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IN THE COMPETITION

Case No. 1066/3/3/06

APPEAL TRIBUNAL

Victoria House
Bloomsbury Place
London WC1A 2EB

30th June 2006

Before:

SIR CHRISTOPHER BELLAMY

(President)

LORD CARLILE OF BERRIEW QC

VINDELYN SMITH-HILLMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

HUTCHISON 3G (UK) LIMITED

Applicant

and

OFFICE OF COMMUNICATIONS

Respondent

Mr. Tom Cassels (Solicitor of Baker & McKenzie LLP) appeared for the Applicant.

Mr. David Anderson QC and Mr. Allan Bates (instructed by the Director of Legal Services (Competition) Office of Communications) appeared for the Respondent.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good afternoon, ladies and gentlemen. Before we start on the formal agenda,
2 Mr. Anderson, just as a way of getting into this case we have one or two very provisional
3 observations that we would like to share with you if we may.

4 At first sight it does seem to us that number portability is a fairly key element in competition in
5 the mobile market which, in itself is a very key economic sector in this country. The questions
6 that we have in our minds – not necessarily for response today but perhaps at some point in the
7 case they may come up one way or another – is that we note first of all the existence of the
8 operators’ Steering Group and although only up to a point it is necessary in this industry to
9 discuss technical matters, does the particular way that group has been operating in relation to
10 this number portability issue raise in Ofcom’s view any difficulties under the Competition Act,
11 1998? That is one thought at the back of our minds.

12 The second matter at some point we think we would like some elucidation about is the idea of
13 what is called in the papers “co-regulation” and in particular how co-regulation is supposed to
14 operate where the regulated group, as I were, has divergent interests within itself and does that
15 run any risk, perhaps of blurring various lines that perhaps should not be blurred.

16 Thirdly, and again in due course, it is said in the papers that the United Kingdom is somewhat
17 behind other countries in Western Europe – particularly Ireland but not just Ireland – both in
18 relation to port time, direct routing and related technical issues. We were wondering whether it
19 is accepted that that is indeed the case in this particular industry.

20 The last point that I have – though my colleagues may have others – is that there seems to be
21 some suggestion in the papers, and we have no idea whether it is right or wrong that in the
22 week that is currently the time needed to port a number from one operator to another there is
23 some evidence of “save” activity – attempts to save an existing client. We were told in the *BT*
24 *Save* case that General Condition 1.2 applied to all operators and we would just like to know
25 by that is meant mobile operators as well and, in due course, whether Ofcom has a position as
26 to whether save activity in this context would be compatible with General Condition 1.2.

27 I think those are the things that we have in mind, but I am not necessarily asking for a response
28 immediately, but we like to share with parties our first impression so that they can put us right
29 when we have got hold of the wrong end of the stick. I do not know if my colleagues want to
30 raise anything else?

31 LORD CARLILE: I have one question, if I may. It relates to what I think is called “tromboning”,
32 and please correct me if I understand it incorrectly. I just wondered how real a concept number
33 portability is in this country. If I understand tromboning correctly it means that if, for
34 example, I start as a subscriber to T-Mobile and I choose, for example, to switch to Vodafone,
35 in fact for the rest of time, although I may retain my number, I remain dependent upon the

1 original network, the T-Mobile network, and therefore though the number is carried by
2 portability the connection is not?

3 MR. ANDERSON: I would be very happy to respond, inevitably with a certain degree of generality,
4 to those initial concerns which ----

5 THE PRESIDENT: Yes, it is entirely up to you. It is very useful if you can.

6 MR. ANDERSON: -- if I may say so, I am quite certain that my clients have very well in mind, and
7 will have even better in mind after what you, Sir, have said today.

8 There is, in a sense, a prior point, which is: are these proceedings going to be the vehicle in
9 which issues such as those have to be determined. I do not know if the Tribunal has seen the
10 correspondence between the parties.

11 THE PRESIDENT: We have seen the correspondence and obviously you and Mr. Cassels are going
12 to update us shortly as to what the latest position is.

13 MR. ANDERSON: When it comes to that what we shall say is that if one looks at the relief that is
14 sought in the Notice of Appeal and at what we are freely offering there really is not a cigarette
15 label between the parties. If there is any difference at all it relates to the issue of how clear it
16 was or should have been before the Notice of Appeal was lodged that we were proposing to
17 consult on both these issues this autumn. I can see that there might be room for discussion
18 about that but I cannot see it is discussion that could be relevant to this case except possibly on
19 the issue of costs. So in terms of what we are actually going to do it is very much what H3G
20 want us to do.

21 THE PRESIDENT: We will hear from Mr. Cassels in a moment, but I have the impression there is a
22 bit more than a cigarette paper between the parties, not least on the issue of timing. But let it
23 unfold and we will see where we are.

24 MR. ANDERSON: So far as co-regulation is concerned, the appellant does say with engaging
25 frankness, and no doubt it is our fault for not making it clear, that they are not quite sure what
26 it means. What it does not mean – certainly so far as we are concerned – is letting the
27 manufacturers or the market operators get on with it and not do anything until they can all
28 agree. Ofcom is acutely aware of exactly the point which is raised in the Notice of Appeal
29 which is that this is a market where you have some incumbents with relatively large market
30 shares, and we have some newcomers – not only H3G, but including H3G – who are trying to
31 find their way in, and it must be perfectly plain from that situation that one cannot simply leave
32 it to the industry to decide whether regulation should happen.

33 The point of co-regulation is really as the name suggests. It is regulation in which both the
34 industry and the regulator participate, classically by the regulator setting a target – one might
35 think of the example of lead times so it would be possible for the regulator to set a target of

1 two hours, six hours or twelve hours, or whatever it might be and for the industry then to work
2 on the detailed protocol that might be necessary to put that target into effect.

3 THE PRESIDENT: Yes.

4 MR. ANDERSON: But for the avoidance of any doubt, there has been no decision in the statement
5 that is challenged in relation to the use of co-regulation on these issues, and that is because a
6 statement, which is challenged, does not deal with these issues of lead time or of core routing.
7 They were outside the scope of the consultations that took place ----

8 THE PRESIDENT: If we had to choose an adjective to describe how Ofcom saw the resolution of
9 this issue what of range of adjectives could one perhaps choose from? Would Ofcom say that
10 this was an 'urgent' matter, or a matter that was 'under consideration', or a matter that was 'to
11 be resolved in due time', or a matter that was 'on the back burner'? Where in the spectrum of
12 importance do we place this – as it seems at first sight – rather critical issue?

13 MR. ANDERSON: Sir, in terms of when this is progressed, not only is it urgent but it is already
14 under way. We have made it clear a letter to the other side– I think not the last but the one
15 before – that we are already progressing international benchmarking studies, and we are
16 progressing to the stage where we begin consultation on both these issues this Autumn, and by
17 'Autumn' I understand we mean October or November. Furthermore, we are doing that with a
18 view to producing a statement we would very much hope in February or, failing that, in March
19 of next year. That is what we have in mind and that is how urgently we view these matters.
20 The Tribunal will understand that we cannot be any more specific than that on the beginning of
21 the consultation. The simple reason is that there is a very substantial 'pre-consultation'
22 consultation, if you like. There is an evidence gathering process. There is a process of talking
23 to stakeholders. There is a process of trying to understand just where some of these issues are
24 going to come out because some of them are very technical issues.

25 THE PRESIDENT: That may be so, but in certain of the papers we have seen so far – they may not
26 of course be accurate or at all complete – there does seem to be a report dealing with the
27 international situation, something called the "Cullen International Report" which, at first sight,
28 would seem to contain enough information to have enabled one to see what the international
29 situation was. One does not of course know what the technical problems are, but if large
30 numbers of other countries have solved them it may be that there are no insuperable technical
31 problems, or that they do not need the sort of time we are now talking about which is not
32 moving at a tremendous gallop – is it?

33 MR. ANDERSON: It would be a mistake, Sir, to think that the problems were only technical in
34 nature. It may be that with lead times the nature of the problem is simpler and I think you will
35 have seen if you have delved into any of the minutes and the meetings and correspondence and

1 so on, that Ofcom has displayed consistently a good deal of sympathy with what H3G are
2 saying about that, though plainly we cannot pre-judge the outcome of any consultation. In
3 relation to core routing it is more difficult, not only because it is technically very difficult
4 which it is, but also because of costs involved. You may have seen that there was a previous
5 statement – the MGN statement?

6 THE PRESIDENT: Yes.

7 MR. ANDERSON: In which the question of core routing was considered from the perspective of
8 fixed to mobile, not mobile to mobile. There was in that case a cost benefit analysis performed
9 which made it plain that very substantial costs were anticipated if this was going to implement
10 it. Put that together with the fact that we are moving to the next generation and that it is not
11 going to be very long – although it is going to be a few years – before the next generation
12 networks are in place, and one begins to see that it is not automatically obvious that one must
13 move straight away to the new system. Although it is quite true that some countries have done
14 so, it is equally true that others have not – one thinks of countries like, I think, France, I will be
15 corrected if I am wrong – where things are very similar to the way they are here. So there is
16 certainly no complacency, there is certainly no wish to be anywhere other than the lead in
17 terms of how ----

18 THE PRESIDENT: France is said to have implemented direct routing – para.5.5 of the Notice of
19 Appeal. I do not know whether that is right or not? Maybe it is not.

20 MR. ANDERSON: I think certainly with lead times France is slow.

21 THE PRESIDENT: There s no obvious Western European major country missing from the list in 5.5
22 except ----

23 MR. ANDERSON: I think if one looks in a little more detail, which I freely admit I have not done --
24 --

25 THE PRESIDENT: Nor have we at this stage, it is very preliminary.

26 MR. ANDERSON: One sees that it is not quite as simple as that, e.g. in France they have done it for
27 mobile to mobile, they have not done it for fixed to mobile, which is a large part of what it is
28 all about.

29 THE PRESIDENT: I am sure there are many different sorts of combinations of things.

30 MR. ANDERSON: When people say that they have established the database, that is not altogether
31 the same as saying that they have call routing in what I would respectfully agree with Lord
32 Carlile is obviously the sensible way to do it, money and technology permitting, which is to
33 route the call directly to the new network.

34 THE PRESIDENT: Yes.

1 MR. ANDERSON: But this is not an issue that people are holding back simply because they find it
2 convenient, it is technically very difficult and it does cost a lot of money and one has found
3 that, for example, in the United States where it has been done, and a very large amount of
4 money has been spent.

5 Having said that, we are not closing our mind, we are consulting again both on fixed to mobile
6 and on mobile to mobile and we will listen to what everybody has to say, aware as we do so of
7 the risk of listening too carefully to the market when the market consists to a large extent of
8 incumbents with large market shares.

9 THE PRESIDENT: Of course, yes.

10 MR. ANDERSON: I am not sure that has answered all the specific points.

11 THE PRESIDENT: There was a point which you can come back to in due course on save activity.

12 MR. ANDERSON: Yes. Well the background to that is that Oftel reduced the period down to five
13 days in 1999. It is perfectly plain that save activity does take place during that period in fact it
14 happened to me when I ported my mobile number not very long ago.

15 THE PRESIDENT: We all have our stories ----

16 MR. ANDERSON: I think if the Tribunal has seen the tenor of the correspondence and the dealings
17 on this issue, it will have detected, at least prima facie, a good deal of sympathy from Ofcom.

18 THE PRESIDENT: But it is contrary to General Condition 1.2 is it not, or does that not apply to
19 mobiles?

20 MR. ANDERSON: (After a pause) Yes, I am told not necessarily, but I will come back to it later, if
21 I may.

22 THE PRESIDENT: We are interested obviously because we try to keep a holistic view of this
23 industry. We were told in the 'Save' case that General Condition 1.2 was of general
24 application, but I am not sure how that reads across to what we are talking about here.

25 MR. ANDERSON: Yes well I may come back to that if I may in due course.

26 THE PRESIDENT: Yes, very well, in the light of that for which many thanks indeed – comments
27 like this from the Tribunal I emphasise are intended to be helpful and not in any way to pre-
28 judge anything – I think probably the best thing is for us to turn to Hutchison 3G and Mr.
29 Cassels and discuss first what is the status of the appeal as such and, in particular whether
30 Hutchison wishes to prosecute it before we turn to look at the agenda.

31 MR. CASSELS: Hutchison's position is that we would like to sleep on it.

32 THE PRESIDENT: You would "like to sleep on it"? You mean sleep on the decision and how far
33 you want to go?

34 MR. CASSELS: The decision about whether we want to prosecute the appeal or not. We have
35 received the correspondence from Ofcom, in particular the letter this morning, and with respect

1 we do not want to look a gift horse in the mouth or appear unwelcome to that sort of movement
2 on Ofcom's part, but it does contain a lot of new information that we would like to think about
3 very carefully, and you, Sir, raised the question of timing and that is one of the things we do
4 want to look at particularly carefully so our position is that we are not ready to make a decision
5 yet on whether we want to take the appeal forward and, if so, how. But it does seem apparent
6 to us that the correspondence with Ofcom in the context of this appeal is beginning to be a
7 constructive dialogue and that is not something that we would like to close down at this stage.

8 THE PRESIDENT: So from the Tribunal's point of view, because at the moment we are engaged in
9 the process of setting a timetable for the appeal amongst other things, when are you going to be
10 in a position to let us know?

11 MR. CASSELS: We will need a week in order to give it some thought and maybe engage in a bit
12 more dialogue with Ofcom. Our suggestion would be to set the timetable for the appeal now in
13 any case to save us having to come back to do that and waste the time and costs of attending
14 today, but in the context of wanting to engage constructively with what we can see as a
15 constructive approach from Ofcom.

16 THE PRESIDENT: Yes. What do you say, Mr. Anderson? What is the most cost effective way of
17 proceeding?

18 MR. ANDERSON: Well it is not just any week, it is a week in which those behind and beside me ---
19 -

20 THE PRESIDENT: Are working hard on the case.

21 MR. ANDERSON: -- are going to be working absolutely flat out ----

22 THE PRESIDENT: I am sure they are.

23 MR. ANDERSON: -- to meet a deadline which we are happy to meet even though H3G in a more
24 relaxed style said we are welcome to the end of the month.

25 THE PRESIDENT: Yes, quite.

26 MR. ANDERSON: In our submission, if you look at what they actually request in the Notice of
27 Appeal – it might worth just turning it up.

28 THE PRESIDENT: Yes, there are obviously important issues in the case as a whole as to how this
29 jurisdiction is supposed to work.

30 MR. ANDERSON: Yes, well that is the intriguing thing about the case from our point of view.

31 THE PRESIDENT: It is an intriguing point.

32 MR. ANDERSON: It raises very interesting points of principle, of course. The sadness for those
33 lawyers of an inquiring turn of mind is that we may not have the vehicle to discuss them
34 because as far as the substance is concerned there seems to be really nothing between what
35 they request, which is at 1.10 of the Notice of Appeal ----

1 THE PRESIDENT: Let us have a look.

2 MR. ANDERSON: “Relief sought.”

3 THE PRESIDENT: They ask us to quash the ----

4 MR. ANDERSON: We have made it plain that the decision does not decide that a co-regulatory
5 approach, however defined, is appropriate with respect to MNP, and apart from requiring a
6 direction to consider the substantive issues, and to consider and consult on proposals for
7 improved UK MNP within three months of the relevant Judgment which, on the timetable
8 envisaged by the appellants could not be until right at the end of the year, I would have
9 thought, at the earliest, we have committed to consulting on proposals, both the proposals that
10 they asked us to consult upon this Autumn, which we understand is October or November; and
11 furthermore to reach a statement early next year which we understand is February or, failing
12 that, March.

13 THE PRESIDENT: The statement would be the definitive ruling, is that right?

14 MR. ANDERSON: Yes.

15 THE PRESIDENT: So when you say “early next year” – I think it was the first quarter, was it? “In
16 early 2007”.

17 MR. ANDERSON: Yes. I think it originally said “early 2008” but that was a mistake.

18 THE PRESIDENT: That is a typo – at least we will accept it was a typographical error.

19 MR. ANDERSON: It would be a decision that would have annexed to it any amendments to the
20 General Conditions.

21 THE PRESIDENT: We are to all intents and purposes at the beginning of July 2006, and you are
22 hoping to reach a definitive view, in whatever direction, by early 2007?

23 MR. ANDERSON: Yes.

24 THE PRESIDENT: Which we assume to be January or early February, or something of that sort?

25 MR. ANDERSON: My understanding is January would be optimistic, not necessarily impossible
26 but I think February much more likely, and March possible. I have been pressing my client
27 quite hard on this.

28 THE PRESIDENT: No, quite, and in anticipation of the pressure that might come from the Tribunal
29 for clarity on this sort of point, I am sure.

30 MR. ANDERSON: Well it does depend, of course, on how many people ----

31 THE PRESIDENT: How many responses you get, what the arguments are, how technical it is, of
32 course.

33 MR. ANDERSON: So really, looking at that, whether it should really need a week, or indeed
34 whether it is not in a sense open to the Tribunal to express a view as to whether this appeal has

1 any continuing function I do not know. I do not wish to hurry the other side, and it is quite true
2 they only had our first letter this Tuesday.

3 THE PRESIDENT: There has been a certain flurry of last minute correspondence.

4 MR. ANDERSON: There has, yes. But if you look at the last letter, the letter of this morning.

5 THE PRESIDENT: That is the letter of the 30th.

6 MR. ANDERSON: The letter of the 30th. The first page deals with what I think is a side issue,
7 unless one were to get into some fight on costs which is the extent to which we made this clear
8 before the appeal was lodged.

9 THE PRESIDENT: This is a public commitment, yes.

10 MR. ANDERSON: We say that we did and that the extracts are set out on the first page and half
11 way down the second page, but I do not think you need to ----

12 THE PRESIDENT: Anyway, there is now a public commitment, whether there was or not then?

13 MR. ANDERSON: There is, it is in the middle of p.2. "We intend to issue a consultation document
14 in the Autumn, and a statement in early 2007." We have confirmed that we will follow the
15 practice set out in our consultation process in relation to each of those consultations because
16 there was a question about how the consultation process would work. What we have to claim
17 to do, and I do not think Mr. Cassels would be for a moment surprised by this, is to prejudge in
18 any way the outcome of the consultation process.

19 THE PRESIDENT: No, of course not, absolutely.

20 MR. ANDERSON: I am sure the last thing that he would want would be a decision that was flawed
21 ----

22 THE PRESIDENT: Somebody else would challenge it on the grounds that you had ----

23 MR. ANDERSON: -- the regulator having fettered its discretion. So really it is difficult to see how
24 any of these fascinating points could sensibly arise from resolution.

25 THE PRESIDENT: Does the guide to the consultation process set out any timing or timetable, do
26 you know?

27 MR. ANDERSON: The normal consultation timetable is set out, it is described as "10 weeks". My
28 understanding is that that is sometimes quicker – I think between four and ten in fact is the
29 range – but it is stated that we will generally allow 10 weeks for complicated policy issues and,
30 as the Tribunal will know, that is slightly shorter than the Cabinet Office Guidelines which I
31 think are generally 12 weeks.

32 THE PRESIDENT: Yes.

33 MR. ANDERSON: Then before the consultation begins there is a good deal of evidence gathering,
34 more informal consultation with stake holders and so on, the idea is to hit the ground running,
35 as it were in that way. In my submission it is quite impressive speed actually, when one looks

1 at the complexity of issues like these. So we would say a week – particularly this week – is not
2 necessary, we would like to know on Monday.

3 THE PRESIDENT: Yes. Mr. Cassels?

4 MR. CASSELS: There are two ways of dealing with those concerns. One is for us to move faster,
5 which we ----

6 THE PRESIDENT: Yes, I think it would be desirable.

7 MR. CASSELS: And the other is to extend the time for service of the defence so no work has to be
8 done in the meantime.

9 THE PRESIDENT: Or a combination of the two.

10 MR. CASSELS: We are happy to work over the weekend, we would like to give this the thought it
11 deserves, this has been something for us that has been a long time in the genesis – several years
12 - and we want to make sure that if we are accepting assurances now from Ofcom that we are
13 doing the right thing in doing so. We need to talk to a lot of stake holders, take instructions
14 from all of the people within our client to make sure that we are doing the right things by
15 ourselves, and I would suggest Tuesday or Wednesday next week we could have a definitive
16 response.

17 THE PRESIDENT: Yes.

18 MR. ANDERSON: I think that was an offer of Tuesday which, for our part we would be disposed to
19 accept. (Laughter)

20 THE PRESIDENT: Which you immediately accept, yes.

21 MR. CASSELS: Yes.

22 LORD CARLILE: Can I just raise one small point with you, Mr. Cassels? In para.1.10 of the
23 Notice of Appeal you express the relief sought as “as a minimum”. It is not a phrase I am
24 familiar with when one is seeking relief from a court or a Tribunal. If that is not the maximum
25 then perhaps your client should state what relief they seek as a maximum in the normal way
26 and work downwards from there as frequently happens.

27 MR. CASSELS: I accept the point Lord Carlile is making.

28 THE PRESIDENT: You expand on 1.10 somewhat in 9.27, particularly at (b), in particular you
29 suggest that in the end we should mandate various possibilities for arriving at technical
30 solutions, and I do not know whether that is still part of the relief you are claiming in this case,
31 or whether that falls by the wayside.

32 MR. CASSELS: To be clear what we ask is that Ofcom should consider mandating a move to ----

33 THE PRESIDENT: Oh I see, it is a direction by us that they should consider it?

1 MR. CASSELS: That is right. It is in order to try and put some framework to the consultation that
2 we are asking should take place, and to deal with the difficulty of not having to pre-judge that
3 consultation or direct the outcome of it.

4 LORD CARLILE: We have the same phrase there as well “as a minimum”, which troubles me
5 somewhat.

6 MR. CASSELS: I am sorry, I think it is a drafting ----

7 LORD CARLILE: I like to know where the end of the road is, if possible.

8 THE PRESIDENT: Yes, thank you.

9 (The Tribunal confer)

10 THE PRESIDENT: Yes, our view at the moment is that what we should do first of all, Mr.
11 Anderson, is to extend the time for the defence by a week so that people can stop work
12 effectively for a week. We are inclined to give Hutchison a week to consider its position
13 because I think some of this correspondence has come in very much at the last minute, and
14 there are very important issues here. If the matter was not to proceed – and there is no
15 particular need for litigation that turns out to be unnecessary obviously, on the other hand,
16 sometimes points do need to be ventilated – I think it would be desirable that any order that the
17 Tribunal made adjourning the appeal, or withdrawing it or whatever, would recite what it was
18 envisaged would happen, i.e. “Upon Ofcom indicating in a manner acceptable to the appellants
19 that it would do” whatever it said it is going to do, so that we have at least some structure
20 for what is envisaged, albeit expressed I am sure in as flexible a way as is necessary and
21 reasonable in the circumstances without wishing in any way to put anybody into a straight-
22 jacket it is just for good order’s sake. It is probably a good idea that everyone had a clear idea
23 as to what it was that was envisaged, and that was a matter of public record. Subject to that,
24 that is what we would propose to say in relation to the immediate question as to what future
25 this appeal has.

26 I do not know, in the light of that, whether there are other points we would need to discuss
27 today. I do not know if we have some potential interveners here, but there seem to be one or
28 two possible interveners floating around in the background, but nothing has crystallised yet,
29 and the time for intervention runs out on Monday, I believe.

30 MR. CASSELS: The Notice of Appeal was sent to BT and Vodafone yesterday.

31 THE PRESIDENT: So they may need a little bit of time too, but on the other hand their decision
32 might be affected by Hutchison’s decision. We probably have jurisdiction *ex parte* to extend
33 the time for intervention for a week as well. I am sure that will get back to everybody. We
34 have a letter from BT of 30th June but it is not entirely clear as to whether they are officially
35 intervening or not. Yes, Mr. Anderson?

1 MR. ANDERSON: Could I make two observations on that?

2 THE PRESIDENT: Yes.

3 MR. ANDERSON: First, we would be quite content with an order in the form that the Tribunal
4 suggests if indeed the appeal were to be withdrawn. One likes to think that where a public
5 authority is concerned it is always done, but if it helps for the sake of clarity then we would be
6 perfectly happy ----

7 THE PRESIDENT: Of course, it is not that. It just helps for clarity, yes, we have every confidence
8 in the undertakings we are given by Ofcom.

9 MR. ANDERSON: The other point is in relation to the extension of a week. Like my friend we do
10 not wish to look gift horses in the mouth but just in case it should become relevant in relation
11 to costs I cannot give an undertaking that Mr. Bates and I – and indeed others – will remain
12 idle for a week in this case. There are reasons, there are other professional commitments, we
13 are also within Ofcom holiday commitments ----

14 THE PRESIDENT: You may need to get the job done.

15 MR. ANDERSON: -- which mean, for example, Mr. Unger has very, very limited time, a day has
16 been carved out of his time; it seems to be the only day he has for a very long time indeed, and
17 it is very difficult to put things on hold on the basis that the appeal may be withdrawn.

18 THE PRESIDENT: I appreciate that.

19 MR. ANDERSON: So we would urge the appellant, if they are able to communicate their intention
20 to the Tribunal before the end of next week for them to do so, because certainly from our point
21 of view it would make life a lot easier, and save a lot of costs and a lot of work.

22 THE PRESIDENT: I have inferred from what Mr. Cassels has said that the appellant will use its
23 best endeavours to inform Ofcom as soon as reasonably possible what its position is. Is that
24 fair, Mr. Cassels?

25 MR. ANDERSON:

26 MR. CASSELS: That is, yes.

27 THE PRESIDENT: So if you can do it – we will not make an order that you have to do it before the
28 end of next week but if you can do it ----

29 MR. CASSELS: My client is extremely anxious to have this matter resolved.

30 THE PRESIDENT: -- in a way that is helpful and as expeditious as possible I think that will help
31 everybody, and Mr. Anderson has made a fair point about the position as to costs.

32 MR. ANDERSON: The only other point that occurs relates to further timetable and the Tribunal
33 may take the view it is premature at this stage, but if the date for the defence is to be fixed at
34 18th July, the appellant asks for two months for a reply – that may be related to the fact that

1 they envisaged possible interventions in the interim, but it would in any event be excessive in
2 our view to allow so much time – much longer, in fact, than we have had for our defence.

3 THE PRESIDENT: Quite.

4 MR. ANDERSON: I do not know whether the Tribunal would be minded to set out a further
5 timetable at this stage, but if so we suggest it be a slightly tighter one.

6 THE PRESIDENT: Indicatively I think we would normally say in a case like this, where I think you
7 have not asked for any extension to your time for the defence, have you?

8 MR. ANDERSON: No, no we have not.

9 THE PRESIDENT: Which is a highly responsible approach by Ofcom. I am not going to make an
10 order now but we would be inclined to say four weeks for a reply after the service of the
11 defence. As far as further proceedings in this case are concerned, I think it may be that it is
12 premature to look any further ahead into what may never need to be looked at all, but probably
13 one would be envisaging a second case management conference early in October or something
14 of that order, by which time – as you point out – your consultation process might already be
15 under way. So in a sense the timetable for the appeal and what you are suggesting do being to
16 look as if they might overlap a bit, that is so. Obviously the more underway your consultation
17 becomes the less point there is in addressing these fascinating but possibly academic issues as
18 to exactly what the jurisdiction of the Tribunal is and what the prospective roles of various
19 players are under this interesting statute.

20 So beyond that, is there anything else that we need to address today? Mr. Cassels, do you have
21 any other points – just let me quickly go back to the agenda of which we have taken very little
22 notice so far. There may or may not be one or two confidentiality issues as regards any third
23 parties that may or may not intervene, but I do not think we can address those now. I cannot
24 for myself see immediately any other matters that we need to address today.

25 MR. CASSELS: No, we do not have anything.

26 THE PRESIDENT: Very well, I think that is probably as far as we can take matters today. Thank
27 you all very much.

28 (The hearing concluded at 2.40 p.m.)