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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos. 1180/3/3/11  
1181/3/3/11  
1182/3/3/11  
1183/3/3/11

Victoria House  
Bloomsbury Place  
London WC1A 2EB

10<sup>th</sup> February 2012

Before:

**MARCUS SMITH QC**

(Sitting as a Tribunal in England and Wales)

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**  
**EVERYTHING EVERYWHERE LIMITED**  
**HUTCHISON 3G (UK) LIMITED**  
**VODAFONE LIMITED**

Appellants

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- and -

**TELEFÓNICA UK LIMITED**

Intervener

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**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

MISS NANCY JOHNSON (of the Legal Department) appeared on behalf of British Telecommunications Plc.

MR. JON TURNER QC (instructed by the Regulatory Department) appeared on behalf of the Everything Everywhere Limited.

MR. BRIAN KENNELLY (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G (UK) Limited.

MRS. ELIZABETH McKNIGHT (Solicitor, Herbert Smith) appeared on behalf of Vodafone Limited.

MR. JOSH HOLMES (instructed by the Office of Communications) appeared on behalf of Ofcom.

MISS KELYN BACON (instructed by SJ Berwin) appeared on behalf of the Intervener, Telefónica UK Limited.

MR. MICHAEL BOWSHER QC appeared on behalf of the Competition Commission.

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1 THE CHAIRMAN: Before we begin, can I start by expressing the Tribunal's appreciation to the  
2 parties' representatives for making themselves available at rather short notice in response to  
3 the Tribunal's letter of 6<sup>th</sup> February and at a time when I am quite sure that everybody  
4 would rather be doing something else. So thank you all. Ideally, a hearing early next week  
5 would have been preferable, but I am afraid that simply was not possible so I fear we have  
6 all had to stop looking at the determination of the CC.

7 The reason the CMC was fixed in advance of the CMC that has already been fixed for the  
8 end of February was because we exchanged correspondence between the parties regarding  
9 procedural orders following the CC's final determination. In particular I am thinking of 3's  
10 letter from Baker & McKenzie of 23<sup>rd</sup> January, EE's letter in response of 24<sup>th</sup> January, and  
11 the letters that followed in that chain. Frankly, the Tribunal did not want to make any  
12 orders without hearing from the parties. Equally, it seems to the Tribunal to be invidious to  
13 wait until the 24<sup>th</sup> February CMC, because by that time it seems to the Tribunal that 3's  
14 proposals for a very expedited hearing would inevitably have been superseded simply by  
15 the passage of time. So hence this hearing.

16 3's proposals seem very clearly set out in the 25<sup>th</sup> January letter. It might be best to hear  
17 from those opposing that sort of timetable, for them to make their submissions first.  
18 Essentially, I think that would mean EE followed by anyone supporting EE, and then we  
19 could have 3's response followed by those supporting 3's position dealing with those points  
20 in response. If there is any third camp, anybody thinking there is a third way, we can hear  
21 from them afterwards. I am not sure there is a third way.

22 In addition to purely the question of timetabling, it would be helpful if the parties could  
23 address the Tribunal as to why it is important that efforts be made to have this matter  
24 determined before 1<sup>st</sup> April. I know the broad point is because of the second year of price  
25 control beginning, but it would be quite helpful to have some steer as to the practical  
26 consequences were there to be a judgment after 1<sup>st</sup> April versus what would happen if there  
27 were to be a judgment before 1<sup>st</sup> April.

28 With that, perhaps I could hand over to EE.

29 MR. TURNER: I am grateful, sir. You will have received before this hearing a letter from BT  
30 setting out their proposals.

31 THE CHAIRMAN: Yes, I have seen and read that, thank you.

32 MR. TURNER: We, for EE, who are likely to be on the other side if there is to be a judicial  
33 review, do not demur very greatly from anything that is set out by way of their proposed  
34 alternative to 3's timetable in their letter.

1 To explain our position, we would be happy to clarify our position in relation to any judicial  
2 review, as they propose, by 24<sup>th</sup> February. We note, as do they, that that is likely to be only  
3 just over two weeks after the non-confidential version of this large document becomes  
4 available to be seen by those in the company, including both those working on the case and  
5 able to help substantively with a judicial review as well as senior people who would need to  
6 give approval for work to be done. So that is a short period of time.

7 After that, how long would it need in order to get things moving? BT propose Monday,  
8 5<sup>th</sup> March for any challenge, and I will come back in a moment to the question of what that  
9 would involve, because they discount any evidence. We do not quite do that. Broadly  
10 speaking, Monday, 5<sup>th</sup> is their proposal. We would say the 7<sup>th</sup>, so it would be the  
11 Wednesday rather than the Monday, because it is more likely that we would be able to get  
12 the job done by then.

13 They then say that they would want two weeks after that in the respondents' camp to get  
14 their answer in. We are happy with that. On that basis it would be from 7<sup>th</sup> to 21<sup>st</sup> March.  
15 They then say a short period of time should be allowed for a reply. They have proposed  
16 only a few days. We would say a week would be fair.

17 The net result is that our proposed approach would mean that all of the pleadings and  
18 submissions would be done by 28<sup>th</sup> March, and then we are looking to find the earliest  
19 practical date after that.

20 That is our position on timetable. I am glad to say that we do not, therefore, demur from  
21 BT's timetable, nor from their view that it would be useful for the Tribunal today to set  
22 down an indicative timetable. Before the hearing began, I was asked by one of the  
23 representatives for 3 about whether this would also supersede the CMC which has been  
24 provisionally fixed for 24<sup>th</sup>? Yes, it would. This would be the occasion to set down a  
25 timetable along those lines.

26 The question for the Tribunal today as we see it is really a purely practical one. The statute  
27 provides for the possibility of a judicial review after the delivery of a final determination of  
28 this kind. The Competition Commission delivered only last night what is a very substantial  
29 document. I do not know, sir, if you have had the opportunity even to appreciate its scope  
30 as yet, or whether you have seen it.

31 THE CHAIRMAN: I have flicked through it, I think it would be fair to say!

32 MR. TURNER: Then you may be ahead of a number of people here, and certainly ahead of the  
33 clients who will need to see this. It is 550 pages. It is complex. The issues are, in many  
34 senses, inter-related. You will see, therefore, the nature of the practical task facing the

1 people who may wish to bring a challenge. It is not yet available in non-confidential form.  
2 We are required to provide our submissions on that by Monday, and we will do so, and then  
3 it will be a few days before the Competition Commission provides it in a form that the  
4 clients can consider.

5 The question for the Tribunal is, what timeframe is fair to enable a proper judicial review  
6 challenge to take place given the nature of the beast and given all the circumstances? That  
7 is the only question. We say that the timetable we have proposed, a slight variation on that  
8 of BT, is eminently fair. It, in itself, represents a form of super-abridged timetable in what  
9 is likely to be a very punishing schedule for getting the job done: first, because it is a very  
10 weighty document, as, sir, you can immediately see. It will have to be reviewed by  
11 technical and commercial people in the company who are outside the confidentiality ring to  
12 get a judicial review going as well.

13 Second, this is not a case where there is going to be a single bullet point, a single discrete  
14 point, or even a couple of points comprised in a judicial review, at least necessarily. You  
15 may have seen from the opening section of the document that I have that the Competition  
16 Commission refers to one particular pleading point and says that this will be a matter for the  
17 Tribunal, if anyone raises it, to take a view on. I apprehend that that will certainly be an  
18 issue to be raised. It may well be the case that there are a number of other serious and  
19 difficult issues for the Tribunal.

20 Third, it is not the case, as BT's letter may have given the impression, that we can proceed  
21 in a super-expedited way because everything that one needs to know about was already set  
22 down in the provisional determination that the Commission issued in December. Since the  
23 provisional determination, on which the parties made copious submissions, including as to  
24 reviewable errors, there has been a very large amount of further work, including  
25 interchanges with the Competition Commission, further modelling work, further requests  
26 for submission of data, all the way up until either yesterday or the day before - I forget  
27 which. Therefore, we, on the parties' side, have to go through the final determination and  
28 see in what respects it has changed, to appreciate whether new points have arisen and to see  
29 how they have dealt with the points in the provisional determination. It is inevitable, and it  
30 will have to be done.

31 There are a number of areas that, having said that, have already been raised by the parties in  
32 their submissions in January on the provisional determination - matters such as failure to  
33 take account of relevant considerations, some illogicality points, and so forth. All of these  
34 we will need to review and to think about anxiously before deciding whether to bring a

1 judicial review. For these reasons we are going to need at least that time, which itself, as  
2 I have said, is very tight, in order to formulate grounds, having decided whether to bring a  
3 judicial review on various grounds at all.

4 We, therefore, say that the period we are asking for is entirely reasonable. The only point  
5 that I ought to add is that BT suggests that there would be no scope for evidence in support  
6 of an application for judicial review. We accept, of course, that the scope for introducing  
7 any evidence is generally limited for a judicial review, but, sir, as you will know from the  
8 authorities, in a case where you have a truly technical decision, and we have one here, it  
9 may be necessary to have evidence to explain the context so that the Tribunal can perform  
10 its function in a judicial review by understanding the nature of any allegation of perversity  
11 or failure to take into account relevant considerations, and matters of that kind. This is a  
12 situation, therefore, where we may have to adduce evidence to enable to Tribunal to do that.  
13 In short, those are our submissions on the timetable.

14 On the final question that you raised about the magic or otherwise of the 1<sup>st</sup> April deadline,  
15 it is true that when we were before you in June last year we set 1<sup>st</sup> April as an important  
16 target. We do not shrink from that. The reason is that that is the date when otherwise these  
17 new rates would come into effect. Sir, you must not be any illusion that there is any magic  
18 in that date in the sense that there any practical difficulties in implementing a result which  
19 takes place after that. Here you have rates that will be set as ceilings which the parties  
20 cannot go above. That will practically be implemented at any time after this without  
21 difficulty so far as we are aware. What happens is that the Tribunal will make its  
22 determination, it will require to implement the new rates at whatever point the process  
23 comes to an end, and then notice is given to relevant parties, because there is a notice period  
24 during which the parties have to wait before new rates can be implemented, and then they  
25 are implemented. There is no magic whether it is 1<sup>st</sup> April or 1<sup>st</sup> May or any other date.  
26 Therefore, there is no concern in that regard. Indeed, BT's own letter pretty well  
27 contemplates the possibility that this may go after 1<sup>st</sup> April.

28 THE CHAIRMAN: It occurred to me when you were making your submissions on timetable,  
29 Mr. Turner, that it was almost inevitable that the Tribunal's judgment would not be handed  
30 down until some time in April.

31 MR. TURNER: Yes.

32 THE CHAIRMAN: If one is anticipating a hearing very late on in March. There are no two ways  
33 about it, you would get something in the middle of April rather than before 1<sup>st</sup> April. That  
34 immediately raises the question of why is it necessary for all the parties to bust a gut to

1 work to an extremely stringent timetable when, as you say, it makes perhaps not a huge  
2 amount of difference whether a judgment comes down before 1<sup>st</sup> April or in May or  
3 whenever. Obviously there is a degree of urgency, but what I am wondering - and I am sure  
4 the other parties will address me on this - is whether there such a degree of urgency that  
5 requires a timetable of this expedition.

6 MR. TURNER: The factors in favour of it are only those which were referred at the hearing in  
7 June, which is that for so long as the process has not been determined, it may be that the  
8 wrong rates have been set and, therefore, money is not in the pockets of those who ought to  
9 have it. This process has been running now for over eight months already, and a couple of  
10 weeks or more either way would not make any difference to that. The Tribunal's overriding  
11 task is to at least allow sufficient time for a meaningful judicial review challenge to occur.  
12 Therefore, given where we are the moment, it would be surprising if anyone sought to say  
13 otherwise.

14 Moreover, in relation to what, sir, you were saying about the date for any result, if a judicial  
15 review were successful of course it must be the case that there would be a further period  
16 during which the results of the successful judicial review had to be processed. That was  
17 always going to be the case, even under the original envisaged timetable.

18 THE CHAIRMAN: I entirely hear that, Mr. Turner. I recall during the last CMC that I did raise  
19 the question of the amount of time that had been left for the Tribunal to deal with the end  
20 game, as it were, after the Competition Commission had had their final determination, on  
21 the basis that it seemed to me that there was not actually very much time between the  
22 commencement of year two of the price control and the time at which the determination was  
23 handed down. At that time the line that the parties were taking was that it can be done very  
24 quickly. Now of course one is hearing, quite understandably, that it is a lot of work, and  
25 I do see that. The question that is for discussion today is, what degree of pressure consistent  
26 with fairness should the Tribunal put on the parties to achieve a very quick outcome?

27 I would just mention one other matter in terms of diary. March is not a great month for the  
28 Tribunal as presently constituted. I am sitting on *Cardiff Bus* in March, and the dates which  
29 we would probably have, if we were looking for March for the hearing of a judicial review,  
30 would be 20<sup>th</sup> March, which is one day when we are not sitting on *Cardiff Bus*. There are  
31 some dates right at the end of March, which could be done. Of course, then one is looking  
32 at why one does not have the hearing in April. I float that date so that people can think  
33 about that.

34 Thank you, that is helpful.

1 MR. TURNER: If I may, there are two further points. The first is, in relation to the issues, it is  
2 not possible at the moment to say that the issues will be this, that or the other. I can say that  
3 on the very cursory reading we have done, the issues that we previously referred to - failure  
4 to take account of relevant considerations, and so forth, are potentially still issues that will  
5 need to be considered. These are complicated and therefore will require a little bit of time  
6 to consider. I cannot go further than that at the moment.

7 The second point is in relation to the date. It should not be assumed that it will only be, if  
8 there is a judicial review, a one day hearing. That is partly a function of the cast of  
9 characters. If you have everybody making submissions, even on a small number of points,  
10 it will already spill into a day and a half, two days. For our part, we have no desire  
11 whatsoever to elongate this for longer than is necessary, but it would be prudent, we think,  
12 to timetable that it is likely to take two days and to have a third day in reserve.

13 THE CHAIRMAN: One of the points that crossed my mind when preparing for this hearing was  
14 not to scrap the CMC on 24<sup>th</sup> February, but to keep it in place, and to make a single order  
15 today which would reflect s.193(6) and (7) of the Communications Act which you will  
16 know fully well, that essentially, absent there being grounds for judicial review under  
17 s.193(7), the Tribunal's hands are tied, we simply make a judgment on the merits in  
18 accordance with what the Competition Commission has found. One of the options that  
19 I was contemplating would be making an order that any party contending that the Tribunal  
20 should not decide this appeal on the merits in accordance with the Competition  
21 Commission's decision pursuant to s.193(6) should, by not later than the end of  
22 21<sup>st</sup> February, file with the Tribunal and serve on the other parties written submissions  
23 stating why s.193(6) does not apply - in other words, we would have several days before the  
24 24<sup>th</sup> February CMC a statement as to the basis on which it would be contended that the on  
25 the merits findings as dictated by s.193(6) does not follow.

26 We might today also make an indication that we would be minded to have a very fast  
27 timetable thereafter, but that could then be debated in the light of a clear list of judicial  
28 review points that all parties would have.

29 MR. TURNER: May I say that on reflection I do see the sense in at least keeping the provisional  
30 listing for the 24<sup>th</sup>, not least for the reason that it may turn out that one can then hold the  
31 hearing, if necessary, to sweep up any points after the parties have decided that there is not  
32 going to be a challenge. It would seem unlikely, particularly because of the single point that  
33 the Competition Commission itself has flagged up. At that point, if that were the only  
34 point, it could be dealt with quite swiftly on that day. Therefore, it would be a shame to

1 lose its listing on that account. So, on reflection, I can see that keeping that listing would be  
2 a useful thing to do.

3 THE CHAIRMAN: As you very fairly said, Mr. Turner, no one has got a grip of the final  
4 determination at the moment. We have had it for less than 24 hours. It seems to me that,  
5 given the date in the diary, it would be sensible to keep it in there just in case. I think we  
6 would be minded to do that unless other parties can persuade us otherwise.

7 MR. TURNER: In terms of the other point, sir, that you mentioned, which is a proposal that by  
8 4 pm 21<sup>st</sup> February the parties should set out submissions, that is going to be very hard. In  
9 fact, in my view it would be not capable of being done. What the Tribunal did in the last  
10 similar case, the local loop unbundling and wholesale line rental case, was to ask for the  
11 parties to indicate the grounds on which they would propose to bring a challenge and the  
12 submissions came thereafter. I do not know if that is what you had in mind, sir. If I have  
13 misunderstood ----

14 THE CHAIRMAN: I did look out the letter that went to the parties as a result, and what was there  
15 requested was a broad indication of the scope of the challenge to the findings. I had in mind  
16 something between that and full submissions. What I had in mind was a statement that  
17 showed cause, as it were, that explained why it is that this is a case that moves from 193(6)  
18 to 193(7) - in other words, they would not be fully fledged judicial review submissions, but  
19 it would explain not simply why the Competition Commission got it wrong, but why that  
20 error gave rise to a judicial review set aside rather than simply an error on the merits.

21 MR. TURNER: Sir, if you are envisaging only a sentence or two to explain that we have a *bona*  
22 *fide* judicial review ground, then that would be something that could be done, I venture to  
23 say, but if it goes further and is something akin to condensed or summary submissions, that  
24 will not be possible. That is less than two weeks potentially from the date when the non-  
25 confidential version emerges, maybe just around that time. It is very, very hard to impose  
26 on parties, with a document of this size and weight, such a stricture. What we can do is to  
27 indicate to the Tribunal, if we are so minded, that we challenge this particular point, for  
28 example, failure to balance relevant negative and positive effects of moving to this costs  
29 standard rather than that.

30 THE CHAIRMAN: Yes. I would expect also to have an explanation as to why that merited a  
31 judicial review rather than it was simply wrong.

32 MR. TURNER: Absolutely, but that could be done by saying that such a balancing exercise is a  
33 necessary consideration before one can conclude. It is not a purely semantic matter, but at  
34 the same time what would be the benefit in requiring the parties to go much further at that

1 stage? On our proposal, the Tribunal will have a clear statement of *bona fide* judicial  
2 review grounds and intention to proceed.

3 What I seek to avoid, to be frank, is a situation where one is forced to try to produce  
4 something which may necessarily be half baked at that stage, and then, when the final  
5 grounds emerge, other people pop up and say, “Look at the consistency issue between that  
6 and what you did two weeks ago”, which will be a distraction and unnecessary.

7 THE CHAIRMAN: One point that occurs to me - I understand that the non-confidential version  
8 of the final determination is not going to be available until next week when time is, on any  
9 view, quite critical. For that reason, I think the Tribunal would be minded to look quite  
10 favourably on any application to extend the confidentiality ring for the purposes of looking  
11 at this document, were that to assist the parties in gaining a day or so in terms of  
12 considering the final determination.

13 MR. TURNER: It may not help - dare I say it, I do not know whether, if there is genuine  
14 confidential information, opening the ring to people who would otherwise be in danger of  
15 taking advantage of it in terms of companies could be an unnecessary risk that this Tribunal  
16 should not countenance for the sake of a day or two's advantage.

17 THE CHAIRMAN: Thank you, Mr. Turner, that is very helpful.

18 MRS. McKNIGHT: For Vodafone I would endorse what Mr. Turner has said, in particular  
19 I think as to the points discussed towards the end of the exchange. I think we would  
20 certainly say that, whilst we would expect to be able to indicate by 21<sup>st</sup> or 24<sup>th</sup> February  
21 what would be the scope of any challenge that Vodafone might decide to bring, we would  
22 also find it difficult to draft up interim submissions. Indeed if the overall timetable was  
23 intended to impose pressure on us consistently with giving a fair opportunity to prepare for  
24 JR but with a view to disposing of the matter as quickly as possible, we are fearful that  
25 preparing such an interim document could actually distract our attention from preparing a  
26 full document that would set out our full argument in support of the grounds. We would  
27 certainly be in a position to explain in a few sentences why any ground of challenge would  
28 amount to a matter that can be assessed as a JR ground of challenge.

29 I think I also wish to endorse what Mr. Turner said about the concern that we would have in  
30 extending the confidentiality ring. Vodafone is obviously very keen to get hold of the final  
31 determination but has factored into its planning that it does not expect to see it this week,  
32 and I think it is therefore trying to front-load other duties they are doing so as to be  
33 available next week.

1 It is also clear to me that the particular individual at Vodafone who will need to look at the  
2 document in some detail to assist in deciding whether there are appropriate grounds for JR  
3 challenge is exactly the sort of person that other mobile operators will not want to have  
4 access to their confidential information. I am sure Vodafone would feel the same about  
5 counterparts in other mobile network companies. So I do see difficulties with that at this  
6 stage.

7 I also endorse the point that Mr. Turner made about our desire to see this matter finally  
8 disposed of as quickly as possible consistently with our having a fair chance, if we so  
9 decide, to pursue a JR challenge. There is no magic in the 1<sup>st</sup> April date, and we agree that  
10 it would be quite possible to introduce a price control at any point in the price control year  
11 to apply prospectively from the date at which adopted subject to due notice.

12 THE CHAIRMAN: Thank you, Mrs. McKnight. Miss Bacon?

13 MISS BACON: Sir, on behalf of Telefónica we agree with the submissions of Mr. Turner and  
14 Mrs. McKnight. As I understand it, your preliminary view is that you will not at this  
15 hearing lay down a timetable as such. Is that right, save for the 21<sup>st</sup>?

16 THE CHAIRMAN: Certainly I have got in mind that there should be something delivered on the  
17 21<sup>st</sup>. Obviously I have yet to hear from those that are looking for a more accelerated  
18 timetable, but certainly one of the advantages of keeping in place the CMC on the 24<sup>th</sup> is  
19 that the question of timetable can be envisaged, but I do not think anybody should be under  
20 any illusions that if an order for a timetable is not made today, it is quite possible that on the  
21 24<sup>th</sup> a timetable along the lines envisaged by the BT letter is certainly on the cards, and  
22 possibly an even quicker one than that, depending on what the other parties say to me today.  
23 Even if there were no order on the 24<sup>th</sup>, there could be an extremely swift timetable imposed  
24 if there is not one today.

25 MISS BACON: On that point I think we would be alarmed if we got to the 24<sup>th</sup> and there were to  
26 be an even quicker timetable than proposed by BT. For our part, we think the proposal of  
27 EE, and in terms of the 7<sup>th</sup>, the 21<sup>st</sup> and 28<sup>th</sup>, is entirely achievable and sensible.

28 I would endorse Mr. Turner's submissions that there is no magic in the 1<sup>st</sup> April deadline.  
29 Whether that timetable is set down at this hearing, or clearly indicated at this hearing, and  
30 then finalised on the 24<sup>th</sup>, does seem to us to make that much difference. It would be quite  
31 difficult if we were to plan on the basis of a timetable of that nature and then come along on  
32 the 24<sup>th</sup> and find a very much quicker timetable imposed.

33 THE CHAIRMAN: Yes. So I think the short answer is that if we are going to work to something  
34 along the lines of the BT proposal, let us say, we make an order to that effect today.

1 MISS BACON: Certainly if anything were more truncated, advance notice would be definitely  
2 preferable. As I said, and I repeat, we endorse Mr. Turner's suggestion that the BT proposal  
3 can sensibly be modified by a few days - the 7<sup>th</sup>, the 21<sup>st</sup>, and the 28<sup>th</sup> - which takes you to a  
4 week later and gives a sensible amount of time for the parties to consider their position and  
5 have a fair stab at the judicial review rather than pushing us into a much more condensed  
6 timetable on a very long document.

7 Other than that, I have nothing to add.

8 THE CHAIRMAN: Thank you very much.

9 MR. KENNELLY: Sir, for 3, our first point is that the April deadline is important. As

10 Mr. Turner recognised correctly at the CMC in June, changing the prices twice does  
11 involving a degree of administrative inconvenience, but the main point, and one that has not  
12 been addressed is, of course, the question of consumer harm. The delay that results from  
13 not having a decision in April has an effect on consumers. They are kept from the fruits of  
14 the determination which may involve lower prices. That is the reason for urgency.

15 I appreciate there has to be fairness in the process, but it is not simply a question of the  
16 degree of administrative inconvenience and changing of prices. There is an issue of  
17 principle at stake also.

18 We would agree with what I think was the point being made by my learned friends that we  
19 really ought to have a deadline and timetable today. There is no substitute for an order from  
20 you, sir, and indication will not generate the kind of urgency that an order will. I think,  
21 whatever order is made, we all agree, we are all here, and no doubt with our diaries to the  
22 extent that is even relevant, we are here to discuss dates and we would urge you to give us  
23 dates today for the full process.

24 In that respect, I would agree with Mr. Turner that the summary grounds proposal that you  
25 made in relation to 21<sup>st</sup> February, because it does require, in fairness to the challengers,  
26 them to fully appreciate and understand the decision in order to produce a very short  
27 document, and that is not practically possible by 21<sup>st</sup> February, if you adopt what  
28 Mr. Turner said about the difficulties that they will have.

29 In relation to the timetable, I think it is important, in my submission, to recognise first that  
30 the Competition Commission has been very good and quick in producing non-confidential  
31 versions of its documents, and we would anticipate, although the Competition Commission  
32 will say if they disagree, having a non-confidential version by Monday or Tuesday.

33 Although we will get our proposed redactions to them by Monday, they normally turn it

1 around very quickly. That is when we would expect to have a non-confidential version  
2 from the Competition Commission.

3 On that basis, it is possible to have a properly expedited process, and we would urge you to  
4 have regard to our proposed timetable, which is tight, but we repeat what we said in our  
5 letter, which is that the parties have had ample notice of the likely results and reasoning in  
6 the provisional determinations, and of course the parties have already lodged detailed  
7 submissions in relation to the provisional determinations, so a high degree of legal,  
8 economic and factual thinking has gone into the parties' responses to what the Competition  
9 Commission is likely to produce.

10 In relation to the subsequent exchanges with the Competition Commission that have taken  
11 place - Mr. Turner referred to them - those are in relation to remedies, and in particular in  
12 relation to remedies under reference question 6. They were not exchanges that went to the  
13 substance of the provisional determination.

14 In terms of the time that is necessary for the initial grounds, we maintain that 15 days from  
15 the confidential version is adequate. We repeat that the challenge will be by way of judicial  
16 review and it would be inappropriate therefore to have detailed factual and economic  
17 evidence. Of course the parties are entitled to have some evidence, explanatory evidence,  
18 but not the kind of detailed factual and economic evidence that requires time. That kind of  
19 evidence would be impermissible in this process. Of course, the main material that will be  
20 before this Tribunal on a judicial review will be the material that was before the  
21 Competition Commission, the detailed material. Of course the parties are very familiar with  
22 that material, and again for that reason we say that 15 days is ample to produce the grounds  
23 of challenge. We, of course, in our timetable allow ourselves a shorter period - we expect to  
24 be resisting the challenge - a shorter period up to 9<sup>th</sup> March. There is provision for a reply.  
25 Of course, as you are probably aware, sir, in the judicial review challenge to the last mobile  
26 call termination Competition Commission determination there was no reply stage at the end  
27 of the process. There was simply an opportunity to put in submissions of challenge, a  
28 response, and then we went straight to the hearing. That is a further stage which has been  
29 inserted, and, in my submission, if you, sir, were unhappy with our proposal for the first  
30 stage you could take out the reply stage and give the parties more time at the beginning to  
31 lodge their grounds.

32 You may, when you make a final order, also look at some of the other suggestions - the  
33 proposals put forward in the last order. Miss Rose at the time - Miss Vivien Rose, the  
34 Chairman of the Tribunal at that time - restricted the parties in terms of the length of their

1 submissions - I think she said ten pages per ground of review - in order to impose some  
2 discipline on the parties and assist the expedition of the process. I am not suggesting that  
3 today, but it gives you an indication of how this was approached before.

4 In terms of the dates in March, Mr. Turner's suggestion of completing the written process  
5 by the 28<sup>th</sup> runs into the problem of Easter. Easter, of course, is early. It is in April - I think  
6 April 8<sup>th</sup> - and so if we finish our written process on 28<sup>th</sup> March, it is likely that a hearing  
7 will be in late April, and that, of course, has a knock-on effect in terms of the date of the  
8 delivery of the judgment. It keeps consumers, as I said, from the fruits of the determination  
9 and the disposal of the appeals.

10 Sir, for that reason we maintain our proposal on dates. You, sir, mentioned that there were  
11 available dates for a hearing at the end of March. You have not given us an indication of  
12 those dates, but they may well be the appropriate dates for a hearing if a strict timetable,  
13 such as we propose, is adopted.

14 THE CHAIRMAN: Mr. Kennelly, I quite understand what you are saying in terms of this process  
15 not involving the detailed factual toing and froing that the Competition Commission's on  
16 the merits jurisdiction involved in the process that has occurred, but it does occur to me that  
17 there is some expenditure of time going to be involved in identifying precisely what the  
18 judicial review grounds are - in other words, in abstracting oneself from the factual detail of  
19 the Competition Commission, and identifying those grounds which are susceptible to  
20 judicial review is, itself, although a shorter process in terms of hearings coming before the  
21 Tribunal, quite a tall order. I sympathise with what Mr. Turner said in response to my  
22 suggestion that one has a moderately detailed articulation of JR grounds on the 21<sup>st</sup>, and yet  
23 your timetable is proposing the 24<sup>th</sup>. Granted one may push that back when one looks at the  
24 third stage or supplementary stage, but it is still extremely tight for those who wish to  
25 challenge the Competition Commission's findings.

26 MR. KENNELLY: It is. It is much tighter than one normally sees in a standard judicial review.  
27 The difference here is that the parties have had very detailed reasoning and proposed results  
28 in the provisional determination. The parties, as you are well aware, are heavily resourced  
29 and highly experienced - highly experienced not only in their own industry, but highly  
30 experienced in this litigation - and from the moment that all of us received the provisional  
31 determination on 21<sup>st</sup> December and on 14<sup>th</sup> December, the lawyers have been considering  
32 potential grounds of judicial review. It is inconceivable that that has not been done from  
33 that moment. It is not a very substantial task to compare the provisional determination to  
34 the final determination to see the differences between them and to revisit the provisional

1 conclusions that no doubt had been reached about what the grounds would be and what the  
2 merits of those grounds would be. That is not an enormous task. All of us have, to varying  
3 degrees, read the final determination already. I am not suggesting that everybody is on top  
4 of it now, but even in a day, because we know the issues and because people are familiar  
5 with the background, that is a task that can be undertaken. Fifteen days, in my submission,  
6 is ample in view of the work that has already taken place - substantial work has taken place,  
7 15 days is ample - to convert that into a final submission.

8 THE CHAIRMAN: What do you say about the hearing length, Mr. Turner's two days and a day  
9 in reserve?

10 MR. KENNELLY: Three days sounds excessive, but it is difficult for me to demur because we  
11 have not seen what their grounds would be. Therefore, I am in difficulty on that, but I have  
12 to accept that we have to assume that it will be at least one day, two days more likely, so  
13 what Mr. Turner says is correct. I am afraid I am not in a position to rebut what Mr. Turner  
14 says about that. I appreciate that has a knock-on effect in terms of the practicalities of  
15 listing. I agree, of course, that it would be most unfortunate if we went part heard. I think  
16 everybody agrees that we have to have the hearing at the same time.

17 THE CHAIRMAN: Thank you, Mr. Kennelly, that is helpful.

18 MISS JOHNSON: For BT, sir, you have got in front of you our letter of today.

19 THE CHAIRMAN: I have that, thank you.

20 MISS JOHNSON: I will make just a few brief remarks. The first is that I think you have the  
21 unenviable task, sir, of balancing speed versus the need for opportunity for judicial review.  
22 With respect to the meaningful opportunity for the parties to consider and submit any  
23 judicial review challenges, I am sympathetic to the point that Mr. Turner made about a two  
24 stage process. Indeed, in the local loop unbundling proceedings, that was the format that  
25 was adopted. So it is on that basis that we made our proposal.

26 With respect to the extension that Mr. Turner has suggested, I do not think we have violent  
27 allergic reactions to the extra days, although I do agree with 3 that there is a question as to  
28 whether the reply period is necessary at the end. So that might be an opportunity to shorten  
29 and compress the timetable.

30 In terms of why is there is a need for speed: quite frankly, because an error has been found  
31 and there is a risk of consumer harm. As Mr. Turner said quite swiftly, monies are sitting in  
32 the wrong pockets at the moment, and of course there is no remedy for the money that is  
33 sitting in the wrong pocket, because you cannot order a retrospective change to an existing  
34 condition. That means that any delay means that that harm subsists and cannot be

1 corrected. That is one of the reasons why we think speed is absolutely critical, balanced  
2 against the need for a meaningful opportunity for judicial review.

3 There are three points that you raised that I would like to offer comment on. The first is that  
4 I also agree with the other parties that having interim submissions on the 21<sup>st</sup> is likely to be  
5 a distraction, so I would not suggest that.

6 I think it is helpful to keep the case management conference on 24<sup>th</sup> February, because I am  
7 sure there will be issues that we can discuss.

8 With respect to widening the confidentiality ring, ironically BT would be one of the parties  
9 who would benefit from that, but on a question of principle, I think it would be an  
10 unfortunate thing to do because, by definition, if information is confidential it is  
11 confidential. So we would be opposed to any widening of the ring.

12 THE CHAIRMAN: Thank you very much. Mr. Bowsher

13 MR. BOWSHER: I apologise for my delay in arriving and my eccentric attire. Our position is,  
14 I think, fairly simple. We are keen obviously to balance the need to keep the pace going  
15 with giving the Tribunal the opportunity to reach the appropriate outcome. Given the  
16 volume of the matters that need to be dealt with, we think that it would be right to work  
17 towards the 24<sup>th</sup> February hearing, but there should be some sort of interim outline grounds  
18 before then, primarily from our perspective so we can have a sighting view as to what, in  
19 fact, we are going to have to do in terms of our own internal work. By the 24<sup>th</sup> we can give  
20 a very firm view to the Tribunal as to how long it is going to take us to address internally  
21 the matters that arise. That seems to us to be the most efficient way forward, because  
22 otherwise we are yet again in that position of having to - "guess" is wrong word - give a less  
23 precise view as to how long that will take.

24 It may be that that pushes the final hearing - for which I think we probably do have to allow  
25 three days - into early April. Easter is there, but there is always some diary obstacle that  
26 needs to be dealt with.

27 We do not mind if the reply comes out. That is the other point I should have made.

28 THE CHAIRMAN: Thank you, Mr. Bowsher. Mr. Holmes?

29 MR. HOLMES: Sir, I am in the third camp on my own! I have one short submission to make.

30 We are neutral on the questions of timetable that have been discussed thus far.

31 On the question that you raised we have always said that there is no magic about 1<sup>st</sup> April.

32 The submission concerns the need to attend to the implementation of the determination after  
33 the judgment on the disposal of the appeals. As Mr. Turner alluded to, there is a process of  
34 implementing the determination, or the determination as varied following a judicial review.

1 What the Tribunal did last time around was to invite submissions not only in respect of the  
2 judicial review, but also as regards the terms of the final directions in parallel. While we  
3 appreciate that you probably will not be making orders as to the further conduct of the  
4 proceedings today, we would commend that course again on this occasion. To simplify  
5 matters and to allow the parties to understand what Ofcom proposes to do, we intend to  
6 write, as we did last time around, setting out how we would propose to implement and with  
7 a mark up of the notification setting the conditions, so that if any party takes violent  
8 exception to them and thinks that other directions should be given to us they can ventilate  
9 that before the Tribunal.

10 THE CHAIRMAN: In other words, what would occur in parallel with the argument about  
11 whether or not the judicial review should be successful, there would be a process whereby  
12 we would have possibly a number of different formulations as to what Ofcom would do  
13 depending upon outcome, which would be, as it were, negotiated with the parties and could  
14 then take effect very rapidly after any judgment is handed down?

15 MR. HOLMES: Sir, we would make our proposals. If a party disagreed with them we would  
16 obviously listen to what they had to say, but really we would suggest they should make  
17 submissions to the Tribunal in relation to them at the final hearing, and written submissions  
18 on the same dates that the judicial review submissions are being made, so that the Tribunal  
19 can address them and we can proceed as rapidly as possible to implement after the judgment  
20 on final disposal.

21 THE CHAIRMAN: That all sounds very sensible.

22 MR. HOLMES: I am grateful, sir.

23 THE CHAIRMAN: Mr. Turner, is there anything you want to say in reply?

24 MR. TURNER: Very briefly, sir, I am assuming that Mr. Holmes' submissions were on the basis  
25 that the judicial review is unsuccessful, and he is, therefore, building in an additional step  
26 that we would have to comply with along with bringing any judicial review in time for the  
27 Tribunal's final hearing on that assumption.

28 MR. HOLMES: Although the figures might change as a result of a judicial review, the steps  
29 required to implement will probably remain the same. That was certainly the experience  
30 last time round. There were various practical questions that would arise whether the level  
31 was at X or Y, and so it would, therefore, probably be sensible to wrap them up so that they  
32 could take effect whatever the outcome of the judicial review.

33 MR. TURNER: Sir, that may be sensible. I have to say it is not the sort of thing that we are in a  
34 position to deal with today. All I would say, I believe on behalf of everyone in this camp, is

1 that we would be entirely co-operative and deal with Ofcom to try and get the right result,  
2 but it is difficult to go beyond that.

3 Sir, in relation to the submissions against us, I would make the following brief observations.

4 The first point made by Mr. Kennelly was that the need for urgency comes down to the  
5 point on consumer harm. There are two points to make in response to that. The first is that  
6 one has to get a sense of proportion when one is talking about consumer harm. We are here  
7 arguing over a period of a few weeks in relation to something that has taken many months.

8 That is not a compelling reason to abbreviate to the point where a practical judicial review  
9 becomes difficult, to the point that it risks being unfair, which is the major consideration.

10 The second referred to in this connection by BT was that what we need to do is ensure that  
11 money sits in the right pockets as soon as possible. We agree with that. What it does not  
12 take account of though is that if a good judicial review is brought then the outcome should  
13 be that money should sit in different pockets. So that has got to be taken into account as  
14 well. The implicit premise is therefore wrong. That is the first point.

15 The second is this: it was suggested also that the task was very manageable indeed because  
16 we already know where we are because of the provisional determination that came in  
17 December. The only point that I would make is to elaborate on what I said in opening, that  
18 the parties made significant and important submissions in response to the provisional  
19 determination, and as a result of that it is not merely reviewing the document to see what  
20 has changed. There has been a lot of movement and we will have to look at these  
21 documents anew and it is a detailed exercise. Sir, although we are now talking about a  
22 matter of days, there is a temptation as this hearing has progressed to regard our  
23 submissions as somehow lethargic. They are not. They are, in themselves, extremely quick  
24 and will involve punishing efforts on the part of everybody on this side of the room. For  
25 that reason, we do urge on you that our timetable is offered in good faith not as an attempt  
26 to delay, but as what we genuinely consider to be the minimum practical time for getting  
27 this done.

28 Sir, those are our submissions.

29 THE CHAIRMAN: Thank you very much, Mr. Turner. What I will do is I will rise for a minutes  
30 and get the diaries and see what sort of dates can properly be done, and I will come back in  
31 a few minutes.

32 (Adjourned for a short time)

33 THE CHAIRMAN: Thank you all very much for those submissions. Having regard to the  
34 amount of work that is entailed, the timetable that is going to be imposed is one which is

1 going to be in line with that suggested in BT's letter, with Mr. Turner's modifications, and  
2 I will come to that in a moment. Mr. Kennelly, I have considerable sympathy with the  
3 desire to move quickly, but that has to be done consistently with fairness, and, frankly, I see  
4 all manner of difficulties if we were to go down the expedited or the extremely expedited  
5 route that 3 proposes. Although I have great sympathy we are not going down that route.  
6 The order that will be made today is, first of all, the 24<sup>th</sup> February CMC will stand. It may  
7 be that it can be vacated later date, but at the moment we will keep it in the diary.  
8 Secondly, by 4 pm on 21<sup>st</sup> February the parties will state, first, whether they intend to raise  
9 any s.193(7) challenge in respect of the Competition Commission's determination; and  
10 secondly, if they intend to do so, they give a broad indication of the scope of that challenge  
11 in terms of the findings or relevant to the paragraphs challenged, and the basis of that  
12 challenge. That, just to assuage Mr. Turner's concerns, is not quite in line with the letter  
13 that accompanied the last exercise, but is close to that. I am not expecting full submissions,  
14 I am expecting an indication of what points will be taken.  
15 Thirdly, in terms of the timetable after the 24<sup>th</sup> February CMC, parties seeking to challenge  
16 the Competition Commission decision should file and serve grounds on which the challenge  
17 is based, including any evidence, by 4 pm on 7<sup>th</sup> March 2012, that the Competition  
18 Commission and any other party that wishes to respond to that challenge should file their  
19 response, including evidence, by 21<sup>st</sup> March 2012, and that should be in the form of a  
20 skeleton argument, that any submissions in reply be served by 28<sup>th</sup> March 2012, and that  
21 any challenge be listed for hearing as soon as possible thereafter, with a time estimate of  
22 three days - two days for the hearing and one day in reserve if there is over-run.  
23 I would like to give the parties a better indication of when that will be, but I am afraid  
24 I cannot today. So far as I am aware, for two members of the Tribunal - myself and one of  
25 the wing members, April is reasonably free. For the third member April constitutes some  
26 problems, and we will simply have to check diaries, but we will notify the parties as soon as  
27 possible what dates are available for a three day hearing.  
28 Not by way of order but by way of indication, in terms of length of submissions, I am sure  
29 all the parties know that brevity, given the relaxed timetable that I have now imposed, is of  
30 real benefit to the Tribunal, rather than length, but I am not going to impose restrictions in  
31 terms of length. The parties will take as long as they see fit.  
32 Secondly, Mr. Holmes' third way, Ofcom's suggestion regarding mechanics, does seem to  
33 be inherently a good one and one that the Tribunal commends to the parties, but I am not  
34 going to make that an order simply because, given the length of the Competition

1 Commission's determination and the difficulties of implementation, it is really just not  
2 possible to make an order that can be sensible, but the parties will bear in mind that it is a  
3 sensible course and one that the Tribunal would expect to follow.

4 Is there anything else that I have missed or that the parties think should be added to that  
5 order?

6 MR. TURNER: Sir, only to say thank you for sitting so late on a Friday to accommodate the  
7 parties on this.

8 THE CHAIRMAN: Can I thank the parties also for accommodating the Tribunal. Thank you all  
9 very much.

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