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IN THE COMPETITION

APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 January 2008

Before:
VIVIEN ROSE
(Chairman)

ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

| | |
|--|-------------|
| HUTCHISON 3G UK LIMITED ("H3G") | 1083/3/3/07 |
| and | |
| OFFICE OF COMMUNICATIONS ("OFCOM") | |
| AND | |
| T-MOBILE UK LIMITED ("T-MOBILE") | 1089/3/3/07 |
| and | |
| OFFICE OF COMMUNICATIONS | |
| AND | |
| BRITISH TELECOMMUNICATIONS PLC ("BT") | 1090/3/3/07 |
| and | |
| OFFICE OF COMMUNICATIONS | |
| AND | |
| HUTCHISON 3G UK LIMITED ("H3G") | 1091/3/3/07 |
| and | |
| OFFICE OF COMMUNICATIONS | |
| AND | |
| CABLE & WIRELESS UK & OTHERS ("CABLE & WIRELESS") | 1092/3/3/07 |
| and | |
| OFFICE OF COMMUNICATIONS | |

HEARING DAY ONE

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, Mrs. 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 S.J. Berwin) appeared for 02(UK) Limited.

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: Good morning, ladies and gentlemen. I have a few introductory remarks to
2 make before we start. First of all, with regard to when the hearing is going to cover
3 confidential matters. Clearly, there are a lot of people in court. Can I make it the
4 responsibility, please, of the senior solicitor who is within the confidentiality ring to ensure
5 that as regards the people in their party, if and when the tribunal does go into closed session
6 that those who should leave do leave, and those who remain are those who are within the
7 ring? We had understood that the confidential material in the bundles was going to be
8 marked in yellow. Our reading indicates that that is not entirely comprehensive. So,
9 everyone should be alert to jumping up if it looks like we are going to come to something
10 which is confidential, and the court needs to be apprised of that.

11 The second point is with regard to witness evidence. The parties have filed witness
12 statements from their witnesses of fact, and those witnesses have all included a statement of
13 truth at the end of the statement, confirming that they believe the contents of their statement
14 to be true. The parties have agreed that evidence in the witness statements should be treated
15 as if the witness had been called and confirmed the statement on oath. Therefore, unless the
16 witness is cross-examined, the tribunal is entitled to rely on that evidence as being true and
17 uncontested as to its factual content if the tribunal considers that the evidence is material to
18 the issues before it. The other parties can make submissions to the tribunal to the effect that
19 the evidence is inadmissible or irrelevant without challenging the truth of the statement.

20 They do not need, therefore, to cross-examine the witness to cross-examine those matters
21 which are essentially matters of legal argument.

22 Further, insofar as the witness statements contain inferences and submissions, then, again,
23 that is something that can be contested without cross-examining the witness. But, if a party
24 intends to submit to the tribunal that something stated by another party's witness is not true,
25 then the tribunal can only make up its mind whether to accept that submission if the witness
26 has had an opportunity in the witness box to respond to the allegation. In the circumstances
27 of this case the tribunal does not consider it is satisfactory for parties simply to file
28 contradictory witness statements saying that something another witness has said is not true,
29 and then ask the tribunal in submissions to prefer one witness over another, because the
30 tribunal is not in a position to weigh the conflicting evidence without having heard what the
31 witness who is challenged has to say in response to that challenge.

32 Now, it appears from the correspondence yesterday that the parties believe that they can
33 refrain from cross-examining a witness, but still make submissions to the tribunal, asking
34 the tribunal to reject the evidence on the basis that it is incorrect. But, the tribunal does not

1 accept that proposal. It is not possible for the tribunal to determine to reject the evidence of
2 a witness on the grounds that it is untrue unless the witness has been cross-examined. It is
3 vital for the tribunal to know at the end of the day what statistics and other facts relied on
4 are accepted, and which are not, and what decisions and determinations the tribunal has to
5 make on questions of fact. So, the tribunal will not allow submissions to be made that a
6 witness has been factually inaccurate unless that allegation/challenge has been put to the
7 witness and he has been allowed to respond.

8 Having said that, the contentious evidence in the witness statement covers many areas
9 which were not explored by Ofcom in the decisions under challenge and which did not form
10 part of Ofcom's reasoning. Certainly the tribunal envisages that it will not be able to make
11 findings of fact in some areas which are covered by the witness statements even on the basis
12 of all the evidence currently before it because that evidence is simply not complete on those
13 topics.

14 Thirdly, the additional witness statements which have been exchanged between the parties
15 and provided to the tribunal, but in relation to which there is as yet no order permitting them
16 to be adduced. First, with regard to Dr. Littlechild's third statement -- The expert evidence
17 covers two main issues - first, the advantages and disadvantages of asymmetric regulation in
18 this market; secondly, the welfare analysis carried out by Ofcom; what was its function;
19 what is the appropriate input price for H3G in the model; how to work out the welfare gain
20 attributable to regulating H3G and whether the resulting figure is significant or negligible.

21 With regard to H3G's application to serve the third statement of Dr. Littlechild, the letter
22 from the tribunal on 21st January indicated that the purpose of that statement was to respond
23 to the expert report of Dr. Walker. In fact, a large part of the proposed witness statement
24 appears to be directed at Mr. Myers' second witness statement. We will come in a moment
25 to whether any of the parties object to Dr. Littlechild's third statement going in, but we
26 would ask H3G to consider whether there is material in the third statement which cannot be
27 dealt with adequately in submissions, or by cross-examination of Mr. Myers.

28 The other witness statements which have been served so far without having formal
29 permission are Mr. Myers' second statement, sworn on 18th January, and Mr. Miller's
30 witness statement correcting something in his earlier statement, and this new statement
31 sworn on 22nd January. May I just pause there to ask if any of the parties object to the
32 second Myers' witness statement, and Mr. Miller's correcting statement being granted
33 permission? I am not going to hear argument now. I just want to ascertain if parties object?

34 MISS ROSE: Madam, we object to Myers 2 if we are not allowed to respond to it.

1 THE CHAIRMAN: The fourth preliminary point is the extension of the confidentiality ring. O2
2 have written saying they wish to add another person from Price Waterhouse Coopers - Mr.
3 Peter Hope. We have, I understand it, the original undertaking from Mr. Hope. O2 have
4 written to say that none of the parties object to Mr. Hope being added. Can I just confirm
5 that that is the case? (After a pause): Thank you.

6 BT have asked to add two further external legal advisors - Ashley Rose and David Aulds.
7 We do not yet have the originals of the undertakings from those. They may arrive during the
8 course of the day, but may I just check whether any of the parties has any objection once
9 those undertakings have been received, to the various people being added to the
10 confidentiality ring? (After a pause): No. Thank you. That is a matter that we will take
11 into account in the course of the day, hopefully.

12 Finally, as far as the tribunal's preparatory reading is concerned, all the members of the
13 tribunal have read all the pleadings and skeleton arguments and witness statements. We
14 have not necessarily all read all the annexes to those documents. So, we would say to parties
15 that if there is something in particular in an annex to which you wish to draw our attention,
16 it is best for you to do that expressly. Mr. Roth, could you indicate to us what Ofcom's
17 position is with regard to the third witness statement from Dr. Littlechild.

18 MR. ROTH: Madam, we do not object to the adducing of the third witness statement of Dr.
19 Littlechild so far as it responds to Mr. Myers. We would have said that irrespective of the
20 observation that Miss Rose made about the second witness statement of Mr. Myers.

21 THE CHAIRMAN: Does anybody else wish to address us on the admissibility, or whether we
22 should grant permission for the third witness statement of Dr. Littlechild to be adduced?
23 No, right, then we grant permission for those three additional witness statements, that is Mr.
24 Myers' second witness statement, Mr. Miller's correcting witness statement and Dr.
25 Littlechild's third statement. We will add the additional Mr. Hope to the confidentiality
26 ring and as and when we get the original undertakings from Mr. Rose and Mr. Olds we will
27 add them to the confidentiality ring.

28 Are there any other preliminary matters that people want to raise before we get under way?
29 Miss Rose?

30 MISS ROSE: Madam, there is just one matter which has been flagged up in correspondence
31 which relates to the extent to which T-Mobile and Vodafone are seeking to run a positive
32 case as to the causes of the traffic imbalance, and madam you will have seen the
33 correspondence on that. There has been an indication by H3G that we would like to submit
34 that certain paragraphs of the witness statements of Mr. Tillotson and Mr. Barden de

1 Lacroix should be held to be inadmissible. Now, this obviously may have some relevance
2 to the points that you have just made in relation to cross-examination and it therefore maybe
3 sensible for us to deal with it at the outset, but I am obviously in your hands.

4 THE CHAIRMAN: Yes. Just wait one moment whilst I confer with my colleagues.

5 (The Tribunal confer)

6 THE CHAIRMAN: The Tribunal has considered this matter. Clearly it is an important part of
7 H3G's case that the traffic imbalance exists and the reason they put forward for that traffic
8 imbalance is the difficulties with number portability. Insofar as the evidence adduced by the
9 other parties indicates that number portability is not the reason why H3G has a traffic
10 imbalance, or has not expanded its market share beyond its current position, then clearly
11 that is admissible and relevant. Insofar as the parties witnesses indicate what they think
12 H3G's strategy in entering the market was or continues to be now and their comments on
13 the performance of H3G as a service provider the Tribunal's position is that in order for the
14 Tribunal to make any findings in relation to those points about customer dissatisfaction or
15 whatever there would need to be a great deal more examination of those issues and evidence
16 put forward by H3G as to what it says about that before the Tribunal could be in a position
17 to draw any conclusions about that. Now, we do not have that evidence, that is therefore an
18 area which is explored in the witness statements, but in which the overall evidence before
19 the Tribunal is incomplete, therefore the Tribunal does not envisage that at the end of this
20 hearing – even if that evidence is not strictly challenged in the witness box – that it is in a
21 position to arrive at any conclusion about H3G's performance over the period it has been in
22 the market or as to what its business strategy was or should have been.

23 MISS ROSE: Madam, I take it that that that also means that the Tribunal would not be drawing
24 any conclusions about the extent to which H3G's commercial strategy was the cause of its
25 traffic imbalance?

26 THE CHAIRMAN: We have to arrive at a conclusion whether it was the traffic imbalances
27 caused by the number portability problems or not – and of course we do not know where we
28 are going to be on that point, but if it should be the Tribunal's view that it was not caused by
29 number portability problems then, as a matter of commonsense, if it exists it must have been
30 caused by something else and one of a number of possibilities might be H3G's commercial
31 strategy and that, as we understand it is the point that was made by Ofcom in the relevant
32 paragraph of the decision about which there has been some discussion, but aside from that
33 we do not envisage being in a position to say that H3G's commercial strategy is what has
34 caused the traffic imbalance or the low market share, or is not, because we would need a lot

1 more evidence from H3G in response to those allegations in order to be able to arrive at a
2 conclusion and we do not envisage opening up that area of debate.

3 MISS ROSE: Madam, I know that you have the point well in mind, that we were refused
4 permission to amend, to put a positive case about what we say is a very significant cause of
5 the traffic imbalance. Now, one of the difficulties that we face as a result of the evidence
6 that has been submitted by T-Mobile and Vodafone is that in fact that evidence directly
7 opens up the case that we have not been permitted to pursue. Can I just give you one very
8 quick example of what I mean?

9 THE CHAIRMAN: I think, Miss Rose, I have indicated that the Tribunal is not at the moment
10 considering whether formally to say that that evidence is inadmissible, but I am indicating
11 that H3G need not feel that it has to challenge all that evidence in order to avoid the
12 Tribunal arriving at a conclusion that actually that was the cause of the traffic imbalance or
13 the failure to gain further market share.

14 MISS ROSE: Madam, I am content with that position.

15 THE CHAIRMAN: Well let us just hear what those parties putting forward this case wish to say,
16 if they wish to say anything about that? Mr. Turner?

17 MR. TURNER: Madam Chairman, this bears, as Miss Rose, says on the question of the
18 Tribunal's attitude to the cross-examination of witnesses and the contents of their
19 statements and how the Tribunal should treat them more generally. In relation to that, may I
20 first make one preliminary observation? The Tribunal has said that it is not prepared to say
21 that the truth of what is attested to in the witness statement should be questioned otherwise
22 than through the process of cross-examination. On the other hand, as I understand it,
23 opinions or inferences to be drawn from the facts attested to in the witness statements may
24 be the subject of submission. May I give one important example on that to ascertain where
25 the line falls? Mr. Russell gives evidence relating to the issue just canvassed of mobile
26 number portability. What he says - and the most immediate reference I have is para. 27 of
27 his first statement - is that in his opinion the inadequate MNP arrangements in the UK are a
28 substantial contributing factor to the traffic imbalance. Now, in those circumstances we
29 obviously do not want to be taken to be accepting that what he says on that is correct. We
30 are not questioning, however, the truth of his opinion, which is what he refers to. We do
31 question the inference that he seeks to draw from it on the basis that it is common ground
32 between everybody, including the tribunal, that we may attack that, then there should be no
33 issue, no problem with the tribunal's proposed approach.

1 So far as the evidence of Mr. Barden is concerned, concerning commercial strategy, again,
2 Mr. Russell places directly in issue that it is the arrangements and the charge control
3 imposed by Ofcom which have caused its inability to grow. It is in response to that
4 assertion that we have the evidence of Mr. Barden - and, I apprehend, Mr. Tillotson as well
5 - that there have been other reasons for that. So, it is directly responsive evidence. I take
6 fully on board what the tribunal says about not being able to come to a concluded view
7 about what these reasons were on the basis of the evidence before it. Nonetheless, it is our
8 submission that the evidence concerned is admissible; that it goes to an issue that is raised
9 in the notice of appeal by Hutchison, and that therefore it should stand, and that the question
10 of the weight that the tribunal should give to it at the end of the day is a matter that need not
11 be determined now, at the outset of this hearing.

12 THE CHAIRMAN: As to your first point on the opinion, the distinction we were trying to draw
13 is the distinction which will enable the tribunal, at the end of the day, to know which factual
14 material it can rely on as forming part of its reasoning. So, for example, in relation to
15 number portability, yes, it may be a matter of opinion what the effect of this is, but there is
16 evidence, for example, about the comparison of the incoming minutes and outgoing minutes
17 of H3G as compared to the other MNOs on which some of the parties rely as showing that it
18 cannot be number portability which has caused the problem.
19 What the tribunal needs to be clear about is: is it accepted that those numbers are correct -
20 that they show what they purport to show? What inferences are then to be drawn from those
21 numbers as to what they show about whether number portability is the cause of the failure
22 to grow market share is something on which submissions can be made. Clearly, in the
23 witness statements there is a lot of material in grey areas between submission and opinion
24 and fact. I suspect that your second point falls within that grey area. I do not think it is
25 practical for the tribunal at this stage to go through all the statements and say, "Well, this is
26 a fact which needs to be contested, and this is not. The point that we were making about the
27 allegations that it was a combination of H3G's commercial strategy and poor performance
28 in terms of poor response to customer complaints, etc., was that even though survey
29 evidence is adduced, and purportedly factual evidence is adduced, to support those
30 arguments - and clearly H3G contest those - even if they are not formally contested in cross-
31 examination, the tribunal would not be in a position, on the basis of those, to conclude that
32 those were the real causes of H3G's problems - I suppose because Miss Rose would submit,
33 "Well not weight should be attached to those. Those are the suppositions of executives of
34 competing companies. There's no evidence from H3G as to what it's commercial strategy

1 was, or how it dealt with customer complaints, or such like”. That is what I meant when I
2 said that the evidence is incomplete and we do not wish to open up that whole area to
3 further evidence needing to be adduced so that we can come to a conclusion on that.
4 Beyond that, I am not sure that at this early stage of the hearing we are able to go any
5 further. I appreciate that the parties now need to decide - which they may, as of yesterday
6 evening, have thought they did not have to decide - which evidence they wish to contest
7 and which they do not. But, let us see how things go. The witnesses of fact, I think, are
8 scheduled for Monday afternoon. It may be that before each witness is called it would be
9 helpful to have an indication from the parties what they contest and what they do not
10 contest. However, our concern is that at the end of the day the tribunal needs to be clear
11 what evidence is accepted; what evidence is contested; and therefore what determinations it
12 needs to make on the factual matters included in the witness statements.

13 MR. TURNER: Madam, I am very grateful for that clarification. As a matter of practicality,
14 given that factual witnesses would otherwise be cross-examined, as you say, on Monday,
15 the task of going through and trying to identify all the factual propositions in every witness
16 statement put in to the tribunal may be, in my submission, an onerous and unnecessary task.
17 The key task is to identify whether there are factual matters which are the direct subject
18 matter of a witness’ evidence in the statement. I have canvassed the question of the opinion
19 of Mr. Russell on number portability, which is a matter of belief, and whether, on central
20 matters, there requires to be cross-examination. It is my understanding so far that the
21 parties at least on that have formed the collective view that cross-examination of witnesses
22 of fact is unnecessary so that if anybody, having heard what the tribunal’s view on this is, is
23 of a different view, in order to accommodate this, because of the need to prepare properly
24 for it, the parties should say what their position is no later than this evening, let us say, at six
25 o’clock - otherwise, it is extremely difficult for us to prepare. We need to know where we
26 are well before the end of the weekend.

27 THE CHAIRMAN: Before the correspondence took place over the last couple of days, the
28 timetable that the parties agreed, subject to the point that H3G made, set aside, I think, a full
29 day for the three of the witnesses of fact to be cross-examined. Our concern as to what has
30 happened in between that time and this is that the parties may have decided amongst
31 themselves that they could dispense with that day and that cross-examination but still say in
32 their submissions later on: “Mr. So-and-So has said that he believes that is true, but we say
33 that that is not true. Now, it is that which we are saying is not acceptable to the Tribunal,
34 and as far as the Tribunal is concerned we are therefore reverting to the position as it stood

1 when the parties provided, on 18th January, the timetable to us; so we are not saying now
2 anything that ought to affect how the parties thought that the hearing was going to be
3 conducted before the correspondence of the last couple of days. What the Tribunal is
4 saying is that if the parties could do without that cross-examination and yet still contest the
5 evidence we are saying that is not the case, we are going back to the original timetable and
6 whatever cross-examination the parties at that stage thought they wanted to conduct.

7 MR. TURNER: Madam, that is very helpful. To conclude, then, just to pick up on your final
8 remarks, on the one side you have the evidence of Mr. Russell, let us say where he says
9 “My belief is that mobile number portability has been the cause of these problems”, and he
10 gives his reasons for that. We plainly are not going to be questioning the sincerity of his
11 belief, we are going to be questioning the inferences to be drawn from the facts that he
12 relies on.

13 On the other side, you have Mr. Barden and Mr. Tillotson saying: “Our belief is that
14 Hutchison’s problems are to some extent caused by its commercial strategy.

15 THE CHAIRMAN: Yes.

16 MR. TURNER: Again, it may be that Miss Rose does not question the sincerity of their belief,
17 what she is interested in is the underlying facts. If that is not a subject matter which need be
18 addressed by cross-examination on either side, then it may well be that the parties can leave
19 things as they are.

20 MR. SCOTT: I think the difficulty to which we are trying to advert is this: if in argument there is
21 a fact as distinct from an inference or an opinion that you wish to challenge then the
22 appropriate stage to do that is in your cross-examination not in argument.

23 MR. TURNER: Yes.

24 MR. SCOTT: The other point that we are trying to make is that there will be areas of the factual
25 matrix where that which is being placed before us, including any cross-examination is not
26 going to be sufficient for the Tribunal to make a factual decision. To stick with number
27 portability for a moment, H3G are not the only party affected by number portability, some
28 of the parties affected by number portability are parties before us, some – Virgin, for
29 example – are not, and you cannot really address the impact of number portability by
30 looking at H3G in isolation, you have to consider what the whole evidence would be, and
31 we are simply not going to have that evidence before us.

32 MR. TURNER: Sir, I am grateful.

33 THE CHAIRMAN: Mr. Roth?

1 MR. ROTH: Yes, madam, I think if I have appreciated correctly the distinction being made is one
2 that is sometimes described as being between primary facts and secondary facts. I think we
3 all appreciate that if there is a primary fact such as how many outgoing minutes related to
4 ingoing minutes and there is a dispute about that, it has to be tested by cross-examination.

5 THE CHAIRMAN: Yes.

6 MR. ROTH: We appreciate that. By “secondary” fact I mean the question is it shown that mobile
7 number portability is the cause of H3G’s traffic imbalance. That is also of course a question
8 of fact, what is the cause, but it is a fact that is inferred from primary facts, and as I
9 understand you to say that is something that if there is a dispute as you said – what is the
10 reason for traffic imbalance? – that is not something on which we need to cross-examine as
11 long as the primary facts on which those conclusions are based are not disputed. That was
12 my understanding if that is fair.

13 We have, as you say, Monday, I think it is the whole day, set aside for the three witnesses
14 now being referred to. May I suggest, I think 6 pm tonight is a bit unrealistic, but in the
15 course of tomorrow morning ideally at the start of the hearing tomorrow the parties can
16 indicate whether, in the light of that having reviewed those statements of those three
17 witnesses they wish them to attend and to clarify it that way, and I would hope we could all
18 do that.

19 As you said also at the outset the Tribunal’s view means that we have to consider something
20 that we thought we did not have to consider. It may be, and I am simply reserving the
21 position that we would need to look again in the light of that whether there might be any
22 other witnesses, I am thinking particularly to do with SIA which is the last issue under the
23 TRD appeal, where there might be any factual contests – I confess I have not focussed my
24 mind particularly on that at this stage, and it may be that if we are having any cross-
25 examination that goes in the overflow days anyway, but I just put down that marker, but for
26 the moment one is concerned, I think, with Messrs. Russell, Gardener and Tillotson, and we
27 look at those in the light of what you have helpfully clarified.

28 THE CHAIRMAN: Thank you, M r. Roth. Miss Rose, I think we are ready to start.

29 MISS ROSE: Madam, members of the Tribunal, today I am going to deal with the question of
30 SMP. As the Tribunal knows very well the history of this appeal goes back to a decision
31 that Ofcom made in 2004, when Ofcom issued a statement finding that all five of the MNOs
32 had significant market power in the market for wholesale call termination. That decision
33 was the subject of an appeal brought by H3G and the subject then of a decision by the
34 Competition Appeal Tribunal on 29th November 2005 to the effect that Ofcom had erred

1 because it had failed properly to assess BT's countervailing buyer power, and in particular
2 in two respects: by failing properly to analyse the effect on BT's countervailing buyer
3 power of its end-to-end connectivity obligation; and secondly, the effect of Ofcom's dispute
4 resolution powers in relation to the end-to-end connectivity obligation.

5 It should be said at the outset that BT was also a party to that appeal, and the decision of the
6 CAT in that instance was not appealed by any of the parties, the matter was remitted back to
7 Ofcom for reconsideration. That is of some significance when we come to consider the
8 position that BT have sought to adopt on this issue in this appeal because it will be my
9 submission that the position that BT are now putting forward is wholly inconsistent with the
10 decision that the CAT made in the first appeal and that they are in fact estopped from
11 running it in these proceedings having chosen not to appeal the first Judgment, and I simply
12 flag that up at the outset.

13 As we know, Ofcom subsequently did reconsider its 2004 decision and, at the same time,
14 produced a fresh decision relating to the future period. So on 27th March 2007 the two
15 decisions were made by Ofcom which we challenge in this appeal. One, to the effect that
16 H3G had significant market power for the period 1st June 2004 to 31st March 2007 – that
17 was its reassessment following the appeal; and secondly, that H3G has significant market
18 power for the period from April 2007 to March 2011.

19 It is H3G's principal case in relation to this part of the appeal that in making both of these
20 decisions Ofcom has repeated the errors that it made in its original 2004 decision. Ofcom,
21 with respect has still failed properly to analyse BT's CBP, and has erred again its analysis at
22 the end to end connectivity obligation and of its own dispute resolution powers in relation to
23 that obligation. Most importantly, Ofcom has construed the end-to-end obligation as
24 requiring to connect with other networks, including H3G's even at prices which are
25 excessive and uncompetitive. Indeed, it will be my submission that it follows inevitably
26 from the position adopted by Ofcom that BT is obliged under the end-to-end obligation to
27 connect with other networks even at prices that are so excessive as to have an adverse effect
28 on consumers. From this construction of the end-to-end obligation follows Ofcom's
29 conclusion that BT's countervailing buyer power is constrained because, says Ofcom, the
30 parties seeking to negotiate a price for mobile call termination would do so on the basis that
31 if they were unable to reach a commercial agreement and the matter were referred to
32 Ofcom, Ofcom would require BT to connect even at an excessive and uncompetitive price.

33 That conclusion, we say, has now been reflected in Ofcom's resolution of the disputes
34 referred to it, which are the subject of the TRD appeals that the Tribunal will be considering

1 next week, and, in particular, Ofcom's adoption of the gains from trade test, as the tribunal
2 knows.

3 We submit that that approach by Ofcom is plainly critical to the decision that it took in
4 March 2007 that H3G had SMP. We submit that that approach was unlawful. It is H3G's
5 case that the end-to-end obligation only obliges BT to connect at a reasonable price. It is
6 both disproportionate and contrary to Ofcom's basic statutory duties for it to interpret a
7 reasonable price as including a price which is excessive and uncompetitive, and, most
8 particularly, to interpret a reasonable price as including a price that would have an adverse
9 effect on consumers.

10 MR. SCOTT: Miss Rose, you have mentioned the fact that we are dealing with a variety of
11 different periods. Your most recent argument refers to interpreting the E2E obligation - the
12 new one. I think we are going to have to be a bit careful because we have got the period
13 before the new obligation comes in. We have the period from the new obligation to the end
14 of the re-assessment, and we have got the period beyond the re-assessment.

15 MISS ROSE: Sir, you are right. I am over-simplifying the impact of regulation on BT. Of
16 course, Ofcom's position on that is rather curious because at the time of the first appeal it
17 was Ofcom's position that BT was under an end-to-end connectivity obligation. Ofcom
18 subsequently, in the process of conducting its market review for the future, appears to have
19 received legal advice to the effect that, actually, BT was under no obligation to connect at
20 all. On that basis, it rushed out its consultation paper in 2006 - a very short, truncated
21 consultation paper (and I shall be returning to this in more detail) - and then rushes out a
22 new end-to-end connectivity obligation. Now, I am going to be looking at the implications
23 of that.

24 My submission is going to be that actually that fascinating course of events - which is
25 interesting for what it reveals about Ofcom's reasoning processes - does not actually affect
26 the substance of the points that we make on the appeal, because my submission would be
27 that what Ofcom has said is, "Well, if BT refuse to interconnect before we impose the new
28 obligation in 2006, we would have imposed an end-to-end connectivity obligation on them".
29 That seems like a reasonable position. We can assume that the obligation they would have
30 imposed is the obligation that they did in fact impose - namely, the obligation to connect at
31 a reasonable price. Therefore, although by a slightly different route, you come back to the
32 same question which is: Has Ofcom misunderstood the content of the end-to-end
33 connectivity obligation that it either has imposed on BT or that it says it would have
34 imposed on BT had BT refused or delayed interconnection.

1 MR. SCOTT: So, just to clarify, what you are saying is that there was at all times, or relevant
2 times an obligation on BT that was either a direct obligation or an indirect obligation in the
3 sense that had BT refused, a legally binding obligation would have been put in place.

4 MISS ROSE: I do not think I would put it in those terms. I would not say that there was an
5 obligation on BT before 2006. But, we do not dispute the argument of Ofcom that had BT
6 refused to interconnect, Ofcom would have pretty rapidly imposed an interconnection
7 obligation on it. Therefore, the regulatory climate remains that BT and H3G would be
8 negotiating in a situation where BT would appreciate that if it refused to interconnect at a
9 reasonable price, it was likely to come under a regulatory requirement to do so. Therefore,
10 we remain in a situation of asking: What is a reasonable price?

11 MR. SCOTT: Thank you.

12 MISS ROSE: I have just made the submission that it is Ofcom's case that it would oblige BT to
13 interconnect at an excessive and uncompetitive price - even a price so excessive as to have
14 an adverse effect on consumers. Now, it is our submission that plainly Ofcom has no power
15 to impose any such obligation on BT. Either Ofcom has misinterpreted the end-to-end
16 obligation - and we submit that the tribunal should strain to interpret the end-to-end
17 connectivity obligation so that it is valid and not void - or (and this is the fall-back
18 submission), the end-to-end connectivity obligation itself is **ultra vires** and void.
19 If we are right, and Ofcom had no power to oblige BT to interconnect at an excessive price,
20 then it would equally be disproportionate and unlawful for Ofcom if a dispute were referred
21 to it in relation to the end-to-end obligation to resolve that dispute by requiring BT to agree
22 an excessive price for MCT.

23 So, that is an overview of the principal way that we put our case. As the tribunal knows,
24 there are some subsidiary points that we take. The only one I intend to develop today is the
25 failure by Ofcom to address what it means by excessive pricing. I am going to deal with
26 that separately. The principal case that we are maintaining is in relation to the construction
27 of the end-to-end connectivity obligation on BT and the way in which Ofcom would resolve
28 a dispute arising out of that obligation.

29 I shall make my submissions today in the following order: (1) I shall deal with the meaning
30 and the proper assessment of significant market power, including countervailing buyer
31 power. (2) I shall set out our analysis of Ofcom's duties and powers in relation to the
32 setting of conditions for network access and interconnection, such as the end-to-end
33 obligation. (3) I shall deal with H3G's submissions on the proper construction of the end-
34 to-end obligation imposed on BT. (4) I shall deal with Ofcom's duties and powers in

1 relation to dispute resolution. (5) With Ofcom's decisions and reasoning. (6) (In practice,
2 this is likely to be closely allied with (5)) Our submissions as to the flaws in Ofcom's
3 reasoning. Finally, (7) our responses to the arguments that have been advanced by Ofcom
4 and the interveners on this issue.

5 That brings me to the first question, which is the meaning and the proper assessment of
6 significant market power. We start with the community regulatory framework, and, in
7 particular, the framework directive which you have in Bundle H1 at Tab 6. The concept of
8 SMP is explained, first of all, in Recitals 25, 27, and 28. If I can invite the tribunal to read
9 those -- I know you are extremely familiar with the legislation. I do not intend to read them
10 out. (Pause whilst read): The first key point is that the concept of SMP is equivalent to the
11 concept of dominance, as we see at Recital 25. Then, at Recital 27 it is essential that ex-
12 anti-regulatory obligations should only be imposed where there is not effective competition,
13 and that it is necessary to draw up guidelines in accordance with the principles of
14 competition law for NRAs to follow in assessing whether competition is effective. We will
15 come back to those guidelines in a minute. Then, at Recital 28 - the need to take into
16 account Community law and the Commission guidance -- rather act in accordance with
17 Community law and take into account the Commission guidance.

18 Then, Articles 14 and 16 of the Directive. Article 14, headed 'Undertakings with Significant
19 Market Power'. At para. 2 we have the test being equivalent to dominance - that is to say, a
20 position of economic strength affording it the power to behave to an appreciable extent
21 independently of competitors, customers and ultimately consumers. The key question here
22 is whether H3G is able to behave to an appreciable extent independently of its principal
23 customer - namely, BT.

24 MR. SCOTT: I think that is simplification. I realise that in this room that is likely to be the
25 argument because we have got you and BT in the room. But, we must not lose sight of the
26 consumers in all this who end up paying the bill.

27 MISS ROSE: I absolutely agree. Of course, as you know, it is fundamental to our case - and also
28 of course fundamental to BT's case on the TRD appeals - that that is precisely what Ofcom
29 appear to have done, to have lost sight of the interests of consumers.

30 Then Article 16. At Article 15 we have the market definition procedure, which is not in
31 issue in this appeal.

32 Then, at Article 16, the market analysis procedure. This is the process to be undertaken by
33 NRAs in assessing whether particular undertakings have a position of SMP.

1 Those general provisions are then brought into national law through the 2003 Act. There are
2 two sections of that Act relevant to this question - namely, the meaning and assessment of
3 SMP. If we go to s.78 at Tab 8 in H1 (p.79 in the internal numbering),

4 “Circumstances required for the setting of SMP conditions. For the purposes of
5 this chapter a person shall be taken to have SMP in relation to a market if he
6 enjoys a position which amounts to, or is equivalent to dominance of the market.
7 References in this section to dominances of a market must be construed in
8 accordance with any applicable provisions of Article 14 of the framework
9 directive”.

10 So a direct read-across of the framework directive international law. Then, at s.79 - Market
11 Power Determinations. So, first, Ofcom must identify the market. Then it must carry out an
12 analysis of the market. In identifying or analysing any services or markets for the purposes
13 of this chapter, it must take account of all applicable guidelines and recommendations
14 issued or made by the Commission.

15 So, that is the basic legislative framework. This tribunal has the advantage of the analysis of
16 that framework and of the Commission guidelines which, of course, are to be taken into
17 account which was carried out in the first H3G appeal, and I would like now to turn that up
18 as a convenient way of looking at how the meaning of SMP is to be analysed in fact. That
19 decision is at H2 tab 12. Turning to p.18 in the Judgment, just above para.36 is the heading:
20 “The Determination of SMP”. First of all we have the definition at Article 14(2), the
21 framework Directive that we have just looked at. Then at para.37 we have Commission’s
22 Guidelines, and those are set out – again, I do not intend to read them out, I simply draw
23 your attention to them – and in particular para. 78 of those Guidelines on p.19, where it
24 said:

25 “It is important to stress that the existence of a dominant position cannot be
26 established on the sole basis of large market shares.”

27 Because of course it is uncontroversial in this case that H3G, like everybody, has a 100 per
28 cent. share of this particular market.

29 “As mentioned above, the existence of high market shares simply means that the operator
30 concerned might be in a dominant position. Therefore, NRAs should undertake a thorough
31 and overall analysis of the economic characteristics of the relevant market, before coming to
32 a conclusion as to the existence of significant market power. In that regard, the following
33 criteria can also be used to measure the power of an undertaking to behave to an appreciable
34 extent independently of its competitors, customers and consumers.”

1 Then various criteria are listed including “absence of or low countervailing buyer power”.
2 We then go to para.42, the CAT summarises the proper approach to be taken to the regime.

3 “What therefore emerges from that regime are the following points which are of
4 importance to this appeal:

5 a) A large market share gives rise to a presumption of dominance.

6 b) However, the nature of that ‘presumption’ must be properly understood.

7 Normally, in English law, a presumption can be relied on by itself if there is
8 no other evidence which goes to the point; no-one suggested that the
9 position would be different so far as any European principles might be in
10 play. The first sentence of paragraph 78 of the guidelines seems at first sight
11 to detract from that principle. However, we are not satisfied that it does.

12 What paragraph 78 provides is that the regulator is not entitled to find a
13 large market share, rely on that as giving rise to a presumption of dominance
14 and stop there. The regulator is obliged to go on and consider all other such
15 factors as are relevant to a consideration of a point in the market in question.
16 The paragraph then goes on to identify some of them. What is required by
17 the guidelines is a ‘thorough and overall analysis of the economic
18 characteristics of the relevant market before coming to a conclusion as to the
19 existence of SMP.”

20 And they say: “This approach is demonstrated by various authorities” and nothing
21 appearing in *Tetra Laval* contradicts or modifies it.

22 So that is the general approach which Ofcom is obliged to adopt.

23 Having set out the general approach to the establishment of SMP the CAT then came on to
24 deal in particular with three factors. First, the relevance of pre-existing regulation to a
25 finding of countervailing buyer power, whether and to what extent such regulation was to be
26 taken into account.

27 Secondly, the question of analysing countervailing buyer power; and thirdly, the relevance
28 and approach to be adopted to Ofcom dispute resolution procedure, and I want to look at the
29 Tribunal’s analysis of each of those questions separately.

30 THE CHAIRMAN: Pause there for a moment, the passage in 42b in which the Tribunal set out
31 how it approached, H3G supports that approach as being the correct one, is that right?

32 MISS ROSE: Yes.

33 THE CHAIRMAN: Thank you.

1 MISS ROSE: It is my sub mission that this Judgment has to be the basis on which Ofcom's
2 analysis is to be undertaken because none of the parties to this case appealed it.

3 MR. SCOTT: There is a point here that you have already made, and you will come to that when
4 you seek to explain to us why BT is estopped from making certain arguments. One of the
5 points that the Tribunal has noted, that whilst your clients and BT and Ofcom were parties
6 to this appeal other parties before us today were not, and the question may arise, and
7 perhaps it should, we should clarify that now, whether any of them will be taking exception
8 to this particular part of H3G (1)?

9 MISS ROSE: Yes. Sir, I had not understood from any of the notices of intervention that any of
10 the other parties were suggesting that H3G (1) was, as it were, wrongly decided. If I am
11 wrong about that I would like to be told now.

12 MR. SCOTT. I think that is correct. It would be helpful to know at this stage ----

13 MISS ROSE: It would, sir.

14 MR. SCOTT: -- So that we can proceed on that basis.

15 MISS ROSE: It would, sir, because I would then need to develop slightly more sophisticated
16 argument about issue estoppel relying on *Henderson v Henderson* which I am sure we will
17 all find very entertaining.

18 MR. SCOTT: That is right.

19 MR. TURNER: Sir, our position is that we certainly do not take any issue with this part of the
20 Judgment, there are parts of the Judgment with which in due course we will take issue.

21 MISS ROSE: Sir, I note that and I therefore do reserve my position on the question of issue
22 estoppel in relation to T-Mobile. Just to make it clear, the point that I intend to make is that
23 T-Mobile could have intervened in this if they had wanted to, on precisely the same grounds
24 that they have intervened in this appeal, and they having chosen not to intervene in this
25 appeal they are equally bound by its result.

26 That brings me to the first of three topics which the CAT addressed in this decision, which
27 is the question of the relevance of pre-existing regulation to a finding of countervailing
28 buyer power. If we go first to para.69, we see the heading "Regulation, Dispute Resolution
29 and Countervailing Buyer Power."

30 "THE NEXT POINTS TAKEN BY Mr. Green have overlapping backgrounds of
31 fact and potentially some overlap of law, and can usefully be introduced together.
32 Although we will elaborate on them below, putting the matter shortly Mr. Green
33 says that in arriving at its SMP determination Ofcom did not take proper account
34 of the following factors:

- 1 a) The effect of the possibility of regulation.
- 2 b) The countervailing buyer power of BT, which was the largest
- 3 purchaser of termination on H3G's network.
- 4 c) The dispute resolution mechanism which exists under the agreement
- 5 between BT and H3G in relation to the access agreement between them."

6 So those are the three topics that the Tribunal is dealing with.

7 We then come to para.88, under the heading: "Regulation".

8 "It is part of H3G's case that, in assessing whether an entity has SMP, at least in a
9 case like this where power over price is an essential element of the regulator's
10 decision, it is relevant, if not important, to consider the effect of regulation or
11 possible regulation on the entity in question."

12 So the submission that H3G were making at that time was that the regulation of H3G was
13 relevant to the assessment of countervailing buyer power.

14 "One of the matters that has to be taken into account in assessing whether or not
15 the entity can charge excessive prices is the extent to which it would be restrained
16 from doing so by the prospects of regulatory intervention to stop it."

17 Then at para.89:

18 "As Mr. Roth pointed out, this point is an unattractive one when taken as a matter of
19 principle. If it were good point then one would expect it to be frequent, if not a
20 universal answer to any attempt to impose ex ante regulation. Any entity in respect
21 of which it was said it could behave independently of its market counterparts would
22 be likely to say that it could not and would not do so because if it did it could see
23 that it would attract regulatory intervention. It would therefore argue that it does not
24 in fact have SMP within the guidance given in Article 14(2)."

25 Now, this is very significant because, of course, the CAT rejected that submission by H3G
26 for the reason that is set out here. But, in my submission, and I will develop this when we
27 come on to look at the defences, and skeleton arguments, particularly of Ofcom, Ofcom has
28 revised this fallacy and put it at the heart of its defence, because what Ofcom says, and the
29 Tribunal will have seen that Ofcom's gambit on this issue is an apocalyptic vision of the
30 end of all ex ante regulation on a pan-European basis if our argument is right. But the basis
31 upon which Ofcom argues that is that it has misunderstood us to be maintaining the
32 position, so it is the possibility of the regulation of H3G by an SMP condition which
33 prevents us having SMP, the circular argument which was rejected – rightly – by the CAT
34 in this case. Of course, that is not our case. Our case relates to the regulation of BT, not the

1 regulation of H3G. My submission is that at the very heart of Ofcom's error in this case is
2 its failure to appreciate that distinction. That appears in its original decision, and is still
3 being maintained now in the argument that develops.

4 So they then, not surprisingly, at para.90 say that they do not think that they are bound to
5 take into account the threat of regulation that could be imposed on H3G as meaning that
6 H3G does not have SMP.

7 We then turn on to para. 95:

8 "Reliance was placed by Ofcom on a decision of the Commission in the *Reg TP*
9 case. Ofcom submitted that the reasoning of this decision supported its case on
10 this point."

11 Then they say that although not strictly binding they should give deference to it. Then over
12 the page at 96:

13 "Reg TP was minded to find that the incumbent operator (DTAG) had SMP in the
14 market for call termination on its network, but that 53 other networks, ('ANOs')
15 did not. DTAG was under a regulatory obligation to interconnect with the ANOs,
16 but in assessing whether DTAG had countervailing buyer power Reg TP had left
17 this factor out of account. It did so on what were described as a 'strict Greenfield
18 approach' and a 'modified Greenfield approach'. The 'strict' approach was one in
19 which it assumed that the interconnection obligation did not exist. The 'modified'
20 approach was one in which the obligation was recognised to exist but under which
21 it was regarded as methodologically wrong to take it into account in assessing the
22 market power of each ANO.

23 97. The Commission rejected the former approach. At paragraph 22 of it
24 decision the Commission dealt with the 'strict Greenfield' approach and stated:

25 'In economic terms, it is not appropriate to exclude regulatory
26 obligations that exist independently of an SMP finding on the market
27 under consideration but that can have an impact on the SMP finding on
28 the markets under consideration. From a methodological viewpoint
29 obligations flowing from existing regulation, *other than the specific*
30 *regulation imposed on the basis of SMP status in the analysed market,*
31 *must be taken into consideration when assessing the ability of an*
32 *undertaking to behave independently of its competitors and customers on*
33 *that market'.*" (emphasis supplied)

1 Now, we submit that is a critical point of distinction, that the distinction was drawn in the
2 *Reg TP* case is between regulation, which arises because of a finding of SMP, it is
3 obviously circular and wrong to say: “There is no SMP because if I behaved excessively I
4 could be regulated for SMP”, clearly that is wrong. When you are analysing the market and
5 there are other regulatory obligations, which are nothing to do with a finding of SMP, as the
6 end to end obligation in this case, which is not an SMP condition but imposed under the
7 Access Directive under a completely different separate regime, then it is not circular to take
8 that into account when considering whether or not the counterparty has SMP.

9 MR. SCOTT: I see what you are arguing from para.22, and I think one has regard to the
10 circumstances in which the Commission were operating there where their concern was with
11 DTAG who had an SMP situation. In para. 98 we then turn to para. 23 where the purpose
12 of the Greenfield approach is indeed to avoid circularity and market analysis.

13 MISS ROSE: Yes. Exactly.

14 MR. SCOTT: In due course I think we may have to examine the RegTP decision on the facts of
15 that extends in the way that you have suggested to the combination to E2E and TRD where
16 the effect of the reasonable price that you have been talking about could, in effect, be the
17 imposition of a price control on H3G. Now, I know that that is to embrace the points to
18 which you are coming, but I think we may have to come back to what happens if you are
19 not dealing with the SMP situation, but looking at the TRD situation. Do those words that
20 you have italicised in 97 ----

21 MISS ROSE: What I have italicised I mean.

22 MR. SCOTT: When read in the context of 23 and the argument about the combination of E2E
23 and TRD, what that means. We have not made up our minds, but I think we are going to be
24 hearing argument on that.

25 MISS ROSE: Sir, you are absolutely, with respect, correct. That is the crunch question. In my
26 submission we do not need to worry about the RegTP’s decision because, in fact, the answer
27 to it is given in our own decision in the first appeal. If I can just pre-figure the point, there
28 has been an elision in Ofcom’s approach between consideration of the effect and scope of
29 the end-to-end obligation on BT and the potential for regulation of H3G. In my submission,
30 that is the wrong approach because what is permissible to take into account is the question:
31 At what price would Ofcom oblige BT to connect with H3G? Not: At what price would
32 Ofcom oblige H3G to offer MCTT. I have just said about four acronyms in one sentence,
33 which proves that I am now a Telecoms lawyer. But, that is the crucial distinction. You
34 will see that this is something that we developed in our skeleton argument. We submit that

1 Ofcom has said, “It would be disproportionate for us to impose a price on H3G in resolving
2 this dispute. It was effectively an SMP condition”. That is their horror and shock. But, they
3 are asking themselves the wrong question. The question is not: What price would they
4 impose on H3G? The question is: What price would they force BT to pay? In my
5 submission, if a dispute is referred where there is not a finding of SMP -- where a dispute is
6 referred by BT because they think that they are being to asked to interconnect at an
7 excessive price -- it is not a reasonable price -- and therefore they say, “We’re not obliged to
8 connect at this price under the end-to-end obligation”, and H3G says, “You are obliged to
9 connect at this price under the end-to-end obligation”. That is the dispute. That is referred
10 to Ofcom.

11 The right and proportionate way for Ofcom to resolve that dispute is not by imposing a
12 price, but by making a declaration. As we will see, one of the powers that Ofcom has under
13 s.190 to resolve disputes is to make a declaration of the rights and obligations of the parties
14 to the dispute. So, the right course is for Ofcom to declare what is the maximum reasonable
15 price at which BT can be obliged under its obligation to connect with H3G. Now, the effect
16 of that declaration is not to impose any price control on H3G. The parties remain free to
17 negotiate commercially above or below the price that has been declared. All that Ofcom has
18 done is to clarify the obligation of BT under its separate regulatory end-to-end connectivity
19 obligation. That is the proper analysis, in my submission. That is where Ofcom have gone
20 wrong, with all due respect to them.

21 I could sit down because that is the answer to this case - but I am not going to. But, that is
22 the answer.

23 THE CHAIRMAN: The point that you make as regards the RegTP point -- I am not quite sure
24 whether it is of two things you are saying. First of all, as far as the greenfield approach is
25 concerned, the circularity only arises when you are looking at whether you should impose
26 precisely the kind of regulation that is in debate - namely, SMP regulation.

27 MISS ROSE: That is right.

28 THE CHAIRMAN: And that even if one did construe what is happening under an E2E obligation
29 as partly regulating BT, but also regulating H3G, because that is not the regulation that is in
30 issue here, one disregards that. Or, are you saying, “We accept that one has to disregard all
31 possible forms of regulation on H3G because that is the market power we are considering,
32 but the TRD dispute resolution procedure, so far as it relates to end-to-end connectivity is
33 not regulation on H3G; it is regulation on BT and that is why it is not ruled out by
34 greenfield”. Now, which of those two are you saying?

1 MISS ROSE: You may be depressed to hear I am saying both. The point I was making in answer
2 to Mr. Scott was the second point - the narrow point, which, in my submission, is enough
3 for us to succeed on this appeal. But, we do also maintain the wider proposition, which is
4 that the point that is being addressed by TRG and by the RegTP decision and endorsed by
5 CAT is, as you say, madam, that it is SMP regulation that must be left out of account. You
6 do not have the circularity problem if you are talking about other forms of regulation.
7 Now, that argument only really becomes necessary for me in relation to the H3G/Orange
8 TRD dispute, because that is a dispute which did not involve end-to-end connectivity
9 obligation. But, it is not something that I need for this main part of our principal appeal.
10 But, we do maintain in.

11 MR. SCOTT: Sticking with para. 98 for the moment - and the last part of that - it follows that the
12 potentially regulated person cannot say that it does not have SMP because the threat of
13 regulation means that it does not have the necessary power. That would be logical.

14 MISS ROSE: Yes.

15 MR. SCOTT: What you are saying then is that that threat of regulation is to be interpreted in a
16 narrow way ----

17 MISS ROSE: That is talking about SMP regulation. It is clear from the quote from para. 23
18 where it is said that the purpose of a Greenfield approach is, indeed, to avoid circularity ...
19 by avoiding that when as a result of existing regulation a market is found to be effectively
20 competitive, which could result in withdrawing the regulation, the market may return to a
21 situation where there is no longer effective competition". In other words an greenfield
22 approach must ensure that absence of SMP is only found, and regulation only rolled back
23 where markets have become sustainable competitive, and not where the absence of SMP is
24 precisely the result of the regulation in place.

25 In other words, if it is only the regulation that is stopping you having SMP, you cannot
26 disregard the regulation and say, "There's no SMP2". That is clear. That is what the
27 tribunal is dealing with.

28 Looking at para. 99,

29 "Although that decision turned on a consideration of the effect of regulation on someone
30 other than the person who is the subject of the investigation (the equivalent of BT in the
31 present case) we agree that the reasoning applies as Ofcom says it does. The effect of this is
32 that the possibility of regulation being brought to bear on H3G is a factor that cannot be
33 prayed in aid by H3G as militating against its having SMP. We reiterate that H3G's
34 submissions would give rise to an illogical and unattractive, if not an unprincipled position,

1 and we consider them to be wrong. The correct position is as found in the RegTP decision,
2 namely that regulatory obligations on a market counterparty can be taken into account, but
3 not the potential for regulation on the party whose market position is under consideration”.
4 Now, my primary submission is simply, “Yes. Yes. Yes. Yes. Look only at the regulation
5 on BT”. My secondary submission, implicit in that, is “SMP regulation on the party whose
6 market position is under consideration.

7 So, we now come to the second issue, which is countervailing buyer power. As you can
8 see, they start to deal with that at para. 100. We do not need to go through the details of the
9 determination. If we go to para. 109,

10 “Ofcom’s case on CBP turns on two principal points - the obligation of BT to connect (and
11 maintain a connection) because of the end-to-end connectivity obligation, and the inability
12 of BT to have resort to a different source of supply. The decision focuses on the former,
13 with little reference to the latter ... Together they clearly amount to factors which are
14 capable of negating any CBP

15 110. However, the way in which the case is put by H3G turns on whether they are,
16 on the facts, sufficient, or whether there should have been a further consideration of
17 the facts in order to make a more fully informed decision about CBP. In this context
18 the first thing that we point out is the significance of CBP. The legislation does not
19 contain a definition to which one can turn. It is part of an overall assessment of
20 whether there is SMP. We consider that the following points have to be borne in
21 mind ----“

22 I invite you to look through those. Of particular significance to us is para. (c),

23 “For these purpose the right question is not the binary one of whether CBP exists or not. In
24 other words, it is not enough to ask whether there is CBP, and if so to hold that there cannot
25 be SMP. CBP is the power of counterparties to offset the powers of the party whose
26 allegedly superior powers are under consideration, and the important question is what
27 degree of CBP is there, and (bearing in mind all the circumstances) does it operate to a
28 sufficient extent so as to mean that there is no SMP. CBP is not an absolute concept in
29 terms of its strength. It is a concept which embodies a possible range of strengths”.

30 So, the question is not: is there CBP, but how much of it is there?

31 MR. SCOTT: We rushed past para. 110(a), thought we did read it earlier on when we were
32 reading the recitals.

33 “The underlying principle in a case like this is whether there is effective competition.”

1 In other words, the task that Ofcom have to undertake primarily is: Is this a market in which
2 competition is effective? Now, you have said to us that you are coming back to that, but
3 that underlying principle runs through from the framework directive to this paragraph.

4 MISS ROSE: Of course that is right. But, of course, Ofcom are bound by the decision that they
5 took, and the decision that they took in this case regarded the existence and extent of BT's
6 CBP as critical in order to answer the question: Is there competition in this market?
7 Therefore, if Ofcom have erred in their assessment of BT's CBP the matter must go back
8 for re-consideration - unless, of course, you conclude that the only correct conclusion is that
9 there was CBP which is, of course, our primary case. Those are the only two options. One
10 cannot, on the facts of this case sustain its decision on the basis of, "Oh, well, it wasn't a
11 competitive market anyway" given the enormous emphasis that they place themselves on
12 the issue of CBP which, of course, had its own separate chapter in the decision.

13 At para. 111,

14 "We turn first to Ofcom's treatment of, and reliance on, the 'no alternative supplier' point.
15 It is, of course, obviously true as a matter of fact. On the facts there is no other way in
16 which BT can procure termination on H3G's network other than by purchasing termination
17 from H3G itself. However, we do not accept that taken by itself it is sufficient to negate
18 bargaining power to an extent sufficient to destroy any CBP that might otherwise have
19 existed. Such an approach is too mechanistic".

20 So, it is not enough that there is not an alternative source of supply.

21 Then, at para. 114,

22 "The earlier documents clearly give the end-to-end connectivity obligation a central, and
23 probably determinative, position. The May and December reviews clearly indicate that the
24 obligation, by itself, removes any bargaining position that BT had or might have had. In its
25 submissions H3G disputed that conclusion (and indeed it contested that there was such an
26 obligation, but that does not matter for present purposes since it now accepts that there is
27 such an obligation)".

28 There is a degree of irony that Ofcom now accepts that there was no such obligation. But,
29 we will pass that by.

30 Here there is a reference to the explanatory memorandum from the European Commission's
31 recommendation on market definition.

32 "Small networks will normally face some degree of buyer power that will limit greatly the
33 associated market power ... The existence of a regulatory requirement to negotiate
34 interconnection in order to ensure end-to-end connectivity redresses this imbalance of

1 market power. However, such a regulatory requirement would not endorse any attempt by a
2 small network to set excessive termination charges”.

3 Again, we submit that is an absolutely critical quotation. It fatally undermines Ofcom’s
4 position on this appeal. The whole point of the end-to-end connectivity obligation is to
5 promote competition between BT as the incumbent fixed network provider and small
6 networks like H3G. It is bizarre and absurd for Ofcom to either impose, or to construe the
7 obligation as imposed, as bestowing market power on H3G because it completely
8 hamstring BT from negotiating a price. That is precisely what the Commission say here,
9 because they say such a regulatory requirement would not endorse any attempt by a small
10 network to set excessive termination charges. Ofcom, with respect, have got to explain to
11 this tribunal how it is that they think they have the power to impose such an obligation.

12 “Consequently, there is still likely to be an imbalance of market power between large
13 and small networks because it would be easier for a large network to initiate the step
14 of raising call termination charges and it would be more difficult for a small network
15 to resist a move by a large network to lower call termination charges”.

16 This reference here is to the addition of the explanatory memorandum which was current at
17 the time that this first appeal was determined. We now have a second edition of this
18 document dating from 2007. That is at Bundle H1, Tab 18. Keep H2 open because we have
19 not finished with the CAT appeal. I want to take a little diversion to look at the up-to-date
20 document in context. I do not actually have a date on it, but it has a 2007 reference. If
21 someone can say what the precise date was, that would be appreciated.

22 MR. ROTH: If it helps, the recommendation to which this is the explanatory memorandum,
23 which you have at Tab 9 in this bundle -- I think this is the accompanying document. The
24 new recommendation is at 9. That was issued on 17th December, 2007.

25 MISS ROSE: So, it is hot off the press.

26 MR. ROTH: The reference is OJ 2007 L344/65.

27 MR. SCOTT: Just for the record, the copy in the bundle is the undated earlier edition, and the
28 reference that Mr. Roth has just made is to the official journal version, which is not the
29 version in the bundle. As far as I know, they are identical in their wording.

30 THE CHAIRMAN: I hope so. If not, we may have more deep-seated problems than we realise.

31 MR. ROTH: I imagine they are. This was how it was put out by the Commission, and then it was
32 published in the journal. It does not suggest any difference.

33 MISS ROSE: Is that OJ reference, the reference for the document that is at Tab 18 or at Tab 9.

1 MR. ROTH: Tab 9. I have not got the reference - we can try and get it - for the one at Tab 18. I
2 think that would be in the C series.

3 MISS ROSE: Just to come to the document, we can actually look first at the document at Tab 9,
4 to which this is an accompaniment. You can see, if you go to the first page, the second
5 paragraph of the recital to this document.

6 “The purpose of this recommendation is to identify those products and service markets in
7 which ex ante regulation may be warranted in accordance with Article 15(1) of the
8 Directive”.

9 If you go to the annexe where the market are listed - at p.8 at the back of the tab - you can
10 see that voice call termination on individual mobile networks is listed there. It is a slightly
11 different list from that which previously applied.

12 If we now go to the explanatory note at Tab 18 ----

13 MR. SCOTT: Can you go back to Tab 9. There are one or two points that are just worth noting.
14 The first is in para. 4 of the recommendation itself. This goes to the argument you are going
15 to make about the E2E TRD combination. In the middle of that paragraph it says, “Markets
16 in the electronic communications sector are often of a two-sided nature ----“ It is going to
17 end up by saying whether they have the characteristics which may justify the imposition of
18 ex ante regulatory obligations. Then, at the end of para. 5, “The third criterion is that the
19 application of competition law alone would not adequately address the market failure(s)
20 concerned.” That, again, is reflected in some of the arguments in the pleadings. I think it is
21 just worth remembering those points for the future.

22 The competition law one recurs again in para. 13. In para. 15,
23 “Member States can ensure that as much of the value chain is open to normal competition
24 processes as possible, thereby delivering the best outcomes for end-users. This
25 recommendation therefore mainly identifies wholesale markets, the appropriate regulation
26 of which is intended to address a lack of effective competition that is manifest on end-user
27 markets”.

28 In other words, it is the same point again - that what we are doing in this wholesale market
29 has its impact on the end market. In fact, when you come to the annex to this, the word
30 ‘wholesale’ disappears ----

31 MISS ROSE: It says ‘wholesale level’. Sir, that is absolutely right. That brings me to the first
32 important point from the explanatory memorandum, which is at p.11 in Tab 18. You
33 helpfully referred to the three cumulative criteria that are set out at para. 4. What is said on
34 p.11 - the paragraph above para. 2.3 -

1 “The three-criteria test focuses on market characteristics. It is intended to determine where
2 persistent market failures, that ultimately cause consumer harm, are most likely to exist. As
3 such, the three-criteria test is different from the SMP assessment. Whereas the three-criteria
4 test focuses on the general structure and characteristics of a market in order to identify those
5 markets whose characteristics are such that they need to be analysed in more detail on a
6 national basis by NRAs, the SMP assessment focuses on the market power of a specific
7 operator in a given market with a view to determining whether that operator should or
8 should not be made subject to ex ante regulation in that particular market. Meeting the
9 three-criteria test does not automatically mean that regulation is warranted. Regulation will
10 only be warranted if on a market that meets the three-criteria test, one or more operators are
11 found to have significant market power. NRAs should follow the same basic criteria and
12 principles when they identify markets other than those appearing in this recommendation”.
13 That is crucial because with respect to Ofcom, some of their arguments appear to be along
14 the lines of, “Oh, well, this has been the market that the Commission designated and all the
15 other NRAs have found that people have SMP on this market, and so we have to find
16 there’s SMP on this market as well”. Well, with great respect, Ofcom cannot take that
17 approach. It is very interesting that other NRAs have found SMP on a wholesale call
18 termination market in their own jurisdictions, but that is not really relevant to the task that
19 Ofcom has to undertake, which is to determine the position of H3G n this particular national
20 market, in the particular conditions that pertained in the United Kingdom.
21 We then come on to wholesale call termination. That section of this document starts at p.24.
22 The passage to which I wish to refer appears at p.25. This is effectively the updated version
23 of the text cited in the first H3G appeal.
24 “However, such a market definition - call termination on individual networks - does not
25 automatically mean that every network operator has significant market power; this depends
26 on the degree of any countervailing buyer power and other factors potentially limiting that
27 market power. Networks, in exchanging traffic in the absence of regulation, will normally
28 face some degree of buyer power that could limit their associated market power. Without
29 nay regulatory rules on interconnection, a net work with few subscribers may have limited
30 market power relative to a larger one in respect of call termination. The existence of a
31 regulatory requirement to negotiate interconnection in order to ensure end-to-end
32 connectivity (as required by the regulatory framework) redresses this imbalance of market
33 power. However, such a requirement would not permit any attempt by a smaller network to
34 initially set excessive termination charges. The existence of buyer power, and the ability of

1 network operators to raise termination rates above the competitive level should be examined
2 on a case-by-case basis in the context of the SMP assessment on this market. Accordingly,
3 one should examine the ability of network operators to raise termination rates not only vis-
4 à-vis the incumbent fixed network operator, but also vis-à-vis operators that may have less
5 buying power”.

6 Now, the latter point is not of significance for the UK market because of the point that BT
7 indirectly transits calls from other networks. So, it is essentially BT who is the monoptionist
8 in this situation. But we still see the caution being exercised by the Commission in saying,
9 “First of all, you cannot assume that just because the market meets the three cumulative
10 criteria, regulation is warranted. You have got to find SMP. Secondly, you cannot assume,
11 just because all network operators have a 100 percent market share on interconnection with
12 their market, that they therefore have SMP. You have got to look at the particular
13 conditions. If you had a situation where there was no end-to-end obligation on BT it is
14 likely that BT would be dominant in this situation. But, given the existence of the end-to-
15 end obligation, you have to ask, “What is the effect of that upon BT’s countervailing buyer
16 power”.

17 THE CHAIRMAN: If this dates from December 2007 obviously it post-dates the various matters
18 that Ofcom was considering, but you are taking us to that presumably because you say that
19 nonetheless this is just the up-to-date thinking which one can read back across all the
20 periods that we are talking about, or ----

21 MISS ROSE: Madam, I do not submit that it is significantly different from the previous edition
22 that was cited. I simply want the CAT to be aware of what the up-to-date position is. I
23 should say in passing that, of course, in relation to the remedies part of this appeal we do
24 seek to rely on some later material. In particular, you will have seen the ELG consultation
25 document concerning the question of asymmetric regulation, which is a more recent
26 document but which we submit does in fact set out the correct approach that Ofcom should
27 have adopted, but did not.

28 Back then to the first H3G Judgment in file H2.

29 MR. SCOTT: Sorry, just before you leave **this** document, and it may be that we will come back
30 to this when we come to the question of remedy. But on pages 40, 41, 42, 43 and 44, there
31 are a variety of points that arise some of which, for example, on p.44 in the fourth full
32 paragraph ----

33 MISS ROSE: Can you read me the words?

34 MR. SCOTT: Yes:

1 “A market definition – however whether every operator then has market power
2 still depends on whether there is countervailing buyer power which would render
3 any non-transitory price increase unprofitable.”

4 MISS ROSE: Yes.

5 MR. SCOTT: That is an example of the sort of material that we have here, and then the decision
6 – this is the last paragraph in that section – “ to the need to fully examine the issue of
7 countervailing buyer power on a case by case basis when analysing the existence of SMP on
8 this market.” So in those pages there is quite a lot of material that is relevant to that about
9 which we are talking.

10 MISS ROSE: Sir, there is, I agree. Of course, the essential point which comes out is that which I
11 have submitted, that you cannot assume SMP just because it is a designated market, you
12 have to find it. In order to find it you must analyse countervailing buyer power – you have
13 to make a proper assessment of the extent of countervailing buyer power.
14 So we are back at H2, tab 12, and if you look at para.116, we can see how Ofcom was
15 putting its case at that time.

16 “The response of Ofcom, having considered this material, is set out above.

17 Paragraph 3.30 of the Decision is not on its face quite as unequivocal as its earlier
18 pronouncements to the effect of the end-to-end obligation, but we think that it seems
19 to be intended to say the same thing. We are strengthened in t his view by Ofcom’s
20 arguments before us. In its skeleton argument it contended that:

21 ‘... once it is clear that Bt has an obligation to provide end-to-end
22 connectivity and therefore *must* do a deal with H3G, which is the only
23 source of access to subscribers on its network, BT has no effective
24 negotiating ploys to counter H3G’s market power derived from its 100%
25 of the market and the absolute barriers to entry to that market.

26 And then Mr. Roth in oral submissions;

27 “BT alone, it is found, did not have any buyer power because of end-to-end connectivity.”

28 That was Ofcom’s position at that time.

29 Then at 118:

30 “We consider that in this respect Ofcom’s reasoning and decision are flawed. We
31 consider there were to errors. The first is the determination or assumption that the
32 end-to-end connectivity obligation removed any bargaining power BT might
33 otherwise have had with the effect that likely or possible future commercial
34 scenarios were not considered by Ofcom. The second is an apparent

1 misunderstanding of Ofcom’s powers in relation to dispute resolution. Ultimately
2 these factors are linked.”

3 Then as to the first they say it is helpful to understand ----

4 THE CHAIRMAN: Miss Rose, we are familiar with this Judgment, I am just concerned at the
5 time moving on, perhaps you can move to what submissions you want to make as to the
6 Judgment.

7 MISS ROSE: Madam, can I just identify some other important passages in it? Paragraph 121,
8 there is a conclusion about what the effect of the obligation was on BT – an obligation to
9 allow connectivity but not on terms specified by the other operator. The scheme envisaged
10 negotiation and the terms and conditions would have to be agreed.

11 “In the event of a disagreement as to any terms the Director was to decide the term
12 in question.”

13 So the same regime as that which is in consideration in this appeal, that there is an
14 obligation to interconnect but not at any price. The parties first of all negotiate, if they
15 cannot reach agreement, the question of the price is referred to the regulator.

16 We then come to para.124, this is the entitlement of Ofcom to require that there should be
17 interconnection. Then at 125:

18 “What all that amounts to is a regime in which interconnection is to be expected,
19 and compelled if necessary, but not on whatever terms a provider specifies.”

20 The crucial point:

21 “BT was under an obligation but not on whatever terms another network operator
22 might propose ... A complete description of the obligation involves adding that
23 the terms would be agreed between the parties or determined by the regulator, and
24 they would be ‘fair and reasonable’.

25 Then at 126 the errors in the decision are identified. The failure of Ofcom to consider how
26 the end-to-end obligation operates but simply the assumption that its existence removes
27 countervailing buyer power and then it is said:

28 “The assessment of countervailing buyer power is an assessment of how the
29 market actually operates (or is likely to operate) on the true facts, not on artificial
30 ‘facts’ or partial facts.”

31 Again, we rely on that because we do rely in fact on the findings of fact that Ofcom has
32 made in this case and we say it found all the right facts but then made an error of law as to
33 the way that “reasonable” should be interpreted in the end-to-end obligation.

34 So then it is said:

1 “It is an obligation with some room for manoeuvre on negotiation, because the terms
2 are to be reasonable and ultimately any dispute will be settled by someone else (the
3 regulator). It is an obligation in those terms which has to be considered in the
4 context of an assessment of countervailing buyer power. To look just at the
5 obligation is not to consider the true facts.”

6 So clearly an anticipation by the CAT that the proper obligations to be considered including
7 the scope for the resolution of disputes by the regulator.

8 Then they say at 127 that this approach is supported by the Commission, and they refer to
9 the *Reg TP* case.

10 At 128:

11 “This error on the part of Ofcom means that it failed to consider the full possible
12 scope and effect of countervailing buyer power. Its consideration stopped short of
13 a full consideration.”

14 Then at 129 a second error – Ofcom’s perception of the limits to its powers as expressed in
15 submission. The argument that was being made at this stage was that Ofcom had no power
16 to fix the price if a dispute was referred under the end-to-end obligation unless there had
17 been a finding of SMP. The Tribunal will recall that we looked at these paragraphs in
18 relation to the Orange preliminary appeal, and that is what Ofcom was arguing at that time,
19 that they could not resolve an end-to-end dispute unless there was a finding of SMP,
20 because that would subvert the SMP regime.

21 Now, Ofcom have moved slightly to accommodate this Judgment, and they say “Okay, we
22 accept that we could resolve the dispute, but when we did that we set an excessive price,
23 because if we set a competitive price we would be subverting the SMP regime.

24 In my submission, the new argument that Ofcom have adopted in an attempt to avoid the
25 implication of this Judgment is far more absurd even than the argument that they ran in the
26 first place. Having said that they could not resolve the dispute at all they now say that they
27 would resolve it at an excessive price, or that they are entitled to resolve it at an excessive
28 price. We rely upon the reasoning of the CAT for saying that there would not be subversion
29 of the SMP regime because there are two parallel dispute resolution processes, and the
30 Tribunal will recall we investigated all this in the Orange appeal under the Access Directive,
31 two parallel processes for dispute resolution – one dealing with access conditions, another
32 dealing with SMP, completely each without prejudice to the other, so that the fact that
33 Ofcom has the power to resolve access related questions has nothing whatever to do with
34 SMP, or a finding of SMP. It is Ofcom’s job simply properly to construe the end-to-end

1 obligation and make a ruling on it, having regard to its statutory duties. The error is
2 identified by the CAT at para.131, where the point is made that disputes relating to price
3 count as access disputes. At 132 Mr. Roth's arguments fail:

4 "The possibility of dispute resolution by Ofcom in the future is therefore part of the overall
5 picture which has to be taken into account in assessing whether BT has a real and effective
6 bargaining position."

7 Now, this is the passage which we say means that BT's position on this appeal is
8 unsustainable, because BT is seeking to maintain the position on this appeal that in fact
9 Ofcom's dispute resolution power should not be taken into account at all. That, we submit
10 is simply unsustainable in the light of para.132. We also rely in that regard on para.134.

11 Finally, just looking at the final paragraphs and conclusions, at 139:

12 "The Decision therefore errs in not considering the true effect and extent of the
13 end-to-end connectivity obligation. It does not necessarily give rise to a situation
14 in which H3G holds all the cards in negotiation. We cannot decide its real effect
15 because we do not have the information and it is quite conceivable that a fuller
16 consideration would lead to the same result, but we can say that the situation
17 requires further investigation and consideration. ..."

18 Then "Conclusions on CBP", para.142 in particular:

19 "... we have borne in mind the fact that under t his head regulation is brought into
20 account in determining CBP, whereas regulation of H3G is left out of account in
21 looking at this side of the SMP assessment. There is nothing inconsistent in this
22 approach.. We have identified the illogicality in allowing a presumption of
23 regulation of a putatively regulated body. That does not apply to a consideration
24 of CBP where one has to consider the question of a counterparty. In assessing the
25 position of that counterparty it would be illogical not to look at the effect of
26 regulation, so Ofcom were quite correct in doing so in this case ... the full factual
27 position must be looked at – one must look at how far the regulation will actually
28 operate in any deemed negotiations."

29 So that is the crucial point. How far the negotiation will actually operate in any deemed
30 negotiation.

31 We do submit that it is clear from the first H3G Judgment that it was essential for Ofcom
32 when considering whether H3G had SMP, first to assess the extent of BT's countervailing
33 buyer power. Secondly, in making that assessment to take into account the end-to-end
34 obligation on BT, and properly to construe the nature and effect of that obligation; and

1 thirdly, to take into account the effect of regulation on BT, including the possibility of
2 dispute resolution in relation to the end-to-end obligation.

3 That brings me to Ofcom's powers and duties when setting an access condition. We are in
4 H1 now at the Access Directive, tab 4. These submissions go, of course, to the dual
5 question, first: what were Ofcom's powers when setting the condition, and therefore is the
6 condition as Ofcom seeks to construe it *ultra vires*? Secondly, they go to the question of
7 what is the proper construction of a condition, because if at all possible the end-to-end
8 obligation should be construed compatibly with the European obligations that Ofcom is
9 bound to implement.

10 Again, we looked at some of this material in relation to the Orange preliminary issue, and
11 the Tribunal will recall in particular paras. 5 and 6 in the Recital. Paragraph 5 was the
12 Utopian market – the open and competitive market where there should be no restriction on
13 undertakings connecting with each other – a sort of sylvan idyll of interconnection.

14 Then the reality at para.6:

15 “In markets where there continue to be large differences in negotiating power
16 between undertakings, and where some undertakings rely on infrastructure
17 provided by others it is appropriate to establish a framework to ensure the market
18 functions effectively.”

19 And that is the basis of the power to secure interconnection, and in particular you will note
20 that it says:

21 “In particular they may ensure end-to-end connectivity by imposing proportionate
22 obligations on undertakings that control access to end-users.”

23 So the power to impose the end-to-end obligation on BT is the power to impose a
24 proportionate obligation on BT, and one makes the obvious question: “How is it
25 proportionate to impose an obligation on BT to buy interconnection at an excessive price.

26 MR. SCOTT: Just pause for a moment, in relation to BT this is the 2(f) obligation. This
27 particular passage is undertakings that control access to end users which, in this case is H3G
28 not BT, so that particular paragraph is not relevant, it seems to me, to your argument. It
29 may be relevant to other matters.

30 MISS ROSE: Sir, with respect, I do not accept that that is right because ----

31 MR. SCOTT: Are you suggesting that it is BT that controls access to your clients' customers?

32 MISS ROSE: I take the point in relation to that specific ----

33 MR. SCOTT: The general point is that that particular paragraph does not aid you.

34 MISS ROSE: Not the paragraph but perhaps the sentence.

1 MR. SCOTT: Sorry, that particular sentence, correct.

2 MISS ROSE: The reasoning is obviously applicable to all end-to-end connectivity obligations,
3 that they must be proportionate, and you cannot impose a disproportionate obligation to
4 interconnect.

5 MR. SCOTT: The point, it seems to me, that the paragraph is making, and we may come to this
6 in relation to the impact of the interrelationship between end-to-end and TRD, is that what it
7 is talking about is imposing a proportional obligation on the terminating party. Now, your
8 argument is going to be that what Ofcom were doing was imposing an obligation on BT, not
9 an obligation on your client.

10 MISS ROSE: Yes, but Ofcom are seeking to contend that they were imposing what would be a
11 disproportionate obligation on BT.

12 MR. SCOTT: Yes.

13 MISS ROSE: An obligation indeed which, on Ofcom's own case, distorts competition in the
14 market.

15 MR. SCOTT: We have to remember that this is not an appeal against the E2E obligation and that
16 is ----

17 MISS ROSE: No, it is not, sir, but the validity of the E2E obligation is an important point. I have
18 put my case in two ways. First, I have said that Ofcom have misunderstood it, and there is
19 really nothing in the E2E obligation that requires it to be construed in the way that Ofcom
20 does, it was simply a question of what you mean by the word reasonable, and I submit the
21 word "reasonable" does not mean excessive, it does not mean "anti-competitive" and it does
22 not mean having a detrimental effect on end users. Indeed, all those things are
23 unreasonable.

24 Now, if I am wrong about that and this Tribunal thinks that "reasonable" does mean all
25 those things then Ofcom have no power to impose that obligation in the first place, and we
26 submit that it is quite self evidently not with Ofcom's powers to impose ex ante SMP
27 regulation on H3G because it has distorted the market as a result of its own unlawful
28 conduct.

29 Article 1 sets out the scope and aim of the Directive, I do not think we need to spend time
30 on it, we are familiar with it; this is all very familiar territory. Article 4 is the rights and
31 obligations on undertakings, and in particular the obligations to negotiate interconnection
32 which, of course, we see in GC1.1 domestically.

33 Then Article 5 – the "Powers and responsibilities of the NRA with regard to access and
34 interconnection" and, as I submitted in the Orange case, this is the source of Ofcom's power

1 to impose the end-to-end obligation. This is an important provision, because we submit
2 Ofcom does not appear to have understood the implications of this provision.

3 So at para 1:

4 “National regulatory authorities shall, acting in pursuit of the objectives set out in
5 Article 8 of the [Framework Directive] encourage and where appropriate ensure,
6 in accordance with the provisions of this Directive, adequate access and
7 interconnection and interoperability of services, exercising their responsibility in
8 away that promotes efficiency, sustainable competition, and gives the maximum
9 benefit to end-users.”

10 So that whenever Ofcom is exercising the power to impose an end-to-end obligation or
11 indeed construing or applying the end-to-end obligation it must have in mind the duties
12 under Article 8 of the Framework Directive, under three specific duties highlighted here –
13 efficiency, sustainable competition and the maximum benefit to end-users. Again, one asks
14 the question how Ofcom’s gains from trade approach which says that any price is
15 reasonable if it can be passed on to the consumer is compatible with that duty.

16 Then you will note the second paragraph: “Without prejudice to SMP ..” so this is
17 completely separate from SMP, and then at (a) NRAs shall be able to impose:

18 “(a) to the extent that is necessary to ensure end-to-end connectivity, obligations
19 on undertakings that control access to end-users, including in justified cases the
20 obligations to interconnect their networks where this is not already the case.”

21 I accept that is dealing with access to end-users buy nevertheless this is the provision from
22 which we find the source of the end-to-end obligation.

23 Then at para. 4 there is the dispute resolution provision that we considered in detail in the
24 Orange case.

25 MR. SCOTT: Paragraph 4 – I think it is worth noting that the NRA is empowered to intervene at
26 its own initiative where justified, or in the absence of agreement, so Article 5 does look like
27 a pro-active ----

28 MISS ROSE: Yes it does indeed, sir. That is quite right. I am going to return to that point. You
29 will recall that we looked at the domestic legislation that implemented that as well, because
30 one of the points that Ofcom has sought to make is that it is not satisfactory just to leave the
31 parties to negotiate with the end-to-end obligation setting the parameters of the reasonable
32 price, because we would not have the power to intervene, it is quite wrong.

1 Of course, this Directive, these provisions refer us back to the basic objectives at Article 8
2 of the Framework Directive, again these are very familiar, we do not need to look at them in
3 detail – you will find these at tab 6.

4 We emphasise in particular, para.2 of Article 8, promotion of competition and (a) maximum
5 benefit to end-users in terms of choice, price and quality. So “price” specifically mentioned
6 there, the price paid by end-users has to be taken into account by Ofcom when applying and
7 construing the end-to-end connectivity obligation under Article 5 of the Access Directive, it
8 is not entitled to say “You can pass it on, what’s the problem?”

9 MR. SCOTT: While you are on that page, we should just note the (c) and (d) all of which may
10 fall to be discussed either under this head or the next matter to which you come.

11 MISS ROSE: Yes. That brings me then to the 2003 Act and the powers that Ofcom has under the
12 domestic legislation to impose the end-to-end connectivity obligation, that is tab 8 in this
13 bundle. General duties of Ofcom, sections 3 and 4. Again, very familiar territory for
14 everybody. The principal duties, to further the interests of citizens, and to further the
15 interests of consumers in relevant markets where appropriate by promoting competition. I
16 do not make my rhetorical point again, but you have it in mind.

17 Then at subparagraph 3, a whole list of the matters to which Ofcom must have regard in
18 performing their duties under subsection 1 – transparency, accountability, proportionality,
19 best regulatory practice, the desirability of promoting competition, encouraging investment,
20 a whole range of matters, and all of this has to be taken into account by Ofcom, all the time.
21 They cannot just say: “We are going to hive off this obligation, the only thing we are
22 looking at is ensuring connectivity and we are going to ignore all the other aspects of our
23 general statutory duties and only consider making sure that there is connection.”

24 Looking at subsection (5) specifically:

25 “In performing their duty under this section of furthering the interests of
26 consumers, Ofcom must have regard, in particular, to the interests of those
27 consumers in respect of choice, price, quality of service and value for money.”

28 Then at section 4 there are the duties to comply with particular Community requirements,
29 we do not need to look at those in detail. If we now come on to s.45, this is Ofcom’s power
30 to set conditions. At 45(2)(b)(ii) Ofcom has the power to set an access-related condition.

31 If you look at subsection (5):

32 “An access-related condition is a condition which contains only provisions
33 authorised by s.73.”

1 So s.73 sets the limits of what is permissible in an access related condition. If we then go
2 to s.73: “Permitted subject-matter f access related conditions.”

3 “(1) The only conditions that may be set under section 45 as access-related
4 conditions are those authorised by this section.

5 (2) Access-related conditions may include conditions relating to the provision of
6 such network access and service interoperability as appears to Ofcom appropriate
7 for the purpose of securing –

8 (a) efficiency on the part of communications providers and persons
9 making associated facilities available.

10 (b) sustainable competition between them.”

11 I just want to pause there because this is not just a general objective to promote competition
12 in the market, this is a duty to ensure that the end-to-end obligation promotes sustainable
13 competition between the communications’ provider and the person making associated
14 facilities available, in other words between BT and H3G. So that an end-to-end obligation
15 which distorted competition between BT and H3G would clearly be *ultra-vires*, even if it
16 was imposed for the general purpose of promoting competition in the market, because it
17 must promote competition between those parties.

18 At (c) again we see the greatest possible benefit for end-users.

19 Then specific types of access-related conditions are at s.74 and we see at (b) the requirement
20 in relation to interconnection.

21 So in summary, and at this point I refer you back mentally, although not physically to the
22 Commission Working Paper, the passage that was cited in the original CAT Judgment and
23 the updated version that we have looked at today, both of which indicate that the purpose of
24 the end-to-end obligation is to ensure balanced competition between the incumbent network,
25 in this case, BT, which controls everything, and the new mobile network, to ensure that
26 there is a levelling of the playing field between them, and it is not appropriate or lawful for
27 Ofcom in imposing such an obligation to move the playing field like that so as to end up
28 removing BT’s countervailing buyer power they would otherwise have had so as to give
29 H3G dominance; that is unlawful, and that is really the heart of our case. We submit it
30 emerges inexorably from all the statutory material I have just shown the Tribunal, from the
31 first CAT Judgment and from the Commission Guidance.

32 That brings me to the end-to-end obligation in this case. I have already made the point
33 about the oddity of Ofcom’s position having originally maintained at the time of the first
34 H3G appeal that there was an end-to-end obligation on BT, an absolute obligation which

1 removed all of its countervailing buyer power but then subsequently having taken some
2 legal advice and decided there was actually no end-to-end obligation at all on BT and
3 therefore it needed to impose one.

4 I would just like to look at the process by which that obligation was imposed, and the
5 content ----

6 THE CHAIRMAN: Well, perhaps Mr. Roth can help us as to what Ofcom's position is. It does
7 seem that the whole of the H3G (1) case was argued on the basis that in some way or other
8 BT was subject to an E2E obligation to interconnect on reasonable terms. Nonetheless we
9 know that it was in September 2006 that they imposed that obligation. Is it Ofcom's case
10 that the H3G argument was fallacious, or what is the position? Perhaps you could clarify?

11 MR. ROTH: The position is, as Miss Rose said, that subsequently Ofcom received legal advice -
12 not, I think, from anyone here, that there was not that obligation. That led them to 13th
13 September imposition of the obligation. But, when Mr. Scott made the point that one has to
14 therefore distinguish the two periods, and Miss Rose said, "But, well, one can proceed on
15 the assumption that even though BT was not under an obligation, the regulatory climate was
16 that it was clear that if they refused interconnection, Ofcom would rapidly have introduced
17 an obligation". Therefore, in practical effect, the situation was the same. We accept that.

18 THE CHAIRMAN: So, any constraint on either party that is in fact imposed by the actual end-to-
19 end obligation, insofar as that actual obligation post-September 2006 constrained the
20 position of the parties in their negotiations, it is, I think, accepted on all sides that that same
21 constraint applied before the formal imposition of the obligation.

22 MR. ROTH: It is accepted by Ofcom, yes. I do not know about BT, but ----

23 THE CHAIRMAN: Is that accepted by BT?

24 MR. ANDERSON: May we reserve our position? That may need a bit of discussion.

25 THE CHAIRMAN: That may not have then helped you, Miss Rose.

26 MISS ROSE: It is cheering to find SMP in a market in which the other players do not know what
27 the obligations that apply are. But, there we are.

28 MR. SCOTT: Can I just say that I appreciate that BT are in the awkward position that counsel
29 representing them at the time has gone on to other things.

30 MISS ROSE: Indeed. One is very conscious of the sheer grandeur of the former representation.

31 MR. SCOTT: It may be helpful to counsel to get BT to think back to earlier days and to ask
32 themselves the question: How did I answer this question back in H3G 1?

1 THE CHAIRMAN: It may help if we ask the question not whether BT at the time thought it was
2 so constrained, but whether they accept that the H3G 1 case appears to have proceeded on
3 the basis that that was the case.

4 MR. ROTH: It may perhaps help further if I remind those now representing BT that BT, in the
5 H3G case last time did accept it in the course of the hearing last time that they were under
6 that constraint.

7 THE CHAIRMAN: Whether they were or not at the time, if at least it is common ground that the
8 case, and the arguments, and the judgment proceeded on the basis that BT was effectively
9 constrained -- or, the parties were constrained by the fact that BT had to interconnect on
10 reasonable terms - for whatever reason - then that may help us move on.

11 MR. ANDERSON: We have no difficulty accepting that at all.

12 THE CHAIRMAN: Then, Miss Rose, that may help you.

13 MISS ROSE: That is clearly the case.

14 I now want to turn to the process by which the new end-to-end obligation was adopted. We
15 need to go to Bundle F2. As you can see, this is the consultation paper on end-to-end
16 connectivity. The first thing to note at p.451 is that the consultation was published on 14th
17 July, seeking responses by 15th August. So, a four week consultation process during the
18 summer holiday period. A remarkable situation for a regulator to adopt - contrary to the
19 Cabinet Office guidelines on consultation, and suggestive, I would suggest respectfully, of
20 the degree of panic within Ofcom when they realised that they did not have matters sorted
21 out as they previously thought they had.

22 Now, what one has to recall is that at the time that this consultation was initiated Ofcom
23 was advanced in the process of its market review, and of its reconsideration of the question
24 of SMP for the period 2004 to 2007, and its consideration of SMP for the future. It was
25 therefore in that context that this obligation was imposed. Now, that being so, in my
26 submission, it would be even more remarkable if Ofcom were, by that process, and in that
27 context, to impose a regulatory obligation on BT which had the effect of reducing BT's
28 otherwise excellent CBP to such an extent as to give H3G dominance in the market. Quite
29 extraordinary.

30 We see the statement at p.537 - the actual decision. It was very quickly produced on 13th
31 September.

32 MR. SCOTT: While you are turning there, those representing BT may be assisted on p.499 by the
33 statement in that letter,

1 “Where BT purchase a service, it expects to do so on fair and reasonable commercial
2 terms”.

3 That reflects their understanding of their expectation at the time.

4 MISS ROSE: Yes. Absolutely. Of course, sir, this is a document that we rely on in relation to
5 the history of the commercial negotiations between H3G and BT. There has been a certain
6 amount of to-ing and fro-ing between the parties, but, actually, as you will see, we do not
7 dissent from the facts as found by Ofcom in its decision. What we do not agree with, with
8 respect, is the lack of emphasis Ofcom placed upon them. What those facts show is that at
9 the outset of the relationship it is obvious that H3G did not have SMP in this market
10 because H3G desperately needed to enter the market -- needed to connect with BT quickly.
11 I accept that it has not been established that BT tried to exploit that situation, but that is not
12 the point. That would be a question of whether BT was trying to abuse what may, or may
13 not, have been a dominant position. The point is that BT at that time had bargaining power
14 because of H3G’s anxiety to enter the market. That was the basis on which the initial price
15 was fixed, which then remained the price.

16 It is interesting that in 2006, what BT are saying to H3G is, “Our commercial position is
17 unchanged from what it was in 2001” when it is quite obvious that BT was not, as it were, at
18 H3G’s mercy in negotiations.

19 MR. SCOTT: We probably do not want to pause there, but I think you rushed through that at
20 breakneck speed.

21 MISS ROSE: It is a later point.

22 MR. SCOTT: I think there may be some controversial matters in there. We should not necessarily
23 accept that.

24 MISS ROSE: No. No. It is simply edited highlights.

25 MR. SCOTT: To be fair to BT in here they do go on -- “BT is pursuing this commercial position
26 to the best of its ability given the nature of market power in mobile termination”. So, they
27 are highlighting that in there.

28 MISS ROSE: That is right. Of course, one has the point which I believe is a point Ofcom itself
29 took, that all the parties are writing rather self-consciously at this time in the context of
30 their knowledge of the ongoing market review. Therefore, one has to take what they say
31 with a pinch of salt.

32 If we just go back to the consultation paper for a moment to highlight some specific
33 paragraphs? Page 454. In the Executive Summary at p.454, without reading it out, but just

1 to note, you can see that they explain under the Background what happened in CAT1 and
2 that they had then thought they did not get it right in CAT1.

3 Then they consider various options which are set out at 1.7: do nothing; new guidelines; an
4 end-to-end obligation only on BT; or an end-to-end obligation on all providers of public
5 electronic communications network. They come down in favour of the BT-only option at
6 the end of the day, but these are the four options that they set out.

7 They say some interesting things about where negotiating power would like in the absence
8 of this regulation. Looking at 1.8,

9 “Option 1 considers whether, if there are no guidelines and no obligation, there is a risk that
10 end-to-end connectivity may not be ensured. Given the asymmetries between PECNs in
11 respect of the number of telecoms connections and in particular the prominent role of BT
12 also as a provider of transit, there is a risk that commercial incentives may be insufficient to
13 ensure end-to-end connectivity and in Ofcom’s view this option is not appropriate”.

14 So, asymmetries - a risk that there will not be interconnection. The same point is made
15 again at 1.9. Then, at 1.10 they explain why they only need to regulate BT. At 1.11,

16 “Ofcom considers that an access-related condition on BT alone is necessary ----“ Then, if
17 we go on into the detail, there is one passage in particular ----

18 THE CHAIRMAN: The significance of the reason why Ofcom decided that it only needed to
19 impose an obligation on BT -- Now, if they had decided to impose an end-to-end
20 connectivity obligation on everybody, then the result of that -- You would not be able to
21 mount the arguments that you are mounting in relation to the degree of regulation, because
22 then there would be regulation on accepting reasonable terms on everybody.

23 MISS ROSE: Madam, I do not accept that. There would still be the question of the extent to
24 which the regulation on BT affected its countervailing buyer power. That would remain ----

25 THE CHAIRMAN: Yes. But, would there not also then be -- Oh, you are saying that even that
26 would not impose a regulatory burden on H3G not to offer NCT at reasonable terms?

27 MISS ROSE: Yes.

28 MR. SCOTT: It does seem to me that had Ofcom chosen to follow the course suggested in the
29 passage that I referred to in Recital 6 - imposing proportionate obligations on undertakings
30 to control access to end-users - then we might have been re-thinking our arguments. They
31 chose not to do that for reasons which Mr. Roth may, or may not, explain to us, but it does
32 seem to me that there is a important distinction there between what they chose to do and
33 what the recital envisaged them doing.

1 THE CHAIRMAN: But the reason why they chose only to impose an obligation on BT is, as
2 expressed there, because of BT's transit business. That is all that is necessary to achieve
3 end-to-end connectivity between everybody.

4 MISS ROSE: Yes.

5 THE CHAIRMAN: It was nothing to do with the bargaining power or pricing strategies of any of
6 the parties in the market, or what ... were likely to be.

7 MISS ROSE: Madam, that appears to be right. Of course, that is consistent with the CAT 1
8 approach - that this is regulation which has nothing to do with SMP, but is about
9 interconnection. Therefore, you take it into account.

10 THE CHAIRMAN: One has to be careful of what the consequences that now are said to arise
11 from the fact that Ofcom took that decision, which may be consequences which were not
12 foreseen, and because the reason why they made that choice was rather limited.

13 MISS ROSE: Madam, with great respect to Ofcom, they certainly were not in a position where
14 they should not have foreseen the consequences, because they had already been through the
15 first H3G appeal. So, they understood absolutely that the nature of the obligation that they
16 imposed on BT would be taken into account, and would have to be taken into account when
17 they assessed the SMP of the other operators. They fully understood that.
18 Now, I must make it clear that I certainly do not concede that if regulation had been
19 imposed on everybody, this argument would not be open to me. You already have my
20 submission that it is only SMP regulation that falls to be excluded. But, we are not in that
21 situation.

22 I just want to draw your attention to one further paragraph at 3.32 in this document, at
23 p.468. "Ofcom is also proposing that BT is not obliged to purchase wholesale narrowband
24 call termination services at any price, but to do so when requested by a PECN and where the
25 terms and conditions offered by that PECN are reasonable. Whether a particular term or
26 condition is reasonable will depend on the particular circumstances relating to any decision
27 not to purchase in the context of the need to ensure end-to-end connectivity and may lie
28 within a broader range of outcomes than that which might be considered in the
29 circumstances of SMP. In particular, as Ofcom has to ensure that any charges it imposes
30 are proportionate, it is unlikely to set charges at a level set in the context of addressing a
31 finding of SMP".

32 Now, in my submission, that is the first appearance of the basic error that Ofcom makes. It
33 jumps from saying an obligation on BT to pay for interconnection at a reasonable price, to
34 saying, "We won't impose the same price that we would impose on SMP". That is the error

1 of analysis. It would not be up to Ofcom to impose a price when dealing with this
2 obligation. It will be up to Ofcom to tell BT what is the maximum price at which you must
3 interconnect. Above that price it is just a matter of commercial negotiation. Ofcom has
4 never understood that point, and, with respect, still does not.

5 Then, going to the end-to-end statement, concerns about what was meant by 'reasonable'
6 were raised - hardly surprisingly. In spite of the truncated nature of the consultation they
7 were raised. If we look at para. 3.40 at p.553 we can see some of the concerns under the
8 heading, "How would the concept of 'reasonableness' be interpreted?" BT asked, "What is
9 a reasonable request?" It requested some level of guidance by Ofcom.

10 "BT's broad concern was to clarify the access-related condition did not remove its ability to
11 negotiate the 'reasonable terms and conditions (including charges)'.

12 Then, at 3.43 there are some further comments by BT about what might be a reasonable
13 term or condition. At 3.44,

14 "BT noted that the type of principles it currently applies when assessing proposed prices
15 from non-SMP operators include reciprocity (i.e. basing the charge on BT's charge for same
16 service) and benchmarking of the proposed new services and prices against those of other
17 comparable services. BT requested that Ofcom provided greater clarity on this issue".

18 Then,

19 "H3G stated that it presumed 'that Ofcom would expect to set a cost-related charge for call
20 termination whether or not it has found SMP. H3G also noted that there was 'no guidance
21 as to how 'reasonable' will be interpreted in relation to other terms and conditions, nor in
22 relation to appropriate timescales'".

23 Then we have Ofcom's view at 5.44. At 3.51, "Ofcom cannot fetter its discretion as to how
24 it might deal with a dispute or complaint referred to it under the set access-related condition.

25 Ofcom would treat the issues BT has raised on a case-by-case basis on their own merits".

26 With all due respect to Ofcom, that was not an adequate response to the concerns that were
27 being raised. It is all very well for Ofcom to say that it cannot fetter its discretion, but
28 Ofcom was deciding what were to be the terms of the access condition to be imposed. It
29 could set whatever obligation it wished.

30 MR. SCOTT: Just as you go by, in 3.5 there is a reference to this LRIC model by H3G. Just for
31 the record, between H3G 1 and now a LRIC model has been created which relates to H3G,
32 as I understand it.

33 MISS ROSE: That is correct, because, of course, simultaneously Ofcom are consulting on their
34 proposed SMP -----

1 MR. SCOTT: So, the points being made here by H3G ----
2 MISS ROSE: "You have got a LRIC model."
3 MR. SCOTT: "You have got a LRIC model" and that would be relevant were you considering
4 this."
5 MISS ROSE: That is right.
6 MR. SCOTT: For reasons that we will come to later, I think it is worth just pointing out that you
7 had at that stage made that point to Ofcom.
8 MISS ROSE: Yes, sir. So, I am critical of Ofcom's response at 3.51 where they ----
9 THE CHAIRMAN: The next word is 'however'.
10 MISS ROSE: Yes. They say, "It is not an obligation to buy at any price or on any terms". Well,
11 that is fantastically helpful. They say that it does not remove a necessity of negotiation
12 between BT and the party, and there would have to be documentary evidence of commercial
13 negotiations. Then, in relation to what will constitute a reasonable charge, they repeat the
14 point that it is not at any price, and it is whether it is reasonable will depend on the
15 circumstances. This is the same paragraph that we looked at before.
16 Then, at para. 3.54, in relation to H3G's point about the LRIC model,
17 "Ofcom considers that it has to ensure that any remedies or charges it ultimately may
18 impose ----"
19 Note the use of the word 'impose'. That is the Ofcom error again. This is about imposing
20 charges.
21 "-- have to be proportionate to the matter at hand. While this does not mean that BT's
22 obligation is unbounded, the aim is to ensure end-to-end connectivity, rather than address
23 any SMP in the relevant market. Therefore ... absent a prior SMP finding, any decision not
24 to purchase in the context of the need to ensure end-to-end connectivity and may lie within
25 a broader range of outcomes than that which might be considered in the circumstances of
26 SMP".
27 Again, it is the same error that they have conflated the obligation on BT with a price being
28 imposed on H3G.

29 (Adjourned for a short time)

30 THE CHAIRMAN: Miss Rose, before we continue, we are getting a bit concerned about the
31 time because, according to the timetable this afternoon was supposed to be partly you and
32 partly Mr. Roth. I appreciate that there was a bit of a delay in getting started, but we really
33 must move on. I think that you, as I indicated at the beginning, can assume that we are
34 familiar with statutory materials, both European and domestic, and particularly with

1 Ofcom's decisions. I note that one of the topics you are going to deal with is the Ofcom
2 decision and its reasoning. We really do not need to be taken to particular paragraphs if you
3 just alert us to the ones to which you want us to have particular regard. I hope that is helpful

4 MISS ROSE: Madam, yes. I should say that it has never been H3G's view that this case could be
5 opened in less than a day. On the basis of the time that we lost this morning, that would
6 mean that I would go over to tomorrow morning. There is also the issue that, of course, I
7 have to deal with interventions.

8 THE CHAIRMAN: We will try and keep interventions to a minimum, but we really do think you
9 should finish by the end of today. If we have to sit for an additional half hour to make up
10 for the time that we have lost in the interlocutory matters, then we can.

11 MISS ROSE: Madam, we were looking at the end-to-end connectivity statement. There is just
12 one further passage that I would like to draw the tribunal's attention to. It is at p.559. At the
13 bottom of the page Ofcom addresses its statutory duties for assessing access conditions - in
14 particular, its duty under s.73(2). You will recall that we looked at that provision earlier.
15 They set out the text of s.73(2). Then, over the page at p.560,

16 "Ofcom considers that the above will be secured by the set access-related condition because
17 the provision of end-to-end connectivity provides the greatest possible benefit by allowing
18 all users to be able to call each other regardless of the network to which the called party is
19 connected".

20 Pausing there, what has obviously been left out of account is the question of price. Then,
21 the second point is that they say,

22 "Such confidence should help secure sustainable competition as providers will be able to
23 stay in the market as customers can use their services, and encourage providers to be
24 efficient as possible so that their costs are lower than other providers, and so that they can
25 compete effectively".

26 Again, madam, we say that they clearly misunderstood the obligation at s.73(2)(b) where
27 what they should have been addressing is sustainable competition between the providers
28 and those providing associated services, and instead there seems to be a general statement
29 here about promoting competition in the market. Again, we say that that is obviously
30 relevant to their assessment of the meaning of 'reasonable'.

31 The actual end-to-end obligation is then set out at p.564. Our submission as to its proper
32 construction is straightforward. We say that it is an obligation to purchase on reasonable
33 terms and conditions, and that reasonable terms and conditions means terms that are
34 competitive and that are not excessive, and that that is the necessary and proportionate

1 condition in order to ensure both that competition is maintained as between the providers,
2 and to ensure the maximum benefit to end users as the statute requires.

3 That brings me to my next topic which is ofcom's duties and powers in relation to dispute
4 resolution.

5 MR. SCOTT: Just one tiny point on s.73(2)(b) - 'between them'. I take it that that embraces the
6 fixed network operators who are not BT, but who are also represented before us?

7 MISS ROSE: Yes - but it is particularly talking about -- 'Them' is referring to communications
8 providers and persons making associated facilities available. So, it is between those parties.
9 That brings me to the next topic which is Ofcom's duties and powers in relation to dispute
10 resolution. That, of course, ties in to the decision of the CAT in the first H3G judgment -
11 that if, on proper construction, the end-to-end obligation does not oblige BT to purchase call
12 termination at an excessive price, then, when resolving a dispute referred to it concerning
13 the price at which BT is obliged to purchase, Ofcom cannot resolve that dispute by
14 requiring BT to purchase at an excessive price.

15 There are some points to note about the dispute resolution power in this context. The first
16 point is one that has already been made, and which we can deal with very quickly: free-
17 standing power that runs parallel with the power to impose SMP conditions. That is the
18 point at para. 131 of H3G 1 and Articles 5 and 8 of the Access Directive. Secondly, that
19 when Ofcom is operating its dispute resolution power, it is subject to the same general
20 statutory duties, including the promotion of competition and the maximum benefits for end-
21 users, including as to price. We have seen all the sources of that - s.3 of the 2003 Act;
22 Article 5 of the Access Directive; Article 8 of the Framework Directive.

23 I have made the submission that it has to be Ofcom's case in this appeal not only that it
24 would have been open to it to resolve a dispute between BT and H3G by requiring BT to
25 pay an excessive and anti-competitive price, but, an excessive price to such an extent that
26 that would have an adverse impact on end-users.

27 The reason why I say that is because of the terms of s.88 of the 2003 Act. If we turn that up
28 in H1, Tab 8, this is in relation to the circumstances in which Ofcom had the power to set an
29 SMP condition fixing a price. The tribunal will recall that we have looked at this before.

30 There are three conditions that must be satisfied before a price control can be set. Looking
31 at s.88(1), it must appear to Ofcom from the market analysis carried out for the purpose of
32 setting that condition, that there is a relevant risk of adverse effects arising from price
33 distortion. That is defined at subsection (3),

1 “There is a relevant of adverse effect arising from price distortion if the dominant provider
2 might so fix and maintain some or all of his prices at an excessively high level as to have
3 adverse consequences for end users”.

4 So, not just fixed, but also maintain a price at such a high level that it would have adverse
5 consequences for end-users. That is a pre-condition to setting the price control. Therefore,
6 it must be Ofcom’s case, given the action that it has taken, that on the proper construction of
7 the end-to-end obligation, BT could be forced to connect at such an excessive price as to
8 have an adverse effect on end users. We say that when you look at the statutory context,
9 that is simply an impossible position for Ofcom to adopt.

10 The final point to make about the dispute resolution power is that the assumption that
11 Ofcom has had throughout this process - we saw it in the consultation paper on the end-to-
12 end obligation; we see it in the MCT decision itself; we have seen it in the skeleton
13 argument and in the defence - Ofcom’s assumption throughout has been that the only power
14 it could exercise when resolving a dispute referred under the end-to-end obligation would be
15 to fix the price. That is the origin of Ofcom’s argument over and over again: it would be
16 disproportionate to impose a price on H3G which is at a competitive level without a finding
17 of SMP. But, that is a misunderstanding of Ofcom’s dispute resolution powers.

18 If we just go to s.190 of the 2003 Act, this sets out the powers that Ofcom has when
19 resolving a dispute. Their main power, at subsection (2) is to do one or more of the
20 following -- The first is to make a declaration setting out the rights and obligations of the
21 parties to the dispute. Now, of course, the obligation on Ofcom, as always, is to act
22 proportionately with a light touch, and so on, and so forth. The obvious proportionate way
23 to resolve a dispute relating to end-to-end connectivity obligation is to make a declaration as
24 to what is the maximum reasonable price that BT could be obliged to pay - not to impose or
25 fix a price; still less impose any price on H3G. The effect of that is that BT’s countervailing
26 buyer power is constrained only to the extent of what is reasonable, and the parties are
27 thereafter left to negotiate commercially. There is no interference with SMP regulation.

28 There is no disproportionate imposition of any obligation on anybody.

29 That brings me to Ofcom’s decisions. If we take up the NCT statement in Bundle B at Tab
30 1 -- S.4, starting on p.56 -- This section deals with market power. Just to note very quickly
31 some paragraph numbers - we do not need to go through them in detail -- Definition of SMP
32 at 4.21, p.60. Then, going on to 4.30, there are the Commission guidelines. At 4. H3G, the
33 assessment discusses the following relevant criteria for the market review. You can see that
34 CBP is one of the criteria listed. There is then consideration of market shares, and absence

1 of potential competition. Those are uncontroversial. Then, CBP is dealt with at 4.43. There
2 is a definition at 4.44, and it is dealt with in detail at s.5, which we will come on to in a
3 minute. There is then excessive pricing to which I shall return.

4 We then see the conclusion at 4.64. In particular, it refers us to s.5. It is quite clear from the
5 structure of the document that it is the assessment of CBP which Ofcom regards as
6 definitive and determinative to the question of the existence of SMP. So, we turn to s.5. At
7 5.4 the test is set out. That is not controversial. At 5.5,

8 “Ofcom considers that MNOs will have SMP if they are able to sustain charges to an
9 appreciable extent above the competitive level”.

10 You will note the use of the word ‘sustain’.

11 Then, at 5.10 there is a list of the economic categories against which CBP is being assessed.

12 Then at 5.40 there is the point that BT’s charge sets the charge for everybody else. Again,
13 that is not controversial.

14 MR. SCOTT: Are there any points that you wish to take on 5.18 to 5.22 which are the arguments
15 made in the consultation?

16 MISS ROSE: This is the point that the mere power to refer means that there is no SMP. Is that
17 the point you are referring to?

18 MR. SCOTT: No. It is merely that you are going past your own ----

19 MISS ROSE: No. It is all right. I am only trying to look at Ofcom’s reasonableness.

20 MR. SCOTT: Okay.

21 MISS ROSE: The initial negotiations are dealt with at 5.44 in relation to this statement. They
22 are considered again in relation to the re-assessment. We will come back to them. Then, if
23 we go to 5.76 - Regulation of the party being assessed for SMP. This adopts the reasoning
24 of the CAT in H3G 1.

25 “-- in assessing whether a given provider has SMP, it is necessary to conduct the analysis on
26 the basis that no SMP related regulation currently exists on that provider [we agree with
27 that] .. regulation which will continue to exist throughout the period independently of an
28 SMP finding must be taken into account”.

29 Again, we say that is entirely correct. There is then reference to the RegTP case, and the
30 CAT judgment. All of that is uncontroversial.

31 Then we come to Regulation of the Party Being Assessed for CBP at 5.81. Again, we agree
32 with the analysis at 5.81.

33 We then come to the assessment of CBP at 5.100 onwards. There are some important
34 findings of fact which are made in this section. Of course, the tribunal will have in mind that

1 assessing CBP is essentially a question of fact. That comes out of the RegTP decision and
2 the Commission's comments upon it. It obviously depends on the particular relationship
3 between the two undertakings. So, first of all at 5.110,

4 "BT is an important customer for all terminating MNOs".

5 At 5.111,

6 "As a consequence, it is necessary for all MNOs to maintain an interconnect agreement with
7 BT".

8 At 5.114,

9 "Ofcom considers that BT is an important outlet for all sellers. Given the availability
10 of transit services, however, whether other purchasers are also important outlets is less
11 clear. They are unlikely to be as important as BT".

12 So, we have BT as effectively the predominant counterparty.

13 Then, at 5.120,

14 "Whilst, during the start-up phase of its business H3G's charges for MCT represented only
15 a very small proportionate of any purchaser's total expenditure on MCT, this has changed as
16 H3G's subscriber base has grown. As termination on H3G's network represents an
17 increasing cost, purchasers are likely to become increasingly sensitive to the price it pays
18 for that service. The evidence cited in the reassessment of H3G's SMP supports the view that
19 BT, the largest purchaser of MCT, is sensitive to the level of H3G's charges, and this
20 sensitivity is likely to continue to grow with the growth in H3G's customer base. Therefore,
21 it can be assumed that all purchasers of MCT have an incentive to try and negotiate
22 competitive prices with all five MNOs."

23 Again, an important finding of fact that BT is well-informed and price-sensitive.

24 There is then reciprocity of trade, which is found not to give any CBP to BT because of the
25 regulation on its own charges.

26 Then lack of alternative sources of supply. Again, not controversial. We do need to look at
27 that in a little bit more detail.

28 Then assessment of purchase of CBP - option not to purchase. This is really the crucial
29 passage. . "Absent other potential sources of supply (i.e. third party or self-supply), a buyer
30 may bring pressure to bear on the seller in the event that it can threaten credibly not to
31 purchase the service (or, to a lesser extent, to threaten to reduce the amount it purchases)".

32 Then, at 5.137, referring to the contracts,

33 "-- all of these contracts require the parties to observe minimum notice periods . . .

34 Thus, the contracts do not prevent purchasers from ceasing to purchase MCT, or

1 threatening to cease purchasing MCT, permanently or temporarily, while renegotiation
2 of prices or other terms and conditions take place.

3 It is therefore relevant to assess the extent to which a threat to refuse to continue
4 purchasing MCT would provide an originating operator with buyer power such that it
5 could influence in its favour the price charged by a terminating MNO for MCT. In
6 this respect Ofcom has identified two issues: (1) commercial constraints; and (2) BT's
7 end-to-end obligation".

8 So, we are narrowing down here to the critical point that BT is price-sensitive. It has got a
9 contract it can terminate. It is incentivised to negotiate a commercial price. So, the question
10 is: To what extent is it prevented from doing so? That is why we eventually home in on the
11 end-to-end obligation as critical.

12 Then we deal with commercial constraints, and the conclusion that is reached is that there is
13 a strong commercial pressure on BT to purchase MCT from the existing MNOs'. We see
14 that at 5.147.

15 Then we come to the end-to-end obligation at 5.148. At 5.149 it is acknowledged that it is
16 not absolute.

17 "Therefore, the extent to which any CBP that BT would otherwise possess is negated b its
18 end-to-end connectivity obligation could depend in part on the expectations of the parties to
19 a dispute as to Ofcom's resolution of that dispute".

20 Again, we agree with that analysis.

21 "The negotiations between BT and an MNO may therefore be partly conditioned by
22 the range of prices those parties consider would be likely to regard as reasonable in
23 applying BT's end-to-end connectivity obligation."

24 Absolutely correct.

25 "The range of prices would affect BT's 'freedom of manoeuvre' in negotiating the
26 price of MT and should therefore be taken into account in determining whether, and to
27 what extent, BT may have CBP".

28 Again, a correct analysis. Then, at 5.153,

29 "-- a number of alternative approaches would be Ofcom in dealing with a dispute ...

30 However, Ofcom would consider the question of what is reasonable by reference to the
31 purpose underlying BT's end-to-end connectivity obligation. The end-to-end connectivity
32 obligation was imposed on BT to remove the risk of a potential market failure from BT
33 refusing to buy call termination. While in principle, BT's customers value calling
34 customers of smaller networks and customers of smaller networks may value receiving such

1 calls, BT may have an incentive not to provide such calls under some circumstances. “On
2 this basis ...”. In other words, on the basis of the purpose that Ofcom said underlay the
3 imposition of the end-to-end obligation.

4 “On this basis, a reasonable charge for BT to purchase MCT with a view to ensuring
5 end-to-end connectivity may be at a price appreciably above the competitive level. As
6 such, if a charge appreciably above the competitive level were in dispute, Ofcom
7 considers it unlikely that it would insist on a strictly cost-based charge, i.e. a charge
8 that was not appreciably above the competitive level”.

9 Now, that is the critical paragraph in this decision where Ofcom falls into error. The
10 principle error that is made there is Ofcom’s assumption that because the purpose of the
11 end-to-end obligation is to ensure connectivity, it does not need to consider the question of
12 maintaining competition between providers, maximising the benefits to end-users, when
13 deciding what is a reasonable price. That is just simply wrong. That is the extent of
14 Ofcom’s reasoning on this critical question, which, on Ofcom’s own reasoning is
15 determinative of CBP.

16 There is a second error here from which Ofcom has sought to resile in its defence. Ofcom
17 in this paragraph clearly equates a price that is not strictly cost-based with a price that is
18 appreciably above the competitive level. What they say is,

19 “Ofcom considers it unlikely that it would insist on a strictly cost-based charge, i.e. a
20 charge that was not appreciably above the competitive level”.

21 I am going to return to this point in relation to the second point we make - that there is a
22 whole confusion, and a lack of clarity, in Ofcom’s reasoning about what is an uncompetitive
23 price. But, in this paragraph, anything that is not strictly cost-based seems to be equated
24 with something that is appreciably above competitive levels.

25 MR. SCOTT: Just while we are in this paragraph, I take it that you would acknowledge, having
26 already referred to the LRIC model, that there could be circumstances in which an
27 inefficient mobile network operator had costs which exceeded a competitive level of price?

28 MISS ROSE: Yes. (After a pause): But, it depends what you mean by ‘competitive’. Certainly
29 that exceeded an efficient cost-based model.

30 MR. SCOTT: Yes, that is the point. One is assuming that a LRIC model is designed to show the
31 costs of an efficient forward-looking operator.

32 MISS ROSE: Yes. But, what is wholly unclear from this decision -- There is some margin
33 between a price that is cost-based on an efficient basis, and a price that is so excessive that it
34 has an adverse effect on end-users. What Ofcom have never explained anywhere is: what

1 is the size of that margin; how do you determine how big it is? You cannot find that
2 anywhere in this decision. Here, there seems to be an equation of anything that is not
3 strictly cost-based with something that is appreciably above the competitive level. So, it is a
4 second level of error, if you like. But, the fundamental error is the error that flows from the
5 words 'on this basis' which reveals a wholesale failure by Ofcom to understand the breadth
6 of its statutory duties.

7 We see this being perpetuated in the following paragraphs. If we go to para. 5.158 Ofcom
8 say

9 "In any event, because there is no ex ante obligation to lend a structure to Ofcom's
10 role, it is not possible to specify what approach Ofcom would apply in resolving a
11 dispute. Ofcom's determination would depend on the facts of each case and the
12 submissions made to it. A broad range of options and methodologies would be a
13 available to Ofcom".

14 With respect to Ofcom, of course there is a framework. The framework is its own statutory
15 duties, which it seems to be completely ignoring.

16 "Additionally, Ofcom would have to consider, as a matter of policy, whether it would
17 be appropriate to assess the market power of the parties and impose cost-orientated
18 charges where no such obligation previously existed because there had not been a
19 market review ----"

20 Again, a complete misunderstanding of what sort of dispute it would be resolving. It is not
21 trying to impose a price on H3G. It is trying to define what is a reasonable price for BT to
22 be obliged to pay. So, this is just nonsense, with respect.

23 Then they say, "This suggests that neither party in a negotiation over MCT, where the
24 MNO had not been found to have SMP, can assume that Ofcom (when resolving such a
25 dispute) would impose a charge for MCT that was not appreciably above the competitive
26 level".

27 We say that is the flawed conclusion that flows from the whole catalogue of legal and
28 analytical errors on this page.

29 Then, at para. 5.161,

30 "Ofcom therefore concludes that a purchaser and supplier of MCT, properly apprised as to
31 Ofcom's approach to dispute resolution, would therefore negotiate on the basis that I a
32 charge appreciably above the competitive level were in dispute, Ofcom would be unlikely to
33 impose a charge for MCT in the context of such a dispute that was not appreciably above
34 the competitive level".

1 Actually, that does not even follow from the previous reasoning. Assuming for a moment
2 that Ofcom was right and that they did not necessarily have to accept the maximum charge
3 for BT at a level that was not appreciably above the competitive level, it does not follow
4 from that that the parties would negotiate on the basis that Ofcom was likely to approve a
5 charge that was appreciably above the competitive level, which is the further jump in logic
6 here.

7 Then, at para. 5.162,

8 “Further, Ofcom considers that certain limitations exist in relation to dispute resolution such
9 that dispute resolution should not be seen as a substitute for the appropriate regulatory
10 processes for addressing the question of market power ----“

11 With respect to Ofcom, that is irrelevant because the question they are seeking to determine
12 here is whether BTs CBP is constrained by their obligation to such an extent that there is
13 market power in H3G. The question of whether Ofcom would find it more convenient to
14 regulate this market through dispute resolution or through ex ante obligations is, with
15 respect, irrelevant to that conclusion.

16 Then they complain that dispute resolution is of limited assistance.

17 “In addition, dispute resolution is of limited assistance in curbing pricing appreciably above
18 the competitive level as it is aimed at resolving a dispute between two (or more) parties and
19 regulators can only act in the context of that dispute - which may not address the
20 ‘regulatory’ issue”.

21 That goes to the point, sir, that I made earlier - that Ofcom had disregarded here its power to
22 intervene without a dispute being referred.

23 ”It is therefore not necessarily the case that: an MNO would bring a dispute; or, another
24 provider would refuse to purchase interconnection at a charge appreciably above the
25 competitive level”.

26 Ofcom are wrong to conclude that they would no power to intervene in relation to the end-
27 to-end obligation - not in relation to SMP, but in relation to the access-related question
28 under s.105 of the Act on that basis, So further error at 162.

29 We then see that Ofcom go on to review the evidence that H3G submitted in relation to the
30 economic framework because H3G submitted two economic papers by Mr. Harbord and
31 another man called Mr. Binmore arguing that parties negotiating in the context of the end-
32 to-end connectivity dispute would negotiate call termination charges within the reasonable
33 range in anticipation that Ofcom would resolve disputes on that basis.

34 We look at Ofcom’s analysis of this at 5.166:

1 “Critical to the results of Binmore and Harbord’s model are the assumptions as to
2 how Ofcom would resolve the referred dispute. The assumptions underlying
3 Binmore and Harbord’s results are that the regulator would either set a charge
4 based on average 2G rates or would set a charge based on H3G’s costs. Were
5 these assumptions correct, Ofcom would agree that it is probable that the outcome
6 of a negotiation would be likely to lie in this range.”

7 So crucially Ofcom accepts that the parties would negotiate interconnection in that range if
8 that were the basis on which Ofcom were likely to resolve the dispute. However, they say:

9 “It is clear from the explanation of Ofcom’s dispute resolution policy above that
10 the assumptions made by Binmore and Harbord are erroneous as explained at
11 paras. 148 to 162 where it was set out how Ofcom might resolve the dispute in the
12 context of end-to-end connectivity as a full range of options, range of potential
13 charges is wide, and if a charge appreciably above the ...dispute it would unlikely
14 Ofcom would impose it.”

15 And then:

16 “Furthermore, he has noted at para.4.45... “ they say the 3G charges levied by H3G are
17 significantly above Ofcom’s view of the appropriate cost base charges for MCT. In
18 summary Harbord and Binmore reached their conclusions based on erroneous assumptions
19 about what Ofcom would do in the event of a dispute” and that is the only basis on which
20 their conclusions are rejected.

21 So that if this Tribunal concludes that Ofcom’s own assessment of what it was legally
22 entitled to do in resolving a dispute is flawed, then its rejection of Binmore and Harbord
23 also falls.

24 Then we have the conclusions on CBP. “Ofcom ... does not have sufficient countervailing
25 buyer power to restrain the MNOs”, and then para. 5.170:

26 While BT is an important outlet, well informed, price sensitive, absence of reciprocity
27 means BT has significantly less CBP than would be the case in the presence of reciprocity
28 no alternative sources of supply, BT ... self-supply, a strong commercial incentive to
29 purchase, and then t his:

30 “BT is subject to an end-to-end connectivity obligation and in Ofcom’s view this means that
31 BT has insufficient CBP to negate SMP, even taking into account that it is not an
32 unbounded obligation and that disputes can be referred.”

33 So it is clear from that that it is the interpretation that Ofcom places on the end-to-end
34 obligation and is dispute resolution power which is determinative of the question of CBP.

1 Very briefly looking at the reassessment statement, which his at tab 3, the reasoning
2 essentially mirrors the reasoning that is in the main NCT statement, but there is a passage
3 that is of significance concerning the original negotiations, that starts at para.4.47 at tab 3.
4 “Option to delay”:

5 “In principle, BT might threaten to delay its purchase of termination and thereby
6 improve its negotiation position against H3G. Indeed, in a setting where both
7 parties to a transaction do not have the choice of walking away from a deal
8 indefinitely, the parties may try to obtain a more favourable outcome by
9 threatening to delay the transaction.

10
11 4.48 A strategy like this may have been effective prior to the negotiation of the
12 initial agreement in January 2002 when BT may have been able to exploit H3G’s
13 sensitivity to a delay in interconnection. The evidence from the period shows that
14 H3G was concerned about the potential impact of delay on its launch. While, as
15 the CAT recognised, it does not appear that BT aggressively sought to exploit the
16 risks of delay to H3G, it is possible that this factor may, at that time, have affected
17 the overall balance of negotiating power of the parties.”

18 Now, we do rely on that paragraph because we submit that it must follow from that that BT
19 did have sufficient countervailing buyer power as at the initial negotiation date so that the
20 price that was fixed at that time could not be said to be an anti-competitive price, and we
21 know in fact the price that was fixed was the same as the 2G termination price as some of
22 the other 2G operators, notwithstanding the fact that H3G, of course, was a 3G network
23 with higher costs. So that supports the proposition.

24 MR. SCOTT: Yes, I hesitate to stop you there, but if you remember it is your client who proposes
25 the rate in the letter – I think – is it 24th December 2001? I appreciate that your client would
26 argue that it did so in very particular circumstances, but nonetheless it is your client who
27 proposes the rate that BT accepts, and not BT who imposed the rate.

28 MISS ROSE: Well that is because BT refused to make a proposal. My client proposed an
29 original rate which BT rejected, and then when H3G said: “Tell us what you want”, BT
30 said: “You have to propose another rate, we are not going to pay any more than we paid for
31 2G termination.” I want to make it clear ----

32 MR. SCOTT: Sorry, just go back, that is not what BT said. BT said that they were open to
33 receiving argument. BT explained the procedure and the FM rates that existed – but I think
34 it is an over simplification of what happened to put it in quite the way that you put it. Now,

1 BT can speak for themselves, but it does seem to me that if you are going to argue that the
2 initial rate itself represents the exercise by BT of countervailing buyer power at a sufficient
3 level that it negates SMP, and that that is sustained then you have to think through the
4 consequences of the fact that that price has been sustained and you drew our attention to the
5 word “sustained” earlier on, notwithstanding the 2G prices falling away beneath it.

6 MISS ROSE: That is a separate point, of course. I was going to come on to what happened after
7 the initial negotiation. The point that I am on is simply that the facts underlying the initial
8 negotiations do not support the proposition that at the time of the initial negotiations H3G
9 was exercising SMP in this market – not because of anything improper that was done by
10 BT, but simply because of the fact that H3G was desperate to launch, and the timing of its
11 launch was of critical importance to its business, and that BT, by refusing to accept a
12 particular price had the power to delay the launch. The extent to which BT chose to
13 exercise that power is not the point here. The point is simply that when you look at that
14 commercial relationship it cannot be said that H3G is dominant because BT has the power
15 to delay its launch, which is of immense importance to H3G.

16 Really the point is no more sophisticated than that, so that the initial price is set in the
17 context of that pricing commercial need.

18 Now, there is then the question that the price is sustained, as you rightly point out to me,
19 over the next year, from the 2G prices before, because the 2G prices, of course, are
20 regulated from 2004, but H3G’s price is not.

21 There are two points to make about that. One is of course that the price remains the same,
22 simply because nobody seeks to change it and BT does not propose that it should be
23 dropped and the answer to that may be the point that Ofcom makes earlier in its statement,
24 that while H3G’s market share is very small BT may not be price sensitive so its
25 termination rate, because it is such a tiny proportion of the calls that are being terminated by
26 BT on other networks it does not really matter to it very much. But it becomes to matter
27 more as H3G’s market share increases towards the 4 to 5 per cent level. So at that point
28 Ofcom finds that BT is price sensitive. What we then see is that a dispute is referred to
29 Ofcom by BT, that when the parties cannot agree the price the dispute is referred. So we
30 can clearly see that BT is willing to refer a dispute at the point at which it becomes price
31 sensitive to H3G.

32 The other point to make is, of course, that you are not comparing like with like when you
33 say the 3G price is higher than the 2G price because the costs terminating on the 3G
34 network are higher.

1 MR. SCOTT: Well, with respect, so far as an end-user is concerned, you are very precisely
2 comparing like with like because the service being provided over 2G or 3G is the same
3 voice call termination.

4 MISS ROSE: Yes, but the cost to an efficient 3G or ----

5 MR. SCOTT: No, sorry, from the end-user's perspective the service is simply the same, I am not
6 saying whether that does or does not justify price differential. What I am saying is that
7 from the point of an end user you are getting the same, and indeed, because of the roaming
8 arrangements that H3G have in place the call may or may not be provided over 3G facilities,
9 so I think one has to be a bit careful here about precisely what one is talking about, and if
10 one is talking about the service being provided there is no differentiation.

11 MISS ROSE: Well the service that is being provided is termination on H3G's network, and the --
12 --

13 MR. SCOTT: No, it is termination numbers in H3G's number range.

14 MISS ROSE: Yes, but Ofcom has found as a fact that H3G's efficiently incurred costs of that
15 termination are higher than the other operators.

16 MR. SCOTT: Yes, that is not the point that I am making.

17 MISS ROSE: And that is why I say you are not comparing like with like if you seek to compare
18 simply the 3G price with the 2G price.

19 THE CHAIRMAN: Is the point not that BT's case has always been that they should not have to
20 pay more for voice termination on 3G than on 2G, and at the initial negotiations you say
21 "Well they effectively managed to win that point", but their winning of that point was not
22 sustained because as the 2G prices dropped away they did not seek to reassess the 3G price
23 so as to continue the position that they think is the correct position – whether it is or not –
24 which is that they should not pay more for H3G termination?

25 MISS ROSE: Yes, and the two points I make about that are, first, you cannot infer from the fact
26 that they did not seek a price reduction that they did not have the power to seek a price
27 reduction, because the volume of calls was so tiny in the early years that it would have
28 made very little difference for them and it was not worth the hassle.

29 THE CHAIRMAN: Well can you say that when you also accept one of the points about CBP
30 that Ofcom make where one of the planks supporting a finding of countervailing buyer
31 power is that price sensitive and motivated ----

32 MISS ROSE: Yes, but we know that they are now, yes. Ofcom has found as a fact that they are
33 now and nobody is disputing that. But if you ask me the question: Why in 2003 were they

1 not trying to beat H3G's price down, the answer may be because in 2003 H3G had a
2 miniscule number of subscribers.

3 MR. SCOTT: I think the other thing to remember is that – and we went round this before – H3G
4 were not sufficiently upset with the 2G rate that they obtained that H3G themselves,
5 initiated form of action ----

6 MISS ROSE: That is correct.

7 MR. SCOTT: -- and there were a variety of forms of action they could have initiated. So we are
8 in a situation where neither party initiated anything. Now, from the point of view of the
9 relationship between the immediate parties that was how it was. From the point of view of
10 end-users, who you have reminded us we need to have in our minds, what actually
11 happened, the actual facts – the phrase “actual facts” comes from H3G (1) Judgment – is
12 that the rates stayed up and they did not go up, they did not go down, until eventually you
13 get to this much more recent period when people disturbed themselves.

14 MISS ROSE: Yes.

15 MR. SCOTT: So from that point of view, what do you think happened the moment that BT
16 responded to the letter of 24th December?

17 MISS ROSE: I am sorry, I am afraid you have lost me.

18 MR. SCOTT: What happens is H3G write to BT saying that they will go with – do you want me
19 to find the reference to it?

20 MISS ROSE: I am going to have to come back to you on this question, I am sorry.

21 THE CHAIRMAN: Miss Rose, I interrupted you when you said there were two points about the
22 sustained, there is the price sensitivity and what was the second?

23 MISS ROSE: Price sensitivity BT increases as our market share increases, that is the finding of
24 Ofcom and it explains why you get a spat.

25 The second point is that you cannot infer that the price was competitive, because Ofcom
26 itself indicated in 2004 that it was virtually impossible to work out what the efficiently
27 incurred costs were for 3G termination at that date, which is one of the reasons why they did
28 not impose charge control on 3G termination. So you do not have the elements in place to
29 indicate that there is anything wrong with that price.

30 Now, of course, the third point is the point that I have already explored with the Tribunal
31 before, which is that if Ofcom had considered that this price was having an adverse effect
32 on their users, it could have intervened without anything to do with SMP simply in relation
33 to the end-to-end obligation under s.105, so those are the three points there.

34 Sorry, I have slightly lost my place.

1 MR. SCOTT: You were in the notice of reassessment.

2 MISS ROSE: I wanted to just show the Tribunal what findings Ofcom made about the initial
3 negotiations in the consultation document which is in F2, p.641. This is the September
4 2006 consultation document. 5.114 to 5.116. The point at 5.114 that H3G did perceive the
5 cost of delay prior to the establishment of the Initial Agreement to be significant since the
6 delay represented an opportunity cost to H3G through foregone income.

7 Whilst Ofcom has seen no compelling evidence that may suggest that BT artificially
8 delayed it is possible the fact that H3G was under pressure to conclude initial negotiations
9 presented BT with a stronger bargaining position prior to the Initial Agreement.

10 Then they make the point that the relative bargaining position change significantly once an
11 Initial Agreement has been reached, and both parties have a sizeable customer base. In
12 particular, once the initial termination agreement and charges are in place, there was no
13 longer significant asymmetry in the cost of delay between the parties.

14 That just simply reinforces the commercial pressures that were on H3G.

15 THE CHAIRMAN: So Ofcom is effectively saying whether or not there was countervailing
16 buyer power and SMP at the time of the initial negotiations that is not relevant to the period
17 2004/2007?

18 MISS ROSE: Yes, and we submit that is not right because in fact on the facts that it found Ofcom
19 should have found that there was countervailing buyer power at the date of the initial
20 negotiations. It was clear that there was countervailing buyer power at the date of those
21 initial negotiations. If that is the rate that was set at the outset, as you say neither party was
22 dissatisfied with it until in 2006 the various spats arose.

23 MR. SCOTT: I think that the problem in the way that you are wording it is this: it is probably
24 uncontroversial that there was at least a theoretical countervailing buyer power in the sense
25 of delay – I put it in that way because there was not actually evidence that BT had
26 untowardly delayed anything – indeed, the initial evidence was that delay had been on the
27 other foot.

28 Saying that is not to say that somebody looking at that situation would have found that there
29 was sufficient buyer power on the part of BT to mean that H3G could not act independently
30 of customers, competitors, and ultimately of consumers, so that one has to incorporate –
31 either implicitly or explicitly – the word “sufficient” before countervailing buyer power in
32 order to judge whether it negated SMP or not.

33 MISS ROSE: Yes, it is certainly very difficult to see how, at the time of the initial negotiations
34 H3G was in a position to act independently of its customer, i.e. BT, because if H3G

1 proposed or wrote that BT was not prepared to pay, BT had the power to say:” That’s too
2 high, put forward a lower rate or we will refer the dispute to Ofcom.”

3 MR. SCOTT: I think the difficulty we have with that has regard to the responsibility of the
4 regulator to consider the end user, and the problem that BT did at the time, and has ever
5 since, passed through a rate that it was charged by H3G to its transit customers, and to its
6 retail customers, and the transit customers to their retail customers. Sorry, we pause at that
7 point.

8 THE CHAIRMAN: We will just take a short break for a couple of minutes.

9 (Adjourned for a short time)

10 THE CHAIRMAN: Yes, Miss Rose.

11 MISS ROSE: I propose to move on to Ofcom’s defence, this is in bundle C2, at tab 1. Can you
12 give an indication of what time you we will have to finish today? What is the latest the
13 Tribunal can sit?

14 THE CHAIRMAN: I think we cannot go beyond 5 o’clock. (After a pause) I understand this may
15 cause some dismay that there is no particular limit on the end of today’s hearing, so we will
16 go on until you have finished, Miss Rose. (Laughter)

17 MISS ROSE: If we take up C2, we see Ofcom’s defence at tab 1. First of all, at p.5 Ofcom sets
18 out what it calls its “overview of issues” in two parts, first in SMP and then in relation to
19 appropriate remedy. What is strange about Ofcom’s overview of the SMP issue is that it is
20 not in fact an analysis of our argument or an identification of any flaws in our argument,
21 instead what the Tribunal has here is an *interorem* plea saying: “If H3G were right the
22 consequences for pan-European regulation would be too awful to contemplate.
23 Now, in my submission, a Tribunal should be very cautious when the first argument put
24 forward by a regulator does not in fact address the case that is being put against it, but is
25 instead, with respect to Ofcom a pure jury point designed to cast terror into the hearts of the
26 Tribunal should they be so bold as to find in our favour, and I would submit that it does
27 demonstrate the vulnerability of Ofcom on the actual merits at this point.

28 In any event, the *interorem* argument is fundamentally flawed. If we take a look at it, at
29 para.8 they seek to characterise our position. First of all there is an irrelevant reference to a
30 letter written by H3G’s parent company to Vivien Reding – one assumes that that is put in,
31 again, as an attempt to prejudice, it has nothing to do with this case – but then it is said that
32 the “*ex ante* regulation, by means of price controls ... is precluded by reason of the *ex post*
33 powers exercised by regulators in resolving disputes between communications’ providers.”

34 Well, that is not actually our case. Our case is that in considering the extent of BT’s

1 countervailing buyer power you have to correctly construe the end-to-end obligation and
2 correctly identify what approach Ofcom ought proportionately to take to the resolution of a
3 dispute concerning that obligation.

4 So then what is said is that our arguments would have very significant consequences if they
5 were found to be correct. Then they say H3G does not rely on some specific factual feature
6 applicable only to its own operations in the UK. That is quite wrong, we absolutely do rely
7 on factual features particular to our operation in the UK, in particular we rely on the
8 findings of fact made by Ofcom as to BT's position as the most important buyer of call
9 termination, as to BT's price sensitivity and its willingness to refer disputes to Ofcom, and
10 as to the proper construction of the specific end-to-end obligation imposed on BT. These
11 are all questions of fact, and we also rely on the finding of fact made by Ofcom, that when
12 negotiating the right price for call termination the parties would take into account the
13 approach that Ofcom would take were a dispute to be referred on Ofcom obligation, and
14 that would constrain the level of prices that would be fixed by commercial negotiation.

15 These are all fact specific findings, they have nothing to do with the pan-European issue.
16 Then the point is made at para.10 that all 24 of the other NRAs have found SMP, and you
17 have already had the points that I make on – so what? It is a fact specific question.

18 Then they say that if our arguments are correct they would be universally applicable to
19 those findings. With great respect, that is absolute nonsense. "... and would suggest a
20 general error of assessment", absolutely incorrect.

21 They then go even further. This argument, with respect, often gets wilder and wilder, at
22 para. 11:

23 "H3G's approach would make it impossible to find SMP in any wholesale market
24 [because] dispute resolution is equally available to regulate rates in relation to
25 fixed call termination ..." and so on.

26 That completely misses the point. The point is simply: "What is the proportionate way in
27 which Ofcom would fix the maximum price that BT is obliged to pay for call termination.
28 That has nothing to do with what powers Ofcom would exercise to resolve different kinds of
29 disputes that arise in different circumstances. So that is the *interorem* argument. We do
30 also make the point concerning the fact specific nature of our case that BT has itself made
31 the submission in these proceedings that it does not follow from our arguments in relation to
32 SMP that the other MNOs also do not have SMP, and we can see that in bundle E at tab 3.
33 This is the case management conference of 26 July 2007, where Mr. Barling, representing
34 BT at that time, on p.11, line 31 said:

1 “May I also just say for the record that we are concerned about the logic of MR.
2 Roth’s approach to the SMP, that is not what you are asking about at the moment
3 and he was only giving it as an example, but if we get onto that we would say it
4 does not follow as night follows day that if H3G were found – unlikely though it
5 may be – not to have SMP at that the same would follow necessarily for the other
6 MNOs, given the grounds on which H3G is challenging SMP. Thank you, very
7 much.”

8 And we respectfully agree with BT’s analysis.

9 If we then go on in Ofcom’s defence to p.27, para. 73, this is where Ofcom purports to
10 address our principal case. First of all, they deal with regulatory provisions other than the
11 end to end obligation and, in particular, general condition 1.1. We do not pursue an
12 argument based on general condition 1.1, or a separate argument for these purposes based
13 on s.185, we do rely on the end to end obligation for these purposes, so we can to straight to
14 para.84. They characterise our argument as this:

15 “H3G contends that Ofcom failed to understand that the purpose of the end-to-end
16 Connectivity Obligation is to promote competition; and that the Obligation should
17 therefore have been interpreted as requiring H3G to supply MCT to BT at a price
18 not appreciably above the competitive level, thereby conferring CBP on BT and
19 removing any SMP from H3G.”

20 Now, when one looks at that characterisation of our case, one can see where Ofcom has
21 gone wrong, they have really completely misunderstood it, because we do not say that the
22 end-to-end obligation should have been interpreted as requiring H3G to supply call
23 termination to BT at any price. Our point is that the end-to-end obligation should have been
24 interpreted as not requiring BT to purchase MCT at any price above a competitive price.
25 But the parties would be free to agree a higher price if they chose to, but that BT would not
26 be obliged to purchase at a price above a competitive price, and Ofcom has never
27 understood this point.

28 Then it said that thereby conferring CBP on BT and removing SMP from H3G, again with
29 respect completely the wrong way around because the starting point, if one takes for a
30 moment the strict Greenfield approach, the starting point is – one assumes – that nobody is
31 regulated, so there is no end to end obligation. BT does not have to interconnect with
32 H3G’s network. In that situation would BT have CBP? Self-evidently it would because BT
33 would be able to refuse or to delay interconnection if it did not like the price.

1 One then says because of that problem and the need (as explained in the Access Directive)
2 to ensure interconnection, you impose –and this of course is also reflected in the working
3 document the Commission looked at earlier - because BT is in that position you impose an
4 obligation on BT to interconnect at a reasonable price to level the playing field – in other
5 words, not to bestow CBP on BT but to limit BT’s CBP because originally BT has an
6 enormous amount of CBP because it can refuse to interconnect at any price, and you limit
7 the amount of the CBP by imposing the obligation on BT.

8 The question is not conferring it but limiting it, and the question is how far do you limit the
9 CBP, because what Ofcom claim to have done is to have constrained BT’s CBP to such an
10 extent that they have bestowed SMP on H3G, and that of course is disproportionate, because
11 instead of levelling the playing field they have distorted it in the other direction. So in fact,
12 para.84 demonstrates precisely the flaws in Ofcom’s logic.

13 Just going on in this passage, Ofcom recognises at para.85 that BT is not required to
14 purchase at any price, and that negotiations may be partly conditioned by the range of prices
15 they would expect Ofcom to regard as reasonable – this is all from the decision. Then at 87:

16 “When considering what is reasonable in the context of such a dispute, Ofcom
17 identified as a relevant consideration the purpose underlying the end-to-end
18 Connectivity Obligation.

19 88 The purpose of end-to-end connectivity is to enable retail customers to make
20 calls to other customers. ... The obligation is therefore an obligation on BT as a
21 purchaser of call termination. When determining a dispute as to the price for that
22 purchase, Ofcom will be concerned principally with reasonableness as regards BT,
23 the party that is subject to the obligation in question. Ofcom will accordingly seek
24 to ensure that the price asked of BT for termination is not so high that it would be
25 unreasonable for BT to be expected to purchase at that price.”

26 Again, we say that reasoning is fundamentally flawed because it leaves out of account
27 Ofcom’s statutory duties, all the general statutory duties we have looked at and, of course,
28 specifically the duties under s.73(2) to ensure competition between the providers and to
29 maximise benefits to end users left out of account in that analysis.

30 Conversely it said that “BT does not insist on a price so low that it cannot reasonably expect
31 termination to be supplied at that price. As regards the former consideration, Ofcom’s
32 approach has therefore been to assess whether the price demanded of BT would necessarily
33 cause BT to make a loss; and if that is not the case then for the purpose of the end-to-end
34 connectivity obligation the price has been considered to be reasonable”.

1 For all the reasons set out above we submit that is plainly an error of law. Thus, they say,
2 “Ofcom will not determine reasonableness in such a dispute on the basis of an
3 assessment of the counterparty supplying BT or the level of profit made by that
4 operator”.

5 We say the whole of that analysis is fundamentally flawed.

6 At para. 89 there is another error.

7 “In other words, the purpose of the end-to-end connectivity obligation is not to
8 constrain the exercise of market power of the operator supplying BT with MCT. That
9 would amount to the imposition of a regulatory obligation on a supplier of call
10 termination of a kind that may be imposed only following an SMP finding”.

11 It is the same error again. This is not about constraining H3G’s market power. It is about not
12 constraining BT’s countervailing buyer power to a disproportionate extent. It is not about
13 imposing an obligation on H3G itself. It is about imposing the maximum obligation on BT
14 to purchase.

15 Going to para. 90, talking about the dispute resolution,

16 “Ofcom declined to set cost based charges, as this would be unnecessary and
17 disproportionate to achieve the purpose underlying the end-to-end connectivity
18 obligations”.

19 Ofcom does not seem to have considered the proportionate resolution to those disputes,
20 namely to make a declaration as to the maximum price BT could be required to pay.

21 Going on to para. 95, Ofcom mount an alternative argument based on para. 5.162 of the
22 MCT statement which we looked at earlier. They say,

23 “If, contrary to the above, the end-to-end connectivity obligation does require Ofcom
24 to resolve disputes between BT and an MNO by reference to whether a charge was
25 appreciably above the competitive level, dispute resolution cannot be relied on to
26 constrain SMP”.

27 The problem with that is that it is inconsistent with Ofcom’s previous findings of fact in the
28 decision that BT is price-sensitive and therefore incentivised to refer disputes, and that
29 when the parties are negotiating, their negotiations will be conditioned by what they
30 understand to be the reasonable price that Ofcom will set.

31 Now, it is right that in a vacuum, without findings of fact made, the mere fact that BT may
32 have recourse to Ofcom in relation to the end-to-end obligation would not necessarily mean
33 that it had CBP. But, on the facts of this case, having regard to the findings of fact that
34 Ofcom made, it is quite clear from Ofcom’s analysis that the only reason that Ofcom

1 concluded that BT did not have CBP was that when the parties were negotiating, they could
2 not do so on the assumption that Ofcom would set a competitive price as the maximum that
3 BT had to pay.

4 We see that in particular from the grounds on which Ofcom rejected the Binmore and
5 Harbord analysis, because the only basis on which that analysis was rejected was that the
6 parties could not assume that that is what Ofcom would do. So, we say that this argument is
7 inconsistent with Ofcom's own finding of fact. As one can see, they say,

8 "BT may not in all cases have sufficient incentive to bring a dispute given: wider
9 commercial considerations affecting BT's relations with the MNO in question".

10 Well, that may be so, but that is not so in relation to H3G. They did refer a dispute in
11 relation to H3G.

12 "The inherent uncertainty of the outcome given the complexities of determining the
13 competitive level and the lack of transparency as to costs; the ability of BT to pass on
14 the costs resulting from MCT rates to its retail or wholesale customers; and the
15 administrative costs of referring a dispute".

16 Yes, of course, we agree it is fact-sensitive, but the facts have been found in this case. This,
17 of course, fundamentally undermines the apocalyptic analysis if H3G's appeal wins, there
18 will be no more ex ante regulation in Europe ever again, and everybody will go to hell in a
19 hand cart.

20 MR. SCOTT: Just on the para. 95 point, I am just thinking of the dates. BT actually refers the
21 dispute on 22nd January, 2007. So, what you would say is that that was in the first of the
22 two periods we are considering. So, there is as a matter of fact a BT reference of a dispute in
23 the first period.

24 MISS ROSE: Yes - and, of course, very close to the beginning of the second period.

25 MR. SCOTT: Absolutely, in relation to the second period. You have already pointed out that this
26 may have been a tactical play element. But, what you are saying is that one of the
27 differences between the former situation and the present situation is that a dispute has now
28 been referred.

29 MISS ROSE: A dispute has been referred. Of course, the finding of fact that BT is price-sensitive
30 ... are increasing market share is the incentive to refer.

31 MR. SCOTT: Yes. I think it is just worth putting that point on the record so that it does refer to
32 both periods.

33 MISS ROSE: Yes, sir. Thank you.

1 If we go to para. 96, there is a heading ‘Ofcom’s Statutory Duties’. This is the section in
2 which Ofcom seek to deal with our point that the way they have behaved is compatible with
3 their statutory duties. Para. 97 - they refer to s.3(4)(b). They say that it does not sit in a
4 vacuum.

5 “It applies in the context of Ofcom’s primary duties under s.3(1) [Yes, we agree] and
6 having regard to the consideration of s.3(3). Ofcom is required to act proportionately
7 and to target its regulatory activities only at case in which action is needed. It would
8 be disproportionate for Ofcom to go further and use the end-to-end connectivity
9 obligation as a regulatory device for imposing price controls on MNOs”.

10 Again, the same error repeated. Then, at para. 97.2 an argument premises on the argument
11 that we are contending - that the end-to-end connectivity obligation should be used to
12 impose price controls on the MNOs. That is not our case.

13 Then, at para. 97.4,

14 “In applying the end-to-end connectivity obligation to require BT to interconnect on
15 terms that are not determined by reference to the MNO’s costs, Ofcom is furthering
16 the Community requirement to encourage the provision of network access and service
17 inoperability. It also promotes competition by reducing the barriers to entry for new
18 network operators by ensuring that their call termination services were purchased by
19 BT”.

20 With respect to Ofcom, that is quite inadequate because it does not consider the points about
21 promoting competition between the providers or maximising the benefits to end users.

22 Very briefly turning to Ofcom’s skeleton argument in Bundle A, which largely repeats the
23 reasoning -- We can take this quite quickly because they maintain the position as set out in
24 their defence. I just want to identify the key paragraphs. We start at p.5, para. 10, under the
25 heading ‘The MCT Appeal - SMP’. We see again the usual mistake in the first sentence
26 where they say,

27 “H3G contends in the MCT appeal that Ofcom is obliged to resolve a dispute referred
28 regarding the price that H3G can charge for MCT ----“

29 Not the point. The point is the price BT can be required to pay - not the price H3G can
30 charge. Then there is the argument that that would apply to all the other MNOs irrespective
31 of the end-to-end obligation. But, this all flows from the misunderstanding of the premise.
32 Then, the ex post power would emasculate the ex ante provisions and ... for Ofcom here.
33 At para. 13 we see the same error again.

1 “The heart of H3G’s challenge appears to be the proposition that any dispute between
2 BT and H3G as to the charge for interconnection must be resolved by the imposition
3 of a charge for MCT not appreciably above the competitive level”.

4 This is the same mistake again.

5 MR. SCOTT: Just one small point. It refers in para. 10 to the ex post power of dispute
6 resolution. We may well ask them to comment on this, but dispute resolution appears to us
7 sometimes to have an ex ante character rather than an ex post character. In this particular
8 case the time has passed from where we get to the TDR bit, and we will be looking
9 backwards. But, it is quite conceivable, it seems to us, that you could be looking forwards.

10 MISS ROSE: Yes, because you might have a situation where two parties seeking to negotiate the
11 price cannot reach agreement, and so they say to Ofcom, “What is the maximum price that
12 BT can be required to purchase for the purchase, as of now”.

13 MR. SCOTT: Yes. That would be an ex ante situation, and you would agree that that would be
14 the case.

15 MISS ROSE: In that situation, it would be, yes.

16 MR. SCOTT: Thank you.

17 MISS ROSE: Paragraph 13. I have made the point that that is the same error again. At para. 15,
18 “As to the application of the end-to-end obligation, BT contends that H3G’s argument
19 is contrary to the ruling of the tribunal ... since it would involve taking account of the
20 application of regulatory powers to H3G in order to determine whether or not H3G
21 has SMP. If BT is correct, that is a short and simple answer to H3G’s argument”.

22 You will note that Ofcom stops some way short of endorsing BT’s argument. We say that is
23 hardly surprising. At para. 16, again the error continues.

24 “If in dispute resolution Ofcom was under a duty to assess whether a proposed price
25 was appreciably above the competitive level and then resolve the dispute by imposing
26 a price at that level so as to constrain the potential market power ----“

27 The same error just flows through the whole of BT’s analysis throughout. I should make it
28 clear that it does not matter to our argument whether the maximum price that Ofcom could
29 require BT to pay is a strictly cost based charge or a slightly wider definition of what is a
30 reasonable and competitive price. My case is not dependent on the strictly cost based
31 analysis. What we take issue with is Ofcom’s assertion that an anti-competitive excessive
32 price could be a reasonable price. But, that, again, takes one to the grey area where we do
33 not know what Ofcom’s analysis is.

34 At para. 17 they say,

1 “For this purpose, the precise way in which Ofcom determined the disputes that are
2 subject to the TDR appeals are irrelevant, unless Ofcom was under an absolute
3 obligation to resolve those disputes by fixing a cost based charge. Hence argument
4 about, e.g. the Gains from Trade Test, are no pertinent to the SMP issue in the H3G
5 appeal”.

6 With great respect, that cannot possibly be right because Ofcom’s own finding in the MCT
7 appeal is the parties’ anticipation of the way in which Ofcom would resolve disputes would
8 influence the way that they are negotiated. Therefore, the fact that Ofcom is applying an
9 unlawful approach to actual disputes is plainly of significance.

10 THE CHAIRMAN: You are not saying that in determining a dispute under s.185 Ofcom have to
11 set a cost based price. You are saying, I think, that even though they may have a greater
12 range of options available to them than they would in an SMP situation, nonetheless that
13 range is constrained by the application of ss.3 and 4 and s.73(2) to exclude from that range
14 excessive pricing.

15 MISS ROSE: Yes, and particularly to exclude excessive prices that would have an adverse effect
16 on end users.

17 THE CHAIRMAN: Yes.

18 MR. SCOTT: I think that is the important point. If the Gains from Trade Test is correct, then
19 there is a sense in which BT become an irrelevance. The question then is whether there is
20 SMP in the family of H3G and BT as against all other customers, competitors and
21 ultimately consumers.

22 MISS ROSE: Yes. We say that that analysis just defeats the whole purpose of the statutory
23 scheme, the main purpose of which is to benefit consumers. The relevance of the TDR
24 appeals primarily is that the way that Ofcom has dealt with those appeals is a vivid
25 illustration of the error underpinning its whole approach. One can see it demonstrating
26 Ofcom’s erroneous appreciation of its powers at the time that it wrote the MCT statement,
27 because having erroneously appreciated what its power were, it has now acted in
28 accordance with that error and produced some quite startling results.

29 Can I now come to BT’s intervention which is at C2, Tab 5? BT addresses SMP. It is
30 p.116 of the bundle at para. 9 of its statement of intervention. BT has a difficult task in
31 relation to this part of the appeal because BT agrees with us that Ofcom has misunderstood
32 its dispute resolution powers, and that its application of them and the Gains from Trade Test
33 is a gross error by Ofcom. It has put BT in something of a difficulty, given the reasoning
34 adopted by Ofcom in the MCT statement. We therefore submit that BT has found itself

1 constrained to adopt a position which in fact is unsustainable as against the first CAT
2 judgment. But, full marks for trying.

3 At para. 9 they say that,

4 “-- BT invites the CT to uphold Ofcom’s finding that BT did not, in all the
5 circumstances, have sufficient CBP to negate a finding that H3G had SMP. This is
6 the case notwithstanding the fact that Ofcom may ultimately set the prices using its
7 dispute resolution powers in the event that price negotiation between BT and H3G
8 reach a stalemate and a dispute is referred to Ofcom ... in para. 99 of the 2005
9 judgment, *‘the possibility of regulation being brought to bear on H3G is a factor
10 that cannot be prayed in aid by H3G as militating against its having SMP’*.

11 Therefore this factor is not a legitimate consideration ----“

12 Of course, the error there is that this is not about regulation being brought to bear on H3G.
13 It is about assessing the extent to which BT’s bargaining power is constrained by the
14 regulation on it under the end-to-end obligation. A different question.

15 If we go to para. 12 BT say,

16 “The fact that BT disagrees with Ofcom’s interpretation of the various statutory
17 provisions and of Ofcom’s duties when resolving price disputes does not undermine
18 the correctness of Ofcom’s conclusion that H3G does not have SMP.”

19 That is quite a bold submission, because the suggestion there is that in spite of the fact that
20 the critical reason that Ofcom relied on for making its decision is fundamentally flawed on
21 BT’s case, that nevertheless Ofcom’s decision should be upheld -- We submit that that
22 cannot be the right answer. If Ofcom misunderstood its powers to that extent the two
23 options realistically open to this tribunal are either to make a positive finding that there is
24 not SMP -- and we submit that you can make that finding on the basis of the facts that
25 Ofcom found -- or, alternatively, to refer the matter back for reconsideration. But, we
26 submit that it would not be appropriate, given the fundamental flaws in Ofcom’s approach
27 to find that there was insufficient CBP notwithstanding the basic errors in Ofcom’s analysis.

28 THE CHAIRMAN: I am not sure I accept that, Miss Rose. I think clearly we have the statutory
29 power to say that either there is, or is not, SMP in this situation. Whether it is in the public
30 interest, were we to decide that Ofcom have erred, to remit it back a second time in relation
31 to the reassessment decision, or whether it would be better, given the extensive investigation
32 that there has been in relation to this particular issue, for us to take a decision one way or
33 the other -- Now, no-one has suggested that there are other factors which need to be
34 investigated. It looks as if this has been thoroughly investigated, and one can come to a

1 conclusion either there is, or is not, SMP. So, at the moment I am not convinced that we
2 could not, if we agreed with you that the decision was flawed, but nonetheless thought that
3 there was still SMP -- that we could take a decision to that effect.

4 MISS ROSE: Madam, just to pause there for a second -- If we are right that Ofcom has
5 misunderstood the end-to-end obligation and the dispute resolution powers, then the
6 conclusion must be that Ofcom ought to have held that when negotiating commercially, BT
7 and H3G would have done so on the basis that if they could not agree, the regulator would
8 not require BT to contract at anything above a reasonable - in the proper sense, i.e. non-
9 excessive - price. Now, the question is, on that basis, given the findings of fact that Ofcom
10 made about BT's price sensitivity and so forth -- the question is: What is the basis on which
11 this tribunal could find that there was SMP because none of the other factual conclusions
12 have been challenged? So, you would have the situation where Ofcom's analysis about the
13 extent to which BT has countervailing buyer power; the extent to which the parties
14 negotiate; the extent to which their negotiations are influenced by their anticipation of what
15 the regulator would do -- All that is correct, but the error is simply in Ofcom's
16 characterisation of its own powers were the dispute to be referred, and that in fact the parties
17 ought to be negotiating on the basis that BT is not bound to contract at any level that is
18 excessive. If BT is not bound to contract at an excessive level, where does the SMP come
19 from? There is a vacuum. There are no facts found by Ofcom that would support that
20 conclusion.

21 In my submission, the options are either that you uphold Ofcom's decision on the grounds
22 that its reasoning is correct, or, if you conclude that Ofcom's reasoning was flawed, either
23 you find that there was no SMP or you refer the matter back. However, I submit that
24 Ofcom has not put forward any basis on which SMP could be found, notwithstanding its
25 errors.

26 THE CHAIRMAN: They have in that the argument which they make, which BT also makes -
27 which is that it does not matter what the test is for the dispute resolution - that cannot be an
28 answer to an allegation of SMP. Now, I know you say that that is not consistent with --
29 Well, it is a fact-sensitive thing and therefore the interorem plea is wrong.

30 MISS ROSE: Madam, it is very important to talk about dispute resolution precisely because the
31 point here is the relevance of the dispute resolution power to determine the scope of the
32 end-to-end obligation on BT - not to fix a price on H3G.

33 MR. SCOTT: Taking that point, one of the points that you have made earlier on is that dispute
34 resolution would scope E2E obligation in relation to BT.

1 MISS ROSE: Yes.

2 MR. SCOTT: If they just do a declaration without going on to any further requirements on the
3 parties that would, as you have suggested, leave the parties able to treat as they wished?
4 Now, the tribunal is faced with the actual history of events, and the actual prices that have
5 flowed through to the transit customers and to the end users. So, the tribunal has before it
6 actual facts which demonstrate what actually happened. We would be having to speculate in
7 relation to what might happen were we to find that the TDR had been misconceived by
8 Ofcom, and were we to strike down the TDR determination or determination ... So, you
9 would then be arguing for a situation in which H3G itself was not circumscribed. BT might
10 be circumscribed, but H3G was not circumscribed, and in which all that would then exist in
11 terms of facts would be the history of the matter since 2001.

12 Now, the tribunal would then be faced with a situation that it could indeed direct Ofcom to
13 go back and reconsider the matter. But, it might, or might not, at that stage decide that there
14 was sufficient evidence before it to say that there should be a finding of SMP. I am
15 hypothesising here because we are leaping a number of fences.

16 MISS ROSE: I understand that. However, in my submission, there is not. Ofcom itself made a
17 finding that the actual conduct of the parties is a faulty guide because they were acting, as it
18 were, self-consciously within a process in which Ofcom was itself conducting its market
19 review, and therefore regulation was threatened. Therefore, it is very difficult to draw any
20 inferences about actual market power from the history of the events.

21 MR. SCOTT: I said that. But, if you take the history up to the point where you say that is
22 happening, which is up to 21st January, 2007 ----

23 MISS ROSE: Well, no, with respect, because, of course, the original decision was taken in 2004,
24 was appealed in 2005, and then Ofcom were reconsidering it. So, from the perspective of
25 H3G, this has been an unresolved issue since 2004.

26 MR. SCOTT: But, there has been nothing to stop either H3G or BT from taking action before 21st
27 January, 2007 in either direction.

28 MISS ROSE: That is correct, but the point that I make is that it is very dangerous to draw any
29 inferences about market power from what they did, or did not do, before that date because
30 they had self-serving reasons for not doing so. So, BT has a reason for not referring the
31 dispute if it thinks it might prejudice it in arguing that it does not have CBP. So, you simply
32 cannot draw that inference. But, what you do have is the actual findings of fact made by
33 Ofcom to the effect that BT is price-sensitive -- that BT would refer a dispute -- and that the
34 parties would negotiate, and that the parameters of their negotiation would be on the basis

1 of the price that they believed would be set if a dispute were referred. Those are the crucial
2 findings of fact which are not challenged, and which, in my submission, mean that either
3 Ofcom is right on its interpretation of the dispute resolution powers - in which case they win
4 - or it is wrong - in which case their conclusion of SMP falls because there is no other basis
5 on which it can be sustained on the particular facts.

6 MR. SCOTT: Yes. I think that is a helpful way of explaining your case, yes. Thank you.

7 MISS ROSE: BT then go on in their statement of intervention to analyse the first CAT judgment,
8 in particular at para. 24 of their statement of intervention. They say that:

9 “The 2005 judgment also explained, very precisely, the scope of the re-evaluation
10 exercise that CAT wanted Ofcom to conduct, namely ...”

11 and it refers to the initial negotiations at (a). As far as other matters are concerned,
12 potentially examining BT’s position as a possible monopsonist the possibilities for joint
13 dominance, relationship with H3G, attitude and propensity to protect the interest of its
14 customers, and of course we now do have findings on those issues, in particular attitude and
15 propensity to protect the interest of its customers.

16 Then as far as the effect of regulation went, considering in view of the fact that the end-to-
17 end was qualified and did not require BT to accept unreasonable price terms, how far the
18 effect of that regulation would actually operate in any deemed negotiations.

19 Now, what, with respect, BT have left out of their summary there of the first CAT
20 Judgment, is the paragraphs in the first CAT Judgment that indicate that dispute resolution
21 in relation to the end-to-end obligation is also relevant, and in particular that is paras. 129,
22 132 and 142 of the CAT Judgment.

23 Paragraph 57, at p. 133:

24 “In paragraph 85 of its defence Ofcom contends that negotiations between BT and
25 an MNO may be partly conditioned by the range of prices they would expect
26 Ofcom to regard as reasonable.

27
28 58. Ofcom accepts that the fact that Ofcom will ultimately set prices through a
29 dispute resolution process has to be left out of account in assessment of H3G’s
30 SMP. It seems to BT that if this argument then is correct it is also irrelevant to
31 consider what expectations the parties might have about the range of possible
32 prices Ofcom would set in relation to any price dispute.”

1 Of course, the error there is that BT is conflating regulation of H3G to be left out of the
2 count with regulation of BT relevant and to be taken into account. So it is the dispute
3 resolution relevant to the end-to-end obligation which is relevant to the negotiations.
4 Paragraph 60, the same error. The willingness or otherwise of BT to refer price disputes to
5 Ofcom, they say, is irrelevant to an assessment of BT's CBP or H3G's CBP because in the
6 final analysis it involves taking into account the effects of Ofcom's regulatory powers on
7 H3G. Again the same mistake, it is the effect of the regulatory powers on BT.
8 Paragraph 71 we simply note that BT makes very serious criticisms of Ofcom's approach to
9 dispute resolution. Now, what is also interesting here is that BT's complaints indicate the
10 extent to which Ofcom's error has erroneously and excessively constrained BT's
11 countervailing buyer power, because if you look at the complaints that BT make here, they
12 say:

13 "The explicit sanction of Ofcom that prices can be set appreciably above the
14 competitive level is wrong; and

15 (a) significantly compromises BT's ability to negotiate rates."

16 That is precisely the point, that if BT was negotiating on the basis that Ofcom would
17 correctly understand its dispute resolution powers it would have a stronger hand in
18 negotiation.

19 "(b) means that the end-to-end obligation (as understood by Ofcom)
20 operates as a restriction which prevents BT from negotiating commercial
21 arrangements for interconnection contrary to Article 3 ..."

22 Again, precisely the point. Then:

23 "(c) undermines interconnection, distorts competition and prejudices end
24 users contrary to requirements of the European Directive.

25 The fact that Ofcom's one-sided interpretation is so at variance with those
26 regulatory obligations further reinforces the conclusion that its interpretation of its
27 own access- related condition is wrong."

28 Now, we agree with all that, but what is significant is how BT there expressly links Ofcom's
29 errors with an erroneous and disproportionate reduction in BT's bargaining power,
30 particularly at (a) and (b), and that therefore – we say – illustrates precisely the link that
31 Ofcom correctly made between Ofcom's interpretation of its dispute resolution power and
32 CBP, but which BT are, as in this statement, seeking to disavow.

33 That is the only intervention I propose to deal with now in opening. I may have points to
34 make in reply to the other Interveners.

1 Can I now deal very briefly – and I am happy to say that there is not a great deal more, so it
2 is unlikely we will be here until 8 o'clock – with the subsidiary arguments that I flagged up
3 earlier, which is the question of excessive pricing?

4 If we go back now to bundle B. The starting point is p.58 of tab 1, para.4.14, where Ofcom
5 addresses the test for the existence of SMP. They say that they reject our contention that
6 Ofcom has equated SMP with the ability to persistently raise prices above cost by any
7 amount.

8 Then they refer to the test at 14.(2) the power to behave to an appreciable extent
9 independently of competitors, customers and ultimately consumers. Then they refer to the
10 European Commission's Guidelines, and the small but significant non-transitory increase in
11 price test. Then the working paper of the ERG, suggesting that the ability to price at a level
12 that keeps profits persistently and significantly above the competitive level is an indicator of
13 market power. Then they say that they agree with H3G that where an undertaking charges a
14 price that is above costs, but only to a non-appreciable degree, this fact is unlikely to be
15 good evidence to support a finding that that undertaking has SMP.

16 "In the context of this review Ofcom considers MNOs will have SMP if they are
17 able to sustain charges to an appreciable extent above the competitive level in the
18 market for MCT."

19 So that is the test that Ofcom say that they are applying. The problem with this test is that
20 first of all Ofcom does not explain what they mean when they refer to the ability to sustain a
21 price appreciably above the competitive level. What does "appreciably" mean? What does
22 "the competitive level" mean? Is the competitive level to be equated with a LRIC cost
23 model? Is it to be equated with a reasonable margin above a LRIC cost model? If so, what
24 is that margin? Are there other factors to be taken into account when considering what is a
25 competitive price such as the economic value to the other party? We just do not know.
26 Neither do we know what Ofcom considers to be a level appreciably above whatever this
27 competitive level may be.

28 We also do not know what evidence Ofcom was relying on to demonstrate that H3G was
29 able to sustain a price that was appreciably above a competitive level because they do not
30 explain that anywhere in this statement.

31 If we look further on in the statement, 4.17, it says:

32 "Secondly, Ofcom does not accept that if H3G's charges are below the monopoly
33 level this implies that H3G does not have SMP. The monopolistic price is an
34 extreme excessive price, and a price can still be excessive, even if it is below the

1 monopolistic price. As noted at para.4.14 MNOs will have SMP if they are able to
2 sustain charges to an appreciable extent above the competitive level.”
3 Then there are references to the fact that the 2G termination charges in 2002/3 of 9.4p and
4 10p per minute were against the public interest because they were above 2G costs. Then:
5 “Furthermore, and in any case, an observation of excessive pricing is not
6 necessary for a finding of SMP which is the ability to behave to an appreciable
7 extent independently of competitors and customers.”
8 So, with respect, that does not take the analysis any further. They say that it might be a
9 price lower than a monopolistic price, but they still do not tell us what are the criteria for a
10 competitive price, what level is appreciably above that, and how are they going to assess
11 that H3G have the ability to charge such a price.
12 MR. SCOTT: Can we pause on that point for a moment? Taking your point that the obligation is
13 on BT we can conceive of a situation where there is a worry in the mind of Ofcom that if
14 they set a price that is too low – let us take a hypothetical example – they say 3p?
15 MISS ROSE: As the maximum price BT ----
16 MR. SCOTT: As the maximum price, yes – then they could be faced with H3G saying: “We are
17 not going to play ball at that level”, and then there would not be interconnection with BT,
18 for the logical reasons that we have already rehearsed, with transit customers and their end
19 users. As I understand it Ofcom would argue – or you would argue if the obligation is on
20 BT, a price which there is a likelihood of the mobile network operator accepting?
21 MISS ROSE: Yes, but of course if the mobile network operator does not accept that price it will
22 have to withdraw entirely from the UK market, because if we do not connect with BT we do
23 not have a business.
24 MR. SCOTT: Right.
25 MISS ROSE: So there is rather strong countervailing buyer power for BT above whatever price
26 Ofcom regards as reasonable for the purpose of the end-to-end obligation. This is why we
27 do not have SMP.
28 MR. SCOTT: We may have to think a bit more about this. Why should Ofcom rationally want to
29 argue this?
30 MISS ROSE: I have asked myself that question! (Laughter)
31 MR. SCOTT: You have asked yourself that question. I am trying to think of why they should ----
32 MISS ROSE: Mr. Roth will tell us, I am sure!
33 MR. SCOTT: -- want to argue this.
34 MISS ROSE: We do not know, it is bizarre.

1 MR. SCOTT: Presumably it has to because the purpose is to effect interconnection and the fear
2 must be that interconnection would not be effected if they set a price that was too low. We
3 shall see; we shall see.

4 MISS ROSE: We shall see, but of course that does not form any part of their reasoning or ----

5 MR. SCOTT: No, that is right.

6 MISS ROSE: You have my point that whatever price they set as the ceiling of the end-to-end
7 obligation it is going to leave BT with a very strong bargaining power at a level above that
8 price, for obvious reasons.

9 But I am on a different point here, which is that as part of its assessment of the question
10 whether we have SMP, Ofcom is asking itself the question, "Do we have the ability to set an
11 excessive price?" But, in my submission, it does not at any stage in its decision identify
12 what it means by 'an excessive price' or identify on what evidence it concludes that H3G
13 does have the ability to set an excessive price.

14 The closest that Ofcom comes to grappling with this is at para. 154 of the decision which
15 we looked at earlier, but which we need to look at again. That is at p.100.

16 "On this basis, a reasonable charge for BT to purchase MCT with a view to ensuring end-to-
17 end connectivity may be at a price appreciably above the competitive level. As such, if a
18 charge appreciably above the competitive level were in dispute, Ofcom considers it unlikely
19 that it would insist on a strictly cost-based charge (such as used in deriving cost benchmarks
20 in s.9 to set efficient regulated charges in the charge control), i.e. a charge that was not
21 appreciably above the competitive level".

22 Now, Ofcom have sought to get out of this, but with great respect to them, they say in the
23 clearest possible terms in this paragraph that a price which is not appreciably above the
24 competitive level is to be equated with a strictly cost-based price. They are therefore saying
25 in this paragraph that any price which is above a strictly cost-based price is appreciably
26 above the competitive level.

27 THE CHAIRMAN: And therefore is an indication of SMP.

28 MISS ROSE: Yes. Madam, with great respect, it is obviously flawed reasoning. You cannot
29 submit that simply because an operator is able to charge a price that is above the price that
30 an efficient operator's costs will be that that is an anti-competitive price. It is simply a *non*
31 *sequitur*. It would mean there would be hundreds of thousands of businesses in dominant
32 positions because hardly anybody charges prices that are strictly cost-based. There are many
33 competitive pressures, upwards and downwards, on price, other than cost. It is just over-
34 simplistic to equate a competitive price with a strictly cost-based price.

1 We submit that that is a clear error. Let us see now how Ofcom seeks to deal with it. This is
2 in its defence. If we go to C2 at Tab 1,p.37, under the heading, “The Meaning of Excessive
3 Pricing for the Purpose of SMP”. First of all, at para. 100 there is an important concession
4 made by Ofcom. They say,

5 “This whole line of argument rests on a fundamental misapprehension as to Ofcom’s
6 position. Ofcom did not base its conclusion that H3G has SMP on any evidence that H3G
7 engages in excessive pricing. That issue goes to abuse, not to SMP, which is the equivalent
8 of dominance. The ability to charge an excessive price is sufficient for a finding of SMP, as
9 Ofcom made clear in the MT statement”.

10 That, with respect muddies the waters still further because it is clear that Ofcom are not
11 saying, “The price which you, H3G, originally agreed with BT, and which was then
12 sustained thereafter, is an excessive price”. They are not saying that. I am going to show
13 you the paragraph where they suggest that the 2G/3G MNOs may have engaged in
14 excessive pricing, and they expressly do not make that finding against H3G. So, that being
15 so, what is the evidential basis for the finding that there is an ability to charge an excessive
16 price? They do not tell us.

17 Then they go on at para. 101 to deal with the flaw at para. 5.154 which I have just shown
18 you.

19 “Nor does Ofcom consider that a charge that is not ‘appreciably above the competitive
20 level’ is the equivalent of a strictly cost based charge”.

21 That is contrary to 154. Then they say,

22 “What Ofcom does contend is that if a charge for MCT is strictly cost based, then it will not
23 exceed the competitive level”.

24 That is an uncontroversial proposition. But, it is not what they say at 154.

25 MR. SCOTT: It is actually not necessarily true of an inefficient operator.

26 MISS ROSE: That is true. That is true. Yes, that is true, sir. An efficient cost based charge
27 would be competitive. That is right. But, it is not what they say at 154. They then say,
28 “H3G’s case under this ground appears to drive from 5.154”. It is marvellous language,
29 this.

30 “The point made there, as explained in paras. 84-94 above, is that if a dispute were referred
31 to Ofcom arising from BT’s end-to-end connectivity obligation, Ofcom would be unlikely
32 to insist on a strictly cost based charge and would not approach the level of charge in the
33 same manner as in determining an SMP condition of charge control. Whatever may be the
34 correct test for determining whether a price for MCT was ‘appreciably above the

1 competitive level' (and the issue of excessive pricing is notoriously complex), Ofcom does
2 not conduct dispute resolution by applying that test."

3 With respect, that is quite a remarkable paragraph because, firstly, what Ofcom claim here -
4 they say at para. 154 - is not what they actually say at 154. If you go back to para. 154 they
5 say, in term,

6 "Ofcom considers it unlikely it would insist on a strictly cost based charge, i.e. a charge that
7 was not appreciably above the competitive level".

8 It is the use of the term 'i.e.' -- What that is saying is that a strictly cost based charge is a
9 charge that is not appreciably above the competitive level. The two are equivalent. The
10 second remarkable thing about para. 102 of Ofcom's defence is that Ofcom does not even
11 attempt to make any positive case as to what is the right test for an excessive price. They
12 simply say "Whatever may be the correct test for determining whether a price is appreciably
13 above the competitive level --" and they say, "Oh, it's notoriously complex". We
14 respectfully agree. It is notoriously complex to determine what is a price appreciably
15 above a competitive level. But, with respect, this was an issue that Ofcom was bound to
16 grapple with because Ofcom was dealing with the question of whether we had the ability to
17 set such a charge. If Ofcom itself does not even know what is the right test for determining
18 how a charge is appreciably above the competitive level, and if Ofcom concedes that they
19 do not base their case on any evidence that we were charging excessively, then, with all due
20 respect, what is the basis for the finding of SMP?

21 THE CHAIRMAN: The basis for their finding of SMP is that you have a 100 percent share of
22 the market, and there is not sufficient countervailing buyer power. It is possible that the
23 evidence of excessive pricing can be used as an indicator of dominance, but it is not
24 necessary. You can establish dominance without considering the pricing practices of the
25 allegedly dominant undertaking. But, are you saying that either in this case they should
26 have, or did, draw a conclusion as to the ability to price excessively necessarily as part of
27 the finding of SMP?

28 MISS ROSE: The fact is that the ability to price excessively was a part of their finding of SMP,
29 but the point that you just made to me points it up because, as you rightly say, they find 100
30 percent market share and that BT does not have sufficient countervailing buyer power. The
31 reason BT, they say, does not have sufficient countervailing buyer power is that in the event
32 of a dispute resolution, Ofcom would not necessarily set a price that was not appreciably
33 above a competitive price. How can Ofcom say that if they themselves do not know what a
34 price appreciably above a competitive level is?

1 THE CHAIRMAN: I think most people are agreed that there can be a range of prices reasonably
2 arrived at in the context of dispute resolution, which might be greater than a strictly cost
3 based price. Now, there is a dispute as to whether within that range you would accept as
4 being a range of the reasonable price -- You would say, "Yes, it does not have to be a
5 strictly cost based price, but it must not be an excessive price, but that leaves some lee-
6 way". There seems to be some lack of clarity about whether Ofcom agrees that there is that
7 lee-way. But, that is a different point. That is part of the point about countervailing buyer
8 power. It is not a separate point about, "Well, even putting on one side the countervailing
9 buyer power point, is there evidence that H3G have priced excessively, thereby indicating
10 that they have SMP?" I think that was part of Ofcom's position.

11 MISS ROSE: The question of whether they have priced excessively -- Ofcom does not rely on
12 that. They tell us at para. 100 that they do not rely on that. So, the question is only about
13 ability to price excessively. But that points up exactly, madam, the point that you make - it
14 does not follow from the proposition that in resolving a dispute, they could set prices that
15 were greater than a strictly cost based price, that H3G would have the ability to price
16 excessively.

17 THE CHAIRMAN: No. No. I understand that is your case.

18 MISS ROSE: That is the point. We made that point in relation to Ofcom's statutory duties, and so
19 on, but now we make the point as a separate error from Ofcom's failure to analyse this very
20 question of what is an uncompetitive price. They appear to have proceeded, from 154,
21 from then erroneous basis that any price greater than a strictly cost based price would be
22 appreciably above the competitive level. That is the only test they use anywhere. It seems to
23 be a part of their error. There is no other test that they use.

24 Madam, of course, I accept that these two points are closely interlinked, but they are distinct
25 errors. This point, of course, also has significance in relation to the remedies appeal,
26 because, as the tribunal knows, under s.88, Ofcom actually has to conclude that there is a
27 risk that we would set a price so excessive as to have an adverse effect on end users. Ofcom
28 has nowhere considered, or addressed, what that level of price would be, or explained how a
29 price at that level would be compatible with the end-to-end obligation.

30 MR. SCOTT: I think one of the strange aspects - and we may come to this later - is that on the
31 one hand we have competitive M2 markets, and on the other hand we have a non-
32 competitive (in the sense that there is 100 percent market share) 2M markets. Yet, little
33 attempt seems to be made to contrast the F2M rates with the M2F rates, if you see what I

1 mean. In retail terms, you can look at those and see some interesting comparisons
2 immediately, but this is not a point that is being explored.

3 MISS ROSE: No, it is not. My point is a more simple one. I believe you have it. We do make
4 the point that a cost plus approach is inadequate as a basis for identifying what is an anti-
5 competitive price. Given that the hour is late, can I just give you the reference? It is the
6 Attheraces case in Vol.H2 at Tab 14, para. 117-118, 204, and 207-208. That makes the point
7 that seeking to equate excessive pricing with pricing above cost is over-simplistic, and you
8 have to look at other considerations, such as economic value. Now, I appreciate that it is
9 said by T-Mobile that we made an elementary error in confusing the test for dominance with
10 the test for abuse of dominance. Perish the thought that we should make such an error. We
11 make simply the more general point that when you are seeking to identify what is an anti-
12 competitive or un-competitive, or excessive price, the position is more complex than simply
13 looking at LRIC-plus.

14 PROFESSOR BAIN: I wonder if I might extend things by just trying to ask a little question on
15 that? You were saying that we have to relate price to economic value rather than cost. I can
16 understand in the context of the Attheraces why that was said. I think I can understand in
17 rough terms what they mean by “economic value” there. What do you mean by “economic
18 value” in the context of this case?

19 MISS ROSE: The value of the service that is being provided to the person purchasing it.

20 PROFESSOR BAIN: How do you measure that?

21 MISS ROSE: Sir, I do not purport to measure it, I say it is Ofcom who should have considered
22 how to measure it, or at least have told us what test they were applying.

23 PROFESSOR BAIN: Yes, one can draw the distinction as to cost base measure and economic
24 value where you have a situation like intellectual property rights, or patents, or the skills of
25 footballers or things of sort, indeed the labour market generally where we do not price
26 people on a cost-plus basis. But when you come to services or commodities of this kind
27 economic value in a competitive market will most commonly be related to some notion of
28 costs. You seem to be suggesting here that this is an exception, and I just wondered what
29 made it exceptional.

30 MISS ROSE: Sir, I am not seeking to make a positive case about what ought to be the right
31 measure of excessive pricing here, the case that I make is more modest, which is simply that
32 the equation that Ofcom appears to have made between strictly cost-based price and
33 anything appreciably above that being anti-competitive we say is too simplistic, so they

1 were not making that equation. The will not tell us what test they were applying and that is
2 the flaw that we identify, but I do not seek to go further than that.

3 Can I just turn up the point that there is not a finding of excessive pricing by H3G. We see
4 this in the MCT statement (file B). Paragraph 4.45 at p.65 of the bundle, under the heading
5 “Excessive Pricing”.

6 They start by noting that:

7 “The Working Paper stated that ‘the ability to price at the level which keeps
8 profits persistently and significantly above the competitive level is an important
9 indicator for market power’.”

10 Then:

11 “... in the context of this review Ofcom considers that evidence MNOs are able to
12 sustain charges to an appreciable extent above the competitive level supports the
13 view that the MNOs have SMP, it is not however a pre-requisite for a finding of
14 SMP. In the last market review Ofcom noted that 2G termination charges appear
15 to have been substantially above a reasonable estimate of each MNO’s costs for a
16 number of years”.

17 Of course, that is talking about their actual costs not efficient costs.

18 “In the case of 3G mobile termination the underlying 3G charges within the
19 blended charges proposed by three of the four 2G/3G MNOs are substantially
20 greater than the 3G charges being levied by H3G.”

21 Now, in that case, in relation to 3G it is the excess of the other operators over us which is
22 being relied on as evidence of excessive pricing.

23 “Furthermore, the underlying 3G charges proposed by all 2G/3G MNOs are
24 substantially greater than Ofcom’s estimate of efficient 3G unit costs. In some
25 cases the MNOs’ charges are more than double the level of Ofcom’s view.”

26 Now, what is striking about that paragraph, and that is the paragraph where Ofcom purports
27 to deal with excessive pricing, is that it does not make any finding against H3G of actual
28 excessive pricing and it gives no reasoning at all to substantiate the finding of ability to
29 price excessively.

30 THE CHAIRMAN: But they did, as a result of this in assessing the H3G MCT charge, set a
31 charge which was substantially below the then current H3G rate.

32 MISS ROSE: Yes, and that again raises the grey area question between what is the efficient
33 LRIC based charge, and what is an excessive price, and we just do not know the answer to
34 that.

1 THE CHAIRMAN: So you are saying that one cannot infer from that, that they thought that the
2 price was excessive?

3 MISS ROSE: No.

4 THE CHAIRMAN: It might have been within that ----

5 MISS ROSE: Within the margin.

6 THE CHAIRMAN: -- within the margin.

7 MISS ROSE: And indeed, they expressly concede at para.100 that they did not base their finding
8 on any evidence of excessive pricing, and the paragraph where they make the finding is
9 made against the others, and specifically not against H3G.

10 THE CHAIRMAN: And there is nothing later in the discussion of why they decided to fix the
11 charge at the level they did fix it?

12 MISS ROSE: Of course, there is an enormous amount about why ----

13 THE CHAIRMAN: Yes, but there is nothing to indicate that they found that it was an excessive
14 price?

15 MISS ROSE: There is not a finding that it was an excessive price in this sense. There was a
16 finding that it was above cost, but that is precisely the problem.

17 Madam, unless I can be of any further assistance, those are our submissions in relation to
18 the issue of SMP.

19 THE CHAIRMAN: I think Professor Bain has some points.

20 PROFESSOR BAIN: I just want to be quite clear about one or two points, Miss Rose. The first
21 is the role of dispute resolution here.

22 You have been arguing, I think, that in the context of the E2E obligation then dispute
23 resolution was putting obligations on BT, it was not putting obligations on H3G?

24 MISS ROSE: No, sir. The E2E obligation places an obligation on BT. Dispute resolution
25 defines the extent of the obligation on BT.

26 PROFESSOR BAIN: I am just trying to see whether, if this is an act of regulation, which in this
27 particular case arises as a result of the dispute that has been created in the context of BT,
28 you seem to be saying, and the way you are saying it should be resolved also follows this, is
29 that this is put as an obligation BT, or it should be cured by putting a particular obligation,
30 or stating a maximum price that they ought to pay?

31 MISS ROSE: Yes.

32 PROFESSOR BAIN: That is the way to do it. But you are not saying, I think, that this is a
33 regulatory action that affects both parties to the dispute, regardless of where that dispute

1 comes from. It is usually the provisions of the Act for a dispute resolution apply over a
2 range of instances?

3 MISS ROSE: Yes.

4 PROFESSOR BAIN: You seem to be saying in this particular instance we should be looking very
5 much at its effect on BT ----

6 MISS ROSE: Yes.

7 PROFESSOR BAIN: -- and not at the fact that it applies equally to the other party to the dispute?

8 MISS ROSE: That is on the basis of the narrower argument based on the narrow construction of
9 the first CAT Judgment, because the first CAT Judgment indicates that when considering
10 the existence of countervailing buyer power you can consider the effect of regulation on the
11 counterparty, but not the effect of regulation on H3G. Now, you have my broader
12 submission which is that, in fact, properly understood that first Judgment only excludes
13 from consideration the effect of SMP regulation on H3G.

14 PROFESSOR BAIN: Yes, I took that to be your point, but I wanted just to be quite clear what
15 you were saying about the nature of regulation as well.

16 MISS ROSE: Yes. So it is absolutely right to say that when a dispute is referred to Ofcom,
17 Ofcom has a range of powers under s.190, which includes the power to fix the price, and
18 that would obviously constrain H3G as well as BT. That is absolutely right.
19 Of course, the submission can be made, on the wider interpretation of the first CAT
20 Judgment, that the effect of that regulation should also be taken into account when
21 considering the parties relevant negotiating strengths. So that is one argument.
22 The second argument, if I am wrong about that, and the first H3G Judgment plainly entitles
23 the Regulator to take into account when assessing countervailing buyer power the effect of
24 regulation on BT and not the effect of regulation at all on H3G – even regulation
25 independent of SMP – then what it must consider is the extent of the end-to-end obligation
26 on BT, and the acknowledgement by both parties when they are negotiating, that if they are
27 unable to agree what is the maximum price BT must pay they can ask Ofcom to resolve that
28 question.

29 PROFESSOR BAIN: Well thank you for that. Can I just follow that up with a second question
30 on the dispute resolution, where you have been saying in a number of contexts, that what
31 Ofcom should do is declare the maximum that BT need to pay. I just wondered what the
32 sections of the Act were that led you to that, just remind me? I think it is s.190(2)(a)?

33 MISS ROSE: Yes.

34 PROFESSOR BAIN: Why do you exclude s.190(2)(b)?

1 MISS ROSE: Because the concern that has been expressed by Ofcom is that it would be
2 disproportionate, when resolving a dispute in relation to the end-to-end obligation, to
3 resolve that dispute by imposing a price control on H3G. That is what Ofcom have argued,
4 but we say that the flaw in that is that it does not follow from that that they have to set a price
5 that is too high, because they are then asking themselves the question: “What is the
6 proportionate way to resolve this dispute?” The proportionate way to resolve it is to
7 declare the maximum price that BT can be bound to pay, and that leaves the parties free to
8 negotiate above that price; it does not equate to an SMP condition, it is light touch
9 regulation but it correctly defines the scope of BT’s end-to-end obligation.

10 PROFESSOR BAIN: So you are relying on Ofcom’s objections to fixing a price in this instance
11 for your own argument that we should discount 190(2)(b)?

12 MISS ROSE: I am saying that if Ofcom are right, and it would be disproportionate to – as they
13 put it – impose regulation on H3G when there was not a finding of SMP, if they are right
14 and that would be disproportionate they are wrong to conclude that the only recourse that
15 they have is to fix an anti-competitive price, because the proportionate result is actually to
16 declare the maximum price at which BT is bound to contract, and they do not seem to have
17 considered that option.

18 PROFESSOR BAIN: Thank you. The third point I wanted to be clear about is on price
19 sensitivity, where it is accepted that Ofcom have said that BT are price sensitive, and BT
20 would agree with that, you seem to be arguing that that price sensitivity will outweigh all
21 other commercial considerations?

22 MISS ROSE: No, I do not argue that; I simply rely on Ofcom’s reasoning where Ofcom, in its
23 own determination, proceeded from that to conclude that what was determinative of the
24 issue of countervailing buyer power was the extent of the end-to-end obligation on BT, and
25 therefore the scope within which the parties would negotiate.

26 PROFESSOR BAIN: Thank you.

27 MR. SCOTT: Sorry, just one or two points on your skeleton. First, on p.29, para. 70. My
28 recollection is that para.35 is your own party’s submissions not a finding ----

29 MISS ROSE: It may be an erroneous paragraph reference, but I do not think the proposition
30 is ----

31 MR. SCOTT: No, not that is right, but it is just ----

32 MISS ROSE: That is possible, but I gave you many paragraphs this morning.

33 MR. SCOTT: No, that is okay. In para.116, you make a statement that “H3G’s costs were likely
34 to have been higher than those of Orange at this stage of its development.”

1 MISS ROSE: Yes.

2 MR. SCOTT: Essentially I am not quite sure what the status of that comment is. It contains the
3 word “likely” so it is an opinion, is it backed by ---

4 MISS ROSE: Sir, we would say it is a legitimate inference from the conclusions that Ofcom
5 reached, in fact, in its own analysis in this case. It would be very surprising, having found
6 that our costs were higher than those of the MNOs, as at 2006/07, it would be pretty
7 surprising if they were smaller when we were launching.

8 MR. SCOTT: It says that H3G’s costs were likely to be higher than those of Orange, I am
9 assuming that that refers to Orange 3G, not Orange ----

10 MISS ROSE: No, because we have to pay Orange’s 2G termination rate. BT required us to
11 negotiate an Orange 2G termination rate. Orange did not have a 3G network at that time.

12 MR. SCOTT: Yes, it was a paragraph that clearly had me confused.

13 MISS ROSE: I am sorry, sir.

14 MR. SCOTT: The other paragraph that was in my mind was para. 153. Again, somebody may be
15 able to help me and tell me where the European Commission’s Guidelines are, where you
16 refer to para.73?

17 MISS ROSE: Sir, that is a point that of course Ofcom’s cite in their own MCT decision. We can
18 hunt out the reference and give it to you tomorrow morning.

19 MR. SCOTT: Yes, it is just that my recollection is that it has to do with restriction of output, and
20 there is no suggestion of a restriction of output here.

21 MISS ROSE: We will check the reference.

22 MR. SCOTT: Thank you.

23 THE CHAIRMAN: Also on your skeleton, Miss Rose, I just want to explore a little bit more your
24 answer to the point that is made against you that the Directives and the regulatory
25 framework seem to contemplate dispute resolution and SMP *ex ante* regulation operating
26 hand in hand, neither one cancelling out the other, and I think it is said against you that
27 whatever the test is for dispute resolution it cannot be that that negates SMP, and your
28 answer to that is “Well, sometimes it might, sometimes it might not, it is very fact
29 sensitive.”

30 Now, in para.166 of your skeleton you say: “This right to refer and BT’s willingness to
31 exercise it are, in H3G’s submission sufficient to displace any finding of dominance.

32 MISS ROSE: Sorry, what paragraph was that?

33 THE CHAIRMAN: I beg your pardon, I am looking at a different version of it. (After a pause)
34 Yes, it is para.173, I am sorry – “This right to refer and BT’s willingness to exercise it are in

1 H3G's submission sufficient to displace any finding of dominance." Now, is there
2 somewhere in your skeleton or can you say now, what it is that you say are the factual
3 elements in this case which mean that the ability to refer the dispute does cancel out SMP?

4 MISS ROSE: It is not simply the ability to refer, that is too simplistic. First, the price that was
5 originally set was set in circumstances where there was not a situation of dominance.

6 THE CHAIRMAN: What I was just going to say was what is there about this case which is
7 different from what must have happened in other Member States who were all faced with
8 the market where there was an incumbent and mobile operators coming in which does not
9 seem to have led to them saying that the mobile operators do not have SMP in their market
10 for call termination. What is it particularly about the facts of this case which you say have
11 that effect?

12 MISS ROSE: I can of course identify what it is about the facts of this case that we indicate
13 demonstrate that BT has countervailing buyer power. I cannot tell you how those facts
14 differ ----

15 THE CHAIRMAN: No.

16 MISS ROSE: -- from the facts of the incumbent in all the other Member States, but the particular
17 facts that are relevant here are first that the price for call termination was originally set in
18 the context of negotiations that took place where BT had strong countervailing buyer power
19 because of its power to delay the launch.

20 Secondly, that that price remained the price and was not raised.

21 Thirdly, that there is the finding that as our market share becomes greater BT becomes
22 increasingly price sensitive and therefore willing to act to protect the interest of its
23 customers.

24 Fourthly, the finding that BT and us will negotiate on the basis of our appreciation of the
25 likely maximum price that would be imposed on the end-to-end obligation on BT.

26 Those are the four crucial findings which lead to the conclusion that the commercial
27 negotiations between the parties would be on the basis of the parties' understanding of what
28 is a reasonable price for interconnection, and therefore we cannot act independently of BT.

29 Of course, the only flaw in that is Ofcom's conclusion that we would correctly perceive that
30 when undertaking that exercise they would be likely to impose an anti-competitive price.

31 Apart from that we adopt and support the particular facts found by Ofcom in its analysis of
32 CBP, and that is what we say makes it critical to its finding of SMP in this case – error that
33 we have identified.

1 Those facts may or may not be different in other Member States. You might have a
2 situation where the incumbent in theory would be able to refer to the regulator, but actually
3 nobody ever did it, and nobody ever considered doing it and there was no evidence that they
4 ever would do it, and that the reality was that they just took whatever the price was and got
5 on with it. You might have a different analysis in that situation, and indeed the case that
6 was referred to in the first H3G Judgment, the *Reg Tp* case does appear to have had facts
7 along those lines, and the criticism that the Commission made of the decision was actually:
8 “Well, there is no evidence at all there would be a reference”.

9 Of course, those are not the facts of this case, and that is why we do say that the assessment
10 of CDP is fact sensitive.

11 MR. SCOTT: Just on excessive pricing, it may be helpful just to remember the revised Working
12 Party which you will find at H1 tab 11, and para.20.

13 THE CHAIRMAN: One moment.

14 MR. SCOTT: (After a pause) Tab 11, p. 7, and para.20. In the middle of that paragraph ----

15 MISS ROSE: Yes.

16 MR. SCOTT: So in the middle there, you have “the power or ability of undertakings to raise
17 prices without incurring a significant loss of sales or revenue”?

18 MISS ROSE: Yes.

19 MR. SCOTT: “In a competitive market individual firms should not be able persistently to raise
20 prices above costs and sustain excessive profits as costs fall prices should be expected to fall
21 too if competition is effective.”

22 MISS ROSE: Yes.

23 MR. SCOTT: Then it goes on: “It is not a necessary condition for finding SMP given the *ex ante*
24 character of the regulator framework. And conversely in the next paragraph: “Low profits
25 may be more of an indicator of the inefficiency of the firm than of effective competition”.
26 So here you have a paragraph which is dealing with some of the material on excessive
27 pricing in the experience of regulators as a whole?

28 MISS ROSE: Yes.

29 THE CHAIRMAN: Thank you very much, Miss Rose.

30 MISS ROSE: May I just take instructions and make sure there is nothing else I need to say.

31 (After taking instructions) Madam, those are our submissions.

32 THE CHAIRMAN: Thank you. I think it is probably a little late in the day for Mr. Roth to start
33 his submissions. Tomorrow therefore we will start with Ofcom in the morning and then the

1 | interveners following, and then H3G's reply, and hope that we will be able to get through
2 | all that tomorrow.

3 | Thank you very much.

4 | (The hearing adjourned until 10.30 am on Friday, 25th January 2008)

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