



Neutral citation: [2007] CAT 18

**IN THE COMPETITION APPEAL  
TRIBUNAL**

Case No. 1071/2/1/06

Victoria House  
Bloomsbury Place  
London WC1A 2EB

3 April 2007

Before:  
MARION SIMMONS QC (Chairman)  
PROFESSOR PETER GRINYER  
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

**CITYHOOK LIMITED**

Appellant

-v.-

**OFFICE OF FAIR TRADING**

Respondent

and

**ALCATEL SUBMARINE NETWORKS LIMITED  
BRITISH TELECOMMUNICATIONS PLC  
CABLE & WIRELESS PLC  
GC PAN EUROPEAN CROSSING UK LIMITED  
GLOBAL CROSSING EUROPE LIMITED  
GLOBAL MARINE SYSTEMS LIMITED  
NTL GROUP LIMITED  
AND  
TYCO TELECOMMUNICATIONS (US) INC**

Interveners

Heard at Victoria House on 30 and 31 January 2007

**JUDGMENT (Admissibility of appeal)**

## **APPEARANCES**

Mr. Kenny Shovell (assisted by Mr David Greene of Edwin Coe) appeared for the Appellant.

Mr. Mark Hoskins (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent.

Mr. Jon Turner QC (instructed by Blake Laphorn Linnell, Charles Russell, Bridgehouse Partners and Beachcroft) appeared for the Interveners: Alcatel Submarine Networks Limited, Cable & Wireless Plc, Global Marine Systems Limited and Tyco Telecommunications (US) Inc.

Mr. Fergus Randolph (instructed by Eversheds) appeared for the Intervener, NTL Group Limited.

Mr. Gerald Barling QC (instructed by BT Legal) appeared for the Intervener, BT plc.

Miss Frances Murphy (of Mayer Brown Rowe & Maw) appeared for the Interveners, GC Pan European Crossing UK Limited and Global Crossing Europe Limited.

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## **I INTRODUCTION**

1. This judgment is in respect of a preliminary issue arising in this appeal, namely whether, in closing its investigations into allegedly anti-competitive behaviour, the respondent, the Office of Fair Trading (“the OFT”), has taken a decision that is appealable to the Competition Appeal Tribunal (“the Tribunal”) under sections 46(3)(a) and 47(1)(a) of the Competition Act 1998, as amended (“the 1998 Act”).
2. By a Notice of Appeal dated 23 August 2006 Cityhook seeks to challenge the decision of the OFT, communicated by a letter of 23 June 2006 (“the final case closure letter”), to close the file on its investigations begun on 1 August 2002 into:
  - (i) an alleged collective boycott of Cityhook by the United Kingdom Cable Protection Committee (“the UKCPC”) and certain of its members in the market for submarine cable laying and landing. The final case closure letter refers to this allegation as the “collective boycott case”; and
  - (ii) an alleged collective setting of so-called “wayleave fees” by the UKCPC and certain of its members. This is referred to in the final case closure letter as the “collective setting case”.
3. Cityhook contends that the OFT has taken a decision, communicated by the final case closure letter, “as to whether the Chapter I prohibition has been infringed” within the meaning of section 46(3)(a) of the 1998 Act. Accordingly, Cityhook argues that it is entitled to appeal to the Tribunal under section 47(1) of the 1998 Act.
4. The OFT submits that its decision to close its investigations into the collective boycott case and the collective setting case was based on the fact that the cases no longer constituted an administrative priority. That being so, the OFT submits that it has not taken a decision which is capable of appeal to the

Tribunal under the 1998 Act. Instead, the OFT submits that its exercise of administrative discretion may be the subject-matter of judicial review by the Administrative Court. Indeed, by its letter to Cityhook of 31 August 2006, copied to the Tribunal, the OFT recommended that Cityhook should obtain legal advice about whether it should also bring a protective application for judicial review in the Administrative Court. It is our understanding that Cityhook subsequently made an application for judicial review of the OFT's decision to close its investigations. The proceedings before the Administrative Court have been stayed pending the outcome of the present appeal.

5. Following submissions made by the OFT at the case management conference on 14 September 2006, and its outline statement on admissibility dated 13 October 2006, the Tribunal decided that the issue of the admissibility of the appeal should be determined as a preliminary issue. The hearing took place on 30 and 31 January 2007.
6. For the reasons set out below, the Tribunal unanimously finds that the appeal should be dismissed on the ground that the Tribunal does not have jurisdiction under sections 46 and 47 of the 1998 Act to entertain it.

## **II BACKGROUND AND CHRONOLOGY OF EVENTS**

### **A THE PARTIES**

#### *(i) Cityhook*

7. It appears from the documents adduced in evidence before the Tribunal that:
  - (a) Cityhook was incorporated on 18 October 1999.
  - (b) Cityhook was founded by three British engineers, each of whom is said to be very experienced in the laying of submarine telecommunication cables.
  - (c) CNS Limited, an oil and gas and telecommunications marine engineering company, funded and supported Cityhook.

- (d) Cityhook was formed to exploit a technology which had been invented by one of its principal founders, Mr Mike Wilson.
- (e) The patented technology relates to a novel foreshore ducting system that involves drilling a tunnel under land and sea-bed and emerging approximately one kilometre offshore; a duct with several sub-ducts is then installed.
- (f) Cityhook's ducting system has the capacity to land multiple sub-sea fibre optic cables under the foreshore and onto dry land.
- (g) Cityhook claims that this technology would encourage competition and improve efficiency in laying and landing sub-sea cables.

(ii) *The UKCPC*

8. The UKCPC is an unincorporated trade association of submarine cable owners, operators and suppliers. Its membership includes Alcatel Submarine Networks Limited ("Alcatel"), British Telecommunications plc ("BT"), Cable and Wireless plc ("Cable and Wireless"), Level 3 Communications Limited ("Level 3"), GC Pan European Crossing (UK) Limited and Global Crossing (Europe) Limited (together "Global Crossing"), Global Marine Systems Limited ("GMS"), NTL Group Limited ("NTL") and Tyco Telecommunications (US) Inc ("Tyco"), all of which, with the exception of Level 3 (which did not want to intervene in the proceedings on the issue of admissibility of the appeal), have been granted permission to intervene in these proceedings.

(iii) *The OFT*

9. On 1 April 2003 the functions of the Director General of Fair Trading became subsumed into a new corporate body, the OFT, by virtue of section 2 of the Enterprise Act 2003 under S.I. 2003 No. 766. The OFT has a wide range of functions in respect of consumer protection and competition matters.

## B THE OFT'S EVIDENCE

10. We set out below the background to the present case and a chronology of the events leading up to the OFT's decision to close the investigations in the collective boycott and collective setting cases, including its decision-making process. The preliminary issue, namely the question whether the OFT has taken a decision as to whether the Chapter I prohibition has been infringed, is primarily a question of fact to be decided in accordance with the particular circumstances of this case. Accordingly, it is necessary to set out the evidence before the Tribunal concerning the OFT's investigations, deliberations and its decision-making process in some detail.

11. For convenience, the Tribunal uses the word "agreement" in this judgment to include a reference to "concerted practice" and "decision by associations of undertakings".

### *(i) Mr Smith's first witness statement*

12. The Tribunal has not been provided with any of the underlying internal OFT documents which are relevant to the collective boycott and collective setting cases and the preliminary issue before this Tribunal. Instead, on 12 October 2006, the OFT filed a witness statement by an OFT official, Mr Vincent Smith, who was the decision-maker in both cases. This witness statement ("Mr Smith's first witness statement") is intended by the OFT to set out the relevant facts to assist the Tribunal in determining whether or not the OFT has taken an appealable decision within the meaning of sections 46 and 47 of the 1998 Act. That evidence provides the basis of our summary of the salient aspects of the chronology and accordingly has been of material assistance to the Tribunal.

### *(ii) Cityhook's requests for disclosure*

13. On 24 October 2006 Cityhook made a contested application for disclosure of certain documents from the OFT's file. On 2 November 2006 the OFT submitted a second witness statement by Mr Smith which was intended to supplement the first and in particular to shed further light on the nature and

outcome of the OFT's investigations and decision-making in these cases ("Mr Smith's second witness statement"). Cityhook's application was rejected by the Tribunal, as explained in its ruling of 20 November 2006: see [2006] CAT 32.

14. On 9 January 2007 Cityhook again applied for disclosure from the OFT of internal documents, on the basis that they might support its case as to the admissibility of its appeal. Cityhook's principal reason for making its second application for disclosure of internal OFT documents was the risk that the effect of the documents may have been unwittingly distorted in Mr Smith's witness statements. Cityhook's concern was that any summary, however conscientiously and skilfully made, may distort the primary evidence (see, to that effect, Lord Bingham in *Tweed v Parades Commission for Northern Ireland* [2007] 2 WLR 1, paragraph 4). In declining to order the disclosure of internal documents, however, the Tribunal concluded that to do so would not be necessary, relevant and proportionate to determining the preliminary issue currently before it: see [2007] CAT 9.
15. The Tribunal has had to be very careful to extract from the witness statements of Mr Smith the evidence of primary fact and to differentiate between his evidence of what happened in the collective boycott and collective setting cases and his statements of opinion and his commentary. Had the OFT disclosed the underlying internal documents rather than providing these witness statements, this would have been of considerable assistance to the Tribunal in considering the application. In addition it would have avoided any risk that in Mr Smith's summary of the primary evidence any distortion, however unintentional, might have occurred or be perceived to have occurred.
16. In this judgment it is important to note that the Tribunal is not making any findings on the underlying facts of either case.

(iii) *The OFT officials involved in the collective boycott case and the collective setting case*

17. According to Mr Smith's first witness statement, the following individuals were involved at different stages in the OFT's investigations in the collective boycott case and the collective setting case:

- (a) In spring 2002 Ms Margaret Bloom was the Director of the Competition Enforcement Division of the OFT ("the CE Division"). The principal responsibilities of the Director of the CE Division are to ensure that the OFT makes effective use of its competition enforcement powers under the relevant legislation.
- (b) In spring 2002 Mr Beckett McGrath was Branch Director of CE4 Branch in the CE Division, which branch carried out the investigations of the collective boycott and collective setting cases.
- (c) In spring 2002 Mr Smith joined the OFT as Director of Competition Policy Coordination and Deputy Director of the CE Division.
- (d) On 1 April 2003 Sir John Vickers, who was previously Director General of Fair Trading, became the Chairman and Chief Executive of the OFT.
- (e) On 1 August 2003 Mr Smith was appointed Director of the CE Division.
- (f) On 22 June 2005 the OFT publicly announced the creation of two new Senior Director posts within the CE Division which report to the Director CE Division.
- (g) Mr Ali Nikpay was appointed to the new post of Senior Director of Case Scrutiny and Policy. He took responsibility for ensuring the robustness of the CE Division's casework output (including leading the

internal case review process, which was introduced in May 2004) and for competition policy.

- (h) In September 2005 Mr Simon Priddis took up the newly created post of Senior Director of Competition Casework and took responsibility for the prioritisation, planning and progression for casework under the 1998 Act.
- (i) On 30 September 2005 Sir John Vickers retired from the OFT.
- (j) On 1 October 2005 Mr Philip Collins was appointed as Chairman of the OFT and Dr John Fingleton became Chief Executive of the OFT.
- (k) In October 2005 Mr Chris Mayock was appointed as the CE4 Branch Director in place of Mr McGrath.
- (l) Following the OFT's internal reorganisation, Mr Smith stepped down as Director of the CE Division on 30 September 2006 and the next day took up the role of Senior Director for Competition.

(iv) *The OFT reporting structure at the relevant time*

- 18. Prior to September 2005 the CE4 Branch Director reported to the Director of the CE Division. With effect from September 2005, the Branch Director of CE4 reported to the Senior Director of Competition Casework.
- 19. Prior to 30 September 2005 the Director of CE Division was directly responsible to the Chairman of the OFT and to the OFT Board. Thereafter the Director of the CE Division was responsible to the Chief Executive of the OFT as well as to the OFT Board for casework undertaken by the CE Division under the 1998 Act.

(v) *Responsibility of Mr Smith*

- 20. The principal responsibilities of the Director of the CE Division are summarised in paragraph 17(a) above. In carrying out this role, Mr Smith had

overall responsibility for the management and progression of the collective boycott case and the collective setting case. Throughout the investigations Mr Smith monitored closely the progress of both cases. Mr Smith was assisted in overseeing both cases by, amongst others, the consecutive directors of the CE Branch responsible for investigating those cases (CE4) and from September 2005 the Senior Directors within the CE Division. Mr Smith ultimately took the OFT's final decision to close the investigations.

(vi) *February 2002: Cityhook's complaint*

21. On 21 February 2002 Cityhook complained to the OFT that it was the victim of an alleged collective boycott by the UKCPC and certain of its members and that its submarine telecommunications cable landing technology was being unlawfully excluded from the market, contrary to the Chapter I prohibition. This is referred to as the collective boycott case.

22. On 29 March 2002 Cityhook made a further complaint to the OFT that certain companies imposed a so-called "vertical restraint" on Alcatel and Tyco, to boycott any company in the sub-sea cable laying chain having any commercial dealings with Cityhook, contrary to the Chapter II prohibition.

(vii) *August 2002: The OFT opens section 25 investigations*

23. On 1 August 2002 the OFT opened an investigation under section 25 of the 1998 Act into whether there had been an agreement contrary to the Chapter I prohibition by way of a collective boycott within the market for submarine cable laying and landing (subsequently refined to the market for the provision of submarine telecommunications cable landing facilities and services).

24. Cityhook's complaint about the "vertical restraint" and a possible infringement of the Chapter II prohibition were considered as part of the collective boycott case. Accordingly, no decision was taken to open an investigation in respect of an alleged infringement of the Chapter II prohibition.

25. In the course of investigating the collective boycott case, the OFT uncovered evidence that gave it reasonable grounds for suspecting that the Chapter I prohibition had been infringed in respect of wayleave fees. The term “wayleave” refers to the telecommunications companies’ right to install, maintain, repair and replace their infrastructure on land. On 23 June 2003 the OFT commenced a section 25 investigation into whether the UKCPC and / or its members had entered into an agreement collectively to set the level of wayleave fees paid for landing cables on land owned by the Crown Estate and the Duchy of Cornwall. This investigation was subsequently broadened on 17 February 2004 to examine whether there was an agreement in relation to wayleave fees payable to UK landowners, including the Country Land & Business Association, and the National Farmers’ Union, which had as its object or effect the restriction of competition in the market for provision of access to land in order to lay a cable. Together these potential infringements became known as the collective setting case.

*(viii) July 2003: The case team submits a “skeleton” to the then OFT Chairman*

26. Once it was clear to the case team that the collective boycott case and the collective setting case might result in the preparation of a Statement of Objections, it prepared an internal submission, referred to as a “skeleton”. In accordance with the OFT’s normal practice at the time, the purpose of the skeleton was to outline the case, the key arguments and salient issues identified by the case team at that stage of the investigation and recommend the way forward for the case.

27. On 24 July 2003 a skeleton dealing mainly with the collective boycott case but also referring to certain limited matters in connection with the collective setting case was submitted to the then Chairman of the OFT, Sir John Vickers, and copied, amongst others, to the then Director of the CE Division, Ms Bloom and Mr Smith, then the Director of Competition Policy Coordination and deputy Director of CE Division.

28. On 28 July 2003 Sir John Vickers informed the case team that he was happy for them to start drafting a Statement of Objections. He noted, however, that there were still some unresolved issues, including, for example, in connection with market definition and the economic and commercial logic of the collective boycott case.
29. Following the identification by Sir John Vickers of unresolved issues and with the approval of the CE4 Branch Director at the time, the case team continued to pursue its investigations into the collective boycott and the collective setting cases. To that end, the case team made use of the OFT's powers under Part I of the 1998 Act to request information and documents from the UKCPC, some of its members and various third parties. This work was done with a view to resolving the issues highlighted by Sir John Vickers and to developing both cases more generally.
- (ix) *May 2004: The OFT introduces a system of internal case review*
30. From spring 2004 the OFT's efforts to improve caseload management and prioritisation within the CE Division became a key focus of Mr Smith's work as Director of that division.
31. As part of these efforts to improve the quality of the OFT's decision-making process in May 2004, a system of formal internal case review was introduced. Under that system when a draft Statement of Objections was in a fairly advanced form and approved by the relevant branch Director it would be put to an internal Case Review Panel ("the CRP") for peer review. The CRP is normally composed of OFT officials working in the CE Division and Legal Division who are independent of the case team. The task of the CRP is to scrutinise the draft Statement of Objections and the supporting evidence. The CRP then decides whether or not to recommend the issue of the Statement of Objections and, if so, whether any drafting changes or further investigation are needed. The CRP's views are then discussed at a meeting between the CRP and the case team, known as the Case Review Meeting ("the CRM"). The position taken at the CRM is not definitive since, according to Mr Smith, it is

a candid internal discussion amongst officials and not a decision-making meeting. According to Mr Smith, neither the CRP nor the CRM binds the final decision maker.

(x) *October 2004: The case team submits a further skeleton to the then Chairman of the OFT*

32. On 7 October 2004 the case team sent a further skeleton to Sir John Vickers. This skeleton focused on, amongst other things, the collective setting case which had been broadened and developed significantly since the first skeleton. The skeleton was copied to Mr Smith amongst others and he made some comments on it.

33. On 11 October 2004 Sir John Vickers responded to the second skeleton. He informed the case team that he was happy for the cases to go forward to the CRP process. He viewed the difficult issues as being whether to address the Statement of Objections to the UKCPC only and whether any resulting fines should be real or token. This was not a decision to issue a Statement of Objections but rather a decision to proceed to draft a Statement of Objections that would be subject to peer review through the internal CRP process.

34. In October 2004, based on the evidence and arguments in the two skeletons, Mr Smith's personal view was that there was good evidence that an infringement of the Chapter I prohibition had been committed by the UKCPC. In light of his view on the substance of both cases, Mr Smith considered that it would be difficult to close the cases on administrative priority grounds. Accordingly, and notwithstanding his awareness of issues concerning the size of the case and the lack of certainty over the facts and the law, Mr Smith considered that the OFT should proceed to issue a Statement of Objections against the UKCPC. According to his first witness statement, Mr Smith was not the ultimate decision maker in either case at that time.

(xi) *December 2004: OFT case management*

35. On 9 December 2004 the OFT took a case management decision to focus the draft Statement of Objections on those parties that it believed to be the most culpable (although this was not limited to the UKCPC). While there was evidence to implicate other parties as well, the OFT decided, on administrative grounds, to confine its investigations to those parties it believed were more directly involved in the alleged infringements of the Chapter I prohibition.
36. In December 2004 and January 2005 the OFT wrote to all parties that had been targets in the investigations, indicating whether or not they would be an addressee of a Statement of Objections (if one were to be issued). These letters made it clear that no decision had been taken, at that stage, as to whether or not to issue a Statement of Objections.

(xii) *Changes in the organisation and operation of the CE Division*

37. From mid-2005 the OFT implemented a programme of organisational change within the CE Division with a view to delivering more efficient progression and prioritisation of the OFT's competition enforcement caseload. As noted above, in June 2005 the positions of Senior Director of Competition Casework and of Senior Director of Case Scrutiny were created.
38. As part of this internal restructuring, the OFT introduced new criteria to help determine which competition cases to prioritise. Mr Smith was instrumental in formulating the administrative priority criteria used by the OFT to decide which competition case investigations to commence, continue and close.
39. From early 2005 the OFT began using six broad categories of factors to prioritise competition cases namely:
- (i) The likely extent of consumer detriment caused by the alleged infringement and hence the consumer benefit from taking the case forward;

- (ii) The strength of the evidence available;
- (iii) The type of infringement;
- (iv) Any aggravating and mitigating factors;
- (v) Policy considerations (such as whether the case has precedent value or is in a priority area set out in the OFT's Annual Plan);
- (vi) Whether enforcement action under the 1998 Act is the most appropriate way of dealing with the issue and the OFT is the most appropriate body to undertake enforcement action.

40. Mr Smith explains in his first witness statement that these six factors are used to give an indication as to whether a case should proceed towards enforcement action under the 1998 Act and to indicate the relative priority of any given competition case. He states that the process of case prioritisation is seldom scientific and not all of the criteria are relevant in every case.

41. Mr Smith further explains that from the beginning of 2005 a review of the relative priority of a particular case was also introduced at so-called "key milestones" of an investigation. The purpose of this internal review is to determine whether the investigation should be progressed. "Key milestones" of an investigation include the following:

- (i) The initial decision to take forward a complaint or first inquiry;
- (ii) The decision on whether to open a formal investigation if the conditions set out in section 25 of the 1998 Act are met;
- (iii) Depending on the individual case, a decision on whether to continue with the formal investigation in light of information gathered pursuant to the powers under sections 26-28A of the 1998 Act;

- (iv) The decision on whether to begin drafting a Statement of Objections;
- (v) The decision on whether to proceed to issuing a Statement of Objections; and
- (vi) The decision on whether to proceed to a final infringement or non-infringement decision.

42. Mr Smith explains that the OFT's priorities can change during the course of a case. He explains that the relative priority of a particular case at key "milestones" may change over time either as a result of developments in relation to that case and/or due to priorities attaching to other cases which may affect the relative weighting "across the board".

*(xiii) December 2004 – August 2005: Preparing the draft Statement of Objections*

43. Between December 2004 and August 2005 the case team proceeded to draft a Statement of Objections in relation to both the collective boycott case and the collective setting case. Based on the evidence gathered in the course of the investigations to date, the draft Statement of Objections focused on the following alleged infringements:

- (i) an agreement by the UKCPC and some of its members to collectively boycott Cityhook and its submarine telecommunications cable landing technology which had as its object or effect the prevention, restriction or distortion of competition in the relevant market i.e. the collective boycott case; and
- (ii) an agreement by the UKCPC and some of its members to collectively set wayleave fees paid to the Crown Estate, the Duchy of Cornwall and other UK landowners which had as its object or effect of the prevention, restriction or distortion of

competition in the relevant market(s) i.e. the collective setting case.

44. The draft Statement of Objections was prepared by the case team and was reviewed by Mr McGrath, the CE4 Branch Director at that time.

45. On 2 August 2005 Mr McGrath confirmed that a draft Statement of Objections could be submitted to the CRP. As a result, the case team submitted a draft Statement of Objections to the CRP the same day.

*(xiv) August 2005 – October 2005: Internal review of the draft Statement of Objections*

46. Between 2 August 2005 and 13 October 2005 the draft Statement of Objections was subject to scrutiny by the CRP as part of the OFT's internal case review process. As noted above, the task of the CRP was to decide whether or not to make a recommendation to issue the Statement of Objections and if so whether any changes or further investigation was needed.

*(a) The case team's view*

47. In the collective boycott case, the case team classified the collective refusal to purchase Cityhook's technology as an object-based infringement, contrary to the Chapter I prohibition. In its view, there was little justification for treating the collective boycott of a supplier differently from the collective boycott of a customer.

48. In the collective setting case, the case team considered the evidence was consistent with an illegal buyers' cartel which fixed prices and not a joint purchasing arrangement.

49. Prior to the CRM, the case team recommended that the way forward in both cases was for a Statement of Objections to be issued and for the alleged infringements to be characterised as object and effect infringements in both the collective boycott and collective setting cases.

*(b) The CRP's view*

50. In the collective boycott case, the CRP considered that, on the basis of a review of the case law and policy statements from the European Commission, the collective refusal to purchase in question should be characterised as an effect-based rather than an object-based infringement unless (a) it was linked to an underlying cartel or (b) possibly, it was aimed at eliminating a competitor.
51. The CRP took the view that, on the basis of case law and guidance, the collective setting case concerned a joint purchasing arrangement, the most likely effect of which would be a reduction in wayleave fees and that, as such, it would not, of itself, appear to constitute a restriction by object (unless it operated as part of a disguised cartel on a downstream market).
52. Prior to the CRM, the CRP proposed that further work should be done so as to allow a non-infringement decision to be adopted in relation to both the collective boycott and collective setting cases.

*(c) The discussion at the CRM*

53. On 13 October 2005 a CRM, chaired by Mr Nikpay (who had been recently appointed as Senior Director of Case Scrutiny), met to discuss the views of the case team and the CRP on both the draft Statement of Objections and the supporting evidence in both the collective boycott and collective setting cases. The CRM was attended by representatives of the case team and the CRP as well as other policy and economic advisors. Mr Smith did not attend this CRM.
54. The CRM considered the collective boycott and collective setting cases separately.
55. The key issues debated at the CRM in both cases included, first of all, whether the alleged infringements should be categorised as object-based or effect-based infringements and secondly, the strength of the evidence that the alleged

agreements had an appreciable restrictive effect on competition. There was strong and unresolved disagreement between the case team and the CRP in respect of both cases.

56. In relation to the collective boycott case, the CRP and the case team strongly disagreed about:

- (i) whether the alleged infringement should be categorised as an object-based or effect-based infringement;
- (ii) if and to the extent that the infringement were to be characterised as effect-based, the strength of the evidence that the boycott had an appreciable effect on competition.

57. In relation to the collective setting case, the CRP and the case team strongly disagreed about:

- (i) whether the collective setting of wayleave fees should be categorised as an object-based or effect-based infringement;
- (ii) if and to the extent that the infringement were to be characterised as effect-based, whether the draft Statement of Objections proved to the required standard that the arrangements in question had an appreciable effect on competition; and
- (iii) whether the criteria in section 9 of the 1998 Act might be satisfied.

58. According to Mr Smith, the conclusion set out in the minute of the CRM (“the CRM Minute”), with which the case team strongly disagreed, was that the draft Statement of Objections should not be issued in its current form in either case. This conclusion reflected the concern about the analysis of an object-based infringement and the strength of evidence as to the effect of the alleged restrictions on competition.

59. If a Statement of Objections were to be issued, however, Mr Smith explains that the CRM Minute stated that any provisional finding of infringement should preferably be based on an analysis that the collective refusal to purchase had an adverse effect on competition in the collective boycott case and had to be based on the collective purchasing arrangement having a negative effect on competition in the collective setting case.
60. According to Mr Smith, the CRM minute also noted that further work would be required to establish the effect on competition to the requisite standard in both cases. In particular:
- (i) In the collective boycott case, proving restrictive effects to the requisite legal standard would require pursuing new lines of enquiry, including whether or not Cityhook's technology would have made entry for telecommunications companies easier. Mr Smith understood that the case team believed that it did not need this further argument in order to prove its case on the basis of restrictive effects. As a result, evidence on this point had not been included in the effects section of the draft Statement of Objections submitted to the CRP. When this issue was raised at the CRM, this was a new argument as far as the CRP was concerned and was thus considered by the CRM as a new line of enquiry which required further investigation and consideration.
  - (ii) In the collective setting case the CRM Minute stated that, given that no downstream adverse effect on competition was likely, such a case would require evidence of effects on other affected markets in relation, for instance, to sub-optimal prices leading to misallocation of resources. It was stated that the draft Statement of Objections contained very little argument and evidence on the effect of the practices under investigation on any market.
61. Mr Smith commented in his second witness statement that the internal debate within the OFT as to whether the arrangements under investigation had as

their object the restriction of competition concerned an issue of law, and in particular the interpretation to be given to relevant case-law and policy statements given the lack of clear legal precedent concerning how to treat purchase-side restrictions similar to those in the cases under investigation.

(xv) *October 2005 – December 2005: Post-CRM developments*

62. Mr Smith understands that, following the CRM, the case team set about reviewing the evidence it had gathered and conducting further research with a view to restating its original arguments that both cases should be characterised as object and effect infringements and further supplementing its arguments concerning the restrictive effect in both cases. The case team also briefed its new CE4 Branch Director, Mr Mayock, about both cases.

63. Mr Smith also explains that, following the CRP review process and the CRM on 13 October 2005, there was no internal consensus regarding the way forward for either the collective boycott case or the collective setting case. There remained strongly opposed internal views. Accordingly, Mr Smith considered it was imperative for the OFT to reach an early decision as to how (or whether) to progress these cases. As a result, Mr Smith asked:

- (i) Mr Mayock, the CE4 Branch Director at the time, to conduct a fresh substantive review of both cases; and
- (ii) Mr Priddis, the Senior Director of Competition Casework, to review both cases against the OFT's administrative priorities (as outlined in paragraph 39 above).

64. In October 2005 Mr Collins and Dr Fingleton took up their posts as Chairman and Chief Executive respectively of the OFT.

65. In November 2005 the final report of the National Audit Office ("the NAO") was published which addressed, amongst other things, the OFT's approach to competition enforcement, prioritisation and case management. The NAO concluded that the OFT should focus on three areas: making better use of its

resources; improving the management of investigations and improving the measurement of its competition enforcement achievements and results of its work and communication of them.

66. A revised draft Statement of Objections had been prepared by the case team by 1 November 2005. This draft was a slightly updated version of the one submitted to the CRP on 2 August 2005; it did not reflect any material changes to the substantive analysis.

67. There is no suggestion in the evidence before us that further material work was done on either case after 1 November 2005. Between that date and 19 June 2006, the OFT's resources would appear to have been focused on whether the OFT should proceed with these cases or whether they should be closed.

*(xvi) 5 December 2005: Mr Mayock's memorandum*

68. On 5 December 2005 Mr Mayock, having conducted his review, provided written advice to Mr Smith and to Dr Fingleton (referred to as "Mr Mayock's memorandum"). According to Mr Smith's first witness statement, Mr Mayock's memorandum (which we have not seen) considered three options to progress the cases: the OFT could either (a) adopt a non-infringement decision; (b) issue a Statement of Objections with a view to proceeding to an infringement decision or (c) close the case file on grounds of administrative priority.

69. As to the substance of both cases, Mr Mayock recommended that a Statement of Objections should be issued (with a view to proceeding to an infringement decision). This option was preferable to adopting a non-infringement decision. Mr Mayock believed that issuing a non-infringement decision would send an inappropriate message in view of the substantive analysis and would have significant resource implications.

70. Mr Smith explains that Mr Mayock considered the alleged infringements in both cases could be characterised as restrictions by object and effect.

Mr Mayock's memorandum noted that, whilst the law on restrictions by object for both infringements was unclear, a credible argument could be advanced to support object-based infringements. Indeed, Mr Mayock's memorandum noted that it was clear from the evidence cited in the draft Statement of Objections dated 2 August 2005 that the undertakings concerned had at least a technical case to answer for both infringements.

71. Mr Mayock noted that the draft Statement of Objections dated 2 August 2005 could be made more robust in relation to the effects analysis with limited further work (albeit there would still be concerns about the robustness of the cases). Prior to issuing any Statement of Objections, Mr Mayock recommended that the case team would need to supplement its arguments in the draft Statement of Objections with extra work to develop the theory of competitive harm in the collective boycott case and to analyse the effect on the supply of land in the collective setting case.
72. Mr Mayock's memorandum also noted that since there were concerns about the robustness of the collective boycott case and the collective setting case, consideration should be given to whether there were more promising cases that should be pursued instead.
73. Notwithstanding his view of the substance of the cases, Mr Mayock's overall recommendation, referring to Mr Priddis' advice, set out below, was for case closure on grounds of administrative priority.

*(xvii) 6 December 2005: Mr Priddis' memorandum*

74. On 6 December 2005 Mr Priddis provided a written note of advice to Mr Smith and to Dr Fingleton (referred to as "Mr Priddis' memorandum"). At that time, Mr Priddis had overall responsibility for balancing the relative resource needs of the various competition cases being pursued within the CE Division. Mr Priddis' memorandum (which we have not seen) concluded by recommending that the collective boycott case and the collective setting case be closed on administrative priority grounds.

75. In formulating his recommendation, Mr Priddis noted that:
- (i) The collective boycott and collective setting cases were not, in his view, non-infringement cases (in other words, the available evidence did not support a finding of non-infringement). Mr Priddis considered that the evidence suggested a degree of coordination between competitors which might be inconsistent with proper competition and that closing the cases on the basis of a non-infringement decision was, therefore, not an option;
  - (ii) The weakness of the existing evidence as to the anti-competitive effects of the alleged conduct was, in his view, concerning, though it was possible that further evidence could be gathered. In relation to gathering further evidence, Mr Priddis noted that the case team had already prepared section 26 notices to gather relevant information;
  - (iii) The lack of a compelling “story of harm” was, in Mr Priddis’ view, problematic; and
  - (iv) The adversarial nature of the draft Statement of Objections dated 2 August 2005 might suggest that the parties could avail themselves of exculpatory arguments that had not at that stage been fully explored, including the weaknesses of the Cityhook technology and the economic imperative on the parties to act given that their cables were just about to arrive off the UK coast and needed to land.
76. According to Mr Smith, Mr Priddis’ memorandum also noted that in order to take both cases forward, additional resources would be needed over an estimated three-year period. This view was based on the following considerations:

- (i) Even though the case team had worked very hard since the CRM to address the CRP's concerns, as Mr Mayock had advised, further material work on the draft Statement of Objections needed to be done. This work included both further drafting and additional investigative work;
- (ii) If a Statement of Objections were to be issued, substantial resources would be needed to deal with the written and oral representations submitted by the relevant parties (quite apart from the separate question of resources needed subsequently to draft a final decision); and
- (iii) There was also the question of resources needed to deal with the appeal if one were made. Mr Priddis considered an appeal would be inevitable.

77. Mr Smith explained that before dedicating further resources to these cases, Mr Priddis suggested that the OFT should consider whether these were the right cases for continuing use of OFT resources.

78. According to Mr Smith, Mr Priddis' memorandum explained his assessment of the priority to be attached to the cases using, as his starting point, the six prioritisation criteria adopted by the CE Division, as follows:

- (i) *Consumer benefit from taking the case forward:* there was little – if any – evidence of consumer detriment in these cases;
- (ii) *The strength of the evidence that there has been an infringement:* in Mr Priddis' view, the available evidence in both cases was mixed: while it seemed clear that the various telecommunications companies had not always behaved entirely “properly”, that might not necessarily amount to “strong and compelling” evidence of an infringement, especially where there may be reasons for the

telecommunications companies to behave in the way that they did;

- (iii) *The type of case:* in Mr Priddis' view there was nothing specific about the type of case – it was not clearly a hardcore infringement, nor did the cases fall within one of the OFT's priority areas (as set out in the OFT Annual Plan for 2005-06, the priority areas for enforcement action were: credit markets, construction and housing markets and related services, healthcare markets, interaction between government and markets and mass-marketed scams). Mr Priddis raised a question as to whether the role of the Crown Estate in the collective setting case brought it within the "Government and markets" priority framework. He took the view, however, that the Crown Estate was in a different position from cases in which the Government is itself said to be responsible for the distortion of competition: in the collective setting case, the Government was, in part, the victim of the alleged anti-competitive conduct;
- (iv) *Aggravating or mitigating factors on the facts of the case:* in Mr Priddis' view there were no such factors in these cases;
- (v) *Any relevant policy consideration:* Mr Priddis drew attention to a range of relevant policy considerations, including the fact that the case team had already dedicated very significant effort to investigation and development of the cases. He noted that this was a long-running investigation to which the OFT had dedicated substantial resources but considered that, while the point the OFT had reached in the case must clearly play a role in thinking about administrative priority, that alone should not deter it from closing the cases if it believed that its resources were better used elsewhere in the future. One of the other policy considerations to which Mr Priddis referred was the risk that the Tribunal might find that an investigation shut down at such a late stage without

an infringement finding amounted to a non-infringement decision. However, he agreed with Mr Mayock's conclusion that the available evidence did not support a finding of non-infringement; and

- (vi) *Whether CE Division was "best placed" to deal with the issue:* Mr Priddis considered that, if the OFT needed to pursue this matter, then CE Division alone appeared able to deal with it.

79. In the light of the foregoing analysis and looking at all of the factors in the round, Mr Smith explains that Mr Priddis did not believe there to be a compelling case for allocating further OFT resources to the collective boycott and collective setting cases. In general terms, Mr Priddis stated he would allocate a low priority to these cases given, in particular, the absence of identifiable consumer detriment.

80. Mr Smith explained that Mr Priddis' memorandum went on to state that the investigations in the collective boycott and collective setting cases need not be closed if either: (a) there were ready resources available in the CE Division (or elsewhere in the OFT) that could be used to progress the cases to the point of issuing a Statement of Objections and beyond, or (b) if there were other cases in the CE Division that were less deserving of OFT resources. At that time Mr Priddis concluded that neither situation (a) nor (b) applied here because:

- (i) there were a number of other cases then active in CE Division that were of higher priority (in particular due to the clear story of harm and identifiable consumer detriment) and to which, in order to progress them promptly, Mr Priddis needed to dedicate additional resources;
- (ii) there was no other CE Division case (or other cases) currently at a key "milestone" on which a decision could sensibly be taken to close the file in order to retain the "Cityhook matter". In any event, given the need to "staff up" a number of existing CE

Division live matters, Mr Priddis considered the OFT needed to close a number of current investigations;

- (iii) Mr Priddis asserted that the OFT should weigh questions of administrative priority in the context of the ongoing organisational change programme. He explained that a core focus of this programme was to take forward fewer cases so that those remaining could have resources dedicated to them. He explained that there would therefore inevitably be some rationalisation of the then CE Division caseload in order to provide for greater flexibility in staffing. In his view, it was also a core principle of the prioritisation process that it was ongoing: in other words, that the OFT should constantly re-evaluate whether dedication of additional resources to a case was a sensible use of OFT resources. This did not mean that the OFT should lightly close down cases that had been running for a long time; but, on the other hand, it did mean that long-running cases were not immune from closure by virtue of their longevity.

- 81. Mr Priddis' conclusion was that both the collective boycott and collective setting cases would need to be developed considerably in order to run them. Thus, in order to issue a Statement of Objections and, ultimately, to adopt a final decision one way or the other would require additional OFT resources. In his opinion, there were a number of higher priority cases which could be progressed more rapidly if the collective boycott and collective setting cases were to be closed. In these circumstances, Mr Priddis recommended that both cases be closed on administrative priority grounds.

*(xviii) 6 December 2005: Case discussion meeting*

- 82. A meeting was held on 6 December 2005 to discuss the way forward in the collective boycott case and the collective setting case. In attendance were Dr Fingleton, Mr Smith, Mr Priddis, Mr Mayock, and Mr Nikpay, certain members of the CRP and certain members of the case team. The strongly

opposing views of the case team and the CRP regarding the substantive assessment of the two cases were again manifest.

83. By the end of this meeting, it was agreed that Mr Smith would decide how to proceed in respect of both cases, based on the internal views expressed and the relevant documentation.

*(xix) 20 January 2006: Mr Smith's provisional decision*

84. In his first witness statement Mr Smith stated that, having given due consideration to all the relevant issues in connection with the collective boycott and collective setting cases, on 20 January 2006 he decided provisionally, on balance, that both cases should be closed on the grounds of administrative priority.

85. According to Mr Smith's first witness statement, his provisional decision was intended to release resources from the collective boycott and collective setting cases to other competition cases which, relatively, were of a higher priority to the OFT and lacked the resources to allow them to be progressed in a timely manner.

86. In making his provisional decision Mr Smith considered the following items of evidence:

- (i) the draft Statement of Objections dated 1 November 2005;
- (ii) the views expressed by the case team and the CRP;
- (iii) the conclusions reached at the CRM, as summarised in the CRM Minute;
- (iv) the views expressed in Mr Mayock's memorandum and Mr Priddis' memorandum; and
- (v) the views expressed at the discussion on 6 December 2005.

87. Mr Smith's provisional view of the substance of both cases was that the case team (and thus the draft Statement of Objections) had made out a *prima facie* case for the parties to answer. On that basis, if the OFT were to issue a Statement of Objections, Mr Smith felt that both cases should be argued as object and effect infringements. Nevertheless, Mr Smith agreed with the view that additional work to further improve the draft Statement of Objections dated 1 November 2005 would need to be undertaken prior to it being issued. He noted Mr Mayock's advice that a Statement of Objections could be issued with limited further work. Mr Smith remained concerned, however, that such limited work might not produce a sufficiently robust Statement of Objections and that the parties' probable counter-arguments might necessitate the preparation of a supplementary Statement of Objections before a final decision could be taken. Mr Smith considered such a procedural step would have had significant resource implications and that it was strongly preferable to ensure that an initial Statement of Objections was sufficiently robust.

88. Notwithstanding his provisional view of the substance of both cases, Mr Smith was persuaded that neither the collective boycott case nor the collective setting case constituted a sufficiently high priority for the OFT. Based on the reasons given in Mr Priddis' memorandum and the views exchanged at the case discussion meeting of 6 December 2005, Mr Smith considered that neither case was a sufficiently high priority. In particular, the cases were not a sufficiently high priority for the OFT relative to certain higher priority investigations. These higher priority investigations lacked sufficient resources to enable timely progress. Consequently Mr Smith decided provisionally to close the collective boycott case and the collective setting case on the grounds of administrative priority in order to release resources from those cases to higher priority cases.

(xx) *24 January 2006: Provisional case closure letter*

89. On 24 January 2006 Mr Mayock wrote to interested parties to give them an opportunity to comment on the impact of Mr Smith's provisional decision before formally deciding whether to close the case file.

90. The consultation period lasted until 5pm on 17 February 2006. The case team received, reviewed and summarised 13 diverse responses (from 12 different respondents) including 2 letters dated 11 and 15 February 2006 written on behalf of Cityhook.

91. According to the final case closure letter, the OFT carefully considered the responses to the provisional case closure letter before taking the final decision to close the investigations.

*(xxi) February – April 2006: Correspondence from interested parties*

92. On 17 February 2006 Mr Alex Salmond MP wrote on behalf of Cityhook to the Chairman of the OFT, Mr Collins. Dr Fingleton, the Chief Executive, replied on 3 March 2006. Mr Salmond responded to Dr Fingleton by a further letter dated 16 March 2006 to which Mr Smith replied on 28 March 2006 and stated that:

“...I would draw your attention to the letter dated 24 January 2006 sent to Cityhook Limited by Chris Mayock which sets out the OFT’s provisional reasoning as to why both the collective boycott of Cityhook and the collective setting of wayleave fees cases are no longer administrative priorities for the OFT, notwithstanding the fact that, in each case, the OFT believed the parties had a case to answer.

...

Inherent in these provisional decisions [to close the OFT’s investigations] is the view that these higher priority cases were much more deserving of the resources tied up on the [collective boycott] case and/or the collective setting of wayleave fees case despite the merits of these two cases.”

93. Mr Salmond sent further letters to Mr Smith dated 17 and 26 April 2006 to which Mr Smith responded on 2 May 2006.

94. Mr Shovell, the Chairman of Cityhook, wrote to the Chairman of the OFT, Mr Collins on 26 April 2006, to which Mr Collins replied on 20 May 2006.

*(xxii) 19 June 2006: Mr Smith’s final decision*

95. Mr Smith explained that, having given due consideration to all the relevant issues, on 19 June 2006 he decided, on balance, that both the collective

boycott case and the collective setting case should be closed on the grounds of administrative priority.

96. In making this final decision Mr Smith states that he took into account the following:

- (i) The draft Statement of Objections dated 1 November 2005;
- (ii) The views expressed by the case team and the CRP;
- (iii) The conclusions reached at the CRM as summarised in the CRM Minute;
- (iv) The views expressed in Mr Mayock's memorandum and Mr Priddis' memorandum;
- (v) The views expressed at the case discussion meeting held on 6 December 2005;
- (vi) The final draft of the case closure letter to be sent by Mr Mayock (which was identical to the final case closure letter, save for one minor and irrelevant drafting error);
- (vii) The draft summary of comments from interested parties received in connection with the OFT's provisional case closure letter; and
- (viii) The letter from Mr Shovell to Mr Collins dated 26 April 2006.

97. Mr Smith's view was that there was evidence of potential infringement in relation to both cases (subject, of course, to the fact that none of the undertakings under investigation had yet had a chance to respond to any Statement of Objections).

98. Mr Smith believed, however, that both cases would need to be developed significantly before a sufficiently robust Statement of Objections could be issued. This further work included:

- (i) A more thorough analysis of the effect of the parties' behaviour on competition, including further work in relation to market definition;
- (ii) As to whether the alleged infringements could properly be object-based. As noted above, there was a strong difference in views within the OFT on this point; and
- (iii) Supplementary drafting work in relation to both object and effect.

99. According to Mr Smith, the OFT decided not to carry out this further work on the basis that neither case continued to constitute an administrative priority for the OFT. Mr Smith was persuaded that neither the collective boycott case nor the collective setting case constituted a sufficiently high administrative priority for the OFT to warrant the allocation of further resources. Mr Smith's first witness statement refers to the reasons set out in the final draft of the case closure letter in this regard.

100. Mr Smith took the view that the reference to a possible object-based infringement in the provisional case closure letter should be omitted from the final case closure letter for the following reasons (bearing in mind the views expressed to him by a senior legal adviser concerning the relevance of the Tribunal's case law in this area):

- (i) there was a strong difference of views within the OFT as to whether the alleged infringements could properly be characterised as object-based;
- (ii) looking at both cases in the round, the further resource requirements which led to the cases being closed on

administrative priority grounds related primarily to demonstrating an effect on competition;

- (iii) further analysis and review of the case law would have been required before the OFT could take a position regarding an ‘object’ case; and
- (iv) further drafting work would also have been necessary in relation to both object and effect.

101. Although the annex to the final case closure letter referred to the fact that the Office of Communications (“OFCOM”) has all the powers of the OFT to apply and enforce, amongst other things, the Chapter I prohibition in order to deal with allegedly anticompetitive agreements which relate to activities connected with communication matters, including the telecommunications sector (see section 371 of the Communications Act 2003), Mr Smith did not consider whether either or both cases should have been transferred to OFCOM in accordance with paragraph 3.17 of the Guideline on *Concurrent application to regulated industries* (OFT 405, December 2004).

102. Mr Smith’s second witness statement confirms that an internal memorandum exists of both his provisional decision to close the OFT investigations in both cases taken on 20 January 2006 and his final decision to the same effect taken on 19 June 2006 (we have not been provided with copies of these memoranda).

(xxiii) *23 June 2006: final case closure letter*

103. On 23 June 2006 the OFT wrote to the interested parties to inform them of Mr Smith’s decision of 19 June to close the investigations into the collective boycott case and the collective setting case, as follows (omitting footnotes):

**“Collective Boycott of Cityhook Limited (Cityhook) and the Collective Setting of Wayleave Fees**

- 1. The Office of Fair Trading (OFT) has now decided to close its investigation into a potential collective boycott of Cityhook by the United Kingdom Cable Protection Committee (UKCPC) and

certain of its members (the Collective Boycott Case). This is on the basis that the Collective Boycott Case no longer constitutes an administrative priority for the OFT.

2. In addition, the OFT has now also decided to close its investigation into the potential collective setting of wayleave fees by the UKCPC and certain of its members (the Collective Setting Case). This is on the basis that the Collective Setting Case no longer constitutes an administrative priority for the OFT.
3. On 24 January 2006, the OFT wrote to the UKCPC, its members and certain interested third parties. That letter stated that the OFT had provisionally decided to close both the Collective Boycott Case and the Collective Setting case and gave the recipients an opportunity to comment on these provisional decisions before 5 pm on 17 February 2006 (the Provisional Closure Letter). The OFT has received various diverse responses to the Provisional Closure Letter (the Responses). The OFT has carefully considered the Responses before taking the administrative decisions to close the Collective Boycott Case and the Collective Setting Case and has taken them into account where the OFT has considered it appropriate and proportionate to do so.
4. The purpose of this letter is to set out the reasons for these administrative decisions following consideration of the Responses. Accordingly, the history of the Collective Boycott Case and the Collective Setting Case is set out below. The OFT then explains the reasons for its administrative decisions. A summary of the germane points raised in the Responses and the OFT's view on those points are set out in the Annex to this letter. By way of notice of these administrative decisions, copies of this letter have been sent to the UKCPC, its members and certain interested third parties.

...

#### **The OFT's Administrative Decision**

21. The OFT has decided that although there is evidence of potential infringement in connection with both cases, the Collective Boycott Case and the Collective Setting Case would both need to be developed considerably before a sufficiently robust Statement of Objections could be issued. This would have to include, in particular in both cases, a more thorough analysis of the effect of the parties' behaviour on competition. For the reasons set out further below, the OFT has decided not to carry out this work on the basis that neither case continues to constitute an administrative priority for the OFT.
22. Consequently, the OFT has decided not to proceed to issuing a Statement of Objections in accordance with rule 4 of the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (OFT's Rules). As a result, the parties have not had the

opportunity to exercise the rights afforded to them, most notably under rule 5 of the OFT's Rules (notices, access to file and representations). The OFT's view that there is evidence of a potential infringement, must therefore be regarded as preliminary and provisional.

23. The OFT receives in the region of 1200 or so competition complaints per year and only has the resources to commence some 25- 40 cases per year. Therefore the OFT has to make difficult choices as to which cases it allocates its limited resources. In this case, the OFT has decided that the allocation of further resources would not be appropriate.
24. This administrative decision has been taken to close the Collective Boycott Case and the Collective Setting Case for a number of reasons. The starting point for this analysis is the six prioritisation criteria adopted by CE Division. In respect of those criteria, in the OFT's view the balance of considerations falls as follows:
  - a) ***consumer benefit from taking the case forward***: there is little, if any, evidence of consumer detriment. For the Collective Boycott Case there is no evidence of Cityhook's technology lowering costs for telecommunications companies which could then be passed on to consumers in the form of lower call charges. With regard to the Collective Setting Case, the amount spent in respect of wayleave fees when compared to the entire installation of networks is insignificant and therefore it is unlikely that there has been significant consumer benefit or detriment;
  - b) ***the strength of the evidence that there has been an infringement***: although there is evidence of potential infringement, as noted above the Statement of Objections would need to be developed considerably before it was issued in relation to the Collective Boycott Case and/or the Collective Setting Case. This would include first gathering and analysing additional evidence as to effects. Second, it would include an investigation of plausible counter-arguments (whether in fact or law) that the parties could possibly put forward in their defence to justify their conduct or, indeed, to negate the evidence of a potential infringement. These are both material pieces of work impacting directly on the strength of the evidence to-date;
  - c) ***the type of case***: there is nothing specific about the Collective Boycott Case or the Collective Setting Case—neither is clearly a hard-core infringement, nor do either of them fall within one of the OFT's priority areas: there is a question as to whether the role of the Crown Estate in the Collective Setting Case brings the OFT within the "Government and markets" priority framework, but in the

OFT's view the Crown Estate in this case is in a different position from cases in which Government is itself said to be responsible for the distortion of competition: here it is in part the victim of the alleged anti-competitive conduct;

- d) ***aggravating or mitigating factors on the facts of the case:*** there appear to be no particular aggravating or mitigating features on the facts of the Collective Boycott Case or the Collective Setting Case;
  - e) ***any relevant policy consideration:*** there is a range of relevant policy considerations to which the OFT needs to have regard in respect of both the Collective Boycott Case and the Collective Setting Case, including the fact that the case team and the parties have dedicated very significant effort to the investigation and development of the case. This is a long-running investigation to which the OFT and the parties have so far dedicated substantial resources - while the point the OFT has reached in the case must clearly play a role in thinking about administrative priority, that alone should not deter the OFT from closing the case, if it believes that its resources are better used elsewhere in the future; and
  - f) ***are we “best placed” to deal with the issue?:*** if the matters need to be pursued, then competition enforcement action appears best able to deal with it.
25. Taking the above factors in the round, the OFT does not believe there to be a compelling case for allocating further OFT resource to either the Collective Boycott Case or- the Collective Setting Case. In general terms, the OFT would today allocate a low priority to both the Collective Boycott Case and the Collective Setting Case given, in particular, the absence of identifiable consumer detriment in both cases.
26. In this context, the OFT has weighed-up the potential benefits of pursuing the Collective Boycott Case and/or the Collective Setting Case against the potential benefits of diverting those resources to other major cases that CE Division currently has open. These alternative investigations include cases involving ‘hard-core’ cartel-type behaviour that cannot currently be progressed in a timely and effective manner due to CE Division's resource constraints. The OFT considers that the time and resources required to investigate and to bring the Collective Boycott Case and/or the Collective Setting Case to a conclusion would be better spent on these other investigations given their very serious nature.
27. It should also be noted that this process of prioritisation is ongoing and involves reviewing cases at key milestones during an investigation to ensure that pursuing a particular investigation continues to represent best use of the OFT’s resources. As

recognised above, CE Division is currently undergoing a substantial programme of change. Accordingly, at the present time, the OFT is placing significant emphasis on these prioritisation reviews as the new approach to focusing the competition enforcement work of the OFT is bedded in.

Your sincerely

Christopher Mayock  
Director Competition Enforcement 4”

104. The Annex attached to the final case closure letter included the following (omitting footnotes):

**“ANNEX**

**The Collective Boycott Case**

1. The majority of respondents welcomed the OFT's provisional administrative decision to close the Collective Boycott Case on the grounds that it no longer constituted an administrative priority for the OFT. Two respondents took the opposite view, with one respondent expressing its surprise at the provisional administrative decision given the amount of effort put into the case and the fact that there did appear to be a case to answer. A further respondent labelled the OFT's provisional administrative decision absurd.
2. One respondent commented that in being so categorical about its findings of breach of the Act and in describing in such detail each step of the inquiry, the OFT may unwittingly encourage third parties to mount a legal challenge to the OFT's administrative decision to close the file before the Competition Appeal Tribunal. This respondent stated that, at very minimum, there was a risk of unnecessarily generating document requests under the Freedom of Information Act 2000 and criticism of the OFT in the press. This party was also concerned that the conclusive tone of the drafting of the Provisional Closure Letter was likely to give third parties false hope such that they may commence futile legal proceedings against the UKCPC and some or all of its members. This would involve all parties in incurring further unnecessary legal fees. Other respondents suggested drafting changes to the OFT's Provisional Closure Letter if it was going to form the basis of a letter notifying parties of the OFT's final administrative decision.

**OFT's Response**

3. The OFT has spelt out its reasons in some detail for closing the Collective Boycott Case on the grounds of it no longer constituting an administrative priority in the attached letter. In the OFT's view, this reasoning still stands despite the fact that it found that there was a potential infringement in connection with both the Collective Boycott Case and the Collective Setting Case. Inherent in that reasoning is the fact that the OFT believes that it has other ongoing cases which are much more deserving of the resources tied up in the Collective Boycott Case.
4. With regard to encouraging appeals before the Competition Appeal Tribunal, encouraging document requests under the Freedom of Information Act 2000 and attracting press criticism because of the level of detail in the Provisional Closure Letter, the OFT believes, the interests of transparency, that it is necessary and proportionate for it to explain the detailed context of its administrative decision. This is particularly so, given the duration of the pertinent investigation.
5. With regard to the point about the conclusive tone of the Provisional Closure Letter encouraging legal proceedings against the UKCPC and some or all of its members, the OFT considers that it has not and cannot have made a decision within the terms of section 46 of the Act that section 2 of the Act has been infringed. This is especially so, given the additional work identified as needed before a Statement of Objections was issued. As such, the evidential burden on a party instituting legal proceedings has not altered from what it was prior to the OFT's investigation. Consequently, it will still be the decision of any potential applicant to weigh up the chances of pursuing successful legal proceedings (with or without legal advice) given the evidence available regardless of the tone adopted by the OFT. In addition, as recognised in paragraph 21 of the attached letter, the Collective Boycott Case and the Collective Setting Case would both need to be developed considerably before a sufficiently robust Statement of Objections could be issued. This would include first gathering and analysing additional evidence as to effects. Second, it would include an investigation of plausible counter-arguments (whether in fact or law) that the parties could possibly put forward in their defence to justify their conduct or, indeed, to negate the evidence of a potential infringement. These are both material pieces of work impacting directly on the strength of the evidence to date.
6. Insofar as respondents suggested specific drafting changes to the Provisional Closure Letter, the OFT has considered these and has decided not to incorporate them generally as they do not express the view of the OFT or help to relay that view to the addressees of this letter. However, having reviewed the Provisional Closure Letter, the OFT acknowledges that the original drafting of the letter may have given an unduly categorical impression of the OFT's assessment of the issue of breach in light of the internal

view that further work, including on the effects issues, would be required before a Statement of Objections was issued. Therefore, changes have been made to the attached letter to reflect more closely the OFT's assessment of the issue of breach.

### **Administrative Priorities**

7. Several respondents welcomed the assessment of this case in the context of the six prioritisation criteria used to analyse whether a case constitutes an administrative priority for the OFT. In particular, some of these respondents emphasised that the lack of apparent consumer detriment was a reason for this case not being a priority for the OFT.
8. However, one respondent was highly critical of the OFT's approach as described below.

### ***Consumer benefit from taking the case forward***

...

### **OFT Response**

13. The OFT understands the theory of the argument presented by the respondent. However, the OFT has not seen concrete evidence from third parties of the impact that Cityhook would have had on the speed to market for submarine cables generally and, in particular the OFT has seen no objective evidence from third parties as to how it would facilitate speed to market for new entrants. In addition, on the facts at the time of the alleged infringement, it was far from clear that the adoption of Cityhook technology would have increased the speed to market of services using the three trans-Atlantic cables actually in construction.
14. The OFT is not in a position, on the information available to it, to determine the impact that the use of Cityhook technology would have had on the route prices quoted by this respondent. In any event, the OFT considers that many factors other than the use of Cityhook technology could influence such prices. In this regard, Cityhook's technology is concerned with landing submarine cables. Given that the cost of landing a submarine cable is minimal when compared to the overall cost of installing one, it would seem that factors impacting on the costs of other parts of the installation process (and not just the landing process) are more likely to impact on telecommunications costs to consumers.

### ***The strength of the evidence that there has been an infringement***

...

### **OFT Response**

17. The OFT's view on the evidence (in connection with both the Collective Boycott Case and the Collective Setting Case), is that, although there is evidence of potential infringement, the Collective Boycott Case and the Collective Setting Case would both need to be developed considerably before a sufficiently robust Statement of Objections could be issued. This would include first gathering and analysing additional evidence as to effects. Second, it would include an investigation of plausible counter-arguments (whether in fact or law) that the parties could possibly put forward in their defence to justify their conduct or, indeed, to negate the evidence of a potential infringement. These are both material pieces of work impacting directly on the strength of the evidence to-date.

### *The type of case*

...

### **OFT's Response**

20. Based on the evidence seen by the OFT, the alleged collective boycott does not constitute a hard-core infringement of the Act. Presently, the OFT is investigating real hard-core cartel cases which cannot be progressed in a timely manner. These cases are of higher administrative priorities to the OFT than the Collective Boycott Case.
21. The OFT's priorities are as set out in its draft annual plan which has recently been the subject of public consultation. The OFT's current priority areas are consumer credit, healthcare, construction, mass-marketed scams and interaction between government and markets. These areas have been a priority to the OFT for over a year. Consequently, telecoms is not a priority area for the OFT, particularly given the existence of OFCOM's concurrent powers in this area. Notwithstanding the OFT's current priority areas, the OFT still undertakes investigations in other sectors where it is evident that the case is a high priority for the OFT and remains so throughout the course of the investigation when compared at key milestones relative to other cases under investigation which have reached the same milestone. Details of the criteria used by the OFT to assess whether a particular investigation is a high priority case relative to other cases at the same milestone are set out in paragraphs 24(a)-(f) of the attached letter.
22. Consequently, the administrative decision to close the Collective Boycott Case is not a matter of the OFT changing its priorities retrospectively. It is rather a rational and proportionate assessment of the investigations it has underway against its priorities in order to determine the highest priority cases to which it should devote its limited resources.

23. The OFT questions this respondent's calculation of the money spent in connection with the Collective Boycott Case. However, the OFT recognises that it and all the parties concerned have dedicated substantial resources to the investigation. The OFT contends that while the juncture reached in the investigation must clearly play a role in thinking about administrative priority, that alone should not deter the OFT from closing the case, if it believes that resources are better used elsewhere in the future.

*Aggravating or mitigating factors on the facts of the case*

...

**OFT's response**

28. The OFT receives in the region of 1200 or so competition complaints per year and only has the resources to commence some 25- 40 cases per year. Included within those complaints are many from both large and small businesses. Therefore the OFT has to make difficult choices as to which cases it allocates its limited resources. Resources are allocated to those cases which are perceived as being of the highest priority as assessed against the OFT's prioritisation criteria detailed in paragraphs 24(a)-(f) of the attached letter. These prioritisation criteria do not discriminate between large or small enterprises as cases which are of a high priority to the OFT may involve both large and small enterprises.
29. Further, in assessing which cases are its highest priority, the OFT has to weigh in the balance the signal sent by closing the Collective Boycott Case when compared with the negative signal sent if the OFT had to close one of its more hard-core cartel investigations because it could not redirect resources from the Collective Boycott Case to progress it in a timely fashion.
30. With regard to the alleged exclusion of Cityhook, the OFT has decided that the case team had made out, prima facie, a case for the parties to answer in connection with the Collective Boycott Case. However, in the OFT's view this is not sufficient, of itself, to constitute an aggravating factor.
31. The OFT has not found any evidence of any party attempting to mislead Parliament. However, even if it had found such evidence, the OFT does not consider that, in the circumstances pertaining, this would be an aggravating factor that the OFT should take into account in balancing the relevant priority of a case. In this regard, the OFT notes that it is for Parliament to decide whether it has been misled.
32. Finally, the OFT considers that its view that there are no aggravating circumstances is a proportionate one given the evidence and responses to the consultation.

*Any relevant policy consideration*

...

**OFT Response**

37. The OFT has given the complainant and other interested parties the opportunity to comment on the OFT's provisional administrative decision. It would be inequitable not to let all interested parties have the same opportunity to comment on a provisional administrative decision which has a significant impact on their businesses.
38. By adopting this administrative decision, the OFT is not showing contempt for the UK or EC Parliament, it is merely exercising its discretion based on its administrative priorities. The OFT considers that it is acting in a proportionate manner in this regard.
39. The OFT's policy is to make markets work well for consumers. This has not changed since the change in the OFT's senior management. This administrative decision merely marks the OFT's wish to allocate resources away from the Collective Boycott Case to other cases which the OFT has concluded are presently of a higher priority to the OFT than the Collective Boycott Case. This conclusion was reached following an objective and proportionate assessment of the Collective Boycott Case and other cases at the same milestone against the OFT's prioritisation criteria as set out in paragraph 24(a)-(f) of the attached letter.
40. As previously stated, the OFT recognises that this is a long-running investigation to which the OFT dedicated substantial resources. For those reasons and in the interests of transparency, the OFT has explained its reasoning in some detail for closing the Collective Boycott Case on the grounds that it no longer constitutes an administrative priority for the OFT. However, while the juncture the OFT has reached in the case must clearly play a role in thinking about administrative priority, that alone should not deter the OFT from closing the case, if it believes that its resources are better used elsewhere in the future.

*Is CE Division "best placed" to deal with the issue?*

...

**OFT Response**

42. As stated above, the OFT collected sufficient evidence for it to decide that there was evidence of a potential infringement in connection with both the Collective Boycott Case and the Collective Setting Case. The reasons for the administrative decision to close the Collective Boycott Case are set out in some detail the attached letter.

### **The Collective Setting Case**

43. In general, the responses were favourable to the OFT's provisional administrative decision to close the Collective Setting Case. However, one respondent remarked on the impact that the closing of both the Collective Boycott Case and Collective Setting Case would have on Cityhook.

### **OFT Response**

44. As stated previously, the OFT receives in the region of 1200 or so competition complaints per year and only has the resources to commence some 25-40 cases per year. Therefore, the OFT has to make difficult choices as to which cases it allocates its limited resources. The OFT has carried an objective and proportionate assessment of both the Collective Boycott Case and Collective Setting Case against its prioritisation criteria (see paragraphs 24(a)-(f) in the attached letter) and found that neither of them continues to be a priority relative to other higher priority cases, measured at the same milestone. As a consequence, the OFT needs to allocate the resources previously allocated to the Collective Boycott Case and the Collective Setting Case to other higher priority cases currently under investigation within the OFT.”

105. Footnote 13 after the word “hard-core” in the first sentence of paragraph 20 of the Annex to the final case closure letter is as follows:

“Sale price fixing, output restrictions, bid-rigging and market sharing”.

### **III THE PROCEDURE BEFORE THE TRIBUNAL**

106. An appeal on the merits of the OFT's decision of 19 June 2006 was received by the Tribunal on 23 August 2006. Since the Tribunal is dealing with the preliminary issue of admissibility, the OFT has not yet filed a defence on the substance.
107. Requests for permission to intervene were filed with the Tribunal by Alcatel and Level 3 on 12 and 13 September 2006 respectively. A case management conference took place on 14 September 2006 at which Alcatel was granted permission to intervene and Level 3's application was adjourned until further order.

108. Further requests to intervene in these proceedings were received from Tyco and BT on 20 September, Cable and Wireless, NTL and Global Crossing on 21 September and GMS on 29 September 2006.
109. At a case management conference on 23 October 2006 the Tribunal ordered that BT, Cable and Wireless, Global Crossing, GMS, NTL and Tyco be granted permission to intervene in these proceedings pursuant to Rule 16 of the Tribunal's Rules.
110. The hearing took place on 30 and 31 January 2007, all parties having filed skeleton arguments. The Tribunal has also considered and taken into account the documents handed up by Cityhook at the hearing on 30 January 2007, insofar as they bear on the issue of admissibility.

#### **IV THE PARTIES' SUBMISSIONS**

##### **A CITYHOOK'S SUBMISSIONS**

###### *(i) Introduction*

111. In its skeleton argument on admissibility, Cityhook contends that this case "is a sorry tale in which large companies ganged up against a newcomer and when the newcomer turned for help to the OFT, it spent four years in investigation but let the small company down and handed victory to the cartel".
112. Cityhook strongly contests the credibility of certain aspects of the OFT's account of events leading up to the decision to close the investigations into the collective boycott case and the collective setting case.
113. In its oral submissions, Cityhook described a number of documents which, in its view, show the factual matrix in which a cartel orchestrated by the UKCPC had as its object and effect the squeezing out of Cityhook in the same market as the undertakings under investigation. These contemporaneous documents are said to reveal the various allegations which were put to the OFT during its investigations in this case.

114. As a matter of substance, Cityhook submits that these documents collectively show this was a clear-cut case of collusive behaviour which, by its very nature, had the object of preventing, restricting or distorting competition within the United Kingdom within the meaning of the Chapter I prohibition.
115. Although the documents presented by Cityhook will not be summarised here, they were fully described at the hearing on 30 January 2007 (a transcript of proceedings is available on the Tribunal's website: <http://www.catribunal.org.uk>). Cityhook, in essence, submits that these documents reveal what Mr Smith's understanding of the case was at the time of his decision.
116. Cityhook submits that, after a detailed investigation, the case team decided that the behaviour at issue contravened the Chapter I prohibition. Indeed, the case team believed that the case was strong and clear. Accordingly, they drafted a 600-page Statement of Objections with full referenced exhibits based on it. Relying on a contemporaneous note by Mr Shovell dated 9 August 2005, Cityhook refers to the fact that the case team informed it that "Big companies acting together against small company. Clearcut. Want [final] decision in 2006."
117. In its oral submissions, Cityhook referred to a document indicating that the OFT case team had also informed Alcatel that it was likely to be a recipient of a Statement of Objections in respect of both the collective boycott and collective setting case.
118. As a result, Cityhook expected the OFT to issue a Statement of Objections and explained why it thought that it was reasonable for the OFT to conclude that the object of the parties under investigation was to restrict competition in the cable landing market.
119. Cityhook notes, however, that the case team's views in both cases were overturned by OFT management. Cityhook refers to the apparent need for the OFT to carry out further work on the effects of the alleged wrongdoing in the

downstream telecommunications market. After a long-running investigation, Cityhook submits that the “bogus” OFT administrative decisions to close the collective boycott and collective setting cases are really non-infringement decisions in circumstances where the OFT is too timid to take the risk of tackling what Cityhook believes is a heavyweight cartel.

120. Cityhook submits that the Tribunal should infer from the decision to close the case file and the surrounding context that the OFT decided, in effect, that there was no restriction of competition by object due to a “legal technicality” (see paragraph 124 below) nor any restrictive effect due to insufficient evidence in both cases. Hence, Cityhook contends that Mr Smith’s decision was either expressly or by necessary implication a decision within the meaning of section 46(3)(a) of the 1998 Act.

121. According to Cityhook, “this issue is all the more disturbing given [Mr Smith’s] decision to omit any reference to this fundamental Objects technical legal issue in the provisional and final case closure letters, and that evading the Tribunal applying justice was the key OFT motivator in that omission and that it was an informed legal view. This is a sham”.

(ii) *Relevant legal principles*

122. Cityhook agrees with the OFT that the main relevant legal principles to be applied in determining whether the latter has adopted an appealable decision are set out in *Claymore v OFT* [2003] CAT 3, at [122].

123. Cityhook submits that identifying an appealable decision under the Act is not simply a question of whether the OFT has an overall positive or negative view of a case it is rather whether the OFT has made a decision on any key substantive issue relevant to an infringement which precludes a finding of infringement. It is irrelevant, says Cityhook, that the OFT takes a positive view in relation to its likely ability to establish some or all of the other ingredients necessary to establish an infringement if it decides that it is unable to establish a necessary ingredient.

(iii) *Whether the conduct under investigation had as its object the restriction of competition*

124. Cityhook attributes the OFT's decision to close the case file in both cases primarily to the fact that the new OFT senior management believed it was faced with making a decision on the so-called "Objects legal technicality", that is to say, whether or not the conduct at issue had as its object the prevention, restriction or distortion of competition, contrary to the Chapter I prohibition.
125. Cityhook disagrees with Mr Smith's explanation that further legal analysis of the case law was needed to decide this technicality. It suggests that further legal research is not credible, effectively defies common sense and is so pathetic it cannot be true. It is also inconsistent with the conclusions reached by the case team, as described in Mr Smith's witness statement, and the views expressed by the CE4 Branch Director during the early stage of the investigation.
126. According to Cityhook, the OFT has learnt from the Tribunal's earlier decisions on admissibility. The judgment on admissibility in *Claymore* indicates that it is a significant factor in whether to infer a non-infringement decision has been made that there was no further work envisaged. No legal decision on whether the conduct has as its object the restriction of competition after a four-year investigation and 165 days of scrutiny is a scandalous position for the OFT to advance. Instead it is appropriate to infer that Mr Smith, especially given his experience in competition law matters, made a non-infringement decision.
127. In its oral submissions, Cityhook drew the Tribunal's attention to a number of sources, including the guidance provided by the Centre for Effective Dispute Resolution and by the OFT guideline on *Involving third parties in Competition Act investigations* (OFT 451, April 2006), both of which explain the importance of giving reasons for a decision that enable the persons concerned to know why the measures in question were taken and provides the competent court with sufficient material for it to exercise its power of review.

128. Cityhook submits that neither the provisional case closure letter nor the final case closure letter clearly explained the OFT's reasoning the "Object legal technicality" (i.e. whether the conduct under investigation could properly be categorised in law as having an anti-competitive object). Cityhook considers that the Tribunal should infer from this omission that the OFT did, in fact, decide that the behaviour at issue did not have an anti-competitive object and that, therefore, it did not constitute an infringement of the 1998 Act.
129. According to Cityhook, the case team informed it on 13 October 2005 that the CRP was concerned about the level of 'risk' the OFT would be taking if it proceeded with this case. Cityhook notes that Mr Smith does not mention the notion of risk of taking the case forward and then losing it on appeal on the ground that the OFT had incorrectly classified the infringement as having as its object the restriction of competition i.e. the "Object legal technicality".
130. Cityhook considers that the omission of both the "Objects legal technicality" from the case closure letters and the apparent risk of proceeding with a case on that basis amount to misrepresentation. Rather, evading the Tribunal's jurisdiction was the key OFT motivator in that omission.
131. Cityhook refers the Tribunal to Mr Smith's first witness statement which states that he received legal advice from a senior OFT lawyer concerning "the relevance of the Tribunal's case law in this area". According to Cityhook this secret legal advice was "OFT code" for not wanting to admit that the OFT did not want to pursue the case on anti-competitive object, else it would look like a non-infringement decision capable of appeal under the 1998 Act.
132. Cityhook disputes the legitimacy of Mr Smith's explanation in paragraph 73 of his first witness statement (quoted at paragraph 280 below) as to why the provisional and final case closure letters omitted the debate within the OFT about the "Objects legal technicality". The omission of this crucial point from the provisional case closure letter deprived Cityhook of the chance to properly contribute to the consultation process between 24 January 2006 and 17 February 2006.

133. In Cityhook’s view, the reference to “law” in paragraph 24(b) of the final case closure letter is not a sufficient reference to the OFT’s position on the objects issue. It does not enable the persons concerned to know that the OFT was unable to determine the anti-competitive object of the conduct in question due to a “legal technicality”.

134. Deploying similar reasoning to that used by the Tribunal in *Claymore* [156], Cityhook submits that the case closure letter in this case did not reveal with sufficient clarity the OFT’s true reason for closing the file.

(iv) *The ‘hard-core’ infringement point*

135. According to Cityhook, paragraph 20 of the Annex to the final case closure letter asserts that the collective boycott case “is not a hard-core infringement.” Cityhook submits that if, as in this case, the OFT has found that the conduct does not amount to a hardcore infringement that should be taken to mean, in effect, that the conduct does not have as its object the restriction of competition. Cityhook rejects the narrower characterisation of hardcore restrictions of competition submitted by the OFT and the interveners.

(v) *Whether the effect of the conduct under investigation was to restrict competition*

136. As to the restrictive effects of the alleged infringements in both cases, Cityhook submits that the OFT senior management did not remain in a neutral state of mind. Contrary to the OFT’s submissions, Cityhook considers the OFT clearly reached a non-infringement decision in relation to the effects of the behaviour due to insufficient evidence. In support of its view, Cityhook refers to:

- (i) Mr Smith’s letter to Mr Salmond on 2 May 2006: “on the consumer benefit point, we have not seen evidence from third parties of the impact that Cityhook would have had on the ‘speed to market’ for submarine cables generally and in particular no evidence from third parties as to how it would facilitate entry to

the market for new entrants ...”. Cityhook also refers to the case closure letter to the same effect.

- (ii) Mr Collins’ letter to Mr Salmond dated 20 May 2006: “during the OFT’s investigation, it has seen no clear evidence that the alleged collective boycott of Cityhook actually resulted in higher telecommunications costs to consumers. In addition, we have not seen concrete evidence from third parties as to how the Cityhook technology would facilitate new entry to this sector”.

137. In oral submissions, Cityhook emphasised that such remarks indicated a high degree of scepticism about the merits of the complaint in terms of restrictive effects. Following the Tribunal’s comment in *Aquavitae (UK) Limited v Director General of Water Services* [2003] CAT 17 at [206] the remarks by OFT officials (set out in paragraph 136 above) should make the inference of an appealable decision ‘irresistible’ in this case.

- (vi) *Further work said by the OFT to be outstanding*

138. In oral submissions, Cityhook questioned the nature and scope of the further work which the OFT may feel still needs to be done before it can sensibly be regarded as having made a decision on the substance of the case. This case involves a long-running investigation and is, therefore, very different from a case at a much earlier stage.

139. Cityhook does not consider that it was reasonable that more case law analysis can fairly be described as the type of further investigation work envisaged by the Tribunal in *Claymore* [142] and [156]. Cityhook submits that, once all the evidence has been collected, then under the principle in *Claymore* [155] that is the point at which the OFT makes up its mind as to whether or not there is an infringement of the 1998 Act. Following a detailed investigation, there were no remaining factual matters to investigate in order to classify the conduct at issue as having as its object the restriction of competition. On this basis, contrary to Mr Smith’s view, Cityhook regards any further work to be superfluous.

140. In addition, Cityhook submits that further work, which might preclude a view being expressed by the OFT on the substance, should not be taken to include the process from issuing a Statement of Objections to adopting a final decision nor any ensuing appeals process.

(vii) *The “object or effect” point*

141. Cityhook submits that if the Tribunal decides that the OFT adopted a non-infringement decision on whether the conduct had an anticompetitive object, that is sufficient for there to be an appealable decision. It follows that Cityhook disputes the OFT’s submission that it must establish that the OFT took a non-infringement decision as regards both the anticompetitive object and effect of the conduct under investigation.

(viii) *Wider ramifications of deciding the question of admissibility in this case*

142. Cityhook does not consider the possibility of judicial review proceedings or a private action for damages as credible alternatives to an appeal against the OFT’s decision on the merits before the Tribunal. Cityhook refers to the difficulty in overturning a discretionary administrative decision on judicial review grounds. Equally, bringing a private action against the undertakings under investigation by the OFT entails various practical difficulties and potentially insuperable costs. Cityhook considers this a difficult, if not impossible, position for a small company to be faced with. Cityhook considers that this specialist Tribunal, with an understanding of competition law, is the logical forum to hear this case.

143. Finally, Cityhook is concerned that, if the Tribunal were to find no appealable decision in this case, the OFT will have established a proven formula to avoid Tribunal scrutiny of non-infringement decisions. All the OFT would need to do is state that there are technical issues that need more analysis, avoid reaching or expressing any conclusion on those issues, and the OFT would be free from appeal to the Tribunal. It is submitted that the OFT could adopt this approach in many cases.

## B THE OFT'S SUBMISSIONS

### (i) *Introduction*

144. The OFT submits that the Tribunal does not have jurisdiction to hear this appeal because the challenged decision is not appealable within the meaning of section 46(3)(a) of the 1998 Act. The exercise of its administrative discretion to close these cases is susceptible to judicial review by the Administrative Court.

### (ii) *Relevant legal principles*

145. Based on the Tribunal's previous case law, the OFT submits that the main principles to be applied in deciding whether there is an appealable decision in this case are summarised in *Claymore* [122].

146. An appealable decision will only arise where the OFT has reached a "firm decision" or "final conclusion" as to whether or not there is an infringement of the 1998 Act. In other words, a "provisional or tentative" conclusion on the evidence before the OFT will not suffice: *Claymore*, [145] and [156].

147. An appealable decision will arise where the OFT has "fully" or "exhaustively" investigated the matter and concluded to its satisfaction that the evidence is not sufficient to establish an infringement: *Claymore*, [132] and [152].

148. The mere fact that the OFT opens a section 25 investigation but subsequently decides not to adopt a final substantive decision cannot give rise to a presumptive inference that the OFT has adopted an appealable decision on the merits: cf. *Aquavita*, [206]. It is well-established in both the jurisprudence of the Community Courts and the Tribunal that a competition authority has an administrative discretion to close the case file: see Cases T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223 and *Claymore*, at [122(iii)]. At its highest, therefore, the observation of the Tribunal in the last sentence of *Aquavita*, at [206] might amount to some form of evidential presumption. Nevertheless, the question of whether the OFT adopted an appealable decision

is always a question of fact to be determined according to the particular circumstances of each case.

149. In this case, the OFT case closure letter expressly acknowledges that it has evidence of a potential infringement and is therefore not sceptical of the merits of Cityhook's complaint. That being so, the inference referred to in *Aquavitae* does not apply here.
150. The final case closure letter expressly stated administrative priority as the reason for closing the investigations into the collective boycott and collective setting cases. According to the OFT, the issue for the Tribunal to decide, therefore, is whether the OFT's decision took an implied decision as to whether or not the Chapter I prohibition has been infringed, within the meaning of section 46(3)(a) of the 1998 Act.
151. The natural starting point for determining whether the OFT has adopted an appealable decision is the final case closure letter. The OFT makes three points in relation to that letter. First of all, it is clear from the face of the letter that the OFT did not reach any final conclusion on the substance of either the collective boycott case or the collective setting case. Second, insofar as the OFT expressed any view on the merits, it was necessarily a provisional and preliminary view that there was evidence of a potential infringement. Third, the OFT considered that there were further salient matters that would need to be investigated and considered in order for the cases to proceed to issuing a Statement of Objections.
152. The OFT makes the same three points in relation to the evidence contained in the witness statements submitted to the Tribunal by Mr Smith.
153. The OFT does not accept any of Cityhook's allegations relating to the conduct of both the OFT and Mr Smith. The OFT characterises Cityhook's allegations against the credibility of Mr Smith's account of the decision-making process as a conspiracy theory without any foundation in fact. There is no basis for Cityhook's allegations and they should be rejected. The Tribunal's ruling on

disclosure on 20 November 2006 has already found that Mr Smith satisfied the duty of candour and provided a full and frank account of the internal process culminating in the decision to close the investigations, see [2006] CAT 32. Furthermore, Cityhook did not seek to challenge the veracity of Mr Smith's witness statements at the previous hearing on disclosure.

(iii) *Whether the conduct under investigation had as its object the restriction of competition*

154. As regards Cityhook's objection to the length of time the OFT took to reach no definitive view on the anti-competitive object of the conduct in question, the OFT refers to the vigorous internal debate on whether the alleged infringements could be correctly classified, as a matter of law and economics, as restrictions by object.
155. In the OFT's submission, paragraph 70 of Mr Smith's first witness statement is the pivotal paragraph of what his view was of the merits of the alleged restrictions by object. Whereas Mr Smith thought there probably was an object case, he did not reach a final or concluded view on this issue in either case. As regards the collective boycott case, this stance is consistent with the OFT's position in *Casting Book v OFT* [2006] CAT 35.
156. Part of the difficulty with Cityhook's position in this case, says the OFT, is its misconceived perception of what an object restriction is. The OFT submits that Cityhook is wrongly conflating the subjective intention of the parties with the objective test of whether or not there is an object restriction. The OFT refers in this regard to the internal debate described by Mr Smith concerning whether or not the alleged collusive behaviour should fall within the objective category of restrictions by object; the internal discussion does not concern the subjective mind of the undertakings under investigation.
157. Referring to Mr Smith's witness statement, the OFT refutes Cityhook's allegation that the legal advice given to Mr Smith was the main reason for not expressly referring to a potential object infringement in the case closure letter. In any event, it is submitted that there is nothing sinister in the OFT taking

into account the Tribunal's case law as to what constitutes an appealable decision.

158. The OFT rejects Cityhook's allegation that it failed to mention or give reasons about the alleged anti-competitive object of the behaviour, which was the subject of its complaint, for a number of reasons. First, the clarity and adequacy of reasoning in the decision is to be controlled by whichever court is competent to hear the case. Second, the OFT rejects any insinuation that the quality of its reasoning means that the OFT is not being straight with the Tribunal. Third, it is apparent from the changes between the provisional case closure letter and the final case closure letter that the object-based infringement in both cases was not central to the OFT's decision to close the investigations. Fourth, it is clear from paragraphs 21 and 24(b) of the provisional case closure letter that it did deal with both object and effect. Fifth, Mr Smith's first witness statement explains the difference in focus between the provisional and final case closure letters. Sixth, the OFT notes that it does not write bespoke provisional case closure letters for individual parties, rather they are drafted to ensure an adequate consultation with all interested parties.

*(iv) The 'hard-core' infringement point*

159. As regards the nature and gravity of the infringement (whether or not it was 'hard-core' or particularly serious) the OFT's primary submission is that it is wholly irrelevant to the admissibility issue before the Tribunal.

160. In the alternative, assuming the question of whether or not the infringement is 'hard-core' is relevant to admissibility, the OFT submits that the nature and gravity of an infringement (i.e. the type of case) is being used as one factor in this case, which was taken into account in order to determine the relative administrative priority of a given case. The OFT submits that the Tribunal could only reach the question of whether the OFT applied its six prioritisation criteria correctly if it had jurisdiction.

161. Since the beginning of May 2005, whether, if proved, these cases would be 'hard-core' infringements helps inform the way in which the OFT chooses to

exercise its administrative discretion to open, continue or close investigations under the 1998 Act. When the case closure letter refers to the term “hard-core infringement” it does so as part of the OFT’s prioritisation criteria.

162. As to the meaning of ‘hard-core’ infringement, the OFT points out that the term is used in a number of contexts, including priority-setting its competition case load and/or the seriousness of a breach of the prohibitions in Part 1 of the 1998 Act. The OFT submits it is more a matter of assessment and judgment, rather than a black letter legal concept.
163. In its oral submissions, the OFT noted that there is no definition of the term in the Act, nor did it refer to any definition contained in its own guidance. The OFT did refer, however, to footnote 13 of the Annex to the final case closure letter which provides a non-exhaustive list of ‘hard-core’ infringements, including “sales price fixing, output restrictions, bid rigging and market sharing”. According to the OFT, there is no necessary correlation between ‘hardcore’ infringements and restrictions by object. “An object infringement may be ‘hard-core’ or not ‘hard-core’. An effect infringement may be ‘hard-core’ or not ‘hard-core’, i.e. the premise that all ‘hard-core’ cases are object cases, or all object cases are ‘hard-core’ cases does not necessarily follow”.
164. The OFT submits that the issue of whether an infringement is ‘hard-core’ or not does not depend on whether the infringement comprises an anti-competitive object or anti-competitive effect. If it is shown that the object pursued by the conduct of the undertakings under investigation is to prevent, restrict or distort competition, that conduct may, or may not, be ‘hard-core’. The same is true of effects-based infringements, which may, or may not, be ‘hard-core’. The OFT acknowledged, however, that there is a large degree of similarity between restrictions by object and ‘hard-core’ infringements.
165. In this case the OFT notes that Cityhook’s allegations concerned an agreement between purchasers to fix purchase prices which, as the OFT’s internal debate shows, is considerably more complex to classify. It was for this reason that the

case closure letter explained that the alleged infringement in each case was not clearly a ‘hard-core’ infringement.

(v) *Whether the effect of the conduct under investigation was to restrict competition*

166. The OFT does not accept Cityhook’s characterisation of its case closure decision as clearly reaching a negative conclusion on proof of restrictive effects in both cases.

167. Far from showing a concluded view on restrictive effects, the express wording of the case closure letter and Mr Smith’s witness evidence refers to the need for further work and analysis to be carried out in order to issue a sufficiently robust Statement of Objections.

(vi) *The need to carry out further work*

168. According to the OFT, the need for further work to be done – on the law relating to anti-competitive object and further fact-finding and analysis of restrictive effects – is one of the main reasons why the case closure letter does not constitute an implied non-infringement decision. In its oral submissions the OFT accepted that a “fair inference” from the evidence of Mr Smith was that the objects case had been fully investigated and that the remaining issue to be decided was the legal characterisation of the collective boycott and in particular whether it had as its object the restriction of competition.

169. In its oral submissions, the OFT accepted that the Tribunal is entitled to review the reasonableness of the matters the OFT has identified as being necessary to reach a definitive conclusion. The OFT acknowledged that the length of the investigation is one non-determinative factor which the Tribunal could consider in determining whether the further work streams were reasonable.

170. Whether or not the further legal research on the meaning of anti-competitive object might be feasible when considered in abstract or in isolation is not

decisive as to whether the OFT reached a firm conclusion on that point in this case. First, this legal issue had given rise to a divisive and unresolved debate within the OFT. Second, categorising a practice as a restriction by object is quite a difficult area. Third, the OFT had been investigating the object and effect of the alleged infringements. Fourth, the OFT had to consider a number of resource-related implications if it were to proceed with the collective boycott and collective setting cases. Fifth, as both the case closure letter and Mr Smith's first witness statement show, the OFT had to consider the relative priority of these cases as opposed to the other pending investigations into more 'hard-core', or serious, competition cases.

(vii) *The "object or effect" point*

171. Even if the Tribunal were to find, contrary to the OFT's submissions, that all restrictions by object may be equated with 'hard-core' infringements, this would not be a sufficient basis upon which to infer an appealable decision.

172. The OFT submits that in order for Cityhook to establish an appealable decision in this case, it is necessary for it to show that the OFT had reached a definitive non-infringement decision that the conduct under investigation did not restrict competition both by object and effect. This is evidently not true in either case: the OFT did not reach a definitive conclusion on either object or effect.

C INTERVENERS' SUBMISSIONS

173. All of the interveners broadly supported the OFT's and each other's submissions and position on the question of admissibility. Any further salient points on admissibility made by the interveners are set out below.

174. None of the interveners accept the veracity of the allegations made against them in this case.

175. Counsel for Alcatel, Cable & Wireless, GMS, and Tyco (the "Joint Intervenors") refers the Tribunal to its previous case law on the question of

what constitutes an appealable decision, in particular to *BetterCare* [2002] CAT 6; *Claymore*; *Aquavitae* and *Pernod v OFT* [2004] CAT 10. In particular, Counsel draws the Tribunal's attention to paragraph 62 of *BetterCare*; paragraphs 122, 139, 140 and 155 of *Claymore*; paragraph 191 of *Aquavitae* and paragraphs 145, 146, and 161 of *Pernod*.

176. The Joint Interveners submit that there is a dividing line to be drawn between a final view in the sense of a decision and a view on the merits which leaves the door ajar, if only slightly, thereby allowing the OFT to move on to other cases. The former is a decision capable of appeal to the Tribunal, the latter is not.
177. For the avoidance of doubt, the Joint Interveners submit that where the OFT has not arrived at a final decision but has moved on for other reasons, it would not be for this Tribunal then to assess the reasonableness of that behaviour i.e. whether it should have made a decision on the substance of the case in the circumstances; such matters are for another court.
178. The Joint Interveners note that paragraph 161 of *Pernod* could be relevant to Cityhook's case: if the OFT were found to have decided that there was no restriction by object in these cases and if that were said to remove one necessary element of an infringement, then, following the logic of *BetterCare*, it could be said that there was a sufficient basis for finding an appealable decision. The Joint Interveners respond to this argument in three ways: first, they submit that the OFT did not make up its mind on the question of whether the infringements were object-based restrictions. Second, whether or not the OFT ought to have made up its mind is said to be irrelevant for determining the question of admissibility. Third, even if there were no restriction by object in this case, that would not be sufficient for there to be an appealable decision under the Act. Following the logic of the *BetterCare* and *Pernod* cases, the 'necessary' element of the Chapter I prohibition for these purposes is whether there is a restriction by object or effect.

179. On the characterisation of the alleged infringements as restrictions by object, the Joint Interveners refer to the judgment of the Court of First Instance of the European Communities (“the CFI”) in Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities*, judgment of 27 September 2006. (The Tribunal notes that since the oral hearing in this case four actions for annulment of the CFI’s judgment have been brought before the European Court of Justice (“the ECJ”): see Case 501/06 P, C-513/06 P, Case C-515/06 P, and Case C-519/06 P).
180. The Joint Interveners drew the Tribunal’s attention to paragraphs 118, 119, and 121 of the CFI’s judgment in *GlaxoSmithKline*. The Joint Interveners note a point which Cityhook might pray in its favour: were it the case that the OFT had taken a clear decision that the collective boycott and collective setting cases involved no detriment to consumers, this may be taken to infer no infringement of the Chapter I prohibition (on the basis that this prohibition, which is the domestic analogue of Article 81, is all about protecting the welfare of final consumers). This emphasis on consumer welfare had been foreshadowed by the European Commission’s Notice containing Guidelines on the application of Article 81(3) (cited in footnote 1 to paragraph 255 below). In respect of this argument, however, the Joint Interveners submit that this was not the factual basis in this case. The Joint Interveners submit that the *GlaxoSmithKline* case also shows that whatever a restriction by object might entail, it is not straightforward. This complexity helps to explain the OFT’s internal deliberations about characterising the alleged infringements in this case.
181. On the meaning of ‘hard-core’ infringement, the Joint Interveners note the definition given in footnote 13 of the annex to the case closure letter which mirrors precisely the conduct caught by the criminal cartel offence contained in section 188 of the Enterprise Act 2002. According to the Joint Interveners, ‘hard-core’ infringement is not identical to agreements which have as their object the restriction of competition. The expression ‘hard-core’ refers to a narrower group of kinds of behaviour which, when accompanied by dishonesty, have been criminalised by Part 6 of the Enterprise Act.

182. In relation to Cityhook's submission that the OFT decided that there was no restriction by object but then sought to conceal that decision from its provisional case closure letter, the Joint Interveners submit that there was in fact no such decision. Indeed, the decision to categorise either case as object-based restrictions was the subject of ongoing unresolved debate within the OFT. In any event, the significance of failing to adequately consult on the question relating to anti-competitive object goes to the fairness of the OFT's consultation process, which is subject to control by courts other than the Tribunal.
183. BT submits that, had Mr Smith made up his mind as to whether or not there had been an infringement, it would have been unnecessary and inappropriate for Mr Smith and the OFT to consider and apply the criteria developed by the OFT in relation to administrative priorities. On the facts of this case, a non-infringement decision would be wholly inconsistent with the evidence of Mr Smith, which was found to be full and frank, and with his candid account of the decision making process.
184. In its oral submissions, BT submits that paragraph 206 of *Aquavitae* makes the very obvious point that if one has an investigation by the OFT on the merits, and then, without more, a case closure, there may well in those circumstances be an inference of an appealable decision, depending on the circumstances.
185. In relation to characterising the alleged infringements as restrictions by object, BT notes that this process is not a straightforward matter. BT refers to the material resource implications to proceed with these cases on the basis of anti-competitive object, noting that a case officer working on these cases would necessarily be prevented from working on cases that, in the OFT's view, had a higher priority. In any event, there was no conclusive decision on the question of object in this case.
186. Global Crossing submits that the OFT's conclusions in this case appear to be very similar to the position reached by the OFT in *Casting Book*.

187. Counsel for NTL refers the Tribunal to its previous case law on the question of what constitutes an appealable decision, in particular to paragraphs 34, 83 and 90 of *BetterCare*, paragraphs 92 and 93 of *Freeserve v Director General of Telecommunications* [2002] CAT 8, paragraphs 198 and 200 of *Aquavitae* and paragraphs 22, 29, and 30 of *Casting Book*. NTL places weight on the availability of judicial review proceedings as an adequate alternative for controlling the lawfulness of the OFT’s decision-making.

## V RELEVANT STATUTORY FRAMEWORK

188. The Chapter I prohibition is contained in section 2 of the 1998 Act and provides, so far as material:

“2 Agreements etc preventing, restricting or distorting competition

(1) Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which—

- (a) may affect trade within the United Kingdom, and
- (b) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom,

are prohibited unless they are exempt in accordance with the provisions of this Part.

(2) Subsection (1) applies, in particular, to agreements, decisions or practices which –

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

...”

189. Section 2 of the 1998 Act is closely modelled on the corresponding provision of Article 81 of the Treaty establishing the European Community (“the EC

Treaty”). Section 60 of the 1998 Act requires that questions arising under section 2 are to be determined, so far as possible, and having regard to any relevant differences, in a manner consistent with Community competition law.

190. Under Chapter III of the 1998 Act, entitled Investigation and Enforcement, the OFT and certain designated sectoral regulators are given extensive powers to investigate and make decisions, amongst other things, as to whether or not the Chapter I prohibition has been infringed.

191. The provisions governing appeals against certain decisions taken under the 1998 Act are set out in sections 46 and 47 of that Act, as amended by section 17 of the Enterprise Act 2002 (with effect from 20 June 2003), and by the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004 S.I. 2004 No. 1078 (with effect from 1 May 2004).

192. Section 46 is directed to appeals by the parties principally affected by a decision of the OFT and provides, so far as relevant:

“46 Appealable decisions

(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.

...

(3) In this section “decision” means a decision of the OFT—

(a) as to whether the Chapter I prohibition has been infringed,

...”

193. Section 47 of the 1998 Act envisages appeals to the Tribunal by third parties and provides:

“47 Third party appeals

(1) A person who does not fall within section 46 (1) or (2) may appeal to the Tribunal with respect to—

(a) a decision falling within paragraphs (a) to (f) of section 46(3);

...

(2) A person may make an appeal under subsection (1) only if the Tribunal considers he has a sufficient interest in the decision with

respect to which the appeal is made, or that he represents persons who have such an interest.

...”

194. It is not disputed that in the present case Cityhook has a “sufficient interest” for the purposes of section 47.

## **VI TRIBUNAL’S ANALYSIS**

### **A CITYHOOK’S NOTICE OF APPEAL**

195. By a Notice of Appeal dated 23 August 2006 Cityhook challenges a decision of the OFT to close its investigations into the collective boycott and collective setting cases on the basis that the OFT had found a *prima facie* breach of the 1998 Act. We understand that Cityhook did not have the benefit of legal representation at the time it prepared and filed the Notice of Appeal.

196. Subsequently, Cityhook filed an Amended Notice of Appeal on 31 October 2006, settled by Counsel, which contends “that the Contested Decision was either expressly or by necessary implication a decision within the meaning of section 46(3)(a) of the 1998 Act to the effect that the Chapter I prohibition has not been infringed by the UKCPC and certain of its members”. The original Notice of Appeal was appended to the Amended Notice of Appeal.

197. At the hearing Cityhook was no longer legally represented and Mr Shovell, a director of Cityhook, presented the submissions for Cityhook as a litigant in person. Cityhook’s submissions at the hearing were on the basis that the OFT had made a non-infringement decision.

198. This change to the basis of appeal had important implications for its prospects of success.

199. In adopting an infringement decision under Chapter I, the OFT is required to follow certain statutory procedures and requirements, which are set out in the 1998 Act, and in The Competition Act 1998 (Office of Fair Trading’s Rules)

Order 2004 S.I. 2004 No. 2751 (“The OFT’s Rules”), which entered into force on 17 November 2004.

200. Section 31(1) of the 1998 Act provides, so far as relevant:

“(1) If as a result of an investigation the OFT proposes to make a decision, the OFT must -

(a) give written notice to the person (or persons) likely to be affected by the proposed decision; and

(b) give that person (or those persons) an opportunity to make representations.

(2) For the purposes of this section ... “decision” means a decision of the OFT -

(a) that the Chapter I prohibition has been infringed;

...”

201. The written notice referred to in section 31(1) of the 1998 Act is normally complied with by the service of what is known as a “Statement of Objections”. The Statement of Objections sets out in detail the infringements alleged, the evidence relied on and the conclusions the OFT proposes to draw from the evidence set out in the notice. Hence, Rules 4 to 5(2) of the OFT’s Rules provide:

“Statement of objections

4. – (1) If the OFT proposes to make an infringement decision -

(a) the OFT shall give notice of this stating which one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 81(1) and the prohibition in Article 82 the OFT considers has been infringed; and

(b) the provisions of rule 5 shall apply.

(2) Subject to rules 17 and 18, the notice referred to in paragraph (1)(a) must be given to each person who the OFT considers is a party to the agreement, or is engaged in conduct, which the OFT considers infringes one or more of the prohibitions mentioned in paragraph (1)(a).

Notices, access to file and representations

5. - (1) In this rule -

(a) “notice” means a notice that the OFT is required to give under rule 4, 12(3) or 13(1); and

(b) “relevant person” means a person to whom notice is required to be given under the rules mentioned in subparagraph (a).

(2) A notice shall state:

(a) the facts on which the OFT relies, the objections raised by the OFT, the action the OFT proposes and its reasons for the proposed action;

(b) the period within which a relevant person may make written representations to the OFT identifying the information contained in the notice which that relevant person considers the OFT should treat as confidential information and explaining why he considers the OFT should treat such information as confidential information; and

(c) the period within which a relevant person may make written representations to the OFT on the matters referred to in the notice.

...”

202. In this case, the OFT had not proceeded to issue a Statement of Objections pursuant to the section 31 procedure. Instead, it wrote to interested parties to inform them that it intended to close the investigations into the collective boycott and collective setting cases. It did not follow the section 31 procedure because it did not propose to adopt an infringement decision at that point in time. Rather, the OFT submits that it considered that there was further investigation and analysis which was required to be done.

## B APPEALABLE DECISIONS, PRIVATE ACTIONS AND JUDICIAL REVIEW PROCEEDINGS

### (i) *Introduction*

203. Companies which complain to competition authorities of anti-competitive practices perform an activating function and in so doing are catalysts for public enforcement of competition law. Notwithstanding the interests of the companies themselves in averting commercial damage as a result of the unlawful practices of their competitors, there is an overriding, significant public interest in ensuring that the competition rules should be observed, which interest is safeguarded by the 1998 Act and protected by the public

bodies responsible for exercising the enforcement powers contained in that Act.

204. It is obviously important for the maintenance of competitive markets and for the protection of victims of anti-competitive behaviour that infringements of the Chapter I prohibition are brought to an end. The 1998 Act provides the OFT (and those sectoral regulators who enjoy concurrent powers) with the power to order interim measures, to take decisions which require that an infringement be brought to an end and/or to impose fines.
205. Moreover if either the OFT (and those sectoral regulators who enjoy concurrent powers) or the Tribunal (on an appeal) decides that the Chapter I prohibition has been infringed a private party can then rely on a finding of infringement in a ‘follow-on’ action for damages brought in the Tribunal (see section 47A of the 1998 Act) or in the High Court (see sections 58A(2) and (3) of the 1998 Act).
206. Furthermore section 58 of the 1998 Act provides that (unless the court otherwise directs) a finding of fact made by the OFT in the course of conducting an investigation which is relevant to an issue arising in proceedings brought otherwise than by the OFT is binding on the parties if the time for bringing an appeal under the 1998 Act in respect of the finding has expired and the relevant party has not brought such an appeal or the decision of the Tribunal on such an appeal has confirmed the finding.
207. Thus an infringement decision is an important weapon in a claimant’s armoury. Although, without such a decision, a claimant can, of course, bring a private action against the alleged offenders, to succeed in such an action it must establish an infringement of the Article 81(1) EC and/or Chapter I prohibition. This will require it to produce sufficient evidence to satisfy the court, on the balance of probabilities, of the existence of an infringement.
208. Bringing a private action against “secret” cartels is no easy task. Since the prohibitions of anti-competitive agreements in Article 81(1) EC and the

Chapter I prohibition and the penalties which offenders may incur are well known, those involved typically keep written evidence to a minimum and often explicit evidence of unlawful contact is only fragmentary and sparse: see the Tribunal's remarks in *Claymore Dairies v OFT* [2003] CAT 18 at [3]-[10] and *JJB Sports v OFT* [2004] CAT 17 at [205]-[206].

209. A claimant in a private action does not have the investigatory powers of the OFT under section 26 to 28A of the 1998 Act to obtain documents and information. Moreover, where the OFT has begun an investigation and is in possession of relevant information a private party does not have any right to that information. The provisions of Part 9 of the Enterprise Act 2002 impose general restrictions on and conditions for the disclosure of specified information held by public authorities, including the OFT. Where an authority has not yet adopted a final decision in connection with a given investigation, these provisions apply in particular to the disclosure of documents contained in the OFT's case file. As is recognised by the OFT in paragraph 5 of the Annex to the final case closure letter, the evidential burden on a party instituting a private action may well be the same after the closure of an investigation as it was before. This is so since in particular any material documents in the OFT's case file cannot be made available voluntarily by the OFT to the claimant.
210. Furthermore the closure of a long-running OFT investigation without any decision on the merits may prejudice a subsequent private action. For example the prior use of the OFT's investigatory powers could hamper a subsequent search for relevant information by the claimant pursuant to a 'search order' (see, for example, section 7 of the Civil Procedure Act 1997 and Rule 25.1(1)(h) of the Civil Procedure Rules). Such prejudice may arise not only because the alleged offenders have been subjected already to enquiries from the OFT but also because of the prejudice which can result necessarily from delay in bringing proceedings, including dullness of memory of witnesses, disappearance of witnesses and loss and destruction of documentary evidence in the meanwhile. Moreover the defendant undertakings may have substantial resources available to them to defend a private action brought against them.

The claimant may not have the financial and other resources necessary to fund a successful private action, especially against the background of the closure of a long-running investigation without any finding as to whether or not there was an infringement.

211. It appears from Mr Smith's description of Mr Priddis' memorandum that Mr Priddis' consideration of administrative priority took into account the question of resources needed to deal with an appeal. Mr Priddis considered that an appeal to the Tribunal was inevitable if the OFT adopted an appealable decision in the collective boycott and collective setting cases. If neither claimants in private actions nor the relevant competition authority have the resources to be able to challenge the anti-competitive behaviour of companies with substantial means, then the effectiveness of competition law enforcement in the UK would be seriously undermined. It could also be very damaging to the competitiveness of the affected markets.

(ii) *Cityhook's private action*

212. On 20 July 2006 Cityhook commenced a private action in the Chancery Division of the High Court against BT, Level 3, Global Crossing, Cable & Wireless, Alcatel, Tyco, Flag, NTL, Viatel and the UKCPC alleging an infringement of Article 81(1) EC and/or the Chapter I prohibition. This action has been stayed pending the outcome of this appeal. Cityhook observed that there are considerable obstacles in its way in bringing this action.

213. Cityhook highlighted the difficulties facing a claimant in a private action by explaining that Alcatel is one of the parties to the action commenced by it. According to Cityhook, Alcatel is a French company. Cityhook told us that Alcatel's lawyers have refused to accept service on the company's behalf and have applied to have the action struck out against them on the basis that they have not been served. Cityhook further explained that the reason why it has not effected service is that in order to do so the documents must be translated into French and Cityhook does not presently have the funds to go through that process now or in relation to further pleadings. Accordingly Cityhook stated

that unless it could raise sufficient funding, it could not bring these private proceedings against undertakings which are outside the jurisdiction. Cityhook further explained that, apart from the difficulties it faced in funding the action, Cityhook is concerned that it does not presently have the finance to meet any costs orders that may be made against it. In those circumstances Cityhook has been advised that its directors are at risk of a costs order being made against them personally if Cityhook were to proceed with the private action. Cityhook submitted that this is a difficult position for a small company to be in and an impossible position for the directors of Cityhook.

214. Cityhook further submitted that in respect of the alleged object-based infringement in the collective boycott case the OFT had obtained all the information necessary but if it had not made a decision within the meaning of section 46 of the 1998 Act none of that information would be available to Cityhook and Cityhook would have to start from scratch in the private action. Cityhook submitted that this was a “ludicrous position” particularly where the only outstanding matter which, according to the OFT, stood in the way of it making a decision, was a point of law which could be resolved by the Tribunal. Cityhook submits that the suggestion that the Tribunal should be comforted by the fact that there are other jurisdictions in which these cases might be heard is both “abhorrent” and “not very practical”.
215. We can understand why, in all of these circumstances, Cityhook may feel a sense of grievance that the OFT had not in fact considered its complaint on the merits.

(iii) *Cityhook’s judicial review proceedings*

216. The OFT submits that the Tribunal does not have jurisdiction because no appealable decision has been taken by it and that since it closed the files on grounds of administrative priority the remedy available to Cityhook is judicial review by the Administrative Court and not an appeal to the Tribunal. Cityhook has commenced judicial review proceedings which we understand have also been stayed pending the decision of the Tribunal.

217. Cityhook submits that the burden on Cityhook in judicial review proceedings is extremely high and that the logical forum for a competition case is the Tribunal.
218. We can understand Cityhook’s reluctance to pursue judicial review proceedings against the OFT. Such proceedings cannot achieve in themselves an infringement decision. If the OFT decision to close the file on administrative priority grounds were found to be legally flawed any relief available in the Administrative Court is more limited as compared to the relief available in the Tribunal (as to which, see paragraph 3 of Schedule 8 of the 1998 Act). The Administrative Court may quash the decision of the OFT and may remit the matter to the OFT to reconsider its actions in this regard. It may then be open to the OFT to close the file again and if it chose that course of action Cityhook would only have achieved a pyrrhic victory in the judicial review proceedings.
219. We note the observations of the Tribunal in *BetterCare* at [90] to [94] concerning the availability of judicial review as a remedy for a complainant whose complaint has been rejected:

“90. As to the various arguments concerning the availability of judicial review to Bettercare in the circumstances of this case, it seems to us, respectfully, that the position is relatively straightforward. If there is a relevant decision for the purposes of section 47(1), then a disappointed complainant has an appeal to this tribunal. If, on a true analysis, there is no relevant decision, but only an exercise of discretion not involving a decision whether the Chapter I or II prohibition has been infringed, then a disappointed complainant may have a remedy, if at all, by way of judicial review at common law. Which route applies depends solely on whether there is a “relevant decision” or not.

91. As we see it, possible complications arise only if too narrow a view is taken of what constitutes a “relevant decision” for the purposes of section 47(1). On the Director’s approach, so it seems to us, quite a lot of substantive issues under the Act could arise in judicial review proceedings. In the present case, it is true, the issue is limited to whether North & West is an undertaking, albeit that that question is not a particularly straightforward matter in a competition law context. In other cases, however, the issue could be whether there was a dominant position, or an abuse, or, in respect to the Chapter I prohibition, whether there was an agreement, or a restriction or distortion of competition. Those are legal and/or economic issues, or questions of

mixed law or fact, which this Tribunal is supposed to be equipped to deal with, notably by virtue of the requirements governing the appointment of chairmen (Schedule 7, paragraphs 4(3) and 26(2)), the process of appointment of appeal panel members, and the training of appeal panel members (Schedule 7, paragraph 24). The Tribunal is also a single tribunal for the United Kingdom.

92. In those circumstances, we are not ourselves convinced that acts of the Director which go beyond the mere exercise of a discretion, and constitute a decision on the substance, were intended by Parliament to be susceptible to judicial review in whichever of the three domestic jurisdictions is appropriate, rather than “funnelled”, as it were, through the Tribunal.

93. There will, no doubt, be borderline cases where it is debatable whether the Director has “taken a decision that there is no infringement” or merely “exercised a discretion not to proceed”. That question, so it seems to us, has to be decided by the Tribunal on the facts of each case. If the matter is disputed, it must be decided by the Tribunal at the outset: *R (Commissioners of Customs & Excise) v VAT Tribunal (Belfast)* [1977] NILR 58. While the fact that the Director has not labelled the act in question as “a decision” may be relevant, the absence of such a label is not in our view determinative of the issue whether there is a decision: it all depends on the facts, viewed objectively.

94. As to the Director’s submission that, if Bettercare is right, “the effective operation of the Act would become almost impossible”, his argument in this case is not whether Bettercare has any remedy; the argument is about which remedy is available to Bettercare, namely an appeal to the Tribunal, or judicial review. Indeed, the Director rests a large part of his argument on the submission that Bettercare could have sought judicial review, presumably under Order 53 of the Rules of the Supreme Court of Northern Ireland. In those circumstances, we do not quite see why the Act would be workable had Bettercare sought judicial review, but becomes unworkable if Bettercare can appeal to the Tribunal. In either case there would be proceedings, both sets of proceedings would involve resources, and there would, presumably, be a determination of “the undertaking” issue, in one form or another. On the facts of this case, we do not therefore accept the argument that, if Bettercare is right, there would be a material effect on the efficient use of the Director’s resources, nor the argument that his administrative priorities may in some way become “skewed”.

220. In a case such as this, when determining whether a case is to be brought before the Tribunal or the Administrative Court, the underlying problem for the parties is the same, namely, whether the OFT has, in fact, taken an appealable decision under the 1998 Act (see paragraph 223 *et seq*) or merely exercised a discretion not to proceed. There is a “chicken-and-egg” problem for any party

who has been affected by such a decision or act of a public authority responsible for enforcing the 1998 Act: should it appeal to the Tribunal, or should it make an application for judicial review in the Administrative Court, or both? This dichotomy as to jurisdiction places an appellant in a difficult predicament and has the result that all of the parties concerned (namely, the appellant, the OFT and the interveners) may not have all the issues which arise determined in one forum. Not only does this have resource implications for all the parties if the appellant chooses to proceed in both jurisdictions either simultaneously or consecutively but it also places a party such as Cityhook in a dilemma as to how best to proceed and how best to use its resources. We can therefore understand why Cityhook, a new entrant seeking to compete through a possible innovation in an established market, considers the dichotomy as to jurisdiction to be prejudicial to its rights.

221. A separate complication arising from the dichotomy as to jurisdiction is that the same legal issue arising under the 1998 Act may fall to be considered in both jurisdictions. A party may challenge the authority's legal characterisation of the alleged infringement. If the decision in question is an appealable one, then the Tribunal would have jurisdiction to decide that issue on the merits. If there is no appealable decision, then the Administrative Court, in exercising its judicial review jurisdiction, may need to consider the same legal issue, namely, whether the relevant competition authority made an error of law or took into account an irrelevant legal consideration or failed to provide reasons that are adequate or intelligible.
222. It is against this background that Cityhook has pursued its appeal to the Tribunal since if the OFT has made an appealable decision then the judicial review proceedings would be unnecessary and Cityhook may, or may not, continue to pursue its private action. Cityhook submits that if, in the collective boycott case, there has been a non-infringement decision by the OFT – because the OFT has decided that the infringement cannot be characterised in law as an object-based infringement – then whether the OFT's decision is correct could be resolved expeditiously by the Tribunal. Cityhook also

submits that the OFT has made an implicit non-infringement decision in relation to effect-based infringements in both cases.

## C TRIBUNAL'S CASE LAW ON APPEALABLE DECISIONS

223. The Tribunal's jurisdiction is statutory. For the Tribunal to have jurisdiction, two features must exist. First, the authority against whom an appeal is brought must have taken a "decision" and secondly, that decision must be of the type which is subject to the jurisdiction of the Tribunal set out in sections 46 and 47 of the 1998 Act: see, to that effect, *BetterCare* at [61].

224. As to whether the OFT has made a "decision", the Tribunal said in *BetterCare* at [62]:

"On the ordinary meaning of words, to take a decision in a legal context means simply to decide or determine a question or issue. Whether such a decision has been taken for the purposes of the Act is, in our view, a question of substance, not form, to be determined objectively. If there is, in substance, a decision, it is immaterial whether it is formally entitled a decision: otherwise the decision-maker could avoid his act being characterised as a decision simply by failing to affix the appropriate label."

225. As to whether any decision is "appealable" within the meaning of sections 46 and 47 of the 1998 Act, the relevant legal principles are summarised at paragraph 122 of the Tribunal's judgment in *Claymore*, cited above, as follows:

"In our view the main principles to be derived from *Bettercare* and *Freeserve* are:

(i) The question whether the Director has "made a decision as to whether the Chapter II prohibition is infringed" is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).

(ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).

(iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion

without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition (*Freeserve*, [101] and [102]).”

226. In *Pernod* the Tribunal observed at [161] that:

“...the words “as to whether” in section 46(3)(b) refer both to a decision that the Chapter II prohibition *has* been infringed, and to a decision that the Chapter II prohibition *has not* been infringed. It is equally common ground that there may be a decision that the Chapter II prohibition “has not been infringed” if the decision in question finds that at least one of the necessary elements comprising the Chapter II prohibition is lacking. Thus, even if the decision is limited to deciding that the body in question is not an “undertaking” (as in *Bettercare*), that by necessary implication is a decision that the Chapter II prohibition has not been infringed, because an element essential to establishing the infringement is not present. The same applies, in the Tribunal’s opinion, if the decision in question is to the effect that there is no dominant position, or no abuse, or no effect on trade in the United Kingdom. In each case it follows, necessarily, that there is no infringement of the Chapter II prohibition.”

227. In *Freeserve* the Tribunal rejected the (former) Director of Telecommunication’s submission that (at [100]):

“... there are subtle “grades” of decision in which some decisions on the substance are insufficiently “final” or “definitive” to constitute “appealable” decisions. In our view, there is either a decision on the substance or there is not. It may be that some non-infringement decisions are more fully reasoned than the present decision, particularly where there is a non-infringement decision at the end of the second, rather than the first, stage of investigation. But in our view the matter cannot depend on how thorough the Director’s investigation has been up to that point, how the Director describes the document, or how far he chooses to go into detail: any such approach would effectively give the Director himself the right to decide whether his decision was to be appealable.”

228. In *Claymore* the Tribunal considered at [148] that:

“... a useful approach is to pose two questions: Did [the OFT] ask [itself] whether the Chapter II prohibition has been infringed? What answer did [the OFT] give when making [its] decision?”

229. In *Claymore*, the Tribunal held that as a matter of substance the OFT had, in the particular circumstances of that case, reached a decision to the effect that there had been no infringement in relation to the matters under investigation. The Tribunal said:

“145. ...in our view [the] conclusion by the Director was to all intents and purposes a final conclusion, subject only to re-opening on the basis of “compelling” new evidence. In our view there is nothing provisional or tentative about his conclusion that no infringement could be established on the evidence. In our view, the Director has reached a firm decision that no infringement of the Chapter II prohibition is established on the evidence before him.

...

152. In this case the Director has investigated the matter exhaustively for the purpose of reaching a conclusion on whether the Chapter II prohibition has been infringed. His conclusion, as we have held, is that such an infringement cannot be established on the evidence before him. He has not, therefore, abstained from expressing a view on the question of infringement. His considered view is that an infringement is not established on the evidence.

...

155. ... Under the Act the Director has the functions of both investigation and decision-making. Initially, the Director is engaged in a process of investigation. The object of that investigation is to come to a conclusion whether the Chapter II prohibition has been infringed. In the nature of the process, that conclusion can be reached only on the basis of the evidence available. At some stage in the investigation the Director reaches the point where he considers that he has all the evidence he needs or can usefully obtain. At that stage he assesses the evidence and makes up his mind. ...

156. ... The Director’s investigation was long and detailed; it appears from the letter of 9 August 2002, that no stone was left unturned. In particular, according to that letter, very large quantities of information were obtained using statutory powers; an additional case officer was assigned to the investigation; specialist software was bought; and consultations with internal and external experts were held. ... The Director and his staff gave close consideration to the evidence and reached a view. That view was that the evidence did not amount to proof of an infringement. As we have said, there was nothing provisional or tentative about that conclusion. ...

230. In *Aquavitae*, the Tribunal said at [206]:

“In normal circumstances, where the OFT or a concurrent regulator has expressly indicated that they will consider a complaint on its merits, the Tribunal will expect that investigation to reach an outcome. If the outcome of that investigation is to close the file, the Tribunal will normally infer that that is because there is insufficient evidence of infringement. In most cases the result will be an appealable decision, in accordance with the principles now established in *Bettercare*, *Freeserve* and *Claymore* .... As *Claymore* makes clear, at paragraphs 124 to 146, the drafting of the case closure letter is unlikely to deflect the Tribunal if the substance of the matter is a finding of insufficient evidence of infringement. Moreover, the inference that the case has been closed because the relevant regulator has concluded that an infringement is not established will normally be irresistible if, at an earlier stage, the regulator has already expressed a view to the effect that he sees little merit in the case.”

#### D TRIBUNAL’S CASE-LAW ON NON-APPEALABLE DECISIONS

231. In *BetterCare* at [83], *Freeserve* at [101] and *Claymore* at [151] the Tribunal envisaged cases where the OFT has genuinely abstained from expressing a view, one way or the other, on the question whether there has been an infringement of the relevant prohibition.

232. In paragraph 83 of *BetterCare* the Tribunal was addressing the question whether the decision there in issue was to be analysed as the exercise of an administrative discretion not to conduct an investigation under section 25 of the 1998 Act, or as a decision that the Chapter II prohibition was not infringed. The Tribunal said:

“In addressing this central issue, it is not in our view helpful to use the concept of a “decision to reject a complaint” because such a term is ambiguous. The Director may decide to “reject a complaint” for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed.”

233. As regards paragraph 83 of the *BetterCare* judgment the Tribunal commented in *Freeserve* at [101]:

“101. ... it seems to us that there will be cases where the Director, or his colleague the Director General of Fair Trading, has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement of the Chapter II prohibition. For example, the Director General of Fair Trading may receive a badly organised complaint. He might be tempted to write back to the effect “The material you have sent me does not enable me to form a view on whether or not the Act may have been infringed. Unfortunately the resources of this Office are limited. I regret that I am not able to take the matter any further.” It is unlikely that such a letter would be a “decision as to whether the Chapter II prohibition has been infringed”. Similarly, a reply by the Director to the effect “I am conducting a market investigation into the industry you mention, and do not propose to take a position on your complaint until that inquiry is completed”, would not be an appealable decision either.

234. At paragraph 151 of *Claymore* the Tribunal provided some examples of non-appealable decisions in cases where the authority may legitimately be said to have abstained from expressing a view on the question of infringement:

“On that approach, the Director’s decision in this case is to be contrasted with other kinds of decisions to close the file, such as where the Director, without going into the merits, decides not to open an investigation because he has other cases to pursue in priority (the situation dealt with by the Court of First Instance in *Automec*, cited above); because he has decided to make a market investigation reference to the Competition Commission under the Enterprise Act 2002; because another competition authority is investigating the matter; because of the possible effect on criminal proceedings under section 188 of the Enterprise Act 2002; or for some other reason which does not involve him taking a considered position on the merits of the case.”

235. In *Aquavitae* the Tribunal held that the (former) Director General of Water Service’s decision to focus his resources on the introduction of a statutory scheme for retail licensing envisaged by the then Water Bill (now the Water Act 2003) rather than use his powers under the 1998 Act constituted a genuine independent reason for closing the file and that no decision as to whether the Chapter II prohibition had been infringed had been taken (at [171] to [212]). At paragraphs 206 to 209 of the judgment the Tribunal made plain that it was only the “exceptional circumstances” of the case, namely the introduction of primary legislation, which led the Tribunal to conclude that the case closure letter of 3 December 2003 was not an appealable decision.

236. In *Casting Book v OFT* [2006] CAT 35, the Tribunal was satisfied that the OFT closed its investigation into an alleged collective boycott for reasons genuinely independent of the merits of the case and without having reached any conclusion on those merits. The Tribunal took into account the fact that the evidence-gathering was still at an early stage, the apparent scarcity of resources in the relevant branch of the CE Division, and that the OFT's resources would be more usefully deployed on higher priority investigations (see in particular at [38] and [39]).

237. In *Independent Water Company v Water Services Regulation Authority (formerly the Director General of Water Services)* [2007] CAT 6 the Tribunal decided it did not have jurisdiction in respect of a decision by the Water Services Regulation Authority to deal with the terms and prices on which Bristol Water was prepared to offer a bulk water supply and as to the terms of connection to its network under the Water Industry Act 1991 rather than under the 1998 Act (at [160] to [179]). In that case the Tribunal held that, on the material provided to it, the Authority had abstained from expressing a view one way or the other on the question whether there had been an infringement of the Chapter II prohibition (at [178]).

#### E THE INTERTWINED CONSIDERATIONS OF SUBSTANCE AND ADMINISTRATIVE PRIORITY IN DECISION-MAKING

238. Decisions under sections 46 and 47 of the 1998 Act are appealable to the Tribunal, whereas other decisions of the OFT are only susceptible to judicial review proceedings. This follows from the structure imposed by the 1998 Act.

239. The OFT submits that it did not reach a non-infringement decision but instead decided to close the file on administrative grounds. The OFT submits that there are two separate and distinct types of decision which it can make: a final substantive decision as to whether there has been an infringement of a relevant prohibition, on the one hand, and an administrative decision to close the case file, on the other hand.

240. The OFT, as the main competition authority responsible for enforcing the 1998 Act, has a combined function: to investigate cases and to decide whether there has been an infringement of Article 81 or Article 82 of the EC Treaty or Chapter I or Chapter II of Part I of the 1998 Act (see *Claymore*, at [155]). In performing this combined function, as the investigation process proceeds, the OFT necessarily must come to a conclusion as to whether it has sufficient evidence on which to reach a decision as to whether there has been an infringement of a relevant prohibition or whether it should obtain more evidence and carry out further analysis. The greater the amount of evidence which the OFT has collected or the more detailed its investigation has been, the less likely it is that further investigation will yield additional, useful evidence. Moreover, the further into the investigation the higher the relative cost of continuing such an investigation is likely to be (barring a completely unexpected turn of events) given that the most easily accessible and relevant information should already have been uncovered.
241. In the process of making up its mind at any stage of its investigation, the OFT must necessarily balance the evidence and analysis it has before it against the resource implications (financial, human and logistical) of seeking further information or conducting further analysis. This involves consideration of its other work commitments and of alternative uses which it could make of its resources. That deliberation necessarily takes into account a mixture of substantive and administrative considerations, which cannot easily be separated from one another.
242. The OFT submits that the six prioritisation criteria on which it relies are purely related to the question of administrative priority. However, analysis shows that they contain criteria relevant to the substance of the case as well as administrative matters. Indeed, at least three of those criteria predominantly require an assessment of substantive matters: the likely extent of consumer detriment, the strength of the evidence available and the type of infringement. It is clear to us from the description of the six prioritisation criteria and from our analysis of the OFT's combined role as investigator and decision-maker, that its role requires it to consider those criteria relating to the substance of the

case with those relating to administrative priority. Applying this framework is particularly problematic in a case such as this one which involved a detailed and extensive investigation.

243. This inter-relationship between substantive and administrative matters is illustrated by what happened when Mr Smith sought to separate these two matters by asking Mr Mayock to conduct a review of the substance of the cases and Mr Priddis to review the cases against the OFT's administrative priorities at the time (see paragraph 63 above). The outcome of these reviews is instructive. According to Mr Smith's summary in his first witness statement, neither Mr Mayock nor Mr Priddis divorced the substance of the case from the question of administrative priority. This demonstrates the close inter-relationship between substance and administrative priority during the course of an investigation and in the decision-making process.

244. Thus it would appear to be an over-simplification to say that the case file in these cases was closed purely on the basis of administrative priorities. In fact the OFT has also assessed the substance of the cases by considering the evidence then in its possession and its analysis of the cases and given consideration to the further evidence and analysis which would still be required. What the OFT concluded was that, on balance, it did not consider that it had sufficient information to proceed to make an infringement decision at that stage of its investigation and that further evidence-gathering or analysis would not be warranted, having regard to its administrative resources and other workload which it considered to comprise "more promising cases".

#### F THE ISSUE WHICH THE TRIBUNAL HAS TO DECIDE

245. The issue presently before the Tribunal is whether, when the OFT closed the investigations in the collective boycott case and the collective setting case, it had made a decision as to whether the Chapter I prohibition has been infringed, either expressly or by necessary implication, on the material before it (see *Freeserve* at [96] and *Claymore*, at [122(ii)]).

246. The OFT's investigations in both cases considered whether the impugned conduct had the object of restricting competition ("object-based infringement") and/or whether it might have an appreciable anti-competitive effect ("effect-based infringement"), contrary to the Chapter I prohibition. We consider the OFT's position in relation to the alleged object-based infringement in both cases, before examining the position on the alleged effect-based infringement.

(i) *The alleged object-based infringement in the collective boycott case and collective setting case*

247. The OFT accepted that it had all the necessary information and evidence to proceed to make a decision in relation to the alleged object-based infringement in both cases. By the stage the investigations had reached on 19 June 2006, it seems, on the material before us, that the OFT's position was that:

(i) the alleged collective boycott of Cityhook did not constitute a 'hard-core' infringement of the 1998 Act (see paragraph 20 of the Annex to the final case closure letter) and neither the collective boycott case nor the collective setting case was "clearly a hard-core infringement" (see paragraph 24(c) of the final case closure letter) (see paragraphs 249 to 267 below); and

(ii) it was questionable whether the alleged collective boycott of Cityhook and collective setting of wayleave fees could be characterised properly in law as having as their object the prevention, restriction or distortion of competition (see paragraphs 268 to 288 below).

248. There is a contradiction between paragraph 20 of the Annex to the final case closure letter (which states a categoric conclusion) and paragraph 24(c) of that letter (which does not). However, for the reasons set out below, it is not necessary for us to resolve this difference.

- (ii) *The reference to the alleged ‘hard-core’ infringement in the collective boycott case*
249. Cityhook submits that the references to ‘hard-core’ infringements in the final case closure letter and Annex to that letter necessarily mean that the OFT decided that the alleged collective boycott did not have as its object the restriction of competition. Cityhook submits that the word ‘hard-core’ is synonymous with an object-based infringement.
250. The OFT submits that the term ‘hard-core’ and the nature of the alleged infringement is irrelevant to the preliminary issue before the Tribunal. In any event, the OFT submits that the word ‘hard-core’ is not synonymous with an object-based infringement but instead refers to the seriousness of the alleged infringement. In other words, the OFT submits that object-based infringements may, or may not, be ‘hard-core’ infringements. Likewise, the OFT submits that effect-based infringements may, or may not, be ‘hard-core’ infringements.
251. In relation to the meaning of ‘hard-core’ infringement, the OFT refers to footnote 13 to paragraph 20 of the Annex to the final case closure letter, which reads “sale price fixing, output restrictions, bid-rigging and market sharing”. The OFT submits that this footnote contains a non-exhaustive list of ‘hard-core’ (i.e. particularly serious) infringements.
252. In order to consider these different submissions it is necessary for the Tribunal to address the meaning of ‘hard-core’ infringement.
253. The term ‘hard-core’ is not specifically mentioned in the 1998 Act. The Chapter I prohibition applies to agreements having as their “object or effect” the prevention, restriction or distortion of competition. Unlike the concept of an agreement “having as its object or effect the prevention, restriction or distortion of competition”, the word ‘hard-core’ is not a statutory term.
254. We were not cited any jurisprudence of the Community Courts which uses the term ‘hard-core’.

255. It appears from the European Commission's guidance<sup>1</sup> that so-called 'hard-core' restrictions are generally considered by it to have as their object the restriction of competition. However, it would also appear that the category of restrictions by object may extend beyond the narrow set of so-called 'hard-core' restrictions, although normally the former encompasses the latter. It therefore appears that the term 'hard-core' is used to refer to the most serious object-based infringements of Article 81(1) EC and, by virtue of section 60(3) of the 1998 Act, the Chapter I prohibition.
256. In this case, the OFT submits that it has used the term 'hard-core' as one of the criteria by which it determines its administrative priorities. In accordance with section 3(1) of the Enterprise Act 2002 the OFT publishes its Annual Plan which contains a statement of its main objectives and priorities for the year. Mr Smith's first witness statement attached the OFT's Annual Plan 2005-06 which indicated the OFT's intention to:
- “ ... deal with anti-competitive behaviour using the Competition Act and/or Articles 81 and 82 of the EC Treaty, prioritising action against price fixing and abuse of market dominance intended to remove rivals (the '*hard-core*' behaviours)” (HC 461, p. 9).” (emphasis added)
257. Mr Smith, in his witness statement, also refers to a speech given on 1 December 2005 by Mr Collins, the Chairman of the OFT, in which he announced the OFT's intention to prioritise its competition enforcement caseload according to a new set of criteria, including:
- “... the nature of the alleged infringement – in particular, is it a *hardcore* case? ...” (emphasis added)
258. We note that the OFT document entitled “Competition prioritisation framework”, published on 12 October 2006, formally sets out a number of

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<sup>1</sup> Counsel for the Joint Intervenors referred the Tribunal to the European Commission's Communication – Notice – Guidelines on the application of Article 81(3) of the EC Treaty (OJ 2004 C 101, p.97), paragraphs 21-23. *See also* Recital 10 and Article 4 in the Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p.21); the Commission's interpretative Notice – Guidelines on Vertical Restraints (OJ 2000 C 291, p. 1), paragraph 46; the Commission's Notice on Agreements of Minor Importance (OJ 2001 C 368, p.13), paragraph 11. *See further* Bellamy & Child *European Community Law of Competition*, 5th Ed, paragraphs 2-063, 2-098 and footnote 56 to paragraph 2-100.

‘steps’ for prioritising competition law enforcement. However, that document does not use the term ‘hard-core’.

259. The OFT submits that (insofar as it may be relevant) whether an agreement is ‘hard-core’ is one factor which the OFT takes into account when determining whether it is appropriate to commit public resources to detecting, investigating and proving the existence of an infringement.
260. In the final case closure letter the OFT also uses the term ‘hard-core’ when testing the relative priority of one case as compared with others.
261. It also appears from the above that the term ‘hard-core’ is used to refer to an object-based infringement of a particularly serious kind (see paragraph 255 above). Such use is consistent with the list of ‘hard-core’ infringements given by the OFT in footnote 13 in the Annex to the final case closure letter.
262. Accordingly, there does not appear to be a universally accepted use of the term ‘hard-core’. It is also not wholly clear whether there is any real distinction between the two different uses of the term ‘hard-core’ or whether they each refer to object-based infringements. If the latter is the case, then ‘hard-core’ infringements are necessarily object-based infringements. The reverse may not be the case. If the relevant competition authority decides that an agreement does not constitute a ‘hard-core’ infringement under the 1998 Act, that agreement may nonetheless have as its object the restriction of competition; such a restriction by object, however, does not fall into the class which is so serious as to be categorised as a ‘hard-core’ infringement.
263. In deciding to close the investigation into the collective boycott case Mr Smith explains that he took into account Mr Priddis’ memorandum as regards the type of case. Mr Priddis was asked by Mr Smith to review the cases against the OFT’s administrative priorities. In Mr Priddis’ view, neither the collective boycott case nor the collective setting case was the type of case which was “clearly a hardcore infringement”. This is reflected in the wording of

paragraph 24(b) of the final case closure letter (cited above). The Annex to the final case closure letter also states:

“Annex

20. Based on the evidence seen by the OFT, the alleged collective boycott case does not constitute a hard-core infringement of the Act. Presently, the OFT is investigating real hard-core cartel cases which cannot be progressed in a timely manner. These cases are of higher administrative priorities to the OFT than the Collective Boycott Case.

...

29. Further, in assessing which cases are its highest priority, the OFT has to weigh in the balance the signal sent by closing the Collective Boycott Case when compared with the negative signal sent if the OFT had to close one of its more hard-core cartel investigations because it could not redirect resources from the Collective Boycott Case to progress it in a timely fashion.”

264. Having given consideration to the submissions of the parties together with the European Commission’s guidance to which we have referred in footnote 1 at paragraph 255 above, we have concluded that the OFT cannot be taken to have been using ‘hard-core’ as a synonym for an object-based infringement. Accordingly the OFT cannot be taken to have decided, either expressly or by necessary implication, that there was no object-based infringement in the collective boycott case when rejecting its classification as a ‘hard-core’ infringement.

265. However, it appears from the submissions by Cityhook and by the OFT that they were at cross-purposes as to the meaning to be attributed to ‘hard-core’ in the case closure letter and that this resulted in Cityhook’s misapprehension as to what the OFT meant by the use of that non-statutory term. The OFT accepted in its oral submissions to the Tribunal that there was some lack of clarity regarding the use of the word ‘hard-core’.

266. We note that in *Claymore* the Tribunal remarked at [129] that:

“It is self-evident that a decision giving reasons should clearly and accurately convey the real reasons for a decision, preferably in plain language. The role of the draftsman or adviser is to assist the decision-maker to convey with clarity what his reasons in fact are, and to resist the temptation to introduce a formula, or “gloss”, intended to reduce the risk of legal challenge. Otherwise, the parties may not receive the

reasons with the clarity to which they are entitled, and difficulties could arise in establishing what the reasons in fact were ...”

267. It is important that case closure letters as well as decisions are clear and transparent and do not leave the reader in any doubt as to the decision contained in them or the reasons for that decision. Words which have ambiguous or multiple meanings can open a line of enquiry leading to an appeal, which can only then be resolved by a judgment of the Tribunal after a full hearing. An appellant in those circumstances cannot be criticised for bringing an appeal.

(iii) *The legal categorisation of the alleged agreements in the collective boycott case and the collective setting case as object-based infringements*

(a) *Relevant law*

268. The assessment of whether or not an agreement has as its object the restriction of competition should take into account a number of factors, including the content of the agreement, the objective aims pursued by it and, where appropriate, the way in which it is implemented. We note that paragraph 22 of the Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty, cited in footnote 1 above, is to this effect.

269. It is well established that there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition (see Case T-168/01, *GlaxoSmithKline Services v Commission*, judgment of 27 September 2006, not yet reported, at [111], referring to Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, at 342).

270. The OFT correctly submits that proof of subjective intention is not a necessary factor in determining whether an agreement has as its object the restriction of competition. However, even if the subjective intention of the parties is not a necessary factor in determining the object of an agreement, there is nothing to prevent the OFT or the Tribunal from taking that intention into account in

finding an object-based infringement. The Tribunal notes that this observation accords with the judgment of the ECJ in Case C-551/03 P, *General Motors BV v Commission*, judgment of 6 April 2006, not yet reported, at [77] and [78].

271. It is also well settled that any agreement which restricts competition, whether by its object or by its effect, may in principle satisfy the criteria in section 9 of the 1998 Act and/or Article 81(3) EC (see Case T-168/01 *GlaxoSmithKline*, cited above, paragraph 233).

(b) *The evidence in Mr Smith's witness statements*

272. From the evidence set out in Mr Smith's witness statements it is apparent that there were contradictory views held by those within the CE Division of the OFT as to whether any agreement at issue in the collective boycott case and the collective setting case could be classified properly in law as an object-based infringement.

273. The case team in CE4 strongly advocated that the collective boycott case could be classified properly in law as an object-based infringement whereas the CRP considered that taking account of the applicable jurisprudence and policy statements by the European Commission (to which we have not been specifically referred), the alleged collective boycott might not be properly categorised as an object-based infringement. Prior to the CRM the CRP proposed that further work should be done so as to allow a non-infringement decision to be adopted in relation to the collective boycott case and the collective setting case. According to Mr Smith the conclusion noted in the minute of the CRM was that any provisional finding of infringement should preferably be based on a negative effect on competition. On the other hand, Mr Mayock in his review of the substance of the cases noted that whilst the law on anti-competitive object for both infringements was unclear, a credible argument could be advanced to support object-based infringements. Although Mr Priddis noted that neither the collective boycott case nor the collective setting case were "non-infringement cases", it appears from the summary of Mr Priddis' memorandum in Mr Smith's first witness statement that in so

noting Mr Priddis did not separately address whether the conduct at issue could be characterised as an object-based infringement.

274. Paragraph 60 of Mr Smith’s first witness statement states that with regard to substance his view on 6 December 2005 was that he considered that both cases should be run as object-based and effect-based infringements of the 1998 Act but that further work would need to be undertaken prior to any Statement of Objections being issued. In paragraphs 70 and 73 of his first witness statement Mr Smith states that in making his decision on 19 June 2006 he believed that further consideration would have been required in relation to the legal analysis of object-based infringements. In taking that decision Mr Smith had before him both the provisional case closure letter and the final draft case closure letter.
275. It is important to compare the wording of paragraph 21 of the final case closure letter with the equivalent paragraph of the provisional case closure letter.
276. Under the heading “The OFT’s Provisional Decision” paragraph 21 of the provisional case closure letter reads as follows:
- “The OFT decided that the case team had made out, prima facie, a case for the parties to answer in connection with both the [Collective Boycott] Case and the Collective Setting Case. Nevertheless, additional work to further improve the draft Statement of Objections would need to be undertaken prior to it being issued. On that basis, were the OFT to issue a Statement of Objections, then both the [Collective Boycott] Case and the Collective Setting Case *would be run as object and effect infringements of the Act.*” (emphasis added)
277. By contrast, paragraph 21 of the final case closure letter stated that:
- “The OFT had decided that although there is evidence of potential infringement in connection with both cases, the Collective Boycott Case and the Collective Setting Case would both need to be developed considerably before a sufficiently robust Statement of Objections could be issued. This would have to include, in particular in both cases, a more thorough analysis of the effect of the parties’ behaviour on competition. For the reasons set out further below, the OFT has decided not to carry out this work on the basis that neither case continues to constitute an administrative priority for the OFT.”

278. The final case closure letter emphasises that further work needed to be done and the cases needed to be developed further in relation to a more thorough analysis of the effect of the parties behaviour on competition, and that the OFT had decided not to carry out “this work” on the basis that neither case constitutes an administrative priority for the OFT.

279. There is no reference to the object-based infringement in the final case closure letter. It seems to us that paragraph 21 of the final case closure letter, together with paragraph 17 of the Annex to that letter, were directed to the OFT’s view on the evidence and not to the question of law as to whether or not the collective boycott case could be categorised properly as having an anti-competitive object and thus constituting an infringement of the Chapter I prohibition.

(c) *Mr Smith’s reasons for omitting any reference to the alleged object-based infringement*

280. Mr Smith in paragraph 73 of his first witness statement seeks to explain his reasoning for leaving out any reference to infringement by object in the final case closure letter as follows:

“...I took the view that the reference to a possible ‘object’ infringement in the provisional case closure letter should be omitted from the final case closure letter for a number of reasons as follows (and bearing in mind the views expressed to me by a senior legal adviser concerning the relevance of the Competition Appeal Tribunal’s case law in this area). First, as I have already explained there was a strong difference in views within the OFT as to whether the alleged infringements could properly be characterised as being by ‘object’. This point was also raised in a response to a provisional case closure letter. Consequently, at paragraph 5 of the Annex to the final closure letter the OFT acknowledged, in response to third party comments, that the original (provisional) letter may have given an unduly categorical impression of the OFT’s assessment of the issue of breach and that changes had been made to the final closure letter to reflect the OFT’s assessment more closely. Second, looking at the cases in the round, the further resource requirements which led to the cases being closed on administrative priority grounds related primarily to demonstrating an effect on competition. However, the additional resource requirements would not have been limited to this exercise. For example, given the ongoing internal debate within the OFT as to whether the alleged infringements could properly be characterised as being by ‘object’ and the third party comment regarding the OFT’s assessment of breach,

further analysis and review of the case law would have been required before the OFT could take a position regarding an ‘object’ case. As noted at paragraph 70 [of Mr Smith’s witness statement] above, further drafting work, in relation to both object and effect, would also have been necessary.”

281. In our view the foregoing passage does not explain why there is no reference to the object-based infringement in the final case closure letter. However, having regard to all the evidence before us, the Tribunal does not consider that it is a necessary implication from this omission that the OFT made a decision as to whether the Chapter I prohibition has been infringed.

(d) *Tribunal’s conclusions on the alleged object-based infringement*

282. The evidence before us shows that the investigation and decision-making process of the OFT in these cases is rather different from the situations considered in previous cases in which the Tribunal found that there was no appealable decision (see paragraphs 231 to 237 above). In particular, in this case the OFT expressed a provisional view on the merits that there was potential evidence of an infringement. Mr Smith’s witness statement explains that his view on the substance of the cases was that the case team had made out, *prima facie*, a case to answer on the question of infringement. Indeed, paragraph 21 of the final case closure letter states that there is evidence of potential infringement.

283. According to the previous case-law, whether an appealable decision has been taken is a question of substance to be determined objectively, taking into account all the circumstances: see *BetterCare*, at [62], [84] to [87], and [93]; *Claymore*, at [122]. The issue is whether the OFT has made a decision as to whether the Chapter I prohibition has been infringed, either expressly or by necessary implication, on the material before it: see *Freeserve*, at [96].

284. In order to find a non-infringement decision, the Tribunal has previously stated that there should be nothing provisional or tentative about the conclusion reached by the OFT, namely that the evidence did not amount to proof of an infringement (see *Claymore*, at [145] and [156]). The Tribunal’s

view in *Claymore* was that, in fact, the former Director General of Fair Trading had reached a “firm decision” that there was no infringement. That finding must be contrasted with the particular facts of this case, in which no firm decision on the alleged object-based infringement in either case appears to have been taken. Rather, there appears to have been intractable differences of view between the case team and CRP. There appears not to have been a meeting of minds as to whether there has been an object-based infringement. Moreover, on 19 June 2006 Mr Smith does not appear to have resolved these differences in his own mind.

285. On the basis of the material before us, in respect of the alleged object-based infringement, the position appears to us to be that the OFT decided not to: (a) determine whether it could establish to the legal standard that the object of the collective boycott case or the collective setting case was to prevent, restrict or distort competition, (b) investigate such counter arguments as might be advanced by the parties to justify their conduct or negate the evidence of potential infringement, (c) produce a sufficiently robust Statement of Objections and (d) adopt, in due course, a final decision. The OFT’s decision to close the investigations in relation to the alleged object-based infringement took into account a combination of substantive and administrative priority considerations which cannot be reviewed separately.
286. Having carefully reviewed both the evidence before us and the parties’ submissions, the Tribunal has concluded that a non-infringement decision is not the necessary implication of the OFT’s decision to close the investigations in relation to the alleged object-based infringement in the collective boycott case and the collective setting case.
287. The Tribunal would be very concerned if the OFT, as the main competition authority responsible for enforcing the 1998 Act, sat on the fence and refrained from taking final decisions due to a disagreement amongst the personnel of the OFT on a point of law. If, for example, the legal characterisation of an object-based infringement were to be the only point left to be resolved by the OFT, then, depending on the circumstances, the necessary implication of any

decision to close the file might well be that the OFT decided, on the balance of probabilities, that it was unable to establish on its analysis of the law that the conduct at issue amounts to an infringement of the Chapter I prohibition. For the reasons set out above, this implication is not one that can be made having regard to all the evidence before us in the present case.

288. However the legal characterisation of an alleged object-based infringement may be relevant in the stayed judicial review proceedings before the Administrative Court; for example as to whether in the decision-making process there may have been an error of law or account may have been taken of irrelevant legal considerations.

(iv) *The alleged effect-based infringement in the collective boycott case and the collective setting case*

289. We now turn to consider whether the OFT decided by necessary implication on the evidence before us that there had not been an effect-based infringement of the Chapter I prohibition.

290. Where an authority has evidence of infringement but is not satisfied that such evidence is sufficient to amount to proof of an infringement and concludes that further investigation is not warranted, then depending on the circumstances, the necessary implication of any decision to close the file might well be that the OFT decided, on the balance of probabilities, that it was unable to establish to the requisite legal standard on the evidence before it that there had been an infringement of the anti-competitive prohibition contained in Chapter I and II and Articles 81 and 82 EC (see *Claymore*, [149] to [157]). This is especially so after a detailed and extensive investigation.

291. It appears from the evidence before us that the stage the OFT had reached in its investigation as to whether there has been an object-based infringement was more advanced than the stage it had reached as to whether in either of the cases there had been an effect-based infringement.

292. It is important here to note that although Mr Mayock considered that an Statement of Objections could be issued with limited further work, Mr Smith was concerned that simply carrying out such limited work might not produce a sufficiently robust Statement of Objections to allow the cases to proceed to a final decision without a supplementary Statement of Objections first being issued and that it was preferable to ensure that an initial Statement of Objections was sufficiently robust. He considered that both cases needed to be developed considerably including carrying out a more thorough analysis of the effect of the parties behaviour on competition.
293. We are satisfied, on the basis of the material available to us, that whilst the OFT considered that there was evidence of a potential effect-based infringement, it did not consider, at that stage, that it had sufficient information to reach a final decision on that issue. Consequently, the OFT had to consider whether it should continue with its investigation and carry out a more thorough analysis of the alleged effect-based infringement. However, the OFT decided that it did not believe there to be a compelling case for allocating further resources to either case (see paragraph 25 of the final case closure letter).
294. Having considered the various matters listed in paragraph 96 above and the strength of the case team's case on an effect-based infringement, the amount of further work involved to issue a Statement of Objection and the OFT's administrative priorities, Mr Smith decided to close the investigations.
295. In these particular circumstances, the Tribunal considers that Mr Smith's decision on 19 June 2006 was not, in substance, a decision by the OFT as to whether there was an effect-based infringement of the Chapter I prohibition.

## **VII CONCLUDING COMMENTS**

296. The Tribunal has not found this case an easy one to decide. As is apparent from its analysis set out above, several features of the contested decision gave us particular concern, including the use of the term 'hard-core' infringement in the final case closure letter and the lack of clarity as to why the object-based

infringement was not expressly addressed in that letter. As we have explained above, the OFT's approach to these matters was unclear and remained so even at the hearing. In the course of its deliberations as to whether an appealable decision had been taken in this case, the Tribunal has had to give lengthy consideration to the evidence put before it and the submissions made, particularly in relation to both of these important points.

297. The Tribunal considers that the lack of clarity in the final case closure letter justified Cityhook's decision to bring an appeal. Nevertheless, after a detailed review of the evidence before us, the Tribunal has unanimously decided that the appeal is inadmissible.
298. In these circumstances, we do not need to decide the question whether it is necessary for the OFT to reach a firm decision on both an object-based and an effect-based infringement for there to be an appealable decision (as to which, see the parties' submissions at paragraphs 141, 171-172 and 178 above).
299. Finally, we note that it is a somewhat incongruous result that a sufficiently interested person has a right of appeal on the merits to the Tribunal against a non-infringement decision, whereas in cases where the evidence supports a finding of a potential infringement, but the authority chooses to close the case file without reaching a final decision, such a person has no right of appeal on the merits.

Marion Simmons QC

Professor Peter Grinyer

David Summers

Charles Dhanowa  
Registrar

3 April 2007