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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1151/3/3/10

Victoria House,
Bloomsbury Place,
London WC1A 2EB

13th May 2010

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS plc

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- AND -

T-MOBILE UK LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
VODAFONE LIMITED
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED

Proposed Interveners

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CASE MANAGEMENT CONFERENCE

APPEARANCES

Mr. Graham Read QC and Miss Maya Lester (instructed by BT Legal) appeared for the Appellant.

Mr. Javan Herberg and Mr. Ewan West (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for the proposed Intervener Vodafone Limited.

Mr. Meredith Pickford (instructed by T-Mobile UK Limited and Orange Personal Communications Services Limited) appeared for the proposed Interveners T-Mobile UK Limited and Orange Personal Communications Services Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for the proposed Intervener Telefónica O2 Limited.

Mr. Richard Pike (of Baker & McKenzie LLP) appeared for the proposed Intervener Hutchison 3G Limited.

1 MR. READ: I think it falls to me, unless you have any introductory points you want to raise, to
2 introduce the matter on behalf of BT, if you are happy with that?

3 THE CHAIRMAN: Yes, I am, thank you.

4 MR. READ: Sir, can I tell you we have managed to achieve some degree of consensus between
5 us because we are all agreed in light of the way that Ofcom has now put the matter in its
6 letter to Tribunal of 11th May that there is actually a more involved point in what they are
7 saying about the admissibility of BT's evidence than we had previously apprehended
8 because, in effect, it seems to us, particularly by the reference to the *dicta* of Lord Justice
9 Jacobs, there is in fact a principle point about the precise extent of the Tribunal's overview
10 of decisions of Ofcom and what exactly is meant about a an appeal on the merits. That is
11 obviously a significant point and it is one that BT, having now seen it, thinks that it needs to
12 be addressed properly. We are also mindful, sir, that obviously all the interveners are
13 saying that they need to have a think about this as well before the matter is dealt with.

14 THE CHAIRMAN: Yes, indeed, Mr. Read, it did seem that time was rather tight for them to have
15 a full consideration of the material.

16 MR. READ: So what, in essence, we have agreed – subject obviously of course to the Tribunal's
17 views on this – is that there should be an initial exchange between BT and Ofcom of letters
18 setting out the greater nuances of the case that each is actually saying. In particular, sir,
19 what I am thinking of is BT still does not yet quite fully understand how exactly Ofcom is
20 saying that, as a matter of principle, the Tribunal was prevented from doing it, so we want
21 some expansion on that.

22 Ofcom are obviously saying that they would like a little more detail as to why BT say this
23 evidence should go before the Tribunal, whether it is on the basis, as you will have seen in
24 their letter, of simply a point of principle, or whether it is information which BT says was
25 already within Ofcom's purview by the material they had already had, or whether we are
26 saying it is material that could not have been got read in time for the determination itself, so
27 the idea is to have an exchange of letters in order to flush those points out. The timetable
28 that I think the parties would propose is 21st May for that initial exchange between Ofcom
29 and BT, with of course the interveners copied in.

30 I perhaps should have actually addressed the question of intervention first, but I do not think
31 there is any objection to the interveners joining although I will obviously come back to the
32 precise terms of that in due course. Assuming they are happy added as interventionists we
33 obviously would copy that material to them. So that would be the first point, 21st May.

1 Then we would look to have an exchange of skeleton arguments between BT and Ofcom on
2 9th June, with the interveners then having the opportunity to put skeleton arguments
3 concerning that point on 15th June. Then there is a hearing of that preliminary issue for one
4 day – it is listed for one day, it may not take that long but we think it is better to list it for
5 one day rather than a half day – sometime, if possible, in the week of 21st June, but of
6 course, that is dependent upon the Tribunal’s availability; that is the sort of timetable that
7 we were thinking in terms of.

8 We also think that it is necessary to fix a long stop trial date, but obviously the precise
9 timetabling between the long stop trial date and the decision of that preliminary issue will,
10 to some extent, depend upon (a) when the decision is actually made; and (b) the contents of
11 the decision itself, because obviously if some of the evidence were to be ruled inadmissible
12 then BT would have to amend its notice of appeal and take the matter further forward. If
13 the evidence was not taken out, as Ofcom has said in its letter to the Tribunal, in effect they
14 would then need time to get external economic evidence in order to be able to respond to
15 BT’s notice of appeal.

16 THE CHAIRMAN: I understand, Mr. Read. One or two points out of that. Do I understand it
17 then that although you are not yet, pending the exchange of correspondence envisaged, able
18 to formulate the preliminary issue that we would hear, that would be an issue that would be
19 generally formulated, it would not be confined to the specific facts of this case? In other
20 words we would not, in the course of the day long preliminary hearing, have to go into the
21 factual ins and outs of precisely what BT could have done by way of service of evidence in
22 front of Ofcom?

23 MR. READ: One of the difficulties we have is we are not quite sure how Ofcom is saying all of
24 this applies, and they are of course saying “We cannot necessarily comprehend that until we
25 have decided whether or not we have seen what BT is saying about the evidence.” There is
26 a sort of, if you like, chicken and egg situation. I think there is a possibility, I do not put it
27 higher than that because on BT’s side we think this is going to turn primarily on the point of
28 principle, but there is a possibility that we may have nuances within that as to how easy it
29 would have been, for example, for BT to consider the material that it now put in, and
30 perhaps also the extent to which BT’s evidence actually was already encapsulated in what it
31 was saying when it put its original response into the draft determination.

32 THE CHAIRMAN: Yes, because, speaking from our point of view, there is considerable
33 attraction in having a preliminary issue which we determine based upon a general principle
34 which BT then, if necessary applies to its notice of appeal in terms of carving out evidence

1 that may be excluded, which is then responded to by the other parties. On the other hand, if
2 it is going to be the case that if we have an exchange of correspondence which raises
3 considerable factual issues, your timetable does not take into account any question of
4 evidence there, nor indeed does it address the question of whether a day would be sufficient.
5 Now do I take it that you will wait and see how the correspondence pans out?

6 MR. READ: I think that was the idea, and there is in fact a gap between 21st May and 9th June
7 where we hope that if there are any issues that need flushing out they can be flushed out
8 fully so that by the time skeleton arguments come along no one is in any shape or form
9 being taken by surprise.

10 The trouble at the moment, and I do not want to get too absorbed as to whether it should be
11 BT's application to admit the evidence or, as we see it and we believe the interveners see it
12 as well, Ofcom's application to exclude the evidence, and that is why we have tried to do it
13 by this mutual exchange of letters rather than necessarily getting into a formulistic process
14 of saying who should be issuing an application. I think the truth of the matter is that until
15 we have that exchange of letters on 21st May whilst we have a fair idea of where the
16 preliminary hearing is likely to be going we cannot obviously give absolute guarantees at
17 this stage, but we would certainly hope that after 21st May it would be clear to everyone
18 what exactly is and is not in the remit of the preliminary issue.

19 THE CHAIRMAN: I understand. The other point I wanted to address, and seek your views on
20 and those of the other parties, is the point you raised at the outset, namely the overall
21 question of timetable assuming we do have a preliminary issue on 21st June. We have
22 informally considered that in terms of our own diaries, and what we were looking at in
23 terms of a date was a date in the latter half of September, October/November being quite
24 tricky for this Tribunal, and obviously we are anxious to ensure that this matter is dealt with
25 as quickly as possible. I understand the estimated length of the hearing is a maximum of
26 five days?

27 MR. READ: I think it is five to eight.

28 THE CHAIRMAN: I see, I was told three to five.

29 MR. READ: Personally, I have some difficulties in envisaging it going much beyond the five day
30 period, but on the other hand there may be evidence that comes out of the other parties and
31 there are obviously a large number of interveners involved, that might extend the process. I
32 think ultimately it comes down to the extent to which cross-examination of all or any of the
33 witnesses is actually going to need to take place or whether, in reality, as with most hearings
34 as I perceive it before the Tribunal, cross-examination of witnesses gets less and less the

1 further into the hearing you actually get. That is the difficulty, but that is why you were
2 given an estimate of five to eight days.

3 THE CHAIRMAN: That is helpful. Was that all you had to say?

4 MR. READ: On the September date itself from my personal position as you may recall, sir, I am
5 actually in some difficulties in September and so therefore I think BT have rather taken the
6 view that they prefer to keep the knowledge that I have in the case if at all possible.
7 The other difficulty is this, obviously if we have the decision on the preliminary issue some
8 time by the end of June – assuming that the Tribunal can obviously perfect a judgment or at
9 least give some form of decision within a very short remit of the actual hearing itself – it
10 still means there has to be some time for BT to digest, depending on the outcome, how it
11 needs to amend its notice of appeal, and for Ofcom obviously to go and get the outside
12 expert evidence that it says it needs to get in order to respond. So that is going to be
13 problematic, particularly when one factors in the August holiday period, because as soon as
14 one puts the August holiday period into it we see no prospect of Ofcom realistically being
15 able to serve its defence much before the middle to the end of September, and that then
16 causes the problem because obviously there has to be service and statement of intervention,
17 and the exchange of skeleton arguments in the run up. That is why although BT has always
18 been quite keen to get this matter dealt with as quickly as possible I think from a practical
19 basis we think September is going to be very, very difficult indeed.

20 THE CHAIRMAN: Yes, I see. That would mean, just as an indication so that the other parties
21 can address the point, we would be looking probably at a December hearing, but we will
22 discuss that in due course.

23 MR. READ: Do you want me to deal with the question of intervention?

24 THE CHAIRMAN: There were a few points which I had on my agenda before the question of
25 preliminary issue, just to run through them and we can address them quite quickly. I
26 assume there is no problem about the proceeding being treated as proceedings in England
27 and Wales?

28 MR. READ: That is right, yes, sir.

29 THE CHAIRMAN: I assume we can leave it to the parties to agree the appropriate arrangements
30 as to confidentiality?

31 MR. READ: Yes.

32 THE CHAIRMAN: Subject to the Tribunal's approval once those arrangements have been made,
33 in which case we would be delighted to hear from you on the question of intervention, or
34 rather the conditions that you would like to see imposed on intervention.

1 MR. READ: As you can see there are a large number of individuals here on behalf of the mobile
2 network operators, and obviously BT's concern about all of this is to try and get any
3 progression of the hearing into a format that is proportionate and amenable. We fully
4 recognise that if there are conflicts of interest between the interveners in what they are
5 putting forward then it is impossible in those circumstances to have any form of effective
6 joint intervention.

7 Our concern has been, and indeed BT expressed it, I think, in the course of the PPC case as
8 well in connection with the fixed network operators, that there should be some form of
9 method of trying to agree joint submissions. That may be difficult – it is obviously difficult
10 for BT in this circumstance to say what exactly may or may not be the tensions between the
11 various mobile network operators. We just flag up the fact that we think it might be a
12 suitable way forward to try and see if there can be some form of joint submission or joint
13 statement of intervention put forward on behalf of the respective MNOs, but I cannot say
14 any more than that. It was designed to try and establish some form of modicum of ease
15 going forward, but obviously if there is vast hostility because there are potential conflicts of
16 interest raised by the other MNOs then that is something that we accept has to be taken into
17 account.

18 THE CHAIRMAN: Indeed, it is really a question of encouraging behaviour that is as time and
19 cost efficient as possible rather than imposing such a thing and, as I am sure all the parties
20 know, the Tribunal encourages submissions that are additional to those that Ofcom would
21 make rather than duplicative, but it may be going too far to compel the parties to be
22 efficient, that may impose greater inefficiencies in itself.

23 MR. READ: Sir, if that was all on your agenda specific, then I think I have probably said
24 everything that I need to say on behalf of BT.

25 THE CHAIRMAN: Thank you, Mr. Read, perhaps now Mr. Herberg for Ofcom.

26 MR. HERBERG: Sir, Mr. Read has put the position very fairly and I can be brief. In relation to
27 the application I do not think anything turns on it for today's perspective, we certainly take
28 the position that it is for BT to make an application to admit fresh evidence on the basis that
29 it is common ground that the "disputed evidence" if I can compendiously refer to it as that,
30 was not before Ofcom below as to one large category, or another smaller category was
31 before it in the very last days but was not taken into account. I do not want to get involved
32 in technicalities as to whose application it is; what is plain is that the Tribunal has to rule
33 one way or the other as to whether it is something which should be admitted or not.

1 The only significance of it being BT's application, we say, which has not been made is that
2 we are, to some extent at the moment in the dark as to the extent to which admission is said
3 to rest on a general proposition that this appeal is in the nature of a rehearing or something
4 sufficiently close to it that this evidence should be allowed in the ordinary course of things
5 or maybe both, but whether there are specific reasons to allow the evidence in, for example,
6 because Ofcom should have allowed it in below and wrongly excluded at least some of it, or
7 should have extended its hearing for exceptional reasons its determination period or, indeed
8 the evidence could not have been obtained with due diligence below, and therefore it is
9 appropriate to allow it in *de novo* on the appeal. All of those uncertainties we hope can be
10 cured by the exchange of letters which I have discussed with my learned friend and, subject
11 to the Tribunal, we are content with proceeding in that way without getting hung up on
12 questions of formal applications or otherwise. Likewise because Mr. Read indicated that it
13 would help them to have some more indication of the nature of our general point about the
14 ambit of the appeal we can provide the same by letter fleshing out we hope we set out in at
15 least some detail in our rather long letter of 11th May.

16 So, sir, that is why we, as it were, designed an exchange of letters before we got to the
17 exchange of skeletons so that the skeletons do not pass like ships in the night but can
18 actually engage with the issues that have been crystallised.

19 THE CHAIRMAN: That is very helpful. Clearly, there is a chicken and egg situation here as to
20 who should be the applicant and really that very much turns on the question of how one
21 construes s.195 which is, of course, the point in issue, in that if one takes the wide view that
22 BT is taking it would seem to us very much to be Ofcom's application to exclude, whereas
23 if one takes a narrow view it is the other way around. I take it you do not want that
24 determined today, and it seems to us very sensible that you deal with that in the
25 correspondence.

26 MR. HERBERG: Indeed, and I do not think anything will turn on that point anyway; no one
27 thinks this application will depend on the burden of proof – who has to prove it – and that
28 seems to be the only formal significance when we are all at the preliminary hearing, the
29 question will there be: should it be admitted or should it be excluded? That will depend
30 upon the substantive question of the nature of the jurisdiction and potentially other reasons
31 that are put forward by BT, if there are other more specific reasons for the admission of the
32 evidence, and we can simply proceed on that basis. But the exchange of letters will, we
33 hope, bring clarity to what is actually in issue between the parties.

1 As to your question as to whether what will be in issue by the time of the hearing will
2 involve a detailed consideration of the evidence, for the reasons my learned friend gave it is
3 difficult to answer with any certainty at this stage. I do anticipate that it may well be
4 necessary I am afraid to go at least some way into the nature of the evidence because I
5 anticipate, particularly if some of the more specific grounds are taken by BT as to why this
6 evidence ought to be allowed in, in other words reasons connected with the way the
7 evidence was submitted or the nature of the evidence as opposed to the point of general
8 principle, that there may be issues as to what was before Ofcom, the relationship of this new
9 evidence to the existing evidence and the like – obviously to the extent that we can keep this
10 to an issue of principle which can then be hopefully determined by the parties by
11 application of that principle that will be, I am sure, preferable for all concerned. However,
12 there is the danger of course that if we go too far down that way that we then cannot agree
13 on the application of whatever decision in principle is given, and we are then not in a
14 position to move smoothly ahead towards the main hearing. So I think we will all be
15 anxious that any issue of application that looks like it might be in dispute is going to be
16 dealt with at the preliminary hearing as well.

17 THE CHAIRMAN: The difficulty I see at the moment is that you are asking the Tribunal to
18 order a one day preliminary issue when the parameters of that issue are actually quite
19 unclear.

20 MR. HERBERG: Sir, I think the way we will be able to phrase it as an issue will be simply
21 whether identified evidence should be admitted or excluded, if I can put it neutrally,
22 between the two tests, so it will fasten on particular statements or even potentially particular
23 parts of statements if it is not the whole of the statement that is objected to. If we can
24 simply put the issue technically in those terms each party can then make what arguments it
25 wants to as to why it should be either admitted or excluded, so there will be a crystallised
26 issue, but I do not think we will formulate an issue. I think it likely, although subject to the
27 Tribunal's indication or further discussions with my learned friend, that we will formulate
28 an over arching question of principle that we invite you to answer.

29 THE CHAIRMAN: I see, so it is actually rather less, not a preliminary issue, but really quite
30 literally the application to exclude or admit?

31 MR. HERBERG: I think it would be best phrased as that, if I can put it that way, one could
32 design it as a preliminary issue, but I suspect the easiest way is going to be to identify the
33 evidence to which objection is taken and ask you to determine it as an issue of evidence. I

1 suspect, subject to what anyone else says, that that is going to be the most convenient way
2 of dealing with it.

3 In relation to timing, first the timing of the preliminary issue, we certainly think a full day is
4 appropriate. If any of the interveners contemplates that it may play a substantive role we
5 might even go beyond a day – I would hope not, but there are important and complex issues
6 on the jurisdiction itself, a number of authorities as to the Framework Directive and as to
7 the application of the actual jurisdiction to be looked at. There is also potentially some
8 examination of the evidence itself, and the evidence is complex expert evidence that will
9 require a little time to be looked at if need be. So there are relatively meaty issues for what
10 is effectively an application as to evidence. I would hope that a day would be sufficient
11 unless any of the interveners are proposing or contemplating playing a relatively substantial
12 role.

13 THE CHAIRMAN: Can I express the pious hope before any of the interveners say anything that
14 we would hope that this is very much a two-way battle with the interveners saying what
15 they feel is necessary obviously, but keeping that to a minimum, but I will obviously hear
16 what you have to say on that.

17 MR. HERBERG: In relation to the main hearing, sir, we respectfully agree with what has already
18 passed between yourself and Mr. Read. We do contemplate that the hearing, if it is
19 confined to matters which do not go to the new evidence, would be easily containable
20 within five days. If the new evidence and the new material are going to be admitted then
21 we see it expanding considerably. There are effectively four expert, or *quasi*-expert reports
22 – or maybe more, there are four people submitting reports by BT. There are very likely to
23 be therefore experts instructed, certainly by ourselves and potentially by interveners. It may
24 be that there will then be a need for evidence and cross-examination in relation to those
25 experts and I do see the hearing expanding to something in the region of eight days at least
26 if what we would characterise as the new issues and the new evidence are going to be fully
27 investigated. So if we are fixing at this stage against the possibility that the evidence may
28 be allowed in depending on the preliminary issue, then we would suggest that eight days
29 would be a prudent period to fix for.

30 In terms of timing of that hearing, sir, we do agree that September looks, unfortunately,
31 over optimistic. The window in discussions with my learned friend just before we came in
32 – not with the interveners but with BT – that we had fixed on as a possible window from
33 our point of view was between 15th November and 7th December. That is a window which,
34 speaking purely from our own selfish ends, we, the two principal parties could do. I should

1 say after 7th December I am in difficulties for the run into Christmas with another fixture.
2 But if there was any way that the Tribunal could fix it to end by 7th December that is
3 something which the principal parties certainly would be able to achieve and would seem to
4 be consonant with any timetable which emerges from the preliminary issue there will be
5 time, whether or not the evidence is admitted, to design a timetable to fit in with that as
6 hearing dates, but of course we are conscious that building a timetable without the Tribunal
7 is perhaps futile exercise.

8 THE CHAIRMAN: I have to say I fear it is going to be later in December than 7th. We will look
9 at our diaries when we rise shortly, but I have a nasty feeling that that particular window is
10 closed.

11 MR. HERBERG: Sir, the other possibility is to get a clean start in January of course, and that is
12 something that rather than fixing in before the end of December I certainly, from a selfish
13 perspective, would invite the Tribunal at least to consider that that would be an alternative
14 that would not delay matters much further. That is certainly something from our side we
15 could do.

16 THE CHAIRMAN: Certainly we do not propose to make any directions to trial until the
17 preliminary issue has been heard and possibly resolved, really today all we are concerned
18 with is ensuring that we have an end date to which everyone can work, that which ever way
19 the preliminary issue goes can be met.

20 MR. HERBERG: Maybe I can take further instructions while other people are making
21 submissions on the date.

22 THE CHAIRMAN: I am grateful, Mr. Herberg. Now we are taking interveners in which
23 particular order.

24 MR. PICKFORD: Sir, I appear for T-Mobile and Orange, and I think those representing other
25 mobile operators are content for me to make some submissions first.

26 THE CHAIRMAN: Thank you, Mr. Pickford.

27 MR. PICKFORD: On the point of timing, we are certainly as keen as anyone that this matter is
28 dealt with expeditiously. We certainly share the concerns raised about a September hearing
29 date which does appear to us to be overly ambitious. If, indeed, the evidence issue is
30 determined in BT's favour and they are allowed to rely on these new expert reports it may
31 well be the case that we, as interveners, need to provide our own expert reports in response,
32 and we can see therefore in that case that there may well be a need for a fairly substantial
33 hearing. I have not given it detailed consideration yet, certainly eight days sounds like it

1 could well be about the right kind of length, but I think we would obviously need to
2 consider that in more detail as you say, sir, once the evidence issue has been determined.
3 On the question of the admissibility of it or not, we certainly hear what you say, sir, about
4 interveners perhaps not having particularly substantial roles to play in that. We necessarily
5 have to reserve our position on that issue at the moment because we simply have not had the
6 opportunity to consider it in any detail, but we will certainly have regard to your comments.

7 THE CHAIRMAN: Yes, indeed, what I said was simply by way of indication and no more than t
8 that.

9 MR. PICKFORD: Yes, I am grateful, sir. There were two really substantial points that were
10 advanced by BT in relation to interventions and they concerned first the legitimate scope of
11 interventions, and secondly, whether we should make joint submissions and provide joint
12 evidence. I am glad to see that in relation to the second of those Mr. Read no longer
13 appears to be pressing the Tribunal for any order in that respect, and that is entirely
14 appropriate that any such order would be without precedent, as far as I am aware, in a
15 Communications Act appeal of this sort, and given the indications, sir, that you have
16 already given, I do not think I need to develop that point any further.

17 THE CHAIRMAN: No, you do not.

18 MR. PICKFORD: The other point that was raised in BT's skeleton, is one again they do not
19 appear to pursue at all today, which concerned the legitimate scope of an intervention. It
20 was said in BT's skeleton that an intervener should not advance any new issue not
21 encompassed in Ofcom's defence. Now, sir, I have prepared submissions to respond to that
22 contention because we strongly disagree with it, but again if it is not pursued by BT today
23 then I do not need to trouble you with them, so perhaps it would be helpful.

24 THE CHAIRMAN: Well it is rather difficult to make a ruling in anticipation of actually seeing
25 the statement of intervention and it does seem to me that these issues, if BT had a point
26 regarding any point that was being taken by the interveners, for that to be dealt with when
27 the point was being taken rather than being speculated about in advance.

28 MR. READ: It was no more than a marker saying "This is what we say you should be limited to",
29 but we cannot obviously comment further upon that until we have actually seen what the
30 statement of intervention says.

31 THE CHAIRMAN: In that case the marker has been made, I think.

32 MR. PICKFORD: And I think we have made our marker in response.

33 THE CHAIRMAN: Both markers are noted!

34 MR. PICKFORD: That is all I need to say on the matter.

1 THE CHAIRMAN: I am very grateful.

2 MR. WARD: Sir, if I could go next on behalf of Vodafone?

3 THE CHAIRMAN: Yes, Mr. Ward.

4 MR. WARD: Thank you. I respectfully agree with the submissions that Mr. Pickford has made
5 and will not repeat them of course. There was only one very small matter in addition I
6 wanted to raise. You referred to the confidentiality ring. It appears from the correspondence
7 that there is acceptance on all sides that a confidentiality ring would be the appropriate
8 course, as is usual in these appeals. There was just a point that raised some concern on the
9 part of my clients arising from the letter that Three filed in advance of today's hearing, the
10 letter of 12th May in which they suggested that there should be four people within the
11 confidentiality ring. I do not know if you have that letter, sir?

12 THE CHAIRMAN: Yes, I have it.

13 MR. WARD: In the last paragraph four names are listed, and I should preface my comments by
14 making it absolutely clear that no point is taken about any individual or their suitability for
15 the confidentiality ring. I am sure that does not need to be said but out of an abundance of
16 caution I say it anyway. It is just that you will see that included are both internal legal
17 advisers and external legal advisers. There is always a concern that a confidentiality ring
18 should not be any wider than is necessary and there is always a concern in cases such as this
19 where competitors are involved about the possibility of material going inside an
20 organisation. It has certainly been my experience that the usual practice is that where
21 external lawyers are used internal lawyers should not also be within the ring, but it is also
22 recognised that some parties come before the Tribunal only using counsel and internal
23 solicitors, and it is accepted that in those circumstances the internal lawyers can be part of
24 the ring. Here we see that Three has proposed, counsel, internal in-house lawyers and
25 external lawyers and we do respectfully ask why that is thought necessary in this particular
26 case. It is not a formal application of any kind, just a query on behalf of my clients who felt
27 some concern about this.

28 THE CHAIRMAN: It is another marker in other words. Yes, thank you.

29 MR. O'DONOGHUE: Sir, without wishing to add to the Tribunal's woes, we certainly echo
30 Ofcom's comments on the substantive preliminary issue, but in our submission there is also
31 a procedural preliminary issue. The issue is as follows, sir: even if the Tribunal is minded
32 as a substantive matter to admit the substantial complex new evidence, there is, in our
33 submission, a procedural question as to the identity of the parties who could give evidence
34 in these proceedings, even if it was otherwise admissible. The point is very simple: Mr.

1 Richards, Mr. Kilburn and Mr. Reed are employees and, we presume, shareholders in
2 British Telecom; On any view they cannot be independent experts for the purpose of these
3 proceedings. The CAT Guide is quite clear that there is a duty of independence, 12.9 and in
4 our submission anyone who is an employee and/or a shareholder and purports to give
5 evidence that is not evidence of fact cannot possibly be admissible evidence in these
6 proceedings, and we say there is a procedural point that is tagged on to the substantive point
7 that must be resolved. The point is very simple, that even if this evidence is otherwise
8 admissible per the standard of review, there are issues as to the identity of the persons who
9 can give that evidence, and we say that that certainly arises from Mr. Richards, Much of
10 Mr. Kilburn's statement, and the algebraic formulae in Mr. Reed's statement. We say on
11 any view there cannot be independent experts for these proceedings.

12 Sir, we go further, we say that insofar as they would purport to give the same evidence, they
13 cannot be witnesses of fact either because plainly economic evidence, economic modelling,
14 algebraic formulae is not evidence of fact, these are arguments.

15 Again, the CAT guide is quite clear, 12.6:

16 "It is not, for example, the function of a witness statement to provide a
17 commentary on the documents in the case files to set out quotations from such
18 documents or to engage in matters of argument."

19 And we say, sir, it is plain, with even a cursory examination of the evidence of Mr. Reed,
20 Mr. Richards and Mr. Kilburn that exclusively, overwhelmingly, it concerns matters of
21 argument, matters of extreme controversy, complex economic evidence, it is not factual in
22 any sense and purely as a matter of procedure this evidence must, in our submission, be
23 excluded.

24 THE CHAIRMAN: Well, Mr. O'Donoghue, that is very helpful, are you presumably content
25 though to have that issue determined in the manner that was outlined by BT at the outset?

26 MR. O'DONOGHUE: Sir, absolutely. It is a short issue, we say it is manifestly clear what the
27 position is, it can be tagged on in a very brief fashion to the preliminary substantive issue.

28 THE CHAIRMAN: I see, thank you. Is it Three that remains?

29 MR. PIKE: Sir, yes. Richard Pike for Three. If I could respond to Mr. Ward first on the point
30 about including in-house counsel in the confidentiality ring. If I might clarify, the reason
31 why we have asked for in-house counsel to be included on this occasion as well as an
32 external solicitor and external counsel is because it is Three's intention to handle much of
33 this case in-house as indeed it did when it intervened in the process before Ofcom.

1 We would say, in any event, sir, that it is not at all unusual to include in-house counsel these
2 days in the confidentiality ring as, indeed, T-Mobile has previously where using external
3 counsel and I would suggest there is no distinction between having external counsel or
4 external solicitors. So, sir, to lay down my own marker we do not see any problem in
5 having in-house counsel included on this occasion.

6 The other point I would like to respond to is the marker you, yourself, laid down as to this
7 being a two-way battle on admissibility. Whilst certainly we are conscious that we should
8 minimise our involvement as far as we possibly can I think we should just say that we can
9 envisage that this might be more of a three-way battle than a two-way battle. I suspect that
10 all our clients, perhaps all the MNOs will find it difficult to align themselves completely
11 behind Ofcom if, indeed, that is the side we are more aligned to just given the significance
12 of this point for future appeals.

13 The third point I would like to make very briefly is in relation to the supply by BT of the
14 notice of appeal and it is really just to invite the Tribunal to perhaps consider making some
15 comments for the benefit of interveners in future cases. This is not the first time that BT has
16 not supplied the notice of appeal until after requests to intervene have been made and,
17 indeed, to propose not to supply, as I understand it, until the requests have been granted. So
18 in this case it has obviously meant it is very difficult for us to address you today on the
19 admissibility issue, but just generally it means it is more difficult to get the case going and
20 to have an expeditious timetable. We would invite the Tribunal to just indicate for the
21 benefit of future parties that it would be helpful for the appellant to provide a non-
22 confidential version of the notice of appeal when asked to do so, certainly by anybody who
23 is likely to be granted rights to intervene.

24 Thank you, sir.

25 THE CHAIRMAN: Thank you, Mr. Pike. Mr. Read?

26 MR. READ: I think there are three points I need to come back on. The first is O2's observations
27 about a further point being taken on admissibility. We find that very surprising given the
28 general approach adopted in the rules of the Tribunal concerning the admissibility of
29 evidence, but if it is a point that is going to be taken then it plainly needs to be flushed out
30 in advance and we would suggest that if O2 is serious about taking that point then it too
31 should exchange a letter on 21st May 2010 setting out precisely what its case is upon that so
32 that no one again is taken by surprise. We would also say this that if they are going to
33 advance any arguments further than what is in that letter then will need to have to look at
34 the way the skeleton arguments are exchanged, because obviously BT needs a proper

1 opportunity consider exactly what O2 is saying about this point in order for BT to be able to
2 deal with it in its skeleton argument. So in other words the contentions put by forward by
3 O2 on this point must be fully set out in their letter of 21st May.

4 THE CHAIRMAN: Mr. O'Donoghue, would that be a problem?

5 MR. O'DONOGHUE: Sir, yes, it is a very short point.

6 THE CHAIRMAN: So there is no problem at all in dealing with it?

7 MR. O'DONOGHUE: None at all.

8 MR. READ: I am grateful for that. The second point was that I can already begin to see that in
9 fact this one day hearing might have more input from the interveners than was originally
10 anticipated and I do not know whether there is sufficient flexibility within the Tribunal's
11 time frame to be able to allow some slippage into a second day should that become
12 necessary, but I am concerned because I can begin to see that by the time you have added in
13 the points that O2 are making, and by the time you are having arguments developed by any
14 of the other interveners that is obviously going to add to the matters that are going to be
15 before you. So I think that if the Tribunal can manage it, it might be better to allow some
16 slack to go into a following day if at all possible.

17 The third point was obviously this question about not giving the notice of appeal. The
18 stance that BT has taken on this is that it really does not want to use the powers of the
19 Tribunal in this because it is the Tribunal who decides whether or not somebody can
20 intervene, and it is the Tribunal who can set precise conditions on how the intervention is
21 actually going to take place, and BT has always felt that it is rather presumptuous on the
22 part of BT to start giving out material that the Tribunal might at a later date turn 'round and
23 say is not to be given or irrelevant to the purpose of being given going forward.

24 The problem BT faces in this is that, of course, whilst in a case like this it might be more
25 obvious who is actually going to make the intervention. BT gets numerous requests from
26 others who perhaps have not taken such an involvement in the dispute. For example, in this
27 particular level I think H3G did not originally put a dispute before Ofcom, they did make
28 submissions, so it is not necessarily clear who exactly is at a later date going to actually be
29 involved in intervening in the case, and that is the problem that BT has with handing out
30 material to anybody who actually asked for it in advance is that BT sees it as rather
31 usurping the function of the Tribunal taking decisions as to who should and should not be
32 allowed to see the material. I just wanted to make that point very clear, sir, because it is
33 something that obviously comes up on a number of occasions for BT and BT feels that it is
34 not for it to usurp the decisions of the Tribunal.

1 I hope that clarifies BT's stance on why it feels that it cannot really start handing over
2 notices of appeal until it has some further indication from the Tribunal.

3 THE CHAIRMAN: Thank you very much, Mr. Read. Are there any other points before we rise
4 to consider what we heard? (After a pause) Thank you we will take our time and come
5 back.

6 (Short break)

7 THE CHAIRMAN: We have looked at our diaries and we have managed to find a slot for the
8 hearing of what I will call a "preliminary issue" on Tuesday, 22nd June and Wednesday, 23rd
9 June. I do not want that to be read as an invitation to take up two days but we have
10 scheduled a hearing for maximum one and a half days in case there is more to be said than
11 we think today. With that in mind it seems to the Tribunal that the timetable to that hearing
12 date should be as described before us today, with an exchange of positions between the
13 parties, and we include the interveners in this, by 21st May – in particular that should
14 include O2's procedural preliminary issue but anything else that the interveners may have to
15 say, with 9th June then for exchange of skeleton arguments between Ofcom and BT and 15th
16 June for anything that the interveners may say in supplement.

17 Regarding argument on 22nd/23rd June we appreciate that the parties are in the process of
18 clarifying their positions and we are very grateful for that in advance, but the Tribunal
19 would very much want to be in a position in its judgment following 22nd/23rd June to be
20 able to identify the broad parameters regarding admissibility of evidence in s.192 cases, so
21 that arguments can, if possible be voided in the future. It may be impossible to avoid
22 detailed consideration of bits and pieces of evidence, but nevertheless the Tribunal would
23 regard that as particularly helpful.

24 We also appreciate that it is a difficult question in this case as to whether this is an
25 application to admit evidence or to exclude it. Without prejudice of any kind to the
26 substance of the argument we consider that it would be helpful to provide the parties with a
27 direction that this should be treated as Ofcom's application to exclude evidence under Rule
28 22 – this may not matter, but it could do, for instance with regard to order of speeches on
29 the day.

30 In terms of the substantive hearing of the matter, it is very regrettable that the admissibility
31 question has derailed the prospect of a September hearing given the importance of this case
32 to other cases that we understand are coming before the Tribunal, but we are where we are,
33 and given the diaries of all concerned a January date has become inevitable. We have
34 marked out a period of eight days commencing Monday, 8th January 2011 for the hearing of

1 this matter substantively, but we consider that other directions to that hearing can be dealt
2 with later on after the preliminary issue – as I will continue to call it – has been decided.
3 I have taken matters a little out of order dealing with the most contentious point, but to
4 sweep up the other matters on our agenda, these proceedings will be located in England and
5 Wales.

6 Regarding the confidentiality ring, that is a matter that in the first instance the Tribunal will
7 leave to the parties and we include in this the question of Three's proposed members. We
8 hope that that can be resolved in correspondence – obviously, if it cannot be we will resolve
9 it but I am sure the parties will be sensible.

10 In terms of intervention, a point that perhaps I should have addressed first, we will allow all
11 the proposed interveners to participate, that is to say T-Mobile or Orange as the first,
12 Vodafone, O2 and Three.

13 We make no order as to duplication or representation but, of course, following the usual
14 practice we would expect helpful supplements to BT's and Ofcom's evidence and argument
15 to be provided by the interveners and no more.

16 Finally, we were asked to comment on the question of disclosure of BT's notice of appeal in
17 this case. We decline to do so. We consider that this is a matter that can only be dealt with
18 on a case by case basis.

19 Thank you very much, an order will be drawn up in due course.

20 MR. READ: Sir, can I just raise one matter. If I have understood my pocket diary correctly, 8th
21 January 2011 appears to be a Saturday.

22 THE CHAIRMAN: Did I say 8th? I am so sorry, I should have said 10th. I was not intending to
23 change a rule so dramatically! (Laughter)

24 MR. READ: I think that has probably dispelled a lot of anxiety on this side! I am grateful.

25 THE CHAIRMAN: Monday, 10th January, absolutely right.
26
