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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1087/2/3/07

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8 April 2008

Before:
VIVIEN ROSE
(Chairman)

MICHAEL BLAIR QC
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

INDEPENDENT MEDIA SUPPORT LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

RED BEE MEDIA LIMITED

BRITISH BROADCASTING CORPORATION

Interveners

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HEARING – DAY 2

APPEARANCES

Mr. Stephen Hornsby (Solicitor, Davenport Lyons) appeared for the Appellant.

Mr. Rupert Anderson QC and Mr. Alan Bates (instructed by the Office of Communications) appeared for the Respondent.

Mr. Nicholas Green QC and Miss Jemima Stratford (instructed by Travers Smith) appeared for the Intervener, Red Bee.

Miss Lesley Farrell (Solicitor, S.J. Berwin LLP) appeared for the Intervener, BBC.

1 MR. ANDERSON: Madam Chairman, there was a point of clarification you asked for yesterday
2 and which I forgot to give you, which was an inconsistency between two figures in tables 6
3 and 7 in our decision. It is a typographical error, the correct figure for both tables should be
4 60 to 70.

5 THE CHAIRMAN: Thank you. Yes, Mr. Green.

6 MR. GREEN: Good morning. What I would like to do this morning is first, provide a very short
7 summary pulling the threads together of the submissions I was making yesterday and then
8 secondly, and finally, deal with the Chapter I point in relation to whether or not the C4
9 contract is properly analysed as five or eight years.

10 So far as a summary to the points I was making yesterday are concerned, the points I wish
11 to make are as follows: first, the notice of appeal focuses explicitly on pricing allegedly
12 engaged into with the C4 contract in 2004 – the pricing is variously described, as you have
13 seen, as “discriminatory” or “very low” or “below cost” or in some way “cross-
14 subsidising”, but – point 2 – the exclusivity for five years plus an option is not alleged to be
15 either a breach of Chapter I or Chapter 2 in and of itself independent of any connection with
16 allegedly abusive pricing.

17 The third point is that the exclusivity and its foreclosing effect is not therefore unlawful if
18 Red Bee was not dominant in 2004. If Red Bee was not dominant then this is contract won
19 in competitive circumstances and Red Bee is entitled to enjoy the benefit of having won that
20 contract in those circumstances until its expiry.

21 There is a separate point which is the not pleaded point, based on the legal position
22 pertaining if a non-dominant undertaking acquires dominance and the impact of that on a
23 legacy contract. This is a novel point, indeed, a number of people have tried to research
24 whether there is any authority on it overnight without success. One might put it in these
25 terms, that if it was not foreclosing in 2004, because it was won in competitive
26 circumstances it is very difficult in principle to see why it should become foreclosing
27 simply because of a change in market structure in circumstances where there is no new
28 conduct on the part of the now *ex hypothesi* dominant undertaking.

29 Setting that aside, the next point is that Ofcom’s analysis in the decision is that high market
30 shares do not translate into market power in this market, so that on the basis of Ofcom’s
31 reasoning a fluctuation in Red Bee’s market share is exactly what would be expected, in
32 other words, whoever wins the BBC contract is going to require a substantially increased
33 share of the market, they are one of the largest players, and who ever wins that is going to
34 increase its market share very substantially. Ofcom took its decision on the basis that there

1 were three suppliers in the market, all of whom were of sufficient reputation and quality to
2 bid effectively in terms of price, and so its starting point was a relatively concentrated
3 market in any event in which there may be switching between the supplier who wins the
4 BBC contract over time; their analysis implicitly includes within it fluctuations in market
5 share depending on who wins the major contracts of which there are a relatively limited
6 number, given the relatively small number of major broadcasters. Since no one has
7 suggested that the description of the market set out in the decision would change, or could
8 change over the period 2004 to 2007 then there is nothing to suggest that a change in market
9 share would alter Ofcom's analysis.

10 THE CHAIRMAN: Is that the same as saying that you do not accept that they did become
11 dominant during the course of the contract?

12 MR. GREEN: Yes, we certainly do not accept that they became dominant. Ofcom's analysis is
13 that the market share does not translate without more inter-market power. Legally in this
14 context it is important to appreciate that it is not in law an abuse of a dominant position for
15 a dominant undertaking to acquire an exclusive licence, and the European Court's ruling in
16 *Tetra Pak* is quite important in this regard. A dominant undertaking can acquire exclusive
17 licence without *per se* infringing Article 82, whether it does so depends on the facts.
18 Paragraph 23 of the European Court's judgment is worth a moment's reflection, if I could
19 take you back to it, it is tab 14 of the authorities' bundle. In the internal numbering it is 27
20 of 34. The court holds here as follows:

21 "Turning to the specific nature of the conduct whose compatibility with Article 86
22 is considered in the Decision, this court holds that the mere fact that an undertaking
23 in a dominant position acquires an exclusive licence does not *per se* constitute
24 abuse within the meaning of Article 86. For the purpose of applying Article 86 the
25 circumstances surrounding the acquisition, and in particular its effects on the
26 structure of competition in the relevant market, must be taken into account. This
27 interpretation is borne out by the case law of the Court of Justice, in which the
28 concept of abuse is defined as 'an objective concept relating to the behaviour of an
29 undertaking in a dominant position which is such as to influence the structure of
30 the market where, as a result of the very presence of the undertaking in question,
31 the degree of competition is weakened and which, through recourse to methods
32 different from those condition normal competition in products or services on the
33 basis of the transactions of commercial operators, has the effect of hindering the
34 maintenance of the degree of competition still existing in the market or the growth

1 of that competition.’ So here the Commission was right not to put in issue the
2 exclusive licence as such but rather to object specifically under Article 86 to the
3 anti-competitive effect of its being acquired by the applicant.”

4 If I pause there for a moment, one has to remember that the applicant here was in a
5 dominant position when it acquired the licence, and what the court goes on to say in the
6 next part of this paragraph is that the licence itself was for, in effect, a blocking patent. So
7 the facts were crucial to the Commission’s conclusion as upheld by the court. The court
8 goes on to say:

9 “It is plain from the reasoning and conclusions of the Decision that the infringement of
10 Article 86 found by the Commission stemmed precisely from Tetra Pak’s acquisition of the
11 exclusive licence ...”

12 And then they are quoting from the Decision –

13 “... ‘in the specific circumstances of this case’. The specific context to which the
14 Commission refers is expressly characterised as being the fact that acquisition of
15 the exclusivity of the licence not only ‘strengthened Tetra’s very considerable
16 dominance, but also had the effect of preventing or, at the very least, considerably
17 delaying the entry of a new competitor into a market where very little if any
18 competition is found’ (paragraph 45 of the Decision; see also paragraph 60). The
19 decisive factor in the finding that acquisition of the exclusive licence constituted an
20 abuse therefore lay quite specifically in the applicant’s position in the relevant
21 market and in particular, as appears from the Decision (paragraph 27), in the fact
22 that at the material time the right to use the process protected by BTG licence was
23 alone capable of giving an undertaking the means of competing effectively with
24 the applicant in the field of the aseptic packaging of milk. The takeover of
25 Liquipak was no more than the means – to which the Commission has attached no
26 particular significance in applying Article 86 – by which the applicant acquired the
27 exclusivity of the BTG licence, the effect of which was to deprive other
28 undertakings of the means of competing with the applicant.”

29 The relevance of this therefore is that the mere change in status on this basis *ex hypothesi* of
30 Red Bee in the market place is not material without more, so the mere fact that it might on
31 this argument be said that Red Bee became dominant, obviously something we do not agree
32 with, is not without more relevant. IMS, in order to make good any such allegation would
33 have to have gone beyond the mere fact of the acquisition of dominance to show in some

1 way how the structure of the market was changed materially by that, but we know from
2 Ofcom's reasoning that its reasoning is independent of fluctuations in market share.
3 A final point, it is not part of the appeal, but even if it were to be we submit there is just
4 simply nothing in the point, and if it were to be made good it would require a considerable
5 amount of evidence challenging the underlying facts and the premises upon which the
6 decision is actually founded upon. That is all I wish to say about dominance.
7 I would like to turn now to the issue of the cost reimbursement fee. Overnight we have
8 managed to get agreement with Channel 4 to produce a non-confidential version of the
9 contract. So, you will be able to see the relevant parts. This does not have to go into a
10 confidentiality ring. Channel 4 has taken out anything which is commercially sensitive, but
11 I think it leaves intact everything which is essentially relevant for present purposes.
12 (After a pause): For present purposes the relevant clause is Clause 4. What I thought it
13 would be really helpful to do was to take you through the relevant provisions. There is
14 nothing remarkable about this contract. It is pretty much as you would expect to see it. It
15 has some commercially sensitive material in it from the point of view of the sorts of
16 services which the provider was supplying. That is not relevant to Clause 4. That is largely
17 the subject matter of the redactions. The prices have been taken out as well. But, again, I
18 think you will see there is nothing which has been taken out which is material.
19 The relevant provisions start at Clause 4.1. It says, "The agreement shall commence on the
20 commencement date". For your note, the commencement date is defined as 1st December,
21 2004.

22 "-- subject to Clause 4.2 [which is where the auction is contained], shall continue
23 for a period of five years and one month from the commencement date ('the initial
24 term') unless terminated sooner by either party under Clauses 16 or 17".

25 The relevance of one month was that there was a sort of migration and transitional
26 arrangement which was due to take four weeks.

27 The option is found in Clause 4.2. It says,

28 "Subject to Clauses 4.4 and 4.5, Channel 4 may, at its option, extend the term of
29 this agreement on the same terms and provisions set out herein for a further period
30 of three years (the extended term) from the expiry of the initial term".

31 So, that covers the period of Years 6, 7, and 8. It is on the same terms and provisions. As
32 you will see, that includes essentially price. Clause 4.3:

33 "At the end of the first year of the initial term, BBC Broadcast shall provide
34 Channel 4 with details of the cost reimbursement fee (including a full breakdown

1 of how it has been calculated and any appropriate supporting documentation)
2 referred to in Clause 4.7 below”.

3 I think it is convenient to go to Clause 4.7 because although it is not 100 percent clear from
4 the decision, the costs incurred were related to TUPE. They were transfer of undertaking
5 costs. This is made clear in 4.7.

6 “Channel 4 shall pay BBC Broadcast an amount equivalent the amounts in respect
7 of outstanding holiday pay, payment in lieu of notice and contractual or statutory
8 awards for redundancy or unfair dismissal that BBC Broadcast pays to any person
9 employed or engaged by the previous providers ----”.

10 Just for your note - you do not need to turn it up - on p.5 in the definitions, that is defined as
11 ‘Intelfax Ltd. and/or Independent Television Facilities Centre Ltd.’. So, it is either Intelfax
12 or ITFC. So,

13 ”-- prior to the service commencement date who was involved in providing
14 services materially similar to the services (‘existing employees’) and whose
15 employment was terminated as a result of the arrangements contemplated by this
16 agreement whether or not such termination of employment was effected or
17 deemed to have been effected by the previous providers, or by BBC Broadcast and
18 where effected prior or up to three months after the service commencement date
19 (‘cost reimbursement fee’).

20 So, it is an objectively justified cost which either C4 or the new successful tenderer was
21 going to have to pay. The way in which it was to be allocated was pursuant to this clause. It
22 had to be verified by the provision by Red Bee of documentation to ensure that it was not
23 inflated.

24 I think it is fair to say that the starting point is that it was an objective justified cost. It was
25 not inserted into the contract for any artificial purpose. The reason I am pointing out that it
26 was TUPE-related is that Ofcom, in its decision, addresses both switching costs generally
27 and TUPE costs specifically. So, I think even though it is not 100 percent evident from the
28 contract that it was a TUPE-related cost, given that Ofcom did address its mind to these
29 issues, I think it is worth pointing out that fact. It is not 100 percent clear from the decision
30 that it is TUPE-related.

31 If one goes back to Clause 4.4,

32 “At least six months before the end of the initial term Channel 4 must notify BBC
33 Broadcast whether it will exercise its option under Clause 4.2 above.

1 Where Channel 4 exercises its option to extend the term pursuant to Clause 4.2,
2 the fees that shall be payable by Channel 4 throughout the extended term shall be
3 the fees paid by Channel 4 in the last year of the initial term increased by an
4 amount equal to the compounded increases in the RPI index in each year of the
5 initial term”.

6 So, that is the point pursuant to which this issue of what prices are applicable in the three
7 years of the option is governed. It is governed by the prices payable under the term
8 increased by a compounded RPI. So, it is an upward-only price in Years 6, 7, and 8 if the
9 option is exercised. Then, at 4.6:

10 “If Channel 4 does not exercise its option to extend the term pursuant to Clause
11 4.2, Clauses 4.7 to 4.14 (inclusive) shall apply”.

12 Then, there is the payment obligation in Clause 4.7. “Channel 4 shall pay BBC Broadcast
13 an amount equivalent to ----“ That is the bit I have just read. That is the obligation to make
14 the payment in the event that the option is not exercised.

15 In Clause 4.8 there is a mitigation provision which I do not think need particularly concern
16 us. It simply says that if BBC Broadcast re-employs, or re-engages, any of the existing
17 employees, then that part of the CRF ceases to be payable by Channel 4. Then there is an
18 election in Clauses 4.9 and 4.10 pursuant to which Channel 4 can elect to stagger the
19 payments over the course of a period, and then that is subject to a multiplier which takes
20 account of the time value of the money. But, again, that cannot materially impact upon the
21 option because Channel 4 simply has a right to spread the costs if it is in its economic
22 interest to do so. These provisions simply concern the mechanics of the CRF if paid by
23 instalments to take account of the time, value and money. They give C4 an extra option to
24 spread the payment. As I say, one assumes that it will do whatever is the most rational for it
25 to do in the circumstances.

26 **THE CHAIRMAN:** Was the intention of this then to give Channel 4 an incentive to ensure that
27 Intelfax dealt with the termination of any employment or any redundancy that was going to
28 happen as a result of the shift of the business from them to BBC Broadcast?

29 **MR. GREEN:** What the decision explains is that there is a certain amount of dispute in the
30 industry as to whether or not TUPE costs are in fact payable. Although the decision says
31 that no broadcaster -- no access service provider said that TUPE costs in fact ever
32 constituted a switching obstacle, they nonetheless record that there is some uncertainty as to
33 whether they are payable. One imagines that, in fact, the contract reflects that someone was
34 putting pressure on Channel 4 and/or the new bidder to make sure that Intelfax’s TUPE

1 cost were in fact paid and for whatever commercial reason C4 and the new bidder, Red Bee,
2 accepted that they had to be paid, and then the question was how were they going to be
3 split? So one then comes simply down to this: one has an objective reason for the cost
4 arising, it is going to be borne by somebody – is C4 going to bear it and, if so, in what
5 circumstances and does it actually constitute an obstacle to switching? Quite how and why
6 the clause came about is not evident from the decision.

7 THE CHAIRMAN: And how or why it was thought appropriate to make the payment contingent
8 on the exercise of the option, given that the amount of the CRF seems to crystallise at the
9 end of the first year of the initial term, and then sits there until one finds out four years later
10 whether they are going to exercise the option to review.

11 MR. GREEN: As I think is explained in the decision, there was a competitive tender for the
12 contract, there was then a negotiated process and I think this was a cost which was
13 negotiated to be allocated in this way. As we all know, if it is allocated in some other way it
14 could have impacted upon the consideration payable under the contract depending on who
15 bore the risk or the cost.

16 PROFESSOR STONEMAN: You used a term which I am not familiar with – “TUPE”?

17 MR. GREEN: Transfer of undertakings. It is simply the allocation of employment related costs
18 on the transfer of an undertaking, and the regulations which govern this are universally
19 known as the “TUPE” – T-U-P-E- Regulations.

20 THE CHAIRMAN: Transfer of Undertakings Protection of Employment, I think.

21 MR. GREEN: A very worthy objective no doubt.

22 PROFESSOR STONEMAN: In 4.12, the blanked out bit, is that a total or a percentage?

23 MR. GREEN: That is an absolute figure and it has been safe for us to redact it because it is very
24 substantially in excess of the amount actually payable, so that the cap referred to in 4.12
25 was never actually going to be the figure which needed to be measured to decide whether
26 or not there was an obstacle to switching.

27 PROFESSOR STONEMAN: Thank you.

28 MR. GREEN: So 4.12 does contain the cap on the payment. 4.13 is worth just brief mention. It
29 simply concerns a situation which could arise under which Red Bee would have expected,
30 or BCCB would have exercised expedited payment at the CRF. It says:

31 “Notwithstanding clause 4.9 above, where Channel 4 enters into any agreement,
32 arrangement or understanding with any service provider to provide any of the
33 services in place of BBC Broadcast from the end of the initial term and such
34 agreement, arrangement or understanding enables Channel 4 to recover the cost

1 reimbursement fee then owing from such service provider in one lump sum or in
2 any time period shorter than the instalment option, Channel 4 shall pay the cost
3 reimbursement fee upon receipt of the same.”

4 So the only contractual obligation is that Channel 4 is required to pay upon receipt, so it is a
5 provision which governs only expedited payment of the CRF to Red Bee or BBC Broadcast,
6 and it actually reflects the fact that Channel 4 was perfectly at liberty to renegotiate with
7 any other person and, if necessary, as part of that negotiation or that negotiation to seek to
8 recover some of the costs if they could; that was simply a possibility which might arise in
9 the future.

10 Finally, 4.14 ----

11 THE CHAIRMAN: So that enables Channel 4 to recover the cost?

12 MR. GREEN: Well it does not enable them, it simply says “Where they do so...” and it
13 contemplates that as part of a new negotiation pursuant to an ITT they might decide in their
14 wisdom to seek to recover it, it does not guarantee that they will be able to do so. It is
15 predicated upon the “where Channel 4 enters into any agreement which entitles them to
16 recover it”, and it covers commercially this situation that BBC Broadcast said: “If you get
17 the money back from somebody else quicker, because you do not exercise the option, can
18 we have it quicker?”

19 THE CHAIRMAN: I am not sure I understand this grammatically, it says: “Such an agreement,
20 arrangement or understanding enables Channel 4 to recover the cost reimbursement fee then
21 owing from such provider ...” but it is not owing by the ----

22 MR. GREEN: No, it is owing from them to us.

23 THE CHAIRMAN: So it enables Channel 4 to recover the cost reimbursement fee then owing
24 from Channel 4 to BBC Broadcast.

25 MR. GREEN: That is right, yes.

26 THE CHAIRMAN: To recover that from any such service provider in a lump sum, I see.

27 MR. GREEN: And then the next words are critical, and the word “shorter” in particular.

28 THE CHAIRMAN: So this says that if Channel 4 manages to persuade the successor company to
29 reimburse it the reimbursement fees that it has to pay to BBC then it gets passed through ---
30 -

31 MR. GREEN: Only if it is quicker, I think there is an accelerated payment provision.

32 PROFESSOR STONEMAN: In line 2 of that, I put some emphasis on “any”, so if they only take
33 a little bit from somebody else they have to pay the whole cost reimbursement fee to Red

1 Bee. So you cannot just get out of a little bit of the contract, you have to take it, it is all or
2 nothing?

3 MR. GREEN: I think lines 3 and 4, "... and such agreement, arrangement or understanding
4 enables Channel 4 to recover the cost reimbursement fee." So that rather suggests that if
5 Channel 4 with new bidder X manages to recover the entirety and they get that figure earlier
6 then they pay it earlier. I do not think it is intended to be anything other than an accelerated
7 payment obligation if and insofar as they manage to recover that figure from a new
8 tenderer.

9 THE CHAIRMAN: I think it is rather para. 4.2 that has the effect that Professor Stoneman is
10 asking about, which is, is it right to say that, given that the option is only to extend the term
11 on the same terms and provisions, which must mean that exclusivity covering all services,
12 and if they do not exercise that option then the CRF becomes payable.

13 MR. GREEN: Sorry, yes, I might have misunderstood your point, yes.

14 PROFESSOR STONEMAN: Yes, the point is that even if Channel 4 only want to get out of a
15 small part of the contract the total CRF is still payable, I think that is the point, yes.

16 MR. BLAIR: Can I be sure about one thing if I may, that the 4.7 amount is TUPE related but if it
17 becomes payable it has no connection with TUPE at that point at all, it is merely a sum
18 payable?

19 MR. GREEN: Yes, absolutely.

20 MR. BLAIR: It has lost its character of an employment related ----

21 MR. GREEN: Yes, I entirely agree. We are analysing it as to its origin simply to show where it
22 comes from, from a competition law point of view it may have relevance – in a sense a
23 negative relevance – it is not, and cannot be suggested it was an artificially incurred cost,
24 but nonetheless one does measure the cost to see whether or not it is a deterrent to
25 switching. That is the contract.

26 What I would like now to show you is that Ofcom undertook essentially three broad
27 categories of analysis which are relevant to this particular issue. They first analysed
28 switching from incumbent generally not just TUPE costs but all costs to see the extent to
29 which in the market place there were innate or inherent costs which would deter switching,
30 and you will see they came to the conclusion that generally speaking there was nothing
31 which hindered switching from incumbents to new potential suppliers.

32 Secondly, they analysed the impact of TUPE costs generally on switching; and thirdly, they
33 analysed clause 4 specifically. They concluded, and I will give you the conclusions and
34 then show you the relevant paragraphs, they concluded there was no evidence that there was

1 any material costs deterring switching. They recorded that no broadcaster or service
2 provider with the exception of IMS suggested that TUPE costs were an obstacle to
3 switching. They concluded that whether TUPE costs were an obstacle was a case-specific
4 issue - it turned on the facts of each case. Ofcom examined the TUPE costs and concluded
5 in the facts of this case that it was unlikely that they could create any material switching
6 obstacle. This was a valid conclusion both (a) in the context of general evidence from the
7 market about switching costs and (b) with regard to the specific analysis of the C4 contract.
8 In that context I would like to start by showing you Ofcom's analysis of switching costs. I
9 will do this largely by giving you a summary of what is in the decision, giving you the
10 relevant paragraphs. However, there will be one or two paragraphs I would like to draw
11 your attention to ----

12 THE CHAIRMAN: Just going back for a moment to the costs in Clause 4.7 -- Those TUPE costs
13 there are only costs which arise if there are redundancies or unfair dismissals in relation to
14 the people who move across to the new business. If you retain everybody from the old
15 business of course there are TUPE costs in the sense that they are then entitled to more
16 benefits, or higher pensions, or more holiday than they would be if you had just engaged
17 them and their employment was starting from scratch. But, it does not seem that those costs
18 are included.

19 MR. GREEN: I think there are three categories of costs referred to in Clause 4.7: (1) outstanding
20 holiday pay; (2) payment in lieu of notice; and then (3) contractual or statutory awards for
21 redundancy or unfair dismissal. As I understand it, if one does not pay-- if some is, as it
22 were, turned off without compensation that would be unfair dismissal or redundancy. So,
23 they have to be compensated. It may be loose to describe it as TUPE. It may be more
24 accurate to describe it as employment-related or employment severance-related costs. I
25 think people in the industry loosely associate these with TUPE, but for the reasons Mr. Blair
26 has given, perhaps the exact analysis of how it fits into employment law does not really
27 matter. No-one is suggesting they are artificial costs. They are costs which have to be
28 incurred one way or another.

29 If you could take the decision -- Ofcom's analysis of the CRF has to be seen in the context
30 of the analysis Ofcom set out in its decision about switching practices. As to switching
31 costs, Ofcom analysed whether, across the market, there were incumbency benefits - in
32 other words, whether on expiry of an agreement they were material obstacles to switching
33 to a new supplier. It is relevant that Ofcom questioned and obtained information from all of
34 the broadcasters and from all access providers. A reference to that is A4.14 on p.78. They

1 obtained copies of tender documentation to see what criteria were used to determine who
2 was to win a contract. That is also at A4.14. Ofcom collated data on the number of times
3 incumbents won repeat contracts (A4.14 and Table 4). But, Ofcom also examined the
4 reasons for switching. It found that there were up to three or four service providers (they
5 generally use the figure 3, but on one occasion they use the figure 4) whom broadcasters
6 considered possessed the necessary reputational and capability and quality characteristics
7 (this included IMS) and that thereafter price was the real determinant. You will find that in
8 A4.14 to 4.17. Ofcom also cited examples from different broadcasters who had switched.
9 That is also in the same set of paragraphs. Then they gave specific examples of three major
10 switching situations in A4.18.

11 In addition to the actual evidence of switching they examined the criteria which governed
12 switching. They looked at the likelihood of switching and the range of costs that might
13 affect it. They collected evidence on this and they identified a series of categories of cost.
14 These were as follows: the cost of installing equipment and data links for a new customer;
15 the administrative costs; what they described as business continuity changeover costs' and
16 regulatory compliance continuity costs (A4.19, A4.24 and A4.25).

17 Then specifically, they address their minds to TUPE costs at A4.20 to A4.23. With regard
18 to what might loosely be described as TUPE costs they noted that IMS had contended that
19 such costs were relevant, but they also recorded in A4.22,

20 “-- no other broadcaster or access services provider has indicated that TUPE costs
21 could create switching costs”.

22 So, the general context in which Ofcom was carrying out its analysis was one in which,
23 other than IMS, nobody had suggested that TUPE costs would constitute switching costs.
24 Ofcom’s analysis in conclusion in A4.23 was that,

25 “-- whether or not TUPE regulations will apply and whether or not there are any
26 associated staff costs which act as a switching cost will depend upon the
27 circumstances of each particular case. On this basis f does not consider there is
28 sufficient evidence to conclude that TUPE-related costs are likely to create
29 material disincentives to switching”.

30 So, they accept that it is a case-by-case analysis, but at the macro level (if I can use that
31 term) they concluded there was no real evidence that they constituted switching costs. But,
32 they did then go on to analyse the individual impact of Clause 4. In that regard can I just
33 take you back please, first of all, to 7.59 and 7.67 on pp.53 and Article 5(3) of the decision.
34 7.59 you have had read to you already - it simply records that in the view of a number of

1 major broadcasters - Sky and ITV - prices would drop over the next few years. You were
2 not taken specifically to 7.67 on p. Article 5(3) which is more specific. This is in the
3 context of broadcasters stimulating effective entry in the face of price rises. There is
4 evidence from an access service provider to the following effect,

5 “When we are pricing a contract, we would tend to speculate that somehow we
6 would be able to reduce our costs over five years, say to around 10 percent less
7 than today’s levels. Although most of our costs are people-related and salaries
8 tend to rise, we tend to assume that there will be some sort of efficiency savings,
9 predominantly relating to process”.

10 With that they are referring to technology. This came out of an IAMCO interview which is
11 evident from Footnote 143. IAMCO was the body instructed by Ofcom to conduct market
12 research on its behalf. So, evidence suggests, and evidence was in front of Ofcom to
13 suggest, that prices would decrease by approximately 10 percent over five years -
14 approximately 2 percent per annum, which means that in 2009 when the C4 contract could
15 expect to have been re-tendered, C4 could expect to get a price roughly 10 percent lower
16 than the price it obtained in 2004. Indeed, if one moves forward in time and assumes a rate
17 of 2 percent per year, if the option had been exercised the differential - in other words
18 between the contract rate and the new tender rate - would be 12 percent in Year 6, 14
19 percent in Year 7, and 16 percent in Year 8. In those circumstances the scale of the CRF,
20 which is 3 percent, is dwarfed by the potential savings which C4 might obtain on a new
21 tender. So far as 3 percent is concerned that was based upon an assumption of a steady state
22 in demand. As we know, the market is expanding.

23 Now, it would not be right to say that C4 had a tremendous scope for increasing its
24 requirements for access services because it is at quite a high percentage already. But, it is
25 clear from the decision that there is some scope for C4 to expand its services - for example,
26 in relation to digital. It has yet to get up to 100 percent of its content. So, there is some
27 scope for an increased demand, in which case the percentage which the CRF represents of
28 the total revenues over the next three years could be less than 3 percent. I think the most one
29 can say is that 3 percent is a relatively conservative figure and is therefore a reasonably safe
30 figure to work from.

31 That then brings me to Ofcom’s analysis of clause 4 itself, which is set out in the decision
32 paras 8.17 to 8.24. Again, I will summarise and give you the relevant paragraphs. The
33 reasoning of Ofcom in relation to this was as follows: Ofcom cited DG Comps’ Guidelines
34 and asked we submit the right question, which is whether the purchaser (C4) faced a

1 genuine choice of new supplier, that is A18, Ofcom asked whether the CRF made it
2 unattractive or onerous for C4 to take up the option (A19 and A20). Ofcom considered
3 whether the CRF created a cost which the decision says was sufficiently high to provide a
4 material disincentive (A21). We submit those are the right questions. Ofcom then set out
5 the right terms, the cap and the actual CRF in A22. You will see that there is quite a lot of
6 material which is excised from that paragraph for confidentiality reasons. Then Ofcom, we
7 submit correctly, stated that any potential deterrent effect had to be measured by reference
8 to the scale of the incremental cost relative to the benefit C4 might expect from not
9 exercising the option (A23 and A24). Then in A24 Ofcom says: "In assessing this Ofcom
10 took as a useful benchmark the scale of the CRF as a percentage of total contract spend",
11 and they said it was less than 5 per cent, and on that basis they concluded it was unlikely to
12 create a material disincentive.

13 We know from Ofcom's subsequent verification exercise, which they have included details
14 of in their skeleton, that the less than 5 per cent is in fact circa 3 per cent and that is para.16
15 of their skeleton. They say that the exact magnitude of the fees payable in the course of the
16 option, were it to be exercised is uncertain because you do not know precisely what volume
17 of services C4 would acquire. We do know that it is a variable cost for C4 and I can explain
18 that the rates are calculated on the basis of hourly rates, so it is a variable cost – obviously
19 variable to a degree because there is a statutory requirement to take these services, and we
20 would know with the benefit of hindsight, on the basis of what Ofcom has carried out, that
21 the 3 per cent figure is more or less correct.

22 **THE CHAIRMAN:** The absolute figure of the fee must be settled by now, but the percentage
23 varies because you do not know what the overall revenue is going to be, is that right?

24 **MR. GREEN:** The volume of the service actually acquired may vary. All of the broadcasters are
25 required year on year to increase the amount of access services which they are taking, the
26 rate of which they expand their demand is variable, and as I say one cannot push this point
27 too far in the case of C4 because they are amongst the best compliers – they have a high
28 percentage of access services already on board so the scope for expansion is limited, but it
29 is not non-existent. I think all it means is that the 3 per cent figure is a conservative figure,
30 one cannot really push it any further than that.

31 **PROFESSOR STONEMAN:** I think the point being taken involves 4.3, the action number of the
32 CRF, apart from the RPI adjustment, is known, and it has been known since the end of the
33 first year of the initial term.

34 **MR. GREEN:** Yes.

1 PROFESSOR STONEMAN: Then what we are doing is translating that into the extent to which
2 it can act as a barrier because of the percentage.

3 MR. GREEN: That is right.

4 PROFESSOR STONEMAN: What one needs is a percentage that it will be of the new contract
5 prices at the time when tenders are requested.

6 MR. GREEN: One needs to be able to quantify it as a potential barrier, as an obstacle, and all
7 Ofcom can do is work out whether it is likely to be material. Now, there is an inexactitude
8 in that you do not know precisely what percentage it would be of the new volume which
9 would arise on the extended contract, but Ofcom put it as a “useful benchmark” I think was
10 the phrase they used, or “useful guideline” – they accept that it is not a precise part, but in
11 particular in view of the context in which nobody in the industry (save IMS) had said this
12 was a material switching cost, and these people with experience of the employment costs
13 arising on a transfer of supplier, that was a reasonable conclusion to arrive at. There is
14 nothing on the facts of this case to suggest that it would be a material switching cost,
15 particularly when Ofcom has examined both the background, taken industry evidence about
16 employment costs generally.

17 THE CHAIRMAN: Is there not also the point that if what the option involves is extending the
18 term of the agreement at the same price or an increased price over the three years, and the
19 evidence is that prices are actually dropping, then the 3 per cent has less significance?

20 MR. GREEN: Yes. The only other point I wish to make, and I am not going to deal with it in any
21 detail because we have dealt with it in our skeleton, is to remind you that IMS’s criticism in
22 is skeleton is essentially based upon what it says is the obstacle it would face in a new
23 tender in overcoming a figure which it says it does not know anything about. That is not the
24 right test, the question is whether C4 would be deterred. But even in relation to the points
25 made by IMS in its skeleton, we have addressed these in our skeleton and I will not repeat
26 them. The scale of the figure is, in fact, relatively modest. There is no suggestion
27 whatsoever, given its capitalisation and access to finance, that it would not be able to meet
28 this cost, it is in relative terms peanuts – it may be a few peanuts but it is still peanuts – and
29 there is not a shred of evidence to suggest, even on its own estimate of what the figure is, it
30 says it is circa six figures; it is there or thereabouts six figures, but it is in relative terms
31 peanuts, and there is not a shred of evidence to suggest that a new bidder would not be able
32 to take that into account and overcome it in the scale of the contract which is being put up to
33 tender. We have dealt with this in the skeleton, these are sort of minor nit-picking points,
34 and there is not much point in going over them again; we have dealt with them

1 comprehensively. Indeed, Mr. Hornsby's point yesterday was focused upon the impact
2 upon C4 rather than the impact on any new access service provider.

3 Unless I can assist you further, those are our submissions.

4 THE CHAIRMAN: Well, yes – I will put to you the same question I put to Mr. Anderson
5 yesterday, which is that Ofcom was considering as at 1st January 2007, a contract which
6 had, on your case, three years to run, the contract representing about 10 per cent of the
7 market, with a party which had a significant share of the market, and they concluded that
8 this did not fall within 81(1) and therefore there was no need to justify it under Article
9 81(3). You support their argumentation as to that conclusion, do you have anything else
10 that you want to say about that?

11 MR. GREEN: Well if there is going to be a suggestion that in those circumstances there is a
12 breach of Article 81 it would have been up to IMS to have challenged the underlying facts
13 in the decision. The underlying facts of the decision are this was a bidding market in which
14 no one had power over price in which prices and terms and conditions were competitively
15 set and broadcasters sought and wished for a degree of exclusivity which Ofcom says is
16 generally between two and seven years. Now it is clear from case law, for example
17 *Delimitis* that Article 81 does not apply to such contracts simply because they have their
18 object of restricting competition, there would have to be effect, and Ofcom has set out a
19 comprehensive and detailed analysis as to why these contracts were normal in the market
20 place, involving competitively set prices at competitively set terms and conditions. The
21 mere fact there is an element of exclusivity does not enable one to arrive at the conclusion
22 that 81(1) or Chapter I was engaged, and if IMS was to suggest that that analysis was
23 incorrect it was incumbent upon it to put forward evidence. That was not evidence outside
24 of its control, or only within the possession of my client, what one finds in IMS's skeleton
25 and in its notice of appeal are these brief asserted criticisms that this was not a bidding
26 market or there was no countervailing buying power, not a single piece of evidence has
27 been put forward, and it is simply not enough to just make the assertion, particularly in the
28 light of Ofcom having engaged in a very detailed market driven analysis. It conducted a
29 huge number of investigations, it collected evidence from all the relevant broadcasters and
30 access service providers, and its analysis is not subject to criticism, and the analysis is there
31 is no anti-competitive effect; prices are set competitively, terms and conditions are
32 competitive, exclusivity is sought by broadcasters in and of itself even IMS does not object
33 to exclusivity. Therefore, we say there is simply nothing which could justify a criticism of
34 the decision as it presently stands. So yes, we support Mr. Anderson.

1 MR. BLAIR: I think I understand your answer, but can I just put it in my terms, and you can tell
2 me whether I have understood it. Your case is that even if Mr. Hornsby had the benefit of
3 the presumption of a breach of s.2(1), or Article 81(1), nonetheless you have produced
4 evidence to rebut that presumption, which he has not shaken?

5 MR. GREEN: The presumption only goes to Article 82 and market share, it obviously does not
6 go ----

7 MR. BLAIR: The wrong word; he has raised a prima facie case that the agreement has as its
8 object or effect the prevention or restriction of competition.

9 MR. GREEN: Well (a) he has not raised the prima facie case ----

10 MR. BLAIR: I said "if".

11 MR. GREEN: "If" – if he has then one simply goes back to the decision and says is there
12 anything in the decision which would cast doubt upon the correctness of the analysis? This
13 is a case which ultimately, since there is no evidence, will have to turn upon a textual
14 analysis of the decision. Does it stack up? Is it logical? This is a decision in which Ofcom
15 has found, having conducted a very detailed analysis, they say explicitly both of facts
16 previously, during and after 2004, from the market place they say prices are set
17 competitively, terms and conditions are set competitively, exclusivity is normal and not
18 objectionable, and there is nothing in IMS's case to suggest that that analysis has shifted
19 over time. They pointed to two facts, first that my client acquired through the processes
20 described in the decision the BBC contract on the sale to the Macquarie Group, and
21 secondly the departure from Intelfax. Intelfax is irrelevant because that reduced the number
22 of suppliers from 4 to 3, but Ofcom's analysis rests upon the existence of three credible
23 suppliers – ITFC, IMS and Red Bee – and that assumes therefore that Intelfax have gone,
24 and they also assume that market share is fluctuating and maybe very high, so IMS's point
25 does not challenge the factual findings in the decision. The absence of material suggesting
26 that there is an error in the decision we submit that it is an unexceptional decision,
27 consistent with the Ofcom's guidelines about bidding markets, and the Competition
28 Commission's guidelines on bidding markets; it is an unexceptional decision. There is
29 nothing which could justify any other conclusion under Chapter I or Article 81.

30 MR. BLAIR: So your submission is that this case can be disposed of on an evidential basis without
31 going into the merits at all.

32 MR. GREEN: There are no merits. There is no evidence to put forward. If there is evidence then
33 you can weigh it, if there is no evidence then you are simply left with the decision asking
34 whether it is properly reasoned and it is consistent and logical, because there is nothing else

1 really to do. If one is suggesting that the agreement was anti-competitive one says “What is
2 it in the notice of appeal which leads you to suggest that it is anti-competitive?” The only
3 reason which has been put forward under Article 81(1) is that it was eight years not five. I
4 accept there is an assertion “it ain’t a bidding market”, but that does not get them anywhere
5 unless there is proper evidence; there is none.

6 MR.HORNSBY: Can I just remind the Tribunal that we do not have the benefit yet of the
7 transcript from yesterday, but I have a note of Mr. Anderson saying in answer to a question
8 from the Tribunal whether he was relying on bidding markets to rebut any presumption that
9 there might be of dominant position and the answer to that was “no”. That question was
10 asked of him twice. The reason why he said, “No” was that in this particular market
11 reputation and branding count for a great deal. That was the reason why there had been, if
12 you like, less reliance on the bidding markets in the decision, and less in the skeleton. Mr.
13 Green is saying that his submission in relation to switching costs that if you go to the
14 decision you will find in it material which shows that switching costs are not significant.
15 Actually, that is in a part of the decision which deals with bidding markets. That is my
16 point.

17 THE CHAIRMAN: I think it has been clear that one of the nubs of Ofcom’s case is that because
18 this is a bidding market one cannot consider market share as being an indictor of market
19 power in the same way that one usually does - that market share is not to be treated as a
20 proxy for market power. I think we were shown some guidelines that indicated that.

21 MR. ANDERSON: Can I just make one point clear to assist Mr. Hornsby when he replies?

22 THE CHAIRMAN: Yes, Mr. Anderson.

23 MR. ANDERSON: When I was asked whether I relied on this being a bidding market, the point I
24 was making was that it had some of the characteristics of a bidding market, but not all of
25 them. So, it could not be described as a pure bidding market. That was the point I was
26 seeking to make because the evidence we discovered was that reputation played a part. One
27 of the characteristics of a pure bidding market is that brand image/reputation is not a
28 significant feature. That was why I was qualifying an answer to the question of: Do we rely
29 on this being a bidding market to say, no, the case we were advancing was that it had some
30 of the characteristics of a bidding market. But, of course, that was only one of the factors we
31 relied on in support of the view that market shares in this particular market, the less
32 significant as an indicator of market power than may be the case in most other markets.
33 That was the point I was seeking to make.

34 THE CHAIRMAN: Mr. Green?

1 MR. GREEN: I do not think there is really anything to add, save for the point that the explanation
2 given by Mr. Anderson is exactly what is in the decision. It says there are some features of a
3 bidding market. They have simply analysed the facts. They are what they are. They have
4 concluded on the basis of the facts that they found - that market share is not the decisive
5 factor. Its position on the scale from a perfect bidding market to an imperfect bidding
6 market is neither here, nor there. The facts are as they are.

7 MR. BLAIR: Yesterday I asked you whether the CRF was a common property of contracts in this
8 market, and you said you were going to try and find out.

9 MR. GREEN: I think the answer is that there is a dispute, or there was at the time -- there was a
10 dispute at the time of the decision. There is a dispute as to the extent to which they do, or do
11 not, apply. I do not think anyone has yet taken the point to court. But, it is clear from this
12 agreement, if from no other, that at least employment-related costs are an issue because they
13 were here. Ofcom records in the decision in relation to TUPE costs that there is this dispute,
14 but that generally people do not think they are commonplace. Therefore, the precise answer
15 is that there is a dispute in the industry as to their relevance. I do not think it would be right
16 for me to say, because we just do not have the contracts to analyse -- to come to a
17 conclusion about that they are common or uncommon. They obviously arise on occasion.

18 MR. BLAIR: It is just that one would view the CRF in this contract as more likely to be entry-
19 deterring if it was only in this contract. If it turned up in all contracts that the practice in
20 the business was pass TUPE costs along to the buyer (in this case Channel 4 as opposed to
21 the seller) and everybody was doing it, then one would not think it was that particularly
22 special.

23 MR. GREEN: I do not want to trespass too far beyond the decision. My instructions are that it is
24 a matter for negotiation as to who bears the costs in each case, and that they do arise. People
25 may argue from the point of principle that they should not arise, but then that may be part of
26 the negotiation to reduce the burden. They do arise and then it is a matter of negotiation
27 how they are allocated, as perhaps one would expect in a negotiated contract. But, they
28 arise, and then it is a matter for haggling. But, we certainly do not have any empirical
29 evidence to really go any further than that.

30 THE CHAIRMAN: Thank you very much indeed, Mr. Green. Mr. Hornsby, it is for you to give
31 your reply. Are you able to start straightaway, or would you like five minutes to collect
32 your thoughts?

1 MR. HORNSBY: I was going to start straightaway, but we have been given some new
2 information this morning, certainly in relation to the redundancy element. I will need to
3 think about that a little bit.

4
5 (Short break)
6

7 MR. HORNSBY: I just want to go through a couple of the points that were made by Mr.
8 Anderson yesterday. Briefly, I think, the question of whether the finding on dominance was
9 capable of being appealed to this tribunal -- He made a submission at the beginning to the
10 effect that it was not a decision which could be appealed. He referred to *Coca-Cola* in this
11 regard. I do not know if you recall.

12 THE CHAIRMAN: Yes, I do. I do not think he was saying you could not appeal the finding of
13 dominance. I think he was saying that this tribunal could not simply just declare the fact of
14 dominance without also remitting the matter back to Ofcom to investigate whether there
15 was also an abuse. I do not think Mr. Anderson was saying you cannot bring an appeal
16 against the finding of the absence of dominance. Perhaps you could just clarify that, Mr.
17 Anderson?

18 MR. ANDERSON: I think what I was saying was that the Tribunal could decide that BBCB was
19 dominant in 2004 and set aside the Chapter II decision, but that is not what Mr Hornsby is
20 seeking - he is not seeking to have that decision set aside or remitted. You could not simply
21 make a free-standing declaration that Red Bee were dominant between the period 2004 to
22 2007. It was not part of the decision. You simply cannot make that as a freestanding
23 declaration and then us all go home. That is what I was saying.

24 MR. HORNSBY: This is fundamental because what we say is that had the decision been properly
25 directed to the relevant period of time it would have covered a period 2004 to
26 2007. Therefore, the Tribunal could make such a decision. I think that is how you
27 dealt with it, from my recollection, yesterday.

28 I will move on to the second point which was raised in Mr. Green's submissions. He said
29 that there was no allegation, or no detail of abuses in our notice of appeal or our skeleton in
30 relation, in particular, to pricing. I think, as the Tribunal pointed out, pricing, although it is
31 a relevant background fact, it is not an issue for this Tribunal. Had Mr. Green had the
32 advantage of seeing the appendix to the complaints that was in the bundle of documents
33 produced to the Tribunal, he would have seen that IMS did produce enough evidence to
34 persuade Ofcom to actually open these proceedings at the relevant time based upon pricing.

1 As it actually happened, Ofcom did not get to look at the issue of pricing because the major
2 plank of getting to that point it felt was not there - namely, dominance. So, there was plenty
3 of material in the appendix on the issue of abuse and sales beneath cost.

4 In putting that information in, obviously we are at a disadvantage. But, that is a
5 disadvantage that is reflected fully in the Ofcom guidelines on submitting complaints. It
6 provides quite helpful guidance to complainants, setting out the information that they
7 should provide. It says basically where the information is of predatory pricing or
8 discriminatory pricing by a dominant company - as is quite often the case in the cases that
9 Ofcom deal with in the telecoms market, for example - Ofcom fully accepts that the
10 information will not be the best and estimates will have to be given.

11 Those are just two preliminary points. The main point that I want to go back to is the
12 relevant period of time for the assessment of dominance. Mr. Anderson repeated the
13 position taken in the defence and the skeleton. The decision, of course, makes it quite clear
14 that the relevant period was actually the period when the contract was awarded - not the
15 period when the bid was made. It was when the contract was actually granted to BBCB. So,
16 that is the decision which is the one we are challenging. To say now that it is more likely to
17 have occurred some time earlier, in our view, goes beyond what the decision clearly
18 contains. That has some implications.

19 Mr. Green was concerned, insofar as I understand it, to say that there was no authority for
20 the proposition being advanced by IMS. There is nothing in the law. The law had not
21 got there yet, he said - if ever it was going to get to the point - where events after an
22 infringement first started, because that is the case of Red Bee and Ofcom. It is when the
23 infringement first starts that you do your analysis of dominance. Mr. Green says there is no
24 authority which shows that events that take place, or changes in the market take place, after
25 an infringement first begins -- no authority that allows that kind of information, or that kind
26 of change of structure to be taken into account.

27 I would like to take you to two authorities where I believe that is quite clearly not the case.
28 They are *Akzo* and *Virgin*. But, before doing that, can we just have a look at the guidelines
29 on abuse again, which are at A35 in the authorities bundle? If you go to para. 30 ----

30 THE CHAIRMAN: This is the DG Competition discussion paper on the application of Article 82
31 of the Treat to exclusionary abuses.

32 MR. HORNSBY: Yes.

33 "Normally, the Commission uses current market shares in its competitive analysis.
34 However, historic market shares may be used if market shares have been volatile,

1 for instance when the market is characterised by large, lumpy orders. Changes in
2 historic market shares may also provide useful information about the competitive
3 process and the likely future importance of the various competitors, for instance,
4 by indicating whether firms have been gaining or losing market shares. In any
5 event, the Commission interprets market shares in the light of likely market
6 conditions, for instance, whether the market is highly dynamic in character and
7 whether the market structure is unstable due to innovation or growth”.

8 I think that is Mr. Green’s point about the market being in a stable state.

9 According to the decision - not according to the gloss they now give to it - the
10 infringement occurred when the contract was granted to BCCB and Intelfax lost that
11 contract. Intelfax had no other business. They provided some teletext services - it was a
12 minor offshoot. Their main business, as was demonstrated by their howl of protest when
13 they lost the Channel 4 contract, was actually with Channel 4. We say that the time for
14 assessing market power is the time when the contract was awarded and Ofcom ought, on
15 its own case, have taken the view that it was likely that Intelfax would exit the market as a
16 result of losing its only contract; therefore at that point there would only be three
17 competitors going forward in the market, and the market share therefore of Intelfax ought
18 to have been heavily caveated at the very least in the sense that it was only going to last
19 for the back end of the contract and come January that market share would have gone to
20 BCCB.

21 So, what we say is that even on the test that is adopted by Ofcom - and you look at the
22 point at 2004 - the benefit of hindsight actually is not particularly necessary. If the test had
23 been carried out at 2004 it would have been prudent to assume that Intelfax would not
24 survive, and that therefore there would be an exit from the market; that there would be
25 three competitors; therefore it would not be appropriate to take into account the market
26 share of Intelfax going forward.

27 I will now turn to some authorities where it is quite clear that events that take place of
28 changes in market structure after the date of the first infringement are taken into account -
29 in other words, where the period of analysis post-dates the first infringement.

30 If we go to *AKZO* at A10 in the authorities bundle -- This decision has also got the
31 opinion of the Advocate General within it. That is where I would like to go to begin with.
32 The facts of the case are really quite well-known. 1979 - I think in front of a bank manager
33 - *AKZO* personnel threatened ECS that unless it towed the line and carried out its wishes
34 in the marketplace it would institute a policy of predatory pricing which would discipline

1 ECS at the very least, or, if not discipline, if it refused to accept the discipline it would
2 result in its disappearance. So, 1979.

3 The Commission took a decision based upon market shares between 1979 and 1982. In
4 other words, it post-dated the period of first infringement. In relation to the period prior to
5 1979 the Commission adduced some evidence as well. If you go to the Advocate
6 General's opinion at p.22 of 51, and go to the fourth paragraph you will see that the
7 Advocate General is focusing very clearly on the fact that at that particular point, around
8 1979/1980 ECS - the small company; the victim, if you like - had really quite a high
9 market share. That was a problem for the Commission. ECS had a market share of
10 between 35 and 40 percent. Mr. Anderson referred yesterday to IMS' share of the free
11 market in 2004 as being at the level of something between 60 and 70 percent, the obvious
12 implication being that BBCB could not be dominant at that particular point.

13 In the fourth paragraph you will see that the Commission tried to adduce some evidence to
14 the fact that prior to the date of first infringement AKZO was a price leader in the relevant
15 market, and that ECS have followed their prices. The Advocate General's answer to that
16 was,

17 "I do not think that the evidence priced on price leadership is at all decisive here
18 since it relates to the period before 1980, that is to say a period which is not the
19 subject of the decision".

20 The decision was referring to market shares in the period 1979 to 1982. You can get that
21 by going to p.31. You look at the fine.

22 "Before examining in detail the decision I must first summarise once again the
23 complaints which have been shown to be justified, assuming that it is considered to
24 be proved that the applicant had a dominant position in the market ----"

25 Then he goes on to talk about the threats. So, threats in November/December 1979. That is
26 just to remind you of the date. We go forward now to p.39, which Mr. Anderson referred to
27 yesterday, para.59.

28 "It should be further observed that according to its own internal documents AKZO
29 had a stable market share of about 50 per cent from 1979 to 1982 (Annexes 2 and
30 4 to the statement of objections and Table A annexed to that statement).

31 Furthermore, AKZO has not adduced any evidence to show that its share
32 decreased during subsequent years."

33 So we have an example here of a company that adopted a policy of predatory pricing at a
34 point where the victim had between 30 and 45 per cent of the market, and the Commission

1 is nevertheless assessing the market share of that company for a period that post dates that
2 of the first infringement.

3 THE CHAIRMAN: Despite ECS's market share, there was still a finding that AKZO was
4 dominant.

5 MR.HORNSBY: I agree, dominant between 1979 and 1982 and the decision that was handed
6 down was published in 1985. So the point that we are making here is that the date of the
7 first infringement is not the first and last time which you take, and you then look back, the
8 market shares prior to date of the first infringement, you actually can look forward as well,
9 and it is in fact appropriate to do so – and was appropriate in the AKZO case to do so
10 because the threats were implemented according to the Commission between 1979 and 1989
11 despite the fact that the High Court injunction had been granted, which sought to restrain
12 AKZO from implementing those threats.

13 What we say is that when there is continuing behaviour, and in this case it was predatory
14 pricing, it is quite appropriate, and indeed necessary, to look at the market share over a
15 period that post-dates that of the first infringement.

16 The second example I would like to take you to is *Virgin* and that is at A23 in the
17 authorities' bundle . You will see the decision is dated 14th July 1999 – I am on p.1 of it.
18 You will see in the third paragraph of the preamble that complaints were lodged by Virgin
19 Atlantic on 9th July 1993, and a supplementary complaint was lodged in 1998 alleging
20 different infringements. If you go to the page with para. 33 on it, you will see that the
21 market share analysis in relation to the practices which were continuing practices, the rebate
22 practices of British Airways which were being complained of by Virgin because it was
23 thought by Virgin that they favoured BA flights as against Virgin and therefore impeded
24 Virgin's access to the market.

25 You will see that the period of time over which dominance is assessed by reference to
26 market shares, one element amongst many, is 1991 to 1998, the decision takes place in
27 1999. So we say there is authority for the proposition that we are advancing; it is we
28 believe a fairly commonsense proposition that the period 2004 to 2007 should have been
29 taken into account and there should not just simply have been a cut off at the point of first
30 infringement on the Article 82 analysis and looking back at Wordwave and all the rest of it,
31 or looking at the market shares at that particular point in time. It should have looked
32 forward, and if it had looked forward it would have seen that Intelfax has gone; it would
33 also have seen that Sky did not actually independently offer these services in the market, it
34 bought some services in and therefore really their market share ought not to have been taken

1 into account. Once you do that you reach a higher market share figure and that is the index
2 against which, if you like, you then look at other elements in the market to see whether the
3 presumption of dominance can be rebutted.

4 THE CHAIRMAN: What is the market share figure that you then say they ought to have taken
5 into account?

6 MR.HORNSBY: We think a safe figure would have been in the order of 53 per cent, and that is
7 based upon the management presentation. That would have been, if you like, a starting
8 point for an investigation of what the market share was. That should then have been done
9 annually for 2005, 2006 and 2007.

10 THE CHAIRMAN: So is that 53 per cent something that you have calculated by adjusting figures
11 that appear in the decision to take account of Intelfax and what you say is the over estimate
12 of Sky's market share?

13 MR.HORNSBY: That is correct, that is the calculation that we have done.

14 THE CHAIRMAN: Which figures in the decision – I just want to be sure that I understand what
15 your case is on what the market share ought to have been treated as?

16 MR.HORNSBY: It is table 6.

17 THE CHAIRMAN: Table 6 on p.38.

18 MR.HORNSBY: Yes.

19 THE CHAIRMAN: Well perhaps you can talk us through that.

20 MR.HORNSBY: It is the second column that you go to.

21 THE CHAIRMAN: Because you say you should include in-house supply?

22 MR.HORNSBY: Yes, where the company in question is active on the market, is seeking business
23 outside its, if you like, captive customer.

24 THE CHAIRMAN: Right, so talk us through then the two adjustments that you refer to?

25 MR.HORNSBY: In the second column Intelfax would be removed and also Sky. You then add
26 up BBC Broadcast, IMS and ITFC.

27 THE CHAIRMAN: So you take those out of the markets, not that you are saying that you
28 redistribute those market shares to somebody else, you just take them out of the market
29 completely.

30 MR.HORNSBY: Take them out of the market, yes.

31 THE CHAIRMAN: So the market then comprises the top three companies, and other?

32 MR.HORNSBY: Yes.

33 THE CHAIRMAN: And if you recalibrate the market shares then you get to a figure of about 50
34 per cent?

1 MR.HORNSBY: 50 plus, yes. That is supported in the Red Bee management presentation. If
2 you would like me to take you to those I will.

3 THE CHAIRMAN: No, I think we know where that is, thank you.

4 MR.HORNSBY: Yes, their figures were based on turnover. Broadly speaking they had a total
5 market size of £34 million per annum which, under Red Bee's figures they accounted for
6 £18 million of turnover. As I said to you yesterday, those estimates given to investors only
7 included three months' turnover of Channel 4, so it is quite conservative, you work out their
8 market share figure on the basis of that and it is over 50 per cent. The management
9 presentation is also interesting to the extent there is no mention of Intelfax only a few
10 months after the complaint even went in; the complaint went in in June 2005. In November
11 2005 in a presentation to investors, which has to be taken very seriously, disclaimers
12 suggest that there will be potential claims, admittedly figures go up and down, so you get
13 the disclaimers for those, but the basic market position that is recounted in the Red Bee
14 management presentation matches the figure on table 6 more or less when you take out
15 Intelfax and Sky, Sky not being mentioned as a potential competitor in the Red Bee
16 management presentation.

17 We say that that is the figure that should have been the index against which all these other
18 indicators ought to have been assessed, and that puts a greater burden on the regulatory
19 authority, it puts obviously a greater burden on the company that is under investigation, it
20 needs to demonstrate that the presumption of dominance can be rebutted.

21 We say that 2004 going backwards is not really giving you the benefit of hindsight as it
22 should do and, as Mr. Green's skeleton makes clear, if 2004 is the relevant time, that was
23 when the contract was awarded to BBCB, you ought to have taken into account the likely
24 consequence of that, namely, the demise of Intelfax. Had you done so the decision would
25 have been one where it would unequivocally been said that there were three competitors in
26 this market and there would not have been this attempt to fudge the issue by saying at least
27 three or four, or whatever it is that seemed appropriate at the actual time. There are, and
28 have been since 2004, three providers of these services to a significant degree in this
29 market, since the demise of Intelfax there has been no new entrant, market concentration
30 has increased.

31 THE CHAIRMAN: So are you saying that those two adjustments in relation to taking out
32 Intelfax, and taking out Sky, those are things that ought to have been done even if you were
33 looking at the position as at 2004, what then is the change in market share that you say
34 occurs subsequently to that which ought to have been also taken into account.

1 MR.HORNSBY: Well those figures ought obviously to have been updated.

2 THE CHAIRMAN: Yes, but what do you say the updated figures would have shown?

3 MR.HORNSBY: A fairly stable situation, one that was again reflected in the material, in the
4 management presentation by Red Bee. Red Bee make this distinction between revenues
5 that are contracted and revenues that are not contracted; I know it is in respect of other
6 services, but they make a colloquial distinction between fishing and farming.

7 THE CHAIRMAN: Is it your case, Mr. Hornsby, that if you look at the position six months after
8 the contract was awarded, say, and the position at the date that the decision was taken, is it
9 your case that there was over that period any change in the market shares of these
10 participants?

11 MR.HORNSBY: We do not know, we should have found out – we believe that Ofcom should
12 have found that out. It should not have stopped its investigation and frozen it in 2004 when
13 the contract was awarded.

14 THE CHAIRMAN: Yes, but we know in this market there is a small number of significant
15 contracts, so would your clients not know if there had been something that happened which
16 significantly shifted the market share?

17 MR.HORNSBY: Yes, they would know, and they would have submitted that information to
18 Ofcom, had Ofcom been open for business on the point. But Ofcom very early decided that
19 the cut-off point, if you like, for the analysis was 2004. Looking at it at that point Ofcom
20 said “no dominance”. We said “What about the fact that Intelfax is no longer there? What
21 about that fact?” They did not say so explicitly, we got no actual answer to that question.
22 We were assuming they were making a finding of no dominance because of their treatment
23 of in-house sales. Until we actually got the decision we did not know that in-house sales
24 were to be taken into account as far as the BBC was concerned and ITFC because they were
25 bidding for other business at the time, but they were not to be taken into account otherwise,
26 except incorrectly for Sky.

27 PROFESSOR STONEMAN: I am having some problems with this. If you try to say there is a set
28 of market shares for 2004 and a set of market shares for 2005 and Intelfax does not appear
29 in 2005, fine. But what you are trying to say is that when you calculate the market shares in
30 2004 Intelfax should not have been included, although I believe Intelfax bid for the Channel
31 4 contract?

32 MR.HORNSBY: Yes, it bid for the Channel 4 contract.

33 PROFESSOR STONEMAN: They were not in the market but they were bidding for a contract?

1 MR.HORNSBY: Yes, but the time you look at, according to the decision, is the time when the
2 contract was awarded. At that point you should take into account the fact that Intelfax's
3 only client of any meaningful nature was Channel 4 and therefore within six months they
4 were out.

5 PROFESSOR STONEMAN: I have no problem at all if you say in 2004 there were two sets of
6 market shares; there were those that existed before the contract was awarded, and those that
7 existed after the contract was awarded, that also makes sense, but I do not think you can just
8 say that Intelfax was not in the market in 2004, especially as it was the original provider to
9 Channel 4 and it was also a bidder to the Channel 4 contract, which you did not get?

10 MR.HORNSBY: That is true, but it was not likely to be in the market from 2005 onwards, in fact
11 it was extremely unlikely to be in the market from 2005 onwards.

12 PROFESSOR STONEMAN: I do not think anybody is disagreeing with that at all.

13 MR.HORNSBY: Ofcom is saying, and it feeds all the way through that Intelfax has to be taken
14 into account. Mr. Anderson said yesterday in answer to a question from the Tribunal what
15 did they do when they were looking at the Channel 4 in 2007, what adjustments were made?
16 He said what Ofcom did was simply treat the in-house supplies as no longer being in-house.

17 THE CHAIRMAN: Whose in-house supplies?

18 MR.HORNSBY: Red Bee, sorry, the BBCB change in ownership meant that the BBC contracts
19 were no longer in-house supplies because of the transitional period under the block
20 exemption having run out. From January 1st, 2007 you had a market share of over 30 per
21 cent that had to be taken into account.

22 THE CHAIRMAN: Just remind me of the date on which that change occurred, it will be in the
23 chronology.

24 MR.HORNSBY: That is 1st January 2007, and if you go the ----

25 THE CHAIRMAN: No, no, the date on which it is right to regard the BBC contract as being an
26 externally supplied contract, rather than an in-house supply.

27 MISS FARRELL: The sale of BBCB took place in May 2005 – August 2005 was the effective
28 date.

29 THE CHAIRMAN: Yes, because yesterday when we were hearing from Mr. Anderson and Mr.
30 Green, the discussion assumed that there had been that structural change in the market
31 which recalibrated the market shares and they were saying because there was not actually
32 any change in the trading that was going on, that did not indicate an increase in market
33 power, or that is their argument.

34 MR.HORNSBY: That is their argument.

1 THE CHAIRMAN: Now you accept then that as between 2004 and 2007 there are two things that
2 happened which can affect the size of the market and who has got what share of the market,
3 that is Intelfax went out of business and there was that shift from in-house supply to
4 external supply in relation to the BBC contract?

5 MR.HORNSBY: Yes.

6 THE CHAIRMAN: Is there anything else that you have pointed us to that happened over that
7 period which would affect the market shares if Ofcom had done what you say they should
8 have done, namely looked across the whole period rather than just up to 2004?

9 MR.HORNSBY: Nothing happened other than a renewal of the Sky contract at a lower price;
10 nothing happened in that period. So we have a stable state, we would submit, between 2004
11 and 2007. In that period (2004 – 2007) we submit that the market share of Intelfax and Sky
12 ought to have fallen out of account, the figures were then plus 50 per cent. There are only
13 five major contracts in this market, the BBC obviously being the largest of those and that
14 one being, as Mr. Anderson said yesterday, unassailable until 2012 at least. So there was
15 basic stability in the market.

16 MR. ANDERSON: 2009 I said, not 2012.

17 MR.HORNSBY: Sorry, the contract between Red Bee and BBC?

18 MR. ANDERSON: Sorry, I thought you meant the Channel 4.

19 MR.HORNSBY: No, I did not.

20 MR. ANDERSON: That is right, yes.

21 MR.HORNSBY: The elephant in the room is what I call the “BBC contract”, that remains in
22 force on any view until 2012, and it may possibly be extended further, we do not know.

23 MR. BLAIR: Can I ask you about those three changes? I can see that one of them, on your
24 submission can relate back to 2004, that is the Intelfax one, because your case – I think – is
25 that that can relate back to 2004 on the basis of reasonable foreseeability the regulator of
26 what would happen; that I can follow. I can not see any such thing in relation to the BBC
27 in-house change, or do you make such a submission?

28 MR.HORNSBY: So far as the BBC in-house share is concerned, we are content to agree with
29 Ofcom that that is a relevant market share because the BBC bids for other business.

30 MR. BLAIR: Right, although that happened only in August 2005?

31 MR.HORNSBY: That is correct, yes.

32 MR. BLAIR: So you do not relate it back to 2004?

33 MR.HORNSBY: We say that the BBCB’s market share ought always to have been taken into
34 account, because it was always competing for business. It was not successful in any major

1 way until it won the Channel 4 contract, but it had capacity to win business other than from
2 the BBC.

3 MR. BLAIR: Even in 2004.

4 MR.HORNSBY: Even in 2004.

5 MR. BLAIR: Thank you.

6 THE CHAIRMAN: Yes, you say it should be taken into account because you should take in-
7 house supply into account, and that is why you are looking at the second column of figures
8 in table 6 rather than the first column of figures, because that 30 to 40 per cent against BBC
9 Broadcast's name, that must be the BBC contract?

10 MR.HORNSBY: That is correct, we are doing it selectively though, we do not include Sky in
11 that for the reasons that I have said.

12 MR. BLAIR: May I just ask about the third one: how do you deal with the Sky contract in terms
13 of relating it back to 04?

14 MR.HORNSBY: You do not, because Sky was never in the market, we say.

15 MR. BLAIR: So that was a pre-2004 fact anyway?

16 MR.HORNSBY: It was a fact anyway.

17 MR. BLAIR: So the table is wrong?

18 MR.HORNSBY: So the table we say starts on a false premise. It should have been updated, but
19 there is actually a failure on Ofcom to comply with its own criteria for assessing whether a
20 company's market share ought to appear at all.

21 MR. BLAIR: Right, thank you, I understand the three points.

22 THE CHAIRMAN: The Sky market share is Sky's in-house supply?

23 MR.HORNSBY: Yes.

24 THE CHAIRMAN: And you say that because Sky was not actively seeking external work it
25 should not have been included in the market, or in the market share?

26 MR.HORNSBY: Correct, that is what we are saying.

27 THE CHAIRMAN: And that situation pertained throughout the whole period? You referred to
28 there being a re-bidding, a re-tender?

29 MR.HORNSBY: Yes, there was a re-tender by IMS, but there was no suggestion in it that Sky
30 was going to try and do that business itself. Sky is not looking to actually supply needs
31 other than its own, and that to a limited extent.

32 THE CHAIRMAN: So Sky still supply its own ----

1 MR.HORNSBY: To a small degree it does, yes, to a small degree it does, but it should not have
2 been included in the table because according to Ofcom's own distinction it was not a
3 company that was in the business of trying to win business outside of its own requirements.

4 THE CHAIRMAN: So that was the situation in 2004, and as at 2007 had that changed, or had
5 that not changed?

6 MR.HORNSBY: There is no reason to believe that it had changed, but it is something that we
7 believe that Ofcom ought to have looked at, as the behaviour was ongoing behaviour we
8 believe that as in *Virgin*, as in *AKZO* it should have updated its analysis and should not have
9 included in its market share analysis a company that had ceased to carry on business.

10 THE CHAIRMAN: Yes. Thank you.

11 MR.HORNSBY: Now, why should this analysis that we are suggesting be correct? We say that
12 the consequence of it not being correct in the hypotheticals that we put forward yesterday
13 have not been convincingly answered at all. There has been no response to the point that we
14 made in our skeleton, which was along the lines of what form can a decision take which is
15 based on 2004 facts over a small period of time in relation to a decision that is actually
16 handed down in 2007? What would a prohibition decision have actually found if it was
17 based upon the market share in 2004? What would it have required the parties to the
18 agreement to do by way of remedy? It would have been based entirely on market shares in
19 2004 and it would have been open to Red Bee and to the BBC and to Channel 4 to say
20 "Whatever you found in relation to abuse relates to something that happened in the past;
21 there was a dominant position then, there is not a dominant position now. Things have
22 changed, therefore the decision is not one that can be supported." So what would
23 effectively be required is a constant updating of the decisions taken by the regulator, and it
24 would make little sense. The realistic way of looking at it is over a long period of time for
25 ongoing activity up until more or less the point when the decision has been made.
26 Obviously sometimes there is going to be a gap between the inquiry being carried out and
27 the writing up of the decision. That may take a year or may take eighteen months. But,
28 what we say is that it would make little sense in these circumstances to take a decision
29 based on 2004. If it were to be a prohibition decision it would be a difficult one to defend.
30 The other issue that was addressed, particularly by Mr. Green, was the interesting one of
31 whether you can acquire a dominant position by predatory pricing and be found to abuse the
32 position when you introduced that particular pricing policy, and whether that is something
33 that is within Article 82. Now, what we would say is that the special responsibility of a
34 dominant company does require it to keep its pricing practices constantly under review. If it

1 reaches a point where its market share is very, very high indeed - either dominant or super-
2 dominant - then certain things must flow from that. They may take the view that they will
3 just wait and see whether the regulator comes after them. They may take the view that
4 actually the market definition is wrong. They might decide to adapt their behaviour. This is
5 because Article 82 creates a prohibition, and you do not need a decision for a prohibition to
6 have an effect - it operates in the mind, if you like, of the dominant company.

7 There is no such thing as sanctity of contracts under Article 82, whatever people may think
8 about that. The essence of Article 82 is the special responsibility and the fact that dominant
9 companies have different rules applying to them than those who are not in a dominant
10 position. We say we do not need to go there. Had Ofcom actually directed itself to the
11 proper period of time, it would have established that there was a presumption of dominance
12 and that the evidence that it then went on to look at had to rebut that. We say that that
13 evidence is weak.

14 We would now like to come on to that, because Mr. Green did say yesterday that we had
15 either accepted the facts as found by Ofcom or we accepted the inferences to be drawn from
16 them. We certainly do accept the facts as found by Ofcom in our response to the original
17 draft decision. We did say that Ofcom had done a very, very thorough exercise. We did not
18 really criticise it on that ground. We do not believe that the analysis of the Sky market
19 share corresponds with its analysis for the reasons that we have given. But, we do dispute -
20 and we have disputed right from the word 'Go' - the issue of whether there is a bidding
21 market, which is the first point that the structure of the market analysis addresses. The
22 second one is buying power.

23 As far as the bidding market is concerned, we have these high market shares. We have a
24 situation in which the major part of the market is not available until 2012 at the earliest. It
25 is not contestable - that is, the BBC market share. We say that it is quite absurd to say that
26 this is a circumstance where there is a bidding market. We cannot point to any authority
27 which is even close to suggesting that where someone has a long-term contract, unassailable
28 from a legal point of view, that accounts for about 40 percent of the market, you can talk
29 about a bidding market. We just think that that is a misnomer - it is more like a non-bidding
30 market.

31 Look at the Channel 4 contract now that we know a little bit more about it. Well, it is not
32 entirely a level playing field - let us put it at its lowest. We can argue about the materiality
33 of that in relation to Article 81. But, it is undoubtedly the case that an advantage does best
34 with the incumbent in this situation.

1 On the other hand, of course, the other contracts that are out there in the market place are
2 very contestable. IMS' market is comprised quite considerably with the services it provides
3 to Sky. Now, the position of Red Bee is really quite a strong one in this regard. What is
4 theirs is theirs, and what is ours is contestable. We do not believe that there is any
5 significance to be given to this bidding market analysis. When we first met Ofcom it was
6 the big thing. It became watered down in the defence where they said there are some
7 elements of the bidding market. I think it finally met its end yesterday afternoon when Mr.
8 Anderson said that actually it is only to the extent that there are large contracts that you can
9 speak of there being a bidding market, and that reputation and brand are important elements
10 which are not the characteristics of the bidding market as identified in the *Arcelor/Corus*
11 case, which was a case, incidentally, where a bidding market was held not to exist. That
12 was commodity steel.

13 So, we say we have got high market shares. The analysis that has been produced - yes, the
14 facts have been properly analysed. The conclusions to be drawn from them we respectfully
15 submit are not supported by those facts. They are simply not supported by those facts.

16 The second argument that is put to us - and the decision contains a great of information on -
17 is the question of buyer power. Buyer power is now increasingly going to have to be where
18 Ofcom justifies its decision because what it says about bidding markets is simply narrative.
19 There is no analysis. There is nothing in the decision which says, "Actually the bidding
20 market analysis overrides the high market shares". It does not say that in the skeleton; nor
21 in the defence. So, it is on buyer power and the ability to sponsor new entry that we say the
22 case depends.

23 In this regard can we just look at the guidelines on the exclusionary abuses, please, in the
24 authorities bundle at Tab 35.

25 THE CHAIRMAN: You describe this as guidelines, Mr. Hornsby. It is actually the discussion
26 paper. You say this is a sort of recitation of the law as it is currently understood to be.

27 MR. HORNSBY: Yes - to many people's disappointment that is its position. Yes, it does
28 summarise the case law.

29 THE CHAIRMAN: Is the status of this accepted by the other side?

30 MR. GREEN: Not at all. It is well-known, in fact, that the Commission is revising its discussion
31 paper and is considering whether or not to produce another version of it. It has four cases in
32 front of it at the moment which it is cogitating on. It is going to review whether this stands
33 in the light of those cases. So, it was a first attempt to stimulate discussion. I think many

1 people here know that there are aspects of it which the Commission has abandoned, and
2 other aspects which it has modified already.

3 THE CHAIRMAN: That is certainly the case as regards ----

4 MR. ANDERSON: That is also our understanding of it.

5 THE CHAIRMAN: -- recommendations that it makes. Those obviously are not binding, or
6 guidance, or anything. But, in relation to these introductory background-setting paragraphs,
7 do you accept that those do indicate the Commission's view of the law, Mr. Anderson?

8 MR. ANDERSON: One really needs to look no further than the first sentence of the whole
9 document to know what the status of it is. One would need to consider any particular
10 paragraph and see what it actually says to understand whether that is including an element
11 intended to provoke discussion, or is nothing other than a statement of the current law.

12 MR. HORNSBY: Well, if you do not like the discussion paper, we can go ----

13 THE CHAIRMAN: No. It is not a question of whether I like it or not, Mr. Hornsby. It is a
14 question of your relying on it as an authority, of whatever strength or weakness, for a
15 proposition. I am simply establishing whether or not that is contested. The fact that it is
16 contested does not in any way stop you from urging us to accept it as such. I just wanted to
17 understand what the situation is.

18 MR. HORNSBY: Paragraph 41 - we will just swiftly go through it. It is actually not particularly
19 different from a notice of the Commission that deals with the same issue. So, I do not think
20 Ofcom will have too much difficulty with this particular point.

21 "The market position of buyers provides an indication of the extent to which they
22 are likely to constrain the allegedly dominant undertaking. However, given the
23 fact that dominance is assessed in relation to a market, it is not sufficient that
24 certain strong buyers may be able to extract more favourable conditions from the
25 allegedly dominant undertaking than their weaker competitors. The presence of
26 strong buyers can only serve to counter a finding of dominance if it is likely that in
27 response to prices being increased above the competitive level, the buyers in
28 question will pave the way for effective new entry or lead existing suppliers in the
29 market to significantly expand their output so as to defeat the price increase".

30 That is matched in the guidelines on the application of Article 81(3). That is to be found at
31 Tab 33. That is referred to in the defence. It is the word 'likely' that is the important one.
32 The guidelines on vertical restraints. Point 145:

33 "Countervailing power' is relevant, as powerful buyers will not easily allow
34 themselves to be cut off from the supply of competing goods or services.

1 Foreclosure which is not based on efficiency and which has harmful effects on
2 ultimate consumers is therefore mainly risk in the case of dispersed buyers.
3 However, where non-compete agreements are concluded with major buyers this
4 may have a strong foreclosure effect”.

5 If you go to the application at para. 3.18 at p.12 of the internal numbering,

6 “Ofcom properly concedes that buyer power in the shape of a threat of self-supply
7 is largely absent. Most major broadcasters have ruled it out, except for ITV which
8 does it already ----“

9 If that is thought to be spin, perhaps you would like to turn to 7.56 of the Channel 4
10 decision? Under the heading of ‘Self Supply & Sponsorship of Entry’.

11 THE CHAIRMAN: “In summary, although there are smaller broadcasters ----“

12 MR. HORNSBY: That is very important. Self-supply has basically been ruled out by the BBC.

13 If you enter into an exclusive agreement or one with a non-compete for a long period of
14 time -- It is not like a sole distribution agreement or sole purchasing agreement where you
15 can do these things yourself. You actually deprive yourself of any freedom to do that. So,
16 until at least 2012 the BBC will not be self-supplying. That is really rather like a non-
17 compete provision in effect. It has the effect of a non-compete provision. That is another
18 element which is quite important to take into account, looking at the structure of the market.
19 We have only got three major competitors in it. One obvious candidate would be a
20 company such as the BBC who sells its business and exits. In normal circumstances you
21 have a non-compete of five years, and what effect that would have on the market place
22 would be that the incumbents would have to have at the back of their minds the possibility
23 that someone like the BBC would re-enter the market. That is actually not going to happen
24 until 2012 at the earliest and may well not happen at all.

25 Channel 4 is in the same boat. The decision makes absolutely clear that Channel 4 has
26 carried out a thorough exercise in relation to whether it is opportune ever to supply these
27 services. Perhaps mindful of the experience with Intelfax it is not going to do it - it has
28 reached the conclusion that it is not going to do it. These are the findings which are
29 summarised in para. 7.56.

30 So, if you are looking at countervailing power leading to the sponsoring of new entry, the
31 facts as found by Ofcom will not lead you to reach the conclusion that the conditions are
32 propitious for that.

33 MR. ANDERSON: It is really not appropriate for my friend to be giving evidence in reply for the
34 first time. I would invite the Tribunal to look at para. 7.56 in the context of the overall

1 section in which it is, which begins at 7.44 - an assessment of buyer power - and concludes
2 at 7.71 and 7.72 with the overall conclusions on buyer power. One will find that to select
3 that one paragraph, 7.56, to support the proposition that we concluded there was no buyer
4 power is simply stretching what is contained in the decision beyond what it can bear.

5 MR. HORNSBY: The points were made in the application. There is nothing novel here. The
6 points were made in the application at para.3.18.

7 THE CHAIRMAN: You accept that Ofcom did find that there was buyer power, although
8 obviously not based on potential for the buyers to self-supply.

9 MR. HORNSBY: We will come on to that if we may.

10 That is dealt with in the application again - the application at 3.19. Referring to 5.50 of the
11 decision,

12 “There is evidence to suggest that in the event that current suppliers of access
13 services did not meet the requirements of the broadcasters, these broadcasters
14 would be willing to relax their reputational criteria and take action to stimulate
15 entry, such as sponsoring new entry by suppliers of adjacent access and language
16 services (see paras. 7.54 to 7.63)”.

17 When we actually get down to it though, Sky is very uncomfortable about this. It is
18 unhappy about the idea of bringing in someone to its market from another country. That is
19 something that is borne out by the experience of Wordwave. Wordwave is a major supplier
20 of these services in the United States and was not able to make an effective entry to the
21 market, and had to do so by means of a joint venture with ITFC.

22 If you go to A3.12 of the Channel 4 decision, the appendix,

23 “However, a set out in Annexe 2, these responses [the responses there are
24 responses basically showing the reluctance of the current purchase of these
25 services to purchase outside the closed circle virtually of the current three] are
26 related to the current situation in choosing a provider in this market where there are
27 a number of suppliers which meet the reputational requirements of the
28 broadcasters. However, broadcasters informed Ofcom that if circumstances were
29 to change, for example if they did not receive sufficient credible bids or prices
30 quoted rose to an unacceptable level, they may change their current minimum
31 selection criteria by, for example, sponsoring entry perhaps from overseas”.

32 So, this is all couched in pretty weak language, we say. It is not actually likely. The
33 evidence does not show that this is likely to happen. Perhaps it would happen at some day in
34 the future. Perhaps one day in the future the attitude of, “No-one ever got sacked for buying

1 IBM” might be abandoned, and they were prepared to actually go out and purchase these
2 services from people who at the moment do not meet the quality threshold like the current
3 three do. But, the situation at the moment is that they are very, very cautious about this
4 possibility. We say that this shows their leverage to actually exercise countervailing power
5 is actually quite limited. They will not go abroad. They do not like the idea of getting the
6 services from abroad. Indeed, no-one has come in who has managed to persuade them of
7 that, even someone particularly strong, such as Wordwave. Self-supply? Most of the major
8 ones are not in favour of that.

9 As for sponsoring new entry, well, it is only when there are certain price increases that are
10 being talked about that that possibility seems to come into play. If we can just deal with
11 that particular point now, we will finish this section. (After a pause): This comes at the
12 end of 7. Paragraph 7.60 onwards.

13 “Therefore the questions asked by Ofcom were of a hypothetical nature [that is,
14 the questions are: What would you do if faced with a price increase?] and the
15 responses were accordingly (sometimes strongly) caveated: broadcasters stated
16 that they would have to consider the commercial reality of the supply of access
17 services at the time and if necessary adjust their current and anticipated criteria
18 accordingly. For example, Five said, ‘[It] would depend on the particular
19 circumstances, the market and the availability of the required resources’”.

20 Five then go on to say,

21 “If the price payable by Five were to increase we would consider alternative
22 suppliers in the market as and when our existing contracts came to an end and
23 depending upon the level of increases, we may well also consider self-supply or
24 sponsoring new entrants into the market. It is not possible to say what level of
25 increase in price would be necessary in order to make it viable for Five to self-
26 supply or sponsor a new entry”.

27 ITV, at 7.62,

28 “If there was more than a 10 percent increase then we would ask questions of our
29 service provider. If there was no chance of change then we would consider action.
30 But, the way we are set up now, our contract pins down a price, so it is a non-
31 issue”.

32 Sky, over the page, says,

33 “If prices rose unexpectedly, it could be a reason for us to look elsewhere”.

1 So, if a market, we say, with three suppliers -- not at least three, but three suppliers -- that
2 has been the situation since 2005 when Intelfax staff were transferred to BBCB. No-one
3 has made it into the market since then. Self-supply has been ruled out by the major
4 broadcasters. Entry from outside has failed. We say that the evidence that is produced by
5 Ofcom is insufficiently strong to rebut the presumption of dominance to which its high
6 market share and a high protected market share gives rise. Therefore it is in a dominant
7 position at what we take to be the material time from 2003 to 2007.

8 Those are our submissions on Part 1 of the application.

9 THE CHAIRMAN: Thank you.

10 MR. HORNSBY: I will be considerably shorter on ----

11 THE CHAIRMAN: Yes. I think you should try and confine yourself to just dealing really with
12 the points that were made by Ofcom and Red Bee. We will come back at two o'clock.

13 (Adjourned for a short time)

14 THE CHAIRMAN: Yes, Mr. Hornsby?

15 MR.HORNSBY: I shall be keeping you only a very short time. The information that we learned
16 this morning obviously is something that we feel ought to have been referred to in the
17 decision, it would have given us a little bit more time to consider its implications. Having at
18 first glance looked at it, we do not have anything particular to add.

19 THE CHAIRMAN: Is this about the contract?

20 MR.HORNSBY: Yes, it is about the contract, and we obviously maintain the position that we
21 adopted in the administrative proceedings that switching costs are significant, it is a bit
22 difficult for us to consider how this impacts, switching costs.

23 We would repeat our contention that in dealing with switching costs Ofcom was looking at
24 matters in its analysis of the bidding market; we do not think a bidding market analysis is
25 appropriate for the reasons that we have given.

26 So we come back to the position where we have a contract that is outside the block
27 exemption on any view, where the market share is, we say, well over 35 per cent and where
28 the contract accounts for 10 per cent of the relevant market, where it is of a duration of three
29 years, where the situation of IMS and ITFC on expiry of the term is more difficult on any
30 view than the position of Red Bee -- we do not know how difficult that is, but I think on any
31 view it is more difficult. If you add to that the other considerations that we have gone
32 through at length, the fact that the market of IMS is one that is open to competition whereas
33 the market of Red Bee, certainly for a large part, will not be open to competition for some
34 considerable while. We believe that even three years is too much. Duration is key as

1 *Crehan* makes absolutely clear; Mr. Green took us to the appropriate section of *Crehan*
2 yesterday.

3 The furthest the law has gone in finding that 81(1) is not engaged in these kind of
4 circumstances is in the Finnish Petrol Station case. I drew the attention of the Tribunal to
5 the fact the Advocate General made it quite clear that that was a case where brand loyalty
6 was not a factor; brand loyalty has been found to be an important factor in the decision of
7 Ofcom.

8 We say that the only way that this contract could have been considered to be acceptable is if
9 the full 81(3) analysis had been carried out and clearly it was not carried out – not yet a rule
10 of reason as I understand it in competition law and therefore the distinction is important
11 between 81(1) and 81(3), you cannot just use the 81(3) considerations and put them into
12 81(1) and hold that because 81(3) would have been satisfied, 81(1) is not. It is important
13 that the burden shifts. Under 81(1) it is for the complainant, if you like, to demonstrate that
14 81(1) is infringed. Once that changes it is then on the parties who are party to that
15 agreement to deal with 81(1) applying and, if you like, rebutting the presumption that the
16 agreement should be treated as void by showing that it has certain efficiencies. Most
17 important of all, it does not result in an addition to a competitive market structure which is
18 impaired; there must not be any substantial elimination of competition. We say it would not
19 have got through those hurdles, market shares are high, the factors that Ofcom has relied up
20 on to down play those market shares properly analysed do not bear the weight on which
21 Ofcom seeks to put on them, and therefore in our view the decision that was taken that this
22 does not infringe Article 81(1) should be quashed.

23 Unless you have anything, that is it from IMS.

24 THE CHAIRMAN: Thank you very much, Mr. Hornsby. Mr. Green and Mr. Anderson, Mr.
25 Hornsby took us to a couple of cases, I think, that we were not taken to in his opening
26 submissions which I think entitles you to come back if you have anything that you want to
27 say in relation to those cases. Mr. Anderson?

28 MR. ANDERSON: I think he raised them simply because I had given them as references to you,
29 the *Virgin* case and the *Sky* case. We have nothing to add other than the obvious that those
30 were continuing breaches and for the period of the duration of those breaches the relevant
31 regulator considered the market shares in order to demonstrate dominance. That seems an
32 obvious, sensible thing to do in the case of a continuing abuse. Our case of course is that
33 the abuse in this case is in reality securing this contract and the benefit of it; it is therefore a
34 one-off abuse in contrast to the position under Article 81 where one is considering the effect

1 of an agreement which necessarily involves considering it over the period of time. So
2 subject to those observations ----

3 THE CHAIRMAN: I think we understand both sides of the argument on that point. You have
4 nothing, Mr. Green?

5 MR. GREEN: No, madam.

6 THE CHAIRMAN: Well thank you very much everybody, it has been very helpful. I understand
7 that the transcript of yesterday's proceedings is available for you to take away with you, so
8 we will now go away and consider what we want to do and you will be notified in the usual
9 way as to when the judgment is ready to be handed down.

10 _____
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