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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

Sitting at:
Royal Courts of Justice

13 June 2011

Before:

MARCUS SMITH QC
(Chairman)

BRIAN LANDERS
COLIN MAYER

Sitting as a Tribunal in England and Wales

BETWEEN:

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

Appellants

– v –

OFFICE OF COMMUNICATIONS

Respondent

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CASE MANAGEMENT CONFERENCE

APPEARANCES

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

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

Mr. Brian Kennelly (instructed by Baker & McKenzie LLP) appeared for the Hutchison 3G UK Limited.

Miss Elizabeth McKnight (Partner, Herbert Smith LLP) appeared for Vodafone Limited.

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

Miss Kelyn Bacon (instructed by SJ Berwin LLP) appeared for Telefónica O2.

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

1 THE CHAIRMAN: Good morning all. Thank you all for your very detailed submissions on the
2 positions that each party have regarding process. It seemed to us reviewing those
3 submissions that in substance a great deal has been agreed regarding interventions and in
4 terms of the order of pleadings with interventions following, as it were, that the interveners
5 are supporting. Additionally, it seems that all parties agree as to the need for expedition so
6 far as this can consistently be achieved with justice and that view is certainly shared by the
7 Tribunal. It is also common ground between the parties, and I am including here the
8 Competition Commission, that there should not be a reference to the Competition
9 Commission until pleadings have closed, and the questions to the Competition Commission
10 should be formulated only when pleadings have closed and not before.

11 Looking at the Competition Commission's timetable that results in a determination either in
12 late February or in late March 2012, which is about a year after the price controls became
13 effective with a possible judicial review still to go and we are, I want to say up front, a little
14 concerned about that, and we would like to float with the parties an alternative along the
15 following lines.

16 First, we are minded to suggest that questions to the Competition Commission be
17 formulated at once with one week for the appellants and any supporting interveners to
18 produce a consolidated draft and, incidentally, we entirely agree with the parties'
19 suggestions that these appeals be heard together, so one week for the appellants' and
20 supporting interveners to put together a consolidated draft. One week for Ofcom and any
21 supporting interveners to comment on that draft and that would essentially involve
22 identifying agreement and, in particular, areas of disagreement with alternative draft
23 wordings where there is such an air of disagreement, and also though we doubt this will
24 arise, identifying any dispute about whether the question is or is not a price control matter.
25 Then, finally, one week for the Tribunal and, indeed, the Competition Commission to
26 review that draft and finalise it.

27 At that point we were minded to suggest the reference to the Competition Commission
28 occur, let us say, by 1st July of this year, with Ofcom then submitting its defence during the
29 course of the Competition Commission's determination, which gives Ofcom rather more
30 time than they otherwise would have, say, submission of a defence by 29th July 2011, with
31 the other core submissions which really lie in the hands of the Competition Commission to
32 determine, to follow. Clearly this would be a matter for the Competition Commission, but
33 we would anticipate that these core submissions would act as a replacement or include any
34 replies or statements of intervention supporting the defence and these would have to be

1 served in the course of August - either on 12th or 19th August, and then the Competition
2 Commission's determination could be circulated some time before the end of the year,
3 between 20th and 30th December of this year.

4 I have articulated this suggestion - it is no more than that at this stage - in some detail
5 because obviously I want the parties to comment on them and express views as to why this
6 is or is not a good course to proceed. The only two points we would like to make is first,
7 we can see no reason why questions to the Competition Commission cannot be formulated
8 in the absence of a defence from Ofcom, because it seems to us they are matters that arise
9 out of the notices of appeal and those alone. Secondly, it is quite clear from the
10 Competition Commission's guidelines that a significant amount of initial work is done in
11 advance of even a formal reference, that there is an informal gearing up. It seems to us that
12 our proposal is rather in tune with that.

13 So with that rather lengthy introduction perhaps I could ask the parties to make their
14 submissions on that proposal and the directions that they would propose.

15 MR. HOLMES: I am very happy to kick off first if that would assist the Tribunal. I am Josh
16 Holmes and I appear for Ofcom in this matter. My learned friend Mr. Robert Palmer
17 appears for British Telecommunications, Mr. Nicholas Gibson appears for the Competition
18 Commission, Mr. Brian Kennelly is here for Hutchison 3G, Miss Kelyn Bacon is here for
19 Telefónica O2, Miss McKnight is here for Vodafone and Mr. Turner QC and Mr. Julian
20 Gregory are for here Everything Everywhere. I think that I have covered everyone in that
21 introduction.

22 I am very grateful for your opening comments and for the indication you have given as to
23 the Tribunal's thinking. There was one point of clarification and I am afraid I was not rapid
24 enough in taking a note, and I was not quite sure what you proposed for statements of
25 intervention in support of appellants, they would come as core submissions, would they,
26 after the questions were referred?

27 THE CHAIRMAN: No, we were envisaging those to come as soon as practicable on a date to be
28 agreed as of now, in other words after the notices of appeal have been submitted, which
29 they have been.

30 MR. HOLMES: I see.

31 THE CHAIRMAN: We did not have a date in mind, but seems sensible that would be before
32 defence rather than after defence.

33 MR. HOLMES: Yes, we would certainly concur with that and of course it matches the position
34 of all of the parties I think, that it is sensible for the statements intervention in support of the

1 appellants to go first so that Ofcom can conveniently and efficiently pick them up and
2 address them in the defence in one round of pleadings.

3 As regards the technicality of drafting the questions now, for our part we agree that there is
4 no reason why they should not be drafted in advance of service of the defence. As you say,
5 sir, the questions are to be formulated by reference to the notices of appeal, and the
6 timetable you propose seems eminently reasonable for achieving that. I understand that the
7 questions are not really in dispute. We certainly have no difficulty with any of the
8 formulations that are on the table, although we think Everything Everywhere and Vodafone
9 should probably collapse their questions given the common ground that they cover.
10 We accept entirely BT's formulation of question which accompanied its written
11 observations.

12 Sir, there is one point on which we do foresee difficulties from our perspective, and on
13 which I fear I am going to seek to persuade you, sir, and the other members of the Tribunal,
14 which is the timing of Ofcom's defence. As regards whether the reference is made before or
15 after the Competition Commission begins its procedure, I think that is a point that I defer to
16 Mr. Gibson on and will not say anything now although in reply there may be points to be
17 taken.

18 As regards the timing, you will have seen our proposal for a defence on 19th August 2011
19 and I fully appreciate the Tribunal's concern to get these proceedings under way as rapidly
20 as possible, the need for expedition is not in dispute, these are time limited price controls;
21 there is quite possibly no scope for recovery if there are under or over payments as a result
22 of any errors and in the public interest and in the commercial interests of the parties any
23 errors should be corrected as rapidly as possible. We do not, needless to say, accept that
24 there are any errors, but the need for expedition is recognised on this side, as you say.

25 The date of 19th August was not lightly arrived at by Ofcom. We were very conscious of
26 the need to be as tight as possible, but our best estimate of the minimum time that will be
27 needed in order for Ofcom to produce a proper defence in these appeals was the date we
28 specified, and that already I should say is cutting back on initial estimates that we arrived at.
29 The figure was not put forward as an opening bid, in case the Tribunal were in any doubt
30 about that, it really was on the basis of careful mapping of the issues, of the tasks, of the
31 time that the tasks will require, and of the available resources to Ofcom when we think we
32 could put in a respectable defence to the Competition Commission and the Tribunal.

33 If the Tribunal were to set the earlier deadline that it proposes we do have grave doubts
34 about our ability to tackle all of the points effectively. This is because the appeals are large

1 and complex and, if I may, I will take just a few minutes of the Tribunal's time to describe
2 the complexities as we see them. The Tribunal gets a flavour of the scale of the appeals -
3 but only, of course, a flavour - from the amount of documentation which is already in the
4 appeals, four separate notices of appeal, 17 lever arch files, notices of appeal which
5 themselves cover around 150 pages, not including lengthy schedules which are incorporated
6 by reference and which contain further detailed argument, eight densely reasoned witness
7 statements and expert reports running to approximately a further 400 pages, again excluding
8 annexes or exhibits and to this we learn that Telefónica will be adding a further statement of
9 intervention which sounds from the preliminary indications as though it may be relatively
10 substantial, it will apparently comprise factual and/or expert evidence and will cover a
11 number of matters including assumptions and costs relating to its Eurotraffic network,
12 consequences for retail charges and producing MTRs, including evidence about Telefónica's
13 historical behaviour, evidence on the relationship between efficient pricing structures and
14 the prices calculated in Ofcom's model. Telefónica, of course, rightly emphasises that this
15 will supplement rather than duplicating any of the material already on the table. A team of
16 five external economists have been added to the ring to assist in preparing the defence.
17 We do not attach too much weight to the volume, it will contain the lengthy statement and
18 exhibits apart from anything else, but we say that the initial impression is more than
19 confirmed if you look at the substance.

20 We point to four strands of the appeals with which Ofcom will need to deal in order to
21 illustrate the complexity of the task. First, the appeals contain many challenges to Ofcom's
22 cost modelling in the statement, and the challenges relate not only to Ofcom's modelling of
23 long run incremental costs but also its alternative modelling of "LRIC Plus" as it has been
24 referred to, an alternative measure that was used in previous price control rounds, which
25 covers not only long run incremental cost but also makes allowance for commonly fixed
26 costs. We counted over 50 separate modelling issues, excluding any duplication between
27 the notices of appeal, and this is also not including the discrete points on weighted average
28 cost of capital ("WAC") which Everything Everywhere raises, and which I will come to in a
29 moment. Each of the modelling issues is detailed and technical and the issues cover a
30 variety of areas, allegations of error including misunderstandings of the latest mobile
31 technology used, points about the design and architecture of mobile networks which are of
32 daunting technical complexity - I imagine the Tribunal may have dipped already into some
33 of the witness evidence and will have seen this.

34 THE CHAIRMAN: Yes, we have a flavour.

1 MR. HOLMES: Yes. Points about likely future traffic levels for data and voice usage, recovery
2 path for network assets, costs of particular items of network equipment, and in many cases
3 these arguments are accompanied by detailed large volumes of documentary material and/or
4 data. Vodafone has helpfully provided a CD-Rom containing each proposed revision to the
5 model to adjust for all of the many alleged modelling errors that have been identified by it,
6 and Ofcom will need to consider these data carefully and will also need to undertake or to
7 consider whether it is conceivably possible to undertake at least some level of calibration in
8 relation to the changes, by that I mean looking at what the changes are and how they affect
9 other outputs in this extremely complex model, because often there are unforeseen or
10 unintended consequences if you change one input for other inputs, but also to compare the
11 outputs of the model against historical data in order to see whether they stack up. The
12 importance of this calibration exercise is illustrated, we say very neatly, by Hutchison 3G's
13 appeal.

14 What Hutchison 3G says is that Ofcom made a mistake in a consequential adjustment that it
15 made following the close of the consultation to Ofcom's model to deal with a criticism that
16 was made during consultation by Vodafone - we tweaked the model to reflect the problem.
17 Hutchison 3G now says the way that we tweaked it produces an anomaly, a mismatch
18 between the results of the model and the historical data that should have been available to
19 Ofcom. That is contested, of course, but it does show the delicate nature of the calibration
20 exercise which will need to be undertaken within the time frame of preparing the defence,
21 and we will need to look very carefully at what is being said in relation to these modelling
22 points.

23 The second strand is weighted average cost of capital. On our account Everything
24 Everywhere advances seven main arguments on this issue which in turn are made up of 20
25 allegations of error or omission. Again, a large volume of data relating to viewing statistics
26 in both the UK and the US, the impact of the credit crisis and changes in the composition of
27 the FTSE Index, that will all need to be verified and assessed. The expert report in support
28 of this issue contains over 20 graphs, which Ofcom would ideally deconstruct to test the
29 assumptions and data relied on. There are also arguments about the consistency of Ofcom's
30 approach with the UK regulators that will need to be considered.

31 A third strand of the appeal concerns LRIC versus LRIC plus, and here Vodafone come
32 forth with three alternative methodologies, not one but three alternative methodologies for
33 estimating LRIC plus, given that on their submission - and Miss McKnight will correct me
34 if there is any infelicity in this - they say that you could not do now in the time available a

1 proper LRIC assessment, and that is an argument in favour of now sticking with the LRIC
2 plus figures which are, they say, well grounded, more appropriately grounded.
3 They also, and in the alternative, offer three alternative bases for assessing the level of pure
4 LRIC in order to arrive at a figure higher than Ofcom's, and we will need to look at all of
5 these and decide how to deal with them in the defence.

6 Fourthly, of course, there is a challenge in relation to the comparative merits of LRIC and
7 LRIC plus of a highly economic nature, and which is a sensitive point given that the UK
8 authorities are bound by a new recommendation on this point, and so if the Competition
9 Commission or the Tribunal went the other way from Ofcom it would need to be absolutely
10 sure that it had heard full argument on the point. So the complexity, we say, fully accords
11 with the initial impression gleaned by the scale of documentary material in the appeal.

12 The points that I have just described are not all points that have been fully and
13 comprehensively chewed over in the consultation process. We are not talking here about a
14 re-run of arguments which have been had through a number of iterations already before
15 Ofcom, and to offer you a few examples both those three alternative options for estimating
16 LRIC costs were not applied by it to arrive at alternative LRIC measures during the
17 consultation, so those three new alternatives for LRIC are new. Vodafone's modified
18 version of the fine model is also understandably new, the tweaks they have made can only
19 really be made to the final iteration of the model, and so that will need to be gone through.

20 The CD-Rom is not something we looked at in the consultation. Similarly, Hutchison 3G's
21 appeal as I have said turns on a new calibration issue turned up by amendments. It is
22 supported by nine Excel spreadsheets, it is a complicated point, and that will also need to be
23 dealt with afresh. Everything Everywhere's expert report on WAC contains new data not
24 previously relied on and the new points on the consistency of Ofcom's approach with the
25 practice of other regulators. Everything Everywhere also poses a number of new questions
26 about the analysis of US stocks undertaken by the Battle Group for Ofcom. Then the
27 arguments in relation to the comparative merits of LRIC and LRIC plus are also reworked
28 and contain new empirical evidence in support of the economic arguments that have been
29 advanced against us, including for example additional survey evidence provided by
30 Vodafone which responds to our criticisms of previous survey evidence put in by Vodafone.

31 So there is a lot of new ground that will need to be dealt with.

32 By my estimation 29th August would give us about 11 weeks - I stand to be corrected if that
33 is wrong - but in 11 weeks we will have to address these four appeals, much of which
34 covers unique ground, and that is two and a half weeks to three weeks per appeal which on

1 any view is highly ambitious, and also to deal with new points thrown up by the
2 interventions. We understand entirely the Tribunal's desire to bring this to a speedy
3 conclusion but we would adhere to our 19th August date in the request that we made to the
4 Tribunal for directions on the future conduct of the proceedings as the date that we really
5 think is the minimum needed to bring home a decent defence which will assist the
6 Competition Commission and the Tribunal and, of course, the pleadings crystallise the
7 issues. If things drag on with points being raised in dribs and drabs at later stages of the
8 Competition Commission process, whenever the reference is made, that will ultimately be
9 one at a serious cost in terms of timing.

10 Another point that I anticipate may arise out of your proposal, if the process were to begin
11 in July there would then be a series of technical meetings in which Ofcom would
12 necessarily play quite an important role and they may, if anything divert resources away
13 from the preparation of the defence, which would make 29th July deadline an even more
14 daunting one for Ofcom to attempt to achieve.

15 We also say, finally - and I am sorry to have taken so long ----

16 THE CHAIRMAN: No, no, it is very helpful, Mr. Holmes.

17 MR. HOLMES: -- but these are points of importance. The final point we would make is we do
18 request that in the run up to the reference a date is fixed for the appellants to come forward
19 with any amendments to their notices of appeal arising out of the disclosure of the fully
20 confidential version of the decision following the establishment of a confidentiality ring.
21 We say this is important to maintain discipline and good order, we cannot have revisions,
22 amendments, expansions of case coming in by degrees once the thing is before the
23 Competition Commission, that would not be fair on the Competition Commission and might
24 well lead to disputes coming back before the Tribunal with all of the messiness of moving
25 between the two bodies. We also say that those amendments should be brought forward in
26 advance of the service of the defence so that we can again deal with any new points that are
27 taken against us or, indeed, object if there are amendment which we think are not justified
28 on the basis of new material disclosed.

29 Now, we mentioned this point in our written observations for today as you will, I hope,
30 have seen, and we suggested that it might be helpful if the parties were able to give an
31 initial indication whether amendments are required in case it is said that a date cannot be
32 conveniently found before 19th August by which the parties can be sure that they are ready.
33 We would note - for your note - that the fully confidential version of the decision was
34 disclosed on 26th and 27th May to the appellants, the slight mismatch between the dates was

1 because of the time some appellants took to get their guys into the confidentiality ring and
2 we could not disclose the stuff until the confidentiality ring was up and running. So
3 between then and 19th August there would still be a number of weeks running. We would
4 hope that any amendments would not expand the grounds of appeal to such an extent as to
5 necessitate any material amendments in the reference questions so to anticipate a question
6 the Tribunal may have I do not think that that would affect the timetable that has been
7 proposed. As I say, we take no position on whether reference should be made before or
8 after close of pleadings; we leave that to Mr. Gibson to express a view upon provided, of
9 course, that we have a date that is sufficient to allow us both to meet our obligations to the
10 Competition Commission as regards technical meetings and to produce an adequate
11 defence.

12 Sir, I should probably stop there unless you have any questions.

13 THE CHAIRMAN: Well, no I do have some questions. Let us suppose we go with your 19th
14 August date, can I just get a feel for the dates that you will be proposing both for the
15 statements of intervention in support of the notice of appeal, a date for the revisions (if any)
16 to the notice of appeal, and then going on from the defence served on 19th August, dates
17 spooling through to the determination of the Competition Commission, how you would be
18 minded to see that process evolve?

19 MR. HOLMES: Well, sir, in relation to the statements in support of the appellants, we propose a
20 date I think of 15th July. I imagine if the reference is to be made in a shorter timescale,
21 were you envisaging that the reference would be made after the statements of intervention?

22 THE CHAIRMAN: Yes, the reference date that we were envisaging was actually earlier than that
23 and we did not necessarily see a problem with that but I want to hear what the parties have
24 to say about those - the date, as it were, the reference was 1st July.

25 MR. HOLMES: Well in principle ----

26 THE CHAIRMAN: In principle you thought no problem?

27 MR. HOLMES: In principle we have no problem, and the reason for that is the one that you have
28 given, which is that in the end the job of the Tribunal and the Competition Commission is to
29 dispose of these appeals by reference to the grounds of appeal contained in the notices of
30 appeal. So the statements of intervention should not make any difference to the scope of the
31 issues before the Competition Commission, and we are sure that Telefónica, which is the
32 only party not to have brought an appeal, has that well in mind when it prepares its
33 statement of intervention. So we do not see that that would be an obstacle if the date of 15th
34 July were to be adopted by the Tribunal, we do not see that that would be an obstacle to a

1 reference being made on the timescale envisaged. The second question related to the timing
2 for amendments to notices of appeal. Now here, I suppose, there is a slightly greater risk
3 that a party will contend that the confidential material is of sufficient significance as to
4 justify expanding the questions as well as the particular arguments to be addressed in
5 relation to each question. We think this is unlikely given the quite limited scope of
6 confidentiality redactions that were made to the decision. If you look at the confidential
7 version of the decision you will see actually not a lot was excised, but we think if the
8 Tribunal does decide to adopt this course of making a reference before we think that the
9 amendments to the notice of appeal could, nonetheless, follow the reference and with the
10 caveat that that might lead to a need for a further consideration of the questions and an
11 amendment of questions which would hopefully be clear from the papers.

12 The alternative, of course, would be to delay your reference date by a week or so to match
13 the date that I think we suggested for amendments to the notices of appeal of 8th July, so it
14 would involve pushing things back by a little over a week. Obviously, we are in your hands
15 as to whether you think that is an appropriate step.

16 THE CHAIRMAN: Well it may be that it is the appellants who can assist us more in terms of
17 what they envisage may occur in the light of the disclosure of confidential information, so
18 we will park that for the moment and see what is said.

19 MR. HOLMES: Thank you. And your final point, sir?

20 THE CHAIRMAN: Yes, the final point was then the timetable from 19th August to a
21 determination.

22 MR. HOLMES: Well, sir, again we are very conscious it is for the Competition Commission
23 ultimately to decide what it can do, but we envisage there will inevitably be some delay to
24 the Competition Commission's CDs. I can see there is one attraction to the approach that
25 you are proposing, that the Competition Commission can gear up its early preparations by
26 reference to the documents it already has from the outset, although of course there is a pre-
27 reference phase already built into the Competition Commission's procedures, but that will
28 no doubt be intensified by an early reference, so some time will be saved in reading in, but
29 they will still have to wait until further iterations to the pleadings come in to be absolutely
30 sure how these things pan out. They will save time for core submissions by having the
31 defence stand as Ofcom's core submission, which is in any event sensible, because if one
32 thinks about it otherwise the first stage after the defence on any timetable would be Ofcom's
33 next document which would only lead to reflect any additional comments arising out of

1 supportive statements made by the interveners, so there is no great need for an elaborate
2 core submission document on Ofcom's part.

3 How the six months would play out and whether an additional few weeks or month would
4 be needed at the end is then for the Competition Commission I think primarily. Perhaps it is
5 a point I might return to in reply, if there are points made which appear to us to require
6 further submission.

7 THE CHAIRMAN: By all means, Mr. Holmes, that was very helpful, thank you. Mr. Turner?

8 MR. TURNER: Sir, the Tribunal has raised a number of points. We had also indicated in our
9 submissions a request for consolidation and I am happy to leave that over, or to address that
10 now as you please?

11 THE CHAIRMAN: Well, a hearing together at the very least is what is going to happen unless
12 someone comes up with something very persuasive that no one else has thought of, and I do
13 not think that is going to happen, so I do not think you need press that.

14 MR. TURNER: Yes, the advantage of formal consolidation is that you then have both from the
15 Tribunal's point of view and the Competition Commission's point of view an integrated
16 procedure with one remedy, one set of documents going out, a difficulty that had occurred
17 in a previous reference - this was the wholesale line rental and local loop on bundling case -
18 was that although there was essentially one transaction the Competition Commission
19 produced two determinations in the absence of consolidation.

20 In the first mobile call termination reference although I do not believe that there was formal
21 order for consolidation you will see from the Competition Commission's website that they
22 treated the appeals as consolidated, and they referred to them as such and then produced one
23 determination, so we would pursue it for that reason.

24 Sir, turning to the points that the Tribunal has raised, the first question relates to the timing
25 of the questions and the reference to the Competition Commission. For our part, that is
26 Everything Everywhere, we support what Mr. Holmes for Ofcom has said. We equally
27 consider that these questions can go off to the Competition Commission ahead of the
28 service of its defence. It is a good proposal because it is not realistic in our view to suppose
29 that any points cropping up in the defence are going to impact on the grounds of appeal and
30 therefore change the shape of the reference.

31 We do not think it is necessary to await potential amendments being made to the notices of
32 appeal ahead of the making of a reference to the Competition Commission. We believe that
33 that is a speculative possibility. I am in a position to say, so far as Everything Everywhere
34 is concerned, that although our review of the confidential version of the statement is not yet

1 complete, it is very unlikely that anything we have seen will lead to a change in the
2 pleadings, in the notice of appeal, and therefore we do not see a risk arising in that direction.
3 Secondly, turning to the overall scope and timetable for these appeals, we endorse entirely
4 the Tribunal's sentiment that it would be desirable, to say the least, if these cases could be
5 completed prior to 1st April next year when the second period of the price control
6 commences, and there is a step change in the applicable price control - if that can be
7 achieved. We have had that very much in mind because, as the Tribunal is aware, from the
8 point of view of ourselves and certain of the other appellants as well, for every week that
9 goes by without correction there is an enormous sum of money at stake, and that is leaving
10 aside the public interest.

11 Thirdly, if I may turn to the question of the timetable that you, sir, have indicated. We have
12 little difficulty with large parts of the proposal apart from one major objection, which I must
13 press, which is that if Ofcom's defence comes at the end of July that deprives the appellant
14 of any time prior to the holiday season to consider that, and then the proposal that they
15 should serve core submissions within a two to three or four week period in the month of
16 August is, from our perspective, not feasible. The Tribunal will be aware for one thing that
17 Ofcom's defence, when it arrives, will be accompanied by its own technical and economic
18 evidence, and that the idea of needing to absorb that to consider the implications with
19 advisers and prepare full and helpful core submissions in the month of August is not going
20 to be possible.

21 We understand from discussions that had taken place with the Competition Commission's
22 counsel and as indicated in their written submissions that they are sympathetic to that and
23 that they would envisage in any event the core submissions being served early in September
24 according to what they call "option 1" which is very similar to Everything Everywhere's
25 proposed timetable. That has the advantage that there will not be a need for place holders,
26 for work to be left over until the later date with the risk that it could turn out to be a false
27 economy leading, indeed, to greater time being needed as the different strands need to be
28 collected and tied together. So we do not need long in September but we do need some
29 time.

30 Having said that, it follows from what I have said that the Tribunal's proposal is in a sense
31 similar to ours at the front end and then similar to Ofcom's at the back end save for the
32 service of the defence. Would it assist the Tribunal if I made certain brief submissions on
33 the respective merits of these two main options which have been proposed?

34 THE CHAIRMAN: Please do, Mr. Turner.

1 MR. TURNER: So far as our timetable is concerned, we do urge the Tribunal to consider its
2 merits. It involves Ofcom producing its defence by 15th July rather than the date of 29th
3 July proposed by the Tribunal. That does give Ofcom nine full weeks to respond to the
4 appeals, it involves a three week extension from the standard period. Mr. Holmes has
5 listed, understandably at some length, points in the various appeals orally. However, in my
6 submission, that cannot give you a fair understanding of how well equipped Ofcom's team
7 is to address those points, and nor has Ofcom, through Mr. Holmes, explained the work that
8 it has already done in the four weeks since the appeals were lodged, to progress these
9 appeals.

10 The defence can be served after an extension of time under the rules if exceptional
11 circumstances are shown, but it really would be incumbent on Mr. Holmes to show more
12 than he has managed to do in order to achieve the much longer extension of time for which
13 he is contending, and for those reasons we say that an extension until 15th July would be fair
14 and right.

15 Another advantage of this is, and it accords also with the Tribunal's approach, that the
16 overall impact of a timetable which starts along those lines is that the entire process can be
17 concluded significantly earlier. If one takes the Everything Everywhere timetable as
18 broadly equivalent to Option 1 in the Competition Commission's annex to its submissions,
19 and the Ofcom approach as broadly equivalent to Option 2, you will see from that that, even
20 on the basis put forward by the Commission, the Competition Commission process can be
21 completed by, let us say, the third week in February, and on the Ofcom approach by the
22 third week in March. Now, for a start the difference between those two positions is
23 significant; it does involve a significant saving and it is an important consideration in itself,
24 but I would also draw to the Tribunal's attention that on our timetable there is in fact the
25 realistic possibility that before 1st April, or at any rate not long after that one can conclude
26 the entire appeal process including any application for judicial review. The Tribunal, once
27 the Competition Commission has given its determination sets the time for submissions to be
28 given. In previous cases that time has been different from (and an abbreviated version of)
29 the time allowed in the Administrative Court under the standard Civil Procedure Rules, and
30 it is possible to complete the process ahead of 1st April change to the second period, and in
31 my submission that is an important point.

32 The final point that I would draw to the Tribunal's attention, which is the difference between
33 our proposal and the Tribunal's, is that if Ofcom serves its defence by 15th July rather than
34 the end of July, that leaves two weeks in July of very useful time during which the

1 appellants are able to consider Ofcom's defence and to make progress on it. It allows the
2 statements of intervention in support of Ofcom to be done and dusted within an ample two
3 week period before the holiday season commences at the beginning of August, and those
4 are considerable advantages because it enables valuable work to be done before August,
5 otherwise - although I hesitate to say this - August is in many respects going to be a dead
6 weight, lost time from the point of view of the process as a whole, so that is one important
7 consideration.

8 THE CHAIRMAN: Mr. Turner, just looking at the timing that Ofcom say they need, I quite take
9 your point that we are not in the best position to judge the amount of work that needs to be
10 done because we are at the start of what is a very steep mountain to climb, but one point
11 surely is fair, which is that although there is one decision by Ofcom there are four
12 differently grounded appeals arising out of that decision which will require separate work
13 and that seemed to me to be quite a powerful point that Mr. Holmes made there. Would you
14 like to address that particularly?

15 MR. TURNER: Yes, let me deal with that. The two main appeals are the Everything Everywhere
16 and Vodafone appeals. Those do not, as was suggested in one of the written sets of
17 observations, cover every aspect of the statement at all, they do not cover either the market
18 definition or the significant market power sections or significant elements of the charge
19 control design and so on, but they call into question the underlying approach to adopt the
20 LRIC cost standard rather than the former LRIC plus cost standard, and they make a
21 number of points about that. So I do not in any way seek to minimise the fact that those are
22 very significant appeals but they do not cover the entire range of the statement, they are
23 matters which are responsive to Ofcom's own decision and, in that connection, although Mr.
24 Holmes drew attention to certain factors that he said were new these are not brand new,
25 they arise out of points that have already been in one way or another canvassed prior to the
26 Ofcom decision having been arrived at, so although those two are large appeals Ofcom is
27 the author of the decision and these are well within the compass of the decision itself.
28 Secondly, the two main appeals, as has been observed already, are largely overlapping in
29 many respects so it is not correct to regard them as two separate chunks at all.
30 Third, turning to the additional appeals of BT on the one hand and 3 on the other hand, the
31 Tribunal will have seen that those are extremely narrow. Both of the appeals say on their
32 face that in most respects they agree with, indeed support the Ofcom decision. Both of
33 them take extremely narrow points, BT takes a point about the glidepath, ultimately a matter
34 of judgment and a very narrow point to consider. H3G takes a single point about the cost

1 modelling relating to the evaluation of costs of a particular group of equipment, radio
2 equipment - again a very narrow point, so the Tribunal should not consider that you have
3 four separate appeals all coming at once and all to be given equal weight. The reality is that
4 there is a main set of appeals, that is the Everything Everywhere and Vodafone appeals,
5 which do not cover the full span decision by any account, which are largely - if not totally -
6 responsive to issues with which Ofcom is already well aware as the author, and which are
7 not significantly added to by the additional two appeals. So although you had formally four
8 appeals, we would say which ought to be consolidated, you do not have a Tsunami of points
9 which Ofcom can only respond to by exercising Stakhanovite fervour in the way that it
10 approaches this case. It is entirely manageable.

11 THE CHAIRMAN: Thank you. Sorry, one other point. There has been a degree of reference to
12 August as being a "dead" month. Could you explain in a little greater detail if the Tribunal
13 are minded to treat August as a working month the difficulties that would put EE in?

14 MR. TURNER: Yes. It is understood that the Tribunal treats August as working month. So far as
15 EE is concerned, we are making arrangements for economic advisers, two of whom are
16 based in Australia currently, to assist and to continue to work during August, so that where
17 the Competition Commission had indicated that it expected to hold certain technical
18 meetings in the month of August, we were expecting that we would be able usefully to
19 participate in those during the month of August.

20 So far as the legal team is concerned, things are more difficult. We have made other
21 arrangements, we will not be able to prepare the documents and complete those in the
22 month of August to be candid, but from EE's technical and economic point of view and,
23 indeed, for the relevant internal resources there is capacity there, there will be people able to
24 work on those matters. Similarly, we understand - as Mr. Holmes can clarify - that at the
25 Ofcom end there are individuals who will be working during August and hence indeed his
26 proposal that the defence should be served on 19th August because it would be a useful time
27 from their point of view.

28 THE CHAIRMAN: And as I asked Mr. Holmes, just in terms of dates up to the time of the
29 defence, no doubt you are still considering whether formal amendments need to be made to
30 the notice of appeal but by what date would you envisage either submitting a nil return, as it
31 were, to say that there will be no amendments, or putting in such amendments as you would
32 want to make in response to such confidential material as you have considered?

33 MR. TURNER: I am referring here to the confidential version of the statement which Mr.
34 Holmes rightly said was served on 26th and 27th May. In relation to that it is our expectation

1 that we should be able to say whether we will need to make any amendments by the last
2 week in June. It is my hope that we would be able to do so as early as 24th June, but in any
3 event during the last week in June.

4 THE CHAIRMAN: Thank you. Miss McKnight?

5 MISS McKNIGHT: Thank you, sir. I would also address you on timetable. Vodafone would
6 object in principle to the reference of questions to the Competition Commission before the
7 pleadings are settled and the reason is as follows, that we have already prepared draft
8 questions, as have other appellants, and we think that is a useful thing to do, and we think
9 that work could be done substantially to settle those questions at this stage. However, the
10 questions are framed in somewhat general terms, and that is inevitable at this stage, because
11 we do not know precisely what issues will crystallise out of those questions. I can give
12 examples as to why that would be so.

13 First, it has already been aired that appellants might wish in the light of the confidential
14 version of Ofcom's determination to elaborate their grounds of appeal so that the broadly
15 framed questions would, if that were to occur, disclose additional factual or legal or
16 theoretical issues that might arise. For Vodafone's part we do not expect to raise anything
17 substantial, but like Everything Everywhere we would wish to have another three weeks or
18 so to finalise our position on that.

19 Until we have seen Ofcom's defence we do not know whether Ofcom's defence will merely
20 consist of a reiteration and elaboration of the reasoning and evidence set out in its original
21 statement. It is possible in the light of what Mr. Holmes has said this morning that we will
22 be seeing additional reasoning and evidence to be responsive to particular adjustments to
23 the model which Vodafone has proposed in its notice of appeal and that would raise new
24 evidence and material which the Competition Commission would need to consider but
25 would not be apparent from the face of the questions.

26 The third possibility - and I think this is a distinct possibility for Vodafone's part - is that
27 where we wish to intervene in support of Ofcom, to resist, for example, BT's appeal, we
28 might well wish to argue that Ofcom made an appropriate decision as to the gradient and
29 starting point of the glidepath, both for the reasons which Ofcom has given in its statement,
30 but also for additional reasons, and that is open to us, of course, because we consider the
31 glidepath to be correct, we did not appeal against it but we consider it to be correct for the
32 reasons Ofcom gave, and potentially for other reasons.

33 That means that although the questions could be referred to the Competition Commission at
34 this stage, and they are sufficiently broadly framed, just to ask whether Ofcom got the

1 glidepath right or not, and we could therefore properly, within the scope of those questions
2 raise all the points we think it proper to raise, it would mean that the Competition
3 Commission would receive the questions but because it had not seen all the pleadings would
4 not know the entirety of the facts and matters which fell to be examined to answer those
5 questions. So we consider that the proper course of action is to allow the parties to
6 complete their pleadings, then to refer the questions which will be fully understood in the
7 light of the pleadings - or could indeed be more precisely specified if that were thought
8 appropriate in light of the pleadings - and the Competition Commission could then start its
9 work with the entirety of the issues revealed by the pleadings. We also think that is the only
10 course of action which would really be fair to parties such as Vodafone, who will need to
11 know what is the entire case against it - what is the entire defence it has to answer - when it
12 starts its work before the Competition Commission.

13 As things stand we would not know to what extent the defence and other interventions in
14 support of the defence of Vodafone's appeal were going to raise facts and matters not clear
15 from the face of the determination which we have appealed.

16 THE CHAIRMAN: Well, Miss McKnight, can I just stop you there, because it seems to me you
17 may be conflating two different matters. Clearly you are right when you say the scope of
18 the evidential issues will not be clear until all the pleadings have closed but indeed it will
19 not be clear until a substantial part of the process before the Competition Commission has
20 run its course, that is the way these things occur, evidence builds up. But in terms of
21 identifying what it is the Competition Commission has to decide, it does seem to me, at first
22 instance at least, that these are questions which do arise simply out of the notices of appeal,
23 and if those issues in the notice of appeal are broadly defined, then so too must the
24 questions be.

25 MISS McKNIGHT: One could certainly refer questions and be confident they were broad
26 enough, or indeed could be amended later, and in that sense one could initiate a
27 Competition Commission investigation of the questions. But we question how useful that
28 would be because if the Competition Commission cannot essentially start work on the
29 matter because it knows what the appellants are saying but it does not know what the
30 defence is going to be, or what intervention is going to be made in support of either side ----

31 THE CHAIRMAN: Well I quite understand that the Competition Commission's process - the
32 process having been referred to it - will obviously be affected by when a defence is served.
33 But what I am struggling to understand is why it is that process cannot at least begin with
34 questions?

1 MISS McKNIGHT: Well let me put it the other way, and I have the impression from what Mr.
2 Holmes said that Ofcom is not going to accept much of our appeal. But imagine the
3 situation where in the defence Ofcom said: "We realise now we were wrong on some of
4 these points, we no longer seek to defend our decision; Vodafone can have that uplift that
5 they have sought". That would no longer be an issue and therefore you might not need to
6 refer a question, it could be resolved without an investigation of the matter by the
7 Competition Commission.

8 THE CHAIRMAN: Well indeed, that is true, Miss McKnight, but surely - and maybe we will
9 hear from the Competition Commission on this - the Competition Commission would
10 simply say: "We have now got a defence which actually is an admission on this point; this
11 question is effectively agreed, and we will determine the matter in the light of the pleadings
12 and that admission."

13 MISS McKNIGHT: Yes, well if the only thing that I think I am debating is whether a reference
14 could be made I would agree it could be made. Whether there is any useful purpose in
15 making it at such an early stage I would certainly question because the Competition
16 Commission would be in receipt of questions which it could not usefully start investigating
17 until it had seen all the pleadings, and therefore if a reference were made and Ofcom were
18 to serve its defence within a week we could see that there would be very little purpose in
19 debating this point. If there is a real risk, as there appears to be, that the questions would be
20 referred, and neither the Competition Commission nor appellants such as Vodafone would
21 know what was Ofcom's case until well into the six months, we would seriously question
22 whether there was any purpose in making the reference at such an early stage or, indeed, we
23 would suggest that the Competition Commission should consider asking for more than six
24 months to resolve the matter, which again would appear to defeat the purpose of the early
25 reference.

26 THE CHAIRMAN: Yes, Miss McKnight, if I can reformulate the point you are making, what
27 you are saying effectively is this: if we have a reference at the beginning of month one,
28 Ofcom's defence does not come in until month five, it is rather difficult for the Competition
29 Commission fairly to determine issues in that one month that remains.

30 MISS McKNIGHT: That would be a very pronounced example; I think we would be concerned
31 even if it were the end of month 1 or six weeks into the reference, and of course we do see
32 the logic of the order of pleadings, that I think all the parties have endorsed, namely that so
33 far as relates to BT and 3's appeals, we should plead after receipt of a defence, so of course
34 pleadings will not be closed with the defence. We are also concerned that there should be a

1 sufficiently significant period for our core submission after the defence, because again Mr.
2 Holmes has intimated that Ofcom will probably take issue with quite detailed points raised
3 by Vodafone as to whether the Ofcom model is fit for the purpose of computing or of
4 deriving a LRIC figure and, if not, whether the proxy methods that Vodafone has proposed
5 are suitable for that purpose and we can therefore expect to need a significant period to
6 respond to that as well.

7 We would therefore propose that almost regardless of when the reference is made, but
8 having regard to the point I make about the utility of the six month period if things start too
9 soon, that the course of the pleadings should be substantially in accordance with the
10 timetable that Everything Everywhere has proposed, or if that simply is not practicable it
11 should be substantially in accordance with the timetable that Ofcom has proposed. But if it
12 were the latter, I think we would have very serious difficulties with a six month reference
13 period starting too early in that process.

14 THE CHAIRMAN: So your primary position is 15th July like Mr. Turner for ----

15 MISS McKNIGHT: 15th July for the defence, yes, sir.

16 THE CHAIRMAN: For the defence of Ofcom, and in terms of any amendments that you might
17 want to make to your notice of appeal are you last week of June, or later?

18 MISS McKNIGHT: I think at the end of June, yes, I think that should be satisfactory. Could I
19 also make a point about our availability during August? Vodafone advisory team will be
20 available during August, or at least there will be sufficient of the team at any time for us to
21 carry on working on the matter. I think the difficulty is that if we were to have to respond
22 to Ofcom's defence through a reply incorporated into a core submission during August, we
23 cannot at this stage identify what resources we would need - it may be theoretical points of
24 economics, it may be technical expertise as to the costs of particular kinds of network
25 equipment or as to forecasts of network usage. Vodafone will do its best to ensure that it
26 has suitable resources available. We would not call August a "dead" month but we would
27 be under resourced to respond to detailed matters raised in Ofcom's defence if there are
28 such matters. So we would suggest that if our core submissions are to be served in response
29 to a defence that is served in late July or early August we would need some time into
30 September to give us ample resource to respond.

31 THE CHAIRMAN: Well if I could press you a little on that, let us suppose first we ordered
32 Ofcom to produce a defence by 15th July - and please do not hold up your hands in horror,
33 Mr. Holmes, I have not decided that yet - when would you produce your core
34 submissions/reply on that basis?

1 MISS McKNIGHT: I think we were satisfied with Everything Everywhere's timetable of 9th
2 September.

3 THE CHAIRMAN: So even if it was 15th July it would be 9th September?

4 MISS McKNIGHT: Yes, the reason is, and it is to elaborate on a point that Mr. Turner made, and
5 that is that Herbert Smith would receive the defence on 15th July. We would immediately
6 seek to identify the areas where we considered further evidence or expert input to be
7 required. We would set that in train before 1st August and hope that there would be
8 sufficient people to work on it during August and bring it together at the beginning of
9 September. Now, that does pre-suppose that provided we get working pretty quickly on
10 15th July we will be able to do enough during August to complete the work that we started
11 in July, and then to write it up in September - we think that we are setting ourselves quite a
12 harsh target there, but in the interest of expedition that is something that we think we could
13 do. I think it would be more difficult on the Ofcom timetable, which would mean we would
14 not get the defence until 19th August, so we might well find that people who are needed to
15 help formulate the work to be done and to set it in motion are not going to be available
16 immediately, but we see that from that time table we would have until week commencing
17 26th September to serve our core submissions, so ----

18 THE CHAIRMAN: Well do not necessarily take what Ofcom are proposing. Let me take it in
19 order, I have your date of 9th September if the defence is on 15th July. Suppose the Tribunal
20 were to go for the date we floated, 31st July, would it still be 9th September or would you
21 want a later date?

22 MISS McKNIGHT: I think we would want later, because we would not have had the benefit of
23 two weeks in July from 15th to 30th before everyone goes away.

24 THE CHAIRMAN: No, no, I see. So would you be wanting an additional two weeks?

25 MISS McKNIGHT: I think that would be necessary, yes. One moment, please. (After a pause): I
26 have had various comments to assist me as to what I should have said. There are two points
27 I should make. One is that experience tells us that whenever parties to such proceedings
28 serve their pleadings they always serve a confidential version which is available to Herbert
29 Smith and its advisers within the confidentiality ring, but which we cannot make available
30 immediately to our clients, whose input is clearly required to make much progress. So I
31 think whatever the timetable we would ask that all parties be required to serve non-
32 confidential versions within a very short period after service of the confidential version and
33 that that additional step be built in to any assessment of how long it will take to respond.
34 Miss Bacon has reminded me as well that, after service of the defence, there will be a need

1 for service of interventions by those parties who support Ofcom in its defence but may wish
2 to add to the reasoning or evidence in support of Ofcom's determination on the points in
3 issue.

4 THE CHAIRMAN: Okay, but you are sticking with your additional two weeks if we were to
5 extend the defence time from 15th July to end of July?

6 MISS McKNIGHT: Perhaps I should say at least two weeks, perhaps my clients would be
7 happier if I said three.

8 THE CHAIRMAN: And on the basis of 19th August your date was 26th September?

9 MISS McKNIGHT: Yes, we would be able to live with that, I think. But again, that is on the
10 assumption that we get non-confidential versions of the pleadings quickly so that our clients
11 can have sight of them and start working.

12 THE CHAIRMAN: Would there be enormous objection if we made an order that non-
13 confidential versions be served at the same time as confidential versions? I appreciate that
14 creates an additional burden, but ----

15 MISS McKNIGHT: I think Ofcom sometimes needs to consult parties as to whether their
16 material is confidential, but that is clearly a point for Ofcom.

17 THE CHAIRMAN: Perhaps that is something for Mr. Holmes to address in reply. Thank you
18 very much, Miss McKnight.

19 MISS McKNIGHT: Could I just say that as regards consolidation we would support Mr. Turner's
20 comments on consolidation of the proceedings as well.

21 THE CHAIRMAN: Thank you. Miss Bacon?

22 MISS BACON: Telefónica is broadly neutral on when the reference is made, so we are happy
23 with the Tribunal's proposal that the questions can go ahead of the defence whether that
24 takes place on 1st July or 8th July or some other date; equally we do not have a problem with
25 the questions going after the defence. The main issue that we have is a timetable and, like
26 Everything Everywhere, we do have problems with putting in formal legal submissions
27 during the month of August and that is a problem on the part of our legal team and some
28 individuals within the client as well. We would be able to participate in technical meetings,
29 for example, but in terms of putting either a statement of intervention or core submissions it
30 would be almost impossible because the two main individuals on our legal team are both
31 away for the whole of August. We could live with Everything Everywhere's timetable
32 because that would envisage us putting in statements of intervention on 29th July in support
33 of Ofcom and then core submissions to the Competition Commission on 9th September.

1 Equally, we could live with a modification of Ofcom's timetable, and the modification being
2 that we would need beyond 2nd September to put in our statements of intervention.
3 Assuming that the Ofcom defence came on 19th August I think we would need until 7th
4 September so that we could then bring together all the witness evidence and the economic
5 evidence and serve a single comprehensive statement of intervention that actually makes
6 sense, and I think we would need at least a week to do that at the start of September; other
7 than that we can live with the timetables that are proposed.

8 THE CHAIRMAN: Thank you. Mr. Kennelly?

9 MR. KENNELLY: To begin, I am content with your proposal in relation to the formation of
10 questions and that can be referred as you suggest, we think that is a sensible suggestion,
11 respectfully, and we concur.

12 In relation to hearing together and consolidation we think the appeals should be heard
13 together. We hear what Mr. Turner says about consolidation, we have no strong view but
14 we see the merit in hearing them together at the very least.

15 In relation to timing, just to clarify, sir, in relation to your proposal following Ofcom's
16 defence I understand that it is suggested that there should be no further statement of
17 intervention, we move straight to core submissions - have I correctly understood?

18 THE CHAIRMAN: That is right. How it is couched does not seem to us to matter, but
19 essentially there would be one set of documents. There would be the Competition
20 Commission's core submissions. They would, if the parties so choose, contain - depending
21 on the party - reply submissions, pleadings and a statement of intervention.

22 MR. KENNELLY: I am grateful, sir, I will come back to that when I make my submissions in
23 relation to timing. I shall not repeat what Mr. Holmes said about the complexity of these
24 appeals, but in view of Mr. Turner's submissions I think I ought to again stress the very
25 important points, that these appeals are extremely complex, in fact the complexity is greater
26 than the volume of documentation would suggest. In commercial appeals one sees far
27 greater documentation in far less complex appeals. These appeals are very complex and,
28 contrary to Mr. Turner's submission, they do not in substance overlap. True it is that EE
29 and Vodafone's appeals both challenge in principle the move from LRIC plus to pure LRIC
30 and they both challenge the figure Ofcom settled at for pure LRIC, and they challenge the
31 figure for LRIC plus which Ofcom offered as a comparison. But, as the Tribunal has seen
32 from the details of the statement of Mr. Roche, Vodafone in particular launched an
33 extremely comprehensive attack on the cost modelling which Ofcom employed, as Mr.
34 Holmes said, on 50 plus different bases each of which raises very difficult technical points

1 of fact and analysis. In addition to that EE has its separate points on weighted cost of
2 capital again, although in terms of the text perhaps not voluminous but extremely difficult
3 technical points. We echo entirely what Mr. Holmes said about the time Ofcom will need to
4 address these properly because, as you said, obviously everyone agrees expedition is
5 important, but it must also be temperate with fairness and the orderly conduct of these
6 proceedings.

7 3's concern in this matter is primarily that Ofcom has had adequate time to do its job
8 properly and then 3 has sufficient time to raise its points and lodge its evidence, which will
9 be detailed, in order to support Ofcom and re-box the very detailed evidence which we
10 received in particular from EE and Vodafone.

11 Sir, before I come on to the detailed dates themselves that is our concern, and obviously the
12 date that we would seek for our intervention will depend on the date that Ofcom gets for its
13 defence.

14 Turning to the dates themselves, in our submission EE's submission in relation to Ofcom's
15 defence is entirely unworkable, and the Tribunal should be very careful to adopt EE's view
16 as to what Ofcom can achieve. We are all here as mobile network operators and BT,
17 seeking to achieve the best result for our clients in addition to resolving the legal issues.
18 Ofcom and the Competition Commission alone here represent the public interest - pure
19 public interest - and they have obviously given careful thought to how much time they need
20 and they are, in my respectful submission, best placed to tell you what they can and cannot
21 realistically achieve, and the Tribunal will be aware of the other commitments in relation to
22 Pay TV, for example, which Ofcom have well into the month of July.

23 With that in mind, if Ofcom's dates are accepted according to the Competition
24 Commission's submissions, the Tribunal's desire to have this matter resolved by April next
25 year will be secured - I appreciate on 3's timetable that is not so clear, and I can tell from the
26 suggestions made by the Tribunal that you are unlikely to adopt my timetable.

27 Turning to Ofcom's timetable, even on that, the April deadline should be achieved
28 according to the Competition Commission.

29 Turning to the dates following Ofcom's defence, again on Ofcom's timetable we have the
30 defence by 19th August and that leaves 3 in the middle of August preparing its statement of
31 intervention because it will undoubtedly seek to put in evidence to support Ofcom, to deal
32 with Ofcom's altered case, if there is such a thing and here we echo Miss McKnight's
33 submissions that it is possible that Ofcom's defence will be different in some respects to the
34 statement; it will have to address the new points which the parties have raised which did not

1 appear in consultation, and so it will not simply be a question of repeating the statement and
2 us repeating our statements in consultation, Ofcom will have completed a massive job and
3 we will then have to digest it and address the points without duplication in two to three
4 weeks in the middle of August, and August is a difficult month not only because, as Mr.
5 Turner said - and we echo what he said about this - some of the legal team have
6 commitments, some of them do not, but the matters in these appeals are so wide ranging, so
7 complex and so important that it will be necessary to have a far greater team of economists
8 and technical experts to hand to prepare the evidence, to rebut the evidence of Mr. Hird and
9 Mr. Roche, and the economic evidence of Mr. Walker in particular in that month. So
10 therefore whatever date you settle on for Ofcom's defence, we urge that you go for the date
11 suggested by Ofcom, we would seek three weeks after that in the month of September when
12 we are able to have full recourse to the legal team, economic and technical teams that we
13 need.

14 On the point of core submissions and statements of intervention, however, it may be
15 difficult to roll up statements of intervention with core submissions because when we have
16 put in our statement of intervention undoubtedly the appellants will want to address that in
17 their core submission and so, as a matter of practicality, it may not be possible for all of us
18 to put in our statements of intervention and core submissions at the same time, undoubtedly
19 EE and Vodafone want to address the evidence that we put in in our statement of
20 intervention in their core submission, it is a point which Miss McKnight makes and I think
21 it is an important one which affects the timetable.

22 Finally, the core submissions according to the Competition Commission's new guidelines
23 are supposed to be concise, pithy statements, summarising our cases. If it is suggested that
24 they should then represent instead the entirety of the case with all the evidence they will not
25 fulfil that important function which is identified for them in the Competition Commission's
26 new guidelines. Thank you.

27 THE CHAIRMAN: Thank you very much.

28 MR. PALMER: Sir, my name is Robert Palmer, I appear for BT in this appeal. Without wishing
29 to repeat anything that other parties have said, the first point we make is that Ofcom's
30 submissions as to the length of time that they all require to reply to four separate appeals
31 appears to our ears to be wholly realistic, and subject to the extent that Mr. Holmes can add
32 to what he said already in answer to Mr. Turner's invitation as to the work done so far, we
33 for our part have heard nothing from any other party to suggest that that timetable is
34 unrealistic. If the Tribunal were at least persuaded that, based on what Ofcom have said,

1 the deadline proposed for EE and Vodafone of 15th July for that defence were unrealistic,
2 and if it were at least persuaded that an extension of time for Ofcom's defence to 29th July -
3 as I understand the Tribunal initially proposed in its preliminary thinking - were at least
4 justified, then the effective time saving it is now apparent in the light of what has been said
5 by many of the MNO appellants, which would be achieved by curtailing their defence at
6 that time rather than allowing the additional time that Ofcom has sought, really does not
7 achieve much in the way of an effective extension to bring forward the time at which core
8 submissions have been made. 9th September has been proposed by Vodafone and EE as I
9 understand it, as a minimum - I think Vodafone asked for even a week beyond that. On the
10 timetable which Ofcom proposes and which BT supports, the worst case we would be
11 looking at core submissions being made to the Competition Commission within one week
12 or two of that date.

13 That additional amount of time, in my submission, is entirely proportionate in the
14 circumstances to meet the concerns of fairness which have been raised by all parties, in
15 particular to the planned commitments and legal advisers, but also in my submission for an
16 additional reason. I would like, if I may, to elaborate very briefly on the disadvantage
17 which BT apprehends to substituting or collapsing the notice of intervention procedure and
18 core submissions into one. It is our submission that the two stages have a useful function.
19 BT would propose to lodge a notice of intervention after receipt of Ofcom's defence. At
20 that point it may be anticipated that we will receive O2's and Vodafone's and Everything
21 Everywhere's notice of intervention in opposition to BT's appeal. We would like to
22 comment on those notices of interventions and to respond to the matters raised by those
23 other parties. We would also like to comment on whatever O2 say in support of the appeals
24 of Vodafone and Everything Everywhere and collapsing those two stages into one is
25 effectively you would have to have a dual headed core submissions process. As I have
26 understood the guidelines produced by the Competition Commission the core submissions
27 are meant to stand pretty much as a once and for all statement of case, subject only to
28 correction of factual inaccuracies in other parties' submissions.

29 THE CHAIRMAN: Well yes, but the guidelines do say that they can stand in place of a reply for
30 instance.

31 MR. PALMER: They can stand in place of a reply but what we would be deprived of is the
32 opportunity to reply to other people's notices of interventions and other people's opportunity
33 to reply to ours, of course. Now that is the cost, and it does not seem to us to be an effective

1 way of proceeding when there may be matters which can be shaken down in identifying the
2 actual issues and which can actually be dealt with in the core submissions.

3 May I say this in the light of what has been said by all the other commercial parties, it
4 appears that nobody has been particularly enthusiastic so far as legal advice has been
5 concerned in producing any core document, any core stage in the month of August. BT
6 stands slightly apart from that in this sense. In our particular case, and I appreciate that the
7 Tribunal would be reluctant to place too much emphasis on an one party's availability and
8 their legal advisers' holiday plans but, as it happens, our difficulty is in doing anything
9 before 19th August but not thereafter. So were Ofcom's defence to be served on 19th August
10 we are perfectly placed to pick up the baton and run, and to produce for our part a statement
11 of intervention within two weeks of that date. I have heard two other parties ask for three
12 weeks and I do not oppose that, but I simply inform the Tribunal for our part the normal two
13 week period is quite sufficient but we do not object to a third week if other parties so
14 require it; we understand why that might be the case. However, far from August being a
15 date way apart from those circumstances Ofcom would have the time which they say they
16 require, we would be able to pick up the baton and so would other parties intervening in
17 support of income, either within a two week period or, as I would say, three and then we
18 would be off to the Competition Commission and making progress.

19 By contrast, bringing that deadline for Ofcom's defence forward it does seem inevitably
20 there will be dead space in August with a corresponding detriment to fairness in terms of
21 people's opportunity to respond to what is said.

22 So for those reasons we support Ofcom's proposed timetable. We suggest a date for our
23 part of 2nd September for the final notice of intervention, but we have heard what Vodafone
24 and Everything Everywhere, and indeed 3, have said and we would suggest 9th September if
25 the Tribunal were sympathetic to those submissions. If a reference of the questions has not
26 already been made by then it could be made swiftly thereafter. We note that two to four
27 weeks is usually allowed for core submissions to be adduced. We would suggest in this
28 case, given the extended timetable, which people have enjoyed up to that point, three weeks
29 would be sufficient, we would be done by the end of September in terms of completing the
30 process up to core submissions.

31 A final point, which is independent of everything which I have said so far, is just the timing
32 of the referral of the questions to the Competition Commission, and in that respect BT
33 concurs with the submissions which you heard from Miss McKnight. We will wish to
34 support Ofcom's decision on the main pure LRIC versus LRIC plus decision, but we will

1 wish to do so for reasons which are supplemental rather than repetitive of the reasons that
2 Ofcom has already given and we find it difficult to see in view of that, in view of the issues
3 which other parties intervening will raise, how the Competition Commission could usefully
4 do an awful lot of work based on one side of the argument only, and for that reason we see
5 absolutely no difficulty with supporting what I understand will be the Commission's own
6 preference which is that the reference of the questions happens at that point.

7 Those are the submissions of BT.

8 THE CHAIRMAN: Thank you very much. Mr. Gibson, now it is you.

9 MR. GIBSON: Sir, my name is Nicholas Gibson, I appear for the Competition Commission. I
10 think all parties here are united in the laudable aim of wishing to move these proceedings
11 forward as expeditiously as possible, but consistent obviously with justice being done. It is
12 the latter part of that aim that I think one needs to focus on here. We are in the realms of
13 the art of the possible, and the CAT has quite rightly shown its concern that Ofcom should
14 have adequate time to prepare its defence and its sympathy in those regards, and we would
15 endorse that. We would also, however, urge you to not underestimate the time that the
16 Competition Commission requires to engage in its process, and that is where I want to focus
17 my submissions on.

18 There has been much discussion of when the reference questions should be referred to the
19 Competition Commission. That is obviously the trigger under the statutory regime, but it is
20 perhaps a red herring to focus on when the procedure starts when, as I understood from your
21 initial comments, sir, the issue is when the procedure ends and it is between that starting and
22 end point that we really need to focus, how long the Competition Commission is actually
23 going to need. The start point triggered by the questions, it is of course the case that
24 questions could be formulated on the basis of the questions that are already set out in the
25 notice of appeal, but the Commission's decision making process will only really be able to
26 start in earnest when it understands what the issues are between the parties. The questions
27 obviously are framed by reference to the notice of appeal and we can read the notice of
28 appeal and see what one party, or one side of the argument is, but it is only when we see
29 both sides of the argument that we can begin formulating our decision making process in
30 earnest.

31 It is of course the case that prior to the questions, and if the questions are referred to us prior
32 to receipt of the defence the Competition Commission will do all it can to move that process
33 forward, but there is a very limited amount that it can do until it understands properly what
34 both sides of the argument are.

1 THE CHAIRMAN: Well this is, I suppose, what I would like your assistance on, because
2 obviously one has got the Ofcom decision, and one has got in the notices of appeal the basis
3 on which that decision is attacked and, as we have heard, there is a great deal of detail in
4 terms of economic modelling and such like, that forms the basis of at least two of the
5 notices of appeal, and presumably there is a good deal of preparative spade work that can be
6 done in terms of understanding the criticisms that are made of the decision before the
7 defence from Ofcom is received, or is that simply misconceived?

8 MR. GIBSON: I would not go so far as to say that it is misconceived, sir, but it is true that one
9 can do some initial work, but the fact remains that the exact way that the criticisms are
10 framed in the notices of appeal is one side of the story. Obviously Ofcom, when it was
11 drafting decisions, was covering a whole range of different issues and the notices of appeal
12 have alighted upon specific issues and it is only proper that Ofcom formulates its response
13 to those issues, and it is only when we understand what it has to say about the criticisms that
14 we can determine whether those criticisms are just because we are not looking at the
15 decision and deciding for ourselves whether we would have made the same decision; we are
16 looking at whether we find there to be good grounds for the criticisms that are made of that
17 and that is where the defence ----

18 THE CHAIRMAN: I quite understand that it is simply not feasible for the Competition
19 Commission to make any kind of decision without hearing both sides of the story, because
20 what one has is a series of defined attacks on the decision, which may be right, may be
21 wrong, and you certainly cannot reach a view on that until you have had Ofcom's response
22 to this; that is blindingly obvious. What I am interested in is the extent to which you can
23 anticipate the consideration of both sides of the coin by, as it were, analysing the attacks
24 without having the Ofcom response. As I understand it you are saying that you can do some
25 work but obviously you cannot make any kind of finding one way or the other until you
26 have heard both sides.

27 MR. GIBSON: Indeed. I would say two things, sir. First, the Competition Commission is very
28 aware of its adjudicative role in the context of Communications Act appeals, and is mindful
29 of the obligation on it to consider properly both sides of the argument before arriving at any
30 decision. It would be loathe, I think, to interrogate too much for itself the nature of the
31 criticisms, it is for it not to second guess what Ofcom wants to say but to wait to hear what
32 Ofcom has to say for itself. The second thing I would say is that the procedure that is
33 envisaged under the guidance set out in CC13, the six month time period is premised on us
34 actually having both sides of the argument before we start that. So I think Miss McKnight

1 made quite a perspicacious comment when she said that we could refer the questions earlier
2 but we would ultimately still be looking for six months from the time at which we had both
3 sides of the argument, so to some degree we do not see there to be a great advantage in
4 hurrying towards questions when we do not actually have both sides of the argument before
5 us. Similar points can be made in relation to the statements of intervention. In
6 concentrating on the defence I do not wish to lose sight of the importance of understanding
7 properly what the statements of intervention have to add to the arguments put before us. I,
8 of course, take the point that ultimately what we have to decide is whether the grounds of
9 appeal stand up and it is not the place of a statement of intervention to widen those grounds
10 of appeal, but they are, as with the defence, necessary to inform what those grounds of
11 appeal are and to inform our thinking as to the veracity of any criticisms made by the
12 appellants to the decision of Ofcom.

13 Perhaps it would assist to talk a little bit about the procedure that we envisage taking place,
14 and to enlarge upon a couple of points under the guidance?

15 THE CHAIRMAN: Yes, that would be helpful, particularly while you are talking about the
16 guidance, CC13 I am looking at paras. 4.1 and 4.2, and those quite properly reference the
17 fact that the parties cases are set out in the pleadings, but it struck us as significant that para.
18 4.2 really does focus on the notice of appeal as being the key document that sets out the
19 issues - not the answer to the issues, but the issues that the Competition Commission is
20 investigating.

21 MR. GIBSON: It may be that rather too much emphasis is placed on the notice of appeal in that
22 paragraph. The position is, as I understand it from those instructing me, that the matters can
23 only really be properly understood when one understands the arguments against what is said
24 in the notice of appeal as well.

25 What I proposed to talk about very briefly was first to emphasise, as I do in my written note,
26 the fact that these guidelines are borne of the very valuable experience gained in hearing the
27 five previous appeals to the Competition Commission and understanding very much better
28 the nuanced decision making processes that are needed in order to arrive at a determination.
29 The two key elements early on in the process are, of course, the core submissions and the
30 technical hearings. Before I go on to the core submissions I just want to highlight how
31 important the technical hearings are for us to understand the matters that we are to
32 determine and that is something that can happen at a relatively early stage in the process and
33 need not wait until we understand exactly what the defence is. That is about understanding,
34 as you had suggested, sir, what the decision under appeal is actually about, familiarising

1 ourselves with the methodologies employed, the working of the model and, to the extent
2 necessary, the technical detail of the technologies involved; that is something that can
3 happen relatively early, but it is something that will need to be done during the summer
4 period if the reference is made prior to the summer notwithstanding the difficulties for the
5 legal parties in producing core submissions.

6 In relation to the core submissions, I would like to make a couple of points. There has been
7 a suggestion that one could collapse the statements of intervention into the core submissions
8 procedure. I think the point was rightly made by one of my learned friends that it is
9 important not to deprive people of the opportunity to actually comment on those statements
10 of intervention. If the statements of intervention collapsed, those in support of Ofcom were
11 collapsed into the core submissions procedure, that would deprive us of the benefit of
12 hearing what people had to say about those statements of intervention, and that is quite an
13 important element in understanding all the parties' views on the questions raised in the
14 appeals.

15 The core submissions - if I can perhaps try and characterise them as being a means of going
16 some way, they are a hybrid beast - one of the things they attempt to do is to address the
17 fact that within the normal Competition Commission procedure, there is no opportunity for
18 the parties to do what they would otherwise do in legal proceedings before a Tribunal for
19 instance, is to set out the detail of their legal argument and explain how they see the
20 pleadings relating to the evidence and tying everything together in a way that gives us a
21 clear understanding of exactly what they have to say.

22 It is important that this document is given due time and consideration and we would have
23 some concerns if the parties were placed under undue pressure to produce these in a
24 precipitate fashion, we think that would be a false economy for all concerned, but not least
25 for the Competition Commission in understanding properly what the parties have to say on
26 the various issues.

27 Sir, you rightly noted that we do envisage that there would be no need for a reply because of
28 the core submissions and to that degree there is a slight elision between the pleadings and
29 what we see the core submissions being about - more about the nature of submissions. The
30 reply, of course, is, one might say, a second bite of the cherry and to that degree I think the
31 view was internally at the Competition Commission that that was something that could be
32 collapsed, but we would not want that to be read as saying generally that we wished the
33 pleadings process to be overridden by the core submissions.

1 In summary, as I understand your proposal, sir, it was to complete the entire process to the
2 final determination before the end of this year. In practical terms, given the Christmas
3 holiday period that is likely to mean a final determination in the week preceding Christmas,
4 I think it is the week commencing 19th December. Given, as the guidelines set out, the need
5 for provisional determination roughly eight weeks in advance of that, and obviously we
6 would try and truncate matters as far as possible, but realistically it is going to be looking
7 like a provisional determination would have to take place towards middle/late October.
8 That would create a very real difficulty for us. This would be in circumstances where core
9 submissions, as I understand on your proposal, would only be made in mid or late August,
10 and would therefore leave us with only eight weeks - possibly less - to arrive at a
11 determination on the basis of a proper understanding of each of the party's views on the
12 matters raised in the appeals. That compares with four months, subject to holidays, that is
13 envisaged under the guidance, and that I would submit is a real contraction of the time for
14 our decision making process, and that really is the essence of our concern. Regardless of
15 what the start date is, if those are the circumstances in which we are making our decision we
16 think it would be false economy and unlikely to do justice to the appeals if our time is
17 contracted in that way. If, as I understand it correctly, your concern is about the overall end
18 date for this process, and with a view on April being the crucial end date, as other parties
19 have already submitted even on our option two there is some time prior to the end of April,
20 but on option one as we put it, and these were only indicative timetables based on
21 discussions with the parties' counsel, so we have no strong views as to exactly how the dates
22 should work and certainly no submissions as to the appropriateness of any time for an
23 extension for Ofcom, or the length of any time for an extension. However, if on our option
24 two we were to make our determination by middle/late February - I think the date that I had
25 indicatively produced was 20th February, but that could be subject to minor tweaking, that
26 would still leave over a month in order to resolve any judicial review issues that arose, and
27 that I would submit would be the appropriate time at which to try and use an expedited time
28 frame. I have in mind the fact that the provisional determination, whilst not completely
29 resolving the likely issues that may arise in judicial review, will give a very clear indication
30 to each of the parties about whether they wish to bring judicial review proceedings, and it
31 may then be appropriate to pencil in dates to ensure that we do not lose a slot in March to
32 resolve those issues if that would be a way of ensuring will be resolved by April.
33 That is all I have to say, sir.

1 THE CHAIRMAN: Thank you very much, Mr. Gibson. Mr. Holmes, I see the time, I would
2 quite like to hear your reply submissions so that we can then use the short adjournment to
3 decide exactly what we are going to do, so would you like to carry on now?

4 MR. HOLMES: Sir, thank you, I think I can be reasonably brief, I will try and be as quick as
5 possible.

6 First, amendments to the notices of appeal, given that the appellants have not been able to
7 rule out the possibility that some amendments might be put forward, we maintain our
8 proposal that some provision be made in the timetable for those to be brought forward so
9 that they can be considered and dealt with in the defence.

10 Secondly, the time allowed for core submissions or following statements of intervention
11 after the defence - in the event that those are separate from core submissions - we heard
12 submissions made by various parties that more than two weeks would be needed following
13 the defence and so we have some sympathy with those points. We do think that it would be
14 a tight process to attempt to deal with Ofcom's defence, which will necessarily respond to
15 the appeal and therefore develop Ofcom's position from that set out in the statement.

16 Thirdly, we come then to the comparative merits of the different timetable options of which
17 there are now a number of permutations on the table. There is, I suppose, Ofcom's original
18 proposal, the Competition Commission's proposal of today, and then Ofcom's and EE's
19 variance on that proposal. We say that 19th August is the time that we need, you have heard
20 me on that. I was criticised on the basis that that the Tribunal would find it hard, of course,
21 take a view on the underlying substance at this stage. I accept it is difficult for the Tribunal
22 but at the same time you can only seek to convey the scale of the task that we feel that we
23 are facing and we hope that you have done that.

24 As regards work done so far, we were asked what we had been up to. I can report to the
25 Tribunal that we have been working diligently during the time that we have so far had. We
26 have been scoping the task and we have identified issues and are now champing through
27 them, and it is a big task.

28 It is said against us that the rules envisage a six week period for Ofcom's defence as
29 standard. Now the rules cover many types of case, including competition appeals that
30 frequently raise limited issues and have only a single appellant. Price control appeals are
31 different beasts and it would be a mistake to try and collapse all of the appeals and to
32 assume that six weeks is one size that fits all. The Competition Commission has made
33 clear, and we fully respect the submission, that they will need six months and not the four
34 months stated in the statutory guidance.

1 Moreover, the Competition Appeal Tribunal's previous practice in relation to price control
2 appeals we say fully reflects the fact that these are complex cases, and that typically Ofcom
3 will need longer than six weeks.

4 Indeed, if one makes two recent comparisons, that is the LLU appeal, and the leased lines
5 appeal, both in 2009 (one brought by Carphone Warehouse and one by Cable & Wireless)
6 what Ofcom is proposing by way of timetable is by no means out of kilter with what we
7 received in those cases. In the *Carphone Warehouse* appeal, one single appellant and one
8 intervener Ofcom was given 13 weeks in total, and the reference was made 18 weeks and
9 two days after the start of the appeal.

10 In Cable & Wireless it was really a much smaller scale than the *Carphone Warehouse*
11 appeal and all the appeals here today, Ofcom was given 10 and a half weeks to prepare its
12 defence, and the reference went after 15 and a half weeks. On Ofcom's proposal today a
13 period of 14 week will have elapsed by the time of defence, and if the reference were made
14 after close of pleadings, as the Competition Commission has pressed, there would have
15 been a shorter period of time for reference of only 16 or 17 weeks, which again is shorter
16 than that in fact that occurred in *Carphone Warehouse*, so we are not out of keeping with
17 past precedents.

18 Everything Everywhere makes the point that the notices of appeal overlap. It is true that
19 there are some overlaps, but there are also significant elements of difference between the
20 Everything Everywhere and the Vodafone appeals, and they each take substantial points of
21 their own. Also Hutchison 3G and BT's appeal, although they are more modest, are still
22 substantial cases which need to be dealt with, and some indication of that is given by the
23 time that the interveners in support of Ofcom, and against Hutchison 3G and BT say that
24 they need in order to be able to deal with the points. I understood that the suggestion was
25 that from 15th July date, the 9th September would be the earliest date by which statements of
26 intervention could be put in and from 19th August date the 26th September was the earliest
27 date, so clearly these appeals are considered sufficiently substantial to merit a fair amount
28 of time in preparation by the interveners in our support on those points.

29 The summer period is a point that is clearly relevant to the Competition Commission's
30 considerations. The Competition Commission's timetable shows that there is some
31 difference, assuming the reference goes after the close of pleadings between Ofcom's date
32 and Everything Everywhere's proposed timetable. That period is, however, truncated by
33 additional time that the Competition Commission says that it needs and that it recognises
34 the parties will need, in order to produce their complete core submissions, so the five week

1 difference between the indicative date for a reference on Everything Everywhere's timetable
2 and our timetable is in fact truncated. We say the difference is truncated to two and a half
3 to three weeks, and I cavil slightly - without any criticism of the Competition Commission
4 because of course as Mr. Gibson rightly pointed out this is an indicative timetable based on
5 conversations between counsel before when the dates were all somewhat fluid - but if one
6 actually looks at week zero on the timeline - and I will not ask the Tribunal to do this now
7 but if they were to attach any weight to those dates they should take into account - the date
8 for Ofcom for week zero is in fact a week later than the date that we propose for our
9 reference, whereas week zero for Everything Everywhere is the week in which they propose
10 to make their reference, and once that is taken into account our date slips back by at least a
11 week, depending where in the week the reference fell, to the latest - and I do not want to get
12 this wrong - I think it is 12th March instead of 20th March, so early rather than late March.
13 That, we say, would allow the procedure to conclude by 1st April 2011. Any judicial review
14 at the end of this process will need to be carefully managed of course, but by then the issues
15 in the appeal, as opposed to the statement, will certainly have been well worked through by
16 all parties. They will be extremely familiar with the issues. The experience in the last
17 round of MCT was that the points that were brought forward at the end were extremely
18 narrow and focused and the Tribunal was able to deal with them in short order. We think
19 that with the experience that has been gleaned since then they could be dealt with in even
20 shorter order and we say that we could get home by 1st April and date for the final
21 determination falling around 12th March. Of course, if there were problems, if very
22 expansive issues were raised at the end of the process, and there is always a risk of
23 regulatory gaming given the commercial interests of the parties, then the Tribunal could
24 consider applications or, indeed, consider of its own motion whether interim relief was
25 appropriate in a case of this nature. By then one would have the Competition Commission's
26 determination, which would give a very fixed reference point for the price, and if it was
27 thought that the judicial review proceedings could drag on jeopardising the 1st April date
28 then, of course, there might be scope in that situation to introduce the new price control
29 before the judicial review was heard and determined.

30 A final point of caution about the 1st April date, we understand for symbolic reasons if
31 nothing else, for reasons of the optics of this it is very important that we get this done
32 quickly and as promptly as possible, compatible with the interests of justice. But the 1st
33 April date has in itself no special magic about it and, indeed, easier in this case to introduce
34 a new price control than it was the last time around, because whereas the last time the price

1 control was a weighted average of the termination rates charged, now the termination rates
2 fixed under the price control are just a fixed cap, so there would be a very simple process to
3 implement as and when necessary. We know, for example, from time taken by the parties
4 to change their termination rates after our 15th March decision, that this can be done very
5 rapidly as necessary.

6 As regards another point in relation to the summer period, there will of course be delays and
7 difficulties in the summer period under which ever of the various timetable options are
8 preferred. We say that we are volunteering to take the pain of all this, to take until 19th
9 August to produce the best defence that we can, and it is not an effort at perfection, it is the
10 effort of doing an adequate job to assist all of the parties, the Competition Commission and
11 the Tribunal. Under any timetable that produced a reference before the summer period we
12 will get bogged down during that period and there will be delays during that period, and any
13 saving may be therefore less impressive than it might at first time appear.

14 The confidentiality process was my last point. I was asked whether we could provide
15 confidential versions of the defence at the same time as non-confidential versions. We are
16 cautious of this on the basis of past experience. There is a lot of confidential material and
17 we are the keepers, the stewards with statutory duties in respect of a large volume of
18 material. What we have done in the past in other cases is to try and fix a short period after
19 serving and filing the confidential version of that defence when the parties themselves can
20 just verify that we are not slipping in any of the crown jewels by mistake, any crucial item
21 of data, and we would feel quite anxious about losing that safeguard. But, subject to that
22 practical consideration we would, of course, seek to minimise any delays resulting from
23 production of a non-confidential version of the defence.

24 Subject to any questions you may have or any points that those instructing will tell me that I
25 have forgotten then I think those are my submissions.

26 THE CHAIRMAN: What is the usual gap between confidential and non-confidential versions?

27 MR. HOLMES: My understanding from experience in previous case is that it varies depending
28 upon the scale of the task. I think we tried to do it within a week to ten days - my learned
29 friends are confirming that a week is the usual period. Of course, we would do what we
30 can, and I am sure that the other parties would do what they could to expedite matters.
31 Unless I can be of any further assistance?

32 THE CHAIRMAN: No, thank you very much, Mr. Holmes. What we will do is rise until a
33 quarter past two and we will hand down our decision then. Thank you all very much.

34 (Adjourned for a short time)

1 THE CHAIRMAN: We will obviously hand down a formal order and circulate it to the parties in
2 due course, but this is what we are ordering today: The appeals will be consolidated.
3 Ofcom's defence will be served on 19th August. Working back from there: amendments to
4 the notices of appeal, if so advised, will be served on 24th June, that is simply in relation to
5 amendments arising out of the confidential information that was disclosed at the end of
6 May. Statements of intervention of those supporting the appellants will be served on the
7 same date, 24th June. Clearly, if there is any significant change in the notices of appeal
8 which might lead to a further change to those statements of intervention, which we do not
9 expect, but if there were then we would look sympathetically on that; we anticipate that to
10 be theoretical.
11 Statements of intervention following Ofcom's defence and supporting it - 9th September.
12 We want to make clear we are not going to make any order at all regarding core
13 submissions before the Competition Commission, we regard that as a matter for the
14 Commission to decide for itself.
15 The final determination of the Competition Commission should be made on 9th February
16 2012. Regarding the formulation of the questions and the making of a formal reference to
17 the Competition Commission we are minded to order that those questions be formulated
18 now and that by close of business on 20th June the appellants and those supporting them
19 circulate to the other parties a consolidated version of the reference that they suggest should
20 be made in the light of all the notices of appeal; that thereafter on 27th June Ofcom and
21 those supporting Ofcom identify their comments, those comments should include, if there
22 are alternative versions of wordings, any alternative wordings that are being proposed and,
23 although we do not anticipate this to be a problem, if there is any debate about whether
24 something is a price control matter that too needs to be articulated in the draft, and we
25 anticipate then making a reference to the Competition Commission on 4th July or
26 thereabouts.
27 There will be general liberty to apply and in the light of that timetable we are minded to put
28 into the diary now a case management conference before the CAT on 24th February 2012 to
29 consider any questions arising out of the Competition Commission's final determination.
30 One final point, which we do not make by way of an order, regarding the circulation of non-
31 confidential documents, to include not merely pleadings but also, for example, the
32 Competition Commission's own final determination, we would anticipate that the parties
33 should work together to ensure that a non-confidential version is circulated within one week
34 of the confidential version. But, as I say, we make no order in that respect.

1 MISS BACON: Can I make a plea regarding I think the fourth of those dates that you have just
2 handed down, the statement of intervention supporting the appellants? You have asked for
3 that to be by 24th June. Ofcom's timetable provided for that to be on 15th July, which I
4 presume gave Ofcom sufficient time. The 24th June is less than two weeks from now and
5 we have only today presumably formally been admitted as interveners.

6 THE CHAIRMAN: Well that is true.

7 MISS BACON: That timetable will just be not feasible for us: we have a witness statement to do
8 covering a number of issues, we have expert evidence to prepare and then the legal
9 statement of intervention bringing those together. If Ofcom's defence is not due until 19th
10 August as Ofcom asked I would ask for 15th July, because there does not seem to be any
11 disagreement by Ofcom that that would give it time to put in a defence, taking into account
12 our statements of intervention.

13 THE CHAIRMAN: Is that right, Mr. Holmes?

14 MR. HOLMES: That is correct, sir.

15 THE CHAIRMAN: Very well we will accept that correction and we will ----

16 MISS BACON: I have one wrap up question regarding the confidentiality ring, and also the
17 Tribunal has not just made any order for statements in intervention; I presume the Tribunal's
18 order will be that we are and the others are admitted as interveners, and then we would ask
19 to be admitted to the confidentiality ring. If that is the case, do you need the precise names
20 of all those to go into it, because if you do I have one addition to those that are set out in my
21 submissions.

22 THE CHAIRMAN: First of all, it is clear that we are going to be making an order that you can
23 intervene, Miss Bacon, that is, as it were, implicit in the whole discussion that we had this
24 morning, but in terms of extending the confidentiality ring it is probably better if you
25 circulate a draft which we can then issue in short order in the usual way.

26 MISS BACON: I am very grateful.

27 THE CHAIRMAN: Is there anything else?

28 MISS McKNIGHT: Sir, I wonder whether we could have until 30th June for any amendments to
29 our notice of appeal consequential on seeing the confidential determination? I am simply
30 not in a position to know whether we can do it by the 24th and I think the 30th will give us a
31 little extra and would not appear to have any impact on the rest of the timetable.

32 THE CHAIRMAN: Well, no, but there is a liberty to apply, and if you need the time then you can
33 obviously apply for it. Thank you all very much.

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