Neutral citation [2007] CAT 36

IN THE COMPETITION APPEAL TRIBUNAL

Case Number: 1080/3/3/07

Victoria House
Bloomsbury Place
London WC1A 2EB

21 December 2007

Before:

VIVIEN ROSE
(Chairman)
PETER CLAYTON
ARTHUR PRYOR CB

Sitting as a Tribunal in England and Wales

BETWEEN:

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

Appellant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC

HUTCHISON 3G UK LIMITED

VODAFONE LIMITED

T-MOBILE (UK) LIMITED

Interveners

JUDGMENT ON THE PRELIMINARY ISSUES

APPEARANCES

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of the Appellant.

Mr. Peter Roth QC and Mr. Ben Lask (instructed by the Office of Communications) appeared for the Respondent.

Mr. Graham Read QC and Miss Anneli Howard (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

I BACKGROUND

1. By an Order dated 6 November 2007 (amended on 9 November 2007), the Tribunal ordered that the following issues arising in this appeal be tried as preliminary issues:

> (1) whether, on the true construction of section 185 of the Communications Act 2003, and having regard to the events which have happened, there was a "dispute" between British Telecommunications plc and the appellant within the meaning of that section capable of being referred to the respondent for resolution in accordance with that section ("the first preliminary issue");
>
> (2) whether, on the true construction of section 185 of that Act and Rule 8(1) of the Tribunal Rules, the appellant would, in proceedings challenging the final determination of the alleged dispute between the appellant and British Telecommunications plc, have been time barred from challenging the jurisdiction of the respondent to resolve that alleged dispute ("the second preliminary issue").

2. The appeal in which these preliminary issues arise is a challenge to the Respondent's decision adopted on 9 February 2007 to accept jurisdiction under section 185 of the Communications Act 2003 ("the 2003 Act") over a matter – to use a neutral term – referred to it by British Telecommunications plc ("BT"). That matter concerns the wholesale mobile call termination rates charged by the Appellant ("Orange") to BT. Mobile call termination ("MCT") is the service necessary for an operator of either a fixed or mobile network to connect a caller with the intended recipient of a call where the call is made to a recipient on a mobile network.

3. Section 185 of the 2003 Act provides as follows:

> "(1) This section applies in the case of a dispute relating to the provision of network access if it is –
>
> (a) a dispute between different communications providers;
>
> ….
>
> (2) This section also applies in the case of any other dispute if –
>
> (a) it relates to rights and obligations conferred or imposed by or under [Part 2 of the 2003 Act] or any of the enactments relating to the management of the radio spectrum that are not contained in this Part;
>
> (b) it is a dispute between different communications providers; and
>
> (c) it is not an excluded dispute.

> (3) Any one or more of the parties to the dispute may refer it to OFCOM.
>
> …
>
> (8) For the purposes of this section –
>
> > (a) the disputes that relate to the provision of network access include disputes as to the terms and conditions on which it is or may be provided in a particular case; and
> >
> > (b) the disputes that relate to an obligation include disputes as to the terms or conditions on which any transaction is to be entered into for the purpose of complying with that obligation".

4. So far as is relevant for the purpose of these preliminary issues, sections 185(1) and (2) of the 2003 Act divide disputes into two kinds; disputes "relating to the provision of network access" which fall within subsection (1) and other disputes which relate to rights and obligations conferred or imposed by or under Part 2 of the 2003 Act which fall within section 185(2). These subsections are mutually exclusive so that a dispute cannot fall within both subsections.

5. Section 185 of the 2003 Act was enacted to implement certain of the United Kingdom's obligations under Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services ("the Framework Directive") and Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive"). Those Directives were adopted by the European Parliament and Council on the 7 March 2002 and came into force on the 24 April 2002. The Access Directive is one of four Directives which are commonly referred to as the "Specific Directives" to distinguish them from the Framework Directive.

6. There are two different provisions of the Directives which concern the powers that Member States must confer on national regulatory authorities such as OFCOM to resolve disputes between electronic communications providers, namely Article 20 of the Framework Directive and Article 5(4) of the Access Directive.

7. It is common ground between the parties that the provisions of the Directives not only require Member States to confer on national regulatory authorities the powers specified but also preclude Member States from conferring any wider powers for dispute

resolution jurisdiction on those authorities. All the parties therefore made their submissions on the basis that a dispute cannot fall within section 185 if it does not also fall within one or both of those two Directive provisions.

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

> "1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
>
> 2. Member States may make provision for national regulatory authorities to decline to resolve a dispute through binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. ….
>
> 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".

9. Article 20 thus covers all disputes arising in connection with obligations under the Directives without distinguishing between disputes relating to the provision of network access and other disputes. The 32nd Recital to the Framework Directive describes what Article 20 is meant to achieve. It states:

> "32. In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives".

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

> "With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of [the Framework Directive], in accordance with the provisions of this Directive

> and the procedures referred to in Articles 6 and 7, 20 and 21 of [the Framework Directive]".

11. Article 5(4) therefore covers disputes "with regard to access and interconnection" whether they arise in relation to a regulatory obligation or not. There is therefore an overlap between Article 20 of the Framework Directive and Article 5(4) of the Access Directive in that a dispute which is "with regard to access and interconnection" and which also arises in connection with a regulatory obligation will fall within both provisions.

12. The terms "access" and "interconnection" are defined in Article 2 of the Access Directive:

> " 'access' means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. …"
>
> 'interconnection' means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators".

13. The events leading up to BT's reference of this matter to OFCOM are as follows. Orange and BT are parties to a contract referred to as BT's Standard Interconnect Agreement or SIA. BT is also a party to an SIA with each of the other mobile network operators who have intervened in these proceedings. This SIA is a substantial document which covers a wide range of services provided by BT to Orange and by Orange to BT. The SIA was originally concluded between the parties in about 1996. It has since been varied in numerous respects and on numerous occasions to introduce new services and to reflect changes in the market. There is, we were told, no consolidated version of the SIA which could be made available to the Tribunal as setting out all the terms which were in force between the parties as at the relevant time. The clauses to which we were referred were those set out in a version of the agreement which was concluded in March 2001 and that version was appended to Orange's Notice of Appeal. We understand that the same clauses formed part of earlier versions of the SIA but all the parties were content for us to proceed on the basis that the wording set

out in the version agreed in March 2001 is, so far as material, the wording that applied at the time relevant to this appeal.

14. Clause 2 of the SIA concerns commencement and duration and provides that:

> "2.1 This Agreement takes effect on the date hereof and shall continue until termination pursuant to this Agreement.
>
> …
>
> 2.3 A Party may terminate this Agreement by giving at any time to the other not less than 24 months' written notice to terminate.
>
> 2.4 After a notice has been given pursuant to paragraph … 2.3 a Party may request the other Party to carry on good faith negotiations with a view to entering into a new agreement.
>
> 2.5 Following a request pursuant to paragraph 2.4, if on termination of this Agreement either Party would be obliged under its Licence to enter into a new interconnection agreement with the other Party the Parties shall carry on good faith negotiations with a view to entering into a new agreement within a reasonable period …"

15. Clauses 12 deals with the provision of services by BT to Orange and clause 13 deals with the provision of services by Orange to BT. Both clauses stipulate that the charges payable by the recipient of the services are the charges specified from time to time in a document known as the Carrier Price List. Both clauses also contain provision for the variation of those charges though these are not the same in both clauses.

16. Clause 13 sets out the mechanism whereby the parties can seek to vary the price charged for the services that the Operator, in this case Orange, provides to BT. Clause 13 provides as follows:

> **"13. OPERATOR SERVICES**
>
> 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 of 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 of 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 the Director General.

13.8 If the Director General 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 the Director General does not uphold the Charge Change Proposal in the Charge Change Notice without modification then that Charge Change Notice shall cease to be of any effect. In the event that the Director General 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 the Director General and the Parties shall forthwith enter into an agreement to modify the Agreement in accordance with this paragraph 13.9".

17. The term "Director General" is defined elsewhere in the SIA as meaning the Director General of Telecommunications. It is common ground between the parties that these references must now be read as referring to OFCOM and the Tribunal is prepared to treat the references in that light: see *Hutchison 3G UK Limited v OFCOM* [2005] CAT 39, paragraph 135. Clearly the clause was drafted before the adoption of the Framework or Access Directives and before the enactment of section 185 of the

2003 Act. But it is also common ground that OFCOM's jurisdiction to resolve disputes referred to it under clause 13.7 cannot now go beyond the jurisdiction conferred on it by section 185. The Tribunal has not received any submissions on how the clause fell to be construed before the 2003 Act came into force.

18. The parties to these SIA agreements with BT refer to a Charge Change Notice served under either paragraph 13.2 or 13.3 of the SIA as an "Operator Charge Change Notice" or "OCCN" to distinguish them from a notice concerning a proposed change in BT's prices served under clause 12 of the SIA.

19. Orange provides mobile voice call termination services using both its 2G and 3G networks. At the relevant time, which is May 2006 to January 2007, the rate charged by mobile network operators to other fixed and mobile network operators for MCT on their 2G networks was subject to a charge control imposed by OFCOM as set out in the OFCOM Statement, *Wholesale Mobile Voice Call Termination*, 1 June 2004 ("the June 2004 Statement"). The rate charged by them for termination of calls on their 3G networks was not regulated by the June 2004 Statement.

20. In 2005 one of the mobile network operators, Vodafone Limited ("Vodafone"), introduced what was referred to as a "blended rate" to terminate voice calls to its subscribers. This was because Vodafone had started to terminate voice calls from other operators using their 3G network as well as their 2G network. Rather than charge a different amount for the call termination depending on which network was in fact used for that particular call, Vodafone set a blended rate which applied to all calls and which incorporated a component representing the price of 2G terminated calls and a component representing the price of 3G terminated calls, the respective size of the two components reflecting what proportion of total calls were forecast to be terminated on each network.

21. Orange complained to OFCOM about the blended rate set by Vodafone claiming that the effect of it was that Vodafone was charging a price for call connection on the 2G network which was above the regulated price permitted by the June 2004 Statement. OFCOM responded in March 2006 stating that it did not consider that charging a blended rate amounted to charging a higher than permissible rate for 2G termination.

According to OFCOM, the June 2004 Statement imposed regulation only on 2G termination rates and the component of the blended rate about which Orange was complaining related to rates for 3G termination which were, at that time, unregulated.

22. On 23 May 2006, Orange issued an OCCN to BT pursuant to clause 13.2 of the SIA. The OCCN proposed a blended MCT rate which, like the Vodafone rate, combined a rate for 2G with a rate for 3G MCT. This represented an overall increase to the previous rate for MCT services though it did not increase the 2G component of that rate.

23. BT initially rejected the OCCN but following a period of negotiation between the parties, BT indicated to Orange on 3 July 2006 that it would accept the blended rate. BT therefore signed the OCCN document accepting the rate on 10 July 2006 and the blended rate took effect on 15 August 2006.

24. On 19 July 2006, BT issued its own OCCN to Orange also under clause 13.3 seeking to reduce the MCT rate to the level that had prevailed before Orange's May OCCN. In his witness statement filed on behalf of BT, Mr Colin Annette who was at the time Director of Regulatory Affairs BT Wholesale, explained this change of heart:

> "I should make clear that BT was influenced to take this decision of 3rd July 2006 by two factors. Firstly BT was in commercial negotiations with Orange over a completely separate and very substantial project. BT was therefore inclined in all the circumstances not unnecessarily to "rock the boat" with Orange. There were also other commercial reasons why BT thought it might in all the circumstances be appropriate to accept the rates. However the second major factor was that only Vodafone and Orange had so far sought a price rise. In particular O2 and T-Mobile had not sought to raise their rates. BT therefore felt financially it could accommodate Orange's rate rises provided O2 and T-Mobile did not also try to go to a blended rate charge.
>
> "However all of that changed within literally the next few days when O2 and T-Mobile served OCCNs on BT. Whatever the previous commercial reasons for agreeing Orange's original OCCN, BT felt it had no option but to challenge all the MNOs which were moving to a blended rate. Thus on 19th July, BT served an OCCN on Vodafone. On the same day BT served an OCCN on Orange. This was all a direct response to the fact that all the MNOs were now seeking to move to a blended rate".

25. Orange rejected the BT OCCN on 1 August 2006. During the remainder of 2006 there was some correspondence between the parties and it appears that meetings took place to consider the position.

26. Further, by way of background, on 13 September 2006 OFCOM imposed an access-related condition on BT under section 74(1) of the 2003 Act requiring it to provide "end-to-end connectivity", that is to say, a condition which obliged BT to purchase wholesale MCT services on reasonable terms from any MNO requesting it to do so ("the September 2006 Statement"). Before the September 2006 Statement end-to-end connectivity was ensured by BT's obligations as a Universal Service provider in accordance with Guidance issued by the former Director General of Telecommunications on "End-to-end connectivity" dated 27 May 2003[1] and before that by a condition in BT's licence under the old regulatory regime: see for example the discussion in *Hutchison 3G UK Limited v OFCOM* [2005] CAT 39 paragraph 119. But at the time that OFCOM assumed jurisdiction over this dispute, the source of BT's end-to-end connectivity obligation was the September 2006 Statement.

27. On 22 January 2007 BT lodged its request to OFCOM to resolve the dispute under section 185 of the 2003 Act. On the same day, OFCOM invited Orange to comment on the dispute reference. Orange responded in a letter dated 29 January 2007 in which it submitted, among other things, that the contractual OCCN procedure having run its course, there was no ongoing dispute between Orange and BT with regard to mobile termination charges. OFCOM, however, decided to accept the reference and notified Orange of this by a letter dated 9 February 2007.

28. By February 2007 OFCOM had had referred to it a number of similar disagreements over the introduction of blended rates between BT and each of Hutchison 3G UK Limited ("H3G"), T-Mobile (UK) Limited ("T-Mobile"), O2 (UK) Limited ("O2") and Vodafone.

29. OFCOM published a notice of its decision in the 26 February 2007 issue of its Competition Bulletin. That notice described the subject matter of these disputes in the following terms:

> "The scope of the disputes is to assess the charges either proposed to BT or paid by BT for call termination in relation to each of the respective MNOs during the periods covered by the respective disputes. Specifically, Ofcom will consider whether:

[1] http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/endcon0503.pdf

> • Prior to 13 September 2006, there is any reason why BT should not have been charged on the basis of the disputed call termination charges; and
>
> • With effect from 13 September 2006, the disputed call termination charges either proposed to BT or paid by BT were not reasonable terms and conditions as set out in the End-to-End obligation.
>
> If Ofcom establishes that the answer to either of these questions is 'yes', Ofcom will consider whether it is appropriate to determine call termination charges in this case, and if so, will determine what these charges should be. Ofcom will also consider whether it is appropriate to require that H3G, Orange and Vodafone make any repayments to BT in respect of the disputed call termination charges and also whether it is appropriate to require that BT make any repayments to T-Mobile and O2 in respect of the disputed call termination charges".

30. Orange lodged a Notice of Appeal on 5 April 2007 contesting OFCOM's decision of 9 February 2007 on the following grounds:

    (a) In accepting BT's dispute reference in relation to Orange, OFCOM erred in law in deciding that a dispute existed between BT and Orange in relation to Orange's mobile call termination charges for the purposes of sections 185-191 of the 2003 Act ("Ground One");

    (b) Without prejudice to Ground One, in the event that a dispute did exist between Orange and BT, OFCOM erred in law in deciding that it was appropriate for it to handle the alleged dispute ("Ground Two");

    (c) With respect to the scope of the dispute as notified to Orange on 9 February 2007, OFCOM erred in law in so far as it has decided that the end-to-end connectivity obligation imposed on BT on 13 September 2006 was a relevant consideration ("Ground Three").

31. Ground One is the ground which is most relevant to the preliminary issues which are the subject of this judgment. It is accepted by the parties that if the first preliminary issue is decided in Orange's favour then Grounds Two and Three fall away.

32. For reasons which will become clear from the discussion below about the second preliminary issue, further proceedings in the appeal commenced by Orange's Notice of Appeal were adjourned awaiting OFCOM's decision on the merits of the matters over which it had assumed jurisdiction.

33. On 7 July 2007, OFCOM published combined determinations resolving all the matters between BT and the different 2G/3G MNOs referred to it under section 185 in relation to the charging of blended rates ("the Final Determination").

34. The Final Determination, broadly speaking, approved the level of termination rates proposed by Orange and the other MNOs. In the light of this, Orange wrote to the Tribunal on 7 September 2007 indicating that Orange did not intend to lodge a further appeal against the Final Determination. As to the further conduct of the current appeal, Orange stated that it would pursue the appeal if BT lodged an appeal against the Final Determination. In the event BT did lodge an appeal against the Final Determination on 7 September 2007 challenging, amongst other things, OFCOM's determination of the dispute between BT and Orange. That case, Case 1090/3/3/07, is currently pending before the Tribunal. A number of other network operators, both mobile and fixed, have challenged that Final Determination on a range of grounds. Those appeals, jointly referred to as the Termination Rate Dispute appeals, are also currently pending before the Tribunal (Cases 1089, 1091 and 1092/3/3/07).

35. None of the other MNOs has sought to argue in the Termination Rate Dispute appeals that OFCOM did not have jurisdiction to determine the dispute between them and BT. By an Order made on 6 November 2007 the Tribunal granted permission to H3G, T-Mobile, BT and Vodafone to intervene in Orange's appeal. In ordering the hearing of these preliminary issues, the Tribunal made clear that it did not intend to consider the effect of a finding in Orange's favour on those other appeals. Vodafone and T-Mobile did not attend the hearing of the preliminary issue. Vodafone made written submissions in which they supported Orange's case on the first preliminary issue. Vodafone reserved its position as to what effect a finding in Orange's favour on that issue would have on OFCOM's determination of the dispute between BT and Vodafone.

II THE FIRST PRELIMINARY ISSUE

36. The first preliminary issue is whether, on the true construction of section 185 of the 2003 Act, and having regard to the events which have happened, there was a "dispute" between BT and Orange within the meaning of that section capable of being referred to the respondent for resolution in accordance with that section.

37. Orange puts its case on this issue in two ways. The first limb (Ground 1(a)) is that the alleged dispute does not fall within either section 185(1) or section 185(2). The second limb (Ground 1(b)) is that, having regard to the terms of the SIA, there was no "dispute" between BT and Orange within the meaning of section 185 because BT had not complied with the dispute resolution mechanism set out in clause 13.7.

GROUND 1(A): THE INTERPRETATION OF THE STATUTORY PROVISIONS

38. Ground 1(a) also has two separate limbs reflecting, in Orange's contention, the two different powers required to be conferred on OFCOM by the Framework and Access Directives and hence the two different situations in which section 185 in fact confers jurisdiction on OFCOM to resolve disputes.

39. So far as the proper construction of section 185 is concerned, it is common ground that:

(a) section 185(1) of the 2003 Act implements that part of Article 5(4) of the Access Directive which requires the national regulatory authority to be able to intervene in the absence of agreement between the parties with regard to the access and interconnection matters covered by that article;

(b) section 105 of the 2003 Act implements that part of Article 5(4) of the Access Directive which requires the national regulatory authority to be able to intervene on its own initiative where justified with regard to access and interconnection matters covered by that article; and

(c) section 185(2) of the 2003 Act implements that part of Article 20 of the Framework Directive which requires the national regulatory authority to be empowered to issue a binding decision in the event of a dispute arising in connection with regulatory obligations at least where those obligations do **not** relate to access or interconnection.

40. The parties do not necessarily agree as to whether the part of Article 20 which requires the national regulatory authority to be empowered to resolve disputes which arise in connection with regulatory obligations which concern access and interconnection has been implemented by section 185(1) or (2). Whether the Tribunal needs to resolve that

question depends on the Tribunal's conclusion as to the meaning and scope of the Directive provisions.

41. When determining the scope of statutory powers it is usual to begin with an examination of the wording of the statutory provisions themselves and, having decided what the natural meaning of those words is, to turn to consider whether that meaning is consistent with the European provisions which the statute aims to implement. In this case, however, it is convenient to approach the issue the other way round and to consider first the scope of the European provisions and then determine how they fit with the provisions of the 2003 Act.

Article 5(4) of the Access Directive and its implementation in the United Kingdom

The parties' submissions

42. The principal issue between the parties concerns what kind of disputes relating to access and interconnection the regulator can be empowered to resolve.

43. Orange argues for a narrow construction of Article 5(4). In summary, they submit that, having regard to the underlying rationale of the regulatory framework and the other provisions of the Access Directive, it is clear that the Access Directive is intended only to confer on regulators powers to perform specific tasks directed at ensuring that interconnection takes place on reasonable terms. It is accepted that at the point when the parties are negotiating entering into an interconnection agreement, a dispute which relates to the terms and conditions on which it will be supplied is within the scope of Article 5(4). But, Orange argues, once interconnection has been established the regulator is not entitled to intervene either on its own initiative or by means of the dispute resolution procedure in the on-going commercial arrangements between the parties as to the terms and conditions under which interconnection takes place.

44. OFCOM in contrast rely on the broad wording of Article 5(4) as covering a much wider range of disputes. They point to the fact that Article 5(4) refers simply to disputes "with regard to access and interconnection" and submit that there is nothing in the rest of that article or in other provisions either of the Access Directive or the Framework Directive which constrains that straightforward meaning. H3G, intervening in support

of OFCOM, submit that it is necessary to construe Article 5(4) in the light of the wording of and the policy behind other provisions of the two Directives. But H3G contend that if one does so interpret it, one sees that in fact this supports a wider not a narrower construction of Article 5(4).

Orange's case on Article 5(4) of the Access Directive and section 185(1)

45. Orange points first to Recital 1 of the Framework Directive. This indicates that the new regulatory framework comprising the Framework Directive and the Specific Directives has been adopted against the background that the previous regulatory framework had succeeded in creating the conditions for effective competition in the telecommunications sector. Recital 27 then goes on to state that it is essential that *ex ante* regulatory obligations are imposed only "where there is not effective competition", that is where there are one or more undertakings with significant market power and where competition law remedies are not sufficient to address the problem.

46. Article 1 of the Framework Directive then refers to laying down tasks for national regulatory authorities to perform within the harmonised framework for telecommunications regulation. Article 8 similarly refers to regulatory tasks specified in the Directives and provides that in carrying out those tasks, the national regulatory authorities must aim to achieve the objectives set out in that Article, for example the objective of promoting competition and contributing to the internal market.

47. It is important therefore, Orange submits, to identify carefully what are the tasks that the Access Directive imposes on the national regulatory authorities. Turning to that Directive, Article 1 provides:

> "This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved".

48. This, when read together with the Recitals to the Access Directive, points to the fact that the primary aim of the Directive is to ensure that interconnection is established. Orange also points to Article 4 which sets out the rights and obligations of undertakings

in relation to negotiating interconnection with each other and Article 5(1) which provides:

> "National Regulatory Authorities shall, acting in pursuit of the objectives set out in Article 8 of the Framework Directive encourage and, where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, and sustainable competition and gives the maximum benefit to end-users.
>
> In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users including in justified cases the obligation to interconnect their networks where this is not already the case".

49. Thus the national regulatory authority can take measures to ensure end-to-end connectivity where access has not already been established. But the tasks conferred on the regulator and hence its powers and functions under this Directive do not go further than that. It follows that OFCOM's powers under section 185 of the 2003 Act do not go further than that either.

50. Turning to the wording of Article 5(4) itself, Orange emphasises the stipulation towards the end of the provision that the national regulatory authority's powers must be exercised "in accordance with the provisions of this Directive…". This means, according to Orange, that the article does not give the regulator a free standing power to intervene outside the scope of the regulatory tasks conferred on them under the Directive. To put it another way, Article 5(4) does not, in Orange's submission, contain a distinct regulatory function of itself but merely sets up a means whereby the regulator can fulfil the primary task conferred on it by the Directive, namely to ensure that interconnection is established. The national regulatory authority does not, therefore, have a wide ranging role under the Access Directive to resolve commercial disputes as to the terms on which interconnection is provided unless the dispute threatens the continued provision of access.

51. As regards the implementation of Article 5(4) by section 185 of the 2003 Act, Orange argues that the phrase "dispute relating to the provision of network access" in section

185(1) must be narrowly construed to reflect the narrow remit established by Article 5(4). The reference to the "provision" of network access points to disputes being limited either to those which arise when the undertakings are first negotiating the terms of access for a particular service or where it is plausible that the outcome of the dispute might be the discontinuation or disruption of access.

52. Orange argues further that a wider interpretation which construes "dispute relating to the provision of network access" in section 185(1) as covering any dispute, provided that it relates in a general way to network access, would not make sense. This is because OFCOM's ability to decline to accept disputes for resolution is very limited. According to section 186 of the 2003 Act (set out in paragraph 122, below) OFCOM must decide that it is appropriate for them to handle the dispute unless the narrow conditions in section 186(3) are made out. This reflects the fact that the Directives not only require Member States to confer dispute resolution powers on the regulator but also appear to confer rights on undertakings to have their disputes resolved. The fact that OFCOM must accept disputes referred to it, Orange argue, points in favour of a narrow construction of section 185. Otherwise OFCOM might be flooded with references by parties seeking arbitration of commercial disputes which do not in fact engage any of OFCOM's regulatory functions.

53. Turning to the facts of the present case, Orange submits that in the current dispute there was no risk to continued interconnection. It is clear from the terms of the SIA that Orange's rejection of the BT OCCN served on 19 July 2006 did not put interconnection at risk. Rather it is accepted on all sides that the effect of the rejection of an OCCN is simply that the contract continues in accordance with the terms that applied before the OCCN was served. Orange submits that it is not credible to suggest that there was a serious risk that BT would seek to terminate the agreement because it was unhappy with the Orange's rejection of the OCCN. The right to terminate is in any event, according to clause 2 of the SIA, subject to a two year termination period.

54. Orange accepts that the logic of its argument is that if BT had rejected Orange's May OCCN and refused to accept the blended MCT rate, Orange would not have been able to invoke the OFCOM dispute resolution procedure in section 185 either. In that event, the agreement would not have been varied and the unblended 2G MCT rates would

have continued. It was put to Orange at the hearing that this meant that the parties had committed themselves in 1996 to a contract which was intended to run indefinitely, was subject to termination on two years' notice and in which there was, according to their argument, no mechanism for independent resolution of disputes over whether the numerous prices set for services provided under the contract should be varied. The answer from Miss Demetriou on behalf of Orange was that this appeared to be the case but could not affect the proper construction of the 2003 Act. She further drew our attention to the fact that clause 12 of the SIA which deals with the charges that BT levies for services provided by BT to Orange does not incorporate any dispute resolution procedure.

OFCOM's submissions on Article 5(4) of the Access Directive and section 185(1)

55. OFCOM argued that it was not right to construe Article 5(4) as limited to situations where the parties had not yet concluded an interconnection agreement at all or where the nature of the dispute meant that continued interconnection was jeopardised. OFCOM referred the Tribunal to Recital 6 of the Access Directive which states that:

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

According to OFCOM, the fact that the example given in this Recital relates to ensuring end-to-end connectivity should not be interpreted as limiting the power to that type of situation. They agree that the regulator's intervention should be aimed at securing that access and interconnection take place. But they do not accept that this rules out all disputes as to the terms and conditions for interconnection once access has been established. They do not accept, therefore, that the wide wording of Article 5(4) – that it covers disputes "with regard to access and interconnection" – is qualified either by Article 5(1) or by other provisions of the Access or Framework Directives. They interpret the requirement in Article 5(4) that the powers to intervene must be exercised "in accordance with the provisions of this Directive" as meaning that, for example, the national regulatory authority cannot impose the kind of obligation that comes within the

subsequent articles of the Directive without complying with the procedural requirements of those subsequent articles.

56. OFCOM rejects the contention that Article 5(4) power is not a free standing regulatory function separate from the NRA's other functions conferred pursuant to the Directives. OFCOM regards this point as having been decided against Orange by the Tribunal's earlier decision in *Hutchison 3G UK Limited v OFCOM* [2005] CAT 39. That case ("*Hutchison I*") concerned OFCOM's decision under sections 48 and 79 of the 2003 Act that H3G had significant market power in the market in which it supplied wholesale mobile termination services. OFCOM found that H3G had 100 per cent market share in the market for wholesale voice call termination on its own network and that there were absolute barriers of entry to that market. Hence, they found, H3G had significant market power. H3G challenged the decision on the grounds, amongst others, that OFCOM had failed adequately to consider whether BT had countervailing buyer power or "CBP" to offset any market power that H3G might enjoy.

57. In arguing that BT in fact had sufficient CBP to remove any market power on H3G's part, H3G in the *Hutchison I* case referred to the dispute resolution mechanisms under section 185 of the 2003 Act and as set out in clause 13.7 of the SIA between H3G and BT respectively. The latter was in identical terms to clause 13.7 in the SIA between BT and Orange. In short, H3G argued that it did not have power to impose an excessive price on BT because if H3G tried to exercise its market power by increasing prices, BT could refer the matter to the regulator for a determination.

58. In the present case OFCOM, supported by BT and H3G, relied in particular on what the Tribunal said in paragraphs 129 to 132 of the *Hutchison I* judgment where the Tribunal considered the scope of OFCOM's powers under section 185 of the 2003 Act:

> "129.There is a second error apparently underlying OFCOM's position (or at least its present position) on this point. The error relates to its perception of the limits to its powers in this area, as expressed in submissions. Part of the regulatory picture at this stage of the argument is the fact that under the statute OFCOM has (or appears to have) the power to determine the price of connection if there is a disagreement between the parties about it. As part of his argument in this appeal Mr Roth sought to argue that OFCOM did not have that power unless it had first made an SMP decision in relation to the party seeking to charge the price. This, if correct, would take the possibility of dispute resolution out of the picture, and perhaps strengthen the case for

saying that BT's bargaining position was weakened to the extent that it had no sufficient CBP to stand against the apparent strength of H3G's position. Mr Roth went so far as to submit that in the absence of an SMP designation, OFCOM would have to decide the pricing dispute in favour of H3G, because to do otherwise would be to impose forbidden price control. He based his argument on the true construction of the Access Directive.

130. We do not agree that that is the effect of the relevant provisions. We have set out above the relevant provisions of the 2003 Act. There is nothing there that supports Mr Roth's arguments. Section 190(4) refers to SMP conditions, but nothing in the wording of the Act suggests that SMP had to be found before the regulator decided a dispute over price. …. Mr Roth submitted that a ruling by OFCOM as to the price which should be charged for interconnection (in order to resolve a dispute) was price control which Article 8(3) [of the Access Directive] forbad in the absence of an SMP determination.

131. We consider this reasoning to be wrong. Under the Access Directive the NRAs have at least two sorts of powers. The first are powers to take steps to ensure end to end connectivity; the second are powers to intervene where SMP has been found. A power to determine a dispute as to connection is capable of falling within both, so it is certainly capable of falling within the former. If it does, the Directive makes it plain that an SMP finding is not necessary. This is apparent from the terms of Article 5. It will be noted that Article 8(3) is without prejudice to Articles 5(1), (2) and (3). [The wording of Article 5(1) was set out] … A power to resolve interconnection disputes is well within this wording, and there is no basis, as a matter of construction of Article 5, for separating out disputes as to price. Indeed, it would be illogical to do so. Pricing may be at the heart of a dispute; and some disputes about connection may have aspects which are not, by themselves, directly disputes about price, but may have pricing consequences so that one cannot decide one without the other. Determinations under this jurisdiction are not price control in the sense of Article 13. The two jurisdictions exist in parallel; the fact that Article 8(3) is without prejudice to the relevant parts of Article 5 demonstrates that they each have their separate existence.

132. Mr Roth's arguments in this respect therefore fail. The possibility of dispute resolution by OFCOM in the future is therefore part of the overall picture which has to be taken into account in assessing whether BT has a real and effective bargaining position that is sufficient to counter the factors which would otherwise point in favour of H3G having SMP".

59. OFCOM point out that there was no suggestion in those earlier proceedings that the Tribunal in *Hutchison I* considered that the dispute resolution powers in Article 5(4) of the Access Directive or section 185 of the 2003 Act were limited in the way now suggested by Orange. On the contrary, the Tribunal's finding that OFCOM should have taken these powers into account in considering whether BT had CBP once it had already entered into an interconnection agreement with H3G was based on the assumption, apparently shared by all the parties in that case, that OFCOM's dispute resolution powers could be exercised during the currency of that agreement.

60. As to the wording of section 185 of the 2003 Act, OFCOM argues that this clearly envisages that disputes falling within subsection (1) will include disputes arising during the currency of an agreement as well as disputes as to whether an access agreement should be entered into in the first place. OFCOM point in particular to section 185(8)(a) which provides a partial definition of "disputes that relate to the provision of network access" for the purposes of section 185(1) as including:

> "…. disputes as to the terms or conditions on *which it is,* or may be provided in a particular case" (emphasis added).

61. The reference in section 185(8)(a) to terms and conditions on which access "is" provided points, in OFCOM's submission, inescapably to the fact that the "provision of network access" includes the continued provision under an existing agreement.

62. As to the floodgates point raised by Orange, OFCOM argue that the participants in this sector appear to have assumed that section 185 does cover a wider range of disputes than that for which Orange contends and this has not, in fact, led OFCOM to be overwhelmed by requests to resolve commercial disputes between the parties. OFCOM also referred to the "Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives" published in July 2004 and still in force at the material time ("the 2004 Guidelines")[2]. In the 2004 Guidelines OFCOM make clear that they will not accept a dispute "without evidence of the failure of meaningful commercial negotiations" (paragraph 13). The 2004 Guidelines state further (paragraph 44) that OFCOM expects that the parties referring the dispute will include in their submissions documentary evidence of commercial negotiations on all issues covered by the dispute and a statement by an officer, preferably the CEO, that the company has used its best endeavours to resolve the dispute through commercial negotiation.

The Interveners' submissions on Article 5(4) and section 185(1)

63. H3G argued that in construing Article 5(4) of the Access Directive it is important to have regard to the rest of Article 5 and to other provisions in that Directive and the Framework Directive. But they argue that these other provisions in fact support the dispute resolution procedure being of wider rather than narrower scope. Under the

[2] http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf.

Access Directive the national regulatory authority is given powers to supervise interconnection which are independent of the powers it has to regulate a market which is characterised by an undertaking holding significant market power. The Access Directive thereby recognises the critical importance of interconnection and access to the development of an open and competitive market. Further, the definition of "access" in Article 2 of the Directive makes it clear that that the terms and conditions of access are an integral part of access so that access is a package which includes both technical and contractual elements.

64. Articles 4 and 5 of the Access Directive deal respectively with the rights and responsibilities of the undertakings and with the powers conferred on the national regulatory authorities. Article 5(1) requires regulators to ensure interconnection "in a way that promotes efficiency, and sustainable competition and gives the maximum benefit to end users". The fact that the obligation imposed is not merely to ensure interconnection but to ensure interconnection which promotes sustainable competition, efficiency and the maximum benefit to end users must mean, H3G argues, that the obligation applies during the currency of interconnection agreements and not only at the outset. This is because the terms and conditions which can be seen to promote those goals at the point when the interconnection agreement is first concluded may well not do so at a later stage during the currency of the agreement.

65. H3G submits that this view is supported by the fact that there are two avenues for the regulator's intervention under Article 5(4). The regulator can intervene not only where the parties to a dispute request it to do so but also "at its own initiative where justified". In other words, the parties may be quite happy with the interconnection agreement they have reached but if the regulator concludes that that agreement is not conducive to efficiency, etc. then it has power to intervene. It would not make sense in policy terms, H3G says, to limit the regulator's power of own-initiative intervention to a situation where the parties are entering into an interconnection arrangement for the first time – indeed it is difficult to see how the own-initiative provision could work in a case where the parties were not already in some contractual relationship with each other.

66. BT provided the Tribunal with written submissions which strongly supported OFCOM's arguments on the interpretation of Article 5(4). Vodafone indicated in its

letter to the Tribunal dated 3 December 2007 that it supported Orange's stance on this point.

The Tribunal's analysis: Article 5(4) of the Access Directive and section 185(1)

67. The Tribunal rejects the narrow construction of Article 5(4) of the Access Directive put forward by Orange. The Tribunal agrees with OFCOM that the general objective of the Directive is to ensure adequate access and interconnection and that there is no reason, either looking at the wording of the Directive or considering the policy behind it, to limit this in the way suggested by Orange. Such a limitation, in the Tribunal's judgment, ignores the reality of how the telecommunications market works. The provisions of the Directive must be construed in the context of an industry where there are long-term arrangements for interconnection and access entered into by the different market participants. The agreement between BT and Orange was entered into in 1996 and has had to be varied and adapted many times since then. Technological and other developments take place frequently and rapidly.

68. The current disagreement between Orange and BT arises out of just such a technological development and a difference of opinion as to what if any effect that development should have on the terms of the SIA. The justification put forward by Orange and the other MNOs for introducing a blended rate was that, during the period since their SIAs with BT had been entered into, 3G spectrum had developed and the MNOs had started to terminate voice calls using that new technology. They therefore wish the charges paid by BT for MCT services to reflect the fact that some of those services are now provided using the 3G spectrum. Orange accepts, as it must, that if BT had refused to accept any of the blended rates in the MNOs' OCCNs, that would not have triggered the dispute resolution mechanism under section 185 of the 2003 Act because in each case there was an underlying interconnection agreement which continued to apply if one party refused to accept a variation proposed by the other. Orange argued that the only way forward for an MNO in that position would be to persuade OFCOM to exercise its other regulatory powers including setting access conditions, price controls etc. If OFCOM thought that the change in circumstances brought about for example by use of 3G spectrum technology to terminate voice calls meant that there was a regulatory reason for intervening to vary MCT charges then it could do so using its other regulatory powers.

69. We do not agree that OFCOM's powers are limited in this way. There is nothing in section 185 which indicates that the phrase should be given a narrow meaning. Similarly, section 105, which it is agreed implements the other limb of Article 5(4) of the Access Directive and so must have the same ambit, does not define the "network access questions" that OFCOM can intervene to determine in a restricted manner. On the contrary, section 105 defines a "network access question" simply as "a question relating to network access or the terms or conditions on which it is or may be provided in a particular case". This reflects the wording of section 185(8)(a) which is discussed further below.

70. We have considered the effect of Tribunal's judgment in *Hutchison I*. We accept that it is clear from that judgment that the Tribunal was considering what OFCOM's role would be in resolving disputes under section 185 in the context of an established interconnection agreement between BT and H3G. However, the point was not argued before the Tribunal and Orange was not itself a party to those proceedings. We note also that the parties and the Tribunal in that case treated the availability of the dispute resolution mechanism in clause 13.7 of the SIA as being a separate point from the availability of dispute resolution under section 185 of the 2003 Act: see paragraphs 135 et seq of the judgment. Analysis of the interrelationship between these provisions has developed since the *Hutchison I* judgment. We do not regard the point currently in issue as having been settled against Orange by the Tribunal's earlier decision in *Hutchison I*.

71. The second reason why we reject Orange's construction of Article 5(4) is that it makes OFCOM's jurisdiction dependent on whether or not they consider that interconnection is somehow at risk because of the dispute that has arisen. OFCOM in its Defence put forward five scenarios:

> "(i) where the parties who have not interconnected fail to agree on the terms on which access is to be provided;
>
> (ii) where the parties are supplying interconnection on agreed terms and then one of them seeks to amend the contract to vary the terms of access to which the other refuses;
>
> (iii) as in (ii), but the contract includes an express provision for variation by notice in the event that the counterparty accepts the variation and reference to Ofcom for resolution in the event that he does not;

(iv) as in (iii), where the party seeking the variation fails to refer the matter to Ofcom for resolution within the time frame set out in the contractual provision;

(v) where the parties are supplying interconnection on agreed terms but one of them serves notice terminating the contract (in accordance with a termination clause in the contract) and they fail to agree on the terms of a new contract".

72. Orange accepted in argument that on its case, only scenarios (i) and (v) would generate disputes which fell within Article 5(4) of the Access Directive and hence within section 185(1) of the 2003 Act. Only those scenarios put interconnection at risk thereby triggering OFCOM's powers to step in to secure that interconnection takes place.

73. But as Mr Roth, appearing on behalf of OFCOM, pointed out, it cannot be right that OFCOM's jurisdiction should vary according to the terms of the interconnection agreements. If the terms of the contract are decisive then OFCOM would be required to look at the contractual framework and consider whether, for example, a notice to terminate where the contractual period is four weeks notice has a different effect on OFCOM's statutory jurisdiction from a 24 month notice to terminate. We agree that it cannot be intended that the regulator should undertake such an investigation or that jurisdiction should depend on the outcome of such an investigation.

74. Such an interpretation of the provisions would undermine the underlying purpose of the Access Directive. It would encourage the parties to include shorter rather than longer notice periods in their interconnection agreements and to resort to serving a termination notice more frequently than they currently do in order to generate a dispute over which OFCOM has jurisdiction. A party may be prompted to serve a termination notice as a bargaining tactic even if in reality it knows that it will withdraw the notice if the other party maintains its refusal to accept the OCCN. This makes interconnection less secure rather than more secure. Given the large sums of money that turn on these contractual variations, we cannot accept Orange's assertion that this is an implausible outcome of the narrow construction for which they contend.

75. The third reason why the Tribunal rejects Orange's construction is that it is simply not supported by the wording either of the statutory provisions or of the Directives.

76. So far as section 185(1) is concerned, Orange appeared at one stage to be arguing that that subsection only implements Article 5(4) and not Article 20 of the Directive so that it can only apply in a situation where there is no existing interconnection agreement. On this analysis, the part of Article 20 of the Framework Directive which covers disputes arising from regulatory obligations which do concern access and interconnection but which do not fall within Article 5(4) of the Access Directive because they arise in a context where access is not at risk would fall within section 185(2) not section 185(1).

77. Such a submission faces insuperable obstacles in the wording of the statutory provisions. There is the point referred to in paragraph 60 above about the inclusion in the partial definition of section 185(1) disputes of a reference to "terms and conditions on which access <u>is</u> or may be provided" in section 185(8)(a) of the 2003 Act (emphasis added).

78. There is also the point raised by both OFCOM and H3G based on section 190(2) of the 2003 Act. Section 190 provides so far as material as follows:

> "**190 Resolution of referred disputes**
>
> (1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.
>
> (2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following-
>
> > (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
> >
> > (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
> >
> > (c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and
> >
> > (d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
>
> (3) Their main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute".

79. The inclusion of the power in section 190(2)(d) shows that OFCOM is expected to resolve disputes which relate to an on-going agreement since it is only in that context that the question of underpayment or overpayment of amounts may arise. Is the power in section 190(2)(d) relevant only to disputes which fall within section 185(2) and not those within section 185(1)? Miss Rose on behalf of H3G argued that this is not a possible construction of section 190(2). She points to the fact that the draftsman has carefully carved out one kind of dispute from the general provision relating to powers, namely a "dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum". OFCOM's powers in relation to those disputes are then specified separately in section 190(3). We agree that this points in favour of construing the powers in paragraphs (a) to (d) of section 190(2) as being generally applicable to all disputes falling within section 185 other than those expressly excluded.

80. If, then, section 185(8)(a) and section 190(2)(d) make it impossible to argue that section 185(1) is limited to pre-contractual disputes, that must mean, on Orange's construction of Article 5(4), that part of section 185(1) implements the obligation on Member States in Article 20 insofar as that Article applies to disputes in on-going arrangements arising from regulatory obligations relating to access and interconnection. If this is correct, the reader faces an intricate task in trying to unpick what the apparently simple phrase "disputes relating to the provision of network access" means. It encompasses pre-contract disputes, disputes relating to access where interconnection is in jeopardy and disputes arising from a regulatory obligation concerning access and interconnection. But it excludes, on Orange's submission, disputes which relate to network access in the absence of a regulatory obligation and in the absence of any threat to continued interconnection. We do not accept that the phrase can bear that meaning.

Conclusion on Article 5(4) of the Access Directive and section 185(1) of the 2003 Act

81. The Tribunal therefore holds that the dispute between BT and Orange over the BT OCCN is a dispute relating to the provision of network access within the meaning of section 185(1) of the 2003 Act. It falls within that subsection insofar as that subsection implements the United Kingdom's obligation under that part of Article 5(4) of the Access Directive which concerns resolution of disputes.

Article 20 of the Framework Directive and the scope of regulatory obligations

82. In the light of the Tribunal's findings on the meaning of Article 5(4) of the Access Directive and section 185(1) of the 2003 Act, we do not need to decide whether the dispute is also a dispute which arises in connection with obligations arising under the Framework Directive or the Access Directive and therefore: (i) falls within Article 20 of the Framework Directive; and (ii) would fall within section 185(2) of the 2003 Act if we were wrong about our construction of section 185(1). However, since the point was fully argued before us, we consider it would be useful to set out our conclusions on this issue albeit somewhat more concisely than was possible in relation to the Article 5(4) point.

83. So far as regulatory obligations are concerned, it is common ground that:

    (a) the dispute between BT and Orange concerns only the component of the blended MCT charge that relates to the use of 3G spectrum – BT has no argument with the component of the charge which relates to the use of 2G spectrum;

    (b) although OFCOM's June 2004 Statement found that Orange, like the other MNOs, had significant market power in relation to calls terminated on its network regardless of whether 2G or 3G technology was used, OFCOM decided in that Statement to regulate only the prices charged for termination on the 2G network. Orange's prices for 3G network termination were therefore not subject to any regulatory obligation at the material time;

    (c) Orange is not subject to an end-to-end connectivity obligation in the same way as BT and there are no other rights and obligations conferred or imposed on Orange by or under Part 2 of the 2003 Act capable of triggering the application of section 185(2) in this case;

    (d) BT was at the time that OFCOM assumed jurisdiction over the dispute subject to an end-to-end connectivity obligation in the terms set out in the 16 September 2006 Statement and imposed by OFCOM under Part 2 of the 2003 Act; and

(e) BT's end-to-end connectivity obligation obliges it to purchase wholesale MCT services from any MNO requesting it to do so, subject to the proviso that BT is only obliged to acquire such services on reasonable terms and conditions.

84. Orange says that having regard to those points there is no regulatory obligation in play on the facts of this case. The disagreement between BT and Orange concerns the price which Orange proposes to charge for 3G MCT services and that price was not, at the time OFCOM assumed jurisdiction over the dispute, a regulated price.

85. OFCOM, supported by H3G, argue that the dispute arises "in connection with" BT's end-to-end connectivity obligation (to use the wording of Article 20) and "relates to" that obligation (to use the wording of section 185(2)) so that those provisions do apply. OFCOM submits that when BT put forward its own OCCN on 19 July 2006 it must be treated as saying to Orange "We regard your current rates as unreasonable and unless you accept our proposed reduced rates we will regard our end-to-end connectivity obligation to you as discharged because we are not obliged to acquire your MCT service otherwise than on reasonable terms and conditions".

86. Orange's answer to this is that on the facts this was not a situation where end-to-end connectivity was in jeopardy when BT served its OCCN. BT had accepted the Orange OCCN introducing the blended rate a few days earlier on the basis of its own commercial assessment of the position as outlined in Mr Annette's witness statement (see paragraph 24 above). It is impermissible therefore for OFCOM to conclude that BT would have threatened to end connectivity on the ground that Orange had rejected its OCCN.

87. In the Tribunal's judgment, the dispute between BT and Orange over the BT OCCN did either relate to or arise in connection with BT's end-to-end connectivity obligation. The Tribunal does not consider that in order for this to be the case it has to be established that the party subject to the obligation felt sufficiently strongly about the subject matter of the dispute that it would have considered that it was or might be entitled to terminate end-to-end connectivity. It is not practicable to make OFCOM's jurisdiction to consider a dispute contingent on it arriving at an answer to that kind of

question and that cannot have been the intention of the legislator. Even if, once Orange had rejected the 19 July OCCN, BT was very unlikely to have chosen to terminate the SIA rather than revert to the blended rate it had agreed on 10 July 2006, it is nonetheless the case that the terms and conditions on which connectivity is provided are negotiated between these parties against the backdrop of BT's regulatory obligation. Although the negotiations might properly be described as commercial, they were not independent of any regulatory element.

88. The Tribunal therefore holds that, in the event that the dispute does not relate to the provision of network access for the purposes of section 185(1) it does relate to rights and obligations conferred on or imposed under Part 2 of the 2003 Act, namely the end-to-end connectivity obligation imposed on BT in September 2006.

GROUND 1(B): THE MEANING OF "DISPUTE"

89. Given that the Tribunal has found that the alleged dispute did relate to the provision of network access within the meaning of section 185(1) or alternatively that it did relate to rights and obligations conferred or imposed by or under Part 2 of the 2003 Act within the meaning of section 185(2), it is necessary for us to consider Ground 1(b) of Orange's case.

90. The second limb of Orange's case that its rejection of the BT OCCN does not amount to a "dispute" within the meaning of section 185 evolved somewhat during the course of the proceedings. Initially it appeared to some of the parties at least that the point was that because BT had accepted Orange's revised rates on 10 July 2006, it could not claim the rates were genuinely in "dispute" by the time BT served its own OCCN on 19 July. However, it became clear during the course of the case management conference on 31 October 2007 that this was not the point being taken.

91. It subsequently appeared that the point was that because BT had not complied with the one month deadline set in clause 13.7 of the SIA for referring a dispute to OFCOM, the "dispute" had in effect been resolved and BT was not entitled to assert that there was continuing disagreement on which OFCOM could properly adjudicate. It was to this point that much of BT's written and oral submissions were directed.

92. At the hearing of the preliminary issue the point was put rather differently by Orange. Orange submitted that there was no "dispute" within the meaning of section 185 because at the time that BT purported to refer the matter to OFCOM in January 2007 they had failed first to use the contractual mechanism set out in the clause 13 by issuing a further OCCN. If BT had issued a further OCCN at that stage, Orange submits, there would have to have been a further 14 day period of negotiation. It is conceivable that the parties would have come to an agreement on the rates and the need for a reference to OFCOM would have been avoided. Because BT had not followed the mechanism provided in the contract, OFCOM should have concluded that there was no "dispute" for them to resolve.

93. OFCOM and BT's primary argument against Orange's interpretation was that the term "dispute" as used in section 185 could not be influenced by, still less be contingent upon, the terms of the particular contract to which the undertakings concerned were party. There is nothing in the statute to indicate that OFCOM's jurisdiction is subject to compliance by the party seeking the reference with any terms of the contract requiring it to negotiate in good faith. On the contrary, OFCOM points to section 187 of the 2003 Act which concerns court proceedings with respect to the matters covered by the dispute. Section 187 provides that:

> "**187 Legal proceedings about referred disputes**
>
> (1) Where a dispute is referred or referred back to OFCOM under this Chapter, the reference is not to prevent
>
> > (a) the person making it,
> >
> > (b) another party to the dispute,
> >
> > (c) OFCOM, or
> >
> > (d) any other person,
>
> from bringing, or continuing, any legal proceedings with respect to any of the matters under dispute.
>
> (2) ….
>
> (3) If, in any legal proceedings with respect to a matter to which a dispute relates, the court orders the handling of the dispute by OFCOM to be stayed or sisted-

> (a) OFCOM are required to make a determination for resolving the dispute only if the stay or sist is lifted or expires; and
>
> (b) the period during which the stay or sist is in force must be disregarded in determining the period within which OFCOM are required to make such a determination.
>
> (4) Subsection (1) is subject to section 190(8) and to any agreement to the contrary binding the parties to the dispute.
>
> (5) In this section "legal proceedings" means civil or criminal proceedings in or before a court".

94. OFCOM contrasts section 187(4) which expressly states that the provision is subject to any agreement to the contrary binding the parties with section 185 which contains no such provision.

95. BT made detailed written and oral submissions on the state of the contractual terms at the point when the reference was made. BT argued that on the proper construction of the contract, the time limits set in clause 13 of 14 days for negotiation and one month for a reference to OFCOM were not "of the essence". By this we understood BT to mean that it had never been the parties' intention that failure by one party to comply with those time limits would have the effect that that party forfeited its right to refer the dispute to OFCOM. In the alternative BT argued that, whatever had been the parties' intention when the contract was concluded, by the time that the events of May 2006 onwards took place, an estoppel by convention had arisen which prevented the parties from asserting that the deadlines had to be strictly complied with. In the further alternative, BT argued that Orange were themselves in breach of the obligation under clause 13.5 to negotiate in good faith following their receipt of the 19 July OCCN. This meant that they were precluded from alleging that BT's failure to comply with the month deadline extinguished BT's right to refer the dispute to OFCOM.

96. Orange submitted that the evidence and argument put forward by BT on the proper construction of the contract and the estoppel by convention was irrelevant. The point as argued at the hearing depended only on the undisputed existence of a contractual dispute mechanism in clause 13 which had to be exhausted before a matter could be referred to OFCOM. Orange therefore did not serve any evidence to counter BT's evidence and did not seek to cross examine BT's witnesses even though they did not accept everything that BT said.

Tribunal's analysis on Ground 1(b)

97. The Tribunal agrees with OFCOM and BT that the meaning of the word "dispute" cannot depend on the terms of the contract between the parties. There is nothing in the statute that suggests that anything other than the ordinary meaning of the word is intended. The absence from section 185 of a provision in the terms of section 187(4) is a strong indication that the parties were not intended to be able to affect OFCOM's jurisdiction by their own agreement.

98. Further, it is clear that the word "dispute" in section 185 must mean the same as "dispute" in Article 20 of the Framework Directive and as "the absence of agreement" in Article 5(4) of the Access Directive. The Tribunal accepts the submission of BT in its written submissions that it cannot be right that whether a dispute exists or not depends upon the national approach to the law of obligations since this could lead to "dispute" meaning one thing in one Member State and a different thing in another.

99. BT's arguments and evidence were primarily directed at countering Orange's reliance on the strict wording of the SIA. But they were also directed at illustrating what BT described as the "Admin Hell" that would result from the Tribunal finding that OFCOM's jurisdiction depended on the terms of the parties' contract. The Tribunal does not need to determine the issues that BT raises as regards the proper construction of the contract or whether BT can rely on an estoppel by convention. But the evidence adduced by BT shows that its submissions cannot be easily dismissed as without merit. We agree that it cannot have been intended that OFCOM should undertake this kind of analysis each time a dispute is referred. The private law consequences of a failure by one or both parties to comply with the contractual provisions are not a matter for the Tribunal to determine and cannot affect the statutory jurisdiction conferred on OFCOM.

100. Further, Orange cannot, in the Tribunal's judgment, avoid these difficult contractual issues by focussing on the alleged failure by BT to issue a further OCCN in January 2007. That submission still depends on Orange establishing that the dispute triggered by the 19 July OCCN was not still live between the parties. The Tribunal was shown documents indicating that there had been continuing discussions between the parties between August 2006 and January 2007. Again the Tribunal does not accept that

OFCOM's jurisdiction is dependent on it examining such documents to determine whether the dispute was still alive as at January 2007.

101. The fact that OFCOM as a matter of good practice encourages parties to a potential dispute to explore fully the possibility of resolving their differences first, is a very different matter from holding that OFCOM's jurisdiction depends on contractual dispute resolution mechanisms having been exhausted.

Conclusion on Ground 1(b)

102. In the Tribunal's judgment the dispute between BT and Orange over the rejection of the BT OCCN is a dispute within the meaning of section 185 of the 2003 Act.

Conclusion on the First Preliminary Issue

103. The Tribunal therefore unanimously concludes that, on the true construction of section 185 of the 2003 Act, and having regard to the events which have happened, there was a "dispute" between BT and Orange within the meaning of that section capable of being referred to OFCOM for resolution in accordance with that section.

III THE SECOND PRELIMINARY ISSUE

104. The second preliminary issue concerns whether a party which considers that OFCOM does not have jurisdiction to accept a dispute for resolution under sections 185 to 190 of the 2003 Act must bring an appeal against the decision to accept jurisdiction or can raise the challenge to OFCOM's jurisdiction as part of a later appeal against the final determination of that dispute.

105. According to section 192(1) of the 2003 Act, section 192 applies to decisions by OFCOM under Part 2 of the 2003 Act. Subsection (2) provides that a person affected by a decision to which the section applies may appeal against it to the Tribunal. Further:

> "**192 Appeals against decisions by OFCOM, the Secretary of State etc**.
>
> …
>
> (3) The means of making an appeal is by sending the Tribunal a notice of appeal in accordance with the Tribunal rules.
>
> (4) The notice of appeal must be sent within the period specified, in relation to the decision appealed against, in those rules".

106. Rule 8 of the Competition Appeal Tribunal Rules 2003 (S.I. No. 1372 of 2003, as amended by S.I. No. 2068 of 2004) ("the Tribunal Rules") provides that an appeal to the Tribunal must be made by sending a notice of appeal to the Registrar so that it is received within two months of the date upon which the appellant was notified of the disputed decision or the date of publication of the decision, whichever is the earlier. The Tribunal may not extend this time limit unless "it is satisfied that the circumstances are exceptional".

107. The predicament of a party in Orange's position was described in its Notice of Appeal as follows:

> "3. Pursuant to Rule 8(1) of the Tribunal Rules, the two-month time limit for lodging an appeal runs from the date on which the Appellant was notified of the disputed decision or the date of publication if earlier. On the face of it, therefore, appeals against such "intermediate" matters as a decision to accept a dispute for resolution or settling the scope of the dispute must be brought within two months from the date that they were notified or published as the case may be. Whilst the Appellant believes that the most practical course of action would be for appeals against such matters to be heard in the context of any substantive appeal against a final determination, the Appellant notes that the Tribunal's practice in this regard is yet to be settled. …. In these circumstances, the Appellant considers it prudent to lodge this Appeal".

108. Orange therefore lodged this appeal on 5 April 2007. At the case management conference on 15 May 2007 both parties indicated that they wished no further action to be taken in the appeal until OFCOM issued its final determination of the alleged dispute. At that hearing OFCOM indicated that it would be useful if the Tribunal addressed the point as to whether such precautionary appeals were necessary.

109. Clearly since Orange did in fact lodge a precautionary appeal in this case, the question as to what would have been the position if it had not done so is a hypothetical one. But since no party properly advised would take the risk of being barred from raising a

challenge to the jurisdiction, the question is unlikely to arise in a case where it is a live issue and it is in the public interest for the Tribunal to rule on the issue.

110. All the parties were agreed that it would be preferable if a party wishing to challenge the jurisdiction did not have to lodge a precautionary appeal. A number of ways of achieving this were put forward.

111. First it was suggested that OFCOM's decision to accept jurisdiction over a dispute should be treated as a preparatory step similar to the issue of a statement of objections in the procedure of the European Commission. There is authority in the judgments of the Community Courts to the effect that such preparatory steps are not capable of being challenged on appeal. In the Tribunal's judgment this approach is inconsistent with the wording of section 192 of the 2003 Act. It is not possible to draw an analogy with the appellate role of the Court of First Instance vis-à-vis the European Commission because the scope of the right of appeal is determined by the wording of the relevant EC Treaty provisions which is different from section 192 of the 2003 Act. The decision of OFCOM to accept jurisdiction is a decision within Part 2 of the 2003 Act and can therefore be challenged on appeal under section 192.

112. Secondly it was suggested that the Tribunal could indicate that if a party delayed challenging a decision to accept jurisdiction because it wanted to await the final determination of the dispute, this would amount to "exceptional circumstances" within the meaning of Rule 8(2) enabling the Tribunal to extend the time limit and thereby allow the appeal to take place. The Tribunal agrees with OFCOM's submission that such an approach would be inconsistent with the ruling in the *Hasbro UK Limited v Director General of Fair Trading* [2003] CAT 1. There the then President of the Tribunal stated:

> "In my judgment, the general intention behind the Tribunal's rules is that the initial time limit for lodging an appeal is intended to be strict. Cases that do not involve force majeure in the strict sense will, in my judgment, only rarely give rise to "exceptional circumstances".
>
> As far as the Tribunal is concerned, respect for the deadline in commencing proceedings is, in many ways, the keystone of the whole procedure. In my judgment, therefore, derogations can be granted only exceptionally under Rule 6(3) [now Rule 8(2)]."

113. In the Tribunal's judgment, however, there is no need to adopt either of these courses. A party which brings an appeal against a final determination is entitled to raise in that appeal an allegation that OFCOM lacked jurisdiction to investigate the matter referred to it. That ground may be one of a number of grounds in which the final determination is challenged. But the appellant is not precluded from raising the point by the fact that it could have brought an appeal against the initial decision to assume jurisdiction but chose not to do so.

114. Support for this conclusion is found in two authorities cited to the Tribunal. The first is the case of *R v London Borough of Hammersmith and Fulham ex p Burkett* [2002] UKHL 23. In that case the local authority had, in September 1999, adopted a resolution which authorised the director of the environment department of the local authority to grant outline permission to a development application provided, amongst other things, that there was no contrary direction from the Government Office for London.

115. In April 2000 Mrs Burkett brought proceedings for judicial review challenging the adoption of that resolution. The resolution was based on an environmental impact statement which Mrs Burkett regarded as defective. In May 2000, the local authority granted the planning permission. At first instance Richards J. held that the operative decision was the September 1999 adoption of the resolution and he refused permission to bring judicial review proceedings on the grounds of delay. Before the Court of Appeal, Counsel for the applicants argued that the final grant of planning permission was the single event from which all rights and obligations flowed and it was therefore the date from which time ran. The Court of Appeal dismissed this argument stating (paragraph 11) that-

> "…where the same objection affects the initial resolution as will affect the eventual grant of permission, it is as a simple matter of language at the date of the resolution that the objection and therefore the grounds for the application first arise."

116. The Court of Appeal concluded that since the impugned environmental impact statement was as necessary to the resolution as to any subsequent steps, the logic of measuring time from the resolution was inescapable.

117. The House of Lords quashed the Court of Appeal's decision holding that if Mrs Burkett's application was amended to challenge the grant of planning permission rather

than the resolution then it would be in time because time ran from May 2000 not from September 1999. Lord Slynn said:

> "4. It is clear that if the challenge is to the resolution (as it may be) time runs from that date, but the question on the present appeal is whether, if the application is amended to challenge the grant of planning permission rather than the resolution, time runs from 15 September 1999 or 12 May 2000.
>
> 5. In my opinion, for the reasons given by Lord Steyn, where there is a challenge to the grant itself, time runs from the date of the grant and not from the date of the resolution. It seems to me clear that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time, i.e. from the date when the planning permission is granted. I realise that this may cause some difficulties in practice, both for local authorities and for developers, but for the grant not to be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests. The relevant legislative provisions do not compel such a result nor do principles of administrative law prevent a challenge to the grant even if the grounds relied on are broadly the same as those which if brought in time would have been relied on to challenge the resolution".

118. Lord Steyn in his speech said:

> "38. …. it can readily be accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. In a context where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it: see generally *Wade & Forsyth*, *Administrative Laws,* 8th ed, p 600; *Craig*, *Administrative Law,* 4th ed, pp 724-725; *Fordham*, *Judicial Review Handbook*, 3rd ed (2001), para 4.8.2. It is clear therefore that if Mrs Burkett had acted in time, she could have challenged the resolution. These propositions do not, however, solve the concrete problem before the House which is whether in respect of a challenge to a final planning decision time runs under Ord 53, r 4(1) from the date of the resolution or from the date of the grant of planning permission. *It does not follow from the fact if Mrs Burkett had acted in time and challenged the resolution that she could not have waited until planning permission was granted and then challenged the grant.*
>
> 39. As a matter of language it is possible to say in respect of a challenge to an alleged unlawful aspect of the grant of planning permission that "grounds for the application first arose" when the decision was made. The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning" (emphasis added).

119. Lord Millett and Lord Phillips of Worth Matravers agreed with the speeches of both Lord Slynn and Lord Steyn.

120. A recent decision on an analogous point is *Bunney v Burns Anderson and the Financial Ombudsman Service Limited* [2007] EWHC 1240 (Ch). In that case the Financial Services Ombudsman had made a finding that Burns Anderson had provided incorrect financial advice to Mr Bunney and that they should compensate him. The Ombudsman purported to direct Burns Anderson to pay an amount in excess of £200,000 to Mr Bunney. In civil proceedings brought by Mr Bunney for an injunction ordering the firm to pay, Burns Anderson wished to allege that the Ombudsman had exceeded his powers in directing the payment of compensation of that amount. The question arose whether it was open to Burns Anderson to raise this point when defending enforcement proceedings. It was common ground that they could have brought judicial review proceedings against the Ombudsman's original direction. The question for the court was whether that was the only means of challenge. Lewison J held that it was not. Reviewing the authorities from *O'Reilly v Mackman* [1983] 2 AC 237 onwards, the learned judge held that it was open to defendants to challenge a public law decision upon which a private cause of action against them was asserted in proceedings which they wished to defend. This was subject to any provision in the enactment pursuant to which the public law decision was taken which forbids any challenge to be made to the decision otherwise than by way of judicial review.

121. In the present case there is nothing in the 2003 Act which stipulates that a decision which can be the subject of an appeal under section 192 cannot be challenged by any other route. As OFCOM pointed out there is an enforcement mechanism in section 190(2)(d) of the 2003 Act which provides that a decision can be enforced by civil proceedings. It would appear to follow from the *Bunney* case that in any enforcement proceedings brought by an MNO the other party could raise an argument that the decision sought to be enforced was ultra vires. If the challenge to the assumption of jurisdiction can be made not only by way of appeal to that decision but also in the course of the later enforcement of the final determination, it would be contrary to a common sense construction of the 2003 Act to hold that it could not instead be made in the course of a challenge to the final determination.

122. OFCOM were more hesitant in relation to whether a challenge to the exercise of OFCOM's discretion under section 186(2) could also properly be raised in an appeal against a final determination. Section 186 of the 2003 Act provides as follows:

> "**186 Action by OFCOM on dispute reference**
>
> (1) This section applies where a dispute is referred to OFCOM under and in accordance with section 185.
>
> (2) OFCOM must decide whether or not it is appropriate for them to handle the dispute.
>
> (3) Unless they consider-
>
> > (a) that there are alternative means available for resolving the dispute,
> >
> > (b) that a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4, and
> >
> > (c) that a prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it,
>
> their decision must be a decision that it is appropriate for them to handle the dispute.
>
> (4) As soon as reasonably practicable after OFCOM have decided-
>
> > (a) that it is appropriate for them to handle the dispute, or
> >
> > (b) that it is not,
>
> they must inform each of the parties to the dispute of their decision and of their reasons for it.
>
> (5) The notification must state the date of the decision.
>
> (6) Where-
>
> > (a) OFCOM decide that it is not appropriate for them to handle the dispute, but
> >
> > (b) the dispute is not resolved by other means before the end of the four months after the day of OFCOM's decision,
>
> the dispute may be referred back to OFCOM by one or more of the parties to the dispute".

123. The Tribunal does not consider that, as a matter of law, there is any distinction between a decision which is ultra vires because the subject matter did not fall within section 185 of the 2003 Act and a decision which is ultra vires because OFCOM acted irrationally in concluding that the grounds in section 186(3) were not made out. But there is an

important practical difference between the two situations. The purpose of section 186 is to ensure that the dispute is resolved promptly and by the most satisfactory means. One would expect that a party which alleged that OFCOM had acted irrationally in deciding that the section 186(3) criteria were not satisfied would want to act quickly to forestall OFCOM's investigation of the dispute so that the alternative prompt and satisfactory means can be got on foot as soon as possible.

124. If instead the party waits until the investigation has taken place and the final determination published before raising this point it is difficult to see what remedy the Tribunal could be asked to order. In the Tribunal's judgment, an appellant may therefore raise such a challenge in an appeal against the final determination as well as in an appeal against the initial acceptance of jurisdiction. But the challenge may well have lost its purpose once OFCOM has in fact carried out the investigation and in fact resolved the dispute.

Conclusion on Second Preliminary Issue

125. In the Tribunal's unanimous judgment therefore on the true construction of section 185 of the 2003 Act and Rule 8(1) of the Tribunal Rules, Orange would not, in proceedings challenging the final determination of the alleged dispute between BT and Orange, have been time-barred from challenging the jurisdiction of OFCOM to resolve that alleged dispute.

Vivien Rose　　　Arthur Pryor CB　　　Peter Clayton

Charles Dhanowa
Registrar　　　Date: 21 December 2007