IN THE COMPETITION APPEAL TRIBUNAL

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17th December, 2007

Before:
VIVIEN ROSE
(Chairman)

ANDREW BAIN
ADAM SCOTT

Sitting as a Tribunal in England and Wales

BETWEEN:

1083/3/3/07

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

and

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

AND

1085/3/3/07

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

and

OFFICE OF COMMUNICATIONS

AND

1089/3/307

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

and

OFFICE OF COMMUNICATIONS

AND

1090/3/3/07

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

OFFICE OF COMMUNICATIONS

AND

1091/3/307

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

OFFICE OF COMMUNICATIONS

AND

1092/3/3/07

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

OFFICE OF COMMUNICATIONS

CASE MANAGEMENT CONFERENCE

APPEARANCES

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

Miss Dinah Rose QC (instructed by Baker & McKenzie) appeared for H3G.

Mrs. Sarah Lee (instructed by BT Legal) appeared for BT.

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

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

Mr. Simon Jones appeared for the Competition Commission.

Mr. Richard Burnley of the Office of Communications appeared for OFCOM.

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THE CHAIRMAN: Good morning everybody. A few points to raise before we get started on this morning's business. First of all, may I remind everybody that this hearing is in public and the transcript of it will be placed on the web in the normal way, so if counsel are going to move on to confidential matters they need to alert us in advance of saying anything that they do not want to appear on the transcript.

The second point is that this is the reconstituted Panel in the termination rate dispute appeals; I hope everybody got the letter from the Tribunal explaining that. This is now the Panel in the appeals against Ofcom's determination of 7th July and 10th August. This is not the Panel in the Orange appeal which is still considering the preliminary issues about which we had the hearing earlier.

The third point is that this hearing must finish at 1 o'clock at the latest so we are planning to deal with the remaining issues about the establishment of confidentiality.

At 4.30 this afternoon I will hand down the Panel's Ruling on BT's application to amend its notice of appeal and also at 4.30 this afternoon we will distribute draft questions for the reference of the specified price control matters to the Competition Commission in the BT and H3G MCT appeals, together with a short covering letter.

Turning to today's hearing, what we envisage will happen after today's hearing is that the Tribunal will draw up a draft of the order to be made and part of that order will be the wording of the undertaking to be given to the Tribunal by those who are to be included in the confidentiality ring, and that undertaking will include a space for each individual to state what professional qualification they have and what Body regulates their profession, which Body's Code of Conduct (if any) they are subject to, and in relation to the lawyers whether they have a practising certificate or not.

We expect everyone by now to have organised themselves so as to be able to return the signed undertakings from their representatives as soon as possible, and by the latest, close of play on Thursday. On Friday we will make the order and include in the order however many people should be in the ring from whom we have received undertakings because we do not want to hold up disclosure to those who have provided undertakings in the event that it is not practicable for one or more of the other people to be included in the ring to have signed their undertakings. So after we have made the order on Friday in relation to whoever has provided their undertakings by that time, we will then add in subsequent people as and when we receive their undertakings and, of course notify the parties accordingly.

To summarise where we are in relation to the issues this morning, the appellants in the 1092 appeal are not, we understand attending today. We note the position taken by those appellants that, if the eventual decision is that in-house counsel should be included in the confidentiality

ring that they would prefer to amend their notice of appeal to remove the relevance of certain confidential information rather than have it disclosed.

We envisage that if, at the end of the hearing, in-house counsel are to be included in the confidentiality ring then the parties should have the opportunity to reconsider whether they prefer to withdraw certain aspects of their case rather than have their information so disclosed. In that regard the Tribunal will look sympathetically on – and deal promptly with – any applications to amend pleadings to have that effect.

The other point that was made in the 1092 appellants' letter listing further in-house people to be included in the confidentiality ring if it is decided that in-house people should be included, that is not the Tribunal's intention. The intention is only to include the four named individuals, - two for BT and two for T-Mobile – on the basis that those companies have not instructed external solicitors. This is not a general inclusion of in-house people for the parties to the proceedings.

O2 are also not attending today and they wrote to the Tribunal on 14th December supporting the two tier structure if workable, but at the end of the day having no objection to the inclusion of in-house counsel.

So the points that remain to be considered are primarily the in-house counsel point, and on that – unless the parties have had discussions amongst themselves to a different effect, we would propose to hear Vodafone and Orange then BT and T-Mobile.

The further point is the additions – whether additions to the confidentiality ring should be made only with the permission of the Tribunal – of course, it being relevant whether all the parties consent, but the Tribunal is reluctant to make an order which allows people to be added to the confidentiality ring solely by consent without an order. Could I have an indication whether there is anybody who wants to be heard on that point or whether the parties are content that that is how the order should be structured? (After a pause) Right, that is helpful, thank you.

Finally, the point about electronic copies. We understand that it may not be feasible – because of the nature of the information being on disk or in complicated models – to limit this to paper copies, but we do have a concern about the practicability of including in the order or the undertaking the removal of those electronic copies at the close of the proceedings because, as we are all aware, computers make copies of things in their hard drives and the fact that when you press the "delete" button it is not actually really deleted from the computer – it would be helpful if there was somebody who could explain to us what the position is and what the parties think is a workable way around that problem, because we do not, of course, want to make an order which is not in fact possible for the parties to comply with.

I think those are all the points that I wanted to make in opening, so unless, as I said, the parties would prefer to address us in some other order why do we not turn first to the in-house counsel point and I will call on Miss McKnight to address us on that.

MISS McKNIGHT: Thank you, madam, and think you for your introductory comments which are very helpful in setting out your preliminary position. As regards the in-house counsel point, possibly the most helpful starting point is our letter of 6th December – if you have that to hand? If not I can take you through it without you needing to have it. (After a pause) I think I have caused complete confusion. Unfortunately our letter is dated 6th December, but I believe that is a mistake and it was sent on the 14th – I do apologise for that. It is a letter in which we set out three items which we would wish to have withheld from in-house counsel if in-house counsel are to be included. (After a pause) The way this came about, I think, is ----

THE CHAIRMAN: Sorry, can I just check that we are all looking at the same letter. It starts: "We refer to the Tribunal's letter of 10th December"?

MISS McKNIGHT: Yes.

THE CHAIRMAN: Right, and you are saying that letter, although it is dated 6th ----

MISS McKNIGHT: It is actually the 14th, I do apologise.

THE CHAIRMAN: Thank you. Sorry, go on.

MISS McKNIGHT: When we were first asked to comment on the way in which confidentiality arrangements should be structured, we had not actually served all our statements of intervention in these proceedings and therefore it was difficult to know what sort of information would be included and hence what confidentiality issues would arise. We have now served our statement of intervention in both the price control and non-price control matter, and not yet, of course, in the termination rate dispute proceedings. But it has become apparent to us that there was actually very little information that we would wish to see withheld from in-house counsel. We think that it is a legitimate concern that we entertain that in-house counsel have a much more intimate role in the affairs of the companies which they represent that we are legitimately concerned that if they were to receive very confidential information about Vodafone's affairs there would be a risk – however careful they were – that it would influence their thinking on other matters than those covered by these proceedings. But we now see that there is very little information that falls into that category. We therefore think it is perfectly practicable to set up an arrangement whereby there is a subset of information which is withheld from in-house counsel. We think that if that were the approach to be adopted, external advisers for the parties concerned, namely BT and T-Mobile would be able, having seen this information to decide whether in order to take proper instructions on it, or to decide how to respond to it, they needed to have access to personnel within the companies they represent, and

we would obviously be happy to discuss at that point whether it was absolutely necessary for further disclosure to be made in a second phase. But we are hopeful – indeed, confident – that that would not turn out to be necessary. I do not know whether you wish me to take you through the particular information covered in this letter – the letter was intended to be self-explanatory and to represent an explanation that could be aired in public, but I would be happy to go further if you wish.

THE CHAIRMAN: One point is that I understand that the information which is mentioned in this letter, and the information which is set out in the schedule to your statement of intervention as being confidential is not quite the same?

MISS McKNIGHT: No, the schedule covers a wider range of matters, and we would envisage that all of that information is confidential, but can go to the confidentiality ring as a whole – external and internal lawyers, if internal lawyers are to be included at all. But this information would not go to the in-house counsel.

THE CHAIRMAN: So this letter of 14th December sets out your position as to what information should not go to in-house counsel?

MISS McKNIGHT: That is correct.

THE CHAIRMAN: It might be helpful if you could take us through it, without of course referring to anything confidential.

MISS McKNIGHT: I think by now you would actually have our statement of intervention of 14th December – you had not got it when we wrote this letter. If you wish to turn it up it is as we say footnote 6 to that statement of intervention is p.14. It is a very small point and not a point on which we actually rely for the case we are advancing. What has happened is that both H3G and Ofcom in their notice of appeal and defence respectively, have made reference to the relative position of H3G's 3G termination rate and Vodafone's, and they say that whilst for the most part I think H3G's termination rate has been higher than other mobile operators, there is a period when exceptionally Vodafone appeared to have reduced their rate.

The purpose of this footnote is to explain exactly what Vodafone was doing that led to that appearance. At the time to which this discussion relates, no one's 3G termination rate was regulated, and therefore Vodafone was deciding how to set its 3G termination rate in an unregulated context. I think it would normally be accepted that it is a matter of confidentiality how an unregulated firm chooses to set its prices, and this is a relatively recent period in the past, so we would not wish what is, I admit, a rather cryptic account in the footnote of how it was done to be disclosed to in-house advisers within competing mobile operators.

MR. SCOTT: I think the difficulty we are going to face is this, in a situation where most of the rates for most of the operators have been regulated, but where some of the rates for some of the

operators have not been regulated, if we get into a substantive discussion of countervailing buyer power the behaviour of parties in co-regulated markets may well end up having the spotlight focused upon it. Now, I do not know whether that is going to happen, but the difficulty is that that might arise. These are rates which would be known to the customers of Vodafone?

MISS McKNIGHT: Yes, BT, for example.

MR. SCOTT: So it is your competitor mobile network operators who do not.

MISS McKNIGHT: I think some of them would actually have had direct interconnection agreements with Vodafone and would know.

MR. SCOTT: Right, so they would know.

MISS McKNIGHT: I think there are two points to make. One is that of course what is disclosed in order to charge the correct price is separate time of day rates, but I do not think that the operator who pays those rates would necessarily know what the weighted average rate is because he would not know the mix of peak, off-peak, and weekends.

The second point is that at the period under discussion I think all the mobile operators charged what is termed a "blended" rate, that is it was a weighted average of 3G and 2G rates according to the proportion of minutes expected to be terminated on the different parts of the network. Again, the decomposition of that might not have been disclosed. I think that is the state of knowledge of the interconnecting operators, but as to the relevance of this evidence to countervailing buying power I stand to be corrected but I am not aware that anyone is advancing a case that the way in which negotiations were conducted with Vodafone for its unregulated charges, or its unregulated call termination services would cast light on whether BT had countervailing buying power vis-à-vis H3G; I think H3G relies only on its own negotiations, so there is no issue to that effect in the proceedings at present, as I understand it. I do not know whether Hutchison wish to confirm that that is so, or not? The point I make is that I do not think the footnote is presently relevant to an issue in the proceedings.

MR. SCOTT: Thank you.

MISS McKNIGHT: Is that sufficient on the footnote?

THE CHAIRMAN: Yes.

MISS McKNIGHT: The second point is that in support of its case on the non-price control matters, Vodafone has now adduced a witness statement of Mr. Craig Tillotson, an executive at Vodafone, and one of the points he makes in discussing why or why not H3G might have fared will or otherwise in the market, relates to the relative costs of 2G and 3G handsets. In broad terms he makes the point that Hutchison has chosen to target only 3G customers – customers who want to buy a 3G capable handset and use its services, and they are inherently more

expensive, so they have essentially opted out of trying to service a large part of the market which is interested in less expensive but less highly functional services. He makes a point about how important this is in terms of cost and hence the price at which services can be offered. He discloses a confidential figure as to the differential in the cost to Vodafone of procuring 2G versus 3G handsets. We think that is a helpful piece of information to be before the Tribunal because it does explain the degree of disadvantage that Hutchison may be placing itself at by not going for this part of the market, but the figure is a figure that relates to Vodafone's procurement costs and although it is an average figure it is not given in respect of a particular model, and there is no table of individual purchase prices, we do think that it gives insight into an important element of Vodafone's costs' structures. It is a current figure, so it is not historic and therefore stale in confidentiality terms, and we think that that is therefore confidential.

The point we would make is that this is a point really which relates to H3G's case, we do not really see any benefit in BT or T-Mobile's in-house lawyers seeing this; we do not see any need for them to do so. That is the point on that second piece of information.

So far we have been talking about very small sentences or figures. The third request would relate to 15 to 19 – several exhibits off Mr. Tillotson's witness statement. A point that H3G make is that they have been a very important influence on the effectiveness of competition in the mobile market, the indication being that if they were not there the other mobile operators might not try as hard to be competitive. The evidence that is adduced here constitutes copies of internal documents produced by Vodafone, which show how they track what competitors are doing, and how they planned their own 3G service launch, essentially balancing the need to be very quick into the market against the need to ensure they did not launch prematurely with a poor quality service. There is quite a lot of detail there. It relates to what might be called "past strategic decisions" but they are quite recent; they relate to services still provided, and they do provide an insight into how Vodafone sets about tracking what competitors are doing and we think that that is, by its nature, confidential and would therefore stress that again it would be damaging for that sort of information to be disclosed to in-house personnel competitors.

Again, this really relates to the part of the case which suggests that, as we put it, H3G has not been such an important influence on competition. We would not think it necessary for BT or for T-Mobile to have direct access to that information.

So that is essentially a summary of the matters in our own statement of case and evidence that we would like to see withheld. I should mention that we are in a state of some uncertainty as to what exactly Ofcom intends to disclose, when it comes to disclose the full confidential versions of its original determination.

You will see that there are annexes relating to each mobile operator's underlying costs which form part of the determination. Annex 11 relates to Vodafone and we have no objection to the whole text of Annex 11 being disclosed under the confidentiality arrangements including disclosed to the in-house counsel. But when Ofcom first sent the full determination decision to Vodafone they sent alongside the decision various tables showing the underlying costs of Vodafone from which annex 11 had been derived. Those tables do not form part of the determination but they obviously have a very close relationship with it. We would not wish those tables to be disclosed to in-house counsel at T-Mobile or BT, they contain very granular costs information and I think in other circumstances it would be regarded as quite anti-competitive to share it, so we naturally have a concern about that. It may well be that Ofcom has no intention of disclosing that anyway because it does not form part of the determination but we would be very keen to see that withheld.

THE CHAIRMAN: Perhaps Mr. Burnley for Ofcom can clarify whether that is the intention?

MR. BURNLEY: We have no intention at the moment, and we have had no application to see those models.

THE CHAIRMAN: Yes, I think we would then need to consider how to deal with that in the order – or if it was necessary to deal with it in the order.

MISS McKNIGHT: If the order were to provide for the determination and the pleadings and evidence to be disclosed in full, subject to the confidentiality arrangements, I think that would not authorise or require separate information to be disclosed, but if someone were to come back saying they needed to see it then we would have to perhaps consider it further, but I would hope that the order would not extend to it at present. We merely mention that for the avoidance of any doubt.

THE CHAIRMAN: Yes, thank you.

MISS McKNIGHT: That covers substantively the information that we feel falls into this category that it should not go to in-house counsel. We did in an earlier letter – I hesitate to ask you to find it now – indicate a form of wording that could be added to the end of para.2 of the draft confidentiality order. If you are happy I can just read it to you, it is quite short, if you have the draft order in any form.

THE CHAIRMAN: Yes.

MISS McKNIGHT: I think para.2 is the substantive paragraph that requires disclosure:

> "Each of the parties shall hereafter disclose to the other parties unredacted versions of their pleadings and other documents served in these proceedings on condition that such unredacted versions and any confidential information contained within these

shall be disclosed only to the relevant advisers; this is in Part A of the schedule to this order."

Then we propose adding a sentence:

"It shall be open to any of the parties to withhold disclosure of certain confidential information to the in-house counsel. This is in Part A of the schedule to this order. If any of the parties wishes to do so they shall clearly indicate those parts of the documents to which this applies."

Now, that does not specify what information would be withheld from in-house counsel, but it was envisaged that this would be a fairly straight forward way of enabling people to withhold information. If then parties withheld too much from the in-house counsel on that basis, the external advisers to BT and T-Mobile would be able to challenge us and say you have withheld this from in-house counsel, why is that so confidential? The liberty to apply provisions would enable any dispute as to particular information to be resolved by the Tribunal if necessary, but we would be giving a firm indication that the only information we intend to withhold under that proviso would be the information I have described today.

THE CHAIRMAN: Yes.

MISS McKNIGHT: We would have no objection to a more specific proviso being added but obviously we were not in a position to draft it at the time.

THE CHAIRMAN: Yes.

MISS McKNIGHT: And indeed to apply to other parties' information.

THE CHAIRMAN: Yes, I suspect that we do want to move to an order which is least likely to cause future applications to the Tribunal.

MISS McKNIGHT: Yes, I clearly sympathise with that. One point I would make is that to the extent this confidentiality ring is expected to apply to the termination rate dispute cases as well, we have not all served statements of intervention in those cases yet so it will be impossible, I think, to have a comprehensive list of information or evidence that fall within that category today for those cases.

THE CHAIRMAN: As far as the point you make about BT and T-Mobile being able to come back if their external advisers decide that their in-house counsel really do need to see this information, is that something that you would ask us to include in the order or would that be swept up by the liberty to apply at the end of the order?

MISS McKNIGHT: I envisaged it would be covered by liberty to apply, but I would make the point that that is not a problem that arises only in respect of this information which is withheld to in-house counsel, because if, for example, I as Vodafone's external adviser were to receive information from H3G which I judged to be clearly relevant to an issue on which Vodafone

had a view, but I needed to take instructions from Vodafone I would have to come back and ask your permission to disclose it perhaps to a commercial person, or someone who operated in a sufficiently quarantined environment that he or she could give instructions on it without them using it for other purposes. But I think the disclosure arrangements where by confidential information goes only to external advisers can only be a first step though obviously we would be hopeful that on some of it we could say straight away "We know how to deal with this" without needing to take further instructions.

THE CHAIRMAN: Going back for a moment to the point about Ofcom's underlying documents, which we now understand they do not intend to disclose, the way the information is currently described in the draft order is "versions of the parties' pleadings and other documents served on the Tribunal". I am not sure whether we need to tighten up that definition to be limited so far as Ofcom is concerned, to the determination itself, rather than the underlying material.

MISS McKNIGHT: I assume Ofcom have served only the determination itself, but perhaps if Ofcom can comment that would be helpful.

MR. BURNLEY: We provided, I believe, the model to the Tribunal, it is marked "confidential" with the determination but we have not served it on any parties or interveners.

THE CHAIRMAN: So the Tribunal does have the underlying material, so that is something that we would then need to tighten up in the wording to exclude?

MISS McKNIGHT: Yes, I am sorry, I was not aware that you had that, but certainly we would wish to see that specifically excluded. It would be helpful if Ofcom could confirm there is nothing else that has been served that similarly might cause concern.

THE CHAIRMAN: Yes, presumably the model that Ofcom has served covers everybody's ----

MISS McKNIGHT: I was thinking that we had rather assumed that they had only served the determination itself, plus everything which is actually exhibited to their defence.

THE CHAIRMAN: I do not think there is an issue here, it is simply a matter of making sure that the order reflects what has in fact happened.

MISS McKNIGHT: Yes. That is all I have to say unless I can assist further.

(The Tribunal confer)

THE CHAIRMAN: Thank you very much, Miss McKnight. Miss Demetriou?

MISS DEMETRIOU: Madam, our only point related to the underlying information, Ofcom's underlying information in relation in our case to annex 9, and we take exactly the same position as Vodafone, but it seems that Ofcom is not intending to serve that information. If it does we would also wish for it to be excluded from the confidentiality ring that includes in-house lawyers, but that is really the only point we want to make on this, otherwise we support Vodafone's position for the reasons they gave, but the only information as far as we are

concerned that we would wish to see excluded from in-house lawyers are the underlying costs' information in relation to annex 9.

THE CHAIRMAN: Thank you. Miss Lee?

MISS LEE: I was going to address two points. The first point is about whether or not the Tribunal's proposed – although for discussion – inclusion of just in-house lawyers for BT and T-Mobile, think the only people who object to in-house lawyers in any form are Cable & Wireless in their letter, I think all of the other parties and interveners are happy there should be inclusion of BT's and T-Mobile's in-house lawyers, but some of them suggest a two tier system in relation to information. So if they could address first the question of whether BT and T-Mobile's in-house lawyers should be included in any form, we say that obviously is sensible, there is precedent for it in the *Genzyme* case – I know that the T-Mobile letters have referred to it in the past. The lawyers in question will be subject to their professional rules, and we submit that it is obviously more convenient and BT and T-Mobile should not be disadvantaged in any way by virtue of the fact that they have not gone to external solicitors. So we would submit that the Tribunal should go with the majority view on this and allow BT's and T-Mobile's in-house lawyers become part of the confidentiality ring.

The second point is I think Vodafone is now the party that is suggesting a two-tier approach in relation to the pleadings, the separate objection to the underlying information does not seem to arise at the moment if Ofcom is not planning to serve the information, and if there were to be any subsequent applications with regard to seeing the model those can be dealt with as and when they arrive.

O2 I think supports in outline the two tier approach but is more concerned that there should not be difficulties – if I can put it that way – in relation to practical problems arising. It seems to us that having a two tier system is going to create practical problems, it may not be workable to always remember what should be included and taken out. There are difficulties with definition and I think the proposal that is now being made is that particular items would probably have to be highlighted in advance and then if future items were to be added, for example, in the TRD pleadings those again would have to be listed, and people would be able to make objections to them and we would have to come back to the specific wording of the order in due course.

I think our principal submission is, given that there is no objection to in-house lawyers seeing confidential information in the main, there is not a justification for this super category of confidentiality and the in-house lawyers are going to be in the same position, the are still governed by their professional rules, and they will sign undertakings. There is nothing really in the information, we say, that Vodafone considers to be confidential that is different from other confidential information. There is no super confidentiality category, and the other point

is, of course, the in-house lawyers are not really involved in day to day business advice, and it is doubtful, we think, whether certainly these points are likely to arise in future when in-house lawyers are advising on particular points, and if they are they will be mindful of their obligations under their undertakings and consider whether they can actually advise their business clients given the information that they know they have. So we do not think is justification for it ----

THE CHAIRMAN: Sorry, where does that put them then? If they are subsequently asked to deal with something to which the information which they have seen is relevant, what do they then say to their clients, employers – "I am sorry, I cannot deal with this because I know something that would be helpful to you"?

MISS LEE: I have not considered it specifically, but I suppose their overriding duty, having signed undertakings to the court, will be something they would have to explain to their client, so I suspect that probably is the case. But, as we say, we are not really sure it is going to arise, particularly in relation to the information Vodafone is suggesting should fall into this category. If I can turn to that. The first point in relation to the footnote in relation to the way in which Vodafone set its unregulated 3G call termination rates, and the points mentioned here were in relation to blended rates, and also in relation to that particular period and weighted day rates. This is historical information and since April of this year these rates are all regulated anyway, so we do wonder actually whether in practice the considerations that went towards the setting of the unregulated rates are going to crop up in the future in relation to any advice sought from in-house lawyers.

On the second point – the handsets – again, we do not at the moment consider that that is sufficiently different in nature from other confidential information. It seems to be an average price and discounts in relation to suppliers and in relation to handsets, and presumably things will move on again in the future reasonably quickly, so we are not sure that that is really different from other confidential information which in-house lawyers are able to see.

Lastly, in relation to the business monitoring and monitoring competitor activity, again this does seem to fall within the general remit of confidential information that Vodafone and others are in general happy for in-house lawyers to see and we are not sure, again, why it would cause problems in relation to giving future advice.

I think those are my submissions unless I can be of further assistance.

THE CHAIRMAN: Thank you, Miss Lee. Mr. Pickford?

MR. PICKFORD: Thank you, madam. I would like to make a number of points substantially in response to Vodafone's submissions this morning. Vodafone suggest that the appropriate place to start was their letter of 14th December. I would actually suggest that the appropriate

place to start is their letter of 29th November 2007, and if the Tribunal does not have a copy it can turn up, I can read it and indeed plan to do so in relation to the first two substantive paragraphs. The history of this putative confidentiality ring – at least the recent history – is that T-Mobile are trying to reignite efforts of the parties which had stumbled, to get some degree of agreement between them. Originally, the suggestion was that in-house counsel would be generally permitted and Vodafone was entirely content with that arrangement. Indeed, on 29th it said in the following letter:

> "The majority of the parties agree to the inclusion of in-house lawyers … It is only Olswang and Baker & McKenzie who have raised concerns.
>
> As a practical matter, Vodafone considers that there is considerable value in including nominated in-house lawyers and economists within the confidentiality ring."

So that was Vodafone's initial position, and it was only after the Tribunal suggested that it would only be appropriate for the provision of information to go to in-house counsel in the case of those parties who were not represented by external solicitors that Vodafone changed its tune. It seems therefore to be something of a sort of tit-for-tat response – "If you don't get yours in, then we won't have ours either". Vodafone have suggested in their recent letter that there is some question mark about the status of some of the in-house nominated representatives of BT or T-Mobile as to whether they are properly purely lawyers, or whether they are engaged in some more commercial sense. Certainly in the case of T-Mobile I can clarify that the two persons who are advanced on behalf of T-Mobile are lawyers; they only act on instruction from the business, and that is set out in some detail in the letter from Robyn Durie of 26th November. It might just be helpful briefly to turn to that letter. On the second page, having made reference to the *Genzyme* case, Miss Durie sets out her particular criteria and how they satisfy those in the *Genzyme* case. She is a solicitor of the Supreme Court of 20 years standing and critically she is the solicitor in charge of the – do the members of the Tribunal have that letter?

THE CHAIRMAN: I think it is how the fax has come through.

MR. PICKFORD: My apologies. The copy that I am reading from it is the last page before the signature of Miss Durie.

THE CHAIRMAN: Yes.

MR. PICKFORD: Critically, she is the solicitor in charge of the litigation and one can immediately see how the solicitor in charge of litigation is excluded in a particular category of their own, it begins to immediately cause practical problems in dealing with a case, for example who is the information sent to? Rather than Miss Durie accepting it, it presumably has to be sent directly to counsel and the whole thing begins to look rather more complicated than it need be. Miss

Durie goes on to state expressly that she is not a member of the business management team at T-Mobile. She provides legal advice to T-Mobile in relation to competition regulatory and certain commercial matters and ultimately only acts on instruction from the business.

In relation to the point that was raised by the Tribunal about how does one potentially deal with a conflict if one were to arise, I have taken very hasty instructions on this issue, but I am told that it is commonplace or relatively commonplace for potential conflicts to arise where, for example, acting on behalf of the business Miss Durie or one of her colleagues might be asked to sign a confidentiality agreement in a commercial context with another party. It is conceivable and indeed I understand has happened on occasion that an issue might arise thereafter which was related in some way to the information that was disclosed under the confidentiality agreement, Miss Durie's stance was that she would not be able to act for T-Mobile in relation to that particular matter. So just as an external solicitor might say: "I am afraid that I consider that I am professionally embarrassed and unable to continue to act, so too will be the case for in-house counsel because, of course, as the point has been made, Miss Durie is bound by exactly the same professional and ethical standards as any other lawyer in this room. So we say to the extent that there is a concern with regard to future conflicts it would be dealt with in the same way as it might be as if Miss McKnight became in possession of particular information which she felt precluded her from acting on a different occasion for, say, Vodafone.

There is, moreover, a considerable, practical difficulty with having a confidentiality ring within a confidentiality ring. To my knowledge there is no precedent for such an approach. There is certainly no provision in the Enterprise Act, or in the Tribunal's Rules which suggest that there are in effect two classes of confidential information. You would have confidential information, then you would have really confidential information and the two are generally to be treated differently.

In our submission there is essentially either confidential information or not confidential information and, as BT has pointed out, if it is appropriate generally for such information to b e disclosed because there are considerable safeguards in relation to the onwards disclosure of it then it should be appropriate generally.

One can also see considerable difficulty with the potential unravelling of the agreement that has thus far been reached. We are currently at a stage where, following considerable negotiations with the parties, we are almost at a stage where the principal parties in the appeals are actually in some sort of agreement as to the appropriate approach going forward. But one can see easily how, if there is a carve-out now in recognition of Vodafone's particular

concerns, that next week there will be a carve-out from H3G and the week after there will be an attempt for a carve out from someone else and the whole thing will just being to unravel.

THE CHAIRMAN: Well, Mr. Pickford, we will not allow that to unravel. All the parties have had ample opportunity to consider whether there is any confidential information they do not want to go to in-house counsel, and we are certainly not going to allow any retraction of the position that the parties have taken after that full consideration. So if it is decided to set up this two tier structure we would need to be very clear about what information, as the parties currently see it, needs to be included in any such schedule. The only difficulty that has been raised so far to that is if this order is to cover the termination rate dispute appeals, as well as the MCT appeals whether the parties are yet in a position to identify what parts of their TRD case pleadings would go into that second tier. But I take your point about the unravelling, but that is something that can be dealt with, I would hope, by the form of the order.

MR. PICKFORD: Well it is a particular concern for us as you, madam, adverted to in relation to the TRD appeals. I take the point that in relation to the information that has thus far been disclosed the parties have had their opportunity to say what they need to say and it will be very difficult for them to climb back on that. But we are not at the stage where we have served statements of intervention, and as I understand it I think all of the parties pretty well have that opportunity coming up at the beginning of January and one can certainly see that Vodafone having established a precedent that they can say": we are going to withhold certain types of information; that will become more commonly adopted. One can easily see that that will lead to considerable amounts of further satellite arguments and litigation over the nature of confidentiality orders, when it would be far more desirable from everyone's point of view if the matter could be dealt with in a much cleaner manner now in the form of an established precedent which has been used, as we have seen, by the Tribunal in, for example, *Genzyme* but also it is commonly used by the courts particularly in relation to intellectual property matters that one has a confidentiality ring.

Personally, I have been involved in a number of such confidentiality rings and I have never come across one which had a two tier status such as this, whether in front of the Tribunal or in the High Court. I would suggest that there is probably a reason for that in that they are likely to become particularly difficult for those parties that are in the two-tier sector, to administer. Speaking personally, I will now have to take account of both the existence of the general information, then the confidential information that Miss Durie is allowed to see and then a higher class of confidential information and, with the best will in the world, one can see how there are potential difficulties and complications from having such a tiered approach and ensuring that it is rigidly adhered to. So notwithstanding that the potential unravelling in

relation into the current information might be relatively easy to deal with, once one opens up the possibility of further unravelling with further pleadings, and then a whole series of particular points of information that are afforded super confidential status, in my submission is going to make the whole thing very difficult practically, to administer particularly for people acting on behalf of BT, and T-Mobile who are part of the super confidentiality ring.

If we turn very briefly to the information that Vodafone seeks to protect, we are at some disadvantage with being able to comment on the necessity or otherwise for T-Mobile to see that information. It has been suggested that we will not need to see it because it is not really advanced to our case. That may be right, or it may be wrong and I am unable to say which to the Tribunal this morning, because we have not yet been provided with the non-confidential versions of those witnesses statements so one cannot see the context in which it appears, so it is very difficult to comment ultimately on whether we might want to say something in relation to it or not.

The first category of information, as I understand it, is relatively old information relating to December 2005 and I think I am correct in saying that Miss McKnight said that in fact Vodafone do not rely on it. Well we would suggest that if they do not positively rely on it the most sensible course would be that which has been sensibly adopted by Cable & Wireless and others, which is to delete it rather than to engage in producing a rather complex confidentiality system for information which is not actually positively relied upon to advance their case.

In relation to the second and third items of evidence there is relatively little that I can say about those having not seen them, or having not even seen the context in which they appear, but it is perhaps worth noting – to give some context to the proportionality of Vodafone's claims – that the witness, Mr. Tillotson, in fact used to be a strategy director at T-Mobile and a few years ago moved over to Vodafone and as I understand carried on his job the very next day. I am not suggesting that anything particularly can be inferred from that, but what it does give the Tribunal is some flavour of whether perhaps these confidentiality concerns are being slightly overblown because it is in the nature of the businesses that people do move between businesses, and of course here what we are talking about is very limited disclosure to people with professional obligations who undertake not to disclose it onward to their businesses.

Addressing the words that have been advanced by Vodafone to deal with confidentiality, the Tribunal has already made the point that as originally envisaged there were some potential difficulties and this is essentially an alternative case, if the Tribunal rejects my submissions and is persuaded by Vodafone to the extent that the Tribunal does envisage some kind of two tier system we would be very concerned if it was not one that was strictly sanctioned and administered by the Tribunal rather than being at the discretion effectively of the parties to

decide which information they were not going to disclose to in-house counsel, because as the Tribunal has noted one could see how that would immediately lead to further applications which hit would be in the interests of all parties to avoid.

Finally, in relation to the underlying information that has not as yet been disclosed, T-Mobile has no objection to that remaining undisclosed, and I think all the parties therefore are in agreement on that particular point, there is no confidentiality issue which arises from it.

Unless I can be of further assistance, madam.

THE CHAIRMAN: Yes, just confirm, as far as the T-Mobile annex to the Ofcom determination, do you adopt the same position as the others, namely, that you have no objection to the annex itself being disclosed generally, but you would object to the underlying model figures being disclosed?

MR. PICKFORD: That is our position.

THE CHAIRMAN: Yes, thank you. Miss McKnight, a member of the Panel has something they wish to ask you.

PROFESSOR BAIN: Miss McKnight, I am really trying to understand the basis and the depth of your concerns, there is a list of 21 economists that I can see on these schedules some of whom are very senior people. In some cases it looks to me as if an entire team – let us take the O2 external economists there is a team of six people listed there, who are not very senior. They could be employed by one of your competitors tomorrow, and if they are junior they will be looking actually at the nitty-gritty of the figures in great detail. You seem to be concerned by in-house counsel who are senior people, subject to very clear regulations and disciplines and ethical practices, having access to data whereas you do not seem to be concerned about rather junior economists who could go and work for those companies tomorrow to the same extent. Now, does not the fact that this wide range of people will have access to the information not cause you to prepare your case in a way that would not leave you subject to major damage if one of those junior economists did happen to go and work for somebody else? They are not subject to six month gardening periods or anything of that sort, moving from one place to another, they can go tomorrow – and they may go tomorrow – in fact you might yourself be hiring somebody who had been working for O2 tomorrow, to do a job for Vodafone. Does the fact that the confidentiality ring is inevitably rather wide not actually influence the way in which you present your case so really the most serious risks are avoided altogether?

MISS McKNIGHT: Well clearly there is a balance to be struck between advancing the best possible case but the withholding things, the disclosure of which would be damaging to Vodafone's wider competitive interests and I think the fact that we have only a little bit of information that we would like to see withheld from the in-house personnel is a reflection of the fact that we

have sought to strike that balance. I entirely take your point that regrettably in one sense there is a wide circle of people who are to have access to the confidential information in this case, but I think there is a distinction to be drawn between external consultants who inevitably pass from one project to another, and persons who are actually employed within one of the parties who compete directly with Vodafone. So, yes, I cannot say that your point was entirely without foundation but I think it is a matter of trying to strike a balance. As to the way we have put our case, to be honest the footnote that we have been discussing we only included it because we thought that we would be criticised for misleading everyone if we did not correct a misapprehension on the part of Ofcom and H3G. We think the point is not material to any party's case, but since the correct situation is purely within the knowledge of Vodafone, it seems that it was only proper to include it. I am actually very happy to take it out so the footnote – perhaps it ought not to be an issue. I would like in a sense to reply to what Mr. Pickford has said, I do not know whether this is the right opportunity.

THE CHAIRMAN: I think H3G wish to be heard before you reply.

MISS McKNIGHT: Yes, just one point, I forgot in my original submissions to refer to your concern about how this deletion of electronic copies could be addressed – would it be helpful if I were to address that now, since it is a first round point.

THE CHAIRMAN: Yes.

MISS McKNIGHT: All I can say is that I entirely share your concern that it is virtually impossible to delete all electronic copies from computers. In a previous case in which I have been involved, one solution that was adopted was that parties would undertake to delete all accessible copies on the basis that it would be tolerable for back up copies held on some remote server to remain in place, but the parties would just agree to delete all accessible copies and not to seek access to those that were held elsewhere. Obviously it is not perfect if it is accessible, it has degrees, but it was found acceptable by the parties.

MR. SCOTT: While you are on your feet, I notice that there is a reference to "… including potentially the discounts", and that raises for me one of the issues that has happened before - before us - which is the difficulty that if you disclose one lot of figures people can start reverse engineering because of things they know, and I am conscious that as we go through this whole proceeding we are going to have to be sensitive to that. What did you mean, if you can tell us without complicating the matter still further, by the word "potentially" there?

MISS McKNIGHT: Are we talking about the footnote?

MR. SCOTT: No, this is in your second one, this is where you are dealing with the handsets whereas, as I understand it, what we were going to be looking at were averaged prices anyway, so that it would not initially look like other people can reach rapid conclusions just

to ----

MISS McKNIGHT: No, an example would be that the information we disclose, if it were to be disclosed, coupled with something that a recipient already knows, it is possible, for example, that a supplier of handsets would have said to others: "I can assure you, you are getting an equivalent discount to everyone else", if that were a major supplier it might give you some insight into how Vodafone's average discount must read across into the levels of discount from other suppliers. But I cannot be any more precise than that, I regret.

MR. SCOTT: But it is that sort of deductive process with which you are concerned?

MISS McKNIGHT: Yes, it is, yes. I think, to be fair, we are concerned about just the state of the average *per se*, but yes, the fact that it could allow a recipient to infer something more than that is yet another concern, but the average figure is itself regarded as confidential.

MR. SCOTT: Thank you.

THE CHAIRMAN: Thank you. Yes, Miss Rose?

MISS ROSE: Madam, very briefly, H3G, as the Tribunal will be aware, did go through a considerable period of agonising on the question of confidentiality and, again as the Tribunal knows, these appeals do involve very considerable amounts of highly confidential material relating to H3G's costs and business, and we considered the *Genzyme* case, and we considered carefully the status of the in-house counsel, and the conclusion we came to was that, as a matter of principle, where in-house counsel are truly acting as lawyers, taking instructions, and are not acting as part of the commercial management, then it is inappropriate as a matter of principle, to treat them differently from other legal advisers, and we are therefore very concerned as a matter of principle by the argument that Vodafone are advancing, because they do not put forward any authority that supports the proposition that while you have somebody who really is acting as in-house legal counsel they can be treated differently from an external solicitor also acting on instructions, also subject to the same professional obligations. We do submit that that submission ought to be treated with very great caution, not least because of the precedent it might set for future cases. We also share some of the scepticism that has been expressed about just how confidential the items that Vodafone has identified really are. Similar points to those that have been made by Miss McKnight in relation to these items of information could be made about the host of the material that is in issue in this case, because essentially all that Miss McKnight is saying is this material is commercially confidential – possession of it by a competitor could give them a commercial advantage, by giving them an insight into our business costs and our business plans, and our business strategies. But that is the definition of commercially confidential information, and that is the reason why we are establishing a confidentiality ring in this case. What, with respect, I do not understand is why

certain isolated pieces of information should be treated differently from the mass of the confidential material in this case. It seems to me that either we have a situation in which the in-house counsel are treated as lawyers and are in the ring, or we have a situation in which it is said: Your role as a lawyer cannot be cleanly divorced from your role in commercial management, and therefore you cannot be in the confidentiality ring." But what I do not, with respect, understand, is how it can be said that the in-house counsel are to be trusted in relation to some parts of the confidential information but not in relation to the rest of it.

Madam, very, very quickly, we do wish to reserve our position on the question whether any of the three categories to which Miss McKnight has referred are in fact properly confidential and should be subject to confidentiality, but that is obviously not a matter to be discussed today.

Finally, on the question of the Ofcom model, this may be my fault – I may not have completely understood what was said on behalf of Ofcom – but I thought that Ofcom were saying that they had supplied the underlying information to the Tribunal. Now, obviously we would have concerns about a situation in which material was in possession of the Tribunal that is going to decide the issues, but has not been disclosed to the parties.

THE CHAIRMAN: I am reminded by the referendaire that the position is that the material is with the Tribunal but the Panel has not seen it.

MISS ROSE: It may be then that if the position that the parties wish to adopt is that that material should not be disclosed that the appropriate course would be for the Tribunal simply to return it to Ofcom without looking at it.

THE CHAIRMAN: It remains to be seen though whether, in fact, any of the parties are going to want to rely on any of the material in there, or Ofcom is going to want to rely on any material in there, in which event we will then have to have a subsequent discussion about the confidentiality of that material. So it may be that the present situation should just be maintained.

MISS ROSE: Madam, those are the points that H3G ----

THE CHAIRMAN: Do you have anything to add on this electronic copies' point?

MISS ROSE: Madam, we would respectfully agree that a formula such as "reasonably accessible", or "readily accessible" is probably the best that we can do given the technological constraints.

THE CHAIRMAN: Thank you. Is there anyone who has not yet addressed us on this point who wishes to address us? (After a pause) Mr. Pickford, before you stand up, the question does seem to have been regarded as raising different issues in relation to Miss Durie, from the issues that it raises in relation to in-house counsel generally. I am not clear where we are now as to whether those who are objecting to the disclosure which I think as far as people here are concerned is Vodafone are making a point specifically about the role that Miss Durie plays

within T-Mobile's business structure, and it might be helpful if Miss McKnight could just clarify that before you get to your feet.

MISS McKNIGHT: Thank you. You are correct, in one of our letters we did ask a question as to Miss Durie's role, because it was the understanding of personnel within Vodafone who had dealt with T-Mobile that Miss Durie performed a wider role than merely as an in-house adviser, but represented T-Mobile's interests and adopted policy positions of her own initiative, vis-à-vis regulators and clearly we do not doubt that Miss Durie will give an honest account of her role to the Tribunal and if she is saying, as we understand from Mr. Pickford, that she acts solely as an in-house lawyer subject to the normal professional duties and merely adopting positions that she is instructed to adopt and to giving legal advice on them, clearly we would not contemplate persisting in such a point.

THE CHAIRMAN: Yes, thank you. Perhaps you would like to take instructions, Mr. Pickford, if you need to and comment on that?

MR. PICKFORD: (After a pause) Madam, thank you. Just three points. First, addressing the issue that has just been raised. Miss Durie confirms that she thought carefully about what was to be said in her letter and I think the position is properly set out in her letter of 26th November, to which I took the Tribunal in my earlier submissions. Her position is that she does perform the role of counsel only and ultimately always has to act on instruction from the business. In that letter she drew the parallel with a Partner in a solicitor's firm who acts regularly and repeatedly for a particular client. Now, there is no doubt, I am sure, that Miss Durie's views are valued and trusted within T-Mobile, just as those of a Partner in a solicitor's firm who had a similar intimate relationship with a particular client would be, but ultimately her role is that of a lawyer and not that of a commercial decision maker, and I am not sure we can say any more than we have said in that letter, but obviously if there are specific questions the Tribunal would like to put to me I can of course take instruction on them.

THE CHAIRMAN: It may be helpful to read into the transcript what that letter says as regards Miss Durie's role. The relevant part of the letter, as I understand it, is point 4 on that page.

MR. PICKFORD: Shall I read it?

THE CHAIRMAN: Yes.

MR. PICKFORD: Miss Durie states in that letter at point 4:

> "I am not a member of the business management team at T-Mobile. I provide legal advice to T-Mobile in relation to competition, regulatory and certain commercial matters; I also conduct competition and regulatory litigation on behalf of T-Mobile. I ultimately only act on instructions from the business teams at T-Mobile in relation to commercial matters. Whilst in some contexts I will clearly act alongside those in the

business management teams at T-Mobile (where legal input is required), this is in no different a manner to the way in which an external solicitor might often do the same. In effect, I carry out a virtually identical role to a partner in a law firm who has a strong relationship with a particular client for whom they deal with all relevant legal matters."

THE CHAIRMAN: And the other person it is contemplated to be included is in a similar position?

MR. PICKFORD: Yes, she goes on to say:

"I am assisted in my role by Xavier Mooyaart, who is also a solicitor of the Supreme Court (formerly employed by Linklaters) and who, like me, performs a role analogous to that of an external solicitor."

THE CHAIRMAN: Yes, thank you. Is there anything further you wish to add?

MR. PICKFORD: Yes, very briefly, madam. Just on this point, and in no way to criticise BT, but I think T-Mobile has provided by far the most detailed explanation of any of the parties of the particular role conducted by Miss Durie, and we would hope that it was satisfactory. Just two points that were raised after I made my initial submissions. First, to deal with a concern raised by Mr. Scott about reverse engineering, with the greatest respect to Miss Durie, she like me is a lawyer and there probably is not going to be a particularly great risk of her learning to reverse engineer particular numbers out of the numbers that have been provided, there would seem to be a much greater risk amongst the economists to whom the information is being provided.

In relation to electronic copies, we would support what the other parties have said. Certainly, we would consider it far better if copies were included within the provisions of the order, rather than entirely excluded because there can be times when it is either impossible to properly come in without them, or certainly it is far more convenient if one does have an electronic copy of information as well, so we would ask for those electronic copies to be preserved within the order.

THE CHAIRMAN: Miss Lee, can you confirm on behalf of BT that the two in-house counsel who it is proposed to include are in the same position in the sense that they are not involved in the business management of BT's business but act to all intents and purposes like external counsel?

MISS LEE: Yes, I can.

THE CHAIRMAN: Than you. Does anyone have anything further they want to say on any of the issues relating to the establishment of the confidentiality ring.

MISS McKNIGHT: May I respond briefly to some of the points that were raised by Mr. Pickford and Miss Lee. I think the first point that was raised by Mr. Pickford is that Vodafone changed its tune once it realised its own in-house lawyers could not see all this information. I would

like to emphasise that is a very unfair and incorrect presentation of the sequence of events, that Vodafone was content with the initial arrangements for a single confidentiality ring including in-house counsel within the confidentiality ring. But once it started finalising its statement of intervention it became apparent what information it would wish to include to advance the strongest possible case. It did become concerned for the reasons that I outlined initially about employees of BT and T-Mobile having access to that information. So the explanation of why Vodafone became more concerned during the second round of correspondence is that it became apparent what sort of information would be included within the evidence and the statement of intervention.

The second point: Mr. Pickford said it would simply be impractical if Miss Durie could not have access to information, and materials were sent directly to him and for him to have to remember that there were two tiers of confidentiality – he said it was without precedent, I think. I would mention that in a case in which my friend is involved before the Tribunal, the Sky/Rapture case, the parties have agreed such an arrangement, it was not done by order of the Tribunal but it has proved to be perfectly workable with materials being sent directly to counsel, where counsel alone is entitled to have access to the information.

I think Miss Lee made the point that it is rather absurd to suggest there are degrees of confidentiality. Again, I do not think that is a fair point at all. In High Court litigation it is quite common, I think, to have confidentiality arrangements where different persons have access to information according to its nature and the degree of its confidentiality, and if anything I think the way in which one should interpret Vodafone's position is that Vodafone is being very reasonable in not objecting to a lot of information which has a certain quality of confidentiality going to in-house counsel, that it really has tried to limit to the absolute minimum what it wishes to see withheld. I am perfectly willing to accept that Miss Durie would not be able to work out particular prices charged by particular suppliers to Vodafone based on the figure that we were seeking to withhold from Mr. Tillotson's statement. But if she is involved in advising on commercial matters, such as procurement contracts for the procurement of handsets from suppliers, the concern would be that she would know whether something offered was a good deal relative to the figure she had seen. We perfectly accept that she is subject to professional duties, but as I think the Tribunal intimated this could place her in a difficult position and force her to recuse herself and it seems undesirable when, frankly, the information does not appear to have any relevance to T-Mobile's case before the Tribunal for us to have to go through that rigmarole and place her in a position where there would be acknowledgement that the information was of commercial value. I think that also essentially answers the point that Miss Rose made that there should not be degrees of confidentiality. We

feel that we are being very reasonable in trying to limit the way in which we delimit the information to be withheld.

That completes what I wish to say.

THE CHAIRMAN: Thank you very much.

(The Tribunal confer)

MISS DEMETRIOU: Madam, I am very sorry to interrupt. There is one point which Orange raised in its letter which I had understood was not being dealt with at this stage, but I am just anxious that it does not slip through the net, which is this question of the different appellants in each appeal. I do not know whether it is a appropriate to deal with that now – I was rather supposing we might come back to it.

THE CHAIRMAN: Well no, my understanding was that none of the other parties objected, and therefore it would be incorporated into the order.

MISS DEMETRIOU: Well I am content to leave it that way, that is my understanding too, but I did not want it to slip through the net if that understanding was not shared. Thank you.

THE CHAIRMAN: I think we will now rise for 10 minutes in the hope that we will be able to come back and tell you our decision. If it appears that that is not going to be possible, we will inform you of that. We will reconvene at quarter past 12.

(Short break)

THE CHAIRMAN: Having regard to the nature of the information which is in contention in this application and the submissions that we have received this morning about the particular four in-house counsel concerned, the Tribunal has decided that it should not structure a two tier confidentiality ring and that those four in-house counsel should be included in the confidentiality ring proposed.

We will draw up an order accordingly. As I indicated at the outset of this morning's proceedings a draft will be provided to the parties in order to take the undertakings from those involved. That order will deal with the point that has emerged about the Ofcom model, and also the point about electronic copies and we will also deal with the Orange additional paragraphs relating to disclosure not needed to parties who are not parties to the particular litigation.

As I also indicated at the outset if, as a result of this ruling, Vodafone and Cable & Wireless wish to amend their pleadings to take out certain information then the Tribunal will look upon that sympathetically. But of course they must let us know as soon as possible.

I would also remind the parties of what I said at the outset, that at 4.30 today I will hand down the ruling on the amendment of BT's notice of appeal and we will distribute the draft questions to the Competition Commission. That will be a purely formal hearing at which there will be no

submissions made, and although everyone is welcome to attend if they wish, there is absolutely no need for counsel and the parties to attend.

I think that is all – ah, no, Miss Rose rises to her feet.

MISS ROSE: Madam, yes, you do not get rid of us so easily. Madam, can I raise some points, mainly housekeeping points which we would invite the Tribunal to consider. I understand they cannot be considered now not least because not everybody is here at the moment, but there are some matters that we do think need to be borne in mind for preparation for the January hearing. The first is the question of the handling of the confidential information. Clearly there will be both confidential and non-confidential bundles. What we would propose is that a common protocol needs to be adopted by all parties for how they serve the confidential and non-confidential material. What we had in mind was that where you had a complete confidential annex, or page it would be printed on a different colour paper – perhaps yellow paper – and that where you had a document that included redacted sentences the confidential parts again would be highlighted in the same colour. For the non-confidential versions of the same bundles there would obviously be gaps, but identical pagination because otherwise the handling of the bundles will be unworkable at the hearing. So then at the hearing you would have some individuals working from a confidential set and some from a non-confidential set but at least everybody would be on the same page and anybody dealing with a confidential document will be able to see immediately which parts of it could not be referred to in public, so that is what we would suggest as a way forward for that.

The second point is the Ofcom statements which were originally redacted, but there was discussion that Ofcom were going to prepare a less redacted version. Now we, I believe, have sent to Ofcom our proposals for, as it were, a less redacted version in relation to H3G – I am not aware that any of the other parties have done so, but could I just flag up the fact that that does need to be done as a matter of urgency.

The next point is that so far Ofcom has not pleaded any defence to s.9 of our price control appendix. We have received a letter from Ofcom on Friday, where they said that their intention was to plead to that in the fully pleaded defence. Madam, there is an obvious technical point that could be taken here which is that if it is not in their outline defence they would need permission to amend, but perhaps now is not the time or the place to take that point.

The next point is a more substantial point, and that is that Ofcom have served evidence from an expert witness, Mr. Myers. We do seek permission to serve evidence in response from Dr. Littlechild. We sent a letter on this topic last week. The position is that we do already have a draft statement in response to Dr. Littlechild which could be served this week.

THE CHAIRMAN: This evidence goes to the non-price control matters?

MISS ROSE: That is correct, yes, it is particularly the question of the welfare model, and we do submit that it is obviously appropriate that Dr. Littlechild should have an opportunity to respond to Mr. Myers's ----

THE CHAIRMAN: Well I do not want you to start making submissions, Miss Rose ----

MISS ROSE: No, I understand.

THE CHAIRMAN: -- on a point which I am not sure at the moment whether there is any actual dispute between the parties as to whether you should be able to adduce a further witness statement. My understanding is that Ofcom have not responded on that, and if there is no debate about it then clearly the Tribunal is in a different position in having to adjudicate on it than if there is.

MISS ROSE: Yes.

THE CHAIRMAN: You have written in?

MISS ROSE: Yes.

THE CHAIRMAN: We will treat that letter as an application to adduce further evidence, and we will wait and see if that is a contested application or not, but I do not see that the Tribunal can take that any further today.

MISS ROSE: Very well, madam, I simply again identify the urgency since obviously we would want to be in a position to serve that before Christmas.

THE CHAIRMAN: Did you set a deadline for their response in your letter.

MISS ROSE: I do not believe that we did.

THE CHAIRMAN: We will consider how to handle that. It is an application that you have made to the Tribunal and we will take that forward.

MISS ROSE: Madam, there is also the question of the timetabling for the hearing.

THE CHAIRMAN: Yes.

MISS ROSE: You will have seen a letter from BT and our response to that letter last week. Essentially BT made what seemed to us very sensible suggestions, first of all that it may be that we need some more time for the January/February hearing, and also suggesting firstly that the parties' counsel should get together some time this week to discuss timetabling and also proposing that the non-SMP H3G appeal should go first. We respectfully agree with all of those proposals, and it is therefore again as a matter of urgency the counsel do need to liaise because we now only have four working days before Christmas.

The other point on the timetabling is of course that raises an issue for the Tribunal about whether the Tribunal is able to offer another three days in February which essentially it would have to be February because there would not be time to start the hearing any earlier.

THE CHAIRMAN: We certainly would not envisage starting the hearing any earlier. As regards the proposed meeting between counsel I think the most that we can say is that the Tribunal would encourage that suggestion insofar as it leads to a more orderly presentation of cases at the hearing. It also occurs to us that it would be useful either at that meeting or however else, for the parties to determine whether there is any agreed statement of background facts in relation to the market or the events which have happened. Now, whether the parties would be able to produce a free standing document to which they could all sign up or whether it would be easier to go through the Ofcom statements and say which paragraphs are agreed factually and which are in contention. I think the Tribunal would find it helpful to have an idea of how much of the background facts is in contention between the parties. That may be something which could also be addressed at the kind of meeting that you refer to.

MISS ROSE: The next point is about bundles, which I believe are due to be served on 16th January. It is obviously essential that this date is not missed because of the tightness of preparation time and therefore the parties again need to liaise very closely now before Christmas to seek, as far as possible, to agree indexes for the bundles. Now, clearly H3G will have conduct of the bundles for its own appeal. Baker & McKenzie have indicated to me that they would be willing to co-ordinate the production of the bundles in general subject to having a suitable contribution to the costs from the other appellants. I do not know if that is a suggestion that other parties would find helpful, but our main concern is that there should be a single, coherent, properly indexed set of documents far enough in advance of the hearing to enable us to prepare the case and it may be that it is more easily achieved if there is one firm of solicitors producing the bundles rather than four or five.

THE CHAIRMAN: Well I am not sure, Miss Rose, if you are asking us to do anything. We have made an order that bundles should be produced by 16th January. No one so far has indicated that they are not going to be able to comply with that order, and we expect it to be complied with. I hesitate to say the Tribunal does not want to micro-manage the process because I can imagine some people thinking that we have actually micro-managed this process, but we have done so in order to help these otherwise unwieldy sets of proceedings to move along rapidly.

MISS ROSE: I am not asking the Tribunal to make an order. I am simply using this forum to make what I hope are constructive suggestions given that people are actually here in the room and perhaps we can go outside and have a short conversation about them.

There is a final matter that I ought to raise as a matter of courtesy which is to inform the Tribunal that we will be making an application for permission to appeal against the decision refusing leave to amend in relation to the price control matters. Now, that clearly does not have any impact on the January/February hearings because it relates only to the matters that

have been referred to the Competition Commission. It should not have any impact on the Reference to the Competition Commission either because the matters that are currently live in the appeal can be referred and if we are successful in our appeal then the additional on net/off net issue can be added to the matters that go before the Competition Commission, but I felt I ought to raise that now so that the Tribunal knows that it will be receiving that application from us this week.

THE CHAIRMAN: Yes, thank you. I have not dealt with the point about the extra days.

MISS ROSE: We do need to list those urgently.

(The Tribunal confer)

THE CHAIRMAN: We would like to rise for a further ten minutes to have a short discussion, but perhaps before that if you could outline, Miss Rose, how you see the application for leave to appeal being dealt with?

MISS ROSE: Madam, we were proposing to make an application for leave to appeal in writing which this Tribunal could deal with, of course, on the papers. If the Tribunal grants permission to appeal obviously we would then proceed simply to the Court of Appeal. If the Decision is refused then we will renew it to the Court of Appeal, that was our proposal and we will be submitting that as soon as we are able.

THE CHAIRMAN: Yes.

MISS ROSE: I was not envisaging an oral hearing.

THE CHAIRMAN: No, thank you, that is helpful. I think nonetheless we would like to rise for a further ten minutes and then come back.

MISS ROSE: My instructing solicitor reminds me one further thing I need to say is that we do anticipate that we would wish to cross-examine Mr. Myers, so we would ask him to attend for cross-examination.

THE CHAIRMAN: Well there will have to be a process between now and January whereby the parties, once all the evidence is in, the parties indicate who they want to cross-examine, we envisage that that is a stage that needs to be undertaken between now and then.

MISS ROSE: Yes.

(Short break)

THE CHAIRMAN: Thank you for your submissions, Miss Rose. As far preparation of the bundles is concerned the Tribunal agrees that what you have proposed is eminently sensible and perhaps the process which we envisage taking place of the parties indicating to Ofcom redactions which they now no longer think are necessary so that that information comes out of the category of confidential information could be undertaken at the same time, and we share the sense of urgency about the preparation for the hearing.

As far as timetable is concerned, the earliest dates that the Tribunal is available to hear any overrun of the hearing that is scheduled or 24th January to 5th February, are the days 25th, 26th, 27th February, so it may be wise to pencil those days in though we do still very much hope to complete the hearing in the nine days set aside in January and the beginning of February, but it may be useful, given the number of parties involved, to give at least that indication that the extra days are unlikely to be before the end of February

Does that now deal with every matter, Miss Lee?

MISS LEE: Madam, there is one very small matter, I do not know, when you are drawing up the draft order this afternoon, whether you were planning to have the list of persons in Part A included in your draft. In relation to the external economist advisers BT has adopted a very limited approach of just having the three people who have given it support and, as the Tribunal has pointed out this morning, others have got more people and more teams, and I just wanted to say that there are one or two extra people that we would probably like to add in and I can certainly send a fax today if you are planning to include it in the order, and if not perhaps we could just send it to everybody.

THE CHAIRMAN: Well I think, Miss Lee, everyone has had plenty of opportunity to decide which external advisers they want to be included. There is going to be a mechanism in the order for adding people to the confidentiality ring and I think your clients will need to take advantage of that mechanism but we do not wish to hold up the drafting of the order in order to accommodate that.

MISS LEE: Thank you.

THE CHAIRMAN: Thank you very much.

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