Neutral citation [2011] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case Nos: 1171/3/3/10
1172/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

3 May 2011

Before:

VIVIEN ROSE
(Chairman)
STEPHEN HARRISON
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

EVERYTHING EVERYWHERE LTD
HUTCHISON 3G UK LTD

Interveners (Case 1171)

VIRGIN MEDIA LTD
EVERYTHING EVERYWHERE LTD
TALKTALK TELECOM GROUP PLC
BRITISH SKY BROADCASTING LTD

Interveners (Case 1172)

Heard at Victoria House on 7 and 8 March 2011

JUDGMENT

APPEARANCES

Miss Sarah Lee (instructed by CMS Cameron McKenna LLP) appeared for the Appellant.

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

Mr Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Ltd.

Mr James Segan (instructed by Olswang LLP) appeared for Virgin Media Ltd.

Mr Alan Bates (instructed by Herbert Smith LLP) appeared for British Sky Broadcasting Ltd and TalkTalk Telecom Group plc.

Mr Richard Pike (of Baker & McKenzie LLP) appeared for Hutchison 3G UK Ltd.

Introduction

1. The Appellant ("BT") has brought two appeals under section 192 of the Communications Act 2003 ("the CA 2003"). BT challenges decisions taken by the Respondent ("OFCOM") in respect of alleged disputes referred to OFCOM under section 185 of the CA 2003. We refer to the first of these appeals (Case 1171/3/3/10) as the "NCCN 1007 Appeal" and to the second (Case 1172/3/3/10) as the "Ethernet Appeal". Broadly speaking, BT argues that OFCOM were wrong to decide that they had jurisdiction to determine the alleged disputes, either because the issues referred to them were not really "disputes" within the meaning of section 185 of the CA 2003 or because, if they were disputes properly so called, OFCOM should have declined jurisdiction on the grounds that there were alternative means available for the resolution of those disputes.

2. The Interveners in both appeals include the other communications providers ("CPs") who have referred the alleged disputes to OFCOM under section 185 and who therefore support OFCOM's assertion of jurisdiction under the CA 2003.

The relevant statutory provisions

The domestic provisions

3. OFCOM's jurisdiction to decide disputes is conferred by section 185 of the CA 2003 ("section 185"):

> "**185 Reference of disputes to OFCOM**
>
> (1) This section applies in the case of a dispute relating to the provision of network access if it is—
>
> (a) a dispute between different communications providers;
>
> …
>
> (3) Any one or more of the parties to the dispute may refer it to OFCOM.
>
> …"

4. Section 185 contains further provisions describing what kinds of disputes can be referred to OFCOM in terms of subject matter but does not contain any definition of the word “dispute”.

5. Once a dispute has been referred, OFCOM’s task is described in section 186 of the CA 2003 (“section 186”):

> **“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 reasonable 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.
>
> ...”

6. Where OFCOM decide that they will handle the dispute, the procedure to be followed is set out in section 188:

> **“188 Procedure for resolving disputes**
>
> ...
>
> (2) OFCOM must—
>
> (a) consider the dispute; and

(b) make a determination for resolving it.

(3) The procedure for the consideration and determination of the dispute is to be the procedure that OFCOM consider appropriate.

…

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

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

…

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

..."

7. The powers that OFCOM can exercise when they determine a dispute are set out in section 190:

"**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 (…) 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.

…

(8) A determination made by OFCOM for resolving a dispute referred ... to them under this Chapter binds all the parties to the dispute.

(9) Subsection (8) is subject to section 192."

The European Common Regulatory Framework

8. The powers and duties set out in sections 185 and 186 derive from the European Common Regulatory Framework which regulates the electronic communications sector across the European Union. OFCOM's dispute resolution function under sections 185 and 186 is designed to implement article 20 of the Framework Directive[1] and article 5(4) of the Access Directive[2]. Article 20 provides:

> "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. The "Specific Directives" referred to in Article 20 include the Access Directive. The reference to "the objectives set out in Article 8" corresponds to the reference in section 186(3)(b) to the "Community requirements set out in section 4" of the CA 2003.

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]."

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[1] Directive 2002/21/EC on the common regulatory framework for electronic communications networks and services ("the Framework Directive"), OJ 2002 L108/33.

[2] Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive") OJ 2002 L108/7.

The background to the NCCN 1007 Appeal

11. BT is party to a standard interconnection agreement with many CPs under which it provides a wide range of wholesale telecoms services. According to that contract, BT can at any time issue a network charge change notice ("NCCN") notifying the CP that the price for a particular service is changing. The notice sets out the new charges and states the date on which they come into effect. The alleged disputes in respect of which BT has lodged the NCCN 1007 Appeal concern the charges that BT has set for mobile network operators ("MNOs") for the termination on its network of calls to numbers starting with 080. 080 numbers form part of a group of non-geographic numbers where a caller dials a number with that particular prefix and the call is then translated into a call to a geographic number.

12. On 3 June 2009 BT issued NCCN 956 introducing a new wholesale charging structure for terminating calls to 080 numbers. The relevant point for our purposes is that NCCN 956 set out what has been described as a "laddered" or "tiered" pricing structure. This structure links the wholesale charge made by BT to the MNO for terminating the call to the retail charge made by the MNO to its own customer for that call. The new prices under NCCN 956 came into effect on 1 July 2009.

13. The MNOs strongly objected to the introduction of laddered pricing. A dispute about NCCN 956 was referred to OFCOM by the predecessor to Everything Everywhere Ltd ("EE") on 16 September 2009 and OFCOM accepted that dispute on 6 October 2009. The reference of a dispute does not prevent the coming into effect of the charges set by an NCCN. OFCOM delivered their determination of that dispute on 5 February 2010 ("the 956 Determination"). OFCOM set aside NCCN 956 and directed BT to return to the prices it had charged prior to the issue of the notice. On 6 April 2010 BT lodged an appeal against the 956 Determination: Case 1151/3/3/10; that appeal is currently pending before the Tribunal.

14. On 2 October 2009, that is four days before OFCOM accepted jurisdiction over the NCCN 956 dispute, BT issued NCCN 985 and NCCN 986. These notices

introduced a laddered pricing structure for MNOs for two other sets of non-geographic call numbers, namely 0845 and 0870 numbers. The new prices came into effect pursuant to those NCCNs on 1 November 2009. Again the MNOs objected to the introduction of laddered pricing for those numbers and by the end of April 2010, five MNOs had referred disputes about NCCNs 985 and 986 to OFCOM under section 185. OFCOM delivered their determination of those disputes on 10 August 2010 ("the 985/986 Determination"). The result of the 985/986 Determination was that OFCOM set aside the NCCNs and ordered BT to return to the previous terms on which it had traded with the MNOs.

15. On 11 October 2010 both BT and EE lodged appeals with the Tribunal against the 985/986 Determination. EE's appeal was prompted by the fact that, although the outcome was entirely in its favour, EE considers that OFCOM did not adequately address the issue whether or not laddered pricing is acceptable as a matter of principle. Those appeals – Case 1168/3/3/10 (EE's appeal) and Case 1169/3/3/10 (BT's appeal) – are currently pending before the Tribunal. A joint hearing of the appeal against the 956 Determination and the two appeals against the 985/986 Determination took place from 4 to 20 April 2011. Judgment in those appeals is now pending. In this judgment we refer to Cases 1151, 1168 and 1169/3/3/10 before the Tribunal as "the earlier NCCN Appeals".

16. Shortly after the publication of the 956 Determination and around the same time as the disputes about NCCNs 985 and 986 were referred to OFCOM, BT issued NCCN 1007. This effectively reintroduced a laddered pricing structure for terminating calls to 080 numbers, the same number category covered by the NCCN which had been overturned by OFCOM in the 956 Determination. The prices set by NCCN 1007 came into effect on 1 April 2010.

17. No one has suggested that BT was not entitled as a matter of law to take this step. BT explained to us the commercial justification behind it. As BT reads the 956 Determination, OFCOM did not reject the idea of laddered pricing as a matter of principle but only because particular aspects of the structure adopted in NCCN 956 were found to create incentives for the MNOs to increase their retail pricing for these 080 numbers. NCCN 1007 was designed, BT said, to adapt the laddered

pricing structure in a way that cured the elements which OFCOM had identified as problematic. If the Tribunal upholds laddered pricing as a matter of principle but does not ultimately reinstate NCCN 956, NCCN 1007 will effectively allow BT to charge a modified form of laddered pricing for 080 number calls as from 1 April 2010.

18. The MNOs on whom NCCN 1007 was served objected to the charges set out in it. On 17 August 2010, after some correspondence and meetings with BT, EE referred an alleged dispute concerning NCCN 1007 to OFCOM. OFCOM wrote to BT on 20 August 2010 informing them of the receipt of the EE reference. Following objections raised by BT, OFCOM wrote again to BT on 11 September 2010 stating that they considered that "EE is in dispute with BT for the purposes of section 185" and that they had decided that it was appropriate for them to handle the dispute. Notice of the reference of the alleged dispute was published by OFCOM. Thereafter three other alleged disputes concerning NCCN 1007 were referred to OFCOM, including one by Hutchison 3G UK Ltd ("H3G"). We refer to these four alleged disputes as "the NCCN 1007 alleged disputes".

19. In that letter to BT of 11 September 2010, OFCOM also dealt with the question whether they should delay resolving the NCCN 1007 alleged disputes pending the Tribunal's judgment in the appeal against the 956 Determination which was, by that time, pending before the Tribunal. OFCOM said:

> "We note that the charges which BT has chosen to introduce through NCCN 1007 apply now in respect of the relevant calls, and that the 080 case is scheduled to be heard in January 2011. It seems to us reasonable to assume that judgment is unlikely to be given immediately following the end of the hearing, and possibly not for some further months. Further, whilst we accept that there is an overlap between the 080 case and the present dispute, it is not necessarily clear to us at this stage that the CAT's judgment in the 080 case will necessarily resolve the matters in dispute in this case.
>
> As a result, we consider that delaying consideration and resolution of this dispute until after the CAT's judgment in the 080 case would result in an unreasonable delay to resolving important ongoing commercial issues between the parties.
>
> …
>
> In summary, we do not consider that we should decide at this stage that exceptional circumstance apply in this dispute, and we will therefore make a final

> determination in respect of this dispute not more than four months after the date of this letter."

20. That decision by OFCOM not to extend the time within which they must resolve the NCCN 1007 alleged disputes forms the basis of the third ground in the NCCN 1007 Appeal.

The background to the Ethernet Appeal

21. The alleged disputes giving rise to the Ethernet Appeal relate to charges set by BT for certain services provided by it in connection with the provision of what are referred to as "Ethernet" facilities. The price set by BT for these services is subject to a regulatory condition called Condition HH3.1 imposed by OFCOM following its Leased Lines Market Review in 2004. That condition stipulates that BT must ensure that the charges are cost based. TalkTalk Telecom Group Plc ("TalkTalk"), British Sky Broadcasting Ltd ("Sky") and Virgin Media Ltd ("VM") claim that the charges they have been paying are not cost based and that BT is in breach of its regulatory obligations. These CPs assert that they have significantly overpaid BT for these services and that BT should reimburse them the amounts overcharged. The periods for which reimbursement is claimed date back several years so that the sums claimed run into several million pounds. Very broadly speaking, the claims turn on whether the methods used by BT to calculate its costs of providing the services are appropriate and compliant with its regulatory obligations.

22. There are certain similarities between the issues raised by the CPs' allegations of overcharging for Ethernet services and the issues considered by OFCOM in disputes referred by other telecoms providers concerning BT's charges for partial private circuits ("PPC"). OFCOM issued a determination on those disputes on 14 October 2009. OFCOM found that BT was in breach of its cost orientation obligation in relation to PPC products because BT had not applied the right test. An appeal against that determination was lodged by BT on 14 December 2009 (Case 1146/3/3/09: "the PPC Appeal"). The main hearing of the PPC Appeal took place before the Tribunal in October 2010. The main judgment was handed down on 22 March 2011, that is after the hearing of these appeals but before this

judgment was finalised. The Tribunal subsequently wrote to the parties requesting observations in relation to the main judgment in the PPC Appeal. In response BT reiterated the overlap in issues between that case and the Ethernet Appeal, whereas OFCOM, Sky and EE noted that the Tribunal had rejected a similar argument to that raised in Ground 3 of the Ethernet Appeal.

23. VM referred an alleged dispute about Ethernet overcharging to OFCOM in April 2010. But they withdrew this dispute on 19 May 2010 saying that although commercial negotiations with BT had proved fruitless, they recognised "that the ultimate outcome of the Dispute may potentially be impacted by the outcome" of the PPC Appeal.

24. On 27 July 2010 TalkTalk and Sky referred alleged disputes about Ethernet overcharging to OFCOM. When it was notified about these alleged disputes, BT wrote to OFCOM on 10 August 2010 impugning the good faith of the CPs in the negotiations that had taken place, asserting that constructive negotiations were still possible and raising a host of other points. BT asserted that it was "inappropriate" for OFCOM to open an investigation at that stage or alternatively contended that OFCOM should extend the deadline for resolving the alleged disputes until after judgment in the PPC Appeal. However, on 13 September 2010, OFCOM wrote to BT stating that they intended to resolve those alleged disputes together with an alleged dispute which had been resubmitted by VM on 10 August 2010 raising similar issues. We refer to the alleged disputes covered by OFCOM's letter of 13 September 2010 as "the Ethernet alleged disputes".

25. On 20 September 2010, BT wrote to OFCOM contending that there were exceptional circumstances which should prompt OFCOM to extend the deadline for determining the Ethernet alleged disputes under section 188(5) of the CA 2003. In their response of 1 October 2010, OFCOM stated that they had concluded that exceptional circumstances did exist in this case and that it might not be possible to resolve the Ethernet alleged disputes within four months. The exceptional circumstances relied on were described as follows:

> "We consider that there is significant overlap between the issues raised in the imminent [PPC Appeal] … and the Disputes. We highlight two particular issues

> here. It has been put to the CAT that Ofcom has taken the wrong approach to both the appropriate test for cost orientation and application of that test. The appropriate level of service aggregation for the purposes of assessing whether charges are cost oriented is also at issue. These and the other issues before the CAT are likely to be highly relevant to our approach to resolving the Disputes and form the basis of the dispute submissions referred to us.
>
> It is less than a month before the hearing of the PPC appeal. We would anticipate that we should be in a position to make a determination to resolve the Disputes within as short a period as possible after judgment in the PPC appeal is given. To confirm we will be progressing our investigation as far as is possible in the meantime. In light of this, we do not consider that there will be undue delay in resolving the Disputes or undue prejudice arising as a result. We do not consider that the possibility of any judgment in the PPC appeal may itself be appealed is a relevant factor in coming to a view on whether exceptional circumstances may apply."

26. OFCOM therefore decided that it did have jurisdiction to determine the Ethernet disputes but extended the time for resolving them. No date for the resolution of the Ethernet alleged disputes had been set by the time of the hearing of the Ethernet Appeal before us.

The existence of a "dispute" for the purposes of section 185

27. BT's first ground of appeal in both the NCCN 1007 and the Ethernet Appeals is that OFCOM erred in finding that there was a "dispute" in existence between BT and the MNOs and CPs who purported to refer the disputes to OFCOM under section 185 of the CA 2003.

28. The scope of the arguments raised in support of Ground 1 in the NCCN 1007 Appeal have narrowed since the Notice of Appeal was lodged with the Tribunal. In that Notice, BT asserted that OFCOM should have concluded that:

> "there remained scope for resolution of the issues raised by NCCN 1007 and/or that negotiations between the relevant MNOs and BT had not been exhausted and/or that MNOs were refusing to enter into negotiation or discussions when there nonetheless remained a meaningful opportunity for negotiation."

29. This assertion led to the Interveners filing extensive evidence about the course of their negotiations with BT following the service of NCCN 1007. In its skeleton argument/reply in the NCCN 1007 Appeal and at the oral hearing before us, BT indicated that it was not submitting that it had been willing to negotiate about the principles behind adopting the charging structure in NCCN 1007. In our judgment

BT was clearly right to abandon that contention. From the evidence we have seen there was no basis for it. On the contrary, the MNOs tried on several occasions to engage BT in negotiations over the principles of laddered pricing. BT was only prepared to discuss the detail of where the MNOs would properly be placed on the ladder and would not consider or respond to the MNOs' more fundamental arguments about whether laddered pricing was legitimate at all.

30. By the time of the hearing, therefore, the basis of BT's Ground 1 was the same in both the NCCN 1007 and the Ethernet Appeals. BT argued that the prospect of future negotiations following the handing down of judgments in the earlier NCCN Appeals and the PPC Appeal meant that no "disputes" had yet arisen within the meaning of section 185.

31. In our judgment the term "dispute" should not be interpreted so narrowly that it does not cover the situation that has arisen here. In relation both to the legitimacy of laddered pricing for termination of calls to 080 numbers and to the existence of an overcharge for Ethernet services, the parties cannot agree. It is accepted that there is a foreseeable event, namely the handing down of the Tribunal judgments, that is likely to affect the parties' ability to come to an agreement at some point in the future. To hold that that foreseeable event prevents a "dispute" from coming into existence would require an interpretation of section 185 which takes the wording a considerable distance away from its ordinary meaning.

32. In a letter dated 19 July 2010 EE invited BT "a final time to consider withdrawing NCCN 1007 so as to avoid the need for a dispute reference to Ofcom". BT responded saying that it would not be withdrawing the NCCN. BT similarly refused to withdraw the NCCN in response to requests to do so from H3G and Vodafone. So far as the Ethernet alleged disputes are concerned, we have seen correspondence and notes of meetings in which the CPs put their case and BT refused to accept that there had been any overcharge or that there was any reimbursement due. Where, as here, the CP has communicated its disagreement on a particular issue and has asked BT to take certain action then, once BT refuses to take that action, there is a dispute between the CP and BT for the purposes of

section 185. Nothing more complicated than that is called for either by section 185 or by the European provisions from which that section is derived.

33. In *Orange Personal Communication Services Ltd v OFCOM* [2007] CAT 36 Orange argued that there was no dispute between the parties because BT had not referred the alleged dispute to OFCOM within one month of the breakdown of negotiations, as required by the terms of the SIA. Orange had argued that BT should have issued its own change notice, triggering a further 14 days of negotiations during which it was conceivable that the parties could have come to an agreement. The Tribunal in that case agreed with BT and OFCOM that the meaning of the word "dispute" in section 185 could not depend on the private law consequences of a failure to comply with contractual provisions. Further, the Tribunal held that, when determining OFCOM's jurisdiction under section 185, Parliament could not have intended to require OFCOM to investigate the proper construction of the terms of the contract between the parties or the existence of an estoppel by convention raised by BT: see paragraphs 99 and 100 of that judgment.

34. In the instant appeals, Miss Lee on behalf of BT sought to distinguish *Orange* on the basis that that case concerned whether the parties' contractual position could affect OFCOM's jurisdiction. Here, by contrast, we are concerned with related pending appeals and the likely effect of the disposal of those appeals on the prospects for future negotiations between the parties. We do not agree that the *Orange* judgment can be distinguished in that way. The principles established by the Tribunal in the *Orange* case are first, that the word "dispute" in section 185 should bear its ordinary meaning and secondly that it should not be construed so as to make OFCOM's jurisdiction dependent on a detailed assessment of the state of preceding negotiations between the parties to the dispute. Whether those negotiations are sparked by a contractual requirement or by some external factor such as related appeals does not appear to us to be material. The same principles as were applied in the *Orange* case apply in the present appeals.

35. Further, we agree with Mr Saini QC on behalf of OFCOM that the fact that there may be further negotiations between the parties is not inconsistent with the existence of a dispute. Even if the parties are far apart, one can never say that

negotiations have come to an end. We reject BT's suggestion that negotiations taking place after a dispute has been referred might indicate that the reference of the dispute was premature. It would be undesirable to interpret section 185 in a way that discourages parties from continuing negotiations during the course of an OFCOM investigation, for fear they might thereby negate OFCOM's jurisdiction.

36. BT relied on three main arguments in support of its construction of section 185. First it referred us to 32nd Recital to the Framework Directive which describes what Article 20 is meant to achieve:

> "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". (emphasis added)

37. The effect of this recital, BT argued, is that the word "dispute" in Article 20 must be interpreted as meaning that a dispute can only arise where negotiations have been exhausted. This threshold applies equally to that part of section 185 derived from Article 5(4) of the Access Directive, either because the words "absence of agreement" in that article bear the same meaning as the word "dispute" in article 20 or because Article 20 is expressly incorporated into Article 5(4) by the cross-reference at the end of Article 5(4) to Article 20.

38. We do not consider that Recital 32 of the Framework Directive can bear the meaning BT urges us to ascribe to it. Even if, as BT argues, the recital is capable of creating a requirement that the aggrieved parties must have negotiated in good faith but failed to reach an agreement, that requirement was clearly satisfied here. By the time of the hearing at least, BT accepted that the CPs had negotiated in good faith about both NCCN 1007 and the alleged Ethernet overcharge. In our judgment, the prospect of future negotiations once the earlier NCCN Appeals and the PPC Appeal had been concluded does not prevent the parties from having

failed to reach agreement for the purposes of this recital, or for the purposes of Article 20 of the Framework Directive or Article 5(4) of the Access Directive.

39. BT's second argument relied on the wording of guidance issued by OFCOM in July 2004, entitled Guidelines for the handling of competition complaints, and complaints and disputes about breaches of conditions imposed under the EU Directives ("2004 Guidance"), describing their jurisdiction to determine disputes under section 185. Paragraph 13 of the 2004 Guidance states:

> "In these guidelines, Ofcom has deliberately sought to set a minimum standard that all submissions must meet before Ofcom will open an investigation. Ofcom *will not accept a dispute without evidence of the failure of meaningful commercial negotiations*. … Ofcom will require an officer, preferably the Chief Executive Officer, of the company making the submission to verify … (in the case of a dispute) that *best endeavours have been used to resolve the dispute through commercial negotiation*." (emphasis added)

40. This message is reinforced in paragraphs 44 and 48 of the 2004 Guidance which state:

> "44. Ofcom *will only accept a dispute* where complainants submit clear information on all details of the dispute including:
>
> …
>
> - documentary evidence of commercial negotiations on all issues covered by the scope of 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*."
>
> 48. Section 185 of the Communications Act only applies to matters which are in dispute, *consequently* Ofcom should only be asked to resolve a dispute between parties where *all avenues of commercial negotiation have failed.* Requests for the provision of access and requests for changes to terms and conditions (including prices) should be addressed by commercial negotiation between the relevant parties. *Only where these negotiations fail should Ofcom be called on to resolve a dispute*." (emphasis added)

41. BT argued that the 2004 Guidance shows that OFCOM shares BT's view as to the proper construction of section 185. Mr Saini argued that the guidance simply sets out OFCOM's view that, as a matter of good practice, they would like parties "to do their very best before they knock on OFCOM's door". We consider that the wording of the 2004 Guidance purports to go further than that. It suggests to a

person proposing to refer a dispute that OFCOM could and would decline to consider a dispute unless that party could prove that all avenues of commercial negotiation had been exhausted. That is not right; there is no such high threshold before a dispute comes into existence and therefore before OFCOM come under a statutory obligation to consider the dispute pursuant to section 186 of the CA 2003. It is unfortunate, in our view, that the 2004 Guidance does not make clear OFCOM's legal obligation to accept disputes referred to them, albeit that OFCOM are entitled to encourage potential parties to make strenuous efforts to resolve their differences.

42. The 2004 Guidance, however, cannot affect the proper interpretation of the statutory provisions, still less of the European Union instruments. We therefore reject BT's reliance on the guidance in support of Ground 1 in both appeals.

43. Finally, BT urged the Tribunal to adopt a narrow construction of the word "dispute" in section 185 on what were described as pragmatic grounds. There are good policy reasons, BT argued, for ensuring that the right to require OFCOM to determine a dispute only arises where all commercial avenues of negotiation have failed. Otherwise there is a risk that the regulator has to deal with a host of premature disputes that might otherwise have settled without the need for its intervention. In the context of the current appeals, Ms Lee for BT outlined the practical disadvantages arising if OFCOM have to consider and determine disputes pending the disposal of the earlier NCCN and PPC Appeals. There will be much time spent duplicating submissions and materials sent to OFCOM, instructing experts and drafting lengthy determinations. If negotiations were allowed to continue after the earlier NCCN appeals were decided, those negotiations would be much more structured because they would take place against the background of knowing what it is that the Tribunal has said about ladder pricing and about the structure of incentives for the MNOs. Any dispute referred at that point would also allow a much more focused approach by OFCOM.

44. Our conclusions on this argument are as follows. So far as the NCCN 1007 Appeal is concerned, no doubt all parties would have preferred not to have to

devote the time and money that has so far been expended on dealing with the reference of the NCCN to OFCOM and with BT's challenge to OFCOM's jurisdiction. However, the need for this effort arises from BT's decision to serve NCCN 1007 while the earlier NCCN appeals are still pending before the Tribunal. As we have said, no one has suggested that BT was not entitled so to do and we have explained BT's commercial justification for issuing NCCN 1007, see paragraph 17 above. Given the history, the MNOs' hostile reaction to NCCN 1007 in March 2010 can hardly have come as a surprise to BT. We do not see that we should strain to interpret section 185 in a way which shields BT's conduct in this matter from the exercise of OFCOM's dispute resolution powers at this stage.

45. We agree with the MNOs that, just as BT is entitled to protect its own commercial position by serving NCCN 1007, so they should be allowed to protect their commercial position by referring a dispute to OFCOM reasonably soon after the disputed prices come into effect. Miss Lee countered that even if the Tribunal accepts that a "dispute" does not in fact arise until many months after NCCN 1007 comes into effect, the MNOs are not in fact thereby disadvantaged. This is because section 190(2)(d) of the CA 2003 provides that OFCOM have the power to backdate any determination on NCCN 1007: see paragraph 7 above. The extent of backdating does not appear to be limited to the date when the dispute was referred and, as Miss Lee pointed out, in the *Termination Rate Dispute* appeals the Tribunal did direct OFCOM to backdate the new charges to a date earlier than the date on which the disputes were referred[3].

46. We do not accept that section 190(2)(d) of the CA 2003 is a complete answer to the MNOs' concerns. We note, first of all, that BT was not prepared to give the MNOs any comfort that it would hold back from contesting the full exercise by OFCOM or the Tribunal of the backdating power in the event that a long period elapses between NCCN 1007 coming into force and the date of OFCOM's determination of disputes. We accept the submission of Mr Woolfe for EE that the MNOs do not know what BT's position would be, or how OFCOM would respond, if EE had to argue in future that a revision of payments should be made

[3] See Cases 1089-92/3/3/07 *T-Mobile (UK) Ltd and others v Office of Communications* [2008] CAT 19 and the subsequent Order of the Tribunal made on 17 November 2008.

going back a substantial time before the dispute was referred to OFCOM. We also accept Mr Woolfe's second point that even if complete backdating of the determination were assured, it is very unsatisfactory for the crystallisation of a dispute to be delayed in the manner contended for by BT. The charges under NCCN 1007 are accruing and run to millions of pounds. It is important for the MNOs to know where they stand as regards the proper level of these charges.

47. So far as the Ethernet Appeal is concerned, again, we do not consider that BT's arguments based on pragmatism assist us in the interpretation of section 185. As we describe later in this judgment, it may well be that even matters resolved by the Tribunal's main judgment in the PPC Appeal will need to be reargued before OFCOM in the Ethernet alleged disputes. The fact that VM first referred and then withdrew its dispute does not support BT's interpretation of section 185. There is no *obligation* on a party to refer a dispute to OFCOM. The fact that a CP may choose not to pursue a dispute under section 185 says nothing about whether a dispute actually exists or not. Mr Bates on behalf of Sky and TTG argued that for as long as this dispute goes unresolved, BT has the disputed funds which it can invest in its own networks, thereby distorting the CPs' forward planning and investment decisions as regards competing with BT in downstream markets. As with the NCCN 1007 Appeal, it is important that the issues raised by these overcharge allegations be resolved.

48. We are unconvinced by BT's concerns that if the jurisdiction under section 185 is triggered too easily there is a risk of OFCOM being swamped by referred disputes. No party would lightly commit itself to the dispute resolution process without having tried first to resolve issues by negotiation. This much is clear from the NCCN 1007 Appeal where the MNOs, far from rushing to OFCOM under section 185, pressed BT over a period of months to discuss the principles behind the new charges with them. According to the unchallenged evidence of Mr Higho, on behalf of Sky and TTG, and Mr Morawetz, for VM, the dispute over the alleged Ethernet charges had been the subject of discussions and correspondence dating back a considerable time before the disputes about PPC charges were referred to OFCOM

49. We do not regard limiting the term "dispute" in the way suggested by BT as either sensible or pragmatic. On the contrary it could require OFCOM to examine in some detail the negotiations that have taken place between the parties or the extent of the overlap between the putative dispute and a pending appeal before being able to establish their jurisdiction. Such examination brings with it issues about how far OFCOM could or should look at 'without prejudice' correspondence concerning matters on which it may shortly thereafter be required to adjudicate. In our judgment, therefore there is nothing in the background to these two appeals which means that interpreting section 185 so as to delay the resolution of these disputes would be pragmatic or otherwise preferable to an interpretation which accords with the natural meaning of the words.

50. For all these reasons Ground 1 of the NCCN 1007 Appeal and the Ethernet Appeal therefore fails.

The availability of "alternative means" for the purposes of section 186(3)

51. Section 186 provides that OFCOM are obliged to decide that it is appropriate for them to handle a dispute unless the three conditions set in subsection (3) are met. Those conditions are that there are "alternative means available for resolving the dispute"; that those means would be consistent with OFCOM's obligations under section 4 of the CA 2003; and that "a prompt and satisfactory resolution of the dispute is likely" if those alternative means are employed.

52. BT's second ground in both the NCCN 1007 Appeal and the Ethernet Appeal is that the future negotiations between it and the MNOs after the earlier NCCN appeals and the PPC Appeal have been determined constitute "alternative means" for the purposes of section 186(3) of the CA 2003. OFCOM should have decided that that a "prompt and satisfactory resolution" of the disputes was likely if those negotiations were allowed to take their course after those judgments were handed down.

53. In our judgment, even where the conditions in section 186(3) are satisfied, OFCOM still have a discretion to decide that they will handle the disputes rather than requiring the parties to use the alternative means. We do not agree with BT

that where alternative means exist, the statute leans in favour of OFCOM declining jurisdiction and allowing those means of resolving the dispute to be deployed. In their submissions before us, OFCOM and the Interveners argued for slightly different interpretations of section 186(3). H3G and VM argued that potential negotiations could never amount to "alternative means" for the purposes of section 186(3). This was either because the term is limited to something like arbitration or a formal alternative dispute resolution procedure or because the "means" must be available at the time the dispute is referred and not just likely to become available at some future time. Mr Saini for OFCOM submitted that it is possible in another case for negotiations to be a suitable alternative means, though he said it is hard to imagine that negotiation alone would be, without some future trigger likely to prompt progress in those negotiations. There were also differences between the parties as to how high a threshold was set by the requirement in section 186(3) that the alternative means be "likely" to lead to a prompt and satisfactory resolution.

54. In the event we do not have to decide these nice points of interpretation. OFCOM were clearly entitled to come to the view that future negotiations would not be at all satisfactory as alternative means for resolving either of these sets of disputes. So far as NCCN 1007 is concerned, at the time the disputes were referred to OFCOM, the appeal against the 956 Determination was at its early stages and the appeals against the 985/986 Determination had not yet been lodged. Even if, as Miss Lee argued, OFCOM must have thought it more likely than not that BT would appeal against the 985/986 Determination, OFCOM had no means of knowing how long those appeals would take to resolve. Moreover, that was a matter which was to a large extent outside OFCOM's control. It would have been unreasonable for OFCOM to have decided that future negotiations following on the disposal of these actual or anticipated appeals constituted alternative means meeting the three conditions in section 186(3).

55. So far as the dispute over the alleged Ethernet overcharges is concerned, it is true that the PPC Appeal was at an advanced stage at the time those disputes were referred to OFCOM. The hearing in the PPC Appeal was due to take place, and in fact took place, a few weeks later. But again, OFCOM were entirely within their

discretion in deciding that it would not be appropriate to decline jurisdiction pending judgment in that appeal. First, OFCOM could not know when judgment would in fact be handed down in the PPC Appeal. Secondly, OFCOM could not know which of the issues raised in the PPC Appeal would be considered and resolved in the Tribunal's judgment and hence to what extent it might unblock the negotiations between the disputing parties. Thirdly, the correspondence we have seen makes clear that BT does not accept that what the Tribunal has decided in relation to charges covered by the PPC Appeal will necessarily apply to Ethernet charges. The evidence from the witnesses for Sky and TTG was to the same effect.

56. BT's submissions to us were careful not to commit BT to any particular read-across from the PPC Appeal judgment to the Ethernet disputes. At most, BT was prepared to state in its Notice of Appeal that "there are a number of similarities" between the factual and legal issues raised. Mr Liam Nicholson, who gave evidence for BT in the Ethernet Appeal, stated at paragraph 22 of his first witness statement:

> "... it is to be anticipated that the judgment will provide considerable clarification and encourage BT and the Parties to negotiate a settlement in relation to Ethernet. Also the PPC appeal is likely to resolve legal and procedural points... it is quite possible that not all of the PPC judgment will apply to the Ethernet context, but, in BT's view, there is considerable overlap between the two disputes".

57. However, he accepted that the scope for a realistic attempt at further negotiation, following the Tribunal's main judgment in the PPC Appeal, was "of course entirely depending on the precise details of [that] judgment": see paragraph 11 of his second witness statement.

58. Mr Segan, appearing for VM, took us to a letter written by Mr Nicholson of BT to VM dated 1 December 2008. In that letter BT refer to "substantive differences between PPCs and Ethernet when considering cost orientation and whether charges have been 'excessive'". Later in that letter Mr Nicholson wrote:

> "Further, there are clear differences between PPC and Ethernet products and their relevant product markets that would make a simple application of Ofcom's approach in the PPF dispute to Ethernet prices entirely inappropriate."

59. We cannot see how BT can both maintain the position taken in that letter and at the same time argue that negotiations following the main judgment in the PPC Appeal are likely to be a prompt and satisfactory way of resolving the disputes over the alleged Ethernet overcharges without OFCOM's intervention.

60. In Ground 3 of the Ethernet Appeal, BT relied on a second "alternative means" which, it argues, should have caused OFCOM to decline jurisdiction. BT submits that if the CPs are right that BT is in breach of its regulatory obligations in respect of the charges for Ethernet services, then a prompt and satisfactory route for resolving the dispute would be for OFCOM to exercise the enforcement powers conferred on them by sections 93 to 103 of the CA 2003 to ascertain whether a breach has indeed occurred. If BT has breached its regulatory obligations, then the CPs have a cause of action to claim any overcharge conferred by section 104 of the CA 2003 (provided they obtain the consent of OFCOM to bring such an action).

61. The Tribunal has already held that the existence of that cause of action under section 104 does not preclude the use of the section 185 procedure in cases where the dispute alleges a breach of a regulatory condition: see the judgment on the preliminary issue in the PPC Appeal: [2010] CAT 15, paragraphs 94 onwards. BT now argues that OFCOM should, as a matter of discretion, have declined to handle the Ethernet dispute because that other avenue was open to the MNOs. We agree with OFCOM that this argument cannot succeed. There is nothing in the facts surrounding these appeals that indicates that proceeding under section 104 of the CA 2003 would be a better way for these disputes to be resolved than the way that the CPs have chosen. OFCOM was right to reject this point when deciding to assume jurisdiction over the Ethernet disputes. We also reject the submission in BT's Notice of Appeal that OFCOM could or should have accepted the disputes and summarily rejected it. We agree with what the Tribunal said on this score in its main judgment in the PPC Appeal: [2011] CAT 5, paragraphs 171 to 176, namely that OFCOM does not have power to determine a dispute summarily without considering the merits.

62. In our judgment, BT's submission in both the NCCN 1007 Appeal and the Ethernet Appeal that OFCOM should have declined jurisdiction over these disputes under section 186 fails.

The existence of "exceptional circumstances" in the NCCN 1007 disputes

63. Section 186(5) provides (in accordance with Article 20(2) of the Framework Directive) that unless exceptional circumstances exist, OFCOM must resolve a dispute within four months. As we have described (paragraph 19 above) OFCOM rejected BT's submission that the pending appeal against the 956 Determination created exceptional circumstances justifying the extension of the time limit for resolving the dispute referred by EE. That rejection is the subject of BT's third ground of challenge in the NCCN 1007 Appeal.

64. We can deal with this point shortly. In our judgment OFCOM were clearly entitled to come to that view. The good sense of this decision is demonstrated by the fact that although at the time OFCOM rejected BT's submission, the appeal against the 956 Determination was due to be heard in January 2011, in fact the hearing of that appeal was later postponed until April 2011 so it could be heard with the appeals against the 985/986 Determination.

65. OFCOM's decision to treat the pending PPC Appeal as generating exceptional circumstances justifying the extension of the time limit for resolving the Ethernet disputes is not inconsistent with their stance on the NCCN 1007 disputes. The hearing in the PPC Appeal was imminent at the time OFCOM took its decision. OFCOM was entitled to decide that it would benefit from seeing the judgment in that appeal before determining the Ethernet disputes. It was therefore appropriate for them to extend the time allowed under section 186 of the CA 2003. That is a matter of OFCOM's discretion and there is no basis on which we could properly interfere with that decision.

Progression of the Ethernet disputes investigation pending judgment in the PPC Appeal

66. Ground 4 of the Ethernet Appeal was a contention that OFCOM should have stayed their investigation in its entirety prior to the Tribunal's judgment in the

PPC Appeal. This ground was prompted by the statement in OFCOM's letter of 1 October 2010 that, although they accepted that there were exceptional circumstances justifying an extension of the deadline beyond the four month time limit, they would "be progressing our investigation as far as is possible in the meantime": see paragraph 25 above.

67. At the hearing, BT told us that in fact no steps have been taken so far to progress that investigation. In the light of this BT did not pursue this ground of appeal and it is not necessary for the Tribunal to deal with it.

Conclusion

68. For the reasons set out above, we unanimously dismiss BT's appeals.

Vivien Rose Stephen Harrison Clare Potter

Charles Dhanowa
Registrar Date: 3 May 2011