



Neutral citation [2006] CAT 12

**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case No:1053/3/3/05

Victoria House  
Bloomsbury Place  
London WC1A 2EB

15 May 2006

Before:

Marion Simmons QC (Chairman)  
Ann Kelly  
Vindelyn Smith-Hillman

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**MEDIA MARKETING & PROMOTIONS**

Appellant

-v-

**OFFICE OF COMMUNICATIONS**

Respondent

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

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

Heard at Victoria House on 22 February 2006

**JUDGMENT (Non-confidential version)**

Note: Excisions in this judgment (marked “[...][C]”) relate to commercially confidential information: Schedule 4, paragraph 1 to the Enterprise Act 2002.

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## **I INTRODUCTION**

### *Background*

1. This is an appeal under section 192 of the Communications Act 2003 (“the 2003 Act”) brought by Media Marketing and Promotions (“MMP”), against a decision taken by OFCOM in a “Notification under section 94 of the Communications Act 2003 of Contravention of General Condition 18”, dated 26 August 2005 (“the Notification”).
2. In the Notification, OFCOM determined that there are reasonable grounds for believing that MMP is contravening or has contravened General Conditions 18.1 and 18.2 by failing to provide “number portability” to Prime Time Radio (“PTR”), a digital radio station, and “portability” to Uniworld Communications (“Uniworld”), respectively, pursuant to their requests.
3. Number portability is, in general terms, the facility enabling customers to retain their telephone number if they switch from one supplier of telecommunications services to another. Number portability obligations were introduced some years ago and are generally regarded as being important to facilitate competition between providers of telecommunications services. The current rules governing number portability are set out in General Condition 18 of the “General Conditions of Entitlement” issued by OFCOM pursuant to Section 45 of the 2003 Act. Section 45 and General Condition 18 implement various provisions of European Directives. The precise circumstances in which number portability is, or should be, provided for by the 2003 Act and/or the European Directives is strongly contested between the parties to the appeal and it is necessary for us to consider below all of the relevant provisions in some detail.
4. Specifically OFCOM determined, as set out in the Notification, that:
  - (a) MMP has provided electronic communications services used in connection with non-geographic numbers and comprising Publicly Available Telephone Services to PTR, previously part of Saga Radio Limited;
  - (b) MMP is a Communications Provider and PTR is a Subscriber as defined in General Condition 18;

- (c) MMP has an obligation under General Condition 18.1 to provide Number Portability (the ability of a Subscriber to port) at the request of a Subscriber (PTR);
  - (d) MMP has an obligation under General Condition 18.2 to provide Portability (a facility between communications providers to enable porting) at the request of another communications provider (Uniworld);
  - (e) PTR, a Subscriber, has requested MMP to provide Number Portability in respect of 3 non-geographic numbers;
  - (f) Uniworld, a communication provider, has requested MMP to provide Portability in respect of 3 non-geographic numbers;
  - (g) MMP has failed to provide PTR with Number Portability in contravention of General Condition 18.1; and
  - (h) MMP has failed to provide Uniworld with Portability in contravention of General Condition 18.2.
5. MMP denies that it is required under General Condition 18 to provide number portability to PTR or portability to Uniworld. MMP denies that it provides an electronic communications service, that it is a Communications Provider, that it is a provider of a “Publicly Available Telephone Services” and that PTR is a “Subscriber”. MMP defines itself as an “End User” and a “Customer” and claims that it would be inconsistent for it to also be a “Communications Provider”.
6. For the reasons set out below, the Tribunal upholds the determination of OFCOM set out in the Notification and dismisses the appeal by MMP.

*MMP*

7. In its notice of appeal, MMP describes itself as a small but highly experienced trading entity providing services to the telecommunications industry, in the main to traditional media industries such as radio, television, newspaper, and magazines and to new media industries such as online, mobile and internet.

8. In its notice of appeal, MMP states that its senior partner Mr Andrew Millard is a former director of ICSTIS (the Independent Committee for the Supervision of Standards of Telephone Information Services: the regulatory body for the premium rate telecommunications industry), a former board member of ATIEP (the Association of Telephone Information and Entertainment Providers), and a main board director of numerous listed and unlisted telecommunications companies with in excess of 20 years telecommunications experience in Europe.
9. MMP describes its business as including the renting out and/or re-selling of non-geographic telecommunications services and associated on-line facilities to third parties. It is common ground between the parties that MMP does not itself provide an electronic communications network. MMP describes itself as an intermediary telecommunications company or a “reseller” providing advice, guidance and the right package for clients in an ever more complex market.
10. MMP estimates the sum involved in this case to be approximately £ [...] [C] and in those circumstances has decided to be self-represented.

*PTR*

11. In its notice of appeal, MMP describes PTR as a relatively new, small digital radio station and a new entrant in the broadcast arena, which entered into an agreement with MMP for the rental of a series of 0870 national call non-geographic numbers. The 0870 numbers were either to be promoted on air for competitions and other uses or used off air, such as with PTR’s advertising sales team. MMP describes Mr David Atkey, the Operations Director of PTR, as having previously been employed by organisations where he had worked with other independent service providers similar to MMP and when so employed, as having been involved in negotiations concerning non-geographic numbers for organisations such as Long Wave Radio 252 and Virgin Radio.

*OFCOM*

12. OFCOM was established by the Office of Communications Act 2002 and, pursuant to the 2003 Act, the functions of the former Director General of Telecommunications (the

“Director”) and his office (“OfTel”), to whom reference is made in the documents and submissions referred to below, were transferred to OFCOM.

## **II THE FACTUAL AND LEGAL BACKGROUND**

13. In June and October 2000, MMP entered into contracts with PTR regarding the routing and the rental of the 0870 numbers: 08700 50 50 50, 08700 50 50 30 and 08700 500 515 (“the Disputed Numbers”). Under each of these contracts it was agreed between MMP and PTR that:
  - (a) PTR would pay to MMP a one-off set-up and connection fee of £250 payable in advance for the “network build” to route all calls made to the 0870 number to a geographic number of PTR;
  - (b) PTR would pay a quarterly rental fee of £75 payable in advance of each quarter;
  - (c) the initial routing charge of the 0870 number to PTR’s geographic number was encompassed within the set-up and connection fee, but all subsequent re-routings, for whatever reason, would incur a further charge of £125 each and every time; and
  - (d) initial routing of the 0870 number and all subsequent re-routings could take up to 7 working days to take effect.
14. It was further agreed that “additional services (for example, time control, date control, divert control, et cetera)” may be provided, but these would be at additional cost and would be subject to further commercial agreement at the time of request.
15. Also in 2000, a series of agreements were entered into between THUS plc (“THUS”) and MMP, pursuant to which THUS agreed to supply certain telecommunication services, namely to route calls made to each of the Disputed Numbers to certain geographic numbers belonging to PTR. A call made by a calling party dialling the relevant 0870 number would be “charged at the originator’s national call rate” and THUS would make payments to MMP in respect of calls made to the Disputed Numbers dependent on

volume. The agreements with THUS were in a standard form which included the following clause:

“6. TELEPHONE NUMBERS

The Customer shall not acquire any title or interest in any telephone numbers allocated by the Company and shall not be entitled to sell or transfer such numbers without the Company’s prior consent. The Company shall be entitled to modify any telephone numbers allocated to the Customer or introduce additional codes if this is required for operational or technical reasons.”

In those agreements the “Customer” was MMP and the “Company” was THUS.

16. On 4 January 2005, Uniworld sent a fax to MMP requesting that the Disputed Numbers be ported from THUS plc to Energis Communications Limited (Energis). That fax attached a letter dated 24 December 2004 from PTR, which was addressed to MMP but apparently not sent directly to MMP, requesting MMP to arrange for the Disputed Numbers to be ported away from MMP as soon as possible and informing MMP that the Disputed Numbers would be ported to Uniworld.
17. On 5 January 2005, MMP wrote to PTR, treating the request to port as three months notice to terminate the contractual agreement between MMP and PTR in respect of the Disputed Numbers. MMP stated in that letter that PTR did not have an entitlement to the Disputed Numbers and that to retain use of the Disputed Numbers PTR would either have to continue to use MMP as its service provider or “agree suitable financial recompense” with MMP in exchange for MMP agreeing to release the Disputed Number to PTR’s preferred “service provider” or PTR’s preferred service provider’s “network operator”.

In this letter MMP wrote:

“Third parties using the number through an SP (such as PTR using the above numbers through MMP) have no contractual link with the NO and no contractual entitlement to the number(s). Therefore I am sorry but it is not possible to port these number to another SP although, of course, MMP could request that these numbers are ported to another NO (for example Energis) if, for example, this is your preferred supplier but provided that MMP has reached agreement with whoever that chosen NO might be. I am surprised that Uniworld has not explained this to you as it is a contractual position they should be familiar with and is the industry norm.” [Emphasis in original]

18. On 15 February 2005, PTR wrote a letter to MMP requesting that the Disputed Numbers be ported to Uniworld. In this letter PTR explained to MMP that the decision to change service providers had been taken as a result of a review of all of PTR's costs occasioned by a change in ownership of the radio station. PTR had identified a number of companies who "will not charge us a fee every month and will actually pay us money on each call". PTR reproduced information from OFCOM's website about Number Portability obligations under General Condition 18 and requested that the Disputed Numbers be ported in accordance with the notice that was previously submitted to MMP by Uniworld.
19. MMP wrote to PTR on 28 February 2005 indicating that the number portability obligations quoted in PTR's letter of 15 February 2005 applied only to network operators and not to service providers. Since MMP regarded itself as a service provider MMP considered that number portability obligations did not apply to it.
20. According to OFCOM, following MMP's refusal to port the Disputed Numbers, Uniworld complained to OFCOM by e-mail on 15 March 2005 and 4 April 2005.
21. MMP sent a letter to PTR on 8 April 2005 indicating that previous correspondence had confirmed that the relationship between PTR and MMP would cease on 4 April 2005 and repeating that MMP did not accept that it was under any obligation to port the Disputed Numbers.
22. According to OFCOM, on 8 April 2005, MMP translated the Disputed Numbers to another termination point, meaning that any calls made to the Disputed Numbers no longer reached PTR.
23. On 12 April 2005 MMP sent a further e-mail to PTR offering a "one-off buyout cost" for the non-geographic number 08700 50 50 50 of £ [...] [C], plus VAT. According to MMP, this price took into account immediate earnings and the future value of such a number. MMP considered that the difficulties in obtaining such numbers and the premiums paid to acquire such numbers were considerably greater in 2005 than in 2000.



24. On 27 April 2005 OFCOM opened a formal investigation to examine an alleged refusal by MMP to provide Portability in respect of the Disputed Numbers and informed MMP of this by letter.
25. OFCOM has powers to enforce any breach of the General Conditions under sections 94 to 103 of the 2003 Act. OFCOM's Notification to MMP was issued pursuant to Section 94 of the 2003 Act, which empowers OFCOM to issue a notification to a person if OFCOM has reasonable grounds for believing that the person is contravening or has contravened, a condition set under section 45 of the Act.
26. OFCOM issued the Notification in this matter on 26 August 2005. That Notification contained a determination by which OFCOM required MMP to comply with General Conditions 18.1 and 18.2 by:
  - “(a) Providing Number Portability in respect of the disputed numbers as soon as it is reasonably practicable after 27 September 2005 and on reasonable terms, including charges, to PTR as a Subscriber;
  - (b) Providing Uniworld with Portability as soon as is reasonably practicable after 27 September 2005 in relation to its request on reasonable terms and in accordance with the Functional Specification (as defined in General Condition 18).”
27. In the Notification, OFCOM stated that it considered “as soon as is reasonably practicable” to be no more than a few days in line with the industry-agreed process for non-geographic number portability. It gave MMP until 27 September 2005 to make representations to OFCOM about the matters contained in the Notification and stated that, if MMP did not comply with General Condition 18, OFCOM: “may issue an enforcement notification under section 95 of the Act and/or may impose a penalty on MMP under section 96 of the Act”.
28. In order to avoid the possibility of sanctions being imposed on MMP by OFCOM, MMP ported the Disputed Numbers to Energis.
29. On 25 October 2005, MMP filed a notice of appeal at the Tribunal against the Notification in which it sought to have the Notification overturned and requested either that the Tribunal order that the Disputed Numbers which it had ported to Energis be

returned to it, or that reasonable compensation be paid for the loss of future earnings and the permanent loss of MMP's numbers.

30. As mentioned above, the contested Notification was made under section 94 of the 2003 Act. The powers of OFCOM following a Notification are set out in sections 95 and 96 of that Act. These provisions provide:

**“94 Notification of contravention of conditions**

(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition set under section 45, they may give that person a notification under this section.

(2) A notification under this section is one which-

- (a) sets out the determination made by OFCOM;
- (b) specifies the condition and contravention in respect of which that determination has been made; and
- (c) specifies the period during which the person notified has an opportunity of doing the things specified in subsection (3).

(3) Those things are-

- (a) making representations about the matters notified;
- (b) complying with notified conditions of which he remains in contravention; and
- (c) remedying the consequences of notified contraventions.

(4) Subject to subsections (5) to (7) and section 98(3), the period for doing those things must be the period of one month beginning with the day after the one on which the notification was given.

(5) OFCOM may, if they think fit, allow a longer period for doing those things either-

- (a) by specifying a longer period in the notification; or
- (b) by subsequently, on one or more occasions, extending the specified period.

(6) The person notified shall have a shorter period for doing those things if a shorter period is agreed between OFCOM and the person notified.

- (7) The person notified shall also have a shorter period if-
- (a) OFCOM have reasonable grounds for believing that the contravention is a repeated contravention;
  - (b) they have determined that, in those circumstances, a shorter period would be appropriate; and
  - (c) the shorter period has been specified in the notification.
- (8) A notification under this section-
- (a) may be given in respect of more than one contravention; and
  - (b) if it is given in respect of a continuing contravention, may be given in respect of any period during which the contravention has continued.
- (9) Where a notification under this section has been given to a person in respect of a contravention of a condition, OFCOM may give a further notification in respect of the same contravention of that condition if, and only if-
- (a) the contravention is one occurring after the time of the giving of the earlier notification;
  - (b) the contravention is a continuing contravention and the subsequent notification is in respect of so much of a period as falls after a period to which the earlier notification relates; or
  - (c) the earlier notification has been withdrawn without a penalty having been imposed in respect of the notified contravention.
- (10) OFCOM must not give a notification under this section in a case in which-
- (a) they decide that a more appropriate way of proceeding in relation to the contravention in question would be under the Competition Act 1998 (c. 41); and
  - (b) they publish a statement to that effect in such manner as they consider appropriate for bringing their decision to the attention of the persons who, in their opinion, are likely to be affected by it.
- (11) For the purposes of this section a contravention is a repeated contravention, in relation to a notification with respect to that contravention, if-
- (a) a previous notification under this section has been given in respect of the same contravention or in respect of another contravention of the same condition; and
  - (b) the subsequent notification is given no more than twelve months after the day of the making by OFCOM of a determination for the purposes of section 95(2) or 96(2) that the contravention to which the previous notification related did occur.

**“95 Enforcement notification for contravention of conditions**

- (1) This section applies where-
  - (a) a person (“the notified provider”) has been given a notification under section 94;
  - (b) OFCOM have allowed the notified provider an opportunity of making representations about the matters notified; and
  - (c) the period allowed for the making of representations has expired.
- (2) OFCOM may give the notified provider an enforcement notification if they are satisfied-
  - (a) that he has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 94; and
  - (b) that he has not, during the period allowed under that section, taken all such steps as they consider appropriate-
    - (i) for complying with that condition; and
    - (ii) for remedying the consequences of the notified contravention of that condition.
- (3) An enforcement notification is a notification which imposes one or both of the following requirements on the notified provider-
  - (a) a requirement to take such steps for complying with the notified condition as may be specified in the notification;
  - (b) a requirement to take such steps for remedying the consequences of the notified contravention as may be so specified.
- (4) A decision of OFCOM to give an enforcement notification to a person-
  - (a) must be notified by them to that person, together with the reasons for the decision, no later than one week after the day on which it is taken; and
  - (b) must fix a reasonable period for the taking of the steps required by the notification.
- (5) It shall be the duty of a person to whom an enforcement notification has been given to comply with it.
- (6) That duty shall be enforceable in civil proceedings by OFCOM-

- (a) for an injunction;
- (b) for specific performance of a statutory duty under section 45 of the Court of Session Act 1988 (c. 36); or
- (c) for any other appropriate remedy or relief.

## **96 Penalties for contravention of conditions**

- (1) This section applies (in addition to section 95) where-
  - (a) a person ("the notified provider") has been given a notification under section 94;
  - (b) OFCOM have allowed the notified provider an opportunity of making representations about the matters notified; and
  - (c) the period allowed for the making of the representations has expired.
- (2) OFCOM may impose a penalty on the notified provider if he-
  - (a) has, in one or more of the respects notified, been in contravention of a condition specified in the notification under section 94; and
  - (b) has not, during the period allowed under that section, taken the steps OFCOM consider appropriate-
    - (i) for complying with the notified condition; and
    - (ii) for remedying the consequences of the notified contravention of that condition.
- (3) Where a notification under section 94 relates to more than one contravention, a separate penalty may be imposed in respect of each contravention.
- (4) Where such a notification relates to a continuing contravention, no more than one penalty may be imposed in respect of the period of contravention specified in the notification.
- (5) OFCOM may also impose a penalty on the notified provider if he has contravened, or is contravening, a requirement of an enforcement notification given under section 95 in respect of the notified contravention.
- (6) Where OFCOM impose a penalty on a person under this section, they shall-
  - (a) within one week of making their decision to impose the penalty, notify that person of that decision and of their reasons for that decision; and

(b) in that notification, fix a reasonable period after it is given as the period within which the penalty is to be paid.

(7) A penalty imposed under this section-

(a) must be paid to OFCOM; and

(b) if not paid within the period fixed by them, is to be recoverable by them accordingly.”

31. Sections 94 to 96 of the 2003 Act raise procedural issues, in particular the relationship between a notification under section 94 to the effect that OFCOM has “reasonable grounds to believe” that there has been a contravention, enforcement action under sections 95 and 96, and the possibility of an appeal to the Tribunal between these two stages. These issues were mentioned in the Tribunal’s judgment in *British Telecommunications plc -v- OFCOM (CPS Save Activity)* [2004] CAT 23 at paragraph 141. MMP complied with the Notification to avoid any risk of sanctions being imposed upon it. As in the earlier appeal cited above, the Tribunal has, in this appeal, proceeded to determine the substantive issue on the correct interpretation of General Condition 18 and has left to one side the procedural issues raised by these sections.

### **III NUMBER PORTABILITY PRIOR TO 2002**

32. The parties referred us to the background to the current regime applicable to number portability. So far as is relevant we summarise that background below.

33. In 1991 a new Condition (34B) was added to the licence held by British Telecommunications plc (“BT”) under the Telecommunications Act 1984 which gave the Director power to direct BT to provide portability of ordinary, geographic telephone numbers within a specific geographic area (if three conditions were fulfilled). If the Director made such a direction, BT was entitled to recover the reasonable costs it incurred in providing such portability. Portability was then understood to be the facility provided by one telephone operator to another which enabled customers to retain their telephone numbers when switching their business between those operations.

34. In August 1994, pursuant to that condition, BT was ordered by the Director to provide portability to Videotron Corporation Limited. However, no agreement could be reached between BT and Videotron as to financial terms. A further modification to BT’s licence

was proposed by the Director to give the Director power to resolve disputes as to how costs were to be allocated in the context of number portability. The proposed modification was unacceptable to BT. The Director therefore made a reference to the Monopolies and Mergers Commission (“MMC”) under section 13 of the Telecommunications Act 1984 to consider whether the inability of the Director to resolve a dispute as to the costs of providing portability, with the result that BT was not in fact providing portability, was against the public interest and if so, to specify the adverse effects (if any), and the modifications to BT’s licence which would remedy them.

35. In its report of 14 December 1995 the MMC noted that the introduction of portability was necessary to promote effective competition between operators, which would benefit customers and promote efficiency and concluded that modifications to BT’s licence were necessary to facilitate the early introduction of portability.
36. According to MMC, at March 1995 BT still had 95 per cent of all direct fixed connections for telecommunications in the UK although competitors were then making some inroad into the market. One reason which deterred customers from switching operators at that time was the need to change their telephone number when they did so.
37. Paragraph 2.157 of the MMC’s report reads as follows:

“In this context the absence of [number portability] is seen as an obstacle to competition because it creates switching costs, ie costs incurred by customers in switching from one operator to another, which many customers (particularly businesses) perceive as high. The introduction of portability, by lowering these switching costs, will therefore strengthen competition and enable the market to function more effectively. This can be expected to lead to increased efficiency and lower costs among operators, including BT, the benefits of which will be passed on to consumers. Lower prices will then stimulate demand and increase consumer benefits.”
38. The MMC stated in paragraph 2.180 of its Report that although the evidence before it concerned portability of single geographic numbers, the same arguments applied to the portability of number blocks and non-geographic numbers.
39. On 20 November 1996 the European Commission published a Green Paper “On a Numbering Policy for Telecommunications Services in Europe”. The Green Paper stated that:

“Subscribers attach a high value to their number. Polls have indicated that some 80-90 percent of business customers would not consider switching operators if they cannot take their number with them.” (page 16)

“Analysis also shows that number portability for mobile services and for non-geographical services such as freephone (e.g. to allow customers to take their golden numbers) should be considered as a matter of urgency and is critical for creating equal conditions for access and opportunity for new entrants” (page 17)

Number portability for non-geographic services such as nation-wide freephone and premium rate services is currently under study in several Member States. The argument for local number portability hold for the non-geographic services.

A recent brainstorm in the context of the [European Numbering Forum] concluded that number portability for freephone services is key to allow customers to retain their valued freephone numbers if they want to change service provider and in fact becomes compulsory when applying the equal access principle on the freephone numbering space.” (page 33)

40. The Commission consulted on the Green Paper and summarised comments it received in a further document entitled “Communication from the Commission to the European Parliament and the Council regarding the consultation on the Green Paper on a Numbering Policy for Telecommunications Services in Europe” COM(97) 203). Under heading III.3 “Number Portability”, the Communication notes that:

“Various international operators and some regulators stress that portability of numbers for special services (freephone, premium rate and shared costs) is an urgent requirement since holders of such numbers are even more reluctant to change operators if this implies changing their number too.”

41. Directive 97/33/EC of 30 June 1997, on Interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), obliged Member States to ensure that national authorities controlled numbering plans and encouraged number portability. Article 12 of that Directive provided as follows:

“Numbering

1. Member States shall ensure the provision of adequate numbers and numbering ranges for all publicly available telecommunications services.

...



3. Member States shall ensure that national telecommunications numbering plans are controlled by the national regulatory authority, in order to guarantee independence from organisations providing telecommunications networks or telecommunications services and facilitate number portability. In order to ensure effective competition, national regulatory authorities shall ensure that the procedures for allocating individual numbers and/or numbering ranges are transparent, equitable and timely and the allocation is carried out in an objective, transparent and non-discriminatory manner. National regulatory authorities may lay down conditions for the use of certain prefixes or certain short codes, in particular where these are used for services of general public interest (e.g. freephone services, kiosk billed services, directory services, emergency services), or to ensure equal access.

...

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

...”

42. Directive 98/61/EC of 24 September 1998 amended Directive 97/33/EC with regard to operator number portability and carrier pre-selection. Article 12(5) of the 1997 directive was replaced by the following:

“5. National regulatory authorities shall encourage the earliest possible introduction of operator number portability whereby subscribers who so request can retain their number(s) on the fixed public telephone network and the integrated services digital network (ISDN) independent of the organisation providing service, in the case of geographic numbers at a specific location and in the case of other than geographic numbers at any location, and shall ensure that this facility is available by 1 January 2000 at the latest or, in those countries which have been granted an additional transition period, as soon as possible after, but no later than two years after, any later date agreed for the full liberalisation of voice telephony services.”

43. Directive 98/61/EC also added a definition of “Subscriber” to Article 2(1) of Directive 97/33/EC as follows:

“‘subscriber’ means any natural or legal person who or which is party to a contract with the provider of publicly available telecommunications services for the supply of such services.”

44. In October 1999, the Director and the Department of Trade and Industry issued a joint consultation document on the implementation of the number portability requirements in Directive 98/61/EC entitled “Numbering Directive: Number Portability Requirements”.

Paragraph 1.10 stated that:

“The proposed new licence condition will be placed in those licences which authorise the running of fixed public telephone systems or the provision of fixed services to the public or both. The requirements of the Directive will also apply, using freestanding Regulations (see Chapter 2), to service providers that do not run a network or system of any sort – the so called systemless service providers (examples of systemless service providers are those that resell the network services of a network operator eg NextCall.)”

45. Paragraphs 2.4 and 2.5 stated that:

“2.4 Customers should be able to keep their number when they change operator or service provider, regardless of whether they have obtained their number directly from a Licensee or from an independent service provider or reseller to whom a Licensee has provided a sub-allocation of numbers. It is the Licensee’s obligation to ensure that any number which has been allocated to him by Oftel can be ported to another operator or service provider. Thus, if a Licensee sub-allocates numbers to another body which provides services over the Licensee’s telecommunication networks to the public, it should take appropriate measures to ensure that those numbers can be ported. Oftel would expect contractual arrangements between any Licensee and a person to whom it has sub-allocated numbers to deal with this situation. This principle is also covered in the Functional Specification (described at Annex A.1.).

2.5 As a further measure to ensure that numbers sub-allocated to independent service providers or resellers are portable, Oftel and DTI intend to place obligations directly on such entities. As such entities fall outside the regulatory structure of licensing this is to be achieved through free standing obligations contained in the implementing Regulations. Systemless service providers are required to provide portability in accordance with the Functional Specification.”

46. The Telecommunications (Interconnection) (Number Portability, etc) Regulations 1999, SI 1999/3449 (which came into force on 19 January 2000) implemented the number portability provisions of Directive 98/61/EC. These Regulations (at Regulation 9) amended licences granted under the Telecommunications Act 1984 to reflect the obligations imposed by the Directive.

47. Definitions were added to the Telecommunications (Licence Modification) (Standard Schedules) Regulation 1999, SI 1999/2931, including that:

“‘Number Portability’ means a facility whereby Subscribers who so request can retain their number on a Fixed Public Telephone System and the integrated services digital network (ISDN), independent of the organisation providing the service at the Network Termination Point of a Subscriber at a specific location in the case of Geographic Portability or at any location in the case of Non-Geographic Portability”, and

“ ‘Portability’ means any facility which may be provided by the Licensee to an Operator or to a Service Provider enabling any Subscriber who requests Number Portability to continue to be provided with any telecommunication service by reference to the same Number irrespective of the identity of the person providing such a service.”

48. In addition, the Telecommunications (Interconnection) Regulations 1997, SI 1997/2931 were amended so as to include a new definition of subscriber:

“‘Subscriber’ means a person who is party to a contract with the provider of publicly available telecommunications services for the supply of such services.”

49. Obligations were imposed directly on systemless service providers by SI 1999/3449. At Regulation 2(1) of SI 1999/3449 “systemless service provider”: was defined to mean

“a person who provides a publicly available telecommunication services but who does not run a telecommunications network within the meaning of Section 4 of the Act by means of which such services are provided.”

50. The following obligations were imposed on “systemless service providers” (see regulation 8):

“Number Portability – Systemless Service Providers

8(1) A Systemless Service Provider shall provide Number Portability on reasonable terms to any of its Subscribers who notify it in writing that they require it to provide them with Number Portability.

(2) A Systemless Service Provider shall provide Portability in relation to any request for Portability made to it by an Operator or a Service Provider (other than Mobile Portability or Paging Portability) on reasonable terms, in accordance with the Functional Specification and as though the number portability condition set out in Schedule 7 to [Regulation 2931/1997] applied to it.”

51. The relevant provisions of SI 1999/3449 entered into force on 19 January 2000. The conclusions from the consultation and guidance as to the Director’s intended approach to enforcement were set out in a statement issued by the Director in January 2000: “Numbering Directive: Number Portability Requirements”. That statement referred to number portability as follows:

“1.2 Number portability is a facility provided by telecommunications operators which enables customers to keep their telephone number when they change their operator.

1.3 Number portability is a key issue in the development of network competition.....the absence of number portability therefore gives the incumbent network operator a significant competitive advantage.”

52. The Statement also provided that the Director and the DTI considered that:

(a) the requirements of the Directive would be applied, under SI 1999 /3449 to: “service providers that do not run a network or system of any sort – the so-called systemless service providers (examples of systemless service providers are those that resell the network services of a network operator eg Nextcall)” [para 1.9 of statement]

(b) under the Directive all numbers for services predominantly provided over the fixed network were required to be portable, including geographic numbers and non-geographic numbers which include freephone numbers (080) local and national rate numbers (0845 and 0870), personal service numbers (070) and premium rate numbers (090). [Para 1.10 of statement].

#### **IV THE CURRENT REGIME APPLICABLE TO NUMBER PORTABILITY**

53. The current regulatory regime applicable to number portability is derived from three main sources to which the parties referred extensively in their submissions:

(a) the 2002 EU Regulatory Framework;

(b) the 2003 Act; and

(c) the General Conditions of Entitlement issued by OFCOM pursuant to section 45 of the 2003 Act.

We consider the relevant provisions below.

##### *The 2002 EU Regulatory Framework*

54. In 2002, the EU enacted a single regulatory framework for all transmission networks and services in the telecommunications, media, and information technology sectors. The

regulatory framework was set out in five new EU Directives which are designed to achieve a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services across Member States:

- (a) Directive 2002/21/EC of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the “Framework Directive”);
- (b) Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the “Access Directive”);
- (c) Directive 2002/20/EC of 7 March 2002 on the authorisation of electronic communications networks and services (the “Authorisation Directive”);
- (d) Directive 2002/22/EC of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (the “Universal Service Directive”); and
- (e) Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the “Privacy Directive”).

55. The first four of these Directives were adopted by the European Parliament and the Council on 7 March 2002. The Privacy Directive is not relevant to the matters in dispute in this appeal.

56. The recitals to the Authorisation Directive set out the aims of the new regime, including:

“(3) The objective of this Directive is to create a legal framework to ensure the freedom to provide electronic communications networks and services, subject only to the conditions laid down in this Directive and to any restrictions in conformity with Article 46(1) of the Treaty, in particular measures regarding public policy, public security and public health.”

...

(15) The conditions, which may be attached to the general authorisation and to the specific rights of use, should be limited to what is strictly necessary to ensure compliance with requirements and obligations under Community law and national law in accordance with Community law.”

57. The Authorisation Directive obliges Member States to ensure the freedom to provide electric communications networks and services, subject only to a general authorisation (except in respect of certain networks or services set out in the Authorisation Directive for which an individual licence may be required). Such general authorisation may require

a notification to a national regulatory authority but may not require an explicit decision or any other administrative act of the national regulatory authority before the undertaking can exercise the rights stemming from the general authorisation. Article 2(1)(a) defines a “general authorisation” to mean:

“a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic networks and services, in accordance with this Directive”

58. Article 5(3) of the Authorisation Directive obliges national authorities to take decisions on the rights of use of numbers as soon as possible after receipt of a completed application and within three weeks in the case of numbers that have been allocated for specific purposes within the national numbering plan. Under Article 5(4) of the Authorisation Directive that time limit may be extended:

“where it has been decided, after consultation with interested parties...that rights for use of numbers of exceptional economic value are to be granted though competitive or comparative selection procedures..”

59. Article 6 of the Authorisation Directive states that:

“the general authorisation for the provision of electronic communications networks or services and ...rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex.”

60. Part C to the Annex to the Authorisation Directive contains the conditions which may be attached to the rights of use of numbers. These include:

- (a) conditions for the effective and efficient use of numbers in accordance with the Framework Directive; and
- (b) conditions relating to number portability requirements in accordance with the Universal Service Directive.

61. Chapter III of the Framework Directive is headed “tasks of national regulatory authorities”. Article 8(1) obliges Member States to ensure that, in carrying out their regulatory tasks under the Directives, national regulatory authorities:

- (a) take all reasonable measures aimed at achieving the objectives set out in Article 8; and
- (b) take the utmost account of the desirability of making regulations technologically neutral.

62. Article 8(2) requires the national regulatory authority to promote competition in the provision of electronic communications networks and electronic communications services by inter alia:

- (a) ensuring that users... derive maximum benefit in terms of choice, price and quality; and
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector...

63. Article 8(4) of the Framework Directive requires the national regulatory authority to promote the interests of the citizens of the European Union.

64. Article 10 of the Framework Directive sets out obligations relating to numbering, naming and addressing and provides as follows:

- “(1) Member States shall ensure that all national regulatory authorities control the assignment of all national numbering resources and the management of the national numbering plans. Member States shall ensure that adequate numbers and numbering ranges are provided for all publicly available electronic communications services. National regulatory authorities shall establish objective, transparent and non-discriminatory assigning procedures for national numbering resources.
- (2) National regulatory authorities shall ensure that numbering plans and procedures are applied in a manner that gives equal treatment to all providers of publicly available electronic communications services. In particular, Member States shall ensure that an undertaking allocated a range of numbers does not discriminate against other providers of electronic communications services as regards the number sequences used to give access to their services.
- (3) Member States shall ensure that the national numbering plans and all subsequent additions and amendments thereto are published...”

65. The provisions relating specifically to number portability are set out in the Universal Service Directive. Recital 40 of that Directive states:

“Number portability is a key facilitator of consumer choice and effective competition in a competitive telecommunications environment such that end users who so request should be able to

retain their number(s) on the public telephone network independently of the organisation providing the service. The provision of this facility between connections to the public telephone network at fixed and non-fixed locations is not covered by this Directive. However, Member States may apply provisions for porting numbers between networks providing services at a fixed location and mobile networks.”

66. The definitions of “public available telephone service” and “non-geographic numbers” are contained in Article 2 of the Universal Services Directive as follows:

“‘Publicly Available Telephone Service’ means a service available to the public for originating and receiving national and international calls and access to emergency services through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance, directory enquiry services, directories, provision of public pay phones, provision of service under special terms, provision of special services for customers with disabilities or with special social needs and/or the provision of non-geographic services;

“non-geographic numbers” means a number from the national numbering plan that is not a geographic number. It includes *inter alia* mobile, freephone and premium rate numbers.”

67. Article 30 of the Universal Service Directive states the following:

“30(1) “Member states shall ensure that all subscribers of publicly available telephone services, including mobile services, who so request can retain their number(s) independently of the undertaking providing the service:

- (a) in the case of geographic numbers, at a specific location; and
- (b) in the case of non-geographic numbers, at any location.”

#### *The 2003 Act*

68. The requirements of the 2002 Directives were transposed into UK law by the 2003 Act, the relevant provisions of which entered into force on 25 July 2003.
69. OFCOM was established by the Office of Communications Act 2002. Under the 2003 Act, OFCOM is subject to a number of general duties, which are set out in section 3.
70. Section 3(1) of the 2003 Act reads as follows:



“It shall be the principal duty of OFCOM in carrying out their functions –

- (a) to further the interests of citizens in relation to communications matters; and
- (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.”

71. Under section 3(3) of the 2003 Act OFCOM must have regard, in all cases, to –

- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
- (b) any other principles appearing to OFCOM to represent the best regulatory practice.

72. Under section 3(4) of the 2003 Act OFCOM must have regard in performing its duties to:

- (a) the desirability of promoting competition in relevant markets (sub-section (b)); and
- (b) the desirability of encouraging the investment and innovation in relevant markets (sub-section (d)).

73. Section 4 of the 2003 Act, places OFCOM under a duty, when carrying out its functions, to act in accordance with six “Community requirements,” which give effect, amongst other things, to Article 8 of the Framework Directive:

“4(3) The first Community requirement is a requirement to promote competition –

- (a) in relation to the provision of electronic communications networks and electronic communications services;
  - (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; and
  - (c) in relation to the supply of directories capable of being used in connection with the use of electronic networks or electronic communications services.
- (4) The second Community requirement is a requirement to secure that OFCOM’s activities contribute to the development of the European internal market.
- (5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the Treaty establishing the European Community).

- (6) The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour-
  - (a) one form of electronic communications network, electronic communications service or associated facility; or
  - (b) one means of providing or making available such a network, service or facility,
 over another.
- (7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.
- (8) That purpose is the purpose of securing-
  - (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and
  - (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.
- (9) The sixth Community requirement is a requirement to encourage such compliance set out in subsection (10) as is necessary for-
  - (a) facilitating service interoperability; and
  - (b) securing freedom of choice for the customers of communications providers.”

*Telephone numbers and the national numbering plan*

74. Sections 56 to 63 of the 2003 Act set out OFCOM's duties with respect to telephone numbers and the General Conditions which may be imposed by OFCOM in relation to telephone numbers. Under section 56(1) of the 2003 Act, OFCOM is under a duty to publish a “National Telephone Numbering Plan” setting out:

- “(a) the numbers that they have determined to be available for allocation by them as telephone numbers;
- (b) such restrictions as they consider appropriate on the adoption of numbers available for allocation under the plan; and
- (c) such restrictions as they consider appropriate on the other uses to which numbers available for allocation in accordance with the plan may be put.”

75. The current National Telephone Numbering Plan was issued on 11 August 2005. OFCOM is also obliged to keep a day-to-day record of numbers allocated pursuant to section 56(3) by means of the National Numbering Scheme.

76. Section 57 of the 2003 Act lists conditions that OFCOM may impose in order to ensure access to telephone numbers:

“(1) General conditions may impose such requirements as OFCOM considers appropriate for securing that every end-user of a public electronic communications service is able, by means of that service–

(a) to make calls or otherwise transmit electronic communications to every normal telephone number; and

(b) to receive every call or other electronic communication that is made or transmitted to him using such a service from apparatus identified by a normal telephone number.”

77. Section 58 of the 2003 Act provides that General Conditions set by OFCOM may include provision concerning the allocation and adoption of numbers, and in particular may:

“(1) ...

(c) impose restrictions on the adoption of telephone numbers by a communications provider, and on other practices by communications providers in relation to telephone numbers allocated to them;

(d) impose requirements on a communications provider in connection with the adoption by him of telephone numbers;

(e) require an allocation of particular telephone numbers to be transferred from one communications provider to another in the circumstances provided for in the conditions;

(f) impose such requirements and restrictions on a communications provider from whom an allocation is required to be transferred as may be provided for, in relation to the transfer, in the conditions;

(g) require payments of such amounts as may be determined by OFCOM to be made to them by a person in respect of the allocation to him of telephone numbers;

(h) require payments of such amounts as may be determined by OFCOM to be made to them by a person in respect of transfers of allocations from one person to another;

...

(2) General conditions may also-

- (a) provide for the procedure to be followed on the making of applications to OFCOM for the allocation of telephone numbers;
- (b) provide for the information that must accompany such applications and for the handling of such applications;
- (c) provide a procedure for telephone numbers to be reserved pending the making and disposal of an application for their allocation;
- (d) provide for the procedure to be followed on the making of applications for telephone numbers to be reserved, and for the handling of such applications;
- (e) regulate the procedures to be followed, the system to be applied and the charges to be imposed for the purposes of, or in connection with, the adoption by a communications provider of telephone numbers allocated to that provider;
- (f) regulate the procedures to be followed, the system to be applied and the charges to be imposed for the purposes of, or in connection with, the transfer of an allocation from one person to another.

...

- (4) The procedure to be followed on the making of an application for the allocation of numbers that are available for allocation in accordance with the National Telephone Numbering Plan must require OFCOM's determination of the application to be made –
  - (a) in the case of an application made in response to an invitation in accordance with subsection (5) before the end of six weeks after the day on which the application is received; and
  - (b) in any other case, before the end of three weeks after that day.
- (5) Where OFCOM are proposing to allocate any telephone numbers, they may-
  - (a) invite persons to indicate the payments each would be willing to make to OFCOM if allocated the numbers; and
  - (b) make the allocation according to the amounts indicated....

78. Under sections 61 and 62 of the 2003 Act, OFCOM has the power to withdraw number allocations if the requirements set out in those sections are fulfilled.

79. OFCOM's general duties relating to its numbering functions are set out in Section 63 of the 2003 Act which provides, inter alia:

“63 (1) It shall be the duty of OFCOM, in the carrying out of their functions under sections 56 to 62-

(a) to secure that what appears to them to be the best use is made of the numbers that are appropriate for use as telephone numbers; and

(b) to encourage efficiency and innovation for that purpose.

(2) It shall also be the duty of OFCOM, in carrying out those functions, to secure that there is no undue discrimination by communications providers against other communications providers in relation to the adoption of telephone numbers for purposes connected with the use by one communications provider, or his customers, of an electronic communications network or electronic communications service provided by another.”

80. Numbers may be geographic or non-geographic. The term “Non-geographic number” is defined in Part I of the Schedule to the Notification of 22 July 2003 setting out the General Conditions (see below) as:

“a Telephone Number from a range of numbers in the National Telephone Numbering Plan designated for assignment to End-Users, the digit structure of which contains no geographic significance for routing calls”.

81. It is not disputed that non-geographic numbers include mobile numbers, and numbers commencing with the prefixes 0800, 0845 and 0870 and premium rate numbers (beginning 090). The Disputed Numbers are non-geographic numbers.

82. OFCOM manages the national numbering plan pursuant to its statutory duties. OFCOM allocates numbers in “blocks” which typically contain a continuous sequence of ten thousand numbers. OFCOM told us that although it may allocate numbers to any communications provider, in fact, it allocates number blocks only to communications providers that can demonstrate an operational need for a direct allocation.

83. As numbers are typically allocated in large fixed block sizes, OFCOM considers that direct allocations to small communications providers, for example intermediary service providers such as MMP, tend to be inefficient. However intermediary service providers will often receive a sub-allocation of numbers, for example from a communications provider that operates a network which the intermediary service provider uses for the purpose of providing its service.

84. As set out above, section 58 of the 2003 Act permits OFCOM to set charges in relation to the allocation of numbers, or in relation to the transfer of such an allocation from one

provider to another. This power derives from Article 5(6) of the Universal Service Directive in respect of numbers of exceptional economic value. OFCOM has not previously set any such charges, and told us that it has no plans to do so currently, but that it may consider the introduction of some form of charge at some stage in the future.

85. The costs of administering numbers are currently covered from a general levy on all electronic communications providers which covers all of OFCOM's administrative costs and not from any specific charge associated with the allocation of numbers.
86. Within each number block there may be sequences of numbers which customers or potential customers may consider "magic" or "golden" because they are memorable numbers and so more valuable than random numbers to certain business customers. It was not disputed that the Disputed Numbers may be considered as "magic" or "golden". OFCOM makes no special provision for the allocation of either individual valuable telephone numbers or the allocation of number blocks that may contain magic or golden numbers. These numbers are allocated by OFCOM indiscriminately and without imposing any charge for them.
87. Some communications providers assign numbers to end-users for a fee associated with the assignment of the number, separate from the price for the service provided to the end-user with which the number is connected. OFCOM told us that this activity is not currently regulated but OFCOM recognises that a "secondary market" in golden numbers does exist in the United Kingdom.

*Electronic communications networks and services*

88. The regime governing the provision of "electronic communications networks" and "electronic communications services" is set out in section 32 and following of the 2003 Act.
89. The terms "electronic communications network" and "electronic communications service" are defined in section 32 of the 2003 Act as follows:

“(1) In this Act "electronic communications network" means-

- (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and
  - (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals-
    - (i) apparatus comprised in the system;
    - (ii) apparatus used for the switching or routing of the signals; and
    - (iii) software and stored data.
- (2) In this Act "electronic communications service" means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service.
- (3) In this Act "associated facility" means a facility which-
- (a) is available for use in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility available); and
  - (b) is so available for the purpose of-
    - (i) making the provision of that network or service possible;
    - (ii) making possible the provision of other services provided by means of that network or service; or
    - (iii) supporting the provision of such other services.
- (4) In this Act-
- (a) references to the provision of an electronic communications network include references to its establishment, maintenance or operation;
  - (b) references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person; and
  - (c) references, where one or more persons are employed or engaged to make facilities available under the direction or control of another person, to the person by whom any associated facilities are made available are confined to references to that other person.
- (5) Paragraphs (a) and (b) of subsection (4) apply in relation to references in subsection (1) to the provision of a transmission system as they apply in relation to references in this Act to the provision of an electronic communications network.

- (6) The reference in subsection (1) to a transmission system includes a reference to a transmission system consisting of no more than a transmitter used for the conveyance of signals.
- (7) In subsection (2) "a content service" means so much of any service as consists in one or both of the following-
  - (a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;
  - (b) the exercise of editorial control over the contents of signals conveyed by means of a such a network.
- (8) In this section references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals and to the broadcasting of signals for general reception.
- (9) For the purposes of this section the cases in which software and stored data are to be taken as being used for a particular purpose include cases in which they-
  - (a) have been installed or stored in order to be used for that purpose; and
  - (b) are available to be so used.
- (10) In this section "signal" includes-
  - (a) anything comprising speech, music, sounds, visual images or communications or data of any description; and
  - (b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of apparatus."

90. Section 405 of the 2003 Act, "the General Interpretation" section, sets out that "provide" and cognate expressions, in relation to an electronic communications network, electronic communications service or associated facilities, are to be construed in accordance with section 32(4).

91. The Tribunal was also referred to a number of other guidance documents issued by the former Director. These included the "Guide to the new regulatory framework for service providers" published on 18 December 2002. That guide aimed to offer service providers a simple introduction to the key features of the new regulatory framework.

*The General Conditions*

92. Under Section 45 of the 2003 Act OFCOM has the power to set conditions, binding on the persons to whom they are applied. A condition may be a "general condition", in



which case it must, according to section 45(3) of the 2003 Act contain only provisions authorised or required by sections 51, 52, 57, 58 or 64 of the 2003 Act, or it may be one of the four other types of conditions, namely: a universal service condition, an access-related condition, a privileged supplier condition or an SMP condition.

93. Section 46 of the Act provides that a general condition may be applied generally:

- “(a) to every person providing an electronic communications network or electronic communications service; or
- (b) to every person providing such a network or service of a particular description specified in the condition.”

94. Under section 47 of the 2003 Act, OFCOM can only set conditions where it is satisfied that a condition is:

- “(a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
- (c) proportionate to what the condition or modification is intended to achieve; and
- (d) in relation to what it is intended to achieve, transparent.”

95. Section 48 of the 2003 Act sets out the procedure for setting, modifying and revoking conditions.

96. In May 2002, following the enactment of the Directives but in advance of the 2003 Act, the Director issued a consultation on “draft General Conditions of Entitlement” to provide electronic communications networks and electronic communications services. Paragraph 1.4 is headed “Scope of the new EC Directives” and reads:

“The new Directives are broader in scope than previous EC legislation in that they apply to “electronic communications” as opposed to “telecommunications”...This broader approach means that traditional distinctions between, for example, licensed network operators and unlicensed resellers (or “systemless service providers”) no longer apply. Resellers will, in general, be providing electronic communications services, and therefore will be subject to the same regulatory regime as those existing network operators who are also providing electronic communications services...All providers of communications networks or services will be known as “communications providers” in the UK.”

97. On 22 July 2003, shortly before the coming into force of the relevant provisions of the 2003 Act, the Director issued a “Notification in accordance with section 48(1) of the 2003 Act” which contained, in a Schedule, the General Conditions which were to take effect on 25 July 2003. The General Conditions are contained in Part II of the Schedule to the 22 July 2003 notification.

98. General Condition 18 is concerned with number portability. It reads, so far as material, as follows:

“18.1 The Communications Provider shall provide Number Portability as soon as it is reasonably practicable on reasonable terms, including charges, to any of its Subscribers who so requests.

18.2 The Communications Provider shall, pursuant to a request from another Communications Provider, provide Portability (other than Paging Portability) as soon as is reasonably practicable in relation to that request on reasonable terms and in accordance with the Functional Specification...”

99. General Condition 18.5 contains certain definitions for the purposes of General Condition 18 including:

(b) “Communications Provider” means a person who provides an Electronic Communications Network or an Electronic Communications Service

...

(h) “Number Portability” means a facility whereby Subscribers who so request can retain their Telephone Number on a Public Telephone Network, independently of the person providing the service at the Network Termination Point of a Subscriber

(i) in the case of Geographic Numbers, at a specific location; or

(ii) in the case of Non-geographic Numbers, at any location,

provided that such retention of a Telephone Number is in accordance with the National Telephone Numbering Plan;

...

(k) “Portability” means any facility which may be provided by a Communications Provider to another enabling any Subscriber who requests Number Portability to continue to be provided with any Publicly Available Telephone Service by reference to the same Telephone Number irrespective of the identity of the person providing such a service;

...

- (l) “Publicly Available Telephone Service” means a service made available to the public for originating and receiving, or only receiving, national and international telephone calls through a number or numbers in a national or international telephone numbering plan;
- (o) “Subscriber” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such services in the United Kingdom”;

100. Part I of the Schedule to the notification setting out the General Conditions contains definitions which apply, except in so far as the context otherwise requires, throughout the Schedule. Part I includes the following definitions:

““Customers”, in relation to a Communications Provider, means the following (including any of them whose use or potential use of the network or service is for the purposes of, or in connection with, a business):

- (a) the persons to whom the network or service is provided in the course of any business carried on as such by the Communications Provider;
- (b) the persons to whom the Communications Provider is seeking to secure that the network or service is so provided;
- (c) the persons who wish to be so provided with the network or service, or who are likely to seek to become persons to whom the network or service is so provided;”

“Electronic Communications Service” means any service consisting in, or having its principal feature, the conveyance by means of an Electronic Communications Network of Signals, except so far as it is a Content Service.

“End-User”, in relation to a Public Electronic Communications Service, means:

- (a) a person who, otherwise than as a Communications provider is a Customer of the provider of that service;
- (b) a person who makes use of the service otherwise than as a Communications Provider; or
- (c) a person who may be authorised, by a person falling within paragraph (a), so as to make use of the service;

“Signal” includes-

- (a) anything comprising speech, music, sounds, visual images or communications or data of any description; and
- (b) signals serving for the impartation of anything between persons, between a person and a thing or between things, or for the actuation or control of apparatus.”

101. Part I of the Schedule to the Notification also includes a definition of a “Publicly Available Telephone Service” which differs from the definition of that term set out in General Condition 18.5, set out above, and reads as follows:

“Publicly Available Telephone Service” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Director Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-Users with disabilities or with special needs and/or the provision of non-geographic services.”

102. On 9 July 2003 the Director published a “Final Statement” on the General Conditions of Entitlement setting out his reasons for making the General Conditions and summarising the results of two consultations which had preceded the Final Statement. Paragraph 3.144 explains the Director’s reasons for adopting the wider definition of Publicly Available Telephone Services for the purposes of General Condition 18:

“3.144 The standard definition of “Publicly Available Telephone Services” does not, on the face of it, provide for the porting of non-geographic services which do not include the ability to make calls (only to receive them like, for example, freephone). Clearly this was not the intention of the Universal Service Directive, given that Article 30(b) extends portability to non-geographic services. Oftel has therefore used a slightly altered definition for the purposes of this Condition only.”

103. The Tribunal was also referred, in the context of interpreting the meaning of “Publicly Available Telephone Services,” to the “Guidelines for the interconnection of public electronic communications networks,” a statement issued by the Director on 23 May 2003. That statement purported to offer guidance on certain issues arising from the implementation in the United Kingdom of the Access Directive. Chapter 5 of the Guidelines contains guidance on the definition of “electronic communications services” in that Directive.

104. Chapter 6 of the Guidelines contains guidance as to the Director’s understanding of the meaning of public availability:

“Oftel’s understanding has been that a publicly available service is one that is available to anyone who is both willing to pay for it and abide by applicable terms and conditions. A publicly available service

is distinguishable from a bespoke service restricted to a limited group of individual and identifiable customers. It is also to be understood that the term members of the public requires a broad interpretation – it is not to be read as residential and small business customers. A service that because of its scale, such as a virtual private network, is only likely to attract corporate customers is still considered to be available to members of the public.” [para 6.1]

105. On 22 July 2003 the Director also published the Number Portability Functional Specification to accompany General Condition 18.

### *Premium Rate Services*

106. MMP also referred us to provisions in the 2003 Act concerned with premium rate services. Sections 120 and following of the 2003 Act set out the regulatory regime governing premium rate services. Under section 120:

- (7) a service is a premium rate service for the purposes of this Chapter if-
  - (a) it is a service falling within subsection (8)
  - (b) there is a charge for the provision of the service;
  - (c) the charge is required to be paid to a person providing an electronic communications service by means of which the service in question is provided; and
  - (d) that charge is imposed in the form of a charge made by that person for the use of the electronic communications service
- (8) A service falls within this subsection if its provision consists in-
  - (a) the provision of the contents of communications transmitted by means of an electronic communications network; or
  - (b) allowing the user of an electronic communications service to make use, by the making of a transmission by means of that service, of a facility made available to the users of the electronic communications service.

## **V THE PARTIES’ SUBMISSIONS**

### **(1) MMP’S SUBMISSIONS**

107. MMP submits that it was entirely justified in refusing PTR’s request to port the Disputed Numbers. MMP relies for this justification on: (i) the terms of the agreements between MMP and PTR and/or the general understanding of portability rights within the

telecommunications industry; (ii) the scope of application of the 2003 Act; and (iii) the policy behind the 2003 Act and/or OFCOM's duties in applying the 2003 Act.

*The agreements between PTR and MMP and the general understanding of portability rights within the telecommunications industry*

108. MMP submits that it owns the Disputed Numbers and that it, and not PTR, is the Subscriber for the purposes of General Condition 18. MMP submits that PTR is not entitled to Number Portability since PTR only rents the Disputed Numbers from MMP and has not acquired any rights in the Disputed Numbers.
109. MMP, in its submissions, explains that it was approached by PTR in mid 2000, as PTR wished to rent a series of 0870 national call non-geographic numbers for a variety of uses by the station (for example for use in on-air competitions and for use by the advertising sales team). MMP considered that the number of calls made to PTR was unlikely to be significant, particularly at the outset. Although PTR was a new entrant in the broadcast arena, according to MMP, PTR's Operations Director, Mr David Atkey, had worked with other businesses similar to MMP offering similar services and was therefore well aware of the contractual relationship traditionally enjoyed by such parties.
110. MMP submits that PTR had a choice of obtaining the required 0870 national call numbers either directly from a network operator or renting such numbers indirectly via a business such as MMP. Mr Atkey had operated and obtained numbers in both ways in the past and in this instance chose to draw upon MMP's experience, MMP's ability to obtain memorable telephone numbers, MMP's efficiency and ultimately Mr Millard's experience and knowledge of successfully integrating telecommunications services into broadcast applications.
111. According to MMP, Mr Millard has an enviable track-record in the industry and has won various marketing awards previously for innovative uses of non-geographic numbering for such well-known household broadcasters as: the BBC, EMAP Radio Group plc, Granada TV, Long Wave Radio Atlantic 252, Scottish Radio Holdings plc and Virgin Radio.

112. According to MMP, Mr Atkey had, in the past, been employed by some of the organisations referred to above and was well aware of the limitations of not directly obtaining non-geographic numbers from a network operator. MMP identifies the main limitation as being the inability to move or port numbers if a broadcast client moves its telecommunications business to a third party. MMP gives as examples Long Wave Radio Atlantic 252 and Virgin Radio where Mr Atkey had been involved in such negotiations and the relevant numbers had not been ported. MMP also gives examples of other previous instances where, it submits, that clients were unable to move numbers to third parties: Challenge TV, Express Newspapers plc, the Family Channel, Granada TV, Meridian TV, Mirror Group Newspapers Plc, the National Magazine Group Ltd.
113. MMP submits that there is a “trade off” for working with businesses such as MMP, as opposed to working directly with network operators. This includes not having the huge capital outlay of investing in suitable call-handling equipment, not having to employ an array of telecommunications experts to service such equipment and not needing call-routing plans, not having to set up a diverse number of third party contracts with different network operators, having the ability to procure good memorable telephone numbers in respect of which network operators often require minimum call spends and guaranteed call traffic, and being able to call upon the knowledge, expertise and creative ability of a business such as MMP.
114. MMP submits that it fitted the role required by PTR perfectly and had the ability to offer PTR a range of suitable numbers that MMP had previously obtained from THUS, a network operator.
115. MMP submits that, having weighed the advantages and disadvantages of both options open to him, Mr Atkey chose to rent a series of 0870 national call numbers from MMP, for an agreed sum of money, for a minimum term of one year, with three months rolling notice thereafter.
116. The contractual arrangements between PTR and MMP were set out in the letters of 1 June and 31 October 2000 from MMP to PTR referred to in paragraph 13 above. MMP submits that under these agreements the Disputed Numbers were being rented by PTR and PTR was paying a rental fee. MMP submits that at the time PTR entered into the

agreements with MMP, PTR was well aware that if it terminated its agreements with MMP at a date in the future it would not be able to retain the use of the Disputed Numbers.

117. Furthermore the contracts between MMP and PTR, refer to “renting” the numbers. MMP submits that the Oxford English Dictionary, which is regularly referred to in English law, defines “to rent” as being to “let someone use (something) in return for payment”. MMP also refers to the definition of “rent” on the website [www.wikipedia.org](http://www.wikipedia.org) which is “a payment made for the temporary use of something owned by someone else”. MMP submits, on the basis of these definitions, that PTR did not have an indefinite right to the Disputed Numbers which it was renting from MMP.
118. MMP also submitted to the Tribunal a number of letters or e-mails from other individuals with expertise in the telecommunications industry who expressed support of Mr Millard’s understanding of the regulatory position. These included a witness statement from Mr David Redmile, the former Chairman of Telephone International Media Limited (TIM) and an e-mail from Claire Milne who had been chair of an industry group on Rights of Use of Numbers from 1999 to 2000. MMP also submitted to the Tribunal that a number of the companies whose internet advertising materials had been submitted to the Tribunal by OFCOM were of the view that their customers were renting numbers and were not able to take the number with them in the event that they chose to change service providers.
119. MMP submits that, properly construed, paragraph 6 of THUS’s standard form agreement referred to in paragraph 15 above permitted the telephone number to be sold or transferred to a third party with THUS’s permission and MMP averred that this had been achieved in other cases.
120. MMP submits that the consequence of OFCOM’s Notification was to remove the ability of intermediary companies such as MMP to offer competitive services. MMP accuses OFCOM of acting anti-competitively by taking away something that has been and should continue to be enjoyed by intermediary companies. OFCOM’s approach to the facts of this case is, according to MMP, an unwarranted interference in a “commercial turf war” between MMP and PTR.



121. MMP explained that it understood that under its contract with THUS, the service that THUS was providing was to translate the non-geographic Disputed Numbers to PTR's geographic telephone number. MMP explained that THUS undertook the initial network build and all resulting calls were routed automatically by THUS. MMP explained that when a caller dialled one of the Disputed Numbers, the call went first to THUS and THUS then routed the call to PTR's number. MMP was not part of that call. The call did not go through MMP's equipment and MMP did not interact with any of THUS's equipment or anywhere else on the network to route that call. The call was routed directly from THUS to PTR. MMP submitted that THUS knew that the geographic number was the telephone number of PTR, that MMP was supplying the Disputed Number to PTR and that under the contract between MMP and THUS, THUS was agreeing to provide a service to PTR. MMP also explained that PTR was told by MMP that the network build was provided by THUS.

*The correct interpretation of the 2003 Act and the General Conditions*

122. MMP refers to General Condition 18 which requires Communications Providers to provide number portability to any of their Subscribers who so request. MMP relies on the definitions set out in the 2003 Act and in the General Conditions to show that it is not a Communications Provider and so does not fall within General Condition 18. MMP's submissions as to the correct interpretation of General Condition 18 are summarised below.

123. MMP submits that THUS and not MMP provides an Electronic Communications Service as defined in General Condition 18.5. The definition of Electronic Communications Service makes clear that it involves the conveyance of signals. MMP does not convey or route any signals. MMP maintains that the service, the routing, the translation and the conveyance of the calls were all provided by THUS. Accordingly it is THUS that provides a service consisting in the conveyance by means of an electronic communications network of signals.

124. MMP further submits that it is a reseller, being a secondary level or intermediary service provider, and should not be confused with a Communications Provider. MMP submits that a Communications Provider is a provider who is at "platform level". MMP refers to

various presentations made by senior representatives of the Director to policy focus groups and stakeholder groups between July 2002 and May 2003 which, MMP submits, make clear that Communications Providers are considered to be those allocated numbers by Oftel.

125. MMP submits that it is possible for intermediary service providers to own their own network assets and physically route calls to their customers. Other intermediaries own systems which are able to interact with a network owned by a network operator and instruct the network of a network operator how to route a call. However MMP does not have ownership of any physical assets required for a conveyance of signals but, rather, has a contract with THUS for this purpose.
126. MMP submits that under the contract between MMP and THUS, THUS routes calls to MMP's customers using THUS' network. MMP simply resells the services provided by THUS. The network build necessary to translate calls to PTR's geographic numbers was undertaken by THUS and the calls were physically routed by THUS' electronic communications network. MMP did not participate in the routing of calls and did not provide electronic communications services. Under its contract with PTR, MMP merely rented the Disputed Numbers to PTR and merely providing a number does not, in itself, constitute the provision of an Electronic Communication Service.
127. MMP submits that the Disputed Numbers should be treated in the same way as premium rate services. MMP submits that premium rate services are content services which are excluded from the definition of electronic communications services set out in section 32(2) of the 2003 Act. Premium rate services are defined in section 120 of the 2003 Act and include, for example, support lines and chat lines offered on numbers beginning with the code 090. MMP submits that these numbers are essentially a particular sub-set of non-geographic numbers. Given that the services which can be offered on premium rate numbers are essentially similar to the services which can be offered on 0870 numbers, MMP submits that the two types of numbers should be treated in the same way and that 0870 numbers should also be excluded from the definition of electronic communications services.

128. MMP further submits that both PTR and MMP are within the definition of an “End-User” set out in Part 1 of the Schedule to the Notification and so MMP cannot be required to provide Number Portability to PTR. MMP submits that that both PTR and MMP fall within sub-paragraph (a) of the definition of End-User: “a person who, otherwise than as a Communications Provider, is a Customer of the provider of that Service” and therefore are both End-Users. MMP falls within this definition as it is a customer of THUS. In addition, MMP submits that it is “a person who may be authorised, by a person falling within paragraph (a) so as to make use of the service” as it must be authorised by PTR to make use of the service provided by THUS in order to provide calls to PTR (since if MMP was not implicitly authorised to use the service, it would have no basis for charging PTR). Therefore MMP falls within sub-paragraph (c) of the definition of End-User as well as sub-paragraph (a). “End User” is a “comparative definition” and, as such, MMP cannot be both a communications provider and an End User.
129. MMP also submits that it fulfils the requirements of the definition of “Customer” in Part 1 of Schedule 1 to the Notification. As “Customer” is a comparative definition, MMP cannot be both a Customer and a Communications Provider and this is a further reason why MMP is not subject to the Number Portability obligations in General Condition 18.
130. MMP submits that it does not provide a Publicly Available Telephone Service as defined in paragraph 18.5(o) of General Condition 18. Accordingly, PTR is not a Subscriber of MMP for the purposes of General Condition 18 because it is not a party to a contract with the provider of Publicly Available Telephone Services. MMP submits that it does not provide Publicly Available Telephone Services because it makes services available only to those customers whom it chooses to supply; MMP avers that it provides a bespoke service. Furthermore, MMP submits that it does not provide a service for “originating and receiving national and international telephone calls”, as any such service is provided by THUS. In this regard MMP refers to the “Final Statement” concerning the General Conditions, issued by the Director on 9 July 2003, which states, at Paragraph 3.144 that, in the context of General Condition 18, the definition of “Subscriber” need only be concerned with Publicly Available Telephone Services and not Electronic Communications Services.

131. MMP submits that the scope of Publicly Available Telephone Services was intended to be limited, either to those who have public service obligations or to “network operators”.
132. MMP submits that since PTR does not have a contract with THUS it is MMP and not PTR which is the Subscriber. MMP is the Subscriber being a party to a contract with THUS, who is the provider of Publicly Available Telephone Services, for the supply of such services in the UK.
133. MMP refers to the Guidelines issued by the Director on 23 May 2003 on the interconnection of public electronic communications networks. MMP submits that these Guidelines provide support for the argument that the principal feature of a Publicly Available Telephone Service is the conveyance of signals. MMP submits that since it does not convey signals it therefore does not provide a Publicly Available Telephone Service.
134. As a Subscriber, MMP submits that it has an entitlement itself to require number portability from THUS under General Condition 18. Since PTR is not a Subscriber it does not have an entitlement to require number portability from MMP under General Condition 18.
135. In the alternative, MMP submits that if both MMP and PTR are “Subscribers”, “End-Users” or “Customers”, as the case may be, and if PTR is entitled to claim Number Portability, as submitted by OFCOM, then MMP should have the same rights as PTR. However, if PTR has the right to port the Disputed Numbers away from MMP and does so, MMP will have been prevented from exercising its own right to port. Since this would place MMP in a position of reduced rights it cannot be the correct construction of General Condition 18.
136. MMP submits that Article 22 of the Universal Services Directive does not apply to it. MMP submits that if it was a provider of Publicly Available Telephone Services it would be obliged to publish the information required by Article 22 and it is not so obliged.
137. MMP also submits that “resellers” provide services at a “secondary level,” whereas Communications Providers operate at “platform level”. MMP submits that in order to

increase competition between providers at platform level, it is important for resellers at the secondary level to have rights in the numbers. The same is not true for Communications Providers.

*The purpose of the 2003 Act and the General Conditions*

138. MMP further relies on a purposive construction of the relevant legislation to avoid a construction which would result in MMP being a Communications Provider. MMP's submissions in this regard are summarised below.
139. MMP refers to the Director's Statement entitled "Numbering Directive, Number Portability Requirements" of January 2000, at paragraph 1.2 and 1.3 (see paragraph 51 above). MMP submits that these paragraphs make clear that the primary target of number portability was network competition. MMP submits that the number portability requirement was introduced to allow subscribers using numbers obtained directly from a network operator to port those numbers to another network operator (for example home users moving their home telephone number). MMP submits that number portability was not introduced to allow switching of non-geographic numbers from one intermediary service provider to another intermediary service provider.
140. MMP submits that the legislation was drafted without taking account of the secondary level market in which MMP operates and that the definitions were not drafted to apply to an intermediary and, if the definitions were to apply to MMP, the effect would be to reduce secondary level competition.
141. MMP also suggests that if the construction relied upon by OFCOM were to be correct then other service providers who were not intended to be caught by General Condition 18 might be caught by this provision, for example, those offering telephone access as part of a serviced office suite or those providing a service hiring mobile telephone handsets for use when travelling abroad.
142. The Universal Services Directive described portability as "a key facilitator of consumer choice and effective competition". MMP submits that the purpose of portability was intended to encourage competition upstream from the Subscriber and to promote

switching between platform providers. MMP submits that this purpose will be encouraged by giving secondary level companies, such as MMP, the ability to retain their numbers. This intermediate market encourages competition at platform level between Communications Providers.

143. MMP submits that the development of a secondary market in telecommunications services and the “renting” of numbers were unforeseen at the time of drafting of the General Conditions and the General Conditions do not comfortably or sufficiently deal with this secondary market. MMP submits that the development of this secondary market is a positive development and the General Conditions should therefore not be construed to preclude the development of this secondary market.
144. MMP submits that OFCOM should have had regard to the possible negative consequences of deterring secondary level competition in light of its duty to “further the interests of consumers in relevant markets where appropriate by furthering competition”. MMP submits that, in order to increase competition at the platform level it is important for resellers, at the secondary level of the market, to have rights in numbers. The availability of portability was one of the driving forces behind many such intermediary providers entering the market. If intermediary service providers do not have the right to port numbers from one network provider to another, this will reduce both platform competition and secondary level competition and will prevent the benefits of competition by intermediary service providers being provided to their customers. Secondary level service providers can only operate if they have the ability to retain their numbers. MMP submits that the approach taken by OFCOM in this case, if widely applied, could have a “massive impact” on the traditional service provider industry. It would destroy the secondary or intermediary market and discourage competition at platform level.
145. MMP further submits that there is no merit in OFCOM’s construction of General Condition 18 and it cannot be in keeping with the purpose of the legislation since OFCOM’s construction of the requirements could easily be circumvented by MMP restructuring its commercial arrangements so that MMP loaned PTR the Disputed Numbers instead of renting them to PTR or so that MMP acted as agent for both THUS and PTR for the purposes of introducing THUS to PTR and PTR to THUS.

146. MMP also submits that the Disputed Numbers are essential facilities as, without those numbers, MMP cannot offer the intermediary services it wishes to offer. It submits that a facility is considered essential where: (i) competitors must have access to it because it is essential for the provision of goods or services in that related market; and (ii) it is not economically efficient or may not be feasible for new entrants to replicate.
147. MMP submits that OFCOM's approach has had the effect of "forcing MMP, under duress, to give up its assets".

**(2) OFCOM'S SUBMISSIONS**

148. OFCOM relies entirely on the reasons set out in the Notification in support of the contention that MMP had an obligation to provide number portability at the request of PTR .
149. OFCOM refers to sections 45 and 58(1)(e) of the 2003 Act and General Condition 18 by which the UK has implemented the relevant provisions of Community law.
150. OFCOM submits that in order for MMP to fall within the requirements to provide Number Portability to PTR, three conditions need to be satisfied:
- (a) MMP must be a Communications Provider for the purposes of General Condition 18.1;
  - (b) PTR must be a Subscriber for the purposes of General Condition 18.1; and
  - (c) PTR must have requested Number Portability.
151. In order for MMP to be under an obligation to provide Portability to Uniworld, then
- (a) MMP must be a Communications Provider for the purposes of General Condition 18.2;
  - (b) Uniworld must also be a Communications Provider for those purposes; and
  - (c) Uniworld must have requested Portability.

*(a) whether MMP is a Communications Provider*

152. OFCOM submits that MMP was a "Communications Provider" as defined in General Condition 18.5(b), in that it provided an "Electronic Communications Service" to PTR as defined in Section 32(2) of the 2003 Act:

“a service consisting in, or having its principal feature, the conveyance by means of an electronic communications network of signals...”

153. OFCOM refers to section 32(10) of the 2003 Act which provides that “signal” includes “anything comprising speech, music, sounds, visual images or communications or data of any description” and concluded that this was broad enough to encapsulate “speech” which is the subject of telephone calls.
154. OFCOM submits that the Electronic Communications Service in this case was the routing or “translation” of telephone calls from the Disputed Numbers to PTR’s geographic telephone number using the Electronic Communications Network operated by THUS.
155. OFCOM submits that by routing or translating telephone calls to the Disputed Numbers to PTR’s geographic telephone number, the Electronic Communications Service provided by MMP consisted of, or had as a principal feature, call conveyance being the conveyance of signals (speech).
156. OFCOM submits that by re-selling such a service, provided on THUS’s network, MMP sold an Electronic Communications Service. OFCOM does not accept MMP’s argument that, in these circumstances, it is THUS, not MMP who provides an Electronic Communications Service. By reselling the service provided on THUS’ network, MMP sold an Electronic Communications Service.
157. OFCOM submits that the obligation on resellers to port is a long-established and well recognised part of the “telecommunications landscape” and was a recognised feature of the telecommunications market before the present regime was adopted. OFCOM refers to Article 12(5) of Directive 98/61/EC, amending Directive 97/33/EC, (“the Numbering Directive”) with regard to operator number portability and carrier pre-selection which provided:
  - “5. National regulatory authorities shall encourage the earliest possible introduction of operator number portability whereby subscribers who so request can retain their number(s) on the fixed public telephone network and the integrated services digital network (ISDN) independent of the organisation providing service, in the case of geographic numbers at a specific location and in the case of other than geographic numbers at any location, and shall ensure that this facility is available by 1 January 2000 at the latest or, in those countries which have been granted an additional transition



period, as soon as possible after, but no later than two years after, any later date agreed for the full liberalisation of voice telephony services.”

158. OFCOM refers to the Numbering Directive as having been implemented in UK law by the Telecommunications (Interconnection) (Number Portability, etc.) Regulations 1999, and, in particular, to Regulation 8, which expressly imposed number portability obligations on “systemless service providers” i.e. those that did not have their own telecommunications system and so did not run a network or system of any sort, for example those that sold the network services of a network operator.
159. In this regard OFCOM also relies on a document issued by The Director on 22 May 2002, entitled “The General Conditions of Entitlement” which provided at paragraph 1.4:
- “The new Directives are broader in scope than previous EC legislation in that they apply to “electronic communications” as opposed to “telecommunications”...This broader approach means that traditional distinctions between, for example, licensed network operators and unlicensed resellers (or “systemless service providers”) no longer apply. Resellers will, in general, be providing electronic communications services, and therefore will be subject to the same regulatory regime as those existing network operators who are also providing electronic communications services...All providers of communications networks or services will be known as “communications providers” in the UK.”
160. OFCOM refers to the distinction between Electronic Communications Services and Electronic Communications Networks, which derives from Article 2 of the Framework Directive, and to Articles 1 and 2 of the Authorisation Directive which provide for the general authorisation of electronic communications networks and services. OFCOM refers to section 46 of the 2003 Act which expressly provides that the power to set General Conditions extends to every person providing an Electronic Communications Service or an Electronic Communications Network. OFCOM submit’s that it is clear from this distinction that its power to make General Conditions extends to providers of services without a network. OFCOM submits that this is the clear legislative intent both at Community level and in the 2003 Act.
161. OFCOM dismisses the suggestion made by MMP that only “those allocated numbers by” OFCOM are Communications Providers. OFCOM explains that, on the contrary, Communications Providers are eligible to have numbers allocated to them by OFCOM

provided they satisfy the requirements for the allocation of numbers contained in the Numbering Plan. Whether such an allocation has already been made is immaterial.

162. OFCOM does not accept MMP's argument that, because Premium Rate Services do not fall within the definition of Electronic Communications Services, the service being presently considered should similarly be excluded. OFCOM submits that this case does not concern a premium rate service. OFCOM refers to the different regulatory regime for premium rate services arising under section 120 of the 2003 Act and to the requirement that providers of such services must comply with the Code of Practice published by ICSTIS. ICSTIS has a wide range of powers in respect of providers of premium rate services and is able to give directions to the provider of an Electronic Communications Service or Electronic Communications Network on which such a service is provided. OFCOM submits that the service being presently considered falls outside the definition of premium rate service set out in section 120(8) because the service does not consist in the provision of the content of communications transmitted by means of an electronic communications network. OFCOM further submits that the Electronic Communications Service or Electronic Communications Network used to deliver a premium rate service will, in any event, itself be subject to the General Conditions.

*(b) whether PTR is a "Subscriber"*

163. OFCOM submits that a Communications Provider is only obliged to provide Number Portability under General Condition 18.1 to one of its "Subscribers". Subscribers have rights to port numbers only within the terms of General Condition 18.
164. OFCOM submits that PTR was a "Subscriber", as defined in General Condition 18.5(o), as it was a party to a contract with MMP for the supply of "Publicly Available Telephone Services", as defined in General Condition 18.5(1).
165. OFCOM submits that the service provided by MMP to PTR was "publicly available" in the relevant sense. OFCOM submits that the service provided by MMP to PTR was made available to the public, because as long as a potential customer was willing to pay and abide by any terms and conditions, MMP was likely to provide the service. As MMP provides a service for receiving telephone calls through numbers in a national or

international telephone numbering plan, which is available to the public, MMP provides Publicly Available Telephone Services.

166. As to the meaning of Publicly Available Telephone Services, OFCOM adopts a statement by the Director in “Guidelines for the interconnection of public electronic communications networks”, dated 23 May 2003 to the effect that a publicly available service is one that is available to anyone who is both willing to pay for it and abide by applicable terms and conditions (see paragraphs 102 and 103 above) and submits that the Director’s interpretation in those Guidelines is correct.
167. OFCOM submits that the mere fact that MMP may be selective about the customers to whom it resells that service does not render the service “private” in any relevant sense. OFCOM submits that were it otherwise, a telecommunications provider might seek to defeat the right to port simply by refusing to supply a single customer, or group of customers. OFCOM also refers to the observations of Advocate General Ruiz-Jarabo Colomer in his Opinion delivered on 27 October 2005 in Case C-339/04 *Nuova societa di telecomunicazioni SpA v Ministero delle Comunicazioni and ENI SpA* and in particular to paragraphs 37 - 44 on the meaning of Publicly Available Telephone Service in the context of an earlier regulatory regime.
168. OFCOM submits that MMP does not suggest that its products were not generally marketed, or were restricted to a certain user group. OFCOM submits that MMP was not in the position of, say, a hotel which only supplies telecommunications services to occupiers of its rooms. OFCOM submits that the fact the MMP may be selective as to the customers to whom it resells does not render its service “private” or any less publicly available in any relevant sense.
169. In response to MMP’s argument that the term Publicly Available Telephone Services was intended to be limited to services provided by those who have public service obligations, OFCOM refers to the position of BT and Kingston (in Hull) who are the only providers which are under an obligation to make services available to the general public under the universal services condition. The Universal Service Directive does not provide that all providers of Publicly Available Telephone Services are subject to universal service obligations.

170. OFCOM refers to the definition of Publicly Available Telephone Service set out in General Condition 18 which is wider than that which is contained in the Universal Service Directive. General Condition 18.5 refers to “a service made available to the public for originating and receiving, or only receiving, national and international telephone calls”. The Universal Service Directive refers, at Article 2(c), to “a service available to the public for originating and receiving national and international calls”. A very similar definition to the one set out in the Universal Service Directive is repeated in Part 1 of the General Conditions. The reason for adopting the wider definition for the purposes of General Condition 18, notwithstanding the narrower definition in the Directive, was set out in the Final Statement, (cited above), published by Oftel on 9 July 2003, following two public consultations.
171. OFCOM submits that the Universal Service Directive makes clear, in Article 2(c), that the definition of Publicly Available Telephone Service can include a non-geographic service. Such a service is defined in Article 2(f) of the Universal Service Directive to include mobile, freephone and premium rate numbers. OFCOM submits that it is therefore plainly envisaged that services which are typically for receiving calls only, such as freephone numbers, may fall within the scope of a Publicly Available Telephone Service. Moreover, Article 30 of the Universal Service Directive makes it expressly clear that the duty to provide portability arises in respect of non-geographic numbers.
172. OFCOM submits that if services using non-geographic numbers were held not to be Publicly Available Telephone Service(s) on grounds that they were only for the reception of calls, then in practice there would be a very large gap in the portability regime.
173. OFCOM submits that in implementing the Directive, following consultation, OFCOM adopted a modified definition of Publicly Available Telephone Service, for the purpose of General Condition 18, in order to give effect to the Directive’s purpose. It submits that such an approach falls within the bounds of permissible implementation for the following reasons:
- (a) Directives must be given a purposive construction - *Litster v Forth Dry Dock Co Ltd [1990] 1 AC 546 at 558* per Lord Templeman;

- (b) The context of a measure must be taken into account; e.g.: Case C-173/99 *R v Secretary of State for Trade and Industry, ex p BECTU* [2001] ECR I-4881, para 36;
- (c) The purpose of a measure may determine whether it should be given a broad or narrow reading - eg: Case C-212/00 *Stallone v Office national d'emploi* [2001] ECR I-7625, para 18;
- (d) It is necessary to look not only at the literal wording of a Community measure but also to the intention of the Community legislature - eg: Case 118/79 *Knauff* [1980] ECR 1183 para 5. In Case C-399/98 *Ordine degli Architetti v Commune di Milano* [2001] ECR I-5409 para 75, a provision of a public procurement directive was interpreted in order to be consistent with a “basic aim” expressed in its recitals to “open up public works to competition”;
- (e) A directive should not be read literally where this conflicts with its aim - eg: Case C-141/96 *Finanzamt Osnabrück- Land v Langhorst* [1997] ECR I-5073 per Advocate-General Léger at para 28; Case 320/85 *Maniglier* [1986] ECR 2917 para 9;
- (f) In interpreting one part of the text of a measure, it may be necessary to refer another part - eg: Case C-66/99 *Wandel GmbH v Hauptzollamt Bremen* [2001] ECR I-873, para 47;
- (g) In particular, the recitals to a Directive may be used as a guide to the objective pursued - eg Case C-122/99 *Toshiba Europe GmbH v Katun Germany GmbH* [2001] ECR I-7945, para 36;
- (h) OFCOM also refers to the Opinion of Advocate General Ruiz-Jarabo Colomer, cited above, as follows:

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

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

- (i) OFCOM also relied on Article 249 EC and the explanation of Advocate General Lenz in Case 103/88 *Fratelli Constanzo v Comune di Milano* [1989] ECR 1839 at paragraph 10:

“The extent to which a Member State is obliged to incorporate the provisions of a directive without amendments or, conversely, is permitted to depart from them must be interpreted by the interpretation of the provision at issue. The basis must be the wording of the provision, and the purpose and objectives of the directive must be ascertained.”

174. OFCOM submits that, contrary to the arguments put forward by MMP, Article 22 of the Universal Service Directive does not provide that Member States should require all providers of Publicly Available Telephone Services to publish the required information, but rather that they should be “able to require” such undertakings to publish such information. General Condition 21 provides OFCOM with the power to direct a Communications Provider to publish such information. Pursuant to General Condition 21 OFCOM published a direction on 27 January 2005 requiring specified Communications Providers providing voice services at a fixed location to publish quality of service information. OFCOM refers to the exclusion from the terms of that direction for those Communications Providers operating at “less than the threshold set at £4m per quarter in gross revenue and 100 million minutes handled per quarter.” Accordingly OFCOM does not oblige all providers of a Publicly Available Telephone Service to publish the information referred to in Article 22, although it is “able to require” such publication.
175. OFCOM submits that MMP itself subscribed to a non-geographic service provided by THUS. Although THUS operated the electronic telecommunications network that actually routed PTR’s calls, PTR did not have a contractual relationship with THUS. Instead, MMP had the direct contractual relationship with THUS and offered the capability, provided to it by THUS, to its own customers including PTR. PTR would not have received telephone calls without its contractual relationship with MMP.
176. OFCOM submits that the fact that MMP is a Subscriber to a contract with THUS does not preclude MMP from simultaneously being a Communications Provider to PTR in respect of the same calls. PTR is therefore a Subscriber under its contract with MMP.

OFCOM submits that both MMP and PTR have a right to port as against the Communications Provider to which each has subscribed under General Condition 18.1.

*(c) Whether PTR had made a request for Number Portability*

177. It is not disputed that PTR made a request for Number Portability.

*(d) Whether Uniworld is a “Communications Provider”*

178. OFCOM submits that under General Condition 18.2 a Communications Provider must provide Portability to another Communications Provider who so requests.

179. OFCOM considers that Uniworld is a Communications Provider, because it intended to provide to PTR similar services to those which had previously been provided by MMP and that therefore, its request for Portability had also been validly made under General Condition 18.5(k).

180. OFCOM submits that once PTR requested Number Portability, and/or Uniworld had requested Portability in respect of the Disputed Numbers, MMP was obliged to port them.

*(e) The policy behind the Directives and the 2003 Act*

181. OFCOM denies that the outcome outlined above is in any way contrary to the policy behind number portability.

182. OFCOM submits that the policy of the Community legislation, and the 2003 Act is to ensure competitive electronic communications markets. OFCOM refers to Article 8 of the Framework Directive which requires Member States to ensure that in carrying out the regulatory tasks specified in the Framework Directives and the other relevant Directives (including the Authorisation Directive) the national authorities shall take “all reasonable measures” aimed at meeting certain objectives set out in that Article. Article 8(2) provides:

“the national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic

communications services and associated facilities and services by inter alia:

- (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
- (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector.”

183. OFCOM refers to section 4 of the 2003 Act which places OFCOM under a duty to act to give effect to these requirements. In addition OFCOM refers to section 3(1)(b) which imposes on OFCOM a general duty to further the interests of consumers in relevant markets, where appropriate by promoting competition. In performing that duty, in accordance with section 3(1)(b) OFCOM must have regard to, inter alia: “the desirability of promoting competition in relevant markets.”
184. OFCOM submits that number portability plays a role in effective competition by removing a disincentive to making a switch between suppliers of telecommunications service in respect of non-geographic numbers.
185. By way of background to the policy underlying the relevant EU legislation OFCOM refers to the Monopolies and Mergers Commission 1995 Report on telephone number portability, the ETO report on Non-Discriminatory Access to Numbering Resources commissioned by the European Commission and published on 15 July 1996, and the Green Paper on a numbering policy for telecommunications services in Europe, published by the Commission on 20 November 1996, as recognising the benefits of number portability.
186. OFCOM contends that, contrary to MMP’s submissions, the facts of this case provide a powerful illustration of why it is pro-competitive for the end-user (PTR) to be given the right to port the Disputed Numbers. If number portability had not been available to it, PTR would have been obliged to retain MMP as its service provider, even where it was able to source a more competitive deal elsewhere, or else to surrender its numbers.
187. In this case, PTR wished to move its business from MMP to Uniworld because it considered that Uniworld was offering a more attractive financial package. In brief, Uniworld offered to share the revenues generated by calls to the Disputed Numbers with PTR and thereby convinced PTR to switch its custom from MMP to Uniworld. OFCOM



submits that MMP's ability to charge what were in effect higher prices for what it considers to be "value-added" services, depends on what the market will bear. PTR should not be prevented from switching from services offered by MMP to services offered by Uniworld because of a reluctance to change its telephone numbers – number portability is intended to prevent customers from having to make such a choice.

188. OFCOM refers to the overall scope and aims of the Universal Services Directive as being contained in Article 1 of that Directive, stating that it "concerns the provision of electronic communications networks and services to end-users" and is aimed at "[ensuring] the availability throughout the Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market".

189. OFCOM submits that, contrary to MMP's submissions, it is clear from the provisions of the Universal Service Directive that there is nothing to suggest that the legislative intention was to restrict the benefits of increased competition and enhanced consumer choice only to upstream parts of the supply chain or platform level users only. OFCOM submits that by ensuring that number portability reaches to the end of the supply chain it serves to ensure that competitive pressure is maintained throughout that chain.

190. OFCOM submits that the relevant number portability regime derives from Community law. The purpose of the right to port is explained in recital 40 to the Universal Services Directive, which states:

"Number portability is a key facilitator in consumer choice and effective competition in a competitive telecommunications environment such that end users who so request should be able to retain their number(s) on the public telephone network independently of the organization providing the service..."

191. OFCOM refers to Article 30(1) of the Universal Services Directive for the derivation of the obligation to port, which provides:

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

(b) in the case of non-geographic numbers, at any location."

(f) *Response to MMP's submissions concerning the contract between MMP and PTR and the "industry understanding" of portability*

192. In paragraphs 57 to 66 of the Notification, OFCOM set out its response to the arguments which had been put forward by MMP concerning its contracts with PTR. Paragraphs 63 to 65, which summarise OFCOM's conclusions on these arguments, are reproduced below:

- “63. In summary, telephone numbers are a public resource and are administered by the regulatory authority (i.e. OFCOM in the UK). OFCOM agrees with the position set out in the report above that no person or organisation can claim to own a telephone number as a result of the regulatory arrangements relating to the allocation and use of numbers; instead they possess a right of use. The extent of that right of use is determined by and must be construed by reference to, the regulatory arrangements governing the provision of electronic communications services including the relevant number allocation, the regulatory rules surrounding certain types of services (such as Publicly Available Telephone Service) and other specific rules such as General Condition 18.
64. OFCOM therefore does not agree with MMP that it could or should be considered to be the owner of the disputed numbers. It follows that MMP cannot “rent” these to PTR and cannot, through the asserting of an ownership right, lawfully prevent the disputed numbers from being ported. The disputed numbers are the telephone numbers that PTR can be reached on and are consequently “their” (i.e. PTR's) numbers. Therefore PTR can request to retain their numbers on a Public Telephone Network i.e. request Number Portability.
65. Furthermore, on inspection of General Condition 18, there do not appear to be any defences or exclusions to the requirement of Number Portability. Specifically, there is no concession made for arrangements whereby telephone numbers are “rented” or “leased”.”

193. OFCOM submits that MMP's use of the Disputed Numbers was governed by a package of rights and obligations determined by the regulatory framework (rights of use). OFCOM refers to Article 6(1) and Annex C 3 to the Authorisation Directive which permits Member States to impose conditions upon the rights of use of numbers and which gives effect to the number portability requirements contained in the Universal Services Directive.

194. OFCOM submits that the extent of an undertaking's interest in a telephone number is defined by the rights of use afforded by the regulatory framework within which the

telecommunications industry operates. Where General Condition 18.1 and 18.2 are satisfied, OFCOM submits that such rights of use are subject to an obligation to port the telephone number. OFCOM submits that MMP's interest in the Disputed Numbers was from 25 July 2003, therefore subject to the obligation to port those numbers where the conditions set out in General Condition 18.1 or General Condition 18.2 were satisfied.

195. OFCOM does not consider that MMP's rights of use in respect of the Disputed Numbers were equivalent to ownership. Community and domestic law do not refer to "ownership" of a telephone number. But even if MMP did "own" the Disputed Numbers OFCOM submits that any such ownership was subject to the obligation to port where the terms of General Condition 18.1 and 18.2 were satisfied.
196. OFCOM submits that neither the perception of the parties, or even the industry, nor the contractual arrangements between MMP and PTR, can serve to defeat, or somehow preclude MMP from complying with, the express provisions of the regulatory requirement to port the Disputed Numbers under General Condition 18.1 and 18.2. (which obligations are derived from statute and ultimately Community law) and the policy considerations which lie behind them. MMP cannot contract out of its regulatory obligations and PTR cannot waive its right to number portability by contract.
197. OFCOM submits that although the agreements refer to the "routing and rental" of the Disputed Numbers, that description of the service provided by MMP is not determinative of the legal effect of the contract. In support of that submission OFCOM refers to *In re Spectrum Plus Ltd (in liquidation)* [2005] 3 WLR 58 para 53. OFCOM submits that, in substance, the agreements provided for the provision by MMP of routing services from the Disputed Numbers to PTR's geographic number.
198. The subsequent termination of the agreement between MMP and PTR does not serve to defeat the obligation to port which arises as a result of requests made by both PTR and Uniworld whilst PTR was a Subscriber to services provided by MMP.
199. In response to MMP's complaint that OFCOM has "intervened in a commercial turf war" which is "not what regulation is about", OFCOM submits that having concluded that

MMP was in breach of General Condition 18.1 and 18.2 it was fully entitled to issue a Notification under section 94 of the 2003 Act.

200. OFCOM does not accept MMP's arguments concerning ways in which OFCOM's decision could be avoided. In particular, OFCOM does not accept that a telephone number can be "loaned". OFCOM submits that the right to port does not preclude commercial arrangements for provision of the kind of services at issue in this case, even if it may affect the form in which those arrangements may be commercially viable. OFCOM submits that portability does not, for example, preclude a Communications Provider from charging a periodic fee for number translation, or a flat fee for a golden number from which calls would be translated.
201. OFCOM further submits that nothing in OFCOM's decision or in the regulatory regime, gives rise to any restriction upon access to essential facilities.

*(g) Other matters arising from MMP's submissions as to General Condition 18*

202. OFCOM submits that the question of whether MMP was an "End-User" within the meaning of the General Conditions is immaterial to the outcome of this case. The term "End-User" is defined in Part 1 of the General Conditions but forms no part of General Condition 18, or the definition of any terms within it. In any event, OFCOM submits that MMP is not the "End-User" of any relevant service because, in relation to PTR, MMP was a Communications Provider, even if it may also have been a customer of THUS. OFCOM agrees with MMP that, under the definition set out in Part 1 of the General Conditions, a person cannot simultaneously be both a Communications Provider and an End-User in respect of any particular service. OFCOM submits that MMP was a Communications Provider and it was a customer of THUS in its capacity as such. It was not a customer of THUS as an End-User.
203. OFCOM submits that the question of whether MMP was a "Customer" is similarly immaterial. The definition of the term "Customer" is included in Part 1 of the General Conditions but the term forms no part of General Condition 18 or the definition of any of the terms within it. Moreover OFCOM submits that nothing in the definition of

“Customer” precludes the possibility that MMP was a Customer of THUS and equally a Communications Provider to PTR.

204. OFCOM submits that in so far as MMP was a “Subscriber” to an Electronic Communications Network or Electronic Communications Service offered by THUS, MMP would have been entitled to request portability of the Disputed Numbers from THUS to another Communications Provider. OFCOM also submits that once PTR had exercised its right to port, MMP lost any right to do so. OFCOM submits that that is the result of the competitive process working, not because, as MMP suggests, of any anti-competitive feature of the regulatory regime.

## **VI THE TRIBUNAL’S ANALYSIS**

### *(1) The history and purpose of number portability*

205. MMP has emphasised the history and purpose of number portability. We have therefore set out the regulatory background in some detail above. Contrary to the submissions which we received from MMP we do not consider that the history assists MMP. It seems to us clear from the regulatory background, which we have set out above, that number portability was intended to apply to “resellers” both before and after the new regulatory framework came into existence.
206. The background materials to the 2002 Directives and the history of number portability obligations in Community law and UK law, support the view that resellers who resell services provided by another Communications Provider are intended to be subject to number portability obligations. For example the 1999 “Telecommunications (Interconnection) (Number Portability, etc.) Regulations”, SI No. 3449/1999, which implemented Directive 98/61/EC into UK law, did clearly apply to providers of telecommunications services which did not themselves own or operate a telecommunications network. The regulations expressly applied to “systemless service providers”, who were defined as “a person who provides publicly available telecommunication services but who does not run a telecommunications system within the meaning of Section 4 of the Act by means of which such services are to be provided”. It is clear that this article envisaged that resellers, who did not themselves own a

telecommunications network by means of which calls could be routed, could provide publicly available telecommunications services.

207. Furthermore, the results of the 1999 Communications Review, the precursor to the 2002 Directives, published as COM (1999) 359, suggest that the European Commission's aim, in relation to number portability obligations, was to extend the scope of those obligations to mobile operators (paras 4.6.3 and 4.6.5). We have carefully considered the material to which MMP referred us, but in our view, the background documents referred to by MMP demonstrate that the policy underlying both Community law and UK law has been to expand, rather than contract, the scope of number portability obligations over time. Therefore it seems to us unlikely that General Condition 18 and the 2003 Act which replaced SI 3449/1999 were intended to have a narrower scope than those regulations and MMPs submissions to us as to this accordingly must be misconceived.
208. MMP also referred us to the background to the agreements between MMP and PTR. MMP submitted that it owned the Disputed Numbers and rented them to PTR under its agreements with PTR. MMP submitted that PTR entered into the agreements with MMP on that basis. MMP also submitted that its arrangements with MMP were permitted under MMP's contract with THUS. We accept the submission of OFCOM that neither the perception of the parties, or even the industry, nor the contractual arrangements between MMP and PTR or between PTR and THUS can serve to defeat, or preclude MMP (or THUS) from complying with the express provisions of the legislation. We accept OFCOM's submissions that MMP cannot contract out of its regulatory obligations and nor could PTR have waived, or otherwise be precluded from relying on, its statutory rights. Accordingly, save as relevant to MMP's submissions as to the application of General Condition 18 in the specific circumstances of this case, we do not consider the submissions of MMP in these respects further.
209. We therefore consider below the current statutory provisions without resorting to the background and history.
210. The issue before us is whether MMP is subject to the obligation to port under the 2003 Act and the General Conditions.

*(2) The 2003 Act and General Condition 18*

211. The Tribunal considers that the starting point, when considering whether MMP was subject to an obligation to port the Disputed Numbers under General Condition 18, is the wording of General Condition 18 itself. General Condition 18.1 reads as follows:

“The Communications Provider shall provide Number Portability as soon as it is reasonably practicable on reasonable terms, including charges, to any of its Subscribers who so requests.”

212. Accordingly for MMP to be subject to the obligation to port the Disputed Numbers MMP must fall within the definition of a “Communication Provider” and PTR must fall within the definition of “its Subscribers”.

213. Communications Provider is defined in General Condition 18.5(b) as meaning:

“a person who provides an electronic communications network or an electronic communications service”.

214. It is common ground that MMP does not provide an electronic communications network. The meaning of electronic communications service is set out in Section 32(2) of the 2003 Act as:

“a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service”.

215. Accordingly, notwithstanding that the service consists of the conveyance of signals by means of an electronic communications network, in so far as the service is a content service it is excluded from the definition of electronic communications service.

216. A content service is defined in section 32(7) as:

“so much of any service as consists in one or both of the following-

(a) the provision of material with a view to its being comprised in signals conveyed by means of an electronic communications network;

(b) the exercise of editorial control over the contents of signals conveyed by means of a such a network.”

217. Section 32(8) of the 2003 Act provides:

“In this section references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals ...”

218. Therefore a person who provides a service consisting of the transmission or routing of signals will be providing an electronic communications service (except in so far as it is a content service).

219. Save where the context otherwise requires, section 405 of the 2003 Act states that “provide and cognate expressions” in relation to an electronic communications service “are to be construed in accordance with section 32(4)”.

220. Section 32(4)(b) of the 2003 Act states that in the 2003 Act:

“(b) references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person; and

221. “Subscriber” is defined in General Condition 18.5(o) as:

‘any person who is party to a contract with the provider of Publicly Available Telephone Services, for the supply of such services in the United Kingdom’.

222. “Publicly Available Telephone Service” is defined for the purposes of GC 18 only in General Condition 18.5(l) as:

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

223. Therefore, in order to determine whether MMP was obliged to offer portability to PTR in this case, the following issues must be decided:

- a) Did MMP provide a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals (which was not a content service)?

If MMP provided such a service, then MMP was a “Communications Provider”.

- b) Was the service which formed the subject matter of the contract between MMP and PTR a service which was made available to the public for originating and receiving, or only receiving, national and international



telephone calls through a number or numbers in a national or international telephone numbering plan?

If so, then the service which formed the subject matter of the contract was a Publicly Available Telephone Service.

- c) If so, was MMP the “provider” of the relevant Publicly Available Telephone Service?
- d) It is accepted that PTR is a party to a contract with MMP, but was PTR a “Subscriber” of MMP?

If MMP was a provider of Publicly Available Telephone Services and the contract between PTR and MMP was for the supply of a Publicly Available Telephone Service, then it would follow that PTR was a “Subscriber” for the purposes of General Condition 18.

*(a) Was MMP a Communications Provider?*

224. Turning first to the question of whether MMP was a “Communications Provider”. MMP has submitted to the Tribunal that it is not a Communications Provider because it does not, itself, convey signals. However there is no dispute between the parties that a service consisting in, or having as its principal feature, the conveyance by means of an Electronic Communications Network of Signals is provided to PTR, since calls to the Disputed Numbers were routed to PTR’s geographic numbers. The question therefore, is whether MMP provided such a service.
225. Section 32(8) of the 2003 Act states that references to the conveyance of signals include references to the transmission or routing of signals or of parts of signals.
226. The contract between MMP and PTR, refers to “the routing and the rental of the national call number 08700 50 50 50”. PTR was to pay to MMP “a one-off set-up and connection fee of £250.00 payable in advance. This is for the network build to route all calls made to the Number onto your PSTN” and, in addition, “a quarterly rental fee of £75”.
227. In our view, in essence, the substance of the contract between MMP and PTR is the ability, which PTR secures under the contract, to receive calls via the Disputed Numbers.

The contract is not a contract for the rental of the Disputed Numbers alone. It expressly provides for the network build to route all calls made to the Disputed Numbers to PTR. In our view, by necessary implication, the contract must include the procuring by MMP of the routing of calls to PTR's geographic number during the currency of the contract. If this were not so, then PTR would not derive any benefit from entering into the contract with MMP as it is difficult to see that the number itself could have any value to PTR unless it could be used to receive calls.

228. Furthermore, if, for whatever reason, the contract between THUS and MMP was brought to an end, so that calls to the Disputed Numbers could no longer be routed using THUS' network, this would not relieve MMP from its contractual obligation to PTR to procure the routing of calls to the Disputed Numbers. The Tribunal is therefore satisfied that the principle feature of the service which MMP agreed to provide to PTR under the contracts is the routing of signals. Furthermore, the service of procuring the routing of signals is not a "content service" within the meaning set out in section 32(7) of the 2003 Act. It does not consist in the provision of material or the exercise of editorial control over the content of signals. The service received by PTR under the contracts is accordingly within the definition of "Electronic Communications Service".

229. The next question is whether MMP "provides" the Electronic Communication Service to PTR. MMP submits that, on the natural meaning of the words, the service in question is "provided" not by MMP, but by THUS. We do not accept that, on the facts of this case, it is THUS and not MMP who is providing the Electronic Communications Service. As we have set out above, the contract between MMP and PTR obliges MMP to procure the routing of calls to PTR. The contract does not require THUS to provide that service to PTR and the agreements with PTR are silent as to how MMP will perform its contractual obligations. We are satisfied that, on the natural meaning of the word "provide", MMP in agreeing to procure the routing of calls via the Disputed Numbers to PTR, was providing an Electronic Communications Service to PTR.

230. However not only is this the natural meaning of "provide" on the facts of the present case, but the provisions of the 2003 Act contain statutory support for this construction.

231. Although not referred to in argument, Section 405 of the 2003 Act, the “General Interpretation” section, includes a definition of “provide” as follows:

“‘provide’ and cognate expressions, in relation to an electronic communications network, electronic communications service or associated facilities, are to be construed in accordance with section 32(4)”

232. We were referred by OFCOM to Section 32(4) of the 2003 Act. This section reads as follows:

“In this Act-

- (a) references to the provision of an electronic communications network include references to its establishment, maintenance and operation;
- (b) references, where one or more persons are employed or engaged to provide the network or service under the direction or control of another person, to the person by whom an electronic communications network or electronic communications service is provided are confined to references to that other person; and
- (c) references, where one or more persons are employed or engaged to make facilities available under the direction or control of another person, to the person by whom any associated facilities are made available are confined to references to that other person.”

233. Under the contract between THUS and MMP, THUS is employed or engaged to provide the electronic communications service under the direction or control of another person i.e. MMP. In those circumstances section 32(4)(b) states that references to “the person by whom the electronic communications... service is provided” are confined to references to “that other person”, ie to MMP. Accordingly, the effect of section 32(4)(b) is that MMP is to be treated as a provider of electronic communications services.

234. For the reasons set out above we consider that MMP’s submission that the service in question is “provided” not by MMP, but by THUS, is misconceived having regard to both the natural meaning of “provide” as well as the statutory definition of references to “provide” in the context of electronic communication services contained in the 2003 Act.

235. Therefore the question we posed in paragraph 222(a) above must be answered in the affirmative. MMP did provide a service consisting in, or having as its principle feature, the conveyance, by means of an electronic communications network, of signals to PTR

which was not a content service. Accordingly, MMP is a “Communications Provider” for the purposes of General Condition 18.

*(b) Was the service provided to PTR a Publicly Available Telephone Service?*

236. The next question is whether the service provided to MMP is a “Publicly Available Telecommunications Service” within the meaning ascribed to that term in General Condition 18.5(1). In order for a service to be a Publicly Available Telephone Service it must, according to the definition set out in 18.5(1), be:

“a service made available to the public for originating and receiving, or only receiving, national and international telephone calls through a number or numbers in a national or international telephone numbering plan”

237. There appears to be no dispute in this case that the service provided to PTR is a service for receiving calls (though not for originating calls) through numbers in the national telephone numbering plan.

238. The meaning of “a service made available to the public” is not further defined in the 2003 Act, the General Conditions, or the 2002 Directives. OFCOM submitted that the service provided by MMP is “a service made available to the public” because as long as the potential customer of MMP is willing to pay and abide by any terms and conditions, MMP is likely to provide the service to that customer. OFCOM accordingly submits that the service is offered by MMP to the public. OFCOM distinguishes between such a service and a “bespoke service”. MMP submits that it simply resells the service provided by THUS and that it supplies only those customers to whom it chooses to supply, and that it is providing a bespoke service as opposed to a service made available to the public. The submissions of both OFCOM and MMP focus on the recipient of the service and they ask themselves whether MMP offers to contract with customers generally (the public) or only with a closed group.

239. The Tribunal, at the hearing, suggested that an alternative construction of “a service made available to the public” might instead be focussed on the service provided rather than on the other party to the contract (the recipient of the service). OFCOM, at the hearing, indicated that it had not previously considered this alternative construction.

240. Whichever is the correct way of approaching the construction of “a service made available to the public” the Tribunal is satisfied, in the circumstances of this case, that the service provided to PTR was a service made available to the public for receiving calls. MMP’s submissions focussed on the services of “guidance” and “offering the right package” in submitting to us that it was providing a “bespoke” service. That submission ignores the essence of its contract with PTR which, we have decided above, was procuring the routing of calls to the Disputed Numbers. MMP did not suggest that the service of procuring the routing of calls was a “bespoke” service. Even on MMP’s own submissions MMP was, in this regard, “re-selling” a publicly available telephone service provided by THUS.
241. Therefore, in our view, the service of the procuring of routing of calls to the Disputed Numbers via PTR’s geographical number is not a bespoke service. The service was in that regard “made available to the public”. Furthermore, a service which is primarily aimed at a section of the public, such as business customers or customers in a particular industry sector, is, in our judgment, nevertheless a service made available to the public.
242. Therefore, we are satisfied that the service provided to PTR in this case was a service made available to the public and was therefore a Publicly Available Telephone Service.
243. During the hearing the question arose as to the reason for the differences between the definition of “Publicly Available Telephone Service” found in General Condition 18 as compared with the definition set out in the Universal Service Directive, and Part I of the Schedule to the Notification setting out the General Conditions. We have carefully considered the submissions of OFCOM in relation to the definition of Publicly Available Telephone Service in General Condition 18 which differs from the definition in the Universal Service Directive. We accept, for the reasons submitted by OFCOM, that OFCOM was not precluded by the terms of the Universal Service Directive from enacting the wider definition of Publicly Available Telephone Service found in General Condition 18 for the purposes of imposing obligations in respect of number portability.

(c) *Did MMP provide the Publicly Available Telephone Service to PTR? Was PTR a Subscriber of MMP?*

244. Given that the service which forms the subject matter of the contract between MMP and PTR falls within the definition of “Publicly Available Telephone Service”, the agreements between MMP and PTR are contracts for the supply of such a service. It is then necessary to consider whether MMP is a “provider” of the Publicly Available Telephone Service pursuant to the agreements.

245. MMP has submitted to the Tribunal that, on the natural meaning of the word “provide”, any Publicly Available Telephone Service in this case was provided to PTR by THUS, and not by MMP. As set out above, section 32(4) of the 2003 Act is concerned with the meaning of “provide” in relation to an “electronic communications service” (see section 405 of the 2003 Act). Those definitions do not expressly refer to Publicly Available Telephone Service. There is no definition of “provide” in relation to a Publicly Available Telephone Service. The question arises therefore whether “provide” should, in this context, be given a narrow meaning (as suggested by MMP) or a wider meaning (analogous with the meaning of “provide” in the context of an electronic communications service).

246. The relationship between “Electronic Communications Service” and “Publicly Available Telephone Service” is not, itself, explicitly set out in the 2003 Act, the General Conditions, or the 2002 Directives. The term “electronic communications service” is the term most commonly used in the Authorisation Directive and the Framework Directive, while “Publicly Available Telephone Service” is defined in the Universal Service Directive, the latter being the Directive that also makes provision, at Article 30, for the requirement to provide number portability. The Director’s “Guide to the new regulatory framework for service providers”, published on 18 December 2002, and referred to above, indicates his view in diagrammatic form, that “Publicly Available Telephone Service” is a sub-category of Electronic Communications Service (see Annex A).

247. It seems clear to us that, within the overall framework of the 2002 Regulations, which is reflected in the 2003 Act, a “Publicly Available Telephone Service” is intended to be a sub-category of “Electronic Communications Service”. This appears to us to be clear from the Authorisation Directive (particularly the wording of Articles 3 and 4) and to be

reflected in the structure of the 2003 Act. It appears to us that any service falling within the definition of Publicly Available Telephone Service set out in General Condition 18, must, necessarily, involve the originating or receiving of calls, and must therefore involve the conveyance of signals so as to fall within the definition of an electronic communications service.

248. In our view, a Publicly Available Telephone Service is therefore a sub-category of an Electronic Communications Service and a Publicly Available Telephone Service is essentially an Electronic Communications Service: (a) for telephone calls and (b) made available to the public. We have decided above, in considering whether MMP is a Communications Provider, that MMP “provided” Electronic Communication Services to PTR pursuant to the agreements. We have also decided above that a Publicly Available Telephone Service was provided to PTR. In our view, and for the same reasons that we have already given in respect of whether MMP is a Communications Provider, MMP’s contract with PTR was for the provision by MMP of a Publicly Available Telephone Service to PTR. It seems to the Tribunal that this construction is supported by common sense.
249. Accordingly, in our view, PTR is therefore a Subscriber for the purposes of General Condition 18.
250. As PTR had a contract with MMP for the supply of the Publicly Available Telephone Services, and was therefore a “Subscriber” of MMP, as defined in general Condition 18.5(o), it was entitled to request Portability from MMP.
251. Accordingly under General Condition 18.1, MMP (the Communications Provider) was required to provide Number Portability as soon as it is reasonably practicable on reasonable terms, including charges, to PTR. Furthermore under General Condition 18.2 MMP should, pursuant to a request from another Communications Provider (Uniworld) have provided Portability, as soon as reasonably practicable in relation to that request on reasonable terms and in accordance with the Functional Specification. It was not disputed for these purpose that Uniworld is a Communications Provider.

(3) ***MMP's other submissions***

252. For the sake of completeness we deal below with the following further submissions made by MMP:

- (a) *That the Disputed Numbers should be treated in the same way as premium rate numbers:*

In so far as premium rate numbers are content services they are excluded from the definition of electronic communication service by section 32(2) of the 2003 Act. In so far as they are not content services the legislation does not treat them any differently to other electronic communication services. As we have held above the service provided by MMP to PTR is not a content service.

- (b) *That MMP is an “end-user” and not a Communications Provider within the definition of “End-User” in Part 1 to the Schedule to the Notification:*

We accept the submissions of OFCOM that MMP is not an “End-User” and we hold for the reasons stated above that MMP, in relation to the Disputed Numbers, is a Communications Provider and accordingly is not an “End-User”.

- (c) *That MMP is a “customer” within the definition of “customers” in Part 1 to the Schedule to the Notification:*

We accept the submissions of OFCOM that nothing in the definition of “Customer” precludes the possibility that MMP is simultaneously a customer of THUS and a Communications Provider to PTR. It seems to the Tribunal that MMP’s submission that a person cannot both be a “customer” and a “communication provider” is without foundation.

- (d) *The effect of Article 22 of the Universal Services Directive:*

We accept OFCOM’s submissions, summarised above, as to the effect of this Article.

- (e) *That the 2003 Act and General Condition 18 should be given a purposive construction.*

For the reasons set out above, we do not consider that the history and background to the 2003 Act and General Condition 18 support the purposive construction



which MMP seeks to place on the legislation. The language of the 2003 Act and General Condition 18 is clear and accords with the Community legislation which it is implementing. Furthermore we consider the construction we have placed upon General Condition 18 to be entirely consistent with its legislative purpose.

- (f) *That OFCOM's interpretation of General Condition 18 is contrary to OFCOM's general duty, in section 3 of the 2003 Act, to promote competition:*

We accept OFCOM's submissions in this regard also that portability both at platform level and in the secondary market is consistent with the promotion of competition by ensuring that competitive pressure is maintained throughout the supply chain.

- (g) *That OFCOM's Notification restricts access to "essential facilities" that are necessary for MMP to carry out its business:*

We agree with OFCOM that MMP has not adequately explained how the doctrine of "essential facilities" in competition law applies in the circumstances of this case. Nor have we been persuaded, on the basis of the submissions we have heard, that our construction of General Condition 18 or OFCOM's Notification in this case has an anti-competitive effect.

## **VII CONCLUSION**

253. For the reasons set out above we unanimously uphold the determination made by OFCOM of MMP's contravention of General Condition 18 as set out in OFCOM's notification under section 94 of the 2003 Act.