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IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1180/3/3/11
1181/3/3/11
1182/3/3/11
1183/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24 February 2012

Before:

MARCUS SMITH QC
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LTD
HUTCHISON 3G UK LIMITED
VODAFONE LIMITED — Appellants

- and -

OFFICE OF COMMUNICATIONS — Respondent

- and -

TELEFONICA UK LIMITED — Intervener

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Robert Palmer (instructed by BT Legal) appeared for British Telecommunications PLC.

Mr. Julian Gregory (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr. Richard Pike (of Baker & McKenzie LLP) appeared for Hutchison 3G UK Limited.

Mr. John McInnes (of Herbert Smith LLP) appeared for Vodafone Limited.

Mr. Michael Bowsher QC and Mr Nicholas Gibson (instructed by The Treasury Solicitor) appeared for the Competition Commission.

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

THE CHAIRMAN: Good morning everyone. Subject, of course, to submissions it might assist if I articulated some present thinking. I note that from their summaries that Vodafone and EE have identified very similar s.193(7) challenges, and that I read somewhere it is proposed to share the advocacy with one of these two taking the lead on each point. That, if I may say so, does seem an eminently sensible approach, and it does seem an approach that could be carried through into the pleading/skeleton arguments and perhaps even any evidence given – if there is any evidence to be called – which of course will reduce the reading and the amount of material that everyone has to respond to.

Secondly, Mr. Bowsher can, of course, try to persuade me otherwise, but I am not minded to make any direction regarding length of submissions, nor am I going to make any order against the duplication of submissions, the Tribunal relies upon the parties to be sensible to ensure that, particularly when one has a very fast timetable, the amount of reading is kept to a minimum. However, it might be sensible, and I float this to impose time limits on the parties' submissions and I was thinking of something like four hours globally for those challenging the CC's decision and four hours for those defending it, to define everyone into those two groups, with two hours for reply. Now, I would exclude from that timing questions from the Tribunal which, as we all know, can take a lot of time and that might be the reason why one would run into a third day, but it seemed to me that an order along these lines might well concentrate the mind in terms of what needs to be said orally and what can be left to written submissions.

Since this is effectively Mr. Bowsher's application to vary the order of 10th February, it seems to me it is appropriate for him to begin, and before you do so, Mr. Bowsher, I would just like to make one further indication which is that having fixed a hearing for 3rd to 5th April, based upon a timetable which, after the last hearing was basically agreed, you will have quite an uphill job to persuade us to unfix that hearing, but I just thought I would mention that.

MR. BOWSHER: Sir, thank you. It is certainly not our primary position that we think that the hearing should be 'unfixed' as it were, but the one point - and I think we did only make one point at the last hearing - which was until we had seen these outline grounds we were not going to be in a position to know what sort of resource implications responding in this case actually involved for us. I think it is pretty clear in the transcript, I do think that really was the key point that we wanted to get over. We have looked carefully at the grounds, and you have seen our written observations about some of them, and some of those observations may end up coming back in our substantive reply about the nature of those grounds, but you

will have seen that some of them do involve some considerable detail, technical detail and whatever our primary position as to the appropriateness of the content of some of those it would be right, or the Tribunal would expect that we come not only able to deal with our points as to what is the appropriate standard of review, the appropriateness of the challenges and so on and so forth, but that we were also able to engage with whatever factual issues actually arise, the technical issues, to deal with that.

We have a simple hard edged problem, and this is not the only resource problem that we have but, as it were, the primary rate determining step from our point of view, is the individual who will be able to provide instructions on behalf of the CC to ourselves, the lawyers, on grounds 7 and 8 is not available until 14th March. Grounds 7 and 8, I do not know if you recall them – I will not try and summarise them, you have read them already – they are possibly the more technical of all the grounds I do not know if you have the grounds to hand, either version will do.

THE CHAIRMAN: Grounds 7 and 8, I have them.

MR. BOWSHER: Ground 7 relates to reference question 2 and you can see that it deals with a number of specific technical errors which are said to have been made, in particular regarding the operation of the model that is referred to. There are a number of points. Then ground 8, which then gets into the use of the time shift approach – again I am not going to get into how that affects the determination for the moment. I think we can simply see from the nature of those grounds that if and insofar as we have to engage with the technical accuracy or otherwise of what is being said, it involves quite a bit of work on our side and we are simply not going to be in a position on our side to start that internal work until the second half of the week of March 12th. I would expect that it is going to take those involved at least three or four days to be in a position to brief those of us preparing the submissions, and it then creates a practical problem, my own personal problem is that, for reasons you will understand, I had kept March 20th aside as the day I might be engaging in wrapping this altogether. It seemed to mesh so neatly with March 21st, but I do not think that I can have any confidence, and it would be unfair on the CC to say: "You have to have it all ready effectively within three working days", it simply is not going to happen; it is simply not likely.

I submit that given that we are asking for less than two weeks in order to respond to these substantial grounds I would suggest that we should have, as it were, that week and a half and just into the following week, which is why we suggested late Tuesday for our submissions.

I see what the Tribunal has said in its letter yesterday about the difficulty of dealing with skeletons in reply. I would suggest that this need not be an insuperable problem. We do have a three day hearing, the nature of submissions in reply is that they are likely to be short and to be the sort of things which are going to be elaborated on at the hearing. In terms of the Tribunal's pre-reading and pre-work I would suggest that those submissions in reply are not going to be, as it were, the heavy burden of pre-reading, and to allow one working day pre-reading for those is not in fact going to be too onerous. We are not suggesting, the Tribunal has in fact the whole of the week before to get on top of all the previous material, it is just that last tranche that they had the day for, and so I would suggest that the timetable we proposed of Tuesday evening and Friday evening – it is accelerated but this whole process is accelerated – gets us to the point that we all want to reach as to be ready to argue this on 3rd April. There is only so much one can say really, it is simply a practical problem.

THE CHAIRMAN: Yes, just two points. First, this particular person is actually not available between now and 12th March, or the week of 12th March, is that right?

MR. BOWSHER: I think there is some availability now but not in that week when we get the actual worked up grounds, until the 14th.

THE CHAIRMAN: Secondly, given that this is a Judicial Review, the question which slightly puzzles me is how far factual evidence from the CC is actually likely to assist the Tribunal, I mean you obviously have the point, but the fact is that unless the answer is evident from the decision itself and justifiable by reference to that, if the CC has to go beyond that in order to justify its reasoning, then is that not actually going to be a problem for the CC in that it is effectively, as the other parties say, seeking to gloss its own decision?

MR. BOWSHER: On that last point, sir, I think this is a false point which has been raised by EE for whatever reason. I do not think we have ever said that we are going to be producing evidence. We are going to have to reserve the position. We do not know what is going to be said in their submissions and there may be some specific point which does need evidence, but it is certainly not our expectation that we are going to be producing evidence. Our expectation is that we are going to be explaining the determination and the working of the determination, in as far as necessary in our submissions, and at the hearing, and primarily addressing the various matters of law that arise. But as I hope we made clear from our note, which I have not gone back to, we very much take on board the Tribunal's view that our primary point is this sort of challenge is not the right place to start; that is our position. But to come to the Tribunal, and one can imagine the way these things may get worked up when we actually see the full challenge, and say: "We are only able to deal with

the high level legal points, we are not able to get to grips of all of the technical detail", when we do not actually have the people who can give us the input to make sure the submissions are fully worked up to answer those. It seems to us to be likely to be unhelpful to this Tribunal and unhelpful to achieving a just and fair outcome for all those involved.

THE CHAIRMAN: It just struck me that it is not quite as extreme as that. Clearly, I take on board your first point that you may well want to say that some of these grounds are not actually Judicial Review grounds, but on the merits grounds – we are not going to discuss that today but I quite understand where you are coming from, and obviously this is a judicial review based process not anything else, so that would be your first point. However, having made that first point it does seem to me that you will be in a position to say that "Looking at the technical detail the answer is wrong because if you, the Tribunal read paras. X and Y of our extremely long decision, you will see that we were not necessarily right, but certainly you cannot overturn us because there is no judicially reviewable error." It does seem to me a very remote contingency that there is going to be a need for detailed factual evidence going beyond that.

MR. BOWSHER: Again, I think evidence is a red-herring here. It is the intermediate position of explaining to the Tribunal the determination which itself involves a certain amount of technical content. The CC will want to be sure that it gets over its best, fullest, technical explanation of the content of the determination, and with the greatest respect to the Tribunal certainly I will need quite a lot of help understanding some of the technical content of the determination, and it is possible that some of the Tribunal may also benefit from some of that technical explanation and context so as to be sure the Tribunal fully understands when I make what on its face is a very simple point, such as "Forget about it; it is clear on p.493", the clarity of that point may require a little bit of contextual explanation – when I say "a little bit" it is likely to require a certain amount of explanation of: What are these different approaches being discussed? What is the approach that you will see at different parts of the decision? How do you deal with that? One sees this again and again in the Administrative Court where, yes, the point is, as it were, expressed in a simple point but to understand why the decision is in fact simple one needs quite a bit of contextual explanation, and to make sure that that is correct, not misleading and as helpful as possible I would suggest that we should have that little bit of extra time, it is only a few days, and it does not actually imperil the Tribunal's preparation at all, it shifts everything back a little. The challengers are not put in any difficult position, they get to put in their written submissions but one imagines by that point they are in effect, the nature of them one sometimes wonders whether one needs

to reply to submissions before these hearings at all. Quite often in the Administrative Court one would dispense with them because one would expect that by the time one has got to reply, written submissions, we are really dealing with a speaking note for the opening in fact and, well, we will have the benefit of the opening.

THE CHAIRMAN: Quite.

MR. BOWSHER: I hope I have made the point but if I have not, yes, we can do some work on the basis of – it may be worth just looking again at those grounds. It is certainly the case that my Junior and I are already working on some aspects with assistance from the CC on some of those grounds as currently stated. Some of those grounds are, as it were, more easily understood in telegraphic form than others. The problem with grounds 7 and 8 in particular – but some of the others as well – and we gave you the example of ground 2 which has the opposite problem, the problem with ground 2, as we referred to in our note is that it is so all encompassing – the first sentence of it – it is so all encompassing one is left wondering what on earth one is supposed to look at, maybe an order for a Scott Schedule of each and every statutory objective and each and every failure to balance might be called for! Sorry, that was a flippant remark.

But at the other end you have something like grounds 7 and 8, and it is of its nature the sort of material that until you have, as it were, the back-up reasoning, there is a limit to what we can do in terms of asking questions of people to get on with it. They can do a certain amount of preparatory work, but they really need to have that full challenge before they can come back and explain to us what it means, and where the CC's position lies.

THE CHAIRMAN: I was going to take you up on that, Mr. Bowsher, because obviously the Tribunal appreciates the considerable help that advocates give it in understanding difficult technical matters, and clearly in order to do so the advocates need to understand those difficult technical matters themselves, that is understood. But one of the reasons a flagging of points was ordered was to enable the CC to get started in making its preparations, and as I understood your point a few moments ago, what you were saying was not that the chief problem was a need to put in evidence, you saw that as an unlikely contingency, but the main point was to understand the technical detail that lay behind the reasoning in the CC's decision, and there of course it does seem to me you can start that now.

MR. BOWSHER: Well what we need to understand, yes, we can start that, but what we need to understand is the technical reasoning and/or flaws therein in the argument that is put to us and I am afraid at the moment what I am told really means not a great deal to me, but at the moment I am told we do not really understand what the argument is we are having to

engage with, and that is what someone is going to have to work with from scratch, to get to grips with, and we know who it is going to be. He is going to be available on 14th March to do that, he will have to get to grips with the argument and decide right, wrong, how do we dismantle it, what else needs to be put forward, what else do we need to explain to this Tribunal? That is the simple practical problem. It is not that there is nothing we can do, but there is just that rate determining step at that point, and I am afraid it is exactly for that reason that we raised the reservation that we did at the last CMC – not for that specific reason but for the possibility of such issues arising, because obviously the CC has a large team of people and we just did not know who was going to be needed for what.

THE CHAIRMAN: Okay.

MR. BOWSHER: I do not think there is really much more I can add. You have our point, it is a short point, it is really just a resource point.

I was not going to address you on the various other points we have made in our note, they were more to make clear that you understood, as it were, the context of what we are saying. There is a danger when one makes these specific resource points it seems that is all one is obsessed with. You will have seen that it sits within a much broader range of concerns. I was not going to make any point about written submissions but we thought we would make that observation.

THE CHAIRMAN: Thank you, very much. Right, is there anyone who is supporting Mr. Bowsher's application before we move on to the battalions who – yes?

MR. PALMER: I appear for BT in this matter. We offer cautions support for the CC's submissions. There are two points which I would like to urge upon you.

First, we take as a given the hearing date which has been set, 3rd to 5th April, and would be very much opposed to any shift in that, so the question which is before the Tribunal is how best to ration the time between now and that date as between the parties.

THE CHAIRMAN: Yes.

MR. PALMER: As things stand the challenging parties have been allowed the best part of four weeks since the publication of the final determination to prepare their challenge of which we have some hint now. The responders have been awarded two weeks, which was the period that BT proposed but on the premise that the challengers would only have three weeks, so they have had an extension but not the responders, and then we have as much as one week being allowed again for the challengers to respond. In terms of prejudice to the parties and the fair allocation of time it seems to us that the CC's proposal is perfectly consistent with the fair rationing of time, and without prejudice to any party. They say they

are prejudiced because they wish to take instructions on what are technical matters to understand the context in which these proposals are brought forward. That appears to us to be reasonable. We want the CC to have what time it needs to take further instructions on these difficult and technical points. But the context in which the need for a reply arises at all is very limited, certainly I am told that on the last MCT Judicial Review there was no direction for a reply at all. When BT proposed in its suggested directions last time that there should be a reply it was simply in order to help formulate the issues in order to assist the Tribunal and we proposed three days which is now again what the CC propose. There is no good reason identified, we would say, why the challenging parties' desire for as much as a week to respond should take precedence over the CC's desire to take full instructions from those who fully understand the context in which this challenge is brought.

We would certainly agree with your suggestion from the Bench, if I may respectfully say so, that there is going to be very limited need, we would say, from either party for additional evidence. It really does come down to: What was the evidence before the CC? How did they respond and deal with that evidence, and does that disclose any error of law? That fact does not relieve the need for all parties to take full instructions about the context of those points. Some points which are pressed upon the Tribunal as being very, very relevant considerations which the Commission did not deal with may, in fact, be wholly irrelevant considerations which the Commission was under no duty to deal with. But understanding that context and explaining why that is so requires instructions to be taken, requires the context to be understood and then communicated and formulated. That need to address those points in those ways obviously requires time.

In terms of balance, it seems to me a few extra days for the CC to respond and, indeed, for BT and any other parties supporting the CC to respond, as against just a couple of days fewer for the challengers to reply to that response, is a fair trade-off, given now what we know of the length and complexity of the grounds which are being advanced. That is the first point I wish to make to you.

The second point concerns some of the practicalities, and that is about the time rationing and the need to avoid duplication so far as possible. Although I have not heard this directly from the CC I anticipate that BT, Three and Ofcom to the extent it wishes to support the CC's determination, will not have advance sight of what the CC proposes to say by way of response, and nor will we have advance knowledge in particular of the length of time that they wish to take during the hearing to develop orally those responses.

In an ideal world what I would suggest to you, sir, is that there would be a differential of just one day – of just 24 hours – between the service of the CC's response and those who wish to support it serving their response. The reason is that although we will all be developing our responses effectively in parallel with knowledge of exactly what the CC is going to say, it would be convenient just to have a very, very short opportunity to be able to whittle our submissions down to avoid duplication because otherwise, although we will do our best not to duplicate, in practice we will not know what the CC is saying and will not be able to avoid that duplication.

Similarly, so far as time rationing is concerned, sir, you suggested four hours for all those responding, I would suggest a harder time limit for the CC, perhaps of four hours since they are the party responding to the challenge, and a shorter period for those supporting who just wish to add anything else, and possibly that could conveniently be on the morning of the third day, followed by a short response by the challengers.

THE CHAIRMAN: I take your point, Mr. Palmer, about the difficulty of avoiding duplication in written submissions, but I am not sure I do as regards the oral submissions. The point about a four hour limit for all those defending was intended to ensure that those defending the decision actively co-operate in terms of the points they take and the points that they leave to others to take.

MR. PALMER: To the extent possible of course we are willing to do that, but the Competition Commission stands apart from the commercial parties and, indeed, from Ofcom, the Regulator, and I anticipate the degree to which the Commission in practice would be willing to have discussions about who is dealing with what point will be limited because they will, understandably, wish to preserve their own independence. I am not in any way closing off any doors to co-operation, I just simply flag that as being an understandable concern, they do not wish to be seen to be close to any one party, they just have the wish to defend their own determination in the way they best think fit, and we will not know what that is until they have sat down. We may have points additional that we wish to develop, but if they sit down after three hours forty-five minutes that would be a shame.

THE CHAIRMAN: I see. Mr. Pike?

MR. PIKE: Richard Pike for Three. We are in a very similar position, sir, to BT in offering cautious support for the CC's application. Again, for Three our priority is to avoid further slippage in the final disposal of the appeals, so certainly we would resist any movement of the hearing from 3rd to 5th April, but we do agree with Mr. Palmer that we see some merit in the CC's application for a bit more time bearing in mind that the outline submissions, the

indications given by EE and Vodafone are rather more substantial than might have been anticipated when the timetable was set two weeks ago.

It does seem to us, sir, that even if you are against the CC on their proposals of 27th and 30th March, that there is still scope for allowing the CC at least some extra time – whether that be to perhaps 24th or 26th, and still allowing a reasonable amount of time for replies.

Just on the practicalities that Mr. Palmer mentioned, we would agree with Mr. Palmer that in an ideal world we would see the CC's written submissions some time before we filed ours, to avoid duplication.

THE CHAIRMAN: But time is so short, it is rather difficult to see how it would work.

MR. PIKE: Exactly, sir, and for our part I think we would rather the CC has the extra time itself to do the preparation, not least as well because I am not sure how much duplication we can avoid with just one day to look at the pleadings. So in terms of the time limits we would like to have some separate time set aside for those supporting the CC for the same reasons that Mr. Palmer gives, that we cannot seriously expect the CC to agree to allow BT or Three to cover any of the points on their own. But, subject to that, sir, we agree very much with what Mr. Palmer said.

THE CHAIRMAN: Thank you very much, Mr. Pike.

MR. HOLMES: We would also offer our cautious support for the Commission's application. We share the Tribunal's unwillingness to see the fixture broken for early April, the sooner this is resolved the better, but we submit that the point that Mr. Bowsher made about the need for context, the need to explain the context of the determination and the arguments being raised against it to the legal teams and then to the Tribunal in full is a powerful one, and we consider that the Tribunal should accommodate the CC if possible in that regard.

We also adopt Mr. Palmer's submissions on the need for equitable distribution of time between the challengers and those responding, and the importance of this has been brought into focus by the extremely wide-ranging and numerous outline grounds of review which we have now seen.

Finally, we would support the Tribunal's proposals to put global caps on the parties at the hearing in order to inject some order into what will undoubtedly be a tight hearing.

Those are our submissions.

THE CHAIRMAN: Thank you very much. Yes?

MR. GREGORY: Julian Gregory, for Everything Everywhere. If I can begin by confirming the Tribunal's suspicions that Vodafone and Everything Everywhere intend to co-ordinate their approaches. The idea is that one of us will take the lead on one of the grounds, and the

other party will then simply support or, at most, offer very brief supplementary comments. That has obviously been done to avoid duplication and should help to ease the time pressure at the hearing.

THE CHAIRMAN: No, that is very helpful, and that will extend ----

MR. GREGORY: To the written submissions as well.

THE CHAIRMAN: Excellent.

MR. GREGORY: On the timetable and response submissions, we say that the starting point is that the timetable should allow the appellants a fair opportunity to put their case. The existing timetable just about does that, but it is very tight, and it requires the parties to plan in advance and to work hard to make sure that they meet their deadlines.

The second starting point is that the Tribunal laid down this timetable only two weeks ago, having heard submissions on these very issues, and having balanced the need for that fairness against the desirability of expedition. So we would say that extremely good reasons are required in order to shift that timetable now.

The case that has been put by the CC has changed slightly from its note of yesterday. Yesterday they seemed to place quite a lot of emphasis on the fact that they said we were trying to re-argue the merits, and today more weight has been given to practical problems, so I will start with those.

The CC's concerns focus on the modelling points. The starting point is that you obviously need to have some understanding of how the model works in general in order then to be able to bore down on the detail of the Judicial Review arguments that relate to them and we quite see that. The CC has said that the relevant person inside the CC has some availability now so the CC's counsel can start that process of getting up to speed with the modelling issues. They have also said that that person is available from 14th March which would mean that they would have a week with him in order to finalise their arguments on the modelling points before they have to lodge on the basis of the existing timetable, and of course they could front load their work on the other points so that that during that second week, priority can be given to the modelling arguments.

We should also note that the points that we will take in our grounds, that are summarised in our outline grounds, were not entirely new points. The same points, or at least very similar points, were taken in our response to the provisional findings, so to the extent that the CC finds our outline grounds to be slightly ambiguous given their brevity, then a bit more explanation can be found in our provisional findings' responses.

To the extent the CC is still relying on the suggestion that we are trying to re-argue the merits, the Tribunal has already taken some of the points I was going to make. We say that we are not doing that, the outline grounds are necessarily brief and we both hope that when we lodge full grounds it will be clear that we are taking proper Judicial Review points.

To the extent that we do not the first response of the CC, as the Tribunal has suggested, is to say: "These are trying to re-argue the merits, they are not proper Judicial Review points, you lose." To the extent you want to engage in the merits, and we say that would be inappropriate then largely all they will need to do is to refer to the relevant paragraphs in the determination. It is a 550 page determination. They have just spent the last few months considering our arguments on the merits that they now say we may try to re-argue, and setting out their conclusions on those arguments. So whether we put proper narrow Judicial Review points or not, the task facing the CC is unlikely to be particularly onerous.

To take an example, Mr. Bowsher referred to our ground 2 – I think he referred to this to say that it was not possible for the CC now to get on with things on the basis of our outline grounds. Well, our ground 2 point is that the CC's analysis under reference question 1 was limited to considering the costs and benefits of pure LRIC and LRIC plus, in the light of the statutory criteria in isolation. We say that nowhere in the final determination do they go on to carry out some sort of overarching balancing exercise or assessment. They do not consider, for example, whether any potential competition benefits of pure LRIC are sufficient to outweigh the potential benefits of LRIC plus in relation to vulnerable customers, or dynamic efficiency.

The CC's response is presumably either going to be that it did carry out such an overall assessment in which case all it needs to do is point out the relevant paragraphs in the determination, or it can say that there is no need for it to carry out that sort of overall assessment, and it can point out the part of the determination where it explains why. I should note that in our response to the provisional determination that was one of our arguments, they need to do such an overall assessment, so one would expect to find an explanation in the determination.

In short, we have little sympathy with the Commission's position. If the Tribunal had more sympathy one possibility that would inject a little more flexibility into the timetable will be to do away with a reply skeleton. We are not pushing for that and it may well be that the Tribunal thinks that a reply skeleton may be helpful in terms of clarifying or narrowing the issues, but we are not going to defend or insist on the need for a reply. What we do not want to do is to be in a position where, in the period running up to the hearing, we have to

spend a lot of time in a condensed period of time, for example, three days on the CC 's suggestion, trying to get out a written skeleton reply, because that will inhibit our ability to prepare properly for the hearing. If we are going to produce a skeleton reply then we would like the period of time that we are given on the existing timetable and we say that trying to require us to do both, the written arguments and prepare the oral hearing in a really condensed period of time, is not fair to our position.

THE CHAIRMAN: Mr. Gregory, the last thing that the Tribunal wants is to require the parties to produce a document that is not going to be helpful, and let me make clear right now that para.4 of the order is not mandatory, it is 'if so advised'. If the parties consider that they are better served by simply preparing with their oral submissions and that there is no need for a reply because it simply adds nothing, then you do not have to serve one. It is only if the CC raises points which you feel need to be addressed in response that para. 4 is in place. Now, no one will be happier than I if the parties took the view that the reply was unnecessary. I am a little loathe to remove the provision because you never know whether some form of response, albeit short, might be helpful, but I am certainly not envisaging in para.4 that these submissions be full fledged opening submissions. They are reply submissions, intended simply to address points which are taken in the CC's response to the notice of appeal and responsive to that.

I have considerable sympathy with what you say about Mr. Bowsher's points, but if one is looking at re-jigging the timetable there is no question of changing para.2, the date on which Vodafone and EE serve their challenges, 7th March is going to be fixed, so you can take that as read. The real question is how far the gap between the CC's response and the reply is squeezed and how far the gap between the reply and the hearing is squeezed, and what I had in mind, and I want to float with you before I do so with Mr. Bowsher, is whether – entirely without prejudice as to the merits of Mr. Bowsher's points at all, we simply want to accommodate the parties and be as fair as possible – we were to say something like 12 o'clock on Monday, 26th March for the Competition Commission's response, and then 4 pm on 30th March for the reply. Now that squeezes the Tribunal's reading time for the reply, but gives most of the parties what they want, and I wonder first of all whether Vodafone and EE can live with that before I hear Mr. Bowsher's views on that.

MR. GREGORY: Can I just take brief instructions?

THE CHAIRMAN: Please do.

MR. GREGORY: (After a pause): We would prefer a deadline of the evening of the Friday rather than the Monday, if that would be possible? We should add that we would not object to the other respondents being allowed to serve 24 hours after the Commission which, in practice, if the Commission's deadline was the Friday evening we would be happy for the other respondents to serve on the Monday evening, so that would give us a full week before the hearing when we would have everyone's arguments.

THE CHAIRMAN: What if I were to stick with the 26th, and would your 24 hour point then apply to the other parties?

MR. GREGORY: I think there are some benefits to us in not receiving very lengthy submissions from the other parties.

THE CHAIRMAN: Yes, I see. Thank you very much, Mr. Gregory, that is also helpful.

MR. McINNES: John McInnes for Vodafone. I just want to endorse everything that Mr. Gregory said but make a couple of additional points. The first is that obviously we have sought to liaise with Everything Everywhere, but as a consequence we will need to allow time for that to work, so that if the timetable is cut too short that will make it difficult to liaise.

The other point worth stressing is that we are obviously not only having to respond to points raised by the Competition Commission but also by three other parties potentially, so that needs to be borne in mind and so our overriding concern is to ensure that we have a fair opportunity to consider the points made against us and to respond to those.

Thank you.

THE CHAIRMAN: Thank you very much, Mr. McInnes. Mr. Bowsher?

MR. BOWSHER: Not a great deal to come back on in reply, but just to pick up a few of the points that have been made. First, my learned friend Mr. Gregory made the great point about this having been laid down on 10th. With the greatest of respect, if it had been laid down in stone immutably on 10th there would have been no point in fixing this hearing. We did make it very clear at the last hearing that we would need to come back today once we knew what the resource implications of the challenges were, and that is what we are doing, and that is in the draft transcript – I have not found it in the transcript that came up on the website this morning – it is on p.14, line 20 - that was exactly what we said, that we would need to review, and that was one of the benefits of having these outline grounds in this structure ----

THE CHAIRMAN: Page 4 line 20, you say?

MR. BOWSHER: 14. This is the draft one, so I am not quite sure that I have it in the final – oh, that is final, is it? Page 14, line 20.

THE CHAIRMAN: I have it.

MR. BOWSHER: And that was exactly the point we made then, that we would need to come back once we knew the points being made and whom we would need to resource to deal with this. Again, with the greatest respect it is not for challengers to start telling us how we have to resource ourselves internally, we are working on these matters, but that is the timetable, that is the constraint that we work under.

Again, in terms of timing and the time that the parties have had, in reality the challengers have had broad notice of where this is going in terms of appeal and so forth since December when the provisional determination came out in two tranches, they had a very considerable time, and I did not engage in a sort of relative comparison – it did not seem to be very sensible. What I wanted to focus on is that we actually need to deal with this in a practical way rather than to say: "You have had a week here, or a week there". The question is: what is needed in order to make sure that the CC is best able to help the Tribunal on 3rd April, and we have set out our position. It is, we suggest, important that we have that additional time. I am not taking you back to reference question 2 which is what these two grounds are about, and I notice Mr. Gregory engaged with another point but not the point which actually we say is the rate determining step, it is grounds 7 and 8 which is about the operation of the model, it is a highly technical matter – one can see some of that in the determination – but in order to see how specific challenges to the operation of that model actually pan out we will need to do some internal work.

In terms of your specific timetable proposal as it were an additional constraint comes in because we have timetabled ourselves accordingly, and the short problem is this, that in terms of finalising any submission I personally am not going to be able to do very much on 22nd or 23rd March if anything at all. We can work through the weekend, but lunchtime Monday, 26th is extremely tight in those circumstances to finalise the matter, I can work on it earlier on, we can work on it now – that is why we made the submission that we did. At the very least I would say the end of the 26th would be the satisfactory way of dealing with the matter. If others want to put in submissions thereafter then so be it, but I pick up on the submissions Mr. Palmer made about the necessity of replies, it seems to us he makes some very cogent points. It is not clear what level of reply is really going to be necessary. What is needed from 26th/27th is that the parties get ready for the hearing the following week – how they do that is, in a sense, a matter for them. If there are specific points which the challengers think are better made in writing, then so be it, but it does not seem to us that that

need imperil the proper preparation for the hearing by the CC in making sure that we get all the points across in our skeletons.

THE CHAIRMAN: You would say that Friday evening is *a fortiori*?

MR. BOWSHER: Friday evening is *a fortiori*, well there is a particular practical issue, I am expecting to have to work on this during the weekend to finalise it, but Friday, 23rd for us does not help.

THE CHAIRMAN: Yes, but we are moving, with respect, Mr. Bowsher, from one point to another. I quite take the point the CC started with, which is that the particular person who can advise the legal team on the technical aspects is not available until week commencing 12th, but we have now slipped into what is more a question of counsel's convenience, and as the Tribunal's letter of a couple of days ago made clear, this hearing is because of the need to move swiftly, very much not being based upon counsel's convenience, and that applies as much to the hearing itself as to the preparation for it.

MR. BOWSHER: Absolutely, sir, but the reality is that that extra weekend and a day is not going to seriously inhibit or imperil the challengers' position and it gives an opportunity for us to have a fair – we do not even have two weeks from the time when the gentleman is available to deal with these grounds to deal with the matter. It is only about 10 days or so – I have not counted it up – if we work to the end of Monday, it is not long. Frankly, it would be surprising if we were confined to what would only be eight or so days to deal with that. The challenge and the content of the challenge will be well known to the challengers. One imagines that they have certainly had it in mind for some weeks already, if not some months, and it is the content of what we see on 21st and I do not know whether it is going to be for the first time or whether it will simply be a heated up version of something we have seen again and again and again. I simply cannot predict that from what we have seen so far; there is maybe a little bit of both from what we have seen.

If it is just a reheated version of old stuff then we may not need as much time, but we have to cater for the fact that there may be material that we are, maybe not looking at for the first time, but having to analyse again in a fresh context to make sure that we can get our points over to the Tribunal in the best possible way, and in those circumstances 12 days is not an absurd length of time. Again, if the challengers want to put in a skeleton on the Friday then that is a matter for them, but as I have said before it is not unheard of for a short reply skeleton to simply add it to the court's material 24 working hours before the start of the hearing just to focus the mind at the last point; that is not the real issue in terms of putting pressure on the Tribunal in my submission.

I have not addressed you on the various points about how the parties may balance up in terms of number of hours. I have heard some of the points about those who may have points supporting aspects of our determination. In a sense I am reluctant to start speaking for them and trying to carve that up at that time. I would say that the suggestion that we have four hours, and those supporting us have a short time on top will have some merit, because again it is probably not right that we be co-ordinating in advance ----

THE CHAIRMAN: Well I do not see why not, Mr. Bowsher. I have had this before, and it actually does serve to concentrate the mind of the parties if those who have, as it were, a broadly common interest, and of course I appreciate there is a difference between the CC and the commercial entities, but nevertheless you are all defending the same decision and the Tribunal will expect a degree of co-operation and co-ordination and a global cap seems to me to be quite a good tool to achieve that.

MR. BOWSHER: But there is a distinctly different interest which we are dealing with and in my submission that ought to be respected in the distinctly different way in which we put ---- It is not a position where it is just a number of challengers all taking, as it were, separate pot shots from a different position at the same decision. We have to take our decision defending our decision. Others have particular reasons which they may or may not want to pursue, but those are philosophically separate points in a sense and I would suggest that they should be kept – I absolutely agree that there may be points on which, as it were, someone leads because it is particularly a point which they have been making during the course of the proceedings and so it may be that it makes more sense for them to, as it were, lead the argument on that. But in terms of overall defence we do have a position which is distinct from those of certainly the commercial entities, and I would suggest that those groups of timing be kept separate, and if we have three days available that need not imperil dealing with the matter within the time.

THE CHAIRMAN: Yes, you have three days available, but the time estimate is one of two days, let us be clear about that as well. Anything else, Mr. Bowsher?

MR. BOWSHER: I do not think so, no.

THE CHAIRMAN: Very well, I will rise for a few minutes to consider my ruling. Thank you very much.

(Short break)

THE CHAIRMAN: I am going to vary the order made on 10th February in the following respects. First, the date in para.3 will be varied from 4 pm on 21st March 2012 to 12 pm on 26th

March for the CC's filing, and 24 hours after that, that is to 12 pm on 27th March, for any other party supporting the CC or otherwise wanting to respond to the document in para. 2. Paragraph 4 will be varied from 4 pm on 28th March to 4 pm on 30th March with two riders to make absolutely clear what we intend by these submissions. First, the reply is to be responsive only to the document served in para.3; and secondly, that a reply is only if the parties are so advised, it is not an obligation to reply, only one if it assists.

Then in addition we make the following orders: first, that the hearing be fixed with a two day time estimate, one day additional in reserve, from 3rd to 5th April. Next, that at the same time as filing their paper documents the parties do file electronically in Word format their filings; and finally that there be a guillotine on the parties' submissions at the oral hearing, and that those who are falling within para. 2, i.e. those who are challenging the decision, will be capped at four hours to be allocated between them as they wish, and those who are responding to that challenge, again four hours to be allocated as they wish. I have fully in mind the CC's position as a regulator rather than a commercial party, but nevertheless it does seem to me that a degree of co-operation between the parties is called upon. If that order presents any difficulties, and I do not expect it to, but if it does then that can be raised at the hearing.

Mr. Bailey reminds me that in addition to four hours there are two hours in reply and those timings are to exclude those very irritating questions that the Tribunal tends to raise with the parties, and we will have someone in the room to keep a stop clock for the parties so they know where they stand. Anything else? Mr. Bowsher?

MR. BOWSHER: It probably does not need to be said but the Intervener has not made an intervention today and I am not quite sure what their position is going to be, it may be that we have missed a communication, but I presume that they would just slot in to which ever group they wished to be in.

THE CHAIRMAN: That would be my expectation. It does seem to me there are only two groups here, fortunately. Thank you very much.