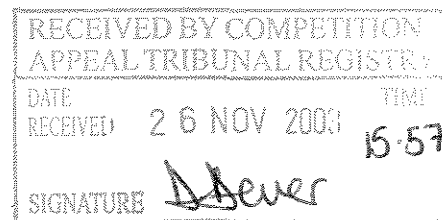


IN THE COMPETITION APPEAL TRIBUNAL
CASE NO. 1018/3/3/03



BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

- and -

THE DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

- and -

VODAFONE LIMITED

First Intervener

-and-

O2 (UK) LIMITED

Second Intervener

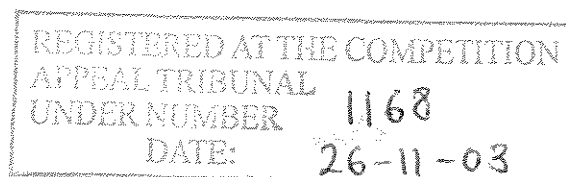
**SKELETON ARGUMENT
OF THE FIRST INTERVENER**

1. Vodafone supports the submissions advanced by the Director in the Respondent's skeleton argument of 24 November 2003. Vodafone has also seen a draft of a skeleton argument to be submitted by O2 and supports the submissions advanced therein. In addition, Vodafone makes the following submissions.

The defining characteristics of a telecommunications network

2. BT argues that, in order to qualify as a telecommunications network eligible for interconnection pursuant to Article 4 of the Interconnection Directive (97/33/EC)¹, a network must be capable of conveying messages from one end user to another

¹ Appeal Bundle 3, tab 3.



(paragraphs 39 to 52 of the Appellant's skeleton argument)².

3. BT's argument is incorrect, for the reasons set out below.
4. There is nothing in the definition of "telecommunications network"³ to suggest that a network must serve end users directly to count as a telecommunications network. It is a defining characteristic of a telecommunications network that it should permit the conveyance of signals between "defined termination points". This requirement serves only to exclude from the definition systems which permit the broadcasting of signals for general reception (e.g. terrestrial TV broadcasting). The function of the termination point (whether it serves an end user or an interconnecting operator) is not material to whether the requirements of the definition are met. What is material is that there should be defined termination points of some kind.
5. That this is the true import of the term "defined termination points" in the definition of "telecommunications network" is borne out by the definition of "telecommunications services"⁴, which makes clear that radio and television broadcasting services are excluded from the scope of services covered by the Directive. In contrast, a quite different approach is adopted under the new regulatory regime enacted via the new communications directives of 2002. That new regime is clearly intended to cover television broadcasting as well as other forms of telecommunications. Article 2 of the new Framework Directive (2002/21/EC) (Appeal Bundle 3, tab 8) defines an "electronic communications network" to include networks used for radio and television broadcasting, and the requirement that a network should permit the conveyance of signals between "defined termination points" has therefore been omitted.

² For completeness, Vodafone would note that its network is, in fact, capable of conveying certain messages from one end user to another, where mobile subscribers are within the coverage area of an RBS which is connected to a Vodafone mobile switch via a self-provided connection. This occurs where the RBS mast and the MTX are on the same site (and an example was mentioned during the Tribunal's site visit).

³ Article 2.1 of the Interconnection Directive.

⁴ Article 2.1 of the Interconnection Directive.

6. Thus, under the Interconnection Directive, the reference to “defined termination points” does not serve to connote just end user termination points, but is wide enough to embrace, in respect of any particular network, termination points at which other networks interconnect with that network. The defined termination points between which signals may be conveyed over a particular network are, in respect of that network, the “network termination points”. The definition of network termination points⁵ makes clear that such points may be points of interconnection with other networks, as well as termination points serving end users.

7. BT points out that, at Annex I to the Interconnection Directive, a public mobile telephony network is defined as “a public telephone network where the network termination points are not at fixed locations”. BT interprets this to mean that such a network must have *no* termination points at fixed locations. But that cannot be correct, since it is clear that the Directive envisages that such a network may interconnect with other (fixed) networks, and that such interconnection may occur at fixed points of interconnection. Therefore, this definition cannot preclude the possibility of a mobile network’s also having termination points at fixed locations.

8. As a separate matter, it is clear that the obligation to offer interconnection is not limited to organisations operating networks which serve end users directly. See, for example, Annex II to the Interconnection Directive, which lists the categories of organisation with rights and obligations to interconnect (by reference to the categories of network subject to interconnection rights and obligations). The categories listed include some networks which serve end users directly (“1. Organisations which provide fixed and/or mobile public switched telecommunications networks . . . , and in doing so control the means of access to one or more network termination points identified by one or more unique numbers in the national numbering plan. . . .”). But the categories listed also include some networks which need not serve end users directly (“2. Organisations which provide leased lines to users’ premises. 3. Organisations which are authorised in a Member State to provide international telecommunications circuits between the Community and third countries, for which

⁵ Article 2.5 of Directive 90/387/EEC (annexed to the Respondent’s skeleton argument).

purpose they have special or exclusive rights.”) It is clear, for example, that category 2 will include leased lines provided to other network operators (and not just to end users)⁶. Similarly, category 3 will include networks which provide relevant international circuits not directly serving end users.

Leased lines as a form of interconnection

9. BT argues that the Director’s reliance on leased lines in support of his case is misplaced, because leased lines form a wholly separate category of interconnection from other categories of interconnection and are subject to the interconnection regime only insofar as partial leased lines may be required to be provided by one operator to another to facilitate competition in the resale of complete leased lines (paragraphs 66 to 81 of the Appellant’s skeleton argument).
10. BT’s argument is incorrect.
 - (i) The structure of the Interconnection Directive makes clear that organisations providing leased lines are subject to obligations to offer interconnection in the same way as operators of other kinds of networks listed in Annex II to the Interconnection Directive. For example, the leased lines service is listed as item 2 in Annex 1 to the Interconnection Directive, between fixed public telephone networks and public mobile telephone networks. The leased line service is not singled out for different treatment, such as to suggest that it is in any way exceptional, or that it is deemed to be a form of interconnection when it would not otherwise qualify as such.

⁶ “User” is defined, in paragraph 2(1)(e) of the Interconnection Directive to mean “individuals, including consumers, or organisations using or requesting publicly available telecommunications services”.

That “users” includes other network operators is also confirmed by the “Commission Recommendation on Leased Line Interconnect Pricing”, cited by BT at paragraph 72 of the Appellant’s skeleton argument (Reply Bundle, tab 2 of the exhibits). In that Recommendation, the Commission notes that it is not only end users who use leased lines, but also network operators. It states, on page 3 of the document that: “Network operators, including mobile network operators, also use leased lines to link their switches and other sites when they do not have their own infrastructure”. The document does not suggest that such linkage falls outwith the scope of the interconnection regime, when it is effected as between network operators.

- (ii) The definition of “leased lines” provided in Annex I, Part 2 of the Interconnection Directive makes clear that a leased line is capable of being a telecommunications network: it comprises equipment and resources permitting conveyance of signals between defined termination points.

- (iii) There is nothing in the Interconnection Directive to suggest that leased lines may be required to be provided by way of interconnection only in the form of partial circuits for the purposes of facilitating competition in the resale of complete leased lines by network operators. The Commission Recommendation on Leased Line Interconnect Pricing⁷ addresses only one purpose for which leased line interconnection may be required. It is not expressed to be exhaustive of the scope of the rights and obligations of Annex II operators to effect leased line interconnection. The Director was correct in stating, at paragraph 3.11 of the explanatory document accompanying the Direction, that “The product which Vodafone is requesting.... falls within [the definition of leased line services] because it is transparent transmission capacity between two network termination points, namely: the point of connection with BT’s applicable system at the Vodafone mobile switch; and the radio base station.”⁸

Distortions of competition

- 11. BT argues that the imposition of cost-oriented price controls on its provision of RBS backhaul services will lead to distortions of competition (paragraphs 36 and 37 of BT’s skeleton argument).

- 12. BT’s argument is incorrect and, in any event, irrelevant.

- 13. BT has not chosen to appeal against the Director’s Direction on the ground that it represents a measure which is distortive of competition, or that the Director’s decision to adopt the Direction was otherwise inconsistent with the regime of the

⁷ Reply Bundle, tab 2 of the exhibits.

⁸ Appeal Bundle 1, tab 5.

Interconnection Directive. It cannot now argue this as a separate ground of challenge.

14. If BT now seeks to argue that its interpretation of the Interconnection Directive as not extending to the provision of RBS backhaul circuits is supported by the fact that a contrary interpretation would inevitably lead to a distortion of competition, then that is incorrect.

(i) If the provision of RBS backhaul circuits is an interconnection service, then a separate question arises as to whether a particular network operator should be required to provide that particular service at cost-oriented prices. It does not follow that the mere classification of the service as an interconnection service will lead to the imposition of a potentially inappropriate cost-oriented pricing obligation. (Moreover, the Direction does not in fact impose a price control, but merely requires that prices charged be determined on a cost-oriented basis.)

(ii) Finally, for completeness – albeit that it is not strictly relevant to the determination of the present appeal – Vodafone denies that the Direction is likely to lead to any distortion of competition. In this regard, Vodafone adopts the conclusions expressed by the Director in paragraphs 3.14 to 3.18 of the explanatory document accompanying the Direction: in short, an obligation on BT to offer cost-oriented prices allows Vodafone and others in a like position to make efficient purchase choices, by comparing the cost of buying an RBS backhaul circuit from BT, the cost of buying from other providers and the cost of self-provision. BT is not being asked to subsidise Vodafone's business.

Elizabeth McKnight

Herbert Smith

26 November 2003

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**SKELETON ARGUMENT
OF THE FIRST INTERVENER**

**Herbert Smith
Exchange House
Primrose Street
London EC2A 2HS
Ref: 2326/30840072
Solicitors for the First Intervener**