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IN THE COMPETITION

Case Nos 1094/3/3/08

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

19th June 2008

Before:
LORD CARLILE QC
(Chairman)

DR ARTHUR PRYOR
PROFESSOR PAUL STONEMAN

BETWEEN:

VODAFONE LIMITED
(Vodafone)
and

Applicant

OFFICE OF COMMUNICATIONS
(“OFCOM”)

Respondent

With Intervenors:

BRITISH TELECOMMUNICATIONS PLC
TELEFONICA O2 UK LIMITED
HUTCHISON 3G UK LIMITED
ORANGE PERSONAL COMMUNICATIONS SERVICES LIMITED
T-MOBILE UK LIMITED

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HEARING DAY TWO

APPEARANCES

Mr. Tim Ward (instructed by Herbert Smith) appeared on behalf of Vodafone.

Mr. Pushpinder Saini QC and Mr. Alan Bates (instructed by the Office of Communications) appeared for the Respondent.

Mr. Aidan Robertson (instructed by BT Legal) appeared on behalf of the Intervener British Telecommunications PLC

Miss Kelyn Bacon (instructed by Miss Aoife Power, Senior Competition Counsel, Telefónica Europe plc) appeared on behalf of the Intervener Telefónica 02 UK Limited.

Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Baker & McKenzie) appeared on behalf of the Intervener Hutchison 3G.

Miss Marie Demetriou and Miss Sarah Love (instructed by Field Fisher Waterhouse) appeared on behalf of the Intervener Orange.

Mr. Meredith Pickford (instructed by Miss Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Intervener T. Mobile.

1 THE CHAIRMAN: Good morning.

2 Mr. TIMOTHY PETER SUTHERNS, recalled

3 Cross-examined by Miss ROSE (continued)

4 Q Mr. Sutherns, can you just take up your witness statement in Volume 2, behind Tab B and
5 behind Tab D, and turn to para. 33? You say,

6 "The change to recipient-led porting is a major change of the existing IT systems
7 in Retail and Provisioning and creates a host of new challenges, that have not even
8 been considered by Ofcom in the preparatory work, and have still not been
9 determined".

10 A. That's correct.

11 Q Now, the reality is that recipient-led porting is universal internationally, is it not? A. I
12 can only answer for UK porting and our part of it. I'm not familiar with other nations'
13 porting processes.

14 Q Are you aware that the only other country in the world that has donor-led porting is the
15 Dominican Republic? A. As I said, I'm not aware of any other nations' porting
16 processes.

17 Q So, to say that recipient-led porting gives rise to a host of new challenges have not even
18 been considered is perhaps a little bold, is it not? A. No, not at all. These discussions are
19 going on in UK porting as we speak. Some of the discussions are absolutely basic. The
20 simple matter of when somebody walks into a Vodafone shop and says they wishes to port
21 their number to us -- Who do we actually authenticate against? Do we authenticate against
22 the network or against the MVNO providing the service? How do we know? Is that in the
23 CDB or is it in some intelligent hub?

24 Q These are challenges that every other country in the world has grappled with and managed
25 to cope with. A. Yes, and it needs to be delivered and alive by the end of December.

26 Q Vodafone, of course, are active in the Irish market, are they not? A. Vodafone (Ireland)
27 are active.

28 Q Yes, which is one of your group companies. A. Yes.

29 Q Where they have recipient-led porting. A. As I say, I work for Vodafone UK and I'm not
30 familiar with other nations' porting processes.

31 Q O2 are also active in the Irish market. Are you aware of that A. No.

32 Q And H3G? A. Okay. Fine.

33 Q So, three of the five MNOs are active in that market. A. Okay. Does that solve the
34 problem of how MVNOs are going to be addressed by this intelligent hub, if there is one?

1 Q Finally, you have made points about the functional specification, complaining that Ofcom
2 did not give you a detailed technical specification. It is not the job of the regulator, is it, to
3 tell industry participants how technically to specify their solutions, is it? A. I don't object
4 to whether Ofcom should write the specification or whether NICC should, or whether UK
5 porting should - just that right now there is no such specification and the costings are
6 necessarily very vague as a result.

7 Q That is normal, is it not - that what a regulator does is to provide a functional specification,
8 saying, "We want you to achieve X, Y, and Z. You go off and work out the most efficient
9 way of doing it". A. Indeed. For a major development at this stage, for a core part of the
10 UK infrastructure - a telephone system - one would expect sufficient time to be allowed to
11 do this in a safe and robust manner.

12 Q I have no further questions.

13 THE CHAIRMAN: Thank you very much, Miss Rose.

14 MR. WARD: I have no re-examination, sir.

15 (The witness withdrew)

16 MR. SAINI: Sir, may I just raise the matter of the running order for today. Mr. Roche, I believe
17 is going to be the next witness. What I have suggested to my learned friends - and most of
18 them, responded positively - was that the other witnesses - and I think there are only going
19 to be two further witnesses (Mr. Wardle from O2 and Mr. Baxter from H3G) come
20 immediately after Mr. Roche so that we get rid of the witnesses effectively in a relatively
21 short time. Then I can have a free run at my submissions rather than interrupting them.

22 THE CHAIRMAN: Any contrary views?

23 MR. WARD: We have no contrary views about the running order. We are a bit surprised by the
24 suggestion that Ofcom is going to cross-examine Mr. Baxter, who, on the face of it,
25 supports their case. I can make more submissions about that later, if that is convenient.

26 THE CHAIRMAN: Why do we not leave that until it arises. We will take the witnesses as a
27 package. That sounds like a very sensible suggestion.

28 Mr. HOWARD BARTHOLOMEW ROCHE, Sworn

29 Examined by Mr. WARD

30 Q Mr. Roche, could you state your full name and address? A. Howard Bartholomew
31 Roche, Vodafone House, The Connection, Newbury, Berkshire.

32 Q Thank you. Have you made two witness statements in these proceedings? A. Yes.

33 Q Can I ask you firstly to turn to bundle 1, tab 2? A. Yes.

34 Q Is that your witness statement? A. Yes.

1 Q Are its contents true to the best of your knowledge and belief? A. Yes.

2 Q Can I also ask you to turn to bundle 2, tab C B, is that your second witness statement? A.

3 Yes.

4 Q Are its contents true to the best of your knowledge and belief? A. Yes.

5 Q I want to ask you just one question by way of reply to a point that is made by Ofcom in its

6 skeleton argument for the first time. Can I ask you to turn that up, please, which is in

7 bundle 3. At page 11, para.11 – “The case put forward by Vodafone and its supporters, the

8 last paragraph at (b):

9 “As noted in paragraph 4 of the Defence, and explained in some depth by H3G ...

10 the benefits of moving to such a solution have been under discussion between the

11 mobile operators over a number of years, with H3G (a net payer of donor

12 conveyance charges) pressing for such a solution to be adopted while the more

13 established MNOs have appeared reluctant.”

14 Is Vodafone a net beneficiary of donor conveyance charges.

15 MR. WARD: Thank you. I have no more questions.

16 Cross-examined by Mr. SAINI

17 Q Mr. Roche, you will be pleased to hear I have very few questions for you. Can I ask you

18 first of all some questions in relation to a schedule which your Vodafone solicitors, Herbert

19 Smith prepared very helpfully for us on Monday, and if I can provide copies to the Tribunal

20 first and then a copy to you. (Document handed to Tribunal and witness) This is a

21 confidential document so I will try not to breach that confidence by reading out any specific

22 figures, but I just want to understand ----

23 MR. WARD: Sir, could I just make a point about the confidentiality?

24 THE CHAIRMAN: Yes.

25 MR. WARD: We simply ask that this document remain within the existing confidentiality ring.

26 THE CHAIRMAN: Thank you.

27 MR. SAINI: First of all I think it is common ground that we need to make a correction to this

28 document, in the top left hand corner there is a description there that says Ofcom, question

29 1, 16 June total number of minutes of call traffic, I think we need to delete the words “to

30 ported numbers”? A. Yes, that’s correct, that is outbound to other mobile volumes.

31 Q So if we put that correction in there and just look at the table as a whole, this provides

32 certain figures for January 07 through to the first quarter of 2008. I just want you to help

33 me, just so I can understand what is going on in the second section of this, which is the

1 ported in traffic. As I understand it, that is describing the situation where Vodafone is the
2 recipient network – correct? A. Yes.

3 Q If one goes to the end of that row to the 2005 total one sees a figure, which I will not read
4 out – do you see the figure at the end? A. Yes.

5 Q Of so many million minutes of ported in traffic?

6 THE CHAIRMAN: Sorry, which column are we looking in, which year?

7 MR. SAINI: Sorry, it is the second ----

8 THE CHAIRMAN: Under which date, Mr. Saini?

9 MR. SAINI: Under 2007 total, and if one goes down two there is a figure there. That is the
10 column describing the situation where you are a recipient network. Can one translate that
11 figure there into a precise donor conveyance charge that is paid out? A. In effect, we
12 suffer 0.1p. on every minute of that, yes.

13 THE CHAIRMAN: 0.1? A. 0.1p.

14 MR. SAINI: Would it be fair for me to say if one multiplied that figure by 0.1p, one would have
15 an amount representing the donor conveyance charge paid out by ---- A. The net cost to
16 us of the ported in traffic, yes.

17 Q Without reciting what the figures are, but going to the next section of this document and
18 going to the same ----

19 THE CHAIRMAN: Sorry, can I just understand that. If we were to replace the comma with a
20 dot, it would be that number of millions of pounds? A. Absolutely, yes.

21 MR. SAINI: I was trying to avoid giving a precise figure If one does the same thing for the next
22 column, if one goes back to the 2007 total and we see a figure there – do you see that?
23 A. Yes.

24 Q That is describing a situation in which you are the donor network – is that correct?

25 A. Yes.

26 Q Namely ported out traffic? A. Yes.

27 Q There one has what one would call, in crude terms, an amount representing donor
28 conveyance charge in? A. Yes.

29 Q I anticipate what you are going to say next, I do not know if there is going to be any dispute
30 about this, which is that we know that there is a difference between donor conveyance
31 charge and donor conveyance cost? A. Can we define our terms carefully. Perhaps if we
32 say a cost of onward routing, as opposed to donor conveyance. As I understand it, the
33 position is that Ofcom took a review in the course of another dispute last year and decided
34 that the cost on onward routing was 0.2p. It then, following on from the methodology

1 adopted by its predecessor back in 1999, it took the view that that cost should be borne half
2 by the donor network and half by the recipient network. Therefore, to the extent that 0.2p is
3 an appropriate view of cost, half of that is – sorry, there is a net cost to the donor operator of
4 the real cost of onward routing less the recovery made by the DCC.

5 Q I agree with absolutely everything you say, and let me just try and explain my
6 understanding to make sure that I am correct. One could multiply that figure there that we
7 have been looking at in the 2007 total just as we have multiplied the figure above it by 0.1?
8 A. Yes.

9 Q That is the amount that you would be receiving in, but there is, in addition, the same amount
10 that you are bearing internally? A. No, the amount we are bearing internally is that sum
11 multiplied by 0.2.

12 Q You are passing on half of that? A. The deduction is half, yes, so effectively what one
13 could do is add those two numbers together in that 2007 total column, the second row and
14 the third row, and that comes to our total costs of onward routing, less DCC.

15 Q I agree with that as well, so one can add in millions of pounds for 2007 at least those figures
16 and say that is the cost to Vodafone for 2007 at least of having an onward routing system –
17 is that correct? A. I think that would be right, yes.

18 Q Thank you very much. One further question I have got in relation to that is this ----

19 PROFESSOR STONEMAN: Just before we move on, are these figures before or after call
20 trapping? A. I believe these would all be after. The Vodafone traffic, the Vodafone
21 ported in traffic, is after our having implemented our own call traps. The ported in volumes
22 are reduced by that. Since not all the operators have in actual fact currently implemented a
23 call trap, some of the ported out traffic is in actual fact this tromboned traffic. So, to some
24 extent there will be call trap volumes in there.

25 Q So, does that translate into these figures giving too high or too low an estimate of these
26 costs? A. The volume of ported-out traffic is exaggerated or increased by the fact that
27 two out of the five operators don't currently operate a call trap. So, the volume of ported
28 traffic that we port out -- We are carrying, if you like, an excessive amount because of the
29 absence of call trap by other operators, whereas our own volumes are constrained by call
30 trap. I think that might explain why there is a significant imbalance between the two
31 numbers.

32 MR. SAINI: Can I ask you, please, keeping that in front of you, to take up Volume 1? Again, I
33 am not sure if this is confidential, or not, this document, but I will proceed on the basis that
34 it is confidential. I believe it is Tab 7. At Tab 7 there is a response to a s.135 notice that

1 was served on Vodafone by Ofcom in September 2006. Within that Tab there is your
2 answer. A. My Tab is empty.

3 Q It just says it is Confidential. (Same handed) You recall that document? A. Yes.

4 Q Everyone will see that this indicates, as I understand it, ported out volumes for 2005. Is that
5 correct? A. Yes.

6 Q If one goes down the right-hand side, one can see, adding Q on to Q4 there is a certain
7 amount of minutes in rough terms. So, that is the figure for 2005 in total. Which is the
8 comparative figure in the table I have shown you for 2007? A. That would be Row 3.

9 Q One can see that there has been an increase in ported out volumes of quite a substantial
10 amount, has there not? A. Yes.

11 Q 2005 and 2007. A. But I would add that if we look at this confidential table and look at
12 one of the columns for the other major operator that implemented call trap around about the
13 same time as we did, you can see that the ported out traffic to that operator took a nosedive
14 in Quarter 4 2005 by about 30 percent.

15 Q Sorry. I am not following which one it would have been.

16 THE CHAIRMAN: It is the second named column. Is that right, Mr. Roche? A. Yes. So,
17 that basically is the impact of call trap. It substantially reduced the volumes.

18 MR. SAINI: I would not at all disagree with that. I just wanted to have a comparison from you,
19 and you have very helpfully provided one for me between the volumes in 2005 and 2006.
20 Can I ask you to put this schedule away, and put it in an appropriate place in the bundles. I
21 just want to ask you one further matter, please, which is in relation to the discount factor.
22 (After a pause): When Ofcom began the consultation process, and awards the changes
23 which are being challenged in these proceedings, what was the discount factor being
24 applied? A. As I recall, it was 7 percent.

25 Q As I understand the position, you made forceful representations to Ofcom about the
26 appropriateness of that. That is correct, is it not? A. Yes, because to my recollection the
27 7 percent that was used was taken directly from the number that Mason had used in the
28 2004 study. I think Mason's logic was, "Well, the social rate is 3.5 percent. The industry
29 rate is 12 percent. Let's take an average and use that". I was arguing that in circumstances
30 where it is an industry investment that is under consideration. The idea of using some
31 hybrid rate is meaningless, and an industry rate ought to be a more appropriate one to use.

32 Q What did Ofcom end up using? A. They used an industry rate.

33 Q So, they accepted your submissions. A. Yes.

34 Q Thank you very much.

Cross-examined by Miss ROSE

1
2 Q Mr. Roche, can we turn to your second witness statement, the one behind the tab labelled
3 B? A. Yes, I have it.

4 Q At p.4 you have set out a table for calculating the future cost of onward routing. A. Yes.

5 Q At p.5(iii), after you have described the approach that you have set out, you say,
6 “If the above approach errs, it is on the conservative side, which makes the
7 numbers used by Ofcom seem all the more curious”.

8 Now, if we just look at the figures you have used, in particular you have given a figure for
9 the retail price index, have you not, at Column 11 of 3.1 percent all the way through. That
10 is not a conservative figure, is it? A. I was using the number from Ofcom’s modelling
11 analysis.

12 Q Yes . But, 3.1 percent cannot be described as a conservative figure for the retail price index
13 at present, can it? A. At the moment, no.

14 Q Current RPI is about 4.3 percent and rising. Yes? A. Yes.

15 Q Of course, using that higher RPI would significantly increase the future costs of onward
16 routing, would it not? A. If it is appropriate to use an RPI-adjusted rate, yes.

17 Q Yes. Going to para. 8 in your statement you say that you note that,

18 “In T-Mobile’s DCC appeal H3G argued that the cost of onward routing should be
19 as low as 0.05 pence per minute, but now seems to accept Ofcom’s view that the
20 costs of onward routing are somewhat higher. I tabulate below the three different
21 views of onward routing cost as proposed by Ofcom, Vodafone (using an
22 inflation-adjusted rate), and Vodafone (using a constant rate)”.

23 When we see your table, all the figures that you have used are figures at or below 0.2 pence
24 per minute, are they not? A. Yes.

25 Q In fact, in the DCC appeal some of the MNOs were arguing that the true cost of onward
26 routing was higher than 0.2 pence per minute, were they not A. Vodafone wasn’t a party
27 to that. So, I never had sight of what it was arguing.

28 Q With respect, you have referred to that appeal in your witness statement. So, presumably
29 you must have looked at it before referring to it. A. If that is the case, so be it, yes.

30 Q Can we just have a look at that? It is still in Volume 2. The first Tab B in Volume 2, Tab 5
31 behind that. This is, I hope you have a document headed “Ofcom Determinations to
32 Resolve Disputes Between Each of O2, Orange and T-Mobile Concerning Donor
33 Conveyance Charges”, do you have that? A. Yes, I do.

34 Q If you could turn to p.12 in that document. At para.4.27:

1 “Further, the MNOs provided varying levels of detail in relation to the build-up of
2 their estimates, and overall the information available has allowed only a high level
3 comparison. However, Ofcom notes that 0.2 ppm is within the range of cost
4 estimates provided by the MNOs, (which was 0.05 ppm ...”

5 We know that was H3G.

6 “... to 0.3 ppm). Two of the MNOs had estimates that were lower than 0.2 ppm
7 and two had estimates that were higher.”

8 Do you see that? A. Yes.

9 Q So, in fact, Ofcom again has used a conservative starting figure for the cost of onward
10 routing, has it not? A. Yes, but I think you are misunderstanding what I was doing in my
11 witness statement. What I was trying to do, I never took a position on what an appropriate
12 level of the cost of onward routing was. I was just trying to take the figure that Ofcom had
13 determined was an appropriate one and extrapolate that using the same method as Ofcom
14 had done to come up with a view that was consistent with Ofcom’s own number of a likely
15 range of costs in the future. I was not putting forward my own view, I was trying to extend
16 Ofcom’s view.

17 MISS ROSE: I have no further questions.

18 MR. WARD: I have no re-examination, Sir, thank you.

19 PROFESSOR STONEMAN: One of the issues that is raised in the notice of appeal, but this has
20 not actually been discussed so far, is to do with the installation timetable being too quick?

21 A. Mmm.

22 Q Vodafone argues that the deadlines have been put on are too close. Now, that is tied in
23 with cost benefit analysis, and I get the impression with your background that you are well
24 aware of the details of cost benefit analysis? A. A bit, yes.

25 Q Has Vodafone made any attempts to look at the impact on their own cost benefit analysis of
26 these changes of differences in the speed of installation of the changes that Ofcom wants to
27 be in place? A. Could I ask specifically which change you are talking about? Are you
28 talking about the change to 2009, over the next 12 months?

29 Q Well there are a number of steps in this. There is the move to the common database, that is
30 one, and I think that is the one probably where you might feel most qualified, that is tied in
31 then to recipient-led porting and that is then tied into the 2 hour porting. Let us take the first
32 one of those which is the common database all calls query, and I think that is the one to
33 which there is most objection, but the timescale is not sufficiently well specified, and to the
34 extent that it is specified it is too fast. Now, what I am asking you is how responsive will

1 the costs of that change be to the speed with which it is implemented? A. In some ways
2 the answer to that probably has to be a technical one which may be that it is a Mr.
3 Sutherns-type response on this. My understanding of what is proposed on this is basically a
4 change to the look up method of every single call that is made on the Vodafone network,
5 which is a very substantial volume – you are talking billions a year. In order to implement
6 such a change we have to go very, very slowly and carefully. The alternative is a terminal
7 situation, a big bang implosion by doing things too quickly. So, from a practical point of
8 view there is a count back from the go live date to have a slow progressive implementation
9 from the point we are ready, which basically means I think we need to be ready to actually
10 start implementing some months before we in actual fact need to in order to allow a slow
11 progressive implementation. You can see that we were doing that on the graph in my
12 witness statement about the implementation of call trap where it does not fall of the cliff, it
13 drops gently like **that**, because we were putting the change in switch by switch, process by
14 process, to make sure there were no unexpected stresses and strains on our network, and if
15 there were to accommodate for them, to be able to back them out. From a technical point of
16 view the timetable that we are running to is very, very tight, so in terms of adding additional
17 cost to make that easier, I am not sure how much scope there really is for that.

18 Q All right, so basically it says the same things will have to be done but over different time
19 periods, and it is not really something one can speed up by putting more resources into it?

20 A. I do not really think so.

21 PROFESSOR STONEMAN: Thank you.

22 THE CHAIRMAN: Thank you. Does anybody want to ask anything arising from my colleague's
23 questions.

24 MR. WARD: I did not want to ask a question, but just two things for the Tribunal's note. The
25 graph Mr. Roche was referring to about the implementation of call trap is in his second
26 witness statement, which is tab CB, and it is on p.9 of that statement, where you will see a
27 falling off in the volumes gently over a period of about six months before a flat line
28 emerges.

29 THE CHAIRMAN: I will just find that. (After a pause) Yes.

30 MR. WARD: Mr. Roche, could you confirm that is what you were referring to? A. That is
31 what I was talking about yes.

32 MR. WARD: I was going to give one other reference to the Tribunal. As I am sure you are
33 aware, Professor Stoneman, Mr. Sutherns' witness statement does deal specifically with

1 what he says is the additional cost of early implementation and the note for that, just for the
2 record is para. 49 and the table below.

3 PROFESSOR STONEMAN: Is that completely consistent with what Mr. Roche has said?

4 THE CHAIRMAN: That is a matter for us, is it not?

5 MR. WARD: I think that is a matter for you. There is an explanation given in para.44 where Mr.
6 Sutherns – he was not challenged on any of this of course – talks about expedited timetables
7 incur premium costs and so on and so forth. The technical explanation of what actually
8 happened on the ground and Mr. Roche has given a slightly more high level explanation
9 from, if you like, an accounting perspective.

10 THE CHAIRMAN: Thank you, Mr. Ward. Right, what is next? Thank you very much indeed,
11 Mr. Roche.

12 (The witness withdrew)

13 Mr. LAWRENCE PETER WARDLE, Sworn

14 Examined by Miss BACON

15 Q Mr. Wardle, could you give your full name and address, please? A. Lawrence Peter
16 Wardle, Telefónica 02 UK Ltd, Wellington Street, Slough.

17 Q Can you take up bundle 2, which may be there in front of you, and could you turn to the
18 second tab E, there are two, and tab 1 behind that? Is that your witness statement? A.
19 Yes, it is.

20 Q And are the contents true to the best of your knowledge and belief? A. Yes, they are.

21 MISS BACON: I do not have any further questions, but Mr. Saini does.

22 Cross-examined by Mr. SAINI

23 Q Mr. Wardle, you have your statement in front of you, I just want to ask you a few questions,
24 please, about some of the attachments to your statement. The indexing is slightly confusing
25 on this so I hope we can work our way around it. If I can first of all please ask you to go
26 behind your statement in tab 12, do you have that, at the top of the page there is an email of
27 8th November 2007. I think we are proceeding on the basis that the content of the email is
28 not confidential other than the figures there in square brackets, do you see those? A. Yes.

29 MISS BACON: Sorry, those are not confidential any more, we have unredacted them.

30 MR. SAINI: Okay, that makes matters much easier. (To the witness) As I understand, because
31 there is a fair summary of the previous emails, you had been having a dialogue over some
32 months with a Mr. Gideon Senensieb of Ofcom about costs, is that correct? A. And there
33 had been a couple of ... emails, yes.

1 Q And he had been chasing you, we see, and I am not being critical of you in any way, in
2 relation to estimates, and you then did reply to him on 8th November, is that correct? A. I
3 stand to be corrected but I think Gideon was chasing another point. We had offered to
4 provide costs principally on the recipient-led porting.

5 THE CHAIRMAN: Could you just turn a little bit. I know it is difficult because Mr. Saini is to
6 your right, but we all have to hear you, so speak into the microphone, if you do not mind.

7 A. Sure. We had offered to provide some estimate of costings principally for recipient
8 porting in our response to the July consultation.

9 MR. SAINI: What was the date for the closure of representations or the end of representations?

10 A. Some time in September, I think.

11 Q But you carried on a dialogue after that with Ofcom – that is correct, is it not? A. Yes, I
12 ought to explain that to even have a broad estimate of costings takes a considerable time in
13 a complex network operator, and necessarily it isn't until November that I can respond to
14 that point.

15 Q If one looks at the document that I took you to, the 8th November 2007 email, top of the
16 page, and if one goes to the first bullet point – and I will take as read the fact that you were
17 stating that these were a floor, not a ceiling and that they were high level estimates – you
18 say:

19 “Direct routing (of voice calls) using a central database would cost 02 in excess of
20 £3.5 million.”

21 Then there is something about a lead time. Can I just ask you about the £3.5 million first of
22 all. There is nothing said there in this email or in any of the previous exchanges that I can
23 find which would indicate to the recipient of this email that your talking only about
24 querying of a central database as far as mobile to mobile calls are concerned? A. I think
25 in my email I set out that this was a floor, and if you cast your mind back to what I had said
26 in our response to the July consultation I had undertaken to try and get even a broad idea on
27 the cost of recipient net porting. So what we sought to do was to evaluate the position in
28 September 2009, and you will recall that in September 2009 we are required to send mobile
29 to mobile traffic directly and recipient net porting. What we have done was to look at the
30 position in September 2009. It is quite clear from this, the limitations that you have referred
31 to, the floor not the ceiling. Also, the first bullet point refers to direct routing of voice calls
32 as well. So we are really looking at a sub-set of what we need to do.

33 Q That does not appear on the face of the document. A recipient of this would think, with the
34 qualification, this is 02's estimate of the cost of a central database for all the purposes that

1 Ofcom is specifying, and you say it is going to be £3.5 million? A. It's also the case at
2 the time that the standard was still being discussed, so we couldn't have provided a costing
3 of what we'd need by the end of 2012 because we simply wouldn't have known at the time.

4 Q My simple point is there is nothing on the face of the document that would indicate any
5 such qualification – do you agree with that? A. Well, I think that is a matter of
6 interpretation.

7 Q Can I ask you then to go back to your statement, and ask you to look at para.25 at p.7,
8 where you refer to this email. You say:

9 “At a conservative estimate, therefore, we put the costs of direct routing of voice
10 calls using a CDB at over £3.5 million for a three-year project following agreement
11 of the standard, and the additional work to provide for near-instant recipient-led
12 porting at over £2 million. In the same email I offered to talk through our findings
13 in this regard with Ofcom, but I received no response to this offer, and Ofcom did
14 not follow up my email with any further questions on this subject.”

15 It appears from your email that you had actually done a lot more work – not from your
16 email but from the rest of your statement – you had done a lot more work on estimates, had
17 you not? A. What we'd tried to do was, given the facts that we had in the summer of
18 2007, have a broad idea of the costs of implementing recipient porting. So there were some
19 documents behind this email that my colleagues produced.

20 Q What I find surprising, Mr. Wardle, is that if one goes on in your statement it appears that at
21 this stage you had concluded that there was going to be a very, very substantially negative
22 NPV based on Ofcom's cost benefit analysis, but I cannot find any document where you
23 told Ofcom that? A. I hadn't at that time put the figures through the Ofcom model.

24 Q Let us just please look at your statement. We know what you sent to the individual from
25 Ofcom. We have seen that. You say at para.38 that you undertook some exercise and I
26 think it is common ground that the product of this exercise was never revealed to Ofcom.
27 The first time we have seen it is in this statement. In para.38 you talk about carrying out an
28 assessment. When did you carry that assessment out? A. Relatively recently.

29 Q What do you mean by that? Could you put a date on that? A. Firstly, I couldn't carry out
30 the assessment at that time because of course Ofcom only provided the information I needed
31 to do the exercise in January, from memory, so I had to take the raw figures that Ofcom
32 provided to us in January and change some numbers in that. I couldn't possibly have done
33 this work in November, I simply couldn't have done it.

34 Q So you did it after or before these proceedings began? A. I did it after.

1 Q When you say in para.38, the second line:
2 “... what I believe Ofcom should have done itself – I put 02’s own estimated cost
3 figure ...”
4 That is for the purpose of these proceedings that you have done this exercise? A. Yes.

5 Q At para.43 after you have set out all of this material you say:
6 “02 would have been able to explain these points to Ofcom had Ofcom accepted
7 02’s offer to a meeting to discuss 02’s cost estimates.”
8 From what you have just told me there would not have been any purpose in this meeting
9 because you could not have done this work at that stage? A. I think that refers to the rest
10 of 42, doesn’t it?

11 Q Let us have a look at 42. We see in the first line of 42 that this was a mobile to mobile
12 solution only, and I have already asked you questions about what appears on the face of the
13 email, and I will not go back to that. You go on at the end of this section to talk about
14 INAP and you talk about Vodafone’s estimates. Again, I am not sure if these figures are
15 confidential, but I will not bother reading them, we can see what they are. When did you
16 first become aware, if it is your position, that the fixed solution using INAP would be very
17 expensive? A. I ought to clarify that. 02 doesn’t know what the costs of porting routing
18 to fixed numbers would be. Obviously, after seeing Vodafone’s estimate ...

19 Q You cannot agree or disagree with Vodafone’s estimate? A. I simply don’t know.

20 Q Then you talk about opportunity costs. At (c) you talk about a commercially realistic
21 payback timeframe. What is 02’s own payback timeframe? A. I think we regard that as
22 commercially confidential.

23 Q Could you perhaps write it down for me, please, I am not going to ask you any questions
24 about it. I may need to refer in due course. A. I’ll write it down, I think we’ve put this
25 down ----

26 THE CHAIRMAN: Just pause for a moment. Is the written down figure commercially
27 confidential, if it were to be written down?

28 MISS BACON: Yes, but it is in the witness statement at para.42(c), it is already written down.

29 THE CHAIRMAN: Thank you. In that case we will look at 42(c). Yes, there we are, it is in the
30 fifth line of 42(c), Mr. Saini.

31 MR. SAINI: I am obliged, thank you very much. In relation to timetable for implementation,
32 how far has 02 got in complying with what is required under the amendment of general
33 condition? A. We are participating in UK porting, the same as many other operators, and
34 we are seeking to achieve the timescale set out in the Decision.

1 Q So, as far as you are concerned, it can be achieved? A. I didn't say that.

2 Q Is it something which is impossible, possible? A. I'm simply not qualified to comment
3 on that. I understand that people think it is extremely challenging and some people
4 expressed the view that it's not achievable.

5 THE CHAIRMAN: Mr. Wardle, if I can interrupt you, please forgive me. There are two
6 confidential timeframes set out in para.42(c) of your statement. The one in the sixth line of
7 that sub-paragraph and the one in the eighth line – got it? A. No, because it is blanked
8 out.

9 Q Your own copy of your own statement ----

10 MISS BACON: It is the court copy of the statement which the other witnesses have used.

11 THE CHAIRMAN: I am sorry, I have got an unredacted version. Could you just have a look at
12 the unredacted version because I want to be clear as to what you say is the appropriate
13 payback time applicable here. Is it the first or the second, fifth line and the seventh line.
14 A. It depends. I mean, these two are both valid, depending on the type of project that we
15 would consider.

16 Q I want to know what kind of project you are being questioned about. Is this a strategic
17 project or is a less important -- They are all strategic projects. Is it a strategically especially
18 important project, or is it merely a strategically important project? A. We're talking now
19 about the All Call Query/Central Database project?

20 Q Yes. A. I have to say, I don't know.

21 Q I am sorry I asked the question. A. I ought to say that as a regulation manager I am a
22 jack-of-all-trades, but unfortunately a master in none.

23 Q I do apologise, Mr. Saini. I should have known better. You carry on.

24 MR. SAINI: Can I just follow on from that? You say in that very same paragraph that you think
25 this is commercially completely unrealistic. How can you say that if you have got no idea
26 what kind of project this is? A. Because it doesn't really matter if you have the project as
27 [CONFIDENTIAL] years. The table I've shown demonstrates that it's only negative NPV
28 after eleven, I think.

29 Q That is not the point - whether or not the NPV is negative. I am just asking you about why it
30 is commercially completely unrealistic. Is it anything to do with the payback period? A.
31 Sorry? I am not sure I am following.

32 Q I just want to understand. What do you mean by the sentence, "In my experience this is
33 commercially completely unrealistic". I do not want you to go to the precise years, please.

1 A. Oh, right. Okay. I was referring to the fact that there is a table in my witness statement
2 which says that after, I think, eleven years the NPV is negative.

3 Q I will leave it. I will not pursue that any more. If I can ask you, please, in the same bundle
4 to go to Tab 11, p.15 of that exhibit ----

5 PROFESSOR STONEMAN: Just before we do that, I would like to clear up the previous point.

6 MR. SAINI: I would be grateful. I have tried.

7 PROFESSOR STONEMAN: It starts off, "Ofcom adopts a generous timeframe of twelve years
8 over which to look at the payback". Basically I read this as 'no commercial organisation
9 would allow a twelve year payback period'. Is that what you are saying? A. I'm saying
10 here that a project that wasn't necessary for some kind of network expansion for capacity,
11 or coverage, or whatever wouldn't, under the current criteria, even be considered because
12 the payback takes too long.

13 Q All right. So, any project that took twelve years to pay back is not commercial realistic.

14 A. As far as O2 is concerned.

15 Q That is what it means. A. Yes.

16 Q Thank you.

17 MR. SAINI: Do you have the document there, Mr. Wardle, at p.15? A document that looks like
18 this (indicated). A. No, I don't have it yet. (After a pause): Yes, I have it.

19 Q Now, can you describe this? This is an exhibit to your statement. Can you please describe
20 to us what it is? A. Yes. I need to remind myself. I think it's a Powerpoint presentation
21 produced by one of my colleagues.

22 Q We know it is dated January 2007. I am assuming that this is not confidential; is that
23 correct? A. That's right.

24 Q So, this is a Powerpoint presentation. I think it is separate from the document prior to that,
25 which has a later date. Now, this is in relation to the issue of mobile number portability and
26 the timeframe, as I understand it, looking at this document. A. Right.

27 Q Someone very helpfully here, for the purpose of a presentation, I assume, to Ofcom or
28 internally within O2 ---- A. I think this was a Powerpoint presentation produced by and
29 used by our Customer Service Department, but I might be wrong.

30 Q Who would it have been presented to.

31 THE CHAIRMAN: I am sorry. Somebody has got a mobile 'phone on, on silent no doubt. It is
32 causing buzz on the microphones. Can you please make sure -- You cannot answer the call
33 anyway until we adjourn. The suspense will do your contacts no harm. So, please would
34 you turn your mobile 'phones off. It is very irritating for the Tribunal.

1 MR. SAINI: The Powerpoint presentation - I am not clear as to who this was presented to.
2 Perhaps I can just ask you some questions about it because it appears to reflect O2's internal
3 thinking at the time. It very helpfully sets out the pros and cons of different porting types. If
4 I can ask you to go over the page, please, to 16 at the bottom right -- If I can go to the
5 bottom boxes,
6 "Ofcom does not define the 2B solution, but two possible outcomes are envisaged.
7 The second is a port lead time of one working day or less, but becomes recipient-
8 driven".
9 Then we see the pros and cons of the different systems set out there. One of the questions
10 that the Tribunal is going to be considering is: What are the advantages and disadvantages
11 of different port lead times? Let us just please have a look at the pros? First of all it says,
12 "Less steps for the customer makes it easier for a customer to port. That promotes
13 competition".
14 That reflects your view, does it? A. This is written by a colleague of mine in Customer
15 Service. It shouldn't be regarded as O2's view, or my view, or anyone's view. This was ----
16 Q It is an O2 Customer Service view. A. I wouldn't even say that. This was an internal
17 presentation by someone in O2's customer service team to the Customer Service
18 department.
19 Q So, one should just disregard it? A. This, I think, was -- No, I'm not saying that at all.
20 This, I think, is an information request sent from Ofcom to us, asking for anything we'd
21 done to calculate the costs, or otherwise of implementing recipient-led porting. So, it's
22 simply a trawl through our internal systems and provided to Ofcom on that basis. It
23 certainly doesn't represent the company view.
24 Q Let me put it no higher than this, please, and see if you agree or disagree: this reflects the
25 views of a presumably knowledgeable Customer Service employee within O2 to the pros
26 and cons of different port lead times.. A. Its quite likely, yes.
27 Q Thank you. So, the first thing this person - he or she - says is that it promotes competition.
28 The second matter is that,
29 "It is easier for customers to move quickly between networks, may make
30 acquisition of new customers easier for strong performing networks".
31 Do you understand what is being said there? A. Yes.
32 Q The second pro point is,
33 "Less complex admin procedures exist as recipient controls instruction to donor".

1 You agree with that? A. Personally I don't agree with that. At the time, in January 2007,
2 I don't know necessarily that this person understood what the implications were of
3 recipient-led porting.

4 Q It would be surprising if they did not understand it, given that the work in Customer
5 Services. They deal with this thing every day. A. Don't know. That's the point. They
6 don't. No, they wouldn't have had to deal with recipient-led porting. No-one will until
7 September ----

8 Q So, this is a misleading document. A. I wouldn't say that at all. It's a document written
9 in January 2007 about something that the person who wrote it may not necessarily have
10 understood properly.

11 Q Okay. Let us have a look, please, at the cons. (After a pause): "Massive strategic change,
12 i.e. no retention opportunity". What is the concern there? A. Well, I think that's probably
13 open to interpretation. But I didn't write this.

14 Q Well, with respect, you are being put forward as the only witness for O2. A. Yes.

15 Q You are supporting Vodafone in this appeal where they are trying to de-rail something
16 which is, in Ofcom's view, in the public interest. This is a document you have produced.
17 You have accepted it is produced by a knowledgeable person within Customer Services.
18 What does it mean? Is it not obvious what it means? A. Yes. I mean, clearly with
19 recipient-led porting this is saying that it would affect retention.

20 THE CHAIRMAN: It is kind of obvious what it means, is it not, Mr. Saini? Whether it is right or
21 wrong, what it means is plain.

22 MR. SAINI: If one can go to the next thing: "The system and organisational change required
23 across Customer Service and sales channels." You agree with that? A. Yes.

24 Q Let us look at these further three sub-bullet points: "A risk to each network from bad
25 debtors being able to leave." If we deal with that first one. That 'phone seems to be
26 buzzing again.

27 THE CHAIRMAN: That might be the court 'phone system.

28 MR. SAINI: Sir, you may like to take the opportunity, as do some High Court judges, and
29 actually answer the 'phone.

30 THE CHAIRMAN: There are some High Court judges I would not want to emulate.

31 MR. SAINI: Bad debtors able to leave. Let me understand what I understand is going on there.
32 At the moment -- Let us imagine I am an O2 customer and I want to port to Vodafone. Let
33 us say I owe some money and I have a dispute with you about contractual debts. Is it O2's

1 practice to stop me porting until I sort that out? A. I don't think that it is, but I can't be
2 sure.

3 Q So, what else is being talked about there because this suggests to me that one of the
4 disadvantages of this solution -----

5 MISS BACON: I am sorry. I am not very enthusiastic about this line of questioning. Mr. Wardle
6 has already said that he did not create the document. He has annexed it to his witness
7 statement because he was simply producing all that he was required to produce as a trawl
8 though O2 systems in response to the s.135 request. He is not in a position to say what was
9 in the mind of the person who created this?

10 MR. SAINI: My response to this is this witness is advanced as the only witness by O2 in
11 opposition to the recipient-led shortened porting process. This is a document created by O2.
12 One of the issues for this Tribunal is going to be what are the pros and cons. This is one of
13 the very few documents where one sees honestly an internal view of what the pros and cons
14 are. What I am asking this witness is, I am trying to understand what is the bad debt risk
15 that is suddenly going to arise if one moves to this recipient-led shortened porting time?
16 How is that risk dealt with at the moment? That is what I want to ask this witness.

17 THE CHAIRMAN: Yes, I understand the basis of your questions completely, Mr. Saini, they are
18 based on a certain premise. Given that premise, if the premise is right, clearly the document
19 is self-evidently correct; if the premise is wrong then it is not, but I am not sure that we need
20 protracted questioning.

21 MR. SAINI: Sir, I want to understand, with respect, just what is the risk of bad debtors being able
22 to leave. How is that risk dealt with at the moment? How is it going to become a bigger
23 problem if the decision which Ofcom has made is implemented?

24 THE CHAIRMAN: Can you answer that question? A. I shall try. At the moment I think we
25 are required to issue porting authorisation codes, except where a customer is within the
26 minimum term of an agreement, so we cannot deny a customer a PAC simply because he
27 owes a debt. It may well be that the person who wrote that did not realise that, I just simply
28 do not know. Certainly, my understanding is we give people PACs even if they owe us
29 money.

30 Q Is it not stating the obvious that if one has recipient led porting then bad debtors will be able
31 to leave more easily? A. I am not ----

32 MISS ROSE: Sir, I think the point this witness has just made is that bad debtors can leave
33 anyway. It is a point that came up yesterday, it is important to distinguish between porting
34 the number and the mobile phone contract, they are completely unconnected. The fact that

1 you can port your number easily to another provider has no effect on your contractual
2 liability.

3 THE CHAIRMAN: You are still under contract to your original provider.

4 MISS ROSE: Exactly, so that the analogy that you made yesterday with credit cards, with
5 respect, was not correct.

6 THE CHAIRMAN: Thank you very much, I understand that.

7 MISS ROSE: The point is there is no risk.

8 THE CHAIRMAN: Thank you very much.

9 MR. SAINI: I will not ask you any further questions about this, Mr. Wardle, thank you very
10 much.

11 MISS BACON: Can I just ask that the passage from the transcript where Mr. Wardle
12 inadvertently set out confidential timescales could be removed.

13 THE CHAIRMAN: Certainly.

14 MISS BACON: It is very difficult when questioning a witness.

15 THE CHAIRMAN: It is very difficult. Yes, thank you very much, Mr. Wardle.

16 (The witness withdrew).

17 MR. SAINI: I believe the next witness is to be Mr. Baxter, and I do not believe anyone wants to
18 cross-examine him apart from me. I anticipate from Mr. Ward's observations this morning
19 that he is going to object to my cross-examination I should explain why I want to cross-
20 examine him. It arises out of the issue of the very substantial cost which Mr. Sutherns has
21 identified in his statement which will be incurred in the switches. This is a new area, Mr.
22 Ward asked extra questions in chief of Mr. Sutherns. It is an issue which appears in reply
23 evidence from Vodafone and the Tribunal needs to get the position clear from a person who
24 has some technical expertise. So I am simply going to ask some questions on what the
25 precise position is in relation to the need to purchase these switches and how much it costs.

26 THE CHAIRMAN: Thank you.

27 MR. WARD: What Mr. Saini is saying is that he wants to lead evidence-in-chief from Mr.
28 Baxter, not that he wants to cross-examine him at all. He has not suggested that what he
29 wants to do is test parts of his evidence or in any way put to him some form of opposing
30 case. Our only concern about this is that he has had his opportunity to cross-examine Mr.
31 Sutherns. It is not as though Mr. Sutherns' witness statement was sprung upon them at the
32 last minute. Our concern is simply that if new evidence-in-chief is now adduced in order in
33 effect to bolster Ofcom's decision, points that were not made as part of its reasoning process
34 it may be very difficult indeed to deal with it now in the little time that is left in this hearing.

1 (The Tribunal confer)

2 THE CHAIRMAN: The Tribunal takes the view that this is in the end a matter of weight not
3 admissibility, and we shall allow the cross-examination, and that it is cross-examination, not
4 examination-in-chief, I should add.

5 MISS ROSE: I Call Mr. Baxter.

6 Mr. GRAHAM CURTIS BAXTER, Sworn

7 Examined by Miss ROSE

8 Q Mr. Baxter, do you have volume 2 there? If you go to the front of the volume you can see
9 the tabs, and the first tab B, behind it there is a tab numbered 1? A. Yes.

10 Q Do you see there a statement described as witness statement of Graham Curtis Baxter? A.
11 I do.

12 Q And your name and address are given, Graham Curtis Baxter, Star House, 20 Grenfell
13 Road, Maidenhead? A. That's correct.

14 Q Is that your statement? A. It is.

15 Q And is it true to the best of your knowledge and belief? A. It is.

16 MISS ROSE: I have no further questions.

17 THE CHAIRMAN: Mr. Saini?

18 Cross-examined by Mr. SAINI

19 Q Mr. Baxter, can I ask you, please, to put your statement to one side for the moment and go
20 in volume 2 to tab 10 and in that to tab D, which is a statement of Timothy Peter Sutherns.
21 Do you have that? A. I do.

22 Q Have you read this statement before? A. I have.

23 Q If I can ask you to go, please, to p.11 of that statement, paras. 49 to 51 in particular where
24 Mr. Sutherns sets out first of all a table, and then he explains at 50 and 51 the need for
25 Vodafone to buy some very expensive switches – I will not mention any figures, they
26 appear to be quite substantial if you look at para.52 in particular. Mr. Sutherns explained
27 yesterday that he used a figure of 20 million, that is out now, but one sees those figures.
28 You are familiar with that part of the statement, are you? A. I am.

29 Q So as I understand it, Vodafone envisages filling its database with all fixed ported numbers,
30 do you understand that to be the position? A. Yes.

31 Q Vodafone appears to believe that it needs at least X new switches ----

32 MR. WARD: Sir, this confidential information and is marked as such in the witness statement.

33 MR. SAINI: I will not ask you about the detail of the number of particular switches that are
34 required or the identity of the distributor, the entity from which you would purchase the

1 switches for the moment, but I just want to ask you from your technical experience, is it
2 necessary in order to implement the decision, and bear in mind when I say implement the
3 decision I am not talking about Vodafone or H3G's internal processes, just implementing
4 the decision: is it necessary for these particular expenses to be undertaken? A. I am not
5 familiar with the Vodafone network itself, that's probably my first point. I would say that,
6 not necessarily from the witness statement here but from the discussions that were raised
7 with Mr. Sutherns yesterday, he seemed to indicate that we would move all of the ported
8 look up capacity within the network, both mobile and fixed, to a new solution which would
9 seem to drive these costs. I would say that the mobile look up function, as it already exists
10 within the Vodafone network to support call trap, then the costs should really apply to just
11 the fixed part. Of course, the number of fixed look ups is a lot smaller than the total number
12 of mobile and fixed look ups. The costs should necessarily be lower than that if you just
13 tackle the fixed part.

14 Q What are the alternative options to buying these switches to implement the Decision?

15 A. To implement the Decision, I would say there's a number of different options. If I take
16 the example of H3G, we would look to re-use the existing system that is used for call trap.
17 The reason the iron-out comes up I believe is because in order to implement the NICC
18 specifications and destination groups that was discussed yesterday, that exceeds the number
19 length that is available in the MAP messaging, which is used to support call trap today. To
20 implement the NICC specification within the H3G network we would use INAP within our
21 switches. Now the switches that we have within the H3G network can support the number
22 look up using INAP with no degradation to the switch performance. This is one of the main
23 criteria that we actually that vendor in the first place. We can use MAP or INAP without
24 any degradation of performance. It makes no difference for H3G to use either.

25 Q Does that explain why it is so cheap apparently for H3G to implement the Decision as
26 compared to others? A. That's one of the factors, yes. So we would re-use the existing
27 call trap infrastructure. Clearly we can't use the MAP protocol to interface between the
28 switch and the database, but we can use INAP. Because there is no performance
29 degradation of the switches we can do that at no additional overhead or cost.

30 Q One of the alternatives is your existing technology, as I understand it? A. Yes.

31 Q The second alternative, and I think this was mentioned yesterday by Mr. Sutherns and was
32 the subject of some questions from Miss Rose, is use of a transit operator. Can you explain
33 to someone like me that has no technical knowledge how that will work. How will use of a
34 transit operator mean one can avoid these switching costs, the costs of these switches, and

1 please be very, very simple? A. The transit operators will also have to implement the
2 number portability position. Therefore they will build this look up functionality. For
3 routing to fixed numbers typically you would send the call to a transit anyway. You
4 wouldn't have interconnect to every single fixed operator. As they are already building that
5 functionality I would expect they would also be able to offer that look up functionality to
6 any of the other operators. I believe it would be a cost effective solution to route the call to
7 a transit operator who would look up the call and onward route.

8 Q Do you have any idea how much that would cost? A. I don't know how much that would
9 cost.

10 Q Perhaps you could help with this. In volume 1 at tab 1, this is why we are all here, the
11 actual Decision that is being challenged. I am being told that I need to go back to p.71 of
12 this bundle, tab 1. It is the last two pages of the Ofcom Decision.

13 THE CHAIRMAN: Notification of modification to GC 18.

14 MR. SAINI: Yes, that is it. Page 73. A. Schedule, yes.

15 Q If one looks at 18.5 under para.3, we see:

16 "As from the Relevant Date, all Originating Communications Providers shall
17 ensure, to the greatest extent possible, that all Electronic Communications
18 originated by them are routed to the Terminating Communications Provider in a
19 manner independent of the donor Provider. Where an Originating Communication
20 Provider purchases transit service to route Electronic Communications, the
21 provider of those transit services is not to be considered as a Donor Provider for
22 the purposes of this paragraph."

23 What was Ofcom doing there by referring to a supplier of transit services? A. Well, the
24 transit provider would provide interconnection mechanism to route calls to its destination.
25 Typically an operator would have direct interconnect to a destination where there was high
26 traffic volumes and use a transit operator to interconnect to other destinations.

27 Q Would it be fair to say that one of the alternatives to the switching, which is use of a transit
28 operator, was expressly contemplated by this amendment to the Condition? A. That's
29 right.

30 Q Can I ask you in relation to timetable, please, which is a matter I was just asking Mr.
31 Wardle about: are you a participant in UK porting? A. Yes, I represent H3G on the UK
32 porting committee.

33 Q Is the timetable, the first deadline being in December this year, is that on target to be met?
34 A. It is currently being planned for, yes.

1 MR. SAINI: Thank you very much.

2 THE CHAIRMAN: Does anybody else want to cross-examine?

3 MR. WARD: No, sir, thank you.

4 THE CHAIRMAN: Thank you very much. Would this be a natural moment to have a break?

5 We will break now until 11.45, and then we are going to hear you, Mr. Saini?

6 MR. SAINI: That is correct, sir.

7 (Short break)

8 MR. SAINI: Sir, I want to divide my submissions into four parts as follows: First, I am going to
9 deal with the legal standard to be applied in this appeal and there is not going to be much
10 dispute in relation to that, but there are some observations I would like to make because the
11 Tribunal has to be clear as to precisely the question it is going to be asking itself when it
12 retires. Secondly, I am going to take the Tribunal through a summary of the process which
13 led to the November 2007 Decision. That process is important for two reasons: first, there
14 is a consultation challenge and the best way of dealing with that is to go through the
15 process. Secondly, and more importantly, is the following reason that Mr. Ward focused for
16 forensic reasons on the end of the process. I want the Tribunal to see the decision making
17 process as it evolved because contrary to the case that has been put forward by Vodafone
18 Ofcom did in fact repeatedly consider different sensitivities. You would think, hearing Mr.
19 Ward's submissions, that there was nothing done apart from what appears in November,
20 but there was a process and various iterations where sensitivities were considered. That
21 review of the process will also show that Vodafone were a prime, if not the prime
22 participant in a consultation process, and that they made many, many helpful contributions
23 and that on very many occasions their submissions led to very radical changes in Ofcom's
24 approach.

25 The complaints that have now been made, but not that strongly pursued by Mr. Ward in his
26 opening submissions in relation to consultation, we say they are *ex post facto* lawyers'
27 complaints. At no point in the process did Vodafone say: "Can you please provide us with
28 this figure?" or "We do not understand this particular point." There was an open
29 relationship of dialogue between Ofcom and Vodafone. What has happened now is in a
30 reconstruction of history there is a claim – defective consultation process.

31 The third main issue, and the issue on which I am going to take the most time, is the cost
32 benefit analysis. What I am going to seek to demonstrate to the Tribunal is that on the basis
33 of the information supplied by participants the cost benefit analysis survives any legal
34 challenge. Mr. Ward has suggested that somehow we are frightened of the Tribunal looking

1 at the cost benefit analysis. Quite to the contrary, we are going to ask the Tribunal, or rather
2 I am going to ask the Tribunal to roll its sleeves up, to look at the figures, look at the
3 assumptions, look at their sensitivities, we have nothing to be scared of and nothing to hide.
4 This is a merits appeal. Mr. Ward has reminded you of that repeatedly, therefore you have
5 to look at the merits, and look at the figures in the cost benefit analysis. It is simply not
6 good enough for Mr. Ward to say: “That looks a bit odd, perhaps this figure should have
7 been different. Tribunal, your task is very simple, just send it back”. That is not a merits
8 appeal, you have actually got to look at the figures. The reason why Mr. Ward’s clients
9 want it sent back and no doubt all of the other MNOs supporting them is obviously delay;
10 they just want to derail and delay this process. That is what they are up to here.

11 The fourth issue, which I am going to deal with is much more confined, which is the
12 decision to mandate to recipient-led near instant porting, it is a separate head of challenge.
13 To summarise again: (1) legal standard, (2) summary of the process, (3) the cost benefit
14 analysis; and (4) our response on the attack to the decision to mandate recipient-led near
15 instant porting.

16 Before I start on the legal standard, it is important that this Tribunal identifies that there are
17 two important issues of principle raised by this appeal – I am not aware that they have been
18 raised by this appeal. I am not aware that they have been raised in any other previous CAT
19 proceeding, or any proceeding before the Competition Commission, but they are issues on
20 which the Tribunal is going to be required to give a view.

21 The first issue is as follows: Can Ofcom, or indeed any other sectoral regulator only ever
22 require industry to take certain actions when the regulator has itself specifically costed the
23 exercise by way of drawing up a technical specification. Mr. Ward’s submission is, yes,
24 that is what every regulator (and specifically Ofcom in this case) has to do.

25 On that issue of principle we will invite the Tribunal to say as follows: first, that it is not
26 necessary. All that the regulator has to do is to specify the functionality required of the
27 system which it is requiring to be put into place and, for the purpose of a cost benefit
28 analysis, the regulator should at least put forward figure of what it believes delivering this
29 system will cost. Now, the purpose of that is to allow the businesses - those who are of
30 technical expertise - to come back and shoot down the figure, and say, “It’s not going to cost
31 this. It is going to cost that”. That is what we say the right approach is across all regulation.
32 So, the regulator puts out a functional specification. It puts out an estimate, doing the best it
33 can, for how much it believes that will cost, and then it is for industry to come back and

1 respond. That is what happened here -- what should have happened here in terms of
2 response.

3 The second issue of principle is as follows: How far can a regulated entity such as
4 Vodafone, O2, or anybody else decline to engage with the regulator and to provide the
5 regulator with information in its possession as to the costs of a proposal, and then
6 subsequently complain that the regulator's cost benefit analysis failed to take that matter
7 into account. That is what has happened here. We know for a fact now, from admissions
8 made yesterday by Mr. Sutherns, that a full three or four months prior to the Decision
9 challenged - the November decision - Vodafone had in its possession information and
10 knowledge that indicated to it that there was a £20 million cost for Vodafone alone, just for
11 switches that was going to be required to be expended. That is something that was necessary
12 to deliver as Ofcom had mandated. Why did they not tell Ofcom?

13 We have a position now - quite frankly an absurd position - where we are being criticised
14 for not taking into account information and saying, "Your cost estimates were wrong" when
15 Vodafone had information of the largest element of the costs. They just never told us.
16 Now, what would happen in any other case, and what should happen as a matter of
17 common-sense, we say, is obvious. You just simply cannot rely upon that. Ofcom cannot
18 be criticised for not taking into account something which it was never shown, which
19 existed. But, that is exactly what has happened here. That is the figure which jumps out - the
20 £20 million.

21 So, we say that on this issue of principle it is simply not legally open for Ofcom to put
22 forward that evidence in Mr. Sutherns' statement as to how much X rate was going to cost
23 when it had that information and it decided, for whatever reasons (I am not saying there was
24 any bad motive here by Vodafone), not to tell us. It puts Ofcom into an impossible
25 position, and it also puts the Tribunal in an impossible position. How are you meant to
26 judge the legality of Ofcom's decision when one of the major complaints about Ofcom's
27 decision is that it did not take into account certain matters when those matters were never
28 notified to it? It just makes no sense.

29 So, what I am going to invite the Tribunal to do is to take the approach that as a matter of
30 principle, what is put forward in Mr. Sutherns' evidence for the first time as to the cost is
31 legally irrelevant; secondly, even if you do take it into account, we have the benefit of Mr.
32 Baxter's evidence that an efficient operator, such as H3G, does not need to spend those
33 sums, and also that whether or not you are efficient operator, you can use transit operators
34 to avoid those costs. I am going to invite the Tribunal to say that even if the evidence of

1 Mr. Sutherns is to be taken into account in relation to these extra costs, the cost benefit
2 analysis survives because there are other ways of delivering this functionality without
3 incurring these costs.

4 However, I want the Tribunal to be focused, with respect, on the fact that there are these
5 two issues of principle. This is not a case which can simply be disposed of on the facts
6 without taking a view on those issues. They do very, very firmly arise in this case.

7 With that rather lengthy introduction, I am going to turn to the legal standard on which I
8 hope my submissions can be brief.

9 It is common ground that this is not a judicial review. It is common ground that you have
10 got to look at the merits. What is not common ground and which, quite frankly, I do not
11 understand is Mr. Ward's adoption of some legal standard known as robustness. What does
12 that mean? It means nothing. It is not a legal standard. He is asking this Tribunal to look at
13 the CBA and say, "It's not robust enough". Now, what the Tribunal have to do is not to
14 consider whether or not it is robust enough. The Tribunal has to consider whether it is
15 wrong. You have got to look at the CBA and decide whether or not it is wrong. That is the
16 simple test. You may be assisted, sir - and no-one has looked at this so far - by just looking
17 at the statute, and at s.192 of the Communications Act in particular. I will not ask you to
18 take out any legislation for the moment, but the relevant sections are set out in our defence,
19 which I think is to be found at Volume 2, Tab A para. 21, at p.10. What the Tribunal has
20 to do when it retires is to focus on whether or not there has been an error of fact or an error
21 of law revealed. One sees that from 21(a). I do not believe that Mr. Ward is invoking any
22 exercise of discretion in this case. I think he is putting the case within 21(a), but no doubt I
23 will be corrected in due course. You have got to consider whether or not there is an error of
24 fact or an error of law. But, you have got to approach those questions on the merits.

25 THE CHAIRMAN: Supposing we were to conclude not necessarily that Ofcom's cost benefit
26 analysis was wrong, but that there was a substantial risk that it was wrong, or a serious risk
27 that it was wrong? What would the legal position be then?

28 MR. SAINI: The legal position would be that the appeal would be dismissed. You have got to
29 decide that it is wrong. This is an appeal on the merits. Either it is wrong or it is right.

30 THE CHAIRMAN: Is it as simple as that, Mr. Saini?

31 MR. SAINI: Sir, we would say that in this case it is. Obviously, that simple statement conceals
32 some subtlety in the sense that when deciding whether or not it is wrong or right, some of
33 the questions you will ask are: In the way that the CBA was formulated, were different
34 variables taken into account? Were sensitivities considered. You may decide that because

1 certain sensitivities were not taken into account, you can say that the decision was wrong --
2 the CBA was unsoundly based. You could say that.

3 What I am trying to identify for the moment is that it is all very well for Mr. Ward to say
4 that the standard is something called robustness, which is not a creature known to law -- It is
5 one of those things that people about judges -- It is often regarded as being a good thing to
6 say about a judge that he is very robust. I never know what that means.

7 THE CHAIRMAN: It usually means he is horrible.

8 MR. SAINI: I know even less what robustness means when it is applied as a legal standard. Our
9 submission is that you have got to look at the CBA. You have got to roll up your sleeves,
10 look at the figures and say, "Was this wrong or was it right?" What is unacceptable is to
11 say "Well, could have been better, perhaps this should have been done, that should have
12 been done, let us send it back" because that is a recipe for delay and is an abdication of this
13 Tribunal's responsibility to decide a case on the merits.

14 PROFESSOR STONEMAN: So wrong or right – 51 per cent. right, 49 per cent wrong.

15 MR. SAINI: Absolutely.

16 PROFESSOR STONEMAN: Or the other way around. So on the balance of probabilities is this
17 wrong or right?

18 MR. SAINI: absolutely.

19 PROFESSOR STONEMAN: That opens it up a lot more than saying is it black or white? We
20 say on the balance of probabilities, given what we have read and what we have heard it is
21 wrong or it is right, is that basically ----

22 MR. SAINI: You will have to stand back, having heard everything you will have to stand back
23 and say "Is this wrong or right?" Not, "I do not really know, I cannot really tell if it is
24 wrong or right, and therefore I will send it back".

25 PROFESSOR STONEMAN: No, I think you are missing the point there, it is wrong or it is right,
26 there is a certain level of probability.

27 MR. SAINI: I do not disagree with that as an approach to the question.

28 PROFESSOR STONEMAN: Right, fine.

29 MR. SAINI: That approach is going to require you to look at the actual CBA in some detail and
30 to the inputs. Mr. Ward did not take you at all to the way the inputs were worked out. He
31 completely ignored for obvious forensic purposes the fact that the inputs were very, very
32 conservative and we would invite the Tribunal when it leaves this case to go away and say
33 "Actually, the pure financial benefits of a move to direct routing are much greater than
34 those that were used for the purposes of Ofcom's CBA." I am not going to mention any

1 figures but the Tribunal already knows from the limited evidence you heard yesterday from
2 Mr. Sutherns as to the benefits of call trap, and also from the charts that I put to Mr. Roche
3 this morning that in pure financial terms there are very, very large sums to be saved by way
4 of DCC. My submission is that Ofcom in a conservative approach actually underestimated,
5 when one looks at it in the cold light of day, how much was going to be saved. I am not
6 going to say anything further about the statute, but you might find some assistance going
7 into the volume of authorities, bundle 4, which is probably the only case that either side is
8 aware of to put before the Tribunal where cost benefit analysis was an issue in a judicial
9 proceeding. This is a decision of the Competition Commission at tab 15, it is the *E.ON*
10 case. If one goes to p.48 of that decision, paras. 6.15 to 6.157, this is the context in which
11 the Competition Commission is hearing an appeal on the merits, so it is very similar to the
12 jurisdiction here. If I can read 6.156, it says:

13 “Secondly, we accept GEMA’s submission that a code modification appeal should
14 not be regarded as an opportunity for rival parties to debate exactly what value
15 should be ascribed to particular items within a quantitative assessment of the costs
16 and benefits of a proposal. Cost-benefit analysis involves a degree of judgment
17 and discretion. Unless the regulator has erred in logic or principle in quantifying
18 a benefit, the Competition Commission will be slow to overturn the regulator’s
19 quantification of that cost or benefit.”

20 Then the next paragraph, which I think is relied upon by some of my learned friends:

21 “Thirdly, we accept GEMA’s submission that benefits need to be quantified in
22 order for them to be reflected in a CBA, and that non-quantified benefits may be
23 as important, or more important, than quantified benefits. However, if a CBA is to
24 be transparent, benefits should be quantified where possible. For the same reason,
25 qualitative benefits should be explained clearly and in detail, so that it can fairly
26 be seen whether there is any potential overlap between the qualitative and
27 quantitative benefits.”

28 That is just a guide and we commend that passage as to a judicial approach to a CBA.

29 THE CHAIRMAN: Just pause for a moment. (After a pause) Yes, thank you, I just wanted to re-
30 read it.

31 MR. SAINI: There is one final point before turning to the second main issue, which is the
32 process. As I understand Mr. Ward’s submissions and his skeleton it is his primary case
33 that if he succeeds in this appeal the Tribunal should remit this whole issue to Ofcom. He is
34 no longer suggesting, as I understood was suggested in the notice of appeal, that this

1 Tribunal could itself decide for various reasons that the merits and demerits of the proposals
2 were so obvious that the matter should just simply be left to die, because there is a
3 difference between the approach in the notice of appeal and the approach taken in the
4 skeleton.

5 In the notice of appeal the primary case is it is obvious that this was a bad idea. You should
6 simply tell kill it now. The approach now is that Mr. Ward accepts that there are good
7 reasons of policy for Ofcom to consider this proposal further and it should be remitted back
8 for further consideration, not that it is obviously bad – that is an important difference
9 between what was originally sought and what is now said should happen.

10 Now, let us turn, Sir, to the second issue, which is the process, and one needs to begin with
11 the Mason Study and I would ask you to go to vol.1, tab 4. There is one particular point I
12 want to draw out of that which, in my submission, should guide the Tribunal in its approach
13 to the quantification of the costs by fixed operators and MNOs. This was a point
14 appreciated by Mason very early – as long ago as 2004 – and if I can pick it up, please, at
15 p.5 of the report. There is a passage which begins “costs and direct cost savings ..” and as a
16 preface here Mason was simply trying to find out how much a solution would cost – I
17 accept we are dealing principally with fixed operators. They say:

18 “A principle of seeking minimum reasonable costs was adopted in the modelling.
19 This was because the cost elements put forward by the operators were generally
20 somewhat higher than experience elsewhere would deem reasonable, an
21 observation that Mason considers to be consistent with the relatively high level of
22 resistance to change articulated by the operators interviewed.”

23 To that same effect, Sir, while we have that open, if one goes to p.23, the same point is
24 made again there in the middle paragraph about the high level of resistance. What Mason is
25 saying is that these operators they are dealing with exaggerate the costs because they just
26 want to throw us off. They want to say “It is too expensive”, and that is an observation one
27 would say has to be carried through to this particular appeal as well. There is a real
28 tendency on the part of the MNOs to oppose the changes, to exaggerate the costs, to try and
29 prevent change.

30 The next material events in the process is before any consultation request goes out one sees
31 at tab 6 – the Mason Report was April – we are jumping now at tab 6 to September 2006,
32 two years later. The first action taken by Ofcom to inform itself of the figures that should
33 be going into a cost benefit is the request under s.135 at tab 6, and one sees the answer at
34 tab 7 – you will recall Mr. Roche was taken to this this morning.

1 Ofcom being responsible wanted to notify itself of the amount of ported out volumes that
2 were in issue, and we know what the figures for 2005 added up to – I will not provide the
3 addition because I believe it is confidential. What might assist the Tribunal is to bear in
4 mind as a cross check is that this is the ported out volumes for 2005, Q1 to Q4 with a few
5 quarters of 2006. The Tribunal should, with respect, write in a comparable figure of ported
6 out volumes that we now know from the schedule I provided this morning for 2007. Again,
7 I am in slight difficulty without being able to read out the number, but in that schedule I
8 would ask the Tribunal to write in ----

9 THE CHAIRMAN: It is the figure in the third section, the one with .8 at the end?

10 MR. SAINI: I am not following that, sir, it is the ----

11 THE CHAIRMAN: That figure.

12 MR. SAINI: That is correct. So compare by way of addition, again this is rather difficult without
13 saying the figures, the very substantial growth in ported out volumes between 2005 and
14 2007. I hope I am not giving anything away by saying they grew. I am sorry if I have, but
15 they grew very substantially, I believe in the region of 30 per cent – 36 per cent I am told by
16 Mr. Bates. That is an important point to bear in mind, and this is going slightly off-track at
17 the moment, when one considers what Ofcom assumed when it comes to its CBA about
18 future growth in ported volumes. What Ofcom assumed has actually shown to be the case
19 proved to be the case. In fact, the growth that Ofcom assumes, that there would be broader
20 volumes, was a substantial under-estimate. I am going to provide the figures in due course,
21 but I would ask the Tribunal to bear in mind the 36 per cent figure for the moment.
22 What happens next, sir, is that we have a consultation which begins in this volume at tab 8,
23 which is the next tab, 16th November 2006. You have not been taken to this document
24 before.

25 THE CHAIRMAN: We were taken to p.4 yesterday.

26 MR. SAINI: It may be that the particular passage that I am going to draw your attention to has
27 not been read out.

28 THE CHAIRMAN: We were taken, as a matter of fact, to pp.64-70.

29 MR. SAINI: I understand, sir. It was mainly the Sagentia estimate which is attached to this that
30 you were taken to. I was going to show you the body of the document rather than the
31 Sagentia estimate. What has happening in this document, sir, is that Ofcom is considering
32 the merits and demerits of both proposed changes, and it is asking the industry for help. I
33 would ask you, please, sir, to go, first of all, to para.1.4 at p.3. Contrary to the submissions
34 of Mr. Ward that somehow we have elevated the risk of network failure to number one

1 status because we feel some weakness in our CBA it was stated in plain terms as the key
2 objective, one of the key objectives. It has been there from day one.

3 PROFESSOR STONEMAN: Can I point out that “one of the key objectives” is not the same as
4 “the key objective”. It does carry on, “and ensuring the efficient use of network”.

5 MR. SAINI: Absolutely.

6 PROFESSOR STONEMAN: You cannot have it both ways.

7 MR. SAINI: All I am responding to, sir, is the suggestion by Mr. Ward, and it also may be in
8 other skeletons, that somehow, because of some concern on the part of Ofcom about its
9 CBA, it is trying to put forward this non-qualitative objective or benefit. I am saying that
10 that is, on the facts, simply not correct. From day one network failure has been the issue,
11 and it was stated from day one. It is no more than that. It is just a matter of making sure the
12 Tribunal gets their facts right.

13 PROFESSOR STONEMAN: Your skeleton says that it is “the key objective”. That is how your
14 skeleton starts.

15 MR. SAINI: Absolutely.

16 PROFESSOR STONEMAN: That is not what this says.

17 MR. SAINI: In my skeleton I have identified three matters. One of them is efficiency, one of
18 them is network failure, the other is simplification. I would accept the point you make, sir.
19 I have highlighted in para.1 network failure.

20 THE CHAIRMAN: I think it would be fair to say that in your skeleton – and I am now going
21 from memory because I am not looking at it – you describe network failure as the primary
22 objective. I think the point that you are making is simply that it was the first stated
23 objective as a matter of order of statement.

24 MR. SAINI: No, more than that.

25 THE CHAIRMAN: I understand.

26 MR. SAINI: Then I would ask you, sir, to look at para.1.8 at p.4. Here bear in mind that at this
27 stage all that Ofcom have got is the Sagentia analysis. We have been through, and they are
28 attaching it to this document and say as follow:

29 “The analysis of the costs and benefits of the transition in the mobile industry
30 suggests that, while migrating to a common solution for both fixed and mobile
31 networks should deliver the optimal outcome, this may be best achieved by
32 migration of the mobile industry to ACQ/CDB solution ahead of that in fixed
33 networks because switches employed in mobile networks are likely to already be
34 capable of carrying out queries on their dabs on every call.”

1 If one just stops there for the moment before the reading the rest, they are putting out an
2 assumption there wanting the industry to come back and say, “Is that right or wrong?” It is
3 going to be easier for the mobile industry, they can do it ahead of the fixed industry because
4 of their switches.

5 Then they carry on:

6 “Ofcom considers that the completeness of such a transition should be achievable
7 by September 2009.”

8 That is in about three years from this time, we should bear that in mind, it is three years
9 hence.

10 “It could, in addition and subject to analysis of detailed information from industry
11 on costs and benefits ...”

12 - “please tell us how much it is going to cost”, and they are saying, “Do it with the Network
13 Inter-operability Consultative Committee, please, tell us how much this is going to cost, you
14 are the experts, all we have got so far is Sagentia’s estimate”.

15 So it is not just in relation to the CDB. Could I ask you to cast your eye down that page to
16 1.12. Here a preliminary view is being expressed in relation to lead times:

17 “In Ofcom’s view the shorter the process, the better it is for competition and
18 consumers. Therefore Ofcom is proposing to reduce mobile port lead times to a
19 period of less than one working day. However, if Ofcom receives evidence that
20 shows that the costs involved in moving to a lead shorter than one working
21 outweigh the benefits then Ofcom will need to consider ...”

22 I will not read the rest of that. The only point that I want to make there is that they are
23 asking for information about costs. They have not made their mind up, they want
24 information both in relation to CDB and mobile lead times.

25 Just for completeness, could I ask you to go p.6 and to note para.2.6, what the objectives are
26 that are identified there. It makes the network failure point.

27 THE CHAIRMAN: It is just a repetition of the previous paragraph.

28 MR. SAINI: Absolutely. We then have the Sagentia report. There are two points. I am not
29 going to take you to that because Mr. Ward has been through that in some detail, but there
30 are two points to note. This is a report based upon interviews with network operators. If
31 you look at p.46 of this document, it is not Sagentia simply working away on their own and
32 deciding what this thing will cost. If you look at para.2.4, one sees Vodafone there and 3G,
33 T-Mobile and BT. Just to make the point that this is not something which has got nowhere -

1 - If you go back to p.44, there is a section there headed 'Cost Benefit Analysis' and it says
2 in the third paragraph,

3 "We have made our own estimates on mobile network costs with some guidance
4 from operators".

5 So, to suggest that this is just simply a back of an envelope calculation, with respect, is quite
6 unfair.

7 While we are in the report, to pick up a point that I believe is made by Mr. Ward in his
8 skeleton, and may also have been made in one of his witness statements (Mr. Roche's
9 witness statement), at p.64 one sees, under the heading 6.2 'Resolved Summary', if one
10 goes to the third paragraph, Scenario F3, it reads, "This scenario extends the Mason model
11 by adding in the mobile traffic ----" I ask you to highlight the following sentence, please:
12 "The traffic levels are derived from the Ofcom 2005 review". It is stated on behalf of
13 Vodafone that they had no idea where these traffic levels were coming from that Sagentia
14 were using for this modelling. It is there stated in black and white. If one goes to p.67,
15 which has been the subject of some detailed submissions, in the fifth paragraph under
16 'Mobile Network Upgrades', there Sagentia say, "Our analysis of the traffic data ---". That
17 is the very same data that has been referred to previously. It is Ofcom's data. Before
18 leaving this document, I would emphasise one point in relation to fixed costs. There is no
19 appeal before you in which it is said that the fixed operators' costs that were identified by
20 Sagentia were wrong. You have got no evidence in relation to that. Therefore, this Tribunal
21 has to proceed, in our submission, on the basis that the quantification of the costs by
22 Sagentia there of the fixed solution are correct.

23 We have a lot of evidence in relation to the mobile costs. There is nothing to contradict that
24 in relation to the fixed costs. That is going to become very important - and I shall indicate
25 where I am going with this point - when you consider the sensitivities that are going to be
26 applied to the costs aspects in the CBA because you will recall that one can increase the
27 costs in the CBA, including the fixed operators' costs, which are very substantial, by 70
28 percent. What I am going to show the Tribunal in due course is that when one does that
29 exercise (in the third part of my submissions) there is a very, very substantial amount of
30 money way beyond the £12 million which is in the pot to cater for a vast, vast overrun in the
31 costs to the MNOs. Again, that has been completely ignored by Mr. Ward because he does
32 not want you to re-look at the CBA.

33 Sir, again, this is Ofcom trying to get information out of the industry. Tab 9. This is the
34 first response by Vodafone to the consultation exercise. I am going to make two points out

1 of this, and I am going to make them good by going through the documents. Two points
2 will appear. The first point that appears is that Vodafone make no effort to say that because
3 of what they know about a solution, even the rudiments of a solution, there is £X of £Y
4 million that needs to be added to Sagentia's estimates. They do not say that anywhere in this
5 document. They have various whinges about Sagentia's work which we will look at, but
6 they do not say that.

7 The second point - and this goes more to the consultation issue - is that Mr. Roche, who
8 drafted this document, had absolutely no difficulty in working out the variables that had
9 been used to identify the benefits. We are going to see some detailed work done by him in
10 this document. That puts in stark contrast the back-solving the case that has been made --
11 "Oh, this was all so opaque that we had to do all this back-solving". There is no back-
12 solving here. It is all very clear. Now, let us just look at those two aspects, please.

13 If one goes, first of all, to p.3, I want to identify the text that is attached to footnote 8. If
14 one goes to para. 13 there are various points made there about how difficult it is -- how
15 difficult it might be to estimate costs in the absence of a technical solution. At para. 13,

16 "As a result, Sagentia's estimates are inevitably based on assumptions which may,
17 or may not, turn out to be correct".

18 There is a footnote 8 which is added there. The point being made there is that Sagentia's
19 report simply adds the cost of the fixed to the mobile solutions whereas as converged
20 solution may cost more.

21 MR. WARD: I am sorry. In fairness, could the Tribunal also read para. 12?

22 MR. SAINI: I am quite content that the Tribunal reads para. 12. I am quite content to emphasise
23 the fact that it is difficult to assess the costs in the absence of technical solution. But, you
24 have my submission as to whose responsibility that is in a modern regulatory environment.
25 All I would ask the Tribunal to note at the moment is that Footnote 8 is very important
26 because Mr. Ward puts this forward in his submissions as the claim signalling to us in 2006
27 as to the very expensive costs of switches, and that type of issue. It is nothing of the sort.

28 (After a pause): I am taking it that the Tribunal has read most of these documents - or
29 certainly will read them in due course. If I can show you a particular aspect of this
30 document at p.25, here one sees - and I would ask the Tribunal to highlight the words at the
31 top of p.25 - that with the help of this information (this is information that is accessible to
32 him) Mr. Roche finds it very simple to reproduce the flows and results ... He suggests his
33 own cost benefit analysis. I cannot find anything in this document which suggests that as
34 far as the benefits were concerned, there was some data which Vodafone needed which

1 Ofcom had not disclosed and which was hindering Vodafone in its consultation process. To
2 the contrary, one sees, just going through these pages - and I am not going to read them -
3 Mr. Roche is able to produce repeated tables varying different variables, again and again.
4 The last point I would make before leaving this document is that Sagentia had said - and
5 you will be aware of this - that the solution for mobile networks is going to be a simple
6 extension of the call trap function. Nowhere in this document - which is a response to the
7 Sagentia report in part - is it said by Vodafone, "You're completely bonkers. This is
8 nothing to do with extension of call trap". Yet, that appears to have been the view within
9 Vodafone as articulated yesterday by Mr. Sutherns. Why did they not tell us? This is a
10 long time ago. So, they are allowing the regulator to go down this route without correcting
11 points which one assumes they were aware should be corrected.

12 One other point I would just make here, which was accepted by Mr. Roche, is that this is the
13 document in which -just for your note - at p.26 Vodafone made their point about the cost of
14 capital used. You may just want to turn and look at that. They object to the 7 percent rate
15 used at p.26, and they make some submissions which eventually led, as Mr. Roche says, to
16 an acceptance by Ofcom that 12 percent should be used. So, this is then an example of
17 Ofcom being open to submissions and taking them into account.

18 It may just be useful to look at the very last sentence of p.26, why Mr. Roche was putting
19 forward a different cost of capital:

20 "For the purpose of this exercise, Vodafone has adopted (without particular
21 endorsement) as a proxy for the industry commercial rate, the cost of capital used
22 by Ofcom in the September 2006 mobile termination review document, i.e. 11 %.
23 (A higher value might be more appropriate.) In order to illustrate the sensitivity of
24 other variables in the cost benefit analysis, outcomes are shown below at both
25 11% and 7%."

26 That was Vodafone's response to the first consultation, without taking too much time over
27 it. The next material event is the result of the first consultation process at tab 15. Again,
28 the Tribunal may have been taken to this and I apologise if I am asking you to look at things
29 you have already seen, but it is important to see what decisions have been made by this
30 stage - this is 17th July 2007. There is a very important fact that emerges from this
31 document which may have been lost in all the detail of this case. Ofcom actually made
32 decisions, it decided as long ago as July 2007 - decided, not left it open for discussion,
33 decided - that a CDB had to be adopted. If I could ask you please to go to p.56 of this
34 document:

1 “7.3 Ofcom has also concluded that providers of fixed and/or mobile services
2 should be required to implement and populate a common database which will hold
3 details of each ported number and the provider which currently terminates the
4 services on that number. This database will enable calls to be routed directly to
5 ported numbers without reliance on the network to which the number was
6 originally allocated.”

7 The Tribunal will be asking “What happened next?” All that happened next was that,
8 having decided this was going to happen, there was an expensive consultation which went
9 on for some time on timetabling. That is what is said on the rest of this page. The
10 following consultation was on when should it happen? and not should it happen?

11 I should indicate, going back into the body of this document to p.33, that very detailed
12 submissions were made by many parties in relation to the cost benefit analysis.

13 Comprehensively Ofcom set them out over these pages, responded to them, and on many
14 occasions adopted them. One example, 4.89 at p.34 – cost of capital. As far as the actual
15 costs of the solution were concerned, no one had provided anything of any help to Ofcom.
16 Their approach had been a bit like Vodafone’s approach which was in the absence of a
17 technical solution it was all very difficult.

18 I should just identify at p.78, Sir, the fact that there were sensitivity analyses undertaken,
19 contrary to the thrust of Mr. Ward’s submissions. One sees between pages 78 and 80 six
20 sensitivities considered. The first one is changing the discount rate, the second is lower
21 costs of the NGN and one sees going through them variations up and down looking at
22 different DCC, looking at different mobile volumes, increased capital costs. So Ofcom is
23 doing its best, so it is wrong to focus just on the November decision and say: “Is that all you
24 have done?” They did a lot more than that.

25 Although I have said that by this date Ofcom have made a decision that a database is going
26 to be implemented, the fact is that there continues to be dialogue with MNOs and fixed
27 operators where, although they are only meant to be consulting on timetable now, what
28 happens in fact is that Vodafone and others take the opportunity to make submissions on the
29 issue of principle, although there has already been a decision. One sees that Mr. Roche in
30 particular makes very, very detailed submissions at tab 21 on a whole range of matters. He
31 for one does not think that the game is over as far as the principle of a CDB is concerned, he
32 is arguing forcibly for various reasons that it is not over. This was actually a very valuable
33 document to Ofcom because it helped Ofcom revise its cost benefit analysis as far as the
34 benefits were concerned quite substantially. What it did not help on at all, in any respect,

1 were the costs. We were still in a position where Vodafone were saying “We do not really
2 know without a technical solution.” They made no effort to try and cost, even in the
3 broadest terms, a technical solution.

4 Just to hit the back-solving complaint on the head, Sir, could you please go in this document
5 to page 4 which is about half way through, in annex 4, it starts at annex 4, p.1 and starts
6 after p.30 of the main document.

7 THE CHAIRMAN: The page with a lot of tables in?

8 MR. SAINI: Yes. The only point I am going to make, I am not going to spend time over this, is
9 that there are very, very detailed calculations done by Mr. Roche. He does not there say: “I
10 could not do this because I do not understand your figures”. That is a lawyer’s complaint
11 made now. It was not clear to me what the date of this document is – I am not sure if
12 anyone can help me with the date – I know it is a reply to the July 2007 document, but I was
13 not able to find a precise date as to when it was sent.

14 Mr. Bates tells me that para.75, p.22 ----

15 THE CHAIRMAN: September.

16 MR. SAINI: September, and that is quite an important date because you know, Sir, by this date,
17 September at least, Mr. Sutherns knows there is a £20 million whopping cost has to be
18 added if there is going to be a mobile to fixed solution. Do we see that anywhere in
19 Vodafone’s representations? No. Had it been in there – I am not saying this would have
20 been in there – perhaps Ofcom would have taken a very different view. There are very
21 good reasons why it did not take a different view and I will come to those. Even if it had
22 been in there we know why you do not have to spend £20 million, but Ofcom was never
23 given the opportunity to take a view of this because Vodafone, despite being in possession
24 of information as to cost, decided for its own reasons not to let Ofcom have that
25 information.

26 Sir, we also know, and I am not going to go to this document because Mr. Ward took you
27 there yesterday, at this time Ofcom was trying to get as much assistance as it could from the
28 industry as to costs, particularly in relation to the recipient led instant porting proposals. It
29 is a matter of history what happened. They tried to formulate a request for Vodafone’s
30 response but this is an unlawful request, “It is all far too complicated, go away, we are not
31 going to help you”. That is symptomatic of the attitude of all of the opposing MNOs, “It is
32 all very expensive, we cannot possibly tell you”. We know, as a matter of fact, that they
33 were in possession of information which would have provided some help to Ofcom.

1 If I can take you to the Decision itself, which you have looked at, I am sure, on your own
2 and also in some detail during ----

3 THE CHAIRMAN: Could you just pause for a moment. What you are saying, in effect,
4 Mr. Saini, is that Vodafone were in breach of their s.135(1) obligations – is that what it
5 amounts to?

6 MR. SAINI: I would not go as far as that, to ask you to make any conclusions. What I have
7 asked you take account of is the fact that when Ofcom sought to obtain information this is
8 the form of response they were met with. I would not want to suggest while I am on my
9 feet that there was actually a breach of any statutory duty because that would be going too
10 far, but it is just symptomatic of the approach that they were faced with, which is, “We are
11 going to tell you a lot, a huge amount, about why you have over-estimated the benefits, we
12 cannot possibly tell you anything about the costs and when you try and exercise powers to
13 find out about the costs, also this is a breach of your duty, it is all very complicated, go
14 away”. Ofcom are then faced with a situation where they have got to take a view as to what
15 to do. That is real life, that is what happened here.

16 THE CHAIRMAN: It may not matter in the end, but I am not sure about the difference between
17 my question and your proposition, if you see what I mean.

18 MR. SAINI: It may well be, sir, that there was a breach of s.135, but we do not need to go into
19 that issue. The fact is that this is the type of attitude which was facing Ofcom. Remember
20 as well, Ofcom is not doing this because it is going to get any benefit itself. It is doing this
21 because it thinks there is a public interest in achieving direct routing, a public interest in
22 recipient led short porting times. It is doing its best. It is getting a brick wall.
23 Sir, when one comes to the Decision, bundle 1, tab 1, by this stage Vodafone had made
24 very, very cogent submissions about some of the variables in the cost benefit analysis, and
25 when we come to the cost benefit analysis I will show you how they were taken into
26 account. By this stage, being responsive to the submissions that had been made, there is a
27 radical revision of the cost benefit analysis. One sees that at p.64. I hope the Tribunal did
28 not get the impression, and I am sure Mr. Ward did not intend this, but what one sees at the
29 top of p.64 is all that there ever was in this case. I have shown the Tribunal that what is at
30 the top of p.64 is a product of quite a lengthy process of exchanges. If we were in a case
31 where I was trying to defend table 2 which had just sprung out of nowhere without any
32 process of dialogue I would be in some difficulty. But table 2 is the product of a lengthy
33 process of consultation.

1 I should also identify, while we are on that page, at A1.59 that there is a quantification there
2 as far as one is possible of the risks of the two customers of network failure, it is a benefit,
3 some of which is hard to quantify, but there is a quantification there.

4 I should say as well, because this is a question the Tribunal raised at the outset yesterday, it
5 is Ofcom's view as a regulator that there is a risk of any of the current incumbents failing.

6 PROFESSOR STONEMAN: Are you suggesting that A1.59 is a cost benefit analysis of an
7 operator failing?

8 MR. SAINI: It is probably identified at A.162 on the facing page. There is an illustration there.

9 PROFESSOR STONEMAN: But for any cost benefit analysis should that not have some
10 probability of this event occurring attached to it? Is the probability 0.001 per cent or 99 per
11 cent?

12 MR. SAINI: Sir, what happened in this case was that there was a quantification at A1.60, which
13 one sees concluding at £9 million. The approach of Ofcom was to say that the essential
14 benefit of network failure was not one which one could quantify so easily.

15 PROFESSOR STONEMAN: You have a number at A1.62 of £9 million ----

16 THE CHAIRMAN: I am so sorry to interrupt you again, Professor Stoneman. I really am getting
17 fed up with this. Somebody has got a mobile phone on in court. Will you please turn it off
18 now. I am sorry, Mr. Saini, it is very discourteous to you.

19 MR. SAINI: Not at all. I think Professor Stoneman's question was that there is a figure identified
20 there. Did Ofcom go on and identify a probability of such an occurrence?

21 PROFESSOR STONEMAN: Yes.

22 MR. SAINI: No.

23 PROFESSOR STONEMAN: It cannot be a cost benefit analysis.

24 MR. SAINI: It depends what one means by a cost benefit analysis there. It is not a quantified
25 item in the sense that I could plug into a table.

26 PROFESSOR STONEMAN: You have just claimed that it was a quantified benefit.

27 MR. SAINI: To make my submission clear, what I was seeking to suggest about A1.59 is a figure
28 was put on it. I am saying further that that was not put into the table.

29 PROFESSOR STONEMAN: What I am saying to you is that the figure itself has no meaning
30 whatsoever without some idea of the probability of that event occurring. Your cost benefit
31 analysis of the ACQ/CDB should say to what extent will that probability be changed by the
32 introduction of that technology, and there is no mention of that whatsoever. There is no
33 quantification here.

1 MR. SAINI: I agree with that as a proposition, and I am sorry if I misled you in my previous
2 answer. There was not a quantification of the type you have mentioned. All I wanted to say
3 was that there was discussion of this issue.

4 The previous submission I was making in response to a question which was raised yesterday
5 morning was that it is the view of Ofcom that any of these major MNOs could fail.

6 Therefore, one cannot ----

7 PROFESSOR STONEMAN: We have got probability, that is the question.

8 MR. SAINI: One cannot do that. The question is a different one, sir. What are the consequences
9 if they fail? There are many things that happen which are unlikely, but the consequences
10 that would flow from what one may say is an unlikely event are very, very serious.

11 THE CHAIRMAN: Where do we place this in the scale between the absurd proposition that the
12 world might, after all, be flat and the proposition that there may be a nuclear accident in
13 France that could affect our lives in the United Kingdom? There is a vast range of
14 probability ratios between those two things.

15 MR. SAINI: It is not a matter that one could say. It is a risk which a responsible regulator should
16 take steps to protect customers from. In other words, it is not like what is the risk that the
17 world is flat. It is not like that at all. The consequences are so serious that it is something
18 that if measures can be taken then the responsible regulator should take measures to protect
19 the consumers from that.

20 THE CHAIRMAN: Forgive me, but if that is right, and I am not suggesting it is wrong, I am
21 listening carefully, what percentage of the protection against network failure is this form of
22 number portability? Do you understand my question?

23 MR. SAINI: No, I am sorry, I do not.

24 THE CHAIRMAN: It is my fault.

25 MR. SAINI: I am sure it is not, sir.

26 THE CHAIRMAN: Ofcom are asserting that number portability, that facilitating porting the way
27 described in your case in part provides protection against network failure.

28 MR. SAINI: Yes, sir.

29 THE CHAIRMAN: But there must be a whole host of other things that might provide protection
30 against network failure, like the way in which Ofcom exercises its regulatory role in reading
31 the accounts of the various companies represented here. Does this form of protection
32 actually resonate as a tremor on the Richter scale or not? How strong is it?

33 MR. SAINI: I would say it is very strong, sir, because we know that, first of all, it is something
34 which is undertaken in many other countries. It is clear there is an international consensus in

1 relation to this system, which is not adopted here, but Ofcom is aware of its other powers. It
2 is aware that it can take precautionary steps to prevent insolvencies or prevent failures. But,
3 in Ofcom's judgment - and this appears from the very first document - this was one of the
4 primary ways in which it would protect consumers.

5 THE CHAIRMAN: Do we have any evidence - and forgive me if I have missed it - of
6 international responses which, as you have said quite rightly obviously, have facilitated
7 porting in every other country, apart from the Dominican Republic, I think you said, as a
8 response to network failure?

9 MR. SAINI: No, sir, but we know that the systems adopted in other countries do not pose this
10 particular risk. Ofcom's reasoning here is that there is an easy way of protecting customers
11 from this type of risk of network failure.

12 THE CHAIRMAN: Thank you. Forgive me for not putting it clearly.

13 MR. SAINI: I think the difficulty that there is - and it is a difficulty that faces Ofcom as well - is
14 that this is one of those issues where a cost benefit analysis has to be undertaken. They
15 undertook a cost benefit analysis, but it is extremely difficult to plug into that cost benefit
16 analysis this benefit of protecting you from network failure. Now, there are two approaches
17 to that. One is to say, "Forget it", which is the Vodafone approach. It is so negligible and so
18 unimportant, in a respect, that it does not factor anywhere. But, that was not Ofcom's
19 approach. That is why Ofcom took this action.

20 PROFESSOR STONEMAN: That must mean that at some time the people in Ofcom sat down
21 and said, "Look, there's a number of things that this industry needs in terms of regulation,
22 and a major problem for this industry is the possibility of network failure. Therefore, we
23 ought to devote some resources to preventing network failure. So, what is a major
24 probability? Is it 20 percent? 50 percent? 80 percent? 100 percent? What is the impact on
25 those percentages of the actions that are now being mandated?" Now, they are the basic
26 questions one would expect to be answered in moving down this line.

27 So, what I am asking you is: what sort of things were discussed in Ofcom about the
28 probability of major network failure, and how that would be affected by these investments?

29 MR. SAINI: Sir, obviously the documents that record Ofcom's decisions are before this
30 Tribunal. It is not appropriate for me to take instructions and to give explanations which are
31 not in the documents before you.

32 THE CHAIRMAN: It is a sort of Northern Rock scenario, is it not, that you are talking about?

33 MR. SAINI: Absolutely.

34 THE CHAIRMAN: I well understand that.

1 MR. SAINI: It is the kind of situation where one knows - and I think some people in this room
2 are actually involved in the litigation following Northern Rock where the contemporaneous
3 documents at the time suggest that it was never going to happen -- When is a British bank
4 ever going to fail? Therefore, the FSA did nothing. The Treasury did nothing. The Bank of
5 England did nothing. And then it happened. Everyone is now saying, "There was an
6 obvious step you could have taken! You could have had a depositors' protection scheme at
7 only a minimal cost for the banks". But, this is that type of situation. Let us imagine next
8 year - God forbid - Vodafone goes bust. You are left with many customers who have ported
9 from Vodafone. Let us imagine many business customers have ported away from Vodafone.
10 They just suddenly lose their service. What questions are they going to be asked?

11 THE CHAIRMAN: The government would intervene ... Please do not take that seriously. That
12 was a joke - and a bad one.

13 MR. SAINI: I think the difficulty one has here is that here and now one can say that it is highly
14 unlikely to happen, but you have just got to consider if it did happen, what would be said.
15 That is also very important, sir, because if, ultimately, my submissions do not succeed and
16 you want us to make some form of order, sending matters back, you have got to focus quite
17 clearly upon exactly what you are sending back. It may be you decide eventually that there
18 are some parts of this Decision which were bad; some were not. You may decide, for
19 example, that the mobile solution almost appears to be ready. These MNOs say that they
20 can modify call trap in some respects - perhaps on a crash programme. The timetable is
21 being adhered to. "We are not going to quash this decision in its entirety. Let's keep
22 something in their place". What will be terrible, sir, is that if the process is de-railed -- "This
23 is a process which has been going for three years. Let's de-rail. Let's say it's de-railed.
24 Vodafone goes bust next year. Questions are asked in Parliament. 'What happened?' 'Well,
25 the cost benefit analysis was not good enough'". One can say, "Well, hold on a minute!
26 How could it possibly ever have been the cost that the cost benefit analysis was not good
27 enough? You have got so many million customers who have got no service. What was
28 going on?"

29 That type of factor is the type of factor that Ofcom will consider.

30 THE CHAIRMAN: Choose your moment, Mr. Saini.

31 MR. SAINI: Sir, I did mention Vodafone, but I do not suggest that Vodafone is going to go bust.

32 (Laughter) I was just using them as an example.

33 THE CHAIRMAN: I am sure they appreciate it.

1 MR. SAINI: They may be the appellants in this case, but I do not want to upset anybody else.
2 Sir, I was going to turn next to the issue of the actual details of the cost benefit analysis.
3 That is going to require some cold towel work.

4 THE CHAIRMAN: We will have lunch to fortify us first?

5
6 (Adjourned for a short time)

7 MR. SAINI: Sir, if I may just mention the matter of timing, first of all. I have had a brief
8 discussion with my learned friends. I think I am going to be at least another hour. I will try
9 and be shorter than that. But, I thought I ought to let the Tribunal know that. Everyone else
10 has got their own time estimates as to how long they need, but the consensus appears to be
11 that we will need to go into tomorrow. It may be that others can indicate how long they are
12 going to need.

13 THE CHAIRMAN: Is there a sort of consensus as to how far into tomorrow? Going into
14 tomorrow is absolutely not a problem, but is there a problem as to how far into tomorrow?

15 MISS ROSE: What I think we thought might be practical is if we have the other interveners,
16 apart from H3G this afternoon, after Mr. Saini. I believe that O2 want an hour. So, that
17 would take us to four o'clock. The remaining interveners said they wanted forty-five
18 minutes between them. That would mean we could finish shortly before five. Then H3G
19 tomorrow morning - I would need a maximum of an hour. I hope it will be less. Then
20 replies from Ofcom and Vodafone. I would have thought on that basis we could finish at
21 lunch-time tomorrow which would obviously be highly desirable.

22 THE CHAIRMAN: In an afternoon that is going to be from, say, to 2.00 to 4.45 or thereabouts I
23 think we should have a break at around about 3.30. Mr. Saini?

24 MR. SAINI: Sir, I was going to turn to the third main issue, which is the cost benefit analysis
25 now, and the actual figures. I will take this quite slowly. As far as the benefits were
26 concerned, first of all - the financial benefits - the calculation was as follows: there are
27 substantial amounts of wasted costs incurred in donor conveyance. Over a period of time
28 one needs to identify a figure for those, and the process which was used - and no-one
29 disagrees with this as an appropriate method at least - is to first of all identify the likely total
30 number of call minutes that will be made to ported numbers between 2007 and 2018, and
31 then to multiply each year's figure by the per minute costs of indirect routing - the DCC. A
32 simple X times Y calculation. It appears to be common ground that both X and Y are
33 matters on which there has to be some prediction, and a judgment has to be exercised.

1 Now, if one looks at X, first of all - namely, the total number of call minutes which will be
2 made to ported numbers between 2007 and 2018 - the approach of Ofcom may be
3 summarised as follows: Step 1 - Ofcom approached each MNO, via a s.135 notice, and
4 sought from them information about actual volumes of ported calls in 2005 and the first two
5 quarters of 2006. Sir, we have looked in Vodafone's response to that request. Just for the
6 purposes of making this submission one should pull that out because I want to make a point
7 in relation to conservative estimates. This is at Tab 7, Volume 1. This is the typical
8 response that was received. So, we have a figure here - again, I will not mention the figure -
9 a figure which one can add up for the first four quarters of 2005, purported calls. We have
10 some figures for 2006 which show an increase. But, the first conservative assumption that
11 Ofcom made was to treat these figures for 2005 as the basis for identifying the percentage
12 of ported calls to all calls.

13 So, if one has a fraction, at the top of the fraction Vodafone put in these figures here for
14 2005 and you need to add in the figures that one has from the other MNOs. That is at the
15 top of the fraction. At the bottom of the fraction - it did not take the 2005 total volume. It
16 took the 2007 total volume.

17 THE CHAIRMAN: Of ported calls?

18 MR. SAINI: No. It was the 2005 volume of ported calls over 2007 total volumes ----

19 THE CHAIRMAN: Of all calls?

20 MR. SAINI: Yes. That showed that 12 percent of incoming calls to mobile appeared to be ported
21 calls. So, keep the figure of 12 percent in mind. Now, one knows, before one goes any
22 further to the next stage, from the actual volume data which we have seen this morning
23 when Mr. Roche gave evidence, that ported volumes generally have very substantially
24 increased. Therefore, the 12 percent figure is likely to be on the low side. That is a very
25 conservative assumption.

26 So, that is the percentage of ported calls - the percentage of all calls that are ported. Now,
27 bearing that in mind one has to next consider Stage 2. That figure is not going to remain
28 static. I think it is common ground that the figure will not remain the same. It will increase
29 by some element year on year. Nobody knows how much it will increase by. Ofcom's next
30 step was to try and estimate the increase. What it relied upon there was its survey. One
31 needs to look at that quite carefully in terms of what it showed. The survey showed, first of
32 all, that 15 percent of the customers who were surveyed had switched provider during the
33 previous twelve months, and one in three of those who had switched had also ported their
34 numbers - one in three and 15 percent had moved. Therefore, from that one gets that 5

1 percent of those consumers had both switched and ported their number in the previous
2 twelve months.

3 So, in its July 2007 consultation paper Ofcom therefore assumed that there would be, as a
4 starting point, an annual 5 percentage point increase in the proportion of mobile calls that
5 would be to ported numbers, year by year, going up.

6 Now, the complaint that Mr. Ward has made, and Mr. Roche's point in his evidence, is that,
7 "You could have done it differently. You could have looked at actual increases in ported
8 volumes over years, and used that". One does not disagree. One could have used that as a
9 basis, but, equally, one could use this. It is not a right answer basis. We are starting from a
10 conservatively low figure, and trying to estimate by how much there is going to be an
11 increase in porting year on year.

12 There is a very important point here which indicates why this 5 percent increase was, in
13 itself, very conservative. I ask you to look at the November Decision itself at para. A1.44.
14 If I could ask you, please, to go to p.59 of the Decision, the last bullet point on that page
15 which begins "Sagentia", and if I may just read that to you, sir:

16 "Sagentia considered that the annual growth in traffic to ported mobile numbers
17 would be 2% each year for all years until 2016. Ofcom noted in the July 2007
18 Statement and Consultation that an annual growth assumption of 2% was not borne
19 out by evidence from market research ..."

20 and they go on and indicate the 5 per cent figure.

21 "On the assumption that consumers who have ported their number have a similar
22 traffic profile as other mobile users, a 5% increase in mobile users with ported
23 numbers will translate to a 5% increase in call minutes to ported numbers. In
24 addition, the data provided by mobile operators ..."

25 This is the point I want to emphasise.

26 "In addition, the data provided by mobile operators for 2005 and the two quarters
27 of 2006 shows that the growth in the volume of ported out minutes for all the
28 mobile operators, between the first two quarters of 2005 and 2006 is above 8%.
29 Taking a conservative approach, Ofcom has adjusted the model to assume that call
30 minutes to ported mobile numbers will increase by 5% each year."

31 Sir, it was perfectly open to Ofcom to say, "Well, the actual data you have given us,
32 Vodafone and others, shows there is an 8 per cent increase every year". They did not do
33 that, they took a very conservative figure of just 5 per cent.

1 So 12 per cent of the total volume each year represents ported calls and that will increase by
2 5 per cent on the face of these assumptions that are conservative. It would have been open
3 to Ofcom to draw stumps and say, "That is enough, we are going to use these figures in
4 order to estimate the avoided DCC". It did not do that. It had an open ear to what
5 Vodafone was saying. Vodafone made some very cogent points as to why the figure that
6 was derived thus far had to be reduced.

7 The first point, looking at the Decision itself, and Mr. Ward took you to this briefly
8 yesterday, but without trying to explain the maths I should just identify the point. If one
9 goes to A1.51, and bear in mind that we are talking here about a 5 per cent increase in
10 annual volume, Vodafone said, quite rightly, that it is not necessarily going to increase by 5
11 per cent each year because some people will stop using their phones, some people will be
12 re-ports, a whole range of issues. What Ofcom did at A1.51 is it reduced that 5 per cent by
13 way of a mathematical calculation. I am not going to suggest to you what that mathematical
14 calculation means. There is no legal challenge to it, but the point that is taken by Vodafone
15 was factored into the analysis. There is a reduction.

16 Ofcom did not stop there. It went even further. Let us park conservative assumption upon
17 conservative assumption. This point is made over the page at p.62, A1.52. If I may read
18 that and then unpack it, it says:

19 "The above obtained percentages are then applied to the volume of forecast
20 termination traffic to obtain porting volumes for each subsequent year. Based on
21 this projection, the cumulative percentage of traffic to ported mobile numbers that
22 benefits from direct routing rises to 33% ... under the Base Case, where all mobile
23 operators are assumed to have implemented Call Trap and to 42% under the less
24 conservative scenario."

25 If I could just stop there for the moment and explain the two further conservative
26 assumptions that are being made. Number one, it is assumed, contrary to the evidence, that
27 everyone has implemented call trap. At this stage that was not the position. So imagine
28 five MNOs have implemented call trap. So you are stripping out a certain amount of annual
29 porting volume, a conservative assumption because that was not the fact.

30 Secondly, how much do you strip out? Vodafone said, "We say 30 per cent". We did not
31 go behind that. We said, "Okay, let us be generous to you, let us assume you are right, let
32 us take out 30 per cent for MNOs on the basis of implemented call trap". That point is
33 made on the previous page, A1.50, if you just look at that, please, sir.

1 Just to see where we are getting to, we start with an overly conservative percentage. We are
2 taking out of that an amount to represent call trap, we are taking out a very high percentage
3 for call trap, we are also stripping out of it unports and re-ports. This is all because we are
4 listening to Vodafone. Vodafone are making these points. In that light we ask, what is the
5 point of further sensitivities? We are doing everything they say, and we are coming to what
6 I would submit is an unrealistically low number for the percentage of ported traffic there
7 will be in future years.

8 PROFESSOR STONEMAN: Can I perhaps get you to be a little bit more arithmetical or
9 mathematical than you seem to be willing to be. Is it right that the discount rate you are
10 using is 12 per cent? When you are generating these benefits you discount them at 12 per
11 cent. If you are discounting at 12 per cent, anything happening in 2018 is irrelevant because
12 it is discounted away to nothing.

13 MR. SAINI: Absolutely.

14 PROFESSOR STONEMAN: So really all that matters is something that is probably – I have not
15 worked it out in front of me – happening around about 2014, 2015. There is no advantage
16 of going to 2018 because you have discounted it right up.

17 MR. SAINI: Absolutely.

18 PROFESSOR STONEMAN: So however impressive your numbers are for 2018 they are
19 irrelevant.

20 MR. SAINI: It does not matter.

21 PROFESSOR STONEMAN: What is really important is what is happening in those first few
22 years.

23 MR. SAINI: Absolutely.

24 PROFESSOR STONEMAN: That is not clear in terms of what you are saying here or in terms of
25 the presentation. The way this is done, you are increasing percentage on percentage on
26 percentage through the rules of cumulative interest. The numbers get much bigger as you
27 go further out. That does not mean that they are good numbers towards the end.

28 MR. SAINI: The point is, sir – I completely accept what you said – for the early years we are
29 starting off with very conservative base numbers and we are applying a less than 5 per cent
30 annual increase to those numbers. I do not disagree with anything you have put to me, sir.

31 PROFESSOR STONEMAN: It may be a point in your favour but ----

32 MR. SAINI: I anticipated it as a point in my favour, sir.

33 PROFESSOR STONEMAN: You said we have to decide whether it is right or wrong. It can be
34 right or wrong in both directions.

1 MR. SAINI: As I understand your point, sir, it is firmly in our favour and it supports the analysis
2 that is here undertaken. These submissions are only made as a counter to Mr. Ward's
3 submission which is that you have adopted a rather odd process here where you take these
4 volumes and do not apply any sensitivities. There are two ways of looking at this. One is
5 you could apply sensitivities, yes. The other way of doing it is that you start off with very,
6 very conservative figures. There are two ways of approaching this matter. What we could
7 have done is we could have put a sensitivity in where we could have more realistic figures
8 in for a higher volume, at least in the early years. We did not do that. We wanted to put
9 forward a case which was very, very conservative for benefits.
10 That is one side of it. That was the X in the equation. There was $X \times Y$, so we have got for
11 each year from 2007 and forward a very, very conservative ported volume. For the
12 purposes of example, let us assume that for 2008 we had come out of this and decided there
13 were 100 ported minutes in that year. We would have to multiply that 100 by whatever the
14 saved donor conveyance charge would be. The complaint made by Vodafone is that you
15 used the wrong donor conveyance charge. It is best understood by looking at Mr. Roche's
16 first statement where he sets out his table. I will try and explain it. I suspect the Tribunal
17 will already understand this point, but I will do my best to explain our submission in
18 relation to it. If one goes to Mr. Roche's first statement, which is in tab 2, volume 1, p.17,
19 para.53. Going back to the equation, there is an $X \times Y$. We know how the X has been
20 derived. The differing candidates for the Y variable are set out there. Vodafone's preferred
21 figures, 0.192, and then Ofcom's preferred figures. The starting point is that neither of the
22 two sets of figures are certain in the sense that one can say one is right and one is wrong.
23 What Ofcom did was that it knew as a fact, because in other process it had determined that
24 for 2007 the DCC should be 0.2, it decided that for 2007 and to 2010 it should stick with
25 that DCC, it had no reason to believe on the basis of what it knew that at least for the next
26 four years there would be a decline in the DCC. One can see what they did that they
27 accepted the submission by Vodafone that it would decline over time, but the patterns were
28 simply different.

29 PROFESSOR STONEMAN: Could you clarify for me, DCC is the Donor Conveyance Charge?

30 MR. SAINI: Yes.

31 PROFESSOR STONEMAN: This is a sort of conveyance cost?

32 MR. SAINI: Absolutely.

33 PROFESSOR STONEMAN: So are you talking about the DCC or are you talking about the cost?

1 MR. SAINI: The cost because the charge is half, the amount that is actually paid in donor
2 conveyance is a half of the total cost.

3 PROFESSOR STONEMAN: I just wanted to get clear what we were talking about because it is
4 not really the DCC.

5 MR. SAINI: I accept that, sir, but ... One can take different views as to how the path would
6 come out but what Mr. Roche has done is he takes a 0.192 figure and, in case you have not
7 seen it – I am sure you have – you should just see where that came from. It is in the same
8 bundle, and in pre-reading you may have seen this – I am not sure if Mr. Ward took you to
9 this, but I will just identify it anyway.

10 THE CHAIRMAN: Is it tab 16?

11 MR. SAINI: Indeed, Sir, I am grateful. If one just goes to the last page of that report. For the
12 purpose of that exercise undertaken by analysis, they decided that a weighted average DCC
13 of 0.201, that is the starting point effectively of Ofcom's table. What Mr. Roche has done
14 is looked at the methodology that was adopted by analysis and, on his own words this
15 morning, he has extrapolated and decided on this methodology, looking at what is going to
16 happen in the future, how would the future DCC look? What Ofcom have done is to take
17 their own view. They know for a fact that the cost of donor conveyance is 0.2 for 2007.
18 We know now for a fact today that for 2008 it is still 0.2, and there is no reason to believe
19 for next year it is not going to be 0.2. Again, this is one of those areas where one can take
20 different views, and the complaint made against us was: "Why did you do it that way?"
21 Equally, one could say to Mr. Roche: "It did not have to do it the way you did it either",
22 everyone has to predict how they think the donor conveyance charge is going to change
23 over the future. So this is put forward as some form of error of law or error of fact, I do not
24 know, but it is simply unsustainable as a legal complaint.

25 I should emphasise, going back to the Decision itself, and it is at A1.55, that Vodafone's
26 submissions were conscientiously considered. Page 62, A1.55 the point made by Mr.
27 Roche is there set out. The last sentence says: "For the purpose of this cost benefit analysis,
28 in the Base Case, Ofcom has made assumptions of falling unit costs consistent with
29 Vodafone's point ..." and they have their own table, and one sees the table at the top of the
30 next page.

31 So we are saying "Yes, Mr. Roche, you are right, it is not going to remain constant, but we
32 think in the future the trend is going to be like this, rather than the trend that you have
33 extrapolated from the analysis work." This is a classic example where there is no right or
34 wrong answer, it is prediction as to what may or may not happen. With the benefit of

1 hindsight one knows in fact that for 2007 0.2 is right, we know it is right for 2008, and there
2 is no reason to believe it is not going to be right for 2009 and the next year, so there is
3 nothing in this point.
4 Going back to where we were, X x Y, X is very conservative and Y is an assessment of
5 future donor conveyance charges.

6 PROFESSOR STONEMAN: I am sorry to interrupt yet again, and I am sure the Chairman will
7 stop me ----

8 MR. SAINI: It is my nomenclature, I am sorry about the mixing of the two ----

9 PROFESSOR STONEMAN: No, it is fine. You said we should go into the ----

10 MR. SAINI: Yes, certainly.

11 PROFESSOR STONEMAN: Now we get our hands dirty.

12 MR. SAINI: Absolutely.

13 PROFESSOR STONEMAN: The Roche figures, according to the second witness statement – not
14 the first witness statement – are generated in the table on p.4 of the second witness
15 statement?

16 MR. SAINI: Yes, sir.

17 PROFESSOR STONEMAN: I am working from a different set of papers.

18 MR. SAINI: Yes, p.7, I have that, sir.

19 PROFESSOR STONEMAN: Really, there are two things that are driving that, one is the RPI
20 which we can argue about, but the other one is the weight of 2G/3G.

21 MR. SAINI: Yes.

22 PROFESSOR STONEMAN: Now are you saying that 2G/3G mix has not changed?

23 MR. SAINI: Absolutely, because we know for a fact that today, in 2008, there has been no
24 change to the rate, we know what the actual rate is, it is still 0.2, and Ofcom has no reason
25 to believe next year is going to change.

26 PROFESSOR STONEMAN: You have worked it out?

27 MR. SAINI: Well we know for a fact that it has not been changed. There is a determination of
28 0.2 remains for the foreseeable future.

29 PROFESSOR STONEMAN: What is this determination? We are not talking about the DCC, we
30 are talking about the actual cost.

31 MR. SAINI: Yes.

32 PROFESSOR STONEMAN: And what this is saying is there are two costs involved, one is
33 involved with 2G and one is involved with 3G. Over time the ratio of 2G and 3G is
34 changing and therefore the average cost is changing.

1 MR. SAINI: Correct, yes.

2 PROFESSOR STONEMAN: Now, are you telling me that that has not happened?

3 MR. SAINI: Well at the moment we are in the early years. In the early years, 2007 and 2008
4 where we can talk about actuals, no, it has not.

5 PROFESSOR STONEMAN: It has stayed exactly the same?

6 MR. SAINI: I should just explain what is meant by that for the other members of the Tribunal,
7 which is that the cost that we are talking about here the view is that if 3G switches are used,
8 and there will be greater use of 3G switches over time, the infrastructure cost of those 3G
9 switches is less than 2G switches, and therefore as 3G switches are more in use the costs
10 will come down over time. We know for a fact that 2007 there was a determination, it has
11 not changed for 2008 and there is no reason at the moment in Ofcom's view to revise it for
12 2009.

13 PROFESSOR STONEMAN: But you are talking about a determination, I am talking about cost
14 data.

15 MR. SAINI: No, I cannot say and if I was going to say I would have to show you a document. I
16 cannot say that I have any cost data that I can point to which would support the path that has
17 been taken there; I cannot show you that. It is basically an informed assumption by Ofcom
18 as to what will happen.

19 PROFESSOR STONEMAN: And the informed assumption is that the ratio of 2G to 3G is not
20 changing in the foreseeable future?

21 MR. SAINI: Absolutely, certainly for the first four years one sees that.

22 THE CHAIRMAN: And you are saying in the absence of contradictory evidence that is a
23 reasonable prediction to make?

24 MR. SAINI: Absolutely.

25 THE CHAIRMAN: That is the essence of it?

26 MR. SAINI: And the point is it is one of those issues one always has to be careful about asking
27 the right question when one is looking at this type of issue, which is that it is not a matter
28 which can be established, it is predictive and it cannot be established to a matter of
29 mathematical certainty. An example of that is if you just look at the Analysis report – I am
30 not going to go to it now – it is a highly complex exercise they adopted in determining the
31 0.2 cost. It makes many assumptions which one might agree or disagree with. So, it is not a
32 no wrong and no right answer type of question. One could see that if, for example, we had
33 used a charge which was not the current charge unless it remained constant for the next

1 however many years, until 2018, one could say, “Well, there may be something wrong with
2 that”.

3 THE CHAIRMAN: I would prefer it still that you referred to a cost and not a charge. There is a
4 difference.

5 MR. SAINI: Absolutely. I accept that.

6 THE CHAIRMAN: The cost is the cost of transferring. The charge is what Ofcom has agreed
7 with the MNOs will be transferred from one operator to another.

8 MR. SAINI: Absolutely. Here we are dealing with the cost.

9 THE CHAIRMAN: Here we are dealing with the cost and not charge.

10 MR. SAINI: Absolutely.

11 THE CHAIRMAN: As far as I can see, you were telling me that because Ofcom has made no
12 change in the charge, there is no change in the cost.

13 MR. SAINI: There is not.

14 THE CHAIRMAN: But you say you have no evidence. I think that although you bridle slightly
15 at the use of the term ‘robust analysis’, what you are actually robustly saying to us is that
16 your predictions are part of a robust analysis.

17 MR. SAINI: One could call it that, but it is partly because I do not understand what robust means
18 here. All I would rather say is that there is a prediction here. The prediction may be wrong.
19 It may also be wrong as far as Vodafone is concerned. Nobody knows. But, it is not
20 completely plucked out of the air. The figures are not such as to make one look askance
21 and say, “Hold on a minute! It’s never going down”. What has happened, sir - and this
22 goes back to the paragraph of the Decision I was referring to at A1.55 - is that an
23 assessment is being made in that paragraph of what the current proportions of 2G and 3G
24 traffic are and what they are likely to be in the future. So, it is exactly your point, sir. An
25 assessment is being reflected there.

26 THE CHAIRMAN: I am sure that H3G were somewhat disappointed that there is not an increase
27 in their market share over a four year period. Plus, the other point about this, of course, is
28 that with the 12 percent discount rate, it is only the early years that really matter.

29 MR. SAINI: Absolutely.

30 THE CHAIRMAN: Therefore, the more incorrect is that for the early years, the more -- The more
31 correct or the more incorrect it is for the early years, the more correct or incorrect is the
32 overall assessment.

33 MR. SAINI: I would agree with that, sir. Now, sir, we have so far been looking just at mobile
34 avoided costs. Do not forget that there is a large sum for fixed networks as well. There, we

1 have been even more conservative. This has not been contradicted. If I can just show you
2 what is said in our defence about this -- It is repeated in the skeleton. It may be easier if I
3 showed it from the skeleton. At p.34 of our skeleton at paras. 62 to 65 -- The point at paras.
4 64 and 65 are in relation to mobile networks. Can I ask the Tribunal please to look at the
5 point at para. 63? The figure that was adopted by Ofcom - for what is called the APCC - is
6 0.013 when the actual charge of BT was higher. So, we could have actually factored in a
7 much greater cost saving for fixed networks. So, where we are getting to, sir, is a position
8 where multiplying X times Y is giving a figure which, as a matter of prediction, is likely to
9 be far lower than should actually be the case. In that context, one stands back and asks,
10 "What is the point of these sensitivity analyses? It does not make any sense". One could
11 understand that argument if Ofcom had taken far too generous initial figures and starting
12 points, but they did not do that.

13 What happens then, sir, is that that is the benefit side of the equation - pure financial benefit.
14 Against that one has to then balance the costs. Now, we know what Sagentia arrived at -
15 £12 million. We have been through the criticisms of why they arrived at that figure, and the
16 lack of engagement by the industry in assisting Ofcom in ascertaining the correctness or
17 otherwise of that figure. But, bear this in mind - and this requires one to go back to the
18 Decision and to the Table 2 at p.64 -- One could perhaps just write in here - because it does
19 not appear here and one has to get this from other documents - that the total capital
20 expenditure that Sagentia had estimated for fixed networks was £61.5 million and for
21 MNOs it was £12 million. You will recall that. You might just write that in at somewhere
22 around Table 2?

23 There is no evidence before this Tribunal that the figure for fixed networks which was
24 derived from the Mason work was wrong. It is not suggested by anybody. Ofcom said you
25 could increase all the costs by 70 percent and still end up with a positive NPV, or neutral
26 NPV. Let us increase the total costs, first of all. So, £12 million plus £61.5 million is £73.5
27 million. Okay? If I allow for another 70 percent of £73.5 million I have another £51.45
28 million to play with.

29 THE CHAIRMAN: Can you just go over that again?

30 MR. SAINI: Certainly. The starting point is the total capital expenditure estimated by Sagentia at
31 £12 million for MNOs and £61.5 for FNOs (for fixed networks) - a total of £73.5 million.
32 Let us assume, in accordance with the evidence, that there is no reason to doubt the £61.5
33 million estimate for FNOs. Let us increase the total cost - in other words, let us increase the
34 £73.5 million by 70 percent. How much does that give us to play with? My point is that it

1 gives us £51.45 million to play with as overspend -- as sums that can be spent by the mobile
2 network operators and still resolved in a positive NPV - over and above the £12 million,
3 that is. In other words, a total of £63.5 million are available for creating and populating, for
4 capex items so far as MNOs are concerned. Now, that is a very, very substantial amount of
5 money.

6 It could be said against that, "Well, let us assume that Vodafone's figures are right. A large
7 chunk of that - £63.5 million - may be eaten up by the 20 million switches".

8 PROFESSOR STONEMAN: This is basically the fourth line in Table 2 of the Decision is it - at
9 A1.57, p.64?

10 MR. SAINI: Yes, sir.

11 PROFESSOR STONEMAN: Saying that the net present value is 2?

12 MR. SAINI: Yes.

13 PROFESSOR STONEMAN: So, really, it is just interpreting '2' as £53.4 minus £51.4 million.

14 MR. SAINI: That is right, but the point I am making is a slightly different one, which is that we
15 know -- or, this Tribunal cannot proceed on any other basis than that the fixed network
16 identified costs appear to be right. Therefore, you have to ask: How much has been left in
17 the overall budget to play with? The point I am making is that there is a very substantial
18 amount left in the budget for MNOs - an amount of about £63.5 million. Now, we know that
19 H3G appear to be able to do this thing as an efficient operator for a very, very modest sum -
20 between £3 million and £4 million. For reasons of their own, neither O2, nor Orange, have
21 decided to come out and say how much they think it is really going to cost them either.

22 PROFESSOR STONEMAN: That is a different point.

23 MR. SAINI: That is a different point. The point is that we are looking at whether or not this cost
24 benefit analysis is right or wrong. What I am saying is that it is definitely right. You have
25 got £63.5 million as an allowance for these costs where it is thought that they were going to
26 cost, say, £12. We know a sense check, you may be thinking, well, that may not be enough,
27 but you know H3G are going to spend between what, £3 and £4 million at the top end.
28 What I am saying, sir, is that when one can get one's hands dirty one sees that there is
29 plenty of allowance here for costs over-run, very substantial allowance. Add to that, do not
30 forget the benefits we are going to receive in terms of avoided costs are much greater in all
31 likelihood than those that were assumed by Ofcom. It is very difficult that there was an
32 erroneous approach undertaken here.

33 What Mr. Ward may say in response to this is, "Okay, you may say, let us assume you are
34 right, you have got £53.5 million in the kitty for the mobile solution, my client is going to

1 spend £20 million of that on its own on the switches, others may do so as well". There are
2 four points in response to that type of argument. Number one, and this is the point of
3 principle, it is not open to my friend to rely upon that point because it was never mentioned
4 before. This Tribunal has to assess Ofcom's Decision on the basis of the materials it had.
5 This point was never mentioned before despite the fact that it was in the possession of
6 Vodafone, in the words of its own witness.

7 The second point, this extra cost of switching does not result from Ofcom's decision. It is
8 not a requirement of Ofcom's decision, it is a requirement of a decision made by the NICC,
9 nothing to do with Ofcom. If the MNOs who participate in NICC were not astute enough to
10 realise this whopping great cost was going to be landed on them by a specification they
11 should have said so. It is nothing to do with Ofcom's Decision.

12 Third, the standard that this Tribunal should be adopting in assessing future costs is the
13 standard of the efficient operator. The efficient operator in this situation is H3G. That
14 should be the benchmark. H3G are going to spend at maximum £3 to £4 million.

15 The fourth point, and this arises from the evidence heard yesterday and today is that, in fact,
16 you do not need to use switches at all. That £20 million cost can be completely avoided by
17 the use of transit networks. That factor was explicitly contemplated by Ofcom's
18 modification of the general condition. It specifically provided that operators were going to
19 be allowed to continue to use transit networks. You can carry on doing that.

20 One gets to a rather unmeritorious position where the principal basis of Vodafone's Appeal
21 is the complaint about the Sagentia costs. That is built upon a foundation that the switches
22 are going to cost so much money. That was never mentioned to us before – never
23 mentioned.

24 Sir, we would invite the Tribunal to conclude that when Ofcom decided that there was
25 going to be a healthy positive NPV and possibly even a neutral NPV, that was a decision which
26 cannot be described as wrong, asking the ultimate question. One could have approached it
27 in different ways. If I were doing it I would have actually said, "No, it is far too
28 conservative, the net present value is actually going to be very, very substantially positive,
29 because you have been far too conservative in your estimation of benefits". The reason I
30 would say is just look at the information provided by Mr. Roche and Herbert Smith as to
31 increase in call volumes. It is rising at an alarming rate, the amount of ported volume.

32 THE CHAIRMAN: Am I right that Ofcom plays no part in NICC?

33 MR. SAINI: Sir, it is only an observer, it has no decision making function there. It just goes
34 along to see what happens. It does not determine any of it. It is basically an industry group

1 which is concerned with developing agreed technical specifications. In fact, I asked the
2 very question when I was preparing this, “Have we got anything to do with NICC?” I was
3 told, “No, we do not, we send an observer there but we do not take part in any decision”.

4 THE CHAIRMAN: A non-participating observer.

5 MR. SAINI: Absolutely.

6 THE CHAIRMAN: A reporting observer.

7 MR. SAINI: What may have happened here is that NICC decided that they wanted a system, a
8 kind of gold plated system which, as Mr. Baxter said, is not necessary, you do not need to
9 do that.

10 PROFESSOR STONEMAN: A couple of questions with respect to the last two points you have
11 made. The first one, Vodafone could use a transit network. Do you think there is any
12 offsetting cost that Vodafone will incur in the fact that much of its current network,
13 therefore, will become redundant and that that will have some capital loss?

14 MR. SAINI: It may do, sir, but at the moment I am putting forward that they could use a transit
15 operator. It has not been put in evidence that there is going to be some – the assumption I
16 would agree with, but you are being asked ----

17 PROFESSOR STONEMAN: Do you not think that should be taken account of in the cost benefit
18 analysis?

19 MR. SAINI: It could be but one needs to quantify it.

20 THE CHAIRMAN: Mr. Ward made the point that transit networks is – I think his term was – “a
21 seller’s market”, and therefore I suppose one might deduce from that that he saying that it
22 makes for a less competitive market.

23 MR. SAINI: I believe that Miss Rose put to Mr. Sutherns that it was a competitive market. I
24 cannot remember what his answer was now, I thought he had agreed.

25 THE CHAIRMAN: Yes, he did agree. It was a very broad question.

26 PROFESSOR STONEMAN: In previous hearings I have had H3G put to me the case that as they
27 use other network operators to a great degree, particularly BT, that they have countervailing
28 buyer power, and therefore make lower returns than other operators. Now, there is a reason
29 why you might not want to use a transit operator. The point is that details of this kind that
30 you are now bringing up, you are bringing up one side of it, but you are not saying that the
31 other side of it, which are costs involved, have been taken account of in the cost benefit
32 analysis.

33 MR. SAINI: Sir, I take your point, but everyone has known that transit operators were an issue,
34 because they appear as being entities that are going to be used, or may be used, on the face

1 of the amended condition. If it was going to be said by any of the witnesses or by Vodafone
2 that it is going to cost a vast amount of money it was open to them to put evidence before
3 this Tribunal to say it is going to cost a lot of money.

4 THE CHAIRMAN: Let us move on.

5 MR. SAINI: I am also reminded by Mr. Bates that Vodafone already use a transit operator and
6 that, in fact, transit operators are a regulated industry so their prices are regulated as well.
7 Can I just mention one last point about this which concerns me in relation to Mr. Sutherns'
8 evidence, which is that one has to be aware of when the £20 million point arose. It has
9 never ever been mentioned until reply evidence by Vodafone. Can I explain how it arose.
10 Mr. Ward was suggesting some kind of implicit criticism of my clients in the way we
11 presented our documents. He has been saying this issue is a new point that we have been
12 making. Let us just go back and see how it arose. It was said in the Notice of Appeal that
13 you have taken no account of the extra costs that will be required by mobile networks to do
14 mobile to fixed. We said, not unsurprisingly, given the record of documents, "This is a
15 speculative point, what are you talking about, what extra costs, you have never mentioned it
16 before?" Lo and behold, one had in his reply evidence in response to that submission Mr.
17 Sutherns' table. That is the first time it arose formally, that is the first time Ofcom became
18 aware of this issue. It is wholly unsatisfactory for a regulated company to mount a root and
19 branch attack on a cost benefit analysis while withholding information which it had in
20 September, and which has only appeared before this Tribunal by accident in reply evidence
21 because of a point that we had raised, simply saying, "What are you talking about?" That
22 again does not affect the legal analysis but I think it is an important in so far as there has
23 been some quite stringent criticism of the way Ofcom approached this matter. It is only
24 correct that the Tribunal has a balanced impression of what happened here.

25 So that is the end of what I am going to say in relation to the CBA, but what I would
26 conclude with is use Mr. Ward's description "robustness", call it a question of right or
27 'wrong-ness' (if there is such a word). We say this CBA, which was not done on the back
28 of an envelope only in November 2007 but was the culmination of a process which took
29 over 18 months with very substantial and helpful contribution from Vodafone, that CBA
30 withstands any legal challenge. If you send this matter back based on the CBA this
31 Tribunal would be substantially derailing a process which the regulator has decided is in the
32 public interest.

33 Sir, without spending too much further time on it, I want to turn to the last issue which is
34 recipient-led instant porting, which I would hope would take less time. If I could ask you to

1 go to the November Decision and to p.65 of that, dealing with the costs of the change just to
2 the recipient-led aspect. I should accept, and I think it is common ground, that Mr. Ward is
3 right to say that having decided to mandate direct routing we made a further decision also to
4 mandate the introduction of recipient led near instant porting. That second decision was not
5 an independent decision, I cannot possibly suggest that.

6 The first point to make, sir, is the point at A1.66, which is that in the view of Ofcom once
7 you have a CDB the pure physical steps of porting a customer are going to be easier
8 because you just have to notify the CDB "Customer A is no longer with 02, she is now with
9 another network". So just as a matter of commonsense having a CDB is going to make that
10 easier. Such is the resistance to that proposal that that simple, commonsense point is not
11 even accepted by any of these people. They say: "No, it is much more complicated than
12 that". It may be, but at least accept there is going to be some simplicity.

13 As far as costs are concerned of this aspect, we made the point at A1.67 that it is difficult to
14 determine the precise costs, but I ask the Tribunal to recall what I was saying before the
15 luncheon adjournment, as long ago as July 2006 we made an open request to the industry:
16 "Please tell us not only how much a CDB is going to cost you, but also the costs of a change
17 to a recipient-led process?" All we were faced with: "We can't really tell you, sorry, we
18 can't tell you". What is the regulator meant to do in those circumstances? Does it just
19 stop? Clearly not, it has to go on and make its best estimate, and what it did at A1.68 is that
20 it made an estimate there of 5 million. That 5 million may be wrong, it may be right, but it
21 was put out there at A1.68 split into changes in network operator systems, changes to
22 processes and retail processes with a one million contingency, it is put out to the industry:
23 "Please tell us is this right or wrong?" Do we hear back anything other than "No, it is just
24 far too complicated, we can't tell you, sorry."

25 THE CHAIRMAN: Accepting that Ofcom were not assisted by much information or, as you put
26 it, no information, given by Vodafone and others in the industry, where does the 5 million
27 figure come from.

28 MR. SAINI: It is an internal working by staff within Ofcom of how much these separate
29 processes, network operator systems, changes to network operator processes and retailer
30 processes would cost.

31 THE CHAIRMAN: That, with respect, is not an answer to the question. There must be a
32 calculation somewhere, you cannot just pluck a figure out of the air.

33 MR. SAINI: Well, Sir, the calculation is not in any documents, and I would be wrong to suggest
34 that I know the underlying basis of the calculation, but one was undertaken as I understand

1 it. It has never been suggested by anyone: “Can you please produce this document?”

2 Obviously I will take instructions as to whether there is an underlying calculation but I
3 cannot immediately point to one, and it would be wrong for me to try.

4 THE CHAIRMAN: This was criticised by Mr. Ward in his submissions earlier ----

5 MR. SAINI: It was.

6 THE CHAIRMAN: -- as just being a figure plucked from nowhere, if I correctly summarise what
7 he was saying.

8 MR. SAINI: That is quite right, that is what Mr. Ward said. The fact is the 5 million is divided
9 into separate elements. It would follow from that that someone has undertaken a calculation
10 within Ofcom as to those separate elements, but it is then put out to industry. It is really for
11 industry to come back and say why it is wrong. What is not acceptable is this hide and seek
12 approach, which is “We will say nothing, we will let them make the decision and then we
13 will say ‘your estimate was wrong’.” But, Sir, I cannot point you to a document which
14 shows a costing of, for example, the 2.5 for changes in network operators, it is an estimate
15 that somebody has done. That person may well not have the experience of MNOs, who run
16 the businesses, to be able to perform a very accurate estimate, but that is the purpose of a
17 consultation process.

18 THE CHAIRMAN: Could Ofcom equally have said: “We have been given no figures on the
19 costings of this so we are entitled to assume that the cost is insignificant”?

20 MR. SAINI: Absolutely, and it probably could have done, Sir, and to say you already have
21 certain costs dealing with a donor system, one is assuming that those costs will be saved, so
22 there will be some offsetting of those costs, and you have not provided us with any further
23 information, therefore we cannot attribute any value, any cost here. We could have done
24 that but what we have tried to do is to put forward a figure. Mr. Ward may say it is plucked
25 from the air, but it is for his clients to come and say why it is wrong. What is not acceptable
26 is a lack of engagement, and you will recall, Sir, that when we served the draft s.135 notice,
27 at tab 17, we did actually split it all up into set up costs, systems integration, hardware
28 changes, training, etc., and it is a matter of history what happened to that request. So we did
29 try our best to get a breakdown from industry.

30 Sir, there is a further issue here as well, which is that one can debate, just in relation to the
31 recipient-led issue, without the ‘instancy’ point, one can debate the pros and cons of a
32 recipient-led system. I can quite see why some operators regard it as being in the interests
33 of their business, and perhaps in the interests of consumers, that the so-called save activity
34 take place, I can see that. But the view of Ofcom was there is equally a benefit in

1 preventing that happening because if customers do not have to go back to their original
2 network, they might be encouraged to increase the offers or the benefits of all customers
3 generally, not the special few who phone up and say: “I am about to go to another operator,
4 can I have my PAC?”

5 So there are two views of it, and neither can be said to be reasonable or unreasonable. So on
6 this particular issue Ofcom decided to follow what was happening elsewhere, which is that
7 the advantages of allowing the recipient and the customer to be in control outweighed the
8 disadvantages.

9 THE CHAIRMAN: Just let me get my head around this – I think it is a very simple point. In a
10 world of recipient-led porting, Ofcom are saying that one of the things that might happen,
11 for example, is that networks might start to offer loyalty bonuses or something of that kind
12 to keep people on the originating network?

13 MR. SAINI: Absolutely. If I can give you an example, if one can become terribly anecdotal on
14 these matters, but one could imagine phoning up any of the networks – I will not use any
15 particular example – and saying: “I am about to leave because I want to get an
16 “Apple i-Phone” and I want to go to O2. You may have experience of this, and others may
17 as well, which is that what immediately happens then, and one sees this I think in Mr.
18 Wardle’s evidence, is they start saying: “Hold on a minute, don’t go. We will offer you a
19 new handset, we’ll offer you a reduced monthly tariff”, but the judgment of Ofcom was that
20 that may benefit that particular sector of the consumers but will there not be a general wider
21 benefit if MNOs decide to offer these good benefits generally to everyone, rather than
22 saying you never get into a position where they really want to leave because they are very
23 happy. So there are two ways of looking at it, and I am not suggesting for one moment that
24 one necessarily is better than the other. One can take different views of these matters.
25 It is also the case, sir - and now I am going over to the issue of quantification of the benefit
26 to a change in the process to make it near instant - we submit it is self-evident that it is
27 going to benefit consumers if they can go into a shop, change suppliers, be home and be
28 able to use their new network. It is like buying any other commercial commodity. If I am
29 told I can go and buy a new car and drive out of the showroom this afternoon, it is clearly
30 going to benefit me and will make my life happier as a consumer, than being told, “No. No.
31 No. First, you have got to go to your Volkswagen dealer and trade in your old Beetle, and
32 get their permission to go off and buy another car”. That is what is happening here. Ofcom’s
33 decision is, “If you can do this quickly, it is going to benefit consumers generally”. It is as
34 simple as that. What is particularly surprising is that one would say, “Well, prove it by

1 consumer research". There are some things you do not need consumer research for because
2 they are so obvious.

3 THE CHAIRMAN: Happiness is a benefit.

4 MR. SAINI: Absolutely. It is a consumer benefit, and it is going to encourage competition
5 because if a customer knows he can go to an O2 shop and be back in chambers in a few
6 hours with a handset with his old number, having migrated or moved from Orange, more
7 people are going to do it. They just simply will. -- rather than being told, "No. No. No.
8 What you've got to do is you've got to 'phone up Orange and say, 'Please, sir, can I have a
9 port authorisation code?'" -- at which I will receive a sharp intake of breath and they will
10 say, "Sir, your account's not looking great. Are you sure you want to do this? If you really
11 do, I'll offer you a handset; I'll offer you reduced tariff --" So, rather than going cap-in-
12 hand to your existing provider, you can simply go to a new provider and the process is
13 seamless from there. That is self-evident. It is no more complex than that, however much
14 Mr. Ward may say, "Well, this survey does not show this". This is a factor.

15 PROFESSOR STONEMAN: Can I get to what is self-evident and what is quantifiable? It may
16 well be that people would prefer to have instant number portability. But, that does not tell
17 me how important it is in the actual purchase of 'phones. It may be that it will have very
18 little impact upon the 'phone that you decide to choose. You will only get the benefit of
19 instant porting if you are going to port. So, what we really need to know is: How important
20 is instant porting in the decision to switch 'phones? I mean, if it is only affecting 0.1
21 percent of the population, then really it is not going to make a lot of difference.

22 MR. SAINI: Sir, I would accept that as a proposition, but one does not know -- One has an
23 intuition as to what might happen.

24 PROFESSOR STONEMAN: Now, there is literature. In fact I have examined PhD theses on
25 what determines the networks to which people sign up. I wanted to ask - because I did not
26 see it mentioned anywhere - whether Ofcom has ever read any of this literature.

27 MR. SAINI: I will take instructions on that, but I cannot give an immediate answer.

28 THE CHAIRMAN: I am sure they have read anything written by Professor Stoneman.

29 PROFESSOR STONEMAN: I have not written anything on it. But, it does seem to me that there
30 is an exercise (I think we were told) of 1,500 people, depending on how you look at it. But,
31 there is literature on switching - what causes people to switch from one supplier to another.

32 MR. SAINI: I recall that there is a footnote somewhere in these many documents where someone
33 has written -- not a thesis, but it is certainly some kind of tract in relation to these issues. I
34 have certainly seen something referred to.

1 PROFESSOR STONEMAN: What that tends to do then is to put one aspect of the transfer
2 process - which in this case is ... - in the context of all the other things. I mean, if it is the
3 case that Vodafone is always more expensive than everybody else's 'phone, then you would
4 tend not to go to Vodafone. So, the cost of how long it takes to transfer to Vodafone is
5 quite irrelevant to nearly everybody in the population. That is not implying that you are or
6 you are not. For anybody who wants to know, I have a very old Tesco pay-as-you-go
7 system. So, it does not affect me at all. So, that is what I want to get at. It is just like the
8 probability of failure.

9 MR. SAINI: Totally.

10 PROFESSOR STONEMAN: So, just to say that it is self-evident does not tell me what benefits
11 are self-evident.

12 THE CHAIRMAN: Leaving aside Professor Stoneman's confession, what you are really saying
13 is that it is self-evident in the sense that if there is an improved consumer experience which
14 is self-evident, that is a benefit.

15 MR. SAINI: Absolutely.

16 THE CHAIRMAN: That really summarises this point entirely, does it not?

17 MR. SAINI: That is it, sir.

18 Sir, I am sorry I have taken a bit longer than I was going to take, but that concludes my
19 submissions for Ofcom.

20 THE CHAIRMAN: Thank you very much, Mr. Saini. Miss Bacon?

21 MISS BACON: Sir, O2 is here, as you know, to support the position of Vodafone in this appeal.

22 We fully endorse the arguments that Mr. Ward made yesterday. What I would like to do
23 today is to expand on three points that Mr. Ward touched on only lightly in his submissions
24 - this was partly by agreement with me. The first, and the biggest, of those three points is
25 the issue of network failure. Mr. Ward has kindly left this largely to me. We did discuss
26 this before the hearing. So, I need to deal with it in some detail. In particular, I will be
27 explaining how Ofcom's position has changed since its previous consultation, despite its
28 submissions to the contrary in the skeleton argument. I am aware that Mr. Saini did not
29 deal with that today. So, I do need to deal with that in some detail.

30 The second issue that I will deal with more briefly is the costs estimates that O2 provided to
31 Ofcom, because we did provide, as you are aware, our own cost estimates at a high level,
32 but we did provide them, both in relation to direct routing and in relation to the porting
33 process. So, it is not correct for Mr. Saini to say that we simply did not come back with
34 something, which he did just a minute ago in relation to the porting process.

1 I also want to show the Tribunal why, if you compare like for like, our estimate in relation
2 to the cost of direct routing is exactly the same as Vodafone's almost.

3 The third and final area that I want to cover is the issue of slamming and mis-selling, which
4 is a problem that O2, in particular, has experienced recently, and which is of great concern
5 to my clients.

6 Before turning to those three major issues I want to cover a few points of general principle.
7 The first is this: it is not Ofcom's responsibility to ensure that mobile networks put in place
8 systems to resolve every conceivable technical glitch that might occur, and which might
9 thereby inconvenience consumers. Nor is it Ofcom's job to remove each and every
10 inefficiency on mobile and fixed networks. For the most part, these are issues that can, and
11 should, be resolved by the network operators themselves. Indeed, the very intense retail
12 competition means that network operators, such as my clients, have a very strong incentive
13 to reduce the inefficiencies on their systems, and to offer the best possible service to their
14 customers.

15 Where MNOs do not make changes it is usually because the costs of doing so are
16 disproportionate to the benefits, or where other changes are more pressing. This is the
17 opportunity cost point. These are judgments that Ofcom does routinely leave to the network
18 operators. I want to give just a few examples to illustrate this point. One is the issue of
19 network congestion. Now, all networks on occasions have problems with congestion. There
20 are also rare occasions when all of the networks in a particular place become congested due
21 to the volume of demand. This is sometimes known as the 'New Year's Eve effect'. Now,
22 Ofcom is well aware of the fact that occasional congestion problems do arise. But, it does
23 not require the MNOs to add capacity to rectify this.

24 Another example is that of call trap itself. There is absolutely no doubt that call trapping
25 reduces inefficiency in terms of network usage and leads over time to costs savings for
26 those operators that implement it, and indeed for other mobile operators, and it produces
27 precisely the type of consumer benefits that Ofcom relies on in the present case. Ofcom has
28 never required all the MNOs to implement call trapping technology. It has never even
29 consulted on such a requirement. The reason why Ofcom does not intervene in these
30 situations is that it may only do so where regulation is proportionate to its objective, and
31 that is what follows from, among other things, s.47(2)(c) of the Communications Act,
32 which, as you will recall, says that Ofcom may only modify a general condition where it is
33 proportionate.

1 In this context we say the concept of proportionality describes a very precise balancing
2 exercise that Ofcom has to go through before it requires a change in the telecommunications
3 systems that will involve significant expenditure on the part of the network operators. That
4 principle of proportionality also explains why, at least in my client's case, 02 has not
5 pushed for a direct routing solution to be implemented and why it is supporting Vodafone in
6 this appeal. Ofcom suggests that various of the MNOs may historically have opposed direct
7 routing because of the balance of DCCs that they receive from MNOs. The implication of
8 course is, and this is why we are here supporting Vodafone today, because we are net
9 recipients of DCCs. You heard the response of Vodafone on that this morning, and I can
10 put on record that it is also not the case for 02 that we are net recipients. As Ofcom is very
11 well aware, we are a net payer of donor conveyance charge and we expect to be so even
12 after we have implemented call trap. So, if anything, we are actually losing out from the
13 direct routing system.

14 So 02's position has always been that some form of direct routing is a good idea in principle
15 and should be introduced if and whether the benefits outweigh the very considerable costs
16 of doing so. As far as we are concerned, that has not been the case in the past and it is not
17 the case under the Decision. It is a question of proportionality.

18 Can I then turn to the first issue, the main issue which I wanted to deal with, which is the
19 question of network failure. We agree with Vodafone that the direct routing part of the
20 Decision is based on two pillars, if you like, the network failure and cost benefit pillar. We
21 agree that if either of those two pillars fails then the whole Decision is, on its terms,
22 unsustainable and must be remitted to Ofcom. Mr. Ward has addressed the second pillar in
23 detail. I want to deal with the first of those pillars, the issue of network failure. We would
24 say that whatever the position on the cost benefit analysis, if you find in Vodafone's favour
25 on the network failure point the Decision must be remitted.

26 The very striking thing about the Decision is that while the risk of network failure is put
27 forward as the primary justification, and I say that ----

28 THE CHAIRMAN: Forgive me, Miss Bacon, if I could just stop you for a moment. Supposing
29 we were to find that what you call the network failure pillar fails but whatever language one
30 uses, whether it is robust or right or wrong, if we were to find that Ofcom's analysis for that
31 apart was right or robust, that the Decision was proportionate and justified, why would the
32 whole Decision then have to fail? Why would we have to remit because this limb we had
33 found was wrong?

34 MISS BACON: I anticipated that question, sir, it is a good question.

1 THE CHAIRMAN: Thank you, kind of you to say so!

2 MISS BACON: The reason is that it would be a completely different kind of Decision. Take
3 perhaps a distasteful analogy, a dog with two legs instead of four legs. The Decision is
4 premised, and I wanted to come to the Decision and I think I have to actually show you the
5 Decision in order to make good this point, but the Decision is premised on the network
6 failure point in respect of direct routing. Obviously, this is not an issue in respect of the
7 porting process. It is a Decision which, on its own terms, is taken because of the risk of
8 direct route as a network failure. They say it is because of this that we are taking the
9 Decision. If you wipe out that you actually lose the public policy justification that is put
10 forward as the ground for Ofcom intervening. I would emphasise, I think you do have to
11 look at the Decision to understand that.

12 Before I actually come to the Decision, which I am going to do, I think I would like to take
13 the Tribunal back in time a few years to the August 2004 Consultation Document, which we
14 referred to in our Statement of Intervention. You have not actually looked at this yet. That
15 is in bundle 2 and it is the second tab E and it is behind sub-tab 2. This is a document, "An
16 assessment of alternative solutions for UK number portability". I am afraid I am going to
17 have to show you most of it. Can I start at p.3. 1.1 is simply explaining the facility of
18 number portability and it concludes that millions of numbers have been transferred under
19 the current system. I do not think we need to mark that up.

20 Immediately at 1.2, we get into the issue that is being discussed here:

21 "However, the failure of Atlantic Telecom in 2001 resulted in around 14,000
22 customers having to move to another provider ..."

23 If you would like to read the first half of that paragraph.

24 THE CHAIRMAN: I do not know if this is relevant, but it struck me throughout reading about
25 the Atlantic Telecom references that that was a very small provider indeed.

26 MISS BACON: It was, and I am going to show you exactly what proportion of fixed line
27 subscribers were affected by it a bit later on.

28 THE CHAIRMAN: I was interested in whether their smallness is relevant.

29 MISS BACON: It is a relevant factor. It is a small provider. I asked my clients about this, why
30 did Atlantic Telecom go wrong and Ionica a few years before. If you scroll down to
31 footnote 1, we say, and this is a point that is made in this document, that normally if a
32 provider such as Atlantic were to fail it would be bought, its assets would be bought. The
33 subscriber base of a telecoms provider is a valuable asset. Footnote 1 explains why it was
34 not, and it said it could not find a buyer. The reason for this was that it had very specific

1 systems which were not compatible with others, it was not compatible with the BT system,
2 it was some kind of a wireless system and that was how it operated. That was the reason
3 why Ionica had the same problem, the fixed radio access network. This was a very, very
4 unusual situation and it had only 14,000 customers. As I said, later on you see the
5 percentage terms of that.

6 What I next wanted to show you is para.1.3, because it is one we cited in our Statement of
7 Intervention:

8 “Ofcom considers that the risk of business failure involving the loss of the network
9 is likely to be higher for fixed networks than for mobile networks. The focus of
10 this consultation is therefore on fixed number portability.”

11 So it was a conclusion that this was really a fixed problem, not a mobile problem, and this
12 was the reason why this consultation was really all about fixed, it was not about mobile.

13 Then 1.4 summarises the fact, if you go down to the last three lines on that page:

14 “But the assessment, looking over a ten year period, shows that only where
15 extreme assumptions are used in the modelling can costs be shown to be offset by
16 the benefits.”

17 Then over the page they talk about the figures involved are £200.6 million and then say:

18 “Some 70 similar incidents like the Atlantic failure would be required to recoup
19 this scale of cost. The benefits do not appear to offset the significant costs ...”

20 Then down to 1.5:

21 “... Ofcom’s initial view is that an IN-based CDB solution is highly unlikely to be
22 cost justified and that it should not therefore be implemented ...”

23 Then they say what they are consulting which was to check the robustness of that
24 assessment. In particular, if you go down to 1.7, the last bullet point, whether there should
25 be enhancements to the existing solutions and effect some kind of contingency planning or
26 bolt-on that you could do in the event of network failure rather than requiring complete
27 change.

28 That is the executive summary. I do not think I need take you to the next section, but if you
29 then go on to p.10, which is the Regulatory Impact Assessment, just to note that that is the
30 start of s.3. If you then turn over to p.13 you get the “Cost-benefit analysis: introduction”,
31 and down the page you see benefit safeguarding number portability when networks fail. If
32 you turn over the first section I really wanted to show you is 3.25, at the top of p.14. Now,
33 they actually start to talk about the kind of benefits you would get by providing a solution
34 for network failure, and they refer to benefits identified by NERA in the 1994 studies. Just

1 for your note that 1994 study is referred to at para.3.6, but you do not need to look at it, it
2 just explains what the study was. They refer to these Type 1, Type 2, and Type 3 benefits.
3 In the next paragraph they go on to talk about the size of the additional benefits resulting on
4 several factors, and then they actually go through under each kind of benefit and assess the
5 benefit that would be obtained by providing a solution for network failure, for example,
6 under 3.29:

7 “The introduction of a CDB would enable consumers to retain their numbers once
8 a certain service was restored.”

9 Then: “Type 2 benefits”, in addition to the efficiency gains that may accrue to operators,
10 there may be an impact to overall competition. Type 3, benefits accruing to general
11 telecoms’ customers.

12 So there is quite detailed analysis here of the kind of benefits that you would get by
13 providing a solution. That is a kind of qualitative analysis, if you like. What Ofcom then
14 goes to do is more of a quantitative analysis, estimating the benefits, and that starts at
15 para.3.45.

16 “Although the quantification of the Types 1 to 3 benefits outlined above is
17 complex, Ofcom has a number of pieces of evidence available which might shed
18 light on the net gains of introducing a CDB system.”

19 I really wanted to take you over the page then to 3.51. 3.51 directly addresses a number of
20 points that Professor Stoneman raised this morning.

21 “ In addition the way in which the potential gains are safeguarding number
22 portability against the risk of network failure are assessed needs to be considered.
23 The size of the potential benefit will be determined by the likelihood that a
24 network will fail and the costs associated with such a failure. These will depend
25 partly on the extent to which consumers are put off switching ...”

26 and so on. Then if you go to 3.54.

27 THE CHAIRMAN: Just pause for a moment. (After a pause) Yes, 3.54.

28 MISS BACON: This is where they actually talk about the risk of networks failing.

29 “The experience of customers of Atlantic is worth considering to help assess how
30 likely it is that the problem of network failure will recur and if it were to recur the
31 likely magnitude of the problem in terms of how consumers would be affected.”

32 Pausing there, this is exactly the kind of analysis that we say ought to have been in the
33 decision and was not, and it was already done in 2004. 3.55, this answers your earlier

1 question, Sir: “Atlantic Telecom failed in 2001 as a result of this failure ...” and so on, and
2 if you go to the last sentence:

3 “Some 14,000 consumers were affected out of a UK base of 35 million lines ...” that is
4 fixed lines. “... “(less than 0.1 per cent of total lines)”. If you compare that with mobile
5 subscribers, they are approximately – very approximately – more than twice as many
6 mobile subscribers, so in the region of 72 million, I calculated before the hearing.

7 THE CHAIRMAN: We now have more than one mobile each, do we, including our babies?

8 MISS BACON: Probably! So if you put that 14,000 in the context of the total number of mobile
9 subscribers that would be an even smaller percentage than 0.1 per cent. They then go on at
10 para.3.57:

11 “Although the failure of Atlantic caused significant cost and inconvenience to
12 customers of Atlantic (and those who previously ported their number from
13 Atlantic), it is worth noting that a relatively small proportion of total UK
14 customers were affected by the network failure. Moreover, it is Ofcom’s view
15 that a permanent network closure such as occurred with Atlantic, is likely to be
16 rare. Previous failures of telecoms’ companies have been on a relatively minor
17 scale, and it seems likely that the two key examples, Atlantic and Ionica, were
18 exceptional”

19 This is again a point that you made at the start. If you would like to read the next to
20 paragraphs, they are paragraphs that we extracted in our statement of intervention.

21 Can I ask you to turn a few pages on to the cost benefit analysis summary at the bottom of
22 p.22. So this is the drawing together of the threads of what they have discussed in the
23 previous section and on the next page, 23, is table 3 – “Summary of the Assessment” and
24 right at the top of that “Benefits Consumers” and in the second column you will see the
25 benefits that are identified as resulting from an all call query system. It says:

26 “System addresses the problems associated with network failure. Consumers able
27 to keep their number even if their network fails or their donor network fails.
28 Impact of this expected to be negligible given the low likelihood of failure of
29 networks and the low numbers of people it is likely to affect.
30 Potentially reduction of the risks associated with network failure could increase
31 the number of consumers willing to port their number.”

32 Then again, a few lines down:

33 “However, the impact of this is expected to be negligible given that consumers
34 have not identified the risks of network failure as a barrier to porting.”

1 At p.26, 3.81, this is where we get the figure which is cited later on, the £220 per subscriber
2 with a ported number if a network fails. Then they go on to estimate the costs if the
3 Atlantic case is taken as a typical example of network failure in 3.82 and 3.83, and then they
4 conclude at the end of that section, 3.87:

5 “The additional benefits of a CDB system are likely to be fairly small given the
6 relatively small risk of network failure, and the fairly small numbers of
7 consumers likely to be affected.

8 Consequently, there does not appear to be a robust economic case for introducing
9 a CDB.”

10 What they then do is ask whether consultees agree with that. Over the page, they then go to
11 discuss alternative options – Option A: Status Quo, Option B implements solutions, Option
12 C – Block transfer. I just want to show you this because this actually explains why they
13 make some of the comments in the subsequent report.

14 4.11 they talk about the industry dialogue short term counter measures. At 4.12 they say
15 “Implications for mobile networks ” They say their consultation is initiated largely in
16 relation to a response to a public policy issue that arose in relation to the fixed market, but
17 there could be some impact on the mobile market, so they are explaining that this is really
18 about fixed, but there would be an impact on mobile providers too. Then they ask whether
19 voluntary migration to direct routing solutions for mobile number portability is likely. That
20 is all I wanted to take you to in that document.

21 Two important points we say emerge from this document. First, that Ofcom considered that
22 insofar as this was an issue at all, it was an issue primarily likely to affect fixed networks,
23 not mobile, so it is consultation focused on fixed as it said a number of times in the
24 document.

25 The second point is that even in that context of fixed networks, Ofcom look very carefully
26 at the risk of network failure, and the number of consumers likely to be affected, the
27 likelihood of the future network failing, and concluded that the risk was so small and the
28 number of consumers affected so small that the benefits arising in this respect were, in
29 Ofcom’s own words, negligible.

30 We cited this document in our statement of intervention and in Mr. Saini’s skeleton
31 argument he said: “Oh well, this was then followed by a report and the report that followed
32 this is entirely consistent with our current conclusions. Sorry, did you have a question?”

33 THE CHAIRMAN: No, I was going to offer you an adjournment at a moment of your choice.

34 MISS BACON: Yes, I can stop now.

1 THE CHAIRMAN: Shall we have 10 minutes?

2 (Short break)

3 MISS BACON: Sir, I had just shown you the August 2004 consultation. I was just about to take
4 you to the result of that which was a document prepared by Ofcom in June 2005. That is at
5 Bundle 5, Tab 4. That is a document that Ofcom refers to in its skeleton argument. This is
6 the extra bundle of authorities containing what was missed out of Bundle 4. It arrived quite
7 late in the day, I believe. It was sent by Ofcom. Behind Tab 4, do you have a document that
8 says ‘An Assessment of Alternative Solutions for UK Number Portability’?

9 THE CHAIRMAN: Yes.

10 MISS BACON: The summary of the document is on p.2. At 1.2,

11 “With regard to the assessment of an Intelligent Network central database solution
12 for number portability, Ofcom concludes that mandating such a solution is not cost
13 justified”.

14 So, it confirms the result of the consultation. It then goes on to say and conclude at 1.3,

15 “-- the Number Portability Commercial Group [I am going to come to that in a
16 minute] should continue to investigate potential contingency measures to address
17 number portability continuity where business failure leads to the loss of service --“

18 So, no mandatory direct routing, but the NPCG is going to carry on looking at contingency
19 solutions.

20 If you turn over a few pages to p.7 -- This is the only bit I want to take you to of the
21 summary of the consultation responses. At para. 3.15,

22 “Whilst BT agreed that it wished to see a better solution for customers, it argued
23 that the provision of such safeguards for consumers has nothing whatsoever to do
24 with number portability, but arises as a result of a company going out of business -
25 a consequence of competition. BT suggest that the costs of such contingency
26 measures should be borne by those customers who benefit from it together with
27 public funding. In the absence of funding then BT suggests that caveat emptor
28 applies. Vodafone also considered that individual consumers retain an element of
29 responsibility in selecting a network”.

30 I only draw your attention to that because that is the argument to which Ofcom was
31 responding in the section that Ofcom cited in its skeleton argument. If you turn over then to
32 p.9 those comments are summarised at para. 4.2 where Ofcom says this,

33 “There were some comments which question the basis for Ofcom’s assessment of
34 alternative solutions for UK number portability. For example, ITSPA did not view

1 protecting consumers against network failure to be a primary benefit of number
2 portability and BT [this is referring to the argument that we have just looked at] set
3 out its argument that the issues surrounding network failure have nothing to do
4 with number portability”.

5 Then Ofcom goes on to explain why it thinks it should be looking at this problem in
6 considering the issue of number portability at paras. 4.3, 4.4, and 4.5. It concludes at para.
7 4.6,

8 “If there were further business failures, in circumstances like that of Atlantic
9 Telecom, and if this then led to a loss of consumer confidence in number
10 portability, there would be a risk of damage to competition. It is therefore wholly
11 consistent with Ofcom’s general duties to assess alternative solutions or
12 enhancements to the current implementation which seek to break the link between
13 network failure and number portability or otherwise mitigate the damage caused”.

14 Just for your note, the passage from paras. 4.3 to 4.6 is the passage cited by Ofcom. Pausing
15 there, all that Ofcom is saying at that point is that it is entitled to look at this issue in the
16 context of number portability. It is responding to the argument made by BT and others,
17 which it summarises at para. 4.2 It is not making any judgment there as to the risk of
18 network failure actually occurring. It is simply saying, “We are entitled to look at it. You
19 say this is nothing to do with number portability. It is. We should look at it. It is our
20 responsibility to do so”. We completely agree with that. But, that is not what it is saying in
21 the current Decision.

22 Can I take you to one or two more passages? At para. 4.9, in the middle, in Ofcom’s
23 conclusion that the benefits are not clear –

24 “The potential benefits of a CDB solution, particularly in terms of the impact on
25 the level of porting, are not clear. On the one hand there is little evidence to
26 support the view that more consumers will port their numbers . . . On the other hand
27 ----”

28 And then cites a few more issues. At the end of that, its conclusion, and this is the
29 conclusion summarised in the Summary Section 1,

30 “Having taken all the response from stakeholders into consideration, Ofcom has
31 concluded that an IN based CDB solution is highly unlikely to be cost justified and
32 it will not therefore seek to mandate such a solution ----“

33 So, that is the first of the two conclusions we looked at in the summary of this document.

1 Over the page, we look at 'Short Term Issues'. This addresses the contingency planning,
2 which was the second of the two points that I raised at the start of this. At para. 4.14,
3 "Ofcom is aware that the Number Portability Commercial Group, representing
4 industry providers with interest in geographic and non-geographic number
5 portability [that is, fixed; that is not mobile - this is a fixed industry group] has
6 already begun work to develop tactical contingency planning for number
7 portability continuity in the event of corporate failure of a UK telephone network.
8 Ofcom welcomes this action".

9 So, all they conclude on that point is that they should continue and complete their
10 assessment of contingency measures. There are two conclusions: "(1) We are not going to
11 mandate direct routing; and (2) We are very happy if the fixed industry group carries on the
12 contingency planning".

13 Now how that is supportive of Ofcom's conclusions on network failure in the Decision I
14 simply do not understand.

15 Moving on chronologically, we then have the consultation the very next year. So, this is in
16 June 2005. In November 2006, a year later, we have a consultation that led to the present
17 Decision. As you will have seen from our statement of intervention it became clear during
18 that consultation process that Ofcom had changed its mind. Only a year before, it had
19 concluded that there was no risk, and that it was not going to mandate direct routing
20 because of network failure. During the various consultation documents there started to
21 creep in statements to the effect that this was suddenly a primary concern. Now, I was not
22 going to show you those, but Mr. Saini, this morning, did say that this was there from the
23 start. I have to therefore take you back to the documents to show you why it was not there
24 from the start. In fact, the very first of the consultation documents - the November 2006 one
25 - says more or less the same as Ofcom had said in the earlier 2004 consultation - that this is
26 a fixed problem. Now, that is in Bundle 1 at Tab 8. (After a pause):

27 THE CHAIRMAN: Mr. Saini referred us to para. 1.4.

28 MISS BACON: Exactly - where it says, "Ofcom's key objectives ----" and then cites two key
29 objectives. Professor Stoneman made the valid point that saying it is one of the objectives
30 is not the same as saying it is the primary objective. So, in this document, as far as we are
31 concerned, Ofcom was saying that there are several objectives. If you can then go to p.12,
32 it starts to consider the options for routing of call supporting numbers. Option 1 on p.12 is
33 to maintain onward routing. Option 2 is the implementation of ACQ CDB for fixed TDM
34 networks. So, this is talking again about the fixed problem. This is essentially considering

1 the same issue as it had been considering in the August 2004 consultation. It is in this
2 context at paras. 3.25 and 3.26, in a fixed context, that it considers Atlantic Telecom and the
3 likelihood of network failure, and concludes exactly the same - that it would not be cost
4 justified. If I can just ask you to read para. 3.26? (Pause whilst read): So, that is entirely
5 consistent with the August 2004/June 2005 documents that we have just seen.

6 Then Ofcom goes on to consider fixed NGN networks, and over the page concludes that the
7 case is justified in relation to these.

8 Then, at Option 4 it goes on to consider the ACQ CDB for mobile networks only. If I can
9 just ask you to skim down those, you will see that what is going on in here in this document
10 at least is that Ofcom is considering the efficiency justification. There is no mention here of
11 network failure. The benefits that are assessed in relation to mobile networks only centre on
12 the efficiency. (Pause whilst read): This is why we say that in the early part of the
13 consultation what Ofcom was saying was consistent with what it had said earlier - that in
14 relation to mobile calls there was an efficiency gain in relation to fixed networks. There was
15 this problem of network failure, but that in relation to current fixed networks, the cost of
16 implementing the solution were disproportionate to the benefits.

17 What we then have is that somehow between this document and the next consultation
18 document in July Ofcom changes its mind somewhat. If you would like to turn to Tab 15 in
19 the same bundle -- I only want to highlight a few short passages. I am sure there are more. I
20 would like to flag up the kind of schizophrenia in this consultation document. This attempts
21 to ride two horses. This document says both that there are twin objectives, and that the
22 primary objective is network failure. The twin objective point is at para. 2.11.

23 “As set out in paras. 2.6 and 3.2 ----” Paragraph 2.6 is the one Mr. Saini referred
24 to, I think. It is not, but it is saying more or less the same thing. “Ofcom’s key
25 objective in relation to the method of routing of calls to porting numbers is to
26 protect consumers as far as possible from the effects of network failure, and to
27 ensure the efficient use of networks”.

28 So, that is a twin objective. But, then, if you go on to p.24, at the top of the page at para.
29 4.29, Ofcom says,

30 “Ofcom’s key objective, in respect of the method of routing calls to ported
31 numbers, is to ensure as far as possible that consumers are protected from the
32 effects of failing providers”.

33 So, we have this creeping in. This primary objective is all about network failure. As I have
34 said, I have not done a complete trawl through this, but I just wanted to give you a flavour.

1 Now, what O2 said was, “Well, look, if you are going to rely on network failure, which you
2 seem to be doing, then you should quantify that. You cannot simply assert that there is a
3 risk without actually making any attempt to quantify the benefit”. I am not going to take
4 you to what O2 said. It is all set out in our SI. Just for your note, it is at paras. 41 to 43 of
5 our statement of intervention.

6 With that somewhat long preamble, can I come to the Decision? I am still not entirely sure
7 what Mr. Saini is saying. In his skeleton argument he did say in several places that the
8 primary objective was all about network failure. At para. 2, “Primary amongst these
9 objectives was the need to protect consumers ----“ and so on. At para. 6, “Even if the CBA
10 had been negative, that would not have ruled out direct routing because Ofcom would then
11 have considered whether the likely costs could be justified as proportionate in order to
12 protect against the network failure risk”.

13 So, in his skeleton Mr. Saini seemed to be saying that he acknowledged that Ofcom’s
14 primary objective was network failure. Today he seemed to be jumping on the twin
15 objectives horse. What I would like you to do is actually look at the decision and see what
16 it says because it is true that there are elements of both in the Decision, but,
17 overwhelmingly, it is saying that the primary objective here is network failure. I have got
18 about six passages I wanted to show you. The first is para. 1.1 of the Decision.

19 “We are making those changes to protect consumers from problems arising from
20 the way calls to ported fixed and mobile numbers are routed, and to make the
21 process of porting mobile numbers easier for consumers”.

22 The second bit of that is dealing with the porting process. That is in the very first
23 paragraph. If you then go down to para. 1.3 you have the same sentiment:

24 “Ofcom has decided that it is time to make changes to the porting process in order
25 to protect consumers from deficiencies in the way calls are routed and to ensure
26 that the process of porting mobile numbers is as convenient as possible”.

27 Again, that is to do with the porting process. Down to the bottom of the page at 1.6,

28 “If the original network fails (commercially or technically), consumers will no
29 longer be able to receive calls to their ported numbers. Ofcom considers that
30 customers should not remain reliant on their former supplier in this way. As more
31 suppliers enter the market using new technology and innovative business models,
32 the risk of failure continues to grow. “

33 At para. 1.7,

1 “Ofcom has, therefore [as in, for the reasons given in para. 1.6] decided that calls
2 to ported numbers must be routed directly to the consumer’s new provider. This
3 offers the following benefits ----“

4 The first two bullet points deal with network failure; the third and fourth bullet points deal
5 with technical issues; finally, the fifth bullet point comes to efficiency. But, that is just an
6 aside because Ofcom has already concluded that Ofcom is going to intervene to mandate
7 direct routing, and it is because of the network failure point. This answers the question that
8 you raised at the start: What happens if we win on network failure but lose on the cost
9 benefit analysis? My point was that this Decision is all about network failure. “Ofcom has
10 therefore decided to do this.” If you knock out the network failure point, the entire rationale
11 for the Decision falls away.

12 Now, I did say that the Decision was slightly schizophrenic because it does have elements
13 of the twin objective point. I want to take you to those, just to be fair to Mr. Saini. If you
14 can turn on to para. 3.3 at p.16 ----

15 THE CHAIRMAN: I suppose para.1.1 is really a twin objectives approach?

16 MISS BACON: 1.1 is twin objectives in the sense the Decision deals with two things, one is
17 direct routing and the other is the porting process, and so when Ofcom is saying “To protect
18 consumers from problems” the first part of that section is dealing with direct routing, the
19 second is dealing with ported numbers. What I am addressing here is only the direct routing
20 part, and our submission is that in relation to direct routing the only justification put forward
21 as the rationale, the fundamental rationale for this decision is the protection of consumers, it
22 is not efficiency for the industry and the fact it is going to save the industry all this donor
23 for mains charge, efficiencies are not even mentioned in para.1.1.

24 I was taking you to para.3.3, this is the section where, for a brief moment Ofcom has a
25 dalliance with its twin objectives in relation to direct routing and it goes back to the
26 suggestion that there are two key objectives so 3.3:

27 “Ofcom’s major objectives are to protect consumers as far as possible from the
28 effects of network failure and to ensure the efficient use of networks.”

29 And then it deals with each of those in turn. Then at para.3.7:

30 “Considering these two objectives together, Ofcom’s aim is to ensure that all calls
31 to ported numbers are routed without reliance on the donor network.”

32 So I completely accept that there are parts in the decision where Ofcom says that it has two
33 objectives, but if you could then turn on to para.3.30, Ofcom then comes back to its

1 dominant theme, this addresses 02 and Vodafone's argument that Ofcom has changed
2 horses. It says:

3 "02 and Vodafone expressed the view that Ofcom's justification for requiring
4 implementation of direct routing using a CDB had undergone a change of
5 emphasis since the November 2006 Consultation was published. In their view
6 Ofcom was now giving less weight to the efficiency savings and more weight to
7 protecting consumers from donor failure."

8 Ofcom's answer to this is at p.25, para.3.49:

9 "Ofcom acknowledges, as Vodafone and 02 have noted, that the July 2007
10 Statement and Consultation set out its primary objective, in respect of direct
11 routing as protection of consumers from the impact of failing donor networks. As
12 has been set out in the November 2006 Consultation and July 2007 Statement and
13 Consultation, there are other benefits to be derived from direct routing, including
14 more efficient use of networks, and fewer constraints on the ability of individual
15 providers to launch these services However, the risk of failure by a donor
16 network has always been Ofcom's primary concern."

17 THE CHAIRMAN: Do I take it that "primary" there is meant to mean paramount?

18 MISS BACON: Yes.

19 THE CHAIRMAN: "Primary" not as the first, but as the most important?

20 MISS BACON: "Primary, not as "here are a number of benefits and this is the first one that we
21 mention", but paramount.

22 THE CHAIRMAN: So your submission is that they have clearly said there that they give
23 paramouncy to network failure?

24 MISS BACON: Absolutely, and reading the whole paragraph in context they say there are other
25 benefits that are primary or, as you correctly say, "paramount" concern is network failure.
26 So that actually shows you what the Decision says. I am not sure why Mr. Saini still says
27 that there are these two objectives. I think he takes it in the "primary" as there are several
28 and this happens to be just the first we cited. That is just not the case, the decision explains
29 that is not so, there are other benefits, but its primary concern is network failure.
30 We say that if that is the case Ofcom has to address it qualitatively and, to the extent it can,
31 quantitatively. I can take you very shortly to what Ofcom does in the way of qualitative and
32 quantitative analysis. There are not very many paragraphs about that in the Decision.

33 THE CHAIRMAN: Forgive me for interrupting, Miss Bacon, but they seem to contradict
34 themselves immediately in the next paragraph – if your analysis of 3.49 is right – in the last

1 sentence of the next paragraph, because there they seem to give paramouncy to other
2 aspects of consumer benefit other than donor failure?

3 MISS BACON: Yes.

4 THE CHAIRMAN: Relegated to not primary role.

5 MISS BACON: That is right. I think the Decision is deeply schizophrenic, but looking at it in
6 context and certainly if you read this together with the opening passages that I took you to,
7 Ofcom is saying: "Our primary concern is network failure". I think the problem is, as is
8 usual, probably Ofcom has cobbled this together by taking bits from previous decisions and
9 that is why you may get hang ups from the old consultations which have not actually been
10 erased, but I think 3.49 in the opening, the Executive Summary, are quite clear.

11 What does Ofcom say about the actual risk of network failure? Paragraph 3.4:

12 "... customers who port their numbers in the UK remain vulnerable to possible
13 failure of their donor provider."

14 3.5:

15 "Even where a donor provider does not suffer outright failure, the quality of
16 service ... may suffer if the donor provider fails to provide sufficient conveyance
17 capacity", so that is a kind of temporary network failure."

18 There are only two more paragraphs: 3.19: "Ofcom considers that the risks to consumers
19 of failing networks are material .." and Ofcom should address those risks "where it is
20 consistent with its other duties." 3.20 when Ofcom talks about Atlantic, it says that the pool
21 of potential failures is growing. The risk is growing rather than diminishing as for example,
22 new spectrum releases enable a wider range of standards to be used when providing service.
23 That is it, as far as I have been able to find. That is it as far as the qualitative assessment,
24 four paragraphs which simply, with respect, rely on assertion. As for the quantitative
25 analysis, Mr. Saini did suggest this morning that paras. A1.59 to A1.62 were quantitative
26 analysis. You probably remember because we had a discussion and Professor Stoneman put
27 to him exactly the point that I was going to make, which is that what paras. A1.59 to A1.62
28 do is simply say if the network fails this is the likely cost to consumers. What they do not
29 do I actually assess the quantitative likelihood, probability of the risk of failure.

30 I should add that I think it is actually common ground that there is no quantitative
31 assessment, because Ofcom's defence says at para.35 that even without seeking to quantify
32 the benefits of protecting consumers from network failure, the CBA comes out positive, so
33 Ofcom is admitting that it never sought to quantify the benefits arising from network
34 failure.

1 I just want to show you two more paragraphs of the Decision and that is Ofcom's
2 Assessment of what I suppose could be the proportionality analysis, what are the other
3 options? Is this the most proportionate means of dealing with it, and there are only two
4 paragraphs that consider that, para.3.20. You will recall that Ofcom discuss in 3.20 Atlantic
5 and the fact that Ofcom says that the risk of network failure is growing and the last sentence
6 it concludes:

7 "In such cases it is not prudent to simply assume (as O2 propose) that there will be
8 an ability to transfer services en masse to a provider of last resort."

9 In the next paragraph:

10 "O2 also suggested that alternative arrangements could be put in place other than
11 changes to the way in which class - for example, an industry fund to compensate
12 customers for losses arising where a network fails. Ofcom agrees that, if no other
13 solution were available, this could be an important option to explore. However,
14 the question is ... whether that is preferable given the available alternative of
15 using the CDB solution. ... All other things being equal, a solution that prevents
16 the risk of harm to consumers furthers the interest of consumers more effectively
17 than steps to provide compensation."

18 So Ofcom is effectively saying that it does not need to consider the other options, it does not
19 need to consider whether you could get there in a Mini because you have a Rolls Royce
20 solution, and the Rolls Royce solution does the job better, and it says all other things being
21 equal, we prefer the Rolls Royce, but of course that misses the point, that all things are not
22 equal. The Rolls Royce entails a significant amount of further costs which the Mini would
23 not require. Our point is there is just simply no attempt to have a proper analysis of the
24 proportionality of what it is trying to do. If - if - as seems to be the case, what they really
25 want to do is address network failure what they should have done is to go on to consider the
26 other options, the costs and the benefits of each option and they did not do that.

27 Now, this is, I am afraid, a wholly insufficient basis for Ofcom's conclusions on the
28 problem of network failure. What Ofcom has done in this Decision is simply to assert that
29 there is a risk of network failure, estimate some of the costs if the network did fail, that is
30 the A159 to A1.62, point out that direct routing would be the Rolls-Royce, the gold-plated
31 solution to those problems, and then sit back and say, "QED, we don't need to go any
32 further, but by the way we also have a positive cost benefit analysis". There is no
33 quantitative or even qualitative analysis of what we say are two crucial issues. The first is
34 the likelihood of a network actually failing bear in mind what the Tribunal said yesterday

1 about the market maturing; and secondly, the numbers of customers in context to actually
2 be affected by such failure. That is despite the fact that, as we saw, the 2004 Consultation
3 did contain a careful analysis of both of those issues. Ofcom was well aware that it could
4 be done.

5 There is no explanation of why, only a few years after that analysis, Ofcom could go from a
6 conclusion that the risk of network failure even on fixed networks was negligible to a
7 conclusion that the risks to consumers were material. The two just simply do not stack up.
8 As you will recall, the failure of Atlantic Telecom affected less than 0.1 per cent of fixed
9 line subscribers. That plainly begs the question as to how this could be a material for
10 mobile networks at all. That is not answered anywhere in the Decision.

11 In legal terms, we say that this is not only insufficient on the basis of Ofcom's own rules on
12 impact assessments, but also on the basis of the statutory requirements in the
13 Communications Act. As I said earlier, this is a case in which the test of proportionality
14 means something, it is a balancing exercise, and it cannot be satisfied by simple assertion
15 without any quantitative analysis at all and no proper qualitative analysis. It also fails by a
16 way to meet the standard that we saw this morning in the *E.ON* case that the benefits should
17 be quantified wherever possible – this is the passage that Mr. Saini took us to – and that
18 qualitative benefits should be explained clearly and in detail. He commended that passage
19 to the Tribunal.

20 Of course, we are not saying that Ofcom cannot depart from its previous decisions,
21 obviously it can, but if it does so it is trite law established, both as a matter of Community
22 law and as a matter of domestic law, that it should give at least summary reasons for doing
23 so.

24 I should make one final point, which is that Mr. Saini this morning talked about the
25 possibility of Vodafone, for example, failing and how catastrophic that would be. Of
26 course, if a network such as Vodafone failed I think the obvious point is that the customers
27 who ported would be the least of the industry's problems, they would have far bigger issues
28 to deal with.

29 That is all I wanted to say on network failure.

30 PROFESSOR STONEMAN: Just before we move on can I go back to this issue of the benefits
31 not being quantified, the risk of failure and benefits from preventing failure. One could
32 characterise the Decision as that the cost benefit analysis shows that in essence it is not at
33 all costly to switch to direct routing. Therefore, there is no need to show these benefits, the
34 benefits to the operators, the MNOs, more than exceed the cost of the transfer. Therefore,

1 in a sense, the Rolls-Royce is free and therefore you need not show that there are benefits
2 from having a Rolls-Royce.

3 MISS BACON: I think what you are putting to me is that because the Decision comes out with a
4 positive cost benefit analysis you do not need to go on and quantify the benefits associated
5 with network failure – is that your point?

6 PROFESSOR STONEMAN: That is the way I have read the document, yes.

7 MISS BACON: If the Decision were overwhelmingly in favour of a cost benefit analysis on the
8 basis of deficiencies and if it had been taken on that basis, and if we could not impugn that –
9 if, as Mr. Saini said, that was robust – then of course we would not be here today. The
10 Decision was not taken on that basis. Ofcom says what its objectives are and the
11 Communications Act mandates that if Ofcom is intervening the costs have to be
12 proportionate to its objectives. Ofcom has said quite clearly, even if it is only one of the
13 objectives, even if it is not the primary objective, that there is this objective of network
14 failure. We say that if the costs are not proportionate to that you can put that forward as
15 your rationale for intervention. It must be there for a reason. If Ofcom had concluded that
16 the efficiency so outweighed any other consideration a decision would have been taken on
17 that ground alone, but it was not. I think that is the point.

18 In fact, as we have seen, in the November 06 Consultation Ofcom did say, “Our reason for
19 intervening in respect of mobile is because of the efficiencies”. It then moved to this
20 position, “We are intervening because of network failure”. Why? Because it thought that it
21 had to base its decision on network failure in order to have a robust decision. We say it is
22 no answer, “You think your efficiency analysis is somewhat dodgy, it is a little bit flaky”,
23 you cannot simply say on that ground, “Okay, we are going to put network failure up at the
24 front and say we have got this unquantified issue of network failure, we have not been able
25 to show that this any material benefit at all, but we are going to put that first, because we are
26 not really sure if our efficiency analysis is going to stack up”. We say that is wholly
27 unsatisfactory. If this decision was going to be taken on the basis of industry efficiencies, it
28 should have said so, but it did not.

29 PROFESSOR STONEMAN: I am sure that Ofcom will come back to that in their reply.

30 MISS BACON: 02’s cost sensitive estimates: I am not going to respond to Mr. Saini’s
31 arguments about the cost benefit analysis. We have not intervened on the detail of that. I
32 just want to explain what our cost figures were doing. We are not saying that Ofcom should
33 have based its Decision on our figures. What we are saying is that our figures, as put
34 forward in Mr. Wardle’s evidence, support Vodafone’s complaint that Ofcom should have

1 sought further information from the operators to support its analysis, particularly given that
2 our estimate was, at face value, significantly higher than Sagentia's. If you put our figures
3 into the sensitivity analysis too, which Mr. Wardle has now done, it comes out with a
4 negative figure.

5 I do not think I need to take you back to our costs estimate. That is set out in the email that
6 you saw this morning, Mr. Wardle was taken to it.

7 What Ofcom says in its skeleton argument about these cost estimates is twofold. In relation
8 to the £3.5 million figure, that is the direct routing figure, Ofcom says, "This proves that our
9 own estimate was robust because that figure is very close to our £12 million if you gross it
10 up, and it is miles and miles away from Vodafone's figures, so this shows that Vodafone's
11 figures are hopelessly inaccurate". The second thing Ofcom says in relation to our £2
12 million, which is the figure for porting, is that we have not put forward anything to
13 substantiate those costs.

14 The immediate observation on those arguments is that, of course, Ofcom is trying to have
15 its cake and eat it. It is happy to accept the figure for direct routing, even though it
16 completely dismisses it in the Decision at para.3.29, where it says 02 provided no
17 information to substantiate this. It is happy to accept that now without further explanation
18 because it thinks it supports its own case. On the other hand, it rejects the porting figure,
19 the £2 million, out of hand because that is inconvenient and it shows that Ofcom's own
20 assumptions of £5 million were wrong.

21 Our answer to that is that both of those criticisms are wrong. To see why Ofcom is wrong
22 in relation to the direct routing figure, that is the £3.5 million, the Tribunal needs to
23 consider what Mr. Wardle said about that and then needs to look at what Mr. Sutherns said.
24 What Mr. Wardle said was that £3.5 million was the starting point. If you gross that up,
25 multiply it by 5, you get to 17.5. That is already greater than the Sagentia figure of £12
26 million. In addition, he says this is a floor not a ceiling and it would need to be increased if
27 the lead time were less than the three years. This was in his email. I completely accept that
28 his email did not go on to say, "We were only considering mobile only". He did say that
29 this is based on a number of assumptions, and specifically said this is based on the
30 assumption of a three year lead time. In his evidence he points out that this is only a mobile
31 to mobile solution. The short point to make on that, Mr. Wardle did say that in that email,
32 "This is based on a number of high level assumptions". He mentioned a couple of them and
33 said, "Come and talk to us, we will come and talk to you to explain the assumptions on
34 which these figures were based, let us know and we will come and explain them". Ofcom

1 simply did not take him up on that offer. It lies ill in Ofcom's mouth now to complain that
2 we did not explain the assumptions on which that was based when Mr. Wardle offered to
3 talk them through that and they never took him up on that offer.

4 So that is what Mr. Wardle said, and you will have seen all that this morning. I only want
5 to show you what Mr. Sutherns said now, and that is at bundle 2, the first tab D, the table
6 below para.49. I think we have looked at this before. The first row of the table: "Mobile-
7 only, direct routing using a CDB". Total for stage: £4 million. Cumulative total - £4
8 million. That is the figure that is the equivalent of our £3.5 million. That is why we say that
9 our £3.5 million is actually very close to Vodafone's own figures. Then Sutherns goes on to
10 say, "Additional costs resulting from early deployment of mobile-only solution in 2009 ----"
11 He is saying, if you have to bring this forward to 2009, there is going to be an additional
12 cost. That is entirely consistent with what we said in the e-mail. This is based on a lead-
13 time of three years. Then he goes on to talk about, "Recipient-led porting process: £1
14 million to £2 million". That is consistent with our figure of £2 million -- It is the same
15 range as our figure of £2 million. Fixed porting is £26 million to £28 million.

16 So, if you actually compare like with like - which is the first row of the table - what we
17 were saying was consistent with what Vodafone says -- That explains *prima facie* the
18 difference that some people have referred to between the two. Vodafone's estimate also
19 went on to deal with the fixed solution.

20 So, we completely reject Ofcom's suggestion that our figure is in any way miles apart from
21 Vodafone or that they validate Ofcom's own estimates.

22 MR. SAINI: Can I just clarify the point my learned friend has made? I may have misunderstood
23 it. Is my learned friend really submitting that the table at para. 49 -- that those figures at the
24 end - the costs of £26 million to £28 million for fixed porting - were ever stated by Mr.
25 Wardle?

26 MISS BACON: No, of course I am not.

27 MR. SAINI: I am content, because I got the impression that she was suggesting that the figures
28 were consistent.

29 MISS BACON: No. No. No. I am not saying that. I am saying that our 3.5 is not miles apart
30 from what Vodafone said, because if you look at the breakdown in Mr. Sutherns' evidence
31 he is saying that where we said the 3.5 would do, he is saying that Vodafone's costing was
32 4. It is not miles apart.

33 THE CHAIRMAN: Mr. Ward was either stretching or wanted to say something.

1 MR. WARD: I am sorry. I am afraid I did want to say something - only that Mr. Saini again
2 referred to a confidential figure and if it could be removed from the transcript we would
3 appreciate that.

4 MR. SAINI: I do apologise.

5 MISS BACON: Actually I may have also done the same thing.

6 THE CHAIRMAN: I think you may have done so too.

7 MR. SAINI: He does not like me - Mr. Ward. He is quite happy for Miss Bacon to say whatever
8 she likes.

9 MISS BACON: I am not sure if it was marked in my copy as confidential. I am very sorry.

10 THE CHAIRMAN: Strike confidential figures from the record.

11 MISS BACON: What both O2 and Vodafone's estimates do show, we say, is that Ofcom adopted
12 its decision hastily on the basis of an incomplete CBA which would have looked very
13 different if it had pursued proper estimates from the industry. We did give our estimates.
14 I just wanted to say a few words about call trap. This came up yesterday, and I promised the
15 Tribunal - and I have kept my promise - that I would explain to the Tribunal how we were
16 going to implement it, and how this would differ from what is proposed under a CDB. I am
17 not sure that this is entirely material to your decision, but it is good background knowledge
18 because it explains why you cannot simply have a call trap and then somehow bolt on to
19 that a CDB. Our note is here. (Same handed)

20 THE CHAIRMAN: Would you like us to read this?

21 MISS BACON: I think I should sit down and you should just read that. (Pause whilst read): Mr.
22 Ward has asked me to confirm that we are planning to implement call trap, and I can also
23 say that our projected costs of doing so are in the region of £420,000, which is a figure
24 which is miles away from the £3.5 million that we think that will incur in implementing the
25 mobile-only solution using CDB. As you will see from this note, it is not in any sense that
26 the CDB can just be a bolt-on to our existing planned call trap solution. In fact, we were
27 always going to have two look-ups. I am not saying that other operators are necessarily
28 going to do the same thing. I just wanted to explain what O2 is doing. Mr. Sutherns
29 explained yesterday what Vodafone was going to do.

30 Can I then turn on to our second figure, which is the £2.5 million for porting? Now, as you
31 will recall, Ofcom's estimate was that this was going to cost the industry a total of £5
32 million, and the costs of also requiring the process to be near-instant would be close to zero.
33 As you will have heard this morning, there is no mathematical basis for those calculations.

1 It is a figure that Ofcom's internal advisors derived. We also do not know where that came
2 from.

3 Now, Ofcom's response to our claims that there are actually going to be significantly
4 greater costs is to say that we have not identified any physical changes to our systems, or
5 any other reasons why the MNOs should incur substantial costs. I just wanted to just
6 mention that our 8th November e-mail - the famous e-mail with the cost estimates -- It is
7 self-explained why those costs would be incurred. I will not take you back to it, but it said,

8 "This is essentially because the existing manual process would need to be
9 automated, and would mean significant development would be needed for O2's
10 retail billing systems and wholesale billing systems".

11 Again, we offered Ofcom to provide more explanation, and they did not take us up on that.
12 Again, we are not saying that we should necessarily have adopted this. But, the difference
13 between this and their kind of finger in the air guesstimate of £5 million should have led
14 them to suspect that maybe they should go back to the industry and get further cost
15 estimates before concluding their CBA.

16 That is all I really wanted to say about the numbers.

17 My final point is slamming. I do need to say a few words about this because my clients have
18 a particular concern about the practice of slamming because they have recently pursued
19 trademark infringement cases against companies that have tried to pass them off against O2.
20 As we said in our statement of intervention, the cost of slamming is an additional cost in
21 relation to the proposed change to recipient-led porting. We say that Ofcom should have
22 analysed this, or at least addressed it in its cost benefit analysis.

23 Ofcom has in fact previously acknowledged that a change to recipient-led processes would
24 itself be likely to increase the potential for slamming and other kinds of mis-selling. I just
25 want to take you in that respect to Migrations consultation document, which is referred to in
26 the Decision by the way. It is a reasonably long document, but I only need to actually show
27 you one paragraph of it. I should add that I am not springing this on my learned friends. I
28 sent them an e-mail last night, and they were aware that I was going to possibly refer to this.
29 I hope that they should all have had this.

30 This is a general consultation about migrations in respect of fixed and broadband, among
31 other things. It is an ongoing consultation. Just to give you the reference in the Decision
32 where this is cited, it is mentioned at 3.129 of the Decision, and Footnote 25. This is the
33 very document that is referred to at Footnote 25 of the Decision at p.40. What the
34 document does is talk about a number of different processes that you use to migrate

1 customers from one provider to another. It deals with what happens with voice transfers at
2 the moment and fixed networks. It deals with with broadband, and then it goes on to
3 consider energy sector solutions. It considers which of these should be the best for telecoms
4 for an overall solution that is going to address all kinds of networks.

5 At para.4.8 it starts talking about one of those processes which is a recipient led process
6 called the Letter Facilitation Process. I do not really need to explain what that is all about,
7 save to say that this is a recipient process. If you go to para.4.12, they say:

8 “The advantages of the Letter Facilitation Process is that switching is simple as
9 there is limited customer involvement as, in order to effect a switch, the customer
10 need only contact the provider of their choice.”

11 The following is the paragraph that I rely on:

12 “However, it is evident that unless strong measures are introduced to tackle the
13 problem of mis-selling and slamming, there is increased potential for irresponsible
14 sales and marketing activity given that upfront validation is reduced under this
15 approach.”

16 Then they go on to refer to the high volume of complaints about mis-selling and slamming
17 practices in the fixed telecom sector.

18 This Consultation did not actually result in a final report from Ofcom. What Ofcom then
19 did was commission a further report from Deloitte. In the interests of not over-burdening
20 you with paper, I am not going to take you to that, but suffice it to say that as far as we
21 found there is nothing in that that contradicts what Ofcom has said here. In fact, there are a
22 number of passages in the Deloitte report that support what Ofcom said here, that if you
23 move to recipient led process there is an increased risk of slamming. This is essentially our
24 complaint, that the current Decision mandates a move to recipient led process, but simply
25 says, as with so many other things, “We will just leave the solution to be worked out later”.
26 We say that is not satisfactory. If you are going to mandate to recipient led process you
27 need to consider the costs of that, and one of the costs is obviously the problem for
28 networks and consumers themselves of slamming and mis-selling.

29 I only just want to address the Irish issue now.

30 THE CHAIRMAN: Just before you do that, if I can interrupt you for a second, you are saying
31 that a cost of slamming should have been built into the CBA?

32 MISS BACON: We are, we are saying that Ofcom should have considered this as one of the
33 attendant risks a recipient led porting process, and should have tried at least to build some
34 kind of quantitative and qualitative analysis of the cost of that into its CBA.

1 THE CHAIRMAN: Having carried out this analysis?

2 MISS BACON: Yes.

3 THE CHAIRMAN: Thank you very much. Your next point was the Irish issue.

4 MISS BACON: The only other thing I wanted to say on slamming was the Irish problem.

5 Hutchison in its skeleton argument points to Ireland and says, “You have got a sister
6 company over in Ireland and you had long experience of addressing those matters there”. I
7 think I made this point yesterday, I did ask my clients about this and their answer is that for
8 them these problems have simply not arisen in Ireland. Mis-selling is, however, a problem
9 in the UK, so much so that Ofcom is considering the matter in a separate consultation and it
10 is proposing formal regulation. We say that, given that this is a problem in the UK, then
11 Ofcom is addressing the recipient led porting solution in the UK.

12 THE CHAIRMAN: Am I right that if it is in Ireland, and I think this arises from something we
13 were shown yesterday, in Ireland recipient led porting is at the end of a more complex
14 process, which includes letters.

15 MR. WARD: Sir, the document you are thinking of is the email appended to Mr. Roche’s second
16 witness statement, which I showed you briefly.

17 MISS BACON: I am very obliged.

18 THE CHAIRMAN: Thank you for refreshing my memory.

19 MISS BACON: There is only one more point. This is really to hand up another document, and
20 this is on the lead times porting. I am not really going to address this at all in my
21 submissions, Miss Demetriou is going to. My instructing solicitor has very helpfully put
22 together a table of port lead in other European countries. This is addressing the point made
23 by Hutchison in para.54 of its skeleton argument in which it refers to us having long
24 experience with neighbouring countries with near-instant porting. I just wanted you to be
25 aware that, as far as we know, the only neighbouring country with near-instant porting is
26 Ireland. That is at the top of the table.

27 As for our other neighbouring countries, the port times are listed on the table. That is
28 derived from Cullen International Benchmarking as at 2nd May 2008. I just hand it up for
29 your information. Just to give a little bit of context, we are fairly near the top with two
30 working days already. So this is not a case that we are behind the rest of Europe in terms of
31 our port lead times at the moment.

32 THE CHAIRMAN: 123 days in Germany.

33 MISS BACON: Yes, the Germans are always a little bit different, are they not? That is all I had
34 to say unless I can assist the Tribunal further.

1 THE CHAIRMAN: You have been of great assistance, thank you.
2 Miss Demetriou, I am reluctant, at the end of a long day, to force you to start at 23 minutes
3 to five, if you would rather address at 10.15 tomorrow.
4 MISS DEMETRIOUS: I think, in any event, Mr. Pickford was due to go before me. I do not
5 mind.
6 THE CHAIRMAN: I am so sorry, you are hiding there at the back, Mr. Pickford.
7 MR. PICKFORD: Indeed, the massed ranks of Ofcom somewhat displace me.
8 THE CHAIRMAN: You are the bottom of our attendance list, which is why I asked
9 Miss Demetriou first. You heard what I said, now or in the morning?
10 MR. PICKFORD: I am happy with whichever the Tribunal prefers. I have about 25 minutes
11 worth of submissions, so with that in mind ----
12 THE CHAIRMAN: I think in the morning. 10.15.
13 (Adjourned until 10.15 a.m . on Friday, 20th June 2008)
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