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IN THE COMPETITION APPEAL

Case No. 1018/3/3/03

TRIBUNAL

New Court,
Carey Street,
London WC2A 3BZ

5 December, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

MICHAEL BLAIR QC
DR ARTHUR PRYOR CB

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicant

and

THE DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED

First Intervener

and

O2(UK) LIMITED

Second Intervener

Mr Gerald Barling QC and Mr Alan Maclean and Miss Sarah Stevens (instructed by British Telecommunications PLC Legal Services) appeared for applicant.

Mr Richard Fowler QC (instructed by The Director of Legal Services (Competition), Office of Telecommunications) appeared for the respondent.

Miss Elizabeth McNight of Herbert Smith appeared for the First Intervener.

Mr Stephen Kon of S J Berwin appeared for the Second Intervener.

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PROCEEDINGS
DAY TWO

1 THE PRESIDENT: Good morning, Mr Fowler.
2 MR FOWLER: Good morning, Sir, Mr Blair, Dr Pryor. We have now handed in an agreed
3 record of the site visit.
4 THE PRESIDENT: Thank you so much, yes.
5 MR FOWLER: There is just one very minor correction on the list of attendees, and that is
6 that Andrew Lidbetter of Herbert Smith did not attend, but I am not sure that that is
7 going to make a great difference to the substance of the document.
8 THE PRESIDENT: Right, thank you.
9 MR FOWLER: In connection with the first of the criteria that need to be satisfied to
10 establish there is interconnection here, and that is whether there are two telecoms.
11 networks, yesterday I took you to the reasons why we say quite clearly that the
12 definition of network termination point includes points where people like Vodafone, as
13 a user, have access to the transmission systems and other facilities that make up the BT
14 Telecoms Network, which we say is relevant in this particular case.
15 THE PRESIDENT: Yes.
16 MR FOWLER: And that definition is incorporated into the ICD, the Interconnection
17 Directive, and we say there is no basis for suggesting it is not relevant in the context of
18 the Interconnection Directive, and no basis for saying that the expression "defined
19 termination points" that forms part of the definition of telecoms network has any
20 different meaning than the meaning arising under Directive 90/387, and that meaning
21 clearly refers to the termination points defined by the NRA and those include the points
22 of interconnection as well as user handsets.
23 In his contrary argument, Mr Barling says well look at the wording of Annex I
24 of the Interconnection Directive and Annex II, and the reference is there, in the
25 definitions of fixed and mobile networks, to what are clearly end-user termination
26 points. Of course, end-user termination points are also network termination points,
27 there is no doubt about that, they are also defined---
28 THE PRESIDENT: But it is not limited to that.
29 MR FOWLER: But it is not limited to that, and when one looks at Annex I and looks at the
30 definitions of fixed and mobile, it is perfectly clear why those are expressed in terms of
31 the end-user termination points, and that is because the distinction between fixed
32 network, and the mobile network is defined by reference to the end-user handsets.
33 The end-user handsets are not fixed in the case of the mobile, and they are fixed
34 in the case of fixed networks. So, of course, that is defined by reference to end-user
35 termination points, but that does not take anyone anywhere in limiting the meaning of
36 that expression generally in this directive - there is no reason why it should limit it. The
37 same is true in relation to Annex II, and the reference there to end-user network
38 termination points, where it is made again explicitly clear that it is talking about end-

1 user network termination points, because there they are points identified by numbers,
2 and again therefore, in the development context those are end-user termination points,
3 but again it takes no one nowhere in limiting the general meaning of the expression
4 network termination points, in the directive as a whole.

5 THE PRESIDENT: Since we are on Annex II, what is the scope of number 2 -
6 "Organisations which provided leased lines to users' premises", what is the "user"
7 there?

8 MR FOWLER: It is the same meaning as the meaning defined in the Interconnection
9 Directive, and one sees that the definition is users of public telecommunications
10 services.

11 THE PRESIDENT: Publicly available services.

12 MR FOWLER: Publicly available services and the meaning of that expression is made
13 clear by the final part of the Recital 5 and it therefore plainly includes any third party,
14 such as Vodafone, acquiring and using publicly available telecom services. Indeed, that
15 is precisely the meaning that the Commission attached to it in the working document
16 that I referred you to yesterday, where they were saying in the context of paragraph 2
17 of Annex II, that users included other network operators.

18 THE PRESIDENT: So, just help me, Mr Fowler, what we are talking about here is in any
19 event a leased line within the meaning of all this?

20 MR FOWLER: Indeed, yes, and indeed that is in my submission - I will come to this later -
21 one of the fundamental obstacles to my friend's argument.

22 THE PRESIDENT: If it is a leased line it is the end of the argument, isn't it?

23 MR FOWLER: The directive patently envisages interconnection in relation to leased line
24 services, with all that that entails, and all that implies, in terms of the extent of the
25 required logical linkage, of the extent of the telecoms network that is involved, and the
26 extent of the purpose for which the interconnection takes place.

27 I will come to this in more detail, but it is plainly envisaged by the Directive---

28 THE PRESIDENT: Well let's park that until you come to it. Yes.

29 MR FOWLER: My friend also suggests that there is some sort of oddity in the fact that
30 what might be thought of as a single network can be broken down into subsets that
31 comprise telecoms. networks, within the meaning of the definition in the directive. In
32 my submission there is no oddity in that at all. On any basis of the definition supplied
33 to network termination points, there is going to be any number of sets of equipment that
34 one can segregate.

35 THE PRESIDENT: There are these layers really.

36 MR FOWLER: That would constitute telecoms networks. So that if access were given only
37 to that part of the network, the overall network by interconnection you could still
38 comply with the requirement that there be interconnection between two telecoms.

1 networks, and that must be obvious and necessary on any meaning given to network
2 terminations.

3 THE PRESIDENT: Yes.

4 MR FOWLER: But in any event, the ICD plainly contemplates interconnection with leased
5 lines. The definition of interconnection must therefore embrace and be capable of
6 applying to leased line services. That means, first, that the facilities that are used in
7 providing those services, the transmission systems and other resources, are capable of
8 constituting a telecoms. network and in that connection I think it might be helpful to
9 take you to the final paragraph of the Agreed Statement of Facts dealing with PPCS,
10 which explains that a PPC, a Partial Private Circuit, has the same technical aspects as
11 RBS backhaul, all be it that the circuit in question runs from the end-user premises to a
12 point of handover with the other operator's network, for onward transmission, so that
13 the facilities in that context that comprise the relevant telecoms network, are between
14 an end-user termination point at the one end, and a point of hand over at the other. So
15 again recognising that telecoms. networks are not limited to facilities terminating at
16 both ends of user premises.

17 Secondly, I say that the fact that interconnection is plainly envisaged by the
18 directive in the contents to the provision of leased line services, means that the degree
19 of logical linkage that is required must be consistent with the logical linkage that arises
20 in the leased line context, and that is bearing in mind the definition of leased line in
21 Annex 1 which talks about transparent transmission capacity - that word that has
22 caused amusement. "Transparent" means "opaque", but it is the same word
23 "Transparent transmission capacity" defining leased line services generally that arises
24 in Annex I, it is plain and I will come to this again later, it is plain that it is envisaged
25 by the directive that interconnection is capable of applying in relation to such services.

26 Thirdly, it must mean that the linkage that is involved in that situation is in
27 order to allow users to communicate with each other within the meaning of the
28 definition of interconnection, and I will come back to that since it applies---

29 THE PRESIDENT: Users in that sense, the word "user" you have just used, meaning "end-
30 user"?

31 MR FOWLER: End-user, yes. Well, in fact, I think any user---

32 THE PRESIDENT: Well, Vodafone is not communicating with itself, is it - or is it?

33 MR FOWLER: Well, it is the users of one organisation, I'm sorry. It is the users of the
34 organisation, so it depends which is the relevant organisation.

35 THE PRESIDENT: The users of the organisation are Vodafone's customers, or those whom
36 Vodafone---

37 MR FOWLER: Where Vodafone is the organisation, yes. In other contexts the relevant
38 organisation may be BT, in which case Vodafone would be the user.

1 Can I move on then to the second criteria, the physical and logical thinking.

2 THE PRESIDENT: Yes.

3 MR FOWLER: There is no dispute that there is a physical linking between the Vodafone
4 equipment and the B T equipment, you saw the link, where the linking took place, both
5 at the RBS end and at the MTX end. The issue is whether there is also a logical link. As
6 to that, in my submission, the key is when one considers the limitations of the physical
7 linkage.

8 The physical linkage, that is to say the physical interface between the two
9 systems will necessarily be defined by reference to the physical shape and dimensions
10 of that of that interconnection, of that interface. But it will be readily apparent that
11 merely to comply with those physical specifications will not be enough to make the two
12 systems work together. Plainly, more is needed than just that the plug fits into the
13 socket, the physical aspect.

14 THE PRESIDENT: Yes. And how much more is part of the question.

15 MR FOWLER: We say it is that additional element that comprises the logical linkage. It is
16 a question of compatibility both at a physical and logical level. It is the logical linkage
17 that enables the signals that are received from Vodafone equipment to be carried over
18 the BT equipment and maintain their integrity and logical meaning. That is not a
19 function of the physical connection, it is a function of the logical connection.

20 THE PRESIDENT: So that the voice message that enters the system, comes out or is
21 transmitted through the system and can be recognised at the other end?

22 MR FOWLER: At the other end, it has to have a logical linkage for that to happen. That
23 does not mean that the network that receives the signals has to be able to understand
24 them or eavesdrop on the conversation that is taking place. BT is not eavesdropping on
25 our conversations - or at least I hope it's not - when we phone each other up. The
26 signals in that sense are passing through transparently.

27 But what the two networks have to be capable of doing is passing the signals,
28 maintaining their logical integrity, and that is achieved by ensuring that the signals
29 conform to a specified logical architecture, which is defined in the protocols, and is that
30 which enables this time slicing, the interleaving of the Vodafone data with the data
31 originating on the BT Network, that allows that to take place - this incredibly
32 complicated linkage that is taking place, and it is a logical arrangement, it is not a
33 physical arrangement, it is a logical arrangement, that is what time division
34 multiplexing is about, and it is that conformity with the logical architecture that
35 enables BT to monitor, to add the path overhead which is referred to in the agreed
36 statement of facts, to add that and monitor the signals as they are passing along the line.

37 THE PRESIDENT: I think part of the argument the other way is that "logical" involves a bit
38 more than simply being able to passively transmit signals through to the MTX. It also

1 involves, or connotes the idea that at some point at a switch the system is capable of
2 making a choice as to which bit of the onward network, the signal is destined for.

3 MR FOWLER: Well of course, that is absolutely true that that does happen where there is a
4 switched signal, where the signal has in front of it the dialled up number, and the
5 number is what initiates the switching, but that only arises in the context of a switched
6 service.

7 THE PRESIDENT: So it can still be less than a switched service, still be within the same---

8 MR FOWLER: I will come to that shortly but the directive specifically refers to
9 "unswitched" services in a context which makes it clear that those are services capable
10 of being the subject of interconnection.

11 THE PRESIDENT: Yes.

12 MR FOWLER: So in Mr Butterworth's statement, when he talks about the mutual
13 understanding that is required in relation to the dialled, the switched service, it is
14 perfectly true that that degree of additional understanding is required, but it is not
15 required in the case of the unswitched service, and it is the unswitched service with
16 which we are concerned here. It is the unswitched service with which the PPC is
17 concerned, and it is the unswitched service with which leased lines generally are
18 concerned, that is part of the definition of leased lines, in Annex I.

19 BT make much of the fact that the Vodafone data, when transmitted, is
20 transmitted in time slots that remain separate and the time slots that carry the BT
21 originating data. But that, in my submission, does not in any way cast doubt upon
22 whether there is a logical linkage here. The question is not whether the Vodafone
23 signals are linked with the signals originating on BT's network. The question is whether
24 the transmission systems and other resources that comprise the BT Network are
25 logically linked with the transmission systems and other resources, that comprise the
26 Vodafone Network.

27 THE PRESIDENT: Just go a little slower, Mr Fowler, because we need to get it down. Yes.

28 MR FOWLER: We say that manifestly such a linking is required for things to work
29 together, more is required than the purely physical.

30 THE PRESIDENT: Yes.

31 MR FOWLER: When BT say that mutual comprehension interaction is required all they
32 are saying is in relation to a switched service, which is not the issue here, this is not a
33 switched service, a PPC is not a switched service .

34 In that connection, one can see that switching is not a necessary element. I
35 would take you first to Article 2 of the Interconnection Directive.

36 THE PRESIDENT: Yes, absolutely, the first definition.

37 MR FOWLER: And the first definition. Well, it is the definition of telecoms network, "C".

38 THE PRESIDENT: "C".

1 MR FOWLER: Yes, switching equipment where applicable, and only where applicable, so
2 that for a start recognises that switching equipment may not be a part of one or either of
3 the telecoms. networks.

4 THE PRESIDENT: It is fairly clear from that, you say, that telecommunications network
5 means transmission systems and, where applicable, switching equipment, but the
6 passive conveyance or transmission of the signal is sufficient and you do not need the
7 additional, as it were, [inverted commas] "intelligent" element produced by the switch.

8 MR FOWLER: For it to be relevant as a---

9 THE PRESIDENT: As a network?

10 MR FOWLER: Yes. That is confirmed more strongly when one looks at the annexes.

11 THE PRESIDENT: Yes, I see.

12 MR FOWLER: And if one goes to Annex I one sees that it says:
13 *"Organisations providing the public telecommunications networks and publicly*
14 *available services identified below which have significant market power are*
15 *subject to specific obligations with regard to interconnection and access..."*
16 Now, it is clear that subject to those obligations, in relation to the services in question,
17 or the networks in question on which they have got significant market power, and those
18 include Part 2 of Annex I, "The leased lines service". The leased lines service is
19 defined as:
20 *"...the telecommunications facilities which provide for transparent*
21 *transmission capacity between network termination points, and which do not*
22 *include on-demand switching (switching functions which the user can control as*
23 *part of the leased line provision). They may include systems which allow*
24 *flexible use of the leased line bandwidth, including certain routing and*
25 *management capabilities."*
26 So the definition of leased line is envisaging an unswitched, transparent system.

27 MR BLAIR: May I interrupt.

28 THE PRESIDENT: Yes, please do.

29 MR BLAIR: It talks there about "on demand switching which the user can control". Is on
30 demand switching the same as switching?

31 MR FOWLER: It is the same as switching in that context. Switching is sometimes used,
32 and I think this is why the second sentence is there, to refer to the routing functions,
33 because the routing in one sense involves switching and what BT does when it sets up
34 the routing for an RBS backhaul circuit is a form of switching, all be it a permanent
35 switch. What happens with on demand switching is that the switching is in response to
36 the user's input of the dialled up destination, as it were. It is in that sense that it is on
37 demand switching.

38 MR BLAIR: If there was switching that was switched by the operator, rather than by the

1 user, would that still be within leased lines?

2 MR FOWLER: That is, I think, the meaning of the second sentence, that it is embracing
3 that the operator may involve certain routing, in that sense what could also be regarded
4 as switching, and it is drawing the distinction between those two things.

5 MR BLAIR: Thank you.

6 MR FOWLER: Then when one goes to Annex II, and Annex II is defining the
7 organisations who are subject to rights and obligations under Article 4(1) and that
8 refers in the very first sentence to organisations which provide switched and
9 unswitched bearer capabilities to users.

10 THE PRESIDENT: Here we get the "user" problem again. You say it includes Vodafone?

11 MR FOWLER: Well it would include Vodafone, yes. So in my submission it is quite clear
12 that the sort of mutual understanding that is required for switching is not a necessary
13 component of interconnection and that the very fact that the directive envisages
14 interconnection in relation to leased line services defined as transparent unswitched
15 transmission capacity demonstrates really beyond any doubt in my submission that the
16 degree of logical linkage that is required for there to be interconnection to satisfy the
17 second criterion cannot mean anything more than the sort of linkage which we have in
18 the present case.

19 Bearing in mind paragraph 20 of the Agreed Statement of Facts that we have
20 just seen, I think it is quite useful to look at the Commission's views of PPCs which is
21 in bundle 7, the second bundle of the defence. This is the Commission
22 Recommendation on Leased Line Interconnection Pricing. On page 782 of the bundle,
23 the first page of the recommendation, four paragraphs down it refers to directive 90/733
24 by which organisations notified by their NRAs as having significant market power in
25 the market for leased line services as set out in Annex I hereto must publish a reference
26 interconnection offer that includes a description of their interconnection offerings to be
27 provided to all operators as defined in Annex II.

28 So that recognising there that leased line offering involves interconnection and
29 the recommendation itself, over the page on page 784 of the bundle---

30 MR BARLING: Sorry, just while we are there would you point out the end of the
31 paragraph you were referring to.

32 MR FOWLER: "...including cost oriented prices for leased line part circuits".

33 MR BARLING: Part circuits, yes.

34 MR FOWLER: Yes, part circuits, yes. I am referring to this in order to demonstrate that the
35 Commission regards PPCs as involving interconnection.

36 THE PRESIDENT: I do not think anyone has disputed that. In any event, what exactly is the
37 status of this document, Mr Fowler. It is a sort of draft of some kind, is it?

38 MR FOWLER: That is the form in which it is on the website. It has in fact been issued as a

1 recommendation.

2 THE PRESIDENT: It has been issued as a recommendation.

3 MR FOWLER: Yes.

4 THE PRESIDENT: And what is the status of a recommendation from our point of view?

5 MR FOWLER: Well, it indicates the way the Commission looks at PPCs. If my friend says
6 that it is not disputed that PPC involves interconnection then it does not add to that. but
7 once it is accepted that PPC involves interconnection, it is accepted that the facilities
8 that provide interconnection are capable of constituting at the one end an end user
9 network termination point, at the other end a termination point which is an
10 interconnection point. It involves accepting that the degree of logical linkage required
11 to constitute interconnection involved no more than the degree of logical leakage that
12 we have here. Those consequences necessarily entail, once it is accepted, that PPCs
13 represent interconnection.

14 MR BARLING: I am sorry to interrupt, but I think the final - I am not sure - we have a
15 version of this in our reply bundle which has got a date - I don't know if it is the final
16 one, but it is at tab 10 of the reply bundle. I am not entirely sure that it is the same one.

17 THE PRESIDENT: We can check it, Mr Barling.

18 MR BARLING: No, I think it has the same problem, but it has the explanatory
19 memorandum with it. The explanatory memorandum is dated, but the actual text of the
20 recommendation has not got a date.

21 MR FOWLER: The memorandum does say, the provisional text on it.

22 MR BARLING: Quite right.

23 MR FOWLER: I think it is because that is what is on the website, I am afraid.

24 THE PRESIDENT: So all we have is a provisional text?

25 MR FOWLER: Yes, but as I say, once it is accepted that PPCs constitute interconnection it
26 does not really take the matter any further forward from that.

27 Can I then move on to the third criterion, that is to say the purpose for which the
28 linking takes place, and the issue here is whether the purpose of RBS backhaul is to
29 allow users of one organisation to communicate with the users of the same or another
30 organisation, that is to say, to allow in the instant case, Vodafone users to communicate
31 with other Vodafone users, or users of other operators.

32 THE PRESIDENT: So "user" in the sense of end-user here?

33 MR FOWLER: Yes, it may in certain circumstances embrace other intermediate users, but
34 generally it is going to be end-users.

35 As I pointed out yesterday, it is plain that if you close down the RBS backhaul
36 link between Heather Row RBS and the Basingstoke MDX the Vodafone users in the
37 cell served by the Heather Row RBS would no longer be able to communicate with
38 other Vodafone users, or with users of other operators. It is the link that allows that

1 communication to take place, and we say that is more than sufficient to satisfy the third
2 requirement. The purpose of having the link is, *inter alia* certainly but is in order to
3 allow Vodafone users served by that RBS to communicate with others, served by other
4 RBSs, and it does so in order to ensure end to end interconnection. In this respect its
5 function is no different from a PPC. The only difference is that the PPC is performing
6 that function at the user end, the end user end, as it were, leading up to the end user.
7 The RBS backhaul is performing that function further down the line, as it were. But
8 that does not alter the nature of what is taking place, that it is part of the network, part
9 of the facilities that are being used in order to enable users to communicate with each
10 other, and it is doing it in the same way as the product, which my friend accepted was a
11 typical interconnect product, the CSI, the customer site interconnect, is doing down the
12 line, as it were rather than at the user end.

13 THE PRESIDENT: Does something depend on how far down the line does interconnection
14 go, as it were?

15 MR FOWLER: I don't think anything depends on that, no, Sir, no. As indeed, the example
16 my friend gives indicates because they are right as far in the middle, as it were, one can
17 get.

18 THE PRESIDENT: For example, I think from the Agreed Statement of Facts it is apparent
19 that BT supplies other elements of MTXs sometimes?

20 MR FOWLER: The linkage?

21 THE PRESIDENT: The linkage, is that sort of thing going to be covered by the Directive as
22 well?

23 MR FOWLER: Well it may in certain circumstances, depending whether it does also
24 satisfy---

25 THE PRESIDENT: Is anything that helps to fill up the system going to be covered by the
26 directive?

27 MR FOWLER: That is certainly one of the functions of the directive, that it does enable,
28 does provide the basis on which new entrants can make up their infrastructure to extend
29 their coverage, and that is what the Commission said in the passage that I referred you
30 to yesterday from the working paper from DG13 I think it was.

31 DR PRYOR: I wonder if I might ask, Mr Fowler, are there in fact any regulatory
32 precedents for dealing with this gap filling function you have just been describing,
33 which might be said to be akin to what is now proposed in relation to RBS backhaul,
34 because if it is part of the function of regulation to address these gaps has it in fact been
35 done for the two?

36 MR FOWLER: I think the closest analogy is the PPC.

37 DR PRYOR: Which I understand.

38 MR FOWLER: And in that connection when one looks at it it is the Eighth Report on

1 Implementation - this is in bundle 7, tab 15, at page 838 of the bundle, page 21 of the
2 document, under "Interconnect Leased Lines" one sees that statement:
3 *"...interconnection leased lines from 64 kilobytes to 34 megabytes enable new*
4 *entrants to provide end to end services to their customers in cases where their*
5 *own networks are not yet sufficiently extensive to enable them to provide these*
6 *services by means of their own infrastructure alone."*

7 THE PRESIDENT: But in the leased lines situation you have a new entrant who is in
8 contractual relations with an end-user to whom he is supplying a circuit or a partial
9 circuit, a private circuit. He is directly in touch with a customer for whom he is
10 providing very often a tailor made set up. That is a bit different, is it not, from the
11 situation here where there is no particular customer who is concerned with what is
12 passing between the RBS and MTX, it is just a bit of the system further up the line or
13 down the line.

14 MR FOWLER: It is no different at all in principle.

15 THE PRESIDENT: Isn't all the thrust of the leased lines part of the directive to enable a sort
16 of intermediate market in leased line provision to exist?

17 MR FOWLER: No, it is to enable---

18 THE PRESIDENT: Isn't it as BT submits a sort of separate subset of the regulatory system?

19 MR FOWLER: If one is talking purely about leased lines going between end-users'
20 premises, that plainly is a specific subset of situations, yes.

21 THE PRESIDENT: But that is the typical situation---

22 MR FOWLER: It is indeed the typical situation.

23 THE PRESIDENT: ---where the leased lines part of the directive is directed to that
24 situation.

25 MR FOWLER: That is indeed the typical situation, but in principle what is going on is no
26 different to what is going on here. In principle there is no difference.

27 THE PRESIDENT: You have not really got the same sort of three part structure. I think we
28 came on to this point yesterday, I think we did touch on it, i.e. and end-user who wants
29 a specific circuit, a middle man who is providing it, and a telephone operator from
30 whom the middle-man is acquiring the ability to supply his customer the circuit, you
31 haven't quite got that.

32 MR FOWLER: I entirely accept that one is not in that precise position, but one is in a
33 position where each aspect of the definition of interconnection is satisfied to the same
34 extent as in that situation, that is to say one has telecoms. network, which in the case of
35 the PPC comprises the equipment, the facilities, enabling transmission between the
36 point of interconnection and the end-user termination point and therefore indicating
37 that the relevant works don't have to be end-user to end-user, one has the same degree
38 of logical interconnection taking place. One has the same purpose being achieved,

1 namely, enabling users to connect with each other. All of those aspects are satisfied.
2 That is something that the directive envisages, and all be it the PPC is a subset of what
3 is envisaged by the directive, the directive applies generally to leased lines and to
4 leased lines to users' premises which, as the Commission says, includes the premises of
5 operators such as Vodafone.

6 THE PRESIDENT: Does this direction say in terms "Well, this is leased line and therefore it
7 is already covered by the cost related prices obligation? I think on your argument it is a
8 leased line. They could have simply have said "This is a leased line - over and out".

9 MR FOWLER: Yes, I think it does say that. As I said yesterday, the Director did not want
10 to rely upon the fact that BT had SMP and leased lines generally simply to say under
11 Annex I "You have to give interconnection in relation to this leased line service". He
12 carried out his market analysis which is in the explanatory memorandum, but the very
13 fact that he could have done it under the SMP provisions in Annex I, demonstrates that
14 this sort of interconnection, this sort of service is capable of being the subject of
15 interconnection within the meaning of the directive, and that is the only issue with
16 which we are concerned here.

17 THE PRESIDENT: Yes.

18 MR FOWLER: Local group unbundling backhaul I am told is another example where the
19 Director has adopted the same approach, carrying out specific analysis even though it
20 would have been possible to have gone straight ahead.

21 THE PRESIDENT: Yes, thank you.

22 MR FOWLER: So in my submission, the very fact that the directive envisages
23 interconnection with leased lines, in Annex I and by reference to Annex II, really
24 drives a coach and horses through my friend's case. It is impossible to reconcile his
25 position with that fact in relation to the definition of network, in relation to the meaning
26 of logical linkage, and in relation to the purpose for which it takes place.

27 THE PRESIDENT: Yes. It is just a bit puzzling, right at the end in the last month of this
28 regime, nobody has ever thought of this before.

29 MR FOWLER: The fact is that so far as Ofcom is concerned it has been moving forward
30 with the PPCs step, with the LLU [Local Loop Unbundling] and this is a further step,
31 but all in the same direction.

32 BT seek to suggest that the provision of Annex II in relation to organisations to
33 provide leased lines to users' premises in some sense constitutes proof that but for their
34 inclusion under that head, leased line services would not be regarded as involving
35 interconnection, and that is what they have said at paragraph 74 I think it is of their
36 skeleton.

37 They say that this very inclusion necessarily implies that leased line services
38 would not have fallen within the standard definition of interconnection. They say

1 therefore, RBS backhaul falls outside. Now, as to that, first of all we say that the
2 definition within Annex II, para 2, is sufficient to cover RBS backhaul in any event.
3 "Organisations which provide leased lines to users' premises", that is what is involved
4 here.

5 The Commission itself in the document on which my friend relies in this regard,
6 says that Telecom's operators constitute users in that context, and---

7 THE PRESIDENT: "The premises" being Vodafone's MTX, and the "user" being
8 Vodafone?

9 MR FOWLER: Yes. That is the way the Commission looks at it in the document on which
10 my friend relies, and that is plainly within the meaning of "user" in the definition in the
11 Directive. So this argument, in my submission, simply does not help BT.

12 But in any event, the idea that somehow it is only by virtue of the inclusion of
13 leased lines in Annex II, that leased lines are somehow brought within the definition of
14 interconnection which wouldn't otherwise apply, simply doesn't stand up when one
15 looks at the structure of the directive.

16 If I could just take you briefly again to the main provisions in Articles 1, 2, 3
17 and 4, one sees that Annex II does not identify categories of service that would
18 otherwise fall outside the definition of interconnection at all. What it does is identify
19 those organisations which have specific rights and obligations. Interconnection has a
20 general meaning as defined in Article 2.

21 Article 3 provides generally duties on Member States in relation to negotiating
22 interconnection between all organisations that are authorised to provide public
23 telecoms. networks.

24 Then Article 4 get into a subset of those organisations by defining organisations
25 with specific rights and obligations by reference to Annex II. So all that Annex II is
26 doing is identifying those organisations which have these rights and obligations. It is
27 not in any way modifying the definition of interconnection and, indeed, it is plain that it
28 proceeds upon the basis that the definition of interconnection is capable of applying to
29 the services that are referred to in Annex II. It must proceed on that basis. It is really, in
30 my submission, nonsense to suggest that the inclusion of a category of organisation in
31 Annex II means therefore that it is somehow modifying the definition of
32 "interconnection".

33 THE PRESIDENT: Yes, they wouldn't be there in the first place.

34 MR FOWLER: So it presupposes, in my submission, that interconnection can arise in
35 relation to those services. And in my submission that is simply the end of BT's case.
36 Their case cannot be consistent with that fact.

37 Unless there is anything further I can add to assist you, those are my
38 submissions.

1 THE PRESIDENT: Thank you, Mr Fowler. Can I just ask one question perhaps for
2 reflection. The concept of "publicly available", which you took us to yesterday. If BT
3 were to say "Gosh, we've suddenly realised that we have fallen into this trap because
4 we have been willing to sell these RBS circuits to people at retail. What we are now
5 going to do is to withdraw from retail sale of RBS circuits, and just not supply them to
6 anybody. Would we still be within the remit of the directive? Would the circuit still be
7 something that was publicly available? Or would "publicly available" have some other
8 meaning?

9 MR FOWLER: What is publicly available, and what is being bought by Vodafone, are the
10 "Megastream N16" or whatever they are called, services.

11 THE PRESIDENT: Yes, BT has discontinued those, but they could in one bound be outside
12 the scope of the directive.

13 MR FOWLER: To all third parties?

14 THE PRESIDENT: Yes.

15 MR FOWLER: That would mean it would step out of leased line services altogether.

16 THE PRESIDENT: Well step out of RBS backhaul?

17 MR FOWLER: No, not out of RBS backhaul, because RBS backhaul is simply a use to
18 which that retail service is put.

19 THE PRESIDENT: I see, right.

20 MR FOWLER: If they would start discriminating on the basis of the use to which it was
21 put they would be in some difficulty.

22 THE PRESIDENT: I see, so as actual service, the actual physical product is the same.

23 MR FOWLER: The product is the same product.

24 THE PRESIDENT: I see. Very well, good. Thank you very much indeed. Miss McNight?

25 MISS MCNIGHT: We have agreed that I will go first as between the two interveners and Mr
26 Kon can decide then whether he wishes to add anything.

27 I will be brief because Mr Fowler has covered a lot of the material, but
28 fortuitously perhaps some of my comments do actually address some of the questions
29 you have been raising.

30 THE PRESIDENT: Yes, thank you.

31 MISS MCNIGHT: BT has sought to argue that since Vodafone could just as well build its
32 own links between its RBS base stations and switches, it would in fact be strange if the
33 interconnection regime did extend so as to require BT to provide this service as an
34 interconnection service.

35 I think, Sir, you raised a similar question yesterday when you said would it not
36 be distortive of competition to require this to be done? I think we feel that the
37 submissions Mr Fowler has made amply demonstrate that regardless of whether it
38 seems wise or not the language of the directive does show that this constitutes

1 interconnection. But I think it is also important to show that that makes good sense, that
2 is that the interpretation for which we contend is supported on the basis that it would
3 contribute to the better attainment of the objectives of the directive. Of course, this only
4 arises if you think there is ambiguity, which we say there is not.

5 First, I intend to look at the objectives of the Interconnection Directive and I
6 think rather than take you to each part of the text on which I rely, I will make the
7 submissions generally and take you at the end to all the points in the text which
8 support that.

9 THE PRESIDENT: Yes, thank you.

10 MISS MCNIGHT: What I will be looking at is what the Interconnection Directive seeks to
11 achieve and why an interconnection regime needs to be as wide as we say it is in order
12 to suffice to attain those objectives.

13 I want then to look at the decision document, the explanatory memorandum
14 supporting Oftel's decision to show that the way in which Oftel set about deciding this
15 case is entirely supportive of the way in which we say the directive is intended to work.

16 By way of background of course it must be recalled that the reason we needed
17 EC legislation in the telecom sector is that we started off from a situation where in each
18 Member State there was generally a monopoly network provider, the only person
19 entitled to provide services over that network, and there was therefore a requirement for
20 EC legislation to assist liberalisation of the sector generally. Of course the earliest
21 directives were enacted under what was Article 90, dealing with public undertakings,
22 now Article 87 of the Treaty, and the Commission promoted legislation that said "OK,
23 if Member States want to reserve to a monopoly provider the operation of a core
24 network, that's fine, but one can't reserve ancillary activities, such as terminal
25 equipment supply, which can quite properly be separated and opened up to
26 competition. That was the first stage.

27 The next stage went further and said well, we can also say even if you have a
28 monopoly network provider that does not mean you have to have only one service
29 provider using that network, and we can therefore have a range of service providers
30 using the single network to provide services in competition with each other. [Directive
31 90/388]

32 I think this provides a useful point at which to explain the whole concept of
33 what we mean by "wholesale services" in this sector. A service provider who wishes to
34 provide telecom services to end users will clearly need, if he doesn't have his own
35 network, to purchase those services or inputs required for the provision of those
36 services, from a network provider, network operator. Those transactions between the
37 network operator and the service provider are characterised as wholesale transactions.
38 Obviously the paradigm case would be that the service provider purchases from the

1 network operator the conveyance of messages for the benefit of the service provider's
2 own retail customers.

3 The reason that this kind of transaction is generally called a "wholesale"
4 transaction is readily apparent. It is a transaction that is transacted not at the retail level
5 of the market but between an upstream supplier, the network operator, and a
6 downstream retailer. Often the service provider will buy the service in bulk he will not
7 transact separately for each call to be conveyed for his end customer, he will buy
8 transmission capacity in bulk, and typically as a retailer he will resell it in individual
9 call packages or other packages.

10 He will not necessarily resell exactly what he buys. He may combine various
11 inputs into something which is presented at the retail level as a seamless end to end
12 service.

13 Thirdly, and I think this is key to our argument on why cost orientation is
14 implicit in the wholesale service, the wholesale supplier, this is the network operator,
15 doesn't incur any retail type costs in providing the wholesale service. He doesn't have to
16 advertise his wholesale service to end-users through the normal advertising media used
17 to reach end-users. His only customers are service providers. Nor does he have to have
18 such sophisticated retail billing systems, or customer management systems, nor does he
19 incur the same level of bad debt because he might be dealing only with a limited
20 number of service providers who can put up security for their payments.

21 So when we say that he should offer his service at a cost oriented price, the sort
22 of costs we are talking about are essentially wholesale type costs, not retail costs and
23 that is essentially what this case is about. Vodafone wants to be able to buy this
24 product, RBS backhaul circuits, on terms which are reflective of its wholesale nature.

25 I think you asked, yesterday, Sir, about the use of the term wholesale which, in
26 its purest sense, might connote buying something for resale precisely in the same form.
27 But I was thinking overnight of possible analogies. Mr Blair might think this would
28 spring to his mind: we talk about the wholesale money markets, where a retail bank
29 might borrow in bulk large tranches of money for on-lending in quite different financial
30 services packages. That is possibly one analogy. That is how service providers fit into
31 the market, but the EC institutions did not stop at saying "Let's liberalise the provision
32 of services over monopoly networks in each country". They wanted instead to facilitate
33 and indeed, I will take you to the legislation, to stimulate competition in the provision
34 of rival networks within each Member State and, of course, to facilitate cross-border
35 provision of services.

36 But if one has a policy of introducing competition among networks that policy,
37 laudable though it is, will introduce new problems that will require some form of
38 regulation.

1 The first problem, which Mr Barling has certainly drawn to our attention, is the
2 problem that if we have more than one network in a single geographic market it is not
3 obvious that we will be able to secure any to any connectivity. A customer of Network
4 A will be isolated from customers of Network B unless the two networks interconnect.
5 So clearly arrangements for interconnection to secure any to any connectivity are going
6 to be a good thing. This certainly is one of the policies underlying the interconnection
7 regime in the Interconnection Directive.

8 It was thought, of course, that it wasn't sufficient to leave it to network
9 operators to agree interconnection, even though interconnection achieves better
10 benefits for all their customers. The reason it couldn't be left to them to do that is an
11 incentive issue. But if you start off with one very well established network operator
12 serving the bulk of customers who are therefore connected to its network, that network
13 has no incentive to connect with a smaller network, if it connects with a new entrant
14 network it is effectively neutralising its competitive advantage. Absent interconnection
15 a new subscriber has a greater incentive to join the large network because it gives him
16 the opportunity to connect to many more people than if he joins the small network
17 which enables him for an equivalent sum of money only to communicate with a much
18 smaller number of persons. So interconnection has to be subject to obligations so as to
19 create the obligation on the larger network which you wouldn't otherwise wish to do
20 voluntarily.

21 But if any to any connectivity were the only object of the interconnection
22 regime we would see quite limited interconnection obligations in the directive, because
23 for one thing the only point at which any to any connectivity requires interconnection is
24 at the end user termination point, so we would see an obligation to provide access to
25 the end-user termination points. So they are the points which control any to any
26 connectivity.

27 Of course a new entrant would not necessarily know which termination point
28 his own customer wanted to call. He would know the number, he wouldn't know which
29 termination point that was. He might require access to some sort of look up, access to a
30 place at which he could look up which termination point he wants, but it would be very
31 limited interconnection.

32 There are though, other problems which the interconnection regime is designed
33 to address. In my submission that accounts for why we have a much wider
34 interconnection regime in the directive, and the principal problem is one of scale, that if
35 one has a well established monopoly network operator with ubiquitous coverage in a
36 Member State, there is very high barrier to entry for a new entrant who wishes to
37 compete offering a similar scope of coverage. He will have to incur very substantial
38 costs to enter the market, effectively replicating much of the incumbent's network

1 coverage.

2 This could well be such a high barrier to entry as to preclude new entrants for
3 coming in by defeating the object of the interconnection directive which is to stimulate
4 internetwork competition. It would therefore be preferable in one sense to allow the
5 new entrant to decide which parts of the incumbent's network he can replicate more
6 efficiently and allow him to do so so that he builds small elements of the overall
7 network - themselves we would say in law individual networks - but to allow him, I
8 think in the language we have been using to plug the gaps, or fill the gaps, by
9 interconnecting with particular tranches of incumbent operators' network. Of course,
10 that is exactly what we would say the RBS backhaul circuit is, and we would say it is
11 what a leased line is. We have also discussed uncontroversially the fact that we talk
12 about a transit network as providing exactly that form of interconnection service.

13 Of course, if one made it too easy for the new entrant just to decide that he
14 cannot be bothered to build a particular limb of his proposed network, or proposed area
15 of coverage he wants to cover, we might well have perverse outcomes that there will be
16 very little incentive for anyone to invest in improving their network coverage, because
17 they will expect everyone else to piggy-back on that and they would rather wait for
18 someone else to do it. That I think is exactly what Advocate General Jacobs had in
19 mind in the *Telefonica España* case that we looked at yesterday, in the part of the
20 quotation which Mr Barling drew our attention to, Advocate General Jacobs said that a
21 heavy handed regulatory approach might have detrimental effects on investment, but as
22 you correctly said, Sir, that I think means that whilst there is a wide scope
23 interconnection, or the term interconnection has a wide meaning it is not always
24 appropriate to require someone to provide a particular interconnection service.

25 The way in which the EC institutions sought to strike the right balance on one
26 of these various objectives - promoting infrastructure competition, but not diminishing
27 incentives to invest - was by imposing quite limited obligations for interconnection on
28 the bulk of operators. Annex II operators just have a general obligation negotiating to
29 connection but the terms are likely regulated.

30 But operators falling within Annex I, with significant market power, are subject
31 to a more onerous obligation because they must offer cost oriented prices and I will
32 take you to parts of the directive we haven't looked at which I think make quite clear,
33 that the cost orientation regime envisages cost oriented prices for particular tranches of
34 the network to enable interconnection along particular parts of the network.

35 The purpose of requiring the operating in significant market power to offer the
36 cost oriented price is to avoid distortions of competition. It means that provided the
37 cost oriented price is properly and fairly calculated, and the directive indicates that
38 should be done, the new entrant will be able to make an efficient choice, such as one

1 would see in a competitive market. He will say to himself "I have a network already,
2 but I need a limb of my network", or "I need to extend the coverage of my network---"

3 THE PRESIDENT: Yes, I see.

4 MISS MCNIGHT: "---from London to Birmingham. Is it cheaper to install my own line? Or
5 to buy it on a cost oriented basis?" There is no unfairness and no distortion in the
6 regime.

7 Before turning to the directive I would like just to bring you back to the
8 explanation I gave previously of what is meant by the wholesale service, that a service
9 provider or another network operator buys in the market? What distinguishes a leased
10 line that BT provides to, perhaps, Lloyds TSB Bank to connect its branch premises
11 with what we are talking about is that where BT deals with the bank it is offering a
12 retail service, that is part of its retail business. The lease line is provided at retail level.

13 If, on the other hand, Vodafone wants to buy a leased line service, to form part
14 of its network it approaches BT as a wholesale customer. I think we must remember
15 that the leased line service is perhaps an ambiguous term. It can connote a service
16 provided to a retail customer, or to a wholesale customer.

17 When it is provided to a wholesale customer it is an interconnection service
18 within the scope of the interconnection regime, because it is offered to someone who
19 has a right and obligation for interconnection by virtue of being an Annex II operator.
20 It is still in layman's terms an interconnection service when it is offered at the retail
21 level, because Lloyds TSB has its own private network to which there is a connection.
22 But Lloyds TSB is not an Annex II operator, because it doesn't provide publicly
23 available services over its network. So it is not invoking rights under the
24 interconnection directive, it is just a retail customer.

25 Perhaps we could turn to the Interconnective Directive if that would assist.

26 THE PRESIDENT: Yes, thank you.

27 MISS MCNIGHT: Clearly, a lot of the provisions to which Mr Fowler has already drawn
28 your attention are relevant to points I have made and I will not repeat them. Perhaps I
29 could just list where appropriate the recitals I think it would be useful for you to look
30 at. I will mention, of course Recital 1, which specifically is the poorest point I have
31 made:

32 *"...the provision of telecommunication services and infrastructure will be*
33 *liberalised."*

34 It is clearly intended there should be promotion of competition infrastructure.

35 THE PRESIDENT: And infrastructure, yes.

36 MISS MCNIGHT: I would like you to look at Recital 2, Recital 4 - the reference to leased
37 lines as being a method of joining up different networks - Recital 6 and Recital 8, but
38 perhaps I could take you to Recital 10.

1 *"Whereas pricing for interconnection is a key factor in determining the*
2 *structure..." etc.*

3 going down it says:

4 *"Organisations with significant market power must be able to demonstrate that*
5 *their interconnection charges are set on the basis of objective criteria and*
6 *follow the principles of transparency and cost orientation, and are sufficiently*
7 *unbundled in terms of network and service elements offered;"*

8 I think this is quite important because it clearly contemplates that there will not just be
9 an interconnection charge for using BT's Network generally, there will be unbundled
10 charges for using particular segments of the network, which clearly contemplates that
11 there will be a right of interconnection just to use particular segments. Of course the
12 RBS backhaul is a segment.

13 A slightly different point, but worth making since we are here, a few lines down
14 we talk about:

15 *"...flexibility in the methods of charging for interconnection traffic should be*
16 *possible, including capacity-based charging;"*

17 I think this is a method of charging which is particularly suited to leased lines, where
18 one is not just paying for individual calls and minutes, one is buying the right to
19 transfer messages of a certain capacity for a fixed length of time, perhaps a 12 month
20 contract, and capacity based charging is particularly a part with that sort of
21 arrangement.

22 I would ask you separately to look at Recital 12, which talks about adequacy of
23 interconnection and a variety of network termination and a variety of network
24 termination points. Perhaps you could also note Article 2, which we discussed
25 extensively, but I think the definitions clearly support the case I am advancing.

26 THE PRESIDENT: Yes.

27 MISS MCNIGHT: And Article 4(1). Article 4(2), I think it is worth noting here that
28 organisations which have significant market power are "obliged to meet all reasonable
29 requests for access to the network", so the finding that an operator has significant
30 market power does not mean that he can be called upon to provide any form of
31 interconnection that might be requested. It is open to the SMP operator to say "It is
32 simply not reasonable to require me to do that". For example, "It would me more
33 costly for me to do it than it would be for you to do it some other way". We will see
34 later in Article 9---

35 THE PRESIDENT: It is only a reasonable request?

36 MISS MCNIGHT: Yes, but the Regulator has the task of deciding whether a particular
37 request is reasonable, if there is a dispute such as we have now.

38 Annex 1 and Annex 2 you have, of course, looked at in great detail. I think I

1 merely refer to Mr Fowler's submissions which support the points I am making.

2 I would like to look at Article 7.3. This is the obligation to just publish the
3 reference offer.

4 *"Different tariffs, terms and conditions may be set for different categories of*
5 *organisations which authorise, provide networks and services, where such*
6 *differences can be objectively justified on the basis of the type of*
7 *interconnection provided ..."*

8 again, this clearly contemplates different types of interconnection. We would suggest
9 that this is compatible with promoting market entry by those who wish to buy in
10 interconnection to supplement their networks.

11 Article 7.3 refers to Annex IV, perhaps we could look at that - again this
12 example is relevant to interconnection charges. The elements which are permitted to be
13 recovered by way of interconnection charges do reveal that the kind of product we are
14 looking at in the RBS backhaul appears to be contemplated as an interconnection
15 service. It envisages charges covering initial implementation of physical
16 interconnection - so dedicated assets to effect the interconnection; traffic related
17 charges as appropriate, or of course capacity charges. This is where it talks about
18 charges on the basis of additional network capacity required.

19 So we would simply say that the tariff elements contemplated here are clearly
20 consistent with the sort of service that we are requesting.

21 Article 8.1 and 8.2, perhaps we could look at.

22 THE PRESIDENT: Yes.

23 MISS MCNIGHT: 8.2 I think is more pertinent. This is the obligation to keep separate
24 accounts for the interconnection activities, and clearly requires a very detailed
25 breakdown of all the elements of cost and revenue, with details of attribution methods
26 used. Clearly it is contemplated to be required because interconnecting operators will
27 be seeking interconnection at different limbs of the overall network.

28 THE PRESIDENT: Yes, the need to disaggregate. Yes.

29 MISS MCNIGHT: Article 9, the National Regulatory Authorities here had their objectives
30 set out, so these are the statutory objectives of the regime. There is, of course, the need
31 to ensure a satisfactory end to any communications for users. This is the any to any
32 connectivity, but also the need to stimulate a competitive market, which goes back to
33 one of the first points that I was making that this is a separate objective of the regime.

34 Article 9(5) which of course is directly relevant. In the event of an
35 interconnection dispute, which is what triggered this direction, there are instructions as
36 to the matters which the National Regulatory Authority will take into account. There is
37 the desirability of stimulating innovative market offerings, so of course that envisages
38 people coming along and asking forms of interconnection. Also one of the things to be

1 taken into account is the availability of technically and commercially viable
2 alternatives to the interconnection requested. So clearly in this case where we are
3 looking at the explanatory memorandum Oftel did take account of the extent to which
4 others were available, because that would go to whether it was a reasonable request
5 which would be met. There was nothing in BT's case to suggest they are appealing on -
6 --

7 THE PRESIDENT: They are not appealing that part of the direction.

8 MISS MCNIGHT: If we could look at the explanatory memorandum now, I think that is tab
9 5 in the first appeal bundle, the slim binder. Just to take you to a point which I think
10 you raised with Mr Fowler. Paragraphs 3.10 and 3.11, Oftel does say in terms here that
11 this is an leased line product.

12 THE PRESIDENT: It falls within the definition, yes, absolutely right.

13 MISS MCNIGHT: So there was no question that this was in the interconnection jurisdiction.
14 This document is largely directed at seeing whether this is a reasonable request.

15 I take you first to paragraph 2.2, page 8. This reminds us what the RBS circuit
16 is, but it actually draws quite a useful distinction as to two parts of the circuit. It
17 envisages that there will be the connection from the RBS, effectively to the LSE, the
18 local exchange. It is worth bearing in mind that it is often in a rural area, and to get
19 ubiquitous coverage Vodafone would want to have its RBSs all over the place, and it is
20 often more effective to get these in quite obscure locations.

21 THE PRESIDENT: Yes.

22 MISS MCNIGHT: They are from the LSE, they will often be what they call a "trunk
23 component", because the MTX, as you will have noticed in our visit, is often located in
24 an urban area. So we have a trunk segment of the circuit for the LSE to the MTX.

25 If we can move on to paragraph 2.25, page 12. I have skipped the discussion of
26 product market, but it is usefully summarised when we get to geographic market. What
27 Oftel has concluded is that there are effectively two relevant markets, what I might call
28 the terminating segment, which was the first part, the RBS up to the LSE; and then
29 separately there is a market of trunk segments, the LSE to the MTX effectively.

30 Here Oftel effectively says "Well if you want a terminating segment in one
31 place in the country, a terminating segment somewhere else that someone else might
32 provide is not much use to you, because you need it along the very route you have in
33 mind, or very close to it".

34 THE PRESIDENT: Yes.

35 MISS MCNIGHT: But it is not practicable to look at a lot of very small, local markets, and
36 most of them are subject to much the same considerations and were treated as a
37 national market. The same is essentially for wholesale trunk segments [paragraph 2.27].
38 In 2.28 they conclude:

1 *"The above product in geographic market definition analyses lead the Director*
2 *to conclude that the relevant markets for RBS backhaul circuits are the national*
3 *narrowband with symmetric broadband origination market..."*

4 That is the first segment, and the national wholesale trunk segment market.

5 So again, we do see that consistent with the objectives of the interconnection
6 directive, Oftel approach this by saying "We know that BT has SMP in relevant
7 markets for the purpose of the directive, but we ought to look at whether it is
8 reasonable and consistent with creating competition to require them to provide this, so
9 we have the market definition."

10 THE PRESIDENT: Yes.

11 MISS MCNIGHT: I would like to go on to paragraph 2.32. This is the market power
12 assessment, and he has a preamble in 2.32 reminding us of the market definition. 2.33
13 he has taken into account certain information. 2.34 he says that he has reached the
14 conclusion that they have market power, and this is because of the ubiquity of BT's
15 infrastructure, BT's ability to exploit economies of scale and scope, and the existence of
16 significant barriers to entry including some of the costs. That mentions exactly the sort
17 of factors which, on my submission, the legislature had in mind in taking these steps to
18 require interconnection to stimulate market entry.

19 THE PRESIDENT: They are well within the context that the directive is contemplating, so
20 you say.

21 MISS MCNIGHT: They go on to say, to emphasise ubiquity:

22 *"...this ubiquity cannot be easily duplicated by other undertakings..."*

23 and so on. They say that in any given area they have a much more significant volume
24 of traffic, and justification for installing kit.

25 So all of that is quite consistent with the regime we have described.

26 In paragraph 2.40 then Oftel acknowledges there are choices for someone such
27 as Vodafone, but he goes on to say that nonetheless BT enjoys market power. It is
28 obviously not a monopolist, but it enjoys market power, and that of course is a familiar
29 concept in competition law where a dominant undertaking need not be a monopolist.

30 So we would say that the way in which Oftel has approached this shows a clear
31 recognition that what Vodafone was asking for was a leased line service. It is a
32 wholesale buyer of leased lines coming forward as such, therefore entitled to purchase
33 leased line services as an interconnection product within the scope of the
34 interconnection regime. The only question is whether it was a reasonable request. It is
35 not the subject of this appeal, but clearly it must lurk in the back of our minds to inform
36 our approach to the question.

37 We say that Oftel approached the question exactly as one would have expected,
38 taking account of the very factors which underlie the interconnection regime in the

1 directive, and its conclusion is not to be overturned here.

2 THE PRESIDENT: Yes.

3 MISS MCNIGHT: That is as much as I wanted to say unless I can help you any further.

4 THE PRESIDENT: Thank you very much indeed, Miss McKnight.

5 MISS MCNIGHT: Thank you.

6 THE PRESIDENT: Yes, Mr Kon?

7 MR KON: Having said that I was not going to say anything, would you indulge me for
8 literally two minutes - I do not think it will be any longer than two minutes.

9 Sir, there is only one submission I have to make and that in a sense is to bring
10 us back to where we started, which is to remind the Tribunal, in so far as it needs
11 reminding, that this is a dispute concerning whether there is or is not interconnection or
12 whether this can be characterised as interconnection. It seems to me that Mr Fowler
13 has very well set out everything that I wanted to say concerning the meaning of
14 interconnection. There is only one additional comment I would make, which is that in
15 looking at this dispute it is particularly important to have regard to the literal meaning
16 of the words used in the directive.

17 It is well established in Community Law that the starting point for interpreting
18 any Community legislation is the literal meaning of the direction. If there is ambiguity
19 concerning the meaning of that legislation one then has regard to the general scheme
20 and scope - which is helpfully defined in Article 1 of the Interconnection Directive in
21 any event - of that particular directive.

22 In looking at Mr Barling's submissions, and in particular his most recent
23 skeleton argument where he criticises BT I think for shoe horning, or trying to shoe
24 horn this particular dispute into the definition of the directive, there is one submission I
25 would make which is that indeed in relation to all the critical terms, notably
26 "interconnection", "telecommunications network", "network termination point", and
27 "user", the clear meaning of the words used in the Interconnection Directive, and the
28 other directives that we have discussed today clearly support the position taken by
29 Oftel in its determination.

30 Indeed, it is notable that many of Mr Barling's submissions appear to rely upon
31 what he refers to as whether it is intuitively correct to approach this particular dispute
32 in the manner in which Oftel have approached it, or what is commonly understood in
33 the industry to be meant by the term "interconnection". I should simply like to
34 emphasise that we are confident, for all the reasons set out by Mr Fowler, and helpfully
35 by Miss McKnight, in relation to the overall scheme and scope of the directive, that if
36 one looks at the terms used in the directive, and how they are defined and worked out
37 in the legislation one clearly arrives at a conclusion which is entirely consistent with
38 that reached by Oftel.

1 I would urge you to simply follow the wording of the directive, and to look at
2 the objectives of the directive as set out in its preambles, and in its terms, and in my
3 submission that could only lead to one conclusion, which is that the Oftel determination
4 is correct.

5 That is all I want to say, Sir.

6 THE PRESIDENT: Thank you very much, Mr Kon.

7 **(The Tribunal confer)**

8 MR BLAIR: I wonder if I could ask a question, probably of Miss McKnight, and maybe
9 also of Mr Fowler? It is about Article 4(2) and in a sense it is to ask whether this cat
10 could have been skinned in a different way. It turns on the question of whether access
11 in 4(2) is a form of interconnection or is something quite distinct from interconnection.
12 The directive appears to use the phrase sometimes as part of it, and sometimes as an
13 alternative to it. But the way you put the policy of the directive, Miss McKnight, led
14 me to wonder whether you regarded 4(2) as a sort of additional bit of interconnection
15 or is access quite different?

16 MISS MCKNIGHT: I don't regard it as different from interconnection, and I am not sure it is
17 a subset of interconnection. I would have thought that all interconnection entails giving
18 the interconnecting operator access to your buyer upon interconnection.

19 MR BLAIR: So what is the additional obligation that someone with SMP has to subject
20 themselves to under 4(2) that is not already in 4(1)?

21 MISS MCKNIGHT: It is at points other than network termination points.

22 MR BLAIR: Whatever that may mean.

23 MISS MCKNIGHT: Well, I think we know what network termination points and the
24 majority of end-users are. An end-user is generally permitted to access the network
25 only through the normal plug in a house. He wouldn't be permitted to go along and say
26 "I'd quite like to go straight into the trunk network at your nerve centre".

27 MR BLAIR: So could backhaul have been put into 4(2)?

28 MISS MCKNIGHT: Well I think it is within 4(2). As I understand it Article 4(1) is just
29 saying that there is a range of network operators who are listed in Annex II who have
30 an obligation to offer interconnection and they have a right of interconnection to other
31 Annex II operators.

32 Article 4(2) is looking at a subset of those who are listed in Annex I who, if
33 they have significant market power, must meet all reasonable requests for access,
34 including at access at points other than the network termination points offered to the
35 majority of end-users. So the more extensive obligation in Article 4(2) is to offer
36 additional forms of interconnection, i.e. interconnection via different access points to
37 the interconnected network, and would necessarily be available if you were merely an
38 Annex II operator under Article 4(1).

1 MR BLAIR: So does that colour the meaning of interconnection in any way?
2 MISS MCKNIGHT: It means it must be wide enough to embrace interconnection through a
3 wide range of access points, not just those normally available to end-users.
4 THE PRESIDENT: What you invite us to infer from Article 4(2) is simply that
5 interconnection connotes access to the network, it is just a wider, "access" is perhaps a
6 slightly less word than "interconnection".
7 MISS MCKNIGHT: Yes, perhaps my view is coloured by later legislation which does
8 distinguish, but I think an end-user could have access to a network, but he is not
9 interconnection because interconnection signifies one network connecting to another.
10 Vodafone is one network interconnecting to another, that is our case. So there are
11 forms of access which would not necessarily be interconnection but I do not think that
12 is in issue as between Article 4(1) and 4(2).
13 THE PRESIDENT: So in 4(2) the word "access" is not intended to widen the meaning of
14 interconnection, within the meaning of the direction.
15 MISS MCKNIGHT: No, but I think it is useful in the sense that it confirms that
16 interconnection must be wide enough to embrace access not merely at the end user
17 point, but access to the network at other points.
18 THE PRESIDENT: At other points in the network, yes, I see.
19 MISS MCKNIGHT: Does that answer your question?
20 MR BLAIR: Indeed.
21 MISS MCKNIGHT: Thank you. You invited Mr Fowler to comment as well.
22 MR FOWLER: I would say all interconnection involves access, not all access necessarily
23 involves interconnection because only that which falls within the definition of
24 interconnection will be interconnection. But it is significant that the obligation of the
25 SMP operator, when it is translated into the agreement he makes in Article 7, that he is
26 required to make, and the charges to be made, are charges for interconnection, so there
27 is no provision about charges for access separate for the charges for interconnection.
28 THE PRESIDENT: Very well. Right, Mr Barling, I think we are in a position to carry on
29 now.
30 MR BARLING: Sir, picking up Mr Kon's last remarks about the literal meaning.
31 THE PRESIDENT: Yes.
32 MR BARLING: The way we invite the Tribunal to approach the case is really two-fold.
33 First of all we have invited you to say on the "elephant" basis that this does not look at
34 all like interconnection when you look at it in principle, and then to cross check that
35 with the wording of the Interconnect Directive which, in our submission, contrary to
36 Mr Kon's interpretation, supports us completely. We would say it would be very
37 unfortunate, as it were, if one were driven by the ambiguous wording of the
38 Interconnect Directive to reach a contrary conclusion. We say that we are a million

1 miles from that. The Interconnect Directive in fact confirms what is one's
2 commonsense intuitive approach to this problem.

3 THE PRESIDENT: I am not sure intuition is a particularly good guide to Community
4 Directives.

5 MR BARLING: Maybe it is not, but I use it in this sense, when one has actually looked at
6 what interconnection is about, and its fundamental purpose and aims, and then looks at
7 the product in question there is a complete mismatch.

8 So what we have done, with a view to being helpful and saving time given what
9 you said yesterday about the available time, what we have done is to prepare in so far
10 as we could a sort of speaking note. Obviously it could not take account of what my
11 learned friends have said today.

12 THE PRESIDENT: I do not want you to feel you are short of time, Mr Barling.

13 MR BARLING: No, how long do I have, in fact?

14 THE PRESIDENT: How long would you like?

15 MR BARLING: Well I will certainly finish by the normal finishing time, I may not take
16 that long.

17 THE PRESIDENT: Well, you take the time you need.

18 MR BARLING: I would have thought about half past twelve, probably.

19 THE PRESIDENT: You take the time you need.

20 MR BARLING: I am grateful. I hope we have enough copies. [Documents handed to the
21 Tribunal]

22 The first point we make really, and this takes us back to yesterday when the
23 Tribunal put the question, or certainly dealt with the question, what network is being
24 interconnected with anything of Vodafone's here?

25 Our impression had been that there had been originally a suggestion that the
26 whole BT Network was in issue. Then when we saw my friend's skeleton it looked as
27 though it was more adjusted, if one looks in particular to paragraph 15 of the skeleton,
28 it looked as though the backhaul circuit itself was a network, and that was the network
29 that was interconnecting with the Vodafone system.

30 I did not feel much clarification, with all respect to what Mr Fowler said. I think
31 what he said was it was those facilities and transmission systems used by BT to convey
32 the Vodafone signal between the RBS and the MTX which was the network. Does that
33 mean that he is saying that there is a connection with the BT Network, the whole
34 cloud? Or is he actually saying, as we understood from the skeleton, that is talking
35 merely about the circuit, the single circuit, and that is a network, and that is
36 interconnection? I am still not sure.

37 THE PRESIDENT: I think we ought to just pause on that point actually, because I think I
38 am not quite sure at the moment.

1 Mr Fowler, can you just help me a bit? If we go to page 15B of your skeleton. I
2 will just turn up my note. I understood: "BT resources and transmission systems" I had
3 the impression that the system was that part of the BT system that was used for
4 conveying the signals - effectively I think you've got it in paragraph 15B - from the
5 RBS to the MTX which I think in terms of the agreed facts, goes through Southampton
6 or somewhere like that. Is that something different from the RBS backhaul circuit
7 itself, or what?

8 MR FOWLER: I think it is a misnomer to call the thing a "circuit", it confuses the issue,
9 and the reason why we have defined it in the terms of the directive, by reference to the
10 termination points, the directive defines a telecommunications network as being
11 transmission systems and other resources which permit the conveyance of signals
12 between defined termination points. That is the definition that we have adopted here -it
13 is all of that equipment.

14 THE PRESIDENT: If I put the question slightly round the other way, and I am only seeking
15 practical clarification, I am probably very slow on the uptake. We have Vodafone's
16 Network on the one hand. As far as the BT Network is concerned, is the network that
17 you rely on anything different from what is actually being supplied to you by BT? In
18 other words, is the other system simply what is being supplied, if you see what I mean?

19 MR FOWLER: It is those resources that are being used to convey these signals. That is a
20 matter for BT what resources it uses, within the definition of Telecoms Network. It is
21 plain, as I said earlier, that there are many different combinations of equipment capable
22 of satisfying that definition. In the case of each RBS backhaul circuit - I use that
23 expression loosely - there will be different telecoms networks defined in that way. But
24 each one of them satisfies the definition of telecoms network in the ICD, and that is
25 why in both---

26 THE PRESIDENT: It is probably me being very slow, I am just trying to see whether it
27 slightly goes around in circles this definition, because the other system cannot be the
28 very product which you are seeking to obtain.

29 MR FOWLER: It is not the product, Sir, it is the facilities used to provide the product.

30 THE PRESIDENT: Right.

31 MR FOWLER: And that is at BT's discretion what facilities it uses to provide the product.
32 It is not the product itself. It is the facilities used to provide those products, and that fits
33 with the definition of telecoms network, and that is how we defined it in our defence
34 document, and how we define it in our skeleton. In both cases we define it in the same
35 way, by reference to the resources that are being used - the transmission systems and
36 resources being used - to convey the messages, and that is paragraph 21 of the defence.
37 There is no change in our position.

38 MISS MCKNIGHT: Sir, may I draw your attention to paragraph 6 of the Agreed Statement

1 of Facts.

2 THE PRESIDENT: Yes, of course.

3 MISS MCKNIGHT: I think it is quite helpful in distinguishing, as Mr Fowler has, what is the
4 network and what is the wholesale service provided over that network.

5 THE PRESIDENT: Yes, fine, that is where I was getting temporarily confused.

6 MISS MCKNIGHT: It says in the bottom paragraph of paragraph 6:
7 *"The instant dispute concerns RBS backhaul circuits provided by BT to*
8 *Vodafone. In this context, a 'circuit' is a service..."*
9 and in the light of our discussion earlier, I would say a "wholesale" service.
10 *"...provided by BT involving the conveyance of data."*
11 and clearly it is conveyed over assets which, because they are capable of conveying
12 that meet the definition of network.

13 THE PRESIDENT: It is the assets over which the service is conveyed.

14 MISS MCKNIGHT: Yes, "assets" I use the term generically to mean systems, equipment,
15 resources, which I think is the statutory terminology, yes.

16 MR FOWLER: But of course not used only for that purpose.

17 MR BARLING: That is why we keep coming back to it. The problem my friends are in, it
18 is now quite clear---

19 THE PRESIDENT: Does that help at all?

20 MR BARLING: Well it is helpful, I think, because it is quite clear they are saying, and
21 there have to be two networks involved, everyone agrees that, they are saying that the
22 other network that is engaged - whatever they call it, facilities, resources - is the
23 backhaul link, to use a shorthand expression, the backhaul link is the network. Indeed,
24 they say it is a network. They say it complies with the definition. It has what they call
25 network termination points at either end and therefore they say it is a network.

26 We know, in fact, that it is capacity that is excised from the BT network. They
27 do not seem now to be saying you can regard the whole cloud, it is the cloud that is
28 being interconnected with and if they were saying that they would be in an even greater
29 difficulty, because one can see why they are driven to suggesting that it is in fact not
30 the whole cloud because they accept, as they must, that this transmission capacity is
31 excised from the cloud. It is no longer available to BT as part of its network, and so
32 they are forced to say "Well, yes, but....this is a network in itself".

33 One has only got to say that to see that it is, with great respect to them, a
34 nonsense to suggest that that is a network - (a). (b) that engages interconnection
35 because by definition it is not part, it is excised from BT, it is a backhaul service,
36 backhaul of what? Backhaul between the RBS, station and their other premises.

37 THE PRESIDENT: It is excised---

38 MR BARLING: The capacity is excised.

1 THE PRESIDENT: Yes, some capacity is excised. Some capacity is reserved to Vodafone.
2 MR BARLING: Precisely.
3 THE PRESIDENT: I think their argument is that capacity on an existing BT system is
4 reserved to Vodafone.
5 MR BARLING: BT owns the infrastructure, certainly.
6 THE PRESIDENT: The infrastructure and the means of transmitting the signals and all the
7 bits and pieces, and whatever it is that enables the logical flow of the transmissions.
8 There is a bit of capacity on your system reserved to you, and it is special to you as
9 other capacity in another context may be special to particular people like internet
10 operators, or whatever. That is the argument?
11 MR BARLING: It is as long as the backhaul link exists, that capacity is for Vodafone's use
12 alone.
13 THE PRESIDENT: Yes, there is a bit of your system that is exclusively used by you, that's
14 what they say.
15 MR BARLING: As with any transmission capacity that is sold or borrowed or leased.
16 THE PRESIDENT: As in any transmission capacity, so they say there are two networks in
17 the sense that there is Vodafone's network, and there's BT's Network, and you have got
18 a bit of BT's network reserved.
19 MR BARLING: That is the network in itself they say.
20 THE PRESIDENT: No, I think the network is the BT network on which some capacity is
21 reserved for Vodafone. Is that what they are saying?
22 MR BARLING: No, Sir, I don't think it is. I think they are saying---
23 MR FOWLER: What we are saying is that it is the facilities that are used to provide this
24 service. The service involves the reservation of capacity, the capacity is reserved on a
25 transmission system, and other facilities that are used for other purposes as well. Those
26 facilities that are used constitute a telecoms network within the meaning of the
27 definition. Now there may be any part of the cloud, as it were, in any particular case,
28 but there will be specific facilities that are used to provide that capacity, which are also
29 used for other purposes, and it is those facilities, those transmission systems, and other
30 resources, within the meaning of the definition, the physical assets that constitute the
31 network, and they are the assets over which the service is provided. It is not the
32 capacity that constitutes the network.
33 THE PRESIDENT: You are saying that BT couldn't do this at all unless it had a network.
34 MR BARLING: Well we could.
35 THE PRESIDENT: And in a loose sense, what Vodafone wants to do is to use part of that
36 network?
37 MR FOWLER: Yes, but it wants to have capacity on that network. Quite how much the
38 network is used is neither here nor there. For the purpose of the interconnection that is

1 taking place it is those facilities which are used for the purpose of the interconnection.
2 They are used for the purpose of providing the service, which are also used for other
3 purposes. It is not the capacity by itself.

4 MR BLAIR: Legally there are "n" networks tucked into one network?

5 MR FOWLER: Well as I said earlier on, whatever approach one adopts to the definition of
6 network termination that is necessarily going to be so. There is all sorts of
7 combinations of assets - transmission systems, switching systems and other resources -
8 that are capable of being regarded as telecoms network. So if access is being given only
9 to that combination it will still fall within the definition.

10 THE PRESIDENT: There will be dozens of these things all over the country.

11 MR FOWLER: And that is why one can find the leased lines are capable of being the
12 subject of interconnection. In the case of a leased line there is the access being given to
13 the facilities between two termination points, and only to that.

14 THE PRESIDENT: Thank you, Mr Fowler. Yes, Mr Barling, I am sorry. We may all be
15 confused at a deep level now.

16 MR BARLING: I have still got great difficulty with it because they seem to be saying well
17 the reason you know this is a network - what they are now saying is not really what
18 they are saying - is because it has got network termination points at either end of it, at
19 the RBS end and at the MTX end. Well that is not consistent with what Mr Fowler has
20 just said. He is saying that bit in between is a network and otherwise why would you
21 need to even investigate whether there were network termination points at the RBS end
22 and at the MTX end, which they do investigate, so he is inconsistent, with respect, in
23 relation to this, and it is important, because it does actually expose the fallacy in Oftel's
24 position on this.

25 And the same reason they are now, in fact, resiling from the cloud argument, the
26 whole cloud argument, because it has been clarified that this is in fact nailed down, a
27 link that is nailed down exclusively for them, for as long as they want it, and to say that
28 BT has to have a network to provide these links is, of course, completely false.
29 Anybody can provide these links. You can provide them just by digging a hole in the
30 ground in the appropriate places, as some people have done.

31 THE PRESIDENT: A contractor can come along and provide it.

32 MR BARLING: Of course, and BT in fact on occasions does that for parts of the links. If it
33 actually hasn't got an existing infrastructure near, it will actually just do that. So with
34 respect this is an important point and I am afraid it exposes the fallacy as does the
35 reluctance of any of my friends to engage with Recital 4 in any proper way, which also
36 gives the lie to the idea that this kind of transmission capacity being borrowed can
37 possibly be anything to do with interconnection.

38 I think probably that deals with the first two pages of our---

1 THE PRESIDENT: If a contractor comes along and does it, Mr Barling, it is probably a very
2 stupid question - I can see that physically speaking you can dig a trench and put a cable
3 down and all the rest of it, and you can join the two things up at either end. But to get
4 the logical linking you need presumably BT and Vodafone to agree on joint design, or--
5 MR BARLING: No, in fact - do you mean so that the link works?
6 THE PRESIDENT: So that the link works, it can't just be done---
7 MR BARLING: There are Standards, and the equipment is only available according to
8 certain International Standards, so it will plug in---
9 THE PRESIDENT: Anybody can make the equipment to those Standards.
10 MR BARLING: There is probably a very limited availability of this type of equipment.
11 THE PRESIDENT: Not anybody but a third party could simply make the equipment---
12 MR BARLING: As I understand it.
13 THE PRESIDENT: ---to the international Standard---
14 MR BARLING: They do make it, yes.
15 THE PRESIDENT: ---bring it along as a product, plug it in and it will work.
16 MR BARLING: That is what I understand is the case, and heads are nodding behind me.
17 THE PRESIDENT: Yes, thank you.
18 MR BARLING: I will come on to logical linking in a moment, if I may.
19 THE PRESIDENT: Going to paragraph 4 of the written note, we say there:
20 *"The Director General fails to engage with the clear distinction referred to in*
21 *recital 4....In brief, interconnection presumes the prior existence of functioning*
22 *networks capable of being interconnected. The provision of an RBS backhaul*
23 *...amounts to the mere provision...of an element of the network."*
24 Then in paragraph 5 we emphasise again, because it is also quite important to do so,
25 and it is not something that any of my friends have dealt with, what Oftel themselves
26 have said. The way they define it is "an essential component of Vodafone's Network".
27 That is the truth, and everything that my friends have sought to say is somehow trying
28 to escape from that reality, and it is very difficult for them to do so.
29 Paragraph 7 of the note - The nature of interconnection. We make the point
30 already that backhaul is different from the services recognised as the interconnection
31 services. Mr Fowler yesterday suggested that backhaul was analogous to transit
32 services which, as I said in opening yesterday, is an established form of what is
33 normally termed indirect interconnection.
34 Mr Fowler said well backhaul simply entails the transmission of signals from
35 the Vodafone Network across the BT's network into another part of the Vodafone
36 Network in a similar manner. But that is, with respect, a gross over simplification of
37 what is involved in transit. I am not sure whether I did show you what the Competition
38 Commission said on this point - I know I took you to the document, it is in our reply

1 bundle, but I apologise if I did not.

2 THE PRESIDENT: No, let's go again anyway.

3 MR BARLING: I will just show you where they deal with it. It is tab 8 of bundle 9.

4 THE PRESIDENT: We did go to the document, but remind us again.

5 MR BARLING: The bit I wanted to show you, it is a bit that is also referred to by Mr
6 Lunt, I think it is the same document, page 6 - yes, I did take you to this. Perhaps I
7 didn't draw sufficient attention to it.

8 THE PRESIDENT: "Via BT Transit", yes.

9 MR BARLING: 3.14:

10 *"If no direct interconnect is in place, either because no interconnection*
11 *agreement has been reached between the networks, or they do not have*
12 *sufficient traffic to merit a permanent interconnection or because it is*
13 *commercially more attractive, the traffic will pass from the source network to*
14 *BT or another licensed operator with the appropriate interconnections..."*

15 So you already have to have your interconnections between networks in place.

16 *"... such as, for example, Cable & Wireless, who will then pass it on to the*
17 *destination network. BT as the incumbent operator is obliged to offer this*
18 *service... transmitting the call to other suitably connected operators. This is*
19 *illustrated in figure 3.2".*

20 and that is the figure that you see below there. It goes on:

21 *"Table 3.2 shows whether full interconnection for voice is in place from and*
22 *between each of the mobile networks and BT. In addition many of the mobile*
23 *operators have direct interconnections with other fixed operators such as Cable*
24 *& Wireless and NTL. There are some connections between networks just as a*
25 *passing of traffic in one direction, for example, from a mobile operator to an*
26 *international network for the provision of international voice calls, but these*
27 *are not shown."*

28 Then the transit layer is described at paragraph 3.7. I am sorry that is confusing,
29 because that is the transit between the mobile MTX switches themselves.

30 So transit is a form of indirect interconnection and if one turns to Mr
31 Butterworth's second statement, which is in the same bundle as the Competition
32 Commission document, at paragraph 23 onwards. Yesterday I think you were referred
33 to paragraph 14 of his first statement when he raised the issue of transit.

34 THE PRESIDENT: Yes.

35 MR BARLING: And he goes into transit in a little bit more detail here, setting out the
36 examples, how it utilises interconnection agreements between A and B on the one
37 hand, and B and C on the other, then a typical communication using transit, how it
38 works over appointed interconnection. Often there is a problem that there is no

1 interconnection between A and C, but there is between A and B, and B and C, and so
2 the transit goes through in that way.

3 Then in paragraph 26 he said:

4 *"Transit can be contrasted with backhaul which, as explained above, is used to*
5 *enable a mobile operator's network function by connecting one component of*
6 *that network, the RBS, to another using a dedicated partner and capacity*
7 *allocated to the sole use of the mobile operator. It does not utilise capacity that*
8 *forms part of BT's available network resources, and rather it is essentially*
9 *partitioned from BT's network. There is no routing by BT call by call on*
10 *demand over BT's Network. The link is purchased and allocated to the mobile*
11 *operator's exclusive use. Its function is not to enable customers from one*
12 *network to communicate with customers of another, nor to access services*
13 *provided by another network operator. In the case of transit, however, the route*
14 *of each call is switched on the basis of information which is contained within*
15 *the signal itself. In this way each call uses the switching facilities...."*

16 and so on.

17 THE PRESIDENT: So it is not even transit on this.

18 MR BARLING: Backhaul is definitely not transit. He goes on in paragraph 27 to explain
19 why it is termed "Indirect interconnection".

20 THE PRESIDENT: Yes.

21 MR BARLING: It is obviously extremely important to recognise that transit is a form of
22 indirect interconnection because it is a spin-off, if you like, of a very useful product of
23 there being interconnection arrangements between several networks, at least three
24 networks, and it enables A to C interconnection, even if there is no interconnection
25 agreement between operators A and C. Once interconnection is in place between
26 networks, of course one can perfectly well see that it can be used then for any purpose,
27 because once interconnection was in place between several networks, and those points
28 of interconnection, it may well be that an interconnected operator may use the points of
29 interconnection that he has established legitimately, as it were under those rules, for
30 carriage to another part of his own network. But that is entirely separate. That is a spin-
31 off of genuine interconnection, and of course it is switched. When messages are
32 brought on to the receiving network in an interconnection arrangement they do not
33 know, it is not clear before it is brought on to the network, whether those messages are
34 going on to Network C, a third Network, or back - and of course there is a logical
35 linkage between the two networks, because it is interconnection they are logically
36 linked and Network D will therefore respond to the dialled digits, work out where the
37 call is destined for, and if there is capacity available on the network at that time, carry it
38 appropriately across the network to the next point of interconnection.

1 So it is extremely important, Sir, that one does understand that this is not RBS
2 backhaul.

3 THE PRESIDENT: As I understood it the argument was not based on the word "transit", but
4 on the word "transmission".

5 MR BARLING: Yes.

6 THE PRESIDENT: And with this capacity reserved to Vodafone a BT Network, or part of
7 it, is being used as a means of transmission of these signals and that is enough to give
8 you effectively a telecommunications Network, to bring the idea into play.

9 MR BARLING: Well on that basis, if that were right, any form of transmission, by any
10 leased line, any transmission capacity of any kind.

11 THE PRESIDENT: Well, what sort of things, apart from leased lines would that bring
12 within the scope of the Directive?

13 MR BARLING: Well, it would bring in MTX links, for example, MTX links that we
14 discussed yesterday, any borrowing of capacity, any borrowing of transmission
15 facilities for the internal purposes - if I can put it that way - of the other network, the
16 borrowing network would *ipso facto* amount to interconnection.

17 MISS MCKNIGHT: Perhaps it would assist if I were to say that we do acknowledge that the
18 links provided between MTXs could be sought by way of interconnection in the same
19 way as the RBS backhaul links, but of course it would be a separate question as to
20 whether that was a reasonable request for interconnection. Vodafone did consider
21 whether to make such a request. It considered it would raise quite different questions as
22 to whether it was reasonable to the RBS backhaul particularly because of the absence
23 of a terminating link in rural areas where BT's ubiquity is particularly important.

24 MR BARLING: Well, I am unsurprised by Miss McKnight's acceptance. It is obviously
25 right, everything is interconnection.

26 THE PRESIDENT: It is implicit in the case, "interconnection" has a very wide meaning.

27 MR BARLING: And you can tear up Recital 4 because it is simply meaningless if that is
28 right.

29 THE PRESIDENT: Let's go back to Recital 4. Which bit do we have to tear up?

30 MR BARLING: The last sentence.

31 THE PRESIDENT: And we tear it up because?

32 MR BARLING: We tear it up because the idea that one's own network can be based on
33 leased lines or transmission capacity not owned by you, i.e. bought in from another
34 supplier is simply wrong, because the aspect of those things bought in will not form
35 part of your network, and there will automatically be interconnection. So in other
36 words the distinction there between telecommunications networks [plural]
37 interconnected, being those networks, being on the one hand either owned by the
38 operators, or built up by the operators using leased or borrowed transmission capacity,

1 is meaningless. You are not building up your network if you are leasing capacity, you
2 are actually already interconnecting. That is already interconnection.

3 In other words, your whole network can be based on interconnection. It is
4 picking oneself up by one's bootstraps. The reality is, and the accepted reality is that
5 you can get any part of your network to make it work or extend it by buying in capacity
6 instead of building it, but in terms of interconnection it is your network. Those are
7 internal purchases, if I can put it that way, your internal needs of your network are
8 fulfilled - however big or small you want it to be, those internal needs can be fulfilled.
9 You don't have to buy it and own it, you can lease it, but it is your network for
10 interconnection purposes. That is the important distinction in Recital 4, and it reflects
11 what actually happens on the ground. Nobody has hitherto suggested that the links we
12 provide for Vodafone between their MTX switches is a form of interconnection, and it
13 isn't - any more than the backhaul links are.

14 THE PRESIDENT: You are saying when you lease capacity on your system to - you will
15 need to give me a realistic example - an internet operator, perhaps, what you are doing
16 is leasing capacity on your system. That is not part of the concept of interconnection as
17 is described in the directive. The concept of interconnection would bear on the ability
18 of the capacity that you have leased to interconnect with another system? Have I
19 understood?

20 MR BARLING: I think, with respect, Sir, yes. Your example though, one has to be a bit
21 cautious about because it depends on which bit of transmission capacity you are
22 leasing, because of the PPC aspect of this.

23 So if the internet service provider actually already has some capacity himself,
24 but he wants to sell his internet access product to your subscriber that might be an
25 example, I hadn't thought it through because it has only just occurred to me, that might
26 be an example of a PPC, I know not, and that might be interconnection, because he is
27 getting---

28 THE PRESIDENT: He has got an existing system and he wants to add to it.

29 MR BARLING: And to add to it, no, the important thing he wants to get at your customer.

30 THE PRESIDENT: OK, right.

31 MR BARLING: And to do that he has to get some capacity to your customer. In other
32 words, he has to get one segment, or access in another way. That is different from an
33 operator buying in capacity not, as it were, to increase competition, and to increase the
34 customers to whom he can sell his product, but buying in capacity in turn to create the
35 system he wants to operate.

36 THE PRESIDENT: What I have written down is "buying in capacity from another operator
37 to create the system the first operator wants to operate is distinct from buying in
38 capacity from an operator in order to connect with that operator's customers".

1 MR BARLING: E.g. a PPC.
2 THE PRESIDENT: E.g a PPC. So you say the difference between this case and a PPC, upon
3 which fundamental reliance is placed, is that this case is simply buying some capacity?
4 MR BARLING: It is buying some capacity, as Oftel have said, to provide an essential part
5 of Vodafone's network.
6 THE PRESIDENT: Of Vodafone's network?
7 MR BARLING: Yes, that is what they said.
8 THE PRESIDENT: And not to enable Vodafone's network to better connect with some BT
9 customers?
10 MR BARLING: Precisely. This is really the heart of this case. Once he has bought in his
11 system, and made that bit of his network function - let us imagine a relatively small
12 mobile network with two or three of these base stations and he has a very small system
13 and it is functioning because he has got customers who can speak to each other. Then
14 he can interconnect that system with anybody.
15 You may recall, Sir, yesterday we saw that bit of the Oftel explanatory
16 document on interconnection where they said "Who has the right to negotiate
17 interconnection? You have to have a system" they said. In other words, we do not allow
18 system-less interconnection, you have to have some system. That is where you draw
19 the line. So not everybody was an organisation put into Annex II. It had to be people
20 who were either operating networks, who sort of fell into the pool, who had an
21 obligation to negotiate with each other. So you can have a very small system as a
22 beginner, but there is a crucial distinction between even the small person having his
23 system, which includes the backhaul link - he must have a backhaul link.
24 THE PRESIDENT: However he provides it?
25 MR BARLING: However he provides it. It is part of his system as Oftel have said, "an
26 essential component of Vodafone's system" - their words - and that is nothing to do
27 with interconnection, however provided.
28 Sir, I am going back to the note. I think we have really dealt with transit. We
29 touch on the PPC point in paragraph 13, and I will have to spend a little time on that at
30 some point, and you can see why, this is crucial to their case. They have to tie this in,
31 because we submit that PPC is entirely different, and the only reason that we have got
32 leased lines. Leased lines are accepted by everybody. The Commission has put it very
33 bluntly when they say interconnection applies to leased lines quite separately, and one
34 can see why, because a leased line is a service - it is described as a "service", and it is
35 something which is there. It is the end product really. A leased line properly called is
36 an end product. It links up two sets of premises. So it is there to be used. So
37 interconnection with the completed product is an inconsistent idea. No one would want
38 a leased line and then interconnect it. It is not about interconnection, it is the end

1 product. It is only when one understands that one sees where it comes. Those
2 organisations who provide the finished product are the ones in Annex II - organisations
3 providing leased lines. They are in Annex II because they have the right and the
4 obligation to negotiate, as the directive says, with each other, to purchase from each
5 other the wherewithal to get at each other's customers for leased lines. That means
6 supplying and buying from each other partial private circuits, from half way house,
7 where the point of interconnection is between the two relevant network operators, that
8 is the point where the two segments, if you like, will meet, that will provide the
9 complete leased line to Barclays Bank or whoever. You have to buy half of that from a
10 competitor because you don't have that branch of Barclays as your customer, perhaps,
11 or you are not in that area, maybe.

12 That is the only aspect of the interconnect directive to which leased lines apply,
13 and the Commission say that in terms in the working document, and in the
14 recommendation - those two documents that we quoted in our skeleton argument.

15 THE PRESIDENT: Yes. RBS backhaul is well upstream from that situation.

16 MR BARLING: Well upstream, yes, indeed. If I can just say something which Mr Maclean
17 and I found extremely useful, the copyright of which is Miss Stevens, it is as though
18 you said that the purpose of the spark plug was to get you from A to B. Obviously, on
19 an Adam and Eve approach you need spark plugs in order to make your engine fire and
20 run in order to engage the gears, in order to get the car on the road, to get you from A
21 to B. But it is very different, and its purpose is to make the car function. So it has an
22 internal object, and this has an internal object as an essential component of Vodafone's
23 network. Then you can start talking about interconnection when you have got a
24 network, otherwise you have nothing to interconnect.

25 In paragraph 15 we point out that there are a number of ways in which
26 Vodafone can fill the gap that they need, the links that they need to make their RBS
27 communicate with their base station controller, but none of those methods, when they
28 fill their gap, it does not give them one iota more competition between those providers,
29 or greater access to the customers of competing networks. It does not further the aims
30 of interconnection other than in the remotest possible sense of the spark plug.

31 THE PRESIDENT: They argue further that the aim of competition is to enable other
32 operators to have better networks and thus be more competitive with incumbent
33 networks.

34 MR BARLING: Yes, well, no doubt that is true. No doubt that is why people put in
35 infrastructure. They build big networks, that is why Vodafone has got a big network,
36 because it makes it more competitive and that is far from saying that the bits of kit that
37 it needs in order to build its big network is anything to do with interconnection.

38 I think that point I have probably now laboured. In a way, this is the "elephant"

1 point - still on the "elephant" point in some ways - why this is clearly not anything to
2 do with interconnection. Can I just turn for a moment to deal with one or two of the
3 arguments raised about the Interconnection Directive itself.

4 As we say, it would be very surprising and unfortunate, if you were constrained
5 by the language, or anything in the Interconnection Directive to reach the conclusion
6 that this is interconnection.

7 The second limb of that submission is that when you do look at the Interconnect
8 Direction as we did yesterday, you are far from being constrained. In our submission
9 you would tend to say "the language there is completely consistent with its not being
10 interconnection". I am not going to weary you unduly by going back to the now very
11 familiar parts of it.

12 But my friends are rather cavalier about what is said in Annex I and II. If you
13 want a categorical statement as to what they mean by defined termination points in this
14 context you only have to look at those provisions dealing with what networks mean.
15 "Fixed network" means, "mobile network" mean where the network termination points
16 are not at fixed locations.

17 Mr Fowler seeks to escape from that by saying "Oh well they are only dealing
18 there with the differences between---"

19 THE PRESIDENT: He says it is not exclusive, you can have other sorts of network.

20 MR BARLING: Yes, he does. We don't say that you necessarily have to conclude that that
21 is not possible in other contexts. This is a question of language, of course. This context
22 is interconnection directive, and this is the Interconnection Directive. There are other
23 contexts where the concept of network termination points, both as a matter of domestic
24 law and, indeed, as a matter of Community law are used. We do not suggest that in
25 other contexts they might not include points of interconnection or other points. But in
26 this connection we submit they clearly are because they are limited, and the main
27 reason they are limited is because they are being used in order to define what is a
28 network. That is subject to interconnect rights and obligations. Therefore, coming back
29 to the system that is resale, you must have a system, and a network is not a network
30 unless it can send things between end users. That is the definition for interconnect
31 purpose.

32 So we do say that "user" in the Annexes means end-user, and it frequently says
33 so in terms. It might just be worth also glancing at something we hadn't quite pointed
34 up yesterday, which was in Recital 15 to the directive.

35 THE PRESIDENT: Numbering?

36 MR BARLING: Numbering, yes. Towards the middle of that paragraph:

37 *"Whereas number portability is an important facility for users... should be*
38 *implemented".*

1 THE PRESIDENT: Yes.

2 MR BARLING: Then the relevant article for that is Article 12. This is just one example, I
3 am sure there are plenty more. Article 12(5):
4 *"National Regulatory Authority should encourage the earliest possible*
5 *introduction of the number portability facility whereby end-users ...can retain*
6 *their numbers"*.

7 When it says "users" in the Recitals it clearly means end-users.

8 THE PRESIDENT: What is your position on the user argument? There it is being argued
9 that Vodafone is a user, or can be a user: "Falls in the concept of all users for the
10 purposes of Article 9(1)".

11 MR BARLING: Yes.

12 THE PRESIDENT: And as a user notably----

13 MR BARLING: Just let me look at 9(1) again, Sir.

14 THE PRESIDENT: It is admitted that the main thrust of the directive on the context is often
15 towards end-users, but it is said that the user is not limited to end-users and can include
16 companies like Vodafone. In particular in Annex II(ii) it said that Vodafone is a user
17 for the purposes of Annex II (ii) and the premises are Vodafone's MTX and this is the
18 provision of a leased line to those premises.

19 MR BARLING: Well can I deal with that, because that is obviously important.
20 Organisations which provide leased lines to users' premises. Leased lines are, as I have
21 already said, the end product.

22 THE PRESIDENT: Yes.

23 MR BARLING: And they are always described as linking up two sets of users' premises.
24 That is what their purpose is. It is perfectly possible for Vodafone to purchase leased
25 lines, in which case they would be a user.

26 THE PRESIDENT: You mean purchase leased lines for their own internal use?

27 MR BARLING: Yes. In our submission this is what this is dealing with. Coming back, Sir,
28 to your point yesterday - you may have been putting rather better than I did what I was
29 saying---

30 THE PRESIDENT: Well, you should not take too much notice of the President's
31 brainstorming. I am trying to get my mind clear.

32 MR BARLING: The point was right, which was the reasons these leased lines are in here is
33 to create a market. It is to enable people who do not have either a very big extensive
34 network, or who do not have all the customers, obviously, even if you have the same
35 national coverage you do not have the same customers as your competitors, but you
36 want to supply them with leased lines, and that is what that is dealing with.

37 THE PRESIDENT: Yes.

38 MR BARLING: And that is what the Commission said it was dealing with - precisely what

1 the Commission said. Again, without wearying you by taking you to our skeleton, we
2 quoted it extensively, it is creating a market in the end product. That is why Oftel made
3 the PPC direction, we have to provide PPCs as interconnection.

4 It is my friends who are out on a limb on this one. PPCs are what Annex II(ii)
5 underlie, they must underlie that.

6 THE PRESIDENT: 72 and onwards in your skeleton.

7 MR BARLING: Thank you, yes. Mr Fowler has to try and say that somehow the backhaul
8 link is somehow similar to the PPC.

9 THE PRESIDENT: He says it is a line, and if fulfils the definition of a leased line, and if
10 you look at each of the components of the definitions in the Directives those words are
11 met by this product, or this situation and therefore it's interconnection, among other
12 arguments.

13 MR BARLING: Yes, and he is completely wrong about that [laughter] because first of all it
14 is not a leased line. If we are right about Annex II(ii), "a leased line to user's premises".
15 Why would it say that if it was talking about anything other than the end product? It is
16 talking about leased lines. Leased lines are understood to be - this is why Recital 4
17 distinguishes between leased lines and transmission capacity. This is transmission
18 capacity. It is not a leased line properly so-called. It does not link up to end users so
19 that they can use it. It is not the end product. Yes, it is technologically, we accept, the
20 same animal, but that is very different.

21 Interestingly, I notice in the explanatory memorandum Oftel describe the
22 backhaul product, interestingly---

23 THE PRESIDENT: Tab 6.

24 MR BARLING: Yes, it might be tab 5---

25 THE PRESIDENT: Tab 5, yes.

26 MR BARLING: ---if I can find the paragraph note. It is where they describe the product.

27 THE PRESIDENT: Market definition?

28 MR BARLING: Yes, it is paragraph 2.2, I am grateful to Mr Maclean.

29 *"RBS circuits are wholesale inputs required for the provision of retail mobile*
30 *telephony services. In this dispute these circuits offer transparent transmission*
31 *capacity by means of the permanently connected link between the mobile*
32 *operator's premises and a point of connection with an appropriate BT SDH*
33 *node."*

34 Now here Oftel is mixing up two terms of description. Why do they say that
35 there are premises on one end, and refer to "nodes" on the other? Is that because they
36 are seeking to make it look more like a PPC, which does have customer premises on
37 one end, and appointed interconnection on the other, so that it can be married up to its
38 mirror image, and supplied as a complete product. Why don't they say either "between

1 customer premises on both ends", which would be just as accurate, or "nodes on both
2 ends" which as I understand would be just as accurate. So they are mixing up, and it
3 makes it look more like a PPC which it emphatically isn't. We are not supplying them
4 with a partial anything, we are supplying them with a complete circuit with two of their
5 bits with two of their components.

6 So that is a misleading description of the product in our submission. It is one
7 which, whether intentionally or not, is somewhat self-serving, because it makes it look
8 like what Mr Fowler is seeking to submit that it is very like, namely a Partial Private
9 Circuit.

10 THE PRESIDENT: Can we just unpack that sentence a little. "Mobile operator's premises",
11 what are the premises we are talking about?

12 MR BARLING: Well, I suppose they are talking about the huts we saw where the tower
13 was, and then the MTX. They seem to be talking only about the first one of the
14 premises, and then they seem to be talking - oh, sorry, it might be the other way
15 around, Mr Maclean says. The might be talking about the MTX as the premises and the
16 hut as the "node".

17 THE PRESIDENT: The hut that was sitting next door to the mast.

18 MR BARLING: To the tower, to the mast. But on either view it is a mixed approached.

19 MR FOWLER: I think the diagram helps, showing what is being referred to as the
20 interconnect between the two premises, each described as "premises" in the square box.
21 One is the Olo's premises, and the other is the BT premises, and the Olo premises is
22 plainly the MTX rather than the RBS, and the BT premises is the LSE.

23 THE PRESIDENT: What is the BT premises there? The BT premises is the---

24 MR FOWLER: LSE serving the MTX.

25 MR BARLING: That is not quite right, because the backhaul circuit is the line at the
26 bottom. It is the whole link between the signal, the mast, and the MTX. They are saying
27 there is premises at one end and a node at the other, so I am not sure the drawing helps
28 too much on that.

29 THE PRESIDENT: I see the point, the point you are making is that it would have been a
30 better description, so you would say, to say "a permanently connected link effectively
31 between two premises of the mobile operator"?

32 MR BARLING: It could have said that, or I suppose they could have said that it was a
33 permanently connected link between whatever the technical expression is for the
34 multiplexer at the---

35 THE PRESIDENT: Yes, but anyway it is a point of connection with an appropriate BT node
36 for the purposes of onward linking, not to the BT Network, but to the mobile operator's
37 premises?

38 MR BARLING: Well to the mobile operator's equivalent equipment at the mast.

1 THE PRESIDENT: At the mast, yes, I see what you mean.

2 MR BARLING: But you see how using that description slightly makes it look as though it
3 has a user at one end, and is like a Partial Private Circuit with a user at one and a point
4 of connection at the other.

5 THE PRESIDENT: Yes.

6 MR BARLING: Which is not actually the case. I am not quite keeping up to the time I had
7 hoped.

8 Going back, if I may, to paragraph 17, we started on this course when we
9 looked at the users, didn't we, in the Annexes, and I believe I have made our point on
10 that. Really to get where they seek to get they rely on other directives and in particular
11 Article 16 of 90/810, which we have quoted in our reply note at paragraph 18, where,
12 as Mr Fowler pointed out, they use the word "..at network termination points other than
13 the commonly provided network termination points". Interestingly of course, the
14 wording in the Interconnection Directive is different. That talks of points other than
15 network termination points offered to the majority of end-users. So at best this is
16 inconclusive and, at worst, it is against my friend's interpretation.

17 THE PRESIDENT: It takes us back into Mr Blair's question and the idea that access in the
18 subsequent directive is a more specific idea than the word "access" in 4(2) of the
19 present directive.

20 MR BARLING: Yes, that as well, but specifically on this point it seems to be an indication
21 that certainly is consistent - I can put it no higher than that - it is absolutely consistent
22 with termination points in the Interconnection Directive being limited to end-user
23 termination points which, when one gets into the Annex to the Interconnection
24 Directive, becomes crystal clear, as my friend would say.

25 THE PRESIDENT: Everyone says their position is "crystal clear"! [Laughter]

26 MR BARLING: Similarly we have referred to Article 4(2). Again the same repetition of
27 the same distinction between points - not network termination points, but points other
28 than the network termination points offered to the majority of end users.

29 Mr Blair's question relating to that, I think there is probably not much between
30 the parties on this. I think 4(2) is probably more about the fact that only certain
31 organisations have to comply with reasonable requests in relation to access at points of
32 interconnection which are not necessarily just plugs in the wall, and that of course is
33 the case. Points of Interconnection almost always, as I understand it, are not at plugs in
34 the wall, they are almost always at some convenient intermediate point between the
35 infrastructure of both networks, and points of interconnection properly so-called -
36 genuine interconnection.

37 It may say more about the type of organisations than about the actual type of
38 access, because as I understand it interconnection is likely to be done in the same kind

1 of place for all types of organisations regardless of whether it has significant market
2 power or not.

3 In paragraph 21 we point to the key differences between the wording of the
4 directives and we say at paragraph 22:

5 *"... a similar disjuncture of usage of network termination points arises because*
6 *under the definition in the 1990 directive, the concept was also used to*
7 *delineate the boundaries for regulatory purposes of the network operator's*
8 *responsibilities, hence in Annex A to BT licence, the network termination points*
9 *have been defined for this purpose to include points of interconnection. It is*
10 *certainly the case that the term "Network Termination Points" has been used*
11 *widely in a variety of contexts and roles. However, these various applications of*
12 *the concept of network termination point do not serve to define the defined*
13 *termination point for the purposes of, and in the context in which it is used in..."*

14 I suppose one should say Article 2(2) of the Interconnection Directive. That is the
15 definition section. Then we go on to make the submission that I have already made
16 effectively, that the reason it is limited to network termination points at the end users,
17 the reason that that is what is meant by defined termination points in the
18 Interconnection Directive, has to be seen in the light of what the Interconnection
19 Directive is doing, is defining a network, and a network can only properly be defined
20 by reference to something that a network is there to do, namely, to provide services to
21 end users.

22 MR BLAIR: Could I ask on that, do you say that a network is like a walled City where
23 every gate has to have an end user at it?

24 MR BARLING: No.

25 MR BLAIR: There can be some gates that have points of interconnection?

26 MR BARLING: Certainly.

27 MR BLAIR: And if you then interconnect?

28 MR BARLING: There are many of those gates in, for example, well most of the big
29 networks would have a lot of points of interconnection around the country.

30 MR BLAIR: So the network is not defined solely by end users.

31 MR BARLING: Oh no, well, sorry---

32 MR BLAIR: They have to have some?

33 MR BARLING: Well the network, if you mean the extent of the network for regulatory
34 purposes is certainly not we accept---

35 MR BLAIR: No, for the purposes of the Article 2 definition?

36 MR BARLING: For the purpose of this Directive's definition it is defined by a set of
37 transmission equipment which sends signals between end users.

38 MR BLAIR: Only?

1 MR BARLING: Yes.

2 MR BLAIR: So the word "only" could go at the end of para. 24?

3 MR BARLING: In the definition, yes, without combing it, but when it deals with
4 termination points, network termination points is only dealing with those related end-
5 users, because it only uses the term "Network Termination Points" and "Defined
6 Termination Points" in relation to "What is a network?"

7 MR BLAIR: Than you.

8 MR BARLING: And, Sir, it is not just a theory, it does say that in relation to fixed and
9 mobile. The mobile operator is where the network termination points are not at fixed
10 locations. That is what the Annex says. So it is important, this, because as we said at
11 the outset, apart from being constrained to reach a funny conclusion here, the language
12 supports the right conclusion. We refer also to the notes and we have set those out
13 there, which I hope is convenient.

14 Then there was as sort of *reductio ad absurdum* I think, the fragmentation of
15 networks point, which was made in the skeleton argument, but not pursued much
16 orally, although we set out there what we say about that.

17 Leased lines, I am pretty sure I - Mr Maclean is obviously feeling peckish, he
18 says I have covered that as well, the leased lines part. I think he is right about that.

19 Physical and logical linking - if I can find the note I made on that. I think the
20 way it was put is that the additional element, I hope I am quoting fairly, the additional
21 element above the physical linking is the logical linking. That sounds fair enough. That
22 which enables a message to be carried integrally so that it comes out at the other end, in
23 the same way it went in. Mr Fowler said that is ensured by conforming to protocol.

24 We submit that whether or not we are ensuring that the pipe works can be
25 described as logical. It is certainly not the kind of logical link which applies in relation
26 to the interconnection of two different networks.

27 THE PRESIDENT: Well what is the additional element that you say is necessary?

28 MR BARLING: The additional element that is necessary is that which is helpfully
29 described by Mr Butterworth in his second statement at paragraph 13 onwards, where
30 he deals with the fact that they speak to one another. In a sense they are speaking to one
31 another, they are reading what each other are doing, they are linked as though one
32 network would be linked, they can recognise each other as engaged tones, they can
33 recognise each other's call waiting. They are logically linked in that sense. I am
34 paraphrasing really what Mr Butterworth says, but I think that is the gist of it.

35 There is a degree of interaction that one would expect if Networks were going
36 to be operating, although they are separate networks they are going to be operating
37 together.

38 THE PRESIDENT: Mutual recognition is the concept.

1 MR BARLING: Mutual recognition, and reading and so on. It might be a matter of mere
2 semantics to say whether or not the linking of this pipe---

3 THE PRESIDENT: Mr Fowler's argument is that that may well be the case in many
4 interconnection situations, but what we have here is sufficient to satisfy the
5 requirement of logical.

6 MR BARLING: Yes, but it is difficult to divorce, I accept, that question from the question
7 of what is one linking, are you dealing with networks? What do you expect from the
8 logical linking of two networks? There we come back to another point, in a way it is
9 logically linked to the other point about what is a network?

10 THE PRESIDENT: Yes, all these points do need to be looked at as a whole.

11 MR BARLING: There is a certain amount of interrelation between the points.

12 THE PRESIDENT: Yes, that is true.

13 MR BARLING: The intelligent element is certainly not limited to switching, as Mr Fowler
14 suggests, but it includes all the other interactions which are the hallmark of telecom
15 networks - engage tone, call waiting and so on and so forth, regardless of switching.
16 Whereas this backhaul circuit is really no more than a pipe - a working pipe of course,
17 but to describe it as a network which is logically linked to another network is stretching
18 the idea of logical linking.

19 That takes me on to purpose. Mr Fowler said about this that this link allowing
20 Vodafone users to talk to other Vodafone users - end users of course - is what that all
21 is, and therefore it is within the definition, and that is sufficient.

22 With respect, and this is an extraordinary suggestion that it proves far too much,
23 it ignores, as I have said already, Recital 4. It means that any transmission capacity
24 whatsoever---

25 THE PRESIDENT: This is the "spark plug" point?

26 MR BARLING: Well, yes it is the spark plug point but under another guise, yes. Anything
27 you get from a competitor must be interconnect, that is what it leads to. I think as Miss
28 McKnight said, yes, the logic of it is MTXs too.

29 He says that the PPC is the best example, and he referred to tab 15 of bundle 7.
30 He accepts however, he said "I entirely accept that we are not in that position here",
31 because that was dealing with partial private circuits and being sold on. The clue is, of
32 course, as I have already said, that you have to recognise PPCs being interconnection
33 with Recital 4, and our interpretation completely reconciles those two. One is dealing
34 with an immediate raw material sold wholesale to make up for the leased line product.
35 The other is a product under Recital 4 - transmission product - bought in to supply your
36 own component.

37 I am not sure whether it was Mr Fowler, or something he drew your attention
38 to, but local loop unbundling I think was referred to at one point.

1 THE PRESIDENT: Yes.

2 MR BARLING: That is also completely different, as I am sure the Tribunal will know. It
3 has not figured much in this case, but we would submit and I think we mentioned it in
4 our Notice of Appeal document that local loop unbundling is way of getting access, just
5 like a partial private circuit is, to the customer, to the other person's customer. It
6 requires you to give access to your local loop, the bit at the end of your network that is
7 attached to the customer, and other competitors can supply them with services over that
8 local loop without having to get separate access.

9 It also has a quite separate regime, and a Community regulation.

10 THE PRESIDENT: I am hoping we do not need to get into the local loop---

11 MR BARLING: I would very much hope so too, certainly at this stage. I am getting very
12 close to the end now, Sir, you will be relieved to hear.

13 Miss McKnight took you to Annex IV of the directive, and that was to do with
14 pricing. I do not think I need to trouble you to go there now, but if I can just make this
15 note about Annex 4. One thing that does make clear when you look at it is the
16 mutuality in most respects of interconnect pricing. It always talks about "must pay
17 each other".

18 THE PRESIDENT: Yes, you say it is two way - it takes two to tango!

19 MR BARLING: Not always, but generally speaking and that emerges very clearly when
20 you look at Annex IV.

21 THE PRESIDENT: Two way operation..

22 MR BARLING: Annex IV interestingly uses the word "traffic to and from the
23 interconnected network" which is also quite interesting, it gives you the flavour again.
24 It is difficult to conceive the traffic to and from the RBS, which is but a transparent
25 pipe, with Vodafone on either end of it. It is a very different idea.

26 Sir, perhaps you would be kind enough, so that I do not delay anything further
27 to take the rest of our note, particularly the passages about the purpose, of why this
28 does not comply with the purpose, as read. I will not read them out but I hope it will be
29 helpful.

30 THE PRESIDENT: That is very helpful, Mr Barling.

31 MR BARLING: Those are our submissions and the reasons why we submit this direction is
32 doomed.

33 THE PRESIDENT: Yes, thank you very much. We will reserve Judgment and once again
34 we would like to express our appreciation to all the parties and to all their teams in the
35 widest sense for the very high quality of the submissions we have received and for the
36 assistance we have had from everybody in deciding this case. Thank you all very much
37 indeed.

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