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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No 1100/3/3/08

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

23rd October 2008

Before:  
**THE HON. MR. JUSTICE WARREN**  
(Chairman)

**MICHAEL BLAIR QC**  
**SHEILA HEWITT**

Sitting as a Tribunal in England and Wales

**BETWEEN:**

**(1) THE NUMBER (UK) LIMITED**  
**(2) CONDUIT ENTERPRISES LIMITED** Appellant

- v -

**OFFICE OF COMMUNICATIONS** Respondent

Supported by

**BRITISH TELECOMMUNICATIONS PLC ("BT")** Intervener

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Miss Dinah Rose QC and Mr. Brian Kennelly (instructed by Olswang) appeared for the Appellant.

Mr. Christopher Vajda QC, Mr. George Peretz and Miss Fiona Banks (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr. John O'Flaherty (instructed by BT Legal) appeared for the Intervener.

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**HEARING DAY TWO**

1 THE CHAIRMAN: Good morning.

2 MR. VAJDA: I have these three documents and I hope they have found their way to the Tribunal. If

3 I could just explain what they are and where perhaps they can go. The first document, which I  
4 will come to first, is the Electronic communications (Universal Service) Regulations and I  
5 suggest that goes in to authorities bundle 1, flag 14, which is where the later order is.

6 We then have a case called *Optident* which is a case on reference which I will come to at the  
7 end of my submissions and that might happily go in bundle 2 of the authorities. We had *P v S*  
8 yesterday which I do not think got a designation, if we give *P v S* 29, this would be 30. The  
9 final document should be a one page letter which I shall also come to on reference and I  
10 suggest the home for that could be at the end of the core bundle, which I make 701.

11 THE CHAIRMAN: That is flagging your position as explained yesterday.

12 MR. VAJDA: Yes. The letter I suggest just goes right at the end of the core bundle and that means  
13 it would be p.701.

14 Yesterday I finished with the Authorisation Directive, and the last Directive I need to come to  
15 is obviously the USD, but before coming to that I would like to deal with what I call the  
16 designation point and in order to do that can I ask the Tribunal to take up the SI I have just  
17 handed in.

18 If one goes to p.2 of this print out, you will see that the Electronic Communications (Universal  
19 Service) Regulations 2003 were made on 9<sup>th</sup> January 2003 and came into force on 1<sup>st</sup> February  
20 2003, and the *vires* for them was s.2.2 of the European Communities Act. One has to  
21 remember that in early 2003 there was already an obligation on the United Kingdom to bring  
22 into effect the CRF by 25<sup>th</sup> July 2003. The way it was going to be done was through the  
23 Communications Act but at the time it was simply a Bill that was going through Parliament. In  
24 anticipation of the Bill becoming law these regulations were made, and if one looks then at p.3  
25 one sees the procedure in relation to designation of Universal Service Provider.

26 THE CHAIRMAN: I think we need to look quite carefully at the two definitions before we do that  
27 of the Universal Service and the Universal Service provider.

28 MR. VAJDA: Yes. The definition section is at regulation 2, and one sees, as the Chairman has  
29 pointed out, one of the definition of Universal Service and Universal Service provider. If one  
30 goes forward to p.3 one sees that at 4(2) "In order to fulfil the duty in paragraph (1) ..." which  
31 is the Director being under a duty to make proposals to secure the universal service, "... the  
32 Director may propose the designation ..." and the "Director" at this stage, this was Oftel which  
33 was still in being, "... may propose a designation of such persons as he considers appropriate  
34 as universal service providers."

1 Then one has a mechanism which begins at subparagraph 3 and that starts with the words:  
2 “Proposals for designating any person as a universal service provider shall be by means of a  
3 notification published by the Director ...” and what we then have in the subsequent  
4 subparagraph is effectively procedural matters in relation to the notification. We can go over  
5 the page to p.4. We need then to focus on subparagraph 10.

6 “If –

- 7 (a) he has considered every representation about the proposals set out in a  
8 notification published under paragraph (3) that is made to him within the  
9 period specified in the notification; and  
10 (b) he has determined, in accordance with paragraph 8(b), that it would not be  
11 appropriate to propose to designate another person as a universal service  
12 provider instead of the person stated in the notification.”

13 the Director may, by publication of a further notification, set out the proposals with or  
14 without modification as he intends that effect would be given to them upon the  
15 coming into force of any enactment (including an enactment contained in subordinate  
16 legislation) which implements the provision of the Universal Service ...”

17 and I think that must be a typo “... Directive to which the proposals relate;”

18 THE CHAIRMAN: Or, as Mr. Blair says, it might indicate that this was done in a rush.

19 MR. VAJDA: Yes, I think it probably indicates both.

20 MR. BLAIR: It is not the only typing error.

21 THE CHAIRMAN: Yes, well perhaps Mr. Blair has personal experience of how SIs are drafted.

22 The further notification that is referred to at subparagraph 10 is the document that we looked at  
23 yesterday and if I can invite the Tribunal to look at the core bundle at flag 10. If we go to 576  
24 we see this document is dated 22<sup>nd</sup> July 2003, and this is a statement and notification issued by  
25 the Director and, as you see, the heading is “Designation of BT and Kingston” and if one goes  
26 to the summary on 578 we see at S.1:

27 “The Director General of Telecommunications (‘the Director’) has today published a  
28 Notification in which he proposes that BT and Kingston be designated as universal  
29 service providers and also proposes that the specific universal conditions be imposed  
30 upon them. The Notification has been made in accordance with the Electronic  
31 Communications (Universal Service) Regulations 2003.”

32 And that is the document we have just looked at, Regulation 410 ... “and the proposals set out  
33 in the Notification will take effect from 25 July 2003.”

34 What happened is that the Communications Act got the Royal Assent on 17<sup>th</sup> July 2003, and  
35 the relevant provisions of that Act, which we will look at in a moment, came into effect on 25<sup>th</sup>

1 July. We do not have the relevant provisions, as it were, in the legislation, but happily they are  
2 actually set out in the Determination, so I am going to ask the Tribunal to go to the  
3 Determination.

4 THE CHAIRMAN: We have two Commencement Orders. We have the first one for the transitional  
5 period; and then the second one in December to give the powers under s.66 and the other  
6 network and service provisions to Oftel.

7 MR. VAJDA: There are an awful lot of different commencement provisions for the Act.

8 THE CHAIRMAN: The two relevant ones, yes.

9 MR. VAJDA: The transitional provisions, so called, are in para.7 of Schedule 18. It is happily in the  
10 same bundle, the core bundle. Can we go to flag 8, p.448. You can see at A5.20 that BT was,  
11 in fact, designated by the DGT under 4.10, and then makes the point that those regulations  
12 were made under s.2(2), and then it says:

13 “However, the transitional provisions in paragraph 7 of Schedule 18 to the 2003 Act  
14 ...”

15 and those came into force, as I said, on 25<sup>th</sup> July 2003. It is p.1205 of the Grey Book, if you  
16 need have the reference for that. The effect is to treat that designation as a designation in  
17 accordance with regulations under s.66.

18 Then if we look at para.7 ----

19 THE CHAIRMAN: Can I ask in passing, have regulations ever been made under s.66? In other  
20 words, when you do your consultation process, what power are you going to exercise to  
21 implement it?

22 MR. VAJDA: I am told that no regulations have been made under s.66.

23 Can we look at para.7(1):

24 “Where a proposal for the designation of a person as a universal service provider has  
25 been confirmed under regulation 4.(10) of the Electronic Communications (Universal  
26 Service) Regulations 2003, the designation is to have effect after the commencement  
27 of section 66 of this Act as a designation in accordance with regulations under that  
28 section.”

29 Section 66 also came into force on 25<sup>th</sup> July 2003, and the reference to that in the Grey Book is  
30 p.904. Then:

31 “(2) Where in any person’s case a proposal to set a condition has been confirmed  
32 under regulation 4(10) of these regulations, that condition is to have effect after  
33 commencement of that section as a condition set by OFCOM under section 45 of this  
34 Act and applied to that person.”

35 Surprise, surprise, s.45 also came into effect on 25<sup>th</sup> July.

1       What we should then look at ----

2   THE CHAIRMAN: Before you leave 7(1), the phrase, “as a designation in accordance with  
3       regulations under that section”, presumably does not require there actually to be regulations,  
4       but it does leave open the question of you could not do something under the 2003 Regulations  
5       and the proposal mechanism which could not have been done under regulations which might  
6       validly to have been made?

7   MR. VAJDA: Yes. As I understand it, this is, if you like, a deeming provisions, it deems the  
8       designation to be a designation that would be made pursuant to a regulation made under s.66.

9   THE CHAIRMAN: So we, the Tribunal, will need to be satisfied that what was actually done in  
10       terms of notification was compliant with the 2003 Regulations. If the Director General did not  
11       have power to make the USC7 under the statutory instrument procedure then it is invalid?

12   MR. VAJDA: Yes.

13   THE CHAIRMAN: Or is there an argument that, even if it was invalid, it was given validity by  
14       para.7 retrospectively, which is something I think is rather problematical for those appearing  
15       against you, that last proposition.

16   MR. VAJDA: In our submission, it is the former, not the latter. What I would like to do is actually  
17       to go now to the sections in the Act.

18   THE CHAIRMAN: You can do. At some stage I want to hear some very careful argument about  
19       why this statutory instrument authorises USC7, and if people are not prepared for it today the  
20       Tribunal will be happy to have written submissions on it, but it is fundamentally important. I  
21       have a lot of problems about the true construction of this statutory instrument when you see  
22       how the application of the definitions fit into para.4 of the regulation, and I would love to  
23       know from someone what on earth para.4(4)(a) means. What is the import of the reference to  
24       the various articles in that sub-paragraph? I do not understand it. This goes to Miss Rose’s  
25       element point. One might say that the definition of “Universal service” quite clearly regards  
26       the universal service as being everything, which is the point I was asking someone yesterday,  
27       does universal mean all the services, or does it mean universally to the end-user? In this  
28       context it is quite clearly meaning the former.

29       Then one has a question, when you look at the universal service provider, it means a person  
30       who provides the whole or part. So quite clearly a universal service provider can mean a  
31       person who only provides the Article 5 requirement. But does not the designation need to do  
32       that? I am troubled. Even if you do not have points about them, I have concerns.

33   MR. VAJDA: What I propose to do is to go through the sections and then to look at the detailed  
34       designation and then, if there are further points which I am not able to deal with orally, then we  
35       will deal with them in writing.

1 Can we go to s.66, which is at flag 13 of authorities bundle 1. This “Designation of universal  
2 service providers”. This is the section that is referred to in para.7(1) of the Transitional  
3 Provisions. 66(1) provides:

4 “OFCOM may by regulations make provision for the designation of the persons to  
5 whom universal service conditions are to be applicable.”

6 So what it is looking at, we say, is designation by reference to conditions, and we say that is  
7 confirmed if one looks at 66(6):

8 “Regulations made by Ofcom under this section must provide for a person’s  
9 designation as a person to whom universal service conditions are to be applicable to  
10 cease to have effect where, in any such case as may be described in the regulations,  
11 the universal service conditions applied to him are all revoked.”

12 So we say that designation does not take place in a vacuum, it takes place by reference to  
13 conditions.

14 We then need to look at s.45. Section 45 is the power of Ofcom to set conditions and, just to  
15 remind the Tribunal, that is the section referred to in 7(2) of the transitional provisions. If we  
16 look at that we see at 45(2):

17 “A condition set by Ofcom under this section must be either –

18 (a) a general condition; or

19 (b) a condition of one of the following descriptions –

20 (i) a universal service condition.

21 And then subparagraph (4) which we also saw yesterday:

22 “A universal service condition is a condition which contains only provisions  
23 authorised or required by section 67.”

24 What I would like to do now is to look at what Mr. Blair describe yesterday as the “scope and  
25 content” of the designations in this case, and I think we can put away the authorities’ bundle  
26 for the moment and go back to the core bundle.

27 THE CHAIRMAN: You will be coming back to 67 later, to deal with the “consider appropriate”  
28 point?

29 MR. VAJDA: Yes, our basic submission is that the Directive precludes USC7. If that is right it is  
30 completely irrelevant what domestic law says because of course Community law overrides  
31 domestic law if Community law prohibits it. The position would be different if, in fact,  
32 Community law does not prohibit but permits, and I have some short submissions on that point  
33 which I will come to in due course, but on the primary position that Ofcom take is that s.67 is  
34 completely irrelevant because if Community law prohibits it then that is it.

1 Turning then to the statement content of designation, can we go back to flag 10 of the core  
2 bundle, at p.584, which is in Chapter II, Designation of BT and Kingston – Kingston you will  
3 remember is the operator in Hull.

4 “2.6 As no expressions of interest have been received, and on the basis of the criteria  
5 set out in paragraph 2.3, the Director has today confirmed his proposal that BT and  
6 Kingston be designated as universal service providers.”

7 If we then go to p.585, we then see “Chapter 3. The specific conditions”.

8 “3.1 The specific conditions that the Director proposes to impose upon BT and upon  
9 Kingston are set out in Parts 2 and 3 respectively of the Schedule to the Notification.”

10 Then we see, if we look further down the page, 585, we see a set of conditions that the  
11 Director proposes should be applied to BT. Then we see eight conditions. Condition 1, which  
12 is the basic voice telephony, that is effectively Article 4, and then call boxes, that is Article 6 I  
13 think of the Directive. Then we have tariffs and itemised billing. Then there is Condition 7,  
14 which is the one that is in issue here, which is “maintenance and supply of a directory  
15 information database and directories.” If one goes to p.622 for a moment that is the Part 2 that  
16 is referred to at 3.1, and that actually sets out, using the language that we now is proposed, but  
17 that then sets out the conditions and we see then set out at 626 to 627 USC condition 7. If we  
18 go back to p.586 we see the conditions that have been imposed on Kingston. Those conditions  
19 are similar but not identical to the ones imposed on BT, and they are set out in full at Part 3  
20 which is at 629, and you will see not surprisingly that all the Conditions so far as Kingston are  
21 concerned are confined to the Hull area, so if you look at Condition 1, for example:

22 “1.1 At the reasonable request of any End-user, Kingston shall provide Telephony  
23 Services, including the ability to make and receive calls employing facsimile and data  
24 communications, at data rates that are sufficient to permit functional internet access,  
25 to that End-user at any place in the Hull Area ...”

26 That is how it has been done. The position of Ofcom is that USC7 is not a proper designation  
27 for the purposes of Article 6(2) of the Authorisation Directive which we looked at yesterday.  
28 If that is right we say that means that Ofcom, or the NRA, cannot impose a condition on BT  
29 which relates to Article 5 of the USD. The fact that somebody is designated to provide certain  
30 universal services does not provide a hook on which one can then impose any other obligation.  
31 If I can take it by way of illustration, Kingston Communications is designated to provide  
32 certain universal services in Hull, but Ofcom could not impose an obligation on Kingston to  
33 provide for example call boxes in the Shetlands even though Kingston is designated in relation  
34 to call boxes within the Hull area. Therefore we do not accept the argument which I think was  
35 being advanced by the appellants yesterday that provided there is some form of universal

1 service designation one can attach a condition. We say that for three reasons: first, it flies in  
2 the face of the minimum regulation agenda in the CRF. Secondly, the CRF, including the USD  
3 is harmonisation, that means uniformity and, indeed, Miss Rose quite properly accepted  
4 yesterday it is not a flaw, it is harmonisation, and to accept the contrary view would allow  
5 different Member States to impose different things on different people, and that we say is at  
6 odds with the concept of the CRF. Thirdly, we say it simply does not make any sense, if one is  
7 designated to provide voice telephony under, say, Condition 1 why should an NRA be able to  
8 impose a condition in respect of a service for which the undertaking has not been designated?  
9

10 MR. BLAIR: So you are saying that the imposition of the conditions cuts down the previous  
11 universal status of being a universal service provider, because the initial step is to make them a  
12 provider for all purposes.

13 MR. VAJDA: No, we do not accept that they make providers for all purposes, that is the point I  
14 make, that you do not designate in vacuum, you designate, to use the word in the Directive:  
15 “elements”. As the Chairman mentioned yesterday if one just looks at Article 5 there are two  
16 elements in Article 5, there is the phone book element, and then there is a DQ element.

17 MR. BLAIR: But you have not shown us a partial designation, you have shown us a total  
18 designation and then a series of conditions that you say cuts that down.

19 MR. VAJDA: Yes, I accept that. You cannot stop and say “There is a total designation”, you have  
20 to look at the designation plus the conditions. You are designating, and this is the point which  
21 is critical in the Directive, Article 8, you are designating an undertaking to provide a specific  
22 service, a specific universal service.

23 THE CHAIRMAN: That is right even on Miss Rose’s construction, is it not?

24 MR. VAJDA: Well I think Miss Rose has two points on Article 8, her first point is that this is the  
25 guarantee that in fact that all Article 8 is doing is imposing an obligation on a Member State  
26 and not an undertaking, and then she has her second point which is her elements point.

27 THE CHAIRMAN: Yes, but on the first of those points would it not be fair to say – I think this is a  
28 point in your favour – even if it only means, as the French suggest that it is “in order to  
29 provide” so its Member States may designate BT in order to ensure the Member State’s  
30 provision of a particular part of the universal service, that is the point?

31 MR. VAJDA: Yes, yes.

32 MR. BLAIR: So if Kingston-on-Hull decided to produce a telephone directory that would be *ultra*  
33 *vires* their powers, would it? There is no condition about that for them?

34 MR. VAJDA: No.

35 MR. BLAIR: They could not be required to produce one.



1 MR. VAJDA: That is right. Conditions are things that are imposed and undertaken. Undertakings  
2 are perfectly free to do whatever they like, subject to general competition law, but nobody is  
3 stopping anybody producing a phone book if they wished to.

4 I would now like to move to the USD itself, and that is in the authorities bundle 1, tab 2. What  
5 I would like to do is to make five preliminary observations about the USD in terms of  
6 construction. It is to be construed as part of the CRF and the CRF as you know is intended to  
7 impose the minimum possible burden on operators. I will just give the Tribunal the reference  
8 to the passage I took them to yesterday, which was p.2 of the explanatory memorandum, flag 8  
9 of authorities bundle 1, p.180.

10 Point two, the CRF shows that there is a general preference for horizontal regulation rather  
11 than sector specific regulation and moves towards *ex post* rather than *ex ante*.

12 Three, it needs obviously to be construed consistently with Article 6.2 of the Authorisation  
13 Directive and the fact that if you are going to impose something in addition to the general  
14 authorisation it has got to be spelt out.

15 Four, we accept, of course, that the USD is to be given, if I can use this expression, “full  
16 effect”, but it should not be given an over-broad effect so as to encroach on general principles  
17 laid down in the CRF.

18 Five, the USD is to be construed so as to limit the discretion of national regulators to impose *ex*  
19 *ante* obligations beyond the bare minimum to avoid distortion of competition at the  
20 Community level. One of the points that perhaps I did not bring out fully yesterday is that, of  
21 course, this is a Community regime which is all part of the internal market regime in the  
22 Community, and one can see from the patches I took the Tribunal to yesterday, one of the  
23 objectives of the CRF is to ensure that you do not have different levels of regulation in each  
24 Member State.

25 Can we look, first of all, at the recitals. Recital 1, we have got liberalisation going hand in  
26 hand which creates a harmonised regulatory framework. That is the point I made just a  
27 moment ago, harmonisation does not mean floor. Recital 2, you will notice that there is a  
28 reference to Article 153 of the Treaty, which is the specific provision of the Treaty dealing  
29 with protection of consumers, and this is very much, as I said yesterday, directed to end-users.  
30 Recital 3 is looking at the position, if you like, at the international level because the  
31 Community also has obligations under the WTO, and under that any member of the WTO – I  
32 am reading from the bottom of the left hand column:

33 “.... has the right to define the kind of universal service obligation it wishes to  
34 maintain. Such obligations will not be regarded as anti-competitive *per se*, provided

1 they are administered in a transparent, non-discriminatory and competitively neutral  
2 manner and are not more burdensome than necessary ...”

3 So again, that is a point that I have made previously for the kind of universal service defined  
4 by the Member State.

5 Recital 4, ensuring universal service, that is to say the provision of a defined minimum set of  
6 services to all end-users at an affordable price, and I hope that answers the question that the  
7 Chairman asked yesterday, “What is meant by universal service?” You are looking at defined  
8 minimum services that are to be provided to all, and that is the point about the Shetlands  
9 crofter. It goes on to say:

10 “... may involve the provision of some services to some end-users at prices that  
11 depart from those resulting from normal market conditions.”

12 That is, of course, significant because what it is saying is there may be competition, that is not  
13 going to do the trick, and that is why you have to have prices that depart from those resulting  
14 from normal competition.

15 Then recital 6:

16 “The network termination point represents a boundary for regulatory purposes  
17 between the regulatory framework for electronic communication networks and  
18 services and the regulation of telecommunication terminal equipment.”

19 I refer to that because of Miss Rose’s emphasis on networks, which I will come to in a  
20 moment.

21 Recital 7:

22 “Member States should continue to ensure that the services set out in Chapter II are  
23 made available with the quality specified to all end-users in their territory ...”

24 What the focus is here is universal service, so that is a service, so it is focusing on services  
25 which are to be made available to end-users.

26 We then go over the page to recital 9, which, as I say, now looks as if it is at the forefront of  
27 Miss Rose’s case. Could I just read it to the Tribunal:

28 “The provisions of this Directive do not preclude Member States from designating  
29 different undertakings to provide the network and service elements of the universal  
30 service. Designated undertakings providing network elements may be required to  
31 ensure such construction and maintenance as are necessary and proportionate to meet  
32 all reasonable requests for connection at a fixed location to the public telephone  
33 network and for access to publicly available telephone services at a fixed location.”

34 I wish to make three points about that recital. First, as Miss Rose quite properly accepted, that  
35 is directed to Article 4, and indeed that can be seen by the second sentence in the recital which

1 I have just read out, because that mirrors what we have in Article 4, if we can look at Article 4,  
2 which is at p.21:

3 “Provision of access at a fixed location.

4 1. Member States shall ensure that all reasonable requests for connection at a fixed  
5 location to the public telephone network and for access to publicly available telephone  
6 services at a fixed location are met by at least one undertaking.”

7 So that is the first point.

8 The second point is that the request for connection and for access is a request by the end-user.  
9 So it is a customer facing obligation. If I can put it in internet jargon, we are concerned not  
10 with B to B, business to business, but B to C.

11 The third point to make is that the word “network” has, in fact, a defined meaning in the CRF.  
12 Could I invite the Tribunal to go to the Framework Directive, which is at tab 5.

13 MISS ROSE: Perhaps you could refer to Article 2 of the Universal Service Directive.

14 MR. VAJDA: I am sure Miss Rose will have ample opportunity to respond. If we go to p.72, we see  
15 “Definitions”. Does the Tribunal have that?

16 THE CHAIRMAN: Yes.

17 MR. VAJDA: And the first definition (a):

18 “‘Electronic communications network’ means transmission systems and, where  
19 appropriate, switching or routing equipment and other resources which permit the  
20 conveyance of signals by wire, by radio, by optical or by other electromagnetic  
21 means, including satellite networks, fixed and mobile terrestrial networks, electricity  
22 cable system, to the extent that they are used for the purpose of transmitting signals,  
23 networks used for radio and television broadcasting, and cable television networks,  
24 irrespective of the type of information conveyed.”

25 It is plain that that definition there does not cover a database. There is no way that a database  
26 could be described as a “network”.

27 Can we then back to the USD, we see at p.21, Article 2, which says:

28 “For the purpose of this Directive, the definitions set out in Article 2 of the Directive  
29 2002/21/EC (Framework Directive) shall apply.”

30 So that definition that I have given applies also to the USD. Of course, that definition is also to  
31 be read into the definition that Miss Rose must, I think, have been referring to, (b), which is  
32 public telephone network, because it refers to an electronic communications network.

33 “Electronic communications network” is defined in the way that I have read out in Article of  
34 the Framework Directive.

1 So those are the three points I have on recital 9. We say that it is actually clear that recital 9 is  
2 of no assistance at all the construction of Article 5.

3 Can we go back to the recitals at p.14, recital 10 which deals with the concept of affordability.  
4 Again, affordability is this important concept because it is a concept at the consumer level:

5 “Affordable price means a price defined by Member State at national level in the light  
6 of specific national conditions, and may involve setting common tariffs irrespective of  
7 location or special tariff options to deal with the needs of low-income users.

8 Affordability for individual consumers is related to their ability to monitor and control  
9 their expenditure.”

10 Would the Tribunal cast an eye on the facing page to recital 15 where the concept of  
11 affordability is developed:

12 “Member States should monitor the situation of consumers with respect to their use of  
13 publicly available telephone services and in particular with respect to affordability.

14 The affordability of telephone service is related to the information which users receive  
15 regarding telephone usage expenses as well as the relative cost of telephone usage  
16 compared to other services, and is also related to their ability to control expenditure.”

17 THE CHAIRMAN: We have read that, thank you.

18 MR. VAJDA: That, if the Tribunal wants to put a little note, is effectively dealt with in Article 10.

19 What is important here to bear in mind, and this comes to a point that you, Chairman, made  
20 yesterday in opening, is the question as to why it was said that wholesale regulation was less  
21 intrusive than retail regulation. Of course, one can see from here that we are looking at two  
22 completely different things. Cost orientation, which is, if you like, the regulation at the  
23 wholesale level, involves a detailed analysis of the costs of an undertaking in providing a  
24 service. Just an element for profit is what you might call a “top down” approach. It is relating  
25 to examining in detail the costs of an undertaking.

26 Affordability is a completely different concept. It is a “bottom up” concept, and it does not  
27 involve looking at the undertaking’s costs at all. What it does is look at whether the service is  
28 affordable from the point of view of the consumer. Indeed, it is precisely because it does not  
29 look at the issue of cost that you have the provisions of unfair burden. You may find that the  
30 tariff which is affordable is, in fact, below cost. So we say that the argument or the assertion  
31 that retail regulation is more intrusive than wholesale regulation is something, as I would put it,  
32 completely fails to understand that you have got two different sorts of regulation going on  
33 here. Affordability is the test at the retail level. We would say that it is certainly no less  
34 intrusive a form of regulation than cost orientation. One can see that, from the point of view of  
35 the regulator, it will require a considerably less amount of work when you have seen how

1 Ofcom have dealt with the issue of affordability in the Consultation Paper, which is effectively  
2 that you look to see how much an average consumer spends on DQ services. So we do not  
3 accept the assertion that retail regulation is more intrusive regulation.

4 Can we then move on to recital 11, this is the recital that deals with Article 5:

5 “Directory information and a directory enquiry service constitute an essential access  
6 tool for publicly available telephone services and form part of the universal service  
7 obligation.”

8 What we say is that that reinforces the point that recital 9 is looking at Article 4, not at Article  
9 5, because the recital this is directed to, Article 5, is recital 11.

10 THE CHAIRMAN: It has never been suggested that recital 9 was looking at anything other than  
11 Article 4, it is merely an analogy about the network being the equivalent of the database.

12 MR. VAJDA: The Tribunal will not be surprised to hear that we say it is a thoroughly bad analogy.

13 What we have in directory information and directory enquiry, it is an essential access for  
14 publicly available telephones. It is, to use the language of Article 8, an element of universal  
15 service. You will notice that is called an “essential access to”, it is not called a “network”.

16 We have dealt with recital 15. Can we then go recital 17, which is at the bottom of p.15. This  
17 is dealing with quality and price. Again, if the Tribunal wishes to mark it, the relevant Articles  
18 that it is directed to are 9 and 11:

19 “Quality and price are key factors in a competitive market and national regulatory  
20 authorities should be able to monitor achieved quality of service for undertakings  
21 which have been designated as having universal service obligations. In relation to the  
22 quality of service attained by such undertakings, national regulatory authorities should  
23 be able to take appropriate measures where they deem it necessary.”

24 We say that that proceeds plainly on the premise that it is a designated undertaking that is  
25 going to provide the service which is then going to be monitored by the NRA.

26 I come, finally, to recital 26. I can deal with this very briefly because Miss Rose very helpfully  
27 took the Tribunal to this yesterday, and I think she accepted that this is all about SMP. The  
28 relevant Articles of the Directive that this relates to are Articles 16 to 19, which are in Chapter  
29 III, and we are concerned with Chapter II, which is the content of the universal service  
30 obligations.

31 Can I then move on to the Articles, which begin at p.20. “Scope and aims”:

32 “Within the framework of [the Framework Directive] this Directive concerns the  
33 provision of electronic communications networks and services to end-users. The aim  
34 is to ensure the availability throughout the Community of good quality publicly  
35 available services through effective competition and choice and to deal with

1 circumstances in which the needs of end-users are not satisfactorily met by the  
2 market.

3 2. This Directive establishes the rights of end-users ...”

4 So that is what is focusing on –

5 “... and the corresponding obligations on undertakings providing publicly available  
6 electronic communications networks and services ... this Directive defines the  
7 minimum set of services of specified quality to which all end-users have access, at an  
8 affordable price.”

9 We then go to Chapter II. We have had the definition of “end-user”, I think the Tribunal have  
10 that, I think Miss Rose took us to that yesterday. It is Article 2(a) of the Framework Directive.  
11 It was accepted by Miss Rose that her clients are not an end-user, and I think she accepted they  
12 were also not a user. “End-user” is defined, if you look at p.73 of the bundle, at 2(n) of the  
13 Framework Directive. It means:

14 “... a user not provide public communications networks or publicly available  
15 electronic communications services.”

16 We then come to Article 3 of the USD, and happily I agree entirely with what Miss Rose said  
17 about Article 3. This is the core duty imposed on the Member State to:

18 “... ensure that the services set out in this Chapter are made available at the quality  
19 specified to all end-users in their territory, independently of geographical location,  
20 and, in the light of specific national conditions, at an affordable price.”

21 Then we need to look at 3.2 on which Miss Rose placed some weight:

22 “Member States shall determine the most efficient and appropriate approach for  
23 ensuring the implementation of universal service ...”

24 We also need to then bear in mind the last sentence:

25 “They shall seek to minimise market distortions, in particular the provision of services  
26 at prices or subject to other terms and conditions which depart from normal  
27 commercial conditions, whilst safeguarding the public interest.”

28 So true it is that there is a degree of latitude in the first sentence of Article 3.2, but that is  
29 effectively importing into that the whole objectives of the CRF. We say that costs oriented  
30 wholesale regulation is a departure from normal commercial conditions.

31 We then come to Article 4, “Provision of access at a fixed location”, and of course one sees  
32 that this right of the consumer requires two things. It requires access to a network and it  
33 requires access to a service. If, for example, the network breaks down and you cannot make a  
34 call then your right is going to be affected. We will see that when we look at the service  
35 parameters.

1 We then come to Article 5, in relation to, first of all, 1(a) the comprehensive directory and, as  
2 Mr. Blair pointed out yesterday, the Member State or the NRA has the ability to approve the  
3 form of it and also that it must be kept up to date at least on an annual basis. Then we have  
4 over the page 5.1(b), which I am sure the Tribunal is familiar and I do not need to read it out  
5 again.

6 We then come to Article 6, which is effectively the call box provision.

7 Then we have Article 7, which is “Special measures for disabled users”, and the Tribunal may  
8 have noticed in some of the conditions imposed on BT and Kingston that there is reference to  
9 disabled users.

10 We then come to Article 8, which is the designation Article, and this Article was described  
11 yesterday by Miss Rose as a “crunch” point in the case. It is obviously critical to her case.  
12 Again, happily, I think there are two areas of common ground: first, that no universal service  
13 obligation can be imposed on an undertaking other than Article 8. We record that at p.38 of  
14 our skeleton argument, which is at core bundle, 2, p.49. Secondly, Article 8 provides a power,  
15 it does not impose an obligation, and there is no need to designate if the market alone is  
16 achieving the necessary result.

17 There are also two issues on which the Tribunal will have to grapple with on which the parties  
18 are divided. One is what I call a “guarantee” point, and the other is the “element” point. Can I  
19 deal, first of all, with the guarantee point. The argument here is that all that Article 8 does is  
20 impose the obligation on the Member State not to designate the undertaking. Could I ask the  
21 Tribunal to take the core bundle up for a moment and just look at the way it is put in the  
22 skeleton at p.22. The last sentence of para.78 makes it very clear that the French version of  
23 Article 8(1) of the USD makes clear in its of the terms “*afin de garantir*”, in order to  
24 guarantee, that it is the Member State which must guarantee the provision of the service to the  
25 end-user and not the designated undertake itself. Does the Tribunal have that passage?

26 THE CHAIRMAN: Yes.

27 MR. VAJDA: We adopt the point that the Chairman made yesterday which is that if that were right  
28 that would add absolutely nothing to the core obligation under Article 3.1. That is our first  
29 point.

30 Our second point is that we say that an examination of recital 17, which we looked at, which is  
31 the one about quality and price, and Articles 9 to 11, indicate that the point of designating an  
32 undertaking is that you can then monitor the provision of the service by that undertaking. We  
33 have looked at recital 17, but can we just look quickly at some of the provisions in Articles 9  
34 onwards. First of all, 9.1:

1 “National regulatory authorities shall monitor the evolution and level of retail tariffs  
2 of the services identified in Articles 4, 5, 6 and 7 ... and provided by designated  
3 undertakings ...”

4 Then 2, which is option of power:

5 “Member States may, in the light of national conditions, require that designated  
6 undertakes provide tariff options or packages to consumers which depart from those  
7 provided under normal commercial conditions ...”

8 Then if we go to Article 10, which is control of expenditure by the subscriber:

9 “Member States shall ensure that designated undertakings, providing facilities and  
10 services additional to those [in the Articles] establish terms and conditions in such a  
11 way that the subscriber is not obliged to pay for facilities or services which are not  
12 necessary ...”

13 That is, if you like, a bundling point. Then 10(2):

14 “Member States shall ensure that designated undertakings with obligations under [the various  
15 Articles] provide the specific facilities and services set out in Annex 1, Part A, in order that  
16 subscribers can monitor and control expenditure and avoid unwarranted disconnection of  
17 service.”

18 Annex 1, Part A, which I think we have seen, if I could just ask the Tribunal to look up again,  
19 that is p.31, and there you have the various facilities that are referred to, itemised billing,  
20 selective call barring from outgoing calls, pre-payment systems, phased payment of  
21 connections fees, non-payment of bills. So these are things that we say designated  
22 undertakings must comply with.

23 Then if we go to Article 11, which is headed “quality of service of designated undertakings:  
24 11(1):

25 “National regulatory authorities shall ensure that all designated undertakings with  
26 [those] obligations publish adequate and up-to-date information concerning their  
27 performance in the provision of universal service, based on the quality of service  
28 parameters, definitions and measurement methods set out in Annex III.”

29 If I could just ask the Tribunal to look briefly at that, that is at p.34. Just in passing one can see  
30 for instance that one of the parameters, so far as directory enquiries are concerned is response  
31 time – when you ring 118 118, or whatever the number is, how long is it you have to wait.

32 Then you will see, if one looks at the second line: “Fault rate per access line”, that is if there is  
33 a fault on the line how long is taken for that to be repaired, and that is, if you like, the network  
34 element in relation to Article 4. You see then below that “fault rate per access line”, how



1 many faults do you have and then fault repair time. These are all, if you like, customer facing  
2 obligations. So that is the second point we make on the guarantee point.

3 The third point is the language point – the *afin de garantir* point. We say it is a complete red  
4 herring. We say that we get the result that “guarantee” means it is the designated undertaking  
5 to provide it from the structure of the Directive. Indeed, Miss Rose made something of the  
6 fact, well Ofcom itself was relying on the language in its determination. That, with respect, is  
7 not entirely an accurate summary of the position, and could I ask the Tribunal to actually look  
8 to see how the language issue surfaced in the determination, if we go to that which is at core  
9 bundle tab 8, p.473, we will see what actually happened. This is dealt with at p.473: “The  
10 Number: No need for designated provider to provide the ultimate end-user.” This was  
11 effectively responding to a number of points made by The Number, and you will see it is The  
12 Number who, in fact, introduce the French and Portuguese texts at A7.48, because it  
13 effectively disputed what Ofcom was saying, and it then relies on French and Portuguese texts,  
14 and Ofcom responded, and this was its primary response at A7.49:

15 “We responded, however, that the purpose of Article 8(1) of the USD is that the  
16 designated undertakings should indeed guarantee provision of universal services  
17 (rather than that they are designated in order to fulfil the Member States obligation to  
18 ensure their provision); that purpose is reflected in the natural reading of the English  
19 version.”

20 I would add that it is also consistent with the whole structure of the Directive. Then, as it  
21 were, by way of riposte, saying that if you are going to start relying on the French and  
22 Portuguese, what about the Spanish and German? The basic point here is that it is a red  
23 herring, it certainly would be, in my submission, completely wrong for this Tribunal to make  
24 any reference to the ECJ on that language point.

25 I come then to the second ----

26 THE CHAIRMAN: Before you leave Article 10, when will you deal with Miss Rose’s point about  
27 telephone directories?

28 MR. VAJDA: Yes, I will deal with it. I am on Article 8 at the moment, but I will come to it. If I  
29 can turn to the elements point which is the second area of disagreement on the construction of  
30 Article 8, and perhaps if we can have Article 8 in front of us. We can put the core bundle away  
31 for the moment. This is the second sentence of 8(1) which is

32 “Member States may designate different undertakings or sets of undertakings to  
33 provide different elements of universal service and/or to cover different parts of the  
34 national territory.”

1 We say that the different elements referred to in Article 8 are the various elements in Articles 4  
2 to 7 of the Chapter II, so you have one element is access to networks, access Article 4, you  
3 have got then Article 5, which can itself be broken down into two elements, you can have one  
4 element which is the provision of the book, and another element which is the provision of the  
5 directory enquiry service. There is another element which is the call boxes, and another  
6 element which is Article 7, which is a disabled element. We say that if one goes back to recital  
7 (4) the way the draftsman put it was: “Ensuring universal service”, and then in the bracket  
8 “(that is to say, the provision of a defined minimum set of services ...)” these are all elements  
9 of universal service. That is my first point. My second point is that recital (9) does not assist  
10 Miss Rose here because she accepted it is directed to Article 4, and I have already explained  
11 that I do not accept that one can read it across by way of analogy.

12 The third point is that access over a network raises a particular consumer issue, because the  
13 consumer does need to have access to the network in order that the Article 4 service can be  
14 provided. So one can see that, if you like, there could be a network and a service element in  
15 Article 4, I accept that, but we say that both elements in Article 4 are provided to the end-user.  
16 I took the Tribunal to Annex III, the quality of service parameters and these are, for instance:  
17 “Fault rate per access line”, “Fault repair time” and those are network elements, but they are  
18 important to the consumer if his phone goes down as, I am sure, the Tribunal may well have  
19 judicial experience of, one wants to know how quickly it is going to be repaired.

20 I should say that that approach is consistent with what Ofcom said in its determination. I am  
21 conscious that I have exceeded the one hour and I have spent quite a lot of time on designation,  
22 if I can just give perhaps the reference? We deal with this point in the determination at A7.56  
23 at p.475.

24 I have made the point so far as regulation is concerned, regulation 9 provides no support for  
25 the proposition that the Member States are entitled generally to regulate on an *ex ante* basis  
26 and input into the universal service. That is what I might call the “diesel” point in relation to  
27 the train that runs from London to Edinburgh. Diesel may well be an essential input in order to  
28 get a passenger from London to Edinburgh, but that does not mean to say that there is a power  
29 to regulate the price of diesel. We say that you cannot read Article 8 to provide an implied  
30 power to regulate at the wholesale level.

31 I have already made the point that a database is not a network within the defined term of the  
32 CRF and Miss Rose did not suggest otherwise. So we say that Article 8 does not assist in  
33 seeking to derive a power to permit a Member State to impose a wholesale obligation in  
34 respect of a database. Such an obligation does not require a designated undertaking to provide  
35 the relevant universal service, namely the provision of a comprehensive directory enquiry

1 service at an affordable price to all end-users. We say that if the Tribunal accept the Office's  
2 submissions on Article 8 that is fatal to Miss Rose's case, because she relies exclusively on  
3 Article 8 to say that USC7 is lawful.

4 However, for the sake of completeness I will say something briefly about Articles 9 to 11 and  
5 12 to 13, and also the phone book point. Articles 9 to 11, we say, when looked at are designed  
6 to ensure that Member States monitor prices and services provided by designated undertakings  
7 to consumers and not wholesalers.

8 I have been through and I do not want to go through again the relevant bits in Articles 9, 10  
9 and 11, which deal with matters at the retail level and also the relevant annexes.

10 I am now coming to the phone book point. Miss Rose notes correctly that although Articles 9  
11 and 11 in their terms apply to all the obligations in Articles 4 to 7, in fact there is nothing in  
12 Article 11 or Annex III that regulates the quality of service standards for phone books.

13 We say that that failed to deal with our general point that Articles 9 and 11 are inconsistent  
14 with the idea of a universal service obligation that fails to require provision of services at the  
15 retail level. I have three small points on that. First, the terms of the relevant Articles which  
16 refer to retail tariffs, which I have already dealt with. Secondly, the point which I have already  
17 drawn to the Tribunal's attention to in Annex III to the Directive. They are provisions that  
18 plainly do apply to DQ Services to end-users, namely response times for DQ services, and it is  
19 impossible to make sense of that in the context of USC7. How can BT be required to publish  
20 information concerning The Number or response times? Indeed, what is happening at that  
21 level is not that BT is providing a DQ service to Conduit, it is providing something different,  
22 namely a database.

23 The third and final point is that there is, in fact, no lacunae – if I can put it like this – in relation  
24 to phone books. As Mr. Blair, with respect, properly pointed out yesterday Article 5(1)(a) does  
25 deal with, if you like, quality issues because the book has to be provided in a form approved by  
26 the NRA, and one can see that in relation to a book, which is something physical – it may be  
27 that the book is so badly put together it falls apart after half an hour – one can see that you  
28 have different issues in relation to a book than something where you have to ring up and you  
29 may be kept hanging on for half an hour on the telephone. So that is all I want to say then on 9  
30 to 11.

31 I then come to 12 and 13, these are the costing provisions. I accept the point that Miss Rose  
32 makes, that Articles 12 and 13 only kick in when there is an unfair burden. But of course, that  
33 reinforces my point about affordability, because affordability may mean a price which is below  
34 cost. That, of course, shows that what we are concerned with in universal service goes beyond

1 just ensuring competition, it is the provision of a specified service to the end-user, whether or  
2 not a competition would ensure that occurred.

3 The second point I would make about Articles 12 and 13 is that in calculating the net cost, this  
4 is if there is an unfair burden, one is directed to look at Annex IV, if we can just look at p.23  
5 where you have Article 12:

6 “For that purpose, National regulatory authorities shall:

- 7 (a) calculate the net cost of the universal service obligation taking into account  
8 any market benefit which accrues to an undertaking designated to provide  
9 the universal service, in accordance with Annex IV, Part A ...”

10 which we will come to in a moment. “Market benefit there refers to, for example, if you are  
11 under an obligation to provide phone boxes which nobody uses nowadays, but if you have  
12 “BT” plastered all over it, then you get a bit of advertising, that is brand recognition and that is  
13 an intangible benefit that can then be taken into account, because although the phone box may  
14 actually cost you money to keep clean and all the rest of it and nobody is using it, you are  
15 getting an intangible benefit because consumers may feel warmer about BT than they might  
16 otherwise have done.

17 If we then look at how net cost is calculated one goes to p.35: “Calculating the net cost, if any,  
18 of universal service obligations”. Then we see “Part A: Calculation of net cost.”

19 “Universal service obligations refer to those obligations placed upon an undertaking  
20 by a Member State which concern the provision of a network and service throughout  
21 a specified geographical area ...”

22 - and there we see how network is used.

23 “... including, where required, averaged prices in that geographical area for the  
24 provision of that service or provision of specific tariff options for consumers with  
25 low incomes or with special social needs.”

26 So one can see that the net cost calculation that you are looking at is effectively the cost of  
27 providing this to consumers, there is nothing about the cost of providing that the wholesale  
28 level, and so we say that that simply reinforces the point that we make that the USD is focused  
29 on the retail level and the end-user.

30 I am coming to the end of the USD; that is all I want to say about Chapter II. If we go back to  
31 p.24, Chapter III, this is a different Chapter which permits regulatory controls on undertakings  
32 with SMP in specific markets and here, this is tied in with recital 26 and also with Articles 7  
33 and 16 of the Framework Directive that I took the Tribunal yesterday, because effectively in  
34 order to engage that one needs to undertake a market analysis. 16(3):

1 “Member States shall ensure that, as soon as possible after the entry into force of this  
2 Directive, and periodically thereafter, national regulatory authorities undertake a  
3 market analysis, in accordance with the procedure ...”

4 and the procedure was one I took the Tribunal to yesterday –

5 “... to determine whether to maintain, amend, or withdraw the obligations relating to  
6 retail markets.”

7 Then the final provision, which is a provision which is familiar to the Tribunal, but I need to  
8 look at, is Article 25, which is in fact for end-user interests and rights. This is in a sense the  
9 corollary of the rights given to consumers in Article 5, 5(1) that subscribers shall have the  
10 right to an entry in the publicly available directory, and then one can see quite clearly and  
11 specifically a wholesale obligation there at 5(2):

12 “Member States shall ensure that all undertakings which assign telephone numbers  
13 to subscribers meet all reasonably ...”

14 THE CHAIRMAN: Yes, that is fine.

15 MR. VAJDA: So to summarise on the USD, its purpose is to guarantee consumers specific rights,  
16 either service or access to a network, the universal service needs to be available and affordable  
17 to all including the Shetlands’ crofter. I have made my point about affordability and the CRF  
18 and the Tribunal I hope has my points on guarantee and elements in relation to Article 8. If I  
19 am permitted just to mention a point that I hope has already come through in my submissions,  
20 but Miss Rose made a lot about the fact that one needs to look at ends and means, but in my  
21 respectful submission that fails to grapple with the point that her chosen means are, we say, an  
22 impermissible means – if the Tribunal is with us on that there is nothing further to add.  
23 If I can just pick up the train analogy that Mr. Blair raised yesterday that I hope I dealt with –  
24 perhaps I have not, I do not know. If I can use the analogy the result to be achieved here is that  
25 the passenger arrives at Edinburgh having paid an affordable fare. That, Ofcom say, is being  
26 achieved. Now, whether or not one train provider is charging too much to another train  
27 provider at York is irrelevant to that provided that the consumer arrives at Edinburgh at an  
28 affordable price. I would also caution against the counterfactual. The counterfactual here is  
29 not using Competition Act powers over the whole journey, because the point about universal  
30 service is to ensure that something is achieved at the retail end and we have seen from the  
31 Ofcom consultation document that the answer is “yes, it is.” The question of whether or not  
32 something should be done at the wholesale level is out for consultation and, as one can see  
33 from the consultation document, at the moment Ofcom does not share the “sky falling in”  
34 despair point that Miss Rose put forward, and if I could just make one additional point to the  
35 point I made yesterday, that one of the reasons that Ofcom thinks the sky is not going to fall in

1 is that the provision of this data to BT is, in fact, a profit making activity, and I just give the  
2 reference in the consultation document, we do not need to turn it up, it is 5.6 to 5.7, which is  
3 p.529 of the core bundle, and with that and the provisions against discrimination there is a  
4 good basis for the view that nothing needs to be done but, as I say, Ofcom have not reached a  
5 conclusion on that.

6 I now turn very briefly to deal with the point that was made at the end of her submissions  
7 yesterday which is what I would call “The evolution of the old legislation into new legislation”  
8 and I will deal with this very rapidly. The argument proceeded on the basis that there was no  
9 change in the USD from the position in the RVTD. There are two premises in that argument.  
10 One, that the RVTD permitted wholesale regulation; and secondly, that there was no change  
11 between the RVTD and the CRF, and we do not accept either premise. We have dealt with this  
12 in our skeleton, and I will give the Tribunal the reference, it is at core bundle, tab 2, pp.6 to 9,  
13 paras. 18 to 27. In a nutshell we say that there are differences between the RVTD and the  
14 USD, and indeed the CRF, and indeed the Chairman made the point yesterday if there is no  
15 change why on earth was there a major review and all new legislation in 2002? The change  
16 was quite important in a sense that we were moving to a system of less regulation and more *ex*  
17 *post* and less *ex ante*.

18 I have two more topics which I will deal with very briefly. First is the position which I think  
19 the Chairman asked me to address in domestic law, if the position is, as a matter of Community  
20 law, that wholesale *ex ante* regulation is permitted but not mandated – is that the question?

21 Yes. We accept that the Secretary of State has the power to make an order pursuant to s.65(1),  
22 which is broad enough to cover that possibility.

23 THE CHAIRMAN: He can only specify the extent it has to be provided, he has nothing to say under  
24 that section about what can be made a condition.

25 MR. VAJDA: I am going to come to 45 in a moment. The first thing that needs to happen is that  
26 there needs to be an order made by the Secretary of State, and then Ofcom itself has power to  
27 set conditions at s.45, and those are a condition of one of the following descriptions and one, as  
28 we see, is a universal service condition. Then we see: “A universal service condition is a  
29 condition which contains only provisions authorised or acquired by s.67.” Section 67 deals  
30 with the content of the condition and, as we have seen, that is:

31 “Ofcom may set any such universal service conditions as they consider appropriate  
32 for securing compliance with the obligations set out in the universal service order.”

33 So we would accept that if this was permitted under the USD this could form part of a  
34 condition under s.67. However, we have to bear in mind that the Secretary of State has made  
35 an order (the order we have seen) which is at tab 14, The Electronic Communications

1 (Universal Service) Order 2003. The order is made pursuant to s.65 setting out things falling  
2 within 65(2)(e) and the order that the Secretary of State made is somewhat prescriptive,  
3 because if one looks at Article 3, it says “Universal Service Obligations”. The extent to which  
4 things falling within s.65(2) must be provided, made available or supplied is set out in the  
5 schedule, and we see then the schedule, para. 3 – at least one comprehensive DQ facility shall  
6 be made available to end-users, including users of public pay telephones. There is a doubt in  
7 the Office’s mind as to whether that is broad enough to encompass the imposition of a  
8 wholesale obligation.

9 THE CHAIRMAN: That is a later question. Surely what the Secretary of State is doing is saying  
10 “Look at s.65(2), it is wider than the minimum requirements of the Directive”, so he is laying  
11 down for the United Kingdom what Ofcom must ensure is actually provided and, in relation to  
12 directories he has said that it is the minimum requirement as specified in Article 5, has he not?  
13 This is nothing to do with anything other than the extent of what Ofcom pursuant to its powers  
14 has to do?

15 MR. VAJDA: 65(1):

16 “The Secretary of State must by order (‘the universal service order’) set out the extent to which  
17 the things falling within subsection (2) must ... be provided.”

18 THE CHAIRMAN: He could not specify less than Articles 4 to 7 provide otherwise it would be  
19 non-compliant with the Directive. So what he has done for directories is said that Article 5 is  
20 enough, you need go no further.

21 MR. VAJDA: Yes. I should say that if the Tribunal were to reach the view that this was not  
22 prohibited by the Directive, that it is permitted but not mandatory, from the point of view of  
23 my clients we do not have an issue about that as a matter of United Kingdom law, obviously  
24 what we are concerned to ensure is that we act lawfully.

25 THE CHAIRMAN: You may not under the Act, but I have a great concern under the statutory  
26 authority under which this USC was actually imposed, which is not the Act it is the Statutory  
27 Instrument made under the European Communities Act, which is in a very different form from  
28 the Act.

29 MR. VAJDA: Yes, well it may be that in relation to that we take up your suggestion of ----

30 THE CHAIRMAN: Exchange of views in writing.

31 MR. VAJDA: -- exchange of views in writing. The point I am making is that, so far as the Office is  
32 concerned, this is not a policy issue or whatever. If the Tribunal take the view that it is  
33 permitted by Community law and if the Tribunal take the view that it is permitted by the  
34 regulation then that is the end of it. What I am saying is that the Office would obviously be  
35 grateful that that would be recorded, as it were, in the judgment.

1 That then takes me to the last point, which is in a sense to supplement what I said yesterday.  
2 We, of course, accept that the Tribunal has a discretion to refer under Article 234, there is no  
3 question about that. The relevant points on discretion are first of all is the point clear? We say,  
4 so far as Article 8 is concerned, both on the guarantee and the element point, the point is clear.  
5 We say that the language point really is a red herring and our position as you, Sir, observed  
6 this morning when I handed the letter in, is set out in the letter that we sent to the other side,  
7 and in fact you will see that we said that if the other side were seeking a reference we would be  
8 grateful if that letter was actually put before the Tribunal, well we are now putting it before the  
9 Tribunal to record what our position is.

10 The second point, that I will just spend a minute or two on, is that the Tribunal should not, in  
11 my respectful submission, be frightened or concerned by the fact that there may be different  
12 views elsewhere in the European Union. Obviously one has regard to it but it is not decisive  
13 and in that respect we say that there is some assistance to be derived from the *Optident* case  
14 that I handed in this morning. What we have given is a House of Lords' judgment and may be  
15 the quickest way of taking this is to go to p.3 of the report. The lead speech in the House of  
16 Lords was given by Lord Slynn of Hadley who, certainly as the Chairman will remember, was  
17 the United Kingdom Judge in Luxembourg and so knows more about references than probably  
18 any other judge in this country. The other factor that one needs to remember, so far as the  
19 House of Lords is concerned, is that they are under 234, so they have a much narrower  
20 discretion than this Tribunal because they have an obligation to refer unless it is acte claire.  
21 The issue shortly put in this case was whether or not a product called "Opalescence", which is  
22 what is called a 'tooth whitening product' was a cosmetic or a medical device and, like all  
23 abstruse arguments there was actually a real commercial issue behind that, because if it was a  
24 cosmetic it was banned, it could not be sold anywhere in the European Union because it  
25 contained too much hydrogen peroxide bleach. If, on the other hand, it was a medical device  
26 and not a cosmetic it could effectively benefit from free circulation throughout the  
27 Community. This was a case where the United Kingdom authorities took the view that the  
28 product was a cosmetic and therefore was banned. However, that view was not shared by the  
29 German authorities and the Swedish authorities, and if we pick the judgment up at p.6, para .14  
30 we see that Lord Slynn recounts that Opalescence was sold in the United Kingdom but  
31 following the amendment to the CD, that is the Cosmetics Directive to limit the hydrogen  
32 peroxide permitted for oral hygiene products it was withdrawn. Following the coming into  
33 effect – that is another Directive, that is the Medical ----

34 THE CHAIRMAN: Do we need all this detail for the point about ----



1 MR. VAJDA: What we see is that there was then an approval under the other regime in Germany,  
2 and so what Optident was then relying on was the German approval to market the product in  
3 the United Kingdom.

4 Then if you look at 15, the issue also arose in Sweden, where the court held that the “C” mark  
5 was lawfully borne and that the Swedish authorities must treat the product as a medicinal  
6 product. So you had a completely different view. The House of Lords look at the relevant  
7 Directive and they came to the view that there was no need to refer, and if we can go to p.12,  
8 para.37 – perhaps I could just ask the Tribunal to read para.37 to themselves.

9 THE CHAIRMAN: (After a pause) Yes.

10 MR. VAJDA: Then para. 38 he comes to the conclusion that it is clear, so clear that it is not  
11 necessary to refer them to the European Court, even though they said the position was different  
12 in Member States. So I just show that to the Tribunal because obviously one has regard to  
13 what happened in Ireland but it is certainly not, we would say, a determining feature in terms  
14 of a reference. The Tribunal should make up its own mind having heard the arguments in front  
15 of it to decide whether or not it can decide the matter and, as I made clear yesterday and the  
16 letter makes clear, the submission of the Office is that we are opposed to a reference, we think  
17 it will lead to delay, it will impact on the consultation and if there is an appeal – and I stress the  
18 word ‘if’ – then the Court of Appeal can revisit the matter.

19 Subject to that, those are my submissions.

20 THE CHAIRMAN: Thank you, Mr. Vajda. Mr. O’Flaherty?

21 MR. O’FLAHERTY: Sir, if I could have ten minutes it would probably shorten the length of my  
22 submissions significantly, because if we can have a quick think about what has been said then  
23 we can decide what we need to add, if anything.

24 THE CHAIRMAN: Ten minutes. I just need to say that we need to finish overall at least by half  
25 past three, so if people think they might need more time than that allows we will take a shorter  
26 break at lunch time.

27 MR. O’FLAHERTY: If I am back by half past twelve I will be finished by one.

28 THE CHAIRMAN: Fine. How long will you want, Miss Rose?

29 MISS ROSE: Half three may be possible, but may be pushing it. I would invite Mr. O’Flaherty to  
30 consider whether he really does need half an hour.

31 MR. O’FLAHERTY: I may well not, that is the purpose of ----

32 MISS ROSE: We were told that we would only have an hour from ----

33 THE CHAIRMAN: We can have a short lunch break. Let us know when you are ready.

34 (Short break)

35

1 MR. O'FLAHERTY: We rely principally on our arguments which we set out briefly, as we said we  
2 would, at least I hope they were concise enough, in our statement of intervention and skeleton  
3 argument. I will focus primarily on questions that really relate specifically to us, and one or  
4 two other points that I would like to deal with.

5 First of all, to answer your first question, which was about the intrusiveness of regulation, from  
6 the point of view of the company that is being regulated, we see nothing inherent at either a  
7 wholesale or a retail level which makes regulation at either level more or less intrusive. It is,  
8 for us, entirely context specific. For example, in relation to situations where SMP obligations  
9 have been imposed, simply because of the conditions that have been set at the wholesale level  
10 by Ofcom, the level of regulation, the wholesale level, in that case is far more intrusive. In  
11 other cases it more intrusive at the retail level. There is nothing inherent in it to say that it is  
12 more intrusive at either level. It is entirely fact specific.

13 To turn to the "sky falling in" argument, we make a number of points. First of all, BT has  
14 continued, and has given an undertaking to continue, providing access to the OSIS database  
15 until this dispute is finally determined.

16 THE CHAIRMAN: What does "finally determined" mean, off to the Court of Appeal, off to  
17 Europe? You do not mean until the decision of this Tribunal?

18 MR. O'FLAHERTY: It is indefinite. We have no plans to change until there is a ruling to tell us to  
19 change, or we are not required to comply or whatever happens, so the final outcome.

20 Secondly, you will have noticed that our pricing, as Mr. Vajda said yesterday, has remained  
21 constant since 2002, which is not the case for the appellants. Their pricing has increased  
22 substantially.

23 Thirdly, they say that it is very important to them to have regulatory certainty, and of course it  
24 is, but it is equally important to us, and I will come back to that in one moment.

25 Fourthly, it is delaying the Ofcom consultation process, which is delaying regulatory certainty  
26 for absolutely everybody.

27 Finally, in reality, it seemed to us that the appellants are attempting to use the concept of  
28 universal service as a competitive tool, as it were, which of course it was never designed to be.  
29 In terms of seeking certainty, turning to the issue of a reference, we would completely support  
30 the submissions of Mr. Vajda for the reasons that he has given, and in particular we support his  
31 submissions that the language issue is a complete red herring.

32 We also see no particular force in the argument that a reference should be made to the court on  
33 the basis that you never know what they might do, but that is by the by.

34 Turning to the issue of the guarantee, this is a key issue as far as we are concerned. Can we  
35 turn up the Directive at tab 2. We say, first of all, that 8.1 has no force whatsoever if the

1 guarantee is not for the undertaking to provide the service in question, for starters because that  
2 would add nothing to Article 3, the Member States' obligation. It would add nothing to Article  
3 5, the specific obligation that we are dealing with. We also say that it must clearly be read  
4 with reference to Article 6.2 of the Authorisation Directive, and that makes clear that it is the  
5 designated undertakings that we are talking about when it comes to the guarantee, in our  
6 submission.

7 Possibly, most importantly, the entire purpose of the USD is to make sure that these services  
8 are provided at a reasonable cost. Whether you want to say it is a guarantee, or whatever you  
9 want to call it, what the USD sets out to do is to ensure that those services are, in fact,  
10 provided. There is little purpose in designating an undertaking if they do not actually have to  
11 provide the service; or alternatively, guarantee the provision of the service in some other way.  
12 We would agree completely with the remarks of the Chair in his opening yesterday that if this  
13 meaning is not given to Article 8.1 then the whole thing really becomes rather ineffective, in  
14 that there is nothing to ensure that the services will be provided, unless the market happens to  
15 provide them. There is no suggestion that the State itself should provide them.

16 We also agree, of course, that it is permissive, it is not mandatory as perhaps was initially  
17 suggested in some of the pleadings.

18 In relation specifically to USC7, which is really the crux of the matter here, and we have not  
19 looked at it in any particular detail this morning, we say that that is simply a wrong  
20 implementation. What that actually requires BT to do is to provide a database. It does not  
21 require BT to actually provide the DQ service itself. So there are two major failings. First of  
22 all, there is a failure to require anybody to provide the service required to be provided by  
23 Article 5; and secondly, we say there is additionally the unlawful obligation at the wholesale  
24 level on BT, unlawful by virtue of Article 6.2 and Article 3.2 of the Authorisation Directive, to  
25 provide a service which in any event will not necessarily result in what my learned friend  
26 called the "target" of the legislation, the "target" being that people get DQ services at an  
27 affordable price.

28 That takes us, in a way, back to the domestic legislation. There was a point, and, Sir, you  
29 asked about it, about the meaning of the word "appropriate" in s.67 of the Act. Our  
30 submission in relation to that is that it has to be read in the context of the full sentence, which  
31 is:

32 "Ofcom may set any such universal service conditions as they consider appropriate  
33 for securing compliance with the obligations set out in the Universal Service Order".

34 The Universal Service Order sets out basically the minimum that is set out in Article 5 of the  
35 Directive. Unfortunately the Universal Service Condition they have set to achieve that,

1 i.e. USC7, does not achieve that. Therefore, it does not secure compliance with the obligation.  
2 That is derived from Community law.

3 THE CHAIRMAN: The Director General saw it, surely, as achieving that, just as you do not need  
4 regulation at all if the market provides it. A possible view, which apparently the DG took, was  
5 that if you regulated at wholesale level the market would then provide. So by regulating at that  
6 higher level you do ensure, or the State ensures, the provision of the DQ service which  
7 otherwise the DG was concerned would not be provided.

8 MR. O'FLAHERTY: That takes you right back to the question of "guarantee" and "ensure". Of  
9 course, simply by making the data available, you are not guaranteeing that anybody will take it  
10 up. Of course it is quite likely that somebody will take it up, and indeed we have a competitive  
11 market in DQ services. You are not guaranteeing, you are not ensuring, that the service will be  
12 provided. That is our very simple point on why USC7 does not do what it aims to do, and does  
13 not necessarily achieve the target of both Article 5 and of the USO. That is our short point on  
14 that.

15 In relation to the discretion argument, we simply say that it adds very little. I just refer you to  
16 our skeleton argument at para.11.

17 Similarly in relation to the statutory history, again we would say that that adds very little,  
18 exactly for the same reasons that my learned friend Mr. Vajda has given. It makes two  
19 assumptions, both of which we would submit, as he has, are simply false. That is set out  
20 briefly in our skeleton argument.

21 I think there are probably only two final matters that I want to touch upon. One relates to the  
22 elements question. I would primarily adopt Mr. Vajda's submissions in relation to elements,  
23 and in particular, when we read the relevant provision that refers to networks, we say, reading  
24 that in context, what we are talking about is what you have in a classic utility industry where  
25 the network is, in our case, for example, access to the loop, or whatever it happens to be. As  
26 Mr. Vajda has submitted, both on ordinary reading of the words and looking at the definitional  
27 provisions, OSIS or the database simply cannot be considered to be a network. However, we  
28 would say that, even if that is wrong and Miss Rose is correct and it were possible to split into  
29 elements, and we recognise that the positive, the plural appears in both Article 8.1 and Article  
30 5.3 of the USD where it refers to "more than one provider". If you are going to split the  
31 service that you want to be provided to the end-user, which is what the USD is all about, then  
32 you need to regulate all elements. There is no point in regulating, for example, as we have  
33 indicated, the up-stream of the database if there is then no regulation of the down-stream price,  
34 because that will not get you, as Mr. Vajda submitted earlier on in relation to the train journey  
35 – if you get to York nice and cheaply but then you have to pay a fortune to get from York to

1 Edinburgh, your whole trip to Edinburgh is no longer affordable. So if you treat it as being  
2 separated into elements then you have got to regulate both.

3 MR. BLAIR: At least if the market is regulating the second part of the journey you do not need to  
4 intervene.

5 MR. O'FLAHERTY: If the market is regulating it there is no need to intervene, full stop.

6 That is my final point. In this context, we say there are a number of alternatives that would  
7 achieve the same result far less intrusively, i.e. no *ex ante* regulation, the reliance on plain old  
8 market forces, reliance on the general provisions of competition law, if necessary, reliance on  
9 specific regulatory provisions in relation to, for example, non-discrimination, and so forth.  
10 Indeed, I think that was an answer to the second question that was posed by the Chair at the  
11 outset of the hearing yesterday.

12 I think the only other matter that is specific to us is the fact that there are two other appeals  
13 outstanding relating to the same enquiry, but relating to the issue of GC19. They are currently  
14 stayed and our submission is that they should remain so until this particular appeal has been  
15 determined, at least by this Tribunal. We think the most likely result is that those appeals will  
16 be withdrawn, but in the meantime, should they remain stay, we can see no prejudice  
17 whatsoever to anybody.

18 THE CHAIRMAN: We will certainly stay it until handing down judgment and deal with it then.

19 MR. O'FLAHERTY: I am grateful.

20 THE CHAIRMAN: Miss Rose, what would you like to do, would you like to start now or start with  
21 a clear run through?

22 MISS ROSE: I am happy to start now if you are happy to listen.

23 THE CHAIRMAN: Just so that I do not have to interrupt you, just in terms of timing, I will be  
24 putting that pressure on you.

25 MISS ROSE: I understand.

26 THE CHAIRMAN: Frankly, I would be surprised if you were anything like that long, given what  
27 we have heard so far from both sides.

28 MISS ROSE: Yes, I think if we have a normal lunch hour I can finish by 3.30.

29 THE CHAIRMAN: Thank you.

30 MISS ROSE: Can I turn, first, to the question of the Universal Service Directive, if we just pick it  
31 up at tab 2. I want to come back to recital 9 because the point does not seem to have been fully  
32 appreciated, with respect, either by Ofcom or by BT, and it is critical. It is critical in two  
33 respects. The first point is that I accept and I have always accepted that recital 9 is referring to  
34 Article 4.

35 THE CHAIRMAN: It is only an analogy.

1 MISS ROSE: I have never suggested that a database is a network, it has never been part of my case.  
2 The point is this: the governing provision in relation to the power to designate and undertaking  
3 is Article 8.1. Article 8.1 does not differentiate in terms of the scope of that power between  
4 Article 4 and Article 5. It treats the scope as the same in relation to both of those Articles.  
5 Therefore, material in the Directive which assists in the proper construction of the scope of the  
6 power under Article 8 in relation to Article 4 obligations is relevant when seeking to construe  
7 the scope of the power in relation to Article 5. That is why recital 9 is relevant.  
8 Then if we look at the substance of recital 9, it tells us two important things. The first thing it  
9 tells us is that elements cannot be equated with the service in each Article of the Directive, or  
10 even in the sub-Articles as in Article 5.1(a) and 5.1(b).

11 THE CHAIRMAN: Why does it tell us that?

12 MISS ROSE: It tells us that because it is relating to Article 4 only and envisaging at least two  
13 different designated entities in relation to Article 4. That is the first thing it tells us.

14 THE CHAIRMAN: So one is connecting to the network and one is providing a service?

15 MISS ROSE: Not connecting to the network, no, a network element.

16 THE CHAIRMAN: It is talking about, I would have thought, the distinction between para.1 and  
17 para.2 of Article 4, one being the service provision and the other being the network provision?

18 MISS ROSE: No. Article 4.1 refers to both:

19 "Member States shall ensure that all reasonable requests for connection ... and for  
20 access to publicly available telephone services ... are met by at least one  
21 undertaking."

22 So you have got the same elements within the same sub-paragraph. That is the first thing it  
23 tells us.

24 The second thing it tells us that the designation under Article 8.1 cannot be limited to the retail  
25 market because, as my learned friend Mr. O'Flaherty has just commented, the classic utilities  
26 division is being envisaged here, which is the situation in which one party owns, establishes,  
27 develops and maintains the physical network of cabling, and another party under licence to that  
28 party provides the services over the cabling to the customer. So what this is envisaging is  
29 obligations at the wholesale level to the network provider under the Universal Service  
30 Directive.

31 THE CHAIRMAN: Who is providing in this country the network to me in my house when I am not  
32 a BT subscriber?

33 MISS ROSE: In general terms it would be BT, because BT is responsible for maintaining the  
34 network.

35 THE CHAIRMAN: I see, so I am the end-user of BT's service?

1 MISS ROSE: No, you may have a contract with ----

2 THE CHAIRMAN: What has a contract got to do with it? I am looking at who is providing ----

3 MISS ROSE: The point I am making is it is not retail, because you are not the customer of BT. You  
4 are the end-user. Let us assume a situation where BT owns the network, let us Virgin Media –  
5 I do not know the names of all the companies – is providing the telephone service and you are  
6 the customer. Your retail contract is with Virgin, then Virgin has a contract with BT. The  
7 point is that obligations may be placed on BT in relation to the construction and maintenance  
8 of its network. Those are at the wholesale level. The purpose of those obligations is clear,  
9 because we are told in recital 9:

10 “Designated undertakings providing network elements may be required to ensure such  
11 construction and maintenance as are necessary and proportionate to meet all  
12 reasonable requests for connection ...”

13 So the purpose, of course, as always in relation to the Universal Service Directive, is consumer  
14 protection. It is to ensure that there is going to be enough cabling to let people connect to a  
15 network. But the request to BT is not going to be made directly by the customer, the customer  
16 will request their provider, and the provider will then request BT. That is the analogy that we  
17 draw, that of course the comprehensive directory enquiry service is being provided for the  
18 benefit of the customer, it is the customer that is going to be interrogating the directory enquiry  
19 service to find out the numbers that they want to call, but the obligation is being placed on BT  
20 to construct and maintain and make available, as it were, the infrastructure that makes it  
21 possible for the directory enquiry service provider to provide that service to the customer.  
22 That is the point. There has been no answer to that point either from Ofcom or from BT.

23 THE CHAIRMAN: It could be said against you that in Article 4 there are two elements, the  
24 wholesale element and the retail element joined by the word “and”, and you cannot derive that  
25 from Article 5.1(b).

26 MISS ROSE: Sir, I accept that that is about the highest the case against me could be put. That is the  
27 analysis that would have to be adopted, but that immediately presents a serious conceptual  
28 problem, because that analysis, which I agree is the only possible tenable one, the only way  
29 you can fit it together and exclude me is by doing it that way. As soon as you do that you ask  
30 yourself, “What is the underlying policy distinction?” because you have to ask the question,  
31 once you accept that it is consistent with the policy of this Directive that the wholesale  
32 obligation may be applied for the purpose of ensuring the provision of the universal service  
33 then why, conceptually, is that okay in relation to network access but not in relation to  
34 directory enquiries facilities. It is at that point that you look at the fact that there is complete  
35 silence on this in the *travaux préparatoire*. There is nothing that casts any light on it anywhere

1 in any of the materials we have looked at. There is no explanation as to why you might treat it  
2 differentially. This court, with respect, would be speculating as to the underlying policy,  
3 which of course takes us back to the reference point.

4 That was the first point that Mr. Vajda made, he said recital 9 is directed to Article 4. Yes, I  
5 accept that, but you have my submission as to why that does not help him.

6 The second point was that he said that the request for connection is by the end-user.

7 Absolutely, the request for connection is by the end-user, but the request for connection is not  
8 to the network provider, the request for connection is to the service provider. So that is the  
9 retail relationship, it is the service provider that then asks the network provider to do the  
10 connecting.

11 The third point he made was about the “network”, where he said a database is not a network.  
12 We agree.

13 Those were the only three points that Mr. Vajda presented against our recital 9 argument, and  
14 we submit that none of them address the point at all.

15 THE CHAIRMAN: Is that a convenient time to break?

16 MISS ROSE: Yes, it is.

17 THE CHAIRMAN: You will be happy if you are back at two?

18 MISS ROSE: I will be happy if I am back at two if I have an hour and a half, yes.

19 (Adjourned for a short time)

20 MISS ROSE: I begin with recital 9 and make the point that the presence of recital 9 in the Directive  
21 is fundamentally inconsistent with an admission that the Directive does not permit a condition  
22 to be imposed at the wholesale level, because recital 9 envisages that as a possibility.

23 In relation to the question of wholesale obligation, Mr. Vajda yesterday made the submission  
24 that what is happening at the wholesale level is irrelevant to the provision of universal service,  
25 that was the submission that he made, and he argued that the Directive was only concerned  
26 with end-users. You have my submission already that that is inconsistent with recital 9 but, in  
27 any event, he sought to support that point by reference to Ofcom’s current consultation paper,  
28 and he referred in particular to the sections of the consultation paper that relate to the  
29 affordability of the directory enquiries service. He made the point, quite rightly, that the  
30 existence of USC7 does not guarantee the provision of an affordable directory enquiries  
31 service, and therefore, he said, it is irrelevant. Of course that ignores the other aspect of the  
32 requirement under Article 5 which is that the directory enquiries service must be  
33 comprehensive. If we look at the consultation paper we can see that this is something that  
34 Ofcom addressed. This was a part of the consultation paper that Mr. Vajda chose not to show  
35 to the Tribunal yesterday. We are at tab 9 in the core bundle, p.507. There you see the



1 heading: “Access to DQ services in the future” and then the sub-heading: “The ‘universal  
2 service’ criteria for DQ services.”

3 “3.53 We next deal with the ‘universal service’ criteria in relation to DQ services. As  
4 with the case for universal service directories, we will consider whether existing  
5 services meet the universal service criteria and consider the robustness of the market in  
6 terms of continued provision.”

7 Then they set out and deal with the different what they call “Universal Service criteria”. The  
8 first of these is comprehensiveness.

9 “3.54 The Universal Service Order provides that ‘at least one comprehensive  
10 telephone directory enquiry facility shall be made available to end-users, including  
11 users of public pay telephones’.”

12 and they cite Article 5.

13 “... there is no definition of the word ‘comprehensive’ ... paragraph 3.17 above  
14 refers to the Universal Service Order ...”

15 and then it says what that says, and then this:

16 “3.56 As with directories, the comprehensiveness of the DQ service is presently  
17 guaranteed...”

18 note the word ‘guaranteed’ –

19 “... by the comprehensiveness of the database on which they are based, currently the  
20 BT OSIS database.”

21 So the position is that Ofcom itself acknowledges in its own consultation paper that the OSIS  
22 database prepared by BT pursuant to USC7 guarantees the comprehensiveness of the directory  
23 enquiry service which is identified by Ofcom as being one of what it calls the universal service  
24 criteria pursuant to Article 5. In the light of that we submit that the submission that was made  
25 yesterday by Mr. Vajda that this obligation under USC7 is irrelevant to the provision of  
26 universal service under Article 5 is obviously unsustainable. You can see that they then, over  
27 the page, go on to deal with affordability, and it was the section on affordability that Mr. Vajda  
28 focused on having passed over what we submit is the crucial section on comprehensiveness.

29  
30 Coming back now to the Directive itself, there is a question of what is meant by “universal  
31 service”, and you, Sir, have suggested that it might refer to the service being available to  
32 everybody or to the complete service envisaged by the universal service directive. In my  
33 submission it means the minimum service, or package of services, to be available to  
34 everybody. What is universal about the service is that everybody has a right to have it at the

1 specified minimum level of quality – that is what is universal. It is the goatherd and the  
2 Orkneys’ point.

3 What we do not find in the Directive is any clear indication of whether universal service (in the  
4 singular) refers to the whole package of articles in Chapter 2 or whether each of the individual  
5 articles is regarded separately as one of the services. We find both the use of singular and  
6 plural in the Directive. Let us just take a look at some of the instances. The first is recital (7),  
7 p.13:

8 “Member States should continue to ensure that the services set out in Chapter II are  
9 made available ...”

10 THE CHAIRMAN: Do we ever find universal coupled with the plural?

11 MISS ROSE: No, but what you find is “universal service obligations”. You see that, for example, at  
12 recital (18), there is a reference to “universal service obligations.” Then if you look at Article  
13 1, there is no actual definition anywhere in this Directive of the term “universal service”, but if  
14 you look at Article 1.2 ----

15 THE CHAIRMAN: What about “(4)” which Mr. Vajda just referred us to.

16 MR. O’FLAHERTY: Article 3, in fact, Sir.

17 THE CHAIRMAN: I was looking at recital (4) “Ensuring universal service (that is to say, the  
18 provision of a defined minimum set of services to all end-users at an affordable price).”

19 MISS ROSE: Yes, but of course that does not tell you anything more except that we are talking  
20 about these services.

21 THE CHAIRMAN: I thought it told us what they mean when they used the words “universal  
22 service” with nothing more. It is not a definition ----

23 MR. VAJDA: We have been through this before, but there is in fact a definition, you will recall, at  
24 Article 2(j) of the Framework Directive which is read into the USD.

25 MISS ROSE: In fact, if we go to that, it is at p.73: “‘universal service’ means the minimum set of  
26 services ...” So then we see again at Article 1.2: “This Directive defines the minimum set of  
27 services of specified quality” and what we do not have is anywhere in the Directive a  
28 definition of what is meant by “elements of universal service”. What we certainly do not find  
29 anywhere in this Directive is the equation of elements of universal service with the individual  
30 services set out in the Articles of the Directive.

31 A question has been asked about the interaction between Article 3 and Article 8. This is very  
32 important, and I would like to just focus on it for a moment. If we start with Article 3.2  
33 because, as is common ground, Article 3 imposes the obligation on the Member States to  
34 ensure the provision of the services, Article 8 gives them a power to designate undertakings.  
35 In my submission, if you ask the question what is Article 8 adding to Article 3, the answer is

1 this: Article 3 places the obligation on the Member State to achieve the aims in the Directive,  
2 Article 8 gives them the power to impose obligations on undertakings for that purpose. In the  
3 absence of Article 8 you would only have the obligation on the Member State but not the  
4 power on the Member State to impose conditions or obligations. Therefore, in my submission,  
5 in order for the purpose of the Directive to be achieved it is necessary for the scope of Article  
6 8.1 to reflect the scope of Article 3.2 because what is necessary is that Member States are  
7 given the powers that they need so that they can fulfil the duties that are placed upon them  
8 under Article 3.2.

9 THE CHAIRMAN: Why do you need 8 at all on that basis? If the Directive tells them to ensure  
10 something and Article 3.2 tells the Member State that he can determine the most efficient and  
11 appropriate approach, why can it then not pass its own national legislation as it thinks fit  
12 without the authorisation under 8?

13 MISS ROSE: Because of Article 6.2 of the Authorisation Directive.

14 THE CHAIRMAN: Precisely.

15 MISS ROSE: Precisely, and that is why, in my submission, it is necessary to give an interpretation  
16 of Article 8 that reflects the policy in Article 3, because otherwise the Member States face a  
17 lacuna which is that they are under a duty to ensure the most efficient method of providing the  
18 universal service, but they may not have the powers that enable them to do that.

19 THE CHAIRMAN: Consistently with the Authorisation Directive, surely?

20 MISS ROSE: No, Sir, because the Authorisation Directive does not limit the scope of the  
21 obligations that can be imposed under the Universal Service Directive. What the Authorisation  
22 Directive does is simply to make it clear that the only obligations that can be imposed, whether  
23 there is a general authorisation scheme in place are those permitted by the universal service  
24 directive, but it takes you back to the universal service directive to ask the question: what are  
25 the types of obligations that can be impose? The crucial point I am on here is that it is  
26 important that Article 8 be construed so as to achieve the aims in Article 3.

27 THE CHAIRMAN: On that footing what does Article 8 add to 3.2 if we did not have the  
28 authorisation directly at all?

29 MISS ROSE: If we did not have the Authorisation Directive there would be no need ----

30 THE CHAIRMAN: No need for 8?

31 MISS ROSE: For 8, no.

32 THE CHAIRMAN: But you are asking us to put a construction on the Authorisation Directive that  
33 says you can do anything that Article 8 lets you do, Article 8 lets you do anything ----

34 MISS ROSE: No.

35 THE CHAIRMAN: What does it not let you do?

1 MISS ROSE: Article 8 only lets you do the things that are contained within the scope of Article 8,  
2 but the question is the proper construction of Article 8 and my point is simply I am looking at  
3 the interaction between Articles 3 and 8. You are asking me what does 8 add to 3. Article 3  
4 places an obligation on a Member States to achieve a certain aim. Article 8 is one of the  
5 provisions that gives it the tools to achieve that aim, the powers.

6 THE CHAIRMAN: I understand that, but if you did not have the Authorisation Directive, Article 8  
7 would be unnecessary but it is spelling out that you can do what we all knew you could do  
8 anyway. So what cuts that completely general power down in your submission?

9 MISS ROSE: Sorry, what “completely general power”?

10 THE CHAIRMAN: The one that subsists under Article 3(2) and 8 which you would not read down  
11 at all if it were not for the Authorisation Directive.

12 MISS ROSE: I am not sure I understand the question because you have to look at them as a scheme.  
13 The point is that you have a scheme that says you can only impose conditions on a  
14 communications provider either that are permitted under the General Authorisation or that are  
15 permitted under the Universal Service Directive. That is what the Authorisation Directive  
16 says. So therefore you have to ask the question what conditions are permitted under the USD?  
17 The answer is the conditions that are allowed under Article 8(1). Then you ask what  
18 conditions are allowed under Article 8(1), and the answer is you have to construe Article 8(1)  
19 compatibly with Article 3(2) so that you do not leave a situation in which the Member State  
20 does not have the powers to fulfil the obligations that are placed upon it under Article 3.

21 THE CHAIRMAN: But that is saying that when you read the two Directives together you end up  
22 with power to do absolutely anything you want provided that it is objectively, or subjectively –  
23 however you look at it – designed to achieve the provisions which Articles 4 to 7 require,  
24 which you could do under Article 3.2 if only it were not for something that stopped you doing  
25 it. The only thing that stops you doing it is Article 3 and 6 of the Authorisation Directives, and  
26 you are asking us to construe Article 8 as completely overriding that. I do not see on your  
27 submission how Article 6(2) of the Authorisation Directive has any content. What does it stop  
28 a Member State doing?

29 MISS ROSE: For example it stops a Member State from imposing as part of the general  
30 authorisation obligations that go beyond the scope of the Authorisation Directive; that is what  
31 it does. But I agree it has no relevance to the question: what is the scope of the universal  
32 service obligation that can be imposed? It carves that out.

33 THE CHAIRMAN: So as soon as the Regulator, Ofcom, picks a provider, BT, and says: “I hereby  
34 designate you”, they can do anything to that person which they could have done absent the  
35 Authorisation Directive?

1 MISS ROSE: No.

2 THE CHAIRMAN: What could they not do?

3 MISS ROSE: They can only do things that fall within the scope of Article 8(1).

4 THE CHAIRMAN: You are going round in circles now.

5 MISS ROSE: No I am not. I am not, all I am saying is that everybody agrees in this case that the  
6 crucial question is the scope of what is permitted under Article 8(1), that is the issue, that is the  
7 issue. What I am arguing is when you look ----

8 THE CHAIRMAN: In the context of the whole CRF?

9 MISS ROSE: Of course, of course, but what I am looking at is how you construe Article 8(1), and I  
10 am inviting you, when you construe Article 8(1) to look at it in the light of the extent of the  
11 obligations placed on the Member State under Article 3(2). The submission that I am making  
12 is that it would be very surprising if the Community placed an obligation on the Member State  
13 but did not give it the powers to meet that obligation, that would be a surprising position. If  
14 the Member State is under a duty to deliver something you would expect the Community to  
15 give it the powers to deliver that, that is all. It is an aid to the construction of Article 8. Can  
16 we just look at Article 3(2) for the moment?

17 “Member States shall determine the most efficient and appropriate approach for  
18 ensuring the implementation of universal service, whilst respecting the principles of  
19 objectivity, transparency, non-discrimination and proportionality. They shall seek to  
20 minimise market distortions ...” etc.

21 So clearly the intention is that the Member State is to make a judgment based on the state of its  
22 own national conditions, as to what is the most efficient way of ensuring that universal service  
23 is provided on its own territory. The submission that I make is that that being so, if you have a  
24 situation as here where the market can supply an affordable directory enquiry service, but  
25 where there is a need to have an efficient system whereby the comprehensive database that is  
26 necessary for that service to be provided is made available, it would be surprising if that was  
27 not permissible under Article 8. Otherwise, what you do – and this is in fact Ofcom’s case –  
28 you have a situation where the Universal Service Directive does not permit the Member State  
29 to adopt the most efficient means of ensuring universal service, because the two alternatives  
30 are either you have no regulation at all in which case each individual party that wishes to  
31 provide directory enquiry must enter into 73 different licences in order to get a comprehensive  
32 data set. That is obviously inefficient, duplication of effort. Or, alternatively it is said that the  
33 only alternative is that the obligation must be imposed on BT that requires them not only to  
34 create, maintain and update the database, but also to make it available to the public at an

1 affordable price. That is quite obviously a more intrusive form of regulation than the form that  
2 has been adopted.

3 THE CHAIRMAN: That is a matter of dispute.

4 MISS ROSE: No, Sir, it cannot be a matter of dispute because that is USC7 plus a retail obligation.

5 At the moment BT is under an obligation to compile and maintain the database but it has a free  
6 hand as to the terms on which it supplies directory enquiries to the public. It can compete in  
7 the market for directory enquiry services with all the other providers, but what is being said  
8 against me is that the only type of universal service obligation that could have been imposed  
9 on BT included an obligation on BT to make the directory enquiry service available at a retail  
10 level at an affordable price. Remember, an affordable price may be less than cost, as Mr.  
11 Vajda correctly said. I know you want to come in but can I just finish this point? So that  
12 necessarily envisages a situation in which BT's ability to compete at the retail level would be  
13 distorted because the other directory enquiries providers would not be under that obligation  
14 and could therefore compete on price based on cost and other factors but BT would be  
15 compelled to provide the directory enquiry service at an affordable price.

16 So the oddity of the position taken by Ofcom is that they argue that this Directive only permits  
17 either no regulation at all, which is inefficient, or regulation of the whole process, not just the  
18 compilation of the database, but also the provision of the retail service. We submit that that  
19 cannot be right when the most efficient method that least distorts competition is to regulate the  
20 obligation to create the comprehensive database, but to leave the market to establish the  
21 competitive and affordable price. That is the point, that is the relevance of Article 3(2) in  
22 construing Article 8(1). This is absolutely fundamental because it goes to the whole purpose  
23 of the CRF. We absolutely agree with Mr. Vajda's submission that one of the fundamental  
24 purposes of the CRF is to lighten the regulatory burden, and that regulation should only be  
25 imposed where it is necessary, and yet the perverse result of Mr. Vajda's submission is that  
26 Ofcom does have the power to regulate BT on a more intrusive basis but does not have the  
27 power to regulate it on a less intrusive basis.

28 THE CHAIRMAN: Under these provisions.

29 MISS ROSE: But these are the only provisions that deal with the universal service. It is no answer  
30 to this to say if BT were to abuse its dominant position there is other *ex post* action that could  
31 be taken, or if BT were found to have SMP there might be limited circumstances where you  
32 could impose an SMP condition because that is for a completely different purpose. That would  
33 be in a situation where there is dominance and a risk of abuse or a finding of abuse, this is  
34 nothing to do with that, this is about consumer protection. The whole point is there may not be  
35 any abuse or risk of abuse, what is necessary is the most efficient means with the least

1 distortion of competition of ensuring the provision of these basic minimum services, and Oftel  
2 has already said what it thinks is the most efficient way of doing it, and nobody disputes that  
3 on the facts, they simply say they do not have the power to do it, therefore they are saying that  
4 the regulator must be forced by these provisions to adopt a less efficient method of providing  
5 the universal service. We say that is a very surprising result.

6 THE CHAIRMAN: I think it is still relevant to ask you though – that was very helpful – I think your  
7 submission is that Article 8(1) at any rate, I am not sure about 8(2) really ought to be read as a  
8 new paragraph in Article 3, which would say this roughly: “(3) In acting under paragraph (2)  
9 Member States may use specific conditions under Article 6 of the Authorisation Directive.” It  
10 does not go much further than that.

11 MISS ROSE: That is not my submission.

12 THE CHAIRMAN: That is where it is leading me.

13 MISS ROSE: My submission is simply if we go back to Article 8:

14 “Member States may designate one or more undertakings to guarantee the provision  
15 of universal service as identified in Articles 4, 5, 6 and 7 ... so that the whole of the  
16 national territory can be covered. Member States may designate different  
17 undertakings or sets of undertakings, to provide different elements of universal  
18 service and/or to cover different parts of the national territory.”

19 So it is intended as a flexible power for the purpose of ensuring, or guaranteeing that the  
20 services set in those Articles are provided, and that is to be read together with Article 3(2)  
21 which requires the Member States to select the most efficient means of achieving that aim.

22 THE CHAIRMAN: I foreshortened my 3, it would be enacting under para.2 Member States may  
23 designate undertakings and use specific conditions under Article 6 of the Authorisation  
24 Directive. That would then eat up 8.1 I think and would remove the point that is against you.

25 MISS ROSE: I am reluctant to reformulate Article 8.1 ----

26 THE CHAIRMAN: Well we cannot.

27 MISS ROSE: No, my submission is simply that when you look at Article 8.1 what it is trying to do  
28 is to give the Member State the tools that it needs for the most efficient achievement of the  
29 universal service, and that it is very strange to impose on Article 8.1 a construction which  
30 prevents or impedes the national regulatory authority from achieving the most efficient  
31 solution.

32 THE CHAIRMAN: And actually goes against the first sentence of 3.2.

33 MISS ROSE: Yes, absolutely.

34 THE CHAIRMAN: Which says “Do it your way, matey”.

1 MISS ROSE: Do it your way, "... shall determine the most efficient and appropriate approach", and  
2 it is interesting we see the word "appropriate" there which is, of course, then picked up  
3 domestically in s.67 – "...for ensuring the implementation of universal service."

4 I do need to stress this point that the only form of regulation on BT which is being said is  
5 permissible in this case is necessarily more intrusive than the formal regulation that has  
6 actually been adopted, because what is being said is that the only form of regulation is USC7  
7 plus a retail obligation, which impedes BT in competing in the retail market, and nobody can  
8 say that a regulation which impedes BT in competing in the retail market is less intrusive than  
9 a regulation which only places an obligation on them at a wholesale level.

10 MR. VAJDA: I hesitate to interrupt but I do not think anybody is suggested USC7 plus retail, that is  
11 not the position of the Office. The position is regulation at the retail level, it is not a question  
12 of USC7 plus.

13 MISS ROSE: Yes, but of course, it makes no sense because what is the retail obligation that Ofcom  
14 is saying that it could impose on BT? It would have to include the compilation of a  
15 comprehensive database.

16 THE CHAIRMAN: It would not, it would merely mean that BT had to provide a directory service.

17 MISS ROSE: Absolutely.

18 THE CHAIRMAN: And for its own internal purposes it would have to have its own database, but it  
19 would not have to provide it to anyone – not under these provisions at least.

20 MISS ROSE: But, Sir, that as well would be a greater distortion of competition, because then you  
21 would have a situation where BT would be in control of the comprehensive database, but under  
22 no obligation to make that available to the competitors in the retail market.

23 THE CHAIRMAN: It probably would make it available.

24 MISS ROSE: Well it might or it might not, Sir.

25 THE CHAIRMAN: It might not, we would have to see.

26 MISS ROSE: Sir, that is precisely my point. That is precisely my point. If it does not make it  
27 available the competitors in the retail market are in a situation where they have to enter into 73  
28 licence agreements to get access to the comprehensive database and then to compete in the  
29 retail market. So the question is: what is it about this Directive that constrains the rigidity of  
30 the approach for which Ofcom contends, and the answer is "nothing." That rigid approach is  
31 inconsistent with Article 3.2 first sentence, it is actively inconsistent with it, and also  
32 inconsistent with the second part of Article 8(1) which is clearly intended, in my submission,  
33 to give a broad power for the designation of different undertakings to provide different  
34 elements, and there is nothing in any part of the Directive that has been pointed to that supports  
35 the restrictive interpretation of that part of Article 8.1.



1 Before I leave the Universal Service Directive, with respect to Mr. Vajda he wholly failed to  
2 deal with the points that were made in particular in relation to Article 11. The point that was  
3 originally being made by Ofcom was that Article 11 was inconsistent with our case because  
4 Article 11 was a comprehensive provision which placed a duty on the Member State to put in  
5 place the quality control reporting mechanisms in relation to every single designated  
6 undertaking, and every single obligation and that since none of the quality control measures  
7 were appropriate to USC7 it followed, it was said, that there was no power to impose USC7.  
8 That argument is obviously unsustainable because it is clear on the face of the Directive that  
9 Article 11 is not comprehensive, it does not cover the directory, and of course the “directory”  
10 is not just a book it may be an electronic directory, but leaving that aside the power that the  
11 regulator has to approve the form of the directory is a completely different power from the  
12 duty that is imposed under Article 11, which is about ensuring the publication of adequate and  
13 up to date information on quality standards, it is nothing to do with approving the form of the  
14 directory and that point we say simply has not been dealt with.

15 I also make the point that there was no oral development at all by Mr. Vajda of the separate  
16 submissions that Ofcom had made in relation to USC7.4, which I indicated to the Tribunal  
17 yesterday that I did not understand, and it appears that that has been quietly dropped and we  
18 can assume Mr. Vajda may not have understood it either.

19 Sir, in relation to the 2003 regulations, I am troubled by the suggestion made by you, Sir, that  
20 the answer to this case could be that USC7 was *ultra vires* to the 2003 regulations. The reason  
21 I am troubled is as follows: Ofcom has never suggested this to us at any stage of the dispute  
22 resolution process which started in 2005. If that had been Ofcom’s concern it would have been  
23 easily cured because Ofcom have the power under s.67 of the 2003 Act to make any universal  
24 service condition that it considers appropriate to comply with the universal service order.

25 Ofcom is not constrained by the terms of the 2003 regulations so there would have been a very  
26 simple way of curing the defect if that were so.

27 THE CHAIRMAN: If they had power.

28 MISS ROSE: Indeed, Sir, that is why I say really the only issue in this case is the European question  
29 of the proper construction of the Universal Service Directive; there is no free-standing  
30 domestic law point in this case.

31 THE CHAIRMAN: Well, surely there is. It may be one of the easier questions in this case to  
32 answer, about what the Act means and envisages, and I think Mr. Vajda ----

33 MISS ROSE: Certainly, and it is common ground, there is no dispute about that.

34 THE CHAIRMAN: Not now.

1 MISS ROSE: That is true, it is now common ground between Ofcom and us that if this condition is  
2 permissible under the Directive it is permissible under the Act.

3 THE CHAIRMAN: Yes, I am not sure that was the position when this hearing started.

4 MISS ROSE: You may be right, Sir, yes, but that is the position now. That being so, there is only  
5 one issue in this case and that is: does the Directive permit this condition?

6 THE CHAIRMAN: Well it is the only matter that has been argued, but I have raised yesterday the  
7 question: how do we get to where we are? What was the authorisation for all these bits of  
8 paper in the first place? We now know it is the regulations and unless both of you tell me that  
9 you do not wish this Tribunal to address the meaning of the regulations but we are to assume  
10 that the only point is the one that you have identified, we have a duty to all the other people  
11 who might be interested in an answer to this case to at least consider the point.

12 MISS ROSE: Sir, I appreciate that, but my point ----

13 THE CHAIRMAN: I am not asking you to do it today.

14 MISS ROSE: No, but my concern is that if you are looking to that as a way of disposing of the case,  
15 because in my submission it could never be a way of disposing of this case ----

16 THE CHAIRMAN: I will have to answer the other questions

17 MISS ROSE: The point is there is no domestic law answer to this case, there is only a European law  
18 answer, because Ofcom accepts that if this is condition, it had the power to impose under the  
19 Directive, it had the power to impose it under national law.

20 THE CHAIRMAN: Well it did on the basis of the Statute but I do not think anyone had focused -----

21 MISS ROSE: Indeed, but if they had, and if Ofcom had taken the position that there was a defect in  
22 the regulations and that they were narrower in scope than the Statute, the answer would simply  
23 have been for them to reissue the condition under s.67.

24 THE CHAIRMAN: But Ofcom could not have done that because Ofcom take the view that USC7 is  
25 *ultra vires* so they -----

26 MISS ROSE: Yes, that is why in my submission the only resolution of the issues in this case  
27 depends upon the European law question. There is no bar in domestic law to Ofcom making  
28 this condition. The only bar to the condition is a European law bar.

29 THE CHAIRMAN: For making it in the future, yes.

30 MISS ROSE: Well that is my point about this dispute resolution procedure having started in 2005.  
31 If this point had ever been taken by Ofcom ----

32 THE CHAIRMAN: Yes, then?

33 MISS ROSE: -- we would have dealt with it at that time and we could have said ----

34 THE CHAIRMAN: How?

1 MISS ROSE: Well we would have said to Ofcom: “If you are concerned that there is a problem with  
2 the regulations you can reissue the condition under the Act.  
3 THE CHAIRMAN: No, but they cannot. They could under the Act ----  
4 MISS ROSE: Yes.  
5 THE CHAIRMAN: -- but then they would say “No, we need to go through a regulatory consultation  
6 before we make a new instrument.  
7 MISS ROSE: Sir, that is my point about why the only question here is the European question  
8 because the reason they consider themselves to be constrained is only because of European  
9 law.  
10 THE CHAIRMAN: About having power ----  
11 MISS ROSE: Yes.  
12 THE CHAIRMAN: -- but whether they would actually go ahead and make one is a completely  
13 different issue, it depends where your starting point is, you have either got a valid set of USC’s  
14 or you have not. If you have not then you take it forward, but it is not “Oh, we must hold the  
15 position by making the new USC7 under the domestic legislation”, assuming the Euro point is  
16 okay.  
17 MISS ROSE: This demonstrates, if I may say so, why it is unfortunate that the Tribunal should seek  
18 to open this issue up now, because this is an appeal against a regulatory process that proceeded  
19 on a particular basis.  
20 THE CHAIRMAN: Well that is a different submission if you say we should not open it.  
21 MISS ROSE: I am sorry that was not clear, my submission is, and I thought I had said that at the  
22 outset, that this is not a matter which, in my submission, it is appropriate to be dealt with in  
23 this process, because it is not a matter that formed any part of Ofcom’s decision or that the  
24 parties have ever ventilated. The only issue that is now live, now that they accept s.67, the  
25 only live issue is the *vires* as a matter of European law.  
26 Sir, I have not seen what submissions Mr. Vajda wants to make about the 2003 regulations,  
27 and once he has made his submissions I would reserve the right to reply to them.  
28 THE CHAIRMAN: Of course. Obviously if it is open you must have a fair hearing.  
29 MISS ROSE: Of course, but my objection to it is more fundamental.  
30 THE CHAIRMAN: Of course you can always object to points taken by your opponent at a late  
31 stage, it is more difficult when the Tribunal is asked to understand how this regulation was  
32 made. It had been presented to us in the skeletons – I know because they are in detail – as  
33 though it was simply does the Act ----  
34 MISS ROSE: Yes.  
35 THE CHAIRMAN: And the Act is not actually the authority.

1 MISS ROSE: No, I take that point.

2 THE CHAIRMAN: If it is a jurisdiction point I would have to take it.

3 MISS ROSE: Sir, it is hard to see that it is a jurisdiction point.

4 THE CHAIRMAN: We will come back to it before we finish.

5 MISS ROSE: In terms of consequences, the Tribunal has already got my submission that this does  
6 not really bear on the question for the Tribunal which is purely a question of law, but I would  
7 make the point that what Ofcom is saying are the solutions open to it, none of them meet the  
8 problem, because Ofcom is saying its options are: first to do nothing, secondly, to use *ex post*  
9 competition law remedies and thirdly to impose an SMP condition, but none of those options  
10 addresses the question of the most efficient way of providing universal service to end users.  
11 There may or may not be a problem of a dominant position and of abuse, and it may or may  
12 not be provable but that simply does not bear on the public policy which the Universal Service  
13 Directive is seeking to achieve.

14 Just to take an example, which might or might not be fanciful, if BT decided that it was no  
15 longer cost-effective for it to be in the directory enquiries market and decided to cease  
16 compiling its database, that would not be anti-competitive behaviour by BT, but it would have  
17 a fairly radical impact on the provision of the comprehensive directory enquiries service, and  
18 that is the whole point, the whole point of USC7 is to require BT to provide the essential  
19 infrastructure that is necessary to the production of a comprehensive directory enquiry service.

20 THE CHAIRMAN: Even though it is not providing the service itself?

21 MISS ROSE: That begs the question of what is meant by “providing the service”, and you have my  
22 submission – there are two parts there – first, whether the condition must be a condition that  
23 requires the undertaking to provide the service, that is the guarantee point. The second  
24 submission is what is meant by elements of the service, and on that our submission is the  
25 compilation of the comprehensive database is a necessary part of the comprehensive directory  
26 enquiry, so they are providing part of the service. They are not providing it at a retail level any  
27 more than BT is providing its network at a retail level when there is an intervening telephone  
28 service provider.

29 THE CHAIRMAN: Miss Rose, can you say that again? Forgive me.

30 MISS ROSE: You have the guarantee point?

31 THE CHAIRMAN: Yes, I do.

32 MISS ROSE: The second part of the submission is that they are providing part of a service because  
33 the comprehensive database is a necessary part of the provision of a comprehensive directory  
34 enquiry service. It is right that they are not providing that at a retail level but neither is BT

1 providing its network at a retail level where there is an intervening service provider with whom  
2 the customer contracts. In that situation BT provides the network ----

3 THE CHAIRMAN: It provides it to me, the user?

4 MISS ROSE: No, Sir, it provides it to the service provider.

5 THE CHAIRMAN: Contractually it goes that way but it is being provided surely by BT – just using  
6 the word “provide” in an ordinary sense?

7 MISS ROSE: Well if we use the word “provide” in that broad sense, Sir, the same can be said about  
8 the directory enquiries database, because the directory enquiries database is provided to users  
9 via the directory enquiry service providers.

10 THE CHAIRMAN: Actually it is not, certain elements within it are supplied – bits of information in  
11 that database, not the whole of it, the relevant information is given to your client who compiles  
12 it into its own database, so the information – yes.

13 MISS ROSE: What is happening when you phone directory enquiries you are interrogating the  
14 database.

15 THE CHAIRMAN: But not OSIS. Your clients compile their own databases, do they not?

16 MISS ROSE: No, it is OSIS.

17 THE CHAIRMAN: You go straight into OSIS do you?

18 MISS ROSE: Yes.

19 THE CHAIRMAN: Oh, I see, I had not appreciated that.

20 MISS ROSE: So they are providing it in precisely the same way that they provide the network  
21 where there is a telephone service provider intervening.

22 THE CHAIRMAN: So you are going into BT servers ----

23 MR. O’FLAHERTY: Sir, that is not right.

24 MISS ROSE: No, not their servers but their database.

25 THE CHAIRMAN: Their database is sitting on their server.

26 MR. O’FLAHERTY: They are given data from the database, they are not given the database.

27 MISS ROSE: It is a copy of OSIS. The Number has a copy of OSIS and that is the database that is  
28 interrogated when you phone directory enquiries. So it is the OSIS database held on  
29 The Number’s server, but the data, the database, is owned by BT and licensed by it to  
30 The Number.

31 THE CHAIRMAN: That seems not to be objected to.

32 MISS ROSE: That is the fundamental point. To take up Mr. Blair’s train analogy, the database is  
33 the track, the directory enquiry service is the train, the customer buys the ticket, but the  
34 universal service is the trip to Edinburgh provided by the track and the train. So the track is an

1 essential element of the service of the trip to Edinburgh, even though the track is not being  
2 provided at a retail level. That is the point.

3 This may not matter very much, but Mr. Vajda suggested that BT would not be in a position to  
4 abuse its dominant position because it could discriminate on price and it would have to charge  
5 the same to its own down-stream subsidiary as it charged to its competitors. With great  
6 respect, if only life were as simple as that. There are plenty of ways that providers can abuse  
7 their dominant positions. What is difficult is proving it. For example, there may be a price  
8 difference between the internal price charged and the external price charged, but then the party  
9 complaining about it has to prove it is discriminatory. BT may argue, I am not saying they  
10 would do this, but this is the sort of thing that can happen, that there are objective factors  
11 justifying the price difference, so then you get into an argument about whether it is  
12 discriminatory or whether it is objectively justified. Similarly, if they are charging the same  
13 internally and externally, you get situations where dominant providers decide to rack up the  
14 price, think they can bear the pain internally for a short period of time and it will be long  
15 enough to squeeze their competitors out of the market. These things do happen. You cannot  
16 simply say there is no way that they could abuse their dominance. The difficulty with *ex post*  
17 regulation is proving it and getting the remedy.

18 You have my primary submission on that which is that it is simply irrelevant.

19 THE CHAIRMAN: I think I have got how far your submission goes. If BT decided that it was  
20 going to get out of the DQ market altogether and it simply said, "We have to provide  
21 everybody with our phone numbers but we are not going to have our own business, and we are  
22 not going to keep an OSIS database any more or provide it to anybody", then the regulator  
23 could say, "You, BT, are such a big player in this market, we are going to impose on you a  
24 retail obligation in fact to get back into the market", I understand that position. You say they  
25 could be compelled to go back into compiling a database to provide it to you even though they  
26 did not want it themselves?

27 MISS ROSE: Yes. If BT were under a retail obligation obviously they would have to compile a  
28 database, or they would not be able to provide a service at all. It is very hard to see how you  
29 could have a situation where BT had compiled the database and were retailing it, but were not  
30 under any obligation, either as a matter of competition law or otherwise, to provide it to other  
31 people in the market. It is very hard to see how that could possibly be right. It would be  
32 impossible for us to compete because we would have to enter into 73 licence agreements. That  
33 brings us back again to Article 3.2, and the point about efficiency.

34 The fundamental question that I asked, which still has not been answered, with respect, by  
35 Ofcom or BT, is, "How does their construction of Directive meet the policy of CRF or the

1 policy of the Directive itself?" There is no answer to that. All that their construction does is to  
2 leave the regulator between a rock and a hard place of either no regulation or more intrusive  
3 regulation, and it prevents a more flexible form of regulation that we submit is provided. That,  
4 of course, goes directly contrary to the underlying policy of the CRF that Mr. Vajda developed  
5 to you yesterday and which we accept.

6 One of the oddities about his submissions yesterday was that he spent a lot of time arguing that  
7 the CRF was intended to minimise *ex ante* controls and to require people to rely on *ex post*  
8 controls as much as possible. The difficulty with that argument is that the whole purpose and  
9 point of the Universal Service Directive is to empower the national regulatory authorities to  
10 impose *ex ante* controls. It is common ground in this case that there is a power in Ofcom to  
11 impose an *ex ante* control on BT for the purpose. The question is not whether there is a power  
12 to impose an *ex ante* control, the question is simply what type of *ex ante* control. So the  
13 preference for *ex post* control simply takes him nowhere.

14 That brings me to the question of a reference. Mr. Vajda's submissions, with respect, made  
15 little attempt to address the fact in relation to the exercise of the Tribunal's discretion to refer  
16 questions, as set out in the *Samex* case, including divergent State practice, linguistic  
17 inconsistency, lack of any case law on the point, the important point of general principle and a  
18 harmonisation Directive, and the disadvantages faced by the national court in this situation.

19 The first point that he made yesterday was he said there have been ten telecoms cases in the  
20 Competition Appeal Tribunal and none of them have been referred to Luxembourg.

21 THE CHAIRMAN: You need not address that. I do not know the first thing about what any of those  
22 cases was about.

23 MISS ROSE: Sir, I do, because I have been in some of them.

24 THE CHAIRMAN: Even so, each case gets referred on its facts.

25 MISS ROSE: Of course it does. Sir, I have been in some of these cases and they are very, very  
26 different from this case.

27 THE CHAIRMAN: I am sure they are, that is why I do not want to know about them! I really do  
28 not.

29 MISS ROSE: I just want to make a very short point.

30 THE CHAIRMAN: Make a short point but do not tell me about the cases!

31 MISS ROSE: I will pass on then, but they are cases about fact and about established legal principle.

32 I am not aware of any other telecoms case that has turned in the way that this case turns on a  
33 single question of pure interpretation of Directive.

34 THE CHAIRMAN: If it is any comfort to you, what Mr. Vajda said about that point ----

35 MISS ROSE: Was unpersuasive.

1 THE CHAIRMAN: Careful!

2 MISS ROSE: What is instructive ----

3 THE CHAIRMAN: At least so far as I am concerned!

4 MISS ROSE: That is always the difficulty with a three person Tribunal. What is instructive is to  
5 look at the practice of expert tribunals in this country that have been for a lengthy period of  
6 time operating in a field where European law is very important. The most obvious example of  
7 that is the employment tribunal system. Employment tribunals have, since the late 70s, been  
8 operating in a field where, of course, European Directives are of fundamental importance. The  
9 fact is that questions are referred to Luxembourg regularly by both employment tribunals and  
10 the Employment Appeal Tribunal. Those are expert tribunals with members who are highly  
11 experienced in industrial relations and employment law, but who rightly recognise that there  
12 are occasions on which they are disadvantaged as a national court in seeking to determine an  
13 untested question of European law.

14 Mr. Vajda's next argument in relation to the question of delay and the most efficient way of  
15 disposing of this question was that he said he could not be certain whether the parties would  
16 appeal. I have not heard any assurance from Ofcom that if it loses this appeal it will not go to  
17 the Court of Appeal. I invite Mr. Vajda to indicate if that is Ofcom's position.

18 THE CHAIRMAN: He would have to see how off the mark our judgment was.

19 MISS ROSE: There was a striking silence, Sir, and it is not surprising because it is a very important  
20 point. Sir, the position is that the appellants in this case have invested hundreds of millions of  
21 pounds on the development of their businesses on the basis of a regulatory framework which  
22 the regulator is now saying is unlawful. The suggestion that that is not a point that they would  
23 take on appeal is, with respect, fanciful. In that regard, one is frankly startled to hear the  
24 submission made by Mr. O'Flaherty on behalf of BT. BT rightly stresses BT's anxiety to  
25 obtain regulatory certainty, and rightly stresses the fact that the current of uncertainty is  
26 damaging for everybody in this market, but he suggests that that is a reason for refusing to  
27 refer the question. Sir, we respectfully suggest that is a very surprising conclusion to draw. It  
28 can only be a more efficient way of dealing with this question if this Tribunal is 100 per cent  
29 confident that whoever lost this appeal would not obtain permission to appeal to the Court of  
30 Appeal.

31 The next point that Mr. Vajda was that he suggested that this point was obvious because, he  
32 said, our case was based on a fundamental misconception of the Universal Service Directive. I  
33 hope that the submissions that I have made have indicated that that is not correct, and that at  
34 the very least there is a very serious question here to be resolved about the scope of the powers  
35 under Article 8.1. In any event, we submit it is a very odd submission for Ofcom to be



1 making, because this universal service condition was not devised or imposed by The Number,  
2 it was devised by the Director General of Telecoms shortly after the implementation of the  
3 Common Regulatory Framework, and it was put in place in the face of a submission by BT, as  
4 you have seen from the Determination, that it was outside the scope of the Directive, and it was  
5 not challenged. It was then maintained by Ofcom until the Decision was taken in this case.  
6 We submit that is a pretty odd course of events if the position is as obvious as Ofcom that it is.  
7 The fact remains, as this Tribunal knows, that there were at least two European regulators who  
8 were in place at the time that the Common Regulatory Framework was negotiated and who it  
9 may be assumed played an active role in the negotiation of the CRF, both of whom formed the  
10 view that this type of condition was permissible under the Universal Service Directive, the  
11 United Kingdom and Ireland. That is a substantial fact which simply cannot be brushed aside  
12 in the way that Mr. Vajda seeks to brush it aside.

13 That brings me finally on this point to the *Optident* case, and if we look at para.37 of that case,  
14 what is clear is that in that case there was an expressed view of the European Commission  
15 which was unequivocally in favour of the position that the House of Lords were adopting in  
16 that case, and the House of Lords found that the positions adopted by the German and Swedish  
17 courts did not reach a final conclusion on the central issues and the questions were not gone  
18 into in depth, so they were held not to be really addressing the questions that were before the  
19 court. So, with respect, it is hard to see anything at all that my learned friend gains from that  
20 case. In this case there is no guidance available from the Commission at all and a settled  
21 practice by at least one other Member State.

22 Finally, that brings me to the question of the wording of potential questions for a reference. If  
23 I can just hand up a draft.

24 MR. VAJDA: We have not seen this.

25 THE CHAIRMAN: I think give it for information. If it is a reference in the judgment you will have  
26 all had time to think about it.

27 MISS ROSE: Sir, I am not suggesting that the Tribunal give judgment now adopting X, but you  
28 asked if we could provide it overnight. What it does, in my submission, is to crystallise what  
29 the issues are. (Same handed)

30 THE CHAIRMAN: That is nice and short!

31 MISS ROSE: Of course, it would be accompanied by a factual section setting out the background,  
32 this is simply the text of the questions themselves.

33 THE CHAIRMAN: (After a pause) I get the thrust and it is very helpful for us.

34 MISS ROSE: Unless I can be of any further assistance those are my submissions.

35 THE CHAIRMAN: Thank you very much, Miss Rose. Mr. Vajda, one minute?

1 MR. VAJDA: It will be a little longer than one minute, but it will certainly be less than ten minutes.

2 There are four points ----

3 MISS ROSE: Sir, I am sorry, he has not right to reply.

4 MR. VAJDA: Will you just let me start. There are four points that need addressing. First of all,  
5 there is the Chairman's point on the regulations, just to see how we deal with it mechanically.  
6 Then there are two points which are points of correction and details, and again it is entirely for  
7 the Tribunal but I would respectfully submit that it would assist the Tribunal. Then there is  
8 also the point about the database, the OSIS, and I was just going to give the Tribunal a  
9 reference in the Determination to what actually The Number has.

10 THE CHAIRMAN: That may be uncontroversial stuff.

11 MISS ROSE: Sir, if it is, but I reserve my right to reply to it.

12 THE CHAIRMAN: Although I do not want ping-pong, it is much better for central points to be  
13 addressed more than once.

14 MR. VAJDA: Miss Rose is an excellent ping-pong player and she need have no fear that she does  
15 not have any right of reply.

16 So far as what OSIS actually has, and this is just a reference, it is dealt with at pp.433 to 436.

17 That is BT's down-stream licence obligations, and that is in the Determination. You will see  
18 in 436 that it says that BT shall deliver the database to the licensee as soon as reasonably  
19 practicable after the commencement date. So there is the delivery of database. That is a  
20 contractual licence.

21 I am instructed that, in fact, The Number add various data of their own to what is delivered to  
22 them. If Miss Rose wants to come back on that no doubt she will.

23 The next point, and this a point, I hope, of clarification, is that at the beginning of her reply  
24 Miss Rose talked about the Virgin-BT example. I do not know whether the Tribunal  
25 remember that. With respect, I think she misunderstood what universal service is about. Can I  
26 just explain it, and again, if she thinks I got it wrong no doubt she will come back. The point  
27 about the USO is that it is an obligation on BT in so far as voice is concerned. If you take the  
28 Shetlands crofter example, Virgin is under no obligation whatsoever to do anything so far as  
29 the Shetlands crofter is concerned. Indeed, that is the whole point of the USO. There may be  
30 many people like Tiscali, or whatever, who do not want to deal with somebody who, for  
31 example, is a bad credit risk or has a low income or there will be a cost of interconnection.  
32 The point is that USO does not come in if you have got a Virgin-BT obligation because Virgin  
33 is not under a USO. The person who is under a USO so far as Article 4 is concerned is BT,  
34 and BT is the only one that has to provide that service on request to a consumer. BT cannot  
35 refuse, but Virgin or Talk-Talk, or whoever it is, can refuse. That is an important point.

1 Secondly, and this was a point that you, Sir, raised in the course of Miss Rose's reply, the  
2 contract point. You are entirely right, Sir, that an end-user does not require a contract. That  
3 obviously is true because, if you take, for instance, a call box, you do not have a contract to use  
4 a call box. The whole of the USO is to give people rights even before they have a subscription.  
5 Just to make good that point, if one looks at the Framework Directive in terms of definitions, it  
6 is important that the Tribunal have in mind – this is at p.73, flag 5 – we have seen a definition  
7 of end-user at 2(n), which I say does not refer to a contract and you can see why. The  
8 definition of “subscriber” at (k) is a person who has a contract. So the point that you, Sir, were  
9 making is entirely correct, and indeed is supported by the Directive. When one looks at the  
10 Chapter II rights they are all in relation to end-users, not subscribers.

11 That then takes me, lastly, to the point you, sir, raised on the regulation. The position of the  
12 Office is that we do not want, as it were, the matter to be left in the open. What we would  
13 invite the Tribunal to do – because I have to say, Sir, that we are not entirely sure that we have  
14 fully understood the concern of the Chairman on this, but if it could be said now orally so it is  
15 in the transcript, and we have got something in writing, we would wish to deal with that,  
16 because we do not want the point left in the open – we suggest that all parties are given, say,  
17 two weeks to respond to the point that is troubling the Chairman.

18 THE CHAIRMAN: To deal with that I will have to tell you what my concerns are, but let us hear  
19 from you, Miss Rose, first.

20 MISS ROSE: Yes, sir, I just want to deal with this point about ----

21 THE CHAIRMAN: Before you do, Mr. O'Flaherty was keen to stand up during the course of your  
22 reply.

23 MR. O'FLAHERTY: A pure point of information on how OSIS works. It is set out in a full annex,  
24 Annex 4 to the Determination, at 423 to 436.

25 MISS ROSE: On the question of network and services, with respect, Mr. Vajda misses the point.

26 The point is that you might have a situation where there is no problem about people obtaining  
27 telephone services, no matter what their geographical location is where the competitive retail  
28 market delivers that. Carphone Warehouse, Virgin and everybody else are operating all over  
29 the UK, so you do not need a universal service obligation to deal with the retail need. You  
30 might need a universal service obligation to make sure that everybody's telephones are  
31 connected. Of course that is for the benefit of end-users, because that is what the universal  
32 service obligation is about. The point is that the retail relationship is between the telephone  
33 service provider and the customer, not between the customer and BT.

34 THE CHAIRMAN: The contract is, yes, but the person actually providing the telephone line is BT,  
35 and BT is providing that to an end-user.

1 MISS ROSE: Yes, they are providing in the sense that they are infrastructure that the person is  
2 using. That is the comparison that we make with the database.

3 THE CHAIRMAN: They are providing what they are obliged to provide under Article 4.

4 MISS ROSE: Yes, but the same thing in relation to the database, BT are providing the  
5 comprehensive database that is interrogated when people make directory enquiries.

6 THE CHAIRMAN: But they are not obliged to provide that under Article 5. They could be but they  
7 have not been.

8 MISS ROSE: Sir, that comes back to the question of what is meant by “elements”.

9 THE CHAIRMAN: Exactly, yes.

10 MISS ROSE: Sir, the problem with it is that what is said against me is that why the database cannot  
11 be an element of the universal service is that it is provided on a wholesale not a retail basis.  
12 That is the argument of Ofcom. The point we make is that that does not work because in  
13 relation to Article 4 you can see that it does not matter if it is wholesale or retail. What matters  
14 is whether it is necessary to have that element so that the service is provided to the end-user.  
15 I am not sure that I can take it any further.

16 THE CHAIRMAN: I am the one who is going to run you into time. I am not sure that the points  
17 under the regulations are significantly different from the ones that we have been addressing in  
18 relation to the Directive, but it is to be noted that the universal service, as defined in these  
19 regulations, means the provision of the services and facilities set out in Articles 4, 5, 6 and 7.  
20 So there is nothing in that definition about who it is targeted at, it is simply the bundle of  
21 services. Whether you call it an “element” or a “bit” or a “part”, each of those Articles  
22 provides a different “bit” of the service. That is significant in relation to the definition of  
23 “universal service provider”, which means a person who is designated as a person who  
24 provides the whole or part of the universal service, which suggests to me that when a person  
25 designates somebody as a universal service provider he must at the same time state or make  
26 clear in his designation in respect of which bits of the service that person is to be designated.  
27 In other words, if you are designated to provide call boxes you do not have to provide directory  
28 enquiry services, and what is more there is no power to make you provide directory enquiry  
29 services. So it is the same point that is arising in relation to the Directives, but it is in much  
30 clearer – just depending on which way you look at it – or much more obscure language which  
31 at least this court is equipped to decide, because it is a matter of black letter law. I appreciate it  
32 has to be construed against the background of the Directives, but we do not have the privilege  
33 of waiting to construe this for a ruling from the European Court.  
34 Then we get to some more obscure stuff under para.4 of these Regulations, because if you look  
35 at 4.2 the Director may propose designation of such persons as he considers appropriate as

1 universal service providers, but you need to read into that the definition of “universal service  
2 providers”. As I work it out, it reads like this:

3 “In order to fulfil the duty in paragraph 1, the Director may propose the designation of  
4 such persons as he considers appropriate to be designated as a person who provides  
5 the whole or part of the universal service.”

6 So it comes back again to linking the designation with a definition of what it is that the person  
7 has to provide. It is not here we have a person who is designated like he is an elephant or he  
8 wears a blue hat, we need to know what his function is.

9 Those are my main concerns. The only other point is in relation to 4.4:

10 “The notification may also set out the following ...

11 The conditions that the Director is proposing to set on a person designed as a  
12 universal service provider ...”

13 That is what he puts into the USC, but then it says:

14 “... in accordance with ...”

15 and he lists the Articles. Articles 4 to 11 do not provide for the setting of conditions. I am  
16 very unclear what those words bring to the party. It may be that it does not matter, but whilst  
17 we were looking at the regulations that was something I was troubled about. It may have an  
18 impact on what overall they mean.

19 Miss Rose, I have completely got your point that we, as a Tribunal, should not be looking at  
20 this, but when people have looked at it it may turn out to be as big a non-point as the Act is and  
21 that it all comes back to the Euro legislation, but I would like at least to know the parties’  
22 positions on that before we give you a judgment. I would like it to be dealt with, please.

23 MISS ROSE: Can I invite then Mr. Vajda to put in submissions and then we will respond to them?

24 THE CHAIRMAN: Of course. I think that is the appropriate way of dealing.

25 MR. VAJDA: Certainly. What we had in mind was two weeks.

26 THE CHAIRMAN: Are you happy with that?

27 MISS ROSE: Yes, we will have another two weeks after that.

28 THE CHAIRMAN: Do you want to put anything in on this point?

29 MR. VAJDA: I would give it to BT and The Number at the same time.

30 THE CHAIRMAN: I think that BT can run in parallel with you. They either just say, “We adopt  
31 Mr. Vajda’s submissions”, or they get on with their own submission.

32 (The Tribunal conferred)

33 THE CHAIRMAN: Mr. Vajda, I think I would want this in a week, otherwise we are going to be ----

34 MR. VAJDA: Certainly, if we cannot do it in a week we will advise you ... (no microphone)

35 THE CHAIRMAN: Can you do a week in reply?

1 | MISS ROSE: I am just trying to work out the dates. I am going to be away next week, but I am  
2 | around the week after that.

3 | THE CHAIRMAN: All right. I will make that order, 31<sup>st</sup> October and 7<sup>th</sup> November. Thank you  
4 | very much.

5 | MR. BLAIR: If appropriate, could it deal with the point that is still troubling me as to whether  
6 | Kingston-upon-Hull is designated in relation to directory enquiries but under no obligations in  
7 | relation to that service?

8 | THE CHAIRMAN: Thank you everyone very much. We will await submissions and then there will  
9 | be a judgment in due course.

10 |

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