns raised in the investigation transcend two markets and would be better dealt with on a forward looking basis within the next Leased Lines Market Review which encompasses both markets... [A]ny adjustment to the PPC wholesale [trunk] segments costs could lead to an adjustment of costs reported in the low and high bandwidth TISBO [viz. terminating] markets and may therefore have an impact on the assumptions used in determining the PPC terminating segments charge control. Ofcom has obtained a clear commitment from BT and agreed a project plan and timetable to prepare the data needed to quantify and correct the problems identified. This analysis may lead to restated costs and revenues for PPC trunk services and a revised methodology for recovery of core transmission costs between trunk and terminating segments on a forward looking basis."

The Determination

23. On 25 June 2008 and 20 October 2008 the Interveners and Thus plc (which is now part of the Cable & Wireless Group) ("the Disputing CPs") submitted requests to Ofcom to resolve disputes, alleging that BT had overcharged them in respect of PPCs since 24 June 2004 and seeking reimbursement. The Disputing CPs claimed payment of approximately £200 million going back to 2004 on the basis that BT had been in breach of its cost orientation obligations in respect of PPCs. The scope of the disputes that Ofcom accepted (together "the dispute") was described in the following terms in paragraph 2.44 of the Determination:

> "The finalised scope is therefore to determine whether, in the period from 24 June 2004 to 30 September 2008:
>
> i. BT has or will have overcharged the parties for PPCs (based on whether or not BT's charges for the underlying trunk and terminating elements of those PPCs were, during that time, 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) and, if so;
>
> ii. by how much the [Disputing CPs] have been overcharged; and
>
> iii. whether and by how much BT should reimburse the [Disputing CPs]."

24. On 25 July 2008 and 2 December 2008 Ofcom accepted the dispute under section 185(1) of the Act. Ofcom issued its Determination, as I have said, on 14 October 2009.

25. One of the key issues in the dispute was whether BT over-recovered its common costs. Condition H3.1 does not impose a specific method for the allocation of common costs, nor does it describe the test for assessing compliance with the cost orientation requirement set by it. When assessing BT's compliance with Condition H3.1, Ofcom therefore had to decide on the methodology or methodologies to be used.

26. Ofcom rejected BT's submissions that Ofcom should, in resolving the dispute, take a holistic aggregated approach and look at PPCs as a whole, comprising both trunk and terminating segments. Instead Ofcom took a "disaggregated" approach, looking at trunk and terminating segments separately.

27. In considering the cost orientation provision in Condition H3.1 and determining how it was to be applied Ofcom stated in the Determination that it was appropriate to look at the Guidelines on the Operation of Network Charge Controls published by its predecessor Oftel in 1997 and 2001 (the "1997 Guidelines" and "the 2001 Guidelines" respectively).

28. Ofcom decided in the Determination that, applying the DSAC (viz. distributed stand alone costs) test, BT had overcharged for 2Mbit/s trunk services for the period from 1 April 2005 to 30 September 2008 (para. 7.168). Ofcom also considered (as summarised in paragraph 5.29(ii)) the magnitude and duration of the amounts by which charges exceeded DSAC and whether charges above DSAC could have caused economic harm.

29. On the issue of whether BT's charges for 2 Mbit/s trunk segments caused economic harm to BT's wholesale customers and to end-users of PPCs, Ofcom found that charging above DSAC had not only the potential for causing economic harm but that it was "likely that such harm would have occurred" (para. 7.35). Ofcom also found that BT's return on capital employed ("ROCE") on 2 Mbit/s trunk was significantly above BT's weighted average cost of capital ("WACC"): see Table 7.3 in paragraph 7.85. That table showed, however, that looking at PPCs as a whole, BT's ROCE was in line with BT's WACC (12.2 per cent. compared to 12.0 per cent.).

30. Applying the DSAC test, Ofcom decided that the total level of such overcharge to the Disputing CPs (that is to say the difference between the price for 2Mbit/s trunk services charged to the Disputing CPs and the price calculated by reference to the DSAC test) was £41.688 million.

31. Ofcom then decided to exercise its discretion under s.190(2)(d) of the Act and directed BT to pay the sum of £41.688 million plus interest to the Disputing CPs.

32. Ofcom subsequently undertook a further review of the markets for PPCs. It published its conclusions in a statement in 2008. In 2009 it published details of the new charge control to apply to PPCs in the period up to 30 September 2012. Ofcom decided to continue the system of separate regulation for trunk and terminating segments, and it proposed, in relation to trunk segments, a charge control as well as cost orientation.

That further review is not, however, strictly relevant to the years which are the subject of the present dispute and this appeal.

The Tribunal's judgments

33. BT appealed under s.192(1)(a) of the Act against the Determination. In its Preliminary Issues Judgment dated 11 June 2010 the Tribunal dismissed BT's arguments that Ofcom did not have legal power to deal with "historic disputes" under the dispute resolution procedure in Chapter 3 of Part 2 of the Act (sections 185 ff) (the "DR procedure").

34. On 22 March 2011 the Tribunal delivered the Main Judgment dismissing BT's appeal against Ofcom's Determination.

35. By way of very brief summary, the Tribunal held that Condition H3.1 applied to trunk segments only; the burden lay on BT to be able to demonstrate to Ofcom that BT's relevant prices were cost orientated and that BT had failed to do so because it had approached cost orientation on the aggregated basis of taking trunk and terminating segments together. Once BT had failed to demonstrate to Ofcom the required cost orientation, it fell to Ofcom to assess a fair cost orientated charge as best it could. The Tribunal found that the approach of using DSAC as a test for cost orientation was "not only entirely appropriate, but actually the only satisfactory available course open to both BT… and to Ofcom" (paragraph 287).

36. Having found that BT's relevant prices were not cost orientated, by virtue of the DSAC assessment, the Tribunal considered that Ofcom had only a "hard" discretion under section 190(2)(d) of the Act, confining Ofcom to follow through on the conclusions it had drawn pursuant to the DR procedure. The Tribunal held that: "Repayment is simply putting the parties in the position they would have been in had Condition H3.1 been complied with" (para. 338(2)). The Tribunal therefore rejected in its entirety BT's appeal against Ofcom's payment directions.

The Appeal to the Court of Appeal

37. There are three grounds of appeal.

<u>Ground 1</u>

38. Ground 1 of the Appeal is that Ofcom did not have jurisdiction under the Act to accept and determine the dispute; alternatively, Ofcom wrongly exercised its discretion to accept the dispute.

39. The first part of Ground 1 turns on the proper interpretation of sections 185 to 190 of the Act. Mr Christopher Vajda QC, for BT, submitted that there is to be implied in section 185 a prohibition against Ofcom accepting a dispute which is likely to take more than four months to resolve. His argument on this point can be briefly summarised as follows. The Act was intended to give effect to the CRF. It is clear from Article 20 of the FD and Article 5(4) of the AD that the dispute resolution procedure specified there was to be a swift and relatively informal mechanism which would enable the NRA "to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances" (FD Article

20(1). Mr Vajda made the point that the telecoms industry is fast moving and that forms part of the context for the four month time period specified in Article 20 of the FD. Those policy considerations are, he said, reflected in section 188(5) and (6) of the Act.

40. Mr Vajda observed that Ofcom's acceptance of the disputes in the present case reflects a trend by CPs to use the DR procedure as a mechanism for obtaining effectively private law redress before the national regulator as a result of past unlawful acts such as, in the present case, historical breaches of SMP conditions. He said that it was contrary to the policy considerations underlying Article 20 of the FD for such matters to be resolved by Ofcom in that way rather than by other procedural mechanisms specified in the Act, such as opening a compliance investigation under section 94 or leaving the complainant to bring a private law action under section 104 of the Act. Mr Vajda submitted that another possible course would have been for the Disputing CPs to have framed their dispute in a way that could have led to a more simple and swift resolution within a four month period, such as taking only a few points and on a forward looking basis rather than historic breaches.

41. Mr Vajda submitted that, in the present case, practical injustice had resulted from Ofcom's acceptance of the disputes within the statutory framework envisaging a four month period for resolution of the disputes. He pointed to the statement of Ofcom in paragraph 13.13 of its draft determination that it could not accede to the Disputing CPs' request for "combinatorial" tests because that was "clearly not possible in the timescales available to Ofcom for resolving the Dispute" and, for that reason, Ofcom had decided to adopt the use of the DSAC and DLRIC (viz. Distributed Long Run Incremental Cost) tests.

42. Mr Vajda did not address us separately on the issue of the exercise of Ofcom's discretion in the event that we were to hold that Ofcom did have jurisdiction under the Act to entertain the dispute. It is apparent, however, from BT's skeleton argument that it relies upon the same considerations as it has deployed in attacking jurisdiction.

Ground 2

43. Mr Vajda divided his submissions on Ground 2 of the appeal into three parts. Firstly, he said that, in determining whether there had been a breach by BT of Condition H3.1, the Tribunal failed to take sufficient account of the provisions of the CRF. Secondly, he said that the Tribunal had failed to take into account the statutory obligation under section 3(3) of the Act to have regard to the principles of transparency, accountability and proportionality. Thirdly, he said that the Tribunal was wrong to say that the Guidelines published by Oftel in 1997 and 2001 were irrelevant. Underlying all those points is BT's fundamental complaint that the Tribunal was wrong to interpret and apply Condition H3.1 in a literal manner without having regard to the objectives of the CRF.

44. Mr Vajda emphasised that Ofcom, in resolving the dispute, was acting as a regulator performing regulatory functions with a view to achieving the objectives in the CRF. He referred in that context to *T-Mobile (UK) Ltd v British Telecommunications plc* [2008] CAT 12 He also referred to Case C-55/06 *Arcor AG & Co. KG v Bundesrepublick Deutschland* [2008] ECR I-2931, in which the European Court of Justice (in the context of pre-CRF law) considered the principle of cost orientation

and said (at para. 57) that account had to be taken "not only of the wording of that principle but also of its context and the objectives pursued by the legislature laying down that principle", including (on the facts of that case) ensuring the economic viability of the network. In that spirit, Mr Vajda laid particular emphasis, in interpreting and applying Condition H3.1, on recital (32) and Articles 1, 7, 8 and 20 of the FD and the corresponding provisions in sections 3 and 4 of the Act. Mr Vajda also emphasised that, as an SMP condition, Condition H3.1 must be interpreted in the light of the provisions of the AD, particularly Articles 8 and 13.

45. The first part of Mr Vajda's submissions under Ground 2 was, in brief, that there is no legislative definition of cost orientation, a regulatory term which appears in Article 13(1) of the AD; Article 8(4) of the AD requires SMP conditions to be proportionate in the light of the objectives laid down in Article 8 of the FD; and Article 13(2) of the AD provides that any cost recovery mechanism or pricing methodology imposed by a NRA, in accordance with the provisions of Article 8 of the AD, must serve to promote efficiency and sustainable competition and maximise consumer benefits, taking into account prices available in comparable competitive markets. BT complains that the Tribunal, however, simply adopted a DSAC pass/failure analysis. BT's case is that, in all the circumstances, the objectives of the AD and the FD required Ofcom, in determining what was an "appropriate" mark-up for the recovery of common costs and an "appropriate" return on capital employed as specified in Condition H3.1, to have regard to the position in the TISBO (viz. Traditional Interface Symmetric Broadband Origination, i.e. the market for terminating segments) market. Mr Vajda advanced his argument on this aspect of the appeal as one of interpretation, and said that there should be written into Condition H3.1 the following:

> "In determining what is an appropriate mark up for the recovery of common costs and an appropriate return on capital employed, one must also look at the position in the TISBO market."

46. BT's case is that, on the facts, the trunk and the TISBO markets are linked because trunk segments are never sold separately from terminating segments. CPs, like the Disputing CPs, always purchase an entire PPC, and that circuit will always include a terminating segment.

47. The evidential lynchpin of BT's case on this part of the appeal is Table 7.3 in the Determination. This shows that, having regard to BT's entire PPC services in wholesale leased line markets for the years 2004-2009, BT's total ROCE was 12.2 per cent in relation to its WACC of 12 per cent. Accordingly, BT says, looking at the position in the round, the return to BT on capital was appropriate.

48. BT acknowledges that the SMP conditions imposed in 2004 provided separately for the trunk market and the TISBO market, but Mr Vajda submitted that regulation is not a one-off activity, and the dispute both enabled and required Ofcom to take into account the way the markets actually worked in the period after the imposition of the SMP conditions. He pointed to an indication in the Determination (in paragraph 7.52) that the information then available might suggest that the rates of return earned on terminating segments were relatively low. His criticism of the Tribunal was that it regarded such information as entirely irrelevant, and that it did not even use the total PPC ROCE shown in Table 7.3 in the Determination as a helpful cross-check.

49. The second part of Mr Vajda's submissions on the second ground of appeal focused on the need for consistency. BT says that, when Ofcom closed its investigation pursuant to section 105 of the Act, Ofcom indicated that both the trunk market and the TISBO market had to be looked at together because they had an impact on each other. BT places reliance on the statements in Ofcom's case closure notice quoted in paragraph [22] above.

50. Mr Vajda submitted that it is contrary to fundamental principles of European regulatory law in this area that there should be an inconsistency between the approach taken by Ofcom there and the approach taken both by Ofcom and the Tribunal in the present case in making a complete distinction between the trunk market and the TISBO market.

51. In the third part of his submissions on the second ground of appeal, Mr Vajda criticised the Tribunal for saying that the 1997 and 2001 Guidelines are irrelevant. Those guidelines, Mr Vajda said, showed that Oftel, the then regulator, approached the issue of cost orientation in a flexible manner, advising that, depending on the precise circumstances, pricing may still be acceptable even where the DSAC is exceeded. The 1997 Guidelines provided (at para 3.5) that whether the charge falls between its incremental cost floor and stand-alone cost ceiling is

> "a first-order test. ... The primary focus of investigation … will however be the effect or likely effect of the charge on competition and on consumers."

52. The point was also made in Annex C to the 1997 Guidelines (at C.1 and C.2) as follows:

> "C.1 In general, Oftel would consider a good first order test of whether a charge is unreasonable or otherwise anti-competitive to be whether the charge in question falls within a floor of long run incremental cost and a ceiling of stand-alone cost ...
>
> C.2 In investigating complaints about charges, Oftel would not apply the floors and ceilings test mechanistically. Floors and ceilings are an effective first order test for the likelihood of anti-competitive or exploitative charging. However, there may be circumstances in which charges set outside the band of floors and ceilings are not abusive, or charges set within the band are abusive. ... If asked to investigate charges, Oftel will seek to analyse the effect of the charge in the relevant market and will take a view on this based on the individual circumstances of each case."

53. The 2001 Guidelines provided as follows at paragraph 3.1:

> "In the event of a complaint that a charge is not reasonable, or is not reasonably derived from the forward looking incremental costs of the service, a first order test will be whether the charge in question falls between its incremental cost floor and stand-alone cost ceiling. The primary focus of an investigation …

> will however be the effect or likely effect of the charge on competition and on consumers."

54. Annex B to the 2001 Guidelines contained provisions to the same effect.

55. Although Ofcom did refer to the Guidelines in paragraph 5.38 of the Determination, they were regarded as irrelevant by the Tribunal. BT submits that the duty to have regard to the Guidelines arises not only from general public law, but also from the duty of Ofcom under section 3(3) of the Act to carry out its statutory functions in a transparent and consistent way. Reliance is placed on the following observation of Lord Fraser in *Attorney General of Hong Kong v Nng Yuen Shiu* [1983] 2 AC 629 at 638 E-F:

> "... when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

56. Mr Vajda submitted that, consistently with that principle Ofcom should have stated expressly that it was deviating from the 1997 and 2001 Guidelines if it intended to do so. He further submitted that the Tribunal proceeded in an inflexible manner that was quite contrary to the approach in the Guidelines. He referred to paragraph 294 of the Main Judgment, in which the Tribunal said that a detailed economic or competition investigation into BT's pricing, looking at criteria different from the DSAC, was plainly not what Condition H3.1 envisages. The Tribunal said:

> "The suggestion that that DSAC is simply a "screening test", triggering a further investigation, understates the significance in monitoring compliance with Condition H3.1."

57. Mr Vajda emphasised that DSAC is not being challenged as an appropriate test. BT's complaint is that it is appropriate, but not conclusive.

Ground 3

58. Ground 3 of the appeal is that both Ofcom and the Tribunal acted unlawfully and contrary to well established English law principles of compensation and restitution in their directions for payment of compensation by BT. Mr Vajda referred to *4Eng Ltd v Harper* [2009] EWHC 2633 (Ch) at [13] and [16] (Sales J) and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366 at [76] and [164] as authority for the need for a principled approach. Whether or not a principled approach was taken in the present case turns on the proper interpretation and application of section 190(2)(d) of the Act. Mr Vajda submitted that section 190(2)(d) should be interpreted by analogy with existing English law remedies for breach of statutory duty and unjust enrichment. That is, he said, consistent not only with a principled approach but also with the usual rule of EU jurisprudence that procedure and remedies are matters for the national law.

59. So far as concerns the analogous remedy of damages for breach of statutory duty, Mr Vajda drew attention to passages in the Determination (paragraph 8.37) and in the Main Judgment (paragraph 332(1)) to the effect that it is likely that any overcharge by

BT has been passed on by the Disputing CPs to their retail customers. He submitted that, in those circumstances, any direction for repayment by BT to the Disputing CPs would not serve the purpose of compensation but, in reality, was a penalty for the purposes of incentivising BT and for deterrence. He pointed to paragraph 8.39 of the Determination as reflecting such considerations. BT contends that it is patently obvious that section 190(2)(d) of the Act cannot be a punitive regime. It is said that punitive regimes, such as an award of exemplary damages, are unusual in civil law and, if introduced by statute, would require clear language, but there is no such clear language in section 190(2)(d). Indeed, Mr Vajda observed that sections 94 to 103 of the Act deal specifically with enforcement and penalties. In any event, BT says that the necessary conditions for an award of punitive (viz exemplary) damages are not met in the present case.

60. BT says that the effect of the payment direction is to confer a windfall on BT's competitors. Ofcom itself acknowledged (in paragraph 8.41) that there is no certainty that anything repaid to the Disputing CPs would be passed on to their customers. Mr Vajda submitted that the obligation of Ofcom to refuse to order repayment under section 190(2)(d) of the Act, in circumstances where no loss on the part of the Disputing CPs could be shown, would be consistent with the general acceptance of a defence of "passing on" in tort claims and would align the remedies for liability in a civil suit pursuant to section 104 of the Act and the remedy under section 190(2)(d).

61. So far as concerns restitution for unjust enrichment, Mr Vajda observed that restitution for unjust enrichment under English law is not limited to private persons and bodies. It applies equally in the case of unjust enrichment of public bodies: *Woolwich Building Society v IRC* [1993] AC 70. Mr Vajda's central point is that there should be counter-restitution for benefits received by the Disputing CPs having regard to the overall charge by BT for the complete circuits. He referred to the late Professor Birks' Introduction to the Law of Restitution at pages 415-425 and Professor Virgo's Principles of the Law of Restitution (2nd ed) at pages 672-674 on counter-restitution and also to *Spence v Crawford* [1939] 2 All ER 271 (esp. at pp. 288-289 (Lord Wright) and 279-280 (Lord Thankerton)), *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 (esp. at pp. 449-451C, 458G and 459A-C), *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] A.C. 669 (at pp. 681G to 682B and 683A-C), *Kleinwort Benson Ltd v Sandwell BC* [1994] 4 All ER 890 (at p. 941), and *Halpern v Halpern (Nos 1 and 2)* [2007] EWCA Civ 291, [2008] QB 195, (at [76]). The principles of fairness and counter-restitution involve taking into account, BT says, the low charge for the terminating segments of PPCs.

62. Mr Vajda submitted generally that, in exercising its powers under section 190 of the Act, Ofcom is acting as a regulator and must exercise its powers consistently with, and so as to give effect to, the CRF. A disproportionate remedy or result is not consistent with those objectives. The result is disproportionate and unjust, BT contends, because the Disputing CPs will be retaining the benefit of cheap terminating segments of the PPC, since what they purchased was never just a trunk section but an entire circuit.

63. In short, BT submits that the Tribunal failed to exercise its discretionary power under s.190(2)(d) of the Act in a principled way, whether having regard to the analogous ground for compensation in English law or having regard to the overall objectives of

the Act and the CRF, to which the Act was intended to give effect, not least the principle of proportionality. Mr Vajda submitted that a broadly analogous principle is to be found in section 2(1) of the Civil Liability (Contribution) Act 1978 which provides that, subject to certain exceptions, the amount of contribution recoverable from any person under that Act "shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". He submitted that the Tribunal, by approaching the issue on the basis that it had a "hard" discretion, namely either to order repayment to the full extent or not at all, was entirely wrong and led to an unprincipled exercise of that statutory power. BT contends that the resulting payment to BT's own competitors would distort competition in the market unfairly to BT's own business competing in the downstream market. It would dramatically reduce the ROCE figures in Table 7.3; particularly so if, as BT contends should be done in calculating its ROCE, BT's internal sales (at the same prices as are charged to the Disputing CPs) are not ignored (contrary to the approach taken by Ofcom and the Tribunal). Mr Vajda submitted that, in the circumstances, the only appropriate course would be for this court to remit the case to the Tribunal for a proper analysis of the extent to which the Disputing CPs have actually been prejudiced by any overcharging, having regard to the entirety of the product which they purchased from BT.

Discussion

64. Mr Vajda's submissions in support of the appeal were attractively and skilfully deployed, but I reject them for reasons that were cogently advanced by Mr Pushpinder Saini QC, for Ofcom, and Ms Dinah Rose QC, for the Interveners. Mr Saini and Ms Rose deployed many arguments. I do not propose to examine all of them. I do not accept some of them, and others were not, in my view, determinative of the appeal. Those with which I agree, and which are sufficient to dispose of this appeal, are included within the following discussion. At the end of the day, BT's criticisms of the Tribunal can be answered relatively briefly.

Ground 1

65. I do not consider that BT's attack on jurisdiction or the exercise of Ofcom's discretion is seriously arguable. BT's argument on jurisdiction is different to that which it advanced before the Tribunal. Its argument before the Tribunal was that references to Ofcom pursuant to section 185 of the Act are confined to current or prospective disputes and do not extend to historic, that is to say retrospective, disputes. BT's argument on jurisdiction before this court was that it is necessarily implicit in the Act that Parliament intended to limit Ofcom's dispute resolution powers to those disputes which are likely to be completed within four months.

66. BT's obvious difficulty with that argument is that the legislature has expressly specified in section 185 of the Act those disputes which may be referred to Ofcom and those disputes which are excluded from such a reference. Section 185(7) specifies four disputes which are excluded. They do not include a dispute likely to take longer than four months. Indeed, it is not until section 188 of the Act, which has the heading "Procedure for resolving disputes", that there is provision for Ofcom to make its determination within four months except in exceptional circumstances. Furthermore, section 186 of the Act confers on Ofcom a discretion whether or not to accept a dispute even where it is within its jurisdiction. Section 186(3) requires

Ofcom to exercise its discretion in favour of handling the dispute unless the three circumstances specified there are met. Those circumstances do not include, as a sole point for rejection, that the dispute is likely to take more than four months to resolve. In those circumstances, it seems to me quite impossible to imply the term which BT argues should be implied as to jurisdiction. I would further observe, on this point, that there is nothing in Article 20 of the FD to preclude a Member State from conferring on the NRA a wider power to resolve disputes than a power to resolve within four months.

67. So far as concerns the exercise of discretion, this point was considered and rejected in a detailed analysis by the Tribunal. The Tribunal considered (at para. 160) that there was nothing intrinsic to the matters in dispute between BT and the Disputing CPs that would render resolution unachievable within four months in other cases raising similar issues. It said that the exceptional circumstances in the present case were that BT's financial statements required correction, and the need for correction was identified at the time when Ofcom accepted the dispute. Corrected figures were not available until September 2008 in the case of 2006/2007 and 2007/2008 and not until October/November 2008 in the case of prior years. I cannot see any basis for saying that the reasoning of the Tribunal on this aspect discloses any seriously arguable point of law.

Ground 2

68. I do not accept that the principles and objectives of the CRF required Ofcom, in considering whether BT was in breach of Condition H3.1, to take into account the lower charges for the terminating sections of PPCs sold by BT. On the contrary, that would undermine the regulatory regime imposed in 2004 by way of *ex-ante* regulation. Although, as I have said, Mr Vajda argued the point as one of interpretation of Condition H3.1, the point is rather one of evidence and fact in the light of regulatory policy. The issue is what, for the purposes of Condition H3.1, was "appropriate" on the facts and in the context of the regulatory purposes of the Condition and the overall scheme of the Act and the CRF to which the Act was intended to give effect.

69. So far as concerns the facts, BT relied heavily before the Tribunal, as it did on the dispute resolution by Ofcom, on Table 7.3 in the Determination, which shows that BT's total PPC ROCE for all trunk and TISBO bandwidths for the relevant years (2004/5 to 2008/9) was 12.2 per cent, which was only very slightly in excess of BT's WACC in respect of the same period and the same products. That comparison is, however, misplaced. In the first place, Condition H3.1 requires that its provisions must be satisfied in respect of "each and every charge offered". The Determination was only in respect of trunk segments of PPCs with 2Mbit/s bandwidth. The average ROCE over the relevant period for that bandwidth for trunk was 109.2 per cent, which was far in excess of BT's WACC of 12 per cent recorded in the Table for the same period.

70. The central plank of BT's justification for its apparently high charges for trunk segments of PPCs is that it was selling the terminating segments at a low price and, for that reason, it would be right to have regard to the relative ROCE and WACC for entire circuits in deciding whether there was a breach of Condition H3.1. That approach, however, is not justified in fact or in principle. Following a full

consultation, the regulatory regime imposed in 2004 identified, and distinguished between, the trunk market and the TISBO market. The former was regulated by SMP Condition H. The latter was regulated by SMP Condition G. Condition G3 imposed cost orientation in the TISBO market. Pursuant to its powers under section 87(9) of the Act, Ofcom also took the extreme step, by Condition G4, of imposing price control in the TISBO market and prohibited BT from charging from 25 June 2004 more than certain specified amounts set out in an annex to the LLMR Statement. The charges actually charged by BT for terminating segments were the maximum specified there. Accordingly, as a matter of fact, BT did not have a business strategy of selling the terminating segments at a particularly low price and compensating for that low price by charging more for the trunk segments. BT sold the terminating segments at the maximum prices that were permitted under Condition G.

71. In any event, it seems obvious that it would be contrary to principle and the objectives of the CRF to exonerate BT for selling trunk segments at prices significantly in excess of its WACC merely because BT was restricted in the prices it could charge for the terminating segments as a result of the *ex ante* Condition G. The object of the price cap was to encourage greater efficiency by BT in the TISBO market. It was imposed in 2004 despite BT's objection at that time that the price cap was too low and would result in a significant under recovery of costs.

72. In support of the regulatory objective in imposing a price control in respect of terminating segments, there was imposed on BT at the same time a specific cost accounting obligation which required BT to strip out the costs of trunk segments and to identify the DSAC ceiling.

73. There was no appeal by BT against Condition H3.1. It was never varied during the period covered by the Determination. BT accepted, and still accepts, that the trunk market and the TISBO market are economically distinct markets. From 2006 BT prepared its financial accounts in accordance with the cost accounting obligation to which I have referred, including, from March 2006, separately identifying DSAC as regards trunk segments.

74. BT never ran an argument, let alone established, before the Tribunal that the price cap fixed by Condition G4 in respect of the TISBO market was no longer appropriate, or no longer fulfilled the intended regulatory objective. Indeed, in paragraph 7.55 of the Determination Ofcom said that it was unlikely that it would have changed the price cap. That was not challenged on the appeal to the Tribunal. It is not surprising, therefore, that BT never suggested to Ofcom that, because of events since 2004, Ofcom should give a direction under Condition H3.1 that BT should not be required to secure and demonstrate to Ofcom's satisfaction that the requirements of that Condition were satisfied in respect of the relevant period.

75. BT's case is not that it should not have to satisfy the requirements of Condition H3.1 in respect of the trunk market because of changes in that market or the TISBO market since 2004. BT's case is that it has complied with Condition H3.1, and has so demonstrated, because it is consistent with the regulatory purposes and the objectives of the CRF to have regard to the charges for entire PPCs, both terminating and trunk segments. The effect of that approach, however, is to undermine the whole object of the 2004 regulatory regime, which (1) identified two economically separate markets, (2) provided for price control in respect of the TISBO market in order to promote

efficiency by BT in that market, and additionally (3) imposed cost orientation in respect of the trunk market. I agree with the Tribunal's statement (in paragraph 227) that BT's "aggregated" approach would have the effect of conflating distinct schemes of regulation.

76. Furthermore, as Ofcom observed in paragraph 7.46 of the Determination, in an extreme example, if the trunk market and a terminating market were aggregated, then BT could charge an exploitative charge in one market and an exclusionary charge in the other as long as overall the charges were in an acceptable range. Ofcom observed that that would be inconsistent with its duties and obligations to protect consumers and to promote competition.

77. Both Ofcom and the Tribunal found that there were and are a number of actual or potential adverse economic consequences for the Disputing CPs as a result of pricing by BT for trunk segments intended to compensate for the prices charged for terminating segments, even though the average overall ROCE for PPCs sold by BT may not be disproportionate to the average WACC. The Tribunal endorsed the findings of Ofcom on this aspect and reinforced them. The Tribunal said the following:

> "330. In the Determination, OFCOM considered in some detail whether BT's overcharging in respect of 2 Mbit/s trunk segments could potentially cause economic harm (see paragraphs 7.36 to 7.72 of the Determination). OFCOM's conclusion was that "not only did BT's charges for 2Mbit/s trunk services have the potential for causing economic harm, but…it seems likely that such harm would have occurred" (paragraph 7.35 of the Determination).
>
> 331. The basis for this conclusion was summarised in paragraph 7.36 of the Determination:
>
> "BT's 2 Mbit/s trunk charges have resulted in the [Altnets] and/or their retail customers paying BT too much for these services, and therefore generating financial loss or harm to them. Moreover, we also consider that the charges are likely to have given rise to a number of economic distortions, and therefore to economic harm. We consider that the main sources of this harm are likely to have been:
>
> i) reducing the overall demand for retail leased lines through increasing retail prices;
>
> ii) distorting competition between [communications providers] at the retail level by favouring those able to self-supply trunk services; and
>
> iii) distorting the investment decisions of [communications providers] in terms of whether to build or buy trunk services."

> 332. We consider all these points to be correct and – with all due respect to OFCOM's analysis in the Determination – virtually self-evident:
>
> (1) Plainly, if, according to Condition H3.1 properly applied, there has been overcharging, then the Altnets [viz. the Disputing CPs] will have suffered economic harm (and BT will have had a corresponding economic benefit). The likelihood is that the increased costs borne by the Altnets (in the form of unduly high charges for 2 Mbit/s trunk segments) will (in some way) be passed on to the Altnets' retail customers.
>
> (2) In paragraph 33 to 35 above, we described the various different networks of the Altnets and – in particular – their varying needs to purchase trunk segments. We noted that these variations were considerable. It is, again, logically inevitable that if the price for trunk segments is improperly high then those communications providers needing to purchase more trunk will be disadvantaged as against those whose networks mean that they can buy less.
>
> (3) Equally clearly, if a communications provider has a network that may require the considerable purchase of trunk segments, because the communications provider does not itself have such trunk connections, then such a communications provider – if it needs to have trunk segments – will either have to purchase them or self-supply. If the price for trunk is improperly high, then the economics of this decision (buy-in or self-supply) are distorted.
>
> 333. Mr Harding gave some hard practical examples of the foregoing points, and Mr Tickel – when cross-examined by Miss Rose – certainly conceded the point at paragraph 332(2) above (Transcript Day 3 (confidential), pages 11-12). He also conceded in abstract terms the point at paragraph 332(3) (Transcript Day 3 (confidential), pages 17-21), but was (quite rightly) cautious about conceding the specific factual example that Miss Rose was putting to him regarding Cable & Wireless' network in the South West of England, and the nature of Cable & Wireless' investment decisions in this particular context.
>
> 334. We conclude that BT's overcharging in respect of 2 Mbit/s trunk certainly had the potential to cause economic harm, and very likely did so. But, as we noted in paragraph 326 above, we consider these consequences to be inherent in a failure to comply with Condition H3.1."

78. I do not accept BT's argument that the Determination and the Main Judgment contravene the principle of consistency in the light of the statements made by Ofcom in its December 2005 case closure notice in respect of Ofcom's "own initiative" investigation pursuant to section 105 of the Act. It is clear from a fair reading of the

notice as a whole that the investigation was closed because of Ofcom's concern about BT's accounting treatment of trunk segments, including in particular the way in which common costs were apportioned to trunk segments, on the one hand, and terminating segments, on the other hand. All that Ofcom was saying in the passages relied upon by BT is that the investigation could not proceed without quantification and correction of the accounting problems which had been identified. There was no representation or assurance by Ofcom that, in determining whether or not there had been a breach of Condition H3.1 in respect of trunk segments, it would be right to take into account the charges by BT for terminating segments.

79. It inevitably follows from what I have already said that I also reject BT's criticism of the Determination and the Main Judgment on the ground that neither Ofcom nor the Tribunal adopted the same approach as described in the 1997 and 2001 Guidelines. The essence of the criticism is that, instead of treating the DSAC as "a first order test", and focusing primarily on the effect or likely effect of BT's charges on competition and consumers, the DSAC was treated as conclusive on the issue of whether or not BT was in breach of Condition H3.1. As a matter of fact, however, Ofcom referred extensively in its Determination to the Guidelines, and indicated that (even though they had been published by Oftel and were in respect of a different *ex ante* condition to Condition H3.1) it was following them. Ofcom expressly described DSAC in paragraph 5.46 of the Determination as a first order test. Further, as I have said, both Ofcom and the Tribunal found that there were, and took into account, adverse economic consequences of BT's charges for trunk segments. The Tribunal said (at paragraph 305) that Ofcom had "acted appropriately in looking to other factors in addition to the mere fact that DSAC had been breached by BT's prices". While it is true that the Tribunal took the view (at paragraph 323) that it was implicit that, if Condition H3.1 was breached, adverse economic conditions would follow, the Tribunal nevertheless went on to consider the question of economic harm if the Tribunal was wrong on that view. I have quoted above paragraphs 330 to 334 of the Main Judgment on that aspect.

80. In any event, I agree with the Tribunal that, on the particular facts of the present case, it was not necessary for Ofcom or the Tribunal to find specific adverse economic consequences of BT's pricing in order to determine that BT was in breach of Condition H3.1. Both under the express terms of Condition H3.1 and under Article 13(3) of the AD the burden was on BT to justify its prices for trunk segments of PPCs. It has sought to do so on the basis that the regulatory scheme and the CRF objectives require that there be taken into account the overall price charged by BT for entire PPCs, including terminating segments, and to have regard to BT's average ROCE and WACC on that basis. For the reasons I have given, however, that justification is fundamentally misconceived since it would undermine the regulatory regime and its objectives applicable during the relevant period and would (as the Tribunal said) conflate distinct schemes of regulation.

Ground 3

81. I turn to the third ground of appeal, namely the appropriateness of the remedy directed by the Tribunal.

82. I do not accept that it is necessary or appropriate to align section 190(2)(d) of the Act to English common law causes of action and remedies. Section 190 is part of a

statutory code intended to give effect to the CRF. It applies to all types of dispute referred to Ofcom, and not just disputes over breaches of SMP conditions. The object of the section generally is to confer power on Ofcom to enforce its determination of disputes referred to Ofcom pursuant to section 185 of the Act. The express purpose of section 190(2)(d) is to give effect to the determination by Ofcom of "the proper amount" of a charge and to do so by way of adjustment of any underpayment or overpayment.

83. It is common ground that Ofcom has a discretion in the exercise its powers under section 190. I do not accept Mr Saini's submission that the discretion is an "all or nothing" discretion: that is to say, in the case of excessive charging, either Ofcom must order repayment of the entire overpayment or it must decline to make any order for repayment. The statutory language does not expressly or impliedly require so extreme and inflexible a position. Nor is it logical for Parliament to have so intended. In exercising its remedial powers Ofcom will, as Mr Vajda said, be acting as a regulator giving effect to the statutory regime and, therefore, to the objectives of the CRF. That is not consistent with conferring an "all or nothing" power on Ofcom. It is, however, consistent with a discretion to make such order for repayment as will best achieve the objectives of the Act and the CRF on the particular facts of the case. Support for that is to be found in the word "adjustment" in section 190(2)(d), which is likely to have been intended to reflect the power of a NRA under Article 13(3) of the AD to require prices to be adjusted "where appropriate".

84. The discretion under section 190 plainly must be exercised in a principled way with a view to achieving those objectives. The starting point must be, in a case of overcharging in breach of an SMP condition, to order repayment of the amount of the excess charge. If, however, the payee can show some good reason why a lesser repayment or no repayment at all would better achieve the objectives of the Act and the CRF then that would provide a principled basis for Ofcom to give a direction for only a partial repayment or to make no direction for repayment at all. If the Tribunal, in describing Ofcom's discretion under section 190(2) as a "hard discretion" (in paragraph 182), intended to exclude such an approach by Ofcom, then I cannot agree. In any event, in the light of the arguments raised on behalf of BT on this appeal which I have rejected, and on the facts as found by the Tribunal, I can see no proper basis for reaching a different conclusion from both Ofcom and the Tribunal on the remedy they considered appropriate.

85. BT argues that, by way of analogy with damages for breach of statutory duty or with restitution for unjust enrichment, neither Ofcom nor the Tribunal should have given a direction for repayment because (1) there was no evidence that the Disputing CPs had in fact suffered any harm, and (2) it would be unjust to make an order for repayment without the Disputing CPs having to account, or give credit, for the benefit they each received by virtue of the low charges for the terminating segments of PPCs purchased by them from BT. Neither of those matters is a proper ground for impugning the exercise of the section 190 discretion by Ofcom or the Tribunal.

86. The second of those points, for which the late Professor Birks coined the expression counter-restitution, is inconsistent with the 2004 regulatory regime reflected in Conditions H3, G3 and G4 for the reasons I have given in relation to the second ground of appeal. There were no "cheap" charges for terminating segments. BT charged for them the maximum permitted under Condition G4.3. Far from promoting

the objects of the Act and the CRF counter-restitution would, on the facts of the present case, undermine them.

87. As to the first of BT's two points, there was no evidence before the Tribunal as to what costs had been passed on by the Disputing CPs to their retail customers. The Tribunal was not, therefore, in a position to make any finding of fact that the excessive costs imposed by BT in breach of Condition H3.1 were passed on to the Disputing CPs' retail customers, although it is fair to say that the Tribunal appears to have been willing to make that assumption. More to the point, both Ofcom and the Tribunal found that overcharging had adverse consequences for both the Disputing CPs and their customers and distorted the market. I have quoted above the relevant passages in the Main Judgment.

88. As Ms Rose pointed out, if the figures for 2004/5 are stripped out of Table 7.3 in the Determination because it was a year in which there was no overcharging, the ROCE for 2Mbit/s trunk and entire PPCs was significantly higher than even stated there. Overcharging for trunk segments disadvantages those CPs whose networks are such that they require more trunk segments than other CPs. It also distorts the decision of CPs, who would require trunk segments, whether or not to purchase trunk sections or to self-supply them, or indeed whether to invest in PPCs at all. Both Ofcom and the Tribunal were perfectly entitled to conclude that it is not consistent with the regulatory regime and the objectives of the CRF to leave BT with the benefit of its excessive charging for trunk segments in breach of Condition H3.1 in the light of those economic consequences as well as the economic harm suffered by the ultimate retail customers.

89. Indeed, Ofcom expressly found (in paragraphs 8.36 to 8.41 of the Determination) that it was appropriate, in the light of the regulatory objectives, to direct BT to repay the overcharges even if the Disputing CPs passed on those charges to their customers.

90. I do not consider that the need to show loss or damage for a civil claim under section 104 of the Act requires a different interpretation of section 190(2)(d) of the Act. Each section turns on its particular wording. The difference in the wording is striking. It is notable that, in the context of a civil claim under section 104 for breach of an SMP condition, Parliament has provided in section 104(3) that it shall be a defence for a defendant to show that he took all reasonable steps and exercised all due diligence to avoid contravening the condition or requirement in question. There is no comparable provision in section 190 and no comparable defence at common law for tortious breach of duty.

91. It is not necessary or appropriate, in the circumstances, to decide as a matter of principle whether there is a "passing on" defence in competition law. The point was not argued before the Tribunal. It is a controversial issue and best addressed if and when the facts require it. The facts of the present case do not require such a decision.

92. It follows from what I have said that there is no basis for BT's challenge to the remedy directed by either Ofcom or the Tribunal on public law grounds.

Conclusion

93. For all those reasons I would refuse permission to appeal on Ground 1 of the grounds of appeal. I would grant permission to appeal on Grounds 2 and 3, but I would dismiss the appeal on those grounds.

Appendix 1

PROVISIONS OF THE CRF

The Framework Directive

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

Whereas:

…

(5) The convergence of the telecommunications media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework. That regulatory framework consists of this Directive and four specific Directives: [the Authorisation Directive], [the Access Directive], [the Universal Service Directive], [the Directive on privacy and electronic communications] (hereinafter referred to as 'the Specific Directives'. …

(32) 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.

Article 1

Scope and aim

1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set

of procedures to ensure the harmonised application of the regulatory framework throughout the Community.

…

Article 3

National regulatory authorities

…

3. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently.

…

Article 7

Consolidating the internal market for electronic communications

1. In carrying out their tasks under this Directive and the Specific Directives, national regulatory authorities shall take the utmost account of the objectives set out in Article 8, including in so far as they relate to the functioning of the internal market.

…

Article 8

Policy objectives and regulatory principles

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

…

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
(c) encouraging efficient investment in infrastructure, and promoting innovation; and

…

Article 16

Market analysis procedure

1. As soon as possible after the adoption of the recommendation or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines. Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities.

…

3. Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in paragraph 2 of this Article. In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market. An appropriate period of notice shall be given to parties affected by such a withdrawal of obligations.

4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist.

…

Article 20

Dispute resolution between undertakings

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 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.

The Access Directive

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

Whereas:

…

(5) 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.

(6) 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. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers

needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services.

…

(20) Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits.

…

Article 1

Scope and aim

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

(2) This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligation imposed by national regulatory authorities are reviewed and where appropriate withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.

…

Article 5

Powers and responsibilities of the national regulatory authorities with regard to access and interconnection

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users....

…

3. Obligations and conditions imposed in accordance with paragraphs 1 and 2 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

4. 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 provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).

…

Article 8

Imposition, amendment or withdrawal of obligations

1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

…

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

…

Article 13

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.

2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

Appendix 2

COMMUNICATIONS ACT 2003

3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

…

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
(b) any other principles appearing to OFCOM to represent the best regulatory practice.

…

(4) Ofcom must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances –

(a) …
(b) the desirability of promoting competition in relevant markets;
(c) …
(d) the desirability of encouraging investment and innovation in relevant markets;
…

(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.

…

4 Duties for the purpose of fulfilling Community obligations

(1) This section applies to the following functions of OFCOM—

(a) their functions under Chapter 1 of Part 2;
(b) …
(c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;…

(2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).

…

(7) The fifth Community requirement is a requirement to encourage, to such extent as Ofcom consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.

(8) That purpose is the purpose of securing –

(a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and
(b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.

45 Power of OFCOM to set conditions

(1) OFCOM shall have the power to set conditions under this section binding the persons to whom they are applied in accordance with section 46.

(2) A condition set by OFCOM under this section must be either –

(a) a general condition; or

(b) a condition of one of the following descriptions –

…

(iv) a significant market power condition (an "SMP condition")

…

(7) An SMP condition is either-

(a) an SMP services condition; or

(b) an SMP apparatus condition

…

47 Test for setting or modifying conditions

(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...
(b) not such as to discriminate unduly against particular persons...
(c) proportionate to what the condition or modification is intended to achieve;
(d) in relation to what it is intended to achieve, transparent."

87 Conditions about network access etc.

(1) Where Ofcom have made a determination that a person to whom this section applies ('the dominant provider') has significant market power in an identified services market, they shall –

(a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and
(b) apply those conditions to that person.

…

(8) The SMP conditions authorised by subsection (7) include conditions imposing requirements about the accounting methods to be used in maintaining the separation.

(9) The SMP conditions authorised by this section also include (subject to section 88) conditions imposing on the dominant provider—

(a) such price controls as OFCOM may direct in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities;
(b) such rules as they may make in relation to those matters about the recovery of costs and cost orientation;
(c) such rules as they may make for those purposes about the use of cost accounting systems; and

…

88 Conditions about network pricing etc

(1) Ofcom are not to set an SMP condition falling within section 87(9) except where –

(a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
(b) it also appears to them that the setting of the condition is appropriate for the purposes of –

(i) promoting efficiency;
(ii) promoting sustainable competition; and
(iii) conferring the greatest possible benefits on the end-users of public electronic communications services.

...

(3) For the purposes of this section, there is a relevant risk of adverse effects arising from price distortion if the dominant provider might –

(a) so fix and maintain some or all of his prices at an excessively high level, or
(b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services.

104 Civil liability for breach of conditions...

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

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

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 that duty causes that person to sustain loss or damage...
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.

185 Reference of disputes to OFCOM

(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;

(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.

(3) Any one or more of the parties to the dispute may refer it to OFCOM.

(4) A reference made under this section is to be made in such manner as OFCOM may require.

…

(7) A dispute is an excluded dispute for the purposes of subsection (2) if it is about-

(a) obligations imposed on a communications provider by SMP apparatus conditions;
(b) contraventions of sections 125 to 127;
(c) obligations imposed on a communications provider by or under any of sections 128 to 131; or
(d) the operation in the case of a communications provider of section 134.

186 Action by OFCOM on dispute reference

(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 for 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.

…

188 Procedure for resolving disputes

(1) This section applies where –

(a) Ofcom have decided under section 186(2) that it is appropriate for them to handle a dispute...

...

(5) Except in exceptional circumstances and subject to section 187(3), OFCOM must make their determination no more than four months after the following day—

(a) in a case falling within subsection (1)(a), the day of the decision by OFCOM that it is appropriate for them to handle the dispute; and

(b) in a case falling within subsection (1)(b), the day on which the dispute is referred back to them.

(6) Where it is practicable for OFCOM to make their determination before the end of the four month period, they must make it as soon in that period as practicable.

…

190 Resolution of referred disputes

(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.

Lord Justice Lewison

94. I agree.

Lord Justice Rix

95. I also agree.