IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

29 January 2008

Before:
VIVIEN ROSE
(Chairman)

ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

1083/3/3/07

HUTCHISON 3G UK LIMITED
("**H3G")**

and

OFFICE OF COMMUNICATIONS ("**OFCOM**")

AND

1089/3/3/07

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

and

OFFICE OF COMMUNICATIONS

AND

1090/3/3/07

BRITISH TELECOMMUNICATIONS PLC ("**BT**")
and

OFFICE OF COMMUNICATIONS

AND

1091/3/3/07

HUTCHISON 3G UK LIMITED ("**H3G**")
and

OFFICE OF COMMUNICATIONS

AND

1092/3/3/07

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

OFFICE OF COMMUNICATIONS

HEARING DAY THREE

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 O2(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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THE CHAIRMAN: Good morning ladies and gentlemen. A couple of administrative matters to deal with first. Thank you very much first of all for the amended timetable, we will see how we go with that. We have received an application from T-Mobile to add another person to the confidentiality ring, that is Deborah Sall, who I understand is an in-house lawyer at T-Mobile. I am not sure whether the parties have been notified of that and whether they have had an opportunity to form a view as to whether they are happy with that. Mr. Turner, what is the position?

MR. TURNER: Madam, the parties were notified, we have received no objection from anyone as yet.

THE CHAIRMAN: Does anyone object to the addition of Deborah Sall or want any further time to consider the matter? (No response) Right, we will make that order in due course. This morning we will hear first from Mr. Roth, if there is anything that he wants to add just in wrapping up a couple of points that were left over from Friday morning, and then it is the turn of the interveners. On Friday we received a note of BT's oral submissions. We have also just been handed a note of the submissions of Vodafone, is there any other written material that we ought to have?

MR. ANDERSON: I hope you have received a two page schedule of transcript references, we have not amended our note but we have given accurate transcript references.

THE CHAIRMAN: Thank you, so we add that then to BT's oral submissions' package.

MR. ANDERSON: Yes, please.

THE CHAIRMAN: Excellent.

MISS ROSE: Madam, I also have a note but I can hand that up later.

MR. ROTH: Thank you. I do not know if I am supposed to say "I am Peter Roth for Ofcom", given the announcement earlier for the shorthand writers. It is just on the postscript to Miss Dinah Rose's submission about the position in other Member States that she added you will recall. There is material on that in the bundles. If you could go to bundle F4 at p.589. This is the ERG consultation on a draft common position on symmetry and mobile fixed call termination rates. It is a document put in because it is relied on by Dr. Littlechild. It was issued on 17th December 2007, so a very recent document. In that document, if you go to p.645 you see there Part 2 deals with mobile call termination and then over the page at 646: "Regulation of market 16", you will recall it is market 16 under the old recommendation on relevant market. Paragraph 25:

> "NRAs from countries belonging to the European Union notified the voice mobile call termination market at least once ..."

And they are all set out.

"In addition, two NRAs belonging to EFTA (Iceland and Norway) and Turkey issued a market analysis of mobile voice call termination market at least once.

> "All NRAs who notified market 16 used the definition of the Recommendation on relevant markets …"

That is voice call termination.

> "Two countries having joined EU at the beginning of this year (Romania and Bulgaria) did not notify market 16 yet. In Switzerland …"
>
> which is of course not part of the EU or the EA, but it seems to belong to the ERG.
>
> "… there is no ex ante regulation on mobile voice call termination , so issues are dealt with through ex-post regulation."

All operators are SMP operators. Then this is the important paragraph:

> "All commercially active operators were designated SMP operators by initial proposed decisions by NRAs (but some decisions may have been suspended or annulled). Consequently the number of MNOs designated as SMP operators is identical to the numbers of MNOs licensed and commercially active when the market analysis is notified in each country (for countries with ex ante regulation)."

i.e. not Switzerland.

It goes on to talk about remedies, we may come back to that later but not relevant for the SMP point that we are dealing with at the moment. So all the countries except the two new Member States have completed a review, all those that did a review designated all MNO operators as having SMP.

Then as Miss Rose referred specifically to the position of new entrants, you will recall, Ofcom has prepared a table, which I ask be handed up to the tribunal - a schedule as regards recent entrants. (Handed) As you see, madam, in six countries the recent entrant is H3G. In all those states the NRA made a finding of SMP. Many of those have been appealed. Some of the appeals have been upheld in Austria, Denmark, Ireland. Ireland one knows from the first judgment in this case. There is then a newer decision following the annulment of the initial decision, again, finding SMP. Some have only been issued in draft, or publicised in draft. The one that is the final new decision in Austria has a further appeal pending. That is H3G.

The other countries with a recent entrant are Cyprus, Latvia, Luxembourg and Spain. You will see the dates of entry. The regulator has found SMP, except in Poland and Slovenia where the entrant is very recent and the matter has not yet been determined. So, in Poland

there was a new entrant in November 2006. The NRA has not yet decided on SMP. Similarly, in Slovenia, not surprisingly, they are very recent.

THE CHAIRMAN: What is the status in these proceedings of this schedule then, Mr. Roth. Is this agreed evidence between everybody, or is this inconsistent with what Miss Rose told us, or is it consistent with it?

MR. ROTH: I do not think it is inconsistent with what Miss Rose told you. But, it is more complete. She says that eight EU countries have a new entrant operator and in six it is H3G. In fact, twelve countries have a new entrant operator and in six it is H3G. Obviously H3G knows about the countries where it is the new entrant. It is no criticism of them that they may not know about all the other countries where the new entrant is Tusmobile, or whatever. But, it has been produced and circulated this morning. I do not think people have yet been in a position to agree it. But, I hope it is not contentious.

THE CHAIRMAN: I think it would be useful to know, at some point, whether it is contentious or not so that if it is contentious we can then consider further if there is anything additional that needs to be done to introduce it as evidence in the case.

Just one further point: I note that the document at 646 onwards has got 'Draft for Consultation' stamped on it. Is that the most up-to-date version that is available? (After a pause): Those behind you are nodding.

MR. ROTH: Yes, it is. It is a draft that was put out in December for consultation to the ERG. It expresses various views which obviously they are seeking responses on. I do not think it is for consultation as to the accuracy of the statement in para. 25. That is the status.

THE CHAIRMAN: Were there any other points on which you wished to address us?

MISS ROSE: Madam, a couple of points. First of all, of course the statement at 646 does not accord with the table which Mr. Roth has given you because the statement at 646 simply says, in general terms, that "all commercially active operators, designated SMP operators by initial proposed decisions. Some may have been suspended or annulled". To the extent that Mr. Roth sought to rely on that to indicate that everybody had been found to have SMP, that is obviously qualified by the table which indicates that in fact in most countries where there is a new entrant, the question is still up for debate and subject to appeal, or the subject only of a draft decision. Secondly, it is not clear from this table whether Ofcom are talking here about 3G entrants or all new entrants. The point that we made last week about the eight countries related to eight new 3G entrants. It is not clear to me whether all of these are 3G only.

THE CHAIRMAN: Yes. I do not think we can debate this further this morning. If the parties believe this is an important point that they want to make, then can I ask them to get together and see if they can agree that the tribunal can rely on this table, or if there are qualifications to it what those are, and let us know the position in due course.

MISS ROSE: Madam, there is one further matter relating to the ERG document which Mr. Roth has just shown the tribunal. We sent a letter to Ofcom, asking them some questions about this document to which we have not yet had a response. Could Ofcom perhaps direct their attention to that letter and respond to it? It would be very helpful to have that information before we deal with the cross-examination.

THE CHAIRMAN: The cross-examination of ----?

MISS ROSE: The experts.

THE CHAIRMAN: Is that going to be possible, Mr. Roth?

MR. ROTH: We can consider the letter and to what extent we think it is appropriate to give the information, then we will do that by the end of today.

THE CHAIRMAN: Mr. Anderson, are you going first for the interveners.

MR. ANDERSON: That is right, madam. The transcribers did me the honour of confusing me on Friday with Mr. Turner, but it is indeed Mr. Anderson this time.

On Friday morning, I stole some of my own thunder by putting in the speaking note to which, madam, you have already referred. To the extent that there was any thunder left, it was then stolen by Mr. Roth, who made, on behalf of Ofcom, very many of the points that I was proposing, if necessary, to make on behalf of BT. I hope that if the tribunal has had an opportunity to look, however briefly, at the speaking note, it will enable me to abbreviate, to some extent, what need to say.

THE CHAIRMAN: Yes. I believe we all have had a chance to read that.

MR. ANDERSON: I am most grateful. You have seen already from the first page that I want to make five points. I have put them as simply as I could. It is fair to say, I think that all of these five points were developed, to some extent, by Mr. Roth. What I would like to do is take you to a few documents which you perhaps have not seen - or parts of documents which you have not seen - in order to illustrate the points that I am seeking to make.

The first point, which starts on the first page, is that dispute resolution by Ofcom regulates H3G. In other words, to put it colloquially, if you tell H3G that it cannot charge more than a certain amount, you are regulating the price that it charges. That seems to us, with respect, common-sense. The reality of the position is not altered by dressing up what you were doing as an obligation somehow uniquely on the buyer. We have set out at para. 5, as

amended by reference to the table dealing with the transcript, some of the formulations that H3G has used.

Mr. Roth pointed out - and I think it is Day 2, pp.15 to 17 - that it is simply not realistic to assume, as Miss Rose asked you to do, that the only power that could properly be used was the power to issue a declaration. You may remember that he made that good by reference to H3G's request for a determination. I would like to add simply one point to that: that you can make the point good in the same way if you look at the determinations themselves.

Perhaps just before showing you a determination, I should just remind you of the terms of s.190 itself. It is at H1, Tab 8. It may be so familiar you do not need to turn it up, but you will remember s.190(2), which is just three or four pages from the end of Tab 8, that Ofcom's main power, as it is described in s.190(2), is to do one or more of the following:

> "To make a declaration setting out the rights and obligations of the parties to the dispute ----"

That is what Miss Rose said they ought to do.

> "(2) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
>
> (3) to give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom;
>
> (4) requiring the payment of sums by way of adjustment of an under-payment or over payment.

You see there is an accepted case, which you get from the first line of subsection 2, a dispute relating to rights and obligations concerning the radio spectrum. Subsection 3 says that in the accepted case they have only a single main power which is just to make a declaration, so that is really where Miss Rose would like to be in relation to interconnection disputes, but in our submission that is not where we are.

If, perhaps keeping that open you could have a look at bundle B, tab 4 at p.74, you see the determination of the dispute between H3G and BT, and in bold type a third of the way down, Ofcom makes this determination for resolving this dispute.

Now, the heading, I accept, says "Declaration of rights and obligations", etc., and that does sound like 192A. But if you read on, para.1 says that the charges are reasonable charges and "shall be effective as between the parties until such time as alternative charges are in place." In our submission that is not only a declaration within A, it is also a direction fixing the terms or conditions of transactions within B, and indeed it may also be under C a

direction imposition an obligation to enter into a transaction on terms and conditions fixed by Ofcom.

Then if you go on to para.2 it says BT must pay to H3G by way of adjustment of an underpayment, certain sums, and that of course is the phrase t hat you get in the last line of 190(2)(d), a direction requiring the payment of sums by way of adjustment of an underpayment.

So whether, as Mr. Roth did, one looks at H3G's request, or whether you look at the determination itself you must, in our submission, conclude that the premise of H3G's argument, which is that it is realistic only to think in terms of Ofcom giving a declaration is not correct.

THE CHAIRMAN: I also note the paragraph 4: "This determination is binding on BT and H3G in accordance with section 190(8) of the 2003 Act" which says that a determination binds all the parties to the dispute.

MR. ANDERSON: Yes, madam, I am most grateful, I had intended to draw attention to that when looking at s.190 but failed to do so, that is absolutely right.

MR. SCOTT: Just to be clear, Mr. Anderson, what you are suggesting to us is that para. 1 there, "The charges contained …" and so on is motivated both by 2A and by 2B, 2A in terms of the declaration of reasonableness and 2B in terms of a direction fixing the terms or conditions, is that correct?

MR. ANDERSON: Yes, that is right.

MR. SCOTT: Thank you.

MR. ANDERSON: Madam, that is all I wanted to say on the first point. May I come on now to the second point, which we have described as a precedent. Mr. Roth, of course, has dealt substantially with the first H3G judgment, and we would reinforce the central point he made which was that the issue in this case was effectively determined by the Tribunal in general terms at para.99 of the judgment and in the specific context of Ofcom's dispute resolution powers at para.138(b), that was the one that H3G did not take you to first time around.

The Tribunal indicated, and we would certainly agree, that there are no material differences between clause 13, which was the subject of argument in that case, and the dispute resolution powers with which we are concerned in this one.

Mr. Roth, also dealt with the *Reg TP* decision by pointing out how it was interpreted by the Tribunal at paras. 97 to 99. We entirely agree also with that. But we further submit that the Tribunal was right in its interpretation and that if one looks carefully at the *Reg TP* decision

it is indeed, as the Tribunal found last time round, on a proper analysis supportive of our position in relation to taking account of regulation on the party being assessed for SMP. We summarised our points on the *Reg TP* decision at para.17 of our speaking note, but may I briefly take you to that decision since I do not think either of the parties has shown it to you so far. It is at bundle H2, tab 13. We can start at para.7: "De3scription of the Draft Measures."

> "Reg TP [The German Regulator] defines and analyses the markets for call termination on individual public telephone networks provided at a fixed location … it identifies a total number of 54 separate operators to be active on such markets, and defines 54 separate markets for call termination on individual public networks. Of these, Deutsche Telekom ('DTAG') is the incumbent and the other 53 operators are alternative network operators."

- the so-called "ANOs". At para.9:

> "Reg TP mainly considers market shares and countervailing buyer power to decide whether or not an undertaking has SMP on the markets concerned. Further criteria considered such as the overall size of the undertakings, technological advantages …."

And so on –

> "… are in Reg TP's view not decisive for the SMP assessment on the markets concerned."

Paragraph 10: Reg TP finds that each operator has 100 per cent market share on its respective network. It designates Deutsche Telekom with SMP on the market for call termination on its network, but concludes that the 53 ANOs do not have SMP for call termination on their networks despite their 100 per cent market share.

> "In Reg TP's view, DTAG has countervailing buyer power which does not allow each of the alternative network operators to behave to an appreciable extent independently of its competitors and customers."

In para. 11 it recognises that its position deviates from the position taken by other NRAs whose arguments have not been opposed by the Commission.

Then at para.12, the "strict Greenfield approach" and the "modified Greenfield approach" are introduced, and it is quite important, I think, to understand the ambit of the argument in this case by looking to see what these approaches are.

Incidentally, I am not sure whether there was a Professor Greenfield somewhere in the background, or whether the Greenfield approach simply means as when one is building one

starts with a green field – I rather suspect the latter, but why then it deserves a capital letter is perhaps just one of those mysteries.

But under the strict Greenfield approach the scenario is that DTAG is not obliged to interconnect with each of the ANO's, so effectively one puts from one's mind the fact that there is regulation on the buyer requiring it to interconnect and, in such a scenario, says Reg TP of course DTAG could credibly threaten each ANO not to interconnect, and thereby exercise countervailing buyer power.

The modified Greenfield approach is that DTAG is generally obliged to connect, but the reason for such obligation is the imbalance of power in interconnection negotiations between DTAG and each ANO. So, says Reg TP, it is methodologically wrong to take this obligation of DTAG into account in the assessment of market power of each ANO.

So that is the rather scrupulous approach that the regulator took; either one deems there to be no interconnection obligation at all or else one disregards it because it is conceptually linked with correcting the imbalance of power.

Paragraph 14 goes on:

"Moreover, the obligation of DTAG to interconnect with and purchase termination services from each ANO would in Reg TP's view solely prohibit a refusal to interconnect at reasonable conditions, but not oblige DTAG to accept unreasonable conditions for interconnections."

So very much the same position as here.

> "Hence, while DTAG would be under an interconnection obligation, it could still refuse unacceptably high call termination rates demanded by an ANO in price negotiations, limit the single ANO's freedom to behave to an appreciable extent independently of its competitors or customers and thereby exercise countervailing buyer power".

Then, going on to 17 and to the assessment of the Commission, the Commission starts off by drawing attention to the importance of ensuring that decisions at national level do not have an adverse effect on the single market, and that everything has to be assessed in line with the framework directive.

> "The 100 percent market share of network operators in the market for call termination on their individual public telephone network provided at a fixed location raises a strong presumption of SMP, save in exceptional circumstances which need to be clearly and unambiguously demonstrated by the NRA".

We rely on that. At para. 20,

"The Commission considers that RegTP has not provided convincing evidence that despite 100 percent market share each of the ANO's would not have SMP. This view is based on the following considerations ----"

If you look at the structure of the next section of the decision, para. 21 to 30 come under the heading 'No justification for the strict greenfield approach'. Paragraphs 31 to 38 come under the heading 'No convincing evidence of absence of SMP under the so-called modified greenfield approach'. So, that is the structure that the Commission adopts. The strict greenfield approach, again, is re-described at para. 21. We then come on to paras. 22 and 23 which were the paragraphs cited by the tribunal at 97 and 98 and which H3G appeared on Thursday to indicate did not, in their view, support the conclusion that the tribunal, at least on our reading, drew from them. Paragraph 22,

"The Commission is of the view that there is no legal or economic basis for such a strict greenfield approach. An analysis of dominance, i.e. SMP requires taking into account the concrete economic circumstances, including legislative and administrative acts. In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of an SMP finding on the market under consideration but that can have an impact on the SMP finding on the markets under consideration. From a methodological viewpoint, obligations flowing from existing regulation, other than the specific regulation imposed on the basis of SMP status in the analysed market must be taken into consideration when assessing the ability of an undertaking to behave independently of its competitors and customers on that market".

Well, read on its own and out of context, that might sound very broad. H3G invite you to read it broadly.

THE CHAIRMAN: Narrowly, I think.

MR. ANDERSON: Yes. 'Narrowly' might be a more attractive way to characterise it.

THE CHAIRMAN: What is being said is that you only look at SMP regulation -- That is all that you disregard. You do not necessarily disregard other regulation, even if it is imposed on the undertaking whose market position you are considering.

MR. ANDERSON: Yes. In my submission we will see from later on in the decision how H3G's attempts to apply these statements to our case cannot be right because they are inconsistent - which is what the Commission itself thought.

MR. SCOTT: To give you an example of that -- If we were to discount regulation entirely, the barrier to entry would disappear. So there would be no barrier to entry because the spectrum

would not be regulated. That would be an example of a regulation that we have taken into account fairly logically, and that nobody as ever suggested we should not.

MR. ANDERSON: In terms of where this comes in the decision, it comes in the Commission's answer to the strict greenfield approach. It is not an approach that anybody is seeking to urge on this tribunal. It is an approach focused entirely on regulation on the party being assessed for CBP. What the German regulator sought to do was simply to ignore that regulation on the party being assessed for CBP. Under the strict greenfield approach, we are not quite sure why. They are simply suggesting that it be deemed not to exist. The Commission is responding to that in this passage. It has to be read in the context of restrictions on the party being assessed for CBP, which everybody in this case agrees should be taken into account. That is what the Commission was saying.

At para. 23,

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

One suspects that H3G liked that paragraph much less because one sees the ratio stated there in a way which, in our submission, is entirely consistent with what we are saying. Indeed, that is what the tribunal found. If one looks one tab earlier on at paras, 97 and 98, one sees what the tribunal made of those two paragraphs. At para. 98 it glossed para. 23 as meaning that,

> "A potentially regulated person cannot claim that it does not have SMP because regulation has procured a situation in which it no longer has it. So long as it is regulation which is bringing about competitive outcomes, the markets are not competitive independently for that regulation. It follows that the potentially regulated person cannot say that it does not have SMP because the threat of regulation means that it does not have the necessary power. That would be circular and illogical".

Madam, it does not end there. There are some other paragraphs which I should show you. At para. 31 the Commission gets on to the modified greenfield approach. At para. 31 it

again recalls what that approach is and says that RegTP questions whether this obligation can be taken into account for assessing the market power of each of the ANOs as the obligation would be imposed precisely to redress the equilibrium in interconnection negotiations between DTAG and each ANO. So, one ignores it because it is all part of the business of redressing equilibrium. That would be circular. The Commission rejects that view of circularity. The source of an ANOs market power -- A very interesting distinction that is made here at para. 32, and which is carried through later on in the decision --

> "The source of an ANO's market power for termination of its own network is not the regulatory requirement on DTAG to interconnect, but the ANO's 100 percent market share and the control over its network and over a service for which no substitute exists.

So, one cannot simply characterise the whole thing as an aspect of the requirement on the buyer to interconnect. One has to distinguish that from the SMP that derives from the market share. At the end of that paragraph,

> "This approach does not lead to circularity because ANO's SMP does not result from the interconnection obligation, but rather from their 100 percent market share. Therefore, when assessing DTAG's buyer power, its interconnection obligation must be taken into account".

Going on to para. 33 one sees discussion of the fact that small networks will normally face greater buyer power than large networks. But, it is said that the regulatory requirements referred to in para. 26 above, which are the interconnection obligation, the E-To-E obligation, will normally redress this imbalance of market power - imbalance, one assumes, between the small network and the large network.

> "However, this would not endorse any attempt by a small ANO to set excessive termination rates."

Then, at para. 34,

> "Contrary to other NROs that have notified market 9 so far [because of course this was fixed rather than mobile termination] RegTP asserts that DTAG's buyer power limits the ability of each ANO to behave independently of its customers and competitors at the retail level. RegTP does, however, not present the evidence that DTAG has effectively exercised such buyer power. In fact, what appears to have constrained the individual ANOs' call termination rates in the past is not the countervailing buyer power on the part of DTAG, but the regulatory regime under

which RegTP has introduced a *de facto ex ante* price regulation for ANOs' termination rates.

and that is a development of the important distinction that was first drawn at para.32 between the countervailing buyer power and the regulatory regime, which his capable of controlling the rates charged by the monopoly seller.

"35 Presently, under the German law, it seems that the interconnection charges (i.e. also call termination rates) of a non-SMP operator may be price regulated in case of failure of private interconnection negotiations and without the need for any prior SMP finding."

So that is interesting. The regulation may be price regulated without the need for any prior SMP finding, so one is not here talking about regulation which is predicated upon a finding of SMP, one is simply talking of different sorts of price control.

"Against this regulatory background and following applications by at least 37 ANOs, Reg TP has since mid September 2004 ruled that each requesting ANO is allowed to charge 25% more for the call termination on its respective network than DTAG. This implies that call termination rates of (a large proportion of) ANOs are constrained by a regulatory ceiling rather than DTAG exercising countervailing buyer power."

So once again this distinction is drawn.

"Such a regulatory price ceiling preventing ANOs from unilaterally raising their call termination charges appears to support the notion of ANO)s attempting to set call termination charges independently of their customers and competitors (at the retail level) and might indicate that the designation of SMP status not only with regard to DTAG but also for these alternative operators would be warranted."

So, in other words, in 35 – and this is, in our submission, a very important paragraph – far from lending support to the idea that price controls on the seller can negative SMP, the Commission is relying upon the need for those price controls as a very good indicator that SMP existed. So it is a decision, in our submission, wholly opposed to the position of H3G, very supportive of the position of BT and the Tribunal was absolutely right in the way that it had interpreted the decision at 97 and 98, coming to the conclusion that it did at 99.

THE CHAIRMAN: What they do not say in para.35 is whether that other form of regulation, which is not related to a finding of SMP falls to be regarded or disregarded under a modified Greenfield approach.

MR. ANDERSON: No, it does not say that in terms, but what it does do is establish a very strict distinction between the SMP that derives from 100 per cent market share and the interconnect obligation, and that is what you get from 32 leading through 34 and into 35.

One might have thought, although I accept the point perhaps did not arise quite as directly as it did in this case, but one might have thought that confronted with knowledge of this regulatory power in the regulator to control price, whether it be *ex ante* or *ex post* perhaps does not make very much difference, and the Tribunal pointed out the other day that the s.190 power operates to some extent on an *ex ante* basis. It would be very surprising if, being aware of that power, the Commission were to rule as it did in relation to the finding of SMP, saying effectively – as one sees at the end, Article 1 and Article 2 – that the draft measures had to be withdrawn because of the erroneous finding that that SMP was lacking.

Indeed, what happened after this was that the matter went back to the German regulator – I will be reminded of the reference, it is in bundle I, tab 3, I do not think I need to take you to it – and in the revised decision Reg TP indeed found that they did have SMP.

Indeed, the Commission goes even further than that by saying almost that one can infer from the need for a regulatory power that these ANOs must have had SMP, why else would the regulatory power have been needed. That, in our submission, is really worlds away from what H3G are saying, which is that the existence of the regulatory power simply negatives the SMP. It really is the exact opposite of the submission that is being made.

It is not the easiest read, but in our submission the Tribunal got it right first time.

Before leaving this bundle, and without taking you to anything that Mr. Roth took you to in the first H3G decision, might I just take you to one other passage that Miss Rose relied upon for H3G. That is just the previous tab, tab 12. I have already drawn attention to 138 (b) which, in our submission, is really the key to this point. But Miss Rose relied upon an earlier passage between 126 and 142, and if I could just remind you of that. Paragraph 126 concerns the taking into account of the end-to-end connectivity obligation. The decision assumes that the existence of the obligation removes such CBP as BT had, or at least negates it to such an extent as leaves H3G with SMP. They find that approach to be over simple, and the Tribunal says, "No", you are not only allowed but obliged to take into account that this is an obligation to interconnect only on reasonable terms.

At 127 they come back to *Reg TP* and they say, quite rightly in our submission that that approach is supported by the approach of the commission in that case.

So it is a relatively simple point made at 126 that is being considered there: Can you bring the connectivity obligation (the interconnection obligation) into the equation?

Then going on to 132, which was a paragraph particularly relied upon by Miss Rose. There has just been a discussion of the regulatory position, and the Tribunal says:

> "Mr Roth's arguments in this respect therefore fail. The possibility of dispute resolution by OFCOM in the future is therefore part of the overall picture which has to be taken into account in assessing whether BT has a real and effective bargaining position that is sufficient to counter the factors which would otherwise point in favour of H3G having SMP."

Again, quite broadly expressed, but in our submission it is a paragraph that needs to be read again in context, first of all in the context of 126, which indicates what that paragraph is really addressing, namely the extent to which one can look at the interconnection obligation. Secondly, forward to 138, plainly the Tribunal may be assumed not to have been saying anything in 132 that is inconsistent with what it said in 138(b), and indeed, establishing consistency between those two paragraphs is, in our submission, not a difficult task. All that is being said here is that the possibility of dispute resolution in the future is part of the overall picture which has to be taken into account in assessing whether BT has a real and effective bargaining position.

What happens at 135 to 138 is that the Tribunal looks at that and it does take it into account, and it decides whether weight must be given to it or not in assessing H3G's SMP. You will be familiar with the discussion of clause 13, it is not suggested that any different factors apply in relation to sections 185 and following. At 138(b) one has the distinction drawn by the Tribunal on the basis of its analysis of the clause 13 mechanism. Had it been what they described as a "Full third party arbitral mechanism of the kind one sees in a rent review clause" one would have taken it into account. But Ofcom's powers are not so extensive as to include the power to be a third party arbitrator. The sort of dispute that clause 13 contemplates is a form of interconnection dispute which Ofcom would resolve as regulator not as a third party dispute resolver. It therefore falls to be disregarded as a matter of principle and that, we say, is a principle established by the *Reg TP* decision, by para.99 of the H3G (1) judgment.

So that is how to make sense of 132 ----

THE CHAIRMAN: Do you say that the Tribunal there held that if clause 13 was just a simple arbitration mechanism, then it should be taken into account because it does not count as regulation?

MR. ANDERSON: I do not say it has held that as a matter of binding authority, that would require a degree of counter-factual reasoning which is perhaps not justified by the nature of

the judgment, but they were ruling out the possibility that it was such a third party arbitral mechanism which might perhaps introduce different factors into the equation.

THE CHAIRMAN: Well the problem with drawing that distinction is the point that you make elsewhere in your note, that s.186 of the 2003 Act allows Ofcom to decline to accept a dispute if it could be better dealt with by other means, and it is thought that those other means might include some kind of third party arbitral mechanism, in which case one might get to a slightly odd position where whether dispute resolution under s.185 counted as regulation, depended on how Ofcom exercised its power under s.186.

MR. ANDERSON: Yes, I do see that, and I do not suggest that the Tribunal has decided as a matter of binding authority what the position would be where Ofcom to be acting in a different capacity, it may be that that one is for another day.

It is a difficult area but the starting point and the end point, in my submission, are very clear from these authorities, and the starting point is that one has regard to the regulatory obligations placed on the party that one is assessing for CBP and that includes the interconnect obligation, it includes the end-to-end obligation. The end point is that one does not have regard to price regulation which has the effect of constraining the price of the seller with 100 per cent market share. Plainly the interconnect obligation and the regulation of price are in a sense points on the spectrum, one shades into another, and there comes a point where one has to say that it no longer makes sense to look at this solely as an obligation on the CBP party; it is in accordance with the law and commonsense an obligation on the party being assessed for SMP. On any view, in our submission, that must be reached when one is in the realm of powers such as those contemplated in s.190 and used in the determinations that you have looked at.

I am conscious of the time, and the fact that others will want to follow. May I then leave my second point and go very quickly to the remaining three. The third point suggests, perhaps unnecessarily in view of the precedent, that the precedent is supported by principle, and we make effectively three points in this section.

First, at paras 18 to 20 of the note, is that it will be surprising if the availability of dispute resolution by Ofcom, were capable of negativing SMP in circumstances where the Directives give NRAs to resolve interconnection disputes, and yet at the same time specifically envisage that SMP may exist in the wholesale market for voice call termination.

The second point, which is at para. 21 and following is that it is difficult to see what policy reason there could be for allowing the existence of a dispute resolution power to a negative SMP in circumstances where the dispute resolution power itself is plainly an inadequate

substitute for the SMP-based regulation. We have set out a few ways there in which it is an inadequate substitute for SMP-based regulation. At para. 22 we refer to other kinds of uncompetitive behaviour that could be controlled by a finding of SMP, but not by this mechanism.

At para. 23 we have set out some of the advantages of ex ante regulation following a finding of SMP, and to those various references I ought, if I may, to add a reference to the witness statement of Mr. Amos on behalf of BT. You will find that in Bundle B2, Tab 6. The reference is para. 26.

Then, at para. 24 there are two further points, one of which, madam, you have just reminded me of - the possibility that there may be commercial reasons for not referring a dispute and the possibility that even if it is referred, the dispute will not be adjudicated on the basis that there are other alternative means.

Then, really the third point on this is the very obvious, but in our submission, the very striking one, that granted that everyone accepts the need to ignore an SMP price control condition. The fact that SMP price controls have already been imposed does not mean that those subject to the controls stop having SMP. It would be very strange if one drew the conclusion that people had stopped having SMP when they were subject to a less perfect, less comprehensive system of regulation, which is offered by the dispute resolution procedure.

So far as the fourth point goes, this really addresses H3G's attempts to avoid what it called the apocalyptic conclusions drawn by Ofcom in the early parts of its defence - the consequences for other MNOs not having SMP -- the consequences for other Member States, and so on, by suggesting that it is, in material respects, different from the other MNOs. Certainly we accept one should be prepared to look at the circumstances before concluding that all are necessarily in the same boat. That, I would respectfully suggest, is al that my illustrious predecessor, Mr. Barling, was suggesting in his cautious intervention before the tribunal (the reference being E3 at 11 and 12). But, if one does look at the factors advanced, they turn out not to be material differences at all. On that, listening to Mr. Roth was really simply a question of looking through my note and one by one ticking the points that he made against my own draft. I think he has really picked up the points on that. We have set them out here in a way which I hope is helpful. But, I think in view of the time I do not need to say any more about those now.

Finally, the initial negotiations from which H3G now seek to construct a positive case, having disclaimed any intention in their notice of appeal of doing so. That point was

mentioned by Mr. Roth. We have developed it in our note at paras. 40 and 41, and 42A. You will remember the point - they initially said that they would not rely on the initial negotiations if they were not key to Ofcom's conclusion - in other words, they were relying upon them only defensively. Ofcom confirmed that its belief in that respect was correct, and they then turned round in their skeleton and said, "Well, you should have paid them more attention. This was a failure to take into account a relevant consideration". We say that that plea should be treated, first of all, as inadmissible on the basis that it simply is not raised on the pleadings in the case.

Mr. Roth made an additional point which I had not spotted or had not remembered when I was doing this note - which was that on the pleadings H3G also indicated that the point was limited to the re-assessment decision, and did not affect the SMP price control decision. W made that point also in the alternative as a ground for the partial inadmissibility of plea. But, as we said at para. 42B, the point is a bad one anyway since Ofcom made use of the initial negotiations in exactly the way that the tribunal said that it should.. Our case on that is set out at para. 34 and following of the note.

At para. 35 we summarise what the tribunal said about the extent to which the initial negotiations might be relevant to the issue of sufficient CBP between 2004 and 2007. So, it is necessary to look at them only to a limited extent, and not necessary to examine them in depth. But, it might have some continuing relevance to the position in any subsequent price negotiation. There is particular emphasis on two points: the effect of time pressure and the fact that BT did not reject H3G's first proposal in any meaningful sense.

Ofcom, in our submission, were correct to a point in the way that they dealt with that. They reviewed, as they said (my para. 36) all the evidence, including evidence not submitted to the CAT, but submitted following their own information requests. I would remind you - and I do not think Mr. Roth took you to it, and I do not need to do that either - of Annexe A to the re-assessment statement which does contain a detailed appraisal of the initial negotiations?

Then, in relation to delay, the point is made at para. 37A - yes, Ofcom did take into account what it found to be the possibility that BT might have threatened to delay its purchase of termination, and that knowledge of this might have affected the overall balance of negotiating power between the parties. I would interpolate - as Ofcom did not - that the fact that BT in fact were found not to have delayed in any way might have meant that H3G were not terribly worried about that. But, nonetheless, the possibility was taken into account by Ofcom. But, their point was that once the agreement had been signed in January 2002, well,

the agreement was there and neither party had any more interest in delay than the other. So, that is why the point really evaporated after that.

The point on commercial incentive - which is really a point to the extent that it is there - in BT's favour is dealt with at para. 37B.

Really, all Ofcom was doing is what the tribunal said it was doing. The idea that it did not have regard to a relevant consideration just is not credible. Its conclusions are set out at para. 39.

We did, at para. 43 of our note, respond to some specific points made in H3G's skeleton in relation to the initial negotiations, which, however, were not developed orally, with the exception of the point at (b) which, in turn, was addressed by Mr. Roth. He pointed out that not only were H3G's rates significantly higher than other operators, but that H3G then sought to increase them by 50 percent. What better illustration of market power, he said? We would agree with that.

Madam, unless I can help you any further I think that is everything that I need to say.

MR. SCOTT: You referred us to Annexe 1 to the re-assessment. That reminds me of A1.9 - that we observed in H3G - that 'embedded' was not the right term. "The provisions for variation, termination, and re-negotiation of the agreement demonstrate that the terms were not fixed." That is a reference by Ofcom to para. 84 of H3G 1, which is in Bundle H2, Tab 12. Those circumstances have now changed, but it is probably just worth remembering the point that was made in the H3G 1 judgment, and then reflected in the re-assessment position.

MR. ANDERSON: Indeed. I am very grateful for that. What I sought to do was to set out in the note at paras. 34 and 35 the purpose for which the conduct of initial negotiations could be relevant. But, certainly, looking back to para. 33 I have given some other references to the H3G judgment. Some findings of fact were made, of which that was certainly an important one. We have, I think, also set those out in our statement of intervention. But, I am very grateful. We do of course rely on that.

THE CHAIRMAN: Is the 'embedded' point linked with the other point that H3G make, which is that they really wanted to negotiate an interim rate for the testing period for their connection, but that BT was not prepared to limit the rate to that interim period, and then start negotiations for when H3G came properly on-line (if that is the correct terminology) so that in that sense the fact that the rate was sustained into the years of H3G's service coming on-stream was something which H3G was not happy with because they had felt under pressure to agree the interim rate to let their tests take place in the expectation that there would then be further negotiations?

MR. ANDERSON: Yes. I do not think that a point on the interim rate was taken in the skeleton argument - at any rate, it is certainly not one of the points that we have addressed specifically in our note, although I see that you address the 'embedded' point at para. 43(b) In terms of the annexe to the re-assessment position at B3, the question of the interim rate is dealt with at A1.30 and following, where H3G sent a letter proposing a new interim rate, and proposed to move FM3 (which at the time was a termination rate charged by One2One) and was the highest rate of any of the four incumbent 2G MNOs. That is the letter that was referred to, I think, by Mr. Scott earlier on. BT accepted H3G's proposed termination rates by e-mail dated 29th January, 2002, and the supplemental agreement was subsequently signed. In fact, I believe it was even signed the same day.

In our submission, that really put that one to bed. I am not sure we appreciated that the point was still being made on that.

Perhaps for completeness, I should just remind you that in our skeleton argument, in an attempt to deal with Annexe 5, which was the document we referred to as a recycled annexe (it was not intended to be in any way derogatory, but certainly a lot of it was rather familiar from the previous proceedings), that one was put in, and once we had heard on the Friday that they were proposing to run a positive case on the initial negotiations we did annexe to our skeleton (I think on the Monday) a table which you have at Bundle A, Tab 9. It is Annexe 1 to our skeleton argument. (After a pause): I suspect it is at 2.8 where the point is set out and addressed. (After a pause): Then, with regard specifically to the interim rate at 2.12, where again ----

THE CHAIRMAN: Where are you looking, Mr. Anderson?

MR. ANDERSON: This is Bundle A, Tab 9, Annexe 1 to our skeleton argument. It is a table in which what we have sought to do is respond one by one to all the points made in Annexe 5. It sounds as though 2.8 and 2.12 are the two most relevant parts of that table. Paragraphs, 2.12, 2.13, and 2.14 - those are the points on the interim rate and the permanent rate. We have tried to explain those by reference to the evidence of Mr. Locker, which is our evidence but it is in annex 5 should you be curious to look at it, by reference to the reassessment position and in particular annex A to that decision. I suspect at this stage that is really as far as I can take it, and those are our answers to those points. I did not hear them develop orally.

THE CHAIRMAN: No, but that is helpful, thank you, Mr. Anderson. Which Intervener is going next? Mr. Turner?

MR. TURNER: I greatly adopt the vast majority of the submissions made by Ofcom and BT, and so I can confine my own remarks to a group of key supplementary points. With an eye on the clock I propose to organise my additional submissions under five heads. First, purely for clarity, to summarise the essential questions which you, the Tribunal, have to decide on the SMP issue. Each of those, as you know, relates to the interpretation of Ofcom's dispute resolution powers, which is the starting point for H3G's argument, and then their significance for the SMP assessment.

Secondly, I will briefly state our own position on the correct interpretation of the dispute resolution powers.

Thirdly, I will make additional points on H3G's first argument – we prefer to see it as the first argument – that the dispute resolution powers in this context should be viewed as regulation of BT alone and not of regulation of the counterparty, in this case H3G.

Fourthly, H3G's second main argument that any SMP assessment needs to take account of the impact in practice, of dispute resolution by Ofcom, as a fact of bolstering BT's countervailing buyer power up to the point where any SMP that H3G enjoys is effectively cancelled out, and that will lead to the question of principle about what you disregard; and finally, shortly address H3G's suggestion at the end of Thursday that if this Tribunal agrees that Ofcom misunderstood and misapplied its dispute resolution powers, then the appropriate course for you is to remit again to Ofcom for further consideration the SMP question and our submission will be that any such suggestion is wholly misplaced, the Tribunal can and should deal with the SMP issue itself.

Starting then with the questions for the Tribunal, the starting point is as both Mr. Roth and Mr. Anderson have emphasised, that Ofcom in this case found that H3G had SMP based on two principal factors, the twin pillars of its approach. First, 100 per cent share of the relevant market terminating voice calls on its network; and secondly, that it faces no potential competition in the market, and there are absolute barriers to entry. Just to give the Tribunal one of the references, para. 4.42 in the MCT statement.

The only issue is whether BT has sufficient countervailing buyer power to cancel out significant market power, and H3G's case is that the impact of the dispute resolution powers when taken together with these other factors that Miss Rose outlined on Thursday, such as BT's price sensitivity means that SMP is cancelled out, and therefore there are three main questions to be answered: first, what do the dispute resolution powers, when properly understood, actually require Ofcom to do in the event of a dispute between H3G and BT concerning the level of the termination charges?

Secondly, does that involve regulation of BT alone, or is it also regulation of H3G? Thirdly, is it in any event regulation of a sort that falls to be disregarded for the purposes of making an assessment of whether H3G has SMP.

Now, turning to the interpretation of the dispute resolution powers, to make our position clear we agree with H3G to the extent of saying that Ofcom was wrong in the way that it has approached the exercise of its dispute resolution powers in this case.

Ofcom should not have taken the view that in disputes about charges involving BT and an MNO, it is concerned only with giving effect to the end-to-end connectivity obligation on BT, and that this can be done by applying its very thin gains from trade test.

H3G's submissions are correct to the extent that Ofcom plainly should resolve disputes in accordance with its wider statutory duties and it should take into account the relevant policy objectives which flow from the EC law, and those should not be left on the side. What that means is this: that where BT and an MNO cannot agree on a charge, on a price, and they refer t he dispute to Ofcom, Ofcom should resolve it by taking account of considerations of efficiency and costs and benefits to end users insofar as practicable, and I intend to develop that part of the submission further in the context of the submissions on the TRD appeals next week.

Nonetheless, all of H3G's further arguments, from that point of departure, the impact of dispute resolution powers in its case – whether taken alone, or in combination with the other features which Miss Rose listed on Thursday – serve to negate any finding of SMP on her clients' part are profoundly misconceived.

Now, I turn to H3G's two main arguments on that issue. The first is whether the dispute resolution powers properly understood do or should involve regulation of BT alone. H3G says that Ofcom's role, when it is determining a dispute as to termination charges between itself on the one hand and BT on the other, boils down in her words "to defining the extent of BT's end-to-end obligation", that was in response to a question from the Tribunal and the reference is day one transcript p.81 – "Defining the extent of BT's end-to-end obligation". According to H3G the right way to do this when Ofcom is faced with a dispute is to declare the maximum reasonable price for BT to pay, which will take into account efficiency, promotion of competition, the interests of consumers, and after Ofcom has done that what then happens? The parties then resume negotiations and, according to H3G, they are free to settle on a price which may be either higher or lower than Ofcom's declared price.

Now, H3G's submissions on this are entirely wrong for all the reasons already stated by Mr. Roth and by Mr. Anderson, and I would add only the following brief remarks.

First, when Ofcom is confronted with a dispute about the level of termination charges, it is not just concerned with applying BT's end-to-end obligation. Ofcom is presented with a dispute between two parties which cannot agree on the level of a charge. It is concerned with reaching a determination to resolve that dispute which discharges its own policy objectives, and indeed H3G has taken that position itself in its notice of appeal, and again in the interests of time I will simply give you the references: paras. 10.16 to 10.17, p.29, bundle C1.

Mr. Scott rightly pointed out, in our submission, on Friday the need to have regard to Article 20, para.3 of the Framework Directive – that was in the course of Ofcom's oral submissions. This confirms the point – again, without needing to turn it up at this stage – Article 20, para.3 directly requires that in resolving a dispute the national regulatory authority shall take decisions aimed at achieving the objective set out in Article 8. You can, if you wish, view the criterion of reasonableness contained in BT's end-to-end obligation as the medium, the prism for Ofcom to give effect to that requirement, but it is much clearer thinking in our view, to think of this as a separate and free standing obligation attaching to Ofcom in the way that it should resolve a dispute.

On that basis, it must follow that Ofcom is doing more in dispute resolution than just defining the extent of the end-to-end obligation on BT. The exercise is different, Ofcom is determining a price for the transaction and that determination of course applies equally to both parties to that transaction.

Even if Ofcom were for some reason in a particular case to want to determine a maximum allowable price for termination on H3G's network, and not a single price which would serve as both a maximum and a minimum, the fact remains that H3G is prevented from charging any more than that maximum.

H3G's suggested way out of that difficulty is to posit that the parties should continue to b e free to negotiate at a price above Ofcom's maximum, if they want to. In our view that makes no sense. Mr. Roth emphasised two points in that regard: first, that if H3G is right then the determination will not be binding, and he referred you to the language of the Framework Directive; and secondly, that the soft edged determination of that kind also will not have addressed the requirements that Ofcom must aim to secure the EU policy objectives, which H3G is otherwise so concerned about.

The only point for me to add to that mix is this: Ofcom will also have achieved next to nothing – if Miss Rose is right – in connection with determining the dispute as a practical

commercial matter. Article 20 para.1 of the Framework Directive envisages that the NRA will issue a binding decision to resolve the dispute and then I emphasise:

> "in the shortest possible time frame and in any event with in four months except in exceptional circumstances."

Therefore, if H3G is right I would add this: her exercise will not have served its essential function; there will not be a practical quick solution to the dispute which the parties need, and which the legislation envisages. That solution will, at best, simply force the parties to keep negotiating and arguing within ever smaller circles. That is all I therefore say on the topic of regulation of BT alone.

I turn to the more, perhaps intractable topic of whether the impact of dispute resolution powers fall to be disregarded in an SMP assessment, being regulation bearing on the person whose market position is under consideration.

The dispute resolution powers do amount to regulation bearing down on H3G and those powers do involve attempting to settle a price which promotes sustainable competition, efficiency, and maximises the interests of end users. That, we say, is a form of regulation which falls to be left out of account in the assessment whether H3G has significant market power.

This principle is in line with at least a major part of the reasoning in the 2005 H3G judgment, even if not – and I say this alone – the entire judgment. Perhaps if the Tribunal would, at this stage, pick up the judgment again in bundle H2, at tab 12, on p.43 at para. 89, which I am conscious the Tribunal has already read, the point of policy expressed by the Tribunal was expressed in general terms, in the second and third sentences of para.89, and it does apply squarely to this situation. H3G cannot be heard to say "We are unable to apply our power to charge excessive prices, because if we do that BT will inevitably invoke some regulatory intervention to prevent us so that we do not really possess any power in the first place.

The Tribunal went on in that paragraph to add that:

> "The argument might also be extended into cases of alleged abuse and ex post regulation, where logically it might be thought to apply on the same basis (notwithstanding the different direction in which the facts might be pointing) in relation to allegations of dominance."

In fact, if one thinks about it, in this case H3G might just as well argue to you that the possibilities of regulatory intervention under the ex post competition laws, and the sanctions which can be imposed on it for an Article 82 abuse of excessive pricing, mean that

it does not have significant market power for the purposes of the Communications Act. Significant market power is the same as dominance. H3G's logic would still be that it cannot, and would not, set prices above the competitive level, because if it did so it could see - and now I am paraphrasing the words of the judgment - that this would attract a form of regulatory intervention - a form of dispute resolution - but this time through BT enforcing the competition rules on abuse of dominance in the course, or via Ofcom if it took the case. So, the same logic applies.

In para. 99 of the judgment the tribunal's conclusions are similarly, as we have seen framed in general terms about the need to disregard the effect of any regulation being brought to bear on the party whose market position is under consideration.

As Mr. Scott rightly reminded us on Thursday, we need squarely to address what is said in para. 97 of this judgment with the italicised language in the quotation from the RegTP decision. Now, we say, in agreement with Mr. Anderson, that this was intended to distinguish regulation applying separately and distinctly to the counterparty, and not regulation which also applies to H3G. To make that good I would like to refer to the RegTP decision in the following tab, and look at a further part of that decision.

In para. 24, immediately following the two paragraphs which are extracted in the 2005 judgment, the Commission said,

> "RegTP has informed the Commission that it intends to impose an interconnection obligation on DTAG as a consequence of DTAG having SMP on the market for termination on its own network. Such a regulatory obligation, together with any other regulatory obligation imposed on a market other than the one for which the SMP assessment is conducted, must be taken into account".

So, what one sees is that we are talking there about DTAG's position in relation to its own market, and the regulation controlling interconnection from that perspective. I should also pick up the sentence that has been omitted in para. 23 from the Tribunal's quotation in its judgment. In the relevant paragraph of the judgment the final sentence at para. 23 was, I believe, omitted from the quotation. Now, that sentence - and here I am anticipating what Miss Rose might want to say about it in reply - also needs to be looked at. It says,

> "This implies that regulation which will continue to exist throughout the period of the forward-looking assessment independently of an SMP finding on the market concerned, must be taken into account".

Now, do the dispute resolution powers fall into that category, or not? It is worth noting, we say, that on a proper analysis, the dispute resolution powers are not independent in the sense

intended here by the Commission. The dispute resolution powers and the significant market power charge control powers affect each other inextricably. If you have an SMP charge control, any subsequent dispute about the level of the charge for the service concerned -- Take a charge imposed on the 2G termination rates for the MNOs -- Any dispute about that charge subsequent to a charge control having been imposed will be answered in a dispute resolution by reference to that charge control which has been imposed under the SMP regulation. The two powers - the SMP charge control and the dispute resolution power - may run in parallel, as the tribunal rightly observed in the 2005 judgment, but they converge in addressing precisely the same subject matter. In that sense the two are not independent. The distinction that the Commission was therefore drawing in this judgment was certainly between regulation bearing down on the MNOs, seeking to set termination charges on the one hand, and regulation (as you see from para. 24) bearing down on the counterparty which is distinct and separate from that.

In relation to para. 35 - the very important paragraph that Mr. Anderson took you to - Madam Chairman asked the question, or canvassed with Mr. Anderson, whether the controls referred to as applying under the German law should fall to be disregarded as a factor in the SMP assessment. We say in relation to that that implicitly that is the correct reading of that paragraph because when one reads the paragraph one sees that the powers are relied on to prove the contrary. The fact of the regulation is taken into account by the Commission in this paragraph, but not the contents of the regulation - namely, regulation which would constrain the prices of the MNO concerned under the German law. The Commission did not say, “Well, the impact of that on the pricing ability of the MNO needs to be taken into account”. Therefore it was not concerned with the content. It did, however, make the remark concerning the fact of that regulation as a reason for bolstering the conclusion that the MNO concerned could be viewed as having significant market power.

Finally on this issue, we have the tribunal’s reasoning in the 2005 judgment beginning at para. 135, under the heading ‘The Interconnect Agreement and Dispute Resolution’. The point has been made that Miss Rose avoided dealing with that part of the judgment in her main submissions. We say that that part of the judgment is consistent only with the wider interpretation of the judgment under which any form of regulation which bears down on the pricing ability of an MNO - the party whose market position is under consideration - should be disregarded when you are assessing significant market power. You see, in particular, para. 137 of the judgment where Mr Green, it appears, was running an argument very similar to the one which is being advanced to the tribunal today - namely, that the presence

of the dispute resolution procedure was, at the end of the day, a part of, or akin to, the regulatory presence, which meant that H3G could not set an excessive price, and therefore had no SMP. The answer to that, which is given by the tribunal in its judgment, and in particular para. 138(b) -- Again, madam Chairman, you raised in the course of argument with Mr. Anderson the issue as to whether the distinction drawn by the tribunal in para. 138(b) between an arbitral mechanism on the one hand, and regulation on the other might be significant.

In relation to that, we would simply remind the tribunal of how, in s.186 of the Communications Act, this arbitral mechanism comes into play. If the tribunal would pick up the Communications Act and turn to para. 186 you will see that at 186(b) the resolution of the dispute by the alternative means needs to be consistent with the Community requirement set out in s.4, the policy objectives. So, actually, what you have is not entirely free-floating arbitral resolution, but a form of surrogate, or out-sourced, regulation to that extent because the arbitral procedure - the procedure envisaged there - needs similarly to take into account the regulatory requirements. You have a form of regulation.

Now I come to the most difficult part of the submissions. Ofcom and BT say that this is the interpretation of the 2005 judgment, which is correct, and that that is an end of it. BT has told you that paras. 126 and 132 of the judgment should be explained as dealing with a different point from the one argued for by Miss Rose. We respectfully agree with BT and with Ofcom as our primary position. However, we apprehend that Miss Rose may attempt to lay emphasis on para. 142 in the judgment, which at least at first sight is more difficult to explain away. This paragraph, which comes under the heading 'Conclusions on CBP' above para. 140 states that,

> "For the sake of completeness, the tribunal observes that they have borne in mind the fact that regulation is brought into account in determining CBP whereas regulation of H3G is left out of account in looking at its side of the SMP assessment".

The tribunal says there is nothing inconsistent in that approach. The tribunal can read the paragraph for itself. However, at the end, there is the conclusion,

> "As we have observed, the full factual position in this respect must be looked at. One must look at how far the regulation will actually operate in any deemed negotiations. It is in failing to do that that Ofcom erred in its decision".

Now, this could be taken therefore as implying, in conjunction with para. 132 of the judgment, that one must look at how far, in practice, dispute resolution, will actually operate

in any deemed negotiations. Now, if that is the right interpretation of this paragraph, then we say respectfully that the paragraph is incorrect because when you are faced with a single piece of regulation bearing down on the party whose market position is being assessed for SMP, as well as on the counterparty, it is in fact illogical to try to disregard its impact on one party and, at the same time, take account of the impact of the same piece of regulation on the latter party. There is only one transaction.

Accordingly, we submit that whatever the correct reading of the judgment, the line taken in para. 138(b), which is unequivocal and cannot be gainsaid, states the correct position of principle. To the extent that there is anything inconsistent with that in the 2005 judgment we say that it should not be followed.

THE CHAIRMAN: The inconsistent point, I suppose, is that it was referred back to Ofcom because if - if - one is right in reading this judgment as saying that the dispute resolution procedure falls to be disregarded, one wonders then why it was necessary to refer it back to Ofcom to have a look at it again.

MR. TURNER: Madam, that is so. Therefore, if there is an inevitable inconsistency you have our submissions on which is the correct approach to take, because at the same time as this paragraph and its implication are there, you have the very clear and unequivocal statement in para. 138(b) about the correct way to approach precisely the sort of issue with which you are now faced in this case.

MR. SCOTT: Just staying with para. 142, it has to be read in the context of the much wider debate that took place in H3G 1 about the course of events and the motivations of various people at various stages. It has to be read in the context of discussions that had taken place between certain parties and the regulator, which were said to have influenced the willingness of parties to engage in dispute resolution. Our debate in this appeal seems to be much more narrowly focused on what actually happens in the context of an actual dispute resolution rather than some of the implications for the possibility of dispute resolution and not least the factor of delay that was discussed in the context of that appeal. So, there is a rather different context to these remarks in the judgment to the context immediately before us today.

MR. TURNER: Yes. Mr. Scott, I am grateful. I am rightly corrected on that. Indeed, while you were making those remarks I was covered in yellow confetti from all sides, saying that that was correct, and that there was a wider situation in that case concerning the factual matters which Ofcom had not, in that case looked at sufficiently so that it would be too narrow to say that there is an inevitable conflict in that way.

Madam, on Thursday Miss Rose suggested at one stage that everybody in the room was estopped from taking issue with anything in the 2005 judgment. That was Day 1, p.16. So far as we are concerned, when it was pointed out that T-Mobile was not a party to those earlier proceedings, she retorted that T-Mobile could have intervened, and that because we did not we have to take it as it is. Perhaps, before I make any submissions on the issue of estoppel which may be unnecessary, I should just clarify whether that point is going to be pursued against me.

MISS ROSE: We put it more broadly as abuse of process.

MR. TURNER: Abuse of process. I am grateful. In that case, with the tribunal's permission, I will briefly deal with the question of abuse of process, and then Miss Rose can make any further points on that as she chooses in her reply.

MISS ROSE: Might I suggest that it might be better for Mr. Turner to hear how we put the point, and then he can respond to it rather than perhaps dealing with a point that we are not to make? I will be referring to a fresh authority. Given that he is now saying, in terms, that the first ----

THE CHAIRMAN: Miss Rose, you did not make the point in your opening, or refer us to any authority, and now it is everybody else's turn to make submissions, to which you then reply. It is not really satisfactory for us all to know that in your reply you are going to be dealing with something which will inevitably then mean that all the other parties have to have a further bite of the cherry.

MISS ROSE: Madam, I made it clear at the outset of my submissions that if any party were to run the argument that the first H3G judgment was wrongly decided, that I would be responding to that. Now, at that stage that had not expressly been stated - and it has not been said by Ofcom or BT. That point is now clearly being made by T-Mobile. Madam, it is common-place that if a point arises out of the submissions of another party - as it now arises out of T-Mobile's submissions - that it will be dealt with in reply. If a new legal authority is produced in reply, other parties have a right to respond to that. That is absolutely standard procedure.

THE CHAIRMAN: If Mr. Turner wants to deal with the point now, then I think he should be allowed to do so. If he prefers to wait until he has heard what you have to say, then so be it. It is up to him to decide in what order he wants to make his submissions.

MISS ROSE: Madam, of course it is. I am only suggesting that it might save time for him to hear how we develop the point before he responds t it.

THE CHAIRMAN: Mr. Turner, having heard that ----

MR. TURNER: Mr. Anderson has his hand up, madam.

THE CHAIRMAN: Mr. Anderson?

MR. ANDERSON: I thought this was asking for trouble! I infer from what Miss Rose has said that the point - be it issue estoppel, or be it described as abuse of process - is a point taken only against those who question the judgment of the tribunal the first time around. Therefore I am protected from having this point raised against me. Perhaps Miss Rose would just confirm that.

THE CHAIRMAN: That is how I understood it.

MISS ROSE: Madam, of course, you will have to determine how you understand the first H3G judgment. If you conclude, as a result of that, that the submissions and the positive case that is being made by either Ofcom or BT, or, we say, anybody else, is inconsistent with that judgment, then in my submission you are not permitted to depart from it. But, it has not been suggested by the other parties that that is so. They are not inviting you to depart from the decision. All they are making are competing submissions about how that decision is to be interpreted. That does not raise a question of abuse of process.

THE CHAIRMAN: Are you saying that what you have heard Mr. Turner say so far in relation to his submissions on the H3G 1 judgment is something which you would wish to argue we should not take into account because it amounts to an abuse of process?

MISS ROSE: Madam, the submission which has been made by Mr. Turner, is that para. 142 of the H3G judgment is wrongly decided. That is the submission to which this goes.

MR. TURNER: Madam, the only authority which was mentioned by Miss Rose last Thursday, you will recall, was the well-known case of *Henderson v Henderson* which deals with a completely different point - that a party in litigation must bring its whole case forward at one time. We did inquire on Thursday whether there was another authority on which H3G relied as against us, and we were told at that stage that there was not. In view of what Miss Rose says about the efficient way to deal with this, rather than trouble the tribunal with reading new extracts of **Halsbury on Abuse of Process**, or any authorities, I think I will, with your leave, allow Miss Rose to say what she has to say and produce her new authority. At this stage it is sufficient to say that it would be an extraordinary position in public interest, public law proceedings for a party which was not a party to the previous judgment to be prevented from pointing out any form of inconsistency in the previous judgment. I look forward to seeing how the point is developed by my learned friend.

THE CHAIRMAN: If there is going to be another authority cited, is it possible to hand it up sooner rather than later?

MISS ROSE: Yes. We can hand it up now.

THE CHAIRMAN: Mr. Turner, apart from that, what other submissions -- I would like you to finish your submissions.

MR. TURNER: I am coming to the end right now.

THE CHAIRMAN: I am not hurrying you at all. I just do not want this to become too fragmented.

MR. TURNER: It will not. My final point to cover is this: it is the consequences for the SMP finding if you, the tribunal, decide that Ofcom did misunderstand its dispute resolution powers in the way that it approached the MCT statement. We say that it is not correct to say that you cannot uphold the finding of SMP yourselves should you decide that Ofcom has misunderstood its dispute resolution powers. If you find that Ofcom should have left the dispute resolution powers out of account when assessing Hutchison 3G's significant market power, then all of the remaining findings which are not challenged in the statement stand. The two factors pointing to significant market power, which I have referred to as the twin pillars supporting the finding, are there. You have a clear basis for upholding the finding of SMP and avoiding a pointless remittal of the case to Ofcom.

Now, H3G's only remaining argument to kick against that conclusion was to suggest in the course of argument, that Ofcom failed to look adequately at whether the company would engage in excessive pricing for the purposes of its SMP analysis. One sees this in H3G's skeleton at paras. 163 to 165. Now, very briefly, Mr. Roth addressed this point on Friday by saying that there was a difference between what you have to do to find significant market power on the one hand, and the conditions necessary to impose a remedy on the other hand, which appear from s.88 of the Communications Act.

THE CHAIRMAN: The price control remedy.

MR. TURNER: The price control remedy. We depart from Mr. Roth only to this extent in view of what he said. If you open s.88 of the Act, I pick up on a point canvassed with Mr. Roth by Madam Chairman. S.88 does not, in our submission, envisage that you are going to have a situation in which you have a dominant undertaking - an undertaking with significant market power - but without there being a risk of excessive pricing, to put the matter broadly. What the section refers to is a relevant risk. A risk needs to be distinguished from a relevant risk for the purpose of s.88. This section, as the tribunal will be aware, is by way of implementation of the suite of 2002 directives, and in particular the Access Directive which is at Bundle H1 ----

THE CHAIRMAN: S.88(3) - Relevant Risk.

MR. TURNER: Yes, there is a relevant risk. That is referred to in s.88(1) - the relevant risk of adverse effects. I did a search using a new electronic facility for the phase 'relevant risk' throughout this enormous Act, and I am satisfied - unless anyone corrects me - that it is not a defined term.

One goes then to the Access Directive at Bundle H1, Tab 4. One looks at Article 13, being the relevant provision.

> "A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls ... in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users."

Then there is what the national regulatory authorities shall take into account. One sees from this, in my submission, that the presence of operators in a market with significant market power is the corollary of the situation of the market not being effectively competitive. Well, you do not have an effectively competitive market - you have one or more persons with SMP. Then you come back to s.88. I mention the phrase 'relevant risk'.

> "The decision whether to impose price controls does not depend on whether there is a risk, but whether there is a relevant risk within s.88".

The term does not appear to be defined in the Act. But, in my submission, what it does do with that adjective 'relevant' is take you back to the general duties of Ofcom in s.3 and to the statutory policy objectives in s.4. In particular, that will include, among other matters, the provision at s.33(a) according to which Ofcom, in performing its duties, must have regard in all cases to the principle under which regulatory activity should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed."

If you still have the Access Directive open that ties in with the criteria which is set out in Article 8, para.4 of the Directive as well.

So the reason why there is daylight between a findings of SMP on the one hand, and the imposition of charge controls on the other hand has regards to considerations of that kind. Do you need this form of regulation? Are you targeting your regulatory activities at cases where the control is really needed, and a good example of the distinction is actually the case of H3G itself back in 2004, part of the case to which we are about to turn. Despite the finding of SMP in that case several years ago, H3G was adjudged unlikely to be in the position to cause significant damage to consumers or to competition in the market in view

of (among other matters) of the tiny number of subscribers they accounted for at that time, no relevant risk. But the point remains that when you are dealing, as we are in this part of the case, with a decision on SMP, the factors referred to by Ofcom, and relied upon in relation to H3G, are ample to conclude the case in favour of that finding.

Madam Chairman, unless the Tribunal wishes any further points those are my submissions.

THE CHAIRMAN: Thank you very much. Miss McKnight.

MISS McKNIGHT: Yes, I would like to make some short submissions for Vodafone. I have handed up a short note, as you intimated, but in light of some of the points that have already been made I may depart somewhat from it by skipping over some points.

Of all the points that Mr. Turner focused on, we would like to focus on only one where we will take a somewhat different slant, and that is essentially on what is the substantive content of the end-to-end connectivity obligation. I think it is clear from what has been said so far that H3G's case is that if Ofcom is called upon to determine a reasonable price pursuant to the end-to-end connectivity obligation, its obligation is to set upon, or to focus upon and determine a price which sets the MCT charge to be levied by H3G at no more than a competitive level because to determine that some much higher price would be reasonable would be inconsistent with the wider regulatory obligations set out in the regulatory framework.

We would take issue with that and say that Ofcom is essentially correct in saying that it can set a reasonable price at a much higher level, a higher level which, on its own, would not be sufficient to constrain Hutchison 3G from exercising SMP, and therefore this is not an answer to a claim that H3G has SMP.

I would turn perhaps to point 4 of my note where I have indicated that H3G advances essentially three arguments as to why it must be correct that the E2E connectivity obligation requires Ofcom to come up with this very harsh competitively set price.

First, as we understand it, H3G says that Ofcom will be failing to achieve all the objectives from Article 8 of the Framework Directive if it allowed a higher price to prevail.

Secondly, H3G says that Ofcom would be imposing a disproportionate obligation on BT by requiring it to contract at much higher prices and thereby depriving it of its pre-existing buyer power. They say that a disproportionate obligation would be contrary not only to general principles but to the express principles set out in Article 5 of the Access Directive.

Then they say, finally, that if Ofcom were to allow this much higher price to prevail it would be acting in breach of its duty under s.73(2) of the 2003 Act. I need not take you to it

but you will recall that they interpreted that obligation as being an obligation on Ofcom to ensure effective competition between the parties to the interconnection dispute.

So H3G say that the Tribunal should, if it needs to, strain to interpret the E2E obligation so as to avoid this outcome and they say that instead you should find that the E2E obligation requires that any determination settle upon a price which constrains H3G to charge no more – or perhaps a slightly higher charge – or something that would not be consistent with its exercising SMP.

We would like to focus on what is the purpose of the end-to-end connectivity obligation. As its name makes clear we think it is quite clear that this obligation is designed just to address one particular form of market failure, namely, the market failure which arises where there is a hiatus in supply because two independent operators cannot agree on interconnection terms. We accept it applies where supply continues but there is a dispute as to what new terms should apply, but the key purpose of the end-to-end connectivity obligation is to avoid a hiatus in supply which arises through an impasse in negotiations.

We say that by securing interconnection, even at quite a high price, the dispute resolution procedure under the end-to-end connectivity obligation confers distinct benefits on consumers by allowing them to enjoy that continuity of supply and the benefit of universal connectivity, which is one of the objectives of the Framework Directive.

We say that the end-to-end connectivity obligation is just one of the many regulatory tools available to national regulatory authorities, and it would be a mistake to imagine that it is incumbent on the NRA to use that single tool to try to achieve all its regulatory objectives; that would be a misunderstanding of the whole regulatory framework.

If I may, I would take you first to the Access Directive – the only bundle I intend to refer to is bundle H1, so it will be worth having that to hand.

The Access Directive is at tab 4 and if we could turn to Article 5. We would say that looking at Article 5.1, it is split into two paragraphs. The first paragraph looks generally at all the powers which NRAs may exercise to deal with questions of access and interconnection and is looking at the exercise of powers, Directives, achieving all the regulatory objectives.

But, the second part of para. 1 looks particularly at the exercise of access related powers to secure end-to-end connectivity, and it expressly says this is without prejudice to measures that may be taken regarding undertakings with significant market power. This appears to us to be a direct recognition that the powers to regulate companies having SMP will be

exercised in pursuit of their appropriate objectives, but there is a separate objective of ensuring end-to-end connectivity.

MR. SCOTT: Could you just pause? Immediately before that you seemed to be suggesting that end users got an advantage from interconnection at whatever price and that seems to be not entirely in keeping with the words "maximum benefit to end users" in Article 5.1.

MISS McKNIGHT: Well Article 5.1 first paragraph, where my interpretation of that would be that there are many ways in which NRAs can regulate matters affecting interconnection. One is by imposing charge controls as to the terms on which interconnection should be offered, so the MCT charge controls – they are directed at securing maximum benefit for end users. But there is a separate paragraph here which talks about the exercise of the powers apart from SMP powers, to secure end-to-end connectivity.

I entirely take your point that for end-to-end connectivity to be achieved at unaffordable prices is of limited benefit to consumers, but it is of some benefit and I will come on to talk about Article 20.1 of the Framework Directive, which emphasises that in exercising a power to resolve disputes under access related conditions, the NRA is required to reach determination in the shortest possible time frame, and I submit that this places emphasis on the fact that the securing of end-to-end connectivity, avoiding a long hiatus in supply is an objective in itself, and that if in resolving a dispute quickly the NRA is unable to conduct the full market analysis, and assessment of what would be an efficient price, which is necessary for a fair SMP assessment, the proper thing to do is to settle upon a reasonable price, and I will come to the fact that has an upper band, without troubling to try to do then the work which it will independently be required to do as part of its SMP analysis. Indeed, when you come to the TRD disputes I think you will see the sequence of events essentially mirrors what I have described as being a proper way for an NRA to behave.

MR. SCOTT: Just in passing on that point, it does indeed say "shortest", it then mentions both "four months" and "exceptions".

MISS McKNIGHT: Yes.

MR. SCOTT: The four months and exceptions seems to ring a small bell in relation to the reference to price control matters to our neighbours. I think the "shortest" has to be seen together with the four months and the exceptions provided for.

MISS McKNIGHT: I think it is a cumulative obligation that one cannot just sit around saying "I have got four months" ----

MR. SCOTT: Absolutely.

MISS McKNIGHT: -- a complex case will take four months I accept, but I think you will find the conduct of a full SMP review and the settling of an appropriate price control, where s.88 provides for the imposition of a price control takes considerably longer than that.

MR. SCOTT: Yes, not least because of the Article 6 and Article 7 Framework Directive provisions.

MISS McKNIGHT: Absolutely, yes. It would not be practical. I wondered, whether before we leave this part of the Access Directive, I could take you also to Article 12 of the Access Directive. It is just a small point arising from the final words in Article 12.1, I think it is clear here that again the legislator recognises that the maintenance or promotion of a sustainable competitive market at the retail level is not in itself sufficient to encapsulate the whole of the end users' interest. The end users' interest is presented as an alternative to that, recognising, I would submit, that the end user may have an interest in securing end-to-end connectivity, even if a further separate action has to be taken to ensure the prices are set at competitive levels. It is a small point but I think an illustration of the fact that the legislator recognises that there is a separate interest in end users securing end-to-end connectivity.

MR. SCOTT: Again, just sticking with Article 12, you will notice that the sentence immediately before 2, is that "National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness."

MISS McKNIGHT: Yes.

MR. SCOTT: So once again, the thought of something being unreasonable in this context should ring alarm bells both for ----

MISS McKNIGHT: Yes, I do not think we are suggesting any price should be unreasonable, we acknowledge it is required to be reasonable. The question is whether "reasonable" imposes as tight a constraint as H3G proposes, and we say it does not. There are other higher prices that would be reasonable, at least pending an SMP review – or the outcome of an SMP review I should say.

THE CHAIRMAN: And that, you say, is because the key purpose of interconnectivity is simply to provide the connection.

MISS McKNIGHT: Of the end-to-end connectivity obligation, yes.

THE CHAIRMAN: So if one were to construe the purpose of the end-to-end obligation slightly more broadly as saying it is to provide interconnection on reasonable terms?

MISS McKNIGHT: We would say that its purpose is to secure end-to-end connectivity, but if one did not impose any limit on the terms that BT would be required to accept it would be

placed in an impossible position. It could be expected to pay quite exorbitant terms. So we say that the incorporation of criterion of reasonableness is intended to protect BT from having to pay something above the outer bounds of what would be reasonable.

THE CHAIRMAN: Thank you.

MISS McKNIGHT: We would point out that it would have been open to Ofcom to define some methodology for setting the price that should be charged under the end-to-end connectivity obligation. It appears that Ofcom chose to say only that BT should be required to comply with any terms that were reasonable. It was well aware of the fact that that was one of the options available to it under the Access Directive. It is Article 10 - the requirement that terms be reasonable. But, of course, the later articles deal directly with cost accounting, the imposition of particular pricing methodologies. So, one has to infer that Ofcom deliberately chose not to impose some more specific definition than merely reasonable.

We would say that this interpretation of the end-to-end connectivity obligation does not in any sense render it non-compliant with the regulatory framework. We start from the position that the regulatory framework as a whole is properly to be regarded as a deregulatory framework. It replaced a pre-existing set of directives which were more onerous and envisaged the imposition of far more wide-ranging regulation.

I think if I could just take you to the Authorisation Directive which we have at Tab 5, the next tab of this bundle. Recital 1 says,

> "The outcome of the public consultation [in respect of what sort of new regulatory framework should be adopted] has confirmed the need for a more harmonised and less onerous market access regulation for electronic communications networks and services throughout the Community".

Recital 7 refers to,

> "The least onerous authorisation system possible should be used to allow the provision of electronic communications networks and services in order to stimulate the development of new electronic communications services ----"

Likewise, if we go to the Framework Directive, which is at Tab 6, Recital 1 says,

> "The current regulatory framework has been successful in creating the conditions for effective competition ----".

That was in fact referring to the previous regulatory framework. "-- during the transition from monopoly to full competition."

So, this recognises that we are in a process of transition towards a situation where we rely more on competition type regulation of firms having SMP. Of course, that is confirmed in

Recital 25, which I think we have looked at before, and which notes that ex ante obligations generally will be imposed only on firms having SMP.

So, we would say that the regulatory framework envisages that for the most part firms who do not have SMP can just charge what they like. Competition will look after consumers because firms which do not have SMP, but charge too much, will simply not prosper and any adverse effect on consumers will be short-lived and of limited effective.

We say that since the end-to-end connectivity obligation is imposed on BT to require it deal with all sorts of firms, including firms not having SMP, it is entirely logical that it should permit those firms to charge what they like on the basis that if what they charge, when passed through to end-users, renders the service unattractive relative to competitors' services, they just will not do very well. So, the upper bound for them for what they can expect BT to charge, albeit it is limited by some outer bound of reasonableness, would certainly allow them to charge more than a perfectly efficient price or a perfectly competitive price because that is the way the regulatory framework works. Such firms are not to be regulated as to their prices, and it would be wrong to construe the end-to-end connectivity obligation as indirectly constraining them to some tighter form of regulation than the framework as a whole envisages.

That is the context in which we would ask you to look at the end-to-end connectivity obligation.

I would like then to turn back to the three particular points that Hutchison 3G have raised which I itemised in Point 4 of my note.

First of all, Hutchison say that if the end-to-end connectivity obligation requires BT to buy MCT services, even at prices that are higher than a competitive level, then the E-To-E obligation will be failing to achieve all the objectives of Article 8 of the Framework Directive. Well, we have essentially addressed that. We have said that the end-to-end connectivity obligation and the dispute resolution mechanism that goes with it is not the only, or the principal, took for achieving all those objectives of the Framework Directive. It is part of the armoury of Ofcom, and it is to be used for its proper purpose, but not to achieve every other collateral purpose. We say that if one were to attempt to use this obligation to achieve all the other objectives of perfect pricing, one would be sacrificing a very important consideration - namely, resolving disputes in the shortest possible timeframe to secure the particular benefit of end-to-end connectivity. But, we would emphasise that Ofcom does, of course, in parallel, pursue market analyses and SMP investigations with a view to later imposing SMP price controls on the interconnecting operators who deal with

BT. If that turns out to be necessary and appropriate, then that is the proper combination of the use of regulatory tools that we would expect to see.

We say that deals with Hutchison 3G's first point.

As to the second point - that, as we interpret it - the end-to-end connectivity obligation imposes a disproportionate obligation on BT - we say that it is not a disproportionate obligation on BT. In particular, we do not accept the point that Hutchison make that by effectively imposing such an onerous obligation on BT as to prevent it exercising countervailing buyer power, off has erred, because the result of what it has done is to create SMP in H3G which would not otherwise have existed. We think that is a flawed criticism because it takes an excessively H3G-centric view of the world. The purpose of the end-to-end connectivity obligation is to secure end-to-end connectivity which is a proper purpose. If, by doing so, Ofcom has, in passing, deprived H3G of a potential defence to a finding that it would have had SMP, then that does not render the imposition of the end-to-end connectivity obligation inappropriate. It simply means that one has to resort to the SMP regulation which the directive always contemplated. I will not take you to it, because you have looked at it very recently, but I was struck, hearing Mr. Anderson's submissions, when he looked at the RegTP decision of the European Commission at Bundle H2, Tab 13, but in para. 32 the European Commission expressly looked at that point, and did say that it would be wrong to suggest that the imposition of this kind of obligation conferred SMP on other parties. The correct way of looking at it is that their 100 percent market share and the insuperable barriers to entry are what confer the SMP. The only question is whether it is improper to look at a particular form of regulation that might abate someone else's countervailing buyer power.

Again, we emphasise that it is not disproportionate to require BT to buy services at higher than competitive prices because the whole regulatory framework contemplates that firms are free to charge what they will subject to SMP regulation.

Hutchison 3G's third point is that there will be a breach of s.73(2) of the 2003 Act if BT were required to buy services from H3G at anything higher than a competitive price. I think it would be worth looking at s.73 at Tab 8 of Bundle H1. You will recall that H3G focused on s.73(2) which says,

> "Access-related conditions may include conditions relating to the provision of such network access and service interoperability as appears to Ofcom appropriate for the purpose of securing (a) efficiency on the part of communications providers and

persons making associated facilities available; and (b) sustainable competition between them ----"

I do not want to disregard (c), but the focus is on the interaction of paras. (a) and (b) where Miss Rose put it to us that this must be sustainable competition between the providers and the persons making the facilities available. We say that that is simply wrong. We appreciate that one possible reading would be to interpret it that way, but we say that that has no basis in the regulatory framework, and since this provision is adopted to give effect to the regulatory framework, the only proper way of interpreting it is that this is a wording which is intended to capture the notion of sustainable competition as an objective of the regulatory regime in its broadest sense, as used in Article 8 of the Framework Directive. To illustrate how unlikely it is that H3G's preferred interpretation is correct, we would point out that in many cases there will not actually be competition between the two parties to an interconnection dispute, or seeking interconnection. Indeed, according to Ofcom's market analyses, H3G and BT do not compete in the same market at all. There are separate retail markets for mobile call origination, and fixed. But, it is difficult to see how one can make sense of this concept if it were interpreted as H3G propose in the context of BT's entire end-to-end connectivity obligation and disputes that might arise from it.

MR. SCOTT: It is the same point again, but the statute translates maximum to greatest possible benefit for end-users. Ofcom have to take that into account in the exercise of their s.73 ----

MISS McKNIGHT: You point out you are raising the same point. I suppose my answer is the same - namely, that the maximum benefit for end-users is achieved by using one tool to secure quick end-to-end connectivity, and another tool to ensure the proper price regulation of SMP providers. Trying to do everything at once probably means that one compromises on the attainment of all those objectives.

That is all I intend to say about the substance of the end-to-end connectivity obligation. My remaining points I just categorise as a number of miscellaneous points, which I can deal with very quickly.

The effect of the end-to-end obligation on H3G - we would adopt the submissions of Ofcom and BT here. We think it is elevating form over substance to suggest that the end-to-end connectivity obligation does not bear on H3G - because it does indeed in its operation. Operators set a maximum price that may be levied - albeit in our submission that one that is above the competitive level. I will not labour that point further.

We would like to comment on the points which were made by H3G as to what they saw as Ofcom's confusion or failure to address what was wrong with H3G's unregulated prices.

Were they too high to be efficient? Above the competitive level? Appreciably above the competitive level? Or excessive? We say that all of these terms do have particular and different meanings, but that they have been somewhat jumbled up in the way in which H3G have presented their case.

We would say that the efficient price for any service of the kind under consideration is generally a cost reflective price, albeit, as I think Mr. Scott has intimated, there will often be debates as to whose costs are relevant where one operator may not operate in a cost efficient manner. Of course, there will be debate, as there is in this case, as to whether the efficient price for call termination should reflect mark-ups, externality, and surcharges, and so on.

As to what is a competitive price, often a competitive price would be the same as an efficient price. In a market which is perfectly competitive, competition would drive prices down to efficient levels. But, of course, the term 'competitive price' is often used to signify any price which prevails in a market where no one or more firms have SMP. But, of course, that does not mean that those prices will be perfectly efficient. I have already illustrated my previous points by suggesting that in a competitive market - one which does not require SMP intervention - some firms could charge high prices, but they will simply lose custom. But, a competitive price is, for this purpose, in a sense ambiguous. It can either mean any price that prevails in a market not requiring SMP intervention, or some target price where one would require an SMP firm to observe if it were to be price-regulated by reference to comparable competitive prices.

We would say that in this particular case one can readily understand why Ofcom did not focus any attention in working out what would be the competitive price for the supply of MCT services on H3G's network because to postulate as to what would be a competitive price one really needs to have some conception of how competition might operate for the supply of MCT services on H3G's network. Although there may be technological wizardry and innovation which will ultimately render it possible for competing firms to compete to terminate calls on a single network, we simply are not there yet. We do not have any conception of what the costs of competing operators would be if they operated in such a world, nor what degree of competition would prevail. Would this be fierce competition on price to provide an identical service, or would there be some differentiation that allowed, even in a competitive market, prices to rise somewhat, albeit not to levels that would require SMP intervention?

We say that it would not have been appropriate to expect Ofcom to focus on working out what would be a competitive price for H3G's call termination service.

We have also heard bandied around notions that people should be charging high prices. We say high price is simply, on its own, somewhat meaningless. It may mean higher than the perfectly efficient or perfectly competitive, but a high price is not itself objectionable in law. The fact that under our interpretation of the end-to-end connectivity obligation BT might be required to purchase services at a high price - one which is higher than is perfectly efficient - it is perfectly consistent with the regulatory framework which allows people to charge high prices unless they are subject to SMP regulation which requires them to reduce their prices. As to the term 'excessive pricing', clearly the notion of excess is that something exceeds some norm - a legal or regulatory norm of some sort. I think hitherto H3G have suggested that it would not be appropriate to require them to reduce their prices by a price control unless there were a risk they were going to charge excessive prices that would amount to an infringement of Article 82. We accept, clearly, that the term 'excessive pricing' is often used to denote something that infringes Article 82, but we do not think that its only or proper meaning here.

We note that under the regulatory framework as implemented through s.88 of the Communications Act, what is envisaged is that if a firm has SMP then it is for Ofcom to decide whether there is, as Mr. Turner was suggesting, a relevant risk of the imposition of excessive prices – perhaps we could turn up s.88?

MR. SCOTT: The actual wording is not quite that, the actual wording is: "…relevant risk of adverse effects arising through price distortion."

MISS McKNIGHT: Yes, that is right. Then we would say that s.88(3) provides some form of definition of what is meant by that:

> "For the purposes of this section there is a relevant risk of adverse effects arising from price distortion. If the dominant provider might –
>
> (a) so fix and maintain some or all of his prices at an excessively high level, or
>
> (b) so impose a price squeeze

as to have adverse consequences for end-users …"

Now, it is clear that if a dominant firm, under competition law, charges excessive prices that infringe Article 82, that is likely to have adverse consequences for end-users. But of course a dominant firm having been found to SMP could intend to set its prices much higher than an efficient level, but perhaps not so high as to amount to an infringement of Article 82, but still produce adverse effect from end-users.

MR. SCOTT: Just sticking with the words "price distortion", and here we are in an interesting situation because we are talking about SMP at this moment and these issues of course range across the next issue and the TRD.

MISS McKNIGHT: Yes, they do.

MR. SCOTT: But it is common knowledge that in this country at the present time, a mobile to fixed call is likely to be priced at a very different retail level to a fixed mobile call.

MISS McKNIGHT: Yes, I do not know as a matter of fact, so I am willing to believe that.

MR. SCOTT: Yes. I suppose the question underlying this is does that distinction fall to be taken in to account by the regulator in any one of the four situations with which these appeals are dealing? So SMP non-price control, was it proportionate? Price control, not for us at this stage, and the TRD?

MISS McKNIGHT: Certainly, we would say that looking at s.88, which of course assumes that one has made a finding of SMP and is debating whether or not it is appropriate to impose a price control, that if there were a concern that left unregulated a firm, such as H3G, would raise its mobile call termination charges so high, and perhaps then discount its retail prices to such a low level as to cause a distortion of competition between the two types of call that you have described. That could be a form of price distortion – indeed, would be a form of price distortion that would justify regulating H3G's mobile call termination charges so as to force those charges down and require it, if it wishes to cover its costs, to charge more for call origination.

My recollection is that that did not represent Ofcom's chief concern as to why it would regulate H3G's call termination charges because in the light of its market analysis of retail markets it considered that since fixed originated calls and mobile originated calls are not direct substitutes that would be a second order concern. The principal concern that justified the imposition of the price control was the concern that H3G would maintain its MCT charge at an excessively higher level, with the adverse effect on consumers that there was an allocative efficiency distortion within the mobile market between mobile originated and mobile terminated calls. So theoretically your point is sound, but it probably was not the most weighty consideration, but I am conscious this leads us into proportionality issues and ultimately issues at to level at which and the criteria by reference to which any price control should be set. So perhaps those could be treated as provisional or preliminary comments until we reach the later issues.

THE CHAIRMAN: But is your point in answer to Mr. Turner's point that it is not really right to say that the term "relevant risk of adverse effects" in s.88(1) is undefined, because actually

it is defined in s.88(3) which effectively says "When we say 'relevant risk of adverse effects', we are limiting that to what is in (a) and (b) rather than any other type of risk of adverse effects.

MISS McKNIGHT: Yes, I did not understand Mr. Turner to be saying that there might be risks of other outcomes that could be used to justify price control. My understanding was that he was making a slightly different point that if a firm has SMP there is a risk that it will price high, but one would only impose a price control if the risk is that it would price high so as to have adverse consequences for end users. One could imagine a world where someone only served two customers, and the adverse consequences for end-users would be so small as not to merit being classified as such. That is what I had understood to be his point but I am sure he will correct me if I am wrong.

MR. TURNER: Madam, there may not be that much difference between us. I am simply drawing attention to the same point that with relevant risk or harm, adverse consequences for end-users, the regulator is being asked to focus on the extent of damage that would arise regardless of whether in theory if you have an operator in a dominant position or with SMP, in theory there is a risk that it can set prices at an excessive level, the regulator is bound to look at it from a proportionate perspective.

THE CHAIRMAN: Thank you, Mr. Turner.

MISS McKNIGHT: In that case I think there is nothing between us but we would characterise subsection 3 as being a defining subsection. That is all I wanted to say about s.88 at this point, so obviously it will be relevant to our proportionality case, but there is one final point that I want ed to make ----

THE CHAIRMAN: Well, I notice it is five past one already.

MISS McKNIGHT: I will take five minutes, I think, but I am happy to continue after lunch if you prefer.

THE CHAIRMAN: I think perhaps that would be best.

MISS McKNIGHT: Of course.

THE CHAIRMAN: So we will adjourn now until five past two. Thank you.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Miss McKnight?

MISS McKNIGHT: Thank you. Before lunch I had essentially finished the comments I wished to make in respect of the way in which the end-to-end connectivity obligation should be construed and the points on s.88. I wish simply to emphasise before moving on that of course I have explained why we consider that the end-to-end connectivity obligation does

not require Ofcom, when settling disputes to settle a price which is close to the competitive level, but I have emphasised that there is, of course, an outer bound beyond which price would be unreasonable. We do not intend to make submissions at this point as t o what criteria would govern what is reasonable, because clearly that would be more appropriately addressed in the context of the TRD dispute issues, and we would return to that as necessary then.

So on that basis there was simply one final point I wished to make, which is that Hutchison 3G have emphasised that they consider that one needs to look at the very particular facts of their situation to judge whether they have SMP or whether the end-to-end connectivity obligation on BT deprives H3G of SMP. You have already heard from other parties that they take issue with that. They would submit that there is nothing particular about H3G's circumstances which makes their case any different from that of other mobile network operators. We would endorse that position that H3G's position appears to be that because there is an end-to-end connectivity obligation with, as they would construe it, a very tight limit on what can be charged, and because BT is sensitive to t he prices that H3G might wish to levy and would therefore resort to dispute resolution in order to cap H3G's price, that deprives H3G of SMP. We would say that applies equally, if not more so, to larger mobile network operators such as Vodafone, because clearly BT can be expected to be equally (if not more) price sensitive to the charges that a firm such as Vodafone might wish to levy.

So if, contrary to what we were saying earlier, you were to conclude that the end-to-end connectivity obligation is such as to deprive H3G of SMP we say that would apply equally to Vodafone. It follows, therefore, that if you were to reach that stage and to be considering what relief to give, if you were to conclude that Ofcom's decision should be set aside, or that Ofcom should be directed to set aside its decision insofar as it relates to Hutchison 3G, we consider it would clearly be unsound to allow that decision to stand in respect of other mobile operators, and we would therefore submit that you should in that event direct Ofcom to set aside the decision in respect of all the mobile operators to whom it relates so that they could then reconsider the question of SMP.

THE CHAIRMAN: Well we will only get to the situation of deciding what orders to make, of course, once we have had the determinations back on the price control matters from the Competition Commission and putting those together with whatever we decide on these two issues in the MCT appeals, working out what the answer is. That may or may not be an easy task, depending on what the answers to those questions are. If it turns out not to be an

easy task then I suspect that we will need to have further submissions from the parties as to what the appropriate orders were, but I do not think we want to get into that territory now.

MISS McKNIGHT: That is very helpful, because it was our understanding that you might reach a decision that Ofcom had not correctly concluded that H3G had SMP, with a view to then nipping in the bud any reference to the Competition Commission insofar as it related to H3G, but if that is not in prospect then clearly we will be happy to wait until later in the proceedings to address questions of relief.

THE CHAIRMAN: I think at one of the very earliest case management conferences in this case we decided that we would not postpone the reference to the Competition Commission until after we had issued a determination in relation to SMP and although things have not necessarily worked out in a way that we thought at that early stage because of the interpolation of the TRD appeals, nonetheless I think that is still the situation.

MISS McKNIGHT: Thank you. That completes the submissions I wish to make. If you have any questions naturally I would be happy to assist.

THE CHAIRMAN: Thank you very much. Who is going next? Miss Demetriou?

MISS DEMETRIOU: Madam, I think I can be very short because Orange is not intervening on the SMP question, so I intend to leave any submissions that we may have, having heard everyone else, on the scope of Ofcom's powers to a later stage, to the TRD appeals.

THE CHAIRMAN: Thank you. Miss Bacon, do you have any submissions on this issue?

MISS BACON: O2 never intervened on the SMP issue, no.

THE CHAIRMAN: Thank you. So then we would move to H3G's reply. Before you get to your feet, Miss Rose, we have been considering how to handle this point which is now being raised to the effect that it is, or might be an abuse of process for T-Mobile to argue that part of the first H3G judgment was wrongly decided, that abuse arising we understand it is said because T-Mobile had standing to intervene in the first H3G proceedings and did not do so. Our current opinion is that this is a novel point and clearly would be an extremely important point for the future conduct, not only of these proceedings but proceedings before the Tribunal generally. There is no authority that we are aware of in the Tribunal that is relied on and we are concerned that the parties have not had adequate time to prepare proper argument on this. Further, the Tribunal's view at the moment is that it should only determine the point, or express a view on the point, if it turns out to be a necessary step in the Tribunal's determination of the case.

T-Mobile, as I understood their submission, say that their point on para.142 of the judgment only arises if their primary submission, which adopts the submissions of Ofcom and BT on the interpretation of the judgment, fails.

The Tribunal has regard, of course, to its case management powers to ensure the just expeditious and economical conduct of the proceedings, and our view at present is that that is best achieved by not hearing argument on this point in the course of these days which have been set aside for dealing with the issues notified to the parties, but if the Tribunal early on in its deliberation considers that this is a necessary step, then it will invite the parties to make written submissions on the point so that it is argued and decided properly in the context of the case in which it actually arises.

Clearly if we are to save time by not hearing the point we do not want to lose that time in arguing about whether we should hear the point or not, but Miss Rose, perhaps you could say whether or not that approach is acceptable to you

MISS ROSE: Madam, it is acceptable.

MR. TURNER: Madam, for the record you have correctly understood our case.

THE CHAIRMAN: Good. So having regard to that point then, Miss Rose, perhaps you would like to speak in reply?

MISS ROSE: Can I hand up this note which I hope will be helpful? (Document handed to the Tribunal)

THE CHAIRMAN: Thank you.

MISS ROSE: Before I come to this note, I just want to say something about the submissions that have been made by Vodafone. Vodafone alone has sought to address the content of the end-to-end obligation. It is fair to say that that is a case that Vodafone have not articulated either in its statement of intervention, or in any previous skeleton argument. We, of course, have not yet heard Ofcom's submissions on that issue, which are likely to be the principal submissions on it, and I therefore would like to reserve my position on responding to Vodafone until the TRD appeals and in the context of what Ofcom says.

THE CHAIRMAN: Yes, well it is precisely because of that that we ordered that here should be this combined hearing.

MISS ROSE: Yes. That brings me then to the submissions that were made initially by Ofcom, but then picked up by both BT and T-Mobile. There is a technique that magicians use which is called "misdirection". What you do is when the actual business of the trick is taking place in one part of the stage, you invite the audience to be distracted to look at a different part of the stage and miss the crucial slight of hand. Indeed, there was one

magician who used to introduce a dancing bear on to the stage at the crucial moment at the climax of the trick.

What you have heard from Ofcom and from BT and T-Mobile, but my submissions are principally of course directed at Ofcom, is an exercise in misdirection in two respects. First, Ofcom has made virtually no reference at all to the decision which it actually took in this case, and to the reasoning that underlay that decision. Ofcom simply has not addressed at all the flaws that we identified in that decision.

Secondly, all the submissions that you have heard from these three parties have sought to characterise our appeal as being based on an argument that Ofcom's dispute resolution powers deprive H3G of SMP. That is a fundamental misunderstanding of our case.

This case is not about Ofcom's dispute resolution powers, it is about the proper interpretation of the end-to-end connectivity obligation imposed on BT and the extent to which that obligation constrained BT's powers in negotiations with H3G. Essentially, the mis-characterisation of our case and the failure to address the decision Ofcom actually made in this case have resulted in the construction of an edifice by Ofcom and by the interveners, a straw man which they have sought to demolish, which is not in fact the case which we put.

Can I now turn to the written note, and I am going to make my submissions by reference to it. You will see that the first point that we make is that Mr. Roth made no attempt to defend Ofcom's reasoning, or to address our criticism of that reasoning.

We then identify in particular the fact that Mr. Roth has not advanced any positive case to support the key conclusions that were made by Ofcom in the MCT statement, and which hare also of course reflected in the reassessment statement. Those conclusions are as follows: first, that the obligation to interconnect at a reasonable price imposed on BT under the end-to-end obligation is properly to be interpreted as requiring BT to connect even at a price appreciably above the competitive level."

That is the first finding that Ofcom made (Vol.B, Tab 1 para. 5.154 of the decision).

The second conclusion is that when the parties were negotiating a price for MCT - in this case, BT and H3G negotiating - they therefore could not assume that if they were unable to agree a price Ofcom would not impose a price appreciably above a competitive level. I stress 'impose on BT' because what we are looking at here is the proper construction of the obligation on BT to connect at a reasonable price. What Ofcom, we say quite correctly, was asking itself was: When the parties are negotiating about interconnection and the price of interconnection, they have to take into account the question, "At what price is BT bound to contract?" Any price up to the price BT is bound to contract constrains BT's buyer power,

because BT has no choice. If we put forward a price, they have to accept it. But, once you get above the price at which BT is bound to contract, you simply have a normal commercial situation in which we may put forward a price and BT may say, "No, that's too high". All that Ofcom were saying is that when the parties are negotiating in that context, one of the factors that they will take into account when asking themselves, "What is the reasonable price that BT have to accept?" is ultimately, "What price would Ofcom determine to be a reasonable price for the purposes of the end-to-end obligation?" That is all that Ofcom found.

So, that is the second conclusion. You see that at para. 5.160. Can I just turn you back to the decision? It has been a very long time since you actually looked at Ofcom's decision. Page 100 in the bundle numbering. We start at para. 154. I made it very clear, I believe, in my opening submissions, that this was the paragraph which, in our submission, contains the basic errors of law. This was a paragraph that was not even addressed by Mr. Roth in his reply. What is said here is about the proper construction of the end-to-end obligation.

> "On this basis, a reasonable charge for BT to purchase MCT with a view to ensuring end-to-end connectivity may be at a price appreciably above the competitive level".

So, that is the construction adopted of the end-to-end obligation.

> "As such, if a charge appreciably above the competitive level were in dispute, Ofcom considers it unlikely it would insist on a strictly cost based charge".

So, there are two findings there. First, the end-to-end obligation requires BT to connect above a competitive level; and, secondly, if Ofcom were determining a dispute about the end-to-end obligation it would require BT to connect above a competitive level. The second follows from the first.

We then see at para.160,

> "In Ofcom's view, this suggests that neither party in a negotiation over MCT, where the MNO had not been found to have SMP, can assume that Ofcom would impose a charge for MCT that was not appreciably above the competitive level".

Now, that is not particularly well-expressed. What they are meaning is that Ofcom would not uphold a charge that was appreciably above a competitive level. Then it said - and this is the crucial finding at para. 161,

> "Ofcom therefore concludes that a purchaser and supplier of MCT, properly apprised as to Ofcom's approach to dispute resolution, would therefore negotiate on the basis that if a charge appreciably above the competitive level were in dispute,

Ofcom would be unlikely to impose a charge for MCT in the context of such a dispute that was not appreciably above the competitive level".

So, dispute resolution is only relevant because Ofcom - and I stress Ofcom - made its decision in this case on the basis that when you are looking at countervailing buyer power you ask, "What would the impact be in the negotiations of the parties' assumptions of what price Ofcom would think reasonable if there should be a dispute?" Now, that is not a case that we mounted. That is the decision Ofcom made. What is quite, with respect, astonishing, is that the submissions that you have heard from Mr. Roth must be premised on the assumption that Ofcom's decision was flawed in law, because the submissions that Mr. Roth has made say in terms that it was legally erroneous for Ofcom to take into account the matters that it took into account at paras. 160 and 161 of its own decision.

The question is: Where would that leave this appeal? You have heard from Ofcom and the interveners much argument about whether it is, or is not, appropriate for Ofcom's approach to dispute resolution arising out of the end-to-end obligation to be taken into account. But, none of them have come back with a decision, and considered what is left of this decision, if it was an error of law, for Ofcom to take that into account?

THE CHAIRMAN: The fact that they are defending the TRD appeals must indicate that they still stick by what they say was the approach - that it is better to deal with those arguments in the context of those appeals where they actually arise rather than here, where they arise hypothetically. So, I did not understand Mr. Roth as resiling from saying that they do still maintain this - but, rather, saying, "Well, we'll debate that in the TRD case, but even if we are wrong, then that still does not help H3G". I take your point that that alternative does not appear anywhere in the decision.

MISS ROSE: Madam, I absolutely accept that that is right. But, consider the way that this case has been put by both BT and T-Mobile. Both BT and T-Mobile are running positive cases in the TRD appeal that Ofcom has misconstrued its dispute resolution powers, and has misconstrued the end-to-end connectivity obligation. They seek to maintain an argument that the SMP appeal should fail notwithstanding those submissions. Now, I agree that Mr. Roth seeks to have it both ways, but I am addressing the arguments that have been put so far. Certainly so far as BT and T-Mobile are concerned, they do not have a fallback position on this.

If you consider the decision for a moment, on the basis that their submission was correct, where would that leave Ofcom's decision? The answer is that where it would leave it is in a situation where you have BT - a price-sensitive buyer - and H3G negotiating for

interconnection. BT, correctly, understands that it is not required to interconnect above a reasonable price. H3G also correctly understands this to be so. H3G puts forward an anti-competitive excessive price appreciably above a competitive level. BT replies and says, "We're not obliged to connect at that level. We will not agree to that price, and if you seek to maintain it, we will not supply you with interconnection". That reasoning holds good whether or not you factor in the role of Ofcom which would ultimately resolve that dispute in the real world by saying whether the price was, or was not, reasonable. If you leave dispute resolution out of this picture, what you are left with is the real issue in this appeal, which is the proper interpretation of the end-to-end obligation. The reason that that is so is because it is only the end-to-end obligation that constrains what would otherwise be BT's overwhelming countervailing buyer power.

MR. SCOTT: Just remind me what happened when your client suggested a range around 16 pence?

MISS ROSE: There was a dispute referral to Ofcom.

MR. SCOTT: So, BT did not regard themselves as outwith the end-to-end obligation and give notice that they were going to cut your client off. It went to the dispute resolution.

MISS ROSE: Of course it did - because that reflects the lack of reality in the approach that the interveners are suggesting. I am going to come on to it, but this is actually the ratio of the first H3G appeal. You have got to look at the facts in the real world. The reality is that BT says, "Well, let's test whether this is a reasonable price, or not, and ask Ofcom to decide whether it is a reasonable price" - not, "Let's ask Ofcom to impose price regulation on H3G".

MR. SCOTT: So, logically, what you are saying to me is that your clients regarded 16 pence as a reasonable price.

MISS ROSE: No, sir, I am not saying that. No, absolutely not. Sir, it is not an amusing point. It is a significant point.

MR. SCOTT: What you are talking about is the actual world. In the actual world your clients put forward -- I will use 16 pence as a shorthand -- 16 pence as a price. Now, clearly, had your clients, had they given their minds to it, would have regarded it either as a reasonable price in the terms we are talking about, or as an unreasonable price, which they might try out. Now, we know what happened after that. We are coming to that in the later appeals. But, before you get to any behaviour by BT you have got the behaviour by your own clients positing the 16 pence.

MISS ROSE: Yes. I am going to deal in detail with the 16 pence because there are a number of answers to it. The first point is the factual context in which that was done. The factual context was that our immediate competitors had raised their weights already in relation to BT. We were in a situation where the underlying 3G rates being charged by three of our competitors were substantially higher even than 16 pence. That left us in an intolerable situation because ours was the 10.7 pence rate, and we were going to be put in a competitively impossible situation if Ofcom upheld the rates of our competitors. That is the context in which the 16 pence was proposed. I am going to show you documents which show that not only was that factually the position, but that we carefully explained it to Ofcom at the time - that that was the only basis. It was never our position that 16 pence was the right price for MCT. On the contrary, it has always been our position that all these rates are much too high, and that they should be much, much lower. But, we were put in an impossible position competitively by the actions of our competitors. So, that is the factual context.

The second point is that there is a positive finding of fact made by Ofcom in its decision that the actual conduct of the parties in the run-up to this decision cannot be relied on because it was distorted by their knowledge of the underlying market review and the regulatory process. Therefore, that does not get you anywhere, the 16 pence. What you have to look at is Ofcom's decision and the reasons that it gave. You must ask yourselves the question: If the submissions that have been made to you are correct, how can this decision, on the facts that were found in this case, be upheld?

Coming back to my written note, I am at p.2. The fourth key conclusion of Ofcom was that it was only because of Ofcom's construction of the end-to-end obligation that Ofcom rejected the analysis in the Harbord and Binmore papers. That is paras. 5.163 to 166 of the decision which we have looked at before.

I also make the point at para. 3 that Mr. Roth has still declined to elucidate what is meant by 'a price appreciably above the competitive level'.

Now, the argument that Mr. Roth put forward was summarised in a passage that we have quoted from the transcript. He said,

> "If H3G are correct that Ofcom is obliged under Article 5(4) of the Access Directive or Article 20 of the Framework Directive to determine a price whether as regards interconnection with BT and H3G or any other supplier of MCT, a price that is not appreciably above the competitive level so as to preclude the exercise of significant market power by Hutchison, then it falls to be disregarded for the purposes of an

SMP assessment . . . It falls to be disregarded since it is a price that has been determined for the purpose of constraining market power on the party whose putative status as having SMP is being assessed, and therefore you avoid the circularity that was referred to by the tribunal in that Judgment, if that is, as a matter of law, the way that Ofcom should resolve such disputes".

Now, when you look at that submission the error is apparent because what he says is -- the way he mis-postulates our submission is that if H3G are correct that Ofcom is obliged to determine a price not appreciably above the competitive level so as to preclude the exercise of significant market power by Hutchison. But, that is not the reason why, we say, Ofcom is obliged to determine a price that is not appreciably above the competitive level. It is nothing to do with constraining market power on H3G. The reason that we say that in a dispute about the end-to-end obligation Ofcom must not endorse or impose, or determine a price appreciably above the competitive level is because it would be disproportionate to impose that obligation on BT. It has got nothing to do with constraining H3G's SMP - it is about the extent to which BT's bargaining power can proportionately be restrained.

Our submission is, and always has been, that it is unlawful for Ofcom to require BT to buy interconnection at an excessive price.

THE CHAIRMAN: If that was the case that the purpose of setting the price was to constrain BT's bargaining power ----

MISS ROSE: No, madam - not to constrain it, but to limit the constraint.

THE CHAIRMAN: Then it would point to actually setting a minimum price because the concern is that BT, with its countervailing buyer power, will say to a little market participant, like H3G, "Well, all right. But, you can connect to us if you want, but we are not going to pay you more than 1 pence per minute". So, actually, the reasonableness cuts both ways. It is both to stop BT making interconnection subject to too low a price, but also it has the effect of constraining the supplier from exercising its market power in setting too high a price.

MISS ROSE: Madam, respectfully, I disagree with that because the purpose of the end-to-end obligation is to make sure that BT connects with other networks. Recital 6 of the Access Directive is that BT has got all the infrastructure and everybody has got to connect with BT. So, the purpose of that obligation is to make sure that BT connects. It cannot refuse to connect and thereby cause somebody to go out of business. But, when imposing that obligation s.73 applies, and all the normal statutory duties. So, the extent of that obligation on BT to interconnect must be limited by what is proportionate and by what is in the best interests of end-users. So, BT cannot be

forced to interconnect at an unreasonable price. But, it can be forced to interconnect at a reasonable price. So, the end-to-end obligation has nothing to do with constraining H3G's market power. We can see its purpose actually set out in the Commission working document which we looked at on the first day, where the Commission said, "Well, you often have a situation where an incumbent network has a lot of power because they control the infrastructure, and in that situation you can impose an end-to-end connectivity obligation, but that must not be at such a level that it would enable the counterparty to impose [and I stress 'impose'] - H3G to impose, i.e. require BT to accept an excessive price". It is all about what is the proportionate obligation to impose on BT - not what is proportionate price regulation of H3G?

MR. SCOTT: But, when we come to TRD, TRD is free-standing. There does not need to be an E-To-E obligation in the sense of the particular one.

MISS ROSE: Yes.

MR. SCOTT: So, when Ofcom come to dispute resolution they can do that on their own initiative under the common regulatory framework, or, as in this case, there can be a dispute. But, as we have rehearsed, the remedies that Ofcom apply are not simply limited to declarations in relation to the rights and obligations of one party. They can affect and impose requirements on both parties. I think it is the taking of E-To-E, as it were, in isolation from the TRD that I think gets you to where you are at the moment. Leaving on one side the decision - because we are going to have to deal with the TRD as well - and we will no doubt come back to these issues - we are looking at this in the sense of three distinct areas: there is the question of the significant market power of your client and whether that is sufficiently countervailed by BT; there is the understanding of the E-To-E; there is understanding the TRD in its free-standing sense. You would expect, in taking a TRD case before Ofcom, that they had regard to your clients and not simply to BT. It is an **inter partes** dispute. It is not just BT going **ex parte**, seeking a declaration. Is that right?

MISS ROSE: Of course. But, that does not alter my argument, with respect, because for this part of the argument let us accept that it is correct to leave out of account Ofcom's free-standing dispute resolution powers to the extent to which they can be used to constrain our market power. Those must be left out of account. The only way that Ofcom's dispute resolution powers are relevant to the question of BT's countervailing buyer power is that when the parties are negotiating BT and H3G's expectation of the price that BT will have to interconnect at -- the price below which BT cannot bargain

ultimately should be determined by Ofcom. That is the only relevance of dispute resolution. That is why I have submitted that there has been a huge amount of mis-direction in this case. Really, this part of the case is not about free-standing dispute resolution. It is not about the extent to which dispute resolution could be used to constrain our SMP. All of that is irrelevant. The only question is: When BT is negotiating interconnection with us, to what extent does BT think it can refuse a price in safety without Ofcom later saying, 'You have to pay that price'?" That is precisely the finding to which Ofcom addressed itself in its decision in the paragraphs we have just looked at. It is about the negotiating power of the parties and about the effect on BT's countervailing buyer power of the parties' anticipation of how Ofcom would construe the end-to-end obligation and the price that Ofcom would impose on BT - not how dispute resolution would be used to constrain our market power, because we accept for this purpose that that must be left out of account.

MR. SCOTT: Do you then differentiate to any extent BT's expectations at (a) the period up to, I think, 13th September, 2006 when the E-To-E obligation comes out; (b) the period between that date and the statements; and (c) a period looking ahead (because we are going to have to look ahead) beyond the resolution of the TRD appeals in due course?

MISS ROSE: We say that in all those periods the analysis must be undertaken on the basis that the regulator correctly construes the obligation. The regulator, self-evidently, cannot rely on its own misconstruction of the obligation to say, "Oh, well, actually you have no CBP at all, because actually you should have been negotiating on the basis that we would impose any price we like on BT". So, for all those periods, whether it is on the basis that the guide is supplied and if they did not connect at a reasonable price such an obligation would immediately be imposed, or on the basis of the obligation itself, properly construed, we say the expectation remains the same - that when the parties negotiate it is on the basis that BT has to accept a price up to a reasonable level, and above a reasonable level it is not obliged to accept that price or to interconnect. Therefore, above whatever the reasonable level is, the parties are simply negotiating freely because ex hypothesi, there is no SMP regulation and we do not consider dispute resolution. That is the significance of the important point that was conceded by Mr. Roth - which is, the way he put it (and I am going to come to all this in more detail later) - that if Ofcom said that a particular price was reasonable, it is fanciful -- had no commercial reality to suggest that H3G could negotiate a higher price. He accepted that if BT said, "No, I'm not going to accept that price. I will not

interconnect at that price", we would go out of business the next day. Absolutely. Precisely. That is why we do not have SMP - because we are a network with 4 or 5 percent of subscribers. BT does have the power to turn round to us and say, "We are not going to connect with you. The price you are asking is unreasonable". Now, we could say the same to BT if we liked, but they would not go out of business the next day. It might be inconvenient for them. But, when you are looking at the negotiating power of the parties, that is the reason why BT has got CBP above whatever price it has to agree under the end-to-end obligation. It has a powerful position in negotiations because it can threaten to withdraw interconnection.

MR. SCOTT: If we took the view that thee was no realistic way in which BT could threaten that, then logically we would conclude that they had not got sufficient countervailing buyer power.

MISS ROSE: Sir, with respect, that is not a conclusion that would be open to you because there is no evidence before this tribunal to that effect, and what you have is the findings of fact that are made by Ofcom on this issue, which nobody is seeking to challenge or elaborate.

That brings me back to my text. Sir, I have made the point that the submission of Mr. Roth is fallacious because it proceeds on the basis that dispute resolution in this context would be being imposed for the purpose of constraining our SMP whereas in fact it would be being imposed for the purpose of defining the limit of the constraint on BT's CBP.

I then made a point at para. 5 that there is a certain lack of clarity about the way Mr. Roth puts his case. It is not clear whether he is saying that in assessing the countervailing buyer power Ofcom should have disregarded the potential outcome of the resolution of any dispute relating to the end-to-end obligation altogether, because it is said that that would necessarily amount to the regulation of H3G as well as BT, or whether he is saying that the outcome of such a dispute only ought to be disregarded if Ofcom would have resolved the dispute by fixing a price at a strictly cost based level.

At first sight that is a rather dense point. But, the significance is this: that in the defence, and in the skeleton argument, it was never alleged by Ofcom that the outcome of dispute resolution when a dispute was referred under the end-to-end obligation that it should be disregarded **per se**. Such a submission, with respect, is impossible for Ofcom to maintain because it is inconsistent with the decision that Ofcom actually took. What was said in the paragraphs that Mr. Roth himself identified immediately after this quote that I have got here

as supporting his submission (para. 97.3 of the defence and para. 60 of the skeleton) -- What he was saying in those paragraphs is that you should disregard the outcome of dispute resolution if Ofcom were obliged to set a strictly cost based charge because then, in effect, Ofcom would be using dispute resolution to constrain H3G's SMP. I do not ask you to turn the passages up, but I invite you to look at them. You will see that that is the more limited submission that was made. That was not a submission that he pursued. Indeed, madam, as I recall it, you asked him the question, "Does it make any difference whether or not you should take into account dispute resolution? What is the level of the charge that Ofcom would set?" He said, "No, it makes no difference". That, with respect, is inconsistent with Ofcom's own decision, and it is inconsistent with the case that was mounted by Ofcom in its defence and in its skeleton argument.

With respect to Mr. Roth, what he has sought to do is to jump on the BT/T-Mobile bandwagon and to run a much more root and branch case and say "This is all about dispute resolution. Dispute resolution necessarily regulates H3G as well as BT and therefore it must be left out of account", which is essentially the BT/T-Mobile argument.

Ofcom is trying to run that argument too, but it is inconsistent with its own decision.

MR. ROTH: I do not want to take my friend out of her flow, but I would ask you to look at 97.3, it does not say what she has attributed to it.

THE CHAIRMAN: Well we will look at these in due course.

MR. ROTH: Of course, and you have – and I will not repeat it – the way we put our case, and I think you adverted to it earlier.

MISS ROSE: Let us look at para. 97, it is in bundle C2, tab 1 p.35 where we can see the submission that is actually being made at para.97. It said:

> "However, when resolving a dispute concerning MCT, it is not correct that Ofcom's only option would be to impose a price on the MNO concerned based on assessment of the competitive level and thus consideration of cost.

So, madam, you will notice immediately that the submission is not, and is nowhere in this document, while assessing SMP Ofcom should disregard dispute resolution. The submission is that Ofcom is not obliged to set a price that is not appreciably above the competitive level.

We then have a number of arguments advanced in support of that. The first concerns the general statutory duties. It is said: "It would be disproportionate for Ofcom to use the end-to-end Connectivity Obligation as a regulatory device for imposing controls on MNOs."

And you have our submission on that, that that is a misconception, that the end-to-end obligation is not used for that, it is used to fix the limit of the obligation on BT.

Secondly, it is said:

> "97.2 In contrast, if Ofcom were to use, and were entitled to use the end-to-end Connectivity Obligation to impose price control on the MNOs in that manner, Ofcom would be using the *ex post* dispute resolution powers to circumvent the regime of periodic reviews…"

So that is the second argument, that if it were to set a competitive price it would be circumventing the SMP regime. That, madam, we submit, is inconsistent with the Orange preliminary judgment, and also of course inconsistent with H3G (1).

> "97.3 Moreover, if Ofcom were to use its dispute resolution powers on the basis submitted by H3G as the mechanism for precluding SMP on the part of the MNOs, such regulation would then fall to be disregarded for present purposes as regulation of the party being assessed for SMP."

Madam, it is quite clear that that submission is being made only in relation to the use of dispute resolution to set a competitive price.

The same can be seen from para.16 of Ofcom's skeleton argument, on which Mr. Roth also relied (tab 2, bundle A) at p.6, para. 16.

> "If in dispute resolution Ofcom was under a duty to assess whether a proposed price was appreciably above the competitive level and then resolve the dispute by imposing a price at that level so as to constrain the potential market power of the operator supplying the service, dispute resolution would indeed become a backdoor means of price control on H3G and if it had to be operated in that way in effect functioning as a means of regulation of the MNOs, then Ofcom agrees it would fall to be disregarded."

So again, even more clearly and explicitly than in the defence, the submission is if the dispute resolution required Ofcom to set a competitive price that would be regulation of H3G to preclude SMP and would fall to be disregarded. Not a general submission, all potential dispute resolution in relation to the end-to-end obligation should be disregarded per se.

Then at para. 6 of my note is the point that I have already made, that the purpose of this would not be to constrain H3G's market power, but determine the limit of the constraint on BT's market power. This is not just a theoretical point; this is Ofcom's own understanding of the function that it was performing in the disputes referred in this case. Can we look first

of all at a note of a meeting between Ofcom and H3G. It is in vol. F3, p.651. It is headed: "Note of Ofcom Meeting on BT OCCN Dispute." So this is a meeting between H3G and Ofcom to discuss the dispute that had been referred.

THE CHAIRMAN: Where does this point get you though, Miss Rose, because it is clear that BT and T-Mobile have raised the argument or started the bandwagon rolling on to which you complain that Ofcom are jumping, and you are right to say, I think, that Ofcom's arguments on this have developed during the course of the proceedings, as have your own arguments on some other aspects of the case. Are you saying that it is not open to us to determine the point on that basis?

MISS ROSE: Madam, what you are seeking to do here is to determine an appeal against a decision which Ofcom took. Ofcom, in effect, is now mounting a case that its decision was flawed by an error of law.

THE CHAIRMAN: Well that is their alternative argument.

MISS ROSE: Yes, but that is the case I am addressing.

THE CHAIRMAN: Yes.

MISS ROSE: Ofcom is seeking to contend that its decision was flawed by an error of law. But actually no positive case has been put forward by Ofcom or by any of the interveners as to how, on the facts that Ofcom found – not on other facts that they may seek to assert but which are not in evidence before you – this decision could be upheld if it is flawed in law.

THE CHAIRMAN: No, I think they do not assert anything other than the market share.

MISS ROSE: Yes, but we know already that the market share is not adequate, because it is very clear the market share is not in dispute. You asked the question earlier: "Why was this matter remitted to Ofcom for reconsideration. If the question of H3G's SMP could be resolved on the basis that it had 100 per cent market share and there was a complete barrier to entry there would have been no remission. The reason it was remitted was for Ofcom to consider the actual dynamics of the negotiating position between the parties. In doing that we say that Ofcom went badly wrong in the way that it construed the regulatory obligation on BT.

THE CHAIRMAN: Yes.

MISS ROSE: Now, the other parties seek to say Ofcom also went wrong in taking into account, as part of that dynamic the ultimate possibility of dispute resolution. We say they are wrong about that, but if they are right, with respect, the only possible solution is a further remittal, because there are not facts put forward that would indicate that if you leave out of account the possibility of dispute resolution BT would not have countervailing buyer power.

Can I just make the point here about the way that Ofcom actually approached these disputes? It is towards the bottom of the page:

> "Ofcom – BT is arguing that the E2E condition means that there is a level of charge where it becomes unreasonable for it to pay. If Ofcom accepts that it should deal with the dispute under the end to end condition. Ofcom will consider if each of the charges are reasonable on a case by case basis. Ofcom suggested that it would not be appropriate for it to provide guidance on a ceiling for reasonable prices as part of dispute resolution which is something Ofcom believes should be dealt with as part of a market review."

In other words, Ofcom correctly understood that what it was being asked to do was to rule on the question: is this price that H3G are putting forward, or that BT putting forward, reasonable? Do BT have to pay it? That was the question. If we then look at the actual resolution of the dispute, which we saw this morning, that is in bundle B, tab 4, p.74 the same point can be seen. This is BT's resolution of the BT/H3G dispute. As he rightly points out it is headed "Declaration of Rights Obligations" etc. The declaration that is made is that

> "The charges contained in H3G's letter to BT of 22nd November 2006 are reasonable for the purpose of the end-to-end obligation and shall be effective from 1st April until such time as alternative charges are in place."

It is right that the second part of the order goes further than just being a declaration, but it necessarily follows from the declaration because the content of the end-to-end obligation is such that if the price is reasonable BT has to pay it. Therefore, you cannot draw any inference from this that this is any form of regulation on H3G. It was H3G that had put the price forward. BT had said "We will not pay it, we are going to refer it to Ofcom." Ofcom says: "It is reasonable, you must pay it."

Then it was relied upon, the fact that this determination is binding on BT and H3G. Well, with respect that adds nothing because all that that is saying is that it is not open to either party to seek to re-raise the question of whether the 16p charge is reasonable, that has been determined and that is binding on both of you, just as any declaration made by any court is binding on the parties to the proceedings.

We submit that the actual approach that is taken by Ofcom indicates clearly that what they were seeking to do was not to constrain H3G's SMP by any form of price cap, but simply to answer the question whether the price that had been requested for interconnection was reasonable and therefore that BT were bound to pay under the end-to-end obligation.

That brings me to para.7 of my note where we say that even if the position adopted by Ofcom and BT and, of course, T-Mobile in oral submissions were correct, it cannot save Ofcom's decision, and that is a point that I have been developing.

At para.8 we say that even if Ofcom were required to disregard the potential outcome of a dispute under the end-to-end obligation it is nevertheless indisputably the case, and we say the central ratio of the first H3G appeal that Ofcom must take into account when assessing CBP the effect on negotiations between the parties of the end-to-end obligation properly construed. There is no question but that that must be taken into account.

In other words, the parties are to be understood to negotiate on the basis that BT is bound to interconnect but only at a reasonable price and that BT is therefore entitled to refuse an unacceptably high price, and if agreement on a reasonable price cannot be reached to give notice to terminate the contract.

Then here is my point in response to Mr. Scott's point to me. In reality, of course, the parties negotiate on the basis of if they cannot agree, a dispute may be referred to Ofcom to identify what is a reasonable price, and that is precisely the reason why the CAT, in the first H3G appeal, indicated that that had to be taken into account when looking at t heir negotiations. It is part of the commercial reality that affects the way that the parties negotiate.

But for these purposes, in accordance with the position that is now being taken by Ofcom and the interveners we ignore this possibility.

So the central error of law made by Ofcom at para.5.154 is that Ofcom has misconstrued the end-to-end obligations requiring BT to connect at a price appreciably above the competitive level whatever that is. That error taints Ofcom's analysis of the manner in which the party would negotiate MCT, whether or not the possibility of dispute resolution is taken into account. That is the key point, whether or not dispute resolution is taken into account.

Indeed, we say on Mr. Roth's case and BT's and T-Mobile's case, Ofcom has actually compounded this error with a further error of law taking into account the likely outcome of s dispute and the effect of the parties appreciation of this on their negotiating position.

Then at para.13 the point again that I have made with respect, that this Tribunal cannot cure these defects and save the decision because there simply is no evidential basis on which it could be held, disregarding the possibility of dispute resolution that BT in negotiation with H3G over MCT rates, in which both parties correctly understood BT could not be required to interconnect at an excessive price, would lack sufficient CBP to prevent H3G from

charging an excessive price. That question was never addressed by Ofcom, there is no evidence in relation to it before this Tribunal.

On the contrary, and here is the point that H3G would go out of business immediately if BT withdrew connection. Given the size of H3G's market share, the same is not true of BT. So the obvious inference is that if the parties appreciated that the obligation to interconnect did not extend to interconnection at an excessive price they would negotiate within the parameters of a price which is not excessive whether or not a dispute could be referred to Ofcom.

Our next point is to say well, actually they are not right. Our first point is even if they are right we still win; and secondly, we say they are not in fact right. We say that the argument advanced by Ofcom and BT is first of all inconsistent with the first H3G judgment, and secondly, inconsistent with the reasons given by Ofcom for the decisions under appeal; and thirdly, wrong in principle.

We will leave aside for now the abuse of process argument, but we do submit that this argument cannot stand with the first H3G decision properly understood.

If we go to para. 17 ----

THE CHAIRMAN: Well is there anything that you want to draw to our attention in H3G(1) which has not already been discussed by various parties?

MISS ROSE: Madam, I do need to go through it, because a lot of submissions have been made.

THE CHAIRMAN: Well I am just concerned that you are only at para.17 of a lengthy skeleton and we are supposed to be getting on to Dr. Littlechild's evidence this afternoon.

MISS ROSE: Madam, I have a situation where three parties have made extensive submissions.

THE CHAIRMAN: Yes, but you also had a day making your submissions in opening. Is it possible for you to truncate this a little?

MISS ROSE: Madam, I do not want to take the Tribunal's time unnecessarily, but this is really essential to our argument.

The starting point, for the first H3G judgment is para.17. When Ofcom made its first determination in 2004 it did so on the basis that BT was subject to an end-to-end obligation which removed any bargaining power that it might otherwise have had, and this was said to the CAT that Ofcom had no power to determine the price of connection if the parties disagreed about it unless it had first made an SMP submission. Those submissions can be seen at paras 118 and 129.

These were the two areas which the CAT identified at para.118, and which it said were linked. We do not need to go back to the judgment because I have set out the relevant

passages here in my note. The first point is it is not the complete picture to say that BT was under an obligation to supply the connectivity. BT was under such an obligation but not on whatever terms another network operator might propose. A complete description of the obligation involves adding that the terms should be agreed between the parties, or determined by the regulator, and they be fair and reasonable.

So what the CAT is seeking to do is to construe the end-to-end obligation and the possibility that if the parties cannot agree the extent of the end-to-end obligation will be determined by the regulator, is part of the construction of the end-to-end obligation. So this is not about dispute resolution in general, it is about the proper interpretation of the end-to-end obligation. That, of course, is a regulatory obligation imposed by Ofcom on BT, not on H3G. Then:

> "The assessment of CBP is an assessment of how the market actually operates (or is likely to operate) on the true facts, not on artificial "facts" or partial facts. If it is correct to bring the obligation into the equation (and we think it is) it must be viewed realistically and for what it is. Were it the case that the obligation were simply an obligation with no qualifications as to the terms on which interconnection was to be achieved then it would remove BT's bargaining power completely. However, that does not describe it properly. It is an obligation with some room for manoeuvre on negotiation, because the terms are to be reasonable and ultimately any dispute will be settled by someone else (the regulator). It is an obligation in those terms which has to be considered in the context of an assessment of CBP. To look just at the obligation is not to consider the true facts of the case."

We submit that is inconsistent with the position taken by all the parties, because their position necessarily involves not looking at the true scope and meaning of the end-to-end obligation.

Then at para.129:

> "Part of the regulatory picture at this stage of the argument is the fact that under the statute OFCOM has (or appears to have) the power to determine the price of connection if there is a disagreement between the parties about it."

Then looking on in para.129, the CAT records Mr. Roth's submission that Ofcom had no power to resolve a dispute about the price of interconnection in the absence of a finding of SMP, or – and his alternative submission:

> "… in the absence of an SMP designation, OFCOM would have to decide the pricing dispute in favour of H3G, because to do otherwise would be to impose forbidden price control."

And that submission was rejected. We submit really the submissions that are being made now by Ofcom are a modified form of the submission that was rejected in the first H3G appeal, that it said: "Oh well, if Ofcom were to determine a dispute about the end-to-end obligation by saying whether a price was or was not reasonable, and had to be paid, that would be SMP regulation by the back door. As the CAT found in this case that is not so because it is a completely different regime, nothing to do with SMP.

That leads to the conclusion at 132:

> "The possibility of dispute resolution by OFCOM in the future is therefore part of the overall picture which has to be taken into account in assessing whether BT has a real and effective bargaining position …"

And one asks the question: how is it possible for the parties to say that regulation must be left out of account when the CAT says, in terms, it must be taken into account? What is the regulation that they think the CAT were talking about here? We know exactly what the regulation is because all the previous paragraphs I have listed here the CAT specifically identifies as part of the end-to-end obligation, the fact that the parties know that if there is a dispute it can be referred to Ofcom. That is the obligation they are talking about, that is the form of regulation they are talking about, and that they say in terms must be taken into account. It says it has to be taken into account in assessing whether BT has a real and effective bargaining position.

Then we come to para.142. Now, madam, Mr. Turner is the only one of the parties that you have heard who has referred to para.142. BT and Ofcom glossed over 142, and we submit that the reason that they did so is that it is a complete answer to the attempt to mount para.138(2) in defence of their position, because what para.142 shows is that the CAT in this decision were fully aware of what appeared on the face to be a conflict between saying "You do take into account regulation when looking at the extent of the end-to-end obligation and its effect in negotiations, but you do not take into account regulation when you are looking generally at dispute resolution powers and prices that might be imposed on H3G. The CAT was aware of that apparent conflict and it resolved it at para.142.

That is the reason why we say that Mr. Turner was constrained – and he gets full marks for intellectual honesty on this point – to make the submission as his alternative case that the first CAT judgment was wrong, because actually that is the correct analysis. The

submissions that you heard from the other three parties can only be maintained on a basis that is inconsistent with the express ratio of the first H3G judgment.

If we look at para.142:

> "…we have borne in mind the fact that under this head [CBP] regulation is brought into account in determining CBP, whereas regulation of H3G is left out of account in looking at its side of the SMP assessment. There is nothing inconsistent in this approach."

In other words they are specifically reconciling para.132 and para.138.

> "We have identified the illogicality in allowing a presumption of regulation of a putatively regulated body to operate to determine whether SMP exists. That does not apply to a consideration of CBP where one has to consider the question of a counterparty. In assessing the position of that counterparty it would be illogical not to look at the effect of regulation (and no-one suggested we should not), so OFCOM were quite correct in doing so in this case. However, as we have observed, the full factual position in this respect must be looked at – one most look at how far the regulation will actually operate in any deemed negotiations. It is in failing to do so that OFCOM erred in its Decision."

Now, the point we make at para.20 is that you cannot maintain a submission that this is not an essential part of the H3G judgment, because as the last sentence that I have italicised it was precisely Ofcom's failure to take into account how far the regulation will actually operate in deemed negotiations, which was the error which the CAT identified, which was one of the reasons that it referred it back, and that goes back to the question that you asked earlier; "why did they remit this for a rehearing if none of this was relevant?" They remitted it because they specifically were requiring Ofcom to take it into account. Ofcom, to give them their due, loyally followed the approach that the CAT has laid out in this judgment, because Ofcom did precisely that, Ofcom did seek to interpret the end-to-end obligation and precisely and clearly considered the question of the extent to which that obligation would affect negotiations between the parties, including the question of the extent of potential regulation in relation to the end-to-end obligation. All of those matters were carefully considered by Ofcom. The problem was that they misconstrued the end-to-end obligation – not that they misconstrued their dispute resolution powers. They misconstrued the end-to-end obligation, and it was that error which led them erroneously to conclude that if they were resolving a dispute they could lawfully do it at a price above a competitive level, the could not do that.

I have made a submission at para.23 that Ofcom cannot seek to defend the substance of its decision on the basis of reasons that are inconsistent with reasons fundamental to that decision. Now, I know that you are seeking to hurry me, I refer to the *Napp* case, which is in the bundle, it is vol. H3, tab 1. I would invite you to look at these paragraphs in your own time, but the point we make is a simple one. In *Napp* the question was whether the Director could adduce fresh evidence to support a decision that had been taken to bolster the decision. It was held that he could not do that, except in rare circumstances to rebut a case being put by somebody else. What was said was that the Director's decision should not be seen as something that can be elaborated on, embroidered or adapted of will once the matter reaches the Tribunal, and this is the key sentence:

> "It is a final administrative Act with important legal consequences which in principle fixes the Director's position."

In other words, it is simply not open to Ofcom now to argue that they were wrong in taking their own decision. If they think they were wrong they ought to withdraw it and retake it, with respect.

We make the point that this is much more significant than what was being sought to be done in *Napp*, because it is not simply trying to adduce fresh evidence to support reasoning that has already been put forward in a decision, but to run a case that not only was not part of Ofcom's original decision but which is actually inconsistent with the reasoning of Ofcom.

That brings me to the third point, which is that Ofcom's approach is wrong in principle, and here we deal with para.138 of the CAT decision. In fact, we say, there are two points being made at 138. In that paragraph the CAT holds that the possibility of the resolution by Ofcom of a dispute over price under clause 13 of the standard interconnect agreement should not affect conclusions as to H3G's SMP, and the first reason for that is that contractual provisions between H3G and BT go to abuse and not dominance; you cannot contract out of a dominant position.

The second is that the possibility that H3G's ability to price might be regulated by Ofcom following a referral of a dispute under clause 13 is to be disregarded for the same reasons SMP regulation on H3G is to be disregarded.

This raises the question of whether there is an inconsistency between this paragraph and para. 132. We say that any apparent inconsistency is resolved by para.142 – this is para.28 of my text. This is the key point. The point the CAT is making is that when considering H3G's market power the possibility that the price H3G may charge - is permitted to charge – for call termination could be fixed by regulation if not agreed, is to be disregarded. That

is the circular argument. The fact that Ofcom could require H3G to cut its price through regulation, through dispute resolution is to be disregarded. However, when considering BT's countervailing buyer power, the fact that BT is not obliged to connect above a reasonable price and that in the absence of agreement a reasonable price would be fixed by regulation is to be taken into account. This possibility affects BT's bargaining power in negotiations and must be properly evaluated.

That paragraph (para.28) we submit is the proper analysis of para.138, para.132 and para.142 of the first CAT judgment. In short, we say, the possibility of regulation to fix the reasonable price BT is bound to pay must be taken into account, but the possibility of regulation to constrain H3G's ability to charge is not to be taken into account. It is no answer to this point to argue – and this is a key point made against me – that when determining a dispute under the end-to-end regulation Ofcom regulates both BT and H3G. That is the key made against me. That is not an answer.

Even if this were correct it would not affect the CAT's analysis set out above. That regulation would be taken into account when assessing BT's buyer power, but not when assessing H3G's SMP. In other words, you simply say when BT is negotiating, to what extent is it constrained by its appreciation of the price that Ofcom would make it pay. But you do not say to what extent is H3G constrained by its appreciation of the price Ofcom might force it, H3G to charge; that is left out of account.

In any event, we say, it is wrong in principle for Ofcom to say that a dispute referred in relation to the end-to-end obligation regulates both parties, because if BT refers a dispute to Ofcom saying: "H3G is trying to make me pay this price, I think it is unreasonable", then the question that Ofcom is being asked to determine: is this a reasonable price which BT is required to pay. Ofcom is not being asked to determine the price, to determine the question: what is the maximum price that H3G can be allowed to charge? The question is, is this price a reasonable price? It is not regulation of H3G it is the question of the extent to which the regulation of BT under the end-to-end obligation extends.

We say that under s.190 Ofcom has the power to resolve this dispute by declaring the extent of BT's obligations, or by fixing the price.

I am just pausing here because I think what I have put in brackets saying "(the maximum reasonable price) may not be correct. I think the correct position is the one that Ofcom actually adopted, which is to say whether the price that is being sought "is or is not reasonable", not the "maximum reasonable price".

Ofcom is under an obligation to choose the proportionate and least intrusive means of regulation. The question is how would it be proportionate , or even a relevant response to a dispute asking whether this price was reasonable under the end-to-end obligation to resolve it by fixing price control on H3G? It is not the question that is posed.

As I have already made the point, that was recognised by Ofcom as is clear from the meeting note and from its actual resolution of this dispute.

I then give you the transcript reference to the point at which Mr. Roth accepted that if Ofcom were to declare the maximum price BT were obliged to pay this would have the same practical effect as fixing the price, for the simple reason BT would be able to refuse to interconnect at a higher price and H3G would immediately go out of business. What that illustrates is that BT has countervailing buyer power above the level of the reasonable price that it is bound to pay; that is the whole point.

In short, we say (at para.34) that Ofcom's response has wrongly placed the emphasis of the argument on dispute resolution and whether that constrains H3G's SMP. The true issue in this appeal is the proper interpretation of the end-to-end obligation, including the possibility of the resolution of disputes and the effect of the end-to-end obligation on BT's bargaining power when negotiating with H3G.

I do need to turn to the *Reg TP* decision, of which much has been made. This is in H2, tab 13.

MR. SCOTT: Just while we are turning to that, the first case in when your predecessor suggested that BT were under no obligation to engage in end-to-end connectivity, it did cause Ofcom to hasten off, get some legal advice and put in place the obligation of 13th ----

MISS ROSE: I do no think it was the case, sir, because everyone actually accepted that there was an obligation, and problem was Ofcom had second thoughts.

MR. SCOTT: That is right, but implicit in what you are saying is that Ofcom might hasten off and impose the end-to-end obligation on others, and then argue that it should be disregarded. Have I got that right?

MISS ROSE: No, sir. In my submission, imposing end-to-end obligations on different parties is not going to determine the question of SMP in this case, because by definition any end-to-end obligation that is imposed must comply with the Access Directive, and also with s.73 of the 2003 Act. So they are all, we would say, constrained by the same general statutory duties, maximum benefit to end users, including clients and so forth. So all that they would ever do is to set a level at which the parties were bound to connect, but they would never oblige the parties to connect at an anti-competitive price because, in my submission that

would always be contrary to the interests of end users in promoting competition and so on, for the reasons that we have already given.

MR. SCOTT: But if it were a regulatory obligation on your client.

MISS ROSE: That would be disregarded.

MR. SCOTT: That would be disregard.

MISS ROSE: Yes, but that would not affect the analysis. It is hard to see how that would give us SMP.

MR. SCOTT: If it would simply be disregarded we would have then to consider the other factors.

MISS ROSE: So we would be in the same situation that we are in of only looking at the end to an obligation on BT.

MR. SCOTT: No, but there would then be no need for an end-to-end obligation on BT, the obligation would be on the parties other than BT, which would have the same effect in that end-to-end connectivity would rise. The reason it was done on BT was the assumption that you only had to do it on BT because everybody would connect with BT. If *per contra* you applied it to everybody but BT, you get the same effect of interconnection, but you would have a rather different effect.

MISS ROSE: We say you would not because BT would not have to interconnect with anybody so would therefore have extremely strong countervailing buyer power.

MR. SCOTT: No, because anybody could go to dispute resolution.

MISS ROSE: But *ex hypothesi* that is to be disregarded, so in that situation you actually hand dominance to BT.

MR. SCOTT: I see what you are saying, yes.

THE CHAIRMAN: So, *Reg TP*?

MISS ROSE: *Reg TP*, tab 13, starting at para.22. The first point at para.22 is that an analysis of SMP:

> "… requires taking into account the concrete economic circumstances including legislative and administrative acts. In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of an SMP finding on the markets under consideration but that can have an impact on the SMP finding on the markets under consideration."

Madam, we strongly rely on that because we say that that indicates that to leave out of account the regulatory obligation on BT to interconnect on the end-to-end obligation would plainly be inconsistent with para.22.

"From a methodological viewpoint obligations flowing from existing regulation, other than the specific regulation imposed on the basis of SMP status … must be taken into consideration …"

So there is an obligation on Ofcom to consider the end-to-end connectivity obligation properly construed.

Then at para.23 I think it was Mr. Turner who suggested I might be less keen on para. 23; he is quite wrong, I am very keen on para.23.

"The purpose of a Greenfield approach is indeed to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition. In other words, a Greenfield must ensure absence of SMP is only found and regulation only rolled back where the markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place. This implies that regulation which will continue to exist throughout the period of the forward-looking assessment independently of an SMP finding must be taken into account."

So again it supports our primary case. We then come on to the modified Greenfield approach, and madam, I just draw your attention in the conclusions of the Commission. In relation to the strict Greenfield approach at (a) what they say is there is no justification for the considered strict Greenfield approach. In other words, it is an error of law to leave out of account regulation which will exist throughout the period of the control, whether or not there is a finding of SMP, that is an error of law.

What they say in relation to the modified Greenfield approach is no convincing evidence of absence of SMP under the so-called modified Greenfield approach. In other words, the modified Greenfield approach is right in principle, but on the particular facts of this case it had not been established that there was sufficient CBP. In other words, this is a fact sensitive determination of countervailing buyer power.

Then at para.31:

"Reg TP proceeds on the basis of a scenario that there is an obligation to interconnect on DTAG or that such an obligation will be imposed on the basis of DTAG's SMP status."

That again, for Mr. Scott's note, indicates that it does not make any difference whether there is an actual interconnect obligation or simply one would be imposed if they refused to interconnect.

"Reg TP considers that taking the interconnection obligation into account could under such circumstances be circular."

So the argument is that you should not take that obligation into account. The Commission rejects that and it says that the source of ANO's market power is not the regulatory requirement on DTAG, but ANO's 100 per cent market share. Again, this echoes, and here the Commission rebuts the error which has been made repeatedly in submissions by the other parties. It has been said over and over again by the other parties that we are seeking to rely on Ofcom's dispute resolution powers as a constraint on our SMP. Not so. Our SMP does not arise, and is not constrained by the dispute resolution powers. The question is the extent to which BT's countervailing buyer power is constrained by the obligation including the possibility of dispute resolution.

So, the same point is made here - that it is 100 percent market share and control over network from which SMP arises. Whether that market power is constrained to such an extent that the ANO cannot behave independently of its competitors should then be assessed on the basis of the concrete economic circumstances, in particular DTAG's buyer power. This approach does not lead to circularity because ANO's SMP does not result from interconnection obligation, but rather from their 100 percent market shares. Therefore, when assessing DTAG's buyer power, its interconnection obligation must be taken into account. Again, we rely on that.

Paragraph 33 is an important paragraph because here the Commission are incorporating into this decision the reasoning which we have looked at before in the working documents, first of all acknowledging that market definition does not automatically mean every network operator has significant market; it depends on the degree of countervailing buyer power, and other factors. Small networks will normally face greater buyer power than large networks. Just pausing there, it has been said repeatedly against me that the size of H3G is irrelevant to the question of CBP. With great respect, that is inconsistent with the approach taken by the Commission, which recognises that small networks will usually face stronger buyer power. The regulatory requirements at para. 26 above [referring to the end-to-end obligation] will normally redress the imbalance of market power. In other words, without any regulation BT would be dominant over H3G because of its much greater power in the market. That balance is redressed by imposing an end-to-end obligation on BT. However,

this would not endorse any attempt by a small ANO to set excessive termination rates. Again, we say that is completely inconsistent with Ofcom's own interpretation of the extent of the end-to-end obligation in this case. It may still be easier for a larger network than a smaller network to initiate a price rise, but this risk is essentially removed if the large network operator's termination rates are regulated.

Then we come to look at facts. There is the assertion by RegTP that DTAG's buyer power limits the ability of the ANOs to charge. Then they say,

> "RegTP does not, however, present concrete evidence that DTAG has effectively exercised such buyer power. In fact, what appears to have constrained the individual ANO's call termination rates is not the countervailing buyer power of DTAG, but the regulatory regime under which RegTP has introduced de facto ex ante price regulation for ANOs' termination rates".

So, what you see there is a determination on the facts based on the evidence, but in fact on the facts of that case DTAG had not sought to exercise its buyer power. There is no evidence that it had done so. Rather, what had happened was that the regulator had imposed ex ante regulation on the other operators rather than allowing them to negotiate. That is different from the findings of fact that are made in this case, where the findings first of all are relating to the initial negotiations; then the findings relating to BT's price sensitivity, and its willingness to refer disputes to Ofcom; and the finding about the basis on which the parties would negotiate interconnection on their understanding of the end-to-end obligation. So, those are the crucial findings which distinguish our case from the case here.

Before I leave para. 35,

> "The call termination rates of a large proportion of ANOs are constrained by a regulatory ceiling rather than DTAG exercising countervailing buyer power".

That is the form of regulation they are talking about - the price cap. That has nothing to do with the resolution by Ofcom of a dispute referred by BT about the extent to which BT is obliged to purchase interconnection. It is not setting a ceiling on H3G. It is determining whether BT is obliged to purchase at that price.

Going back to my note at para. 36 -- You have this point already about the findings of fact which have been made. I need not repeat it.

I will come to the fact-sensitive assessment. We have just been looking at the reference to the Commission's explanatory memorandum that was in the RegTP decision. It is clear from that paragraph, and from the other references that I have given here, that notwithstanding the fact that every network operator has a 100 percent market share, it does

not follow that they all have SMP. That depends on CBP, which is to be assessed on the facts of the particular case. That is the approach specifically endorsed by the Commission. The fact-sensitive nature of the analysis, we say, appears from the RegTP decision itself, which we have just looked at. There is the point I have already made about the failure to produce concrete evidence about the exercise of buyer power. Ofcom's findings in its MCT statement are different. Ofcom found BT is price-sensitive, and that the parties to commercial negotiations would take place on the basis of their understanding of the scope of the end-to-end obligation. It should be noted, we say, that if BT was not price-sensitive and was not incentivised to refer disputes, then it would not necessarily follow that there will be any countervailing buyer power arising out of the end-to-end obligation, because if BT was not price-sensitive, well-informed, and incentivised to refer disputes, it would be in a position where it would interconnect at any price. So, that is a critical fact-sensitive finding.

We have made the point that the initial negotiations and BT's reference in 2006 are concrete evidence of the exercise of buyer power. That, of course, is subject to the point I make that the actual actions of the parties are to be treated with caution on the facts of this case.

It is said against me "Well, the reasoning in Ofcom's decision applies to all the MNOs", to which the answer, with great respect is, "So what?" That may indicate that Ofcom has not been particularly careful in its reasoning and has not thought enough about the ways to distinguish the parties. But, it is no answer to my case. I do not need to establish, as part of my case, that H3G is a unique operator. All the I need to establish is that on the facts found by Ofcom, there is no SMP in this case. Now, it may be that the other MNOs could have made similar appeals, but they did not. With great respect to Miss McKnight it is not open to the other MNOs, having accepted a finding of SMP and not appealed it, to suggest that this tribunal should make any order that affects the finding of SMP made against them.

In fact, it is clear that there were different considerations that operated in relation to BT's commercial relationship with the other MNOs and its commercial relationship with H3G which, for example, might affect the extent to which BT was willing to refer disputes to Ofcom. May I just briefly refer you to the first Orange judgment at Bundle H2, Tab 21. This is from evidence on behalf of BT in that case. "I should make clear that BT was influenced to take this decision [that was to refer a dispute -- I beg your pardon. Not to refer a dispute, but to accept the higher rates that Orange put forward] by two factors. Firstly, BT was in commercial negotiations with Orange over a completely separate and very substantial project. BT was therefore inclined in all the circumstances not

unnecessarily to 'rock the boat' with Orange. There were also other commercial reasons why BT thought it might, in all the circumstances, be appropriate to accept the rates. However the second major factor was that only Vodafone and Orange had so far sought a price rise. In particular O2 and T-Mobile had not sought to raise their rates. BT therefore felt financially it could accommodate Orange's rate rises ----"

Madam, that is precisely what we mean about a fact-sensitive assessment of CBP. On the particular fact that obtained at that time in July 2006, BT was prepared to accept an excessive rate because of other commercial considerations in its relationship with Orange. Now, there is no finding at all by Ofcom that any such considerations inhibited BT in relation to H3G.

I do not say there are findings on which you could say that H3G is in a different category to the other MNOs. I do not need to. All that I say is that it does not follow from the submissions that I make, that every MNO does not have SMP. That must depend on the assessment of the countervailing buyer power, the dynamic of the negotiations in the particular case.

On the other hand we say at para 41 that it is the position adopted by Ofcom and BT, and T-Mobile which leads inevitably to the result that all network operators -- Indeed, we say any operator terminating calls for a group of subscribers with allocated numbers on the national numbering plan would have SMP from the moment that they entered the market. What they say is that all such operators should have 100 percent market share; that there be an absolute barrier to entry in every case; they would all wish to contract with BT; BT would be subject to the end-to-end obligation; that obligation removes BT's countervailing buyer power firstly because, they say, it would require BT to connect even at a price appreciably above a competitive level. Secondly, they say that the effect of Ofcom's ability to resolve a dispute by determining a lower price would have to be ignored in the assessment of SMP. If they are right, every single operator seeking to terminate calls on its network or for a range of subscribers has SMP. That, we submit, is inconsistent with the Commission's own approach. I have noted here that Mr. Roth has gone so far as to say that it is irrelevant to the finding that H3G is small or a new entrant. Again, you will see that that is inconsistent with the Commission's approach.

Not only is it inconsistent with what the Commission has said, but we say highly undesirable because all new entrants would immediately become subject to SMP regulation with all its associated burdens and likely adverse consequences for investment, innovation, competition and the interests of consumers.

That brings me to excessive pricing where we say that Mr. Roth, with respect, does appear to have misunderstood our argument. Our argument, with respect to Mr. Green, has nothing to do with the points that Mr. Green made on behalf of H3G in the first appeal.

It brings us back to para. 5.154 - the crucial paragraph in the decision. Ofcom concluded that under the end-to-end obligation, a reasonable charge for B to purchase MCT could include a 'charge appreciably above the competitive level'. This finding was fundamental t the finding that BT does not have sufficient buyer power to counteract SMP. But, off has never explained how it defines a charge appreciably above the competitive level; how that price is related to a strictly cost based charge, or how such a charge is properly to be regarded as reasonable. None of those questions has ever been explained by Ofcom.

Mr. Roth made a point about s.88. He said, "Well, I was wrong to refer to s.88 because that goes to price control and not a finding of SMP". He is right, of course, about that. But, he misses the point, with respect. In order to impose a price control Ofcom must conclude that there is a risk that H3G would so fix and maintain its prices at an excessively high level as to have adverse consequences for end-users. It must follow from Ofcom's reasoning at paras. 154 - 161 and the imposition of a price control that Ofcom does consider that the end-to-end obligation on BT obliges BT to purchase connection even at such an excessive price - otherwise there would not be any relevant risk because BT would not be under an obligation to purchase at that price, and, as we have already seen, if BT was not going to purchase at that price, we would have no choice but to agree a lower price or leave the market.

MR. SCOTT: I think that is a slight over-simplification because of the sort of inertia that we saw in the market place up to the point where things stirred in the context of the fresh review. I must be careful what I say at this stage because it is subject to further argument no doubt, but in terms of looking at the factual matrix you cannot automatically assume - and nor has it been automatically assumed - that BT will automatically go in for dispute resolution. In fact, there is ample evidence that it did not for quite some time. So, to hasten by that point too swiftly is to simplify the facts beyond the point at which ----

MISS ROSE: There are two point there. The first is: do you take into account BT's ability to go for dispute resolution? I say you do.

MR. SCOTT: You say you do.

MISS ROSE: If I am right, and I say that you do, then you have the finding made by Ofcom at 161 that the parties would negotiate interconnection on the parameters of what price they thought Ofcom would be likely to judge was reasonable. That therefore brings me squarely

to the question of: What is a reasonable price? Ofcom has made a finding that when the parties negotiate they will do so within the parameters of what is a reasonable price for the end-to-end obligation. Okay? Properly construed. Therefore, in order for there to be a relevant risk that H3G would fix and maintain a price so excessive as to have adverse effects for end users, it has to be Ofcom's case that the end-to-end obligation would oblige BT to connect at that price.

MR. SCOTT: yes.

MISS ROSE: If BT was not obliged to connect at that price, then, on Ofcom's own findings, the parties would not negotiate within those parameters.

MR. SCOTT: But, having regard to the underlying definition of 'significant market power' it is quite possible to conceive of a price which would be regarded as reasonable between the three parties sitting in the front row, but which might not be regarded as demonstrative of independence of customers, competitors, and ultimately consumers by those sitting further back or further outside the room. Do you see what I am saying?

MISS ROSE: Sir, that is precisely the issue that arises when one is looking at the proper construction of the end-to-end obligation because our submission is that the Access Directive and s.73 oblige Ofcom, when they set the end-to-end obligation on BT not to require BT to connect at a price that is not in the best interests of end-users, because they just do not have the power to do that. Ofcom does not have the power to force BT to contract at a price that is going to have an adverse effect on end-users. That is our submission. Also, it does not have the power to force BT to contract at a price that distorts competition in the market. It does not have the power to do those things. It is fundamentally inconsistent with the CRF and with the 2003 Act. So, that brings you squarely to that issue which we are going to be re-visiting. That is why I say that s.88 is relevant here because it has to be Ofcom's case that the end-to-end obligation is to be construed as forcing BT to contract at a s.88-type price, because otherwise Ofcom has no case on price control.

So, we say that it was incumbent on BT first to identify the level of the excessive prices it considered H3G will be able to require BT to pay under the end-to-end obligation, and explain how the imposition of an obligation on BT to pay those prices was compatible with its statutory duties. We say that it has not done either.

Right at the end of his submissions Mr. Roth sought to mount a new factual case. In effect, madam, you asked him whether these were matters that Ofcom had actually taken into account when it took its decision. He said he would take instructions, but he has not come back on that point. The case that he sought to mount was that he sought to rely on the fact

that H3G's initial price for MCT was not reduced, and that in November 2006 H3G sought to increase the price. He said that was a classic demonstration of the exploitation of market power.

We submit that Ofcom is not entitled to mount any argument for SMP based on these facts, which formed no part of its reasoning in the MCT statements. Not only that, it is inconsistent, first of all, with Ofcom's concession that it did not make a finding that H3G had engaged in excessive pricing (para. 100 of Ofcom's defence) and also it was inconsistent with Ofcom's finding in the MCT statement that the behaviour of BT and the MNOs in respect of the recent proposals to increase or decrease MCT charges had been strongly conditioned by the existence or threat of regulation, and did not mirror the behaviour likely to be observed absent regulation or the threat of regulation.

I just want to pick that up. It is at Bundle B, Tab 1, p.85, para. 5.75. You can see the part that I have quoted - the second sentence.

> "Ofcom considers that the behaviour of purchasers and suppliers of MCT, in respect of the recent proposals to increase or decrease MCT charges has been strongly conditioned by the existence or threat of regulation in these markets, and by the expectation that these markets may be subject to further regulation ----"

Then, at the end of the paragraph,

> "As such, Ofcom does not believe that the behaviour of BT or the MNOs mirrors the behaviour likely to be observed absent regulation or the threat of regulation".

In those circumstances I submit it is simply not open to Mr. Roth to make the submission that he did to the tribunal.

But, we go further. We say that in fact these matters, which Ofcom sought to raise, do not support any inference of excessive pricing. First, let us look at the maintenance of the initial charge. H3G's initial charge was set at the level of T-Mobile's 2G termination rate, notwithstanding the fact that at that time H3G's efficiently-incurred costs of termination were higher than T-Mobile's. Indeed, on Ofcom's own efficient charge benchmarks -- Now, as the tribunal know, we do not accept that these benchmarks are correct, but for a moment let us look at Ofcom's own case. On Ofcom's own efficient charge benchmarks there is a wide divergence between H3G's efficiently-incurred costs and those of the 2G MNOs as at that date. Now, I want to show you a Table at Bundle B, p.303.

MR. SCOTT: One has got to be a bit careful here because the initial rates were set at a time when, as I recall, there was no 3G model, and your clients' costs were in, as I recall, some

disarray - in other words, there was an absence of costs information rather than a presence of costs information. So, there was a 2G model, but there was no 3G model.

MISS ROSE: That is right. That was subsequently.

MR. SCOTT: Absolutely.

MISS ROSE: It was subsequently modelled. Let us just have a look at the model that Ofcom has produced in graphic form at p.303. One point that we are going to be returning to in relation to remedies is that the cost benchmarks Ofcom has used are subject to very significant uncertainties, and that as a result Ofcom adopted high, medium, and low assumptions for different parameters including levels of traffic. Also there was the vexed question of the extent to which 3G spectrum costs were to be taken into account. But, if we look at p.303 there is a table prepared by Ofcom - Fig.A13.4 - a comparison of 2G/3G 1800 MHz and 3G only blended efficient charge benchmarks under the medium voice and data traffic scenario. Okay? Now, if you look at that, and look at the 3G-only rate you will see that in the year 2004/5 (which is the first year for which we have it), the efficiently incurred cost benchmark for 3G-only termination is over 10 pence per minute. At the same date the efficiently-incurred costs for 2G are just over 5 pence. So, on that basis H3G's efficiently-incurred costs are about double those of T-Mobile. Now, that also indicates, of course, that the price that was initially agreed by H3G with BT may not even have covered its efficiently-incurred costs. It may actually have been below its efficiently-incurred costs whereas the price that T-Mobile had agreed for 2G termination was very significantly above the efficiently-incurred costs.

As I have said, that is on the basis of the medium voice and traffic data scenarios. If you just go on to p.307 you can see here Table A13.8 - the full range of efficient charge benchmarks in 2010-11. Unfortunately, we do not have a graph showing these for all years, but we have them for the terminal year of this price control. Separately for the 900-1800 MHz operators. The 1800 MHz operators virtually the same. And 3G-only. You can see that for 3G-only the range is wider and that the efficiently incurred costs are potentially much higher. Now, you will also see that the top level, there - this is the upper end of the range of potential efficiently-incurred costs benchmarks for 2011 - is about 7 pence per minute. Okay?

If you go back to p.303 and you follow the graph to 2011-2012, and put 7 pence per minute in there ---- Am I going too fast? If you put a dot in on the graph at 2011-2012 at 7 pence per minute you will see that it is significantly above the medium efficiently-incurred costs benchmarks. If we assume that the curve of the graph is roughly the same, you will see that

H3G's efficiently-incurred costs on that benchmark were significantly above 10 pence per minute until about the year 2006.

That, we submit, may be one of the reasons why Ofcom has studiously avoided, in these case, indicating that there is actually any evidence of excessive charging on the part of H3G.

The final point on this that Mr. Roth sought to rely on was the attempt by H3G to raise its charges in November 2006. This is also a matter that Mr. Scott has taxed me with on a number of occasions. I do need, therefore, to show the tribunal the materials on that. The OCCN by which H3G raised its charges, or sought to raise its charges, significantly in November 2006 was submitted as a direct response by H3G to the very large increases in 3G rates which were being proposed by the other 2G/3G MNOs, and which H3G was obliged to meet in order to compete.

MR. SCOTT: Miss Rose, just to textualise this, so that we understand it, by the time you reach this OCCN you are still only 3G and in round numbers there were probably about 7 million 3G connections of which you had about 3 million in rough terms. So, the reason you are facing this is because the blended rates, given the other people's 3G capacity, are going to impact on it.

MISS ROSE: That is right.

MR. SCOTT: I merely put that in for context.

MISS ROSE: That is right, sir. In effect, three of our competitors are charging underlying 3G rates which are very much greater than our own. We become aware of this point because it becomes evident as the number of their 3G connections increase, and we suddenly realise that we are at a massive competitive disadvantage. You can see the letter which we wrote to Ofcom at p.627 in Bundle F3. I would invite the tribunal to read the whole of this letter, but can I just refer to a couple of paragraphs? You will see the history and contexts are set out broadly in the terms that Mr. Scott has indicated. If we go to p.628,

> "BT issued its OCCN against H3G on 17 August, 2006. In that OCCN, BT has requested the rate provisionally indicated by Ofcom in one of the consultations as being cost reflective to take effect from 1 November, 2006. This request ignored the fact that Ofcom's own provisional proposals for H3G call for a glide path . . . For specific (defensive) reasons, H3G rejected BT's proposal and counter proposed a 3G rate equal to that being paid by BT to Orange.
>
> H3G's counter proposal was based on the following analysis. BT's proposal of a rate contained in an Ofcom consultation document (which was still open) did not seem consistent even with Ofcom's document ... and by definition ignored H3G's

response to that document which in November expressed serious concerns with Ofcom's cost model and other issues. We also considered a counter proposal of H3G's current rate. However, H3G's current rate was imposed on H3G by BT at the point of the interconnect agreement being signed in 2002 and seemed inappropriate as it was, if anything, related to 2G rates from 2002. Accordingly the only rate that could reasonably be suggested pending the outcome of Ofcom's cost model deliberations was the rate that BT was currently paying Orange for 3G call termination.

Further, given that H3G is both a buyer and seller of 3G call termination, H3G would be seriously disadvantaged if the various disputes arising from the negotiations and price change requests outlined above were not resolved consistently and/or at the same time. As there is at least some risk Orange and the other operators will prevail in their 3G rate request. H3G would want to be treated consistently. If not, H3G would find itself as the only 3G operator not receiving a proper rate for 3G call termination while simultaneously having to pay that rate to its competitors. H3G also considers it important to understand the process by which Ofcom will assess the rate BT is currently paying to Orange. Before the situation is resolved, H3G maintains that it should be paid the same as its direct competitors for an equivalent service".

So, that was the reasoning behind the 16 pence. It was a defensive move, prompted by the fact that this was the underlying 3G rate being requested by Orange; that disputes had been referred in relation to that rate, and that if Ofcom were to resolve that dispute in Orange's favour, H3G would be left hopelessly at a competitive disadvantage. Now, I rely on that at this stage to indicate that it was far from being a classic exploitation of market power. Of course, if it was an exploitation of market power, it was remarkably unsuccessful in the sense that BT did not agree to pay the rate, but referred it to Ofcom, which then we say managed to make a mess of the determination. But, what cannot be inferred from this is that H3G has ever considered that 16 pence per minute was the right rate for call termination. On the contrary, there is overwhelming evidence in this case that H3G wants everybody to have much lower rates for call termination. Now, this point is going to be relevant in relation to remedies, because you will have seen that there is dispute between the experts about what is the right price to take when considering the welfare model. But, I flag it up now in this context.

Can I just briefly check my notes to see if I need to make any specific replies to the interveners? I think I may have picked most of the points up as I went, but I just want to check. (After a pause): Madam, just to repeat, I reserve my position on Vodafone's submissions, but otherwise those are H3G's submissions, subject to any questions.

THE CHAIRMAN: Thank you, Miss Rose. That has been very clear and helpful. I think, therefore, we now move on to your opening on the CTM remedy.

(Adjourned for a short time)

MISS ROSE: I shall be making detailed submissions on remedy after we have heard the evidence from the experts. What I propose to do now is simply an outline route map to the way that we put our case, highlighting the issues.

I should make it clear that it is not my intention to call a witness this evening.

THE CHAIRMAN: That is up to the tribunal, I think, Miss Rose, how long we choose to sit, and where we get to.

MISS ROSE: Madam, I appreciate that is right, but I would submit that this is a long day, and that if we are talking about a witness starting to give evidence somewhere close to quarter to five, I think that would, with respect, be inappropriate.

THE CHAIRMAN: Let us see how we get on.

MISS ROSE: The premise for the argument on remedy is that Ofcom were correct in finding that H3G had SMP. So, in other words, we start from the conclusion that Ofcom were right to find that BT's countervailing buyer power was not sufficient to counteract a dominance which H3G enjoyed by virtue of its market share and the barriers to entry. It is important to recognise, we submit, that under both the CRF and the national legislation, it does not inevitably follow from a finding of SMP that an undertaking's prices are to be controlled by the regulator. Price control is a highly intrusive form of regulation which Ofcom is not permitted to adopt unless it has thoroughly investigated and assessed all relevant matters and is in a position to conclude that a price control is a proportionate means of meeting its regulatory aims. That assessment includes demonstrating that the price control in question is reasonably necessary in pursuit of the aims sought to be achieved; that there is no less onerous means of achieving those aims; and that the benefits of imposing a price control on H3G outweigh the detriments of doing so, including, we stress, any detriments on competition and any adverse effect on H3G itself.

We emphasise that the onus is on Ofcom to conduct this investigation and assessment. It is not for H3G to prove in the consultation process that it would be disproportionate to impose a price control upon it. It is for Ofcom to prove the opposite. We say that that follows inevitably for two principal reasons: firstly, because it is the regulator which must justify intrusive regulatory action which controls an undertaking's use of its own property; and, secondly, because Ofcom is in the unique position of being able to require H3G and all the other MNOs to supply information for the purposes of the investigation, including, of course, commercially confidential information. Ofcom is far better placed than H3G, for example, to investigate the particular tariffs operated by operators and what effect they might have on the balance of traffic between operators.

H3G submits that even if Ofcom was correct to conclude that H3G had SMP, it erred in deciding to impose price control on H3G. We put our case in a number of ways, but essentially our submission is that Ofcom has failed to establish that the pre-conditions for the imposition of price control required by ss.47 and 88 of the 2003 Act are satisfied in the case of H3G.

Our first submission is that Ofcom has failed to demonstrate that there is a relevant risk that H3G would so fix and maintain its price at an excessively high level as to have adverse consequences for end users - that is the s.88(3) paragraph that we have looked at on a number of occasions - and that Ofcom has failed to evaluate or quantify any such risk. So, we say that one of the essential pre-conditions for the imposition for a price control under ss.88 has not been fulfilled.

Having failed to identify or evaluate the risk that it was purportedly seeking to address, we submit that it was not possible for Ofcom correctly to assess what was the regulatory action which was proportionate to the elimination of that risk. This error, as the tribunal will now be very aware, flows from the error at para. 5.154, and in particular from Ofcom's failure to identify, or to explain the limits of its interpretation of the end-to-end obligation. In order for a price control to be adopted, it must be Ofcom's case not only that the end-to-end obligation properly construed obliged BT to connect at a price appreciably above the competitive level, but also that it obliged BT to connect at a price so excessive as to have adverse effects on end-users.

Even if we are wrong in that submission, we submit that Ofcom has nevertheless failed to demonstrate that imposing a price control is appropriate and proportionate as a means of promoting efficiency in competition and conferring the greatest possible benefits on end-users. We identify the following points where Ofcom has failed to establish the

proportionality of the imposition of price control: (1) we submit that Ofcom has failed to conduct a proper impact assessment or welfare analysis comparing the costs and benefits of imposing price control on H3G - and I stress H3G, not all five MNOs - with the costs and benefits of maintaining the status quo under which price control only applied to the other four MNOs. First, Ofcom failed to quantify what we say are the very modest benefits of regulating H3G by price control, and, further, failed to compare and balance those modest benefits with the serious adverse consequences of such regulation.

(2) We submit Ofcom proceeded from an assumption that asymmetric regulation was necessarily a detriment to be avoided, and did not appear to have appreciated that there are some circumstances in which asymmetric regulation might be actively beneficial for competition to promote innovation and investment, and ultimately to benefit consumers.

Next, we submit that Ofcom has wrongly proceeded on the basis that H3G's traffic imbalance, which is the reason why the imposition of price control upon it will have such a significant adverse effect on H3G is irrelevant to the question of whether a price control should be imposed. As a result of that erroneous conclusion, Ofcom has failed properly to investigate the causes of H3G's traffic imbalance.

Our submission in this regard is fortified to the extent that this tribunal is satisfied that we are correct in identifying defects in the system for mobile number portability as part of the reason for the traffic imbalance, because if we are right about that, this is a serious defect in the market under the control of Ofcom, but outside the control of H3G, which has prevented and which continues to prevent H3G from competing on an equal footing with the other MNOs. We submit that it is disproportionate for Ofcom to impose an intrusive form of regulation in the form of price control on H3G which has such an adverse impact on H3G because of the traffic imbalance caused by defects in the market which Ofcom has not fixed.

However, even if you are not satisfied that H3G had demonstrated the defects in the MNP system are a significant cause of the traffic imbalance, we submit that Ofcom has still erred in treating the traffic imbalance as irrelevant, and failing properly to investigate and establish its causes. Before it imposed a price control on H3G Ofcom should have established whether the traffic imbalance was the result of a freely chosen commercial strategy pursued by H3G, or whether it was the product of distortions to competition in the market which either directly caused the imbalance or left H3G with no practical alternative than to follow a commercial strategy leading to the imbalance. We say that it was incumbent on Ofcom to conduct this investigation because the combined effect of the traffic imbalance and the price control has such a serious adverse effect on H3G's finances, both in absolute

terms, but also in relation to the other MNOs. Not only does this mean that H3G loses revenue, but H3G is required to transfer revenue directly, in very large sums, to its direct competitors, thereby enhancing their relative ability to compete with H3G.

Now, we submit that before Ofcom took regulatory action that was going to have that effect on H3G it should have made sure that the disadvantage that H3G was going to suffer was not the result of other competitive distortions in the market disadvantaging H3G.

There is, before this tribunal, evidence concerning the relative costs and benefits of regulating H3G differently from the other MNOs. This tribunal will have noted there is disagreement between experts, and also between Ofcom and other European regulators over the question as to whether asymmetric regulation would promote dynamic competition and be beneficial to consumers at least in an initial period after a new entry, or whether it would constitute unjustified entry assistance. There is also considerable disagreement over the causes of H3G's problems in growing market share and its traffic imbalance. We submit that it is not necessary for this tribunal to give definitive answers to these questions.

As the tribunal noted at the outset, this tribunal does not have the full factual picture or the evidence in relation to the questions of the extent to which H3G's problems are the product of its own commercial strategy, and the extent to which the traffic imbalance is caused by MNP or by other factors.

But, we submit that the resolution of these questions, following proper research and analysis, ought to have been the starting point from which Ofcom considered whether to impose a charge control on H3G. We submit that it is clear that Ofcom simply has not done the necessary analysis.

Unlike our position that we adopt in relation to SMP, we do not suggest that the question whether it was proportionate to impose price control on H3G could actually be answered one way or the other by the tribunal in this appeal. We submit this was a question that Ofcom should have addressed squarely; that it failed properly to address; and that the matter therefore does need to be remitted to Ofcom for reconsideration.

Madam, that is the overall scope of the issues on the remedies appeal.

THE CHAIRMAN: Thank you, Miss Rose. That does bring us to the question of whether we should at least get the administrative aspects of swearing in Dr. Littlechild sorted out now so that we can start directly with his evidence tomorrow morning.

MISS ROSE: Madam, you will be aware that if he is sworn in now, he is not able to speak with any member of our legal team. I would submit that the saving of perhaps a minute to be

caused by swearing him in tomorrow morning does not outweigh the difficulties that that will cause.

THE CHAIRMAN: Let me just confer with my colleagues. (After a pause): We will adjourn now, but we will start sitting at ten tomorrow morning, if that is convenient with people so that we catch up a little bit of time.

MR. COOK: Madam, before you rise, timing is obviously a matter that has been on everyone's mind today. It is a matter that is particularly in our minds, for a party which only participates in the TRD appeals. We are very, very concerned now that we are getting to a stage where the TRD appeals are being squeezed to the extent at which it is going to become a problem. We have already gone to the SIA construction issue being moved to the next hearing, replies in writing, I think that is the limit to the extent we can move issues off as stand alone issues. We are now half a day behind where we should be in terms of Ofcom's timetable that was produced this morning, and if we continue through – evening accordance with the timetable Ofcom has given us this morning – we are not going to finish by half a day.

Madam, our suggestion would be at this stage, we consider it absolutely vital that we do get all of the issues that are left to be decided in before the end of this period, and that it is absolutely unacceptable to countenance the idea that the TRD appeals will go part heard to come back for Ofcom or the interveners to give submissions in three or four weeks time. Our submission would be it is now appropriate to agree a timetable which actually has fixed blocks of time for individual people, and that those periods of time should be guillotined, and if you have an hour to talk, you can talk about whatever you fancy within that hour … (laughter) … within reasonable limits obviously, but at the end of it you then have to sit down, and that is something that is realistically, madam, the only way in which we are going to actually finish this hearing.

If we were in front of the ECJ we would have much more narrowly confined periods of time with just those principles in place. It is not unacceptable to give people reasonable periods of time and then say: "That's your lot", and madam we suggest that realistically we have got to the period now where unless that is introduced at this point we are simply not going to finish this within the period available.

THE CHAIRMAN: An alternative would be for us to move to consider the TRD appeals next, and leave remedy over potentially. That does take things rather out of the logical order – insofar as there is a logical order. No, that does not seem to appeal. Well, we hear what you say, Mr. Cook, and to an extent of course it is up to the Tribunal to manage the conduct

of the proceedings, but it is also up to counsel to exercise some self-restraint in not repeating points that they have made already. We do not wish to prolong things by interventions more than is necessary for us to get our thoughts clear on the issues, but we are rather in your hands collectively as to how long this takes. I should say we cannot sit beyond next Tuesday because of the other commitments of the Panel members, but if the parties want to adopt the course that you advocate and can come up with timings, and are content for us to require people to sit down when they have gone through their allotted time, then that would be acceptable to us. Let us leave that with you and we will reassemble tomorrow at 10 o'clock. I am hoping that the cross-examination of the experts will not perhaps take quite as long as was allowed for in the timetable, and we may make up a little time there, given the rather narrow ambit of the points that they make and the extent of agreement between them.

Does anybody else have any submissions they want to make on this topic? Mr. Anderson?

MR. ANDERSON: For BT, and I think speaking collectively for BT, we would very much support the approach suggested by Mr. Cook for the … nets. There is a great danger that without firm guidance from the Tribunal the parties simply will not be in a position to agree to truncate cross-examination or submissions on proportionality. We would, for example, hope very much that it would be possible to cross-examine these expert witnesses within a day and get that done and dusted tomorrow. Whether the parties are actually going to agree that between themselves I very much doubt, and I speak as someone who does not have an expert, and who does not propose to cross-examine any of them. (Laughter) So in that sense perhaps I am in a similar position to Mr. Cook. I know Mr. Reed behind me shares the anxieties that have been expressed about the TRD appeal. If it is possible to do any more by way of guidance we would ask them to do it. If not, no doubt the parties will be left to do what they can. Certainly, on today's showing, having had a timetable this morning, which has already been exceeded by something like 100 per cent, the omens it must be said are not good.

THE CHAIRMAN: Yes, Miss Bacon?

MISS BACON: Madam, I apologise for speaking, I know I have a very cameo role in this. The problem up until now has been that the parties simply cannot agree a timetable – at least most of the parties have been able to agree a timetable but Hutchison has not. I fear that if we go away we are going to end up in further protracted discussions about how to accommodate the remaining submissions within the time we have available. If I could make perhaps an unwelcome suggestion, maybe we should actually use the time now to set a

timetable for the rest of the proceedings so that we can at least all go away and know how to schedule our own personal commitments around the timetable that we have available, rather than coming back tomorrow with a possibility that we still will not have resolved the issue when we stand up tomorrow morning.

THE CHAIRMAN: Yes. Miss Demetriou?

MISS DEMETRIOU: Madam, from a personal point of view I know also that Orange has rather a cameo role in this too, but I am concerned about the timetable, and I endorse what Mr. Cook said. Looking at the timetable as it stands, the opportunity for Orange's intervention is very last thing in the afternoon of Tuesday, 5th, and personally I am in difficulty for the dates, the further three slip over dates that the Tribunal has set. So if it slips over into those dates then I simply will not be here to present Orange's intervention, which would, from Orange's perspective, be unfortunate given that we have sat through this hearing. So I very much endorse Mr. Cook's suggestion in the hope that we can find a way of achieving this timetable in the days that remain.

THE CHAIRMAN: Miss Rose, is there anything you want to say?

MISS ROSE: Madam, I agree that it is a good idea if we can fix a timetable. The reason that we have had difficulty agreeing a timetable so far is that we have not agreed the estimates that other parties have put forward, and in fact we have been shown so far to have been correct in our own assessment of how long it was going to take to put our case. (Laughter) I am in a somewhat different position to those from whom you have heard because our role is not a cameo role in these proceedings, this is our appeal; we have an enormous amount at stake in this case. Everybody else here is here to oppose me – broadly speaking – in different ways and in different combinations, but essentially it is seven or eight against one.

I do not make any complaint about that, we are always happy for a scrap, but I do need time to respond to the points that are made against me. I hope that you do not feel that I have wasted your time, either last week or today. If you do feel that I have been unnecessarily long-winded then of course I will try and limit what I say, but I sincerely believe that the points that I am making are the points that need to be taken by H3G. The same is true in relation to cross-examination, it is not my intention to be verbose, but there are points that I do need to put to the two experts mounted against me. Once again, it is me who will bear the brunt of the cross-examination in this case.

THE CHAIRMAN: Thank you, Miss rose. Looking at Dr. Littlechild, who is it who is going to cross-examine Dr. Littlechild tomorrow?

MR. ROTH: I will, madam, on behalf of Ofcom.

THE CHAIRMAN: Mr. Roth on behalf of Ofcom.

MR. TURNER: I will, Madam.

THE CHAIRMAN: And Mr. Turner on behalf of T-Mobile.

MISS McKNIGHT: We have reserved the right in the timetable to put some additional questions to Dr. Littlechild, but we think it very unlikely that we will need to do that if both Mr. Roth and Mr. Turner go before us, so I think we would not expect to have to, but we have reserved some time to do that.

THE CHAIRMAN: And who is going to cross-examine Mr. Myers? That is Miss Rose?

MR. TURNER: We reserve the right to, but it is very unlikely that we will ask him any questions.

MISS McKNIGHT: And we are in the same position.

THE CHAIRMAN: That is Mr. Turner and Miss McKnight. And Dr. Walker, that is again Miss Rose?

MR. ROTH: Madam, we similarly reserve the right to put some additional questions to Dr. Walker.

PROFESSOR BAIN: We do wonder if it would be possible in cross-examination to focus on the issues that we as a Tribunal will have to decide now and to avoid spending time on issues that have much more to do with the level of asymmetric regulation, rather than the question of whether there should be any, and the question of whether or not Ofcom have in fact demonstrated the case which they are required to make under the Act. Certainly, we had the feeling that if we could avoid any extended discussion about the pros and cons, the difference arguments to do with the level of asymmetric regulation, and a great deal of the report actually has to do with that, then we might be able to save quite a lot of time.

THE CHAIRMAN: I think it is difficult to predict how long the cross-examination of the experts is going to take because of course it depends on what they say, but perhaps after that we will then revisit the question of setting strict time limits for the remaining days which are purely taken up with submissions. Does that satisfy you, Mr. Cook, for the time being?

MR. COOK: Madam, it was only a suggestion anyway, but that certainly satisfies me.

THE CHAIRMAN: I think that tomorrow we will certainly complete the economic evidence and H3G's submissions on remedy, it should be entirely possible to complete that in one day, and if it is possible to have written submissions which speed up the time taken in oral submission that would be helpful, but we cannot constrain the proceedings more than is practicable to enable all the various arguments to be properly aired.

MISS ROSE: Madam, I think it is unlikely that we will be able to get through all the expert evidence and all my submissions tomorrow.

MR. ANDERSON: It probably does not assist in the slightest, madam, but one is conscious that there are now courts where even the cross-examination of experts is time limited. If one takes, for example the Patents' Court where in relation to every witness the standard form, as I understand it, is now to have a number of minutes that will be allocated to examination-in-chief, cross-examination – it may be unpalatable to those of us brought up in the old days when one had all the time one needed to cross-examine uphill and down dale, but in my respectful submission the principle that you suggested of at least getting through the experts tomorrow, even if we cannot get through H3G's submissions as well is a very sound one.

THE CHAIRMAN: Oh, I think we will certainly get through the experts tomorrow. The question is how much of H3G's submissions we can expect to get through, but I think we can do no more at the moment than to register the concerns that have been expressed and say that we share them and ask the parties to limit their cross-examination of the witnesses accordingly. So we will resume tomorrow at 10 o'clock. Thank you.

(Adjourned until 10 am on Wednesday, 30th January 2008)