Neutral Citation Number: [2012] EWCA Civ 1002

Case Nos: C3/2011/3121, 3124, 3315, 3316 and 2012/0692

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MARCUS SMITH Q.C., PETER CLAYTON, PROFESSOR PAUL STONEMAN
[2011] CAT 24 AND 26

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 July 2012

Before:

LORD JUSTICE LLOYD
LORD JUSTICE ETHERTON
and
LORD JUSTICE ELIAS

- -

Between:

(1) TELEFÓNICA O2 UK LTD **(2) EVERYTHING EVERYWHERE LTD** **(3) VODAFONE LTD** **(4) HUTCHISON 3G UK LTD**	**Appellants**
- and -	
BRITISH TELECOMMUNICATIONS PLC	**Respondent**
OFFICE OF COMMUNICATIONS	**Interested Party**

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- -

Jonathan Crow Q.C. and Robert O'Donoghue (instructed by **S J Berwin LLP**)
for the **Appellant Telefónica O2 UK Ltd**
Jon Turner Q.C. and Philip Woolfe for the **Appellants Everything Everywhere Ltd (**instructed by **Everything Everywhere Ltd), Vodafone Ltd** (instructed by **Herbert Smith LLP**) and **Hutchison 3G UK Ltd (**instructed by **Baker & Mackenzie LLP)**
Graham Read Q.C., Sarah Lee and Richard Eschwege instructed by **BT Legal**
for **British Telecommunications plc**
Javan Herberg Q.C. and Mark Vinall instructed by **Ofcom**
for the **Office of Communications**

Hearing dates: 1-3 May 2012

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Approved Judgment

Lord Justice Lloyd:

Introduction

1. This judgment is given on several appeals from a decision of the Competition Appeal Tribunal (the Tribunal), itself on an appeal from determinations by the Respondent the Office of Communications (Ofcom) by way of the resolution of disputes under the Communications Act 2003 between, on the one hand, British Telecommunications plc (BT) and, on the other, a number of mobile telephone network operators.

2. If a person in the United Kingdom makes a phone call on his mobile telephone, the call is likely to be passed by the operator of the mobile phone network to which he subscribes to another operator in order to be connected to the person to whom the call is made. The chances are that BT will be involved in that process in one way or another. The general principle is that the caller pays for the call, and what he pays will depend on his contract with his network operator. However, when the call is passed from one operator to another a payment will fall to be made as between those two organisations. Because calls involving mobile phones are so very numerous, even small differences in the rate payable as between two operators may amount to large sums of money when applied to all relevant calls. The sector is regulated by Ofcom, largely under a system of regulation laid down by the European Union and known as the Common Regulatory Framework (CRF). A great deal of effort has been devoted to that regulatory process, in respect of the rates payable in these circumstances, and the parties involved have engaged large amounts of time and money on those processes, and in litigation arising from it, by way of appeals to the Tribunal and further appeals to the Court of Appeal.

3. The issue which led to these proceedings concerns the rates payable as between BT and four mobile network operators (the MNOs) in respect of calls to numbers beginning with 080, 0845 and 0871. Ofcom determined disputes between BT and the MNOs in two successive determinations, dated 5 February 2010 (for 080 numbers) and 10 August 2010 (for 0845 and 0871 numbers), deciding against BT in each case. BT appealed against those determinations. The Tribunal allowed those appeals in its judgment given on 1 August 2011, and gave a further judgment on consequential matters on 12 August 2011, disposing of the appeals by an order on that date. The Tribunal gave permission to appeal to the MNOs on a limited ground. More extensive permission to appeal was given to the appellants by the Court of Appeal (myself and Etherton LJ) on 15 February 2012: [2012] EWCA Civ 300. BT served a Respondent's Notice and applied for permission to cross-appeal on a particular point. I granted that permission in relation to the appellant Telefónica O2 but refused it in relation to the other MNOs, on 4 April 2012.

4. Thus we have before us four appeals, one by each of the MNOs, and a cross-appeal by BT against Telefónica O2 only. Telefónica O2 was represented before us by Mr Jonathan Crow Q.C., leading Mr Robert O'Donoghue. The other three MNOs, Everything Everywhere, Hutchinson 3G and Vodafone, made common cause and were represented by Mr Jon Turner Q.C., leading Mr Philip Woolfe. Mr Crow and Mr Turner diverged to some extent in their submissions, but were able to avoid unnecessary repetition. BT was represented by Mr Graham Read Q.C., leading Ms Sarah Lee and Mr Richard Eschwege. Ofcom, as an interested party, was represented

by Mr Javan Herberg Q.C. and Mr Mark Vinall. I am grateful to all Counsel for their able and clear submissions.

5. Telephone numbers which begin with 08 may be on lines provided by BT or on lines provided by one of a number of other fixed network operators (including Cable & Wireless). They are different from numbers which begin with 01 or 02, and they are known as Non-Geographic Numbers. The distinction is drawn pursuant to a plan published by Ofcom called the National Telephone Numbering Plan ("the Plan"). Publication of the Plan is required of Ofcom by section 56 of the Communications Act 2003 ("the Act" or "the 2003 Act"). The Plan specifies 080 as the prefix for Special Services numbers, on which there is to be no charge to the customer, except where charges are notified to the customer at the start of the call. Numbers beginning 0845 are specified as Special Services basic rate, to be charged at BT's standard local call rate for BT customers (prices charged by other networks may vary), and 0870 calls in turn are to be charged, in effect, at the relevant network's normal national call rates except where different call charges have been published. I will have to say more about the sums payable in respect of calls to these three kinds of numbers. When a caller rings a non-geographic number the call is translated by the network to a geographic number to deliver the call to its destination. For this reason non-geographic numbers are sometimes called number translation services, or NTS, numbers.

6. The idea behind these NTS numbers, as appears from the Plan, was that the call should either be free to a caller on a BT line, or that the rate payable by the caller should be related to geographic call charges. For an 0845 number the organisation to which the call is made may be located far away from the caller, outside the scope of a local call, but the caller should expect to pay only the local rate. The difference is to be made up to the operator by the recipient of the call. Equally, for an 080 number, the recipient, offering a service to those interested in contacting it which is or may be free to the caller, can be expected to bear the cost of the call.

7. Calls to a small class of 080 numbers are operated entirely free to callers. These are to those starting with 080880, which are confined to certain charity helplines. It seems that calls on these numbers are free both to the caller and to the recipient, whatever networks are involved in making and transmitting the call.

8. Although Ofcom's Plan contains provisions about the rate of charges on calls to NTS numbers, it is not allowed to impose price controls by this means. Therefore, apart from those cases where by agreement there is no charge to the caller (as for the charity helplines mentioned above), there may be a charge, or a higher charge, to the caller, than is envisaged by the Plan. This explains the requirement, in respect of 080 numbers, for the caller to be told at the start of the call (if relevant) that there is a charge for the call.

9. Calls to NTS numbers from a fixed network telephone number are not the subject of these proceedings. The issues concern calls made to NTS numbers from a mobile network number. As with calls from a mobile telephone to geographic numbers on a fixed network, this will involve the use of at least two networks. All telephone users expect to be able to call any number from any telephone, regardless of what network is used by the caller or the recipient. This is known as end-to-end connectivity, and it is one of the objectives reflected in the CRF. In order to achieve this,

communications providers (CPs) enter into contractual arrangements with each other for the provision of access to each other's networks. In the simplest cases, where caller and recipient use different networks, two CPs are involved: the originating CP (OCP) and the terminating CP (TCP). In the case of calls other than to NTS numbers, the caller will pay a charge to his network, the originating CP, and that CP will pay a charge, known as the call termination charge, to the terminating CP. The charge is expressed in pence per minute, or ppm. BT, as the major fixed network CP in the UK, may also be involved even if it is neither the originating nor the terminating CP, because it provides transit services for calls between other CPs. In such a case BT will pay a termination charge to the terminating CP, but it will pass that on, as well as imposing fees or charges for the transit service, to the originating CP. The use of transit services makes it possible for a CP to ensure that all calls using its network can be connected, whatever other network may be involved, without having to enter into a separate contract with all other CPs that might possibly be relevant. It can rely on BT having made the necessary arrangements as an intermediary, so to speak. Nor is BT the only supplier of either call hosting or transit services; both Cable & Wireless and Opal Telecom, each of which participated before the Tribunal as an intervener, provide both fixed network services and transit services. There was evidence before the Tribunal that there is a good deal of competition between the providers of call hosting services, for the custom of service providers. Cable & Wireless and Opal may be following the present dispute with interest, but neither was involved in the hearing before the Court of Appeal.

10. BT provides connection services with its network to other CPs under the terms of its Standard Interconnect Agreement (SIA). The SIA, of which we saw a blank example, is a substantial document providing for the terms on which services are to be provided as between BT and the counterparty to the particular agreement (referred to as the "Operator"), which is necessarily the provider of a public electronic communications network. One of the issues in the appeal turns on the terms and significance of the SIA. I will come to that in due course. It is an agreement which is open-ended in duration, and is capable of being terminated only on 24 months' notice. Paragraph 12 is headed BT Services and paragraph 13 Operator Services. The SIA makes extensive reference to a Carrier Price List, which specifies charges payable both to BT by the Operator and by BT to the Operator. The SIA also provides for reviews (under paragraph 19) and for disputes (under paragraph 26).

11. Ofcom has a function and duty of resolving disputes, under section 185 of the Act. It is by virtue of that provision that the present issues came before Ofcom. It is common ground that its role in resolving such disputes is a regulatory role. That is clear from the legislation. The relevant parts of section 185 were, at the material time[1], as follows:

> "**185 Reference of disputes to OFCOM**
>
> (1) This section applies in the case of a dispute relating to the provision of network access if it is—

[1] The section has since been amended, as have other provisions relevant to this appeal. It was common ground before us that the issues turned on the unamended text, as set out and referred to here and elsewhere in this judgment.

> (a) a dispute between different communications providers;
>
> …
>
> (3) Any one or more of the parties to the dispute may refer it to OFCOM.
>
> …
>
> (8) For the purposes of this section—
>
> (a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; …"

12. This provision, required under the CRF, replaced earlier legislation to similar effect which itself had a forerunner in the terms of BT's licence. The details of the previous provisions do not matter.

13. The most relevant provisions of the SIA, as they now stand, are paragraphs 12, 13 and 26. The parts of these paragraphs which are material are set out below in an Annex to the court's judgments.

14. The effect of the main provisions of the SIA is that the charge payable for a BT service or facility is specified by BT, and may be varied by BT by notice under paragraph 12.2. The variation takes effect in accordance with the notice, but the Operator may dispute the variation in accordance with the procedure under paragraph 26. If that does not produce an agreed solution it may be referred to Ofcom. If Ofcom rules against the variation, then BT must give effect to the ruling. By contrast, the price payable by BT for an Operator service or facility can be the subject of a Charge Change Notice served by the Operator under paragraph 13, but such a notice does not have effect to change the amount of the charge by itself. BT may give notice accepting the variation or rejecting it. For its part BT may request a variation of the charge for an Operator service or facility by a Charge Change Notice. If the requested change is agreed, then the parties are to enter into an agreement recording the change. If it cannot be resolved by agreement, either party may refer the dispute to Ofcom, whose ruling will determine what, if any, change shall take effect. BT placed a good deal of reliance on the difference between the effect of a notice under paragraph 12 and that of a notice under paragraph 13.

15. The SIA does not define a BT service or facility nor an Operator service or facility. The distinction which appears from paragraphs 12.1 and 13.1 lies in the identity of who is to pay for the service or facility. If the Operator pays, it is a BT service or facility, and if BT pays it is an Operator service or facility. Only BT can alter the charge for a BT service or facility by notice under paragraph 12 (though subject to the dispute resolution provisions of paragraph 26), whereas both the Operator and BT can propose a change to the charge for an Operator service or facility, under paragraph 13.2 and 13.3. The possibility of a change being proposed by BT as well as by the Operator may have some relevance to the fact that a change notice under paragraph 13 does not have automatic effect, even if served by the Operator.

16. As well as these provisions, paragraph 19 allows a party to seek to amend the agreement by serving on the other a review notice, in certain events, (including a general review, but in that case only at specified times, with a window of three months every two years). Upon service of a review notice, the parties are to negotiate in good faith, but if agreement cannot be reached within a given time, Ofcom may be asked to resolve the dispute.

17. The situation that led to the determination by Ofcom from which the appeals to the CAT and to this court arise may be described, in brief, as follows.

18. Before November 2008, for 080 calls, BT included a negative rate of charge in the Carrier Price List: -0.6261 (daytime), -0.2866 (evening) and -0.2257 (weekend). This meant that BT paid a charge to the originating CP, rather than receiving a charge from the originating CP, in respect of calls originated on another network (whether fixed or mobile) and terminated on BT's network. As from November 2008 BT changed this position by a notice called Network Charge Change Notice (NCCN) 911, so that it made these payments only to fixed network CPs but made no such payments to mobile network CPs. Mobile network CPs continued to charge their own customers for such calls. NCCN 911 is only relevant as part of the history.

19. In June 2009 BT issued NCCN 956, to come into effect on 1 July 2009. It introduced a novel method of pricing, described by BT itself as a radical departure from the existing pricing practice, and by Ofcom as representing a substantial change in the approach to termination charges for NTS numbers: see Ofcom's second determination, paragraph 9.45, quoted in the Tribunal's decision at paragraph 171(3). Under this notice, if no retail charge was payable by the originating CP, then negative charges applied, so that BT paid the originating CP (whether a fixed or a mobile operator) an origination charge for calls originated on another network and terminated on BT's network. If the retail charge payable by the originating CP's customer was more than nil but less than 8.5 ppm, then nothing was payable either by or to BT by way of origination charge or termination charge. If the retail charge was 8.5ppm or more, but less than 12.5 ppm, then the originating CP was to pay BT a termination charge at the rate of 2 ppm for all such calls. Successively higher rates applied if the retail charge exceeded 12.5 ppm, or 17.5 ppm, or 22.5 ppm, or 27.5 ppm. This structure was described as ladder pricing. So far as the introduction of the successive layers of termination charge was concerned, the Tribunal observed that this amounted to a variation imposed by BT under paragraph 12.2 of the SIA, and they said at paragraph 74 that this had been common ground before them.

20. Later in 2009, BT served NCCN 985, to take effect on 1 November 2009, in respect of 0845 calls. This introduced charges on a similar ladder structure, though this involved a positive termination charge in all cases. Where the retail charge payable by the originating CP's customer was less than 12.5 ppm, then there was no change to the rate of the termination charge payable. If the retail charge payable was higher then the termination charge was varied to be higher in turn, and successively so in five bands.

21. At the same time BT served NCCN 986 in respect of 0870 calls. In this case too there was a positive termination charge in all cases, but if the originating CP's retail charge was less than 12.5 ppm, there was no change to the rate. If the retail charge was

higher, then the termination charge was to be higher, again successively so in five bands.

22. In each of these three cases, the MNOs disputed BT's NCCN, and referred the matter to Ofcom. Ofcom determined the dispute about the 080 numbers, under NCCN 956, on 5 February 2010. In turn it determined the dispute about the 0845 and 0870 numbers, NCCN 985 and 986, on 10 August 2010. In each case it rejected BT's variation of the charges. BT appealed against those determinations to the Tribunal, and succeeded in its appeals. Hence the further appeals by the MNOs.

23. In the course of the proceedings before the Tribunal a dispute arose as to whether BT was entitled to adduce evidence before the Tribunal that had not been before Ofcom. The Tribunal decided that in favour of BT, and that conclusion was confirmed by this court on an appeal by Ofcom: *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245. As a result, the hearing before the Tribunal was the more substantial, with evidence from eleven witnesses, and it lasted over eleven days.

The CRF – relevant provisions

24. Since the issue before us is as to the correctness or otherwise of Ofcom's resolution of the disputes under section 185, it is necessary to have clearly in mind the nature of the dispute resolution procedure, which is laid down in accordance with the CRF.

25. Two Directives forming part of the CRF are relevant in the present case: the Framework Directive, Directive 2002/21/EC, on a common regulatory framework for electronic communications networks and services, and the Access Directive, Directive 2002/19/EC, on access to, and interconnection of, electronic communications networks and associated facilities. Interconnection is the feature which is central to these appeals. That is at the heart of all relevant regulatory decisions in this area.

26. Recitals to the Framework Directive record that "the convergence of the telecommunications, media and information technology sectors means all transmission networks and services should be covered by a single regulatory framework" (recital 5), that *ex ante* regulatory obligations should be imposed only where there is not effective competition and where national and Community competition law remedies are not sufficient to address the problem (recital 27), and that, in the event of a dispute between undertakings in the same Member State in an area covered by the CRF, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute (recital 32). That recital states in terms that national regulatory authorities should be able to impose a solution on the parties and that the intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under the CRF. Definitions in the Framework Directive include those of "user", as a legal entity or natural person using or requesting a publicly available electronic communications service, and "consumer" as any natural person who uses or requests a publicly available communications service for purposes which are outside his or her trade, business or profession.

27. The Directive assigns tasks to a national regulatory authority (NRA) in each Member State, and requires Member States to see that these tasks are undertaken by a competent body. By article 8, it requires Member States to ensure that, in carrying out the relevant regulatory tasks, the NRA takes all reasonable measures aimed at achieving the objectives set out in article 8, those measures being proportionate to those objectives. The relevant objective for present purposes is that set out in paragraph 2 of article 8, as follows:

> "2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:
>
> (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;
>
> (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
>
> (c) encouraging efficient investment in infrastructure, and promoting innovation; and
>
> (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources."

28. Article 20 of the Directive deals with dispute resolution; paragraphs 1 and 3 are of particular relevance:

> "1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
>
> 3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives."

29. The Access Directive includes some relevant recitals, such as (5) which records that "in an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty" and that "in the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to

consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith". Recital (6) refers to the need, in given circumstances, for the NRA to be able to ensure end-to-end connectivity by imposing proportionate obligations, and in turn recital (8) refers to the need, in relation to network operators who control access to their own customers on the basis of unique numbers or addresses from a published numbering or addressing range, for other network operators to be able to deliver traffic to those customers, and so to be able to interconnect directly or indirectly to each other. Recital (9) identifies the benefit to end-users of interoperability, and states that it is an important aim of the CRF, and that one of the objectives of NRAs is to encourage interoperability. The recitals also display a concern to avoid over-regulation, as in recitals (13) and (14).

30. Turning to the operative provisions, article 1.1 sets out the aim of the Directive:

> "The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits."

31. In line with this aim, article 3.1 requires Member States to "ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law". In turn article 4.1, dealing with rights and obligations for undertakings, says this:

> "Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community."

32. Article 5 deals with the powers and responsibilities of NRAs with regard to access and interconnection. Paragraph 4 is as follows:

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

The 2003 Act

33. The CRF is implemented in the UK by the 2003 Act, so far as relevant. The first part of the Act deals with Ofcom. Section 3 sets out its general duties when carrying out its functions. The provisions material for our purposes are these:

> "3(1) It shall be the principal duty of OFCOM, in carrying out their functions—
>
> (a) to further the interests of citizens in relation to communications matters; and
>
> (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
>
> (3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—
>
> (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
>
> (b) any other principles appearing to OFCOM to represent the best regulatory practice.
>
> (4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—
>
> …
>
> (b) the desirability of promoting competition in relevant markets;
>
> …
>
> (d) the desirability of encouraging investment and innovation in relevant markets;
>
> …
>
> (6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections."

34. "Citizens", in paragraph (a) of section 3(1), means all members of the public in the UK: see section 3(14). "Consumers in relevant markets", in paragraph (b), is defined by section 405(5). In relation to a market for the kind of service with which we are concerned its principal meanings are, first, persons to whom the service is provided, made available or supplied (whether in a personal capacity or for the purposes of their business) and, secondly, persons who wish to come into that category, or whom the supplier of the service wishes to bring into that category. These definitions are not the

same as those of "user" and "consumer" in the Framework Directive, set out at paragraph [26] above. In terms of the Framework Directive definitions, consumers are those who wish to make telephone calls, not for business purposes, on NTS numbers, whereas users include callers (not limited by excluding business calls) but also service providers who do, or wish to, offer an NTS number to their callers. Both of these categories are within the definition in the Act of consumers in the relevant market.

35. The duties arising under the CRF are dealt with in terms in section 4, of which the following provisions are of particular relevance:

> "4(1) This section applies to the following functions of OFCOM—
>
> …
>
> (c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;
>
> …
>
> (2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).
>
> (3) The first Community requirement is a requirement to promote competition—
>
> (a) in relation to the provision of electronic communications networks and electronic communications services;
>
> (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; …
>
> …
>
> (7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.
>
> (8) That purpose is the purpose of securing—
>
> (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities;
>
> (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.

…

> (11) Where it appears to OFCOM that any of the Community requirements conflict with each other, they must secure that the conflict is resolved in the manner they think best in the circumstances."

36. I have already set out section 185 as regards dispute resolution, which implements the obligations in article 20 of the Framework Directive: see paragraph [11] above. I will turn later to the provisions about appeals.

Ofcom's decisions

37. There were differences of approach between Ofcom's two relevant decisions. In practice, it is possible and appropriate to consider only the later determination, for most purposes of the appeals, on the basis that, to the extent that it differs, it should be regarded as having superseded the earlier.

38. Ofcom said that their task in determining the dispute was to decide whether it was fair and reasonable for BT to apply new termination charges for calls to the relevant numbers hosted on its network, based on the level of the retail charge made by originating CPs for calls to these numbers, as set out in BT's relevant NCCNs. They adopted an analytical framework for assessing the matter in dispute based on three cumulative principles, concerned with pricing and cost recovery. These three principles were as follows:

    i) The MNOs should not be denied the opportunity to recover their efficient costs of originating calls to the relevant numbers hosted on BT's network. In practice that meant that it was not fair or reasonable for BT to impose variable termination charges unless the average retention by each of the MNOs (the average retail price minus the termination charge) is sufficiently large relative to the retention obtained on geographic calls.

    ii) The charges imposed in the NCCNs should (a) provide benefits to consumers, taking into account (i) the impact on retail prices of calls to the relevant numbers (the Direct effect) (ii) the impact on service providers and, through improved services, callers, i.e. consumers of such calls (the Indirect effect) and (iii) the impact on the overall MNO offering to its customers (the Mobile Tariff Package effect), and also (b) avoid a material distortion of competition among terminating CPs, transit operators, originating CPs in retail services and MNOs in wholesale sales to Mobile Virtual Network Operators (MVNOs).

    iii) The changes in the NCCNs should be reasonably practical to implement.

39. These principles incorporated six principles of pricing and cost recovery which Ofcom had often used before for this purpose: cost causation, cost minimisation, effective competition, reciprocity, distribution of benefits and practicability. Neither the Tribunal nor any party before us criticised Ofcom for the use of these principles, though the Tribunal was critical of the formulation of the second principle. The dispute turned mainly on their application of the principles.

40. Ofcom's conclusion, in their second determination, was that the first principle was satisfied, but that neither the second nor the third principle was satisfied. In the first determination, however, they had concluded that the third principle was satisfied. That view prevailed with the Tribunal, and is not now in issue. I can therefore limit myself to what was said about the second principle. Ofcom summarised their conclusion on this at paragraphs 1.23 to 1.26 of the second determination, as follows:

> "**Our final conclusion on Principle 2**
>
> 1.23 Principle 2 relates to consumer and competition effects. Our final conclusion that Principle 2 is not met, for the following reasons:
>
> *Consumer effects*
>
> 1.24 As set out in the Supplementary Consultation, we consider that it is more likely that NCCNs 985 and 986 will lead to price decreases for 0845/0870 calls rather than price increases. This represents a change from our provisional conclusion in the Draft Determination. However, we are still uncertain about the magnitude of the Direct effect and still consider that there will be a negative Mobile tariff package effect, which leads us to consider that there is a risk of an overall adverse effect on consumers. We consider it reasonable, in light of our overriding statutory duties to further the interests of consumers, to place greater weight on this potential risk than on the potential benefits of allowing the charges in NCCNs 985 and 986 to stand.
>
> *Competitive effects*
>
> 1.25 Our final conclusion is the same as our provisional conclusion in the Draft Determination. The risk of competitive distortions between TCPs is relatively low and there may be no significant distortion to competition in MNOs' wholesale sales to MVNOs. However, there are possible concerns about the potential distortion of OCPs' choice of transit provider, and about competition between MNOs and MVNOs in retail services (relating to disincentives to pricing innovations and potential for the range of retail packages to be reduced, although the nature of these effects depends on the method to derive the MNOs' average retail price).
>
> *Overall view*
>
> 1.26 Taking the issues raised by our analysis of consumer benefits and competitive distortion in the round, we consider that, on the evidence currently before us, Principle 2 is not sufficiently likely to be met. A more detailed statement of our conclusion on Principle 2 is set out in Section 9 below."

41. It is also worth seeing how they expressed their conclusion in Section 9, where they summarised their analysis and stated their final conclusions on whether the NCCNs were fair and reasonable. At paragraphs 9.31 and 9.32 they said this:

> "9.31 Our judgement in respect of Principle 2 is therefore finely balanced. We recognise the possibility that consumers could benefit from NCCNs 985 and 986. However we also recognise the risk of harm to consumers from NCCNs 986 and 986, particularly in the light of our conclusions on the Mobile tariff package effect.
>
> 9.32 Given the uncertainty which we have identified as to whether BT's NCCNs would result in a net benefit or net harm to consumers, and in light of our overriding statutory duties to further the interests of consumers, we consider it appropriate for us to place greater weight on this potential risk to consumers from NCCNs 985 and 986."

42. To expand a little on the three effects which Ofcom considered for the purposes of the second principle, the Direct Effect is that of driving down the retail prices payable by consumers for the relevant calls. If that were a result of the ladder pricing structure, it would clearly be of benefit to consumers. The Indirect Effect could arise if BT were to pass on part of the benefit to it of any additional revenue which it would receive from its increased prices to service providers, that is to say the recipients of the relevant calls, and if they in turn were to use some of that money to improve their own services as provided to callers. The Mobile Tariff Package Effect is sometimes known as the waterbed effect, because it takes into account the possibility that, if the return to an MNO from a particular service is reduced, whether by a reduction of its own charges or by an increase in charges which it has to bear, it may compensate for that by increasing other charges to consumers.

43. In effect, Ofcom considered that it was likely that there would be some direct benefit through a reduction in prices to consumers for the relevant calls, but it could not quantify that benefit, that there might be some indirect effect, but that this was even more difficult to quantify, and that there would be a significant (though not quantifiable) adverse waterbed effect, leading overall to a risk of an adverse effect on consumers. They considered that for this reason they should not uphold BT's new charges as fair and reasonable.

The Tribunal's decision

44. On BT's appeal to the Tribunal, one of its contentions was that the prices charged by the MNOs were excessive and represented market failure. The Tribunal rejected the contention as to excessive prices (paragraph 125) but both Ofcom and the Tribunal accepted that there were symptoms of market failure. We were shown a consultation document issued by Ofcom in relation to NTS numbers, which discusses the limitations on the way in which this market operates, particularly because of lack of transparency and lack of awareness on the part of callers of the price payable for NTS calls made from mobile phones. This also underlies Ofcom's policy preference as regards charges for calls to NTS numbers, and in that way it featured in Ofcom's analysis of the likely effects of the new charging structure on consumers. However, overall the analysis on this aspect was itself inconclusive. Therefore, attention on the appeal was focussed on other aspects of the effect of BT's new charges on consumers.

45. For this purpose the Tribunal devoted a substantial part of the decision to a welfare assessment, that is to say an assessment of the economic effects of the introduction of the ladder pricing structure, and whether these economic effects would be beneficial

or otherwise to consumers (see paragraph 280). In the course of their welfare assessment, the Tribunal said that Ofcom's conclusion about the Direct Effect was correct: retail prices for these calls would fall but it was impossible to tell by how much (paragraphs 343-4). They held that the Indirect Effect was even more uncertain than the Direct Effect, and that Ofcom should not have paid even as little attention as it did to this factor in assessing possible benefits to consumers (paragraphs 347-9). As regards the Waterbed effect, the Tribunal held that it would be significant but impossible to quantify (paragraph 364). In summary, at paragraph 379 the Tribunal said this:

> "Fundamentally, the welfare analysis is inconclusive, due to a lack of empirical evidence. Even with the assistance of the simplifying assumptions that we have described, a reliable assessment of elasticity of demand is not possible. Whilst it is possible to conclude that prices for 080, 0845 and 0870 calls will, on balance, fall, it cannot be said how far they will fall, nor what volumes of calls there will be at any given price. Equally, the extent of the Mobile Tariff Package Effect is essentially unknown."

46. Ofcom had held that there was a risk of adverse effect on consumers. The Tribunal put it more neutrally, that the assessment of benefits and otherwise was inconclusive. Either way, it was impossible to show that the change would, or would be likely to, benefit consumers, overall. That is sufficient to show that BT did not succeed in making out its contention that the changes would be of benefit to consumers.

47. The next part of the Tribunal's decision is headed "The effect on competition". In the course of this the Tribunal referred to the position as between BT and other terminating CPs. At paragraph 392 they made this observation:

> "The ability to price differently, and to introduce innovative pricing structures, is a key aspect of competition between suppliers. If too restrictive a test is imposed on the introduction of innovative pricing structures, then competition will not be enhanced, but restricted."

48. This led the Tribunal to identify an issue as to the right approach for a regulator, and to criticise Ofcom's determination accordingly, in paragraphs 395 to 397, as follows:

> "395. It is clear that, in promulgating a stringent test that must be satisfied before BT can introduce its NCCNs, which will be applied to other terminating CPs should they seek to introduce similar measures, OFCOM is significantly restricting communication providers' commercial freedom to price which – absent the Dispute Resolution Process – is not constrained by regulation. It might be said that a test that simply seeks to assess whether a price change provides benefits to consumers (Principle 2(i)) and does not materially distort competition (Principle 2(ii)) is not especially stringent. But that is to overlook the lack of empirical evidence as to what BT's pricing would do in this market, and the sheer difficulty (in the absence of such evidence) of demonstrating through modelling that the NCCNs would be beneficial to consumers.

> 396. The crucial question is what is a regulator to do in the context of such uncertainty? Essentially, the regulator has two choices:
>
> (1) To prevent change unless it can be demonstrated that the change is beneficial – in which case it may well be said that the dead hand of regulation is constraining behaviour which may actually be beneficial to consumers. We stress that our conclusion regarding Principle 2(i) was that the welfare assessment was inconclusive, not that consumers would be harmed.
>
> (2) Alternatively, to allow change despite the uncertainty, even though there is a risk that the change may result in a disbenefit to consumers, recognising that an undue fetter on commercial freedom is itself a disbenefit to consumers.
>
> 397. In the Determinations, Ofcom clearly opted for the first choice. But it did so without articulating or considering the alternative. We consider that this is a matter that Ofcom should have considered during the course of its Determinations."

49. Moving to the last section of the decision, at paragraphs 416 to 418 the Tribunal listed eleven potentially relevant factors, of which they had discarded two as irrelevant. They said that several that were relevant had been properly taken into account by Ofcom. These included Ofcom's general statutory obligations under the 2003 Act, their policy preference as regards the relevant calls (namely the approach set out in the Plan, described at paragraph [5] above), their welfare assessment, the ability of MNOs to recover their efficient costs, and questions of practicality. However, at paragraph 418 they said that Ofcom had not taken properly into account three relevant factors: BT's rights under the SIA, the regulatory obligations and duties on the parties to the dispute, and the effect on competition. They also identified as relevant (at paragraph 419) the nature of the dispute resolution process, and the need for Ofcom to be able to resolve disputes satisfactorily within the four month time limit imposed by the legislation.

50. The Tribunal approved Ofcom's use of the three principles, by way of an analytical framework, but they were critical of the formulation of Principle 2 as set out at paragraph [38(ii)] above. At paragraph 440 they commented that it did not make clear what should be the relationship between benefits to consumers, on the one hand, and avoiding material distortion of competition on the other, and also that it did not take into account BT's contractual rights under the SIA.

51. The Tribunal considered that to introduce ladder pricing would not distort competition, and said that the imposition of a stringent test for the introduction of price changes by BT would itself distort competition by restraining the pricing freedom of BT and other terminating CPs (see paragraph 442). They went on:

> "We are mindful that price control is an intrusive form of control which, elsewhere in the 2003 Act, can only be introduced by SMP condition. None of the parties to the dispute were subject to regulatory control as regards the prices for 080, 0845 or 0870 calls nor as regards the prices for terminating such calls."

52. They said that these were "powerful indicators in favour of allowing BT to introduce the new prices" (paragraph 443).

53. As regards BT's contractual rights under the SIA, they considered that it was within BT's contractual rights to impose the NCCNs on the MNOs, and although these rights could be modified by the regulatory regime, including by conditions imposed where an undertaking has significant market power (SMP), and although the dispute resolution process could override contractual rights, nevertheless, first, contractual rights are relevant factors to be taken into account and, secondly, BT's rights under paragraph 12 of the SIA "point in the direction of allowing BT to introduce the new prices": see paragraph 444.

54. Those points related to the second aspect of principle 2. As to the first, the Tribunal recognised that the result of the welfare assessment was that it could not be said that the NCCNs did provide benefits to consumers. They went on as follows, at paragraphs 447 and 448:

> "447. If, therefore, the test to be applied is whether the NCCNs can be shown to provide benefits to consumers, then that test is not met. However, we do not consider this to be the correct test in the circumstances of the present case, because it places undue importance on OFCOM's policy preference, at the expense of the two other relevant factors that we have identified as forming a part of Principle 2 (namely Principle 2(ii) and BT's private law rights).
>
> 448. We consider that whilst OFCOM's welfare analysis could override these other factors, it should only do so where it can clearly and distinctly be demonstrated that the introduction of the NCCNs would act as a material disbenefit to consumers. In short, given the presence of the two other factors that we have identified, it is not enough for the welfare analysis to be simply inconclusive. The welfare analysis must demonstrate, and demonstrate clearly, that the interests of consumers will be disadvantaged."

55. On that approach, the Tribunal held that to require BT to show that the NCCNs would be of benefit to consumers would involve "an undue pre-disposition in favour of the status quo, to the detriment of other legitimate interests", whereas the Tribunal's preferred approach would avoid "excessive focus on economic analysis where such analysis is intrinsically equivocal" (paragraph 449). For those reasons the Tribunal held that the three NCCNs were fair and reasonable, that BT had the right to introduce them, and that BT's appeal should succeed (paragraph 450). They directed Ofcom to allow the three NCCNs to stand.

56. Consequential issues arose from the fact that they had not been allowed to stand in the meantime, and there are issues on the appeal which arise from that aspect of the matter, but I need not deal with those at this stage.

57. Thus, three particular factors require attention as underlying the Tribunal's decision: the nature and relevance of BT's contractual rights, the relevance of competition as a goal in itself, and thus of any distortion of competition, and the Tribunal's view as to "regulatory absence" in a dispute resolution process.

Dispute resolution by Ofcom

58. At this point I will say something, first, about the nature of the dispute resolution process and secondly about appeals to the Tribunal. I have already set out section 185 under which the power to resolve disputes arises (see paragraph [11] above), as well as the provisions of the CRF Directives which require and govern that provision. I will mention briefly some supplementary provisions in the Act. At the time when Ofcom accepted the disputes that are relevant to this appeal, they had no choice under the Act but to accept those disputes for resolution unless satisfactory alternative means for resolving the dispute were available. Under section 188, if they decide that it is appropriate for them to resolve the dispute, they must consider the dispute, according to the procedure which they think appropriate, and make a determination resolving it, and they must do so as soon as practicable and, otherwise than in exceptional circumstances, within four months of the decision that they should resolve it. Ofcom's powers, when resolving a dispute, are set out in section 190:

> "(2) Their main power … is to do one or more of the following—
>
> (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
>
> (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
>
> (c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and
>
> (d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

59. As already mentioned, there have been a good many instances of dispute resolutions by Ofcom, and several appeals to the Tribunal. One case which is of particular significance is known as the *TRD case* (short for Termination Rate Dispute): *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12. In that decision the Tribunal gave some general guidance as to Ofcom's functions. There Ofcom had declined to interfere with proposals by the MNOs as to the termination charges payable, and the Tribunal said that they had erred by failing to recognise that dispute resolution was a "third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law".

60. In paragraph 101 of their decision in the *TRD case*, the Tribunal said this, describing the test that Ofcom should adopt:

> "That test can be expressed as requiring OFCOM to determine what are reasonable terms and conditions as between the parties. The word "reasonable" in this context means two things. First it requires a fair

> balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because OFCOM is a regulator bound by its statutory duties and the Community requirements it also means reasonable for the purposes of ensuring that those objectives and requirements are achieved. OFCOM did not approach resolving these disputes on this basis and it therefore committed an error of law."

61. The Tribunal in that case said that the use of this approach would not amount to using dispute resolution powers as an alternative means for addressing SMP. Rather it should be considered as an appropriate way by which Ofcom ensures that the objectives set out in sections 3 and 4 of the 2003 Act are fulfilled (paragraph 106). Later in the decision, in the course of giving further guidance to Ofcom for the future, the Tribunal observed that the onus lay on the party proposing the variation to provide to the other party and to Ofcom the justification for changing the previous charges, that Ofcom should first examine the reasons for the change to decide whether they are justified, as being both fair between the parties and reasonable from the point of view of the relevant regulatory objectives. If the reasons do not support the change proposed, it may simply be rejected; conversely if the objections advanced by the other party are unjustified, the change may be upheld. However, because of Ofcom's role as regulator, they must always consider whether the position arrived at on a consideration of the rival parties' contentions is one which accords with the regulatory objectives. That exercise is not to be ignored on the basis that relevant matters might be dealt with in future on a market review into the possible imposition of SMP conditions, that is to say *ex ante* regulation, or by the application of domestic or European competition law, by way of *ex post* regulation (paragraphs 177-180).

62. In the present case, while recognising the force and value of the guidance given in the *TRD case*, the Tribunal drew a distinction between that case and this on the basis that the present case, unlike the *TRD case*, was concerned with a notice under paragraph 12 of the SIA, rather than one under paragraph 13. They held that there was no onus on BT to justify its NCCNs, because it was contractually entitled to make the change under paragraph 12: paragraph 438. I will come back to that point, when I deal with the relevance of BT's contractual rights.

63. Certain matters were common ground between the parties and on the part of the Tribunal, as Ofcom pointed out in their helpful submissions as intervener, concerned as to the debate as to their proper role in relation to dispute resolution. It is worth setting these out in terms here. The purpose of dispute resolution is to provide a solution where a deadlock is reached in commercial negotiations between parties. Ofcom's task, where it undertakes the resolution of the dispute, is to impose a solution that meets the public policy objectives of the CRF, as set out in article 8 of the Framework Directive, and therefore goes beyond deciding disputes on the basis of the parties' respective contractual rights. Dispute resolution is a form of regulation in its own right, to be applied in accordance with its own terms, and it is intended to operate as a rapid and relatively informal means of breaking a commercial deadlock, especially having regard to the normal maximum of four months for completion of the process.

The nature of the appeal to the Tribunal

64. An appeal may be brought to the Tribunal in a case of this kind under section 192 of the 2003 Act. Under section 195(2) the Tribunal must determine the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal. (By contrast, a further appeal, such as these appeals, under section 196 lies only on a point of law.) By virtue of the previous decision of this court in relation to this particular dispute resolution process, already mentioned at paragraph [23] above, the appeal to the Tribunal is not limited to the material that was before Ofcom. It is a full consideration on the merits, by reference to the specified grounds of appeal. In *T-Mobile (UK) Ltd v Ofcom* [2008] EWCA Civ 1373, where the argument was as to whether a particular dispute was to be resolved on a judicial review application or on an appeal to the Tribunal, Jacob LJ said this at paragraphs 30 and 31:

> "30. I would add this: it seems to me to be evident that whether the "appeal" went to the CAT or by way of judicial review, the same standard for success would have to be shown. In either case it would not be enough to invite the tribunal to consider the matter afresh – as though the Award had never been made. …
>
> 31. After all it is inconceivable that article 4, in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision."

65. In the course of his judgment on the appeal concerning the evidence admissible on the appeal to the Tribunal, already mentioned (at paragraph [23] above), Toulson LJ had occasion to comment on the nature of the task facing the Tribunal, which was relevant to the question whether it could look at evidence which Ofcom had not seen. At paragraph 60 he referred to the Framework Directive's requirement that the merits of the case are fully taken into account, and said this:

> "There is nothing in Article 4 which confines the function of the appeal body to judgment of the merits as they appeared at the time of the decision under appeal. The expression "merits of the case" is not synonymous with the merits of the decision of the national regulatory authority."

66. Later, at paragraph 65, he commented that a scheme which permits an appeal body to receive fresh evidence "is not necessarily inconsistent with the appeal body being obliged to have proper regard for the role of the primary decision-maker", as an example of which he cited appeals from licensing authorities to magistrates' courts.

67. Thus, the question is whether the regulator was right in its decision on the merits, but the appeal body's consideration of that is not necessarily confined to material that was before the regulator. The question on the merits, however, is the same as was (or should have been) addressed by the regulator, and if the regulator has addressed the

right question by reference to relevant material, any value judgment on its part, as between different relevant considerations, must carry great weight.

BT's contractual rights

68. Two points arise from what the Tribunal said in this case on this aspect of the case: what are BT's rights under the SIA, and how does dispute resolution impact on them? The Tribunal considered that there was a fundamental difference in this respect between the right to serve notice of a change under paragraph 12, and that to serve notice proposing a change under paragraph 13. Clearly there is a difference between the two provisions, and there is no doubt good reason for that difference. One is that, under paragraph 13, both BT and the Operator can serve notices, whereas under paragraph 12 only BT can do so. It would not make sense for any notice under paragraph 13 to have automatic effect, subject to Ofcom's powers of dispute resolution, as is the case under paragraph 12. It was also suggested that because BT's charges specified in the Carrier Price List apply in relation to many operators, it is logical, sensible and necessary that BT should be able to change the charges payable to it just by serving notice, leaving it to an aggrieved Operator (if there is one) to challenge the notice by way of a dispute. All of that is understandable. However, it does not necessarily follow that there is a real substantive difference between these two provisions for our present purposes, in the context of dispute resolution. Some arguments were addressed to the Tribunal and to us about the correct analysis of the paragraph 12 power, as a matter of the law of contract. I see no good reason to spend any time on that question. It is expressed as a simple and straightforward power, but it is, inherently and unavoidably, subject to the dispute resolution procedure and to Ofcom's ability to intervene under section 185.

69. Moreover, it may be a matter of debate, or even of chance, as to which of the two paragraphs applies to a given change. Thus, under NCCN 956, for example, in certain cases a negative charge was payable as between BT and the originating CP. In terms of the SIA, because BT pays the Operator in this instance, the service or facility appears to count as an Operator service or facility, and any change would be covered by paragraph 13.3. It is not clear what the position is, as between paragraphs 12 and 13, for the case where nothing is payable either way, as is the case where the retail charge payable by the caller is positive but less than 8.5 ppm: if the nature of the service, and therefore the applicability of paragraph 12 or 13, depend on who pays whom, the case of a nil payment either way does not appear to be covered. As regards the other instances, where the originating CP was to pay to BT a positive, and progressive, termination charge, that looks like a BT service, paid for by the originating CP. However, in relation to one notice intended to bring into operation these diverse provisions, it is not easy to see how it is to be categorised in terms of paragraphs 12 and 13, especially since any one notice should be expected to have the same operation, in contractual terms, as regards all of its provisions. It is difficult to see why the same operation should be regarded as involving one type of service or another, thereby attracting a different contractual provision and, as BT would submit, different legal results, according to whether the payment specified is to pass from BT to the Operator, or the other way.

70. In addition to this consideration, which tends to suggest that all aspects of the changes should be treated in the same way for our purposes, whether they arose under paragraph 12 or paragraph 13, there is the more substantive factor that, under

whichever provision a change takes effect, it is subject to Ofcom's dispute resolution jurisdiction, one way or another. Under paragraph 13, it does not take effect unless it is either agreed to or upheld by Ofcom; under paragraph 12 it does take effect but it may be challenged and set aside or modified by Ofcom under the same provisions.

71. A point was made to us about the basis of the disputes which were the subject of the *TRD case*. Some of the changes under consideration in that case were the subject of notices under paragraph 13 given by the Operator, but others were initiated by notices under paragraph 13 given by BT, which had at first accepted a notice of change, and then thought better of it. In the latter cases, therefore the new charge was already contractual as between BT and the Operator (Orange), and BT sought a change to that contractual position: see the *TRD case* paragraph 44. That made no difference as to how the Tribunal in that case addressed the issues arising. The Tribunal in the present case may have overlooked that in what they said at paragraph 438.

72. It was also argued that the Tribunal's conclusion on this is inconsistent with the principle underlying the decision in *Orange Personal Communications Services Ltd v Office of Communications* [2007] CAT 36, even if not, strictly, with the decision itself. In that case the Tribunal decided that whether a party was able to refer a dispute for resolution did not depend on the contractual position (if any) as between it and the counterparty. By the same token, it was said, the approach of Ofcom to the resolution of the dispute should not be affected by how the dispute arose. That is a minor point in the present context, because it affected jurisdiction, rather than the principles on which a dispute, once referred to Ofcom, should be decided. Nevertheless it seems to me that it is a legitimate point, adding a little weight to others of greater significance already mentioned, against different treatment of different disputes according to how they arose for decision.

73. For all these reasons, I disagree with the view of the Tribunal in the present case that the position on a dispute resolution is different according to whether the change which is being considered was proposed under paragraph 12 or under paragraph 13 of the SIA, and if the latter, by which party it was proposed. I can see no reason why there should be such a difference in treatment. In my view it would distort the application of Ofcom's regulatory power by way of dispute resolution, for no reason that can be discerned from the CRF or from the domestic legislation. I therefore regard as incorrect the Tribunal's statement at the end of paragraph 438 that there is no onus on BT to justify its NCCNs, and also its position, expressed in paragraph 444, that the nature of BT's contractual right to impose the new tariff under paragraph 12 of the SIA points in the direction of allowing BT to introduce the new prices. To take that position would, as it seems to me, involve a somewhat similar abdication of a regulatory role to that of which Ofcom was guilty in the *TRD case*.

74. It seems to me that the Tribunal in the present case, although having set out material passages from the *TRD case* decision, failed to give effect to them, or to do so properly, in paragraph 444. The whole point of this aspect of the CRF is that the NRA must be able to sort out a dispute between parties in the relevant market, who may or may not already be in contractual relations with each other. If there is already a contract, the NRA's powers must enable it to override the contractual rights of one party (or even those of both parties). There is no place for any kind of presumption either way as to the position of one party or the other. If there is not a contract already, the regulator's powers must enable it to prescribe what the terms are to be.

So, while the previous position under the contract (if there is one) is no doubt relevant (as the Tribunal said in the *TRD case*), and while upholding contractual rights, thereby favouring commercial certainty, can be a relevant consideration for the regulator to bear in mind, neither the actual or previous contractual position, nor any right of BT to impose a change, can be of any overriding significance. For BT Mr Read placed stress on the importance of commercial certainty, and he is entitled to rely on recital (5) to the Access Directive, with its proposition that undertakings which receive requests for interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith. Nevertheless, the regulator has the power and, where appropriate, the duty to resolve a deadlock whether by deciding in favour of the position taken by one party or the other, or by imposing an intermediate solution.

75. Where the relevant contractual position is no more than that one CP has the right to impose a change of pricing on the other, and seeks to do so in a way which is not, for example, justified by reference to increased costs or some other such normal relevant economic factor, then it seems to me that there is nothing in the intrinsic nature of the provision (which could take any of a number of different forms) that ought to affect the approach of the regulator to the question whether the change effected or proposed is or is not fair and reasonable, in the sense described in the *TRD case*. The regulator must be able to apply its regulatory powers in the same way regardless of how the issue at the heart of the dispute may have arisen.

76. Of course, it does not follow that Ofcom will always interfere in the process by disallowing a notice, under whichever provision it may have been served. As the Tribunal recognised in the *TRD case*, there may very well be cases in which the contractual notice seems to be fully justified as between the parties, and does not give rise to any issue as regards the regulatory objectives. In such a case the regulator may choose not to resolve the dispute at all or, having undertaken the resolution of the dispute, may simply uphold the disputed notice. I see as unrealistic BT's professed fear that to accept the contentions of the MNOs would lead to the parties' agreements (where they exist) being invariably ignored and replaced by a regulatory solution on every occasion that a dispute is referred to Ofcom.

The regulatory regime – "regulatory absence" as regards dispute resolution

77. Some of the MNOs had argued before the Tribunal that the new charging structure introduced by the NCCNs was a form of indirect price control on them, and was illegitimate for that reason. This argument was rejected, and is not now revived. None of BT and the MNOs is constrained in its pricing as regards these calls by any regulatory obligation imposed *ex ante*, whether on the basis of significant market power, or the need to ensure end-to-end connectivity, or otherwise. The Tribunal reiterated that point at paragraph 276, and went on to make this point at paragraph 277:

> "We would only say this in addition: we regard the presence or absence of a power to regulate by condition, and the fact that that power has, or has not, been exercised, as highly material. (Of course, the Dispute Resolution Process is itself a form of regulation, and in resolving disputes, OFCOM is acting as a regulator and not simply as an arbitrator.) But, essentially, the point is this. Where a power to

> regulate by rule or condition does not exist, or does exist, but has not been exercised, then it must be asked why this question should be revisited through the Dispute Resolution Process. The power to regulate by rule or condition is curtailed for a reason, and it is our view that this is something that OFCOM needs to take into account in the Dispute Resolution Process. A "regulatory absence", of this sort is an important indicator, for the purposes of the Dispute Resolution Process, suggesting that a price set by a communications provider should not be interfered with."

78. This is the basis for the Tribunal's conclusion that Ofcom had erred in the third of the ways summarised at paragraph [57] above. The conclusion has the odd effect that, having rejected (rightly) the contention that to allow the NCCNs would constitute indirect price control on the MNOs, the Tribunal held that to disallow them would amount to indirect price control on BT. Quite apart from this apparent contradiction, and from a lack of clarity in the paragraph itself[2], it does not seem to me that the Tribunal's conclusion gives adequate weight or significance to the third aspect of regulation in this area which the dispute resolution process itself represents, as the *TRD case* decision showed. In my judgment, to speak of regulatory absence in this context suggests a misunderstanding of the position.

79. Of course *ex ante* regulation, such as by way of SMP conditions, is limited in its scope. That is manifest, for example, from recital (27) to the Framework Directive, and from its contrast with recital (25). Such forms of regulation are the most intrusive and extreme and can only be justified by strong considerations. *Ex post* regulation by way of the application of European or domestic legislation, as in instances of cartels or of abuse of a dominant position, is in some respects a powerful constraint on the activities of undertakings, in whatever area of economic activity, but that is not of any particular use in regulating a market such as that of electronic communications, especially one which is so active and fast-developing as that involving mobile telephones. Hence the need for the NRA to have power to resolve disputes between relevant undertakings, whether or not already in contract with each other, and to do so with its regulatory objectives in mind rather than merely as a sort of commercial arbitrator, as reflected in recital (32) to the Framework Directive. The Tribunal did refer to dispute resolution as being a regulatory function in itself, but it seems to me that, by virtue of what they went on to say, they did little more than pay lip-service to that aspect of Ofcom's regulatory functions. The dispute resolution function is, in itself, part of the regulatory responsibility for ensuring interconnectivity. I do not understand why the Tribunal took the view that the fact that the particular area of market operations is not constrained by *ex ante* regulation is an "important indicator" that, although it is affected by the particular form of regulation represented by dispute resolution, nevertheless that aspect of regulatory control should not be exercised so as to interfere with a price set by a CP who is in a position (as BT is) to set it contractually. In any event, I disagree with that view, which I consider to be wrong in principle.

[2] What, for example, is the question referred to as "this question" in the fourth sentence? It may be the question stated at paragraph 241: "if there is a clear contractual right in a person [to change the charges under the contract], in what circumstances is it right for Ofcom to override it?"

80. On this point too therefore, with respect, I differ from the Tribunal's approach which seems to me to be inconsistent with the *TRD case*, and a misdirection in law. It seems to me to have led the Tribunal along the same wrong path as their inaccurate assessment of BT's contractual rights and of the relevance of those rights. It fails to give proper effect to article 20 of the Framework Directive, in particular article 20.3, and to section 4 of the 2003 Act, under which Ofcom must, in resolving a dispute, aim to achieve the relevant regulatory objectives.

81. To my mind there is a good deal of force in the submission made on behalf of Ofcom, that the Tribunal's emphasis on commercial freedom and on the absence of *ex ante* regulation is essentially very similar to the approach adopted by Ofcom in the *TRD case*, which the Tribunal in that case described as a fundamental error. It seems to me that the Tribunal's approach in the present case is not consistent with the decision in the *TRD case*, that it is likely to cause confusion and difficulty for Ofcom, and for parties to actual and potential future (and pending) disputes, and that it is not correct.

The relevance of the promotion of competition in itself

82. As I have said, the third of the points on which the Tribunal held that Ofcom had gone wrong, so as to reach the wrong conclusion, was that the introduction of the NCCNs would not distort competition. Their reasoning on this, at paragraph 442, referred to and in part quoted at paragraph [51] above, also brought in the relevance of the absence of relevant regulatory control, so their position on this point is to some extent vitiated by what I have already said I regard as a misdirection by the Tribunal.

83. More generally, the Tribunal's reasoning suggests that they regarded competition as a good in itself, regardless of whether it can be expected to operate to the benefit of any relevant consumer. Under section 3 of the 2003 Act, the principal duty of Ofcom, so far as relevant, is to further the interests of consumers in relevant markets, *where appropriate*[3] by promoting competition: see section 3(1)(b). The desirability of promoting competition in relevant markets also comes in as one of the matters to which Ofcom is to have regard where relevant, under section 3(4)(b). The promotion of competition is one of the objectives identified in article 8 of the Framework Directive (see paragraph [27] above) so that it is right for Ofcom to act in accordance with that objective under section 4(7) and (8) in resolving disputes as well as in other functions. Article 8.2 identifies the objective of promoting competition, by, inter alia, "ensuring that users … derive maximum benefit in terms of choice price and quality", and as well as by ensuring that there is no distortion or restriction of competition in the sector. Mr Read pointed out, correctly, that for these purposes, competition for the business of service providers is just as relevant as competition for the custom of callers. However, I do not read article 8.2 as providing that competition is necessarily to be promoted regardless of whether, in given circumstances, the particular steps to be taken would be for the benefit or for the disadvantage of consumers. Moreover, to the extent that there is any conflict between any of the Community requirements, it is for Ofcom to resolve that conflict as they think best in the circumstances: section 4(11).

84. In its second determination, Ofcom addressed the effect of the new charges on competition in several respects. At paragraph 4.34 they referred to the duty to further

[3] My emphasis.

the interests of consumers where appropriate by promoting competition, and said that, for that reason, the impact on competition of the new charges was important to their analysis. They observed that the effects of termination charges might influence, or be influenced by, competitive conditions. They looked at competition in several respects: between terminating CPs, relevant mainly to the possible Indirect effect, among transit providers, among originating CPs, and between MNOs in wholesale access and origination to MVNOs. Their conclusion on all these aspects of competition is set out in paragraph 8.157 of the second determination, as follows:

> "The risk of competitive distortions between TCPs is relatively low and there may be no significant distortion to competition in MNOs' wholesale sales to MVNOs. However, there are possible concerns about the potential distortion of OCPs' choice of transit provider, and about competition between MNOs/MVNOs in retail services (relating to disincentives to pricing innovations and potential for the range of retail packages to be reduced, although the nature of these effects depends on the method used to derive the MNOs' average retail price). As set out in the Supplementary Consultation, we consider that it is more likely that NCCNs 985 and 986 will lead to price decreases for 0845/0870 calls rather than prices increases. … However, we are still uncertain about the magnitude of the Direct effect and still consider that there will be a negative Mobile tariff package effect, which leads us to consider there is a risk of an overall adverse effect on consumers. We consider it reasonable, in light of our overriding statutory duties to further the interests of consumers, to place greater weight on this potential risk than on the potential benefits of allowing the charges in NCCNs 985 and 986 to stand."

85. It is from this that Ofcom took the summary quoted above (at paragraph [40]) as regards the effect on competition at paragraph 1.25, and as regards the balancing of factors at paragraphs 9.31 and 9.32, also quoted above, at paragraph [41].

86. In principle, one would expect that to promote competition would be for the benefit of consumers in the relevant market, since a non-competitive market is likely to work to the disadvantage of consumers of the relevant goods or services. BT submitted that this would be the case, saying that competitive forces generally bring about innovation and lower prices, which are good for consumers. However, it does not seem to me that these provisions mean that promoting competition is an aim in itself, regardless of whether, in the given circumstances, it would or would not operate to the advantage of relevant consumers. As I read the legislation, that is apparent from the terms of section 3 of the Act. While the Community requirements, under the CRF, are to have priority in the event of conflict, under section 3(6), I cannot see that to have regard to the likelihood or otherwise of benefit to consumers from the particular operation that is in question could in itself conflict with the Community requirements. That is particularly true, in the case of interconnectivity, from the terms of section 4(7) and (8), describing the fifth Community requirement, with its reference at paragraph (8)(b) to securing the maximum benefit for the persons who are customers of CPs, including both callers and service providers. Moreover, in this particular case Ofcom examined the welfare of consumers directly, and they found that benefit to consumers could not be shown to be likely to result from the changes in question, and

that there was a risk of disbenefit to consumers. In that situation it seems to me that to contend that promoting competition is good in itself as likely to be of benefit to consumers is unconvincing. The general proposition cannot prevail over the particular finding of absence of proof of benefit and of there being a risk of disbenefit.

87. Conversely, whereas BT argued that Ofcom's approach would require an impossibly high degree of certainty of benefit to consumers to be shown by the proponent of the change, I would not accept that proposition, either in principle or as the indirect result of upholding Ofcom's determinations. On the one hand, BT's argument in the particular case was that Ofcom had not given proper effect to the likelihood of benefit to service providers from the new pricing structure, whereas the Tribunal was even more clear than Ofcom had been that this aspect of the effects of the change, the Indirect effect, was so speculative as to be incapable of being weighed in the balance. In the light of that, the argument as regards the promotion of competition in itself seems to be no more than an oblique way of proving benefit by way of the Indirect effect which could not be proved directly. On the other hand, although Ofcom's approach does involve a burden on the proponent to justify the change as being both fair and reasonable, it does not postulate any special standard to which that has to be shown.

88. BT argued that to permit the NCCNs to stand would promote innovation which is itself among the objectives to which Ofcom is required to have regard. It is true that innovation is a relevant factor, and this may well not be limited to technical innovation. But not all innovation is necessarily good in competition terms or in terms of benefits to consumers. There could be anti-competitive innovation, just as there can be innovation which is good for consumers. Thus, innovation as such is not a good in itself; it must be assessed by reference to the other regulatory objectives, above all to the benefit of consumers.

89. Ofcom came to their conclusion in the second determination by way of a balancing exercise, taking into account the uncertainty as to whether the changes would produce benefit or harm to consumers, taking into effect the likely effects as regards competition in several areas, and having regard to their overriding statutory duties to further the interests of consumers. This is one of their duties, where they find that different factors point in different ways: see section 4(11) and article 5.1 of the Access Directive. The Tribunal considered the issue of benefit or harm to consumers by reference to the evidence placed before them, but came to the same conclusion in that respect as Ofcom had done. It seems to me that there was, therefore, no scope for them to overturn Ofcom's conclusion on the basis that likely benefit to consumers could be shown. That being so, it seems to me that they were not entitled to override Ofcom's conclusion on the basis that Ofcom had not had proper regard to their duties as regulator. The balancing of the various regulatory objectives, insofar as they pointed in different directions, was a matter for Ofcom by virtue of the terms of the legislation. The Tribunal and Ofcom were proceeding on essentially the same basis as regards the welfare assessment, so that, despite the additional evidence called before the Tribunal, the appeal on the merits had not undermined Ofcom's view that benefit to consumers had not been demonstrated as a probable result of the changes. That being so, it seems to me that it was not open to the Tribunal to reach their own different conclusion as to how the relevant considerations should be weighed in the

balance against each other, unless Ofcom's conclusion could be shown to have been wrong in law.

90. This is not the occasion on which to review the true nature of the relationship between Ofcom and the Tribunal on an appeal of this kind. Nothing turns on it, and we did not hear argument on this, other than points made in passing, to which I have referred at paragraphs [64] to [67] above. Although the Tribunal is an expert and specialised body, it is not set up as a second tier regulator of the sector, and it seems to me that, absent new evidence which shows that the factual basis on which Ofcom proceeded was wrong, or an error of law, the Tribunal ought to respect the policy decisions and matters of judgment involved in Ofcom's decisions. To an extent the Tribunal did so, for example as regards respecting Ofcom's policy preference as regards the pricing of 080x calls. Consistently with that, it does not seem to me that it was open to the Tribunal to balance the various potentially conflicting considerations relevant to the regulatory objectives in a different way from that adopted by Ofcom, unless an error could be shown in Ofcom's approach. Nor, to be fair, was it argued before us that this is what the Tribunal had done. The basis for their disagreement with the conclusion reached by Ofcom was that Ofcom's approach had been wrong because of the three misdirections identified, not that Ofcom had considered the right questions on the right material but had weighed up the relevant factors wrongly: see paragraph 231 where the Tribunal said: "Accordingly, we consider that we must ask ourselves … whether the approach in fact adopted by Ofcom was a "wrong" approach".

The correct test

91. Drawing together all the various factors which I have now discussed, I come to the Tribunal's consideration of the correct approach, at paragraphs 447 and 448. The Tribunal had previously stated the approach as identified in the *TRD case*, but had rejected a material part of it on the basis that there was no onus on BT to justify its changes. On that basis, BT could promulgate the changes, under its contractual rights, and simply rest on those rights as a sufficient justification. As I have said, that seems to me to be incorrect. It is therefore for BT to justify its changes, when challenged. BT's justification depended primarily, in the end, on showing that it was in the interests of consumers. The welfare assessment was inconclusive, so BT was not able to make this proposition good on that basis, and the proposal had to be judged on the footing that it might be to the disadvantage of consumers.

92. In paragraph 447 the Tribunal gave two reasons for rejecting the test of whether it was shown that the NCCNs would provide benefits to consumers. These were the "regulatory absence" in dispute resolution and BT's private contractual rights. I have given my reasons for my conclusion that neither of these is a valid point. In paragraph 448 the Tribunal went on to reverse the burden of proof. Instead of requiring BT to justify its changes as being fair and reasonable (in the sense described in the *TRD case*), the Tribunal proposed that BT's private law rights (in a position of regulatory absence) should prevail so as to allow the changes to take effect, unless it could "clearly and distinctly" be shown that the change "would act as a material disbenefit to consumers". That approach presents opponents, and indeed Ofcom, with a formidable task, especially given the short timescale within which these disputes have to be resolved. In my judgment it is not correct. There is no good reason to reverse the burden and to relieve the proponent of the change (under whatever

provision of the SIA it may have arisen) of the need to show that the change is fair and reasonable, in the sense explained in the *TRD case*.

93. It seems to me, moreover, that this would be an odd position to adopt, for practical reasons, quite apart from the considerations that I have already mentioned. The proponent of such a change (here BT) is likely to have spent a good deal of time and effort in preparing for and formulating the change before it gives its contractual notice. In so doing it will, no doubt, consider alternatives, and also the likely impact of the change on its own circumstances, on those of consumers and those of other relevant participants in the market, as well as, more generally, in relation to the regulatory objectives. In that preparation, it will know that it may have to justify the change, either in negotiation to the other party or parties or, in the course of a dispute resolution process, to Ofcom. It therefore has an intrinsic advantage over the other party or parties, who may well not have any prior warning of the particular change before the contractual notice is served. To expect the opponent, likely to be starting from scratch at that stage, to muster evidence as to the effects of the change on consumers and otherwise, on a point which may well (as here) be very difficult to forecast, and to have to do so to the point of being able to show clearly and distinctly that the change would be detrimental to consumers, seems to me to be decidedly unrealistic, and not consonant with a proper regulatory approach.

94. I find another error earlier in the Tribunal's decision, at paragraph 396, where the Tribunal stated what seems to me to be a false dichotomy (see paragraph [48] above). The stark choice there postulated seems to me to overlook the function and duty of the regulator to consider all the various factors and to assess the balance of advantages and disadvantages, whether proved, probable, likely or merely possible, to take into account the degrees of probability in each case and the respective seriousness of each, and to come to a balanced assessment overall as to what outcome would most appropriately meet the relevant regulatory objectives. As appears from my quotation of what Ofcom said at paragraphs 9.31 and 9.32 of their second determination, at paragraph [41] above, that is what Ofcom said that they had done in the present case, placing greater weight, for what seem to me to be entirely legitimate reasons, on the risk of disbenefit to consumers. That involves a value judgment on the part of Ofcom, on which they could perhaps have come to a different conclusion on the same facts, and on which they might well have come to a different conclusion on different facts and evidence. But that is a matter for the regulator to decide. I can find no error in that approach.

95. I do not understand Ofcom to have said that innovative price changes could never be approved without conclusive proof that consumers would benefit. If they had said so, it would have been an improper fetter on their discretion and could inhibit desirable change. That is particularly true given the inevitable uncertainties involved in predicting consumer and CP reactions to price changes. In my judgment Ofcom did not fall into such an error here, as the Tribunal seems to have thought. It seems to me that Ofcom focussed on the relevant factors and exercised their judgment in a proper manner which was not vitiated by any error of law.

96. In turn, it seems to me that, having identified the wrong question in paragraph 396, the Tribunal came to the wrong answer in paragraph 397. In that paragraph it did not have regard to what Ofcom had done. Rather than pose two stark alternatives and choose one of them, Ofcom had approached the question by reference to the relevant

factors (and to none that were not relevant) and had come to a rational conclusion as to the weight to be given to each, having proper regard to the regulatory objectives laid down in the European and domestic legislation. That was the proper and correct approach.

Conclusion

97. I therefore conclude that Ofcom acted properly within their powers and in accordance with their duties in rejecting BT's NCCNs as not being fair and reasonable, and did not misdirect themselves in any relevant way, and that the Tribunal was wrong in law in reversing Ofcom's determination. I would allow the appeal and direct that BT's three NCCNs shall not have effect, and shall be treated as never having had effect. It is therefore not necessary to consider Telefónica's appeal against the Tribunal's consequential order, nor BT's Respondent's Notice on that aspect of the case.

Lord Justice Etherton

98. The Tribunal has carried out a careful and conscientious analysis. I agree, however, that this appeal should be allowed for the reasons given by Lloyd LJ. I add the following brief comments of my own since we are disagreeing with the Tribunal.

99. BT has argued strongly in support of the Tribunal's reasoning that Ofcom failed to take adequate account of BT's contractual rights under the SIA. I do not accept BT's analysis or, with respect, the Tribunal's reasoning on this aspect. There were several strands to BT's argument.

100. BT submitted that the CRF favours competition over regulation. While that is no doubt true in the most generalised theoretical terms, I do not consider that any meaningful principle to that effect can be deduced from the CRF which is helpful to resolving the present dispute. Provisions in the CRF to which we were referred, including recital (13) of the Access Directive, say no more in substance than the obvious proposition that, as markets become more competitive, Member States should be able to relax regulatory requirements.

101. Paragraph 26 of the SIA contains express provision for dispute resolution by Ofcom. Such dispute resolution is in any event required by Article 5(4) of the Access Directive. In those circumstances the fact that BT has contractual rights to vary charges under paragraph 12 seems to me to be entirely neutral from a regulatory perspective.

102. Contrary to the view expressed by the Tribunal in paragraph 277 of its decision, I consider that the absence of *ex ante* regulation is also entirely neutral. There is no difference in the regulatory objectives, whether the regulation is *ex ante* or otherwise. The fact that *ex ante* regulation is predicated on significant market power whereas other regulation is not does not undermine the principle of the CRF, and the Access Directive in particular, that national regulatory authorities must exercise their powers as and where and when necessary in order to ensure that, as regards electronic communications networks and services, there is adequate access and interconnection and interoperability of services in the interests of users, including consumers: see also sections 3 and 4 of the 2003 Act.

103. BT has laid considerable emphasis on the fact that the charges presently in dispute arose under paragraph 12 of the SIA rather than paragraph 13. I cannot see that this makes any difference other than that expressly stated in those paragraphs, namely that the charges imposed by BT under paragraph 12 are binding and effective unless and until Ofcom determines otherwise whereas a disputed charge under paragraph 13 becomes binding and effective only if and to the extent that Ofcom so determines. In both situations, however, the regulatory objectives of Ofcom remain the same: compare the *TRD case* and Lloyd LJ's comments in paragraph [71] above.

104. Turning to matters relied upon by the Tribunal other than BT's private law rights, the Tribunal was of the view that, since the outcome of the welfare assessment by BT was inconclusive (that is to say, whether or not the NCCNs did provide benefit to consumers), it could not override Principle 2(ii) and BT's private law rights. The Tribunal said in paragraph 448 that those rights could only be overridden if it can be clearly demonstrated that the interests of consumers will be disadvantaged. Aside from what I have already said about BT's private law rights, I do not agree with that approach for two reasons. Firstly, the Tribunal does not appear to have taken the view that it was differing from Ofcom on the welfare assessment, but the Tribunal mischaracterised Ofcom's welfare assessment in saying that the assessment was inconclusive. Ofcom's conclusion in paragraphs 1.24 and 9.31 of its second determination was that there would be a "negative Mobile tariff package effect" and so there was an identifiable risk of an overall adverse effect on consumers. Secondly, it was a policy matter for Ofcom, as the national regulatory authority, how best to promote the regulatory objectives in those circumstances: see section 4(11) of the 2003 Act. Ofcom was entitled to make that policy judgment by concluding in paragraphs 1.24, 8.157 and 9.32 that it was right to place greater weight on the potential risk to consumers Ofcom had identified than on the potential benefits of allowing the charges in the NCCNs to stand.

105. The Tribunal said in paragraphs 392 and 442 that interference with the price changes by BT would distort competition by placing a restraint on pricing freedom on BT and any other terminating CP which might wish to introduce similar pricing structures to those contained in the NCCNs. The Tribunal was of the view, therefore, that non-interference would promote competition rather than detract from it and that was a powerful indicator in favour of allowing BT to introduce the new prices. I respectfully consider, however, that analysis was flawed for two reasons. First, the Tribunal said in paragraph 377 that the benefit to service providers should be discounted as so minor as to be irrelevant. Secondly, so far as concerns consumers, the Tribunal considered (paragraph 378(2)) that the indirect effect should not be taken into account; and the welfare assessment, even after taking into account the direct benefit, was at best inconclusive and, in Ofcom's view, posed a real risk of harm. There was no basis, therefore, for concluding that non-interference with the new pricing structure would benefit competition in any desirable way for the purposes of the CRF, and the Access Directive in particular.

Lord Justice Elias

106. I agree with both judgments.

Annex – relevant provisions of the SIA

Paragraph 12

12.1 For a BT service or facility the Operator shall pay to BT the charges specified from time to time in the Carrier Price List.

12.2 BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date, being a date not less than 28 calendar days after the date of such publication, unless a period other than 28 Calendar days is expressly specified in a Schedule.

12.3 Notwithstanding the provisions of paragraph 12.2, BT may vary the charge which has retrospective effect for a BT service or facility by publication in the Carrier Price List if the variation is as a result of:

12.3.1 a variation of a charge which has retrospective effect payable by or to BT in respect of any Third Party Operator or an Authorised Overseas System; or

12.3.2 an order, direction, determination or requirement of OFCOM or any other regulatory authority or body or competent jurisdiction.

. . .

12.5 As soon as reasonably practicable following an order, direction, determination or consent (for the purposes of this paragraph 12 a "determination" which expression includes a redetermination referred to in paragraph 12.6) by OFCOM of a charge (or the means of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such determination.

12.6 If a determination referred to in paragraph 12.5 is subject to a legal challenge, the Parties shall, without prejudice, treat the determination as valid until the conclusion of the legal proceedings, unless the court otherwise directs. If the court finds the determination to be unlawful then the Parties agree to revert to the charges payable immediately prior to such determination being made and BT shall make any necessary alterations to the Carrier Price List. As soon as reasonably practicable following a re-determination by OFCOM (as a result of a legal challenge) of a charge (or the means of calculating that charge) for a BT service or facility, BT shall make any necessary alterations to the Carrier Price List so that it accords with such re-determination.

…

12.9 If there is a difference between a charge for a BT service or facility specified in the Carrier Price List and a charge determined by OFCOM, the charge determined by OFCOM shall prevail.

Paragraph 13

13.1 For an Operator service or facility BT shall pay to the Operator the charges specified from time to time in the Carrier Price List.

13.2 The Operator may from time to time by sending to such person, as BT may notify to the Operator from time to time, a notice in writing in duplicate request a variation to a charge for an Operator service or facility ("Charge Change Notice"). Such notice shall specify the proposed new charge and the date on which it is proposed that the variation is to become effective ("Charge Change Proposal"). BT shall within 4 Working Days of receipt of such notice acknowledge receipt and within a reasonable time notify the Operator in writing of acceptance or rejection of the proposed variation.

13.3 BT may from time to time by sending to such person, as the Operator may notify to BT from time to time, a notice in writing in duplicate request a variation to a charge for an Operator service or facility ("Charge Change Notice"). Such notice shall specify the proposed new charge and the date on which it is proposed that the variation is to become effective ("Charge Change Proposal"). The Operator shall within 4 Working Days of receipt of such notice acknowledge receipt and within 14 days of receipt of such notice notify BT in writing of acceptance or rejection of the proposed variation. If the Operator has not accepted the Charge Change Proposal within 14 days of receipt of such notice (or such longer period as may be agreed in writing) the proposed variation shall be deemed to have been rejected.

13.4 If the party receiving a Charge Change Notice accepts the Charge Change Proposal the Parties shall forthwith enter into an agreement to modify the Agreement in accordance with the Charge Change Proposal.

13.5 If the party receiving a Charge Change Notice rejects the Charge Change Proposal the Parties shall forthwith negotiate in good faith.

13.6 If following rejection of a Charge Change Proposal and negotiation, the Parties agree that the Charge Change Notice requires modification, the Party who sent the Charge Change Notice may send a further Charge Change Notice.

13.7 If following rejection of a Charge Change Proposal and negotiation the Parties fail to reach agreement within 14 days of the rejection of the Charge Change Proposal, either Party may, not later than 1 month after the expiration of such 14 days period, refer the matters in dispute to OFCOM.

13.8 If OFCOM upholds the Charge Change Proposal in the Charge Change Notice without modification the Charge Change Proposal shall take effect on the date specified in the Charge Change Notice and the Parties shall forthwith enter into an agreement to modify the Agreement in accordance with this paragraph 13.8.

13.9 If OFCOM does not uphold the Charge Change Proposal in the Change Charge Notice without modification then that Change Charge Notice shall cease to be of any effect. In the event that OFCOM proceeds to make an order, direction, determination or requirement following a referral pursuant to paragraph 13.7 then the Party who sent the Charge Change Notice shall send a further Charge Change Notice in accordance with the order, direction, determination or requirement of OFCOM and the Parties shall forthwith enter into an agreement to modify the Agreement in accordance with this paragraph 13.9.

Paragraph 26

26.1 If a Party (the "disputing Party") wishes to invoke the dispute procedure specified in this paragraph, it shall send written notice of the Dispute to the other party's commercial contact (the "receiving Party"). The notice shall contain all relevant details including the nature and extent of the Dispute. The receiving party shall acknowledge the receipt of such notice of the Dispute within two Working Days.

This paragraph 26 does not apply to disputes relating to:

26.1.1 the accuracy of an invoices, to which paragraph 6 of Annex B shall apply

26.1.2 the application of BT's credit management provisions in accordance with paragraph 14B and Annex F, to which the dispute resolution procedures specified therein will apply.

. . .

26.3 Following notice under paragraph 26.1, the Parties shall consult in good faith to try to resolve the Dispute. If agreement is not reached within 14 days, the Dispute may be escalated by either party under paragraph 26.4.

26.4 If the Dispute is not resolved under paragraph 26.3, either Party may send written notice to the other party's commercial contact requiring the Dispute to be escalated and stating to whom that Party has escalated the Dispute. The commercial contact receiving such a notice shall acknowledge the receipt of such notice within four Working days and state to whom the Dispute has been escalated.

26.5 Following notice under paragraph 26.4, the Parties shall work in good faith to try to resolve such Dispute, involving appropriate senior managers and shall use reasonable endeavours to resolve the dispute within four weeks, except if the Parties agree otherwise.

26.6 If the Dispute is not resolved at any time, either Party may refer the Dispute to OFCOM and shall forthwith send a copy of the referral to the other Party. In the event of a reference to OFCOM, both Parties shall complete a detailed dispute report which shall include origin, nature, extent, issues and any proposals for resolution and make their respective reports available to OFCOM and each other within 28 days of the referral.

26.7 The above procedures are without prejudice to any other rights and remedies that may be available in respect of any breach of any provisions of this Agreement.

26.8 Nothing herein shall prevent a Party from:

26.10.1[4] seeking (including obtaining or implementing) interlocutory or other immediate relief;

26.10.2 referring the Dispute to OFCOM in accordance with any right (if any) either Party may have to request a determination or other appropriate steps for its resolution.

[4] The odd numbering is in the original.

26.9 The dispute procedure specified in this paragraph shall not apply to disputes arising out of the service of a Charge Change Notice.