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IN THE COMPETITION

Case No. 1053/3/3/05

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

22nd February 2006

Before:
MARION SIMMONS QC
(Chairman)

ANN KELLY
VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

MEDIA MARKETING & PROMOTIONS

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

Andrew Millard (of Media Marketing Promotions) appeared for the Appellant.

Tim Ward (instructed by the Office of Communications) appeared for the Respondent.

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HEARING

1 THE CHAIRMAN: Good morning, Mr. Millard?

2 MR. MILLARD: Good morning, ma'am, and members of the Panel. If I may first of all refer to
3 some correspondence that was received yesterday from Ofcom, I was travelling down here on
4 the train and received it when I arrived in London last evening. At that time Ofcom advised
5 that they did not oppose my original application to withdraw the Appeal. However, they did
6 outline that I might have misunderstood some elements of a consultation or consultations that
7 are about to happen. My two main reasons for withdrawing the application were first, with the
8 weight of material and the resources that Ofcom seems to be piling into this I was very
9 concerned about costs; and secondly, it was my understanding that there is due to be future
10 consultation which would take account of this particular case and therefore I thought it best
11 that I could save the CAT time in using other forum for that in the future. Having said that,
12 Ofcom says that that is not the case and also they do confirm, for the avoidance of doubt, that
13 they will not seek to recover costs from the Appellant in the circumstances of this case.
14 Therefore, on that basis I am not now withdrawing the Appeal, and I trust that is acceptable to
15 yourself and the members of the Panel?

16 THE CHAIRMAN: Yes. I had rather assumed that was the position and I have noted that Ofcom
17 are nodding that they agree with what you have just said.

18 MR. MILLARD: Thank you very much. I shall begin then. I am grateful to CAT for giving me this
19 opportunity to lay before you my case as to why in my view the disputed 0870 numbers were
20 wrested from MMP. I believe it is due to inadequacies in the legislation. The legislation does
21 not take account of such a scenario as in this case. It is contrary to the agreement (and the
22 spirit of that agreement) between MMP and Prime Time Radio ("PTR"). It is contrary to
23 common law and also it is contrary to the rationale behind telephone number portability in the
24 UK.

25 The reason I brought this before CAT is that I believe that Ofcom has acted anti-
26 competitively. Before I begin properly, with respect to all parties, I would like to reiterate that
27 I am not legally qualified and not necessarily 100 per cent. au fait with proceedings in such
28 a court, therefore I apologise in advance if my approach today is somewhat unusual or
29 unorthodox and if I do stray inadvertently outside the bounds of what normal procedure would
30 be then I am sure I will be corrected on that. I do try, as effectively as possible – without
31 a legal background – to get across my case and ultimately see what I believe to be natural
32 justice to be done and to prevail.

33 There is a massive amount of information and material that has been provided by
34 Ofcom in this case, certainly from my view much too much to digest fully and go back time
35 and time again and cross reference. Much of it, if you do not mind me saying, Ma'am and

1 members of the Panel, I think is irrelevant. However we have already held two case
2 management conferences, and I think they have been very useful – certainly from my side.
3 Please forgive me today if I retrace any steps within those case management conference
4 sessions, if I do it will be simply to clarify or emphasise (or both) the salient points from those.
5 With the points I make I will endeavour to provide some simple examples which I hope puts
6 each of them into context.

7 If I may, I would like to start with the background to number portability very briefly.
8 In 1984 the monopoly provider and carrier of telephone services in the UK was BT. That year
9 the Government privatised the company, floating just over 50 per cent. of its shareholding on
10 the London Stock Exchange. A new framework of regulation was established through the
11 1984 Act and BT's monopoly was effectively abolished. Other operators were allowed into
12 the market and this really was the first stage in the UK to opening up the telecommunications'
13 market to competition.

14 Arguably the second, and most important step, was taken in 1991 when the then
15 Director General of Oftel added a condition (Condition 34B) to the licence of operators that
16 they should provide portability. Whilst BT no longer had a monopoly at that time still around
17 95 per cent. of subscribers were BT subscribers. One reason deterring subscribers switching
18 away from BT to another operator was the need to change their telephone number. Portability
19 would, it was believed, overcome this.

20 As originally promoted by Oftel in their numbering directive in January 2000 (p.55 of
21 MMP's bundle) number portability is facility by telecommunications' operators which enables
22 customers to keep their telephone numbers when they change their operator. Number
23 portability is the key issue in the development of network competition. The absence of number
24 portability therefore gives the network operator a significant competitive advantage. It is clear
25 that the intent is that number portability should be between subscriber and their network
26 operator. In other words, portability you should be given by the network operator when their
27 subscriber so requests. Number portability provides competition and helps open up the market
28 further by allowing subscribers to move their number from one network operator to another
29 network operator.

30 If I may, I will give a very simple example. As a customer, as a subscriber, I may
31 have my home telephone number with, for example, BT. Then a local cable company offers
32 me service and I decide to move my home telephone service to that local cable company. Both
33 BT and the cable company are network operators. One thing that deters me is I might lose my
34 telephone number, therefore portability enables me to move seamlessly to myself, my friends,
35 my colleagues, anyone who wants to phone me. That was the essence behind portability

1 – network operator to network operator.

2 When number portability Condition 34B was introduced, it was never envisaged it
3 would apply to secondary, tertiary, intermediary or any other level of telecommunications’
4 company or companies. It was designed to ensure portability between network operator and
5 network operator. If the Condition had intended movement between other levels of
6 telecommunications companies within the industry then surely it would have taken account of
7 this. This is because other levels of telecommunications’ operators were already in existence
8 at that time, and had been for a number of years. If Oftel had wanted portability to flow down
9 to other level operators it would have enforced this. But, between 1991, when the condition
10 was introduced, and 2003 when the new Communications Act came into force, no other level
11 of portability was required. It was only enforced upon network operators as the condition had
12 intended and was envisaged. This worked well. If I may, I refer to pages 15, 16 and 17 of
13 MMPs bundle, and Mr. David Redmile’s witness statement – Mr. Redmile being the former
14 chairman of Telephone International Media. Mr. Redmile makes this very clear. He also adds
15 his own opinion on the matter from his personal experience, of course. The picture that
16 Mr. Redmile paints is reality.

17 If I may, some more examples. I have a mobile phone, this is with a network
18 operator. I am the subscriber to that network operator. I have my O7 telephone number.
19 I lend my mobile phone to a friend for the day, the friend gives it back to me, they do not keep
20 the number, I am the subscriber. There are a number of telecommunications’ companies that
21 assist people travelling abroad who may not have a mobile handset that might operate in the
22 country or countries that they are travelling to. They lend or rent that mobile phone handset
23 with a number to that individual for a week, two weeks, however long it is required. When
24 that person returns they hand back the handset and the number. They do not take the number
25 with them.

26 Another example might be a serviced office suite. One might rent some
27 accommodation in a serviced office suite and there may be some telephone services associated
28 with that. At the end of one week, one year, a ten year period that organisation moves out; the
29 telephone numbers remain with the subscriber to the network operator in the serviced office
30 suite. Those are not three examples in the past. Those are there examples today. They are
31 reality.

32 So that is the background as to how number portability came about and, as I say, the
33 reality of how it still works effectively today. It was intended solely to be a tool to allow direct
34 subscribers to network operators the ability to move freely their numbers between network
35 operator and network operator, and therefore open up the market further. It worked well. It

1 made the market competitive. It was widely accepted throughout the industry as being fair,
2 practical, and reasonable. In fact, one might argue that number portability was one of the
3 driving forces behind many of the new intermediary telephone providers and companies
4 entering the market and being so successful as it allowed them, being the subscriber, to switch
5 freely between network operator and network operator which might, as one effect, drive down
6 prices. It would also flow a number of other benefits through to their end customers.

7 Unfortunately, what Ofcom is effectively doing is removing that competitive ability
8 from such intermediary companies. Ofcom is acting anti-competitively by taking away
9 something that has been and should continue to be enjoyed by intermediary companies. Prices
10 are, of course, a commercial matter and not a regulatory one – as I know well from my
11 previous regulatory experience. With respect to members of the Panel I fear Ofcom does, on
12 occasions, lose site of this fact, particularly in their documentation. It is in the market to see
13 fair play and a level playing field on regulatory matters. It is to ensure consumer choice. It is
14 not empowered to determine what commercial rates a non-geographic number company can or
15 cannot charge, which is what it is effectively now doing by entering into the commercial turf
16 war between MMP and Prime Time Radio.

17 A bit of background, if I may, about MMP. It is effectively an intermediary
18 telecommunications' company. It provides advice, guidance and offers clients the right
19 package for them in an ever complex market. MMP has never claimed to be the cheapest – we
20 do not stack them high and we do not sell them cheap. But, the service we provide at the end
21 of the day is extremely good, plus we bring experience and knowledge to the party. MMP
22 does not own any network. MMP does not own any servers. It does not own any call handling
23 equipment. MMP does not own its own switches or exchanges. MMP does not interface or
24 remotely access any telephone network at any time. We do not route calls. We do not have
25 the ability even to route calls, translate terminate or whatever. MMP is a standalone product.
26 This is distinctly different to several other intermediary companies and unlike the vast majority
27 of telecommunications' companies in the UK.

28 Those that are being cited by Ofcom in their bundle in the commercial material
29 sections (p.325, s.14 – s.20) in essence these companies provide the same end result to their
30 clients, however, there is one fundamental difference. They have their own switches. They
31 have the ability to route calls themselves and some of them have their own networks.
32 Unfortunately one of the examples does not even relate to 0870 telephone numbers, it provides
33 mobile and internet services, but then that is another matter and we are not here to discuss
34 those today.

1 The first example provided is “Spitfire” (p.325). In a telephone conversation with
2 Spitfire on Monday of this week they described to me how they have their own network. In
3 addition, despite having their own network, Spitfire advises that if a customer of theirs moves
4 – and I quote – “the number remains the property of Spitfire. If the customer wishes to change
5 service provider they cannot take the number with them.” That information I have to say
6 arrived with me last night at 8 minutes past 5 in the evening.

7 THE CHAIRMAN: I am not sure how much we can take that information into account.

8 MR. MILLARD: I do appreciate, ma’am, but I think ----

9 THE CHAIRMAN: Is it clear from p.325 at all that that is the position?

10 MR. MILLARD: Spitfire was mentioned and was cited in the second case management study as
11 being a company that has managed to circumvent the legislation, to get round it, to circumvent
12 the rules. I would need to refer to the ----

13 MR. WARD: That is not why it was relied upon.

14 MR. MILLARD: I would need to refer back to the transcript of that, but from recollection it was
15 provided because it was a company that was available on the web and was able to operate
16 effectively within the legislation as Spitfire is advising customers cannot take their number
17 with them. That, I do believe, clearly shows there is confusion or the legislation is unclear,
18 because certainly Spitfire believe that they can keep the numbers, and whilst they are
19 a company providing network services, unlike MMP, the end result effectively is the same.

20 A little about Prime Time Radio, if I may. In 2000 Prime Time Radio contacted
21 MMP to see whether MMP had any suitable 0870 telephone numbers that Prime Time Radio
22 might wish to use in various on and off-air promotions. Prime Time Radio was a new DAB
23 (digital audio broadcasting) radio station without any broadcast track record. It was likely that
24 the total number of calls made to any of the numbers promoted by Prime Time Radio to the
25 public would not be significant at that time due to the limited size of the audience Prime Time
26 Radio would enjoy in its infancy.

27 MMP had a range of 0870 numbers it could offer. It also had agreements with
28 various network operators whereby MMP could obtain additional 0870 numbers from those
29 operators at relatively short notice. MMP had a reputation with the industry of providing first
30 class advice on telecommunications’ services particularly to broadcasting organisations. It was
31 both the advice and suitable telephone numbers Prime Time Radio was after. It should not,
32 members of the Panel, be underestimated that Prime Time Radio had a choice. It could work
33 with other companies within the industry, other intermediaries, it could work with network
34 operator or it could work with MMP. It chose to work with MMP for three main reasons.
35 First, the reputation that MMP had in its first rate track record in supplying the broadcast

1 industry. Secondly, the advice MMP could give and its understanding of the demands
2 required by broadcast clients; and thirdly – and perhaps most importantly – the highly valuable
3 and memorable telephone numbers MMP had which included, amongst others, 08700 50 50
4 50. MMP was the subscriber to the network operator for all three of the disputed numbers.
5 Prime Time Radio was unable to obtain or use the disputed numbers without working with
6 MMP. Prime Time Radio wanted to use those numbers and therefore had to work with MMP;
7 that was because MMP had ascertained the value of such numbers, particularly 08700 50 50
8 50, and had secured their use as the subscriber to the network operator. Prime Time Radio was
9 well aware that if it terminated its agreement with MMP at a date in the future it would not be
10 able to retain the use of the disputed numbers. The reasoning behind this, and examples were
11 given by MMP at the first case management conference in November 2005. Agreement was
12 reached for MMP to arrange the network builds. In this instance the network build was
13 actually undertaken by the relevant network operator, “Thus PLC”. This was made clear at the
14 time to both Prime Time Radio and requested of Thus. This can be proven by reference to the
15 contract to MMP and Thus already supplied.

16 Ma’am and members of the Panel if I might digress one moment, in the
17 correspondence received from Ofcom yesterday they were asking for the additional
18 supplementary material to accompany the contract.

19 THE CHAIRMAN: That is the contract with Thus?

20 MR. MILLARD: That is correct, ma’am.

21 THE CHAIRMAN: Are you dealing with the contract with Thus or the contract with Prime Time?

22 MR. MILLARD: With respect, ma’am, I am dealing with MMP’s contract with Thus.

23 THE CHAIRMAN: Right.

24 MR. MILLARD: That additional material has been supplied to the defendant. I only received that
25 request yesterday evening and it was supplied about three quarters of an hour ago and copies to
26 each of you.

27 THE CHAIRMAN: That is the annex to the contract ----

28 MR. MILLARD: That is correct.

29 THE CHAIRMAN: Shall we look at the contract with Thus? Shall we have that open before us?

30 MR. MILLARD: We may do, ma’am, it may be useful. I am actually surprised at Ofcom’s request
31 for this additional material because on the front page of the agreement between MMP and Thus
32 it makes it very clear what that information is. That is standard throughout the industry. It
33 refers to the self-billing for VAT purposes, it refers to service levels. It is fairly standard
34 within the industry and has no material effect on what is actually delivered in the contract. It is
35 just addendum agreeing as to how efficient they are going to operate.

1 THE CHAIRMAN: Just so that I understand. In the contract there are standards of service and
2 standards of installation version B5, and then there is the special conditions noted annex to
3 contract conditions re value added tax.

4 MR. MILLARD: Yes.

5 THE CHAIRMAN: And the call control services. Now, what you have provided this morning is
6 which of those?

7 MR. MILLARD: Well this is all the material that I have, ma'am. It is the annex to the contract
8 conditions re value added tax.

9 THE CHAIRMAN: Yes.

10 MR. MILLARD: It is the special conditions for call control and premium rate services. It is the
11 standards of service and standards of installation.

12 THE CHAIRMAN: Hold on, the special conditions of service, so that is that one. So you have
13 provided both of the number four on the contract. It is only that I have not looked at this
14 before, so I just want to make sure, and the standards of service and standards of
15 installation ----

16 MR. MILLARD: Which is their point 3.

17 THE CHAIRMAN: Which is 3.

18 MR. MILLARD: Those are fairly standard documents which simply confirm from Thus, and
19 between MMP and Thus issues like value added tax, registration, payment issues, there's
20 fraud, there's custom and excise billing, payment terms, the standards of service that Thus will
21 provide.

22 THE CHAIRMAN: You do not understand why they have asked for those and you think they would
23 have known about them anyway.

24 MR. MILLARD: I certainly do.

25 THE CHAIRMAN: So wait until we hear as to why they asked for them, if they make some point,
26 and then you will be able to come back.

27 MR. MILLARD: I appreciate ma'am, but they are supplied.

28 THE CHAIRMAN: Yes.

29 MR. MILLARD: As I was saying, arrangement was reached for MMP to arrange the network build
30 and in this instance ----

31 THE CHAIRMAN: You say that the Thus contract says that. Can you just explain why you say
32 that?

33 MR. MILLARD: Certainly ma'am. The Thus contract is one of what they call standard call control
34 service agreements. I have to say it is perhaps in this particular case not that helpful because it
35 is one of their standard forms where they just fill in certain boxes or tick certain boxes. But on

1 the front page it talks about a description of the service, and this is the service that Thus is
2 providing, it has the selected – this is just one of the contracts, there are three and they are all
3 identical, the selected number of areas 08700 50 50 50 and the translated number, into which it
4 is translated is 0207 828 1954, that is a Prime Time Radio number. I hope in a couple of
5 minutes when I show a diagram **here** it will become clear exactly what this is meaning, and
6 what it is showing. If not at that time I would be very happy to come back to it, ma'am, if that
7 is all right.

8 THE CHAIRMAN: Yes.

9 MR. MILLARD: Thank you very much. It is perfectly possible for intermediaries such as MMP to
10 both handle calls, either through its own switches (effectively exchanges) or own call handling
11 equipment commonly servers; or to do the physical build of the network itself as those
12 companies that do are cited by Ofcom in the commercial market. However in this instance this
13 was not the case. The network build was undertaken by the network operator and all resulting
14 calls routed automatically by the network operator. To clarify matters this is where I would
15 like to refer to some charts if I may? I do have hard copies of these if that would be useful?

16 THE CHAIRMAN: I think it would, probably. [Document handed to the Tribunal and Mr. Ward]

17 MR. MILLARD: The first one shows very clearly how it is possible for intermediaries to route calls.
18 This is not how MMP operates but how it can operate. **Here**, on the right hand side is
19 a telephone symbol – that is the common telecoms' symbol for somebody picking up a
20 telephone handset and making or receiving a call. The call comes into the network operator. If
21 the calls route through the intermediary it comes down, and the intermediary decides what to
22 do with that call and where it should go. In this case it sends it off to their client over **there**.
23 They could have a range of other clients but in this case they choose to send it to **there**. It may
24 be that they have their own call handling equipment, it may be that they have their own
25 switches. Effectively they are a mini-network operator.

26 The other alternative is that that intermediary may interact with the main network
27 operator system and that is the dotted orange line **here**, and they can effectively connect **here**
28 and tell this piece of equipment where to send calls. In this instance they said all the calls that
29 come in we now want them to go direct down **here**. So there are two options. The call comes
30 into the network and it can either go through the intermediary in some shape or form for which
31 there could be several patterns and paths, and directly down; or they can interact and it can be
32 sent that way.

33 THE CHAIRMAN: But that is not you?

34 MR. MILLARD: But that is not me. What actually happens in this instance, and this is the next
35 sheet and the next handout. [Document handed to the Tribunal and Mr. Ward] There was the

1 caller dialling 08700 50 50 50. The call went to Thus PLC and it went straight from Thus to
2 Prime Time Radio. The contract makes that very clear. 08700 50 50 50, they will route it on
3 to 0207 828 1954, that was at that time Prime Time Radio's termination number. At no stage
4 was MMP a part of that call. The call neither went through MMP, nor did MMP interact with
5 any of Thus's equipment or anywhere else on the network to route that call. The call went
6 direct.

7 The agreement between MMP and Prime Time Radio also clearly stated that the
8 numbers were being rented by Prime Time Radio. There was a rental fee which was invoiced
9 by MMP, Prime Time Radio paid such invoices accordingly.

10 THE CHAIRMAN: Are you moving away now from the Thus agreement?

11 MR. MILLARD: Yes, but I will happily go back to it, ma'am, if you would like.

12 THE CHAIRMAN: One of the questions in our mind is clause 6 of the standard terms at the back of
13 it.

14 MR. MILLARD: Certainly that is common with all telephone companies, all network operators and
15 even would be a network operator contract under licence from Ofcom. It is purely so that if
16 there is a complete change in the national numbering plan those numbers can be given back,
17 and we have been through several national numbering plan changes in recent years. On the
18 conventional public switch telephone network service, for example, here in London it used to
19 be 01, then we had for inner London and outer London 071 and 081, then we had 0171, 0181,
20 and now we have 0207 and 0208. So the whole point about that particular clause there is that
21 it is standard in every single agreement with a network operator to an intermediary or indeed
22 effectively Ofcom giving the numbers, it is part of the licence.

23 THE CHAIRMAN: Can we just go back to what it says in 6?

24 "The customer shall not acquire in title or interest in any telephone numbers allocated
25 by the company and shall not be entitled to sell or transfer such numbers without the
26 company's prior consent."

27 MR. MILLARD: That is correct, ma'am.

28 THE CHAIRMAN: So it is saying that you cannot sell it or transfer it to a third party?

29 MR. MILLARD: Without their permission?

30 THE CHAIRMAN: Yes.

31 MR. MILLARD: But that can be done, and has been done in the past as cited at previous case
32 management conference and, in fact, I think I am correct in saying in the bundle of papers with
33 Mr. Redmile's witness statement where he mentions two particular companies where numbers
34 were actually sold on, and the permission of the network operator would have been acquired in
35 that particular case.

1 THE CHAIRMAN: Right. Would Thus have known that the translated number was the number of
2 PTR?

3 MR. MILLARD: Yes, and that was made clear to them at that time. They knew that that is what
4 was being purchased effectively.

5 THE CHAIRMAN: So they knew that you were supplying the selected number to PTR?

6 MR. MILLARD: The selected number being 08700 50 50 50?

7 THE CHAIRMAN: Yes.

8 MR. MILLARD: That is correct.

9 THE CHAIRMAN: -- to PTR, because the translated number is a PTR number?

10 MR. MILLARD: Correct.

11 THE CHAIRMAN: And they are therefore agreeing to provide this service – whatever that is – to
12 that translated number?

13 MR. MILLARD: That is correct.

14 THE CHAIRMAN: And they are not agreeing under para.6 to provide it to anybody else without
15 their consent?

16 MR. MILLARD: Correct, and that is standard. If I may ma'am, with respect, point out clause 13,
17 the jurisdiction, that it is a Scottish contract in conformity with Scots' law.

18 THE CHAIRMAN: Yes, well I do not know if the law of Scotland would be any different to the law
19 of England in relation to this, but I think for this purpose we will assume it is all the same.

20 MR. MILLARD: If I may continue? I was mentioning how Prime Time Radio rented the numbers,
21 and that is very clear in the agreement and agreements. Rental of the disputed numbers was
22 invoiced up to 4th April 2005, the final date of rental, and this was made clear to PTR. PTR
23 paid this final invoice and on this basis. Prime Time Radio requested MMP to port the
24 disputed numbers. MMP refused as Prime Time Radio was not the subscriber. It was simply
25 renting the disputed numbers from MMP. MMP was the subscriber to the network operator.

26 I will now move on, if I may, to non-geographic numbers generally. Non-geographic
27 numbers, by their very definition, are not tied to any specific location. They include, amongst
28 others, Freephone, local and national call and premium rates. Calls made to non-geographic
29 numbers only use part of the conventional telephone network. Invariably the call originates
30 from a landline or a mobile number, and it is routed by the operator to the non-geographic call
31 handling platform of that operator. Again, if I may, I have the diagram to show this.

32 The caller is **here** at point A, we do not know who their network operator is but for
33 argument's sake I am calling it BT. They dial a non-geographic number. That call goes into
34 the non-geographic platform of the network operator concerned – I am saying “point B”. It

1 will then be looked at by that network operator and decided where it is due to terminate and be
2 transported to the network operator's non-geographic platform for termination – in this case
3 I am calling it "Thus". Then they will send that on through to Prime Time Radio or who ever.
4 In this diagram for clarity MMP is here at the side. MMP is not part of that call under any
5 circumstances. Either way the call **here** will eventually arrive at the end of the non-geographic
6 call handling platform run by the end network operator and, as I say, it will be terminated to
7 the relevant point.

8 THE CHAIRMAN: You have put MMP on the left there, should it not be at the bottom.

9 MR. MILLARD: MMP could be down **here**, it could be anywhere, but it is not a part of this chain.

10 THE CHAIRMAN: But where you say it has any involvement in the circumstances is that it has
11 some contractual relationship with PTR at the bottom?

12 MR. MILLARD: Apologies, ma'am, one could.

13 THE CHAIRMAN: It has no contractual relationship otherwise? No.

14 MR. MILLARD: One could do that. I am sorry, this is not meant to show the contractual
15 relationships, this is meant to show the way that non-geographic calls are routed but, yes, there
16 could be a line from MMP to PTR because MMP rents the numbers to PTR.

17 As an example, the BT non-geographic platform, or number translation platform is
18 called "Horizon". Other network operators have similar platforms to BT's Horizon. However,
19 irrespective of the network operator the procedure is the same. It is important to remember
20 that it is exactly the same for every non-geographic call, whether it be Freephone, local,
21 national call, or premium rate – they are all non-geographic numbers. The only difference,
22 effectively, is in the charging structure. With Freephone being just that – free to call, local
23 being the cost of a local call, national being that of a flat rate anywhere in the country, and
24 premium rate being at a premium, although ironically in this day and age some premium rate
25 services may be cheaper than a national call in some circumstances. There is no technical
26 difference. Therefore, as the role of Ofcom is to ensure a level playing field, and to further the
27 interests of consumers in relevant markets where appropriate by furthering competition there
28 should be no difference, in my view, in the way they regulate non-geographic services,
29 whether they are Freephone, local, national or premium rates.

30 Four new EC Communication Directives entered into force from 24th April 2002,
31 requiring the repeal of the then current licensing regime for telecommunications in the UK.
32 The implementation date for the new regime was to be 25th July 2003, and it was the 2003
33 Telecommunications Act. Of course, as we now know part of that Act consists of various
34 sections and conditions. Condition 18, which relates to number portability. The notification
35 served on MMP by Ofcom on 26th August 2005 required MMP to port the disputed numbers

1 under General Conditions 18.1 and 18.2 of the Act. Throughout its Defence Ofcom has relied
2 heavily upon the argument that MMP is a communications' provider.

3 THE CHAIRMAN: Should we have General Conditions 18.1 and 18.2 open before us? Would that
4 be helpful?

5 MR. MILLARD: That may well be, ma'am. As I was saying, ma'am, throughout its Defence
6 Ofcom has relied heavily upon the argument that MMP is a communications provider. MMP
7 disputes this. A communications provider is defined in general condition 18.5 as:

8 "A person who provides an electronic communications network or an electronic
9 communications' service."

10 It is accepted by all parties that MMP did not provide an electronic communications network.
11 However, MMP also contends that it did not provide an electronic communications service.
12 The definition of an electronic communications service is: "A service consisting in or having
13 as its ----

14 THE CHAIRMAN: Where are you reading from?

15 MR. WARD: Page 446.

16 MR. MILLARD: Thank you, ma'am, I am obliged.

17 THE CHAIRMAN: I like to mark my documents as I go through so you have to stop and let me
18 mark them, all right?

19 MR. MILLARD: I will pause more frequently.

20 "... any service consisting in or having as its principal feature, the conveyance by
21 means of an Electronic Communications Network."

22 MMP did not convey the calls. MMP did not route the calls. MMP did not translate the calls.
23 The service, the routing, the translation and the conveyance of the calls was provided by Thus
24 PLC, the network operator in this instance. I refer back to the second diagram. MMP is
25 therefore not a communications provider, therefore the duty to port the disputed numbers did
26 not arise.

27 On 3rd November 2005 Ofcom consulted the industry on number portability and
28 technology neutrality. Part of the papers of this consultation are in MMP's bundle, pages
29 50-53 inclusive.

30 THE CHAIRMAN: Yes, I will just get the document.

31 MR. MILLARD: I apologise, ma'am, and members of the Panel but some previous pages of the said
32 document ----

33 THE CHAIRMAN: Just let me get the document first. What pages are you referring to?

34 MR. MILLARD: 50 to 53, they are sample pages from the Ofcom Number Portability and
35 Technology Neutrality on 3rd November 2005. As I was saying, ma'am, and members of the

1 Panel, I apologise but some previous pages which are part of that document, and in hindsight
2 contain some pertinent substance in this matter, were omitted from that particular bundle.

3 THE CHAIRMAN: So you are providing them now?

4 MR. MILLARD: Although they are part of the same document and I am able to provide them now
5 – in fact, there is one page plus the cover sheet. [Documents handed to the Tribunal and
6 Mr. Ward]

7 THE CHAIRMAN: Can we call these so we know where they are? If we call them 48, because 49
8 is on our reverse the way that it has been done, so I think it is 48A and 48C.

9 MR. MILLARD: Certainly, ma'am.

10 THE CHAIRMAN: Yes, go on.

11 MR. MILLARD: The purpose of this document is to consult the industry on some clear shortfalls
12 within Ofcom's number portability conditions. The document contains a number of proposals.
13 Responses have been received by Ofcom. A number of these refer to "inconsistency" within
14 the number portability conditions. However, so far I believe no formal reply has been posted
15 by Ofcom. This is therefore still a grey area. However the document does refer to the number
16 portability of non-geographic numbers – p.5, para.2

17 THE CHAIRMAN: When you say p.5.

18 MR. MILLARD: Sorry, p.5 of the document, 2.15 which is one of the pages, I think it is 48C I have
19 now just produced.

20 THE CHAIRMAN: So which paragraph?

21 MR. MILLARD: 2.15. In this it makes it clear that for non-geographic numbers at any location
22 number portability is defined as being a facility whereby subscribers who so request can retain
23 their telephone number on a public telephone network independently of the person providing
24 the service at the network termination point of a subscriber.

25 Turning to two important questions: is Prime Time Radio a subscriber? Is MMP
26 a subscriber? I am afraid we are going to jump around some papers again here, ma'am.

27 THE CHAIRMAN: Let me just get this so we do not lose these pages.

28 MR. MILLARD: We are going back to general conditions – 18. A subscriber is defined in General
29 Condition 18.5(o) as:

30 "Any person who is party to a contract with a provider of publicly available telephone services
31 for the supply of such services in the UK."

32 If I may I will call publicly available telephone services "PATS" from now on. PATS is
33 defined in General Condition 18.5(l) as:

1 “A service made available to the public for originating and receiving or only receiving
2 national and international telephone calls through a number of numbers in a national
3 or international telephone numbering plan.”

4 As was highlighted by the Panel at the last case management conference, the definition of
5 PATS appears to differ in this Condition than elsewhere within the Act. Ma’am, and members
6 of the Panel, I hope I am being helpful here if I may assist in clarifying this matter. I would
7 refer to the Defendant’s bundle of supplementary documents, p.261. The papers relate to
8 a consultation with operators. It is important to note that this is not consultation with
9 telecommunications intermediaries, third parties, resellers, etc., but purely network operators.
10 “Condition 18: Number Portability” ----

11 MR. WARD: I am sorry, I have to interrupt. That is not in fact correct, there was a general
12 consultation.

13 MR. MILLARD: Ma’am, with respect it refers to “Operators’ responses”.

14 THE CHAIRMAN: Where is that?

15 MR. MILLARD: Page 261, para.3.137 “Responses”. “The Operators’ Group”.

16 THE CHAIRMAN: But that does not mean that the consultation was only to the Operators’ Group,
17 they are just referring to those responses.

18 MR. MILLARD: It would appear, ma’am, that only operators responded to this.

19 THE CHAIRMAN: That does not mean it was not out for consultation generally.

20 MR. MILLARD: I am not sure about that, ma’am, but it is interesting that only operators did.

21 MR. WARD: The document was published on the internet and it was open to anyone who wished to
22 respond to do so.

23 MR. MILLARD: “Condition 18: Number Portability” is being considered. Paragraph 3.139 on the
24 same page shows the concerns the network operators had with the differences in the definition
25 of “PATS” and “Subscriber” between Condition 18 and that in the General Definitions section.
26 Whilst I appreciate the comments Mr. Ward may have said, ma’am, and members of the Panel
27 I am simply pointing this out to be helpful, to show where the discrepancies in the Act lie.

28 If you then turn the page to p.262, para.3.144, this actually clarifies matters – the
29 addition of the ‘or receiving’ part of PATS, which is what was being questioned at the last case
30 management conference, relates in this Condition to non-geographic numbers, and refers back
31 to the Universal Services Directive. I believe though that the latter was written with network
32 operators in mind and, as such this definition should therefore be considered. It was not
33 written with intermediaries, such as MMP, in mind. This has been considered by the network
34 operators group in their responses. Further, the paragraph continues that this Condition – the
35 definition of ‘subscriber’ “...need only be concerned with Publicly Available Telephone

1 Services, not electronic communications services.” Therefore, Ofcom’s argument that MMP
2 provided an electronic communications service and is therefore a communications provider
3 (their notification dated 26th August, p.11, para.34) is wholly irrelevant in the context of
4 Condition 18. It is only relevant if MMP provides PATS.

5 MMP considers that PATS was drafted with a public service obligation in mind and,
6 as such, does not apply to MMP. MMP does not make services available to the public whereas
7 Thus PLC does. In its Defence Ofcom cites a definition of “publicly available service”
8 although there neither appears to be the definition in this term in the strictest senses or in the
9 Condition, nor does there appear to be the definition of ‘public’ as being distinguishable from
10 a bespoke service restricted to a limited group of individuals or identifiable customers. MMP
11 contends that the contract it had with Prime Time Radio made it clear that Prime Time Radio
12 was renting the disputed numbers from MMP. MMP’s client, Prime Time Radio, is therefore
13 a distinguishable, or identifiable customer. It was Prime Time Radio’s choice to make the
14 disputed numbers available to the public and it was Thus PLC that provided the publicly
15 available service through which members of the public contacted Prime Time Radio. MMP
16 was not part of any call chain. MMP did not promote the disputed numbers to the public
17 – Prime Time Radio did.

18 In May 2003 Oftel issued guidelines for the interconnection of public electronic
19 communication networks, and I am grateful to Ofcom for providing this in their supplementary
20 bundle. Page 45 asks the question: “Do stakeholders ...”

21 THE CHAIRMAN: Which question? Question 4 or question 5?

22 MR. MILLARD: Sorry, question 5, ma’am. This relates to networks. So it is asking the question:
23 “Do stakeholders...” i.e. network operators in this instance, “... agree with the guidelines’
24 understanding of what constitutes a publicly available service?” Answer 16 network operators
25 responding advised that most responses agreed that asked the question how will Oftel decide
26 whether the principal feature was the conveyance or the content? The Group argued that the
27 principal feature test would be the determining factor as to whether a given service would be
28 regulated under the Communications Act or the Electronic Commerce Regulations, as there
29 was also a discussion about content.

30 In answer, Oftel believes this to be partially true, and goes on to mention that there
31 could be content services which are not information society services. However, the crucial
32 point here is that Oftel accepts that to be considered under the Communications Act the
33 principal feature has to be the conveyance. So, what Ofcom is saying is that the principal
34 feature of PATS is the conveyance. It is very clear, MMP does not convey. Again, I will refer
35 to the second diagram. Thus PLC conveys, therefore MMP does not provide a PATS. As

1 confirmed by Ofcom, Prime Time Radio does not have a contractual relationship with Thus. It
2 is in their notification, p.11, para.33, whereas MMP does. Therefore, MMP is the subscriber
3 and Prime Time Radio is not. As a subscriber, MMP was entitled to port the disputed numbers
4 from Thus PLC. Ofcom has, by its notification Decision, deprived MMP of the right to the
5 disputed numbers that the legislation intended. If, as Ofcom contends but MMP does not
6 accept, Prime Time Radio is a subscriber too then Ofcom has defeated the purpose of the
7 legislation by deciding, where two subscribers each has the right to port, which should be
8 entitled to do so. Let me ask Ofcom, if I may, ma'am, through the Chair, for the sake of
9 argument where two people have the right to port, where do you look to? What do you look
10 to? Show me in the legislation where it says if they port first I lose my rights. But for Ofcom
11 to interpret in this way I believe is acting unfairly and one could argue acting unlawfully.
12 Ofcom cannot simply exercise its discretion. It does not have such statutory authority or
13 powers to do so. It is pulled in two different directions by what is clearly poorly worded, ill
14 thought out legislation.

15 In my consideration as to whether or not I should withdraw this Appeal it came to
16 light from someone who is described as a "telecommunications expert" that in fact this is still
17 a grey area. If I may I will read to you an email that I have received from this
18 telecommunications expert.

19 THE CHAIRMAN: I am not sure that is very helpful. If he has a point you can make it as
20 a submission.

21 MR. MILLARD: I will read the salient points, ma'am, to make it as a submission if I may? The
22 industry group on rights of use of which this person was the Chair independently in 1999/2000
23 recognised that although porting rights should, as default, go to the end user there were
24 circumstances in which they should properly belong to the service provider, the intermediary
25 in this case, MMP. This person suggested to me that it was considered by this Rights of Use
26 Group how to define the circumstances, and the best solution that could be come up with was
27 that porting rights should be clearly set out in the contract between the service provide and the
28 end user. This proposal was to be consulted upon. But, because of the Communications Act
29 and the setting up of Ofcom it is this person's view that the issue has not yet been revisited.
30 I am advised that they have made contact with someone within Ofcom who has confirmed that
31 to them.

32 "Ofcom does ...", this person says, "... still plan to consult on rights of use..."
33 presumably including this particular issue, "...once the new framework for charging for
34 numbers has been established following this week's numbering consultations." So it is after the
35 current consultations. This person continues: "Looking at the service contracts still seems to

1 be me to be the likely part of any resolution on this issue, even if it is not the whole answer and
2 if contracts are to determine or effect where porting rights lie, then in my view it would seem
3 only fair to provide a period of grace during which all service providers would have the
4 opportunity to clarify their existing contracts in this regard.” I refer back to Spitfire earlier.
5 “Equally, the end users would have the opportunity to change to another provider without
6 penalty if they did not like the clarified terms, or to negotiate a mutually acceptable
7 settlement.” I have that here and I have copies if that would be useful.

8 There is clear conflict as outlined and again as recommended, and in good business
9 practice there should be a voluntary agreement between the parties. There is always the ability
10 to terminate the contract. There is always the ability to come to agreed commercial terms, and
11 this is where Ofcom has involved itself in a commercial turf war where that was going on.

12 Back to non-geographic numbers, if I may. I think it might be useful to digress for
13 a moment and take a step back, so to speak, to consider really what a non-geographic
14 telephone number is. As outlined in the first case management conference in November of last
15 year, and accepted by all parties, a non-geographic telephone number is one that is not
16 regionally based, or not specific to a particular location. This is in stark contrast to geographic
17 numbers, such as for example, 0207 and 0208 that are specific to the inner and outer London
18 areas respectively.

19 As has been said, non-geographic numbers come in all shapes and forms, however the
20 most well known are freephone, usually 0800, local – usually 0845, national call – usually
21 0879 (as in this case) , and premium rate services usually 090. There is absolutely no
22 difference in the technical aspects of any of these services. The difference is in the charging.
23 All of these services have the same call routing procedures behind them as described earlier.
24 They are all transported around the telephone networks in the country broadly in the same way
25 as each other, again as described earlier. Calls made to such numbers have the ability to
26 terminate anywhere in the UK, and calls to such numbers may be routed to virtually any
27 terminating point, telephone handset or computer server. The only restriction on where a call
28 to such numbers may or may not terminate will be on commercial terms. Technically there is
29 no difference. So might I respectfully suggest that there are two important points for CAT to
30 consider here: (1) how the calls made to the disputed numbers terminated at Prime Time
31 Radio’s offices? (2) whether Ofcom should discriminate, as it appears to do, between MMP’s
32 non-geographic numbers (the disputed numbers) and any other non-geographic number or
33 numbers, including premium rate.

34 How did calls terminate at Prime Time Radio? To terminate a call one needs to have
35 a telephone number and, in the contract that was referred to earlier, in this instance it is 020

1 7828 1954, but you do not necessarily need a telephone handset. The number needs to reside
2 on suitable equipment. Usually the terminating number is a conventional telephone number, or
3 a PSTN (Public Switched Telephone Network) number. In the case of the disputed numbers
4 Prime Time Radio provided details of their PSTN in each of the three instances. The PSTN
5 numbers were not those of MMP, they were of Prime Time Radio's network operator –
6 whoever that may have been. It was Thus PLC who programmed into their computer servers,
7 in their managed services network platform the routing of the calls and hence calls made to the
8 disputed numbers went from the originating network operator to Thus, and from Thus within
9 their network to Prime Time Radio's network operator. At no time was MMP conveying the
10 calls.

11 The second point is that there was no technical difference between any non-
12 geographic number, all such calls, whether they are of one of the four I have described earlier,
13 are routed by the network operators to the terminating network operators' PSTN numbers via
14 the platforms owned by the networks. These are often referred to as the number translation
15 platform. On this basis one might suppose that if, as Ofcom contends, the disputed numbers
16 were covered by the general conditions then one could fairly and reasonably assume, premium
17 rate should also be covered by the General Conditions. After all, if not, then Ofcom is not
18 offering a level playing field. Is Ofcom acting anti-competitively to one or either for
19 non-geographic banding of numbers? Surely there should be a level playing field for all
20 non-geographic numbers.

21 Again, I refer to the supplementary bundle, p.141.

22 THE CHAIRMAN: Behind divider 6?

23 MR. MILLARD: Correct, ma'am. Paragraph 1.27:

24 "In implementing the new regulatory framework, the Government concluded that
25 PRS were excluded from the definition of electronic communications services within
26 the meaning of the Directives..."

27 And then:

28 "... as they are not a service consisting in, or having as its principal feature, the
29 conveyance of signals. For this reason, the provision of PRS cannot be directly
30 regulated by way of the general conditions – general conditions can only apply to
31 persons providing an electronic communications network or service."

32 Therefore, if the principal feature of premium rate is not the conveyance of calls, surely this is
33 the same for all non-geographic services, including the disputed numbers which operates on
34 exactly the same system and the same principle. Again, this highlights huge inconsistencies in
35 the legislation. There are, of course, some premium rate numbers used for information

1 services. One could, at a stretch, argue that the principal feature of such services was the
2 content, or the information, and that the conveyance might be secondary, although I would
3 contend that without the conveyance the service would not be available at all. However, there
4 are many premium rate services where there is no information (or very little) and the principal
5 feature must, therefore, be the conveyance – live chat services is one example, computer
6 support line services and directory inquiry services are others. Whenever two people chat or
7 talk to each other the service is not an information service; there are no technical differences.
8 Therefore, how come Ofcom segregate between premium rate on one side and the disputed
9 numbers on the other. Surely, one rule should fit all if we are to see fair play and fair
10 competition.

11 THE CHAIRMAN: What is the definition of “premium rate”?

12 MR. MILLARD: I will have to pause for a moment, ma’am. I was rather assuming we all knew ----

13 THE CHAIRMAN: Well if we look at p.136: “What are Premium Rate Services”.

14 MR. WARD: The statutory definition is at p.121, behind tab 4.

15 THE CHAIRMAN: Subsections (7) and (8).

16 MR. MILLARD: I think, ma’am, it may be useful, with respect to Mr. Ward, the page you referred
17 to, 136, is contained within the Ofcom bundle “Conditions Regulating Premium Rate Services”,
18 and it does describe what premium rate services are. They are “commonly containing
19 information or entertainment”. “PRS typically vary in cost from 10 pence per call to £1.50
20 per minute. The money paid for the telephone call is shared between the telephone companies
21 carrying the service and the organisation responsible for the content, product or service.”

22 THE CHAIRMAN: So what they are providing is not a service in which you have a voice?

23 MR. MILLARD: You can do. Not all premium rate services are content services.

24 THE CHAIRMAN: That is why I think we ought to look at the definition. If one looks at s.120,
25 which is the section that was being referred to.

26 “(8) A service falls within this subsection if its provision consists in –

27 (a) the provision of the contents of communications transmitted by means of
28 an electronic communications network; or

29 (b) allowing the user of an electronic communications service to make use,
30 by the making of a transmission by means of that service, of a facility
31 made available to the users of the electronic communications service.”

32 MR. WARD: “Facility” is defined in subsection 14 over the page.

33 THE CHAIRMAN: Yes.

34 “References in this section to a facility include, in particular, references to –

35 (a) a facility for making a payment for goods or services;

1 (b) a facility for entering a competition or claiming a prize; and

2 (c) a facility for registering a vote or recording a preference.”

3 There does not seem to be a caller – unless it is one of those facilities somehow?

4 MR. MILLARD: Yes, there is that ability, ma’am. I have given some examples already. There is
5 an ability, for example, with live chat, and that is premium rate.

6 THE CHAIRMAN: That does not seem to be within subparagraph 14?

7 MR. MILLARD: With respect, ma’am, premium rate services are regulated according to Ofcom by
8 ICSTIS, the Independent Committee for the Supervision of Telephone Information Standards,
9 and they do regulate chat services. In fact, it has been one of the biggest growth areas in
10 recent years. Therefore not all premium rate services are contents services.

11 THE CHAIRMAN: Can you just explain to me, so there is no misunderstanding, what you mean by
12 “chat services”?

13 MR. MILLARD: Certainly, ma’am, it is when – how can I put this politely – you may see some
14 advertisements in the back of a newspaper or a magazine, and you pick up your telephone and
15 you have a chat with someone at the other end about a variety of matters.

16 THE CHAIRMAN: That is what I thought, but that does not seem to be within subparagraph 14.

17 MR. MILLARD: With respect, ma’am, this might have been drafted some time ago, prior to such
18 services coming into existence, but they are a reality today.

19 THE CHAIRMAN: Let us just see what Mr. Ward says.

20 MR. WARD: If it helps, Ofcom’s view is that a chat service is a service for the provision of content,
21 not facilities, so it would be caught by s.128(A) because what is being purchased is the content
22 in the form of whatever is said by the person on the other end of the chatline.

23 THE CHAIRMAN: You will address me later, but I do not see what the difference between that
24 chatline is, the conversation and an ordinary conversation ----

25 MR. MILLARD: Correct, ma’am, nor do I. I do not see any difference either.

26 THE CHAIRMAN: Well then say that to us.

27 MR. MILLARD: Therefore, I would contend that premium rate services are on a level playing field,
28 particularly the chat ones with the disputed numbers. One might suppose that if, as Ofcom
29 contends, the disputed numbers were covered by the General Conditions, then one could fairly
30 and reasonably assume the premium rate should also be covered by the General Conditions.
31 After all, if not then Ofcom again is not offering a level playing field.

32 THE CHAIRMAN: I suppose what you are saying is that if chat services are covered by sub-clause
33 8(a) then the service that is being provided, which is a specific content conversation ----

34 MR. MILLARD: Yes.

35 THE CHAIRMAN: -- should be equally covered. Is that your thinking?

1 MR. MILLARD: Correct, and also I am saying that those services should be equally covered if
2 MMP's services are covered by General Condition 18, that those other services should be
3 covered by General Condition 18 as well.

4 THE CHAIRMAN: There is no distinction between the chat service ----

5 MR. MILLARD: There is no distinction and there is no difference.

6 THE CHAIRMAN: If the chat service is within "content", then the services being provided here are
7 equally within "content"?

8 MR. MILLARD: And likewise, ma'am, if I am not providing a content service, then there are chat
9 services which are premium rate services and are not content services either.

10 THE CHAIRMAN: But they cannot discriminate between ----

11 MR. MILLARD: They cannot discriminate, but they appear to have done. Ofcom is clearly not
12 offering a level playing field. Is it acting anti-competitively to one or either non-geographic
13 banding of numbers? Surely there should be this level playing field for all non-geographic
14 numbers. Again, this highlights the huge inconsistencies in the legislation or the way it is
15 being enforced.

16 THE CHAIRMAN: Can I just explore that a bit further, you say all non-geographic numbers? Is it
17 not possible that I could have a non-geographic number, and I do not have any specific
18 content, I am using it as my telephone number?

19 MR. MILLARD: Correct, ma'am.

20 THE CHAIRMAN: Are you saying that that would come within the exception?

21 MR. MILLARD: What I am saying, ma'am, is that here there are some services that Ofcom says are
22 accepted which are in essence the same as to the type of service that can be operated on 0870
23 telephone numbers and the disputed numbers.

24 THE CHAIRMAN: But does it matter that it is an 0870 number ----

25 MR. MILLARD: No.

26 THE CHAIRMAN: -- or does it matter that it is the content?

27 MR. MILLARD: My own view is that it does not matter whether it is freephone, national call,
28 premium rate, which is the charging structure, or 0870. I am saying there should be a level
29 playing field for all the different charging networks.

30 THE CHAIRMAN: But is it the use of the number that distinguishes it? So if you use it for chat
31 services, or you use it because it is a special phone-in number for a particular prize, or
32 something of that sort? (After a pause) If any of those numbers were used for ordinary
33 telephone services that I would use generally ----

34 MR. MILLARD: Sorry, which numbers, ma'am?

35 THE CHAIRMAN: 0870 ----

1 MR. MILLARD: Or even 090, even premium rate?

2 THE CHAIRMAN: Yes, then in that respect does it fall within what you are saying would be
3 exempted? Surely it is only, on your submission, if it can fall within 8(a) or (b)?

4 MR. MILLARD: What I am saying, ma'am is that I do believe that there are services across the
5 different networks which should be treated in the same way. In essence there are some
6 premium rate services that are no different to some services that may be offered on the
7 disputed numbers and therefore, if Ofcom believes that the principal feature of a premium rate
8 services is not the conveyance, and therefore it cannot be directly regulated by the General
9 Conditions, as the principal feature of the 0870 – sorry, can I just correct what I am saying?
10 Ofcom is saying that the principal feature, not having the conveyance of signals, premium rate
11 cannot be regulated by way of the General Conditions. There are some services that actually
12 are to all intents and purposes the same, that were provided on the disputed numbers, therefore
13 either both should be regulated by the General Conditions or both should not.

14 THE CHAIRMAN: Yes, I think you are saying what I was trying to put to you.

15 MR. MILLARD: I may well be.

16 THE CHAIRMAN: Which is that it is not non-geographic numbers, it is only the non-geographic
17 numbers used for those services.

18 MR. MILLARD: That is correct, sorry yes, I apologise, yes. What I was talking about before was
19 the way that non-geographic numbers as a whole flow around.

20 THE CHAIRMAN: I did not want to misunderstand you, and I think what I heard was that it was all
21 non-geographic numbers, and I think that it is only non-geographic numbers used for the same
22 purpose as the definition of premium rate service, which is the content.

23 MR. MILLARD: Yes.

24 THE CHAIRMAN: So you would have to know what the service was being provided for to know
25 whether it fell in or outside the General Conditions?

26 MR. MILLARD: Yes. Therefore, as I am saying I cannot understand how they can segregate
27 premium rate on to one side and in this instance the disputed numbers on to another. Surely,
28 to see fair play and fair competition it should be the same for all. What I believe, ma'am, is
29 we are seeing unfortunately Ofcom acting anti-competitively. Remember that prior to July
30 2003 number portability worked well. It was operated in a fair and reasonable manner. It was
31 forced on network operators as the legislation intended. The market grew and diversified,
32 number portability encouraged competition and diversified the market still further. What we
33 are seeing now is Ofcom taking away from MMP MMP's rights that MMP enjoyed in the
34 previously open, free and competitive market. Ofcom's interpretation of the badly worded

1 legislation works against the spirit and the purpose. Ofcom, a public authority, is taking away
2 MMP's rights without compensation.

3 Finally, Ofcom relies on fine legal distinction with no merits. This is evidenced by
4 the fact that MMP, or any other similar company, could easily restructure its commercial
5 arrangements to circumvent the consequences of 18.1 and 18.2. This can be done (as MMP
6 did) renting MMP's numbers to Prime Time Radio. MMP could procure the provision of
7 electronic communication services by Thus to PTR as an agent for Thus. MMP would not
8 provide an electronic communications service to Prime Time Radio. Prime Time Radio would
9 have no right to port the numbers from MMP, and the whole purpose of the General
10 Conditions, and the legislation behind the General Conditions would be defeated.

11 Ma'am, members of the Panel, in summary:

- 12 (i) MMP is not a communications provider. It does not convey calls. MMP does
13 not provide an electronic communications service. Even so, under General
14 Condition 18, electronic communications service is irrelevant in the definition of
15 a communications provider, as has been proven earlier.
- 16 (ii) PATS is the only relevant point here.
- 17 (iii) MMP does not provide PATS. The principal feature of PATS is the conveyance
18 of calls, as has been proven earlier. MMP does not convey calls.
- 19 (iv) Further, MMP contracted with Prime Time Radio to rent numbers. Thus made
20 the service available to the public and Prime Time Radio promoted it to the public.
21 MMP is the subscriber. There is no question that MMP does not have a contract
22 with Thus. Thus provides an electronic communications network and electronic
23 communications services and PATS.
- 24 (v) MMP enjoys portability. Ofcom is denying MMP that right.
- 25 (vi) By removing MMP's ability and right to port Ofcom has acted anti-
26 competitively.

27 I request that this Appeal is upheld. Thank you.

28 THE CHAIRMAN: Thank you very much. Mr. Ward?

29 MR. WARD: Ma'am, I am not proposing to simply read out my skeleton argument, or to go through
30 all the points within it. I will seek to make a few of the core propositions which are in the
31 written case, whilst answering the points that Mr. Millard has made orally today. But we do
32 respectfully urge the Tribunal to consider all of the submissions that we have made in writing.

33 THE CHAIRMAN: Yes.

34 MR. WARD: Before dealing with the detail of this case, I would like, if I may just to put the present
35 dispute into its "Competition" context, because a large part of Mr. Millard's case is that

1 Ofcom's approach is somehow anti-competitive. Ofcom's submission is quite the contrary,
2 that its approach is necessary to give full effect to the pro-competitive objectives of both the
3 Community and the national legislation at issue.

4 We have set out in the early part of the skeleton argument the various duties that arise
5 in respect of the furthering of competition and I will not take up time going through those
6 now, but they clearly form the context against which this case must be considered. In
7 particular, there is no dispute with Mr. Millard that number portability itself is of particular
8 importance to competition for the reasons he so clearly explained earlier this morning. Again,
9 in para.8 of our skeleton argument we have provided a list of references to the published
10 material in the bundle to make that good.

11 I want, if I may, to begin by just respectfully differing from Mr. Millard about the
12 history of number portability, because Mr. Millard's case was that everything worked
13 beautifully until 2003, and up until that time the obligation was only upon what he describes
14 as "network operators" and not to intermediaries such as MMP. It is quite clear, and
15 Mr. Millard says this explicitly that what MMP does is resell the services provided by Thus.
16 His case is that in the past at least that was never within the scope of number portability. In
17 a sense that does not matter because all you are concerned with is, of course, the regulatory
18 regime which applies today, but it may be useful, just for the sake of completeness to see that,
19 in our respectful submission, that is in fact quite wrong. For that one must turn to the first
20 Regulatory Statement and accompanying bundle.

21 THE CHAIRMAN: Which divider?

22 MR. WARD: Firstly divider 6, please. This is, I hope, Directive 97/33/EC ----

23 THE CHAIRMAN: It is.

24 MR. WARD: -- which first introduced duties of number portability and did so in very general
25 language, and you can see that at p.208, which is p.13 of 22 of the print-out.

26 THE CHAIRMAN: Which Article?

27 MR. WARD: Article 12(5):

28 "National regulatory authorities shall encourage the earliest possible introduction of
29 the number portability facility whereby end-users who so request can retain their
30 number(s) on the fixed public telephone network at a specific location independent of
31 the organisation providing the service, and shall ensure that this facility is available at
32 least in all major centres of population before 1 January 2003."

33 So that is couched in rather general terms and only talks about "encouragement" it is not the
34 usual Community language that is mandatory. But that obligation was essentially superseded
35 by the next Directive, which is the next tab in the bundle, although unfortunately the version

1 that is in there is illegible, but I do have what I hope is a clearer copy. Can I just hand this up
2 by way of substitution? (Document handed to the Tribunal and Mr. Millard) This is Directive
3 98/61. You will see at Article 1 the term “subscriber” is introduced in essentially the form that
4 we have in the current Directive: “any natural or legal person who or which is party to
5 a contract with a provider of publicly available telecommunications services.” Then it says at
6 Article 1(2) “The first subparagraph of Article 12(5) shall be replaced by the following ...” so
7 the section I have just showed you has gone out and the following has come in, which is again
8 an obligation in respect of number portability.

9 “National regulatory authorities shall encourage the earliest possible introduction of
10 operator number portability whereby subscribers who so request can retain their
11 numbers on the fixed public telephone network and that integrated services digital
12 network independent of the organisation providing the service, and in the case of
13 geographic numbers at a specific location and in the case of other than geographic
14 numbers at any location.”

15 So it is geographic and non-geographic numbering. Provisions were implemented by the UK
16 and that is described within the regulatory summary itself, the textual document, and I do not
17 intend to take the Tribunal through this in detail, but if I could ask you just to glance at what is
18 numbered at p.30 and 31 of this bundle, you will see there is a section there headed “Number
19 portability under the previous UK regime”, and if you would just cast your eye forward to
20 paragraph 81 it quotes a section of the implementing UK legislation. If you wanted to see the
21 legislation itself it is at tab 8. The short point here is only that the legislation is said to apply
22 to what were described as systemless service providers. In other words, persons who provide
23 a service but without their own telecommunications system, because as Mr. Millard said earlier
24 there is nothing novel in being a reseller. What MMP does is a long established and well
25 recognised part of the telecommunications landscape. But so too is the obligation upon such
26 bodies to port in the circumstances described by the legislation.

27 I do not propose to take you through the detail of all of that legislation because it is
28 just historical now. It is quite clear and there is no dispute as to what it is you are actually
29 dealing with, which is the obligations arising under Article 13 of the Universal Service
30 Directive as implemented in General Condition 18. Before going to this particular case I make
31 one general observation. There is no warrant in any of the legislation or any of the supporting
32 material for reading the obligation to port in a narrow way. The pro-competitive interest in
33 porting is not somehow defined to a particular sub-group of users, it is general to the interests
34 of telecommunications users. In his reply at p.7, and rather echoing what Mr. Millard said
35 today, he talked about the benefit accruing to what he calls ‘platform level users only’. We

1 respectfully submit there is absolutely no logic to that whatsoever. The logic of the
2 competition law context is that the obligation to port ought to be general. It is not specific in
3 its benefits to anyone particular group of users. The logic of Mr. Millard's case, as I will
4 explore in a moment, is to extract a group of users from the benefits of porting, and in our
5 respectful submission there is simply no reason to read the legislation to achieve that effect.

6 We do say that this case, in fact, powerfully demonstrates the point. What we have
7 seen is that the agreement that MMP entered into with PTR was for £250 start-up costs and
8 then £300 a year in quarterly payments. Would it be helpful to look at that? It is in the
9 documents, exhibited to the Notice of Appeal itself.

10 THE CHAIRMAN: On the last page?

11 MR. WARD: The last page, yes. It is the sample agreement. There are three agreements, although
12 we follow Mr. Millard in describing it as one agreement, nothing turns on that for sure in this
13 Appeal. You will see here, this is the agreement in relation to the number 50 50 50, which is
14 the one that Mr. Millard has shown us the contract with Thus for. I will just take you through
15 the charges, if I may. Paragraph 1, there is a one-off set-up and connection fee of £250,
16 payable in advance. This is for the network build. Then there is a quarterly rental fee of £75.
17 In other words, £300 a year. Then what happened in this case is, of course, as you know, PTR
18 decided to port, and we can see its reasons, its letter of 15th February 2005, which is about
19 eight or nine pages further into the bundle.

20 THE CHAIRMAN: Before you go on to that, I am just curious, they charge £250 for the network
21 build. Under the contract with Thus it does not appear that there is a charge?

22 MR. WARD: No, I will come to the charges on the contract with Thus in a moment.

23 THE CHAIRMAN: You are going to come on to that?

24 MR. WARD: Yes, certainly. But of course, Mr. Millard is free to contract with his client in
25 whatever way the market will bear. One point that is perhaps very important to get clear is
26 that Ofcom does not purport to tell Mr. Millard how to charge. What Ofcom does is regulate
27 the regulatory framework, which may or may not make this charging structure viable. So we
28 have a one-off fee, and then we have a quarterly fee that is described as a rental, although, as
29 you appreciate we do not accept that that is a proper description. Then if we may ask you to
30 turn on about 10 pages in the bundle to PTR's letter of 15th February 2005. This is subsequent
31 to PTR's request but whilst it is still in correspondence with MMP about the request for
32 porting. It is the fourth paragraph which is material here:

33 "We have spoken to a number of companies who will not charge us a fee each month
34 and will actually pay us money on each call. Therefore I have taken the decision to
35 terminate our contract with MMP and place it with Uni-World Communications."

1 So instead of paying a fee PTR is actually going to be paid for these calls, and the mechanism
2 by which this happens is itself a product of regulation, and is explained again in the regulatory
3 summary. If I could just give you the reference and invite you to consider it later. It is in the
4 part of the regulatory summary dealing with number translation services. It is p.43-47,
5 para.136 onwards. But if I can put it in very, very short terms, the mechanism is known as
6 a “micro-payment mechanism”, where effectively the charges incurred through the call are
7 divided between various parties to the call and the various undertakings who process the call,
8 but the end result is the recipient, the body like PTR, ends up with a small payment arising out
9 of the call. That is the way the funds are divided up.

10 I am now going to go, if I may, to the agreement with Thus, because that agreement
11 shows that a micro-payment of that kind was envisaged by Thus with MMP. It is the first
12 page of the agreement. This is of course a contract between Thus and MMP, it is not
13 a contract with PTR, as Mr. Millard has explained. What we see is a number translation from
14 the 0870 number to the 0207 ----

15 MR. MILLARD: I am sorry, if I could interject. I never said it was a contract between Thus and
16 PTR.

17 MR. WARD: That is exactly what I said. It is between Thus and MMP.

18 MR. MILLARD: Apologies, I am getting hard of hearing in my old age!

19 MR. WARD: I would just invite you, please, to consider the passage underneath the numbers that
20 are set out under “Description of services”. There 0870 control is:

21 “... a service whereby a call made by a calling party dialling 0870, or other numbers
22 as applicable, or ported number as appropriate to this service followed by the number
23 allocated to the customer is charged at the originating operator’s national call rate and
24 a payment for the call may be made by the company [Thus] to the 0870 control
25 customer [MMP] dependent on volume.”

26 Now the actual structure of payments we do not know, because the one document which is
27 still missing from this is the first of the attachments for Thus call control services business
28 price list which, if Mr. Millard has, we have not seen. The various other attachments we have
29 seen, as you have. But it does not actually matter in truth for the purposes of the Appeal,
30 because what this shows is the contract between Thus and MMP was what one might call
31 a micro-payment contract, rather of the kind that we speculate that Uni-World is going to take
32 advantage of in its arrangements with Energis.

33 Here, what MMP has done is to offer a very different deal to its own customer
34 – perfectly legitimate, no criticism of that, it is a matter of freedom of contract, but it is also

1 a matter of what the market will bear. Mr. Millard said that MMP has never claimed to be the
2 cheapest, and if I paraphrase somewhat, offers value-added services as well in the form of
3 advice, and of course one can entirely accept that. There is a value-added service being
4 offered, but the question is what price will the market bear. Here, MMP in effect is taking
5 advantage both of the payment from PTR and also the micro-payments that will come from
6 Thus if the volume reaches a sufficient level. Uni-World has come in and effectively offered
7 to undercut, and say “We will share the benefits of the micro-payments, and we will not be
8 charging you a flat fee on top”. The logic of the position therefore is that if Mr. Millard is
9 right, PTR has two choices, it either sticks with PTR and pays PTR’s hire charges, or it
10 abandons the telephone numbers. The telephone numbers which one can speculate it has
11 essentially invested capital in promoting to its customers as Mr. Millard said, indeed, that it
12 had. But the whole purpose of number portability is to prevent the need to make that choice,
13 because it is recognised that having to give up the numbers is an obstacle to moving between
14 – if I can use the term loosely – service providers.

15 Mr. Millard’s case though is that in this sector where there is a reseller involved there
16 can be no portability by the end user, because of course the end user here, namely, PTR, only
17 has a contract with MMP. It cannot possibly ask for porting directly to Thus or to any other
18 entity, it is either to MMP or it is nobody, and the whole point of Mr. Millard’s argument is to
19 say that PTR is stuck with MMP. Ofcom’s answer to that is to say “No, because the
20 regulatory framework specifically provides a right to port, specifically to ensure there is
21 competitive pressure on telecommunications service providers”. Of course, we do point out
22 though that that pressure cuts both ways in the sense that – if I may indulge in the cliché – it is
23 both a threat and an opportunity to people like MMP because, of course, MMP risks losing its
24 clients to Uni-World, but equally portability gives MMP the opportunity to compete for clients
25 currently using the services of other resellers.

26 So to reiterate the point I made earlier and put it into context, we respectfully submit
27 that any realistic construction of this legislation should strain to avoid an outcome where there
28 is a gap in the portability regime, because that is clearly contrary to the competition interests
29 which the legislation articulates.

30 The first point that Mr. Millard made on the detail of the argument is that MMP is not
31 a communications provider, and of course we accept unhesitatingly that if he is right about
32 that then his Appeal must succeed because it is only upon communication providers that the
33 obligation to port bites. We dealt with this in the skeleton argument on p.4 and 5 and, if
34 I may, I will just take you very briefly through those paragraphs.

35 THE CHAIRMAN: From para.18?

1 MR. WARD: From para.18 because, as Mr. Millard says, we entirely accept that he is not providing
2 an electronic communications network so it must be either an electronic communications
3 service or it is nothing, and we remind you of the definition of “ECS” at para.18, then at
4 para.19 the definition of “Signal”, and then we make this submission: there is no dispute as to
5 the practical nature of the service provided by MMP. The service included number
6 translation. It routed calls to the disputed numbers, to PTR’s geographic number. It did so
7 using the ECN provided to MMP by Thus.

8 THE CHAIRMAN: Can I just stop you because I have just notice, which I had not understood
9 before about this contents service, because contents service is exempted from the definition of
10 ECS.

11 MR. WARD: May I come to that in due course, but I will almost certainly address you on that. If
12 we can put that aside for present purposes, because that is a separate argument, and I will most
13 certainly address you upon it. What we say is very simple, that this service provided to PTR
14 was a service for the conveyance of a signal comprised of speech. That makes it an electronic
15 communication service. Mr. Millard’s argument is that is not right because the conveying was
16 done on the physical network owned by Thus. As he put it, and I have quoted him over the
17 page, para.21, and it is very much the point he made today: “It is clear that the service is the
18 conveyance”. The point is that it is MMP that has contracted with PTR to provide that
19 service, albeit MMP has also contracted with Thus for the physical provision of the service,
20 but if you ask what it is that MMP has provided to PTR it is the service of conveyance. The
21 fact that it is using someone else’s network does not make it any the less an electronic
22 communications service. But one must also look again at the broader context of the legislation
23 here, because the distinction between electronic communications service, and electronic
24 communication network comes from the community regime itself, and you can see it from
25 Article 2 of the Framework Directive – that is just very briefly if I may go to the legislation.
26 That you will find at p.317, tab 12 of the Regulatory Summary bundle.

27 THE CHAIRMAN: For our purposes it is bundle 4.

28 MR. WARD: You will see at 317 Article 2, this is the definition section of the Framework Directive
29 and you will also have seen that those definitions apply to the other related Directives.
30 Without taking you through the language you will see Article 2(a) on p.317 is the definition of
31 ‘electronic communications network’ and then Article 2(c) is the definition of ‘electronic
32 communications service’ so this distinction is embedded in the Framework Directive. Then it
33 is drawn upon in the Authorisation Directive, which is the preceding tab, tab 11 and if I may
34 I would like to show you p.304. Article 1:

1 “1. The aim of this Directive is to implement an internal market in electronic
2 communications networks and services through the harmonisation and simplification
3 of authorisation rules and conditions in order to facilitate their provision throughout
4 the Community.

5 “2. This Directive shall apply to authorisations for the provision of electronic
6 communications networks and services.”

7 Then the Directive goes on and says, if I may very crudely simplify, that there must be
8 a general authorisation for electronic communications and electronic services which replaced
9 in the UK the old regime of individual licensing.

10 The short point here then is that it is completely fundamental to the regime that there
11 should be both ECN and ECS. In their terms they capture both providers who have networks
12 and providers who do not have networks. The alternative view, Mr. Millard’s view, is that
13 resellers who do not have networks are simply outside the scope of regulation altogether, but
14 that plainly is not the legislative intent because the old system has gone and the new system in
15 its place of general authorisation on Ofcom’s view applies to both, on Mr. Millard’s view,
16 however, again there is a large hole.

17 It may be of assistance to show you what Ofcom said about this at the time this
18 regime was being put into effect, which is in the supplementary regulatory summary bundle
19 – the slimmer bundle of background materials – at tab 3. You will see at tab 3, page 49, it is
20 a consultation about how to implement the new Community regime. At p.54 is a paragraph
21 about the scope of application of the new Directives. If I may just take you through this very
22 briefly. “The new Directives are broader in scope than previous EC legislation in that they
23 apply to ‘electronic communications’ as opposed to ‘telecommunications’ ...” Well that is
24 not relevant for present purposes.

25 “The obligations contained in the new Directives are intended to apply to the
26 provision of an electronic communications network or an electronic communications
27 service or an associated facility. This broader approach means that traditional
28 distinctions between, for example, licensed network operator and unlicensed resellers
29 (or ‘systemless service providers’) no longer apply. Resellers will, in general, be
30 providing electronic communication services, and therefore will be subject to the
31 same regulatory regime as those existing network operators who are also providing
32 electronic communications services.”

33 Now, much of Mr. Millard’s submission has been couched in the language of network
34 operators and service providers, which is the old language of the pre-2002 legislation. But
35 what this new legislation introduced was a completely different conceptual framework,

1 electronic communications services, and electronic communications networks. In our
2 respectful submission the result of that was to embrace the resellers fully within the regime
3 rather than leaving them out in the cold.

4 One can, finally before leaving this point, test the logic of the position this way.
5 Mr. Millard admitted and averred that Thus itself was providing an electronic communications
6 network and providing an electronic communications service. He also averred that what MMP
7 was doing was simply reselling that service. Where, we ask, would be the regulatory logic to
8 allow that reseller selling in substance the very same thing to escape the net of regulation. In
9 our submission that would be bad for competition and it would be bad for consumers, it is not
10 what the legislation provides.

11 The next element in the definition in essence is subscriber. Mr. Millard says he is not
12 a subscriber. He says, forgive me, that PTR is not a subscriber because MMP is a subscriber.
13 MMP is a subscriber, he says, to the contract with Thus. Having now seen that contract
14 Ofcom would agree that MMP is indeed a subscriber to a contract with Thus, but that does not
15 preclude MMP from also being a communications provider to PTR. Before going to the detail
16 of this argument it is also relevant to say that one of Mr. Millard's complaints in essence is
17 that somehow there is an unfairness here because if PTR has a right to port, MMP has no right
18 to port. We say in that regard that insofar as MMP is a subscriber it has the right within GC
19 18 as much as anybody else to port as against the communications provider to which it has
20 subscribed. But that does not mean that PTR does not have the right too. If PTR and MMP
21 both fit the definition they both have the rights.

22 THE CHAIRMAN: What is going through my mind, and I do not know whether or not it is relevant,
23 is that under the Thus contract there is the translated number, and we know the translated
24 number is PTR.

25 MR. WARD: We do, we are told.

26 THE CHAIRMAN: And we accept that, do we?

27 MR. WARD: Well we have no reason to doubt it.

28 THE CHAIRMAN: No. So for this purpose we are accepting that that is a PTR number ---

29 MR. WARD: Yes.

30 THE CHAIRMAN: -- and Thus would know that was a PTR number?

31 MR. WARD: That again is what we are told today.

32 THE CHAIRMAN: Are we accepting that or not?

33 MR. WARD: I accept that is what we have been told. I am not casting suspicion on what
34 Mr. Millard has been saying.

1 MR. MILLARD: Ma'am, could I interject because it may be helpful – sorry. Because the calls have
2 to actually terminate there, I was actually advised at the time by PTR that a technician turned
3 up and in fact, sorry, correction: that they received a telephone from Thus directly to PTR
4 arranging that connection at the time.

5 THE CHAIRMAN: Let us just assume that they do know.

6 MR. WARD: Absolutely.

7 THE CHAIRMAN: All right, for the time being. Thus therefore know that they are providing this
8 service to PTR, to that number. Is it right on that basis that on your analysis that MMP is also
9 a subscriber, because it is only for this purpose.

10 MR. WARD: Well is it helpful to turn to the definition of “subscriber”?

11 THE CHAIRMAN: Yes.

12 MR. WARD: It is in General Condition 18 at point ‘O’. You will find that in bundle 4 at p.460
13 which is tab 16, and it is “(o)”:

14 “‘Subscriber’ means any person who is a party to a contract with the provider of
15 Publicly Available Telephone Services for the supply of such services in the United
16 Kingdom.”

17 Ofcom makes this almost ‘tautological’ point which is if you are a subscriber then you have
18 the right to port, and until yesterday we had not seen the contract with Thus, we have not
19 reflected on it very hard, but assuming for the sake of argument that MMP is a subscriber or
20 was a subscriber of Thus, then it would have had a right to port, assuming it can satisfy all the
21 other elements of General Condition 18. But for present purposes of course the central
22 question is whether PTR is a subscriber to MMP. Of course, the reason that it matters, if I can
23 just ask you to remind yourselves of what General Condition 18 says on the previous page:

24
25 “18.1 It is only a subscriber who can request Number portability. So it is only the party
26 which actually has a contract with a communications provider who can request number
27 portability. The only contract that PTR has is a contact with MMP. So really this echoes what
28 I have said a few moments ago, if PTR cannot request MMP to port then it has no right to port
29 at all. Once again we respectfully rely on purposive considerations in so far as you are
30 considering this question, because it is quite unambiguous intends that end users should have
31 the right to Port. We can see that from the recital to the Universal Service Directive, which is
32 in your bundle 4, tab 13 and it is recital 40 on p.336:

33 “40 Number portability is a key facilitator of consumer choice and effective
34 competition in a competitive telecommunications environment such at end-users who

1 so request should be able to retain their number(s) on the public telephone network
2 independently of the organisation providing service.”

3
4 So he obvious legislative intent is that at the very least one might say end users ought to be
5 able to retain their numbers.

6 THE CHAIRMAN: Does it help at all on what end-users mean in this context?

7 MR. WARD: Yes, there is a definition, and the definition is, in fact, in the Framework Directive, but
8 it does apply explicitly I can reassure you of that.

9 THE CHAIRMAN: They all apply to each other, do they not?

10 MR. WARD: Yes, they do. You will see that at p.318 in tab 12. The definition of “end user” itself
11 is at “(n)”:

12 “ ‘end-user’ means a user not providing public communications networks or publicly
13 available electronic communications services.”

14 Then “user” is defined at “(h)”:

15 “...a legal entity or natural person using or requesting a publicly available electronic
16 communications service.”

17 and that is contra-distinguished to “consumer” which is only a natural person, at definition
18 “(i)”. So I am making a rather broad-brush submission about these definitions, which is the
19 Office legislative intent was the person at the end of the chain ought to be able to request
20 portability, and here that is PTR or it is nobody.

21 The reason why Mr. Millard says that PTR was not a subscriber is that he says MMP
22 did not provide a publicly available telephone service which is, of course, a component in the
23 definition of “subscriber”. Can I remind you of that? (bundle 4, tab.16, p.460).

24 “Subscriber means any person who is party to a contract with a provider of Publicly
25 Available Telephone Services for the supply of such services in the United Kingdom.”

26 So we accept again, unhesitatingly, that if he is right that MMP is not providing PATS, then
27 PTR is not a subscriber and the right to port does not arise. Here I just want to remind you
28 what Mr. Millard has said about the status of Thus, because he has accepted that Thus is itself
29 providing a PATS and he has accepted that all MMP is doing is reselling the PATS provided
30 by Thus, and he said that to you this morning, but he also says it in his pleadings. I can show
31 you the references in the pleadings if need be, that it is very much what he said this morning.
32 I am not taking a form of pleading point in respect of a litigant in person, however
33 accomplished, not at all. However, what I do say is that that was a sensible, obvious and
34 natural way to describe the activities of Thus and if all MMP is doing is reselling those
35 services it too is providing a PATS.

1 THE CHAIRMAN: What was being pointed out to me is the definition of ‘subscriber’ at divider 12,
2 p.318 which is in the Framework Directive.

3 MR. WARD: Yes.

4 THE CHAIRMAN: I am sorry, I have taken you out of turn.

5 MR. WARD: Indeed, ma’am, what the language reflects is actually Article 30 of the Universal
6 Service Directive, which is the obligation to port and that, if I may ask you to look, is at p.345,
7 tab 13, which says:

8 “Article 30.

9 Number portability

10 1. Member States shall ensure that all subscribers of publicly available telephone
11 services, including mobile services, who so request can retain their number(s)
12 independently of the undertaking providing the service.”

13 And the definition that I just showed you in GC18.5 (o) is specific to GC18. In other words,
14 the definition of “subscriber” used for the purposes of General Condition 18 reflects the
15 obligation in the Directive under Article 30.

16 THE CHAIRMAN: But “subscriber” in Article 30 is the defined subscriber in the Framework
17 Directive?

18 MR. WARD: Well there is no additional definition.

19 THE CHAIRMAN: So it must be the one in the Framework Directive?

20 MR. WARD: Yes, but it is quite clear from contacts that what is envisaged here is the subscriber to
21 a publicly available telephone service, which is what the UK’s implementing definition
22 actually provides, and I quite understand the point being made which is that is not quite the
23 same as the general definition of “subscriber” in the Framework Directive. Then it is also
24 quite clear that that is not what is, in fact, intended in Article 30 of the Universal Service
25 Directive which deals directly with the question of number portability.

26 THE CHAIRMAN: The difference is the mention of a contract – right?

27 MR. WARD: Yes.

28 THE CHAIRMAN: Why should one not read into Article 30 “Member States should ensure that all
29 subscribers, i.e. ...”

30 MR. WARD: In fact we have. The contract appears as well in the definition at 460.

31 THE CHAIRMAN: Yes.

32 MR. WARD: So it may be that there is really no point of substance here at all, because indeed the
33 contractual element is there in the GC18 definition.

34 In his written pleadings at least Mr. Millard relied upon the fact that he argued his
35 service was not publicly available because he was only providing it to selected customers in

1 essence. He said “I do not provide this service to anybody”, and we respectfully submitted in
2 writing, and very, very briefly now that that really is not the relevant test. It is publicly
3 available in the sense that it is being offered to the public rather than a closed user group.

4 The term “publicly available” is not in fact defined in any of these Directives, and
5 therefore it becomes a question of whether the UK is lawfully implementing what is, in fact,
6 rather general language adopted by the Community. There is an explanation of the UK’s
7 approach in your bundle 5 at p.38. It is at para.6.1 to 6.5 really of this section. Ma’am, I note
8 the time is now 1 o’clock, if it would be convenient for the Tribunal to read this over lunch,
9 and then I can pick up from the point we are now. I am also going to refer you, if I may, very
10 briefly to a case called “*ENI*”, which we sent through a couple of days ago, where the
11 Advocate General has given some consideration to the meaning of this term, albeit under the
12 previous regime. It is of fairly limited application, but we do say of some application to your
13 deliberations as to what this may mean. I think it came in accompanying a letter which dealt
14 with Article 5(4) of the Authorisation Directive.

15 THE CHAIRMAN: Yes, I have it **here**. Is there something you want us particularly to look at?

16 MR. WARD: You will see at paras.42-44 the Advocate General expresses a view about what the
17 distinction between public and private may be, albeit under the previous legislation. Then we
18 will also be relying upon paras.55 and 56 of his opinion. It is of limited assistance because it
19 does not deal with this legislation but we do submit it is helpful in understanding the spirits of
20 the distinction the Community is relying up.

21 THE CHAIRMAN: We will look at that, thank you. Five past two.

22 (Adjourned for a short time)

23 MR. WARD: Ma’am, before lunch I had turned to the question of whether this was a service made
24 available to the public and I asked you to read from an Ofcom consultation document which
25 gave an explanation as to what was understood by that term. It may be useful to narrow the
26 focus slightly because in the Notification itself a specific explanation of the meaning of
27 “public” was in fact give, derived from another published document (para.39 of the
28 Notification). I hope you will agree it says the same thing, albeit in a much more compressed
29 language.

30 THE CHAIRMAN: I think we find that in 1.

31 MR. WARD: The Notification itself. It is p.12 of the original pagination in the bottom right hand
32 corner, para.39 of the Notification.

33 THE CHAIRMAN: Yes.

34 MR. WARD: Could I just invite you to read those two paragraphs to yourselves.

35 THE CHAIRMAN: Yes. (After a pause) Yes. It says “Ofcom stated ...” where did it state?

1 MR. WARD: There is a footnote there, it stated ----

2 THE CHAIRMAN: Sorry, I did not see that, yes.

3 MR. WARD: The original document actually is not in the regulatory summary although precisely
4 the same quote is given in the regulatory summary. If it becomes important I am sure we can
5 provide it.

6 In both these passages Ofcom is essentially drawing the same distinction between
7 what one might loosely call a “public offering” to anyone who wishes to pay for the service,
8 and an offering made to a closed group, such as residents in a hotel, tenants of a landlord, or
9 inmates of a prison. Obviously, even though a hotel might be providing a telephone service
10 to its guests I cannot ring up the hotel and ask to be attached to its telephone network, it just
11 does not work like that. The question is whether that is an appropriate, or indeed permissible
12 interpretation of the phrase service made available to the public, because that language is not
13 defined in the Directives at all.

14 THE CHAIRMAN: Can I just interrupt because there are two ends, there is the person who dials the
15 number, and there is the recipient at the other end – just make it simple, without anybody in
16 the middle. If you provide a number to the recipient of the call, as I understand it the publicly
17 available service is the fact that anybody can dial into that. Is that wrong?

18 MR. WARD: No, that is how we understand it.

19 THE CHAIRMAN: That is why I have interrupted you, yes.

20 MR. WARD: To take the absolutely uncontested example, if you ask BT to supply you with
21 telephone line and a telephone number, and you meet their conditions they will do it. That is
22 unambiguously a publicly available telephone service. Then who rings you on that number is
23 an entirely separate issue. BT is very different from the position of a landlord that was
24 discussed in the consultation document because supposing a landlord has 10 flats in a block, if
25 I do not live in those flats and I say to the landlord will you provide me with a telephone
26 service, he will say “no”, I only provide it for tenants. That is the distinction that Ofcom is
27 driving at. A publicly available service, in other words one where it is open to members of the
28 public ----

29 THE CHAIRMAN: So it is to the recipient?

30 MR. WARD: Yes, the person purchasing the service. Can anybody purchase the service or only
31 closed group of users purchase the service.

32 THE CHAIRMAN: Who is purchasing the service in the Thus example, because the people who pay
33 are the callers not the receivers.

34 MR. WARD: MMP has entered into the contract with Thus, “purchase” perhaps was not a very wise
35 use of words. But MMP could have gone to Thus, or like Uni-World it could have gone to

1 Energis, and there may be other providers for all I know – no doubt there are – who also
2 provide these number translation services. But MMP went to Thus and said “We would like
3 to subscribe to your number translation service, and then they entered into a contract.
4 r. Millard accepts that Thus’s service was unambiguously public, because all you had to do
5 was contact us, meet its terms and conditions, no doubt they do checks on your credit
6 worthiness or whatever, if there is credit involved, but essentially they provide the service.

7 THE CHAIRMAN: What you are saying is that they will provide it effectively to anyone, and it is
8 providing the telephone number to effectively the recipient of the call?

9 MR. WARD: Yes, in this example it involves supplying a telephone number, that is exactly right. In
10 our submission the question is only, as you put it, whether anyone can apply to Thus in the
11 way that MMP did and, provided they can agree the terms of the business they will do the
12 business, or whether there is a predetermined user group who can do so.

13 THE CHAIRMAN: Can we just explore this for a moment, because it is a publicly available
14 telephone service. Now, if it is only the supply of the number to the recipient, is that a
15 publicly available telephone service or is it the fact that anybody can phone into that number
16 that makes it a publicly available telephone service?

17 MR. WARD: It is actually “no” to both, ma’am. “No” to the latter first. It is not the phoning in, it is
18 the obtaining the service. The reason I said “no” to the former as well is that the telephone
19 number on its own is not a service. A telephone number merely identifies the end point of a
20 service of some kind. So forgive me for saying so, but I would not accept either limb. What
21 am saying is that the person who obtains the number for the service to be provided into that
22 number is the person who is obtaining the telephone service.

23 THE CHAIRMAN: But why is it publicly available?

24 MR. WARD: If anyone can apply, just as in the case of Thus.

25 THE CHAIRMAN: Anyone can apply for that service, not ----

26 MR. WARD: Yes, exactly.

27 THE CHAIRMAN: And where do you get that from?

28 MR. WARD: First, I get it from the plain meaning of the language.

29 THE CHAIRMAN: The plain meaning of the language could be the supply of the service which is
30 publicly available, i.e. anyone can phone in on it, it is not a closed line.

31 MR. WARD: If we go back to the definition it is certainly not, I confess, how we thought it could be
32 read, and perhaps there is a clue to that in the language of the definition. It is at GC18, file 4,
33 tab 16, p.460. What we are actually grappling with here, of course, is the definition of
34 “subscriber” and PATS is just a component to the definition of “subscriber”.

1 “Subscriber means any person who is party to a contract with the provider of Publicly
2 Available Telephone Services for the supply of such services.”

3 Mr. Millard at least says that he was such a subscriber, so ----

4 THE CHAIRMAN: Well let us forget about what Mr. Millard says, because let us just try to make
5 sure that Mr. Millard ----

6 MR. WARD: The reason I am doing so is because I do not want to get onto the contentious issue of
7 what PTR was doing. Mr. Millard at least says “I was a subscriber to Thus and the service
8 that Thus was providing was a publicly available telephone service.” The telephone service
9 was number transcription, it was publicly available because it was open to Mr. Millard as
10 much as anybody else, to apply to Thus to enter into a contract for it.

11 THE CHAIRMAN: If you look at the definition of “publicly available telephone service” it means:
12 “ ...a service made available to the public for originating and receiving, or only
13 receiving, national and international telephone calls through a number or numbers in
14 national or international telephone numbering plan.”

15 MR. WARD: Yes, but the point ----

16 THE CHAIRMAN: So it is made available to the public for originating and receiving or only
17 receiving, so you say because it says that, and the “public” who acquires the number.

18 MR. WARD: Who enters into the contract. You are quite right, of course, ma’am, if there is
19 publicly available telephone service such as the one that was used in this case anybody can
20 ring, anyone who has the number can ring, but to do so they do not enter into a contract, of
21 course, they just dial. What we are interested in in the regulation is the person who contracts
22 for the provision of a telephone service.

23 THE CHAIRMAN: Yes, but you are jumping, I am afraid you are jumping because I am trying to
24 find out what “publicly available telephone service” is before I go to “(o)” and find out what
25 subscriber is.

26 MR. WARD: But I am respectfully submitting that “(o)” helps one understand what must be meant
27 by “(l)” because “(o)” explains what the interest is in a telephone service and, of course, it is
28 true that a telephone service involves someone who calls and someone who receives that call.
29 That is the essence of it. We are interested in the party who contracts for the provision of that
30 telephone service.

31 THE CHAIRMAN: But that could be contracts with someone ----

32 MR. WARD: With a provider.

33 THE CHAIRMAN: -- with a provider of a service in which the public can dial in on.

34 MR. WARD: Well it could mean that, conceivably, but if it means that Mr. Millard is every bit as
35 caught by it as if it means what we say it means. There is a little help in the *ENI* case which

1 was going to come to in due course. I confess that the meaning you posited, ma'am, is not
2 one that we have discussed or considered.

3 THE CHAIRMAN: No. I mean that just shows that different people look at it in different ways.

4 MR. WARD: Of course it does. Of course what we are interested in here is a person who enters into
5 a contract, the contract is for the telephone service. What does it mean for that service to be
6 publicly available? Ma'am, you are positing all that may mean is that anyone can ring in. If
7 that is so, Mr. Millard is most certainly caught. We are positing a somewhat narrower
8 interpretation which is it means a service offered by Thus, or we would say MMP, to the
9 public at large, and Mr. Millard is going for a yet narrower interpretation which I will come on
10 to in a minute. So whilst your interpretation is not the one that Ofcom has fastened upon it
11 would not actually lead to this Appeal being allowed, were it correct.

12 THE CHAIRMAN: No, I am just trying to think through everything. I am not suggesting which
13 way it goes at the end, I just want to get the definitions right. Once we get the definitions right
14 we will understand what it is about and then we might be able to decide the case.

15 MR. WARD: Well yes, I appreciate that must be the order. (Laughter) But I do say that even
16 though it is not the version that we have lighted upon it would not actually defeat ----

17 THE CHAIRMAN: But is there a reason why what I am suggesting is wrong?

18 MR. WARD: I think there is some guidance in the case I am about to show you which I asked you
19 to look at over lunch. It is of limited assistance because, of course, it deals with the previous
20 regime – the 1997 regime. I do not know if you had a chance to read it, but it may be true to
21 say that the learned Advocate General was not at his clearest.

22 THE CHAIRMAN: Yes, we did have a chance to read it but I am not sure we understood it.

23 MR. WARD: There is a certain amount of ellipsis, but actually one can very much understand what
24 the case is about by looking at para.37, where he distils what he thinks the issue in the case is.

25 “What the national court really needs to know is whether the private use of a
26 telecommunications network falls under the aegis of Directive 97/13 irrespective of
27 the kind of certificate on which it is based.”

28 So he is really saying does the Directive apply to a private network? Because what you will
29 recall from the facts is that the Italian Energy undertaking had operated a private network for
30 its own uses and then wanted to branch out into making public provision of telephone services
31 as well. We can see that explained in short form at para.23 for example. It says:

32 “ENI, a company entitled to provide the public services of producing and distributing
33 power from hydrocarbons and natural gas, has for a long time been the sole assignee
34 of radio frequencies franchised for private use in respect of the security and

1 management of its own equipment and operators and has set up a complex network of
2 mobile systems...”

3 In other words, it is operating its own radio telephone network for its own use. Then what it
4 does is decide it would quite like to go to the business of providing public services as well and
5 you will see in para.26:

6 “...pursuant to Presidential Decree the Minister of Telecommunications issued NST
7 with an individual licence for the provision of services accessible to the public at
8 national level.”

9 Then the argument was about the fees that had to be paid for these franchises, because the
10 relevant Directive basically precluded there being any fees over and above the recovery of
11 costs and, as you can see from the figures, even though they are in Italian Lire, they are fairly
12 large figures that the Italian State was after. The question was therefore whether these fees on
13 the private network were precluded by the Directive and that is where we get to para.37. What
14 the Advocate General does is analyse the language of the Directive, and you will see at
15 para.40 he starts by defining telecommunications network. It is all slightly different from the
16 regime we are looking at. Then he talks about telecommunications services at 41, and then he
17 talks about whether they are public or private telecommunications services. What he says is:

18 “42. The latter may be labelled public or private according to the scope of the
19 offering; the first adjective is ascribed to those providing services available to users
20 indiscriminately. Directive 97/33 throws light on this point when it states, at the end
21 of the fifth recital, that ‘public’ does not refer to ownership, nor does it refer to a
22 limited set of offerings designated as ‘public networks’ or ‘public services’, but means
23 any network or service that is made publicly available for use by third parties.

24 “43. In short, a network in private hands may be public, in order that it may provide
25 services of that kind, available to all consumers.”

26 THE CHAIRMAN: But wait a minute, does that not assist me on my interpretation? “...any network
27 or service that is made publicly available for use by third parties”?

28 MR. WARD: Again, we have read that as meaning third parties who wished to purchase the service
29 or enter into a contract for service.

30 THE CHAIRMAN: Do we have the bit of legislation that this is positing?

31 MR. WARD: We do, and indeed it is discussed in the footnote. The legislation itself is in bundle 4
32 at tab 6 and this is Directive 97/33 that you have already seen.

33 THE CHAIRMAN: Yes. Which paragraph?

34 MR. WARD: If you look at Article 2(1)(b) which is at p.200, it defines “public telecommunications
35 network”, which is the term that he is considering, as “ ...a telecommunications network

1 used, in whole or in part, for the provision of publicly available telecommunications services.”

2 Then the recitals which the Advocate General considered are on p.197 and it is recitals (4) and
3 (5), can I just invite you to read those?

4 THE CHAIRMAN: Yes. (After a pause) Yes.

5 MR. WARD: You will see, I hope, an echo of what we are submitting, particularly in recital 4.

6 THE CHAIRMAN: I am not sure. It means “any network or services made publicly available for
7 use by third parties”. That is looking at the ----

8 MR. WARD: Well that is at best ambiguous, if I may respectfully submit.

9 THE CHAIRMAN: I am being very thick about this, but I do not at the moment see how that means
10 that it is publicly available to the person who gets the number rather than publicly available
11 because the number can be used by third parties who can call in and that they are the public.

12 MR. WARD: It could be either taken on its own. In other words, the third party in question may be
13 a potential contractor with the telecoms undertaking or, indeed, on your posited analysis it
14 could be the potential caller – either could be described as a ‘third party’.

15 THE CHAIRMAN: Well who is the contractor?

16 MR. WARD: The person who would like to subscribe to the telephone service, the person who asks
17 the undertaking to provide them with a telephone number and a telephone service – in this
18 case we would say “PTR”. Can I seek to suggest that some of recital 4 is at least of some
19 assistance here, because it says:

20 “... the regulatory framework for interconnection covers those situations where the
21 interconnected networks are used for the commercial provision of publicly available
22 telecommunications services ...”

23 in other words, purchasing a service; “... whereas ...” and this is perhaps more useful,

24 “... the regulatory framework for interconnection does not cover cases where
25 telecommunications network is used for the provision of telecommunications services
26 available only to a specific end user or to a closed user group.”

27 THE CHAIRMAN: Well that is why I think at the moment that it is not to do with the end user, it is
28 to do with who can call in on the line.

29 MR. WARD: Here the reference is to specific end users, by which we take that to mean for example
30 the tenants of a particular landlord in a block of flats as opposed to the public at large, such as
31 MMP who can subscribe to Thus’s service. It is pointed out to me on the approach that you
32 are positing hypothetically any telephone number would be publicly available if it can be
33 dialled from another telephone number, so then it may become an empty distinction.

1 THE CHAIRMAN: Well no, what I am positing is that it is available to be dialled by any telephone
2 number whereas some numbers may only to be dialled between two numbers. This may
3 become relevant because of the translated number point.

4 MR. WARD: It may be relevant but, as I have said, in our submission on your analysis the
5 obligation is simply wider than we had even posited, because Ofcom has taken the view that it
6 only applies where a telephone service is offered to the public to subscribe in the sense of an
7 organisation such as MMP, or we would say PTR entering into a subscription for that service.
8 You are suggesting, ma'am, that it is wider than that and that it applies to any telephone
9 service to which anybody can dial in.

10 THE CHAIRMAN: So your landlord and tenant point – why do you say that is different?

11 MR. WARD: Because unlike Thus it was not open to MMP to simply ring up and contact the owner
12 of a block of flats and say “I would like to be provided with the same service that you would
13 provide your tenants, because the landlord would say “No, you are not one of my tenants,
14 only provide the service to the tenants”, whereas Thus will say “Provided you meet on terms
15 and conditions we are happy to supply you.”

16 THE CHAIRMAN: We are going to have to explore that, I am being very slow. Let us not use the
17 landlord and tenant point, let us use the hotel because that is a more obvious example, is it
18 or not?

19 MR. WARD: I am not sure.

20 THE CHAIRMAN: Ah!

21 MR. WARD: I am happy to pursue any example you wish, ma'am. It is closed user group ----

22 THE CHAIRMAN: A landlord and tenant situation does not normally provide a telephone service.

23 MR. WARD: Well shall we go with perhaps the example of the *ENI* case where there is a telecom
24 service ----

25 MR. MILLARD: Ma'am, would it be helpful can I point something out here, if I may, and that is
26 you have mentioned about a hotel situation here. Yes, sure, there can be some guests in that
27 hotel but on the other hand members of the public from outside can dial into that service as
28 well and reach those members in their rooms.

29 MR. WARD: I entirely accept that. It may be that a real example is better, and we have a real
30 example here in front of us in the form of this *ENI* case, where this energy undertaking was
31 operating a network for the benefit of its own employees ----

32 THE CHAIRMAN: It was an internal telephone service.

33 MR. WARD: An internal telephone system. In the first instance, before it branched out into public
34 services I could not have contacted ENI and said “Would you supply me with a telephone
35 link?” because they would have said “No, you are not part of our closed user group, namely

1 our employees.” Once they expanded their business to make public offerings I could have
2 contacted them and said “Would you supply me with a telephone service now?” They would
3 have said “Well that’s fine, it’s a public offering, you don’t need to be one of our employees.”
4 I think that is perhaps a better example than worrying about hotels that we do not know the
5 terms of occupation of.

6 THE CHAIRMAN: I am not sure that that actually takes us any further because in the closed user
7 group I, as somebody from outside, cannot dial into that closed user group; if you open it to
8 the public I can dial in, so it just begs the question again.

9 MR. WARD: It may beg the question or, indeed, it may be a separate question because we do not
10 know what incoming calls can be taken in this closed user group, but at least it is an example
11 which is, if you like, from the real world rather than hypothetical

12 THE CHAIRMAN: I think if you are a closed user group anybody can dial into the closed user
13 group, then I do not see what the closed user group is doing because the whole point of the
14 closed user group is that everybody is dialling within that group.

15 MR. WARD: The closed user group, ENI is supplying handsets to its employees presumably so that
16 they can make calls to facilitate ENI’s work.

17 THE CHAIRMAN: To each other?

18 MR. WARD: To each other presumably. The crucial point in Ofcom’s submission is whether
19 somebody else can also subscribe to that user group. So could I go to ENI and ask for
20 handset and be joined on to their network, that is the crucial thing ----

21 THE CHAIRMAN: Yes, but you would not be able to do that because it is a closed user group ----

22 MR. WARD: Indeed.

23 THE CHAIRMAN: -- the only people who can make calls between each other are within the closed
24 user group.

25 MR. WARD: Well I do not know if that is right ----

26 THE CHAIRMAN: Once you open it up ----

27 MR. WARD: I am prepared to assume for the sake of argument that ENI’s closed user group can
28 also take incoming calls. I have no idea, of course, and the case does not make that clear. But
29 let us assume that that is the case for a moment.

30 THE CHAIRMAN: Well if that was the case then I can see your point, but I do not call that a closed
31 user group unless that is the definition of a closed user group.

32 MR. WARD: This is not a term of art at all. What Ofcom is seeking to distinguish here is a case
33 such as ENI where there is only a limited provision of subscription to the service from a case
34 where, in principle, anyone can subscribe. That is the distinction we seek to rely upon.
35 Crucially though in this Appeal the issue is whether that be right, or whether a yet narrower

1 approach advocated by Mr. Millard is right, because Mr. Millard's approach is that he is not
2 within the Ofcom definition because, if I can put it in rather concise terms, MMP is selective
3 about its customers. It does not supply just anybody. He says that because of that his service
4 is not publicly available.

5 MRS. KELLY: Can I just ask a question there? In terms of the difference, I am quite happy about
6 the "publicly available" bit, Thus are offering something which anybody can have access to,
7 but surely once Mr. Millard has the deal with Thus he has to preset the deal almost before
8 selling it on, so it is a simultaneous thing. So what he is actually selling is not something
9 which the public would actually want, because it is simultaneous – he has set up the package
10 here, tied it up in a bow and says "Here you are, PTR". So actually is what he is offering then
11 not something which would be publicly available?

12 MR. WARD: We would respectfully disagree on the basis that what you have described as the
13 "package" which was custom made, we have heard, for PTR, was something that he would
14 have been prepared to do for other people. It was not his case that, for example, I would only
15 prepare this package for a certain limited class of people such as the employees of MMP, or
16 residents of Berkshire, or any other pre-defined category. His offering was more general than
17 that even if it was not a situation where he had a sort of stock in trade to distribute on
18 application, he says "We are specialists in telecoms. If you need these kind of telecoms
19 services, we will give you advice, we will go to a supplier such as Thus, and we will put
20 package together and then we will sell it to you." But the reason his offering was public was
21 that that offer was advanced generally and could have been taken up by others, it was not
22 specific to some form of closed or defined class – employees of the organisation, geographical
23 area, however one might define it.

24 His argument is "no, because we are highly selective about whom we do business
25 with. We would not do business with anybody." Ofcom's submission in that regard is that
26 that is not an answer, because of course elementarily most organisations are choosy about
27 whom they do business with and it is not enough to defeat the obligation to port to say "Our
28 offering is not made publicly because in some circumstances we will refuse some applicants"
29 – because they may have a bad credit history or there may be more specific reasons for not
30 wishing to do business with a particular undertaking and, generally speaking, people are free
31 to make those decisions for themselves. So merely because MMP may have high standards or
32 be very selective about who it deals with that does not mean it is not publicly available in
33 principle, because there is no pre-determined class to whom the service is only available. It is
34 available to suitable applicants whoever they are.

35 MRS. KELLY: Interesting.

1 MR. WARD: Have I answered your question?

2 MRS. KELLY: Well, maybe ----

3 MR. WARD: If not may I try again?

4 MRS. KELLY: Well try again. It is just that listening to you first time I was happily following the
5 "public" bit, but that said to me if stage A is public then stage B becomes questionable?

6 MR. WARD: I am sorry, I am not sure I understand the distinction between A and B.

7 MRS. KELLY: All right, "A" is the major provider to MMP in this instance – that is "A". I could
8 see where you were going with that. But that then said to me hang on, if that is where you are
9 going along that line, when you get to the stage where there is the set up with PTR, that
10 seemed to me then to be not on the same basis.

11 MR. WARD: May I try again then?

12 MRS. KELLY: Yes, sure. Thank you.

13 MR. WARD: It is not on the same basis inasmuch as it is a customised package that is prepared for
14 PTR. It is, however, on the same basis inasmuch as the offer to make such a package is
15 generally open. In other words, it is not that there is a small group of people with whom MMP
16 has some form of prior relationship who are the only ones with which it will deal – family,
17 employees, related companies, companies in the group or some perhaps discriminatory
18 criterion. That is not the situation at all. MMP's business is putting together these packages.
19 That is how it makes its money. So when a client comes to it and says "I am interested in such
20 a package" MMP, as Mr. Millard explains, gives advice and then negotiates the package with
21 a suitable provider. He offers expertise as a middle-man rather as, say, someone who is
22 financial adviser might do. But that does not mean so even you end up with a customised
23 package, like somebody may have a customised pension plan, the offer to make up such
24 packages is made to the public at large. The fact that Mr. Millard may be selective about who
25 he deals with, choosy about his clients does not affect the generally public nature. It does not
26 rely on some form of prior relationship, such as being an employee, member of the family, so
27 on and so forth. That, I hope, at least makes clear what the case is that we are advancing,
28 whether or not it is accepted.

29 THE CHAIRMAN: Does that not depend – if you look at the definition at "(1)" of publicly
30 available telephone service, that is at p.460, does that not depend on whether a "service" there
31 refers to what you are calling "a package"?

32 MR. WARD: It will not ordinarily be a package.

33 THE CHAIRMAN: What is meant by a "service" then? "Service" is not defined.

34 MR. WARD: No, well it is a telephone service.

35 THE CHAIRMAN: Yes.

1 MR. WARD: That is ordinary English in the sense that it is not defined.

2 THE CHAIRMAN: That means that MMP would have to be providing a service made available to
3 the public for originating and receiving, etc., and the question is, is the service made available
4 to the public for originating or receiving, etc., a service made available by MMP, or is it
5 service made available by Thus? He may provide this package with some wrapping paper
6 and the bow that was referred to, but that may not be the service.

7 MR. WARD: This takes us back to the question of whether MMP is providing an electronic
8 communications service. I made my submissions about that earlier, but very, very briefly it
9 provides a service – that is at p.446 – “... consisting in or having as its principal feature, the
10 conveyance by means of an Electronic Communication Network of Signals”, and “Signals”
11 means any form of data. What I submitted before lunch is that that is precisely the service that
12 MMP is providing to PTR, because it is providing a service whereby calls to the 0870 number
13 will be transcribed to PTR’s 0207 number. It is using Thus to physically execute the service
14 but as between MMP and PTR, MMP is providing that service. That, in our submission, is the
15 telephone service which MMP is providing for the purposes of the definition of PATS. It is
16 number translation. Yes, it is true, it is using Thus’s network, but for the reasons I explained
17 this morning we submit that is wholly irrelevant, that is just the difference between ECN and
18 ECS.

19 THE CHAIRMAN: Can we just explore the difference between ECN and ECS for a minute?

20 MR. WARD: Certainly. the difference, in short, is that ECN involves a network. Electronic
21 Communications Network means a transmission system for the conveyance of signals – in
22 other words, hardware. Electronic Communications Service means the conveyance using an
23 Electronic Communication Network of Signals.

24 THE CHAIRMAN: So, for example, you might have the hardware, or you may have the right to use
25 the hardware to convey a signal. If you have the hardware that is an electronic
26 communications network.

27 MR. WARD: Yes.

28 THE CHAIRMAN: If you only have the right over the hardware, that is electronic communications
29 service?

30 MR. WARD: Yes.

31 THE CHAIRMAN: Does MMP have any right to convey anything?

32 MR. WARD: It is contractual – it is not really the right way of looking at it. What MMP has done is
33 contract with PTR to provide number translation services. That is uncontested, that is on the
34 face of the contract. It does not own any networks, as Mr. Millard said. It does not own a

1 scrap of hardware. So it uses Thus's network to do the actual work, the underlying
2 transmission.

3 THE CHAIRMAN: Yes, I think what I am trying to test is whether it does itself use Thus's network.

4 MR. WARD: No, it contracts with PTR and it contracts with Thus. To PTR it promises the number
5 from 0870 will be translated to your 0207 number. With Thus it contracts that Thus agrees to
6 actually make that translation happen. So what PTR has provided is the service of translation,
7 but executing it – almost as if it is a subcontractor – through the actual physical work done by
8 Thus, and the whole purpose of this, as I was seeking to explain this morning, is to capture
9 people who used to be described as “systemless” service providers. That jargon has gone
10 because the Community conceptual framework has come in, but the difference between these
11 definitions in essence is, is it your hardware? If it is your hardware it is ECN, and if you are
12 using the hardware of others on a contracted basis then it is ECS.

13 THE CHAIRMAN: What I am trying to explore is using the hardware of others. Do we assume that
14 Thus has the hardware?

15 MR. WARD: We assume it does.

16 THE CHAIRMAN: I do not know if it does or it does not. It does have the hardware?

17 MR. WARD: It does.

18 THE CHAIRMAN: All right.

19 MR. WARD: Let us assume that that is right as we are told it is.

20 THE CHAIRMAN: Fine, because it could be that they are using somebody else's hardware.

21 MR. WARD: Conceivably it could be, in which case Thus would only be providing an ECS to
22 MMP.

23 THE CHAIRMAN: Absolutely, I have now understood that bit, that was very useful. Now, I go to
24 Thus and say to Thus “I can get you some customers that will use your hardware if you will
25 provide the service”?

26 MR. WARD: Yes

27 THE CHAIRMAN: They say “Fine”. So I go off and get some customers and I get the translated
28 numbers from the customers and I say to Thus “Here are the translated numbers”. On these
29 selected numbers through that translated number you will provide a service and they say
30 “Fine”. What is going through my mind is whether, in fact, as between Thus and me I am
31 actually Thus's agent.

32 MR. WARD: You might be.

33 THE CHAIRMAN: And if I am Thus's agent I am not providing that service, Thus is?

34 MR. WARD: Yes.

1 THE CHAIRMAN: As between me and PTR I may be a principal in that contract. But when I am
2 arranging the transaction insofar as there is any conveyance it is Thus that is providing that
3 conveyance not me. He is nodding so I think that is your case is it not?

4 MR. WARD: Thus far ----

5 THE CHAIRMAN: The question is why is that wrong?

6 MR. WARD: The short answer to this is two fold. First, the regulatory regime does not deal in
7 terms of agency, it is derived from the Community Law regime itself, and what we have is
8 definitions which either apply or they do not apply, derived from Community law.

9 The second thing is what are the facts on the ground in this particular case? All we
10 know is that PTR contracted with MMP, apparently as principal to provide this service,
11 because that is what it says on the face of the contract. Then we have the second agreement
12 provided yesterday, between Thus and MMP where MMP contracts, apparently as principal
13 with Thus, because of course there is no mention anywhere on the face of this contract as
14 PTR.

15 THE CHAIRMAN: Well except we have the translated number which we know is a PTR number.

16 MR. WARD: We happen to know that is a PTR number, but the contract simply says that Thus
17 agrees to provide MMP with this number translation service. The contract between MMP and
18 PTR simply says that MMP will provide PTR with the number translation service. Our
19 submission is really very, very simple. That service is an electronic communications service
20 within the meaning of the definition because it consists of the conveyance of a signal.

21 MR. MILLARD: Ma'am, may I interject there and just correct something Mr. Ward has said. The
22 contract between MMP and PTR does not say that MMP will translate those calls, it talks
23 about, it talks about how it will arrange the network build.

24 MR. WARD: That is absolutely true, but it does not matter at all because this contract describes the
25 service which MMP is proposing to provide, which is if you like setting up the network. It
26 says, as Mr. Millard rightly says ----

27 THE CHAIRMAN: "One-off set up".

28 MR. WARD: This is a one-off set up and connection fee for the network build, and then there is
29 continuing routing charge. He describes it as "rental", we describe it ----

30 MR. MILLARD: It is a rental charge, ma'am, not a routing charge.

31 MR. WARD: We dispute that it is a rental, that it is appropriately described.

32 THE CHAIRMAN: Well it does not matter, you just need to look at "1". It is a one-off set up and
33 connection fee. This is for the network build, to route all calls made to number on to your
34 PSTN?

1 MR. WARD: Yes, and that we submit is in order to set up a number translation service in other
2 words. The service provided here is number translation. That is what PTR is paying for,
3 including an initial set up cost. That service is an electronic communications service.

4 THE CHAIRMAN: But if, in reality, MMP have an agreement which is effectively an agency
5 agreement with Thus then although this may say that “we are doing it” in reality contractually
6 – and you may say well I should not be looking at contract – but in reality contractually this is
7 being done by MMP as agent for Thus and the person who is doing the conveyancing is Thus.
8 That is why I was interested in whether this is mirrored, because this is not mirrored in the
9 Thus contract.

10 MR. WARD: Exactly, the Thus contract is not in any way, shape or form, expressed as an agency
11 contract. That is point number 1.

12 THE CHAIRMAN: Well that does not matter, because it is what the reality is rather than ----

13 MR. WARD: Well indeed, but that is of course the only real evidence is as to what the reality is.

14 THE CHAIRMAN: But you said you were going to come back to the £250, do you remember, when
15 I mentioned it earlier? I said “Was Thus charging the £250?” and you said “I will come back
16 to that.”

17 MR. WARD: No, well what I came back to earlier was to show you what the charging structure was
18 under the contract, which is not payments to Thus, but payments by Thus to MMP. That was
19 the point I was going to come back to.

20 THE CHAIRMAN: Where it says in the agreement, which you said we do not have, Thus call
21 control services business price list, have you got it there?

22 MR. WARD: We do not have it, we have not seen it. The only information we have about charges
23 is that payments will be made by Thus to MMP, so we do not know whether MMP was
24 charged a flat fee or not.

25 MR. MILLARD: Ma’am, if I may be helpful, I do not have a copy of that Thus call control services
26 business price list, but as all operators will be required that will be published on the website,
27 or they will have to make it available publicly, and it was never attached to this document
28 because that would be a generally publicly available document.

29 THE CHAIRMAN: Did you have to pay the £250 over to Thus? Was that your charge?

30 MR. MILLARD: I would have had to have paid a charge to Thus but, to be honest, ma’am, unless
31 go back to my accounts back in 2000 I would not be able to say what that was, or what that
32 was not, but would have paid a charge to Thus, yes.

33 THE CHAIRMAN: For the connection?

34 MR. MILLARD: Yes.

1 MR. WARD: I am told that there is a provision in the Communications Act which deals with agency
2 in any event for what it is worth, and it is in s.32(4)(b), I do not think it is in your bundle,
3 actually. We had not anticipated this point.

4 THE CHAIRMAN: Do we want to come back to it, I can get somebody to go and get my
5 Communications Act.

6 MR. WARD: Yes. The short point I am really relying on here is that the Regulation clearly
7 envisages that there may be provision of a service using someone else's network. That is what
8 electronic communications service is all about. That is precisely this case. Mr. Millard
9 actually has asserted that he is not an agent, not that he is, because in his reply he said
10 "Agency might be one of the ways I could have avoided this obligation."

11 THE CHAIRMAN: No, he said that this morning as well.

12 MR. WARD: So he has actually asserted the contrary, so in a sense the case that you are dealing
13 with, ma'am, is hypothetical. What would the position be if he was an agent? I think the
14 answer comes from the Communications Act, which is that you would look through the
15 agency, so PTR would have a right to port as against Thus. Mr. Millard's whole case is, of
16 course, he has an interest in the numbers. Mr. Millard then would have no interest in the
17 numbers at all. He would have just acted as an agent setting up an arrangement between Thus
18 and PTR. Therefore his whole reason for being here, which is to assert an interest in the
19 numbers, would crumble away. So he is quite right not to have asserted any agency in fact.

20 THE CHAIRMAN: Because of the Communications Act provision?

21 MR. WARD: Yes.

22 THE CHAIRMAN: Yes, we will have a look at that.

23 MR. WARD: We will have a look at that in due course.

24 THE CHAIRMAN: I am just concerned that because Mr. Millard is not a lawyer he may be
25 conceding something that a lawyer might not concede.

26 MR. WARD: But here he is actually right to not concede it because everything he is here to prove
27 would fail by reason of his agency.

28 THE CHAIRMAN: Right, well we will look at the provision.

29 MR. WARD: Then the porting arrangement would exist between Thus and PTR, but as a mere agent
30 he would have no interest in the principal's numbers, if I can put it rather colloquially, at all.
31 So the whole Appeal would be doomed, albeit for completely new and different reasons. Of
32 course, no arguments on agency were advanced in front of Ofcom so this line of reasoning is
33 not explored in the Decision. Perhaps when you have the Communications Act before you we
34 can come back to that. (After a pause) It looks like you have the same printed version as

1 have, so I hope you will find it on p.30, s.32.4(b). I am afraid it is not the easiest to follow.

2 Can I just suggest that you read it?

3 THE CHAIRMAN: Yes. (After a pause) Yes.

4 MR. WARD: Well here is what we think it means. Where one or more persons are employed or
5 engaged to provide the network or service, and that “one or more persons” for now is MMP, if
6 one puts that in, the network or service under the direction or control of another, Thus –
7 assuming that MMP really is an agent ----

8 THE CHAIRMAN: To PTR ----

9 MR. WARD: -- to PTR, references – which is the first word in the paragraph – are confined to
10 references to the other person, the other person being the “another” of four lines earlier, being
11 Thus. So in other words you read Thus in instead of PTR. This section of course applies to
12 the interpretation of the General Condition.

13 THE CHAIRMAN: If what I was saying was correct then that goes against Mr. Millard.

14 MR. WARD: Yes, it is fatal to his argument.

15 THE CHAIRMAN: Fatal to his argument. He has to be a principal.

16 MR. WARD: He has to be a principal and he has rightly asserted that he is.

17 THE CHAIRMAN: Sorry to have taken you down that line.

18 MR. WARD: No, not at all, ma’am, I am glad we were able to help. What I was going to move on
19 to, if it is convenient for the Tribunal, is dealing with the remaining question arising out of
20 publicly available telephone services, which is the definition adopted in the domestic
21 legislation which, as you pointed out in the previous case management conference, differs
22 critically from the definition in the Directive. The starting point, perhaps, is the Directive
23 definition itself, which we find in the Universal Services Directive.

24 THE CHAIRMAN: That is divider 13?

25 MR. WARD: Divider 13, p.338, 2(c): “publicly available telephone service means a service
26 available to the public for originating and receiving calls.” The point you made, ma’am, that
27 the definition adopted in General Condition 18, but not more generally, includes also the
28 words “Or for receiving”. The question is whether or not that is a permissible implementation
29 of the definition because, of course, this is the implementation of a Directive. Before moving
30 on to the argument as to why we say it is, one must in my respectful submission consider the
31 policy background to this provision again.

32 If, in fact, PATS was confined only to services for originating and receiving calls
33 there would be a very large gap in the portability regime. The reason for that is that a great
34 many non-geographic services are for receiving calls only – as this case exemplifies. As I said
35 this morning, and I repeat very briefly, there is no logic to such a gap in the competition

1 concerns. They arise just as much with one way services as they do with two way services.
2 But moreover the Directive itself quite clearly and unambiguously envisages that non-
3 geographic services can be PATS, and we see that firstly from Article 2(c) itself. You will see
4 in the last three words, that PATS can include non-geographic services. So the Community
5 legislature was thinking about non-geographic services. Then at (f) you will see that
6 non-geographic numbers means a number from the national numbering plan that is not a
7 geographic number”, well that is so far so tortological. Then it says “It includes *inter alia*
8 mobile, freephone and premium rate numbers.” Mobile numbers are, of course, two way, but
9 freephone and premium rate numbers are frequently, if not invariably, one way.

10 So then the question that you are faced with is do you interpret literally and conclude
11 that if it is not a service for receiving and originating calls, then it cannot be a PATS, or do
12 you interpret – in our submission purposively and really read the “and” as an “and/or” which
13 is all that is required. If you interpret literally a large swathe of non-geographic numbers they
14 become non-portable, with the obvious detriment to the competition interests which this is
15 intended to promote.

16 THE CHAIRMAN: Mr. Millard will say that that actually solves his problem, because that is what
17 he was trying to say to us, that there is a large number which ought to be non-portable.

18 MR. WARD: Oh absolutely, it solves his problem because it frees him from the constraints of
19 competition which Uni-World are trying to place upon him. But we respectfully submit it is
20 the very policy of the Act to prevent that, and if there is any doubt about that one must turn to
21 Article 30, which is the obligation to port itself and that is at p.345. I realise this is familiar
22 territory but 31(b) specifically refers to the porting of non-geographic numbers. For your note,
23 and it is self-evident, at pages 180 and 186 of bundle 4 there is an explanation of why porting
24 of non-geographic numbers is particularly important. But it is self-evident, because
25 companies such as PTR invest in their promotion and rely upon them being known by their
26 customers, so it is obvious that inability to port is a major impediment to changing service
27 provider.

28 So we submit that really here there is just the choice between a purposive construction
29 which reads “and” as “and/or”, or a literal construction which insists upon the “and”. Ofcom
30 has concluded that the purposive construction is the appropriate one, and it explained that
31 explicitly in the passage that Mr. Millard in fact read to you this morning. It has been quite
32 overt about adopting a modified definition specifically for this purpose. If I can just remind
33 you that the modified definition is in GC18 itself, it only applies to GC18, and this is the
34 definition we have been looking at on p.460. Just for your note, the explanation given by
35 Ofcom for the reason why it adopted this modified definition is at p.262 of bundle 5. You have

1 been shown it already by Mr. Millard, and I have really given you the gist of it now. In which
2 case, therefore, the question is only is it permissible as purposive interpretation to interpret the
3 way that Ofcom submits – permissible whether or not required, because this is, of course, the
4 implementation of a Directive. Our submission is that it is plainly in the tradition of purposive
5 interpretation of Community legislation, and we have set out at para.69 of the skeleton
6 argument a whole series of propositions derived really just by way of example from
7 Community cases, cases in the Court of Justice and one from the House of Lords about what
8 the proper approach to the interpretation of Community legislation is. I do not propose to take
9 up your time now going through them, but of course invite you to consider them. But we do
10 say that what we are saying here is anything but a heresy and, indeed, we would also rely on
11 some language from the *ENI* case as well, which I referred to just before lunch, where you will
12 see that the Advocate General summarises his approach at paras. 55 and 56. Talking in fact
13 about publicly available telephone services specifically, he says:

14 “55. The terms used by the Community legislature do not offer firm guidelines
15 because, as I pointed out in footnote 26 of this Opinion, they are somewhat
16 inconsistent.”

17 Then he says:

18 “56. Furthermore, the analysis of certain passages in these Directives ... cannot take
19 precedence over the avowed aim of devoting their resolutions to the liberalisation of
20 the telecommunications market.”

21 We respectfully echo that and say that nor can it take precedent over the aim of giving proper
22 effect to competition in the telecoms market. So that is our submission on “and” versus
23 “and/or”.

24 I was then going to deal very briefly indeed with the argument that, in fact, has
25 formed the central plank of this Appeal, which is essentially rental of telephone numbers.
26 would refer you, if I may, to our skeleton argument where we deal with this in some length at
27 para.79 to 88. I am not going to read out those arguments, I am just going to make one
28 supplemental point arising from the agreement between Thus and MMP which you already
29 averted to earlier, namely, that what Mr. Millard is asserting is, in truth, completely
30 inconsistent with General Condition 6 on the second page of this agreement, because it
31 specifically provides that the customer “shall not acquire any title or interest in any telephone
32 numbers allocated by the company.” So even before one gets to the question of the regulatory
33 regime the contract itself does not deliver the goods – it cannot be rental of something in
34 which Mr. Millard has no interest. But, in any event, we would say even if the contract
35 apparently permitted it, it is simply not the nature of a telephone number to be private

1 property, or if it is property it is in any event qualified by the right to port. That is the
2 argument we set out in the skeleton, and unless I can particularly assist on that I will leave it
3 there.

4 I have almost finished in fact, I hope to be no more than about another five minutes.
5 am going to deal very briefly with the question of PRS – Premium Rate Services.

6 r. Millard suggested that there was some form of unfairness in a distinction between the
7 regulation of PRS and the regulation of the kind of services in issue in this case. Of course,
8 the first point to make here is that this case is not concerned in any way with the PRS, and
9 Mr. Millard is not asserting the contrary.

10 The second point to make is that even if there were such an unfairness that is derived
11 from Community law. The provisions at issue implement the Community Directives. The
12 Community regime does not apply to the regulation of content services, such as PRS. So there
13 is not much we could do, but we do not accept the premise anyway.

14 THE CHAIRMAN: Well I think we discovered before that contents services has special
15 significance, and the question is if chat room is contents services why are the special numbers
16 for the purposes of ringing the Prime Time Radio not?

17 MR. WARD: Can we start by looking at a definition of what PRS is really all about.

18 THE CHAIRMAN: What you showed us before?

19 MR. WARD: Yes, it is at p.121 in bundle 5. The essential point I am going to come to in a minute
20 is that PRS gets additional regulation, not less regulation. Mr. Millard's case is that there is
21 a sort of unfairness because PRS is relatively lightly regulated, but that is simply not true.

22 One sees at s.120(1):

23 "OFCOM shall have the power, for the purpose of regulating the provision, content,
24 promotion and marketing of premium rate services, to set conditions ..."

25 So it is the provision, content, promotion and marketing of the services. What it is not about is
26 the underlying transmission because any premium rate service will involve a transmission,
27 a number translation service, from an 0900 number to a landline, in effect. So s.120 is about
28 regulation of what, for short term, I will just call the "content" while recognising that it is
29 slightly broader than that. Then, as you saw before, ma'am, the definition of what falls within
30 this section is provided at p.128, and it is the provision of the contents of the communication,
31 and then "facilities" by which it means interactive facilities of various kinds. So it is the
32 provision of the contents which are regulated under s.120, and the way it is regulated, as
33 Mr. Millard said, is through ICSTIS which has a code of practice which is rendered binding by
34 Ofcom's conditions. The details of all this you can find in the supplementary regulatory
35 summary at paras.13 through to 22. I am just trying to deal with this in short form now.

1 THE CHAIRMAN: Yes, are you saying that s.120 does not apply to the conveyancing? It only
2 applies to the provision, content, promotion and marketing, and conveyancing is somewhere
3 else?

4 MR. WARD: It is regulation of the content.

5 THE CHAIRMAN: Right, so where is regulation of the conveyancing? Back where we were?

6 MR. WARD: Exactly, so the content will be transmitted using an electronic communications service
7 or electronic communications network because there will be number translation. If you
8 imagine the example of a service provider providing a computer helpline (one of Mr. Millard's
9 examples) they are providing content in the form of advice about computers. That service, the
10 contents service is regulated as a PRS. If that contents service uses the network owned by
11 Thus, and Thus provides number translation from the 0900 number to the computer helpdesk,
12 then that number translation service will be regulated as any other electronic communications
13 network and, as a result and contrary to the impression that you might have gained from
14 reading s.120 on its own, there can be portability with PRS services, because the person who
15 has entered into the agreement with Thus may become dissatisfied and use Energis instead.
16 General Condition 18 bites just as much upon that as it does upon the present case. What
17 General Condition 18 is not interested in is the content aspect of the service. So that is why,
18 with the greatest of respect, this is actually a complete red herring. Regulation is additional
19 not alternative.

20 Before I finish there are just two more points that I wanted to reply to briefly. The
21 first point is that Mr. Millard asked us a question which was: "If both MMP and PTR are
22 subscribers who gets to choose who has the right to port?" His grievance, if I understand it, is
23 that if PTR ports away MMP cannot port away, because of course there is nothing to port
24 – MMP has lost the number which it might otherwise have ported. The answer to that question
25 as to who gets to choose is, of course, it is the subscribers. Assuming, for the sake of
26 argument, that both MMP and PTR are subscribers, both of them have the right to port as
27 against the communications provider to whom they subscribe. In other words, on Ofcom's
28 analysis at least, PTR can port away from MMP, but MMP could have ported away from
29 Thus. So if MMP had concluded that Thus was offering it a raw deal, and that Energis might
30 have offered it even more profitable terms, then MMP could indeed have ported away. But
31 once the number has been ported away from MMP by PTR then there is nothing left for MMP
32 to port. So the implication of this is that the right to port exists at both steps of the chain, but
33 therefore the competitive pressures also exist, so that if MMP wishes to keep its customer it
34 has to be mindful both upstream and downstream to make sure the most competitive deal is on

1 offer. The simple answer to the question is therefore anyone who satisfies General Condition
2 18 has the right support whilst they satisfy it.

3 The final point I was going to refer to very, very briefly, was the consultation
4 document that Mr. Millard showed you and inserted some additional pages, 48A and C into
5 the documents that were appended to his reply.

6 THE CHAIRMAN: Yes, can you remind us where that was?

7 MR. WARD: It is appended to his Reply, and I am afraid I do not know which file that is in.

8 THE CHAIRMAN: Yes.

9 MR. WARD: I think what Mr. Millard was placing emphasis on was at para.2.21 where there is
10 a reference to inter-platform competition. Page 50?

11 THE CHAIRMAN: Yes, 2.21.

12 MR. WARD: 2.21 and I hope I am not unfairly characterising the purpose for which he showed this
13 to you. Ofcom believes that number portability should be mandated in a manner that promotes
14 inter-platform competition.” Mr. Millard’s argument is “Yes, but not into reseller
15 competition”. The only reason I refer back to this at all is simply to put it into context. This
16 consultation arose out of an application by Vodafone to provide fixed line services to compete
17 with, say, BT, albeit using Vodafone’s wireless network; in other words, its mobile network.
18 It raised the question of whether wireless networks and, indeed, voice over internet protocol
19 networks ought to be allowed to compete with fixed line networks. That was the real issue,
20 and therefore in that context Ofcom said that number portability should be mandated in
21 a manner that promotes inter-platform competition. Inter-platform competition was, in fact,
22 the subject matter of this document. Just for your note, the introduction to that document is at
23 the final tab of your bundle 4, p.512 to 516 where the nature of the consultation exercise is
24 explained. So it is not that we resile in any way from what is said there, it was just selective
25 and for a purpose.

26 Unless I can assist further ----

27 THE CHAIRMAN: You can assist in one matter. Your letter of 20th February dealing with Article
28 5(4) of the Directive?

29 MR. WARD: Yes, would you give me a moment? (After a pause) Yes, I have it.

30 THE CHAIRMAN: This was very useful so thank you very much for doing it. If you look at the
31 penultimate paragraph I think it is, I read that to mean that even where one has gone down the
32 route of exceptional and economic value, the numbers still remain portable?

33 MR. WARD: Yes. May I posit how that could make sense?

34 MR COLGATE: Yes.

1 MR. WARD: A person to whom the number is allocated has it on the understanding it will be
2 portable in the hands of any end user. If the numbers are auctioned by Ofcom the price and
3 value of those numbers must surely reflect the fact that once they are sub-allocated to
4 a subscriber they can be ported. That means that the person who purchases the numbers in the
5 auction must bear that in mind when doing so, as to what their future value will be. But until,
6 of course, the purchaser – to use that term loosely - allows someone to subscribe to the
7 number they cannot be ported away. So supposing Thus decides to pay a fee for a golden
8 number, whilst Thus retains that number it cannot be ported away. Thus must then ask itself
9 how can it recover the value which it has paid to Ofcom to have that number from its potential
10 subscriber. It is a matter, of course, of commercial logic how one might do that, but one can
11 imagine – and I put it no higher than that – that charging a fixed fee for the allocation of that
12 number may make more sense than a periodic charge where the numbers may be ported away.

13 Alternatively, if the periodic charge is part of an otherwise highly competitive
14 offering there may be no incentive to port the number away. What created the incentive here
15 was the perception – fair or not – by PTR that it could get a better deal from Uni-World. So in
16 my example Thus must ask itself “How much dare I pay?” and the answer to that question
17 must be “How much revenue can I realise?” When someone comes along to Thus and is
18 offered the chance to pay a large sum of money for this number, that person must again
19 appraise whether or not they run the risk of it being ported. So if the person purchasing from
20 Thus is an end user – supposing PTR was dealing directly with Thus – then PTR is not worried
21 about the number being ported away because as the end user it does not face that risk. But any
22 form of intermediary must essentially construct a financial model that makes commercial
23 sense. But the fact that it is ported away does not preclude the number from being auctioned.

24 THE CHAIRMAN: So you are saying that it allows the portability because what you do is you sell
25 the number each time so that the person who has the number either is somebody who wants
26 the number, or who realises its value?

27 MR. WARD: And obtains it in order to sub-allocate it.

28 THE CHAIRMAN: To realise its value again? So you are either in the market of buying and selling
29 numbers, or you are the end user of using that number and therefore paying a lot of money for
30 that number?

31 MR. WARD: Yes, and of course we do not accept “buying” and “selling” is an accurate description
32 for the reasons we have gone into, but in shorthand exactly so. But the market must reflect the
33 regulatory reality, so the person who obtains the number for onward allocation must operate
34 wisely in the knowledge that it can be ported away, and must come up with a charging
35 structure that reflects that. So one way you can ensure against this is if you pay £10,000 to

1 Ofcom, if you then charge a flat fee of £11,000 to the person to whom you hand the number
2 on then you cannot be out of pocket. The risk that you run that Mr. Millard has essentially
3 complained about is, if you charge what he would describe as a monthly rental fee because of
4 course then somebody could say “I will pay the first so-called ‘rental’ and then I will port
5 away.”

6 THE CHAIRMAN: Because what you say is what you are trying to prevent is the middle people
7 retaining the number, and therefore causing anti-competitive behaviour either up or
8 downstream.

9 MR. WARD: It is the latter we are trying to prevent not the former, in the sense it is quite wrong if it
10 is being suggested that there is some regulatory bias against intermediaries, not at all. The
11 purpose of the regulatory regime is to ensure that intermediaries are subject to the same
12 competitive pressures as everybody else, so as to prevent the intermediaries being essentially
13 a block on the competitive process which, in our submission, is precisely what Mr. Millard is
14 actually arguing for. (After a pause) As it is put to me, of course, the purpose of the regime is
15 the promotion of competition, not *per se* the restraint of anti-competitive behaviour. As you
16 are all too aware ma’am, there is a whole separate mechanism that deals with that.

17 Can I assist further?

18 THE CHAIRMAN: No, thank you very much. Mr. Millard, are you happy to go now, or would you
19 like a five minute break?

20 MR. MILLARD: I am happy to go now, ma’am, thank you. I do not have a number of people
21 behind me to pass papers and shuffle papers.

22 THE CHAIRMAN: You may be fortunate in that – it is sometimes very difficult for an advocate.

23 MR. MILLARD: Just picking up to the last point that was made, referring to the Directive. I think
24 the wording there was intended to ensure that Member States and the Regulators of those
25 Member States ensured the initial fair portioning of potentially golden or memorable numbers
26 throughout the different operators.

27 THE CHAIRMAN: There is no obligation under Article 5, it is discretionary.

28 MR. MILLARD: It is a discretion, but it is an indication. Picking up on some of the points that
29 Mr. Ward has made both this morning and this afternoon. First, Mr. Ward was talking about
30 commercial issues here. He was talking about matters which I personally believe do not come
31 under regulatory control. He was talking about the rental charges charged by MMP to PTR.
32 He was talking about the lack of micro-payments by MMP to PTR, and the potential micro-
33 payments as per the contract that may have come from Thus to MMP. With respect, ma’am,
34 and Members of the Panel, Ofcom is losing sight here on this issue. It is the Regulator. It is to
35 ensure consumer choice. It is not empowered to determine what commercial rates a non-

1 geographic number company can or cannot charge, which effectively is what Mr. Ward is
2 trying to bring into their argument.

3 I referred earlier to “Spitfire” which was one of the examples in Mr. Ward’s bundle of
4 commercial materials. Spitfire do have a different charging structure to MMP, because I have
5 ascertained that. There is another company called “Planet Telecommunications” which can be
6 found very simply on the web (via Google) in exactly the same way, that charges exorbitantly
7 more than MMP was charging. Those are commercial matters, they are not regulatory issues.
8 It is between PTR and MMP as to whether they wish to continue on a commercial basis or
9 renegotiate. I refer again to Spitfire and how they say – and I quote ----

10 THE CHAIRMAN: Well I am not sure that is terribly useful. You told us before what they said, but
11 the fact is it is hearsay on hearsay. We have no way of it being checked and no way can
12 Ofcom now, because it has been brought up at this stage, check that.

13 MR. MILLARD: Right, I do have correspondence from them.

14 THE CHAIRMAN: I do not think it is very helpful.

15 MR. MILLARD: Okay. There is a question, and in fact Mr. Ward questioned whether MMP was
16 renting the numbers or not to Prime Time Radio. I refer the Panel simply to the contract,
17 talking about the rental fees and it being a quarterly rental. I refer also to the fact that PTR
18 paid those rental fees on such a basis, and that the final rental invoice was up to and including
19 4th April 2005, and they paid that on that basis.

20 Mr. Ward talked about how a company such as PTR may have invested capital in the
21 numbers. In fact, in his skeleton argument, p.19, para.100, third sentence: “It [PTR] would be
22 effectively forced to choose between continuing with the uncompetitive service of MMP ...”
23 well that is subjective, “... and writing off the commercial capital expended in promoting the
24 numbers to its listeners.” MMP would contend that PTR had a choice. It chose to come to
25 MMP. It did not choose to go direct to Thus, it did not go anywhere else, it came to MMP. If
26 it would have to write off the commercial capital expended in promoting the numbers to its
27 listeners, how is that different to, for example, a national newspaper that promotes premium
28 rate numbers and might have expended a huge amount in promoting to its readers?

29 THE CHAIRMAN: But what Mr. Ward has said is there is no difference between the premium rate
30 numbers.

31 MR. MILLARD: Unfortunately, ma’am, there is and I will come on to that in a moment, if I may.

32 I would actually refer you to GMTV who has expended a huge amount of money in one of its
33 premium rate numbers that it broadcasts several times every morning for its competitions. In
34 addition, it expended a huge amount of money promoting a premium rate number for its
35 weather service, which I would beg to put forward it has recently changed.

1 THE CHAIRMAN: Recently changed its number?

2 MR. MILLARD: Yes. Therefore there is no difference – no difference – between this service or
3 a premium rate service, and I will come on to the discrepancy and the disagreement that there
4 is over that.

5 It is very clear that MMP is not a communications provider. For this particular
6 Condition – Condition 18 – this was clarified in the number portability consultation that took
7 place to which an operator group or groups responded. It clarified the matter, which I did this
8 morning, and Mr. Ward has confirmed this afternoon, that for this particular condition the
9 definition of “subscriber” need only be concerned with PATS and not electronic
10 communications services. Therefore, everything that Mr. Ward has talked about this
11 afternoon to do with electronic communications services, with respect, ma’am, and members
12 of the Panel, is wholly irrelevant because for this particular condition it does not relate to
13 electronic communications services, and that can be referred to in the bundle of additional
14 material p.261. It need only be concerned with PATS.

15 I must say, ma’am and members of the Panel, I liked it when Mr. Ward said (and
16 I quote): “Ofcom agrees MMP is a subscriber”. MMP is a subscriber. He then went on to say
17 (and I quote): “Only a subscriber can request number portability.” Following the notification
18 served by Ofcom on MMP, MMP had to request of Thus the portability of the disputed
19 numbers. PTR did not have that ability to go to Thus and request it.

20 Mr. Ward has talked about end-users, and again I refer to his skeleton argument, p.7,
21 para.36. I am not quite sure why Mr. Ward spent actually so much time this afternoon talking
22 about end users because in this it says (and I quote): “The question whether MMP was an end
23 user within the meaning of the regulatory regime is immaterial to the outcome of this case.” If
24 it is immaterial why talk about it? Why bring it up? If we turn over the page to para.39:
25 “MMP was not authorised” so he says. MMP would contend, if we are looking at end user,
26 that it is authorised under 36(c). You cannot give what you do not have. How can I rent
27 something if I do not have an interest in it in the first instance? Therefore MMP was
28 authorised.

29 Turning to Publicly Available Telephone Services (“PATS”). There was a lot of
30 discussion about that and I am grateful because I think it really opens up the discussion.
31 However, yet again, we are moving away from actually what PATS means in relation to this
32 condition, because on p.45 of the supplementary bundle, the Operators’ Group was talking
33 about what the principal feature is. Is it the conveyance or the content, and under the
34 Communications Act it is agreed that the principal feature is the conveyance. Therefore, as
35 shown earlier here on this second diagram, MMP does not convey.

1 Mr. Ward talked a lot about “public”. Well I am sorry it is not actually defined in
2 General Condition 18. The definition referred to by Mr. Ward in the notification (p.12,
3 para.39) relates to an electronic communications network, not PATS, not even an ECS, which
4 we now know is irrelevant, it refers to an electronic communications network. Therefore, I am
5 sorry but his definition of public in my view is inaccurate, and we need to go back and
6 actually look at this particular condition which is nothing to do with – in my case – MMP
7 providing an electronic communications network, it is not to do with an ECS, it is to do with
8 PATS. PATS is meant to have the principal feature of being the conveyance, and MMP did
9 not convey.

10 It was accepted by Mr. Ward that (and I quote): “ a telephone number is not
11 a service.” One should remember that again MMP rented the disputed numbers.

12 Much reference has been made to Directives, Opinions of Advocates General from
13 cases elsewhere. I am not a legal person but I think we should look at the UK legislation and,
14 unfortunately I do believe that the UK legislation is unclear. We have already found several
15 mistakes within it, and I quote Mr. Ward: “Ofcom has taken a view”, well surely the
16 legislation should be clear? It should not be able to be interpreted in different ways – but
17 Ofcom apparently “has taken a view”. I would once again reiterate, and I apologise it is in
18 a slightly different order, but these are my notes, MMP rented the numbers to Prime Time
19 Radio, Prime Time Radio made that service available to the public.

20 The reason why I brought this to CAT is because I do believe that Ofcom is being
21 anti-competitive. Ofcom, as a public authority, has effectively taken away MMP’s rights and,
22 as Mr. Ward has confirmed, MMP is a subscriber and my porting rights have been taken away
23 from me and without compensation. MMP is not a communications provider, it does not
24 convey calls. MMP does not provide an electronic communications service but as discussed
25 that is irrelevant, PATS is the only relevant point. MMP does not provide PATS, the principal
26 feature is the conveyance of calls and MMP does not convey. Further, MMP contracted with
27 PTR to rent the numbers, thus made the service available to the public PTR chose, at its
28 discretion to promote it. It is very clear that MMP is the subscriber and therefore MMP should
29 enjoy portability. Ofcom is denying MMP that right, and by removing MMP’s ability and
30 right to port, Ofcom has acted anti-competitively. I would refer to the document that I read
31 some excerpts from, from an industry expert who made it clear that this was a grey area.

32 THE CHAIRMAN: It does not help us, we have to decide what the law is. Industry experts or other
33 people in the industry cannot really help us.

34 MR. MILLARD: I do appreciate that, ma’am. I rest my case that my numbers, as a subscriber, have
35 been ported away from me.

1 THE CHAIRMAN: Can I just ask you, I have a note which appears to be contradictory, I may have
2 misheard. I think at one point you said that PTR made the service available to the public and
3 then a few minutes later you said Thus made the service available to the public.

4 MR. MILLARD: Sorry, no, Thus made the service available to the public, PTR promoted it to the
5 public. It was not MMP that made that service available to the public.

6 I trust the Appeal is upheld. It will have interesting consequences on the industry, and
7 if nothing else comes from this case it may well be that the legislation is clarified or redrafted
8 accordingly.

9 Thank you ma'am, members of the Panel.

10 THE CHAIRMAN: Thank you very much. I think the submissions were very informative on both
11 sides and, if I can say so, I think you made your position very clear and it was very helpful to
12 hear you. In due course we will deliver a Judgment.

13 (The hearing concluded at 4 p.m.)