**IN THE COMPETITION APPEAL TRIBUNAL**

Case No. 1189/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 April 2012

Before:

**THE HON. MR JUSTICE HENDERSON**
(Chairman)

WILLIAM ALLAN
STEPHEN WILKS

Sitting as a Tribunal in England and Wales

BETWEEN:

**TELEFONICA O2 UK LIMITED** — Appellant

– and –

**OFFICE OF COMMUNICATIONS** — Respondent

– and –

**(1) HUTCHISON 3G UK LIMITED**
**(2) VODAFONE LIMITED** — Interveners

_____

*Transcribed from tape by Beverley F. Nunnery & Co.*
*Official Shorthand Writers and Tape Transcribers*
*Quality House, Quality Court, Chancery Lane, London WC2A 1HP*
*Tel: 020 7831 5627 Fax: 020 7831 7737*

_____

# H E A R I N G

# APPEARANCES

Mr. Tom Richards (instructed by Ashurst LLP) appeared for the Appellant.

Mr. Pushpinder Saini QC and Mr. Andrew Scott (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward QC (instructed by Herbert Smith LLP) appeared for the Interveners Vodafone.

Miss Monica Carss-Frisk QC and Mr. F. Campbell (instructed by Baker & McKenzie LLP) appeared for the Intervener Hutchison 3G UK Limited.

_____

THE CHAIRMAN: Yes, good morning.

MR. RICHARDS: Sir, I appear in this matter for Telefónica. My learned friend, Mr Saini QC appears with Mr. Scott for the respondent, Ofcom. There are two interveners here in support of Ofcom, my learned friends Miss Carss-Frisk and Mr. Campbell appear for H3G and my learned friend, Mr. Ward, appears for Vodafone.

Permission to intervene has also been granted, Sir, to Everything Everywhere but they are not represented at this hearing.

This is an appeal from a determination by Ofcom on 14th September 2011 from a dispute between Telefónica and H3G and Vodafone. That dispute concerns, as the Tribunal will have seen, H3G and Vodafone charges for voice call termination for the month of October 2010, which represented in the industry parlance "flip-flopping".

THE CHAIRMAN: Yes.

MR. RICHARDS: The parties are agreed that the issues in this appeal are solely ones of law, and they concern, as again I hope the Tribunal will have seen, the approach which Ofcom should take to the determination of the dispute about call termination charges where those are subject to a pre-existing charge control.

THE CHAIRMAN: Yes, I should let you know, Mr. Richards, we have read your very helpful skeleton argument and so you can take it we have read our way into the case to a certain extent.

MR. RICHARDS: I am very grateful.

THE CHAIRMAN: And I hope we have at least a basic indication of what the issues are.

MR. RICHARDS: Sir, the parties have agreed the following aspirational timetable, subject of course to the Tribunal, that I should open the appeal this morning and carry on until the short adjournment. Mr. Saini will respond for about two hours this afternoon. Then it will be the turn of Miss Carss-Frisk and Mr. Ward for about 50 minutes each. We anticipate Miss Carss-Frisk will begin this afternoon and finish tomorrow morning, and that ought to leave me about an hour and 20 minutes before lunch tomorrow to make my reply.

THE CHAIRMAN: Well that sounds an admirably concise timetable; I think we have all of tomorrow if we need it, not that that is an encouragement to take any longer than that, but thank you.

MR. RICHARDS: Sir, subject of course to you and to the Tribunal I intend to develop my submissions in four parts. First, to outline the legislative framework in EU and domestic law, and I appreciate this may be a matter where the Tribunal wants to cut me off because they have already read the submissions.

Secondly, to give what I hope may be helpful, a brief history of flip-flopping and the circumstances in which Ofcom made its determination.

THE CHAIRMAN: Yes, I think you will have gathered from the letter which we sent out last week that we felt we could do with a little assistance on the history, and in particular why it was left so much to the very last minute for your client to have made its intervention.

MR. RICHARDS: Sir, yes. Third, I shall make submissions on the approach to the determination which Ofcom ought to have adopted; and fourthly and finally, I shall seek to show by reference to the detail of the determination, how Ofcom failed to follow the necessary approach, and shall seek to make good each of Telefónica's five grounds of appeal.

Beginning then with a short tour of the legislative framework. The regulation of Telecoms in the EU is governed by a bundle of Directives, the keystone of which is the Framework Directive. Those Directives were made in 2002 and were amended by a further Direction in 2009. Article 5 of the amended Directive which, for your note, is at tab 3 of authorities' bundle A, required Member States to implement the amendments with effect from 26th May 2011.

The Framework Directive in its amended form is in vol. A of the bundle at tab 4. Can I ask you please to turn to tab 4, p.76. The first feature of the Framework to note is that under the EU Regulatory Framework the business of regulation is allocated to national regulatory authorities, or NRAs. In the UK, of course, the relevant authority is Ofcom.

At p.85 you will find Article 8 of the Framework Directive, which is central to Ofcom's business of regulating the telecoms. It sets out the objectives and regulatory principles, which NRAs must follow in carrying out any of their tasks and, of course, those objectives include the provision of competition as referred to in para.2 of Article 8. In para.4 the promotion of interest of citizens of the EU.

Paragraph.5 of our claim, which is a new insertion by the amended Directive in 2009, sets out various regulatory principles which must be applied. These include the promotion of regulatory predictability and safeguarding competition for the benefit of consumers.

So the regulatory task with which this appeal ----

THE CHAIRMAN: One point of view of what this appeal raises is the interaction between (a) and (c) and the parties.

MR. RICHARDS: The regulatory task with which we are concerned in this appeal principally is the resolution of disputes which is governed by Article 20 on p.99. In particular I rely on paras. 1 and 3. There are three key features. First, that dispute resolution is a regulatory function, it is one of the tasks of regulation which is allocated to NRAs.

Secondly, in para.3 of Article 20 there is a specific obligation, not merely an incident of the obligations under Article 8 but there is a specific obligation that in resolving a dispute the NRA should take decisions aimed at achieving the Article 8 objectives.

Again, in para.3 the reference to obligations which an NRA may impose shows that it is envisaged that in order to achieve the Article 8 objectives in a dispute resolution function an NRA may have to impose new obligations upon the parties to a dispute.

It is worth noting, Sir, that Article 20, para.1 has been amended by the 2009 Directive to extend the description of the parties who may refer a dispute. The original form of Article 20, para.1 is in tab 1, at p.14. One sees in the original version what was said was that only in the event of dispute arising between undertakings providing electronic communication networks or services could there be a reference to the NRA.

The amended Article 20, para.1 makes it clear that it is not only disputes between providers of electronic communications networks and services who may refer disputes, the Article also applies to disputes between such providers of networks and services, and other undertakings who benefit from access or interconnection obligations.

MR. ALLAN: Mr. Richards, can I just clarify, would you regard Telefónica as falling within the first set of , as it were, beneficiaries on the part of the ----

MR. RICHARDS: Absolutely.

MR. ALLAN: -- or brought that in so the amendment does not do anything to alter your client's position?

MR. RICHARDS: Absolutely not, sir. Telefónica is a provider of electronic communications networks, it always has been, and I do think that is in dispute in these proceedings.

Another important regulatory function which is allocated to NRAs is the promotion of access to electronic communication services. It is sufficiently important to have its own Directive, the Access Directive, which, in its amended form, is behind tab 5 of the authorities bundle. I would ask you, please, simply to note the provisions of Article 5 at p.114. At para.1 there is a positive duty upon NRAs to "encourage and, where appropriate, ensure access and interconnection" in a way that promotes the list of objectives:

> "… efficiency, sustainable competition, efficient investment and innovation, and gives the maximum benefit to end users."

Paragraph 3 of Article 5 notes that there may be circumstances in which the NRA ought to intervene of its own initiative and it must be empowered to do so.

> "With regard to access and interconnection referred to in paragraph 1, Member States shall ensure that the national regulatory authority is empowered to

intervene at its own initiative where justified in order to secure the policy objectives of Article 8 …"

I do not ask you to turn them up but Articles 8 to 13a of Access Directive deal with another function of NRAs, namely the imposition upon operators with significant market power ('SMP') of obligations. They need to be read with Article 16 of the Framework Directive which requires NRAs to carry out a market review process to identify whether there are operators in the market who enjoy SMP; and, if so, the NRA has to consider what obligations to impose.

There is, of course, a key difference between the two regulatory tasks of SMP regulation and dispose resolution, namely that regulation by an SMP condition is ex-ante regulation, it regulates future behaviour due to perceived risks of competitive or consumer harm. Dispute resolution is necessarily ex post in that it addresses disputes which have arisen and, although it is not to say that it could not address future risk as well, primarily the dispute resolution process is directed at actual conduct on a retrospective basis.

Sir, both of those regulatory tasks are implemented in domestic law by the Communications Act, as the Tribunal will have seen. That has been amended by regulations in 2011 to reflect the amendments to the Framework Directive, and the relevant provisions of the Communications Act you will find behind tab 8 in their amended form. Behind tab 8A, section 3, the general duties of Ofcom, including a principal duty to further the interests of citizens and consumers, but it is s.4 which is particularly pertinent to the present case, duties for the purpose of fulfilling EU obligations. This section applies to the following functions of Ofcom, and a number of functions are listed, including sub-section (1)(c), the dispute resolution functions under s.185 of the Act and associated sections.

Sub-section (2) imposes a duty upon Ofcom in carrying out any of those functions to act in accordance with six Community requirements which are specified below. I would ask the Tribunal to note the terms of the duty. It is a duty to act in accordance with, and while that no doubt will inform, or must inform, as I shall submit in due course, Ofcom's decision making processes. It is primarily regulating the way in which Ofcom behaves.

Behind tab C, Sir, are the provisions governing dispute resolution. Section 185 governs the reference of disputes to Ofcom. We see from sub-section (1), together with sub-section (3), that among the kinds of disputes that may be referred to Ofcom are a dispute relating to the provision of network access if it is a dispute between different communications providers..

THE CHAIRMAN: And that is the present case?

MR. RICHARDS: In my submission, yes. There is a definition of "communication provider" in s.405 of the Act. It is in the bundle behind tab 8D. To avoid us needing to turning it up let me simply say what it is. A communication provider is a person who, within the meaning of s.32(4), provides an electronic communications network, or electronic communications service. That is defined in s.32(4), which is also behind tab 8D.

It is, as I understand it, common ground that Telefónica, H3G and Vodafone are all communication providers within the of s.185(1)(a).

There is a new sub-section (1A) which implements the extended scope of Article 20.1 of the Framework Directive, and one can see quite clearly there the correlation between that new sub-section and the amended paragraph of Article 20.

THE CHAIRMAN: Before you go on, is it also common ground that this dispute, were it to be relevant, also falls within (1A)?

MR. RICHARDS: Sir, can I answer that question in this way: it quite possibly is. I have not yet seen exactly how Mr. Saini puts his case in relation to that.

THE CHAIRMAN: We will wait and see what he says about it.

MR. RICHARDS: It rather depends on what he says, but for reasons I shall explain in due course it does not matter.

THE CHAIRMAN: Yes, I appreciate that is your answer anyway.

MR. RICHARDS: At p.295 you will find s.190, which provides for the resolution of referred disputes. Sub-section (2) sets out Ofcom's powers which include, in particular, at para.(c) a power to give a direction imposing an obligation to enter into a transaction; and also (d) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge, to give a direction requiring the payment of sums by way of an adjustment of under-payment or over-payment.

There then comes new sub-paragraph (2A) which, as the Tribunal will have appreciated, is crucial to the resolution of this appeal:

> "In relation to a dispute falling within section 185(1), Ofcom must exercise their powers under subsection (2) in the way that seems to them most appropriate for the purpose of securing –
>
> (a) efficiency;
>
> (b) sustainable competition;
>
> (c) efficient investment and innovation; and
>
> (d) the greatest possible benefit for the end users of public electronic communications services."

The Tribunal may hear in those words the echo of Article 5 of Access Directive, which we have just looked at.

I shall naturally have much more on s.190(2A) in due course, but for the time being I should just note that where my learned friend Mr. Ward says in his skeleton argument that the correct approach to dispute resolution is not set down in any statute – para.34 of his skeleton - that, certainly in the light of sub-section (2A) is simply, with respect, wrong. There is a mandatory approach which is prescribed by the Act

THE CHAIRMAN: But there is of course an issue whether subsection (2A) applies to this particular dispute.

MR. RICHARDS: There is, of course. Yes, there is, of course.

THE CHAIRMAN: It may be Mr. Ward just meant putting that on one side or, anyway -----

MR. RICHARDS: That brings me, Sir, to my second head of submissions, namely the brief history of the ex ante regulation of mobile call termination and the exploitation of that regime by flip-flopping. Call termination describes the process when a caller on one network, for example Telefónica's, is connected to the recipient to the call on another operator's network, let us say H3G's. The recipient network which makes the connection to the receiving caller is described as "terminating the call", and for that service it makes a call termination charge to the operator from whose network the call originated. Pursuant to its obligations under Article 16 of the Framework Directive, in March 2007, following a lengthy process of market review, Ofcom issued its Mobile Call Termination Statement in which it concluded that each of the national mobile operators had significant market power in the market for termination of calls on their respective networks. That statement, Sir, is the forbiddingly long document in bundle B tab.21. I can summarise it simply by saying that Ofcom concluded

THE CHAIRMAN: Which bundle B are we taking about? Is it the core bundle?

MR. RICHARDS: I am sorry. It is core bundle B, which is something of a misnomer, Sir, because the core bundles include all of the relevant documents.

THE CHAIRMAN: Well, yes, I mean the purpose of the core bundle really might have been to extract the relevant bits rather than give us the whole thing again in toto but, never mind.

MR. RICHARDS: Sir, yes, we did discuss this with the registry and were told that, as we were over-running a single volume anyway, it might be more helpful just to produce new hearing bundles. We should perhaps not have called them core bundles, though. I fully recognise that.

THE CHAIRMAN: Anyway, never mind. Yes.

MR. RICHARDS: Sir, yes, it is in core bundle B, "hearing bundle B", I will just call it, at tab.21.

THE CHAIRMAN: Yes.

MR. RICHARDS: What Ofcom concluded was that each of the mobile operators had SMP in the market for the termination of calls on its own network.

THE CHAIRMAN: Yes.

MR. RICHARDS: And each of those represented different markets for termination of calls on each different network. Ofcom's response to the findings of SMP was to impose a set of ex ante regulatory obligations pursuant to the access directive in the form of SMP conditions including, in particular, a charge control which restricted the termination charges which each operator could raise. That was to run for four years from 1st April 2007. Can I ask, you, please to turn in tab.21 to p.841, and to look at condition MA4. The control was in fact in two parts: one part governed the termination of calls originating on fixed networks; the other part, MA4, governed the termination of calls originating on mobile networks -----

THE CHAIRMAN: Yes.

MR. RICHARDS: -- and that is the relevant provision for the purposes of this appeal. You will see that the rule was that an operator's average charge in MA4.1, the average inter-connection charge should not exceed a target average charge. That is the first significant feature of this charge control.

The second significant feature is that the way the average inter-connection charge was to be calculated (we see this in MA4.2) was by weighting according to the call volumes in the previous year. We see that in MA4.2. The AIC means that the average of the mobile-to-mobile inter-connection charges during the relevant year, which shall be weighted according to (a) and (b) profiles and volumes in the base year. "Base year" is defined at p.836 as the year previous to the relevant year.

THE CHAIRMAN: Yes.

MR. RICHARDS: And that, as I shall show you in due course, is what allows flip-flopping to happen. In addition to the charge control, Ofcom imposed a general obligation in MA1.2 to provide access on fair and reasonable terms and conditions, but Ofcom made it clear that this specific SMP obligation of fairness and reasonableness was not to apply to termination charge subject to the charge control. And, for the Tribunal's note, the relevant passage is para.10.27 of this statement at p.622.

THE CHAIRMAN: I am sorry, which paragraph number again?

MR. RICHARDS: Sorry, it is paragraph 10.27.

THE CHAIRMAN: Thank you.

MR. RICHARDS: And I hope that it is clear from my skeleton argument, but I should just make clear again that the fairness and reasonableness approach which Telefónica submits Ofcom should have followed in determining present disputes is not the same as an SMP condition requiring fair and reasonable charges.

THE CHAIRMAN: You say it is derived from the case law and the underlying directives.

MR. RICHARDS: Quite so.

THE CHAIRMAN: Yes.

MR. RICHARDS: In a sense, "fair and reasonable", which is a term derived from TRD, a judgment of this Tribunal, has the potential to be a red herring because it distracts from the principles for which that shorthand stands.

THE CHAIRMAN: Yes. One problem is it is such an anodyne term anyway. I mean, it is rather as gnat and flycatcher, because one always hopes any decision one takes is going to be fair and reasonable. It is all a question of what the precise content of that obligation is in any given context.

MR. RICHARDS: Indeed, sir. The MCT statement was appealed by both H3G and by BT. The appeal succeeded only insofar as they concerned the level of the charge control. And on 2nd April 2009 following the decision by the Competition Commission and the judgment of this Tribunal, Ofcom published a revised version of the charge control with lower target average charges. But the means of calculating the AIC, the average inter-connection charge, did not change. For your note, the revised tax may be found in tab.22 of this bundle B.

There is a further legal twist in the tail — which is that in its judgment on the appeal from this statement, the Tribunal directed Ofcom to amend the charge control retrospectively for the whole period from 1st April 2007 onwards. The mobile operators appealed, and that resulted in the *Vodafone v BT* judgment at the Court of Appeal on 20th April 2010 which, for your note, is at authorities bundle B, tab.29. The Court of Appeal held that Ofcom had no power to impose or to amend SMP conditions retrospectively. They were, by their nature, ex ante prospective regulation, and so they could only be amended on a prospective basis. It followed that the CAT could only direct Ofcom to amend them on a prospective basis.

The charge control regime imposed by the 2007 statement was due to expire at the end of March 2011. In May 2009 Ofcom began its process of market review in preparation for the possible imposition of SMP regulation from April 2011 onwards, and began it with a preliminary consultation which, for your note, is at Core bundle B tab.23. Flip-flopping

was not mentioned in the May 2009 consultation. However, three of the respondents to the May 2009 consultation raised serious concerns about flip-flopping, and so far as the evidence before this Tribunal goes, the first record of those concerns is in Ofcom's April 2010 consultation, which is in tab.25 of Core bundle B. Could I ask you, please, to turn to p.973, tab.25. Just to note at para.4.22 Ofcom recorded the fact that its preliminary consultation in May 2009 had provoked expressions of concern about the practice of see-sawing or flip-flopping of mobile termination rates.

We see how Ofcom took these concerns very seriously further on in the April 2010 consultation at p.1062.

THE CHAIRMAN: I am sorry, Mr. Richards, just to be clear is Telefónica one of the three respondents that expressed strong concerns?

MR. RICHARDS: No.

THE CHAIRMAN: I see.

MR. RICHARDS: On p.1062 at para. 9.110 Ofcom began to address the question of flip-flopping. It explained the background that there were no restrictions on frequency of changing mobile termination rates under the 2007 charge control. It explained that a number of fixed providers in a number of fixed providers and one of the national NCPs had raised concerns about flip-flopping, and at 9.111 that Ofcom wanted to close this loophole in the new charge control. This is because left unaddressed we believe it would have an adverse effect on purchasers of MCT and ultimately on consumers during the period of this market review.

Ofcom proceeded to explain first of all how the existing charge control works, which I have sought to show the Tribunal already. Then over the page on 1064 under the heading "How has flexibility of pricing been used in practice?" there is an explanation of the flip-flopping.

> "9.116 By allowing NCPs freedom to change the structure of their time of day rates, some providers have used this flexibility to 'flip-flop' their rates. This flip-flopping behaviour is motivated by securing additional revenue under the charge control beyond that envisaged by us when setting the glide path.
>
> 9.117 Flip-flopping works by exploiting the difference in the number of weekends in each month, between the prior year and the current year. By identifying the months in the current year where the number of weekends differs from the same months in the prior year, prices can be structured to maximise revenues."

And so that is a straightforward function of the fact that the AIC is calculated by weighting with reference to the previous year's call volumes and profile.

THE CHAIRMAN: Yes, how many such months are there likely to be in any given year? Does anyone know or worked it out?

MR. RICHARDS: Sir, I will take instructions on that. I cannot immediately tell you. I can say how much more it allows a mobile provider to generate. (After a pause): The answer is I cannot answer that question at the moment.

THE CHAIRMAN: Well it may not matter, I am just slightly curious because am I right in thinking it is only in a situation where you have a difference in the number of weekends between the current months and the corresponding months in the previous year.

MR. RICHARDS: Sir, in general that is the most obvious way of doing it, there may be further and more subtle ways of doing it; it is exploiting the difference in the number of weekends which is the key.

THE CHAIRMAN: And presumably, Mr. Richards, it is predictable by an MNO as to when a potential flip-flopping opportunity will arise, and may be expected to be exploited, the weekend variant at least?

MR. RICHARDS: That is right, Sir, some operators – not Telefónica – took up flip-flopping they say to protect themselves from other people doing it to them. It is not something my client did. Of course, it is not possible to guess precisely by how much another operator is going to try to flip-flop but it ought to be possible in advance to identify those months in which flip-flopping will be possible.

THE CHAIRMAN: Well we just need to sit down with a few calendars and spend half an hour working it out, it would not take long. I think it could probably be done by a computer anyway.

MR. RICHARDS: Sir, yes. There is an indication in fig.15 on p.1065 of how one of the mobile providers has flipped its weekend termination rate over the period from November 2008 to November 2009. One sees that the variation in rates is quite striking. Ofcom thought that flip-flopping was a problem. At para. 9.120 it begins to explain the reasons why. First, flip-flopping on Ofcom's calculations allow mobile providers to get up to 5 per cent more by way of termination charges than Ofcom had intended when setting the charge control. Secondly, 9.121 "frequent and radical changes" in rates increase risk, and potentially increase costs for originating providers. Thirdly, and this is 9.122, having quoted an observation by Colt, there is a consequential detriment to consumers who pay higher prices as a result of flip-flopping.

Over the page at 9.124 there is the observation that even if the flip-flopping rates are not directly passed through to consumers retail customers are likely to lose out in the long run from higher overall rates.

A fourth policy objection to flip-flopping is in 9.125, that by exploiting the freedom to vary prices, which was permitted for the sake of efficiency operators in fact are likely to operate counter to those very efficiency objectives. Flip-flopping in Ofcom's view was calculated to result in inefficiency.

At para.9.126 Ofcom noted that it had not revised the current charge control. It explained its reasons why, but it also explained its intention with effect from March 2011, to improve the design of the rules so that flip-flopping could not happen.

At para. 9.127 et seq Ofcom set out a series of options for resolving flip-flopping.

THE CHAIRMAN: Mr. Richards, can I just take you back briefly to 9.122, which refers to the anticipatory responses of paying operators, I think the evidence in support of the notice of application says that Telefónica was not able to adjust its retail prices in order to protect itself against the practice of flip-flopping. Is that an accurate statement of your position?

MR. RICHARDS: Yes.

THE CHAIRMAN: So Telefónica is in a different position from the position that some other operators have taken to guard against this activity?

MR. RICHARDS: Yes, Sir, that is right.

THE CHAIRMAN: Is there any reason why that should be the case?

MR. RICHARDS: Well, the reason which we have explained in evidence is that for us it just was not practical to pass them on. There is still a fact that at 9.124, as Ofcom observes, that if new rates cannot directly be passed on they are still going to raise costs to customers generally speaking. As to why Colt thought that it might and could pass through flip-flop rates to customers I am not able to explain why Colt was in that position but the key point for the purposes of this appeal is that Ofcom made that observation.

THE CHAIRMAN: My question was rather why Telefónica did not, and I understand you cannot say why Colt did.

MR. RICHARDS: In relation to the October 2010 charges the principal reason is that we did not have time.

THE CHAIRMAN: Okay.

MR. RICHARDS: Sir, the Tribunal in its questions which were circulated last week asked if the parties could help it on when flip-flopping started. So far as the evidence before the Tribunal goes, the best I can do is on p.1068. At fig.16 there is a graph ----

THE CHAIRMAN: Oh, I see.

MR. RICHARDS: -- which applies only to one operator, and an anomalous operator, setting out percentage changes in termination rates. We see that those start towards the end of 2008. That is the best I can do so far as the evidence before the Tribunal goes. We have sought to compile our own graph of flip-flopping rates that we were charged by all operators, but it is not in evidence, and I do not seek the Tribunal's permission to adduce it unless it would be helpful.

Ofcom took up the question of flip-flopping in a workshop in October 2010. We do not have a documentary note of that in the bundles, but it is referred to in a further consultation document dated 16th November 2010, which is in Core bundle C, tab 26. We see there in the Executive Summary, paras. 1.1 to 1.3 it is explained that this is a supplementary consultation and there is a proposed changed to the pricing rule in response to the April 2010 and following further discussions with industry at a workshop on 12th October 2010. The subject of that workshop was flip-flopping.

At paras.2.5 and 2.7 of this consultation Ofcom repeated their concerns about the practice, that it is undesirable because it undermines the core purpose of charge control. Ofcom suggested a solution at para.2.39. It had canvassed new options 5 and 6 in addition to the four it had floated in the April consultation. Its preferred option was option 6, effectively a maximum ceiling on rates with flexibility beneath that ceiling, but not allowing the radical changes in termination rates in which most of the mobile operators, not including Telefónica, had engaged. That was the proposed ceiling and indeed that was the approach which, in its March 2011 MCT statement, Ofcom took. For your reference, that statement is in Core bundle C at tab 29, and new condition M3 will be found at p.1647 of tab 29.

Just staying, however, with this November 2010 consultation for a moment, could I ask you to turn to p.1089 and look at para.2.14. What is significant is that Ofcom notes that:

> "In general responses to our proposals considered that preventing flip-flopping was a good idea. The majority of respondents, including MCPs, agreed that regulation should prevent frequent and significant changes in MTRs – and agreed with our assessment that flip-flopping harms the interests of other providers and, indirectly, consumers."

On 26th August 2010, just to roll back a little, Vodafone and H3G each wrote to Telefónica, at that stage known as O2, with details of their charges for October 2010. Just for your reference – I do not ask you to turn it up – that date is referred to in Telefónica's reference of the dispute at core bundle A, tab 12, p.293, paras.5 and 6.

Telefónica considered that these charges constituted an egregious example and flip-flopping, and, fortified by Ofcom's analysis in the April 2010 consultation and the consensus that was apparent from the responses to it, it objected to the charges.

THE CHAIRMAN: Sorry to interrupt you again, but can I just ask why, if Telefónica objected that strongly, did it take until 30th September, just before the October rates come into force, for that objection to be noted to both Vodafone and H3G? I think I have got the date correct.

MR. RICHARDS: Sir, I am sure you have.

THE CHAIRMAN: It is in the correspondence.

MR. RICHARDS: Sir, it is simply down to the time consuming demands of running a business and not getting round to it until then.

THE CHAIRMAN: I understand – life!

MR. RICHARDS: Yes, Sir. Following the publication of the 2011 MCT statement on 15th March, and following unsuccessful attempts to negotiate commercially with H3G and Vodafone Telefónica submitted this dispute to Ofcom.

I have not yet addressed the question asked in the Tribunal's letter of last week as to why Telefónica did not seek some other route to challenge flip-flopping. I do not propose to say more about it unless it would be helpful for me to do so.

THE CHAIRMAN: Can you help me on one point that is puzzling me? You have chosen to challenge the flip-flopping for this particular month. Plainly there were earlier months when flip-flopping occurred. There is no reason in principle, is there, why Telefónica could not have challenged those months as well retrospectively or is it something that can only be done in relation to a prospective imposition of a charge?

MR. RICHARDS: Part of the problem, Sir, is that it is not necessarily easy to predict whether a particular set of charges is going to be commercially harmful. The October 2010 charges were the first charges which came after the April 2010 consultation and responses thereto, which Telefónica perceived in time to be an example of flip-flopping which was harmful to its commercial interests. It could, I suppose, have sought to challenge other instances, but it did not, and proved my submission that it was entitled to limit its challenge to an example it considered particularly egregious.

THE CHAIRMAN: That leads on to another point. Is this particular dispute in any sense a test case, which, if it is resolved in your client's favour, would immediately be followed by a plethora of other claims relating to every other months where flip-flopping occurred, or is this recognised to be a one-off challenge?

MR. RICHARDS: Sir, I cannot give any commitment that we would not seek to challenge any other instances of flip-flopping. However, I can say this: the problem ought now to be an historical one because since 2011 and the March MCT statement it has not been possible to engage it in the same way.

THE CHAIRMAN: Yes, and as I understand it, but correct me if I am wrong, there is no limitation period, is there, which applies to raising a dispute, so it is not as though as there is any question of becoming time barred at any point?

MR. RICHARDS: I think, Sir, that is right.

THE CHAIRMAN: There might be an abuse of process argument, I suppose, that is another point.

MR. RICHARDS: And Ofcom might take the view that a very late challenge should not be entertained on the basis that it amounted to waiver or exceptions. Ofcom could conceivably decide that a challenge after a long period of time was such that it was not fair and reasonable to uphold in all the circumstances, and it would be entitled to do so if it had regard to all of its regulatory obligations.

THE CHAIRMAN: I am asking you these questions because we were intrigued by the fact that this challenge related only to one particular month at the very end of the period before the new 2011 regime came into force. We were left wondering whether there is a kind of, so to speak, stalking horse or whether it is just one particular month which has been chosen and without any wider intention to ----

MR. RICHARDS: Sir, it is the latter. It is one particular month which has been chosen. It is not a stalking horse. I cannot offer any undertaking that if we had a favourable judgment from this Tribunal and then a favourable decision from Ofcom, our interest in looking at other months might not be excited, but it is not a stalking horse.

THE CHAIRMAN: Thank you.

MR. ALLAN: Without going into why there was not an earlier challenge, can I ask your position on whether Telefónica could have mounted a challenge as a matter of law into the April 2010 consultation statement, either directly or by, as it were, provoking an appropriate decision from Ofcom?

MR. RICHARDS: There is embedded in your question, I think, the answer to the first part, which is that directly there was nothing to challenge, because there was simply an omission to make any amendment to the existing regime, and in order to challenge an omission it is necessary under s.192(8) to submit a request to Ofcom for them to make a decision first. So in order to set up a challenge to the omission to amend the charge control regime you would

have needed to do that. Then, if Ofcom had refused to make a change we could have appealed to this Tribunal.

MR. ALLAN: Do you think there would have been any significant obstacle to Telefónica setting up the challenge in that way, either then or maybe even earlier, but certainly in April 2010?

MR. RICHARDS: Yes. First, let me preface my answer with a slightly different point which is that, in my respectful submission, this is not strictly relevant to the issues in dispute because Ofcom did not have regard to any failure by my client to challenge its non-amendment to the charge control. In terms of the practicalities, what Telefónica would have to have is, having seen the responses to the April 2010 consultation and the developing consensus that flip-flopping was a bad thing, make a formal request to Ofcom to vary the charge control. One does not know how that long would have taken for Ofcom to make a decision on, but it could have been a month or some months and, if it was refused, then to appeal to this Tribunal. On the timeframe alone we could well have ended up in April 2011 before any change could be made and it would be too late.

MR. ALLAN: Leaving aside the calendar implications, in principle, it is open to somebody in Telefónica's position to provoke an issue which could eventually have brought it before the Tribunal?

MR. RICHARDS: In principle, sir, yes, but the appropriate way, in my submission, to dispute a particular charge which has been levied is by the dispute resolution process.

MR. ALLAN: I understand that. I suppose the response that tends to provoke is that this is a particular instance within the framework of an overall charging structure and it is the purpose of a charge control to set a framework within which operators should conduct their business, and, in a sense, it is that framework that you are challenging?

MR. RICHARDS: Well, sir, with respect, I am not challenging the framework. I am saying that even within the existing regulatory framework flip-flopping is behaviour which should not accepted for regulatory reasons. So it is not quite the same as saying that there ought to be a prospective amendment to the framework.

MR. ALLAN: I think, if I have understood you correctly, what you are saying is that there should be scope through, as it were, *ad hoc* triggering of the dispute resolution process to deal with what might be commercially disadvantageous instances of the practice, rather than dealing with the practice as a whole?

MR. RICHARDS: Sir, yes, and not just commercially disadvantageous, but instances which are in someone's commercial interests to complain about, and which, from a regulatory perspective, are not acceptable.

MR. ALLAN: So it is going to be commercially disadvantageous, because if it is not disadvantageous, as you have said already, you are not going to trigger a dispute.

MR. RICHARDS: Sir, it may be worth noting at the time that at the time Ofcom's own position was that dispute resolution was the appropriate forum for resolution of such ad hoc disputes. May I briefly show the Tribunal the *Vodafone v BT* judgment in authorities bundle B.

THE CHAIRMAN: Yes. Just before you do that, is it correct, or do we simply not know, whether Telefónica was the only operator not to indulge in flip-flopping?

MR. RICHARDS: Sir, we say so, yes — or we think so.

MR. ALLAN: It seems likely, without obviously necessarily being true, that in respect of all the other operators who did indulge in flip-flopping, they are unlikely overall to have suffered very much, because I suppose the whole point of joining in was to ensure you got the same benefits for yourselves, and it would all come out in the wash. So, it may be that the only operator with a real commercial interest in making a fuss about it is Telefónica.

MR. RICHARDS: Sir, that may well be right.

THE CHAIRMAN: But, anyway, I am just again thinking really of what the implications might be of your argument if it succeeds, which from one point of view may be said to be irrelevant — but, equally, one has to, I think, have some regard to.

MR. RICHARDS: Sir, it is right to note that Telefónica is not the only person who has complained about flip-flopping.

THE CHAIRMAN: No. True, yes.

MR. RICHARDS: I should say that there are others.

THE CHAIRMAN: Yes.

MR. RICHARDS: Including in particular fixed operators.

THE CHAIRMAN: Yes.

MR. RICHARDS: May I quickly show the Tribunal a passage in the *Vodafone v BT* judgment in the Court of Appeal which is in authorities bundle B, tab.29.

THE CHAIRMAN: Yes. It did look as if, para.28, as though at that stage Ofcom were taking a line rather similar to that which you are now arguing.

MR. RICHARDS: Yes, absolutely, Sir.

THE CHAIRMAN: And the point was left open by the court.

MR. RICHARDS: It was left open by the court. But if the Tribunal is considering why it was that, or whether it was appropriate for Telefónica to follow the dispute resolution procedure, in my respectful submission it is relevant that this was Ofcom's position at the time. And it is recorded that counsel for Ofcom's submission to the Court of Appeal was that in effect, it

was not necessary for Ofcom to be able to have an extraordinary power to amend SMP conditions retrospectively because its dispute resolution function was an adequate safety valve.

THE CHAIRMAN: Yes.

MR. RICHARDS: And in particular one sees by the first hole punch the example which Mr. de la Mare on behalf of Ofcom gave:

> "An operator who considers the controlled price to be too high may not only appeal against the price control decision, but also raise at the same time a dispute with his counterparty as to the right charge for the service, and that dispute can be referred to Ofcom".

THE CHAIRMAN: Yes.

MR. RICHARDS: And that existence of adequate regulatory remedy in the form of dispute resolution powers was relied upon by Ofcom as a reason why it was necessary to strain the interpretation of their SMP powers.

MR. ALLAN: Yes. And, of course, the whole point about dispute resolution is it is done retrospective and you can grant financial recompense by way of correcting over-payments, under-payments, which have been made under s.190.

MR. RICHARDS: Absolutely.

THE CHAIRMAN: Yes.

MR. ALLAN: We should not probably dwell on this for too long, but does that process actually work very satisfactorily in a framework where dispute resolution is supposed to be settled within four months after the reference to the dispute? And you can imagine that the appeal against the charge control itself would take significantly longer than four months? Or would you simply say that this is one of those exceptional circumstances where the dispute is referred to Ofcom and, if you like, then stayed until the charge control issue has been resolved?

MR. RICHARDS: I think that if both an appeal against, both an appeal and a dispute were made, then a stay might have to be inevitable. I would not necessarily commend the suggestion by Ofcom's counsel in that case that one ought to appeal and refer the dispute to Ofcom; it would be sufficient in my submission simply to refer the dispute — so long as one is only complaining about historic charges.

That brings me to my third head of submissions: namely, the proper approach which Ofcom should have taken as something central to its determination.

THE CHAIRMAN: Yes. We were thinking we might have a five-minute break in the middle of the morning, Mr. Richards, so perhaps now would be a convenient time to do that, if you are about to move on to a new heading.

MR. RICHARDS: Certainly, sir.

THE CHAIRMAN: In that case we will have a short break now.

(Short Break)

THE CHAIRMAN: Yes.

MR. RICHARDS: Sir, I am about to move on to the approach which Ofcom ought to have adopted. Before I do that may I just make one note, which I should have made earlier, in relation to the predictability of flip-flopping.

THE CHAIRMAN: Yes.

MR. RICHARDS: In particular in relation to the October 2010 charges. What we knew at the end of August 2010 was simply the rates that we were going to be charged. We of course did not know the volumes which were going to actually occur in October 2010, and there is an added layer of complexity caused by the curiosities of mobile number porting which can actually affect whether flip-flopping turns out to be a good or bad thing in a particular month. The upshot was that whilst we challenged the charges to get our foot in the door, we did not know that we would actually want to proceed with the dispute until about November when the commercial upshot was clear.

THE CHAIRMAN: I am sorry, I do not want to do a complete nit-pick on the way you did it, but you said you did not know whether flip-flopping would be a good or bad thing, I assume you mean the degree of badness. Are there any circumstances under which you as the originating supplier could actually benefit from a terminating supplier's flip?

MR. RICHARDS: Possibly, yes, because of the vagaries of MNP (Mobile Number Portability).

THE CHAIRMAN: Thank you.

MR. RICHARDS: Moving to the proper approach, there are four things which, in my submission, ought to have been central to Ofcom's approach, and to begin with I have identified in my skeleton argument at para. 27 three key principles which I derive from the Judgments of this Tribunal, TRD and 08 numbers. The first principle is in its disputes jurisdiction, Ofcom acts as a regulator, so the policy objectives of Article 8 must be central to its analysis.

The second principle is that dispute resolution and regulation *ex ante* by SMP conditions are distinct limbs of regulation and different regulatory functions which operate alongside one another.

The third principle is that in examining the appropriateness of a termination charge in a dispute even if there is a pre-existing charge control. Ofcom must consider whether the charge is fair and reasonable, that is to say Ofcom must examine the appropriateness of the charge having regard to all relevant considerations in light of its regulatory duties and objectives.

The fourth point which ought to have been key to Ofcom's analysis was s.190(2A) of the 2003 Act, which is consistent with the three principles I have identified, but which goes further in imposing a specific statutory duty governing the way in which Ofcom is to approach the resolution of disputes.

Before I come to that I shall seek to make my three principles good by reference to the Judgments in TRD and 08 numbers. TRD is in authorities bundle B at tab 25. The background to the case I have explained in my skeleton argument at para. 35, and I have the relevant references there to the paragraphs of the Judgment.

The potted history is this: we need to go back to the time before the 2007 MCT statement, and in particular to 2004 when Ofcom imposed the charge control on the mobile operators' termination charges, but only in respect of 2G networks. They decided not to impose charges for 3G because 3G at that time was still a new technology and a much less significant part of the market. That charge control initially applied until 31st March 2006, but Ofcom decided to roll it over to March 2007 and in that roll over period of a year 3G charges were not covered by the charge control. From 2004 onwards, the 2G and 3G operators began to charge blended rates – those are rates for which the charges for 2G, which were regulated by *ex ante* charge controls were blended with the unregulated by SMP conditions, 3G charges, and a number of disputes were referred to Ofcom concerning the 3G element of the blended rates which results in determinations by Ofcom and appeals to this Tribunal.

THE CHAIRMAN: I am not sure whether much turns on this, but as I read the case I think blended rates were introduced by Vodafone in September 2004, though not immediately apparent to the other operators. Is that your understanding as well?

MR. RICHARDS: That is my understanding that the mobile operators, at least Vodafone, were not up front about what they were doing with blended rates, at least to begin with. Ofcom's reasoning is quoted by the Tribunal at para. 57 in the first set of disputes, or para.57 is where the Tribunal began to explain Ofcom's reasoning.

Beginning with the BT Disputes Determinations, which were one set, we see over the page at para.59:

> "As regards the period before 13 September 2006 Ofcom said it had to consider what the relevant framework for the resolution of the disputes should be. Ofcom referred back to the 2004 Statement in which it had decided not to impose regulation on the price of 3G termination for the period covered by that market review. Ofcom went on to say …"

in short, and I rely particularly on paras. 4.19, 4.20 and 4.21. In light of its 2004 decision not to impose SMP regulation on 3G it would be inappropriate to determine the disputes in the way that Ofcom characterised as effectively imposing SMP-type regulation retrospectively.

At para. 4.21 Ofcom said that:

> "… subject to ex-post competition law, MNOs may set the level of blended charges for call termination on their respective networks as they consider appropriate, provided that the 2G element of their charges complies with their SMP conditions and the relevant charge controls."

At para.63 there is another observation of Ofcom's which is recorded:

> "… during the period covered by the 2004 Statement, only 2G call termination was regulated. This meant that 'the only ex-ante regulation in place which is relevant to an assessment of the blended termination charges during this time is BT's End-to-End Connectivity Obligation in the period following 13 September 2006."

That referred to an obligation imposed upon BT from that date to purchase wholesale mobile call termination services from all of the mobile operators at fair and reasonable rates and Ofcom said that that was the only *ex ante* regulation.

There was another set of disputes, the H3G disputes, and the Tribunal again referred in some detail to Ofcom's reasoning in its determination of those disputes. We see at p.871 of the bundle at 5.23 of Ofcom's determination. In its draft determinations Ofcom itself is recording:

> "… Ofcom stated that, in the circumstances of these disputes, the only regulation in place during the period in question was the charge control on 2G termination."

The significance, Sir, of this language is that you will see echoes of it in the determination in this case too. Paragraph 73 of the CAT's Judgment:

> "As regards H3G's request that Ofcom should set a cost based charge, Ofcom repeated what it had said in the BT Disputes Determination that 'it did not consider it appropriate to use the dispute resolution process as a substitute for (or

in a manner that is inconsistent with) decisions already taken under the appropriate regulatory processes for addressing the question of significant market power'."

Over the page:

" Ofcom therefore considered it would not be appropriate 'to effectively retrospectively impose regulation on providers in a situation in which it has explicitly chosen not to impose SMP-type regulation'."

And its reason for that was to ensure regulatory certainty. This Tribunal held that, in taking that approach, Ofcom had failed to have proper regard to its regulatory obligations. Could I ask you, please, to turn to p.876 of the Judgment. At para.84 Ofcom accepted one criticism that it focused on in the BT disputes regarding the end-to-end connectivity obligation, but it tried to argue before the Tribunal, at para.85, that the approach it took had reflected the six Community requirements that give effect to Article 8, and also Ofcom's duties under s.3 of the Communications Act.

The Tribunal recorded what Ofcom had actually said about its duties in the determinations. Ofcom had noted its statutory duty under s.3(3)(a) of the Act. Then towards the bottom of para.86 we see this:

"Since the decision taken in the 2004 Statement not to regulate 3G termination charges complied with the Community requirements set out in section 4 of the 2003 Act and with Ofcom's duties in section 3 of that Act, then Ofcom argues, since the decision it was now taking was consistent with the result of the 2004 Statement, that decision must be consistent with the statutory objectives."

The identical argument, Sir, is run by Ofcom in these proceedings, although the relevant decision was a decision to impose SMP controls rather than not to impose them.

At para.87 another passage from Ofcom's determination is quoted by the Tribunal. Four lines from the bottom of that Ofcom is describing its methodology which:

"… seeks to ensure that the parties' freedom to determine their price is curtailed only insofar as necessary and proportionate to fulfil the objectives of such obligations."

- namely any existing *ex ante* obligations applicable to the parties.

"Of will, however, also consider whether there are any overriding policy objectives which should be taken into account."

The Tribunal held, at para.88, that this approach effectively involved relegating Ofcom's statutory duties to the consideration of whether there were overriding policy objectives

which should be taken into account and thereby representing, in the Tribunal's Judgment, a fundamental error as to the task facing Ofcom in determining the disputes.

> "Ofcom failed to recognise that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law."

Paragraph 89:

> The fact that dispute resolution is intended to be an additional form of regulation exercised in parallel with SMP regulation and general competition law is clear from the Common Regulatory Framework."

and the Tribunal refer to Article 5(4) of the Access Directive in its original form prior to amendment by the 2009 Directive which contained, like new para.3 of the Access Directive, a positive obligation to intervene to resolve disputes with regard to access and interconnection. The Tribunal also referred to Article 20 of the Framework Directive as I have done in my submissions earlier, which makes it plain, in the CAT's words that policy objectives of Article 8 "are intended to be central to the regulator's consideration of the issues" in the determination of an interconnection dispute.

Moving to p.882 of the Judgment, para.99 is the identification of the fundamental failure in Ofcom's approach; that the objective set in sections 3 and 4 of the 2003 Act:

> "… should have been central to its approach to interpreting and applying the section 185 procedure and to its assessment of the figures arrived at. It was not right for Ofcom to argue …"

- as it still does before this Tribunal:

> "that because it complied with its statutory duties in carrying out the review which resulted in the 2004 Statement and applied the results of that Statement to these disputes it had therefore effectively complied with its statutory objectives."

Given the amount of time that had elapsed, it was important that Ofcom should have a fresh look. At paras. 100 and 101, as I have made clear in my skeleton argument, and as is clear from the notice of appeal the Tribunal held that Ofcom had an obligation to assess the fairness and reasonableness of the disputed charges, which obligation stems not from any pre-existing SMP condition, but was a function of Ofcom's own duties as a regulator to assess the regulatory appropriateness of a contested charge.

THE CHAIRMAN: Ultimately it is always going to be a question of a fair reading of the determination under appeal as to whether this duty has been complied with. I do not think there is any dispute about the existence of these principles or their potential relevance, is

there? It is more a dispute about what a fair reading of the determination actually reveals about the thought process of Ofcom.

MR. RICHARDS: Sir, if I may respectfully say so, I am sure that is absolutely right, though it should be noted that in their defence Ofcom have denied that the principles I described are applicable beyond the boundaries of TRD and 08 numbers.

THE CHAIRMAN: We will see how far that point is still persisted in. I think, to a certain extent, both sides have climbed down from the more extreme positions which they started off with.

MR. RICHARDS: Sir, if I might respectfully say so, it may not be so much a climbing down as a narrowing of the real issues in dispute by a process of exchange of pleadings and skeleton arguments.

THE CHAIRMAN: All right, I do not mind how you characterise it, but the area of dispute seems to have been narrowed, let us put it that way.

MR. RICHARDS: Before I leave TRD, I ought just to note para.175 of the judgment, p.911. The parties had specifically sought guidance from this Tribunal of how Ofcom should go about resolving the disputes if they were remitted. The Tribunal accepted that invitation and made some general observations. In my respectful submission, the Tribunal did not go beyond what was proper in determining the issues before it. What is clear is that the principles laid down were intended to be of a general application, but specifically were applicable in the context of that particular dispute.

At para.180 I would ask the Tribunal to note especially this: that it is a function of the fact that Ofcom's role is as a regulator that whatever the arguments put forward by one side, and even if those are misconceived:

> "… Ofcom must still check whether the position that would be arrived at by fully accepting one or other side's argument would accord with the regulatory objectives. This is not to say that Ofcom must, as a matter of course, consider the matter afresh regardless of how wide or narrow the actual area of dispute is between the parties. However, it is always appropriate for Ofcom to ask itself whether there are grounds which would justify it exercising other powers under the 2003 Act to intervene …"

This is part of Ofcom regulatory remit.

THE CHAIRMAN: From our point of view that is precisely what Ofcom did in the present case. It checked the position by reference to its overriding obligations and decided, for reasons which it stated, that there was no reason to depart from its provisional determination.

MR. RICHARDS: Sir, as I shall seek to show, Ofcom did not properly consider any of its regulatory objectives bar one, which was the importance of legal and regulatory certainty. I rely on that simply to point out that Ofcom may have to intervene and act on its own initiative.

In 08 numbers, Sir, the boot was on the other foot, because it was termination charges levied by BT rather than by the mobile operators which were in dispute. I do not think it is necessary for me to take you through it at any length, but what is of some significance is the Tribunal's approach in 08 numbers to the decision in TRD.

THE CHAIRMAN: Which tab is it?

MR. RICHARDS: I am sorry, Sir, it is tab 32 of authorities bundle B, and at p.1265 the Tribunal begins its treatment of the TRD case. One sees that it recites at some length what the Tribunal had held in that case, and at p.1270, paras.433 and 434 the Tribunal expressly approved the "fair and reasonable" test subject to the qualification that nothing should be allowed to fetter Ofcom's discretion, so as to create an unduly restrictive approach to dispose resolution.

The Tribunal was very alive to the dangers of going beyond the precise matters in dispute to give impermissible general guidance – we see that from the sentence immediately before para.436, but it did not consider it appropriate nonetheless to seek to draw out generally applicable legal principles from TRD. We see that at 437 over the page:

> "It is important to distinguish between those aspects of the [TRD decision] that articulate general propositions of law, and those aspects that seek to describe the manner in which the particular appeals before the Tribunal should be resolved."

The Tribunal approved the holdings in TRD that Ofcom is a regulator and, as such, it must take due regard of its statutory duties. How those statutory duties are taken into account is a matter in the first instance for Ofcom. Then sub-para.(2):

> "The Dispute Resolution Process contains powers in Ofcom not merely to resolve disputes in the traditional sense, also powers to impose solutions on the parties to the dispute which are not necessarily in accordance with the strict legal rights and obligations of those parties."

That understanding informed the Tribunal's views in TRD that the dispute resolution process represented a third regulatory restraint operating in parallel with Ofcom's powers to impose SMP conditions and not legally subordinate to them.

So, Sir, I say my three principles are plainly established in the TRD and 08 numbers decisions. In my skeleton argument at para.31 I have set out my arguments why TRD and

08 numbers are not confined to the circumstances of those particular cases, and I do not propose to elaborate upon those now, but I may do so in reply, depending on what Mr. Saini and the interveners have to say.

I have a fourth matter which ought to have been central to Ofcom's consideration, which was s.190(2A) of the 2003 Act. Can I ask you, please, to turn up authorities bundle A at tab 8C, p.295. This sub-section (2A) was inserted by the 2011 Regulations. As we see, it applies only to disputes falling within s.185(1), and for your note Ofcom accepted in its determination at para.2.29 that the dispute fell within s.185(1)(a).

Sub-section (2A) lists a series of regulatory goals. It is right to observe that each one of those regulatory goals is mentioned elsewhere among Ofcom's statutory duties. In particular, Ofcom was already under an obligation under s.4(2) of the Act to act in accordance with the six Community requirements, which obligation incorporated all of those matters. However, s.190(2A) goes further. It does not simply say that Ofcom has to act in accordance with a number of principles, it lays down how Ofcom has to think because it combines those four listed objectives in a specified thought process mandated by statute. It is, in my submission, necessarily implicit in sub-section (2A) that Ofcom must ask itself, in determining any dispute, "What is the way that seems to us most appropriate to secure each of these regulatory objectives?" If it does not ask itself that question in relation to each one of them, (a), (b), (c) and (d), it is in breach of its statutory duty.

Ofcom, of course, argues in resisting this appeal that s.190(2A) applies only to the determinations of disputes referred on or after 26th May 2011.

Ofcom, quite properly, does not suggest that there is any express provision to that extent, it argues that such provision should be implied. My respectful submission is that that argument simply cannot be sustained on a proper reading of the statute. I have three points. First, sub-section (2A) applies to a category of disputes, s.185(1) disputes, which had always existed prior to the 2011 Regulations and continued to exist thereafter. That is not any package of amendments such that it is logically necessary for sub-section (2A) to apply only to disputes referred on or after 26th May 2011.

The second point is that there is clear provision made in 2011 Regulations for the temporal effect they are supposed to have. One sees first in Regulation 1(2), behind tab 7 of authorities bundle A, that the Regulations come into force on 26th May 2011. We see in Regulation 2(1) that Schedule 1 contains implementing provisions for the 2009 Directive. The Tribunal will recall that that Directive had to be implemented with effect from 26th May. Schedule 1 has effect, immediate effect.

12.15

Rosie 1215 hours

And, lastly, and just to cement the position, the regulations contain transitional provisions. One sees regulation 4 in respect to schedule 3, and schedule 3 is in tab.7 at p.202. These transitional provisions say nothing about sub-section (2A) of s.190. They do not say, "Sub-section (2A) of s.190 is only to apply to disputes referred on or after 26th May". But they do make provision in other respects, for example, at para.1 of schedule 3:

> "Regulation 3 in paras.1, 2, 66A, 101-102 schedule 1 all of which concern applications to install facilities do not apply in relation to an application received before 26th May 2011".

Similarly, para.3 of schedule 3, paras.10-13 of schedule 1 do not apply in relation to a contravention of s.33 of the Communications Act. That is the provision of electronic communication services without advance notice to Ofcom in respect of any period of contravention before 26th May 2011.

And, Sir, it is my submission that the plain intention of the regulations in the light of all the features to which I have drawn the Tribunal's attention, is that in contradistinction to applications to install facilities and change associations therewith, sub-section (2A) of s.190 is intended to have immediate effect.

The third and final point on this is that there is nothing in my construction which infringes the presumption against retrospectivity. Sub-section (2A) only has prospective effect from 26th May 2011 onwards as there is no retrospectivity at all; nor is there anything unfair, for the reasons I have given in my skeleton argument, at para.25(5) for your note, about introducing the statutory test to apply to pre-existing disputes. So, those are the four things that should have been at the heart of Ofcom's approach; and I shall move to my fourth and final part of my submissions.

THE CHAIRMAN: Before you do so, Mr. Richards, can I just take you back to the significance of sub-section (2A).

MR. RICHARDS: Of course.

THE CHAIRMAN: I think you said that there is a strong overlap between s.4 and sub-section (2A) about the, I would have thought, as it were, the analytical framework that Ofcom is supposed to apply. If I look at para.3.37 of the determination, it says:

> "As part of our analysis, we have considered our general duties and to the six Community requirements set out in s.4".

And they then go on in 3.38 to comment on specific aspects of that. But, they do say in 3.37, "We have considered the six Community requirements". Are there any elements in sub-sections A-D of (2A) which you say are not covered as one or other of the six Community requirements. By saying they considered the six Community requirements, have they also by necessary implication, considered the four issues that are identified in sub-section (2A)?

MR. RICHARDS: If it were suggested, and if Ofcom actually had considered every single one of the facets of those Community requirements they would, in the course of doing so, have had to consider each of those four items. However, it is common ground, as I understand it, that Ofcom did not give any consideration in its determination to (a) efficiency; or (c) efficient investment and innovation.

Now, I do not rely on the failure to give consideration to efficient investment and innovation -----

MR. ALLAN: Sorry, can I just be clear that that is common ground, because sub-sections 4.7 and 4.8 refer to the fifth Community requirement as encouraging the provision of network access and service inter-operability, sub-section 8, the purpose of that being to secure efficiency and sustainable competition; and when Ofcom say that they have considered the six Community requirements one might understand that they had given thought to that issue. Or, are you saying the way in which the determination is written shows that have given inadequate thought to that issue?

MR. RICHARDS: Yes, sir. There are two points on that. The first is that it is not enough just to "name-check", as it were, the statutory duty, still less to name-check something by incorporation, so, referring to one of the six Community requirements. But the second point is that in Ofcom's own skeleton argument at para.94, it is said that Ofcom agrees with H3G that the fact that Ofcom did not specifically refer to the determination to efficiency or to efficient investment innovation was not material to the determination, in particular in circumstances where those matters were not raised by any part to the dispute. I had interpreted that as an acceptance that efficiency was not specifically considered by Ofcom. But, sir, I was intending to come to the question of Ofcom's breach of s.190 sub-section (2A) in just a moment.

THE CHAIRMAN: Sorry. Thank you.

MR. RICHARDS: There is no better place to start in considering the errors of Ofcom's approach than the determination itself, which is in Core bundle A, tab.11. And, rather than follow slavishly the numerical order of my grounds, I shall take the errors as they come. I skip

over s.1, which is simply a summary, and ask you, please, to look at p.258, s.2 and footnote 2 thereof, where it is said:

"The wording of sections 185 and 186 was amended by the [2011 regulations]. As the referral occurred before this date, Ofcom has considered the dispute in accordance with the provisions in place before 26th May 2011".

And it is absolutely plain from the determination that Ofcom took the same view of sub-section (2A) of s.190. It has not suggested otherwise in the course of these proceedings. For the reasons I have already given, Ofcom simply mis-directed itself in law in taking the view that s.190 sub-section (2A) was inapplicable. Now, that in itself is an error of law.

THE CHAIRMAN: But it may be an error which did not matter.

MR. RICHARDS: Absolutely, Sir, and I must accept that if Ofcom had (it did not, but if it had).

THE CHAIRMAN: Yes.

MR. RICHARDS: In substance complied with the requirements of sub-section (2A) notwithstanding that error of law, it might be said that my appeal should be dismissed for the immateriality of the error. The error, however, is plainly material, and I have five points in this regard. First of all, sub-section (2A) mandates a specific statutory thought process, as I have said. H3G have very helpfully drawn an analogy to equality duties as discussed in the Court of Appeal's judgment in *The Queen on the application of Baker v Secretary of State for Communities and Local Government*. Could I ask you please, to turn up in authorities bundle B, tab.24. One sees from the head note (p.819 of the bundle) this concerned the grant of planning permissions for gypsy sites by the local authority and then by the Secretary of State's inspector. I say "the grant", I should say "the refusal to grant" permission for such sites. And there was an appeal on the ground that the inspector had failed to have regard, this is my letter (f) to the need to promote equality and opportunity between persons of different racial groups as required by s.71(I)(b) of the Race Relations Act. May I ask you to turn, in the judgment of Dyson LJ (as he then was) to para.22 where the learned judge recites the terms of s.71(I) of the Race Relations Act. And, having read that, to turn on to para.31 of his judgment, where Dyson LJ emphasises that:

> "Section 71 is not a duty to achieve a result … It is a duty to *have due regard to the need* to achieve these goals".

The duty concerns the mental process that the decision-maker must follow, to put it in other words, rather than specific things which the decision-maker must achieve. Over the page at para.35, Dyson LJ considered a submission that the decision-maker had to demonstrate:

"… by the language in which he expresses his decision that he is conscious that he is discharging the duty".

And that submission was rejected. Paragraph 36:

"I do not accept that the failure of an inspector to make explicit reference to section 71(I) is determinative … So, to hold would be to sacrifice substance to form. I agree with what Ouseley J said in [the *Smith* case].

'I do not accept the submission made by Mr. Bird that section 71 was concerned with outcomes; ultimately of course it is aimed at affecting the way in which bodies act. But it does so through the requirement that a process of consideration, a thought process, be undertaken at the time when decisions which could have an impact on racial grounds or on race relations, to put it broadly, are being taken. That process should cover the three aspects identified in the section. However, that process can be carried out without the section being referred to provided that the aspects to which it is addressed are considered, and due regard is paid to them'".

Lord Justice Dyson continues (at 37):

"The question in every case is whether the decision-maker has *in substance* [complied with the duty]. Just as the use of a mantra referring to the statutory provision does not of itself show that the duty has been performed, so too a failure to refer expressly to the statute does not of itself show that the duty has not been performed".

In my submission, sub-section (2A) is directly analogous in that it requires Ofcom to carry out a substantial, in substance a specified thought process. It must ask itself a series of questions. Unless it does that the duty will not have been performed. Of course, while *Baker* is a helpful analogy, there is one key point of distinction with the present case: that in *Baker* the inspector had not erred in law as Ofcom have in my submission by directing herself that the duty did not apply. Had the inspector done so, had she said, "I do not consider that section 71 of the Race Relations Act applies to my decision", it is hard to see that the court would have been as generous to her decision-making as it was.

The second of my five points, is that it is evident from the decision itself that Ofcom never asked itself the question, "What is the most appropriate way of resolving this dispute for the purpose of securing the four listed regulatory objectives?" Instead, it decided that the appropriate means of determining the dispute was by reference to the criteria in the charge control; and that is an error of approach which goes to the heart of the determination.

Now, Ofcom may be said to have touched upon the subjects of sustainable competition and benefit to end users. I shall seek to show in relation to my other grounds of appeal that it is treatment of those was superficial and inadequate. But, touching upon "is not good enough", for the purposes of sub-section (2A), what is crucial is that Ofcom should ask itself the question which sub-section (2A) requires it to ask.

The third point is that the first of the four regulatory objectives, efficiency, is not the subject of even cursory analysis anywhere in the decision. Ofcom has said that this was not a matter which was raised by any of the parties to the dispute but, with respect, that is simply wrong. Telefónica expressly relied in its reference of the dispute to Ofcom upon what Ofcom had said in its April 2010 consultation about flip-flopping. For your note the relevant paragraph of the reference is 39.4 at tab.12 of Core bundle A, p.299.

THE CHAIRMAN: I am sorry, could you just repeat that, please.

MR. RICHARDS: Of course, bundle A, tab.12, p.299, para.39.4 of Telefónica's reference of the dispute, where Telefónica, where Telefónica prayed in aid in general terms, it did not specifically refer to efficiency but it prayed in aid in general terms what Ofcom has said in the April 2010 consultation.

Sir, the Tribunal has already seen earlier in my submissions that efficiency was one of the key issues with which flip-flopping was bound up. Just for your note, because I have shown it to you already, para. 9.125 of the April 2010, Core bundle B, tab 25, p.1066.

The significance of efficiency was again emphasised by Ofcom in the 2011 MCT statement which, for your note, is para.10.85 at Core bundle C, tab 29, p.1619.

MR. ALLAN: Can I just make sure I am reading the right paragraph in your reference to the submission to Ofcom, it is the paragraph where Telefónica say: "Ofcom's other regulatory objectives would be met by upholding O2's rejection", is that right?

MR. RICHARDS: Page 299 in core bundle A. That is right.

MR. ALLAN: Efficiency is encompassed by reference rather than explicit identification?

MR. RICHARDS: That is absolutely right, Sir, it is encompassed by reference to the second sentence of that paragraph: Ofcom has explained in clear terms why flip-flopping is undesirable from the perspective of its general duties in its consultation documents of 1st April 2010.

MR. ALLAN: What Telefónica did not develop there or elsewhere a more specific efficiency argument other than that?

MR. RICHARDS: That is quite right. My fourth point on materiality is that if you are satisfied that there was an error of law, the scope for dismissing the appeal on grounds of

immateriality is very limited indeed. I have cited the relevant authorities in my skeleton argument at para.61(2), and may I ask you to turn that up, please?

This Tribunal should be slow to dismiss an appeal on such grounds. I say that in general the decision, which has been found to be flawed, must be set aside. The authority for that is the case of *Edwards*, and before dismissing any appeal on the basis of immateriality of outcome, the Tribunal would have to be satisfied that Ofcom would necessarily still have made the same decision but for the error of breach, and aside from the context of judicial review, *Simplex*. These principles appear to be common ground and, indeed, my learned friends Mr. Saini and Mr. Scott themselves cite my para.61(2) and rely upon it.

Generally, the position is that a decision should be quashed if it is erroneous in law, and you would need to be satisfied that Ofcom would necessarily have made the decision but for the error to refuse to allow the appeal.

With respect, there is no basis on which this Tribunal could conclude that the same result would have been inevitable had Ofcom followed the approach mandated by subsection 190(2A). Indeed, it is evident from Ofcom's own consultation papers and what they say about efficiency that they might have reached a different view had they followed the mandatory approach.

Fifthly, and lastly, on materiality I ought to address an ingenious argument which Ofcom have developed in their skeleton and in their defence, which is without foundation. The argument is this: that Ofcom contends that had it appreciated that s.190(2A) was applicable. It would have treated the dispute as one falling within 185(1)(a) to which subsection (2A) of s.190 does not apply. For your reference, see, for example, para.90 of their skeleton argument. That argument just will not work, with respect.

Can I ask you, please, to turn in the authorities' bundle A to tab 8 C? We know that Ofcom prior to 26th May had accepted the dispute on the basis that it fell within s.185(1)(a). Ofcom was plainly right to accept the dispute on that basis because Telefónica, H3G and Vodafone are all communications providers within the meaning of the Act. They did not cease to be communications providers because subsection (1A) was introduced by the 2011 regulations. The clear purpose, as I have submitted, of the new subsection (1A) is to implement the expanded or clarified scope of Article 20 of the Framework Directive to make it clear that the dispute jurisdiction covers people who are not communications providers but may have a right to network access.

Just to anchor that in a practical example it might be that a cable television operator is under a "must carry" obligation imposed under a general condition by Ofcom to provide free local

television under its cable television network, what the amendment to s.185 clarifies is that such a person, albeit perhaps not described as a "communications provider" can still refer a dispute to Ofcom concerning its access rights to the network.

Lastly on this point, it is quite possible that someone may be both a communications provider and a person who meets the description in subparagraph (1A). If that is so, s.190(2A) will still apply to that person because the simple fact that he falls into a subsection (1A) cannot mean that he is no longer a communications provider who, under s.185(1)(a) and s.190(2A) has the right to a particular statutory approach to dispute resolution from Ofcom.

THE CHAIRMAN: One thing I cannot understand is what is the reason for dis-applying 190(2A) in relation to disputes that fall within 185(1A)?

MR. RICHARDS: Sir, that is a curiosity which I have not been able to fathom.

THE CHAIRMAN: I am almost wondering whether it might just have been an oversight, it just seems very curious unless there is some policy reason which escapes me at the moment. Anyway, you have no answer?

MR. RICHARDS: It may be that Mr. Saini will have a positive case on this, in which case I will deal with it in reply.

THE CHAIRMAN: Yes, thank you.

MR. RICHARDS: Sir, on p.3 of the determination, footnote 2, that was the first ever … in the decision and also my ground three of appeal.

But whether or not you were with me on ground three, it is also my submission that Ofcom erred in refusing to follow the TRD approach and, as a result, refusing in effect to have proper regard to all of its statutory duties as it was required to have.

In order to understand where Ofcom went wrong one must, of course, look at the detail of its reasoning, and to that end, can I ask you, please, to turn to s.3 entitled "Analysis of the dispute." Para.3.3 states that :

> "… considering whether we should exercise our discretion in this case, direct repayments requires us to make an assessment of what is fair and reasonable in light of the prevailing regulatory regime."

So far so good. At paras.3.4 to 3.17 Ofcom explain what is described as the prevailing regime and it is clear from the title, the 2007 MCT Statement, that what is being described is the prevailing *ex ante* SMP regime imposed by that statement. It is an accurate description of the regime.

On p.267, however, Ofcom addresses the argument which Telefónica had made that Ofcom needs to look at more simply than the existing *ex ante* charge control and, in particular, that Ofcom should conduct an exercise considering the fairness and reasonableness of the charges in the TRD sense.

We see from para.3.18 that O2 had explained what it meant in its reliance upon the fair and reasonable test in TRD, and had said in particular at 3.18.4, as Ofcom records, that Ofcom's other regulatory objectives would be met by upholding O2's rejection of the October charges given Ofcom's previous statements that flip-flopping is undesirable from the perspective of its general duties.

In effect, Telefónica is saying, "You must look at these charges in the light of your general duties and your previous statements as to their undesirability and determine in that sense their fairness and reasonableness, as explained by the Tribunal in TRD".

Over the page at para.3.22, Ofcom rejects Telefónica's invitation. It distinguishes TRD on the grounds that in that case no charge control applied and says:

> "We therefore consider that the guidance provided by the TRD case is not relevant for the purpose of this Draft Determination insofar as it is claimed that it has the effect of imposing an additional requirement that charges are fair and reasonable."

Although the rejection of Telefónica's submissions contains that qualification in so far as it is claimed, it is quite clear that Ofcom is rejecting the submission that Ofcom should consider, among other things, what Telefónica has said at para.3.18.4 on the previous page. Ofcom rejects the submission that TRD and its interpretation of Ofcom's duties requires Ofcom to give those matters such consideration. That, in my submission, is an error of law. The fair and reasonable test articulated in TRD is, for the reasons I have explained in my skeleton argument, not to be confined to that decision's particular facts.

THE CHAIRMAN: It is a test, you say, which has to inform the whole consideration of the question. It is not something that just comes in by way of cross-check at the end. It is something that you have to have at the forefront of your mind from the beginning?

MR. RICHARDS: Yes, Sir. The reason for that is really two-fold: first, the regulatory duties under which Ofcom labours are of such importance that they plainly must be intended, as the Tribunal held in TRD, to be central to Ofcom's analysis. They are not tick boxes at the end, they have got to be part of the machinery of the actual decision making.

There is also the further point that if there were any doubt about that – I say there is not, but if there were – s.190(2A) puts it beyond doubt, at least so far as concerns those specific regulatory objectives.

Ofcom proceeds next to consider the topic of legal and regulatory certainty, and at paras.3.26 and 3.27 it summarises the approach for which Telefónica contended. O2 argues that in any event Ofcom should balance the need to be consistent with the regime set by the 2007 MCT statement and the need to be consistent with its proposals for the MCT consultation in April 2010 onwards.

What was urged by Telefónica upon Ofcom was a balancing exercise of all material factors in the light of all of Ofcom's duties. That balancing exercise was something which Ofcom refused to conduct. At para.3.30 it was said that this was the prevailing regulatory regime. To apply any other regulatory regime with retroactive effect would be contrary to the principle of legal and regulatory certainty, a conclusion which is elaborated by Ofcom at para.3.34, that in the light of the prevailing regulatory regime:

> "… Ofcom does not consider that it would be consistent with the principles of legal and regulatory certainty to seek to apply any additional obligations to this period. Whilst Ofcom raised concerns … we did not amend the charge control … On that basis, the only regulation applicable at the time of the October 2010 charges was the charge control alone."

Over the page at 3.35, that leads to the conclusion:

> "Accordingly, and on the basis that Vodafone and H3G complied with SMP Conditions MA1 and MA4 … it was fair and reasonable in the light of the prevailing regulatory regime …"

That conclusion is transported, one sees on the following page at 3.39, directly to Ofcom's provisional conclusion.

THE CHAIRMAN: May I just ask you something about certainty? As I understand it, Telefónica case was that the requirement of certainty needed to be balanced against all the other regulatory objectives, and there was a failure to do that because in effect Ofcom just took its stand on the 2007 charge control. It occurs to me that a possible argument might have been, but I do not think this is what Telefónica was saying, that flip-flopping does not really come within any sensible concept of certainty in the first place. The certainty you need is a certainty to plan in a responsible manner but not to indulge in antics like flip-flopping. That does not offend any against any sensible conception of certainty at all. Might that not have been a possible way of looking at it?

MR. RICHARDS: Quite so, Sir, that is probably more fairly characterised as "commercial certainty" rather than "regulatory certainty", and it is my case that Ofcom ought to have thought about efficiency, a subject in relation to which commercial uncertainty caused by flip-flopping definitely carries negative points, if I can put it that way.

Sir, the effect of these paragraphs is that, having considered only the fact that there is an existing charge control and the principle of regulatory certainty, Ofcom has decided to determine the dispute by reference to those criteria alone. The fundamental vice here is that Ofcom has chosen the criteria for its determination of the dispute having regard to only one of the mandatory matters which it must consider as a regulator.

What it ought to have done before selecting the criteria for determination of the dispute is to say, "These are our views on regulatory certainty, these are our views on, for example, consumer harm, these are our views on efficiency, this is how we quantify the historic harm to competition caused by the flip-flop charges", and only after having regard to all those features of its regulatory duties should Ofcom have decided how to determine the dispute, but it jumped too soon to selecting the charge control criteria as the appropriate criteria.

How is it, against that background, that Ofcom claims to have complied with its duties? It is significant to note that Ofcom's primary answer is exactly the same argument that it ran in TRD, that because the charge control itself was imposed consistently with Ofcom's regulatory duties, it was equally consistent with those duties for Ofcom to apply it to a dispute, the subject matter fell within its scope. In effect, Ofcom says, "Because I complied with my regulatory duties in 2007, I can simply carry over that compliance by mechanically applying the charge control criteria four years later".

There are four reasons why that approach cannot be accepted, in my respectful submission, and I set them out in my skeleton argument at para.37. In the light of the time I do not propose to elaborate them orally. It is, in my submission, self-evident that it was not good enough for Ofcom, which owes Article 20 duties, to seek to achieve the objectives set out in Article 8 when it determines any dispute simply to say, "Here is an answer I made earlier". For Ofcom to apply the results of a three year old analysis conducted under a different regulatory function is simply to abdicate its duties under Article 20 of the Framework Directive.

As to the principle of regulatory certainty which led Ofcom to follow this approach, I accept of course that it was a relevant consideration, but there are two points on regulatory certainty which can be shortly stated. First, Ofcom's error was in having regard only to regulatory certainty in deciding whether or not it should adopt the SMP conditions as the

sole criteria for the dispute. By the way it approached regulatory certainty, Ofcom cut itself off from a proper consideration of its other regulatory obligations.

Secondly, to the extent that Ofcom considered itself bound by principles of regulatory certainty to adopt the SMP conditions as the sole criteria for determination of the dispute, it was wrong to do so for the reasons I have set out at some considerable length in my skeleton argument at paras.39 to 49.

Sir, Ofcom does not put all its eggs in one basket on the first argument. It does have a secondary argument, that in any event it had sufficient regard to its duties in para.3.37 and 3.38 on p.270 of tab 11, Core bundle A. In my submission, those paragraphs cannot be adequate to fulfil Ofcom's duties for the following reasons: first, the title is telling, "Assessment of our draft determination against Ofcom's statutory duties and Community requirements". It is clear, and it appears to be acknowledged in Ofcom's defence at para.94, that what Ofcom is doing is testing the conclusion it has already reached for consistency with its duties. That is entirely the wrong way round. Ofcom should not be reaching any conclusions, even provisional ones, without putting its duties at the centre of its analysis.

THE CHAIRMAN: May it not be said that that is a form over substance type of distinction? What really matters is the substance of whether they have given proper consideration, not whether they structured it as reaching a provisional view and then testing it against all the other relevant considerations, or fully, as it were, directing themselves about all the relevant considerations before coming to a conclusion at all.

MR. RICHARDS: It is certainly not a form over substance point so far as concerns s.190(2A).

THE CHAIRMAN: Yes, I see that.

MR. RICHARDS: So far as concerns the general TRD approach, it is a point of substance because when one actually looks at how the decision works we see that the very approach is to identify criteria for the determination dispute without reference to any of the relevant statutory duties, apart from the need to take into account regulatory certainty. The fact that is then sense checked for consistency, in my respectful submission, is not good enough. The duties ought to be central both to the selection of the criteria for the determination of the dispute and to the development of Ofcom's conclusions. As the Tribunal put in TRD at para.89, all of Ofcom's duties should be central to the Regulator's consideration of the issues.

That is my first point, that this does not put them where they should be, which is at the heart of the decision making process. They are tacked on.

The second point: the mere incantation at para.3.37 of the six Community requirements under s.3 of the Act in itself is not good enough – see *Baker* in the judgment of Lord Justice Dyson, para.37, the use of a statutory mantra does not of itself show that the duty has been performed; and see also TRD at para.187.

Thirdly and finally on this point, the only positive consideration of any of Ofcom's duties or obligations beyond the principle of regulatory certainty is contained in para.3.38.1. That paragraph contains no attempt to assess the historic impact of the October 2010 charges on consumers for any competitive distortion that was caused by those charges. All that is said is, first, that the impacts are likely to be relatively small compared to the ongoing harms considered in the April 2010 consultation. That must be right as a matter of logic because it is only one set of charges, whereas the April 2010 consultation was considering potentially the rest of time. There is no actual assessment of the absolute size of the harm.

THE CHAIRMAN: Maybe that was a tenable approach to adopt given that, for reasons of their own, Telefónica had chosen to challenge only one particular month right at the very end of the period before the new regime with a ceiling was introduced with effect of 2011.

MR. RICHARDS: Sir, it would have been tenable for Ofcom to say, "We assess the historic harm as being at this level", but it did not do that, it just said it is smaller than the bigger picture that you have looked at. It related to a much shorter period where the associated impact on consumers and competition cannot be any more material and is likely to be much smaller. That is not actually attempting to quantify the level of the harm.

What is said is that because flip-flopping has been dealt with on an ex-ante basis by the 2011 March statement, any determination is, on a prospective basis, likely to have negligible effects. That does not engage with the question which arises on a retrospective dispute resolution determination, which is how big a historic impact did these charges have? That is a question which Ofcom did not grapple with and ought to have answered before determining the dispute.

Sir, I have over-run my time estimate, I am afraid.

THE CHAIRMAN: Only very little.

MR. RICHARDS: Because I have not finished.

THE CHAIRMAN: How much longer do you think you are likely to be, without holding you to it?

MR. RICHARDS: I have a very little more on grounds 1, 2 and 4, and then just ground 5. I should hope no more than 15 minutes.

THE CHAIRMAN: I think in that case we had better break off now, but we will continue – is two o'clock all right, or would you rather I said five past?

MR. RICHARDS: Two o'clock is convenient on this side of the room.

THE CHAIRMAN: All right, we will continue at two o'clock then. Thank you very much.

(Adjourned for a short time)

MR. RICHARDS: Sir, I have been looking at s.3 of the decision. The decision follows the usual form of being distributed to the parties in draft.

THE CHAIRMAN: Yes.

MR. RICHARDS: And then having a further section, here s.4, with Ofcom's response to the comments on the draft. That, of course, gives Ofcom the opportunity to remedy any defects it may recognise in the decision. But, I am afraid that in my submission s.4 compounds rather than cures Ofcom's errors. In particular, again at para.4.15, Ofcom again rejects Telefónica's case on the guidance provided by *TRD* which was, in effect, that Ofcom had to have regard to all of its statutory duties. I ought, however, to address you on para.4.27.

THE CHAIRMAN: Yes.

MR. RICHARDS: Where Ofcom says this:

> "Whilst Ofcom raised concerns over flip-flopping prior to the imposition of the October 2010 charges, the charge control was not amended, neither was any additional regulation imposed at the time". On that basis the charge control was the only relevant regulation. We continue to consider that it would be inconsistent with principles of regulatory certainty in the light of the prevailing regulatory regime at the time to seek to apply any additional obligations in the absence of any compelling reasons requiring us to exercise our dispute resolution powers in a conflicting manner".

And that is followed through in para.4.30 where Ofcom say they, perhaps sensibly, protect their position for future disputes in case they want to take a different line and say that there may be circumstances where compelling reasons lead them to take a different approach. That, however, does not rescue the determination, Sir, because inherent in the concept of applying other criteria in the event of compelling reasons to do so is this vice: that in the ordinary course, Ofcom just adopts the charge control criteria as the relevant criteria without considering its regulatory duties before so doing; and the effect of Ofcom's approach here is to say that, unless there are compelling reasons to do so, we will not consider our regulatory duties in the round before identifying the criteria by which we should determine the dispute. And that, in my respectful submission, cannot be legitimate.

THE CHAIRMAN: But, is that so very different from the kind of situation where a body charged with some kind of power or discretion adopts a policy which it will normally follow, but from which it reserves the right to depart? I mean, that is not objectionable in most circumstances. And is that not in substance what is happening here?

MR. RICHARDS: Well, Sir, I accept that that is a fair analogy, with respect, but it is not legitimate for Ofcom to say, "We adopt a general policy which does not involve us considering our statutory duties in the round but will, in exceptional circumstances, depart from that approach". It is an exceptionality approach which in fact Ofcom had also taken in the disputes before the Tribunal in *TRD*. And the reason it will not do is that it fails to put Ofcom's duties at the heart in every case of its decision-making process.

THE CHAIRMAN: But of course it is said that *TRD* was different because there was no relevant charge control regime then in place. Sorry, I see now there is one which was itself the product of detailed consultation and consideration of all relevant considerations etcetera. So, may it not then be said it is perfectly acceptable to use that as your starting point in relation to disputes which come within the scope of that charging control and only departing from it if some very good reason is thrown for doing so?

MR. RICHARDS: Well, Sir, no, because it is necessary for Ofcom to ask itself in any dispute, "Is it appropriate to use this set of criteria as our starting point?" Ofcom must in every case have regard to all of its regulatory duties.

THE CHAIRMAN: But, does that not rather – does that not undermine or negate the whole purpose of having a charge control regime in the first place? I mean, the whole purpose of it is to deal with the generality of cases.

MR. RICHARDS: Well, Sir, no, it does not undermine the charge control regime. Take, for example, this case and suppose that there were no merit in the complaints about flip-flopping. What Ofcom should have done is to say, "This is the charge control regime. We consider that it has been complied with [that is a separate point which I will come to] we have assessed Telefónica's complaints of harm from flip-flopping as being of no merit or insufficient merit, to justify departing from — to justify our not simply applying the SMP conditions. We have made our own assessment as Regulator of the following matters, efficiency", and so on, and then it would be open for Ofcom to say, "In the circumstances, we think it is entirely appropriate for us to determine this dispute purely by reference to the charge control".

But Ofcom cannot say, "It is only in unspecified, exceptional circumstances where we see there to be compelling reasons that we will start from square one, which is where we ought

to start, and say what, by reference to our regulatory duties, are the appropriate criteria by which to determine this dispute?"

THE CHAIRMAN: Can we just pursue it a little bit further, because if I take what you say literally, that almost seems to suggest there is a de novo assessment of the situation at each dispute that comes up which in your skeleton you eschew. And so what I am struggling with, I suppose, is the balance between the weight that Ofcom can appropriately give to the established policy, and the weight that you would say should — the specific circumstances of the dispute for it and, I am struggling a little bit to identify where you would place that balance and upon what criteria.

MR. RICHARDS: Well, Sir, the primary point is that Ofcom in this case has failed to conduct the necessary balancing exercise, in my submission. Pre-eminently, the weight to be given to the consideration is a matter for the Regulator. My submission is that Ofcom has not weighed up in the scales against its other regulatory objectives the importance of complying, sorry, the importance of regulatory certainty. It has simply started from the position that is the appropriate way by which to determine the dispute. Now, if we were back before Ofcom, having been remitted for further consideration after this appeal, then Telefónica's case would be that the appropriate weight to be given to the SMP conditions and compliance with them is significant but is outweighed by the very serious effect that flip-flopping has had on consumers and on competition and on efficiency. But, for this tribunal's purposes it is really not a question of weight because my submission is that the balancing exercise has not been conducted, and Ofcom's answer that in compelling circumstances or given compelling reasons we might have given up the balancing exercise is no answer.

THE CHAIRMAN: I am sorry, I think maybe I have misunderstood what Ofcom is saying, but it could be read to be saying "We attach a high weight to legal certainty and the balance that we are conducting is that high weight against the compelling circumstances to the contrary, and that itself is a balancing exercise.

MR. RICHARDS: Well, the difficulty is, Sir, that the other regulatory duties have not been considered in selecting the appropriate criteria in the first place. Fundamentally, the point is that Ofcom has to look at everything in all cases, whatever weight it ultimately decides to give to the pre-existing charge control. That is not to say it is a de novo assessment because the charge control is already there. But, just lastly on s.4, may I note that at paras.4.3-4.35 a number of specific arguments which Telefónica had raised on the draft determination were recorded by Ofcom including, at 4.34, a point about efficiency objectives; and in response

at 4.41-4.42 Ofcom simply asserts that none of this makes any difference. We have considered our general duties and the six Community requirements. Again, the indication of the magical sections is no substitute for an actual analysis of, for example, the impact of the flip-flop charges on efficiency. And, as I said, you will find no such analysis in the determination.

So, the matters on which I have addressed you in the determination go to each of Telefónica's first, second and fourth grounds of appeal — namely that Ofcom erred in law in applying only the charge control regime; that it failed to have regard to all of its duties in the manner explained in *TRD*, and it wrongly allowed putative compliance with the charge control to dominate its reasoning.

The difference it would have made, had Ofcom followed the correct approach is, in my respectful submission, clear. It would not have started from the position that the only relevant regulation was contained in the charge control regime. Rather, in selecting the appropriate criteria by which to determine the dispute, and in assessing the dispute against those criteria, Ofcom would at both stages have had regard to all of its statutory objectives. And to that end one would find in the determination a proper analysis of the extent of any historic consumer harm or competitive distortion or inefficiency resulting from the charges which would have been weighed in the balance along with the importance of regulatory certainty and Ofcom's own policy goals.

Sir, I accept that had Ofcom done all that, there is a chance it might still have reached the same result. I cannot exclude that chance, not least because the underlying evidence about the merits of the dispute is not before the Tribunal. But, that is nothing to the point, because it cannot be said that it is inevitable that Ofcom would reach the same result. It cannot be said it is inevitable because, among other things Ofcom has failed to conduct the necessary assessments, for example, of historic consumer harm or impact on efficiency.

THE CHAIRMAN: You have criticised Ofcom for not considering the resulting consumer harm, but did they have the material to do so? I mean, were they supplied with the basis for conducting such an assessment?

MR. RICHARDS: Sir, not by Telefónica. However, they are the Regulator.

THE CHAIRMAN: Well yes. On the other hand you are the complainant, it might be said.

MR. RICHARDS: Well, it may be very difficult for an individual operator to demonstrate the extent of consumer harm.

THE CHAIRMAN: Surely, one has to be realistic here. I mean, surely when a complaint is made, one normally confines oneself to the substance of the complaint — to the points

which have been raised by the person who is making the fuss. And, admittedly, you have to look at it in the wider context of your regulatory duties, but on your argument, Ofcom comes under an obligation every time a complaint is made to initiate a whole series of investigations into matters which the complainant is not even making any reference to.

MR. RICHARDS: Ofcom can properly say, "We don't consider it necessary to look into this because it hasn't been raised, and we don't think there is any reason from our own perspective why it is likely to be relevant. However, where as in this case Telefónica raises the issue of the consumer harm, it is something that Ofcom has itself remarked upon in its own policy documents as a result of flip-flopping. Ofcom cannot sit back as an arbitrator would be entitled to do in a private law arbitration and say: "Well, the claimant has failed to prove its case and that is the end of the matter." Ofcom is bound as a regulator to form its own view and make reasonable inquiries to support the view it ultimately takes.

MR. ALLAN: What weight is Ofcom entitled to attach to the fact that in the April 2010 consultation document it had carried out an investigation in which it had some estimate of the scale of consumer harm, and efficiency impacts which it said were outweighed by considerations of regulatory certainty and the balance of the charge control period, so that at that point it had conducted a broader examination of the issues, reached a conclusion and your complaint comes along and is it not entitled to draw, indeed not bound, to draw upon that consideration when informing its Judgment on this occasion?

MR. RICHARDS: It is, sir, absolutely entitled and, indeed, bound to have regard to its views on consumer harm expressed in previous policy documents, but one has to be quite careful about what Ofcom actually said in the April 2010 Consultation. What it said in para.9.126 was:

> "We have not revised the current charge control condition, considering that any risks of harm need to be considered alongside the need to preserve regulatory certainty once a control is set."

And that was it, there was no detailed analysis at all of whether the need to preserve regulatory certainty outweighed the risk of consumer harm.

MR. ALLAN: One might say to that – sorry to interrupt you – that one can quarrel with the conclusion that Ofcom reached, but it is hard to say they did not reach a conclusion as a result of a thought process.

MR. RICHARDS: A thought process in its April 2010 consultation?

MR. ALLAN: Correct.

MR. RICHARDS: It is hard to characterise what is said in the April 2010 consultation as a decision as such. What it does is it records the fact that Ofcom has not done anything and simply states Ofcom's reason for an action.

MR. ALLAN: But I am putting the hypothesis to you that when one looks at their decision in your case, that is at the end of a process which has involved broader consideration of the issues which it could be said your case a subset.

MR. RICHARDS: Well had Ofcom properly addressed in this determination the factors which led it to make that statement in 9.126, or even referred to what those factors were – which it did not – then it would undoubtedly be allowed to be permissible for Ofcom to attribute significant weight to that. Ofcom does not go into its underlying reasoning either in the April 2010 document – this is the reasoning for inaction either in the April 2010 document, or in the determination, and what is clear throughout Ofcom's policy documents around this time is a consistent view that there is a harm in flip-flopping, for reasons which are stated in some detail, unlike the very brief note that Ofcom has not yet done anything about it.

Sir, if you are with me that there is a legal error in Ofcom's determination in my respectful submission you should allow the appeal. It cannot be said that the same result is inevitable, and there is always a public interest unless it would be a waste of regulatory time, in the regulator being required to direct itself properly on its decision making process.

Very briefly on my fifth ground of appeal, that is that Ofcom determine the dispute upon the premise which was unreasonable and unlawful that H3G and Vodafone had complied with the charge control.

Whether one characterises that as a factual conclusion or a premise makes no difference for my purposes. One sees it in clear terms in the decision at paras.3.35 and 3.39 the provisional conclusion is reached on the basis that Vodafone and H3G complied, and that is repeated in 3.39.

At 4.6 on p.273 there is a qualification in response to submissions by Telefónica.

> "Ofcom has not determined that Vodafone and H3G have complied to the charge controls. Rather, our conclusions in this dispute are based on the fact that O2 did not allege that there had been a breach of the charge controls and we have seen no evidence that Vodafone and H3G did not in fact comply with them. Ofcom is monitoring compliance as part of a separate project which will be concluded after the time permitted by the Act for resolution of this Dispute has expired."

What is clear is that Ofcom proceeded at least upon the basis that there had been compliance. The question of law for the Tribunal is whether Ofcom was reasonably justified in so doing.

THE CHAIRMAN: I would be amazed if they did anything different, I must say, in those circumstances.

MR. RICHARDS: Well, Sir, there are four reasons why they should not have done that. First, as we have seen, Ofcom as a regulator has a duty to take the initiative. We have seen in particular from Article 20 that the resolution of disputes is a regulatory function and that of course is now given a domestic statutory footing in subsection (2A) of s.190. I do not suggest, Sir, that Ofcom always has an obligation to go beyond the allegations that are made to it in the complaint, but this is not a case, Sir, where Ofcom decided that since non-compliance with the charge control is not specifically alleged it was unnecessary for Ofcom to form a view on it.

THE CHAIRMAN: Well, precisely, they say they are monitoring it and that is part of a separate project, so they have the matter in hand, but they are not dealing with it now because it is not part of Telefónica's complaint. What on earth is wrong with that?

MR. RICHARDS: Well, Sir, it is absolutely right that it is not part of Telefónica's complaint. It is not necessary to Telefónica's complaint. The problem is that Ofcom has decided to determine the dispute in its own words, in the defence at para.6 by reference to the criteria set out in the charge control.

Ofcom may have made a rod to beat its own back, but having decided to determine the dispute on that basis it has to do so properly.

The third point, this is not a case where it was agreed or common ground that there had been compliance and Telefónica explained that it could put no positive case as to non-compliance because it did not know. The reference to its submissions in the draft determination is paras. 15 to 18 at tab 18 of Core bundle A, p.403. There was, accordingly, put in issue the question of compliance.

The fourth point, sir, which may answer your question as to why could Ofcom not just hive this off as part of a separate procedure? It is common ground that in determining disputes Ofcom is entitled to and, where appropriate, should use such information as they have at their disposal from the exercise of their other regulatory functions in determining a dispute. For the Tribunal's note the references are TRD at para.105 for the principle I rely upon, and for Ofcom's acceptance of that principle, para.109 of the defence.

Ofcom, as we have just seen, proceeded upon the basis that it had seen no evidence of non-compliance, but that was blind to the fact that it had the evidence of compliance or otherwise at its own fingertips. It said that there is a separate project which we concluded after the time permitted by the Act for resolution of the dispute has expired. But it is not suggested that the necessary evidence had not been gathered, nor that it would have been impossible for Ofcom to consider the evidence within the time frame for determining the dispute, and in those circumstances in my respectful submission there is no reasonable justification for Ofcom in insisting and ignoring the material that it had gathered in the exercise of that other regulatory function. That, Sir, is a further reason why this appeal should be allowed and the matter remitted to Ofcom to properly consider in accordance with their statutory duties.

I maintain all the contentions in my skeleton argument in addition to those I had made, or sought to make orally. But, subject to any questions the Tribunal has, those are my submissions.

MR. ALLAN: Just a question on our ground five, is it the case that compliance with the charge control raises issues about the terminating suppliers' charges over the whole of the charge control year?

MR. RICHARDS: yes.

MR. ALLAN: But I think, as I have understood you, you have emphasised very much that this dispute is about the charges in October 2010.

MR. RICHARDS: Yes.

MR. ALLAN: If that is correct, in any meaningful way how can it be said that whatever the interveners have done in 2010 in and of itself bears decisively on their compliance for the charge control over the year as a whole? The inquiry that Ofcom would have had to have undertaken would have been a far larger inquiry of which the October 2010 charges would have been one issue amongst many, and so I struggle a little bit to see how that question is really put in issue by the dispute that Telefónica referred to them.

MR. RICHARDS: Sir, it is not. It is again a rod that Ofcom has created for its own back by choosing the criteria in the charter control as the appropriate criteria by which the dispute should be determined.

MR. ALLAN: You might say that that is the framework within from which they are extracting the relevant rules for the determination.

MR. RICHARDS: One might, sir, but even so I think the point still stands that the only way on which to assess or to think about compliance with a charge control in the strict letter of the charge control is on an annual basis.

THE CHAIRMAN: A related point is it seems highly implausible that there should have been any failure to comply. The whole point of flip-flopping was it was a device intended to comply with the letter of the charge control but in order to achieve an unintended benefit and normally people who embark upon that kind of exercise take very good care to keep within the provisions which they are trying to exploit, I mean that is like elementary tax planning.

MR. RICHARDS: Well, Sir, yes to an extent, but my understanding is that actually compliance with the charge control is rather a complicated matter, and if one flip-flops one is taking a certain risk as to the ultimate calculation that may be made down the line, because it is not at all easy as I understand it to know, or to be absolutely 100 per cent sure that one's flip-flopping will prove compliant at the end of the day.

THE CHAIRMAN: I see. Well, thank you very much, Mr. Richards. Yes, Mr. Saini.

MR. SAINI: I have divided my submissions into five parts under the following headings. First, I am going to address the Statutory Framework, secondly, the relevant SMP condition, thirdly, the terms of the particular dispute notified by Telefónica, fourthly the relevance of the TRD case; and fifthly, and finally, I am going to address the specific grounds of appeal, the five grounds of appeal. We have done a note, which I will hand up at the end of today, in relation to the Tribunal's questions of last week.

THE CHAIRMAN: Thank you very much.

MR. SAINI: But I will not interrupt my presentation now by taking any time up on that note. Dealing, first of all, with the Statutory Framework, can I please ask the Tribunal to go to bundle A of the authorities, tab 8B, and I hope, because this is a late addition to the bundle, that one will find s.45 of the Communications Act. I am not going to take time showing the Tribunal sections that Mr. Richards has already been through. There are some sections which the Tribunal needs to be aware of in approaching the appeal. Section 45(2)(b)(iv) sets out the type of condition we are concerned with here, which is "a significant market power condition (an 'SMP condition')". If one goes down the page to sub-section (8), please, we see that there is a restriction there saying that SMP conditions, in particular an SMP services condition, and we are dealing in this case with a services condition rather than an apparatus condition, can contain only provisions authorised by further sub-sections and sections which we will look at.

Jumping ahead then, please, to s.87, which I believe is on p.247 in the bottom right hand corner, this was the route that Ofcom followed in 2007 after the determination that there was significant market power. 87(1)(a) allows Ofcom to impose certain conditions. The particular type of condition that we are concerned with here appears over the page, Sir, at the bottom of p.248:

> "(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 …"

It is very important to note that proviso in sub-section (9) which refers to "subject to section 88", because we are going to see next at p.251 that there is a very rigorous process that Ofcom must undertake before it decides to impose the type of price control SMP condition that is in issue in this appeal.

If the Tribunal could look at s.88(1), you will see that there are two conditions set out there. I would ask the Tribunal to note, by way of sidelining, the particular factors that appear in 88(1)(b), which you will see later on, when we come to the dreadful s.190(2A), which we have been debating this morning, are very similar. So at the time that Ofcom decides to set a price control condition here in 2007 it has to consider matters such as promotion of efficiency, promotion of competition and conferring greatest possible benefits on the end users of services.

I think it is common ground that a price control condition is the most intrusive form of regulation that Ofcom can impose. Ofcom could have, as you saw from the 2007 market review, adopted a fairness and reasonableness condition where, rather than saying, "Your price will be X or will be an average of X", they said, "Your price has to be fair and reasonable", and in the passage Mr. Richards showed you this morning, which I will come back to in due course, they decided that as far as these terminating rates were concerned, they considered imposing a condition that the charge would be fair and reasonable but because of the uncertainty that would create they preferred to impose this average charging system so that providers would know where they stood and not effectively face, as we are facing in this case, a challenge down the line that "your charges are not fair and reasonable".

Can I then jump ahead, please, to s.185, p.281. I need to take this quite slowly because it is clear that the way we expressed it in our skeleton argument was not sufficiently clear.

There is an underlying issue here, which we will come to when we look at s.190, as to whether or not the new aspects of s.190 refer to this dispute.

Just some notes to make, first of all: the new s.185(1A) came into force on 26th May 2011. We know that from the Statutory Instrument. The dispute referred to Ofcom was on 25th March 2011, so one just needs to bear those dates in mind when looking at these sections. The structure of s.185 and the following sections following the amendment is in rough terms as follows, and I am going to make this good by showing you the specific wording: Parliament decided to create two kinds of dispute. This was all new from 26th May 2011. One type of dispute was a dispute that fell within the old s.185(1), a dispute between communications providers, but it also included a new type of dispute which may once have fallen within the original section but was given a special categorisation, and this was a new type of dispute that fell within s.185(1A). What Ofcom has to do now, that is after 26th May 2011, when it receives a dispute, when a dispute lands on its desk, is decide: is this a 185(1) dispute, or a 185(1A) dispute? I will explain in a moment why that is very important. It cannot be both.

THE CHAIRMAN: That was going to be my question.

MR. SAINI: It cannot be both, although one could see that under the language you could potentially be both, but when one sees the scheme of the remaining amendments it is clear that it cannot be both.

If the Tribunal will just bear with me for a moment and take it, on the basis of my assurance, that the dispute that Telefónica notified is a dispute which, I think Mr. Richards accepted, fell within s.185(1A), which is:

> "… it is a dispute relating to the provision of network access if –
>
> (a) it is a dispute between a communications provider and a person who is identified, or is a member of a class identified, in a condition imposed on the communications provider under section 45 …"

We know that the SMP condition in this case was a s.45 condition.

MR. ALLAN: You are saying that this dispute falls within the new s.185(1A)?

MR. SAINI: No. I say that the issue for the Tribunal is, does this package of amendments – we are looking at one of them – apply to ----

MR. ALLAN: Can I ask a simpler question: which of these two categories do you say the dispute falls into?

MR. SAINI: Into s.185(1)(a) because at the time Ofcom had to make the decision, or the relevant time for focusing upon which section applied, 185(1A) did not exist, did not apply.

MR. ALLAN: Let me ask a hypothetical question: if the package did apply so that the two categories were in place at the relevant point, which of these categories ----

MR. SAINI: The second.

MR. ALLAN: So you say it shifts?

MR. SAINI: Absolutely. It may sound odd, but there is a very good, which I am going to ----

MR. ALLAN: What I am struggling with is para.2.1 of the Determination, which says that s.185(1)(a),

MR. SAINI: The old section.

MR. ALLAN: That is referred to ----

MR. SAINI: That is our position. I am only showing you these sections to make good my ultimate submission which is that Mr. Richards is wrong in saying that these amendments could have applied to this dispute.

THE CHAIRMAN: So it goes to the question of the implied limitation on the commencement date of 185(1A)?

MR. SAINI: Absolutely, and I am sorry I am not making it sufficiently clear. Hopefully, when I show you the next section it will become clearer. You may be asking at this stage, not unreasonably, what is the point of creating these two kinds of dispute? There was a very important reason which appears, jumping a few pages ahead to p.287 ----

THE CHAIRMAN: Sorry, before I forget, I think for the sake of our sanity and for whoever is doing the transcript, it might be helpful to refer to 1(a) and (1A) when we are talking about s.185, because otherwise it is almost impossible to make clear which one one is talking about. I am afraid I am guilty of that myself probably.

MR. SAINI: I will try. Going ahead to p.287, and the Tribunal will see that the heading on s.186 "Action by Ofcom on dispute reference". Bear in mind it received the dispute reference on 25th March 2011. This is the dispute landing on Ofcom's desk, and under sub-section (2) Ofcom has to decide whether or not it is appropriate to handle the dispute. What the legislature has done in s.186(2A) is that it has decided that, in relation to what I call the old type of dispute, s.185(1), it has the opportunity to say, "Sorry, we are not going to deal with this dispute because we do not have enough by way of resources". However, under sub-section (3), which is the addition, where you have a new type of dispute falling within 185(1A), their options for refusing to deal with the dispute are very, very limited. You have the twin track approach, you have a classification once the dispute turns up.

THE CHAIRMAN: I see. So where it is an old fashioned dispute on the 185(1)(a) there is no right to have it determined at all?

MR. SAINI: Absolutely.

THE CHAIRMAN: Ofcom simply has to decide whether it is appropriate for them or not?

MR. SAINI: Absolutely.

THE CHAIRMAN: Whereas if it is under the new (1A) regime they have to take it on unless you get within one of the three specified let-outs?

MR. SAINI: Absolutely.

THE CHAIRMAN: I have got it, thank you.

MR. SAINI: What could have happened hypothetically here, and we could not do this because these sections did not apply, is when Telefónica referred the dispute to Ofcom, Ofcom could well have said, "We have dealt with these issues in the April 2010 consultation paper, we are aware of flip-flopping, we have limited resources, we would rather not deal with this". They did not have that option because these sections had not come into force. They had come into force on 26th May, but they did not apply because one has to a fix a point in time at which the action by Ofcom needs to be considered. We say that must be, only can sensibly be, the day that Ofcom receives the dispute.

THE CHAIRMAN: Or within a reasonable time thereafter?

MR. SAINI: Absolutely. Otherwise one could have the rather unattractive position which is that Ofcom could receive the dispute at the time it was submitted, sit on it until June, say, and say, "Ah, we now have the ability to say that we are not going to handle this dispute because we do not have the resources". That is a very strong pointer.

There is a further pointer in relation to the retrospectivity issue.

MR. ALLAN: Sorry, Mr. Saini, can I just ask, as a point of clarification, what did the preceding legislation say? I am just trying to see what s.186 said about the time that Ofcom received the dispute.

MR. SAINI: I can tell you what it is. It is not there, but we can provide it. I am very familiar with it. It basically required Ofcom to deal with the dispute, subject to a very limited get out.

MR. ALLAN: So, the duties as stated under sub-section 3 apply to all disputes, is that right?

MR. SAINI: Yes.

MR. ALLAN: Okay.

MR. RICHARDS: Sir, if I can assist on that we do have it in the bundle at p.129, tab 6.

MR. SAINI: I am grateful to my friend.

MR. RICHARDS: Sorry. I thought we did have it, but we do not.

MR. ALLAN: Thanks for the effort.

MR. SAINI: I think it is there, p.129, it is there. So, if one goes back to that p.129, s.186(3), if the Tribunal would look at sub-section 3, it is very similar to the constraint that now applies to new type disputes only.

MR. ALLAN: I am sorry. In that case I was at cross-purposes, and I was — I thought all that there was before was simply the sub-section 2, leaving it up in the air as to whether or not it was appropriate.

MR. SAINI: No.

MR. ALLAN: But in fact there was a —

MR. SAINI: There was a provision.

MR. ALLAN: There was a provision.

MR. SAINI: There was a provision. So, basically, the background is that Ofcom had a very limited ability as to refuse to handle a dispute under what one sees at p.129. Certainly, a factor that was not there which is now there is the resource factor.

MR. ALLAN: I see. So, the purpose was to give them a resource let-out.

MR. SAINI: Absolutely.

MR. ALLAN: Except for cases which fall within the new one.

MR. SAINI: Absolutely. Absolutely. Now, I said that there are other indicators in relation to this particular factor, which is retrospectivity issue and (I have just lost my note) but there is a provision which allows Ofcom to require the person referring the dispute to pay its costs, which was also introduced in this package of measures. I am sorry, I have just lost my notes, I will find them in a moment. It is at p.296. One can pick it up at p.295, and one sees the new section added there from (2) in the middle of the page. And at the top of p.296 there is a new provision enabling Ofcom to require a complaining party to pay its costs. That is, again, a new feature. So, if Mr. Richards is right, somebody who referred a dispute to Ofcom prior to 26th May 2011 under the old regime under which there was no costs risk suddenly becomes liable to pay costs if these amendments apply to his dispute.

MR. ALLAN: Sorry, if I am looking at p.296, sub-section (6) at the top is not in square brackets, which implies to me that that was part of the pre-existing regime.

MR. SAINI: (6)(a).

MR. ALLAN: This appears to be a limitation now, that they may not "require a party to the dispute to make payments" —

MR. SAINI: You are quite right.

MR. ALLAN: — unless those criteria are satisfied. But the general power to do so was there before, was it not?

MR. SAINI: You are quite right, Sir. The only additions — that addition there and also the addition right above that.

MR. ALLAN: Yes, not the —

MR. SAINI: Yes.

MR. ALLAN: So —

MR. SAINI: But there is a point, the same point arises when we move to (6)(a) in terms of a change.

MR. ALLAN: Well, I see there is a change there. But I cannot at the moment see how that really impacts on the question of when (2A) applies.

MR. SAINI: Well, it is only an additional point to suggest that you have to fix a point in time at which these new, this package of amendments come into force. And we say that the only sensible date that one can fix upon is that the amendments will apply to disputes which are referred after 26th May 2011, not prior to that.

MR. ALLAN: Well, if so, why was that not specifically stated in the schedule that deals in detail?

MR. SAINI: I accept that point. I accept that point. But, it is quite clear that if one goes back to s.185 and also s.186 Parliament clearly intended that at the point a dispute was received it would fall into one track or another track.

MR. ALLAN: Yes. Well, for the future that is plainly the case.

MR. SAINI: Absolutely.

MR. ALLAN: But one then has a problem what to do with ending disputes —

MR. SAINI: Ending, so we say —

MR. ALLAN: — which have already been accepted, and have necessarily been accepted on the footing that they fall within section one hundred and whatever it is.

MR. SAINI: It is s.185(1) the old —

MR. ALLAN: Exactly, under the old sub-section (1)(a) yes.

MR. SAINI: But, sorry, I jumped ahead without completing this point, but you will see that, going to p.295, at 190(2A) there Parliament decided that in relation to what one would perhaps call "old-type disputes", 185(1) disputes, Ofcom's powers under sub-section (2) of section 190 had to be exercised by reference to certain matters. But it did not — which is one of the puzzles, I think, that you referred to this morning — it decided to expressly refer to old-type 185(1) disputes and did not include new 185(1A) disputes. Now, one can only guess why that is.

MR. ALLAN: I was hoping you might have an answer.

MR. SAINI: No. There is a pretty, we would submit, good answer, which is that Parliament knows that if one is concerned with a dispute relating to network access arising under an SMP condition, a new 185(1A) dispute, these factors, efficiency, competition etcetera, would have already been considered by Ofcom when it set that condition, and now there is an almost complete overlap. I reminded the Tribunal when I was going to s.88 back at p.251 to bear in mind those words at 88(1)(b). So, if one compares the text at 88(1)(b) p.251, with the text at p.295 at 190(2A).

MR. ALLAN: So, it is (a), (b) and (d) are pretty much replicated.

MR. SAINI: Yes.

MR. ALLAN: But not (c) "efficient investment and innovation".

MR. SAINI: Now, it is important just to step back here at the moment and see the relevance of all of this. I will explain. Ofcom's approach is that you apply the unamended sections because you have got to apply the law as at the date of the referral of the dispute, which was 25th March 2011. Mr. Richards' case is that in fact although the dispute was referred earlier than the formal commencement of these provisions, you apply all of these sections, the new sections. Now, if that is right, which we do not accept is right, one has the position that his dispute is a 185(1A) dispute.

MR. ALLAN: I do not think he says that. I think he accepts it is an old-style (1)(a) dispute, but he says if you look at s.190(2A) there is nothing in it to say its commencement is anything other than the date when it was brought into force.

MR. SAINI: Sir, I know he would want it to be an old-style dispute, but the Tribunal would have to consider, is this an old or a new-type dispute? It cannot be both.

MR. ALLAN: No, it is *ex hypothesi* an old one because of the date when it was brought in, there is no problem about that. The only question is whether 190(2A) applies to it as a change in the applicable regime introduced while it was pending but before it had been determined.

MR. SAINI: Sir, the answer to that is 190(2A) is an amendment that is introduced. If you are going to apply 190(2A) why do you not apply 185(1A)? There is no logical reason. I think the simple point is, he cannot have it both ways. On Ofcom's approach none of the amendments here apply, given the date of the referral of the dispute. If he has it his way and says they all apply, then the Tribunal will have to say, "Okay, they all apply. Is this a 185 old dispute, or a 185(1A) new dispute?

MR. ALLAN: The answer to that is easy. It is an old-style dispute, just simply because of the date when it was introduced, is it not?

MR. SAINI: No, Sir.

MR. ALLAN: No.

MR. SAINI: Because you have got to decide which sub-section it falls into. You cannot, with respect, apply 190(2A) without applying 185(1A) as well.

MR. ALLAN: That is the question, is it not? What is the necessity for that linkage?

MR. SAINI: Because Parliament in its wisdom has decided to create two tracks here, and for one track, the old track, it has decided to impose certain obligations in relation to resolution of the disputes; but it has not decided to impose those in relation to the new track of dispute. But I must emphasise that our point in relation to 190(2A) is a secondary point only if we are wrong in respect to our primary point which is that the implication one gets from this legislation is that it cannot apply to disputes which are referred to Ofcom before the commencement date. That is the primary point and therefore none of the amendments can apply.

MR. ALLAN: I know that is your primary argument, but I am still not quite clear what it is you are relying upon to support it. Given that we have express provision made in the small print of Schedule 3 which does not appear to place any restriction on the commencement of 190(2A) and conversely does in other situations draw a distinction based upon the date when the relevant dispute was —

MR. SAINI: Well, Sir, with respect, the answer to that is the commencement provisions equally make no reference to the commencement of s.186. And I hope I have, I have sought to demonstrate that one can only sensibly apply s.186 by focusing on the date of the reference being made as the relevant date.

MR. ALLAN: Can I approach just to say —

THE CHAIRMAN: Certainly, Mr. Allan.

MR. ALLAN: Is it right that cases that fall within 185(1A)(a) are invariably a sub-set of cases that fall within 185(1)(a).

MR. SAINI: Once upon a time they may have been, yes. They can be. They can be, so you can have an overlap. And here —

MR. ALLAN: But, is it not a complete overlap because the (1A)(a) class is a dispute between the communications provider and another communications provider, is it not?

MR. SAINI: In this particular context, yes.

MR. ALLAN: It is either the person identified in the condition or a member of a class identified in the condition imposed on the communication provider, so I would take it from that that they must be communications providers.

MR. SAINI: Generally, yes.

MR. ALLAN: So why do you say "generally, yes".

MR. SAINI: Well, no, I am saying in this particular case – in this particular case – we have an SMP condition which refers to all of the providers and expressly refers to communication providers generally as the class identified.

MR. ALLAN: My only point is to wonder whether the class of disputes that fall within that subsection must be a subset of a class of disputes between different communication providers.

MR. SAINI: Yes.

MR. ALLAN: So as and when the package applies the disputes that fall within (1A)(a) must necessarily be excepted from (1)(a).

MR. SAINI: Correct.

MR. ALLAN: I am not sure where that takes me, but thank you.

MR. SAINI: That is why I say that had this dispute been notified after 26th May Ofcom would have had to have made a decision, and Ofcom's view, and I do not think that Mr. Richards disagrees with this – I know he says it also falls within 185(1) old type of dispute, but I think he accepts that it would fall with 185(1A).

MR. RICHARDS: On a point of clarification, I did not understand myself to have accepted that, I thought I had reserved my position depending on what Mr. Saini said, but I just lay down that marker.

MR. SAINI: Well I will need to make that good that point when I take you to the SMP conditions.

THE CHAIRMAN: Yes, thank you, Mr. Richards. I think that is right, you did reserve your position on it.

MR. SAINI: My overriding position, however, is the package point. It would be odd indeed if some of these amendments applied or could only sensibly apply on a future looking basis and some of them applied retrospectively. There should be a consistency.

THE CHAIRMAN: In order to help answer that question, one wants to know what it is that the amendment is doing, what is its purpose, and that brings one back to the puzzle as to the apparent limitation on the scope of 190(2A). Nobody has yet been able to suggest sensible reason – well, no, I am sorry, you have made one suggestion – as to why that should be confined to s.185(1) disputes, and should not extend to (1A).

MR. SAINI: Sir, I accept it is not a satisfactory position but that is what Ofcom thinks has happened here, which is that the legislature decided that it did not want to repeat these considerations in a new type dispute, which concerned an SMP condition because those

considerations would have been considered at the time of the SMP condition being set, but I accept it is a puzzle.

THE CHAIRMAN: It is either that or it is a drafting oversight, I cannot think of anything else.

MR. SAINI: I think the overriding point and I am going to come to it in due course, which is that I believe that it is common ground that these particular considerations are, in any event, implicit in the six Community requirements ----

THE CHAIRMAN: That is a relevant point, yes.

MR. SAINI: -- which everyone accepts apply to all kinds of disputes.

MR. ALLAN: I suppose the thing I just struggle with a little bit there, is if your surmise about the reason for the introduction of 190(2A) is right, that it is distinguishing between those cases where an SMP determination is already … and therefore those considerations have been taken into account, and those cases where an SMP determination has not been made, if all of those considerations are built into the s.4 duty anyway, why is there a need to make this distinction? That underlying duty applies in any event to all of the decisions that Ofcom has to make, so why has the legislator singled out those cases where the SMP determination has not yet been made for imposition of additional duties? It seems to suggest doubt on the part of the legislator at least, that s.4 is sufficient in and of itself?

MR. SAINI: Well it is not a satisfactory answer, but Ofcom's position is that there is nothing new added by these additional duties in 190(2A). One sees both comparing the Framework Directive and the Access Directive, they repeat things again and again in separate Directives. Now, what has clearly happened is the draftsman has decided to pick some particular matters that he has found in the Access Directive in Article 5 and include them here, but then puzzlingly has decided they are not going to apply generally. There is certainly nothing in the Access Directive, which is important, which is where these, if they are additional duties, come from, We say that these particular additional duties are to be applied only in particular kinds of disputes. It is a puzzle but the only answer to this is that, as a matter of substance, I do not believe there is any dispute between the parties, that the considerations that are enumerated in 190(2A) are implicit in the six Community requirements in any event.

It is also just worth bearing in mind, although this is a forensic point, and it is a limited point, which is that you will recall that when Telefónica responded to Ofcom's draft determination it did not suggest that these new sections applied at all. It did not say: "Hold on a moment, Ofcom, you have got it wrong. You are applying the historic six Community requirements, there are now these new requirements", so it would be fair to say that neither

Ofcom nor Telefónica nor, indeed, the other telecommunications providers who made submissions to Ofcom, believed that these new duties in 190(2A) were relevant. Now, that is a limited point because obviously Ofcom has to get the law right, but it is not Ofcom out on its own thinking that these particular subsections were not in place specifically.

THE CHAIRMAN: It is all rather unsatisfactory because your argument, and I can see the force of it is that basically the subsection is unnecessary because it is pointless and if it does have any point there is no real convincing explanation of why it is not applied generally.

MR. SAINI: Yes.

THE CHAIRMAN: On any view it is a bit of a non-starter.

MR. SAINI: I also have my third point which, I know, Sir, you do not find attractive, which is if Mr. Richards is right that these amendments all apply to him, then the correct application of those amendments means that he does not get the benefit of 190(2A) because his is a new type dispute, if it made any difference.

THE CHAIRMAN: Well, he wants to get the best of both worlds ----

MR. SAINI: Absolutely.

THE CHAIRMAN: -- he says that it remains an old world dispute, but you have to apply this new world provision to it, and on the face of the provisions for commencement that is the literal result, unless you can build in an implied limitation.

MR. SAINI: With respect, we already know, I would submit, that one has to build an implied limitation on s.186, which is the division of disputes into old and new disputes ----

THE CHAIRMAN: I am inclined to agree with that, but I am still not quite so clear why you have to -----

MR. SAINI: Well it is only a question of consistency.

THE CHAIRMAN: I see.

MR. SAINI: If you are going to give these amendments a notional commencement date, which you have to imply at least one would suggest that there has to be consistency in deciding when they apply, but happily – and we will come to this in due course – in our submission it does not make any difference, to this whole point.

If I can then turn, Sir, to the second main heading, which is the relevant SMP condition, one sees that in bundle B at the back of the mobile call termination statement at tab 21 of core bundle B, p.835.

THE CHAIRMAN: Yes.

MR. SAINI: Perhaps, before I get to the conditions, while we are in this document I could just deal with a particular point, which is at p.622. I cannot recall if Mr. Richards showed you

para.10.27, but it is quite important. There was an explicit policy decision made by Ofcom in this 2007 statement that it would not be appropriate to have just a fairness and reasonableness test for the charges, because of the importance of certainty in this context. At 10.43, p.625 one sees there in the first sentence an endorsement of the ability of MNOs to vary charges subject to compliance. So the idea that there would be variations was positively, I would not say 'condoned' but accepted that it would be possible ----

THE CHAIRMAN: Yes, but there are variations and variations, are there not?

MR. SAINI: Absolutely. If I can then take you to the conditions themselves at p.835, and I show you p.835 just to make good the point in relation to s.185(1A) that the conditions that we are concerned with, were there any dispute, are s.45 conditions, so these are conditions set under s.45 – see the top of p.835.

If I can identify at p.838 the definition of "Third Party", that is plainly a person who is providing a Public Electronic Communication Network. That definition is relevant to conditions MA1 et seq on p.839. So Dominant Providers which include H3G in this context, and Vodafone, have to provide network access. MA3.1 are the terms upon which network access is to be provided.

I show you those points just to make good the earlier submission relates to 185(1A), which is that Telefónica is a person in a class, or to quote that section: "A member of a class identified in a condition imposed under s.45."

So were Ofcom to be dealing with this dispute today rather than at the start of 2011, it would have classified it on the twin track approach as a 185(1A) dispute, which it would have had to have dealt with subject to the very limited get-outs.

Sir, we can put that bundle away, please, and I want to turn to my third main issue.

THE CHAIRMAN: Mr. Saini, we were going to have a short break mid-afternoon, would that be a good moment?

MR. SAINI: Certainly.

THE CHAIRMAN: We will have a five minute break in that case. Thank you very much.

(Short break)

MR. SAINI: Sir, I was going to take you to a document which I do not think you have been taken to yet, which is the actual original dispute that was notified, which is in core bundle A, tab 12. This is the request to resolve the dispute which does not have a date on it, but it is 25th March 2011. After the introduction, it is important to focus on the second page, p.294, and it is absolutely clear between paras.7 and 11 that the complaint is in relation to October 2010, but it is also clear that there is no suggestion by O2 that aside from the complaint

concerning flip-flopping there was in any event a failure to comply with the charge control. I think it is common ground, but I just needed to show you this in case it was not, that at no point did Telefónica (then O2) suggest that there had been a breach of the charge control conditions. That is relevant to Ground 5, which I will address in due course. Were that to be disputed, it is absolutely clear from the body of this document that there was no such complaint raised. Indeed, one sees that the position of Vodafone and H3G, the bottom of p.294, the top of p.295, was that, in fact, the terms of the charge control allowed them to engage in flip-flopping.

This document is also relevant, Sir, for a different issue which goes to the heart of this appeal, which is the scope of the dispute. If one goes a few pages ahead to p.298, para.37, O2 propose that the particular scope be, 37:

> "(i) whether it was fair and reasonable for each of Vodafone and H3G to levy the October 2010 charges for the wholesale voice call termination services; and
> (ii) if not, what charges should Vodafone and H3G have levied for the service in October 2010?"

It is very important to note that the dispute in those terms was not accepted by Ofcom. There was a very important insertion into the terms of the proposed dispute, and one can leave this document now and go to the Determination, because it is set out near the beginning, p.256 (the previous tab, tab 11). If the Tribunal would please look at para.1.4 at p.256, one sees in italics the focus of the dispute, and the Tribunal will immediately note that what Ofcom inserted were the words "*in light of the prevailing regulatory regime*". The Tribunal has not been troubled with the toing and froing. There was quite a lot of toing and froing between Ofcom and Telefónica as to what the precise scope of the dispute was. Ofcom decided that this was going to be the scope of the dispute and Telefónica reluctantly, it seems perhaps, agreed with that. What it did not do, which other communications providers have done in other cases, is appeal against this original decision as to the scope of the dispute. So there are examples where communications providers say, "Actually, that is not my dispute, and you have mischaracterised it".

The decision to open a dispute is an important statutory step and Ofcom is obliged to publish the particular dispute that it has accepted. That is an important part of the background.

So Ofcom was alive from the very outset to the dangers of entertaining a dispute where fairness and reasonableness at large were to be considered, and therefore inserted the wording "*in light of the prevailing regulatory regime*". Mr. Richards can, of course, argue

all of his points and say that they are all points that are part of the prevailing regulatory regime, but I just wanted the Tribunal to know that the dispute in the terms which Telefónica wanted Ofcom to proceed was not accepted by Ofcom.

That, having been said, I turn to my fourth main issue, which is the relevance of the TRD case, which is the centre point of Mr. Richards' submissions, and I hope I do not do him a disservice by saying that his position is that particular paragraphs of TRD set a firm legal test which is to be applied in all dispute resolution cases. Our simple answer to that is that the tests that the Tribunal set out in the TRD case and the 08 numbers case were tests that the Tribunal decided were appropriate for the type of disputes that they were dealing with. For want of a better phrase I call those disputes "clean page disputes". By that I mean disputes where there is not a specific regulatory obligation that has been imposed by Ofcom concerning charges. In that type of case I accept that one starts with a clean page and in accordance with the TRD judgment one has to apply the general fairness and reasonableness factors. However, and I will come to show you the particular paragraphs of TRD in a moment, there is something fundamentally legally wrong with applying that test in an unvarnished fashion when Ofcom does not begin with a clean page. There must be some different test applying in cases where there has been specific regulation of the charges which are the subject of complaint, otherwise one is left with a position where the charge control loses its relevance, and parties face the risk of having a retrospective amendment of the SMP condition imposed upon them. Now you will recall, Sir, that in the *Vodafone* case which the Tribunal may be familiar with, the *Vodafone* case in the Court of Appeal, Richards LJ when examining the relevant legislation made it clear that there were important reasons as a matter of policy why the legislature had decided that SMP conditions could not be altered or modified with retrospective effect, and it was basically the principle of legal certainty. That principle of legal certainty does not lose its relevance when one enters the domain of dispute resolution. Now, what I want to do is go straight to the central paragraph of the *TRD* case and explain why it cannot possibly apply in this case. And if one did try and apply it, one would end up in a mess. And if I could ask the Tribunal to put away bundle A (core bundle) for the moment, and take up the *TRD* case which I think is in authorities bundle B —

THE CHAIRMAN: Will you be coming back to *Vodafone* at some point?

MR. SAINI: I will, I think —

THE CHAIRMAN: Because —

MR. SAINI: — draw your attention to those paragraphs in *Vodafone*.

THE CHAIRMAN: It is partly also that issue that we raised this morning as to the, what appears at least on one reading to be the attitude adopted on Ofcom's behalf in para.28.

MR. SAINI: Absolutely.

THE CHAIRMAN: Which is rather at odds with what you are now saying, or at least —

MR. SAINI: Yes, well, I will try to explain why it is perhaps not at odds. I have the escape route which is Lord Justice Richards did not decide anything based on submissions.

THE CHAIRMAN: Absolutely, it is not a finding, but even so it is — Yes, sorry, where are we going now?

MR. SAINI: It is tab.25 of authorities bundle B. I ask you, please, to go to p.883 and I will not take you to the earlier paragraphs because Mr. Richards has been through them very thoroughly, but I think he lands upon paragraph 101 as the test. If the Tribunal could perhaps read that to themselves before I make any submissions on it. It is paragraph 101 at p.883.

THE CHAIRMAN: Yes.

MR. SAINI: Now, the first point to make, Sir, arises from the very first sentence of 101, which is the words "In these disputes". So, the Tribunal was clearly there conscious that it was dealing with a particular type of dispute, which I call "the clean page dispute", and in a clean page dispute in the absence of any guidance or explicit guidance in the legislation either at EU or at domestic level, it decided that you simply had to apply a test of what was reasonable bearing in mind reasonable between the parties, and reasonable from a regulatory perspective. Now, there is a very simple reason why this test falls apart if one tries to apply it on the facts of the present case where one has an SMP condition, because the first question that the Tribunal there poses is Ofcom must determine "what are reasonable terms and conditions as between the parties", but Ofcom has already decided that. Ofcom already decided what the reasonable terms and conditions were in the SMP condition imposed in 2007.

THE CHAIRMAN: But, can it be said to have decided in any meaningful sense that a wholly unforeseen loophole which was being exploited subsequently was part of the regime which it deliberately chose to introduce?

MR. SAINI: Well, it certainly decided that it was not going to impose a price cap. It wanted to allow flexibility.

THE CHAIRMAN: Absolutely.

MR. SAINI: But it had not foreseen, I accept, it had not foreseen that that flexibility might be used in an unattractive way. There is no doubt about that.

THE CHAIRMAN: So, it is an unforeseen abuse of the system which was introduced. So, how far does it really get you to say that careful consideration was given to introducing this regime when it has been exploited in the manner which you think you would want to stamp on as hard as you can?

MR. SAINI: I am going to come back to that point.

THE CHAIRMAN: Yes.

MR. SAINI: Because that really concerns the question of what is the appropriate regulatory response once an abuse has been found.

THE CHAIRMAN: Yes.

MR. SAINI: My simple point at this stage, Sir, is that there are great difficulties in applying paragraph 101 in this type of case.

THE CHAIRMAN: Yes. I see.

MR. SAINI: Instead, Sir, what we say should happen in a case which is a non-clean page case is a two-stage process.

Stage one should be for the Regulator to identify which specific regulation applies to the charges in respect of which complaint is made; and we say that was relatively easily answered in this case because it was the charge control. But, that is not an end of the matter.

Stage two, then, for the Regulator is to say, "Well, these charges appear to be in accordance with the charge control, but if the result of that is something which the Regulator finds unattractive, do Ofcom's other objectives, and in particular Community law requirements, dictate a different result. In other words, rather than just saying to the complainant, "Well, these charges are in accordance with the charge control", so, two stages:

First stage — what is the regulation:

Stage two, once one has done that, how does applying that regulation deal with the Community law objectives?

Now that, oddly enough, was a process which the Tribunal in this same judgment in the *TRD* case did endorse. And I need to show you a passage which I do not think you have seen yet. And if one goes to p.912, para.177 in this same judgment, and one sees here the Tribunal giving general guidance, and under the sub-headings one sees, the first sub-heading, "*Consideration of why the dispute has arisen*", if one goes over the page one sees another sub-heading, *(b) Information about costs*, *(c) Benchmarking*.

But the central part I want to show the Tribunal appears at p.916, para.187, and there the Tribunal set out a process which is exactly the process that Ofcom followed in this case.

And I emphasise at 187 that the Tribunal was there saying that once Ofcom has decided a proposed resolution of the dispute, in other words a provisional decision, then it should go on and see how it accords with the Community law requirements. And it is notable at para.188 it says the way to do that as Ofcom conducted itself in the present case is to send a draft determination to the parties (see para.188) and see what the parties consider are the relevant points in relation to Community law requirements.

MR. ALLAN: Mr. Saini, can you just comment on what significance you attach to para.189, where the Tribunal says that consistency is important? Two aspects:

> "First, Ofcom needs to consider whether there are relevant *ex ante* obligations in place".
>
> "Thus, the end-to-end connectivity obligation … may well be a relevant factor to bear in mind, though it should not be treated as an overriding factor".

And I guess I am thinking about your reference in your skeleton to the notion of compelling reasons to set aside legal certainty when "compelling" and "overriding" seem to be somewhat analogous thoughts, and the Tribunal here is saying that the *ex ante* obligations should not be treated as an overriding factor, and how that fits with your suggested scheme.

MR. SAINI: Well, Sir, I suppose it is a question of language. In our submission, the existence of a price control is a very very powerful factor, and one would need some compelling reasons drawn from the six Community law objectives to displace that. We stand by the submission, and this was not an issue in this particular case. There was no, I think that the comments here are quite difficult to translate to a specific price control. So, the Tribunal was not considering the importance of a price control.

It is also important to bear in mind, Sir, that— and I think this is common ground —a lot has been said about the Community law requirements concerning efficiency, promotion of competition, interests of consumers. But it is accepted that legal certainty is a very very important Community law requirement as well. So, what one gets to, Sir, is if one adopts the two-stage approach, as I have suggested, at the second stage it is a question of an assessment by Ofcom of how much weight it is going to give to the existing scheme of regulation as against the other Community law requirements. And Mr. Richards accepts that is not a matter with which this Tribunal can interfere; it is a matter for Ofcom. But what I submit, Sir, is that it is very dangerous to try and take from *TRD*, which is a very different case on the facts, some general test applying.

What one can take from *TRD* is the point that follows from para.187 and following, which is the six Community law requirements are matters by way of a cross-check in a way. I am

not trying to limit their importance, but the Tribunal endorsed the approach that, once you come to an interim decision, then you cross-check. And Mr. Richards made much of the fact that the Community law requirements are considered towards the end of the draft determination. But that is in a sense what the Tribunal were suggesting here.

I should deal with a particular point here, which relates to a potential argument that may have been available to Ofcom. It could be said that there are not two stages in a non-clean page case, in other words a case where there is a price control. It could be said with some force that there is only one stage, which is you identify the specific regulation that applies, and if the regulation has been complied with that is an end of the case. And the reason that that can be said with some force is that if something else is possible, in other words, despite compliance with a charge control there can be a requirement for repayment, it could be said that that is a back-door way of amending an SMP condition with retrospective effect.

Now, we know from the *Vodafone* case in the Court of Appeal, which we will come to, that Ofcom does not have the power to amend an SMP condition with retrospective effect with the consequence that people have got to repay money. It is only forward-looking. It might be said that it is a strange proposition that in the exercise of dispute resolution powers you could achieve the same result, because H3G and Vodafone may say that, "Well, if Ofcom had decided this dispute in Telefónica's favour, although we have complied with the charge control, the net effect of requiring repayment would have been to rewrite that charge control, in other words to say that flip-flopping, which on its face was permissible under the old charge control, was no longer permissible. But Ofcom does not go that far. Ofcom says that there are two stages. Stage one is identifying the relevant regulation; but at stage two there may be some case which one cannot predict where the behaviour or conduct is so egregious that considerations of legal certainty have to take a back seat.

Now, we say that is not this case. But there may be such a case where, for example, some seriously anti-competitive behaviour has been undertaken, and one could think of an example. Well, let us say that flip-flopping applied, but it is not applied across the board to other communication providers, a communication provider decides that only one particular communication provider that is going to terminate calls on its network will be subject to certain prices.

There are a whole range of other regulatory methods for dealing with that type of situation, but my simple point is that Ofcom does not go as far as to say that stage two does not arise. It may arise in some case. But in this particular case, we say, when Ofcom did the balance in stage two, in other words the cross-check as against Community law requirements, this

was a case where overwhelmingly the interest of legal certainty required it not to interfere in particular because Ofcom had already carefully considered how it was going to deal with this problem and had decided, without complaint from anyone in the industry, that the way to deal with this problem was on a future-looking basis from March 2011 and following. And it is very difficult for this Tribunal when one comes to the second stage of the analysis to try and put itself in Ofcom's shoes and second guess Ofcom as to the balance, for example, between legal certainty, the apparent harm that Telefónica says it is claiming, and how does it give weight in the balance to its policy decision in relation to April 2010. If I am wrong in relation to the question of these two stages and the Tribunal says, in fact, there are not two stages, there is basically one stage, fairness and reasonableness at large in the sense used in the TRD case, but that is not the approach we adopted. We did not consider fairness and reasonableness at large, because that approach would give no weight, or no substantial weight to the existence of the charge control.

THE CHAIRMAN: It is quite hard to define, I think, exactly where the division lies between what you are arguing for and what Mr. Richards is arguing for.

MR. SAINI: I think there is a softening and I think both sides may have softened their position in their skeletons.

THE CHAIRMAN: Well I think that is what I had ----

MR. SAINI: But I think that what has happened is that as we read the grounds of appeal it was suggested that the issue for Ofcom was fairness and reasonableness generally, bearing in mind the statutory objectives.

THE CHAIRMAN: Yes.

MR. SAINI: There is a softening of that in the way that Mr. Richards has put his oral submissions and also his written submissions which is that now they say that all the factors to be considered in the fairness and reasonableness analysis, the existence of the charge control was obviously a factor and I think one of his grounds of appeal is that we gave it too much importance, or overwhelming importance.

THE CHAIRMAN: But that is a matter of weight which is not a question of law which necessarily rules out ----

MR. SAINI: Absolutely. I suppose it is always better to see these things from the view of an outside observer. Mr. Ward in his skeleton argument, having seen the skeletons of both sides fairly said that there does not seem to be a huge difference between the parties. In my submission there is still one very, very crucial difference which is that ----

THE CHAIRMAN: Could you pinpoint that for us?

MR. SAINI: We say that stage 1 is the important stage in terms of identifying the relevant regulation that applies, and stage 2 is the stage at which the extra factors come into play. Mr. Richards does not accept there are two stages, he says it is all one general mix, so you throw into the mix the charge control, the six Community law factors and out pops something which will bear fairness and reasonableness on its head. We say that is not a helpful approach because it does not give sufficient weight to the explicit system of regulation, the charge control that has been imposed. It may be that it is a semantic difference ----

THE CHAIRMAN: I was going to say maybe here one is getting into a form and substance, rather sterile debate.

MR. SAINI: Absolutely.

THE CHAIRMAN: Because what really matters is the substance rather than the procedure by which you address that – whether it is by adopting a prima facie but rebuttable position, or whether it is by looking at everything in the mix from the beginning surely cannot matter as long as you give due consideration to each relevant consideration before you finally sign off on your determination.

MR. SAINI: Absolutely, Sir. But we do not drop the point which is that the existence of the charge control is a very powerful factor. Whether or not one needs compelling contrary factors to knock that out is a matter of language, but it is a very, very powerful factor to bear in mind and that factor was absent from the TRD case and the 08 numbers case.

MR. ALLAN: Mr. Saini, just before you move on, can we just briefly consider the extent to which thought was given by Ofcom to the scope for a forward looking modification to the charge control in the 2007-11 period in order to address flip-flopping so that the legal certainty could have been respected in the sense that existing transactions and future transactions within the foreseeable time frame proceeded on a basis that was established, but that for the future beyond that time frame the evil of flip-flopping which Ofcom acknowledged was cured. The reason I ask that is that the way the documents appear to have been written almost elevates the preservation of the charge control as a fixed point to a point of principle, and there does not seem to be any thought given to the ability to use the power to modify, to address problems that arise. Is that something that is relevant?

MR. SAINI: It is relevant. I need to show you the April 2010 document – perhaps I will go to that now and I will summarise the position that had been reached.

Ofcom itself had identified, following complaints from many parties, prior to April 2010, that flip-flopping was a problem, and in a note that we are going to hand up – although it is

not formally in evidence but I would be surprised if it is in dispute – we set out the dates upon which Ofcom believes various communications providers started engaging in flip-flopping.

In April 2010 Ofcom did expressly consider this issue in the paper, and if I can ask the Tribunal to turn that up. It is back in core bundle B. There are two parts to this, the relevant part is at tab 25, which is the Market Review, the main consultation. If I can please pick it up at 972, at para. 4.15.

What had happened is that in May 2009 – one sees from the heading – there had been a consultation by Ofcom and there were responses to that. This concerned market power assessment, and also possibly conduct of those with SMP. The important paragraph is over the page at 973, at 4.22, which I think Mr. Richards showed you.

THE CHAIRMAN: Yes.

MR. SAINI: Telefónica itself had not complained about that, but there is then a detailed discussion in the body of this document which begins at p.1062 under Part 3, under the whole issue of flexibility.

Ofcom had various options as to how to deal with the loophole as it described it, flip-flopping (9.111), but it concluded at 9.126, and this is an important paragraph, p.1066:

> "We have not revised the current charge control condition, considering that any risks of harm need to be considered alongside the need to preserve regulatory certainty once a control is set. In setting a new charge control, however, we want to ensure a glide-path approach where by pence per minute charges match forecast costs plus a reasonable rate of return."

What they decided to do then, given that the charge control – this is now April 2010 – there is going to be a new charge control in less than a year, they made a policy decision which is: "We are aware of the harm, we agree that it is unattractive but give that we are going to have a charge control in March, we believe that the balance favours removing this for the future."

What is important, Sir, and this may go to one of your questions from this morning, and we deal with this in our note, there was a decision there. There was a decision not to alter the current charge control; it would have been perfectly possible for Telefónica to appeal that there and then. So there was an unappealed policy decision and, not only was it unappealed, you will see that there is a further consultation invited, further responses invited here. Telefónica not only did not appeal this but in their consultation response – it is a very long document so I have not troubled the Tribunal with it – there was no mention of

this issue. So they were perfectly content to spend many pages talking about the future, about the future design of the charge control, but not a word about the fact that Ofcom, as a matter of policy, had decided to deal with this unattractive position, flip-flopping, with future effect. That is why it is surprising that a year later one sees a complaint about this. So what one has effectively is a collateral attack upon a decision that was made in this April decision, a decision to deal with the problem with future effect. What is effectively being done through the dispute resolution process is, by a side wind, is that Telefónica are trying to attack that decision, having not complained about it at the time in any way.

It could well have been the case, Sir, going back to your earlier point, that Ofcom, having been alerted to the problem and Ofcom, itself, of its own motion, having concluded that this is unattractive, could have made a different decision. It could have decided, and there is a statutory process to do this, that although there is only one year left of the charge control, less than a year, "we can actually amend this condition because this is so terrible that we need to act now". There is a statutory route to do that, but it decided not to do that.

MR. ALLAN: But that does not follow from some almost theological belief in the need to maintain regulatory certainty for the duration of charge control. It was a specific consideration of the practicalities of making that modification within the last year of the charge control.

MR. SAINI: Yes, absolutely. Just while I am on these particular pages so that I do not have to come back to this again, I would ask the Tribunal to bear in mind paras.9.120 to 9.126 because Ofcom there, in its own language, articulated why flip-flopping was a problem, and articulated the likely long-run harm it would cause. Therefore, one needs to bear in mind when one comes back to the Determination and Ofcom referring back to the 2010 Paper, that Ofcom was very well aware of why flip-flopping was attractive, it was very well aware of its potential anti-competitive behaviour. It was very well aware of its potential harm. One cannot assume that it has forgotten all of those factors when it decides how to resolve the dispute.

The reasoning at the end of the determination in relation to the Community law practice is brief, but that is because the issue had been considered in some detail previously, and a particular policy approach had been decided upon as the answer to the problem.

Sir, I was going to turn now to the Determination itself, which is in core bundle A.

Mr. Richards's first point is in relation to the point at footnote at p.258, which he says leads into the error law, the error being the failure to apply s.190(2A). I will come back to that when I deal with the specific grounds of appeal. I just want to identify the structure of this

Determination and to explain why we say in terms of the way it approached the legal issues which arose, there is no error here. First of all, Sir, could I ask you to turn to p.259, para.2.6. There is a clear correct direction of law right at the beginning of the determination where Ofcom refers to the six Community requirements.

Then, after a description of flip-flopping over some paragraphs, if one goes to p.261, one sees at 2.14 the legal direction which Ofcom gave itself, which is that it must consider the dispute in the light of the prevailing regulatory regime. That is what I call stage one. So what is the prevailing regulatory regime? Then it goes on to identify that. No complaint is made about this particular aspect. However, it is important to note at 2.31 that Ofcom returns to the question of the scope of the dispute which I mentioned earlier this afternoon. It is said at 2.32:

> "Our analysis and conclusions are based on the regulatory regime prevailing in October 2010, and in particular SMP Conditions MA1 and MA4."

At 3.18 at p.267, essentially for the reasons that I have sought to give this afternoon, Ofcom rejects – in our submission, rightly – the relevance of the TRD case. Then it gives preliminary views in relation to the TRD case at 3.22, and preliminary views at 3.30 as to what it thinks the answer should be. In particular it notes at 3.34 that it has decided not to amend the charge control – that document that I have shown you. So it has come to an interim decision, which is applying stage one, but there has been compliance with MA1 and MA4, no allegation to the contrary. It is minded to decide the dispute effectively against Telefónica.

Then at 3.37 it does exactly what the Tribunal in the TRD case suggested was appropriate, which is it does a cross-check.

Mr. Richards sought to criticise Ofcom in respect of the heading "Assessment of our Draft Determination against Ofcom's statutory duties and Community requirements". With respect, that is not a fair criticism, because it is doing what the Tribunal in TRD suggested once a draft decision had been made. Further, it is doing this because it is effectively going to invite the parties to say, "This is what we think the result is of applying the Community law requirements, these are the relevant factors". It says at 3.38 that these are some factors that it highlights in particular.

It is important to note, Sir, and this is a point made by Mr. Ward in his skeleton argument, that Mr. Richards does not attack any of the factual conclusions in 3.38.1. He is not suggesting, and has put no evidence before this Tribunal to suggest, that when Ofcom concluded that the material impacts on consumers will be slight, and the effect on

competition would be negligible, those are errors of fact, because in fact Ofcom had before it evidence suggesting that the effect on consumers was going to be substantial.

I emphasise again that one has to read into 3.38.1, when Ofcom refers to the April 2010 consultation, all of those factors Ofcom was aware of, because it, itself, had identified those factors in April 2010. In so far as Ofcom referred to factors such as efficiency, effect on competition over the long run in April 2010, one cannot assume that it has forgotten those factors when it came do the cross-check in 3.38.

At 3.38.2 it refers to principles of legal certainty and consistency as a factor.

It is important, Sir, to recall the stage we are at here. This is the Draft Determination. What then happens, and Mr. Richards showed you this briefly but we need to look at it in more detail, is that this all goes to the parties, and the parties have the opportunity in accordance with the process and the TRD case to tell Ofcom how they have got it wrong, or what further factual matters Ofcom should take into account. One sees that there are detailed representations made (following on at p.272 at section 4) by O2, Cable & Wireless and others. In particular, Sir, putting aside the legal matters, if you would go to p.276, O2 sets out what the various Community law requirements are, etc, but if you look, please, at para.4.41, there is no dispute, Ofcom accept that those Community law requirements that are identified by O2 and Cable & Wireless are relevant there. Crucially, Sir, and this goes back to a point on which I think Mr. Richards was questioned, O2 had the ability to say to Ofcom, "There are these 15 points you have missed in terms of harm to consumers that will arise if you do not order repayment of the October 2010 charges, there are these impacts in relation to our competition with competitors". It had every chance to do that, but it does not do that.

I think Mr. Richards' submission came to this effectively: that Ofcom's role if it was going to faithfully fulfil the Community law requirements was to become a roving investigator. It should have gone off and started investigating not only whether the charge control had been complied with, which was not even a matter that Telefónica were complaining about, but it should have started a very substantial investigation into the effect of the October 2010 charges, bearing in mind that it is just those charges, the October 2010 charges, on competition generally, on efficiency, on harm to consumers. With respect, it cannot be appropriate for a regulator to do that when it is trying to resolve a dispute within four months, as the Tribunal will recall from this statutory process.

THE CHAIRMAN: I can see the force in the argument, it would really make life impossible, if every time any complaint was raised it effectively had to give rise to, as you say, a roving

investigation into all potentially relevant aspects of it, whether raised in the complaint or not.

MR. SAINI: Yes, absolutely, and if Telefónica had some compelling point on the facts in terms of the very serious economic impact that the October 2010 charges had on its business, such as, for example, "We were charged to this extent, and therefore, although we could not directly raise the prices for customers in that month, we upped the prices in the next month", something like that, no doubt they would have put it before Ofcom. Instead, Ofcom is faced with a position where, if one does a balancing exercise, we have the charge control, which has substantial weight, the charge control that has been complied with, we have the interests of regulatory certainty, we have Ofcom's policy decision to recognise the problem and to deal with it on a future looking basis in a way which has appealed, in particular not Telefónica; and as against that we have a rather vague and unspecified and unspecific set of complaints from Telefónica about these particular charges. If there were any balancing exercise to be done it is, with respect, obvious where the balance would come down in this case. Therefore, even if this Tribunal – I know Mr. Richards does not suggest it – even if this Tribunal were to say, "Well, actually we think a different approach should have been followed", we say this is a one right answer case. It is hard to see how, on the basis of the factors which Telefónica had put forward, there could have been any other result. It would have been a *volte face* as far as Ofcom is concerned, Ofcom having decided in April 2010 that the way to deal with this, bearing in mind what it knew about the harm that this problem caused, was to deal with it on a future basis. It was actually going to reverse that policy decision in the context of a dispute resolution consideration.

That is why we say, Sir, that it is hard to see how any different result could be achieved. What would be the point of remitting this matter? Let us take the example of efficiency. Mr. Richards says, "Well, where is efficiency in here?" and the Tribunal asked, "Where did you raise efficiency?" and he says, "No, we did not raise efficiency, but Ofcom were well aware of efficiency because they, themselves, mentioned that as a matter in April 2010". The answer is that we are aware of efficiency as a consideration because we refer to the factors in the April 2010 consultation.

What he must do before this Tribunal is identify some fact, some economic fact relating to Telefónica's business or the industry generally which convinces this Tribunal that there would be any purpose in remitting this matter if you thought there was otherwise an error of law. There is not any purpose because there would be no different result in this case.

Crucially, and I underline the fact, when Ofcom did consider factors such as effect on competition and consumer harm and came to some factual conclusions there, Mr. Richards has not made any complaint that those factual conclusions were wrong. I think his submission comes to this: he cannot say they are wrong, but as part of his roving investigation submission they should have actually done a bit more, they should have gone off and started a competition investigation or something like that. I do not think he can say that they came to any errors in terms of the assessment of the evidence they had before them.

THE CHAIRMAN: Was any evidence placed by Telefónica before Ofcom about the particular financial prejudice ----

MR. SAINI: There was very limited evidence, and one sees in the Determination. One point that they did try and argue, and one can pick this up, Sir, in the Determination at p.270, para.3.36 – they had one particular complaint that an undesirable aspect flip-flopping was what they called "Arbitrage", and Ofcom said, "You have not actually provided any evidence comparing these particular rates to retails tariffs nor provided any evidence that arbitrage arose or how this would cause harm to competition and ultimately consumers". All that they said, and one sees this from this actual dispute reference which I showed you earlier this afternoon, "We have been charged too much". The Tribunal can go back and look at the factual case that was put by Telefónica. They do not say very much other than, "We have been charged too much and we do not like this". Had they gone the extra mile and said, "And the result of this, bearing in mind this is only October 2010, was that we suffered in our business in particular ways", one can understand there may have been something of a case in relation to these other Community law requirements, but they did not do that.

THE CHAIRMAN: That is what was occurring to me. I can see perhaps force in an argument that even though Ofcom has decided for the future to regulate the position generally with effect from the new regime coming into force in 2011, if nevertheless a particular operator can show it, itself, has been caused financial prejudice by an application of an admittedly abusive process, in crude terms why should it not be able to get recompense via the dispute?

MR. SAINI: It would be a very powerful factor to put in the mix. It may be, as was said earlier, a factor if the case is so terrible, if the particular facts are so terrible, where Ofcom says, "We are obviously aware of the importance of legal certainty, and we are very aware of the fact that this is a charge control which, on its face, you have complied with, but we will not condone this behaviour". That is not this case. Ultimately, where one gets to is we have a

range of factors considered, Ofcom makes a decision weighing the factors, it being accepted by Mr. Richards that weight is a matter for Ofcom, and we have a conclusion that in this particular case we are not going to make any award in relation to this dispute.

THE CHAIRMAN: I thought at one stage it might almost be self-evident that if you are on the wrong side on the flip-flopping and you do not do it yourself it is going to cause you prejudice. It appeared from an answer to a question this morning that that is not necessarily the case. In fact, there may be a situation where flip-flopping turns out to work to the advantage of a so to speak injured innocent who does not do itself.

MR. SAINI: It may do, but what is difficult, Sir, is in the absence of any attack on the factual findings which Ofcom made because it had limited material, it is very hard for this Tribunal then, if Mr. Richards wants to make a case – although it is too late now – that there were some errors of fact, this would have been a very different appeal.

THE CHAIRMAN: And it is not for us to enter into that kind of investigation in a case which is broadly confined to issues of law.

MR. SAINI: Sir, what one gets to then is that whatever the answer is in relation to, do the Community law requirements and general considerations of reasonableness come in at stage one or stage two, there is no doubt on a fair reading of this Determination that Ofcom did not just ask one thing, which is: has the charge control been complied with, full stop; it went on to consider further factors and indeed invited the parties to make representations as to the further factors which relate to the Community law requirements.

THE CHAIRMAN: And for what it is worth, in doing that, it was following guidance given in TRD?

MR. SAINI: Absolutely, Sir.

Sir, I am going to then try and trot through the five grounds of appeal.

MR. WILKS: Can I just before you do that, Mr. Saini, just pursue one particular aspect that is interesting. This whole idea of compelling reasons, you do concede in the Determination in 4.27 and 4.30 that there may be compelling reasons for exercising dispute resolution that conflicts with legal certainty. You have explained that flip-flopping is not a compelling reason. On the basis really of an Ofcom policy decision, in a sense it is licensed abuse, if you want to put it pejoratively. What would be a compelling reason?

MR. SAINI: A compelling reason could be an example of, and I have tried to give an example of this earlier, where flip-flopping is adopted but it is targeted at one particular competitive operator. Therefore, it is not a policy applied across the board, but a particular competitor is targeted in order to drive them out of business – that type of example.

What I am saying is that Ofcom did not close off the possibility that there may be some circumstance in which, although someone has complied with a charge control, the results of their conduct are so unacceptable that Ofcom needs to act. So it could happen in another case.

I have also remembered now actually, I had forgotten that I was going to go back, which I may need to do tomorrow morning, to the *Vodafone* Court of Appeal case, because it is quite important that when one looks at the statutory scheme, particularly the statutory scheme concerning dispute resolution, one must not forget that the idea of retrospective amendment of SMP conditions cannot be achieved through the front door because the statute does not allow it. If the result of a dispute resolution exercise or powers is effectively in substance if not in form to rewrite an SMP condition, although I accept that is a step which Ofcom can take in substance, it is something which should only really happen in very rare circumstances.

THE CHAIRMAN: One needs to be careful there because the fact that it can happens means that one must not rule out of the possibility of, so to speak, permitting it to happen in an appropriate case.

MR. SAINI: Absolutely.

THE CHAIRMAN: Otherwise one is at risk of turning the third limb of regulation into just a mere shadow or having no real difference from the other limbs.

MR. SAINI: Absolutely.

THE CHAIRMAN: So I think it is important not to let that point assume too much significance.

MR. SAINI: Indeed.

MR. ALLAN: It is also important, and maybe you will talk about this tomorrow morning, to have a clear understanding of the consistency of what you are saying now with Mr. de la Mare said in the *Vodafone* case.

MR. SAINI: I hoped you were not going to ask me that!

MR. ALLAN: I was holding myself back! His submission in that case seemed to be that dispute resolution was a general cure-all for the gap left by limited modification powers to the SMP regulation. My particular concern was that if we bring that possibility within the framework of the submissions you are now making, the need to address the consequences of the annulled charge control would have to be classified as a compelling circumstance justifying an invasion or restriction of legal and regulatory certainty, and my question I suppose was: how does a rather broad qualification of that principle in the context of an annulled charge control sit with a rather narrow approach to that self-same possibility in the context of

dispute resolution? In a pure dispute resolution case the two things do not seem to be that different to me.

MR. SAINI: Although there is a difference between an annulled charge control and one which has not been annulled.

MR. ALLAN: Because considerations of legal and regulatory certainty seem to be rather the same.

MR. SAINI: Absolutely.

MR. ALLAN: Are you going to address that now?

MR. SAINI: I am certainly going to come back to the *Vodafone* case.

THE CHAIRMAN: It is very nearly 4.30 so we will do it tomorrow. You know it is a point that we would like to hear your views on, and we will be very interested to hear what you have to say.

You said you were going to hand a note in, so perhaps we can read it over the adjournment. Is that a convenient moment to break off?

MR. SAINI: Yes, Sir.

THE CHAIRMAN: How long do you think you are likely to be tomorrow?

MR. SAINI: I think about 15 minutes or so.

THE CHAIRMAN: In that case we should be well on course to finish, if not by lunchtime, certainly in the course of the afternoon.

Thank you all very much. We will continue at 10.30 tomorrow.

(Adjourned until 10.30 am on Thursday, 26th April 2012)