IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1047/3/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

25th May 2005

Before:
THE HON. MR. JUSTICE MANN
(Chairman)

MR. ADAM SCOTT TD
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Applicant

Mr. Peter Roth QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

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HEARING DAY THREE

MR. ROTH: Sir, I ended yesterday with a brief reference I think to the *Freeserve* Decision. I move on to what Ofcom's Decision in this case actually is, because Mr. Green said time and again that the essence of our case against H3G is price, and price alone. If that means that Ofcom based the SMP finding that H3G could act to an appreciable extent independently of competitors' customers and consumers on the ability to set prices above the competitive level, that is correct, but if it is said to mean that it was based on a finding that operators would, on the balance of probability or some other standard in fact charge excessive prices, that is not correct, and I shall come to incentive in just a moment. After lunch on Monday he took the Tribunal to certain passages in the Decision and the two prior consultation documents. But with respect one needs to see those passages in context. May I also respond to Mr. Scott's question when he asked my friend Mr. Green what is the relevance of those two earlier statements, that is to say the May statement and the December statement. Mr. Green said that it is relevant only where they are expressly referred to (transcript day 1,p.45, lines 5-6) That is, with respect, not correct. Can I just ask you to look at the Decision in bundle A2, tab 6, p.1089.

THE CHAIRMAN: Can you give me the paragraph numbers, Mr. Roth, because I am looking at them in a form which does not have those numbers on?

MR. ROTH: Paragraph 1.21.

> "This statement should be read in conjunction with the May and December consultations for the full reasoning for Ofcom's Decision."

So the reasons as a whole are to be taken from the three documents, of course, in so far as there is evolution in the thinking, because Ofcom have regard to the observations and representations it received from indeed H3G, BT and others, if there is any inconsistency it is the final Decision document which is decisive. But insofar as they are consistent they are to be read together.

So I start with the May consultation document, but perhaps you would like to keep out file A2, because I will come to it in a moment and then I will go to file A1 at tab 2. Mr. Green, took you to the annex at p.649, you may recall that, headed "Assessment and Market Power" and read various parts of that. That is annex B, but the discussion in the substantive document in fact starts at p.517. Picking it up at para.4.5:

> "Criteria used in assessing significant market power"
>
> "4.5 This market power assessment analysis focuses on single firm dominance."

Pausing there, that is by distinction with collective dominance, which is a rather peculiar animal in competition law, it does not arise in this case.

"The Director considers that in the market for wholesale mobile voice call termination SMP cannot be held by more than one company due to the specific characteristics of this market (see below and Chapter 3). As a consequence, there is no need to assess and apply the criteria relating to collective dominance in the assessment of market power set out in this chapter.

4.5 This chapter begins with a brief discussion of the CPP arrangement, which the Director believes is the key factor that shapes the competitive conditions prevailing in the wholesale mobile voice call termination markets. The rest of the chapter is devoted to a review of the single dominance criteria defined by the EU Commission and by Oftel in their respective SMP guidelines, which the Director believes are the most significant in this market. The remaining criteria, which are less relevant, are discussed in Annex B.

That is the reference to Annex B.

"4.7 To inform his SMP analysis in addition to drawing on external expertise (especially for technical aspects) the Director has gathered evidence in various ways. He has employed statistics and figures collected by Oftel as part of its general data gathering function. He has also used comparative tables contained in the Implementation Report."

Then there is a description of Calling Party Pays:

"… the CPP arrangement plays a fundamental role in shaping the boundaries, as well as the competitive conditions of this market. The CPP implies that demand for termination is generated and the charges for it are borne by the calling party, but that the level of these charges is strongly affected by the action of the called party who chooses the termination network."

4.9 Hence, the CPP arrangement determines that termination on each MNO's networks represents a separate economic market in which each MNO is a monopolist."

That, of course, is not challenged.

"Discussion of the single dominance criteria".

4.10 This section is devoted to examination of the single dominance criteria set by the EU Commission and by Oftel in their SMP guidelines most relevant to this market."

Then there is "Market Shares", and you see at 4.11 to 4.13 noting that each MNO has 100 per cent. of the market as defined, and then in 4.13 the correct reference and reflection of the Court of Justice:

"4.13 Market shares do not represent a conclusive criterion on their own in determining whether a firm has SMP in the relevant market. However, according to Community case law, there is a presumption that firms with market shares persistently above 50% are dominant (*AKZO*) unless contrary evidence is provided."

Then Ofcom went on to consider ease of entry and absence of potential competition and concluded, as you see in 4.15 – I will not read it all out - those absolute barriers to entry. That is not challenged, then there is:

"4.16 The ability persistently and profitably above the competitive level is an important indicator of market power. In a competitive market, individual firms should not be able to raise prices above costs and sustain excess profits for prolonged periods of time.

Then there is discussion of the MNOs behaviour in setting 2G voice termination, that is not related to H3G. That goes down to 4.20. Then there is discussion of countervailing buyer power starting at 4.21:

"Countervailing buyer power exists when a particular purchaser (or group of purchasers) of a good or service is sufficiently important to its supplier to influence the price charged for that good or service. In order to constrain the price effectively, the purchaser must be able to bring some pressure to bear on the supplier to prevent a price rise by exerting a credible threat, for example not to purchase or to self-provide.

"4.22 in this case, the question of whether each MNO providing voice call termination has SMP depends on the extent to which its monopolistic position may be off-set by the buyer power or purchasers.

4.23 BT is the major buyer of voice call termination on mobile networks. In theory BT might credibly threaten not to purchase termination from an MNO and this would deprive that MNO of the pricing freedom that it derives from its monopoly over termination. In practice, this issue is irrelevant since BT, even if it did have buyer power, has not been able to exert it because of its obligation to complete all calls whatever the terminating network. The reason for this obligation will be set out in the document *End to End Connectivity* (published in May 2003)."

Ofcom are not saying the reason will derive from their recognising that that is the position, they are just saying it is going to be spelt out in a document that is, at this point, not yet published.

"This regulatory requirement curbs any buyer power that BT may have and leaves the MNOs free to set terminating charges above the competitive level."

They go on to look at individual MNOs, and at 4.27 over the page, the Director concludes that it is likely that any purchaser of termination would possess sufficient countervailing buying power to prevent the MNOs from setting termination charges above the competitive level. Then you see 4.28, initial conclusions.

> "4.28 The definition of the relevant market has led the Director to conclude initially that there is a separate market for termination on each MNO's network(s). This means each MNO is, in effect, a monopolist in the supply of termination to its own networks. This initial conclusion combined with the analysis of the competitive constraints presented above, indicates that each mobile operator enjoys SMP in the provision of mobile voice call termination on its network(s), and in the case of 3's 2G services voice call termination provided to its subscribers. Such SMP allows each of the MNOs to behave to an appreciable extent independently of competitors and consumers."

We say that is an entirely orthodox means of reaching, here of course an initial conclusion because it is the first document for consultation, based on the approach of the Court of Justice. That is the May Consultation document. Then one goes to the next document which is the December statement, which is bundle A2 at tab 4. Mr. Green again reading to you at p.768 with para. 3.17, under the heading "Excessive prices and profitability". The discussion, in fact, starts at p.766, under the general heading "Assessment of SMP against relevant criteria" and as you see it reflects the earlier May document, starting with the discussion of the CPP (calling party pays) and at 3.10

> "Hence, the CPP arrangement is crucial to Oftel's preliminary conclusion that voice call termination on each MNO's network represents a separate economic market in which MNO is a monopolist."

I just note in 3.12:

> "As mentioned in Chapter 2, until it has rolled out its national network, '3' uses the 2G network of another operator to terminate some voice calls to its subscribers [that other operator was O2 and I think still is O2]. Since calling parties and originating operators have no choice but to use '3' to terminate those calls (even if '3' uses another MNO's network to support its termination services), '3' has 100% share of the market for wholesale mobile voice call termination on its network."

That is not challenged, just saying that the fact that in certain areas where H3G has not got 3G coverage it has to use a roaming agreement with a 2G operator for the call to reach its subscribers does not affect the analysis of 100% market share.

MR. SCOTT: Mr. Roth, you will remember that the reason I asked the technical question earlier on has to do with that paragraph and the way in which this is actually accomplished in a technical sense, and the fact that the '3' mobiles actually attach themselves to one of the two networks at any one time. It is still part of '3''s market, it is not part of O2's market.

MR. ROTH: Absolutely, and this is covering that. Oftel originally were themselves a little unclear about the position originally and it got refined through the consultation process.

MR. SCOTT: In fact when it came to the remedies, the remedy is addressed at 2G in fact rather than at 3G, so there are some subtleties along the way.

MR. ROTH: There are some subtleties in the remedies. I was going to come to the remedy because whilst you have obviously read it, sir, the Tribunal have not formally been shown the remedy. Then 3.13,

> "Market shares do not represent a conclusive criterion on their own [then again a reflection of the case law, the presumption] … unless contrary evidence is provided."

That is an absolutely orthodox approach. Then there is "Ease of market entry" that is separately considered and then only then, after going through that process, is excessive price and profitability taken into account as another factor, just as it was in the May statement. Mr. Green read some of those paragraphs and after that on page 771, countervailing buyer power is considered, and specifically on page 773 at paragraph 3.41 is the discussion of '3''s position because of '3''s response to the May consultation, the position of '3' as a new entrant.

> "In addition to the points discussed above, in its response to the May consultation, '3' argued that the Director lacked a theoretical basis and the empirical evidence to support a view that it would set excessive termination charges, as evidence only referred to the charges of other MNOs. Further, concerns have been raised with the Director about switching …
>
> 3.42 In relation to calls originated by BT, the Director sets out in paragraph 3.34 why he believes that '3' will have the ability to set excessive termination charges in the absence of an ex ante regulatory constraint."

Then he talks about constraints from the other MNOs and considers that even as regards the other MNOs they do not exercise countervailing buyer power, and that is not part, I think, of Mr. Green's argument, he bases it on the position of BT.

Mr. Green read to you from Chapter 5 of the December statement. Chapter 5 starts on page 791 and Chapter 5 is dealing with regulatory remedies, in other words having decided now to propose to designate all six MNOs as having SMP, the Director (as he then was) goes on to consider what might be the appropriate remedy. Oftel, in the discussion of remedies, noted that H3G had the ability to raise the level of charges but was less certain whether it had the incentive to do so – that is paragraph 5.128 on page 814. If I could ask you to turn back one page to 812 where you see the general heading of this section, "Treatment of '3''s 2G voice termination services. You will see from paragraph 5.118,

> "In the May consultation, the Director proposed that '3' should be subject to ex ante regulation. The Director's view at that time was that a requirement on '3' to set charges for 2G voice call termination services on the basis of forward-looking long-run incremental costs (LRIC) would be proportionate."

That was the original proposal, but the Director moved away from that and, having listened to '3''s arguments decided that, no, any kind of price control at this stage is not proportionate, and he explains why. Then he says at 5.125,

> "The Director is still of the view that '3' has the ability to set excessive charges for 2G termination services. As with all MNOs, '3' is the only MNO that can terminate calls to its subscribers, hence it has the freedom to set charges above the competitive level.
>
> 5.126 Costs incurred by '3' when terminating 2G calls include a payment to O2 as part of a roaming agreement. This might suggest that charges set by '3' for 2G termination would be above the industry norm. The Director's concern, however, is whether '3' uses its ability to set excessive charges for voice call termination (i.e. charges well above those costs incurred)."

There is then the response of '3' and then at 5.128,

> "The Director recognises that, whilst it has the ability, whether '3' has the incentive to set excessive charges for 2G voice call termination services is less certain. The Director accepts that so far '3' has set charges for 2G voice call termination services in line with those of the other MNOs. This does not mean, however, that charges will remain so indefinitely, or that '3' lacks the ability to significantly raise the level of charges for 2G termination services."

Then in 5.130 it repeats the point,

"In addition to uncertainty regarding '3''s incentive to set excessive charges, combined with '3's unique position as an MNO, the Director also notes that in order to verify that charges are LRIC-based, the Director would first require a detailed examination of '3''s costs, in particular cost of capital. This examination would consider costs concerning a service that is still in the early stages [of] roll-out. It would also need to reflect an anticipated drop in the percentage of calls terminated using a 2G service. If regulated charges are based on cost information that is changing significantly over time, revisions to the obligation may be needed to ensure that there is no over or under recovery. The Director now considers that a LRIC based obligation for 2G voice call termination by '3' may not be justified, given the difficulties in assessing the costs involved in using a new and innovative 3G service and which is likely to require regular updating as '3' aims to minimise the very service the control is intended to address."

Pausing there, the point being made is that H3G's objective is to move more and more of its subscribers over to 3G and not to have to use 02's 2G roaming service.

> "5.132 The Director has therefore concluded that a LRIC-based obligation is not proportionate because …"

And various reasons are set out. Then:

> "5.134 However, addressing the fact that '3' is able to raise charges for 2G voice call termination the Director takes the view that a reporting obligation is required to offer transparency of 3's behaviour.
>
> 5.135 The Director believes that such an obligation should take the form of a requirement to provide advance notification of changes to charges for 2G voice call termination to interested parties, and periodic notification of call volumes to the Director. This would allow PECN providers to adapt to changes to termination charges of '3', and the Director to monitor '3's behaviour and assess whether his assumptions, and therefore his proposals for regulation, are appropriate."

So with great respect, Mr. Green mis-stated when he said that Oftel, or Ofcom, found that H3G had no incentive to supra competitive levels. We did not make any finding that they had no incentive. What we said expressly is that it was uncertain in those situations whether they had the incentive or not. They had the ability and the position about incentive is uncertain, and having regard to that only the lowest level of ex ante regulation was appropriate and proportionate. The reference to my friend's submission, he said that this was one of the admissions, and we referred to his skeleton, it was pointed out that it was not listed in the skeleton, and he said "Well, it should be added" (day2, p.18 lines 17-20). No such admission, on the contrary, we expressly say we do not know.

All of this is relevant of course, not to SMP, not as to whether or not H3G have SMP but to what is the proportionate and appropriate remedy. That is how it is approached.

MR. SCOTT: Mr. Roth, one of the points that Mr. Green made to us in opening was his concern about onerous obligations and one of the points made in 5.136 and 5.137 relates to the nature of that obligation. As far as I recall, we have not been informed as to the current state of information flowing between H3G and Ofcom, and my recollection is that there has been, in the past, some uncertainty as to when and what would flow. But do you have any observations in relation to the words "it is a straightforward task" in 136, as distinguished from Mr. Green's expresses concern about onerous responsibilities.

MR. ROTH: Thank you for the question, the answer is "yes", I do have observations. Might I deal with them this way – because this is still a proposal of course – to go to the Decision of June 2004, to actually show you the remedy, which you have not been shown in terms – you have heard all the reasoning – and then makes those observations, because I think it is important the Tribunal should see the remedy, which is what this is all about – or the burdensome allegation is all about.

Following this, of course, we get to the June 2004 Decision which is, as everyone knows now, at tab 6. Mr. Green read para.3.7 at p.1098, and he referred also to para.3.2 at p.1097, the list of criteria which, out of the many more criteria in the Guidelines Ofcom considered were the ones that could be of relevance in this case.

Again, 3.7 is to be read in context as following paras.3.5 and 3.6. 3.7 is the further support by reference to 2G voice call termination charges of the other four MNOs but the basic reasoning is 3.5, which is market share barriers to entry – absolute barrier to entry – and 3.6 insufficient countervailing buyer power, the references back to the December consultation, so this is a short encapsulated summary of those rather longer discussion paragraphs in the earlier documents. That is, we say, quite clearly how they are to be understood.

Then there was further discussion specifically about the new entrant '3' on p.1101, paras 3.21 to 3.22, Ofcom's conclusion on the new entrant '3'. 3.21:

> "Ofcom maintains its view that '3' has SMP in the market in which it supplies wholesale mobile termination services. Ofcom considers that (i) '3's 100% market share in the market for wholesale voice call termination on its network; and (ii) the presence of absolute barriers to entry in that market mean that '3' has SMP.
>
> 3.22 In addition, Ofcom believes that purchasers of termination from '3' have insufficient buyer power to offset '3's market power and thus constrain its pricing behaviour."

They refer to '3's response to the consultation paper, and then discuss BT's countervailing buyer power in paras.3.25 to 3.28. Sorry, I mis-stated, that is '3's argument about BT's countervailing buyer power, and the submissions that '3' put forward which are here summarised, and Ofcom's response is at 3.29 at 3.33.

MR. SCOTT: Mr. Roth, just before you rush past 3.23, 3.23 is the point at which '3' also indicates that it does not believe Ofcom has taken into account all the relevant evidence and submissions provided by ‘3’. In the passage to which you referred us earlier you drew our attention to the possibility of contrary evidence being produced, and Mr. Green would no doubt say that that relevant evidence and submission contained such contrary evidence. Are you going to come back to that? Or are you moving on?

MR. ROTH: What I think ‘3’ is saying is we put in a response to the December consultation and you have not fully taken into account what we said to you. That is what I think ‘3’ were saying as in summarised in 3.23, and I think we have in the papers, but they have not been opened before the Tribunal a copy of H3G’s response. Ofcom, in answer to that says at 3.29 that it believes it has taken account ----

MR. SCOTT: Indeed.

MR. ROTH: -- of all relevant evidence supplied by ‘3’. I was not proposing, unless you wish me to go through ‘3’s submission – I think it is for Mr. Green to do that, but rather to look at what Ofcom says, how it is responding, has taken into account those factors. It discusses in particular the point about BT’s countervailing buyer power, which is clearly a key point, because it says it does not believe that the existing regulatory framework would in practice allow BT, as an originating operator, to reject price increases by ‘3’.

MR. SCOTT: There is another subtlety in 3.23 which relates to the remedy, and that is that:

> “In its response to the consultation ‘3’ claims that Ofcom’s analysis of whether ‘3’ has a position of SMP in the wholesale mobile voice call termination market is highly generalised and unduly aligned to the analysis of the existing 2G mobile operators.”

When we come to the remedies we will see that this is the remedy in relation to 2G?

MR. ROTH: Yes, and one of the reasons for that is precisely because we did not have enough information ----

MR. SCOTT: In relation to 3G.

MR. ROTH: It would be onerous to require 3G to supply that degree of information on charging with regard to their 3G service, so we took that into account.

MR. SCOTT: It is that subtlety that I think is worth realising is present in this stage of the reasoning, not simply when you come to the remedies.

MR. ROTH: Yes, I am obliged, I absolutely take that point.

THE CHAIRMAN: Before you leave that, Mr. Roth, I do not know if there is a point that you wish to take, or which you wish to disclaim in relation to this. Mr. Green said made submissions about how your clients fell down on the job, they did not carry out enough investigations and if the costing model was not available there were other things which were available, there were business plans and so on and so forth, which they could have used, or which they could have called for or considered, and I hope I do not do his submissions a terrible injustice in summarising them in that way. As a result of Professor Stoneman's observations or questions yesterday about what Mr. Green described as a critical contemporaneous document when the deal was being negotiat4ed with BT it transpired that there were business plans, there was the odd business plan available, which had some details of costing and so on and so forth, as far as one could tell. If one goes back to the May consultation paper, and at p.523 of bundle A1, one of the questions asked, and which the participants were invited to respond to:

> "Question 4: Do the respondents agree with the criteria used in assessing SMP? If not, how would they suggest developing the analysis?"

Then the passage before then to which our attention has been drawn, there is a debate about the cost and the LRIC model and so on, which was obviously not applying to '3's 3G offering. One thing that might be said is that well if there were business plans in existence, I think the evidence and submissions yesterday established that by this time there was a business plan inexistence because this was post-launch, and we established there was a business plan with some relevant information in post-launch. It could have been provided by '3' so that your clients could consider that level of evidence, even though a full LRIC cost model was not available, and nobody would criticise anybody for that. There is no evidence that such a document was provided and I think it is inherent to Mr. Green's submissions that your clients did not consider anything like that. Do you take any point on the extent to which, putting it shortly, it is "a bit rich" for '3' to complain that you did not take into account information which they could, and it might be said should have submitted, in response for example to that question to which I drew your attention a few minutes ago? That is rather a long question, but what it boils down to is, do you say that any failure of your clients to take into account matters which Mr. Green now says you should have taken into account, certainly is down to his client, because they did not provide information that they had? Or is that not a point which arises?

MR. ROTH: I think it may arise. There are perhaps two separate points. One is to say that Ofcom should have constructed a costs' model. That, we say, was a hugely elaborate exercise. It is one thing all the experts, whose evidence, thankfully, we do not have to read, it is one thing they would all agree on – they cannot even agree how to do it, but they all agree it is very difficult and complicated and would take a long time. So we say we certainly should not be criticised for that.

If it said there were particular documents, such as a business plan of H3G, which would have affected our thinking, this is not an investigation like investigating a price cartel where the OFT goes in with dawn raids and tries and gets the hidden documents. This is, as you have seen, quite a drawn out consultation process where questions are addressed to the interested parties, where they respond with detailed submissions, no doubt very well advised, and put before the Regulator those materials that they think are very relevant to the conclusions which the Regulator has already sketched out in provisional form so that they can address them. They cannot say we have now produced, under a cloak of secrecy – which then mysteriously dropped away with some urging from the Tribunal – a document and you should have asked for that particular document or a business plan or whatever at the time. We say that when there is this consultation process, where they are particularly asked specifically "Tell us what you want us to take into account", they respond saying, "You should look at whether our charges are excessive", but they do not say "Look, here are our business plans, you can see actually what we are seeking to do." It was open to them to do that and if that is how they wanted us to approach it, they should have done that.

THE CHAIRMAN: Is that your response to Mr. Green's point that Oftel/Ofcom did not take into account relevant material on pricing? This is an example that he actually gave, if there were not cost models available and people could not have done it, and even his clients I think could not have done it – I am not sure your clients are criticised for not having constructed a model at the time, but Mr. Green says there were alternatives. You have not made it part of your case so far that if there were alternatives it was for his client to put them in if they had them, and we now know that there was a business plan. Do you make it part of your case or do you say you do not need to make that part of your case and you therefore do not?

MR. ROTH: Forgive me just one moment. (<u>Pause for Mr. Roth to take instructions</u>). I can check the response Hutchison make to the consultation later, but in the pleadings the point about a business plan was never made, it was that they did not have empirical evidence on costs, but it was never suggested until argument in this hearing, I am told, that we should have sought business plans, nor was that put in the response to the consultation. They did provide some information on actual costs and we did take that into account, but we decided that it did not amount to very much. The business plan point is a new point and so we certainly say that we cannot be criticised for that. Whether in fact a business plan from 2001 – how far in this fast-moving market it would in fact have been relevant as at 2004 looking forward two years. Business plans, as everybody knows, get revised in all industries, particularly in an industry changing as rapidly as this. I certainly take the point that it is very rich to take that particular criticism now and that we did take into account what was put before us in response to particular questions. As I say, one is not dealing with innocents abroad in this case, these are very sophisticated multinational companies and their UK subsidiaries. They know how the process works and they put before the Regulator what they want the Regulator to look at, and they argue their case very hard.

I was looking at the Ofcom response at 3.29 saying they have taken into account the relevant evidence and dealing again with BT's bargaining position in 3.30. Mr. Green read these paragraphs so I will not read them out again, and then 3.31 says:

"It is possible that during the initial interconnection negotiations between BT and '3', '3''s urgency to launch services was a relevant factor in the relative bargaining positions of each party. However, Ofcom's analysis in this market review must be forward-looking and consider '3''s likely position in the next 18 to 24 months. Therefore, Ofcom must also consider future negotiations between '3' and BT."

I shall come back to that.

MR. SCOTT: Mr. Roth, before you leave countervailing buyer power in 3.32 again we go to the question of providing contrary evidence during the consultation period, and in the middle of that paragraph:

"However, it does not provide a sufficient indication of how future negotiations with BT would run."

In other words, Oftel was taking the view that it had not received sufficient contrary evidence in relation to a future course of conduct by BT as distinct from a past course of conduct by BT.

MR. ROTH: We are saying – and perhaps by this stage it is my client, Ofcom, I think it had just become Ofcom – that as regards what we had been told about the August 2000 negotiations that does not tell us – they were very particular circumstances when they were needing urgently to start their network – what may happen in 2005/2006.

MR. SCOTT: I was thinking which part of the evidence had been presented.

MR. ROTH: That goes to the whole point about there is this contract with a 24 month notice period, which was a point that was put to us.

Then excessive prices, because here is H3G's point at 3.43:

"'3' considers that Ofcom: '… has manifestly failed to give proper individual consideration to the question of whether H3G can set excessive call termination prices'.

'3' also questions whether Ofcom's analysis of the MNO's behaviour in setting 2G voice termination charges and its conclusion that these charges have been set above a reasonable estimate of each MNO's costs for a number of years applies also to '3'. '3' argues the December consultation contains no analysis of its costs that could have led Ofcom to conclude that '3''s charges are excessive."

That was the point they had made throughout, not about business plans but saying you should have analysed our costs.

> "In addition, '3' claims that it has provided Ofcom with evidence that demonstrates that its pricing is not excessive."

That is the costs evidence I referred to a moment ago, and then there is something about number portability, which I do not think is still pursued. Ofcom's response:

> "3.46 The analysis of 2G termination charges Ofcom presented in Chapter 4 of the December consultation was limited to the charges levied by Vodafone, O2, Orange and T-Mobile. Ofcom is aware that '3''s termination charges in practice reflect a combination of its 2G and 3G termination costs and Ofcom has not performed a detailed analysis of '3''s charges. As Ofcom has noted, 3G networks are new and capable of providing a range of innovative services, and therefore it would be difficult to assess with confidence the relevant voice call termination costs and the appropriate rate of return on capital invested. However, this does not imply that '3' is unable to set excessive termination charges given the lack of constraints it faces. The constraints facing '3' are similar in nature to those facing the other MNOs and these are not sufficient to hold charges at the competitive level on a forward-looking basis.
> 3.47 With regard to the evidence submitted by '3', this did not include any information on '3''s termination costs and, more importantly, it only refers to ported numbers for which '3', like all the other MNOs, receives a different termination charge from its own …"

It explains why ported numbers does not help. Then 3.49:

> "With regard to '3''s roaming agreement with O2, Ofcom considers that, to the extent that it has constrained '3''s termination charges, the effect is likely to be transitory and short term. This is because in Ofcom's understanding the agreement was struck to ensure that '3''s customers had sufficient network coverage in the time before '3''s network is completed. Hence, this feature will be of declining importance over the period to 2005/06."

Then there is reference to the dispute resolution procedure and a reference back, and I will come back to that when I deal with dispute resolution.

So they address the point about excessive pricing made by H3G in the same terms laid out in its Notice of Appeal here, and that I think takes me to the remedy that resulted from all this, the remedy imposed, which you find in this bundle at 1163 at Annex A to the June statement. Just to explain, it is under the Communications Act, because of course we have been looking at the EC Directives; the EC Directives bind only the member state, they do not have direct effect on companies in the UK. The UK implemented the Directives through the Communications Act and any formal legal act regarding UK companies has to be, therefore, under UK law, namely the 2003 Act.

You will see here the notification, which in paragraphs 2 and 3 on page 1165 designates the SMP of each of the operators with regard to its market, so paragraph 2(a), '3' is designated as regards the market set out in paragraph 1(a) and in paragraph 3,

> "In accordance with sections 48(1) and 79 of the Act, Ofcom hereby set pursuant to section 45 of the ACT the SMP services conditions on the persons referred to in paragraph 2 above as set out in Schedules 1 … to this Notification to take effect, unless otherwise is stated in those Schedules, on the date of publication of this Notification."

The cross-reference for Schedule 1 is then page 1167 as the one regarding '3', the SMP services conditions imposed on '3', Part 1 is definitions, Part 2 is the condition. In the definitions in Part 1, perhaps you could note on page 1168 that "Access contract" means a contract for the provision of network access and network access – the point I think made by Mr. Scott – means those services, facilities or arrangements which are necessary to terminate a 2G call. So it is only 2G calls, not 3G calls. You will see "dominant provider" just above, that is Hutchison 3G.

Then one comes to the condition itself on page 1171, and this is of course the condition on '3':

> "Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider [H3G] shall publish the charges and act in the manner set out below.
>
> 1.2 The Dominant Provider shall send to Ofcom and to every person with which it has entered into an Access Contract a written notice of any amendment to the charges on which it provides Network access or in relation to any charges for new Network Access … not less than 28 days before any such amendment comes into effect."

1.3 states what that notice must include, 1.4 says,

> "The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date."

So those three paragraphs are the charge part of the condition and 1.5

> "Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall send to Ofcom no later than three months after the end of each quarterly period a

written notice of the volume of minutes of 2G calls by charging period and the volume of minutes of all calls by charging period."

In other words, there are two parts to the condition. There is the publication of charges to Ofcom part, and all that is required that if the charges for voice call termination of 2G calls should change, Ofcom should be notified no less than 28 days before the effective date. So if in fact, as H3G submits, they are not going to change, nothing will be notified pursuant to that condition, or if they can only change – as H3G at some point seemed to suggest – after some dispute resolution procedure which goes to Ofcom and Ofcom then decides, then Ofcom will get its notification anyway because it will be involved in dispute resolution. This is only covering the potential circumstance that BT and H3G might, as this market develops over the next, as then it was, 18, 24 months, agree some re-arrangement which would come to some different charge for 2G calls from 3G calls that Ofcom should be informed about that so it can monitor what has happened. That is the point, and on H3G's argument we are never going to get a notification of this because that charge is embedded or locked in, or whatever?

THE CHAIRMAN: So what?

MR. ROTH: So it is hardly burdensome, is the point. Even if it was going to change it is not burdensome, but on their view it is in fact never going to be implemented.

PROFESSOR STONEMAN: Can I try and present a characterisation of what you have been saying for the last half an hour and you can tell me whether I am correct or not? Basically you are saying that the Oftel approach was Ofcom considered that H3G had SMP in wholesale voice call termination on its network, and you have established that. Then you say that Ofcom was unable to judge if that dominance was abused for calls terminated using 3rd Generation technology, because you did not have the cost and you did not have the model, and you did not say whether there was dominance in that area.

MR. ROTH: I am sorry, whether there was abuse in that area.

PROFESSOR STONEMAN: Sorry, whether there was abuse in that area. However, Ofcom felt safer making judgment with respect to calls terminated using Second Generation technology, because there they would have a direct comparison with the other mobile network operators. However, they felt that the share of the market that '3' had in that 2G area was so small it was hardly worth bothering about in terms of regulation. So all that you were putting on were reporting requirements in that 2G area and the whole third generation activities of H3G were being left alone. Is that a summary, or characterisation, or ----

MR. ROTH: To the most extent, yes, but not entirely so. The point about 2G is, you could only tell whether there was an excessive charge for 2G if you could distinguish between H3G's costs as related to 2G as opposed to 3G, and that distinction, that separation out of costs also could not be performed. So that was an important element.

MR. SCOTT: There is the additional reporting requirement in MA1.5 and that presumably enables Ofcom to exercise a watching brief as to the proportionality between 2G and 3G and presumably a watching brief in relation to any development of 3G that might give rise to further investigation and indeed a consideration of the impact of any costs' modelling had they been undertaken.

MR. ROTH: Absolutely, a watching brief, that is what it is designed to achieve and to describe this as "burdensome" is frankly extraordinary. If Ofcom were subsequently to consider that it is appropriate to impose an SMP condition of excessive pricing. That would be, of course, a further stage which could be subject to separate challenge, because it can only be done if it is appropriate and proportionate. So that is what has happened.

Once an undertaking is designated as having an SMP then the question always arises what are the appropriate and proportionate regulatory obligations to be imposed, because as you know the regime provides for a range of such obligations from which to choose, they are in the Access Directive, Article 8(2) – you need not turn it up, I think everyone is now familiar with it – from the lowest level, which is transparency, up to the most intrusive, which is price control. But none can be imposed if there is no SMP. That is clear from Article 8(3).

Similarly, the Framework Directive, Article16(4) and Recital 27 on which H3G relies does not establish, with respect, that SMP designation is an administration act of last resort – the submission put in H3G's skeleton at para.54(v). Perhaps I can ask you to go back to bundle E1, the legislation bundle, and the Framework Directive, which is at tab 9. Article 16(4) on p.152:

> "Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with SMP on that market in accordance with Article 15 and the national regulatory authority shall on such undertakings impose appropriate regulatory obligations referred to in paragraph 2 of this Article …"

Which cross refers to the Access Directive.

> "… or maintain or amend such obligations where they already exist."

Then recital 27 was strongly relied on on p.143.

> "It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with SMP, and where national and Community competition law remedies are not

sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level…"

And so on. None of that is saying "administrative act of last resort", simply that ex ante regulations should only be imposed where there is no effective competition in the market, that is to say, when one or more undertakings has SMP.

If one goes to the choice of obligations in the Access Directive, which is at tab 7, where you see in Article 8(4), p.119:

"Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Directive 2002/21/EC. Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 and that Directive.

That is the Commission consultation. Then you have from Article 9, the transparency, Article 10, non-discrimination, Article 11, accounting separation, Article 12 the specific network facilities, access to and use thereof, Article 13, price control and cost accounting obligations. In Article 13, which was read to you may I make this point:

"A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provisions of specific types of interconnection …" etc. "…in situations where a market analysis indicate that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze."

Mr. Green said that "might" here means a probability. Well, maybe it does, maybe it does not, but this is the criterion for the selection of price control as the appropriate remedy. Once you have made a designation of SMP it is not the criterion for designation as SMP, it is saying if you have SMP then before you actually think the appropriate remedy is the imposition of price control the NRA should find on the basis of its analysis the operator might sustain prices at an excessively high level. Far from supporting the submission that is being made, that you have to make such a finding to designate SMP in fact it shows that it is not an essential ingredient of SMP although it might be an essential ingredient when you consider that price control is the appropriate remedy having made the SMP designation.

MR. SCOTT: Indeed, Mr. Green, when I mentioned Article 33 gave me to consider that we were premature in considering Article 13 at the market analysis stage.

MR. ROTH: I am not sure if one would or would not. If Ofcom were considering whether to impose price control on Hutchison and was getting down that route it would have to consider Article 13 in the same analysis.

MR. SCOTT: Yes, indeed, yes.

MR. ROTH: But it did not, and I think that is your point.

MR. SCOTT: Yes.

MR. ROTH: But effectively the suggestion that is being made is that in order to designate SMP Ofcom would have to find that H3G might sustain prices at an excessively high level is flatly contradicted by the fact that this is clearly something that arises only when considering whether that, as opposed to a much less intrusive and intensive remedy is the appropriate one.

One may ask why is it that it is only an appropriate obligation from the range of options set out in the Access Directive that has to be imposed, that you choose which one, as compared to Article 82, because Article 82 applies in toto when a company is in a dominant position. It is not only bits of Article 82 that apply, certain kinds of abuse, a dominant company shall not abuse that position. The answer is because the whole policy underlying this regime for electronic communications is not just the prevention of anti-competitive practices, which is Article 82, but the promotion of competition, but ensure the development of a competitive market, that is the policy fundamental to the whole framework. It is there in the Framework Directive, in Article 8, para.2, which is the over arching provision.

If one turns to the Framework Directive and goes to Article 8, on p.148, the policy objectives and regulatory principles, and goes to Article 8(1):

> "Member states shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives they take all reasonable measures which are aimed at achieving the objectives set out in paras 2, 3, and 4, such measures shall be proportionate to those objectives."

One goes on to para.2 over the page:

> "National regulatory authorities shall promote competition in the provision of electronic communication networks, electronic communications services and associated facilities and services by *inter alia* …"

That is the whole principle of ex ante regulation that here applies and hence (a) and (b) under Article 8, and hence also, as explained, the idea in recital 25 on p.143, recital 25 to the Framework Directive, first sentence:

> "There is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market."

So even though there is no abuse, or not yet any abuse, this is designed to ensure that in a market where there is not effective competition as yet, achievement of that goal will be promoted.

I want now to turn to the case of *Tetra Laval*, because ----

THE CHAIRMAN: Would that be a convenient moment for a break?

MR. ROTH: Yes, it would.

THE CHAIRMAN: How much longer do you think you will be?

MR. ROTH: Possibly until 1, possibly until just before 1.

THE CHAIRMAN: Very well, 11.30.

(Short break)

MR. ROTH: *Tetra Laval*. With respect, before you even open the judgment, we say it is irrelevant to anything the Tribunal has to decide in this case, and to explain why permit me, please, to take just a little time over the decision and explain what it is all about. This was a conglomerate merger and, as you know, the test under the European Community Merger Regulation, the ECMR, is whether a merger or a concentration (to use the European parlance) creates or strengthens a dominant position, and then there is a further part of the test that I will come to. Usually, one is talking about single firm dominance, occasionally collective dominance, which is a special animal. Single firm dominance, which was *Tetra Laval* and indeed the present case, breaks down to three different categories or kinds of mergers. There are horizontal mergers, for example if T-Mobile were to merge with Vodafone, two competitors on the same market merging, an immediate increase in market share; there is a vertical merger when two companies operating at a different level of the supply chain in the same industry merge, say Vodafone acquired Nokia. That does not necessarily cause competition concerns, but it might because Nokia being a major manufacturer of handsets, it could be that this would foreclose use of Nokia handsets with a competitor or Vodafone, so it less serious but it can create problems. The third category is a conglomerate merger, a rather ugly expression but used to describe a merger between firms in distinct markets. For example, if a producer of ice cream merged with a producer of pet food, they are in different markets – except I suppose for dogs who like ice cream, but in most circumstances it is clearly two distinct markets. Prima facie there is no reason why a conglomerate merger should give rise to any competition concern or creation of dominance since, by definition, the two companies are not in the same market. Usually, in competition terms, the effect is neutral; indeed, it may even be beneficial in that it can lead to efficiencies – for example, they might in my hypothesis merge their distribution systems to supermarkets to reduce costs, enable lower prices and pass those on to consumers, so the merger is in fact pro-competitive. As Professor Stoneman knows far better than I, there is much economic writing to the effect that there is no ground for objection to conglomerate mergers at all.

In *Tetra Laval* Tetra (the Swedish company) was in the market for carton packages – indeed, it was the world leader in that market – and it was dominant in aseptic carton packages of a particular kind. Sidel (the Finnish acquired company) was in the market for stretch blow-moulding machines for making a specific kind of plastic packaging called PET (polyethylene terethrolate) which is a porous resin through which oxygen and light can pass, so less suitable for milk (which is light) and fruit juices which need protection from oxygen – or the other way round of course. Carton packaging and PET packaging are distinct markets, but Tetra and Sidel have common customers, so that was the factual situation.

The Commission found that although these are distinct markets there was a concern because they found, and held in their decision, that the merger would encourage and enable Tetra to leverage its position on the market for carton packaging to persuade its customers who were also using PET packaging to switch to Sidel's SBM machines, and so by such conduct would turn Sidel's leading position on that distinct PET market into a dominant position. That is how they put their case on the objection to the conglomerate merger.

The condition for prohibition of a merger is in Article 2, paragraph 3 of the ECMR, and it is perhaps worth just briefly looking at the legislation before turning to the judgment. This is Bundle H2, tab 18. There were some errors in the original published version and they had to republish it at page 450, so it starts at page 451. This is the then merger regulation which has since been replaced by a slightly amended one. It is Article 2, paragraph 3, page 454,

> "A concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."

That is the test that the Commission had to apply and the CFI held in the *Tetra Laval* case that this test involves two conditions and not one condition expressed in two parts, but I do not think anything turns on that.

The judgment of the Court of Justice on the final appeal is at tab 17 of this bundle, and I would ask you to turn to page 376 where you have the first ground of appeal at the bottom of the page. Paragraph 19 was read by Mr. Green and I will not read it again, but I will take it up if I may at paragraph 21 on the facing page.

“In paragraph 120 of the judgment under appeal, the Court of First Instance interpreted Article 2(3) of the Regulation as follows: ‘It must also be recalled that under Article 2(3) of the Regulation a concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it must be declared incompatible with the common market. Conversely, the Commission is bound to declare a concentration falling within the scope of application of the Regulation compatible with the common market where the two conditions laid down in that provision are not fulfilled … If, therefore, a dominant position is not created or strengthened, the transaction must be authorised and there is no need to examine the effects of the transaction on effective competition …

22 The first ground of appeal relied on by the Commission relates to a number of paragraphs in the judgment under appeal. However, it is appropriate to reproduce the passages from that judgment which relate to the conglomerate nature of the notified merger, which is defined in paragraph 142 of that judgment as a ‘merger of undertakings which, essentially, do not have a pre-existing competitive relationship, either as direct competitors or as suppliers and customers’, a merger which does not give rise to true horizontal overlaps between the activities of the parties to it or to a vertical relationship between the parties in the strict sense of the term and in respect of which it therefore cannot be presumed , as a general rule, that it produces anti-competitive effects.

23 In paragraph 146 of the judgment under appeal, the CFI interpreted the regulation in so far as it applies to conglomerates, as follows: ‘It should be observed, first, that the Regulation, particularly at Article 2(2) and (3), does nor draw any distinction between, on the one hand, merger transactions having horizontal and vertical effects and, on the other hand, those having a conglomerate effect. It follows that, without distinction between those types of transactions, a merger can be prohibited only if the two conditions laid down in Article 2(3) are met … Consequently, a merger having a conglomerate effect must, like any other merger … be authorised by the Commission if it is not established that it creates or strengthens a dominant position in the common market or in a substantial part of it and that, as a result, effective competition will be significantly impeded’.

24 With respect to the impact on competition of a conglomerate-type merger and to the Commission’s analysis in that regard, the Court of First Instance held as follows

[and they quote] ‘It is necessary first to determine whether a merger transaction creating a competitive structure which does not immediately confer on the merged entity a dominant position [i.e. not a horizontal merger and not a vertical merger] may nevertheless be prohibited under Article 2(3) of the Regulation, when in all likelihood it will allow that entity, as a result of leveraging by the acquiring party from a market in which it is already dominant, to obtain in the relatively near future a dominant position on another market in which the party acquired currently holds a leading position, and when the acquisition in question has significant anti-competitive effects on the relevant markets …

150 The Court observes that, in principle, a merger between undertakings which are active on distinct markets is not usually of such a nature as immediately to create or strengthen a dominant position due to the combination of the market shares held by the parties to the merger. The factors which are of significance for the relative positions of competitors within a given market are generally to be found within the market itself, namely, in particular, the market shares held by the competitors and the conditions of competition on the market. It does not follow, however, that the conditions of competition on the market can never be affected by factors external to that market.

151 Thus, by way of example, in a case where the markets in question are neighbouring markets and one of the parties to a merger transaction already holds a dominant position on one of the markets, the means and capacities brought together by the transaction mat immediate create conditions allowing the merged entity to leverage its way so as to acquire, in the relatively near future, a dominant position on the other market. This could especially be the case where the relevant markets are tending to converge and where, in addition to the dominant position held by one of the parties to the transaction on the market, the other party or one of the other parties, to the transaction holds a leading position on another market.

152 Any other interpretation of Article (3) pf the Regulation could deprive the Commission of the power to exercise control over merger transactions which have solely or principally a conglomerate effect.

153 Consequently, in a prospective analysis of the effects of a conglomerate-type merger transaction, if the Commission is able to conclude that a dominant position would, in all likelihood, be created or strengthened in relatively near future, and

> would lead to effective competition on the market being significantly impeded, it must prohibit it …
>
> 154 In this context, it is also appropriate to distinguish, on the one hand, between a situation where a merger having conglomerate effects immediately changes the conditions of competition on the second market and results in the creation or strengthening of a dominant position on the market due to a dominant position already held on the first market and, on the other hand, a situation where the creation or strengthening of a dominant position on the second market does not immediately result from the merger but will occur, in those circumstances, only after a certain time and will result from conduct engaged in by the merged entity on the first market where it already holds a dominant position. In this latter case, it is not the structure resulting from the merger transaction itself which creates or strengthens a dominant position within the meaning of Article 2(3) of the Regulation, but rather the future conduct in question.
>
> 155 The Commission's analysis of a merger producing a conglomerate effect is conditioned by the requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance [reference to *Kali & Salz* and the *Airtours* judgment]. Thus, the Commission's analysis of a merger transaction which is expected to have an anti-competitive conglomerate effect calls for a particularly close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition in the reference market. As the Court has already held, where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof [*Airtours*]. Since the effects of a conglomerate-type merger are generally considered to be neutral, or even beneficial, for the competition on the markets concerned, as is recognised in the present case by the economic writings cited in the analyses annexed to the parties' written pleadings, the proof if anti-competitive conglomerate effects of such a merger calls for a precise examination, supported by convincing evidence, of the circumstances which allegedly produce those effects (see by analogy *Airtours* … [the collective dominance case]."

That is the statement of context of this appeal, set out by the CFI in the judgment which is in large part upheld by the ECJ. Then they turn to the arguments of the parties, part of which was read to you, and then at page 381, paragraph 37, the findings of the Court as to the first ground of appeal.

> "By its first ground of appeal, the Commission contests the judgment under appeal in so far as the Court of First Instance required it …"

That is the summary of the complaint and that was read to you. Paragraph 38:

"It should be observed that, in paragraph 119 of the judgment under appeal, the Court of First Instance correctly set out the tests to be applied when carrying out judicial review of a Commission decision on a concentration as laid down in the judgment in *Kali & Salz*. The regulations confer upon the Commission a certain discretion, the review must take account of the margin of discretion. Paragraph 39 is important:

> "Whilst the Court recognises that the court has a margin of discretion with regard to economic matters, that does not mean that Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts *inter alia* establish whether the evidence relied on is factually accurate, reliable and consistent, but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."

Then they say:

> "Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.
>
> 40. Thus the Court of First Instance was right to find in para.155 of the judgment under appeal…that the Commissions analysis of a merger producing a conglomerate effect is subject to requirements similar to those defined by the Court with regard to the creation of a situation of collective dominance and that it calls for a close examination of the circumstances which are relevant for an assessment of that effect on the conditions of competition on the reference market.
>
> 41 Although the Court of First Instance stated in para.155 that proof of anti-competitive conglomerate effects of the kind notified calls for precise examination, supported by convincing evidence of the circumstances which allegedly produce those effects, it by no means added a condition relating to the requisite standard of proof but merely drew attention to the essential function of evidence, which is to establish convincingly the merits of an argument, or as in the present case of a decision on a merger."

So it is not about standard of proof, if you are dealing with a conglomerate type merger you need more convincing evidence than a horizontal merger and, one might say, equally with a horizontal merger if it is going to produce a market share of only 50 per cent. you are going to need more convincing evidence than if it is going to produce a market share of 80 per cent., because obviously prima facie the concerns about dominance are less strong and less evident.

Then the court continued:

> "42 A prospective analysis of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events – for which often many items of evidence are available to make it possible to understand the causes – or current events, but rather a prediction of events which are more or less likely to occur in future if a decision prohibiting the planned concentration or laying down the conditions for it is not adopted."

That is because it is looking at the creation of the dominant position and future conduct.

> "43 Thus the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition."

That is the second condition on Article 2(3).

> "Such analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.
>
> 44 The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish."

And that is all because it is a conglomerate merger.

> "That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since the evidence must support the Commission's conclusion that, if such a decision were not adopted the economic development envisaged by it would be plausible."

Mr. Green said that is later explained as being "likely", and I do not think it really matters, it may well mean likely, I accept that. But, as I say, we are dealing with a very different situation.

"45 It follows from those various factors that the CFI did not err in law when it set out the tests."

Then it considers some of the particular findings that were made. So that is the first ground of appeal, namely, they did not change the standard of proof, as the Commission is alleging, the CFI held, and the ECJ say correctly held, that in a merger producing conglomerate effects of this kind one has to look at the evidence with particular care and one needs particular convincing evidence showing that that actually will produce an anti-competitive result because by the nature of that type of concentration the effects are not self-evident, they are, as they put it dimly discernible, uncertain and difficult to establish, and so you need stronger evidence.

THE CHAIRMAN: But that is almost a truism, the more difficult the case the better your evidence is going to have to be, to paraphrase it slightly inadequately. But in paras. 42 and 43 it seems to be rather general about merger control rather generally and not confining itself to conglomerate mergers.

MR. ROTH: I think that is absolutely right. They then say even more so in 44, with 'conglomerate-type' mergers.

THE CHAIRMAN: Yes, but what the court seems to be saying is you are not doing anything which is conceptually different in these sort of cases, you are just recognising that it is a more difficult case and you will expect some evidence, because that which is obvious in other cases is not obvious in this sort of case. But nevertheless it is all flowing from an exercise which is in general terms described in paras.42 and 43 applicable to all merger cases.

MR. ROTH: I think that is absolutely right, because the two conditions in Article 2(3), the second condition, and that is why – I am not in any way disagreeing with you, I am fully agreeing with what you are saying – that is why they say the Commission's argument that the court below changed the standard of proof was wrong.

THE CHAIRMAN: Yes, so on this ground this case cannot be distinguished on the basis that it actually is all dealing with something special for when you come to consider conglomerate mergers, it is merely an application of the general principle applicable to all mergers, as shown to be applicable in conglomerate mergers?

MR. ROTH: On the first ground of appeal that is right. The second ground of appeal then goes to the question of having to show conduct, and that is where the distinction does come in.

THE CHAIRMAN: Where we have got to so far is everything you are saying is generally applicable to all merger control, with particular reference to conglomerate mergers?

MR. ROTH: Yes, as you put it the more difficult the case, as it were, the stronger the evidence has to be, and the fact that it is a conglomerate merger is one clear feature that shows it was a more difficult case, and as I say, equally a horizontal merger resulting in 50 per cent. market share, or 40 per cent. market share would be more difficult to show that produces dominance than if it produces 80 per cent. market share.

MR. SCOTT: The word "prospective" of course, is also distinguishing in the sense that in the decision under appeal you have to show significant market power now, whereas in *Tetral Laval* you are considering the potential for the development of dominance because of behaviour once the merger has taken place.

MR. ROTH: Absolutely. One of the distinctions between a merger case and SMP, although SMP is forward looking it is looking at the situation now taking account of anticipated developments in the market. Some horizontal mergers, you have an immediate structural effect, so that you have, as a result of the merger, they would say "future" merger because it has not been consummated, but one knows that it will result in – suppose there were only two competitors in a market, each with 50 per cent. market share, and they are going to merge, and the result is 100 per cent. market share, yes, it is prospective, but the result is immediate.

MR. SCOTT: Yes, that was the situation considered in *Airtours* to which we have not gone yet, and in which of course the result was not to ----

MR. ROTH: Yes, I will come back to *Airtours*.

PROFESSOR STONEMAN: Can I chip in here? You twice used the same example, which was that if you have a merger which creates 50 per cent. market share, there is less likely to be dominance than a merger that creates an 80 per cent. market share. Is that consistent with the logic you were expressing earlier in the day when you were saying dominance is ability and it is market share that determines dominance, and then there is abuse that comes with it, which is a separate category, so you could say there is more likely to be abuse with an 80 per cent. market share than with a 50 per cent. market share, but dominance is a market share greater than 50 per cent.?

MR. ROTH: I think and hope it is consistent. A market share of greater than 50 per cent. raises a presumption of dominance, it is not dominance – it is only a presumption. You have to look at other factors. Dominance is the ability to behave to an appreciable extent independently. Abuse is the actual behaviour, and the higher the market share the more likely you have that ability. 100 per cent. market share, it is very likely you have it, but you still have to consider other factors.

The second ground of appeal, para.52:

"By its second ground of appeal, the Commission complains the CFI infringed Articles 2 and 8 of the Regulation in that it required the Commission to take account of the impact which the illegality of certain conduct would have on the incentives of the merged entity to engage in leveraging and to assess as a possible remedy the commitments not to engage in abusive conduct."

This is now very important.

> "53 The contested parts of the judgment under appeal are in the section examining the plea alleging a lack of foreseeable conglomerate effect in which more specifically the CFI analysed the likelihood of leveraging. According to the Commission's line of argument the merged entity would have been capable of exploiting its dominant position on the market for aseptic carton and would have been encouraged to do so in order to leverage its leading position on the market for PET equipment, in particular that for high and low capacity SBM machines used for sensitive products, so as to create a dominant position.
>
> 54 The forms of leveraging are described as follows in recital 364 of the contested decision.

'Leveraging [this position] … in a number of ways, Tetra/Sidel …"

That is the new merged entity.

> " … would have the ability to tie carton packaging equipment and consumables with PET packaging equipment and possibly, performs (in particular barrier-enhanced performs). Tetra/ Sidel would also have the ability to use pressure or incentives (such as predatory pricing or price wars and loyalty rebates) so that its carton customers buy PET equipment and possibly performs from … Tetra/Sidel and not from its competitors or converters'
>
> 55 In response to the Commission's criticisms, Tetra proposed to enter into various commitments. However, the Commission took the view that those commitments could not be regarded as eliminating the competition concerns identified by it effectively. With respect to the behavioural commitments, the following reasons were stated for the contested decision."

Paragraph 429:

> "The behavioural commitment, namely the separation of Sidel from Tetra Pak, together with the confirmation of pre-existing Article 82 undertakings, are submitted in particular with regard to the concerns on the ability of the merged entity to leverage its dominant position in carton packaging to gain a dominant position in PET packaging equipment. This commitment, and the pre-existing Article 82 commitments are, however, purely behavioural. As such, they are not suitable to

restore conditions of effective competition on a permanent basis, since they do not address the permanent change in the market structure created by the notified operation that causes these concerns.

And it goes on quoting from the Commission Decision as to why it did not think these commitments are sufficient, they are only behavioural. Then para.56 of the Court's Judgement:

"The Commission's argument challenges paragraphs 156 -162 of the judgment under appeal, which immediately follow paragraphs 148-155 which were likewise challenged by the Commission were examined by the court in connection with the first ground of appeal. In those paragraphs the CFI held as follows:

156 in the present case, the leveraging from the aseptic carton market, as described in the contested decision, would manifest itself – in addition to the possibility of the merged entity engaging in practices such as tying sales of carton packaging equipment and consumables to sales of packaging equipment and forced sales – firstly, by the probability of predatory pricing by the merged entity; secondly, by price wars; and, thirdly by the granting of loyalty rebates. Engaging in these practices would enable the merged entity to ensure as far as possible that it s customers on the carton market obtain from Sidel any PET equipment they may require. The contested decision finds that Tetra holds a dominant position on the aseptic carton markets, that is to say, the markets for aseptic carton packaging systems and aseptic cartons … [a finding which is not disputed by the applicant].

157 It should be recalled that, according to settled case-law, where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect …

158 Moreover, in response to the questions put by the Court at the hearing, the Commission did not deny that leveraging by Tetra through the conduct described above could constitute abuse of Tetra's pre-existing dominant position in the aseptic carton markets [that is to say, existing pre-merger]. This could also be the case, according to the concerns expressed by the Commission in its defence, in circumstances where the merged entity refused to participate in the installation and any necessary conversion of Sidel SBM machines, to provide after-sales service or to honour the guarantees for such machines when sold by converters. However, the Commission went on to state that the fact that a type of conduct may constitute an

independent infringement of Article 82 not preclude that conduct from being taken into account in the Commission's assessment of all forms of leveraging made possible by a merger transaction.

159 In this regard, it must be stated that, although the Regulation provides for the prohibition of a merger creating or strengthening a dominant position which has significant anti-competitive effects, these conditions do not require it to be demonstrated that the merged entity will, as a result of the merger, engage in abusive and consequently unlawful conduct. Although it cannot therefore be presumed that Community law will not be complied with by the parties to a conglomerate-type merger transaction, such a possibility cannot be excluded by the Commission when it carries out its control of mergers. Accordingly, when the Commission, in assessing the effects of such a merger, relies on foreseeable conduct which in itself is likely to constitute an abuse of an existing dominant position, it is required to assess whether, despite the prohibition of such conduct, it is none the less likely that the entity resulting from the merger will act in such a manner or whether, on the contrary, the illegal nature of the conduct and/or the risk of detection will make such a strategy unlikely."

That part of the CFI's judgment, as Mr. Green said, was upheld and the next part was not, so I shall skip over that for a moment.

"160 Since the Commission did not carry out such an assessment in the contested decision, it follows that, in so far as the Commission's assessment is based on the possibility, or even the probability, that Tetra will engage in such conduct in the aseptic carton markets, it findings in this respect cannot be upheld.

161 Moreover, the fact that the applicant offered commitments regarding its future conduct is also a factor which the Commission should have taken into account in assessing whether it was likely that the merged entity would act in a manner which could result in the creation of a dominant position on one or more of the relevant PET equipment markets. There is no indication in the contested decision that the Commission took account of the implications of those commitments when it assessed the creation of such a position in future through leveraging.

162 It follows from the foregoing that it is necessary to examine whether the Commission based its analysis of the likelihood of leveraging from the aseptic carton markets, and of the consequences of such leveraging by the merged entity, on sufficiently convincing evidence. In the course of that examination it is necessary, in

the present case, to take account only of conduct which would, at least probably, not be illegal. In addition, since the anticipated dominant position would only emerge after a certain lapse of time, by 2005 according to the Commission, its analysis of the future position must, whilst allowing for a certain margin of discretion, be particularly plausible.'

End of quote from the CFI judgment.

That was challenged by the Commission and I do not think I need read the arguments of the parties, I go to the findings of the Court of Justice at page 388, paragraph 71.

> "It should be observed, first of all, that paragraphs 148 to 162 of the judgment under appeal, which the Commission challenges under both its first and its second ground of appeal, form a section in which the CFI described certain specific aspects of conglomerate effects, in particular temporal aspects, and inferred from them certain general rules as to the evidence which the Commission must produce when it considers that a proposed concentration must be declared in compatible with the common market.
>
> 72 It was in the context of this reminder of the need for 'convincing evidence' that the CFI made a reference to the obligation to examine all the relevant information.
>
> 73 Such an examination must be carried out in the light of the purpose of the Regulation, which is to prevent the creation or strengthening of dominant positions capable of significantly impeding effective competition in the common market or a substantial part thereof.
>
> 74 Since the view is taken in the contested decision that adoption of the conduct referred to in recital 364 in that decision is an essential step in leveraging, the CFI was right to hold that the likelihood of its adoption must be examined comprehensively, that is to say, taking account, as stated in paragraph 159 of the judgment under appeal, both of the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful."

Then they disapprove of the last sentence of paragraph 159.

> "75 However, it would run counter to the Regulation's purpose of prevention to require the Commission, as was held in the last sentence of paragraph 159 of the judgment under appeal, to examine, for each proposed merger, the extent to which the incentives to adopt anti-competitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood

> of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue."

That would just be too onerous.

I pick it up again at paragraph 78.

THE CHAIRMAN: Mr. Roth, what I do not think I have quite divined is what the Court is saying you can nevertheless leave in account, as opposed to the matters which you are not entitled to take into account or you should not take into account in paragraphs 75 and 76. What is left in relation to any incentives that flow from regulation or unlawfulness? I am afraid I have difficulty with that.

MR. ROTH: It is perhaps made clear by paragraphs 77 and 78.

> "77 It follows that, at the stage of assessing a proposed merger, an assessment intended to establish whether an infringement of Article 82 is likely and to ascertain that it will be penalised in several legal orders would be too speculative and would not allow the Commission to base its assessment on all of the relevant facts with a view to establishing whether they support an economic scenario in which a development such as leveraging will occur.

> "78 Consequently, the CFI erred in law in rejecting the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of resulting in leveraging on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently, of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue. Nevertheless, since the judgment under appeal is also based on the failure to take account of the commitments offered by Tetra, it is necessary to continue the examination of the second ground of appeal."

They are saying, as I understand it, that the CFI was wrong to say that the Commission should have had a regard to the disincentive that flowed from the general prohibition under Article 82, but they go on to hold that the Court was right to hold that the Commission should have had regard to the specific commitments offered by Tetra, both its previously offered commitments as a result of a previous case, when they had offered specific targeted commitments, and the commitments which it offered in the course of these proceedings.

THE CHAIRMAN: So one leaves out of account not merely the assessment of what the position might be in lots of jurisdictions (of which there are 20 something now) one leaves out of account, if you are right about this, the general regulatory position, one simply does not take that into account at all.

MR. ROTH: That is what they are saying. I entirely agree with Mr. Green that it is the last part of paragraph 159 of the CFI's judgment, which you find quoted at page 385, which was set aside by the ECJ. The first part of paragraph 159 of the CFI's judgment was upheld, the last part beginning "While it is appropriate to take account …" Mr. Green said that was set aside and I agree that that is what they did.

One may say it is a nice distinction, but I think it is actually quite a clear distinction. There is the general law prohibition and then there is this company, Tetra Pak, which as a result of its previous misdoings had to enter into specific detailed commitments with the Commission, which were binding, and then in the course of the merger proceedings offered further specific commitments that it would not do the things that the Commission was worried about and the court saying well, that they should have had regard to and the Commission saying we do not have regard to it.

MR. SCOTT: Just thinking about this conceptually for a moment, Tetra Sidel are in a situation where they could, absent any prohibition, move to a position of collective dominance, with or without infringing either Article 82 or their existing commitments or commitments they offered, or they could move to collective dominance with infringement.

MR. ROTH: I think collective dominance, with great respect, is a red herring.

MR. SCOTT: Okay.

MR. ROTH: They referred by analogy to *Airtours*. I think it is just dominance.

MR. SCOTT: Yes, leave out collective. They are in a situation where, clearly, by infringing Article 82 or not keeping to the commitments made previously or now offered, they could move to a position of dominance.

MR. ROTH: It is a very special case. Tetra was in a position of dominance, it was dominant before this merger took place.

MR. SCOTT: As we know from the previous litigation.

MR. ROTH: In the aseptic carton market. Sidel was not dominant, it was big but it was not dominant in PET cartons. The merger between the two would not of itself change the dominance position, it would not make Tetra dominant, Tetra already was dominant. It would not make Sidel dominant because it does not add anything to Sidel's position in the PET market. The Commission was concerned, and the basis of its decision was, that putting the two together would give that new entity power to engage in conduct which, as a result of that conduct, would make the merged entity dominant in the PET market, which neither of the two merging parties was dominant in previously. Hence, the creation, which is the prerequisite for the prohibition.

MR. SCOTT: Forgive me, it was that piece of dominance that I had in mind. Staying with that piece of dominance for a moment, if we are thinking about the incentives, in so far as those incentives are derived from illegality of conduct, that illegality could derive from Article 82, from existing commitments or from additional commitments. Conceptually, there could be behaviour that resulted in a dominant position which did not infringe Article 82 or existing commitments; in other words we have got a variety of boundaries in place. Article 82 is about abusive dominance, it is not about dominance itself. The commitments are very specific and it is quite possible to envisage a situation in which, conceptually still, Sidel could find itself in a position of dominance without having performed an illegal act.

MR. ROTH: The only basis upon which the Commission put its case was that the way in which they said there was a likelihood, plausibility or whatever of the merged entity achieving dominance in the PET market was through leveraging conduct ---

MR. SCOTT: And that that leveraging conduct would be abusive.

MR. ROTH: That leveraging conduct would be an abuse of Tetra's pre-existing position in the aseptic carton market.

MR. SCOTT: Right.

MR. ROTH: Then there were various degrees of disincentive to Tetra engaging in that conduct of the three types that you enumerated.

MR. SCOTT: The reason for thinking about this is that when we come to the instant appeal there will be the question, if we are going to discuss incentives, about just what behaviour those incentives might dissuade H3G from engaging in

MR. ROTH: Yes.

MR. SCOTT: And if we are thinking about price we then come to a question whether there is a price level which would be subject to regulation but which would not give rise to an action under 82 as an abuse. So there is a regulatory subtlety there, and so there was a question about what is the nature of the incentive? I am sorry that I was not as clear as I should have been about *Sidel*. It was *Sidel*'s position that I had in mind and just what were the incentives and how far would they be effective? I take the point that the Commission had in mind an abusive piece of behaviour.

MR. ROTH: And it is brought out by the next critical six or seven paragraphs. I think I did not read 78 but that goes back to my Lord's question:

"Consequently the CFI erred in law in rejecting the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of resulting in leverage on the sole ground. Nevertheless, since the judgment is also based on the failure to take up the commitments it is necessary to continue with the second ground of appeal. With respect to the argument that the CFI departed from the approach taken by it in the *Gencor* judgment it must be held that contrary to what the Commission claims the CFI did not depart from the position taken by it in para.94 of that judgment, namely that there will be a significant impediment to effective competition if there is a lasting alteration of the structure of the relevant markets as a result of a concentration having the direct and immediate effect of creating conditions in which abusive conduct is possible [not probable] possible and economically rational.

80 The situation in the *Gencor* case was entirely different from that addressed in the contested decision. As is clear from paragraph 91 of the judgment in that case, the concentration would have led to the creation of a dominant duopoly in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market.

81 It was therefore the concentration which would have given rise to a lasting alteration of the structure of the relevant markets in that case and thus would have made abuses possible and economically rational.

82 In the present case [by contrast] it is true that the notified merger was capable of slightly altering the structure of the market for carton in as much as the merged entity could strengthen the dominant position which Tetra had held for some time on that market and which, moreover, had been the subject of the Commission decision pursuant to Article 82. However, it was not effective competition on the carton market which the Commission intended to protect by prohibiting the merger, but competition on the market for PET equipment, in particular that for low and high capacity SBM machines used for sensitive products.

83 The structure of that market would not have been immediately and directly affected by the notified merger, but it could have been so affected only as a result of leveraging and, in particular, abusive conduct by the merged entity on the carton market."

The point Mr. Scott was just making.

84 It follows from the above considerations that the situation examined in the *Gencor* case is not sufficiently comparable to that on which the CFI ruled by the judgment under appeal for that court to have been able to draw any useful inferences from it. The structure of the market on which the Commission intended by the contested decision to preserve effective competition was, in the *Gencor* case, directly altered by the merger, whereas in the present case it could be altered only by leveraging.

85 With respect to consideration of the behavioural commitments offered by Tetra, the CFI was right to hold, in paragraph 161 of the judgment under appeal, the fact that Tetra had, in the present case, offered commitments relating to its future conduct was a factor which the commission had to take into account when assessing the likelihood that the merged entity would act in such a way as to make it possible to create a dominant position on one or more of the relevant markets for PET equipment."

So, pausing there. The distinction the Court of Justice was making between *Gencor* and on which the Commission sought to rely, and *Tetra Laval* is in *Gencor* you have immediately, through the merged entity, alteration in market shares, creating a decline in competition, competitive conditions which makes anti-competitive conduct possible and economically rational, whereas in *Tetra Laval* you do not, because it is a conglomerate merger, have any such change. It is only by the hypothesised future conduct by the merged entity that there could be the creation of a dominant position in the PET market.

Apply that to this case. Is this a *Gencor* case, or is this a *Tetra Laval* case? We say it is quite clear. The concern that gives rise to dominance here is the 100 per cent. market share, absolute barriers to entry, lack of countervailing buyer power. It is not the future anticipated future conduct by H3G that is relied on to establish prospective dominance, it is no part of the finding. That would be abuse. But here, in *Tetra Laval* that conduct was integral to establishing that there was going to be the creation of a dominant position. That was why the Commission had to establish to whatever relative degree of likelihood is appropriate, that that conduct was going to take place. If you have to establish that that conduct was going to take place then you ask the question "what are the incentives to the conduct?" and, to adopt the chairman's words, "what are the disincentives?" Then you get into an argument which regulatory constraint is relevant to looking at disincentives?

THE CHAIRMAN: And what this decision tells us about that last point is that the *Tetra Laval* cannot say "Of course we are not going to do that, because if we did that the Regulators would jump all over us". But they can say "Of course, we are not going to do that because we have offered undertakings in the past which would prevent us from doing it, and here are some more", something like that. That is the distinction you seek to draw – have I understood you correctly?

MR. ROTH: There are, I think, two points which come out of this. That is one point, namely, when you are looking at disincentives, which legal disincentives is it appropriate and proper to take into account, and I just adopt what you just said.

The separate and more fundamental point is, do you have to look at conduct at all in order to establish dominance? In *Tetra Laval* you had to because, and that is why the conglomerate merger is so important, because this was all based on the only way the Article 2(3) test of the ECMR could be fulfilled, on which the Commission based its decision, was by establishing that there was going to be this future conduct which would lead to the creation of a dominant position. Whereas in the present case the dominant position is there today, was there in June 2004, and whether in fact in the future at any time H3G charges supra competitive, or excessive prices is completely relevant to conduct, that only comes into abuse.

So when I started out saying the *Tetra Laval* case is irrelevant I should slightly rephrase that, it is relevant to the one point that the Chairman mentioned, namely, what are the appropriate disincentives if you are looking at conduct, but it is irrelevant to the general approach of whether conduct is something you need to look at in establishing dominance.

MR. SCOTT: Presumably had your clients had a strong feeling that abuse was likely to occur, that is likely to have been reflected in their consideration of remedies, and it is not reflected in their consideration of immediate events?

MR. ROTH: No, in fact, what is reflected is that we have no particular reason, we do not know, as it says, we are uncertain whether they have an incentive or not, absolutely it would be reflected in the remedies, as it was for the others, of course, who have a much more onerous remedy.

THE CHAIRMAN: Can you just help me, going back to para.159 of the CFI judgment, pages 384 and 385, we have the disallowed sentence at the end.

MR. ROTH: Yes.

THE CHAIRMAN: That disallowed sentence seems to be going to the point that I mentioned, which is what do you take into account in deciding whether there is going to be dominance in the new market – that is what that is going to. The first half of that paragraph, on its face, seems to be going to abuse and not the existence of a new dominance. Am I right about that?

MR. ROTH: I think all the abuse is going to the existence of the new dominance, because the only way the Commission found there could be new dominance is by abusive conduct.

THE CHAIRMAN: Of an existing dominance?

MR. ROTH: Of Tetra's existing dominant position in the carton market.

MR. SCOTT: Yes, that is in the centre of that paragraph at the top of p.385, where there is foreseeable conduct which in itself is likely to constitute an abuse of an existing dominant position.

MR. ROTH: Yes, because of course, although Tetra, through the merger acquires Sidel, the Tetra business is still part of the merged entity, and the merged entity remains dominant on the aseptic carton market, that dominance does not disappear. It does not result from the merger, but it is not removed by the merger. I think that takes one to para.89, the last paragraph I will read:

> "It follows from the examination of the second ground of appeal as a whole that, although the Court of First Instance erred in law by rejecting the Commission's conclusions as to the adoption by the merged entity of conduct likely to result in leveraging it was nevertheless right to hold in para.161 of the judgment that the Commission ought to have taken account of the commitment submitted by Tetra with regard to that entity's future conduct. Accordingly, while the ground of appeal was well founded in part, it cannot call into question the judgment under appeal in so far as it annulled the contested decision since that annulment was based, inter alia, on the Commission's refusal to take account of those commitments."

I think that is making the point, perhaps very clear, as to what could be taken into account, and what could not and therefore the error of the CFI was not sufficient for this ground of appeal to succeed.

Reference was made to the Advocate General's opinion which, the Chairman pointed out, was not really adopted in the judgment in any event, but just taking it very quickly, p.401 is the start of the Advocate General's opinion, Advocate General Tizzano, and in his opinion at p.411 Mr. Green read to you paragraphs 74 to 77 about the test. I just draw your attention to paras. 78 to 80. The reasoning of the Advocate General is partly based on the balance in the merger regulation itself, particularly that if the Commission does not take a decision in good time the concentration must be deemed to be authorised, and from that he derived the view that, in fact, the balance of the ECMR is in favour of allowing mergers rather than prohibiting them. That is the view he expressed. It is the first sentence of para.79, so he derived from the structure of the regulation that there was a balance in the provision which is, of course, very different from the telecoms regulatory framework. That is the only point I wanted to make, (a) it was not adopted in the judgment, but (b) it is based on a particular construction of the ECMR peculiar to that legislation.

So we submit, in a nutshell, that the conclusion that is drawn by Mr. Green, from the *Tetra Laval* judgment and jurisprudence, expressed at para.17 of his note on standard of proof that was handed up to the Tribunal yesterday. The framework directive and EC merger jurisprudence therefore consistently established the litmus test for SMP to be applied by Ofcom is as follows: in the absence of ex ante regulation will the undertaking concerned – I think he amended it on prompting from Professor Stoneman to set prices rather than raise prices – set prices to supra-competitive levels or fail to reduce prices in line with cost? On the *Tetra* formulation the "will" in this test means very probably or in all likelihood. The test requires a precise examination both of ability and incentive – we say that is just completely wrong.

Finally on this point, you saw reference in the judgment in *Tetra Laval* to *Airtours* saying by analogy with *Airtours*, *Airtours* is a collective dominance case so it is not a horizontal merger, it is not a vertical merger. Rather than taking up time on another long judgment – the *Airtours* judgment is a very long judgment – which is of no relevance to this case because no one is suggesting collective dominance here, can I just hand up an extract from Professor Wish's well-known treatise on competition law, which has a very full discussion of collective dominance and *Airtours*. If you wish to see what that is all about I could certainly do a lot worse than is set out there and in so far as it is of interest, could I invite the Tribunal just to read it at your leisure? It explains what is collective dominance, what was the *Airtours* judgment. It is a very different situation from anything being considered here, and you will recall that in all the Ofcom/Oftel documents they say this is not a collective dominance situation.

THE CHAIRMAN: I cannot speak for my brethren, but for my part I am unlikely to get into that when the case was not in fact opened to us and we will not get into it all. If it were such a crushing blow I would have expected it to have come and been outlined to us in some detail. Thank you for that, I suppose it is done on a just in case base; for my part I think I am unlikely to spend much or indeed any time on this case as it stands at the moment because we simply were not taken to the case.

MR. ROTH: It is very much there on a just in case basis, and it is only because in *Tetra Laval* in a couple of passages that you have seen they say "by analogy with *Airtours*" and you may therefore wonder what is *Airtours* about and why is collective dominance relevant to a conglomerate merger. That explains that collective dominance is not something that prima facie arises also. Collective dominance is when a market with four players through the merger are reduced to three players, but the new entity does not particularly have a very high market share, but it is said that the reduction from four to three or five to four, an oligopolistic market, will lead them to co-ordinate their conduct in a way that they did not do before. So it is a very high hurdle to establish, as occasionally there have been collective dominance mergers, but that is a very different situation. That is all I need say about it.

I took a little longer I am afraid with *Tetra Laval* than I had hoped but what I want to deal with now is countervailing buyer power, regulation as a factor in SMP, the BT Ageement and, finally, consistency on the directives. I go first to countervailing buyer power. That is referred to in paragraph 78 of the EC guidelines, you will remember, as one of the factors, but it is not developed there at all, it is just listed as something that one should look at, but it is discussed as a concept in other guidelines and decided cases, and I would ask that you look very briefly at the way countervailing buyer power as a concept is explained, and then ask how might that apply in the present case. Sticking with bundle H2, if you turn to the very last tab 28 you have the European Commission's horizontal merger guidelines, fairly new guidelines issued in February 2004, very much dealing with horizontal mergers, and at paragraph 64 to 67 on page 964 you will see a discussion under the head "Countervailing buyer power". In the interests of time I wonder if I might ask you just quickly to read paragraphs 64 to 66, rather than my reading them out aloud. (Pause for reading). You see there how it is explained and at paragraph 66, the point about the incentive of buyers to utilise their power, I think reflects the point made by Mr. Scott, they have to ask not only have they got the buyer power but are they going to use it, or can they just pass on any price increase.

There are two actual decisions reflecting this, one going one way and one the other way among EC merger decisions which you find in the bundle H4. Tab 1 is *Alcatel/Telettra* which is actually a telecoms case, as it happens, both companies supplying telecommunications systems and equipment, and you can see that from paragraphs 2 and 3 on the first page. So they were in the same market. Various product markets were identified, each of which had to be looked at separately, and then going to paragraph 37 you see there one of the markets is transmission markets in Spain:

> "On the basis of actual market shares of Alcatel and Telettra in 1989, the concentration leads to very high combined market shares on the transmission markets in Spain for the new entity, because the two companies are the two current principal suppliers to Telefonica"

who are the BT of Spain, and they set out the combined market shares and you can add them up and see how high it will be. Then there is the heading "Contestability of the transmission markets":

> "A very high share of any market could indicate that a dominant position exists. Such an indication in the case of a supplier may nevertheless be counted, for example by the buying power of a monopsonistic purchaser.
>
> In the present case, the high market shares of Alcatel and Telettra in the transmission markets in Spain result from Telefonica's choice of these companies as its main suppliers. This choice was however made on the basis of Alcatel and Telettra being active competitors in the past. Since Telefonica has maintained a diversified purchasing policy up to now, it is not probable that the new combined entity will sustain the same market share as achieved by the parties as competitors.
>
> It is possible for Telefonica to increase its purchases from other suppliers of transmission equipment in order to prevent any dependence on the new entity.
>
> AT&T is immediately capable of increasing its deliveries across the entire range of line transmission equipment products. AT&T is not yet supplying microwave products in Spain but AT&-NS Espana is continuing to pursue some public tender opportunities.
>
> Although Ericsson does not cover the whole range of line transmission systems, it is capable of increasing deliveries of digital products, these products being the most important segment for new installations. Ericsson currently has only limited sales of microwave equipment in Spain. It has stated, however, that it is intended to develop its position in that Member State.
>
> The two principal actual competitors are therefore capable of increasing supply. Furthermore, it would seem possible for some competitors, not currently present to a significant extent in Spain, to become suppliers in the changed environment …
>
> 42. On this basis there would be no significant barrier from the demand side for strong competitors such as Siemens to enter into Spain. Siemens is already present to some extent in the microwave equipment market."

All that leading to the conclusion in paragraphs 47 and 48:

> "For the reasons outlined above, it appears that competitors of Alcatel and Telettra are capable in the near future of increasing their supply to Telefonica in the transmission markets. Because of its diversified purchasing policy and removal of vertical links with Alcatel and Telettra it also appears that Telefonica is capable in the near future of increasing its purchases from other suppliers.

> 48. In these circumstances it is not considered that the current high market shares of Alcatel and Telettra on the transmission market in Spain will enable the new entity to behave to an appreciable extent independently of its competitors and main customer."

So a classic example of a very high market share but still not dominant because the large buyer, Telefonica, has got countervailing buyer power. Why? Because there are alternative sources of supply and the policy of Telefonica in the past indicates it is going to use alternative sources of supply. The key test for countervailing buyer power therefore is the ability to switch to alternative suppliers and the availability of alternative suppliers.

MR. SCOTT: Mr. Roth, just to set that in the context of the previous citation, in paragraph 65 it says the Commission gave as an example that one source of countervailing buyer power would be if a customer could credibly threaten to resort within a reasonable timeframe, so it is clearly one possibility.

MR. ROTH: Yes.

MR. SCOTT: That suggests other possibilities. My recollection is that BT may take a view on this and they have stressed the need for an alternative and they have stressed the fact that they have not got one, but to be fair the guidance from the Commission does say "one source".

MR. ROTH: Yes, because the other source is self-supply. We are looking at companies who are large buyers and they might be able to set up their own supply operation and go into that market themselves if there are no barriers to entry. Of course, the present case is that BT cannot switch because to get voice call termination on the 3G network which is the market you are compelled to purchase that service from H3G.

At tab 4 in this bundle is the case of *CVC/Lenzing*. This is a very different market, it is man-made fibres and led to the creation, on the merger, of the world's leading supplier of certain kinds of synthetic staple fibres. If I could ask you to turn in the decision to paragraph 124, you will see the market definition.

> "The Commission concludes that the following categories constitute the relevant product markets which have to be taken into account …"

and you have those various kinds of fibre markets. Then at paragraph 192 to 194 (page 59 of the pages at the top right):

> "Insufficient competitive constraint by countervailing buyer power"
>
> "Finally, the parties argue that the market power of the new entity will be effectively constrained by countervailing buyer power.
>
> 193. Based on the results of its market investigation, the Commission does not share this point of view. First of all, the commodity VSF market [the viscose staple fibre

> market] is characterised by a significant number of small and medium-sized customers … who are unable to exercise significant buying power. Secondly, it should be borne in mind that quality, certain product requirements and reliability of supply are of particular importance to most customers. Under such circumstances the disappearance of one of the leading independent suppliers of high quality VSF in the EEA significantly limits customers' choice as switching to unknown suppliers may entail significant commercial risks due to production losses. Thirdly, long-term business relationships are common in this sector, thereby raising barriers to customers' potential wish to switch to other suppliers, and finally, in a situation of potential shortage of supply, the fact that customers generally operate with short lead times, and hold only limited stocks can limit them in the exercise of their buyer power.
>
> The responses of third parties to the Commission's questionnaire confirm this conclusion".

So there no countervailing buyer power, and the merger was I think blocked.

PROFESSOR STONEMAN: Mr. Roth, can I ask you a question? We are here in a position of discussing countervailing buyer power, and basically what we have a situation of in the relationship between H3G and BT is not exactly countervailing buyer power as you describe here, but the situation of bilateral monopoly.

MR. ROTH: Yes.

PROFESSOR STONEMAN: Now, are you saying that bilateral monopoly does not involve countervailing buyer power as defined here?

MR. ROTH: I would not say that as an inevitable general proposition. If the buyer (a) has no potential to develop self-supply; and (b) has to take supply from the supplier – cannot decide "I am not going to have this service at all", which is another alternative, "I will not switch supply, I will not have it. I do not need it. If it gets too expensive I will do without it". None of those alternatives apply. In that situation you do not have countervailing buyer power.

PROFESSOR STONEMAN: But that is exactly the description of a bilateral monopoly?

MR. ROTH: Well then I agree, I am sorry.

PROFESSOR STONEMAN: Basically you have a monopsonist buyer and a monopoly seller.

MR. ROTH: And they have to buy, the monopsonist buyer has to buy, it cannot decide "I will not take the product".

PROFESSOR STONEMAN: Has to buy, yes – end-to-end connectivity, yes.

MR. ROTH: Yes, well that is my qualification.

PROFESSOR STONEMAN: So we have a bilateral monopoly.

MR. ROTH: The only alternative could be – I had not thought about this before I read the German veto decision – where the other way there could be bargaining through the monopsonist buyer's ability to set its charges excessively and use that as a bargaining power, and the German veto decision of the Commission, as you saw, said that Deutsche Telecom cannot do that because they are regulated, they have SMP. Exactly the same applies in our case, because BT in the converse situation, supply of termination on BT's fixed network to H3G, BT is subject to SMP designation so they have not got that buyer power.

PROFESSOR STONEMAN: The technical point was that your argument seems to be that countervailing buyer power does not encompass a bilateral monopoly and following Mr. Green's argument yesterday being as Ofcom did not consider it an appeal for bilateral monopoly then we should not talk about it any further.

MR. ROTH: Yes, and we say that it is quite clear from the decision that the end-to-end connectivity was fundamental to Ofcom's consideration of the countervailing buyer power argument.

PROFESSOR STONEMAN: But that end-to-end connectivity is basically what makes it a bilateral monopoly, I think. It changes the weights in the bilateral discussion.

MR. ROTH: Bilateral monopoly in this sense, it is not a complete monopoly because there are also a few other buyers, of course, but I think we are all proceeding on the basis that the BT price effectively sets the ceiling. I think it is common ground that BT, through end-to-end connectivity has to buy the services from H3G. They cannot say "We are not going to connect our subscribers to H3G if the transmission termination charge is too expensive", they have to do it because of end-to-end connectivity.

PROFESSOR STONEMAN: There is no alternative seller, and that is why H3G is a monopolist. I am not sure this is getting us anywhere, it is more a matter of the fact that this argument that there has to be an alternative seller in countervailing bargaining power, means that a situation of bilateral monopoly, by definition, will not involve countervailing buyer power.

MR. ROTH: That is right, unless the monopsonist buyer can say "I will do without service", which they cannot.

THE CHAIRMAN: It sounded to me as though you were saying it is your case that BT has no countervailing buyer power because it has to buy from '3' termination services at any price. Is that part of your case?

MR. ROTH: I am afraid that takes one back to the sort of circularity of SMP. No, hat I am saying is that they have to take the service from H3G, they cannot, because the price is too high, refuse to take it. BT, now that the service is up and running cannot say to H3G, if there is a renegotiation of the agreement, “We think the price you are proposing is too high, we are not going to connect our subscribers to H3G.”

THE CHAIRMAN: That is your case is it, in other words, H3G can demand whatever they like, and BT because of its end-to-end connectivity cannot say “We are perfectly happy to connect, but not at that price.” Is that your case?

MR. ROTH: Well that would be if we are saying it is because of that position that they have, apart from other things SMP, and because they have SMP we can stop them doing that, so in fact they cannot do that.

THE CHAIRMAN: I am sorry, say that again.

MR. ROTH: It is the greenfields fallacy in the German veto decision. Because they have, in our judgment, SMP, they cannot in fact do that, but they cannot rely on the fact ----

THE CHAIRMAN: So who cannot do that?

MR. ROTH: H3G cannot set any price and BT still has to buy. BT has to buy the service, that is the starting point. They have to procure end-to-end connectivity, and the only way of doing that is through acquiring termination service through H3G. We say H3G could not set some artificially high price because they have SMP and they would then be subject to further control by Ofcom.

THE CHAIRMAN: But there is another reason why they may not be able to sell at an artificially high price, and it may all depend on where you … I suppose, which is that if they tried to set an artificially high price you would say “I am not paying this absurd price, we will invoke the statutory (if that is what it is) mechanism for having Ofcom determine this interconnection dispute”.

MR. ROTH: That is the dispute resolution argument, which I am coming to.

THE CHAIRMAN: It seems to me that it feeds in potentially to countervailing buyer power in that particular way. That is why I was anxious to isolate whether you were saying that the interconnection obligation means that you have to take the service at whatever price is specified, leaving aside what the facts of 2001 and 2002 may tell us, that seems to me not to reflect reality.

MR. ROTH: If I do it first absent any dispute resolution procedure, if there were none, parking the question of how does it work and what does it mean, parking that question for the moment, then we would say “Yes”, that would be the position. Then one asks how does the statutory procedure alter that position? That is what I am about to come to, although I have not kept to my estimate, I am so sorry.

THE CHAIRMAN: It is not your fault and you need not apologise.

MR. ROTH: I can see you are going to be questioning me, I know, about that, it is going to be another hour, I fear.

THE CHAIRMAN: That sounds a bit like a threat! (laughter)

MR. ROTH: The less questions the shorter it is, but that is a statement of the obvious.

THE CHAIRMAN: But the fewer questions the less the level of understanding of the Tribunal, I am afraid.

MR. SCOTT: Just while we are in bundle H4, and before we put it away, are you going to come to tab 5, to which we were taken by Mr. Green, in particular, to p.25 of tab 5?

MR. ROTH: If my memory serves me rightly, sir, I think I took you to tab 5.

MR. SCOTT: I am sorry, you took us.

MR. ROTH: This went back to the whole question of how do you establish SMP, I said you can look at conduct as supporting, but you do not have to.

MR. SCOTT: Yes.

MR. ROTH: If I may say so with respect, it is a very helpful question, because if we go back to p.24, which is buyer power.

MR. SCOTT: Yes, it was to that section I wanted to come.

MR. ROTH: Paragraph 6.1 is actually very helpful:

"The strength of buyers and the structure of the buyer's side of the market may constrain the market power of the seller. Size is not sufficient for buyer power. Buyer power requires the buyer to have choice".

That puts in a sentence what I have probably spent about half an hour saying. Then they give various alternative means of the way that choice can be exercised, including self-production and so on.

MR. SCOTT: The other point that Professor Stoneman is making is contained in the first sentence of 6.4 over the page.

MR. ROTH: "… is beneficial in two circumstances", yes, that is the passing on. 6.4 I think also is the point that you made, sir, that also incentives are important.

MR. SCOTT: That is right.

MR. ROTH: Because this takes one back to the definition of dominance, ultimately consumers, it might be all right for the customer, but it might still be behaving to an appreciable extent independently of the consumer, because the price is passed on, which links to the monopoly seller/monopsonistic buyer.

MR. SCOTT: It is sometimes the circumstance before the Tribunal that we have the large parties before us and we do not have a representative of that ultimate consumer who is having to bear the eventual burden.

MR. ROTH: I fear not sometimes, but usually, although of course the regulator is charged with looking after the interests of consumers.

MR. SCOTT: Indeed.

THE CHAIRMAN: Would that be a convenient moment?

MR. ROTH: Absolutely. Thank you.

(Adjourned for a short time)

MR. ROTH: Sir, can I just revert to one point arising from your questions earlier today regarding H3G's response in the consultation process, which you will recall, and just draw the Tribunal's attention to what H3G said in their response, which is in bundle B3 at tab 47. The document starts at page 1725, so this is H3G's response to the first Oftel document, the May 2003 document. In the document at page 1735, paragraph 4.17 to 4.23, this is Hutchison's submissions.

"The Director provides no evidence of H3G's ability to price persistently and profitably above a competitive level. Nor does he present any information at all in relation to Hutchison 3G … 4.18 Hutchison 3G provides specific information on these matters, as they relate to Hutchison 3G, below. Before the Director can conclude Hutchison 3G has SMP he must be able to establish, on the basis of evidence, that Hutchison 3G is able to act independently of its customers and competitors i.e. to set interconnection charges without constraint from its customers."

There are then some confidential passages going over the page, and the only point I would make is that the only information being provided in those paragraphs 4.19 to 4.23 on actual costs, which is said to support the conclusion stated at 4.21 in an open sentence,

"Therefore in respect of certain calls Hutchison 3G could not be covering its costs on a call by call basis .."

is related to calls ported in to H3G from other networks or routed onto O2's network. That is the extent of what is being produced there, which was commented on in the decision. I also think there is nothing in this document about any sort of lock-in to the price in the BT Agreement and nothing about business plans is being offered.

At tab 48, page 1809, the covering letter of February 2004 – this is the response to the December statement – you will see at page 1811, paragraph 1.1:

"Hutchison 3G UK Limited is an affected party and has fully participated in the consultation by the Director General of Telecommunications and now by Ofcom on wholesale mobile voice call termination …"

Again, there is nothing offered by way of reference to a business plan of any kind. Indeed, you will see from 1.2 that they welcome the fact that as a result of their representations Oftel (now Ofcom) had resiled from its initial proposal to impose price control.

PROFESSOR STONEMAN: Just before we leave that point, what are we supposed to take from this?

MR. ROTH: It was only the point made by the Chairman which, with respect, I think is a very valid point, that to complain that we did not get a business plan from Hutchison - Hutchison were being asked to participate in consultation, they were being asked questions. They did respond and this is what they put to us. They say we have fully participated and they cannot now stand up and say oh, you should have demanded a business plan.

PROFESSOR STONEMAN: Thank you.

THE CHAIRMAN: Interestingly enough, Hutchison in 2.2, now that I come to read it again, says that,

"… this does not relieve the Director from his obligation to conduct a full and detailed review of the market and of whether Hutchison 3G has the ability to exercise market power."

MR. ROTH: Yes, which is where we put the test. Thank you, sir. I was dealing just before lunch with countervailing buyer power and just to wrap that up, the issue of course is not whether BT had countervailing buyer power in August 2001, almost three years before the decision and when there was a different regulatory regime, it is as of June 2004 on a forward-looking assessment. The point about BT's countervailing buyer power is the same point for Hutchison 3G in large part as for the other 2G operators; Ofcom correctly analysed this at the start of the market review in May 2003, in the document that we have at bundle A1, tab 2, page 520, the May statement, paragraphs 4.21 to 4.23. I have read them before and I am not going to read them out again. This is for all the MNOs because it is the same point about BT, and it is then followed through in the later documents. The argument of H3G was in fact also advanced by Orange, they made the same point as was reflected in the December statement, bundle A2 at tab 4, page 771 and 772, paragraph 3.33 to 3.36. Again, countervailing buyer power,

"In this case, the question of whether each MNO providing voice call termination has SMP depends on the extent to which its monopolistic position may be off-set by the buyer power of purchasers."

You will see at paragraph 3.35 there is the argument of '3' and Orange, which I have read before, then 3.36: "'3' and Orange further argue that BT can use regulation …" and I will come to that on the regulation argument. It is not a particular H3G point, therefore, it is a general point.

MR. SCOTT: Sticking with page 771, Mr. Green was at pains to distinguish the terminology of 3.32 with its reference to "influence and some pressure" from 3.34 with the language of "irrelevance" and of "curbing any buyer power."

MR. ROTH: And he suggested that it should not be seen as all or nothing, buyer power.

MR. SCOTT: Correct.

MR. ROTH: Clearly, the question with countervailing buyer power is always, even if there is some buyer power, is it sufficient to constrain the otherwise dominant position of the seller? BT alone, it is found, did not have any buyer power because of end-to-end connectivity. The other MNOs, and we have not gone into the discussion about that, I think it is suggested might have had a little because they have not got into end-to-end connectivity, but not very much. I think that is how that plays in.

Ofcom did not take a view as to whether BT had countervailing buyer power at the time the BT/H3G agreement was entered into in August 2001. They acknowledge that BT may have had countervailing buyer power at that time, or they may not, but if they did there might have been some because there was prospect of delay in the very particular circumstances at that time that H3G was anxious to get a quick launch of its new service.

The relevance of the May statement on end-to-end connectivity was only that it made clear to everyone that BT was under such an obligation. BT, I think, knew that it was under such an obligation, but countervailing buyer power is all about negotiating strength. Even if the buyer knows that it has no alternative to purchasing the service, if the seller does not know that then there could still be some countervailing buyer power and it is not at all clear that Hutchison in 2001 at the time of the original negotiations realised that BT had this obligation. Even in these proceedings H3G, as the chairman pointed out, did not at the beginning acknowledge that BT was under such an obligation, and as the chairman pointed out they have changed their position in the course of these proceedings. So if they did not fully appreciate it then that could have given BT some countervailing buyer power at the time. But all of that is historical, what is quite clear is that as of June 2004 everyone knew that position.

May I go to regulation as a factor in countervailing buyer power more generally. Mr. Green argued that the constraint on the ability to price independently of competitors, customers or ultimately consumers – and here there are no competitors so it is customers or consumers –

can come from a variety of sources including regulation or the treaty itself, including Article 82, and that here there is a wider range of constraint than an ordinary Article 82 case because here there is, as he put in answer to Professor Stoneman, the generally regulatory environment (Day 1, page 26, lines 21 to 34).

Taking that in stages, as far as the general regulatory environment relates to that deriving from dominance in Article 82, or an SMP designation, we say the argument is circular; it is the very fallacy that the European Commission pointed out in its recent veto decision regarding the proposed decision of the German telecoms regulator, which you find in bundle F1 at tab 19 at paragraph 23 of the decision at page 732.

> "The purpose of a Greenfield approach is indeed to avoid circularity in the market analysis … when, as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition. In other words, any Greenfield approach must ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainable competitive, and not where the absence of SMP is precisely the result of the regulation in place."

That is, with respect, commonsense. Exactly the same applies for the purpose of Article 82. If dominance is the ability to behave independently of competitors, customers and so on, and knowledge that if one would conduct oneself in that way this would contravene Article 82, which acts as a *de facto* and *de jure* disincentive to behaving in that way, and so leads to the conclusion that you are not dominant, one is going around in a circle, and a law abiding company could never be dominant and not subject to the Article 82 obligation. The point is clear, and the same applies to the SMP designation. That is the first level, Article 82 SMP. Apart from that there is, of course, the statutory position under the Communications Act to which the Chairman referred for dispute resolution procedure, and that reflects to some extent Article 5(4) of the Access Directive. It is said that this power can be used to control H3G's prices to prevent them charging excessive prices. So they have no ability to raise prices to an excessive level.

But of course if that power, whether from the Statute or the Directive, or indeed the contract, were broad enough to preclude the ability of an operator to charge a supra competitive price in a way that is relevant for an SMP designation, no operator would ever be designated as having SMP, because that statutory power is not confined to operators with SMP. It would apply not just to H3G, it would apply to the other four 2G operators, because they all take advantage of the statutory procedure, and it would apply not just to the five mobile network operators, it would apply to all the fixed network operators. You saw from the German veto decision that in Germany it was not just Deutsche Telecom, but there were 53 other fixed network operators designated in a market which were subject to consideration. In the United Kingdom, I am told, in the fixed market there is British Telecom fixed termination and 52 other fixed network operators, each of whom has been designated as having SMP in termination of voice call. All can take advantage of the s.185 dispute procedure, and the intervention of Ofcom and, if this argument is right, it means that actually none of them, apart from BT have SMP. We say that that is clearly not right – it is not right for two reasons. The primary reason, we say, is that one considers whether an undertaking has SMP without regard to the legal and regulatory framework for control of excessive pricing that is applicable to the undertaking in question, without regard to the legal and regulatory framework for control of excessive pricing applicable to the undertaking in question.

As far as Article 82 is concerned, the authority for that is *Tetra Laval* as you saw. Of course, one can think of many examples. Railtrack, who I think is now Network Rail, has all the track in the UK, and does arrangements for use by the train operating companies. It is, of course, regulated on what it can charge in terms of contract by the Office of Rail Regulation, the Rail Regulator. It cannot hold the companies to ransom and charge what it likes. We submit it cannot seriously be suggested for that reason that Network Rail is not in a dominant position in the supply of track, it would be a startling conclusion. That is the first reason.

The second reason is a subsidiary position, but it is a relevant position, namely, the circumstances in which a NRA – a regulatory authority – can control prices is, in fact, carefully circumscribed by the Access Directive, because while the Statute, the Communications Act, gives powers to Ofcom, I think it is common ground that the Act must be interpreted and, certainly Ofcom must act, in accordance with the requirements of the EC Framework, and Ofcom is subject to the Directives directly. The meaning of "price control" in the Access Directive" is very broad. Can I ask you to look at the Access Directive again, bundle E1, tab 7, it starts at p.112 and recital 20 is on p.115:

> "20 Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing."

So that is why we say the concept of price control, as used in the Access Directive, is a very broad one. Article 8(3), p.119:

> "Without prejudice to:
>
> -- the provisions of Articles 5(1), 5(2) and 6…"

And please note it does not say Article 5(4). Then the two indents, and then:

> "… national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2."

i.e. not designated as having SMP. Article 13 is, of course, price control. So what is quite clear is Article 8(3) is saying without prejudice to the provisions of Articles 5(1), 5(2) and 6, and some other things that are not relevant, national regulatory authorities shall not impose price control under Article 13 unless an undertaking has been designated as having SMP. So we say that the power of an NRA to curb a desired price increase can be used only (1) where an operator has been designated as having SMP, or (2), in conjunction with an obligation imposed on that undertaking pursuant to Article 5(1), or Article 5(2). Moreover, the Article 5(1) power is to be used only exceptionally for a non-SMP operator. The Article 5(1) power is the power for the authority to impose obligations that control Access to end users including interconnection.

If one goes to the Guidelines of the Commission at tab 11 of this bundle, and in those Guidelines at p.207, para.124, under the heading of "Imposition of certain specific regulatory obligations on non-SMP operators":

> "124 the preceding parts of this section set out the procedures whereby certain specific obligations may be imposed on SMP undertakings, under Articles 7 and 8 of the access Directive and Article 16-19 of the universal service Directive. Exceptionally, similar obligations may be imposed on operators other than those that have been designated as having SMP in the following cases listed in Article 8(3) of the Access Directive."

There you have as the first indent the Article 5(1) Article 5(2) case. So it can be done, but that is an exceptional route. The point here is that no such Article 5(1) or Article 5(2) obligation has been imposed on H3G. So we say Article 5(4) does not permit the regulator to impose an obligation on H3G that restrains its pricing unless it has SMP, it has been designated as having SMP, but if it has not Article 5(4) and dispute resolution does not enable that to happen.

PROFESSOR STONEMAN: Mr. Roth, I want to go back a bit, before you went into the Framework Directive, you stated that in determining SMP one should ignore regulation of the undertaking in question, I think that was what you were suggesting. What about the regulation of the undertakings with whom it negotiates?

MR. ROTH: No, you do not ignore that.

PROFESSOR STONEMAN: Right, so if BT already has an SMP designation that affects its negotiating behaviour with respect to H3G, in determining the SMP of H3G you assume that the SMP determination on BT exists?

MR. ROTH: Absolutely.

THE CHAIRMAN: And it is fundamental to your case on this that there is one crucial piece of regulation which is fundamental to your case on this, which is the end-to-end connectivity, which is itself a regulated ----

MR. ROTH: Indeed, and following that through, I entirely accept that, suppose that BT was not subject to end-to-end connectivity obligation one can well see – I do not make a formal admission but I think it is very likely that BT would have countervailing buyer power in dealing with H3G.

MR. SCOTT: BT had proposed, as I understand it, the Cellnet rate and faced with no possibility of interconnection unless they accepted that, it is hard to envisage a situation in which H3G would not have accepted the Cellnet rate.

MR. ROTH: Yes. Take away end-to-end, which as the chairman says is fundamental to our case and reflected in all the documents, the decision and previous consultations.

THE CHAIRMAN: Can we just pursue that for the moment? It is part of your case, as we have just established, and I understand it, that that crucial piece of regulation is part of the picture.

MR. ROTH: Yes.

THE CHAIRMAN: How far does that go because another crucial part of the regulatory context is not merely the interconnection obligation, it is the availability of a dispute resolution mechanism, should the terms not be agreed.

MR. ROTH: Yes.

THE CHAIRMAN: So BT is not just under an obligation to connection willy-nilly on any terms, if it has a problem with the pricing or the conditions then, ultimately, your clients regulate that, so if it is being asked to pay what it thinks to be an extortionate sum as the price of connecting it could say no – this is the theory at any rate – and your clients would regulate that. That, I think, is theoretically how it would work, is it not?

MR. ROTH: The difficulty is this, and this is where the circularity can come in. The way in which my clients would regulate that is crucially dependent on whether H3G has been designated as having SMP or not.

THE CHAIRMAN: Never mind about that because that sort of begs the question. This may all come back to the same point as to where one is based in the circle. Let us just for the moment take the position as it is. If one said that is the regulatory element – because one is trying to describe the regulatory obligation which BT was under under the interconnect obligation – it would not be that they are under an obligation to produce end-to-end connection full stop. That would not be an accurate way of describing it because they do not have to accept the terms that are imposed on them by the people with whom they are trying to connect. At the end of the day there is a mechanism for resolving any failure to agree, if necessary. That is a matter of regulatory fact, is it not?

MR. ROTH: It is.

THE CHAIRMAN: Do you say that in fact the regulatory element that one takes into account stops with the existence of the interconnect obligation, or do you say one actually takes the whole picture into account which includes the possibility of dispute resolution?

MR. ROTH: It can include the possibility of dispute resolution but it cannot include, because of the circularity, what Ofcom would do upon a dispute being referred. I think it is easiest if one takes it looking at the clear alternative. If BT did not have end-to-end connectivity, or indeed if – perhaps looking five or six years ahead – end-to-end connectivity could be achieved by BT without actually purchasing termination services from H3G because through some technological advance, some new kind of SIM card or whatever, BT could get a call to the end user, the subscriber, who may be a subscriber for H3G, without having to use the termination services of H3G. In those circumstances BT probably would have countervailing buyer power and they might fail to agree a price, but BT could say yes, we have to achieve end-to-end connectivity but we do not have to do it through you, we can do it another way, so they would be in a quite different bargaining position. If then they cannot agree on a price and it is referred to Ofcom under the dispute resolution procedure, going through the various hoops you have seen in the statute, which is first Ofcom sending the parties to ADR ---

THE CHAIRMAN: That is not the statute.

MR. ROTH: Is it not? Perhaps it is not.

THE CHAIRMAN: It is in something else, it is Ofcom's guidelines and/or set out in Mr Rutnam's statement. It would not be statutory.

MR. ROTH: I was thinking of section 186(3) about alternative means available for resolving disputes, that they can do that first. So there are various hoops that one may go through. Then Ofcom can say "Right, this is a situation where H3G does not have SMP, we will seek to set a price." If in fact it is a situation where BT's end-to-end connectivity obligation means they must purchase termination services from H3G – the current situation – and therefore H3G nonetheless does not have SMP, that means this is an effectively competitive market because that is what no SMP means, it is an effectively competitive market. If it is an effectively competitive market, and therefore the market position should set a competitive price, Ofcom cannot be in a situation of seeking to place a ceiling upon the price that someone who does not have SMP is seeking to charge, because that would be capping the price of H3G in circumstances that do not fall within Article 8(3) of the Directive.

THE CHAIRMAN: With respect, I think that argument misses out a second source of Ofcom's powers or obligations or whatever it is. As I understand it – and correct me if I am wrong - it has at least two functions in this respect. One is to spot that people have got SMP and come in and put price control in, say you are charging too much, or we want transparency and so on and so forth – what has happened in this case. The other – but if you are constructing a network it would logically come first – is their function of producing interconnections. If one looks at the Act and the various regulatory stuff, as I understand it, various people – including probably the networks themselves – are under obligations to provide connectivity to each other in various ways. One of Ofcom's functions is to sort out – I put it colloquially for the moment – problems and disputes that exist at that level, so in other words Network A is trying to connect to Network B and they are negotiating, and they are not getting anywhere on price, either Network A or B (or both) can come to Ofcom and say "Not fair, we cannot agree. We want to connect, we are each under an obligation to connect with each other, we cannot agree on the price, please fix it for us." I cannot put my finger on the provision at the moment, but I am confident it is there, both in the Communications Act and in one or more of the directives – that is one of its functions. It is Article 5 of the Access Directive, that is its other function as I understand it. That function, as I understand it, does not require any designation of SMP, it is the way that Ofcom says "Connect in this way", just as if there was a technical dispute, which is another of Ofcom's remits, they would resolve that as well. So they resolve all these things, but all that happens without SMP.

I come back to my question to you, and it is this. You accept that you take into account the end-to-end connectivity obligation of BT and that regulatory element, you say, is in play.

MR. ROTH: Yes.

THE CHAIRMAN: Putting my question a different way – I do not think it is a different question but if it is I will ask it anyway – is why do you stop there? If it is the case that BT's regulatory obligation does not stop there, it does not have to pay any price – if one is just looking at access dispute resolution – why does one not take into account the fact that Ofcom has a dispute resolution function there which seems to fall short of having to find SMP? Putting it in context, suppose that during the negotiation in this case between 3 and BT the parties had fallen out and they simply had not managed to come to a price, as I understand it BT would have had the power to come in and fix the price. Again, as I understand it, and you may tell me I am wrong, it would have been able to do so and would probably have been obliged to do so if ADR did not work, even in the absence of finding that one or other of them had SMP because it is their job to solve interconnection disputes. If that is right, then that element of sorting interconnection disputes is part of the regulatory framework, if you like, which goes along with the interconnection obligation of BT.

MR. ROTH: In that situation it could only have been done by imposing an Article 5(1) obligation.

THE CHAIRMAN: Quite.

MR. ROTH: A specific decision imposing an Article 5(1) obligation on H3G.

THE CHAIRMAN: Yes, or on BT, whichever one was being difficult – or both actually. Never mind.

MR. ROTH: And I am saying you do not look at the obligations that are imposed on the party who's SMP or not one is trying to determine.

THE CHAIRMAN: In that case it may matter. If Bt are trying to interconnect with '3' and '3' are saying they want £5.00 a minute and BT are saying, "That is outrageous, we are not paying that", and '3' say "We are not moving", then basically the parties come to Ofcom and they say "Please impose a price" and it does not matter whether you say it is on one or other. '3' would say "Please impose a £5.00 obligation price on BT" so there is an obligation not on '3', that is on BT.

I come back to the question – and perhaps I am not making myself clear. It seems to me to be inaccurate to describe the regulatory obligation on BT in relation to interconnection as being only the fact of producing an interconnection, because that is ultimately linked with the fact that Ofcom will resolve disputes about the terms on which they do it.

MR. ROTH: The difficulty is that Ofcom, in resolving that dispute, if it is a competitive market cannot seek to curb H3G's ability to charge the price it is asking for. If it is a competitive market, by reason of the operation of the directive Ofcom would have to resolve the dispute by accepting H3G's price.

THE CHAIRMAN: Why?

MR. ROTH: Because otherwise it would be curbing H3G's price which is price control.

THE CHAIRMAN: No, it is not, on this analysis it is determining an interconnection dispute. Curbing the price is when '3' has a price and it says you have got SMP, it is too much and so on – as I understand it. This is the other function, which is working out interconnection disputes. They cannot agree in the first place what should be paid, just as we can perhaps imagine they could not agree on the widgets that were necessary to connect one bit to the other. It is determining that, it is not necessarily curbing prices because it is actually determining the conditions of access, is it not?

MR. ROTH: It is determining a dispute regarding price as opposed to politics. It is determining a dispute regarding price by saying "The price that H3G is demanding is not the price that H3G is entitled to be paid." That is what they are doing. If you are saying to a seller the price that you wish to charge for the supply of your service is not the price that you can charge, it is something less, that is price control. It does not matter whether they have already sold it or they are offering to sell it.

MR. SCOTT: Mr. Roth, if we faced a situation in which BT gave notice to H3G under clause 19 that they believed that some aspect of the agreement had become unreasonable, then as I understand it if that dispute were to go to Ofcom, Ofcom's powers would be defined by section 190 of the Communications Act which is in bundle E1 at page 465.

MR. ROTH: You are just a little ahead of me, I am looking for clause 19.

MR. SCOTT: Clause 19 is the reasonableness one.

MR. ROTH: Clause 19 is the amendment of the agreement. That is bundle A1, tab 1, page 21. 19.1.7 I think.

MR. SCOTT: That is right. We have the reasonableness cause for review and then in 19.5, "On service of review notice, the Parties shall forthwith negotiate in good faith the matters to be resolved with a view to agreeing the relevant amendments to this Agreement."

MR. ROTH: Yes.

MR. SCOTT: So if we were in a situation where those good faith negotiations were in a state of collapse, and we then went to Ofcom, am I right in saying that Ofcom's powers in determining a dispute are governed by section 190, which is found on page 465 of bundle E1?

MR. ROTH: Yes, that is right.

MR. SCOTT: I accept that this has to be read in the light of the European framework, but do I understand you to be saying that when we read section 190 (2)(b) in the light of the European framework, pricing is included from the terms and conditions of transactions between the parties to the dispute?

MR. ROTH: Only if they have not got SMP, Article 8(3).

MR. SCOTT: So what you are saying is that we have to read s.190 in the light of that?

MR. ROTH: Yes. And so if they have SMP we can then say "You cannot charge £5, you can only charge £2.50", but if they have not got SMP, we would be acting incompatibly with Article 8(3) by seeking to curb a price by doing so.

MR. SCOTT: And that drives you back to 2(a) where you make a declaration setting out the rights and obligations of the parties to the dispute, but you are not able to go further than that.

MR. ROTH: Would you give me one moment?

MR. SCOTT: Yes, of course.

MR. ROTH: (After a pause) My instructions are that is quite possibly exactly what would happen. That is why, I am sure, in the German veto decision, even though under German law, not the EC Framework, there was some price control of the German companies, imposed by reason of German law which prevented them increasing price, the Commission said that that does not mean you cannot take account of that in concluding therefore that they do not have SMP.

THE CHAIRMAN: To take Mr. Scott's provision and translate it into the context of s.185 of the Act, which we find at p.461, this relates to a resolution of the dispute between communications' providers, and provides that Ofcom sorts it out and then in subparagraph 8: "For the purposes of this section the disputes that relate to the provision of network access, which is what they sort out, include disputes as to the terms or conditions on which it is, or may be provided in a particular case."

That is what it says, and you would say in brackets "(except as to price unless there is SMP)". That is how you would say it would work?

MR. ROTH: Probably not quite, because I think that would include price. It is a question of how we can then resolve the dispute – it is probably how it would work – namely, one can only resolve the dispute in accordance with the EC Regulatory Framework, and the only way we can resolve it in accordance with the EC Regulatory Framework if the undertaking does not have SMP is not imposing control on their price, and that is why we say we will just have to accept that price in that situation.

THE CHAIRMAN: So I am right that in your way, if you will allow me to say so, in a more long-winded way which gives the reasons for it, but that is the effect of what you say, they can decide everything except price unless they make an SMP determination first?

MR. ROTH: Effectively, yes, and that is indeed reflected in the Decision document – perhaps I can show you that?

THE CHAIRMAN: It may be that that reflects Ofcom's view as to that, it does not prove it is right?

MR. ROTH: No, no, clearly not. All I was seeking to say was that that this is not some argument I have come up with today, it is there ----

THE CHAIRMAN: It would be none the worse if that were true, Mr. Roth! (Laughter)

MR. ROTH: I am relieved to hear it. But it is thought out, it has been Oftel's understanding of how the Framework and access to it operates all along. I would say this, this is a change from the old regime, this restriction, the old interconnection Directive regime, which we do not have to look at thankfully, did not have this circumscription in it.

PROFESSOR STONEMAN: Can I go back to summarise two points you are making. The first one is that in the absence of a finding of SMP by definition H3G cannot be demanding a price that is above the competitive price, because it can only be asking for a supra competitive price if it has SMP?

MR. ROTH: If I can slightly qualify that, H3G cannot ransom, as it were, cannot insist on BT paying a supra competitive price – they can ask for it, and BT would say "no", and they bargain it down. But they cannot achieve sale at a supra competitive price.

PROFESSOR STONEMAN: In open negotiation without intervention from Ofcom.

MR. ROTH: Because it is by definition a competitive market.

PROFESSOR STONEMAN: Right, so if it is a competitive market any negotiation that takes place between H3G and BT, if there is no SMP will yield a price that is not supra competitive?

MR. ROTH: Yes.

PROFESSOR STONEMAN: Right, so in the absence of a finding of SMP any argument between H3G as to the price, you must go with the H3G price because we know there is no SMP, and therefore it is a competitive price?

MR. ROTH: Yes.

PROFESSOR STONEMAN: So that is the first part of this. The second part is that should it be the case that the rest of the world does not believe this, and particularly the two parties do not believe this, they come to you to resolve it, what you are saying is you cannot resolve it on the price, you cannot sort out the price for them, and impose it on H3G unless H3G has a finding of SMP imposed upon it. So in the absence of a finding of SMP on H3G you cannot impose a price on H3G?

MR. ROTH: Yes, exactly, it is a very short point really. I think the Chairman said I was rather "long-winded".

THE CHAIRMAN: No, no, just your encapsulation.

MR. ROTH: Against that background I can then come to deal briefly with the BT H3G Agreement, and Miss Laurent. We say first of all this is a matte of general principle, a private contract will not normally displace dominance. You cannot, as it were, contract out of dominance and come back into dominance when a contract is set aside, and we dealt with this in our supplementary skeleton in answer to the Tribunal's questions. I think I am told by your Referendaire you have a supplementary bundle of skeletons, it is at tab 7. We dealt with this on p.5 within the document, which is paras.15 and 16. We say:

> "The European Court of Justice has not considered the specific issue, the fact of contractual mandatory arbitration within the context of Article 82. However, support for Ofcom's position in the present case is found in the approach of the European Commission in the field of merger control which also involves ex ante regulation.
> 16 Under the merger regulation the Commission must act to prevent mergers which significantly impede effective competition by the creation of a dominant position the Common Market."

and we refer to the case of *Total Fina Elf* and for your marginal note that is at bundle H4, tab 3.

> "The parties argued that the contractual agreement ensured third party access for the provision of aviation fuels at the relevant airports. The Commission dismissed the parties' argument that this meant that the transaction would not create a dominant position, stating that the contracts do not change the fact that Total Fina Elf would acquire a dominant position at the two airports as a result of the merger. It is the creation in itself of such a position that the merger regulation is intended to prevent. The application of the regulation is not affected by the argument developed by the notifying party that the clauses concerned may limit the capacity of the new entity to abuse its dominant position."

Then over the page we refer to *Napp*, and the passages that I read to you regarding the price control under the PPRS, and again that the PPRS as a regulatory scheme was said to prevent Napp from charging an excessive price, and that also is an independent regulatory regime. We said that that cannot go to the issue of dominance.

In any case, this contract is not an everlasting contract. It may not be a fixed term contract, but it has a 24 months' notice period. The H3G seek to deal with that in their skeleton argument, which is in this same bundle, I think at tab 3, para.77 which is p.28 within the document.

> "The BT Interconnection Agreement was signed on 13th August 2001. It may be terminated by either party pursuant to clause 2.3 on giving not less than 24 months' notice, but otherwise is indeterminate. Hence, as of the date of the Decision H3G

could not have served notice to terminate and avoided the agreement during the period of the Decision, 18-24 months."

That is technically correct. They could have served notice, clearly. They could have served notice the following week, but the agreement would only end 24 months later. But with respect we say that is a wholly artificial approach, because what would happen if H3G served notice, given the end-to-end connectivity and given, indeed, H3G's desire that BT should terminate calls originating on the BT network, it would obviously lead to renegotiation. People would not wait 24 months and then at midnight the next day try and draft a new agreement, and no doubt it is the 24 months notice period to allow a time for renegotiation. It is a negotiation that the bargaining power of the parties is all important. H3G would have its significant market power in the negotiation of the new price for the new agreement, and that is the point made in the Decision at para.3.32 when it says that originally back in August 2001 there may or may not have been SMP, any future negotiation H3G will be able to exercise significant market power.

Furthermore, the agreement only constrains and deals with the price level for the supply of call termination to BT. It does not say anything about price discrimination, that is to say the ability of H3G to charge a different price from the price it is charging BT to anyone else. There is not, as there is in some contracts, a clause saying "If you charge anyone a lower price, we are entitled to that lower price. You find that in some contracts, but not in this contract.

As regards the other independent 2G operators, we can see H3G is not going to be able to charge them a higher price than BT because they will transit the calls through BT under transit arrangements and BT, having SMP in the transit market, is subject to an obligation as an SMP transit operator to take those transit calls, and we have to take that into account in the assessment.

But that is not the only way price discrimination could arise, it could arise, for example, if Hutchison were itself to buy or set up an independent 2G operator and it sought to give a more favourable price to its own sister company. That would be price discrimination and that is not covered in the agreement. That is a point made in our amended defence at paragraph 47.

That takes me to Miss Laurent, whose witness statement is in bundle D1 at tab 4.

MR. SCOTT: I think, Mr. Roth, in passing, because of the licensing requirement for 2G, you may be better considering that they set up a fixed network operator than a mobile network operator.

MR. ROTH: My clients tell me that is absolutely right, yes, thank you. Indeed, from the news this morning regarding Vodafone, a fixed operator is probably more attractive.

Miss Laurent talks in paragraph 4 of her agreement – and I am well aware a lot of this is business secrets – about the possibility of terminating the BT Agreement being contemplated during the period of her employment. This is at page 61, bundle D1, tab 4. She says:

"The possibility of terminating the BT Agreement was not seriously contemplated during the period of my employment …"

and she gives various reasons. Her employment, as we see from paragraph 1, ended on 31 December 2003. Similarly, in paragraph 9 of her statement she talks about the service of a Charge Change Notice (a clause 13 notice) under the Agreement for the reasons "already referred to above."

"Whilst I was regulatory director, H3G did not consider serving a Charge Change Notice."

Again, that ended on 31 December 2003. With respect, we are not concerned with any of that. Ofcom was deciding in June 2004, on a forward look over the next two years, in an industry that as everyone knows, is very fast-changing. One just sees the figures for growth in H3G's subscriber base over the past 12 months that Mr. Green handed up to the Tribunal, a dramatic rate of change in this industry. So none of what Miss Laurent says is directly relevant to the exercise Ofcom was engaged in anyway, and in any event what does she say? Speaking in general terms about details that are business secrets, she is talking about commercial reasons and considerations why H3G did not at that time seek to terminate the agreement or seek a higher price through a contractual mechanism. There are all kinds of commercial and strategic reasons and considerations which act as a disincentive to a dominant company to charge a supra-competitive price. That does not mean that the company is not dominant; most dominant companies do not charge excessive prices and cases of abuse by excessive pricing are in fact extremely rare. The great majority of abuse cases under Article 82 are not excessive price cases. I think in your bundle H1 it is only *United Brands*, none of the others are excessive price cases.

Why do they not seek to charge excessive prices, these companies concerned for their shareholders' interests? Well, it may be the threat of Article 82, it may be desire to maintain good relations with their customers for all sorts of other reasons that bring other benefits, it may be adverse consumer reaction, it may be concern about goodwill – none of that means that they are not dominant.

Yes, we were offered the opportunity to cross-examine Miss Laurent and have her brought over from Germany for cross-examination – H3G said she would be available – but we accept that this is a true account of H3G's internal thinking at the time of her employment, we are not quarrelling with that that and that that is how they thought up to 31 December 2003, we say it is simply not relevant to the issues before the Tribunal.

So I come to my final short topic, which is consistency in the EC. One of the principal purposes of the new EC regime, the regime that this case is concerned with that took effect in July 2003 with the framework directive and the associated directives, one of the principal purposes is harmonisation across the European Union. Could I ask you for just a moment to take bundle H2, tab 14, starting at page 267. This is the T-Mobile judicial review before Moses J. It concerned the old regime, but the judge was taken to the new regime, and he said at paragraph 65, page 286 in the bundle,

> "The central purpose of the new regime was to achieve harmonisation. The old system of licensing is repealed and a new system of general authorisation takes its place. Recital 5 of the Framework Directive refers to all transmission networks and services being covered by a single regulatory framework. Recital 16 requires NRAs to have a harmonised set of objectives and principles. It requires co-ordination, Recital 36 speaks of the objective of consistent application in all member states. Recital 37 requires co-operation between the NRAs and the European Commission in a transparent manner."

With respect, we adopt all of that paragraph.

One sees this specifically from the Framework Directive, Article 7, that is Bundle E1 at tab 9, page 148. Paragraph 2:

> "National regulatory authorities shall contribute to the development of the internal market by co-operating with each other and with the Commission in a transparent manner to ensure the consistent application in all member states of the provision of this directive and the specific directives. To this end, they shall, in particular, seek to agree on the types of instruments and remedies …"

Paragraph 3,

> "In addition to the consultation referred to in Article 6, where an NRA intends to take a measure which falls within the scope … [and that includes SMP] it shall at the same time make the draft measure accessible to the Commission and the NRAs in other member states, together with the reasoning on which the measure is based, in accordance with Article 5(3) and inform the Commission and other NRAs thereof.
> 4. Where an intended measure covered by paragraph 3 aims at … (b) deciding whether or not to designate an undertaking as having either individually or jointly

> with others SMP … and would affect trade between member states and the Commission has indicated to the NRA that it considers the draft measure would create a barrier to the single market, or if it has serious doubts as to its compatibility with Community law and in particular the objectives referred to in Article 8, then the draft measure shall not be adopted for a further two months. This period may not be extended. Within this period the Commission may, in accordance with the procedure referred to in Article 22(2) take a decision requiring the national regulatory authority concerned to withdraw the draft measure. This decision shall be accompanied by a detailed and objective analysis of why the Commission considers the draft measure should not be adopted together with specific proposals for amending its draft measure.
>
> 5. The national regulatory authority shall take the utmost account of comments of other national regulatory authorities and the Commission may, except in cases covered by paragraph 4, adopt the resulting draft measure."

That is why Article 7(4) is referred to as the Commission's veto power.

MR. SCOTT: Mr. Roth, the institutions of the European Union have emphasised the need for harmonisation. This European framework provides structural measures for harmonisation at the regulatory level, they are set out and you have averted to them. What the European framework does not do is to provide an equivalent structural mechanism for harmonisation at the appellate level, so that although we are operating in as it were a European mode here, we do not have the equivalent of consultation with the other 25 member states, nor with Luxembourg.

Mr. Green was anxious that we should understand the hierarchy of material within the EU and one of the questions that may therefore arise is the relationship between this Tribunal and documents that emanate from the Commission. I wondered whether you would wish to comment on that particular area, bearing in mind that there is the possibility that whatever we decide, were we to remit it to you, there is a possibility of that going back into consultation and therefore back to the Commission, with the Commission presumably having the right to exercise a power of veto which, were it not to suit Mr. Green's client, could then presumably result in an appeal to the CFI. So we need to think through the hierarchy, both in terms of the documentation that emanates from Brussels and the other possibilities that are likely to follow.

MR. ROTH: Absolutely. I think as your question developed it became clear, if I may most respectfully say so, you have thought it through because I think it is exactly, in my respectful submission, as you outlined. Mr. Green put his submissions as the amended Notice of Appeal is drafted and what is sought is a setting aside of the decision and a remission to Ofcom – indeed, many of his points were that they should have done more work on this and that and so on. If Ofcom, whatever fresh decision they propose to take, whether it was again SMP or no SMP, it would have to be notified, the Article 7 procedure would have to be gone through. It could be subject to a Commission veto, as the German regulatory authority was. It would then be the Commission's veto decision which would govern, and that decision could be challenged in the Court of First Instance in Luxembourg and not in this Tribunal. That would be the route that would be taken, it seems to me that that is the way it has to work. Does that answer the point?

MR. SCOTT: That addresses the point. It seemed to me that we needed to have your view on that as well as Mr. Green's, and he may want to come back on that later.

MR. ROTH: Of course, Ofcom did in this case, as you know, go through the Article 7 procedure. No one has taken you to it and I am not going to, but you have in bundle A2 at tab 5 the European Commission observations on the December statement, and of course they did not suggest that Ofcom (or then Oftel) was going down the wrong track by proposing to designate each MNO as having SMP.

You see from the German veto decision that the finding of SMP for each operator in the call termination market (a) that that market definition and (b) that the finding that each MNO having 100% market share has SMP, is the position of various other NRAs. The German authority was very much out of line with others in Europe; there it was fixed of course, not mobile, but the principle is the same – we see that from footnote 5 in the German veto decision that I think you kindly looked at this morning.

Indeed, the arguments that are here urged on the Tribunal and indeed were similarly urged by H3G in its observations to the Commission in the German case, would be contrary to the decision reached by the Commission under Article 7(4) in the German case. If one looked at that at tab 19 of bundle F1, there in paragraph 11 is the reference to other national regulatory authorities, the German authority,

> "RegTP, recognises in its notification that its position deviates from the position taken by other NRAs that have analysed Market 9, the termination of fixed voice calls so far."

Then footnote 5 is Oftel, Portugal, Ireland, Austria and then Finland, Sweden, Hungary and Denmark in their notifications were proposing to come to the same conclusion.

> "Generally NRAs indeed consider the incumbent's buyer power vis a vis the ANOs is limited by the incumbent's obligation to interconnect with the ANOs and by the fact

> that its own termination tariffs are regulated. The Commission has not opposed these arguments."

They then summarise the strict Greenfield and the modified Greenfield approach, and then turn to their assessments. I know you have read this and I take it very quickly. In paragraph 20

> "The Commission considers that RegTP has not provided convincing evidence, but despite 100 per cent. market share each of the 53 ANOs in Germany would not have SMP on the market for call termination on the individual networks. This view is based on the following consideration …"

And there is the strict Greenfield, and I have already read to you I think para.23, the circularity argument, and the conclusion there at para.30:

> "Under the present regulatory framework and prevailing economic circumstance of Germany, the Commission considers therefore not correct to assess the market power of each of the ANOs as if Deutsche Telecom AG would not, through regulation or otherwise be obliged to interconnect with each of them. RegTP has not provided evidence of Deutsche Telecom in having effectively used buyer power in the face of these regulatory and economic constraints, on the contrary it seems Deutsche Telecom continues to buy termination services voluntarily even at rates it does not agree with and that at least in part continues to challenge."

Then there is the modified Greenfield approach. In para.33 the Commission acknowledges that

> "…call termination on individual networks – does not automatically mean that every network operator has significant market power. This depends on the degree of any countervailing buyer power and other factors potentially limiting that market power. While small networks will normally face greater buyer power than large networks, the regulatory requirements referred to in para.26 above will normally redress this imbalance in market power. However, this would not endorse any attempt by a small ANO to set excessive termination rates. It may still be easier for a large network than for a small network to initiate a price raise, but this risk is essentially removed if the large network operator's termination rates are regulated as is the case for Deutsche Telecom."

That is the point I mentioned which I have to say Ofcom did not take in the Decision, it did not perhaps think of, namely, that there might be some bargaining power if in the converse case the call going the other way BT were free to set its termination rates because it could have used that as a bargaining power in negotiating the termination rates charged by H3G, and they are making the point that Deutsche Telecom could not do that because its termination rates are regulated because it has SMP on the reverse direction, exactly the same is true of BT.

> "Contrary to the other NRAs that have notified Market 9 so far RegTP asserts Deutsche Telecom's buyer power limits the ability of each ANO to behave independently of its customers and competitors. RegTP does however not present concrete evidence Deutsche Telecom has effectively exercised such buyer power, in fact, it appears to have constrained the individual ANOs call termination rates in the past is not the countervailing buyer power on the part of Deutsche Telecom, but the regulatory regime under which RegTP has introduced de facto ex ante price regulation for ANOs termination rates. Presently under the German law it seems that the interconnection charges, that is also called termination rates, of the non-SMP operator may be price regulated in case of failure of private interconnection negotiations, and without the need for any prior SMP finding."

A bit like dispute resolution.

> "Against this regulatory background, and following applications by at least 37 ANOs, RegTP has since mid-September 2004 ruled that each requesting ANO is allowed to charge 25 per cent. more for the call termination on its respective network than Deutsche Telecom. This implies that call termination rates of a large proportion of ANOs are constrained by a regulatory ceiling rather than Deutsche Telecom exercising countervailing buyer power. Such a regulatory price ceiling preventing ANOs from unilaterally raising their call termination rates appears not …"

Pausing there, if one were to ignore it

"… to mean they have not got the ability to charge excessive rates. On the contrary to support the notion of ANOs attempting to set call termination rates independently of their customers and competitors, and might indicate that the designation of SMP status not only with regard to Deutsche Telecom, but also for these alternative operators, would be warranted."

That is why we say this supports our approach as to how one analyses the role of some extraneous to SMP regulatory intervention.

PROFESSOR STONEMAN: Mr. Roth, shall we just turn the page on that, from 735 to 736, you put in the aside that this was like "dispute resolution".

> "Under German law a non-SMP operator may be price regulated in the case of failure of private interconnection negotiations and without the need for any prior MSP finding."

And you said "Just like dispute resolution". I thought earlier you told me that without an SMP finding you could not impose a price on H3G, so it is quite unlike dispute resolution?

MR. ROTH: You are absolutely right, sir, and I was conflating two different points. You are absolutely right, I am sorry. Can I explain it?

PROFESSOR STONEMAN: Yes.

MR. ROTH: I made two submissions on dispute resolution. I said first, you ignore any kind of regulatory constraint on the undertaking whose SMP status or not is being considered. You do not rely on the fact that there is some independent non-SMP dependent regulatory constraint on that undertaking to say then it has not got SMP. I then said in the alternative, if you do take it into account, in fact, the dispute resolution cannot, because of the EC framework, be used to cap the price. Those are two separate points. This supports, I say, the first point, the first way of putting it, because it says that the German telecoms' regulator ability to cap a price independent of SMP is not properly to be relied upon in saying that the ANO has not got SMP because it cannot set its own price. It supports the first point, it is inconsistent, as you point out, with my second point. On that I ask you to look at the comment of the Commission on the German law, which you find back on p.723 under tab 18, at the top of the page, under the heading which starts on p.722: "Why has the Commission vetoed RegTP's draft measures?" and you see:

> "Paradoxically, RegTP has in practice introduced price regulation for a number of ANOs through dispute resolution procedures since 2004 and intends to maintain this price regulation despite its finding that ANOs do not have significant market power. In the Commission's view such an approach is incompatible with the regulatory framework."

And Ofcom shares the Commission's view.

PROFESSOR STONEMAN: Thank you.

MR. ROTH: The Commission's veto Decision shows that Ofcom's decision is in line with the decision of other Member States' regulatory authorities. It shows conversely that what is being urged by H3G is a decision that would be out of line with those of other regulatory authorities, and what is being urged by H3G is indeed inconsistent with the reasoning in this recent Commission decision.

Sir, Mr. Green opened his submissions in this case, what now seems a long time ago, with a rhetorical flourish claiming that the Decision of Ofcom commits every sin known to Community law. Well, members of the Tribunal, if indeed my clients do sin, we say we do so in very good regulatory company, and in reality the position of H3G is more like that of the old lady who goes to see the changing of the guard in Buckingham Palace when her grandson is in the Coldstream Guards and as the Guards march out of the Palace gates and she looks at them and she exclaims "My goodness, they are all out of step except my Johnny".

Subject to any questions, which I know you may have, those are our submissions.

MR. SCOTT: Mr. Roth, thank you, three, I hope small points. The first is on p.724 of the document to which you have just referred us, in which the Commission has sought to address Mr. Green's concern about investment, and where they say, in the middle of the paragraph at the bottom:

> "*Ex ante* regulation, as opposed to *ad hoc* intervention, creates legal certainty and transparency. Both are necessary to foster competition and investment."

In other words, it is the belief of the Commission that the policy requirements of Article 8(2)(c) are addressed by ex ante regulation rather better than they would be addressed by ad hoc intervention.

The next point is really an information point. Mr. Green has suggested to us that the significance of this Appeal is that it is a pathfinding appeal in relation to these market analyses. We understand that a large quantity of other decisions have been taken not simply by the United Kingdom NRA but by other NRAs, and that some of those decisions either have been appealed or may still be open to appeal. It would be helpful to the Tribunal to have any information that your client has that may confirm or update the view given to us by Mr. Green.

The third point is this, and it goes to Mr. Green's points about incentive in H3G. There are two rather different situations that may arise in relation to pricing. The first situation which may arise in relation to pricing arises when there is regulation and, in that situation, the burden is placed by Article 13(3) upon the regulated party. The second situation, by contrast, is what happens in the case of an allegation of abuse, under Article 82, whereas we understand it the burden falls either on the National Competition Authority or, in these days of private enforcement, on a complainant, to establish the fact that pricing is abusive. My questions, and I appreciate from your point of view this is not a relevant consideration, but this is a relevant consideration from Mr. Green's point of view, whether you would (a) seek to confirm your view of that situation and whether you would wish to reflect on whether, therefore, the Article 82 threat constitutes as much of a threat as Mr. Green is suggesting in relation to removing the consequences of an SMP finding in relation to price regulation. That is a slightly convoluted way round, but I think you will see the point being made.

MR. ROTH: Thank you. Can I just take instructions on one of those points?

THE CHAIRMAN: Of course. Mr. Roth, we are going to take a short break so why not take your instructions while we take our break and we will sit at quarter to four.

(Short break).

MR. ROTH: In reply to Mr. Scott's three questions, first of all, a dampener on investment, you helpfully, sir, drew attention to that passage. It is never the SMP designation as such that can be a dampener on investment, it can only be through actual remedies that constrain what the company can do, and this goes to the appropriateness of the remedy – whether the remedy will in fact dampen investment. Clearly, the remedy in the present case cannot possibly have that effect.

Your second question about appeals in other cases, can I draw attention as a first answer to that to a document not opened which is in bundle F1 at tab 17, page 694? This is, as you see from the covering e-mail, Hutchison 3G's response to the Commission's serious doubts letter in the German case.

MR. SCOTT: Because it was not agreed in terms of the bundle it was removed from the Tribunal's papers.

MR. ROTH: Is there any impediment to my referring to it, I hope someone will tell me if there is.

THE CHAIRMAN: I suspect there was an evidential point, it looked like an attempt to get in – it might have been thought by somebody to be an attempt to get in some expert evidence without the slightly tedious step of calling the expert.

MR. ROTH: Oh, because of the attachment, yes. Well you will be pleased to know that I am not going to address you on p.711 within that document, and the profit formula there set out. On p.695 at the top you will see there from the first paragraph, the first sentence that the SMP designations and call termination on mobiles, are being appealed on precisely this issue by the UK, Sweden, Austria and Ireland, those are all H3G appeals. We understand the Irish appeal is to be heard shortly. None of them, so far as we are aware, and obviously Mr. Green's clients, will know better, have yet been decided. I have just been handed a helpful piece of information which is not in the bundle, there is in Finland by 3 mobile companies on SMP designation and remedies, and in Sweden not only are H3G appealing but Vodafone and three other companies are also appealing.

MR. SCOTT: Thank you, we were in the awkward position that Tribunal members had all read this but then the document was withdrawn, and so we could not pay attention to it without asking the question.

MR. ROTH: Yes, so that is my understanding of the up to date position. On your third question regarding pricing, with respect I agree, the position is this – save only for one perhaps slight gloss, where there is SMP designation and then the appropriate remedy is price control, you will recall from recital 20 to the Access Directive, p.115 there is a range of price control from the least intensive within price control itself as being relatively light, such as an obligation that prices are reasonable, as laid down in Directive 97/33 or much heavier, such as an obligation that prices are cost oriented.

Article 13(3) to which you drew attention is saying if there is that particular form of price control, namely, that prices are cost oriented the burden is then on the regulated company to supply the information showing that it has complied with that obligation. Article 82 is much more general and, indeed, as you said, the burden is then on the regulator or private party to show that there has been an abuse, and to show that there has been excessive pricing which is very much at large. So I quite accept that if there were to be an SMP condition of price control, and if that condition were of the form that all prices must be cost oriented, that would be a heavier burden on a company than simply the general law of Article 82.

THE CHAIRMAN: Thank you very much, Mr. Roth, that is very helpful. Mr. Barling?

MR. BARLING: I feel like Cinderella coming to the ball! We have intervened, B T, as you know, mainly for two reasons. First, because in challenging the finding of SMP H3G have thought fit to make unwarranted assertions about BT’s conduct in the negotiations with them for the interconnect agreement. Those assertions were made, perhaps to bolster the argument about BT’s alleged countervailing buyer power, but from our perspective importantly they do not reflect the facts.

Secondly, we intervened because questions had arisen about the dispute resolution provisions, both in the BT Agreement, (clause 13) and also of course more broadly about the ramifications of the new regime originating in the Directives and its effect on the regulatory dispute resolution powers of Ofcom. The second of these two points is also of great importance to BT for obvious reasons, as clause 13 is contained, as you know, in some hundreds – the figure of 250 has been mentioned, but I gather it changes from week to week – similar agreements. So far as the other issues are concerned, obviously we do have views on them, but in the light of Mr. Roth’s submission I can restrict myself to some relatively brief remarks about the SMP issue generally and the irrelevance of, as he has put it, of the *Tetra Laval* decision on which Mr. Green built a very high edifice, and in short we agree with Mr. Roth when he says that the foundations of that building are rather shaky, and that in essence the decision is of no assistance in a case such as this.

Then I shall come to countervailing buyer power and, in particular, the facts of the negotiations in 200. Then after dealing with the facts on that I will just summarise and make some comments about the factors which we submit are relevant to any issue of countervailing buying power, conscious as I am that the dangers of this Tribunal having to decide those issues; make firm findings about it seem to have receded into the somewhat remote distance now, and Mr. Green said you do not need to – that may well be right. Nevertheless, I think it is appropriate that we should comment succinctly on the factors and briefly on the evidence; and finally then come to deal with the clause 13 and, if I may call it the "vires" point which Ofcom have discussed before and after lunch.

I will deal first of all very quickly with one or two little extra points on dominance, if I may. We have set out at para.9 onwards of our skeleton, really, the ground rules and it is common ground that we are talking about dominance here, as understood in Community law and the jurisprudence of the Luxembourg courts, all that jurisprudence applies.

I want to say something, if I may, about the Commission Guidelines, and also about the Commission recommendations as far as market analysis and market definition and findings of SMP are concerned, because in his submissions Mr. Green, in dealing with the hierarchy of the various Community rules, starting with the Treaty and coming down to mere recommendations, perhaps put these guidelines and these recommendations on a little bit too low a level. The inference was, well, they have been superseded in some respects by some of the case law and so on, but I think what one has perhaps to bear in mind and I will only give you the references to it, and I am sure you have already got it in mind, is that so far as the guidelines are concerned, Member States are required, when they carry out market analysis and assess SMP to take "the utmost account of the Guidelines". So, there is, as it were, a sort of legislative underpinning of what would otherwise only be guidelines, perhaps giving them a greater value in the hierarchy – that is Article 16(1) of the Framework Directive.

So far as the markets which the Commission were required to identify as being good candidates for SMP which ought to be analysed because of the likelihood of being SMP in those markets, they were required to make a recommendation, they did make a recommendation, and Article 15 of the Framework Directive again requires Member States to take the utmost account of that recommendation.

I do not believe anyone has taken you through it – you have probably taken yourselves to it – but for your record the market in question is set out in the annex to the recommendation, the recommendation of course being in bundle E1, tab 12. The annex to that, para.16 is the relevant identification made by the Commission of the market which ought to be analysed. We very much agree with what Mr. Roth said, that in terms of analysing the market – markets when analysed are either effectively competitive or there is someone with SMP.

That appears to be the structure of it and, indeed, as I am sure that members of the Tribunal know at least as well and probably better than I do, that also makes economic sense. So if a market is not effectively competitive then almost by definition there is going to be someone with SMP.

Looking at it in a very simplistic way here, because it does set the scene in a way for the way it has been reasoned, clearly H3G's call termination market is not by any stretch of the imagination effectively competitive. There is no competition at all, and none can develop for the foreseeable future. So in a sense one can see the findings of SMP are almost inevitable. Indeed, that has been put in quite graphic terms by the Commission in what has been called the German veto Decision – again, I will not ask you to turn to it at this late hour, but it is at para.17 of their Decision in that matter where they say that 100% market share on call termination markets raises "a strong presumption of SMP save in exceptional circumstances which need to be clearly and unambiguously demonstrated" by whoever is seeking to demonstrate it. That was a decision of the Commission pursuant to the notification by Germany under Article 7, as Mr. Roth has explained it, and we know – it is common ground – the Commission have taken no objection to Ofcom's notification of the draft December provisional finding in relation to H3G and others. I think the letters are in your bundle – the relevant documents are in A2, tab 5, page 1071. We would submit in the same way that Mr. Roth has that that is all in line very much with the European case-law. One has only got to look at *AKZO* – if you have 50% market share or more then there is a pretty strong presumption of dominance, at 100% it seems it is very difficult to argue to the contrary, although there may be cases.

We also would emphasise – stating the obvious again – that ex ante obligations are wholly separate from findings of dominance. We would not make that point had Mr. Green not spent so much time, in a sense, conflating issues of dominance with issues of abuse, with particular reference to the *Tetra Laval* case, where one can see that there were very special reasons why those two concepts were discussed in tandem. That is not this case, as Mr. Roth has explained, and I will not reiterate, but we agree entirely with what he said about that.

It is true that if SMP is found in this framework regime, one or more ex ante obligations must be imposed, but it is a complete non sequitur to argue, as H3G have done in their skeleton, and they give you an example at paragraph 20 – I am not sure if it is their skeleton or their second skeleton, the one in response to the Tribunal's questions, I think it is the latter. It is a non sequitur to argue, as they do there, that the existence of SMP is somehow dependent or affected by the existence as a matter of course of regulatory constraints of whatever kind, or that the two are analytically identical. The ex ante obligations are logically and analytically distinct and SMP is not dependent on their existence.

I mentioned that we agree that the reliance by Mr. Green on *Tetra Laval* is unsafe and indeed incorrect. There are really two points about that: first of all, the existence of dominance and, secondly, the abuse of it. The first point is the fallacy at the heart of his thesis, that in order to establish the presence or the existence of dominance it is necessary to prove that an abuse will occur in the future to some greater or lesser degree of probability or certainty. The correct position in law, as Mr. Roth has set out in his submissions, and as the case-law of the Court of Justice, we submit, makes very clear – when you look at the cases they deal with them in watertight compartments. In the *AKZO* case, the *Michelin* case, the *Hoffman-La Roche* case you will notice that the very structure of the judgments deal with dominance and then, as a wholly separate matter, they look at the questions of abuse. One has to prove nothing about what will or will not occur in the future in order to establish dominance, and for that reason we submit that that point was at the basis of a lot of Mr. Green's submissions. He looked at the burden of proof and the standard of proof that you had to go into to prove what will happen in the future, whether they will impose excessive prices. We submit that that is just fundamentally unsound and it would be entirely erroneous to proceed on that basis, that that is what Ofcom needed to do here in order to find SMP. Nor, we submit, is the *Tetra* judgment any authority for the proposition that regulatory constraints are typically relevant to the existence of dominance or SMP. One can see, as it were, on a quick reading of *Tetra Laval* one might think, hang on, they were looking at the creation or the increase of a dominant position and they were looking at whether abuse led to that, but that of course, as Mr. Roth has explained, was in the very special circumstances of that case where the question was whether the Commission ought to have taken account of those commitments when deciding whether an existing dominant party could leverage or would be likely to leverage that dominance into a separate market. That is a wholly separate matter, normally one does not need to look at all at conduct in order to establish dominance, although we entirely accept that where there is evidence in a case of abuse, it is perfectly proper and appropriate to look at that evidence as supporting a finding of dominance, but it is not in any sense a necessary element in a finding of dominance because there is nothing wrong in being dominant, as we are told in the case-law time and time again.

That is really all I propose to say because, true to my promise yesterday, I really have scored though large chunks of things that I might have had to deal with in more detail, but I do not propose to in view of Mr. Roth's very helpful submissions.

I come on if I may now to the question of countervailing buyer power which, just in case you wanted to make a note of it – and I am not asking you to turn immediately to it but our skeleton deals with the issue in general terms at paragraph 18 onwards. What I wanted to do on this first of all, if I may, is to go straight to a point that Mr. Green made in his submissions yesterday relating to paragraph 24 of our skeleton argument where we had set out a quotation from the Commission recommendation. Turning to paragraph 24, you may remember that he asked you to note that we had italicised certain words in the quotation:

> " Such a market definition, call termination on individual networks does not automatically mean that every network operator has significant market power. This depends on the degree of countervailing buyer power and other factors potentially limiting that power. Small networks will normally face some degree of buyer power that will limit greatly the associated market power. Absent any regulatory rules on interconnection…"

That is obviously crucial,

> "… a small network may have very little market power relative to a larger one in respect of call termination. The existence of a regulatory requirement to negotiate interconnection in order to ensure end-to-end connectivity, as required by the regulatory framework, redresses this imbalance of market power. However, such a regulatory requirement would not endorse any attempt by a small network to set excessive termination charges, consequently there is still likely to be an imbalance of market power between large and small networks because it would be easier for a large network than a small network to initiate the step of raising call termination charges and would be more difficult for a small network to resist and move by a large by a large network to lower termination charges."

If I can just comment on that, what the Commission do there is to confirm that a regulatory requirement to interconnect, in order to ensure end-to-end connectivity redresses the imbalance between the large and the small network. They then go on to state perhaps a rather obvious point that regulation of that kind would not be such as to approve the smaller network than attempting to set excessive charges. The Commission postulates that there may still be some residual imbalance which would make it harder for the smaller to resist pressure from the larger network to reduce termination charges.

We make two comments on that. As a matter of fact, we know that since the prices were fixed in 2001 they have remained unchanged, I think that is a matter of record now; and also that they are now by far the highest mass mobile call termination charges paid by BT. So one has to bear in mind that, but also perhaps it is interesting to see in this context the slight gloss that the Commission put on that in the German veto Decision – if one looks at para.33 of their Decision in that matter. They pray in aid this concept, they say in para.33, if the Tribunal would just glance through para.33 so that I am not droning, and then I would just ask you to take note of what they have added in the last phrase in the last sentence.

MR. SCOTT: Mr. Barling, while we are on this area we have all studiously avoided any mention of the quantities which lie behind your remark that may have remained unchanged. I think we are at the moment happy to stay with that, but the reality is that so far as the retail customers are concerned, tariffs are public and in order to provide a context it may be sensible at some stage for us to know the premier that calls to H3G command over those other mobile network operators calls to whom you have just mentioned.

MR. BARLING: I am pretty sure it is in the public domain all that.

MR. SCOTT: It is public knowledge, we do not expect you to have an instant answer.

MR. BARLING: No, but it seems to me that it is perfectly sensible that you should have it and I will see if we can arrange that overnight. Of course, the point that is made at the end of para.33 is a point that I will draw attention to again at the appropriate moment, but I will just flag it up now, that of course BT's call termination charges a regulated and so they do not have that weapon, what was described in the German veto case in another paragraph as "the obvious bargaining tool" of their reciprocal charges for the same service, that an unencumbered, or unregulated bargaining partner would have. That obviously was a very important factor in the German case and effectively curtailing the countervailing buyer power as the Commission saw it, of Deutsche Telecom, and just such a factor is present here but has not been referred to.

Miss Stevens helpfully points out that in Mr. Locker's second witness statement, D1, tab 16, page 322 we see the termination rates at least as of January this year. Whether any of the others have altered I cannot say but we will check overnight.

MR. SCOTT: Those are the wholesale rates?

MR. BARLING: Those are the wholesale rates.

MR. SCOTT: And the wholesale rates we have been deliberately not mentioning because they are marked as "strictly confidential" and "non-public"

MR. BARLING: As I understand it, they are not, they are public. Because they are mentioned in the BT carrier price list on the website. Is that right?

FEMALE SPEAKER: It is the weighted average of H3G which is confidential, but those figures are public.

THE CHAIRMAN: The first three columns, that is right.

MR. BARLING: So what you do not know, as it were, how volumes feed in to that, because you do not have the weighted average.

MR. SCOTT: Then those are reflected through, as we understand it, into the retail prices, which the ultimate consumer, with whom we are concerned in the definition ----

MR. BARLING: They are, yes.

MR. SCOTT: -- is paying.

MR. BARLING: Precisely.

THE CHAIRMAN: Sorry, what is confidential is the weighted average figure?

MR. BARLING: Whether it is confidential, it is not public anyway.

THE CHAIRMAN: It is not public, but there is a figure which is not the same as that bottom right hand corner figure, which has been bandied around. It is a greater figure by 0.37p, if I just assist in the obliqueness for the moment contrary to my latter inclination.

MR. ROTH: From what I understood those are straight averages.

MR. BARLING: And not weighted averages. Presumably they are weighted by minutes, are they, or volume of minutes? (After a pause) And time of day too. I assume that is not shown, because that would give the information about the size and so on and so forth, which is thought of a confidential.

PROFESSOR STONEMAN: Can you please clarify what the weights are? The other number that was written in the paper is a number that we could use but did not actually mean anything.

MR. BARLING: May we check on that point overnight.

PROFESSOR STONEMAN: Ten plus one, or something.

MR. BARLING: I can give you an accurate answer the.

PROFESSOR STONEMAN: We would like to know what the weights are. These weights here are pure proportion of hours in the day?

MR. BARLING: I do not think there are any weights in this.

PROFESSOR STONEMAN: Add the three and divide by three?

MR. BARLING: Yes.

PROFESSOR STONEMAN: One would expect there would be a lot more calls in the evening.

MR. BARLING: We will try and find out the position in a little more detail overnight.

PROFESSOR STONEMAN: Thank you.

MR. BARLING: Sir, you have seen the criteria Mr. Roth took you through in the various guidelines and the case law about countervailing buyer power and in particular the switching – almost always where there is countervailing buyer power there has to be the possibility of switching to another supplier or self-supply, or simply walking away from the market. None of those obviously apply in the present case. In our submission it is therefore difficult to see how BT could have, let a lone have exercised, any countervailing buyer power, either at the time of the negotiations in 2001 or indeed could do so at any time up to the present. We know that Ofcom made no actual assessment as at the time of the negotiations because they considered then that countervailing buyer power of BT was irrelevant, it was not the period that they were seeking to look at going forward. So far as that period was concerned, they held that there was no sufficient countervailing buyer power in particular because of the clear regulatory obligations upon BT as set out in the May 2003 notice.

We submit that Ofcom was clearly right in its finding of no, or no sufficient countervailing buyer power at the time of the Decision and going forward. We also submit that had Ofcom examined the position at the time of the negotiations it would have been bound to reach the same conclusion. It may be that the Tribunal, as I have said, does not need to actually make a finding in relation to the existence, or the exercise at either point in time, of countervailing buyer power. As it has developed this appeal has been approached very much in the way of a judicial review, the basic attack being on the Decision that it was insufficiently reasoned, or putting it another way that there were factors that were not taken account of that H3G say ought to have been taken into account, or ought to have been investigated and were not investigated. Mr. Green yesterday said that you either should not or need not, reach any conclusion about the facts. To some extent that conditions the way that we propose to deal with them, but we do nevertheless feel that it is appropriate to draw to the Tribunal’s attention the contemporaneous documents about the negotiations and then to ask you to note, as I have said, the main factors which militate – or would militate – against there being any countervailing buyer power, let alone any sufficient to counteract H3G’s monopoly over its call termination service.

May I therefore turn to the question of the negotiations in 2001? Various assertions are made in the Notice of Appeal, the Amended Notice of Appeal and, in particular, in the witness statements of Mr. Westby, about BT’s conduct of these negotiations. They are strongly refuted and dealt with in the corresponding witness statements of Mr. Locker – the only exception being that I think Mr. Locker never saw, because it was confidential, and we did not make an issue about it, the third witness statement of Mr. Westby and did not comment on it. But by that stage things were at the reiteration stage I think one finds reading those witness statements, and we took the view that it really was not necessary for Mr. Locker to come back to say the same thing again.

We say, however, all one really needs to do in respect of the facts of the negotiations is to look at the very few documents – there are not many, they are in a pretty small compass – and one will then be able to find without much difficulty that the allegations are without substance. In essence, what was being said was that BT was using delaying tactics, that it was being obstructive, and that - summarising it – it was throwing its weight about for someone who was a big player, a big bully, and there was poor little Hutchison having to do what it was told. That is far from the position that emerges from the actual documents. One does to some extent have to get one's hands dirty and look at what is said in them, but we have attempted to provide you with at least a pair of rubber gloves in the form of a note, where we summarise what we say are the important bits of them. Obviously, that may be subject to comment, although it is pretty full. It is just to have on one little clip the main quotes and the dates and who was writing to whom. That does not mean that we cannot look at the documents if we need to, and they are all mainly in B1 – there may be one or two in A1. If I may hand this note – I hope we have enough copies. [Documents handed to the Tribunal] Hoping that this will speed up enormously what I need to say by way of commentary.

I am very much in your hands, I do not know to what extent you want me to start in on this.

THE CHAIRMAN: What is your current projected ETF?

MR. BARLING: Well, given that Mr. Roth has done much of the ground work on all this, I would think possibly another hour to an hour and a quarter.

THE CHAIRMAN: Mr. Green, how much do you think you will need in reply?

MR. BARLING: Say an hour and a half, to be on the safe side.

MR. GREEN: 40, 45 minutes in reply.

THE CHAIRMAN: That is all you will need?

MR. GREEN: Yes.

THE CHAIRMAN: Which means that if we start at 10 tomorrow you will finish by 1 if we do not do any of this now?

MR. BARLING: I would have thought we would be bound to.

THE CHAIRMAN: It would probably speed things up if we read what you were going to say before you said it.

MR. BARLING: It means you will not have to carry B1 anywhere, or A1.

THE CHAIRMAN: What we will do is we will finish now and read this overnight, and that will help speed you on your way. We might also give some consideration – I shall give some consideration as to the extent to which it is necessary to deal with this anyway if what you are doing is trying to defend BT's honour against what they may see as an outrageous slur to their conduct as opposed to matters going to countervailing buyer power because it is not entirely synonymous.

MR. BARLING: I think the motive for coming in is the former, but it is also relevant to the latter.

THE CHAIRMAN: Yes, so far as it is relevant to the matter we may have to look at this. As far as it has any relevance to the former, I think it is unlikely there would be any adverse finding, if it were not otherwise relevant to the CBP point.

MR. BARLING: I am grateful for that. Given the weight that is placed on it in the papers I think it is probably safer – I am not proposing to spend a huge amount of time, I will take you through it fairly quickly, but it would help if you were able to read it.

THE CHAIRMAN: In that case we will save some time, and we will look at it overnight.

MISS SMITH: Sir, if I could just ask that the Tribunal excuse my not attending tomorrow. I have a hearing in Luxembourg so I will not be able to attend the hearing here.

THE CHAIRMAN: It is kind of you to ask, thank you very much, we certainly will. Very well, we will resume at 10 o'clock tomorrow morning.

(Adjourned until 10 a.m. on Thursday, 26th May 2005)