IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

25 January 2008

Before:
VIVIEN ROSE
(Chairman)

ANDREW BAIN OBE
ADAM SCOTT TD

Sitting as a Tribunal in England and Wales

BETWEEN:

1083/3/3/07

HUTCHISON 3G UK LIMITED
("**H3G")**

and

OFFICE OF COMMUNICATIONS ("**OFCOM**")

AND

1089/3/3/07

T-MOBILE UK LIMITED ("**T-MOBILE**")

and

OFFICE OF COMMUNICATIONS

AND

1090/3/3/07

BRITISH TELECOMMUNICATIONS PLC ("**BT**")
and

OFFICE OF COMMUNICATIONS

AND

1091/3/3/07

HUTCHISON 3G UK LIMITED ("**H3G**")
and

OFFICE OF COMMUNICATIONS

AND

1092/3/3/07

CABLE & WIRELESS UK & OTHERS ("**CABLE & WIRELESS**")
and

OFFICE OF COMMUNICATIONS

HEARING DAY TWO

APPEARANCES

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared for H3G.

Mr. David Anderson QC, Mr. Graham Read QC, Miss Anneli Howard, Mrs. Sarah Lee (instructed by BT legal) appeared for BT.

Mr. Jon Turner QC and Meredith Pickford (instructed by Regulatory Counsel, T-Mobile) appeared for T-Mobile.

Mr. Matthew Cook (instructed by Olswang) appeared for Cable & Wireless.

Miss Elizabeth McKnight and Mr. Stephen Wisking (Partners, Herbert Smith) appeared for Vodafone.

Miss Marie Demetriou (instructed by Field Fisher Waterhouse) appeared for Orange.

Miss Kelyn Bacon (instructed by S.J. Berwin) appeared for 02(UK) Limited.

Mr. Peter Roth QC, Mr. Josh Holmes and Mr. Ben Lask (instructed by the Office of Communications) appeared for OFCOM.

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THE CHAIRMAN: Good morning, ladies and gentlemen. As I think has just been indicated to you, Professor Bain is struggling at the moment with a very bad cough. We very much do want to be able to continue as a panel of three. Therefore, our plan is that we will hear Ofcom this morning, and then adjourn at one and not sit this afternoon. I understand, Mr. Roth, that the parties have decided that they do not need to cross-examine the witnesses of fact.

MR. ROTH: As regards this part of the case, that is right, madam. I say that only because I made the point regarding SIA at the very end where there are some witnesses ---- That is likely to spill over.

THE CHAIRMAN: I think that is now likely to spill over.

MR. ANDERSON: You are quite right, madam. We do not wish to cross-examine. I simply want to say that it is not, as you appreciate, that we agree with everything that is said - in particular in the second statement of Mr. Russell. It is rather that having heard what the tribunal said yesterday about irrelevance, and about supposition, and the distinction Mr. Roth made between primary fact and secondary fact, we take the view that in normal circumstances, for the purpose of this appeal, cross-examination is not necessary. That may seem over-cautious, but I did just want to make that point.

THE CHAIRMAN: That is very helpful.

MR. ANDERSON: I should also say that Mr. Reid, on the TRD appeal, reserves his position in relation to the non-core issues. That may be self-evident to everybody, but he would just want me to say that.

THE CHAIRMAN: Thank you. We will then resume on Tuesday morning with the interveners and the reply. Then there will be Tuesday afternoon and Wednesday for the economic evidence which should not take that long. Then the timetable will be moved forward accordingly. It is likely therefore that the SIA construction point will move on to the spill-over days at the end of February. If we run out of time it may be that replies can be submitted in writing rather than given orally.

At lunchtime, copies of the transcript of yesterday's proceedings will be available for you to collect.

MR. ROTH: It may be that someone from the parties will produce a revised timetable incorporating what you have said.

May I also just mention a preliminary matter? The experts and evidence is now scattered around different bundles. It seems sensible - as there is going to be cross-examination of experts - and indeed for everyone's assistance that they should be brought together in a

single bundle. Nobody wants to multiply bundles - we have enough in this case - but it will assist greatly. I think the parties' solicitors, between them, will produce a bundle that brings together the three statements of Professor Littlechild, the two of Mr. Myers, and Dr. Walker all in one single bundle, probably by witness. I think that should assist.

MR. SCOTT: From the point of view of being able to mark up a copy, how soon do you think that would be available?

MR. ROTH: It is not in my hands. I can take instructions. Whether it can be done by the end of today, given that we have got this afternoon -- I would have thought so. It is not a great copying exercise. One possibility is that one produces an index - I do not think they have to be paginated as a bundle. They are internally paginated - and tab divide cards, and a file, and tell you where they are now, and just invite you to re-file them. That, indeed, saves trees. That can certainly be done by mid-afternoon, I am sure.

I am told that Miss Dinah Rose has something which she wishes to add.

MISS ROSE: Madam, to respond to a question that you asked me yesterday about the situation in other Member States -- This is to the best of H3G's knowledge, I should make clear - what we have been able to ascertain overnight. So far as we know there are eight EU countries which have a new entrant 3G-only operator. In six of those the new entrant is in fact H3G; in two it is a different operator. The situation in each of those eight countries is as follows: in Austria, where the new entrant is H3G, a finding of SMP was made and a charge control imposed. There is an appeal pending against the charge control which, if successful, would also have the effect of overturning the finding of SMP. The whole decision would fall. In Sweden, there has been a whole series of decisions and appeals, but there is currently an appeal pending against the finding of SMP. In the UK, of course, there is this appeal pending against the finding of SMP. In Ireland there was an initial decision taken that was then successfully appealed. Currently there is a draft decision, and a final decision is expected later in the Spring. In Denmark there is also a draft decision, but not a final decision on SMP. In Italy a decision has been taken on SMP, but combined with asymmetric charge control, which adequately takes into account the position of the new entrant. In Poland - this is not H3G but a different 3G operator - our understanding is that there has not yet been a market analysis carried out by the NRA. In Spain - again this is not H3G, but another operator - we understand that a finding of SMP was made in October 2007. We do not know whether or not that is subject to appeal.

So, to summarise, it certainly is not the case that there is a settled situation in the European Union of findings of SMP in relation to new entrant 3G operators - quite the contrary. The whole situation is in a current state of flux.

THE CHAIRMAN: Thank you, Miss Rose.

MR. ROTH: Thank you, madam. At the heart of these appeals is the proper interpretation and application of the common regulatory framework adopted by the European Parliament and Council in 2002 and given effect in the United Kingdom as required on 25th July 2003 by the 2003 Communications Act.

We have set out a description of the material aspects of the CRF and, in particular, the Framework Directive and the Access Directive in some detail in writing in our defence, and I am not going to repeat that here.

The CRF, as you know, has many elements. One of the parties, I cannot now remember which, but it is not H3G, has suggested that the CRF is internally inconsistent and that therefore one should not seek to apply it in a coherent way but just focus on the particular obligation or provision at issue.

Ofcom, as the UK national regulatory authority wholly disagrees with that approach. The Directives may not be as elegantly drafted as one would wish – dare one say it, that happens sometimes even with a United Kingdom domestic statute – and it may not always be clear why a particular provision is in **this** Directive and not in **that** Directive, and there is a bit of overlap sometimes between the two Directives, but one should nonetheless seek to interpret the CRF in a manner that is coherent, and apply its various elements in a manner that is consistent and has regard to its overall approach. It is, as it is called, a framework, and it is a harmonised one for all now 27 Member States.

As I have said, there are many elements in the CRF, but a key plank is the process of market review (or market analysis as it is called in the Directive) which each NRA is obliged to conduct, and that is in the Framework Directive, and can I just ask you to look specifically at those provisions. It is in your bundle H1, tab 6. Framework Directive, Article 16, para.1:

> "As soon as possible after the adoption of the recommendation …" which is the recommendation on market referred to in Article 15:

"… or any updating thereof, national regulatory authorities shall carry out an analysis of the relevant markets taking the utmost account of the guidelines."

Those are the guidelines referred to in Article 15(2):

> "Member States shall ensure that this analysis is carried out, where appropriate, in collaboration with the national competition authorities."

Then para.3:

> "Where a national regulatory authority concludes that the market is effectively competitive, it shall not impose or maintain any of the specific regulatory obligations referred to in para.2 of this Article."

That includes the SMP.

> "In cases where sector specific regulatory obligations already exist, it shall withdraw such obligations placed on undertakings in that relevant market."

Then skipping the next sentence, para. 4:

> "Where a national regulatory authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power on that market in accordance with Article 14 and the national regulatory authority shall on such undertakings impose appropriate specific regulatory obligations referred to in paragraph 2 of this Article or maintain or amend such obligations where they already exist."

So the key is whether the market is or is not effectively competitive. If it is effectively competitive then it should be left to market forces to achieve a competitive outcome subject to any specific powers which I have referred to as *ex post* powers in the sense – there was some discussion of *ex post/ex ante* – using ex ante regulation in the way that it is referred to in recital 27 of this Directive. You will see from recital 7 that it is essential that *ex ante* obligations should only be imposed where there is not effective competition.

I fully accept that dispute resolution can have a forward effect, in that sense we call it *ex ante*, but it is not *ex ante* like a market review, which is looking at a hypothetical future and trying to see how a market might develop, and that is why I think the market review, market analysis is what they refer to as *ex ante* – it is just a semantic distinction.

The key point is if effectively competitive, not that sort of regulation, leave it to market forces. The purpose of the market review, or market analysis is to see whether the market is effectively competitive or not. If it is not then, as we know, the NRA is required to determine which of the operators in the market has significant market power, and then impose appropriate obligations on that SMP operator from the menu of possible obligations that are set out in the Access Directive at Articles 9 to 13, of which price control is one but not the only one.

The Commission recommendation on relevant market, which is referred to in Article 15 para.1, that the Commission has to issue was duly issued on 11th February 2003 and then, as we saw yesterday there has been a new, recent one revising that in December 2007. Those

at the material time for this market review that you are concerned with here in the MCT statement and the reassessment statement is of course the 2003 version, and that you have in bundle H1 at tab 20. If you go to the annex to the recommendation, which is the fourth page, you see there are set out the various markets that the Commission has identified. There are seven retail level markets and then there are 10 or 11 wholesale level markets, from 8 to 18, and the relevant market here is "Market 16", often referred to in the industry as "Market 16" which is voice call termination on individual mobile networks. That remains a relevant market under the new recommendation, it is now "Market 7", because the number of retail markets has been cut back to one. The new one we saw yesterday – I do not ask you to turn it up, but for your note it is H1, tab 18.

Moreover, the market review procedure is not a once and for all procedure, the NRAs are required to conduct periodic reviews, and that is set out in the Access Directive, which is tab 4 of this bundle, at Article 7, para.3:

> "Member States shall ensure that, as soon as possible, after the entry into force of this Directive and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with the Article 165 of the [Framework] Directive to determine whether to maintain, amend or withdraw these [SMP] obligations. An appropriate period of notice shall be given to the parties affected."

The market analysis procedure is a complex process involving consultation, the provision of the findings in draft, the comment by the Commission and NRAs in other Member States, and so on, and you have seen the length of Ofcom's MCT statement, and indeed one thing H3G does not complain about, that it is too long, indeed, it says in certain respects it is inadequate and according to Dr. Littlechild "incomplete", so it ought to be rather longer.

H3G's main case on SMP, and there are some subsidiary arguments to which I shall come, but their main case stripped to its essentials really comes down to four simple steps. First, SMP under the Framework is equivalent to dominance. Secondly, if an operator cannot charge a price appreciably above the competitive level then it is not dominant. Thirdly, Ofcom's role in dispute resolution that is provided for in the CRF - and, indeed, in the 2003 Act - requires Ofcom to resolve a dispute as to the amount that H3G seeks to charge for call termination by determining a charge - I use the word 'determining' advisedly, and I will come back to that - that is not appreciably above the competitive level.

THE CHAIRMAN: When you say a charge that is not appreciably above competitive level, are you using that as a shorthand for saying a charge that would be excessive or abusive?

MR. ROTH: No. I am using it in the sense of the requirement for dominance. We will come to excessive pricing later. It is treated as the basis for saying whether a company is dominant is the ability to charge price appreciably above the competitive level. Whether that is the same as an excessive price is a point which, if I may, I will come to later on. I appreciate that that is a point which arises.

MR. SCOTT: Just staying on this point, the point being made to us yesterday by Miss Rose was, as I understood it, not that they are making an **inter partes** determination so much as they are setting a threshold that applies to BT, and that the parties were at liberty then to treat, having regard to that threshold, that they might have a price that was different to that threshold. That is a difference which is important, it seems to me, to her, but it may not be quite what you are saying.

MR. ROTH: I will come back to this idea that it is a declaration -- or should be a declaration and that the parties could price higher. But, for the argument of no SMP I think what is said is that the determination - whether it is by declaration or setting a price, or in whatever way - and that is why I use the word 'determination' as a neutral word, because that is the statutory phrase under s.190 - determining the dispute -- determining by whatever appropriate means should be adopted -- That determination should be - and it is a figure - a charge that is not appreciably above the competitive level. That is Step 3.

Step 4, therefore, by reason of that control through dispute resolution, H3G cannot be dominant. I appreciate, of course, that it was elaborated and there are various points to explore which I come back to. But, that is, in essence, what the case comes down to. One sees how that follows from that logical train.

Just taking those four points, as to the first, SMP equals dominance - that is agreed. It is clear. As to the second - if you cannot charge a price appreciably above the competitive level, you are not dominant - we say that is not quite correct because dominance is defined (it is defined in Article 14, para. 2 of the Framework Directive, following United Brands and countless other cases) as the ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers. That is the definition of dominance. Power over price is not the touchstone. This tribunal dealt with that very point in the 2005 case. I do not ask you to turn it up at the moment, but just to give you the reference, it is paras. 45 to 51. For present purposes, for this stage of the argument, I am prepared to assume that that is correct. We say that assuming the second proposition is correct, if the third is correct, and the fourth, then those elements of the CRF that provide for dispute resolution as part of the regulatory powers of an NRA emasculates the market review

procedure and SMP obligations in wholesale markets where parties can resort to the reference of disputes regarding interconnection to their NRA.

Now, H3G seek to stigmatise this submission as being made **in terrorem** to frighten this tribunal - or, indeed, Miss Dinah Rose said yesterday, "We are making a jury point". It is always understood that forensically that is the ultimate insult you can make to an advocate in a civil case - you are appealing purely to sentiment and not using rational argument. With respect, this is nothing of the sort. We submit that it is entirely conventional and appropriate to test the strength and correctness of an argument by considering its consequences, and if the consequence of the argument is to destroy the whole balance of the CRF, whether for MCT in Market 16 in the United Kingdom only, or possibly more widely, then there is reason to suppose that something must be wrong with it. One looks to see what is wrong with it.

But, before explaining where we say that is indeed the consequence of H3G's argument, and why H3G's various attempts to isolate their case is special to its facts are unfounded, can I ask you to look for a moment at the dispute resolution provisions in the CRF? They are, I know, familiar from the Orange preliminary issue hearing. They are, you will recall, in two places. They are in the Framework Directive at H1, Tab 6, in Article 20, para. 1.

> "In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a communications networks or services in a Member State, the NRA concerned, shall, at the request of either party, and without prejudice to the provisions of para. 2, issue a binding decision [I emphasise those words - 'a binding decision'] to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances".

Here, of course, as regards the disputes with BT - not just the H3G dispute, but the other disputes with BT - there is a regulatory obligation under the directives - that is the E2E obligation, so in the disputes with BT Article 20 is engaged. One sees as regards the operation of Article 20, para.1, also recital 32 to this Directive, which makes this entirely clear:

> "In the event of a dispute between undertakings in the same Member State in an area covered by this Directive or the Specific Directives, for example relating to obligations for access and interconnection or to the means of transferring subscriber lists, an aggrieved party that has negotiated in good faith but failed to

reach agreement should be able to call on the national regulatory authority to resolve the dispute. National Regulatory Authorities should be able to **impose** …"

And I stress the word "impose" –

"… a solution on the parties. The intervention of a national regulatory authority in the resolution of a dispute between undertakings providing electronic communications networks or services should seek to ensure compliance with the obligations arising under this Directive or the Specific Directives."

Then there is secondly, the dispute resolution provision in Article 5(4) of the Access Directive, which is at tab 4 of this bundle ----

MR. SCOTT: Sorry, just before you leave that Directive, we are reminded in Article 23 that the NRA has to have regard to the objectives set out in Article 8.

MR. ROTH: Absolutely, and indeed having regard to the objectives in Article 8, as it would permeate the whole framework. It is something that I think the parties strongly rely on in the TRD appeals. We have the same thing incidentally in Article 5 of the Access Directive. Article 5, para.4:

"With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved …"

And there again as, sir, you point out,

"… in order to secure the policy objectives of Article 8 of the [Framework] Directive and the procedures …"

So the same procedure but a different but overlapping jurisdiction for dispute resolution because here it is any dispute with regard to access and interconnection irrespective of there being a specific regulatory obligation, which is what engages Article … Those are the dispute resolution jurisdictions, which as we explained in the Orange appeal, overlap in jurisdiction.

H3G in its skeleton submits, as it must, that the consequences of its argument are not general, but are confined to the present case; they do that not only in written argument, but again in addressing this Tribunal yesterday, and the Chairman asked a question about that at the end of the hearing yesterday. Although the grounds on which H3G seek to distinguish the present case do seem to fluctuate. Can I ask you first to look at the skeleton which is in bundle A, tab 1, H3G's skeleton at para.7:

> "It should be stressed at the outset that H3G's submission does not lead to the pan-European consequences claimed (*in terrorem*) by Ofcom. The question whether any individual undertaking has SMP is fact-sensitive, and the answer will differ depending on the regulatory structure in particular Member States, and the circumstances of the particular undertakings involved. In this case, it is of particular significance that H3G is a new entrant to the market with a small market share; that its contract with BT derives from negotiations undertaken when H3G was anxious to launch and BT consequently had considerable power in the initial negotiations, because of its power to delay H3G's launch; and that Ofcom has found as a fact that BT is price sensitive, and therefore incentivised to refer disputes to Ofcom if a price for MCT cannot be agreed by commercial negotiation. In short, Ofcom's conclusion that H3G has SMP is flawed by its error of law, which, on the facts of this particular case, is critical to its conclusion, but it does not follow that, if Ofcom had correctly interpreted the E2E connectivity obligation and its own powers and duties on dispute resolution, no operator would have SMP in this market."

So what he has there said, first, that the answer will depend on the regulatory structure in particular Member States, and will differ accordingly. Well with respect that is wrong. Article 5(4) of the Access Directive is not based on there being regulatory obligations, still less a particular end-to-end obligation. It is a provision of the CRF, which all Member States are required to introduce and apply, and it enables any operator in a dispute, including of course a dispute over price – the most likely source of dispute – for interconnection with a dominant wholesaler, to refer the matter to its NRA.

The second thing they say is that this is specific to H3G as a new entrant to the market with a small market share. That point of distinction is wrong, indeed, para. 5 – just above on the same page – which argues the alleged error in Ofcom's interpretation of BT's end-to-end obligation in terms is expressed as applying to all parties interconnecting with BT, so it clearly applies as much to the other MNOs in the UK, as it does to H3G. Paragraph 5:

> "Ofcom has misconstrued the E2E connectivity obligation as requiring BT to connect with other networks even at prices …"

Then:

> "From this error flows Ofcom's conclusion that Bt's CBP is constrained because the parties …"

It is entirely general. It is not just H3G. It is wrong also because it is irrelevant to the finding that H3G has SMP, that it is small or a new entrant. The SMP finding is based prima facie on the undisputed facts that H3G has 100 per cent market share and there are complete barriers to entry, and it is in those circumstances that the question arises: "Is there anything to restrain what would otherwise be clearly a position of significant market power?" And it is to answer that question that H3G seeks to pray in aid their dispute resolution.

But that question arises just as much for a wholesaler that may have a large share of the retail market – a larger share than H3G wishes – of course a different market, or has been operating for a longer time. They all have 100 per cent market share. In each of the wholesale markets there are complete barriers to entry, and the question is would they be constrained.

Thirdly, they say here, it depends on BT being price sensitive, and incentivised to refer disputes. That is correct, but it is not a ground for distinction of H3G's particular position for two reasons: first, as regards the UK MNOs, Ofcom did not find that this was a characteristic only of BT, or only vis-à-vis H3G, it is a finding regarding all other operators. Can I ask you to look please, at the underlying MCT statement, the subject of this appeal, which is at your bundle B, tab 1, and on the internal pagination within the statement it is at p.91. It is paras 5.119 to 5.120:

"Wholesale termination charges (whether paid directly to the MNO or through BT's part of the cost of BT's transit services) make up a significant proportion of the cost base for originating operators in providing calls to mobiles. Therefore, to the extent that they impact on the retail price for these calls and therefore on the customers of originating operators, originating operators will be sensitive to wholesale termination charges.

> "Whilst, during the start-up phase of its business, H3G's charges for MCT represented only a very small proportion of any purchaser's total expenditure on MCT, this has changed as H3G's subscriber base has grown. As termination on H3G's network represents an increasing cost, purchasers are likely to become increasingly sensitive to the price it pays for that service. The evidence cited ... of the reassessment pf H3G's SMP supports the view that BT, the largest purchaser of MCT, is sensitive to the level of H3G charges, and this sensitivity is likely to continue to grow with the growth in H3G's customer base. Therefore, it can be assumed that all purchasers of MCT have an incentive to try and negotiate competitive prices with all five MNOs"

The point being made there, in fact, is that in the past H3G, at the outset, might have been in a special position in that BT might not have been price-sensitive to H3G in 2002 or 2003, whereas it was to everybody else. Now, H3G has achieved sufficient success in advance, but BT is price-sensitive to H3G as it is to all the others. It is not that it is only price-sensitive to H3G - not a bit of it. Indeed, we know that BT has indeed referred disputes by several of the MNOs - Orange and Vodafone. So, it is not just H3G that BT is price-sensitive to. Of course not.

MR. SCOTT: Sticking with that point for a moment, the situation has changed in the sense that in relation to the 2G operators when they were just 2G operators -- For some time those rates have been determined by regulation. As we shall hear when we come to the TRD, they are all now doing 3G as well. So, the price-sensitivity of BT is likely to have expanded to embrace them, as we have seen on the facts, simply because they are all now in play, ahead of any regulation of 3G prices. So, we would expect one of the differences between the old situation and the new situation to be that price sensitivity would extend not just to H3G's unregulated rates, but to any other unregulated rate.

MR. ROTH: I think, with respect, sir, the one thing the parties agreed on is that for the purpose of SMP, following the previous judgment, you will leave out of account regulation imposed on the party being assessed for SMP, but on an SMP condition. So, for this analysis, and the price regulation on 2G is under an SMP condition ----

MR. SCOTT: I entirely agree with that, as you understand. But, in terms of BT's behaviour we did not see BT raising dispute resolution in fact. But, now, whether as a matter of H3G rising market share, or as a matter of other 3G coming in, that sensitivity now appears to be manifest.

MR. ROTH: Yes. The only point I am making is that the finding here is that it would have applied to 2G, but there were no references for the reason you have given that it was controlled. My point is a general one for all the MNOs.

Secondly, as regards BT, and indeed the others, while there is a finding of fact that BT is price-sensitive and likely to refer disputes - something that H3G accepts and indeed relies on, and adopts - one sees the basis for that finding. It is not based on documents or statements from BT, or from anyone else. It is **a priori** reasoning, as explained in para. 5.118 and then leading into 5.119 that

> "A buyer's credibility in negotiations with the seller is enhanced where the buyer understands how important his custom is to the seller, and has some insight into the seller's operations and negotiating strategy. It may reasonably be assumed that all

purchasers of MCT, being major commercial undertakings, are well-informed and price-sensitive buyers with extensive commercial expertise".

That is the basis for the finding. Then one gets into 5.119 about termination charges being important. If one did not think they were important, one just looks round the room and one sees how important they clearly are. Those propositions are important - and we have the reasonable assumption in 5.118 - are self-evidently equally applicable to other markets in other Member States (perhaps not every member state, but clearly other Member States).

At para. 5.121, it goes on,

"Moreover, originating operators face five terminating MNOs and therefore can make price comparisons across MNOs for what their customers would likely perceive to be the same service, that is, calling a mobile. It appears therefore that originating operators have the ability and incentive to compare the charge offered by one seller with that one offered by another, to consider other wider repercussions in agreement with supplier may have a similar agreement with others to recognise the implications of the MCT charges for the retail prices faced by its subscribers for calls to mobile networks

As such Ofcom considers all purchase of MCT are well-informed and price-sensitive buyers".

No doubt it is the case in other Member States that there may not be five MNOs - there may be three; there may be six. But, we all know that in many Member States there are several MNOs and the price comparison point applies equally.

So, this reasoning is simply looking at the conduct that may be assumed of an economically rational operator where in the downstream retail market it faces competitors. Therefore there is nothing peculiar to H3G's position that arises from that.

In answer to the Chairman at the end of yesterday, Miss Dinah Rose, I think, did not rely in her four points on H3G being smaller and a late entrant - the point made in the skeleton was not one that she gave yesterday. But, she did add in her four points as the first point that the price charged by H3G was originally set in a situation where BT had strong CBP. I think those were her words. We have not got the transcript yet, but that is my note. Secondly, that H3G's price remained at that original level, and was not raised.

However, as to that, although Miss Dinah Rose was here purporting to rely on Ofcom's factual findings, in fact there is no finding that BT had 'strong CBP'. It is simply accepted by Ofcom that BT may have had CBP prior to January 2002. That is the reassessment statement at para. 4.48. Perhaps I could ask you to look at that, which is in the same bundle

at Tab 3. At para. 4.48, on the internal pagination is p.30 of the document, but p.472 of the bundle - Assessment of BT's CBP Option to Delay. At para. 4.47 it is talking about BT threatening to delay, and then it goes on at 4.48,

> "A strategy like this may have been effective prior to the negotiation of the initial agreement in January 2002 when BT may have been able to exploit H3G's sensitivity to delay in interconnection. The evidence from that period shows that H3G was concerned about the potential impact of delay on its launch while the CAT recognised it does not appear BT aggressively sought to exploit the risks of delay to H3G it is possible that this factor may, at that time have affected the overall balance of negotiating power between the parties".

That was the finding.

Then, Ofcom proceeded in the next paragraph to find that this historical situation was of no consequence after the conclusion of the interconnection agreement with BT in January 2002. I just ask you to cast your eye down paras. 4.49 and 4.50. (Pause whilst read): So, Ofcom is saying that in that original situation it may have been that CBP prior to January 2002 is irrelevant in their finding. Of course, in August 2006 BT contended that H3G's charges should be reduced, which H3G refused, and so BT referred that dispute to Ofcom.

THE CHAIRMAN: You are saying in para. 4.49 that when you are considering the continuing effect of the initial negotiations position, you have to posit the question, "Well, what would happen if a dispute arose now because it is in the context of such dispute that bargaining power, or lack of it, would be relevant or manifest?"

MR. ROTH: Exactly. And that the potential for delay, which would apply pre-January 2002 is no longer a factor. Therefore, I am really saying two things: (1) it is not right to say that Ofcom found that BT had 'strong CBP originally'. They said that BT may have had CBP. But, they went on to find that that is no longer relevant for the reason, madam, which you have just given and summarised.

MR. SCOTT: While we are on that page, in relation to something which Miss Rose said yesterday, it is worth looking at para. 4.55, and the statement by Ofcom,

> "BT appeared at all times proactive in establishing an agreement on charges. BT also appeared to employ considerable effort to consider whether it is possible to grant H3G a different charging structure from that prevailing with other MNOs".

That was the context that lay behind the letter of 24th December in which H3G actually proposed to go with one of the existing retail charging levels rather than any other charging level that might have been more attractive to them.

MR. ROTH: Yes. I think that is absolutely right. We say that how the price was originally set in that situation is irrelevant. The point that H3G's price remained at the original level and was not raised does not take one anywhere because, as we know, the prices of the other operators fell and it was BT, as I said, contending that H3G charges should be reduced, which H3G resisted and which led to that dispute referral to Ofcom.

Given that BT is price-sensitive not only to H3G, but also to the prices of the larger networks, of course, BT is now as likely to refer disputes with H3G as it is with any of the other MNOs.

The final point of distinction advanced yesterday was that BT and H3G would negotiate a charge for interconnection on the basis of the expected result of the reference of a dispute to Ofcom. That alleged basis for contending the position of H3G is somehow different from that of everyone else suffers the same fallacy from the claim that other purchasers are not price-sensitive. Once parties are price sensitive, as Ofcom found them to be, they will bargain over price in the shadow of the regulatory framework, and thus the expectation of what would happen in the event of deadlock when an NRA had to determine their dispute. There is nothing peculiar about the situation of H3G or, indeed, H3G vis-à-vis BT, as opposed to any other MNOs bargaining about charge.

So, all the suggested points of distinction that are said to make the H3G position peculiar to its facts fall away. Indeed, it is notable that in H3G's notice of appeal - the grounds on which the tribunal has to decide this case - H3G put the point entirely generally, and not even confined to terms of BT's end-to-end obligation. That is in the notice of appeal in Bundle C1 at Tab 1, p.29 (document p.28). Paragraph 10.16,

> "The correct interpretation of Ofcom's powers and duties is such that it would set a price [an interesting use of words in the light of the submissions yesterday] that takes account of the considerations identified at, for example, para. 7.2 of the SMP/Price Controls Decision in relation to all disputes referred to it, whether under GC1.1, the end-to-end connectivity obligation and/or s.185 of the 2003 Act [which is the dispute referral provision]. Given this, H3G submits that such a price should not and would not be 'appreciably above the competitive level'".

So, this is a point being made with regard to all disputes being referred to Ofcom under those powers and duties - not just H3G and disputes with BT under an end-to-end obligation.

Does this result - that is, that the dispute resolution power - mean that any party in a wholesale market that is therefore susceptible to dispute resolution cannot have SMP follow

from this tribunal's judgment in the first H3G case in November 2005? It would be very odd if it did, I have to say. We submit it certainly does not. Indeed, we submit that the judgment of this tribunal is to the contrary. But, before going to the judgment I think it ma be helpful to address the question of what is the proper interpretation of Ofcom's dispute resolution powers? Miss Dinah Rose, yesterday, devoted considerable time to alleging that Ofcom has misconstrued its dispute resolution powers. She roundly, and repeatedly, criticised Ofcom for misunderstanding its powers. It was almost the light motif of her submissions, pointing to references by Ofcom to imposing a price, or setting a price, and saying, "It just shows that on end-to-end Ofcom had got it all wrong". She said in answer to Mr. Scott that what Ofcom should do when a dispute is referred to it is to make a declaration - that, sir, was the point you reminded me of earlier - as to the maximum reasonable price at which BT is obliged is interconnect, and then the parties would be free commercially to negotiate a price above or below that level. She criticised our defence for mis-characterising H3G's case by suggesting that H3G was contending that on the dispute resolution Ofcom should set a price at which H3G should purchase call termination. Instead, she said that Ofcom should have light-handed regulation, declaring the declaration of a price level above which BT was not obliged to purchase. You will recall all those passages she complained about where Ofcom refers to imposing a price. She said, "Well, that is all erroneous".

With respect, this is all fanciful for three reasons: (1) it is entirely divorced from commercial reality. As Miss Rose accepted, H3G, in practice, has to sell mobile call termination (MCT) to be BT. She put it that if they do not, they have to exit the market. As she also accepted - and, indeed, emphasised - BT is price-sensitive. So, if Ofcom declared the maximum price that BT had to pay as being X pence per minute, BT is not going to pay more than X pence per minute as a price-sensitive purchaser, and H3G would have to sell at X pence per minute because it needs BT to buy.

So, whether one is legally imposing a price or declaring a price at which the parties are then, in practice, bound to do business makes no practical difference whatsoever. You will remember that the issue one is considering is: is the market effectively competitive.

(2) It is fanciful because it was suggested that Ofcom should determine by declaration what it considers to be a reasonable price, and then, on H3G's case, that reasonable price should have regard to the interests of end users. They stress that. But, then they said, "Well, it's only by way of declaration, and so the parties could then negotiate a higher price". But, of

course, if that is the circumstance, then the interests of end users, which they say Ofcom has to safeguard, have gone by the wayside.

That is why, of course, under s.190 of the UK statute one sees how the dispute resolution powers are set out. This is the UK statute - which I am working off the Grey Book, but I hope someone can give me a bundle reference ---- H1, Tab 8. It is s.190. Resolution of Referred Disputes.

> "(1) Where Ofcom makes a determination for resolving a dispute [that is why I used the word 'determining' earlier because that is what Ofcom is doing] referred to them under this Chapter, their only powers are those conferred by this section.
>
> (2) Their main power (except in the case of a dispute relating to rights and obligations conferred or imposed by or under the enactments relating to the management of the radio spectrum) is to do one or more of the following:
>
> (a) to make a declaration setting out the rights and obligations of the parties to the dispute;
>
> (b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute ----"

We say it is entirely appropriate to use it when the parties are unable to agree, and if the determined price is below the prevailing price, indeed, then Ofcom can require repayment. That is sub-section (d)

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

That is the statutory framework. Of course, that is what the parties would expect, including, indeed, H3G. If one goes back for a moment to their notice of appeal in this case (Bundle C1, Tab1, p.23, at para. 9.10),

> "The fact remains that both H3G and BT are now and have for some time been aware that a regulator, i.e. Ofcom, with the legal duties referred to above and subject to an appal on the merits, would set the MCT rate in the absence of an agreement. Even if there was doubt before, the position is now clear".

So, Ofcom sets the MCT rate and that is therefore the MCT rate being charged by H3G. It is not some hypothetical reasonable rate. It is the rate that is going to be charged and paid - the price.

Miss Dinah Rose said, "Well, it is very important to talk about dispute resolution precisely", meaning on the actual factual situation of H3G in dispute resolution. Well, we can see that, indeed, because there were disputes that H3G did refer. So, we can see what goes on. We have got the referral by H3G which is Bundle F3 at p.657. This is the Referral of Disputes between H3G and others.

MR. SCOTT: Mr. Roth, just before we refer to this, this is an example of a page which has come out in white, but which is labelled 'Confidential'.

MR. ROTH: As I understand it, it was confidential when it was sent - in the original - and there are yellow markings on the bits that are now confidential. But, if I am wrong about that, someone will correct me. The H3G solicitor is nodding. I only need refer to Bundle F3, p.663, which, on my copy is not in yellow - Remedies Sought.

> "Ofcom should resolve the various disputes by determining a reasonable price for the MTRs as between (i) BT and H3G; (ii) H3G and Orange; and (iii) H3G and O2. In respect of (i) H3G should be paid the same as Orange's higher 3G rate for the reasons set out in the negotiations with BT, assuming this is paid to Orange. In the alternative, H3G should be paid at least the highest 3G rate determined by Ofcom in relation to H3G's competitors".

and it requests things about the competitors' rates as well.

That is what H3G wanted, they wanted the price to be set, the price at which H3G would pay to the other party to the dispute and the other party would have to accept. So when Ofcom determines a price under a dispute between two parties pursuant to s.190 of the UK Statute, giving effect to Article 5, para.4 of the Access Directive, and where there is an end-to-end obligation (Article 20 of the Framework Directive) it is effectively "imposing" – the word used in the recital to the Framework Directive – regulation on both parties to the dispute and not just on one of them. It is the height of sophistry to suggest that this can be characterised as just one-sided only. It is against that background that I turn to the 2005 CAT Judgment.

THE CHAIRMAN: Mr. Roth, are you going to come back to that point about whether dispute resolution imposes regulation on both parties rather than just on BT?

MR. ROTH: I was not going to but I can if you would like me to.

THE CHAIRMAN: Well it seemed to be quite an important plank of Miss Rose's argument.

MR. ROTH: Oh, it is, absolutely. For the reasons I have sought to outline we say it is fallacious in substance.

THE CHAIRMAN: I see, so you say the fact that actually what you set is a price that is paid necessarily means that you are regulating both the price that is charged and the price that is paid and therefore the price relevant to both parties.

MR. ROTH: Exactly.

THE CHAIRMAN: And you say then that that is always the case, even if you are doing that in the context of an E2E obligation which is actually only imposed on one of the parties?

MR. ROTH: Down the line the E2E obligation is imposed on any one, but once there comes regulatory dispute resolution under the regulatory framework determining the price, that is regulation of both because it is what the one must pay and the other must charge, and that in substance is its effect. Even if it were to be rather bizarrely in the form of a declaration rather than as has been – for obvious reasons – actually fixing the price, setting the price is what the notice of appeal says, but we have been accused of mischaracterising that, and that has the same effect. Or if it does not have the same effect and the parties can agree a higher price, then it is all wrong for the reasons on H3G's case of taking account of end users. We say that is what the Framework certainly – if it is end-to-end, which was your question, then it comes within Article 20 of the Framework Directive, it is the application of a regulatory obligation already imposed, and there as recital 32 says, you are imposing a position regulating both parties. It is on that basis that I ask you now to look at the 2005 Judgment, which you find at bundle H2, at tab 12. It is important, with respect, to appreciate, as Mr. Scott no doubt remembers, or perhaps painfully remembers, what were the arguments before this Tribunal in the previous case, and what the Tribunal in fact decided, and forgive me – you have been taken to it – if I ask you to look at it again with some care, and at certain passages in it, but it is very important to our case.

The Tribunal conceded Ofcom's dispute resolution powers in the context of an assessment of SMP on H3G. The Tribunal did not decide that the dispute resolution powers meant that H3G did not have SMP, that is clear from the summary right at the outset after the factual background and the procedural history, the summary at para .23:

> "In considering whether MNOs had SMP in the market for wholesale voice call termination in their respective mobile networks, Ofcom noted the application of CPP and relied on four criteria …"

And that is set out.

"In that regard, H3G had 100 per cent market share and there were absolute barriers to entry in the market for wholesale voice call termination on the H3G mobile network. We note that it was against the background of those strong *prima facie* indicators of SMP that Ofcom

reached its decision that there was no effective competition in that market and, accordingly, concluded that H3G has SMP. Nonetheless, it was for Ofcom to analyse whether there was sufficient CBP in the market to negate the finding of SMP. We take the view that on that one aspect of its Decision, Ofcom did not meet the standard required of it. Notwithstanding that, on a reconsideration, it would be open to Ofcom to reach the same conclusion; it is now for Ofcom to reconsider that part of the decision relating to CBP in the light of this judgment and the information currently available."

Well that is the summary for what actually happened and what was decided. H3G had four principal grounds of challenge to Ofcom's decision, and they are set out in para.35. The first, as you see:

> "Ofcom did not carry out sufficient analysis of prices to entitle it to come to a decision that H3G had SMP."

That is to say pricing and costs was what was covered by that. That first ground of challenge is dealt with from paras. 44 onwards, under the heading "Pricing and Costs". I will not read into it now, I will come back to it, it is relevant to excessive pricing, but it was rejected, and that one sees in paras.67 and 68.

The second of the four grounds summarised in para.35 was regulation:

"Ofcom failed to take account, or sufficient account, of restraints on H3G's ability to increase prices arising from regulation."

That concerned dispute resolution countervailing buyer power and so on, and after some introductory observations at para. 69 is really addressed at paras. 88 onwards (p.42). One sees paras. 88, 89 and this bit is obviously important, para. 88:

"It is part of H3G's case that, in assessing whether an entity has SMP, at least in a case like this where power over price is an essential element of the regulator's decision, it is relevant, if not important to consider the effect of regulation, or possible regulation on the entity in question. One of the matters that has to be taken into account in assessing whether or not the entity can charge excessive prices is the extent to which it would be restrained from doing so by the prospects of regulatory intervention to stop it. H3G says the relevance of regulation is acknowledged in para.3.39 of the Decision, but Ofcom did not consider the point fully, because it did not consider the impact of regulation on H3G. It took it into account so far as the position of BT was concerned, but failed to do so as far as H3G was concerned. H3G's own evidence showed that the possibility of regulation was a curb, because an internal memorandum prepared in the course of the negotiations with BT, in November 2001, showed that it acknowledged that one of the constraints on its future

pricing was the possibility of regulation by the then regulator. This point is probably related to the point already dealt with as to the extent of the necessary inquiry as to future conduct (including a consideration of incentives and disincentives). It is also related to the point as to dispute resolution dealt with below, but Mr. Green [counsel for H3G] said it also had its own individual effects.

As [I] pointed out, this point is an unattractive one when taken as a matter of principle. If it were a good point then one could expect it to be a frequent if not a universal answer to any attempt to impose ex ante regulation. Any entity in respect of which it was said that it could behave independently of its market counterparts ----"

THE CHAIRMAN: Sorry, I think Miss Rose accepted yesterday that this was a bad point, or they accept the Tribunal's ruling that so far as looking at potential SMP regulation that is not something that you should look at as acting as a constraint. The question is whether that also rules out looking at dispute resolution as a constraint.

MR. ROTH: Indeed, and I think she went so far as saying it was an obviously bad point – that it could be SMP – did not prevent her clients advancing it with great vigour last time, but it is clearly out now.

I am looking at the middle of para. 89 where the Tribunal comments on the argument, and I fully appreciate why you are saying it is not necessary to look at this, but with respect there is something here that we rely on, because when the Tribunal is rejecting that argument they look at what conceptually it involves. Picking it up six lines down:

> "It would therefore argue that it does not in fact have significant market power within the guidance given in Article 14(2) of the Framework Directive. The argument might also be extended into cases of alleged abuse and ex post regulation, where logically it might be thought to apply on the same basis (notwithstanding the different direction in which the facts might be pointing) in relation to allegations of dominance. Thus one would have the parad006F: there could never be SMP where one has a vigilant regulator, so ex ante regulation would never be appropriate (or indeed necessary) despite the fact that it could turn out (on the facts) that there was dominance (and abuse) after all. That is not an attractive scenario, and it is one which we would only espouse if we were bound to by authority."

Then there was a lot of discussion about *Tetra Laval* which we can skip over, it is not help, it does not support H3G's case. That takes one to the end of para. 94 and that disposed of *Tetra Laval*, and then para.95:

"Reliance was placed by Ofcom on a decision of the Commission in the '*Reg TP*' case. Ofcom submitted that the reasoning of this decision supported its case on this point. Decisions of the Commission, although not strictly binding, are matters to which we should give due deference."

They explain the background to that. Then at para.96 what *Reg TP* was minded to find regarding the incumbent operator, Deutsche Telekom – this was in the fixed market, in the "strict Greenfield", the "modified Greenfield", and the quotation I will not read it, it has been read to you.

MR. SCOTT: I should just say as we pass by, the footnote there, that *Crehan*, Court of Appeal, it subsequently went to the Lords and we would now have had to go and look at *Crehan* in the Lords in relation to how we felt about the Commission.

MR. ROTH: Yes, I think on that point, giving deference, I think that remains, I think that is uncontroversial and you would not need to revise your Judgment in the light of the Lords' Ruling in *Crehan*, but thank you, I had skipped that.

Then there is the quotation of para.22 of the Commission's rejection decision, and then below that in para.97 the Tribunal comments:

"It was appropriate to take into account the existence of the regulatory interconnection obligation on DTAG, but not the effect of regulation on the very parties whose market power was under consideration.

This point is said to be developed in para.23 of the decision:

'The purpose of a Greenfield approach is indeed to avoid circularity in the market analysis by avoiding that when, as a result of existing regulation a market is found to be competitive, which could result in withdrawing that when as a result of existing regulation a market is found to be effectively competitive, which could result in withdrawing that regulation, the market may return to a situation when there is no longer effective competition. In other words any Greenfield approach must ensure that absence of SMP is only found and regulation only rolled back where markets have become sustainably competitive, and not where the absence of SMP is precisely the result of the regulation place."

The Tribunal continued:

"In other words, a potentially regulated person cannot claim that it does not have SMP because regulation has procured a situation in which it no longer has it. So long as it is regulation which is bringing about competitive outcomes, the markets

are not competitive independently of that regulation. It follows that the potentially regulated person cannot say that it does not have SMP because the threat of regulation means that it does not have the necessary power. That would be circular and illogical."

That was our submission – "Ofcom relied on this reasoning." The Tribunal continued:

"Although that Decision (*Reg TP*) turned on a consideration of the effect of regulation on someone other than the person who is the subject of the investigation (the equivalent of BT in the present case) we agree that the reasoning applies as Ofcom says it does. The effect of this is that the possibility of regulation being brought to bear on H3G is a factor that cannot be prayed in aid by H3G as militating against its having SMP. We reiterate that H3G's submissions would give rise to an illogical and unattractive if not an unprincipled, position, and we consider them to be wrong."

It is what is said to be a jury point.

"The correct position is as found in the *Reg TP* decision, namely that regulatory obligations on a market counterparty can be taken into account, but not the potential for regulation on the party whose market position is under consideration."

So clearly the broader interpretation of the two interpretations that Miss Dinah Rose identified.

MR. SCOTT: Just go back, I think to be fair to Miss Rose, she drew particular attention in para.97 to the ".. other than the specific regulation imposed on the basis of SMP status in the analysed market". I think you probably have to address that, even though I accept that you are stressing the generality of 99.

MR. ROTH: Yes, certainly, because that was what the German regulator had done, and so that is what they were addressing in the Commission's letter. The conclusions this Tribunal drew from that, or they rely on that as reinforcing their analysis and conclusion as a matter of principle, which is put more broadly. I am relying on the Tribunal's holding in para.99 as expressing the principle in broad terms, and they are saying "Well there is an illustration of it in a specific SMP case", where it produces circularity, but, says the Tribunal – and you put it – and I appreciate I am addressing one of the judges from that occasion, but you put it in broader terms as the same principle applying and one sees that when we come on in the Judgment to what you say later, and you refer back to this passage, and that may help on this point, if I may.

Then comes the third of the four grounds identified in para.35, namely countervailing buyer power, from para. 100 onwards. That, of course, is where Ofcom went wrong. You see at para.109 Ofcom's case:

> "Thus Ofcom's case on CBP turns on two principal points – the obligation of BT to connect (and maintain a connection) because of the end to end connectivity obligation, and the inability of BT to have resort to a different source of supply. The Decision focuses on the former, with little reference to the latter; the argument before us focused more on the latter. Together they clearly amount to factors which are capable of negating any CBP."

Then the Tribunal has commented on that in para. 110:

> "We consider the following points have to be borne in mind:
>
> a) The underlying principle in a case like this is whether there is effective competition. SMP is a tool in determining this question – indeed, it is the central tool.
>
> b) Various factors are relevant in determining whether there is SMP, and one of those is CBP.
>
> c) For these purposes the right question is not the binary one of whether CBP exists or not. In other words, it is not enough to ask whether there is CBP, and if so to hold that there cannot be SMP. CBP is the power of counterparties to offset the powers of the party whose allegedly superior powers are under consideration, and the important question is what degree of CBP is there, and (bearing in mind all the circumstances) does it operate to a sufficient extent so as to mean that there is no SMP? CBP is not an absolute concept in terms of its strength. It is a concept which embodies a possible range of strengths. In any case where it is relevant, the relevant question is likely to be not whether there is CBP or not, but whether there is any CBP, and if so how much and what effect does it have?"

They deal with the first point relied upon by Ofcom, the "no alternative supplier", and conclude at 112:

> "We do not consider that the absence of an ability to switch means that nothing else need be investigated. If there should have been further consideration of factors that were not considered then this factor does not excuse its not being carried out."

So it was not conclusive itself. They then go through the Ofcom decision, and conclude at para.118 that there are two errors:

"We consider that in this respect Ofcom's reasoning and …"

THE CHAIRMAN: Mr. Roth, I am sorry to stop you but I think we know what the errors were and I really do not want any more reading out of this Judgment if at all possible. Can we move to what conclusions you want to draw from the decision with which we are familiar.

MR. ROTH: Certainly, madam. If I can go on to paras 125 and 126, was the obligation on BT. Then para.128 is the first error. Then para.129 is the second error. Then the Tribunal came to consider the interconnect agreement and dispute resolution at para.135 and following. One sees at 137 the point that is being put. This was dispute resolution referring to clause 13 of the standard Interconnect Agreement with BT. This is, with respect, very, very important. Paragraph 137:

> "Mr. Green took the position that the presence of the dispute resolution procedure under clause 13 was, a t the end of the day, part of, or akin to, the regulatory presence which meant that H3G could not set an excessive price and therefore had no SMP. Mr. Roth's position on this clause can be shortly stated – he said one cannot contract out of a dominant position if one is otherwise in one, and he relied on authority in support of that."
>
> 138 We agree with Ofcom the mechanism of clause 13 does not affect the conclusions to which Ofcom might otherwise properly have come about any SMP possessed by H3G (or CBP possessed by BT)."

Very important. They then refer to case law from merger cases. Then in para.138(b), the paragraph that Miss Dinah Rose did not read and jumped over, they give the second answer to this argument.

> "b) The second answer lies in identifying just what the clause 13 mechanism is. It is not actually a full third party arbitral mechanism of the kind one sees in, for example, a rent review clause. The arbiter in clause 13 is the regulator. The regulator's powers are conferred and constrained by statute, and while Ofcom's are extensive they do not include the power to be a third party arbitrator. In truth clause 13 does not invoke that latter sort of states. The sort of dispute that clause 13 contemplates is a form of interconnection dispute, which Ofcom would resolve as regulator, not as a third party dispute resolver."

So that is Ofcom, and the point came out in the Orange appeal, you will recall. Ofcom is resolving these disputes not pursuant to any contractual arrangements but under its regulatory duties of dispute resolution.

"Its intervention would therefore be as regulator, and would be a form of regulation. It therefore falls to be disregarded, as a matter of principle, just as Ofcom's general presence as a regulator with a potential effect on the conduct of the putatively regulated person falls to be disregarded, for the reasons given above."

And those were the reasons that I was just referring to.

"This is the same point that we have considered and dealt with above." So the Tribunal is saying "Our reasoning above is to be understood in general terms, because that is why it applies to what Ofcom is doing when there is a referral contractually from the parties under clause 13, but Ofcom is acting as regulator exercising its regulatory dispute resolution powers, and that is what we say is exactly the dispute resolution powers one is concerned about in this case on the present argument.

THE CHAIRMAN: So you say that even in the earlier passage if there the Tribunal was focusing on SMP regulation, and one could read SMP as being impliedly inserted before the references to regulation in that paragraph, you say nonetheless, this paragraph shows that you are applying it to dispute resolution both under – well they dealt separately with clause 13 and s.185 in that Judgment, but I think we now all consider those to be actually two aspects of the same regulatory role.

MR. ROTH: Exactly. They were earlier referring more specifically to SMP because that was the argument that was being addressed to them, so quite understandably the Tribunal was focusing on what is the argument and saying an SMP, and indeed the Deustche Telekom case was also about SMP, but the reasoning was expressed for rejecting it in broader terms – the logic of the reasoning – and that is made clear here where that reasoning is invoked, the same reasoning is invoked, to defeat another argument that was being advanced on the basis of dispute resolution powers. The point also being made that Ofcom's dispute resolution powers that it is exercising are not contractual or arbitral powers, they are regulatory powers under its statutory provisions, i.e. the same dispute resolution powers that are being relied on by Hutchison in this case, and that is why we say the 2005 Judgment has in fact addressed this argument and explained how it is to be disregarded and hence the conclusion in 139, where they summarise what the position is.

So here we submit the position that one faces on the case before you, madam, is this. If H3G is correct, as a matter of law, that in disputes referred to Ofcom, such as the dispute

subject of the appeals being heard next week – many of which incidentally involve contractual change notices, but that is irrelevant – if they are correct that Ofcom is obliged under Article 5(4) of the Access Directive, or Article 20 of the Framework Directive, to "determine" – a neutral word – to determine a price whether as regards interconnection with BT and H3G or any other supplier of MCT, a price that is not appreciably above the competitive level so as to preclude the exercise of significant market power by Hutchison, then it falls to be disregarded for the purposes of an SMP assessment under Article 16 of the Framework Directive and the parallel UK provisions. It falls to be disregarded since it is a price that has been determined for the purpose of constraining market power on the party whose putative status as having SMP is being assessed, and therefore you avoid t he circularity that was referred to by this Tribunal in that Judgment, if that is, as a matter of law, the way that Ofcom should resolve such disputes.

So to that extent we agree with what BT say and, as we make clear in our skeleton at para. 16, and the point we plead in our defence at para. 97.3.

But, if, on the other hand, Ofcom is not obliged to resolve disputes by setting a price for the supplier that is not appreciably the competitive level, which is Ofcom's case in the dispute resolution appeals, then, of course, H3G's argument falls away because then, in practice, dispute resolution cannot be relied on in any negotiations between BT and H3G, or any other, as inevitably producing that result. It is central for their case that dispute resolution has to - and Ofcom is obliged - determine a price that is not appreciably above the competitive level. We say that if they are right about that, then it falls to be disregarded because, otherwise, you would have that circularity. If they are wrong about that, then their argument on SMP does not stand up at all. You do not, in this appeal being heard now, need to decide which of those differing approaches to dispute resolution, or, indeed, another approach to this dispute resolution advocated by T-Mobile, which approach is correct. That is for the TRD appeal, where you will hear a lot of argument about it, and whether Ofcom should take costs into account in some way. We say that in the circumstances of the present TRD appeals, Ofcom was entitled not to factor in costs. But, I will explain all that when we come to those appeals. I had better not do it now, or we will never finish.

There are various ways, in any event, that this tribunal may hold that Ofcom should act in resolving those disputes. But, it is critical that for present purposes in order to sustain their argument that the dispute resolution power of Ofcom in itself precludes SMP, it must be on the basis that disputes resolution always results in a determination of the price which means

that the supplier cannot supply at appreciably above the competitive level, which, with respect, Professor Bain pointed out in this kind of market is going to be a price related to price - a costs based price. This is not intellectual property rights. Clearly this is going to be a price related to costs in some way.

We will be submitting in the TRD appeals that this is not the proper interpretation of a dispute resolution, and so there is no basic error in the various passages in the MCT statement that H3G relied on. Miss Dinah Rose took you through them. But, even if we are wrong about that, this does not avail H3G since in that event we are getting precisely the situation that this tribunal had in mind in the 2005 judgment as set out in para. 138(b), referring back to para. 89.

MR. SCOTT: Just to clarify one point, is that an implicit reference to Attheraces or a different point?

MR. ROTH: It was an implicit reference to Attheraces and I shall make an explicit reference to Attheraces very shortly.

MR. SCOTT: Very good.

THE CHAIRMAN: You are not saying though that the test that is applied under s.185 is relevant to whether this is the kind of regulatory obligation -- or regulatory constraint which should be disregarded? If what you say about the passage in para. 138(b) of the first judgment is right - that the reference of dispute is a regulatory matter and therefore falls to be disregarded - that must be the case regardless of the test that is actually imposed. But, what you say is that "Well, we do not even have to get to that if Ofcom is right in saying that it is not bound to constrain prices in the way that the other parties allege.

MR. ROTH: Absolutely, madam. It is not confined that way. The only reason it might be said to be confined that way is that insofar as the reasoning - and I am looking back and incorporating the final points of 89 - it is based on the concern about the circularity. The circularity only arises. Otherwise, you do not have to worry about circularity, and it could be said, "Well, then the analysis might not apply". But, I fully take your point that it is expressed more widely as being regulatory.

I come now to the meaning of excessive pricing. I would emphasise that in considering this issue now it is in terms of whether Ofcom was correct to find that H3G had SMP. It is not now the question of the remedy which is the second stage of this case. On this we have found H3G's arguments, frankly, very puzzling. They accept as being uncontroversial the proposition that if a mobile network operator has an ability to sustain charges to an appreciable extent above the competitive level, that means that it has SMP. They say that

in their notice of appeal at para. 10.20. I do not ask you to turn it up. That, indeed, is the test that Ofcom sets out in the MCT statement at para. 4.14.

However, yesterday, Miss Dinah Rose said, if my note is correct, "There are problems with this test. First, what is 'appreciably'; secondly, what is the competitive level". She observed rhetorically, "We just don't know". In their skeleton, H3G seems to put forward a slightly different test. That is at Bundle A, Tab 1.

THE CHAIRMAN: I think she was saying that it is not clear from the Ofcom decision what view you took of those things ----

MR. ROTH: What view we took as to what is the competitive level, and what is meant by 'appreciably'. Yes. The skeleton in Bundle A, Tab 1, at para. 158, p.56,

"Having referred to the test of assessing whether an undertaking has the ability to price at a level that keeps its profits persistently and significantly above the competitive level [which we did not] Ofcom fails to examine whether H3G's profits have been persistently and significantly above the competitive level, or what such a competitive level ought to be".

So, that seems to be a profits test. Then comes the reference - explicit and not implicit - to Attheraces, showing that there is an error here in para. 161, leading to the conclusion at para. 165,

"Even if, as Ofcom claims, it was sufficient for it to show an ability on the part of H3G to price excessively it remained necessary to assess how such prices would be excessive. This Ofcom has failed to do or its attempt to do so is vitiated by an error of law and/or assessment. Alternatively, Ofcom has unlawfully failed to prove any or sufficient reasons for its decision in this respect".

We say that really there is a complete misconception here. The question for SMP or dominance is whether an undertaking has the ability to price at appreciably above the competitive level. One answers that question by looking at its market position and the constraints that it faces. It is quite separate from the question of whether it actually is pricing at that level, or, even, whether there is a real risk that it will price at that level. There are many dominant companies around - dominant with, therefore, the ability to price at above the competitive level - but most of them do not engage, thankfully, in excessive pricing. This is made clear by s.88 of the statute. The provisions in s.88, relating to a network --

"Ofcom are not to set an SMP condition falling within s.87(9) [price control] except where it appears to them from the market analysis ... there is a relevant risk of adverse effects arising from price distortion".

What are adverse effects? They are set out in sub-section (3):

"For the purpose of this section there is a relevant risk of adverse effects arising if the dominant supplier might so fix and maintain some or all of its prices at an excessively high level ----"

Those are the criteria, or the conditions, that must be satisfied to set a price control SMP condition. That stage comes after finding SMP. Finding SMP you do not have to satisfy those conditions to impose any of the other SMP conditions. It is only from price control. That is clear from s.87.

"Where Ofcom have made a determination that a person to whom this section applies, the dominant provider has significant market power in identifying the market they shall: set such SMP conditions authorised by the section ----"

Then you have the whole menu of conditions which it is really taking on.

THE CHAIRMAN: So, s.88(3) envisages a situation where you have an undertaking which has SMP, but where there is no risk of it being able to fix and maintain prices at an excessively high level so as to have adverse consequences.

MR. ROTH: Where there is not a relevant risk of adverse effects, namely to maintain prices at an excessively high level - but it has got SMP. In other words, it has got SMP, but there is no risk that -- Once SMP has been found you get to the question, "Well, can you impose a price control obligation?" For that obligation, as opposed to the other SMP obligation s.88 imposes additional criteria. So, far from supporting Hutchison's case, it shows exactly the opposite - you can have SMP, although there are none of the risks within sub-section (3). That goes to remedy.

Attheraces is a perfect example of this distinction. The judgment in Attheraces is in Bundle H2 at Tab 14. The decision of the Court of Appeal. Madam, I am not going to spend much time on Attheraces. Frankly, I feel I gave up enough of my life to that case in 2006. However, if you look at para. 107, Market Dominance,

"It is now accepted that, as ruled by the judge, BHB had a dominant position in the relevant product market at the relevant time: it was the sole supplier of pre-race data in the 'upstream market' in which it deals with ATR".

It had 100 percent market share - not wholly dissimilar to the situation here. It had a 100 percent market share. There were not complete barriers to entry, but there were very high barriers to entry. So, dominance, yes, but the Court of Appeal overruled the judge on the finding that prices were excessive and abusive for this very peculiar

product. In other words, yes, because of its 100 percent market share and high barriers to entry, BHB had the ability to price excessively appreciably above the competitive level - and I accept that - it was not shown that in fact it had actually done so. There is the perfect distinction between being able to say, "Yes, you have SMP even though it is not shown what the competitive level actually is and whether you are pricing above it".

THE CHAIRMAN: I am not sure, then, whether this phrase 'the undertaking has the ability to price appreciably above the competitive level' is another way of saying that it has the ability to behave independently of customers, consumers, etc. So it is a description of dominance rather than a factor leading to dominance, because if it is to be treated as a factor in determining whether dominance exists, then you would have to look at evidence of actual pricing - otherwise you would get into a circular position whereby you would say, "Well, it's dominant. Therefore it has the ability to raise prices and if it has that ability, then it must be dominant".

MR. ROTH: Yes. I think what you may be able to say is, "Well, what is the market situation. If it is a monopolist -- if it has buyers who have to buy from it -- if there are high barriers to entry, then it has got a lot of power over pricing, and can put its prices up without constraint. If you put them up above this hypothetical competitive level ----" Of course, if it is a monopolised market, to work out what this competitive level is is extremely difficult. Indeed, in some senses, it can be virtually impossible. The point is brought out in even starker terms from the argument that H3G advanced last time to this tribunal, where it was alleged that the SMP finding was flawed not then because there was on finding that prices were excessive, but it was put slightly more modestly then when it was said, "It is flawed because there is no finding that H3G had even an incentive to charge excessive prices. Therefore it could not have SMP" whereas Ofcom, last time, had found that there was such an incentive for the other four MNOs. For that I would ask you to look again at the judgment in this same bundle at Tab 12, para. 57 of the 2005 judgment, at p.28.

"With that in mind we therefore turn to Mr. Green's arguments about incentive. His argument was that the mere ability to raise prices was not enough. There must also be an incentive to do so. Although he mischaracterised what Ofcom said about this, he can still make the point that he sought to make ---"

The tribunal continued at para. 59,

"In considering whether Mr. Green is right about this, our starting point is the definition in Article 14(2) of the Framework Directive [that is, the definition of dominance] ... It does not seem to provide any basis for Mr. Green's submissions. This reflects a position rather than a course of conduct. It reflects a 'position of economic strength'. One can logically consider whether an entity is in that position without having to consider whether it has any incentive (or, indeed, any intention) to sue it to any purpose. Being in a position and using it, or wishing to use it, to any particular purpose are different things (though they are obviously linked - one cannot use what one has not got). The same analysis applies when one moves on through the Article - 'affording the power to behave to an appreciable extent [etc.]'. Having a power and having the incentive to exercise it are two conceptually different things, as Mr. Green himself effectively accepted when he acknowledged that a man who left a house with a knife had the ability to hurt someone with it but did not necessarily have an incentive to do so. There is nothing in the wording of the Article which suggests that one adds incentive into the equation".

Tetra Laval does not help. At para. 61,

"Accordingly, we reject Mr. Green's submission that Ofcom left a vital consideration out of account when it did not form a view about the incentive of H3G to raise its prices to an excessive level. Such a consideration is not relevant to the assessment of SMP (though it may be relevant to the remedy to be imposed, which is on analysis the context in which Ofcom refers to its inability to find anything about incentive in the Decision and the context in which it makes findings about the other MNOs in this respect)".

That is, of course, a coded reference, if you like, to s.88(3). Then at Point (c) - the alleged failure to assess costs or to ascertain when prices would become excessive. At para, 62,

"H3G's point under this head is that Ofcom did not carry out any analysis from which one could determine whether H3G's charge was excessive at the time of the decision or would become excessive over time. It is said that Ofcom relied purely on a theoretical ability to charge excessive prices without any reference to the actual prices charged and the costs involved".

That is discussed. At para. 66, the conclusion, "However, more fundamentally, we consider that it was not necessary for H3G to conduct the exercise or exercises that H3G says should have been carried out. The existence of a power to behave

independently of competitors, customers, and consumers may, in some cases, result in excessive prices, but that is not necessarily the case. It is perfectly possible to have SMP and not charge excessive prices, either at the time the position is being tested or in the future. Excessive prices are not an inevitable manifestation of SMP. SMP was found to exist on the basis of the material referred to above. Such a finding can be perfectly proper even in the absence of excessive pricing. If excessive prices (in the sense referred to by H3G) do not have to be found to exist in order to support a finding of SMP, then it does not necessarily matter that pricing is not investigated. Accordingly, Ofcom's reasoning cannot be criticised on the footing that it did not carry out this investigation".

So, there is the same argument being advanced, effectively, as we have had for the same client being advanced before this tribunal. So, to adopt the famous American baseball coach, Yogi Berra, it is déjà vue all over again. (Laughter)

The MCT statement of Ofcom took an entirely conventional approach, taking on board the guidance from the 2005 judgment. One sees that from the statement in Bundle B, Tab 1. The point is this: of course, if you can show that an undertaking actually is engaging in excessive pricing, well, that is evidence that can be relevant to support a finding of SMP, but it is not a pre-requisite to such a finding. One sees in the statement at para. 4.33 under the heading 'Assessment of SMP against relevant criteria' ---- You will note, just before going to that, in the previous and facing page, that Ofcom quoted the Commission guidelines on significant market power. In 4.30 there is a quotation set out of the various criteria which are not just large market shares - although that creates a presumption -- There is other criteria which you see set out at p.59 and p.60. The Commission actually does not list excessive pricing. We see at 4.31 that the ERG SMP working paper does list excessive pricing, and Ofcom says, "We will consider the following relevant criteria: market shares; absence of potential competition; ease of market entry and the related criterion (i.e. barriers to entry); absence of countervailing buying power and excessive pricing". As to excessive pricing what they say is at 4.45. As before, if you look, while it is open, at the paragraph above, 4.44, about CBP -- That is absolutely adopting what the CAT said in the 2005 judgment -- taking it on board. That is looked at in Section 4.

Then, at 4.45,

"The EFG-SMP working paper stated that, 'the ability to price at a level that keeps the profits persistently and significantly above the competitive level is an important indicator for market power'. As noted in para. 41.4 above, in the context of this view, Ofcom considers that evidence that MNOs are able to sustain prices to an appreciable extent above the competitive level supports the view that MNOs have SMP. It is not, however, a pre-requisite to a finding of SMP."

By saying 'able to sustain' what they mean, as is clear from the earlier passages, is that the other MNOs, but not H3G, they consider were pricing high for the rates for 3G.

"In the last market review Ofcom noted that 2G termination charges appeared to have been substantially above a reasonable estimate of each MNO's costs for a number of years (despite formal and informal regulation). In the case of 3G mobile termination, the underlying 3G charges within the blended charges proposed by three of the four 2G/3G MNOs are substantially greater than the 3G charges being levied".

So, that is how excessive pricing -- saying, "Yes, well, for some of them we can see there is actually evidence they did it, but it is not a pre-requisite to a finding of SMP". An entirely conventional and correct statement.

THE CHAIRMAN: So, how would you summarise then the findings in relation to excessive pricing and SMP in relation to H3G?

MR. ROTH: For this part of the argument - and I will come back to it on remedy - I would say it is not necessary to find that there is excessive pricing in order to find SMP. The argument that you need to do so to find SMP is wrong as a matter of law.

THE CHAIRMAN: But, do you accept the point that was made yesterday that it is clear from para. 4.45 that as regards H3G in contrast to the 2G/3G MNOs there was no finding that there had been excessive pricing?

MR. ROTH: That is correct as to 4.45. When Ofcom comes on to look at remedy - and look at the situation - it looks at the position of H3G and what it has done somewhat more carefully. I will deal with on remedy as the pre-condition for price control. But, it is not necessary for present purposes. The basis for the conclusion that H3G had SMP is the ability to price, and that is complete monopolist - 100 percent market share, complete barriers to entry, and insufficient countervailing buyer power. Now, either we are right or wrong about insufficient countervailing buyer power, but that was the first part of the argument. If we are right about that, whatever the hypothetical

competitive price might be, we say it is clear that the undertaking has the ability to price appreciably above that hypothetical level. That is sufficient to deal with this point. With respect, it is a complete answer to that point.

I come to the end-to-end obligation to which Miss Dinah Rose took you, which is in Bundle F2 at p.451. There is the consultation at p.451. Miss Dinah Rose sought to make great play of the fact that there was only one month for a response, stretching into the summer holidays, Ofcom was panicking and so on, that is pure prejudice, and it is not correct, but it is irrelevant anyway to this case. It is a short a document, and to introduce an end-to-end which most people thought had been there anyway, and then it was discovered on later legal analysis that perhaps there had not. Oftel took the original view, and Ofcom decided it had got it wrong. So that is what happened there.

Then one has the passage within it that was read, which is at p.455 in the executive summary, of the various options, in para.1.7, on p.455 of the bundle. The four options. Option 3 is a connection obligation on all PECNs, option 4 only on BT. Paragraphs 1.10 to 1.11 you will recall explain why Ofcom concluded it was only necessary to impose the interconnectivity obligation on BT in order to ensure the end-to-end connectivity takes place for everyone because of the transit position.

But on H3G's case, unless one accepts their very narrow interpretation of the 2005 Judgment, namely, you only disregard SMP obligations, but if one accepts the broader interpretation of the Judgment, then if Ofcom had chosen option 3 H3G would have to accept, and I think Miss Dinah Rose, to be fair, did accept, there would then be a regulatory obligation on H3G – clearly, because that is what option 3 involves, which would fall to be disregarded.

THE CHAIRMAN: No, I think actually I put that point to her and she did not accept that, because we are talking about the price at which BT has to buy MCT and the fact that you might regulate the price at which H3G has to buy MCT does not mean that you are regulating the price at which MCT has to sell ----

MR. ROTH: Well, then I am sorry if I misunderstood her answer to your question.

THE CHAIRMAN: Yes, because I thought that and she put me right. (Laughter)

MR. ROTH: I see, well in that case this point may not arise, because I also then misunderstood the point, and there may be nothing arising from this point, I am sorry, I misunderstood the answer.

THE CHAIRMAN: I do not want to stop you from making a point if there is still a point there for you to make, but perhaps you could have a further think about that.

MR. ROTH: Yes, let me just give that brief consideration because, I am sorry, I had also misunderstood what was the position.

The other basis, apart from the end-to-end obligation on which it was alleged in the notice of appeal that dispute resolution would lead to the imposition of a price, or the determination of a price such that H3G does not have SMP where general condition 1.1 and s.185. The reference for that is the amended notice of appeal, paras. 10.5 to 10.8. I hope I understood this bit correctly from yesterday, which is that it is not being pursued.

THE CHAIRMAN: I understood that as well.

MR. ROTH: So that is abandoned. The other ground that is relied on by H3G, apart from dispute resolution is what we have called "the initial negotiation ground", which is in the amended notice of appeal at paras. 8.1 to 8.4, if perhaps you could please look at that, and that is bundle C1 at tab 1, at p.20. section 8: "The Initial negotiations Between H3G and BT indicate H3G Did Not Have SMP At The Time." You see at 8.1, the Judgment. 8.2:

> "From H3G's reading of the Decisions, whilst Ofcom noted that delaying tactics may have been employed by BT at the time of the initial negotiations, the initial negotiations are not key to Ofcom's conclusion that BT has insufficient CBP …"

- then refers to paragraphs –

> "In the event that Ofcom disagrees with this, H3G sets out below its assessment of the initial negotiations."

Well, from that ground of appeal we confirm that that is correct. We confirmed in our defence that it was not a key basis of the decision, that is our defence Bundle C2, Tab 1, paras. 59 to 68. From that ground of appeal set out it did not appear to be live, and in any event H3G is reiterating the point that it did not have SMP *ab initio* on the basis of the initial negotiations. Now, as I understand it, it is apparently said that this was a relevant consideration which Ofcom should have had regard to and apparently not only as regard to the reassessment statement, but also the forward looking MCT statement, and that is as it is put in the skeleton argument at Bundle A, Tab 1, para.167.

THE CHAIRMAN: Well if one looks at para. 2.39(a) of the notice of appeal, it does say there that it is in relation to the SMP reassessment decision that Ofcom has erred in its assessment of the facts relied on, and then contrasts with (b) in relation to both decisions.

MR. ROTH: (b) I think is not the initial negotiation point, is it?

THE CHAIRMAN: No, no, exactly, that is the point I am making ----

MR. ROTH: I am so sorry.

THE CHAIRMAN: -- that I had understood that the initial negotiations' point was limited by 2.3(a) of the notice of appeal to the reassessment decision and did not apply to the March ---

MR. ROTH: Well that is exactly our understanding, madam, but then we had para. 167 of the skeleton.

MISS ROSE: Madam, the reasoning applies equally to both decisions.

THE CHAIRMAN: So you say that this sustained point applies to both decisions.

MISS ROSE: Yes, the point is the same in relation to both decisions, so that the price is fixed in a situation where there is not SMP and thereafter can only be varied either by agreement or by referral of dispute in the context of the end-to-end obligation.

THE CHAIRMAN: Okay, thank you. Sorry, I should not have interrupted you, Mr. Roth.

MR. ROTH: I am grateful for the clarification, that is how we then understood it being put in the skeleton as Miss Dinah Rose has just explained, at para.167 of the skeleton. Could I ask you to look at that, bundle A, tab 1. Paragraph 167: Ofcom decided to give no or almost no weight to the effect of initial negotiations between H3G and BT" referring both to the Reassessment Statement and the forward looking MCT Statement.

> "This amounted to a failure to take into account a relevant consideration since these initial negotiations produced effects which have a direct and continuing impact on BT's CBP"

A point that Miss Dinah Rose just clarified. What is said there, and one sees at 168:

> "The initial negotiation and their lasting effects distinguish H3G from the 2G/3g MNOs. This relevant consideration Ofcom also unlawfully failed to take into account".

So it is a sort of *Wednesbury* kind of challenge that we did not take something into account that we should have taken into account. But in fact Ofcom clearly did take it into account, and one sees that from the passage in the reassessment statement, which in fact in another context I have already read to the Tribunal, which is 4.50, the point about initially delay before January 2002, I will not read it again.

Then in the MCT statement as well, and there – I have not looked at it – it is para. 5.44. Bundle B, Tab 1, p.74 of the document at para. 5.44. There is reference to considering this matter and what significance Ofcom thought it had. So, did we take it into account? Yes, we did. We did not think it got them anywhere, but it was taken into account, and, indeed, took account of subsequent negotiations at the time because para.5.64, which is a confidential paragraph, looks in some detail at what actually happened in the disputes.

That was looking at the current position. So, yes, we took it into account. I just do not see that this takes H3G anywhere. It goes back at the end of the day to the correct definition of SMP, and the correct definition which is not dependent, as a touchstone, on the ability to price above the competitive level. It is, as the tribunal held last time, the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. We know that the prices of the other MNOs came down as a result of price control. The price of H3G did not. It was not subject to price control. We know that BT considered that H3G should not be able to charge more for a 3G termination than the other MNOs that charged for 2G termination. That was BT's view. You will recall the letter of 11th August, 2006. I do not ask you to turn it up, but, for your reference, it can be found at Bundle F2, at p.499. That is what BT considered should be the right position.

But, notwithstanding that view of BT, H3G did not reduce its price. That shows that BT did not have sufficient countervailing fire power to constrain H3G's pricing behaviour. Indeed, in November 2006 H3G sought to increase its price for MCT to BT by over 50 percent. That is almost the classic demonstration of the exploitation of market power. All this points exactly the other way, supporting the SMP.

Finally, madam, the other ground relied on in the amended notice of appeal, s.9 - I do not ask you to turn it up - was the fact that BT may be likely to refer disputes to Ofcom, and that that negates SMP. Well, with respect, and I think Miss Rose (I hope I understood this correctly) accepted, or said in submission, that that was too simplistic -- That can only operate as a restraint on market power if the counterparty expects the result of the reference will be a determination bringing the price down. So, it can take H3G no further than its main point about dispute resolution. If it succeeds on the main point, it does not need this point. If it fails on the main point, this point gets them ----

THE CHAIRMAN: Just one question. On the points that you have just made about the price not coming down when the other 2G MNOs -- Is that something that Ofcom relied on in either of these decisions under challenge? Or, are you saying it is something which the tribunal could take into account in its own determination of these appeals, or -- What are your submissions on that?

MR. ROTH: (After a pause): We will have to check notwithstanding that everyone here has read, and re-read the determination. I do not think it was relied on for SMP. It may have been for remedy. But, whether or not it was relied on in the decision, we can certainly rely on it in rebutting the argument that is put - namely, that it has been advanced by H3G, namely because the price was set from the initial negotiations and did not change, that

shows that we did not have SMP. They rely on that as a positive argument. We can certainly rely on this in answer to that argument. Whether it was in the statement or not -- They even rely on the 11th August letter, I think. They put it forward. So, we can certainly rely on that by way of response.

Having regard to the time, if I can just check on E2E and the points that Miss Dinah Rose made this morning about other Member States, that concludes my submissions.

MR. SCOTT: Just one very, very quick point -- To refer to s.3(7), that recognises the fact that your clients may find conflicts and have to resolve them in a manner they think best to the circumstances. So, there is an acknowledgement that amongst their many duties, conflicts may occur.

MR. ROTH: Absolutely. I am grateful for that. We will be praying that in aid in the course of next week.

THE CHAIRMAN: Just to remind people, the transcript of yesterday's hearing is available now. The transcript of today's proceedings will be sent out by e-mail in the usual manner. We will now adjourn until 10.30 on Tuesday morning. Thank you very much.

(Adjourned until 10.30 a.m. on Tuesday, 29th January, 2008)