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IN THE COMPETITION

Case Nos 1094/3/3/08

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A.2EB

20th 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

Transcribed from tape by
Beverley F. Nunnery & Co.
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737

HEARING DAY THREE

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. Yes, Mr. Pickford?

2 MR. PICKFORD: Thank you, sir, Members of the Tribunal, Mr. Ward has already
3 comprehensively set out the case against Ofcom, and I fully endorse and adopt his
4 submissions. I do not intend to be comprehensive. My submissions are essentially
5 something of an assortment of optional extras, and I am going to cover six primary areas.
6 The first of those is the test to be applied by the Tribunal and the issue of principle which is
7 said to be at stake in these proceedings. The second is the role of the cost benefit analysis,
8 the third is the issue of a development of a specification for the proposals. The fourth is a
9 short point raised by Professor Stoneman concerning discount rates. The fifth is why
10 Hutchison's submissions on competition can safely be ignored. The sixth is some minor
11 points of clarification for the record arising out of some evidence that was led by Miss Rose
12 yesterday. The first three of those points are the most substantial ones and I am going to
13 take the majority of time on those, so the Tribunal should not lose heart if it takes me some
14 time to get to point.

15 Turning to the first of them, which is the test to be applied by the Tribunal, Mr. Saini
16 appears to have something of an aversion to the word "robust". The Tribunal will recall
17 that yesterday he made a great play of the fact that that word has no role as a legal test, and
18 he could understand why Mr. Ward kept using it. If he wants we can substitute the word
19 "rigorous", because the Tribunal in the Hutchison case, to which Mr. Ward took you on
20 Wednesday, said that it should engage in a profound and rigorous scrutiny as a specialist
21 tribunal. If Ofcom's cost benefit analysis is not a rigorous one, it is very hard to see how it
22 can withstand profound and rigorous scrutiny. Mr. Saini does not argue with the fact that
23 that is the test that should be applied.

24 THE CHAIRMAN: Is "profound and rigorous" the tautology?

25 MR. PICKFORD: I am not sure. I am not sure it really matters for these purposes.

26 THE CHAIRMAN: That would suggest it is a tautology, would it not? Carry on.

27 MR. PICKFORD: Moreover, I listened to Mr. Saini's submissions about the absence of any legal
28 basis for a "robust" test in law with some interest. I probably do not need to remind the
29 Tribunal that in the context of its Competition Act jurisdiction, which is also on the merits,
30 just as we are here, the test which is applied by the Tribunal time and time again to any
31 assessment of economic analysis is whether it is robust and soundly based. I have authority
32 for that proposition in the form of *Genzyme*, which perhaps I might hand up. It is a rather
33 weighty tome like many of the Competition Act decisions. (Same handed) It is para.150.
34 This is the section of the Decision where the Tribunal is considering the burden and

1 standard of proof, which begins at para. 148, and then towards the end of para.150 the
2 Tribunal says as follows:

3 “ We bear in mind, however, that resolving the issues in the present case such as
4 matters of the relevant product market, dominance and abuse, may require a more
5 or less complex assessment of numerous interlocking factors including economic
6 evidence. Such an exercise intrinsically involves an element of appreciation and
7 the exercise of judgment. On such issues it seems to us that the question of
8 whether the OFT has ‘proved’ its case involves asking ourselves questions such as:
9 Has the OFT established the underlying facts? Is the Tribunal satisfied that the
10 OFT’s analysis of the application of Chapter II prohibition to those facts is robust
11 and soundly based?”

12 Now, I have chosen *Genzyme*, I could equally have chosen pretty well any of this Tribunal’s
13 Competition Act judgments, I could have chosen *Aberdeen Journals*, *Argos*, *Burgess*, the
14 list really goes on.

15 So what does it mean, that the decision and, in particular, the cost benefit analysis has to be
16 robust and soundly based? Well we say in short that means that given the context in which
17 the decision was being taken Ofcom’s analysis has to be fit for purpose, so when Mr. Saini
18 also suggested yesterday that really this attack was just about the Interveners and Vodafone
19 saying it could have done a bit better that is wrong. We, unfortunately, are not so kind. We
20 say that Ofcom’s approach simply was not fit for purpose in the context in which Ofcom
21 was taking its decision. He also says that there is an issue of principle here about whether
22 Ofcom should, in every case, be required to conduct a detailed cost benefit analysis on the
23 basis of particular specifications for a system that is planning to be introduced. We say that
24 is wrong because the issues are intrinsically context dependent. Here there was already a
25 fully functioning system of mobile number portability and on the basis of Ofcom’s own
26 consumer research consumers were generally happy with it. Even on Ofcom’s own
27 estimate changing the system was going to cost the best part of £100 million and you have
28 heard the case of Vodafone and the Interveners that it in fact it would be considerably more.
29 In those circumstances we say that a robust justification for changing the system really was
30 required. That is not to say that in every case where Ofcom takes a decision it will have to
31 go through exactly the same process.

32 There is a final connected point here which is that Ofcom likes to portray this debate as one
33 between itself, the regulator protecting the public interest, versus the industry incumbents
34 who, it says, are all being intransigent. Now, where (as here) we have what is accepted to

1 be an effectively competitive industry, what happens if you impose hundreds of millions of
2 pounds on that industry is that it feeds through into the prices that consumers ultimately
3 have to pay, so it is one thing to say to a consumer: “Well, would you like a faster system of
4 mobile number portability?” They might well say: “Yes, sounds all right, don’t really
5 know”. Ask them “Would you be happy to pay an extra £25 for the benefit of that system”
6 they may well give you a rather different answer. So this appeal is not about delay it is
7 about whether Ofcom’s decision is robust and soundly based, and withstands the rigorous
8 scrutiny that this Tribunal will apply. If it cannot do that it cannot claim the moral high
9 ground of the public interest we say. So that is the first area of submissions containing the
10 relevant test. The second is Ofcom’s approach to the cost benefit analysis.

11 The key point has already been made by Mr. Ward, and it is the cost benefit analysis
12 matters. It is central to Ofcom’s reasoning in the decision and if it is flawed the decision
13 cannot stand. I have three further points to make in that connection.

14 The first is a very brief one, it is merely support for the proposition that I have just
15 advanced, and it is contained in Ofcom’s own defence, and I would just like to quote that
16 but I can see, Sir, that you are turning to it, so I am happy to look at it in reality. It is vol.2
17 tab A, para.35. What Ofcom say, it is their own words, they are these:

18 “Since, even without seeking to quantify the benefits of protecting consumers from
19 network failure, the CBA calculation indicated positive net benefits of the move to
20 direct routing, there was no need for Ofcom to seek to quantify the other benefits
21 in order to conclude that mandating a transition to direct routing was justified.”

22 One sees plainly from that that if the cost benefit analysis is flawed then that reasoning
23 simply falls apart. If it is possible that the cost benefit analysis might have been negative,
24 they need to go back and revisit the entire decision again.

25 The second point in this connection is that Mr. Saini suggests that it is for the Tribunal to
26 assess whether the cost benefit analysis was right or wrong. There are two problems with
27 that submission. The first is a point I have already dealt with. The real issue is not whether it
28 is right or wrong; it is whether it is robust and soundly based, or rigorous, or whatever
29 alternative phrase one wishes to use. The second problem is that in putting forward that
30 submission, he’s attempting to lure the Tribunal into thinking that it needs to adjudicate on
31 whether the result of the cost benefit analysis is correct. That is not the challenge here. The
32 challenge here is to approach - and he confuses result with approach. We say it is not for
33 this Tribunal to assess whether the result of the cost benefit analysis is wrong because it

1 does not have the material before it to do so. If it was to attempt to do so, we would be here
2 for many weeks.

3 The right question for the Tribunal, we say, is twofold. Firstly, was Ofcom's approach
4 sufficiently rigorous, given the context in which it was operating? Secondly, if not, is there
5 a material risk that the outcome might have been different? We say we do not need to show
6 that there was a significant risk that the outcome was different. We certainly do not need to
7 show that there was a 51 percent probability that the outcome would have been different. It
8 is simply that if the exercise was not carried out properly, and there is a material risk that
9 that might matter, then the decision needs to go back.

10 The third point on this issue is that Mr. Saini has attempted to engage in something of a
11 conjuring trick, we would say, in relation to whether there is sufficient headroom in the cost
12 benefit analysis to withstand the challenge that has been brought by Vodafone. We say
13 there are two problems with this approach. You will recall that he said, effectively, that he
14 has over £51 million to play with. (After a pause): I thought there was an extra £51
15 million. But, in any event, I will take my points in turn. Firstly, he gets 84 percent of his
16 headroom, supposedly, from the fact that originally, in effect, Ofcom allowed a 70 percent
17 overrun in respect of the fixed network operators. The major element of cost in Ofcom's
18 decision was in respect of fixed network operators, and he applies his 70 percent globally to
19 the whole cost figure. So, that is where he derives most of his headroom from. So, he has to
20 assume that, in reality, there will no overrun whatsoever in respect of fixed network
21 operators of implementing the solution that has been proposed. However, we say there is no
22 safe basis at all for that assumption. We simply do not know. Certainly Ofcom has not
23 provided any evidence to demonstrate that, in fact, the fixed side of this will come in
24 entirely on budget.

25 The second point, we say, is that his headroom does not even save him. Even if he is right,
26 it is going to be eaten up by T-Mobile, Vodafone, and possibly, depending on exactly how
27 much, one of the other mobile operators. T-Mobile estimates - ignoring opportunity costs -
28 that implementing Ofcom's proposals will cost it in the region of £33.6 million. That figure
29 is not confidential. It is contained in the witness statement of Mr. Harrison in Volume 2,
30 Tab D (not the first D one comes to in this bundle; it is a D which is about two-thirds of the
31 way through), and at Tab 2 behind that. This is what is my Volume 2. I fear that the
32 Tribunal's bundles are marked in a slightly different manner.

33 THE CHAIRMAN: Yes, they are marked differently.

1 MR. PICKFORD: If one turns to the end of that witness statement at para.29. It is a slightly
2 confusingly labelled bundle, but it is behind tab 2, which is behind, T-Mobile's Statement
3 of Intervention.

4 THE CHAIRMAN: Yes, I have got it. It is paragraph?

5 MR. PICKFORD: It is para.29 and the right at the end of his witness statement, just before the
6 statement of truth. He sets out a table there of T-Mobile's best estimate currently on the
7 information that it has, what it is going to cost it to implement the proposals. One sees a
8 figure at the bottom there, £48.6 million. £15 million of that is his estimate of opportunity
9 cost. We do not need to rely on that. Even if one knocks that off that still is a figure of
10 £33.6 million. The sum originally allowed per operator by Ofcom is in the region of about
11 £2.4 million. One gets that simply by taking the £12 million and dividing by five. So if one
12 looks at the difference between the two figures there is an excess of over £31 million in
13 respect of T-Mobile alone. Vodafone's figure, which is in Sutherns – I do not need to take
14 the Tribunal to it, but just for the Tribunal's note – witness statement, volume 2, tab C and
15 then tab D, para.49. That is a similar order of magnitude. One can see that we are already
16 eating up and exceeding the headroom that Mr. Saini has allowed himself. That is before
17 even getting to Orange and 02 and H3G. That is my final point on the cost benefit analysis.
18 Turning then to the development of a specification for the proposals, Ofcom originally
19 argued that it was not proportionate to require the industry to engage in developing such a
20 specification before deciding whether to implement the proposal. The Tribunal will already
21 have the main point because Mr. Ward made it on Wednesday, that that is really putting the
22 cart before the horse, you need to know what the costs are in order to decide whether to
23 implement the proposal, or at least you need to have a fairly good understanding of those
24 costs.

25 There are four further points that I would like to make. The first is that no one has
26 challenged Mr. Harrison's statement, which is contained in his witness statement at para.14,
27 that absent any detailed agreement or statement on the characteristics of a system the
28 industry could not engage in a meaningful evaluation of costs. Even if it is the case that
29 H3G is far cleverer than everyone else and is an exception to that rule, that still remains the
30 case for T-Mobile, Vodafone, Orange and 02. So what is Mr. Saini's response to that? He
31 moved away from his disproportionality ground it appears, and he now appears to expect, as
32 far as I can understand, that it might actually be a good idea to have some form of
33 specification, but he lays the blame for there being no specification at the door of the mobile
34 operators, he says because they failed to come forward and develop their own

1 specifications, they simply stonewalled Ofcom, that is the claim. We say that is an
2 abdication of responsibility on the part of Ofcom, and it is not fair. I will leave Mr. Ward to
3 deal with why it is not fair, given Vodafone's extremely detailed responses to the
4 Consultation.

5 The point I wish to make is to respond to the suggestion that industry participants should
6 have gone away and developed their own proposals. We say that is just incoherent. A point
7 that Ofcom, themselves, make in their defence is that this exercise is not costless. We agree
8 with that.

9 Another point which no one disputes is this, if this is a system that is going to function
10 effectively it needs to be developed by the industry acting together to develop common
11 standards. One can immediately see that there is relatively little point in asking the
12 individual operators to go away and devise their own separate specifications for a system
13 based on different assumptions about how their version of the system might ultimately
14 work. First, the result of that exercise will tell Ofcom very little because it will have as
15 many different variants, specifications and assumptions as it will get answers. Secondly,
16 given that ultimately the need will be to develop a common system that works for everyone,
17 one can see that that really would have wasted costs and really would have been
18 disproportionate. Also, as Vodafone noted in one of its letters that Mr. Ward took you to on
19 Wednesday, Ofcom did not actually allow enough time in its consultation process for that to
20 happen, because developing a specification takes time.

21 All that was actually needed in this case was for Ofcom to show some leadership and say to
22 the industry, "We give you X months to go away and do your best to develop some form of
23 specification for this system that we are thinking of implementing, and make sure you do
24 the best job you can in that time, because at the end of that time we are going to ask you to
25 cost it, so this is your opportunity to go away, develop the system, get a specification and
26 get some costs for it". There was absolutely nothing to prevent Ofcom from following that
27 approach.

28 Ofcom attempt to defend that failure to take what we say is a really obvious step on the
29 basis of, "Well, industry participants, they might be influenced by their own commercial
30 considerations when they give you information, they cannot be trusted to be objective", was
31 effectively what Mr. Saini was saying yesterday. Just one small point of note: that point
32 was not put to my witness, or indeed any of the witnesses as far as I recall, but more
33 importantly that consideration is not a sound basis for failing to go and ask the questions.
34 Firstly, as the Tribunal noted, a provision of false information is, in fact, an offence under

1 the Act, and that has to be borne in mind. Secondly, Ofcom cannot have it both ways.
2 Other points in their submissions, they rely upon the fact that the only people that know
3 about this, the only that know how to do it and how much it is ultimately going to cost once
4 they have worked out the specification is the industry. So you cannot then ignore what the
5 industry has to say about that because what they say might be influenced by their own
6 commercial considerations.

7 The third point is that it is part of every day regulatory life for Ofcom and for every other
8 economic regulator to ask for information from the very people they regulate. It is
9 inevitable, it is what regulators do. This is what they should do as a key and integral part of
10 their job. Of course, it is appropriate to scrutinise that information to ensure that what has
11 been given to you is robust and properly reflects the questions that have been asked. It does
12 not mean you do not ask for it in the first place. There are lots of things that Ofcom can do
13 once they have got the information to ensure that it is robust. If it had a concrete basis for
14 the specifications that would have given it some sort of concrete basis for assessing
15 divergences of view and understanding why different operators are saying different things.
16 They could potentially have relied on costings provided by third party contractors who
17 would not have had a particular incentive to inflate the number or to deflate the number, if
18 they are actually going to be bidding and trying to win a contract. Ofcom could have
19 benchmarked one operator against another operator on the basis of some coherent
20 specification. You cannot do that if everyone has gone off and done their own thing
21 because there is nothing sufficiently consistent to benchmark against.

22 Ofcom could also have commissioned its technical experts to comment on the information
23 when it came back, again against the specification that had been developed. These are all
24 techniques that regulators regularly employ and they are all techniques that Ofcom denied
25 itself the opportunity to use because it did not get the concrete specification in the first
26 place.

27 **THE CHAIRMAN:** Mr. Pickford, we have heard during the course of the evidence that Ofcom
28 had an attending observer at, I think it was, the NICC Committee. Is there any evidence –
29 and there could well be, I may well have overlooked it – of any misgivings being expressed
30 by Ofcom as a result of the observations made by the observer at NICC as to the process
31 that was being followed?

32 **MR. PICKFORD:** I cannot immediately point you, sir, to that evidence. It may be that someone
33 can direct you to it.

1 THE CHAIRMAN: It would be helpful if there is any material in which there is any
2 correspondence saying that our observer at NICC, or for that matter any other relevant
3 committee, is disturbed by the way in which these issues are being dealt with or the
4 progress that is being made, I think the Tribunal would welcome seeing it.

5 MR. PICKFORD: Certainly, sir, I will endeavour to address you on those -----

6 THE CHAIRMAN: Forgive me for interrupting you.

7 MR. PICKFORD: I will endeavour to assist. The third main point to make in this context is that
8 Ofcom's reasons it now advances for not getting a specification from the industry are first,
9 nowhere to be found in the decision and, perhaps even worse than that, they have not even
10 tried to provide any evidence to fill the gap to explain the reasons that they say were taken
11 into account at the time they took their decision, so the Tribunal simply has no basis for
12 knowing whether the reasons that are now advanced ever crossed Ofcom's mind – they only
13 appear in a document signed by Ofcom's lawyers. We heard Mr. Saini disparagingly
14 referring to "lawyers' points" yesterday which he said arose in the context of Vodafone's
15 submissions. We do not accept that Vodafone is excluded from relying upon anything that
16 it said, but again I will leave that to Mr. Ward. What is very clear is that Ofcom certainly is
17 prevented from attempting to bolster its decision now on the basis of entirely new reasoning
18 and there is a very important reason why that must be the case here, it is because there is a
19 clear statutory consultation process that Mr. Ward explained on Wednesday, it is laid down
20 in s.48 of the Communications Act: if Ofcom are intending to set, modify or revoke a
21 condition, and it also arises under s.7(7) in relation to impact assessment. There is no
22 dispute as to whether there should be a consultation process. We say it is not open for this
23 Tribunal to decide that Ofcom's reasoning was inadequate but the decision should be
24 upheld on a different basis, for reasons that Ofcom did not rely upon at the time, because
25 that would ride roughshod over the whole consultation process. If this Tribunal considers
26 that Ofcom has erred, it is incumbent on Ofcom to think again and to consult again on its
27 new proposals.

28 In that connection it is worth noting that although there are six stake holders in this court
29 room, Ofcom noted that it received, I think, 25 responses to its consultation (para.3.2 of the
30 decision) and if there is to be a new decision on the basis of different reasons, all of those
31 stakeholders are entitled to the opportunity of making their views known on the new
32 reasoning that is said to justify it.

33 The fourth and final point I have to make on this aspect of the case concerns the issue of
34 timing. We say that had the industry first been allowed to develop some form of

1 specification for the new system that would have enabled an informed view to be taken on a
2 robust and meaningful basis of the deadlines that would need to be imposed to enable the
3 work to be properly carried out. The reasoning contained in the decision concerning
4 timetables, and again this is simply for the Tribunal's note, is at paras. 3.68 to 3.75 and 3.78
5 to 3.81, and 3.86 to 3.91. If one were to look at those, there is no reasoning contained in it
6 to explain why the timetables adopted were actually realistic ones. Now, the unchallenged
7 evidence of Mr. Harrison – and that is at para.16 of his statement – is that the timetable is a
8 wholly unrealistic one and the project has already fallen behind schedule. Given the
9 importance of an effectively functioning central database for telephony in the United
10 Kingdom it is simply not satisfactory, we say, to allow an insufficient amount of time for
11 the job to be completed. I think it was Mr. Roche, who referred to the Heathrow Terminal 5
12 fiasco, and that is really stark reminder of what happens if you try to rush things through
13 without sufficient time to do them.

14 That takes me now to my fourth general area of submissions which concerns the sensitivity
15 testing and the point put by Professor Stoneman to Mr. Ward on Wednesday, which was – if
16 I might summarise – that an alternative to sensitivity testing is to say that the discount rate
17 reflects the cost of capital which, in turn reflects uncertainty, if my understanding is correct.
18 We say that that is perfectly theoretically possible. The first point, which I think Mr. Ward
19 made already, is that there is no suggestion that Ofcom actually adopted that approach, but
20 there is a further point, which is this. The discount rate apparently applied by Ofcom was
21 12 per cent. I cannot actually find the 12 per cent in the decision itself, but for the sake of
22 this particular point it does not matter what the precise figure is. What matters is that it was
23 said to be representative of a rate that a commercial operator might itself employ in costing
24 a project because it reflects some commercial cost of capital.

25 It is implicit in the idea of a major corporation going to capital markets to raise finance at a
26 commercial rate, that it does what any properly run commercial organisation would do
27 when deciding what projects to invest in, it conducts what Mr. Harrison describes in his
28 witness statement, as a proper robust cost benefit analysis based on some sort of concrete
29 specification.

30 If I might just take the Tribunal to Mr. Harrison's statement again, if it has been put away,
31 it is volume 2, tab D, behind tab 2 again.

32 THE CHAIRMAN: Yes.

1 MR. PICKFORD: If the Tribunal would very briefly like to skim to itself para.4 through to para.
2 12, he describes there what any commercial operator would do when deciding to implement
3 a major project such as this.

4 THE CHAIRMAN: Yes.

5 MR. PICKFORD: It is a very simple point – it takes a little while to explain the process. Again,
6 that is unchallenged evidence that that is what an ordinary commercial operator would do.
7 So now instead imagine a commercial operator going to the capital markets and trying to
8 raise finance on the following basis. It says that whilst it could do so, it has not actually
9 specified the project it is planning to implement. It has done a rough and ready calculation
10 of a different project that it did do, and it has a range of costs for that that vary by a factor of
11 30. It has then added a bit more for some other element, we cannot actually tell you the
12 basis on which it got those extra costs. You could not remotely raise commercial finance on
13 that basis, certainly not at 12 per cent. I do not know whether the Members of the Tribunal
14 are familiar with this programme, it would be like a scene from something called the
15 “Dragon’s Den”. The “Dragon’s Den” is a programme where generally inept would-be
16 entrepreneurs seek to raise finance from venture capitalists, and they generally get ripped
17 apart precisely because what they have not done is properly worked out what the costs of
18 their business are going to be before they decide to engage in it. So we say it certainly is not
19 realistic to suppose in the present case the 12 per cent discount rate that was apparently used
20 factored in the risks involved in undertaking a project before you have any proper idea
21 about the costs.

22 I then turn to the next main area of submissions which concern H3G’s points on
23 competition. Now, Vodafone has already explained why H3G’s points cannot save the
24 decision and I have just two additional points to make. The first comes back to a point that
25 I have already made in the context of Ofcom attempting to rely on Ofcom’s new reasons.
26 The Tribunal cannot substitute H3G’s reasoning for what was in the decision for the same
27 reasons.

28 The second point is that in their statement of intervention H3G take an additional argument
29 to the one that was canvassed by Mr. Ward on Wednesday. You may recall that the
30 argument Mr. Ward dealt with was Hutchison’s argument that because of the indirect
31 routing process and donor conveyance charges and the implications of how that works in
32 with the termination rate regime, it does not get its full termination rate on all of its calls,
33 and it says it is disadvantaged by that; that is the point he dealt with.

1 There is another point that Hutchison advance and it is the argument that competition is
2 undermined because they say the current system of mobile number portability is inadequate.
3 They say that deters people from porting generally; in particular, they say it deters people
4 from porting to them, that in turn prevents them from growing and that prevents or distorts
5 competition. That is the other limb that is advanced by Hutchison. We see that developed at
6 paras. 63 to 89 of its statement of intervention.

7 There is a very simple answer to that, which is that Hutchison has already raised that very
8 point in its own appeal before this Tribunal, and those submissions have been roundly
9 rejected by the Tribunal. If the Tribunal might just turn up Tab 17 of the authorities bundle
10 you will see the Hutchison appeal. It was adjudicated upon relatively recently. If one could
11 turn to para. 260 at p.102? As I said, Hutchison raised this argument. The Tribunal's
12 conclusions on it were in the following terms,

13 "In the Tribunal's judgment the evidence provided by Ofcom and the interveners
14 is overwhelming in establishing that the mobile number portability arrangements
15 are not the sole or even the major cause of H3G's failure hitherto to grow its
16 market share".

17 If I could just ask the Tribunal to read down to the end of para. 261? (Pause whilst read):
18 So, one can see from that that even if this Tribunal wanted to attempt to save the decision
19 on the basis of Hutchison's reasoning, it simply is not open to it to do so. It would be an
20 abuse of process for Hutchison to be able to re-litigate issues as an intervener in these
21 proceedings, which it has already lost in its own appeal.

22 That takes me finally to some very short points of clarification, simply for the Tribunal's
23 record. None of these points, we say, is critical to the Tribunal's determination. But, it is
24 important, nonetheless, that the Tribunal is not mis-informed, at least of T-Mobile's
25 position on these issues. The first of them is that Miss Rose, yesterday, led evidence I think
26 to the effect that every country apart from the Dominican Republic has done what Ofcom is
27 proposing to do in these proceedings.

28 THE CHAIRMAN: Whether you are correctly representing what Miss Rose said or not, we have
29 seen the comparative table which was handed in yesterday - the one that I observed, at the
30 time, included the 123 day German position.

31 MR. PICKFORD: Yes.

32 MISS ROSE: Sir, just to be clear, the point about the Dominican Republic was on donor or
33 recipient-led porting. Every other country in the world apart from the UK and the
34 Dominican Republic does not allow the donor network to control porting. It is the

1 recipient-led porting point. It is not about direct routing. It is not about the time limit for
2 porting.

3 THE CHAIRMAN: Thank you, Miss Rose. There may be an issue about the word 'control' in
4 any event.

5 MR. PICKFORD: If I have misunderstood ----

6 MISS ROSE: Donor-led or recipient-led porting.

7 THE CHAIRMAN: I understand what you are saying.

8 MR. PICKFORD: If the point is not being made -- or the point I thought was being made is not
9 being made, then that is fine. It does not arise. But, it is nonetheless helpful, I think, to
10 consider the case of Ireland, about which quite a lot was made. One can see the description
11 of the situation in Ireland in the Sagentia report in the appeal bundle at Tab 8, p.54. The
12 Tribunal will recall that quite a lot was made of the fact, "Well, if this is all being done in
13 Ireland, then why are you making such a fuss about it here? Surely, you are just completely
14 exaggerating the situation?" What is worth noting from Sagentia's own analysis is, as they
15 say, that the CDB for mobile in Ireland is separate from the fixed CDB, and it is supplied by
16 Ward Solutions and is in use by all mobile operators.

17 "CDB is operated in non-realtime mode with data regularly updated to local
18 realtime databases within each operator's system".

19 So, what we have there is two separate systems for fixed and for mobile. The Tribunal will
20 recall that a lot of the problems that are said to arise in the current situation are from trying
21 to combine those ultimately into a single system. So, Ireland is not, we say, a good example.
22 That is the first point of clarification.

23 The second point - and, again, I may be corrected, and so please do correct me if I am
24 wrong - is that I understood Miss Rose yesterday to say that there was, as some sort of
25 general matter, no difference between recipient-led and donor-led systems as regards
26 whether customers could be required to pay on their contractual liabilities before switching
27 networks. Now, that point was not put to our witness, but it is certainly the case that I am
28 instructed that as regards T-Mobile that is not the case. T-Mobile does not allow its
29 customers to port if they still have existing contractual obligations. So, whatever the case
30 might be for O2 or another, it is not the case for T-Mobile.

31 The third - and this really is a very small point, but again simply for the record - point is that
32 it was said by Miss Rose yesterday that T-Mobile's DCC appeal involved a challenge to the
33 donor conveyance charge rates. It did not involve such a challenge. That was not the basis

1 of the appeal. If the Tribunal wishes, I can hand up the Tribunal's summary of the appeal,
2 which explains the grounds that were taken.

3 THE CHAIRMAN: We have it anyway.

4 MR. PICKFORD: Indeed. It is a small point, but simply for the Tribunal's record.

5 Unless I can be of any further assistance ----

6 THE CHAIRMAN: No. Thank you very much indeed, Mr. Pickford. Miss Demetriou?

7 MISS DEMETRIOU: Sir, members of the Tribunal, Orange intervenes in support of Vodafone
8 on the issue of recipient-led two hour porting. We submit that this part of Ofcom's decision
9 is flawed and should be quashed by the Tribunal and remitted to Ofcom for reconsideration.
10 Really, the point that Orange makes is a simple one: we say that Ofcom based its decision to
11 require recipient-led two hour porting on an impact assessment which purported to weigh
12 the benefits of this change against the costs, and that that cost benefit analysis was unsafe,
13 first because Ofcom's estimate of the costs of the change it was mandating was speculative
14 in the extreme, and, secondly, because Ofcom failed properly to assess and evaluate the
15 benefits it said that this change would confer on consumers.

16 Mr. Ward made these points to the Tribunal on Wednesday by reference to the Decision.
17 We endorse his submissions. I do not seek to repeat them now. But, what I would like to do
18 in the time available to me is to reinforce his submissions by reference, in particular, to
19 Orange's evidence - the witness statement of Mr. Hodgson - which is unchallenged
20 evidence. Perhaps if the Tribunal, whilst I make my submissions, could have that witness
21 statement open?

22 THE CHAIRMAN: Let me just find it to be sure I have got it.

23 MISS DEMETRIOU: It is towards the back of the second bundle, it is tab F and then behind tab
24 1, Mr. Hodgson.

25 THE CHAIRMAN: I have got in my bundle Orange's Statement of Intervention.

26 MISS DEMETRIOU: That is right, there should be a tab immediately behind that.

27 THE CHAIRMAN: Mr. Hodgson, thank you. I am sorry, this is a rather confusingly labelled
28 file, and I have been struggling with it throughout.

29 MISS DEMETRIOU: As have most of us. Before turning to the witness statement I would like
30 to start with a fundamental point, and that is that Ofcom has at all times proceeded on the
31 basis that it would not be appropriate to introduce recipient-led to our porting if the benefits
32 did not outweigh the costs. Mr. Saini said to the Tribunal yesterday that it was very
33 important to look at the entire decision making process. I would agree with that, and I
34 would say that it is evident from that entire process that a cost benefit analysis underpinned

1 Ofcom's decision making on porting from the outset. Could I just refer to two particular
2 paragraphs in this process: the first the conclusion in the Decision itself at para.3.136 of the
3 Decision, so that is bundle 1, tab 1, and it is internal numbering 42. What we have at 3.136
4 is Ofcom's conclusion in respect of recipient-led to our porting and it says:

5 "As set out in more detail in Annex 1, Ofcom estimates that the costs of
6 implementing a recipient-led process ... will be approximately £5 million."

7 Then it goes on to look at the savings to industry and says at the end of that paragraph:

8 "Ofcom considers that the benefits of a requirement for recipient-led, near-instant
9 porting of mobile numbers would therefore outweigh the costs of such a
10 requirement (even before taking into account the benefit to consumers) and
11 therefore the measure is cost justified."

12 So this is the basis on which Ofcom decided to mandate these changes. That is its Decision.
13 This approach is reflected all the way through the consultation process. If one goes back to
14 the November 2006 Consultation, which the Tribunal will find at tab 8 of the same bundle,
15 and if you could turn to para.1.12, p.4 of that document, the Tribunal will recall at this stage
16 what was in place a five day lead time and Ofcom were considering here whether or not to
17 reduce the five day period to a shorter period. They say:

18 "In Ofcom's view the shorter the process, the better it is for competition and
19 consumers. Therefore Ofcom is proposing to reduce mobile port lead times to a
20 period of less than one working day. However, if Ofcom receives evidence that
21 shows that the costs involved in moving to a lead time shorter than one working
22 day outweigh the benefits then Ofcom will need to consider whether a three
23 working day period is more appropriate in light of the evidence received. It would
24 currently appear that the current mobile porting process can be reduced to three
25 working days without the mobile operators incurring significant costs."

26 So at this stage it is say, "We want to reduce to less than one day, but it is not appropriate to
27 do that if the benefits do not outweigh the costs". The Tribunal will recall that it decided at
28 the end of this consultation period not to reduce the lead time to less than one working day,
29 but instead to mandate a two day period, because it decided that that was justified on the
30 cost benefit analysis.

31 THE CHAIRMAN: I think I am right in saying, am I not, that there is some work being done in
32 Europe on the appropriate period for porting. It appears somewhere in the papers, does it
33 not? The period is, I think, still under discussion, it is one day.

1 MR. WARD: Sir, I am told that there is consideration in Europe. There is a regulatory
2 framework review going on and this is one of the issues that is under consideration.

3 THE CHAIRMAN: I see, so it is still under consideration?

4 MR. WARD: I believe so.

5 THE CHAIRMAN: Thank you very much. I knew I had read Europe and one day together
6 somewhere. I am sorry, Miss Demetriou.

7 MISS DEMETRIOU: Could the Tribunal, whilst you have got this document open, also turn to
8 para.4.24, which is internal p.27. You see here a discussion of option requiring a reduction
9 of port lead times to less than one working day. At 4.24 Ofcom are saying that it has little
10 information about the costs involved in implementing a new process, but then
11 acknowledges that there would be costs involved. It says that it understands that it would
12 involve changes to the processes and procedures and modifications to the computer system
13 run by Syniverse. Then it says that in order that Ofcom can balance the benefits against
14 relevant costs it needs further evidence and it needs to be able to assess whether the costs of
15 implementing such a process are likely to be significant.

16 The detail of the changes that are required are something Mr. Hodgson deals with in his
17 statement, but I just draw it to the Tribunal's attention at this stage to demonstrate that
18 Ofcom all along has said that it is important to proceed on the basis of weighing costs and
19 benefits.

20 I will come back to this but it is an important point because once Ofcom have decided that it
21 should only proceed to mandate these changes to porting if the benefits outweighed the
22 costs, then we say it was incumbent on Ofcom to carry out the cost benefit analysis properly
23 and in a rigorous manner. Again I will come back to this but that is really the answer to
24 Mr. Saini's point that it was all the operators' fault that Ofcom did not have adequate cost
25 information. We say the responsibility, once Ofcom has decided that it should only
26 intervene if the benefits outweigh the costs, then it is incumbent on it to obtain those costs.
27 We say that the cost benefit analysis was inadequate both as regards the cost and the benefit
28 inputs.

29 Taking costs first, Mr. Ward has taken you to the part of Ofcom's Decision which deals
30 with costs which Ofcom estimates to be approximately £5 million. We have seen that there
31 is no real basis for that estimation and that Mr. Saini was unable to point to any internal
32 calculation when the Tribunal asked him to explain how that figure was arrived at.

33 We make two particular points on costs. The first point is that Ofcom's reasoning in its
34 Decision clearly rests on an assumption that recipient-led two hour porting would follow

1 easily and cheaply once the central database had been established. Mr. Saini did not dispute
2 that. Indeed, he put it forward as an important plank of Ofcom's defence. We say that that
3 factual assumption is incorrect. The key point here is that the porting process involves two
4 elements. The first is the authorisation of the port as between the two operators, and the
5 second is the physical implementation of the port. Although the central database might
6 have some impact, although it is interesting that at the moment one cannot assess
7 definitively the degree of impact the central database will have because it has not yet been
8 developed to that point. Although it may have some impact on the physical implementation
9 of the port, it has no impact on the authorisation of the port, and that follows from Mr.
10 Hodgson's evidence. The paragraphs dealing with this are paras.8-10 of his statement.
11 What happens at present under the current system in terms of authorisation is that, broadly,
12 the customer goes to his donor network and asks for his number to be ported. The donor
13 network then satisfies itself that this customer has authority to port the number – in other
14 words, that the customer is who he says is. That is very important in terms of avoiding
15 fraud. So there is an authentication element to the process, which at the moment the donor
16 network carries out because they have all sorts of security information about this particular
17 customer.

18 Then the donor network, having satisfied itself that this customer is the account holder,
19 generates a reference number, the PAC, via Syniverse which is a central hub which all the
20 operators use. Then the donor network transmits the PAC code to the customer who then
21 transmits the number to the recipient network and the recipient network validates the port
22 via Syniverse. This is how it happens, this is how authorisation happens at the moment.
23 When these changes mandated by Ofcom take place, i.e. moves from donor-led to recipient-
24 led and the port lead times are dramatically reduced to hours, all of this process will have to
25 change quite substantially. Those changes will not be affected by the existence of the
26 central database, and that follows from para.9 of Mr. Hodgson's statement. So these are
27 changes which are going to have to be made which do not follow, as Mr. Saini would have
28 it from the existence of the central database.

29 THE CHAIRMAN: Can I just go back to what may be a simplistic point, but something Miss
30 Rose said made me doubt the logic of an earlier intervention I had made. Take the factual
31 situation of a person who is behind with payment of their bills. In the proposed two hour
32 lead time recipient-led porting process am I right that the donor network would still be able
33 to block the authorisation because the bills had not been paid, because if they cannot what is
34 the value of their contract?

1 MISS DEMETRIOU: My understanding is that they cannot block the porting process but they
2 can only rely on their contractual rights as against the particular customer.

3 THE CHAIRMAN: So they just have to go to the County Court or whatever to collect £49.

4 MISS DEMETRIOU: Exactly.

5 THE CHAIRMAN: Which is a process that no intelligent commercial company would do, in
6 most circumstances, is it not, in the real world? I do not know, maybe I am wrong about
7 that, but the collection of very small debts in the County Court is an expensive process
8 which rarely produces a profit, it is more a disciplinary process than a profitable process.

9 MISS DEMETRIOU: No doubt it is more difficult once the customer has switched to another
10 network to enforce these debts, but I guess it is a situation in which lots of businesses find
11 themselves, and so there will be some processes for debt collection. What is clear is that the
12 porting process does not affect that, so the operator can only rely on their contractual rights
13 and, if necessary, follow them up in the County Courts.

14 THE CHAIRMAN: They cannot, for example, cut the phone off? You cannot anyway, all right it
15 was a silly question.

16 PROFESSOR STONEMAN: Can I just interrupt on that, there is this difference between
17 changing network and porting numbers.

18 MISS DEMETRIOU: That is right.

19 PROFESSOR STONEMAN: I can forget the contract with Tesco's and switch to Orange, and it
20 really does not matter whether I port the number or not I will still have contractual
21 obligations, perhaps, with Tesco's in exactly the same way.

22 MISS DEMETRIOU: That is correct, but what we say is that the move to recipient-led porting
23 makes it much more difficult for the network operator to enforce their contractual rights, but
24 perhaps more importantly, we say from our point of view, makes it much less transparent so
25 it is less likely that the consumer will be informed of their contractual obligations – that is a
26 point we will come on to – because we say the donor network has very little incentive to
27 inform the consumer that they may still have liabilities under their contract.

28 THE CHAIRMAN: I am sorry, I am going to go back to my point, I am not sure that it is such a
29 stupid point after all. Supposing that we have two hour recipient-led porting, and I run up a
30 substantial bill – say a two month bill – with my originating network, and then I port to
31 another network and run up another two month bill, and there are six potential networks in
32 this court room, and then I go to a third and so on, what is to prevent me in those
33 circumstances running up six substantial bills before I run out of steam and leaving all the
34 networks struggling to recover their money?

1 MISS DEMETRIOU: Well I do not think there is very much to prevent that happening.

2 THE CHAIRMAN: So the potential for fraud is increased.

3 MISS DEMETRIOU: That is right, but what we say is that the changes to the porting process
4 make it much more difficult in those circumstances for the operators to ensure that there is
5 no fraud, because at the moment what happens is that the donor network has all sorts of
6 information about the customer and even though they cannot refuse to authorise the port as
7 a result of bad debt and so on, the information is there, but what would happen once it is
8 changed to recipient led two hour porting is it is not at all clear how authentication will be
9 carried out and how the two networks will carry out the requisite checks to avoid fraud
10 taking place, so that is one of the concerns that Orange has.

11 THE CHAIRMAN: Well if anyone wants to reply or say anything on that they can at a later
12 stage. I am sorry.

13 MISS DEMETRIOU: No, not at all. The point I was making was that the authentication and
14 authorisation process as it stands will have to change substantially and, as Mr. Hodgson
15 says in his evidence, those changes will not be alleviated by the existence of a central
16 database, and we say that the operators will have to find some other way of authenticating
17 the customer for exactly the kind of reason that you, Sir, have been canvassing, to help
18 prevent fraud, and also for authorising the port as between the two networks. Those
19 changes, are set out in Mr. Hodgson's witness statement, primarily at para.12. What he says
20 there is that the changes will involve decommissioning and re-designing the Syniverse
21 system, and the Tribunal will recall the paragraph in the November 2006 consultation that I
22 took you to, where Ofcom recognise that even reducing from five days to one working day
23 would require major changes to the Syniverse system and that is something with which Mr.
24 Hodgson agrees. It would also involve from Orange's perspective a redesign of Orange's
25 interface with the Syniverse system, and a redesign of various internal systems that Orange
26 uses to process ports, then we see at para.13 of Mr. Hodgson's statement where he says that
27 Orange will also have significant costs associated with the redesign of approximately 17
28 internal systems, for example, customer relationship management, sales ordering, call
29 centre, internet channels and so on, and all of these changes will have to be made as a result
30 of the introduction of recipient-led two hour porting.

31 The points he makes at paras. 21 to 24 of his statement come back to this question of
32 customer authentication, and he makes the point at para.14 that in Ireland what happens at
33 the moment is that authentication and efforts to minimise fraud are carried out by an
34 independent credit agency in Ireland, and so that is one possibility in this country but that

1 still has not yet been decided as to whether that is appropriate, and that in itself would
2 involve cost to the operator.

3 What we say, shortly, is that none of these changes and the costs of implementing them
4 were taken into account by Ofcom, because Ofcom simply said that it all comes down to the
5 existence of the central database and we say that is plainly wrong.

6 PROFESSOR STONEMAN: Can I ask you something about these administrative processes. To
7 what extent are they “save” processes? For example, you may say you have to change your
8 customer relationship management system, but if that is set up largely to generate save
9 activity, to stop people transferring that is not a cost that we ought to be talking about, that
10 is a benefit.

11 MISS DEMETRIOU: It may be, sir, maybe I can come back to you with a more detailed
12 response to that, but my understanding is that they are certainly not wholly concerned with
13 save activity, but these are internal systems set up at the moment (a) to authenticate the port,
14 and (b) to authorise it, and that those will have to be developed in the light of the new
15 requirements, and so I think those systems underlie various other systems such as tele sales
16 and call centre systems and so on.

17 PROFESSOR STONEMAN: But they are not necessarily costs in terms of the cost benefit
18 analysis because they will be savings, that is part of the savings that will come about, part of
19 the savings that will stimulate competition?

20 MISS DEMETRIOU: It is a very good question as to what extent they are savings. Clearly some
21 costs will have to be incurred to develop the systems and to change them, then the savings
22 that will then follow from decommissioning the old systems will have to be balanced
23 against that and what we are not doing in this statement is saying that the costs will be X at
24 a particular level, but we do say that we would incur significant costs and, of course, once
25 we identify those, which we are not in a position to do at the moment, we will have to
26 balance against those costs any savings we make. I do accept that as a matter of principle,
27 but our view at present is that we will be incurring significant net costs.

28 THE CHAIRMAN: I think what you are saying is that so far as it relates to authentication and
29 verification it is a cost. So far as it is save activity, as Professor Stoneman has said, it is a
30 benefit. Is that a fair summary?

31 MISS DEMETRIOU: We have an additional point of principle which is that we think Ofcom’s
32 view of save activity is all one way, and that they have ignored the benefits of save activity.

33 THE CHAIRMAN: I take that point, I made the point earlier myself. You might telephone
34 someone and offer them a new handset or a cheaper rate.

1 MISS DEMETRIOU: And that puts the customer in the position where it can play off one
2 operator against another, which we say is beneficial from the customer's point of view.

3 THE CHAIRMAN: Let us move on.

4 MISS DEMETRIOU: So that is really our first point on costs. Our second point is this question
5 of the absence of any technical specification. We say that in the absence of any technical
6 specification for achieving recipient-led two hour porting, Ofcom was simply in no position
7 properly to assess the costs of the change. Mr. Ward made this point on Wednesday to the
8 Tribunal. He illustrated it by reference to Ofcom's consultation. In particular, the Tribunal
9 will recall that there is the draft s.135 request which was then later modified by Ofcom. We
10 agree with his submissions on that. Orange was in the same position as Vodafone, and was
11 unable at that stage to respond in any meaningful way to Ofcom's request for costs
12 information. We say, moreover, that the timing of the draft request is illuminating because it
13 was made in August 2007 - so, after the July 2007 consultation. If the Tribunal could just
14 turn up the July 2007 consultation at Tab 15 of the appeal bundle. You will see at para.
15 1.25 at p.4 that that paragraph contains this £5 million figure which I assume is the same £5
16 million which then appears in the Decision itself. It says,

17 "Ofcom has estimated the additional cost of enabling same day porting of mobile
18 numbers through the use of a common database to be in the region of £5 million
19 for the industry".

20 Now, that is the same £5 million which then appears in the Decision presumably. Yet,
21 following the estimation of that £5 million Ofcom has gone to the operators and said, "Well,
22 we don't have enough costs information here". So, we say, "Well, it is self-evident that the
23 cost estimate of £5 million in the Decision itself is shaky because it, itself, recognised that it
24 had to seek further information when it sent out its draft request in August 2007".

25 What Mr. Hodgson says in his statement at paras. 9 and 11 is that even at this stage it is
26 difficult for Orange to quantify the costs involved given that the technical specification to
27 implement recipient-led two hour porting has still not been determined. Here I endorse the
28 submissions made by Mr. Pickford. I note that Mr. Harrison's evidence is exactly to the
29 same effect.

30 This is an area where robust costs information cannot be submitted unless and until there is
31 a reasonably precise technical specification underlying the changes. There simply was not
32 at the time of the decision, and there is still not to date. This is certainly not a question of
33 Orange withholding costs information from Ofcom. It appears from Mr. Saini's
34 submissions yesterday that this has developed into an important part of Ofcom's defence.

1 We say that it is plainly a bad submission, with respect. Firstly, as I have indicated, it is
2 factually wrong. Again, I rely on Mr. Hodgson's unchallenged evidence, and Mr.
3 Harrison's unchallenged evidence to the same effect. Both of those witnesses say it is
4 impossible to give Ofcom meaningful costs estimates in the absence of an agreed technical
5 specification.

6 Secondly we say it simply defies belief to suggest that the operators would not give Ofcom
7 costs information if they had it. Why not?, we ask ourselves. If they had evidence that the
8 costs would be higher than Ofcom estimated, then it is plainly in their interests to give
9 Ofcom that information because it would tip the cost benefit analysis the other way. So, we
10 say there is no possible motivation here for them to withhold information from Ofcom.

11 I do not know if the case has been handed up, but he passed round the case of *Royal Mail*
12 *Group* this morning, just before we started?

13 THE CHAIRMAN: We do not have it.

14 MISS DEMETRIOU: He has not handed it up yet, but as I do not have the opportunity to reply. I
15 wonder if I might make some short submissions on it because it goes to his point?

16 THE CHAIRMAN: If he is going to rely on it -- Would you mind handing it up Mr. Saini if you
17 have got copies? (Same handed)

18 MISS DEMETRIOU: It may be that this is something that Mr. Ward might want to come back to
19 because I have not had very much time to look at it. Obviously I have not heard Mr. Saini's
20 submissions on it yet. However, what I anticipate he will say is that this is authority for
21 saying that if consultees do not give the regulator adequate information, that then cannot be
22 used against the regulator at a later date. I see that Mr. Saini was in this case. So, one sees
23 where the seeds of the argument for yesterday's submission began. But, I would just like to
24 make two points. The first is that this case arose in a very, very different context to the
25 present. If you turn to para. 3 of the judgment ----

26 THE CHAIRMAN: What is absolutely certain is that Mr. Saini and Miss Rose were not on the
27 same side in this case! But, there we are. That is life at the Bar.

28 MISS DEMETRIOU: I think, having lost the case, Mr. Saini is using it for his advantage.

29 THE CHAIRMAN: Why not?! (Laughter)

30 MISS DEMETRIOU: At para. 3 you will see the background to the issue - the background issue,
31 which is that Postcom had imposed penalties on the Royal Mail for breaches of its
32 conditions of its license. Then, if you go forward to paras. 18 and 19, you will see that what
33 was at issue here was the methodology for assessing the penalty, and that Postcom had
34 calculated the penalty in a particular way which related to its assumptions as to lost volumes

1 of mail. We see that from para. 18. Then we see at para. 19, Mr. Beloff, who acted for
2 Royal Mail, said that essentially Postcom's decision was unsafe. He said that its decision
3 was not soundly based in fact; that the figures were plucked out of the air by Postcom.
4 (After a pause): Then, the conclusion reached by the Court of Appeal was that that could
5 not be held against Postcom, which had done its best in the circumstances. So, one sees
6 where Mr. Saini might be going with this case.

7 However, the two points that I want to make are that, first of all, the context of this case was
8 extremely different because what it involved was an alleged breach of Royal Mail's license.
9 So, it was the regulator essentially pursuing Royal Mail for breach of its license. One can
10 see at para. 34 of the judgment an important passage. The court is there saying - under the
11 section of the court's conclusions:

12 "Royal Mail appears to take the approach traditional in criminal cases in which a
13 defendant could do nothing and see whether the prosecution can prove its case, an
14 approach now much qualified even in criminal cases".

15 So, what Royal Mail were doing there, obviously, was saying, "Well, we're not going to
16 give you any of this information. It is for you to prove your case, Regulator". This is
17 entirely different to the present case where there can be no suggestion whatsoever that the
18 operators are taking such an approach. The reason that the operators were not able to give
19 detailed costs information to Ofcom was because they could not meaningfully estimate that
20 costs information in the absence of a technical specification. It is entirely different.

21 The second point is the obvious point which I have really made before - which is that here,
22 in this case, there was a clear incentive for the Royal Mail not to provide the information
23 sought by the regulator. In the present case the incentive goes in the opposite direction. If
24 the operators had had meaningful costs information, then their incentive was to provide it to
25 Ofcom because that would have waived the cost benefit analysis in their favour.

26 So we say that this case is really nothing to the point. It is entirely different to the present.

27 THE CHAIRMAN: I do not know, but is there any equivalent to s.135 in the jurisdiction that was
28 under consideration in this case?

29 MR. SAINI: [No microphone]

30 THE CHAIRMAN: I think it may have been misunderstood in that way in part by the Tribunal.

31 MR. SAINI: [No microphone]

32 THE CHAIRMAN: I think your advocacy is so forceful, Mr. Saini, if I may say so, that that
33 impression may have been given yesterday, and I understand where Miss Demetriou is
34 coming from, but what you have just said is probably extremely helpful.

1 MISS DEMETRIOU: That is very helpful. I am grateful for that because we had understood it as
2 being a submission that we were withholding information.

3 MR. SAINI: [No microphone] ... but for whatever reason, I am not saying it was a bad reason, it
4 was not supplied to Ofcom.

5 THE CHAIRMAN: Thank you, that is very helpful clarification.

6 MISS DEMETRIOU: I am grateful for that. We say in relation to Orange that we simply did not
7 have that information because we could not begin to estimate costs without a technical
8 specification.

9 The other point that Mr. Saini makes on this is that he says, "Well, it cannot be the case that
10 a regulator can never leave the question of technical specification to industry". He says that
11 it was open to Ofcom to leave the development for technical specification to industry in this
12 context. We say to that, in some circumstances that may well be correct, but not in these
13 circumstances. As I said at the outset, in this case Ofcom decided that it would only be
14 appropriate to mandate these changes to porting if the benefits outweighed the costs. So it
15 had to carry out a proper cost benefit analysis. If that meant producing its own technical
16 specification or, probably preferably in this case, requiring the industry to go some way to
17 produce an agreed technical specification in order that costs could be assessed then that is
18 what is required. So it is not open to them to say, "We will mandate changes if the benefits
19 outweigh the costs", and then say, "Oh, but we cannot estimate the costs because there is no
20 technical specification". We say that that is an approach which was precluded in this case,
21 and that is the central flaw in this part of Ofcom's Decision.

22 So those are our submissions on costs, sir.

23 In relation to benefits, we say that Ofcom's approach to identifying the benefits of recipient-
24 led two hour porting was even shakier, and we make two points. The first is that in the
25 main the benefits identified by Ofcom are nothing more than assertion, and this is
26 particularly true in relation to the two hour requirement. Mr. Saini said himself yesterday
27 that the benefits were self-evident, you do not need consumer research to prove them. I
28 think he said that it came down to intuition. That stance is again encapsulated or reflected
29 in Ofcom's Defence at p.37, where they say it is self-evident and hardly necessary to
30 require consumers' research to demonstrate that it would be in the interests of consumers
31 who had decided to change providers for that decision to be given effect in the shortest
32 possible timeframe. That is Ofcom's position on benefits.

33 We say it is not self-evident, and it is certainly not a matter of intuition, and that Ofcom's
34 approach is simply not good enough. Ofcom had to establish whether reducing the duration

1 of porting to two hours would confirm a tangible, as opposed to merely a theoretical, benefit
2 on consumers. For example, would it have had a real impact on switching and, if so, how
3 much of an impact, how many consumers would it have persuaded to switch networks who
4 otherwise would not have switched if the port lead time had been longer.

5 Professor Stoneman put these points to Mr. Saini yesterday. Ofcom had to evaluate the
6 benefits, had to assess them, and this is supported by the passage from the *E.ON* case that
7 Mr. Saini endorsed to the Tribunal, and we also endorse that passage. So we say that in
8 terms of identifying, assessing and evaluating the benefits, Ofcom's decision falls very,
9 very far short of what was required. To the extent that the consumer evidence is helpful, it
10 undermines Ofcom's own assertion as to consumer benefits. That is our first point.

11 Our second point is that Ofcom identified in its Decision several disadvantages to
12 consumers that would follow from recipient-led two hour porting. It then fails completely
13 to include these in the cost benefit analysis. These are explained in Mr. Hodgson's witness
14 statement. Miss Bacon yesterday made the point in relation to slamming and mis-selling.
15 A similar point arises in relation to contract termination issues, and these are discussed at
16 paras.19-20 of Mr. Hodgson's witness statement. Essentially the point is once the process
17 is recipient-led the donor operator will no longer have the opportunity to inform the
18 customer about continuing liability under the contract, so about termination periods, unpaid
19 bills, liability for payments, and so on. We say that the recipient network is in a position of
20 conflict as far as this is concerned because it is not in the recipient network's interest to
21 highlight these liabilities to the consumer because it wants them to switch as soon as
22 possible.

23 Now Ofcom's response to this is at para.3.122 of the Decision. I do not ask you to turn it
24 up but in summary what Ofcom says is that it expects providers to devise processes for
25 ensuring that customers are aware of liabilities. We say that is not good enough because
26 that is not a reason to exclude that disadvantage from the cost benefit analysis, which is
27 what it has done. In any event, what processes are the networks to devise, how good will
28 they be, how much will they cost? None of this was taken into account.

29 Precisely the same point can be made in respect of slamming and mis-selling, and I will not
30 labour the point because Miss Bacon made it to the Tribunal yesterday.

31 We make a similar point in relation to loss of win-back, which I have dealt with in passing
32 in response to a question which is, as Mr. Hodgson says at paras.27-28 of his evidence,
33 there are good things about win-back, because without win-back customers are being
34 deprived of the enhanced bargaining power that win-back confers on them. They can play

1 one operator off against the other. Ofcom recognises this itself at para.3.109 of its
2 Decision, and again I do not think there is any need to turn that up. It recognises that saving
3 activity has consumer benefit, but then completely fails to take account of that in the cost
4 benefit analysis. We say that is another flaw.

5 In conclusion, sir, what we say is that both elements, both the cost element and the benefit
6 element of the cost benefit analysis, are extremely superficial and inadequate and since they
7 form the very foundation of Ofcom's decision to mandate recipient-led two hour porting its
8 Decision' must be quashed.

9 Unless I can help any further, those are my submissions.

10 THE CHAIRMAN: Thank you very much, Miss Demetriou. We will take a break until just
11 before five to.

12 (Short break)

13 THE CHAIRMAN: Yes, Mr. Robertson.

14 MR. ROBERTSON: Sir, members of the Tribunal I am told that Miss Demetriou gave a time
15 estimate of 15 minutes for her submissions, that is my time estimate as well but I hope to
16 be able to able to stick to it.

17 THE CHAIRMAN: It depends how much we interrupt, does it not? (Laughter) Carry on.

18 MR. ROBERTSON: BT's intervention is in support of Vodafone's application to have the
19 decision set aside and remitted to Ofcom. There are three issues on which we wish to
20 address the Tribunal. These are, first, BT's approach to Ofcom's consultation, secondly,
21 to outline BT's case why the cost benefit analysis is not sufficiently robust to be relied
22 upon; and thirdly, to say a few words about Ofcom's reliance on the revised wording of
23 general condition 18.5.

24 The first of those issues – BT's approach to Ofcom's consultation – the reason why we are
25 addressing you on this point is that Mr. Saini repeatedly sought to portray the industry
26 reaction to Ofcom's consultation as obstructive. He said yesterday in presenting his case
27 "They want to delay and derail the process", you will see that in the day 2 transcript, p.24,
28 lines 8 to 10.

29 That could not be further from the truth. Those instructing me take great exception to the
30 implication that we are not somehow taking a constructive approach to the exercise that
31 Ofcom has embarked upon. For example, when we received the first s.135 notice, making
32 very extensive information requests, we discussed that request with Ofcom, it required us
33 to engage in a considerable exercise, interrogating computers, laptops, and those working
34 on the exercise that will lead to a common database. We had to employ outside assistance

1 from paralegals to supplement BT's own internal legal resource, it cost us several
2 thousand pounds. We have provided a lot of information to Ofcom, and at the end of the
3 day they said "Thanks very much, actually we think you have been rather too rigorous in
4 this process."

5 So we do take great exception to the idea that we want to delay and derail the process.
6 Even allowing for advocates' licence, that is a gross misrepresentation of how BT, in
7 common with the rest of the industry, have sought to deal with the problems posed by the
8 consultation.

9 The heart of the problem is that from BT's perspective, the Ofcom cost benefit analysis is
10 posing a question which is incapable at this stage of a sensible answer. They are
11 essentially asking what are the cost implications for an unspecified database on a next
12 generation network that we are developing that is yet to be rolled out.

13 This process of developing a common database does, of course, require industry
14 participation to set common standards. Mr. Pickford and Miss Demetriou have all
15 addressed you on that this morning, I am not going to repeat what they say, but there is
16 essentially a three stage process in developing a common database, specify, design,
17 develop. You cannot just assume that you have got one, you need to specify it, you need
18 to design it, you then need to develop it.

19 You have heard submissions from Mr. Ward on behalf of Vodafone saying when they are
20 asked for cost information, the s.135 notice that they reply to (they replied to the draft
21 notice) on 21st August 2007 (tab 17, vol.1), you see them saying "We just do not have the
22 cost information, we cannot answer your request, it is premature".

23 Mr. Sutherns' cross-examination at the end of day 1, in response to questions from Miss
24 Rose said "you are making assumptions which are just simply premature". In that cross-
25 examination, it is at p.82 of the transcript – it is probably better to pick up at the bottom of
26 p.81, Miss Rose is putting questions to him about the use of INAP for switches for mobile
27 to mobile porting, and she puts it to him at the top of p.82. He said that you might have
28 two solutions. She then jumps in and says: "But two solutions might be cheaper", and Mr.
29 Sutherns said:

30 "If I could just finish off on that point. [you have to see this in the context] We
31 also have the specific issue that the mobile solution must be in [under Ofcom's
32 current direction] by 2009. So, we have to do it a particular way on a platform that
33 is going to be de-commissioned in 2010. So, regardless of what else we do, we
34 have this solution that gets thrown away. We then have to do a fixed solution, no

1 later than 2012, which is the second one. So, we have a choice. We can either do
2 the fixed solution and extend it to mobile - which means we are only doing things
3 twice and we only end up with one solution at the end of the day - or we can do a
4 different mobile solution (not the original one, but a third development). Then we
5 have two solutions to maintain for ever and a day. We have not done the detailed
6 cost analysis yet. We are still analysing the specifications, working out exactly
7 what our options should be.”

8 So they are still at the specified stage of the threefold specified design develop exercise.
9 It is not surprising that you cannot do cost data for the end result when you are still at the
10 first stage.

11 We have drawn this to Ofcom’s attention right from the outset of this process. Sir, if I
12 could ask you to turn to our first response to Ofcom, it should be at the very end of vol.2.
13 If I could ask you to turn to p.3 of 19, this is the “Executive Summary”, the last paragraph
14 on that page:

15 “The commercial case is presented by the CBA for moving to a CDB solution for
16 fixed NP is far less clear. It is heavily dependent on certain key assumptions. BT
17 are not even certain that the CBA justifies a transition to a CDB solution at all, let
18 alone by the prescribed date. Whilst BT supports a CDB solution for fixed NP in
19 principle ...”

20 We are not philosophically opposed to this –

21 ----“ setting a date for full implementation six years out appears to be premature.
22 BT would prefer to see Ofcom agree with industry rather more realistic shorter
23 term and intermediate commercial and technical milestones, linked to next
24 generation network roll-out, standards development, agreement of common
25 database governance arrangements, etc. rather than today setting December 2012
26 as the date for implementation of a common database solution for fixed number
27 portability”.

28 Even if this ends up being the right answer -- even if you do take -- We are not objecting in
29 principle to a deadline, but what we are objecting to is doing things prematurely. You have
30 got to take this step by step because there are a number of factors to be taken into account.
31 The same point is reiterated in our second response -- in the second round of consultation.
32 You find that at Tab G2, the document before. Again, it is para. 5 of the executive
33 summary. That, again, is p.3 of 15.

1 “Given the above uncertainties, and the early stage of next generation network
2 migration, BT strongly believes that it is far too early to set a date in General
3 Condition 18 for the mandatory use of the common database, especially for fixed
4 numbers. BT suggests that Ofcom consults, say at one or two year intervals,
5 setting dates only once a satisfactory cost benefit analysis has been completed and
6 once NGN roll-out and CDB implementation plans are further advanced”.

7 So, we are not Luddites. We are not opposed to change. Actually we think we agree with
8 change in principle. But, Ofcom has put the cart before the horse. It is running before we
9 can walk. We want to move in the direction mandated by Ofcom, but on a properly made-
10 out economic basis. That is why we support Vodafone’s appeal that the economic basis for
11 the Decision, as set out in the cost benefit analysis, just is not made out. That is why this
12 matter should be remitted back to Ofcom. If Vodafone’s application succeeds and we are
13 back in front of Ofcom, then we will be continuing to say, “Take it on an intermediate step-
14 by-step basis. You cannot just jump to the end”.

15 The final point which goes to Ofcom’s approach - and, again, this is just to rebut this
16 allegation, as it were, of foot-dragging -- This really comes from Miss Rose’s reference to
17 comparison with Ireland. This is a little bit like the old joke about Ireland, about seeking
18 directions in Ireland: “I would not start from here if I were you”. Ireland did not have
19 donor-led porting at the outset. So, it did not have to manage a change in systems to
20 recipient-led porting. The UK, because it was at the forefront of porting adopted a system
21 which is donor-led, and does have to manage a change to recipient-led. If you like, it is first
22 mover disadvantage. That is why the situation is different.

23 I turn to the second of my issues: our case why the cost benefit analysis is not sufficiently
24 robust for Ofcom to rely upon. As the issue has been developed before the Tribunal, there
25 are essentially two prongs to Mr. Ward’s attack on the cost benefit analysis. There are two
26 limbs to each of these prongs, if that is what prongs have. I was going to pursue Miss
27 Bacon’s analogy about a dog with four legs and then slicing them off, but I do not think it is
28 one I want to pursue. But, the two limbs to the first prong are: (1) the costs; and (2) the
29 benefits of direct routing using a common database. The second prong of Mr. Ward’s
30 attack is: Limb 1 - the costs; Limb 2 - the benefits of recipient-led two hour porting.

31 Now, our intervention is directed to providing additional evidence on the first limb of the
32 first prong - the costs of direct routing using a common database solution. What we have
33 done is provide a statement of intervention in which we set out two grounds where we say
34 that Ofcom appear not to have taken into account additional costs that we incurred as a

1 consequence of their decision. You will find them in our statement of intervention at pp.4 to
2 5, paras. 14, 15, and 16. Those summarise what our grounds are. If the Tribunal would
3 kindly read those. (Pause whilst read): This is really just for the Tribunal's note - I do not
4 think it is necessary to go through this in detail at this stage: we develop each of those in the
5 statement. The first ground is at paras.17 to 28; the second ground at paras. 29 to 32. It is
6 supported by Mr. Spindley's witness statement, which is behind the statement of
7 intervention. He deals with the first ground at paras. 9 to 15; the second at paras. 16 to 19.
8 As to the substance of our intervention, as to this evidence that we have put forward, Ofcom
9 simply has not advanced any case in response. The only response we have had to that
10 evidence is in one obscure observation at Footnote 31, at para. 47 to Ofcom's skeleton,
11 picking upon a point at para. 13 of Mr. Spindley's witness statement. I do not think it is
12 necessary to go to it because if they are going to dispute Mr. Spindley's witness statement
13 then they should have called him as a witness and put this point to him. So this really is an
14 obscure point and we cannot quite work out what they mean by it. They cannot rely upon it
15 because they did not put it to our witness when they could have.

16 Their only response to our Statement of Intervention is to raise an objection para.36 of their
17 Defence, that our case bears little or no relation to the grounds of appeal pursued by
18 Vodafone. Had BT wished to mount such a challenge it should have issued its own appeal.
19 It cannot piggy-back so as introduce a new appeal through the back door of an intervention.
20 Sir, Ofcom are confusing grounds with evidence. The ground that we support Vodafone on
21 is that summarised at para.6(a) of Vodafone's skeleton referring back to their pleadings
22 namely that Ofcom "failed to ensure that its cost benefit analysis was sufficiently robust so
23 as to provide a basis for its proposed regulatory intervention". That is the ground that we
24 intervened in support. Our evidence goes to the lack of robustness, namely that we have
25 identified additional costs that Ofcom just have not taken into account in their cost benefit
26 analysis, and Ofcom have not come back on that at all. There is nothing in their skeleton,
27 nothing in their Defence taking issue with the substance of our intervention. So there is
28 nothing in that procedural objection and we say, therefore, that the matters that we advance
29 plainly are matters which go to the lack of robustness of the cost benefit analysis and
30 support Mr. Ward's attack on it.

31 That takes me to the third of my issues, Ofcom's reliance on the revised wording of General
32 Condition 18.5. This aspect of Ofcom's case first came to light yesterday morning. It came
33 to light through a somewhat unexpected process, namely Mr. Saini cross-examining a
34 witness tendered by a third party in support of Ofcom's own case as to Ofcom's own

1 purpose in revising the wording of General Condition 18.5. Just picking the point up, that
2 cross-examination can be seen on the Day 2 transcript at p.22. Mr. Ward objected to this
3 somewhat unusual procedure but the Tribunal allowed it and said, “Let us just look at the
4 weight of this evidence”, and that is why I am taking the Tribunal back to this point. Can
5 we start at line 10 where Mr. Saini looks at the final decision and looks at the modification
6 to 18.5. Then he puts the question at line 23 to Mr. Baxter, a witness on behalf of H3G:

7 “What was Ofcom doing there by referring to a supplier of transit services?

8 A. Well, the transit provider would provide interconnection mechanism to route
9 calls to its destination. Typically an operator would have direct interconnect to a
10 destination where there was high traffic volumes and use a transit operator to
11 interconnect to other destinations.

12 Q Would it be fair to say that one of the alternatives to the switching, which is
13 use of a transit operator, was expressly contemplated by this amendment to the
14 Condition? A. That’s right.”

15 That then forms the basis for Mr. Saini’s submission, which is at p.25, line 31. He is
16 inviting the Tribunal to do this:

17 “... even if you do take it into account [Mr. Sutherns’ evidence] we have the
18 benefit of Mr. Baxter’s evidence that an efficient operator, such as H3G, does not
19 need to spend those sums, and also that whether or not you are efficient operator,
20 you can use transit operators to avoid those costs.”

21 Mr. Saini is saying that is what the amendment to Condition 18.4 is directed at.

22 I should say, first of all, that this submission made is not foreshadowed anywhere in
23 Ofcom’s Decision, Defence, skeleton argument, not part of the cost benefit analysis. To
24 follow this one through we need to start off with the original proposal for Condition 18.5
25 which you will find in bundle 1, tab 8, p.94. One can see the text of 18.5 as proposed. This
26 document is the November 2006 First Consultation. You can see there the text of 18.5 as
27 originally proposed.

28 There were submissions on the wording of 18.5 and Ofcom responded to those in the final
29 Decision, which is to be found at tab 1 of this bundle, p.44. The page is headed “The scope
30 and drafting of the revised General Condition 18, Respondent’s views”. Paragraph 3.145
31 starts, “Thus asked for”. “Thus” is actually the name of Thus Communications, it is a fixed
32 provider:

1 “Thus [Communications] asked for clarification that the obligation to ensure that
2 calls to ported numbers (fixed or mobile) are routed in a manner independent of the
3 donor provider ...”

4 That is what 18.5 on its wording as originally proposed said:

5 “... was not intended to prevent use of a transit operator who also happens to be
6 the donor provider in that instance.”

7 So it is this issue. Then you see at 3.147:

8 “Ofcom did not intend to exclude, or dissuade, transit arrangements as a result of
9 its proposed changes to General Condition 18. The obligation to ensure that calls
10 are routed in a manner independent of the donor provider seeks to ensure that calls
11 are directly routed to the recipient operator. Where a transit operator is used,
12 whether or not that that operator is a donor operator should not affect compliance
13 with the obligation. For the avoidance of doubt, Ofcom has amended General
14 Condition 18.5 to include the words ‘Where an Originating Communications
15 provider purchases transit services to route Electronic Communications, the
16 provider of those transit services is not to be considered as a donor provider for the
17 purposes of this paragraph’.”

18 That is the reason for the reference to “transit services” in the final version of General
19 Condition 18.5. Mr. Saini did not need to explore that point with Mr. Baxter, he could have
20 looked it up in his own decision and found the answer.

21 Sir, those are the three issues on which I wanted to address the Tribunal.

22 In conclusion, as we said in opening, the basic problem with Ofcom’s cost benefit analysis
23 is that it asked a question which was incapable of a sensible answer. What are the cost
24 implications for an unspecified database on a network that is yet to be rolled out? By
25 asking this question prematurely it was almost inevitable that the cost benefit analysis
26 would not be secure or robust. We do not submit that the two grounds that we advance in
27 our intervention are decisive. We do not think they are necessarily sufficient on their own
28 to alter the cost benefit analysis, but there are plainly important matters which must form
29 part of Ofcom’s reconsideration of this matter should, as we submit, the decision be
30 quashed and remitted. A lot more is now known about the process that we are undergoing
31 and so a fresh cost benefit analysis could now be tackled. In short, Ofcom should adopt the
32 stage by stage approach that we at BT have advocated at the outset.

33 Sir, unless I can be of any further assistance, those are BT’s submissions.

1 PROFESSOR STONEMAN: I wanted to get your views on the step-by-step basis and the CBA,
2 and I do not mind if you bounce this question off to Mr. Ward to deal with. Are you
3 suggesting that basically, with an issue such as this, which is not atypical where a regulator
4 wants to undertake a major change in an industry that involves quite a lot of technological
5 uncertainty and nobody is sure of the answer, what you are saying is first of all you go
6 through a step by step stage. You start that off with a CBA and because it is very
7 speculative, in one way or another you have to account for the uncertainty, you might do
8 that with a high discount rate, you might do it in other ways. That then enables you to start
9 the process off if it looks at that stage that the costs are less than the benefits. As you go
10 further in you say the regulatory processes will stop at a certain stage and see how far we
11 have got. We will refine our analysis and do another CBA perhaps with a lower discount
12 rate to reflect the lesser uncertainty and then we will see whether it is worth proceeding to
13 the next stage. Then, having done that, you will go through another CBA to see whether it
14 is worth going to the third stage. Now I do not know of any other regulator in the world
15 that works in that way, but it does seem to me that that is what you are suggesting, is that
16 true?

17 MR. ROBERTSON: That is what we have said at the outset. I think there are two points to be
18 made on that. First, Ofcom are not free just to adopt an approach which they think is
19 desirable, they are subject to their legal obligations only to act in a way that is essentially
20 proportionate, and you have had the submissions from the parties on the constraints that its
21 obligations under the Act place upon Ofcom, so it can only proceed on the basis where
22 benefits outweigh costs in these circumstances.

23 When you are dealing with something which is such a huge project, then it may only be
24 sensible to take it on a step by step basis. If you attempt to do what Ofcom have done here
25 then you are asking the participants to cost things which are just incapable of being costed,
26 or with such a lack of degree of certainty that the answer you get is going to be effectively
27 meaningless.

28 PROFESSOR STONEMAN: So within BT, for example, when you are undertaking a major
29 project you would actually start on the project having done some cost benefit analysis and
30 started off. You would then proceed and then review that project to see whether it was
31 worth continuing using a CBA and then, as time goes on, you would carry on, keep
32 reviewing the project and seeing whether you wish to continue it. That is essentially what
33 you are saying that Ofcom should proceed in that way. Is that how it is done in BT?

1 MR. ROBERTSON: Yes, we obviously keep all projects under continuous review. You may
2 start off down a particular road, and then if it turns out that it is not going to deliver returns
3 to justify the investment, then you have to decide whether proceed with it, at the end of the
4 day you have a duty to your shareholders.

5 PROFESSOR STONEMAN: I think the point I want to get at, you do a cost benefit analysis at
6 every stage?

7 THE CHAIRMAN: Are we talking about new cost benefit analysis at every stage, or reviewing
8 the cost benefit analysis or its model as you go along?

9 MR. ROBERTSON: The specific question that Professor Stoneman has asked me is not one on
10 which those instructing me can give a definitive answer. It may be that I can take
11 instructions over lunch, but I would have thought that any organisation that is continuing
12 with large scale investments, which is what this involves, bear in mind the next generation
13 network – and that is the backdrop for this as far as BT are concerned – for BT to roll out its
14 next generation network is one of the largest ever capital projects BT has ever engaged in. I
15 do not see that any business embarking upon a large project takes a snapshot approach and
16 says “That is it, we are definitely going down that process”.

17 THE CHAIRMAN: Can I offer you an analogy for what I think you are trying to say in answer to
18 Professor Stoneman’s question. If you take the analogy of a takeover bid by one company
19 for another. First off the board would do a cost benefit analysis on the basis of the
20 information that they have, the publicly available company statements and so on. They then
21 go on to due diligence, and they either refine the cost benefit analysis or make a new one on
22 the basis of the much more detailed information they have acquired as a result of the due
23 diligence process. That seems to me to be all that you are trying to say which, if so, I
24 suspect is a bit of a no-brainer, it is a normal commercial process.

25 MR. ROBERTSON: That is an apt description of how takeovers work, but this is not, as it were,
26 a one-off acquisition.

27 THE CHAIRMAN: I tried to produce an analogy that might have helped us.

28 MR. ROBERTSON: What I suspect we are effectively talking about is infrastructure roll-out, and
29 that is something that you keep under review.

30 THE CHAIRMAN: Well if you can take instructions and there is anything you want to add – you
31 do not have to add anything in answer to Professor Stoneman’s question, could you do so
32 later.

33 MR. ROBERTSON: I will do so later today if I can.

34 THE CHAIRMAN: Thank you, Mr. Robertson. Right, Miss Rose?

1 MISS ROSE: Members of the Tribunal, on behalf of H3G, there are four points that I would like
2 to make. The first relates to the approach of the Tribunal, and we do submit that the
3 Tribunal is not limited to considering the matters relied on by Ofcom in its decision when
4 deciding how to determine this appeal because, as you have heard too many times now for it
5 to need reiteration, this is a merits' appeal, and if the Tribunal were to conclude that there
6 were errors in Ofcom's approach, and that those errors were not material to the outcome, in
7 other words it reached the right answer, even if not by the right method, then the right
8 solution would be to dismiss the appeal and uphold the decision. That is the reason why we
9 have an expert Tribunal dealing with these matters.

10 The second point I would like to address is the significance of the risks of network failure,
11 and how this fits into the cost benefit analysis.

12 The third point covers some points we would like to pick up on Ofcom's cost benefit
13 analysis for direct routing and, in particular, the MNOs estimates of their costs for
14 implementing direct routing and, finally, some points on the costs and benefits of recipient-
15 led two hour porting.

16 Just as a general preamble, we do submit that it is no coincidence that what the Tribunal
17 sees today is the incumbent mobile operators opposing the decision by Ofcom to move to
18 direct routing and to recipient led porting, and the new entrant, H3G, which is still trying to
19 break into that market and get an equivalent market share supporting those moves. The
20 underlying reality is that the current arrangements for mobile number portability in the UK,
21 which are out of step with virtually the whole of the developed world favour the incumbents
22 and make it more difficult for new entrants to build market share. It is because it is in the
23 commercial interests of the mobile operators to keep control of the current system that so
24 much energy is being devoted to this appeal. In particular, we submit that it is striking to
25 see the very widely divergent estimates of the costs of implementation that have been put
26 forward to this Tribunal by H3G, a company that has a commercial incentive to make these
27 changes, and by companies such as Vodafone in particular, which does not have a
28 commercial incentive to make these changes. There are obviously difficulties in examining
29 the accuracy of the cost estimates that have been put forward in the course of a three day
30 hearing where there has not been full disclosure of documents, but it will be my submission
31 that the evidence that you have heard over the last three days casts very serious doubt on the
32 accuracy of the cost estimates that have been put forward, particularly by Vodafone in
33 relation to the fixed networks.

1 So, with those preliminary remarks I turn to my first submission which relates to the task of
2 this Tribunal. We submit that the fact that this is a merit appeal cuts both ways. The
3 essential thrust of Mr. Ward's case has been to complain about Ofcom's process, to
4 complain about the way in which it went about its consultation and its cost benefit analysis.
5 But, we submit that that is not sufficient to get Vodafone home, because Vodafone must
6 satisfy the Tribunal that the result is wrong either in fact or in law, because if errors were
7 made in the process but the outcome is nevertheless still demonstrably correct, then in my
8 submission the appeal fails.

9 In that regard we submit it is absolutely appropriate for H3G, as an intervener, to put
10 forward additional reasons to show that even if Ofcom went wrong in the process, the
11 outcome is still correct. That is the whole purpose of a merits appeal and the express
12 provision made in the CAT rules for interventions in support of the Decision. If all we are
13 permitted to do is to rely on reasoning given by Ofcom, what is the point of us being here?

14 THE CHAIRMAN: It would be a judicial review, in effect, you are saying.

15 MISS ROSE: Yes. It is a merits appeal.

16 THE CHAIRMAN: I understand the point.

17 MISS ROSE: Yes. Our position is similar to that of a party which wins a case at first instance,
18 but wishes to argue on the appeal, through a respondent's notice, that the decision should be
19 upheld on different grounds.

20 THE CHAIRMAN: I suppose the residual issue might be that more weight would be given to an
21 additional point made since the Decision if the other parties have had a reasonable
22 opportunity to respond to it.

23 MISS ROSE: Yes. I accept that.

24 THE CHAIRMAN: If you pulled a new point out of the bag now, then the Tribunal might give it
25 far less weight than a new point that has been on the table for some time.

26 MISS ROSE: Yes. Of course, sir, it is interesting that you make that point, because, of course,
27 one of the problems with this appeal is that it was not advanced by Vodafone on the basis
28 that it is now being run by Vodafone. As this Tribunal knows very well, there is an
29 obligation on parties in this Tribunal to put forward the entirety of their case with their
30 notice of appeal, including their evidence, including all of their arguments. What we saw in
31 this case was a wholly unparticularised complaint by Vodafone about their costs of
32 implementing direct routing, and then only in their reply evidence was there any attempt at
33 all, through the evidence of Mr. Sutherns and the second statement of Mr. Roche, to
34 quantify those costs.

1 THE CHAIRMAN: But you are not really complaining about that because it is a merits appeal.

2 MISS ROSE: Sir, you make the point to me about weight ----

3 THE CHAIRMAN: You cannot have it both ways. I mean, you cannot complain about the fact
4 that they have only put it in in their reply if you are saying to us that we can consider all
5 evidence that has been placed before the Tribunal. I understand the comment that they have
6 produced the evidence late in the day, but, on your submission we can take it fully into
7 account.

8 MISS ROSE: Yes. Sir, I do not suggest that you cannot take it into account. The point I am
9 making goes to weight - as I believe the point you are putting to me went also to weight.
10 So, that is the first point about the task of the Tribunal.

11 That brings me to the first of the substantive issues that I want to address, which is the
12 question of the significance of network failure. There was considerable consideration of the
13 way in which Ofcom's objectives were formulated in its initial consultation, the second
14 consultation, and then in the final Decision document. In my submission, what matters is
15 what Ofcom were saying in its Decision document because that, after all, is the decision that
16 is under appeal. The question is: Was Ofcom pursuing a legitimate aim or aims? Were the
17 means that it adopted to meet those aims proportionate? That is the two-stage
18 proportionality approach. In my submission, it is clear from the Decision that Ofcom were
19 saying that their primary aim was to protect consumers against the risk of network failure,
20 but that a secondary objective was also to enhance the efficiency of networks.

21 If we can just pick this up in the Decision in Bundle 1, Tab 1, at para. 3.3. "Ofcom
22 Objectives".

23 "In considering the method of routing calls, Ofcom's major objectives are to
24 protect consumers as far as possible from the effects of network failure and to
25 ensure the efficient use of networks. The key identified risk to consumers in the
26 current method for routing calls to ported numbers was the loss of incoming calls
27 where the donor provider ceases to be able to onward route calls to the recipient
28 provider (whether due to financial or technical failure)".

29 So, both aims are identified, but then the key risk is identified as being the risk to
30 consumers.

31 Can I just draw to your attention the point in brackets there: 'financial or technical failure'.
32 This is a really important point that I am going to be developing at some length because the
33 almost exclusive focus of Vodafone and O2, who dealt with this point, was to deal with the
34 risk of financial failure, and to say, "Oh, it's a remote risk. It's very unlikely to happen".

1 What they have not done is to address the second limb that Ofcom was addressing, which is
2 the risk which materialises regularly namely, that technical faults or congestion on the
3 donor network cause problems for the service of the person who has ported their number.
4 That is something that really has not been addressed by Vodafone or O2 and it is a critical
5 point in relation to consumer benefit that I will be returning to.

6 We can see this in the Decision. If we go to para. 1.6, at the bottom of p.3,

7 “At present subscribers (mobile or fixed) who port their numbers to a new
8 network rely indefinitely on their original network to forward incoming calls to
9 them. If the original network fails (commercially or technically), consumers will
10 no longer be able to receive calls to their ported numbers. Ofcom considers that
11 customers should not remain reliant on their former supplier in this way. As more
12 suppliers enter the market using new technology and innovative business models,
13 the risk of failure continues to grow”.

14 Then, at para. 1.7,

15 “Ofcom has, therefore, decided that calls to ported numbers must be routed
16 directly to the consumer’s new provider. This offers the following benefits:
17 Customers who have ported their number to a new supplier (perhaps many years
18 earlier) will be protected from the risk of losing incoming calls if their former
19 provider should fail commercially or technically. Existing customers of failing
20 providers will be able to port their number to a new viable provider.
21 Quality of service (call quality/congestion) will no longer risk being degraded by
22 the customer’s former provider if that network is unable to match the quality
23 standards achieved by the customer’s new provider”.

24 That is the point about congestion and quality.

25 The next point is,

26 “Ported customers will be able to enjoy innovative new services even if these are
27 not supported by the former provider., and there will no longer be a risk that
28 launch of such services, to the generality of consumers, may have to be delayed
29 until all providers from whom numbers have been ported can support the new
30 services”.

31 The final bullet is,

32 “Calls will be routed more efficiently, enabling substantial costs savings to be
33 achieved ----”

1 So, we submit that it is a gross over-simplification of the benefit to consumers derived from
2 direct routing to suggest that all that this is about is protecting against some remote risk of
3 commercial failure. It is about something much more fundamental. What it is about is
4 whether the UK has a proper system of number portability at all at the moment.

5 There is a mismatch between what the consumer perceives that they have done and what
6 they have actually achieved. The consumer thinks when they change from Vodafone to
7 H3G that they left behind Vodafone's congested network and are now playing on the newer,
8 better serviced H3G network and, of course, taking advantage of H3G's more attractive
9 tariffs.

10 They are able to take advantage of H3G's tariffs, but they are not able to take advantage of
11 its superior network, because they would still be subject to the delays and congestions and
12 problems from their old donor network. They may very well not realise that this is so
13 because they think they have ported their number to a new network. So who are they going
14 to blame for that? They are going to blame H3G, not Vodafone, because as far as they are
15 concerned they are nothing to do with Vodafone any more. This presents H3G with a
16 significant problem because H3G does not even know what are the faults that Vodafone is
17 experiencing on its network, and certainly is in no position to be able to fix those faults.
18 This, therefore, causes a problem for H3G in relation to providing to its customers the
19 service levels that it wishes to be able to provide.

20 Not only is this a problem for any network when it has ported-in customers, the problem is
21 more acute for a new entrant to the market. The reason for that is that the older networks
22 were taking customers before people had mobile phones. They built up their customer
23 bases from customers who were purchasing their first mobile phone. They were not ported,
24 they were not switched. We know that in the UK 60 per cent of customers have never
25 ported their number, have never switched, they are still with their original provider. Newer
26 entrants coming into a mature or maturing market have to obtain the majority of their
27 customers from those who already have mobiles, they have to persuade them to switch.
28 Therefore, a newer network like H3G has far more customers who have switched than an
29 older network like Vodafone. Of course, if far more of its customers have switched more of
30 its customers will have ported their numbers.

31 That means that the problem that H3G has to deal with that a proportion of its customers are
32 still dependent on another network for their service quality is greater because it is a new
33 entrant to the market. I know I do not have to remind this Tribunal that impeding new
34 entrants to the market is detrimental to competition. That is the problem, not some remote

1 risk. Of course the risk of commercial failure is important and I am going to make
2 submissions on that, but this is the key issue here.

3 PROFESSOR STONEMAN: Would you quantify how often that happened in the last year.

4 MISS ROSE: Yes. Let me just show you the evidence on this from Mr. Baxter. It is in his
5 witness statement. Before I come to Mr. Baxter can I show you where this appears in the
6 Ofcom Decision, and then I will come to Mr. Baxter's evidence. I do not want to lose the
7 point. We have already looked at paras.1.6 and 1.7. Can you just look at para.3.5 in the
8 Decision. This again is under the heading of "Ofcom's objectives", and it is under the
9 principal heading, "Protecting consumers from network failure", and at 3.4 you see the
10 point about commercial failure, and then at 3.5:

11 "Even where a donor provider does not suffer outright failure, the quality of
12 service experienced by former customers who have ported out their number may
13 suffer if the donor provider fails to provide sufficient conveyance capacity to avoid
14 network congestion or call quality degradation. Also some new services offered by
15 the recipient provider may not work satisfactorily if the donor provider is unable to
16 support them when forwarding the call. Awareness of this factor may cause some
17 providers of new services to delay implementation, harming the interests of all
18 customers and not only those who have ported in their number."

19 There is a reference here specifically to a problem with launching video calling. That was a
20 problem that affected H3G, that H3G launched its service with video calling. Vodafone
21 also had a video calling service, other networks did not, big problem for ported in
22 customers.

23 Let us just have a look at the evidence that Mr. Baxter gives on this point. It is in volume 2,
24 behind the first B, 1. It starts at para.34, "Technical failure". He describes the problem I
25 have outlined to you at para.35, and then at para.36 he says:

26 "H3G is aware of multiple events on other networks that could have affected calls
27 to ported in customers of H3G in the past year. Because H3G has implemented
28 Call Trap, any calls originating on H3G's network to ported numbers would be
29 unaffected by any Original Donor Network failure. However, in an onward
30 routing MNP implementation, H3G has no way of knowing the impact to calls
31 originating from an outside network to a ported in number. What is certain is that
32 any Original Donor Network issues would have no impact under a direct routing
33 MNP mechanism and H3G would have full visibility and control over mobile calls
34 terminating to its customers."

1 Then at para.37 specific examples are given about network problems. Some of these you
2 will see are confidential, so I will not read it out. You can see there are specific references
3 there at 37, 28 and 39.

4 Then the point at 40:

5 “The fact that there are three MNOs and, potentially, two transit operators involved
6 in each call to a ported number will also make fault identification and resolution
7 significantly more difficult than with the direct routing MNP solution described in
8 the Decision.”

9 Just pausing there, to explain why he says three MNOs and potentially two transit operators
10 in each call to a ported number, as the Tribunal knows, some MNOs have direct
11 interconnection but some use transit operators. If you have a ported in call at the moment,
12 assuming that it is not a call trap situation, the call comes in, the MNO routes it out to a
13 transit operator, the transit operator routes it to the donor network, the donor network routes
14 it to another transit operator, the transit operator routes it to the recipient network. So you
15 have three MNOs and two transit operators to route that single call. It is obvious how risks
16 of faults are going to come into the process and will be difficult to detect and beyond the
17 control of the particular network whose customer is involved to fix.

18 THE CHAIRMAN: Given what you have said earlier and understandably that customers may
19 have absolutely no idea that when they ported their call actually goes through their original
20 network, and they will, therefore, blame, for example, H3G. Is there any evidence of the
21 level of such complaints? What is the reality of this situation? I can see the theory of it, but
22 has anyone done any work as to how often this happens, what proportion of calls it affects?

23 MISS ROSE: We do not have any instructions about complaints. What I do have instructions
24 about is a recent incident some weeks ago where there was a failure on one of the other
25 MNO’s networks where H3G has spent literally weeks trying to get information out of that
26 network as to what the nature of the fault was and as to whether its customers would have
27 been affected.

28 THE CHAIRMAN: Thank you.

29 MISS ROSE: There is an issue of principle here in that it is actually questionable whether the
30 UK’s current number portability arrangements comply with Universal Service Directive.
31 Can I just hand up copies of Article 30 of the Universal Service Directive. This is the
32 obligation on number portability.

33 THE CHAIRMAN: I take it that this is a new point?

34 MISS ROSE: It is a new point, sir.

1 THE CHAIRMAN: It is quite late for the introduction of such a fundamental point, Miss Rose, is
2 it not?

3 MISS ROSE: I accept that, Sir.

4 THE CHAIRMAN: Why have we not heard this before?

5 MISS ROSE: The simple reason is because it only struck me yesterday. Can I just show it to the
6 Tribunal and you can make of it what you will. Article 13:

7 “Member States shall ensure that all subscribers of publicly available telephone
8 services, including mobile services who so request can retain their numbers
9 independently of the undertaking providing the service.”

10 Of course, it depends on how you interpret the word “independently”, whether you simply
11 say that they must be able to retain their number, even though they are no longer
12 subscribing to the original service, or whether it means the number must be purely
13 independent.

14 I have already shown the Tribunal the unchallenged evidence of Mr. Baxter ----

15 THE CHAIRMAN: I am sorry, can you just give me a moment to read the rest of this. What
16 does the sentence after A and B mean, and I have read it for the first time – at least recently
17 – just now.

18 MISS ROSE: The obligation does not apply to porting numbers between fixed and mobile
19 networks, you only have to be able to port your number mobile to mobile or fixed to fixed.

20 THE CHAIRMAN: Yes, thank you.

21 MISS ROSE: You will see, while we are at this, that there is also an obligation on national
22 regulatory authorities to ensure that pricing for interconnection relating to the provision of
23 number portability is cost oriented, in other words the donor conveyance charge must be
24 cost oriented, and that indicates that the donor conveyance charge must reflect the cost of
25 donor conveyance, so there is an interrelationship between the donor conveyance charge
26 and the donor conveyance cost which I know was a point which was raised yesterday. I do
27 not seek to make a positive case that there is a breach of Article 30, but what it does indicate
28 is that the policy of the European Community is that people should be able to own their
29 number and take their number with them to a new network. There is a real problem, in our
30 submission, with the process in the UK which does not actually enable them to do that in
31 the real technical engineering sense.

32 I made the submission that this is a real practical problem, and I have shown the Tribunal
33 the unchallenged evidence of Mr. Baxter to that effect, but there was further significant

1 evidence that this Tribunal has heard which bears that out, and that is the evidence of Mr.
2 Sutherns.

3 PROFESSOR STONEMAN: I am sorry, in what sense is 31, that is number portability, apart
4 from fixed to mobile, in what sense is that not being fulfilled at the moment?

5 MISS ROSE: It is simply a question of whether they are retaining their numbers independently of
6 the undertaking providing the service.

7 THE CHAIRMAN: You are not saying in any event that there is a breach of the Article, you are
8 saying that it simply emphasises ----

9 MISS ROSE: The need for independence.

10 THE CHAIRMAN: Yes, I think that is clear, thank you.

11 MISS ROSE: I was coming on to the question of the evidence of Mr. Sutherns, for Vodafone,
12 because in fact, in my submission, the evidence that Mr. Sutherns gave strongly supports
13 the submission of H3G that these are real risks that cause real problems for networks and
14 for consumers, because the evidence of Mr. Sutherns, who was a technical person and not a
15 commercial person, was that the reluctance of Vodafone to use a transit operator to do the
16 look ups for direct routing was that this would lead to, as he put it, dependence, upon
17 another network and when I said to him "Why would that be a problem?" he said "The
18 reasons that have been given, the risks of commercial failure or technical failure", and he
19 agreed that in that situation there would be an unacceptable risk from the perspective of
20 Vodafone that the quality of service to the customers might be impeded by congestion or
21 problems on the transit operator's network. Indeed, it is apparent that Vodafone is prepared
22 to make very substantial investments on its own case in order to avoid the materialisation of
23 that risk. Yet, in my submission, it is also clear from the answers Mr. Sutherns gave in
24 cross-examination, and it is obvious, the risks that are associated with using a transit
25 operator in terms of dependence are far less than the risks and problems associated with
26 dependence on the donor network, because if you are in a transit situation the network has a
27 commercial agreement with the transit operator for the conveyance of the call, it is selected,
28 the transit operator because it considers that they are a commercially viable business and
29 that they are technically competent and if there is a problem in the service that is provided
30 by the transit operator, there will be recourse under the contract and the two parties will
31 communicate and they will know where the call is going.

32 None of this applies when you are talking about the problem of onward routing, because in
33 this situation the recipient network has no control at all over who the donor network is. By
34 a process of natural selection people are more likely to be switching from the less

1 satisfactory networks to the more satisfactory networks either because they are more
2 expensive or their service is not as good, and therefore by definition the ported in numbers
3 are likely to be coming from the poorer networks, and there is no contractual relationship
4 for this service which enables the recipient network to have any recourse against the donor
5 network. Also, the customer in question is no longer the customer of the donor network,
6 who has control over the quality of their service. There is no incentive at all for the donor
7 network to protect the interests of that customer who has abandoned them and gone to the
8 new network, and no incentive at all for the donor network to co-operate with its competitor
9 who has taken its customer to ensure that problems do not arise, so you are not in a co-
10 operative situation as you are with a transit operator, you are in a competitive situation
11 where the system of onward routing continues to give your competitors, who are less
12 successful than you at retaining their customers, continues to give them control over the
13 quality of the service that your customers receive, and we submit that that is self-evidently
14 unacceptable. It is quite obvious that Vodafone will consider that to be unacceptable in a
15 far less serious situation and would make very substantial investment to avoid it.
16 But, of course, the problem for ported in customers is far less significant for Vodafone
17 because Vodafone is '*par excellence*' the incumbent in this market. Their problem is more
18 likely to be with customers porting out than with customers porting in.

19 THE CHAIRMAN: Choose your moment.

20 MISS ROSE: Just one more point before we end – it is the end of this point. I have made the
21 submission that this argument has barely been addressed by Vodafone or 02, 02 in fact did
22 not address it at all. Vodafone's only response to it was to say if there are problems with
23 congestion or technical failure, they will affect all the customers of the donor network and
24 so they will have an incentive to fix them. With great respect that, of course, does not
25 answer the point because the point that I have made is in the nature of things more likely to
26 be the less good network with the older technology and the greater congestion which will be
27 losing more customers. So the fact that all the remaining customers of that network are still
28 getting a poorer service does not answer the point, the point is these are customers who
29 thought they had left that network and its problems behind, but in fact they find they have
30 simply taken the problems with them.

31 That would be a convenient moment.

32 THE CHAIRMAN: Thank you, we will adjourn until 2 o'clock.

33 (Adjourned for a short time)

1 MISS ROSE: (no microphone) Sir, I was asked for some information about customer complaints
2 relating to ... problems. We have been told by our Customer Service Department that in
3 the five months between January and May 2008 we received about 1,200 complaints from
4 customers who had ported their numbers, that they were not receiving inbound calls. This
5 was the second largest category of complaints, the largest being complaints about porting.

6 THE CHAIRMAN: Thank you very much.

7 MISS ROSE: Of course, as the Tribunal knows, numbers of complaints are a tiny tip of an
8 iceberg.

9 I was also asked about the number of technical failures. I am able to say that between
10 January and March 2008 - so, that is a three month period - there were twenty-seven failures
11 on other mobile networks which could have affected our ported customers. We are unable
12 to say, of course, whether they did affect our particular customers because of the problem I
13 have already developed about us not knowing what the effects are. That equates to more
14 than one hundred incidents a year.

15 Sir, that is the problem of technical failures.

16 The second aspect is difficulties in taking up innovative services. This is dealt with again in
17 Mr. Baxter's witness statement in Bundle 2, B1 at paras. 42 to 50. He there explains the
18 specific problem that was received in relation to video calls. Vodafone say about this,
19 "Well, that's historic". Of course, it is historic because if it was not historic we would not be
20 able to give evidence about it. But, it is in the nature of new technology and innovation that
21 it is hard to predict exactly what it might be, or what its effect might be in the future. But,
22 what we can say is that this is a concrete problem which has occurred in the past.

23 The third aspect is the risk of commercial failure. Ofcom made a finding about this which
24 is not challenged in this appeal, which is in the Decision at paras. 3.19 to 3.20.

25 "Ofcom considers the risks to consumers of failing networks are material and,
26 given Ofcom's statutory duties and powers, Ofcom should act to address these
27 risks where it is consistent with its other duties to do so (for example, that this can
28 be done at reasonable cost and in a way that reflects the need to act
29 proportionately)"

30 Before we pass on from this paragraph, you will note that there is a Footnote 18, which
31 refers to Footnote 7. It says,

32 "Ofcom considers it is useful to note the UK is almost alone amongst European
33 and North American countries in relying on onward routing".

34 If we go to Footnote 7, which is at p.10,

1 “In Australia, Canada, USA and almost all the EC the process for porting mobile
2 numbers is led by the gaining provider. In some new member states, such as
3 Latvia and Romania, number porting facilities are not yet complete”.

4 Then, at para. 3.20 there is a reference to the Atlantic Telecom failure - acknowledgement
5 that that was seven years ago. It says,

6 “-- there has not been another downturn in the telecoms market since that time,
7 and, therefore, the fact that similar failures have not occurred does not provide
8 sufficient comfort (in Ofcom’s view) that further failures are unlikely in future”.

9 Now, of course, this Decision was written before the current downturn which we are now
10 starting to experience. So, Ofcom’s comment that future economic circumstances are
11 uncertain and just because the economy is good at the time does not mean it will remain so
12 now looks prescient. Then they say,

13 “This is particularly true given the prospect of new entrants offering services that
14 will compete with, or be delivered alongside conventional services. Many of these
15 entrants are likely to use new technology and innovative business models - itself,
16 of course, a positive for competition and, hence, consumers. Inevitably, however,
17 this has an important corollary: the pool of potential failures (and hence, affected
18 customers) is also growing”.

19 Again, that point is borne out by the current situation. As the Tribunal may, or may not,
20 know Ofcom is currently contemplating an auction of 2.5 spectrum which is suitable for use
21 in mobile technologies, and there are, indeed, a number of new entrants to the market. Some
22 evidence again about this from H3G. Just as an example, this is an annexe to the witness
23 statement of Mr. Baxter. It is Tab 7, behind Mr. Baxter’s witness statement.

24 THE CHAIRMAN: The noodle one?

25 MISS ROSE: The noodle one, yes. That is just an example of the kind of new entrants to the
26 market that we are seeing. We see that they say they have got ‘27,000 customers soon to
27 receive the unique Noodle UK SIM card’. So, you have got a growing pool of new entrants,
28 uncertain economic conditions, innovative and new technologies, and therefore a risk of
29 future commercial failures, just as there has been in at least two instances in the past. That
30 is the commercial situation.

31 My learned friend, Miss Bacon, relied on an earlier Ofcom document from 2004, saying
32 that the risks of network failure at that time were negligible. I have two points to make
33 about that. That was talking about fixed networks - not mobile networks. Therefore, the
34 problems I have been identifying in relation to technical failures, congestion, and so on, are

1 not applicable. Secondly, of course, things have moved on since 2004: different climate
2 technologically; different climate in terms of new entrants. Ofcom has changed its view.
3 That is what regulators do.

4 A point that is perhaps obvious: the introduction of direct routing is not intended to prevent
5 the risk of networks failing. What it does is to protect customers against the consequences
6 of network failure. The reason I say that is that Professor Stoneman made a comment about
7 saying, "Well, how could you evaluate the contribution that these measures would make to
8 preventing network failure?" Of course, they will not prevent network failure. What they
9 will do is to reduce the adverse consequences of a network failure for customers. There are
10 two points here. The first is in relation to customers who have already realised that the
11 network was no good and had already ported away from the network. We will find that in
12 fact they have not cast off the shackles of the network when it fails, but would then not be
13 able to receive calls. The second is customers who are with the network when it fails, who
14 cannot at that time, when the network fails, port their numbers away but have to lose their
15 number at the time of failure. So, those are the two categories of adverse consequences.

16 Those are actually referred to at para. 1.7 of the Decision which we have already looked at.
17 The key point on this is how the risks of network failure, both technical and commercial, tie
18 in with the cost benefit analysis. Here is a point, again, where I would respectfully adopt
19 the point that was made by Professor Stoneman yesterday - that is, that the legitimate aim
20 for these purposes is protecting customers against the consequences of network failure. The
21 question is whether the means adopted - namely, direct routing - are proportionate to that
22 aim. If you find that direct routing imposes a net cost on the industry, then you might go on
23 to ask the question: Is it proportionate to incur that cost in order to get the benefit of
24 protection against network failure? But, if your conclusion is that introducing direct routing
25 is either in itself positively beneficial in terms of efficiency or neutral in terms of cost, you
26 do not need to quantify the risks of network failure because there is no cost to be offset. We
27 know that protecting against the risk of network failure is, in itself, a net benefit of
28 consumers, and if you can achieve that benefit by a method which does not, itself, impose a
29 net cost on the industry there is no remaining issue of proportionality. Therefore, provided
30 the NPV is neutral you do not have to quantify the risk of network failure.

31 Now, the more difficult question is what if the NPV is negative. In that situation there has
32 to be at least some balancing of the negative cost to industry against the benefit. In my
33 submission, that does not necessarily have to be through a mathematical calculation. The
34 Tribunal saw the Good Practice Guide that Ofcom uses in relation to impact assessment,

1 and that makes it clear that not all benefits are capable of being quantified, do not
2 necessarily have to be quantified, they can be taken into account as qualitative benefits in
3 terms of improving the experience of consumers. So you do not necessarily have to do a
4 simple mathematical calculation.

5 We do not even get into that question unless Mr. Ward succeeds in the primary ground of
6 his appeal, which is to say that the cost benefit analysis is wrong and there cannot even be
7 shown to be a neutral NPV.

8 That of course takes you back to the 2004 Consultation Paper that Miss Bacon relied on. If
9 you read that paper you will see that the argument that was being developed there was that
10 under the existing fixed networks at that time there would be a net cost of £200 million of
11 imposing direct routing. It was in that context that it was said, well, the benefits to
12 consumers do not warrant it. It is a completely different situation and has no relevance to
13 this case.

14 That brings to the question of the cost benefit analysis. The first topic I would like to
15 address is the costs of onward routing – in other words, these are the costs that will be saved
16 by the introduction of direct routing. In my submission, it is now quite clear from the
17 evidence which this Tribunal has heard that the costs of onward routing which would be
18 saved by introducing direct routing were seriously under-estimated by Ofcom.

19 The first piece of evidence on which we rely to support that submission is the introduction
20 of call trap. As the Tribunal has heard, three of the MNOs have already introduced call
21 trap, two are in the process of doing so.

22 It is important to explain the similarities and differences between call trap and direct routing
23 mobile to mobile. Can I just hand up a short note on this point, which has some diagrams.
24 (Same handed) Before we look at the note, I just want to explain it and then we will look at
25 the pictures. We will look at the note in a minute, I just want to explain it first. What
26 happens in call trap is that the mobile operator sets up a database containing all the numbers
27 that have ported out from its number range and all the numbers that have ported in to its
28 number range from other networks. When a call is then received by that network to any
29 mobile number – to any mobile number – the network operator performs a look up. So the
30 network operator's switch interrogates the database to see whether this is a number that has
31 ported out of the network or a number that has ported in. If it is a number that has ported
32 out of the network the call will be directed to the new destination. If it is a number that has
33 ported in to the network the call will be trapped, so it will not have to trombone out to its

1 original number range and then come back in again. Instead, it will simply be routed
2 directly to the customer on the same network.

3 Two things follow from that. In order to implement call trap you set up a database which
4 does not include all mobile ported numbers. It only includes the mobile numbers that are
5 ported out from your network and those that are ported in. But, and this is crucial, you must
6 have capacity on your mobile network to perform a look up whenever a call is received
7 directed to any mobile number, because every time a call comes in for a mobile number you
8 have to be able to interrogate your database to see if it is a ported number in or out of your
9 network. Therefore, in order to implement call trap you have to establish a system with
10 sufficient switching capacity to enable you to perform a look up for any mobile to mobile
11 call – a crucial point.

12 When you implement direct routing, how does that system change? The way it changes is
13 that all five of the MNOs set up one common database, and on the common database are
14 held the details of all mobile numbers which have ported. The individual mobile operators
15 may interrogate that database or they may set up a copy and regularly update it by reference
16 to the central database. So they need a bigger database. The switching situation is the
17 same. Whenever a call is receive addressed to a mobile number they interrogate the
18 database. This time if that number is ported from any network to any other network they
19 will know and it will be routed directly without going through the donor network. That is
20 the difference between call trap and direct routing. Therefore, you do not need any extra
21 switching capacity for direct routing mobile to mobile. I am not talking about mobile to
22 fixed. Mobile to mobile you do not need any extra switching capacity, you just need a
23 bigger database and a connection with the database.

24 In fact, and this is a technical perhaps we do not need to get into, there will be fewer look
25 ups when you implement direct routing, but I will not trouble you with that.

26 You can see this illustrated with these two figures in this note. The first figure is an
27 illustration of call trap. On the left hand side you can see there is the radio network and a
28 call to a mobile number. That comes in to the mobile switch. That is routed to the HLR,
29 which is the database, containing the own mobile customers' numbers, routed to its own
30 customer or routed to another mobile operator and then it is routed. That is where the
31 database just contains numbers that are ported in and ported out from that network.

32 The second figure is direct routing mobile to mobile. Again, looking at the left hand side,
33 the call to a mobile number comes in to the mobile switch. Here there is a look up. As you
34 can see, there is the database and a copy of the central database with an IT interface with

1 other mobile customers. The call comes back and is routed. The only thing different is the
2 connection with the central database. The switching capacity is unchanged.

3 The point about this is that the significant upgrade is not mobile to mobile direct routing, it
4 is call trap. That is the significant upgrade, that is where the money is. These points are
5 outlined in Mr. Baxter's witness statement, again unchallenged evidence, if I can show you
6 the references. It is back in vol.2 B1, para. 53: "How direct routing works". Can I invite
7 the Tribunal to read, not necessarily now but to read from para.53 down to para. 60 where
8 he explains call trap and direct routing, how they interact and the implications of moving to
9 direct routing – this is all mobile to mobile we are talking about here. There is one
10 particular passage para.67 to 68, "Implications of moving to direct routing."

11 "Direct routing is straightforward to implement given that all MNOs have already
12 implemented MNP onward routing. It uses very much the same functionality in a
13 mobile operator as for onward routing ... the main things that change are the
14 MNO that performs the MNP look-up, the additional ported mobile number
15 information contained in the MNP IRD and the fact that all originating mobile
16 calls are looked up on ..."

17 Then this at para.68:

18 "In the case of MNOs, like H3G, that already perform Call Trap, the change
19 simply involves adding ported Outside Mobile Numbers to the MNP IRD, and
20 some simple modifications to the numbering analysis in the core network".

21 And he was not cross-examined on that. We know that all five of the MNOs have taken a
22 commercial judgment that it is in their financial interest to implement call trap. We know
23 from Mr. Sutherns the scale of the benefit that Vodafone experienced from doing so, that
24 was the confidential figure that was passed around, the annual figure. We also know that
25 that figure is very much higher than the maximum figure which Sagentia envisaged as being
26 at the saving from introducing call trap. The maximum figure that Sagentia envisaged was
27 £1.1 million a year, and you can compare that figure, the confidential figure, it is very
28 much greater.

29 So we know that Ofcom from the outset was underestimating the benefits of introducing
30 call trap. What we do not know is Vodafone's costs of implementing call trap, and the
31 reason we do not know that is that Mr. Sutherns was very keen not to get drawn on that
32 issue. But we do know from O2 what their costs were of implementing call trap, because we
33 were told by Miss Bacon that it was a little over £400,000 to implement call trap. That
34 figure sounds reasonable to H3G, it is the sort of figure we would expect. What, with

1 respect, makes no sense at all is how it could cost less than half a million pounds to
2 implement call trap but on O2's case £3.5 million to extend call trap to direct mobile to
3 mobile routing. With all due respect that is nonsensical.

4 We submit that it is quite clear from the evidence that the Tribunal has heard that all five
5 MNOs have taken a commercial judgment that call trap is worthwhile, that Vodafone at
6 least has obtained very substantial benefits from doing so, far in excess of the benefits that
7 Ofcom anticipated from direct routing and the costs of doing so appear to be modest. We
8 submit that that is very good evidence that the costs of implementing direct mobile to
9 mobile routing are very much lower than Vodafone and O2 have sought to suggest to this
10 Tribunal.

11 The next question is the estimates of the volumes of ported minutes, because you have a
12 price per minute and then you have to estimate the volumes of the ported minutes. Mr.
13 Saini has already demonstrated how Ofcom's assumptions on this issue were very
14 conservative and, in my submission, they clearly underestimated the future growth in ported
15 minutes. With great respect to Mr. Roche, he cannot be right in his evidence about this
16 because his assertion for the growth in ported minutes will be very low cannot stand with
17 Ofcom's projection of the growth in H3G's market share between now and 2020. H3G
18 currently has a little under 5 per cent of the market, and Ofcom are projecting it to grow to
19 19 per cent of the market by 2020. H3G can only do that by persuading customers to
20 switch, and a proportion of the customers who switch will port.

21 Ofcom did not take into account, when assessing the likely growth in ported minutes the
22 effect of the introduction of recipient-led porting. Now, as the Tribunal knows, at the
23 moment a recipient network has no incentive at all to promote porting for two reasons.
24 First, if the customer ports they have to go back to the donor network to get the
25 authorisation and there will then be retention activity, and I shall come on to the
26 significance of retention activity later.

27 Secondly, at least in the case of H3G there is a financial penalty as well if a customer ports,
28 because H3G's regulated mobile call termination rate is higher than the regulated call
29 termination rates of the other networks, but if the customer ports their number H3G will
30 only receive the lower mobile call termination rate applicable to the donor network, so it is
31 directly against H3G's financial interest to promote porting under the present system, and it
32 is directly against the interests of all networks to promote porting because of the retention
33 issue.

1 Of course, if this decision were implemented the converse would be so. One of the services
2 which the networks would be keen to promote and advertise to customers, would be the
3 ease and convenience of moving to their network with its attractive tariffs and keeping your
4 old number because it is an incentive – “There will be no inconvenience, your friends and
5 family will still be able to reach you, there will be no interruption in your service, come
6 over to our network and we will save you £20 a month.” It is obviously something that they
7 will promote, and that will lead to greater consumer knowledge, and inevitably to greater
8 porting.

9 We know from the survey evidence that at the moment many consumers are unaware of the
10 right to port and that only one-third of those who switch port. There is obviously very
11 considerable capacity for growth in the number of ported minutes. Mr. Ward says that you
12 have to leave all of that out of account when you are looking at the likely growth of ported
13 minutes because he says the approach that Ofcom took was that they would not move to
14 recipient-led porting unless they had concluded first that the costs and benefits of direct
15 routing were in themselves sufficient to justify the decision. Yes, that is what Ofcom did
16 but, in my submission, they were not right to do that because the right approach is to
17 consider whether the implementation of the decision as a whole would be to the benefit of
18 consumers and would promote competition and therefore, in my submission, it is right to
19 take into account the realistic growth in the volume of ported minutes on the
20 implementation of this decision, because if you do not this is a clear consequence of the
21 decision which is never taken into account at all in the cost benefit analysis, and we submit
22 that cannot be right.

23 A final small point on this, another factor in relation to which we say Ofcom clearly
24 underestimated the future growth in the volume of ported calls. It is in the decision, it is at
25 p.59. It is footnote 30. If you look at the last bullet on p.59:

26 “On the assumption that consumers who have ported their number have a similar
27 traffic profile as other mobile users, a 5% increase in mobile users with ported
28 numbers will translate to a 5% increase in call minutes to ported numbers.”

29 So that was the basis Ofcom did it, they said 5% increase in ported numbers equates to 5%
30 increase in ported traffic, but they noted in a footnote:

31 “In practice this assumption may understate the increase in call minutes to ported
32 numbers. Customers who most value continuity in their mobile number and
33 therefore take care to port their number with them, may tend to receive more call

1 minutes than customers who do not port their number. As H3G noted in its
2 response ----”

3 So, if 5 percent are porting, that may lead to a higher increase in inward ported minutes. So,
4 yet another respect, in addition to all those which Mr. Saini has already identified, in which
5 Ofcom under-estimated the future growth in ported minutes.

6 Turning to the costs of introducing direct routing -- The Tribunal already has my
7 submission about what we submit is the unsustainability of the estimates put forward by the
8 other MNOs of the costs of introducing direct mobile-to-mobile routing. Our submission is
9 that you can infer that those costs are modest, both from O2’s costs of introducing call trap,
10 and the commercial decision by all five MNOs to introduce call trap.

11 However, the key complaint that is made in this appeal is not about mobile-to-mobile direct
12 routing at all. It is about a separate aspect of this Decision - a wholly severable aspect of
13 this Decision - namely, direct routing of mobile to fixed calls to be introduced from 2012. I
14 emphasise that those decisions are entirely distinct. They do not necessary stand and fall
15 together. I am going to come back to this point later. What the key complaint of Vodafone
16 comes down to is its point about the cost of new switches. That is by far and away the
17 largest element of the cost that it has identified in relation to mobile to fixed.

18 A crucial point here: what you see is all the incumbent MNOs piling into this appeal to
19 support Vodafone, to try to get this Decision put back. What you do not see is any one of
20 those MNOs supporting Vodafone on the switching point. It is remarkable. Let me just
21 show you what the evidence is on this. Our submission is that there is simply no
22 independent evidence from T-Mobile, Orange, or O2 that they will incur similar costs in
23 relation to mobile to fixed.

24 If we deal with O2, at Volume 2, in the witness statement of Mr. Wardle, behind Tab 1 of
25 one of the Tab Es at para. 42A. He says about half-way down that paragraph at p.14,

26 “My analysis, therefore, takes no account of the considerable further costs of
27 enabling direct routing of calls to ported fixed numbers using, for example, INAP.
28 Making an adjustment for this would reduce the NPV significantly still further
29 because of the need to adopt a new routing protocol. Indeed, I note Vodafone
30 believes that it alone will incur a cost in excess of ----“

31 -- and he gives a figure. Now, what he does not say - and noticeably does not say - is what
32 he thinks 2 will incur for that cost. We submit that that omission is striking.

33 THE CHAIRMAN: What about the last sentence of the paragraph? If what you are saying is
34 correct, then the last sentence of the paragraph would be deeply misleading.

1 MISS ROSE: Sir, when you look at the paragraph, he is not asserting that it would be that, and he
2 is not asserting that it would be O2's costs. He is simply saying that he notes that
3 'Vodafone believes it alone will incur a cost in excess of those figures, and therefore it may
4 reduce the NPV by a further £100 million, therefore ----' He is not putting forward any
5 evidence at all that this is O2's estimate of what it will incur. He is just saying, "Oh, well,
6 Vodafone thinks that. So, if everybody costs the same, that's what it will cost".

7 PROFESSOR STONEMAN: In a related way I have heard a couple of people today saying,
8 "Nobody has challenged this comment, and therefore it must be accepted". A number of
9 the papers I have seen are saying, "Just because we do not raise a point, it does not mean
10 that we accept it". Now, I am somewhat concerned that just because out of this huge pile of
11 papers nobody has actually picked on a particular number or a particular sentence that that
12 means that everybody accepts that it is true. I would have thought the starting point is that
13 nobody accepts that it is true, and it is just to stop us being here for ever and a day that they
14 have not raised any objection to it.

15 MISS ROSE: There has been a lot of debate about this, but in my submission you have to
16 distinguish between statements of fact and statements that are not, on analysis, statements of
17 fact at all.

18 THE CHAIRMAN: Miss Rose, I am troubled by the proposition you have just put about para.
19 42A of Mr. Wardle's statement because Mr. Wardle gave evidence. You had the
20 opportunity to cross-examine Mr. Wardle. You are now saying that that is a very misleading
21 paragraph.

22 MISS ROSE: Sir, I am not saying that.

23 THE CHAIRMAN: Well, surely you are.

24 MISS ROSE: With respect, I am not saying that. I am not.

25 THE CHAIRMAN: Why did you not cross-examine Mr. Wardle about this?

26 MISS ROSE: Sir, I had no need to cross-examine Mr. Wardle about this because the statement
27 that he makes on its face does not include any estimate of what it would cost O2 to
28 implement mobile to fixed. Indeed, it is a very carefully worded statement that does not say
29 that.

30 THE CHAIRMAN: Well, I am bound to say that my instant reaction is that having taken the
31 opportunity of cross-examining Mr. Wardle, if your case at that point was that he is using -
32 and I use the vernacular - weasel words, and that we are to draw the interpretation you are
33 contending for now, I find it astonishing that you did not cross-examine him about the
34 meaning of that paragraph.

1 MISS ROSE: But, sir, with respect, the meaning of the paragraph is plain.

2 THE CHAIRMAN: Is it?

3 MISS ROSE: Yes.

4 THE CHAIRMAN: Yes, I think the meaning of the paragraph is plain. At first blush it suggests
5 that it is a legitimate exercise to multiply. You are saying that it is not a legitimate exercise
6 at all; these are weasel words concealing that there is no cost whatsoever to his employers.

7 MISS ROSE: No, sir, I did not say that. I said that he makes no attempt to estimate the cost to
8 O2. Indeed, he does not. What he does is to say, "I note Vodafone believes that it alone will
9 incur a cost in excess of X and Y. Implementation across all five MNOs may therefore
10 reduce the NPV by, in the region of --" So, he is saying, "If you just take Vodafone's
11 estimate and multiply it up, that is the figure that you get". That is all he is saying.
12 Now, I do not dispute that if you take Vodafone's number and multiply it, that is the figure
13 that you get. The point I am making is a different one, which is that he does not attempt to
14 present to this Tribunal any evidence about O2's estimates of its own costs of mobile to
15 fixed. That is in start contrast to his approach to mobile-to-mobile. Sir, I am not in any way
16 ----

17 THE CHAIRMAN: I understand your point, but I do not resile from my concern that this was not
18 pursued in evidence.

19 MISS ROSE: Sir, with respect, there was no reason for it to be pursued in evidence because I do
20 not seek to undermine what is in his witness statement. On the contrary, I rely upon it. I
21 rely upon what is not in his witness statement. I rely upon the fact he ----

22 THE CHAIRMAN: We have your submission.

23 MISS ROSE: Yes. (After a pause): So, exactly the same point applies to T-Mobile. This is the
24 statement of Mr. Harrison. It is a table at the end of his witness statement. You will see in
25 that table that he gives a figure for network infrastructure fixed portability. He gives the
26 same figure as Vodafone, but then there is a footnote. The footnote says,

27 "T-Mobile has not yet engaged in a detailed analysis of this aspect of the
28 implementation and has therefore not acquired its own cost estimates with regard
29 to this item. However, I understand from my colleague Thomas Bennett, our
30 Network Systems Integration Manager, that the nature of the solution and
31 consequent costs are likely to be broadly equivalent as between T-Mobile and
32 Vodafone."

1 In other words, he says, “We have not done our own estimates, but whatever Vodafone say
2 it will cost them, we think it will cost us something similar”. There is no independent
3 evidence at all.

4 Orange do not address this question at all. They are complete silent on it.

5 MISS DEMETRIOU: Sorry to interrupt, I am sure I do not need to remind the Tribunal but
6 Orange has not intervened at all on direct routing, so it is not surprising that we have not
7 addressed this evidence, so nothing can be read into that at all.

8 MISS ROSE: What can be read into it is the submission that I made.

9 THE CHAIRMAN: I am sorry, can I just intervene. In relation to Miss Demetriou’s point, I
10 think it is probably fair to point out that the Tribunal may be the cause of Orange not
11 addressing this point. In our directions we made it absolutely clear that there should be no
12 duplication. I think that is the underlying point that Miss Demetriou is making.

13 MISS DEMETRIOU: Sir, you are right, but it is an even broader point which is that we have
14 only intervened in support of Vodafone on the porting arrangements, so on recipient-led two
15 hour porting, and not in respect of direct routing at all. Nothing can be read into it. We say
16 in our Statement of Intervention that we share many of Vodafone’s concerns on direct
17 routing, but for reasons which are not material to this debate we chose not to intervene in
18 respect of direct routing. We have adduced no evidence at all. It is not open to Miss Rose
19 at this stage to read something negative into the fact that we have not adduced evidence on
20 it. We simply did not intervene on that part of the case.

21 MISS ROSE: Sir, the point is a very simple one. They are not challenging that part of Ofcom’s
22 reasoning. They are only challenging Ofcom’s reasoning in relation to recipient-led
23 porting.

24 The point remains the point that I have put at the outset, which is that only Vodafone is
25 positively asserting that this is the cost.

26 PROFESSOR STONEMAN: Can I go back to this footnote then, footnote 2 ----

27 MISS ROSE: Mr. Harrison’s evidence, yes.

28 PROFESSOR STONEMAN: I assume that this Thomas Bennett, their network systems
29 integration manager, is their expert in this field?

30 MISS ROSE: Sir, that is not a question I can answer for obvious reasons.

31 PROFESSOR STONEMAN: The reference is that their expert agrees with numbers that T-
32 Mobile and Vodafone gave. That sounds to me like quite a good estimate of the cost.

33 MISS ROSE: Sir, with respect, that is not what it says. Remember, this is T-Mobile’s expert, or
34 T-Mobile’s person. He is not saying that I agree with numbers that T-Mobile give. He is

1 saying that the nature of the solution and consequent costs are like to be broadly equivalent
2 as between T-Mobile and Vodafone – in other words, “We have not estimated a figure, but
3 we think that it is likely that our solution on costs will be similar to whatever it costs
4 Vodafone”. They are not saying, “We think it will cost us £X million or £Y million”.

5 PROFESSOR STONEMAN: They believe they will have the same figure as Vodafone, although
6 they do not know what the Vodafone figure?

7 MISS ROSE: Of course, this man knows what the Vodafone figure is because he cites it.

8 PROFESSOR STONEMAN: If he says, “Our number is going to be equivalent to the Vodafone
9 figure”, he knows what number that is equivalent to.

10 MISS ROSE: Yes, absolutely, but that is not the result of any calculation that T-Mobile have
11 done.

12 PROFESSOR STONEMAN: Not any specific calculation.

13 MISS ROSE: Indeed, there is no analysis.

14 PROFESSOR STONEMAN: It is qualitative, if you like, in the way that you said it should be
15 taken into account.

16 MISS ROSE: Sir, with respect no, it is comparative, because he is simply saying, “Whatever
17 Vodafone say it will cost them, because our solution is similar, it will cost us the same”.

18 That begs the question whether Vodafone’s calculation is correct.

19 PROFESSOR STONEMAN: That is how you interpret it.

20 MISS ROSE: Sir, with respect, that has to be the way you interpret because they say they have
21 not engaged in any detailed analysis of its implementation.

22 PROFESSOR STONEMAN: The fact that I am arguing with you means it is not how you have to
23 interpret it.

24 MISS ROSE: I beg your pardon?

25 PROFESSOR STONEMAN: The fact that I am arguing with you means it is not how you have to
26 interpret it.

27 MISS ROSE: Sir, with respect, how would you interpret it?

28 THE CHAIRMAN: Shall we move on, if you do not mind.

29 PROFESSOR STONEMAN: I am happy to do that.

30 THE CHAIRMAN: Once it becomes a dialogue I think we need to move on.

31 MISS ROSE: Sir, I do submit that what we are left with is Vodafone asserting this figure. The
32 Tribunal has got the submissions of Mr. Saini, which again we support and adopt, that the
33 costs that Vodafone are complaining of are the results of its own choices and are not the
34 result of the decision made of Ofcom.

1 The first point is that it appears that Vodafone switches are of a poorer quality than H3G's,
2 and that they therefore cannot take the greater load of the INAP system without
3 degradation, and that is why they need more switches. In other words, that is the result of a
4 poor technological choice.

5 The second point is that the need for additional switches is not the result of the Ofcom
6 decision that there should be direct routing mobile to fixed, it is the result of the decision
7 taken by the NICC to adopt a 19 digit standard.

8 There are a number of points to be made about this. The members of the NICC include all
9 the incumbent MNOs. Vodafone attend the meetings of the NICC, responded to the
10 NICC's questionnaire in August 2007. NICC's decision, not taken until April 2008.

11 Vodafone's evidence is that it knew about this number as a ballpark figure at the latest by
12 September 2007, and yet it never raised with the NICC any suggestion that the 19 digit
13 protocol was unacceptable because of the cost of the new switches. It never raised it.

14 You might consider that that casts doubt on the credibility of that number. In my
15 submission, it is unthinkable that a company of the size and sophistication of Vodafone, if it
16 thought that a protocol of this nature was going to result in it incurring that cost, would not
17 have raised it with the NICC.

18 By the way, I should add that although the NICC decision has been taken it CDB amended.
19 There is nothing at all to stop Vodafone now saying to the NICC, "Hang on a second, we
20 have done a detailed costing of your 19 digit standard and it is unacceptable to us and we
21 would like you to re-think". It remains open to them to do that and suggest a 15 digit
22 number. Again, they have not done that. I would submit that that does cast doubt on the
23 number that they are now putting forward. You already have the submission about how late
24 in the day and how late in these proceedings that number actually emerged.

25 The next point is that the costing in relation to the switches is based, as Mr. Sutherns said,
26 on installing the INAP system for look ups, mobile to mobile as well as mobile to fixed.

27 With respect, that is gold-plating, there is no need whatsoever to do that in order to
28 implement this decision. As Mr. Sutherns accepted, they could continue to use the MAP
29 system to do their mobile to mobile look ups and only use INAP for mobile to fixed. That
30 option has not even been costed by Vodafone. Again, we submit it is strange that they have
31 not costed that obvious alternative if the costs of installing are as high as they say.

32 A further point was made by T-Mobile this morning on this relating to Ireland. They said
33 that it was interesting that in Ireland there were separate mobile and fixed databases and that
34 a lot of the problem that was arising in the United Kingdom had come from the decision to

1 have one combined database for mobile and fixed. Again, that is not a decision that that the
2 Ofcom Decision requires. That is a decision that the industry members have taken through
3 UK porting. Ofcom was not mandating that single database.

4 The next point is that the transit operator option does not appear to have been explored or
5 costed by Vodafone at all. I ask the Tribunal to go back and look at the original
6 submissions that were made by Mr. Ward on the transit operator option, because those
7 submissions were not supported by his own witness. What Mr. Ward said was that transit is
8 just a pipe and cannot do the look up. With great respect, that was simply incorrect and Mr.
9 Sutherns accepted that the transit operator could do the look up, which is where the costs
10 are. There is no technical reason at all why you cannot use a transit operator for this
11 operation.

12 In his evidence in chief Mr. Sutherns said that this option would be commercially
13 unacceptable because you would have to by transit from transit operators and it would be a
14 sellers' market. But, if you look at his cross-examination that he was not a commercial
15 person, that he knew nothing about the transit market, he did not even know the names of
16 the major companies that were active in that market. With all due respect to Mr. Sutherns,
17 he was in no position to make the comment that he did about the commercial acceptability
18 (or unacceptability) of using a transit operator. What he was in a position to do, and what
19 he did talk about was the technical acceptability to Vodafone of using a transit operator. It
20 is there that his evidence became really fascinating because what he told us was that the
21 risks of congestion and system failure of using a transit operator made it unacceptable.
22 Therefore, Vodafone's position must be that those risks are so financially significant that
23 Vodafone would rather invest the sum of money we are talking about on switches and incur
24 them. Of course, that brings you right back to the reason why onward routing is a bad idea
25 in the first place.

26 That of course strongly suggests that direct routing would be a proportionate response even
27 if it was significantly costly to the industry because Vodafone are prepared to incur the
28 costs of direct routing without transit at significant cost to themselves to avoid the risks.
29 The final point Mr. Ward made was that he said using transit goes against the grain of the
30 decision, which is direct routing. We submit that that is not correct. If we just pick up the
31 decision – this also goes to a point made by BT this morning where they tried to suggest
32 that the reason for amending condition 18.5 was not because Ofcom was envisaging that the
33 decision could be implemented using transit instead of having your own system for direct

1 routing. With respect that is not correct. If you go to para.3.7 of the decision: “Implications
2 for the method of call routing”:

3 “Considering these two objectives together in assessing the evidence for
4 regulatory change, Ofcom’s aim is to ensure that all calls to ported numbers are
5 routed without reliance on the donor network. Ofcom considers that, whether this
6 is achieved by all originating operators interrogating a CDB, or whether some
7 providers choose to rely on commercial arrangements with transit operators to
8 determine call routing on their behalf (in effect, purchasing access and the
9 functionality of a CDB from another operator) is a matter for individual providers
10 to determine.”

11 So in fact it is quite clear that the decision expressly envisaged and referred to the option of
12 commercial purchase of direct routing and look-ups from a transit provider as one of the
13 methods of implementing the decision.

14 That brings me to the question of recipient-led two hour porting, and it is important in my
15 submission to distinguish between what is important about this part of the decision ----

16 THE CHAIRMAN: Can I just stop you, forgive me, Miss Rose, on the last point but it connects
17 up with this one. It has been said to us that recipient-led porting is plainly self-evidently a
18 good thing, a desirable aim. By the same token is not Vodafone’s proposition that they
19 wish to cut out the middle man, the transit operator self-evidently a good thing?

20 MISS ROSE: Well it might be or it might not be, that is a matter for them. Transit operators are
21 a fact of life in the mobile telecommunications market.

22 THE CHAIRMAN: But is it not a fact that Ofcom perhaps should take into account if recipient-
23 led porting is self-evidently a good thing then why should not the operators take into
24 account factors which may cost money, that are self-evidently a good thing. They are
25 making the case, as I understand it – Mr. Ward will correct me if I am wrong – that in a
26 recipient-led porting situation commercially it makes sense, and it also improves the service
27 for them and for their subscribers ----

28 MISS ROSE: Sorry, I think we are at cross purposes. I think you are talking about direct routing
29 and not recipient-led porting.

30 THE CHAIRMAN: I am sorry, forgive me.

31 MISS ROSE: I am sorry, I was not understanding you.

32 THE CHAIRMAN: They are saying that direct routing is self-evidently a good thing
33 commercially in the long term, measuring their commercial interests and also the
34 commerciability of the subscriber. Is it not a rather similar point in quality to Ofcom’s

1 assertion that recipient-led porting is self-evidently a good thing. This is a sauce for the
2 goose and sauce for the gander point, is it not? You are looking puzzled.

3 MISS ROSE: Sorry, I am puzzled.

4 THE CHAIRMAN: Well move on, I will try and phrase it in another way if I need to.

5 MISS ROSE: Can I come to recipient-led two hour porting, because there is an important point to
6 make here which is that although Ofcom introduces it as one decision the recipient-led part
7 of it is a lot more important than the two hour part of it in terms of its effects. The crucial
8 part of this decision is the movement to recipient-led porting, and this is the point at which
9 you have my point that the United Kingdom is virtually alone in the world in maintaining a
10 system of donor-led porting. If I could just consider the implications of donor-led porting
11 for a moment, because we do submit that donor-led porting distorts competition, impedes
12 new entry and is bad for consumers. There has been considerable debate over whether
13 retention activity, save activity is good or bad. In my submission, it is quite clear that
14 retention activity distorts competition. The position is that if somebody wishes to leave
15 their network in the United Kingdom they first have to go to the network, tell them they
16 want to leave and get the authorisation code. The incumbent network knows everything
17 about that customer, because they have been with them for a time, they know how valuable
18 their business is – they know how many calls they make and how many they receive – and
19 how useful they are to keep; they can therefore calibrate exactly how much they are going
20 to offer them to incentivise them to stay – whether it is a cut price phone or a better tariff.
21 In the short term that is great for that individual consumer, but what is its effect on the
22 market? The effect is that for the new entrant who has to gain all their customers from the
23 incumbent networks they are placed at a serious disadvantage because the incumbent
24 network is basically vetting everybody who wants to port their number and making efforts
25 to keep the plum people, and letting out only the ones that they are not bothered about, the
26 less profitable customers, clearly placing the new entrant at a serious disadvantage in
27 breaking into the market, and of course, generally speaking placing a new entrant at a
28 disadvantage because the donor network gets the opportunity to retain the customer every
29 time, the customer wants to port their number.

30 In the short term that may mean that those individual customers get a better deal, but what it
31 means in the longer term is that it is harder for new entrants to enter the market, that means
32 there is less intense competition, that means that the incumbent's networks can keep their
33 prices higher overall because there is less competition.

1 If you have a situation in which people are switching and porting more freely everybody
2 brings their prices down, everybody has an incentive to improve their customer service
3 because it is harder to keep their customers. That is why we submit that you cannot
4 rationally say that save activity associated with donor-led porting is good for competition. If
5 you have recipient-led porting the control is with the customer, because of course it is still
6 open to the customer to decide that they want to play the two networks off against each
7 other. If the customer gets offered a good tariff by one network they can still go to their
8 existing network provider, phone them up and say “I have just been offered a great deal, can
9 you better it”, the control is with the customer, the control is not with the incumbent
10 network.

11 We submit that O2’s internal Powerpoint presentation is highly revealing on this issue. It is
12 in Volume 2, behind Mr. Wardle’s statement at p.16 of the attachment at Tab 11. Here we
13 see O2’s internal thinking about the pros and cons of a move to recipient-led porting. We
14 see two options considered on p.16. The first is,

15 “Ofcom does not define the ‘To Be’ solution, but two possible outcomes are
16 envisaged, the first is a port lead time of 1 working day or less but remains donor
17 driven”.

18 So, this is the situation where you keep donor-led porting. As you can see, the first listed
19 pro is ‘Retention opportunity remains as process is donor-driven’. Then, when you go
20 down to the second option,

21 “Ofcom does not define the ‘To Be’ solution but 2 possible outcomes are
22 envisaged, the second is a port lead time of 1 working day or less but becomes
23 recipient driven”.

24 The first of the cons listed is,

25 “Massive strategic change, i.e. no retention opportunity!”

26 In my submission there is no doubt what the concern is here. O2’s concern is not with the
27 administrative costs of moving from a donor to a recipient-led system. Their concern is the
28 effect on their ability to keep their customers. It is a competitive distortion. That is really
29 what this is about.

30 A number of alleged disadvantages of moving to recipient-led porting have been suggested.
31 The first is the risk of slamming. We submit that is quite an odd proposition because, in
32 fact, the evidence is to the contrary. The evidence that this Tribunal has heard is that in
33 Ireland, which has a recipient-led porting system with a two hour maximum port lead-time,
34 there is no problem with slamming. In the United Kingdom, which has a donor-led porting

1 system with a five-day maximum, there is a problem with slamming. So, what we can say
2 is that whatever causes slamming, it is not recipient-led porting, because the one country in
3 the world that has not got it has got a slamming problem.

4 In any event, the answer to slamming is to have a proper authentication process.

5 There is no reason why that should be expensive or difficult to operate. It operates fine
6 everywhere else.

7 The second allegation was that there was a risk of fraud on the old network. This is the
8 point that has been to and fro on a number of occasions. In my submission it really is simply
9 misconceived because what we are talking about is the right of the customer to keep their
10 number - that is all - just the right to have their own number which they can move to
11 different contracts. It has nothing whatever to do with their contractual relationship with
12 their old network. That remains. Just as it is under the donor system, so under the
13 recipient-led system if they are in breach of contract, if they owe money, normal legal
14 processes apply.

15 Now, it has been suggested that in some way the donor network is at a disadvantage if they
16 cannot intervene at the moment of port. With great respect, it is very hard to see why
17 because donor networks are not allowed to stop people from porting their numbers on the
18 basis that they are in breach of contract. They are not allowed to do that. So, the donor
19 network, in either scenario, knows who the customer is; knows what their 'phone number is
20 *ex hypothesi*, and knows where they live. So, in either event they can serve proceedings on
21 them or ask them to pay up. What difference is there unless improper attempts were going
22 to be made to stop somebody from porting on the basis that money was owed?

23 What, in my submission, is remarkable is the sort of evidence that we saw at para. 33 of Mr.
24 Suthern's statement. Can we turn that up in Volume 2, at p.7, para. 33. He says,

25 he change to recipient-led porting is a major change of the existing IT systems in
26 Retail and Provisioning and creates a host of new challenges that have not even
27 been considered by Ofcom ----“

28 With great respect, you have to ask the question: How can that be being said in a situation
29 where Vodafone is a very large multi-national company operating in many jurisdictions
30 where recipient-led porting is the norm? There is not a host of new challenges at all. It is
31 the United Kingdom which is out on a limb here. Everybody knows how to deal with
32 recipient-led porting because they all do it. When questioned about that, there was just a
33 brick wall, saying, “Well, I don't know anything about anywhere else”. With great respect,
34 if he does not, why is he giving this evidence in the first place?

1 One further point, going back to costs of implementing mobile to switched -- The notes that
2 you were handed yesterday by Miss Bacon said that O2 would keep call trap for mobile-to-
3 mobile calls and upgrade it to do direct routing.

4 THE CHAIRMAN: Let us have a look at the note because I can see Miss Bacon becoming
5 excitable. Forgive me for putting that way. This was the one-page note that was put in
6 yesterday. Call Trap Implementation.

7 MISS ROSE: Yes. At the bottom of that page, they say, "However it ultimately designs its
8 systems to comply with ----"

9 THE CHAIRMAN: Is there a starting point? You have just told us that O2 would keep call trap,
10 but they have not yet implemented call trap according to the note?

11 MISS ROSE: No, that is true. They say that when it does implement it, it will interrogate the
12 HLR for every call to a mobile number, and it also holds details of the numbers that are
13 ported into O2, and so forth, and so forth. Then they say what they will do from September
14 2009, which is to continue to interrogate the HLR in respect of all calls to mobile numbers
15 in the first stage in the look-up. Then, interrogate the CDB. Then, as far as O2 is
16 concerned,

17 "However it ultimately designs its systems to comply with the requirement for
18 direct routing, the obligation to use the ACQ CDB would not remove the call trap
19 layer. It would simply add another look-up layer."

20 So, they would retain call trap and add on. The point that is being made is that if that is so,
21 it is hard to see how they would have the same mobile to fixed costs of Vodafone, who are
22 saying that they would bin their existing call trap technology and introduce the INAP
23 system for everything. It is perhaps a minor point.

24 So, that is recipient-led porting.

25 Two hour porting. Can I hand up a note which explains the process in Ireland - the two
26 hour porting process in Ireland? (Same handed) This is a post-pay customer, a customer
27 with a contract. The customer walks into a shop and requests service and port. A
28 possession check or calling line identification check to confirm ownership. Essentially you
29 call the mobile or get them to call you from their mobile and check whether it is the right
30 number. They are in the shop and you can see if they are calling you from the right
31 number. Then a copy of the donor bill is collected. The customer authorisation form is filled
32 in by the customer. This includes the terms and conditions of porting, and information about
33 the request, and is signed by the customer. The name on the bill should be the same as the
34 person signing the customer authorisation form. The point is made that this form may be

1 sent in the post; it may be faxed; it may be done in the shop, or it could be done on-line.
2 Then the port request is submitted to the donor and at that point the two hour service level
3 agreement starts. So it is from that point of submission of the porting request to the donor
4 that the two hours begins. Then the donor checks the port request against industry agreed
5 criteria to determine whether the customer is allowed to port. The donor responds to
6 recipient accepting or rejecting the port request.

7 THE CHAIRMAN: Can I just pause at that point. I think you told me earlier, and have told me
8 repeatedly to try and correct a misconception that I have repeated, that in the United
9 Kingdom the donor cannot reject the porting request – right? Have I got that finally?

10 MISS ROSE: On grounds of breach of contract?

11 THE CHAIRMAN: On grounds of breach of contract. Is the situation the same in Ireland or can
12 the donor in Ireland reject the request on grounds of breach of contract? That may make a
13 very substantial difference to the comparison. If you look at para.2(2) donor response to
14 recipient either accepting or rejecting the port request, how can the donor reject the port
15 request?

16 MISS ROSE: Sir, we are just getting some instructions.

17 THE CHAIRMAN: Someone is coming from your left.

18 MISS ROSE: (After a pause) Nothing to do with the contract. It would be something like not in
19 the right number range. They cannot reject it on the basis of money owed or bad debts.

20 THE CHAIRMAN: All right.

21 MISS ROSE: Then the number activates on the network, update the routing information on the
22 central database, central database notifies the change to all operators.

23 THE CHAIRMAN: I must say, I am puzzled by the answer you have just given me. Surely,
24 whether it was in the right number range or not would be one of the things that would be
25 self-evident, to use a phrase that has been bandied about in this case, on walking into the
26 shop. We do need to be certain about this.

27 MISS ROSE: Could you give me five minutes and I will get some proper instructions?

28 THE CHAIRMAN: Yes, let us have a five minute break and perhaps the parties could think
29 about the timetable, because it is beginning to look to me as though we are going into a
30 fourth day.

31 (Short break)

32 THE CHAIRMAN: Yes, Miss Rose?

33 MISS ROSE: (no microphone) I have been instructed that the main reason that the port would
34 not be authorised would be some kind of a mismatch between what is on the form and the

1 records the donor network has, for example, if ... has written that it was post-paid, but the
2 record said it was (microphone on) prepay, or if it was prepay registered or prepay
3 unregistered, something of that nature. It is also the case that the port would not be
4 authorised if the account was suspended, so it is important to say that there are some
5 circumstances where if there was an allegation of fraud or legal proceedings that they
6 could deny the port if the account was suspended, but they specifically cannot deny the
7 port simply because of unpaid bills.

8 THE CHAIRMAN: Thank you very much, that is very helpful.

9 MISS ROSE: T-Mobile relied on a point arising out of H3G's SMP appeal, this is in the
10 authorities' bundle volume 4, tab 17, para. 260. In my submission this is addressing a
11 completely different issue than we are addressing in this appeal. The question here was
12 whether the problems with the mobile number portability system in the UK was the
13 reason, or the principle reason why H3G had not grown its market share as quickly as it
14 had done, and that of course is not the point we are seeking to make in this proceeding.
15 We are simply making the point that there are various features of the mobile number
16 portability system that cause disadvantages to new entrants vis-à-vis the incumbents,
17 which is a different point.

18 You will also note that in fact the finding at the end of para.260 is:

19 "Mobile number portability may at most be a contributory factor towards the lack
20 of customers prepared to switch to H3G but certainly does not play the role that
21 H3G has claimed for it in these proceedings."

22 So in fact there is acceptance that it may be a contributory factor. That takes me to the
23 question of the appropriate relief if the Tribunal were minded to allow all or any part of
24 this appeal. The first submission that we would make is that we would invite the Tribunal
25 to produce a decision quickly. This is a situation in which, in my submission, any delay is
26 likely to be very damaging because if the Tribunal decides to remit all or any part of the
27 decision to Ofcom there will have to be a further consultation and a further decision, and
28 if the result of that is the same conclusion that it is in the public interest to introduce this
29 system there will inevitably be delay with consequential adverse effects, and we submit
30 therefore that it is important, whatever the decision is that it is produced as quickly as
31 possible.

32 The second point is that the Tribunal, of course, has a wide discretion under s.195 of the
33 2003 Act in relation to the form of relief. Essentially the relief that the Tribunal would
34 grant would be to remit the matter back to Ofcom, and what s.195 says is: "With such

1 directions as the Tribunal thinks appropriate as to what decision the decision maker
2 should take, or what action the decision maker should take”, so you have a very wide
3 discretion as to what is the appropriate direction to give to Ofcom.

4 In my submission, there is a clear distinction in this case between the situation in relation
5 to mobile to mobile direct routing and the situation in relation to mobile to fixed direct
6 routing. So far as mobile to mobile direct routing is concerned, we know first of all three
7 out of the five MNOs have already implemented call trap, two are in the process of doing
8 so. The MNOs are actively engaged in UK porting, in sorting out the database for the end
9 of this year. The evidence of Mr. Baxter on which he was not cross-examined was that
10 that timetable was on track. Now, T-Mobile say: “Mr. Harrison’s evidence is that it is not
11 on track”. But in any event the parties are actively dealing with the database. You have
12 my submission, again based on the unchallenged evidence of Mr. Baxter, that extension
13 from call trap to mobile to mobile is, relatively speaking, a modest extension. You also
14 have my submission about the clear consumer interest in terms of the problem of the
15 dependence of the consumer on their old network, or when they think they have ported
16 their number.

17 In my submission, whatever view you take of the quality of Ofcom’s decision in this case
18 and the quality of its cost benefits analysis, there is no good reason why the mobile to
19 mobile direct routing should not proceed and, in my submission, the evidence you have
20 heard demonstrates that it is strongly in the public interest that it should proceed. That
21 can be done regardless of what decision you make about the mobile to fixed solution.
22 Now, of course BT’s objections are solely directed to the mobile to fixed solution and
23 Vodafone’s objections and, in particular, its complaints about costs, are principally
24 directed to the mobile to fixed solution.

25 There is also, of course, a larger window of opportunity for further consultation and a
26 further decision without necessarily imminent damage to the public interest because the
27 timescale is in any event longer to 2012. So, in my submission, exercising your judgment
28 on the merits as of course you are constrained to do, there is a significant difference
29 between the judgment to be made in relation to mobile to mobile, and the judgment to be
30 made in relation to mobile to fixed.

31 Similarly, in relation to recipient-led porting, in my submission the evidence in favour of
32 recipient-led porting again overwhelming.

33 Unless I can be of any further assistance, those are my submissions.

1 MR. PICKFORD: There are two points of factual clarification arising out of the papers that were
2 handed up by Miss Rose. The first of those is the one on call trap says that T-Mobile has
3 implemented call trap. We have tried but we have not implemented call trap yet, so we
4 have not succeeded in doing that. The other point of clarification is on the process in
5 Ireland our belief is that there is a port reject code for bad debt in Ireland. Thank you.

6 MR. ROBERTSON: We have one point of clarification after what Miss Rose has said and I also
7 have to deal with the question that Professor Stoneman asked me before lunch.

8 THE CHAIRMAN: Yes.

9 MR. ROBERTSON: The point of clarification to Miss Rose, she said that BT's only interest is
10 fixed to mobile, obviously it is not, it is also fixed-to-fixed.

11 The answer to the question that Professor Stoneman asked, I think the question probably
12 arises out of lack of clarity in my submissions. You were asking does BT carry out a cost
13 benefit analysis at each step of carrying out an infrastructure project and the answer to that
14 is "no", although you might have stages. You might have phase 1, and then at phase 2 you
15 might revisit the business case as it is called within BT. The reason I say the question arises
16 out of lack of clarity in my submissions is I said BT argued for a step by step approach, and
17 the reason why we did that – I put this under my first issue – my issue was that BT has not
18 been obstructive and foot-dragging. What we did say was that the process was premature,
19 and what was premature was setting a deadline of December 2012. We said, "Don't set the
20 deadline. Proceed on a step-by-step basis as things roll out, but don't tie us to meeting that
21 deadline". That is why I made the submission that Ofcom should be proceeding on a step-
22 by-step basis.

23 Standing back and looking at the cost benefit analysis that Ofcom did, our submissions are
24 in support of Vodafone's - that costs in relation to onward routing have been ignored in
25 their cost benefit analysis, and that is why we say the cost benefit analysis is deficient.

26 PROFESSOR STONEMAN: That clarifies it, yes.

27 THE CHAIRMAN: Thank you. Mr. Saini?

28 MR. SAINI: Sir, we have had a brief discussion about timing. I think I will use half an hour.

29 Mr. Ward, as I understand it, needs an hour. We are in the Tribunal's hands essentially. We
30 are going to try and adhere to that. Alternatively, if the Tribunal wishes to, we can
31 reconvene another day. Obviously, there are a large number of people whose diaries would
32 have to be looked at, but I would have thought that if we do convene another day, it will
33 probably only be myself and Mr. Ward who need to be there, rather than the masses behind
34 us. But, we could actually try and finish today if the Tribunal would like to.

1 THE CHAIRMAN: Our preference would be try to finish today, if we can. I do not want to put
2 pressure on anyone but if we were to aim for five o'clock -- I think the factual issues are
3 pretty clearly before the Tribunal now. That might be a decent target.

4 MISS ROSE: In advance, can I apologise for the fact that Mr. Kennelly has to catch a 'plane and
5 may have to leave before five. There is no discourtesy intended.

6 THE CHAIRMAN: Do you have a mobile 'phone with an Irish telephone number?

7 MR. KENNELLY: I do.

8 THE CHAIRMAN: I thought you might have. Go when it is convenient, Mr. Kennelly. We shall
9 miss you, but we shall not be offended.

10 MR. SAINI: Sir, can I deal with one point first of all on yesterday's transcript? This arises in
11 relation to Mr. Roche's evidence. It is in connection with the table. The Tribunal will recall
12 the table that indicated the 2007 figures for ported-in and ported-out volumes. In
13 yesterday's transcript Mr. Ward, in chief, asked Mr. Roche a question about whether or not
14 Vodafone were net gainers or losers, as far as donor credit charges are concerned and he
15 said that they were net losers, but one sees that the question and the answer just does not
16 appear on the transcript for some reason.

17 THE CHAIRMAN: Let me explain. It was not the transcript writers' fault. The microphone was
18 not switched on.

19 MR. SAINI: There is slightly more substance in that, apart from the correction of the transcript -
20 and Mr. Ward, I am sure, will explain this when he gives his submissions -- Just looking at
21 the 2007 schedule on its own and doing a mathematical calculation, it looks like Vodafone
22 were net gainers there. There may be an answer to that. But, I do not want the Tribunal to
23 go away without that issue being resolved. I doubt it is going to be a matter for controversy.

24 MR. WARD: Can I just explain very briefly and very broadly, and if more detail is needed I will
25 get it from those behind me? The answer is that they are net losers overall when you look at
26 the allocation of donor conveyance charge between incoming and outgoing calls.
27 Moreover, even when you adjust for the fact that there are disparities between termination
28 rates as between different networks, the answer is that when you do all of the sums
29 Vodafone ends up worse off as a result. I am sorry - that is very broad brush. If more detail
30 is needed, we can provide it.

31 THE CHAIRMAN: I have a short note which indicates that the answer is summarised as, "No".

32 MR. SAINI: Yes, that is what I understood. But, I think Mr. Ward's clarification is helpful
33 because I think it is including general mobile call termination charges. On the pure question
34 of DCC in and DCC out, the picture that one sees on the 2007 schedule suggests that there

1 is a net gain, and Mr. Ward's clarification indicates that if one goes beyond that and looks at
2 the global picture, there is a net loss. So, one can put that transcript away.

3 I am going to try and deal with the interveners' submissions, starting first of all with BT and
4 working back from those, dealing first of all with the most recent submission.

5 As far as BT is concerned, there is a point of law. It may be an important point of law for
6 the practice of this Tribunal. Our position is that an intervener cannot intervene in
7 proceedings and advance grounds, or facts and matters, in support of the intervention, or in
8 support of the appellant, which are not at all foreshadowed in any way in the actual grounds
9 of appeal. Mr. Robertson has sought to criticise Ofcom for not dealing with the points made
10 in his intervention. That was for a simple reason - that they bear no relation at all to the
11 grounds of appeal.

12 Taking it in stages, when the Tribunal decides an appeal under s.195(2) -- It may be
13 worthwhile having a look at that.

14 "The Tribunal shall decide the appeal on the merits and by reference to the
15 grounds of appeal set out in the notice of appeal".

16 Now, very helpfully in the notice of appeal in this case there is a section marked 'Grounds
17 of Appeal' and one sees that if one goes in Bundle 1, starting at p.67 where there are set out
18 exhaustively the grounds of appeal, beginning at para. 125 and going on for a few pages.

19 What the drafter has helpfully done here, and it is the form one commonly sees docked in a
20 notice of appeal, is that there is identification of a form of error - a legal error - and then an
21 expansion of the facts and matters which are relied upon in support of the submission that
22 there was a legal error. I have no complaint about the fact that the other interveners have
23 sought to expand upon these grounds. But, BT's statement of intervention bears absolutely
24 no relation to these grounds. It raises a completely unrelated point. Now, I am sure out of
25 considerations of timing Mr. Robertson has not been through those specific complaints with
26 you. I am not criticising him for that. But, the Tribunal will no doubt in its own time look at
27 the specific complaints made, and one does not see any hint of them anywhere.

28 THE CHAIRMAN: What is the significance of the word 'and' in s.195(2)?

29 MR. SAINI: I believe it is no more than saying that you cannot allow an appeal on the merits
30 other than on the bases that are set out in the grounds of appeal.

31 THE CHAIRMAN: Does it? If what you are contending -- I am just attempting to prod your
32 submission, if I may, Mr. Saini. Forgive me for taking up time. But, if the section read,
33 "The Tribunal shall decide the appeal on the merits by reference to the grounds of appeal set
34 out in the notice of appeal" without the word 'and', would that not be the sort of provision

1 that meets your submission? Doesn't the word 'and' mean that it is open to the Tribunal to
2 decide the appeal on the merits **and** by reference -- in other words, including reference to
3 the grounds of appeal mandatorily.

4 MR. SAINI: Sir, there would be a very dangerous consequence if that were correct. I would
5 invite the Tribunal, just for its own practice, to avoid that consequence. There are very
6 strict limits for bringing an appeal to this Tribunal.

7 THE CHAIRMAN: Supposing this Tribunal habitually allows interventions as, for example, does
8 the Administrative Court in certain types of proceedings. It is an inevitable consequence of
9 allowing interventions that an intervener might produce an entirely novel point. One can
10 think of the *Pinochet* case, as a very good example, where some novel points were
11 introduced by interveners. Does s.195(2) not allow for exactly that situation?

12 MR. SAINI: No, sir, in the Administrative Court if that kind of point was going to be raised – in
13 other words, over and above what one would find in a claim form, it would need to be
14 pleaded and the person would have had to raise that point in time. You cannot just argue
15 any old point. I need to go back to my point about timing. Let us assume in this case that
16 BT had some burning complaint and they decided for whatever reason to allow the time for
17 making their appeal to pass and then another MNO or an FNO issues an appeal, it just
18 seems to be wrong in principle that you can piggy-back on that appeal and raise something
19 which you should have raised through the front door in time. That is exactly what has
20 happened here. It is going to make a mockery of the time limits if the course of action is
21 acceptable.

22 MR. ROBERTSON: If I can just assist as Mr. Saini is on the point now, could I draw the
23 Tribunal's attention to para.128 of the Notice of Appeal. Ofcom failed to collate all the
24 evidence which it required in order to undertake a well-informed cost benefit analysis. That
25 is our case.

26 MR. SAINI: My Lord, if I give you an example. There is a simple answer to what my friend
27 says. Let us assume that we had an appeal in the Court of Appeal where someone
28 complained a judge below had not made his decision by reference to all of the evidence
29 adduced before him. That would not be an acceptable basis for an appeal. The Court of
30 Appeal would want us to say which particular piece of evidence was ignored or not taken
31 into account. We have very helpfully set out expansively in this Notice of Appeal the
32 particular matters which were said to be relevant and which were ignored. One cannot flip
33 a different appeal in under the guise of what is in para.128 because it renders this whole
34 process meaningless. Sir, that is the point of law that is raised.

1 The second point on which I am afraid Mr. Robertson was rather unfair to me, and I do not
2 make a complaint about that, he says that the standard operators point never arose, no one
3 pleaded it, no one ever mentioned it, and I extracted it from Mr. Baxter in cross-
4 examination. With respect to Mr. Robertson, the point was fairly and squarely identified in
5 our skeleton argument. Could I ask you, sir, to go to p.27, para.42, which starts at p.26 and
6 it carries on over to p.27. I would ask you look at footnote 28. There I referred, number
7 one, to the fact that transit operators can be used to deal with these extra costs; and number
8 two, I expressly referred to General Condition 18.5. So it is quite unfair and simply wrong
9 for Mr. Robertson to suggest that this was introduced somehow very late in the day through
10 some form of irregular cross-examination of Mr. Baxter. I made clear when I made
11 submissions yesterday, the reason it is raised in the skeleton is because the first time the
12 point ever arose was in the Reply evidence submitted by Vodafone. So they are the ones
13 who started the hare running. I dealt with it fairly and squarely some weeks ago in the
14 skeleton. This is not a late invention, it has always been there.

15 The third point that is made by Mr. Robertson is that somehow his clients feel hurt by the
16 fact that we have suggested that this is an attempt to derail the process. I am not upset by
17 what Mr. Robertson says about advocates' licence. It is the position. BT did assist in the
18 consultation process, but they are part of the derailing camp. It is as simple as that.

19 THE CHAIRMAN: It is just a cause and effect relationship.

20 MR. SAINI: Absolutely. Can I turn then to the question of costs, and I am trying to deal, without
21 separating what my learned friends said, I am trying to deal with their points collectively
22 here. Mr. Harrison's evidence (I will not ask you to turn it up) is in bundle 2, tab D2, and
23 there is a table there which I believe Miss Rose took the Tribunal to and there was that
24 footnote over which there was some debate. I am not arguing with Miss Rose's argument,
25 but I simply want to make a basic point of fact which is that it appears from Mr. Harrison's
26 evidence that these figures, which amount of £48.6 million were ascertainable, readily
27 available, as far as his employers were concerned. He did not say, "These are things I have
28 only just discovered now". We are back in the position where there were some very, very
29 valuable pieces of information which were simply not disclosed to Ofcom. I made the
30 position clear this morning and I am not suggesting there is anything improper or there is
31 any form of bad faith in that, but Ofcom relies upon what it is told. If Mr. Harrison knew
32 that these costs that T-Mobile were going to incur were going to be so substantial and that
33 call trap was not an appropriate analogy they should have simply said so. It is exactly the
34 same as Mr. Sutherns' evidence in relation to the £20 million per switch.

1 There is also a point of error in Mr. Pickford's submissions. He is suggesting, you will
2 recall, that I said that there was a substantial amount of headroom if one inflates the cost by
3 70 per cent. He was suggesting that Ofcom only allowed an inflation of a fixed solution
4 cost by 70 per cent. It was all of the costs by 70 per cent that could be inflated. That was
5 not my suggestion. I was saying that substantial parts of his figure that he had to play came
6 from fixed and he was giving it all to mobile. All of it came from fixed on the basis of the
7 submission that there is no evidence before the court that the fixed costs of £60 million odd
8 are wrong.

9 Sir, if I can turn to the question of why Ofcom made their Decision, and I can be very, very
10 brief on this. There is nothing to be gained by debating which was the primary reason and
11 which was the secondary reason. The Decision is the Decision. It is not for me to say that
12 it says anything other than what it says. This is an English language document which the
13 Tribunal can read. It is quite clear, sir, from the very first paragraph of the Decision, and it
14 is important to look at this, 1.1, which factors motivated the Decision. One does not need to
15 go into archaeological exercise, as Miss Bacon did, as to what happened over the last few
16 years. It is absolutely clear. We are making these changes, para.1.1, to protect customers
17 from problems arising from the way calls to ported fixed and mobile numbers are routed,
18 and to make the process of porting mobile numbers easier for consumers. If Miss Bacon
19 was suggesting that this decision was made purely on the basis of network failure, whatever
20 the cost, that is not the position.

21 THE CHAIRMAN: I do not think she was suggesting that.

22 MR. SAINI: The position is that because of developments between 2004 and now it became clear
23 to Ofcom that achieving the purpose of network security or protecting customers, that that
24 could be achieved at a cost which was acceptable, in fact with a net benefit. That is what
25 fundamentally changed in 2004 and 2007, therefore what is happening now is that this Rolls
26 Royce solution – the debate we had yesterday – this is not a Rolls Royce solution, this is a
27 very, very cheap solution given the benefit that is going to be achieved, and I would not for
28 one moment want to divorce these two points, the point about network failure and costs and
29 that little should be debated about saying primary or secondary, they are both essential
30 factors.

31 If I can turn to the question of slamming, which Miss Bacon relied on as well. Slamming is
32 a very odd point because as I understand the submission it comes to this, that MNOs and
33 MNVOs undertake improper practices, seducing customers improperly. The submission
34 amounts to this, that somehow because we, some of these interveners and our agents may

1 do naughty things which are contrary to the rules, and there is going to be perhaps a greater
2 propensity for these naughty things to happen in the future that is a very, very important
3 factor. It is a thoroughly unmeritorious position. The fact is there exists a regulatory
4 scheme already to deal with these problems, and there is no reason why that regulatory
5 scheme cannot carry on working.

6 It is also the case that slamming in fact is primarily a problem in fixed networks rather than
7 mobile networks.

8 Miss Rose has already made the point so far as the timetable is concerned. It is clear from
9 Mr. Baxter's evidence that the timetable for achievement of the first stage looks like it is
10 going to be adhered to and therefore it is not the case that somehow that was an
11 unreasonable timetable.

12 If I may check my notes – I am conscious of the time and I want to try and use it wisely.

13 THE CHAIRMAN: We are grateful to you, Mr. Saini for this approach.

14 MR. SAINI: There were certain other points I was going to make that Miss Rose has already
15 dealt with. (After a pause) Sir, I do not believe there is anything I can usefully add.

16 THE CHAIRMAN: Perhaps I should say that if, because of any sense of time pressure there are –
17 and I emphasise the word “in short” – in capital letters, underlined – “short” additional
18 reply points that counsel wishes to submit within the next three to four days then they
19 certainly would not be rejected as long as they are disclosed to everyone else.

20 MR. SAINI: Thank you very much.

21 THE CHAIRMAN: Thank you, Mr. Saini. Yes, Mr. Ward.

22 MR. WARD: Sir, I will endeavour to be as quick as I properly can be, not least because I am
23 able to gratefully accept the submissions of all of my learned friends, in particular Mr.
24 Pickford, as well as Miss Demetriou. For that reason I am going to be very brief on the
25 question of the legal test.

26 Mr. Saini made submissions about this yesterday, which we fundamentally disagree with,
27 but for precisely the reasons which Mr. Pickford gave, so if I may I will simply leave it
28 there, adding only this, that appeal to new wholly unquantified factors cannot save a cost
29 benefit analysis of quantified factors. That was, in truth, the core theme of Miss Rose's
30 submissions, all sorts of unquantified things were brought to bear in an effort to save the
31 cost benefit analysis. They cannot help, precisely because they were never quantified, not
32 by Ofcom, not by H3G.

33 The second point I was going to deal with, again I will deal with very quickly, Mr. Saini
34 tried to make an impossible task for Vodafone by framing what he said was a point of

1 principle which was, in truth, entirely spurious. He said (transcript reference is Day 1, p.24,
2 line 21) the question is: can Ofcom, or any other sectoral regulator only ever require
3 industry to take certain actions when the regulator has itself specifically costed a technical
4 specification. Mr. Ward says: “Yes, it has to”. Now, we do not say that at all. What we
5 said is that on the facts of this particular case it was the only sensible way to proceed, in
6 particular because the question was whether to replace a system which Ofcom itself said
7 was effective and worked, and the particular question was: would the costs of the new
8 solution outweigh the benefits?

9 If I can just deal with Professor Stoneman’s question to Mr. Robertson. What does that
10 mean in practice? I am going to take a much narrower approach to the answer than that
11 which Mr. Robertson did, which was really about practice within BT as a whole. In this
12 case what happened was that Ofcom put up a cost benefit analysis that we have
13 characterised as crude and unacceptable. The answer it got back from the industry, not just
14 from Vodafone, we now know from the whole industry, was: “We can’t help with this
15 because there is no technical specification”. I am obviously going to come back to that
16 point. The answer then was not “Just let’s blunder on regardless”, the answer was: “Well
17 there must be a problem here”. In other words, the consultation response has told us that on
18 this occasion this approach does not work. In truth what Ofcom did was ignore the
19 consultation response and say: “Well if no one else has any figures we will just stick with
20 these.” Just for your note – I will not go there, to save time – Mr. Roche, in his first witness
21 statement, at para.56 gives an indication of what he would regard as a more typical general
22 approach. But, as I said, I do not need that broader submission in order to succeed.
23 Of course, the core of our argument, in a sense, was the attempt to cost the proposal without
24 any technical specification was a resounding failure, because that is what Sagentia tried to
25 do. Sagentia said industry needs Directives to agree a common approach so that the costs
26 can be estimated. I have, of course, taken you to that before but again it is tab 8, p.69.
27 Another thing that we learned, really through Mr. Saini’s submissions was that it was not
28 only Vodafone saying they could not do this, he pointed to the list of interviewees – you
29 will remember there is a long list of organisations that Sagentia had spoken to – and
30 obviously they could not help either. What we were left with, therefore, was an analysis
31 that was done by the most indirect of means and strikingly neither Mr. Saini, nor even Miss
32 Rose, made any attempt at all to defend the substance of Sagentia’s analysis – none
33 whatsoever. We say therefore you really are entitled to conclude that it is completely
34 unsatisfactory.

1 The main thrust really of Mr. Saini's defence has been to say it is all your fault, Vodafone,
2 for not giving us the figures, and our answer is that we could not give useful figures, and I
3 would like to give you – again for your note, if I may – some references in our consultation
4 responses where we said that. It is not all of them but it is some of them. Starting with the
5 first consultation response, which is tab 9, could I direct you to p.3, paras. 12 and 13, and
6 accompanying footnotes, p. 6, para.26. Then in Vodafone's second response, tab 21. p.3,
7 para.10, and p.12 at paras. 43 to 46. One of the things Mr. Saini actually said - and again it
8 is on the transcript - is: "What Ofcom met was a brick wall"- a brick wall from Vodafone.
9 That is wholly unfair. I would invite you in the course of your deliberation to look at the
10 sheer level of detail of Vodafone's consultation responses. In fairness to Mr. Saini, he did
11 acknowledge in his argument that many of Vodafone's points had been accepted. So, on
12 any view this was a detailed and constructive engagement.

13 The real complaint is that the figure given by Mr. Sutherns in his evidence did not appear in
14 any consultation document. We have four responses briefly, if I may, to that argument.
15 Firstly, Ofcom is the expert regulator. It is Ofcom's job to satisfy itself that its impact
16 assessment is sufficient, and that its statutory duties are discharged. Vodafone is a mere
17 consultee. It was not obliged to respond to the consultation process at all. Secondly, the
18 truth is that Mr. Saini did come close to suggesting that we had acted to deliberately
19 suppress the information. He has clearly disavowed that suggestion. We are grateful for
20 that. But, then what? What is it that Vodafone and the others are said to have done? Is it
21 just a case of incompetence or negligence or just sort of benign oversight on their part? We
22 really do not know. But, here I echo a point that Miss Demetriou made: according to
23 Ofcom we wanted to do everything possible to de-rail the Decision. That is his case. He has
24 repeated it in his reply. Well, then, why on earth would we not have put this figure forward
25 if we thought it was something that could, or should, be relied upon by Ofcom? Did we
26 want the process to be dragged out and to be in this Tribunal a year or so later? It really
27 beggars belief!

28 The real reason, of course, which was not put forward, can be found from what Mr.
29 Sutherns actually said about it. May I ask you to take up the transcript of Day 1 at p.68? I
30 would like just to read you a few lines from pp.68 and 69 because it puts the figure in
31 context. We start please at l.15 on p.68.

32 "We tried to come up with some scale of estimate because clearly this was a very
33 big change. The problem was the specification is so vague that any number is just
34 plucking a number out of the air. Whatever number we could have quoted would

1 have been open to challenge of either, “You’re quoting an unrealistically large
2 number. Where’s the back-up? Where’s your justification for that number?” or,
3 ‘We’re quoting a number that wouldn’t actually pay for what you need to do’.
4 Even now the specification is still very vague, but over the last six months a great
5 deal of work has gone into tying down what that specification is to the level of at
6 least three-quarters we can start to cost”.

7 Then he mentions the particular figure. Please note the date. I will have to come back to
8 this. It says at l.28 that the figure emerged at the end of September. That matters because it
9 is actually after the consultation process.

10 Over the page at p.69 at l.13 he describes the figure as a ‘guestimate’.

11 “I say a guestimate because that is all it was. It didn’t come from the capacity
12 planning team. It didn’t come from the official forecasting. It didn’t come through
13 Vendor Management. It wasn’t an official figure in any way, which is why I’m
14 somewhat hesitant about quoting it, quite apart from any competitive thing about
15 revealing an actual price, because it was based on a guess”.

16 So, what then would have happened if Vodafone had actually put that figure to Ofcom?
17 That is not actually entirely a matter of speculation because we can see what happened to
18 O2. You will recall Mr. Wardle sent them an e-mail which he was shown, which contained
19 specific figures. Just for the reference and reminder, it is at E12. Could I just ask you
20 briefly to take up the Decision at para. 3.29 at p.21?

21 “On 8th November O2 stated in an e-mail that direct routing of voice calls using a
22 central database would cost X. O2 provided no information to explain or
23 substantiate those assertions”.

24 So, the figure given by Mr. Wardle was rejected out of hand because it was not sufficiently
25 backed up. It is just an obvious point. Clearly the same thing would have happened in
26 respect of the obviously much higher figure of Mr. Sutherns. But, the truth is that, of
27 course, even O2’s figure put Ofcom on notice that something was wrong here because it
28 was miles out of line with Sagentia’s estimate.

29 Mr. Saini gave three other reasons why you should ignore Mr. Sutherns’ evidence. That was
30 really his strategy in dealing with it. All of them were completely new, and first seen in the
31 skeleton argument or in the hearing. First, he said that the extra costs derive from the
32 decisions of the NICC - not from Ofcom. So, it was nothing to do with Ofcom. Ofcom
33 could just wash its hands of those costs. In opening the case I did show you some
34 references in the Decision that Ofcom was well aware that some standard-setting by the

1 NICC would be necessary in light of its action. Just again for convenience, if you look at
2 3.63 and A1.16 - not now, but just for reference - of the Decision. You will also remember
3 that I showed you the NICC's consultation response which also flags up the issue. Another
4 piece of the puzzle has now dropped in which is that Mr. Saini confirmed that Ofcom has an
5 observer on the NICC. So, clearly, all the channels of communication are open here.

6 Ofcom, in a corporate sense at least, knows what is going on in the NICC.

7 So, it is not really some unforeseeable act of God that the standard suddenly comes down
8 out of the blue, unexpectedly and *ex post facto* de-rails the cost benefit analysis. That is
9 really Mr. Saini's case. The truth is that it was a foreseeable consequence of what Ofcom
10 were doing. If it really wanted to assess the costs and benefits, the costs imposed by the
11 necessary technical standards are part of the cost. Of course, the much better approach
12 would have been just to involve the NICC in the process of specification design in the first
13 place. That in fact is the suggestion made by Mr. Roche in para. 26 of his first witness
14 statement.

15 I do want to now correct something that Miss Rose said. She may unintentionally have
16 given you a false impression in the sense that she complained, "Well, why didn't Vodafone
17 do something about this at the time?" The answer is that they did. The transcript reference
18 is from yesterday at p.82, 131 to 33. Mr. Sutherns made absolutely clear that Vodafone
19 opposed the adoption of this standard. He did not say that they went uphill and down dale
20 on the costs implications. But, the NICC is a technical forum. It is not a forum for
21 discussion of costs. I am so sorry. Miss Bacon corrects me. That was in Day 1 - not
22 yesterday.

23 The next reason Mr. Saini gives for ignoring Mr. Sutherns' evidence is he said the
24 benchmark should be what it would cost an efficient operator, and the efficient operator was
25 H3G. That is a simply remarkable assertion to make so late in the day. It plays no part in
26 the Decision and begs a host of unanswered questions. It just does not follow that because
27 H3G's evidence is that it could do this more cheaply than Vodafone, that Vodafone's
28 evidence can be somehow discounted. There are two very obvious points to make here.
29 The first thing is there is a difference in scale between H3G and the operators, and the
30 reference for that is in Mr. Roche's second witness statement, p.32, para.61.1, and in rough
31 terms the position is that H3G's share is that H3G's share is about 4 to 5 per cent and the
32 rest is shared out between the other operators.

33 THE CHAIRMAN: And I think Vodafone is not quite the largest.

1 MR. WARD: Not quite the largest, exactly so, sir. If you read H3G's skeleton there is a lot of
2 indignation about this point. We are not saying they do not matter or that somehow they
3 can be marginalised. It is just that when you are looking particularly at questions of
4 capacity, questions of cost may not be necessarily read across.

5 What H3G actually says in its skeleton is that it has what it calls a modular network
6 architecture, whatever that means, but then it says it has spare capacity. So, in fact, it is
7 carrying spare capacity one way or the other. Vodafone's evidence is that it will need extra
8 capacity. That does not give rise to a *prima facie* case that Vodafone is just clearly
9 inefficient and its experience is somehow irrelevant. In truth, on the face of it, it may even
10 suggest the opposite. Of course, you will anticipate that I am not asking you to decide, not
11 in the least, you do need to. What you can see though is that their experience, H3G's
12 experience, is very different, but that difference does not give any reason to just throw out
13 of the window Vodafone's experience.

14 THE CHAIRMAN: I presume "module network architecture" means a sort of technical version
15 of Lego, does it not?

16 MR. WARD: It sounds a lot like it, sir.

17 THE CHAIRMAN: I presume everyone has a modular network architecture within the network
18 that one is discussing at any given time because one would not design a network without
19 modular network.

20 MR. WARD: Particularly not if one was hoping to grow.

21 THE CHAIRMAN: Just so I am clear that I understand it correctly.

22 MR. WARD: I think we understand sufficiently if we just recognise that they say we have
23 additional capacity. The fact that Vodafone does not does not show some form of
24 incompetence or inefficiency on the part of Vodafone such that would justify you simply
25 brushing aside what Vodafone's experience would be.

26 Let us not forget how few operators are really in the field here. In truth, the market is made
27 up of a relatively small number of actors. Their position may actually differ from each
28 other, but that is the context into which Ofcom is regulating.

29 The next way in which we were told that Mr. Sutherns' evidence could just be discounted
30 was this new point about transit networks. There have been some arguments about what the
31 Decision does or does not say about this, and I will leave the Tribunal to look at that. I
32 adopt Mr. Pickford's submissions. Of course, the point now made by Ofcom is much more
33 ambitious than anything in the Decision, and it is this: the costs and the switches, to quote
34 Mr. Saini, are completely avoided by the use of a transit network. The only evidence we

1 have on that is the oral evidence of Mr. Sutherns and Mr. Baxter. To put it mildly, it is
2 pretty inconclusive. What Mr. Sutherns said was that Vodafone would not want to do this
3 for a number of reasons. One, the really obvious point that the whole exercise is about
4 reducing the use of other networks, not increasing the use of other networks. Vodafone, in
5 particular, which has a fixed line business, faces the absurd suggestion that it should simply
6 trombone out its calls for routing purposes in order to bring them back into its own network.
7 Then he made some points about commercial considerations, which I accept were not other
8 than conjectural. I am quite happy to accept that. He did not really know, because nobody
9 really knows at this point, and the only evidence you have got to set against that is the
10 evidence of Mr. Baxter. In his cross-examination by Mr. Saini he dealt with this. It is
11 worth very briefly looking at what he said because it just does not clarify things, and we are
12 back in the transcript for day two, please. It starts on p.21 for material purposes. The first
13 point is really almost the most important. He says, and it is obvious, at line 4:

14 "I am not familiar with the Vodafone network itself, that's probably my first
15 point."

16 Absolutely, he can speak about H3G's experience. We entirely understand that, but he does
17 not know what goes on at Vodafone.

18 The next thing he says that is important is over the page on p.22. If this happens, he says on
19 the first two lines:

20 "The transit operators will also have to implement the number portability position.
21 Therefore they will build this look up functionality."

22 In other words, they are going to incur some capital costs here presumably if they are going
23 to offer this function. Mr. Saini asks him at line 8, "How much costs?"

24 "I don't know how much that would cost."

25 So he has no idea either. Then at lines 25 to 26 he explains when an operator would or
26 would not be willing to use a transit network:

27 "Typically an operator would have direct interconnect to a destination where there
28 was high traffic volumes and use a transit operator to interconnect to other
29 destinations."

30 The core point here is nobody knows, but whether or not the switching is going to be bought
31 by Vodafone or built by a transit operator or, in a sense, hired by Vodafone from the transit
32 operator who did build it, there are costs. It is not free. It does not make the problem go
33 away. It may be, or may not be, that overall it would be cheaper. We do not know. The

1 Tribunal does not know, Ofcom does not know. It is not in the Decision. It cannot save the
2 cost benefit analysis.

3 I want to just mention very briefly the debate between the Tribunal and Miss Rose about
4 what the evidence really shows in this area, and whether it is supported or not supported.
5 One thing that is important is that Mr. Sutherns' evidence about Vodafone's position was
6 not successfully challenged at all in cross-examination. The strategy has been to tell you it
7 is somehow inadmissible rather than it cannot be trusted. It may or may not be right for
8 others. Vodafone simply does not know. Mr. Baxter has accepted that he can only speak
9 for Hutchison, or he cannot speak for Vodafone. He does not know about Vodafone. We
10 come back to, in a sense, our core complaint which is the lack of figures is in part a product
11 of the lack of specification, and even now the specification has not been resolved. There is
12 all sorts of unchallenged evidence on that.

13 Miss Rose made some sweeping submissions about call trap and said something like, "Call
14 trap is so cheap that you can therefore conclude that this is all a gross over-estimate". The
15 reality is that very different views have been expressed in the evidence about exactly what
16 the costs might be over and above call trap. They are both technical questions and
17 commercial questions, and Miss Rose is just not in a position to simply cut through them
18 with sweeping assertions. Of course, none of the evidence on these questions was
19 effectively challenged, if it was challenged at all. Where we stand is that the whole thing
20 has not really been considered. All Ofcom has done is go on the utterly hopeless Sagentia
21 estimates.

22 Miss Rose also said, "Look at how much benefit there is of call trap", talking about the
23 confidential figure that Mr. Sutherns mentioned. We are not really concerned with that.
24 We are concerned with the benefits of direct routing. Direct routing may or may not
25 involve some form of development of call trap depending on the timescale, and so on and so
26 forth. But that is the question that you are looking at, not whether or not freestanding call
27 trap delivers a benefit to Vodafone.

28 Moving on now, increasingly rapidly, I assure, as we are going through the points.
29 Implementation costs, capex costs for fixed network operators. We made some submissions
30 about the adequacy of Sagentia's estimates in this respect. No answer at all was given on
31 the substance. Mr. Saini made no effort at all to defend it. The only point made somewhere
32 in the paper work is that BT did not complain at the time. I sweep that up in my general
33 point, but actually it is not entirely fair anyway. If I could ask you to look at the back of
34 bundle 2, BT's submission that Mr. Robertson has already shown you, the very last

1 document. This is the first consultation response, and it is tab G3, p.16 of 19, Annex B:
2 “Assessment of cost benefit analysis”, “Risks to costs”. “Costs May Be Higher Than
3 Expected”. Then there is an element of critique of what it is that Sagentia were talking
4 about, which I do not need to take you through. But BT did not say: “Oh, Sagentia, that
5 looks fine to us, nothing to worry about”. It raised a series of worries about it which, as far
6 as we can tell were just ignored.

7 What Mr. Saini said again is well, you just cannot look at this because there is no positive
8 evidence as to what the correct figure is, and our answer to that, like Mr. Pickford, is simply
9 to say: “We do not need to prove the correct figure, we just have to prove that the outcome
10 is in doubt.”

11 If I can move on now to the benefits of direct routing. In his submissions Mr. Saini
12 persistently blurred a very important distinction between the regulated donor conveyance
13 charge and the actual costs of onward routing. We are concerned with the actual costs.
14 Here we had a very simple and short point which was about the changes of the costs over
15 time. We said on our version of events the net present value was reduced by £16 million.
16 The big difference between Vodafone’s version and Ofcom’s version was Ofcom allowed
17 for no change whatsoever for the first four years and, as Professor Stoneman said, that has a
18 powerful effect because the change takes place in the early years before the discount kicks
19 in.

20 But our point is not that we reached different judgments about this, or reasonable people
21 had disagreed, it is that we applied Ofcom’s own model, its own model used to determine
22 call termination charges and the cost of call termination over time. So the key ingredient in
23 this, which is blend between 2G and 3G, how quickly 3G would replace 2G, Vodafone did
24 not make up its own analysis in that regard, it did not exercise judgment about what would
25 happen, it simply applied what the model said. It is of course open to Ofcom to not rely on
26 the model. It is not binding on them in any legal sense, but in fact they did rely on it in part
27 even in this decision. But the real point is what was the reason for them not relying on it?

28 Why have they departed from their own model, and the only answer we have had from Mr.
29 Saini was they made an informed assumption that the costs would not change for four years.
30 We simply ask: informed by what?

31 Volume of calls, volume of traffic – here Mr. Saini’s point was that because Ofcom had
32 been conservative in some respects it did not matter if it was excessively generous in others.
33 You will recall that our key concern was that the trend going forward departed by miles
34 from Vodafone’s actual experience in this area. Our very simple answer to this, which I

1 gave in opening – forgive me for repeating it – is that you just cannot assume that one will
2 cancel out the other, generosity in one respect, conservatism in the other. They may not
3 cancel out – if I can put it this way: two wrongs do not make a right. What they needed to
4 do was assess it properly.

5 I just want to emphasise another point that got a little bit muddled in some of the
6 submissions, which is that the crucial decision is based on the cumulative percentage of
7 traffic to ported numbers. In other words, how much of the overall traffic is ported, and it is
8 put that it is going to rise to 33 per cent by 2018, and that is the key, and it in fact shows a
9 doubling by 2010. But that must not be muddled up with the question of absolute volumes
10 of ported traffic, and again Mr. Saini tended to muddle the two up. Absolute volumes may
11 be rising very steeply but if overall volumes of calls are also rising very steeply, of course,
12 the percentage of ported volumes actually stays the same. So one must be careful to
13 compare like with like.

14 What the evidence shows, which Mr. Roche explained rather more than Ofcom has, is that
15 by 2010 there will in effect be a doubling of the percentage of traffic which is ported, and
16 he says this is completely at odds with our current experience. Of course, Professor
17 Stoneman, you pointed out again, and I think Mr. Saini thought this was a lifeline, it is the
18 early years that matter and maybe what is going to happen by 2018 with a 33 per cent does
19 not matter. But what happens in 2010 matters, because of course the solution only kicks in
20 September 2009, those are the early years. Again, Ofcom may well reasonably conclude
21 that the overall picture is complicated, all we know about is Vodafone; it may not be
22 typical, although we do not know why. If it was going to conclude that it needed to have
23 reasons, and unfortunately it did not.

24 Miss Rose really made the same mistake. She talked about how Mr. Roche’s analysis
25 cannot be right because at least H3G’s volumes are going to grow, but that again is talking
26 about absolute volumes rather than overall percentage of calls that are to ported numbers,
27 which is the basis of Ofcom’s analysis.

28 She then said that you really ought to take into account the effect of recipient-led porting,
29 which she says will massively increase the volumes of ported numbers, but this is, I am
30 afraid, completely question-begging. The decision is premised on the fact that direct routing
31 must be shown to be in place first and only then – only then – do you go on and consider the
32 merits of recipient-led porting, it is just pulling yourself up by the boot straps in the old bar
33 cliché to say “Never mind, we can factor in the recipient-led porting gains in trying to
34 decide whether to do direct routing at all”. Her answer to that was to say that that is what

1 Ofcom should have done, it should have looked at it in the totality and then it would have
2 been able to rely on that. But, of course, that is not what Ofcom did. Miss Rose said that
3 you needed to look at – and I wrote down her words – “the realistic growth of volume of
4 ported minutes as a result of recipient-led porting”. Well, all right, but what is it? There is
5 no quantification at all of that factor before you, so even if it was right in principle, it is just
6 not in evidence before the Tribunal.

7 If it goes back, as we submit that it should, no doubt Hutchison can make that point and
8 maybe even adduce some empirical evidence.

9 That takes me to recipient-led two hour porting, the costs. Mr. Saini admitted that the cost
10 estimate was something put together by Ofcom in-house and that there were no workings
11 for it that he could show you. He again blamed Vodafone for this. He said “Why did you
12 not give us figures?” and that Vodafone failed to co-operate – I think this is where he said
13 that they met a brick wall. That really is not a fair characterisation. You will remember that
14 I showed you the response to the draft s.135 notice, where Vodafone said: “Please do this
15 properly and we will help you”, but I would also like to show you briefly the consultation
16 response where this is dealt with, and that is at tab 21 of the appeal bundle, p.12, and paras.
17 43 to 46, and I do not ask you to take time now reading them rather than just skim reading
18 them. What you will see is that they raise the worry about the cost of an authentication
19 system.

20 Elsewhere in this document, at p.3, para.10 we have made the point that you have to
21 produce a specification if you want us to cost it. So this was not refusing to be helpful, this
22 was saying: “Look, there is a really big issue here that you have not thought about. We
23 cannot really help with it because we do not know what it will cost either.” Of course the
24 unchallenged evidence of Mr. Sutherns - and it is only an explanation of what UK porting
25 are doing, and so it is not surprising that it is unchallenged - is that it is still unclear what the
26 solution will be and what it might cost. We also know from what Mr. Saini said that other
27 operators have been unable to help with this. Miss Demetriou was quite specific about
28 Orange’s position.

29 So, what was the regulator to do? What Mr. Saini said is that the regulator has got to take a
30 view. Well, our submission is that what it should have done is listen to what the industry
31 was saying, and the industry was saying, “We just can’t help here without a specification”.
32 Do not forget that this is all taking place against the background of a mechanism which
33 Ofcom says is an effective mechanism. That is para. 2.7 of the Decision. This matters
34 because there was no urgent need for a change. There was no European deadline bearing

1 down on Ofcom, or anything of the kind. It is understandable if they think it is in the public
2 interest that they want to do it soon - and they would rather do it sooner than later because
3 if they are right, the benefits may as well start accruing as soon as possible. But, there was
4 no real need to just ignore what the industry was saying and charge on obliviously.
5 Just one point of clarification before I leave this. Lord Carlile asked Mr. Saini, “Were
6 Vodafone in breach of s.135 for not answering this notice?” No, because it was a draft
7 notice. It was served in draft, saying, “Do you have any comments?” Comments came back
8 from Vodafone and then, finally, eventually, a notice was served in final form that just said,
9 “Give us whatever existing material you have” and Vodafone complied with it. So, that is
10 why, in truth, the issue of breach could never have arisen.

11 THE CHAIRMAN: So, there was never a s.135 notice as such?

12 MR. WARD: There was, but it asked the much more anodyne question ---- Would it be helpful to
13 go back to the documents?

14 THE CHAIRMAN: I have got you now.

15 MR. WARD: It is in the transcript from Day 1. Now, dealing now very, very briefly with what is
16 left, in the area of benefits from recipient-led two hour porting we are stuck with the
17 assertion that the benefits are self-evident, and that, as Mr. Saini said, one has an intuition as
18 to what might happen. The problem is that this does not begin to grapple with the question
19 of: If there are preferences here, how much weight should be afforded to them, and how
20 important are they as against the detriments? Here we do adopt the submissions of Orange
21 that there is a basket of pros and cons here. Mr. Saini said in his submissions, “Well, the
22 real importance here is in encouraging competition because it serves to enhance a switch
23 opportunity”. But, the problem is that what we come up with here is Ofcom’s own research
24 on the question - the market research which they said (just for your note, at 3.97), “We
25 can’t rely on the market research as really showing anything. It was just too inconclusive”.
26 So, there is no hard-edged evidence there.

27 Similarly, we have Miss Rose making the same point. She says, “A new entrant is a really
28 serious disadvantage here because of save activity”. But, here there are a number of
29 problems. One is that Ofcom actually accepted that save was a benefit, or a potential
30 benefit. So, if Miss Rose disagrees about that, then there is obviously a debate: Is it a
31 benefit? Is it not a benefit? But, there is nothing that you can begin to look at in this
32 Tribunal that could possibly enable you to decide it and say that that somehow saves the
33 analysis that Ofcom did.

1 There is also the problem - and this is really a general problem for Hutchison in this case -
2 that the competition problems that it talks about in a general sense were all considered by
3 the Tribunal in the decision of *May* (at Tab 17 of the authorities bundle). I will not take you
4 to it now, but Mr. Pickford showed you the relevant passage. We do invite you to read it.
5 Again, Miss Rose says, “Well, it’s not entirely conclusive. It doesn’t completely shut the
6 door on these arguments”. But there is nothing at all in front of this Tribunal that could be
7 used, in effect, to plug in some kind of quantifiable benefit that might somehow save the
8 cost benefit analysis.

9 Insofar as Ofcom may or may not also rely on unquantified benefits, that is just not the
10 decision they took. The core premise of the Decision is that the cost benefit analysis is
11 positive. Our case, of course, you appreciate, is that that is unreliable.

12 THE CHAIRMAN: Miss Rose is certainly right to the extent that we are not legally bound by
13 that decision, is she not?

14 MR. WARD: In a sort of *stare decisis* sense.

15 THE CHAIRMAN: Yes.

16 MR. WARD: Well, perhaps not.

17 THE CHAIRMAN: The evidential context is somewhat different, is it not?

18 MR. WARD: Yes, but I am merely making a slightly less legalistic point than a sort of *stare*
19 *decisis* point. I am just saying that what you have here are some assertions by Hutchison
20 about how they say it affects them. You also have a decision of the Tribunal which looks
21 like it looked into it on a kind of contested basis. The question is: Does anything Hutchison
22 say give you a reason to, in a sense, re-write Ofcom’s Decision where Ofcom itself has not
23 relied upon these wider competition benefits that they rely on? We say, “Absolutely not”.
24 Putting it at its very highest - at its very highest - if you think that is something that Ofcom
25 should be dealing with in this forum, what you should do is send it back.

26 I just remind you of something I explained in opening, which is that, of course, the issue is
27 being dealt with by Ofcom, but in a completely different capacity. It has a consultation
28 afoot on some of the issues that concern H3G. It is all explained in Mr. Rodman’s witness
29 statement. I will not take up time with it now. But, the point is that it just cannot be
30 somehow laid on top of a defective cost benefit analysis in order to save the Decision.

31 The final factor I need to deal with, as briefly as I can, is the question of donor network
32 failure. One very important point was made by Mr. Saini in his brief reply. He said that both
33 donor network failure and economic efficiency were central factors. So, in a sense they
34 stand to be looked at independently and in their own right. One thing we echo in Miss

1 Bacon's submissions is, "Well, if the donor network failure issue was so important, it did
2 need to be looked at properly. It could not just free-ride on the supposedly better work done
3 on the cost benefit analysis".

4 Here again, Miss Rose says this all creates a terrible competitive disadvantage because there
5 are faults arising on the donor networks, and so on, and so forth. Now, here, in the CAT's
6 analysis, in the case of the previous Decision, there was no argument advanced at that stage
7 at all that there were technical issues giving rise to competition problems. Lord Carlile
8 asked, in our respectful submission, a very important question: "Have you measured these
9 problems? Is there some way to quantify them? At two o'clock, for the very first time,
10 some figures were produced. But -and again, we come back to the Decision - there is
11 nothing at all in the Decision under this kind of head that comes close to a sort of reasoned
12 appraisal of the seriousness of these faults or the likelihood of any losses that may arise
13 from them, or any of the things you would need if you were going to sensibly quantify them
14 as part of an impact assessment.

15 Miss Rose also raises the question of technical innovations. Does this not pose a problem
16 for technical innovation? Here I just refer you to the evidence of Mr. Sutherns which has
17 not been challenged, and which explained that the problem of video-telephony is, in a sense,
18 historic. We come, again, against the same question: "What is the quantified risk, going
19 forwards in the future, that these problems will happen again?"

20 Finally, just a few brief context points on this, and just tackling some of the factual
21 assertions made by Miss Rose. One must not lose sight of the context that inter-dependence
22 is a fact of life for network operators. Transit arrangements, which have been much prayed
23 in aid, are a form of inter-dependence where one network relies upon the other. But, the fact
24 that they are common actually shows you that they are not regarded as completely inimical
25 by the networks to the quality issues that Miss Rose actually raises, even if, in fairness, Mr.
26 Sutherns was not very enthusiastic about them.

27 However, the other important point in Mr. Sutherns' evidence which Miss Rose sort of
28 danced around is that there is just no way to discriminate between your ported ex-customers
29 who you can sort of let down in your porting arrangements, and your current customers who
30 of course you want to do your best for. If there is a network failure of some kind - a
31 technical failure - you need to help them both. There is no way to sever one from the other.
32 So, the point she made about the absence of contractual incentives is, in truth, a really bad
33 one because the incentive is there to get the network up and running, and anyway I am told
34 that, in fact, there will always be a place, an interconnection contract, that allows for the

1 onward routing of calls, backed up of course by the regulatory obligation to facilitate
2 portability under General Condition 18.

3 Another suggestion that she made, without any evidence at all, was that the other four
4 networks may have fewer ported customers and offer lower quality service than Hutchison
5 itself. Well, in fact, our primary point here is, where is the evidence? The answer is that
6 there is not any at all. I am reluctant to start giving evidence on this, but I am told that
7 Vodafone has more ported in traffic than Hutchison does by volume, which is perhaps not
8 surprising given the overall scale of the operators. One cannot save this Decision by
9 throwing in, very much at the last minute, these kinds of factual assertions.

10 Another thing that does not save the Decision is the last minute recourse to Article 30 of the
11 Directive. In argument with Miss Rose, sir, you really made the first point about that,
12 which is, what does it mean when it refers to the independence of ported numbers. There is
13 another thing which is important about Article 30, which is that Article 30(2) says that
14 National Regulatory Authorities shall ensure that pricing for interconnection related to the
15 provision of number portability is cost-oriented. So it seems, on its face, to envisage that
16 number portability may require interconnection arrangements of some kind. In fairness to
17 Miss Rose, she did not rely on it very heavily, but we do submit that you should not rely on
18 it at all.

19 Finally, in dealing with her argument, she cast doubt on whether or not you could describe
20 this current arrangement in the UK as a porting arrangement at all. There we go back to
21 where we started in my opening submissions, the current system is thought by Ofcom to be
22 an effective mechanism. It says so in para.2.7 of the Decision. If you think there is
23 something wrong with that Decision the right thing to do is to remit it.

24 Two more very brief points to deal with. Firstly, this point about the Irish experience.
25 There have been all sorts of inconsistent partial explanations offered at the Irish experience
26 before you. I just remind you of what was said in the email from Mr. Wilson attached to
27 Roche two about the problems that Vodafone had encountered in Ireland. All I say about
28 that is you simply cannot draw any safe conclusions from it one way or the other.

29 Finally then, the question of relief. Miss Rose invited you to somehow sever the case up.
30 As you appreciate, our submission is the entire Decision should go back. In respect of the
31 distinction she tried to draw between mobile to mobile and mobile to fixed porting, the two
32 are inextricably bound up in Ofcom's Decision. One of our key complaints is that they are
33 not distinguished, and that the differences between the two are not dealt with.

1 On top of that the next layer is recipient-led porting, but that is premised on the cost benefit
2 analysis for the central database, the CDB. So, putting one layer upon the other, we do
3 submit that, in truth, the correct analysis is the cost benefit analysis is flawed, the rest of the
4 Decision is also flawed for the reasons that we have given and the only right course for the
5 Tribunal is to remit the entire thing to Ofcom to be done again.

6 Unless I can assist further, and with thanks for your patience, those are my submissions.

7 THE CHAIRMAN: Thank you very much, Mr. Ward. We will inevitably take time, but as little
8 time as possible, Miss Rose, to reach our decision, and in the usual way the parties will be
9 informed when it is imminent.

10 Thank you all for your assistance. We are very grateful, and I am sure I speak for both my
11 colleagues when I say we are very grateful to all counsel and those assiduously assisting
12 them and of course the witnesses for the help we have been given. I hope you all have a
13 good week-end and enjoy the Irish experience, Mr. Kennelly.

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