IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1047/3/3/04

Victoria House
Bloomsbury Place
London WC1A.2EB

24rd May 2005

Before:
THE HON. MR. JUSTICE MANN
(Chairman)

MR. ADAM SCOTT TD
PROFESSOR PAUL STONEMAN

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

BT GROUP PLC

Intervener

Mr. Nicholas Green QC (instructed by Freshfields Bruckhaus Deringer) appeared for the Applicant

Mr. Peter Roth QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Communications) appeared for the Respondent.

Mr. Gerald Barling QC and Miss Sarah Stevens (instructed by BT Legal) appeared for the Intervener.

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HEARING DAY TWO

THE CHAIRMAN: Mr Green, just so you know, we will take a break at some convenient moment between a quarter and half past eleven, so if there comes a convenient moment at that time, and assuming you are still on your feet, then you may choose it.

MR. GREEN: Can I start by dealing with one or two housekeeping matters. First, subscriber numbers, and we have some details available from the public domain about Hutchison's subscriber numbers for various months – if I could hand those up? (Documents handed to the Tribunal) We have prepared a short note extracting the references from the cases on the standard of proof, just stripping them out, so you have them paragraph by paragraph. (Documents handed to the Tribunal)

So far as the technical question which arose yesterday is concerned, we are just finalising the technical matter in relation to that and I will hand that up as an aide memoir when I have the appropriate document.

THE CHAIRMAN: Thank you.

MR. GREEN: What we produced as far as subscriber numbers are two tables, one for Hutchison the other for BT, taken either from our own press releases in the public domain or BT's website, which indicate the growth in our subscriber numbers between August 03 and March 05. The figure for March 04 of 361,000 is the figure given in Mr. Westby's statement, and for the purpose of contrast BT's position from its website figures are given there.

The second document which I have handed up is entitled "Standard of Proof" and it is an extraction of the various references from principally *Tetra Laval* and from other cases cited in *Tetra Laval*. The only additional references that I will take you to at this stage are in para.5, the AG's opinion. You have seen the CFI because it was extracted into the ECJ's Judgment, but the Advocate General's opinion, which I did not show you yesterday is important, because the Advocate General does explicitly address the question of the standard of proof. He analyses the past cases and he gives his interpretation of them, including the CFI Judgment. He was of the view that the standard of proof was not something below 50 per cent. On the contrary, he thought it was substantially above 50 per cent. He said it was not as high as "absolute certainty", that is para.74, but he put it at somewhere below that which he described as "very probably", that is para.76. If you would like to I can take you to those paragraphs in the Judgment now – I think that is probably a useful thing to do. Bundle H2, tab 17, p.411 of the bundle. I think one can take it conveniently from para.73, although if anybody wishes me to read more I will.

"73 It is plain, however, that the Commission's opinion regarding the creation or strengthening of such a dominant position involves more than a mere factual

assessment as to the material existence or otherwise of certain requirements. In addition to that assessment its opinion entails a complex evaluation, based not on the application of precise scientific rules but on criteria and principles which are open to question, such as economic ones. More particularly, the Commission is required to undertake a complex assessment predicting the effects of the concentration on the structure and competitive dynamics of the markets concerned, taking into consideration the many constantly evolving factors which may impinge on the future development of supply and demand on those markets.

74 It therefore cannot be claimed that in order to prohibit a concentration the Commission must establish with absolute certainty that the concentration would lead to the creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it. It seems to me sufficient for that purpose if, on the basis of solid elements gathered in the course of a thorough and painstaking investigation, and having recourse to its technical knowledge, the Commission is persuaded that the notified transaction would very probably lead to the creation or strengthening of such a dominant position. If the Commission is not so convinced, it must on the contrary authorise the merger.

75. Unlike the Commission, I believe that application of such a test is not contrary to the perfectly symmetrical nature of the legal requirements laid down in Article 2(2) and (3) of the Regulations, for a declaration that a concentration is or is not compatible with the common market.

76. As a matter of fact, I consider that the symmetry of those requirements cannot be absolute seeing that there is, between the cases in which the notified transaction would very probably create or strengthen a dominant position within the meaning of Article 2, and the cases in which those transactions very probably would not create or strengthen such a dominant position, a grey area, an area, that is to say, in which cases are to be found where it is especially difficult to foresee the effects of the notified transaction and where it is therefore impossible to arrive at a clear, distinct conviction that the likelihood that the dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or strengthened. The system laid down by Regulation 4064/89 must therefore necessarily provide a yardstick for the solution of those cases which are of doubtful or difficult classification.

77. I believe that in such cases the most correct solution is quite certainly to authorise the notified transaction."

So he says that where there is a grey area you approve it, you could prohibit it if it is clearly, very probably, creates or strengthens the dominant position, but you cannot prohibit until you are clear that very probably it would have an adverse effect.

THE CHAIRMAN: It does not seem to be clearly reflected in the court's opinion, you do not really find anything that strong.

MR. GREEN: You do not find anything that strong, but one must remember this, that he was analysing the CFI's judgment in the previous case law, in particular *Kali & Salz*. If you add it up and look at it in the round they are pretty much saying the same thing. We analysed the individual words yesterday and I will not go back to them, but they endorsed the CFI judgment. What you do have is the Advocate General saying "My analysis of the CFI judgment and other CFI rulings is that it sets out this very high standard of proof. So he is saying this is not just a balance of probabilities, he would put it somewhere higher. He is two steps away from an intervention where there is something less than 50%, where there is a risk. He is categorically going to the prophylactic exercise of discretion, but you do not get anything as explicit in the ECJ judgment.

THE CHAIRMAN: It might be said to be surprising that where you have this explicit material in front of the ECJ they use words like "plausible", rather weaker words.

MR. GREEN: They use the word "plausible" because they did so in the context of approving what the CFI had said, where the CFI used the same word but I think they said "particularly plausible", and when you read what the CFI were saying it is clear that they were imposing a pretty high standard of proof. I am afraid that particular quote is not in the note, but you will remember from yesterday the ECJ cites the CFI. That was just one word and the number of times they use "likely", or "very likely", or "more or less likely" or "the most likely" or "the likelihood" is legion. You have also got to factor into that that the court is required and indeed endorsed the CFI when it talks about a "precise examination" with "solid evidence", "coherent evidence", "convincing evidence"; that is absolutely inconsistent with a notion of precise, coherent, convincing evidence of something which improbably might not occur, which is less than 50%. It just does not make sense to interpret it in that way. Plausible means, certainly as the Advocate General would have it, more than 50% on a balance of probabilities. I think part of the difficulty is that the CFI does not generally think in common law, balance of probability terms but uses different language, because of partly the different legal traditions that many of the judges have. We are trying to put it into a more understandable common law framework,

but we are after all applying the directive and the directive does not use the language of risk, the directive, if you go to the end of our note, paragraph 15, puts it in absolute terms, is there or is there not SMP? That comes out of Article 14(2), it is not might there be or could there be or is there a risk of dominance, the framework directive puts it in absolute terms and absolute terms plainly does not mean an absolute certainty, because life just is not like that and economics is not like that, but it does require, as the court would have it, cogent, coherent evidence based upon painstaking analysis and the likelihood that certain conduct would arise, and not only an ability to engage in that conduct but also an incentive.

MR. SCOTT: Mr. Green, if we turn to the second part of paragraph 73,

> "… the Commission is required to undertake a complex assessment predicting the effects of the concentration on the structure and competitive dynamics of the markets concerned, taking into consideration the many constantly evolving factors which may impinge on the future development of supply and demand on those markets."

So we are dealing with a complex situation, but what that sentence appears to say is that the Commission has got to predict the effects of the concentration. There are two stages in predicting the effects is what you are saying to us. You are saying to us that the Commission has got first to think about the ability and the incentives on the concentrated party, and then the Commission has got to think of the impact of that behaviour on the structure and competitive dynamics of the markets concerned.

MR. GREEN: With a view to dominance being created, stripping out the equation and looking at it sequentially.

MR. SCOTT: Yes.

MR. GREEN: Merger, conduct, creation of dominance, and that is simply because on the facts of this case there was a time gap between the merger and the expected …

MR. SCOTT: But in conceptual terms there is a distinction, therefore, between cause and effect. There is necessarily a distinction between cause and effect, though in fact in most markets there is a certain circularity. So in that one sentence you have quite a complex analysis taking place, even though it is in one sentence, and there is a convolution in that sentence of the different stages.

MR. GREEN: Any assessment of dominance involves the taking into account of more or less complex economic factors and that does not vary between cases so there is nothing peculiar about the analysis referred to in paragraph 73, it is a statement which applies to all dominant cases.

MR. SCOTT: If we then take that on to a case such as the one which we are considering, there is no strange in the structure as we understand it that is possible in the dynamics of the market.

MR. GREEN: With respect, there is. It is very important here to recognise that Ofcom's case is not that the mere existence of a 100% market share because of its narrow product market definition has any immediate impact on the market; Ofcom's case is that there is an ability to set an excessive price and that is the impact on the market.

MR. SCOTT: Or to sustain a price.

MR. GREEN: Yes, to sustain a persistent, excessive price, so the conduct is an integral part of Ofcom's definition of SMP in this case, and that is really quite important. Also, the timeframe in this case, it is Ofcom's case that as of today – and I mean as of the date of the Decision – there was no evidence of excessive price, their case is forward-looking, that at some point in time in the future there may be an excessive price, largely because as they put it the effect of BT as a countervailing buyer power will evaporate. So they have a forward-looking analysis, they say the prices will become excessive in the future but conduct is absolutely integral to their definition of SMP, and that was one of the reasons why I took you at considerable length yesterday through the fact that they identified profit and profitability as a key criteria, that they examined it at great length in relation to the four MNOs, they examined it in relation to existing regulatory constraints, they did not examine it in relation to us but they still maintain it because of their analysis of ability. So there is really quite a strong analogy with the facts of *Tetra Laval*, obviously given the plain differences that there was a merger.

MR. SCOTT: But if Ofcom believed that there could come a situation at either a plausible or a higher than plausible level between the date upon which they made their decision and the date on which they made the next decision, that prices would be out of line with costs which by then they had modelled, or upon which by then they had modelled, or on which by then they had received evidence. Then they would, it seems to me, have to make a decision of SMP because they could envisage in that period a situation arising in which regulatory intervention would be appropriate.

MR. GREEN: If that were Ofcom's finding in however long it takes that Hutchison's costs were very substantially below its prices and the margin was excessive, then as with the other MNOs they would no doubt take that into account, but that ----

MR. SCOTT: But they did not do that.

MR. GREEN: They did not do that, no, indeed they accept explicitly that it is no part of their case in relation to this decision that the prices were excessive. It is not just that they did not do the exercise but they accept it is not part of the case. In other words, the decision has to be

analysed, *ex hypothesi* on the basis that they are not saying that the prices are now excessive or will become so during the course of the Decision. That is why we have relied so heavily upon these submissions. That is why you are not going to hear evidence about costs. You are quite right in two or three years' time if the market changed, costs changed and Ofcom came to a different conclusion we would be in an entirely different factual situation with a different Decision to challenge or not challenge.

For your note the reference to "particularly plausible" in *Tetra* is para.162, and it is tab 13 of H2 at para.162, p.197 and 198 of the bundle. It is probably worth just reading that to you, p.196 of bundle H2. Perhaps I could just ask you to read from 160 to the end of 162.

THE CHAIRMAN: (After a pause) Yes.

MR. GREEN: That is where the "particularly plausible" comes from.

THE CHAIRMAN: And what impact do we give to the words "whilst allowing for a certain margin of discretion"?

MR. GREEN: That is hallowed phrase which is relevant in Judicial Reviews in which the fact that the Commission has a margin of discretion means, at least in the eyes of the Commission, that the CFI should keep its grubby paws off its decisions. The CFI profoundly resented that suggestion and in para.39 of the ECJ's Judgment the court limited the scope of the words "margin of discretion" and it identified the ways in which the court would review the Commission's decision and by parity of reasoning it set out an indication of the sort of things the Commission would have to ensure that it had got right. The margin of discretion is a limitation coming from the EC Treaty in the context of judicial review; it does not apply on the merits.

THE CHAIRMAN: But the use of those words in that context weakens does it not, rather than strengthens what might be read into the words "particularly plausible" if you are trying to us that as a synonym for whatever the Advocate General said?

MR. GREEN: No, it was quite different. "Margin of discretion" is a well known concept which is simply an allocation of functions between the decision maker – the Commission – and the supervising court, the CFI.

THE CHAIRMAN: I understand that but actually in this context, and for the purpose you are taking us to the words "particularly plausible", which you are trying to suggest is some sort of synonym for "highly probable", or "very probably", or something like that, it may be slightly misplaced but it weakens the effect of your submission, does it not?

MR. GREEN: For example, look at para.39, with respect I do not see how it can do. In para.39 the court says:

"Whilst the court recognises the Commission has a margin of discretion with regard to economic matters that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community court inter alia establish whether the evidence relied upon is factually accurate, reliable and consistent, but also whether the evidence contains all the information which must be taken into account in order to assess a complex situation, and whether it is capable of substantiating the conclusions drawn from it. Such review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect."

Now if you apply a balance of probabilities to that one simply says the CFI would overturn a Commission decision if, on a balance of probabilities, it concluded that the evidence relied upon by the Commission in the decision was not factually accurate. Or on a balance of probabilities it concluded it was not reliable. The word "margin of discretion" does not tell you anything about the standard of proof, because you simply take the fact that there is a margin of discretion, you work out what the test for a judicial review is and you apply the appropriate standard of proof. The court is going to require of the Commission that at the very least establishes the facts and the inferences that it draws on the balance of probabilities, and there is a difference even within para.39 of the sort of exercise the court will engage in. "Balance of probabilities" becomes less relevant if the court identifies an omission. So, for example, if the CFI finds that the Commission has not addressed its mind to what the CFI believes is a relevant factual inquiry, balance of probabilities does not figure as part of that assessment. You say "misaddressed itself as a question of law because it failed to address itself to relevant facts. These were relevant and material, ergo we set the Decision aside." If the question is did a particular expert's report establish dominance, then there is an issue of fact for the court to review and it does so on a balance of probabilities or the Advocate General would have it, "higher standard".

PROFESSOR STONEMAN: Mr. Green, while we have interrupted you, could I go back to para.l7 of the standard of proof document? Your conclusion as to what Ofcom should have done if they had followed the framework Directive and EC merger jurisprudence. What you say is what they should have done is to address in the absence of ex ante regulation.. the undertaking concerned raise prices to supra competitive levels or fail to reduce prices in line with costs", that is what you say, and that is the underlined section. First of all, in the absence of ex ante regulation can I take it what you mean here is in the absence of ex ante regulation of the undertaking being considered, but in the presence of all other regulation?

MR. GREEN: Yes.

PROFESSOR STONEMAN: So in the absence of regulation of H3G, but in the presence of regulation of Vodafone, Orange, BT and the whole regulatory environment.

MR. GREEN: Regulatory framework imposed on H3G and other MNOs.

PROFESSOR STONEMAN: All right, fine, I just want to make clear what it is ----

MR. GREEN: You were right, it is a little bit ----

PROFESSOR STONEMAN: And then you say "will the undertaking concerned raise prices?" I think the phrase should be "set prices", should it not? "Will the undertaking concerned set prices?"

MR. GREEN: Again, I think that is probably a little more accurate.

PROFESSOR STONEMAN: Then with your argument "Will the undertaking concerned …" and you are saying here it means "very probably". I am quite incapable of interpreting what you are telling us. Is it saying is it more likely that the undertaking will set prices at a supra competitive level than at a non-supra competitive level? What is the more likely, the higher prices or the lower prices? Now, that is not the same as "very probably" or "in all likelihood". It is saying "On the balance of probabilities the price is going to become supra-competitive or not supra-competitive?" I think it is rather different from "on the balance of probabilities" that we had earlier." "More likely" means more likely of a list of outcomes. You could have just two outcomes, supra-competitive prices and non-supra-competitive prices and you could say which is more likely, or you could have 27 different outcomes and you could say which is more likely. If it is 27 different outcomes and which is more like, the probability of the one that you choose could be 5%, it is still the most likely. I am rather worried here that what you are trying to do is to take something that was more likely of two possible outcomes and turn it into in all likelihood, which is not the same.

MR. GREEN: Let us test your hypothesis. If the position was that there was a 5% chance of H3G setting prices at a supra-competitive level because that was one of 20 less than equally probable circumstances, if Ofcom set an SMP designation and obligations on that basis, that it was slightly more likely, albeit 5%, that they would set an excessive level – it is inconceivable that Ofcom would do that.

PROFESSOR STONEMAN: That is the criteria you are trying to give us as more likely or most likely.

MR. GREEN: We are simply saying that the facts which go to the establishment of SMP, each and every one of them has to be established on a balance of probabilities.

PROFESSOR STONEMAN: Between two outcomes.

MR. GREEN: There are only really two outcomes in this case, there was either setting a persistently excessive price or not.

PROFESSOR STONEMAN: Alright, fine. The first stage anyway is set prices not raise prices, although it is reduce prices once they have been set.

MR. GREEN: We are looking at an excessive price, which can be a price either derived because we raised them or we failed to lower them, so your rolling up of that into set prices is probably accurate.

PROFESSOR STONEMAN: Thank you.

MR. SCOTT: Can we just stay with your paragraph 16 here. We are, as you pointed out yesterday, dealing with one instance of something over 400 decisions across the European Union where, in accordance with the recommendations, NRAs are going through the three-stage process in relation to a variety of markets, defined either in the terms of the recommendations or those adjusted for national circumstances. I suppose the question that is in my mind is whether, in the European regulatory framework for electronic communications, it is proportional to imagine the 25 member states NRAs engaging in the depth of analysis you are suggesting is appropriate in a conglomerate merger in relation to each of those markets and each of the parties who may or may not have SMP in those markets. I suppose the reason for asking this is that there seems to me a possible distinction between *Tetra Laval* in which you are considering prohibiting a conglomerate merger, and the possibility of precautionary regulation. I am not trying to be prejudicial about this, I am merely trying to think in realistic terms about how one should interpret the European framework in a purposive way, because although I entirely accept that it has been designed to reduce the amount of regulation over a period of time as markets become effectively competitive, it is also designed to retain regulation in markets that are not effectively competitive. So each NRA is faced with a real question of how they deploy their limited resources in relation to making what is necessarily a large number of decisions, and remaking those decisions as time goes by. It would be inappropriate, it seems, for us to end up making a decision which suggested an impossible amount of effort for the 25 NRAs and indeed the Commission.

MR. GREEN: There is an enormous assumption inherent in the question. Let us take it in stages. First of all, in the present case, Ofcom did not do a single shred of a cost base analysis for Hutchison, but it did for the other four MNOs, and it is not as if it cannot do it. Secondly, in a dispute resolution exercise it must undertake some price analysis and it must do so within four months – price analysis is the name of the game and the only problem in this case is that it has not yet developed its 3G model. Once it has done that it is a relatively easy exercise to keep it

updated and the Regulator does that on a fairly steady basis, but that then gives it the benchmark against which, very easily, to assess future disputes. So we are in this hiatus where we are moving from 2G to 3G and during this gap there is not a cost bank, if you like, which normally exists and which has existed for some time for 2G. So we are in a peculiar situation, but the purpose behind the regulation is to minimise intervention and you have seen from a number of recitals that it is not dirigiste and it is not precautionary in any sense of the word – on the contrary, the access directive cautions against a precautionary approach. For example, in interconnection if you take short term measures it can cause long term distortions, so we would challenge head-on the notion that it is a precautionary basis and we would challenge head-on the notion that it is disproportionate that a regulator, whose job par excellence is to engage in price regulation, should be able to throw its hands up and say it is all too difficult and it is disproportionate for us to have to carry out the exercise. Within two or three years, possibly a shorter timeframe, it will have the databank that it needs for 3G and life will become simpler, everybody will know what the parameters are. Dispute resolution is an illustration of why the regulator must, across Europe, either engage in some form of price review or mini price review to set a price, if that is inherent in the structure of the legislation.

MR. SCOTT: It seems that from the decision taken to veto Reg TP's decision in relation to fixed alternative network operators, the Commission certainly is concerned that ad hoc dispute resolution is not necessarily a proper replacement for ex ante regulation.

MR. GREEN: With the greatest respect to the Commission, if the law says that it has to be done then it has to be done and that was very much the Commission's problem with merger analysis, it did not believe it had to do the level of analysis which the court has set forth. That is why you must very clearly distinguish between what the Commission thinks is the proper framework for regulation and what the law says, and with respect you are a court of law.

MR. SCOTT: We appreciate that.

MR. GREEN: I hope that is not a contentious proposition.

MR. SCOTT: I think we do have regard to what you said yesterday about the hierarchy in Europe, I was merely exploring the purposive interpretation of the European framework.

MR. GREEN: I understand that, it is a perfectly proper exercise for a court to engage in. What I would like to do now us just draw some of the threads together in relation to prices and then move on to the other two factual issues which directly concern the ability to set excessive prices, which is dispute resolution and countervailing buyer power.

This appeal, as you know, is a challenge to a narrowly based decision and the jurisdiction of the Tribunal is limited to the issues in the Notice of Appeal, it is not the

jurisdiction at large, the conclusion is not affected by the fact that this is a merits appeal and not a judicial review. In our Notice of Appeal we focused upon failures of Ofcom to conduct an analysis of matters which we say are relevant and material and which they were required to investigate, and we have focused upon what we submit are errors of law for illogicalities or inconsistencies. These are the matters set out in the Notice of Appeal which are for the Tribunal to rule on; this is not an appeal where there are factual conclusions arrived at by Ofcom which we are challenging. For example, Ofcom has not found – if I can take Professor Stoneman's example from yesterday – that a competitive price is one which relates to 2G costs and that a competitive price should be determined by reference to 2G costs even for a 3G operator. That is a valid question and it is one which will be debated between the parties and Ofcom in the ensuing months, but Ofcom has not stated in its Decision that the costs are the same as 3G costs or that the framework is the same, even in relation to the narrow product market that we concerned with here, wholesale voice call termination. Indeed, Ofcom accepts in its decision that there are these material differences, so whatever the right answer to the question, that is going to be for a future day.

As we know, and it is common ground, Ofcom has not examined 3G costs at all, that is the exercise it is now embarking upon, it has not concluded that the embed price in the BT Agreement is excessive and it has not found that the costs for 3G will fall, during the course of this Decision, to a level which will render the embedded price an excessive one, nor has it found that Hutchison has an incentive to set excessive prices. It examined that issue and found no evidence of it. We rely upon those findings as admissions, and it is not within, with the greatest of respect, the jurisdiction of the Tribunal to arrive at its own findings on these matters. It is for that reason that there is no evidence before the Tribunal on the matters, and indeed, it is for that reason that the parties are agreed that a number of factual matters, for example, the exchange between Mr. Mickel and Mr. Myers, and the evidence as to cost and price are not for determination.

In so far as Ofcom considers these matters it will address them shortly. There might or might not be a dispute as to these matters, and I think it is fair to say there might or might not be an Appeal on these matters. At this juncture you might, if you are unlucky enough to sit on this case in a few years' time have the pleasure of, for example, analysing such issues as what is the correct beta to be used in assessing risk for the purpose of weighted average cost of capital to be included in the LRIC model. Those pleasures are not for today they are for a future Appeal. The point I wish to make is that the present Appeal focuses on narrow grounds. If H3G is correct, then the logical conclusion is that there is remission with appropriate

directions for Ofcom to comply with. The factual issue I have dealt with, and perhaps I could just say this at this point, if you were with us on that hypothesis I think we would be inviting the Tribunal to simply render its Judgment, and my learned friends may have views on this in due course, and for the parties to consider what, if any, directions should be made to Ofcom in the light of the Judgment, and we would invite the Tribunal to look at this in two stages – Judgment first and then consider appropriate directions which may follow.

Putting this in the context of prices, there are a limited number of points to be made. The first point is this, Ofcom' S test for dominance incorporates conduct, and this is an important point. This is not a case such as the *Gencor* case before the CFI and Mergers, which is referred to in the ECJ in *Tetra Laval* where the finding of dominance on the part of the Commission turned upon the immediate impact of the merger on the structure of the market without that effect being linked to any conduct. This is a particular type of dominance case where the dominance is contingent upon market share and conduct, and I think it is worth looking – just so you have the distinction squarely in mind, at what the Court of Justice said in *Tetra Laval* about *Gencor* because it is a different type of case and I want you to be clear in your own minds that it is different. If you go back to *Tetra Laval* paras.80 to 84, bundle H2, p.389, where the court refers to the *Gencor* case which was a case where there was no conduct alleged as being an integral part of dominance, but was simply this giant squatting toad on the market place which, in its own right, immediately would impact on the market to create and strengthen dominance. The court distinguishes that situation, the situation in *Gencor* from the present one. In 80 the court thus says:

> "The situation in the *Gencor* case was entirely different from that addressed in the contested decision. As is clear from paragraph 91 of the judgment in that case, the concentration would have led to the creation of a dominant duopoly in the platinum and rhodium markets, as a result of which effective competition would have been significantly impeded in the common market.
>
> 81 It was therefore the concentration which would have given rise to a lasting alteration of the structure of the relevant markets in that case and thus would have made abuses possible and economically rational."

The objection was not a conduct based objection, it was the very fact of the merger sitting there in its own right, *per se* creating this impediment to competition and creating or strengthening dominance. That case is to be distinguished from one in which an element of conduct is wrapped up into dominance, which is the present case and the *Tetra Laval* case. Coming back to the drawing of the threads together ----

THE CHAIRMAN: Sorry, Mr. Green, just before you move off that, there is an element of conduct or anticipated future conduct built in to what is said in para.81, is there not, when it talks about the structure of the market would make abuses possible and economically rational.

MR. GREEN: Yes, the abuse that is referred to there is what is sometimes described as a "structural abuse". There are some mergers which are deemed to be abusive simply because their very existence alters the structure of the market. It is not something where the alteration on the structure of the market flows from conduct, it is the very being of the merger, impacts immediately without more, on the structure, and that is capable – according to a long line of consistent case law – of falling within the definition of abuse. You have the cases which are broadly described as "conduct based", and you have cases which are broadly described as "existence" or "structural" abuses. *Gencor* was a structural abuse. All the court is saying here is that in *Tetra Laval* the objection was the leveraging which then gave rise to the dominance, and that was an integral part of the dominance, it was that which had to be proven. Test the proposition this way: Does Ofcom in the present case say that there would be SMP if it had not found an ability to set a persistently excessive price? Answer: No. If you simply strip out the conduct element, would they have found SMP? No, not on the basis of their decision. So the conduct is integral to the decision and the SMP found by Ofcom in this case. They have lowered the hurdle for the conduct down to ability, but it is there. That is the crucial difference.

PROFESSOR STONEMAN: Mr. Green, I think we are going around in circles as to where we were yesterday afternoon. I think it is a nice distinction between "structure" and "conduct". Basically the paragraphs which follow in this page say as you have just explained, there are certain cases where structure is important. In the *Gencor* case it was saying that it was going towards a duopoly and it was perfectly rational that that duopoly would then exploit the market and therefore it was not desirable. But then it goes on, in this case it is saying that it is looking at a third market, or another market, where there was not going to be a significant change in structure – just reading through here. Therefore, you could not rely upon the structural argument; you had to rely upon the conduct argument. So it said in certain cases conduct is sufficient. It is basically here saying if there is a duopoly then it is economically rational to exploit that duopoly position.

If we go back to the H3G case we could say 100 per cent. of the market, it is perfectly rational to exploit a monopoly position. You do not then have to prove execution.

MR. GREEN: They do say that but that is not what *Gencor* was about.

PROFESSOR STONEMAN: I am just reading paragraph ----

MR. GREEN: No, but that is why one has to understand that ----

PROFESSOR STONEMAN: I am reading para.81 and interpreting it into the H3G situation.

MR. GREEN: Yes, but that is what I have just explained. You have to ask yourself whether, on the facts of a particular dominance case, conduct is viewed as an integral part of the dominance as it is in the present case. If it is not, and it does not necessarily have to be in all cases.

PROFESSOR STONEMAN: By "present" you mean this case we are in today?

MR. GREEN: Yes.

PROFESSOR STONEMAN: So why do you see that conduct is part of the dominance?

MR. GREEN: Because Ofcom's case is not that if they had not found the ability to set an excessive price there would be dominance. If you strip that element out of the decision they would not have found SNP.

THE CHAIRMAN: I got lost in your double negative, I am afraid, Mr. Green.

PROFESSOR STONEMAN: Do have I, yes.

MR. GREEN: Ask yourself this, on the decision we have in front of us, and Ofcom's reasoning, is the existing of an ability to set a consistently excessive price an ingredient of the facts they have set out to prove for dominance? The answer is plainly "yes". They set it out at the beginning of their Decision, the factors which they say are relevant to SMP – one of them is profit, and profitability. They then analyse it for the four MNOs in detail. They do not analyse it for us but they still rely upon it because they say we have the ability to engage in excessive pricing. If they did not conclude that we had the ability to engage in excessive pricing they would not have found SMP. Conduct is absolutely integral to the findings of SMP against all five of the MNOs in issue here, 2G and 3G.

PROFESSOR STONEMAN: What conduct?

MR. GREEN: The ability to set, or the setting of an excessive price on a persistent basis. That is conduct, we are setting the price which, on this definition, is an abusive price.

MR. ROTH: I do not know if this will help, but given what has been attributed to Ofcom, that if I may respectfully say so what Professor Stoneman said in his question in a sentence encapsulates Ofcom's case, and I shall be developing that in due course.

MR. GREEN: Well that is Ofcom's reformulated case.

MR. ROTH: No, it is in the Decision but I shall deal with that in due course.

PROFESSOR STONEMAN: I am not trying to put your case for you (Laughter) I am trying to understand, but it does seem as if we have gone in circles. I thought "conduct" meant "putting into effect", and I though "ability" means "having the ability to put into effect".

MR. GREEN: That is what Ofcom says. Obviously we will come around to whether we have the actual ability later, but Ofcom's case is the mere theoretical ability which they deduce from 100 per cent. market share is enough.

MR. SCOTT: Mr. Green, that seems to me to be a structural point that is being made. There is a structure in this market, and the existence of a dominant player in a market can be structural point and here we have a market which is structured in a particular way. I was actually about to reach for my copy of the Decision because I am conscious at the moment you are engaging in polemic about the Decision without actually examining the Decision and I was wondering whether I would want to be taken to that – Mr. Roth will no doubt do that in due course. But what you are saying is that they did not rely upon the argument of a rebuttable presumption from the 100 per cent. market share, and absolute barriers to entry, they went beyond that in their other two arms of their four armed approach.

MR. GREEN: Yes, para.3.2 of the Decision.

MR. SCOTT: Yes.

MR. GREEN: Ofcom set itself the task of proving SMP not just by market share and entry barriers, but also by reference to the countervailing buyer power and profits and profitability. Those are two parts of the four pillars of the Decision. If they had not concluded there was an ability to set an excessive price, that is conduct in exactly the same way that leveraging is conduct, which is just another aspect of pricing conduct, price wars, predatory pricing, excessive pricing, it is just conduct within the meaning of *Tetra Laval*. That is an integral part of the task Ofcom set itself. They cannot escape from that. This is not a structural decision *per se*. This is not a structural decision. It is structural plus conduct and it is not open to Ofcom to try and re-write its decision now by pretending it is purely structural. It is not. If we want we can go to the Decision, you remember it para.3.2

MR. SCOTT: Yes, absolutely.

MR. GREEN: And countervailing buyer power is, if you like, structural and conduct based. It is whether the conduct of BT as a buyer can negate the seller's market power. But this is not, and I emphasise a structure based decision.

MR. SCOTT: But if we then go to the task that the Tribunal has to undertake, you very properly directed us to the g rounds of appeal and it may be that the grounds of your appeal have shifted a bit since the initial pleadin.gs, but we can leave that on one side for the moment. The legislation requires us to decide the appeal on the merits and by reference to the grounds of appeal, and then we have to include a decision as to what, if any, is the appropriate action for the decision maker to take, and you have addressed us on the subject of a two-stage process

there. It is 469 in the legislation, section 195. One of the questions, therefore, that may arise for us is whether there is before us sufficient evidence to take us to the stage of presumption, and then whether there is sufficient evidence before us to take us to the stage of rebuttal. You may think, the way the appeal has progressed, that we simply will not have evidence on which to deal with that and that the proper course is remission, but it does seem to me that our task goes a little beyond what I understood to be the narrower suggestion that you were making. Let me say it again: you said we had to address ourselves to the grounds of the appeal.

MR. GREEN: Yes.

MR. SCOTT: We do have a task in relation to the merits and we do face a problem that we are not going to have the level of evidence that you suggest is necessary in order to address the merits. Is that correct?

MR. GREEN: You have to analyse the merits of the grounds, that is what you are about to do under the Act, you assess this appeal by reference to our grounds and you do so on the merits. Our grounds – we amended them to bring them up to date so I hope they are still up to date and I do not think we resile from any part of them – are primarily focused upon what we say are errors of law – failure to examine or an error of law then resulting in a failure to examine a material issue, and although it is a merits appeal the grounds are more structured as judicial review type grounds, simply because we do not have the evidence in front of us and it is not part of the appeal. If we have the evidence in front of us we may then be asking you to draw different assessments about the underlying facts, so it is a particular and rather peculiar type of appeal. In that sense it is somehow inappropriate – we spent a great deal of time talking about the standard of proof and the burden of proof, but when you are looking at an appeal based on a judicial review type challenge, they have made an error of law, they have failed to address their mind to a particular issue, those issues become less significant and it really becomes a question do you accept as a court that they failed to address a relevant issue? If so, you may just simply stop there and remit it without getting any further into the grounds. You may remember that Mr. Fowler some months ago, when we were setting a date for the hearing, asked for a quick hearing on the basis he thought it was a quick, judicial review type appeal, and I think everybody essentially agreed. That is why there is a danger in getting sucked into the facts of this case.

What we are essentially saying to you and what I really want to do now is to explain in challenge terms what we say about prices. There are really only three or four points that it boils down to and they are essential, so perhaps I could do that now. The first point that we make is the distinction between ability and an incentive. You know that in the case of the four

2G MNOs Ofcom found both ability and incentive, and it says so in terms in its Decision. In *Tetra Laval* the Court of Justice confirmed the CFI to the effect that when dominance turns in part on conduct it is not enough to establish pure ability – see, for example, the ECJ in para 54 which was citing the Commission decision as to the ability to engage in leveraging. On the contrary, the Commission has to go further and examine with care and precision, according to all the standards that have been set out, the manner in which the alleged conduct would come about and how it would impact upon dominance. In the case of Hutchison Ofcom found only ability, but accepted in its Decision, having reviewed the matter, that there is no evidence of incentive. We say, as a matter of law, ability and incentive have to be examined. Ofcom did that in relation to the four 2G MNOs, the Court of Justice made it clear that it was part of the ex ante test for dominance, and it did not do so for us; on the contrary, it found there was no evidence of incentive. We therefore say ability per se is not enough, Ofcom has failed to address itself to a relevant consideration and if one is asking oneself whether, within the timeframe of this decision, which is short, H3G will raise/set prices at an excessive level, when Ofcom accepts no evidence of incentive to do so but merely a theoretical ability, is that enough? We submit in law the answer is no. That is the first point.

The second point is failure to examine an issue and connected to the point about incentive, I suppose, is the fact that Ofcom failed to conduct any analysis of H3G's costs or prices, either on a static or a dynamic basis over time. On the contrary – and this is where the list of admissions we have set out in our first skeleton is relevant – Ofcom accepts for the purpose of the Decision that there is no evidence of excessive pricing and it is not part of its case that costs would fall to such a level as to make the embedded contract price excessive in the course of the Decision.

In *Tetra Laval* the CFI held that it was the duty of the Commission to conduct detailed economic analysis and if it did not do so then in a paragraph of the CFI judgment endorsed by the ECJ, it was no answer for the Commission to turn round and say we found a possibility or even a probability that the conduct would arise and that other factors would lead to dominance. So if you do not conduct the analysis you cannot simply as it were research, by reference to logic or whatever argument you wish to advance, that it is possible or probable. Here we rely upon the fact that it is common ground in this case that there was no analysis done, and we set out an entire list of what Ofcom says it did and did not do in our skeleton with the references.

What do we say about that in terms of a legal challenge? They failed to examine a material issue, namely movement in costs and prices, they relied purely and simply on a theoretical ability, but in the light of the admissions that is not goods enough and they are

therefore, in the absence of a proper economic analysis, particularly in the light of the many admissions made – and I think the timescale is important here, we are talking about a short timescale of 18 to 24 months from June 2004 – that that is an error of law.

THE CHAIRMAN: Sorry, what do you mean by "many admissions made"?

MR. GREEN: The many admissions that there was no analysis of price, there was no analysis of cost, no analysis of a movement of cost, an acceptance that there was no incentive, all these admissions.

We have extracted them and set them out in our skeleton argument at paragraph 46, page 18 of the first skeleton. We have given the references to Ofcom's amended defence and Ofcom's pleadings; can I just perhaps add two lines here. First of all, if you look at 46(ii) excessive pricing formed no part of the basis upon which Ofcom found that the appellants had SMP – what that means is evidence of excessive pricing. You have seen (a) that they have set out excessive pricing for themselves as a task, and they found that we had the ability to engage in it, it is quite plain that they are just talking about evidence in relation to excessive pricing formed no part of the basis. There is a whole series of factors which are common ground, and we would add in the one about incentives which I do not think is listed here.

THE CHAIRMAN: Yes, I was about to ask is it in your list. Are you suggesting that they have accepted that?

MR. GREEN: I took you to the December statement in the Decision yesterday; they accept there was no evidence of incentive, so we simply take that at face value. Those are the admissions and one has to read the Decision in the light of those admissions, and you read that in the light of the ECJ in *Tetra Laval* simply saying if you do not carry out an assessment then it is not open to you to say that it is possible or probable, and I took you to the reference to that yesterday. Failure to examine a relevant issue, therefore, is a ground of judicial review.

Those are the two very important points, but there is a third point about the temporal element. In *Tetra Laval* the CFI and ECJ held that where dominance was due to emerge following conduct after a period of time, then the Commission had to factor that into its detailed analysis, so it is the further away the hypothesised conduct the more remote and less likely it was that dominance would arise. Ofcom's case is somewhat confused here and we have seen a shift in Ofcom's position. In their skeletons Ofcom suggest that the decision is based upon the here and now, in other words some form of present ability; however, this does not with respect stack up since, first, Ofcom accepted that there is no present incentive to raise prices to an excessive level; secondly, Ofcom accepts that during the course of the Decision costs will not decline to such a degree that the embedded price will become fixed at a level

which is so much greater than costs that it will become excessive, and then perhaps most importantly – and it is set out in that list of admitted common ground statements – Ofcom expressly accepts in the Decision that its decision is forward-looking and it is saying that even if BT did, for example, exert countervailing buyer power in 2001 that is no guarantee that at some point in the future we would not acquire dominance through the ability to set prices. So the Decision, properly analysed, is forward-looking. In *Tetra Laval* the court said you have to examine the emergence of this dominance within a relevant timeframe; the court emphasised therefore that the Commission had to examine the entire question of temporal considerations as p[art of its analysis. In this case Ofcom has not done this and there is no indication of when costs will fall to reach a level so far below the embedded contract price that the price will become excessive – indeed, Ofcom accepts that for the purpose of the Decision, the 18 to 24 months, it will not happen. In other words, Ofcom's analysis of when the price will become excessive is outside the scope of the Decision and there is no analysis of when it is said, looking at the converse, raising prices, if it does (b) – if it is in fact Ofcom's case that H3G will raise its prices under the contract. Over what period of time is it said that we will use our powers under the contract to push prices up? How would that mechanism operate and over what period of time? Nothing is said in the Decision about that, so this is yet another matter which Ofcom should have examined but which it did not examine. It is very important because the timeframe in the Decision is very short and the logic of the Decision, which is all that is in issue before this Court, is that H3G's prices will become excessive during the 18 to 24 month period, in other words either by the end of this year at the earliest or by early summer of next year at the latest. It is not open to Ofcom to say that the period of the next review has now been put back, this is not part of the Decision it is simply an administrative change of tack, and it is not relevant to the decision that you are assessing. There is nothing in the Decision which provides any guidance as to Ofcom's views on costs beyond the period of its Decision. So that is another matter which has not been examined which the Court of Justice said was relevant; those are three relevant matters in relation to prices that we say have not been considered. You simply look at the Decision, it is a small Decision, it does not cover many paragraphs – it invokes a great number of words but it does not involve many paragraphs – and you will see, with respect, that that is true.

Can I turn from the complex question of prices to the more straightforward factually driven question of dispute resolution and countervailing buyer power? I wonder actually if this is an appropriate moment to have a break.

THE CHAIRMAN: Yes, though Professor Stoneman has one question.

PROFESSOR STONEMAN: It is a question of words again. You have talked of two pairs of words, one is ability and incentive and the other is structure and conduct. Are these synonymous pairs?

MR. GREEN: I do not think so. Ability and incentive are different, as are structure and conduct. As I said earlier, in case law you can have what is described as "structural abuse". There are cases where, without more it is deemed that a merger is abusive and that was certainly the case before the merger control regulation came into force, and there were certain occasions where the mere fact that a dominant company does something without more, almost the mere fact that it exists and acts will necessarily mean that it can abuse a dominant position. They are exceptional cases, but they are defined as "structural abuses" and they are quite narrowly defined. The vast majority of cases are conduct based, certainly under Article 82, merger cases are perhaps more evenly spread for obvious reasons, but *Tetra Laval* was a conduct based case and the present case is, on Ofcom's own analysis, conduct based. So I do not think I review them as synonymous pairs. Maybe I have misunderstood you.

PROFESSOR STONEMAN: Well, as you know, I come out of the economics' side and not out of the legal side, and within the analysis of industrial economics analysis there was a thing called "The structure conduct and performance paradigm", structure relating to the market shares in the market, conduct relating to how the firms in the market behave, performance reflecting what happens on the market. I have a feeling in fact that we may be talking at somewhat cross purposes on some of these if we are not careful as to how we define these words.

MR. GREEN: Yes, I accept that. I am talking in more prosaic legal language. I would have used "conduct" as anything to do with contract, anything to do with the actual behaviour of an undertaking, calculating buyer power is conduct based, though you might describe it also as structural because it impacts upon – these are not always neat divisions. But I think in the context of *Gencor* the court is talking about what it referred to as a "structural abuse", but I do not want to get bogged down with *Gencor*, this case is what you are concerned with, and I am simply concerned with what Ofcom did in this case, what its own grounds were.

PROFESSOR STONEMAN: Thank you.

MR. GREEN: Now, it is quarter past eleven.

THE CHAIRMAN: Well done. 11.30.

(Short break)

THE CHAIRMAN: Mr. Green, just before you resume, what is your current estimate of timetable? I say that not because we are pressing you or nobody is living up to our expectations because I know we have probably contributed to such under estimates of the time you thought you were

going to take. Roughly speaking, and we are not going to put deadlines on, how much longer do you think you are going to be, and I will ask you, gentlemen, how long you think you will be as well?

MR. GREEN: I will not be that much longer, it is possible that I will finish about lunchtime, or shortly thereafter.

THE CHAIRMAN: Right, Mr. Roth, allow for no interventions, unlikely though that is, but that is all you can do and we will add on whatever we think fit, so we have an idea. I think we want to know whether we are going to go into Thursday and, if so, by how much?

MR. ROTH: I would hope the answer to that last question is "no", and that if my friend, Mr. Green, finishes by lunch time, I would probably just spill into tomorrow morning, but for only about three quarters of an hour in the morning.

THE CHAIRMAN: And that is assuming a clear, uninterrupted run?

MR. ROTH: Assuming a clear run and subject, of course, that I do not know what my friend is about to say between now and lunch and what that might provoke, but subject to that.

THE CHAIRMAN: Good, thank you. Mr. Barling?

MR. BARLING: Well as Interveners and coming third, obviously I will be in a position of scoring out, no doubt, large chunks of what I was going to say – it may be that Mr. Roth will say quite a lot of what I have down, but I might have to say. At the moment it looks like about two hours, but it could well be less.

THE CHAIRMAN: So there is a sporting chance we will finish tomorrow, but it does not sound as though it is inevitable, it will depend on what Mr. Green thinks he has to pick up by way of reply, probably?

MR. BARLING: Yes.

MR. GREEN: I do have some difficulties on Thursday, is there any possibility we can start a bit earlier tomorrow?

THE CHAIRMAN: I doubt it, Mr. Green, we will have to see how we go.

MR. GREEN: I am going to move now to dispute resolution. Can I ask you to put some paragraph numbers in your notes because it is clear from the exchange a few moments ago that Mr. Roth is going to say that in some way shape or form their Decision is not based upon conduct. The paragraphs in the Decision which make it clear that that simply is not correct are many, but the key ones are paras. 3.2, 3.7, 3.32 and 3.46. We submit that the most important is 3.2 which makes it explicitly clear that in its assessment of SMP prices and profitability were taken account of and that was an integral part of the analysis leading to SMP. Page 1097 of the bundle. When you look at it you will see if you put it in traditional Article 82 terms, we are

not talking about abuse now, this is not a case about abuse, we are talking about dominance. 3.2 says:

> "In its assessment of SMP in the markets for voice call termination, Ofcom has focused on single firm dominance and has relied on four of the criteria listed in the SMP Guidelines, and in Oftel's Guidelines on the assessment of SMP. These are…"

(a), (b), (c), (d) – (c) is "excessive prices and profitability". So conduct is one of the criteria it is relying upon in order to get itself to a position where it can conclude that there is SMP. It is not saying "we found SMP and excessive pricing is the abuse". This is an integral part of the definition of SMP. That is not always the case in all Article 82 dominance cases. If Ofcom wants to retract on its Decision then it is just not entitled to do that. If it wishes to say that in some way it did not bring conduct into the definition of dominance, then that just is not the case. We are entitled to attack the Decision as it stands, and this is not an abuse case. This is a dominance case. The word "excessive" is there. We are not talking about just the power to set price at a higher level; we are talking about a price which is defined as one which is abusive. That is the oddity, they might describe that as abuse, but they encapsulate the abuse into the dominance, and that is precisely what happened in *Tetra Laval*. The abuse became part of the definition of the dominance.

MR. SCOTT: Mr. Green, if you turn to 3.21 of the Decision, I entirely accept that earlier on in 3.7 they had been talking about ability and incentive in relation to the other MNOs, but by contrast the wording of 3.21 and 3.22 suggests a belief that there is a structural ground for SMP as distinct from a behavioural ground for SMP.

MR. GREEN: Yes, but look at the word "addition" in 3.22. One can get hung up on the language here, but when you look at it in the round, and you look squarely at what was said in 3.32 and 3.46 almost everything they analyse is designed to take them to the conclusion is there an ability to set an excessive price – whether it is countervailing buyer power, which they say does not constrain the ability to set an excessive price, whether it is the dispute resolution, which they say does not constrain the ability to set an excessive price, everything focuses upon what is analysed as conduct and otherwise abusive.

MR. SCOTT: Hold on, just go back to 3.21, it seems on the face of the document that before they get to behaviour they have a structural argument.

MR. GREEN: With respect, I understand what you are saying about the semantics, but it does not stack up when you look at the Decision as a whole. When you look at the Decision as a whole, which is what we are entitled to challenge, it is quite plain that they set themselves the task of looking at prices, they made a conclusion about prices without carrying out an investigation,

they analysed all the constraints in terms of whether or not they were sufficient to prevent us from setting an excessive i.e. abusive price. They themselves cite the Commission's guidelines that very high market shares do not in their own right, and should not in their own right be sufficient to create dominance. If this case turns on nothing more than a presumption based purely and simply on their narrow product market definition then (a) that would simply be inadequate; and (b) it is just not the case we are meeting. I understand what you are saying about the semantics of 3.21 and 3.22, but I really do not think Ofcom can get home by simply referring to some semantics in these two paragraphs, which is what they actually did.

MR. SCOTT: I am simply drawing a distinction ----

MR. GREEN: I understand that.

MR. SCOTT: -- between their approach to the other MNOs and their approach to 3.

MR. GREEN: They intended to rely upon - we would be arguing discriminatory treatment if they said for everybody we actually accept we have to do prices, we have to do CVP, countervailing buyer power, and so on and so forth – "Oh, Hutchison they are a new entrant, they have no subscribers, they will not worry if we just slap an SMP on them if we do not impose a price regulation obligation on them." If that was the case, which I hope it is not, then we would be able to describe discriminatory treatment. If it is the case it – it does not seem to be the case from the Decision – we would be crying blue murder. Can I move on to dispute resolution?

Dispute resolution naturally precedes countervailing buyer power, I think because of one of the questions that you posed to us in your letter – "What is the relationship between dispute resolution and countervailing buyer power?" I think it is naturally a precursor to countervailing buyer power because a buyer can use the threat of a reference to a regulator as part of its armoury which may negate the supplier's supplier power, but it is probably best viewed independently, because the supplier can use the threat of a reference to get a better price out of a buyer and the regulator itself, of its own initiative can, inappropriate cases, intervene to set a price. So it has free-standing value and moreover, our case against BT on countervailing buyer power is in essence that they would have had buyer power regardless of the threat of intervention. It would stand alone as independent buyer power, but clearly there is a connection or cross-over between the two to some degree.

The starting point in law is Article 14(2) of the Framework Directive, and I will not track back to the discussion we had yesterday, it is descriptive of the test for dominance, this is clear from the Framework Directive itself, from the recitals, from the Commission's guidelines. So we have the legislature and the Commission saying that SMP equals dominance.

In *Tetra Laval* the European Court endorsed the ruling of the Court of First Instance to the effect that it was incumbent upon the Commission to assess whether an allegedly dominant undertaking would engage in conduct which it was said it had the ability to engage in. You had to take into account the disincentives, and deterrents simply because they were factually relevant. I would like to just give you references to CFI, and you have had them already so I will not go back to them, and I then ultimately want to give you the references to Ofcom's Decision to show what it thought about the relevance of regulatory deterrence. These are really just for noting first of all. CFI paras.156 through to 162, and paras. 217 through to 224, and these are set out and recited in the ECJ, paragraphs 56 and 57. Then the key paragraphs of the ECJ when it expressed its own view are 74, 75, 85 and 89. There does not seem to be much difference in principle between the ECJ and CFI's position and Ofcom's position. Can I show you what Ofcom thought about regulation, first of all in the Decision, para 3.39, page 1103. That is in relation to buyer power and the first part thereof says as follows:

> "The December consultation (paragraph 3.44) noted that there were commercial considerations which limited the countervailing buyer power of MNOs. Aside from these commercial considerations Ofcom also considers that in relation to whether an operator has countervailing buyer power the threat of regulatory intervention is relevant."

So the first point that we rely upon is that Ofcom itself believes that regulatory intervention and even the threat of it is, at the very least, a relevant consideration. I suppose what we would say about that particular paragraph is that what is sauce for the goose must be sauce for the gander, there is no logical distinction which can be drawn between taking account of regulation for the purpose of assessing the demand side buyer power, but then ignoring that same consideration when determining whether there is seller side market power, so if it relevant to the demand side, it is buyer side, there it is plainly relevant the supply side, and that does not appear to be a disputed proposition. If you go then in the Decision to 3.50, Ofcom says here in relation to excessive prices, which is the heading on the previous page 1104,

"'3' claims that it submitted evidence to indicate that the threat or use of dispute resolution processes had constrained its own pricing and would continue to do so for the foreseeable future, but that Ofcom has dismissed this without any consideration.

> "Ofcom's response:

"Ofcom believes it has already addressed this issue in paragraphs 4.3 to 4.9 of the December consultation, where it was explained that the possibility of dispute resolution will not in

practice constrain an MNO from setting excessive termination charges. Ofcom provides further reasoning on this point in the following chapters – see 4.14."

So Ofcom's point is not that regulation is irrelevant in principle, it is that it is irrelevant in practice.

If you go to paragraph 4.14 at 1109 Ofcom says as follows:

"In this context, Ofcom notes it has the power to resolve the price increase dispute in question by determining that it will not prevent the increase until it has exercised its powers to set, inter alia, an SMP condition (see section 190(4) of the Act). Accordingly, Ofcom does not accept that it has made a material error of fact in rejecting dispute resolution as a constraint on the MNOs' ability to price excessively."

The point we would draw from that is that Ofcom accepts that it is relevant that on its view of the law it concludes that the exercise of dispute resolution powers would not curb Hutchison's increase in price.

MR. SCOTT: Mr. Green, while you are on that page the previous paragraph contains Ofcom's response to Orange and their belief that reliance on its powers to resolve disputes would not be the most appropriate way to achieve the objective set out in Article 8, so they are going back to the purposive interpretation of the framework as a context. The opening words of 4.14 are "In this context" and the context is the purposive interpretation.

MR. GREEN: Orange is talking about frequent, repeated references and that is not what we are concerned with here, that is clear from the first two lines of 3.13. Orange's suggestion appears to be that price increase disputes could be referred frequently to Ofcom and I do not think we are talking in the present case about Ofcom acting as a de facto day by day price regulator, we are talking about occasional one-offs.

MR. SCOTT: And as we discussed yesterday BT has taken no steps to change prices or to refer the agreement.

MR. GREEN: Then if one goes back to the December statement, because that is incorporated by reference into this Decision from 3.51 – that is where the reference is found – that paragraph refers to 4.3 to 4.9 of the December consultation and those are found at page 775 and 776 of this bundle. I will go through those quickly, 4.3:

"The Director believes that, in the absence of any regulation (and of the threat of regulation) MNOs would have the ability and incentive to set voice termination charges at the profit-maximising (monopoly) level. They might not immediately increase their charges to this level, but they would be likely to do so over time. The Director accepts that since it is not possible to remove the threat of future regulation

it is possible that the behaviour of the MNOs would be constrained and that the termination charges would not quite reach profit-maximising levels. However, he is of the view that MNOs would raise their termination charges to an excessive level if no regulation was placed on them at this time.

4.4 Orange argue that the Director's statement about the likely level of charges in the absence of (ex ante) regulation were unrealistic. It suggested that it was impossible to ignore the broader EU framework, under which Oftel is obligated to resolve disputes about terms and conditions between network operators – and Oftel would not set an 'excessive' charge in a dispute. Orange then suggested it would not be appropriate to consider the likely level of charges in the absence of regulation without also considering the possibility of BT being unregulated (which might increase BT's countervailing buyer power).

4.5 In the Director's view, it is not tenable to conclude that the threat of dispute resolution (or other ex post regulation) would constrain termination charges in the absence of ex ante regulation. To see this, it is necessary to consider the circumstances in which he would be likely to forbear from ex ante regulation: if he believed that termination charges would be constrained by competition (i.e. if there was no SMO); if he did not believe that charges would be constrained (i.e. there was SMP), but he thought that the net detriment to consumers from termination charges was not significant to justify ex ante regulation; or if he believed there was SMP, and there woiuld be net detriment but he thought it preferable to rely on dispute resolution or other ex post regulation rather than ex ante regulation to prevent an increase in charges.

4.6 It is clear that if either of the first two scenarios were applicable, then the Director would not object to an MNO's increase in termination charges even if a dispute between interconnecting operators was raised.

4.7 The third scenario under which termination charges might be constrained would be if the Director thought that dispute resolution or other forms of ex post regulation were sufficient to deal with the problem of excessive pricing."

Can I pause there? Here he is recognising the *Tetra Laval* point that even Article 82 as an ex post at large deterrent might on the facts of the case be sufficient.

"But, as discussed in Chapter 5 and in Annex N, for the four MNOs, the Director does not believe ex post regulation would be an efficient or appropriate way to deal with high termination charges, largely because of the extensive compliance and

monitoring requirements entailed in the development and implementation of cost-based prices. Consequently, this scenario is not relevant. Hence, the Director believes that under any relevant scenario the absence of ex ante regulation would allow termination charges to increase.

4.8 The Director also disagrees with Orange's argument that it is not appropriate to consider the likely level of charges in the absence of regulation, without also considering the possibility of BT being unregulated (which might increase BT's countervailing buyer power). Once an SMP finding has been made, the objective of this review is to establish whether or not there should be ex ante regulation imposed in mobile termination markets. The Director's analysis must therefore presume two alternative states of the world – one with and one without the specific obligations imposed on MNOs with SMP. It would not be appropriate in this context to consider what would happen if regulation on BT was also to fall away, which itself has been the subject of other market reviews. This approach would only be relevant if these other reviews concluded that important regulation on BT should be removed. The Director does not conclude there have been any material changes to the obligations on BT that would be relevant to this review.

4.9 The Director therefore maintains his view that in the absence of regulation, termination charges would be excessive, to the detriment of consumers."

That is a very general statement, more directed at the four 2G MNOs. You have seen that in specific relation to Hutchison he says that because you assume that there is no SMP when there is a reference to the regulator, what he would do is allow any application by Hutchison to raise prices and refuse any application by BT to lower prices. In principle, therefore, Ofcom does not say regulation is not capable of being a constraint. His case, as you have seen in relation to the 2G MNOs was that, notwithstanding regulation, prices were excessive, and he has a different case in relation to Hutchison.

Where does this take one? It means that there is a substantial amount of common ground in terms of principle as to whether or not regulation is capable of being a constraint and is relevant. It is clear that that is the case, that regulation is relevant, it is capable of being a constraint. The question is then how does it apply on the facts of Hutchison's case? In our submission, Hutchison is wholly unable to set an excessive price, both (a) absolutely and (b) within the confines of this Decision and the time period it incorporates. This is because we submit an excessive price is precluded by virtue of the operation of the dispute resolution procedure. Hutchison's case is to be distinguished from that of the 2G operators where there is

a long history of pricing that Ofcom can scrutinise; Ofcom came to the conclusion that prices would be excessive, notwithstanding regulation. No such history exists in relation to Hutchison and the analysis is therefore entirely prospective and ex ante.

Ofcom made an error of law in relation to dispute resolution when it said that it would be bound to always allow a Hutchison price increase and reject always a BT price increase. The effect of that error of law was that Ofcom did not, as you have seen from the Decision, examine any other consequence or scenario for Hutchison. So Ofcom's starting point was a legal error and Ofcom, as you have seen again in its most recent submissions, has somewhat moved away from the proposition it advanced in its amended defence and has now identified Article 5(4) of the Access Directive as the relevant statutory provision, and I am going to come to that shortly. In our submission it is plain under that provision that Ofcom would have no power to permit any application by Hutchison and reject any counter-application by BT. As you posited as a hypothesis in your letter, a public body acting under public law duties could not conceivably act in the way that Ofcom said it would act, namely allow our application and reject BT's, that is just not a possible scenario under the directive for a public body.

Having fallen into that legal error, there is nothing behind it in the Decision, Ofcom just did not examine what it would have done in relation to Hutchison' absent that conclusion. We are therefore in a classic case of an error of law leading the decision-maker into an omission, an omission to examine a relevant situation, in the same way that the European Commission in *Tetra Laval* said we do not believe commitments are ever relevant because they are behavioural and we do not accept behavioural undertakings, therefore we will not examine them as part of the incentives and disincentives. The Court of Justice said that is an error of law, as a result you did not assess whether or not the commitments would or would not be relevant and therefore in the absence of an assessment you cannot get by the assertion of other consequences, probable or possible.

Why is it manifestly wrong in law? If we go to Article 5(4) of the Directive we will see why. This is in bundle E1, tab 7. I hope I can take this area relatively shortly because all parties have now dealt with it twice in writing, and obviously you are aware of what we have said in writing, so I do not intend to rehearse all the points that we have covered already. Article 5(4) of the Access Directive says:

> "With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to ensure the policy objectives of Article 8 of

Directive 2002/21/EC (Framework Directive) in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC."

The question is can Ofcom take the view that it will always allow Hutchison's applications and always reject BT's when a dispute is referred to it because there is no agreement between the parties. The first point to note is that the exercise of the dispute resolution power ahs to be in accordance with the policy objectives of Article 8 and those you will find if you turn over to p.148 of this bundle. Article 8 of the Framework Directive, at p.148, tab 9, is headed "Policy objectives and regulatory principles". Article 8(1):

"Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paras. 2, 3 and 4. Such measures shall be proportionate to those objectives."

Before moving on I make two points. First, the regulator must act reasonably, and secondly, the regulator must act proportionately. Ofcom's conclusion that it will always allow Hutchison's application and always reject BT's is neither reasonable nor proportionate. Article 8 goes on to say:

"Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

"National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism."

Then Article 8(2) says as follows:

"The national regulatory authorities shall promote competition".

That is a mandatory duty to promote competition.

"… in the provision of electronic communication networks, electronic communication services and associated facilities in services by *inter alia*;

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

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

(c) encouraging efficient investment in infrastructure, promoting innovation,

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources."

The first three of those would be infringed by Ofcom's own analysis that it will always allow our application however manifestly unreasonable, and always refuse BT's. You are contemplating the possibility that you are going to set up a system whereby users do not get a choice of price and quality; distortions and restrictions of competition arise, and you discourage efficient investment in infrastructure and promotion of innovation. In relation to 2(c) I rely on recital 19 to the Access Directive.

Can I take you back to recital 19, which I have shown you already, so I will not read it again, but then I want to take you back to two previous recitals. Recital 19 on p.114, and the relevant bit, which I suspect is the bit you have already got marked, is on p.115 and it is the caution the Council Of Ministers is urging upon MRAs not to distort long term decision taking in access by taking short term decisions.

The other two relevant recitals are 5 and 6 on p.112 and p.113. 5 says:

"In an open and competitive market there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis and negotiate in good faith.

"(6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile) and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the

case, for example, if network operators were to restrict unreasonably end-user's choice for access to internet portals and services."

So two points come out of that. First, the NRAs are primarily intervening where there are large differences in negotiating powers between undertakings and where undertakings rely on infrastructure provided by others for delivery of their service. Those assist in construing Article 5(4) but none of those provide any support for Ofcom's proposition that it would be always bound to allow Hutchison's application and refuse BT's.

Article 5(4) being a Community provision has to be construed proportionately, reasonably, and it does not allow the conclusion that Ofcom says would apply, and did say would apply, in the Decision. Where does this take one? It is not suggested in the present case that Ofcom would not have intervened. Ofcom's position is that it would have intervened but in a particular way, so it is not as if Ofcom is saying in this Decision had there been a dispute with a new entrant who had incurred vast costs "we would just wash our hands of it". Ofcom's position in the Decision is quite different. Ofcom's position therefore is flawed, it just does not stack up and therefore Ofcom did not address its mind to the relevant position. There were other matters which we have set out in our supplementary submission, which we invite you to take account of which would prevent Ofcom from adopting the solution that it has adopted. For example, and I think this really should not be controversial, as a public body under Community Law it would be bound also to apply the competition law. Under Regulation 1 of 2003 Ofcom cannot permit a price which it actually endorses, which it knows at the same time is abusive. It would not have the power to do that, that must be commonsense. That must be a limiting factor over and above this Directive. It comes straight out of a combination of Articles 3, 10 and 82 of the Treaty, and we have set that out in detail in our written submissions and I will not go back into that.

We have also referred to recital 27 of this Directive, but that really is just icing on the cake. The construction of Article 5(4) and Articles 3, 10 and 82 take you to that inevitable conclusion. As a result, we are entitled to say that there would have been a reference, at least in principle there could have been a reference to Ofcom. If Ofcom had had a reference in law it would have been bound to have prevented Hutchison from charging an excessive price, or setting an excessive price. It is an absolute curb. Moreover, one needs to ask also this question: how proximate is that as a regulatory constraint? It is far more proximate than the over arching Article 82 which exists as a deterrent but which is generally ex post and is, one might say, somewhat remote. It is more proximate than the threat of fines or deterrents imposed under the implementing machinery for Article 82. All these were matters the Court of

Justice said were at least in principle relevant in *Tetra Laval.* It is directly relevant because it relates directly to the facts of Hutchison's entry into the market, and when I show you some of the documents on countervailing buyer power you will see that Hutchison was contemplating on a day by day basis how the regulator would react and whether or not it could make a reference to the regulator.

PROFESSOR STONEMAN: Could I just intervene there? Again, I think we are going round a bit in circles. The offence under Article 82 is abuse of a dominant position, and let us say that setting an excessive price is an abuse. Unless you have a finding of dominance it is not an abuse to set an excessive price. It is only an offence for a firm that is in a dominant position. So the ex post regulation would not stop any firm in a non-dominant position from setting an excessive price. Without a finding of SMP, or if you find that there is no SMP, is it not then the case that H3G would not be in a dominant position and therefore by setting an excessive price would not be in contravention of Article 82?

MR. GREEN: This is Ofcom's, what we saw in the Catch 22/Gotcha. It is quite plain what Ofcom was thinking – certainly when it came to pleading this case out – was that they would say the hypothesis for calculating this scenario is no SMP, "therefore we are going to allow any price that Hutchison wants. We will also reject any price that BT wants. If that means that they have then got market power we will prevent that price coming into being because we will slap an SMP determination on them and price regulation". There are only two ways of looking at it. If they allow us under this, we say, balmy legal route, to set any price we want, that is simply a step on the route to them concluding "gotcha, you've got power over price because we have allowed it, ergo you have now got SMP and we reduce the price." This is simply intellectual semantics. Those are the only two choices, it is either they say "No SMP, but now you have got SMP, so we prevent the price", or they have to accept that they have to act reasonably". But Article 5(4) is not conditional upon dominance or SMP. So it is contemplating that you may have two non-dominant operators, and both of them have a dispute which is referred to dispute resolution. Recital 5 and 6 take you only to the point that the regulators NOAs are urged, at the very least, to intervene where there is an imbalance in the size of the networks.

So yes, if you are looking at Ofcom's first position which it has to be done under framework directive and it is all about SMP, no, now we are looking at it under Article 5(4).

PROFESSOR STONEMAN: Given your argument yesterday, would Article 82 not dominate this Directive that we have here, so that Article 82 is the leading piece of legislation and if your

price was controlled under this legislation then you would come on the grounds of appeal that it is in contravention of Article 82.

MR. GREEN: Article 18(2) of the Framework Directive is plainly linked to Article 82, but there is nothing in the Access Directive which necessarily takes you to Article 82. One just does not find it. Article 5(4) is not going to be triggered purely in dominance cases, and it seems very clear that the legislative intent is to provide a broader basis for intervention for dispute resolution and standing back from it is a matter of commonsense. I think one would say that dispute resolution disputes can arise in non-dominant circumstances but it is very important that they are resolved for the benefit of consumers, and that is why even if, for the sake of argument, BT is not dominant as a purchaser, it is still subject to an end-to-end connectivity requirement. So when it comes to solving interconnection disputes it is not linked in the law to dominance.

MR. SCOTT: Mr. Green, thinking about dispute resolution, as I understand it the uncontested facts in the evidence show that in the negotiations between BT and H3G, BT rejected an initial set of prices – and BT is clearly a party against whom a finding of SMP has been made.

MR. GREEN: In a different market.

MR. SCOTT: In a different market, but heading in the other direction.

MR. GREEN: Yes.

MR. SCOTT: You then had a circumstance in which again, as we understand the evidence, your client decided against dispute resolution in the particular circumstance of urgency. We have also had evidence that BT has taken no steps to try and change notice or an unreasonableness provision, neither has your client under the provisions of the Agreement, so that so far as the Agreement is concerned neither party has disturbed the situation. What you are suggesting is that there are threats of regulation and regulators that overshadow your client's behaviour.

MR. GREEN: I am going to deal with the evidence in relation to countervailing buyer power next and I was not going to deal with the particular points that you are addressing at this stage.

MR. SCOTT: I am not going to countervailing buyer power, you will see where I am going in a moment. Under Article 8, to which you drew our attention – and you just mentioned it a moment ago – the ultimate concern here is the price charged to consumers and what you are suggesting to us is that because of that ultimate concern the threat of regulations and of regulators is such that your client will behave properly. But what is likely to happen there is not a dispute resolution, it is somebody acting on behalf of the consumer which could be Ofcom acting on its own account, as is suggested in the framework, or it could be a complaint to Ofcom, either as the national regulatory authority or as the national competition authority.

There is something going on here, therefore, which they may not have taken into account, but which can be either them in their role as an NRA or them in their concurrent role as an NCA. So at this stage it seems to me that it is not just dispute resolution that may need to be taken into account in terms of conditioning your client's behaviour, and I think that is what you have been saying to us.

MR. GREEN: Yes, I put dispute resolution as simply one of a number of potential regulatory constraints and of that menu one or more may be more or less relevant on the facts of any given case. It is undoubtedly true that Ofcom as an NCA (national competition authority) may have concurrent but slightly different concerns which would incentivise it to investigate, use its regulatory powers of investigation, to prohibit or control if it thought that was appropriate.

MR. SCOTT: Classically, if BT are in a position that they can pass through the prices charged by H3G you have a situation of bilateral monopoly in which there is no particular incentive on either party to disturb the agreement.

MR. GREEN: And if they cannot pass through then that is a very strong incentive for them to try and prevent ---

MR. SCOTT: Absolutely. If BT were constrained to charge the same for all fixed to mobile calls and not to use FM6 as a distinct band, then I suspect we would be in a different situation.

MR. GREEN: Again, you are right, these are things which might or might not be. Of course, they are not part of the decision so one can speculate as to what might have happened, but you do not know what Ofcom's conclusion would be. My criticism is that they made a legal error; if I am right on that then I must be right on the second criticism, which is they did not examine the facts.

MR. SCOTT: The potential incentives.

MR. GREEN: Potential incentives/disincentives to work out what they would have allowed and what they would not have allowed, but we do not have that in the Decision and therefore it is plainly not part of my challenge. I can point out that they did not do the exercise, which we say they should have done, and we can say, we submit with great force, that they would have constrained any excessive price. To a degree I do not want to overlap with what I am going to shortly say about countervailing buyer power because the facts of the case I think shed light upon both that issue and dispute resolution.

MR. SCOTT: Thank you.

MR. GREEN: In relation to dispute resolution there are a number of other matters which I will deal with shortly. I would like to deal with clause 13 of the BT Agreement. We have dealt with this in writing and I think it suffices to say that it may or may not be common ground, but

certainly from Hutchison's point of view it is not occurred to it that the cause is frustrated simply because the Director-General no longer exists. It is a standard form agreement, it has been initiated by but it has been subject to a certain amount of consultation and debate within the industry and regulatory oversight. It is certainly Hutchison's understanding that there may be an anachronism left in clause 13, but the intent is that it is a power to refer to whoever is the prevailing regulator at the rime. If one were to put it in traditional contract language one would go back to either Lord Steyn in *Manor Investments* or Lord Hoffman in *Investors Compensation v West Bromwich* and simply say the House of Lords have said if businessmen cock it up then the courts can remedy any minor defects, provided we understand what their intention is.

MR. SCOTT: But this is not a cock-up vbecause it made sense when it was entered into.

MR. GREEN: It made sense when it was entered into, it is not a cock-up, and we would simply say that in a sense that supports what we would say about its intention, which is it is intended to be a reference to the then regulator, which was at that point in time the Director-General, it simply has not been updated but it is intended to be the person who has the statutory power of intervention and dispute resolution.

Assuming that it has valid force, then can Hutchison charge an excessive rate? If it is simply a matter of going to BT and saying can we up the price, please, that requires BT's consent and the answer is no. If it is a matter of serving notice to terminate then Hutchison can do that but then there will be fresh negotiations and there will be BT saying we just do not accept your excessive price, it is a matter of negotiation, but if there is a dispute it takes one straight back into Ofcom. It does not matter for this purpose whether Ofcom is Ofcom or the Director-General, Ofcom's powers exist quite independently of the contract and even under the contract Ofcom or even the Director-General could not have been forced by specific performance to act because it was not a party to the contract. In the 1990s the Director-General used to insert himself into contracts, and we have cited in our skeleton the case which went to the House of Lords on the Director-General's powers to resolve interconnection disputes, both as a matter of contract and public law. That does not happen now, the regulator stands to the side of the contract so the parties to the contract cannot force the regulator to act. The regulator acts when he has a power to act under the relevant statutory provisions.

THE CHAIRMAN: Why would this not be an interconnection dispute under the relevant statutory provision, section 183 or whatever it is? Here are parties who have agreed part of the price of an interconnection, Ofcom (if it had been Ofcom) could have intervened to regulate the entire terms of this contract if they could not agree it, why can they not simply invoke his powers and

say we cannot agree on this, the mechanism has broken down, but it is an interconnection dispute, resolve it?

MR. GREEN: That is the point I am making, that his powers exist under statute and the statute is no more and no less than what is in the directive, Parliament cannot derogate from the directive. So he has a freestanding power and duty and obligation to act, so even if clause 13 evaporated they would still be able to say to him, resolve my dispute.

MR. SCOTT: Indeed, clause 19(1)(2) deals with the situation of a material change in the law in the United Kingdom, so they could proceed on that basis.

MR. GREEN: Yes. I do not know if there is going to be much dispute about that, but we are certainly not saying that there was no power to invoke the relevant regulator at the time. So you are either going to have to negotiate a new price – which is Hutchison trying to charge an excessive price to BT when the existing price is an embedded price – or, and we are talking about the framework again is the timescale of the Decision before we are talking about a reference to the regulator who must act reasonably.

MR. SCOTT: Pausing on the word "reasonable", Mr. Green, 19(1)(7) also provides for a situation in which the agreement or any part thereof has ceased to be reasonable. So there could be a circumstance, say, in 10 years time, if nothing has happened in relation to the charges, when something like 19(1)(7) may apply.

MR. GREEN: Yes. BT may say your costs have collapsed to such a degree that your price is now unreasonable, reduce it, and if we said no then it would be referred up to Ofcom. That is all I wish to say about the dispute resolution procedure.

Moving finally to countervailing buyer power, it is the third main issue. We have gone into pricing, (2) is dispute resolution and (3) is countervailing buyer power. I propose to deal with the issue in this way, first as a matter of analysis of what is in the decision and secondly as a matter of evidence, showing that had Ofcom rolled its sleeves up any distance past its wrists it would have been apparent very quickly that the notion that BT could not wield a big stick was ludicrous. Ofcom did not do that and you do not have to decide whether there is or is not countervailing buyer power, you simply have to ask yourself whether Ofcom should have investigated this issue, and for that purpose, in my submission, you would look at the evidence to see whether it is a material and serious issue requiring consideration.

The first point is an obvious point which is reflected in the Decision. I think I have shown it to you already; I will happily take you back to it, but in the interests of time can I give you the reference? It is the decision, paragraph 3.42, bundle A2, page 1104. Ofcom makes the

obvious point that there is a disparity in the size of the networks between Hutchison and the other 2G MNOs and BT, of course.

Ofcom's position in this case is that the end-to-end connectivity obligation imposed on BT negates any countervailing buyer power – and if I may I will use the expression CVP as a shorthand. Ofcom's decision is to the effect that because BT was subject to this end-to-end connectivity guidance in May 2003, this is a complete answer – I emphasise the word "complete answer" – to the suggestion that BT has sufficient CVP to curb an ability on the part of Hutchison to set prices at an excessive level. In other words, putting it more prosaically, because BT must interconnect BT has no CVP, and that is because, reducing it to its barest essentials, on Ofcom's analysis the only manner in which CVP can be manifested is through leveraging the threat of an outright refusal to act, and a refusal to connect. That is Ofcom's theory as set out in the Decision, because CVP can manifest only through leveraging the threat of an outright refusal to interconnect, so therefore when you take that power of refusal away from them, they are left with no CVP. Once that threat has gone there is nothing left for BT to wield.

This is Ofcom's long-held view. Can I start by showing you the December statement, bundle A2, tab 4 at page 771, paragraphs 3.32 through to paragraph 3.34. At 3.32 Ofcom says: "Countervailing buyer power exists when a particular purchaser (or group of purchasers) of a good or service is sufficiently important to its supplier to influence the price charged for that good or service. In order to constrain the price effectively, the purchaser must be able to bring some pressure to bear on the supplier to prevent a price rise by exerting a credible threat, for example not to purchase or to self-provide."

Could you please emphasise the words "influence" and "some pressure" because what Ofcom is saying is that it is a relative concept, it is not a binary all or nothing, black or white, it is a question of fact and degree in any given case whether a buyer can exert sufficient influence and pressure to constrain a supplier, which commonsense dictates should be correct. That is reflected in paragraph 3.33:

"In this case, the question of whether each MNO providing voice call termination has SMP depends [these words are important] on the extent to which its monopolistic position may be offset by the buyer power of purchasers."

So that is the theory, it is a question of fact and degree in every case. Then you get the conclusion in 3.34:

> "BT is the major buyer of voice call termination on mobile networks (see table 3.2 below). In theory, BT might credibly threaten not to purchase termination from an

MNO and this would deprive that MNO from the pricing freedom that it derives from its monopoly over termination. In practice, this issue is irrelevant."

There they are saying utterly irrelevant, not partially irrelevant, absolutely irrelevant.

"BT, even if it did have buyer power has not been able to exert it because of its obligation to complete all calls, whatever the terminating network. The reasons for this obligation were set out in Oftel's Guidance document, "End-to-End Connectivity"(published in May 2003). That requirement curbs any, (and please emphasise the word "any") buyer power that BT may have, and leaves the MNOs free to set terminating charges above the competitive level."

So Ofcom's position set out in the December statement was that it is a question of fact and degree but the end-to-end connectivity obligation, as described in the May document of 2003 curbs any buyer power that BT may have. If one goes to the Decision one finds a similar position adopted, albeit a slightly different language, A2, tab 6, p.1102. If we start at 3.30, this is under the heading "BT's countervailing buyer power" on page 1101. Ofcom says as follows:

"Ofcom believes it has taken account of all relevant evidence supplied by '3'.

3.30 In relation to the point about BT's countervailing buyer power, Ofcom does not believe that the existing regulatory framework would, in practice, allow BT (as an originating operator) to reject price increases by '3'. While, as '3' has pointed out there were no formal conditions in place – because they have not previously been required – the May guidance explains that BT is expected to offer end-to-end connectivity in order to meet Universal Service Obligation requirements to provide publicly available telephone services. This weakens BT's bargaining position as it removes the threat of BT not providing connectivity if agreement over charges cannot be reached.

3.31 It is possible that during the initial interconnection negotiations between BT and '3', '3's urgency to launch services was a relevant factor in the relative bargaining positions of each party. However, Ofcom's analysis in this market review must be forward looking and consider '3's likely position ion the next 18 to 24 months. Therefore, Ofcom must also consider future negotiations between '3' and BT.

3.32 With such a forward looking perspective, and with delay not such a critical issue for '3', it would be difficult to argue that '3' could not set excessive charges for termination services provided to BT."

And then we have read the rest of that paragraph. So at this stage they are saying the end to end connectivity obligation weakens the bargaining position. They conclude that the only factor which gave BT bargaining power in 2001 was urgency, and that is the only thing that is left as a reason once you strip out end-to-end connectivity, and that looking forward because they say, and I think the words in 3.32 are quite important, with delay not such a critical issue it would be difficult to argue that '3' could not set excessive changes. So it boils down to this, BT is subject to an end-to-end connectivity obligation, that means it cannot refuse to interconnect. It may have had a CBP in 2001, but that was only because of the fear of delay and Hutchison's need for speed. In the future, because BT has no ability to refuse, it has no countervailing buyer power, and although Ofcom accepts that delay may be important it is not so critical. So this is what the countervailing buyer power point ultimately ends with.

The first point to note is that the end-to-end connectivity obligation long pre-dated the May 2003 guidelines, and Ofcom is simply wrong when it says that was in some way a material change in circumstance. BT, as you have seen from its own skeleton has been at pains to point out that it was subject to an end-to-end connectivity obligation for a very long period prior to May 2003. I will show you the documents in a moment, but what is clear therefore is that in 2001, when Ofcom accepts that in principle BT might have had CBP it was still subject to an obligation to connect. The obligation to connect in 2001 did not strip BT of possible countervailing buyer power, and Ofcom accepts in principle it might have done so. You will remember from their pleadings they go further than they say in the Decision, they accept it is a possibility they had countervailing buyer power in 2001, that is notwithstanding the duty to connect. In other words, the duty to connect is not determinative of whether they have countervailing buyer power.

MR. SCOTT: Mr. Green, it seems you have changed your position. I seem to recall earlier on in these proceedings your challenging whether BT was subject to a legally enforceable obligation at the time of the earlier negotiations. Is it now your position that this is allied to your existence of regulator, existence of regulations, allied to your argument that behaviour that is conditioned by the existence ----

MR. GREEN: We accept, and we have seen BT's skeleton, we have checked the documents they have referred to and we accept that they were subject to an end-to-end connectivity obligation beforehand.

MR. SCOTT: Right, so you now accept that, yes.

MR. GREEN: Having looked through the documents they referred to and tracked the history backwards it seems to us that is correct. When you actually look at the May 2003 document, which I will take you to now, that actually makes it clear ----

MR. SCOTT: It was simply that you did challenge that at an earlier stage.

MR. GREEN: Yes, I had forgotten that, but we accept the position, it is a matter of record. We have tracked back and done the homework and BT have usefully set out the history of the matter. If you go to the 2003 Guidelines, bundle A1, p.729 and 730. Those are the only two relevant paragraphs which I need to draw to your attention. They are 2.2 and 2.10. 2.2 on 729 says:

> "The extent to which regulatory intervention is required to ensure end-to-end connectivity -with originating operators requesting, and terminating operators providing call termination on fair and reasonable terms – depends in part on the extent of the respective power the interconnecting providers have in the market. Distortion can arise either if the provider of call termination services has SMP or if the provider originating has countervailing buyer power as a result of SMP."
>
> "2.10 Oftel proposes to continue the existing policy that USO (Universal Service) providers, in meeting reasonable requests to provide access to PATS (publicly available telephone services) must ensure that their customers can call other customers and services irrespective of terminating network, that is they must provide end-to-end connectivity."

The point being made was that Ofcom was continuing an existing policy. The conclusion, at least at this early point is that the logic underpinning the Decision is a flawed one. The May 2003 document did not change anything. At all times BT was subject to an obligation to interconnect, and yet in 2001 Ofcom was certainly of the position that it was quite possible BT had countervailing buyer power.

BT make a great play in their skeleton about the Commission's recommendation of February 2003. Could I ask you to go to BT's skeleton, para.24, p.10 of 31? BT says:

> "In the Commission's recommendation of 11th February 2003 on relevant product and service markets within the electronic communications sector, susceptible to ex ante regulation published pursuant to Article 15(1) of the Framework Directive, at p.20 the Commission makes the following observations on the role of countervailing buyer power in the market for call termination on individual networks."

The quote is as follows:

> "For such a market definition call termination on individual networks does not automatically mean that every network operator has SMP…"

We, of course, rely upon that quite heavily.

> "This depends on the degree of any countervailing buyer power and other factors potentially limiting that market power. Small networks will normally face some degree of buyer power which will limit greatly the associated market power. Absent any regulatory rules on interconnection, a small network may have very little market power relative to a larger one in respect of call termination."

Then BT emphasise the following words:

> "The existence of a regulatory requirement to negotiate interconnection in order to ensure end-to-end connectivity as required by the Regulatory Framework, redresses this balance of market power",

But then they do not emphasise the next words: "However, such a regulatory requirement", so it starts with a "however", not promising for BT.

> "However, such a regulatory requirement would not endorse any attempt by a small network to set excessive termination charges."

So a regulatory requirement does not in the Commission's view permit a small network to permit excessive charges to a large network which is precisely what we have in the present case. Consequently there is still likely to be an imbalance of market power between large and small networks, because it would be easier for a large network than a small network to initiate the step of raising call termination charges and would be more difficult for a small network to resist a move by a large network to lower termination charges.

The Commission contemplates that BT can reduce charges just in the same way that Hutchison can seek to raise charges. That in its own right is evidence we rely upon to show that Ofcom's analysis of dispute resolution is incorrect. But here the Commission is saying that as a matter of principle, an interconnection obligation is not conclusive of the countervailing buyer power argument.

I gave you the reference earlier, para.3.42 of the Decision, p.1104 where Ofcom recognise the obvious fact that Hutchison's network was smaller than BTs in almost every conceivable way.

So far as the law is concerned, before I turn to the evidence, the criticisms of the Decision are first that it gives undue weight and almost seemingly total weight to the assumption that an interconnection obligation negates BT's countervailing buying power, and that is, we submit, a serious error of law, a serious error of assessment. You read the December statement and you read the Decision, it is quite plain that Ofcom believed that simply because BT was subject to a duty to interconnect that negated its buyer power. That

was jumping to a factual conclusion which it was not entitled to jump to. It may or may not be the case, but if it was to support such a conclusion, our submission – which takes me to our second criticism – is it needed to examine the facts, and it did not do so. Who knows, it might have found that the interconnection obligation did *de facto* negate CBP, but it did not do that exercise, and therefore it does not know what the true answer is.

MR. SCOTT: Mr. Green, just while you are on CVP, does your analysis in relation to capability and incentive apply to CVP as well, in other words if there is no incentive on BT to exercise CVP, does that negate the CVP? What I have in mind is that if there is an end-to-end connectivity obligation and an ability to pass through the costs, there seems to be little incentive on BT to exercise any CVP.

MR. GREEN: Can I most helpfully address that in the context of the facts, because I think in a sense the relevance of that issue or otherwise becomes quite clear from the documents and from the history of the case. It is a relevant question to ask, but I think the context point is going to arise in a few moments so can I park it?

MR. SCOTT: Yes, of course.

MR. GREEN: One turns to the evidence and since we have BT's submission to hand, if you could turn to BT's skeleton at paragraph 47, BT says that the various points that it makes about CVP are clear on the face of the documents themselves. This has been BT's position throughout, that we do not need to worry about what Miss Laurent and Mr Locker say because it is clear from the documents in question. BT relies in particular on one document which is, I think it would be common ground, an important document. It is dated November 2001 and it was right in the middle of the negotiations, at a crucial moment. There was an internal analysis by Hutchison of its negotiating position, and of all the documents BT is probably correct to identify this as symptomatic or as at the top of the pile, as highly relevant. When one actually looks at this document, we submit that it makes all the points that Hutchison has made in its case, and I put it to you only on this basis, that you need to look at it and say does this demonstrate as it were a case to answer? If Ofcom had looked at this, would they have considered that there was a serious issue to be examined in relation to countervailing buyer power? I am not asking you to decide the question as between BT and Hutchison, but you have to decide whether the criticism we make of Ofcom is a material one. Are there sufficient pointers or indicators in this to suggest that BT might have had countervailing buyer power in 2001, and then how does that translate into the future?

The relevant document is dated 12 November 2001 and you will find it at B1, tab 24. You will see that this is a confidential document so I am going to ask you to read portions of it

and then I will make the submissions I want to make, hopefully not too elliptically. The document starts on page 571 and you will see it is dated 12 November 2001 and it is from a Mr Jeffery to a variety of people within Hutchison, including Mr Westby who you have evidence from. He says:

"Please find attached a paper on call termination, revised to take into account the comments received last week and BT's explanation of the timescales for implementation."

There is then a document attached, and the document itself starts at page 573 in this bundle. BT says that this documents provides useful insight into Hutchison's thinking and it proves that BT did not have countervailing buyer power. The document concerns three effective matters which are identified in the third paragraph under the headings (a), (b) and (c) and I will try and summarise them without giving away anything confidential. First of all it concerns interim pricing, which it is said requires urgent approval, secondly, it considers factors relevant to charges and, thirdly, it considers issues concerning timescale. You will see there is a heading "interconnect charge for termination" and there is a description of what interconnect charge is, and then there is a paragraph which is an important paragraph.

PROFESSOR STONEMAN: This is the five line paragraph.

MR. GREEN: I think I can read this paragraph, I do not think there is anything confidential in it.

THE CHAIRMAN: Mr. Green, one thing that struck me, looking at all the documents in this case, is that there seemed to have been absurdly wide-ranging claims for confidentiality, for things which cannot on any sensible basis be treated as being confidential. Fortunately, it has not actually obstructed the proper hearing of this case, but if it had you would have expected an intervention by me rather earlier than this to indicate that I, for my part, would have paid very little attention to any of these designations of business secrets without a detailed case being made in relation to each of them, which I think would have led to one or other of you actually withdrawing a lot of the matter. This may be a document in point. I really do not want this important point to be lost and significance not to be given to things because of over-sensitivity about commercial matters. This is your document so you have got people behind and to the side of you who will be able to say yes or no, but I would actually like to be able to have a proper debate on this without being too constrained, and if necessary I will stop to rule on this, but I hope it will not be necessary. I would like a degree of realism to be injected into this area at this stage of the proceedings, please.

MR. GREEN: As you know, the parties discussed matters and we decided that a large number of the documents were unlikely to be relevant so we decided that it was unnecessary to get into a detailed debate, but we take on board your comments.

THE CHAIRMAN: I think you all come to a common regime and the difficulty was being created by us rather than any one of you, I accept that. I think it is not going to be a problem in the way in which this case has gone, but I put down a marker now and it may help you in deciding whether you would, rather than point us to things. It is helpful, speaking for myself, to have the words read and for the emphases to be placed on the important words.

MR. GREEN: Can I just have a moment?

THE CHAIRMAN: Yes, of course. (Pause for Mr. Green to take instructions).

MR. GREEN: There are one or two thickets, I think, over which we would hope to preserve confidentiality.

THE CHAIRMAN: I am sympathetic to detailed figures and things like that, but if one looks at the paragraph beginning "H3G's interconnect charge" which I think is the one you are going to read, it is obvious to a first year business student it seems to me. There it is, Mr. Green, you have my point and you appreciate the importance I give to it.

MR. GREEN: I will read this paragraph. There is only five minutes to lunch and it may be that by the time I get to anything really serious I can just identify very precisely what we are concerned about.

THE CHAIRMAN: Yes.

MR. GREEN: "H3G's interconnect charge must be set at a level to maximise this revenue

> Opportunity without being unacceptable to Oftel, or to our interconnect partners. A high interconnect charge will be reflected by other networks charging their customers a high retail price for calling to H3G."

So at the outset of this document what is in Hutchison's mind is (a) the threat of intervention, unacceptable to Oftel. We cannot set a charge at a level which is unacceptable, also we cannot set a level which is unacceptable to our interconnect partners, not just BT but the other MNOs, and not least this is because if we set a charge which is too high it will be reflected in charges to their customers by way of a high retail charge, and as is explained later what they do not want to do is to depress demand at the outset for their product, for the offering they are making of connecting to Hutchison. So they are concerned right at the very outset with Oftel's position, BT's position and the impact upon customers. That is the starting point and one sees that these points becomes repeated and elaborated upon as the document unwinds.

MR. SCOTT: Mr. Green, just pausing on that second sentence, that is the pass-through point. That appears to be a statement by your client that recognises the joint power between H3G and BT of being able to be independent of the ultimate consumer.

MR. GREEN: It certainly contemplates that as a possibility, and you may want to put a note by the side of this. If my memory serves me correctly I think that in paragraph 75 of the amended defence of Ofcom they say in relation to dispute resolution that they do not mind allowing Hutchison a very high price because, frankly, consumers would not bear it, and the consumer would ultimately drive the price down. If there is an assumption of no SMP they assume a factual scenario where there might be a pass-through. Again, we cannot speculate too much because it is not in the decision, but all we can say is that there appears to be a reflection of a possibility.

In relation to the point about consumers – I think I will deal with this and then end – it is worthy just looking at BT's own position. If you go back in the same bundle to page 311, tab 1, this is the Competition Commission's report into Cellnet and Vodafone of December 1998 and this is BT's evidence, page 310 of the bundle, paragraph 9.81 and 9.82. This is BT's evidence to the Competition Commission:

> "As to its role in the determination of termination charges, BT said that it had no option but to interconnect with MNOs; similarly MNOs had no option but to interconnect with BT and other operators seeking direct interconnect. Termination charges paid by BT to the MNOs were commercially negotiated. BT was motivated to seek reductions in termination charges to maintain customers' perception of value for money in its retail prices and to stimulate calling and in particular increased call durations in the longer term. As a growing number of competitors exploited arbitrage opportunities to offer significantly cheaper fixed-to-mobile calls, BT would press for lower termination charges to remain competitive. However, BT did not believe that termination rates should be set so low as to risk stifling development of the mobile market. Its customers benefited from having an ever-wider group of mobile users they could call.
>
> "9.82 Significant competitive constraints applied to MNOs. In addition to the downward pressure exerted by BT on termination charges it was not in MNOs' own interests to let interconnection charges become too high. The mobile market was highly competitive. Whilst the price of calls-to-mobiles was the least competitive aspect for subscribers selecting an MNO there were nonetheless pressures on these prices. First, the charges for fixed-to-mobile calls were important in the selection of an MNO for some customers. Customers who anticipated paying for fixed-to-mobile calls within a closed user group would take account of the level of fixed-to-mobile charges when deciding which MNO to use. MNOs needed to ensure that their

respective termination charges did not lead to retail tariffs for fixed-to-mobile calls that made them uncompetitive in attracting new mobile customers and retaining existing ones. Second, there were alternative services that could be used as substitutes to a fixed-to-mobile call. These alternatives included (a) making a call to a fixed line (as most mobile users also had a fixed phone); (b) call-back by the mobile user to the fixed phone, if there was an excessive price differential between fixed-to-mobile and mobile-to-fixed calls; (c) the use of pagers; and (d) for PABX users, the use of equipment to route calls direct to a mobile network via a private circuit, so bypassing the public fixed network."

BT's position, admittedly in 1998, subject to an interconnect obligation, was that it could constrain supplier prices, it attempted to do so and it was conscious of retail competition downstream. Again, one does not have to accept that as the necessary truth, but it is a serious issue for negotiation. You can rely also on Mr Locker's evidence in this case that BT refuses termination rates on the basis that they represent a too high a cost for its retail customers – that is Locker 1, volume D1, tab 15, page 302 para 52.9 and in Locker's second witness statement, D1, tab 16, page 316, para 12(g) he says:

"BT Wholesale is always mindful of the fact that it is the end customer who must pay the termination rates to which BT Wholesale agrees ..."

and then in the same second witness statement, paragraph 12(h):

"It would not be commercially rational for BT to accept just any pricing proposal from an operator seeking to interconnect just because the operator wants to rapidly conclude an interconnect agreement."

So that is BT's position in 1998, BT's position now is does it raise an issue which Ofcom should investigate? BT says we can constrain prices, we are aware of consumers' needs and we do attempt to take those into account when negotiating an interconnect price, and we will not just accept a price offered to us because the offeror, the supplier, is subject to an urgent requirement to conclude an agreement. Is that an appropriate moment?

THE CHAIRMAN: Yes. Two o'clock.

(The short adjournment).

THE CHAIRMAN: Mr. Green?

MR. GREEN: Can I take you back to the document we were looking at before lunch. We will need p.573.

THE CHAIRMAN: This document headed "Confidential" is not confidential?

MR. GREEN: I have taken instructions. I suspect it was confidential.

THE CHAIRMAN: I can quite see it was confidential once. My only point, you will have appreciated Mr. Green, is the potential unnecessary obstruction in mindlessly – that is unfair – too automatically labelling things "business secret" in these proceedings, but I have had my say on that.

MR. GREEN: We have agreed, I have taken instructions, the document is to be treated as referable by all concerned.

THE CHAIRMAN: Right.

MR. GREEN: I pointed out to you that right at the beginning of the document Hutchison was explaining, as it were, to itself that its pricing policy had to be acceptable to Oftel, acceptable to BT and had to take account of downstream consumers. You can see there on p.573 there is a heading "An interim solution". If you turn over and look at the bottom of the next page, 574, the interim solution which Hutchison was negotiating was, as its name suggests, interim pending the final solution. It was to be for the purpose of a test four hours per week, which was to generate revenues of approximately £150 and that is the context of the analysis, or the commentary under the heading "An interim solution".

The first point that is made in the three paragraphs at the bottom of 573 is that Hutchison was deeply concerned that if it did not adopt one of BT's existing prices in its existing price list that that would cause undue delay. So Hutchison recognised that as a new entrant into the market, what it had to do was simply to read across BT's price list and try and find someone who it viewed as comparable and put the argument on the basis of BT's pricing. For your note that is what Mr. Westby says, but it is obvious from this section that it is Westby D1, tab 8, para.19, but you get it really from this document. You just simply read across BT's price list, find something which is comparable and then plug away at that and hope that BT will accept it.

You will see on the next page, 574, second paragraph:

"We recommend that H3G adopt the FM2 price point, i.e. the same charges as applies to Dolphin, the Tetra operator, for interim"

And the word "interim" is emphasised,

"…interconnect charges. These charges will apply to the test calls from BT terminating on the H3G network. The interim charges will continue to apply until H3G proposes a different price that will apply at launch."

Then they identify the benefits of the course of action and there are five bullet points.

"By using an existing price point in BT's billing system, H3G avoid a lengthy delay for implementation of the interim charges. The work to implement an additional price point H3G final charges can take place in parallel.

"The FM2 price point has been accepted by BT Retail and applies to a new entrant mobile network providing voice and data services similar to H3G in these respects."

Dolphin's interconnect charges are not subject to regulation so they sought to identify themselves with Dolphin on the basis that they were also a new entrant, similar to H3G. Then they say:

"The interconnect charges for the FM2 price point are higher than those applying for existing MNOs maintaining a valuable source of revenue for H3G."

Well it turns out it was £150.

MR. SCOTT: They did make the note, Mr. Green, that Dolphin's interconnect charges were not subject to regulation.

MR. GREEN: Yes.

MR. SCOTT: That is an interesting point.

MR. GREEN: It is.

"Setting H3G's interconnect charges higher than those for the MNOs allows scope for H3G to negotiate lower charges subsequently if necessary."

Of course, what one does know and one has to bear in mind, that this suggestion by Hutchison was rejected. So they offered BT the Dolphin FM2 rate because they thought it was comparable and BT simply said "no", and you have seen the evidence for that, it is set out in Mr. Locker's statement, and Mr. Westby's statement. For your note: Westby 1st, paras 30-31, D1, tab 1, p.12. So that was just simply rejected out of hand by BT. It was rejected by BT upon the basis, said BT in their note, that BT found it (a) too high; and (b) they did not think their customers would bear it. That is what the BT explanation said. The point is if you have the ----

MR. BARLING: That is not an accurate statement.

THE CHAIRMAN: I know, we will ----

MR. GREEN: If you have the ability to act independently on the market you can tell BT that you are going to have the Dolphin rate. If you are unconstrained, it means that you can set the price. If the buyer says "no" for whatever reason – it really does not matter what the reason is – if they simply say "no, we are not going to wash that price for our own reasons, good, bad or indifferent", that is an indication at the very least that you do not have an unconstrained ability to set prices, not even on an interim level pending the final price.

THE CHAIRMAN: Mr. Green, this may not matter, but just in case it does I will mention it. There is something that strikes us as being quite extraordinary about this exercise, or purported exercise, and it is this. On the face of this document and on the face of the evidence what your clients were asking for was a price for terminating calls relating to a test period. So it was purely for testing and someone has hazarded that it would be about £150 worth of calls anyway. So unless I have completely misunderstood what they were trying to agree with BT is that BT would pay '3' for terminating the test calls. So it is an incoming price, but at the other end someone was going to have to pay BT that, and if they were test calls presumably it was your clients. So it is money going round largely in a circle, and here they are agonising very deeply about what price they should pay.

MR. GREEN: Well it has slightly greater relevance than that.

THE CHAIRMAN: Well what they could have agreed, bearing in mind the test calls, is that the calls be 1p, or zero, with a view to fixing other rates. It does not really matter.

MR. GREEN: I agree, but as you know from the evidence BT simply said "No" to that.

THE CHAIRMAN: What, to zero?

MR. GREEN: No to zero.

THE CHAIRMAN: We will have to look at that if it is necessary to do so.

MR. GREEN: They refused to test unless the price was agreed. There was going to be no testing without.

THE CHAIRMAN: In that case, you could have agreed logically. You could have agreed whatever price you liked because it was entirely irrelevant and you were paying it, what mattered was the final price at the end of the day.

MR. GREEN: Exactly, and of course I think it is common ground between Westby and Locker that the interim price was at least going to have some bearing on the final price. It is the first shot across the bows in trying to negotiate a final price. So it is not going to be a price which is completely in a vacuum.

THE CHAIRMAN: So we should view this, should we, as being part of the opening price for negotiation? And all this interim stuff is really rather a smokescreen.

MR. GREEN: No, it is not a smokescreen at all, it obviously has an important reference in relation to interim pricing and testing, but it is also part of the matrix for setting the final price. It is one of the opening gambits or exchanges in relation to that, and I think that Mr. Westby says that and Mr. Locker says that.

THE CHAIRMAN: But it is only that because H3G chose to position it in that way. There may have been reasons for not negotiating it, but it could have been an acceptable way of

negotiating to say "the final price you want is X", and negotiate X, whatever band you like, and in the meanwhile for testing purposes we will have 1p per call, or something like that. That would have been a way of going about achieving your objective of having a testable network, would it not? If you do anything other than that then it means that the setting up of this interim charge, as it appears to me, is really actually somewhat covertly part of the negotiation, trying to soften BT up.

MR. GREEN: I am getting a lot of sound from the back.

THE CHAIRMAN: Well I know, I seem to have caused a lot of fluttering in the dovecote. That is how it seems to me. It may not matter much, but if there is something which needs to be said, you can say it and we can work out then whether it matters.

MR. GREEN: Yes, I will find out what I have to say in a moment! (Laughter) The fourth bullet point, if you go to that.

> "Setting H3G's interconnect charges higher (these are the interim) than those for MNOs allows scope for H3G to negotiate lower charges subsequently."

So ask yourself this question throughout. Is this evidence of a company which is unconstrained in the way in which it sets price, or is this evidence of a negotiation, possibly at arms' length? BT does not have to be a monopsonist, in other words a dominant buyer in order to exert countervailing buyer power. It has to have a sufficient degree of power to curb an excessive price. So is this evidence of a company that is setting an unconstrained price? Even in relation to interim which may or may not be a piddling little issue, Hutchison did not get its own way; the price it suggested, whether that is material or not, was rejected by BT, for whatever reasons – good, bad or indifferent, really does not matter. Hutchison here, even for interim was trying to work out a negotiating strategy recognising it may have to negotiate downwards. Is that a company that can exercise an unconstrained ability to set an excessive rate? This is only the precursor to the final negotiation and the final steps which are dealt with on the next page.

MR. SCOTT: Mr. Green, just looking at this document, in the second paragraph on p.574, "the interim charges will continue to apply until 3G proposes a different price that will apply at launch". So your clients are envisaging a situation in which they take the reference interconnect offer, they insert into the reference interconnect offer a set of prices which are the interim set of prices – yes? And that those would continue to apply unless there is a change and they are envisaging a situation in which H3G propose a change?

MR. GREEN: The context of this is they are proposing a price for interim, knowing that interim will change in final and you have interim in order to facilitate testing, but knowing that maybe

some day if you get price X agreed that will form part of the framework for setting price Y which is the final price. There was no doubt between both parties that a final price would have to be set at some point. Neither party thought otherwise. That is why, if you look at p.575, you then see "Next step, interconnect charges at launch".

MR. SCOTT: There was an agreement, but had there not been an agreement presumably given the existence of an agreement with a set of tariffs in those tariffs would have continued?

MR. GREEN: I will have to check the way in which the contract or mechanism operated, because I have a feeling that it could not have just continued *pro tem*.

MR. SCOTT: It is a reference interconnect offer, I mean it is a standard agreement.

MR. GREEN: What actually happened was that BT forced the price down to the price BT thought it would ultimately accept and BT said "The price you have got for interim is the price you are going to get for ever and a day". That is what happened.

MR. SCOTT: But point one, and we are only ----

THE CHAIRMAN: Say that again, Mr. Green?

MR. GREEN: BT forced the price down. The interim price became the ultimate price.

THE CHAIRMAN: You said something about "forever and a day"?

MR. GREEN: For ever and a day until such time as under the BT Agreement it is varied by Ofcom or by consent. But it becomes the contractual embedded price. When you ask yourselves the questions in relation to the position on p.575: "Next step, interconnect charges at launch. The process of determining the interconnect charges which will apply at launch, should consider a number of factors to ensure that these charges are appropriate. Interconnect must be profitable and should, at a minimum, cover all H3G's costs relating to completion of the call."

So they do not say let us charge something that is excessive, they say you have to cover the costs.

> "H3G's business plan and network topology are still being developed, hence the relevant costs for call termination are not yet known and will be subject to change post launch."

Then the second bullet point:

> "Interconnect prices should not be set in isolation to retail prices. If a high interconnect rate is set, there may be more scope for lowering prices on outgoing calls. The retail pricing strategy does not appear to have been finalised at this stage."

Again, just pausing there, what is the company saying? The company is saying we have to try and cover our costs. It would be nice to be able to sort this bearing in mind a retail price strategy, but we have not yet finalised that.

MR. SCOTT: Mr. Green, just pause on the central sentence there. This is a recognition by your client of the general principle that MNOs have funded themselves out of incoming calls and thereby enabled themselves to compete with the lowering prices on outgoing calls, so we have a situation as I understand it in which outgoing calls from mobile-to-fixed are priced at a level that is significantly ---

MR. GREEN: I think they are identifying the possibility, they are identifying the possibility, they say there may be more scope and that is as far as it goes. They have not identified what their retail strategy is yet so ideally they would like to bear that in mind but they have not yet finalised the retail strategy. If they can get a higher interconnection rate there may be scope for lowering prices on outgoing.

MR. SCOTT: The reason I mention is that earlier on we had the question of incentive and your clients are recognising an incentive in that sentence.

MR. GREEN: Yes.

> "If H3G propose interconnect charges which are outside BT's existing interconnect price points, this will almost certainly lead to BT Retail requesting cost justification for those prices. This will increase the time taken for BT to establish interconnection."

So Hutchison knows that if it seeks a higher price it will be asked to cost-justify it, but it also knows that it is not gong to be able to do that and it also knows that therefore it has to set a price which does not trigger as it were the cost justification exercise, and you will have seen from the documents that in fact BT did ask for a cost justification which Hutchison was unable to give. It also was highly confidential information, but that was a pressure forcing Hutchison to accept a lower price. Are they unconstrained, answer no. The buyer says I am not going to accept your price unless you cost-justify it, you have problems in doing that and you do not want to do it anyway so what do you do, you accept a lower price. Is that constrained? No, if you were unconstrained you would not have to worry about whether someone asks you for a cost justification.

PROFESSOR STONEMAN: Mr. Green, do you accept that there might be a position of partial constraint? It is all or nothing, I think, from what you are saying, you are constrained or you are not constrained. Is there such a thing as partial constraint?

MR. GREEN: Yes, I accept a notion of partial constraint but as I said at the outset this is not a binary question, it is not a yes or no, it is a question of fact. One has to analyse quite closely whether the buyer has sufficient market power to curb an excessive price, not just a p[rice increase but one which is excessive and thereby unacceptable. All we say is that Ofcom have a

task to undertake and what this demonstrates is that there were real issues which required investigation as to the extent of BT's ability to curb prices, and whether or not that extent was sufficient to prevent Hutchison setting an excessive price on a persistent basis.

PROFESSOR STONEMAN: What you are saying then is that there might be some. How can we judge whether some is sufficient?

MR. GREEN: You cannot judge, Ofcom can. Ofcom has to get into the minutiae or roll it sleeves up. It may have to supplement an analysis of documents with an analysis of costs and prices, there may be a number of things which it would have to do. It is not an issue in the appeal whether or not BT had CVP, it is an issue whether Ofcom should have investigated the issue. Then we go to the fourth bullet point:

> "If BT reject H3G's proposed interconnect charges and no agreement can be reached commercially, this will result in BT requesting Oftel to intervene and determine what charges should apply. In addition to being a long and costly process for H3G, this will almost certainly result in lower interconnect charges for H3G."

Again, what are they saying? They are saying that if we do not accept a lower rate, BT will make a reference to the dispute resolution procedure to Ofcom and Ofcom may lower our prices, and this will in any event be long and costly. So the threat of regulation here curbed the ability to push prices up to an excessive level.

Finally,

> "If H3G propose final interconnect charges for voice traffic which are significantly higher than the interconnect charges of other MNOs, Oftel may conclude that, in the long term, H3G, could be controlling (along with other MNOs) the market for mobile termination and apply regulation to the interconnect charges for call termination. This has been the experience of the other MNOs, which are now subject to a price cap on their interconnect charges."

Again, the threat of regulation was potent; it is a fact, they did curb their price demands by reference to the threat of regulation.

The next paragraph I do not think is relevant, but then there is the proposal:

> "We propose that H3G continue to investigate the various factors which influence the level of interconnect charges to ensure that the final interconnect charges are consistent with both regulatory and pricing strategy."

So the final charge must be consistent with their perception of regulatory intervention, and we are only talking about the threat here, not even the actuality. The pricing strategy was such matters as you cover costs, must not be unacceptable to BT, do not want to have to cost-justify

it and therefore they keep it at a level which BT accepts and find a comparable price on the BT price scale and see if BT will accept that.

Then they say,

> "These final charges must be implemented in time for soft launch, as they will apply to all calls made to H3G. the timescale for implementing changes to interconnect charges is lengthy, particularly if an entirely new price point is adopted. H3G cannot change these charges quickly if they are later found to be inappropriate."

So those were the factors governing Hutchison and we submit that, manifestly, it is not a reflection of a company that feels it can set prices in an unconstrained manner. The other point on the next page, timescale, provides a highlight between the two different processes within BT for agreeing prices, and there is a statement that BT has advised Hutchison of the lead time for implementing interconnect charge proposals. You will see in that table that for an existing price point it is 55 days, for a new price point it is 125 days. So there is a difference of 70 days which is just between two and three months, which may not be large in the overall scheme of things but was obviously a factor which Hutchison was aware of.

That is the document which BT relies upon as the zenith of its case. This document is extracted and they say it demonstrates that Hutchison must have had supplier power and BT had no countervailing buyer power whatsoever.

The next document I want to show you is Miss Laurent's witness statement. If you would like me to I will take you to it, but as you have probably read it I think I can summarise the points and just give you references to paragraph numbers unless you would like me to deal with it in some other way. Following the BT Agreement, there was no logical or rational basis upon which Hutchison could justify either seeking to renegotiate the price by service a notice to terminate or referring the matter to Ofcom. The practical effect was that Hutchison was locked into a price which was cast for a considerable period of time, and only subject to change in accordance with the contractual mechanisms. BT's buyer power, if it exists, which is a matter for Ofcom to investigate, would exist for a considerable period of time, there is a degree of lock-in by virtue of the agreement. Ofcom of course did not examine either this agreement or the implications of this agreement for the future, and Miss Laurent's evidence (D1, tab 4, pages 60-65), unchallenged evidence, may be summarised as follows, and I will give you a series of propositions and the paragraph numbers from the statement. First of all, the agreement with BT was essential to Hutchison's launch. The negotiations were long and difficult (paragraph 4(a) and, secondly, Hutchison was dependent upon BT for the vast majority of Hutchison's external traffic, and this was an essential product offering for any

mobile operator (also 4(a)). Thirdly, once the agreement was signed it would have been highly distracting, time consuming and costly to be involved in new negotiations or a price review, both of which would have been uncertain in outcome at a time when Hutchison's services had not even been launched and were in the initial post launch phase (also 4(a)). Hutchison also needed BT for other critical services such as international and emergency calling and to have sought to renegotiate with BT immediately after having concluded an agreement would have been damaging to Hutchison's relationship with BT.

The fifth proposition is that it was contrary to Hutchison's rational business interests to signal uncertainty to the marketplace or customers about its ability to deliver incoming and outgoing calls. It therefore made no sense to serve notice to terminate the very agreement which had just been signed after great length and effort (4(d)).

Sixthly, it was extremely unattractive to invite an Oftel price review which was uncertain in terms of duration, process and outcome (4(e)).

The next proposition: Ofcom expressed the view to Hutchison that it did not wish to undertake a price review whilst the Competition Commission was ongoing. Ofcom had said that a price review could take a long time (4(e), 5, 6, 7 and 13 in relation to Vodafone). Indeed, Ofcom in all practical terms appears to have declined to assist in resolving Hutchison's difficulties with BT in the 2001 negotiations (paragraph 5).

Ofcom never suggested that it could or would always grant Hutchison's application until 2004.

THE CHAIRMAN: What was your last point on paragraph 5?

MR. GREEN: For all practical purposes Hutchison considered Ofcom as declining to assist in resolving Hutchison's difficulties with BT because of the time that would be taken and the complexities.

THE CHAIRMAN: Where do you get that out of paragraph 5? You referred to paragraph 5 and I just do not see that at all in paragraph 5.

MR. GREEN: It is a combination of 4(e), 5, 6 and 7. If you look particularly in 7,

"Ofcom's opinion I was told was that resolving a dispute on call termination would be lengthy and did not offer any estimate on how long that resolution would take … considered the dispute was very difficult to resolve because H3G was a new entrant providing a new service, building a network based on new technologies such that the analysis required would be complicated and time-consuming. Instead, Oftel suggested that H3G should attempt to reach a commercial solution with BT. This was also the approach that Oftel adopted in subsequent meetings that I had, as I mention below, and also in other contexts such as issues relating to

national roaming. I am not aware of any suggestion by Oftel during these discussions that at any other time prior to these proceedings that Hutchison could impose a call termination price on BT that BT would simply have to accept because Oftel would force BT to accept that price. I am not aware of any serious suggestion to Hutchison that once having entered into the BT Agreement one potential way forward was to terminate the BT Agreement and renegotiate the charges."

So from Hutchison's perspective it was presented with not an outright refusal but effectively a significant disinclination. That was its position, it was basically told it was too difficult, it was too complicated, you should reach a commercial solution, and that is why you see reflected in the November memorandum that from Hutchison's perspective it had little choice but to either agree BT's price or BT would refer it and then it would be involved in what it perceived then to be a long, costly dispute resolution procedure within Ofcom. That was its position and that was its perception at the time. Ofcom has not sought to challenge the evidence of Miss Laurent.

THE CHAIRMAN: That does not mean to say that we have to give it full weight, does it? We can still give this evidence such weight as we think fit and find it as convincing as we find it when we put it in its actual context.

MR. GREEN: It is an important factor in this case, and it will be on the transcript – I remember Mr. Fowler saying that they accepted that this was Hutchison's view at the time, and it did not wish to say that it was incorrect. Obviously the court can give such weight to it as you see fit, that is plainly correct, but it is relevant that it is not challenged when the relevant party who could challenge it has chosen deliberately not to.

THE CHAIRMAN: Well I can see that there are difficulties in rejecting it on grounds of falsity if it has not been challenged, but there are also questions of weight, and if you wish to rely on what you say Mr. Fowler said, and you may well be right, but I would want to see the extent of that concession on the transcript unless, of course, it is confirmed in due course by one or other of the parties. My recollection of the case management conference which I chaired was that there was some debate as to whether she would be called. It would be inconsistent, I think, with what I recall happening, that he would have said that his clients accepted what she said, whether as being H3G's view or higher. But my recollection may well be wrong, and it is always dangerous as we all know, Mr. Green.

MR. GREEN: I think it is more important that in the context of this case we were going to call her for the first hearing and she was scheduled to come across, and then a deliberate decision was taken not to. So she is available to be cross-examined, she is willing to be cross-examined, we

were willing to put her up and they have chosen not to. That is entitled to be given considerable weight in the thought process which goes into evaluating the evidence.

MR. SCOTT: Just staying with the evidence for a moment, what your client was experiencing was some of the difficulty in actually getting the regulator to take action against a major player like BT, and it may be that that provides a bit of colour in their own realisation about the relationship between regulator and regulated, to which you are giving some attention in relation to other matters.

MR. GREEN: I think one can look at it two ways. If Ofcom was not prepared to act then my client was facing a negotiation where it was either going to have to knuckle under, or it was going to have to force BT (or itself) to try and force Ofcom to make a reference. If Ofcom was willing to act, and it certainly seems from the November document that they were contemplating that the price had to be acceptable to Ofcom, then that may have contemplated that they thought ultimately Ofcom might intervene. Either way it is not the evidence of a company that has an unconstrained ability to set prices. The November document I think is telling because Hutchison was acutely conscious of the fact that it had to find a price that was going to be acceptable from a regulatory perspective, and acceptable to BT.

Miss Laurent's evidence simply goes to the fact that once that price was in place commercial reality took over. Was there an ability or an incentive to charge an excessive price, in other words, try and escape from the contract in the 18 to 24 month period from June 2004? Answer: No, because having spent a lot of time negotiating that contract you would be sending entirely the wrong signals to the market place if you turned around and tried to renegotiate the contract you have just concluded. It just did not make business sense when you have to launch a new product – launching a new product to establish a new network. So from the prospective of either ability or incentive neither exists when you look at it in the light of commercial reality, not certainly in the time frame of this decision, which is a short time frame.

I have been shown the transcript of what Mr. Fowler said. Page 5 of the transcript:

> "MR. FOWLER: We do not challenge those statements as statements of their position. They are simply not relevant to the question of countervailing buying power.
>
> THE CHAIRMAN: What it boils down to is this, are you going to seek to challenge anything that Miss Laurent says in her witness statement?
>
> MR. FOWLER: We are not."

THE CHAIRMAN: Yes, if it goes to their thinking, "we are not in a position to challenge it", if that is their thinking that is their thinking. We do not challenge their statements as statements.

PROFESSOR STONEMAN: Mr. Green, just before we leave this document, I am not sure about timing on this, so you may tell me that it is a matter of timing. On p.62 ----

MR. GREEN: I am sorry, which document?

PROFESSOR STONEMAN: Miss Laurent's statement.

MR. GREEN: Yes.

PROFESSOR STONEMAN: Page 62C, which is marked "business secrets", so we had better not read it out.

MR. GREEN: Which subparagraph?

PROFESSOR STONEMAN: C, in the middle. This is an admission by the regulatory director of H3G that basically it did not have the information and knowledge to do a detailed analysis of HG3 costs or prices.

MR. GREEN: Before or shortly after launch, she said.

PROFESSOR STONEMAN: So where does this fit in, if you are saying that this is what Ofcom should have done----

MR. GREEN: No, she says "before or shortly after".

PROFESSOR STONEMAN: The timing then, this is about 2001, 2002?

MR. GREEN: No, there were 15 months after launch before the June 2004 decision. The launch was in March 2003.

PROFESSOR STONEMAN: So the date on that statement is somewhere in ----

MR. GREEN: Approximately up to March 2003 and shortly thereafter.

PROFESSOR STONEMAN: Whereas Ofcom were supposed to have done their analysis when?

MR. GREEN: By June 2004, 15 months later.

PROFESSOR STONEMAN: By which time we must assume that H3G had all that information, is that right?

MR. GREEN: Well had sufficient information. To put that in context it comes back to a point you made before lunch, or it might have been Mr. Scott, about proportionality. In Brussels the European Commission must conduct a full scale merger analysis, phase 1 within 30 days, phase 2 within 90 days. Now, the European Court has not said "We are afraid it is too complicated, you are not allowed to do these things, four months is just too much, we will let you off the hook". They had 15 months.

PROFESSOR STONEMAN: I do not think that is a valid argument. The argument that H3G did not have the information in March 2003, which is what this says here?

MR. GREEN: Yes.

PROFESSOR STONEMAN: But by June 2004, Ofcom was supposed to have that information and the only place from which it could come would be H3G.

MR. GREEN: It depends what level of costs' data you required, what level of analysis has to be done in order to test whether a particular price is excessive.

PROFESSOR STONEMAN: You told us yesterday that it should be a detailed inspection of H3G and 3G costs and prices.

MR. GREEN: On the contrary I said you can either do a cost based analysis, or if you do not have the costs there are other tests which can be used. I made the point that under the Directives there was a dispute resolution procedure which has to be gone through in four months. By analogy there are admission procedures which have to be done within 30 days or 90 days. You do not have to have a full cost base analysis, there are other things which can be done, which is why I took you to the *Openworld Freeserve* Decision. You have to do what you have to do – it is a best evidence exercise.

PROFESSOR STONEMAN: That is fine, thank you.

MR. GREEN: Conclusions on countervailing buyer power. I go on to propose a series of propositions about a company that has unrestrained seller power. If one asks a series of questions you get some very quick answers which would give you an indication as to whether this was an issue Ofcom should have investigated.

First, is there evidence that a buyer can reject a seller's price? The answer to that is plainly "yes". BT rejected H3G's request for the fm2 price on both an interim and a permanent basis. Plainly Hutchison did not have the ability to impose prices

Secondly, is there evidence that it does not have to justify its prices? If you are unconstrained you generally would not have to justify your prices. We have seen that BT required to justify its prices and Hutchison was aware that it might have to justify its prices. Just for your note the demand by BT to justify the prices is B1, tab 33, p.593.

Thirdly, is there evidence that the seller has relied upon the buyer for speedy and timeous implementation? Yes, there is plenty of information that the supplier had to constrain its desire for a higher price, because it needed to overcome the internal procedures of the purchaser. It was not just a matter of saying "Here is the price", it was a long, complicated procedure internally within BT, and Hutchison needed a degree of speed.

Fourthly, is there evidence that the seller believes it has to negotiate in a negotiating process? Yes, well we see that by reference, for example, to the interim price. There was, on any view, a negotiation, and there was a negotiation whereby Hutchison started with a higher price and was driven to a lower price.

Is there evidence that a seller drafts a business case on a conservative basis? Yes, the November document, p,575, the first bullet point, Hutchison says that its business case was setting a lower price than it was negotiating and that is at least part of the evidence.

PROFESSOR STONEMAN: Could I ask you on that one, it was not quite clear whether the price on the fm2 band was higher than that assumed in the business case for the introductory period, or whether it was higher than that assumed in the business case for the post-introductory period, because when you get three paragraphs on you say that there is no business plan for the post introductory period. I am on p.574 of B1. The point you have just made is in the middle of p.574. You say: "H3G's business plan is built upon lower charges than the fm2 price point". Yes?

MR. GREEN: Yes.

PROFESSOR STONEMAN: Then at the top of p.575 in bullet point 1, you say ----

MR. GREEN: I see the point.

PROFESSOR STONEMAN: "H3G's business plan and network typology are still being developed".

MR. GREEN: I do not know the precise answer to that factual question, I can take instructions if you want me to.

PROFESSOR STONEMAN: Then I cannot take your interpretation of it.

MR. GREEN: What you see is, even if you just take it in stages, for interim the business plan was set at a lower level. It seems that the business plan which is being referred to in the first bullet point on p.575, I would assume it is the same business plan. It is hard to see that there should be one for a month or so's launch, rather than one that which is in the state of development.

PROFESSOR STONEMAN: How can you have a business plan on p.2 but not a business plan on p.3?

MR. GREEN: It only says it is being developed, it does not say it does not exist. It says it is being developed.

PROFESSOR STONEMAN: So the plan that was in existence had built into it already the complete price profile which was somewhat below the fm2 price point.

MR. GREEN: That would appear to be what is stated in the document. All we are trying to work out here is whether there was an issue for an investigation. If the Tribunal was going to get into the nuts and bolts of what was the true position then you would require a great deal more evidence. This is the document BT rely on and they say it shows unequivocally BT did not have countervailing buying power. We say that looking at this document it demonstrates there is a real issue because here you see, for example, as per the next proposition, did the seller

believe it had to set prices which were acceptable to the buyer and the regulators, answer "yes". That is almost an answer in its own right. If you have to do something which your buyer finds acceptable, and which the Regulator also finds acceptable, it is very difficult to say you are not constrained. Those are the two most powerful circling constraints upon you – your buyer and your regulator, and here you are accepting that you must find something acceptable to them.

PROFESSOR STONEMAN: Thank you.

MR. SCOTT: Mr. Green, as I recall the evidence, after the rejection of the *Tetra* rate, which as we understand it is a rate applied to an "un-normal" mobile network operator, your client then went back and suggested the highest possible conventional mobile network operator rate. At that point, as I understand it, BT did not exercise any buyer power to suggest one of the three lower rates?

MR. GREEN: The evidence suggest and is certainly set out in Mr. Westby's statement, and if it is a disputed fact it is not something that really needs to be disputed, that we had proposed to us an existing 2G rate by BT. We ultimately felt that we had to accept that.

MR. SCOTT: But as I understand it, both BT and H3G were faced with a situation in which there were bands fm1, 2, 3, 4 and 5, and there would be that extra delay mentioned over the page on page 576 if FM6 was to be introduced prior to the launch.

MR. GREEN: Yes, that is right.

MR. SCOTT: So the most advantageous position for your client was the One-2-One rate, FM3.

MR. GREEN: We were given the rate BT paid to its own business O2 at the time, we were given the O2 rate. We were simply given the existing 2G rate which was equivalent to the O2 rate.

MR. SCOTT: You were given the highest one, the O2 rate was the lowest one. If BT had been exercising buyer power they could have pushed H3G right down to the bottom. They did not do that, instead H3G got the top rate.

MR. GREEN: We got the 2G rate which they were prepared to pay for the other MNOs and we are a 3G operator. Of course, we were asking for something which reflected our high level of costs.

THE CHAIRMAN: You got one of the 2G rates.

MR. GREEN: We got one of the 2G rates.

THE CHAIRMAN: Which you proposed, not BT.

MR. GREEN: I think we would say that BT proposed it.

MR. SCOTT: According to the evidence you proposed it.

MR. GREEN: I think there is a dispute over that, but I do not think it really matters.

THE CHAIRMAN: Mr. Westby, who is your client, says that you wrote to BT (paragraph 39) to set out a counter-proposal to set the rates to the same level as those of One-2-One, so your own witness says that you proposed the rate. That is paragraph 39 of Westby (1).

MR. GREEN: The suggestion that we adopt an existing 2G operator's rate was put to us by BT.

THE CHAIRMAN: Yes, and you then proposed ---

MR. GREEN: Yes. It is page 590 of B1.

"They suggested that H3G adopt an existing mobile operator's termination charges, specifically those of Cellnet."

MR. SCOTT: So we are not in a situation where BT made a counter-proposal. In other words, BT, as far as we are able to see from the evidence, made no attempt to force H3G down to the bottom of the range of conventional 2G MNOs.

MR. GREEN: They told us that would give us a 2G rate, that is what they proposed. They proposed to us a 2G rate, they said Cellnet, their own subsidiary – as you may be aware there was a lot of margin-squeeze allegations being levelled at the time, right or wrong, but from the outsider's point of view Hutchison said right, it is a 2G rate we will go for the best rate.

MR. SCOTT: Yes.

MR. GREEN: We were a 3G operator, we wanted a price which would reflect the 3G cost.

MR. SCOTT: Mr. Green, hold on. In the regulatory framework – if you are referring to the regulatory framework, earlier on you took us to Article 8. Article 8, which is part of the framework within which we are operating, speaks of technological neutrality ---

MR. GREEN: Not between 2G and 3G, manifestly not. The Government has required everybody to move to 3G and has set up a £20 billion plus auction requiring people to go to 3G.

MR. SCOTT: May I remind you of the hierarchy, Mr. Green. We are talking here about an EU document which is talking about technological neutrality. If you then go down a bit you come to innovation and investment.

MR. GREEN: I can deal with that because there is other legislation dealing with the introduction of 3G called the UNTS directive and that actually deals specifically with the question of the introduction of new technology, and there is quite a long history to the introduction of 3G, in particular that it is being actually promoted, and there is specific legislation brought in at the Community level to introduce 3G. If it is then said that there should be neutrality between 2G and 3G then one is going to beg the question about a considerable body of EC legislation, particularly on 3G.

MR. SCOTT: Let us just ask ourselves in relation to what are we talking about technological neutrality? We are talking about technological neutrality in relation to a finding of significant

market power, and when we are considering significant market power over wholesale voice termination, in which I think we have all agreed the wholesale voice termination is wholesale voice termination regardless of the technology deployed to implement it ---

MR. GREEN: With respect, I cannot agree with that for three reasons. First of all, this is not Ofcom's reasoning in the Decision, manifestly it is not. Secondly, Ofcom says 2G and 3G are different, and I have taken you to the paragraphs in the decision which demonstrate that, and, frankly, this is a matter which Ofcom is presently reviewing, the 3G costs, to see whether or not – they may come to this conclusion in a year's time, who knows, but it is not something which can form the basis of my challenge to this decision which is that Ofcom made an error of law about countervailing buyer power, it did not investigate what therefore lay behind in the facts, and all I have sought to do is to demonstrate to you that there was a real issue which required investigation. The points you raise may be very valid points and they may have been the sorts of things Ofcom would have reviewed and ruled upon had it done the exercise, but it did not.

MR. SCOTT: In that case we may need to move on to an issue to which we were going to come later on, and that is the relationship between our finding of what Ofcom did and any order we make in relation to what Ofcom should subsequently do.

MR. GREEN: Yes.

MR. SCOTT: This matter may become relevant in relation to the second as distinct from the first.

MR. GREEN: I understand that and I hope I have not been offensive in the way I have tried to point out that the decision is narrow, but I am very conscious that there are many, many questions which are begged in the documents. That perhaps is our fault for opening Pandora's Box, and we certainly are responsible for Mickle and Myers in some degree at least, and there are many questions which would have to be raised and discussed and debated within Ofcom between my client, and they are very serious issues. The point raised yesterday about 2G and 3G costs – which is the relevant benchmark – is a serious issue which will have to be aired in the future. We have to challenge a specific decision, which may be a narrow and technical decision and we are going to have to meet these points in the future, but if you are with us on technical grounds – and lot of our Notice of appeal raises criticism of the consistency or logic which would simply result I think in a remittal – there may well be big issues as to what is remitted back. That is why I hinted yesterday that one way to deal with this is if you were with us in principle then we would need to consider the judgment and consider with you what would be the nature of any direction, what guidance the Tribunal could give to Ofcom as to the things it should or need not examine in a future investigation. That is something that no doubt my

learned friends would have a view on as a sensible, mechanical way forward. I have been trying to suggest to the Tribunal what is the scope of the appeal and it is quite a narrow appeal, but I have obviously got to show you that there is a serious issue here in relation to CVP. We say at the very least there is that, it is not something you have to decide.

MR. SCOTT: The context of my remarks was simply having to do with the fact that what BT appeared to be saying was you are providing a fixed-to-mobile call, we have a set of fixed-to-mobile tariffs, they suggested the lowest one, your client came back with the highest one and BT did not exercise whatever buyer power they had to push your client back down.

MR. GREEN: we do not know, for example, whether BT was not also concerned that if it went to Ofcom, Ofcom might give us credit for being a 3G operator and give us a higher price. In a negotiation what one is seeing is a negotiation, you do not have all the evidence and nor do we, you have only seen on our side a portion of it. We wanted a higher price to reflect what we perceive to be higher costs, but we did not get that. Does this demonstrate unconstrained pricing? Answer, we submit, no. It is a serious issue which Ofcom should have investigated.

There is only one other thing that I want to say and then I think I am just going to sit down. That is this, that the negotiations and evidence you have seen are evidence which would have durable effect, at least in some considerable measure. If we assume another negotiation between BT and Hutchison in a few years time, what factors out of these documents would have currency as matters move forward? What will Ofcom have to review now? It would obviously be conscious of the fact that BT was conscious of consumers' reactions. That seems to be an on-going matter, or at least it might be. Ofcom would also take account of the fact that as Hutchison developed it was still a much smaller network than BT and would be concerned about speed and urgency, though not for the same reasons as it was in 2001, but as Miss Laurent says she cannot possibly do without a interconnect agreement with BT. BT's own internal procedures would remain a constant; BT's own contract – the BT Agreement originated within BT, subject to industry consultation, but that means that there cannot be supplier power reflected in the contract terms, it is an industry-negotiated contract.

MR. SCOTT: Just pausing on that, as I understand it the reference interconnect offer is a regulatory requirement under the framework and it remains a regulatory requirement to date?

MR. GREEN: The obligation to interconnect?

MR. SCOTT: No, BT as a dominant operator is obliged to provide what is called a reference interconnect offer, and that is what is reflected.

MR. GREEN: Yes.

MR. SCOTT: So it is a regulatory requirement.

MR. GREEN: Absolutely. It may not mean that BT has buyer power, but from the supplier you cannot enforce your own terms on BT because it is an industry norm. Is Hutchison aware of Ofcom? They were in 2001 and they of course still are aware of Ofcom and Ofcom's regulatory powers. Are they aware that BT has the ability to simply reject its prices? They did in the past, BT has given evidence to the Competition Commission and gives evidence in MR. Locker's witness statement that they take account of consumers and they will not just accept any old price. There are many factors which one sees which would have on-going currency. Again, it is dangerous to speculate about how they would play out in a future negotiation, but they are in fact relevant. That really is the final piece in the jigsaw. We submit Ofcom was in error in its analysis in the Decision, which is too simplistic and made the wrong assumptions, it did not carry out the proper analysis that it should have carried out, that was something which it should have done and these are material because not only were they relevant at the time but these are the sorts of considerations which may operate in the future again. I dare not say I have finished, lest you have any further questions.

MR. SCOTT: I am afraid there are, Mr. Green. You spent some time this afternoon and indeed this morning dealing with whether there was countervailing buyer power in the negotiations and complaining that there were lots of things in there which Ofcom ought to have taken into account. On one reading of Ofcom's Decision – perhaps assume that in your favour and not consider that because they say in paragraph 3.31 of the Decision at page 22 of the internal numbering ---

MR. GREEN: Page 1102 of the bundle.

MR. SCOTT: Thank you. Having set out delays and weakening of bargaining position in 3.30, the Decision says:

> "It is possible that during the initial interconnection negotiation between BT and '3', '3''s urgency to launch services was a relevant factor in the relevant bargaining positions of each party."

It is dealing there with whether or not the situation was special because of your urgency.

MR. GREEN: Yes, that is right.

MR. SCOTT: But then it goes on to say

> "However, what we are interested in is the future."

MR. GREEN: Yes.

MR. SCOTT: It looks to me, I confess, that what Ofcom were doing was parking any consideration – or perhaps putting on hold would be a more appropriate metaphor in a telecoms case – any consideration of what was going on at the time of the negotiation and looking to the future. If

that is what went on then it does not really matter. I hesitate to say this about any of your submissions, Mr. Green, but what you have been submitting does not really matter because it was dealing with an irrelevant period, and what one should be addressing is what they did think of or what they should have thought of in relation to the future period, that is to say from their review onwards.

MR. GREEN: I agree with that, that is what I have been trying to show, but the only evidence I have in order to demonstrate what they should have done was, in a sense, the past. What they seem to say is that in the future is "yes", there will be interconnection obligation and no, there will be no urgency – or not such urgency. They go from that, which is I think what you deduce from 3.31 and the first part of 3.32, you go from that to their conclusion and it would be difficult to argue '3' could not set excessive charges. So BT has an interconnect obligation, we are no longer constrained by urgency, ergo we can set excessive charges, to which I say well, if you look at the 2001 negotiation when there was an interconnect obligation it was much, much more complicated than that. It was much more complicated than just urgency.

THE CHAIRMAN: So you are saying that the sort of things which you have drawn to our attention as operating at the time are the sort of things which may still operate now which require some thought.

MR. GREEN: Exactly, that is really the final thing I was talking about just a few moments ago. That is the only evidence we really have. That is your test laboratory - the only two factors which are relevant, interconnection obligation and urgency. The negotiations make that very clear, that that is not so, there are many other factors, it is much more complicated and that is why they needed to go on and examine this much more complicated situation.

THE CHAIRMAN: Right, and my second question is this: there has gone into our bundles the Commission Decision of 17th May about the Reg.TP, to which passing reference has been made from time to time, I think, by Mr. Scott. One can see the approach of the Commission there and what it says about regulation and t he impact of regulation, a greenfield approach, or a partial Greenfield approach. Did you want to say anything about that?

MR. GREEN: Given it was so recent I was going to wait and see what Ofcom said about it and deal with it in reply.

THE CHAIRMAN: I am sure we would be assisted by anything you want to say about that, but I cannot make you say anything about it obviously. We can leave it until then so long as you are going to cover it.

MR. GREEN: Yes, I am very conscious of the time, and I think ----

THE CHAIRMAN: I would not worry about that.

MR. GREEN: If that is acceptable I would prefer, I think, to deal with it in reply.
THE CHAIRMAN: Thank you very much, Mr. Green.
MR. GREEN: We promised to hand up what we described as our "technical note", and I hope by handing it up now I will not even get a question about it.
THE CHAIRMAN: There may be no such luck, actually, Mr. Green. We are going to take a short break so we can gather our thoughts, and I think Professor Stoneman will in fact have a question for you after that.
PROFESSOR STONEMAN: Unless you want to do it before?
THE CHAIRMAN: Well do it before.
PROFESSOR STONEMAN: That would be the neat and tidy way. I want to tidy up where we are now and get back to our friendly definition of significant market power, "to an appreciable extent" is the phrase within that definition, "being able to act to an appreciable extent independent of…" Are you basically arguing now that because of what we observe in the dealings between Hutchison and BT that there is no extent to which H3G can act independent of its customers?
MR. GREEN: It would be foolish to say there was "no extent", it is a question of degree, but there is sufficient buyer power to constrain an excessive supplier price, and it is a question of fact and degree.
PROFESSOR STONEMAN: That is all I want, thank you.
MR. GREEN: There are many, many points across the barometer between those two extremes, but that is what we say Ofcom is there to do.
MR. SCOTT: Can I thank you for the note. It would seem sensible to read the note into the record in the sense that it does explain the answer to my question. The problem, as I understand it being, that because the individual handset listens out for a network, and once it has found a network attaches itself to that network, and that network might be the H3G network, or might be the O2 network. O2 would not know at any stage what had happened if a telephone had associated itself with the H3G network.
MR. GREEN: Nor would BT.
MR. SCOTT: Nor would BT, yes.
THE CHAIRMAN: 3.15.

(Short break)

THE CHAIRMAN: Mr. Roth.
MR. ROTH: May I begin where the Tribunal began in your first question to Mr. Green at the outset, the meaning of SMP. The concept of SMP clearly has to be seen in the context of the EC

regime for electronic communications where it is set out. Under that regime if a market is not effectively competitive then an undertaking has SMP. In other words, the absence of an effectively competitive market and the existence of an undertaking with SMP are two sides of the same coin. That is clear from the Framework Directive, which is bundle E1, tab 9, p.152, Article 16(4):

> "Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14."

The EC Guidelines, the same bundle at tab 11, p.193, at para.19:

> "In respect of each of these relevant markets, NRAs will assess whether the competition is effective. A finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market."

Also in these guidelines para.112, p.206, p.112:

> "As explained in Section 1, the notion of effective competition means that there is no undertaking with dominance on the relevant market. In other words, a finding that a relevant market is effectively competitive is, in effect, a determination that there is neither single nor joint dominance on that market. Conversely a finding that a relevant market is not effectively competitive is a determination that there is single or joint dominance on that market."

This may, perhaps, have some bearing on the point, if I may respectfully say so, very apposite observation made by Professor Stoneman after lunch on Monday, that a competitive price is by definition the price that is charged in a competitive market. That I apprehend is rather basic first year economics.

SMP is defined as being equivalent to dominance – as that term has been explained in the case law of the European court. That is of course the Framework Directive, Article 14(2), same bundle E1, tab 9, p.151. It has been read, of course before:

> "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say apposition of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

Recital 25 of this Directive, at p.143:

"For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities."

That is, of course, a reference to Article 82 and, as Mr. Green said in answer to Mr. Scott, on Monday afternoon, SMP under the Directives is 'linked squarely to Article 82", and to be interpreted and applied in accordance with the case law under Article 82. That is for the record, transcript p.45 lines 23-24, and see also p.22 lines 13-14. I said in answer to Mr. Scott I see in the transcript all the questions seem to have been put as coming from the Chairman, but it was in fact Mr. Scott who asked the question.

Here the designation is to be based on a forward looking structural evaluation of the market, obviously based on existing market conditions, because that is the evidence that is available, but looking at likely development in the market in the future. That is made clear in the Guidelines, para.19. I do not ask you to turn them up, that is a reference.

So one turns to the case law of the European Courts. Under the case law of the European Court of Justice a highly significant factor in determining dominance is market share. In particular a very large market share raises a presumption of dominance. That is so fundamental, but there is, with great respect, a danger of overlooking some of those fundamentals of the case law of the Court of Justice in the way the argument ahs been addressed to this Tribunal.

So can I ask you, please, to take bundle H1? In bundle H1 at tab 2, *Hoffman-La Roche*, one of the landmark cases under what is now Article 82, then of course Article 86, a case where the abuse in question was tying and exclusive purchasing with regard to vitamins, and if you go in the stamped numbering to page 206, paragraph 39, the last paragraph:

"The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.

A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.

Even though each group of vitamins [the subject-matter of the case] constitutes a separate market, the different markets, as has emerged from the examination of their structure, nevertheless have a sufficient number of features in common to make it possible for the same criteria to be applied to them as far as concerns the importance of the market sharers for the purpose of determining whether there is a dominant position or not.

Furthermore, although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.

An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner [echoes of course of the situation here for H3G voice termination] and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position."

Then *AKZO* at tab 6 of this bundle, a case from 1991 of predatory pricing, and at page 529, paragraphs 60 to 61 in the judgment,

> "With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position [reference to the judgment in *Hoffman-La Roche*]. That is the situation where there is a market share of 50% such as that found to exist in this case.

61 Moreover, the Commission rightly pointed out that other factors confirmed AKZO's predominance in the market. In addition to the fact that AKZO regards itself as the world leader in the peroxides markets, it should be observed that, as AKZO itself admits, it has the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of their competitors with regard to safety and toxicology.

62 The pleas put forward by AKZO in order to deny that it had a dominant position within the organic peroxides market as a whole must therefore be rejected."

So it is a presumption, not conclusive, but it is then a question whether that evidential presumption has been rebutted. Again, one can see that if one turns back to *Hoffmann-La Roche* at tab 2 and goes in the judgment now to page 217. I pick it up first at paragraph 68, the summary:

"It follows from the foregoing that, as far as concerns the groups of vitamins A, B2, B6, C, E and H, all the constituent elements of a dominant position were present whereas the existence of such a position in the case of vitamin B3 has not been established."

If you cast your eye up the previous paragraph you see vitamin H, its 100% market share and then 93%, so a de facto monopoly, that was the basis for the summary. Then section 5 goes on to say:

"It is however necessary to consider whether the preceding conclusions are belied by the applicant's behaviour on the relevant markets, which in its view shows that there was not only lively competition but also that such competition brought pressure to bear on it.

On this point it places special reliance on the fact that the prices of the various groups of vitamins continually fell and also that in certain member states its market shares decreased."

Then it also refers to information contained in various internal documents and so on.

Paragraph 70:

> "The Court has already held inter alia in its judgment of 14 February 1978 in [the *United Brands* case] that even the existence of lively competition on a particular market does not rule out the possibility that [there] is a dominant position on this market since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering any detrimental effects from such behaviour.

"However, the fact that an undertaking is compelled by the pressure of its competitors' price reductions to lower its own prices is in general incompatible with that independent conduct which is the hallmark of a dominant position."

The court then looks at the evidence produced by Hoffmann-La Roche, seeking to show that it was not therefore dominant, and concludes at paragraph 78 on page 220:

> "Although the figures and documents produced show that price variations, which were sometimes considerable, may be recorded on the markets for all the different vitamins, these variations appear in certain cases to bear no relation to the existence of competition, while in other cases it is usually Roche which at least plays the part of the price leader.

Furthermore, the documents products taken as a whole disclose the existence of a first-rate commercial and marketing organisation through which it is possible, not only to carry out a systematic survey of the markets but also to detect the slightest intention on the part of any possible competitor to enter the market for one or other of the products, and which is capable not only of reacting instantaneously but also of forestalling such endeavours by taking appropriate steps.

All these considerations show that the price variations alleged and in fact confirmed do not prove that there was any competitive pressure which was likely to jeopardise the marked degree of independence enjoyed by Roche as far as concerns its market strategy and that such variations are not of such a kind as to invalidate the findings that there is a dominant position

based, in the case of each group of vitamins, on the combination of the market shares and the other factors used."

This is not a reversal of the burden of proof, it is saying that market share establishes an evidential presumption and other factors must be looked at to see if that is displaced. Nothing in the *Tetra Laval* judgment, to which I shall come in due course, has changed that position, neither expressly nor by implication, and *Tetra Laval* has most certainly not cast aside these landmark cases from the Court if Justice from the late 1970s to the 1980s and the early 1990s. We absolutely reject Mr. Green's submission that the burden of the regulator to establish SMP under these directives is all the greater than to establish dominance under Article 82 because, he said, SMP carries negative consequences for the company concerned. (Transcript, Monday, page 33, lines 26-30).

There is no authority at all for that proposition, and indeed it is well settled that dominance for the purpose of Article 82 also carries very serious consequences for the company concerned. That is noted by the Court of First Instance in the *Tetra Laval* case itself, if I could ask you to look briefly in bundle H2 at tab 13, page 195, the bottom of the page:

> "It should be recalled that, according to settled case-law, where an undertaking is in a dominant position it is in consequence obliged, where appropriate, to modify its conduct so as not to impair effective competition on the market regardless of whether the Commission has adopted a decision to that effect [reference to *Michelin,* to the *Tetra Pak* Article 82 case and to the case of *Coca-Cola*]."

For example, certain kinds of pricing conduct are prohibited for a dominant company but they are available to a company that is not dominant, and a dominant company, as any dominant company is well aware, is constrained in the way it can behave in the market – indeed, often much more constrained that under, in this case, the very light SMP obligation imposed.

MR. SCOTT: Mr. Roth, just to clarify that point, what you are suggesting here is that dominance leads to behaviour, not behaviour leads to dominance. Let me re-express that. What the court is saying is that if you are in a dominant position you are obliged to modify your conduct, whereas as we understand something of what has been said by your learned friend, the dominance and the behaviour are closely associated.

MR. ROTH: I think he has been saying that and I shall come to that. I was actually meeting a slightly more limited point, namely that there is somehow a higher standard of proof, a higher burden on the regulator to establish SMP than to establish dominance for Article 82, and we say that is not right. The only reason given for that – no authority quoted – was SMP has

serious consequences; I am saying so does Article 82 have serious consequences so there is absolutely no basis for saying a different burden. The conduct point, can I come back to that because I think that is a slightly different point.

He does lead into my next point which is that we submit it is not necessary to establish or even to consider whether an undertaking's prices are excessive in order to determine dominance, nor is it necessary to conduct an analysis of the undertaking's costs and whether those costs are fairly related to its prices. You will recall that that was a fundamental part of Mr. Green's submission and one can see that from so many of these landmark cases in the Community courts. *United Brands*, back in bundle H1 – but if you could keep bundle H2 out if you have somewhere to put it – at tab 1. This is a case, as you will see from the first page, the sub-heading is "Chiquita Bananas", it is a bananas case, all about pricing of bananas. It was not only pricing, the abuses here were price discrimination, excessive prices – this is one of the very few excessive price cases – and refusal to supply. Those were the three abuses that they were accused of, but of course the first question is whether they were dominant, and if one goes to page 78, paragraph 125, one sees the argument put by United Brands:

"However UBC takes into account the losses which its banana division made from 1971 to 1976 – whereas during this period its competitors made profits – for the purpose of inferring that, since dominance is in essence the power to fix prices, making losses is inconsistent with the existence of a dominant position.

An undertaking's economic strength is not measured by its profitability; a reduced profit margin or even losses for a time are not incompatible with a dominant position, just as large profits may be compatible with a situation where there is effective competition.

The fact that UBC's profitability is for a time moderate or non-existent must be considered in the light of the whole of its operations.

The finding that, whatever losses UBC may make, the customers continue to buy more goods from UBC which is the dearest vendor, is more significant and this fact is a particular feature of the dominant position and its verification is determinative in this case.

The cumulative effect of all the advantages enjoyed by UBC thus ensures that it has a dominant position on the relevant market."

The excessive pricing which the Court goes on to look at under the heading of "Abuse", is normally taken into account if at all in the prior determination as to whether or not UBC was dominant.

THE CHAIRMAN: Before you move on, you were reading this case to establish the proposition that it is not necessary to establish whether prices are excessive in order to determine dominance,

the passage you read refers to profitability which is not prices. It says we are not interested in profitability, but that does not I think itself quite make good your point, does it?

MR. ROTH: The other part of my point was whether costs are reasonably related to prices.

THE CHAIRMAN: It does not quite make good that point either, it says what we have seen here does not deflect us from our previous view. Is your point effectively that if you go back and read the other pages – and there are a lot of them which we have not read – you will not find much or anything about prices or costs there?

MR. ROTH: That is correct. This is the closest you get to it; I fully accept your point, sir, clearly, it is not saying in terms here excessive prices, it is not necessary for determining dominance.

Under tab 2 is the *Hoffmann-La Roche* case. I have read you on page 206 the paragraphs about market share and the presumption, but I did not read paragraph 42:

"The contested decision has mentioned besides the market shares a number of other factors which together with Roche's market shares would secure for it in certain circumstances, a dominant position."

Perhaps I need not read them out, but if you just cast your eye down sub-paragraph (a) to (f) you will see no reference there to excessive prices or costs in relation to prices.

Then *Michelin*, the next tab, 3. *Michelin* was a case where the abuse was to do with quantity discounts and tying of products, and in the *Michelin* case at p.338, paras.54 to 59, under the heading "The other criteria and evidence proving or disproving the existence of a dominant position" para.54:

> "It [Michelin] also claims that the Commission took no account of a number of evidential factors which were incompatible with the existence of a dominant position. For instance, dealers' net margins on Michelin tyres and competing tyres are comparable and the cost per mile of Michelin tyres is the most favourable for users. Since 1979 Michelin NV has made a loss. As its production capacity is insufficient, its competitors, which are also financially strong and more diversified than the Michelin group can at any moment replace the quantities which it supplies. Lastly, because users of heavy-vehicle tyres re experienced trade buyers they have the ability to act as a counter-poise to the tyre manufacturers."
>
> "55 In reply to those arguments it should first be observed that in order to assess the relative economic strength of Michelin NV and its competitors on the Netherlands market the advantages which those undertakings may derive from belonging to groups of undertakings operating throughout Europe or even the world must be taken into consideration. Amongst those advantages the lead which the Michelin group has over

its competitors in the matters of investment and research and the special extent of its range of products, to which the Commission referred in its decision, haven not been denied. In fact in the case of certain types of tyre the Michelin group is the only supplier on the market to offer them in its range.

"56 The situation ensures that on the Netherlands market a large number of users of heavy-vehicle tyres have a strong preference for Michelin tyres. As the purchase of tyres represents a considerable investment for a transport undertaking and since much time is required in order to ascertain in practice the cost-effectiveness of a type or brand of tyre, Michelin NV therefore enjoys a position which renders it largely immune to competition. As a result, a dealer established in the Netherlands normally cannot afford not to sell Michelin tyres.

"57 It is not possible to uphold the objections made against those arguments by Michelin NV, supported on this point by the French Government, that Michelin NV is thus penalised for the quality of its products and services. A finding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.

"58 Due weight must also be attached to the importance of Michelin NV's network of commercial representatives, which gives it direct access to tyre users at all times. Michelin NV has not disputed the fact that in absolute terms its network is considerably larger than those of its competitors or challenged the description, in the decision at issue, of the services performed by its network whose efficiency and quality of services are unquestioned. The direct access to users and the standard of service which the network can give them enables Michelin NV to maintain and strengthen its position on the market and to protect itself more effectively against competition.

"59 As regards the additional criteria and evidence to which Michelin NV refers in order to disprove the existence of a dominant position, it must be observed that temporary unprofitability or even losses are not inconsistent with a dominant position. By the same token, the fact that the prices charged by Michelin NV do not constitute an abuse and are not even particularly high does not justify the conclusion that a dominant position does not exist."

Of course, we emphasise that sentence.

"Finally, neither the size, financial strength and degree of diversification of Michelin NV's competitors at world level nor the counterpoise arising from the fact that buyers of heavy-vehicle tyres are experienced trade users are such as to deprive Michelin NV of its privileged position on the Netherlands market."

Then there is *Akzo* which is at tab 6. I do not think I need to read *Akzo* to the Tribunal. *Akzo*, the abuse, was predatory pricing, in other words charging below cost with a view of driving out competitors, so self-evidently there was no evidence that *Akzo's* prices were excessively high. The whole basis of the case was the opposite. They were held to be abusive. Those are all cases in the Court of Justice. One case in the Court of First Instance, which is at the last tab, tab 11, of this bundle, at p.797, the case of *AAMS* and going to 801, you will see from para.1 that this was a decision by the Commission finding that the Italian body, AAMS, state body, had abused its dominant position and engaged in the production, import/export wholesale distribution of manufactured tobaccos. That is what AAMS did, and the abuse here was abusive contract terms. In the Judgment at p.824, paras. 51 to 53.

"51 It is settled case law that very large market shares are in themselves and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for – without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods that freedom of action which is the special feature of a dominant position."

That is a straight quote, as you will recall, from *Hoffman-La Roche*.

"Moreover, a dominant position is a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

And that is a quote from *United Brands*, which is of course taken over in the Directives here – that is the source. Then the judgment goes on:

"52 In the present case, AAMS does not dispute either that its share of the Italian market for the wholesale distribution of cigarettes was 100 %..."

So this is one of the very few cases of 100 market share.

> " … or that it preserved that share in its entirety, despite the fact that at law foreign firms were able either to set up their own distribution network, or to entrust the wholesale distribution of their cigarettes to traders operating bonded warehouses. Further, AAMS's argument alleging that the creation by foreign firms of their own distribution networks could be justified from an economic point of view cannot be accepted, the financial difficulties that foreign firms (other than Philip Morris), whose total share of the Italian cigarette market is less than 10%, would have encountered when setting up an independent distribution network and AAMS's ability to decline the requests of those firms for amendments to be made to the distribution agreement are factors which may be properly be taken into account tin the finding of a dominant position."

In other words, barriers to entry.

> "Furthermore, AAMS did not deny at the hearing that retailers are in any event obliged *de facto* to obtain their supplies from AAMS's warehouse outlets."

In other words, compulsory trading partner.

> "53 It follows that the Commission did not make a manifest error of assessment when it found that AAMS held a dominant position on the Italian market for the wholesale distribution of cigarettes."

No reference anywhere to costs, prices, or any relation between the two. When an undertaking is alleged to have abused a dominant position the conduct constituting the abuse may be, but need not be, considered as supporting the finding of dominance. There is nothing wrong with looking at the conduct and saying "Does it support it?" but it is not necessary to do so, because dominance is a concept that is completely distinct from abuse. That was made, if I may say so, very clear by this Tribunal in its comprehensive Judgment in the *Napp* case, and that is bundle H2 at tab 12, stamped p.37, paras. 153 to 165. I can start it at 153, "Dominant Position".

> "Napp argues in the notice of appeal that it is not dominant in any relevant market because the PPRS is effective to prevent Napp from being able to abuse any dominance it might otherwise enjoy at least in respect of the abuses alleged in this case."

Pausing there, the "PPRS", as the Tribunal may well know is the pharmaceutical price regulation scheme, which is a scheme between the pharmaceutical industry and the NHS to stop the pharmaceutical companies charging excessive prices, and one of the abuses alleged against Napp was excessive pricing.

"Napp argues, in particular, that the PPRS prevents Napp from engaging in excessive pricing. In addition, the Department of Health could regulate the offering, by PPRS companies, of discounts against the NHS list prices. The fact that the Department does not choose to do so is irrelevant.

> "154 The Director submits that Napp is dominant by virtue of its market shares alone, which are in excess of 90%. That dominance is reinforced by the barriers to entry referred to in the Decision. The PPRS does not go to rebut dominance at all. That scheme controls the overall profit that a supplier of branded pharmaceuticals may earn from the NHS but is not directed at anti-competitive abuse. It does not affect discounting to hospitals. Napp's argument confuses the question of dominance with the separate question of whether, in the light of the PPRS Napp's prices in the community segment are an abuse of its dominant position."

Then the Tribunal says "We agree with the submissions of the Director."

The Tribunal sets out quotations from the *Hoffman-La Roche* case, refers at the top of the next page to the *Akzo* case, and the passage that I have read, and continues in para.159:

> "In the present case Napp's overall market share in the relevant market has been in excess of 90 per cent for many years. It is currently around 96 per cent, and over 90 per cent, in the community and hospital segments of the market respectively. In addition, various further factors reinforce barriers to entry and Napp's 'first mover advantage', as pointed out in paras 102-108 of the Decision. None of these facts are contested by Napp.
>
> "160 Applying the concept of a dominant position in Community law to the Chapter II prohibition, which we are required to do by s 60 of the Competition Act, the foregoing considerations suffice, in our view, to establish that Napp enjoys a dominant position within the meaning of s18(1) of the Act, without it being necessary at this stage of the analysis to rely on the further matters to which the Director refers at para.114-118 of the Decision.

There is then some discussion of the PPRS, perhaps I can go to the facing page, para.164:

> "In our view, the case law on the existence of a dominant position, cited above, directs our attention to the competitive situation in the market place, and in particular to whether the allegedly dominant undertaking is able to 'prevent effective competition being maintained on the relevant market'. As seen from the foregoing the PPRS does not have a direct effect on Napp's freedom to conduct itself as it wishes in the market for oral sustained release morphine…"

which was the product at issue, called MST.

> "As regards the issue of dominance, the effects of the PPRS are at most remote and indirect, in that the scheme might in some circumstances constrain Napp from increasing the price of MST (an issue not relevant here) and may similarly constrain Napp's profits on its range of NHS branded medicines taken as a whole, as distinct from MST in particular. In our view neither of those indirect effects go to the threshold question of whether Nap has the degree of power in the market place necessary to bring the Chapter II prohibition potentially into play.
>
> "165 The fact that the initial price set for MST in 1980 *may* have been constrained by the PPRS and has been reduced since in the context of across the board reductions agreed under successive schemes, could perhaps, be relevant to the Director's allegation that the community price for MST was excessively high, as could, perhaps, Napp's argument that the portfolio based approach of the PPRS is to be preferred when it comes to determining whether the price of MST is excessive for the purposes of the Chapter II prohibition. But those arguments which in any event we reject at paras 406 et seq below, go to the question of *abuse* and not to the question of the existence of the dominant position."

That passage I will turn to in the context of role of regulation, when one comes to look at dominance.

MR. SCOTT: It is the word 'prior' question of existence.

MR. ROTH: Not to the prior question – sorry, I missed out "prior", I am so sorry.

"…not to the prior question of the dominant position", that is important, indeed.

MR. SCOTT: The reason it is important it has to do with this, is it a one stage or a two stage analysis?

MR. ROTH: Absolutely, and we say it is clearly a two stage analysis.

PROFESSOR STONEMAN: Before you go on, you are drawing from this that it is a two stage analysis. Are you actually going to say anything about whether this also means whether regulation should be involved in the definition of "dominant position" or is that to come?

MR. ROTH: That is to come.

PROFESSOR STONEMAN: All right.

MR. ROTH: Yes, indeed, I will return to that. We say it is a two stage analysis, because of course many undertakings are dominant in various markets, without, thankfully, committing any abuse, whether by excessive pricing or otherwise. The world would be a much less happy place if every dominant company was going around abusing its position. It would be a still

less happy place if they were all abusing their positions by excessive pricing. The great majority are not. But we accept that conduct can be evidence of market power. It is not irrelevant in that sense that one cannot look at it, and that is seen from the OFT's new Guidelines on market power, which we have supplied to the Tribunal in a relatively small – everything is relative – supplementary bundle H4, at tab 5. I say "small" the bundle is as big as all the others, but the content is a bit slimmer. At tab 5, and this is the 2004 Guideline of the Office of Fair Trading on Assessment and Market Power, and if you go to tab 5, p.25, which is one of the last pages in the bundle, paragraph 6.5, p.25 in the document. You see the OFT says:

> "Evidence on behaviour and performance"
>
> 6.5 An undertaking's conduct in a market or its financial performance may provide evidence that it possesses market power. Depending on other available evidence it might, for example, be reasonable to infer that an undertaking possesses market power from evidence that it has:
>
> * set prices consistently above an appropriate measure of cost, or
> * persistently earned an excessive rate of profit.
>
> 6.6 High prices or profits alone are not sufficient proof that an undertaking has market power: high profits may represent a return on previous innovation, or result from changing demand conditions. As such, they may be consistent with a competitive market, where undertakings are able to take advantage of profitable opportunities when they exist. However, persistent significantly high returns, relative to those which would prevail in a competitive market of similar risk and rate of innovation, may suggest that market power does exist. This would be especially so if those high returns did not stimulate new entry or innovation."

We fully accept from what the OFT sets out that it can be supporting evidence, but it is not necessary evidence, and equally the lack of excessive prices does not disprove or displace a finding of dominance or a significant market power.

So the contention that because Ofcom did not find excessive pricing by H3G, or carry out a cost analysis of H3G's costs Ofcom therefore did not do a proper job, or did not do its homework, or the various opprobrious comments that Mr. Green levelled at my clients in his submissions in assessing whether or not they were dominant, that submission is fundamentally misconceived.

The fact that much less than 100 per cent. market share can be consistent with dominance shows that dominance does not require a complete absence of competitive restraint

but the power to behave to an appreciable extent independently of competitors' customers, and ultimately consumers - and the words "appreciable extent" are, of course, important. Here we have a situation whereH3G has 100 per cent. market share on a market definition which reflects the EC Guidance and is not challenged. Mr Green says it is a narrow market definition. There have been lots of cases with narrow market definitions. Companies have been held to be dominant in the supply of spare parts for their own products – a very narrow market definition, and there is no challenge to the market definition. So we have 100 per cent. market share.

Secondly, there are absolute barriers to entry. Those matters are not speculative. H3G's skeleton argument, at para.10 says that Ofcom has determined that H3G has got significant market power based on speculation. With respect that is wholly wrong. These are objective facts, they are beyond dispute. The question then is whether the presumption of dominance derived from the market share alone, a very high, indeed absolute monopoly position, is rebutted by other factors. One of those other factors one looks at, as you saw, from *AAMS* is barriers to entry. Here barriers to entry are absolute, so that does not rebut it.

Another relevant factor is countervailing buyer power, and I shall come to that. But I do note that in almost half a century, since what is now Article 82, previously Article 86 of the EC Treaty came into force on 1st January 1958. I do not know of a single case where a complete monopolist in a market has not been found to be dominant, and I note that no case has been cited by H3G. So one approaches that proposition with some caution.

The position here was that the high prices charged by the 2G MNOs were indeed used by Ofcom as further support to establish the finding that each of those MNOs has SMP. I ask you now please to look at the Decision, which I am sure the Tribunal will recall is in bundle A2 at tab 6, paragraphs 3.5 to 3.7, page 1098. Mr. Green read to you paragraph 3.7, but one has to see that in the context of the two previous paragraphs.

"Ofcom considers that Vodafone, Orange, O2 and T-Mobile each have SMP in the market for mobile voice termination on their 2G and, where services are offered, their 3G networks. This is due to the fact that the calling party pays arrangement and existing technologies prevent other providers from offering termination services on a specific network. This is an absolute barrier to entry. Hence, each MNO faces no actual or potential competition in the supply of termination services on its own network(s). This means that each MNO is in effect a monopolist. This is further addressed in paragraphs … of the December consultation.

3.6 In addition, Ofcom believes that there is insufficient countervailing buyer power on the part of any originating operator, fixed or mobile, to offset the ability of these MNOs to act

independently of their customers and to prevent them from setting excessive termination charges [reference back to the December consultation.

3.7 This SMP finding has been further supported by Ofcom's analyses of 2G voice call termination charges which appear to have been substantially above the reasonable estimate of each MNOs' cost for a number of years, despite both formal and informal regulation. This ability to keep prices persistently and profitably above the competitive level is a further, important, indicator of SMP. In addition, Ofcom considers that, in the absence of any ex ante regulation (or threat of any ex post regulation) the MNOs would have an incentive and ability to set even higher termination charges (i.e. at the profit-maximising level – which may be at 20 pence per minute or more)."

They used, clearly, the finding that call termination charges had been high for the 2G operators as further support, but they could not do that for H3G as a new entrant because 3G cost calculations are problematic, and so Ofcom made no finding one way or the other as to whether H3G's current termination rate is excessive. That is absolutely clear from 3.46 of the Decision where they say that Ofcom has not performed a detailed analysis of '3''s charges, and they explain why.

They did not find, as Mr. Green asserted earlier today, that the H3G termination charge is not excessive, they made no positive finding of that, or that it may become excessive, we just do not know. It may be that it is or it may not be, and that is hardly surprising when one looks at H3G's own evidence about this, and I ask you briefly to take bundle D1 at tab 2. This is Mr. Mickle of H3G at paragraph 9. this is confidential, which I am aware of, but I am only looking at the first part of the second sentence of paragraph 9 which begins "Even without a comprehensive calculation of 3G termination costs …" It is the next few words which I find very hard to imagine could conceivably be a business secret. If I am asked not to read them out I will not, but you can all see what it says. That is what H3G's own witness says about doing that exercise and Mr. Mantzos, an outside consultant whose evidence is put in by H3G at tab 5 of this bundle, at page 68, paragraphs 8 and 9, says much the same. You will see the first sentence of paragraph 9; again, I find it very hard to see how that statement can possibly be a business secret.

Indeed, Mr. Mantzos in fact, so complex is this, disagrees with some of the approach of Mr. Mickle, because if you look at paragraph 34 on page 73 with regard to one element of this calculation, which is the low utilisation adjustments, you see the last sentence of paragraph 34. So they cannot even agree with each other what is the most appropriate approach. It is because of the complexity and because H3G is a new entrant that my clients did not take that

approach and get that additional support with regard to H3G, but that does not vitiate the finding of SMP as regards H3G because that is not in any way an essential or necessary condition to reach a conclusion of dominance.

I would only mention that the *Freeserve* decision on which Mr. Green relied in this context by way of suggested comparison was not a decision on dominance at all, it was a decision on abuse, and in that decision, as Ofcom found there was no abuse, they said we will not actually take a decision on whether the company is dominant because even if it is dominant we find no abuse so we do not have to go through that part of the exercise. That is bundle H3, tab 3, paragraph 1.6 of the *Freeserve* decision.

PROFESSOR STONEMAN: If I can interrupt again, Mr. Roth. When we were talking about this area earlier, Mr. Green suggested that there were other indicators, we did not need full model of HG3, costs and prices, in order to undertake this exercise of whether prices were excessive or not. He indicated that there were other indicators. I am still not quite sure in my own mind what those other indicators are, or were, but could you not have explored these other indicators?

MR. ROTH: There is no closed set of indicators that can be relied on to support a finding of dominance, but where you have a situation of very high market share, indeed not very high, 100 per cent., where the next immediate indicator you look at, which is potential competition, barriers to entry is absolute - so no potential competition – then the most obvious thing you look at next is if it is suggested and here it was, is countervailing buying power. When you have been through that you do not need to go further. There is never a limit to what you can look at but it is not necessary. What is being said here is that this finding has to be set aside, and we say this finding on this evidence is absolutely solid.

I am conscious, Sir, of the time. I had been optimistic before lunch saying I might only be three-quarters of an hour in the morning, but I thought I might, from what Mr. Green said, start a bit earlier. I do not know if you would like to go on for a little bit today?

THE CHAIRMAN: Let us go on for another five minutes or so, I cannot sit particularly late. We will go on if you have another self-contained point that you can develop in five minutes or so, otherwise I think we might as well start tomorrow morning.

MR. ROTH: My next point will probably take us, because of the documents, to 4.30. Is that possible?

THE CHAIRMAN: Let us do it tomorrow morning. I have difficulties sitting later today. You think you will be roughly how long tomorrow?

MR. ROTH: I think I will be maybe till 12.30 – if I can do it by noon ----

THE CHAIRMAN: There is no pressure on you, Mr. Roth, we just want an indication, and we will have to wait and see.

MR. ROTH: Can I just mention, I think from your questions you have all read it, the Commission's veto decision I think it is called, with regard to Deutsche Telecom, that will save me having to read it all out, I can just refer to relevant bits of it. It is clear from your questioning that you are on top of it, as it were.

THE CHAIRMAN: Well, I have read it anyway, Mr. Roth, but if you are flagging that you would like us to have read it and got on top of it we will do what we can.

MR. ROTH: If you are able to look at it – it is mercifully short. The previous tab, they are at the end of bundle F1, is a very short press release, which is in even more readable language – question and answers on it – from the Commission which is also helpful. If there is a chance of you all looking at that overnight I am most grateful.

THE CHAIRMAN: Yes,

MR. ROTH: The last two tabs of bundle F1.

THE CHAIRMAN: We will do what we can.

MR. ROTH: Thank you so much.

THE CHAIRMAN: Very well, 10 o'clock tomorrow morning.

(Adjourned until 10.a.m. on Wednesday, 25th May 2005)