

IN THE COMPETITION APPEAL TRIBUNAL

CASE NO. 1018/3/3/03

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

and

**THE DIRECTOR GENERAL OF THE OFFICE OF
TELECOMMUNICATIONS**

Respondent

and

VODAFONE LIMITED

First Intervener

and

O2 (UK) LIMITED

Second Intervener

**SKELETON ARGUMENT ON BEHALF OF
THE APPELLANT**

References in this skeleton are to the following documents referenced in the form binder/tab/page and where applicable /paragraph:

AB = Documents contained in BT's Appeal Bundles 1-3 served 11 August 2003

DB = Documents contained in the Director General's Defence Bundles 1-2 served 2 October 2003

RB = Documents contained in BT's Reply Bundle served 3 November 2003

Witnesses Name = Witness Statement then referenced in the form Binder/Tab/Page and where applicable /paragraph

Statement of Case = Statement of case then referenced in the form Binder/Tab/Page and where applicable /paragraph

Introduction

1. This is the skeleton argument of the Appellant, British Telecommunications Plc ("BT") in BT's appeal against the Respondent, the Director General of Telecommunications ("the Director General") brought pursuant to Section 192 of the Communications Act 2003 ("the 2003 Act").
2. BT appeals:
 - a. The Direction of the Director General made on 23 June 2003 and published 24 June 2003 ("the Direction") [AB/1/5]; and
 - b. The Continuation Notice dated 21 July 2003 ("the Continuation Notice") [AB/1/6], which provides pursuant to paragraph 22 of Schedule 18 of the 2003 Act that the Direction shall continue to have effect from 25 July 2003. The Continuation Notice is parasitic on the Direction and stands or falls with it.
3. BT submits that the effect of the Direction and the Continuation Notice would be to oblige BT to subsidise certain mobile network operators, and in particular the First Intervener Vodafone Limited ("Vodafone"), by requiring BT to provide essential components of the mobile operators' own mobile networks at regulated cost-oriented prices rather than at retail prices.

4. BT appeals on the grounds that the Direction is ultra vires the Director General [**Notice of Appeal AB/1/1**].

The subject matter of the dispute: RBS backhaul

5. The Direction concerns the basis on which BT charges Vodafone for the provision of radio base station backhaul circuits (“RBS backhaul”). These RBS backhaul circuits connect Vodafone’s radio base stations (“RBS”) to its mobile telephone exchanges (“MTX”). Without these RBS backhaul links, Vodafone’s mobile telephone network would not operate at all.
6. Linkage between the RBS and its parent MTX can be provided either by cable, the method with which the instant dispute is concerned, by microwave radio link, or by a combination of the two. Mobile operators can choose whether to self-provide such links by building the necessary infrastructure themselves or may choose to purchase RBS circuits from suppliers such as BT [**Butterworth1 AB/1/3/2-3/7-12**].

The Direction

7. Following a request by Vodafone that the Director General determine a dispute concerning the terms on which BT should provide RBS backhaul circuits to Vodafone, the Director General issued the contested Direction.
8. The purported basis of the Direction is set out in the Explanatory Memorandum to the Direction [**AB/1/5**]. The Director General relies on Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997, (“the 1997 Regulations”) [**AB/3/1**] which permits him to make directions in order resolve a “dispute concerning interconnection between organisations.”
9. BT’s case is, simply, that the dispute between BT and Vodafone as to the provision of RBS backhaul is not a “dispute concerning interconnection” for the purposes of Regulation 6(6) of the 1997 Regulations and that

consequently, both the Direction and the Continuation Notice are ultra vires the Director General [**Notice of Appeal AB/1/1; Reply RB/1**].

The legal framework

10. Regulation 6(6) of the 1997 Regulations, on which the Director General relies, provides:

(6) Where there is a dispute concerning interconnection between organisations the Director shall, at the request of either party, take steps to resolve the dispute within six months of the date of the request. The direction which the Director makes to resolve the dispute shall represent a fair balance between the legitimate interests of both parties. The direction shall be notified to the parties and made available in accordance with regulation 8(3). The parties concerned shall be given a full statement of the reasons on which it is based.”

11. “Interconnection” is defined in Regulation 2(2) as follows:

2(2) In these Regulations—

.....
“interconnection” means the physical and logical linking of telecommunications networks used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation or to access services provided by another organisation. Services may be provided by the parties involved or other parties who have access to the network;

12. The 1997 Regulations implement Directive 97/33/EC of the European Parliament and of the Council on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of the Open Network Provision (“The Interconnection Directive”) [**AB/3/3**]. The aims and intentions of the Interconnection Directive are evident from the recitals. In particular, Recital 2 provides:

“Whereas a general framework for interconnection to public telecommunications networks and publicly available telecommunications services, irrespective of the supporting technologies employed, is needed *in order to provide end-to-end interoperability of services for Community users*; whereas fair,

proportionate and non-discriminatory conditions for interconnection and interoperability are key factors in fostering the development of open and competitive markets;” (italics added)

13. Recital 4 provides inter alia:

“.....whereas telecommunications networks which are interconnected may be owned by the parties involved or may be based on leased lines and/or transmission capacity not owned by the parties involved.”

14. Recital 5 provides inter alia:

“.....whereas it is necessary to ensure adequate interconnection within the Community of certain networks and interoperability of services essential for the social and economic well-being of Community users, notably fixed and mobile public telephone networks and services, and leased lines.....”

15. The 1997 Regulations adopt, save where the context otherwise requires, the same definitions as the Interconnection Directive. In particular, the Interconnection Directive defines “Interconnection” in Article 2(1)(a) in identical terms to the 1997 Regulations.

16. “Telecommunications network” is defined in Article 2(1)(c) of the Interconnection Directive thus:

“transmission systems and, where applicable, switching equipment or other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means.”

17. The Interconnection Directive stipulates, at Article 2.2 [**AB/3/3 page 6 of 23**] that definitions contained in Council Directive 90/387 on the establishment of the internal market for telecommunications services through the implementation of the Open Network Provision (“the ONP Framework Directive”) shall apply. This provides assistance as to the meaning of “defined termination points” in the definition of

telecommunications network. The ONP Framework Directive as amended by Directive 1997/51/EC [RB/9/b] provides in Article 2 as follows:

“5. ‘network termination point’ shall mean the physical point at which a user is provided with access to a public telecommunications network. The locations of network termination points shall be defined by the national regulatory authority and shall represent a boundary, for regulatory purposes, of the public telecommunications network;”

18. User is defined in Article 2(1)(e) of the Interconnection Directive thus:

“users’ shall mean individuals, including consumers, or organizations using or requesting publicly available telecommunications services¹;”

19. Further guidance as to the meaning of network termination point can be derived from the definitions of fixed public telephone network and public mobile telephony network contained in Annex I to the Interconnection Directive:

“The fixed public telephone network means the public switched telecommunications network which supports the transfer between network termination points at fixed locations of speech and 3,1 kHz bandwidth audio information...

...

A public mobile telephony network is a public telephone network where the network termination points are not at fixed locations.”

20. Reference is also made in Annexes I and II of the Interconnection Directive to leased line services, on which the Director General places reliance [Defence DB/1/A/12-13/34-35]. These Annexes relate back to Articles 3 and 4 of the Interconnection Directive. Article 3 provides, so far as is material:

“Interconnection at national and Community level

¹ RBS backhaul, it is to be noted, involves the use by the mobile operator of a private, dedicated circuit provided by, in this case, BT, to the operator and allocated to the sole use of the operator – see Butterworth2 RB/3/7, 9/21, 26.

1. Member States shall take all necessary measures to remove any restrictions which prevent organizations authorized by Member States to provide public telecommunications networks and publicly available telecommunications services from negotiating interconnection agreements between themselves in accordance with Community law. The organizations concerned may be in the same Member State or in different Member States. Technical and commercial arrangements for interconnection shall be a matter for agreement between the parties involved, subject to the provisions of this Directive and the competition rules of the Treaty.

2. Member States shall ensure the adequate and efficient interconnection of the public telecommunications networks set out in Annex I, to the extent necessary to ensure interoperability of these services for all users within the Community.”

21. Article 3 refers to Annex I which provides:

“ANNEX I

SPECIFIC PUBLIC TELECOMMUNICATIONS NETWORKS AND
PUBLICLY AVAILABLE TELECOMMUNICATIONS SERVICES

(referred to in Article 3 (2))

The following public telecommunications networks and publicly available telecommunications services are considered of major importance at European level.

Organizations providing the public telecommunications networks and/or publicly available services identified below which have significant market power are subject to specific obligations with regard to interconnection and access, as specified in Articles 4 (2), 6 and 7.

....

[The Annex goes on to identify the fixed public telephone network, and fixed public telephone service, the public mobile telephone network and public mobile telephone services, and also:]

Part 2

The leased lines service

Leased lines means the telecommunications facilities which provide for transparent transmission capacity between network termination points, and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision). They may include systems which allow flexible use of the

leased line bandwidth, including certain routing and management capabilities.”

22. Article 4 of the Interconnection Directive provides, so far as is material:

“Rights and obligations for interconnection

1. Organizations authorized to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have a right and, when requested by organizations in that category, an obligation to negotiate interconnection with each other for the purpose of providing the services in question, in order to ensure provision of these networks and services throughout the Community.”

23. Article 4 refers to Annex II which states:

“ANNEX II

ORGANIZATIONS WITH RIGHTS AND OBLIGATIONS TO
NEGOTIATE INTERCONNECTION WITH EACH OTHER IN
ORDER TO ENSURE COMMUNITY-WIDE SERVICES

(referred to in Article 4 (1))

This Annex covers those organizations which provide switched and unswitched bearer capabilities to users upon which other telecommunications services depend.

Organizations in the following categories have both rights and obligations to interconnect with each other, in accordance with Article 4 (1). Interconnection between these organizations is subject to additional supervision by national regulatory authorities, in accordance with Article 9 (2). Special interconnection charges, terms and conditions may exist for these categories of organizations in accordance with Article 7 (3).

...

[The Annex then describes a number of organisations, including those providing fixed and/or mobile public switched telecommunications networks and/or publicly available telecommunications services, and also:]

2. Organizations which provide leased lines to users' premises.”

The Issues

24. The central issue in this case is whether or not the provision of RBS backhaul circuits by BT entails “interconnection” such that the dispute between BT and Vodafone constitutes a “dispute concerning interconnection between organisations” within the meaning of the 1997 Regulations.
25. In order that the provision of RBS backhaul could give rise to “interconnection” at least three criteria must be fulfilled:
 - a. There must exist two or more “telecommunications networks.” A particular component or combination of components constitutes a “telecommunications network” if it:
 - i. Comprises transmission systems and, where applicable, switching equipment or other resources; which
 - ii. permit the conveyance of signals;
 - iii. “between defined termination points”, being the physical point at which a user is provided with access to a public telecommunications network.
 - b. Those “telecommunications networks” are “physically and logically linked.”
 - c. The physical and logical linking of the telecommunications networks has taken place “in order to allow the users of one organisation to communicate with users of the same or another organisation, or to access services provided by another organisation.”

26. The Director General must demonstrate the existence of each of these three criteria in order to succeed in his contention that the provision of RBS backhaul constitutes “interconnection.”

BT’s case in summary

27. BT’s case in summary is that the Director General’s case fails at each of the three hurdles identified above as necessary criteria for the establishment of “interconnection.” Specifically:
- a. Neither the RBS backhaul circuit provided by BT nor Vodafone’s layer of MTXs constitute a telecommunications network. Neither is capable on its own of permitting the conveyance of signals between defined termination points.
 - b. The connection of the RBS backhaul circuit to Vodafone’s RBS at one end and an MTX site at the other entails no physical and logical linking to BT’s network;
 - c. The defining purpose of RBS backhaul circuits is to provide an essential component of the Vodafone network, without which it would not function. Its purpose is not “to allow the users of one organisation to communicate with the users of the same or another organisation, or to access services provided by another organisation.” In this, it is quite different from the partial private circuits on which the Director General lays considerable emphasis.
28. If BT is right in one or more of these three key submissions, then the provision of RBS backhaul circuits does not give rise to interconnection within the 1997 Regulations, and this appeal must succeed.
29. BT will address each of the three necessary criteria in detail below. But some preliminary observations may assist. First, on initial examination, the Director General’s contention that RBS backhaul constitutes

interconnection is intuitively difficult to accept. The Director General acknowledges in the Explanatory Statement [AB/1/5] that the Direction seeks to apply the concept of interconnection “in a novel area.” This is, it is submitted, a considerable understatement.

30. The concept of interconnection has always been understood within the industry to mean a service which establishes a link between two functioning, independent networks, in order to enable the customers of each network to communicate not only with fellow customers of that network but also with the customers of the other network, or to access services provided by or over the other network [Notice of Appeal AB/1/11/42].
31. It is immediately evident that the provision of RBS backhaul circuits bears no resemblance whatsoever to interconnection as so understood. Unlike such interconnection, RBS backhaul does not entail the linking together of two separate and distinct functioning networks. It merely connects two components of the mobile operator’s own network in order that it can function as such in the first place.
32. The point can be illustrated in this way: if an interconnection link (as commonly understood) between two networks were removed or ceased to function, it would leave behind two separate, functioning networks. By contrast, if an RBS backhaul circuit were removed, the remaining components of the network would be unable to function in any useful way whatsoever. The Vodafone components called Base Station Controllers (“BSC”), which must communicate constantly with the RBSs for which they are responsible, would be unable so to communicate and the RBS would be stranded and useless, as would the BSC.
33. Further, RBS backhaul is not an exercise that requires any interlinking with another network operator at all. Unlike interconnection as commonly understood, which is the only method by which interoperability for the end users of two different networks can be achieved, the goal of linking the

mobile operator's MTX (or more precisely, the BSC) to its RBS can be achieved perfectly well without linking to any other network. Many mobile operators can, and in fact do, self provide RBS backhaul links. It would be a bizarre result that a mobile network operator's election to source its RBS backhaul service from an external network operator should change fundamentally the nature of the operation itself.

34. It is also notable that once established, interconnection as commonly understood results in a mutually beneficial relationship for both network operators. The reciprocity of interconnection means that both operators are able to send traffic across the interconnection link for termination on the other network. RBS backhaul results in no such reciprocity of benefits. The mobile network operator recipient of the RBS backhaul service benefits, in that a link is provided between its MTX (BSC) and its RBS, but there is no mutuality of benefit for the service provider, who, indeed, if the Director General is right, has to provide the RBS backhaul link at cost-oriented prices.
35. Finally, from the perspective of the consumer, RBS backhaul does not facilitate an enhanced level of services or the interoperability that results from interconnection as commonly understood. In fact, RBS backhaul is a precondition of the mobile operator's ability to provide its customers with *any* level of service whatsoever. In short, RBS backhaul does not conform in any respect with the notion of interconnection as it has been understood to date.
36. The purpose of the Director General's attempt to shoehorn RBS backhaul into the definition of "interconnection" is to enable the imposition of price regulation in relation to the provision of RBS backhaul circuits. However, intervention and price regulation in the manner contemplated by the Director General could result in considerable injustice. Mobile operators such as Vodafone will be the recipients of a windfall in the form of the opportunity to obtain significant elements of their network at regulated cost oriented prices in comparison to operators such as Orange who have

elected largely to self build their RBS backhaul provision and have configured their network accordingly. Equally, other operators that currently supply or would have hoped to supply such circuits to mobile operators may well find that their prices are undercut by those which BT would be obliged to charge pursuant to the Direction [**Lamb2 RB/2/13/42-44**].

37. Price regulation in the manner contemplated by the Director General is a distortion of normal commercial and market conditions and must be strictly justified in competition terms. It should not be introduced on the basis of an artificial and tenuous interpretation of “interconnection” which stretches the concept beyond recognition.
38. In short, the Director General’s attempt to shoehorn RBS backhaul into the ill-fitting concept of “interconnection” is artificial, counter-intuitive, unwarranted and, ultimately, legally flawed.

Neither the RBS backhaul circuit nor the individual components of Vodafone’s network are “telecommunications networks”

39. In order to characterise the provision of RBS backhaul circuits as giving rise to “interconnection”, the Director must first establish that the provision of RBS backhaul involves two identifiable “telecommunications networks.”
40. In BT’s submission, the Director General’s argument fails at this first hurdle. The components identified by the Director General as comprising the two relevant “telecommunications networks” are, first, the RBS backhaul circuit provided by BT [**Defence DB/1/A/7 and 11/21 and 31; Statement of Mr Walker DB/1/B/4/9a**] and second, Vodafone’s layer of MTXs [**Defence DB/1/A/7/22**]. Neither of these elements are by themselves capable of permitting the conveyance of signals between “defined termination points” so as to fall within the definition of “telecommunications network.”

41. “Defined termination point” means a physical point at which a user is provided with access to the public telecommunications network (See paragraph 17 above). End users obtain access to public telecommunications services only at points at which they either initiate or receive messages. This means, in the case of mobile networks, apparatus such as telephone handsets, and in the case of fixed networks, the point where the end user’s apparatus such as a handset, a fax machine etc is connected to the network (usually a plug in the wall).

42. Hence, the definition of a public mobile telephony network in Annex I to the Interconnection Directive as:

“a public telephone network where the network termination points are not at fixed locations.”

43. This clearly implies that the term “network termination points” in relation to a mobile network refers to the mobile telephone handsets. Similarly, the definition of a fixed public telephone network in Annex I is:

“the public switched telecommunications network which supports the transfer between network termination points at fixed locations of speech and 3,1 kHz bandwidth audio information...”

44. In contrast to a mobile telephony network, a fixed public telephone network has its network termination points at fixed locations. This clearly refers to the fixed point at which apparatus such as a telephone or a fax machine can be plugged in.

45. No access to users is provided at an RBS or at a BSC/MTX. These are simply intermediate components of the mobile operator’s network over which calls or messages pass transparently before continuing to the point at which they are accessible to the user. They do not therefore constitute defined termination points within the meaning of the Article 2.1(c) of the Interconnection Directive.

46. It follows that neither an RBS backhaul circuit nor a layer of MTXs is capable of being defined as a “telecommunications network”. The MTXs alone are incapable of conveying signals between telephone handsets where they might be accessed by the end user. Indeed, Vodafone’s layer of MTXs serves no useful function in the absence of a link to the RBS. The MTXs comprise merely one component of a mobile operator’s network, which are unable to perform in isolation the functions of an entire network.
47. An RBS backhaul circuit merely provides a link over which Vodafone may transmit signals between its RBS and its BSC/MTX, which are simply intermediate points on its network. The transmission of signals is controlled not by the RBS backhaul circuit itself, but by the BSC Controller owned and operated by Vodafone [**Butterworth RB/3/5/15**]. Furthermore, the RBS backhaul circuit cannot by itself transmit signals to points at which they become accessible to the user, such as a mobile telephone handset. The RBS backhaul circuit is a discrete component, which is capable of performing as part of a functioning network only when combined with other indispensable components.
48. To the extent that the Director General contends that the RBS backhaul circuit and the layer of MTXs each constitute networks in themselves on the grounds that they convey signals between points of interconnection with BT’s network, which constitute “network termination points,” the Director General is descending into circularity. The essence of such an argument is that the provision of RBS backhaul constitutes “interconnection” because it involves the linking of two “telecommunications networks”, but that the RBS backhaul circuit and the layer of MTXs constitute “telecommunications networks”, because they convey signals between points of interconnection. This argument is plainly circular and does nothing to advance the Director General’s case.
49. Quite apart from the above, the Director General’s contention that both the RBS backhaul circuit and the layer of MTXs constitute complete

telecommunications networks in themselves² is implausible in the extreme. It is difficult to see how, or why, on any reasonable interpretation, a single circuit provided by BT to link two components together should in fact be a network all of its own. Equally inexplicable is why Vodafone's mobile network should on a true analysis be considered to be fragmented into multiple "telecommunications networks".

50. It is illuminating to note that in his Explanatory Statement, at times at least, the Director General himself appears to consider the RBS backhaul circuit to comprise one component of a network rather than a network in itself [AB/1/5]. Most notably, he says:

"4.5 It is clear that the links between Vodafone's RBS and MTX are of fundamental importance to its business; the links *are an essential component of Vodafone's network...*"(emphasis added)

51. Furthermore, this characterisation of leased capacity as comprising one component of the lessee's network is echoed by Recital 4 to the Interconnection Directive cited above. The recital makes clear that a network may be based on leased lines or transmission capacity not owned by the parties involved, but that such capacity does not constitute a network in itself.

52. In short, the provision of RBS backhaul does not involve two separate telecommunications networks. It involves the provision by BT of a service to Vodafone, which comprises one component of Vodafone's mobile phone network³.

² The Director even appears, at times, to argue that Vodafone's radio base stations are themselves a "network" – see Defence at DB/A/1/26/9.

³ RBS backhaul may, or may not, fall within the definition of "access facility" as set out in the OVUM report on a new interconnection directive [RB/5/24]. But the Interconnection Directive is only concerned with what that report terms "network interconnect services" [RB/5/24]. The Director General is, in effect, attempting to regulate under the old regime a matter which may in principle fall within the ambit of the new regime but without going through the quite different preliminary analytical steps which apply (and which BT submits the Director General knows he could not satisfy) under the new regime.

There has been no “physical and logical linking” between BT’s network and Vodafone’s Network

53. In addition to his contention, dealt with above, that the RBS backhaul circuit constitutes a telecommunications network in itself, the Director General also attempts to satisfy the requirement that the provision of RBS backhaul services engages two telecommunications networks by describing the RBS backhaul circuit as a service provided over BT’s entire network [**Defence DB1/A/8-11/24-31; Walker DB1/B/9-13/27-44**] A similar argument is advanced by Vodafone [**Statement of Intervention of the First Intervener para. 6; Blount paras. 9 to 22**].
54. In making such a contention, the Director General in BT’s submission falls foul of the second hurdle which must be fulfilled in order to give rise to “interconnection”. The Director General must demonstrate that the provision of an RBS backhaul circuit by BT to Vodafone gives rise to a “physical and logical linking” between the two identified networks. This he cannot do. The RBS backhaul circuit is simply an externally sourced element of Vodafone’s own network which cannot be characterised as providing a link to the BT network.
55. It is certainly the case that a physical link is established between certain transmission facilities supplied by BT, namely the RBS backhaul circuit, and two components of Vodafone’s mobile network, specifically the RBS and the BSC/MTX. However, the requirement that there be *logical* linking envisages not only the establishment of physical contact between corporeal components, but also the establishment of mutual compatibility of signalling and protocols in order to facilitate two-way, mutual comprehension and interaction between the two networks [**Butterworth2 RB/3/4-5/13-16; Reply RB/1/8-9/24-25**].
56. Such mutual comprehension and interaction is imperative to the provision of services conventionally associated with interconnection, such as permitting a customer of one network to communicate with a customer on

another network. It enables the network operators to accept each other's telephony traffic and treat it as they would do traffic originating on their own networks. Interconnection services as normally understood are dependent on this *exchange* of information between network operators, and could not be provided if the networks were merely physically connected but lacked a logical interconnection. As the OVUM report puts it, network interconnect services are concerned with "the mutual exchange of traffic" (**RB/5 page 27**). This essential element of mutuality is missing in the case of RBS backhaul⁴.

57. Save for the most basic requirements of compatibility in order that Vodafone be able to utilise the supplied circuit at all, such mutual cooperation, comprehension and interaction between the provider of the service and the recipient of the service is simply neither present nor necessary in the case of the conveyance of RBS backhaul traffic. The provision of the RBS backhaul service is characterised by a partitioning off of the facilities used to provide the service from BT's transmission systems. Dedicated capacity is allocated on a fixed route and set aside for the exclusive use of Vodafone⁵. This capacity can be utilised by Vodafone to convey signals between its BSC and its RBS independently of any further interaction or mutual comprehension on the part of the respective networks [**Butterworth2 RB/3/4-5/13-16**].

58. The key point is that BT does not accept RBS backhaul traffic and treat it as its own in a manner that would require a logical linkage. BT merely provides a "transparent" route through which Vodafone can convey data

⁴ The Director General's Defence is especially vague on this point, asserting [**DB/A/1/8/23**] that "there is also a logical linkage because the signals conveyed across the backhaul circuits, between Vodafone's MTX network and its RBS network, have to conform to given protocols so that the conveyance can take place."

⁵ Contrast the Director General's assertion [**Defence DB/A/1/27/9**] that "signals are not conveyed across a specific, dedicated line or circuit". In fact, as noted in BT's Reply [**RB/1 para 19**] "BT does not switch RBS backhaul traffic throughout its network." – see also the further explanation in Butterworth2 at **RB/3/6/17 - 18**.

between two parts of *its* network.⁶ Once the capacity has been allocated on a fixed route, BT does not switch the RBS traffic, it does not maintain an awareness of its nature or content, and it does not treat the allocated capacity as a potential source of BT's network resources. The logical interconnection that is necessary for the provision of conventional interconnection services is simply unnecessary for the provision of RBS backhaul.

59. Indeed, the Director General's contention that there is a logical linkage would, if correct, lead to some distinctly illogical results. The point is most clearly illustrated by the following example: A Vodafone customer wishes to place a call to a BT customer. The call originates on the Vodafone network at a mobile telephone handset, travels to the RBS, and passes through the RBS backhaul circuit. As the call is intended to be terminated on the BT network, if the Director General's case is correct that the RBS backhaul circuit is a point of interconnection with the BT network, and that there is a logical linkage between that circuit and Vodafone's network, it would be most economical, and logical, for the call to pass into the BT network via the RBS backhaul circuit and be switched directly to the BT customer with whom the call is to be terminated.
60. But this is quite different from what actually happens with RBS backhaul. What happens is that the call passes through the RBS backhaul circuit, remains segregated from BT's own traffic (including genuine interconnection traffic) and reaches the MTX. Only then is the call identified as destined to terminate on the BT network and sent through the MTX layer to an established point of interconnection with the BT network, where it will be terminated by BT.
61. As this example illustrates, the RBS backhaul traffic passes through the RBS backhaul circuit without any logical interaction with the BT network.

⁶ The term "transparent" in this context is used to represent the concept of a pipe through which there is unobstructed vision from one end to the other for Vodafone, but the contents of which cannot be seen by BT.

The relevant transmission facilities are separated from BT's network resources, are allocated to Vodafone's exclusive use, and perform their function of linking two components of Vodafone's network without the necessity of further comprehension or interaction between Vodafone and BT. For this reason, BT contends that RBS backhaul services entail no logical linking between BT's network (whether that is understood to be simply the RBS backhaul circuit itself or BT's network as properly so called and generally understood) and the Vodafone network. If that is right, then again, BT's appeal succeeds and no further analysis is necessary.

Purpose of linking of two networks

62. Interconnection is defined by the Interconnection Directive as taking place in order to realise a particular and specific purpose. That purpose is contained in the very definition of interconnection in Article 2.1 of the Directive, namely "in order to allow the users of one organisation to communicate with the users of the same or another organisation, or to access services provided by another organisation."
63. The express wording of Article 2.1 therefore requires that in addition to establishing the physical and logical linking of two telecommunications networks, the Director General must show that the purpose of the provision of an RBS backhaul circuit by BT to Vodafone is to facilitate the end-to-end interoperability between end users and or the access to services of competing network operators which forms the *raison d'être* of interconnection within the Interconnection Directive. The linking of telecommunications networks for any other purpose does not fall within the definition of "interconnection" and could not support the imposition of price regulation and the attendant distortion of normal market conditions.
64. In fact, the function of an RBS backhaul circuit is a long way from that envisaged by the Interconnection Directive. The RBS backhaul circuit is provided to a mobile operator to link two components of the mobile

operator's own network in order that the network is capable of functioning at all. It is not provided to facilitate communication by the users of one network with the users of another network with whom they would otherwise not have been able to communicate. Nor does it permit access to the services of another network and thereby tend to increase competition or facilitate access to the market for competing network providers.

65. The defining purpose of RBS backhaul circuits sets the provision of such services well apart from other services that have been the subject of regulation on the basis that they give rise to "interconnection." An example is transit services, which enable a customer of one network to communicate with a customer of another network by virtue of two separate interconnection agreements with an intermediary network. The any-to-any interoperability which results from transit services is a paradigm example of the function of interconnection [**Butterworth2 RB/3/8-9/23-27**].

Leased lines and Partial Private Circuits "PPCs"

66. Annex I and II of the Interconnection Directive provide that certain leased lines fall within the notion of "interconnection" [**AB/3/3/pages 18-19 of 23**]. However, the Director General's reliance on the leased lines aspects of the Interconnection Directive in support of his case that RBS backhaul constitutes "interconnection" is misplaced.
67. Reference is made to leased lines firstly in Annex I of the Interconnection Directive, which relates back to Article 3.2 of the Interconnection Directive, set out above. That Article creates obligations for Member States with respect to interconnection at national and community level. In particular, Article 3.2 requires Member States to ensure the adequate and efficient interconnection of the public telecommunications networks set out in Annex I, to the extent necessary to ensure interoperability of publicly available telecommunications services for all users within the Community.

68. Annex I lists publicly available telecommunications networks and services considered of major importance at Community level which form the subject matter of Member States' obligations to ensure interoperability. It includes, at Part 2, the leased lines service defined as telecommunications facilities that provide for transparent transmission capacity *between network termination points*. As is set out above, the RBS backhaul circuit does not provide for transparent transmission capacity *between network termination points* and so does not fall within the definition of leased line services as defined in Annex I. Annex I therefore provides no foundation for the assertion that RBS backhaul constitutes interconnection.
69. Further reference to leased lines is made in Annex II of the Interconnection Directive, which relates back to Article 4.1 of the Directive. Article 4.1 sets out rights and obligations for interconnection between organisations. It provides that the organisations authorised to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have rights and obligations to negotiate interconnection with each other *for the purpose of providing the services in question, in order to ensure the provision of these networks and services throughout the Community*. Thus the purpose of interconnection rights and obligations under Article 4.1 is to facilitate the provision of particular services.
70. Annex II states that it covers those organisations which provide "switched and unswitched bearer capabilities to users *upon which other telecommunications services depend*" (emphasis added). It is concerned with organisations that provide elements of telecommunications services which are necessary for the provision of other telecommunications services. The latter are the 'end product' services to be facilitated by means of interconnection, the former the wholesale component or input necessary for the ultimate provision of the 'end product' services.
71. Category 2 of the list in Annex II of organisations which trade in telecommunications services necessitating such input components is

“Organisations which provide leased lines to users’ premises.” It is this definition in Part II of Annex I of the Interconnection Directive which underpins the analysis in the Commission’s Recommendation on Leased Lines Interconnection Pricing [DB/2/13/778/para 6] on which Mr Walker places reliance [DB/1/B/16/para 53] on behalf of the Director General.

72. However, as the Commission makes clear in its Working Document on Leased Line Interconnect Pricing [RB/2], the reference to leased lines in this context is a reference to the provision of *partial* circuits by the providers of leased lines to other network operators *in order that competing providers can provide the end product complete leased line to the user’s premises*. As the Commission states:

“Category b) of Annex II of the [Interconnection] Directive refers in particular to organisations which provide leased lines to users’ premises. The aim of this provision is to ensure that any leased line provider has the right and the obligation to negotiate with other leased line providers for the ‘interconnection’ of leased line part circuits, in order to provide customers with a complete end-to-end leased line between their premises. In this way, a leased line provider operating in a limited geographical area is able to offer his customers leased lines that terminate in any part of the Community, whether in the same Member State or in another Member State. *This provision for the ‘interconnection’ of leased lines is quite separate from other provisions in the Interconnection Directive concerning the interconnection of public switched networks.*” (emphasis added)

73. Thus, an operator is obliged to provide a PPC to operators wishing, in turn, to supply end users with a complete leased line. By contrast, as explained in BT’s Reply [RB/1/12 - 13/para 36 – 43; Lamb 2 RB/2/5-6 and 11/20-21 and 36], RBS backhaul circuits are analogous not to wholesale partial circuits but to retail complete circuits. Consequently, even if Mr Walker is right to state [DB/1/B/17/para 54(c)] that the Commission has described PPCs as falling within the Interconnection Directive, it does not assist the Director General in the present case. Rather than forming a wholesale input for a complete leased line product that will be sold on to the end user, a RBS backhaul circuit is itself an end product to be used by the network operator. The RBS backhaul circuit is therefore neither the ‘end-

product' service that is to be facilitated, nor the wholesale component necessary for the provision of the end-product service.

74. It is notable that in the passage set out above, the Commission states that the provision for the interconnection of leased lines is wholly separate from other provisions in the Interconnection Directive concerning interconnection. The fact that the notion of leased lines interconnection is a stand-alone regulatory provision necessarily implies that it would not have fallen within the standard definition of "interconnection" in the Interconnection Directive. It is because of this bespoke provision that those *particular* leased lines, as defined in the Interconnection Directive, are capable of giving rise to interconnection. Absent this provision, leased lines would have fallen outside the interconnection obligations of the Interconnection Directive.
75. Given that RBS backhaul cannot be brought within the scope of the stand-alone provisions concerning leased lines as defined by the Interconnection Directive, the inevitable conclusion is that they must fall outside the definition of "interconnection." Thus, wholly contrary to the Director General's assertion that "the treatment of leased lines within the Interconnection Directive confirms that provision of a service such as RBS backhaul may involve use of the provider's "telecommunications network" and thus give rise to "interconnection," the treatment of defined leased lines as a discrete additional category of interconnection leads to the conclusion that since RBS backhaul falls outside the definition, it cannot constitute "interconnection."
76. Although, as set out above, PPCs are quite different from RBS backhaul⁷, it is informative to consider the purpose behind their regulation. Previous

⁷ The UK Government's Initial Response on the Future Regulatory Framework for Communications Infrastructure and Associated Services recognised, rightly, that wholesale leased lines used to *complete operators' networks* was a separate concept both from "access to networks" and "interconnection" (RB/3 page 10 of 20 at section 2 - see also section 4 for the distinction between "access" and "interconnection", interconnection being a specific form of access between network operators). The Director General's position in these proceedings is irreconcilable with the Government's expressed views.

regulation both by UK regulatory authorities and within the European Community has sought to regulate only a part leased line product rather than a complete circuit product. The leased line part circuit is sold to a network operator as a wholesale component of a complete leased line retail product. The intention is to increase competition in the market for end-to-end leased lines and to increase access to services for the end user by permitting new entrants to provide competitive end-to-end circuits in competition with the incumbent operator and to address a perceived “bottleneck problem” of local network access [**Lamb RB/2/5-8/18-26; See also the Working Document on Leased Line Interconnect Pricing at RB/2 page 10 at para 4**⁸].

77. This reasoning is evident from the Commission Recommendation on Leased Lines interconnection pricing in a liberalised telecommunications market [**RB/10 Explanatory Memorandum paras 9, 10 and 14**] in which the Commission states:

“...These leased line interconnection services are provided by one operator to another *operator* to give access to a customer’s premises, and that constitute one segment of a end-to-end leased line between customer premises. This will allow new entrants⁹ to provide competitive end-to-end leased line offerings in particular serving small and medium enterprises...

10.....By focussing on this area where the competition is weak and the incumbent operator in each Member State continues to dominate the market, the aim is to stimulate the emergence of a competitive leased lines market providing users with a choice of leased-line supplier.

14. Finally, as leased lines are only one means of access to the customer, this Recommendation also calls on Member States to implement other complementary measures to attack the “bottleneck” problem of the local access network. These may include *unbundled access to the local loop* of the incumbent.....” (Italics original, underlining added)

⁸ Note that there is no suggestion in this Working Document that the partial leased line provided by the incumbent is itself a “network”. Rather, it provides a connection between the new entrant’s network and the incumbent’s network – see e.g. Figure 2 at RB/2 page 6.

⁹ I.e. to the relevant retail market.

78. The rationale for the Recommendation was, as the provisional text made clear **[RB/10 page 2 of the Recommendation]** that “incumbent operators remain the dominant suppliers of short distance leased lines into users’ premises.....”
79. Hence the regulation of PPCs is entirely in line with the underlying aim of increasing interoperability and access to services that underpins the definition of “interconnection” in the Interconnection Directive. PPCs are a direct and immediate input into the complete leased line product and their provision at wholesale prices is intended to increase competition in the market for leased lines.
80. The defining purpose of an RBS backhaul circuit could not be more different. It is a complete circuit product provided to the network operator not for resale, but to be employed as a component of the network operator’s own network to convey voice and data signals. It does not increase interoperability for the end user or improve access to competing services in the manner of conventional interconnection services.
81. It follows that the provision of RBS backhaul circuits does not fall within the purpose necessary for the presence of “interconnection” within the Interconnection Directive and the 1997 Regulations. If that is right, BT’s appeal succeeds on this ground also.

Discrimination

82. The Director General seeks to make a discrimination case against BT **[Defence DB/A/44-48/15-17]**. This adds nothing to the analysis. BT accepts, of course, that interconnection must be provided on a non-discriminatory basis, as set out, for example, in recital 6 of the Interconnection Directive. But the Director General’s reliance on this recital **[Defence DB/A/46/16]** assumes that which he needs to prove,

namely that RBS backhaul involves interconnection in the first place. The point therefore carries the Director General no further forward.

83. On the contrary, it is the Director General who is not treating like situations alike, not BT. It is he that is seeking to create discriminatory distortions to the market (see **Lamb 2 RB/2/12 – 13/40 – 44**).

Conclusion

84. The distortion of the market through the imposition of price regulatory measures cannot be justified in respect of the provision of RBS backhaul circuits. The Direction and the Continuation Notice are both ultra vires.
85. BT respectfully invites the Competition Appeal Tribunal to allow the appeal and make an order directing that both the Direction and the Continuation notice be set aside forthwith.

GERALD BARLING QC
ALAN MACLEAN
SARAH STEVENS
24 November 2003

Brick Court Chambers
7-8 Essex Street
London
WC2R 3LD

