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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1245/3/3/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 May 2016

Before:

HERIOT CURRIE QC
(Chairman)
PROFESSOR GAVIN REID
BRIAN LANDERS

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Applicant

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

GAMMA TELECOM HOLDINGS LIMITED
CP GROUP

Interveners

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DAY ONE

APPEARANCES

Mr. Robert Palmer (instructed by BT Legal) appeared on behalf of the Applicant.

Mr. Josh Holmes (instructed by Ofcom Legal) appeared on behalf of the Respondent.

Mr. Tim Johnston & Sarah Love (instructed by Charles Russell Speechlys) appeared on behalf of Gamma Telcom Holdings Limited.

Mr. Alan Bates (instructed by Towerhouse LLP) appeared on behalf of CP Group.

Wednesday, 18 May 2016

1 **(10.30 am)**

2 THE CHAIRMAN: Good morning.

3 MR PALMER: Good morning, sir, and to the Tribunal.

4 I appear in this matter with Miss Fiona Banks for the appellant, BT.

5 Mr Josh Holmes appears for Ofcom. Mr Tristan Jones is not here today. Mr

6 Alan Bates, to Mr Holmes' left, appears for the CP Group made up on Sky,

7 TalkTalk and Vodafone. And then Sarah Love and Tim Johnston to the extreme

8 left for Gamma.

9 This is an appeal against the determination of disputes between BT and Vodafone

10 concerning charges for calls to reported numbers, and specifically they concern

11 BT's average porting conveyance charges made to RCPs under onward routing

12 arrangements.

13 Sir, I am conscious that the Tribunal has had some time to read into the papers

14 and I do not want to take time unnecessarily explaining the background. We

15 provided a list of suggested pre-reading, which was not everything bearing in

16 mind how much time you had, but an indication of how much progress the

17 Tribunal has had might enable me to target my submissions appropriately.

18 THE CHAIRMAN: Thank you, Mr Palmer. We have read everything that you suggested

19 we read. But the issues, both in terms of telecommunications and economics

20 seem to us to be quite complicated, so do not feel under any pressure to finish

21 within or before the timetable dictates that you should. I think you have the floor

22 this morning, that's been agreed. We would propose to rise for about ten minutes

23 at quarter to 12.

1 Are there any other preliminary issues this morning?

2

3 **Housekeeping**

4 MR PALMER: No, sir. The only housekeeping matters, there are some additional
5 documents which might be worth handing up now to minimise disruption later.
6 The first document to hand up is another of the general conditions. This appeal is
7 concerned in particular with General Condition 18, as you will have seen. But
8 I informed the parties yesterday that I wish to bring, in light of what they have
9 said, General Condition 20. I suggest that that be filed at the very back of
10 bundle BT1, tab 10. **(Handed)**

11 I will come to it in due course. That is that document.

12 There is also, in authorities bundle 1, at tab 5, section 6 to be inserted into the
13 Communications Act of 2003. It's referred to in the notice of appeal, in fact, but it
14 didn't make its way into that collection of sections from the Act. So we have
15 behind tab 5 first section 3, and behind that section 4. And then I suggest that just
16 be inserted, section 6, after section 4 and before section 45, which comes next in
17 the extracts.

18 The next document, if that has gone in safely, is to go at the back of bundle BT6,
19 tab 12. **(Handed)** That was dated yesterday, responding to some points made in
20 the skeleton arguments lodged by Ofcom and the interveners updating various
21 tables in Mr Morden's second witness statement.

22 Rather than adduce all that in chief in response to what is said in skeleton
23 argument I thought it was better to have that in writing so we can refer to it at the
24 appropriate time.

1 And the last document you should already have, but I would like you to check that
2 you have it so you know where it is in your bundles. That is at the rear of BT's
3 skeleton argument, there was an annex seeking to set out facts which were not in
4 dispute. Ofcom helpfully said at the footnote of their skeleton argument that they
5 would liaise with us and thought it was a good idea and would make sure it was
6 fully agreed with all.

7 We have done that and yesterday produced a note to be supplied to the Tribunal, a
8 document labelled "Agreed annex to BT's skeleton argument". And it should be
9 at the back of the skeleton argument, and I am grateful for that information.

10 THE CHAIRMAN: I have it.

11 MR PALMER: Those were the only housekeeping matters.

12

13 **Opening submissions by MR PALMER**

14 MR PALMER: So by way of very broad introduction, and this may be going over some
15 of the territory with which the Tribunal is already familiar, but it may help set the
16 scene, APCCs are comprised of two charges: A charge for switch conveyance
17 and a charge for inter-switch conveyance, which we refer to as ISC.

18 Switch conveyance is the charge for the necessary switch when an onward routed
19 call is directed by the OCP to BT, assuming for the purposes of this example that
20 BT is the donor communications provider. The originating CP would not have
21 known that the call was to a ported number, they won't have that information as
22 things stand. But when it arrives at the original destination with BT, BT looks up
23 the number and recognises it to be a ported call and adds a prefix to onward route
24 it to the new receiving CP, or RCP.

1 That inevitably involves a switch, and that is switch conveyance. But then the
2 onward routing to the RCP via inter-switch conveyance may or may not be
3 necessary for each call, depending on where the RCP has chosen to collect that
4 call. They may collect that call at the very switch where it entered BT's network,
5 they may have arranged to collect that call at a different switch from BT's
6 network, in which case they will need to purchase ISC.

7 So this appeal concerns only what the appropriate basis of charges for the ISC
8 element of the APCC should be. All are agreed that charge should be based on
9 the long run incremental cost of providing the service, or LRIC, in practice. I will
10 qualify that in a moment. The effective issue which we get to by the end of the
11 appeal is whether to include a plus which represents a contribution to the common
12 costs incurred by reason of the provision not only of the service consumed, but
13 also other services carried in the network without being specific to any one of
14 those services.

15 We say, yes; Ofcom and the interveners say no. I said I would qualify that
16 statement because we say the actual true answer to this is that that price should
17 not be regulated at all, it should not be fixed. And the basis of commercial
18 negotiation between the parties in the context of a competitive market, that
19 competitive rate arrived at will not be pure LRIC, but will include in effect a
20 contribution to common costs at a competitive rate and will be in effect a LRIC+
21 rate.

22 It's important to emphasise from the outset the provision of number portability.
23 It's not in any way an issue in these proceedings. Its benefits and importance are
24 undoubted and not an issue in these proceedings. It has long been available; it

1 will continue to be. Consumers do not pay for it to happen and do not pay
2 differentiated call charges according to whether or not they have ported or
3 whether or not the person they are calling has ported.

4 It's undeniably the case that number portability has been widely adopted whilst
5 APCCs have been set at competitive rates, or LRIC+ rates, which in turn has
6 greatly facilitated a competitive retail market as end users have been able to take
7 their numbers with them, and others have been able to contact them seamlessly.

8 As we said in the skeleton argument in 2014 BT estimated that 10 million
9 customers, including 8 million from BT, had retained their numbers when they
10 changed operator. That's over 30 per cent of customers in total, considerably in
11 excess of Ofcom's forecasts made as recently as 2009.

12 But Ofcom has never suggested in the guidance, the determination, its defence
13 and supporting evidence, Ofcom's never suggested that pricing at LRIC+ has
14 acted as a disincentive for subscribers to change service provider. And nor could
15 it, in light of the undoubted success of the provision of portability.

16 The move to the pure LRIC now as a basis for prices would be a wholly
17 exceptional measure which requires specific justification. We say no, or no
18 adequate, justification has been given by Ofcom.

19 This matter is, as the Tribunal has already recognised, a factually complex area,
20 but there is an agreed start at least. And if I may turn to that agreed annex so we
21 can at least start off on a undisputed basis.

22 I appreciate that the Tribunal may have had a chance to read this already, but if
23 we just read through it to set the scene. The starting point is BT has a TDM
24 network, time division transmission or multiplexing. And the alternative or next

1 generation network approach that is being adopted by others based on internet
2 protocol or IP technology is operated by Gamma, Sky and TalkTalk.

3 Secondly, networks are comprised of switching nodes and transmission links
4 between those nodes. And in BT's network those exchanges feature at either the
5 DLE, the digital local exchange, or the tandem layer. Geographic numbers are
6 assigned to BT by Ofcom and are allocated to a specific DLE. It's that DLE
7 which has that information as to where the number geographically relates to.
8 DLEs are the first point in a network where calls can be connected to or from
9 telephone lines attached to that exchange. Each DLE is connected to two or more
10 tandem switches that connect calls between DLEs. And it's possible for CPs to
11 interconnect their network to BT's by a transmission link so every BT DLE and
12 tandem exchange, every and any.

13 But CPs may or may not choose to do so. They may rely on BT's network or a
14 third party to allow calls to be routed from their own network to DLE and tandem
15 exchanges to which they are not directly interconnected depending on their
16 commercial strategies. So some CPs may be linked up to absolutely everything,
17 others may not.

18 There's no third party product available to convey ported calls from a BT DLE.
19 That's a carefully limited statement. The first thing is of course there are transit
20 products for non-ported calls widely available. The second point to make is that
21 there's no transit products specifically for ported calls from a BT DLE. But BT
22 itself does offer transit products for ported calls when the DCP is a different
23 network. So BT has transit products to take calls from other DCPs to the RCP.
24 So those products are available and have been for a very long time. They are

1 priced competitively, unregulated, and there is no reason in principle why any
2 other CP could not offer a transit product from BT DLEs. The fact is that they do
3 not at the moment, but the fact that they could operates as a competitive constraint
4 on the prices that BT charges for ISC.

5 Similarly, there are effectively transit products available from BT tandem
6 exchanges. I say effectively in the light of services provided, for example, by
7 Gamma to host other CPs. And as Gamma put it at paragraph 9 of their skeleton
8 argument:

9 "Gamma's own wholesale customers, many of whom are market
10 participants in their own right, in effect purchase ISC through Gamma."

11 And we say in effect that is Gamma providing transit for those CPs from BT's
12 tandem exchanges which Gamma is connected.

13 Again, there's no reason in principle why others could not offer specific transit
14 products from tandem switches either, and the fact that they could operates as a
15 competitive constraint on BT and the prices it charges.

16 Going over the page, the connections between BT DLEs and tandem exchanges
17 and CP's network are realised through individual interconnect circuits with a
18 capacity of 2 megabits per second. And there's four types of interconnection
19 generally available. I won't take you through those now. That's some of the detail
20 that will be covered no doubt during the witness evidence that sets the scene.

21 Paragraph 6:

22 "Where a CP relies upon BT's network for ISC, BT offers a local
23 tandem conveyance," that's LTC, "and that's specific to traffic between
24 a DLE and a tandem exchange."

1 So just pausing there. If a call is delivered to a DLE but the RCP wants to collect
2 it from the tandem exchange to which it is connected, ie one of its parents, then
3 they will, as a minimum, need that LTC conveyance, if they're not going to
4 connect in some other way to the DLE itself.

5 So that's LTC. And inter-tandem conveyance, or ITC, services convey traffic
6 between tandem exchanges with charges reflecting the components of BT's
7 network use. There are, as you may have seen, three levels of charge: Short,
8 medium and long distance basically at increments of 100km. So considerable
9 variation within those categories.

10 Notably, we say, BT's LTC and ITC services are no longer subject to SMP
11 regulation given the constraint exercised by the extensive interconnection by other
12 CPs at the DLE and tandem layer. Indeed, that degree of interconnection is very
13 vividly described by Mr Young in his witness statement -- I will not turn to it
14 now, you will have read it -- where you can see the numbers of and levels of
15 interconnection on a specific CP-to-CP basis. I am not going to go to it now
16 because that's largely confidential information and I am going to try and stay in
17 non-confidential territory in this opening.

18 Ofcom stress that for the assessment of SMP, Ofcom only took into account
19 non-ported calls. But we will be arguing no difference arises in relation to ported
20 calls in that regard, and indeed, certainly Ofcom hasn't found SMP in regard to
21 the conveyance of ported calls, and rightly not.

22 Paragraph 7 explains the system of onward routing. One, a call originating from
23 off BT's network. Two, a number which has been ported from BT is, as I outlined
24 at the beginning, directed by the OCP to where the number was originally hosted.

1 The routing of that call may be to the DLE or to the parent tandem, and the
2 associated cost of that routing is the responsibility of the OCP just as for a
3 non-ported call. The OCP will never know whether it's a ported call or not. They
4 are not concerned, they pay the same, they route it the same regardless.

5 Two, once a ported call arrives at BT's DLE or one of the parent tandem
6 exchanges, that call has to be conveyed to the RCP's network. That's the
7 minimum path to a point of handover to the RCP's network is across one of these
8 switches. That's switch conveyance and that is unavoidably required to be
9 supplied by BT where BT is the donor CP. And indeed, that has been priced on
10 LRIC based prices following the introduction of the new guidance.

11 That switch conveyance is, at the DLE layer, effected by BT's DLE handover
12 product. So this is specific product devised and introduced in order to allow
13 an RCP to connect at the DLE to collect ported calls.

14 That was introduced following a dispute where Opal, now TalkTalk, complained
15 that they couldn't collect ported calls from the DLE. Ofcom decided in that
16 dispute that that facility ought to be available, and it's currently used by TalkTalk
17 to collect its ported traffic.

18 At the tandem layer, the call will be conveyed over the tandem switch directly to
19 the RCP. They're present there. And again, that's switch conveyance. We make
20 the point that the five largest RCPs which we identify in confidential terms
21 interconnect to a large number of tandem exchanges across the country. Again,
22 there's a footnote with the reference there in Mr Perry's statement.

23 But if the RCP has not chosen to interconnect to the DLE or the parent tandem in
24 question, there's a need for ISC to convey the call from the exchange in question

1 to the point on BT's network where it can be handed over to the RCP. And that's
2 effected by ISC. Whether it's LTC, ITC, a combination of the two depends
3 entirely on where the RCP has arranged to collect the call. And that ISC will be
4 charged to the RCP as a component part of the APCC.

5 So far, so good on the factual background. That takes us to what is in issue
6 between the parties, which is a mixture of legal, factual and economic matters.

7 PROFESSOR REID: Before we move on from your very clear exposition, could I just
8 ask one question.

9 You say that others could offer transit products with tandem switches, yet in
10 reality that doesn't happen although it is a competitive threat. Is there any
11 intellectual constraint upon others doing so?

12 MR PALMER: No.

13 PROFESSOR REID: Thank you.

14 MR PALMER: It's a matter of commercial choice, that's all. It may or may not suit them
15 from a commercial perspective, but if, for the sake of argument, BT sought to
16 increase its prices above the competitive rate, then that would present a
17 commercial opportunity and that opportunity would be more attractive to others to
18 provide that sort of product and undercut BT. That's why we say it's a constraint.
19 There's no intellectual property issue.

20 PROFESSOR REID: Thank you.

21 MR PALMER: Indeed, I am reminded by Ms Banks it's important to emphasise that
22 there's no technical distinction between transiting ported call and other traffic,
23 non-ported calls. So non-ported calls are transited already frequently by other
24 CPs from tandems. Technically it would be achieved in a similar way, just be

1 specifically to collect the ported calls as well.

2 So at the centre of this appeal lie three aspects of Ofcom's determination. The
3 first is its decision that the pricing of ISC of ported calls is related to the provision
4 of number portability within the meaning of Article 30 of the USD, the Universal
5 Service Directive, and amounts to a charge for the provision of such portability,
6 they say, within the meaning of General Condition 18.5.

7 They say, therefore, that charges for ISC must comply with the condition in
8 GC18.5(a):

9 "But subject always to the requirement of reasonableness, charges shall
10 be cost orientated and based on the incremental cost of providing
11 portability unless the DCP and the RCP have agreed another basis for
12 the charges."

13 That decision gives rise to the first issue and, indeed, to our ground 1.

14 We say Ofcom has adopted an unduly wide interpretation of Article 30,
15 specifically of the words:

16 "... related to the provision of number portability."

17 And in determining that ISC relates to the provision of number portability.

18 What we say is that on its proper construction, Article 30 and GC18 in turn are
19 concerned with the treatment of costs directly associated with enabling number
20 portability to be provided. Under the system of onward routing required by
21 Ofcom to be provided, porting is enabled by the provision of switch conveyance,
22 but beyond that its onward conveyance is a matter of commercial choice for the
23 RCP as to how and where to collect the call, including whether or not to purchase
24 ISC from BT, just as it makes a similar choice for any other type of traffic. In no

1 different way.

2 So that conveyance, where it's used, is an incidence of the call, not an incidence
3 of the provision of number portability. That's the fundamental distinction that we
4 seek to draw here.

5 Yes, of course it is a ported call as a matter of fact. But that fact is not
6 informative or relative to the question of whether it is related to the provision of
7 number portability.

8 THE CHAIRMAN: Mr Palmer, could I ask you just a factual question. Might there be
9 cases where the fact that a call is a ported call requires the call to use more transit on BT's
10 network than it would if it was not a ported call?

11 MR PALMER: It depends. It depends. It depends entirely again on the interconnection
12 arrangements which would otherwise apply.

13 So Ofcom and the CPs make much of the fact that under onward routing you are
14 required to provide (a) that there is what they call an extra leg. That is the call
15 must be routed to the DCP in the first instance before then being passed on to the
16 RCP.

17 So in theory, a non-ported call between the same OCP and the same RCP needs
18 not go via BT, for example, the DCP, but could be routed directly from the OCP
19 to the RCP. Whether it would or not depends on whether there is such routing
20 arrangements avoiding BT's network between that OCP and that RCP, which may
21 well in practice depend on the size of that OCP and the RCP.

22 So, for example, a call from -- I do not know, TalkTalk to Sky may or may not be
23 accurate, but might avoid BT's network entirely. But a smaller provider, a
24 relatively new entrant who may be more dependent on BT's transit products, may

1 be going via BT's network anyway in order to connect that call, whether that's an
2 OCP or the RCP.

3 So the critical regulatory tool that Ofcom had implemented in this context is to
4 isolate what it calls additional conveyance charges which, when we get to the
5 condition, we see is defined:

6 "Additional conveyance charges in respect of which prices are set at
7 zero."

8 A DCP cannot recover additional charges. That is to say, it cannot charge more
9 for a ported call than it would charge for a non-ported call following the same
10 route across the DCP's network.

11 Of course, once you remove the fact that it's a ported call, once you remove the
12 requirement for onward routing and go to directly routed calls, there may or may
13 not, as Ofcom is anxious to stress, be more efficient ways of routing that call.

14 That in itself doesn't depend on whether it's a ported call or a non-ported call, that
15 depends on the interconnection arrangements made between those CPs generally.

16 THE CHAIRMAN: Thank you.

17 MR PALMER: That's the broad shape of ground 1 to which I will come back in
18 considerably more detail.

19 But the second main issue is that Ofcom, having decided that Article 30 applies at
20 all to ISC, similarly GC18.5, then decided that it was free to reinterpret the effect
21 of Condition 18.5 to change the costs standard upon which incremental costs of
22 providing portability are assessed to exclude costs which are common to the
23 provision of ISC and other services.

24 So the condition didn't change. It said on 1 January this year precisely what it

1 said on 31 December last year, and before. Going back to the 1 January 2015
2 rather than 31 December 2014, it didn't change at all, but it was reinterpreted by
3 Ofcom. So what "cost orientated" used to mean isn't what it means now, and it
4 did so even though pricing of such services at a level which included a
5 contribution towards common costs had previously been accepted by Ofcom as
6 being fully compatible with GC18.5 and Article 30.

7 So they weren't saying, actually, we have realised DCP, BT in particular, had
8 been in breach of these conditions all this time, they were fully compliant with
9 that condition all that time at LRIC+ prices, but now it's going to mean something
10 different. So if you continue to charge LRIC+, you will now be in breach of
11 condition.

12 And indeed, Ofcom have launched an investigation into BT alleging a breach of
13 condition in respect of the pricing for ISC since 1 January 2015 although that
14 investigation has been stayed and is on hold until the outcome of this appeal.

15 So we are said suddenly to be in breach even though the condition hasn't been
16 amended, even though BT had contracted with other CPs before that date to
17 provide ISC at a price arrived at in a fully competitive market, and even though
18 Ofcom hadn't identified any basis upon which to conclude that the results of those
19 arrangements were not consistent with the objectives under Article 8 of the
20 Framework Directive to which I will come in a moment, nor with the objectives
21 of Article 30 of the USD, which is to provide number portability to end users.

22 No problems identified under either, but they said nonetheless we are free to
23 change. That is the target of our second ground of appeal. Even if, in principle,
24 these costs do fall within the scope of Article 30, there's no basis upon which

1 further regulatory intervention to change the cost standard could be justified, least
2 of all through the issue of guidance rather than amending the condition.

3 Charges were agreed, were based on the competitive market rate and were thus
4 already cost orientated as Ofcom had already always accepted up until then.

5 There's no basis to think that the resulting charges undermined the objectives of
6 Article 8 or Article 30. We say the effect of Ofcom's decision was therefore
7 disproportionate and unlawful and contrary to the common regulatory framework
8 because no such change was necessary to achieve the objectives that Ofcom was
9 required to fulfil.

10 The third issue between us is that even if we are wrong about that and it was open
11 to Ofcom just to change as a matter of simple regulatory policy -- we are just
12 going to change our policy, we are entitled to do that, cost orientation now means
13 something different, but that's what we have decided, in our regulatory
14 discretion -- then the target of our challenge is the choice of the LRIC cost
15 standard.

16 We say LRIC+ is clearly the most appropriate standard to apply to the ISC
17 element of APCC. Ofcom had no basis to justify the change to pure LRIC given
18 in particular the lack of any evidence to support any incremental benefit on the
19 intensity of competition in the retail market and the associated cost of doing so in
20 terms of increasing prices for other services and the potential to create diverse
21 incentives on other CPs in both the wholesale conveyance and transit markets and
22 also to dampen incentives to move to direct routing and migrate to IP based
23 networks.

24 Fundamentally, we say the move to pure LRIC in this context ought to be an

1 exceptional measure. In terms of other regulatory practice, it is exceptional to set
2 a cost standard of LRIC rather than LRIC+. No justification, or sufficient
3 justification, was identified by Ofcom on this occasion.

4 With that outline of the issues, I am going to turn next to the regulatory
5 framework itself for considering two of the key authorities in this case. One is
6 referred to generally as the Supreme Court judgment. We use these words
7 because all the cases are called BT v Ofcom, so we have to distinguish them
8 somehow.

9 That was the 2008 dispute. I will be going to that, then I will be going to
10 Mobistar about which Ofcom places particular emphasis in the skeleton argument
11 and we say has misinterpreted it.

12 Let's start with the regulatory framework to set the scene. If I could ask you to
13 take to hand authorities bundle volume 1. I am going to start with the EU
14 legislation which makes up together the common regulatory framework.

15 There's the first four tabs of volume 1 of the four relevant directives which are
16 part of the CRF. I am going to start at tab 2, which is the Framework Directive.

17 And within that if I could turn straight, please, to Article 7, which is at page 19 in
18 the top right-hand corner.

19 At (1), in carrying out their tasks under this directive and the specific
20 directives -- the specific directives are the other three directives we have
21 produced -- national regulatory authorities shall take the utmost account of the
22 objectives set out in Article 8, including in so far as they relate to the functioning
23 ...*(Reading to the words)*... market."

24 So that's an all pervasive rider characterised under all the directives, to take

1 utmost account of the objectives set out in Article 8, and we can turn to Article 8
2 next.

3 At page 22, which begins at (1), in the first paragraph of 8.1:

4 "Member states shall ensure that in carrying out the regulatory tasks
5 specified in this directive and the specific directives, the national
6 regulatory authorities take all reasonable measures which are aimed at
7 achieving the objectives set out in paragraphs 2, 3 and 4. Such
8 measures shall be proportionate to those objectives."

9 Let's emphasise that last sentence. Proportionate to those objectives.

10 Then we can look at what those objectives are. First of all, as far as material, at
11 (2), at the foot of that page:

12 "The national regulatory authorities ...(Reading to the words)... of
13 electronic communications networks, electronic communications
14 services and associated facilities and services by, inter alia ..."

15 And then at (b):

16 "... ensuring that there is no distortion or restriction of competition in
17 the electronic communications sector, including the transmission of
18 content."

19 I shall not read through the other objectives in 3 and 4. I am going to turn the
20 page and go to 5.

21 5:

22 "The national regulatory authorities shall, in pursuit of the policy
23 objectives referred to in paragraphs 2, 3 and 4, apply objective
24 transparent, non-discriminatory and proportionate regulatory principles

1 by, inter alia (a) prompting regulatory predictability by ensuring a
2 consistent regulatory approach over appropriate review periods;
3 "(b) ensuring in similar circumstances there's no discrimination in the
4 treatment of undertakings;
5 "(c) safeguarding competition to the benefit of consumers and
6 promoting where appropriate infrastructure-based competition;
7 "(d) promoting efficient investment and innovation in new and
8 enhanced infrastructures;
9 "(e) taking due account of the ...(Reading to the words)... and various
10 geographic areas within a member state; and.
11 "(f) imposing ex ante regulatory obligations only where there is no
12 effective and sustainable competition and relaxing or lifting such
13 obligations as soon as that condition is fulfilled."

14 Just pausing there, that is defined as a regulatory principle which must be
15 observed in pursuit of all of the policy objectives.

16 Then within this directive if I could just go to Article 20 which is on page 38,
17 which provides for a dispute resolution between undertakings.

18 That's subject of this appeal:

19 "(1) In connection with ...(Reading to the words)... the national
20 regulatory authority concerned shall, at the request of either party,
21 without prejudice to paragraph 2, issue a binding decision to resolve the
22 dispute."

23 That's where we are.

24 And at 3:

1 "In resolving a dispute, the national regulatory authority shall take
2 decisions aimed at achieving the objectives set out in Article 8. Any
3 obligations imposed on an undertaking by the NRA in resolving the
4 dispute shall respect the provisions of this directive or the specific
5 directive."

6 So that's the framework directive.

7 Before we leave it if we can just turn back to the recitals just to point up some
8 important features in the material when we get to the Supreme Court case.

9 First of all at recital 1, this is the starting point:

10 "Whereas the current regulatory framework for telecommunications has
11 been successful in creating the conditions for effective competition in
12 the telecommunications sector during the transition from monopoly to
13 full competition ..."

14 Just good to note that.

15 Then at 25:

16 "There is a need for ex ante obligations in certain circumstances in
17 order to ensure the development of a competitive market."

18 And then setting out what the then definition of "significant market power", or
19 SMP, was but now needs to be adapted. And it's adapted to the equivalent of the
20 concept of the dominance.

21 Then at 27:

22 "It's essential that ex ante regulatory obligations should only be
23 imposed where there ...(Reading to the words)... significant market
24 power, and where national and community competition law remedies

1 are not sufficient to address the problem."

2 So those are recitals introducing that concept of although it's a competitive
3 market, there may still be ex ante regulatory conditions required where there's not
4 effective competition.

5 If we turn next to the Authorisation Directive which is at tab 4, and go to Article 3
6 which is at page 8.

7 It is in some ways another of the foundations of what is later described as the
8 permissive approach to regulation. It's Article 3 which provides for a general
9 authorisation, rather than the previous licensing system. There is a general
10 authorisation on which only certain specific obligations can be imposed. You see
11 that at paragraph 2:

12 "... without prejudice to the specific obligations referred to in
13 Article 6(2) or rights of use referred to in Article 5 only be subject to a
14 general authorisation."

15 And those specific obligations we can see over at page 6, which we see from
16 paragraph 1, the general authorisation may be subject only to the conditions listed
17 in the annex.

18 3:

19 "The general authorisation should only contain conditions which are
20 specific for that sector."

21 And the annex at the back of the directive, at the back of the tab, it's the last three
22 pages. And the very final page, the conditions which may be imposed include at
23 heading C, "Conditions which may be attached to rights of use for numbers."

24 And at paragraph 3:

1 "Number portability requirements in conformity with the universal
2 services directive."

3 So that is one of the conditions which can be imposed on the general
4 authorisation.

5 That takes us to the USD, which is at tab 1. We turn first to recitals 40 to 42,
6 page 11. This is important to discern the purpose of the number portability
7 requirements imposed by Article 30.

8 40:

9 "Number portability is a key facilitator of consumer choice and
10 effective competition in a competitive telecommunications
11 environment, such that end users who so request should be able to
12 retain their numbers on the public telephone network independently of
13 the organisation providing service."

14 In other words, they can move provider but they can request be able to retain their
15 number:

16 "The provision of this facility between connections to the public
17 telephone network at fixed and non-fixed ...(Reading to the words)...
18 porting numbers between networks providing services at a fixed
19 location and mobile networks. The impact of number portability is
20 considerably strengthened when there is transparent tariff information."

21 So recital 41 is about the transparency of tariffs, and then at 42:

22 "When ensuring that pricing for interconnection related to the provision
23 of number portability is cost orientated, national regulatory authorities
24 may also take account of prices available in comparable markets."

1 That in itself tells you nothing about the purpose of number portability
2 requirement. That is to be found at 40.
3 Then you get to the requirement itself at Article 30. I am sure by now you have
4 seen, but page 27, just keeping a finger at 27 and turn back for a moment at
5 page 20, you will see that Article 30 falls within chapter 4 of the USD, which is
6 headed "End user interests and rights".
7 So what follows is a series of rights and matters dealing in the interests of end
8 users.
9 Article 30 itself at page 27, facilitating change of provider :

10 "(1) Member states shall ensure that all subscribers ...(Reading to the
11 words)... can retain their number(s) independently of the undertaking
12 providing the service in accordance with the provisions of Part C of
13 Annex 1."
14 (2):
15 "The national regulatory authorities shall ensure that pricing between
16 operators and/or service providers related to the provision of number
17 portability is cost orientated and that direct charges to subscribers, if
18 any, do not act as a disincentive for subscribers against changing
19 service provider."
20 Of course there are in the UK no direct charges to subscribers for providing
21 number portability. That's the USD.
22 Finally, we need to go to the Access and Interconnection Directive, which is at
23 tab 3. If I can turn here to recital 5 first.
24 These recitals are important, as we see when we get to the Supreme Court

1 judgment, for setting essentially the framework within which Ofcom regulates:

2 "In an open and competitive market there should be no restrictions that
3 prevent undertakings from negotiating access and interconnection
4 arrangements between themselves, in particular on cross-border
5 agreements, subject to the ...(Reading to the words)... more choice and
6 competitive services to consumers, undertakings which receive requests
7 ... should in principle conclude such agreements on a commercial basis,
8 and negotiate in good faith."

9 That's the starting point.

10 "(6) In markets where ...(Reading to the words)... and where some
11 undertakings rely on infrastructure provided by others for delivery of
12 their services, it is appropriate to establish a framework to ensure that
13 the market functions effectively.

14 "NRAs should have the power to secure where commercial negotiation
15 fails adequate access and interconnection and interoperability of
16 services in the interests of end users. In particular they may ensure
17 end-to-end connectivity by imposing proportionate obligations on
18 undertakings that control access to end users.

19 "Control of means of access may entail ownership or control of the
20 physical link to the end user, either fixed or mobile, and/or the ability to
21 change or withdraw the national numbers needed to access an end user's
22 network termination point. This would be the case, for example, if
23 network operators were to restrict unreasonably end user choice for
24 access to internet portals and services."

1 Then at 14, a reference back to the previous directive before the CRF came in
2 referring to a range of obligations, including cost orientation:

3 "This range of possible obligations should be maintained, but in
4 addition they should be established as a set of maximum obligations
5 that can be applied to undertakings in order to avoid overregulation."

6 So an important concern of the framework:

7 "Exceptionally, in order to comply with ...(Reading to the words)... for
8 access or interconnection on all market players as is currently the case
9 for conditional access ... digital television services."

10 Last of the recitals we need is number 20:

11 " Price control may be necessary when market analysis in particular
12 market reveals inefficient competition. The regulatory intervention may
13 be relatively light that ...(Reading to the words)... reasonable..., or
14 much heavier, such as an obligation that prices are cost orientated to
15 provide full justification for those prices where competition is not
16 sufficiently strong to prevent excessive pricing."

17 What I want to take from that is price control in the sense of obligation to ensure
18 that prices are cost orientated is treated as one of the heavier regulatory measures
19 of intervention, which will be important when we come to issues of
20 proportionality in terms of how that's interpreted.

21 In terms of the actual provisions of this directive, Article 4 confers a right and
22 obligation to negotiate interconnection to each other on terms and conditions
23 consistent imposed by the NRA pursuant to Articles 5 to 8.

24 Article 5(1):

1 "National regulatory authorities shall, acting in pursuit of the objectives
2 set out in Article 8 of the Framework Directive [which we went to
3 earlier] encourage and, where appropriate, ensure in accordance with
4 the provisions of this directive adequate access ...(Reading to the
5 words)... their responsibility in a way that promotes efficiency ... and
6 innovation and gives the maximum benefit to end users."

7 At the foot of the same page, paragraph 3:

8 "With regard to access and interconnection referred to in paragraph 1,
9 member states shall ensure that the NRA is empowered to intervene at
10 its own initiative where justified in order to secure the policy objectives
11 of Article 8 in accordance with the provisions of this directive, and the
12 procedures referred to in Articles 6, 7, 20 and 21 of the Framework
13 Directive."

14 You will remember 21 was the dispute resolution mechanism that we saw earlier.

15 Then we go to Article 8(2):

16 "Where an operator is designated as having significant market power
17 [not the position in our case, of course] on a specific market as a result
18 of a market analysis carried out in accordance with Article 16 of the
19 Framework Directive, NRA shall impose the obligations set out in
20 Articles 9 to 13 of this directive as appropriate."

21 Then 8(3) is important:

22 "Without prejudice to ..."

23 And then the second indent:

24 "The provisions of ..."

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And then four lines down you will see:

"... Article 30 of the USD," which is number portability of course.

So without prejudice to, amongst other things:

"... Article 30 of the USD, NRAs [after the last indent] shall not impose
...(Reading to the words)... on operators that have not been designated
in accordance with paragraph 2."

So the SMP remedies, if you like, can only be imposed where a proper SMP
analysis has been done, but that is without prejudice to Article 30 of the USD,
amongst others.

Then at 8(4), near the bottom of that same page:

"Obligations imposed in accordance with this article ...(Reading to the
words)... justified in light of the objectives laid down in Article 8."

Which is unsurprising.

And then Article 13, which is the last of those obligations which can be imposed
in the case of SMP, we get to the heavier end of the spectrum which is:

"Price control and cost accounting obligations," we can see from 1:
"An NRA may, in accordance with the provisions of Article 8
...(Reading to the words)... controls, including obligations for cost
orientation of prices," and so forth.

Then further provision as to that.

Normally obligation of cost orientation only where SMP, but always
remembering without prejudice to Article 30.

So that is the European regulatory framework. We can cover the domestic
framework rather more briefly. That's at tab 5 for the Communications Act. You

1 can see the principle duty of Ofcom is at section 3(1):

2 "Further to the interests ...(Reading to the words)... promoting
3 competition."

4 And then at 3(3) at the foot of that page:

5 "In performing their duties under subsection 1, Ofcom must have regard
6 in all cases to the principles ...(Reading to the words)... accountable,
7 proportionate, consistent and targeted only at cases in which action is
8 needed and (b) any other ... regulatory practice."

9 3(4).

10 "Ofcom must also have regard in performing ...(Reading to the words)...
11 circumstances."

12 We pick out (b) and (d) as being particularly material in our context.

13 Over the page, to section 4, which carries into effect the community requirements
14 that are called here the Framework Directive. So this section applies to the
15 following functions of Ofcom: Their functions under chapter 1 of part 2, which
16 includes setting of conditions. Their functions under chapter 3 of part 2 in
17 relation to disputes referred to them, which is where we are now.

18 At subsection 2:

19 "It shall be the duty of Ofcom ...(Reading to the words)... to the
20 requirements of Article 8 to the Framework Directive and are to be read
21 accordingly," and it sets out what those are.

22 Section 6, which we inserted earlier, we just need subsection 1:

23 "Ofcom must keep carrying out their functions under review with a
24 view to securing that regulation by Ofcom does not involve the

1 imposition of burdens which are unnecessary or the maintenance of
2 burdens which have become unnecessary."

3 So, again, that's underpinning the duties reflected in subsection 3 of section 3 of
4 the requirement for proportionality and necessity.

5 Then at section 45 over the page is just the power to impose the general
6 conditions, including those authorised or required by section 58, which in effect
7 grants the power to impose the number portability condition, which I do not need
8 to dwell over.

9 I can put away that bundle for now. Just to take to hand bundle BT1. At tab 10
10 we have General Condition 18, just over the page, the second page, it's numbered
11 71 under the heading "Number portability", at 18.1 is the obligation to provide
12 number portability on request of subscribers. 18.5, which we are concerned with:

13 "The communication provider shall, pursuant to a request from another
14 communication provider, provide portability as soon as reasonably
15 practical ...(Reading to the words)... following principles.

16 "Subject always to the requirement of reasonableness, charges shall be
17 cost orientated and based on the incremental costs of providing
18 portability unless:

19 "(i) the DCP and the RCP have agreed another basis for the charges;
20 and.

21 "(b) the donor provider shall make no a charge in relation to system
22 set-up costs or [I mentioned earlier] additional conveyance costs."

23 No charge for those.

24 And then the definitions of the terms that we have seen in those conditions are

1 over the page at 18.11.

2 And then at (a):

3 "Additional conveyance costs [as I've outlined] means any costs
4 incurred by the DCP associated with resources used in effecting the
5 switch processing required to set up each ported call and providing the
6 switch and transmission capacity for any part of the duration of each
7 ported call additional to the costs of conveyance of non-ported calls
8 from the DCP's network to the RCP's network.

9 So if there are additional costs of that kind, no charge may be made by the DCP
10 for them.

11 Then at (k) is the definition of "portability". There's a separate definition for
12 "number portability", which is (h). The term "portability" is used in 18.5, and
13 that's defined at (k).

14 It means:

15 "Any facility which may be provided by a CP to another CP enabling
16 any subscriber who requests number portability to continue to be
17 provided with any public electronic communication service by
18 reference to the same telephone number irrespective of the identity of
19 the person providing such a service."

20 So a facility enabling a subscriber who requests it. So that is condition 18.

21 We earlier put at the very back of the final page of this tab General Condition 20.

22 I put this in to draw your attention to 20.1:

23 "The CP shall ensure, where technically and economically feasible, that
24 end users in any part of the European Community are about (a) to

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access and use non-geographic numbers which the CP adopts."

"(b) access all telephone numbers provided in the European Community regardless of the technological devices used by the operator, including those in the national telephone numbering plan" and others.

The significance of that and why I put it in and drew it to your attention is one of the arguments that Ofcom and the CPs make is that if BT was right about the scope of Article 30 of the USD, BT, having provided switch conveyance, could effectively decline to provide inter-switch conveyance, thus meaning that the call wouldn't get through.

That's wrong, because as is unsurprising, there are specific obligations to ensure that all calls can be made if the end is to ensure end-to-end connectivity as the directives put it. So the consequence couldn't be, and wouldn't be, that BT would simply drop calls, not provide the service at all. Except where it was not technically or economically feasible. But of course it's technically and economically feasible, there's no problem about that.

This applies to all providers, all CPs of course. BT in particular has separate additional end-to-end connectivity obligations, which I do not need to trouble you with on top of that.

Last point for this background is the contract under which then BT provides its services to other CPs. We can put away this bundle and please take out bundle DF2 and turn to tab 20.

This is the standard interconnect agreement, often referred to as the SIA. Within that we need clause 12, which starts at page 9 of 24.

1 BT services, 12.1:

2 "For a BT service or facility, the operator shall pay to BT the charges
3 specified from time to time in the carrier price list."

4 BT puts out its prices in the carrier price list. They include the APCC charges.
5 Those varied from CP to CP based on their average consumption.

6 12.2:

7 "BT may from time to time vary the charge for a BT service or facility.
8 Where it does so through issue of a charge change notice pursuant to
9 the charge change manual, such new charge shall take effect on the
10 effective date being a date not less than 56 calendar days after
11 notification unless ...(Reading to the words)... Subject to notice they can
12 vary the price they charge."

13 And 12.3:

14 "Where there is a variation, the new charge will be published in the
15 carrier price list," or CPL.

16 And that takes effect on the effective date, that being a date not less than 42 days
17 after the date of publication unless, again, a different period is expressly specified.
18 So that is a unilateral power to change its charges, but it's subject, importantly, to
19 what's envisaged at 12.6, over the page, which is:

20 "As soon as reasonably practical following an order, direction,
21 determination or consent, and determination includes a redetermination
22 by Ofcom of a charge (or the means of calculating that charge) for a BT
23 service or facility, BT shall make a necessary alteration to the carrier
24 price list so that it accords with such determination."

1 That amounts to a reference to the dispute procedure. So although BT has this
2 unilateral power to vary its charges, if the CP consuming the service doesn't like it
3 it can ultimately go to a dispute if it can't be agreed between the parties with
4 Ofcom. And if Ofcom issues a determination, then BT is contractually banned to
5 make any alterations to the carrier price list. And there can be -- and I will not go
6 through it and do it -- with retrospective effect.

7 12.10:

8 "If there's a difference between the ...(Reading to the words)... the
9 charge determined by Ofcom shall prevail."

10 So that's the contractual mechanism in a nutshell by which we get to where we are
11 in the present cases.

12 I can put away that bundle now.

13 THE CHAIRMAN: Mr Palmer, would this be a convenient moment to take a short
14 break?

15 MR PALMER: It is because I am going to go to the Supreme Court judgment next, so
16 it's bang on convenient.

17 THE CHAIRMAN: Thank you.

18 **(11.45 am)**

19 **(A short break)**

20 **(12.00 pm)**

21 MR PALMER: I was going to go next to the Supreme Court case, which is at the back of
22 volume 2 of the authorities bundle, tab 21.

23 This is BT v Telefonica O2, but it was a dispute which went up to the Supreme
24 Court.

1 At paragraph 1 we can see in a nutshell what the case was about: The
2 determination charges which BT is entitled charge to mobile network operators by
3 putting calls from the latter's networks through to BT fixed lines with associated
4 08 numbers. That's what it was about.

5 And it detailed the dispute:

6 This judgment "... (Reading to the words)... " when determining such a
7 dispute.

8 At paragraph 4 over the page, you see that Lord Sumption, who gave the single
9 judgment of the court, sets out the legal framework and introduces the CRF and
10 indicates that the objective, the first point emphasised, of the scheme is to ensure
11 end-to-end connectivity on a common basis throughout the EU without distortions
12 arising from anticompetitive behaviour or restrictions arising from national law or
13 practices. That's the first point.

14 At paragraph 5, the background to the directives and the previous directives on
15 the same subject, is:

16 "The progressive liberalisation of the European telecommunications
17 market which had previously been dominated by state controlled
18 monopolies". The Framework Directive recites at recital 1, and I've
19 shown you recital 1, I've shown you recitals 25 and 27, which
20 Lord Sumption picks out in introducing the Framework Directive.

21 At the top of the next page, he says:

22 "Subject to ... (Reading to the words)... is permissive."

23 And then he recites the five recitals from the Access Directive, which I have taken
24 you to already in support of that statement, which I emphasise the scheme of the

1 directives is permissive subject to ex ante regulation SMP.

2 At paragraph 6 the general objectives of the scheme are identified by Article 7
3 and 8 of the Framework Directive. Again, I have taken you to those.

4 At paragraph 8 he is in the Access Directive. He says:

5 "The relevant provisions are Access Directive Articles 4 and 5," which
6 I have shown you.

7 Each case I have shown you in context so you can see how it all fits together.

8 And at (9) at the bottom of page 8, he says:

9 "Articles 9 to 13 of the access directive represent the most intrusive
10 parts ...(Reading to the words)... separation, access to and use of
11 specific network facilities and price control [that's Article 13] and
12 unaccounted obligations in certain cases."

13 Article 8.3 provides:

14 "Without prejudice to ...(Reading to the words)... shall not impose the
15 obligations set out in Article 9 to 13 on operators that have not been
16 designated in accordance with paragraph 2."

17 He might have added, and no doubt would have if it had been relevant to the case
18 before him, which it wasn't, those words at the bottom of page 8:

19 "... among other provisions, include Article 30(2) of the USD."

20 I showed you that. At the end of paragraph 9 midway through page 9:

21 "BT has not been designated as having SMP in the market ...(Reading
22 to the words)... and present appeal has nothing to do with Articles 9 to
23 13 of the Access Directive, which are relevant only by way of
24 background."

1 So into the present case we are not in SMP territory, nothing to do with Articles 9
2 to 13 of the Access Directive, but that is the relevant background.

3 10:

4 "The scheme of the Directives has been considered on a number of
5 occasions by the Court of Justice.... It can fairly be summarised as
6 follows.

7 "The objectives of the scheme are set out in Article 8 of the Framework
8 Directive, and in particular in Article 8.2, which assumes that consumer
9 welfare will generally be achieved by competition and requires NRAs
10 to promote both."

11 That's consumer welfare and competition:

12 "The telecommunications sector is assumed to have become
13 competitive except in those cases ...(Reading to the words)... in a
14 relevant market. In a competitive market, the objectives in Article 8 of
15 the Framework Directive are to be achieved through the terms of the
16 interconnection agreements between CPs. CPs operating in such a
17 market are left to negotiate their own interconnection terms in good
18 faith with the minimum of regulatory interference."

19 I will not read out the rest of the paragraph.

20 11:

21 "Reserve powers are required to be ...(Reading to the words)... objective
22 proportionate, non-discriminatory ... Article 8 of the Framework
23 Directive. In summary, these powers are exercisable where it is
24 necessary to do so in order either:

1 "(i), to achieve end-to-end connectivity ... or
2 "(ii), to achieve the objectives in Article 8 of the FD in a case where
3 interconnection terms have been agreed but are not calculated to
4 achieve those objectives, or
5 "(iii), in order to impose certain kinds of terms of parties with SMP.
6 ...(Reading to the words)... relevant in all three cases."

7 Then sets out dispute resolution. We have seen Article 20 of the FD, and
8 paragraph 3 in resolving the dispute, aiming to achieve the objectives set out in
9 Article 8.

10 We are then onto the Communications Act, and at paragraph 15, reference to
11 sections 3 and 4, which I have shown you. Lord Sumption's emphasis in this
12 context is on section 3(3), which reflects:

13 "... the permissive character of the regulatory scheme by providing that
14 Ofcom must have regard in all cases to the principles under which
15 regulatory activities should be, transparent, accountable, proportionate,
16 consistent and [he emphasises] targeted only at cases in which action is
17 needed."

18 Then we get onto the contract. It's essentially the same.

19 The paragraph numbering is slightly different in the current contract, but no real
20 difference. An explanation of how that interacts with the dispute resolution
21 mechanism at paragraph 17. So all relevant background in that case just as it is in
22 this.

23 Then we can fast forward to page 18, function of Ofcom in resolving disputes.

24 This is what the Court of Appeal have said at 31:

1 "The dispute resolutions of Ofcom ...(Reading to the words)... and
2 provides that analysis in paragraph 32."

3 I need not linger over that for present purposes.

4 33 is important:

5 "As I have pointed out above, the scheme of the Directives depends
6 critically on the agreed interconnection terms. This is a feature of the
7 scheme which is fundamental to its essentially permissive character. It
8 reflects the consistent emphasis in the Directives on respecting freely
9 negotiated interconnection terms in a competitive market. See in
10 particular recital 5 of the Access Directive.

11 "In the ordinary case, the interconnection terms will have been
12 negotiated between the parties within the constraints imposed by law,
13 namely that the result must be consistent with the objectives in Article 8
14 of the Framework Agreement."

15 I interpose here: In the case of number portability must be consistent with the
16 objectives in Article 30 of the USD.

17 THE CHAIRMAN: Mr Palmer, so you are saying that in relation to number portability a
18 determination of Ofcom must comply with the principles that you have mentioned in the
19 reference to this case and Article 30?

20 MR PALMER: Yes, because it's all pervasive, it's in all cases to seek to pursue those
21 objectives, observe those principles. And in the specific case of the provision of number
22 portability, you also need to ensure that number portability is provided and that the
23 charges between operators relating to the provision of number portability, which we will
24 come back to, are costs orientated. So all of that is in the mix.

1 Because against this is the essentially permissive basis where the starting point is
2 the freely negotiating interconnection terms.

3 Then at 34, when Ofcom's resolving a dispute about a proposed variation of
4 charges, it's performing a mixture of adjudicative and regulatory functions, the
5 terms of the interconnection agreement are the necessary starting point for this
6 process.

7 And at four lines down:

8 "If there is a contractual right to a variation [we know there is] but the
9 proposed variation is not consistent with the Article 8 objectives,
10 Ofcom may reject the variation. It may also modify any terms which
11 created an entitlement inconsistent with the Article 8 objectives."

12 Here we may add: Inconsistent with Article 30 USD.

13 But notice the way that Lord Sumption puts that. It's not for Ofcom just to come
14 up with its own solution as to what it thinks would be consistent with Article 8.
15 It's to eliminate inconsistency with Article 8, and here, inconsistency with
16 Article 30.

17 Then we get finally to paragraphs 36 to 38. At 36, again, linking this back to
18 clause 12 of the Standard Interconnect Agreement referring power to unilaterally
19 fix or vary charges:

20 37:

21 "The manner in which English law ensures that contractual effect is
22 given to the Article 8 objectives is by treating BT's discretion under
23 clause 12 as limited.

24 "As a general rule the scope of a contractual discretion will depend on

1 the nature of the discretion and the construction of the language
2 conferring it ...(Reading to the words)... This will normally mean it
3 must be exercised consistently with its contractual purpose."

4 Some more authorities:

5 "Interconnection agreements are made in a regulated environment. The
6 regulatory scheme may change quite possibly after interconnection
7 terms have been agreed" (as they did in this case), [but not in ours in
8 terms of the conditions]. "But the intention of the parties must be to
9 comply with the scheme as it stands from time to time so far as the
10 contract permits. That intention necessarily informs the scope and
11 operation of any contractual discretions.

12 "In my opinion, it is entirely clear that the discretion conferred by
13 clause 12 of the SIA is limited by reference to the purposes set out in
14 Article 8 of the Framework Directive," and limited to, in our case, by
15 Article 30 USD.

16 "It follows that contractually BT was entitled to set its own charges, but
17 only within limits which are fixed by those objectives. By virtue of
18 clause 12.5 ..."

19 He says. It's now 12.6 in the version I showed you:

20 "... BT's power to set its own charges ...(Reading to the words)... can do
21 what it likes. It is bound to start from the parties' contractual rights and
22 may override them only if that is required by the Article 8 objectives."

23 I add: Or by Article 30 USD in the case of provision of number portability.

24 "However, under clause 12 of the Interconnection Agreement, this is a

1 conflict which cannot arise because BT has no contractual right to
2 require a price variation which is not consistent with the Article 8
3 objectives," or Article 30.

4 THE CHAIRMAN: What does Lord Sumption mean by saying: This is a conflict which
5 cannot arise? I do not really follow that. Because if BT were to seek to press charges
6 that were not consistent with Article 8, surely the conflict could arise?

7 MR PALMER: It arises on the facts. I think what he is saying is not in law because their
8 power to set their charges, their conditions are already constrained by the limits. So it is
9 not a conflict between the true scope of its contractual discretion and Ofcom interfering
10 that. Ofcom is there to make sure that it sets conditions within the scope of the discretion
11 that it has.

12 THE CHAIRMAN: Thank you.

13 MR PALMER: In this case, therefore, Ofcom's function was to determine whether BT's
14 proposed charges exceeded the limits of its contractual discretion. That depends on
15 whether they were in fact consistent with the Article 8 objectives, and in our case I will
16 add "consistent with Article 30 objectives".

17 That is the framework within which we are operating.

18 None of that will assist in determining what the scope of Article 30 is. That's not
19 dealt with here. It does go directly -- and I will come back to it in the context of
20 ground 2, about the basis upon which Ofcom can interfere with a contractually set
21 price.

22 It can't do what it likes, it may only interfere with contractual terms on a dispute
23 insofar as is necessary to achieve the objectives of Article 8, or to comply with
24 Article 30, and/or to the extent they are inconsistent with Article 8 or Article 30.

1 PROFESSOR REID: When you say there "insofar as is necessary", could I ask are you
2 linking it in your mind, and maybe in our minds too, to your earlier referral on a number
3 of occasions to proportionality?

4 MR PALMER: Yes. Because part of the proportionality test, as traditionally formulated,
5 is that a particular measure should be no more restrictive than is necessary to achieve the
6 regulatory objective.

7 So if there's a less prescriptive means of achieving an objective, then that is more
8 proportionate, that's what proportionality demands.

9 PROFESSOR REID: Thank you.

10 MR PALMER: And that is not necessary to achieve a regulatory objective. It's not
11 proportionate, is another way of putting it.

12 The key point that I emphasise is it must be no more restrictive than is necessary
13 to achieve the regulatory aims. And of course, here the regulatory aim,
14 Article 30, is to ensure that number portability is provided without
15 disincentivising end users from making use of that facility, which we say is fully
16 achieved.

17 THE CHAIRMAN: But is that not only just part of USD 30? Because it refers to cost as
18 well.

19 MR PALMER: Cost orientation obligation.

20 THE CHAIRMAN: Yes.

21 MR PALMER: Yes, there are two questions which arise under that. What services fall
22 within the scope of what must be cost orientated. That's what ground 1's all about. And
23 the second question which arises is: In that context, can Ofcom simply choose what cost
24 orientated actually means and adopt a more restrictive definition, as it now has, unless it

1 is necessary to do that in order to achieve the regulatory objectives under Article 8 FD
2 and the provision of number portability as set out in Article 1.

3 THE CHAIRMAN: Yes, thank you.

4 MR PALMER: We do say there is that burden of showing that change to a more
5 restrictive model restricting what BT can recover by way of charges beyond what it has
6 contractually agreed with up in this point to do so, when it's not necessary to do so for
7 any of the relevant objectives.

8 And so the burden is on them, we say, to show that necessity. They do not engage
9 with that at all in their decision, in their guidance, in their defence. They say the
10 opposite. They say "We don't have to show it's necessary, we've got regulatory
11 discretion, we can choose what we like, we can do what we like". Our
12 fundamental point is that is precisely the opposite of what Lord Sumption is
13 drawing attention to.

14 They say the case before the Supreme Court doesn't apply here at all because that
15 was a case which was unregulated, there's no SMP and no Article 30 USD. So
16 therefore the whole thing is irrelevant, is their position.

17 We say that's a fundamental misunderstanding of the scope of what
18 Lord Sumption was doing, which was treating the permissive scheme as a whole
19 subject to specific carve-out, which are there where necessary to achieve the
20 ultimate objectives of ensuring end-to-end connectivity and competition and so
21 forth are met.

22 THE CHAIRMAN: Thank you.

23 MR PALMER: Ofcom's badly misdirected itself. I can put away that bundle and I will
24 turn to Mobistar, which is in the first authorities bundle, which is concerned specifically

1 with number portability and is now relied on rather heavily by Ofcom in its skeleton
2 argument. It's at tab 7.

3 PROFESSOR REID: Sorry, what was that bundle?

4 MR PALMER: Authorities bundle 1, tab 7. You have got here, and we haven't in
5 general with the European authorities, other Court of Justice authorities, troubled you
6 with the Advocate General's opinion which proceeds the judgment, but in this case we
7 have because Ofcom has cited it and relies on it extensively.

8 I am going to show you that they have badly misunderstood what is being said
9 and the context of what is being said. Although it may take some time, again it's
10 necessary to deal with this in some detail in light of that misunderstanding by
11 Ofcom.

12 First of all, to set the scene this was a reference from the Belgian courts to
13 understand what was within the scope of Article 30, paragraph 2, and what
14 approach to the obligation of cost orientation the NRA was entitled to take.

15 We see that in paragraph 4 it sets the scene, refers to the objectives of
16 Article 30(2), in particular:

17 "These questions arise in connection with number portability, the
18 facility for users in this case mobile telephone users, [but it doesn't
19 matter] to retain their existing number when they change network
20 operators and to take it to their new network. Particularly in a market,
21 like mobile telephony market, that is practically saturated ... portability
22 is of crucial importance with a view to efficient competition because it
23 increases users' willingness to change operators and because,
24 conversely, the lack of a number portability facility or the costs of

1 porting may deter users from choosing a new supplier."

2 So we see there, with users, consistently with the USD. If we turn forward for a
3 moment to paragraph 13, again there's a reference to:

4 "The aim [of the USD as a whole] to ensure the availability throughout
5 the Community of good quality, publicly available services through
6 effective competition and choice, and to deal with circumstances in
7 which the needs of end users are not satisfactorily met by the market."

8 Now, the national law in this case is important to understand the context in which
9 the Court of Justice and the Advocate General are operating. We need to
10 understand what the system was.

11 At paragraph 17 we see that the law was in the Royal decree, and it includes laws
12 on the way in which:

13 "... costs incurred by operators in connection with mobile number
14 portability are to be borne, and draws a distinction between four types
15 of costs: Costs generated by the setting up of portability," like a system
16 set-up, "per line or per number set-up costs ..."

17 So that's the implementation of number portability for a specific user who has
18 requested it:

19 "Costs connected with the central reference data bank."

20 That's because it's a system of direct routing, so that the OCP can check on
21 a central data bank whether or not a number has ported.

22 And:

23 "Traffic costs connected with number portability."

24 That is what is referred to as "traffic costs." Look at those words:

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"Traffic costs connected with number portability."

After the various explanation of the other categories of cost, at paragraph 22 it comes back to the definition of traffic costs under the Royal decree:

"Under Article 18..., traffic costs are the additional costs generated on the network by calls to ported numbers, as compared with calls to non-ported numbers. The donor operator is to be reimbursed these traffic costs on a pro rata basis by the operator of the network from which the call is generated and which charges the end user for the call."

So in Belgium under this law it is an OCP pays rule, as we put it. But all they are paying so far as traffic cost in any reference to traffic cost in this opinion and in the judgment, is to additional costs for ported numbers as compared with calls to non-ported numbers. There is no suggestion at any point in this judgment that all costs associated with the conveyance of a ported call are being referred to, or being dealt with by the Belgian law which is under consideration. It's specifically that subset of costs which are additional.

So that is the national law. The facts are set out from paragraph 23. At glance you can see that from paragraphs 23 to 25 there are three main operators. Belgacom was effectively incumbent, former monopolist. Then Mobistar, 24, had been active in the market from a couple of years later. It was the second largest mobile operator. And then BASE was effectively the challenger, came in two years after that and had around 14 per cent of the end users.

Then the decision which was the subject of the case before the Belgian courts which gave rise to this reference is, at 26. The regulator fixed the amount to cover the set-up costs per successfully ported mobile number on the basis of the

1 concept of the theoretical costs of an efficient mobile operator contained in the
2 Royal decree.

3 So in other words, there was constructed a model of what an efficient mobile
4 operator would incur by way of cost for those set-up costs per line, per number
5 and set a maximum, which you can see at the top, two maximums, depending
6 whether it's a simple installation or a complex installation. So a maximum charge
7 which could be applied.

8 THE CHAIRMAN: Define what is meant by "set-up costs."

9 MR PALMER: That's defined. I just took you to paragraph 17.

10 THE CHAIRMAN: Yes.

11 MR PALMER: And you can see that specific -- it's per line or per number set-up costs is
12 then defined as "set-up costs". What that means is when a user contacts their new mobile
13 phone company and says "I want to move to you, I want to bring my number with me",
14 the process of making sure that calls to that number then go to the new CP, the RCP,
15 requires an initial set-up before any calls are actually made, an initial tweak to the system
16 to put that in place. The costs attached to that, that is the set-up cost.

17 At 26, the decision under challenge was a maximum for that service based on the
18 costs of an efficient mobile operator were set by the regulator. Mobistar
19 challenged that. It said these costs were too high, didn't actually correspond to the
20 theoretical costs.

21 BASE, you can see at 27, shared that but above all objected to the calculation
22 method. So it's no good assessing these costs by reference to an efficient
23 operator, you should be assessing my costs on the basis of the actual costs
24 incurred by each mobile operator.

1 Belgacom at 28, resisting all this, said none of this applies because set-up costs
2 are outside the scope of Article 30 completely. We do not need to worry about
3 any of this. Only, it said, the traffic costs connected with number portability. We
4 know in this context are the additional costs. That was its case.

5 The court in Belgium was unsure of the answer so it referred questions to the
6 Court of Justice. You see those questions at 30. Question 1 I will not read out,
7 but it was essentially: Does Article 30 refer only to costs related to traffic of the
8 ported number, or does it also refer to tariffs of costs incurred by operators in
9 executing requests for porting, ie the set-up costs?

10 (2) was, well, if the answer is it refers only to interconnection costs, the question
11 is then how that should be interpreted. We don't need to spend time on that
12 because the ultimate answer was: It does include set-up costs.

13 So question 3, midway down the first column of next page:

14 "If it must be interpreted as imposing on all operators the ...(Reading to
15 the words)... in respect of the costs of number porting, must it be
16 interpreted as precluding (a) national regulatory measure imposing a
17 specific method of calculating the costs in question?, (b) a national
18 measure which fixes ex ante the allocation of the costs between the
19 operators? [as to who should pay], (c) a national measure which
20 empowers the NRA to fix ex ante for all operators and for a given
21 period a maximum charge?"

22 And (d):

23 "A national measure which grants the ...(Reading to the words)... to
24 apply the tariff set by the NRA, relieving that operator of the obligation

1 to prove that the tariff which it applies is cost oriented to its own
2 costs?"

3 So if it's within the scope, can the national regulatory authority deal with it in this
4 way, or is it precluded from doing so, was the question.

5 The Advocate General summarised all those questions at 37. Essentially to
6 establish whether Article 30 precludes national rules which provides for set-up
7 costs on the basis of a theoretical model. That was the question. And the answer
8 to question 1, are set-up costs in scope at all, is to be found at paragraph 51, first
9 of all. Interpretation of Article 30(2) in the context, in light of its aim and purpose
10 indicates that set-up costs are covered. That conclusion is repeated at 57. We can
11 see the reasoning which leads to that at 53 through to 55. I emphasise the
12 consumer focus of that reasoning, 53.

13 At 54 it says:

14 "Excessive set-up costs ...burden ...(Reading to the words)... number
15 portability facility and changing to the new network.

16 "Consequently [55], the number portability facility cannot neutralise the
17 telephone number factor as a criterion in choosing a supplier in favour
18 of...(Reading to the words)... instead, on account of the costs of number
19 portability the telephone number continues to be an obstacle to the
20 willingness of mobile customers to change networks and to effective
21 competition between mobile operators.

22 "Moreover, it is also clear from the second half of Article 30(2) USD
23 relating to any indirect charges, that USD seeks to prevent consumers
24 from being deterred from using the number portability facility."

1 So in essence, set-up costs must be in because otherwise they could deter
2 consumers from using the facility.

3 Just pausing there, when we get to our scenario of the wholesale costs of ISC,
4 which an RCP pays, of course an RCP must ultimately recover its costs from its
5 consumers. But there's no discrimination between ported customers and
6 non-ported customers, so the cost is spread across the entire consumer base.
7 These costs, as well as all other costs, are recovered from its customers ultimately.
8 What we will have to look at when we look at the evidence on this in particular is
9 whether it's right to say that there could in that context be any possibility of
10 number portability costs deterring consumers from using the facility and changing
11 to the new network.

12 What I will show is that Ofcom provide a clear answer to that, which is: No,
13 there's no real possibility of customers being deterred. That's why we say there is
14 an unsurprising result where you are just talking about the costs of conveyance, an
15 element of the conveyance of the calls as a whole being shared amongst all
16 customers, and why we say that category of cost is not within the contemplation
17 of Article 30(2) of the USD.

18 Further reasons given at paragraph 56 which relate to the interests of the
19 incumbent. Ofcom place some reliance on this. Let's have look at it:

20 "It should also be borne in mind in this connection that operators
21 already established on the market and operators with significant market
22 power often those undertakings that had exclusive rights ...(Reading to
23 the words)... natural interest in the set-up costs being fixed as high as
24 possible.

1 "By charging excessive set-up costs, donor operators can deter their
2 customers from changing networks and even obtain some compensation
3 for loss of customers where they do change networks", by charging
4 excessive set-up.

5 Of course, that is wholly unsurprising to read as justifying why set-up costs must
6 be in, because if the donor network could charge a sky high price, it would
7 obviously have an effect on competition.

8 Obviously if it could, that would be in its self interest if it could get away with
9 that. But when you go to the context of conveyance, that same logic doesn't apply
10 when you bear in mind, as Lord Sumption emphasised, when you are outside the
11 SMP context, you are assumed to be, as indeed we are, in a competitive market,
12 you can't just charge what you like, that's not how a competitive market, as
13 opposed to a market where you have SMP, works. You may like to charge as
14 much as you possibly can in a competitive market, that doesn't mean you can
15 charge what you like. Here, you are looking at a natural bottleneck and set-up
16 costs, it's only the donor CP who can work the magic on the system to release the
17 number and move it on and provide that set up portability. You can't compete for
18 that. Just as, under the system with routing, you can't compete for that initial
19 switch for which a call is delivered. But conveyance is in a different category,
20 bearing in mind always that all this judgment is concerned with is the limited
21 extent to which any additional conveyance costs can be incurred.

22 So although Ofcom seek to insinuate the possibility that BT could be charging as
23 high as possible, when we get to the evidence, you will see that is not right. What
24 it charges is the competitive rate which is applied effectively to other services as

1 well, or less. And that's not surprising in a competitive market.

2 THE CHAIRMAN: You use the word "effectively" because it's part of a bundle of
3 charges.

4 MR PALMER: You can never buy inter-switch conveyance on its own, if you think
5 about it. As a product, it doesn't work on its own. You have go through a switch before
6 you can use any conveyance. So inter-switch conveyance is sold in each case as part of a
7 bundle, a product for different purposes, different outside purposes in each case. Despite
8 that, it's still possible to extrapolate what the price is for the inter-switch conveyance
9 element, or local tandem conveyance element, or inter-tandem element, respectively, you
10 can break that down. Mr Morden explains all that in his evidence, in particular in his
11 second witness statement. When you look at that you get clear evidence of the
12 competitive price being charged or, indeed, less.

13 THE CHAIRMAN: Mr Palmer, is it the case that in Mobistar there was no argument that
14 the exercise of its powers under Article 30(2) by the regulator also had to be informed by
15 Article 8? And is that because that argument wasn't relevant?

16 MR PALMER: I am not sure, I can check whether that was relevant. I can't remember it
17 being raised but that's because the point wouldn't have been taken rather than because it
18 somehow didn't apply. We know it applies in all cases, as Lord Sumption explains.

19 So that is 56, that's when you get to the conclusion at 57. 58 to 60, I shall not read
20 out but there's an emphasis on costs to be borne directly or indirectly by the end
21 user who uses the portability facility and the relevance that the weight that has in
22 the decision about changing operators, you can see that at 60, "the costs which
23 have to be borne by consumers themselves carry more weight in the decision
24 about changing operators than any additional costs for their callers", that last

1 phrase being a reference to the fact that in that system OCP pays so people
2 changing aren't going to be fussed about what their caller is being charged for a
3 call to them, they are concerned with the costs which they are going to bear. If
4 they want to move on to a new CP they have the choice, it's entirely up to them
5 whether they port their number or not, have a new number or keep their old
6 number. They will not be bearing any additional costs in the UK as a result of
7 that decision. Their calls still cost the same and their line rentals still cost the
8 same.

9 That was the answer to question 1 if you like, you find the final answer reiterated
10 at 62. At 63 we move on to what was effectively a reference to question 3 which
11 is whether the National Regulatory Authorities are permitted to ensure that set up
12 costs are cost oriented by fixing ex ante maximum prices in respect of all
13 operators on the basis of an abstract model of the costs. Which, as you will recall,
14 was in issue.

15 According to the order for reference and the submissions of the parties there are
16 essentially two aspects at issue. The opinion deals with each in turn. The first
17 aspect is the scope *ratione personae* of the principle of cost orientation with
18 respect to the portability. In other words, the first question is, to whom does the
19 obligation apply? Not, what does it entail, to whom does it apply, the scope
20 *ratione personae*. That's an important question which in an analysis of the opinion
21 Ofcom ignore that context. So you can see that, working down 63, the question
22 about to whom does it apply, is:

23 "Whether the ...(Reading to the words)... portability or for example only
24 in respect of operators with SMP."

1 Just pausing there, it's no part of my case to argue that Article 30 only applies to
2 operators with SMP. That's clearly wrong and clearly apparent from what we
3 have seen from the CRF as a whole, that that is the question that the court here
4 was considering, because that's what one of the parties was arguing, it only
5 applies if you have got SMP. BT accepts of course that Article 30 does apply to
6 it. That doesn't in itself answer what the scope of it is in terms of, for example,
7 switch conveyance costs or inter-switch conveyance costs, what's related to the
8 provision of number portability.

9 The second aspect, picking up Article 63, is the conformity of community law of
10 the actual method of regulation, namely fixing a maximum price on the basis of a
11 theoretical model of an efficient operator and the market in question. So from
12 paragraphs 64 to 68 we are dealing with that first aspect, namely to whom does it
13 apply. 64 says this:

14 "It is clear from the arguments above...(Reading to the words)...
15 Accordingly, in its three paragraphs, Article 30 ...(Reading to the
16 words)... In the light of these considerations it ...(Reading to the
17 words)... provision of number portability [that's how Article 30(2) it
18 was then phrased]."

19 And:

20 "In the present case to set up costs, irrespective of whether that pricing
21 is demanded by operators with or without market power. It must not be
22 forgotten ...(Reading to the words)... against the background of a
23 situation where, in the new legal framework for telecommunications as
24 in the old legal framework the freedom enjoyed by undertakings to

1 negotiate among themselves the conditions ...(Reading to the words)...
2 on undertakings with significant market power is limited."

3 Just pausing there, what the Advocate General is saying, she is saying it must not
4 be forgotten, it is not an argument raised by the parties, she is saying, that is the
5 context and it must not be forgotten. In one sense, that takes matters no further
6 which it is in answering that first question, the first aspect, who is in the scope.

7 She says:

8 "Amongst other things...(Reading to the words)... however number
9 portability is expressly not among the areas under Article 8(3) of the
10 Access Directive in which the NRAs would be prevented from
11 imposing the ex ante obligation referred to in Article 9 to 13."

12 In other words, it's without prejudice, that limitation of when you can impose
13 price control is without prejudice to Article 30. In 68:

14 "In my opinion this reinforces the view that an NRA is permitted
15 ...(Reading to the words)... without significant market power."

16 Pause there. So far, unsurprising. But now this, which Ofcom ignores:

17 "With regard to the overregulation of the telecommunications sector,
18 which the new legal framework, which includes the USD, seeks to
19 avoid [that's the overregulation] I think it is important that the contested
20 rules do not provide for a fixed price for the set-up costs, but merely for
21 a maximum amount to be fixed by the NRA for the set-up costs with
22 the result that the possibility for operators freely to negotiate the level
23 of the set-up costs with one another is not completely restricted but an
24 upper limit is merely set for the freedom of negotiation in this regard."

1 I just invite you just to pause there and ask yourselves, why is that important
2 here? Ofcom says it's all very straightforward, nothing to do with freedom of the
3 Supreme Court judgment, that freedom of negotiation, that freedom of
4 interconnection, of ability, we can just effectively fix the price at LRIC. Bear in
5 mind that no operator will ever freely negotiate a price under LRIC, by definition
6 that means they're losing money in providing that service, so it can't be a standard
7 price, the price to be applied. Why is it important that the contested rules do not
8 provide for that fixed level? We will come back to that when we get to the
9 judgment of the court.

10 "Furthermore obligations imposed on them in terms of portability are
11 defined very broadly in Article 30".

12 Again, this is relied upon those words, the obligations are defined very broadly,
13 but Ofcom seem to rely on that saying that means it can say it means what it likes.

14 Let's read that, we can decide what it means, whatever we say, in other words.

15 Read what actually the context is, that then goes on to explain at 70:

16 "Under Article 30(1) of that directive Member States must ensure
17 number portability in general [that's what's broadly defined] in general
18 for all ...(Reading to the words)... Article 30(2) clarifies that obligation
19 to the effect that NRAs must ensure that pricing for number portability -
20 including set-up costs - is cost orientated and that direct charges to
21 subscribers, if any, do not act as a disincentive."

22 Just pausing there, that breadth is nothing to do with the breadth of what is
23 actually entailed in providing number portability, which Ofcom seeks to turn it
24 into. That's not what's being said.

1 “Lastly, Article 30(3) contains a negative stipulation. Again, that doesn't take us
2 any further.

3 71:

4 "The USD therefore allows the member states considerable scope
5 ...(Reading to the words)... guaranteeing number portability."

6 They go on at 72:

7 "There's nothing in Article 30(2) which suggests that the ex ante fixing
8 of a maximum price on the basis of a theoretical model of an efficient
9 operator on the market in question would be inconsistent with that
10 provision, or would not constitute an adequate means of ensuring that
11 the set-up costs which a donor operator may demand from a recipient
12 operator are cost orientated."

13 Bear in mind the context in which we are now. We have moved on from the first
14 issue, which was: are set-up costs included at all, the answer is yes, we have
15 moved from, are operators without SMP included in the scope of this to whom it
16 applies. The answer is yes. And so it's only in the scope of designing the means
17 of ensuring cost orientation that what is being said is they have considerable
18 scope in implementing their obligations. This doesn't tell you anything about
19 whether conveyance, ie non-additional conveyance, falls within the scope of the
20 term "provision of number portability".

21 But Ofcom specifically cite paragraphs 69, defined very broadly, 71, considerable
22 scope, considerable scope in implementing obligations as some kind of
23 justification for explaining why, in their view, inter-switch conveyance falls
24 within the scope of number portability. That, in my respectful submission, is a

1 complete misunderstanding of what is actually in issue and actually being dealt
2 with here. That's what the Advocate General said.

3 The judgment we can take very, very quickly. You do not need to go through any
4 of the background and so forth, I will just ask you to turn onto it, to the note at
5 page I-6708, the bottom left-hand corner.

6 When the court rehearses the facts, like the Advocate General they include at
7 paragraphs 11 and 16 the emphasis on traffic costs and the additional costs, not
8 any costs. So that's the court, which is much more briefly expressed and only
9 recites the facts it considers at all relevant. Again, sets that out. Then in
10 answering the first part of the question, ie are set-up costs within scope, you can
11 go straight to paragraph 27, it matches what the Advocate General says. No
12 surprises on 28.

13 So the answer is set-up costs do fall within. So far so good. And then it moves to
14 effectively part 3 of the question, question 3, and you can go to 34 just see the
15 careful terms in which they answer that question.

16 Once it is established that prices are fixed on the basis of cost, once they are
17 within scope, that provision confers a certain discretion, not an open, a certain
18 discretion on the national authorities to assess the situation and define the method
19 which appears to them to be the most suitable to make portability fully
20 effective -- I emphasise those words -- to make portability fully effective in a
21 manner which ensures that consumers are not dissuaded from making use of that
22 facility.

23 35:

24 "Clearly the limits of that discretion have not been exceeded in the

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present case by the national regulatory authorities."

So it's recognising that there are limits to that discretion. Those limits, of course, had they been issued, would have been exercised compatibly with Article 8, Framework Directive, and ensuring the objectives of Article 30, as set out at paragraph 34, here are met. And thus, 36, it follows that this principle, it doesn't preclude that method, and so they answer the question.

The key point to draw from all of this, the Advocate General's opinion and the judgment, is that none of this means that the NRA can do what it likes, see Lord Sumption. What it does must be necessary and proportionate to the given objective and result from inconsistency with the achievement of Article 8 FD objectives. So we know that as a matter of fundamental design principle of the CRF, and we see it emphasised by the Attorney General at paragraph 67 and following in the context of the facts of that case.

None of this, take a second point to draw out, is directed to the question of the scope of what is related to the provision of number portability in the context of the costs of transmission conveyance of calls beyond additional costs.

So that's Mobistar. I am conscious that we have reached the end of the morning and I have spent all the time on the background law and going through the agreed facts and the CRF, which no doubt we will have had to cover between us. I am also conscious we have got a timetable agreed and conscious that you invited me to not worry too much about it. But if I may be permitted, it's in the light of that that I might just draw together some headline points on each of the ground perhaps after the break rather than embarking on ground 1 now, and be done relatively quickly, but in that context which I have now set out.

1 THE CHAIRMAN: How long do you think you will be?

2 MR PALMER: I would say between 20 and 30 minutes at the outside. I will try to keep
3 it to 20.

4 THE CHAIRMAN: Mr Holmes, do you have a position on this?

5 MR HOLMES: Sir, we do not object.

6 THE CHAIRMAN: Okay, that's fine.

7 MR PALMER: I am grateful.

8 THE CHAIRMAN: You can carry on after lunch.

9 **(1.00 pm)**

10 **(The luncheon adjournment)**

11 **(2.00 pm)**

12 MR PALMER: I am very grateful. I am just going to run through each of my three
13 grounds. I shall endeavour not to repeat, or at least unduly, what's already in the skeleton
14 argument, but just to draw attention to some key propositions which we advance as
15 demonstrating Ofcom's errors.

16 We start with ground 1, the question whether ISC falls within the scope of
17 Article 30 at all. In other words, whether it's related in fact to the provision of
18 number portability.

19 Our core submission is the need or otherwise for ISC is entirely a function of the
20 commercial choice of the RCP as to where and to what extent to interconnect with
21 BT. Ofcom erroneously approached this point in its final determination -- the
22 reference is 5.39 -- on the basis that CPs would have to connect to each DLE and
23 each tandem, and this in turn has been misunderstood by the CPs.

24 BT's submission is not and never has been that it will be commercially viable for

1 every CP to interconnect everywhere. BT's submission is that it is a commercial
2 choice as to where to interconnect made in the context of a competitive market for
3 ISC, and on analysis, for the great majority of traffic for the major providers it
4 will be commercially viable. Making a normal commercial choice the same way
5 as for non-ported traffic.

6 You have seen Mr Morden's tables in his second witness statement, and smaller
7 CPs can still take advantage of the benefits of scale as Gamma's business model
8 demonstrates.

9 The core submission advanced to you by Ofcom and the CP Group on this is that
10 it's wrong to ask RCPs to contribute to common costs of BT's network which
11 would exist anyway. It's wrong to ask them to subsidise those costs when BT has
12 lost the relationship with the customer. But that's looking at it from precisely the
13 wrong end of the telescope.

14 Allowing RCPs to convey calls over BT's network without contributing to the
15 fixed costs that the RCP would face if it was using its own network, if anything,
16 amounts to a cross subsidy from the DCP to the RCP. It's the very point that
17 RCPs do not have to connect everywhere because of the relevant economies of
18 scale, amongst other things, that there is a competitive market for ISC.

19 When they take advantage of that they are avoiding the costs of interconnecting
20 themselves. If they were to interconnect themselves, they would incur a higher
21 level of costs which may or may not be commercially viable for them depending
22 on the topography of their own network and the make-up of their own customer
23 bases. That would vary in every case.

24 That's why ISC is provided so they can do it on a per call basis, provide that

1 connectivity without incurring all those larger costs. So it enables the RCP to
2 avoid the costs of circuit provision to the first switch. But none of that relates to
3 the provision of number portability. It's a function of the size and topology of the
4 RCP network and it occurs, this purchase of ISC occurs, because the RCP chooses
5 to purchase it rather than augmenting its own network. And that commercial
6 choice, based on number of customers and cost of circuit provision, is the same
7 choice that as exists in a non-ported context.

8 THE CHAIRMAN: Do I understand you to be accepting it's not commercially viable for
9 everyone to connect over a DLE and tandem switch?

10 MR PALMER: Yes. We never suggested otherwise.

11 THE CHAIRMAN: If that's the case, does that mean that at least to some extent ISC is
12 necessary?

13 MR PALMER: Yes and no. It depends on what level -- obviously conveyance is
14 necessary for any call. What Ofcom and the CPs are saying is because a ported call must,
15 at least from some exchanges, from a commercial point of view, make use of ISC
16 because it wouldn't be viable for us, then the provision of that ISC relates to the provision
17 of number portability as a whole.

18 And that's where we part company. We say that's not what it relates to. What it
19 relates to is the make-up of your network whether you have chosen to
20 interconnect everywhere, whether that is viable for you or not, whether if you
21 have interconnected you have chosen ported calls or only non-ported calls, those
22 are choices which you make. And it's a consequence of those choices which
23 determine whether you use ISC.

24 That doesn't make it necessary in a sense which means that it actually relates to

1 the provision of number portability. That's the key distinction.

2 THE CHAIRMAN: Thank you.

3 MR PALMER: The way they plan those networks and build them out is a function of
4 their overall network planning, commercial choices, with regard to ported traffic and
5 non-ported traffic. Taken together it reflects broad strategic choices.

6 A whole series of arguments are raised against us on this, saying: Can you
7 imagine what would happen if BT was right about this? Shock horror, ISC were
8 unregulated in this context as it is for the provision of other services? BT could
9 put up its prices, BT could not provide it at all, and so forth. I have given you the
10 answer to the argument that it need not be provided at all. We find that in the
11 General Condition 20.1 of BT's end-to-end connectivity obligation.

12 But as to the prices we see it's precisely the presence of effective competition
13 which does in fact constrain prices for ISC. If BT set higher prices that would
14 just result in the erosion of its market share in network services as RCPs move to
15 cheaper alternatives, rather than face an increase in costs. That's by definition
16 what a competitive market is.

17 Secondly, it's precisely the presence of effective competition which has led BT to
18 keep the LTC component of APCCs equal below the level of LTC generally. See
19 Morden at tables 8 and 9.

20 It's priced uniformly everywhere. That's ITC rather. Varied as to distance in the
21 case of ITC in increments of 100kms. It's not varied to increase where an RPC
22 can't afford an alternative. Standardised prices based on distance which you can
23 take or not take. There may be areas or exchanges where the CP commercially
24 wouldn't choose anything other than to consume that product. But BT then

1 doesn't put up a price in those cases just because they are there, they are
2 constrained. There's a competitive constraint that applies nationally. And if it put
3 up its prices in areas where CPs do have genuine realistic commercial choices to
4 be made based on their own level of interconnection, it would be viable for them
5 to take it or not take it as suits them. If you put up those prices, they will not take
6 it.

7 So that level of price is constrained even where the CPs say they have no practical
8 alternative in terms of viability.

9 Thirdly, it's precisely the presence of effective competition which has led BT in
10 some cases to offer lower prices in order to keep the business. You have
11 confidential evidence about that. It's Mr Young and his witness statement,
12 paragraph 39.

13 Fourthly, it's the fact that transit could be made available which constrains
14 pricing, as I outlined earlier, remembering that BT offers transit products for
15 RCPs collecting from other DCPs, long has. Unregulated and provided
16 competitively. As I explained earlier, Gamma hosts smaller CPs effectively
17 providing them with ISC.

18 So this is inconsistent treatment on the part of Ofcom. ISC is alleged to be related
19 to the provision of number portability. It's not, it's related to the conveyance of a
20 call. Ported or non-porting makes no difference beyond the first switch.

21 If there were, of course, any ability to abuse the market position and put prices up,
22 that is precisely when the SMP provisions would come in to protect other CPs and
23 control the price following a market study. That would be the remedy under the
24 access and interconnection directive if, and only if, the strict requirements for

1 such price controls were met. But in the competitive market those requirements
2 are not met.

3 THE CHAIRMAN: Can I just ask you a question about your statement that porting
4 makes no difference beyond the first switch. Is that true in every case?

5 MR PALMER: I beg your pardon?

6 THE CHAIRMAN: You said that porting makes no difference beyond the first switch.
7 Is that true in every case?

8 MR PALMER: Yes, indeed, the first switch is inevitable. Effectively only the DCP can
9 provide that service because it's not even recognised as a ported call at all until you get
10 that far. But after this, it's traffic, which is technically the same as non-ported traffic.

11 THE CHAIRMAN: Something I have not quite got to grips with is that on a number of
12 occasions in it's written materials, Ofcom says that a ported call takes a detour, something
13 along those lines.

14 MR PALMER: Yes.

15 THE CHAIRMAN: The question at the back of my mind is: is that because a ported call
16 has to take a detour back to the BT DLE or tandem switch? Could that mean in certain
17 cases that the call was taking a different route because it is ported than if it wasn't ported?

18 MR PALMER: Under the model of onward routing, yes, it could mean it is a different
19 route and often will mean it is a different route.

20 THE CHAIRMAN: So is it correct for you to state the provision as broadly as porting
21 makes no difference beyond the first switch?

22 MR PALMER: To the use of ISC and the ability of a CP to make use of the ISC product
23 to convey that call onwards from the first switch.

24 THE CHAIRMAN: Yes.

1 MR PALMER: Of course, if it's not a ported call and it's not a call to a BT customer,
2 then there's no reason why it needs to come onto BT's network at all. Whether it does or
3 not will depend on the extent to which the originating CP and terminating CP have
4 interconnection. They might in fact make use of BT for transit purposes, they may not.
5 It's entirely a function of the arrangement of their networks.

6 THE CHAIRMAN: But if you imagine a situation, I am probably grossly
7 oversimplifying it, but the ported call goes to a particular exchange because it's a ported
8 call, the next bit of the journey, it seems to me, could be described as a part of the journey
9 the call then has to take because it's a ported call. Is that correct?

10 MR PALMER: Once it has as a matter of fact been routed to the BT DLE, it will as a
11 matter of fact have to be routed from that DLE, or tandem switch, to the point where the
12 RCP has chosen to collect it. That is certainly right.

13 THE CHAIRMAN: Yes.

14 MR PALMER: That much. But the point where the RCP has chosen to collect it is not
15 fixed in stone anywhere. That's a flexible commercial choice. They can collect it right
16 there at the DLE or tandem switch.

17 THE CHAIRMAN: Thank you.

18 MR PALMER: That is the same with non-ported calls which the originating CP is taking
19 through that point to BT's network. If the point of handover to the terminating CP's
20 network is not immediately there, it can be transited on. It's the same product. It's called
21 ITT, inter-tandem transit, rather than inter-tandem conveyance, but it's the same thing.
22 It's being carried down the pipes to the point where the ultimate destination, the ultimate
23 terminating CP is going to collect it.

24 Where that point is is, again, just as much a matter of choice for each network to

1 determine. There's no technical differences in that regard between ported and
2 non-ported traffic. That's the point I am seeking to make. So it's just conveyance.
3 Of course the precise route of conveyance may be affected by the fact it is ported
4 by onward routing rather than conveyed directly, as BT regards as more efficient,
5 from one to the other.

6 THE CHAIRMAN: Yes.

7 MR PALMER: But of course, the reason why Ofcom is so careful to say it might be
8 efficient in some cases but not so efficient in other cases, it might still be more efficient
9 for it to be onward routed, is because interconnection arrangements vary. You can have
10 two CPs which are interconnected very closely at all sort of points. You can have,
11 particularly in the cases of smaller CPs, ones which rely on third parties to interconnect it
12 with other CPs.

13 So on that basis, they say in that case mandating direct routing might not be
14 efficient for them. But there's two sides to that coin. Of course the route can be
15 affected, but that in itself is nothing to do with the competitiveness of
16 conveyance, nothing to do with the contestability of those services and hence
17 nothing to do with the provision of number portability itself. It's just one of those
18 commercial choices as to how a call is conveyed.

19 It's then said against us under ground 1 that there are nonetheless practical
20 difficulties beyond that. We say there are none, and this will be explored in
21 evidence. We say there are no material, practical, economic, contractual
22 difficulties that prevent CPs from taking advantage of alternatives to inter-switch
23 conveyance from BT for ported traffic.

24 That would be a matter for evidence. That's ground 1. For those reasons, ISC is

1 not related to the provision of number portability.

2 Ground 2, if we are wrong about that, and if it's the fact that sometimes for
3 commercial reasons CPs may be in a position where they inevitably consume ISC
4 sometimes as a matter of commercial choice, rather than augmenting their
5 network, then we say nonetheless, if we are within the scope of 30(2) USD, that
6 doesn't mean that Ofcom can do what it likes.

7 I have covered a lot of ground on this already with the Supreme Court decision in
8 particular. I shall not repeat any of that. Our submission is that Ofcom had no
9 lawful basis to purport to use its regulatory powers to amend the effect of General
10 Condition 18.5 to have a more restrictive effect on BT's freedom to provide
11 services by excluding its ability of BT to recover common costs without first
12 identifying a problem requiring further regulatory intervention before disturbing
13 the contractual arrangements with CPs under the SIA.

14 That arises out of the Supreme Court decision.

15 THE CHAIRMAN: Can I just ask you for clarification about that.

16 Is your essential point, Mr Palmer, that Ofcom did not apply its mind, and does
17 not apply its mind, properly to whether the objectives of Article 8 read with
18 Article 30, or Article 30 read with Article 8, could just as well be met by LRIC+
19 as LRIC? Is that what you are saying?

20 MR PALMER: What they failed to do, if you remember I pointed out when we were
21 going through the Supreme Court judgment the way round Lord Sumption put it:
22 Contractual arrangements come first.

23 What you are looking for is inconsistent with Article 8 objectives, and here it
24 would also have been Article 30, and incompatibility with Article 30. If we are

1 going to overturn, therefore, those contractual arrangements it must be because
2 you, the regulator, Ofcom, has found such level of inconsistency, something
3 which is actually undermining those objectives.

4 If you just look at how Ofcom put it, if you take a moment to hand their skeleton
5 argument where they respond to this point. Just see if there's a difference between
6 us and what we say is a clear error on the part of Ofcom. It's paragraph 86
7 through to 90. They say we are:

8 "... ignoring [86] the fact that the EU legislature has already identified a
9 ground for regulatory intervention in the case of number portability and
10 has decided to put ex ante regulation in place in the form of
11 Article 30(2) USD."

12 In 88, they say their task:

13 "... is to apply that ...(Reading to the words)... in fact comply with that
14 Article before requiring them to be varied."

15 We did, they say:

16 "Our exercise of discretion in applying 30(2) is subject to judicial
17 oversight by the tribunal."

18 That's the focus of ground 3.

19 "There was no additional threshold of justification which Ofcom was
20 required to surmount."

21 In other words, they say, if all the ground is made for them by the fact that the
22 legislature has put in place the Article 30(2) requirement for cost orientation,
23 that's all they need.

24 Beyond that, they say, they have a discretion, which is why, when they respond to

1 the proposition recorded at 89, that they've failed to discharge the burden of
2 showing that regulatory intervention by setting ISC at LRIC is necessary so as to
3 justify interfering with the basis of charges agreed, they say this approaches the
4 matter from the wrong end. There's already regulatory obligation in place.
5 Ofcom is required to ensure compliance with it.

6 What that misses out as a part of analysis, it goes straight from the part of that
7 obligation to the way in which it is implemented, which we say is more restrictive
8 than necessary. And if they were going, therefore, to show that they had grounds
9 for interfering with the previous LRIC+ arrangements, then they had to engage
10 with that and show what was inconsistent with it and, therefore, why it was
11 necessary to take a more restrictive approach within that framework. That's what
12 they have missed out.

13 THE CHAIRMAN: Thank you.

14 MR PALMER: Reference back to Mobistar, which feels that that is a necessary step.

15 THE CHAIRMAN: Sorry, I interrupted you.

16 MR PALMER: Until 1 January 2015, Ofcom acknowledged that BT's APCCs were
17 compliant.

18 So that's the essential ground 2 point.

19 The central ground 3 point, this assumes, this ground assumes that we are wrong
20 on ground 2, we can only succeed on one of these points to get home. But if we
21 are wrong and we say Ofcom didn't have to do anything more to identify a
22 regulatory problem before intervening and overturning those contractual deals,
23 then we say they still made the wrong choice to favour LRIC over LRIC+, and
24 everything that we have mentioned up until now under the heading of ground 1,

1 under the heading of ground 2, is still relevant here. It still informs what that
2 choice should be, in particular the existence of the competitive market, the
3 existence of the alternatives, the fact that ISC is a substitute for other CPs instead
4 of augmenting their own network, all point in the direction of LRIC+.

5 It's not a get out of jail free card to avoid common costs which they would incur if
6 they were doing it the hard way, if you like.

7 The key points to emphasise, that three principles were prayed in aid: Cost
8 causation, cost minimisation and effective competition. And the guidance in the
9 rubric that was adopted.

10 We say the first two, cost causation and cost minimisation, were incapable of
11 demonstrating any substantial reason to move to LRIC. In reality, Ofcom's
12 central building block was the third of those: Effective competition. But the
13 interests of competition cannot be reduced to what is cheapest for any particular
14 CP being best or, indeed, what is cheapest for all CPs smaller than BT.

15 We have got a fully competitive retail market served by a fully competitive
16 wholesale market for ISC. One might think that was enough to conclude that the
17 interests of effective competition were being served, particularly where smaller
18 operators can get services from servers such as Gamma.

19 But Ofcom says even against that background, since the lifetime profitability of
20 customers is affected by the charges that a CP has to pay, it says the higher the
21 porting charges an RCP has to pay, the fewer incentives it would have to compete
22 intensively to gain customers that are likely to port their number.

23 That's an argument which proves too much. It recognises no lower limit on the
24 appropriate price for APCCs. It's essentially the cheaper, the better because the

1 cheaper it is, the easier it would be for others to compete, the more profit they can
2 make from a customer.

3 So far, it is stating the obvious. But not the principle of competition. Ofcom
4 recognises that there should be a floor, of course. They rejected TalkTalk's
5 submission that prices should be even lower than LRIC, but the justification for
6 the existence of a floor has to come from somewhere beyond this broadly stated
7 principle that the higher the porting charges, the fewer incentives to compete. So
8 you have to find the appropriate floor by reference to some other point, not that
9 principle. But Ofcom failed to do so.

10 And the context in which to assess Ofcom's claim that the higher the porting
11 charges the RCP has to pay, the fewer incentives it would have to compete, must
12 be firmly recalled, which is that in actual fact, as we will explore in evidence, the
13 additional charges which would have to be levied to an RCP's customers are so
14 small, and Ofcom itself considers unlikely to deter a customer from switching,
15 and certainly unlikely to lead an RCP to consider attracting further customers if
16 their ported customers would be unprofitable.

17 In this context we will draw particular attention to the reasons why Ofcom
18 decided to reject BT's submission that they should switch to an OCP pays system
19 rather than an RCP pays system. There's some reference to that in the arguments
20 before you. This appeal is not brought on the basis that Ofcom erred in failing to
21 require OCPs to pay rather than RCPs, but it's a very important point of context
22 that they did first make that decision in the guidance that they decided that the
23 RCP should pay.

24 That's an important point of context because obviously as soon as you say the

1 RCP must pay, there is that dynamic that the more they have to pay, the less
2 attractive a new customer might be.

3 But the reason why Ofcom said that didn't matter was in essence it had no
4 material impact on competition. Correct, that's why we are not appealing on that
5 point. But then when they come to the LRIC versus LRIC+ point, suddenly on
6 this appeal they defend it by emphasising what they say would be damaging to
7 effective competition. They can't have it both ways.

8 That's what we will be saying on competition. On efficiency, very briefly, we say
9 again it can't be reduced to what's the lowest cost option for any particular CP.

10 That's just plain wrong, but that's the approach which is taken. A global view
11 must be taken, costs must be minimised across the system as a whole.

12 And lastly, we will be emphasising the importance of incentives. We say Ofcom
13 has failed to recall it is important to focus on the incentives regulation creates, not
14 the merits or otherwise of current and previous interconnection investment
15 decisions. Putting the right incentives in place leads to efficient decision making
16 in a competitive market.

17 Those incentives should include incentives to move away from BT's TDM
18 network to next generation IP-based networks, and incentives to move to direct
19 routing and not to treat ported traffic differently from non-ported traffic.

20 Notably, in the guidance, there is no consideration as to specific effect of moving
21 to LRIC on those incentives. To conclude, the likely result of that failure to
22 allocate common costs appropriately is to compel BT to maintain a network
23 which is dimensioned to carry that ported traffic without additional contributions
24 to the common costs which support the network as a whole.

1 The voice market is diminishing over time, and BT is seeking to shrink that voice
2 network. But once you have reached a point where common costs must be borne
3 by BT's own customers alone, the result is that those customers move away, as
4 they port to other CPs, BT becomes increasingly uncompetitive. And if you take
5 that argument and that dynamic to the logical extreme, what you end up with is
6 one presumably very rich and very loyal customer remaining, to whom Ofcom
7 says all of the common costs should attach.

8 That's the dynamic. It's clearly wrong and clearly inappropriate. It dampens
9 incentives to efficiency and to competition. The serious impacts are altogether
10 ignored by Ofcom.

11 So for all of those reasons, we are going to ask you to allow the appeal.

12 THE CHAIRMAN: Thank you very much, Mr Palmer, that's a very helpful introduction
13 to your case.

14 Mr Holmes?

15
16 **Opening submissions by MR HOLMES**

17 MR HOLMES: Thank you, sir.

18 When I was preparing for this hearing, I must say I felt more than a little
19 sympathy for this Tribunal.

20 The case is an -- I noted what Lord Sumption said of the 08 case, it contained a
21 surfeit of acronyms. This case is a veritable alphabet soup and there are also
22 some fiddly technical details, and the factual and expert evidence is both
23 extensive and argumentative. But our submission today will be that the case can
24 be boiled down to manageable proportions, and that at its heart it raises issues

1 which are much more straightforward than one might have thought based on the
2 submissions which you have heard so far today.

3 An example of the unnecessary complexity, in our submission, lies in the reliance
4 which has been placed today on the 08 case. This seemed like an elaborate
5 excursion to arrive at a broadly uncontentious end point.

6 BT accepts that Article 30 paragraph 2 of the Universal Service Directive applies
7 to it where its products are within the scope of that provision. And it accepted
8 that the 2008 case was not relevant to the scope of that provision.

9 Let me be clear that Ofcom accepts absolutely that each regulatory intervention
10 must be justified and proportionate and must comply with such of the Article 8
11 duties under the framework directive as are relevant to a particular case.

12 Both the determination and the guidance referred specifically to the duties of
13 proportionality and the requirements arising from Article 8 of the Framework
14 Directive. This is not a case where Ofcom forgot the legal duties to which it was
15 subject. Ofcom does not contend that it can do what it likes when applying
16 Article 30(2) of the Universal Service Directive.

17 Our case is that the determination and the guidance were both justified and
18 proportionate and, as a preliminary observation, it's striking that Mr Palmer took
19 you neither to the determination nor to the guidance in his opening submissions
20 today.

21 With that initial observation in mind, let me tell you the structure that I propose to
22 follow in my remaining submissions today. I propose to develop those
23 submissions in three stages. I shall begin by addressing the purpose of regulating
24 the charges at issue. I shall then deal with the legal framework, and in conclusion,

1 I shall make brief submissions, insofar as it's possible having just heard
2 Mr Palmer on his feet this afternoon, in response to each of BT's grounds of
3 appeal.

4 So beginning with the case for regulating APCCs. Under this head, there are
5 three questions: What are the reasons for regulating conveyance charges? Do
6 those reasons extend to all such conveyance charges, or only to some limited
7 subset of them as BT contends? And, thirdly, do the reasons provide sufficient
8 justification for Ofcom's decision that cost orientation should not exceed the level
9 of BT's long run incremental costs which, for the avoidance of doubt, would
10 include both fixed and variable costs of providing the services in question?

11 We say that there are compelling reasons for regulating porting conveyance
12 charges generally and that those reasons support Ofcom's application of the LRIC
13 cost standard. And I would make five points in support of that submission.

14 First, it is an uncontroversial point, but nonetheless worth setting out from the
15 beginning that number portability itself plays a key role in enabling effective
16 competition between communications providers. In this regard, although
17 Mr Palmer placed emphasis on end users' rights, it is worth recalling at the outset
18 that recital 40 of the Universal Service Directive refers to effective competition
19 alongside and as well as consumer choice. And as we shall see, the
20 Advocate General saw those two things as flip sides of the same coin.

21 And the reason for that is that whether a consumer is aware that they are deterred,
22 whether costs are directly imposed at the moment of porting or subsequently on a
23 ported customer, insofar as the economics of serving a ported customer are more
24 expensive, insofar there is a greater cost burden, a cost disadvantage associated

1 specifically with serving a ported customer, that will soften the retail competition
2 for that customer's business.

3 Perhaps, imperceptibly, to that customer, there is a potential to effect the choices
4 that are available to the customer. We do not accept the distinction that was
5 drawn by Mr Palmer this morning between end users' rights on the one hand and
6 effective competition on the other as justifications for the intervention which
7 Article 30(2) of the Universal Service Directive represents.

8 The reason why porting is important is of course that many consumers and
9 businesses will be very attached to their telephone number and unwilling to move
10 providers without it, given friends, family, customers' knowledge of that number.

11 But the second point which flows from the first is that it is not enough to ensure
12 the technical mechanisms to enable a customer to port their number. To make
13 number portability a realistic option, the charges related to portability also need to
14 be circumscribed. The only charges to end customers need to be controlled to
15 stop phone companies from exploiting directly the customer's attachment to their
16 number. But the charges between phone providers also need to be observed and
17 to be kept in check. This is because of the competitive dynamics of porting.

18 Established operators in the market will already have an installed base of
19 customers which they have accrued over time. In a relatively saturated market,
20 newer entrants will need to win customers from the established operators and
21 many of those customers will have a strong preference to take those numbers with
22 them. New entrants will therefore end up with a customer base consisting of a
23 much higher proportion of customers using ported numbers than their established
24 rivals.

1 New entrants will need to buy various services from their established competitors
2 in order to connect and serve ported customers, and the established operators will
3 have an obvious incentive to price these services as high as possible, or otherwise
4 attach costly and inconvenient conditions to the supply of such services or the
5 alternatives to such services. And the Tribunal will hear evidence on the terms
6 that attach to the product, a BT product upon which it relies as a means of
7 avoiding inter-switch conveyance for recipient communications providers
8 between the local and the tandem layers of BT's network.

9 The reason why established operators will have these incentives, both as regards
10 costs and the other terms and conditions on which suppliers made, is because they
11 can thereby create barriers to entry and expansion reducing entrants' incentives to
12 compete for the business of their customers. And they can also, of course, boost
13 their own revenues.

14 The established operators are not exposed to a symmetrical risk in this regard
15 because the position is not symmetrical as regards customers or traffic. The
16 established operators will have a lower proportion of ported customers than the
17 new entrants.

18 The third point is that the need to control charges relating to portability applies
19 not only to initial set-up costs, the costs which were directly an issue in the
20 Mobistar case, as Mr Palmer showed you this morning, but also, and we would
21 say a fortiori, to the ongoing traffic costs related to portability.

22 Mr Palmer has explained that under the UK system for implementing portability,
23 calls are onward routed. When a person calls a ported number, their provider, the
24 originating CP, does not know that the number has moved and sends the call to

1 the provider to which the number was originally assigned. The donor CP or DCP.
2 And the donor CP then carries the call to the new provider of the person being
3 called the recipient CP. So the call goes on a dog-leg route via the DCP. The
4 DCP levies a charge on the RCP for every minute of traffic carried to the ported
5 number, and this is the average porting conveyance charge. The APCC is
6 therefore imposing an ongoing cost which is unique and specific to ported
7 customers.

8 To appreciate the commercial impact of the APCCs, it is helpful to compare the
9 commercial position of unported traffic. There is a helpful diagram to illustrate
10 this in Ofcom's 2013 Fixed Narrowband Market Review. If I could ask the
11 Tribunal to turn that up, it is in BT bundle 4, tab 38.

12 You will see from the front page that this is Ofcom's market review of retail in
13 wholesale markets for fixed narrowband telephony in the UK. That's voice calls
14 and the wholesale services involved in providing them.

15 This was in the context of SMP regulation. So this was under the Access
16 Directive. You see that from the reference to market power just under the review
17 title. The date is 26 September 2013.

18 Turning within this document to page 225, you will see that there is a diagram at
19 the foot of the page setting out a stylised example of the APCC showing the
20 revenue flows that are involved. The usual flow of payment in the case of an
21 unported call is shown at the bottom of the page. The payment flows straight
22 forwardly from the originating CP to the terminating CP. That is the termination
23 charge described with a little t, and that is regulated by Ofcom. Because of the
24 bottleneck that the termination on networks represents, you can only get to the

1 subscriber of a telephone service via the communications provider that controls
2 the number.

3 Above that bottom line you see the position in relation to ported traffic. In that
4 case, the originating CP doesn't know the call is ported, sends it to the DCP where
5 the number was originally assigned, and pays a termination charge when it hands
6 the call over. The DCP then routes the call on to a point of connection with the
7 RCP. When this connects with the RCP it hands on the termination charge, it
8 pays a termination charge itself.

9 Although the position is slightly complex, one can generally assume that the
10 termination rate will be the same on the way in to the DCP as it is on the way into
11 the RCP. But you will see that there is also another flow, another revenue flow in
12 the reverse direction, and that is a per minute payment which requires to be made
13 by the terminating CP, the RCP, to the DCP, for all of the ported traffic which is
14 carried to its network by RCP.

15 APCCs can be viewed, if you like, as a kind of tax on porting under these
16 commercial arrangements. They represent an open-ended commercial
17 disadvantage associated with serving ported numbers, and this is a disadvantage
18 which weighs in particular on later entrants.

19 Sir, if might briefly address you now on a question that you raised on two
20 occasions with my learned friend Mr Palmer, which was the question about the
21 detour. How far is it the case that the routing of a call that has been ported will
22 differ from the routing of a call which has not been ported?

23 In our submission, it is to be expected that there will be a difference. That is for
24 this reason. Where a call is taken directly, a non-ported call is taken directly from

1 the OCP to the TCP, the terminating CP, the OCP who pays, the OCP who foots
2 the bill, controls the routing from end to end. They may not do all of the routing,
3 but they will control the routing and they will do it as efficiently as they can.
4 The evidence before the Tribunal is that communications providers do not like to
5 see their traffic carried on other providers' networks. So wherever possible, the
6 originating provider will carry the call all of the way to the local exchange at
7 which the call is to be terminated and will only hand it over there.
8 Insofar as they use a third party for some of the route, because of limits in the
9 scale of their network or their interconnection arrangements, they will have a
10 choice of different routes available to them because they control the routing from
11 end to end. They will therefore make sure that this is done at lowest cost and in
12 the most efficient manner.
13 When you interpose a donor provider into that process, that control by the paying
14 party for the transit for the conveyance of the call is broken because the call ends
15 up at a third point on the triangle, on the network of the donor CP, where the
16 number was originally routed. The recipient provider in this situation will not
17 have the same free control in the routing of the call to get it home.
18 Mr Palmer candidly admitted that in traversing the recipient CP's network there
19 will be portions where there may be no competitive alternative. The evidence, in
20 our submission, shows that there are a number of such portions and they are
21 important. And it is very difficult to say with confidence that much of that
22 conveyance will be contestable or competitive. I will come to that in a moment.
23 But what is clear is that there is not the same element of control over the routing
24 of the call as there would be where the call goes directly from the originating CP

1 by whatever predetermined route they have arrived at to the particular called
2 party's CP.

3 To conclude this point, we say that the APCCs, for the reasons shown in
4 figure 8.3 of the MDMR impose an ongoing cost which is unique and specific to
5 ported numbers.

6 The fourth point --

7 THE CHAIRMAN: Sorry, before you move on, Mr Holmes, should one qualify that last
8 proposition by saying that in some cases there are differences between the route taken by
9 a ported call and a non-ported call, or is it in every case?

10 MR HOLMES: In my submission, this will obviously be the subject of evidence for the
11 Tribunal, and you will have the opportunity to quiz industry parties who are much more
12 familiar than I am with these arrangements. But my own understanding, and we will see
13 how this is borne out by the evidence, is that the route via the DCP will rarely be the
14 route that -- it would be an unusual coincidence if that route coincided with the route
15 which the originating CP would have selected in the case of a non-ported call.

16 THE CHAIRMAN: Again, we can hear evidence about this, but just so I can clarify my
17 own understanding, once the initial switch of a ported call has taken place, is your point
18 that the RCP has no control over the route by which that call gets to him?

19 MR HOLMES: There are two aspects which are unpredictable, as the evidence will
20 show.

21 The first element of unpredictability is knowing which, in the cluster of switches
22 associated with the DLE at which the number was originally hosted, where it was
23 originally assigned, the call happened to land on the identified as a ported call.

24 There are various possibilities here. The most likely possibility is that the call

1 will be delivered to the DLE, and the reason for that is the one I alluded to a
2 moment ago, which is that operators, including BT, avoid other people's
3 networks. That means they carry them, as far as they can, far end
4 routing -- I think it's described in that way by Mr Morden. They will drop the call
5 if they can with the DLE, the number where the number was originally hosted.

6 The evidence shows that at the DLE there is currently only one provider that
7 interconnects to collect ported traffic. Others are interconnected, but we will see
8 that BT's product for collecting ported traffic requires a separate and segregated
9 link. This goes to the point I was making earlier about the costs burden associated
10 with serving ported traffic and the incentives on the incumbent operator.

11 So there is then, currently, only one CP that picks up ported traffic directly at the
12 DLE where the traffic is most likely to land. And there are -- and this is again a
13 matter for evidence, but our case is that there are specific circumstances relating
14 to that one CP which go to explain why it may have made the choices that it has,
15 it may have invested for the workaround that it has.

16 No other CP has done that. The evidence of Mr Morden seeks to show that it
17 would be commercially viable for other operators to have done it. When rates
18 were at the previous, the rate prior to the determination, that is to say the rates
19 loaded up with an unspecified element of common costs, the -- I am sorry, I have
20 lost my thread.

21 THE CHAIRMAN: I think the point you were going to make was when rates were at the
22 higher LRIC+ level.

23 MR HOLMES: No other operator interconnected.

24 Now, Mr Morden, contrary to the observed experience of the market, says ah, but

1 there could, and he does a number of back of the envelope calculations which it
2 appears are still evolving in order to show that it would be economical for them to
3 interconnect.

4 But the fact remains that they have not done so yet, and one has to ask why. It
5 would certainly be expensive for them and difficult to do so. And in
6 consequence, this is not an obvious example of a contestable constraint, that is to
7 say the risk or the possibility of rapid entry constraining BT's prices. It couldn't
8 be done overnight and it would be costly to do it.

9 My final point is there's a question about how this avails BT. To say that there's
10 an expensive method of avoiding this tax on ported customers that involves
11 buying another BT product on terms which appear to be very inconvenient for the
12 potential purchasers of that product, the DLE handover product, so that they incur
13 comparably high costs in order to get round that stage of the network, there's a
14 question about how far that really addresses the concern.

15 So those are my submissions.

16 THE CHAIRMAN: Thank you. That's helpful.

17 MR HOLMES: If I could go back though, I have gone slightly out of turn.

18 The fourth point I wanted to make was that I have described a general concern in
19 relation to ported traffic, the lack of control, the specific costs that are associated
20 with ported traffic and uniquely with ported traffic.

21 The fourth point is that that competitive concern, it applies generally in a market
22 because in a dynamic market there will always be new entrants who will face the
23 challenge of winning customers from more established operators. And in a sense,
24 all of the CPs who are appearing before you today are established operators to a

1 degree. They have their installed base of customers, and over time they have built
2 up a proportion of that customer base which consists of non-ported numbers.

3 So there will always be an imbalance in the market generally between those who
4 came earlier and the new arrivals. The European rules for ensuring portability
5 clearly, therefore, apply to all operators in the market. Mr Palmer accepted this
6 morning, and we will go back to the rules to make this clear, that there's no
7 requirement to show significant market power. All operators are subject to the
8 requirement of cost orientation.

9 In our submission, this is, if you like, general prophylactic regulation of the
10 market. It doesn't depend on assessing operators for market power, or gauging the
11 precise levels of competition in the market on a case by case basis, which would
12 be a daunting task to do. Instead it applies a general rule that services related to
13 portability are not priced above cost because of the obvious potential for pricing
14 to impede effective competition.

15 So while it is a general concern, we would say that the competitive concern is
16 particularly acute with the original incumbent operator which has an enduring
17 advantage from its former monopoly status when all numbers were assigned to it.

18 The evidence, in our submission, shows very clearly that this is the case for BT.

19 If I can ask the Tribunal to take up defence volume 1 and turn to tab 4. This is the
20 expert report of Mr Godfrey, Ofcom's economist, who oversaw the guidance, and
21 who the Tribunal will be hearing evidence from later in the course of the hearing.

22 There's one feature of the evidence which I think is uncontested, a factual aspect
23 which has not been the subject of any response on evidence. That's set out on
24 page 53. There you will see two figures. The specific data that is used to compile

1 the tables is confidential, but I can describe the contents in broad terms.

2 What figure 7 shows is the balance of onward routed traffic and ported in traffic

3 for BT and various other CPs. The first purple bar for each CP shows the onward

4 routed traffic, so that's the ported minutes which come to each of these first as the

5 donor CP, the ported traffic that they convey on, the recipient CP. On these calls

6 of course they obtain revenues in the form of APCCs.

7 The second green bar for each CP shows the ported in traffic. That is the number

8 of ported minutes which each of the CPs receives as the recipient CP from other

9 donor CPs. On these minutes, they pay APCCs, that's the specific cost burden

10 applicable only to ported traffic.

11 And the third bar shows the balance between these two types of traffic. You will

12 see that BT onward routes a lot of minutes, but is the recipient of comparatively

13 little ported traffic. Whereas for the other providers, the picture is different.

14 Figure 8 draws the financial consequences of this imbalance. BT is a major net

15 beneficiary of APCCs. For later entrants, the other CPs, the position again looks

16 different. This traffic imbalance reflects the fact that the later entrants will have

17 many more ported customers than BT as a portion of their customer base. It also

18 illustrates the additional costs that such entrants must bear by comparison with the

19 incumbent.

20 The fifth point is that the concerns which I have described apply to BT's average

21 porting conveyance charges as a whole and not some minor fraction of them.

22 This brings me to the point that you raised with me, but if I might just recap to

23 make sure I have covered the ground. For its part, BT accepts that under the UK

24 system of porting, the recipient CP has to consume a conveyance of a ported call

1 across the switch where it is identified as ported.

2 BT has regulated that charge at LRIC. As I understand it, it doesn't contest LRIC
3 regulation of that component. But apart from this minimum path, this scintilla of
4 BT's network represented by a single switch, BT contends that there is no need to
5 regulate porting conveyance.

6 From that point on, BT contends that the recipient CP has a free choice of
7 competitive alternatives to BT to carry the call. These alternatives are that the
8 recipient could build its network to every switch to BT's network so as to be sure
9 of picking up each ported call directly at the switch where it is identified as such.
10 It's common ground that that is not currently the case, and at the local level only
11 one provider has the interconnection arrangements in place that would enable
12 collection at the point where the call is most likely to be delivered.

13 The other possibility it is said is that a third party transit provider could enter the
14 market and, through connections at the relevant switch, could pick up the call and
15 carry it back to the recipient provider's network. This is all said adequately to
16 constrain prices for conveyance.

17 We accept that this is an attractive argument, but we say that it is incorrect for
18 several reasons. On the one hand it is incorrect because the regulation of charges
19 relating to portability does not require a prior assessment of competitiveness, and
20 it would not be practical for it to do so. Those charges in themselves represent a
21 competitive disadvantage associated with serving ported customers. They are a
22 special and an unusual case.

23 Every minute terminated on a recipient provider's network is more expensive for
24 that provider than it is for providers to deliver, convey unported minutes to their

1 customers as the terminating operator. And BT is the big beneficiary of this
2 effect in relation to the fixed line communications.

3 But all operators' charges relating to portability are kept in check in order to limit
4 this barrier to entry and expansion.

5 On the other hand, and looking at the facts specific to this case, conveyance of
6 ported traffic across the dog-leg is, in any event, not contestable as BT claims.

7 And the Tribunal will hear evidence about this, but I can set out points which
8 I think are uncontested, beginning with the agreed facts which I think are still
9 sitting in their amended form at the back of BT's skeleton argument. I am not
10 sure in which file the Tribunal has put those.

11 I should just observe to begin with that the way Ofcom approached this exercise
12 was not to garner all the facts that appear on the evidence to be uncontested.

13 There are facts that we see as material which appear to be common ground. I will
14 be drawing your attention to them, testing if necessary in cross-examination.

15 We approach the annex in the light of its description at the start as relating to BT's
16 network and associated interconnection arrangements. So it's only those facts
17 which you see listed here.

18 Point 5, the clarification that I would like to make is this. Mr Palmer noted that
19 the final sentence had been carefully settled to reflect the extent of the agreement
20 as to the availability of third party transit between the parties, which relates only
21 to transit from the DLE to the tandem switch, the LTC element. But it's common
22 ground that there is currently no transit product there.

23 The preceding sentence needs also to be treated with a little caution. It states that:
24 "CPs may choose not to [interconnect their network at every

1 transmission link] however and rely on either BT's network or that of a
2 third party to allow calls to be routed from their own network to BT's
3 DLE and Tandem exchanges to which they are not directly
4 interconnect, depending on their commercial strategies."

5 To be clear, that is also carefully framed to relate to traffic from originating
6 providers.

7 We are talking here about the transit, the carriage of calls from the originator to
8 the recipient. There is no agreement about the options which are realistically
9 available for carriage of calls from the DCP -- BT -- to the RCP, routed from their
10 network, that was the point I'm making. This was about OCP to DCP.

11 As I was describing earlier, the OCP has control over the routing. The OCP pays
12 in the normal case and controls the routing of the call. So those are the agreed
13 facts.

14 In Ofcom's submission, the following points emerge clearly from the evidence.
15 The majority of the ported traffic is delivered at the local layer, at the DLEs,
16 consisting of 600 plus changes across the country. And they are delivered there to
17 avoid any charges by BT. Only one CP currently has the necessary connectivity
18 in place with BT which requires the use of BT's DLE handover product. There
19 are contractual restrictions on this product, and the effect of those restrictions is to
20 raise rivals' costs by requiring a specific transmission link from ported traffic.

21 The Tribunal will also hear evidence about the specific market position of the CP
22 that does interconnect at the local level. No other CP is able at present to collect
23 traffic directly from BT at the local layer in the sense that there are no
24 arrangements in place, they do not use the DLE handover product. They all buy

1 inter-switch conveyance from BT.

2 There is no transit provider for ported traffic at the local level. The one CP that
3 uses BT's DLE handover product does not make the associated links available to
4 third parties.

5 Ofcom, of course, is regulating the market not only for providers that are present
6 here today, but for smaller providers and specifically for new entrants. It will
7 never be economical for those parties to interconnect at every, or even a large
8 number of local switches on BT's network, for the purposes of collecting ported
9 traffic. For those operators, BT is the only show in town.

10 Those operators are not addressed in the evidence of Mr Morden, the back of the
11 envelope calculations in which he arrives at a different view of the economics of
12 the position than the actual market participants have done over the last five years.

13 There is no way for these entrants to avoid purchasing inter-switch conveyance
14 for the whole of the detour that their ported traffic must take across the local layer
15 of BT's network. Insofar as the references that were made to Gamma are intended
16 to show otherwise, our understanding of Gamma's evidence is that it too buys
17 local tandem conveyance from BT. In transporting the calls of other CPs whose
18 numbers are hosting with it, it will incur on their behalf BT's ISC charges and will
19 pass them on.

20 You have my submissions on Mr Morden's evidence about commercial viability.

21 Some ported traffic will also be handed over unpredictably at the tandem layer of
22 the exchanges. There are a hundred such exchanges. They will be the minority of
23 traffic that is ported traffic. For that traffic, if it's not picked up at the specific
24 tandem switch, there will be an inter-switch conveyance charge called an IT,

1 inter-tandem, conveyance.

2 There is extensive interconnection by the largest CPs at the tandem layer, but the
3 evidence on this point is slightly perplexing. What it shows is that even the
4 largest of CPs struggles to pick up all of the ported traffic at tandem switches, at
5 parent tandem switches. It appears that part of the problem may lie in the
6 unpredictability of which parent tandem switch the call happens to be identified as
7 ported at.

8 For reasons of network resilience, each DLE will have several connected, like a
9 pattern of the neurons, if you like. There will be several connections to tandem
10 switches to ensure resilience of the network. So if one goes down, there are other
11 ways of routing the call.

12 The RCP, even if it has numbers that were originally hosted on a particular DLE
13 and which are ported, it has no way of knowing when traffic to those numbers
14 might present among the parent tandem switches which relate to that DLE. It
15 may have perfectly efficient routing arrangements in place for terminating traffic
16 itself at the relevant DLE while minimising conveyance charges by BT. But it
17 may just have picked the wrong tandem; the wrong parent tandem. The call
18 might end up on a different parent tandem because that's where the OCP chooses
19 to drop it. Or it's where BT might choose to deliver it insofar as the OCP didn't
20 get as far as the parent tandem.

21 THE CHAIRMAN: Just wondering, Mr Holmes, if we should have short break at this
22 point. Would this be convenient?

23 MR HOLMES: Absolutely.

24 **(3.18 pm)**

1 (A short break)

2 (3.30 pm)

3 THE CHAIRMAN: Can I just ask Mr Holmes if he could finish on the submissions by
4 4.30?

5 MR HOLMES: Sir, I imagine I will be in a position to conclude by 4.30 with a fair wind.
6 I think it's unlikely that both I and my learned friend, Ms Love, will be able to cover our
7 submissions. So there may be some overflow of the interveners' opening submissions.
8 She has a specific legal point, the Tribunal will have seen, which she needs to open.

9 In terms of the time that has been allowed for factual witnesses, it's always a little
10 unpredictable, but the hope is that the three days that we have set aside for that
11 should be ample, working on the basis that one does not need to put all
12 contentious points to every witness.

13 THE CHAIRMAN: Yes. So would the plan, then, be to rise at 4.30 and have the
14 opening submissions to be considered first thing tomorrow?

15 MR HOLMES: Yes, sir.

16 THE CHAIRMAN: That's fine.

17 MR HOLMES: I had come to the sixth and final point on the reasons for regulating
18 porting conveyance charges, and this concerns the measure of cost orientation that should
19 be applied.

20 Based on its guidance, Ofcom has applied long run incremental costs as the
21 appropriate measure. In my submission, Ofcom had good and lawful reasons for
22 so doing.

23 As Mr Palmer has explained, the basis for Ofcom's approach to the cost standing
24 in the determination which is under appeal today was its analysis in the guidance,

1 and so it's to the guidance that we need to go for the relevant reasoning.
2 If I could ask you to turn that up, it is in BT's first bundle at tab 8.
3 If we can pick up at page 22 in the confidential version, if that is what you have.
4 If you are working from a non-confidential, as I am, it's page 21. At the top of the
5 page you see the heading "Choice of costs standard". At 4.3, Ofcom explains that
6 they had, in a prior consultation, considered whether to adopt an LRIC or an
7 LRIC+ costs standard to calculate the costs of porting under GC18. And the
8 remainder of section 4 sets out their reasoning in support of that decision in
9 favour of the LRIC standard.
10 There was some discussion in some of the written materials from BT that Ofcom
11 had not considered the comparative selection of LRIC versus LRIC+. That is
12 clearly incorrect.
13 This was the subject of a chapter in the guidance, and the reasoning, you will see
14 at 4.4, Ofcom had proposed in the consultation LRIC:
15 "The majority of respondents had agreed with our proposal."
16 At 4.6, you see that BT and EE, respectively the largest operators in fixed and
17 mobile, preferred LRIC+. Largest and the longest established operators.
18 4.7, TalkTalk argued for short run marginal cost.
19 Turning to 4.16, the Tribunal will see the criteria which Ofcom considered. It
20 inherited these from the Monopolies and Mergers Commission, which assessed
21 geographic number portability some time ago and looked at those criteria. Those
22 were considered in turn, and I would like to pick up in particular the effective
23 competition criteria, which begins on page 32 of the confidential version.
24 Ofcom first sets out what it had proposed in the consultation. We need not be too

1 concerned with that, but at 4.58 I would just make the point that Ofcom took
2 account of two particular considerations which made effective competition an
3 important criterion:

4 "[N]umber portability was introduced to facilitate consumer switching
5 ... important facilitator of retail competition."

6 The Tribunal will recall recital 40 of the Universal Service Directive.

7 Ofcom had regard also to its statutory duty to further the interests of consumers
8 where appropriate by promoting competition.

9 Then at page 34, you see the analysis and conclusions. If I could ask the Tribunal
10 just to refresh its memory of paragraphs 4.68 and 4.69 of the guidance.

11 Mr Palmer criticised Ofcom for saying that lower is better for incentives to
12 compete, but it's worth standing back and observing the context within which this
13 analysis is couched.

14 Under Article 30, paragraph 2, Ofcom is required to ensure cost orientation of
15 service, of charges related to portability. Subject to the debate about the scope,
16 about whether these various elements of porting conveyance can be described as
17 related to portability, the choice is then about what costs orientation means. And
18 in considering LRIC+ versus LRIC, it is reasonable from the perspective of
19 effective competition, retail competition, it is reasonable to observe that lower
20 porting charges will reduce the tax which we saw earlier, the specific cost which
21 attaches to serving ported customers.

22 You will see that Ofcom really, in these two paragraphs, encapsulates a number of
23 the points in fairly compressed form that I have developed already in my
24 submissions this morning about the imbalance, about the different position of later

1 entrants.

2 Ofcom then had to decide what cost orientation measure would be most
3 appropriate in view of effective competition. Over the page at 4.71, again you see
4 the argument by TalkTalk that incentives to compete could be enhanced by
5 lowering porting charges below LRIC to short run marginal costs. But Ofcom
6 concludes that this would not be appropriate because the setting of porting
7 charges below LRIC would adversely affect incentives to invest in the provision
8 of porting services in the long run.

9 Again, I would emphasise that LRIC is a long run measure of the incremental
10 costs of porting which will include the fixed costs which are specific to porting.

11 THE CHAIRMAN: Could I just check that because Mr Palmer specifically said that it
12 would have been unfair subsidy implying that fixed costs were not included in LRIC.
13 Have we got a common definition of what LRIC is?

14 MR HOLMES: Sir, I do not believe that it is in -- obviously there will be the experts that
15 Mr Palmer will be able to question about this, but I do not believe there's any dispute that
16 a long run measure of incremental costs will include all of the costs of proportioning a
17 network to carry the incremental traffic associated with porting.

18 Looking behind me to check that I am not misspeaking, because we have Ofcom's
19 economist in the audience. But it would include the fixed as well as the other
20 shorter run costs associated.

21 So in our submission, there is no inappropriate subsidy. BT recovers all of its
22 costs of providing porting conveyance under either its existing TDM network or
23 its NGN network. Whichever network it chooses to deploy it will be able to
24 recover the long running incremental costs of providing porting services, the

1 porting traffic carrying the porting traffic across that network.

2 THE CHAIRMAN: That is specifically not what Mr Palmer says.

3 MR HOLMES: It may be that there is a dispute in the evidence, and of course that will
4 be tested in cross-examination.

5 THE CHAIRMAN: That's fine.

6 MR HOLMES: Ofcom also referred to practical difficulties associated with short run
7 marginal costs measure.

8 In Ofcom's submission, there were sound reasons for selecting cost orientation at
9 rather than above or below long run incremental costs when applying
10 Article 30(2) of the Universal Service Directive.

11 Against this, BT contends that the prices that they apply are competitive and that
12 this is sufficient to show that they are adequately cost orientated for the purposes
13 of Article 30(2).

14 To be clear, BT is here seeking to avoid any regulation of the level of its porting
15 conveyance charges. It says that it should be free to set this. It doesn't want
16 Ofcom to undertake a LRIC+ assessment of them. It says there's already enough
17 competition.

18 We do not accept that APCCs are contestable in the way that BT contends, and
19 you have my submission on that. Contrary to BT's suggestions, Ofcom has never
20 made any finding in the context of its SMP regulation for narrowband markets to
21 the effect that there is effective competition in the supply of porting conveyance.
22 This appears from the agreed facts to be accepted. In paragraph 6, at the end of
23 paragraph 6, of those facts, it is agreed that for the assessment of SMP, Ofcom
24 only took into account non-ported calls. So the progressive deregulation of other

1 types of conveyance by Ofcom doesn't represent any particular regulatory finding
2 as to the level of competitiveness relating to porting conveyance. Nor does the
3 fact that BT uses the same level of one of the charges for inter-switch conveyance
4 to derive the APCCs as it does to derive other charges in the carrier price list. The
5 carrier price list simply sets out BT's standard rates.

6 The interveners' evidence shows that those rates are more in the nature of a
7 ceiling than a real market rate where competition applies. So their presence, or
8 the presence of a rating shown on a rate list of a component that is common to
9 other services, does not in our submission show that the price is competitive and
10 therefore sufficiently cost orientated.

11 BT also relies on the fact that at previous stages Oftel, Ofcom's predecessor,
12 under a previous regulatory framework, adopted LRIC+ regulation of porting. I
13 just note, we can show you the references later, that LRIC+ is of course an
14 extremely malleable measure because you have in this sector huge common costs
15 covering multiple services, and you can allocate those between different services.
16 If there's no regulation of how that allocation occurs, LRIC+ can mean more or
17 less anything between LRIC and the stand-alone costs of providing a network for
18 the purposes of porting conveyance.

19 We can give you the reference later, but Oftel I think, when it looked at porting
20 charges back in 2002, proposed a 9.5 per cent mark-up. That is to be compared
21 with the reduction in the levels of fees, of charges, APCCs, which resulted from
22 the determination which were in excess of 100 per cent of the level of the LRIC
23 price for porting conveyance.

24 BT also contends that the setting of APCCs at LRIC would entail distortions at

1 the wholesale level. In the guidance, Ofcom recognised that by fixing
2 conveyance charges at LRIC, BT could no longer load any of this large pot of
3 common costs onto those charges as it had previously done. It would therefore
4 have to recover the common costs component of its existing APCCs elsewhere.
5 BT claims that this would result in some increase in the level of common costs
6 recovered through the pricing of other BT products and services, which is correct.
7 Ofcom addressed this point in paragraph 4.76 of the guidance, beginning at page
8 36 of the confidential version.

9 If I could ask the Tribunal just to review, refresh its memory of 4.76 and the
10 accompanying footnote 79. **(Pause)**

11 So the amounts at stake across BT's operations were comparatively
12 inconsequential, and I am tempted to observe that the Tribunal will have noted
13 that it's assisted on all sides today by junior counsel. So it's probably to our
14 advantage that larger sums were not at stake because we would not have had the
15 opportunity to make submissions to you today.

16 The figure which is shown at 4.76, the confidential figure, includes the LRIC
17 element. And crudely speaking, one can assume that the common cost element,
18 which is the adjustment affected by the guidance in the determination, will be
19 around half of that level. And by way of further context, BT's annual standard
20 line rental is at least £200, and that's before considering other retail from other
21 calls and services. And this assumes that BT charged the above LRIC element of
22 APCCs to its retail customers, but it could equally adjust the prices of its many
23 unregulated wholesale services.

24 For your note, I am not sure we need to go there, but Ofcom also consider the

1 impact of reduced APCCs on the fixed line industry and aggregate, paragraphs
2 7.11 and 7.12 of the guidance referred to in 4.76, and concluded that the impact
3 across the sector was similarly inconsequential.

4 Mr Palmer suggested, I think, in the closing part of his opening submissions that
5 this was the point that cut both ways and that it suggested that the regulation here
6 of porting conveyance charges wasn't worth the candle.

7 Why, if the amounts are so small, can it be assumed that there will be any effect
8 on retail competition? I think that was the way the point was developed.

9 Ofcom's obligation is to ensure cost orientation, and in another context, in relation
10 to another of the many points that are between us, he has indicated that there are
11 no **de minimis** threshold, no appreciability limitation on that duty under
12 Article 30(2).

13 But in any event, we are looking here at the consequences of the costs for BT, the
14 incumbent operator, a huge operation and vast revenues and, on the industry, a
15 huge -- which is in turn part of the huge industry. And of course considered in
16 that context, the costs may well be inconsequential, but Ofcom is considering this
17 matter from the perspective of potential new entries. And for them, the costs
18 could be highly material.

19 So I do not accept the submission that this point cuts against me on the materiality
20 of impacts on effective competition.

21 In these appeal proceedings BT has also sought to identify various other alleged
22 distortions, and some of these advocated by BT's expert witness, Dr Maldoom.

23 And new candidates have emerged and assumed prominence in the reply and the
24 skeleton argument.

1 I propose to address you on these as necessary after you have heard the oral
2 evidence, but there is one particular factual clarification in relation to direct
3 routing which I should make immediately. This is the alternative to onward
4 routing, where you have a database or databases with the original communications
5 provider whereby they know from the outset a call has been ported and they avoid
6 the dog-leg detour via the recipient CP.

7 It was suggested that Ofcom has recognised that direct routing, or onward routing,
8 might be the same or similar or equally efficient because of its recognition that
9 either direct routing or onward routing might be the efficient outcome. To be
10 clear, that is not the reason why Ofcom says that onward routing might be more
11 efficient than direct routing. The reason is to do with the legacy costs that have
12 already been invested in the system that we have in place today.

13 We were one of the forerunners in the UK, the early adopters. As early adopters
14 of consumer electronics, you end up with a product that later on will appear
15 outmoded in comparison with other options in the market. But when you are
16 deciding whether to switch, you have to take into account the upfront costs of
17 implementing an alternative. Those costs are why it's by no means clear that it
18 would be more efficient now to invest in everyone having distributed databases or
19 there being some central database which OCPs could consult when deciding
20 where to route all calls. Those carry costs.

21 Last time Ofcom looked at that, those costs were significantly negative on a side
22 by side NPV calculation. And Mr Godfrey has given evidence as to why the
23 position may now be less optimistic for direct routing in a market which, as
24 Mr Palmer has pointed out, is a declining market, the market for fixed voice calls.

1 That concludes the first part of my submissions. I want to use the final
2 35 minutes to turn my attention to the law.

3 I think you will have gathered the outline of my indication on the facts from what
4 I have already developed when discussing the reasons for porting.

5 So turning to the applicable law, the starting point is, of course, Article 30(2) of
6 the Universal Service Directive.

7 This is the obligation under European law that General Condition 18.5(a)
8 implements in the UK, which Ofcom was required to apply in determining a
9 dispute about charges relating to portability.

10 Mr Palmer's already shown you it this morning, but I have some additional points
11 to make about the framework, and those are most conveniently made by
12 reopening it, if that's convenient to the Tribunal. So if you could pick up
13 authorities bundle 1 and turn to the first tab.

14 The recitals, at 40 on page 11 we have the observation adopted by Ofcom in the
15 determination that number portability is a key facilitator of consumer choice and
16 effective competition. And you have my point that this is as much about
17 wholesale charges and competitive conditions at the wholesale level as it is about
18 the rights of end users. The two are obviously inextricably bound up.

19 At recital 42 you note the reference to interconnection. Mr Palmer submitted that
20 this told you nothing about the scope of Article 30(2). In our submission, that's
21 not quite right. Recital 42 certainly shows that traffic costs were always intended
22 as a target of regulation by Article 30(2) as well as set-up costs. Indeed, the
23 context of the Mobistar case was that in its originally cast, the directive
24 emphasised interconnection in the operative part, in Article 30(2), referred to

1 interconnection and that raised the question about whether it extended to set-up
2 costs.

3 And of course, the EU, in drafting this, was mindful of the fact that the UK -- it
4 didn't pass the people who negotiated this legislation, agreed this legislation, that
5 the UK had a system of onward routing. We were one of the early adopters, and
6 it was well known that we were at the vanguard when the first iteration of this
7 original 2002 text was agreed. So of course interconnection and traffic costs were
8 in the scope of the directive, and that was common ground in the Mobistar case.

9 Turning to Article 30 itself, three points. The first is that it imposes a mandatory
10 obligation on national regulatory authorities to ensure cost orientation in relation
11 to services within its scope. I emphasise the need to ensure cost orientation by
12 reference to BT's argument that prices can be left as they are. Ofcom is the
13 designated national regulatory authority for these purposes in the UK.

14 The second point is that the obligation is to ensure cost orientation of pricing
15 between operators and/or service providers. Again, confirmation that this
16 operates at the wholesale level.

17 Thirdly, you also see the reference to incentives for subscribers, but that is in
18 relation to direct charges for subscribers. The very fact that reference is made to
19 direct charges for subscribers demonstrates that this provision is intended to cover
20 indirect costs whether or not those are passed on directly to subscribers.

21 Otherwise the language would be otiose.

22 That was my fourth point.

23 THE CHAIRMAN: I think I have only got three so far.

24 MR HOLMES: And so the points were, to take them in turn: Mandatory, wholesale as

1 well as retail; related -- yes, I am sorry. The fourth point is that the costs orientation
2 obligation is framed in broad terms as applying to wholesale pricing that is "related to the
3 provision of number portability". So the argument under ground 1 about necessity,
4 whether it be right or it be wrong, does depend on reading words in to the text of
5 Article 30(2). There's nothing on the face of Article 30(2) which implies such a
6 restriction upon the scope of the services which are caught, the charges which are caught.

7 THE CHAIRMAN: Could you give me your third point again?

8 MR HOLMES: Yes. I have caused general confusion.

9 The third point was about the direct charges to subscribers, that this is an
10 additional and separate aspect of the obligation under Article 30(2) to carrying
11 through, the point we saw also in the recital, that this is not just about end users
12 rights, not just about direct charges, but also about competitive conditions,
13 indirect charges at the wholesale level which will affect competitive conditions.

14 I am not entirely sure how far the next point needs to be made in the light of
15 clarifications that Mr Palmer made this morning. But given that he placed
16 repeated emphasis on an analysis of competitive conditions of whether there was
17 a bottleneck in justifying regulation under Article 30(2), whether there was
18 effective competition, I think it is worth noting that Article 30(2) applies to all
19 operators and is specifically not contingent upon any finding of a lack of effective
20 competition caused by an undertaking having significant market power in any
21 relevant market.

22 To make that good, it's clear from the recitals, recital 5, if I could ask you to turn
23 back to that on page 3, a distinction is drawn there between certain obligations
24 which are applied to:

1 "... all undertakings providing publicly available telephone services...
2 and others [which] should apply only to undertakings enjoying
3 significant market power."

4 That's then built out within the framework of the Universal Service Directive by
5 distinction between chapter 3 and chapter 4.

6 Chapter 3 on page 19 specifies certain regulatory controls on undertakings with
7 significant market power in specific retail markets. You see from Article 17(1)
8 that:

9 Member states must ensure that national regulatory authorities impose
10 obligations on undertakings having significant market power as a result
11 of a market analysis which shows that the market is not effectively
12 competitive.

13 To be clear, under the framework as a whole there is a distinction between
14 markets where an undertaking has significant market power and effectively
15 competitive markets. These are, if you like, binary propositions. Either a market
16 is regarded as effectively competitive for the purposes of the regulatory
17 framework or it's regarded as a market where there is significant market power.

18 It's clear that the Article 17 obligations, for example, obligations not to charge
19 excessive prices, including market entry and so on, are set out in Article 17(2), are
20 specific to undertakings with significant market power.

21 Chapter 4, by contrast, as Mr Palmer has shown the Tribunal, relates to end user
22 interests as well as end user rights, and those interests relate, of course, to
23 competition and ensuring effective competition.

24 Article 30 falls within this chapter and is not one of those obligations in relation

1 to which any prior finding of lack of effective competition or a finding of
2 significant market power needs to be made. It is general prophylactic legislation
3 applicable to all operators and not dependent on a prior assessment of competitive
4 conditions in order to minimise the cost disadvantages that might otherwise attach
5 to serving a ported customer.

6 Looking across the other directives of the Common Regulatory Framework, these
7 confirm that the obligation to ensure cost orientation of charges related to number
8 portability is not contingent on the need to show any lack of effective competition
9 as a justification for intervention.

10 One sees this first from the Access Directive, tab 3. This directive lays down a
11 number of ex ante regulatory obligations which member states may impose, but
12 only on undertakings of significant market power. Article 8(2) on page 13 shows
13 that generally the types of obligation in 9 to 13 may only be imposed where there
14 is significant market power.

15 13, as Mr Palmer has shown you, is price control, regulation of prices. But
16 Article 8(3) contains the specific caveat which Mr Palmer also highlighted, that
17 this is without prejudice to the provisions of Article 30, which is of course about
18 the control of prices, and that is precisely why the caveat is needed.

19 And the final confirmation that Article 30 of the Universal Service Directive is
20 generally applicable and not a feature of only SMP regulation can be found from
21 the Authorisation Directive at tab 4. This, as Mr Palmer noted, prohibits member
22 states from making communications providers obtain a prior licence authorising
23 market entry. Instead, they operate under a general authorisation, subject only to
24 requirement to notify relevant authorities, prior to provision of service. We see

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that from Article 3.

Then in Article 6(1), you see that the general authorisation may be subject to the conditions listed in the annex. Those conditions contain, at point (c) in the annex:

"Number of portability requirements and reporting of Directive 2002/22/EC."

Now, Mr Palmer showed you these points, but I want to be clear that running through the framework there is a very clear distinction between regulation that requires a prior finding of market power as a result, for example, of an economic bottleneck, and other types of regulation which are generally applicable. And there can be no doubt that Article 30(2) falls into the latter category.

That is relevant when one comes to consider the implications of Lord Sumption's judgment in the 08 case. Because one finds that the obligation to ensure cost orientation under Article 30(2) is implemented by way of a general authorisation. That is why one finds the national obligation in our set of conditions for general authorisation, the general conditions applicable to all operators and not merely to BT.

Another point relating to the Framework Directive is Article 8, so if I could ask you just to return to that at tab 2. You have my submissions, but of course Ofcom must act proportionately, and of course it must justify its conclusions.

Of course it must have regard to all of these various objectives and principles set out in Article 8. To be clear, one only needs to review that list. It's at tab 2 on page 22, just so the Tribunal has it.

To be clear, this contains a wide range of different considerations not all of which will be relevant in every case. Some will be relevant in some, particularly

1 relevant in some cases; some in others. The national regulatory authorities need
2 to look at those and see what is relevant in a given case.

3 You see that from the range, for example, some relate to trans-European
4 networks, some relate to high level protection in relation to dispute resolution,
5 some relate to personal data and privacy, some relate to specific social groups
6 such as disabled users. It's not every decision that will engage these various
7 obligations to the same extent.

8 Mr Palmer placed particular reliance on Article 8(5)(f) imposing ex ante, which
9 says that:

10 National regulatory authorities shall, in pursuit of a policy objectives
11 referred to above, apply objective transparent ...(Reading to the
12 words)... as soon as that condition is fulfilled.

13 That is partly, of course, a universal application. The notion that one rolls back
14 regulation where it's no longer needed makes very good sense in any context. But
15 we do say that this provision was not intended to defeat the overall scheme of the
16 framework that I have shown you whereby some obligations, some requirements,
17 are not subject to any finding of an absence of effective competition. Some are
18 not subject to an assessment of whether there is SMP. That is not what, in our
19 submission, Article 8(5)(f) means.

20 It's interesting, if one looks at section 4 of the Communications Act, as
21 Article 8(5)(f) was inserted as a result of an amendment in 2009. The
22 government, in implementing this amendment to the framework directive were
23 content that Article 8(5)(f) was covered by the existing provisions. There's no
24 section 4 duty which specifically requires national regulatory authorities only to

1 apply ex ante regulatory obligations where there is no effective and sustainable
2 competition. That would make a nonsense of the distinction developed that I have
3 shown you runs through the framework between SMP regulation and, for
4 example, regulation under Article 30(2).

5 Turning to the case law, there are two cases that the parties place particular
6 reliance on. One is the Mobistar case, and I think we should return to that, if we
7 may. That's in authorities bundle 1 at tab 7.

8 Mr Palmer has explained the background. The Belgian regulator had taken a
9 decision fixing the maximum amount that could be charged by the donor operator
10 for the set of costs of porting a mobile number. This was under appeal to a
11 Belgian court by various mobile operators, the new entrants complaining that the
12 fee was too high and the incumbent arguing that Article 30(2) didn't cover set-up
13 costs among other things.

14 That argument arose because of the former text of the directive, which only
15 referred to interconnection costs. The National Court referred several questions
16 on the interpretation of European Union law. Essentially, it asked first whether
17 Article 30(2) extended to set-up costs, and it also asked whether Article 30(2)
18 permitted the national legislation to impose a specific method of calculating costs,
19 for the national regulator to fix an ex ante charge within a period.

20 I accept, of course, that a different category of costs was at issue here, set-up costs
21 rather than traffic costs. But the case is nonetheless, in our submission, helpful
22 and relevant on two points. First, it sheds light on the purpose and scope of
23 Article 30(2), and secondly, we say it does provide helpful guidance on the degree
24 of latitude enjoyed by national regulatory authorities when applying the cost

1 orientation requirement.

2 First, as to the purpose and scope of Article 30(2), and beginning with the
3 Advocate General's opinion, Mr Palmer's submission was that this tended to
4 confirm that this was all about ensuring that end users were not deterred from
5 switching, this was all about end user rights.

6 I would just note that at paragraph 53, the Advocate General identifies that
7 number portability is important in two respects, two sides of the same coin:
8 Easier for users to change between operators; and secondly, importance with
9 regard to the interests of the consumers themselves.

10 So the first eliminating an obstacle for operators in the competition for mobile
11 users, and the second facilitating freedom of choice. Facilitating the freedom of
12 choice.

13 Point 54, the Advocate General notes that excessive set-up costs for the provision
14 of portability are a burden for operators who want to attract new customers and
15 can make it more difficult to a new operator to enter the market.

16 We concur. The word "set-up" there was relevant only because of the specific
17 questions referred. It applies, in our submission, with equal force to ongoing
18 traffic costs.

19 "Insofar as the recipient operator passes on the set-up costs to the end-
20 user - which it must do, if not directly, then at least indirectly through
21 its general tariff structure – such portability costs. may deter
22 consumers."

23 So there the Advocate General specifically acknowledging that there might not be
24 a direct cost for ported customers. There might just be an indirect passing on of

1 this cost, this additional cost of porting, in the general tariff structure. The
2 Advocate General still regarded that as relevant to the purposes that were being
3 addressed by Article 30(2).

4 At point 56, you see the Advocate General recognising the consideration, which
5 Ofcom referred to in its determination, about:

6 ... the imbalance between operators already established on the market,
7 which already have a large customer base, and are not as reliant as an
8 up and coming competitor on customers changing networks. The
9 result, the established operators have a natural interest in the set-up
10 costs being as high as possible.

11 You will note that she does not confine established operators to operators with
12 significant power, those that have control of a bottleneck. The concern is more
13 general than that.

14 She then turns to consider the place of Article 30(2) in the wider scheme of the
15 framework, beginning at point 63. As Mr Palmer observed, she asks there what
16 the scope *ratione personae* of the principle of cost orientation under Article 30(2)
17 is. Who is subject to it? Is it confined to operators with significant market
18 power?

19 Her conclusion considering, among other matters, Article 8(3) of the Access
20 Directive, the specific caveat I showed the Tribunal, from the SMP regime, that
21 there is no limitation to operators having significant market power. This is a
22 generally applicable concern.

23 Mr Palmer attached significance to the latter part of point 68 and he said that a
24 fixed price for set-up, he noted that the Advocate General observed that a fixed

1 price for set-up might be problematic under the directive.

2 I would only observe that, in this case, Ofcom did not impose any fixed price. It
3 assessed the LRIC level of BT's charges and specified that that should be the cap
4 on the charges to be made. It did not impose a fixed price universally on all
5 operators.

6 The other aspect of the case is the degree of discretion enjoyed by a regulator in
7 determining what constitutes a cost orientated charge. There are two relevant
8 paragraphs here, paragraph 69 and paragraph 71, both of which Mr Palmer
9 showed you in his opening.

10 Paragraph 69 notes that the obligations imposed on the member states in respect
11 of number portability are defined very broadly in Article 30 of the universal
12 service directive. And paragraph 70 then proceeds basically to set out the
13 provision as it stood at the time.

14 He said that this point was not relevant to the ground 1 issue that is before the
15 Tribunal, the scope of Article 30(2) USD and whether it includes only such
16 elements of porting conveyance as are physically necessary or perhaps
17 economically contestable.

18 In my submission, paragraph 69 goes further than Mr Palmer suggests. It's an
19 observation of the breadth of Article 30, nothing more and nothing less. The
20 language of Article 30 remains extremely broad. In fact, it has been broadened
21 since this decision to encompass not only interconnection costs, but to make clear
22 following this judgment that set-up costs are also covered.

23 Paragraph 71, I think Mr Palmer makes a fair point when he says that this does
24 relate more to the choice of the costs standard, the selection of what is an

1 appropriate cost orientated charge. The universal service directive, therefore,
2 allows the member states considerable scope in implementing their obligations in
3 connection with guaranteeing number portability.

4 But of course, Ofcom here did have to consider an exercise, a discretion as to
5 what cost orientation should require in this case. This paragraph is relevant to the
6 breadth of Ofcom's discretion in that case.

7 For reasons of time I won't take you to the court's judgment, but I would only note
8 that paragraph 32 supports the breadth of the construction of Article 30(2) and
9 that paragraphs 33 and 34 confirm the existence of a discretion in assessing cost
10 orientation.

11 The other point of distinction that Mr Palmer sought to draw was the fact that, in
12 Belgian law, porting conveyance charges appear to have been defined in
13 a particular way and that it was a system of, OCP pays and direct routing. These
14 are all of course potential points of difference between the Belgian system and the
15 UK system. They shed absolutely no light on the principles enunciated by the
16 Court of Justice on the interpretation European Union law. They concerned a
17 feature of the Belgian system that simply did not arise on the questions that had
18 been referred by the Belgian Court. It should be noted that this is described in the
19 legal context section, it's a peripheral and incidental fact and, in our submission, it
20 really doesn't effect the relevance or the applicability of the principles enunciated
21 in Mobistar.

22 Turning to the relevant UK law, the regulatory framework is implemented by the
23 Communications Act 2003 and by acts taken under it, such as the adoption of the
24 general conditions. Mr Palmer has shown you a number of the relevant

1 provisions. We rely on Ofcom's principle duty under section 3(1)(b) to further the
2 interests of consumers in relevant markets where appropriate by promoting
3 competition, because there is a relevance when attaching weight to the criteria of
4 effective competition in the guidance.

5 The text of General Condition 18.5 in our submission is in similarly broad terms
6 to Article 30(2) itself and makes no reference to particular facilities being
7 necessary or not contestable or not effectively competitive. As regards the case
8 law for the United Kingdom, Mr Palmer relied on the 08 case. As I have said, the
9 difference between the parties is not entirely clear following his submission. He
10 accepts Article 30(2) applies in the absence of SMP and it's an obligation that one
11 has to apply. We accept that Ofcom has to follow its duties under EU law and has
12 to act proportionately. We do say that Lord Sumption's submissions have to be
13 read with some care, having regard to the context of the case which was before
14 him. If I could ask the Tribunal, Sir, I fear that I may run over by 10 to 15
15 minutes.

16 THE CHAIRMAN: That's fine.

17 MR HOLMES: I am grateful. The case is in authorities bundle 2, at the final tab, 21.

18 THE CHAIRMAN: One member of the Tribunal has to be away by 4.45, so if you could
19 aim to finish by that time.

20 MR HOLMES: Sir, I am grateful for that, I am on the home stretch. The first point
21 I would make is that Lord Sumption's analysis was in the context of resolving a dispute in
22 which there was no preexisting obligation either as a result of SMP regulation or as a
23 result of any other specific regulatory obligation.

24 His perspective on the framework was inevitably informed by the issue as it arose

1 in that case, it wasn't taken to the universal service direct, there was nothing to
2 suggest it was taken to the universal service direct, he makes no reference to it, it
3 wasn't relevant to the reference before him. His analysis of the framework was
4 nonetheless slightly more nuanced than was suggested and I would draw the
5 Tribunal's attention to the end of paragraph 11 of his judgment on page 10. He
6 notes by reference to a Court of Justice judgment that:

7 "Although price control may not be imposed by regulation on CPs
8 without significant market power, this does not mean that competition
9 considerations are irrelevant in a competitive market ...(Reading to the
10 words)... a monopoly of access to its current customers."

11 He is making a somewhat different point, but he is observing that the framework
12 directive is not confined to regulation of significant market power. There may be
13 other regulatory justifications to intervene. And I highlighted in the first portion
14 of my submissions today why, in our submission, such obligations apply in the
15 context of portability, they apply to the porting conveyance charges, and why
16 those are therefore regulated under Article 13(2) of the USD.

17 Turning then onto page 18, one comes to the heart of Mr Palmer's submission
18 concerning the function of Ofcom in resolving disputes. It's important to observe
19 the distinction that Lord Sumption develops at paragraph 32 arising from different
20 bases for dispute determination:

21 "As a national regulatory authority charged with the resolution of
22 disputes, Ofcom has both regulatory and adjudicatory powers."

23 He notes that:

24 Article 20.1 of the Framework Directive, requires national regulatory

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...(Reading to the words)... of the Specific Directives between undertakings."

In our submission, that was the basis upon which Ofcom resolved the dispute in this case. There was an existing obligation, namely Article 30(2), but in the case before Lord Sumption, he was not under that head. He was under Article 5.4 of the access directive which requires national regulatory authorities to have a power of intervention in the dispute about access and interconnection.

He notes that:

"The combined effect of these provisions ...(Reading to the words)... of the Framework Directive."

None of those is why Ofcom resolved the dispute in this case.

Ofcom resolved the dispute in this case because of an existing obligation. It was obliged to apply to resolve the dispute under Article 20.1 of the framework directive.

Now, of course if there is no existing regulatory obligation and there's just a dispute about interconnection terms, one can see why a contract between the parties should carry considerable weight. What regulatory justification is there in that case for upsetting the bargain, the pact that has been reached between the operators in question?

We are in a quite different context in this case. We are dealing with the application of a regulatory obligation. In those circumstances, in my submission, it is not necessary to cross, to surmount some higher burden. What Ofcom must do is no more and no less than apply the existing obligation.

In applying the existing obligation, of course it must take account of its Article 8

1 duties. Of course it must give reasons and justify its approach and behave
2 proportionately. But that is the nature of the task which it's confronted with, and
3 Lord Sumption's -- nothing in this judgment, in our submission, takes matters any
4 further than that.

5 On a connected point, if we could just turn up the standard interconnection
6 agreement to which you have been taken this morning. This is in defence
7 bundle 2 at tab 20.

8 Mr Palmer showed you the relevant clause, 12, services, and he showed you the
9 conditions about the carrier price list and to change it unilaterally from time to
10 time. I want to draw your attention to clauses 12.9 and 12.12.

11 You will see that 12.9 requires BT to ensure that a charge for a BT service or
12 facility specified in the CPL accords with the relevant conditions applying to that
13 BT service or facility. Conditions are the general conditions to which BT is
14 subject, as are all communications providers, in implementation of the
15 Authorisation Directive.

16 There's an obligation to vary the charges from time to time, so in this context to
17 maintain cost orientation insofar as Article 30(2) applies.

18 At 12.12, for the avoidance of doubt, the provisions of this paragraph 12 are not
19 intended to prejudice the rights, liabilities and obligations of the parties created by
20 or under a condition.

21 So in the Article 20.1 type of dispute where there is an existing obligation,
22 clause 12 makes specific provision. The agreement is subject to the regulation.

23 One would expect nothing else. Of course the contract must be subject to the
24 generally applicable regulatory obligations under statute.

1 My final point concerns General Condition 20, and it was submitted by
2 Mr Palmer, this was the first time you heard -- I do not fault him for that because
3 the argument emerged, I think, at this stage of the skeleton arguments. But his
4 suggestion is that General Condition 20 requires BT to provide inter-switch
5 conveyance for ported calls even if they fall outside the scope of General
6 Condition 18.5.

7 In our submission, this is an incorrect understanding of General Condition 20.
8 That condition is aimed at ensuring that end users can call and receive calls from
9 all types of numbers provided in the European Union. The focus is therefore
10 upon a provider's own customers and users, and the general condition requires a
11 provider to ensure that it is not blocking its customer's access to particular types
12 of numbers unless providing such access is not technologically or economically
13 feasible.

14 So to give you an example, there was a time when people connected at extremely
15 irritatingly slow speeds to particular internet service providers via particular
16 numbers. General Condition 20 would preclude a provider from blocking its
17 users access to that number by way of example.

18 This is not about an obligation to interconnection at the wholesale level.
19 Interconnection is instead covered by General Condition 1, which requires
20 communications providers to negotiate with a view to reaching an agreement on
21 interconnection. If it were a requirement for CPs to establish interconnection
22 between themselves for the purposes of ensuring that a customer of one CP could
23 call the customer of a number, General Condition 1 would be redundant in this
24 context.

1 So General Condition 20, in our submission, cannot have the breadth which BT
2 seeks to assign to it. We can also refer to Article 4 of the Access Directive, just
3 briefly turning that up again. This is at tab 3. You will see that this is a carefully
4 cabined obligation.

5 The obligation, the right and the obligation, is to negotiate interconnection. It is
6 not to interconnect, and General Condition 20 was not intended to defeat that
7 permissive constraint, which is reflective of exactly the considerations that
8 Mr Palmer has emphasised about leaving people free to contract in the market.
9 General Condition 20 is not intended to defeat that by a side wind. We say that
10 our submission is a good one, but if BT were right about ground 1, there is a risk
11 that inter-switch conveyance would not be required to be provided by BT. For
12 that reason, it is important not to narrow the scope of General Condition 18 and
13 Article 30(2) by reading in vague and uncertain concepts of technical necessity or
14 economic contestability.

15 Sir, I have already overstepped my time. I should stop now. I hope that you have
16 gained a broad impression of where Ofcom stands on the grounds. In any event,
17 I hope that's clear from Ofcom's skeleton arguments.

18 So subject to Ms Love's submissions to you tomorrow on the first specific point,
19 we should be able to start factual witnesses.

20 THE CHAIRMAN: Thank you very much, Mr Holmes.

21 MR HOLMES: Thank you, sir.

22 THE CHAIRMAN: We will rise now.

23 **(4.42 pm)**

24 **(The hearing adjourned until Thursday, 19 May 2016)**

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at 10.30 am)

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