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IN THE COMPETITION APPEAL

Case No. 1018/3/3/03

TRIBUNAL

New Court,
Carey Street,
London WC2A 3BZ

4 December, 2003

Before:
SIR CHRISTOPHER BELLAMY
(President)

MICHAEL BLAIR QC
DR ARTHUR PRYOR CB

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicant

and

THE DIRECTOR GENERAL OF TELECOMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED

First Intervener

and

O2(UK) LIMITED

Second Intervener

Mr Gerald Barling QC and Mr Alan Maclean and Miss Sarah Stevens (instructed by British Telecommunications PLC Legal Services) appeared for applicant.

Mr Richard Fowler QC and Miss Kassie Smith (instructed by The Director of Legal Services (Competition), Office of Telecommunications) appeared for the respondent.

Miss Elizabeth McNight of Herbert Smith appeared for the First Intervener.

Mr Stephen Kon of S J Berwin appeared for the Second Intervener.

Transcribed from the shorthand notes of

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PROCEEDINGS
DAY ONE

1 THE PRESIDENT: Good morning, Mr Barling. May I apologise for the fact that this
2 hearing had to be put back.

3 MR BARLING: No, no, we understand that certainly you, Sir, have been extremely
4 occupied.

5 THE PRESIDENT: We would find it useful, I think, to start with a small discussion as to
6 where we exactly are in this case in relation to facts and so on.

7 MR BARLING: Let me help on that. Sir, I think you know everybody here, don't you? I
8 don't think I need to make the introductions - but if it would help I can.

9 THE PRESIDENT: Why not, because it is in the transcript.

10 MR BARLING: I appear with Mr Alan Maclean and Miss Sarah Stevens for BT, the
11 appellant. Mr Richard Fowler and Miss Kassie Smith appear for the respondent
12 OFTEL. Miss Elizabeth McNight for Vodafone, and Mr Stephen Kon for O2.

13 I hope that the Tribunal has had the right number of skeletons over the course of
14 last week, probably more than enough.

15 THE PRESIDENT: No, we have had the skeletons for which we are very grateful indeed.
16 The other two items outstanding which were requested by the Tribunal by the site visit
17 were, first of all a record of the site visit, and secondly if we could agree a statement of
18 facts. There has been quite a lot of effort, as you might imagine, put in particularly in
19 respect of that latter, but as it were, hot off the press virtually, as it were, we have this
20 morning in court finally reached an accord on the statement of facts, and just before
21 you came in I hope you had put into your hands the current version.

22 THE PRESIDENT: It has just been handed up to us now.

23 MR BARLING: Yes, I am grateful. You will not have had an opportunity obviously to look
24 at it. Can I just explain one or two things about that. We will get you clean copies over
25 lunch.

26 THE PRESIDENT: Yes, there are one or two manuscript amendments.

27 MR BARLING: There are one or two bits and pieces that have to come out. You may see
28 the words crossed out in the footnote first of all below paragraph 5, the footnote from
29 paragraph 5 there is some wording crossed out - "*or register with the network*" is
30 deleted.

31 THE PRESIDENT: Yes.

32 MR BARLING: In paragraph 7 there is a reference there to another major mobile company
33 in the UK having chosen to use exclusively microwave links and configured its
34 network accordingly.

35 THE PRESIDENT: Yes.

36 MR BARLING: And has therefore positioned many of its base station controllers remotely.
37 The position there is that Vodafone and O2 have indicated to us that they do not know
38 whether this is true or not. If I can put it in the vernacular they do not propose to make

1 a fuss about it but they want it registered nevertheless that they do not know whether
2 this is true or not. Our understanding - "our" being BT understanding is that OFTEL are
3 well aware of this and so I can't believe that this will become a big issue in fact, if it
4 does we will obviously have to find a way around it, because I don't think BT feel
5 particularly comfortable identifying it.

6 THE PRESIDENT: No, no, so that is not agreed as such?

7 MR BARLING: It is not agreed as such, but it is not tremendously in issue. In paragraph
8 11 there is some other wording that has been deleted, and as I said we will get clean
9 copies to the Tribunal as soon as we can.

10 THE PRESIDENT: Yes.

11 MR BARLING: I am sorry as it were at the 11th, well the 12th hour before the hearing, but
12 I hope it will be of some assistance, much of it is dealt with in one way or another in
13 the evidence that the Tribunal has anyway.

14 THE PRESIDENT: Yes.

15 MR BARLING: As far as an agreed record of the site visit is concerned, we assume that
16 the Tribunal would still like to have that. In an advanced state of agreement, I think
17 there is just a little bit of tinkering with it to do because by the very nature it was quite
18 difficult because there were some things that were said that some people would have
19 heard and not others, and a formal transcript was not, as I understand it, taken of the
20 actual presentation. So there has been a bit of argy-bargy going on about that. But if
21 the Tribunal would like, and it may be a helpful record, we will carry on the process
22 and make sure that you have what can be agreed about it.

23 THE PRESIDENT: I think if it is not too much trouble if you can see if you can produce
24 something, even if it is quite a short record, for two reasons. First of all, unfortunately
25 Dr Pryor wasn't able to be on the site visit; and, secondly, I think it ought to be clear for
26 the purposes of our record what we have and have not taken into account. I would not
27 want to run the risk of something somebody said informally on a site visit sort of
28 creeping into the back our minds, there is no record of it as it were.

29 MR BARLING: No, I see the point too.

30 THE PRESIDENT: We want to make sure we are operating on the basis of "The Record".

31 MR BARLING: We worked on the basis that you would want it and I am pretty sure that
32 you will be able to have it, if not today then very soon afterwards.

33 The other matter is the question of interim relief, and I believe the Tribunal has
34 been sent a draft proposed consent order---

35 THE PRESIDENT: If we have I have to confess it has not quite reached my attention yet.
36 Have we got a draft consent order?

37 MR BARLING: In any event I have just been given a signed copy of it, so perhaps the
38 answer might be, because nothing turns on this at the moment, if I were to hand that in

1 - we have added in fact, liberty to apply expressly - so the one that was sent to the
2 Tribunal earlier a week or so ago is not in fact now completely accurate. If I were to
3 hand this signed version in---

4 THE PRESIDENT: This is a suggestion that we should make an agreed consent order in the
5 agreed terms?

6 MR BARLING: Indeed. I will hand the original, which probably is appropriate to go to the
7 court.

8 THE PRESIDENT: Yes.

9 MR BARLING: It is the original - it is the only one we have! [Laughter]

10 THE PRESIDENT: I am somewhat nervous about taking charge of this important document
11 at the moment. I think the best thing to do is to kindly ask someone to make some
12 copies now - if the Registry could just make some copies of that. I will ask the learned
13 usher to pop up and get the photocopies done.

14 MR BARLING: While that is happening, as I said, the only other thing is we have a certain
15 number of bundles, perhaps I could do a tally to make sure. There are three BT bundles
16 and I will refer to them as "BT1, 2 and 3".

17 THE PRESIDENT: Yes, we have a numbering system - I do not know whether our
18 numbering system has been communicated to the parties.

19 THE REGISTRAR: I have some copies.

20 MR BARLING: That is very helpful. 1, 2, and 3 are BT bundles, then I see you have
21 "Request for Permission to intervene", yes, I have not conceptually myself got "4".

22 THE PRESIDENT: It is a very slim volume!

23 MR BARLING: Then there are two big defence bundles, and then there is a biggish reply
24 bundle, plus all the skeletons.

25 THE PRESIDENT: Yes.

26 MR BARLING: I do not think we will get into too much difficulty.

27 THE PRESIDENT: No, we have got what you think we have.

28 MR BARLING: There is just one other housekeeping matter - timing.

29 THE PRESIDENT: Yes, I think we do want to explore this a little, from two points of view.
30 First of all, the question of how far we can get today, whether we are going to need
31 more time and in particular we have not yet had a chance to absorb the agreed
32 statement of facts, and we ourselves have obviously been cogitating various issues, and
33 we were waiting to possibly communicate some questions for the parties once we had
34 got the agreed statement of facts. So what we are wondering is whether we should treat
35 today as a kind of opening statement of position by everybody.

36 MR BARLING: Yes.

37 THE PRESIDENT: Pause after today to absorb the statement of facts and to reflect what
38 questions we have that still remain as it were, relevant questions and regroup not

1 tomorrow, because I think we need time for everybody to absorb what we have, but a
2 little later on for a second go at it where we could have more of a discussion and then
3 the closing speeches. Of course, we are very much in the parties' hands as to how you
4 would want to do it. We do not particularly want for this case to turn into a kind of
5 debate between medieval theologians as to what particular technical matters mean
6 without having quite a good grasp of the underlying factual real context in which the
7 point arises.

8 MR BARLING: No, I see.

9 THE PRESIDENT: So that was our very preliminary thinking. We are very much in the
10 parties' hands. I do not know what your thinking was, and when we have got your
11 thinking, Mr Barling, perhaps we could go around the table and see what everybody
12 thinks.

13 MR BARLING: Starting, as it were, with the nuts and bolts, my feeling is that it is
14 conceivable that we would finish today, but that it would be tight. I do not know
15 whether my friends share that approach. My feeling is that we would certainly finish in
16 a day and a half. Dealing with the point, Sir, you make, about the understanding, the
17 facts, although to some extent apparently complex---

18 THE PRESIDENT: Are not as complex as they may at first seem.

19 MR BARLING: ---are probably not as complex - one has in mind the time slot matter that
20 we discussed at the presentations, but I think in a way we say that that is interesting
21 technology but not terribly important in how the thing is done, when what is agreed is
22 what has been agreed.

23 THE PRESIDENT: Yes, well we do not quite know what you have agreed yet.

24 MR BARLING: Of course you don't. So obviously it is very much for the Tribunal I think
25 as to whether they feel happy doing it now. But it sounds as though, Sir, from what you
26 are saying, that if we did not finish today we would in any event go off to another day,
27 so that would in any event leave time for---

28 THE PRESIDENT: Well, we have had a very provisional look at our diaries and 16th
29 December or 18th December might be possible. We do not want to rush this case, Mr
30 Barling---

31 MR BARLING: No.

32 THE PRESIDENT: ---or try to compress it.

33 MR BARLING: No, certainly not.

34 THE PRESIDENT: We want to feel comfortable that we have got and understood
35 everything that is said to us.

36 MR BARLING: Well either of those would not pose a problem at the moment for me
37 particularly.

38 THE PRESIDENT: Right.

1 MR BARLING: What might be appropriate is for me, if I may, to open the case---

2 THE PRESIDENT: Yes.

3 MR BARLING: ---because there will be certain things that the Tribunal will want, as it
4 were, to have their attention drawn to in any event.

5 THE PRESIDENT: I think you should, absolutely.

6 MR BARLING: And then see where we get to after that.

7 THE PRESIDENT: Yes. I think that is a very good idea.

8 MR BARLING: Then I have my chance in reply if the Tribunal feels that it has not fully
9 appreciated ...

10 THE PRESIDENT: That would be a very good idea. Shall we go around the table and see
11 what everybody thinks? Mr Fowler, I think probably it is you next. We are just on nuts
12 and bolts at the moment.

13 MR FOWLER: I can see considerable advantages in the course of action you have
14 suggested in order for the parties to be in a position to respond to any concerns or
15 questions that you have, but I do agree with my friend that in fact the facts are not as
16 complicated as they might at first appear and the issue is a very short and narrow one,
17 and it may be that we can usefully today put the nuts and bolts of the case on all sides
18 to you and then see whether you would like to have additional time and come back to
19 us in a second round.

20 THE PRESIDENT: That sounds sensible. Let us start in the normal way and see how we
21 get and if, later in the day, we decide there is a point at which we want to stop -
22 certainly we would like to have everybody's position today - we will reflect on it and
23 have a discussion amongst ourselves as to what we want to do, and then come back
24 with a suggestion to the parties.

25 MR BARLING: That seems very sensible. I had anticipated - I know things can always be
26 a bit longer or a bit shorter - I had anticipated that with a fair wind I would probably be
27 going until early this afternoon - I probably would not finish at lunch time, but it would
28 be hopefully not very long after.

29 THE PRESIDENT: Well let's see how we get on.

30 MR BARLING: As you said there have been quite full skeleton arguments, and we have
31 had the site visit so in a sense one can get down to the basics without too much
32 preamble. You already know, and everybody agrees, that there is only one issue in the
33 case and at least it can be stated as a crisp issue. Whether the provision of what is
34 known as an RBS backhaul circuit by BT to Vodafone engages the concept of
35 "interconnection" - "interconnection" in quotes because it is obviously in connection
36 within the meaning of the Interconnection Directive. If does amount to interconnection
37 in that sense then it is common ground also that Oftel did not have jurisdiction to
38 determine the dispute between BT and Vodafone under the relevant 1997 regulations

1 which implement the Interconnection Directive into domestic law.

2 On the other hand, the result of the product being held to the interconnection
3 would be that those many RBS backhaul products currently supplied by BT to
4 Vodafone and indeed to other mobile operators, currently supplied at normally
5 negotiated commercial prices would have to be supplied, instead on a different non-
6 commercial basis which is expressed as cost oriented, but in effect is a form of
7 regulated pricing, so in effect BT would be supplying a competitor, in fact the biggest
8 mobile company in the world - five times larger than BT by market cap scales, with
9 components of its own network at special subsidised prices.

10 One of the anomalies, if I can just make a few general points---

11 THE PRESIDENT: Yes.

12 MR BARLING: ---of that result would be what might be regarded as an unfair advantage
13 that it would provide to Vodafone in relation to other mobile companies - we do not
14 represent them obviously - some of them largely self-provide these components. "Self-
15 provide" is a horrible word but it is the word that people use about this. They build them
16 themselves by employing contractors. What that normally involves is a contractor
17 laying a cable, or setting up a microwave link between the RBS tower and the base
18 station controller, or they may use a combination of a cable and a microwave link.

19 Those mobile companies who have done this have obviously had to pay their
20 contractors ordinary commercial prices. They are unlikely to have received any subsidy
21 from the cable layers, and they have now incurred the cost of configuring and building
22 the network accordingly. If Vodafone and Oftel are right about this in saying where BT
23 supplies it it is a form of interconnection - which we say they are not - then there is
24 obviously scope for considerable skewing of the commercial decision to build or buy
25 which has already been made by all these mobile companies.

26 Sir, I will refer to my skeleton in due course, but may I first of all make a
27 number of points which are important, which emerge I think from all the skeletons---

28 THE PRESIDENT: Yes.

29 MR BARLING: ---because they help, in our submission, to demonstrate why this direction
30 is wrong headed, and wrong in law.

31 At the heart of the dispute here is a distinction between whether the supply of
32 the product is interconnection of two telecommunications networks, and they of course
33 are defined - telecommunications networks are defined - whether it is that, an
34 interconnection, or alternatively whether BT is supplying Vodafone with a component
35 which it needs in order to create a functioning network, something necessary to bring
36 the network into being which is logically prior to any possibility of interconnection -
37 you have to have a network before you can interconnect.

38 This, we submit, is an important distinction here, and it is a distinction which is

1 recognised by the interconnect Directive itself. It is so important, if I may just trouble
2 you - probably I will be referring quite a lot to the Directive and I don't know whether,
3 Sir, you have extracted it.

4 THE PRESIDENT: No, we haven't yet.

5 MR BARLING: It is lurking in bundle 3. I am going to take the Tribunal, if I may, to this
6 Directive in some detail in due course, as a separate exercise, because it is obviously
7 very important. If I can just point out at the moment preamble number 4, recital 4.

8 One ought perhaps to skim read recital number 4. It is the last sentence that we
9 particularly emphasise in this connection:

10 *"...whereas telecommunications [plural] which are interconnected may be*
11 *owned by the parties involved or may be based on leased lines and/or*
12 *transmission capacity not owned by the parties involved."*

13 THE PRESIDENT: Yes.

14 MR BARLING: So the Directive is saying that the fact that you have built or based your
15 network on transmission capacity which you have bought in inevitably from other
16 operators, and therefore the fact that that bit of your network at any rate is not owned
17 by you, does not prevent you from having the interconnect rights and obligations which
18 a network owner would have in respect of the network which you have just
19 constructed. It draws a distinction, in other words, between interconnect rights between
20 networks and how the individual operators build up their networks.

21 Translating that to the present case Vodafone's network is, at least, in part based
22 on transmission capacity bought from BT, in particular these backhaul links, though
23 actually others as well which I am going to touch on which they buy from BT which
24 equally are components of the network which we are not dealing with at the moment.

25 THE PRESIDENT: So it is analytically the purchase of transmission capacity rather than an
26 interconnection?

27 MR BARLING: Yes. And so, however you do it, you end up with your network that
28 functions and then your question of interconnection logically can arise. Then when it
29 does arise it takes place between the Vodafone network including the bits that they've
30 bought in, the bits that BT have provided them with and the network of another
31 operator. Vodafone is not interconnecting its network with the bits bought in because
32 until Vodafone has bought them in Vodafone has not got a network to interconnect
33 with anything. We submit that that is absolutely clear when one looks at that recital.

34 Another word or two about this self-provision of links or other bits of one's
35 network. It is common ground that acquiring this product from BT, or indeed from
36 another backhaul link supplier because although BT is the biggest supplier of these
37 kinds of links other operators do it too, and that is simply an alternative to building it
38 yourself, as other mobile operators have done.

1 When BT supplies these links all it is doing is the equivalent of a contractor
2 laying the cables of sufficient capacity from the relevant cohort, or base stations,
3 because as you remember, Sir, from the visit one base station controller, normally in
4 this case back at the MTX building, one base station controller actually controls a
5 number of these base stations, the towers. So all BT really is doing is equivalent to the
6 contractor laying the cables of sufficient capacity back from the cohort at the base
7 stations to the relevant base station controller.

8 We make two points about that. First of all, it is counter intuitive to suggest that
9 a product which can just as well be self provided is suddenly cloaked with the magic of
10 interconnection when instead of being self-provided it is brought in from another
11 operator.

12 Secondly, and perhaps a point that I have already made, but if the mobile
13 operator cannot get a special price from his cable layer when he self-provides it, why
14 should they get it from BT when they provide the self same product?

15 There is another point which I would like to emphasise. The touchstone of
16 interconnection, as the Tribunal will already appreciate, and which will be reinforced
17 when we look at the Directive, is that it enables one operator to get at the customers
18 who are subscribers to other networks. That is the great thing about interconnection -
19 any to any, all to all is the ultimate object throughout the European Community, in
20 looking at it in the macro sense - interconnection of networks throughout the
21 Community. It is obviously on a national scale, exactly the same. If you are in
22 Kingston-upon-Hull with your little separate network, historically if it has always
23 existed in Hull you do want to be able to phone anybody else in the Country, even if
24 they are on different networks, and so that is the magic of interconnection. In this
25 country separate networks always had to be separately franchised, separately licensed,
26 even if they were owned by the same organisation.

27 The link, **this** link, whether self-provided or bought in, does not enable
28 Vodafone customers to communicate with another network's subscribers. All it does is
29 that it enables the base station controller to do what its job is, namely, to control and
30 communicate with the base station - nothing more. It gives Vodafone subscribers no
31 access to subscribers on BT's network. Vodafone would have to have this link, even if
32 interconnection did not exist, and if, for example, the concept of interconnection was
33 prohibited it would still be an essential link.

34 THE PRESIDENT: Just to talk to other Vodafone subscribers?;

35 MR BARLING: Yes, indeed. What permits Vodafone customers to communicate with the
36 subscribers of other networks, including BT's network, are what are known as the
37 "Established points of interconnection" between Vodafone's network and each of those
38 other networks.

1 There is a very helpful, because I suppose it comes from an attractively
2 "neutral" source, statement of all this in the Competition Commission's description,
3 which if the Tribunal would just take out bundle 3 - in your enumeration it is... it is the
4 reply bundle, basically.

5 THE PRESIDENT: Yes, bundle 9 in our coding.

6 MR BARLING: At tab 8 of that, is some text that Mr Butterworth refers to in his second
7 statement at paragraph 10. Actually, I would invite the Tribunal to put a "sticker" in
8 this bit because it is very helpful.

9 This is the report given by the Competition Commission on termination
10 charges. Under the heading "Mobile Telephony", if one turns to page 5 of that report,
11 one sees towards the bottom of the page:

12 *"The Basic Principles of calling a mobile phone".*

13 THE PRESIDENT: Yes.

14 MR BARLING: Sir, it may save time - I do not know whether you are willing - if the
15 Tribunal is just willing to read to itself paragraphs 3.10 through to 3.15.

16 THE PRESIDENT: I think we have probably already looked at some of this, but let's
17 quickly look at it again. [*Pause for reading*]

18 MR BARLING: That is quite important. That describes what is regarded as
19 interconnection. Then if one goes on, one goes down to page 7.

20 THE PRESIDENT: Your point is interconnection?

21 MR BARLING: Yes. Sir, you hit it on the head straight away. But if you look a little bit
22 earlier at the bottom of page 7 where it says the heading "GSM Network Architecture,
23 Overview", paragraph 3.19 describing the features of Networks of this kind. Then over
24 the page, under paragraph 3.20 there is a helpful diagram, and paragraph 3.20 says that
25 the diagram describes in a general way the main components of the GSM mobile
26 Network.

27 *"The Network is broken down in to several layers each with its own
28 characteristic and purposes. The individual components are described below."*

29 Then the text from paragraph 3.21, over the page to 2.39, we submit is very
30 important, or certainly a very helpful description of the various layers of a mobile
31 network.

32 THE PRESIDENT: We are just quickly skim reading to remind ourselves.

33 MR BARLING: I am grateful.

34 THE PRESIDENT: [*Pause for reading*] Yes.

35 MR BARLING: The Tribunal will note that what we are arguing about, the RBS backhaul
36 circuit, is dealt with really at paragraph 3.21 as far as the "radio layer", if I can put it
37 that way. The radio layer comprises the basic receiver stations, BTS - the "BTS" as I
38 understand it is what we have been calling RBS.

1 THE PRESIDENT: Yes.

2 MR BARLING: So that is the slightly different terminology there - I will be corrected if I
3 am wrong about that. So it comprises the base station, receiver stations, and base
4 station controllers [BSC]. Then a little bit lower down it says:
5 *"BTSs are either connected directly to a BSC or in some cases may be daisy
6 wheeling through other BTSs. An insurance may be dual links."*
7 which I think we heard about on the site visit. There may be another link just to provide
8 a back up route.
9 Then it goes on, lower down, under the heading "*The Mobile Switching Centre
10 Layer*":
11 *"The mobile switching centre, MSC..."*
12 which we have called the MTX in our usage throughout this, "*...comprises a number of
13 MSCs and a series of databases..."*
14 and so on.
15 *"Connections between BSCs and MSCs are often duplicated to increase
16 reliance."*
17 Then there is the transit layer, to carry calls between. The transit layer, as we
18 understand it, are the things that link up the group of MTXs in some of the diagrams
19 that you saw and we have copies of those slides that were at the presentation in case the
20 Tribunal has not retained them.
21 You remember there was a circle of MTXs I think on one of them, each linked
22 up by a link.

23 THE PRESIDENT: Will the slides form part of the account of the site visit?

24 MR BARLING: Yes, indeed they do, they do. We suggest there is a description and then
25 the slide is annexed to it.

26 THE PRESIDENT: Yes.

27 MR BARLING: Then we come to the point of interconnection which connects with other
28 networks.

29 THE PRESIDENT: Is the point of interconnection the same as a network termination point?

30 MR BARLING: No, no, in our submission.

31 THE PRESIDENT: Will we come to that?

32 MR BARLING: We will. It is going to be an issue for us in this case because in the context
33 of the Interconnection Directive, and in particular the definition of what is a Network,
34 we submit that it is very clear that when the Interconnection Directive talks about the
35 defined termination points as, in effect, being one of the criteria for discovering
36 whether you have a network, it is only talking about end user termination points.

37 THE PRESIDENT: Yes.

38 MR BARLING: It is not talking about intermediate points. That, we submit, is crystal clear

1 when one looks at the Interconnective Directive itself.

2 So what we submit is correct about the Competition Commission's approach

3 with respect to describing it. Clearly, there is a very clear distinction between the

4 interconnection, which takes place beyond, if I can put it that way, the MTX - it is has

5 to go through the MTX switch proper. You cannot get a signal from, and I understand t

6 his to be common ground, a signal from first of all the mobile handset must go the base

7 station tower, it must go down the backhaul link, and must go through the base station

8 controller and then it must go to the switch. The only thing I am not sure about now

9 that I am on my feet is whether it is the base station controller or the MTX Switch

10 which actually determines "Ah, this is something which needs to go to a point of

11 interconnection. But certainly, I think it is the switch, but I will be corrected very

12 quickly.

13 THE PRESIDENT: So interconnection, on your submission, does not take place at any point

14 before the switch

15 MR BARLING: Precisely.

16 THE PRESIDENT: It is at or beyond the switch?

17 MR BARLING: It is at or beyond the switch, and so when we get to the mobile switch, the

18 MTX, then that reads into "Ah, this is not something going back on to a customer on

19 the Vodafone Network, it is going off to a BT customer", and it then sends it to the

20 nearest point of interconnection with the BT Network, which will probably also be at

21 the switch site that we went to. It may even go back down the same cable, the same

22 infrastructure that is used for the backhaul link, but it will always be separate from

23 what is coming through, back and forwards, along the backhaul link. This is the time

24 slotting point which is so clever---

25 THE PRESIDENT: May physically use the same...

26 MR BARLING: Yes, but it will always be separate.

27 THE PRESIDENT: Yes.

28 MR BARLING: The time slotting is so clever that it can actually interleave, it can use the

29 same optical infrastructure for different channels.

30 THE PRESIDENT: Yes.

31 MR BARLING: And those were the straws, if you like, that we saw in the helpful model,

32 which again is available. This example provides some insight into the issue which we

33 have to touch on in the course of this, one of the criteria for interconnection, which is

34 the logical linking of networks.

35 THE PRESIDENT: Yes, we are going to need a bit of help on that.

36 MR BARLING: I think we all will, but one thing that is quite clear is that if, as they

37 submit, the backhaul circuit that BT provides is either the BT circuit proper or is some

38 other kind of notional BT circuit which we submit does not exist, a Network in itself, or

1 is the BT Network - the larger BT Network - what is quite clear is that there is no
2 logical linking with the BT Network.

3 In other words if what they say is right, it ought to be possible, if that were a
4 point of interconnection with BT in any sense of the word, it ought to be possible for a
5 message for a BT customer to break out of the RBS backhaul link, but that is not
6 possible. Regardless of whether the Vodafone customer is calling a BT customer,
7 whatever he does it will go down the pipe. The pipe could only go to one place. Its
8 purpose is limited. It could only take these messages to and from the base station
9 controller. There is no question of it being logically linked in any sense of the word,
10 normal sense of the word, with the BT Network.

11 One comes back then to the question, which may be the fundamental question,
12 and one sort of agonizes about this, as one looks at it in different ways, "Whose
13 Network are we talking about here?" When I say "Whose Network is it?" We do not
14 mean in a regulatory sense, or indeed in ownership terms. BT undoubtedly owns, and
15 is responsible for, the infrastructure, which is used to provide the backhaul link. When
16 we say "Whose Network is it?" we mean in terms of the distinction which was in
17 Recital 4 of the Directive, which presupposes that although I may not own my network,
18 or all of it, basing it on borrowed capacity, it is still my network. The answer, therefore,
19 we submit, must surely be in any commonsense way this is Vodafone's Network.

20 THE PRESIDENT: It is part of the Vodafone Network?

21 MR BARLING: Yes. They have bought this transmission capacity in for their own
22 purposes to complete their own network, nobody else can use it.

23 THE PRESIDENT: They have simply bought a chunk of capacity?

24 MR BARLING: Yes, bought, or if you prefer it we can say "leased", or borrowed,
25 whatever, but it is for their own purposes to complete their own network, nobody else
26 can use it, and when Vodafone use it, they use it for all the purposes that any operator
27 uses his own Network, precisely the same purpose that the mobile operator down the
28 road, who has built his own, uses his backhaul link for.

29 Sir, Oftel to some extent share this view. If one turns up in the first volume,
30 Volume 1, Oftel's explanatory memorandum, explaining this decision, it is in tab 5.

31 THE PRESIDENT: Yes.

32 MR BARLING: I just want to show you two paragraphs, the summary starts at page 5.
33 Over the page at paragraph S.8 of the Summary it says:

34 *"The Director believes there are a number of benefits. He notes that the*
35 *provision of radio based station backhaul circuits is crucial to the operation of*
36 *Vodafone's Network."*

37 Then if one goes a bit further--

38 THE PRESIDENT: You place emphasis on the words "Vodafone's Network"?

1 MR BARLING: Yes. Then paragraph 4.5, which is even clearer:
2 *"It is clear that the links between Vodafone's RBS and MTX are of fundamental*
3 *importance to its business. The links are an essential component of Vodafone's*
4 *Network."*

5 THE PRESIDENT: Yes.

6 MR BARLING: It couldn't be clearer than that. In some ways this is really the start and the
7 end of the case. If it is, as we submit in reality it is, Vodafone's Network that is being
8 completed or, in the words of recital 4, is being based on this transmission capacity to
9 some extent, then interconnection becomes an irrelevance. There is only a single
10 Network, and that was in fact the case. What is happening here is not interconnecting
11 with BT's Network, it is actually connecting up a bit of their Network, one bit to
12 another.

13 I mentioned the Competition Commission referred to the layer, what they called
14 "MSC Layer", I think, which was the main switching layer of the mobile network - we
15 have called them "MTX's" and if you may remember there are about 30 of those around
16 the Network, and they are all linked up together. There has to be a link between each of
17 those switches as well, that is what they call the "Layer".

18 If using these borrowed backhaul links to complete their network amounts to
19 interconnection then why would it not also amount to interconnection to use that same
20 kind of borrowed capacity to link up the switches.

21 THE PRESIDENT: The Vodafone switches you mean?

22 MR BARLING: The Vodafone switches, yes, in fact they are equally vital components of
23 the mobile companies' Network and, in fact, BT actually sells many of those also to
24 Vodafone - a lot of those are bought from BT.

25 THE PRESIDENT: So you say that you sell many items of various kinds to Vodafone that
26 they need to make their Network?

27 MR BARLING: Yes.

28 THE PRESIDENT: It is only interconnection if the particular item that you are selling, or
29 particular circumstance is that that item is in itself capable of carrying a message to
30 some other operator's Network, rather than being confined internally to the Vodafone
31 Network? I may not have put it very well.

32 MR BARLING: Well, we're all trying to think of it, as it were, because it is the "old
33 elephant" problem---

34 THE PRESIDENT: Yes, quite. Anyway that is your submission?

35 MR BARLING: Yes, it is, so we don't know. Does this decision by OfTel mean that BT will
36 also have to supply all those other bits of Vodafone's Network which they buy from us
37 at subsidised prices. But that is the apparent result. We say in reality those are no more
38 backhaul links than the MTX links are.

1 The conclusion, we submit is the right one, is confirmed when one looks, since
2 I have started as it were almost sort of top down---

3 THE PRESIDENT: No, you got straight to the central point.

4 MR BARLING: But if one looks then at the nuts and bolts of the Directive, the criteria
5 referred to in the Directive defining interconnection, we submit that the analysis I have
6 just put before the Tribunal is supported and confirmed. I think the Tribunal know we
7 have looked at it from three points of view. We looked at it, is there a network? What
8 are the Networks, if you like, that are being linked, and the question of "Defined
9 termination point" goes to that issue.

10 Then we have looked at well, even if there are Networks, are they logically
11 linked? Finally, we have looked at the last criterion which Oftel ignored until, as far as
12 I can see, their skeleton argument, they said there were only two criteria, but they now
13 accept that there are, in fact, three mentioned in the definition of interconnection, which
14 is "Does the product in question serve the purpose required by an interconnection
15 product?" We have submitted that they fail on all three of those when one looks at
16 them.

17 But given what we have already submitted, looking at it as it were in the round,
18 that is hardly surprising, that it fails the test. I mean taking the first of those, it is hardly
19 surprising that backhaul links don't conform to the required aim of interconnection, the
20 interoperability of two networks, so that customers can, in fact, communicate with
21 customers on another Network, just as they communicate with customers on their own
22 Network. Why is it hardly surprising? Because links only serve to create one single
23 Network, namely the Vodafone Network.

24 THE PRESIDENT: What would be an interconnection product?

25 MR BARLING: One interconnection product might be, for example, an interconnection
26 link, which also BT supplies to Vodafone, which is the cabling, or linkage required,
27 sometimes to take the BT Network up to a suitable permanent point of interconnection
28 with the Vodafone Network. I may not have expressed that very well, but that would be
29 perhaps one of the most obvious, I think they are called "Interconnect" circuits and as I
30 understand it BT sells many of these to mobile companies and they are standard
31 interconnect products sold on the normal wholesale cost oriented terms.

32 They are logically linked because they enable the two networks, as it were, to
33 operate as one. Just to give an example of what this logical linking creates. If a
34 Vodafone customer rings a BT customer, and the BT customer is on the phone, the
35 two Networks need to be able to recognise the engaged tone, for example, that the BT
36 phone is sending out. That is just one example, there are a whole lot of other things that
37 are involved in this kind of logical linking.

38 THE PRESIDENT: To enable the two Networks to talk to each other?

1 MR BARLING: Yes.

2 THE PRESIDENT: I don't mean talk in the physical sense, but to communicate with each
3 other, digitally and otherwise.

4 MR BARLING: Yes, so that would be a classic interconnect product. If BT already had the
5 cabling, as it were, that enabled them to get close to the Vodafone Network to provide
6 interconnection, Vodafone might well prefer, rather than paying for a cable themselves,
7 to go to another place. They might say "We'll buy it from you", and they do that. There
8 are many other interconnection products as well, but that is an example.

9 THE PRESIDENT: If I can put it rather broadly, I will try not to use any technical word, in
10 any system, for want of a better word, in the widest sense, you have somebody who is
11 trying to make a telephone call at one end, trying to reach the person who is calling at
12 the other end, the mobile handset operator, whatever it may be, who is calling from a
13 fixed handset to a mobile set, or two mobile sets or whatever---

14 MR BARLING: Yes.

15 THE PRESIDENT: ---all that requires a vast great system, and the central point is at what
16 point in this series of events takes us from the caller to the RBS, all the way through to
17 the other caller at the other end. At what point do we get to interconnect them?

18 MR BARLING: We get to interconnection at the point after the switch has recognised.

19 THE PRESIDENT: You say it is after the switch?

20 MR BARLING: Yes, I can't believe that is in dispute, and there is a description in Mr
21 Butterworth's which we can look at, but the switch will say "Ah, that's on another
22 Network", and it will then, as it were, communicate with the other Network. The other
23 Network will have to respond to say whether it can carry the call, whether it has
24 capacity at that moment to carry the call and so on and so forth. So the interplay will
25 then begin, and these signals pass over the established points of interconnection
26 between the two networks - not the backhaul links.

27 THE PRESIDENT: No, fine.

28 MR BARLING: Just to hammer away at the point. I was saying why, as it were, when one
29 looks at it bottom up, as opposed to top down, one gets the same result, so the purpose
30 is just not there.

31 Secondly, it is hardly surprising that the backhaul link itself does not satisfy the
32 criteria for a Network. It is counter intuitive anyway to think of it as a Network, just
33 this one link, which is just in effect a pipe - what has been called, rather curiously, this
34 transparent pipe by which - I have now got to the bottom of it - is meant in the business
35 that if you put your eye at one end you would see straight through to the other end
36 because what goes in at one end will come out at the other end, the same as it went in.
37 Things do happen in the middle, of course, to get it there, because that is part of the
38 carriage process with multiplexing in particular, which is the breaking down of the

1 electronic signals so that they can be carried on optical cables and so on, if that is the
2 way it is being carried.

3 THE PRESIDENT: Someone used the image of a straw in the site meeting, I don't know
4 whether that is an appropriate image.

5 MR BARLING: Well that is what happens in practice. What is interesting is the
6 technology, but the concept is the same as a pipe. It is not in dispute that what comes
7 out is the same as what went in. It will always come out at the same point. It cannot go
8 anywhere else. So it is hardly surprising, therefore, that that circuit, that pipe does not
9 satisfy the criterion for being a Network, namely that it should carried signals between
10 defined termination points, because it is not a Network of its own, it is a component of
11 Vodafone's Network as Oftel themselves have said in their explanatory memorandum.

12 Finally, it is hardly surprising that there is no logical link into BT's Network.
13 Why? Because the backhaul link is, in fact, linking up parts of Vodafone's Network.

14 I will obviously need to come on to the three criteria in a little more detail, Sir,
15 in due course, but on any view, as Oftel themselves, very frankly concede, also in their
16 explanatory memorandum, if one looks at paragraph 5.8:

17 *"...to consider this product as amounting to interconnection would be novel".*
18 - their words.

19 THE PRESIDENT: He says it is a standard dispute, all be it in a novel area.

20 MR BARLING: Yes. Well, am I being unfair? I assumed that meant the---

21 THE PRESIDENT: Well we simply read what he says.

22 MR BARLING: I took that to mean that as a standard interconnect dispute this was a novel
23 area.

24 What I was proposing to do now was to delve in slightly more detail into the
25 purpose and meaning of interconnection, just by reference to one or two documents,
26 then look at the Interconnect Directive in a little more detail and then I need to spend a
27 moment or two after that just dealing with the leased lines issue which we see
28 discussed in the Interconnect Directive and explain that, because that is quite, as it
29 were, a tricky bit to understand. So when one understands it, in our submission, it is
30 fine. Then I will come on to the three main criteria, and that is the road plan, really.

31 The best explanation of the meaning and purpose of interconnection as
32 generally understood is in an Oftel document published in 1999, explaining what the
33 rights and obligations to interconnect under the Directive entail. If one looks at volume
34 2, and turns to tab 7.24. You see what the document is **there**, an Oftel statement about
35 the Rights and Obligations to Interconnect Under the EC Directive.

36 If I can just quickly take you to one or two passages. If one looks on the second
37 main page, under paragraph 1.2, *"The Provisions in the EC Interconnection Directive"*
38 is the heading.

1 *"The EC Interconnection Rules are designed to ensure end to end*
2 *interoperability of Networks and quality of access, universality of service. In*
3 *practice this means ensuring that customers to whom access is provided by one*
4 *operator can contact customers to whom access is provided by a different*
5 *operator. Thus regardless of who provides the facilities which customers elect*
6 *to use to access the Telecoms Service they can communicate with one another.*
7 *The EC Rules on who should interconnect are set out in Article 4 in Annex 2 of*
8 *the Directive. Annex 2 describes the categories operated which are deemed to*
9 *have rights and obligations to interconnect with each other. Article 4 defines*
10 *those rights and obligations as being to negotiate interconnect with each other*
11 *for the provision of publicly available telecommunications services."*

12 There is then a reference to additional obligations on operators with significant market
13 power.

14 But really it is not particularly put very helpfully what the aim of
15 interconnection is, and we could not have put it better. Perhaps it is also useful to turn
16 to paragraph 1.14 which is where Oftel is explaining what you have to do to qualify to
17 be included in the Annex 2 list of operators with those rights and obligations of
18 interconnection. They must be providing publicly available Network Services, and they
19 must be running a system with which to interconnect to others. You have to have
20 something that is working before you can interconnect it.

21 MISS McKNIGHT: Can you read to the end?

22 MR BARLING: You want me to read to the end of where? Yes. *"...which will comprise*
23 *transmission and where appropriate switching"*.

24 Then perhaps for what it is worth just reading 1.18, and explain a little bit more
25 what they mean by running a system. The punch line seems to be there, the last
26 sentence:

27 *"This means a systemless service providers cannot qualify for inclusion"*.

28 In other words you have to have a system, we say a "Network", or you can interconnect
29 it with anything. But of course, we know from the Directive that that Network can, of
30 course, be built up.

31 That is all I have on that unless anybody has any other bits they want me to
32 draw attention to?

33 If we can go in the same bundle to tab 7.2, which is another Oftel document, the
34 year earlier - this is April 1998, on "Interconnection/Interoperability of services over
35 telephony networks. This is just helpful, perhaps generally. All I suggest, Sir, is that
36 maybe the Tribunal would care to side line over the page 2 - "Oftel's Policy on
37 Interconnection/Interoperability has been developed through discussion." Then it deals
38 with why interconnection and interoperability is important. There is just the first bullet

1 point, really, over the page:

2 *"It is important for customers who want to be able to use services whether or*
3 *not they are customers of the operator which has launched the service, and*
4 *whatever customer premises they use it is important for Telecoms' Operators,*
5 *who may wish to make their own services available more widely than just to*
6 *their own directly connected customers, and also to provide their customers*
7 *with the use of services launched by other operators.*

8 THE PRESIDENT: Yes.

9 MR BARLING: And then effective competition and so on. All I was trying to do there,
10 really, was to get the feel for, and then continuing in this same document there is a
11 point **here**, which deals with the any to any concept of calls. One sees that if one goes
12 through to page 20 of the document. It is really, not quite a table, but a thing called a
13 "Working definition". It is below paragraph 3.4:

14 THE PRESIDENT: Yes.

15 MR BARLING: *"In any to any calls to find a simple call from any Network Termination*
16 *Point [NTP] of a PTO to any other NTP [Network Termination Point] associated with*
17 *a number in the national numbering scheme. The calls are the following types: Voice*
18 *telephony, telex packet, ISDN."*

19 It may just be worth noting that Note 2 says:

20 *"For the purposes of this definition, the term 'NTP' also includes mobile*
21 *terminals, on land mobile radio services, and other points where calls may*
22 *terminate such as payphones".*

23 *For what it is worth you may just want to just note they hazard a definition of*
24 *interconnection themselves in this document at Annex E on the last page.*

25 THE PRESIDENT: Are you saying that the word "interconnection" is synonymous with the
26 terms "interoperability", or are there separate----

27 MR BARLING: No, it is really the product of interconnection that gives you
28 interoperability. I think it is rather the aim of interconnection. Interconnection is the
29 physical act you have to carry out in order to get interoperability.

30 THE PRESIDENT: Yes.

31 MR BARLING: For what it is worth that is the OfTel document. I think that really leaves
32 the way open for us to turn to the Directive itself. I would like spend a few minutes on
33 it because it is clearly of major importance.

34 I know the Tribunal will have already poured over it to some extent, but I hope
35 they will forgive me if I just ask you to sideline various bits again and I will try and
36 explain as we go through what we say the significance of them is.

37 The Preamble, Recital number 1 says, just above the middle of it, it says that it
38 recognises that:

1 *"...in order to promote a Community-wide telecommunications services there is*
2 *a need to ensure interconnection of public networks and, in the future*
3 *competitive environment, interconnection between different national and*
4 *Community operators".*

5 It refers to the Directive that we also have touched upon in arguments, the
6 Council directive of 90/387 on on Open Network provision - laying down harmonised
7 principles for open and efficient access.

8 Then Recital 2, and this is quite important:

9 *"Whereas a general framework for interconnection to public*
10 *telecommunications networks and publicly available telecommunications*
11 *services, irrespective of the supporting technologies employed, is needed in*
12 *order to provide end-to-end interoperability of services for Community users".*

13 Perhaps that answers, Sir, your question earlier.

14 THE PRESIDENT: Yes.

15 MR BARLING: They have to be fair, proportionate and non-discriminatory conditions for
16 interconnection.

17 Over the page we have Recital 4 which we do submit is extremely important in
18 exposing the fallacy of Oftel's approach here. What we would emphasise in addition
19 about Recital 4 is: that here the Regulatory framework for interconnection covers those
20 situations where the interconnected Networks [plural] are used in the commercial
21 provision of services.

22 *"Interconnection does not cover cases where a telecommunications Network is*
23 *used for the provision of telecommunication services available only to a specific*
24 *end user, or to a closed user group, but covers only cases where a*
25 *telecommunications Network is used as a provision of publicly available*
26 *services".*

27 Then the bit we rely upon particularly. Then the next preamble is also important
28 in regard to leased lines. First of all, it says that Organisations providing networks and
29 services have to be free to negotiate the agreements for interconnection on a
30 commercial basis. Then it goes on to say:

31 *"Whereas it is necessary to ensure adequate interconnection within the*
32 *Community of certain networks and interoperability of services essential for the*
33 *social and economic wellbeing of Community users, notably fixed and mobile*
34 *public telephone networks and services, and leased lines..."*

35 The "leased lines" comes in there. It does not refer to ownership, it goes on to
36 deal with what is meant by "public". Then they define the organisations having rights
37 under this Directive. Then in 6:

38 *"It is important to encourage new forms of interconnection and special network*

1 *access at points other than network termination points offered to the majority of*
2 *end users".*

3 It might be worth just side-lining that as something that one might need to look at again
4 in relation to what defined termination points means in the definitions' section. But
5 without being controversial at the moment, just so that people understand it, when it
6 talks about "Network Termination Points" being offered to end users what it is talking
7 about, as I understand it, is in the case of a fixed network, such as BT's, one is talking
8 about the socket in the wall, where you plug your equipment into. When you are
9 talking about mobile networks it is more properly described as the "mobile handset",
10 there being no socket to plug anything into.

11 Then unless anybody wants me to look at anything in between, I was going to
12 skip to recital 10, which is dealing with the pricing, just to ask the Tribunal, if it had
13 not already, to sideline that. That is the effect, it has to be cost orientated.

14 Then I was going to go to 12, the second sentence:
15 "*...whereas adequate interconnection takes account of the requests of the*
16 *operator wishing to interconnect, in particular concerning the most appropriate*
17 *interconnection points, with each operator having responsibility for carrying*
18 *calls and setting charges to each other up to the interconnection point".*

19 So there is an element of mutuality that creeps in there, which is one of the
20 Touchstone normally of interconnection. It is possible to have interconnection as all
21 one way, but it is most unlikely. Normally there it is a two-way business where there is
22 interconnection.

23 THE PRESIDENT: But are we, in this case, dealing with what is called here as an
24 interconnection charge? Is this charges for interconnection exactly?

25 MR BARLING: It will be if this Direction stands, then it will have to be included in the list
26 of interconnection standard services. Backhaul will become a standard interconnection
27 service and charged accordingly.

28 THE PRESIDENT: Just thinking aloud, one would have thought that the natural meaning of
29 the phrase "Interconnection Charge", is the charge you make for interconnecting at the
30 point where the two networks need to be interconnected, as it were.

31 MR BARLING: Yes,

32 THE PRESIDENT: That would set the service of interconnecting.

33 MR BARLING: Yes. I am sure that is true, but take, for example, there are also the other
34 standard services like the one I mentioned, the interconnection circuit where someone
35 has to put a long cable in to link up the two networks. So in order to get interconnection
36 someone has to do that.

37 THE PRESIDENT: That is within the concept of an interconnection charge.

38 MR BARLING: As I understand it, that would be an interconnection service which would

1 have to be charged according to interconnection rules of cost orientation and so on and
2 so forth.

3 THE PRESIDENT: So it is the same point really: how far back from the point of
4 interconnection do we go in order to fall within the concept of an interconnection
5 charge?

6 MR BARLING: Yes, but you put it in terms of "how far back?" but you mean notionally -
7 you are not talking about distance?

8 THE PRESIDENT: Notionally in terms of the stages between one customer over **here** and
9 another customer over **there**, somewhere in that whole spectrum there is a point, for
10 want of a better word at this stage, where two Networks talk to each other.

11 MR BARLING: Yes.

12 THE PRESIDENT: The idea of interconnection seems to centre round that point.

13 MR BARLING: Yes.

14 THE PRESIDENT: Charges for the point at which the two Networks are enabled to talk to
15 each other. But either side of that point there is the whole of the rest of the Network.

16 MR BARLING: There is, so I see the point you are making.

17 THE PRESIDENT: And when we get back to the RBS backhaul circuit it is sort of down
18 **here** somewhere, in my sort of mental diagram.

19 MR BARLING: Yes, but it is in a different colour, because there will be bits of kit, as it
20 were, or notional kit whose function in life is to enable interconnection to take place.

21 THE PRESIDENT: Yes.

22 MR BARLING: And without interconnection they may not exist in that form, or they might
23 not be used in that way. Some of those may well be covered by the interconnection
24 charges, depending on who has to put them in and the agreement about sharing costs
25 and so on is.

26 THE PRESIDENT: Yes.

27 MR BARLING: I think I have been handed what is probably an example, or says it is an
28 example of classic interconnection and it should be basically a link between a
29 Vodafone switch and a BT switch. One of these products is called "Customer sited
30 interconnection" [CSI]. I assume that is where BT, as it were, would make itself
31 responsible for the circuit and the point of interconnection would then be at the
32 customer site, in other words, for example, in this case the Vodafone NTX site would
33 have the beginning of this circuit on it. There is nodding, so I think that is right!

34 I am told thousands of those type of products exist, but I may have to take
35 instructions on the pay arrangements for them. But my understanding about those is
36 that in that example they would be paid for as an interconnect service by the mobile
37 operator. We will come on in a moment to Annex 4 of the Directive which deals with
38 interconnect charges.

1 Then you see, going back to the Recitals, at the bottom of 12, that in some cases
2 a national OfTel can require organisations to interconnect where it is in the users'
3 interests.

4 Paragraph 15 of the Recital deals with numbering and in the middle of it,
5 number portability is an important facility for users, i.e. end users, of course that
6 means.

7 Then we can skip to paragraph 25:

8 *"Whereas the essential goal of interconnection of networks [plural] and*
9 *interoperability of services throughout the Community cannot be sufficiently*
10 *achieved at Member State level, and can therefore be better achieved at*
11 *Community level..."*

12 Then finally, it is without prejudice to the competition rules.

13 So those are the bits of the Recitals I wanted to draw your attention to. Then we
14 go to the body of the provisions.

15 You have the "Aim". Again, it is the interconnection of "Networks", plural.
16 Then in Article 2 we have the important definitions.

17 *"(a) 'interconnection' means the physical and logical linking of*
18 *telecommunications networks [plural] used by the same or a different*
19 *organisation in order to allow the users of one organisation..."*

20 we say that obviously means end users -

21 *"...to communicate with users of the same or another organisation, or to access*
22 *services provided by another organisation."*

23 We will come on to this in more detail when we look at this, but moving on:

24 *"(b) 'public telecommunications network' means a telecommunications network*
25 *used, in whole or in part, for the provision of publicly available*
26 *telecommunications services.*

27 *"(b) 'telecommunications network' [singular] means transmission systems*
28 *[plural] and, where applicable, switching equipment and the resources which*
29 *permit the conveyance of signals between defined termination points by wire, by*
30 *radio..."* etc.

31 That is obviously quite an important, all be it a somewhat elusive definition. Then
32 "users" are defined as

33 *"individuals including consumers, or organisations using or requesting publicly*
34 *available telecommunications services"*

35 I do not think we need to trouble anybody with "special rights", or "universal service".

36 Then it says:

37 *"Further definitions given in Directive 90/387 shall apply where relevant".*

38 As you may have seen from the skeletons there is, in fact, a definition in that Directive

1 of "Network Termination Point", but not of "Defined Termination Point". So there is a
2 slight puzzlement.

3 Then Interconnection at national and Community level:

4 *"Member States should take all the necessary measures to remove any*
5 *restrictions"*.

6 That seems to be the negative side of this obligation. They must be allowed to negotiate
7 interconnection agreements between themselves, and then the slightly more positive
8 side is in paragraph 2:

9 *"Member States shall ensure the adequate and efficient interconnection of*
10 *telecommunications networks set out in Annex I to the extent necessary to*
11 *ensure interoperability of these services for all users within the Community"*.

12 So, as it were, there is an aim in view of the interconnection.

13 Then under 4:

14 *"Organisations authorised to provide public telecommunications networks or*
15 *services as set out in Annex II shall have a right and when requested by*
16 *organisations in that category an obligation to negotiate interconnection with*
17 *each other for the purpose of providing the service in question in order to*
18 *ensure provision of these networks and services throughout the Community"*.

19 So Annex I, as it were, referred to in Article 3 is identifying networks and services, and
20 Article 4 is identifying organisations. In a rough and ready way that seems to be the
21 division there.

22 Then in paragraph 2 of Article 4, there is the special provision for organisations
23 having significant market power. They should

24 *"meet all reasonable requests for access to the network including access at*
25 *points other than network termination points offered to the majority of end*
26 *users."*

27 THE PRESIDENT: Just before we leave Article 4, I will ask it simply because we're on
28 Article 4, I don't expect you to answer the question because I think it is more a question
29 for the Respondent. As we are on the basic scheme of this Directive, at the time by
30 virtue of Article 4 paragraph 3, a number of organisations having a share of more than
31 25 per cent. of a particular market were presumed to have significant market power, i.e.
32 if you were big enough you were just deemed to have it. Under the new regime,
33 however, the question of whether you have significant market power has to be looked
34 at rather more closely.

35 MR BARLING: Yes.

36 THE PRESIDENT: This was at a stage when there were still large numbers of national
37 operators the previous Post Offices, who had market power, you say "OK, you've got
38 market power, we'll assume you've got it..."

1 MR BARLING: That has been allied to dominance.

2 THE PRESIDENT: Yes. In this particular Direction, although it is not in issue in the case,
3 we just want to understand the background, there is quite a lot of discussion as to
4 whether BT actually has or has not got market power in the particular circumstances,
5 and what we are wondering is why, in this particular case nobody just relied on Article
6 4 paragraph 3, first sentence, to presume that there was significant market power? I.e.
7 why was all that discussion, as it were, necessary?

8 MR BARLING: We can hazard a guess, but I think, Sir, you are probably right in putting
9 that. Maybe the feeling was that this was done in the dying days of the old regime,
10 there ought at least to be a nod towards the new regime.

11 MR FOWLER: Would it assist, Sir----

12 THE PRESIDENT: Yes, I am sorry, Mr Fowler, we are getting off the point.

13 MR FOWLER: ----if I touch on that point briefly? The fact is that BT have been designated
14 as having significant market power in the market for leased lines, and that designation
15 was made in December, 1997 and so, as you say, it would have been possible to
16 proceed in this case on the basis of that designation, and look at it in that way. But
17 Oftel, the Director General, had taken a policy view that it was not appropriate to look
18 at the market in that general way, but to look more specifically and to conduct a market
19 analysis, which is what they have done in this case, identifying a more narrowly
20 defined relevant market than just leased lines, a market which, as you will have seen
21 from the explanatory nature of the decision, includes RBS backhaul and PPC [Partial
22 Private Circuits], but that is a policy decision as to the appropriate way, the proper
23 administration, to approach this sort of case.

24 THE PRESIDENT: Thank you. In annex 2 to the Directive, which we are taken to by
25 Article 4 (1), there is a list of three different organisations:
26 *"1. Organisations which provide fixed and/or mobile public switched*
27 *telecommunications networks..." etc.*
28 *"2. Organisations which provide leased lines to users' premises."*
29 And the third one is international networks, etc.

30 MR BARLING: And there is a fourth one---

31 THE PRESIDENT: There is a fourth one over the page, yes, I am sorry. Just to understand
32 it, from Oftel's point of view as far as the legal basis of this direction is concerned,
33 which of those four categories is being relied on? Is it the public telephone network? Is
34 it the leased lines one? Those are the two choices, effectively.

35 In other words, is the legal basis for this Direction that BT is an organisation
36 which provides leased lines for users' premises? Or is it that it is an organisation which
37 provides public switched telecommunications networks, etc.

38 MR FOWLER: It is both in the alternative I'd say.

1 THE PRESIDENT: In the alternative?
2 MR FOWLER: Yes. Indeed, more generally, it is the fact that there is here a dispute about
3 interconnection falling within Article 9(3) and that is really irrespective of the
4 provisions of Article 4(1) which imposed rights and obligations in relation to
5 interconnection on the categories of organisations falling within Annex 2.
6 THE PRESIDENT: Yes, thank you. Sorry, Mr Barling.
7 MR BARLING: Not at all. I was really just going to point out, rather than trouble you with
8 it, Article 7 is obviously the one that deals with pricing, cost oriented pricing, and as
9 Mr Fowler has already indicated, Article 9 deals with the powers in relation to
10 interconnection disputes.
11 You might just want to sideline - I don't know whether or not it is helpful - in
12 passing, Article 9(1) and the various interesting use there of the concept of "users" and
13 "end users" which has been referred to in the skeletons. It may have some marginal
14 importance.
15 Article 5, paragraph 5 is the one that relates to interconnection disputes. That is
16 really all. There is further reference to end users in Article 12, paragraph 5, in relation
17 to number portability.
18 THE PRESIDENT: Do we need to worry about number portability?
19 MR BARLING: No, and neither do you need to worry about deferment in Article 20, but I
20 only mention it in so far as it may give a clue or a feel about what we are really dealing
21 with about interconnection. It talks about the direct interconnection between mobile
22 networks of that Member State - the fixed or mobile networks of other Member States.
23 I do not think it probably helps very much.
24 So we can come on to what is very important, which are the two Annexes -
25 Annex I and Annex II.
26 THE PRESIDENT: Just on Article 20, is there any significance in the word "direct"?
27 MR BARLING: Well the significance of "direct" is that there is the concept of "indirect".
28 THE PRESIDENT: Under the new regime?
29 MR BARLING: No, there has always been the concept of indirect connection, which is
30 sometimes called "transit" and I think you may have seen a reference to as "transit",
31 and I will come back to that, if I may, in due course.
32 THE PRESIDENT: Yes.
33 MR BARLING: Interconnection agreements are normally bilateral agreements between
34 two network operators. So to take BT, for example, which probably has interconnect
35 agreements with everybody, because of its ubiquitous nature, so if there is a network,
36 for example - I am not sure this is right, I am just using it - if there is something in Hull
37 that is a separate network, there might be another network down in Bristol. BT would
38 have an interconnect agreement with both separately. One of the spin-offs of those

1 interconnect agreements is that actually calls destined between Bristol and Hull, those
2 two networks - if they are separate networks - actually through the interconnect
3 agreements with BT can indirectly interconnect with each other and do so, and that is
4 transit. I don't know whether in Article 20 by "direct" they have that in mind but it is
5 something that is accepted as a concept - the "indirectness" of some interconnection.

6 May we then go to the Annexes - Annex I and Annex II. These are very
7 important for a number of reasons. They are important because they deal with the
8 leased lines concept a little more, which I need to spend a minute or two on, and
9 because they also in our submission make it pretty clear what "defined termination
10 points" means, in order to have a network.

11 So if I may just go through it, perhaps making the odd comment - I will try not
12 to labour it too much.

13 *"The following public telecommunications networks and publicly available*
14 *telecommunications services are considered of major importance..."*

15 Part 1 - the fixed one. There are, of course, more than one fixed one, but it may be at
16 this time the legislature saw there was only probably likely to be one in most places.

17 *"The fixed public telephone network means the public switched*
18 *telecommunications network which supports the transfer between network*
19 *termination points at fixed locations of speech...to support..*

20 - *voice telephony*

21 - *fax...*

22 - *voice band..."*

23 and so on.

24 *"Access to the end-user's network termination point is via a number or numbers*
25 *in the national numbering plan."*

26 Just pausing there, it is quite clear when we go on, in our submission, that when it says
27 in defining what the fixed public telephone network means, when it says:

28 *"...supports the transfer between network termination points at fixed locations"*

29 it is talking about the end user termination points. That is the definition of public
30 telephone network. We say it is clear for a number of reasons but it is particularly clear
31 when one compares that definition of the fixed public telephone network with the
32 definition of, in part 3, just over the page, of the public mobile telephony network.

33 If one just goes to that, if I may, now.

34 *"A public mobile telephony network is a public telephone network where the*
35 *network termination points are not at fixed locations.*

36 So when one reads that back to the fixed one, one sees that in both cases what is being
37 spoken of, to define the network in relation to the Interconnect Directive and what is
38 covered by it is, in the case of a mobile handset, the user's hand set, in the case of a

1 fixed network, as I have already indicated, it is normally the plug in the wall where you
2 plug in your phone or whatever system you are using. It is not a point of
3 interconnection, or any other intermediate point on regulatory boundaries perhaps,
4 maybe, where the network might come to an end. That is likely to be a point of issue
5 between the parties.

6 Going back to part I with what we say is clearly meant in mind, one then reads
7 on:

8 *"Access to the end-user's network termination point is via a number or numbers*
9 *in the national numbering plan."*

10 So end-user is now ---

11 THE PRESIDENT: Well, they now talk about the end-user's network termination point.

12 MR BARLING: Yes, but we submit that that is not in contra-distinction to what they said
13 above and, Sir, you are well familiar with the nature of European drafting. If this were
14 a UK Statute someone might say "Well, the fact that they've used it in a different sense
15 within a small space of time has some significance." We would submit that that very
16 often is not the case when one is dealing with European legislation, Sir, as you well
17 know, and that it is very, very obviously not the case here, when one sees from what
18 goes on that all they are talking about are end-user termination points.

19 THE PRESIDENT: Yes and, as you say, just over the page, when they come back to end-
20 users:

21 *"The fixed public telephone services means the provision to end-users at fixed*
22 *locations...."*

23 MR BARLING: Exactly so.

24 THE PRESIDENT: So the first definition you took us to is presumed to have the words
25 "end-user" in it.

26 MR BARLING: Exactly.

27 THE PRESIDENT: Yes, I see.

28 MR BARLING: Sir, at the end of that paragraph that you pointed out:

29 *"Access to the end-user is via a number or numbers..."*

30 THE PRESIDENT: Yes, it is all about the end-user---

31 MR BARLING: Yes, quite.

32 THE PRESIDENT: ---according to you.

33 MR BARLING: Then Part 2:

34 *"The leased lines service".*

35 This is interesting, this is the only thing that is called a "service". The only category of
36 its own, as it were.

37 *"Leased lines means the telecommunications facilities which provide the*
38 *transparent transmission capacity between network termination points, and*

1 *which do not include on-demand switching (switching functions which the user*
2 *can control as part of the leased line provision). They may include systems*
3 *which allow flexible use of the leased line bandwidth..."*

4 Now, a lease line - I am sure the Tribunal well knows what it is in ordinary
5 parlance, and if a bank or someone has several branches, rather than paying calls on the
6 ordinary public switch telephone network it might prefer to purchase a leased line,
7 sometimes called a private circuit, so that it has then in effect a direct line to its own
8 other premises, and just buys the capacity so there would not be any charge for time
9 and so on and so forth.

10 By its nature a leased line is an end product between the user's premises. It is
11 defined as such here because in our submission network termination point is clearly the
12 same as it is when it is talking about fixed and mobile network termination points in the
13 other paragraphs. It is talking about end-user's termination points. So leased lines for
14 the purpose of this Directive is defined as a service provided to end-users. The
15 importance, when one understands that, one understands why PPCs - Partial Private
16 Circuits - are the subject, are understood to be the subject of interconnection, as a *sui*
17 *generis* - if I am still allowed to use Latin, but as a special----

18 THE PRESIDENT: We are in this Tribunal.

19 MR BARLING: I am grateful. Thank goodness for that! These lines are *sui generis* in
20 relation to interconnection for reasons which I will explain, but in a nutshell it is this:
21 the purpose of putting lease lines in the Interconnection Directorate was so that
22 someone with a limited network coverage - one could look at this either in a national or
23 international sense, but just looking at it in a national sense for a moment - if I am
24 Kingston-upon-Hull with a network that only covers that area, and I want to provide a
25 big bank with a leased line, I can only give them a leased line if both their branches are
26 in my network area. But the aim of the Interconnect Directive in regard to leased lines
27 was to enable those with limited network areas to provided leased lines to customers
28 outside their area, or one of the premises, if you like, that they wanted to link up were
29 outside the area.

30 So through the Interconnect Directive, because the person with the limited
31 network is entitled to purchase a PPC, or a Partial Private Circuit, one the other end, the
32 other segment, from an interconnected operator. Then he joins them up and lo and
33 behold he can provide a final product to bank because he has both ends now. He has the
34 customer within his network area, **that** premises, and he can then get the other partial
35 private circuit which is a sort of wholesale input, if you like, into a complete lease line
36 product. That is the use of interconnection in the context of leased lines. That is why
37 leased lines is in here.

38 THE PRESIDENT: Well I was just wondering whether that is the whole story. There are

1 probably not many Kingston-upon-Hull type examples around the Community, are
2 there?

3 MR BARLING: But there were many at the time, there were all the cable companies, you
4 see, with limited franchise areas who had rights under this. There were those who, for
5 example, only wanted City of London, who only had a franchise area for the City of
6 London, or for parts of East Anglia, so there were all those different franchise areas
7 with limited networks for whom obviously this arrangement was crucial. But it is not
8 the whole story, you are right, because the Community legislature has in mind, as one
9 sees from the preambles, that this concept ought to apply on a Community-wide basis,
10 so that a network operator, even if he has the whole global network in, for example, the
11 United Kingdom, can offer a leased line through interconnection rights, ultimately, the
12 idea is throughout Europe. It is expressed at the beginning of the Directive that that is
13 the aim, so people can provide not just national but international services.

14 THE PRESIDENT: Well just help me to see if I have understood it. In the context of a
15 leased line you have got a customer, an end-user who is there, who is leasing a line.

16 MR BARLING: Yes.

17 THE PRESIDENT: It is for the reasons you have just given possible to imagine the
18 intermediate supply of a leased line by someone who is not BT, that is to say BT
19 supplies the "capacity", for want of a better word, to somebody else who then supplies
20 it to the end-user---

21 MR BARLING: Yes.

22 THE PRESIDENT: ---it may be to Kingston-upon-Hull, it may be to a cable company who
23 makes a profit. In that context one can perhaps understand the concept of a wholesale
24 price which creeps into the argument from time to time, i.e. it is a price to somebody
25 who is going to on-sell to somebody else. What I at least am having a bit of difficulty
26 in understanding at the moment, and again I think this is more a question for the
27 Respondent than for the Applicant, is whether there is a direct analogy between leased
28 lines and the situation we have here, where there is not a direct re-supply by Vodafone
29 of the backhaul circuit to an end user, something that it, Vodafone uses.

30 MR BARLING: Yes.

31 THE PRESIDENT: It is not exactly a sort of wholesale situation, although from time to time
32 the words "wholesale price" creep into the argument.

33 MR BARLING: Well with respect, Sir, we agree that there is a difference and it is quite an
34 important one. What we supply to Vodafone is really in the nature of a finished
35 product. It is a product they need. They are, in a sense - in one sense - the user of that
36 product. They take that product and use it for their own purposes not, as you rightly
37 say, in particular in this concept of leased lines, they are not using it to bundle with a
38 segment of their own, another partial private circuit making a full private circuit and

1 sell on. So one can see that the partial private circuit, and I think you are aware that
2 there has been a separate direction in relation to that - two separate directions in fact in
3 relation to that - by Oftel which have not been challenged, based on the allegation that
4 those amount to interconnection for the reason that they do allow a competing operator,
5 as it were, to have access to an end-user's premises in my territory, and I have to supply
6 them with that other half of the line to get at my customer. So they get at my customer
7 through buying a partial private circuit from me as they are entitled to do in the light of
8 Oftel's Direction, at wholesale, or cost oriented prices.

9 We can see, and have said so, that that does serve the purpose of
10 interconnection. It is consistent with the purpose of interconnection. It directly enables
11 him to get at my customer, and allows me to provide a product to get at my customer,
12 and that is perfectly consistent, indeed, it is fairly and squarely within the express
13 purpose of interconnect rules, so we fully understand that.

14 We do say that there is a fundamental difference of principle between that
15 position and the supply by us of what is, in effect, the product they need, not to add to
16 anything, they just need that product to complete their network. It is not enabling them
17 to get at any customer of course, or anything of the kind. So there is a fundamental
18 difference.

19 My learned friend says "oh, well it is technologically the same. It is the same
20 technology that is used to supply it and all the rest of it, and it is very similar. When
21 you look at it, you look at a picture of it, a photograph of it, yes, it will be very similar,
22 that is true. But it would have one difference, it wouldn't have one end, unlike a partial
23 private circuit, it does not have one end at an end-user's premises.

24 THE PRESIDENT: OK. I am just writing that down. So it doesn't, on your argument,
25 involve a network termination point.

26 MR BARLING: No, backhaul circuit doesn't, no. And additionally for that reason it doesn't
27 actually, technically amount to a network, unlike a leased line. We can see a leased line
28 as defined in the Directive **here**, what's called a leased line service means that you
29 could say that that was also a network, the leased line, because it does fit the definition
30 of a telecommunications' network, because it conveys messages between defined
31 determination points, namely, end-user termination points. But a leased line is on that
32 definition, the leased lines at any rate that they are talking about between end-user
33 premises are probably also networks for this purpose. Whether that gets one anywhere,
34 or matters, is different. What it does mean is that the backhaul circuit that we supply
35 Vodafone with is not a network.

36 THE PRESIDENT: Yes.

37 MR BARLING: And it is not a leased line within the meaning of this definition. I think
38 that is probably all on Annex I. We ought just to look at Annex II because in our

1 submission Annex II helps to confirm what we have said about what is being talked
2 about here in relation to the meaning of network termination points. I want to just look
3 at it quite quickly:

4 *"...switched and unswitched bearer capabilities to users upon which other*
5 *telecommunications services depend."*

6 It covers organisations who provide certain networks, and unswitched bearer
7 capabilities. That is an interesting sort of neutral phraseology which might encompass
8 these lines, and other services can be supplied over those capabilities or networks.

9 Then organisations who do that have rights and obligations to interconnect with
10 each other.

11 *"1. Organisations which provide fixed and/or mobile public switched*
12 *telecommunications networks and/or publicly available telecommunications*
13 *services, and in so doing control the means of access to one or more network*
14 *termination points identified by one or more unique numbers..."*

15 So again that is end-users they are talking about. End-user termination point is the one-
16 --

17 THE PRESIDENT: The one that has got the number attached.

18 MR BARLING: That has the numbering, precisely.

19 *"2. Organisations which provide leased lines to users' premises.*

20 *"3. Organisations which are authorised in a Member State to provide*
21 *international..."*

22 Then the "Notes", over the page:

23 *"Control of the means of access to a network termination point means the*
24 *ability to control the telecommunications services..."*

25 well, they are really hammering it home now.

26 *"... available to the end-user at that network termination point and/or the ability*
27 *to deny other service providers access to the end-user at the network*
28 *termination point.*

29 *"Control of the means of access may entail ownership or..." etc.*

30 So obviously the Tribunal will be able to just have a glance at that in due course, but
31 we submit that the context of these annexes, that is all they are talking about.

32 THE PRESIDENT: Yes.

33 MR BARLING: They may still may have to be defined. Precisely what the end-user's
34 termination point consists of, and one sees that this is very carefully defined in, for
35 example, BT's licence, as what I have crudely called, "The plug in the wall", which is
36 obviously a much more technical definition when one looks at the licence.

37 THE PRESIDENT: In the licence, just remind me, there is a definition of Network
38 Termination Points?

1 MR BARLING: Yes, there is a definition of Network Termination Points in the licence, in
2 Annex A of the licence. In our submission it cannot affect the meaning of the
3 Interconnect Directive. It includes points what one may loosely call points of
4 interconnection with other Networks, as well as end user points. We submit that is true,
5 but uninteresting, because Network Termination Point is for the purposes of the licence
6 and not for the purposes of the Interconnect Directive. What it is mainly doing, in
7 Annex A is determining, for the purposes of the national domestic rules, what the scope
8 of the so-called "applicable system" is. In other words, if you are taking BT for
9 example, their network for regulatory purposes - whose responsibility in a regulatory
10 sense is this bit of equipment? It is not dealing with interconnection.

11 THE PRESIDENT: I suppose it might be arguable that the concept of Network Termination
12 Point in these annexes, although very largely dealing with Network Termination Points
13 in the sense of a plug in the wall might not necessarily be limited to that, and might
14 include other points that were in some commonsense way points at which the Network
15 is terminated i.e. the point at which two networks, as it were met, or interconnected?

16 MR BARLING: The trouble with that is that whereas one can see how that might be the
17 case if one is looking at, say, who is responsible. If one is dealing with "What has one
18 got to have in order to be the subject of interconnect rights and obligations?" They say
19 "Well, for that you have to have a network, and we will define network". So this
20 defined termination point has been done simply to define what is a network that can
21 interconnect with another that is worth interconnecting with another network?
22 Something that is not working has not got end-users----

23 THE PRESIDENT: There is obviously a more general sense in which Vodafone has a
24 network. There is obviously more than one network here.

25 MR BARLING: But if we look at it in the microcosm at the moment, which is what they
26 invite us to do in their skeleton, their very tiny network which is one base station, one
27 MTX and so on, ludicrous of course, but they have not got anything worth
28 interconnecting with until they have something that produces signals between end-
29 users that communicates. So one can see that when one is dealing with
30 interconnections, defined termination point, which is the phrase in the definition of the
31 telecommunications network rather than network telecommunications points, it makes
32 sense as end-user termination points.

33 Unless people want me to draw attention to anything else, that was really all I
34 was going to say about that Directive. There is, of course, the OMP Directive. I was not
35 proposing to trouble you with that at the moment, other than to just mention it is there,
36 and of course, it's definitions where relevant are said to apply where relevant. It does
37 have a definition of Network Termination Point. Perhaps I ought just to show you
38 where it is, there was a bit of confusion because there are two versions of it. The

1 relevant up to date one is at tab 9 of our bundle 9. There you see something called
2 "The Informal Consolidated Text of the OMP Leased Lines directive", it is not that one
3 anyway, thank goodness. There might be a small divider that is not immediately
4 obvious to you in the middle of that tab which gives you then Directive 90/751. This is
5 a Directive which amends Council Directive 90/387 and 90/244 - 90/387 is the one we
6 were looking at. If you turn through that to page 10 you will see towards the top of
7 page 10:
8 *"Article 2 shall be replaced by the following..."*
9 THE PRESIDENT: Yes.
10 MR BARLING: So those are the definitions that are referred to by the parties in their
11 skeleton arguments - various documents. Those are the amended ones which are
12 different, interestingly, from the ones in the original version.
13 THE PRESIDENT: This is more or less contemporaneous with the Interconnection
14 Directive?
15 MR BARLING: Yes.
16 THE PRESIDENT: They are bringing them in line, is that an inference?
17 MR BARLING: Let's have a look at just what it says.
18 THE PRESIDENT: Actually, it may be a bit later. This is 6th October, and the other one
19 was 30th June, Interconnection Directive, 30th June.
20 MR BARLING: The preamble---
21 THE PRESIDENT: Well we can sort it out.
22 MR BARLING: ---is a long explanation as to quite what they are doing. But I don't think
23 the Interconnection Directive is the top of their list of reasons.
24 THE PRESIDENT: Maybe not.
25 MR BARLING: It maybe touched on, I am just trying to see if there is a reference. Yes,
26 there is a reference in Recital 16, for example. Anyway, all I was really pointing out
27 was that in case you are puzzled, because attached to my learned friend Mr Fowler's
28 skeleton was I think the very original version of this Directive 90/387 - am I right?
29 MR FOWLER: Plus this amendment.
30 MR BARLING: Did you have this as well.
31 MR FOWLER: That is the amendment.
32 MR BARLING: Sorry, I missed it. I missed the amendment.
33 THE PRESIDENT: Isn't Recital 17 the relevant one here?
34 MR BARLING: It may well be.
35 THE PRESIDENT: *"...certain amendments to existing open network provision measures are*
36 *appropriate in order to ensure their consistency with new technical developments and*
37 *with other regulatory measures that will form part of an overall regulatory framework*
38 *for telecommunications."*

1 MR BARLING: Yes, that might well be it.
2 THE PRESIDENT: At all events, this is the new definition.
3 MR BARLING: That's it, and my apologies to Mr Fowler, I hadn't spotted it - attached to
4 his skeleton you get the whole thing apparently.
5 MR FOWLER: Are you going to read the definition?
6 MR BARLING: I'm sure, Sir, you've read the definition, have you?
7 THE PRESIDENT: What is the relevant point we're making? You have to define
8 termination points.
9 MR BARLING: Yes.
10 MR FOWLER: It may be helpful to refer you, Sir, to the same definition of "users" and
11 "telecommunications network" which is on the previous page, which is an identical
12 definition to the definition in the ICD.
13 MR BARLING: Yes absolutely.
14 MR BLAIR: Except for one comma, perhaps, which may or may not be significant.
15 MR FOWLER: I am not sure which comma, sir?
16 MR BLAIR: It is whether an individual includes an organisation.
17 MR FOWLER: In the definition of a user.
18 THE PRESIDENT: There is a comma after "*consumers*" in the later one but not in the ICD.
19 It may be that little turns on the comma.
20 MR BARLING: If and in so far as that definition applies, which is an interesting point
21 where relevant, when one looks at the Interconnect Directive, then one has to consider
22 whether there is anything in the backhaul circuit which provides access to a public
23 telecommunications network.
24 The next sentence: "*The locations of network termination shall be defined...*"
25 doesn't help one particularly because they are defined - whatever they mean they are all
26 defined by regulatory authorities, by the regulatory authority.
27 THE PRESIDENT: So does the definition in the licence you have just told us about come
28 under that?
29 MR BARLING: I wonder whether it pre-dates it, but I am not sure about that.
30 THE PRESIDENT: It probably does, yes.
31 MR BARLING: We might be able to check on that.
32 THE PRESIDENT: Under this definition of network termination point----
33 MR BARLING: If it applies we would submit it is talking about end-users, and end-user
34 termination points as defined somewhere.
35 THE PRESIDENT: It is a slightly curious situation, because at the time the ICD is adopted
36 in June, 1997 it is referring back to definitions in Directive 90/387 where relevant, it is
37 referring back to rather old definitions, but subsequent to ICD we have now got some
38 new definitions.

1 MR BARLING: Well, I agree it is curious.

2 THE PRESIDENT: So we have just got that particular feature of the situation. Whether it is
3 helpful to refer to subsequent definitions, I don't know. However...

4 MR BARLING: What emerges, we submit, from all that, is particularly from looking at
5 the Interconnection Directive, and the Annex in particular, is that interconnection is
6 about interoperability of public telecommunications networks and services. That, we
7 submit, is crystal clear throughout as far as possible throughout the Community, to
8 increase the scope of coverage of existing networks.

9 It involves the linking of networks [plural] - there must be more than one
10 network. A network eligible for interconnection may be owned, or may be based
11 wholly or partly on borrowed transmission capacity.

12 To be a network eligible for those interconnection rights and obligations it must
13 be made up of transmission systems, as is put in the definition, including switching
14 where applicable, which permit the conveyance of signals between end users -
15 otherwise it is a pretty hopeless kind of thing, it only permits transmission between
16 some other intermediate points that don't arrive at anywhere useful. Clearly a network
17 must be something that works as a network.

18 Interconnection we accept, we must accept in the light of the interconnect
19 directive, engages these lines as defined but only so as to enable an operator who is
20 interconnecting, to supply a full leased line and in order to do that to have the right to
21 interconnect with another operator who can provide the other half of the circuit, the
22 partial private circuit.

23 The Interconnect Directive does not cover circuits for at least two reasons,
24 backhaul circuit is not a leased line as defined, it does not run between two termination
25 points as defined. Secondly, it is not being acquired so as to interconnect with a
26 corresponding segment of Vodafone, and then being on supplied by Vodafone to an
27 end-user as a full leased line.

28 I need to take this question of leased lines in a little more detail because it is
29 elusive but quite important here.

30 THE PRESIDENT: How are you getting on in general, Mr Barling?

31 MR BARLING: Well, I am getting on pretty well. I would say that another hour would do
32 it. That is roughly what I thought would be the case. We have about another quarter of
33 an hour - assuming the Tribunal would want to rise at the usual time.

34 THE PRESIDENT: Yes.

35 MR BARLING: Will you be starting again at---

36 THE PRESIDENT: Yes, normal time - maybe a few minutes earlier, I don't know, we will
37 see how we get on.

38 MR BARLING: I should be able to go over this pretty quickly now because we have dealt

1 with this quite a lot already. Just to explain why these lines are in the Directive---

2 THE PRESIDENT: By now we have quite a good picture of the basic submissions.

3 MR BARLING: You have, and so perhaps I could just direct you to the bit of our skeleton
4 where we elaborate on it?

5 THE PRESIDENT: Yes.

6 MR BARLING: And that will probably be as much as I need to do. Starting at the wrong
7 end of the skeleton I'm afraid, but on this point it starts at paragraph 66. I really just
8 want to pick up a couple of the quotations we have made there, which really do
9 underscore what we have said.

10 The first point perhaps one can make is that interconnection relates to leased
11 lines in a way which is "quite separate" from interconnection between public switched
12 networks. If you look at paragraph 72 of our skeleton, you find where the source of that
13 quote is. It is from a Commission working document on lease line interconnect pricing,
14 and we submit that in the context it makes it quite clear that the rationale is the
15 provision of partial circuits by the providers of leased lines to other network operators
16 in order that competing providers can provide the end product. Then we quote from the
17 working document:

18 *"Category b) of Annex II of the [Interconnection] Directive refers in particular*
19 *to organisations which provide leased lines to users' premises. The aim of this*
20 *provision is to ensure that any leased line provider"*

21 THE PRESIDENT: Yes, we have I think read it.

22 MR BARLING: I am very grateful. Sir, have you noted the very important bit at the end of
23 it that we put in italics?

24 THE PRESIDENT: It would be a bit difficult not to notice it is emphasised.

25 MR BARLING: It does not fit neatly with the concept of interconnection, and it also
26 explains this concept of partial private circuits.

27 THE PRESIDENT: What is, in your submission, the weight or meaning to be given to the
28 word "partially" in partially provided circuits?

29 MR BARLING: It is because to have a full circuit you need to have two end users, one at
30 each end. Usually, they might be the same organisation with different branches, for
31 example, not necessarily. But you normally have to have two end users. The partial
32 circuit is the circuit where I have, as it were, as a subscriber to my network one of those
33 premises so I can provide access to that customer, so the High Street Bank and
34 Barclays is my subscriber. You, wanting to connect with me, have the other half. So
35 you can make me provide you with the partial private circuit which is my High Street
36 branch line up to a suitable point of interconnection between the two networks.

37 THE PRESIDENT: The complete circuit being the internal circuit?

38 MR BARLING: Between the two banks' branches.

1 THE PRESIDENT: Right, thank you.

2 MR BARLING: As you have seen, everyone calls them "PPCs", that's what they are.

3 THE PRESIDENT: Yes.

4 MR BARLING: And that is why they are interconnection

5 THE PRESIDENT: Yes.

6 MR BARLING: The other passage to note, also from the Commission, is just a little bit

7 lower down, paragraph 77 - all these documents are in the bundles, but we have quoted

8 the bits we wanted to rely upon - where you see that they explain there why it is that

9 the provision of partial private circuits, by covering lease lines and interconnect

10 actually serve the purpose of interconnection. It unlocks the bottleneck, if you like.

11 THE PRESIDENT: Well it could create a market in leased lines.

12 MR BARLING: Quite. As we say at the end, paragraph 79:

13 *"Hence the regulation of PPCs is entirely in line with the underlying aim of*

14 *increasing interoperability and access to services that underpins the definition*

15 *of "interconnection".*

16 In paragraph 80:

17 *"The defining purpose of an RBS backhaul circuit could not be more different."*

18 THE PRESIDENT: Yes. That is all the point we were on earlier, isn't it?

19 MR BARLING: Yes.

20 THE PRESIDENT: What is wholesale.

21 MR BARLING: Quite. This is much more analogous to a retail product, the backhaul

22 circuit.

23 Good, well I think that was the leased lines part of it. Now, what I was minded

24 to do is, fairly swiftly I hope, to deal with the specific criteria for interconnection that

25 we have already looked at. I am very much in your hands how you would like to do it. I

26 was planning to make some relatively short comments about Mr Fowler's and my other

27 friend's skeletons as I went through, rather than save it all up for replying, in fairness.

28 THE PRESIDENT: Yes, that is useful.

29 MR BARLING: But I obviously will not take too much time on that, they need to develop

30 their own side.

31 Just by reference to our skeleton again, I think one can almost take as read up

32 to paragraph 24. I know that you have read all that. We then summarise the issues with

33 the summary, making a lot of the point that I have dealt with now, up to paragraph 39

34 where we begin the first of the three criteria issues, whether there is a network, whether

35 the backhaul circuit or any individual components of Vodafone's network amount to

36 telecommunications networks.

37 Perhaps I might make one general point about the skeleton for Oftel. I don't

38 know whether it is convenient to have that to hand as well. If one looks at paragraph 11

1 of it, this is really a more general point in relation to interpretation of these provisions
2 in the Interconnection Directive. There is a bit of missing wording there, in the middle
3 of the quotation from the *Telefonica* case.

4 In our submission it would be better if that wording was not omitted, because it
5 is quite important, so if I could just show you what that is. It is very helpfully attached
6 to Oftel's skeleton, I think it is paragraph 73 of the Advocate General's Opinion.

7 THE PRESIDENT: Yes, it is annex 1 to the Oftel skeleton. Yes?

8 MR BARLING: Just so that you do bear in mind, it is better to read the whole of paragraph
9 73 of the Advocate General, it is on page 14 of the copy that we have been provided
10 with. What he is doing is distinguishing between saying that:

11 *"That flexibility is perhaps a necessary corollary of the speed of technological*
12 *and economic developments in the field of telecommunications and the*
13 *divergent degrees of liberalisation in the Community. In Member States where*
14 *as a result of former special or exclusive rights the incumbent had a very strong*
15 *position in the market, asymmetric regulation and strict supervision of access*
16 *and interconnection agreements is indispensable.....In other countries in which*
17 *markets are already competitive a heavy-handed regulatory approach might on*
18 *the contrary have detrimental effects on investments in infrastructure."*

19 That is the bit that is missing. That is very much, we submit, pertinent in the United
20 Kingdom, which is one of those Countries which took the lead, in fact, several years
21 ahead of the liberalisation in most other European Countries.

22 THE PRESIDENT: But the legal definition of the Directive cannot depend on whether in a
23 particular Member State----

24 MR BARLING: No, no, we agree with that, certainly that is right.

25 THE PRESIDENT: This is probably more directed to the circumstances in which you could
26 exercise the power rather than the circumstances in which the powers exist in the first
27 place.

28 MR BARLING: Yes, well that may be right.

29 THE PRESIDENT: However, we will see.

30 MR BARLING: It is quite difficult to split up these different criteria for interconnection
31 without bearing in mind throughout the underlying reason why we submit that Oftel's
32 case is wrong.

33 THE PRESIDENT: You are going to let me know when you get to a convenient moment,
34 Mr Barling?

35 MR BARLING: Yes, well it will be very soon. The underlying reason of course, is that
36 really we are only talking about one network here. That is the underlying reason, and so
37 one has in a sense to bear that in mind.

38 THE PRESIDENT: Only one network, i.e. the Vodafone Network.

1 MR BARLING: Yes.

2 THE PRESIDENT: According to you.

3 MR BARLING: And therefore no question of any interconnection. So in a sense it would
4 be surprising and unfortunate, we submit, if what one might just call a small print
5 without any disrespect to it, by which I mean highly technical definitions were to lead
6 one to a contrary conclusion, and in our submission when one looks at them they
7 clearly lead to exactly the same conclusion.

8 Well, Sir, if that is convenient, that is very convenient for me, because I am now
9 going to start on the first point, which is the network termination point, and deal with
10 that pretty quickly in the light of what you have seen.

11 THE PRESIDENT: Very well, shall we say 2 o'clock.

12 **(Adjourned for a short time)**

13 THE PRESIDENT: Mr Barling, two things before we start. We have had a look at the
14 consent order. We are quite happy to make an order in those terms---

15 MR BARLING: I am very grateful.

16 THE PRESIDENT: ---while noting that the question of what is a reasonable period for the
17 purposes of the order is not yet defined.

18 MR BARLING: Yes.

19 THE PRESIDENT: We would need to devise some procedural solution to that issue were it
20 ever to arise.

21 MR BARLING: Certainly.

22 THE PRESIDENT: That is the first point. The second point is a slightly more practical point
23 on, as it were, where we are on the timing of today, to pick up our earlier discussion.

24 I think we have the impression that perhaps matters are getting a bit clearer as
25 we go along and it might not, after all, be necessary to break for an extended time, but
26 it may on the other hand be difficult to imagine us finishing today.

27 MR BARLING: Yes.

28 THE PRESIDENT: In which case the question of whether we should go on tomorrow arises.
29 If there were a choice, and partly as a result of the interruption caused earlier this week
30 by another case, the Tribunal would prefer to rise a bit earlier tonight, and start a bit
31 earlier tomorrow if it were the case that we could finish fairly comfortably tomorrow
32 morning, by which I mean by about 12 o'clock or so.

33 MR BARLING: Yes.

34 THE PRESIDENT: If that was not possible then we might need to think of other
35 arrangements. So it would help me a little bit if I could just inquire now around the
36 table where we are, what sort of time estimates---

37 MR BARLING: I have obviously shuffled through things a bit and had a look at my notes.
38 I am going to be pretty quick now.

1 THE PRESIDENT: I had the impression we were quite far advanced on your argument.
2 MR BARLING: So I would have thought in 15 or 20 minutes I would probably have dealt
3 with my opening. We were also having a think over the adjournment about what might
4 be done, and there was that possibility, Sir, that you have mentioned.
5 The other possibility we mentioned - we thought perhaps you are not able to sit
6 tomorrow - if we were squeezed as it were for reply we would be perfectly happy to
7 reply in writing for example, which is sometimes helpful anyway and that would be one
8 way if one wanted to finish today and not to have, as it were, the inconvenience of
9 refixing this. Obviously, if there are questions arising one can always do that ad hoc,
10 but that is something else it might be worth throwing into the arena.
11 THE PRESIDENT: Very well. Let's just see how long others anticipate. Mr Fowler, do you
12 have a sort of mental idea of how long you would like?
13 MR FOWLER: I don't think I should be more than about an hour and a half, maybe a bit
14 longer.
15 THE PRESIDENT: Right. Mr Kon, Miss McKnight?
16 MR KON: I may not require any time at all, but if I do I will require a very short period of
17 time.
18 MISS MCKNIGHT: I would envisage about 40 minutes, but it may be somewhat less if Mr
19 Fowler covers the things I had in mind.
20 THE PRESIDENT: Yes. I would have thought from an intervener's point of view there
21 probably may not be a great deal more to add by the time we had got to the end of Mr
22 Fowler.
23 Well it sounds to me on that basis that we possibly could finish tomorrow
24 morning, if it went over until tomorrow morning, even if we rose a bit early tonight. So
25 I think that would be one course, although it may mean splitting you up, as it were, Mr
26 Fowler, having most of your submissions today but going over a bit in the morning.
27 Would you see that as inconvenient or unfair?
28 MR FOWLER: I would not see that as a problem, no.
29 MR BARLING: What time do you have in mind to rise, Sir, today?
30 THE PRESIDENT: If it was entirely in my own hands I would like to rise between about
31 3.15 and 3.30, certainly by 3.30. The other possibility of course, if it were not too
32 inconvenient, would be to start at 10 o'clock tomorrow, to make sure we did finish in
33 the morning. Would that be a working plan?
34 MR BARLING: Yes.
35 THE PRESIDENT: Incidentally it would also give us the chance to catch up a bit and now
36 we have the statement of facts to refine down whether we have got things we want to
37 pursue with you. So is it convenient to proceed in that way?
38 MR BARLING: Yes, finish about 3.15, 3.30 and start at 10.

1 THE PRESIDENT: Yes.
2 MR BARLING: Yes, certainly.
3 THE PRESIDENT: Let us proceed accordingly then. I am very grateful. Yes.
4 MR BARLING: Well, Sir, I hope you have now had a clean copy and you have probably
5 read the non-clean copy over the lunch interval but there is a copy---
6 THE PRESIDENT: Yes, we have quickly read it, we can see exactly---
7 MR BARLING: Yes.
8 THE PRESIDENT: We are very grateful indeed for everyone having done that, it is helpful.
9 MR BARLING: Well we hope it is. It may be it is of particular interest in so far as we are
10 concerned in relation to the concept, the purpose of this, that side of it, whether it is an
11 interconnection type purpose within the meaning or not, and equally it has a bearing on
12 the logical linking aspect.
13 THE PRESIDENT: Yes, the logical point, I think, is still important.
14 MR BARLING: And obviously we draw attention to the facts agreed in relation to that at
15 paragraphs 9, 10 and 11 as indicating really that this is not unlike the logical linking
16 that one expects when one network is linked with another, in particular that one doesn't
17 even know if something is a voice call or an internet access call that is being sent down
18 the pipe.
19 The other thing that we pray in aid is something I have touched on already
20 which is the description of what happens when calls are made, both in relation to
21 Vodafone to Vodafone calls [paragraph 17] and then calls to another network
22 [paragraphs 18 and 19] where one can see in fact, it is treated - rightly treated - as part
23 of the Vodafone Network, and interconnection does not come into play until the MTX
24 stage later on.
25 As I promised, I shall try and be brief, there are very few points really that I
26 have not already made in relation to the three criteria. My learned friends, none of them
27 really engage with the fundamental point so far as network termination points and
28 defined termination points is concerned with the clear indications in the annex that
29 what is meant by those is end user termination points, nor do they engage with the
30 commonsense position of the telecoms. network and can hardly serve any useful
31 purpose if it only conveys signals between intermediate points, and doesn't extend to
32 any end user.
33 I have dealt with the licence issue, and I have dealt with the leased lines point.
34 All I would say about the leased lines relevance is that it is quite clear from the Oftel
35 skeleton that they appear to have completely misunderstood the way in which
36 interconnection engages with leased lines really in the context of partial private circuits
37 and I have already dealt as fully as I can with that, and I don't propose to say any more
38 about that.

1 As far as the logical link is concerned, the problem we have, as one will see
2 from the papers, is that sometimes we had the feeling that Oftel was relying upon a
3 logical linkage with the BT Network and sometimes they appear to be falling back on
4 so-called logical linkage with the circuit itself said to be a separate network.

5 Much of Mr Walker's evidence, on behalf of Oftel, was dealing as you may
6 recall with the BT cloud, which is put in terms of the BT Network, in a true sense the
7 big picture of the BT Network, and the implication being, from Mr Walker's evidence,
8 that somehow the backhaul circuit enabled something in Vodafone's equipment to be
9 logically linked to the BT cloud as a network cloud. On the other hand, we have the
10 alternative way they put it as "Oh well, no, it is only the circuit that is the BT Network
11 that is being linked with".

12 BT deals with the big picture, the way in which Mr Walker seemed to be
13 putting it in our evidence, and no doubt the Tribunal has had an opportunity of reading
14 Mr Butterworth's second statement - I am not going to take you to it now - but this
15 aspect of logical linking is dealt with at paragraph 13 onwards in his second statement
16 in bundle 9.

17 We submit, of course, that it is absurd about any linking in the sense of
18 interconnection with that BT Network, properly so-called "the Cloud", and I have
19 really said all I can say about why there is no logical linking with that through the
20 circuit. You cannot break out of it. You have to go through the pipe to the MTX and
21 the switch before Vodafone's Network will even appreciate that there may be a call to
22 another operator's customer and the transparency - if I can now use it in that way
23 myself - of the pipe.

24 In so far as the alternative way they put the argument, well the circuit itself is a
25 separate network and there is logical linking with that. They deal with that in three
26 subparagraphs of their skeleton [the Oftel skeleton] in paragraph 41, and perhaps I can
27 just say a word, very briefly, about what is said there.

28 The first point is the signals that BT conveys through the backhaul link have to
29 conform to protocols. You can see now the agreed statement is about that. All it
30 amounts to is that of course there has to be compatibility, and the plug has to fit in the
31 hole so that the link will work. But we submit that is not based on how Mr Butterworth
32 explains logical linking in his second statement.

33 THE PRESIDENT: Yes, I see.

34 MR BARLING: There is not the interaction required for two networks to be linked up in
35 any sensible meaning of that word, logically. An example is given it is not even known
36 whether it is an internet access call that is going through, or it is a voice telephony call.
37 There is simply no reaction to the pipe. What goes in the pipe at one end comes out
38 unchanged at the other end.

1 The second way they put it in that paragraph is they say that "BT convey signals
2 on behalf of Vodafone by way of time segmented multiplexing; the Vodafone signals
3 are broken down by BT and interleaved with other data, and 'packages'", and so on and
4 so forth. As you will see from the agreed statement of facts what is clear at all times,
5 the packages are separate, there is a separate pipe. This is just playing with technology.
6 The concept is just as it always was if you provided a cable. It is just another way of
7 doing what you did when ---

8 THE PRESIDENT: It would do the same thing if you had, physically speaking, a separate
9 wire.

10 MR BARLING: Precisely. The reason is that that cannot amount to any logical linking
11 with anything.

12 The third way, they talk about a logical route. The trouble is it is not the route
13 that has to be logical under the definition, it is the linking of networks, they have to be
14 logically linked and it implies that the route is there in fact, that is not the case as you
15 have seen again from the agreed statement of facts, the route is, as it is put in the
16 vernacular "nailed down" unless there is a certain serious type of fault where there
17 would be a major breakdown and then in fact some of these important backhaul circuit
18 links are actually duplicated so that there is a fall back link. I don't know whether that
19 is the one that you immediately turn to. Of course, there is provision for breakdown and
20 re-routing in a case of serious breakdowns. I think there is not quite a meeting of minds
21 in the agreed statement on how serious the thought has to be, but that may not be a
22 matter of great importance, but we submit that the fact that there is a dedicated capacity
23 path that is really the nature of the beast.

24 The real point, in our submission, that emerges from the evidence on this is that
25 logical linking of networks cannot be satisfied by the insertion of a transparent pipe
26 into a slot in Vodafone's network, which is what this amounts to.

27 I cannot add very much more to what Mr Butterworth has said, and what is in
28 the agreed statement of facts in relation logical linking.

29 THE PRESIDENT: Yes, thank you.

30 MR BARLING: And so far as the purpose is concerned, I think I have already really said
31 as much as I need to about the purpose of this. We just really borrow a remark of the
32 Tribunal's at the beginning of today - we would say analytically what is happening here
33 is "the purchase of transmission capacity" and it is much more by nature a retail
34 product that is being sold to them for their own purposes, than it is anything which
35 could be denoted as interconnection, and it clearly is not interconnection.

36 Sir, unless there are any specific questions about the agreed statement, or
37 anything else at this stage, really that is all I wish to say.

38 THE PRESIDENT: Thank you very much, Mr Barling. Yes, Mr Fowler?

1 MR FOWLER: Sir, I hope I can keep my submissions brief.
2 THE PRESIDENT: Take your time as you need.
3 MR FOWLER: There is a very short point, as my friend says, whether this is an
4 interconnection dispute, which comes down to whether or not the provision of the RBS
5 backhaul service involves interconnection and, as my friend says, we are agreed that
6 that depends upon the three criteria:
7 * are there two Telecoms networks?
8 * are they linked logically and physically? and
9 * is that in order to allow users of one organisation to communicate with users of
10 the **same** or another organisation?
11 I emphasise the "same" because that is within the definition.
12 THE PRESIDENT: Yes.
13 MR FOWLER: We say that each of those criteria is plainly satisfied, and like Mr Barling I
14 will take them in turn, but first I have some general observations on the case, and on
15 BT's case.
16 BT make a lot of the fact that the typical interconnection is one that enables a
17 customer or Network A enables a customer to communicate with a customer of
18 Network B. Of course, that is the typical interconnection we do not dispute that, but it
19 is far from the only interconnection, and although Mr Barling says intuitively one feels
20 that this cannot be interconnection, this cannot be a Network and so on, when one
21 looks at Mr Butterworth's first statement, for example, one sees he identifies that form
22 of interconnection as being a possible form of interconnection, and that is at paragraph
23 14 of his first witness statement which, for convenience, it is perhaps easier to refer to
24 it at paragraph 50 of our skeleton, where he says:
25 **"similarly, if a customer of Operator X wishes to talk to another customer**
26 **of Operator X, then the service that links the terminating ends of Operator**
27 **X's network together may also be interconnection, (e.g. transit services)**
28 **but only because the call transmits another operator's network."**
29 THE PRESIDENT: So something that transits, links in the sense of "transit" is still
30 interconnection?
31 MR FOWLER: Yes, that is what he is saying there, and we say that that description is
32 entirely appropriate to cover what is happening here. That, of course, depends upon
33 there being a BT Network which the Vodafone Network is transitting, but we say that
34 that aspect is satisfied.
35 THE PRESIDENT: So something that merely permits transit will do?
36 MR FOWLER: It will then be, assuming that the other criteria are satisfied, it will be in
37 order to allow the customers, the users of organisation A, to communicate with other
38 users of organisation A which is plainly within the definition and also, of course, with

1 users of organisation B, C, D ad infinitum. So the fact that it is, as it were, in the middle
2 conceptually of Operator A's Network, does not of itself stop the operation being
3 interconnection.

4 THE PRESIDENT: If that is right, how does a radio station backhaul circuit differ from any
5 other bit of hardware, as it were, that you need to make a circuit or a system work.
6 Obviously there are innumerable items of equipment that you need to make up a circuit
7 to allow users of system A to communicate with other users of system A. What
8 differentiates this particular item from all the things you need to have a working
9 system.

10 MR FOWLER: But it is the fact that it moves out of the Vodafone Network, the mobile
11 operator's network and on to the other Network that creates a distinction. It is not going
12 on to an individual piece of wire that is laid down, it is going into what we say falls
13 clearly within the definition of a telecoms. network. That is what creates the
14 distinction. Indeed, in that regard, it is no different conceptually in this aspect than
15 what my friend referred to as the typical interconnection product, the customer site
16 interconnect, which is a product linking internally, as it were, in the sense of the
17 distance from the end-users at either end, filling a gap between Vodafone's Network
18 and BT's Network.

19 THE PRESIDENT: I think what he is arguing is that according to BT it never goes out of
20 the Vodafone Network in the way that you put it. It is just a bit that completes the
21 Vodafone Network. It may go on to the BT system, but perhaps not into the BT system.

22 MR FOWLER: We say the simple answer to that, and in my submission, the absolute
23 answer, is that what is happening here is absolutely no different from what is
24 happening with partial private circuits. It is just that what happens with partial private
25 circuit is filling a gap, as it were, at the customer end, but it is enabling the Vodafone
26 Network to be extended by that extra distance. Here what is happening is filling a gap
27 in the middle, as it were. The location of the interconnection service is really
28 immaterial to the function that it is performing and, whether or not, it involves a
29 linkage with another telecoms network, and a logical linkage as well. All of those tests
30 must be the same when applied to the PPC, as when applied to the RBS backhaul.

31 THE PRESIDENT: Yes.

32 MR FOWLER: Again, talking about how one intuitively reacts to this, I would like to refer
33 you again to the BT letter of 13th November, and their diagram with the cloud, because
34 again it does illustrate something that we say is material to what is happening here.

35 THE PRESIDENT: Where do you want to go?

36 MR FOWLER: That is at your bundle 2 at tab 7.13, which is providing a diagram to do a
37 configuration of RBS backhaul's provision on page 3. One sees the picture, as
38 portrayed, matches Mr Butterworth's description of a transitting interconnection. It is

1 connecting two sides of a third party network across a BT Network in the middle.

2 We say there is nothing odd about a transitting interconnection of this sort. It is
3 within the realms of what is regarded as being interconnection.

4 The second point my friend makes is that this backhaul doesn't link two
5 networks it creates one network. It creates the Vodafone Network rather than linking
6 the Vodafone Network to the BT Network, and they say take away the RBS backhaul
7 link, and you wouldn't have two functioning networks, but in Vodafone's case you
8 would just have some components which couldn't function at all.

9 We say that just is not right. Even on BT's view of what constitutes a network,
10 what constitutes the relevant termination points - the user handset effectively - there
11 would be a Vodafone Network if you took away all the BT provisioned RBS backhaul.

12 THE PRESIDENT: There would still be a network, it might not be working as well?

13 MR FOWLER: It would not be as extensive, but we saw at Basingstoke the Vodafone
14 MTX which had, on the same site a Vodafone RBS, and the MTX and the RBS were
15 linked by a self-provided link so that there in Basingstoke, even if not connected to
16 anything else, there is something which, on BT's acceptance of the definition must
17 constitute a telecoms. network.

18 What happens if you take away the RBS link is very simple. If you take away
19 the RBS link from the Heather Row RBS that we saw, and take away that backhaul link
20 what happens is that the Vodafone customers within the Heather Row cell served by
21 that RBS station cease to be able to communicate with the other Vodafone customers,
22 or indeed BT customers on the Vodafone or BT Network.

23 THE PRESIDENT: So the coverage is reduced, but the network still exists?

24 MR FOWLER: The network still exists and what, as I say, has happened is that those
25 Vodafone customers served by the Heather Row cell can no longer communicate with
26 the other Vodafone customers, and the purpose of the RBS link is precisely that - and I
27 will come back to this later - it is in order that the customers served by the RBS link
28 can communicate with the other customers. It falls again squarely within the criteria of
29 definition---

30 THE PRESIDENT: For the purpose of your point, yes.

31 MR FOWLER: ---for the purpose. In this connection it is quite instructive to look at one of
32 the Commission Reports that is exhibited to Mr Walker's evidence, the Eighth Report
33 on the Implementation of Telecoms. This is at the second defence binder, which is your
34 bundle 7 at tab 15. This is going through how things are progressing in the Community
35 as a whole in various aspects of telecoms., and turning in particular to page 838 of the
36 bundle, page 21 of the document, it says that:

37 *"interconnection leased lines from 64 kilobytes to 34 megabytes enable new*
38 *entrants to provide end to end services to their customers in cases where their*

1 *own networks are not yet sufficiently extensive to enable them to provide these*
2 *services by means of their own infrastructure alone."*

3 Of course, that is one of the functions served by PPCs. It is also one of the functions
4 that is served by RBS backhaul. It enables new entrants to provide services where their
5 own infrastructure is not sufficient.

6 THE PRESIDENT: But what is being provided, in the case of leased line, the service that is
7 being provided is the line, presumably?

8 MR FOWLER: It is the same sort of line as the line that we are talking about here. It is a
9 line which will in part be dedicated, possibly, and then go into an LSE and multiplexed
10 in with other BT activities, and come out of another LSE and go on to the competitors'
11 premises.

12 THE PRESIDENT: In the case of leased lines, and I am going to oversimplify, and you are
13 going to need to correct me because I am probably going to get it wrong, as we have
14 understood it there are independent operators who supply retail customers with circuits
15 and leased lines and so forth. So the situation is you have BT, you have a middleman
16 who is performing a wholesale function of some sort, and then you have a retail
17 customer at the other end. In the case of the generality of the Vodafone Network, how
18 does that analysis work? Vodafone is not exactly doing this sort of wholesale function
19 it just has its own customers. Or perhaps you say there is no real distinction between
20 the role that Vodafone is undertaking to supply telephone service to its customers, than
21 the role of someone who buys a PPC from BT in order to sell a PPC to complete a
22 circuit to his retail customers, there is a conceptual difference?

23 MR FOWLER: What you have just said, Sir, the fact is it is to enable him to sell a
24 complete leased line circuit to the customer, he is taking the PPC, the partial private
25 circuit as an input to enable him to offer the complete product. That is conceptually
26 exactly the same as what is happening here. It is an input to the product that is being
27 offered by Vodafone or as the case may be.

28 It is an input supplied on a wholesale basis in the case of the PPC, and there is
29 no reason why it should not be supplied on a wholesale basis, we say, in the case of the
30 RBS backhaul any more than there is any reason why the customer site interconnect
31 should not be supplied as it is on a wholesale basis. All of these are bits that are going
32 to make up the network of the operator taking them in, all be it that they also remain
33 part of the network of the operator making them available.

34 THE PRESIDENT: Yes.

35 MR FOWLER: My friend also suggested that in some sense what was happening here was
36 that BT was being required to give a subsidy, or would be required if this direction
37 stood, to give a subsidy to Vodafone. We say that that is not the position. The
38 requirement of the direction would be that BT charge the cost oriented charge, one

1 entitled to include the wholesale profit margin. It is no different again from the price,
2 and the make up of the price that would be charged for a customer site interconnect. It
3 is based up on cost and a profit - no subsidy involved at all.

4 My friend also suggested that here was Vodafone, one of the largest telecoms
5 companies in the world seeking to have this subsidy. Well, first of all it is not seeking
6 to have the subsidy, but secondly, the question is not a question that is related
7 specifically to Vodafone. In examining the purpose and the meaning of the directive
8 one has to have regard to other smaller people in the same position, and the sort of
9 people referred to in the eighth report to which I have just referred you, the new
10 entrants whose infrastructure has not been rolled out sufficiently far, who can take
11 advantage, and should be able to take advantage we say, of the services available from
12 an incumbent, when they fall within the definition of "interconnect", and they should be
13 entitled to do so as wholesale inputs.

14 THE PRESIDENT: The structure of the directives, at the time at least, seemed to be
15 proceeding on the basis that in a normal case the incumbent would also be, as it were,
16 the monopolist, who would control the service required or whose co-operation with the
17 interconnection is necessary in order to have interoperability. We have heard in this
18 case a little bit about the alternatives of self-build, microwave, and so forth, and that is
19 to some extent dealt with in the decision. Why should, and perhaps you are going to
20 tell me it does not matter, why should the incumbent have imposed on him an
21 obligation to interconnect if there are perfectly good alternatives available for third
22 parties, perhaps cheaper alternatives for all we know. If there are specific situations
23 where, for one reason or another, there is not an alternative - because there is a hill in
24 the way or something - should the exercise of the regulatory powers be confined to that
25 part of the market for which there is no alternative and, in either case, could it be said
26 that the introduction of regulation into this sector will itself change, or even (in inverted
27 commas) "distort" the way it is operating because the very existence of this direction
28 will change, or might change, the economics of whether you should self-build, use
29 microwave or buy a backhaul circuit from BT?

30 I don't know whether any of those questions go directly to the construction of
31 the word "interconnection" but they are floating around in the background to the case,
32 and I don't know whether you have any comment on them, or whether it links at all
33 with what we are talking about?

34 MR FOWLER: My first observation would be that of course the regime has changed, and
35 the regime has changed to one which is much more oriented to specific market inquiry.
36 The old regime was one under which, as you pointed out this morning, there was a
37 presumption of significant market power of 25 per cent.

38 THE PRESIDENT: Just stopping there, has that fact alone got any relevance for the

1 Tribunal and for the outcome of this case. In other words, how far, if at all, should we
2 have regard to the fact this is done right at the end of an old regime when a new
3 situation would arise under the new regime? Is that at all relevant, for example, to the
4 question of whether one should give a narrow or broad interpretation to the word
5 "interconnection"?

6 MR FOWLER: In my submission it does not make any difference to the interpretation to be
7 given to the word "interconnection". If the challenge had been brought on a different
8 basis, then it might have been a relevant consideration. The basis on which it has been
9 brought is that the decision is *ultra vires*.

10 THE PRESIDENT: Yes.

11 MR FOWLER: And that is the only basis on which this challenge has been brought. We
12 would have gone into a lot more evidence obviously about the economic justification for
13 the decision, and the decision itself seeks to examine the particular market here, as I
14 pointed out this morning, rather than relying on the SMP powers and simply saying
15 "You have got SMP and therefore you are required under Article 4 (2) and Annex I to
16 provide leased line services on these terms". That is not what has happened.

17 THE PRESIDENT: I suppose you say that logically the terms of the new legislation are not
18 really relevant to the interpretation of the old legislation, because the old legislation
19 depends on what the legislators of the old legislation thought about it at the time?

20 MR FOWLER: I would say that is certainly the case, yes, Sir. The new legislation does,
21 however, provide this transitional period, then it is the transitional period under which
22 this is taking place.

23 THE PRESIDENT: Yes, thank you. Very well.

24 MR FOWLER: As a final general point, before I come to the criteria, we say that there is
25 no reason at all, looking at the purposes of the Interconnection Directive, why this
26 particular form of interconnection should be excluded from the provisions of the ICD.
27 The aim of the Interconnection Directive includes securing the interconnection of
28 networks in an environment of open and competitive market, and Oftel's duties, and
29 perhaps it may be useful to look more closely at those duties in Article 9 of the
30 Interconnection Directive. The duties include duties to secure adequate
31 interconnection in the interests of all users, to secure maximum economic efficiency,
32 give maximum benefit to end-users, and they need to take account of the NRAs, the
33 need to ensure satisfactory end to end communications for users, and the need to
34 stimulate a competitive market - as well as harmonisation and co-operation.

35 THE PRESIDENT: So "users" you say includes everybody, it includes Vodafone as well as-
36 --

37 MR FOWLER: It certainly includes Vodafone, I will come to that later, but yes, it
38 certainly includes Vodafone, but it is also in the interests of users, we say.

1 THE PRESIDENT: In the most general sense.

2 MR FOWLER: In the most general sense, and again that is why Oftel has carried out the
3 economic analysis that is not at the moment under challenge in these proceedings, and
4 it has not simply gone straight in and exercised its powers in relation to SMP.

5 Providing transitting interconnection of the sort here, or the sort that arises we
6 say with BPCs is a way of furthering those objectives, of enabling operators to fill gaps
7 in their infrastructure, in the way that they regard as most cost-effective. There is no
8 reason why the directive should be construed in a way that excludes, as a matter of
9 principle, the form of interconnection that we say arises here.

10 THE PRESIDENT: So we should construe it in line with what you say is the general
11 intention, which is to give a wide meaning to the concept of ---

12 MR FOWLER: Indeed, yes, Sir, and that does in fact take me on to the *Telefonica* case. We
13 say that in this particular case actually the issues can be resolved on the plain wording
14 of the directive, but if there were any doubt then in the light of the decision in
15 *Telefonica* we say that the doubt should be resolved in favour of giving a margin of
16 appreciation to the National Regulatory Authority here.

17 What one had in the *Telefonica* case was a challenge by the Spanish old
18 monopolist - Telefonica - to a Spanish Royal Decree that was implementing the
19 Interconnection Directive, that provided inter alia that there was an ex ante requirement
20 imposed on an operator with SMP to provide access at specific points in its network
21 and in particular the subscriber loop and local and high level switching centres, that is
22 what was at issue there, and the question was, was that within the powers of the NRA,
23 under the directive.

24 Article 9(2) of the directive permits ex ante conditions to be imposed, but says
25 that they may be imposed in the areas listed in Part 1 of Annex VII. The question was
26 whether that limited ex ante conditions to those conditions listed in Annex VII, or
27 whether it still left a margin of appreciation to the domestic authorities.

28 Advocate General Jacobs came to the conclusion - rightly, in our submission -
29 that the Member States have a significant margin of manoeuvre in the implementation
30 of the directive and the court in its judgment found that indeed, though not reflecting
31 the wording of the Advocate General, found that indeed the directive was not to be
32 construed in a narrow way as limiting the powers to set ex ante conditions to those
33 specified in the Annex, but went beyond that.

34 Similarly, we say here, that the definition that we are looking at here, the
35 various definitions, are not to be construed in a way that limits the application of the
36 provisions for interconnection in the directive.

37 So coming to the three criteria, and starting with the first, the question of
38 whether there are two telecoms. networks involved here. We say one has on the one

1 hand the network of Vodafone MTXs, or the network based upon Vodafone MTXs,
2 with the termination points including the handsets and the points of interconnection.
3 And, on the other hand, one has got at the very least the BT resources and transmission
4 systems that are used to convey the Vodafone signals, between the RBS and the MTX.
5 We say that both of those constitute telecoms. networks within the meaning of the
6 definition.

7 THE PRESIDENT: So the networks we are talking about, as far as you submit, is the two
8 networks - there is the Vodafone Network and that part of the BT Network that is being
9 used to transmit these signals from one bit of the Vodafone Network to the other bit?

10 MR FOWLER: We say that that comprises the relevant telecoms. network, the wider
11 network.

12 THE PRESIDENT: So are you still maintaining that the RBS itself is a network, if you ever
13 did?

14 MR FOWLER: I am not sure that we have done so, Sir.

15 THE PRESIDENT: No.

16 MR FOWLER: That the RBS may comprise a network is not part of our case.

17 THE PRESIDENT: No.

18 MR FOWLER: But the relevant networks we say are those two. BT objects largely on the
19 basis of its interpretation of the meaning of a "defined termination point".

20 THE PRESIDENT: Yes.

21 MR FOWLER: And my friend today has pointed to the fact that the Article 2 definitions in
22 the Interconnections Directive refer to "defined termination points" rather than
23 "network termination points". I am not quite sure whether he is still arguing this. His
24 reply argued that "defined termination points" meant Network Termination points as
25 defined in Directive 90/387 - quite what significance is attached to the word "defined"
26 in that context.

27 Essentially what he is saying is that it means the end-user termination point, and
28 we say that that is just wrong, that users are not limited to end users, and the
29 termination points, in fact, are the points where the network terminates, not where calls
30 terminate - the termination point of the network - and it forms the boundary of the
31 network, and it includes points of interconnection, or to use a neutral term points of
32 connection - "points of handover" I think is the expression that is used in the Agreed
33 Statement of Facts.

34 THE PRESIDENT: So it is wider than just the plug in the wall?

35 MR FOWLER: It includes the plug in the wall.

36 THE PRESIDENT: It includes the plug in the wall, and most network termination points
37 will be the plug in the wall, but it is not limited.

38 MR FOWLER: It is not limited to that.

1 THE PRESIDENT: No.

2 MR FOWLER: If I can start in this connection with the definition in 90/751, which is the
3 amended regulation.

4 THE PRESIDENT: That was in file?

5 MR FOWLER: At the back of the reply bundle.

6 THE PRESIDENT: This is our bundle 9, I think.

7 MR FOWLER: It is in the middle of tab 9.

8 THE PRESIDENT: Yes.

9 MR FOWLER: One starts with the definition of Network Termination Point there, which is
10 at Article 2(5), that it means the physical point at which a user is provided with access
11 to a public telecoms. network.

12 *"The location of network termination points shall be defined by the NRA and*
13 *shall represent a boundary for regulatory purposes of the public telecoms.*
14 *network".*

15 Now, we say clearly the boundary for regulatory purposes of the network is the
16 boundary of the network. It is where the network terminates, rather than where the calls
17 terminate, or rather necessarily where the calls terminate. Simply from the point of
18 view of logic it must include the points at which one network ceases and joins into
19 another network. That is to say the points of handover or interconnection.

20 THE PRESIDENT: How does that work as far as the boundary for regulatory purposes is
21 concerned? On one construction you could say the Radio Station backhaul circuit was
22 outside the system for regulatory purposes because we have two points of connection
23 where the network ends, at either end of the points that are being connected by the
24 Radio Station backhaul circuit. What is happening in the middle?

25 MR FOWLER: All of that is part of the BT Network, all of that is BT equipment.

26 THE PRESIDENT: I see, that is inside--

27 MR FOWLER: Yes.

28 THE PRESIDENT: Right, that is part of the network, I see. It terminates at either end.

29 MR FOWLER: So there is the cloud, as it were, and then you have those two points the
30 MTX and the RBS which are also termination points, and there are a whole lot of other
31 termination points within the cloud, but all of those comprise, taken together, join up
32 the dots, and you have the boundary of the network.

33 THE PRESIDENT: So the two ends of the Radio Base Station backhaul circuit are both
34 network termination points in this case? The two physical points at which the user is
35 provided with access to a public telecommunications network. "Access" on your case,
36 meaning here, transit across ---

37 MR FOWLER: It is the point at which Vodafone, as the user in this context, is provided
38 with access. It gets its access in that handover box that we saw at the RBS, and at the

1 other end at the MTX.

2 THE PRESIDENT: Yes.

3 MR FOWLER: And that is the network termination---

4 THE PRESIDENT: That is the network termination point.

5 MR FOWLER: Yes, and there are lots of others.

6 That definition follows on referring to network termination points to be defined

7 by the National Regulatory Authority, it follows after the definition at "2" there,

8 referring to the Telecoms. network, and permitting the conveyance of signals between

9 defined termination points. In my submission it is a coincidence that the words

10 "defined termination points" appears in Article 2(2) and the obligation to define

11 appears in Article 2(5). Those two definitions are plainly linked, and what is meant by

12 "defined termination points" are those termination points defined by the NRA.

13 THE PRESIDENT: Yes.

14 MR FOWLER: Before leaving that, the definition of network termination points, are points

15 at which the user is provided with access, and a "user" is defined above to mean

16 "individuals including consumers..." with or without a comma, "...or organisations

17 using or requesting publicly available telecoms services." The same definition of "user"

18 in Article 2 of the ICD.

19 As to the meaning of requesting publicly available telecoms services, it is

20 helpful to look at the end of Recital 5 to the ICD to see that there is no particular

21 esoteric magic in those words. At the end of Recital 5 it provides:

22 *"For the purposes of this Directive, 'public' does not refer to ownership, nor*

23 *does it refer to a limited set of offerings designated as public networks or public*

24 *services, but means any network or service that is made publicly available for*

25 *use by third parties."*

26 and it is clearly just distinguishing between services or networks to use in-house as it

27 were, and those that are made available to third parties. So that the definition of "user"

28 is looking at those persons who constitute third parties seeking such publicly available

29 telecoms. services. Vodafone is plainly such a person, as are the other operators

30 seeking services that BT makes publicly available, as it does at the moment on a retail

31 basis in the case of RBS backhaul.

32 THE PRESIDENT: So the supply of RBS backhaul is a telecommunications service?

33 MR FOWLER: It is indeed, yes, and it is a publicly available one, because it is not one

34 limited in-house, as it were, to BT. It is one that they make available to third parties,

35 and that is what Recital 5 says is meant by "publicly available telecoms services".

36 THE PRESIDENT: "Any network or service that is made publicly available for use by third

37 parties..." Yes, I see. So they are a user within 2(1)?

38 MR FOWLER: Yes. And for the purposes of the definition in 2(5), "the physical points at

1 which a user is provided with access". That is the crucial aspect of this, in tying down
2 what is meant by this definition of network termination, because it includes the points
3 at which people like Vodafone are provided with access, because they are users who
4 are seeking publicly available telecoms. services.

5 That interpretation is borne out by the document that my friend referred to this
6 morning, the DG13 working document, on the Commission's Recommendation on
7 Leased Line Pricing, and that is in their reply bundle, bundle 9 tab 2 under tab 3, subtab
8 2. This is the Information Society DG's working document. At page 8 of that document,
9 which contains the passage that my friend read from his skeleton this morning, at the
10 top of the page, about PPCs, it is followed by a passage that says:

11 *"It should be noted that the term 'user', as defined in the Interconnection*
12 *Directive, covers both individuals and organisations as, for example, a network*
13 *operator providing switched telecom services may also be a user of leased*
14 *lines".*

15 THE PRESIDENT: Yes.

16 MR FOWLER: And that is to be borne in mind, of course, in the light of the first sentence
17 of the previous paragraph which talks about leased lines provided to users' premises.
18 What is being said is that users' premises include the premises of Vodafone and the like
19 in that context, in the context of Annex II to the Directive.

20 THE PRESIDENT: So something, I think, depends on the closeness of the analogy you
21 draw with leased lines, if they are closely analogous and parallel that supports you. If
22 they are as distant as Mr Barling submits, then it is less strong?

23 MR FOWLER: That is indeed the case, but we do submit that when one looks at what is
24 going on with the leased line all the features, and indeed the RBS backhaul is itself a
25 leased line---

26 THE PRESIDENT: In the sense that it is a line that is leased?

27 MR FOWLER: Well in the sense that that expression, in my submission, is used in the
28 interconnection way, Sir, yes, it is a leased line.

29 THE PRESIDENT: Yes.

30 MR FOWLER: In my submission, it is plain that the meaning of Network Termination
31 Points is not limited to end-user terminations, and that is borne out when one looks at
32 the way in which it is used - if I can look first at a different directive, which is also
33 dependent, as is **this** one, on Directive 90/387 definitions, and if I may just raise a point
34 you raised this morning, Sir---

35 THE PRESIDENT: Yes.

36 MR FOWLER: --about this Interconnection Directive preceding the amendment in 90/751
37 to Directive 90/387, although in date the 90/751 came---

38 THE PRESIDENT: 90/751 is the subsequent one.

1 MR FOWLER: Where the subsequent one came later, it was of course, all part of the
2 package so they were all considered together, so one can't say that it is not the intention
3 to embrace the definitions in the amended version of 90/387.

4 THE PRESIDENT: They are bringing the passage as a whole up to date?

5 MR FOWLER: Yes. And that is also true in relation to the package, of the Directive to
6 which I am about to take you, which is 90/810 which came out the next year. This is a
7 directive which, again, relies up on the definitions. That is exhibited to our skeleton.

8 THE PRESIDENT: Yes.

9 MR FOWLER: This is on the application of open network provision to voice telephony.

10 THE PRESIDENT: Yes, that is at tab 3 of your skeleton.

11 MR FOWLER: One sees that it provides at Article 2 (1) that the definitions given in
12 Directive 90/387 shall apply. Then one moves forward to Article 16 and one finds this:
13 *"National regulatory authorities shall ensure that organisations with significant*
14 *market power in the provision of fixed public telephone networks deal with*
15 *reasonable requests from organisations providing telecommunications services*
16 *for access to the fixed public telephone network at network termination points*
17 *other than the commonly provided network termination points referred to in*
18 *Annex II, part 1."*

19 and Annex II, part 1 does not cast much light on that, because it just talks about
20 commonly provided network termination points.

21 But what is absolutely crystal clear from that use of the expression "Network
22 termination points" is that the points being referred to are points at which other
23 operators, as users, have access to the network, because it is other operators who are
24 making the requests.

25 THE PRESIDENT: So this is an example, you say, of the use of the expression "Network
26 Termination Point"?

27 MR FOWLER: Which manifestly----

28 THE PRESIDENT: ---manifestly refers to where operators connect with each other? Not to
29 the chap with the phone---

30 MR FOWLER: With the phone.

31 THE PRESIDENT: And that might, be I suppose you would say that that idea, if you look at
32 Annex II, part 1, which refers to technical characteristics of network interfaces at
33 commonly provided network termination points, it is the kind of language that is
34 perhaps more apposite to connection points between operators than to plug in the wall.

35 MR FOWLER: Indeed, yes, because manifestly in that context it must be referring to the
36 connection points between operators.

37 THE PRESIDENT: Yes. For example, to make it possible for someone who is calling from
38 a phone that is on an analogue system, to connect at the other end with a user who has

1 an ISDN line, all those technical characteristics have to be sorted out at the interface
2 between the connection of the two networks?

3 MR FOWLER: That is what is being dealt with **here**, yes, at that particular network
4 terminal, at least those particular network termination points. But the main point of it
5 is that it does show the meaning of this word, and the meaning of the word "users" in
6 the definition, and it plainly supports what DG 13 says in its working document, that
7 "user" includes other operators.

8 One finds a similar provision, although not quite the same in Recital 6 and
9 Article 4(2) of the Interconnection Directive itself. Recital 6 refers to encouraging new
10 forms of interconnection and special network access at points other than the network
11 termination points offered to the majority of end users, again in that context, although it
12 does not use the words "network termination points" twice, it is plainly referring to ---

13 THE PRESIDENT: When it says "points"---

14 MR FOWLER: It means network termination points in my submission. Similarly that is
15 reflected and given effect to in Article 4(2) which is the obligation on undertakings
16 with SMP to meet all reasonable requests for access to the network including access at
17 points other than the network termination points offered to the majority of end-users.

18 THE PRESIDENT: Yes. So "points" in there again as a network termination point in the
19 widest sense?

20 MR FOWLER: Yes.

21 THE PRESIDENT: "...access at points..."

22 MR FOWLER: Then finally on this topic of the meaning of "Network Termination Points
23 and Users" in this context, we have referred already to the fact that the definition in 387
24 refers to the obligation of the NRA to define the network termination points as the
25 boundary for regulatory purposes of the network. We have included Annex A to the
26 licence which is a definition by the regulatory authority of those termination points.
27 That is also annexed to our skeleton, although I just go to that briefly.

28 THE PRESIDENT: Is this tab 4?

29 MR FOWLER: Tab 4.

30 THE PRESIDENT: What is the date of this document, Mr Fowler?

31 MR FOWLER: The definition here is a definition that pre-dates the ICD, but the licence
32 was revised in the light of the new package and reissued including and reaffirming the
33 definition. The definition is carried over, but this is the definition that forms part of the
34 licence, as amended in the light of the new package.

35 THE PRESIDENT: It was re-examined and carried over on the basis that it was a suitable
36 definition for the purposes of the new provision?

37 MR FOWLER: Yes, the definition for regulatory purposes of the applicable systems.

38 THE PRESIDENT: The existing definition still works and that is what is carried over.

1 MR FOWLER: So one sees on the second page of this annex, at the foot of the page that:
2 *"Network Termination Point" means any point:*
3 *"(i) within an item of Network Connecting Apparatus..."*
4 and then it goes on to define precisely where in the connecting apparatus the point
5 arises, and that is the point at which energy is conveyed directly to or from apparatus
6 from somebody else's system effectively. That reflects the definition of Network
7 Connecting Apparatus as above, it means:
8 *"Network Connecting Apparatus' means telecommunication apparatus*
9 *comprised in the Applicable Systems which is not Network Termination and*
10 *Testing Apparatus and is connected to another telecommunication system."*
11 "Network Termination and Testing Apparatus" is the apparatus that includes the end-
12 user network termination points. So it has both the defined termination points here are
13 both interconnection points and end-user termination points.
14 THE PRESIDENT: For what purpose is this definition in this licence? It is a wider purpose,
15 presumably, than just in connection---
16 MR FOWLER: It is for defining where the applicable systems end, the boundary---
17 THE PRESIDENT: Of regulation?
18 MR FOWLER: Yes, effectively what is envisaged in that provision of network termination
19 points which provides that NRA shall define the network termination points as a
20 boundary for regulatory purposes, and that is the purpose of this in defining the
21 boundary at the limits of the applicable system.
22 THE PRESIDENT: So you say this definition is conceived for the purpose of the
23 Interconnections Directive, or some other purpose?
24 MR FOWLER: It, as I said, pre-dated the ---
25 THE PRESIDENT: Yes.
26 MR FOWLER: ---Interconnection Directive, so it was not conceived for the purpose of
27 that. It was conceived for the purpose of defining what the equipment was, and what
28 the systems were that they were licensed to operate, because at that stage, of course,
29 they required a licence to operate the systems, and so one had to define what the
30 systems were, and this is the product of that requirement.
31 THE PRESIDENT: They could not have challenged this definition on the basis that it was
32 *ultra vires* the ICD because it is a definition with a much wider purpose, it sets the
33 boundaries of the whole regulatory system. Would that be right?
34 MR FOWLER: Well, it sets the boundaries of the network for the purpose of the regulatory
35 system. So it should coincide with the requirements of 90/387 as amended.
36 THE PRESIDENT: Yes.
37 MR FOWLER: Because he is defining the limits of the network, here called "The
38 applicable systems".

1 THE PRESIDENT: Yes. At what point are you likely to come to a natural break in your
2 flow?
3 MR FOWLER: I was now going to start to address the BT arguments on this aspect, and it
4 may be an appropriate point at which to stop.
5 THE PRESIDENT: It would be quite a convenient point for us if it is not inconvenient to
6 you?
7 MR FOWLER: No, no, I can break there I think quite conveniently.
8 THE PRESIDENT: Very well, if we may then we will break there. We will re-look at
9 everything we need to look at overnight, and come back refreshed in the morning at 10
10 o'clock if we may. Thank you very much.
11 **(Adjourned until 10 am the following day)**

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