Neutral Citation Number: [2008] EWCA Civ 536

Case Nos: C1/2007/0373 and C1/2007/0374

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(Sir Christopher Bellamy, The Honourable Anthony Lewis
and Professor John Pickering)
[2006] CAT 23 and [2006] CAT 36

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE LONGMORE
and
LORD JUSTICE RICHARDS

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Between :

Dŵr Cymru Cyfyngedig	**Appellant**
- and -	
Albion Water Limited	**Respondent**
- and -	
(1) Water Services Regulation Authority (formerly Director General of Water Services)	
(2) Office of Fair Trading	
(3) Office of Communications	**Interveners**

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Christopher Vajda QC and **Meredith Pickford** (instructed by **Wilmer Cutler Pickering Hale and Dorr LLP**) for the **Appellant**
Rhodri Thompson QC and **John O'Flaherty** (instructed by **Messrs Palmer Solicitors and Messrs McKinells**) for the **Respondent**
Rupert Anderson QC and **Valentina Sloane** (instructed by **Pinsent Masons**) for the **Water Services Regulation Authority**
Written observations were submitted by **Daniel Beard** for the **Office of Fair Trading** and by **Peter Roth QC** for the **Office of Communications**

Hearing dates : 14-15 January 2008

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Judgment Approved by the court for handing down (subject to editorial corrections)

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Lord Justice Richards :

1. This is the judgment of the court. The case arises out of a complaint by Albion Water Limited ("Albion") against Dŵr Cymru Cyfyngedig ("Dŵr Cymru") under the Competition Act 1998 ("the 1998 Act"). In 1999 Albion became the first new statutory water undertaker since the privatisation of the water industry in England and Wales. It replaced Dŵr Cymru as the statutory water undertaker in respect of Shotton Paper Mill ("Shotton") on Deeside. Since then it has purchased non-potable water in bulk from Dŵr Cymru at the point of supply to Shotton and has resold that water to Shotton. It wishes, however, to move to a different arrangement, under which it would purchase water direct from United Utilities (the current supplier to Dŵr Cymru), at the point at which the water is abstracted from the River Dee, and would pay Dŵr Cymru to transport the water to Shotton through Dŵr Cymru's water distribution network and treatment works (sometimes referred to as the Ashgrove system). The use of an undertaker's water supply network by a third party in this way is known as "common carriage". Albion's complaint relates to the price quoted by Dŵr Cymru for the common carriage of water across the relevant part of its network.

2. The complaint was made to the Director General of Water Services ("the Director"), whose functions were subsequently transferred to the Water Services Regulation Authority ("the Authority") pursuant to the Water Act 2003. It will be convenient to refer generally to the Authority, save when dealing with the Director's involvement as a matter of history. The Authority is the specialist regulator for the water industry and is also given express powers to apply the 1998 Act to that industry.

3. The complaint related to an alleged breach of the prohibition, in s.18 of the 1998 Act, of conduct amounting to an abuse of a dominant position. The abuse was said to lie in the offer of a price for common carriage which was excessive, gave rise to a "margin squeeze" (also referred to as a "price squeeze") and was discriminatory.

4. In a decision dated 26 May 2004, the Director rejected the complaint. He expressed reservations on whether Dŵr Cymru could actually be said to have a dominant position on the evidence before him, but, for the purpose of analysing Albion's allegations of abuse, he made the assumption that Dŵr Cymru did hold a dominant position on the relevant market. He then proceeded to consider and to dismiss each of the allegations of abuse.

5. Albion appealed to the Competition Appeal Tribunal ("the Tribunal"). The appeal focused on the allegations of margin squeeze and excessive pricing. After a hearing in May 2005, the Tribunal handed down an interim judgment on 22 December 2005 ([2005] CAT 40, [2006] CompAR 269), in which it said that it required further information and submissions to reach a final conclusion.

6. Following the submission of further evidence and pleadings the case came on again for hearing in May/June 2006. Thereafter, on 6 October 2006, the Tribunal handed down its main judgment ([2006] CAT 23, [2007] CompAR 22), in which it found, *inter alia*, that the Director's conclusion on the issue of margin squeeze was "erroneous in law and incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on and the investigation undertaken" (para 981(5)). It left open what consequential action it should take in relation to margin squeeze, in particular whether it should remit the issue to the Authority or take its own

decision on it. The judgment did not finally resolve the issue of excessive pricing. At the end of the judgment the Tribunal also expressed the view that it was highly unsatisfactory for the issue of dominance to be left as it was and to have become detached from the issues of abuse. It indicated that it proposed to consider with the parties how the matter of dominance should now be handled.

7. That led to further hearings in October/November 2006, and to a further judgment handed down on 18 December 2006 ([2006] CAT 36, [2007] CompAR 328). In the further judgment the Tribunal held first that it should consider the issue of dominance; and, having made detailed findings as to the relevant market and Dŵr Cymru's position within that market, it set aside the paragraphs of the Director's decision in which doubts or reservations had been expressed on the issue of dominance. The Tribunal proceeded to confirm the correctness of the assumption of dominance made in the Director's decision; and it found in any event, in the exercise of the decision-making powers conferred on it by the 1998 Act, that at all material times Dŵr Cymru had a dominant position on the relevant market.

8. In the same judgment the Tribunal proceeded, in the light of its finding of dominance, to give further consideration to the allegations of abuse. On the issue of excessive pricing it considered that it should take a decision but that a further investigation and hearing would be required for the purpose. On the issue of margin squeeze, the Tribunal went one step further, reaching a decision that Dŵr Cymru had abused a dominant position by imposing a margin squeeze. It then decided to confirm an existing order for interim relief, pending resolution of the separate issue of excessive pricing.

9. Dŵr Cymru, which had the status of an intervener in the proceedings before the Tribunal but was directly affected by the outcome of those proceedings, applied to the Tribunal for permission to appeal against the decisions in respect of dominant position and the margin squeeze abuse. The Tribunal gave a detailed judgment refusing permission on 2 February 2007.

10. An application for permission to appeal was then made to this court. It was refused on the papers by Richards LJ, but permission was granted on two specific issues at an oral hearing before Rix LJ and Thomas LJ. The issues were: (1) the correct legal test for finding a margin squeeze, and (2) the jurisdiction of the Tribunal to decide the issue of dominance (rather than remitting the matter for a decision by the Authority).

11. The substantive appeal on those two issues came on for hearing before us in January 2008, when we had the benefit of written and oral submissions from counsel for Dŵr Cymru, for Albion and for the Authority (which intervened in the appeal even though it had not itself, as the original decision-maker and the respondent before the Tribunal, sought to appeal the Tribunal's decisions). We also had the benefit of written submissions, settled by counsel, for two other United Kingdom regulatory authorities, namely the Office of Fair Trading ("the OFT") and the Office of Communications ("Ofcom"). Since the hearing we have received further written materials, largely in response to a request made by the court in the course of the hearing. We are grateful to all concerned for the assistance they have given the court.

12. We should mention that prior to the hearing, Dŵr Cymru applied for Richards LJ to recuse himself on the ground that he had originally refused permission to appeal on the

papers. We refused that application in a judgment given at the outset of the hearing: see [2008] EWCA Civ 97.

13. While Dŵr Cymru has been pursuing its appeal before this court, the issue of excessive pricing which was left open by the Tribunal in its further judgment has been subject to further investigation by the Authority and a further hearing before the Tribunal, which took place in February 2008. A yet further judgment of the Tribunal in respect of that issue is awaited.

The statutory framework

14. The competition law issues with which this case is concerned arise under the 1998 Act, but it is also necessary to have in mind, by way of background, the Authority's wider regulatory powers in respect of the water industry.

15. Albion's complaint concerned an alleged breach of s.18 of the 1998 Act, which is at the heart of Chapter II of Part I of the Act. It reads:

> "(1) Subject to section 19 [which contains immaterial exceptions], any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom.
>
> (2) Conduct may, in particular, constitute such an abuse if it consists in -
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> ....
>
> (3) In this section –
>
> 'dominant position' means a dominant position within the United Kingdom; and 'the United Kingdom' means the United Kingdom or any part of it.
>
> (4) The prohibition imposed by subsection (1) is referred to in this Act as 'the Chapter II prohibition'."

16. Chapter III deals with powers of investigation and enforcement. By its express terms, the statute confers those powers on the OFT; but, by an amendment to the Water Industry Act 1991, it entitles the Authority to exercise, concurrently with the OFT, the relevant functions of the OFT in relation to commercial activities connected with the supply of water or securing a supply of water or with the provision or securing of sewerage services. Accordingly, references to "the OFT" in the relevant sections are to be read as applying equally to the Authority.

17. If, as a result of an investigation, it is proposed to make a decision that the Chapter II prohibition has been infringed, s.31 provides that notice must be given to the person or persons likely to be affected by it. There is no provision relating to the taking of a decision as such, but ss.46 and 47 provide for rights of appeal to the Tribunal once a decision is taken. It was under s.47 that Albion exercised a right of appeal to the Tribunal against the Director's decision that the Chapter II prohibition had not been infringed by Dŵr Cymru.

18. The Tribunal's powers on an appeal are governed by schedule 8 to the 1998 Act and will be considered separately when we come to the jurisdictional issue.

19. In determining questions arising under Part I of the 1998 Act, the Authority and the Tribunal (and the court on this appeal) are required to apply the principles laid down in s.60, which reads:

> "(1) The purpose of this section is to ensure that so far as possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between -
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission.
>
> (4) Subsections (2) and (3) also apply to –
>
> (a) the OFT; and
>
> (b) any person acting on behalf of the OFT, in connection with any matter arising under this Part.
>
> (5) In subsections (2) and (3), 'court' means any court or tribunal.
>
> ..."

20. By virtue of that section the issues arising under s.18 of the 1998 Act call for consideration of the corresponding issues arising under Article 82 EC in respect of an abuse of a dominant position within the Community.

21. Separate from the Authority's powers in relation to competition law are its wider regulatory powers in respect of the water industry, under the Water Industry Act 1991 and the Water Act 2003.

22. We will refer to certain provisions of the Water Industry Act 1991 when describing the relevant facts in greater detail. We confine ourselves to mentioning here that, although the Act confers a variety of functions on the Authority and imposes various duties on it in relation to the carrying out of certain of those functions, it may not have regard to those duties when exercising any of its functions under the 1998 Act (see s.2(6A), as inserted by the 1998 Act). This serves to underline the separation between the competition law powers and the wider regulatory powers of the Authority.

23. The Water Act 2003 established a new water supply regime which includes provision for the calculation of an access price under what is known as the "Costs Principle", which undertakers will have to apply when determining charges to new suppliers licensed under the Act. It seems likely, therefore, that issues of the kind raised by the present case will be resolved in the future, in the context of the water industry, under the provisions of that Act. The Chapter II prohibition is unlikely to bite at that point since it does not apply to conduct engaged in so as to comply with a legal requirement (see para 5(2) of schedule 3 to the 1998 Act). We have been assured, however, that the issues in this case remain very much alive so far as Albion is concerned. The relevant provisions of the Water Act 2003 relate to undertakers licensed under the Act; but Albion, rather than seeking such a licence, has sought an exemption under the Act, which would enable it to continue to rely on the regime of the Water Industry Act 1991 under which it has operated hitherto.

The relevant facts in greater detail

24. Dŵr Cymru was one of a number of water undertakers appointed by the Secretary of State pursuant to the Water Industry Act 1991. One of the Director's powers, under s.7 of that Act, was to replace an existing undertaker with another company ("an inset appointee") as the undertaker for a specified geographical area if certain conditions were met. Albion was granted an inset appointment to enable it to supply Shotton in 1999. An inset appointee must carry out all the functions, and has all the rights and obligations, of any other undertaker under the Act.

25. It is open to undertakers to make a bulk supply agreement for the supply of water in bulk for distribution by the undertaker taking the supply; and the Director had the power under s.40 of the Act to determine the terms of bulk supply agreements where agreement could not be reached.

26. Albion entered into a bulk supply agreement with Dŵr Cymru (referred to as "the Second Bulk Supply Agreement") in March 1999, for the purpose of supplying Shotton under its inset appointment. The agreement came into force in May 1999 and expired in May 2003, but the parties continued to operate it as if it had not expired. The price for water supplied under the agreement is about 26 p/m^3. Under a separate supply

agreement between Albion and Shotton ("the Shotton Supply Agreement"), Shotton agreed to pay the same price to Albion.

27. In the hope of achieving a reduction in the price payable to Dŵr Cymru, Albion applied to the Director for a bulk supply determination, but the Director concluded that a formal determination would not be appropriate.

28. An alternative approach tried by Albion was to seek the replacement of the Second Bulk Supply Agreement by the arrangement to which we have already referred, namely to purchase water from United Utilities at the point of its abstraction from the River Dee and to pay Dŵr Cymru for its common carriage across Dŵr Cymru's network to Shotton. Albion first asked Dŵr Cymru for a common carriage agreement in September 2000.

29. In December 2000 Albion lodged a formal complaint under the 1998 Act, alleging a failure by Dŵr Cymru to negotiate the common carriage access price. In March 2001 Dŵr Cymru informed Albion that it was prepared to offer an access price of 23.2 p/m^3 (referred to as "the First Access Price"). This was unacceptable to Albion. The essence of its concern was that it would be left with no effective margin if it had to purchase water from United Utilities (at a cost of over 3 p/m^3), pay a First Access Price of 23.2 p/m^3 and resell the water to Shotton at a price competitive with Dŵr Cymru's retail price of 26 p/m^3.

Margin squeeze: introduction

30. The effect of s.60 of the 1998 Act, with its aim of achieving a high degree of consistency between the relevant domestic and Community law, is that consideration of the issue of margin squeeze (or price squeeze) requires examination of relevant Community case-law and practice as well as domestic material. Indeed, it is primarily in the Community context that the concept has been developed.

31. Margin squeeze is a recognised form of abuse of a dominant position. The general principle is explained in notices issued respectively by the European Commission ("the Commission") and the OFT. It is helpful to quote passages from those documents at this stage in order to set the scene, though we will need to go into greater detail later.

32. In its Notice on the application of the competition rules to access agreements in the telecommunications sector ("the Telecommunications Notice"), published in (1998) OJ C265/2, the Commission sought *inter alia* "to explain how the competition rules will be applied in a consistent way across the sectors involved in the provision of new services, and in particular to access issues and gateways in this context" (preface). The notice is stated to be based on the Commission's experience in several cases and certain studies carried out on behalf of the Commission (para 6). It constitutes in our view a relevant "statement of the Commission" to which we must have regard pursuant to s.60(3) of the 1998 Act. The exposition of principles that the Commission said it would apply in cases before it includes a lengthy section on abuse of dominance. The first sub-heading is "Refusal to grant access to facilities and application of unfavourable terms". The second is "Other forms of abuse" and includes the following:

> "*Price Squeeze*
>
> 117. Where the operator is dominant in the product or services market, a price squeeze could constitute an abuse. A price squeeze could be demonstrated by showing that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company. A loss-making downstream arm could be hidden if the dominant operator has allocated costs to its access operations which should properly be allocated to the downstream operations, or has otherwise improperly determined the transfer prices within the organisation ….
>
> 118. In appropriate circumstances, a price squeeze could also be demonstrated by showing that the margin between the price charged to competitors on the downstream market (including the dominant company's own downstream operations, if any) for access and the price which the network operator charges in the downstream market is insufficient to allow a reasonably efficient service provider in the downstream market to obtain a normal profit (unless the dominant company can show that its downstream operation is exceptionally efficient)."

33. The OFT's description of a margin squeeze is to be found in a draft Guideline, "Assessment of Conduct" (OFT 414a, April 2004), which was relied on by the Tribunal and by the parties before us despite its description as a "draft":

> "6.1 A margin squeeze may occur in an industry where a vertically integrated undertaking is dominant in the supply of an important input for a downstream market in which it also operates. The vertically integrated undertaking could then harm competition by setting such a low margin between its input price (e.g. wholesale price) and the price it sets in the downstream market (e.g. retail price) that an efficient downstream competitor is forced to exit the market or is unable to compete effectively.
>
> 6.2 To test for margin squeeze, it is usual to determine whether an efficient downstream competitor would earn (at least) a normal profit when paying input prices set by the vertically integrated undertaking.
>
> 6.3 In practice, in order to determine whether an efficient downstream competitor would make a normal profit, the test is typically applied to the downstream arm of the vertically integrated undertaking. Therefore, the test asks whether, given its revenues at the time of the alleged margin squeeze, the integrated undertaking's downstream business would make (at least) a normal profit if it paid the same input price that it charged its competitors.

> 6.4 A test for margin squeeze might require assessing the accounts of a 'notional business' as in practice the integrated undertaking's downstream business may not have separate accounts from its upstream business and would not usually treat its input prices as a cost in the same way that an independent downstream competitor would. Therefore, the details of how costs and revenues are allocated and/or calculated will depend on the circumstances of each case ....
>
> 6.5 If there is evidence that a vertically integrated dominant undertaking has applied a margin squeeze and that it harmed (or was likely to harm) competition, this is likely to constitute an abuse of that dominant position."

The Director's decision

34. The relevant part of the Director's decision set out the guidance in the Telecommunications Notice and observed that para 118 of the Notice "is based on the premise that an undertaking operating on an upstream market is charging a price to an operator on a separate downstream market, which may be an unfair price" (para 345). It therefore considered the nature of the water supply services supplied by Dŵr Cymru and Albion respectively, "in circumstances where Albion Water claims to be entitled to be charged a price by Dŵr Cymru which is sufficiently low to allow Albion Water to earn a reasonable profit on its water supply activity" (ibid.). The decision continued:

> "346. Prior to Albion Water's Inset Appointment, Dŵr Cymru had been supplying the relevant water to Shotton direct through the Ashgrove System. When Albion Water was granted its Inset Appointment, it simply purchased the water from Dŵr Cymru at the boundary of Shotton's premises (under the Second Bulk Supply Agreement), and sold it straight on to Shotton (under the Shotton Supply Agreement). It is difficult to see how, in practice the nature of the 'retail' activities carried out by Dŵr Cymru changed. It simply ceased supplying one customer (Shotton) and replaced this customer with a second customer (Albion Water).
>
> 347. Further, ... on 12 December 1996 we provisionally decided a price (26 p/m^3) as indicative of the price we would determine formally if we were asked to determine the Second Bulk Supply Agreement (although ultimately the parties agreed the same price without needing a formal determination). This price was based on other retail prices offered by Dŵr Cymru at the time .... The New Tariff, which is a retail tariff, is slightly below the price in the Second Bulk Supply Agreement. The price which Shotton agreed to pay Albion Water under the Shotton Supply Agreement is the same as that in the Second Bulk Supply Agreement. These are all consistent with Albion Water simply replacing Shotton as Dŵr Cymru's retail customer.
>
> 348. Importantly, we have seen no evidence that the arrival of Albion Water has resulted in Dŵr Cymru ceasing to incur any

retail costs. We asked Albion Water for details of the services it offers Shotton to assess whether Albion Water was carrying out any retail activities in the place of Dŵr Cymru. In a letter to us [Albion Water set out a list of services which Shotton required from it] ....

349. It is difficult to see how any of the services currently provided by Albion Water replace retail supply activities that were previously offered by Dŵr Cymru direct to Shotton. Services such as *'the delivery of management information'*, *'advice and provision of water management services'*, *'advice on ETP operations and safe recycling opportunities'* and *'interface between Dŵr Cymru and Shotton to deliver short term operational benefits'* all appear to be separate and distinct 'value added' services, which can be offered by consultants for example. They are not part of the 'retail' activity of water supply. Similarly, the *'Investigation of alternative resources'* is not a retail activity (and is not relevant for an undertaker which is already supplying water from an established water source ...) ....

350. Importantly, the reference to the *'interface between Dŵr Cymru and Shotton to deliver short term operational benefits'* indicates that Dŵr Cymru was still carrying out a customer relations function for the benefit of Shotton ....

351. We do not have any evidence that Dŵr Cymru ceased to incur any retail costs as a result of supplying Albion Water under the Second Bulk Supply Agreement, or that Dŵr Cymru would make any similar saving under Albion Water's proposed new arrangement. In simple terms, Dŵr Cymru will continue to supply the same water, through the same pipes, to the same premises. It will continue to issue one set of bills to one customer. Assuming that the relevant 'upstream' and 'downstream' operations are treatment/transport operations and retail operations respectively, it is not necessary to analyse the split, and relationship, between these operations carried out by Dŵr Cymru, as Dŵr Cymru will continue to provide both.

352. In summary, we do not believe that Dŵr Cymru has abused a dominant position in breach of the Chapter II prohibition in these circumstances, by engaging in price squeezing. In supplying Albion Water, Dŵr Cymru is in practical terms carrying on precisely the same water supply service and incurring the same costs as it was doing when it supplied Shotton directly."

The Tribunal's main judgment

35. The overall view expressed by the Tribunal in its main judgment was one of serious concern about the Director's decision and its consequences for the development of competition in the water industry. At para 11 the Tribunal stated:

> "The effect of the Decision is to render uneconomic Albion's proposal to supply Shotton Paper via common carriage, and largely to remove the viability of Albion's existing inset appointment. The consequent removal of choice for Shotton Paper, and the potential elimination of the only new undertaker to enter the water industry since 1989, are matters which the Tribunal views with serious concern, particularly against the background of recent policy to encourage competition in the water industry as regards supplies to large industrial users …."

In a later passage (at para 772) the Tribunal said that if the decision was correct, Albion's common carriage proposal was "dead": it was not seriously suggested that Albion could survive on a zero margin, and Albion had only done so thus far because of the support of Shotton and the interim relief ordered by the Tribunal.

36. As to the margin squeeze issue, the Tribunal provided a summary of its findings at paras 47-56 and set out its detailed reasoning at paras 843-919. The section containing the detailed reasoning begins by quoting paras 117 and 118 of the Telecommunications Notice and summarising the Director's decision and the parties' arguments. There is then a section on the relevant law, in which the Tribunal places the issue of margin squeeze within the broader context of anti-competitive conduct by dominant undertakings:

> "861. In a series of well-known cases the Court of Justice has held that it may well be an abuse if an undertaking which is dominant in one market acts without objective justification in a way which tends to monopolise a downstream, neighbouring or associated market ….
>
> 862. The effect of those decisions, in broad terms, is that it may be an abuse for an undertaking which is dominant in one (upstream) market to refuse to supply a rival with which it is in competition in a neighbouring or downstream market with goods or services which are indispensable to carrying on the rival's business, provided that: (i) the refusal will eliminate all competition on the part of the person requesting goods or services; (ii) the refusal is incapable of being objectively justified; and (iii) the goods or services are indispensable for carrying on the rival's business, in the sense that there is no realistic possibility of creating a potential alternative ….
>
> 863. One particular manifestation of the above general principle occurs in the case of a 'price squeeze' or 'margin squeeze' where, instead of refusing entirely to supply the essential input in question, the dominant undertaking supplies the input to its competitors on the downstream market at a price which does not enable those competitors to compete effectively on the downstream market …."

37. The Tribunal then quoted the OFT's Guideline, saying that the tests for margin squeeze set out in it are very similar to the tests set out in the Telecommunications

Notice; and it referred to the Commission's decision in *Deutsche Telekom AG* (2003) OJ L263/99, to which it will be necessary for us to return.

38. The next section of the judgment contains the Tribunal's analysis. It refers to the various price figures and states that, in effect, the difference between Dŵr Cymru's price for the upstream input (common carriage) and the price set by Dŵr Cymru in the downstream market (retail supply) would leave Albion with a zero margin and thus unable to compete unless Shotton was prepared to pay Albion more than Dŵr Cymru's retail price. It continues:

> "872. In those circumstances there is no doubt in our view that in this case there is a margin squeeze in the terms set out in OFT 414a and the Telecommunications Notice. The question is whether or not the Decision was correct in finding that the facts here in question did not give rise to an abuse within the meaning of the Chapter II Prohibition.
>
> 873. In our view, there are four reasons why the analysis in the Decision is incorrect, or at least inadequate, on the issue of margin squeeze. (1) Since the First Access Price has not been shown to be related to the costs, and the evidence strongly suggests that price to have been excessive ..., it cannot be assumed that Dŵr Cymru's upstream price is reasonable. (2) The margin squeeze in question cannot be justified on the basis of an ECPR approach which is itself unsound, for the reasons already given. (3) The Decision does not deal adequately with the fact that Albion wishes to continue to combine the supply of water with its offer of water efficiency services. (4) The Director's approach in the Decision is contrary to the approach for determining the existence or otherwise of a margin squeeze under Community Law. We are not persuaded that any different approach is justified on the facts of this case."

39. The first reason brings in the separate issue of excessive pricing, on which the Tribunal had at this stage reached no final decision. Nevertheless the Tribunal stated (at para 874) that "[s]ince the evidence strongly suggests that the level of the upstream price was excessive, in our view the zero margin between Dŵr Cymru's upstream price and its downstream price cannot be objectively justified". In this respect the case was said to differ from the decision of the Court of First Instance in Case T-5/97 *Industries des Poudres Sphériques v Commission* [2000] ECR II-3755 ("the *IPS* case"), where there was no evidence that the upstream price was excessive.

40. The second reason relates to the Director's application of an approach known as the Efficient Component Pricing Rule (ECPR), which essentially involves taking the prevailing retail price and deducting the cost which the incumbent avoids by not making the supply in question. Applying that approach, the Director had found that an access price of 22.5 p/m^3 would have been justified. The Tribunal held in a separate part of its main judgment that the approach could not safely be relied on; and in the Tribunal's view it followed that the approach did not objectively justify the margin squeeze (para 875). Dŵr Cymru was not given permission to appeal against that aspect of the Tribunal's reasoning.

41. The third reason is dealt with at some length, at paras 876-895. The Tribunal stated that the analysis of margin squeeze in this case was complicated by the fact that the services Albion as a water supplier wished to provide to Shotton, and was currently providing, were not merely "water only" services but consisted of a water supply combined with water efficiency services: Albion had assisted Shotton in improving production efficiency in the use of water by some 20 per cent and took the view that this kind of service should be seen as part of the normal activities of a responsible water supplier. Dŵr Cymru had previously offered water efficiency services to major customers but had discontinued those services; yet it had to be assumed that the cost of providing the services was taken into account in setting Dŵr Cymru's tariff for large industrial users and was still reflected in the current tariff, notwithstanding that Dŵr Cymru no longer provided those services. The Tribunal rejected the Authority's stance that the water efficiency services supplied by Albion did not form part of a statutory water undertaker's appointed activities or that Shotton should pay for such services over and above the tariff price if it wanted them. In the course of its analysis, the Tribunal stated this:

> "893. The Authority originally characterised Albion's position as that of someone who snatched a letter from the postman's hand at the garden gate, and then demanded a margin for delivering the letter to the front door. According to the Authority, Albion merely 'retyped the invoice' .... That description turns out to be far from the facts of this case. The Authority's stance of being opposed to undertakers offering water efficiency services somewhat surprised us, as did the apparent lack of weight attached by the Authority to the water efficiency services in issue in the present case in view of public concern about conservation of water resources ....
>
> 894. It seems to us that Albion is supplying Shotton Paper with exactly the kind of services the government hoped would be provided in a more competitive environment ....
>
> 895. It follows, in our view, that in the Decision the Director did not adequately investigate what services were being supplied to Shotton Paper by Albion, nor did he consider the relevance to the margin squeeze issue of the facts that: (a) Dŵr Cymru's tariffs presupposed the supply of water efficiency services; (b) Dŵr Cymru ceased to supply those services but did not adjust its tariffs; and (c) Albion has been supplying such services to Shotton Paper sine 1999. In our view, the question whether in those circumstances the First Access Price should have allowed a margin to enable Albion to supply water efficiency services which Dŵr Cymru was no longer offering, was a relevant consideration which should have been addressed in the Decision, but was not."

42. Again, to the extent that Dŵr Cymru sought to appeal that aspect of the Tribunal's reasoning, permission was refused.

43. The Tribunal's fourth reason for holding the Director's decision to be incorrect brings us to the heart of this appeal. Having referred once more to the Tribunal's rejection of the ECPR approach as unsound, the judgment continues as follows:

> "898. With regard to the legal question of whether an unlawful margin squeeze arose in this case, both the OFT and the European Commission apply the same tests for determining whether there is a margin squeeze. The standard formulation poses two alternative tests: (i) that the dominant company's own downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by the upstream operating arm of the dominant company; or (ii) that a reasonably efficient downstream operator could not earn (at least) a normal profit when paying input prices set by the vertically integrated undertaking.
>
> 899. As regards (ii) above, it is not suggested that Albion is an inefficient undertaking. Nor has it been suggested that Albion could earn a normal profit (or indeed any profit) when paying the First Access Price. On that approach, there is a clear margin squeeze in this case.
>
> 890. As regards (i) above, examination of the question whether the dominant undertaking's downstream operation (here Dŵr Cymru's notional retail operation) could itself trade profitably at the upstream price charged to Albion by Dŵr Cymru (here the First Access Price of 23.2 p/m^3) normally involves considering a notional business (here consisting of Dŵr Cymru's retail arm), and allocating costs to that business, including an appropriate amount for profit. That approach is common to both the OFT (OFT 414a at para 6.14) and the European Commission (e.g. *Deutsche Telekom*, para 140). That approach was not followed by the Director in this case. In our view that failure constitutes an error of analysis.
>
> 901. Moreover, in our view it is manifest that a 'notional' retail business of Dŵr Cymru could not trade profitably at a retail price of 26 p/m^3 and an input price of 23.2 p/m^3. It would still have to acquire the water (costing at least 3.3 p/m^3). At a retail price of 26 p/m^3, a notional 'retail arm' of Dŵr Cymru would itself have no margin to meet its costs, including overheads and profit. It follows that on this approach the alternative test for a margin squeeze is also met."

44. At paras 902-905 the Tribunal referred to the Director's own published guidance, "MD 163", which was extant at the time of the decision and which stated the principle that in setting common carriage charges the incumbent "should charge entrants as it would charge itself and should be able to demonstrate this ...". The Tribunal held that the Director should be held to his guidance, as well as to the guidance issued by the OFT and the Commission. The failure to consider the costs of a notional retail arm of Dŵr Cymru was in the Tribunal's view an important omission. The Tribunal

added at paras 906-907 that a central weakness in the decision was that the service sought by Albion was essentially a transportation service, but no attempt had been made to identify separately the costs of providing that service and the approach in the main decision did not put the incumbent and the new entrant on an equal footing.

45. The Tribunal dealt next with a central argument advanced before it by the Authority and repeated before us by Dŵr Cymru:

> "909. The Authority's essential argument is that there is no scope here for a margin squeeze since Albion is duplicating, rather than replacing, services offered by Dŵr Cymru. To create a margin would be artificial, and would amount to subsidising Albion. According to the Authority, Albion has not come up with an innovative business model which gives rise to efficiencies. Cases such as *Napier Brown / British Sugar*, *Deutsche Telekom* and *Genzyme* implicitly assume that the margin is to be found in the dominant supplier's avoided costs.
>
> 910. To take the last point first, it is true that in the margin squeeze cases cited above, the incumbents did not incur the costs of the downstream activities in question when supplying third parties with the upstream inputs. However, in *Genzyme* … the Tribunal did not determine the appropriate margin on the basis of Genzyme's avoided costs, but on the basis of the margin required by a reasonably efficient homecare services provider to supply its services and earn a competitive return … i.e. an amount sufficient to cover the entrant's total costs. Neither *Napier Brown / British Sugar* nor *Deutsche Telekom*, nor the Guidance issued by the OFT and the Commission, appear to proceed on an 'avoided costs' basis. An 'avoided cost' approach in our view would not be a satisfactory basis for a margin squeeze test, because it takes no account of the incumbent's fixed costs, takes no account of the entrant's total costs, and requires the entrant to be more efficient than the incumbent, as already shown above. In addition there are the problems of determining 'avoided' costs. These difficulties are illustrated by the fact that the Authority's position seems to have swung during these proceedings from arguing that no retail costs are avoided to submitting that all retail costs are avoidable.
>
> 911. As to the Authority's argument that Albion is merely 'duplicating', not replacing, Dŵr Cymru's services and that Albion's presence is 'artificial', that argument would lead logically to the conclusion that there would never be any prospect of Shotton Paper (or Corus) seeking an alternative supplier via common carriage. That would deprive the customer of choice of supplier, and it is the interests of the customers, as beneficiaries of the competitive process, to which the Tribunal must have primary regard ….

912. As to the suggestion that the alternative would be to require Dŵr Cymru to subsidise Albion, we have already dealt with cross-subsidy issues ….

913. We add, moreover, that to the extent that competition brings the efficiency and other gains envisaged by the Consultation Paper [i.e. a government consultation paper in 2002], we have no reason, on the evidence, to suppose that customers generally should not benefit from a degree of competition in the water industry ….

914. As to the Authority's and Dŵr Cymru's argument that, if Albion is correct, any company could simply interpose itself in the supply chain of a dominant company and demand a margin for doing so, that argument ignores the particular facts of this case. Albion is a statutory inset appointee of some years' standing which is already being supplied by Dŵr Cymru under the Second Bulk Supply Agreement. Albion's inset appointment runs to over 100 pages and imposes significant statutory duties on Albion. Albion has an existing 10-year supply agreement with Shotton Paper dated 19 March 1999 under which Albion assumes supply obligations, the credit risk and the functions of metering, billing and customer service. In addition, Albion supplies the water efficiency services to Shotton Paper already mentioned. It has been supported throughout by Shotton Paper which, presumably, prefers Albion to Dŵr Cymru, even though Shotton Paper was previously Dŵr Cymru's largest customer. Shotton Paper has improved its productive efficiency as a result of dealing with Albion. Albion's offering, which combines water supply services with water efficiency services through the same supplier is a desirable innovation, according to the Consultation Paper. In those specific circumstances, the approach in the Decision, which would eliminate the existing offering by Albion …, is not in our view compatible with the Chapter II Prohibition.

…

918. For the reasons given above, in the specific factual circumstances of this case, we see no reason to depart from the standard approach to the finding of a margin squeeze contrary to the Chapter II Prohibition, as set out in OFT's Guidance in OFT 414a, the European Commission's approach in the Telecommunications Notice, the decision in *Deutsche Telekom*, and MD 163 itself, properly interpreted."

46. Accordingly, the Tribunal concluded in para 919, and repeated at para 981(5), that the Director's conclusion that Dŵr Cymru did not infringe the Chapter II prohibition by engaging in a margin squeeze was "erroneous in law and incorrect, or at least insufficient, from the point of view of the reasons given, the facts and analysis relied on, and the investigation undertaken".

The Tribunal's further judgment

47. The Tribunal returned to the issue in its further judgment, in which it reached the decision that Dŵr Cymru had abused a dominant position by imposing a margin squeeze. The relevant section of the judgment, at paras 282-313, referred back extensively to the main judgment. As to the facts, it stated that "there is no doubt that a margin squeeze exists as a matter of fact" (para 286); that the effect of the margin squeeze "is, and was, to prevent Albion from entering into a common carriage arrangement and to eliminate Albion as a competitor" (para 287); and that "it is plain, on the evidence before the Tribunal, that in this case the First Access Price would, in practice, not merely offer a zero margin, but a substantially negative margin" (para 289).

48. As to the law to be applied, the Tribunal summarised the passages in the main judgment to which we have already referred, then stated that "it follows from the foregoing that the elimination by Dŵr Cymru of its only competitor, Albion, and the prevention of competition by common carriage by imposing on Albion a zero, or even negative, margin is properly characterised as an abuse of dominant position" (para 296). It dealt next with an argument by Dŵr Cymru that the Tribunal was not yet in a position to determine the issue of margin squeeze abuse because in order to demonstrate such abuse it had to be shown that the input price (i.e. here, the First Access Price) was excessive. For that argument Dŵr Cymru relied on the *IPS* case (cited at para 39 above). The Tribunal, however, distinguished the *IPS* case and held that "it does not seem to us that the *IPS* case introduces, by a side wind, a gloss on the Commission's and OFT's margin squeeze tests to the effect that a margin squeeze can be established only if it is shown that the input price is so unfairly high as to amount to an abuse" (para 301). The Tribunal reiterated its view that "there can be no doubt that the margin squeeze tests of the Commission and the OFT are met in this case" (para 304).

49. The Tribunal continued:

> "305. The principal argument advanced by the Authority and Dŵr Cymru to avoid the orthodox application of the margin squeeze test was that the margin squeeze decisions such as *Napier Brown/British Sugar*, *Deutsche Telekom* and *Genzyme* cited in the main judgment are all based on the idea that the price charged by the dominant supplier had failed to take account of the supplier's avoided costs, whereas in this case, according to Dŵr Cymru and the Authority, the First Access Price did reflect Dŵr Cymru's avoided costs. The Tribunal has already rejected that argument at paras [908]-[911] of the main judgment. There is no suggestion in the text of those decisions that the basis of the reasoning is an 'avoided cost' principle. The margin squeeze test looks at whether either an efficient competitor, or the incumbent's downstream arm, could compete and earn a normal profit in the downstream market at the incumbent's input price. If that is not the case, it is for the dominant firm to show an objective justification. In our view, the avoided cost approach of Dŵr Cymru and the Authority is open to the same objections as the ECPR approach rejected by the Tribunal at length in … the main judgment: see para [910] of the main judgment.

306. In any event, during the course of these proceedings the Authority and Dŵr Cymru advanced various inconsistent arguments about 'avoided costs'. It was first submitted that only the water resource cost was avoided, but the Authority and Dŵr Cymru ultimately submitted to the Tribunal that all retail costs should be treated as avoidable …. However, that was not the basis of the decision, and no attempt was made to ascertain what were the avoidable costs in this wider sense, either when quoting the First Access Price, or subsequently. In our view, on the facts, the 'avoided costs' arguments were too inconsistent and imprecise to assist Dŵr Cymru or the Authority.

307. The Authority and Dŵr Cymru also argued that the latter could not be required to 'subsidise' Albion. That, as an abstract statement, is not open to objection under the Chapter II Prohibition, nor is a 'subsidy' being advocated in this case. However, in this case Dŵr Cymru is a dominant undertaking which is in a position to control whether a competitor enters the market or not. Dŵr Cymru commands the infrastructure which the competitor needs to use and can set both the upstream price for the use of that infrastructure and its own downstream retail price against which a competitor has to compete. If the margin between those two prices is either zero or negative, no competitor can enter the market.

308. It is in those circumstances that a dominant undertaking, and certainly an undertaking with 100% of the market such as Dŵr Cymru, is required to justify its pricing policy, otherwise it would be able permanently to foreclose any competition. The dominant firm is not required to subsidise its competitors, but it is required to show that the allegedly insufficient margin it imposes is objectively justified. The normal means of doing this is to show that a downstream arm of the dominant undertaking could earn at least a normal profit in the downstream market in question; or alternatively that a reasonably efficient competitor could do so. If that is shown, that is the end of the matter. A prospective entrant who cannot compete because it is inefficient, or has higher costs than the incumbent's downstream arm, is not entitled to be subsidised. It is also open to the dominant firm to show that, on a proper allocation of costs, the margin is not open to criticism.

309. In the present case, Albion does not, in our view, seek a subsidy, but a proper opportunity to compete on an equal footing with Dŵr Cymru's own 'retail' activities. Self-evidently, a zero or negative margin prevents that competition. Dŵr Cymru has not shown any objective justification for that margin. It has not shown that its own retail activities could make a normal profit in the downstream market at the margin in question; nor that any other competitor could do so, nor that Albion is inefficient. Dŵr

> Cymru has made no attempt to identify the costs properly to be allocated to the service of transportation, as distinct from the 'distribution' function as a whole, which we understand to include, besides transportation, a range of other costs including notably retail costs, as well as other heads of costs ..... Moreover, Dŵr Cymru submitted inconsistent arguments on the issue of avoided costs .... In all those circumstances, it is not a question of Dŵr Cymru being called upon to 'subsidise' Albion. It is simply that the zero or negative margin which Dŵr Cymru imposed on Albion called for an objective justification, and Dŵr Cymru has failed to provide any such justification.
>
> 310. ... The margin squeeze in this case would have the further effect of preventing Albion from offering water efficiency services on an economic basis. This additional element further supports the finding of margin squeeze, for the reasons given in paras [876]-[895] of the main judgment.
>
> 311. In the light of all the foregoing we can see no reason to doubt that the margin squeeze imposed on Albion by Dŵr Cymru in this case amounted to an abuse of a dominant position."

The rival submissions on margin squeeze

50. *Dŵr Cymru's* case is that the Director's decision was correct and that the Tribunal fell into legal error in holding to the contrary and finding an abuse.

51. In his written skeleton argument, Mr Vajda submitted that the following features must, as a minimum, be present for there to be a margin squeeze: (i) the dominant undertaking must be vertically integrated and operate on two clearly distinct markets – an "upstream market" and a "downstream market" in which a competitor may seek to operate; (ii) the dominant undertaking must be dominant in the upstream market and significantly active in the downstream market; (iii) it must be necessary, in order to operate in the downstream market, to have access to an "input" which is produced on the upstream market; (iv) a competitor who wishes to compete on the downstream market must add value to / transform the input on the downstream market, and the dominant undertaking when supplying merely the input rather than the added-value downstream product must itself avoid the costs associated with transformation at the downstream level; (v) the dominant undertaking must set a margin between its upstream input price and its own downstream price which renders it unfeasible for an efficient downstream competitor to add value to the input and be able to compete effectively against the dominant undertaking on the downstream market; and (vi) there must be no objective justification for the prices charged by the vertically integrated firm at the upstream or downstream level.

52. In his oral submissions Mr Vajda talked in terms of a "two-market premise" to the guidance and authorities on margin squeeze, namely the existence of an upstream market and a downstream market, involving distinct activities at each level and with distinct costs associated with each activity. He focused on features (iv) and (v) above as representing the effective area of dispute. He said that feature (iv) contained two limbs. The first was the need for "transformative activity" by the competitor on the

downstream market, that is the doing of something that transforms the input into an economically distinct product. The second was the dominant undertaking's avoidance of costs associated with that transformative activity: unless the competitor incurs transformative costs and the dominant undertaking avoids such costs, the dominant undertaking will be subsidising the competitor and the overall costs of supply will increase, to the detriment of consumers. Both in relation to feature (iv) and in relation to feature (v), Mr Vajda indicated a preference for the expression "transformative activity" rather than "adding value". He submitted that the two-market premise and the need for transformative activity and avoided costs at the downstream level underlay the guidance and the cases. He referred in particular to the Commission's decisions in *National Carbonising* (1976) OJ L35/6, *Napier Brown / British Sugar* (1988) OJ L284/41, *Deutsche Telekom* (cited above) and *Wanadoo España vs Telefónica* (4 July 2007), the judgment of the Court of First Instance in the *IPS* case (cited above), and the Tribunal's own decision in *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4, [2004] CompAR 358. We will examine those authorities later in this judgment.

53. The nature of Dŵr Cymru's case is also brought out by the form of declaration that it seeks as part of its re-amended claim to relief. It asks the court to "declare that the Tribunal adopted a test for margin squeeze without regard to a necessary feature of the test, namely, that it does not apply in circumstances where the product or service provided by the putative 'downstream' competitor for which the putative 'upstream' input is required [is not economically transformative of the 'upstream' input], with the result that the entry of the 'downstream' competitor saves the dominant undertaking no costs". Mr Vajda said that the passage in square brackets could in the alternative read "does not displace the provision of that service by the incumbent" or "merely duplicates an activity still carried on by the incumbent". That way of expressing it ties in closely with the way the point was put by Mr Anderson QC for the Authority, which Mr Vajda, in his reply, was content to accept as being in substance the same as his own case.

54. Before leaving Mr Vajda's submissions, however, we should also mention a subsidiary attack upon the Tribunal's reasoning, arising out of its reference at para 874 of the main judgment to the First Access Price being excessive (see para 39 above). Since the Tribunal had reached no final decision at that stage on whether the price was excessive, it could not properly rely on the point as a ground of criticism of the Director's analysis, and its own analysis of margin squeeze had to proceed on the basis that the price was not excessive. Accordingly, it was submitted, the Tribunal was wrong to distinguish the *IPS* case on the basis that there was no evidence of an excessive upstream price in that case. It also failed to take account of the proposition at para 179 of the *IPS* judgment that a dominant undertaking does not engage in a margin squeeze in the absence of either an excessive price on the upstream market or a predatory price on the downstream market.

55. *The Authority's* position, as explained by Mr Anderson, was that although it had not appealed against the Tribunal's decision, it was represented before the court because of the wider implications of the issues raised on the appeal. It shared Dŵr Cymru's concerns about margin squeeze. The Tribunal purported to apply the traditional test for margin squeeze, namely whether an efficient downstream competitor or the incumbent's downstream operation could earn a normal profit on the basis of the price offered. That formulation, however, is only appropriate in circumstances where the third party

requiring the upstream input for its downstream activity *displaces* the incumbent from that downstream activity: the formulation proceeds on the premise that such circumstances are present; and if they are not present, it is inappropriate. The concept of displacement came to the fore in Mr Anderson's oral submissions, whereas his written observations were expressed in terms of the third party saving the incumbent the costs of the downstream activity; but he submitted that displacement and cost savings referred in substance to the same point. He also preferred to refer to displacement rather than to transformative activity, because the downstream activity might not always involve an element of transforming.

56. After completing his oral submissions, Mr Anderson handed in a helpful written summary of the test contended for by the Authority. The Authority says that the relevant test should be: "whether *in circumstances where the new entrant displaces the activities of the vertically integrated dominant incumbent in the downstream market, rather than duplicating those activities*, [thereby relieving the incumbent of the costs associated with those activities] the price charged in the upstream market would enable the incumbent's downstream operations (or a reasonably efficient new entrant) to trade profitably" (original italics). To address a situation where there is a new activity, for example a new customer, it is said that the test could be adjusted as follows: "whether, *in circumstances where the new entrant undertakes downstream activities which, absent the presence of the new entrant would otherwise be undertaken by the vertically integrated dominant incumbent, rather than duplicating such activities*, [thereby relieving the incumbent of the costs associated with such activities] the price charged in the upstream market would enable the incumbent's downstream operations (or a reasonably efficient new entrant) to trade profitably".

57. The italicised passages represent what Mr Anderson submitted to be an essential premise to the application of the margin squeeze test. He said that in none of the decided cases was that premise in dispute. In the present case, by contrast, the premise was in dispute, and the Tribunal did not decide (and held that it did not need to decide) whether Albion was duplicating rather than displacing activities of Dŵr Cymru or whether Albion's role would relieve Dŵr Cymru of any costs. The Tribunal thereby applied the wrong legal test.

58. For *Albion*, Mr Thompson QC made a number of "key submissions" which he reduced to writing and took the court through. First, he submitted that the Tribunal applied the conventional legal and economic tests for a margin squeeze, as summarised in the Telecommunications Notice and the OFT's Guideline. In developing that point, he submitted that the Tribunal rightly looked at margin squeeze in the context of the wider test of exclusionary abuse of a dominant position (see para 861 of the main judgment, quoted at para 36 above), which has three elements: (i) dominance in an upstream market, (ii) exclusion of competition in a downstream market, and (iii) absence of objective justification. The real question is whether the Tribunal was right to find an exclusionary abuse on the facts as found in this case. There is nothing in the Commission's guidance, the OFT's guidance, the decided cases (including "network" cases similar to this) or the textbooks to support the view that the margin squeeze tests as formulated have to be qualified by reference to avoided costs or an equivalent concept. The Tribunal was entitled to find that both tests in the standard formulation were satisfied: a zero or negative margin is the limiting case of an abusive margin squeeze, since it means that no downstream

competitor, however efficient, could trade profitably, nor could the downstream arm of the vertically integrated incumbent. Moreover, the Tribunal correctly accepted the possibility of objective justification, and took into account all the points made about costs and displacement as being relevant to that issue.

59. In that connection Mr Thompson accepted that it could be a form of objective justification to show that the new entrant was not engaging in a genuine economic activity in the downstream market. To that extent he accepted the need for displacement of economic activity of the incumbent. But he submitted that displacement can be potential as well as actual, that is to say the new entrant may do something that the incumbent does not do but could do: he cited the example of the supply of water efficiency services by Albion. He submitted that there is no separate need to show avoided costs; and if "transformative activity" means something other than displacement of economic activity, there is likewise no need to show it.

60. The second key submission for Albion was that the *IPS* case is consistent with the conventional tests of margin squeeze and, in particular, does not lay down any requirement as to excessive pricing at the upstream level or predatory pricing at the downstream level for a margin squeeze to exist. What was said about excessive pricing and predatory pricing must be read in the light of the particular allegations and findings in the case.

61. The third key submission was that the Tribunal, applying the conventional tests to the facts of this case, found on the facts a "serious and severe margin squeeze", based on "not merely ... a zero margin, but a substantially negative margin". This takes one back to points already covered, including those dealt with by the Tribunal in the context of objective justification. It is also relevant to note here Mr Thompson's further submission that the Tribunal's approach to the test of margin squeeze cannot in practice be divorced from issues of fact and judgment; and that Dŵr Cymru's appeal, in contending that the test of margin squeeze was not intended to apply to circumstances such as these, tries to reargue issues of fact as a point of law.

62. The fourth key submission was that the correct approach in principle to quantifying the extent of a margin squeeze, in a network case of this kind, would be for Dŵr Cymru clearly to disaggregate the long run average incremental costs of its retail services from the network costs it incurs in treating and transporting non-potable water. Mr Thompson referred to *Telefónica* and to para 6.4 of the OFT's Guideline as supporting this approach. He suggested that any confusion in the Tribunal's judgment arose from the Tribunal's frustration that this task had not been performed.

63. *The OFT's* own written observations are silent on the issue of margin squeeze. That was relied on understandably by Mr Thompson as indicating that the OFT did not wish to qualify its guidance by reference to an avoided costs rule or its equivalent.

64. *Ofcom's* written observations, on the other hand, deal with the issue of margin squeeze at some length, referring to its particular relevance to a regulator in the field of telecommunications. Ofcom describes the essential concept of a margin squeeze as simple: a firm which is dominant in an upstream market supplies a product in that market to undertakings which compete with it in the downstream market at a price which does not leave those competitors sufficient margin to sell profitably in the downstream market; as a result, the firm uses its dominance in the upstream market to

curtail competition to its downstream operation. One of the difficulties in determining the precise requirements for a margin squeeze as a matter of law is that the jurisprudence on this form of abuse to date is limited. The fact that the decided cases have shared some particular common feature does not necessarily mean that that feature is an essential ingredient for a margin squeeze abuse, properly understood.

65. Ofcom does not take issue with features (i) to (iii) or feature (vi) in Mr Vajda's analysis. It expresses concern, however, at "the over-specific and somewhat elaborate formulations" in features (iv) and (v). The qualification in feature (iv) may apply appropriately in the case of physical products, where some function is carried out in relation to the product itself. But for less tangible products, a margin squeeze may apply where essentially the same product is being supplied at wholesale and retail levels: the retail operation will not affect the product as such, but involves marketing, delivery, customer billing, etc. The real point is that there needs to be a downstream market distinct from the upstream market; but that basic premise is addressed in feature (i). As to feature (v), the incorporation of reference to "adding value" is confusing. The point at which this feature appears to be directed is more appropriately set out in the following general formulation: there is a margin squeeze if the dominant company's downstream operations could not trade profitably on the basis of the upstream price charged to its competitors by its upstream operating arm (the "equally efficient competitor" test).

66. Turning to the Tribunal's decision, Ofcom suggests that the Tribunal's formulation at para 898 of the main judgment (quoted at para 43 above) is derived from the Telecommunications Notice, which sets out the "equally efficient competitor" test in para 117 and the "reasonably efficient competitor" test in para 118. Ofcom notes, however, that the Notice qualifies the "reasonably efficient competitor" test as applicable only "in appropriate circumstances"; and it submits that the Tribunal was in error in so far as it treated the two tests as simple alternatives. The primary test is the "equally efficient competitor" test. If the "reasonably efficient competitor" test were generally applicable, it would mean that a margin squeeze would be established whenever the price charged to a downstream competitor which was *less efficient* than the dominant company's own downstream operation would not enable that competitor to compete with the dominant company (which might in turn have the undesirable consequence of leading the dominant company to increase its downstream prices to the consumer in order to avoid the risk of abuse). In none of the final decisions at Community level has the "reasonably efficient competitor" test been applied. For it to be applied, it would be necessary to show good reasons why, on the facts, it was more appropriate than the primary test. In the present case, however, the Tribunal applied it without any consideration of why or on what basis it was appropriate to apply it. The Tribunal's error was, however, immaterial since the Tribunal proceeded to apply as an alternative the "equally efficient competitor" test and found that Dŵr Cymru committed an abuse on that basis as well.

The Tribunal's observations at the permission stage

67. The Tribunal's lengthy judgment refusing permission to appeal is not to be used as a source of additional reasoning on the issues in dispute before it, but it does serve to crystallise certain matters by giving the Tribunal's reaction to the case advanced by Dŵr Cymru at the permission stage, which was essentially the same on the margin squeeze issue as has been advanced in more developed form before us (though it also included numerous points for which permission to appeal has not been granted).

68. In the section dealing with the contention that it had misapplied and misunderstood the Community case law on margin squeeze, the Tribunal stated that, in reaching its conclusions that the Director's decision was in error and that Dŵr Cymru had abused a dominant position by imposing a margin squeeze, it "applied an entirely orthodox approach to margin squeeze, following the guidance of both the OFT and the European Commission" (para 81). It could detect nothing in *Deutsche Telekom*, *Napier Brown / British Sugar* or *Genzyme* (which were all relied on by Dŵr Cymru in seeking permission to appeal) to support Dŵr Cymru's point that the cases were based on the concept of avoided costs (paras 84-86). Dŵr Cymru did not contest the Tribunal's finding that the accepted test for margin squeeze was met in this case (para 87).

69. The Tribunal added that Dŵr Cymru's avoided costs approach to margin squeeze was, to all intents and purposes, the same as the ECPR approach followed in the Director's decision and rejected by the Tribunal for reasons including the detrimental effect it would have on competition; and to advance an avoided costs approach on the margin squeeze issue without properly challenging the Tribunal's conclusions as to the consequences of an avoided costs approach in its analysis of ECPR would give this court less than half the picture (paras 88-92).

70. In the remaining paragraphs of the relevant section of the judgment (paras 93-100), the Tribunal went on to deal with a number of more detailed points relied on in support of the application for permission to appeal.

The case-law on margin squeeze

71. Before we come to our own discussion of the submissions now advanced, it will be helpful for us to consider the principal authorities, both at the Community level and in domestic law, to which we have been referred. After the hearing, at the court's request, the main parties each provided a very helpful written note (subsequently updated) analysing those authorities. We have of course already set out, and do not need to repeat, the relevant parts of the Telecommunications Notice and the OFT's Guideline.

72. Decision 76/185/ECSC, *National Carbonising* (1976) OJ L35/6 was a decision of the Commission in respect of a complaint by the National Carbonising Company ("NCC") against the National Coal Board ("NCB") and its subsidiary National Smokeless Fuels ("NSF"). NCC, a manufacturer of coke, bought all the coal it required for coke production from NCB, which had a virtual monopoly of coal production in the United Kingdom. NCC competed against NSF in the sale of coke. The gist of its complaint was that the prices charged by NCB and NSF respectively for the upstream product (coking coal) and the downstream product (coke) constituted a violation of Article 60 of the ECSC Treaty (the equivalent to Article 82 of the EC Treaty) on the ground that the margin between those two prices was insufficient to allow NCC to operate economically. The Commission referred to the general principle that an undertaking in a dominant position as regards the production of a raw material and therefore able to control the price to independent manufacturers of derivatives, and which was itself producing the same derivatives in competition with these manufacturers, "may abuse its dominant position if it acts in such a way as to eliminate the competition from these manufacturers in the market for derivatives" (p.2). From that general principle the Commission "deduced that the enterprise in a

dominant position may have an obligation to arrange its prices so as to allow a reasonably efficient manufacturer of the derivatives a margin sufficient to enable it to survive in the long term" (ibid.). One sees in that passage the seeds of the margin squeeze test, but the Commission did not elaborate further on it. The report states that on the basis of the facts available to it, the Commission concluded that NCB/NSF, while subject to the obligation, did not appear to have acted contrary to it. NCC had challenged that conclusion in the Court of Justice, which had ordered the Commission to take interim measures to protect NCC's position pending completion of the proceedings before the Court. The rest of the report is concerned with the issue of interim measures.

73. Case No. IV/30.178, *Napier Brown / British Sugar* (1988) OJ L284/41 concerned allegations by Napier Brown ("NB"), a sugar merchant, that British Sugar ("BS"), the largest producer and seller of sugar in the United Kingdom, had abused its dominant position in breach of Article 86 EEC (now Article 82 EC). NB purchased industrial sugar from BS which it repackaged for retail sale. The relevant complaint was that BS had been undercutting NB's retail sugar prices to a level at which it was impossible for repackagers of industrial sugar to survive in the long term, thus artificially maintaining an unrealistically low margin between its prices of industrial and retail sugar with the objective of forcing NB out of the market. In its assessment of the facts, the Commission examined BS's relevant costs and prices and found that NB had an insufficient margin to repackage and sell retail sugar. It expressed its conclusion on the relevant issue as follows (referring in a footnote to *National Carbonising*):

> "(65) The pricing information indicated above shows that BS has engaged in a price cutting campaign leaving an insufficient margin for a packager and seller of retail sugar, as efficient as BS itself in its packaging and selling operations, to survive in the long term.
>
> (66) The maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product and the price which it charges for the derived product, which is insufficient to reflect that dominant company's own costs of transformation (in this case the margin maintained by BS between its industrial and retail sugar prices compared to its own repackaging costs) with the result that competition in the derived product is restricted, is an abuse of dominant position.
>
> In the present case, BS's action of reducing the margin between its industrial and retail sugar prices such that it sold retail sugar at a price which no longer reflected its own transformation costs resulted in an abuse of a dominant position …."

74. Case T-5/97, *Industries de Poudres Sphériques SA v Commission* [2000] ECR II-3759 (referred to above as "the *IPS* case"), was a judgment of the European Court of First

Instance on an appeal by IPS against a Commission decision rejecting IPS's complaints against Péchiney Électrométallurgie ("PEM") alleging inter alia an abuse of dominant position in breach of Article 86 (now Article 82). PEM was a manufacturer of primary calcium metal and also of a derivative, broken calcium metal. IPS wanted to purchase primary calcium metal from PEM to transform into broken calcium metal using a different and more expensive process. It complained that PEM offered primary calcium metal at a price which, combined with PEM's price for broken calcium metal on the market for the derivative, left IPS an insufficient margin to remain in the market for the derivative. The court stated the relevant test in these terms:

> "178. Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product."

75. The court, however, rejected IPS's complaint, holding that the price on which PEM offered to supply primary calcium metal was justified by its costs; and that "[i]n the absence of abusive prices being charged by PEM for the raw material ... or of predatory pricing for the derived product ..., the fact the applicant cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising PEM's pricing policy as abusive" (para 179). Moreover IPS had not shown on the facts that the price of the primary calcium metal was such as to eliminate an efficient competitor from the broken calcium market (paras 180-182).

76. The next EC decision is that of the Commission in Case COMP/C-1/37.451, 37.578, 37.579, *Deutsche Telekom AG* (2003) OJ L263/9. That decision, however, was challenged by Deutsche Telekom in the Court of First Instance, which handed down judgment on 4 April 2008 in Case T-271/03, *Deutsche Telekom AG v Commission* (not yet reported). The judgment post-dated the hearing of the appeal before us but was dealt with in updates to the written notes provided to us after the hearing. Since the judgment considers the relevant parts of the Commission's decision, it is convenient to concentrate on the judgment.

77. Deutsche Telekom ("DT") operated the German fixed telephone network. It offered access to its local networks to other telecommunications operators ("wholesale access") and to subscribers ("retail access"). The Commission found that the relevant product or service markets were the upstream market in local network access for DT's competitors at the wholesale level and the downstream market in access to narrowband connections and broadband connections at the retail level. DT held a dominant position on all relevant markets. According to the Commission, DT had infringed Article 82 by operating abusive pricing in the form of a margin squeeze. The Commission's reasoning is summarised as follows in the Court's judgment:

> "173. According to the Commission, there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services 'is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market' …. The Commission therefore relies on [DT's] charges and costs as a basis for assessing whether [DT's] pricing practices are abusive.
>
> …
>
> 181. On the basis of that calculation of monthly prices, the Commission finds that the spread between [DT's] wholesale and retail prices was negative between 1998 and 2001 …. In view of that finding, it is not necessary, according to the Commission, 'to determine whether this spread was sufficient to cover [DT's] downstream costs for customer relations' …. By contrast, since the spread was positive from 2002 onwards, the Commission calculated '[DT's] product-specific costs [for providing retail services], in order to assess whether this positive spread [was] sufficient [for DT] to cover [those] product-specific costs' ….
>
> 182. The Commission concludes that the margin squeeze in access to the local network still existed at the time of the adoption of the contested decision …, since [DT's] product-specific costs for providing retail services still exceeded the positive spread between retail and wholesale prices …."

78. Before considering the various complaints and arguments put forward in the proceedings, the Court said that it must be borne in mind that "although as a general rule the Community judicature undertakes a comprehensive review of the question whether the conditions for applying the competition provisions of the EC Treaty are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers" (para 185).

79. The Court then considered the approach adopted by the Commission in determining the existence of a margin squeeze:

> "186. It must be observed first of all that the Commission considered in the contested decision whether the pricing practices of the dominant undertaking could have the effect of removing from the market an economic operator that was just as efficient as the dominant undertaking. The Commission therefore relied exclusively on [DT's] charges and costs, instead of on the particular situation of [DT's] actual or

> potential competitors, in order to assess whether [DT's] pricing practices were abusive.
>
> 187. According to the Commission, 'there is an abusive margin squeeze if the difference between the retail prices charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market .... In the present case, the margin squeeze is said to be abusive because [DT] itself 'would have been unable to offer its own retail services without incurring a loss if ... it had had to pay the wholesale access price as an internal transfer price for its own retail operations' .... In those circumstances, 'competitors [who] are just as efficient' as [DT] cannot 'offer retail access services at a competitive price unless they find additional efficiency gains' ...."

80. The Court noted that "although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors" (para 188). That was supported by reference to, *inter alia*, the *IPS* case and *Napier Brown / British Sugar*, as well as to the general principle of legal certainty. The Court concluded that the Commission "was therefore correct to analyse the abusive nature of [DT's] pricing practices solely on the basis of the applicant's particular situation and therefore on the basis of [DT's] charges and costs" (para 193). This was a clear endorsement of the "equally efficient competitor" test in preference to the "reasonably efficient competitor" test.

81. The Court went on to reject various challenges to the Commission's calculations of prices and costs in finding a margin squeeze. One error was identified in the calculation of DT's product-specific costs in 2001, but that error was held not to be material:

> "218. As regards the period from 1998 to 2001, the Commission did not take [DT's] product-specific costs into account in classifying [DT's] pricing policy as abusive. In the contested decision ..., the Commission concluded from the existence of a negative spread between [DT's] wholesale and retail prices that [DT's] pricing policy constituted an infringement. The finding as to [DT's] infringement during that period is therefore not at all affected by the error in calculating [DT's] product-specific costs in 2001.
>
> 219. By contrast, from 2002 onwards, the Commission classified [DT's] pricing practices as an infringement because [DT's] product-specific costs associated with retail access services exceeded the positive spread between [DT's]

> wholesale and retail prices. In order to make that calculation, the Commission relied in the contested decision on [DT's] product-specific costs in 2001 ....
>
> ...
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> 222. If the Commission had not made the calculation error complained of, the product-specific costs for 2001 should ... have been fixed at EUR .... However, even if those product-specific costs were taken into account without the calculation error, there would still be a margin squeeze throughout the period of the infringement covered by the contested decision.
>
> 223. Owing to the fact that the unfair – within the meaning of Article 82 EC – nature of [DT's] pricing practices is linked in the contested decision ... to the very existence of the margin squeeze rather than to its precise spread, the Commission's calculation error does not affect the lawfulness of the contested decision."

82. The Court proceeded to consider a contention by DT that the margin squeeze had no effect on the market. Although it is not directly relevant to the specific issue of the legal test for a margin squeeze, we think it helpful to cite one passage from that part of the judgment because it echoes the fundamental concern expressed by the Tribunal in relation to the present case. The Court pointed out that DT owned the fixed telephone network in Germany and that there was no other infrastructure in Germany at the time of the decision that would have enabled competitors to make a viable entry onto the market in retail services. It continued:

> "237. Having regard to the fact that [DT's] wholesale services are thus indispensable to enabling a competitor to enter into competition with [DT] on the downstream market in retail access services, a margin squeeze between [DT's] wholesale and retail charges will in principle hinder the growth of competition in the downstream markets. If [DT's] retail prices are lower than its wholesale charges, or if the spread between [DT's] wholesale and retail charges is insufficient to enable an equally efficient competitor to cover its product-specific costs of supplying retail access services, a potential competitor who is just as efficient as [DT] would not be able to enter the retail access services market without suffering losses."

83. The Commission's decision of 4 July 2007 in Case COMP/38.784, *Wanadoo España vs Telefónica* ("*Telefónica*") also concerned access to a telephone infrastructure. Again the decision has been the subject of challenge in the Court of First Instance (Case T-336/07), but there is as yet no judgment in those proceedings. In its decision the Commission found that Telefónica had infringed Article 82 by imposing unfair prices in the form of a margin squeeze between the prices for retail broadband access in the Spanish "mass market" and the regional and national wholesale broadband access markets. The services involved were, at the wholesale level, access to infrastructure owned by the incumbent, Telefónica, and needed by competitors to

provide, at the retail level, broadband internet access services to end users. The Commission set out the "equally efficient competitor" test and the "reasonably efficient competitor" test, but considered that the former was applicable. Thus the relevant test was "whether Telefónica would have been able to offer downstream services without incurring a loss if, during the period under investigation, it had had to pay the upstream access price charged to competitors as an internal transfer price for its own retail operations" (recital (312)). That approach was said to be the same as in *Deutsche Telekom* and consistent with that in *Napier Brown / British Sugar*. The Commission also described the test as being "whether a competitor having the same cost function as the downstream arm of the vertically integrated company is able to be profitable in the downstream market given the wholesale and retail prices levied by the vertically integrated company" (recital (315)).

84. The appropriate measure for calculating Telefónica's relevant downstream costs, for the purpose of assessing the sufficiency of the margin, was held to be that of long run average incremental costs. The matter was explained as follows:

> "(316) A horizontally and vertically integrated company like Telefónica has several kinds of costs. It has incremental costs which arise only because of its operations in the downstream market, and which would not be incurred if Telefónica would only be operating in the upstream market. It also has costs which are common to different operations. Contrary to a downstream competitor as efficient as Telefónica's downstream arm, Telefónica has economies of scale and scope and is able to spread its common costs over a set of operations instead of only one.
>
> (317) Cost structures in network industries tend to be quite different from most other industries because the former have much larger fixed costs. As set out in [the Telecommunications Notice], a price which equates to the variable cost of a service may be substantially lower than the price the operator needs in order to cover the cost of providing the service in the long term. In order to assess the profitability of prices which are to be applied over time by an operator, and which will form the basis of that operator's decisions to invest, the costs considered must include the total costs which are incremental to the provision of the service.
>
> (318) Therefore, in accordance with economic theory and with the practice of the Commission on margin squeeze where the ability of competitors to operate profitably in the long term was assessed, the relevant cost measure for the assessment of a margin squeeze in the telecommunications sector is the long run average incremental costs (LRAIC).
>
> (319) The long run incremental cost of an individual product refers to the product-specific costs associated with the total volume of output of the relevant product. It is the difference between the total costs incurred by the firm when producing all

> products, including the individual product under analysis, and the total costs of the firm when the output of the individual product is set equal to zero, holding the output of all other products fixed. Such costs include not only all volume sensitive and fixed costs directly attributable to the production of the total volume of output of the product in question but also the increase in the common costs that is attributable to this activity.
>
> (320) Since the long run incremental cost of the individual product also includes the increase in the common costs resulting from the provision of the product in question, the mere fact that one cost is common to different operations does not necessarily imply that the long run incremental cost due to the activity in question is zero for any individual product. One must assess whether such common cost would have been incurred, partially or totally, if the company would have decided not to provide the product in question.
>
> ...
>
> (322) In the present case, LRAIC is an appropriate measure of Telefónica's downstream costs below which the spread between Telefónica's upstream and downstream prices provides evidence of a margin squeeze."

85. After a detailed factual analysis, the Commission concluded that the margin between Telefónica's downstream and upstream prices was not sufficient to cover its relevant downstream costs in the period in question. Further, Telefónica's conduct was not only capable of restricting and likely to restrict competition, but the empirical evidence was consistent with it having produced actual restrictive effects. The Commission rejected arguments that the conduct was objectively justified or produced efficiencies which outweighed the negative effect on competition. It followed that Telefónica had infringed Article 82 by imposing unfair prices in the form of a margin squeeze (see recitals (691) to (694)).

86. We turn finally to one relevant domestic decision, that of the Tribunal itself in *Genzyme Ltd v Office of Fair Trading* [2004] CAT 4, [2004] CompAR 358. Genzyme was a pharmaceutical company which manufactured a drug used in the treatment of Gaucher's disease. The drug could be administered either in a hospital setting or at home. Where it was administered to a patient at home, specialist delivery and homecare services, including nursing services, were required. Genzyme was found to be dominant in the upstream market for the supply of drugs for the treatment of Gaucher's disease in the United Kingdom. The relevant downstream market was the supply of homecare services for patients suffering from Gaucher's disease. The complainant, Healthcare at Home, had previously been Genzyme's sole and exclusive distributor of the drug, but Genzyme had now set up an in-house company, Genzyme Homecare, with which the complainant was in competition in the downstream market. Genzyme supplied the drug to Healthcare at Home and other competitors at the same price as it supplied to the NHS, leaving those competitors with no effective margin on onward sales to the NHS, so that it was uneconomic for them to re-sell the drug to the

NHS with the related homecare services. By contrast, Genzyme supplied the drug to Genzyme Homecare at an internal transfer price that gave Genzyme Homecare a significant margin on sales to the NHS. The Tribunal, applying *National Carbonising* and *Napier Brown / British Sugar*, found in the circumstances that the sale of the drug to other homecare providers at the same list price as for sales to the NHS gave rise to an abusive margin squeeze.

Margin squeeze: discussion

87. We take as our starting-point the ways in which the test for margin squeeze has been formulated in the guidance and the case-law. The precise formulation seems to be tailored to the context, and the language used on each occasion is open-ended rather than purporting to lay down a definitive test. For example, the Telecommunications Notice refers to ways in which a price squeeze "could be demonstrated" (see para 32 above); the Court in the *IPS* case stated that price squeezing "may be said to take place ..." in the circumstances there set out, which were expressed in terms of the markets for unprocessed and processed products because that was the subject-matter of the case (see para 74 above); the Commission in *Deutsche Telekom* focused on the specific context of access to a local network when holding that "there is an abusive margin squeeze if ...", and the Court in the same case upheld the Commission's analysis but did not seek to provide an exhaustive definition of a margin squeeze (see paras 79-80 above).

88. Nevertheless, it is possible to identify features that are common to the various formulations. Such features include the existence of two markets (an upstream market and a downstream market), a vertically integrated undertaking which is dominant on the upstream market and active (whether or not also dominant) on the downstream market, and the need for access to an input from the upstream market in order to operate in the downstream market. Those correspond to features (i) to (iii) of the analysis put forward by Mr Vajda, and they were accepted in substance by the other parties.

89. The next feature that is common to the various formulations is, in broad terms, the setting of upstream and downstream prices by the dominant undertaking that leave an insufficient margin for an efficient competitor to operate profitably in the downstream market. That corresponds to feature (v) of Mr Vajda's analysis, if one omits from feature (v) the reference to "adding value" (or the alternative expression "transformative activity"). Subject to that qualification it was again accepted in substance by the other parties.

90. Of course, the broad terms in which we have expressed that feature do not bring out the differences of approach that have existed in relation to the determination of whether an "efficient" competitor can operate profitably, that is to say the difference between the "equally efficient competitor" test (which focuses on the costs of the dominant undertaking's own downstream operation) and the "reasonably efficient competitor" test (which focuses on the costs of an actual or potential competitor in the downstream market). The Commission's Telecommunications Notice and the OFT's Guideline allow for either test. Ofcom's submissions counselled caution in relation to the use of the "reasonably efficient competitor" test. The Court in *Deutsche Telekom* has more than vindicated that note of caution, by its clear endorsement of the "equally efficient competitor" test in preference to the "reasonably efficient competitor" test

(para 80 above). All of this, however, goes to the detailed content of feature (v) rather than affecting its broad thrust.

91. Mr Vajda's feature (vi), that is the absence of objective justification for the dominant undertaking's conduct, is not problematic. The various formulations of the margin squeeze test do not generally refer in terms to the absence of objective justification, but it is common ground, and inherent in the scheme of Article 82, that a margin squeeze will not be abusive if there is an objective justification for the conduct in question. Thus, for example, arguments as to objective justification were considered but rejected by the Commission in *Telefónica* (para 85 above).

92. That leaves for consideration the two limbs of Mr Vajda's feature (iv) and the partial reference back to them in his feature (v): the alleged need for transformative activity (or added value) by the competitor on the downstream market, and for the dominant undertaking to avoid the costs associated with that transformative activity. Those matters fall to be considered in conjunction with Mr Anderson's alternative way of putting the point, on the basis of a need for the competitor to displace (rather than duplicate) the activities of the dominant undertaking in the downstream market and thereby to relieve the incumbent of the costs associated with those activities. As we have indicated, a dispute about the need for such features is at the heart of the case.

93. It is striking that none of the formulations of the margin squeeze test refer to such features. The test as variously formulated is capable of being understood and applied without the need to ask additional questions about transformative activity, displacement/duplication or avoided costs (subject to a point to which we will come in a moment, as to the method of calculating whether the margin is sufficient to enable profitable trading at the downstream level); and on the face of it, no such additional questions are asked.

94. The case has therefore had to be advanced by Mr Vajda and Mr Anderson on the basis that, although not spelled out in the formulation of the test, those features have been present as a matter of fact in each case and the test has been formulated in each case on the premise that they are present; so that, in order to produce a complete statement of the test, the premise has to be read into it. We approach that line of argument with considerable caution, for a number of reasons.

95. First, there is good sense in Ofcom's observation that the fact that the decided cases have shared a common feature does not mean that that feature is an essential ingredient of the test for margin squeeze.

96. Secondly, if a feature were an essential ingredient of the test, we would expect the point to have been articulated in the guidance and in the case-law.

97. Thirdly, the test for a margin squeeze must be distinguished from whether the test is appropriately applied in particular factual circumstances. That is of especial importance where, as here, an appeal lies only on a point of law and the specific point of law in respect of which permission to appeal has been granted is whether the Tribunal adopted the correct test for a margin squeeze, not whether it applied the test appropriately on the particular facts before it (which takes one in any event into an area of expert judgment by the Tribunal). The declaration sought by Dŵr Cymru is that "the Tribunal adopted a test for margin squeeze without regard to a necessary

feature of the test, that it does not apply in circumstances where ...". Thus Dŵr Cymru seeks to build in, as a necessary feature of the test itself, that it does not apply in particular circumstances; but the dividing line between a feature of the test itself and whether or how the test is to be applied in particular circumstances may be a fine one. It is to be borne in mind that the test itself, however formulated, is not the end of the matter but simply an element in the overall assessment of whether conduct amounts to an abuse.

98. Nevertheless we have given careful consideration to the decided cases in order to see what support they give to the propositions advanced by Mr Vajda and Mr Anderson. It is true that in each of the first three EC cases – *National Carbonising*, *Napier Brown / British Sugar* and the *IPS* case – the complainant was engaged in what was clearly a transformative activity (the manufacture of a derivative) in a downstream market in direct competition with the vertically integrated dominant incumbent, in circumstances where the complainant's transformative activity might be said to displace activity by the incumbent and to save the incumbent the costs associated with that activity. The analysis in the cases, however, contains nothing to suggest that such transformative activity, displacement or avoided costs were regarded as necessary features of the test of margin squeeze. The same applies to the domestic case, *Genzyme*, where the complainant's activity in the downstream market (the supply of the product with a related service) was again in direct competition with that of the dominant undertaking and sales by the complainant were liable to displace those of the dominant undertaking.

99. As to the next two EC cases – *Deutsche Telekom* and *Telefónica* – we doubt whether the relevant economic activity of the telecommunications operators in question is aptly described as "transformative". Nor is it clear whether or to what extent the competitors wanting access to the incumbent's infrastructure were liable to displace the activities of the incumbent in the downstream market (as opposed to offering new products and expanding the market). But Mr Vajda's submission was that avoided costs were integral to the Commission's reasoning in both cases. In *Deutsche Telekom* the Commission considered whether the margin between the upstream and downstream prices was sufficient to cover the dominant undertaking's product-specific costs of providing retail services on the downstream market. In *Telefónica* the Commission's reasoning was more elaborate, involving the express adoption of the measure of long run average incremental costs ("LRAIC") in calculating the sufficiency of the dominant undertaking's margin at the downstream level. That measure, submitted Mr Vajda, is simply another way of referring to avoided costs: it looks to the costs incurred by the dominant undertaking in providing the relevant downstream product or service, being costs that would be avoided if the undertaking did not provide that product or service.

100. We do not accept that the reference to the product-specific costs of the downstream supply or the use of the LRAIC measure has the significance for which Mr Vajda contended. Under the "equally efficient competitor" test one looks at the costs of the dominant undertaking's downstream activities in order to determine the sufficiency of the margin between upstream and downstream prices, since the question is whether the dominant undertaking would be able to trade profitably if it had to pay the upstream price as an internal transfer price for its own downstream operation. If the dominant undertaking could not trade profitably, then an equally efficient competitor

could not trade profitably, which is why the pricing policy is potentially anti-competitive and there is said to be a margin squeeze calling for justification. But the fact that the costs of the dominant undertaking's downstream activities are used in calculating whether a margin squeeze exists does not mean that actual displacement of the dominant undertaking's activities in the downstream market or the saving of costs associated with those activities are necessary features of the margin squeeze test.

101. That point can be underlined by reference to one aspect of the decision in *Deutsche Telekom*. As regards the period 1998-2001 the Commission did not take into account DT's product-specific costs at the downstream level in finding the existence of a margin squeeze, since it had found there to be a negative spread between DT's wholesale and retail prices. The negative spread was in itself a direct measure of the margin squeeze, without any need to consider the downstream costs. That approach was approved by the Court, which was why an error in the Commission's calculation of the downstream costs in 2001 was held to be immaterial. If it is unnecessary in such circumstances to look at the product-specific costs of the downstream operation in finding the existence of a margin squeeze, it is difficult to see why the avoidance of such costs as a result of the competitor's downstream activities should be regarded as a necessary feature of the margin squeeze test. There is, moreover, an obvious parallel between the situation in *Deutsche Telekom* and the present case, given that the Tribunal found in this case too that there was a zero or negative margin between the dominant undertaking's upstream and downstream prices.

102. In any event, there was no specific suggestion either in *Deutsche Telekom* or in *Telefónica* that the displacement of the dominant undertaking's downstream activities or the avoidance of the costs of those activities was necessary for a finding of margin squeeze.

103. The conclusion we reach in the light of the guidance and the case-law is that transformative activity, displacement and avoided costs are *not* necessary features of the margin squeeze test.

104. We also reject the suggestion that Mr Vajda appeared at one stage to be making that without such features it was not possible to identify distinct upstream and downstream markets at all. The need to identify distinct markets is not in doubt, but in our view the Tribunal was plainly entitled to find in this case an upstream market for the transportation of water and a downstream market for retail supply. Albion is active on the downstream market, even though it has only the one large customer. It needs an upstream input in the form of common carriage in much the same way as the telecommunications operators in *Deutsche Telekom* and *Telefónica* needed access to the network of the dominant undertaking in order to operate on the downstream market.

105. It follows that the Tribunal was correct to direct itself by reference to the test of margin squeeze as expressly formulated in the guidance and the case-law, and it did not fall into legal error as contended by Dŵr Cymru and the Authority. There is one qualification to that, but it relates to a secondary issue and does not affect the outcome. The Tribunal applied both the "equally efficient competitor" and the "reasonably efficient competitor" tests in determining the existence of a margin squeeze, whereas the Court in *Deutsche Telekom* has now endorsed the former in preference to the latter. If the Tribunal was wrong to apply the "reasonably efficient

competitor" test, nothing turns on it, since it reached the same decision by reference to the alternative "equally efficient competitor" test.

106. Whilst the Tribunal rightly rejected the arguments that displacement and avoided costs are a necessary feature of the test of margin squeeze, it did look carefully at the substance of those arguments as part of its overall assessment of Dŵr Cymru's conduct, specifically in considering whether there was an objective justification for a zero or negative margin. In our view that was the appropriate context within which to consider such matters. They are plainly relevant and potentially important considerations, but account can properly be taken of them in the context of objective justification without having to build them into the margin squeeze test itself.

107. The Tribunal's approach appears clearly at paras 305-311 of the further judgment (quoted at para 49 above). At para 305 the Tribunal referred to the need for objective justification and reiterated that the avoided costs argument was open to the same objections of principle as the ECPR approach which it had previously rejected (see, further, paras 40 and 69 above). At para 306 it said that, on the facts, the arguments as to avoided costs were too inconsistent and imprecise to assist Dŵr Cymru or the Authority; and it returned to that point at para 309. At paras 307-308 it reverted to the need for objective justification of a dominant undertaking's pricing policy which has the effect of foreclosing the market to competition. In the course of its analysis the Tribunal also rejected Dŵr Cymru's argument that to accede to Albion's case would be tantamount to requiring Dŵr Cymru to subsidise Albion.

108. At para 310 the Tribunal said that the margin squeeze in this case would have the further effect of preventing Albion from offering water efficiency services on an economic basis. In that connection it referred back to the part of its main judgment in which it held that water efficiency services as supplied by Albion to Shotton were part of the services of a water supplier and had previously been supplied by Dŵr Cymru itself. This was one of the matters taken into account by the Tribunal in rejecting, on the facts, the contention that Albion was merely duplicating Dŵr Cymru's activities: see, in particular, paras 893-895 of the main judgment (quoted at para 41 above) and para 914 of the same judgment (quoted at para 45 above). The point about water efficiency services ties in with Mr Thompson's submission for Albion, which we accept, that displacement can be potential as well as actual: it is a relevant factor, in our view, that the supply by Albion at the retail level involves an activity which Dŵr Cymru has carried out in the past and could carry out in the future, even if it does not carry it out at present.

109. It is therefore clear that a wide range of relevant matters, covering the various points raised by Dŵr Cymru and the Authority, was taken into account by the Tribunal in reaching the conclusion that the margin squeeze was not objectively justified and amounted to an abuse. Whilst, in the course of his submissions, Mr Vajda made various criticisms of the Tribunal's reasoning and conclusions in relation to objective justification, those are not issues in respect of which permission to appeal was granted and we need say no more about them.

110. We should deal finally with the subsidiary argument that the Tribunal erred in its main judgment by relying on Dŵr Cymru's upstream price being excessive as a reason why the zero margin could not be objectively justified. We accept that, since the Tribunal had made no finding on whether the price was excessive, it could not

properly rely on the point in support of its findings on margin squeeze even if, as was stated, the evidence strongly suggested that the price was excessive. In itself, however, this has no bearing on the central issue concerning the correct test for a margin squeeze. Nor did it play any material part in the reasoning that led the Tribunal to its conclusion, in the further judgment, that the margin squeeze amounted to an abuse. In so far as the argument on this point brought in the *IPS* case, it suffices to state that in our judgment the *IPS* case is consistent with the other authorities on margin squeeze and, in particular, we reject the contention that it stands as authority for the proposition that a dominant undertaking does not engage in a margin squeeze in the absence of an excessive upstream price or a predatory downstream price. We agree with the Tribunal that the judgment does not introduce a gloss on the margin squeeze test as it appears in the guidance (see para 48 above).

111. For those reasons we reject Dŵr Cymru's appeal on the issue of margin squeeze.

The jurisdictional issue

112. We turn to consider the second issue before us, namely Dŵr Cymru's contention that the Tribunal did not have jurisdiction to find, as it did in its further judgment, that Dŵr Cymru held a dominant position. The Director had taken no decision on that issue, making it clear that he had reservations on it and had not reached any final view; and he did not need to decide the issue because he found no abuse. It is submitted that in those circumstances it was not open to the Tribunal, on an appeal from the Director's decision, to reach a decision of its own on the issue.

113. We have already referred briefly to ss.46 and 47 of the 1998 Act which confer rights of appeal against decisions of the Director or Authority, and to schedule 8 which provides for the Tribunal's powers on an appeal. It is now necessary to set them out more fully. The relevant provisions of ss.46 and 47 as they stood at the material time are these:

> "46.(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section 'decision' means a decision of the OFT –
>
> > ...
> >
> > (c) as to whether the Chapter II prohibition has been infringed ....
>
> 47.(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to –
>
> > (a) a decision falling within paragraphs (a) to (f) of section 46(3) ....
>
> (2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the

> decision with respect to which the appeal is made, or that he represents persons who have such an interest."

114. As previously explained, references to the OFT in those provisions are to be read as including references to the Director or the Authority. Albion's appeal to the Tribunal against the Director's decision was brought under s.47.

115. The powers of the Tribunal are contained in para 3 of schedule 8, the material provisions of which are these:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> (a) remit the matter to the OFT,
> (b) impose or revoke, or vary the amount of, a penalty,
> ...
> (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
> (e) make any other decision which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.
>
> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

116. The Tribunal's approach in the further judgment was to consider first whether to "confirm or set aside" any part of the Director's analysis of dominance in accordance with the opening words of para 3(2). It proceeded to "set aside" the paragraphs of the Director's decision expressing doubts or reservations on the issue of dominant position (para 183); and then to "confirm" the factual correctness of the assumption of dominance made in the decision, describing that as "a relatively short step to take" (para 190).

117. However, the Tribunal also went on (at paras 191-198) to deal with the matter in the alternative under para 3(2)(e), holding that it was entitled under that provision to make any decision of a kind that the OFT (or in this case the Authority) could have made and that it was appropriate in the circumstances for it to proceed to such a decision. It thereby followed the approach in *Burgess v Office of Fair Trading* [2005] CAT 25, [2005] CompAR 1151, taking the view that the criteria laid down in *Burgess* for proceeding to a decision were fulfilled. It rejected various contentions advanced by Dŵr Cymru, including the contention that for the Tribunal to make a finding on an issue such as dominance conflicted with the "two tier" system of the 1998 Act, which envisages in an infringement case a decision by the OFT (here the Authority), followed

by an appeal on the merits to the Tribunal and then an appeal on a point of law to the Court of Appeal. It pointed out first that under the 1998 Act the Tribunal in its merits jurisdiction acts in many cases as the primary decision maker on matters of fact. Secondly, it might occur, as in the present case, that the appeal was against a non-infringement decision in the course of which it appeared that, after all, the facts gave rise to an infringement, contrary to the view of the OFT (or the Authority). In such cases the Tribunal should take a decision of infringement, after hearing the parties, only if the facts were agreed, uncontested, or plain and obvious, as was the case here:

> "197. In the present case, the evidence now presented to the Tribunal shows plainly and obviously that Dŵr Cymru had a dominant position in the relevant market at the material time. In our view no further investigation is required. To remit that issue to be decided by the Authority would serve no useful purpose, merely adding to the delay and cost of these proceedings …."

The Tribunal found accordingly that at all material times Dŵr Cymru had a dominant position on the relevant market for the purposes of the Chapter II prohibition.

118. Mr Vajda challenged both limbs of the Tribunal's reasoning. First, he submitted that it was not open to the Tribunal, under the opening words of para 3(2), to "confirm" an *assumption* so as to transform it into a *finding*; and he submitted further that this was not a "short step" for the Tribunal to take, since a mere assumption of dominance carries with it no adverse implications for Dŵr Cymru, whereas a finding of dominance is an essential step to a finding of abuse of dominance, which carries with it the possibility of fines and damages actions. We agree with those submissions. By the time of its judgment refusing permission to appeal, the Tribunal itself had shifted its focus from this aspect of its reasoning to the alternative limb, namely the exercise of its jurisdiction under para 3(2)(e), which it described as "the main point" (para 115 of the permission judgment).

119. As to that alternative limb, Mr Vajda submitted in his skeleton argument that, since the Tribunal had no jurisdiction to confirm or set aside an assumption of dominance, it did not possess the jurisdiction to go on to take a decision on dominance. That is a manifestly bad argument. The Tribunal had power under the opening words of para 3(2) to set aside any part of the decision, and it exercised that power by setting aside the paragraphs of the decision expressing doubts or reservations on the issue of dominant position. It had the further power under para 3(2)(e) to make any other decision which the Authority could itself have made. The exercise of that further power did not depend in any way on the Tribunal's confirmation of the assumption of dominance.

120. At the hearing Mr Vajda concentrated on a different submission, developing a point that appeared at the very end of his supplementary skeleton argument. He submitted that para 3(2)(e) refers to a narrower class or type of decision than do the opening words of para 3(2): the words "which the OFT could itself *have made*" (emphasis added) introduce an additional qualification as to the type of decision which the Tribunal has jurisdiction to make. The use of the past tense indicates that the Tribunal can only lawfully take a decision if the OFT (or in this case the Authority) could lawfully have done so at the time it took the decision which is under appeal. If, at the time of its decision, the OFT had not sufficiently investigated a particular necessary

ingredient of an infringement decision, such as the existence of a dominant position, then plainly the OFT could not itself have made a lawful infringement decision: before making an infringement decision, the OFT would have to comply with relevant procedural requirements, including the issue of a statement of objections and giving access to the file (see rules 4 and 5 of the Competition Act (Office of Fair Trading's Rules) Order 2004). The Tribunal is subject to the same limitation and cannot therefore make an infringement decision pursuant to para 3(2)(e). If that had not been the intended effect, the legislator would have used the present tense ("which the OFT can itself make"). To give the provision the same meaning as if the present tense had been used would not be in conformity with its language and would render the qualifying words without purpose.

121. Mr Vajda submitted further that the construction for which he was contending gave proper effect to the two-tier institutional structure which Parliament has put in place by the 1998 Act, and that the Tribunal was wrong to reject this point in its further judgment. The first tier is the OFT or sectoral regulator, such as the Authority. Such bodies have a wide discretion in determining when to take decisions, what points need to be decided and what points should merely be assumed rather than decided. The second tier is the Tribunal, whose function is appellate. For the Tribunal to address points on which the first-tier regulator has not taken a decision would be to usurp that regulator's role. The importance of the Tribunal not usurping the role of the first tier regulator is reinforced by the fact that appeals to the Tribunal lie on both fact and law (see para 3(1) of schedule 8), whereas appeals from the Tribunal to the Court of Appeal lie only on a point of law (see s.49(1)(c) of the 1998 Act).

122. In *Floe Telecom Ltd v Office of Communications* [2006] 4 All ER 688 the Court of Appeal had to consider the different issue of whether the Tribunal, having remitted a case in its entirety to the Director General of Telecommunications (the relevant regulator in that case), had power to make case management directions in respect of the further proceedings before the Director. It held that "decision" in the opening words of para 3(2) and in paras 3(3) and 3(4) must mean a decision as defined in s.46(3) and therefore referred to a decision affecting third parties, and in that context the only sensible interpretation of paras 3(2)(d) and (e) was that they both dealt with matters affecting third parties as well (see per Lloyd LJ at para 32). Mr Vajda accepted that premise but contended that para 3(2)(e) referred only to a limited type of such decision, as outlined above. He also sought to draw support from the general thrust of *Floe Telecom*, to the effect that the Tribunal has the task of deciding appeals brought to it rather than the more general function of supervising regulators (see e.g. per Lloyd LJ at para 34).

123. Dŵr Cymru was not supported by the Authority on the jurisdictional issue. Mr Anderson explained to us that the Authority accepted the Tribunal's view that the power under para 3(2)(e) is not limited to a power to make a decision that the regulator could have made at the time it took the decision under appeal. The language embraces any decision *of a kind* that the regulator could have made, that is a decision within the meaning of s.46(3), in particular as to whether there has been a relevant infringement. The statute cannot use the present tense because the matter is no longer before the regulator; it therefore uses the *conditional*, "could have made". The Tribunal has jurisdiction to make a decision where it has before it material on the basis of which the regulator could have made that decision if seized of the matter.

The provision does not import the procedural requirements to which the regulator is subject, such as the issue of a statement of objections. Whether it is appropriate in all the circumstances for the Tribunal to exercise its discretion to make such a decision is a different issue, which does not arise in this case: Dŵr Cymru was refused permission to appeal on grounds relating to the exercise of the Tribunal's discretion to make a decision.

124. Mr Thompson, for Albion Water, adopted Mr Anderson's submissions and referred us to a later case before the Tribunal, *VIP Communications Ltd v Office of Communications* [2007] CAT 3, [2007] CompAR 666, in which arguments similar to those put forward by Dŵr Cymru were advanced but were roundly rejected by the Tribunal. He submitted that in the present case the Tribunal clearly had jurisdiction under para 3(2) to make a decision as to whether there had been a relevant infringement (that is, a decision as defined in s.46(3)) and therefore to decide that Dŵr Cymru had a dominant position and had abused that dominant position.

125. The written observations of the OFT accept that the Tribunal has jurisdiction under para 3(2)(e) to reach its own decision in respect of a matter forming part of the decision under appeal. The fact that a particular assessment has been made by the regulator on the basis of an assumption does not, in terms of principle, preclude the Tribunal from reaching its own view on that matter. The OFT goes on to submit that the circumstances in which the Tribunal should act as a primary decision-maker in respect of a matter on which the regulator has made an assumption should be limited. That, however, engages the issue of discretion which is not before us on this appeal.

126. Ofcom has made no submissions on the jurisdictional issue.

127. In our judgment, the analysis put forward by Mr Anderson on behalf of the Authority is correct. In particular, the reference in para 3(2)(e) to "any other decision which the OFT could itself have made" is a reference to the *kind* of decision which the regulator could have made, namely a decision within s.46(3) (for example, "a decision … as to whether the Chapter II prohibition has been infringed"). The provision does not look at the historical position but confers jurisdiction on the Tribunal to make a decision of a kind that the regulator, if still seized of the matter, could have made on the basis of the material now available. Similarly, the provision does not import the procedural requirements of decision-making by the regulator. The Tribunal has its own procedures and must act fairly when reaching a decision under para 3(2)(e). Such procedural requirements do not, however, affect the Tribunal's jurisdiction to make a decision but go to the lawfulness of a decision reached in the exercise of its jurisdiction.

128. We are therefore satisfied that this aspect of Dŵr Cymru's appeal should also be rejected, and that the Tribunal had jurisdiction to make the decision it did under para 3(2)(e) that Dŵr Cymru had a dominant position in the relevant market at the material time.

Conclusion

129. For the reasons given, Dŵr Cymru fails on both issues on which it was given permission to appeal, and the appeal must be dismissed.

130. We conclude with a few more general observations on the proceedings before the Tribunal in this case. We recognise that the subject-matter is highly complex and that the merits jurisdiction of the Tribunal may call for extensive factual investigation in the course of appeals before it, all of which may contribute to the length of its proceedings and of its judgments. We are, however, concerned at the number of separate judgments in the case, the length of those judgments, the extent to which the sequential approach gave rise to duplication (which has made it more difficult for us to digest and analyse the Tribunal's reasoning for the purposes of this appeal), and the protracted nature of the proceedings overall. The interim judgment in December 2005 was 428 paragraphs long and, with headnote, takes up 90 pages of the printed law report. The main judgment in October 2006 was 985 paragraphs long and, with headnote and an annex, extends to 241 pages of the printed law report. The further judgment in December 2006 was 360 paragraphs long and, with headnote, takes up 91 pages of the printed report. Astonishingly, the judgment refusing permission to appeal in February 2007 was itself 133 paragraphs long. A yet further judgment on the issue of excessive pricing is still awaited.

131. We are sure that there must be a more efficient and speedier way of dealing even with complex cases of this kind. In particular, we urge the Tribunal to do its utmost to produce, if at all possible, shorter judgments for the benefit of everyone in the future. We recognise both that this court often produces judgments which are too long and that parties are inclined to take many points in cases of factual and legal complexity, but we cannot believe that it would not be possible to resolve the issues more concisely. We will try to do so ourselves and we urge others to do the same.