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IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

4 February 2008

Before:

VIVIEN ROSE
(Chairman)

ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

1083/3/3/07

HUTCHISON 3G UK LIMITED
("H3G")

and

OFFICE OF COMMUNICATIONS ("OFCOM")

AND

1089/3/3/07

T-MOBILE UK LIMITED ("T-MOBILE")

and

OFFICE OF COMMUNICATIONS

AND

1090/3/3/07

BRITISH TELECOMMUNICATIONS PLC ("BT")

and

OFFICE OF COMMUNICATIONS

AND

1091/3/3/07

HUTCHISON 3G UK LIMITED ("H3G")

and

OFFICE OF COMMUNICATIONS

AND

1092/3/3/07

CABLE & WIRELESS UK & OTHERS ("CABLE & WIRELESS")

and

OFFICE OF COMMUNICATIONS

HEARING DAY SEVEN

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared for H3G.

Mr. David Anderson QC, Mr. Graham Read QC, Miss Anneli Howard, and Miss Sarah Lee (instructed by BT Legal) appeared for BT.

Mr. Jon Turner QC and Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared for T-Mobile.

Mr. Matthew Cook (instructed by Olswang) appeared for Cable & Wireless.

Miss Elizabeth McKnight and Mr. Stephen Wisking (Partners, Herbert Smith) appeared for Vodafone.

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Miss Kelyn Bacon (instructed by SJ Berwin) appeared for O2.

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for OFCOM.

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1 THE CHAIRMAN: There are just a couple of issues to raise with people before we get started
2 this morning. The first is in relation to what the results of this hearing are going to be in
3 terms of how we intend to approach handing down of judgments. Our current intention is
4 that we will hand down two judgments as a result of these proceedings, one will deal with
5 all the non-price control matters in the H3G appeal case 1083, and then there will be a
6 composite judgment dealing with the core issues in all four of the TRD appeals. If any of
7 the parties want to make any representations that we should do something different from
8 that can they please let the Tribunal know before the start of proceedings tomorrow?
9 The second point is something that I forgot to raise with Mr. Cook on Friday afternoon; a
10 small point on Mr. Harding's witness statement, para.4.2 we are not sure whether something
11 has gone a little wrong with the drafting of that, and you might like to have a look at it and
12 see if it should be clarified, particularly in relation to the timing of Orange's OCCN sent to
13 Cable & Wireless – I do not want to take up time with it now but if you could just have a
14 look at that.
15 Thirdly, thank you to BT for the letter on Friday evening dealing with the point that we
16 raised; I assume Ofcom has seen that and we await what they have to say about that.
17 Finally, a point a bout the SIA construction submissions which are scheduled for tomorrow
18 afternoon. Having thought about this the Tribunal wants to flag up an area where it would
19 welcome some assistance from the parties. It seems to be accepted now that this point
20 about the construction of clause 12.3.1 does not arise in relation to the second stage of the
21 gains from trade test because that relates to prospective charges only. The question
22 therefore arises because of the application of s.190(2)(d) of the 2003 Act which empowers
23 Ofcom to order the payment over of moneys which represent an under or overpayment, that
24 is the difference between what the parties have been paying during the period of the dispute
25 and what Ofcom then determines is the reasonable rate. It seems to the Tribunal this should
26 be a fairly straight forward provision and that it should ordinarily follow on from a
27 determination of this kind of dispute that this adjustment takes place, otherwise the party
28 which has – as it turned out wrongly – resisted the proposed OCCN, is in a better position
29 than they would have been in had they accepted it without challenge.
30 Therefore, if it decides in this particular dispute that BT has paid too little for the service
31 that it has been buying over the period of the dispute Ofcom has to decide whether or not to
32 make the adjustment in H3G's favour under s.190(2)(d).
33 The Tribunal would welcome some assistance as to why the parties consider it is relevant
34 how BT finds the money to make that back payment to H3G, in particular why it is relevant,

1 whether it is legally or morally or commercially possible for it to go back to its customers,
2 and collect the money by applying a surcharge on past minutes of transit, why it cannot just
3 find the money to make the payment some other way. It is clear that many issues arise as to
4 whether BT can recover the money under clause 12.3.1, not only are there questions about
5 the proper interpretation of that clause, how it relates to the carrier price list, and the SMP
6 conditions, and whether there are reasons outside the strict terms of the agreement, because
7 of what was said or not said between them which legally or commercially prevent BT from
8 relying on that clause. We would therefore like to hear from the parties as to how far
9 Ofcom and hence the Tribunal have to consider all those points before deciding whether to
10 exercise the power under s.190(2)(d).
11 With that we now ask Mr. Turner for his submissions.
12 MR. READ: Just before Mr. Turner starts his submissions, could I just come back on the point
13 that you have just alluded to about the retrospective recovery under the SIA and how that
14 impacts on s.190. I want to make it clear that we, certainly in our skeleton argument, have
15 not accepted that Ofcom have characterised the reclaiming of the payment in the correct
16 manner as it has in its defence, and so we would be reserving our position on that as well
17 when dealing with the SIA tomorrow; I would not want that point being lost, so I just flag
18 that up.
19 THE CHAIRMAN: Thank you, Mr. Read. Mr. Turner?
20 MR. TURNER: Madam, I believe that the order of play today is myself for up to an hour and a
21 half, although I anticipate that I am going to be somewhat less than that, then Miss Rose,
22 and then Ofcom will follow us.
23 May I take it that the Tribunal is familiar with our notice of appeal and has read our
24 skeleton argument? We rely on them.
25 We also very largely adopt the points that were made by BT and by the Altnets on Friday,
26 and we particularly adopt what Mr. Cook said about the impact of the gains from trade test
27 on the transit customers, and how that impact was not properly considered by Ofcom, by the
28 application of its very crude average gross margin industry-wide test, and you will have
29 seen, in particular Mr. Miller's evidence that T-Mobile's retail charges on its two most
30 popular tariffs, within respectively the post-pay and the pre-pay segments – that is its retail
31 tariffs – were both lower than the wholesale termination charges for H3G that were
32 eventually approved as reasonable charges by Ofcom.
33 THE CHAIRMAN: Were the charges for the monthly recurring charge tariff also lower than the
34 other parties MCT charges as well?

1 MR. TURNER: Madam, I do not recall that, I remember the comparator being H3G.
2 THE CHAIRMAN: Yes, the comparison made was with H3G's charge, I am just asking whether
3 it was also the case ----
4 MR. TURNER: I do not believe so, madam, we will check that.
5 THE CHAIRMAN: Thank you.
6 MR. TURNER: Madam, I am going to organise my submissions then, as follows: first, as usual,
7 some preliminary remarks, this time concerned with the nature and scope of T-Mobile's
8 case on this appeal; secondly, I would like to address very briefly the issues of the
9 Tribunal's jurisdiction to entertain grounds of appeal that were not flagged up prior to the
10 final decision being adopted by Ofcom, and the extent of the margin of discretion which
11 Ofcom enjoys when it is resolving disputes, both issues raised by Ofcom in its defence.
12 I will then turn directly to the substance of the issues which the Tribunal has to decide on
13 this appeal, and may I say immediately our central argument is extremely simple, and it is
14 this, that within the practical constraints of the dispute resolution process Ofcom should
15 have aimed to achieve the statutory policy objectives in the termination charges that it set.
16 We refer to the specific circumstances of this case.
17 In this case Ofcom did have available to it key information from the market review that was
18 fully up-to-date. Only a few weeks previously, Ofcom had set specific target average
19 charges for the year beginning 1st April, 2007. Those took into account considerations of
20 efficiency, sustainable competition, and the interests of end users. It was all there, and that
21 was, in my submission, a clear benchmark for settling the disputed rates, but Ofcom did not
22 use it. Instead, the test that it did use left achievement of the EU policy objectives out of
23 account. In the case of H3G, which is our particular quarry, it was asking for by far the
24 highest rates, and that resulted in wholly unjustifiable levels of charge that were offensive to
25 the requirements of the EU policy objectives.
26 Now, in looking at the substance I would like to proceed as follows: I would like to begin
27 by returning briefly to the two central EU legal provisions to make a number of
28 observations that are purely supplementary to those already made by Mr. Read and Mr.
29 Cook. I would then, with the tribunal's leave, like to look at the determinations document
30 itself in a somewhat more systematic fashion than was done on Friday by following through
31 the thread of Ofcom's reasoning. We say that is an important exercise to form at this stage
32 because Mr. Roth's defence places a gloss on the reasoning in the determinations in the
33 same way as his interjection on Friday about the meaning of different regulatory purpose
34 also did. It is critical that when Mr. Roth stands up and makes his submissions a little bit

1 later on today, he must deal with the wording of the determinations themselves, unvarnished
2 and uncut.
3 Finally, insofar as these have not already been comprehensively dealt with by BT and by the
4 Altnets, I will address in turn a number of the arguments which have been mounted by
5 Ofcom in defence of their approach.
6 So, turning to the preliminary remarks, the main point, which I am sure is on the tribunal's
7 mind is this: our appeal, so far as the core TRD issues are concerned, targets the H3G
8 determination which is at Annexe 1(3) of the decision document. That is the part of the final
9 determinations document which we are asking the tribunal to set aside in our prayer for
10 relief at para. 116 of the notice of appeal. We recognise straightaway that the logic of our
11 argument applies equally to the other determinations. That includes, of course, the BT/T-
12 Mobile determination against which BT and the Altnets are appealing to you now. We take
13 that on the chin. We absorb the blow. The H3G determination is so far out of line with the
14 other determinations as to create a real disparity in treatment between the MNOs. This is of
15 overriding concern to T-Mobile. So, we know about the fact that our arguments also have a
16 backwash effect so far as our own determination is concerned.
17 Next, the tribunal's jurisdiction. The points raised by Ofcom in its defence at para. 17.
18 Ofcom has argued that it would be inappropriate for the tribunal to deal with any issues
19 which go beyond the confines of the matters that were actually raised before Ofcom at the
20 pre-decision stage. Ofcom also says in that paragraph that this tribunal should be slow to
21 interfere where there are errors of appreciation as opposed to errors of law or of fact being
22 alleged by the appellants. We have dealt with those issues at paras. 8 to 14 of our own
23 skeleton. There is no rule of law. I believe Mr. Roth will not say otherwise. There is no rule
24 of law which limits a party to raising grounds of appeal which it argued previously at the
25 consultation stage. The appellant will very often not know Ofcom's full reasoning, the full
26 shape of the decision, the full findings before the final decision is published. In this case,
27 by way purely of example, T-Mobile was unaware of the magnitude of the charges that
28 were being sought by H3G until after the publication of the final decision. It had no
29 visibility of the levels of charge being considered. It was after the publication of the
30 decision that we received the multi-million pound bill.
31 Similarly, the tribunal will be fully aware that Ofcom changed its position between the draft
32 determination on which T-Mobile commented, albeit briefly, and the final determination
33 with respect to the question of retrospective pass-through of charges by BT to transit
34 customers such as T-Mobile.

But, in any case, the argument that an appellant should be restricted to raising points that it had taken prior to the decision being published does not take off anywhere in this case. Ofcom is not saying in its defence that anyone here should be stopped from arguing any grounds of appeal before you - at least there is no distinct point made to that effect in its defence. The key issue which you have to decide, which concerns Ofcom's failure to take into account MNO cost considerations before it endorsed the rates demanded by the MNOs was in fact raised if not by T-Mobile, then at least by other parties before the final decision was reached. So, we say the argument is moot anyway.

On the second argument that Ofcom raises in connection with jurisdiction, which is that it should be given this margin of discretion by the tribunal in connection with matters of judgment, that also is academic on the fact of this case because this is not a question of the regulator having some lee-way on a point of judgment. You might have a point of judgment where there is a question whether the determined charge which Ofcom sets should be X percent, or X plus one, or X plus two percent in relation to, let us say, the target average charge for the following year. It is a matter of judgment. But, the main point that we and the others are taking is that Ofcom's entire approach to assessing reasonableness under the determinations was fundamentally wrong as a question of appraisal. That boils down to a plain error of law.

So, this is not a case where issues of lee-way need trouble the tribunal.

I would ask the tribunal then to turn back to the two main legal provisions of crucial importance in this case - first, the Framework Directive in Bundle H1, Tab 6. If the tribunal would be kind enough to turn to Article 8, concerned with the policy objectives and regulatory principles -- Of course, Article 8(1) tells us that,

> "Member States shall ensure that in carrying out the regulatory tasks specified in this directive and the specific directives, the NRAs take all reasonable measures which are aimed at achieving the objectives at paras. 2, 3, and 4.

As we understand it, Ofcom's approach in the dispute determinations seems to be that this can be done by dealing with one thing at a time depending on the particular power which is being used. So in market reviews and in amendments to the SMP conditions, if that is being considered, Ofcom can address objectives of efficiency, of competition, of benefits to end users. We are in the territory of dispute resolution and perhaps it being said that Ofcom is not concerned with aiming to achieve such objectives, at least fully, at least directly, or at least Ofcom is not necessarily concerned with achieving those objectives. Its focus instead

1 in dispute resolution is on practical quick solutions which will ensure compliance with any
2 regulatory obligations that the parties may have, *ex ante* regulatory obligations.
3 It is clear, in our submission, that has to be the wrong approach when you turn on to Article
4 20, para.30 in this Directive. In the clearest terms para.3 tells us that in resolving a dispute
5 the NRA shall take decisions aimed at achieving the objectives set out in Article 8. We take
6 from that that aiming to achieve the policy objectives, the regulatory principles being
7 fulfilled, it is an integral part of what dispute resolution is about.
8 You see the same thing from the Access Directive, which is tab 4 of that bundle. On Friday
9 some argument was canvassed concerning Recital 5, the provision concerned with how
10 negotiation should function in an open and competitive market. Mr. Scott in particular
11 raised the question of whether that Recital was looking at the matter descriptively or
12 prescriptively. In our submission, it is prescriptive. The Recital corresponds in the
13 Directive itself to Articles 3 and 4. You will see from language of the first paragraph of
14 Article 3 the requirement placed on Member States to:
15 "… ensure that there are no restrictions which prevent undertakings in the same
16 Member State or in different Member States from negotiating between themselves
17 agreements on … arrangements for access and/or interconnection, in accordance
18 with Community law."
19 We endorse the points which were made to you by the Altnets in this connection.
20 Negotiation against the backdrop of the regulator imposing the price of the seller in the
21 absence of any agreement between the parties, or at best applying the exiguous gains from
22 trade test, does not encourage market led negotiation at all. It distorts the process of
23 negotiation, it tilts bargaining power towards the seller. That is the particular relevance of
24 those parts of the directive.
25 We would also draw the Tribunal's attention to the following Recital, Recital 6. Recital 6 is
26 concerned with the point where there is a breakdown in negotiation between the parties. In
27 the second sentence the Recital read:
28 "National regulatory authorities should have the power to secure, where
29 commercial negotiation fails, adequate access and interconnection and inter-
30 operability of services in the interests of end users …"
31 – and so on. That corresponds to Article 5 in the Directive itself. Our submission is that
32 Article 5, including Article 5.4, which is concerned with intervention in cases where parties
33 cannot agree on charges, needs to be read as a whole. What that means is that the approach
34 to be taken, which you see in the first paragraph of Article 5, about exercising responsibility

1 also governs interventions by Ofcom and the way it should deal with those under Article 4,
2 where there is an absence of agreement on the terms of interconnection and where Ofcom
3 steps in. As we read the 2005 judgment that was also the view taken by the tribunal.
4 If the tribunal would be kind enough to pick up bundle H2, I just want to show you one
5 paragraph in that regard. It is bundle H2, tab 12, para.131. The tribunal will recall that this
6 paragraph sits in a part of the judgment addressing Ofcom's submission which was rejected,
7 that in the absence of an SMP designation Ofcom would have to decide the pricing dispute
8 in favour of H3G, because to do otherwise would be to impose forbidden price court. In
9 para.131 what the tribunal does is to refer to Article 5, to quote extensively Article 5.1,
10 including the passage concerning how Ofcom needs to exercise its responsibility, and then
11 under the quotation you have this sentence:
12 "A power to resolve interconnection disputes is well within this wording …"
13 So it appears that the tribunal there was rightly looking at Article 5 as a whole. We see that
14 Ofcom should exercise its responsibility in the resolution of access disputes in a way that
15 promotes efficiency, sustainable competition and gives the maximum benefit to end users.
16 To reinforce that message you then have within Article 5.4 itself equally and in harmony
17 with the Framework Directive the requirement that the NRA should intervene in disputes to
18 secure the policy objectives of Article 8 of the Framework Directive.
19 Putting all of these together, in summary there can be no doubt that in the dispute
20 resolutions cases before the tribunal Ofcom was required to aim to achieve the EU policy
21 objectives within the practical constraints of the dispute resolution procedure. As a guide to
22 what it means, what it involves in practice, to aim to achieve objectives, what does that
23 actually mean, we have taken the analogy of another area of law where a public authority is
24 given EU inspired objectives, and that is the field of environmental law.
25 I do not want to take the tribunal down a rabbit hole that leads nowhere, but I do say that it
26 is instructive to see how the Court of Appeal has considered similar principles in a different
27 area of EU law. For that purpose would the Tribunal take up bundle H3, tab 5. You have
28 here a Westlaw print-out of the Court of Appeal judgment in *Blewett* a judgment of Lord
29 Justices Auld, Buxton and Buxton. This case concerns the lawfulness of a decision to grant
30 planning permission to a land-filling operation. One of the questions was the scope of the
31 duty of the public authority there in having to act in line with certain objectives that had
32 been laid down under EC law. Would the tribunal turn to p.5 of 30, under the heading
33 "Law and Policy", there is then a further heading "The Waste Framework Directive",
34 para.21 of the judgment of Lord Justice Auld, it is recited that the starting point is that the

1 Waste Framework Directive, Articles 3, 4, and 5 of the Directive set out what Article 7 of it
2 calls "The Objectives". These objectives have been made part of our domestic law by waste
3 management licence regulations", and Article 4 articulates the central obligation under the
4 Directive, it deals with the recovery or disposal of waste. It provides so far as material the
5 Tribunal can read the provision there.
6 Then if you go on to p.17 Lord Justice Auld recalls the words of Lord Justice Pill in an
7 earlier case concerned with the same issue of what an "objective" means, and again I set
8 this out in our skeleton argument, but essentially Lord Justice Pill was there saying that an
9 objective is something that must always be kept in mind when you are making a decision,
10 even while there are other material considerations.
11 Lord Justice Auld himself, if you move forward to paras. 90 and 91, summarises the
12 position so far as he is concerned. If you focus particularly on para.91, Lord Justice Auld
13 says that he agrees with certain reasoning in an earlier case of Mr. Justice Richards (as he
14 then was), and he says that it all actually does come down to weight, and where you have
15 objectives those are matters to which you should give in your decision making substantial
16 weight, or alternatively you could treat them as important considerations, but one way or
17 another objectives are something that the decision maker should keep at the forefront of
18 their mind when they are performing the task in question, and we have seen that the
19 Framework Directive at Article 20, para.3, requires the decision maker to keep in mind the
20 policy objectives when it is resolving disputes.
21 Madam, with that I turn to the decision document itself, which is at bundle B, tab 4. I do
22 not propose to take the Tribunal of course to any parts of the decision document which have
23 been already looked at in detail in the course of Mr. Read's or Mr. Cook's submissions, but
24 I do want to track the process of reasoning by Ofcom, by looking at key paragraphs. It
25 begins at para. 1.4. There is an important recognition in this paragraph that H3G has a 3G
26 network which it operates, but it has roaming agreements with both 02 and Orange, by
27 which it effectively resells 2G termination.
28 "Therefore in this sense H3G also charges blended call termination rates, as the
29 same charge applies irrespective of whether the call terminates on its own 3G
30 network or via roaming on ..[the other networks]"
31 THE CHAIRMAN: Well it is not blended really in the same sense in that as far as we are aware
32 they do not set the charge based on what proportion they forecast is going to be terminated
33 on one or the other. It is blended in the sense that it is charged the same whether in fact it is

1 terminated on one or the other, but it does not take account, as far as I am aware, of the
2 costs of the roaming agreement in the setting of the charge, is that right?
3 MR. TURNER: That is one way of looking at it, madam. We see it as follows, that on the
4 roaming part of the network they are receiving this rate in respect of calls terminated on the
5 2G network, even though the costs associated with that are different from the costs of
6 termination on its own 3G network, and what that means is that when you see this being
7 called a 3G rate, in fact, the implicit, or underlying 3G rate is going to be higher than that,
8 because this is a rate which applies equally to both. We say no more than that, but in the
9 interests of clarity you see the rate that is being applied by H3G. Indeed, if you go on to
10 para.3.17 and look at the penultimate bullet point there, and as the Tribunal is aware H3G
11 proposes termination charges higher than the existing termination BT is paying, and those
12 are pinned to what it saw as the underlying 3G element of the blended charges that BT had
13 agreed with Orange earlier. So it is saying – we say wrongly – "we are a 3G network, we
14 want a 3G charge, and the 3G charge should be the same as the underlying element of the
15 Orange 3G charge, whereas in fact its charge applies both to 2G and 3G termination on its
16 network equally.
17 At para.3.26 the scope of the investigation is defined, and for the period prior to 13th
18 September 2006 Ofcom is asking itself whether there is any reason not to charge BT – not
19 to charge BT - on the basis of the rates being demanding by the MNOs. You see there the
20 first indication of the MNO centric approach that Ofcom is taking. For the subsequent
21 period the entire focus of the question being asked by Ofcom of itself relates to the end-to-
22 end obligation and the meaning of reasonable terms, focussed in that way.
23 If you go forward to para.4.12, under the heading "Disputes between BT and each of T-
24 Mobile, 02 and H3G", you see here again that Ofcom is taking as its subject matter, as its
25 correct focus, the hire charges being proposed by the MNOs in the dispute, whether the
26 charge is requested by each of the MNOs are reasonable, and similarly in 4.13 and going
27 down to 4.16, in connection with the "Disputes between BT and each of Vodafone and
28 Orange" again Ofcom is focussing on the reasonableness of the higher of the charges being
29 contended for by the parties.
30 THE CHAIRMAN: But you say they should not be focussing on that?
31 MR. TURNER: We say that they should be considering whether two parties, each contending for
32 a different price, that they need to consider reasonableness, not simply by reference to the
33 highest of the charges which is in dispute between the two parties; in other words, it should

not be saying "Let us look at the highest price being asked for here and apply the test to that", it should approach the problem more generally.

Paras. 4.19 and 4.20, you have an important section of reasoning under the heading: "The period prior to 13th September 2006", and you will read paras. 4.19 and 4.20 to yourselves, but three points emerge from Ofcom's description of the situation. The first is that Ofcom views the imposition of regulatory obligations on the MNOs through the medium of dispute resolution as effectively SMP-type regulation. It says that Ofcom:

> "Consistent with and giving effect to its decision in the 2004 CTM review, Ofcom does not consider it appropriate to effectively impose SMP type regulation on 3G voice call termination charges in the context of the present dispute."

So it is already characterising the imposition of charges which seek to control the costs of the MNOs as being SMP type regulations.

The second point is that Ofcom is viewing this as inconsistent with the decision that it had reached in the 2004 CTM review – "consistent with" it says "and giving effect to" its decision in the 2004 CTM review.

The third point, which you see from para.4.20, in the second sentence, is that Ofcom is saying that it saw at that stage – the way it is described is: "… no overriding policy objectives" which would cause it to impose new obligations in such circumstances.

Very briefly, our case is that each of those elements of reasoning is plainly wrong. First, because the imposition of a solution in dispute negotiation is not SMP type regulation consistent with the approach taken by this Tribunal in the 2005 judgment it is a parallel basis for fixing prices in accordance with the over arching policy objectives.

THE CHAIRMAN: But that is not really the point they are making, as I read it. What they are saying is that looking at what we have to do in terms of our regulatory functions, we have to find a methodology for getting to a resolution of these disputes because the parties want us to come up with a figure expressed to a tenth of a penny, which is then going to be the rate that they pay.

MR. TURNER: Yes.

THE CHAIRMAN: And it is all very well looking Article 8 and sections 3 and 4 of the Act, but those do not provide you with a way of getting to that figure. What they are saying is that one way of getting to that figure is to do it on a cost base, to compare the prices with cost. Whether you describe that as SMP type regulation, or whether that is just another way of saying "Should we approach this by comparing the prices with cost?" does not seem to me

1 to be the point. The point is, is a cost based approach the appropriate methodology to apply
2 in order to arrive at whatever "penny" figure we are going to arrive at?
3 MR. TURNER: Yes. Two points come out of that. First, when you are looking at the Article A
4 policy objectives, which concern considerations of efficiency, maximum benefits to end
5 users and matters of that kind, in my submission it does take you to cost as a relevant
6 question to be considered.
7 The second is the characterisation that is used here which we are going to see then
8 developed as the reasoning in the decision progresses, namely, that when we are
9 considering questions of cost, that is SMP-type regulation, whereas we now are concerned
10 with something that does not raise those sorts of issues. My point is that what we have seen
11 from the central legal provisions and how Ofcom is intended to approach its functions is
12 that Ofcom ought to be taking into account these sorts of considerations in discharging this
13 function, as in discharging its SMP-type obligations - the difference relating to the
14 extensiveness with which it can go into these sorts of matters, but not to the principle.
15 THE CHAIRMAN: So, the principle, in your view, is not dependent on the fact that they had, as
16 it so happened, been carrying out a review for the purposes of which they had gathered all
17 sorts of material. You say that even if they had not been undertaking an SMP review, they
18 ought to have gone into these costs matters as part of determining these disputes.
19 MR. TURNER: Not in the same way. The particular situation that the parties and Ofcom were in
20 at this stage is that all this work had just been done. All of that material was therefore there.
21 That enabled it to look at the cost information -- to look at the way that it approached the
22 setting of target average charges going forward in the parallel regulatory exercise, and draw
23 on that in determining these disputes. I fully accept that when you have dispute resolution it
24 is an animal which the legislation also tells us - and I am not expressing this very well - is a
25 four-month animal, except in exceptional circumstances. So, you have to take into account
26 that you have a task that has got to be done within that particular timeframe. But, in some
27 cases, such as this, where you have information available to you that enables you to
28 discharge your essential objectives better by using that sort of information, you can, and you
29 should, do so. In other cases, if you had no such information available, you may say to
30 yourself, "Well, cost is a relevant consideration, bearing in mind my essential objectives".
31 On the other hand, I cannot begin by own mini market review process in the time available
32 for a dispute. I have to do the best I can on the information that I have got, and take into
33 account such considerations -- such information as I have available to me in that context".

1 I cannot speak for how Ofcom needs to apply itself in every case before it. What this
2 tribunal is faced with is how Ofcom should have applied itself in the circumstances of this
3 dispute. That must be clear, given the information it had available to it at the time.
4 So, that is the way that we see this part of the case.
5 The two supplementary points I wanted to make in relation to these paragraphs are: (1) that
6 contrary to what is suggested there, there was no inconsistency with the 2004 CTM review.
7 I will not take you all the way back to it, but the relevant paragraph is 5.47. But, in any
8 event you see from that that they had declared that the situation with 3G termination
9 charges had to be kept under review.
10 THE CHAIRMAN: That is 5.47 of the 2004 statement.
11 MR. TURNER: We have been there, I think, twice before. The third point is that the policy
12 objectives were not, as they expressed it, "Are there any overriding policy objectives that
13 should be brought into account?" They are not a discretionary add-on to be brought into
14 account insofar as relevant. They should be the driver of Ofcom's thinking. That is a legal
15 point. But, what it comes down to is that they should have been at the heart of the way
16 Ofcom approached its function. It approached it wrongly.
17 At 4.43 in the determination -- I am leaping forward over milestones in the decision in an
18 effort to elucidate the analysis. At 4.43 you have Ofcom's description of the purpose of the
19 end-to-end obligation which it saw as the central feature for its reasoning in the case. Its
20 purpose is to ensure that Ofcom's obligation to purchase is not completely unbounded. It
21 goes on in the second sentence to add,
22 "The purpose is not to regulate terminating operators because of competition
23 problems in the markets for the supply of mobile call termination. There is a
24 separate set of powers and processes to address questions relating to the exercise of
25 SMP by terminating operators ----".
26 That is specifically market reviews of terminating markets and SMP obligations.
27 What one sees from this is that a consideration of competition problems is regarded as
28 extraneous to the task with which Ofcom was faced. Again, to pick up on Madam
29 Chairman's question to me, I readily accept that the dispute resolution process is not a
30 substitute. To that extent Ofcom is right. It should not have been required to go into matters
31 in exhaustive detail, bearing in mind the constraints of the dispute resolution framework.
32 Nonetheless, the requirements to bear in mind considerations of competition in the market,
33 in the charges which it determines as the output of dispute resolution, should have been a

1 relevant consideration for it. It should have been more than that. It was an objective. It
2 should have been an important consideration.
3 Moving forward, at 4.50, Ofcom says to itself, "Well, how can we approach our task? We
4 have a number of potential approaches". It mentions in particular three of those - namely,
5 setting strictly cost based charges; (2) developing an understanding of gains from trade; and
6 (3) a benchmarking analysis.
7 Now, the first of those - strictly cost based charges - with the emphasis on 'strictly' - is
8 rejected in paras. 4.52 and following on two main grounds. In 4.52 itself there is the
9 argument that this would impose involving regulatory burdens on other providers who are
10 not subject to the end-to-end obligation. Do you see that there in the last sentence of 4.52?
11 Then in para. 4.53 the second main argument - that it would be inconsistent with the
12 decisions already taken in the SMP process, and that this would undermine regulatory
13 certainty and consistency. Now, the first of those is certainly well-covered ground before
14 this tribunal now. I will come back to the second in a moment.
15 At 4.58 you have the definition of what a gains from trade test is -- what it means. I make
16 no comment about it there, otherwise than to draw the tribunal's attention to, "Where this is
17 where you find it being defined".
18 The benchmark approach is considered in 4.62 to 4.66. I do want to make a point about
19 this. In this section what Ofcom does, very strikingly, is to ignore the very benchmark that
20 Ofcom itself refers to specifically in its own defence at para. 138. So, it rejects an internal
21 comparison of the charges of the other MNOs; rejects termination charges applying in other
22 countries -- One can have some sympathy with that, I should say, because of the difficulties
23 to which Ofcom does refer; but then it takes the benchmark and operates its one-way test of
24 a comparison with the 2G regulated costs set under the previous market review process.
25 But, when you come to Ofcom's defence at para. 138 - and I would ask the tribunal just to
26 turn that up at this stage in D3, Tab 6, p.54 of the internal numbering - Ofcom itself deploys
27 the target average charges (the first year target charges for the new period) and compares
28 those with the charges upheld in the disputes. In fact, almost as a run-off, or continuation,
29 from its process of reasoning in the decision, it goes on in para. 139 to make some
30 comments about that.
31 Why, we say, does Ofcom not take that into account -- did it not take that into account as it
32 could have done, and should have done in the original dispute determinations itself? Had it
33 performed that exercise our point is that it would have become immediately clear that one
34 of the charges in particular is radically out of line with the others.

THE CHAIRMAN: Do you accept that the correct comparison is with the first year target charge rather that the ultimate TAC charge arrived at in the MCT statement?

MR. TURNER: The first year charge is the charge for the year beginning 1st April, 2007 is the charge which Ofcom has decided is the fair charge to set, taking into account considerations of cost, efficiency, the glide path needed to ensure that investment is not upset and so forth for each of the operators concerned.

THE CHAIRMAN: Yes. But, what they actually set is the charge which they are arriving at in the final year - that is what is set in relation to the costs. Is the glide path imposed because actually costs are not yet there, but it is expected that they will reduce and so the glide path reflects a reduction in costs over the period to the final year of the charge? I rather thought it was just so that not to cause too dramatic a change in rates, the glide path is to sort of soften the blow, as it were ----

MR. TURNER: Yes.

THE CHAIRMAN: But, if you are saying that it should be a cost based charge, I am not sure why then ----

MR. TURNER: -- you do not go straight to the final point.

THE CHAIRMAN: -- why you do not go straight to the final point.

MR. TURNER: Let me not be misunderstood. We are not saying that strict cost based charges is the sole way in which this matter should be approached in dispute resolution so that dispute resolution would become pure SMP-to-SMP, as it were. Rather, you do take into account the same sorts of consideration concerning the need not to undermine investment and so forth in coming down over the glide path to a correct cost based charge at the end of the period, and that that is equally a relevant consideration for Ofcom to have regard to in this context: that the policies, the principles, and the way it thinks about things should be joined up. Therefore it should approach matters in the same way in a dispute resolution, as it does in the market review. It would therefore not jump in a dispute resolution in a jagged or disruptive sense right to the cost based charge at the end of the review period.

MR. SCOTT: But presumably it should at least have alerted itself to what the underlying costs were in an informative way, given that it had the information.

MR. TURNER: Yes, given that it had the information in this case, absolutely. That was important. It is the same policy objectives that apply in both contexts. It is the same ones, promotion of competition, sustainable competition, efficiency, benefits to end users. Those apply both in the dynamic as well as in the static sense, so you are trying not to undermine investment by suddenly requiring people to drop their charges precipitately right at the

1 outset. It would be disharmonious to require them in the context of dispute resolution to do
2 that where, in a market review, they were coming down gradually.
3 THE CHAIRMAN: So what then do you say should have been the reasonable charge imposed on
4 H3G?
5 MR. TURNER: They should have had regard to the target average charge that was imposed after
6 full consideration in the market review or the adjacent year, the year beginning 1st April
7 2007, and they should have imposed charges that were, if one extrapolated the glide path
8 back – this is not in our submission, this is me saying what would have been a reasonable
9 approach. You could have extrapolated the glide path back and given them some margin on
10 top of that consistent with the same trajectory which would therefore have been in line with
11 the approach adopted in the SMP process and in line with the approach that was adopted for
12 the other operators.
13 MR. SCOTT: So in essence what you are saying is something between 10.7 and 9.1?
14 MR. TURNER: Yes. The charge upheld in the dispute, as the tribunal is aware, was much higher
15 than 10.7, the charge upheld as reasonable.
16 If one moves on to the application of the gains from trade test to the H3G dispute at
17 paras.4.88 to 4.91 – again, I am not going to read these paragraphs – the point is that Ofcom
18 is considering that the high price demanded by H3G is a reasonable price for the purposes
19 of the end-to-end obligation because it could in principle be passed through. Footnote 58 is
20 important on p.36 of the internal numbering, because it shows an appreciation that pass-
21 through could have led to a reduction in the volume of calls to H3G. Instead of considering
22 that from the point of view of practical connectivity for end users, the volume of calls
23 dropping off as the price goes up, this is considered only from the point of view of whether
24 it would have increased BT's unit costs and so affected the metric of the gains from trade
25 test. Here I am picking up on a point that I believe Mr. Cook made about how you have to
26 look at connectivity in the real world, and Ofcom did not do that.
27 At 4.97 – you now move into the essential reasoning, and I am concluding this survey of the
28 decision very shortly – Ofcom says that its assessment of reasonableness in this case is
29 tailored to the purpose of the end-to-end obligation. It specifically says here that if it had
30 been wearing its SMP hat the assessment might have been different because of the quite
31 different purpose of such regulation. So there is nothing about the factual information being
32 irrelevant. As we see it, the point which is being made is that Ofcom is wearing a different
33 hat when it performs its dispute resolution function. The implication of that appears to be
34 that the SMP and the dispute resolution functions can pull in different directions, even

1 though again Ofcom is meant to be governed at all times by the same harmonious set of
2 principles.
3 If you go now to the final section of the reasoning in s.6 of the document, para.6.6, that
4 point is then amplified. You will see from the last sentence a very clear and stark statement,
5 that Ofcom does not consider it is necessary or appropriate to set charges in these disputes
6 by reference to data gathered in the context of the 2007 CTM review in the context of these
7 disputes. That was its final position. Its thinking, as you see here in the same paragraph, is
8 that it has made what it refers to as an explicit policy decision in the 2004 CTM review that
9 it will not regulate 3G termination rates up to the end of the earlier period; and secondly,
10 that information which has been gathered for assessing SMP charges for the subsequent
11 period is gathered with a different regulatory purpose, it is not to be taken into account.
12 Lastly, Ofcom advances reasons why its gains from trade test does, in its view, deal with the
13 policy objectives. I need to refer to that because I apprehend that Mr. Roth will certainly do
14 so. At para.6.13 Ofcom's argument is that the gains from trade test protects retail customers
15 because they are able to connect with customers of other communications providers. So
16 there is the protection of the interests of end users.
17 In the section which we looked at when Mr. Read was making submissions, 6.23 to 6.28,
18 there is focus on the extended section entitled "Consistency of the outcome of these disputes
19 with Ofcom's duties". At 6.28 in particular Ofcom adds that the principle of promotion of
20 competition is also met by its test by all active communications providers to interconnect
21 with everybody else.
22 Standing back, my simple point is that that is the height of their appreciation of how the test
23 that they applied fitted with the over-arching policy objectives, but it is an exiguous and
24 entirely inadequate approach to the achievement of the policy objectives. They are
25 protected only to a very limited extent on the basis of that reasoning in circumstances where
26 Ofcom in this case – in this case – had every opportunity to use the information from the
27 2007 CTM review that it had recently concluded to set charges which better achieved the
28 objectives.
29 Madam, would you then put away the determination document and pick up Ofcom's
30 defence. I will limit my concluding remarks to a small number of points based on the
31 defence of Ofcom's defence because Mr. Read and Mr. Cook very eloquently have put most
32 of the points that I want to rely upon. Turning first to para.153, and I am using the internal
33 numbering, p.58 Ofcom says that it is not

` "… the role of the end-to-end obligation, the gains from trade test or for that matter dispute resolution more generally to discourage terminating operators from determining their own charges, subject to any *ex ante* regulation and *ex post* competition law, operators are free to set such charges as they consider appropriate."

That, in my submission, crystallises the error of the approach which the tribunal has already had rehearsed before it on several occasions, namely the focus being on the MNO and it setting charges as though it were the only person there. There are two parties in a dispute who will want charges determined. Why refrain from regulating the party imposing an obligation on the party which seeks the higher charge in the process?

Next, and I apologise for jumping about, para.46, p.19 of the internal numbering. In the opening sentences of para.46 Ofcom picks up on a number of the points that we have now seen from the determination itself., the first being that the principal purpose of the dispute resolution procedure in Ofcom's submission is to impose a binding solution on the parties and ensure compliance with any existing obligations arising under the directive. Our point is that the focus on *ex ante* obligations on the parties uniquely and on the need for a practical quick solution are not the whole story. They are both important but there is more than that. Article 20.3 of the Framework Directive and Article 5 of the Access Directive make this very clear, that achievement of the policy objectives is integral to the dispute resolution function.

The second point is this divergence that competition issues should be addressed using the SMP powers, as one gathers from para.46 of the defence. It creates a false opposition between on, on the one hand, intervening under *ex ante* SMP controls after a market review; and then, on the other hand, leaving price to the market, or more specifically leaving it to the MNO which should be free to determine the charge it wants. Dispute resolution we accept is not a substitute for the SMP process. At the risk of awful repetition it does not mean that considerations of efficiency and cost should not inform Ofcom's thinking if it has the information at its very fingertips.

At p.49 of the internal numbering, para.123, there is a point that we have not specifically addressed yet, I believe, and this is the argument from s.3(3)(a) of the 2003 Act, that regulatory activity should be not only transparent, accountable and proportionate and consistent, but also targeted only at cases in which action is needed. If that is intending to suggest that these were not cases in which action was needed, we respectfully disagree. These were certainly cases in which action was needed. Ofcom, for one thing, had been

1 called on to exercise its dispute resolution functions and it was obliged to engage in a form
2 of regulation, a form of regulation that should have been informed by the objectives. The
3 question therefore is not whether to exercise its functions, whether to engage in regulatory
4 activities here, but how to do it.
5 At p.29 of the internal numbering, para.63.2, you have the point oft made in the defence and
6 which you have seen also from the determination that in the 2004 MCT statement, the
7 second sentence from 63.2, the very clear statement:
8 "In the 2004 MCT Statement, Ofcom expressly decided not to regulate 3G MCT
9 rates for the period of that market review".
10 It did not do so. It did not, and if Ofcom had made such a decision then the question would
11 frankly have arisen whether it was bound to stick with that even if circumstances changed,
12 particularly given the point in, I believe, s.3.6 of the 2003 Act, that the regulatory objectives
13 are to be given priority over the general duties in s.3 of the Act, and so had there been a
14 conflict between the need to achieve consistency and, obviously, if there had been such
15 requirements to bring charges that were well out of line with cost or caused distortions, into
16 competitive harmony the latter consideration should have governed. But we do not even get
17 there because Ofcom are wrong in the first place in what they say in the second sentence of
18 63.2, that is factually incorrect.
19 My last point arises from para.59 on p.27 of the internal numbering, a page or so back. At
20 para.59 Ofcom kicks against the arguments raised by the appellants that it disregarded cost
21 information, and it says we did not; we did not because we compared charges to the cost
22 base 2G regulated charges in the 2004 MCT statement. In response to that I think I have
23 already made my submissions in canvassing this point with the Tribunal. We have seen
24 from Ofcom's defence at para.138, the highly pertinent benchmarks from the 2007 market
25 review process, which could and should have been used, which both relate to the adjacent
26 time period, which relate to 2G and 3G termination and therefore the qualification entered
27 by Ofcom in the dispute determinations about how its benchmark was not particularly
28 relevant to H3G, because H3G was not a 2G operator would not have applied. This was
29 readily available information which was not used but should have been used.
30 Madam, my ultimate submission is this: the graphic difference in situation of H3G is readily
31 apparent. On any view that determination, that one is unjustifiable, once one has a correct
32 appreciation of Ofcom's duties. In a nutshell it is quite wrong to fix charges in a dispute
33 determination which are so far detached from the cost base levels that Ofcom were setting

1 according to the glide path for the adjacent forthcoming period. There was no
2 maximisation of benefits for end users, there was no promotion of efficiency.
3 Finally, madam, Mr. Pickford draws to my attention, in relation to Mr. Scott's question
4 about whether the charge should have been somewhere between 9.1 and 10.7 strictly one
5 would extrapolate backwards from the 9.1, the 10.7 is not a necessary ceiling to that.
6 Madam, I am conscious of the time, but subject to any questions the Tribunal may have,
7 those are our submissions.
8 THE CHAIRMAN: I know you say, Mr. Turner, that you are only dealing with this appeal, and
9 with the set of circumstances in which Ofcom found itself where it was effectively
10 conducting this at the same time as gathering information for an SMP review, but the parties
11 have asked the Tribunal to set out what principles should govern Ofcom's determination of
12 these disputes more generally. What concerns me is that the essence of your case is that it
13 should be cost based but Ofcom do not have to go through such a detailed examination as
14 they do in SMP, they should come to a rough and ready type of solution that you can arrive
15 at within the four month period.
16 What I am wondering is whether or not that is practical in the sense that if Ofcom said it
17 wanted to look at the costs, is it not – given the way this industry works – inevitable that
18 then a large number of CDs with models on and pantechnicons of lever arch files would
19 have arrived from everybody and inevitably there would be huge argument over what the
20 costs were and are, and if Ofcom had then said "We cannot look into all that, but this is
21 what we think is roughly the position", they would be accused of inadequate reasoning and
22 not taking into account all the relevant material. Now, as an MNO is it T-Mobile's case that
23 they would be prepared to live with some kind of rough and ready cost estimate without
24 going into the depths that are gone into in an SMP dispute?
25 MR. TURNER: Yes, madam, may I address that in three ways. First, I do not believe it is the
26 parties who have asked for general guidance as to how Ofcom should exercise its powers,
27 Ofcom certainly has and I know that is something Mr. Roth is very keen to get from the
28 Tribunal. What we are concerned with is the correctness of the decision that was arrived at
29 in this case, and that is why I have limited my submissions accordingly.
30 So far as your question about where does consideration of costs get you, is it not a
31 Pandora's box, or rather a box of CD-Roms that will arrive that will prevent you, paralyse
32 you from reaching a decision within four months, I am not in a position to say whether,
33 generally speaking, that is going to be correct or not. In many cases there will be – more or
34 less – relevant cost information available which can be taken into account, and it is our

1 position that Ofcom can and should – and the Tribunal should – bear in mind that dispute
2 resolution is not something which should turn into a market review, it should be something
3 capable of being completed within four months save in exceptional circumstances.
4 Thirdly, in a answer to your question to me, would we be prepared to live with something
5 more rough and ready? The answer is that that accords with our understanding of how
6 dispute resolution should function where cost considerations are an issue. It would be
7 wrong for a party to hijack a dispute resolution and say that it should turn into a full scale
8 market review process. But you should not confuse the general with the particular. This
9 particular case involved a special set of circumstances and it is very clear that Ofcom
10 radically departed from the course it should have taken.
11 MR. SCOTT: I am conscious that this four month period is going to come up again when we
12 consider the questions that we are placing before our neighbours in the Competition
13 Commission, and that having regard to what it is reasonable to expect to do in a four month
14 period will recur then. What you are saying to us is that in these particular circumstances –
15 both in relation to 2G and in relation to 3G – modelling activities had been taking place so
16 that we were not in a Greenfield.
17 MR. TURNER: Far from it.
18 MR. SCOTT: Far from it. So both in relation to a dispute in 2007 and in relation to a future
19 dispute, in this context there would be a model. There may be other circumstances in which
20 there would not be a model but here there would be a model, and you are saying that that
21 needed to be taken into account?
22 MR. TURNER: Yes, I am also conscious, I am not sure quite how wide Ofcom's request for
23 guidance travels, because we are here concerned with termination charges and the
24 wholesale markets for termination are and have been regulated for some time, and there is
25 in the background cost information from time to time. If Ofcom is asking for more general
26 guidance about how it should approach its functions in relation to other markets then I am
27 afraid that does go beyond the scope of this ----
28 THE CHAIRMAN: I was simply anticipating a point that Mr. Roth might make, which is that the
29 Tribunal should not say in its determination that Ofcom should in this case have followed a
30 cost based approach if the only reason for that is the coincidence of these disputes and the
31 MCT review, but not indicating that in any other cases a cost based approach would be
32 appropriate, that would not be a principled approach to take. You are not putting it any
33 higher than that?

1 MR. TURNER: Yes, I understand that. We are not saying that there is a disconnection between
2 this case and all other cases, far from it. In other cases, particularly in connection with
3 mobile call termination charges, more or less there will be cost information available.
4 Ofcom will be entitled to deploy that information, having regard to considerations of
5 efficiency and so forth and exercise judgment, and come back perhaps to the starting point
6 of the submissions, but it can exercise judgment in deciding we will go this far and no
7 further, otherwise this will turn into the yawning chasm of a full scale market review. But,
8 in all cases, because of the overriding principles, these considerations should apply.
9 THE CHAIRMAN: Yes, thank you, Mr. Turner. Miss Rose?
10 MISS ROSE: In common with the other parties that you have heard from we rely on our notice of
11 appeal and on our skeleton argument.
12 In addition, as the Tribunal knows, I have already made submissions in the context of the
13 SMP issue on what we say is the proper interpretation of the end-to-end obligation and how
14 Ofcom should have gone about dealing with that when it came to resolving a dispute, and I
15 do not intend to repeat those submissions. We do generally adopt the submissions in
16 particular made by Mr. Cook on behalf of the 1092 appellants as regards the proper
17 construction of Ofcom's dispute resolution powers under s.185(1) and the proper approach
18 to the end-to-end obligation and I do just want to add a very few comments.
19 First in relation to H3G's particular position on these appeals because, as the Tribunal will
20 be aware, it is an oddity that we are appealing a decision which upheld the OCCN which we
21 had submitted seeking a higher rate. Of course, that puts into context the circumstances in
22 which we were driven to seek the higher rate in the first place, and the Tribunal has seen the
23 correspondence, and in particular our explanation to Ofcom, and the references in Mr.
24 Russell's witness statement of the of the circumstances that H3G found itself in where the
25 underlying 3G rates being charged by the other MNOs it transpired were very much higher
26 than those which H3G was charging for its 3G termination service in those circumstances
27 H3G was concerned that if Ofcom was going to resolve the dispute referred by BT in
28 relation to the other MNOs, in favour of the other MNOs very high 3G termination charges
29 then H3G was going to be left at a competitive disadvantage, and those are the very special
30 circumstances in which we also put in an OCCN which led to the resolution of a dispute. It
31 was not, and is not, our position, that 16.6 p is the right rate for 3G call termination. Our
32 position is that all of these proposed rates were too high, and it should have been made very
33 clear by Ofcom that they were not reasonable rates which BT was under any obligation to
34 pay. Just a small point on that: the submission was made by Mr. Turner that our rate should

1 be treated as if it were a blended rate because we have a roaming agreement with O2 and
2 Orange. Without wishing to make too much of this point I do just draw the tribunal's
3 attention to certain paragraphs in the NCT statement where Ofcom address this argument -
4 paras. 9.29 to 9.30 and Annexe 13, paras. A13.46 to 7. The point that Ofcom made there
5 was that the proportion of calls which it anticipated H3G would be terminating on 2G
6 networks by the year 2010-2011 was so miniscule that it was going to make no difference at
7 all to the rate. In fact, it was less than 0.1 pence per minute difference. So, you can see
8 there that that really does not take the matter any further. The concern that H3G had was a
9 comparison between the unregulated, underlying 3G rates that the other MNOs were
10 charging which were higher - much higher - than H3G's rate and H3G's own 3G
11 termination rate.
12 Just in relation to dispute resolution generally, it is right, as has been said by all of those
13 whose submissions you have heard so far, that the power to resolve disputes relating to
14 network access and to s.185(1)(a) is not limited to circumstances in which the parties are
15 subject to any regulatory obligation. Neither, of course, is it limited to the circumstances in
16 which parties have SMP. As the tribunal is now very well aware, having been told on a
17 number of occasions that this is a parallel scheme, derived from Article 5(4) of the Access
18 Directive, independent of the quite separate regime for SMP regulation, and therefore it is
19 right that Ofcom has the power under s.185 and s.190 to regulate both parties when
20 resolving a dispute, whether or not there is any *ex ante* regulation on either of them. In that
21 sense it can fix a disputed rate and require both parties to charge it and to pay it.
22 However, we say that when a specific dispute is referred to Ofcom under s.185, it is
23 necessary for Ofcom to analyse what is the nature of the dispute between the parties and to
24 seek to resolve that actual dispute in a proportionate way. Here, Ofcom's emphasis on the
25 s.33 point that regulation must be targeted, and transparent, and proportionate and only
26 where needed, is of significance, we submit, because the obligation on Ofcom is to resolve
27 the particular dispute referred to it by the least onerous means compatible with the
28 regulatory aim pursued.
29 Therefore - and here we do differ somewhat from the submissions that you have heard from
30 the other parties - in circumstances in which BT, another MNO, refers a dispute of which
31 the subject matter is the extent of the end-to-end obligation on BT, and the extent to which
32 BT is obliged to accept a price which a particular MNO is seeking to charge for call
33 termination, we submit it is not erroneous for Ofcom to focus, when resolving that dispute,

1 on the question whether or not the price in question is reasonable for the purposes of the
2 end-to-end obligation.
3 On the contrary, we say that is a reasonable and proportionate approach for Ofcom to take.
4 In short, it is right that Ofcom does not need to find that there is any existing obligation
5 when it is resolving an access-related dispute. It has the jurisdiction to resolve an access-
6 related dispute whether or not there is a pre-existing obligation. But, if the nature of the
7 particular dispute referred is as to the proper interpretation and scope of a pre-existing
8 obligation, then it certainly is not erroneous for Ofcom to focus on that question when
9 resolving the dispute.
10 MR. SCOTT: Miss Rose, I thought that earlier on we had noted that absent the E-To-E
11 specifically imposed upon BT there were, nonetheless, in the common regulatory
12 framework obligations that lay on all operators in relation to inter-connection. I take it that
13 in your remarks you are addressing solely E-To-E, but that there is the question of
14 obligations which are more general, both in terms of the framework and in terms of general
15 conditions.
16 MISS ROSE: Yes. I certainly do not dissent from that proposition. The point that I make is that
17 Ofcom has got to consider what the parties are actually disagreeing about so that if what the
18 nature of the dispute is is that H3G are saying, "We want to charge 16.6 pence per minute"
19 and BT are saying, "That's unreasonable. We don't have to pay that", then the question for
20 Ofcom is, "Does BT have to pay that charge or not?"
21 THE CHAIRMAN: Is the question - and nobody seems to have thought that this is the relevant
22 point - "Is it relevant for Ofcom to investigate why the party is seeking to put up the price?
23 The dispute resolution procedure operates on the basis - assuming we are not talking about
24 an initial interconnection - that the parties are engaged in providing each other with a
25 service -- or a service is being provided at a price, and one party is now saying that it wants
26 to change that price, and the other party is saying, "No, we don't think the price should be
27 changed". Is it relevant as to what justification the party seeking to change the price puts
28 forward for saying, "Well, now we think it should be more expensive than it has been in the
29 past"?
30 MISS ROSE: Of course it might well be relevant because, to take the simplest case, the reason
31 might be that that party's costs have suddenly increased, and therefore that would be the
32 justification for them increasing the price.
33 THE CHAIRMAN: Yes. But, would Ofcom's task then be to consider whether it is true that their
34 costs have increased, or not? Or, are you saying that regardless of the truth, or otherwise, of

1 the reason that the party who has initiated the change in price puts forward that nonetheless
2 Ofcom's task is simply to ignore that, but say, "Well, do we think that this is a reasonable
3 price?"
4 MISS ROSE: Madam, I certainly do not suggest that Ofcom ignores the situation of the MNOs,
5 because the question it is asking is: Is this a reasonable price that BT is bound to pay? That
6 is always the question it is asking. But, essentially, the point that I make - and this is an
7 elision or an error which we have heard so many times in the course of this appeal -- people
8 talking about Ofcom imposing regulation on the MNO, imposing price on the MNO -- That
9 is really what my submission is directed at - that this dispute was not about imposing a
10 price on the MNO. What it was about was giving a judgment as to whether the price that the
11 MNO was seeking to charge was a reasonable price that BT could be obliged to pay. In
12 other words, the question is the extent of the regulatory burden on BT - not the imposition
13 of regulatory burden on the MNOs. Ofcom itself, as I have submitted before,
14 fundamentally misunderstood the difference between those positions. That appears to have
15 infected the way that it considered the question of reasonableness. Ofcom was saying
16 throughout this process, "Well, it's disproportionate to impose a strictly cost based charge
17 on the MNOs when that is properly something to be the subject of SMP regulation".
18 Now, leaving aside all the arguments you have heard generally about whether that is, or is
19 not, correct, it simply was not the point because Ofcom was not being asked to impose a
20 charge on the MNOs. It was being asked whether it was appropriate to impose a particular
21 charge on BT. Therefore, it was looking at proportionality through the wrong end of the
22 telescope - not, "Is this charge too low to be one which the MNOs are to be required to limit
23 themselves to?", but, "Is this charge too high to be one that BT is to be forced to pay
24 without any scope for negotiation?"
25 We say it is particularly an oddity - the position that BT has adopted in this appeal -
26 because, actually, Ofcom did correctly take that approach through much of the reasoning in
27 this dispute resolution. Ofcom did appreciate that it was being asked the question whether
28 these were reasonable charges for the purpose of the end-to-end obligation and focused on
29 it. Without turning them up, to refer to a number of paragraphs in the decision, 1.11, 1.12,
30 2.7 to 2.10, 4.1 to 4.5, and 8.1. We say there was nothing wrong in principle with Ofcom's
31 approach in that regard, but the error was in the way that Ofcom construed the end-to-end
32 obligation. That error is beautifully crystallised at para. 139 of Ofcom's defence (which we
33 looked at last week and which I will not turn up again - I am sure the tribunal recalls it: it is
34 the paragraph in which Ofcom says, 'Well, H3G's rate may well have been an abuse of a

1 dominant position contrary to Article 82. There was nothing we could do about that'") We
2 submit it is an absolutely gross error because that meant that what Ofcom were saying was
3 that they would impose regulation on BT that forced BT too pay a rate that Ofcom
4 considered to be an abuse of a dominant position - a fundamental misconception of the task
5 that Ofcom was being asked to undertake in resolving this dispute.
6 Of course, you might well get a different situation if Ofcom was being asked to resolve an
7 access-related dispute where there is no end-to-end obligation. The tribunal has an example
8 of that - not only in relation to the very short period of time before the end-to-end obligation
9 came into effect, but also in relation to the H3G/Orange TRD appeals. In that situation we
10 submit that the approach suggested by the 1092 appellants is correct. I have nothing to add
11 to it.
12 In relation to the BT disputes, we say the focus is rightly on the question: How much is BT
13 to be forced to pay? It cannot be forced to pay a rate that is uncompetitive.
14 Can I just very quickly turn up a couple of particular paragraphs in the decision? Bundle B,
15 Tab 4, in particular para. 4.52. I do not want to take time on this because I know you have
16 looked at it this morning. (After a pause): We say that para. 4.52 at p.28 illustrates the
17 elision and confusion between regulating BT and regulating the MNOs. It says,
18 "Ofcom did not consider in the draft determinations that it would be appropriate to
19 set strictly cost based charges in these disputes, as this would be unnecessary and
20 disproportionate to achieve the purpose underlying the end-to-end obligation. The
21 end-to-end obligation is one which applies only to BT and should not be used as a
22 means of effectively imposing regulatory burdens on other providers who are not
23 subject to the end-to-end obligation."
24 With respect, that is inexplicable because the effect of that approach is to impose a
25 disproportionate regulatory burden on BT. We do submit that the approach that Ofcom
26 have taken in this appeal is very odd, given what they actually did in the decision, because
27 in the decision they do appear, rightly, to have appreciated that this was about the extent of
28 regulation on BT, but, as the tribunal have seen over the last few days, their position has
29 been very much to say that this was about regulating both parties and about imposing
30 obligations on the MNOs. We wait to hear from Mr. Roth how it is that Ofcom will seek to
31 reconcile the approach that they took in the actual dispute resolution decisions, and the
32 approach that they have taken so far on this appeal.
33 Madam, can I just address one final point which is the debate that the tribunal were having
34 with Mr. Turner on the question of cost which is the debate the tribunal were having with

1 Mr. Turner on the question of cost based dispute resolution. It is our submission that if you
2 are asking the question, "Is this a reasonable charge?" and you are doing so in accordance
3 with the statutory duties, in accordance with the objectives identified in the Access
4 Directive and in the Framework Directive, then the focus of Ofcom, rightly, is to be on
5 efficiency, promotion of competition, maximising benefits to end users. As Professor Bain
6 put to me very early on in this appeal, given the particular nature of the service, given the
7 circumstances, it is very likely that you are going to be focused on cost because there
8 simply may not be much scope for other factors to be relevant. Therefore, it is essential for
9 Ofcom, when asking whether this is a reasonable charge that BT is bound to pay, to
10 consider the question of costs.
11 The precise method by which Ofcom does that will depend on the circumstances. It will
12 partly be a question of proportionality depending on how big the dispute is, how significant
13 is implications are and therefore how much resource should proportionately be committed
14 to answering that question, and of course it is not right for Ofcom to ignore that it already
15 has available to it. We do submit that the focus is inevitably going to be on cost and that the
16 one thing that Ofcom cannot do is mandate and impose upon BT a charge which Ofcom
17 itself considers to be appreciably above the competitive level because that is simply an
18 impossible result given the framework of statutory duties that the tribunal has already heard
19 so many submissions about.
20 Madam, I have been very short, but unless I can be of any further assistance those are our
21 submissions.
22 MR. SCOTT: While you have the determination open, could you turn to para.6.7. In para.6. H3G
23 brought to the attention of Ofcom its failure to take into account the powers available, and
24 so on, and referred to the *Rapture* matter. We have the *Rapture* matter before a different
25 panel here, and one of the questions that had certainly occurred to us was the interaction
26 between the approach taken by Ofcom in *Rapture* and the approach taken by Ofcom in this
27 case. We realise that certain people were in different positions in *Rapture*, but whether now
28 or after lunch you want to say anything about that we would leave to you, but we are
29 conscious that a different approach was taken.
30 MISS ROSE: Sir, can I consider that, and it is probably best if we deal with it in our written
31 reply.
32 PROFESSOR BAIN: Miss Rose, could I put to you more or less the same question as I put to
33 Mr. Read. I want just to be quite clear that you see importance of cost relevant to other
34 things. The question to Mr. Read was that if an MNO comes along to suggest that the price

1 ought to be Y when it has been X and Ofcom decide that a cost based price take everything
2 into account would be Z, lower than X, is H3G's position that Ofcom should make a
3 determination that is lower than the prevailing price of X in those circumstances? Dost cost
4 base trump everything?
5 MISS ROSE: There is no doubt that Ofcom would have the power to do that. Everybody agrees
6 that they would have the power under s.185. They also of course would have the power
7 under s.105 to intervene if they thought the parties had agreed an excessive charge for
8 interconnection even if no dispute had been referred to them. So they would have the
9 power to do that.
10 In deciding whether or not they should require the price to be dropped, they would of course
11 have to consider questions of proportionality and their normal statutory duties. So whether
12 it would be right to do so in the particular case would depend on how significant the gap
13 was, whether they thought that it was actually having an adverse effect on end users, and so
14 forth.
15 PROFESSOR BAIN: It could be right to do so?
16 MISS ROSE: It could be, yes.
17 PROFESSOR BAIN: Thank you.
18 THE CHAIRMAN: Thank you, Miss Rose. Mr. Roth, people have been rather quicker this
19 morning than they thought they were going to be. I think you expected to have the short
20 adjournment before you got to your feet, but are you able to make a start now?
21 MR. ROTH: Madam, I could make a start now. It may be, and it will not disrupt our timetable,
22 that I will ask the tribunal to finish slightly earlier today, and to use the hour and a half that
23 I anticipated tomorrow morning and use that, which will fit in with our timetable. I imagine
24 there will not be great dismay if you do seek to rise early. On that basis I could make
25 certain submissions now and continue this afternoon.
26 THE CHAIRMAN: If there comes a point before one o'clock when it would be suitable to break
27 for the short adjournment, then perhaps you will let us know?
28 MR. ROTH: Yes, thank you, madam. Madam, may I start on what I hope is a harmonious note
29 and say that Ofcom entirely endorses and adopts what Mr. Read said at the outset of his
30 submissions for BT that in the even that the tribunal should remit either or both of the
31 determinations to Ofcom – and of course we say that they should be upheld and you should
32 not – we do ask you, please, to give clear directions as to how these particular disputes
33 should be resolved. At the end of the day, these are disputes about charges and Ofcom has
34 to come up with specific figures, and, as you just observed a short while ago, madam, to the

1 tenth of a penny. Any figures that Ofcom does derive will no doubt be seen as less
2 advantageous to one operator or another and so they may be appealed again. These are
3 large, well funded companies and if one thing is clear it is that they are not shy about
4 bringing appeals to this tribunal. Indeed, you heard last week that Ofcom has come out with
5 its statement to revise the arrangements for mobile number portability, something H3G has
6 been pressing Ofcom to do, complaining they have not done it earlier, and now that is under
7 appeal by another MNO.
8 One thing we respectfully submit would serve nobody's interests, not BT, not the other
9 operators, and certainly not Ofcom, is that the tribunal gives indications of a general nature
10 as to what should or should not be taken into account but does not, as it were, give clear
11 directions as to how it should be taken into account, what criteria to apply to those factors,
12 in coming up with specific numbers.
13 THE CHAIRMAN: You are not saying that we should come up with the numbers ourselves,
14 Mr. Roth, are you?
15 MR. ROTH: I think we would not mind if you did, but if that is something that does not seem
16 possible to you at least the criteria should be specific so that they can be applied.
17 THE CHAIRMAN: We have in mind that it would not be very helpful – not having formed any
18 view as yet – to say that you must have regard, or more regard or different regard, to your
19 policy objectives without saying something that enables you to make the jump from those to
20 arriving at figures.
21 MR. ROTH: Or indeed being more specific – a submission made by various parties that you
22 should have more regard to costs, but how and to what extent and where do you put it in.
23 We are not asking, of course, for the broadest guidance for all possible disputes that come
24 before Ofcom in the future, although obviously this judgment is going to be looked at by
25 people to other disputes.
26 I make that point right at the outset not because I want to start in a defensive way.
27 Conceding the possibility of defeat is not a recommended course of advocacy. It has been
28 highlighted by the way the different appellants have put their cases. There has been
29 extensive and detailed criticism of what the regulator has done. Somewhat vague in many
30 cases, and indeed inconsistent indications of what Ofcom should have done, inconsistent not
31 only as between appellants but within the same appellant, and that is not only of little help, I
32 suggest, to the tribunal, but it does expose, we suggest, some of the weaknesses in the way
33 they approach these whole disputes.

1 BT in its original reference of the dispute to Ofcom argued indeed that Ofcom should adopt
2 an approach that was clear and precise. I would ask you to look at the actual dispute
3 reference, because that is what came to Ofcom. It is F3, p.357. It is confidential document.
4 This is the BT reference of the disputes, as you can see, in January 2007. If you turn on to
5 p.362, para.5, you see "Remedies Sought". This is all marked "Confidential". Again, I
6 have to say I am at a loss to understand why what is said in s.5 can possibly be confidential,
7 but I will not read it out, but would ask you to read it to yourselves. Perhaps BT might,
8 while you are doing that, reflect on whether this paragraph really can be classified as
9 confidential. (After a pause) That was the basis on which the disputes were referred to
10 Ofcom and that is what we are asked to do.
11 Then in the notice of appeal as, madam Chairman, you pointed out on Friday, they take a
12 very different position. So we have the letter on Friday evening which you made reference
13 to at the outset today, where in paras.4 and 5 of the letter it is said that, although BT
14 indicated that 3G rates should be fixed at the level of 2G rates in its dispute referral letter,
15 the confidential bit, and in its response to the draft determination BT does not pursue this
16 rigid approach in its TRD notice of appeal. Therefore, BT is continuing to pursue the line
17 set out in para.115 of its notice of appeal. That is just quoting paras.4 and 5 of the letter.
18 What we have in para.115 is a multi-faceted approach and indeed the assertion that the 3G
19 component of the charge should be assessed separately from the 2G component. As you
20 will recall, that is para.115(3), and I do not ask you to read that. We have prepared, to
21 illustrate this point, a short table simply drawn from the documents submitted by the various
22 parties, if I can hand that up and pass it along, of what we were asked to do and what we are
23 now being asked to do, or what it is said we should have done, because this is an appeal and
24 it is saying this is what we ought to have done. (Same handed) I hope it will find its way
25 back.
26 THE CHAIRMAN: There is nothing confidential in this?
27 MR. SCOTT: In so far as it reflects para.5 ----
28 MR. ROTH: I am not going to read it out.
29 MR. SCOTT: -- it should not go too far back.
30 MR. ROTH: If that paragraph really is a confidential paragraph. I have dealt with BT so I need
31 not say any more about that. If you look at T-Mobile, T-Mobile challenge two aspects of
32 the determination. In their referral what they ask for is, as you see, a direction that BT
33 accept the OCCN of 3rd July, alternatively the one of 1st December. There were two
34 OCCNs. Ofcom then publishes its draft determination. In their response they say that T-

Mobile agrees with Ofcom's analysis of the disputes and methodology used to assess the reasonableness of the MNO's rates, and we give the reference. Now they say when the decision comes out, "No, no, the methodology is all wrong". I appreciate, and Mr. Turner said, that they did not know the exact number that would result for one of the operators and maybe they thought again when the figures come out, but the position they took "actually, this methodology is a sound methodology" and if it is a sound methodology the fact that it actually produces a figure they do not like does not make it unsound, and now of course they take a very different position and that has been clarified by Mr. Turner – or elaborated on by Mr. Turner – today saying what we should have done, and he developed this argument. We should have taken the glide path backwards; that is not something, as he recognised, in their notice of appeal. It is even more remarkable on something that is not a core issue – it is non-core issue – but it illustrates the point, because what we were asked to do, as you see, was to direct that BT accept either the 5th July OCCN, or alternatively the December OCCN. That was the referral.

The other point taken, as you will have seen in T-Mobile's notice of appeal, is that our decision was wrong because Ofcom decided to accept the first and we should also have accepted the second, which is completely inconsistent with what we have been asked to do.

H3G's appeal, both the BT determination and what, for convenience, perhaps I can call the MNO determination – the determination in which BT is not involved – it puts its case in the different appeals in a variety of alternative ways which is a little difficult to summarise, but it basically argues for the use of the LRIC cost model to set the rates, but also that Ofcom should have set a non-discriminatory rate for 3G for all the MNOs while allowing for H3G's particular position, given its higher costs and the market dynamics. It is a little difficult in our third major column to work out from para.3.1 of the notice of appeal exactly what they are saying we should have done, but we have quoted it there.

I make these points not just to take the sting out of some of the criticisms that have been showered on my client since these appeals were open, but since of course in the determination Ofcom focused on what the parties to the dispute were urging Ofcom to do, this was dispute resolution. It is not a general regulatory inquiry, and also to highlight the problem of arriving at figures for charges once one departs from a more precise approach.

May I then make some observations about the scope of the appellate jurisdiction in this case? I think the way the case has been argued by the appellants it may not at the end of the day make a substantive difference in the present case, or at least in all aspects of the present case, in view of some of the challenges, but it has been the subject of submissions, it may be

1 relevant, I think in one respect, and of course anything you say about this (if you do address
2 it in your judgment) had very important implications for the future. We of course accept
3 this is not Judicial Review, it is an appeal on the merits.
4 My friend, Mr. Cook, submitted that it is a full rehearing. With respect, that is not correct,
5 and I suspect that may be not what he really meant. A full, rehearing is, for example, when
6 on an appeal from the Magistrates' Court to the Crown Court all the evidence is reheard and
7 the prosecution has to establish its case again. If it were a full rehearing in a sense that
8 would suit Ofcom very well; this is an *inter partes*' dispute, the parties are before you, there
9 is an appeal, they would make their arguments, interveners would make their arguments,
10 Ofcom would not even have to turn up – the Magistrates do not turn up to the Crown Court
11 to put their case. But that is not correct, Ofcom is acting as regulator, not as arbitrator, and
12 it is determining the disputes in accordance with objectives of regulatory policy, and this is
13 an appeal against determinations reached on that basis.
14 The point that we were making in our skeleton argument was a different one – perhaps, if I
15 can put that way – a slightly more subtle one, but no less important. We say, in certain
16 respects, these determinations and dispute resolution generally, involves exercise of
17 regulatory judgment as there are matters of appreciation – there are obviously matters of
18 fact, there are matters of law, but there are also matters of appreciation. One can see that in
19 BT's notice of appeal, the way they put it themselves. If I could ask you to look at that in
20 bundle D1, tab 3, p.110, para.114:
21 "BT does not contend that there is necessarily a single rate which can be
22 automatically viewed as reasonable in the context of assessing the MCT charges
23 which form the subject matter of these Interconnection Disputes. However, there
24 is plainly a range outside of which an MCT charge *cannot* be considered
25 reasonable. The 3G MCT rates approved in the Determination clearly fall within
26 that unreasonable category."
27 If BT are correct that it is outside the range of reasonableness then of course it should be
28 annulled, but if it is within that range we submit that it is not appropriate for the Tribunal to
29 say: "We are looking at this afresh, we (the Tribunal) would select this particular rate within
30 that range, the figure X, Ofcom has taken the figure Y, which is also within that range, and
31 so we annul and send it back with a direction that they should think about the figure Y".
32 THE CHAIRMAN: Is this perhaps also relevant to the question that Professor Bain has been
33 putting about "Well, what if you do a cost base analysis and discover that the figure is
34 actually lower than the one that the parties have happily been paying, that nonetheless if the

1 figure that they have been paying is not outside the range of reasonable figures the Tribunal
2 might then simply decide that parties should return to the *status quo* rather than pay the
3 lower ----
4 MR. ROTH: Madam, I think it does. If, following Professor Bain's question to us to its, it were,
5 logical conclusion, if Ofcom or the Tribunal, although I think his question was about
6 Ofcom, were to find that actually both figures are outside the range of reasonableness and
7 actually it is the lower figure is the only one, then Ofcom I think will certainly have the
8 powers – everyone is agreed – and in appropriate circumstances it would be appropriate for
9 them to take the lower figure. One has to qualify that by the fact that this being a bi-
10 partisan dispute resolution with the four month outside deadline, clearly Ofcom would have
11 to go back to the parties and give them a chance to comment on that, and look at it if that
12 was the view they were coming to – they could not just listen to arguments for two figures
13 and come up with one lower, that would be quite inappropriate and procedurally unfair, and
14 whether all that is really possible within the confines of dispute resolution Ofcom does have
15 power – it is in the Act, s.190 and someone will give me the subsection – to stay a dispute
16 resolution, to say there are exceptional circumstances, "We shall stay the resolution and
17 initiate .." for example, ".. an SMP investigation". It may be that in that situation, posited
18 in Professor Bain's hypothesis, that that would be the appropriate approach, saying: "We
19 think something is going wrong here, we will stay this, and we will launch a fuller
20 investigation and then we will deal with it". So that might be one approach to that
21 hypothesis. I would need to take fuller instructions from my clients as to quite how one
22 might deal with it.
23 MR. SCOTT: Just staying with this process point. Were we to find against you and to remit,
24 presumably there would be a two stage process again, one of which would be an *inter*
25 *partes* process leading to a draft determination, and at that point, e.g. the Altnets would
26 have an opportunity of commenting on the draft determination before it went to a full
27 determination.
28 MR. ROTH: That is the procedure Ofcom follows of issuing determinations in draft – not
29 incidentally a statutory required procedure, there is no obligation to consult but Ofcom has
30 adopted that procedure of doing so.
31 MR. SCOTT: You raised that point, I am just thinking under the CRF whether there is not a
32 requirement?
33 MR. ROTH: Not on dispute resolution, no. It is one of the big distinctions between that and the
34 other powers, and indeed again it comes down to the four months.

1 We say on this point that it is in fact recognised that these matters involve regulatory
2 judgment in the Communications Act. If I could ask you to look at the Act, which I think is
3 in bundle H1, tab 8, section 3. Section 3 sets out the general duties of Ofcom, s.3(1) the
4 principal duty, s.3(3): In performing their duties under subsection (1) Ofcom must have
5 regard, in all cases, to …" and you see subsection (b):
6 "any other principles appearing to Ofcom to represent the best regulatory practice."
7 Those words are not in subsection (a). Subsection (a):
8 "… the principles under which regulatory activities should be transparent,
9 accountable, proportionate, consistent and targeted …"
10 and so on – Mr. Turner referred to that.
11 "(b) any other principles appearing to Ofcom to represent the best regulatory practice", and
12 again in s.4(11), where it appears to Ofcom that any of the Community requirements, and
13 that is the s.8 objectives and so on, conflict with each other, they must secure the conflict is
14 resolved in the manner they think best in the circumstances. So there is express statutory
15 recognition that there are matters of regulatory judgment involved, or could be – I should
16 say – matters of regulatory judgment involved in these cases.
17 Then on appeal we say the question is not what the Tribunal thinks is – if I take s.4(11) –
18 the best manner to resolve the conflict, but has it been shown by the appellants that Ofcom's
19 exercise of it regulatory judgment was clearly wrong.
20 THE CHAIRMAN: Sorry, what section was that?
21 MR. ROTH: Section 4(11). Section 4 is the Community obligation section which brings in what
22 is in Article 8 of the Framework Directive, and a little b it extra as well. Then section 4(11)
23 "Where it appears to Ofcom that any of the Community requirements conflict with
24 each other, they (Ofcom) must secure that the conflict is resolved in the manner
25 they think best in the circumstances."
26 So again a reference to the exercise of regulatory judgment, and that is where I say on an
27 appeal we submit the approach of the Tribunal is not "how do we think is the best manner to
28 reconcile any conflict, but has it been shown by the appellants that Ofcom's exercise of its
29 regulatory judgment was clearly wrong?
30 THE CHAIRMAN: You accept that this regulatory judgment has to be exercised in each case?
31 Going back to the point I put to Miss Rose, the dispute may be submitted to Ofcom on a
32 fairly narrow basis as far as the parties are concerned in an argument about, for example,
33 suppose that the price increase proposed was because the seller says: "I know I have been
34 charging you X so far but now we have looked at international comparisons and we have

1 decided to increase our price to bring it up to rates in other countries, and the buyer says
2 "We do not think those international comparisons are valid for whatever reason, and we do
3 not think the price should be increased, and then they refer the dispute to Ofcom. Is it
4 Ofcom's job then simply to look at whether the international comparisons are valid, and
5 whether that is a good reason for increasing the rate, or do you say that Ofcom is not
6 constrained by the scope of the debate between the parties, but must always rise at a rate
7 which is reasonable, regardless of the justification put forward?
8 MR. ROTH: Well, first, I think Ofcom would have to address the arguments raised by the parties,
9 and we would have to say on that hypothesis that, "We think international comparison is
10 irrelevant for the following reasons ----" or, if, on the contrary, they thought they were
11 relevant then no doubt we would, so far as possible, look at what is said. But, Ofcom is not
12 fully constrained by what the parties have put before it. But, again, it certainly does not
13 have to resolve the dispute in the manner that one party or the other suggests because it is
14 governed by overriding regulatory considerations that I am coming on to -- But, for Ofcom
15 to start taking into account a whole range of matters which the parties have not put before it,
16 again, we get to the position of then having to go back to the parties and say, "Well, you've
17 said this on one side. You've said that on the other side. We think that you both might want
18 to start thinking about this, this, and this. What do you say about that?" One has to be, as it
19 were, proportionate to the procedure involved, which is a relatively quick dispute resolution
20 process where the amount of information that can be provided can rapidly escalate if one
21 opens it up too widely. So, that is not a very precise answer. I appreciate that - because it
22 will be so fact-dependent.
23 MR. SCOTT: Mr. Roth, it is not clear to me whether your clients regarded this as an important
24 case. (After a pause): One looks around the room and one thinks, well, that it must have
25 been.
26 MR. ROTH: In one sense, yes, of course any dispute between major operators is important and is
27 taken very seriously. At the same time it was seen as of much less importance than an MCT
28 dispute could have because it was clear - originally at the time of referral - and certainly at
29 the time of the decision - that this was of a limited significance in terms of timespan and -
30 and I am coming back to this, but jumping ahead of myself - that in this case, or these cases,
31 I should say, what was being determined was purely a retrospective rate. You pointed out
32 early on that often dispute resolution will be going forward, but, in these cases, because of
33 the imminence of the new SMP controls at the time of the referral and the fact that at the
34 time of the determination they have in fact already been introduced and taken effect, this

1 was of rather limited import. That very much had a bearing on the way Ofcom approached
2 it. Absolutely.
3 MR. SCOTT: You will appreciate that from H3G's point of view, because of the interaction
4 between their view of SMP and the dispute resolution it was of potentially wider
5 significance -- The reason, of course, that I mention the important case is your statutory
6 duties of Ofcom under s.3(8) and s.3(9). Really it goes back to the way in which we are to
7 have regard to the exercise of Ofcom's conflict resolution powers. The expectation is that
8 there will be a reasoned decision, and, as I understand it, what you are suggesting to us is
9 that we should take a judicial review-type approach to s.3(8)(c). Of course, one turns to
10 s.3(9)(b) - Ofcom would have, despite it being an *inter partes* dispute resolution matter to
11 bring it to the attention of other persons who are in the room now, but who might not be
12 party to the dispute resolution. So, that is why whether it is an important case may be
13 significant.
14 MR. ROTH: Yes, sir. I see that. Of course, s.3(8) is dealing with a situation where Ofcom have
15 considered there is a conflict between the duty in s.3(1)(a) and s.3(1)(b) - namely, the
16 interests of citizens (EU citizens) and consumers -- citizens more widely and consumers in
17 relevant markets. I think that is the conflict they are referring to in sub-section (8).
18 Certainly Ofcom - even aside from the ported case point -- I do not think we considered
19 there is any such conflict here.
20 MR. SCOTT: So, it is not that sort of conflict.
21 MR. ROTH: It is not that sort of case, no.
22 We point out that even on a full merits jurisdiction, in an infringement case where there is a
23 fine imposed under the Competition Act and the potential therefore for private damages
24 action in very serious cases, the tribunal has indicated - even in cases of that nature - that it
25 may be slow to interfere with complex assessment of many factors by a regulator. That is
26 the *Aberdeen Journals* judgment of the tribunal (which is not in the bundle but has been
27 provided to my friends and to the tribunal, but not at the moment to me). It is a very short
28 passage at para. 125 on p.42. This was an abuse finding on predatory pricing. The tribunal
29 say at para. 125,
30 "We bear in mind, however, that an issue such as the relevant product market may
31 require more or less complex assessment of numerous interlocking factors,
32 including economic evidence. Such an exercise intrinsically involves an element of
33 appreciation and the exercise of judgment. On such issues it seems to us that the
34 question whether the Director has 'proved' his case involves us asking ourselves, 'Is

1 the tribunal satisfied the Director's analysis of the relevant product market is robust
2 and soundly based?'"
3 I refer you to that by way of analogy, but also bearing in mind that, yes, that is on the merits
4 there, but, even so, there is this limited deference (but deference nonetheless) to what the
5 regulator has done, but that is in the very different situation of an infringement case
6 involving a penalty. The subsequent *Freeserve* judgment to which counsel for T-Mobile
7 referred in their skeleton does not vary that. They quote a passage from *Freeserve*. That
8 was an appeal against the rejection of a complaint of infringement of the Chapter 2
9 prohibition, but the tribunal - and you see that from the passage that they quote - expressly
10 reserved its view as to what may be the position in cases where no penalty is involved.
11 Perhaps it is convenient to look at the judgment at H3, Tab 3, p.40, para. 121. That is the
12 paragraph from which there is quoted an extract in T-Mobile's skeleton. You see two-thirds
13 of the way down that paragraph, the tribunal say,
14 "Whether and to what extent the Director may reasonably enjoy a certain 'margin of
15 appreciation' on issues of economic assessment in cases where no penalty is
16 involved will depend on the particular facts with which the tribunal is confronted in
17 a particular case, bearing in mind both that this is a specialist tribunal and that the
18 appeal is on the merits.
19 The working out of these general, and at this stage, preliminary, indications will
20 depend on the circumstances arising in future cases".
21 So, they very much reserve the position.
22 We say that these appeals under the Communications Act are very different kinds of case
23 from infringement cases under the Competition Act. We point out that, indeed, in the
24 Communications Act, the jurisdiction of this tribunal is expressed in different terms from
25 the jurisdiction under the Competition Act. Both are appeals on the merits, but under the
26 Competition Act the tribunal, as you know, can take any decision that the OFT or the
27 regulator could take - and, indeed, has done so in, I think, two cases now: the *Burgess* case
28 and the *Albion Water* case (the second under appeal). That is not so here. Of course, you
29 have to remit. That also indicates a slightly different approach to the position of the tribunal
30 vis-à-vis the regulator.
31 As I say, I am not sure to what extent this will arise in this case. Of course, if we should
32 have set a cost based price, then that is not a matter of appreciation -- or if the gains from
33 trade test is fundamentally flawed and it was inappropriate to use it again. But, I make
34 these submissions for the reason I explained at the outset.

1 Madam, I think that probably is a convenient moment.
2 THE CHAIRMAN: Thank you, Mr. Roth. We will re-assemble at two o'clock.
3 (Adjourned for a short time)
4 THE CHAIRMAN: Yes, Mr. Roth.
5 MR. ROTH: Madam, the question of whether new arguments can be raised by either side, can the
6 parties raise arguments not raised in the determination? We never suggested that anyone is
7 estopped or there is any abuse of process. Those words never come from us in this hearing.
8 Equally, this does not just go to any question of costs should we lose. We are just saying,
9 and it is all we are saying, for example, the BT change of case to the much broader range of
10 factors it is now said should have been dealt with, that when one is dealing with appeals
11 from what is intended to be relatively quick *inter partes* determination, it should not turn
12 into an examination of a very wide range of factors that were not raised and could not
13 reasonably have been encompassed within the dispute resolution process. That is all we are
14 facing.
15 Conversely, is Ofcom allowed to rely on arguments not set out in the determination? On
16 this, Mr. Read, you will recall, cited the *Napp* case interim judgment of Sir Christopher
17 Bellamy. I do not ask you to turn it up. The reference is H3, tab 1. That judgment is, with
18 respect, we say not relevant to this question. *Napp* concerned an application by the OFT to
19 adduce new evidence to support a finding of infringement and a large fine for a violation of
20 the Chapter II prohibition under the Competition Act. The decision on whether new
21 evidence could be adduced turned very heavily on the fact that those were *quasi* criminal
22 proceedings and engaged Article 6 of the European Convention on Human Rights.
23 We are not relying here on any new evidence, but even if we were we would adopt what
24 was said by Mr. Turner in the MCT appeal when the same case was there relied on, I think
25 by H3G, and the reference is transcript day 5, p.82, line 28, to p.83, line 11. I do not repeat
26 what he said. We say it must follow that if the parties to the disputes may themselves
27 advance new arguments on an appeal that Ofcom can rely on arguments to rebut the
28 elaborated case against it. Indeed, if arguments are raised by appellants like the Altnets
29 who were not parties at all in the dispute and now bring an appeal, as they are entitled to do,
30 because affected parties by a determination can appeal.
31 For example, Mr. Turner referred this morning to the table in the defence comparing the
32 charges fixed in the determination against the first year charges fixed under the MCT
33 statement and said that is nowhere in the determination, we have to go to the defence for it.
34 We say we are quite entitled to put in a table like that. It is being said against us, "You

1 should have looked at these things", and we say, "Okay, here they are, what do they show?"
2 That is all I say about the new arguments point. We are entitled therefore to explain the
3 determination under appeal by reference to the challenges brought against it.
4 So I come to the central, or one of the central questions, namely the role of dispute
5 resolution under the Common Regulatory Framework, the role of dispute resolution under
6 the CRF. I think it is a rule for the advocate that he or she should avoid repetition, deviation
7 or, so far as possible, hesitation, but I was reminded on hearing Mr. Read advance his
8 submissions on this part of the appeal that it is BT who seek to argue in their skeleton that
9 there is a lack of consistency in the CRF that makes it impossible to spell out a coherent
10 regulatory regime. You will recall, Madam Chairman, the answer you gave to him, "We
11 must do the best we can". We submit that, similarly, Ofcom, as the national regulatory
12 authority must seek as best it can to implement and apply the CRF in a coherent and
13 consistent manner. That is important because it is wrong to focus narrowly on the dispute
14 resolution provisions of the CRF in isolation from the general context of the CRF and the
15 range of powers given to and obligations placed upon the national regulatory authority.
16 It has been emphasised by many of those addressing you that the policy objectives in
17 Article 8 of the Framework Directive are expressly referred to in the dispute resolution
18 provisions, both Article 20 of the Framework Directive and Article 5.4 of the Access
19 Directive, and so they are. We rely on that too, as I will explain shortly.
20 They are not only referred to there. They underlie the whole of the CRF. Can I ask you to
21 go to the Directives in bundle H1, and to Framework Directive at tab 6, Article 8. One sees
22 the heading of Article 8, "Policy objectives and regulatory principles". I stress the words
23 "policy objectives" for reasons that will become clear. Then Article 8.1:
24 "Member States shall ensure that in carrying out the regulatory tasks specified in
25 this Directive and the Specific Directives …"
26 so all of those regulatory tasks:
27 "… the national regulatory authorities take all reasonable measures which are
28 aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures
29 shall be proportionate to those objectives."
30 Then come the objectives in paras.2, 3 and 4.
31 When it comes in the Access Directive to the setting of SMP conditions (and the Access
32 Directive is at tab 4 of this bundle) if you go Article 8, para.4 – Article 8, you will recall is
33 the article that requires the imposition of SMP obligations when a market review finds that
34 a market is not effectively competitive – it says:

1 "Obligations imposed in accordance with this Article shall be based on the nature
2 of the problem identified, proportionate and justified in the light of the objectives
3 laid down in Article 8 of the Framework Directive."
4 So SMP obligations also must have regard to the Article 8 policy objectives. These policy
5 objectives indeed underpin the whole of the CRF, and one sees the recital that relates to
6 Article 8. If you go to the Framework Directive at tab 6, it is Recital 16:
7 "National regulatory authorities should have a harmonised set of objectives and
8 principles to underpin …"
9 – not a very happily worded sentence. Then it goes on about co-ordination. It was because
10 it is not very happily worded that we looked at the French text. The French version is, in
11 fact, remarkably clearer if I could ask you to look at the French text of the Directive, Recital
12 16. One does not need any advanced French to see that it is saying:
13 "Il convient que les autorités réglementaires nationales fondent leur action sur un
14 ensemble harmonisé d'objectifs et de principes ----".
15 In other words, they base their action on a set of harmonised objectives and principles.
16 Then it goes on to deal with the co-ordination which is a separate point.
17 That is the basis of this, but they are policy objectives. They are not free-standing
18 obligations. They colour and influence the way that the various specific obligations of the
19 NRA have to be carried out. Mr. Turner this morning referred to the Court of Appeal
20 discussion of objectives in a Community context in the *Blewett* case, you will recall. There
21 is just one other little passage that he did not draw your attention, which I would wish to do.
22 It is bundle H3, tab 5. Could you keep before you bundle H1, because I am coming back to
23 it. It is within the Westlaw print-out, p.23, and Mr. Turner referred to para.80, a quotation
24 from the then Mr. Justice Richards, para. 91, and it is at the end of para.91 you see the last
25 two sentences:
26 "However, the attainment of those objectives cannot sensibly be the overriding
27 factor, regardless of all the considerations material to any individual decision, so
28 as to be a pre-condition of the operation of a waste management plan and/or
29 planning permission for a waste proposal. However, important as such objectives
30 are, the tilt towards their attainment may, as the European Court recognised in
31 Braine-le-Chateau, be reversed by other and more powerful considerations. The
32 machinery provided by s.54A and 70(2) of the 1990 Act allow for this
33 contingency in appropriate circumstances and, in doing so, do not, in my view,
34 violate either of the *Directives*."

1 We say that is important and so, indeed, does the Communications Act in its approach to the
2 policy objectives. You will recall that in the Communications Act, what in Article 8 are
3 called "Policy objectives" are called "Community Requirements", and they are in s.4 of the
4 Communications Act, which is in the same bundle. (H1, tab 8). Section 4(2) is the six
5 Community requirements, of which the first three are drawn from Article 8 of the
6 Framework Directive, but then one sees 4(11), which I referred to in a different context:
7 "Where it appears to Ofcom that any of the Community requirements conflict with each
8 other, they must secure that the conflict is resolved in the manner they think best in the
9 circumstances."
10 So acknowledging there, that they can pull in different directions. Then also in the
11 Communications Act, s.3(1) and 3(3). Section 3(1) – the general duties of Ofcom:
12 "It shall be the principal duty of Ofcom, in carrying out their functions –
13 (a) to further the interests of citizens in relations to communications matters;
14 and
15 (b) to further the interests of consumers in relevant markets where appropriate
16 by promoting competition."
17 Then subsection (3):
18 "In performing their duties under subsection (1) Ofcom must have regard, in all
19 cases, to
20 (a) the principles under which regulatory activities should be transparent,
21 accountable, proportionate, consistent and targeted only at cases in which
22 action is needed; and
23 (b) any other principles appearing to Ofcom to represent the best regulatory
24 practice."
25 Of course, if there is a conflict between s.3 and s.4, s.4 prevails, that is spelt out in s.3(6), in
26 other words the Community requirements will trump anything said in s.3, but there is no
27 suggestion that there is any such conflict here. We say that s.3(3) that I have just read in
28 fact embraces the stricture in Article 8, para.1 of the Framework Directive, that measures
29 taken must be reasonable and proportionate. It is the same approach, as indeed one might
30 expect.
31 So I go back to the Framework Directive, in this bundle at tab 6. I read Article 8, para.1,
32 perhaps while we are there I should ask you to look quickly at Article 8 para.2, because that
33 I think is the one that is most relied on:

"The national regulatory authorities shall promote competition in the provision of electronic communications networks … by *inter alia* –

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality."

So it is not just price, it is choice and quality as well.

"(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation."

(d) is of no relevance.

MR. SCOTT: Why do you say that (d) is of no relevance, when what we are dealing with here is a situation in which differential pricing between the use of mobile and the used of fixed networks seems to me to be at the core of the case?

MR. ROTH: Because it goes back to my point of being – no, I have not come to the point yet! (Laughter) It does not go back to my point. I am so sorry. As I will seek to explain shortly, and have not yet, we say that it does not here feed through to prices to consumers, and does no distort choices between fixed and mobile, and so the consideration that arose and you referred to in the earlier part of the appeal, in the MCT statement, is not of relevance here because of the retrospectivity and the effect on retail prices and I will explain that.

MR. SCOTT: So this is very Act specific, and we should not have this in mind when we come to any general observations in relation to Ofcom's dispute resolution powers?

MR. ROTH: Yes, that is right. And indeed, I will explain that it is very fact specific in a number of ways as so many arguments in this case, those arguing against me have said that it is very fact specific, and that shows how we got it wrong. We are saying: "yes, it is very fact specific and that shows how we got it right, and that very much affects what directions you may wish to give should you find against us and send it back. Yes, there are certainly cases where that would be very important, and there are cases – as I referred to earlier – where dispute resolution is forward looking.

MR. SCOTT: Yes, I think that is a helpful clarification.

MR. ROTH: Yes, I am sorry I had not explained that properly. Then in the Framework Direction, if we go on to Article 20, which is of course the dispute resolution provision – I will not read it out now, it has been read many times, and you will recall the related recital 32 to which you, indeed, referred.

1 Mr. Read made two submissions on Article 20 and recital 32; I think he made them with an
2 eye on the E2E obligation, but they are general submissions. First, he said the reference to
3 obligations is just a jurisdictional gateway – you will recall that submission. He said there
4 has to be a regulatory obligation for Article 20 to be engaged, but on that basis a dispute can
5 then be brought to Ofcom, and then that obligation is not the exclusive focus of the dispute.
6 That was his first point.
7 Secondly, he submitted it is not confined to obligations imposed by Ofcom. He agreed with
8 madam chairman that it has to be an obligation on operators, but he said it can be an
9 obligation that arises under the Directives themselves, and he referred to Article 4.
10 I address both of those. First, just a jurisdictional gateway, we say with respect that is
11 wrong. Even if the Recital may be said to be ambiguous – we doubt that it is, but even if it
12 were – the opening words of Article 20(1) are very clear it is: "In the event of a dispute
13 arising in connection with obligations arising under this Directive or the Specific Directives
14 …" it is a dispute regarding the scope or application of the obligation.
15 The contrary view would have really quite alarming consequences and implications. The
16 idea is that once there is a regulatory obligation and there is a commercial dispute with the
17 undertaking that that is the subject of the obligation which in some way might be connected,
18 but does not actually concern the obligation, that it can be brought to the regulator who is
19 then bound to decide it. Ofcom has this broad-ranging dispute resolution obligation: "Well,
20 Ofcom effectively would have to open a dispute resolution annexe to deal with all these
21 cases". Of course, BT, Mr. Read's client, is subject to a whole host of regulatory
22 obligations. We say, "No, that's not what it means. It would make no sense. It would make
23 sense because NRAs are not there to offer some general arbitration service for the
24 telecommunications industry at public expense. They are there - and this is what Article 20
25 is getting at - to ensure that the regulatory obligations are met and applied properly. So, it is
26 disputes about the regulatory obligations. That is what Article 20, para. 1 is dealing with.
27 That fits absolutely with the explanation in Recital 32. I am dealing with Article 20, and
28 not Article 5(4) - you appreciate that.
29 His second point - that it is not confined to obligations imposed by Ofcom, but it could be
30 an obligation arising under the directives themselves, we submit, with respect that is (a)
31 wrong; and (b) irrelevant. It is wrong because a directive cannot impose obligations on
32 undertakings. These are directives. They are not regulations. They bind the Member State.
33 Article 4 of the Access Directive, to which he referred, and which you recall is the
34 obligation to negotiate, does not apply directly to operators. It cannot. What it does is to

1 require the Member State to introduce such an obligation on operators. That flows basically
2 from Article 189 of the Treaty. Ofcom has done that by imposing General Condition 1.1.
3 That is how Ofcom has implemented Article 4 of the Access Directive. So, it is, in the end,
4 an obligation imposed always under national law by the regulator.
5 So, it is wrong, But, secondly, it is irrelevant for the reason given by my friend, Mr. Cook.
6 There is no suggestion here of a breach of General Condition 1.1, which is an obligation to
7 negotiate. That is not the basis on which any of these disputes were brought before Ofcom.
8 As Mr. Cook said, the parties have negotiated. They are, indeed, in contract. But, they fail
9 to agree. That is what the disputes are about.
10 So, we say that Article 20 is a dispute regarding a regulatory obligation. Indeed, I just
11 noticed - and we looked at this before - that it is even clearer in the French text. Article 20,
12 para. 1,
13
14 "Lorsque'un litige survient, en ce qui concerne des obligations découlant de la
15 présente directive ou des directives particulières ----"
16 "Concerning the obligations under this directive, or the special directives".
17 So, an Article 20 dispute - which is a dispute regarding a regulatory obligation - is
18 accordingly the focus of the regulator's role in determining that dispute. Then one goes to
19 Article 5, para. 4 of the Access Directive, which is at Tab 4. Again, it has been read out to
20 you many times. I will not read it again. That paragraph addresses a dispute concerning
21 access and interconnection. So, Article 5, para. 4 can apply even in the absence of a
22 regulatory obligation to interconnect. But, the focus of the regulator's role in resolving that
23 dispute is to ensure that there is access and interconnection. One sees that from the title of
24 Article 5 - the powers and responsibilities of the NRAs with regard to access and
25 interconnection, and one sees it from Article 5, para. 1. Mr. Turner emphasised this
26 morning that Article 5 has to be read as a whole. We entirely agree. Article 5, para. 1, while
27 again referring to the Article 8 objections (and they are referred to all over the place) then
28 goes and says specifically,
29 "To ensure, in accordance with the provisions of this directive adequate access and
30 interconnection and inter-operability of services, exercising their responsibility in a
31 way that promotes efficiency, sustainable competition and gives the maximum
32 benefit to end users".
33 I stress that reference to end users as being the particular focus when one is dealing with
34 access and interconnection.

Of course, there is an overlap between the dispute resolution under Article 20 of the Framework Directive and under Article 5, para. 4 of the Access Directive, as we explained in the Orange preliminary issues hearing, as you will recall. When a dispute concerns a regulatory obligation that does address access and interconnection, then both these provisions will apply.

Why is all that important? We say it is important because if one looks at Article 5, para. 4 and the purpose of regulatory intervention in that case, it is to further access an interconnection in a manner that promotes the three specific objectives spelt out in Article 5, para. 1, and, of course, to secure the wider policy objectives in Article A.

Again, it is not turning the NRA into a general commercial arbitrator of interconnection disputes, charged with determining a reasonable price, save by implication when that is necessary to secure the Article 8 objectives. Indeed, that is the reason because one is not acting as a commercial arbitrator when I gave the answer to Professor Bain's question earlier that I did - that the regulator could, in a dispute resolution, determine a price outside the range proposed by the two parties. Well, of course, a commercial arbitrator could never do that. He would have to decide purely on the contending arguments of the two sides before him.

Much of the submission and argument by the various appellants - to the detail of which I am going to have to come and will - is based on a fundamental misapprehension as to Ofcom's role in dispute resolution under the CRF, and is seeking to turn Ofcom into a neutral arbitrator charged with determining what is a fair and reasonable price as between the two parties. If that were Ofcom's role one can see that many of the criticisms that are advanced against us would have force, and Ofcom would have to go about the dispute resolution in a rather different way.

The other point regarding dispute resolution under the CRF is, of course, one that I know you have well in mind, but I need to stress it - that is, that it has to be done in a short time. That is Article 20, para. 1 of the Framework Directive that is incorporated by reference also to disputes under Article 5, para. 4 of the Access Directive. You will recall that Article 20, para. 1 of the Framework Directive says,

> "To resolve the dispute in the shortest possible timeframe and, in any case, within four months except in exceptional circumstances".

The domestic statute - the Communications Acts enacts that in s.188(6). It uses the words,

> "As soon as practicable within the four month period".

1 So, this is not the same, you will note, as the position of the Competition Commission under
2 a price control reference. The Competition Commission there under the rule simply says
3 that they have to do it within four months. Ofcom has to do it within the shortest possible
4 time, and in any event within four months, save in exceptional circumstances. We say that
5 this time stricture is material, and must be material, when you consider what is the proper
6 approach to this regulatory dispute resolution.
7 Mr. Cook said on Friday that, in fact, Ofcom usually relies on exceptional circumstances to
8 extend the four month period. Well, I am tempted to say that that is a rather cheap remark -
9 except that I suspect that no observation from any advocate in this case could be described
10 as coming cheap. It is not correct. Can I just hand up a schedule of what has happened in
11 the disputes in the last two years. This is obviously not a confidential document. All this is
12 on the Ofcom website. You will see there that of all these disputes in the past two years
13 there have only been three where exceptional circumstances have been claimed. The first
14 one, and that is because it became regulatory obligation, the Universal Services Condition 7,
15 that was one of the issue in the dispute, was *ultra vires*, so that obviously caused
16 considerable problems.
17 Then on the second page one of the two determinations before you in this appeal, the BT
18 determination, and the only reason for exceptional circumstances there is that certain
19 information supplied by BT turned out to be inaccurate. To be fair to them, BT pointed this
20 out to Ofcom. One had to get new information and that led to delay. It is referred to in the
21 determinations. You may have seen it when reading them. It is paras.3.35 to 3.37, which
22 set out what happened.
23 The other determination before you was resolved with no exceptional circumstances.
24 Then there is one other, which is 31st August 2007, which is the 0870 number
25 determination. That has been delayed because of this appeal and because BT in that dispute
26 is raising some of the same arguments as are raised in this appeal. Otherwise they have all
27 been done within the four months.
28 So, madam, I come to the present determinations under appeal. It is trite to say that every
29 dispute is different and involves its own particular circumstances. These disputes were
30 referred to Ofcom, we say, under very particular and rather unusual circumstances in two
31 important and fundamental respects. First, they were purely retrospective; secondly, they
32 concerned matters that were the subject of recent consideration under the market review
33 provisions of the CRF and were subject to a contemporaneous reconsideration under that
34 market review process. I want to address, if I may, please, both of those features.

1 First, that they were retrospective, and this picks up the point from Mr. Scott's question to
2 me a moment ago, and the point that dispute resolution can be *ex ante* or *ex post*, and often
3 a dispute resolution will set a charge going forward. Here, since the MCT statement has
4 fixed blended charges for all MNOs as from 1st April, the disputes determined in July and
5 August 2007 were purely retrospective and limited to the period up to 1st April 2007, a point
6 to which Ofcom attached considerable significance. I will call them, if I may, the BT
7 determination and the MNO determination for shorthand. The BT determination is
8 para.2.27, the MNO determination para.3.23. We need not turn it up.
9 It followed that it was not going to affect prices charged to consumers. It concerned calls
10 that had already been made. There is no suggestion anywhere in the evidence that BT or
11 H3G in the MNO dispute would be increasing or reducing prices to consumers in
12 consequence of the outcome. There was suggestion in argument that it has an ongoing
13 effect. Mr. Read made that point (transcript day 6, p.47, lines 16 to 18) where he referred to
14 Mr. Richardson's witness statement, paras.30 to 43. We have re-read that statement and
15 those paragraphs. I will not ask you to turn up, but it is bundle D2. There is no reference in
16 those paragraphs to any adverse impact of this disputed increases in MCT charges on
17 consumers. What Mr. Richardson said is that BT's customers derived no benefits from call
18 termination on a 3G network compared to a 2G now. That is a very different point, of
19 course.
20 MR. SCOTT: Mr. Roth, if you are arguing that this is a purely retrospective determination and
21 dispute, then there can be no question of the obligation not being met to interconnect in a
22 physical sense. It is merely a retrospective dispute in relation to price.
23 MR. ROTH: Yes.
24 MR. SCOTT: What you seem to be deducing from that is that in that context Ofcom can have
25 regard to a rather narrower set of policy objectives. It is not entirely clear to me in relation
26 to the obligation that you are seeking to pursue that since that obligation is no longer
27 relevant because it has already been met by physical interconnection, what you are
28 suggesting is left of the regulator's task as distinct from a pure arbitration as to what might
29 have been a reasonable amount to pay.
30 MR. ROTH: What is left is two things: first of all, the Article 8 objectives are not confined to the
31 interests on consumers, there are other points in the objectives that also have to be borne in
32 mind; secondly, when I come to the BT determination that concerned a regulatory
33 obligation on BT which included a requirement of reasonableness. So that is
34 reasonableness from the perspective of BT, and that had to be considered in the dispute.

1 Irrespective of effect on consumers, reasonableness was very much at the heart of the
2 dispute.
3 MR. SCOTT: That I understand. Sticking with the MNOs for a moment, what are you
4 suggesting that Ofcom had left in relation to the MNOs?
5 MR. ROTH: May I answer your question this way, and I am not in any way seeking to duck it.
6 What I was proposing to do was just explain these two fundamental points of distinction
7 and then actually come to look at the determination and specifically the MNO determination
8 because you have heard very little about that so far.
9 MR. SCOTT: Absolutely.
10 MR. ROTH: Maybe, rather than trying to give a summary answer, I could do it when I take you
11 through that. Is that all right?
12 MR. SCOTT: That is quite all right, and of course presumably the same reflections apply to pre-
13 13 September 2006?
14 MR. ROTH: They do, although I have to say that it comes out much clearer, as you would
15 expect, in the MNO determination than in this little period in the BT determination that
16 really was not very significant. Mr. Cook took that one perhaps because his clients are not
17 interested in the MNO determination. I think it is much clearer when one looks at the MNO
18 determination, but you are absolutely right, it is the same point.
19 I was saying that Mr. Richardson does not point to any adverse effect on consumers from
20 the price. It was also said that some MNOs – I think, if my memory is right, Vodafone may
21 have been referred to, but it does not really matter – continued with the higher charge well
22 beyond 1st April 2007. No doubt that is correct, but of course the TAC, the target average
23 charge, for the year fixed by the MCT statement is an average charge that applies for the
24 whole year, and so if some MNOs may have had a higher charge at the first part they must
25 have a correspondingly lower charge in the second part of the year because they have got to
26 meet the average. Ofcom is looking at the effect on the totality of the consumers, and so as
27 the TAC kicks in on 1st April 2007 we do say that does not lead to a forward looking effect.
28 Both the MNOs and the fixed net operators, the alternatives, all of them, BT and the others,
29 make the point – indeed I think they rely on it – that they cannot pass on increased charges
30 to their customers retrospectively. Mr. Miller says that (para.14, D3, tab 2, p.46), Mr.
31 Granberg for the Altnets (if I can call them this terrible circumlocution, the 1092 appellants)
32 says it (para.3.7, D3, tab 5, p.102). As I say, it is a point they all rely on when they say
33 "unfair". Nor, of course, is there any realistic prospect that the payment of these charges
34 retrospectively could be recouped through an increase in retail charges for the future. These

1 are now sunk costs. As a matter of evidence, none of the parties have suggested that it is
2 raising its prices, or will raise its prices, to consumers to recover what it has had to pay
3 retrospectively. As a matter of principle, the position is that none of the operators are price
4 regulated at the retail level. Now, as you know, BT is no longer price regulated at the retail
5 levels, so they must be presumed to be charging their profit maximising prices already.
6 Some costs of course do not affect your profit maximising price going forward.
7 We say in the unusual circumstances here, purely retrospective, no adverse effect on
8 consumers; secondly, the second unusual feature is the concurrency with the market review
9 process. The position there is this: the 2004 MCT statement found SMP on all MNOs, but
10 decided to introduce price control only for 2G and not for 3G, as you know. That was a two
11 year review expiring in March 2006. In taking that decision, as you saw, Ofcom had to
12 promote the Article 8 objectives. Then in December 2005 Ofcom decided to extend the
13 application of the 2005 statement and price controls by a further 12 months. That was also
14 a formal decision for which Ofcom had to consult, had to notify the Commission and had to
15 act to promote the Article 8 objectives. Indeed, because it had to consult, various people
16 made representations, as usual from the consultation, and some, including BT, responded to
17 that proposal saying that it was wrong, and they said Ofcom should proceed in April 2006
18 to introduce charge controls on 3G as well as 2G and said you should use the 2G, but
19 Ofcom rejected that and decided that control only of 2G services should continue to apply
20 for a further 12 months. At the very same time as Ofcom started its consultation on the 12
21 month extension (June 2005) Ofcom started it consultation on a new statement to apply
22 from 1st April 2007 and the proposal to apply in that new period charge control for 3G
23 services.
24 So it was in the period of this one year extension, and while these consultations were
25 proceeding as to whether charge control for 3G should be introduced from April 2007 or
26 not, and then on what basis, these various disputes were referred. May I hand up a
27 chronology that Mr. Lask has prepared cross-referenced to the bundles just of these various
28 stages that I have mentioned.
29 THE CHAIRMAN: Have the other parties had a chance to look at this?
30 MR. ROTH: No, we are just passing this along. It is simply taken from the documents. It is
31 really to assist your note-taking of the dates. (Same handed) It starts with the 2004
32 statement, and you see from the key that A is the charge control extension process, B is the
33 2007 market review process, C is the dispute determinations process. It just sets out with
34 the reference to the documents in the bundles the dates when the various things that I just

1 described were happening. You will see over the page the referral in December 2006 and
2 then January, February and March 2007 the various disputes, and how they were taking
3 place contemporaneously. This chronology of this market review process is indeed
4 reflected in the determinations themselves. It was regarded as so important, this
5 simultaneous situation , that it is set out in some considerable detail in the two
6 determinations, that is the BT determination, paras. 2.12 to 2.26, and the MNO
7 determination paras.3.6 to 3.22. I think they are almost word for word the same.
8 In June 2005, when Ofcom consulted on both the extension of the 2004 statement for a
9 further 12 months, and about the new market review in that document it expressly
10 acknowledged that the MNOs could introduce blended charges of 2G and 3G rates. One
11 need not go back to the June 2005 document, though we have it, but it is quoted in the BT
12 determination at para.2.19 and the MNO determination para.3.15.
13 The position was that as from that time ----
14 THE CHAIRMAN: Was that in both the consultation documents, both the extension consultation
15 and the future regulation consultation?
16 MR. ROTH: I think it is in the future regulation consultation document. They were both issued
17 on the same date, but I am fairly sure it is in bundle B, if one goes to the quotation – it is the
18 quickest – it is in the consultation on the new one, it is referred to there as the preliminary
19 consultation. The industry knew and the operators knew that Ofcom was acknowledging
20 that MNOs could introduce blended rate.
21 THE CHAIRMAN: But was that not one of the things that you were consulting on in that
22 consultation? It did seem to me rather strange that in the final determination you rely in
23 response to BT's submissions that there should not be these blended rates you rely on
24 previous public statements from Ofcom to the effect that the MNOs should be able to
25 charge blended rates, but one of those public statements was an early consultation document
26 for this final determination. You seem to be suggesting that by the time you get to the final
27 determination you are somehow bound by things that you had said in the earlier
28 consultation which is part of that same process.
29 MR. ROTH: I am sorry, I did not make myself clear, and it is my fault. Ofcom was consulting in
30 the consultation on the market review process, of course to continue the finding of SMP, but
31 also whether or not to introduce charge control on the 3G. It was not consulting on whether
32 operators could introduce blended rates; it was recognising that they could, and indeed they
33 were, as we know, shortly afterwards Vodafone did introduce a blended rate after its
34 unregulated 3G charge with the regulated 2G charge. The consultation was not about

1 whether that is permissible. The consultation was about whether the 3G element should be
2 subject to price control. It was not a consultation about the principle of blending. In the
3 consultation it just stated that, as a result of what we decide in 2004 it follows that operators
4 can introduce blended charges. Mr. Lask helpfully draws my attention to the actual
5 paragraph in the June 2005 consultation (para.1.11) which must be bundle F1, p.306, and
6 that makes that clear. That is the position, it was not a consultation about the principle
7 blending.

8 MR. SCOTT: With respect to Mr. Lask, what we do not have in here is the OCCN's which
9 enable us to see what was going on *inter partes*, at this stage.

10 MR. ROTH: We may have some OCCNs in the bundle. The OCCNs come a year later when we
11 have the disputes. It involved, I believe, some technological adjustment to their measuring
12 or billing system for an operator to actually technically be able to do it, measure the traffic
13 or whatever. Vodafone was the first to do that, and then the others started doing it, and that
14 led to some of the OCCNs, that is my understanding of the position. What Ofcom said was
15 you are entitled to do it. At that point I think no one was doing it – or perhaps Vodafone
16 was already doing it, I think they had started earlier, but they were ahead of the game; so
17 that is the position.

18 There was no question but that operators in Ofcom's view publicly stated were entitled to
19 do that, and they said that in clear terms in the June 2005 consultation document.

20 THE CHAIRMAN: Because you had taken the view that it did not amount to charging in excess
21 of the 2G regulated rate?

22 MR. ROTH: Exactly.

23 MR. SCOTT: But BT noticed and they did object in the context of the consultation.

24 MR. ROTH: They then objected to what Vodafone did and we rejected their protest, that is right.

25 THE CHAIRMAN: Maybe you are coming to this as you go through the determinations, but I
26 think we are interested in the extent to which Ofcom did not look again at that issue because
27 of the earlier statements in that respect.

28 MR. ROTH: Yes, I am coming to that. I am coming to the major part of my submission on the
29 blended rate point, because that has been a big point against us. So the position was that as
30 from December 2005 the industry knew that Ofcom had decided not to impose charge
31 control on 3G services before 1st April 07, that is the extension statement, December 05, and
32 had confirmed that MNOs might set blended rates; that is the June 2005 consultation
33 document.

1 It was submitted on Friday that the 2004 statement and, by implication, the 2005 extension,
2 did not create any expectation that 3G prices would not be controlled because of what is
3 said in the 2004 statement, and this morning Mr. Turner attacked a statement in our defence
4 (para.63.2) as factually incorrect.
5 With respect, I think one needs to see what was said in the 2004 statement on this point, and
6 it is at bundle F1, p. 85 – it is the first document in the chronology, of course. If you go to
7 p.125 you see the heading: "Conclusion on the ex ante regulation of 3G voice call
8 termination"
9 "5.45 As explained" – it is the first document in the chronology, of course. If you go to
10 p.125 you see the heading: "Conclusion on the ex ante regulation of 3G voice call
11 termination"
12 "5.45 As explained [above] Ofcom does not believe that specific *ex ante*
13 regulation 3G voice call termination is appropriate.
14 5.46 For the reasons discussed in paragraph 5.44 above, Ofcom is of the view that
15 the proposals set out in the December consultation concerning '3' (the only MNO
16 currently offering 3G voice call termination) preclude the need for additional 3G-
17 specific *ex ante* regulation of its services. The inclusion of additional SMP
18 obligations would therefore be disproportionate. The issue of transparency is
19 discussed in more detail below."
20 Then 5.47, the important paragraph:
21 "For the period covered by the market review, Ofcom thus considers its approach
22 to the *ex ante* regulation of 3G voice call termination to be proportionate.
23 However, whilst there are currently insufficient grounds to impose additional *ex*
24 *ante* regulation, it is possible that during the period of the next formal review of
25 mobile voice call termination markets, 3G voice call termination may establish
26 itself to such an extent that Ofcom may need to reconsider its position."
27 – as we know it did.
28 "Subject to satisfying the relevant tests, such as s.47(2) of the Act Ofcom retains
29 the power to impose an SMP condition(s) to address concerns with 3G voice call
30 termination charges at a point after the publication of this statement. In line with
31 paragraph 5.113 of the December consultation, Ofcom's position will be kept
32 under review."
33 So what is being said there is that if circumstances change Ofcom might have to review the
34 imposition of an SMP condition on 3G in accordance with s.47 of the Act. Section 47 of

the Act provides for the modification of SMP conditions, but only on a prospective basis. SMP conditions are always prospective, and they are always after full consultation.

So we do submit, and rely strongly on the fact that these statements – this statement and then the extension – created a clear expectation in the industry that there would be no regulation of 3G prices until the next market review unless by way of modification of the SMP conditions, and then again after further consultation and on a prospective basis by SMP under s.47.

In 2006/2007, when the present disputes were referred, of course the process of consultation for the next market review period was well under way. We say that these are very relevant circumstances for Ofcom, both the retrospectivity point and the concurrency of the market review process, and the expectations created when Ofcom was deciding how to approach these particular dispute referrals. It is not that Ofcom has no power to require a supplier to charge a lower price on dispute resolution; they clearly do – the 2005 judgment established that very clearly. Sometimes it will be appropriate to do so, and sometimes it may be appropriate to do what Professor Bain hypothesised and do something lower. But in the present cases, in the circumstances in which they arose, when the price would be purely retrospective we say consistency and regulatory certainty were very potetnt factors, and for Ofcom to have regard to those factors as significant is entirely in accordance with the Article 8 objectives and the Communications Act 2003, and that this is noto a case – as has been suggested – of Ofcom trying to rely on considerations of certainty and consistency to circumvent the Article 8 objectives, not a bit of it. We acted entirely in accordance with those objectives and on that I make four points.

First, Article 8 does not mean that every regulatory power of Ofcom under the CRF has to be used to the maximum extent possible to achieve those objectives in the same way. There are a range of tools for effective regulation provided by the CRF and the regulator can assess which tool is most appropriately deployed and in what way to achieve the Article 8 policy objectives.

We rely upon, and respectfully adopt the submissions that Miss McKnight (for Vodafone) made so clearly in the H3G appeal last week, and the note which she handed up dealing with this point.

Secondly, Article 8(1) is important. BT's skeleton argument submits that the principles of proportionality cannot take precedence over the substantive requirements from Article 8 - that is, para. 81 of their skeleton. But, with respect, Article 8(1) says, in terms that the requirements on the NRA is to take reasonable measures which shall be proportionate to the

1 objectives in the subsequent paragraphs. Proportionality is in Article 8. It is not something
2 coming in from outside.
3 Thirdly, the objective of promoting competition in Article 8 - the policy objective - is not
4 simply about ensuring lower prices for users. It is also to promote competition by
5 encouraging investment and innovation (as you saw), and to give users the benefits of
6 choice and quality which are really things that result from innovation and investment.
7 Regulatory certainty is a very important element in that encouragement of investment. Put
8 the other way, regulatory uncertainty and the realisation that although Ofcom had recently
9 announced, by the extension statement, that there be no charge controls on 3G until 31st
10 March, 2007 nonetheless the regulator might be using its dispute resolution power to
11 impose, in effect, retrospective price control on 3G services for the period before 31st
12 March, 2007. That is exactly the sort of conduct that discourages investment. The fact that
13 Ofcom, in the determinations, used the phrase 'regulatory certainty' did not always -
14 although it did sometimes, as we will see in moment - refer to encouragement of
15 investment. That is a criticism of form - not of substance.
16 Fourthly, one refers to a s.3(1) and (3) of the Communications Act 2003 which I read to you
17 a short while ago. We do not see that as in any way conflicting with Article 8 or the spirit of
18 the Common Regulatory Framework. It is pretty remarkable if, in those very general
19 provisions, the United Kingdom draftsman had flown in the face of the CRF. We say they
20 encapsulate the same idea, and they say there, as you will recall -- They refer to principles
21 of proportionality and consistency, and they refer to principles appearing to Ofcom to
22 represent the best regulatory practice.
23 We note the argument that is advanced by BT in its notice of appeal at para. 46. My note
24 says that we note the argument - I cannot remember -- (After a pause): It is D1, Tab 3,
25 p.84, para. 46 of BT's notice of appeal.
26 "Given the considerable change in prevailing market conditions, the fact that
27 between 2004 and 2007 Ofcom consistently found that the MNOs had SMP IN call
28 termination [I think that means under the 2004 statement and the extension] and the
29 fact that Ofcom already had relevant 3G cost data to hand relating to the period
30 between September 2006 and March 2007, there seems no obvious justification why
31 it [Ofcom] should not have considered it appropriate to review its previous policy
32 decision in this particular case and to exercise its wider regulatory powers".
33 Well, quite apart from the fact that we do not accept that the dispute resolution powers are
34 wider than the SMP powers, we say it is not the right means to review a policy decision -

1 and, quite right, it was a policy decision taken in 2004 and then extended in December 2005
2 - through the mechanism of a dispute resolution. It would be wholly inappropriate to do that
3 in that way, and not, as they say, appropriate. It is a much shorter process. It is a much less
4 extensive analysis. It does not involve wide consultation. That would not be the way to
5 review a policy decision.
6 MR. SCOTT: Mr. Roth, what you are saying to us, I understand, looking in retrospect at the 2004
7 decision. However, when I look at the 2004 decision, and particularly at para. 5.65, and at
8 the transparency obligation provided for in para. 5.86(f), two things come to mind. So,
9 para. 5.65 at p.128 in Bundle F1. That has regard to the fact that three are using both 3G
10 and 2G and that 2G charges were going to come down. Now, there was the question of
11 migration. Ofcom were going to have the advantage because of the transparency obligation
12 of knowing what was going on as between the use of 3G and 2G. That is referred to in para.
13 5.86(f).
14 MR. ROTH: Yes.
15 MR. SCOTT: Now, somebody looking at that in prospect - as distinct from retrospect - might
16 have thought that it was there as part of Ofcom keeping the matter under review and asking
17 itself the question: Is there a corresponding reduction in rates going on? The unbiased
18 observer, looking in prospect, might have expected - you are dealing with expectations -
19 that something might have been done about it if that were the case because effectively what
20 was going on was a blended rate. You are looking at what is going on within the blend.
21 What you are saying to us is that that unbiased observer would be wrong, and that the
22 expectation that they should have got from this was that notwithstanding the transparency
23 obligation -- notwithstanding the mention of review, the passage to which you referred us
24 earlier on pp.125 and 126, would have meant that one did not expect a change in the
25 regulatory regime.
26 MR. ROTH: I am not quite saying that. Sorry. I am saying that I think you are absolutely right,
27 sir. We are saying, “We are keeping it under review. We are getting this information to see
28 what is going on”. The transparency obligation related to 2G only, but it would enable
29 Ofcom to see the distinctions. But, what one would see is that Ofcom is saying “We will
30 keep it under review. We may have to change things, but we will change it through the SMP
31 process under s.47 of the Act, which allows us to modify an SMP condition ----“
32 MR. SCOTT: Not through some other process.
33 MR. ROTH: That is a prospective process that has to precede consultation. That is what they
34 would say. So, yes, we might need to change it. Although it is only a two-year review, even

1 within the two years it may be that things will change so much that we will do something.
2 But, we do it this way within the scope of the SMP process, and we will not be doing it --
3 There is no expectation greater than that it could happen through dispute resolution on a
4 retrospective basis of calls already made.
5 THE CHAIRMAN: So, if, during the press conference at which this statement in 2004 was being
6 produced, or in the Question and Answer at the bottom of the press release there had been a
7 question, "What happens if a dispute is referred to Ofcom about 3G termination rates
8 between now and the end of 2006?", what then, looking forward, would have been Ofcom's
9 answer as the regulator?
10 MR. ROTH: I think one has to distinguish between a dispute between BT - because they have the
11 particular provision of the end-to-end obligation, which gives a quite different focus to a
12 dispute with BT, which I am coming to of course -- a dispute as between MNOs -- I do not
13 know what did happen at this press conference, or whether it took place, but -- I gather there
14 was no press conference ----
15 THE CHAIRMAN: I think you get the point.
16 MR. ROTH: I get the point, yes. I do.
17 THE CHAIRMAN: What would have been the expectation of people when this statement was
18 published as to how Ofcom would deal with the dispute? Put it another way: if the day after
19 the statement had been published the 2G/3G MNOs had thought, "Oh, jolly good! Ofcom
20 has decided not to regulate our 3G rates for the next few years. So, why don't we put them
21 up substantially?" ----
22 MR. ROTH: I fully take the question, madam, but if that had come up, the answer would have
23 been, "It is not going to be regulated through a dispute retrospectively, but if, through this
24 dispute, we learn now circumstances that are suggesting that what we expect would happen
25 is not happening and rates are shooting up, then we will exercise our powers under the
26 dispute reference section - s.190(4) - namely, that as a result of consideration of the dispute
27 matters have come to light that make Ofcom think that we should in fact exercise our SMP
28 powers to do something about this, contrary to the way we thought we would, and then
29 Ofcom would suspend the dispute resolution for exceptional circumstances and exercise its
30 powers under s.190(4) and start an urgent modification process. They protected themselves
31 with the right to do that by actually drawing the attention of the industry (in the passage that
32 I mentioned, and the passage which Mr. Scott mentioned) saying, "Yes, watch out. If our
33 expectations are not fulfilled we can come back to it". That is the way we do it.

1 MR. SCOTT: In the H3G order - I think at the end of the judgment we had particular regard to
2 the fact that we believed that by the time the review was completed circumstances would
3 significantly have changed, and that needed to be taken into account in the re-assessment.
4 MR. ROTH: Yes, indeed.
5 So, I come to the determinations themselves, and what Ofcom did. As I mentioned just a
6 short while ago, in answer, madam, to you, to see what happens without an end-to-end
7 obligation I think more useful than looking at the treatment of the twelve days in the BT
8 determination we have got other material to look at - and that is the MNO determination.
9 The twelve days were treated very shortly, probably because they were only twelve days.
10 Indeed, Ofcom says, "Well, even if an end-to-end had applied in those twelve days, it would
11 have passed the test" - that is, the BT termination at para. 4.101. So, I think the other
12 determination is much more instructive. Remarkably, I do not think anyone has taken you
13 to it in the course of all the submissions from my learned friends. It is in Bundle B, Tab 5.
14 These were disputes, as you know, between H3G, on the one hand, and Orange and O2 on
15 the other. Bundle B, Tab 5. In summary H3G advanced two alternative proposals to
16 Ofcom, one that the blended charge should be the same as the regulated 2G charges; or
17 alternatively, that Ofcom should set cost based charges. You will see, if you go to
18 para.5.22, p.22 within the document, the heading "Should Orange and O2's blended charges
19 be no higher than the regulated charges for 2G termination?" because that was one of their
20 points, and 5.22:
21 "As the End-to-end connectivity obligation applies to BT only, it is not relevant to
22 the disputes that H3G has referred against Orange and O2. Therefore, unlike the
23 situation in the BT disputes, there is no obligation that the disputed termination
24 charges must be purchased by H3G on reasonable terms and conditions as
25 envisaged in the End-to-end connectivity obligation. H3G has recognised that the
26 End-to-end connectivity obligation is not relevant to its disputes with O2 and
27 Orange.
28 Therefore in the draft determinations Ofcom stated that, in the circumstances of
29 these disputes, the only regulation in place during the period in question was the
30 charge control on 2G termination."
31 Then, just following that up, in 6.39 to 6.41 on p.32 (within the document) under the
32 heading "Gains from trade approach"
33 "6.39 H3G also states that Ofcom does not apply a 'gains from trade test' in
34 resolving the disputes between H3G and each of O2 and Orange. Although H3G

1 confirms that it does not consider that such an approach is appropriate in the context of its disputes with each of O2 and Orange it further states that Ofcom is creating additional uncertainty by using two different approaches to resolving similar disputes, which H3G states is 'apparently solely on the basis of the e2e obligation placed on BT.

6 ***Ofcom's response***

7 6.41 When resolving disputes, Ofcom will take into account all regulation in place relevant to the resolution of that dispute. As set out above, no charge regulation was applicable to the level of blended charges during the period covered by the disputes. In the case of the BT disputes, the e2e obligation is a distinct piece of regulation which applies to BT and should be taken into account. Ofcom has resolved both the present disputes and the disputes involving BT in the context of the relevant regulation applicable to the two sets of disputes."

14 So that is explaining why gains from trade is not relevant to this dispute and is not applied.

15 Regarding cost based charges ----

16 THE CHAIRMAN: Just pause there for a moment. In 6.41 you are saying no charge regulation was applicable. Is that just another way of saying, "We had taken a policy decision not to regulate 3G charges", which is how it has been put elsewhere?

19 MR. ROTH: I think that is simply a statement of fact that no 3G charge regulation was in place at the time.

21 THE CHAIRMAN: What I am asking is whether Ofcom considered it important that it had, in fact, taken a decision not to impose charge control regulation, rather than the fact that there might have been some other reason – for example, it had not got round to doing its Market 16 review?

25 MR. ROTH: The answer is, yes, it did. I think that comes in the other paragraphs earlier. I think this is just explaining why we do not apply gains from trade, that is linked to the E2E and therefore it is not relevant here. I think perhaps the answer to your question is brought in 5.28 to 5.32, where Ofcom deal with H3G's request that Ofcom should set cost based charges in resolving these disputes, and that is where the policy and the consistency are coming in.

31 Paragraph 5.28 records H3G's request and Ofcom's position set out in the draft determinations:

33 "Ofcom set out its view that it did not consider it appropriate to use the dispute resolution process as a substitute for (or in a manner that is inconsistent with)

decisions already taken under the appropriate regulatory processes for addressing the question of significant market power as set out in Articles 15 and 16 of the Framework Directive.

Ofcom considered that it would not be appropriate therefore to effectively retrospectively impose regulation on providers in a situation in which it has explicitly chosen not to impose SMP-type regulation. This is in order to ensure regulatory certainty and consistency.

Conclusion

Therefore Ofcom's provisional view, as outlined in the draft determinations, was that Ofcom does not intend to determine cost based charges for the termination service offered by Orange and O2 during the period in question. Ofcom considered that it was appropriate for Orange and O2 to charge blended termination rates and recognised that those rates may be higher than the regulated 2G rates. Ofcom therefore reached a provisional conclusion that H3G should be required to pay for mobile call termination on networks of 02 and Orange at the rates set out in the respective Notices of Variation."

Then there is a whole section with a heading "Consistency with the Community Requirements and Ofcom's duties". The "Community Requirements" is the term of art used, you will recall, in s.4, which the Article 8 obligations. The fact that it does not say Article 8 of the Framework Directive but says "Community requirements" is, with respect, a distinction of no significance at all.

"5.31 The decision taken during the 2004 CTM Review was itself consistent with the Community Requirements and Ofcom's duties. Ofcom concluded during the 2004 Market Review that, given the position of SMP held by all providers of mobile voice call termination services – i.e. their ability to behave to an appreciable extent … – it was appropriate to impose certain SMP conditions in relation to 2G mobile call terminations service, because, among other things, in the absence of regulation the SMP of MNOs would lead to excessive termination charges. Ofcom also concluded at that time that there should be no ex-ante regulation of 3G mobile call termination services, because, among other things, at that stage the adverse effects to consumers associated with charges for 3G voice call termination were likely be small. As a result, Ofcom considered that it would be disproportionate to impose ex ante obligations on 3G voice call termination at

1 that time. In order to ensure certainty, it is not appropriate for Ofcom to adopt an
2 approach which would be inconsistent with its previous policy decision."
3 I think that is the point, madam, that you were asking me about.
4 Then it goes on this business of retrospective effect and it refers to s.3(3)(a) of the Act, that
5 Ofcom has a duty to
6 "…have regard to the principles under which regulatory activities should be
7 consistent in carrying out its duties."
8 It is saying that was the policy position that has been adopted. There is an importance when
9 considering the Community requirements and the 2003 Act of ensuring certainty. It is not
10 appropriate, therefore, in this situation now to do something with retrospective effect.
11 Therefore, the H3G submission that Ofcom should set cost based charges in resolving the
12 disputes was rejected.
13 There are only two arguments put by H3G. One was the same level as 2G, the other was
14 cost based. Both of those were answered. There was nothing else to answer.
15 MR. SCOTT: The logic then says that were we to find ourselves where SMP was upheld in
16 relation to the four older MNOs but struck down in relation to H3G, we would be sailing
17 through the next period to March 2011 in a situation where, on a regulatory certainty basis,
18 H3G would be free to charge what they liked within the limits of competition law. Did I
19 make the right deduction?
20 MR. ROTH: I think so, as regards other MNOs.
21 MR. SCOTT: Leave H3G out of it for a moment.
22 MR. ROTH: If they do not have SMP that means the market in which they supply mobile call
23 termination is effectively competitive. It also means they are not dominant. So I do not see
24 how competition law would bite, because SMP equals dominance, so Article 82 would not
25 be engaged. It would mean they could set what charge they liked. If one had concluded
26 that the market is effectively competitive is not of concern because it follows from it being
27 effectively competitive that somebody wanting that service could go to a competitor of H3G
28 and get it, and get their interconnection. The fact that they could go to a competitor of H3G
29 would itself act as constraint on H3G in its pricing. So it would be the fact that you have an
30 effectively competitive market that would provide the constraint. If you have an effectively
31 competitive market there is no need for SMP obligations.
32 MR. SCOTT: I understand that.
33 MR. ROTH: So that would follow from the striking down of SMP, because inherent in that we
34 say is the notion that the market is effectively competitive, unless of course H3G is right in

1 its submissions that this regime has to be used to impose cost based charges, which is what
2 they are saying. If they are right on that then I go back to my submissions of last week. We
3 say it is to be disregarded because of the circularity.
4 MR. SCOTT: I understand that.
5 THE CHAIRMAN: If the SMP finding was struck down and H3G then served an OCCN to say
6 that they wanted to increase their prices – I know we have heard they would not do such a
7 thing, but suppose they did – and the purchaser referred a dispute under s.185, is Ofcom's
8 answer then, "It has been decided that this market is effectively competitive and therefore
9 whatever they want to charge is fine with us"?
10 MR. ROTH: What we would have to do in looking at it is also consider the other Article 8
11 objectives. It is difficult to see, if one starts from the premise that it is an effectively
12 competitive market, that it could have an adverse effect on consumers because it means
13 there are alternative sources of supply which those wishing to purchase from H3G could be
14 satisfied and provide the service that they want to provide to consumers. It is all a bit
15 artificial if one is talking about a market that has termination on H3G's network, but one is
16 assuming ----
17 THE CHAIRMAN: It is not artificial in that everybody accepts that the dispute resolution
18 procedure is not limited to undertakings which have SMP.
19 MR. ROTH: If one is hypothesising a truly competitive market, that would be a very powerful
20 consideration and Ofcom would still have to think, "Is there anything else, in particular
21 having regard to the specific objectives of interconnection in Article 5.1, promotion of
22 competition, interests of end users, sustainable competition efficiency?" whether there is
23 any reason on those bases to interfere with the price. So they would have to consider that.
24 If there were not then this is an effectively competitive market and it is not appropriate for a
25 regulator then to start interfering with an effectively competitive market setting the price.
26 The whole approach of the framework – I think Miss McKnight in her note made the point
27 is deregulatory framework, it is reducing regulation and saying that where a market is
28 effectively competitive the market should deal with these matters. So that would be the
29 proper approach.
30 I wanted to go on in this document, in fact, because some further points were made
31 regarding Ofcom's duties, and we see the reference to discouraging investment. It is in s.6,
32 p.26 of the document, where H3G's response is recorded to the draft determinations where
33 H3G say that Ofcom has erred in its approach to dispute resolution. In 6.1:

1 “6.1 H3G has stated in response to the draft determinations that Ofcom’s approach
2 in resolving these disputes is inconsistent with its legal obligations and has illogical
3 consequences that are detrimental to consumers, and they have referred to
4 s.188(5).”
5 Then you see Ofcom’s response:
6 “6.3 Ofcom has not ‘circumvented’ its requirement to resolve disputes in this
7 case. It has chosen, for the reasons set out in this determination to uphold the
8 charge as proposed by O2 and Orange to H3G and this amounts to resolution of
9 the dispute.
10 6.4 Ofcom has taken this approach in the circumstances of this dispute which
11 concerns a service which, prior to 31st March 2007, Ofcom has explicitly chosen
12 not to regulate. Therefore this outcome is consistent with previous regulatory
13 decisions. Ofcom does not consider it appropriate to use the dispute resolution
14 process as a substitute for (or in a manner that is inconsistent with) decisions
15 already taken under the appropriate regulatory processes for addressing the
16 question of significant market power as set out in Articles 15 and 16 of the
17 Framework Directive.
18 6.5 Ofcom has not stated that *any* rate requested by an operator would be
19 reasonable. Ofcom has determined in the context of these disputes that the
20 specific charges proposed by Orange and O2 should be upheld. Any further
21 disputes on similar issues will be resolved applying Ofcom’s regulatory principles
22 and policies then operative to the facts of each individual case.
23 6.6 H3G asserts that Ofcom has failed to take into account the interests of
24 consumers in its approach. As set out in paragraph s 3.8 – 3.11 above, one of
25 Ofcom’s reasons for not regulating 3G termination at the time of the 2004 CTM
26 Review was that regulating such a new service could deter investment and
27 development of new services, ultimately disadvantaging consumers. Ofcom has
28 now sought to address concerns relating to the protection of consumers through its
29 2007 CTM Review and as of 1 April 2007 2G and 3G termination are now
30 regulated. The result of this is that O2 and Orange (as well as the other MNOs)
31 can no longer set unregulated blended charges. Ofcom considers that this
32 outcome is consistent with the protection of consumers, and ensures that the
33 appropriate protection of retail customers arising from the exercise of market
34 power is addressed under the market reviews and SMP conditions.”

1 So Ofcom is referring there to the investment point, to the protection of consumers' point,
2 and to the consistency point, explaining how it has indeed had regard to its duties. We say,
3 with respect, that that is an entirely correct approach in the circumstances, where the sole
4 basis of that dispute was under Article 5(4), this was not in Article 20, and therefore what
5 Ofcom had to do was to sustain interconnection, having regard in particular to ensure that
6 the three specific requirements in Article 5(1) while of course always seeking to secure the
7 more general policy objectives in Article 8.
8 THE CHAIRMAN: But how is that point then consistent with the stance you took on the Orange
9 preliminary issue, where, as I recall, Orange were arguing that the regulatory function of
10 Ofcom in relation to Article 5(4) is simply to ensure that interconnection takes place, and as
11 I recall Ofcom argued strenuously that it was wider than that, and that it was not limited to
12 simply ensuring that interconnection took place, whereas now you seemed to be saying "As
13 long as the price is one at which interconnection takes place, or has taken place, then it is
14 not for us to interfere.
15 MR. ROTH: Oh, I am sorry, I was not intending to make such a sweeping submission. What I
16 am saying is, and here we do have SMP – this is not a hypothetical market with no SMP –
17 we are saying here that in the particular circumstances of this dispute, the Orange/H3G
18 dispute, where it is purely retrospective, where it comes in a situation where it is in the
19 concurrency of the old market review, where a new market review has just been concluded
20 that introduces price control on 3G, in those particular circumstances we say the objectives
21 – specifically in Article 5(1), and the more general policy objectives in Article 8 – do not
22 require a change to the price. But that is not a qualification that applies to Article 5(4)
23 dispute resolution generally. There will be other circumstances, and certainly if it had been
24 forward looking, and this is a case of SMP, detrimental effect on consumers would be very
25 important.
26 So I move, madam, to the BT determination where the focus is indeed on the end-to-end
27 obligation and that indeed is what distinguishes the BT situation from that of an
28 MNO/MNO interconnection dispute. That was a regulatory obligation, it is imposed under
29 Article 5(1) of the Access Directive, but the result is that the BT disputes are not solely
30 within Article 5, para .4, as concerning interconnection, they are also within Article 20 of
31 the Framework Directive.
32 If I can call it the E2E obligation it introduces an express condition of reasonableness. BT
33 are obliged to interconnect on reasonable terms and conditions including charges. Since the
34 disputes with BT were solely about price, the MNOs wanted to increase the charge or BT

1 wanted to reduce the charge, the focus of the dispute was – we say quite correctly – whether
2 the charge at issue in each case met this requirement of reasonableness i.e. whether it was
3 reasonable for BT to be required to purchase mobile call termination from the particular
4 MNO at that price; that was the focus of the dispute.
5 Ofcom approached that in a manner consistently with the Article 8 policy objectives or the
6 "Community requirements" under the 2003 Act which it indeed referred to in paras. 6.23 to
7 6.28 of the BT determination.
8 Save for the importance difference of the end-to-end obligation they would apply in the
9 same way as in the MNO determination, but the end-to-end obligation of course made a
10 difference. Again the fact that Ofcom, in referring to the Community requirements, or
11 policy objectives does not go through in its document each of the Article 8 policy objectives
12 one by one with express consideration of each in turn, we say that does not vitiate the
13 determination and there is no obligation to do that.
14 The appellants, particularly BT but others as well, the Altnets and indeed others of my
15 friends, strongly attacked the way that Ofcom approached the question of reasonableness,
16 and I need to deal with my response to that under four heads. First, the question of the
17 blended rate, secondly, the gains from trade test, thirdly the additional pass through issue,
18 fourthly benchmarking by comparison to 2G regulated rates.
19 So first the blended rate and Mr. Budd's box of eggs. We say that it is entirely appropriate
20 to focus in the determination on the blended rate for the 2G/3G MNOs for a number of
21 reasons. First, these were disputes about the prices demanded by suppliers of mobile call
22 termination or sought by purchases of mobile call termination in some of the disputes, and
23 in each case the disputed price that was referred was a blended price – they were blended
24 price figures.
25 So first the disputed price that formed the basis of the reference to Ofcom was a blended
26 price. Secondly, that is not surprising as that is the price and the only price that the network
27 operator acquiring mobile call termination ever pays.
28 Thirdly, Ofcom found in the determinations consistently with its previous public statements
29 that MNOs are entitled to charge a blended rate, and none of the appellants – BT included –
30 challenges that finding. During the period before 3G price control MNOs are entitled to
31 charge a blended rate, that is not challenged, it is explained in some detail in the
32 determinations and why that conclusion is reached.

1 Fourthly, as BT's evidence makes clear, it is of no interest to their customers whether the
2 call is terminated on a 2G or a 3G network, the customers do not care; they do not even
3 know. There is no difference in functionality as regards voice call termination.
4 Fifthly, no customer ever pays a pure 3G charge. Even if we were to assume hypothetically
5 a customer (subscriber) of, say, Orange, who has a 3G phone and who hardly ever receives
6 calls within Orange's area of 3G coverage, nevertheless Orange will charge the calling
7 network and will receive from the calling network only the blended rate for every one of
8 those calls.
9 MR. SCOTT: This relates to the four MNOs. A customer calling a 3 mobile from BT, as I
10 understand it, pays a special premium rate?
11 MR. ROTH: The use of the blended relates to the four 2G/3G MNOs, that is what I am
12 addressing. Therefore, we submit, the eggs' analogy is really quite misleading. The
13 purpose of the analogy, you will recall, was to equate the brown eggs in the box with the
14 underlying equivalent of an underlying 3G service. But if one pursues the analogy –
15 analogies are always imperfect of course – the correct approach we suggest is this: first, you
16 have a purchaser who cannot choose as between white and brown eggs. She cannot say: "I
17 want them all brown", or "I want half of them to be brown and half of them white". Indeed,
18 she will not even know how many are white or brown because to her they all look alike.
19 Secondly, the supplier, the seller, is charging the same price irrespective of the mix of the
20 eggs in the box, and is permitted to do so by the regulator, so if they are all white the
21 charge is the same as if they are all brown, because they are always charging the blended
22 rate, nothing else. The price does not change irrespective of the mix of eggs. In those
23 circumstances the relevant price from the customers' perspective, and this is about a
24 reasonable price for BT, is the price for the box of eggs, not the various ingredients that go
25 to make up that price, because that is what the customer is paying (and is always paying)
26 and is in no position to choose or even know what the mix might be, nor does it matter. So
27 we say that really does not get one anywhere, indeed, quite the opposite, if one pursues the
28 analogy it actually supports exactly the approach Ofcom took.
29 THE CHAIRMAN: Well I can see that that is the case as long as the overall price of the box of
30 eggs does not exceed the price that you would pay if all the eggs were white eggs
31 and it was at the regulated rate. The difficulty here is that the price has now risen
32 above that rate. It is now more than 120 pence for the dozen white eggs. Ofcom
33 says, "Well, that is because the price of brown eggs is not regulated". But, what I
34 have difficulty with is Ofcom both saying, "Well, we're not interested in the price of

1 brown eggs because those are not regulated", but then also saying, "It doesn't matter
2 to us that the price of the box of eggs has risen above the price that would apply if
3 all the eggs were white".
4 MR. ROTH: If that is what Ofcom said, I can fully understand the concern. But, they did not.
5 What they said was, "We look therefore at the extent to which the price of the box has risen.
6 We are looking at the price of the box being above 120 pence". But, they are looking at the
7 price of the box - of the totality, and not at -- They are looking at the blended rate, and how
8 much has it gone up? That is the point I am addressing. It is said against us that we should
9 not have focused on the blended rate. This is what I am dealing with at this point. It was
10 quite right to focus on the blended rate. The question was: Is the blended rate then
11 reasonable for terms of E-To-E? But, it would have been quite wrong for us to start looking
12 at underlying 3G element. We look at the blended rate that BT were paying. Then the
13 question is: Well, is that blended rate outside the bound of reasonableness?
14 THE CHAIRMAN: Is the first question not: Is that blended rate above the regulated rate?
15 Answer: Yes, it is, because you are now charging more than 120 pence for a box of eggs.
16 MR. ROTH: Yes, that is logical. I fully accept that is the first question. I was jumping to the
17 follow-on question.
18 MR. SCOTT: Is there not a problem Mr. Roth? I have no difficulty with any of your five reasons
19 for looking at a blended rate. None of them actually helps you to look at the
20 appropriateness of that rate. It is when you come to look at the appropriateness of the rate
21 that you must break it down into two parts. Indeed, you do break it down into two parts.
22 MR. ROTH: I am coming on to how we looked at the appropriateness of the rate, but all I am
23 seeking to do at the moment - and maybe I should try not to jump ahead of myself - is to say
24 that the starting point is: Is it higher than the 2G rate? Yes, it is. The next point is: Well, is
25 it so much higher that it is unreasonable? That is the appropriate question. Unreasonable
26 from the perspective of BT in terms of the end-to-end obligation. It was right to focus on
27 that question. That is the only point I am trying to make. But, I think it is being said that we
28 should not actually have been looking at the blended rate - we should have been looking at
29 the 3G element.
30 MR. SCOTT: Because of the relatively short period of time we are addressing in this part of the
31 appeals the blend was remaining stable. The situation would presumably have been
32 marketed different if we had been in a dynamic situation over a longer period in which the
33 blend was shifting. So, again, we are in a very fact-specific stage here of talking about a

1 retrospective, relatively stable situation in which we are not sorting a rate where 3G may
2 search.
3 MR. ROTH: Absolutely. Absolutely. That is why, of course, in the MCT statement, which is
4 forward-looking up to 2010 and 2011, by which stage the position was expected to be very
5 different, and where the 3G element becomes quite significant. Absolutely, sir.
6 In answer to Madam Chairman's earlier question, I have been reminded that, actually,
7 Ofcom did ask the question whether blended rate could be higher than the 2G rate and it
8 answered it, saying, "Yes, it could". That follows from looking at the process of blending
9 being permitted. So, they did go through that first stage, saying, "Might it result in a higher
10 rate? By permitting blending inherently the result may be a rate that is above the regulated
11 2G rate". So, that is the first question.
12 The other question is: Well, is the actual rate now being proposed the reasonable one?
13 THE CHAIRMAN: The reason why it is not illegal for them to charge the blended rate, even
14 though it is above the maximum regulated 2G rate is because the blend contains a
15 component for 3G termination.
16 MR. ROTH: It continues to be legal, of course, for them to charge the blended rate under the
17 price controls. They always charge the blended rate.
18 THE CHAIRMAN: Yes. But, when the initial complaint was made to Ofcom about the charging
19 of the blended rate, the argument was, "This is effectively increasing the rate for voice
20 termination above the rate that Ofcom has set" to which your answer was, "Well, no,
21 because the rate we set was for termination on 2G, and what has increased the price is not
22 an increase in the rate for 2G termination, but the blending in of a 3G termination rate".
23 MR. ROTH: Exactly. They have done it, and that is why, as I said earlier, it took some of them
24 longer to do it than others. They had to introduce a way of measuring the amount of 3G and
25 2G to make sure that the 2G element was only charged at the control price. Exactly.
26 The Altnets, you will recall, put in a table to show how a very small increase in the blended
27 charge is produced by a very substantial increase in the 3G element. It is a confidential
28 table at Annexe A2 to Mr. Cook's skeleton argument. I think you will recall that. It was
29 referred to in Mr. Cook's submissions. We say, "Yes, exactly". That graphically illustrates
30 why, at this point in time that the disputes were concerned with - as Mr. Scott has just
31 emphasised (2006/2007) for the 2G/3G MNOs (obviously we are not talking about H3G) --
32 The 3G element had a very minor impact on the rate that was actually paid by the purchaser,
33 and why it is not appropriate to look at the 3G element separately when deciding whether
34 the charge being contested -- the blended charge was a reasonable one for BT to pay. What

1 we should look at is the actual charge that BT is being asked to pay, and ask the question: Is
2 that a reasonable charge at which BT should be required to purchase interconnection under
3 the end-to-end obligation? You will appreciate the point I made - that the reasonableness
4 element comes in because of the terms of the end-to-end obligation, and that is why it does
5 not come into the MNO determination because there there is no reasonableness requirement
6 - the reasonableness is in the regulatory obligation imposed on BT. It goes back to the point
7 I made some time ago - that Ofcom is not a commercial arbitrator simply determining
8 between parties who bring a dispute as to what is a fair and reasonable charge? In the case
9 of the BT dispute, it had to look at reasonableness because that is part of the regulatory
10 obligation on BT. So, it came into addressing the regulatory obligation which was the focus
11 of the dispute.
12 THE CHAIRMAN: So, Ofcom would not then accept that the sum of all the s.3 and s.4, and
13 Article 8 obligations imposed on it result in fact in it having to set a reasonable rate in any
14 dispute that is referred to it under s.185. The reasonableness element only arises because of
15 the end-to-end obligation, and the sum of the other regulatory obligations does not require
16 in the same way the setting of a reasonable rate by Ofcom.
17 MR. ROTH: Absolutely, madam. Of course, one can define 'reasonableness' in various ways. If
18 one says, "Well, if it has an adverse effect on consumers, it is not reasonable". If that is
19 what one means by 'reasonable', then of course you would have to look at it under Article
20 8. But, it is because of adverse effect on consumers that as a sort of free-standing sense of
21 reasonable purely as between the parties in the way that an arbitrator might look at it -- if it
22 has no wider impact, the answer is: No, Ofcom would not.
23 THE CHAIRMAN: So, there is a substantive difference then between the test absent the E-To-E
24 obligation and the test under the E-To-E obligation.
25 MR. ROTH: Absolutely. One sees that in the very different approach, because all the business
26 about gains from trade, and so on is only in the BT determination which concerns the E-To-
27 E obligation. You will recall the passage I took you to in the MNO determination, saying,
28 "No, it doesn't arise here because we haven't got that question". That is exactly how we say
29 the position is.
30 Madam, that brings me to a point where I would be starting on gains from trade and pass-
31 through. I wonder if that might be - if that were acceptable to the tribunal - a convenient
32 point to stop? I have discussed the position with my friends coming after me. I have an
33 hour and a half of submissions, I estimate, left. I am followed by Vodafone and Orange as
34 interveneners. Between them they tell me they will not be more than an hour and probably

1 less. That would mean that we will conclude by lunch-time tomorrow on the TRD appeal,
2 meaning that we have a clean start after lunch for the SIA issue which those involved tell
3 me is unlikely to take until four-thirty, but certainly no longer. I shall be playing a
4 relatively small part in that particular argument. So, if it were acceptable to stop now, and
5 we have tomorrow what I suppose is the telecommunications industry's equivalent of Super
6 Tuesday in which to cover those issues.
7 THE CHAIRMAN: That seems an eminently sensible way to proceed, Mr. Roth. We will adjourn
8 now until ten-thirty tomorrow morning.
9 MR. TURNER: At the outset, the tribunal mentioned that you were proposing provisionally to
10 produce two judgments - one dealing with the H3G appeal; the other a composite TRD core
11 judgment. You had asked the parties to reflect on that and come back to you tomorrow with
12 any views. One point in our mind is that, of course, we have the non-core issues which are
13 currently scheduled for hearing around about the end of March. One factor - and the
14 tribunal may well not be able to answer this question - in our minds is whether the tribunal
15 currently has a view about how long it might take to produce either, or both, of these
16 judgments because of the sequencing? I fully understand if the tribunal is unable to answer
17 that question.
18 THE CHAIRMAN: I am not sure we can say anything very helpful in that regard. On the one
19 hand, of course we appreciate the urgency of this, both the H3G/MCT appeal and the core
20 issues. But these are very complex matters and there are also other things going on in
21 relation to these appeals. If you are asking whether we will be able to deliver a judgment on
22 these matters before the date set down for the non-core issues, I am afraid I cannot give any
23 indication whether that is going to be possible, or not.
24 Thank you.
25
26 (Adjourned until 10.30 a.m. on Tuesday, 5th February, 2008)
27