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IN THE COMPETITION

Case Nos 1083/3/3/07

APPEAL TRIBUNAL

1085/3/3/07

Victoria House
Bloomsbury Place
London WC1A.2EB

2nd February 2009

Before:

MISS VIVIEN ROSE

(Chairman)

PROFESSOR ANDREW BAIN OBE

ADAM SCOTT OBE TD

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G UK LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

BRITISH TELECOMMUNICATIONS PLC

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

with Interventions by:

ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED

TELEFÓNICA O2 (UK) LIMITED

T-MOBILE (UK) LIMITED

VODAFONE LIMITED

Interveners

and

THE COMPETITION COMMISSION

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared on behalf of Hutchison 3G UK Limited.

Miss Sarah Lee and Miss Sarah Ford (instructed by BT Legal) appeared on behalf of British Telecommunications PLC.

Mr. Josh Holmes and Mr. Jorren Knibbe (instructed by the Office of Communications) appeared for the Respondent.

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared on behalf of Orange Personal Communications Services Limited.

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared on behalf of Telefónica O2 (UK) Limited.

Mr. Meredith Pickford (instructed by T-Mobile Regulatory Counsel) appeared on behalf of T-Mobile (UK) Limited.

Miss Elizabeth McKnight (Partner, of Herbert Smith) appeared on behalf of Vodafone Limited.

Mr. Tom Sharpe QC and Mr. David Caplan (instructed by the Competition Commission) appeared on behalf of the Competition Commission.

1 THE CHAIRMAN: Good morning everybody, and many thanks to you all for making your way
2 in on this rather difficult morning. I have some preliminary remarks to make. First of all,
3 and this is, of course, without prejudice to anything that may finally be decided, we thank
4 the Competition Commission for the determination that they have notified to us on the
5 questions that we referred to them in March last year.

6 There are a number of points for us to consider today, which we have gleaned from the
7 letters that have been sent in. The first one is the point about the calculations under
8 para.16.47 of the Commission's determination. We agree that it would be helpful to have in
9 front of us for this stage of the proceedings what the TACs are for all four years on the basis
10 of the Commission's determination in 2006/2007 prices and what the controlling
11 percentages would be. We do not envisage ordering or directing Ofcom to produce those,
12 but it would be helpful if they could be produced.

13 O2 raised some point in their letter about using actual figures rather than projections or
14 assumptions. We are not quite clear what they were referring to there, what actual figures
15 are relevant, but we are concerned that this should not be turned into a complicated exercise,
16 but O2 may be able to clarify what they mean by that.

17 As far as the need for domestic or European consultation is concerned, on domestic
18 consultation our preliminary view is that it is too soon now to say what, if any, consultation
19 is needed, because we do not know whether as a result of the judicial review challenges
20 there will be more work to be done by Ofcom. Our preliminary view is that if, on the final
21 disposal of this appeal, we are able to set precise figures for Ofcom to include in the new
22 price control, we find it difficult to see what purpose would be served by any domestic
23 consultation, given that Ofcom will be bound to implement our direction.

24 On the European Framework Directive consultation, it would be useful to have an
25 indication now from Ofcom as to how long it considers it would take for it to consult with
26 Europe if the Competition Commission's determination is either confirmed or modified in a
27 way which results in precise figures being set in the direction by this Tribunal. Our
28 preliminary view is that it is not for this Tribunal to rule on whether Ofcom needs to consult
29 with the EC Commission or not – that is a matter for Ofcom to decide – but, as I say, it
30 would be useful to know whether Ofcom considers that, if it did decide that it needed to
31 consult, it would be able to do so rapidly or within a longer timeframe.

32 The third point is the 60 day notice point. We note what the parties have said about that so
33 far. That is something on which we will receive submissions at the same time as we receive
34 submissions on the judicial review challenges, but our preliminary view is that the MNOs

1 have had plenty of opportunity to anticipate the results of this appeal. We understand that
2 this is not a statutory requirement but one that Ofcom has generally adhered to as a matter
3 of its own practice. I shall say no more on that for the time being.

4 Turning then to the judicial review issues that have been raised by the parties, these are
5 what we have gleaned so far. The first is the differential between H3G's allowance for
6 spectrum costs and the allowance for spectrum costs for the 2G/3G MNOs. This ground has
7 been raised by a number of interveners. In this as in the other challenges, we would prefer
8 to have a single submission made on behalf of all those who are raising the point, and we
9 will come later to how we are going to organise that. The second is H3G's point about the
10 ported numbers. Again I will be asking shortly who is going to be making submissions on
11 that issue. Third, the point raised by Orange about whether 2G spectrum costs are an
12 appropriate measure of the opportunity cost for 3G spectrum and how that should be
13 determined. Fourth, the glide path issues, alleged lack of consultation and failure to
14 exercise a discretion, and Vodafone's point about the appropriateness of the glide path,
15 again a point raised by a number of interveners. Fifth, the point that T-Mobile makes about
16 CARS costs. Our preliminary view is that this is not an admissible ground of challenge
17 because H3G's appeal only seeks inclusion of CARS costs for its own rate, not for all the
18 MNOs, and we cannot see that it is an issue in either of these appeals whether CARS costs
19 should have been included in the costs base for the rates of the 2G/3G MNOs. It is not an
20 issue in this appeal. We do not see that this appeal could result in the 2G/3G MNOs' rates
21 being increased because of the inclusion of CARS costs. So we would like to hear
22 submissions as to why it is considered that this is an appropriate ground of challenge.
23 Finally, the network externality charge point also raised by T-Mobile: we do consider this
24 is admissible since the inclusion or exclusion of the charge is in issue in these appeals in
25 relation to all the MNOs' costs. Again, we will wish to determine who is going to be
26 making submissions on that point.

27 As far as submissions are concerned, we want to keep a tight rein on the conduct of this
28 stage of the proceedings and we are, you will not be surprised to learn, concerned that this
29 should not turn into a re-run of the Competition Commission's investigations. We are,
30 therefore, considering setting limits on the length of submissions and the volume of
31 accompanying documentation. We certainly do not want all the material that was submitted
32 to the Commission now to be submitted to us as part of the evidence. If evidence is to be
33 included in these applications, extracts from documents or electronic versions of documents
34 should be used as far as possible.

1 As far as the directions by this Tribunal at the end of the day are concerned, the
2 Communications Act does not prescribe what the Tribunal should do in the event that it
3 decides that part or all of the Commission's determination should be set aside on judicial
4 review grounds, but we envisage that at the end of this stage we will be in a position to give
5 directions for the final disposal of the appeal, so as part of their submissions on the
6 particular judicial review grounds, the parties should be very clear what they are asking us
7 to do at the end of the day.

8 As far as timetable is concerned, what we had in mind was a deadline of 20th February for
9 submissions on the judicial review grounds, responses by 6th March and we would pencil
10 18th and 19th March for a hearing if such a hearing is necessary and once we have received
11 the written submissions we will then notify the parties as to whether we consider that a
12 hearing is necessary.

13 Finally, we have of course BT's application for interim measures. We do not want that
14 application to derail or delay the process for deciding what needs to be decided to dispose of
15 the appeal. It may be that BT would wish to consider whether, if we are able to proceed on
16 the timetable we have indicated, we need to consider that application and of course
17 whatever Ofcom has to say, how long it would take it to implement any directions coming
18 from this Tribunal on final disposal will be relevant to the necessity for dealing with that
19 application.

20 That is all I have to say by way of preliminaries, who is going to kick off with any
21 submissions.

22 MR. HOLMES Madam, I am very grateful for those indications from the Tribunal and in
23 consequence I can be extremely brief. You asked first, madam, how long we thought it
24 would take to consult with the European Commission. We cannot give an absolutely certain
25 answer today but we do not envisage that it would take very long at all, it would not be a
26 material delay. We imagine that within the space of a week it ought to be possible to obtain
27 guidance from the Commission.

28 As regards the period required to implement at the end of the day that obviously depends
29 slightly on what conclusions were arrived at as a result of the judicial review challenges
30 which parties have indicated they are minded to bring, but if it were simply a matter of
31 applying the determination as set out by the Competition Commission that would be a very
32 short process indeed, and could be done within the seven days indicated in the interim relief
33 application made by BT.

1 As regards the timetable our only slight concern in relation to the Tribunal's proposal is as
2 to whether it would not be safer to keep a day in reserve if that were convenient in terms of
3 the Tribunal's diary. It would obviously be the worst of all possible worlds if we were to go
4 part heard and there are a number of parties to be heard. It may be that with case
5 management that that risk could be avoided but we flag that only in case the Tribunal were
6 minded ----

7 THE CHAIRMAN: You are thinking of three rather than two?

8 MR. HOLMES: Three days rather than two. I should say we sought the views of parties
9 obviously before hearing what you had to say and, equally before the Competition
10 Commission's letter was delivered and while I was not able to speak with all parties a
11 number indicated that three days was an appropriate length.

12 (The Tribunal conferred)

13 THE CHAIRMAN: We will check whether that is possible. As far as responses, Mr. Holmes, to
14 the challenges what role do you envisage Ofcom playing in this stage?

15 MR. HOLMES: We intend to make short and focused submissions, madam, insofar as we think it
16 helpful to assist the Tribunal. We do not envisage playing a primary role in the proceedings
17 when considering the judicial review challenges.

18 THE CHAIRMAN: Yes, it seems that 18th, 19th and 20th is possible for the Tribunal.

19 MR. HOLMES: I am grateful, madam.

20 MISS ROSE: Madam, on behalf of H3G, we read the Competition Commission's letter of Friday
21 with great interest, and in particular the suggestion that the Competition Commission made
22 that it might be possible for this to be dealt with by written submissions without having
23 another oral hearing. We are keen that the procedure should be streamlined at this point as
24 much as possible, and we entirely take on board the point that the Competition Commission
25 makes about the huge amount of public money as well as private money that has been spent
26 on this process so far, and we would invite this Tribunal to consider whether, in fact, these
27 issues could be dealt with on the papers. There has been every conceivable argument
28 developed before the Competition Commission, the grounds of challenge are limited to
29 judicial review challenges and we would suggest that it might be possible for it to be dealt
30 with on the papers.

31 So far as the timetable that the Tribunal suggests, I have a difficulty on 18th March. I
32 appreciate that counsel's commitments tend not to be first priority, but you will appreciate
33 madam that we are a very, very long way advanced in this litigation, we are also talking
34 about fixing a date at short notice; you will also have in mind that we are in the Court of

1 Appeal the previous week on our appeal on the SMP issue. I am concerned that it would be
2 very difficult for H3G to switch horses at this stage. I would be able to do the Thursday,
3 Friday and the following Monday, but on the Wednesday I have a commitment.

4 THE CHAIRMAN: Let us hear what others have to say. Do you have anything else to say on
5 any of the other issues.

6 MISS ROSE: The only other point, in terms of the role that H3G envisages itself playing, the
7 only positive ground of appeal we are pursuing is the ported numbers issue. Apart from that
8 we envisage that it may well fall to us principally to defend the Competition Commission's
9 decision in relation to the year 4 TAC and the glidepath because I anticipate also from the
10 letter of the Competition Commission that they intend essentially to rely on their decision
11 and leave it to the parties to fight it out and I imagine it will be H3G essentially taking the
12 lead role on those points, which is another reason why we would submit that it would be
13 very difficult for H3G to have to change counsel at this point.

14 THE CHAIRMAN: Yes, thank you. Yes, Miss Lee?

15 MISS LEE: Madam, obviously we are very much in the hands of the Tribunal in terms of the
16 Tribunal's availability for a hearing in relation to the JR challenges. I was, before I heard
17 your preliminary remarks this morning, going to urge a tighter timetable on the Tribunal
18 than the one that you have outlined. We do consider that there is merit in the suggestion of
19 the Competition Commission that the matter be dealt with in writing, and we echo the
20 remarks made by Miss Rose, really that this is a process that has taken a long time and we
21 do feel that there are matters that could be dealt with in writing.

22 If the timetable for the submissions has been set on the basis that a two or three day hearing
23 cannot take place until 18th March, and if it were the case that everything could be dealt
24 with in writing, maybe we could have an even tighter timetable, I do not know. I was going
25 to suggest that the parties have known about this for a very long time, they know the points
26 and if they are going to raise judicial review challenges they can be dealt with shortly and
27 clearly. I was going to suggest a much more limited timetable for them to put in their
28 grounds of application, even towards the end of this week or the beginning of next, with a
29 10 day or so period for BT and others to reply. Obviously I recognise if there has to be a
30 hearing then in a sense we should work backwards from the hearing in setting the timetable
31 but we are very keen obviously to press this as soon as possible.

32 In relation to the interim relief application, we do realise that there comes a point where the
33 hearing and the judicial review challenges can be decided quickly enough that it is not
34 necessary therefore to deal with the interim relief application. Nevertheless, as I say, I set

1 out this morning with a tighter timetable in mind and I would like to take instructions as to
2 what we would do in relation to an interim relief application if it is the case that in fact a
3 decision on the JR challenges may not be made until the end of March. That is something
4 that we would want to consider further.

5 In relation to interim relief again we think it could be dealt with largely in writing with a
6 short, one day hearing, and if that were the case I would propose a short timetable with the
7 MNOs setting out their position in writing and an opportunity for us to reply in writing on
8 any jurisdictional points which obviously we have not addressed in our application. The
9 matter could then be dealt with with a tight, one day hearing, so that could be fitted in at an
10 earlier date, although I do not know when. Again it depends on the Tribunal's availability.
11 I do not think that we want to give up on interim relief at this stage, but I will take
12 instructions.

13 THE CHAIRMAN: Thank you. Do any of the interveners wish to say anything?

14 MISS DEMETRIOU: Madam, our position is that we certainly do need a hearing to consider
15 these points, not least because we have a very complex determination that has been issued
16 by the Competition Commission. The timetable that the Tribunal has suggested is tight but
17 we say we accept it is realistic and will endeavour to do our best to comply with that. We
18 certainly do not think this is a case that can do without a hearing; the points are complicated
19 and they are both legally and commercially very significant, so it seems to me to be entirely
20 wrong to suggest that these could be dealt with on paper.

21 In terms of the timetable that has been suggested, as I have indicated we see that as tight but
22 realistic and we do not want to delay things further, and will endeavour to meet it.

23 MR. PICKFORD: We strongly endorse those comments, we would vehemently resist any
24 determination of this matter solely on paper. It is true they are JR points, but JR points,
25 particularly of this complexity, are not ordinarily dealt with without an oral hearing. Again,
26 in relation to the timetable in our view it is a tight but hopefully workable timetable,
27 assuming that is that we are not all blown off course attempting to deal with an interim
28 relief application from BT at the same time, so it really is contingent, I think, on that. In
29 relation to the point that the Tribunal raised about the admissibility of the CARS cost point
30 we will, of course, reflect on that, and if we are to pursue it we will make sure we address
31 that admissibility issue, but as we indicated in our letter our initial grounds were in any
32 event preliminary and we will consider the Tribunal's remarks accordingly.

33 THE CHAIRMAN: Thank you. Yes, Miss McKnight?

1 MISS McKNIGHT: We would endorse the comments made by Orange and T-Mobile as to
2 timetable, and as to the need for a hearing on the JR points. One small point, I think
3 madam, when you summarised the grounds which have been identified for possible JR
4 challenge that you referred to Vodafone's second ground as being a challenge to the
5 glidepath. In one sense it is because it is a challenge to the Commission's determination as
6 to what should be done to the TACs for years 1 and 2, we would characterise it as a
7 challenge on the basis that the Commission did not properly exercise its judgment as to
8 whether it should go back over years one and two at all, let alone as to what levels it should
9 adopt, but subject to that we agree with your summary of the grounds that have been
10 identified.

11 THE CHAIRMAN: Thank you. Miss Bacon?

12 MISS. BACON: Madam, I do not have anything to say about the JR issues, obviously we have
13 already expressed our intention not to JR the Competition Commission's determination. Of
14 course, we will be at the hearing and we are content with the hearing date. We may wish,
15 for example, to make submissions in response to those of some of the other parties, for
16 example, H3G's submissions. I think it falls to me to explain the point that we made in our
17 letter, I think Vodafone echoed the point in their letter, regarding the projected versus actual
18 figures. It is a small point and actually we envisage that this may well be something for
19 Ofcom when it comes to calculate the TACs, but it was simply to note that in at least one
20 place in the original decision Ofcom relied on a projection for inflation which has
21 subsequently been overtaken by actual figures and we merely wanted to put on record that
22 when matters occurred, we assume that the actual figures would be used rather than what
23 was then projections. I can give you the paragraph references, but it is only one or two
24 paragraphs of the decision, it is a small point.

25 THE CHAIRMAN: Thank you, finally Mr. Sharpe, for the Commission?

26 MR. SHARPE: Madam, you have received our letter and it has been referred to and we stand by
27 that. I just have some very brief remarks, if I may. First, the Competition Commission will
28 obviously rely upon its determination as its primary evidence in reply. You should not
29 assume though, I do not think you would, that we will be shrinking violets in defence of the
30 determination and we will, indeed, respond – if necessary in writing but certainly orally on
31 all the matters which are being challenged.

32 Secondly, as to the oral hearing, you need no reminding under Rule 19 that you are masters
33 in your own home, and to the extent that this is a necessary step before you take the further
34 steps in relation to Ofcom, it is a step you have to take whether or not people object to the

1 determination at all. It is arguable that the full panoply of written and especially an oral
2 hearing may not be strictly necessary, and you are obviously seized of that. Our view is that
3 this very familiar material, very familiar indeed, and that unless the Tribunal is going to be
4 materially assisted in oral argument, then there is a very good case, particularly in the public
5 interest of fast tracking this to its final conclusion for there not to be an oral hearing.

6 However, that said, it has been remarked that this is a complex matter and that the timetable
7 is tight. Repeating the points about the familiarity of the material I wonder whether, in fact,
8 in the public interest we might try and speed things up a little. You have asked for written
9 submissions by 20th February, nearly three weeks' time. The parties have already traversed
10 the material in their correspondence with you, none of it is new to the Commission and a lot
11 of it is indeed reflected in the determination itself. It seems to me that is an unduly
12 generous and indulgent period of time within which these parties should put their
13 submissions in writing, and I would respectfully ask that a shorter period would be
14 appropriate. I think arguments about complexity, delay and pressure read a little hollow
15 when one bears in mind what has gone before us. I think a tighter timetable would be
16 better.

17 My final point is partly a personal one, but partly relates to the tighter timetable, I have the
18 honour to defend the British Airports Authority in the week beginning 16th March. It is not
19 one of those cases that people can bet on settling – far from it – therefore I am completely
20 out of the timetable that you have proposed. Now, I endorse Miss Rose's view that the
21 Tribunal is not here for my convenience, but on the other hand, I have been with the
22 Commission on this for a very long time and, despite the terrific service my Junior has
23 provided, and indeed his familiarity with the determination is unmatched, I would feel very
24 reluctant indeed to delegate it to him.

25 I have a practical proposal which I hope will find favour. If you are willing to abbreviate,
26 albeit by a short period, the period of written submissions and if the Tribunal were available
27 and of course my friends, we could perhaps kick off in the week before, perhaps the last
28 three days of the week.

29 MISS ROSE: We have another engagement that week in the Court of Appeal; all of us, for the
30 SMP appeal.

31 MR. SHARPE: All of us except me, it seems. There is a difficulty here, and it is not easy to see
32 how it can be resolved.

33 The primary point is that I think the period of time is slightly indulgent, bearing in mind the
34 issues which have been raised, which are essential issues challenging the substance of the

1 determination, and there are one or two issues regarding consultation which a casual perusal
2 of the footnotes in the determination might easily dispose of. It may be, madam, that this is
3 something that may not arise if, after due consideration, you feel that no oral hearing is
4 needed.

5 THE CHAIRMAN: Thank you, Mr. Sharpe.

6 MISS ROSE: Madam, may I just make one very rapid comment, which is that it is striking that
7 all the parties to this appeal think it can be dealt with in writing. The only people asking for
8 an oral hearing are not parties but are interveners.

9 THE CHAIRMAN: Yes, let me make clear that the reason why we suggested a date for an oral
10 hearing – I think I said we would pencil it in – was not that we are committed to holding an
11 oral hearing, but if it should turn out that one is necessary after we have read the
12 submissions we should not have to start at that point trying to find a date which suits
13 everybody. I thought it might be easier to start that process now. Whether it is or not, I am
14 not sure. I think we will at this stage just work out who is going to be involved in making
15 comments on each of the grounds that we have identified. On the point that the 2G price
16 cap should have applied to H3G's TAC as well and that there should have been no greater
17 provision for spectrum costs for H3G – Orange, Vodafone and T-Mobile, I have made a
18 note, will want to argue in one direction on that. H3G presumably will be arguing to the
19 contrary. Are there any other parties that envisage being involved on that point?

20 Mr. Sharpe for the Competition Commission.

21 Miss Lee, you look undecided.

22 MISS LEE: Madam, I think perhaps I should say we are undecided but at the moment we do not
23 think that we would intervene on that point. I think the only danger is the knock-on effect it
24 might have on everything else, so we may want to make some submissions. We have not
25 made a case up to now that is different from the MNOs on that. Can I reserve my position,
26 but with that indication.

27 THE CHAIRMAN: Yes.

28 MR. SHARPE: Madam, just for completeness, can we reserve our position generally. Our
29 submissions will be short on any points on which we choose to make them, but until we
30 have seen the positions of the other parties in writing we do not feel we are yet in a position
31 to commit ourselves.

32 THE CHAIRMAN: On that point would it be feasible to have a single written submission from
33 the three interveners rather than three separate submissions? I raise that point. We will
34 break in a moment for you to take instructions on that. Clearly, as far as responses are

1 concerned, H3G may wish to take a different stance from the Competition Commission and
2 from Ofcom, so we do not regard it as appropriate to expect the responses to be in a single
3 submission.

4 On the ported numbers point, that would be H3G in the lead. Anybody else who envisages
5 making submissions in support of H3G's arguments on ported numbers? No.

6 Who is going to be the respondent, as it were, as regards that point. That would primarily
7 be the Competition Commission? Does British Telecom take a view on that point, Miss
8 Lee?

9 MISS LEE: Again, I am not sure we would necessarily take any factual points. We may want to
10 take a position consistent with our submissions on the other points about the nature of JR
11 challenge, I suppose. Again, can I reserve my position to say something if necessary.
12 Thank you.

13 THE CHAIRMAN: Then there is Orange's point on whether the 2G spectrum costs are the
14 proper way of measuring the opportunity costs of 3G's spectrum – that is the AIP point.
15 That will be Orange in the lead on that. Anybody else envisage making submissions in
16 favour of that point. Miss Rose?

17 MISS ROSE: Yes, madam, we would want the opportunity to make submissions on that.

18 MR. PICKFORD: Madam, I am instructed that we would wish to reserve our position on that as
19 well, albeit that if we had anything to say I am sure it will be extremely short.

20 THE CHAIRMAN: Responding to that point, again it is probably the Competition Commission
21 to respond to that?

22 MR. SHARPE: Yes. Madam, I think as a general proposition our intention is to defend the
23 defensible.

24 THE CHAIRMAN: Yes. I think it is worth finding out if there is anybody else who will be going
25 in to bat on that.

26 MISS LEE: Madam, I was just going to say in relation to that, and I think probably in relation to
27 the rest, BT would probably wish to make submissions in opposition, in support of the
28 Competition Commission and in opposition to everybody else.

29 THE CHAIRMAN: On the glide path, this is also an Orange, Vodafone and T-Mobile point, and
30 again, if it were possible to have a joint submission from those with one of them taking the
31 lead, whichever you decide, and again the respondent on that is likely to be the Commission
32 and BT.

33 MISS ROSE: Madam, we reserve our position on that as well.

34 MR. SCOTT: Are we embracing the appropriateness question in that as well?

1 THE CHAIRMAN: Yes, I think so. The CARS point, you have heard what we have to say about
2 that for the moment, but that would be a T-Mobile point, if it went ahead, and again that
3 would be BT and the Competition Commission in response. The network externality
4 surcharge the same. Is there anyone else who would be interested in making submissions
5 on the network externality?

6 MISS ROSE: We reserve our position.

7 (The Tribunal conferred)

8 THE CHAIRMAN: We will now adjourn briefly to see if the parties can discuss amongst
9 themselves a timetable for the hearing on dates different from those that we have pencilled
10 in. We will rise now for a short time during which we would like you to consider dates, if
11 those dates that we suggested do not suit, and also if the interveners particularly could
12 discuss amongst themselves whether there is one of their number who will take the lead on
13 the points which are points raised by more than one of them, but where they are likely to be
14 wishing to make the same submissions, so that we can streamline the process.

15 Yes, Miss Lee?

16 MISS LEE: Madam, before we go and discuss it with the other parties, are there any dates
17 available in the Tribunal's diaries that are earlier than 19th March? It might focus
18 discussions if we knew that.

19 THE CHAIRMAN: We will discuss that outside, but we do see the difficulty that is created by
20 the Court of Appeal hearing in the week of the 9th. We will rise now for 15 minutes, but if
21 you need more time then let us know.

22 (Short break)

23 THE CHAIRMAN: Just to tell you the position of the Tribunal at the moment. We have not
24 ruled out having an oral hearing of these grounds, but we will endeavour to decide as much
25 as possible on the papers and therefore restrict the oral hearing to perhaps a day with a day
26 in reserve. We would then meet as a Panel before that hearing and indicate to the parties
27 which of the issues we consider need to be covered by oral submissions, and which we will
28 deal with on the papers.

29 (The Tribunal conferred)

30 THE CHAIRMAN: Mr. Holmes, you are going to tell us the outcome of your discussions?

31 MR. HOLMES: Yes, indeed, madam. The position appears to be that counsel for the
32 Competition Commission is available in the week commencing 23rd March, but not
33 thereafter, and not before. Counsel for Hutchison, Vodafone and T-Mobile are all available
34 from 19th March, counsel for Orange is available from 18th to 20th March, but not in the

1 week commencing 23rd March, and counsel for O2 is available from 18th March onwards,
2 and BT is available from 18th March to 25th March. So it appears that all parties except
3 Orange are available in the week commencing 23rd March and all parties, with the exception
4 of the Competition Commission, are available on 18th, 19th and 20th March – more than that
5 we have not been able to do, I am afraid. I am not sure it assists the Tribunal much.

6 MISS ROSE: We are not available on 18th.

7 MR. HOLMES: I am sorry, 19th and 20th March.

8 (The Tribunal conferred)

9 THE CHAIRMAN: Our concern with putting this back to the week beginning 23rd is that we are
10 then getting very close to the start of the third year of the price control. Mr. Sharpe, it may
11 be that we will have to fix the hearing despite it not being convenient for you, I am afraid,
12 though of course we would very much value the written submissions that you could present
13 on behalf of the Commission. The previous week beginning 9th we do not think is feasible
14 because the other parties are involved in the Court of Appeal proceedings, and the week of
15 2nd March is probably a bit too soon and, in any event, does not work for the Panel.

16 MR. SHARPE: Madam, I would submit that the distinction between Thursday and Friday of 20th
17 and the Monday and Tuesday of the following week would not seem to be overly material
18 in relation to the review period respectfully.

19 THE CHAIRMAN: Yes, Miss Lee?

20 MISS LEE: Madam, I do not want to add a complication but I think it is likely that we would
21 want to press our interim relief application in which case going to the week of the 23rd
22 March is not a huge difference, as Mr. Sharpe says, from the 18th/19th. I have heard what
23 some of the parties have said about derailing the timetable of everything else, but it seems to
24 us at least that the timetable currently envisaged for the written submissions on the JR front
25 is, as Mr. Sharpe describe it, “indulgent”, so we do not think that that would be a problem,
26 and if there could be an earlier hearing at the beginning of March – one day in relation to
27 the interim relief etc, that may slightly ease the pressure, but I appreciate it depends on the
28 Tribunal’s diaries.

29 THE CHAIRMAN: It is the same problem as we have for finding a day for this.

30 MISS LEE: I wanted to raise that in conjunction with Mr. Sharpe’s submission about the week
31 beginning 23rd March. Obviously we do not want it to go any further than the week
32 beginning 23rd March.

33 THE CHAIRMAN: (After a pause) This is what we would propose: that submissions in support
34 of the judicial review challenges and responses to the interim relief application that has been

1 made by BT should be in by close of play on 13th February. Responses to the judicial
2 review challenges and BT reply to the interim relief responses by close of play on Monday,
3 23rd February. We could then sit to hear the interim relief application on 27th February if
4 necessary. We would indicate to the parties by 10th March whether there needed to be an
5 oral hearing on the judicial review application and, if so, which matters would be covered
6 by that, and we would then hear that on 24th with 25th in reserve.

7 MISS DEMETRIOU: Madam, can I make a couple of points. I do appreciate that it is very hard
8 to find a hearing date that suits everybody, but the two points I would like to make are that
9 the revised timetable, which is now curtailed by a week, and which now includes responses
10 to the interim relief application is, I am afraid, just unworkable from our perspective
11 because not only are we going to have to develop our grounds on the judicial review – and
12 the judicial review seems to have been described variously by the Competition Commission,
13 BT and H3G as some kind of indulgence; it is not, this is our right and our only opportunity
14 to challenge the lawfulness of this determination. We cannot go before the Administrative
15 Court, this is our opportunity to judicially review this important determination which has
16 huge commercial consequences for our clients. So to compress the timetable so that we are
17 having to deal with an interim relief application, which no doubt will have to develop
18 evidence in response to, and formulate our grounds for judicial review by 13th February I
19 am afraid does not give us an effective opportunity to put our case; that is the first point, we
20 are really concerned by this.

21 Secondly, I am not available in the week of 23rd to 27th and I appreciate the difficulty of
22 finding a date to suit everybody, but I am the only counsel on Orange's team and the
23 Competition Commission, by contrast they do have two counsel so Mr. Sharpe's junior
24 could do the hearing if required. It is our challenge and I think we would find it very
25 difficult to hand over to someone else who has not been involved at all up to this point. So
26 those are my two concerns.

27 THE CHAIRMAN: Well the only point on which Orange is the only person making the
28 challenge is the AIP point.

29 MISS DEMETRIOU: Yes, madam, but we are also making two other points of challenge, and
30 you have asked us to co-ordinate, to agree a single submission. That is very difficult to do,
31 especially if the primary procedure is going to be a written procedure. Now, I can quite see
32 that we could agree a written document, if we had time to do it, and then those of us who
33 did not feel that our points had been sufficiently put in the document could make brief
34 supplementary oral submissions, but it is going to be very difficult in the time frame to

1 agree, in respect of our two other grounds, a document that all three MNOs pursuing the
2 points are equally happy with.

3 MR. PICKFORD: Madam, we would strongly endorse that and, as far as I could understand, the
4 date that is being suggested for the oral hearing has not actually been brought forward at all
5 relative to the date that was originally suggested by the Tribunal, so we do not see why in
6 relation to the JR grounds it is necessary to abridge the timetable that was originally
7 proposed by the Tribunal, even if in relation to an interim relief application, it has to
8 proceed on a more expedited timetable. We simply do consider that to be able to co-
9 ordinate and produce a joint document by 13th in relation to these complex issues, is not
10 practicable.

11 PROFESSOR BAIN: Could I just say, Mr. Pickford, part of our thinking was that if we had the
12 papers in earlier from the parties we would then be in a position to look at them, and deal
13 with certain matters on the papers without knowing in advance which they would be, but we
14 felt it likely that some of the issues could be dealt with on the papers, which would allow us
15 to curtail the oral hearing, so one of the reasons for bringing it forward is to provide us time
16 to deal with it in that way, which we think is a more cost effective way of dealing with it.

17 MR. PICKFORD: I am grateful, sir, for that indication, but we would reiterate what we said at
18 the outset, that this is an extremely important matter for all of the MNOs here, who are
19 parties, they may not have brought the challenges, but they are parties and the repercussions
20 of the Decision are profound, and we would respectfully say that it is an appropriate
21 exercise of our rights to enable us to have an oral hearing in relation to these difficult and
22 complex matters.

23 (The Tribunal conferred)

24 THE CHAIRMAN: The dates of 24th and 25th March – those, Miss Demetriou, that you say you
25 cannot do – are those problematic for anybody else? The dates of 19th and 20th March, it is
26 Mr. Sharpe who cannot appear? I am afraid we are going to have to rise again for another
27 short adjournment and decide what to do. The 27th February, if we need a day for the
28 interim relief hearing, is that convenient in so far as anything is convenient?

29 MISS LEE: I am afraid I have not checked that with Mr. Anderson's diary. One of the problems
30 with me coming here direct and not from Chambers this morning because of the weather is
31 that I did not bring the print-out of the diary. It is sitting on my desk, I am afraid. Perhaps I
32 could double-check that, if that would be helpful?

33 THE CHAIRMAN: Yes, thank you. We will endeavour to square this, thank you.

34 (Short break)

1 THE CHAIRMAN: We have decided as follows: we will split out the timetable for the interim
2 relief application and the judicial review application. As far as the interim relief application
3 is concerned, responses to BT's application by 13th February, and we would welcome
4 submissions from Ofcom on the issues and the practicality of the interim relief being
5 sought; BT's reply by 23rd February, and the hearing, if necessary, on 27th February. We
6 are prepared to grant the interveners a bit more time on the judicial review application in the
7 light of Miss Demetriou's submissions. Applications for judicial review by 20th February,
8 responses by 3rd March, and we will endeavour to indicate by 11th March which issues, if
9 any, will proceed to the oral hearing.

10 Because we do not know which issues are going to be the subject of the oral hearing, it is
11 very difficult at the moment to weigh the competing claims for retention of the various
12 counsel involved, and realising that parties may regard this as the worst of all possible
13 worlds, we would ask you to keep free the 19th, 20th and 24th and 25th, and we will let you
14 know on the 11th which of those is going to be the date. Of course, if anyone's difficulties
15 with any of those dates lifts between now and then please let the Tribunal know as quickly
16 as possible so we may be able to come to a decision on dates sooner than I have indicated.

17 I mentioned in my preliminary remarks that we wished to set some limits on the size of the
18 judicial review submissions that we receive. We can make clear now that there is no need
19 for the parties to include any background discussion, factual matrix or whatever, in their
20 submissions. They should focus immediately on the points being raised. We had in mind to
21 direct that the parties should be limited to ten pages for each ground of appeal, in standard
22 print, and that any documentation that they wish to append to their applications should
23 include extracts from documents where you are only intending to rely on an extract, and
24 similarly if, in response, a party wishes to say, "That chunk needs to be read in context with
25 this chunk", they should just include whichever passages they consider need to be drawn to
26 our attention. We do not need to see the whole document if the whole document is not
27 relevant. Similarly, responses should be limited to ten pages in relation to each ground of
28 appeal.

29 Does any party wish to be heard on that final point? No.

30 Has there been any progress on whether it is possible for one party to take the lead on the
31 points on which a number of interveners wish to raise the same arguments? Perhaps we can
32 leave that one with you.

33 (The Tribunal conferred)

1 THE CHAIRMAN: I am reminded that I have summarised this morning the points that have so
2 far been raised in the letters from the parties. Most of the parties, if not all of them,
3 reserved the right to raise further points, but given that no one has done so this morning if
4 people want to raise a point that has not yet been canvassed in correspondence they should
5 seek permission from the Tribunal before doing so. We do not want the submissions that
6 are put in on 20th February to include material which is not at the moment expected.
7 Do any of the parties have anything further they wish to raise for today?

8 MISS ROSE: Madam, just on the point of response, we, of course, will be defending the
9 Competition Commission's decision in relation to the asymmetry in Year 4. Just to make it
10 clear, we will not necessarily be relying exclusively on the reasoning adopted by the
11 Competition Commission for reaching that conclusion. So we may be in that sense raising
12 arguments that we have put before the Competition Commission to demonstrate that at least
13 that asymmetry is justifiable.

14 THE CHAIRMAN: Yes, thank you, that is what we understood.
15 Thank you everybody very much.

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