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Case No: C1 2008/1931

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(VIVIEN ROSE, PROFESSOR ANDREW BAIN AND ADAM SCOTT TD)
[2008] CAT 11

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 July 2009

Before:

LORD JUSTICE WARD
LORD JUSTICE LLOYD
and
LORD JUSTICE ETHERTON

- -

Between:

HUTCHISON 3G UK LTD	**Appellant**
- and -	
THE OFFICE OF COMMUNICATIONS	**Respondent**
BRITISH TELECOMMUNICATIONS PLC	
T-MOBILE (UK) LTD	**Interveners**

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Dinah Rose Q.C. and Brian Kennelly, with Keith Jones, solicitor advocate, (instructed by **Baker & McKenzie LLP**) for the **Appellant**
Peter Roth Q.C. and Josh Holmes (instructed by **the Office of Communications**) for the **Respondent**
David Anderson Q.C. and Sarah Lee (instructed by **BT Legal)** for **British Telecommunications plc**
Jon Turner Q.C. and Meredith Pickford (instructed by **T-Mobile)** for **T-Mobile (UK) Ltd**

Hearing dates: 10 to 12 March 2009

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Judgment

Lord Justice Lloyd:

Introduction

1. This appeal is brought from the Competition Appeal Tribunal, with its permission, and concerns the regulation of the mobile telecommunications sector. Five mobile network operators exist in the UK, of which the Appellant Hutchison 3G UK Ltd (H3G) is the most recent entrant to the market and has the smallest body of customers. The five operate in an extremely competitive way as against each other, not least because of having invested very large sums of money in securing the ability to offer third generation communication facilities. Each operator, however, has a monopoly within its own network, and for each of them there is one very large undertaking with whom they have to deal, namely BT. Each mobile network operator (MNO) sells to other MNOs and to fixed network operators the service of connecting phone calls to its network. That is called mobile call termination (MCT). It is one of the many aspects of the operations of the telecommunications sector which is subject to regulation in the UK in a way which is prescribed by European legislation. The EU legislation is referred to as the Common Regulatory Framework (CRF), and consists of a group of Directives of which three are particularly relevant for present purposes. They are implemented in the UK by the Communications Act 2003, and the national regulatory authority is the Office of Communications (Ofcom), the respondent to this appeal.

2. The principal issue in this appeal is whether H3G has significant market power (SMP) in the market for MCT on its network. It is the only seller in that market, and BT is overwhelmingly the largest buyer. In a market where there is one buyer and one seller, it does not necessarily follow that the seller has SMP, because the buyer may have sufficient countervailing buyer power (CBP) to balance the seller's monopoly. The possession of SMP is defined in the CRF as the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. It is equivalent to the concept of dominant position, for the purposes of article 82 of the EU Treaty and section 18 of the Competition Act 1998.

3. BT might well be regarded as having SMP in markets where it is a supplier, having regard (among other things) to the size of its customer base, and its ownership of much of the infrastructure. It is itself constrained in several relevant respects, including by an obligation to allow other network operators to interconnect with it, on reasonable terms, known as end-to-end connectivity (E2E). Its important position in relation to relevant markets derives not only from its own large customer base, but also from the fact that other operators are able to send calls from their networks via that of BT, under transit arrangements, for an appropriate charge.

4. One of Ofcom's obligations under the CRF is to analyse telecommunications markets in the UK to see whether they are "effectively competitive". If they are not, Ofcom must identify undertakings which have SMP on a given market, and must then consider imposing, or amending, regulatory conditions (SMP conditions) on such undertakings. In certain circumstances these conditions may include price controls.

5. Another of Ofcom's functions which has to be considered in this appeal is the resolution of disputes. The distinction between Ofcom's market review powers and their functions in resolving disputes is significant, and corresponds with a wider

distinction between different types of provision for regulatory intervention. One, of which the market review powers is an example, is referred to as "ex ante", and empowers the regulator to lay down in advance the conditions under which one or more undertakings are to operate on a market. The other type is called "ex post", and in some cases involves action by way of sanction for prior breaches of obligations. Action under articles 81 and 82 of the EC Treaty or, in the domestic context, sections 2 and 18 of the Competition Act 1998 is an example. Ofcom's role in the resolution of disputes is also treated as a power of this kind, even though as between the parties the determination of the dispute may lay down the position for the future as well as for the past.

6. In 2004 Ofcom investigated the MCT market and concluded that H3G had SMP on its network as regards termination of voice calls. Because H3G's operations (which had started in 2003) were on a small scale, it did not impose price controls at that stage. H3G nevertheless appealed against the finding, to the CAT. The Tribunal allowed H3G's appeal and remitted the matter to Ofcom. In 2007, Ofcom reconsidered the question of H3G's market power as at 2004, and came to the same conclusion. At the same time they also investigated the position for 2007 to 2011. They concluded that H3G (as did all other MNOs on their respective networks) had SMP on the market for MCT on its own network, and this time they did impose price controls on H3G, as they had for the other operators previously and did again on this occasion. H3G appealed against the findings of SMP as at 2004 and 2007. BT and H3G appealed against the levels of price allowed for MCT. The price control aspect of the appeal was referred to the Competition Commission, under section 193 of the Communications Act 2003.

7. There were also appeals against separate rulings by Ofcom on disputes between BT and various operators, and also between H3G and, respectively, Orange and O2, as to the rates payable for termination; these were known as the Termination Rate Disputes (TRD). Because these did not arise on the exercise of Ofcom's SMP powers, section 193 did not apply and the appeal lay to the Tribunal without further reference to the Competition Commission. The Tribunal dismissed H3G's appeal, and dealt separately with TRD, but it decided on certain core issues in the TRD appeals at the same time as, and following a conjoined hearing with, H3G's MCT appeal. It has been necessary to consider Ofcom's determination in 2004 and each of their determinations in 2007 (the MCT Statement, as regards the position from 2007 to 2011, and the Reassessment Statement as regards H3G's position in 2004), the judgment of the Tribunal in 2005 on H3G's first appeal (*H3G1*), [2005] CAT 39, and its TRD Core Issues judgment, [2008] CAT 19, in addition to that from which this appeal is brought, (*H3G2*), [2008] CAT 11. This complicated procedural history has led to a large quantity of paper being generated, through which Counsel have sought to guide us, illustrating and supporting their submissions by reference to yet more paper, much of it emanating from the European Commission.

8. Before the Tribunal on *H3G2*, there appeared not only H3G as appellant and Ofcom as respondent, but also BT and all the four other MNOs (O2, Vodafone, Orange and T-Mobile) as interveners. On this appeal, BT and T-Mobile took part as interveners, as well as the Appellant and the Respondent. We had the benefit of written arguments which were by no means skeletal, and full and concentrated oral submissions of a very high quality from Counsel for all four parties. None of this made it easier to

determine the issues on this important appeal, other than by feeling that, however the parties' positions have developed in the course of the prolonged forensic process from Ofcom's first determination in 2004 to the present appeal, we can be reasonably sure that no material point has been overlooked.

9. I regret very much that it has taken so long for this judgment to be prepared – even longer than the four months which are laid down as the period within which national regulatory authorities are supposed to complete their process of dispute resolution (see article 20.1 of the Framework Directive, referred to below, and section 188 of the Communications Act 2003). The combination of the substance and power of the respective submissions made to us, and the quantity of documentation supplied and used in connection with the appeal, on the one hand, and the demands of other substantial appeals, on the other, made this a much more protracted task than I would have wished.

10. This judgment will be found to be strewn with acronyms, without which it would have taken up even more paper. There is a glossary at the end.

The legislation

11. It is necessary to consider a good deal of the legislation, and I will turn to this without further introduction.

12. The relevant European Directives are the Framework Directive, 2002/21/EC, the Access Directive 2002/19/EC and the Authorisation Directive, 2002/20/EC.

13. The starting place is the Framework Directive. Its many recitals include two concerned with the need for ex ante regulation, (25) and (27), as follows:

> "(25) There is a need for ex ante obligations in certain circumstances in order to ensure the development of a competitive market. The definition of significant market power in the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP) has proved effective in the initial stages of market opening as the threshold for ex ante obligations, but now needs to be adapted to suit more complex and dynamic markets. For this reason, the definition used in this Directive is equivalent to the concept of dominance as defined in the case law of the Court of Justice and the Court of First Instance of the European Communities.
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> …
>
> (27) It is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem. It is necessary therefore for the Commission to draw up guidelines at Community level in

> accordance with the principles of competition law for national regulatory authorities to follow in assessing whether competition is effective in a given market and in assessing significant market power. National regulatory authorities should analyse whether a given product or service market is effectively competitive in a given geographical area, which could be the whole or a part of the territory of the Member State concerned or neighbouring parts of territories of Member States considered together. An analysis of effective competition should include an analysis as to whether the market is prospectively competitive, and thus whether any lack of effective competition is durable. Those guidelines will also address the issue of newly emerging markets, where de facto the market leader is likely to have a substantial market share but should not be subjected to inappropriate obligations. The Commission should review the guidelines regularly to ensure that they remain appropriate in a rapidly developing market. National regulatory authorities will need to cooperate with each other where the relevant market is found to be transnational."

14. Recital (28) says that national regulatory authorities must act in accordance with Community law and "take into the utmost account" the guidelines laid down by the Commission as envisaged in recital (27). In turn, recital (32) refers to the function of resolving disputes:

> "(32) In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to reach agreement should be able to call on the national regulatory authority to resolve the dispute. National regulatory authorities should be able to impose a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services in a Member State should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives."

15. Article 1.1 sets out the scope and aim of the Framework Directive:

> "1. This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community."

16. The Directive proceeds to deal with the role of national regulatory authorities, including rights of appeal against the decisions of such authorities, and a requirement for such authorities to provide the opportunity for comment on proposed measures, both to interested parties and to the Commission and other national regulatory authorities. Under article 7, the Commission has the power to veto such a draft measure. Article 8 sets out policy objectives which are to guide the actions of the

national regulatory authorities. I do not need to quote all of these objectives, since not all are relevant to the present case. The main relevant objectives are those mentioned in article 8.2:

> "2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:
>
> (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;
>
> (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
>
> (c) encouraging efficient investment in infrastructure, and promoting innovation; and
>
> (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources."

17. I have mentioned that this Directive defines the circumstances in which an undertaking is to be regarded as having significant market power. This is in article 14.2:

> "2. An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

18. The Directive then deals with market definition (article 15) and market analysis (article 16). The Commission is to adopt a recommendation on relevant product and service markets, identifying "markets within the electronic communications sector, the characteristics of which may be such as to justify the imposition of regulatory obligations set out in the Specific Directives". The definition is to be in accordance with the principles of competition law, and is without prejudice to the markets which may be defined in specific cases for the purposes of competition law. Among the markets listed in Annex 1, which had been defined under the previous regulatory framework, and to be reviewed, was the market for call termination on public mobile telephone networks. The Commission is also to publish guidelines for market analysis and for the assessment of SMP. National regulatory authorities, taking utmost account of the recommendation and guidelines, are to define relevant markets appropriate to national circumstances. Under article 16, they are also to carry out an analysis of the relevant markets, and to determine on the basis of its market analysis whether a relevant market is effectively competitive. Under article 16.4:

> "4. Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall

on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist."

19. Article 20 contains the substantive provisions of the Directive dealing with the resolution of disputes between undertakings:

> "1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.
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> …
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> 3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives."

20. The Commission's recommendations on relevant markets were first published in February 2003. At that stage voice call termination on individual mobile networks was identified as item 16 in the list of markets. The recommendation was reviewed in 2007; by then it had become item 7, the last in a much shorter list.

21. The Access Directive deals with the need, in some circumstances, to ensure that undertakings are able to have access to and interconnection with each other's networks. Two recitals merit quotation in this context:

> "(5) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis, and negotiate in good faith.
>
> (6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails,

adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services."

22. The article which deals with end-to-end connectivity is article 5, the relevant parts of which are as follows:

> "1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.
>
> In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:
>
> (a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;
>
> …
>
> 3. Obligations and conditions imposed in accordance with paragraphs 1 and 2 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).
>
> 4. With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive)."

23. In turn article 8 deals with the imposition of SMP conditions:

"1. Member States shall ensure that national regulatory authorities are empowered to impose the obligations identified in Articles 9 to 13.

2. Where an operator is designated as having significant market power on a specific market as a result of a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), national regulatory authorities shall impose the obligations set out in Articles 9 to 13 of this Directive as appropriate.

3. Without prejudice to:

- the provisions of Articles 5(1), 5(2) and 6,

- the provisions of Articles 12 and 13 of Directive 2002/21/EC (Framework Directive), Condition 7 in Part B of the Annex to Directive 2002/20/EC (Authorisation Directive) as applied by virtue of Article 6(1) of that Directive, Articles 27, 28 and 30 of Directive 2002/22/EC (Universal Service Directive) and the relevant provisions of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector containing obligations on undertakings other than those designated as having significant market power, or

- the need to comply with international commitments,

national regulatory authorities shall not impose the obligations set out in Articles 9 to 13 on operators that have not been designated in accordance with paragraph 2.

In exceptional circumstances, when a national regulatory authority intends to impose on operators with significant market power other obligations for access or interconnection than those set out in Articles 9 to 13 in this Directive it shall submit this request to the Commission. The Commission, acting in accordance with Article 14(2), shall take a decision authorising or preventing the national regulatory authority from taking such measures.

4. Obligations imposed in accordance with this Article shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of Directive 2002/21/EC (Framework Directive). Such obligations shall only be imposed following consultation in accordance with Articles 6 and 7 of that Directive.

5. In relation to the third indent of the first subparagraph of paragraph 3, national regulatory authorities shall notify decisions to impose, amend or withdraw obligations on market players to the Commission, in accordance with the procedure referred to in Article 7 of Directive 2002/21/EC (Framework Directive)."

24. Price control conditions are among those authorised by article 13:

> "1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.
>
> 2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.
>
> 3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted."

25. The relevant provisions were transposed into UK law by the Communications Act 2003. Having set out fairly fully the important provisions of the Directives, I do not need to quote all the relevant provisions of the Act.

26. Section 3 imposes on Ofcom the principal duty "in carrying out their functions to further the interests of citizens in relation to communications matters; and to further the interests of consumers in relevant markets, where appropriate by promoting competition". It also requires them to have regard, in all cases to:

> "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
>
> any other principles appearing to OFCOM to represent the best regulatory practice."

and, where relevant, to "the desirability of promoting competition in relevant markets": section 3(3) and (4)(b).

27. Section 4 requires them, in carrying out functions relevant for present purposes, to act in accordance with what are called the six Community requirements, namely those mentioned in article 8 of the Framework Directive. The most important of those, for present purposes, are:

i) a requirement to promote competition in relation to the provision of electronic communications networks and electronic communications services: section 4(3)(a); and

ii) a requirement to encourage the provision of network access and service interoperability, to such extent as OFCOM consider appropriate for the purpose of securing (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available: section 4(7) and (8).

28. Section 45 gives Ofcom the power to impose conditions on undertakings, including access-related conditions and SMP conditions. The persons to whom these conditions may be applied are identified in section 46. For SMP conditions, the person must be a communications provider or a person who makes associated facilities available, and must be (relevantly) someone whom OFCOM have determined to be a person having significant market power in a specific market for electronic communications networks, electronic communications services or associated facilities: section 46(7) and (8). No condition may be set unless it satisfies the test that it is (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates; (b) not such as to discriminate unduly against particular persons or against a particular description of persons; (c) proportionate to what the condition or modification is intended to achieve; and (d) in relation to what it is intended to achieve, transparent: section 47.

29. Access-related conditions are governed by the more specific provisions of sections 73 and 74, which include particular provisions about securing end-to-end connectivity. The E2E obligation was imposed on BT under these provisions.

30. SMP conditions are dealt with by sections 78 and following. A person is to be taken as having SMP in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market, and dominance of a market is to be construed in accordance with applicable provisions of the Framework Directive: section 78(1) and (2). Where Ofcom have determined that a person has SMP in a relevant market, they are to set such SMP conditions authorised by section 87 as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and apply those conditions to that person: section 87(1). By section 87(9) the SMP conditions authorised by this section include conditions imposing on the provider who has SMP price controls in relation to matters connected with the provision of network access to the relevant network, subject to section 88 being satisfied. The relevant provisions of that section are as follows:

> "(1) OFCOM are not to set an SMP condition falling within section 87(9) except where

(a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and

(b) it also appears to them that the setting of the condition is appropriate for the purposes of

(i) promoting efficiency;

(ii) promoting sustainable competition; and

(iii) conferring the greatest possible benefits on the end-users of public electronic communications services.

(3) For the purposes of this section there is a relevant risk of adverse affects arising from price distortion if the dominant provider might

(a) so fix and maintain some or all of his prices at an excessively high level, or

(b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services."

31. Consistently with article 15 of the Framework Directive, section 79(2) of the Act requires Ofcom to take due account of all applicable guidelines and recommendations issued or made by the Commission in pursuance of a Community instrument which relate to market identification and analysis, when identifying or analysing relevant markets, and section 79(3) makes similar provision as regards market analysis or the determination of what constitutes SMP, when Ofcom consider whether to make or revise a market power determination. Correspondingly, on appeals from Ofcom, the Tribunal and in turn the court must do likewise.

32. The Act contains provisions under which Ofcom can resolve disputes, of which section 185 is the first to require attention.

"(1) This section applies in the case of a dispute relating to the provision of network access if it is—

(a) a dispute between different communications providers;

(b) a dispute between a communications provider and a person who makes associated facilities available;

(c) a dispute between different persons making such facilities available;

(d) a dispute relating to the subject-matter of a condition set under section 74(1) between a communications provider or person who

makes associated facilities available and a person who (without being such a person) is a person to whom such a condition applies; or

(e) a dispute relating to the subject-matter of such a condition between different persons each of whom (without being a communications provider or a person who makes associated facilities available) is a person to whom such a condition applies.

…

(3) Any one or more of the parties to the dispute may refer it to OFCOM.

(4) A reference made under this section is to be made in such manner as OFCOM may require.

…

(8) For the purposes of this section—

(a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and

(b) the disputes that relate to an obligation include disputes as to the terms or conditions on which any transaction is to be entered into for the purpose of complying with that obligation."

33. Section 188 deals with how Ofcom must go about resolving a dispute under these provisions. By sub-section (5), except in exceptional circumstances, Ofcom must make their determination within no more than four months, and by (6) if they can do so within the four month period, they must do so as soon as practicable.

34. What Ofcom can do by way of the resolution of a dispute is governed by section 190:

"(1) Where OFCOM make a determination for resolving a dispute referred to them under this Chapter, their only powers are those conferred by this section.

(2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following—

(a) to make a declaration setting out the rights and obligations of the parties to the dispute;

(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;

(c) to give a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by OFCOM; and

(d) for the purpose of giving effect to a determination by OFCOM of the proper amount of a charge in respect of which amounts have been paid by one of the parties of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.

(3) Their main power in the excepted case is just to make a declaration setting out the rights and obligations of the parties to the dispute.

(4) Nothing in this section prevents OFCOM from exercising the following powers in consequence of their consideration under this Chapter of any dispute—

(a) their powers under Chapter 1 of this Part to set, modify or revoke general conditions, universal service conditions, access related conditions, privileged supplier conditions or SMP conditions;

…

(8) A determination made by OFCOM for resolving a dispute referred or referred back to them under this Chapter binds all the parties to the dispute.

(9) Subsection (8) is subject to section 192."

35. We were also referred to section 105 which gives Ofcom a power to intervene of their own initiative:

"(1) This section applies where—

(a) it appears to OFCOM that a network access question has arisen and needs to be determined; and

(b) they consider that, for the purpose of determining that question, it would be appropriate for them to exercise their powers under this Chapter to set, modify or revoke conditions falling within subsection (2).

(2) Conditions falling within this subsection are—

(a) access-related conditions authorised by section 73(2) or (4); and

(b) SMP services conditions authorised by section 87.

(3) Before considering whether, for the purpose of determining the question that has arisen, to set, modify or revoke conditions falling within subsection (2), OFCOM must publish a notification of their proposal to consider that matter.

(4) If, after considering that matter, OFCOM decide not to exercise their powers to set, modify or revoke conditions falling within subsection (2), they must publish a notification of their decision.

(5) A notification under this section must be published in the manner that OFCOM consider appropriate for bringing it to the attention of the persons who, in OFCOM's opinion, would be likely to be affected by action taken for determining the network access question that appears to them to have arisen.

(6) In this section "network access question" means a question relating to network access or the terms or conditions on which it is or may be provided in a particular case."

BT's end to end connectivity obligation

36. Much attention was given in the course of the case to BT's E2E obligation. As it now stands, it was imposed by Ofcom on 13 September 2006 under section 73 of the Act. The access condition imposed on BT is, relevantly, in the following terms:

> "1.1 Where a provider of a public Electronic Communisations Network reasonably requests in writing the Connectivity Provider [i.e. BT] to purchase wholesale narrowband call termination services (fixed and mobile voice, and Narrowband Data) provided by it, the Connectivity Provider shall purchase such services.
>
> 1.2 The purchase of such services shall occur as soon as reasonably practicable and shall be on reasonable terms and conditions (including charges) and on such terms and conditions (including charges) as Ofcom shall direct."

37. These conditions replaced guidance published by Ofcom's regulatory predecessor, Oftel, in 2003, but, so far as concerns the issues before us, it seems to be common ground that, in effect, BT was subject to a similar obligation before September 2006 as well.

The appeal

38. An appeal lies from Ofcom to the Tribunal under section 192 of the Act, on grounds of fact or of law: see section 192(6). A further appeal to this court lies only on a point of law: section 196(2)(b). As I have mentioned, one of the issues before us, namely whether H3G had SMP in the first relevant period, has been the subject of a decision by Ofcom which was set aside on appeal to the Tribunal, and then of another decision by Ofcom which was upheld by the Tribunal in the decision now under appeal. Understandably, we were shown some of the reasoning of Ofcom and of the Tribunal at both these stages, as well as in the TRD Core Issues judgment of the Tribunal. It

would be possible to get drawn into a comparison of what was said at different levels and at different stages of this process. I intend to avoid that temptation. So far as facts are concerned, what matters is what Ofcom found in 2007 (which was not materially affected by the appeal to the Tribunal in *H3G2*). As for the law, we are not bound by any view expressed by Ofcom or the Tribunal, at any stage of the processes which I have described.

39. H3G appeals on three separate grounds.

i) The first turns on the E2E obligation, under which (taken together, if necessary, with the determination of a dispute by Ofcom), it is said, BT could not lawfully be required to pay a price appreciably above the competitive level, so that H3G is not able to act independently of BT and does not have SMP.

ii) The second is that the Tribunal was wrong to hold that Ofcom's dispute resolution powers should be disregarded when considering whether H3G had SMP.

iii) The third is that the Tribunal was wrong to hold that Ofcom could impose a price condition, because there was no risk that H3G might set an excessively high price for MCT and require BT to pay it under the E2E obligation.

40. For H3G, Miss Rose Q.C. argued that, since the question whether H3G has SMP depends on the extent to which BT has CBP as regards MCT on H3G's market, it follows that the point on which the issue of H3G's ability, or otherwise, to act independently of its customers depends, in turn, on the terms on which business would be done between BT and H3G in this respect. That involves considering H3G's need for a deal with BT, as well as any need that BT has to do a deal with H3G, and it also involves considering what the constraints are on either party. She said that for H3G, it was an absolute prerequisite to persuade BT to buy MCT from it, since otherwise it would get no business. There was some debate about whether it was also important for BT to buy MCT from H3G, as to which the position could have been different at different dates. Her submission was that there was no adequate evidence to show a commercial constraint of that kind on BT.

41. The potential dependency of a new or small operator on an undertaking such as BT is one of the reasons why the E2E obligation was provided for and imposed. But for that obligation, Miss Rose argued, BT would have no sufficient incentive to buy MCT from H3G, or not until H3G had become a great deal bigger and more important, so it would have more than enough market power to counteract any ability of H3G to exploit its monopoly position in its own market. However, she went on, the E2E obligation is not unqualified, and only obliges BT to buy on reasonable terms. In the event of a dispute as to whether the terms demanded by H3G, or those offered by BT, are reasonable, Ofcom would have to resolve the dispute under section 185. That is why the scope of Ofcom's dispute resolution powers is relevant to the case. Miss Rose submitted that, if it is right to take into account the fact that BT cannot just walk away, because of the E2E obligation, it must also be necessary to take into account what BT can be required to do, namely to buy MCT at reasonable rates and on reasonable terms. By the same token, it must follow that H3G cannot charge more than reasonable rates to BT for MCT. If so, she asked, where is H3G's ability to act

independently of its customers? All it can do is charge BT (and therefore any other such customers) reasonable rates for the service. That does not suggest that H3G has SMP.

42. There is an issue as to whether, at the relevant times, BT was under a commercial constraint to interconnect with H3G, to protect its own business interests. But leaving that aside, there is an issue of principle as to the relevance of the E2E obligation, and of Ofcom's dispute resolution power. If E2E were ignored altogether then, apart from any commercial constraint, BT would have the ultimate buyer power of being able to walk away and refuse to deal. In that case, Miss Rose submits, H3G plainly would not have SMP, because no-one could be made to deal with it. If E2E, backed up by dispute resolution, is to be brought into account, that question is to what extent and with what effect. Mr Roth Q.C. for Ofcom argues that, if they are taken into account so as to prove that H3G cannot insist on interconnection at other than a reasonable price, and if that is enough to get rid of any risk that H3G has SMP, then the likelihood is that no MNO could be found to have SMP, and that no market assessment under these provisions could ever come to the conclusion that a party in the position of the MNOs had SMP.

The modified Greenfield approach

43. In the light of these contentions, one of the central issues in the case involves a consideration of the relevance to an assessment of SMP of regulatory constraints on the relevant undertakings. For Ofcom it is said that H3G's propositions would deprive the regulatory framework of much of its effect, because the proposition that H3G does not have SMP depends on relying on regulatory factors which would be present in all cases. H3G denies that contention, but accepts that it is necessary to take a view as to which regulatory provisions are to be taken into account in assessing market power and, if so, how.

44. So far as we were shown there is no decided case in which this issue has had to be addressed (other than one in the Bundesverwaltungsgericht, in Germany, to which I will refer at paragraph 52 below), but it features in a decision of the Commission in relation to call termination in Germany, in fact on landlines rather than mobile phones, but the principles are the same. This is decision DE/2005/0144, under the Framework Directive, which was referred to as *RegTP*. In Germany there was one operator in a dominant position in the market generally, Deutsche Telekom (DT), and 53 smaller alternative network operators (ANOs), each of which had a monopoly of call termination on its own network. The German Telecommunications Regulatory Authority, known for short as RegTP, assessed the markets and concluded that the 53 ANOs did not have SMP on their own markets. As required by article 7 of the Framework Directive, it submitted this proposed assessment to the Commission. In the published decision, the Commission gives its reasons for deciding that this assessment was not compatible with Community law, and prohibiting RegTP from proceeding with it. RegTP had come to the view that DT had sufficient CBP to negate any SMP on the part of the ANOs.

45. Because this is the only decision from the Commission on the point, and because it is closely analogous to the present case, I think it appropriate to quote fairly fully from the decision. At paragraphs (10) to (14) the Commission explained the basis of the proposal by RegTP, and the way it was said to be justified under either of two

versions of the Greenfield approach, before going on to examine that approach in detail:

> "(10) In the markets for call termination on individual public telephone networks provided at a fixed location, RegTP finds that each operator has a 100% market share on its respective network. RegTP designates DTAG with SMP on the market for call termination on its network. However, RegTP concludes that the 53 ANOs do not have SMP for call termination on their respective networks, despite their 100% market share. In RegTP's view, DTAG has countervailing buyer power which does not allow each of the alternative network operators to behave to an appreciable extent independently of its competitors (at the retail level) and customers (at the wholesale level, in the relevant market) when offering call termination services.
>
> (11) RegTP recognizes in its notification that its position deviates from the position taken by other national regulatory authorities (NRAs) that have analysed market 9 so far. Generally, NRAs indeed consider that the incumbent's buyer power vis-à-vis the ANOs is limited by the incumbent's obligation to interconnect with the ANOs and by the fact that its own termination tariffs are regulated. The Commission has not opposed these arguments.
>
> (12) RegTP argues its finding of non-SMP for ANOs on the basis of two Greenfield approaches, the so-called "strict Greenfield approach" and the so-called "modified Greenfield approach".
>
> (13) RegTP considers under the "strict Greenfield approach" a scenario under which DTAG is not obliged to interconnect with each of the ANOs. In such a scenario, DTAG could, be it in general or in price negotiations, credibly threaten each ANO not to interconnect or to disconnect and thereby exercise countervailing buyer power.
>
> (14) Under the "modified Greenfield approach", RegTP proceeds on the basis of a scenario in which DTAG is generally obliged to interconnect with ANOs. According to RegTP, such obligation is however imposed on account of the imbalance of power in interconnection negotiations between DTAG and each ANO. It would therefore be methodologically wrong, in RegTP's view, to take this obligation of DTAG into account in the assessment of market power of each ANO. Moreover, the obligation of DTAG to interconnect with and purchase termination services from each ANO would in RegTP's view solely prohibit a refusal to interconnect at reasonable conditions but not oblige DTAG to accept unreasonable conditions for interconnections. Hence, while DTAG would be under an interconnection obligation, it could still refuse unacceptably high call termination rates demanded by an ANO in (price) negotiations, limit the single ANO's freedom to behave to an appreciable extent independently of its competitors or customers and thereby exercise countervailing buyer power."

46. At paragraph (17), the Commission set out its approach in general terms, and said that it did not accept the finding that ANOs did not have SMP:

> "(17) In order to ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives, measures taken by NRAs should be compatible with Community law, and in particular with the objectives and principles of the new regulatory framework. Although NRAs are accorded discretionary powers correlative to the complex character of the economic, factual and legal situations, these factors must be assessed in line with the requirements of the Framework Directive, in particular, its Articles 14 to 16. Therefore an undertaking should be designated to have SMP, if either individually or jointly with others, it enjoys a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. The 100% market share of network operators in the market for call termination on their individual public telephone network provided at a fixed location raises a strong presumption of SMP, save in exceptional circumstances which need to be clearly and unambiguously demonstrated by the NRA. RegTP therefore has not provided sufficient evidence to support a finding of absence of SMP of each ANO on the market for call termination on its individual public telephone networks."

47. Then the Commission examined the ways in which RegTP sought to justify its finding, dealing first with the strict Greenfield approach. This seems to be discredited, but it is useful to see how it was formulated and addressed.

> "(21) Under the so-called "strict Greenfield approach", RegTP considers a scenario under which DTAG is not obliged to interconnect with each of the ANOs. In such a scenario, DTAG could, according to RegTP, credibly threaten each ANO not to interconnect or to disconnect and thereby exercise countervailing buyer power.
>
> (22) The Commission is, however, of the view that there is no legal or economic basis for such a strict Greenfield approach. On the basis of competition rules, applicable under Article 14 and 16 of the Framework Directive, in particular Article 82 of the EC Treaty, an analysis of dominance (i.e. SMP) requires taking into account the concrete economic circumstances including legislative and administrative acts. In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of a SMP finding on the market under consideration but that can have an impact on the SMP finding on the markets under consideration. From a methodological viewpoint obligations flowing from existing regulation, other than the specific regulation imposed on the basis of SMP status in the analysed market, must be taken into consideration when assessing the ability of an undertaking to behave independently of its competitors and customers on that market. In the Commission's view, this could only be otherwise where it is uncertain whether the regulation concerned

will continue to exist throughout the period of the forward-looking assessment.

(23) The purpose of a Greenfield approach is indeed to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition. In other words, any Greenfield approach must ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place. This implies that regulation which will continue to exist throughout the period of the forward-looking assessment independently of a SMP finding on the market concerned, must be taken into account.

(24) RegTP has informed the Commission that it intends to impose an interconnection obligation on DTAG as a consequence of DTAG having SMP on the market for termination of its own network. Such a regulatory obligation, together with any other regulatory obligation imposed on a market other than the one for which the SMP assessment is conducted, must be taken into account.

(25) Accordingly, there is no justification for the proposed strict Greenfield approach."

48. It is fair to say that the Commission also observed that DT had commercial as well as regulatory reasons for buying termination services from the ANOs, as it explained at paragraphs (26) to (30), so that both regulatory and commercial factors ruled out reliance on the strict Greenfield approach:

"(26) RegTP has not demonstrated that DTAG can credibly threaten to cut off its existing interconnection with each of the ANOs. Under the European regulatory framework, each public network operator has a right and, when requested, an obligation to negotiate interconnection agreements in order to ensure provision and interoperability of services. NRAs may also order operators controlling access to end-users to interconnect where necessary to ensure end-to-end connectivity. Further NRAs are to contribute to the development of the internal market by encouraging *inter alia* end-to-end connectivity. If an operator, such as DTAG, were unwilling to interconnect at the request of an ANO or were to cut off an existing interconnection, the ANO could turn to RegTP to seek an interconnection order. These requirements are not dependent on a finding of SMP.

(27) Regardless of the existing regulatory framework set out above, DTAG has little economic incentive either to cut off current interconnection with, or to stop buying termination services from, any particular ANO. According to DTAG, offering its customers the possibility to call all retail customers irrespective of whether they are subscribed to DTAG or an ANO is an important selling point for

DTAG. If DTAG decided not to purchase termination from a certain ANO, this would conversely result in customer dissatisfaction, reputation damage and pressure from consumer organisations as DTAG's retail customers would no longer be ensured end-to-end connectivity.

(28) In addition, if DTAG were to cease to purchase termination from ANOs, this may have the effect of stimulating substitution via carrier selection. There are several long distance carrier (pre-) select operators on the German retail calls markets which are eager to capture market share. In the presence of such carrier (pre-) select operators, a refusal by DTAG to offer its customers certain retail calls services – namely calls to the subscribers of ANOs which DTAG no longer wants to purchase termination services from – could lead DTAG's retail customers to switch to these carrier (pre-) select operators for making such calls. DTAG's retail customers could thus use such carrier (pre-) selection operators to by-pass calls - whose ubiquitous coverage is no longer guaranteed by DTAG – provided of course that those operators are directly or indirectly interconnected with the ANO in question. In such a case, DTAG would lose market share in a core area of its business.

(29) Finally, RegTP has confirmed that DTAG has in practice never ceased to purchase termination services from an ANO, even where ANOs had – against the will of DTAG – on the basis of regulatory intervention raised their termination rates and some of them had cancelled their existing interconnection agreement with DTAG. According to RegTP, DTAG continued to purchase these services voluntarily, without any explicit buying obligation having been imposed on it.

(30) Under the present regulatory framework and prevailing economic circumstances in Germany, the Commission considers it therefore not correct to assess the market power of each of the ANOs as if DTAG would not, through regulation or otherwise, be obliged to interconnect with each of them. RegTP has not provided evidence of DTAG having effectively used buyer power in the face of these regulatory and economic constraints. On the contrary, it seems that DTAG continues to buy termination services voluntarily, even at rates that it does not agree with and that it (at least in part) continues to challenge in court."

49. Then the Commission turned to deal with the modified Greenfield approach, which is that now relied on. The issue on H3G's appeal is what regulatory constraints should, and which should not, be taken into account. That was also an issue in the *RegTP* case. The discussion is at paragraphs (31) to (38).

"(31) Under the modified Greenfield approach, RegTP proceeds on the basis of a scenario that there is an obligation to interconnect on DTAG or that such an obligation will be imposed on the basis of DTAG's SMP status on the market for termination of calls on its own

network. RegTP, however, questions whether this obligation can be taken into account for assessing the market power of each of the ANOs, as the obligation would be imposed precisely to redress the equilibrium in interconnection negotiations between DTAG and each ANO. RegTP considers that taking the interconnection obligation into account could under such circumstances be circular.

(32) The Commission does not share RegTP views. The source of an ANO's market power for termination on its own network is not the regulatory requirement on DTAG to interconnect, but the ANO's 100% market share and the control over its network and over a service for which no substitute exists. Whether that market power is constrained to such an extent that the ANO cannot behave independently of its competitors (at the retail level) and of consumers should then be assessed on the basis of the concrete economic circumstances, in particular DTAG's buyer power. This approach does not lead to circularity, because ANOs' SMP does not result from interconnection obligation, but rather from their 100% market shares. Therefore, when assessing DTAG's buyer power its interconnection obligation must be taken into account.

(33) The Commission acknowledges that the market definition – call termination on individual networks – does not automatically mean that every network operator has significant market power; this depends on the degree of any countervailing buyer power and other factors potentially limiting that market power. While small networks will normally face greater buyer power than large networks, the regulatory requirements referred to in paragraph 26 above will normally redress this imbalance of market power. However, this would not endorse any attempt by a small ANO to set excessive termination rates. It may still be easier for a large network than for a small network to initiate a price raise, but this risk is essentially removed if the large network operator's termination rates are regulated (as in case for DTAG).

(34) Contrary to other NRAs that have notified market 9 so far, RegTP asserts that DTAG's buyer power limits the ability of each ANO to behave independently of its customers and competitors (at the retail level). RegTP does, however, not present concrete evidence that DTAG has effectively exercised such buyer power. In fact what appears to have constrained the individual ANOs' call termination rates in the past is not the countervailing buyer power on the part of DTAG, but the regulatory regime under which RegTP has introduced a *de facto* ex ante price regulation for ANOs' termination rates.

(35) Presently, under the German law, it seems that the interconnection charges (i.e. also call termination rates) of a non-SMP operator may be price regulated in case of failure of private interconnection negotiations and without the need for any prior SMP finding. Against this regulatory background and following applications by at least 37 ANOs, RegTP has since mid September 2004 ruled that each requesting ANO is allowed to charge 25% more

for the call termination on its respective network than DTAG. This implies that call termination rates of (a large proportion of) ANO are constrained by a regulatory ceiling rather than DTAG exercising countervailing buyer power. Such a regulatory price ceiling preventing ANOs from unilaterally raising their call termination charges appears to support the notion of ANOs attempting to set call termination charges independently of their customers and competitors (at the retail level) and might indicate that the designation of SMP status not only with regard to DTAG but also for these alternative operators would be warranted.

(36) It is generally considered that countervailing buyer power of a large operator is essentially lost if its call termination rates are additionally regulated in the market for call termination on that operator's individual public telephone network. DTAG's call termination rates are currently regulated and it is the Commission's understanding that they will continue to be regulated as a consequence of RegTP's finding that DTAG has SMP on the market for call termination on its network. In view of DTAG's own termination rates being regulated, and given that it cannot realistically threaten to stop purchasing termination services (as set out above), DTAG would therefore be deprived of any bargaining tool in the form of a corresponding increase in its own tariffs when negotiating termination rates on that ANO's network.

(37) RegTP does not contest that DTAG's own termination rates will (continue to) be price regulated, nor does it contest that, even in a Greenfield approach, this element is to be taken into account when assessing DTAG's buyer power. In RegTP's view, price regulation of DTAG's own termination rates does however not significantly limit its buyer power. RegTP argues to the contrary that it reduces the risk of collusion whereby both DTAG and each ANO would have a joint interest in raising termination rates. It may indeed be correct that DTAG's own price regulation could lower the risk of potential collusion, the DTAG could thus from this perspective have a greater incentive to exercise buyer power. However, as regards the *ability* rather than the incentive of DTAG to exert buyer power, the regulation of DTAG's own termination rates undisputedly removes a potential instrument of buyer power.

(38) For the above reasons, the Commission considers that also under the modified Greenfield approach, RegTP has not provided convincing evidence to support the absence of SMP of each ANO."

50. Thus the Commission considered that it was correct to take into account the fact that DT must interconnect with the ANOs (whether for regulatory or for commercial reasons) and therefore could not exercise buyer power by refusing to deal. It rejected (though without giving separate reasons for this) RegTP's contention, recorded at paragraph (14), that because the obligation to interconnect only required DT to buy termination services on reasonable conditions, it could therefore resist any unreasonable demands by an ANO, thereby limiting the ability of an ANO to behave

51. On the basis of that decision, the Commission required RegTP to withdraw the proposed measures. By the time a new proposed measure was notified, the relevant German regulatory authority had changed to the Federal Network Agency (BNetzA for short), and the proposal which it put forward designated all the ANOs as having SMP on the market for call termination on their respective networks. In those circumstances, the Commission did not intervene, and the designation proceeded. It is unnecessary to refer to any details of the published decision.

52. We were also shown a decision of the German Federal Administrative Court dated 2 April 2008, on an appeal by a mobile network operator against a decision by BNetzA that the operator had SMP on its network, and imposing various regulatory constraints on it. The court held to be valid the approach of the regulator to the identification of SMP, primarily by reference to the existence and extent of CBP on the part of, above all, DT. The court referred to the *RegTP* decision, and said that, on the basis of that decision, BNetzA had concluded correctly that:

> "in view of its own existing or certainly foreseeable regulatory obligations, not even [DT], as the largest fixed network operator, even allowing for leverage from the inclusion of other fields of business, had sufficient possibilities for effectively controlling pricing behaviour on the mobile termination markets through direct countervailing buyer power."

53. As the Commission said in paragraph (23) of the *RegTP* decision, the point of the modified Greenfield approach is to avoid circularity in relation to a market assessment as regards SMP. SMP is not to be found to be absent from a market if its absence is the result of regulation which is in place. Correspondingly, looking forward, an undertaking which would otherwise have SMP is not to be entitled to argue that it does not have it because its freedom of operation is or would be limited (directly or indirectly) by regulatory provisions such as are designed to be put in place in order to constrain the exercise of SMP. Whether a market is "effectively competitive" must be assessed regardless of the regulatory constraints that might be imposed if it is found that it is not. Otherwise the regulatory regime would in this respect be self-defeating.

54. Miss Rose did not argue for all regulatory provisions to be ignored, but did point out that, if BT's E2E obligation were not brought into account, then there would, apparently, be nothing that would constrain BT from refusing to deal with H3G, unless it were shown that BT could not afford not to do so for commercial reasons. She submitted that no such commercial constraints existed in 2004 or in 2007, so that the finding of SMP had to be justified by reference to regulatory constraints on BT.

55. If, however, the E2E obligation is to be taken into account, she argued, it must be seen as a whole, including the feature that BT could only be required to interconnect on reasonable conditions. Conversely, therefore, it was not open to H3G to put forward whatever conditions it liked and to require BT to buy MCT services on that basis.

Accordingly, she submitted, H3G was not free to act independently of its customers, and therefore did not have SMP.

56. As I have said, the reasoning of RegTP in declining to assess the ANOs as having SMP included a proposition similar to that advanced by Miss Rose, that H3G was not free to act independently of its customers – particularly BT – because BT could refuse to interconnect except on reasonable terms. The Commission ruled that this was not correct. Since the requirement on an operator in the position of BT to interconnect is based on article 5 of the Access Directive, and the obligation must be proportionate (hence it cannot be imposed so as to require connection otherwise than on reasonable terms), it would otherwise be an answer to an assessment of SMP on any undertaking in the position of the ANOs in the *RegTP* case, or of H3G in the present case. It is clear that, if H3G's argument is correct, it is, at the very least, highly likely to apply to all the other four MNOs in the UK market, as well as to MNOs in the market in other countries in the EU.

57. The debate about this aspect of the regulatory regime extended beyond the E2E obligation to Ofcom's dispute resolution powers, in section 185 of the Act, derived from article 20 of the Framework Directive. It is clear from paragraph 3 of the article, and from section 4(1)(c) of the Act, that the process of resolving a dispute is part of Ofcom's regulatory functions. Ofcom must, in resolving a dispute, act in accordance with the relevant Community requirements, derived from article 8 of the Framework Directive. In particular, of course, it must promote competition.

58. The Tribunal recognised this characteristic of Ofcom's dispute resolution powers. At paragraph 107 of *H3G2* it said:

> "Dispute resolution is not intended to operate as ancillary to pre-existing regulatory constraints. It is a form of regulation in its own right so that the fixing of the price at the end of the dispute resolution process does amount to a form of price regulation by OFCOM of H3G. This does not mean that the regulation has to be of the same kind as is imposed as a price control condition on a party that is found to have SMP. As the Tribunal said in *H3G (1)*, the dispute resolution power and the power to set SMP conditions exist in parallel. But it is nonetheless a form of regulation."

59. Then the Tribunal considered the arguments as to whether, on that footing, the effects of the dispute resolution power should be ignored under the modified Greenfield approach, reviewing *RegTP* for that purpose. At paragraph 122 the Tribunal said that the dispute resolution powers should be ignored.

> "The Tribunal's conclusion on this point is that the dispute resolution powers of OFCOM under section 185 of the 2003 Act should be disregarded under the application of the modified greenfield approach. The exercise of OFCOM's dispute resolution powers is a form of regulation which has the effect of curbing H3G's exercise of market power even though that may not be its sole or even main aim. If H3G were to propose an abusively high price for mobile call termination whether during initial negotiations for interconnection or during the currency of an interconnection agreement, BT could refuse to accept

> that price and refer the matter to OFCOM for resolution. As we have found, OFCOM would be required in resolving the dispute to set a price which was below the level which constitutes an abuse of H3G's dominant position. If BT chose, for its own commercial reasons, to accept an abusively high price, and simply pass the cost on to its own customers, it would be open to OFCOM to intervene in the exercise of its powers under section 105 of the 2003 Act or to open an investigation under Article 82 EC or Chapter II of the 1998 Act. Alternatively a third party, for example a transit customer, who has seen an increase in the price of transit might bring an action under competition law challenging the price set by H3G. All these possibilities are ways in which regulatory intervention could be brought to bear to prevent H3G from charging an abusive price or from exercising its market power in some other way when setting the terms and conditions on which it supplies mobile call termination. It is important not to lose sight of the overall purpose of examining this question which is to determine whether the market for mobile call termination on H3G's network is effectively competitive within the meaning of the Framework Directive and, if it is not, whether H3G has significant market power. The fact that a company with a large market share is constrained in its pricing decisions by the threat of *ex post* regulation of one sort or other does not mean that the company is not dominant."

60. The reference in the fourth sentence of that paragraph to the price which Ofcom would be required to set is to the part of the Tribunal's judgment which H3G challenges under the first of its grounds of appeal. However, even if H3G's point on that were accepted, so that Ofcom could not properly set a price which is above the competitive level under their dispute resolution powers, the point made in paragraph 122 would not be affected. The essence of the point is made in the last sentence. The possibility or probability of ex post regulation (such as fixing a reasonable price by dispute resolution) may in fact operate as a constraint on the freedom of an undertaking which has a large market share, but it is not relevant to a decision as to whether that undertaking has SMP.

61. A question as to how an undertaking would operate on a market cannot be answered, in this context, by saying that it would behave in a way that would comply with the regulatory controls that might be imposed on it if it did not. That would result in a regulatory system being self-defeating. Its existence would mean that the mischief which it exists to deal with would be found not to be present because of the very existence of the system, thereby negating, in theory, the conditions for the application of regulatory control but leaving it open to the undertaking, in practice, to operate (for a time at least) uncontrolled by regulation.

62. Miss Rose argued that, as enunciated in *RegTP* at paragraph (22), the modified Greenfield approach does not require or permit to be ignored any regulatory obligations that exist independently of an SMP finding on the market in question, nor obligations flowing from existing regulation other than that which is imposed on the basis of SMP status on the market in question. She went on to submit that, on that basis, the dispute resolution power and its possible effects on the relevant

undertakings cannot be ignored, because it exists entirely independent of a finding of SMP. Disputes can be resolved between undertakings neither of which has SMP, and such disputes are not, of course, limited to those arising between parties, one of which is subject to an E2E obligation. Therefore, she argued, the dispute resolution provision and its consequences are "regulatory obligations that exist independently of an SMP finding on the market under consideration", which have to be taken into account because of what was said in paragraph (22) of *RegTP*.

63. She also submitted that Ofcom's dispute resolution powers were relevant to the extent of BT's CBP, not to whether H3G had SMP, and therefore they should not be ignored. However, in practice, these two issues are the two sides of the same coin: if BT's CBP is constrained, then H3G's market power is not. The fact that dispute resolution may be of assistance to a party which does not have significant CBP is irrelevant to the present case.

64. As it seems to me, one of the critical aspects of the modified Greenfield approach is that it requires that a feature of the regulatory regime be ignored, in a market assessment as to whether an undertaking has SMP or not, if otherwise it would itself provide the answer to the question whether the undertaking does or does not have SMP. That is the basis of what the Commission said at paragraph (23) of *RegTP*. In that part of the decision, the Commission was addressing the strict Greenfield approach, and in particular the proposition that even the E2E obligation should be ignored, leaving DT (or BT in the present case) free to refuse to deal with the ANOs (or the MNOs in this case) and thus with untrammelled CBP. These passages do not provide Miss Rose with any support for her argument that the limitation on BT's E2E obligation, by which it can only be required to connect on reasonable terms, shows that BT does have adequate CBP, and therefore H3G does not have SMP. If that had been a valid point, it would have produced the opposite result in *RegTP* when the Commission came to examine the modified Greenfield approach, later in its decision.

65. Miss Rose might respond to the effect that the Tribunal's approach, set out in paragraph 122 of *H3G2*, proves too much, and that network operators, which intrinsically have the whole of the market for call termination on their own networks, would always have SMP. On the contrary, she could say, what the Commission said at paragraph (33) of *RegTP* shows that this is not always the case, and that it will depend on the particular facts, not on legal presumptions. As to that, for an undertaking to have a 100% position on a market raises a strong presumption of SMP. That presumption can be rebutted, but only on the basis of facts as regards the commercial context which show that potential buyers of the call termination service are in truth free to act in a way which counteracts the SMP that the network operator would otherwise have. On the facts of *RegTP* it was not negated by the fact that, although DT could be required to interconnect and to buy call termination services from the ANOs, it could not be forced to do so except on reasonable terms. If that factor did not save the ANOs from a finding of SMP, as it did not, I do not see how the same factor can save H3G from such a finding.

66. A regulatory provision which, if used, would have an effect on the freedom of an operator to act independently of its customers cannot be allowed to provide an a priori answer to the question whether that operator does or does not have SMP. It does not seem to me to matter whether the provision is one which affects, directly, the operator in question or a third party dealing with it, such as BT in the present case, the extent

of whose CBP is in issue and would affect the operator's freedom in relation to its customers. Accordingly it does not seem to me helpful or relevant to consider whether the dispute resolution powers are to be seen, in this context, as affecting BT or H3G or both. Either way, in the present situation, if it were taken into account in the way Miss Rose submitted is correct, it would provide an automatic answer to the question, and would not allow a finding of SMP in any such case. That cannot be a correct application of the legislation.

67. Miss Rose's submission, based on paragraph (22) of *RegTP*, that dispute resolution cannot be ignored because it is a regulatory obligation that exists independently of an SMP finding on the market in question, is fairly made, so far as the express reasoning of the Commission is concerned, but it ignores that fact that, in that decision itself, the Commission did not accept the very features on which Miss Rose relies as constraining the freedom of the ANOs to act independently of their customers. I prefer to rely on the actual decision, on its facts, which are closely analogous with the present case, regardless of what might be deduced from one or another phrase or sentence in the expression of the Commission's reasoning.

68. As is said in recital (27) to the Framework Directive, ex ante regulatory obligations are only to be imposed "where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem". If the existence of the national regulatory authority's dispute resolution power, together with the feature of the E2E obligation that (because of the need for proportionality) BT cannot be required to buy MCT otherwise than on reasonable terms, were "sufficient to address the problem", which is in essence what Miss Rose submits, the conditions for the imposition of ex ante regulatory obligations in this kind of case could never be satisfied.

69. As I have mentioned, we had conflicting submissions as to whether BT was under commercial constraints which limited its CBP vis-à-vis H3G. Such constraints on Deutsche Telekom were mentioned in the Commission's decision *RegTP*. I can deal with this briefly. In Ofcom's MCT statement in 2007, the point was addressed at paragraphs 5.135 to 5.147. For reasons identified at paragraphs 5.141-2 and others given at paragraphs 5.144 and 5.146-7, there were several factors (including those mentioned at paragraphs (27) and (28) of the *RegTP* decision) which gave BT "a significant commercial imperative" to provide its "subscribers with the opportunity to call each of the mobile networks", and that even when H3G was a newcomer in the market in 2002 BT "judged that it had a commercial incentive to purchase call termination services from H3G": paragraph 5.142.

70. Miss Rose argued that this could not stand with evidence put in by H3G, to which Ofcom refer at paragraphs 5.163 to 5.168 of the MCT Statement, consisting of a paper by an expert, Dr David Harbord, and an article by him and Professor Ken Binmore published in the Journal of Competition Law and Economics in 2005. She argued that Ofcom only disregarded their conclusion on the basis of an erroneous view of what the outcome of dispute resolution might be (that is to say, the issue on the first ground of appeal) and pointed out, at paragraph 5.166 of the MCT Statement, the comment that if the assumptions of the two experts were correct, it was probable that the outcome of the negotiation between BT and H3G would be that charges would be set either based on the average 2G rates (i.e. those charged by the other MNOs) or based

on H3G's costs. It does not seem to me that Miss Rose's submission is correct, because at paragraph 5.167, referring back to paragraph 4.45, Ofcom record that the charges currently made by H3G "are significantly above Ofcom's view of the appropriate cost-based charges for MCT". Corresponding comments appear in Ofcom's reassessment of the position as it was in 2004, published at the same time.

71. The Tribunal referred to this subject, and some of this material, at paragraphs 55 to 57 of *H3G2*. More could be said about this point, but since it is not critical to the outcome of the case, as I see it, I do not intend to say more than that, for these reasons, it seems to me that Ofcom's view that BT was under strong commercial pressure, even in 2004, to buy MCT from H3G, was soundly based and provides an additional justification for the conclusion, reached by Ofcom and upheld by the Tribunal, that BT did not have so much CBP as to counteract the SMP which H3G, as a monopolist, would have, prima facie, on its own market.

72. A separate issue, which only arises if the dispute resolution power does have to be brought into account, is whether it would necessarily result in the charge for MCT being fixed at a competitive level. H3G's argument is that dispute resolution is not merely an exercise akin to arbitration by an independent third party, it is part of Ofcom's regulatory functions. That being so, it is said, it should be inconceivable that Ofcom could fix a price which is inconsistent with the pro-competitive objectives which it is required to promote under the Framework Directive. The Tribunal decided in *H3G2* that Ofcom might lawfully fix a rate of charge that was appreciably above the competitive level, though not so high as to be abusive: see paragraphs 89 to 93. Miss Rose submits that this cannot be correct, in which she is supported by Mr Anderson Q.C. on behalf of BT. This is her first ground of appeal, and is only relevant if the dispute resolution powers are themselves found to be relevant, despite the second ground of appeal. In my judgment it is not necessary to resolve that issue, because the second ground of appeal does not succeed, the dispute resolution provisions are to be ignored, and it therefore does not matter whether Miss Rose is right or the Tribunal is right as to the possible lawful outcomes of the process. I can see that it is an important point, in itself, and I can see a good deal of force in Miss Rose's submissions on the point, but since it is not necessary, I do not propose to lengthen or delay this judgment still further by discussing a point not essential to my reasoning.

Price control

73. The third ground of appeal is separate and distinct, and relates specifically to the imposition of price control on H3G for 2007 to 2011. Miss Rose argued that price control depends, under section 88, on whether Ofcom conclude that there is a relevant risk that the undertaking might so fix and maintain some or all of its prices at an excessively high level, with adverse consequences for end-users. It is said that Ofcom did not come to that conclusion (or if they did, they had no proper grounds for doing so) and therefore could not impose price control. Ofcom's primary basis for imposing price control was not that H3G had shown any specific tendency to impose excessive prices, but rather that it had the ability to charge excessive prices, and an incentive to do so, and there was no other factor in the market which would remove that risk in the absence of ex ante price regulation, as there had been in 2004, when H3G was so new in the market. Nor did Ofcom consider that dispute resolution and the E2E obligation could be brought into account to counteract this, for both the reasons already

mentioned, namely that the price fixed might be above the competitive level, and that it was in any event irrelevant. So far as the first of these points is concerned Miss Rose showed us that the Tribunal did not conclude that Ofcom could fix a price which was excessively high, so as to be within section 88: see paragraphs 91-2, and paragraph 93 referring back to the penultimate sentence of paragraph 86, as well as the reference earlier in paragraph 86 to a price which is higher than the most efficient level but within the bounds of reasonableness "without giving rise to any significant detriment to end-users".

74. The debate under sections 87 and 88 proceeds on the footing that there has already been a finding of SMP on the relevant market. It can fairly be said that the structure of the sections shows that it does not follow, merely because there has been a finding of SMP, that price controls can be imposed. Otherwise it would not have been necessary to prescribe the additional requirement that section 88 be satisfied. The provisions of section 88 derive from article 13 of the Access Directive, quoted above at paragraph [24]. Reading the provisions as to price control in their context in the Access Directive, while it is a legitimate point that the imposition of price controls is not necessarily to be possible in every case where there has been a finding of SMP, it seems to me that article 13 does not suggest that it will necessarily be unusual or exceptional that price controls are imposed. "Situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level … to the detriment of end users" (to quote from article 13) would not be uncommon when a finding of SMP has been made.

75. At this stage it must be clear that the modified Greenfield approach would exclude from consideration the fact (assuming this in Miss Rose's favour) that, by virtue of resort to Ofcom's dispute resolution powers, neither BT nor H3G could impose unreasonable terms on the other. Since that factor would go to the question whether H3G has SMP, to which, for reasons already given, it is irrelevant, it must be all the more irrelevant once it has been established that H3G does have SMP. It would entirely subvert the regulatory structure under the CRF in SMP cases if it were open to an undertaking with SMP to avoid price control by means of this argument.

76. Miss Rose's other argument is that there was in any event no factual basis on which Ofcom could conclude that H3G might fix or maintain its prices at an excessively high level with adverse consequences for end-users. Ofcom dealt with this, in relation to each of the MNOs, in section 7 of the MCT statement. Paragraph 7.1 states Ofcom's belief "that absent regulation, or the threat of regulation, MNOs would have the ability and incentive to set excessive charges for MCT." The rest of the section is largely devoted to a discussion of whether the effect of excessive charges would in fact be detrimental to end-users, with the conclusion that it would be. The Tribunal agreed with Ofcom's reasoning in this section, and their conclusion that each MNO might impose excessive charges, specifically (as regards the Tribunal's decision) as this applied to H3G: see paragraphs 284 to 286. There was also, in any event, some evidence that H3G would take advantage of its SMP, discussed by the Tribunal at paragraphs 289 and following. In the light of this, it seems to me that H3G could only show that section 88 was not satisfied by reference to the regulatory powers to control its prices, but that is a circular argument of exactly the kind that the modified Greenfield approach excludes.

77. For those reasons I conclude that the third ground of appeal fails, as well as the second. I do not need to decide on the first ground, because it would only arise if the second succeeded. I would hold that Ofcom were justified in finding that H3G had SMP in 2004, and also that in 2007 not only did it have SMP but that it might set excessive charges for MCT, so as to justify price control under section 88. It follows that the appeal should be dismissed.

78. We had some submissions about whether questions should be referred to the European Court of Justice. Although it has been necessary in the course of this appeal to consider the ambit and application of the modified Greenfield approach, which has been developed as a European Community concept in this particular context, it does not seem to me that this is a case in which a reference would be useful, still less in which it is necessary. The essential nature of the modified Greenfield concept is clear: it is a device for avoiding circularity in the application of a complex and interlocking regulatory system. How it applies in any given type of case will depend on what would be the result if it did not apply, and what would be the risk of circularity. In the present case it seems to me clear that the approach has to be applied in the ways that I have described, because otherwise the answer would be determined in advance in every such case. So far as the second ground of appeal is concerned the case is, in essence, on all fours with the *RegTP* decision by the Commission, and I see no need or reason to seek any further clarification of the right approach, since we have that Commission decision as guidance, of which Ofcom were bound to take due account.

Glossary of acronyms

1. General

BT: the intervener, British Telecommunications plc

CAT: Competition Appeal Tribunal

CBP: Countervailing buyer power (paragraph 2)

CRF: Common Regulatory Framework (see paragraph 1)

E2E: End-to-end connectivity (paragraph 3)

H3G: the appellant, Hutchison 3G UK Ltd

H3G1: the CAT's judgment on H3G's first appeal against Ofcom (para 7)

H3G2: the CAT's judgment on H3G's second appeal against Ofcom, from which this appeal is brought (paragraph 7)

MCT: Mobile call termination (see paragraph 1)

MNO: Mobile network operator

Ofcom: the respondent, the Office of Communications

SMP: Significant market power (paragraph 2)

TRD: Termination Rate Disputes (paragraph 7)

2. relating to the Commission's decision *RegTP*

ANOs: Alternative network operators in Germany

BNetzA: the successor to RegTP as German National regulatory authority: see paragraph 51

DT: Deutsche Telekom AG

RegTP The German national regulatory authority in place in 2005, and (in italics) the reference for a decision by the Commission concerning a proposed SMP determination by it (see paragraph 44)

Lord Justice Etherton

79. I agree that this appeal should be dismissed. The Competition Appeal Tribunal ("the Tribunal") decided correctly as a matter of law in its judgment dated 20 May 2008 ("the Decision") that the dispute resolution powers of Ofcom under s. 185 of the Communications Act 2003 ("the 2003 Act") should be disregarded when considering whether Hutchison 3G UK Limited ("H3G") had "significant market power" ("SMP") in the market for wholesale mobile voice call termination on H3G's network. The Tribunal was entitled to reach the conclusion, which it did on the facts, that British Telecommunications plc ("BT") did not have sufficient countervailing buyer power ("CBP") to preclude SMP on the part of H3G. That is sufficient to dispose of this appeal from the Decision both on SMP and on price control.

General points

80. In deciding the appeal, the following general points are important.

81. The issues on the appeal arise out of the European "Common Regulatory Framework" ("the CRF"), which took effect across the European Community ("the EC") in July 2003. The CRF comprises five Directives, including, in particular, Directive 2002/21/EC (known as the Framework Directive ("FD")) and Directive 2002/19/EC (known as the Access Directive ("AD")). The 2003 Act gives effect to the CRF.

82. The 2003 Act must be interpreted consistently with the CRF, which it was intended to implement; and the CRF itself must be interpreted as a coherent whole, in the light of its purpose, viewed in its economic and commercial context: *Shanning International Limited v Lloyds TSB Bank plc* [2001] UKHL 31 at para [24]. The CRF was intended to establish a harmonised framework for the regulation of public electronic communications networks, electronic communications services and associated facilities and services across the member states of the EC, with a view to preventing ineffective competition and to ensuring the development of a competitive market: FD recitals (25) and (27) and art 8. That objective includes encouraging and ensuring adequate access and interconnection to services so as to promote efficiency, sustainable competition, and giving the maximum benefit to end-users: FD art. 5(1).

83. In the FD the market for call termination on public mobile telephone networks was identified as a market which has characteristics that may justify the imposition of regulatory obligations: FD art 15 and Annex 1. In 2003 and 2007 the European Commission ("the Commission") recommended that the market for voice call termination on individual mobile networks be analysed to see if they were effectively

competitive. The first stage of the market review requires an analysis as to whether the market is effectively competitive or there is SMP: FD art 16. If it is not effectively competitive, the second stage of the market review requires that consideration be given as to what obligations should be imposed on the operator or operators that have been designated as having SMP: AD art 8 ff, and the 2003 Act s.88.

84. SMP is a European concept, which is equivalent to dominance: 2003 Act s. 78(1). H3G had SMP if its economic strength enabled it to behave, to an appreciable extent, independently of competitors, customers and, ultimately, consumers: FD art 14.

85. The CRF and the 2003 Act provide for what are generally called *ex ante* regulation and *ex post* regulation. *Ex ante* regulation includes obligations that National Regulatory Authorities ("NRAs"), here the Office of Communications ("Ofcom"), may impose on particular undertakings that have been found to have SMP, including, in particular, access to markets and price controls (with an appeal from Ofcom on price control matters to the Competition Tribunal and on other matters to the Tribunal). *Ex post* regulation includes resolution of disputes by NRAs in connection with obligations arising under any of the CRF Directives, the 2003 Act, and the application of Article 82 of the EC Treaty or Chapter II of the Competition Act 1998 as regards abuse of a dominant position. The two types of regulation exist side by side, that is to say, in the case of any market *ex ante* regulation is supplemented by *ex post* regulation which may be required from time to time to deal with particular disputes or abuse in that market.

86. So, in the present case, *ex ante* regulation includes the obligation imposed on BT by Ofcom by notification published on 13 September 2006 not to refuse a reasonable request by any network operator, including H3G, for BT to purchase termination of voice calls on that network operator's network. That obligation was to achieve "end to end connectivity" ("E2E"), that is to say the ability to make calls between (among others) retail customers of BT and other network operators. BT's E2E obligation was an access related condition under ss. 45(2)(ii), 73 and 74 of the 2003 Act (giving effect to AD art 5(1) and (3)). *Ex ante* regulation also includes the price controls which Ofcom, having found SMP on the part of H3G, seeks to impose on H3G by way of an SMP condition under the 2003 Act ss. 45(2)(iv) and 87(9) and which H3G seeks to resist on this appeal. By contrast, s.185 of the 2003 Act (giving effect to FD recital (32) and art. 20, and AD art 5(4)), which provides, for example, for the reference to Ofcom of particular disputes between communication providers and others, is *ex post* regulation. Section 185(1)(d) mentions specifically disputes over access related conditions, such as BT's E2E obligation.

87. The nature, scale and scope of the two different types of regulation, *ex ante* and *ex post*, are quite different. Investigation of whether a network operator has SMP, and, if so, whether SMP conditions should be imposed is a lengthy, painstaking and detailed process pursuant to s. 79 of the 2003 Act (giving effect to FD art 16). Guidance on how it should be carried out has been given by the Commission: [2002] OJ C165/6 ("the Commission Guidelines"). As is shown in the present case, it can take years to complete. By contrast, dispute resolution by Ofcom under s. 185 must, save in exceptional circumstances, be completed within 4 months, at the latest: 2003 Act s. 188(5) and (6). Dispute resolution by Ofcom under s.185 was described by the Tribunal in its judgment in *T-Mobile (UK) Limited v Office of Communications*

[2008] CAT 19 at paragraph [5] as "intended to be a rapid and relatively informal means of breaking a commercial deadlock between the parties".

88. In its statement published on 27 March 2007 ("the MCT Statement") Ofcom designated mobile voice call termination on each mobile network in the United Kingdom as a distinct market. The NRAs in all the other member states of the European Union ("the EU") have made a similar ruling in their respective countries.

89. H3G, like the other mobile network operators ("MNOs"), has 100 per cent share of the market in terminating calls on its own network. There is therefore a strong starting assumption that it has SMP in relation to access to its network. As expressed in the Commission's decision in Case DE/2005/0144 *RegTP* (17.5.2005) (*"RegTP"*) at paragraph (17):

> "The 100% market share of network operators in the market for call termination on their individual public telephone network … raises a strong presumption of SMP, save in exceptional circumstances which need to be clearly and unambiguously demonstrated by the NRA."

90. "Convincing" evidence is required to rebut the presumption: ibid para. (38).

91. Whether or not H3G is able to exercise SMP on that market will depend, therefore, on the extent to which it can show that BT, as by far the largest buyer of that service, has sufficient countervailing buyer power ("CBP") to off-set what would otherwise be the significant power of H3G in that market: 2003 Act s. 78(1). CBP is not a statutorily defined expression, but is part of the overall assessment of whether a network operator has SMP: see para 78 of the Commission Guidelines.

92. In determining whether or not H3G has SMP, a so-called "Greenfield" approach is to be adopted. This is an analytical approach which is intended to avoid circularity, and to give purposive and workable effect to the CRF, by requiring regulation to be ignored which would otherwise distort inappropriately the answer to the enquiry whether a network operator has SMP. It was explained in the following way by the Commission in *RegTP* at paragraphs (22) and (23):

> "(22) … [A]n analysis of dominance (i.e. SMP) requires taking into account the concrete economic circumstances including legislative and administrative acts. In economic terms, it is not appropriate to exclude regulatory obligations that exist independently of a SMP finding on the market under consideration but that can have an impact on the SMP finding on the markets under consideration …
>
> (23) The purpose of a Greenfield approach is … to avoid circularity in the market analysis by avoiding that, when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation where there is no longer effective competition. In other words, any Greenfield approach must ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation in place. This implies that

regulation which will continue to exist throughout the period of the forward-looking assessment independently of a SMP finding on the market concerned, must be taken into account".

93. That is the co-called "modified Greenfield approach", which requires BT's E2E obligation to be taken into account in the SMP enquiry. It is to be distinguished from a "strict Greenfield approach", which was rejected by the Commission in *RegTP*, under which an E2E obligation would be ignored. At the heart of this appeal is the relevance and impact of BT's E2E obligation on the issue whether H3G has SMP.

Appeal Ground 2

94. The Tribunal concluded that, although BT's E2E obligation had to be taken into account, the modified Greenfield approach required the dispute resolution powers of Ofcom under s. 185 of the 2003 Act to be ignored since they operate as a regulatory restraint on what H3G can charge BT for interconnection. H3G maintains that is incorrect. It further maintains that the Tribunal was wrong to find that Ofcom could determine a price dispute with BT by setting a price appreciably above the competitive level. If H3G is correct on both those points, then BT plainly had sufficient CBP to preclude SMP on the part of H3G.

95. That brief summary does not do full justice to the excellent submissions of Ms Dinah Rose Q.C. on this part of the appeal. Her sophisticated analysis proceeded along the following lines. On the facts, BT had CBP because it was a very large, experienced, knowledgeable and price sensitive purchaser, whereas H3G was a small, new entrant to the mobile telephone market, and would speedily have gone out of business if BT refused to connect with it. BT's E2E obligation was imposed in order to correct that imbalance. That obligation was plainly relevant to, and reduced, BT's CBP, but not to such an extent as to make H3G dominant and so give it SMP. That is because BT could only be required to connect on reasonable terms and conditions, and such terms and conditions would not be reasonable if they were such as to confer SMP on H3G. If a dispute as to the reasonableness of those terms and conditions was referred to Ofcom under s. 185 of the 2003 Act, Ofcom could not set a price appreciably above the competitive level, that is to say at a level which distorts competition. It was proper to have regard to Ofcom's dispute resolution powers, even under a modified Greenfield approach, since, as part of the E2E obligation, they were part of the regulatory framework for restraining abuse by BT of its superior market strength. That is to say, such regulation included regulation of BT's fixed termination charges, its E2E obligation, and potential enforcement of that obligation by dispute resolution. The latter was not regulation of H3G. In any event, the Tribunal should not have decided otherwise, since Ofcom itself, prior to the appeal to the Tribunal from the MCT Statement, acted and reached its conclusion on H3G's SMP on the basis that the s. 185 dispute resolution powers were to be taken into account in connection with BT's E2E obligation. That approach of Ofcom, prior to the appeal to the Tribunal, was consistent with the earlier judgment of the Tribunal in *Hutchison 3G (UK) Limited v Office of Communications* [2005] CAT 39 ("the 2005 Decision") on H3G's successful appeal from Ofcom's determination in its statement dated 1 June 2004 that H3G had SMP. The 2005 Decision was never appealed. Even if Ofcom's dispute resolution powers were ignored under the modified Greenfield approach, it still remained the case that BT could only be required to connect on reasonable terms and conditions. BT was in a sufficiently strong commercial position, in comparison with

H3G, that there was no reason to believe that it would agree to unreasonable terms demanded by H3G, that is to say, for example, a price so appreciably above the competitive level as to render H3G dominant in the market. Alternatively, the Tribunal ought to have remitted the case to Ofcom for reconsideration since Ofcom itself had never considered the position as regards H3G's SMP if Ofcom's dispute resolution powers under s. 185 were ignored.

96. In my judgment, there are short answers to those points, attractively put as they were.

97. Whether or not the modified Greenfield approach required Ofcom's dispute resolution powers to be ignored (as a constraint on H3G) in the context of BT's E2E obligation is a matter of law. I see no good reason why Ofcom should not have been entitled to change its position on the point at the stage of the appeal before the Tribunal. The appeal is an appeal "on the merits": 2003 Act s. 195(2); *Freeserve.Com plc v Director General of Telecommunications* [2003] CAT 5, esp. at paras. [106] – [113]. The 2005 Decision did not preclude the Tribunal considering the matter. The 2005 Decision was essentially concerned with a different argument, and was neither clear nor consistent on the point. In her skeleton argument Ms Rose relied on the decision in *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] ECC 3, but that case does not seem to me materially to assist H3G. In that case the Director General of Fair Trading ("the OFT") was not allowed to rely before the Tribunal on certain new evidence to justify a finding by the OFT of abuse of a dominant position. The Tribunal acknowledged, however, that it had a discretion to admit new evidence, and that the manner in which the discretion would be exercised would depend upon the particular facts and circumstances. The Tribunal did in fact decide to permit certain new evidence to be admitted. Further, the circumstances in that case were not analogous to the present dispute, which concerns the correct legal analysis of a regulatory function. In any event, in the present case the other MNOs who intervened on the appeal before the Tribunal contended that Ofcom's dispute resolution powers were to be ignored. They were plainly entitled to do so, since they were not bound by the MCT Statement, and, apart from BT, were not parties to the proceedings before the Tribunal resulting in the 2005 Decision. In those circumstances, I see no good reason why the Tribunal was not entitled to proceed with and decide the appeal on the basis of the modified Greenfield approach for which they and Ofcom contended.

98. H3G is correct in submitting that BT's E2E obligation was imposed in order to promote fair competition in circumstances in which there might otherwise be a competitive imbalance between BT and other network operators. It is not correct, however, that Ofcom's power to resolve disputes over the reasonableness of prices demanded or offered for the purchase of interconnection by BT is merely regulation of BT, for the purposes of the modified Greenfield approach. It seems obvious that Ofcom's dispute resolution powers under s. 185 of the 2003 Act are capable of both protecting the MNOs from unreasonably low prices put forward by BT, and protecting BT from demands by MNOs for excessive prices. Insofar as Ofcom's dispute resolution powers embrace the latter, they are *ex post* regulation of MNOs, including H3G, which the Tribunal was right to ignore on the modified Greenfield approach. That conclusion is consistent with the analysis and decision of the Commission in *RegTP*, which I discuss in greater detail later in this judgment. It is also reinforced by the following two considerations.

99. If H3G is correct that the modified Greenfield approach requires Ofcom's dispute resolution powers to be taken into account in the enquiry as to a MNO's SMP, and, in exercise of them, Ofcom cannot set a price appreciably above the competitive price, it is difficult to envisage any circumstances in which a MNO will ever have SMP in the market for wholesale call termination on its network. It would, therefore, never be possible to have *ex ante* SMP regulation in relation to that market. That would be contrary to the CRF, which envisages *ex ante* and *ex post* regulation operating side by side.

100. Further, dispute resolution, the restriction of an E2E obligation to reasonable terms and conditions, and Article 82, are plainly not suitable or sufficient substitutes for the thorough *ex ante* regime intended under the CRF for the protection of consumers by enabling NRAs in member states across the EU to determine whether voice termination markets are effectively competitive and, if not, which of the remedial obligations in AD arts 9 to 13 should be imposed under the 2003 Act. As I have said, dispute resolution must be carried out within 4 months, save in exceptional circumstances. Moreover, there might be occasions when, for purely commercial reasons, perhaps to do with other dealings between them, BT would agree terms with a MNO even if the agreed rates were above the competitive level, rather than dispute those terms and refer the dispute to Ofcom for resolution. As the Tribunal said in paragraph [123] of its Decision:

> "Reliance on dispute resolution powers would give rise to obvious uncertainties for the market as a whole and would be disruptive, costly and resource intensive for participants in the dispute and those further down the supply chain."

101. If a narrow, technical and literal approach is adopted to the enquiry about H3G's market power in the hypothetical situation in which BT's E2E obligation is recognised, but Ofcom's dispute resolution powers are ignored, there is scope for obscurity and uncertainty. BT's E2E obligation requires it to purchase call termination services on request, but the obligation to interconnect is (and all parties agree that in the hypothetical circumstances it is to be regarded as) limited to interconnection on reasonable terms and conditions. There was not much consideration before us, however, whether the hypothesis is that some body other than Ofcom, such as the courts, could and would determine what would be reasonable in the event of dispute, what the remedies of the parties might be in those circumstances, and what commercial or tactical position the parties might realistically take in the light of those hypothetical considerations. Instead, Ms Rose adopted the broad and straightforward approach that, in the hypothetical situation postulated, the matter would essentially come down to the commercial position of the parties; and that, in view of BT's obviously superior economic position, BT could and would simply refuse to interconnect with H3G's network if H3G sought to impose unreasonable terms or conditions, including unacceptably high termination rates. For that reason, she submitted, BT's CBP was sufficient to undermine the case for SMP on the part of H3G, and the Tribunal ought to have so held. Subject to one important point, that approach appears to me fairly to reflect the fundamental issue, namely whether, ignoring *ex post* regulation, H3G could demand and secure from BT terms and conditions for interconnection that it could not have done if it did not have dominance, that is to say if it could not behave to an appreciable extent independently

of competitors, customers and ultimately consumers, including BT: 2003 Act s.78(1) and (2), FD art 2(2). The qualification, which is an important one, is that, as stated by the Commission in *RegTP* and quoted above, in view of H3G's 100 per cent market share, there is a strong presumption in favour of SMP on the part of H3G, notwithstanding the qualified nature of BT's E2E obligation, and that the onus is on those seeking to rebut that presumption to provide clear and convincing evidence of the absence of SMP.

102. Ms Rose emphasised Ofcom's findings that BT was a well informed and price sensitive purchaser of mobile call termination, and that H3G could not survive commercially without an interconnection with BT. In comparing them, as I have already mentioned, she said that BT was large, knowledgeable and expert whereas H3G was small and a relatively recent entrant to the telecommunications market. It is clear, however, that both Ofcom and the Tribunal concluded on the facts that the commercial pressures on BT to connect to H3G's network and other practical considerations were such as to undermine substantially BT's CBP. In paragraph 4.35 of Ofcom's statement published on 27 March 2007, in which, following the Tribunal's 2005 Decision, it reconsidered the question whether H3G had SMP for the period 2004-2007 ("the Reassessment Statement"), Ofcom said that "knowledge and price sensitivity alone are insufficient to constrain prices." It said the same in paragraph 5.117 of the MCT Statement. In the Decision the Tribunal summarised as follows (so far as relevant to this appeal) Ofcom's findings in the Reassessment Statement and the MCT Statement on the commercial and other practical considerations on BT to interconnect with the MNOs' networks, and particularly H3G's network, which undermined BT's CBP:

> "53…. However, OFCOM also found that there were factors that pointed against BT having CBP:
>
> > (iii) Whereas BT may have been in a position to exercise CBP at the time of the initial negotiations on MCT rates before the launch of H3G's retail service because it could have delayed or threatened to delay interconnection and hence disrupt the launch of H3G's service, it was not in a position to engage in such conduct during either of the relevant periods, that is between 2004 and 2007 or between 2007 and 2011 because there was a binding contract in place."
> >
> > (iv) There was no "reciprocity of trade": that is to say that because BT's own call termination rates are fixed by OFCOM, BT cannot try to bring the price at which it sells termination on the BT network to H3G into the negotiation over the price at which it buys termination on the H3G network.
> >
> > (v) There are no alternative sources of supply to which BT could turn if H3G tried to impose too high a price.
> >
> > (vi) BT does not have the option either to refuse to buy mobile call termination from H3G or to delay purchasing mobile call termination in order to put pressure on H3G to

> lower its price. This is partly due to commercial constraints which prevent BT from acting in such a manner and partly due to the fact that, as explained further below, BT is subject to a regulatory obligation to interconnect with other network operators.
>
> …

54 …

55. As well as the end-to-end connectivity obligation, there were other regulatory constraints imposed on BT which, OFCOM found, may weaken BT's CBP. BT is required to allow Carrier Pre Selection (CPS) and Indirect Access (IA) which enable competing retail service providers to provide calls to customers using the BT network. OFCOM noted (paragraph 5.91) that while the purpose of these conditions is to promote competition in a range of downstream markets, they also have a specific impact on the retail market for calls to mobiles. The ability of consumers to switch to alternative CPS or IA based providers of such calls may weaken BT's ability to threaten to cease purchasing wholesale MCT.

56. There were also more general commercial constraints on BT's ability to refuse to buy interconnection from MNOs. OFCOM noted that there would potentially be a significant commercial imperative for all originating operators, including BT, to provide their subscribers with the opportunity to call each of the mobile networks. OFCOM commented (paragraph 5.142 of the 2007 Statement, footnotes omitted):

> "Although it might be thought that this may not be the case where a new entrant MNO (with few, if any customers) wishes to sell call termination to a large incumbent network, OFCOM notes that the evidence suggests that BT, the largest purchaser of MCT, regarded the entry of H3G in 2001 as an opportunity for incremental income from its retail customers rather than a potential threat to its own access and origination revenue. In this case BT therefore judged that it had a commercial incentive to purchase call termination services from H3G."

57. In light of all these factors OFCOM's view was that BT does not have sufficient CBP to constrain the MNOs' ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers, such that MNOs are unable to sustain charges appreciably above the competitive level.

58. As regards the Reassessment Statement OFCOM concluded that nothing had occurred in the market over the period between ……. 2004 ….. and the adoption of the Reassessment Statement to alter its

> earlier assessment and hence OFCOM concluded that BT did not have CBP sufficient to negate H3G's market power. It further concluded that H3G had SMP in the relevant market …"

103. Ofcom's decisions on BT's CBP and H3G's SMP were based, in part, on those considerations and, in part, on its decision that, in the event of a dispute between BT and H3G about the reasonableness of prices to be charged to BT for call termination on H3G's network, Ofcom could impose a price under s. 185 of the 2003 Act which was appreciably above the competitive level. H3G's appeal to the Tribunal largely centred on that issue. Ofcom successfully persuaded the Tribunal that it was right in that regard. That issue is reflected in Ground 1 of the appeal to this Court. As I have said, Ofcom advanced for the first time before the Tribunal a second line of Defence (which I am presently considering and which is Ground 2 of the appeal to this Court), namely that Ofcom's dispute resolution powers in any event fall to be disregarded when assessing H3G's market power. Ofcom succeeded on that issue also, and, for the reasons I have given, was entitled to do so. Ms Rose submitted that, even if the Decision of the Tribunal is upheld on that point, that is not the end of the matter, since Ofcom never considered the specific issue whether, if Ofcom's s.185 dispute resolution powers were ignored, the facts were such as to establish that BT's CBP was sufficient to negate SMP on the part of H3G.

104. It is clear that the Tribunal itself did find that, in the light of the facts established by Ofcom, BT did not have sufficient CBP to prevent SMP on the part of H3G, or, putting it differently, the facts were not such as to rebut the strong presumption that H3G had SMP, even though BT's obligation was a limited one. I have set out above the Tribunal's detailed summary of the commercial and practical factors which Ofcom considered undermined BT's CBP. In paragraph [124] of the Decision, the Tribunal said:

> "124. We do not accept that H3G's argument that the findings of SMP are "fact sensitive" overcomes this fundamental difficulty. H3G referred to a number of features of the market which, they submitted, distinguished their case from other MNOs in the United Kingdom and which distinguished the United Kingdom markets from the markets in other Member States. These included the regulatory structure, BT's status as a price sensitive customer and H3G's status as a new entrant with a small market share. We have considered all the points put forward by H3G in this regard in both their written and oral submissions and concluded that none of these factors overcomes OFCOM's argument that to regard the potential exercise of an NRA's dispute resolution powers as constraining market power would be contrary to the scheme for regulation established by the CRF."

105. The Tribunal summarised its conclusions on SMP at paragraphs [140] –[141] of the Decision, where it said as follows, so far as relevant:

> "140. The Tribunal's conclusions on the existence of SMP on the part of H3G in the market for mobile call termination on H3G's network can be summarised as follows:

> (a) OFCOM was correct in concluding that the availability of its dispute resolution powers under section 185 of the 2003 Act did not constrain H3G's market power to a degree sufficient to preclude a finding of SMP because …..
>
> ….
>
> (iv) … OFCOM's powers of dispute resolution constitute a form of price regulation on H3G which falls to be disregarded when assessing H3G's market power, under the modified greenfield approach described by the Tribunal in the judgment in *H3G (1)*;
>
> …
>
> (d) OFCOM was right to rely on other factors such as BT's regulatory obligations regarding Carrier Pre-Selection and Indirect Access and more general commercial considerations which might weaken BT's CBP;
>
> (e) OFCOM was therefore entitled to conclude that H3G had and has SMP because of its 100 per cent market share, the existence of absolute barriers to entry and the absence of sufficient countervailing buyer power on the part of its main customer BT.
>
> 141. The Tribunal therefore dismisses H3G's appeal in so far as it challenges both the Reassessment Statement and the finding of SMP in the 2007 Statement."

106. It is clear from those passages that the Tribunal was endorsing Ofcom's conclusions on BT's insufficient CBP and H3G's SMP, even if Ofcom's s.185 powers were ignored.

107. Ms Rose submitted that the Tribunal was wrong to have reached that conclusion on the facts, and that it should have remitted the matter back to Ofcom for further consideration. I do not agree. As I have said, the appeal to the Tribunal was an appeal "on the merits". In the light of the extensive findings of fact by Ofcom on the commercial and other practical considerations undermining BT's CBP, the Tribunal was fully entitled to decide the appeal without remitting that aspect back to Ofcom. Ms Rose criticised Ofcom's rejection of the economic analysis contained in papers by Dr David Harbord and Professor Ken Binmore on the ground that Ofcom's rejection was the result of a misconstruction by Ofcom of BT's E2E obligation and the way that Ofcom would resolve any dispute. My understanding is that this point is relevant to Appeal Ground 1 and does not arise under Appeal Ground 2 if, as I consider, the dispute resolution powers of Ofcom under s. 185 of the 2003 Act must be ignored for the purposes of the enquiry whether H3G had SMP. If my understanding is wrong, nevertheless the Tribunal was entitled to form, and did form, its own view of the facts in the light of all the evidence. The Tribunal is a specialist and highly qualified body, and this court would be very slow to interfere with its findings of fact. I would reject

the need to remit the matter to Ofcom because of the view Ofcom took of the analysis by Harbord and Binmore.

108. It is noteworthy that the Tribunal's analysis and conclusion mirror those of the Commission in *RegTP*. The Commission's ruling in that case was given pursuant to its power under the CRF to veto decisions taken by NRAs as to whether an undertaking has SMP. The German regulator, RegTP, had identified 54 operators, each of which had its own separate market for call termination on an individual public telephone network. Each operator had a 100 per cent market share on its respective network. Of those, Deutsche Telekom AG ("DTAG") was the incumbent network operator, and 53 were much smaller alternative network operators ("ANOs"). The Commission rejected the conclusion of RegTP that the 53 ANOs did not have SMP on their respective networks because of DTAG's CBP, bearing in mind its superior economic position and that, although it was under an obligation to interconnect, that obligation was only an obligation to connect on reasonable terms. The Commission found that, regardless of the existing regulatory framework, DTAG had little economic incentive to cut off current interconnection with, or to stop buying termination services from, any particular ANO for similar reasons to those found by the Tribunal in the present case regarding BT and H3G's network. The Commission considered that the source of an ANO's market power for termination on its own network was not the regulatory requirement on DTAG to interconnect, but the ANO's 100 per cent market share and the control over its network and over a service for which no substitute existed. The Commission considered that the CBP of a large operator was essentially lost if its call termination rates were regulated in the separate market for call termination on that operator's individual public telephone network and it could not realistically threaten to stop purchasing termination services: it would be deprived of any bargaining tool in the form of a corresponding increase in its own tariffs when negotiating termination rates on that ANO's network. The Commission concluded that, in the circumstances, RegTP had not provided convincing evidence to support the absence of SMP of each ANO. The matter then went back to the NRA, which decided that the ANOs did have SMP.

Appeal Ground 1

109. In Ground 1 of the appeal H3G contends that the Tribunal erred in concluding that Ofcom could determine a price dispute between H3G and BT by setting a price appreciably above the competitive level. That is an important point, but it does not strictly arise for decision on this appeal in view of what I have said above. The issue involves consideration of the meaning of, and the relationship between, concepts and expressions in the European and UK statutory framework of competition law such as an abusive price, an excessively high price, a price appreciably above the competitive level, a reasonable price, a competitive price, and the most efficient cost related price. It also involves consideration of whether the reasoning and conclusions of the Court of Appeal in *Attheraces Ltd v The British Horseracing Board Ltd* [2007] EWCA Civ 38 about excessive and unfair pricing, and in particular whether a competitive price can be equated with a cost plus price and whether an abusive price is one which significantly exceeds the economic value of the product, are relevant to the determination under s. 185 of the 2003 Act of disputes about charges. There is disagreement between the parties about those matters. It is also necessary to consider

the implications of the limited time and available information for Ofcom to reach a decision under s.185.

110. I am inclined to agree with Ms Rose's submissions that "reasonable terms and conditions" for BT's E2E obligation are those which are reasonable as between the parties and also reasonable having regard to Ofcom's statutory duties and duties under the CRF, and so Ofcom could not lawfully require BT to pay a price for call termination which was so appreciably above the competitive level that H3G was rendered dominant in the market. She was supported on this point by Mr David Anderson QC, for BT. I do not consider it appropriate, however, formally to decide this hypothetical point when it is not strictly necessary to do so on this appeal, and the various potential factual situations in which the point might arise are so many and varied.

Appeal Ground 3

111. It follows from what I have said earlier in this judgment that the Tribunal was correct to find, at paragraph [287] of its Decision, that under the modified Greenfield approach Ofcom's potential intervention to set a price in a dispute between BT and H3G must be disregarded when considering, for the purposes of s. 88 of the 2003 Act, H3G's likely conduct in the absence of regulation.

112. I do not understand H3G to contend that, if the Tribunal was correct on that point, Ground 3 of the appeal is sustainable. If my understanding is wrong, I nevertheless agree with Lloyd LJ that, for the reasons given by him, this ground of appeal must be dismissed.

Conclusion

113. For all those reasons, I agree with Lloyd LJ that the appeal should be dismissed.

Lord Justice Ward

114. I agree with both judgments and there is nothing useful I can add.