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

Case Nos. 1151/3/3/10  
1168/3/3/10  
1169/3/3/10

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

6 April 2011

Before:

MARCUS SMITH QC  
(Chairman)

PETER CLAYTON  
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

**BRITISH TELECOMMUNICATIONS PLC**  
**EVERYTHING EVERYWHERE LIMITED**

Appellants

– v –

**OFFICE OF COMMUNICATIONS**

Respondent

**EVERYTHING EVERYWHERE LIMITED**  
**VODAFONE LIMITED**  
**TELEFONICA O2 UK LIMITED**  
**HUTCHISON 3G UK LIMITED**

Interveners (Case 1151)

**BRITISH TELECOMMUNICATIONS PLC**  
**EVERYTHING EVERYWHERE LIMITED**  
**VODAFONE LIMITED**  
**TELEFONICA O2 UK LIMITED**  
**HUTCHISON 3G UK LIMITED**  
**OPAL TELECOM LTD**  
**CABLE & WIRELESS UK**

Interveners  
(Cases 1168 and 1169)

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**HEARING DAY THREE**

## **APPEARANCES**

Mr. Graham Read QC, Miss Sarah Lee and Mr. Richard Eshwege (instructed by BT Legal) appeared for the Appellant.

Miss Kassie Smith and Mr. Philip Woolfe (instructed by Regulatory Counsel, Everything Everywhere Limited) appeared for Everything Everywhere Limited

Mr. Javan Herberg and Mr. Mark Vinall (instructed by the Office of Communications) appeared for the Respondent.

Mr. Tim Ward (instructed by Herbert Smith LLP) appeared for the Intervener Vodafone Limited.

Mr. Robert O'Donoghue (instructed by Telefónica O2 Limited) appeared for the Intervener Telefónica O2 Limited.

Mr. Daniel Beard (instructed by Charles Russell LLP) appeared for the Intervener Cable & Wireless.

The Interveners Hutchison 3G UK Limited and Opal Telecom Ltd did not attend and were not represented.

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1 THE CHAIRMAN: Yes, Mr. Herberg.

2 MR. HERBERG: Good morning, sir. Sir, I had taken the Tribunal yesterday afternoon, by way  
3 of my instructions, to three different scenarios: full reduction scenario; no reduction; and  
4 part of a reduction scenario, just in very basic outline. Can I now move on, as part of my  
5 introduction, just to consider for a moment Ofcom's position and its role in making  
6 (assuming that it had to make any assessment at all) welfare assessment or assessment as to  
7 direct effect and then welfare assessment. Assume that it had that role and assuming  
8 therefore that EE's and O2's submissions were fundamentally misconceived and are not  
9 right.

10 On that basis, what Ofcom had to do was make assessment (when one reached the welfare  
11 assessment) of the cross cutting, the different and the cross cutting effects, in different  
12 scenarios. Can I draw attention to a number of features of this exercise that we say made  
13 that task for Ofcom, and indeed now makes that task for the Tribunal, one of particular  
14 difficulty and uncertainty in this case.

15 Sir, the first is simply the obvious point that the Tribunal was not merely faced in this case  
16 with an assessment of observable facts. There were certainly formidable difficulties, even  
17 with assessment of observable facts in this case. For example, the inquiry into the MNOs'  
18 average retail prices (ARP). Even on that there was a very thorny issue as to whether data  
19 could be produced, whether reliable data could be produced, whether the MNOs were  
20 obfuscating, whether BT could draw proper inferences from the information it did have, etc.  
21 That is a matter which is, as it were, pursued before you in the Tribunal with the parties  
22 putting further evidence in on the question really of the feasibility of finding the facts rather  
23 than what the facts are, to some extent.

24 Although that enterprise in itself was difficult, of course the task is much harder than that  
25 because even moving beyond the facts, there is then effectively a speculative enquiry into  
26 multiple future potential effects. One must ask what will, in the future, be the effect of the  
27 proposed changes, the proposed pricing changes, firstly on pricing behaviour (and that  
28 includes on the one hand the behaviour of the MNOs in setting their 08 prices and then the  
29 effect on them in setting their other mobile prices because of the mobile package effect), but  
30 also on spending behaviour: behaviour of BT - will it keep its higher termination charges or  
31 will it revenue share them; and also the behaviour of the service providers - will they keep  
32 any part of the revenues, or will they deploy it to improve the quality of their offering, for  
33 example, rather than pocketing it or giving it to their shareholders? So there were multiple  
34 enquiries into future behaviour of different types.

1 Secondly, that enquiry had to be made, and if it must be done has to be made, into a  
2 completely new proposed pricing structure, new of a type as well as new in terms of its  
3 actual introduction, what was a radical change from what had obtained before and indeed  
4 from what had previously been used in the industry. So the ladder pricing structure based  
5 on MNOs retail prices is simply not something on which real world data exists at all.  
6 Certainly, BT could put forward no such data. It says not only complex; it is novel and  
7 untested. Indeed, BT itself described the new charging pattern for 080 as a radical  
8 departure from BT's standard practice. That can be found in the NTS summary paper of  
9 27<sup>th</sup> May 2009. I will not take you to it but it is bundle 3 in the Tribunal's numbering,  
10 which is the third BT defence bundle in 080 tab 27.2.1 p.3.

11 Sir, the MNOs of course have also pointed to the fact that to the extent that there was any  
12 real world evidence BT's own real world expectations do weigh in the scale against BT.  
13 We do agree that it is not a jury point, but it was something that was referred to in the Final  
14 Determination (although it is not something to which particular weight was given). But it is  
15 right to take into account that at the time that it instituted the price changes it appears that  
16 BT's expectations were nothing like what its own experts now say on the theoretical  
17 analysis they should have been. They were completely at variance. We will say, and this  
18 may be a matter for witnesses, that BT clearly anticipated substantial extra revenue and  
19 profits as a result of this change. They wanted to share in the profits. There may be nothing  
20 wrong with that but it is certainly not the case that is now put to the Tribunal.

21 The case that is put to the Tribunal has to be assessed on its own merits, and it is absolutely  
22 not the case that this is an investigation of motivation at the time. If there is an ex post facto  
23 justification, we fully accept and address the Final Determinations on the basis that it must  
24 be looked at on its merits. But it is right that looking on its merits at abstract theoretical  
25 predictions for the future, one straw that one can grasp at is BT's actual contemporaneous  
26 expectation of what it would do.

27 Sir, we also would accept that there is some justice in the MNOs' complaints that this  
28 overall complexity is the fault of BT's. Vodafone, for example, points out at para.32 of its  
29 skeleton that it would have been very easy for BT to have designed the ladder priced  
30 wholesale tariff schedule with absolutely obvious effects. Whether it would have been a  
31 beneficial one and would have passed a welfare analysis is another matter. One could have  
32 simply designed it with a gradient at a scale that made it absolutely unambiguous that the  
33 economically sensible course for the MNOs was to reduce prices. That is certainly not this  
34 case. The effect is anything but obvious.

1 What is instead required to assess the impact of the change is what I think O2 described as  
2 an extraordinarily complex welfare assessment. Indeed, Professor Dobbs himself concedes  
3 that the assessment of the overall welfare impact is, as he puts it, far from straightforward.  
4 Indeed, he said that in his seventh attempt at that assessment in Dobbs 7 para.144.

5 Sir, this is a point I made yesterday afternoon, against that background it is hardly  
6 surprising that some of Ofcom's conclusions were not expressed in decisive terms; they  
7 were expressed in shades of grey rather than in decisive terms, and they were expressed in  
8 directional terms rather than in quantitative terms. We say that there can certainly be no  
9 criticisms on transparency terms of that approach and that outcome.

10 I will come back to the specific transparency points made by Mr. Read somewhat later. But  
11 in circumstances where there are significant, and we say radical, uncertainties in both the  
12 assessment of the likely size of the price fall and then subsequently on the welfare  
13 assessment, it is not inappropriate, we say, for Ofcom to have taken the approach that it did.  
14 In any event, Ofcom did conclude in the 0845 case first that it was persuaded that there was  
15 a direct effect in the first place. It was persuaded, in other words, that prices were likely to  
16 fall but it was uncertain as to the size of the likely reduction in prices. Particularly, it could  
17 not be satisfied that prices would fall to the lowest depth. It could not be sufficiently  
18 satisfied to proceed on that basis and to do the welfare analysis on that basis.

19 Mr. Read, on Monday, submitted (transcript day one p.57 line 25) that Ofcom should have  
20 identified the most likely level to which it thought prices would fall and should have  
21 conducted the welfare analysis at that level, whatever it was. We say that in Ofcom's  
22 findings that simply was not a feasible approach that it could or should have taken. BT's  
23 economic model purports to predict a fall to the lowest rung, at least in those circumstances.  
24 This is not a case where Ofcom had a different economic model that produced a different  
25 result and that it should have proceeded on that basis instead. This is a case where Ofcom  
26 was simply unpersuaded, and it was all the evidence, that BT's model was capable of giving  
27 a reliable or acceptable prediction. There were simply too many uncertainties to give a  
28 quantitative prediction of the level of prices that MNOs or any particular MNO because of  
29 course at this stage one cannot group them altogether, would be likely to set on which  
30 Ofcom sensibly could rely.

31 Ofcom did conclude that if it were right that the reduction were to the lowest step then when  
32 it reached the welfare analysis stage BT was right that overall one could make a judgment  
33 that the welfare effect overall was likely beneficial. Even with all the uncertainties one  
34 could reach a sensible conclusion to that effect so that Principle 2 would have been satisfied

1 but, importantly, it found that the overall welfare conclusion in a partial reduction scenario  
2 was too uncertain to make a finding that the welfare test was satisfied for the reasons I have  
3 mentioned. For that reason BT failed to demonstrate that the wholesale tariff schedule  
4 overall would be likely to bring about an effect that was overall beneficial.

5 I have already made the point BT not only criticise Ofcom for its uncertainty, but they  
6 suggested Ofcom in some way seized on or took refuge in uncertainty to avoid finding in  
7 their favour. It has been stressed that this does not involve an allegation of impropriety but  
8 I have some difficulty in seeing how the allegation is put. There seems to be a suggestion  
9 that there was some conscious decision not to simply go with the evidence and reach results  
10 but to operate on a different basis, to consciously choose uncertainty. In any event we say  
11 Ofcom's conclusions were wholly proper and were properly come to and whatever way it is  
12 put, whatever way the uncertainty point is put it simply does not hold good.

13 We do say that Ofcom was right not to attempt to express its conclusions with undue  
14 certainty, it did not attempt to take refuge in certainty if I can put it that way 'round, it  
15 frankly concluded, indeed, that the outcome on Principle 2 was finally balanced, that there  
16 was the possibility that consumers could benefit overall from NCCNs 985/986. Mr. Read,  
17 of course, leaps on that, of course, to say that if it was finely balanced it only needs a little  
18 push to get over the line and at that point he seems to display creditable deference to  
19 Ofcom's findings at that particular point. Of course, the Tribunal is effectively looking at  
20 the material again – indeed, it is not looking at the material it is looking at a huge swathe of  
21 fresh material again, and so while Ofcom's conclusion that it was finely balanced is in the  
22 mix and will be given no doubt due regard by the Tribunal I find it difficult to see how it  
23 can really be said that one starts off with finely balanced and takes it over the line because  
24 everything is up for grabs, but that is there so far as the Tribunal wish to give weight to it.  
25 Any suggestion that Ofcom was resolutely against BT is simply not the case, it changed its  
26 mind on important elements of the case when it was persuaded by BT – it changed its mind  
27 between the 080 case and the 0845 on the direct effect. It saw new evidence, it accepted  
28 that yes, the direct effect was now made out to some degree, there was going to be a  
29 reduction, it was different from the earlier stage. It also went the other way when it was  
30 persuaded the other way on Principle 3; new points were put up, new objections were taken  
31 and it was persuaded that there were certain elements of Principle 3 which meant that it  
32 could not be satisfied in the 0845 case.

33 The issue of uncertainty does, perhaps, add some significance to the issue which has arisen  
34 as to the burden of proof, and can I turn to that issue. I would suggest that burden of proof

1 issues are often relatively sterile but here BT does argue in terms – as Mr. Read did on  
2 Monday – that Ofcom erred, the burden should have been but was not placed upon the  
3 MNOs to justify the striking down of the NCCNs. As we understand it BT’s argument is  
4 that I had a contractual right to make the price changes, the SIA to which all the parties had  
5 subscribed gave BT the right to make the change, and it gave the MNOs no contractual  
6 recourse. This, say BT, distinguishes this case from the TRD core issues decision and the  
7 *dicta* that the onus lies on the party proposing the variation because in the TRD appeal the  
8 contractual structure was different although there was a contractual right to initiate a change  
9 there was also a contractual right to object and so there was effectively, as it were, a  
10 deadlock until the dispute was referred to Ofcom and the price was determined by Ofcom in  
11 its dispute resolution role. We accept that there is that distinction in the first place between  
12 the two cases. So we say that the burden in this case simply cannot be determined  
13 mechanistically by virtue of a contractual analysis as to entitlement, although we also say  
14 you should not automatically simply follow the *dicta* in TRD, the issue runs rather deeper  
15 than that. The reason BT’s contractual analysis is unhelpful is that its contractual rights  
16 were always agreed and known to be subject to BT’s dispute resolution procedure. It was  
17 not even simply known about in the background, it wasn’t just simply the basis as one of the  
18 MNOs said on which they would have been prepared to agree the SIA, that was true, but it  
19 was actually, as you have seen, when you looked at the SIA during Miss Smith’s  
20 submissions it was actually woven into the SIA itself, the dispute resolution role of Ofcom  
21 and the right to refer to Ofcom. It is true it was not referred where there was a deadlock, it  
22 was referred where there was a change that was not liked, but it was clearly woven in and  
23 the whole commercial understanding of the parties was that, yes, there is a complete right  
24 on BT to make whatever change it wants, but do not worry, if you do not like it you can go  
25 to Ofcom on the dispute resolution ----

26 THE CHAIRMAN: We saw that in the contemporary documents as well where BT clearly  
27 expected that there could be ----

28 MR. HERBERG: So you did.

29 THE CHAIRMAN: -- an Ofcom involvement if there was a dispute referred.

30 MR. HERBERG: Precisely. That we say has a significant effect. It is not right to view this case  
31 as an unfettered right to make pricing changes, and even Mr. Kilburn recognises this – it is  
32 Kilburn 3 para. 15 – I do not need to take you to it, bundle C1, tab 19, he says in the last  
33 sentence of that paragraph:

1 “The framework for the relationship with all CPs would look rather different if  
2 such a dispute resolution procedure did not exist.”

3 There is an implicit acceptance that the form of the contract was very much determined by  
4 the fact of the dispute resolution procedure. As you say, sir, the commercial reality was that  
5 BT could only change prices subject to the dispute resolution procedure if anyone objected.

6 THE CHAIRMAN: The problem, and no doubt you will be coming to this, is it begs the question  
7 of what the dispute resolution procedure can do when a dispute has been referred up.

8 MR. HERBERG: That raises the question of jurisdiction and it might be convenient for me to  
9 deal with that precisely at this stage. Before I do that I am going to go slightly blind here  
10 but I am told that this is something that is very important that you do see because it deals  
11 expressly with this point. The authority of *Orange* which is at authorities bundle 2, tab 26.  
12 This is the case of *Orange v Ofcom* and the point is that precisely the same argument in  
13 relation to the SIA was here made and was considered in the CAT by a Panel including Mr.  
14 Clayton I see, who may remember the case.

15 There was an argument here by Orange that the terms of the SIA meant effectively that  
16 there was no risk to interconnection, no power to decide, and the argument is put at para. 53  
17 if I can just read that to you:

18 “Turning to the facts of the present case, orange submits that in the current dispute  
19 there was no risk to continued interconnection. It is clear from the terms of the  
20 SIA that Orange’s rejection of the BT OCCN served on 19 July 2006 did not put  
21 interconnection at risk. Rather it is accepted on all sides that the effect of the  
22 rejection of an OCCN is simply that the contract continues in accordance with the  
23 terms that applied before the OCCN was served. Orange submits that it is not  
24 credible to suggest that there was a serious risk that BT would seek to terminate  
25 the agreement because it was unhappy with Orange’s rejection of the OCCN. The  
26 right to terminate is, in any event, according to clause 2 of the SIA, subject to a  
27 two year termination period.”

28 Pausing there, I am perhaps slightly anticipating where I am just coming to which is going  
29 to be the question you raise which is the nature of Ofcom’s role, because that is going to be  
30 informed by the Access Directive and indeed the risk to interconnection with which this  
31 paragraph is concerned.

32 Sir, the important point is that this argument is then rejected by the Tribunal. I will give  
33 you the paragraphs in which it is rejected – it is quite a long passage – and then take you  
34 back to my argument on jurisdiction because it ties in with that. Paragraphs 67 to 80 give

1 the reasoning of the Tribunal as to why it rejects the argument that effectively there is no  
2 risk of interconnection and therefore, as it were, Ofcom's engagement with its powers is  
3 conceived.

4 Sir, the question you rightly asked me was Ofcom's dispute resolution role woven into the  
5 SIA and that begs the question of what Ofcom's role is. Sir, I have not got any revelation  
6 on this subject. Miss Smith did, we say, take you in the right direction to the right places,  
7 but it might help if I set out the steps from Ofcom's point of view as to how analyses the  
8 powers. One does, of course, start with the Directives before one comes to the operative  
9 provisions in the Communications Act. Sir, we say the starting position is the Framework  
10 Directive, Article 8, which is AB1, tab 8. Article 8 is on p.10 in that bundle. We start off  
11 with the policy objectives and regulatory principles. One sees in Article 8.1:

12 "Member States shall ensure that in carrying out the regulatory tasks specified in  
13 this Directive and the Specific Directives, the national regulatory authorities take  
14 all reasonable measures which are aimed at achieving the objectives set out in  
15 paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.  
16 Member States shall ensure that in carrying out the regulatory tasks specified in  
17 this Directive and the Specific Directives, in particular those designed to ensure  
18 effective competition, national regulatory authorities take the utmost account of the  
19 desirability of making regulations technologically neutral ..."

20 and so forth. The para.2 to 4 objectives I do not need to take you to, you will be well  
21 familiar with them. They are of the widest and include all Ofcom's main policy objectives.  
22 Sir, this therefore informs all the Specific Directives, and in particular informs the Access  
23 Directive which is relevant for present purposes.

24 THE CHAIRMAN: When you say they are quite wide, they are obviously in one sense quite  
25 wide, but is there an objective which homes in specifically on price? 2(a) is terms of  
26 choice, price and quality.

27 MR. HERBERG: It is:

28 "... ensuring that users, including disabled users, derive maximum benefit in terms  
29 of choice, price, and quality ..."

30 That is the price and that is as wide as possible, all users. It is "maximum benefits", which  
31 does not necessarily mean lowest. That, we would say, is importing some form of welfare  
32 type of standard. It is phrased in wide terms. It is not saying the cheapest possible price, or  
33 anything like. It is saying maximum benefit in terms of price.

1 THE CHAIRMAN: I see there is a wide discretionary element, if one may call it that, in 2(a).  
2 You would be going so far as to say that in an appropriate case one can take a view as to  
3 what the price would be – in other words, as Miss Smith was suggesting yesterday, there  
4 might be a principle that price ought to be oriented to cost, and for that reason ladder pricing  
5 is not to be contemplated simply because it is *ex hypothesi*, not ----

6 MR. HERBERG: We do not shrink from that. Ofcom's dispute resolutions are frequently,  
7 centrally, concerned with price, and what price should be, and there are frequent debates –  
8 and I will take you at least one previous case shortly as to whether it is appropriate to make  
9 them termination cost based, and the 0870 Determination was one that you were referred to  
10 yesterday by Miss Smith, or by reference to other principles, or by an infusion of both,  
11 typically. There are clearly, as it were, policy issues, in that sense, which arise as to the  
12 basis on which Ofcom ought to intervene and how to do it. Those are all the sorts of  
13 considerations that even the Framework Directive, the very highest level of regulation,  
14 contemplates, and which are then, we say, borne out when one looks at the more specific  
15 duties on Ofcom. So, yes, sir, we do say that there is no getting away from it, in the mix in  
16 Ofcom's general duties as NRA and which plays all the way down into its dispute  
17 resolution function, we say there are wide considerations and it is not possible to see  
18 Ofcom's role as a much more limited one.

19 THE CHAIRMAN: Again, even in Article 8 there is a question that is to beg, is there not?  
20 Article 8.1 is referring to carrying out regulatory tasks specified in this Directive.

21 MR. HERBERG: And in the Specific Directives.

22 THE CHAIRMAN: Sure, and no doubt we will come to that in due course.

23 MR. HERBERG: Indeed, sir.

24 THE CHAIRMAN: One needs to have a task, one of which clearly is dispute resolution, but as  
25 part of that task, dispute resolution, it has got to include an ability to take into account  
26 factors other than strict rights and obligations of the parties to the dispute before these  
27 factors can come into play. I fully accept that if there is a power in Ofcom to take into  
28 account such other factors beyond the rights and obligations of the parties, then that power  
29 will be informed by these Article 8 objectives.

30 MR. HERBERG: Sir, we say that that power is integrally woven into the whole of the scheme. If  
31 you were looking for the comfort of a provision that says, "In determining disputes Ofcom  
32 can go beyond the contractual rights of the parties", you will not find it in those terms,  
33 because it is woven into the whole scheme of regulation and Ofcom's dispute resolution  
34 role is the obligation to take into account, for example, in its dispute resolution role, its s.3

1 and 4 duties. Those are very wide and are completely incompatible with the type of duties  
2 which would be required of someone sitting in an arbitral role and simply deciding on  
3 contractual rights. The intermediate step is that one starts with a Framework Directive, and  
4 I am now going to take you to a Specific Directive, the Interconnection Directive, which  
5 focuses on the role which Ofcom is playing in this case. This case, although it is a dispute  
6 resolution about price, what is lying behind it is the regulatory concern that one cannot be  
7 left with a situation where there is no interconnection because the parties cannot agree about  
8 price. One cannot end up with a situation where Vodafone and O2 and others say, "This  
9 price has been unilaterally varied, we simply cannot provide the service at this price, we are  
10 no longer going to interconnect 08 calls". It is to avert that prospect that the policy gives  
11 Ofcom the role which goes far beyond the policy which one might as a ring-holder of other  
12 parties.

13 THE CHAIRMAN: I completely see the force in that. The difficulty I have is that it almost  
14 proves too much, in that it undermines the very clear distinction that one sees drawn in the  
15 2003 Act but drawn from the European common framework of the distinction between, for  
16 example, SMP conditions and general conditions, where in the former, obviously, price  
17 control is a key question, whereas in the latter, in the general conditions, it is something  
18 which is not supposed to happen.

19 MR. HERBERG: We say that price consideration simply cannot be kept out of individual  
20 disputes. Obviously one will take into account, in making price decisions in dispute  
21 resolution cases, the fact that SMP has not been found on one or any of the bodies in the  
22 case. Indeed, that something that Ofcom specifically referred to, although the MNOs have  
23 been rather pushing the fact that at earlier periods BT was found to have SMP in the  
24 relevant markets. Ofcom did not proceed on that basis, and we say it was right not to  
25 proceed on that basis. The fact that there is that recognition is an important one because it  
26 very much constrains what it may be appropriate on the facts to do in a dispute resolution  
27 case. How far we may be prepared to go, it goes into the analysis of what would happen to  
28 costs and suchlike, it would be infused into the case. But we do not say that a line can be  
29 drawn at keeping price considerations out of a dispute resolution case. If I may, I am going  
30 to take you back to the H3G case where that argument was put to the Tribunal and was  
31 rejected, and the Tribunal actually talked about: these are two parallel jurisdictions and it  
32 expressly made the point that price considerations (I will unpick a bit what price  
33 considerations are because there are questions of motive and effect which Miss Smith raised  
34 which I will come to) cannot be kept out of a dispute resolution case. Indeed, the

1 consequence, were one to try to do so, would be to put Ofcom in conflict with its own  
2 duties. In exercising its dispute resolution role, I am anticipating where I am coming to on  
3 the Act, it has to take into account its s.3 and 4 duties.

4 Its s.3 and 4 duties clearly require that it looks at the benefit to the consumer, some sort of  
5 welfare as part of the case. Price is clearly an important part of that welfare assessment. If  
6 one could not look at price, or was constrained on having a view as to the desirability of  
7 certain pricing results (which is nearer to what Miss Smith said) Ofcom would not be  
8 fulfilling its statutory duties. So there would be a direct conflict, we say, were some sort of  
9 division on that basis to try to be erected. I understand the point you are putting to me about  
10 the danger of restrictions on price control and all the safeguards attendant on price control  
11 being swept out of the way under cover of dispute resolution, but we say that that is not  
12 what is happening in a case like the present. It is a very long way away from that sort of  
13 scenario.

14 Sir, can I continue with the hierarchy.

15 THE CHAIRMAN: Yes, please do. Just one thought, which I will plant the seed for. It may be  
16 that the way of squaring the circle is to say that a certain degree of weight, not inexorable  
17 weight as it were, needs to be attached to the terms of the particular contract that exists as a  
18 factor for the regulator to consider. Not decisive but of importance.

19 MR. HERBERG: Sir, the difficulty with that in a case like the present is that the term of the  
20 contract we are dealing with is one giving BT absolute discretion as to what prices it sets.  
21 That only existed because of the fact that the dispute resolution was woven into the  
22 commercial agreement between the parties. It is very difficult to see how one gives  
23 particular weight to that feature. In a way, that pushes in favour of giving BT a lot of extra  
24 weight. It is the MNOs who are raising the argument to some extent of saying it is wrong to  
25 have pricing consequences for us. In a way, giving weight to the contract will push it  
26 further away from the MNOs.

27 THE CHAIRMAN: I quite take your point that the reason this has become a difficult issue is  
28 because EE squarely suggests a different approach should be taken. That immediately  
29 raises the question of how to articulate the criteria for determining what approaches are  
30 right and what approaches are wrong. If it were just BT and Ofcom in the ring then there is  
31 clearly a substantial measure of agreement as to the correct approach and the debate is  
32 whether it has been correctly applied.

33 MR. HERBERG: Yes. What might be said is that it does not particularly lie with EE and O2 to  
34 complain that BT's decision is going to have an effect on their retail prices, and indeed that

1 the regulator is taking into account that effect and actually considering what is good and bad  
2 about that effect when they have subscribed to an agreement that gives BT very wide  
3 powers. Let me put it another way. They subscribed to an agreement that gives BT wide  
4 powers, leaving only recourse to Ofcom's dispute resolution procedure which, as they  
5 know, enables it to take into account very wide matters including pricing. They have put  
6 themselves in a position by agreeing to the agreement to a situation where they are subject  
7 to (1) BT putting up the price; and (2) Ofcom and then the Tribunal on appeal considering  
8 issues which will include issues as to desirable prices, including desirable retail prices.

9 THE CHAIRMAN: Clearly, it is a difficult argument to support, to suggest that BT can do  
10 whatever it likes pursuant to Clause 12, and it may be that an answer is that there is some  
11 yet to be articulated implied limitation on Clause 12. Let me put to you a slightly more  
12 specific example to test your argument regarding dispute resolution.  
13 Suppose I have a provision for the adjustment of termination charges by reference to some  
14 kind of inflationary measures. I will take that as an example. There was a dispute between  
15 the parties to the agreement as to how that measure operated. One party was saying you  
16 look at X figure and the other party was saying you look at Y figure. They cannot agree and  
17 they say: there is a dispute, off it goes to Ofcom. Would you say that it was a permissible  
18 course for Ofcom to say: we are going to look at the relevant test for the inflationary uplift,  
19 but I can look at all the other factors and perhaps impose an altogether different form of  
20 solution on the parties, ignore the terms of this very specific provision of the contract?

21 MR. HERBERG: Sir, I am happy to respond to that. Can I just take instructions so that I can see  
22 that my response squares with that of those behind me.

23 THE CHAIRMAN: By all means. (Pause) Mr. Herberg, before you give your answer, I am very  
24 happy to hear your answer in closing rather than now.

25 MR. HERBERG: Happily, the answer that occurred to me was the answer which occurred to  
26 those behind me! Can I give the pith of it now, and if it needs to be elaborated on or  
27 modified later I will do so. Sir, the answer is that of course Ofcom, and therefore of course  
28 the Tribunal, would give weight (and it might be substantial weight) where there was a  
29 specific dispute like that, to the commercial intentions of the parties. It would be promoting  
30 Ofcom's overall duties to as far as possible assist commercial certainty and to insist that the  
31 bargains of the parties were given weight. But one only has to think that one can have a  
32 bargain which is anti competitive between two parties who are colluding to that, to see that  
33 it would not necessarily be bound by what the parties had decided was going to be the way  
34 they would price.

1 But in a particular case, and particularly the example you have given to me, where you have  
2 a specific and presumptively unobjectionable way of deciding, one would expect that  
3 Ofcom, and one would have expected the Tribunal, would want to give very special weight  
4 to the parties' expectations as a matter to take into account in deciding what to do, most  
5 obviously because there has to be good reason for upsetting commercial certainty and the  
6 expectations of the players in the market.

7 So, sir, yes, weight would transfer to them. One would therefore, in an appropriate case,  
8 have that certainty. But it is precisely because this is a case so far at variance from that -  
9 not simply because we are dealing with a term which gives BT untold powers but because I  
10 suppose that is not the case. One cannot see it in that way. I come back to the submission  
11 one sees it with Ofcom's dispute resolution procedure being an important part of the mix.

12 THE CHAIRMAN: Yes. It may well be that the correct approach is to look at Clause 12 as being  
13 subject to a clear implied limitation being Ofcom's regulatory jurisdiction

14 MR. HERBERG: Sir, yes indeed, and of course 26 and Clause 12 effectively do that in terms.

15 Sir, it may be that these are very significant matters which you are absolutely rightly  
16 raising. It may be that we will want to consider and refine that in closing. It is clearly a  
17 matter that we want to make sure we have given full submissions on.

18 THE CHAIRMAN: No, that is me on the hoof for Ofcom.

19 MR. HERBERG: Sir, yes, but I hope that, at this stage, is a sufficient answer as to the way in  
20 which we view the position. Sir, just to complete, I think effectively you have anticipated  
21 and you already have the rest of the framework, but just to make the point: one then has the  
22 access Directive at tab 6 of the bundle. Perhaps I can just briefly take you to look at the  
23 relevant parts of this. The dispute resolution is all under the access Directive and it is all  
24 informed by the importance of ensuring access and interconnection. One sees of particular  
25 relevance Recital 6 on the second of 14 pages:

26 "In markets where there continue to be large differences in negotiating power  
27 between undertakings ..."

28 Pausing there, that is not just talking about SMP, that is talking about perhaps the sort of  
29 situation we have here where one has an incumbent BT which still has generally and under  
30 the SIA in particular obviously very significant negotiating power.

31 "... and where some undertakings rely on infrastructure provided by others for  
32 delivery of their services, it is appropriate to establish a framework to ensure that  
33 the market functions effectively. National regulatory authorities should have the  
34 power to secure, where commercial negotiation fails, adequate access and

1 interconnection and interoperability of services to end-users. In particular, they  
2 may ensure end-to-end connectivity by imposing proportionate obligations on  
3 undertakings that control access to end-users.”

4 You will of course see where commercial negotiations fail, but again we say you cannot  
5 rely on a simple contractual point that BT has the right to do it, this is not the way this is  
6 operated.

7 Then one has Articles 5(1) and 6(4) which I think Miss Smith took you to yesterday  
8 anyway. These are powers and responsibilities of the NRA with regard to access and  
9 interconnection. At 5(1) they have to act in pursuit of the objectives set out in Article 8.  
10 They have to encourage and, where appropriate, ensure in accordance with the provisions of  
11 the Directive adequate access and interconnection and interoperability, exercising  
12 responsibility in a way that promotes efficiencies, sustainable competition and gives  
13 maximum benefit to end users. Then (4):

14 “With regard to access and interconnection Member States shall ensure that the  
15 NRA is empowered to intervene at its own initiative where justified or, in the  
16 absence of agreement between undertakings at the request of either of the parties  
17 involved, in order to secure the policy objectives of Article 8 ...”

18 - that is the Framework Directive to which I have just taken you –

19 “in accordance with the provisions of this Directive and the procedures referred to  
20 in Articles 6 and 7, 20 and 21.”

21 That links back to Article 8 of the Framework Directive, and it is making it clear that it is  
22 the objective of ensuring access and interconnection and, of course, continued  
23 interconnection requires that the NRA has this power to intervene and indeed overturn  
24 initiative or where the parties cannot agree, and that is the forum, and that is what is  
25 effectively being implemented by the dispute resolution procedure in the 2003 Act.

26 What one then has is the 2003 Act itself (tab 3), and Miss Smith took you to s.185(1)(a),  
27 which is what disputes can be referred to Ofcom, and it clearly includes this category, and  
28 then most importantly s.190(2), resolution of disputes which have been referred and here we  
29 have Ofcom’s powers and the powers are at their widest, particularly (2)(b)

30 “to give a direction imposing an obligation, enforceable by the parties to the  
31 dispute to enter into a transaction between themselves on the terms and conditions  
32 fixed by Ofcom.”

33 THE CHAIRMAN: That was (b).

34 MR. HERBERG: I am sorry, that was (c), I should have read (b):

1 “to give a direction fixing the terms or conditions of transactions between the  
2 parties to the dispute ...”

3 Now, a dispute may arise as to terms and conditions and Ofcom can fix terms and  
4 conditions. It clearly can go beyond the contract and it can, as it were, impose terms and  
5 conditions which derive from the outside. It is clearly not adjudicating on what the terms  
6 and conditions are, and that is the crucial point. That is informed, we will read that by a  
7 natural reading, but informed by the duties which are being implemented one quite clearly  
8 gets there.

9 Finally, in terms of the Act, what of course is relevant, and I have already made this point, is  
10 s.190 has to be exercised in conformity with the s.3 and 4 duties, and indeed, I will not take  
11 you through all those duties again because you are very familiar with them, but it is notable  
12 that s.4(1)(c): “This section applies to the following functions of Ofcom, their functions  
13 under Chapter 3 of Part 2 in relation to disputes referred to them under s.185”, and the sorts  
14 of duties which are being set out under 3 and 4 – I have made the point already – are not the  
15 sort of duties that are compatible with simply an adjudicative function, it is clearly going  
16 well beyond that in terms of the factors that have to be taken into account, and the  
17 objectives which have to be secured.

18 We say therefore Ofcom is entitled, indeed obliged to decide disputes in accordance with its  
19 own, not only statutory duties in connection with 3 and 4 but the working out of those duties  
20 in relation to its own policy preferences. That does not mean policy preferences will be  
21 blindly followed, and in the situation which you posited to me, sir, the specific dispute as to  
22 the meaning of a specific contractual term it might well be that it would not be appropriate  
23 for Ofcom to ditch what either of the parties thought the term meant, and just go for a  
24 completely different policy objective, it might be entirely inappropriate, but it is relevant  
25 that where it is appropriate Ofcom should have regard to its policy preferences in reaching  
26 its decisions.

27 Against that background can I come back to the burden question? We say in a case such as  
28 this Ofcom was justified in proceeding on the basis that it needed to be satisfied as to the  
29 benefit of the charges which BT was proposing through its contractual entitlement to make,  
30 or was making through its contractual entitlement and it was entitled to proceed in that way  
31 from the simple fact that it was BT which was making a substantial and novel change to the  
32 status quo in terms of amount of charges and more fundamentally in terms of charging  
33 principles. It does not flow from the contractual position because that is effectively moot,  
34 we say. It does not follow from anything other than the real world situation with which

1 Ofcom was faced. It was BT that was asserting that this substantial change would be  
2 welfare beneficial and, indeed, that it advanced Ofcom's policy objectives compared to the  
3 status quo, that was the whole nature of its case. This is better than the status quo that  
4 existed before. It was not therefore unreasonable for Ofcom to proceed on the basis that it  
5 needed to be satisfied, not to a high level of proof or to an unreasonably high demanding  
6 standard but it needed to be overall satisfied that consumers would not be worse off as a  
7 result of the change. It had to compare what was being proposed to what was in force at the  
8 time. Since a radical change was being instituted by BT Ofcom was entitled to proceed on  
9 the basis that it had to be satisfied as to the effects of that radical change. BT's suggestion  
10 is that because of its contractual rights it had effectively already made the change as it was  
11 put at one stage and it was the MNOs who really must be considered to be the ones seeking  
12 variation of the change that BT had already made, but we say that is a formulistic point and,  
13 with respect, is the height of unreality to put it in that way. BT's own case did not analyse  
14 the situation on the basis of a change back from its charging schedule to what had gone  
15 before. It did not put the matter that way around, in fact it is impossible to conceive the  
16 case on that basis. If one just thinks for the moment on the basis of Principle 3, how on  
17 earth would one analyse Principle 3 in terms of starting off with BT's new charging  
18 schedule and then looking at the reasonable practicality of moving back to the old charges.  
19 It would be a completely different exercise and an entirely hypothetical one in  
20 circumstances where the change had not actually taken place in real world terms.

21 THE CHAIRMAN: Can I put perhaps a variant of BT's point, which is this: putting the burden of  
22 proof on BT attaches no weight to a discretion that – on one reading at least – undoubtedly  
23 exists under clause 12. It may well be that that discretion is fettered, but could it not be said  
24 that clause 12 gives a margin of appreciation, as it were, to BT which the regulator ought to  
25 give at least some respect to?

26 MR. HERBERG: I see the point but we do say that that would be a wrong reading of clause 12.  
27 It looks at clause 12 alone and does not look at the entire contractual position between the  
28 parties. One has to look at clause 12 with clause 26 and with the dispute resolution  
29 procedure shot through. The other way that these contracts are often designed is that BT  
30 has an unfettered right ....

31 The other way that these contracts are often designed is that BT has an unfettered right to  
32 make the change and then the other party has an unfettered right to object and then there is  
33 deadlock and then you go to Ofcom. Our proposition is that this, as a matter of commercial  
34 reality, is not really different from that situation and therefore from the H3G situation.

1 What you have is BT making the change and then the other parties are able to refer it to  
2 Ofcom. So there is no magical significance in what appears to be an unfettered contractual  
3 right to BT.

4 THE CHAIRMAN: So your answer to my point is that if there were a genuine discretion then  
5 that is something that you would give weight to, but in this case there is not?

6 MR. HERBERG: Sir, yes, I think it must follow from the fact that, as I accepted a few minutes  
7 ago, the contractual intentions of the parties are a relevant matter. That must follow. If  
8 both parties had agreed on a particular form of termination, then of course it would be  
9 relevant and that would be given weight by Ofcom. If the parties have genuinely chosen to  
10 arrive at a situation where BT does have unfettered powers, subject only to some control,  
11 then that might be something that would be relevant to take into account. I do rely on the  
12 fact that that is a wrong analysis of this contractual position between them, rather than  
13 saying that in principle it is not a factor which could be relevant on that hypothesis.

14 Sir, Mr. Read attempts to add force to his argument by appealing to the principle of  
15 proportionality. We had relatively lengthy submissions on proportionality, but effectively  
16 he submitted at the end of that section that they all went to burden of proof. That was the  
17 very last thing he said on proportionality.

18 We say proportionality effectively takes the matter no further forward because it begs the  
19 question. If one looks at this as a change which BT was entitled to make then of course it is  
20 more right to look at it in terms of the proportionality of interfering with BT's contractual  
21 rights, but that simply begs the question about whether it is right to look at the change in  
22 that way. We say that really proportionality here is proportionality between the parties. It  
23 begs the question of who is initiating a change from what status quo.

24 We also do not say that it should be viewed as the MNOs having the status quo, and  
25 therefore is it proportionate to move from the status quo? We say it does not assist on either  
26 route.

27 Sir, there is one other thing which I do wish to emphasise on the burden of proof. I  
28 prefaced it, I think, by saying the burden of proof can be sterile. We do say that although  
29 this is a case of uncertainty, not actually that much should hang on the burden of proof in  
30 the ultimate analysis. In some cases, in particular where there is a binary question – either  
31 something happened or did not happen – and it is finally balanced, the burden of proof may  
32 be absolutely crucial because it will mean that one party or other wins or loses because no  
33 more evidence can be found. We say that in a case like this where we are talking about  
34 deep rooted multiple uncertainties on something which is very significant, even if the

1 former burden was, in fact, on the MNOs it would be a burden to show that the price  
2 changes were sufficiently uncertain such as they should not go ahead. That would be  
3 unlikely to lead to a different result. This was not a case where it was hanging exactly at  
4 50 per cent as to whether the changes were too uncertain and that changing the burden  
5 would push it over the line. That is not a correct characterisation of the dispute. This is a  
6 case where there was, as it were, ultimately radical uncertainty. Even if it was for the  
7 MNOs to show that there was uncertainty, rather than for BT to show that there was not that  
8 uncertainty, the case does not resolve itself on burden of proof questions.

9 If one analyses it differently, if Mr. Read's submission is that actually there was a  
10 substantive burden on the MNOs to show what would happen in this case, that something  
11 bad can be proved to flow from the changes, we say that that would lead to an obvious and  
12 very dangerous incentive on BT, or on any party in the position of BT, to make a scheme  
13 with the changes as complex and as difficult to analyse as possible. It sounds silly, but it is  
14 actually a very serious point, sir. If one devises a scheme which is sufficiently obscure and  
15 impossible to analyse and impossible to be certain about what its effects will be, and the  
16 burden of proof is not on you to justify that scheme, one sets up a very dangerous situation.  
17 Sir, can I move away from burden to, much more shortly, another aspect of the Tribunal's  
18 approach. That is the Tribunal's approach with regard to Ofcom's decision and the weight  
19 or lack of weight which it ought to attribute to it. As I understand it, it is common ground  
20 that it is for whoever the burden lies on to demonstrate that Ofcom has made an error of fact  
21 or law or has made a wrong exercise of discretion in coming to its determination. That  
22 remains the position after the judgment of the Court of Appeal in this case.

23 Sir, against that background, we are a little puzzled at Mr. Read's attack in opening on  
24 paras.8 to 11 of our skeleton as to the intensity of review. We did not think that the  
25 propositions that we there set out were particularly controversial and we say they were  
26 certainly were not addressed or contradicted by the Court of Appeal in this case. The Court  
27 of Appeal really said nothing and was not considering the intensity of review.

28 It may be that it is my fault for the authorities which I cited. I should make absolutely plain  
29 that I am not seeking to import some foreign standard from the CPRs or even needing to  
30 rely on Lord Justice Jacob's *dicta* to which Mr. Read so objected. It should be in argument  
31 as to what the status of his remarks continues to be in the light of the Court of Appeal  
32 decision, and it may be that we would disagree with Mr. Read as to the reasons why they  
33 were not following them in that case. That can await another day.

1 Sir, it is perhaps significant, you may note that the authority that we cite in para.10 of our  
2 skeleton – I do not know whether you have got my skeleton to hand. I think it is in bundle  
3 B2 at tab 18. I hope I can deal with this very shortly. At para.10, p.4, you will see that the  
4 very authority which we relied upon suggesting that “according ‘appropriate respect’  
5 involves the Tribunal being slower to overturn a decision” is *Vodafone v. Ofcom* in the  
6 CAT, which is precisely the case that my learned friend was taking you to. Sir, can I take  
7 you back to it very briefly. It is the only case I think I need to show you on this. It is  
8 authorities bundle 3, tab 31. Can I go straight to para.46. Mr. Read took you to this part of  
9 the judgment dealing with intensity of review. In particular, he took you to the last part of  
10 para.46 and emphasised, and we fully accept this, that it is incumbent on Ofcom to conduct  
11 its case with care and to ensure that it can withstand the profound and rigorous scrutiny that  
12 the Tribunal will apply on an appeal under the merits. We fully accept that.

13 We do also draw attention to the first part of the paragraph:

14 “As noted by the Tribunal on numerous occasions (see, for example,  
15 *Freeserve.com plc v. Director General of Telecommunications*, the way in  
16 which the Tribunal exercises its jurisdiction is likely to be affected by the  
17 particular circumstances under consideration. What the above judgments  
18 clearly demonstrate is that the Tribunal may, depending on particular  
19 circumstances, be slower to overturn certain decisions where, as here, there may  
20 be a number of different approaches which Ofcom could reasonably adopt.”

21 Sir, that is effectively the point. Of course, before one even gets there one has to be  
22 satisfied that the methodology is appropriate, there is no error of fact or law, but where there  
23 are a number of different possible approaches which Ofcom could reasonably adopt, even if  
24 the Tribunal might, with a completely open choice, plump for a different one it gives some  
25 weight to Ofcom’s approach, to Ofcom’s choice of decision.

26 THE CHAIRMAN: It seemed to me that this was an issue of considerable moment in the debate  
27 that you have with EE. Let me put this to you. Suppose EE has got two alternative  
28 approaches. There is the Ofcom three principles approach and there is the EE price should  
29 be oriented to costs approach, if I can articulate it in that shorthand way. Let us suppose  
30 that we were of the view that both were reasonable approaches but that one was a little bit  
31 better than the other, and as it happened, we thought that EE’s was better than Ofcom’s. In  
32 that context presumably you would say if there are both reasonable approaches then  
33 Ofcom’s decision to plump for its course ought to be respected by the Tribunal. And even

1 if we took the view that the alternative was marginally better, nevertheless we ought to  
2 accord respect to the regulator's decision there.

3 MR. HERBERG: Sir, we would say that. Under that banner of that dispute, EE make a number  
4 of submissions about how Ofcom respectfully have gone wrong on matters of law in some  
5 of its approach. But provided that you had rejected those submissions and were satisfied  
6 that there was nothing within that, so it genuinely came down to a matter of free choice for  
7 Ofcom effectively as to which it could have adopted, then we say at that stage yes, you have  
8 regard to that; you also have regard to the policy preferences of Ofcom which do inform  
9 that choice.

10 Sir, another area where it is particularly relevant is there are a number of arguments made  
11 by both BT and EE where they say that the weight was wrong. Ofcom did not give enough  
12 weight or gave too much weight. Without more, that is a classic argument where there may  
13 be a range of precise weights which can be given to a particular factor and if the Tribunal  
14 thinks that Ofcom's weight is a reasonable approach (you might have done things a bit  
15 differently but this is a reasonable approach) you can say yes, someone could give that  
16 weight, there is the policy preference and the reasoning makes sense and there is no actual  
17 error of fact or law, then that is classically a situation where the Tribunal should perhaps be  
18 slow to overturn.

19 THE CHAIRMAN: It is that third class of appealable ground: discretion on fact or law.

20 MR. HERBERG: Precisely, sir.

21 PROFESSOR STONEMAN: Can I chip in there, as a non lawyer. Picking up the statement from  
22 the Court of Appeal decision, something that struck me was they say that the CAT should  
23 decide the case on the merits, not the merits of the Ofcom judgment. There is quite a  
24 difference there in that you are saying that we should be looking at the merits of the Ofcom  
25 judgment: is it reasonable, is it proportionate, have they done anything undesirable? That is  
26 not what the Court of Appeal said we should be doing. The Court of Appeal says we should  
27 be deciding it on the merits of the case: although you may have done a very good job, we  
28 just think you came to the wrong answer.

29 MR. HERBERG: Sir, have you got the paragraph?

30 PROFESSOR STONEMAN: No.

31 MR. HERBERG: The way you characterised my submission as to what your role is I think takes  
32 it too far. That almost sounds like a judicial review court. I am not trying to resurrect an  
33 argument I never made. I certainly do not suggest that this is anything like a judicial review  
34 jurisdiction. I do not think that the paragraph from Vodafone and Ofcom which I have cited

1 either goes anything like that far. This is simply positing that when the Tribunal is deciding  
2 the case on the merits it is still looking for errors of fact, law, errors of discretion. Although  
3 it is you deciding it on the merits, you in doing so are entitled to give some weight in that  
4 process to the fact that Ofcom has come to a particular view, and that it has reasonably  
5 come to that view, even if it is not necessarily the view to which you would have come  
6 yourself if you were in Ofcom's position deciding the case for the first time. The question  
7 is: is there something sufficiently wrong to lead you to say this is a wrong exercise of  
8 discretion, or is it within a band which is correct?

9 THE CHAIRMAN: I think it is para.60 that Professor Stoneman, tab 45 of the Court of Appeal's  
10 judgment.

11 MR. HERBERG: Sir, yes, the merits of the case is picking up the framework Directive.

12 "Nothing in Article 4 confines the function of the appeal body to the judgment of  
13 the merits as they appeared at the time of the decision under appeal. The  
14 expression 'merits of the case' is not synonymous with the merits of the decision  
15 of the national regulatory authority. The omission from Article 4 of words  
16 limiting the material which the appeal body may consider is unsurprising. When  
17 an appeal body is given responsibility for considering the merits of the case, it is  
18 not typically limited to considering the material which was available at the  
19 moment when the decision was made. There may be powerful reasons why an  
20 appeal body should decline to admit fresh evidence which was available at the  
21 time of the original decision to the party seeking to rely on it at the appeal stage,  
22 but that is a different matter."

23 Just pausing there, that last sentence is quite significant. What this case is not doing is  
24 saying is this is a completely de novo hearing. This is still an appeal rather than a de novo  
25 hearing. There are other regulatory bodies such as the Financial Services and Markets  
26 Tribunal, for example, which determines the case entirely from the beginning when it hears  
27 a case; it is a de novo appeal and places no weight at all by statute on the body below. But  
28 that is not the situation here. The Court of Appeal is recognising that and saying there may  
29 be powerful reasons why you should decline to admit new material. If it was de novo why  
30 on earth not let all the new material in? But it is still emphasising that there is a matter of  
31 discretion there, not framed in the way in which I submitted to you some many months ago.  
32 It is framed in a different way, I wholly accept.

33 I do not think that anything in my submissions is in any way seeking to go behind the Court  
34 of Appeal (which was not actually looking at intensity) or indeed a line of previous cases as

1 exemplified by *Vodafone v. Ofcom*. There is nothing, we would say, inconsistent with an  
2 appeal on the merits in having given some weight to the decision of the front line regulator  
3 when it reached its decision.

4 PROFESSOR STONEMAN: You did not actually get to the phrase that I wanted.

5 MR. HERBERG: Sir, I apologise, I was distracted. It has been indicated to me that it is in the bit  
6 I did read to you. “The expression ‘merits of the case’ is not synonymous with the merits of  
7 the decision of the national regulatory authority.”

8 PROFESSOR STONEMAN: I will find the reference later; that is not the one.

9 MR. HERBERG: Sir, can I take you to one other passage, which I am sure is not the passage you  
10 want, but is relevant to the question, para.65 which perhaps comes the closest to the  
11 questions that we are now debating, although they are different:

12 “A statutory scheme which permits an appeal body to receive fresh evidence is not  
13 necessarily inconsistent with an appeal body being obliged to have proper regard  
14 to the role of the primary decision maker. [That again is my precisely my point.]  
15 For example, the Licensing Act 2003 creates a system of appeal from decisions of  
16 licensing authorities to the magistrates’ court, in which the parties may call fresh  
17 evidence, but the court is bound to pay careful attention to the reasons given by  
18 the licensing authority for arriving at the decision under appeal, bearing in mind  
19 that Parliament has chosen to place primary responsibility for making such  
20 decisions on the local authorities.”

21 Then there is a citation of authority, the *Hope and Glory* case which indeed Toulson LJ  
22 giving his judgment had been involved in shortly before this case.

23 “Liquor licensing and electronic communication regulation are very different  
24 fields of regulation [I do not think anyone can disagree with that - well, some  
25 would disagree with that!] but the characteristic of Ofcom that it has a particular  
26 duty towards the public does not make it unique. Under the Licensing Act  
27 primary responsibility is placed on the local authorities precisely because  
28 Parliament considered that their contact with the electorate made them the  
29 appropriate primary body for weighing the public and private interests at play on a  
30 licensing applications in their area.”

31 Pausing there, he is obviously drawing a close analogy between the two situations despite  
32 their very different statutory context. What he is saying there is that in both contexts one  
33 does pay careful attention to the reasons for the body arriving at the decision, bearing in

1 mind the allocation of responsibilities. We say that is absolutely of a piece with the previous  
2 CAT decision.

3 Just for the Tribunal's note, we say that the proposition that I have articulated is consistent  
4 firstly with the H3G case at authorities bundle 2 tab 28 para.164 which my learned friend  
5 took you to, which merely emphasises the test is not *Wednesbury* JR or review, and also  
6 with TRD no.2, core issues bundle 2, tab 29, para. 82 where the phrase is: "... should be  
7 slow to overturn a decision arrived at by appropriate methodology" – it is "slow to  
8 overturn" again. It is not restricting the Tribunal but it is giving an indication of how it  
9 should approach the matter. EE make the point, and BT also take this line that even on an  
10 issue of judgment or appreciation or of course on an issue of fact and law as well, a  
11 Tribunal is entitled to substitute its own view for Ofcom (para.18 of EE's skeleton), that is  
12 undoubtedly right as a matter of power but of course the Tribunal also has the power to  
13 remit matters to Ofcom for its investigation and determination in accordance with the  
14 Tribunal's guidance in its decision. So which course is right may become an issue in this  
15 case. At this stage all that I would say is that the choice between which is the appropriate  
16 course, if that stage is right, may be influenced by a number of different factors but it will  
17 include, particularly where the Tribunal relies on new arguments and new evidence which  
18 were not before Ofcom it will include the consideration about the lack of opportunity of  
19 parties not represented on this appeal to have an input into that decision and that of course  
20 involved the risk of disenfranchising those not immediately involved. The point is that a  
21 dispute resolution procedure was not deprived at arbitration in that there are consultation  
22 obligations that allow third party injection. That is one feature, there will be many other  
23 factors which influence what is the appropriate course, and probably closing is the best time  
24 to address those issues rather than at this stage. It is certainly the case that Ofcom has no  
25 vested interest in wanting this judgment back to decide again – I am not sure that anyone  
26 would particularly relish it – but there again there would be all sorts of questions about what  
27 is the appropriate course, and it depends in considerable part on what is the basis on which,  
28 were the Tribunal to find there was something wrong with Ofcom's decision, that decision  
29 was made. One can imagine, for example, if a fundamental EE submission was successful  
30 then obviously there would be nothing to refer back at one extreme. I will not take that point  
31 further for now.

32 Sir, I do not know if that is an appropriate time, or if I should go a little longer before the  
33 mid-morning break?

34 THE CHAIRMAN: No, that is a very good moment to take five minutes.

1 (Short break)

2 MR. HERBERG: Sir, can I then refer to issues connected with the 080 case and the 080 appeal  
3 very shortly. The Tribunal is obviously confronted with a situation in which there is  
4 radically different evidence admitted on the 080 appeal to the 0845 appeal. It might help  
5 illustrate this point if I take you to C1 to consider for a moment what is in issue in which  
6 case. Sir, by agreement between the parties there was meant to be, as it were, shading – on  
7 the copy I have got certainly it has been photocopied so many times it is not clear – to  
8 indicate which appeal which evidence goes to. We have produced some more with bright  
9 yellow colours so that it is much easier to see. This was agreed between the parties. As one  
10 can see, this is just simply the index to all the evidence bundles. White rows indicates  
11 documents which are relevant to both 080 appeal and 0845/0870 appeals, and the shaded  
12 rows indicate documents relevant to the 0845/0870 appeals only. What one can see is that  
13 Professor Dobbs, everything from 4 to 7 is only in 0845/0870, Maldoom, everything from 4  
14 to 7 ditto, Kilburn, 2 to 4, Fitzakerly, and so on down the list. Of course it applies to the  
15 evidence that is responded to BT's evidence as well. Mr. Myers' second statement, very  
16 importantly, Pratt, Valletti. Then factual evidence, EE evidence, and expert evidence of  
17 Mr. Muysert, first and third.

18 The point is a general one rather than a specific one, but it is on precisely what is where.  
19 What that means is that at least formally the Tribunal is faced with completely different  
20 evidence in completely different cases on the two appeals. Obviously a sensible line has to  
21 be taken as to this. It would be impossible for the Tribunal to put on blinkers and to try and  
22 decide the 080 case while trying to ignore what is increasing sophistication in some cases of  
23 the same argument – for example, as to the waterbed effect, as to direct effect. This is a  
24 continuing conversation that is going on. While in some parts completely new arguments  
25 are deployed and new evidence, in other cases it is continuation of the same dialogue. Sir,  
26 on the other hand, it cannot be right to have regard to evidence which actually is not  
27 adduced in the appeal.

28 What we say is the obvious answer is for the Tribunal effectively to treat the 0845/0870  
29 case as a lead case. That is not to say that you should not take any consideration of 080 or  
30 consider any of the factors in that case but to treat 0845/0870 as, in substance, the lead  
31 appeal. If the Tribunal then, at the end of the day, is satisfied that Ofcom has materially  
32 erred in its determination in 0845/0870, it will have to decide what to do with the 080 case.  
33 The likely result may well be that the 080 case should be remitted to Ofcom for decision in  
34 the light of the Tribunal's judgment in 0845/0870. There are, we say, sufficient differences

1 in policy terms between 080 and the other 08X numbers to make this likely to be, at least in  
2 some factual scenarios, the appropriate outcome, because it would be dangerous to assume  
3 that the conclusions in 080 can be simply read across. We set out those considerations at  
4 para.70 of our skeleton, just for your note, but I do not go to it.

5 I emphasise that I am not being dogmatic that that is **the** appropriate course. It will depend  
6 very much on what the Tribunal decides. There is one example: if the Tribunal comes to a  
7 decision that EE is right in its fundamental submission that ladder pricing is simply not  
8 something that Ofcom has the *vires* to do, then there is an obvious determination of the 080  
9 appeal as well and it would not need to go back to Ofcom for anything. No doubt, there are  
10 other findings which that same result would apply to. Certainly, Ofcom, as I said before,  
11 has no vested interest in getting the case back for another welfare analysis. There may be  
12 circumstances where that is the appropriate course, and it is a way of dealing with the fact  
13 that Ofcom has got very different evidence on the two appeals as all parties acknowledge.  
14 Sir, the only other matter before turning to the EE appeal, which I am going to deal with  
15 first, is the current NGCS review. I perhaps need to do rather less on this because both BT  
16 and EE have in the course of their submissions taken you to the nature of that review and  
17 what it is all about. So I do not need to go over that at any length. Both the appellants have  
18 referred to it in different contexts. EE's suggestion is that it is only through a thought  
19 process such as the NGCS, or a process such as the NGCS, that Ofcom could legitimately  
20 impose pricing controls on it, and even then only after the change in the law anticipated for  
21 next month, which would give it the power to do so – i.e. impose pricing controls, although  
22 they may not even then accept that Ofcom will have – I thought I sensed a certain  
23 conditionality about that submission and holding of position. Without that they would not  
24 have the power.

25 BT, on the other hand, contends that Ofcom has in some way relied on the NGCS  
26 consultation to abstain from action which it should have taken on this case, that we  
27 somehow unlawfully said, “This is all too difficult and uncertain, it is all right, we can leave  
28 it for the NGCS”.

29 Sir, EE's argument I can just address in dealing with the grounds, but BT's is, we say, an  
30 unattractive submission and one on which there is no basis to make, although we note that  
31 they have disclaimed any allegation of impropriety. The fact is that Ofcom, on the face on  
32 the decision, has very carefully directed itself, as my learned friend said in numerous places,  
33 but one example is para.9.51 of the Final Determination, the 0845 Final Determination.  
34 Although given a free choice, a policy development process, for example, our ongoing

1 NGCS review, would represent a more desirable approach to such a substantive and  
2 important change with wide ranging implications. However, we must resolve this dispute  
3 now, and do not consider that it would be appropriate for us instead to wait until the  
4 outcome of the NGCS review. That was not an issue of timing, that was about substance.  
5 We grasped the nettle and looked at the actual issues and decided it. The only relevance of  
6 the NGCS review for Ofcom, the only practical relevance, was on the Principle 3 question  
7 of the reasonable practicability of implementation. At that stage we do say there is some  
8 relevance because of course the cost and difficulty of implementation must, to some extent,  
9 be measured against the length of time that the system might be expected to endure. One  
10 only has to think of a situation where the NGCS result was expected a week after the case.  
11 It would have been obvious that it would have been highly relevant that one would not want  
12 a change, whereas with the longer timescale of course it is less relevant, but it certainly was  
13 not an irrelevant matter to have regard to that there was a substantial policy change on the  
14 horizon purely in terms of, as it were, reasonable practicality questions. But aside from  
15 that, we say there is absolutely no basis for any suggestion that Ofcom approached its  
16 dispute resolution role other than conscientiously and on the basis of the material before it.  
17 I listened very carefully to my learned friend's submissions and really his submission rested  
18 on no more than an inference from the fact that the overall result was against him and was  
19 based on uncertainty. There was nothing specific that he latched on to to suggest that  
20 Ofcom had improperly abdicated its discretion. We say there is simply nothing in the  
21 submission at all.

22 Sir, in relation to the substance of the consultation, I do not think (unless you want me to) I  
23 need to take you through what is proposed or what the potential outcome is. You have the  
24 reference for where it is, and if necessary it is there to be looked at.

25 Sir, can I then turn to the EE appeal. What I will do is follow the order of Miss Smith and  
26 deal with the grounds sequentially. The first ground is the argument that Ofcom has placed  
27 unjustified reliance on its policy preference and has sought to regulate MNO prices through  
28 the back door effectively.

29 The first point to note, we say, is that EE, like Vodafone, BT and all the other parties except  
30 O2, do accept and recognise that Ofcom does have, and did have before this dispute arose, a  
31 relatively clearly defined policy preference covering these number ranges. In short  
32 summary, 080 numbers that calls be free or close to free as possible, 0845/0870 numbers,  
33 the retail price of the calls should be aligned with those for geographic numbers. It can be  
34 expressed with some more sophistication including bundling, etc to tariffs. That is the

1 essence of the policy. EE's acceptance, for example, is at para.38 and 83.2 of its skeleton  
2 for 0845 and 080 respectively.

3 So O2 is the odd man out in this respect. In its skeleton at paragraphs 48 to 50 it sets out a  
4 case as to why Ofcom either has no relevant policy preference at all or, if one exists, falls  
5 far short of providing support for what BT actually did; it does not engage with this case.

6 Sir, you will not be surprised to know that we do not accept that this is the case. We do  
7 place some weight (it is not purely a jury matter) on the fact that all of even BT's comrades  
8 in arms in other matters on the appeal had no difficulty in identifying Ofcom's policy  
9 preference, and indeed complaining not only that it existed but that it should not have been  
10 taken into account, saying it is wrong to take it into account. Obviously, matters of  
11 transparency and certainty are relevant, and no-one else seems to have had any difficulty in  
12 appreciating what the policy preference was.

13 Sir, given the time available and the pressures on time, I am not going, at this stage, to  
14 address the detail of O2's submissions. If O2 makes points in closing, I will of course  
15 respond to them. What I should perhaps do, though, is just to set out, to identify in the Final  
16 Determination the sources which it discusses in terms of the policy preference, identifies the  
17 sources from which we say the preferences are made relatively clear.

18 Sir, can I deal shortly first with the 080 Final Determination in Bundle A tab 1. Sir, I  
19 should perhaps say that the big picture, the background, to this is that Ofcom was making a  
20 series of efforts over the years to restore the geographical link (going back to 0845 and  
21 0870) to pricing. It is absolutely clear we say from a number of regulatory interventions  
22 that it was trying to do that: removing regulatory support for pass through and so forth. It  
23 does strike us, simply from that perspective, as a slightly strange submission to say that  
24 Ofcom did not have a policy preference. It was one that absolutely, we say, was obvious  
25 and clear.

26 080, sir, if I can just briefly take you to this, it is addressed starting at para.2.32 of the Final  
27 Determination. One sees there at para.2.33:

28 "Our preference is that 080 calls ought to be free to the caller, and if they are not  
29 free, that they are as close to free as possible. This preference is consistent with  
30 our general duties under section 3 of the Act and the six Community requirements  
31 set out in section 4 of the Act and with our earlier that that, *'in principle, 0800*  
32 *calls should be paid for entirely and should be completely free to caller'* (see  
33 paragraph 2.43 below). In addition this preference reflects"

1 And then it reflects a number of benefits behind it. At 2.43 and following (I am not going  
2 to take you through the detail of this) one then sees reference to Annex 6 of a Determination  
3 right back in 2006 stating Ofcom's view that in principle 080 calls should be free to the  
4 caller, while acknowledging of course that OCPs were not prevented from imposing a  
5 charge for those calls. There has always been an acknowledgement. It has only ever been a  
6 preference, and it has been fully accepted that MNOs are not obliged to follow the policy  
7 preference. But the very acknowledgement that OCPs were not prevented by the policy  
8 preference from imposing a charge for these calls itself underlines the fact that there was a  
9 preference from which they were departing in doing so.

10 I should also, just for your note, identify para.2.54 referring to the 2006 numbering  
11 statement.

12 Sir, the position of 0845, maybe I can just do this by giving you the reference rather than  
13 taking you to the actual document. The preference itself is set out clearly in para.2.2 of the  
14 Final Determination. See also paras.2.53. It is a longer section on this, it really starts at  
15 2.40 and goes all the way to 2.42. 2.43, all the way through to 2.55 which deals with a  
16 number of documents and draws the distinction between a regulatory obligation and a  
17 policy preference and making the claim that it is just the latter.

18 Sir, it may be that my learned friend will have particular points on those documents, and we  
19 fully accept that it was a policy preference; it was not legislation; it was expressed in  
20 slightly different terms, but the real question is whether there was substantial material  
21 uncertainty, or whether it was so unclear that no policy preference existed. We say that  
22 cannot possibly be the case and no other party has suggested that that is the position.

23 PROFESSOR STONEMAN: If I could interrupt, it is a word you used. You said you wanted to  
24 "restore" the situation where 0800 calls were free. Have they ever been free on the mobile  
25 networks?

26 MR. HERBERG: Sir, as far as I know they have never been free, and I think when I said  
27 "restore" that was in relation to 0845.

28 PROFESSOR STONEMAN: No, you were saying it with respect to 0800. They have been on  
29 BT, but otherwise it is a matter of extending.

30 MR. HERBERG: Sir, I think from the mutterings, there may be a time when they were free at an  
31 early stage.

32 MISS SMITH: (No microphone) May I refer the Tribunal to para.3 in point 11 of the 2001  
33 Orange direction. At that stage, preceding the Orange direction, O80 calls were zero rated,  
34 and they had to put them up because they were not allowed to charge an extra call

1 origination charge, a higher call origination charge. You will recall, I think I took you to  
2 that document yesterday.

3 PROFESSOR STONEMAN: Yes, you did.

4 MISS SMITH: It is bundle 3 tab 32.

5 PROFESSOR STONEMAN: Have the other mobile operators ever given 0800 calls free, apart  
6 from these special deals?

7 MISS SMITH: I will just go back to 3/11. Orange and One 2 One were not charging for free  
8 phone. At the time some other mobile operators were in 2001. I am not sure what the  
9 position was before 2001, whether they were being charged, zero rated, back in the 90s. I  
10 do not know and I cannot give you the answer. But there were other special arrangements  
11 that you have already been referred to where the calls were zero rated on mobiles.

12 PROFESSOR STONEMAN: Thank you.

13 MR. HERBERG: I am very grateful to Miss Smith. That is absolutely right. The Orange case is  
14 a concrete example.

15 Sir, may I then turn to EE's case, Ofcom's unjustified reliance on the policy preferences.

16 That case, of course, is supported by O2 in the alternative to its argument that there were  
17 not any policy preferences at all. But it is perhaps revealingly not supported by Vodafone,  
18 the other MNO which has otherwise aligned generally speaking. It does not take any issue  
19 as to unjustified reliance on policy preferences so far as we are aware.

20 EE submits Ofcom's reliance on its policy preference was "potentially determinative" is the  
21 way they put it (EE skeleton para. 38) but obviously it was not actually determinative  
22 because in spite of having the policy preferences we rejected all the notices, the change  
23 notices. Indeed, BT in turn complains that the policy preferences were not given sufficient  
24 weight for that reason. But EE's case, as I understand it, is that the policy preferences could  
25 have been determinative in tipping the balance had Ofcom's findings been other than they  
26 were on its assessment, because the policy preferences – and this is right – the policy  
27 preferences were reflected in the greater weight which Ofcom ascribed to the direct effect  
28 i.e. the downward effect on 08X prices compared to the mobile tariff package effect relating  
29 to other prices, and I address their case on that basis. It is rather a hypothetical case given  
30 that we did not get there but clearly it has important implications for it.

31 Sir, EE advanced a long argument, and it is also set out in O2's skeleton I think (paras. 6 to  
32 17) setting out the Community and the Domestic Framework, all of which emphasises the  
33 differences between Ofcom's dispute resolution function and its retail price control function  
34 which can only be imposed of course where there is not effective competition, where there

1 is SMP. I can short circuit that, we entirely accept the analysis there set out; as indicated  
2 the position may change from next month potentially but that is the position at the moment.  
3 We also agree that as EE notes in its skeleton para. 43.3 communications providers other  
4 than BT are only subject to the conditions in the NTMP and the general conditions of  
5 entitlement, and we accept that those conditions do not do more than impose obligations of  
6 transparency in relation to the origination of calls to both 080 and 0845, 0870 numbers.  
7 They do not require adherence to an Ofcom's policy preferences obviously.  
8 EE's case, as it is put in its skeleton is that Ofcom is not permitted to use its dispute  
9 resolution function to seek indirectly to control retail prices where, as a matter of EU law it  
10 is not permitted to impose retail price controls directly. So from that it appears that what is  
11 objected to is not that a decision may have some effect on EE's freedom to price, it is a  
12 slightly more sophisticated case; it is a case that BT is not entitled to seek that objective, it  
13 should not be motivated by retail price preference in making its decisions. It should not  
14 actually take that into account in some way. O2 as we understand it, puts the case even  
15 higher by contending that Ofcom would be acting beyond its powers where the behaviour  
16 merely had the effect of imposing an industry-wide price cap on MNOS 08X calls, had it  
17 not stuck down BT's NCCN.  
18 We say that whatever formulation is put there are immediate and threshold objections to  
19 both lines of reasoning and that first is the very simple point that Ofcom is not imposing  
20 caps or price control in this case. BT has exercised a contractual right subject, of course, to  
21 the provisions of the DRP (the review process) to increase its termination charges in a way  
22 which may impact upon MNOs choice of retail prices. In deciding whether or not the  
23 charges are fair and reasonable in accordance with Ofcom's s.3 and s.4 duties, and as well  
24 of course as its Community obligations, Ofcom is not in any relevant sense imposing price  
25 control whether directly or indirectly.  
26 Indeed, sir, we say that Miss Smith was in some ways between the devil and the deep blue  
27 sea on this issue, once one accepts that Ofcom does have this broad regulatory power, as she  
28 did in response to the submission that BT has an apparently unfettered contractual power, so  
29 what is your case? Once you accept Ofcom's broad regulatory input and its s.3 and s.4  
30 duties then one has to accept all that comes with it, and that does involve acceptance of the  
31 relevance of price considerations when Ofcom is making its assessment, because – can I  
32 address again what Ofcom is actually doing here? Ofcom is actually assessing whether a  
33 charge a commercial party has sought to introduce is fair charge. It involves among other  
34 things consideration as to whether it is in the interests of consumers generally if, what is

1 said to happen as a result of these charges does happen. If MNOs retail prices come down  
2 as a result of the proposed changes, and they have to therefore it says whether that would be  
3 a desirable outcome if it were to occur. It then concludes that it would be a desirable  
4 outcome if it were to occur, informed of course by its policy preference, but not wholly  
5 dependent on that, there might be no policy preference it could still decide that in fact it is a  
6 desirable outcome for the sort of economic reasons analysed. If it decides that then in  
7 setting its test for whether it should approve the charges or not, whether the change all  
8 round is beneficial it has logically to take account of the benefit it finds will flow from those  
9 reduced charges. None of that, we say, can remotely be equated to direct or indirect  
10 imposition of price control, and that is also why EE's attempt, elegant as it may be, to try  
11 and distinguish between motivation and effect, just does not work. Ofcom has, exercising  
12 its duties, to look at what would be the outcome of the proposed changes in termination  
13 prices as soon as one effect of that, desired or otherwise, or intended or otherwise is a  
14 change in retail prices, it has to assess the effect of that and whether or not it would be  
15 welfare desirable. Then it has, if it finds they are welfare desirable, to take that into account  
16 in its overall assessment of whether the change is right or not. There is no stage along the  
17 line at which you can say that Ofcom cannot do that because it is wanting it, but Ofcom can  
18 do that because it is assessing it, the two go together because of the nature of Ofcom's s.3  
19 and s.4 duties.

20 There is also, of course, the point that what would be introduced by way of the NCCNs  
21 anyway would not amount to a maximum price control in the form of a maximum cap or  
22 otherwise. Nothing in BT's charges prevents MNOs from charging what they choose for  
23 08X calls. Yes, it may be that if BT's economic evidence is correct, a hypothesis which, of  
24 course, is strongly rejected by the MNOs and also has not been accepted by Ofcom in  
25 material parts, but if BT is right then an economically profit maximising course for an MNO  
26 might well be to reduce prices to the lowest step, but that is a very long way away from  
27 establishing that Ofcom has imposed some form of price cap. Indeed, the MNOs have  
28 vociferously argued that the effect of the NCCNs might be to cause them to increase their  
29 prices.

30 But the more fundamental objection, we say, is that EE's and O2's case is inconsistent with  
31 Ofcom's regulatory duties in exercising its s.185 dispute resolution functions, and indeed,  
32 with the decisions of this Tribunal as EE acknowledges Ofcom has a duty to consider not  
33 only fairness and reasonableness but the broader picture of Ofcom's s.3 and s.4 duties. The  
34 TRD makes clear, as EE indeed recognises, that any determination under s.185 the Tribunal

1 would expect to see some consideration by Ofcom of which of the general duties set out in  
2 s.3 and s.4 are particularly engaged by the issues raised in the dispute, how the proposed  
3 resolution of the dispute accords with those objectives – the judgment they themselves are  
4 relying on.

5 Where, in analysing price change, Ofcom comes to the conclusion that one beneficial  
6 feature is that it would be likely to result in the parties reducing their prices is the point I  
7 have already made, that has to then be taken into account. One cannot ignore the feature, it  
8 would be not compatible with the proper s.3 and s.4 duties. To be more specific that  
9 particularly applies to the principal duty of Ofcom under s.3(1) of furthering the interests of  
10 citizens and consumers, and 3(5) providing that in performing the duty of furthering the  
11 interests of consumers Ofcom must have regard to their interests in respect of, among other  
12 things, price. That is perhaps the point I did not link up earlier, that the price point which  
13 was in the Directive that we looked at does link through via s.3(5) in the Act to Ofcom – the  
14 previous point. There is specific domestic statutory authority for Ofcom looking at price  
15 points as well.

16 So Ofcom would, on the face of the Act, have failed in its duty if it had not considered the  
17 impact of the dispute on price paid by consumers and whether or not that impact was  
18 desirable and if it had not acted in making its decision upon what it found.

19 As we note in our skeleton at para. 32 a similar argument has in any event previously been  
20 advanced to the Tribunal and rejected in the *H3G* case. Can I take you shortly to that case  
21 in Authorities bundle 2, tab 25. In that case it was Ofcom who was arguing that it did not  
22 have the power to determine the price of interconnection if there was a disagreement about  
23 it unless it had first made an SMP decision in relation to the party seeking to change the  
24 price. Can I pick up a particular argument that Ofcom made and the Tribunal's response to  
25 it. One can pick it up at the end of para.129 on p.37 of 41. Three lines from the end of that  
26 paragraph:

27 “Mr. Roth went so far as to submit ...”

28 Mr. Roth was, I think, for Ofcom.

29 “... that in the absence of an SMP designation Ofcom would have to decide the  
30 pricing dispute in favour of H3G, because to do otherwise would be to impose  
31 forbidden price control. He based his argument on the true construction of the  
32 Access Directive.

33 We do not agree that that is the effect of the relevant provisions. We have set  
34 out above the relevant provision of the 2003 Act. There is nothing there that

1 supports Mr. Roth's arguments. Section 190(4) refers to SMP conditions, but  
2 nothing in the wording of the Act suggests that SMP had to be found before the  
3 regulator decided a dispute over price. Mr. Roth's arguments centred around art  
4 8 of the Access Directive. Paragraph 2 of that Article provides that:

5 '... where an operator is designated as having significant market power on a  
6 specific market ... national regulatory authorities shall impose the obligations  
7 set out in Articles 9 to 13 of this Directive as appropriate.'

8 Article 8(3) provides that:

9 'Without prejudice to [those other Articles] ... national regulatory authorities  
10 shall not impose the obligations set out in Articles 9 to 13 on operators that have  
11 not been designated in accordance with paragraph 2.'

12 Article 13 is headed 'Price control and cost accounting obligations' and  
13 provides that an NRA:

14 '... may, in accordance with the provisions of Article 8, impose obligations  
15 relating to cost recovery and price controls ... where a market analysis indicates  
16 that a lack of effective competition means that the operator concerned might  
17 sustain prices at an excessively high level ...'

18 Mr. Roth submitted that a ruling by Ofcom as to the price which should be  
19 charged for interconnection (in order to resolve a dispute) was price control  
20 which art.8(3) forbade in the absence of an SMP determination.

21 We consider this reasoning to be wrong. Under the Access Directive the NRAs  
22 have at least two sorts of powers. The first are powers to take steps to ensure  
23 end-to-end connectivity; the second are powers to intervene where SMP has  
24 been found. A power to determine a dispute as to connection is capable of  
25 falling within both, so it is certainly capable of falling within the former. If it  
26 does, the Directive makes it plain that an SMP finding is not necessary. This is  
27 apparent from the terms of art 5. It will be noted that art 8(3) is without  
28 prejudice to arts 5(1), (2) and (3). Article 5(1) provides ..."

29 I do not think I need to read that. You have already seen that.

30 There is one more important paragraph:

31 "A power to resolve interconnection disputes is well within this wording, and  
32 there is no basis, as a matter of construction of art 5, for separating out disputes  
33 as to price. Indeed, it would be illogical to do so. Pricing may be at the heart of  
34 a dispute; and some disputes about connection may have aspects which are not,

1 by themselves, directly disputes about price, but may have pricing  
2 consequences so that one cannot decide one without the other. Determinations  
3 under this jurisdiction are not price control in the sense of art 13. The two  
4 jurisdictions exist in parallel; the fact that art 8(3) is without prejudice to the  
5 relevant parts of art 5 demonstrates that they each have their separate  
6 existence.”

7 So this obviously goes back to the argument which I was making to you before. It is of  
8 direct relevance here.

9 Miss Smith, as I understood her, sought to distinguish this authority on the basis that in that  
10 case pricing was actually the subject of the dispute, so that of course the Tribunal could  
11 decide it because the wholesale pricing issue was part of the dispute. Pricing issues were  
12 for that reason, because it was subject to the dispute, amenable to Ofcom’s dispute  
13 resolution process and therefore to the Tribunal’s jurisdiction. Contra here, she says, the  
14 pricing issue is BT’s wholesale price and the MNOs’ retail prices are not the subject of the  
15 dispute. I think that is her attempt at distinction. We say that does not work because it  
16 simply ignores the terms of para.131, which I have just read. Just picking it up again, it  
17 makes the point that the dispute may be directly about price but it may be that a dispute  
18 which is not about price has pricing consequences so that one cannot decide one without the  
19 other.

20 They are making the point that even in such a case where the dispute is not about price or is  
21 not about the same price, which would be this case, that does not mean that you can not take  
22 account of pricing consequences. So it is absolutely clear that the decision was going wider  
23 than she suggests. It must be right, we say, that pricing consequences of whatever sort must  
24 be relevant, otherwise we would be in the very uncomfortable and indeed, we say, unlawful  
25 position of ignoring certain categories of consumer effect in making decisions to which ss.3  
26 and 4 apply. That is why there is no tenable distinction between desirability and effect in  
27 taking account in doing the welfare calculus. One cannot have one without the other.

28 Finally, on this issue, at the risk of labouring the point, but I think it is right because you  
29 were taken to it, can I give just one more example of the inextricability of pricing  
30 consequences from dispute resolution decisions.

31 Miss Smith, you may recall, held up to you Ofcom’s 0870 determination as an example of  
32 what Ofcom should have done. She dealt with it in relation to focusing on BT’s costs of  
33 termination, her second ground. She held up that this is the right way of looking at it. That  
34 decision focused on the costs of termination, it ignored extraneous policy consequences.

1 Sir, can I take you to that determination, which is in bundle 25, BT3, tab 11.11. Before  
2 taking you to the specific passage, can I just remind you of the facts of that dispute because  
3 it is quite significant, not only here but at a slightly later stage of my argument when I do  
4 get on to costs. Sir, the 0870 determination was a dispute between BT and various other  
5 fixed line operators, who were the TCPs, about the rates charged by those operators to BT  
6 for terminating BT originated 0870 calls. So BT was the originator. BT proposed to end  
7 revenue sharing on 0870 and thus cut the termination charges that it paid, or proposed to do  
8 so. It was effectively anticipating Ofcom's proposal to remove 0870 from the NTS  
9 condition, remove regulatory support for the pass through. The TCPs objected to the cut.  
10 Ofcom ultimately resolved the dispute by setting rates somewhat in the middle of the  
11 parties' positions, and the rates it set were based on the costs of termination for geographic  
12 calls, plus relevant additional costs of terminating 0870 calls, and did so on a fully allocated  
13 costs basis – i.e. a contribution towards the TCPs' common costs. So it did it by reference  
14 to a costs basis.

15 Sir, although Miss Smith held this up to the Tribunal as an example of the way Ofcom  
16 should have proceeded, it is instructive to see what actually Ofcom took into account in  
17 coming to its decision. Can I take you, first, to para.1.19:

18 “As set out above, a number of TCPs proposed alternative charges, although  
19 subsequently some of these proposals have been withdrawn. Our assessment of  
20 the remaining proposed charges leads us to conclude that these charges are too  
21 high to be reasonable, given Ofcom's policy to re-establish the links between  
22 retail charges for 0870 calls and those for geographic calls. We have concluded  
23 that the charges proposed by the TCPs would be likely to deter BT from linking  
24 the retail prices for calls to 0870 numbers to the prices for calls to geographic  
25 numbers.”

26 What one there sees is, one, Ofcom taking into account the policy preference; and two,  
27 expressly taking into account the consequences of the decision for BT's retail prices. That  
28 is repeated. Can I just give you the other references. There is a longer discretion at  
29 para.6.99 to 6.101, where in some more detail express consideration is given to the retail  
30 price consequences of the decision. Of course, in that case it was the other way round. BT  
31 was escaping higher long term charges by way of the retail price considerations. It did not  
32 have higher prices imposed on it. What if the incentive had been the other way round like  
33 here, it was not just one way? The point is that retail price considerations are relevant  
34 considerations to take into account, were in that case, even in a case which is primarily

1 focused on costs of termination. It was taken into account by Ofcom, and we say rightly so.  
2 But on Miss Smith's case that must be a lawful consideration for Ofcom to have taken into  
3 account, as we understand it.

4 Sir, the reality, we say, is that it would be impossible and wrong to exclude such retail price  
5 considerations from decisions. There are two parallel jurisdictions as the Tribunal  
6 explained in H3G.

7 Sir, can I then come on to the second ground, which is the complaint that Ofcom did not  
8 take (sufficient) account of the BT's costs of termination. Sir, there is, as we understand it,  
9 some ambiguity in EE's case, or it may be that they are alternative cases, between on the  
10 one hand the complaint that Ofcom simply failed to consider BT's costs of termination,  
11 failed to consider them at all. The skeleton at para.48 does say: "did not take any or any  
12 proper consideration". So they appear to say (1) they took no consideration at all; (2) they  
13 did not take any proper consideration, which presumably means did not give it enough  
14 weight. To those two cases our response is Ofcom certainly did take into account, expressly  
15 and properly took into account (not even by implication) termination costs considerations.  
16 But then there seems to be a separate argument that Ofcom should have directed itself that it  
17 could only approve the disputed charges if they were not cost reflective. That seems to be  
18 that clearly they did not have to be exclusively cost reflective, but that more realistically  
19 they were in some way closer to cost reflectivity so that more weight should have been  
20 given to the costs. In other words, it seems that it is not simply a taking into account point,  
21 it is actually that it should only lawfully have approved the disputed charges if they were  
22 given more weight than they actually were.

23 Sir, as to the latter, Ofcom does not accept that there was any requirement for the charges to  
24 be cost reflective. It contends that the weight given by it was entirely appropriate. So there  
25 was no long exercise of discretion. EE considers that some different degree of weight could  
26 or should have been given. Indeed, we would say that if the Tribunal considers that it might  
27 have given some different weight, certainly Ofcom's decision was entirely reasonable and  
28 might fall - as indeed you suggested, sir - within that category.

29 Sir, firstly can I deal with whether Ofcom in fact took BT's costs into account. We say it is  
30 absolutely plain and obvious that it did. It identified as the proper benchmark for  
31 comparison for BT's costs the termination rate set in the 0870 determination to which I  
32 have just taken you. That, as I explained, addressed the charges applied between BT and  
33 fixed terminating operators applied to November 2009 and the rates there set. Sir, can I  
34 take you to the Final Determination in this regard at bundle B1 para.4.42 where the section

1 starts. What one sees there is a section headed “Benchmarking”. First of all, the Tribunal  
2 notes the TRD core issues talking about the value of benchmarking in looking at the  
3 reasonableness of charges or other terms and conditions being proposed. Then 4.43:

4 “We have considered benchmarks in relation to both the cost of termination and  
5 the cost of mobile origination for 0845/0870 calls. The MNOs have argued that  
6 BT’s termination charges should not exceed the cost of termination. To assess the  
7 opportunity for recovery of efficient costs by MNO’s in accordance with Principle  
8 1, the cost of origination may be relevant.”

9 Then there is a heading: “Benchmarks for the efficient cost of termination”:

10 “4.44 T-Mobile states that the most appropriate benchmarks to be considered in  
11 this dispute are the charges applied by BT and other terminating operators prior to  
12 1<sup>st</sup> November 2009, and in particular for 0870 numbers the rates that were applied  
13 as a result of Ofcom’s 0870 Determination. Additionally, it and other MNOs  
14 argue that BT’s efficient cost of termination should be the focus of this Dispute.

15 “4.45 As stated above, the termination rates set in the 0870 Determination reflect  
16 cost-based termination charges and so are the most suitable benchmark for the  
17 efficient costs of termination for both 0845 and 0870 calls (since we do not expect  
18 the cost of terminating 0845 calls to be materially different to 0870 calls).

19 However, we have also noted above that, in our consideration of this Dispute, we  
20 are analysing the reasonableness of revenue share on these number ranges. This  
21 has an important implication for the appropriate price to compare to the  
22 benchmark for the cost of termination.”

23 Sir, I might just continue this because this next bit is about how it is going to be relevant  
24 when one gets on to the revenue share part of the argument.

25 “4.46 To the extent that revenue share is considered reasonable in our analysis [it  
26 has not decided that yet], the appropriate comparison is between termination cost  
27 and the net termination charge, not the gross termination charge. The gross  
28 termination charge is the rate actually levied on the COP by the TCP, in this case  
29 the charges specified in NCCNs 985 and 986. The net termination charge is the  
30 gross charge less any revenue share paid to the SP. If revenue share is considered  
31 reasonable, then the revenue that the TCP uses to recover its costs of termination  
32 is the net termination charge (not the gross charge).

33 “4.47 Therefore, although it is clear that the gross termination charges in NCCNs  
34 985 and 986 (above the bottom tier) are in excess of the benchmark for the cost of

1 termination, the implication of this comparison depends on whether revenue share is  
2 considered reasonable or not on the 08745/0870 calls. If it is reasonable, then it is  
3 not decisive to compare the benchmark for the cost of termination against the gross  
4 termination charge. The question of whether or not revenue share is reasonable is,  
5 in effect, assessed in detail in Section 5.”

6 So, sir, I read out that whole section because it is going to be relevant at several stages on  
7 this second argument, the second ground of appeal. Sir, we do say it is perhaps surprising  
8 that Miss Smith did not take you to this part of the Final Determination in submitting that  
9 Ofcom did not pay any attention to costs of termination, not least because it was T-Mobile,  
10 the progenitor of EE, which itself suggested that Ofcom adopt the benchmark which it did  
11 adopt in considering costs of termination. It was precisely their approach which the  
12 Tribunal followed. I am not saying that the approach was what they would have advocated  
13 all the way down the line, but in setting the benchmark and looking at the costs of  
14 termination, it was EE’s own proposal that was adopted.

15 Ofcom, we say, properly directed itself by reference to the guidance contained in the TRD  
16 case and the appropriateness of benchmarking. Sir, I would remind you that the TRD case  
17 does not suggest that costs have to be a central feature or preoccupation. It may be that I  
18 should just very briefly take you back to this because it is a significant feature of the way  
19 that costs jurisdiction should be operated. It is authorities bundle 2 tab 29 paras.183 to 184.  
20 Sir, the heading is “Information about costs”. This is the decision of the Tribunal on the  
21 core issues.

22 “In some cases the reason why an increase in price is proposed is that there has  
23 been an increase in the supplier’s costs. Conversely they may be cases where the  
24 purchase, noting that some new technological or other market development has  
25 decreased the supplier’s costs, proposes a reduction in price so that it and its  
26 customers can share in the benefit of the cost savings (as would be likely to  
27 happen if the supplier were operating in an effectively competitive market). In  
28 such a case, Ofcom will need to investigate the assertions of the parties to  
29 determine whether a change in the price is fair and reasonable. As explained  
30 earlier, it is accepted that Ofcom is not expected to carry out the kind of cost based  
31 analysis that is performed in the setting of a price control SMP condition. The  
32 Tribunal has made clear that parties’ expectations must be realistic and that Ofcom  
33 has a degree of discretion as to how it approaches this task.

1 “184 Even if the submissions made by the parties do not focus on costs issues, the  
2 Tribunal would expect Ofcom at least to consider whether an analysis, however  
3 broad brush, of the relationship of prices to costs is necessary. Ofcom should also  
4 have regard to the consistency of price and cost trends in all cases, regardless of  
5 the stance adopted by the parties.”

6 Sir, what the Tribunal is indicating is that what was needed was consideration of whether  
7 even a broad brush analysis of costs was necessary. Ofcom certainly gave that  
8 consideration; it went further than that and indicated proper benchmark criteria and  
9 considered costs of termination in its analysis.

10 THE CHAIRMAN: Where do I find the paragraphs in the 080 FD?

11 MR. HERBERG: Sir, can I check that? I will answer that later, if I may.

12 PROFESSOR STONEMAN: Could I take that one stage further. Consideration of costs, some  
13 degree that the treatment of BT’s profit gain as having zero welfare benefit is essentially the  
14 same as saying as there has not been any change in underlying BT costs, that the price  
15 should be kept in line with those termination costs so that the treatment of the profits in the  
16 welfare evaluation is exactly the same as the argument that the termination prices should be  
17 cost based.

18 MR. HERBERG: I may have missed the beginning, are you referring to the revenue share aspect?

19 PROFESSOR STONEMAN: The welfare benefit, the welfare calculation that is undertaken looks  
20 at the gain to callers and also says that there may be a profit gain by BT as a result of the  
21 new price structure. However, that profit going to BT is given as zero welfare weight.

22 MR. HERBERG: Yes.

23 PROFESSOR STONEMAN: Now, that zero welfare weight of that gain from BT is almost  
24 equivalent to saying that BT should have kept their prices at what they were previously  
25 which was as of November 2009?

26 MR. HERBERG: Yes, because it pulls against BT getting the charges approved. That is  
27 absolutely right. It could have been one of the reasons that the charge were rejected was  
28 that if there had not been any indirect effect because the charges were all being kept with  
29 BT that would have been valued at nil on the welfare gain and therefore that is absolutely  
30 right, sir, that it would have pulled in that direction in the analysis. So the fact that it was  
31 not termination based cost charges, but BT was making a gain would have been a reason  
32 why Ofcom would have been pre-disposed to reject the charges.

1 PROFESSOR STONEMAN: It is just a matter of you cannot really separate out the treatment of  
2 the profit gain that BT might or might not be making and the termination cost based pricing  
3 being called for by EE?

4 MR. HERBERG: Yes, that is right. I think that the welfare analysis clearly was very sensitive to  
5 what happened to the excess sums that went to BT over the cost based termination, but  
6 Ofcom carefully looked at the cost of termination to the extent that BT is getting these  
7 additional sums because prices do not come down to the lower tier, what will happen to  
8 them. As it were, one BT box was ticked because Ofcom was persuaded that in general,  
9 though with some hesitation and on balance, and I will come on to this in a moment, costs  
10 would be passed through to the service providers. So that box was ticked, and so if that  
11 were right then we are back to the cost of termination effectively and so there is no problem  
12 on that front. In fact, the outcome of my submission was going to be that Ofcom's test in  
13 some instances was tougher than the cost of termination because Ofcom was not satisfied  
14 merely with the costs not staying with BT and going off somewhere else, and therefore BT  
15 being left only with the cost of termination. We also wanted to know what was happening  
16 with the costs once they had left BT and ascribed much less welfare weight to them when  
17 they were in the hands of the SP's only, than if they had then gone further to the callers  
18 through improved offerings or whatever. In a sense, BT got a cross in that box because to a  
19 certain extent we were [...] because Ofcom was not persuaded that the costs would  
20 generally be passed on in that way and because, we say perfectly properly, it ascribed less –  
21 not “no” – but less weight to the cost in the hands of the SPs than it did in the hands of the  
22 consumers. So in a sense the test was tougher in that respect. The short point is I agree  
23 with your analysis, Professor Stoneman, that it was part of the calculations very sensitive to  
24 what, as it were, happened to the costs in BT's hands – if there were any, of course, BT was  
25 saying there would not be any.

26 I will deal with the 080 position, it sounds like an explanation is needed so I will look at that  
27 and come back to that if I may.

28 Coming back to that passage from the final determination it obviously does make it clear  
29 that together with the conventional cost of termination Ofcom had regard to the revenue  
30 share, and effectively I have anticipated what I was going to say in answer to Professor  
31 Stoneman's question, it was rightly, we say, reasoned that if the revenue charge share was  
32 appropriate, if, then it could be considered as part of the costs of termination because it was  
33 being passed on and could be included within the gross costs as opposed to a net revenue  
34 cost once any revenue share was stripped out. We do emphasise that revenue share itself is

1 not a justification, Ofcom is not seeking here to pull itself up by its own boot straps as EE  
2 suggested. The final determination rightly treats the revenue share, in the passage cited, as  
3 a conditional deduction from the cost of determination, that must be separately considered  
4 in a welfare analysis.

5 Of course, on BT's case prices were going to drop to the lowest tier and there would be no  
6 additional termination charge, and therefore costs would remain as cost based as they were  
7 before. I say "as cost based" rather than completely cost based, because one of the features  
8 is that, certainly for 0845 the costs were not in any event completely based on termination  
9 charges because of regulatory support for the pass through. Of course, in one sense it is  
10 notable that at one stage of the argument the MNOs are arguing that they are subject to  
11 price caps and that prices will be driven down to the lowest level as maximum price. On  
12 the other hand, on this argument on costs of termination they have assumed that that will  
13 not happen because there will be effectively revenue share through – I am just checking I  
14 have that argument the right way around – yes, it is the right way around, if costs are driven  
15 all the way down to the lowest tier there will be no regulatory pass through, there will be  
16 nothing above costs of termination that BT will be getting anyway, so this argument faces a  
17 very different direction from the previous argument.

18 Of course, Ofcom did not accept BT's case as to reduction to the lowest step and,  
19 accordingly, the issue of whether the hire charges were justified in welfare terms was in  
20 issue. Ofcom had to consider under P2 whether the hire charges could be justified, taking  
21 into account the fact of the existing high retail prices charged by MNOs with what it found  
22 were the associated externalities in relation to again what it found was a two-sided market.  
23 I will come back in a moment to a consideration of the alleged externalities in the two-sided  
24 market and the justification, but it is perhaps convenient first to consider the interplay with  
25 revenue share.

26 Revenue share was of course part of BT's justification for the price changes because  
27 without it BT would have been left, assuming that the incentive was not to reduce prices to  
28 the lowest step, with a substantial profit, which in Ofcom's view, and we submit was plainly  
29 right, was not counted in welfare terms – this is precisely Professor Stoneman's point. The  
30 indirect effect was therefore very important to BT's case in a partial reduction scenario. So  
31 what we say is important to note is that when Ofcom was considering this argument as part  
32 of the welfare effect it did effectively decide that the indirect effect was weak, that the  
33 revenue sharing argument was not completely made out. It found that there was just about  
34 on balance sufficient evidence that passed through from BT to the service providers.

1 Maybe I should take you to this because it becomes relevant particularly to Mr. Read's  
2 argument in due course. It is in the 0845 determination, bundle B1. The most helpful  
3 passage is annex 3, at para.5.223 on p.238 it is an annex to the final determination.

4 "However, the NTS TCPs (BT ..)" and someone else "... Are either currently – or  
5 intending to – use variable termination charges, as well as a number of other TCPs.  
6 Therefore, we consider it likely that in due course competitive pressures would  
7 encourage some pass-on of increased termination revenue to SPs., whether in the  
8 form of lower prices or improved quality of hosting services. There may, however,  
9 be a time lag before this competitive pressure builds up. In addition, the pass-on to  
10 SPs may require renegotiation of contracts and this may take some time to occur,  
11 depending on the duration of existing contracts."

12 So that was the earlier stage, and it is taken slightly further forward at 5.227, this then is on  
13 the pass through to callers:

14 "We therefore consider that it is uncertain whether and to what extent SPs will  
15 improve the availability or quality of their services to the benefit of 0845/0870  
16 consumers (even if there is a pass-on by TCPs of higher termination charges into  
17 better deals for hosting services to those SPs)."

18 The respective judgments were then confirmed in the actual final determination at  
19 para.7.163 for SPs and 7.168 for callers. It is also analysed at paras. 9.27 to 9.28. I am not  
20 going to take you to the detail of the analysis but that is effectively the line of reasoning. It  
21 was not, of course, satisfied of the pass through from SPs to customers, as we have seen,  
22 and that was one of the reasons why the indirect effect was weak, given the treatment of  
23 consumers, to which I will to come.

24 The outcome of that is that, of course, Ofcom reached a conclusion on revenue sharing that  
25 EE actually wanted, that it was submitting for, that the revenue share did not justify this  
26 wholesale tariff schedule because of the weakness of the indirect effect. As I have already  
27 made the submission, in one sense that was done because of a tougher test than purely cost  
28 of termination. Even though we found that the revenue share would pass through to the SPs  
29 that still was not enough.

30 Sir, that, of course, does leave to be analysed Ofcom's positive reasons for departing even  
31 in principle from a strict cost reflective approach. Why did it do so? This is the issue of the  
32 nature of the market and the externalities. Sir, I should emphasise in putting in that way, the  
33 reasons for departing, I do not accept that Ofcom was required, even as a matter of  
34 principle, to have a strong or compelling justification for not following cost reflectivity. It

1 was not required, even as a starting point or as a position to be presumed until displaced,  
2 that cost reflectivity was effectively the default position. That was not what was said in the  
3 TRD case. It also was not the existing position for 0845 at least where there was still  
4 regulatory support for the pass through.

5 Clearly, of course, Ofcom needed to have rational reasons for adopting its charging  
6 structure, for not going for a structure that was simply cost based. There is no default  
7 position of cost reflectivity. There is an open series of judgments as to what were the  
8 appropriate principles to adopt or to test the proposal against. BT, after all, would argue  
9 that it had not regulatory, or it would say even contractual, obligations, certainly not  
10 regulatory constraints upon it in charging for termination, it was not subject to some  
11 condition requiring it only to receive costs of termination.

12 Sir, Ofcom's case, as set out in the Final Determination and as explained further in  
13 Mr. Myers' second statement, is that the justification in principle for Ofcom's approach is,  
14 we say, a proper and a compelling one, that one is here dealing with a two sided market  
15 with both horizontal and vertical externalities. Miss Smith has already taken you to the  
16 meaning of the two different types of externality. It was also an issue, you will recall,  
17 which Mr. Read took you to in the NGCS review which also grapples with the same issues,  
18 the problem of market failure that exists in this particular market, particularly 4.4 of the  
19 NGCS review we commend to you as an analysis of what was the problem here.

20 Sir, I do not go back to that now, and what I am not going to try and do in this opening,  
21 given the time constraints, is to address substantively the issues which are clearly expert  
22 issues which will need to be explored in evidence about horizontal and vertical externalities  
23 and two sided markets and those issues. EE have joined issue, and Mr. Muysert, their  
24 expert, clearly takes a different view of the matter from that of Mr. Myers and from Ofcom  
25 in its determination. It is set out relatively shortly in EE's own skeleton at paras.59 to 62,  
26 but it was rather expanded in Miss Smith's submissions. I am not making any complaint as  
27 to that, but I am not even going to attempt to respond to the economic arguments at this  
28 stage.

29 Sir, just for the Tribunal's reference, Mr. Myers' position is probably best summarised at  
30 Myers 2, para.98. There is sustained treatment and there is a sustained debate between the  
31 experts on the issue.

32 There are just a few sweep up points I should make responding to EE's submissions in  
33 relation to this issue. The first point is that of course it is true that the externalities which  
34 Ofcom found could have been dealt with in other ways – for example, by direct regulation

1 of retail pricing, as EE submits, although of course there is not any power to do so, we say  
2 there will be shortly. That simply was not an issue in the dispute resolution process.  
3 Ofcom was limited to considering whether the price changes proposed by BT would  
4 represent an improvement on the status quo. We could not abstain from consideration of  
5 the issue because there were other ways, even other more appropriate ways, in which we  
6 could have addressed the issue. If we had done so then BT would have had a legitimate  
7 complaint that we were having some other pretext for not deciding, be it the NGCS review  
8 or whatever. We cannot abstain from exercising the dispute resolution procedure because  
9 there might be more optimal ways. We would certainly accept that this is not an optimal  
10 way of resolving these questions, and part of the difficulty is that the risk that one is being  
11 dragged into an exercise which looks much more like an elaborate SMP type exercise in  
12 deciding a dispute resolution case. That is a problem which we say is caused by the nature  
13 of the charges and BT's way of justifying it, and that is a separate issue. It is absolutely  
14 clear that we had to address the issue. We could not, on the basis of the sort of submission  
15 that EE made as to better routes of dealing with it, not deal with it.

16 Secondly, EE contends that Ofcom should have had more regard to BT's termination costs  
17 because of, as it put it, the real prospect that BT had a position of SMP in the provision of  
18 call termination.

19 Sir, Ofcom did not, and could not, make a formal finding obviously of SMP in the course of  
20 this dispute, but it did, of course, consider carefully the question. In the first place it  
21 considered the point noted by Miss Smith that Ofcom had, in the past, in its decision under  
22 the Competition Act in relation to NCCN 500, found that BT was dominant. That decision  
23 – again I need not take you to it because I am making a point of principle rather than detail  
24 – I will give you a reference in due course to the NCCN 500 decision.

25 Although Miss Smith made the point that the decision was made in 2009 (I think that is  
26 right), in fairness to BT it should be pointed out that the period to which the determination  
27 related was 1<sup>st</sup> May 2004 to 31<sup>st</sup> December 2005. So there was a finding of dominance, but  
28 it was getting quite old by the time one is looking at the position in 2010.

29 In any event, in the 080 Final Determination, Ofcom did indeed find it was unable to  
30 conclude that other TCPs were in the position to replicate BT's charges. The reference is  
31 para.5.224, but Ofcom did find that it was concerned that there was a potential competition  
32 problem, not the same as a finding of SMP of course, but there was a problem that other  
33 TCPs would not be able to replicate BT's charges and so there would be a difficulty.

1 By the time of the 0845 determination Ofcom concluded that there had been a material  
2 change in circumstances since the previous decisions because a change in BT's billing  
3 arrangements meant that it is now possible for other TCPs to replicate BT's variable  
4 termination charges, as indeed some have now done. The reference for that is Ofcom's  
5 defence to the EE appeal at para.34, and the 0845 Final Determination itself at paras.5.30  
6 and 7.117. So there was a change in evidence presented to Ofcom between the two  
7 determinations. We looked at the position and noted that BT's billing arrangements had  
8 changed and therefore made a different conclusion as to the practicality of other TCPs being  
9 able to, as it were, compete.

10 So we say the point was properly considered. EE say that merely the risk of significant  
11 market power was enough. The mere fact that there was a potential for it, a risk, should  
12 have meant that Ofcom should have clearly on that basis been ready to go for a cost based  
13 approach or something closer to it. We say Ofcom properly considered the issue and in the  
14 0845 case was, on balance, persuaded that there was sufficient competition in call  
15 termination. In the event, I would imagine that Mr. Beard is probably now about to get on  
16 his feet and remind us of his existence and that there are other bodies flying the matter of  
17 pricing that are not by any stretch of the imagination having SMP concerns.

18 THE CHAIRMAN: No reminder required, Mr Beard!

19 MR. HERBERG: Sir, that deals with everything on BT's second ground apart from a short  
20 reference which I need to make to discrimination which I can deal with very shortly. But it  
21 might be convenient for me to do that after lunch.

22 THE CHAIRMAN: How are we doing in terms of timing, Mr. Herberg?

23 MR. HERBERG: Sir, I am certainly going to finish this afternoon. I have still got to deal with  
24 BT's submissions. I would estimate that I am somewhere around another hour and a half,  
25 something like that. I am not going to try to deal with every submission made by Mr. Read.  
26 Maybe I am being a little pessimistic but I want to under estimate.

27 THE CHAIRMAN: No, of course.

28 MR. HERBERG: It is something in that region: an hour or an hour and a half.

29 THE CHAIRMAN: Again, of course, there are a number of points that Mr. Read made which are  
30 probably better addressed through the experts.

31 MR. HERBERG: Sir, yes, particularly when one gets to the direct effect and the detail I am going  
32 to take that course. I need to deal with consumers, I need to deal with some issues of  
33 principle, but I will try to get through this as quickly as I can.

34 THE CHAIRMAN: I am grateful.

1 MR. BEARD: I am sorry, Mr Chairman, just two brief points. First of all, no discourtesy  
2 intended, but I will be unable to attend this afternoon. Indeed, a further point, just to be  
3 clear, Cable & Wireless, during the period of the evidence being given, were not intending  
4 to be represented by counsel. The arrangements for the closing, as the Tribunal will have  
5 seen, are subject to further negotiations and we will liaise with the other parties. There will  
6 be someone from Cable & Wireless here, it is intended, for particular periods during the  
7 evidence but we did not wish in any way to be discourteous to the Tribunal. We will, of  
8 course, look at the transcripts and so on coming through.

9 THE CHAIRMAN: That is perfectly acceptable.

10 MR. BEARD: I am most grateful. Thank you.

11 THE CHAIRMAN: Thank you, Mr. Beard. Shall we say 2 o'clock.

12 (Adjourned for a short time)

13 THE CHAIRMAN: Mr. Herberg?

14 MR. HERBERG: Sir, there was one question which you asked me this morning which I said I  
15 would respond to, which is the 080 cost of termination, and the answer is that there is a  
16 difference with the 080 determination on this point – it may be that you are ahead of me,  
17 sir. In the 080 determination the costs of termination were not taken into account. Just for  
18 your note para. 5.69 records O2 putting it to Ofcom that the cost of termination should be  
19 taken into account and paras. 5.71 to 5.72 of the final determination explain why Ofcom  
20 declined to do so. It just goes into another category where the 080 decision is different from  
21 the 0845 and has, to some extent, been superseded by it. The reasoning effectively there  
22 was that the status quo reflected termination costs or the current position which no one was  
23 seeking to disturb, and the real question was what would happen on top of that as a result of  
24 the charges. The other difference in that case, of course, was that Ofcom concluded that Bt  
25 would keep the money because at that stage it was not even accepting a pass through to the  
26 service providers, and so in a sense all that money went into a black hole anyway on  
27 Ofcom's welfare analysis it went to a party, BT, that was not included in the consumer  
28 analysis. It may not have made much difference, in other words the cost of termination was  
29 not taken into account on the then analysis, but that is the position.

30 THE CHAIRMAN: Thank you.

31 MR. HERBERG: I then said I would address discrimination I hope very briefly. EE's case now  
32 on discrimination appears to be – I take this from para. 70 of the skeleton – they say that  
33 "Ofcom's case has shifted and is unclear, it now appears to contend that whether it  
34 is permissible to charge different prices to different MNOs depends on the

1 circumstances, and that it chose not to consider the discrimination issue fully,  
2 because it had already concluded that NCCNs 985 and 986 were not justified”  
3 and it refers to the defence. “However, that is not the approach it took at 0845/870 FD 490  
4 to 491.” We continue to rely, as we intended to in the defence, on the final determination  
5 and we think our case is certainly not confusing, certainly not contradictory and we hope  
6 not unclear. Can I just go briefly to the final determination at para. 4.90 (bundle B1, tab 1,  
7 p.56). We said there:

8 “In this dispute we are considering whether the proposed determination payments  
9 [are fair and reasonable] as set out ... in the published scope of the dispute. In our  
10 view the same reasoning applies as in the 080 Determination, i.e. that BT charging  
11 different termination rates for 0845 and 0870 calls to different MNOs is not in  
12 principle *per se* discriminatory, but depends on the facts of each case.”

13 Sir, what Ofcom is effectively reasoning there is that there are two stages, there is an issue  
14 of principle, is it in principle discriminatory to charge effectively at different rates  
15 depending on retail prices, and it is secondly saying that there may be a factual stage,  
16 depending on the facts of each case.

17 As to the issue of principle, that is potentially based on an objective and material factor, i.e.  
18 the difference in retail prices. If it is legitimate to look at that factor then it is not  
19 discriminatory, but it is then noting that of course there could be discrimination based on  
20 particular facts where the difference in retail pricing is not a sufficiently good factor to  
21 justify the difference in termination charges. We say the question of discrimination really  
22 just collapses back into EE’s general challenge as to whether it is otherwise legitimate to  
23 have regard to retail prices. If it is then it is discriminatory, if it is not then it is not. There  
24 is no separate magic in the discrimination point. EE indeed unintentionally admit this in  
25 para.71 of their skeleton. They say there that BT’s argument on this point, namely that the  
26 MNOs which charge the same retail price would be on the same rung of BT’s charging  
27 ladder and would therefore be charged the same wholesale price simply begs the question of  
28 whether a difference in retail prices is a relevant criterion to take into account when setting  
29 wholesale prices. Indeed, that is why there is nothing further in this discrimination point at  
30 all, it does not add anything at all.

31 I then come on to Ground 3 – impracticability, and it is convenient to deal under this  
32 heading first with EE’s case and then also with BT’s case at the same time rather than  
33 coming back to that issue when I come to BT’s appeal.

1 EE's complaint, as we understand it, is in essence that Ofcom failed to find that the NCCNs  
2 would be impracticable in practice to implement and to operate by virtue of the difficulties  
3 which the MNOs said that they would face in first of all collecting information about the  
4 retail price of their calls and, secondly, in calculating an average retail price (e.g. EE  
5 skeleton paras. 73 to 75). Ofcom did not reach any firm conclusion about ARP because it  
6 said the parties had made no attempt to negotiate although it did express provisional views  
7 that each MNO should be in a position to be able to calculate an ARP to an acceptable  
8 degree of accuracy and that they should be able to ensure billing accuracy without distorting  
9 competition where it was necessary to inquire from other parties on their platform. As Mr.  
10 Read for BT has explained, Ofcom did, of course, on the 0845 final determination find that  
11 Principle 3 was not satisfied, but that was not on EE's grounds, it was on a different basis.  
12 What EE are effectively seeking to do is to support the Principle 3 decision that EE has  
13 failed on different grounds from the grounds which Ofcom found. To do so they have  
14 adduced new evidence which was not before Ofcom to back that up about ARP problems if  
15 I can use that compendious description in particular. It is BT not Ofcom which has  
16 responded to that new evidence, and the issue is joined between them on that subject. This  
17 is accordingly a matter which Ofcom proposes to leave primarily to the commercial parties  
18 to debate before the Tribunal. Ofcom was clearly hampered in dealing with this matter on  
19 the lack of proper engagement between the parties, we address that in our skeleton at paras.  
20 43 to 45, and also refer back there to the final decision. But we effectively retire from that  
21 particular field of conflict if that is permissible.

22 So in relation to BT's challenge on practicality we set out our response at paras. 64 to 65 of  
23 our skeleton and defence para. 64 to 69 and all I will do now is just respond to some points  
24 which BT made orally impugning Ofcom's decision making. In the first place we do reject  
25 emphatically the suggestion that Ofcom's conclusion that Principle 3 was not satisfied on  
26 0845 coming after it had found that it was satisfied on 080 is any evidence that Ofcom was  
27 wrongly erecting higher hurdles for BT to jump over as it got nearer to an overall pass mark  
28 as we found Principle 1 in its favour, or that we were trying to seize on uncertainty.

29 Without going into the detail and the history, BT is only too well aware that the world did  
30 not stand still in terms of evidence between 080 and 0845, the case changed in nature, there  
31 was new evidence, there were new arguments, and we do say it is dangerously close to bad  
32 faith, although BT have disclaimed this, to suggest that Ofcom's change of heart on  
33 Principle 3 was motivated by some extraneous considerations other than looking at the  
34 evidence properly. They may disagree with our conclusions but it is another thing to say

1 that we are erecting higher hurdles in order to put obstacles in their way because they were  
2 doing better on other matters. We do not think there is any basis for that at all.

3 Secondly, we contend that reliance placed at the Principle 3 stage on the NGCS review was  
4 perfectly proper and I have already addressed the Tribunal on that. The reasonable  
5 practicability test meant that we could look at horizons to the implementation of these  
6 charges and when that would interact with another process that was anticipated. It was  
7 proper to have regard to that (I put it no higher) as a factor. It was not in any event a major  
8 factor in the way the decision was expressed.

9 Third, sir, there was a double accounting point made in relation to Principle 2 bleeding in  
10 terms of Principle 3. Sir, we say that is misconceived for the reason identified by you in  
11 asking a question of Mr. Read, namely that the principles must all be passed separately. If  
12 there is a consideration which is relevant to more than one principle, then it must be counted  
13 at both sides. There is no question of double counting. That is simply a logically faulty  
14 analysis. If the same factor is relevant more than once, then it must be taken into account  
15 more than once.

16 But we do accept, sir, the fact that the conclusion on Principle 3 was clearly buttressed at  
17 para.9.53 of the Final Determination, it was clearly buttressed by Ofcom's conclusion on  
18 Principle 2. That does mean, we accept, that if Principle 2 was wrongly decided by Ofcom  
19 then logically we relied on an improper factor in deciding Principle 3 and Principle 3 must  
20 therefore be up for grabs all over again. It does not mean that BT win on Principle 3, but it  
21 does mean that one of the factors relied on by Ofcom, if they are right on Principle 2, was  
22 not a correct one. Sir, at that point the Tribunal will be left with the further evidence of the  
23 parties as to practicability on the 0845 case, and again evidence on which we do not intend  
24 to test or make submissions at this hearing.

25 Sir, it may be that the Tribunal will ultimately consider that there is force in the argument  
26 that there is scope for the parties to negotiate further on the issue of Principle 3  
27 practicability if that stage need be reached, although with a reversion to Ofcom if the  
28 negotiations are unsuccessful. We do not exclude the possibility that it might be rightly  
29 submitted that there are certain issues on which the Tribunal's ruling is needed if there are  
30 intractable issues of principle, but it may be that closing is the time to address any matters  
31 of that type.

32 Sir, finally on the EE case, there was a fourth ground raised of procedural unfairness which  
33 I hope I do not need to waste any particular time on. We do say, however, that in running  
34 this ground EE is effectively wrongly seeking to pre-empt a current Ofcom consultation on

1 the very issue of what should be disclosed in the course of the dispute resolution process,  
2 and so that the Tribunal should be cautious, in the absence of any practical reason at all, to  
3 engage with it. We say at paras. 46 to 47 of our skeleton that there is indeed no practical  
4 reason for the Tribunal to look at this issue. It is a purely historical one on EE's own case.  
5 Can I turn, then, to BT's grounds of appeal, sir. I have already dealt with Principle 3. What  
6 I propose to do is to deal first with some of Mr. Read's general points before turning to  
7 Principle 1, then Principle 2 affecting the welfare analysis. I am going to try to confine  
8 myself very shortly to responding to some of the points made orally, and obviously not to  
9 address the whole case, or even to respond to everything that Mr. Read said on his feet.  
10 Sir, the first issue which I do need to address is the meaning of "consumer", as a legal  
11 meaning. Mr. Read's jumping off point on this, so to speak, was I think para.16.3 of our  
12 skeleton argument where we gave some examples of types of submission with public  
13 interest implications. We included in that list BT's argument that Ofcom is not entitled to  
14 prefer the interests of "human consumers" over those of service providers such as banks.  
15 Sir, this led to a sustained argument from him designed to show that service providers are  
16 properly to be treated as consumers under the 2003 Act read with the framework Directive  
17 that consumers are not limited to natural persons.  
18 Sir, I am afraid that whole argument was based on a misconception. We did not say in  
19 para.16.3 and do not say that SPs are not consumers. What Ofcom said there was that  
20 Ofcom is entitled to prefer the interests of human consumers, in other words give them  
21 more weight. One can prefer by giving greater weight to a particular category. That is all  
22 we were seeking to suggest. We have got absolutely no quarrel with Mr. Read's  
23 submissions to the effect that SPs are consumers under the Act and the rules. The contrary  
24 was never suggested in the Final Determinations, nor in Mr. Myers' evidence, nor in our  
25 skeleton for that matter. Indeed, para.47 makes it plain that we would view the opposite to  
26 be the case. Just for your note, I refer also to the 0845 Final Determination para.2.33 and  
27 footnote 22.  
28 Sir, we do say however that Ofcom was entitled to give greater weight in welfare terms in  
29 doing its welfare analysis to particular types of consumers, and in particular to consumers  
30 who are callers rather than consumers who are service providers receiving benefits to  
31 improve their profitability. It is difficult to see how Mr. Read could argue with that, at least  
32 as a matter of principle. Indeed, as I understand it, although this is contrary to his written  
33 case, it is now conceded by him. He made a submission at the beginning of yesterday  
34 morning in answer to a question from the Chairman in the context of the assertion that BT

1 was a user and should be counted. He said it is, but it could be given less weight. The  
2 reference is day two p.7 line 29. Giving less weight is precisely what we say can be done.  
3 We say that is not right with respect to BT because they are not a consumer at all, but for  
4 SPs, for example, it is absolutely plain that one can give less weight. It is absolutely plain  
5 indeed that consumer welfare need not be weighted equally. Indeed, Ofcom's duties at  
6 sections 3 and 4 pick out particular categories of consumer, vulnerable groups and other  
7 matters, who may in particular cases need to be given more weight. It is absolutely plain  
8 that that is the proper process.

9 It might help, very shortly, to track through how that point plays out with Ofcom giving  
10 different weight to different groups. In relation to the Direct effect, both callers and SPs  
11 (and in callers I am including human and non human business callers), benefit from the  
12 effect identified provided they are operative: lower priced calls with potential volume  
13 effects. I am just going back to my flow diagrams as I talk about these things. Also, of  
14 course, brand quality effects. All those groups do benefit.

15 For the Indirect effect we expressly gave equal weight to callers who received benefits  
16 through the revenue share operation. The reference is Myers 395 and 397. Can I perhaps  
17 just take you shortly to Myers 397 because a submission was made on that to which I  
18 should respond. Sir, that is bundle C2 tab 28, para.397 p.117:

19 "If Ofcom had placed equal weight on the benefits to SPs as to callers under the  
20 Indirect effect, then Ofcom would not have concluded that a negative overall  
21 effect on consumers was more likely, given that the potential scales of the Mobile  
22 tariff package and Indirect effects were similar. It was the importance placed by  
23 Ofcom on the (lack of) benefits to callers that led it to its conclusion that a  
24 negative overall effect was more likely."

25 Sir, Mr. Read made a submission on that. The reference is day two pp.5 to 6 of the  
26 transcript which appeared to me at least to move from the statement of Mr. Myers that SPs  
27 were not given equal weight (in other words were given less weight) to a submission he said  
28 that they were given no weight. Of course, it does not follow and that is simply not right.  
29 They were given less weight, they were not given no weight.

30 Sir, that is also made plain by the table 9.1, you may recall, Final Determination p.170 table  
31 9.1(iii). I will not go back to it. Again, for your note, as to the justification for giving less  
32 weigh to SPs, Mr. Myers 2 at para.398 (one page on from where we were) gives a short  
33 explanation as to why that was justifiable.

1            “In my view, this approach by Ofcom strikes a reasonable balance between the  
2            relevant considerations. Although SPs fall under the definition of ‘consumers’ in  
3            the Communications Act, they are not the end-users of 0845/0870 services. The  
4            end-users are the people who make calls to those numbers.”

5            So there is no case for saying that Ofcom wrongly ignored the welfare interests of service  
6            providers. There is no basis for saying that Ofcom ignored or failed to comply with  
7            s.3(2)(b) which was suggested at one point. Indeed, there is no pleaded ground of appeal to  
8            that effect.

9            Sir, there was also the submission that BT potentially was a consumer. That ties into the  
10           whole total welfare analysis argument. It is contained in BT’s skeleton argument. It did not  
11           feature heavily in oral submissions, although a question was raised by you, sir, about it. I  
12           am not going to propose spending a lot of time dealing with that orally. Can I just give a  
13           reference to our skeleton at paras.50 to 54 and also refer to BT defence at paras. 75 to 76. If  
14           I need to return to that in closing I can do so, but it is also a matter which I anticipate expert  
15           witnesses are going to be asked questions about, although I think it is accepted that it may  
16           not, in reality, be an expert question. We certainly accept that economists might take the  
17           view that it was more proper in doing a complete welfare analysis to look at producer  
18           welfare as well as consumer welfare. Our short point is effectively that is not the legal  
19           framework within which Ofcom operates. Ofcom is specifically directed to look at a  
20           narrower class of interest and total welfare. So any suggestions to the contrary by expert  
21           witnesses are legally wrong. It may be a matter which will be shortly raised, if not  
22           exhaustively pursued, depending on what answers are given.

23           Sir, there is one error which we say Mr. Read did make in his statutory analysis - on a  
24           slightly different point, but it is potentially an important point so I should deal with it. That  
25           relates to s.3(1)(b) and the relationship with competition. Sir, that is authorities bundle 1  
26           tab 3. May I just take you back to the wording of s.3(1)(b) 2003 Act. Sir, as I have it  
27           recorded (transcript reference day one p.32 line 14), he suggested there that

28           “... whereas the interests of citizens are unconstrained an unlinked, consumer  
29           interests in s.3(1)(b) are specifically linked to the promotion of competition -  
30           ‘where appropriate by promoting competition’. In other words, one simply, in our  
31           respectful submission, cannot dictate from that that you can decouple the interests  
32           of consumers from the promotion of competition. That is a very important point,  
33           in our respectful submission, because it does not equate the interests of consumers

1 completely with low prices. There may be important reasons why higher prices  
2 may be required in order to promote competition.”

3 So what he appears to be suggesting therefore was that the interests of consumers could  
4 only be advanced by promoting competition. That is the link he was making. We say that  
5 is clearly wrong on the wording of 3(1)(b). It imposes a principal duty on Ofcom “to  
6 further the interests of consumers in relevant markets, where appropriate by promoting  
7 competition.” The comma would have to be after “appropriate” for Mr. Read’s meaning. If  
8 it is to further the interests of consumers in relevant markets where appropriate, by  
9 promoting competition, then it would be potentially limiting the whole scope of s.3(1)(b) to  
10 advancing competitive benefits, but it is not doing that at all. Plainly, it is a general duty to  
11 further the interests of consumers, where appropriate by promoting competition. We say it  
12 is clear on the wording. Any suggestion that there is a necessary link - of course  
13 competition will be highly relevant in 3(1)(b) matters - can only be done through promoting  
14 competition is misconceived.

15 Sir, one further issue which I should maybe shortly address arising out of the meaning of  
16 “consumer” because it was a point raised was a question which was asked as to why Ofcom  
17 gave more weight in welfare terms to businesses which are callers by MNOs (Corporate  
18 Mobile Users) compared to businesses which are SPs. They are both businesses, if you are  
19 giving less weight to the SPs why not also give less weight to the mobile corporate users?

20 Sir, we say that the answer to that is not particularly hard to find. It is two-fold. The first  
21 and obvious difference is simply that the former are indeed callers. Ofcom was entitled to  
22 give greater weight to the interests of callers than to companies which were providing 08  
23 services. They were effectively consumers of hosting services. That is the sense in which  
24 SP companies were consumers. They were consuming the hosting services provided by BT  
25 and the other TCPs. Ofcom was entitled to give higher weight - not excluding the latter - to  
26 callers generally, including corporate companies who were callers. I would refer to  
27 paras.9.27 to 9.28 of the Final Determination. I do not need to go to it, but it certainly takes  
28 residential and business callers together although I accept it does not elaborate the point or  
29 the distinction.

30 Sir a second reason perhaps for giving a different weight - and I accept that this reason does  
31 not emerge from the Final Determination but I advance it as a logical potential reason - for  
32 the category of SPs there is a conflict between their interests and the interests of their  
33 customers in the sense that the more they keep as SPs (and either put into their pocket or  
34 distribute to their shareholders) the less is available to be passed on to 08 customers by way

1 of improved services, for example. On the other hand, the business mobile users are not  
2 subject to that or any other relevant conflict of interest in respect of welfare terms; they are  
3 simply users consuming call services like any other caller. So there is a potential difference  
4 in that respect between the two categories.

5 Sir, can I then turn (and I hope deal very shortly with) Principle 1. We agree with where I  
6 think Mr. Read ended up, which is that there is effectively no issue remaining on Principle  
7 1. In 0845 case we accepted that Principle 1 was satisfied; in the 080 case there is a  
8 technical dispute between Ofcom and BT as to whether, on the proper reading of the Final  
9 Determination, BT has failed on Principle 1 as they suggest, or whether Principle 1 was  
10 simply never finally determined because the case turned on Principle 2, as Ofcom have  
11 suggested.

12 So I am going to resist showing you any documents on this because it is simply an academic  
13 dispute, given where we have reached. We accept that in the light of the way in which the  
14 argument moved on, on the 0845 case, the 080 conclusion on Principle 1 that, we say, it did  
15 not need to be decided, that it could not be satisfied cannot be right. The battleground here  
16 must be on Principle 2.

17 Sir, I should also add that as we see it, as a result of the fact that there is no relevant  
18 Principle 1 argument, there really is from BT's side no relevant challenge to the three  
19 principles employed by Ofcom at all. You will see there is some debate in the skeletons and  
20 the pleadings as to whether BT ever properly challenged the principle. As we say, from the  
21 early stage of the outset of the 080 case, they said they fundamentally agreed with the  
22 principles and it was only rather later on that they developed some particular criticisms. But  
23 really all of that, we think, is water under the bridge and I will not place particular reliance  
24 on it.

25 Sir, that applies to the three principles more generally. Mr. Read did continue to make the  
26 points orally that the Tribunal, at the admissibility hearing, had expressed some scepticism  
27 without deciding about whether BT could have derived the three principles from the six  
28 principles of cost, causation, etc. Again, we just do not think that goes anywhere. The  
29 Tribunal was expressing that scepticism in the context of a question about whether BT  
30 could have appreciated, before it got the draft determination, what Ofcom was going to do.  
31 But that is not the format in which one is now looking at it. There was no argument on  
32 whether actually the principles are determinable from those, and it is really again, we say,  
33 water under the bridge.

34 THE CHAIRMAN: I entirely agree.

1 MR. HERBERG: Thank you, sir. Finally, perhaps Principle 1 does provide an answer to a  
2 question which Professor Stoneman asked at a very early stage on the first day about free  
3 lunches. I think the question was as to whether Ofcom's policy preference for free calls  
4 was limited by any considerations of costs to the MNO, would that policy preference  
5 operate even if, as a result, the MNOs were not even recovering their costs? The answer is  
6 that, on Ofcom's analysis, no, because Principle 1 protected them. They would not pass  
7 Principle 1 unless all proper costs were recovered. One would not even get in the game, as  
8 it were, in terms of a welfare analysis unless the MNOs had at least – that was not the limit,  
9 but that was the floor – recovered their costs. That might perhaps provide an answer to the  
10 issue.

11 Sir, can I then make some limited submissions on the direct effect. Again, much of it will  
12 be reserved for witnesses and then closing, to the extent that we are addressing that issue at  
13 all. Sir, first of all, we have accepted BT's case on the direction of the direct effect, if I can  
14 put it that way. We accept the evidence has moved on since we made the 080 decision.  
15 We admit, and indeed emphasise, that Ofcom's decision was that it was appropriate to place  
16 greater weight on the direct effect and the mobile tariff package effect to reflect various  
17 matters such as the externalities. Sir, just for your note, various criticisms have been made  
18 of Ofcom's approach in this regard. I am not going to go through them all, but just to give  
19 some references, we introduced the extra weight which we place on the direct effect – this is  
20 a passage I should take you to, the Final Determination at paras.4.31 to 4.33, bundle B1, tab  
21 1. I should take you to this because this was the subject of sustained criticism from  
22 Mr. Read. This sets out the weighing of the direct effect and MTPE. I think this may be a  
23 passage that you have seen. I wonder if you could read briefly through those paragraphs  
24 rather than me reading them out to the Tribunal.

25 THE CHAIRMAN: (After a pause) Yes.

26 MR. HERBERG: BT complain, as I understood it, that this greater weight given to the direct  
27 effect was unclear and in particular they were not clear whether BT was just enabling a tie  
28 break scenario, so that if they were absolutely equal one would outweigh the other or more  
29 than that. We just do not see how that doubt can be sensibly derived from the paragraph. It  
30 is absolutely plain that what is said is that the direct effect was given greater weight. That  
31 does not mean it just a tie break. Clearly it is not expressing quantitative terms, but it is  
32 quite clear that even if the direct effect was slightly less than the mobile tariff package  
33 effect, it is entirely possible that by giving it greater weight it could come to overtake it. It  
34 is not just a tie break scenario. There is no passage in this determination at all, we say, and

1 none has been pointed to, that suggests we were limiting the extra effect to a tie break. If  
2 we had been, I would accept that that would be seriously downgrading because we place  
3 quite a lot of weight on the extra weight, as it were. There were various factors, such as the  
4 volume increase and other externalities, that were taken account of by way of the extra  
5 weight. This was an important element in Ofcom's reasoning.

6 Sir, for your note, we respond to BT's complaint in our defence at paras.18 to 19, and it is  
7 also dealt with in Mr. Myers' second statement at paras.63(c) and 64(a). Mr. Myers sets out  
8 a detailed analysis of which externality factors are reflected in the extra weight in his  
9 second statement at para.204 and following, and the table which we have already seen, p.74,  
10 table 6. You may recall that there was a chart of the direct effects, which I took you to. It  
11 itemises the different effects. That includes the volume effect, it includes also the brand  
12 improvement effect, box K.

13 Mr. Read did complain that Ofcom had not properly weighed box K, the brand  
14 enhancement effect, and we do say that that is incorrect. It may be, just for the purposes of  
15 that, I ought to show you where in the box it is taken account of. It is back in volume C2,  
16 Mr. Myers' statement, para.241, p.73. Then the tables are on the next page. The treatment  
17 of the table in para.241 is also important at (a), (b) and (c). I will not go through that now,  
18 but that sets out the commentary and the explanation. What he deals with at para.241(a) is  
19 increase in demand due to lower prices without any implication of alleviating the  
20 externalities. It is the box that Mr. Read said was missing from his diagram, the volume  
21 effect, the additional box. 241(b) is the alleviation of suppressed or distorted demand  
22 arising from externalities such as to improve consumer confidence or a reduced gap  
23 between perceived natural prices. That is box K. That effectively includes increased  
24 demand caused by an improvement for the brand. Consumers feel more clear and more  
25 certain about 08 numbers, about the prices, about what is going to happen, and therefore  
26 they make more calls and there is an effect through that route. That can be seen very clearly  
27 from the table. One sees under the column "Mechanism", second column, that these are all  
28 things triggered by a reduction in the 08 prices, and one sees alleviation of suppressed or  
29 distorted towards the demand, to improving meaning and value to consumers or reputations  
30 0845/0870 and possibly other number ranges, it is mainly to benefit such as to reduce the  
31 gap for consumers between perceived natural price, increase consumer confidence. That is  
32 all given greater weight on the direct effect. That is brand enhancement, and it is not  
33 missing, either from Mr. Myers' consideration or from the decision.

1 Sir, it is of course the case that how much weight to place on this and therefore how much  
2 extra weight to give the direct effect is not something which can be decided once and for all,  
3 or it has one value. It is another level complication in the analysis, that there may be  
4 different values to be given to this effect depending on the level of price at which you are  
5 looking at it. If prices come all the way down to the lowest level there will be a much  
6 greater chance of approximation with freephone prices, 080 prices, or geographical prices,  
7 and brand enhancement may be much stronger because customers can generally rely on the  
8 price being the same uniformly. If we are talking about the partial reduction scenario, a  
9 point made by Miss Smith, forcefully, and it has to be seen a strong point, there will still be  
10 confusion, and there may be much smaller potential for brand enhancement where you have  
11 still got different prices, confusion between prices but just less than before – in other words,  
12 a reduction in the disparity of prices on its may not do a huge amount for brand  
13 enhancement. So there would have to be in any welfare analysis a very careful calibration  
14 in some way according to what prices are, how much the reduction was, not only on the  
15 particular MNO but on other MNOs, on all the other effects on prices. Working through the  
16 effect we say is, in this aspect as in so many other aspects, extremely complex business.  
17 That does bring me rather back to the causes of uncertainty. Mr. Read made the point that  
18 the lack of empirical evidence is not BT's fault, subject to one reservation which we set out  
19 in Ofcom's skeleton at para. 60 and footnote 45, we agree that that is the case. Of course, it  
20 does not mean that it is anyone else's fault, or it does not in a sense matter whose fault it is  
21 the fact is that the absence of empirical evidence has an effect on the level of certainty  
22 which the decision maker can have in relation to the models. BT had originally chosen to  
23 bring in a price structure which, as I say, was novel and untested and therefore have a  
24 responsibility in that sense but that is another matter. What is obviously not right is for BT  
25 to argue that because it has no empirical evidence Ofcom should have simply gone with the  
26 theoretical model because there was no empirical evidence to counter it. That cannot be the  
27 right basis. One does have one reality check, as I have already noted, which was BT's own  
28 commercial intentions at the time when it actually made the changes anticipating  
29 considerable extra revenue.

30 So then very shortly on the mobile tariff package effects and waterbed, Mr. Read as I  
31 understood it complained that Ofcom should have split the mobile tariff package effect up  
32 along the lines of boxes W and X as we did do, and then that we should not have taken into  
33 account at all the type W mobile tariff package effect, that is the additional revenues on  
34 other calls as a result of the waterbed effect relating to A, which is core revenues lost to

1 MNOs because the MNOs reduce prices (transcript, day 1, p.82, line 21). I may have  
2 misunderstood but in any event I do say that simply cannot be right. It is one thing to place  
3 greater weight on the direct effect than on the mobile tariff package effect, it would be  
4 another to ignore the equivalent part of the MTP entirely, in other words there is no logic in  
5 saying that you know that one effect is bigger than the other and therefore you should  
6 disregard the lesser effect. If you are looking at the whole of the direct effect then you must  
7 look at the whole of the mobile tariff package effect and give greater weight to one than the  
8 other if that is the right decision, but you simply cannot ignore one part of the equation and  
9 we have not done so.

10 Mr. Read also pointed out that the mobile tariff package effect is less than 100 per cent, he  
11 puts that case strongly. Ofcom concluded that this might be correct in the final  
12 determination 0845 at paras. 7.146 to 7.147, and also that followed on from the draft  
13 determination at para. 5.197. I do not need to go back to it. There is likely to be an issue  
14 which there will be expert cross-examination on, the extent to which one can say: "How  
15 much less than 100 per cent?" in other words the uncertainty about it and the actual figures.  
16 For now we simply say that it does not follow from the fact that we acknowledge that it  
17 would be less that it would be a little less or a lot less, those are obviously completely  
18 separate questions and that is a matter that I can leave for examination and I do not need to  
19 make further submissions on now.

20 It also does not follow, of course, from the fact that the positive outweighs the negative, as  
21 it were, in comparing the direct effect in the partial reduction scenario that the overall effect  
22 is positive because of course one has to take into account the effectiveness of the indirect  
23 effect as well that could then be outweighed by the type X mobile tariff package effect, so  
24 one has to look at both sides of the equation before reaching the overall welfare decision as  
25 I am sure the Panel has appreciated.

26 Then very shortly can I finish with the welfare analysis and transparency. In setting out  
27 submissions on the welfare analysis Mr. Read identified three issues. First, what factors are  
28 appropriate or inappropriate to take into account, secondly, what weight did Ofcom give to  
29 those factors; and, thirdly, did Ofcom explain properly or has it shifted its ground? Those  
30 were his three issues. Subject to the fact that this is not simply an examination of what  
31 Ofcom did, we are content with the first two and we will obviously look at the relevant  
32 factors for the welfare analysis, and what weight is also a question to be asked, although  
33 there is a question of whether Ofcom gave reasonable weight as I indicated earlier on.

1 We are a little more cautious about the question about did Ofcom explain it properly or has  
2 it shifted its ground? The case that BT is mounting is substantially developed and new  
3 since even the hearing before Ofcom, it is absolutely clear as in response to criticisms made  
4 of its case in part and for other reasons the case has developed. Mr. Read said that we have  
5 been on a journey, meaning it is a criticism as to where Ofcom had got to but in my  
6 submission we are all journeying very much in the Good Ship BT and hence it is BT's  
7 models which have effectively developed iteration by iteration and stage by stage, and it is  
8 no criticism of itself that as criticisms have developed there have been responses and it has  
9 gone back and forward. The point for now is that the criticism of Ofcom explaining  
10 properly and the question about whether Ofcom has shifted its ground is going to be a  
11 difficult question to focus, or is a dubious question to focus on in these circumstances. Of  
12 course Ofcom shifted its ground between 080 and 0845 in that it was considering different  
13 evidence, and it then considered further evidence in 0845, but to the extent that we have  
14 responded to evidence and to new arguments or arguments put differently, or put in more  
15 sophisticated ways since the decision then of course Ofcom will be responding in a way that  
16 was not reflected in the final determination.

17 So far as possible, as I have indicated, I am going to try to some extent be hors de combat  
18 on those arguments and leave that to others who are here. However, because these  
19 arguments are progressions there are obviously some stages where it is impossible to draw  
20 an exact firm line at the edges of the final determination and go no further, and that is not  
21 going to happen. Clearly, Ofcom's witnesses who are here to explain their positions and  
22 justify their positions, we all take account in answer to questions of what has happened  
23 since, and Ofcom's witnesses have considered and engaged with all of the justifications  
24 provided by BT right up to the most recent reports, and it would not have been helpful were  
25 they to give evidence and say: "I have not read the recent stuff because it is beyond our  
26 confines". They have read it and they have looked at it, what they have not done is  
27 undertaken new analyses or further substantial investigations or tried to produce further  
28 reports in response to Dobbs 7 or Maldoom 7, so where appropriate they will obviously  
29 indicate the limits on what they have done, but they have considered those reports and we  
30 will, when asked questions by either the interveners or by BT, hopefully be in a position to  
31 respond to those questions. I hope that makes clear Ofcom's position.

32 I think the final point – final point and a half - that I might make, the first one just simply I  
33 hope, in our submission, to put to rest is in relation to transparency. Mr. Read made  
34 repeated attacks on the lack of clarity in Ofcom's decision . Even if it were the case, which

1 we do not accept that Ofcom's case was materially unclear and has now been clarified, one  
2 has to ask where does that leave us. Either our clarified case is right and Ofcom's analysis  
3 now makes sense or it is not. If I get it wrong then of course consequences flow from that  
4 in terms of the Tribunal allowing the appeal potentially. If its case is right BT cannot  
5 seriously be suggesting that notwithstanding there is no error or flaw in Ofcom's decision  
6 properly explained, the whole thing ought to be remitted back so Ofcom can explain that all  
7 over again. It would be utterly pointless. There is really no independent ground of appeal  
8 here which rests on transparency, it must really relate back into the substantive arguments  
9 as to the nature of Ofcom's reasoning and as to the new arguments which have been put.  
10 Indeed, BT's whole case on the preliminary issue in relation to admissibility has been very  
11 much to focus on that way of doing this. So we really say transparency goes nowhere.  
12 Also going nowhere, we say, is ground four of the appeal which was scope. That was a  
13 very specific complaint about the way in which BT was misled by the way the scope was  
14 originally defined before the position became clear in the 080 draft determination. We have  
15 accepted that the position may well not have been clear to BT until it got the draft  
16 determination and could see the reasoning. That was our position even at the admissibility  
17 hearing, and it is certainly the position now. But the fact is that water has flowed under  
18 many bridges since then in 080 and then in 0845. Really, we cannot see any consequences  
19 that flow from that point. Mr. Read tried to turn it into a more general submission that  
20 Ofcom did not get the decision right because it did not have the right information available  
21 to it, but that is not ground four. Ground four was a very specific complaint of unfairness to  
22 BT by reference to that fact. We say that there was no unfairness because it got the draft  
23 determination, it made submissions, it expressly said that it had said all that it wanted to  
24 say, and therefore there is no unfairness at all to BT. That is our submission. But even on  
25 that issue, BT would no doubt disagree with that and say that they were hurried, they did  
26 not have adequate time. We say they should have asked for more time, etc. That debate is  
27 not for this hearing, we submit. It really leads nowhere in terms of substantive relief that the  
28 Tribunal is going to grant. So subject to any further submissions that are made, I do not  
29 need to address it further.

30 Sir, may I just have a moment.

31 THE CHAIRMAN: Of course. (Pause)

32 MR. HERBERG: Sir, subject to any questions from the Tribunal, those are my submissions in  
33 opening.

1 PROFESSOR STONEMAN: It is a point of clarification, standing back from the three judgments  
2 by Ofcom. What was in front of Ofcom was the three NCCN notices which, as you have  
3 said, contained rather a new and unusual pricing structure: ladder pricing in wholesale  
4 markets. Although you have pointed out that Ofcom have decided such a system is not  
5 discriminatory, what I am not quite sure about is whether Ofcom has said there is nothing  
6 wrong in principle with ladder pricing, but the parameters being introduced with these three  
7 particular schemes are not acceptable, or whether Ofcom has said: we object to ladder  
8 pricing whatever the parameters; or whether what you said is we do not want to answer the  
9 general question; we have three schemes in front of us, we reject those three schemes and  
10 we are not going to tell you whether it is particularly because of the parameters or  
11 particularly because of the pricing structure. Can you enlighten me as to where Ofcom  
12 stands on this?

13 MR. HERBERG: Sir, I think I can. I think our submission is firmly and squarely - and we were  
14 decisive on this; we did not try to take refuge in uncertainty - the first. We accepted that  
15 there was no problem in principle, or we did not identify any problem in principle with  
16 ladder pricing. That is why EE and the interveners effectively cross appealed despite the fact  
17 the decision was in their favour, because they say you should have found a problem in  
18 principle with ladder pricing, and simply said: we will not be approving this or any other  
19 ladder pricing scheme because they are fundamentally wrong and incompatible with  
20 Ofcom's duties. We did not do so; we accepted they were in principle legitimate, we  
21 looked at how this particular scheme would work, the consequences and the welfare  
22 analysis and doing the best we can, we decided that on the particular facts of these  
23 particular schemes they were not welfare beneficial, or we could not be satisfied that they  
24 were, and so we rejected them. We certainly did not say that there was any problem with  
25 ladder pricing, which may explain the profusion of further ladder pricing schemes that now  
26 appear to be appearing. BT have had a second bash in their second raft of 080 ladder  
27 pricing schemes, Cable & Wireless and other people as well.

28 PROFESSOR STONEMAN: That deals with the issue, thank you.

29 MR. HERBERG: Sir, I am grateful.

30 THE CHAIRMAN: Thank you very much.

31 MR. READ: Sir, before I call my first witness, I would just like to clarify with the Tribunal as to  
32 how late it can sit today. Let me explain what the problem is. The problem is, as you  
33 know, Mr. Kilburn's wife is heavily pregnant and therefore expected to give birth very  
34 shortly. In normal circumstances I would be very keen to get him out of the way today so

1 that if an event happens tomorrow or on Friday we are not stuck with the problem of not  
2 having Mr. Kilburn. Having talked to my learned friends, they have given an indication that  
3 they are talking about spending some time cross-examining him, which I think will  
4 inevitably mean that we could not finish the cross-examination by 4.30, and I certainly  
5 would not want him to go part heard. If the Tribunal can sit later then I certainly would be  
6 keen to try to get him out of the way today. I am in the Tribunal's hands to that extent.

7 THE CHAIRMAN: What we may do is to rise for five minutes to see what can be done. I will  
8 need to speak to the shorthand writers whether that can be accommodated.

9 MR. HERBERG: Sir, before you do so I can now express some concern about dealing with Mr.  
10 Kilburn this afternoon even if the Tribunal sat a bit late. I am not going to take the lead on  
11 Mr. Kilburn. I know that EE are proposing to go first in cross-examination, but given Miss  
12 Smith's estimate and given that other people will have at least some questions, I am a little  
13 concerned about finishing, even if we were sat until 5 for example. So while I understand  
14 Mr. Read's concerns, I think we do have another witness here, Mr. Fitzakerly, who is  
15 available and could certainly be finished this afternoon. I do think, in spite of those  
16 concerns, the better course would probably be for that to be pursued because it would be  
17 very unfortunate for him to go part heard and then for paternity issues to intervene and for  
18 him then to be part heard for a considerable period.

19 THE CHAIRMAN: Let me hear from Miss Smith about what her estimate is.

20 MISS SMITH: Sir, we have discussed this and there is a possibility that I could take a couple of  
21 hours' cross-examination with Mr. Kilburn. I do not want to exclude the possibility that  
22 others may have some questions. It could be much quicker. These things cannot be  
23 absolutely precise. But we have Mr. Fitzakerly here and we are prepared to proceed with  
24 him and we think that we would be pretty safe in getting him finished by 4.30 this  
25 afternoon. Mr. O'Donoghue from O2 is going to go first after Ofcom.

26 I should also make it clear that we have discussed between ourselves as interveners that one  
27 or other of us will go first on cross-examining after Ofcom for the witnesses and we will not  
28 repeat any of the questions that the first intervener puts. But that should be understood on  
29 the basis that if I put questions those points are also being put by Vodafone and O2. Let no  
30 point be made on that.

31 THE CHAIRMAN: Of course. That is clear. Mr. Read.

32 MR. READ: Sir, I only make the point that if events intervene between now and Friday we may  
33 lose Mr. Kilburn on Friday as well.

1 THE CHAIRMAN: I quite understand and I think all the parties appreciate that if events  
2 intervene, then he will be interposed, if necessary, quite late on in the hearing, taking it very  
3 much out of order.

4 MR. READ: Can I also make the point in response to what Miss Smith just said, that obviously  
5 as far as BT is concerned it certainly is not going to put every point that it possibly could to  
6 all of the witnesses. We are going to try to simply cross-examine on the bits that we think  
7 are particularly relevant to the Tribunal's decision. If the MNOs or Ofcom do likewise it is  
8 fully understood that I am not going to be standing up at the end saying: that point was not  
9 taken in cross-examination.

10 THE CHAIRMAN: I think all the parties can take it as read that the Tribunal will not be taking  
11 particularly kindly to forensic points that a particular matter was or was not put, given the  
12 sheer size of this case and issues. Clearly, if important points are put, then that is relevant,  
13 but we are not very interested in that sort of forensic argumentation.

14 MR. READ: I anticipated that that might be the Tribunal's view.

15 THE CHAIRMAN: Shall we rise for five minutes?

16 MR. READ: I think it might be useful, sir.

17 (Short break)

18 MR. READ: I am grateful for the little extra delay. I will call Anthony Richard Fitzakerley.

19 Mr. ANTHONY RICHARD FITZAKERLY, Sworn

20 Examined by Mr. READ

21 Q You are Anthony Richard Fitzakerly. Your business address is BT PLC, BT Centre, 81  
22 Newgate Street, London EC1A.7AJ, is that right?

23 A Yes.

24 Q Mr. Fitzakerly, can you look at the box on your left, and within that box there should be a  
25 bundle entitled C1, can you see that?

26 A Yes.

27 Q If you can take that out, please, and turn to tab 21 and I should preface it by saying I am not  
28 entirely sure how important this particular statement is going to be because it relates  
29 primarily to the preliminary issues hearing, but as it is in the bundle I think I should take the  
30 witness to it. it is a statement dated 17<sup>th</sup> June 2010 and on p.9 – do you have p.9?

31 A Yes.

32 Q There is a signature there, is that your signature?

33 A It is.

34 Q And do you adopt this statement as your evidence?

1 A Yes.

2 Q Can I ask you to look at the next tab, which is tab 22, and that is a further statement from  
3 you in this appeal, and if you go to the end of that statement, the last page, I think in your  
4 copy although it may not be in the Tribunal's copy, there is a signature on it, is that right?

5 A Yes.

6 Q And that is your signature?

7 A It is.

8 Q Is there anything in that statement you want to clarify at all in any way?

9 A Yes, on para. 42 of that statement I say that:

10 "BT has no incentive to increase its retail charges for calls to 0845 numbers that  
11 terminate on TCPs' network as the effect of the NTS Formula is that BT can  
12 never keep more than its regulated costs of retailing and originating an 0845 call."  
13 It is the next sentence:

14 "However, as the NTS Formula only applies to BT this is not the case for other  
15 OCPs, including the MNOs. The MNOs have taken advantage of this lack of  
16 regulatory restriction to charge considerably more than an appropriate amount ..."  
17 I think that probably does need clarification because as may well become clear, the NTS  
18 formula applies throughout the industry but it is only actually enforced on BT because the  
19 mechanism for enforcing it is the NTS call origination condition which specifically does  
20 apply to BT.

21 Q But subject to that clarification do you adopt that statement?

22 A I do.

23 Q Finally, can I ask you to go to tab 23 and at the final page of that there is again a signature, I  
24 hope, in your bundle ----

25 A Yes.

26 Q -- that will not be unfortunately, I think, in everyone else's core bundles, is that your  
27 signature?

28 A It is.

29 Q And do you adopt that statement as your evidence in the case?

30 A Yes.

31 MR. READ: Yes, thank you, Mr. Fitzakerly, if you would just like to stay there you will be asked  
32 some more questions.

33 MR. HERBERG: Sir, my Junior, Mr. Vinall, is going to ask questions of Mr. Fitzakerly.

34

Cross-examined by Mr. VINALL

- 1
- 2 Q Good afternoon, Mr. Fitzakerly, I am going to be asking you some questions on behalf of
- 3 Ofcom. Can I start off before I do by just putting down a quick marker about what I am not
- 4 going to be asking Mr. Fitzakerly questions on. As Mr. Read indicated Mr. Fitzakerly's
- 5 first statement does relate to matters which we say are water under the bridge and it is not
- 6 going to assist the Tribunal, we say, to any great extent going into those disagreements that
- 7 remain between Mr. Fitzakerly and Mr. Buckley and, indeed, BT has indicated it does not
- 8 intend to cross-examine Mr. Buckley, so we are not going to trouble Mr. Fitzakerly about
- 9 that. Similarly, Mr. Fitzakerly takes a short point in paras. 26 and 27 of his third statement,
- 10 at tab 23 which, as far as we can see is a matter of argument criticising Ofcom's reasoning
- 11 in the decision, I am not proposing to cross-examine Mr. Fitzakerly on that, that is a matter
- 12 on which the lawyers can argue about as necessary.
- 13 Mr. Fitzakerly, I would like you to go back, please, to your second statement at tab 22, and I
- 14 just want to first of all ask a question arising out of the clarification that you just gave to the
- 15 Tribunal. You said, I think, that this related to para. 42, if you want to turn it up? You
- 16 said, I think, that the NTS formula only applies to BT, and you clarified it applies
- 17 throughout the industry but it is only enforced as against BT?
- 18 A Yes.
- 19 Q I just want to be clear about what you mean by that. You say it is only enforced against BT
- 20 and the mechanism through which it is enforced is the NTS condition?
- 21 A That's right.
- 22 Q Which you describe in your witness statement at para. 21?
- 23 A The current incarnation.
- 24 Q Mr. Fitzakerly, do you have para. 21 of your statement at tab 22, please?
- 25 A Yes.
- 26 Q You refer there to the 2009 Wholesale Markets Review, which re-imposed the NTS
- 27 conditions. So that is the legal basis for applying the NTS condition to BT?
- 28 A Yes.
- 29 Q And it is right, is it not, if you could go back to para. 17, that is your description of the NTS
- 30 formula?
- 31 A Yes.
- 32 Q And it is right, is it not, that that is not the precise language that is used in the NTS
- 33 condition?
- 34 A That's correct.

1 Q But you say that it has a similar effect, and I do not think that is something we disagree  
2 with. So when you say, as you just did, that it applies throughout the industry that is true to  
3 the extent that it is true only as a matter of industry practice, and in particular BT's former  
4 practice, that is right, is it not?

5 A Well it is difficult to say in the sense that it was applied to the industry and was expressed  
6 as control on the termination payments that were paid to BT by all originating operators in  
7 the original expression of the NTS formula, 1996. Therefore it did apply across the industry  
8 in that sense but it was in terms of the payments that BT would receive rather than what  
9 others were receiving. BT has always been of the view, and if one looks at the way that it is  
10 formulated it is justified several times by Ofcom in its different consultation documents as  
11 being to ensure that terminating operators get the profit from an NTS call, and I think that is  
12 set out in the 2005 statement "NTS Way Forward" which sets out the policy on that.

13 Q So you accept, do you, that it only applies to anybody other than BT as a matter of industry  
14 practice?

15 A I think yes, in the sense that what Ofcom has said in its own statement, and I think it says in  
16 the final determination of the 0845 cases that the problem with the policy preference  
17 effectively was that the designation in the numbering plan applied to the terminators, so it  
18 was the terminators who took on a number range would take on the obligation to provide  
19 services at those prices. But of course it is not the terminators that are setting the call price  
20 and therefore there was no mechanism for controlling what that price was. In the 2005  
21 statement Ofcom said it was not practical to impose a specific price control on each ONO  
22 (Originating Network Operator) and that therefore we would stick with one price which was  
23 the BT price effectively, but that did not mean that the NTS formula would not work, apply  
24 to everyone, and certainly that has always been the position in the industry that everyone in  
25 the industry has understood that that is how it operates and has operated for very many  
26 years.

27 Q That is an important distinction though, is it not, Mr. Fitzakerly, because when you talk  
28 about the NTS formula applying in that sense, you are referring to an NTS formula based on  
29 BT's costs?

30 A Yes. Yes, the formula relates specifically to BT's costs. It relates to individual ONOs'  
31 prices.

32 Q Mr. Fitzakerly, can you please now turn over to para.19 of tab 22, and just take a moment,  
33 please, to read that paragraph back to yourself.

34 A (After a pause) Yes.

1 Q Mr. Fitzakerly, what you are suggesting there, as I understand it, you say the regime is  
2 based on a particular assumption, and that is an assumption which you are attributing to  
3 Oftel and Ofcom – that is right, is it not?

4 A Yes.

5 Q The assumption is that the bulk of the revenue from an end to end NTS call should go to the  
6 party that generates the value to the caller – that is the main value resides with the number  
7 range holder, namely the TCP?

8 A Yes.

9 Q In this paragraph you are referring, when you talk about the telecommunications regime put  
10 in place by Oftel, to the January 1996 determination which introduced the NTS formula –  
11 that is right, is it not?

12 A Yes, that and the numbering plan.

13 Q Could I just ask you to turn that up. Mr. Fitzakerly, I do not know how easy it is going to  
14 be for you to find this, but if you can find the bundle marked 24, it is also BT2. One you  
15 have got that there should be a tab marked 11.3.

16 A Yes.

17 Q This is a determination by Oftel of the interim charges that BT could make for various  
18 services in respect of the year ending 31<sup>st</sup> March 2006. NTS services are dealt with on p.19,  
19 are they not?

20 A Yes.

21 Q Then there is an explanation of the way that they are dealt with on p.48 and following,  
22 annex 6 – that is right, is it not?

23 A Yes.

24 Q Can I just ask you to read the first two paragraphs of annex 6, Mr. Fitzakerly. (After a  
25 pause) Mr. Fitzakerly, the policy that is said to be being advanced by this measure is the  
26 objective:

27 “... to promote investment and innovation in services with a telecommunication  
28 service component by adequately rewarding those who invest in these services  
29 whilst ensuring a fair return for owners of the infrastructure on which the call  
30 originates.”

31 It is fair to say, Mr. Fitzakerly, that at least principally the person who invests in the  
32 services which are being described there is the SP rather than the TCP?

33 A I think that’s possibly true. It’s a combination of the SP and the TCP, yes. The investment  
34 is mainly in the information that is provided.

1 Q Indeed.

2 A Yes, I would accept that might come from the SP rather than the TCP.

3 Q Just to be clear, the TCP is not involved in providing information over the telephone, is it?

4 A No, not in that role.

5 Q Going back to your para.19, which I hope you have still got open, you say that the TCP

6 should receive the major share of the total end to end call revenue. I do not dispute that the

7 effect of the NTS formula was that the OCP would pass the major share of that revenue to

8 the TCP.

9 A Yes.

10 Q The TCP there is acting as a conduit of that revenue on to the SP, is it not?

11 A The assumption was there would be a revenue between the TCP and the SP, yes.

12 Q So it would not be right to say that there was any policy that the TCP should get to keep the

13 major share of the total end to end call revenue?

14 A No, the policy was that the major share should go to the TCP. Whether it kept it or not was

15 not a matter that was expressed as a policy.

16 Q With respect, Mr. Fitzakerly, that is not consistent with the answer that you gave a moment

17 ago, is it, which is that the aim of the policy is to promote investment innovation by the

18 person who you agreed was the SP?

19 A Well, the policy as expressed in the NTS formula was that it should go to the TCP. There

20 was no specific requirement as to what the terminator would do with the money.

21 Q Let me put it this way, Mr. Fitzakerly: there is no other way of getting money – assuming

22 you are using the telephone system as a way of making micro-payments – to the SP other

23 than via the TCP, is there?

24 A We've heard that there are arrangements been put in place.

25 Q There is no other way in common use at this time?

26 A At that time there was no other way.

27 Q In your last sentence of 19 you say that the call originator merely provides access to these

28 services?

29 A Yes.

30 Q It is not unfair, is it, to say that that is largely what the TCP does as well?

31 A I think that's true, yes.

32 Q Mr. Fitzakerly, could you turn to para.22 and para.23. Perhaps you would like to refresh

33 your memory of these two paragraphs, and certainly I would like the Tribunal to read them.

34 (After a pause) Are you happy for me to continue? If I have understood the point that you

1 are making in para.23, you are seeking to suggest, as I understand it, that it is not terribly  
2 novel to have a pricing ladder structure for termination charges. Is that the point you are  
3 making?

4 A That's correct.

5 Q You are relying on 0844 and 0871 as an example of a number range where there is a pricing  
6 ladder, and indeed a pricing ladder which has been approved by Oftel?

7 A Yes.

8 Q I think this is set out in the underlined part in the first paragraph of the quotation in para.22.  
9 The point about those number ranges was that the TCP or the SP would be allowed to  
10 choose a retail price point for their service. That was the aim of these number ranges?

11 A Yes.

12 Q When I say a retail price point, it only worked on calls from BT numbers?

13 A That's correct.

14 Q Because only BT was restricted in the amount of its origination charge. But if one restricts  
15 the focus to BT numbers, then that was how it was supposed to work?

16 A Yes.

17 Q I have got a service which I want to retail at 5p per minute, so I set my termination charge  
18 accordingly; I know how much BT will keep so I can market the service as being 5p per  
19 minute from BT landlines?

20 A That's right.

21 Q I want to explore what you mean in 23 by a "pricing ladder based charging principle". Does  
22 that mean anything more than there is variation in the retail price which correlates with  
23 variation in the termination charge?

24 A No, that is what it means.

25 Q That is what it means. As I have just described it, and as you have just agreed with me, the  
26 variable that is chosen in the 0844 example is the termination charge and that results in a  
27 retail price outcome?

28 A Yes.

29 Q You do not suggest, do you, that that is how the NCCNs with which we are concerned in  
30 this appeal operate?

31 A No, it is simply the point that there are ladder pricing mechanisms that that part of the  
32 pricing mechanism wasn't that unusual, but clearly the mechanism underlying it was more  
33 limited.

1 Q To be fair, you do not say this in your statement, but you would not go so far as to say that  
2 the fact that Ofcom has supported what you described as a ladder pricing mechanism on  
3 these number ranges is terribly significant for the purpose of deciding whether it should  
4 support a ladder pricing mechanism on these NCCNs?

5 A Yes, it is clearly not a determinative factor; it is just a background factor that such things do  
6 exist and therefore SPs and others have some experience of dealing with different ladder  
7 positions.

8 Q Could you find a bundle marked B1 please. This is the 0845 Final Determination. Go to  
9 tab 1 para.8.195. I want to take you first of all to the last line of that paragraph. You will  
10 see that Ofcom's conclusion about the relevance of 0844 was: "we do not consider that this  
11 should have any bearing on whether NCCNS 985 and 986 are found to be fair and  
12 reasonable." Let us leave that for the moment. Apart from that conclusion, the reasoning in  
13 that paragraph is correct, is it not?

14 A I think I take issue for the reason that I made in my correction of my statement that the  
15 regulatory policy is different in relation to OCPs and say that the regulation is different.  
16 The policy, as far as I am aware, is still the same.

17 Q Let me take you up on that. BT has been found to have significant market power in NTS  
18 origination. That is right?

19 A At wholesale level.

20 Q Wholesale NTS origination, I am grateful. Other operators have not. That is a relevant  
21 regulatory difference, is it not?

22 A It is a difference.

23 Q And it leads to different regulatory outcomes in that BT is saddled with the NTS condition  
24 and everybody else is not?

25 A Yes, that is a moot point as far as BT is concerned, given that BT does not believe that it  
26 should be subject to an NTS condition that applies to its retail pricing as a remedy for a  
27 wholesale SMP problem. But that is perhaps a moot point.

28 Q I want to move on now, Mr. Fitzakerly, to the last of my topics which is what you say about  
29 the waterbed. Have you got your witness statement there?

30 A Yes.

31 Q Same witness statement para.49. Looking at the first sentence of para.49 you say that Oftel  
32 and Ofcom have always assessed the waterbed effect in relation to mobile tariffs as being  
33 incomplete at best. Now, you are not saying, are you Mr. Fitzakerly, that Ofcom assessed a  
34 percentage (if I can put it that way) of the waterbed effect as being 100 per cent in this case?

1 A No.

2 Q Indeed, you say the contrary in para.61 of your witness statement, do you not, second line:  
3 “Although it is correct to say that in the 0845/0870 dispute Ofcom also regards the waterbed  
4 effect as being less than 100%.”

5 A Yes.

6 Q So just as a matter of definition, there is a difference, is there not, between saying that the  
7 waterbed effect is not complete in the sense of being 100 per cent pound for pound, and  
8 saying it is not important?

9 A Indeed.

10 Q To take an extreme example, a 99 per cent waterbed effect would be incomplete, but it  
11 would not necessarily be unimportant.

12 A Yes.

13 Q Just to tell the story of your statement, you highlight various examples of findings by  
14 Ofcom that the waterbed effect in particular areas is incomplete, but it does not really take  
15 matters much further. In para.58 you make this criticism:  
16 “The importance which Ofcom is now attaching to the waterbed effect in the  
17 context of 0845/0870 dispute is surprising because in the past this effect has not  
18 been seen as a deciding factor.”

19 You then quote various documents to support that. The first one, which is at the bottom of  
20 58, is the 2008 Statement on Wholesale Mobile Voice Call Termination. I will ask you to  
21 read the quote in a minute, but what I want to suggest to you, Mr. Fitzakerly, is – actually,  
22 could you read that first, please, if you would, just the extract. (After a pause) What that is  
23 saying is that in case there were arguments which supported regulation, whether or not there  
24 was a complete waterbed?

25 A Yes.

26 Q It is not a general statement that waterbed effects do not matter?

27 A I don’t think it is a general statement, no, I think it’s important.

28 Q Some of those arguments, the other arguments which support regulation, are set out in the  
29 extract that you give in para.59.

30 A Yes.

31 Q Just going through them one by one, structure of prices that is detrimental to economic  
32 efficiency and the interests of end users, adverse distributional outcomes, distortion of  
33 competition, an increased risk of anti-competitive behaviour. Assuming that those findings

1 were correct, that was a compelling case for regulation regardless of whether there was a  
2 waterbed?

3 A Yes.

4 Q You cannot take from that any general principle or expectation that waterbed effects cannot  
5 be decisive?

6 A I think all one deduce is that waterbed effects don't outweigh all those other effects that  
7 Ofcom considered in that case.

8 Q You are seeking to suggest in 58 that the approach that Ofcom took in the 0845/0870  
9 dispute in this case is somehow inconsistent with, or different from the approach that it has  
10 taken in previous cases. Looking at how Ofcom approached what it referred to as the "full  
11 reduction scenario" – do you understand what I mean by that?

12 A Yes.

13 Q A scenario where the NCCNs induce the mobile operators to drop their prices down to the  
14 bottom rung of the ladder?

15 A Yes.

16 Q You are aware, are you not, that Ofcom concluded when it considered Principle 2 that that  
17 scenario would result in an overall gain for consumer welfare?

18 A Yes.

19 Q Even though part of that scenario involves a waterbed effect, the mobile tariff package  
20 effect. Where there were other factors pulling in the other direction Ofcom did decide that  
21 the waterbed effect was outweighed by them, did it not? I am sorry, that was a badly  
22 phrased question, I to rephrase it. That is an example of a case where Ofcom decided that  
23 any negative effects arising from the waterbed were outweighed by other considerations –  
24 that is right, is it not?

25 A Yes, that is correct.

26 Q So the extracts that you provided give no reason to expect that Ofcom would not be  
27 concerned about consumer harm arising from waterbed effects in a case where there are less  
28 clear considerations in the other direction?

29 A I think all I can say is that the waterbed has been a factor which Ofcom has considered for  
30 very many years. It has not previously been one that has been determinative of any specific  
31 disputes, but it has clearly been a factor which may or may not be outweighed by other  
32 factors.

33 Q Can we deal very quickly with this: the mobile termination rates situation was a relatively  
34 simple waterbed effect, was it not, because you regulate and therefore reduce the mobile

1 termination rate and that may or may not result in an increase in prices on the rest of the  
2 bundle?

3 A Yes.

4 Q The present situation, other than in the full reduction scenario, is different, is it not, because,  
5 as Mr. Read said, there are two different waterbed effects in play. Let me take you through  
6 them. First of all, there is the analogous waterbed effect where you drop the price and other  
7 prices may rise as a result – yes?

8 A Yes.

9 Q There is also, where prices do not fall to the bottom rung, a potential waterbed effect arising  
10 from the increased termination charges that are being paid?

11 A There must be a potential for that, yes.

12 MR. VINALL: Thank you very much, Mr. Fitzakerly?

13 THE CHAIRMAN: Mr. O'Donoghue?

14 Cross-examined by Mr. O'DONOGHUE

15 Q Mr. Fitzakerly, I gather you have been unwell during the short adjournment, so if you have  
16 any further episodes, please let me know. Can I start, Mr. Fitzakerly, with the following:  
17 BT's primary economic case is that it would be irrational for a profit maximising mobile  
18 operator to price below 12.5p per minute, or 8.5p per minute, depending on which NCCN  
19 we are talking about. That is the evidence in a nutshell of Professor Dobbs?

20 A It would be irrational to price below.

21 Q Because of the penalty effect of the NCCN? This penalty effect, if I can call it that without  
22 being too pejorative, would apply to all mobile operators – that is correct?

23 A Yes.

24 Q We know that last summer the other principal TCPs have replicated identical or virtually  
25 identical ladder pricing systems to those of BT with the exception, I think, of Cable &  
26 Wireless?

27 A I believe, yes, a number of other operators have introduced some kind of ladder pricing.  
28 I'm not up to date on exactly how many there are at the moment, but I think perhaps Mr.  
29 Kilburn, when he gives evidence, will be able to give more information on that.

30 Q We can check that, but can we assume for now at least that with the exception of Cable &  
31 Wireless, the other principal TCPs have identical ladder pricing systems to BT to the very  
32 penny, and that Cable & Wireless is substantially the same?

33 A I'm sorry, sir, I really don't know the answer to that. Whether it is identical or not, I don't  
34 know.

1 Q Let us assume I am correct on that for now. What we have is that on the TCP side of the  
2 market all the operators have virtually identical ladder pricing systems, and on the OCP end  
3 of the market we have all the MNOs being simultaneously subject to these ladder pricing  
4 systems – that is correct, is it not?

5 A Whether they're simultaneous or not again would depend on the ----

6 THE CHAIRMAN: On the assumption that is correct?

7 A On the assumption, yes.

8 MR. O'DONOGHUE: You would agree with that, subject to the qualification?

9 A Yes.

10 Q If that is the case and BT's primary economic case is that this is the only proper maximising  
11 response for the MNOs, that they should not price above a particular level, then it follows,  
12 does it not, that in reality what these charges do is impose an industry wide price cap. You  
13 are not suggesting to the Tribunal that it should assume that the MNOs will act in an  
14 economically irrational manner. That would be entirely contrary to your primary economic  
15 case?

16 A Yes, forgive me I am not an economist, but I am certainly not ----

17 Q Neither am I, this is ----

18 A -- assuming there would be any rational reason for them to do anything other than price at  
19 the most rational point which would appear to be the 12.5p or just under. Everyone would  
20 have the same incentive if the same pricing structure applied.

21 Q And if that is correct, subject again to the assumption these NCCNs in their totality are  
22 economically indistinguishable from a maximum price cap applied across the industry, are  
23 they not?

24 A No, I disagree with that ----

25 Q But it would be irrational to say otherwise.

26 THE CHAIRMAN: I think he had not finished, Mr. O'Donoghue, do carry on.

27 THE WITNESS: Thank you, sir. I do not think they are the same in the sense that price cap –  
28 certainly the experience that BT has of it over many years – is something that applies to all  
29 the charges within the relevant category. BT terminates something under 25 per cent of  
30 traffic to NTS calls, therefore 75 per cent of traffic is not regulated by whatever happens to  
31 BT's charges, so I would not say that it was ...in that sense, and the MNOs would still  
32 retain that choice and if, of course, they didn't agree with the economic rationale then they  
33 could well decide that their profit maximising price was something different from that.

1 MR. O'DONOGHUE: Well again, Mr. Fitzakerly, BT's primary economic case, spelt out in  
2 detail by Professor Dobbs, is that there is a very robust basis for saying that it would be  
3 economically irrational for the MNOs to price at any level other than the bottom rung of the  
4 BT NCCN's?

5 A That's right, yes.

6 Q It must follow therefore, perhaps not in the legal sense, that they are in *de facto* economic  
7 terms subject to a pricing restriction. There is a ceiling above which it would be  
8 economically irrational to go?

9 A It is not the same as the price control, the MNO or any other originating operator would still  
10 have the freedom to choose to price in whatever way they chose, would be able to  
11 discriminate which includes things in packages, or excludes them – they have quite a  
12 degree of freedom around how they chose to price their services, whereas the price control  
13 makes it pretty clear and explicit what the maximum price is.

14 Q Suppose I had a price control which said that I could price up to 10 ppm but when I exceed  
15 that the money goes to a charity or some other third party. Now, that case, if I am acting  
16 rationally, there is no incentive for me, if I am profit maximising to do anything other than  
17 respect the cap?

18 A It may be that there is no direct incentive in that situation. Again, it does depend on your  
19 hypothesis that everyone is operating the same price ----

20 Q Well we are assuming for now that is correct, and I am happy to be corrected on that, if that  
21 is true?

22 MR. READ: Can I just make the point that if my learned friend wants to make submissions I am  
23 quite happy for him to make submissions at the end, but I do not know whether it is  
24 actually going to help the Tribunal having a witness who does not mention any of this in his  
25 statement and actually being cross-examined on assumptions that he says he does not know  
26 about.

27 THE CHAIRMAN: Well carry on for the moment.

28 MR. O'DONOGHUE: I am happy to move on. (To the witness): Can we at least agree that the  
29 rationale from British Telecom, its stated rationale to the Tribunal, in introducing these  
30 charges was to effect reductions in what it regarded as excessive retail prices on behalf of  
31 mobile companies?

32 A Mmm.

33 Q You would agree with that?

34 A Yes, I think that's right.

1 Q Your own experts agree with that in some detail. Can I refer you to bundle C1, please at tab  
2 9. This is the second statement of Dr. Maldoom. On the last page of that statement do you  
3 see the heading: “5 Efficient pricing and surplus transfer”?

4 A Yes.

5 Q Dr. Maldoom says: “The use of retail price related termination charge could be seen as a  
6 response by BT to an inefficiently large margin on mobile –originated 0800 calls.” So you  
7 would agree that what he is saying is that this was a response to excessive retail pricing by  
8 the mobile operators, that is the gist of what he is saying, is it not?

9 A Because it could be seen as a response, yes.

10 PROFESSOR STONEMAN: Should we not ask Dr. Maldoom that? It says “It could be seen”,  
11 you could see it, he could see it, somebody else could see it, we want to know if Dr.  
12 Maldoom sees it, and therefore I do not see it is useful to ask this witness whether that is  
13 what Dr. Maldoom meant?

14 MR. O’DONOGHUE: Sir, the point I am putting to the witness is that he has disagreed that one  
15 can view these as price controls and the point I am putting to him is that their own evidence  
16 is that these were a response to what was perceived to be excessive pricing.

17 PROFESSOR STONEMAN: Then you asked him to give a view on an opinion expressed by  
18 another witness who we are seeing later.

19 MR. O’DONOGHUE: Well, sir, I will do that, but Mr. Fitzakerly says he was involved in these  
20 determinations and I am interested for the record in his views as an employee of BT as to  
21 what the purpose of these NCCNs was?

22 A The purpose of the NCCNs I think is partly – there was a reaction to the high prices, it was  
23 a view that the mobile operators were making a lot of money out of charging high prices for  
24 calls to these numbers, and that that was detrimental to BT Group’s interest, as a terminator  
25 itself and that it would be better if either Ofcom’s policy preference was followed, or if not  
26 that BT would take a share of the excess profits itself.

27 Q And was there a concern in this regard that the obligations under the national telephone  
28 numbering plan did not go far enough insofar as concerned MNOs as OCPs?

29 A Yes, I mean BT, perhaps contrary to the view of Ofcom felt that Ofcom actually had the  
30 power to impose the restriction on other people in the numbering plan in terms of what they  
31 charge. Ofcom, as we have heard, has said that it would not have that power until the  
32 transposition of the new Directives in May of this year, but BT’s position, which is on  
33 record in a number of disputes, is that Ofcom already has that power and the fact that the

1 Directive says “for the avoidance of doubt” in our view means that it was a power that was  
2 already there.

3 Q To be very clear, you are not suggesting that insofar as the national telephone numbering  
4 plan imposes obligations on the MNOs that they include in respect of the NCCNs in this  
5 case explicit price controls?

6 A The National Numbering Plan does not impose explicit price controls on the MNOs, no.

7 Q Thank you. Are you familiar with BT’s Standard Interconnect Agreement?

8 A Well not all of it, it’s a very large agreement, but I am ----

9 Q Would you mind turning it up, please, it is at CAT bundle 22, tab 17. Can I refer you to  
10 Clause 18 of the SIA please. Page 30. It is Clause 18 headed “Numbering”.

11 A Yes.

12 Q The Clause says: ”Each party shall use the numbers in accordance with the National  
13 Telephone Numbering Plan and shall comply with the numbering provisions in Annex A.”  
14 You have accepted that the MNOs are currently under no obligation under the National  
15 Telephone Numbering Plan to have retail price controls. My question to you is: given that  
16 in the contract it is assumed that each party shall act in accordance with the National  
17 Telephone Numbering Plan and no more, on what possible basis can BT rely on this  
18 contract to effect changes to the telephone numbering plan via the NCCN?

19 A Well, I wouldn’t accept that the NCCNs change the numbering plan. I don’t think that’s  
20 what they’re doing.

21 Q With respect, I am making a different point. The point is that the agreement assumes that  
22 both parties will comply with any relevant obligations on the National Telephone  
23 Numbering Plan. My question is that in circumstances where you accept that the MNOs are  
24 not in breach of any current obligation under that plan, how can this contract be used to  
25 proceed as if they are?

26 THE CHAIRMAN: By all means answer the question, but it does seem to me that this is straying  
27 very much into questions of construction of regulatory and financial provisions.

28 MR. O'DONOGHUE: Sir, I accept that Mr. Fitzakerly is not a lawyer.

29 THE CHAIRMAN: Indeed. Not only that, but it is not really his role to answer that question; it  
30 is our role to answer that question. Do answer the question but I am not sure really how  
31 profitable this is.

32 A Sorry, sir, as you say, I am not a qualified lawyer. The view is that what we are talking  
33 about is the NCCNs as a change to the wholesale price which is not in itself a change to the  
34 retail price that the MNOs charge.

1 MR. O'DONOGHUE: But you have indicated that BT's intention in introducing these charges  
2 was, at least in part, to regulate the retail prices charged by the mobile operators.

3 A I don't think I said that it was intended to regulate. I think we were intending to see that the  
4 prices either came down or, if they didn't, that we would have a share of the excess profit.

5 Q But BT's economic case, its primary case, is that they would be capped at 12.5 p per minute  
6 or 8.5 p per minute.

7 A That they would have an incentive to reduce to that level, yes.

8 Q Acting rationally?

9 A Yes.

10 Q Can I go back now to Ofcom's preference which BT relies on. Would you go to core  
11 bundle A, the Final Determination, para.1.28. In the last sentence you will see that Ofcom  
12 preference that 080 calls ought to be free to the caller, and if they are not free, that they are  
13 as close to free as possible. In your witness statement you have not identified any  
14 regulatory document which includes the phrase "as close to free as possible" have you?

15 A I don't believe it was annexed. I don't think so.

16 Q Can you tell the Tribunal what would be the price of a call that is as close to free as  
17 possible? What is that price?

18 A Well, the view that Oftel took would be that it would be zero plus the cost of origination.

19 Q I am sorry, you just said that there is no policy document explaining what a call as close to  
20 free as possible is.

21 THE CHAIRMAN: This is really not helping us very much at all, Mr. O'Donoghue. This is, in  
22 the first place, a document which is not the witness'. Where exactly are we going on this?

23 MR. O'DONOGHUE: Mr. Fitzakerly's two statements are replete with references to support  
24 what this preference is, part of BT's case in these proceedings. I am asking him to  
25 articulate what a price of a call as close to as free as possible would mean.

26 THE CHAIRMAN: But it is Ofcom's preference. It may be a wrong preference, but it is the  
27 preference of Ofcom articulated in the Final Determination. You may want to attack that,  
28 but why does it matter what this witness says about it? We know that BT prays it in aid, but  
29 it is there in the Determination.

30 MR. O'DONOGHUE: Sir, it is there. Perhaps what is more fruitless is to go through the  
31 contemporaneous documents and show that it is only there in the Final Determination rather  
32 than in the contemporaneous documents themselves. Mr. Fitzakerly, you have helpfully set  
33 out in the annexes to your statements the various supporting regulatory documents. Can I  
34 ask you to turn to CAT bundle 24, please. Mr. Fitzakerly, as the same time can I ask you to

1 reopen the Final Determination tab 1 core bundle A. Can you turn to para.2.33 please.  
2 You will, Mr. Fitzakerly, a quote from an Oftel document from 1996 saying: "In principle  
3 0800 calls should be paid for entirely and should be completely free to the caller." Do you  
4 see that?

5 A Yes.

6 Q Can we now turn up the Oftel document in question? That is at tab 11.3 bundle 24 p.48.  
7 You will see in the penultimate paragraph that quote set out in full:

8  
9 "In principle, OFTEL believes that 0800 calls should be paid for entirely and  
10 should be completely free to caller. The Director General's determination does  
11 not, however, prevent ONOs from imposing a charge for 0800 calls on their  
12 customers. ... This determination is concerned with access to BT's NTS systems  
13 ..."

14 So you see, Mr. Fitzakerly, that there is a significant qualification to the first statement, the  
15 "in principle" statement, and that in principle also the MNOs as OCPs are perfectly entitled  
16 to impose a charge for 0800 calls if they wish. You accept that, do you not?

17 A Yes, I think it's always been expressed that provided they give an announcement of the  
18 charges that they could.

19 Q If you go back to the Final Determination, again sticking with the basis for the preference,  
20 at 2.55 please. There Ofcom says: "In further market research carried for the 2006  
21 Numbering Statement, 64% of the consumer base recognised 0800 numbers as free to call."  
22 Would you turn to CAT bundle 3 tab 37, about halfway through, p.8 para.1.4. Mr.  
23 Fitzakerly in the middle you will see that 64 per cent recognise 0800 numbers as free to call  
24 from fixed line phones.

25 THE CHAIRMAN: I think we are looking at different documents here. Ours does not say that.

26 MR. O'DONOGHUE: Sorry, sir, it is 35. It is clear, is it not, that the research to support the  
27 preference concerned only calls from fixed line phones?

28 A Yes, I mean that bit of research was related to calls from fixed lines.

29 Q So that there was no basis, was there, for using that same evidence for saying that the same  
30 was true of preferences in respect of mobile phones?

31 A Ofcom have expressed their preferences applying to all MNOs. I don't know what research  
32 they have to back it up. That has always been their expressed preference.

33 PROFESSOR STONEMAN: (No microphone) Your focus has got to be ...

1 MR. O'DONOGHUE: Simply that when one looks at the contemporaneous documents, the  
2 evidence supporting the preference concerns something entirely different. It was a survey  
3 that related to fixed lines and it is being used as if it had applied in full to mobile lines.

4 PROFESSOR STONEMAN: This is not ...

5 MR. O'DONOGHUE: Indeed.

6 THE CHAIRMAN: Sometimes it is helpful to have documentary points put through witnesses  
7 and sometimes it is not. I venture to suggest that this is probably an occasion where we can  
8 get that point from reading the documents without troubling Mr. Fitzakerly.

9 MR. O'DONOGHUE: I am sorry, I do not want to labour the point, but I did want to put a couple  
10 of points to him on the contemporaneous documents.

11 PROFESSOR STONEMAN: Did it come through in the latest review from Ofcom ...

12 MR. O'DONOGHUE: Sir, yes, I believe it may.

13 PROFESSOR STONEMAN: I believe the distinction between fixed and mobile is very clear  
14 there.

15 MR. O'DONOGHUE: Yes, sir. Mr. Fitzakerly, can you go back to your main witness bundle,  
16 please tab 11.9. Bundle 24, paragraph 4.153 please. There Ofcom again sets out its policy  
17 position at the time. In the first bit it says: it believes in the medium to longer term that  
18 0845 calls should be charged for on the same basis as geographic calls, and that they should  
19 be removed from the NTS condition. Then in the next bullet point it says that

20 "These changes should not be introduced until the number of dial-up internet  
21 customers using 0845 numbers has declined to a level at which the prospective  
22 costs of making these changes are less than the prospective benefits."

23 Ofcom then says it will do a further review in a couple of years. Again, simply to  
24 understand BT's position on the preference on which it relies, you are not saying that a  
25 contingent preference expressed in this way, where the costs in 2006 outweigh the benefits  
26 of the preference as expressed, you are not saying that that is a preference on which it would  
27 be legitimate to base a fine determination?

28 A Sorry, forgive me, I do not quite understand the question.

29 Q To rephrase: Ofcom said that it had in mind to restore linkage between geographic calls and  
30 non-geographic calls, but it said that the position in relation to dial-up internet was such that  
31 the costs of doing so in 2006 would outweigh the benefits of doing so at the time, and  
32 therefore it proposed to wait and see. So it was a preference that was entirely contingent on  
33 future events, was it not?

1 A I think the combination of restoring the link and removing 0845 from the NTS call  
2 origination condition which would have been two things happening together were  
3 something that Ofcom proposed to review again in a couple years – in fact, it did not  
4 actually get ‘round to it but that was the intention.

5 Q Indeed. So you would accept that a contingent preference, that was contingent on events  
6 which Ofcom never actually did, is a weak basis for supporting a preference in the context  
7 of a final determination.

8 THE CHAIRMAN: It is not a final determination here, Mr. O’Donoghue.

9 MR. O’DONOGHUE: Yes, sir.

10 THE CHAIRMAN: That would be, if anything, a question for Mr. Myers.

11 MR. O’DONOGHUE: Sir, we will put it to Mr. Myers, but it is very firmly part of BT’s case that  
12 this policy preference must be accorded decisive weight in certain scenarios in this case.

13 THE CHAIRMAN: That surely is a question for submission not a question for this witness.

14 MR. O’DONOGHUE: Well, sir, I am simply interested in his view on the weight to be attached  
15 to this preference?

16 THE CHAIRMAN: Well do ask the question, but can I make one thing clear on timing, we do  
17 need to finish at half past four today and it would be unfortunate if we did not finish this  
18 witness today, so carry on.

19 MR. O’DONOGHUE: Sir, I will finish by 4.30.

20 THE CHAIRMAN: Very well.

21 A I think your point is that Ofcom should not have relied on a policy preference that was  
22 contingent in 2006 to decide a matter in 2010, is that right?

23 MR. O’DONOGHUE: Yes, when in fact when it did not undertake the review it said it would do  
24 in 2006?

25 A I think that would be the case if the decision had been taken in 2006 or in between, given  
26 that a lot of water has flowed under the bridge and the policy preference has been expressed  
27 in other places since then, I think it still stands and the fact that 0845 still has not been taken  
28 out of the NTS call origination condition is not specifically a problem I do not think.

29 Q Well let us come to the position since, because I want to be very clear about this. Can I go  
30 to your third statement, para. 17, core bundle C1, tab 23. There, Mr. Fitzakerly you set out  
31 a quote from Ofcom.

32 “The primary purpose of the link [to geographic prices] is not to provide  
33 transparency for consumers: rather it is to protect consumers’ interests by  
34 maintaining reasonable retail prices ...”

1 and there is a reference to the final determination. Can I ask you to go back to tab 11.9  
2 because this is the contemporaneous document, para.245 please.

3 THE CHAIRMAN: Can we just be clear at para. 245 what we are talking about, is it the 0845  
4 final determination or ----

5 MR. O'DONOGHUE: In tab 11.9 NTS have moved forward from 2006. Bundle 24, I am sorry,  
6 4.104 please. There Ofcom says:

7 "... the main aim of restoring the geographic link is to improve price transparency,  
8 not to bring down the price of calls. The relevant question is whether the pre-  
9 announcement option would achieve the desired level of transparency or not".

10 Now, Mr. Fitzakerly, I appreciate in your statement you were quoting Ofcom, but again if  
11 one looks at the contemporaneous document, referring to the link in question in fact it says  
12 the opposite, does it not? It says that the purpose of it was not price control, it was simply  
13 transparency?

14 A That's what it says.

15 Q Mr. Fitzakerly, finally a few short questions on the extent to which the BT charges would  
16 further the preference that BT relies on. BT's primary economic case is that the NCCNs  
17 will reduce prices to no more than 12.5 ppm and 8.5 ppm. That does not result in calls that  
18 are free, does it?

19 A No.

20 Q And because geographical prices for mobile phones are unregulated, they of course may  
21 increase themselves?

22 A That's true.

23 Q And is BT saying that when that happens the price of 0800 calls would also have to  
24 increase?

25 A It wouldn't have to, no.

26 Q So there is no link in that sense?

27 A No.

28 Q And conversely, if geographic retail prices of mobile calls decrease, there is nothing in the  
29 BT charges which result in the 08 prices themselves decreasing?

30 A Not as I understand it, no. The BT charges are, as I say, a wholesale charge between two  
31 partners to a wholesale bargain, the effect of prices is ----

32 Q Indeed, the point I am putting to you ----

33 A -- not something I am qualified to comment on.

1 Q The point I am putting to you, Mr. Fitzakerly, is that these charges do nothing to further a  
2 link with geographic prices, they are entirely disconnected, because when the geographic  
3 prices increases or decrease nothing happens to the 0800 prices. There is no link?

4 A What these charges will do, if our economic analysis is correct is they will provide an  
5 incentive to reduce the prices of the origination ----

6 Q Of non-geographic calls?

7 A Of non-geographic calls, yes, they provide the incentive to do that, and if it does not get to  
8 what Ofcom's policy preference is it is at least moving in what we would say is the right  
9 direction.

10 PROFESSOR STONEMAN: Can I interrupt there? What the scheme does is to reduce prices to  
11 marginal cost. If it is a case that the mobile operator's marginal costs rise on geographic  
12 calls and therefore they have to increase the price you would also expect them to be rising  
13 with respect to these calls and therefore the price would rise accordingly. So the scheme  
14 does not say that prices will be independent of those costs and also determine geographic  
15 prices. It is just a bit of economics.

16 MR. O'DONOGHUE: Sir, I have no further questions for this witness.

17 THE CHAIRMAN: Yes, Miss Smith.

18 MISS SMITH: I see what the time is, I do have a very short number of questions, I just wanted to  
19 take Mr. Fitzakerly back to the NTS formula, Mr. Vinall put to him earlier. Could do those  
20 questions in about five minutes. I understand Mr. Ward has a few questions too. It may be  
21 that these are questions that we can also put to Mr. Kilburn tomorrow. I just do not want  
22 there to be a criticism that we have not put them to Mr. Fitzakerly.

23 MR. WARD: Before perhaps you consider that, Miss Smith and I were whispering, I hope  
24 discretely about this point during Mr. O'Donoghue's cross-examination. There is a point  
25 arising out of one of Mr. Fitzakerly's answers about the purpose of the NCCs which we had  
26 anticipated putting to Mr. Kilburn. He deals with the purpose in his evidence. So it was  
27 almost an aside from Mr. Fitzakerly. For my part, I would be perfectly happy to put the  
28 points to Mr. Kilburn, as had been intended. Moreover, they do require us to trespass us to  
29 some extent into the confidentiality ring only material, albeit that it is BT's material, so we  
30 do not see any difficulty in putting it to a BT witness. None of that is ideal at 4.30. I have,  
31 of course, heard what Mr. Read said about being pragmatic about having the case put, and  
32 for my part I am quite happy to put these purpose points, including what Mr. Fitzakerly  
33 himself said, to Mr. Kilburn, but of course we do not want it to be later said that ----

34 THE CHAIRMAN: I understand. If you can do it very briefly, let us make it briefly now.

1 MISS SMITH: I think I can put my questions in less than five minutes.

2 Cross-examined by Miss SMITH

3 Q Mr. Fitzakerly, could I ask you to go to bundle 24. Can I take you back to the document  
4 that is at tab 11.3 towards the very beginning of the bundle. This is Oftel's 1996  
5 Determination and Explanatory Document on a number of issues, including the NTS  
6 formula, and Mr. Vinall asked you some questions on that. I would just like to ask you,  
7 with your help, to clarify how the NTS formula actually works. Could we go to the formula  
8 itself which is on p.49. There are two parts to the formula. The first is the ONO, the  
9 originating network operator, keeps P, which is defined below as the actual retail price  
10 charged by the ONO to the customer – minus D, which the deemed retail price, and we will  
11 come to that, plus C, which in summary is the costs of origination. Do you agree, that is the  
12 formula set out for what the originating network operator keeps?

13 A Yes.

14 Q We have the actual retail price minus the deemed retail price, and if you flick back to p.19,  
15 the deemed retail price is defined in the second paragraph in there, in the case of freefone  
16 services the deemed retail price, and this is effectively BT's deemed retail price, is it not, or  
17 the deemed retail price as defined by reference to BT's adjusted retail prices at the time – is  
18 that correct?

19 A Yes, that's right, the D is specific to each originating operator.

20 Q Let us have a look at that, if we can. We have deemed retail price on p.49 for the call is  
21 defined in addendum 8, which we find at p.19.

22 A Yes.

23 Q And deemed retail price in the case of freephone services is zero?

24 A Yes.

25 Q In the case of Lo-call services, 0345, and the 0345 numbers have now been replaced by  
26 0845 – is that right?

27 A That is right, yes.

28 Q And National Call, 0990 services, which are now 0870 services – is that right?

29 A Yes.

30 Q The deemed retail price is the retail price charged by the ONO for local or national calls,  
31 minus discounts, or if the ONO's discounted price is greater than BT's adjusted retail price  
32 for that call specified in the table below then BT's adjusted retail price minus 6.5 per cent?

33 A Yes.

1 Q So the deemed retail price – tell me whether or not this is a fair summary – is either the  
2 retail price actually charged by the ONO or, if the retail price actually charged by the ONO  
3 is greater than BT’s adjusted retail price, the deemed retail price is BT’s adjusted retail price  
4 – is that right?

5 A That’s correct.

6 Q If we go back to the formula on p.49, the ONO keeps their actual retail price minus the  
7 deemed retail price plus the costs of origination?

8 A Yes.

9 Q So if their actual retail price is higher than BT’s adjusted retail price, they keep their actual  
10 retail price minus BT’s adjusted retail price plus the costs of origination – is that correct?

11 A Yes, that’s correct.

12 Q So the effect of this equation – tell me if you agree or not – is that where the originating  
13 network operators’ actual retail price is greater than BT’s adjusted retail price, the  
14 originating network operator keeps that, or accepts that difference in price as well as the  
15 cost of originating the call. Is that correct?

16 A They did under that formulation, yes.

17 Q So this formula does not stop originating operators apart from BT charging higher retail  
18 prices than BT’s retail prices for these types of calls, does it?

19 A That’s correct.

20 Q We see actually explicitly – I think Mr. O'Donoghue took you to it on p.48 – the Director  
21 General’s determination does not, however, prevent ONOs from imposing for 0800 calls on  
22 their customers, even though BT’s deemed retail price for those calls may be zero – that is  
23 correct, is it not?

24 A Yes.

25 Q Let us look at what BT keeps as the terminating operator, which is the second part of the  
26 formula on p.49. BT keeps D, that is BT’s deemed retail price, BT’s adjusted retail price,  
27 minus the costs of origination?

28 A Yes.

29 Q That is correct?

30 A Yes.

31 Q So the termination charge is only BT’s deemed retail price minus the costs of origination –  
32 is that correct?

33 A Yes.

1 Q So any excess, any extra price, any extra revenue that is obtained by an originating operator  
2 as a result of charging a higher price than BT, they keep that excess, it does not go to the  
3 terminating operator – is that correct?

4 A That was the correct formulation at the time, yes.

5 Q It is also correct that any revenue share that is to be made by BT as the terminating network  
6 operator is made from that amount only – D minus C, the deemed retail price minus the  
7 costs of origination?

8 A That is BT's retention, yes.

9 Q So the NTS formula does not impose any obligations on originating network operators apart  
10 from BT to pass through to terminating network operators, all of their retail price minus  
11 only the cost of origination, does it?

12 A No.

13 MISS SMITH: Thank you, those are my only questions.

14 THE CHAIRMAN: Mr. Ward?

15 MR. WARD: Sir, I anticipate my questions will take a similar length of time to those of  
16 Miss Smith, although the topic is entirely different. It may prove necessary to ask the  
17 people who are not in the confidentiality ring to leave but that will depend to some extent  
18 on the answers I get.

19 Cross-examined by Mr. WARD

20 Q Mr. Fitzakerly, what I wanted to ask you about was something that you said to  
21 Mr. O'Donoghue when he asked what the purpose was of the NCCNs and I will tell you  
22 what I wrote down, and I hope you will tell me if you think this is wrong. You said: the  
23 MNOs were making a lot of money. That was detrimental to BT Group interests and it was  
24 better either for Ofcom's policy preference to be followed, or for BT to take a share of the  
25 profits.

26 A Yes.

27 Q Talking first about the share of the profits, it is right, is it not, that BT itself cannot  
28 realistically raise its prices for the 08X calls that we are talking about because of the NTS  
29 condition and the regulatory frame that we have heard about?

30 A Yes.

31 Q But of course the MNOs are free to increase their prices?

32 A Yes.

33 Q So there is a revenue stream there that the MNOs have been enjoying that BT has not?

34 A Correct.

1 Q Is that regarded as a satisfactory state of affairs at BT?  
2 A It is not an optimal state of affairs.  
3 Q No. I do not think your answer will strike anyone as surprising. So your objective here was  
4 again two-fold. In one sense to take a share of the profits, commercial objective?  
5 A Yes.  
6 Q But you also referred to Ofcom's policy preference. I wondered which policy preference  
7 you were talking about, just for the avoidance of any doubt.  
8 A The policy preference as expressed by Ofcom in the Final Determinations.  
9 Q The policy preference that prices for 080 numbers should fall to zero and that prices should  
10 be at geographic levels for 0845/0870?  
11 A Yes.  
12 Q Would you accept that the NCCNs do not directly achieve that policy objective?  
13 A I would agree that there is no guarantee that that would be the outcome.  
14 Q It is a little more than that, is it not, because even if all of your economic evidence is  
15 accepted on face value unchallenged, then what we have is an incentive to reduce to 8.49 p  
16 per minute for 080 calls - so not an incentive to go all the way to nothing - and an incentive  
17 to go to 12.49 p per minute on 0870 and 0845 calls?  
18 A Yes.  
19 Q That particular figure does not reflect geographic pricing for these calls?  
20 A It doesn't.  
21 Q No. So on their own the NCCNs are at best an oblique method for achieving Ofcom's  
22 policy preference?  
23 A Yes, they are an oblique method. The only person that could do that would be Ofcom, I  
24 think.  
25 Q The only person who could do that would be Ofcom, not least of course because Ofcom can  
26 potentially regulate the entire industry?  
27 A Indeed.  
28 Q Not merely, as in this case, MNOs, vis-à-vis BT?  
29 A That's right.  
30 Q Of course, at the time that you imposed these NCCNs only BT was even in a position to  
31 implement ladder pricing?  
32 A I think there is some evidence that when the original 0800 one was installed there were  
33 some difficulties, but we had already had a request from others that were interested in doing  
34 something similar.

1 Q It had not actually happened at that time?

2 A It had not happened. Whether it is true to say that it couldn't have happened, I wouldn't  
3 necessarily agree.

4 Q I think you said earlier in your evidence that BT itself was only terminating 25 per cent of  
5 08X calls?

6 A That's right.

7 Q So it was a very long way from the kind of regulatory solution that Ofcom could adopt,  
8 subject of course to arguments about its powers?

9 A Indeed.

10 Q Let me look, then, at this from BT's perspective rather than Ofcom's perspective. You have  
11 posited two different alternatives that were in your mind. They are very different indeed,  
12 are they not? The first alternative is that there is at least a fall towards the bottom step,  
13 which is a way of (as I put it) obliquely seeking to realise Ofcom's policy objectives. If  
14 there is a fall to the bottom step, there is no wholesale revenue for BT, is there?

15 A That's right.

16 Q The only commercial advantage it gives you is indirect advantage through benefits to the  
17 number ranges in general. That is rather longer and, I would suggest, rather difficult to  
18 quantify.

19 A Yes.

20 Q But on the other hand, if there were no fall in price, if the MNOs chose to keep their prices  
21 at the same level, then BT stood to make large wholesale revenues?

22 A Correct.

23 Q So those are very different commercial propositions from the point of view of BT?

24 A Yes.

25 Q Were you involved at the time that the decision was made to put these charges forward by  
26 BT?

27 A I was involved on the periphery if you like. The matter was decided at a far more senior  
28 level within BT.

29 Q Yes. What I want to do is show you the contemporaneous documents that BT itself has  
30 provided to talk about what the reasons were at the time. The decisions were of course  
31 taken at Board level?

32 A At the Wholesale Executive Board.

33 Q Wholesale Executive Board level. What I want to show you is that those documents show  
34 that absolutely no price fall was anticipated at all at the time on the part of the MNOs. At

1 this point, the documents I need to show you are in fact confidential, but what I will do is  
2 proceed with the confidential versions without addressing any of the confidential  
3 information unless it becomes necessary. I am assuming that the confidential versions will  
4 not be in the witness bundles and therefore I have them loose to hand up, if I may. Oh there  
5 are? That would be good. Shall we see how we go?

6 THE CHAIRMAN: Let us see how we go.

7 MR. READ: All I would say is that the witness ought to know in advance that anything that he  
8 sees marked as confidential within that document he should not advert to without saying he  
9 actually wants to actually refer to that confidential information.

10 THE CHAIRMAN: Mr. Fitzakerly, you understand. If it is marked confidential then let us know  
11 if you want to refer to it and I am sure that the ...

12 MR. WARD: Mr. Fitzakerly, the first bundle I wanted to show you is bundle 3 and you are also  
13 going to need volume 23. Can I ask you to turn up tab 26 bundle 3. Do you have that?

14 A Yes.

15 Q A letter from Ofcom to you in fact?

16 A Yes.

17 Q What this is is a formal notice under s.191 Communications Act. As the Tribunal will  
18 know, this is a request for information under compulsory powers backed up on pain of  
19 penalty. Then on the next page is an annex which sets out the questions which BT have  
20 been asked. Sir, do you have that?

21 THE CHAIRMAN: Yes.

22 MR. WARD: You will see that question 2 asks BT to provide copies of “final internal  
23 documents: memos, briefings, documents, Board minutes, that consider the impact or  
24 effects of NCCN 956” on your business. Then four categories of documents.

25 “Any strengths, weaknesses, opportunities, threats analysis or cost-benefit analysis  
26 of the impact of NCCN 956 of your business;

27 “(b) The actual or estimated revenue BT expects to realise through the  
28 implementation of NCCN 956, together with an explanation of how BT has  
29 calculated this;

30 “(c) Any assessment of options for using the additional revenue generated by the  
31 implementation of NCCN 956, ...

32 “(d) Any assessment of the impact NCCN 956 may have on volumes of calls ...”

33 Then behind this are the documents that were provided by BT. The cover letter is at 27.2  
34 addressed to Neil Buckley, signed on your behalf by one of your colleagues.

1 A Yes.

2 Q It just says:

3 "Please find in the annex to this document, BT's response to those questions posed

4 by Ofcom ... There are a number of accompanying files which address several of

5 the questions posed. Those files are listed within the BT responses ..."

6 What I want to show you is one of the documents that was enclosed which is at 27.2.1. The

7 Tribunal has already seen this document. It is headed "CP NTS Paper - 0800". Parts of this

8 document are marked as confidential, but not all of it. Have you seen this document before,

9 Mr. Fitzakerly?

10 A I'm not sure that I have. I've seen something like it. I'm not sure.

11 Q We saw it was enclosed with your letter, but of course that was a long time ago.

12 A That was a long time ago.

13 Q You have not seen it especially recently?

14 A Not recently, no.

15 Q As we understand it, this is a submission paper provided to the Board that were charged

16 with making the decision. Does that seem like a fair interpretation?

17 A That would seem to be correct, yes.

18 Q Shall we see what it says:

19 "This paper outlines a proposal to increase the charges for BT terminating 0800

20 services to those Communication Providers who charge their end users to access

21 a free to caller service."

22 In other words, the words the MNOs?

23 A Yes.

24 Q "The charging mechanism proposed will improve ..."

25 so strong language –

26 "... margin and revenue by [CONFIDENTIAL] per annum."

27 So it is actually saying that it will have the same figure of improvement both on margin and

28 on revenue.

29 A That's what it says, yes.

30 MR. WARD: I am sorry, it is not marked as such in my version.

31 MR. READ: This is very unsatisfactory, sir. The trouble is that the document is being put has not

32 always been clearly marked. It is come from a confidential ----

33 THE CHAIRMAN: What we will do is we will empty the court room for those who are not

34 entitled to see this document and we will proceed on that basis.

1 MR. WARD: Thank you, sir, I must again apologise.  
2 PROFESSOR STONEMAN: I believe that number was in an Ofcom document that we went  
3 through yesterday.  
4 MR. WARD: Perhaps no harm is done, but then ----  
5 THE CHAIRMAN: No harm is done, but let us be safe rather than sorry.  
6 (For proceedings in private, see separate transcript)  
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