

**IN THE COMPETITION APPEAL TRIBUNAL**

**AND IN THE MATTER OF A NOTIFICATION UNDER SECTION 94 OF THE  
COMMUNICATIONS ACT 2003**

Competition Appeal Tribunal  
Victoria House  
Bloomsbury Place  
LONDON

**Wednesday, 5 May 2004**

Before:

**THE PRESIDENT, SIR CHRISTOPHER BELLAMY  
(CHAIRMAN)  
MS MARION SIMMONS QC  
MS ANN KELLY**

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**B E T W E E N:**

**BRITISH TELECOMMUNICATIONS PLC**

**Appellant**

**-and-**

**THE DIRECTOR GENERAL OF TELECOMMUNICATIONS**

**Respondent**

**Together with**

**THUS PLC AND BROADSYSTEM VENTURES LIMITED**

**-and-**

**NJ ASSOCIATES**

**Intervenors**

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**MR GERALD BARLING QC and MS SARAH LEA** (instructed by BT Legal Department) appeared for the Appellant.

**MS ELEANOR SHARPSTON QC and MR JOHN O' FLAHERTY** (instructed by OFCOM) appeared for the Respondent.

**MR JOHN EDWARDS** (Solicitor) and **MS NUSRAT ZAR** of Messrs Herbert Smith appeared for the Intervenors THUS PLC and BVL.

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**PROCEEDINGS - DAY 1**

1 THE CHAIRMAN: Good morning Mr Barling.

2 MR BARLING: Good morning. May it please the Tribunal, as I  
3 think you know, I appear with Ms Sarah Lea for the  
4 Appellants, BT; Ms Eleanor Sharpson QC and Mr John  
5 Flaherty appear for the regulator, OFCOM, and Mr John  
6 edwards of Herbert Smith for the interveners THUS and  
7 BVL. As far as I am aware, Mr Jones does not appear, but  
8 I hope I am right in saying that.

9 THE CHAIRMAN: Before you start, I wonder if I could just  
10 say a couple of things. First of all, we are very  
11 grateful to the parties for their further comments on  
12 section 94 and following of the Act and how that  
13 works. When we had raised the point on the previous  
14 occasion, Ms Simmons in particular raised the point,  
15 we were not then aware that the very same point had  
16 actually been raised in the course of the  
17 Parliamentary passage of the Bill.

18 MR BARLING: Yes.

19 THE CHAIRMAN: However, we feel at the moment, for the  
20 purposes of today at least, we can park that whole point,  
21 because what we want to do is to get on with the  
22 substantive issues, as I think you know.

23 MR BARLING: I am grateful

24 THE CHAIRMAN: What I would like to do is to just, if I may,  
25 tell you where I am as it were personally, on the  
26 legislative history of what we are considering, so you  
27 can put me right - and I have no idea where this takes  
28 one. originally, we had the 1997 Interconnection  
29 Directive which ---

30 MR BARLING: Which the Tribunal is familiar with, for  
31 certain reasons.

32 THE CHAIRMAN: Which I have had occasion to become familiar  
33 with, which, at least in general terms, was predominantly  
34 concerned with operator to operator relationships, and  
35 the whole question of inter-operability between network  
36 operators.

37 MR BARLING: Indeed.

38 THE CHAIRMAN: And that was the subject of an eminent

1 judgment by another tribunal here. It then appears that  
2 in Directive 98/61/EC, which is at tab 10 to your file of  
3 Directives, Carrier Pre-selection was sort of bolted on  
4 to the Interconnection Directive.

5 MR BARLING: Along with number portability.

6 THE CHAIRMAN: Along with number portability, which in fact  
7 surfaces in the Interconnection Directive to some extent,  
8 I think, in one of the later Articles. So to that extent  
9 one can say that there was some perceived association  
10 between interconnection and carrier Pre-selection and  
11 number portability.

12 MR BARLING: Yes.

13 THE CHAIRMAN: We then get to the 2002 package of Directives,  
14 in which again matters bifocate to some extent. You have  
15 the Access Directive, which is what we are here concerned  
16 with, particularly the fact that network access,  
17 presumably for the purpose of that Directive, is now  
18 defined statutorily in section 151 of the Act and General  
19 Condition GC1.4.

20 MR BARLING: Yes.

21 THE CHAIRMAN: But Carrier Pre-selection is now not dealt  
22 with in the Access Directive but is dealt with, so far as  
23 I can see, in the Universal Service Directive at Article  
24 19, or it seems to come up in Article 19.

25 MR BARLING: Quite so, yes.

26 THE CHAIRMAN: Of the Universal Service Directive.

27 MR BARLING: One can see the logic of that because the  
28 Universal Service Directive is dealing to a great extent  
29 with what the end users need to have as a minimum set of  
30 ....

31 THE CHAIRMAN: Correct, but Article 19(2) of the Universal  
32 Service Directive (which may or may not be relevant)  
33 refers to what it calls "user requirements" for the  
34 carrier selection procedure - "... shall be assessed in  
35 accordance with the market analysis procedure laid down  
36 in the Framework Directive and implemented in Article 12  
37 of the Access Directive ...", which takes one back to the  
38 Access Directive.

39 MR BARLING: Yes.

1 THE CHAIRMAN: Where that takes one I am not quite sure, but  
2 that is the statutory framework insofar as I have so far  
3 understood it.

4 MR BARLING: That is extremely helpful to know. I was,  
5 obviously, going to take the tribunal to those  
6 provisions, and you have anticipated me.

7 THE CHAIRMAN: That also raises the question, which is  
8 probably fairly central to the case, which is whether the  
9 information that we are talking about here is provided  
10 before, during or after the process of negotiating  
11 network access as now defined in the Act. One question,  
12 I suppose, is whether this idea of network access as  
13 defined means or includes particular circumstances in  
14 which particular customers want to change apparatus, or  
15 whether we are in a situation in which network access is  
16 limited to arrangements between operators that amount to  
17 interconnection or the use of other services or  
18 facilities, but that once such network access is in  
19 place, anything that happens after that which has a  
20 sufficient nexus with that, is covered by GC1.2 as  
21 something that has happened after the process of  
22 negotiating it and is therefore covered by the  
23 confidentiality provisions.

24 MR BARLING: Certainly, that is a question that arises. We  
25 would say that the answer to the second part of the  
26 question is that, quite clearly, the access in this  
27 context does not include access by end users, such as  
28 might be said to occur when you have CPS.

29 THE CHAIRMAN: Yes.

30 MR BARLING: We rely for that upon the whole framework as  
31 explained in our skeleton argument, but if one wants to  
32 focus in on one very clear provision, it would be Article  
33 1(2) of the Access Directive which says in terms "Access  
34 in this Directive does not refer to access by end users".

35 THE CHAIRMAN: Yes.

36 MR BARLING: When one looks at the preamble one can see why  
37 that should be, it is just dealing with the relationship,  
38 and access by one network operator to the facilities of  
39 another, that kind of access.

1 THE CHAIRMAN: Even if that were right, would it not leave  
2 open the possibility that Article 4(3) should be given a  
3 wide enough interpretation as to, as it were, put a cloak  
4 of confidentiality over everything that is supposedly  
5 confidential and which happens after the access has been  
6 put in place.

7 MR BARLING: That is the argument that OFCOM raises. We say  
8 it is fundamentally wrong and can be seen, clearly, to be  
9 fundamentally wrong, because it ignores, apart from  
10 anything else, the words of GC1.2 and, in particular, the  
11 information which is protected by GC1.2 must be acquired  
12 in confidence but also in connection with and solely for  
13 the purpose of negotiations relating to interconnection  
14 or access.

15 THE CHAIRMAN: Yes.

16 MR BARLING: We submit that that meaning is also to be  
17 derived, as it was derived by Oftel when they implemented  
18 it - from Article 4.3 of the Access Directive.

19 THE CHAIRMAN: Yes.

20 MR BARLING: Sir, you have homed in on the crucial, vital  
21 issue in the proceedings which is: is this the kind of  
22 information - that is the customer identification  
23 information which goes in day in, day out, simply as part  
24 of the day to day CPS service - something which vis  
25 within the scope of protection of Article 4.3 and/or  
26 GC1.2? we, as you know, submit emphatically that it is  
27 not referring to that, for a whole host of reasons, which  
28 we say are extremely compelling.

29 THE CHAIRMAN: Yes.

30 MR BARLING: Sir, I entirely accept that you have, in a very  
31 focused way, isolated the real issue.

32 THE CHAIRMAN: I did not want to take you out of your stride,  
33 Mr Barling.

34 THE CHAIRMAN: Not at all, it is helpful.

35 THE CHAIRMAN: That is all that we wanted to say at the  
36 beginning.

37 MR BARLING: It is helpful to know where the Tribunal has  
38 got to. If I may just deal with a bit of housekeeping to  
39 begin with, I do apologise that you have got quite a few

1 bundles. Inevitably, when things are referred to,  
2 however tangentially, in the course of skeletons or  
3 pleadings, they tend to get put in a bundle, so we may  
4 not need to trouble you with everything in those bundles  
5 - I very much hope not, in fact, but they are there.

6 There is also a short further witness statement  
7 from Mr David Moulson of BT. I do not invite you to  
8 read it now because I will come to it in context.

9 THE CHAIRMAN: It has been served on the other parties, has  
10 it?

11 MR BARLING: It has been served this morning. I am afraid  
12 it was only produced yesterday.

13 THE CHAIRMAN: Yes.

14 MR BARLING: It really relates to a factual assertion in the  
15 interveners' skeleton argument - which we received on  
16 Friday, and then with the intervening Bank holiday, the  
17 relevant people were not able to be collared until  
18 yesterday to deal with it. It is just dealing with a  
19 short matter and, as I say, I will come to it in due  
20 course.

21 Also, you should have now a small clip of extracts  
22 from some consultation papers relating to the  
23 introduction of General Condition 1.2.

24 THE CHAIRMAN: Yes.

25 MR BARLING: Again, if I may, I will deal with those in due  
26 course, but just so that you know what they are.

27 The main issue is, of course, does GC1.2 apply to  
28 prevent "save" activity, and I leave aside for the moment  
29 what precisely is encompassed in OFCOM's idea of save  
30 activity, because there are areas of considerable doubt  
31 about what they say we can and cannot do. Leaving that  
32 on one side, that is the question, and that question  
33 involves deciding whether 1.2 applies to and constrains  
34 BT's use of this customer ID information, which is  
35 provided to BT via the gaining operator. It may be that  
36 it is convenient to arrive at a sort of shorthand,  
37 otherwise we are going to be using lots of different  
38 expressions for these. I have tended to call the gaining  
39 operator the CPSO, the Carrier Pre-selection Operator, so

1 if I do lapse into that shorthand, the Tribunal knows  
2 what I mean.

3 Sir, this information comes to BT via, at the  
4 moment, the gaining CPSO under the CPS transfer process.  
5 That is the question: does GC1.2 apply to it?

6 We are now, so far as we are aware, safe in saying  
7 that the parties are ad idem in asking the Tribunal to  
8 resolve this issue of interpretation and, indeed,  
9 application of GC1.2 without, directly at any rate,  
10 having to resolve the interesting question of the nature  
11 of the decision appealed against.

12 THE CHAIRMAN: Yes.

13 MR BARLING: Both types of decisions which are candidates  
14 require OFCOM to interpret GC1.2.

15 THE CHAIRMAN: If you were to win on construction you would  
16 no longer have reasonable grounds.

17 MR BARLING: Exactly. Those subsidiary issues you are happy  
18 to park, as you have said, and I know you have seen our  
19 short paper on the interrelation between sections 94 and  
20 96. Also, I rather assumed that what you said, sir,  
21 applies to some extent to the "winback" points.

22 THE CHAIRMAN: Yes.

23 MR BARLING: We have, as you seen, filed a separate argument  
24 on the winback issue: whether and to what extent the  
25 notification covers it. There is not much to add to what  
26 we have said in our skeleton on that, and perhaps I can  
27 come to that at the very end of my submissions.

28 THE CHAIRMAN: I think we will treat that as parked as well,  
29 until we signal to the contrary.

30 MR BARLING: I am grateful. We have also put something in  
31 on transferable products, which was a question you  
32 specifically raised at the CMC.

33 THE CHAIRMAN: Thank you.

34 MR BARLING: May I therefore turn to the crunch question and  
35 make a few introductory remarks before delving a little  
36 further into the issue. We submit that OFCOM and the  
37 Interveners have fallen very badly into error in arguing  
38 that this condition has anything to do with the data as  
39 to customer ID. The Interveners, one understands, have

1 an interest in arguing that it does have something to do  
2 with it, because if the arguments succeed, they will have  
3 achieved a major competitive advantage over BT, an  
4 advantage resulting directly from a change of process  
5 agreed to by BT in August 2002, at the request of the  
6 industry (if I can put it broadly) CPSOs in particular.  
7 It was requested in order to make the transfer process  
8 less cumbersome. Sir, I do not know to what extent the  
9 tribunal has had an opportunity to read the evidence, but  
10 Mr Steggles, in his first statement ---

11 THE CHAIRMAN: If you just give us the references, that is  
12 probably sufficient.

13 MR BARLING: Mr Steggles' first witness statement at  
14 paragraph 45 onwards explains how the change to what has  
15 been called the reply Slip System came about, and the  
16 reasons for it.

17 THE CHAIRMAN: Yes.

18 MR BARLING: BT agreed to that change reluctantly, to some  
19 extent because it removed the only requirement for a  
20 customer's signature which most people in the industry  
21 feel more comfortable about, and certainly it is a  
22 standard feature of an ordering system for this kind of  
23 service in other jurisdictions (as we understand it).  
24 The customer basically signed his reply slip and sent it  
25 back to BT, so there was a direct authorization.

26 BT was willing to agree to this change of process  
27 because there would still remain the notification letter  
28 sent to the customer by the loser (in this case BT) and  
29 there was still the "save" call that BT tended to make  
30 when it received notification from its customer that it  
31 wanted to change. Can I just, for the Tribunal's notes,  
32 ask you to glance at Mr Steggles' first witness  
33 statement, paragraph 48, in relation to that and why BT  
34 was happy to agree.

35 No one at any time, until this notification or the  
36 immediate preamble to the notification, suggested that  
37 this change from a direct notification by the customer to  
38 BT to an indirect notification, would or might cause a  
39 profound change in the characterisation of the ID

1 information in question. If OFCOM is correct and the  
2 Interveners are correct, an apparently innocent change of  
3 process agreed to to help both CPSOs and customers - in  
4 other words to streamline the transfer process - suddenly  
5 and by a magical process akin to alchemy has rendered the  
6 ID of the BT customer in question the subject of  
7 stringent confidentiality obligations and a whole panoply  
8 of GC1.2 protection for it. Suddenly, the information  
9 which a BT customer was always and is still quite happy  
10 for BT to receive and used to send directly to BT, and  
11 which BT was admittedly quite legally free to use if it  
12 received it in that way, suddenly becomes valuable  
13 commercial information.

14 THE CHAIRMAN: It does apply to everybody though.

15 MR BARLING: Yes, it does.

16 THE CHAIRMAN: If one changes from one mobile operator to  
17 another, say.

18 MR BARLING: Mobile we have to be a bit cautious about  
19 because although there is of course a transfer process, I  
20 am not sure precisely what the exact process is. (Mr  
21 Barling takes instructions). So far as mobile is  
22 concerned, the transfer position is that you have to get  
23 what is called a PACT number from your existing supplier  
24 before you can begin the process, so it is in a sense  
25 even more that you tell your existing supplier than it  
26 was under the reply Card system for fixed line  
27 arrangements. We can look into that a bit more if you  
28 would find it helpful.

29 THE CHAIRMAN: It might be interesting at some stage to  
30 understand how this works on an industry-wide basis.

31 MR BARLING: I think the trouble is, sir, that there are  
32 these end to end processes negotiated on an industry-wide  
33 basis, but they tend to be focused on particular types of  
34 product, so there is one end to end process for CPS on  
35 fixed line, there is one for wholesale line rental, when  
36 you want to transfer the actual line operation. So there  
37 are quite different arrangements for each of these  
38 products, it is the way it has happened. One will not  
39 find, as it were, necessary harmony in all respects.

1 MS SIMMONS: Forget about mobile, in an ordinary land line  
2 situation, if the customer was no longer a BT customer  
3 because he has moved to Smith line ---  
4 MR BARLING: So he is not a line rental customer.  
5 MS SIMMONS: He has done whatever happens here, so he has  
6 become a customer of somebody else.  
7 MR BARLING: If he has done whatever happens here then he is  
8 still probably a BT line customer, and he may also have  
9 some calls through BT because it depends which CPS option  
10 he has chosen. If he has chosen the all calls option,  
11 then he will not have any calls through BT other than  
12 emergency and one or two others.  
13 MS SIMMONS: So in so far as he is not the customer of BT,  
14 he is the customer of Smith.  
15 MR BARLING: Yes, he gets a bill from both.  
16 MS SIMMONS: Then he decides that he is going to change from  
17 Smith to Jones. That is the situation where I am  
18 interested in what happens, because he is not then a BT  
19 customer in that sense, therefore what happens in  
20 relation to the information? You may want to park it.  
21 MR BARLING: No, I can answer it. In those circumstances  
22 the information comes to BT as the access operator  
23 because BT will have to facilitate the transfer from  
24 smith to Jones in its exchanges, but there will not be  
25 any question of any "save" activity because they are  
26 simply moving from one CPSO to another, other than BT.  
27 The issue with which we are concerned ----  
28 THE CHAIRMAN: No save activity on the part of BT, but  
29 possibly save activity on the part of Smith, which would  
30 be, presumably, prevented by the General Condition.  
31 MR BARLING: There is a big question over that, in the way  
32 in which it has been said to cover this information,  
33 whether it would because there may be no interconnection  
34 agreement, there may be no negotiations or anything of  
35 that kind between Smith and Jones. They only have to  
36 individually have interconnection agreements with BT, and  
37 in many cases they will not have any negotiation between  
38 themselves or, indeed, any agreement. That is the  
39 example that Mr Steggles has given in his witness

1 statement and which we say, in a sense, gives the lie to  
2 the type of information in question, the ID information,  
3 in relation to CPS being anything to do with GC1.2.

4 MS SIMMONS: But it does mean that BT is in a better  
5 position when you are still a BT customer than Smith in  
6 my example, who would not get that information and  
7 therefore ---

8 MR BARLING: No, Smith will get the information. He will  
9 get it from BT. BT is the access operator who receives  
10 the information and BT will pass the information to the  
11 losing operator, and the losing operator will then use  
12 it, if allowed to do so, depending on how the Tribunal  
13 interprets this condition. So the losing operator will  
14 be in exactly the same position, whether he is BT or  
15 another loser.

16 THE CHAIRMAN: Yes, Mr Barling, you have told us about the  
17 background now.

18 MR BARLING: I am still going through it a little bit, if I  
19 may. We would say, therefore, that because of the  
20 alchemy point, if you like, the fortuitous nature that  
21 this change, done for wholly unrelated reasons, suddenly  
22 produces that surprising result, is an indication as it  
23 were that OFCOM's arguments are not likely to be correct  
24 because it is, we submit, an absurd result.  
25 Confidentiality and the possibility of severe fines ought  
26 not to arise as a result of an entirely unconnected  
27 change of procedure, because the reply slip was dropped.

28 Again, looking at it with an overview, why is  
29 OFCOM's argument wrong? Well, there is a host of  
30 reasons, but just listing the main ones, one can approach  
31 it in a number of different ways. In reality, this  
32 information is not acquired from the CPSO, it has  
33 historically been sent by the customer to BT. On  
34 occasions, even under the reply slip system, the new  
35 operator would get the signature and then offer to send  
36 the card to BT, in which case he is effectively a postman  
37 for the customer. That is precisely what we say the  
38 position is now, now that the reply slip has fallen into  
39 disuse. The information comes from the customer via the

1 CPSO; the nature of the information is that it is not  
2 acquired in connection with negotiations for access or  
3 interconnection; and, thirdly, it is not acquired in  
4 confidence. All these points are related in a sense, it  
5 is difficult to completely separate them out.

6 Dealing with the first one, that it is not awkward  
7 from the CPSO, we rely upon, obviously, the incidental  
8 change of process as not making any difference. The  
9 origins of CPS are also extremely important here and,  
10 sir, you have indicated the origins of GC1.2 and we also  
11 place some emphasis on the origins of CPS in contrast to  
12 that. From the very beginning it was something which  
13 affected the retail relationship between BT and its  
14 customer. The retail customer, from the very beginning,  
15 was required to request this service from BT; it was a  
16 service provided by BT.

17 I am still in a bit of a preamble, but it would  
18 save time later if I could just at this point show you  
19 the passage you referred to in the amended  
20 interconnection Directive. The old one (unamended) is at  
21 tab 9, the new bit that was inserted to do with number  
22 portability, as you said, is at tab 10 and there was a  
23 new sub-paragraph 7 added to Article 12. There are two  
24 points really to note about this. It related to  
25 organisations which had significant market power (SMP),  
26 they had "... to enable their subscribers ..." - so it  
27 had to be something that they enabled their subscribers  
28 to do - "... to access the services of any interconnected  
29 provider ..." Then it goes on to say: "National  
30 regulatory authorities shall ensure that pricing ...  
31 related to the provision of [this] is cost orientated and  
32 that direct charges to consumers ... do not act as a  
33 disincentive ..." Obviously, the fear of the Council in  
34 this case was that those who already had the customers  
35 might well try and charge their customers too much for  
36 providing this facility so that they could go elsewhere  
37 for calls. So there was a restriction on direct charges.

38 So it is quite clear that what was envisaged here  
39 was a service being provided by BT, by the existing

1 supplier, to its subscribers. If one goes on ---  
2 THE CHAIRMAN: Just before you do that, when we read the  
3 words "pricing for ... interconnection related to the  
4 provision of this facility ..." what is comprised in  
5 interconnection there?  
6 MR BARLING: My understanding of this is that what the  
7 Council is saying is that there are charges both to the  
8 new supplier - so the person who wants to take BT's  
9 customer is also going to be charged something because --  
10 -  
11 THE CHAIRMAN: What is he going to be charged for?  
12 MR BARLING: He is going to be charged for a certain amount  
13 of carriage because, inevitably, there will be the set-up  
14 charges - to set up the interconnection between the trio  
15 systems - there will be carriage charges of calls and so  
16 on. Of course, the interconnection agreement relates to  
17 those.  
18 THE CHAIRMAN: Will they not be there already?  
19 MR BARLING: They may be, they may well be, but of course  
20 this is one size fits all legislation, so there are parts  
21 of the Community which are more developed than other  
22 parts.  
23 THE CHAIRMAN: Assuming that there is an interconnection  
24 agreement in place already, what is the additional  
25 element that could give rise to a charge to the new  
26 operator?  
27 MR BARLING: I would suspect - and I will be corrected if I  
28 am wrong - that it is carriage, call origination charges  
29 - heads are nodding. You see when the new operator has  
30 taken over the customer, they will still be relying  
31 (unless there is some change of line rental) upon BT to  
32 carry the calls at least to the point of interconnection  
33 between the two networks. So the main ongoing charges  
34 will be wholesale carriage charges.  
35 THE CHAIRMAN: Yes.  
36 MR BARLING: Those charges will not be seen in a BT bill to  
37 the customer anomer, all the customer will see from BT is  
38 the rental for the line assuming all calls have gone  
39 through other operators, but those charges will be

1 carried through into the new operator's charges t,o the  
2 customer.

3 THE CHAIRMAN: Yes.

4 MR BARLING: So this is dealing with two sorts of pricing,  
5 it is saying so far as you charge the new operator, those  
6 cost charges must be cost-orientated. So far as you  
7 charge for your service that you are providing your  
8 customer, direct charges to customers must not be a  
9 disincentive.

10 THE CHAIRMAN: Yes.

11 MR BARLING: That was effectively carried through into  
12 condition 50A, and if you would be kind enough just to  
13 turn to tab 13 and turn over one page You should see 50A.

14 THE CHAIRMAN: Yes.

15 MR BARLING: Of course, this was in force at the time of  
16 ctge notification, so on 7 November when notification was  
17 made, this was the relevant condition in BT's licence.  
18 It had been continued by a continuation notice beyond 25  
19 July 2003 date when all such conditions were supposed to  
20 be reviewed.

21 THE CHAIRMAN: Yes.

22 MR BARLING: I am showing you this now just to make the  
23 point that one sees in 50A.1 reelecting what we have just  
24 seen in article 12(7).

25 THE CHAIRMAN: Yes.

26 MR BARLING: "The Licensee shall provide Carrier Pre-  
27 selection in accordance with the Carrier Pre-selection  
28 functional specification which does not involve  
29 Autodiallers to any of its subscribers who notify the  
30 Licensee in writing that they require it to provide  
31 Carrier Pre-selection ..."

32 Then going down to 50A.3 you see the reference to  
33 direct charges again and so on.

34 THE CHAIRMAN: Yes.

35 MR BARLING: Can I also, while we are here, ask you to turn  
36 over the page and look at 50A.11 at the very bottom of  
37 the last page? "If requested in writing by the Director,  
38 the Licensee shall provide to the Director a record of  
39 each subscriber in relation to which it is providing

1 Carrier Pre-selection." So that is how that was done.

2 Then under the current system the corresponding  
3 provisions are Article 19 of the Universal Service  
4 Directive (who you have already referred us to) in tab 8.

5 We perhaps do not need to go to it again, but we can,  
6 there are very similar provisions to what was in Article  
7 12(7). Condition AA8.1 which is what has replaced 50A,  
8 for your reference, is in OFCOM's documents at tab 30.

9 Sir, without going to those one can see that there  
10 is a retail relationship in relation to this, there is a  
11 relationship between BT and its customers for the  
12 provision of CPS, and it was always envisaged from the  
13 very outset that it was going to be requested by a  
14 customer of BT. It is not information about the CPS  
15 operator that we are dealing with here, despite the  
16 attempt by OFCOM in their skeleton to say that really  
17 there is a bundle of information that vis being  
18 transferred, it is both about the CPS operator and the  
19 customer. With respect, it is not, the only thing that  
20 is relevant to "save" activity is the information  
21 relating to who is our customer, which of our customers.  
22 The customer wants and indeed needs BT to have this  
23 information, because it has to make a request.

24 May I, at this point, just introduce the new  
25 witness statement and deal very briefly with the points  
26 arising out of that?

27 THE CHAIRMAN: Is there any objection to this statement?  
28 (There were no objections).

29 MR BARLING: We noted in the skeleton lodged on behalf of  
30 THUS and BVL (the Interveners) at paragraph 25, the very  
31 last sentence of that paragraph, they say: "In the old  
32 reply Card system the information would still not be  
33 lawfully received by BT Retail for such a purpose since  
34 the Reply Card went only to BT Wholesale." That is what  
35 the statement deals with. That is completely wrong; we  
36 do not know where they have got that from and Mr Moulson  
37 deals with that.

38 THE CHAIRMAN: He says the reply Card went to BT Retail.

39 MR BARLING: If I can just ask the tribunal to glance at

1 that, it will probably be quicker than my reading it. It  
2 is quite important, in any event, to see what happens.  
3 (Pause for reading).

4 THE CHAIRMAN: Yes.

5 MR BARLING: It has always been made quite plain that what  
6 was being done in the reply statement was a variation of  
7 the retail relationship, and that is exactly the wording  
8 that the industry agreed to - you can see that from the  
9 quote in paragraph 6 of the witness statement. That is  
10 from 3.4.1 the end to end process, and I will probably  
11 have to take you to the end to end process at some point;  
12 it is very much about the retail relationship.

13 Sir, we say that this information is not acquired  
14 from the CPSO in the sense in which Article 4(3) and  
15 GC1.2 is saying.

16 THE CHAIRMAN: Yes.

17 MR BARLING: As to the question of it being acquired in  
18 connection with negotiations for access and  
19 interconnection, it is extremely important again to bear  
20 in mind how CPS evolved and the separate evolution of the  
21 interconnect and access arrangements. I will point up  
22 issues that we have made in our skeleton argument in a  
23 few minutes, but the conclusion and the submission that  
24 we make about it is that CPS transfer to a retail  
25 customer is a separate and distinct process from the  
26 relationship negotiated between interconnected operators.

27 No one is saying that there is not an association, of  
28 course there is, because without the concept of  
29 interconnection you are not going to be able to have CPS.

30 so in an Adam and Eve sense there is of course an  
31 association, but in terms of GC1.2 it vis simply not what  
32 is being talked about, the downstream, if you like, day  
33 to day multiple transfers that take place to make CPS  
34 work.

35 THE CHAIRMAN: That is perhaps not a bad way of looking at  
36 it, how far downstream does GC1.2 go?

37 MR BARLING: Yes. We say there are a lot of clues: one has  
38 got the in confidence, one has got the in connection with  
39 and solely for the purpose of negotiations relating to

1 these various matters, and one can see when one sees one  
2 or two of the other documents that I want to show you,  
3 that that was precisely how it was always understood,  
4 even by the regulator until very recently.

5 On the other hand, 4(3) and 1.2 applies to the  
6 information provided by one operator to another in order  
7 to forge the interconnection or access relationship.

8 as you will have seen, OFCOM do not like the  
9 wording of 1.2, even though that there was (if I can lump  
10 them together with their predecessor Oftel) the way they  
11 interpreted Article 4(3). We submit they got it exactly  
12 right; so far as the wording differs from article 4(3),  
13 it only differs in such a way as to draw out the true  
14 meaning of article 4(3). Now they want to turn their  
15 back on it, they are very keen to disown as much as they  
16 decently can the wording of GC1.2, even though that is  
17 what we are being prosecuted under, and go back to what  
18 they regard, wrongly in our submission, as the more  
19 benign (from their point of view) wording of Article  
20 4(3).

21 They say that they are not doing that, but if one  
22 can just glance for a moment at their skeleton at  
23 paragraph 115, they say: "Contrary to BT's submissions,  
24 ofcom does not seek to rely principally on article 4(3)  
25 ... or to rely upon Article 4(3) 'rather than' or 'in  
26 substitution for' GC 1.2, so as to impose obligations on  
27 BT."

28 THE CHAIRMAN: They rely upon *Mar Leasing* to interpret it.

29 MR BARLING: Yes. Then all is fine, one might say, but then  
30 you go to paragraph 136 of the skeleton: "To the extent  
31 that it is necessary to do so, OFCOM relies on the  
32 broader wording of the directive as an aid to the proper  
33 construction ..." but then say "We do not need to rely  
34 upon it" - this is in connection with the words "in  
35 connection with and solely for the purpose of such  
36 negotiations ..." which they do not like now.

37 Similarly, at paragraph 146 they say: "However,  
38 should it be necessary, OFCOM relies on the fact that the  
39 text of article 4(3) does not require the information to

1 be acquired in connection with the negotiations ..."  
2 They are trying to say now that the wording of their own  
3 condition should be ignored if necessary in order to get  
4 the conviction. This is not only a rather strange  
5 approach by the regulator, we submit, to their own  
6 condition which, as we shall see in a moment, they said  
7 they had very carefully and closely adapted to Article  
8 4(3), but it is also wrong in law, for reasons which we  
9 have explained in the skeleton and which I will touch on  
10 again, because they have turned on its head the correct  
11 legal principle. The correct legal principle is that  
12 yes, you apply *Mar Leasing*, but if it comes to a stage  
13 where you need to rely upon the words of the Directive  
14 rather than the words of the national implementing rules  
15 in order to impose greater obligations, let alone  
16 criminal penalties or quasi-criminal penalties, of a  
17 potentially huge kind as here, 10% of turnover, if it  
18 comes to that then you cannot do it, and they are seeking  
19 to do it. We say that they are completely wrong in any  
20 event because the wording of article 4(3) and GC 1.2 are  
21 perfectly sympathetic to each other and all that GC1.2  
22 does is to draw out the correct meaning of 4.3.

23 THE CHAIRMAN: Just unpacking that point for a moment, GC1.2  
24 is implementing a Directive. Implementation of  
25 Directives leaves a certain amount of scope to the member  
26 state as to the means of implementation. As far as the  
27 tribunal is concerned, presumably our starting point is  
28 the actual wording of 1.2, that is what you have been  
29 accused of contravening.

30 MR BARLING: Yes, and that is all we can be accused of.

31 THE CHAIRMAN: That is all you can be accused of  
32 contravening, you cannot be accused - I am now thinking  
33 aloud but it is probably better that I do so that  
34 everybody knows what the points are - of directly  
35 contravening the Directive because the implementation of  
36 the Directive is in GC 1.2.

37 MR BARLING: Yes.

38 THE CHAIRMAN: In order to work out what the meaning of GC1.2  
39 is, we can presumably have recourse to the Directive in

1 order to understand it and, in so far as there is room  
2 for more than one meaning, presumably we can rely *Mar*  
3 *Leasing* to interpret 1.2 in the sense intended by the  
4 Directive.

5 MR BARLING: Yes, but with a caveat though.

6 THE CHAIRMAN: There is, presumably, a limit to how far you  
7 can go with that, in other words you cannot, one might  
8 argue and I think you submit, by the *Mar Leasing* route  
9 as it were either rewrite or write out or as it were  
10 strike out what is in 1.2 by an interpretation mechanism  
11 because, at the end of the day, it is 1.2 that is being  
12 contravened, not the Directive.

13 MR BARLING: Yes, with respect.

14 THE CHAIRMAN: just to finish this train of thought, if 1.2  
15 is drafted more tightly than the Directive would have  
16 required, you would submit that is the way we have  
17 implemented the Directive and unless it is actually  
18 contrary to the Directive, there it is, we go by 1.2.

19 MR BARLING: Yes, sir, that is right.

20 THE CHAIRMAN: If it was contrary to the directive presumably  
21 there could not have been a contravention in the first  
22 place because it would not have been properly  
23 implemented.

24 MR BARLING: It would not have been properly implemented,  
25 precisely. The only grey area is the area where there  
26 are two possible meanings - I am not at the moment  
27 suggesting we are in this area - and there is a broader  
28 meaning as it were, a more penal meaning, a more onerous  
29 meaning, and one which is less onerous. My concern is  
30 that the principles laid down by the European court may  
31 well require the national court or indeed the European  
32 court, not to adopt the more onerous meaning by reference  
33 to the Directive, if it involves further obligations or  
34 heavier obligations or, indeed, criminal responsibility,  
35 and we would submit quasi-criminal, or criminal in a  
36 sense that would be used in the human rights context of  
37 very severe penalties.

38 THE CHAIRMAN: Yes.

39 MR BARLING: So we would, if necessary, submit that that

1 would apply here if the Tribunal - which we submit it  
2 should not - reached the view that Article 4(3) covered  
3 this kind of information and GC 1.2 might or might not.  
4 We submit we are not in that position.

5 THE CHAIRMAN: Yes.

6 MR BARLING: In their interpretation of 4(3) and  
7 implementation of 4(3) Oftel produced 1.2, and they did  
8 add the words "that it should be acquired "in connection  
9 with and solely for the purpose ..." We submit they were  
10 absolutely right to emphasise that it should be in  
11 connection with that.

12 I just want to, if I may, introduce the second of  
13 the two additional bits of paper here. It is perhaps  
14 only fair to bring these in at the outset. There is a  
15 document in our bundle, attached to our notice of Appeal,  
16 at tab 12.

17 THE CHAIRMAN: General Conditions.

18 MR BARLING: Yes. This was the final statement by the  
19 director-General on 9 July and, as you see from the  
20 beginning, if you look at paragraph 1.4, you will see  
21 that there had been two previous consultations on these  
22 general conditions that were going to apply going  
23 forward. It is extracts from those consultation papers  
24 produced by Oftel that we have put in this additional  
25 slip. These are extremely long documents and they could  
26 be reproduced, but what we have done is select the  
27 passages that we consider are pertinent, but they are  
28 there for anybody to look at and my learned friends are  
29 well familiar with them in any event.

30 I want to show you some passages in this document f  
31 9 July, which is in the bundle, but perhaps I can turn  
32 first to the slip and show you what we note. The first  
33 document is the first of the two consultations, May 2002,  
34 on draft general conditions, and turning over four pages  
35 you come to page 4. "General access. This condition  
36 oblige the providers of public electronic communication  
37 networks to negotiate interconnect agreements with each  
38 other. It also imposes restrictions on the use of or  
39 passing on of confidential information obtained by

1 communications providers during access or interconnection  
2 negotiations." Obviously, it is not binding, it is a  
3 shorthand, but it shows how the Regulator understood what  
4 was to become condition 1.2.

5 Over the page, paragraph 3.4, the regulator said:  
6 "This condition is required to implement the obligations  
7 contained in Articles 4(1) and 4(3) of the Directive and  
8 falls within condition 3.14 ..."

9 Then going to the next document which is the  
10 consultation on certain aspects of implementation of the  
11 access Directive, also in 2002, one sees a reference at  
12 manuscript page 8, paragraph 2.2. "The general  
13 obligation to negotiate interconnection is set out in the  
14 draft general conditions ... draft general condition 1  
15 ... obliges providers of PECNs to negotiate  
16 interconnection agreements ... It also imposes  
17 restrictions on the use or passing of confidential  
18 information obtained by providers in the coursed of such  
19 negotiations."

20 Finally, we have simply inserted at the end, page  
21 16, the draft general condition 1.2. headings are not to  
22 be relied upon, but one cannot help but forensically note  
23 the heading to general condition 1.2 in this document,  
24 "Information obtained during negotiations for network  
25 access". Similarly, the very last page of the slip, page  
26 19, paragraph 2.2 again.

27 so those are the early ones and then the Director  
28 reaches some conclusions which it sets out in tab 12.  
29 right at the beginning, s.7, he says the proposed general  
30 conditions have been drafted to apply appropriate  
31 regulation, reflecting the obligations required by the  
32 new EC Directives as closely as possible.

33 THE CHAIRMAN: Yes.

34 MR BARLING: There are two sets of conditions drafted, annex  
35 A and annex B, but we are only concerned with annex B  
36 because one was done against the possibility that the  
37 Communications Act might not be passed in time so they  
38 would have to be differently worded, so in the end only  
39 annex B became relevant because the Act was passed in

1 time.

2 turning to paragraph 1.6, one just notes who must  
3 comply with general conditions, and then in the table,  
4 general condition 1, 1.2: "Contains confidentiality  
5 requirements applying to all communications to providers  
6 engaged in network access negotiations.

7 Then I would just ask you to note in 2.3 the  
8 footnote 2, that the intervenor THUS was actually a  
9 member of the operators' Group which submitted detailed  
10 responses to the consultation documents.

11 Then in paragraph 3.3 in chapter 3, discussing  
12 condition 1, first of all "The operators group objected  
13 to the drafting of 1.1 on the basis that it laid the  
14 emphasis on conclusion of an agreement following  
15 negotiations. They believe the obligation should relate  
16 only to the negotiations themselves. The operators group  
17 also suggested that paragraph 1.2 be deleted in its  
18 entirety on the basis that confidentiality terms should  
19 be agreed commercially between the communications  
20 providers themselves, but if it is going to be retained  
21 it should be more transparent."

22 It is interesting to note that they thought it was  
23 not necessary because once you have got an agreement you  
24 have dealt with the confidentiality anyway. Then at the  
25 bottom of the page one sees Oftel's comments on those  
26 remarks and that they have not taken the point to amend  
27 condition 1 in line with the operators group response.  
28 "The current draft requires networks ... to negotiate  
29 with a view to concluding an agreement. In Oftel's view  
30 this appropriately puts emphasis on the conclusion of  
31 negotiations in that it requires those providers to  
32 negotiate ... rather simply negotiating without more for  
33 an indefinite period. The drafting of 1.2 is drawn from  
34 4(3) of the Access Directive ... Oftel does not agree  
35 that these terms lack clarity or transparency. In  
36 Oftel's view references to departments are to internal  
37 departments ..."

38 Then it is interesting to note that they say:  
39 "references to a competitive advantage should be read as

1 meaning an unfair advantage over competitors." That is  
2 quite an important point, if it is right, and we submit  
3 it is. Then at 3.7, the next paragraph: "OfTel agrees  
4 with the replacement of 'in this condition' with 'for the  
5 purposes of this condition'.

6 "OfTel has also amended paragraph 1.4 so as to  
7 clarify the broader application of paragraph 1.2 (in  
8 relation to network access negotiations) over paragraph  
9 1.1 (which only applies to interconnection  
10 negotiations)."

11 The point, sir, as you will readily appreciate,  
12 that we make about it is that everyone's understanding is  
13 that what one is dealing with here in relation to Article  
14 4(3) and 1.2 is the confidentiality of information passed  
15 to each other during or in connection with negotiations  
16 to reach an interconnection agreement, widened to include  
17 an access agreement. It is that kind of information  
18 which is being dealt with and which everybody understands  
19 in the industry is being dealt with, it is nothing to do  
20 with the downstream, day to day identification of  
21 particular customers who want a service.

22 The actual conditions are set out of course later  
23 on in that document. At this stage they still retain the  
24 heading that we saw in the consultation paper,  
25 "Information obtained during negotiations for network  
26 access" but I readily accept that on the previous page  
27 under "Interpretation" it says that headings and titles  
28 should be disregarded - before Ms Sharpson points that  
29 out. Then you have got the wording which, as far as I am  
30 aware, is the final wording. It is interesting to note,  
31 lower down in 1.4, what network access means, as we have  
32 already mentioned.

33 THE CHAIRMAN: Yes.

34 MR BARLING: we say that clearly, of course, does not  
35 include CPS provision to subscribers. That would be  
36 consistent with Article 1 of the Directive that says that  
37 access does not mean access by end users.

38 THE CHAIRMAN: Yes.

39 MR BARLING: So, in a sense, GC1.2 cannot cover CPS. In a

1 sense one can stop there, by looking at that - although I  
2 suspect we are not going to be able to.

3 So that is the second of the three indications, if  
4 you like, as to why we say this cannot apply. The third  
5 one was the reference to being acquired in confidence.  
6 Again, it is related to both of the first two points. It  
7 comes via the CPSO who is merely a conduit for the  
8 request from the customer to BT and of course it is not  
9 acquired in confidence; it is an indirect rather than a  
10 direct communication. Similarly, if it has nothing to do  
11 with the negotiations between competing networks then it  
12 is unlikely to be the subject of confidentiality. So  
13 they are linked and, again, as I pointed out, OFCOM does  
14 not like the wording of 1.2 and it seeks to get away from  
15 this express requirement that the information be acquired  
16 in confidence.

17 we wonder whether the matter can be tested in this  
18 way. Suppose that the reply slip system was still in  
19 use. No one would say that the retail customer's request  
20 to BT for CPS was acquired by BT in confidence. They get  
21 the reply slip direct from the customer and they also get  
22 a separate order, as they do now, from the CPS operator,  
23 the gaining operator. No one could possibly suggest that  
24 under the reply slip system that was acquired in  
25 confidence, nor would they, we would add, possibly  
26 suggest that it was acquired in connection with  
27 negotiations for interconnection etc. If it came direct  
28 from the customer how could it possibly be acquired in  
29 connection with and solely for the purpose of  
30 negotiations etc?

31 Equally, no one would be remotely interested in  
32 what the CPSO's purpose was in placing the order, which  
33 is how they communicate this information to BT Wholesale.  
34 What their purpose was would not matter.

35 In focusing on the purpose of the CPSO in supplying  
36 the information now, we submit OFCOM are really falling  
37 into confusion, for although they submit that it is the  
38 CPSO's purpose that is relevant - as one sees from  
39 paragraph 100 of Ms Wallace's witness statement - they

1 are also constrained to accept (in the same witness  
2 statement, paragraph 91) that the CPSO places this order  
3 on behalf of "BT's customer". We submit therefore that  
4 the purpose that the CPSO has when he is placing the  
5 order is irrelevant to this question and is another clear  
6 indication that OFCOM's attempt to force this square peg  
7 into a round hole is utterly misconceived.

8 Before I dig into the skeleton, just a couple of  
9 other quick points. There is a big problem about the  
10 lack of clarity and transparency if you accept OFCOM's  
11 interpretation. This may be a criticism as much of the  
12 notification itself as of GC 1.2, but we have got to a  
13 situation where we do not know what we are allowed to do  
14 and what we are not allowed to do, according to OFCOM's  
15 interpretation of 1.2 - no one could know. They say "You  
16 are allowed to contact your customer, but you can't say  
17 certain things to him. You are allowed to make sure that  
18 he has not been slammed", but we do not know whether we  
19 are allowed to give him neutral information such as the  
20 impact that his proposed transfer would have on existing  
21 services because they blow hot and cold in their papers.

22 Even now we do not know whether it is their case that we  
23 can supply to our customer, along with the notification  
24 of transfer, purely neutral information about what that  
25 means in respect of existing services.

26 They do not seem to be able to make their mind up  
27 about neutral information, they do not seem to be able to  
28 make their mind up about whether we are allowed to tell  
29 the customer that they can still, after transfer, use BT  
30 by dialling 1280. They have forbidden us to do it and we  
31 had to remove it from our notification of transfer letter  
32 pending this hearing, but in another part of their  
33 documents they say - I cannot recall the exact words -  
34 that it is an essential consumer protection that they  
35 should know that they can dial 1280. We are not allowed  
36 to do it; so they do not really know either.

37 The root cause for these problems is because of  
38 their misinterpretation of 1.2. If they confined 1.2 to  
39 what it is intended to and does cover, namely clearly

1 confidential information passed between people when  
2 negotiating, or indeed after negotiations - negotiations  
3 may fail, there are all sorts of reasons why you have to  
4 keep it in being, even after the interconnection  
5 agreement has come into being, you have to have  
6 confidentiality requirements - then none of these  
7 problems would arise. It is because they are trying to  
8 suggest that this is not really confidential information  
9 because we can transmit it to BT Retail if it comes  
10 through BT Wholesale, we can tell BT Retail and they can  
11 use it to contact the customer, but they cannot say X  
12 they can only say Y. This is a nonsense, and you will  
13 not find any of those purposes or as it were delineations  
14 from GC1.2. So if they are right about this there is a  
15 very real issue of legal certainty as far as both the  
16 notification and GC1.2 are concerned.

17 it is also, of course, we submit, a grossly unfair  
18 situation that when one operator persuaded our customer  
19 to leave us for certain calls of all calls, presumably by  
20 extolling the virtues of their own services and possibly  
21 by denigrating the quality of BT's services, who knows,  
22 they can continue to reinforce their advocacy throughout  
23 the cooling-off period of ten days as much as they want,  
24 but BT who is potentially the loser, is artificially  
25 constrained from contacting its customer. We submit that  
26 is not just nonsense, it is also very unfair, it is anti-  
27 competitive and it is certainly nothing that you can read  
28 out of the effect of GC1.2. It is contrary to the rules  
29 of natural justice.

30 There are no consumer protection benefits here at  
31 all in relation to this notification, they do not really  
32 try and make a case for this being consumer protection;  
33 it cannot possibly be, it is not fair competition, it is  
34 the opposite, and it lacks transparency.

35 It is interesting also, finally, to note that in  
36 the context of local loop unbundling, which was quite  
37 akin to CPS in some respects, Oftel considered save  
38 activity was quite possibly beneficial to the customer.  
39 The reference for that, sir, is in the documents attached

1 to the reply bundle, mr Steggle's appendices to his  
2 second statement, the very last document. It might just  
3 be worth glancing at that, just to show you where it is.

4 Immediately after Mr Steggle's second statement of 10  
5 March there are a number of tabs. Tab 3 is the first of  
6 the documents and you can see that that is dealing with  
7 replacement of the reply slip process, there are  
8 discussions about the merits and demerits of the reply  
9 slip system, and towards the bottom someone says it is  
10 not an infallible method of preventing slamming, the  
11 reply slip, so you could dispense with it. I just show  
12 you that there.

13 Then there is a group meeting at tab 4, and at the  
14 third page of that there is a reference to the "save"  
15 call, just so you know what it is, at the bottom, the  
16 paragraph just before the heading AOB, there is a  
17 reference: "Of tel summarised the conclusion of consumer  
18 groups that BT could make a call during the cooling-off  
19 period ... the costs should not be recoverable." so it  
20 appears to be thought of as fairly innocuous at that  
21 point, but we were not allowed to charge the other  
22 operator for making it.

23 THE CHAIRMAN: That starts off by saying "The firm view of  
24 consumer groups was the outbound telephone call from BT  
25 was unnecessary."

26 MR BARLING: Yes. It was not popular with our competitors,  
27 certainly.

28 THE CHAIRMAN: Who is the consumer group there? These are  
29 consumers, are they?

30 MR BARLING: I am not quite sure who is in the Consumers  
31 Group, but I can find out. Of tel's view certainly is  
32 that the "save" call could be made. Going to the next  
33 document, which is another commercial group meeting,  
34 really the only relevant passage there is under the  
35 heading "AOB" towards the end of the document, relating  
36 to outbound calls during the cooling-of period, Ms  
37 Wallace said that there would be controls on what BT  
38 would be allowed to say during the cooling-off period  
39 when making outbound calls to customers who had been

1 signed out by a CPS operator."  
2 Then there is the letter dealing mainly with local  
3 loop unbundling, but with reply cards in relation to  
4 that.

5 THE CHAIRMAN: Yes.

6 MR BARLING: The passage that I was referring to earlier is  
7 on page 3 of the letter, the second paragraph on that  
8 page.

9 THE CHAIRMAN: "... BT should not be prevented from  
10 undertaking 'save' and 'winback' activities ..."

11 MR BARLING: Yes. "Within the framework of BT's existing  
12 regulatory obligations, 'save' activity before transfer  
13 of service had occurred could be beneficial as it would  
14 enable consumers to receive information about the  
15 services and products of companies including BT."

16 I do not know if anybody else wants me to read  
17 anything more from that. Sir, that is all I was going to  
18 say by way of an overview of the case. May I then, using  
19 the skeleton as a guide, at paragraph 8 of the skeleton  
20 we set out a ground plan and, in the remainder of my  
21 submissions, I was going to stick fairly much to the  
22 order of service set out in paragraph 8.

23 THE CHAIRMAN: How are we getting on, do you think, from a  
24 timing point of view?

25 MR BARLING: Pretty well, I think.

26 THE CHAIRMAN: I have the impression we have already covered  
27 quite a lot.

28 MR BARLING: I am sure that we will come to a chunk of  
29 skeleton that we will be able to pass over, on the basis  
30 that we have already covered it. I know you would  
31 encourage me to do that, and I will try and be receptive  
32 to that. I think, sir, you were content for me to have a  
33 bit of time this afternoon, and I would have thought that  
34 sticking to that I should be fine.

35 THE CHAIRMAN: Yes.

36 MR BARLING: It will hopefully help that we have set out the  
37 text of 1.2 and 4(3) at paragraph 5 of this, so it may be  
38 easier to turn to look at them in the skeleton if we need  
39 to, and the full version of General Condition 1 is at tab

1 12.

2 THE CHAIRMAN: Yes.

3 MR BARLING: The position we had got to is that Oftel  
4 clearly regarded 1.2 as covering information revealed  
5 by an operator to another operator in relation to  
6 negotiations for network access or interconnection. We  
7 saw that from the July paper and the Interveners thought  
8 that 1.2 was not necessary as it would be really subsumed  
9 by confidentiality agreements. It is also clear that  
10 Oftel had given considerable thought to the wording of  
11 1.2 in an attempt to make it reflect 4(3).

12 THE CHAIRMAN: Just remind me, was there a still earlier  
13 version of 1.2 that was less tightly drawn than the one  
14 we finish up with?

15 MR BARLING: I am aware of an earlier version, but I do not  
16 know whether it is the one in here that we see in the  
17 slip at page 16. The only change in the wording as far  
18 as I am aware is the wording which related to network  
19 access, in relation to which in tab 12 Oftel says it did  
20 accept the submissions that were made and changed the  
21 wording slightly. It is paragraph 3.7 of tab 12. "Oftel  
22 agrees with the replacement of ..." Actually, that is  
23 not in the wording of 1.2, that is in the wording of 1.4.

24 THE CHAIRMAN: The definition of network access.

25 MR BARLING: Yes. The answer then is that so far as I am  
26 aware there is not an earlier version.

27 Picking it up at paragraph 10 of our skeleton then,  
28 we are dealing with some general remarks on the  
29 legislative background, many of which I hope I have now  
30 covered, the main point being that OFCOM has confused two  
31 fundamentally distinct - not unrelated but clearly  
32 distinct matters - the provision and negotiation of  
33 access or interconnection and the processing, if you  
34 like, of customer requests for CPS.

35 One sees in paragraph 11 the Interveners condense  
36 this and it is almost a *reductio ad absurdum*, they say  
37 that Network Access is being negotiated when each  
38 customer requests CPS, that that is another negotiation  
39 of network access. We say that really, in a sense,

1 encapsulates why this is so flawed, it is clearly wrong.  
2 then we refer at paragraph 13 that the history and  
3 wording of 4(3) has clearly demonstrated that those  
4 provisions have nothing to do with the provision of CPS  
5 to customers. Nothing to do is, perhaps, putting it too  
6 strongly because of course CPS is one of the spin-offs,  
7 one of the downstream products, but it is not itself  
8 something which relates to or is in connection with  
9 negotiation of network access and interconnection.

10 Then in paragraph 15 we come back to the text of  
11 1.2, how that appears also to have been a tightening.  
12 That appears clearly to be the Director General himself  
13 looking at 4(3) and saying this is dealing with a certain  
14 class of information, otherwise it is not Achieving its  
15 object, and the class of information this is dealing with  
16 is information acquired in connection with these  
17 negotiations, not just any information which happens  
18 temporally to be transferred from one to another after  
19 negotiations have taken place.

20 THE CHAIRMAN: Just help me a little on the technicalities.  
21 Every time a customer transfers from BT to another  
22 operator, in most circumstances the other operator would  
23 require the use of some parts of BT's existing  
24 facilities, even if it is only the last bit of the line  
25 from the local exchange to the customer's house.

26 MR BARLING: I believe that is right.

27 THE CHAIRMAN: The new operator using that part of BT's  
28 facilities - and I use the word so as not to get involved  
29 in arguments about networks - is that not a form of  
30 network access?

31 MR BARLING: In pure CPS they will not be using our  
32 facilities in that sense, because we will still be  
33 providing the line to our retail customer. As I  
34 understand it, in the typical case, what will happen is  
35 that we will retain the relationship with the line, so we  
36 will bill the line. Assuming they have opted for all  
37 calls - that is the all calls option: international,  
38 national and local calls they are taking from the new  
39 operator rather than from BT, and they can have, as you

1 know, various combinations of that, then we will  
2 presumably carry those calls as subcontractor to the  
3 nearest point of interconnection with that new  
4 operator's network and charge for it, so in that sense,  
5 yes, there is a use. But they are not borrowing it, we  
6 are ---

7 THE CHAIRMAN: But your agreement to carry those calls as a  
8 sub-contractor for the new operator is a form of giving  
9 the new operator access to the network, or at least to  
10 the facilities.

11 MR BARLING: Yes. I suppose we might need to get into the  
12 intricacies of the interconnect Agreement, as to whether  
13 that is the right analysis.

14 THE CHAIRMAN: It may well not be, I am trying to understand  
15 how it works technically, what you have to do. Where the  
16 customer is still paying for the line ---

17 MR BARLING: I think this might be explained quite helpfully  
18 by Mr Steggles' first statement at paragraph 33 and 34  
19 where he deals to some extent with this. He is referring  
20 here to the Interconnect Agreement: "... incorporates  
21 into the interconnection agreement between BT and the CPS  
22 Operator ... the CPS Industry Code of practice ...  
23 published and amended ... The Order Handling Process  
24 ..." This is to do with order handling. I am told that  
25 paragraph 16 might be more helpful, of Mr Steggles. Yes,  
26 I think this is slightly more on the point. That is 16  
27 and 17. (Pause for reading). I do not know whether this  
28 answers your question, sir, but it is quite clear that  
29 the customer, in a sense, still retains the ability to  
30 use BT as its retail carrier because it can use the  
31 override if it wants to on a call by call basis, but  
32 equally BT is in effect agreeing to take other calls that  
33 are pre-selected, straight to the point of  
34 interconnection, but I think the position is that for  
35 those calls there is no charge to this customer by BT,  
36 the charge is all carried by the CPSO for those pre-  
37 selected calls, even including a bit of carriage, up to  
38 the point of interconnection. I have a nasty feeling  
39 that is not quite what you were driving at.

1 THE CHAIRMAN: What I am trying to drive at is when the  
2 customer has selected a new operator, although the  
3 customer is still paying for the line, and although the  
4 customer apparently retains the ability nonetheless to go  
5 back to BT, perhaps by dialling the 1280 number that you  
6 were referring to a moment ago, is there any sense in  
7 which, in order for the customer to use the new operator,  
8 BT is making available to that new operator facilities  
9 within the definition of access, for the purpose of  
10 providing electronic communication services.

11 MR BARLING: I think, in a sense, the answer may be that  
12 they have already done that, because inevitably they will  
13 have reached an interconnect agreement with that operator  
14 - otherwise, CPS will not work.

15 THE CHAIRMAN: Yes, that I follow. I am trying to come back  
16 to a point I think I may have asked about in a rather  
17 confused way earlier. Once there is an interconnect  
18 arrangement of some kind in process, what additional  
19 availability of facilities is made available when you are  
20 dealing with particular customers, or is the facility  
21 already there and it is just a question of using it?

22 MR BARLING: I think Ms Kelly has got a question.

23 MS KELLY: Is the network access agreement a bit like an  
24 exchange of codes or something, or giving the other  
25 operator a key so that they then have access to the line?

26 MR BARLING: It no doubt incorporates that idea but as I  
27 understand it, it is a complex marrying up of the  
28 charging arrangements that need to be made, the technical  
29 link-up with the points of interconnection. Obviously,  
30 the two networks have to be compatible so there has to be  
31 an exchange of protocols, there has to be an idea of  
32 forecasting ....

33 MS KELLY: There is a technical bit and a business bit, and  
34 it is the technical bit we were just trying to clarify.

35 MR BARLING: I am just reading the paragraph that ms Leas  
36 has pointed out to me. "In relation to CPS, it has no  
37 effect on existing interconnection arrangements ..."

38 THE CHAIRMAN: Where are you?

39 MR BARLING: This is Mr Steggle's second witness statement,

1 paragraph 39. It is really from paragraph 34 onwards and  
2 it might be helpful just to glance at 34 through to 42.  
3 (Pause for reading).

4 THE CHAIRMAN: To put the question in another way - and we  
5 need to read this with some care - the question is when a  
6 particular customer transfers to another operator, is BT  
7 in any sense making available to the other operator some  
8 additional facility, over and above the facility that  
9 already exists by virtue of the existing interconnection?

10 MR BARLING: My understanding at the moment is no, in that  
11 it is all in effect ---

12 THE CHAIRMAN: It is all covered, you do not need to do  
13 anything, you just ---

14 MR BARLING: Ms lea reminds me of course that the crucial  
15 thing is that there will have to be the twiddle of the  
16 knobs in the BT exchange that means that the customer can  
17 just dial the normal number and he will automatically be  
18 carried onto that other CPSO's network at the point of  
19 interconnection. In other words, it routes his calls  
20 henceforth, in a pre-selected way, from wherever the  
21 relevant exchange is, onto the point of interconnection  
22 with that particular operator. So that will have to be  
23 done, but because the interconnection agreement is in  
24 place, in a sense everything is in place for that to be  
25 done that just needs to be done. Paragraph 39 of Mr  
26 Steggles says: "It has no effect on any existing  
27 interconnection arrangements that the CPS operator has  
28 with BT except to ensure that the calls are handed over  
29 at the point of interconnection."

30 He goes on to point out - Ms Simmons' point - that  
31 you can look at it in terms of two operators who are not  
32 interconnected with each other, but each has an  
33 interconnection arrangement with BT, as he says in  
34 paragraph 39. CPS still works between those non-  
35 interconnected operators, all that happens is that the  
36 twiddling of the BT knob at its exchange sends it off to  
37 a different point of interconnection. So it has been  
38 going onto Jones's network at Jones's point of  
39 interconnection with BT, now it is going to Smith's point

1 of interconnection with BT. Obviously, those points of  
2 interconnection have to be the subject of pre-negotiation  
3 agreements and all the rest of the panoply of  
4 interconnection arrangements. Obviously, the  
5 interconnection involves making the interconnection work  
6 and compatible and that has also already been done.

7 MS SIMMONS: In the previous scheme, when it was done with  
8 the customer sending the card, how was the person in the  
9 switching told about the switching?

10 MR BARLING: Were they told by BT Retail as it were or were  
11 they told by BT Wholesale? I am not sure.

12 MS SIMMONS: You said that the document effectively went to  
13 BT Retail, but that would not have actually effected the  
14 operation that was needed, the technical operation.

15 MR BARLING: No.

16 MS SIMMONS: So what happened on the technical operation?

17 MR BARLING: On the technical operation I suspect that it  
18 was done from the BT Wholesale side, but I am not sure.

19 MS SIMMONS: So who told BT Wholesale?

20 MR BARLING: What happens, just to recap, is that when the  
21 customer decides that he wants to try another operator,  
22 he gets signed up by the new operator and, under the  
23 reply slip system, the customer would then have a reply  
24 slip which he would sign and send with the relevant  
25 details to Bt Retail, to make the request basically, "I  
26 want to henceforth have these calls with this operator."

27 MS SIMMONS: Yes.

28 MR BARLING: At the same time as that is happening, the new  
29 operator has placed an order - it basically has notified  
30 BT Wholesale that this order is coming.

31 MS SIMMONS: So there are two bits of information.

32 MR BARLING: Yes, the new operator says to BT Wholesale,  
33 through what is called the CPS Gateway, I want to place  
34 an order on behalf of your customer X for this kind of  
35 CPS thing", so that data goes into the system. Then when  
36 the reply slip data came through the BT Retail system,  
37 the two would be married up and if they matched bingo,  
38 the order went through.

39 THE CHAIRMAN: Sorry, Mr Barling, can I just go back to

1 paragraph 11 in your skeleton where you were criticising  
2 the Interveners' argument or the idea that network access  
3 is broad enough to cover the actual case where a  
4 particular customer transfers to a new operator, where  
5 there is an interconnection agreement already in place.  
6 I have open in front of me Article 2A of the Access  
7 Directive which defines access, and although there is a  
8 long list of inter alias, the basic definition means "the  
9 making available of facilities and/or services to another  
10 undertaking under defined conditions on either an  
11 exclusive or non-exclusive basis for the purpose of  
12 providing electronic communications services."

13 MR BARLING: Yes.

14 THE CHAIRMAN: Could it be said that when BT twiddles the  
15 knob, as you said - language that I can understand but I  
16 think probably seems somewhat archaic to some of our more  
17 technical representatives of today's modern technology -  
18 could it not be said that they were making available  
19 facilities or services to another undertaking for the  
20 purpose of providing electronic communications services,  
21 thus giving a form of access within the wide terms of  
22 this definition?

23 MR BARLING: The only reason I hesitate - and it may be I  
24 will be told that I need not hesitate - is because, in a  
25 sense, inevitably, that access has already been made  
26 available inevitably to that operator under an  
27 interconnection agreement.

28 THE CHAIRMAN: What I am still struggling to understand - and  
29 I am sure it is all in the papers somewhere, I just need  
30 to get on top of the technicality - is whether there is  
31 some additional step that could be described as a further  
32 making available of further facilities on the basis of  
33 the existing agreement that brings the transaction within  
34 the idea of network access, and thus triggers the  
35 confidentiality arrangements? I just do not know.

36 MR BARLING: Those sitting behind me have heard the question  
37 and I wonder whether I could try and come back to that.

38 THE CHAIRMAN: Of course, take your time with it.

39 MR BARLING: My reaction is that all that is in place,

1 inevitably, because we have reached now beyond the stage  
2 where the ---

3 THE CHAIRMAN: Your basic case is that it is already in  
4 place, the relevant negotiations which article 4(3) is  
5 talking about are long since passed, it is simply a  
6 pretty basic implementation of what is already there.

7 MR BARLING: Yes, and it is one of the reasons why people  
8 bother to enter into interconnection agreements and  
9 network access agreements; they do it so that they can  
10 provide a whole host of services to each other's  
11 customers.

12 THE CHAIRMAN: Yes.

13 MR BARLING: The question in this case is whether the  
14 confidentiality and the information that is being  
15 protected is information at the upstream stage, which has  
16 all been negotiated and agreed, or whether it somehow  
17 encompasses ---

18 THE CHAIRMAN: Extends over to its downstream implementation.

19 MR BARLING: Yes. I am sorry not to be able to throw more  
20 light on that at the moment, but we have got in mind that  
21 you would like some further input on that.

22 Moving on, I am keen now as I go through the  
23 skeleton just to, in a sense, point out points rather  
24 than deal with things at length, and also to make sure  
25 you have seen the things throughout the papers that you  
26 want to look at.

27 THE CHAIRMAN: Do not hesitate to draw our attention to  
28 things you particularly want us to bear in mind.

29 MR BARLING: I do as it were remind you, as we have said in  
30 paragraph 16 that Network Access as defined in 1.4 does  
31 not include the provision of CPS, which is an important  
32 point related to the question that you were asking now.

33 Then we turn to the legislative history and we have  
34 seen the Interconnection Directive at tab 10. I suppose  
35 I just ought to show you, so that you can sideline it if  
36 you have not already done so, tab 9, the precursor to  
37 that. The only relevant part of that is 6(d) which is  
38 the forerunner of article 4(3) and of course was in place  
39 before CPS came on the scene.

1 THE CHAIRMAN: Yes.

2 MR BARLING: So whatever else 6(d) was thinking of, it  
3 certainly was not thinking of CPS because CPS was not a  
4 Community animal at this point.

5 i have shown you tab 13 and condition 50A. The  
6 introduction of a requirement to introduce CPS came about  
7 following a consultation initiated by the Commission on  
8 numbering policy. I do not believe you would need to see  
9 that, but in case you want it just for your notes, it is  
10 in the second of the two authorities bundles at tab 15,  
11 and I was not proposing to trouble you with it. That  
12 deals with the increased demand of users wanting to use  
13 other carriers. We have said a bit about the history  
14 here, and there was a resolution inviting the Commission  
15 to adopt proposals with regards to CPS; that is at tab 19  
16 of the same bundle.

17 Then the Interconnection Directive came in with  
18 12(7) and the Universal Service Directive then took over,  
19 and you have seen that. We set out at paragraph 21 the  
20 scope and the aims of that Universal Service Directive.  
21 something I perhaps did not point up when we were looking  
22 at it a few minutes ago, but we set it out in terms in  
23 paragraph 21, which is that it is expressly saying it is  
24 dealing with the needs of end users and establishing the  
25 rights of end users.

26 Sir, as you said at the outset, we had number  
27 portability and this was shoved into the Interconnection  
28 Directive when it first came in by way of amendment, but  
29 with the new package of legislation they were separated  
30 out again, so that you have the Access Directive on the  
31 one hand, dealing with rights and negotiations and so on  
32 between operators, expressly not dealing with end users,  
33 and then end users coming in through the Universal  
34 Service Directive.

35 THE CHAIRMAN: We have not got Article 19(2) in your skeleton  
36 which sort of links it back again by another route to the  
37 Access Directive.

38 MR BARLING: That is perfectly true. Then article 19 and  
39 then the current requirement which we have set out of the

1 replacement for Condition 50A, AA8.1. Again, it is still  
2 required to be supplied by the operator to any of its  
3 subscribers upon request.

4 THE CHAIRMAN: Yes.

5 MR BARLING: So there is still this need for a request which  
6 we say in a sense just cancels out the whole problem  
7 here. If they had got to tell you who they are if they  
8 want it, how can there possibly be any confidentiality in  
9 that information when it comes by a different route? We  
10 are entitled to know it, and all that has happened now is  
11 that we have said "Fine, we do not need to have it from  
12 two routes, we will let our customer tell you via the  
13 operator who tells us anyway." Really, it is almost as  
14 simple as that, this case. We are making the same points  
15 in paragraph 25 about the relationship.

16 Then we turn to the legislative history of access  
17 and interconnection and we go through a very similar  
18 process. Again, you have seen now most of these matters  
19 referred to already in my introductory remarks, but we  
20 are making the point here that the Access Directive  
21 envisages negotiations between two service providers on  
22 the technical and commercial arrangements in order to  
23 establish access and/or interconnection between their  
24 networks. That is pointed out in Article 1, which we  
25 have quoted there.

26 THE CHAIRMAN: I think we have got all that.

27 MR BARLING: As I say, I am just moving through now, just to  
28 make sure. Similarly, article 1 of the Access Directive.

29 Then we come on to the meaning of access, and we  
30 have heard the recitals in the Access Directive, where it  
31 says in terms that it "has a wide range of meanings, and  
32 it is therefore necessary to define precisely how that  
33 term is used in this Directive ..." and it then defines  
34 it.

35 THE CHAIRMAN: It is a laudable aspiration, but it is not  
36 entirely achieved.

37 MR BARLING: No, and also passing quickly over the meaning  
38 of interconnection, which may be a painful subject, and  
39 coming to the conclusion in paragraph 32, we say that

1 this really shows that neither of the terms "access" or  
2 "interconnection" includes the provision of services to  
3 end users such as CPS.

4 THE CHAIRMAN: Yes.

5 MR BARLING: Then the history of 4(3) taking a similar  
6 course. There we have a quote from Article 6(d) of the  
7 old Interconnection Directive: "Information received from  
8 an organisation seeking interconnection ..."

9 THE CHAIRMAN: Yes.

10 MR BARLING: We know that that wording changed when it came  
11 into Article 4(3) and talked about before, during or  
12 after negotiations, which my learned friends jump on and  
13 say now it is all different, it is a completely different  
14 source of information now, but we say no, it is quite  
15 clearly not. For a start, all that did was protect the  
16 information coming one way from the organisation seeking  
17 interconnection, the new condition 1.2 makes two changes,  
18 we submit. First of all, it now protects information  
19 going both ways, so it does not matter which of the two,  
20 whether it is the person seeking or the person giving.  
21 It is rather an odd thing anyway to say seeking because  
22 it implies that there is a dominant partner and, more and  
23 more of course, everybody needs interconnection,  
24 everybody is seeking interconnection now.

25 The other thing is the temporal change which we  
26 submit does not have the significance that my learned  
27 friends say, it simply is a tightening-up exercise,  
28 recognising that extremely confidential information may  
29 well pass after negotiations in a whole host of different  
30 scenarios. For example, negotiations may break down, or  
31 maybe the confidentiality agreement that is inevitably  
32 going to be entered into is not sufficiently widely  
33 drawn, and there are ongoing relationships, as one knows,  
34 once interconnection is established that have to be  
35 maintained. Confidential information does not stop being  
36 passed once there is an interconnection agreement, it  
37 continues, as Mr Steggles explains.

38 So we submit those are the reasons for those  
39 changes in emphasis, they do not suddenly mean that the

1 type of information, the class of information has  
2 changed, it still has to be information, we submit, that  
3 is supplied in connection with those negotiations or  
4 arrangements.

5 THE CHAIRMAN: When we get on to paragraph 33 and following  
6 you have helpfully given us a lot of references to the  
7 various stages at which this occurs. To what extent do  
8 you say we need really to burrow into all that?

9 MR BARLING: Very little, because we have, I hope, drawn out  
10 or indeed quoted actually from them. I apologise that we  
11 do not say which of the authorities bundles these are in,  
12 but if it would help we can give you a list of tab  
13 numbers or possibly even send through at some point a  
14 version with those in.

15 THE CHAIRMAN: If they are in the authorities bundle I do not  
16 think we need it particularly.

17 MR BARLING: I am grateful. This was really just to set the  
18 scene and I would doubt, frankly, whether you would need  
19 to delve into it.

20 THE CHAIRMAN: No, unless there is some particular point that  
21 you want to draw to our attention.

22 MR BARLING: We have normally put it in the text if there  
23 is, for example the scope from the Commission's  
24 explanation, paragraph 34, that the amendments "increase  
25 transparency and ensure reasonable confidentiality."

26 Article 4(3) is then dealt with in paragraphs 36  
27 onwards, and we have uncovered also those points.  
28 Perhaps the point I can make about paragraphs 37 and 38  
29 is that the juxtaposition of 4(1) and 4(3) was not  
30 accidental. 4(1) is all to do with the obligation to  
31 negotiate interconnection and access, and 4(3) then  
32 protects the information.

33 THE CHAIRMAN: So we cannot lift 4(3) out of its context and  
34 apply it to something that is not really within the scope  
35 of the Access Directive at all.

36 MR BARLING: No, sir, that is the submission. Then we turn  
37 in paragraph 39 to come down more to the specific wording  
38 of the provision itself. Again, many of these points  
39 have now been made and it may be that I will just refer

1 briefly to one or two passages in the evidence and make  
2 one or two other points of emphasis. It has to be  
3 before, during or after the process of negotiating access  
4 or interconnection, and of course it has to be acquired  
5 in connection with those negotiations or arrangements.  
6 Obviously, information about a particular customer who  
7 might wish to use CPS is simply not in the picture at the  
8 stage this is all envisaging, it is well downstream and  
9 of a different type.

10 Mr Steggles, in his first witness statement at  
11 paragraph 33, and also in his second witness statement at  
12 paragraph 34, seeks to explain why the differences are  
13 very real and fundamental between these two types of  
14 information. We have seen some of this already, the  
15 passage is really 33 to 41, and he touches in the course  
16 of this upon how the negotiations are progressed between  
17 the two parties and he also provides a specimen  
18 confidentiality agreement at tab 38, which might be worth  
19 glancing at so you can see it.

20 THE CHAIRMAN: Yes.

21 MR BARLING: If one turns over one page in the agreement you  
22 come to a definition of confidential information.

23 THE CHAIRMAN: This appears to pre-date the 2002 Directive.

24 MR BARLING: Yes, this is the 2000 version, but it is  
25 presumably a version that is just a specimen. Can I just  
26 ask you to sideline that as it were, then also clause 3  
27 and the heading "Confidentiality".

28 All I want to say about these is that these are the  
29 types of clauses that parties negotiate between  
30 themselves to protect themselves.

31 THE CHAIRMAN: Last for six years after the end of the  
32 signing of the agreement.

33 MR BARLING: Yes. Then skipping a tab and going to tab 40  
34 we see, again, a specimen, this time dated 2002, of the  
35 main part of an interconnection agreement.  
36 Confidentiality is also touched on in this; if you look  
37 at page 16 of the internal pagination, clause 21.  
38 Inevitably, as Mr Steggles says, one will find something  
39 of this kind in arrangements.

1 THE CHAIRMAN: Yes.

2 MR BARLING: So that is where those are. May I just check  
3 that there is nothing in this second statement at  
4 paragraph 34 that I should have shown you? I think we  
5 have already looked at that in answer to your question,  
6 sir, it is dealing with the type of information that  
7 might be provided on an ongoing basis. That is also, in  
8 those passages, dealing with what Ms Wallace says in  
9 paragraph 95, who "attempts to argue that on each  
10 occasion that the CPS Operator places an order it is in  
11 order to enable interconnection to work. This is clearly  
12 incorrect. Interconnection points, which are set up  
13 between BT and CPS Operators for the handover of traffic,  
14 are not affected by individual orders.

15 "The lodging of an individual ... order merely  
16 enables an individual customer's choice to be implemented  
17 as is required by Condition AA8.1. BT Wholesale makes a  
18 change in the exchange that relates to that particular  
19 customer (and no others) which ensures that the  
20 customer's calls are handed over to the CPSO at the  
21 nearest point of interconnection between BT and that  
22 CPSO. BT is thus providing a service to that customer.

23 "It has no effect on any existing interconnection  
24 arrangements that the CPS Operator has with BT except to  
25 ensure that the calls are handed over at the point of  
26 interconnection." He then gives the example of two CPSOs  
27 who are not interconnected.

28 THE CHAIRMAN: I am sorry to take you back, but can we just  
29 glance at paragraph 38 of Mr Steggles' first statement,  
30 which talks about BT sending prospective CPS Operators a  
31 Customer Requirements Document. I take it that is the  
32 document sent when any customer wants to transfer to a  
33 CPS operator.

34 MR BARLING: No, apparently not. Apparently, this is all to  
35 do with interconnection, the customer in this context is  
36 the person seeking interconnection.

37 THE CHAIRMAN: If we go to the tab, tab 39.

38 MR BARLING: The subtitle is "Notification to commence  
39 interconnect planning".

1 THE CHAIRMAN: I may have got completely the wrong end of the  
2 stick, but as you turn through this it starts off with  
3 the operator details.

4 MR BARLING: That would be the operator seeking  
5 interconnection.

6 THE CHAIRMAN: Then it goes to customer billing details. Is  
7 that the same as the operator, or is that somebody else?

8 MR BARLING: That would also be the operator.

9 THE CHAIRMAN: And then there is a number of services that  
10 are being offered, operator services, ring back when  
11 free, in transit calls, directory enquiries and all those  
12 sorts of things, but that is all operator to operator.

13 MR BARLING: These are descriptions of products which the  
14 interconnect operator wants to purchased from BT,  
15 presumably for the purposes of providing services to its  
16 own customers or those who will become its customers.

17 THE CHAIRMAN: I follow, thank you.

18 MS KELLY: If you look at the back it is all set out there,  
19 it is operator to operator.

20 MR BARLING: Yes, I think that is right, but there is a  
21 little more in 38 and 39 of Mr Steggles' first statement,  
22 filling in a few of the gaps in that.

23 THE CHAIRMAN: Yes, I follow.

24 MR BARLING: I am not sure whether I have made the point or  
25 not, but towards the end of paragraph 42 we say that the  
26 situation is well illustrated by an example Mr Steggles  
27 gives in paragraph 39 of his second witness statement.  
28 If one thinks of the example of a transfer of information  
29 between two CPS operators who may or may not be  
30 interconnected with each other, the information  
31 transferred by the gaining provider merely ensures that  
32 the calls are handed over to a different point of  
33 interconnect used by the gaining provider. It cannot  
34 affect any agreement between the two operators because  
35 none is in existence. Nor does it affect any  
36 arrangements between BT and anyone else. So far as BT is  
37 concerned it is simply routing calls to one interconnect  
38 point rather than another.

39 We go on to say that it is not clear whether or not

1 OFCOM contends that if there is no interconnection of  
2 access agreement between the gaining and the losing  
3 providers that the CPS information passed to the losing  
4 provider is still governed by GC1.2 notwithstanding that  
5 there is no question of any network access negotiations  
6 ever having taken place between the two. Then we point  
7 out that at paragraphs 64 and 67 of OFCOM's defence they  
8 seem to put it in different ways, and we say that if  
9 OFCOM does in fact rely on there being an interconnection  
10 agreement between the two undertakings in place it would  
11 mean that when BT is the losing provider, it would be in  
12 a worse position under GC1.2 than other losing providers  
13 who will not have an interconnect agreement with the  
14 gaining provider (because the losing provider is not also  
15 the access operator). Why should the fact that BT is the  
16 losing provider mean that it cannot use the information  
17 when other losing providers would not be prevented from  
18 doing so?

19 We would say that looking at that example, GC1.2  
20 cannot cover this type of information when you have got  
21 as it were three parts to the system. In that example it  
22 cannot be covered by GC1.2, there is no question of it  
23 being acquired in connection with negotiations of access  
24 or interconnection, and it would be absurd if it covered  
25 BT just because BT virtually always has an  
26 interconnection agreement with other operators. In a  
27 sense it is just an acid test really, to see how this  
28 clause must be related to the class of information that  
29 we say it relates to, namely passed in the course of or  
30 after negotiations, but in connection with negotiations  
31 for interconnection.

32 It can be tested in a different way, we say in  
33 paragraph 44. If the CPS customer placed his request for  
34 CPS directly (as he used to do rather than going through  
35 the CPS Operator) could it conceivably be said that the  
36 information had anything to do with negotiating access or  
37 interconnection arrangements between two undertakings?  
38 The answer is no. This is the alchemy point really.

39 THE CHAIRMAN: Yes.

1 MR BARLING: The purpose of Article 4(3) we deal with in a  
2 number of paragraphs there, which I might just take quite  
3 briefly because I have really dealt with most of this  
4 already and I do not think one wants to dwell upon it.  
5 All I would say, of course, is that what we are saying in  
6 45 and 46 is that normally speaking, once there is an  
7 interconnection agreement, as you will see from the  
8 specimen, the parties will normally cover this. That is  
9 not to say that there cannot be some continuing exchange  
10 of information, one can see that there might not be  
11 complete co-extensiveness between the confidentiality  
12 agreement and the regulatory measure, it may be possible,  
13 and no doubt Article 4(3) in the change of wording wanted  
14 to cover ctge possibilities, that information of a  
15 confidential nature would not necessarily just stop once  
16 you had first signed the interconnect agreement?

17 MS SIMMONS: Is there another reason for that, that you  
18 cannot contract out what is in the Directive or in the  
19 General Condition?

20 MR BARLING: That is certainly the argument that Oftel put  
21 when the Operators Group said let us strike out 1.2 and  
22 get rid of it - that was in the July document at tab 12.  
23 That is what Oftel said, that we have got to do  
24 something like this because the Directive says so.

25 THE CHAIRMAN: Recital 5 provides "there should be no  
26 restrictions that prevent undertakings from negotiating  
27 access and interconnection arrangements between  
28 themselves ..."

29 MR BARLING: Yes. That is very important in understanding  
30 4(3) and in a sense it explains why, apart from the  
31 wording of 4(1) and 4(3) itself, Oftel built in that  
32 extra bit that made it quite plain that this was only  
33 dealing with information in connection with these  
34 negotiations.

35 THE CHAIRMAN: Yes.

36 MR BARLING: In paragraphs 49 and 50 make additional points  
37 to say that it is not anything to do with end users. As  
38 for the promotion of competition, we accept that of  
39 course the Access Directive is designed to encourage

1 competition, but we do make the remark that giving it a  
2 broad construction so as to include this kind of  
3 information within it would not have any effect on  
4 encouraging negotiations in respect of access and  
5 interconnection agreements, which by definition have  
6 already taken place.

7 Then we come to the need for a restrictive  
8 interpretation. There is supposed to be a light touch on  
9 regulation now, the regulatory authorities are supposed  
10 to be reviewing all regulatory restrictions and, where  
11 appropriate, withdrawing them and avoiding over-  
12 regulation, as Recital 14 to the Directive itself states.

13 So there is a tension here between that aim of the  
14 Directive and OFCOM's primary argument which is  
15 effectively to apply Article 4(3) to anything which, in  
16 terms of time, happens and which in an Adam and Eve sense  
17 would not have happened but for the existence of an  
18 interconnection agreement.

19 THE CHAIRMAN: So at least in terms of General Conditions the  
20 conditions should be as tightly drawn as possible.

21 MR BARLING: Yes, to deal specifically with the matters it  
22 is required to deal with. On OFCOM's interpretation,  
23 there is no hiding it, this is extremely draconian in its  
24 effect. It means that we really cannot talk to our  
25 customers, at a stage where they have been "chatted up"  
26 by a competitor and persuaded that they will get a better  
27 deal, and we are suddenly told "Sorry, BT, you cannot  
28 talk to them." It is very draconian.

29 THE CHAIRMAN: You cannot, for example, tell them that they  
30 need to read the small print.

31 MR BARLING: Or are they aware that there is this deal and  
32 the other deal and so on. Of course, that is marketing,  
33 but we are not even, as far as we can see, allowed to say  
34 "Well, of course you will not be able to get Call Waiting  
35 or Ringback, you realise that, don't you?" We are not  
36 even to give them factual information on the impact of  
37 what they are doing to their existing services. It is  
38 very bizarre this, and we submit that one should lean  
39 very heavily against interpreting anything in such a way

1 that it has that effect, if it is not inevitable. That  
2 is a more general point.

3 So OFCOM ignores entirely all this history of the  
4 clear distinction between negotiations for  
5 interconnection and network access on the one hand, and  
6 the history of CPS on the other. Yes, they have touched  
7 at times and they came together for a while in the  
8 Interconnection Directive, but they are separate and  
9 distinct in concept. None of that has really been  
10 addressed by OFCOM or the Interveners.

11 In paragraph 57 we give a different wording between  
12 6(d) and 4(3) and I have already dealt with that, and  
13 then at paragraph 58 we come on to those respects in  
14 which OFCOM has sidelined as it were the specific  
15 requirements of GC1.2. I have taken you already to  
16 paragraphs 136 and 146 of their skeleton and asked you to  
17 contrast that with what they say in paragraph 115, so I  
18 need not take you to any of that again, but we do say  
19 that reading between the lines they are saying ignore  
20 these words in confidence and ignore the fact that it  
21 requires interconnection and just look at article 4(3).  
22 That is not permissible and runs completely contrary to  
23 what the Director General himself said in July of last  
24 year, that he aimed to get as close as possible to the  
25 requirements of 4(3).

26 There is a point to be made at some stage in  
27 reflation to what OFCOM say are the purposes of the  
28 operator passing this information on. Both the Director  
29 General and OFCOM recognise that the customer information  
30 can be passed by BT Wholesale to BT Retail or indeed to  
31 another losing provider for the purpose of the  
32 Notification of transfer letter. So that is the peculiar  
33 thing about this, they both say yes you can do it for  
34 that purpose.

35 Then Ms Wallace in her witness statement at  
36 paragraph 100, which is quite important, sets out a whole  
37 range of other purposes. She attributes all these  
38 purposes to the CPS operator, and we submit that this is  
39 an unreal exercise. To take for example number 5, "To

1 ensure that the Notification of Transfer letter is sent  
2 out." I am not sure why, particularly, CPS operators  
3 care about that. A CPS operator who has mis-sold,  
4 perhaps, or slammed, it certainly would not be within his  
5 purposes. His purpose in supplying the information to BT  
6 would be so that BT would twiddle the knob that would  
7 enable the customer to come through to his point of  
8 interconnect. All these other points, some of which have  
9 some validity - he wants the order validated of course  
10 (number 1) because if the order is not validated BT will  
11 not twiddle the knob, but number 8 is completely unreal,  
12 we would submit, "to deal with any CPS Operator's  
13 specific questions or problems that may arise", (7)

14 "Provide management information to the CPS industry ..."

15 Number (6) perhaps: "answer customer questions about the  
16 order - and possibly cancel the order ..." That is the  
17 last thing that the CPS Operator wants, that the customer  
18 rings up BT and talks to BT.

19 So with all due respect to Ms Wallace, this does  
20 not make sense, and it does not make sense because it is  
21 trying to attribute a whole range of purposes to the  
22 operator sending it through. The reason is two-fold; he  
23 sends it through because first of all BT has to have a  
24 request from the customer. If one turns back to  
25 paragraph 91 of her statement she says, quite correctly:  
26 "Thus, when a BT customer wishes to switch to a CPS  
27 provider, an electronic order is lodged with BT Wholesale  
28 by the relevant CPS operator on the customer's behalf."  
29 There has to be a request to BT from the customer, that  
30 is what all the regulatory provisions have always said  
31 and it is hardly surprising, there it is.

32 What Ms Wallace avoids saying in paragraph 100 is  
33 that really the purpose is the customer's purpose. The  
34 person here who needs the request to be placed is the  
35 customer, and the CPS operator is simply doing it on  
36 behalf of the customer, which is why all this talk about  
37 confidence is nonsense actually, and it is nonsense to  
38 talk about any other purposes.

39 Of course, once you get into speculation about for

1 what purposes it might be permissible for BT to contact  
2 its customer, ofcom is putting itself in the position, as  
3 it has now done, effectively of having complete  
4 discretion over what we may and may not say. Once it  
5 says, as it has now said, that we may talk to our  
6 customer about slamming, we may not talk about 1280 (the  
7 override number) and we may not talk about anything which  
8 could persuade the customer to come back, does that mean  
9 that if we tell them the truth about the impacts, if that  
10 might have the effect of the customer coming back to BT,  
11 that will also be treated as marketing activity? We do  
12 not know the answer to any of these questions and they  
13 have not provided any clear answers. So we are in the  
14 position where their say-so is now everything, OFCOM can  
15 say what they like and we have to obey it in terms of the  
16 way they have constructed this. That also, we submit,  
17 gives the lie to their interpretation of the measure.

18 Coming on to their interpretation of the words "in  
19 connection with negotiations", they say it is really a  
20 "but for" test, it is sufficient if it is consequent upon  
21 the interconnection agreement having been made. In  
22 paragraph 62 and 63 we have explained why we submit that  
23 that is simply not correct. Apart from anything else, it  
24 would have said that; if it was going to be that  
25 draconian and wide, that anything that happens after the  
26 event, that would not have happened if the world had not  
27 gone that way would be covered, it would have said so.  
28 We submit that actually, funnily enough, OFCOM have put  
29 it rather well themselves in their skeleton argument at  
30 paragraph 138. If you have it to hand, just glance at  
31 paragraph 138. They say in the second half of that  
32 paragraph: "If the reference to the 'process of  
33 negotiating network access' were to refer solely to the  
34 initial negotiation for access, it would be meaningless  
35 for many CPS operators to speak of negotiations for  
36 access in the context of CPS at all, since they already  
37 had 'access' to BT's network prior to the introduction of  
38 CPS." Exactly, that is precisely what we are saying, it  
39 is meaningless.

1           Sir, I am getting on quite well, I am virtually  
2 finishing off on any other sweep-up points on the  
3 request. I have got to deal with one or two letters, in  
4 particular the notification of transfer letters, and then  
5 a word on confidentiality, the relevance of the  
6 significant difference in wording which I have dealt with  
7 to a large extent, a word about competitive advantage and  
8 then the final argument as to whether the interpretation,  
9 if they are right, would make it unlawful.

10 THE CHAIRMAN: Yes.

11 MR BARLING: I do not anticipate having any difficulty in  
12 covering those points in an hour or so after lunch.

13 THE CHAIRMAN: I think three o'clock was the time suggested.

14           If that is a convenient moment for you, Mr Barling, it  
15 is convenient for us.

16 MR BARLING: Certainly.

17 THE CHAIRMAN: If we say two o'clock then.

18   **(Lunch adjournment).**

19 MR BARLING: Sir, if I may make a couple of points relating  
20 to the network access point, which may take us some way  
21 down the road to understanding this. According to  
22 paragraphs 29 and 30 of the Notice of Appeal, which I  
23 probably should have taken you to before ...

24 THE CHAIRMAN: It is always good to go back to it.

25 MR BARLING: 28 deals with the reply slip and then 29.

26           "Once a customer's CPS order is lodged with BT it sends a  
27 Task to Switch Manager which is the BT system which  
28 controls changes to the configuration of customers of  
29 lines in the BT local exchanges."

30 THE CHAIRMAN: Yes.

31 MR BARLING: "Switch Manager then marks the customer and the  
32 category of CPS calls (for example national and  
33 international etc) and which operator will carry the  
34 calls. BT sends a message back to the CPSO to confirm  
35 that the switchover has taken place.

36           "After switch over, when the customer makes a call,  
37 the local exchange looks at the dialled digits to see  
38 what type of call is being made. If the call is  
39 appropriate to CPS, the local exchange inserts the 8XXX

1 code before the dialled digits and sends them to the  
2 trunk network. The call is then routed as per the agreed  
3 routing plan. If the customer dials an indirect access  
4 (IA) override code [the 1280] the local exchange will  
5 send all the dialled digits to the trunk network and the  
6 calls would be routed as per the agreed routing plan for  
7 that IA code."  
8 THE CHAIRMAN: Right.  
9 MR BARLING: Then there is a bill for the parts of the call  
10 that are carried over the BT network which is sent to the  
11 CPS operator.  
12 THE CHAIRMAN: That is what happens.  
13 MR BARLING: That is what happens. Then I should also show  
14 you tab 41 which is an annex to the Interconnection  
15 Agreement. Again, this must be a specimen but no doubt  
16 it is a standard type of thing. You see that it is  
17 actually an annex dealing with how Carrier Pre-selection  
18 is dealt with and it defines ---  
19 THE CHAIRMAN: This is an annex to what?  
20 MR BARLING: To the standard Interconnection Agreement, such  
21 as the one we saw at tab 40. It has got its various  
22 definitions, including the definition of Carrier Pre-  
23 selection.  
24 THE CHAIRMAN: Yes.  
25 MR BARLING: "a service whereby a CPS Customer opts for some  
26 outgoing calls ... to be routed to the Operator System  
27 for conveyance by the Operator", the Operator being the  
28 CPS Operator.  
29 THE CHAIRMAN: Yes.  
30 MR BARLING: Then "CPS Call". You can see then the  
31 definition of routing prefix as referred to in the Notice  
32 of Appeal; "a routing prefix code, in the format 8xxx,  
33 allocated by Oftel which indicates the operator ..." So  
34 every operator has its own 8xxx code. Then lower down  
35 the "Transaction" is defined, "A BT activity in respect  
36 of each CLI for any of set-up, remove, re-number, cancel,  
37 change or dummy or any other such CPS processing activity  
38 ..." Then "Transaction request" is dealt with. If you  
39 look at 2.4, for example, "The Parties shall agree in

1 advance all necessary technical requirements, including  
2 call set-up and cleardown sequences ..." Then over the  
3 page there are some general obligations on both BT and  
4 the operator, in particular 3.2: "BT shall process each  
5 CPS transaction Request in accordance with the Process  
6 description ..." I think that must be a reference to the  
7 end-to-end process description, which is a document I am  
8 going to refer you to in a moment.

9 then we have provisions relating to forecasting,  
10 routing, charging etc. I am not sure that there is  
11 anything in particular, but 3.4, as Ms Lea points out, is  
12 "If the CPS Customer makes a call to the Operator System  
13 under one of the CPS Options, BT shall prefix each such  
14 CPS call with the CPS Routing Prefix allocated to the  
15 Operator, and hand over such calls to the Operator System  
16 in accordance with the provisions of this schedule."

17 So, as it were, when you enter into an  
18 Interconnection Agreement with an Operator, it obviously  
19 includes setting it up. Prior to CPS, almost back to the  
20 Eighties, there was the possibility of dialling a code -  
21 the customer could dial a code and access another  
22 operator, I think it was called Indirect Access - and  
23 then the call would be routed according to that code,  
24 over any interconnected operator's network, if they were  
25 interconnected to BT and vice versa. Under CPS, of  
26 course, the benefit is that the customer does not have to  
27 dial a code for each call, it is done by the access  
28 operator at the local exchange, with the software that is  
29 contained there.

30 Obviously, there is no doubt about it, CPS is a  
31 downstream retail product, dependent upon there being in  
32 place interconnection between different networks.

33 THE CHAIRMAN: Thank you.

34 MR BARLING: I do not know how much that helps on it. May I  
35 turn back then and again follow the general framework of  
36 the skeleton? I think we were at page 18 where we were  
37 emphasising the importance of and the reasons for the  
38 request made by the customer to its retail operator, in  
39 this case BT, for CPS facilities. The importance of the

1 request is evidenced in a number of ways, and we set  
2 those out in paragraph 67, the Interconnection Directive,  
3 Article 19, the SMP service condition, the new one AA8.1,  
4 condition 50A, the one it replaced, and also at the end  
5 we have made a reference to the industry end to end  
6 process description. This is an important document which  
7 you have not yet had an opportunity to see, and I will  
8 ask you, if I may, to turn to tab 43 of the BT bundle.  
9 What you have there is the industry end-to-end process  
10 description - this is the thing that was thrashed out by  
11 the industry players who all have an interest in these  
12 things, and in the case of CPS this is incorporated by  
13 reference into the actual agreements. As you saw, it is  
14 referred to no doubt in a whole range of places in the  
15 actual Interconnection Agreement and its annexes.

16 THE CHAIRMAN: Yes.

17 MR BARLING: As far as I am aware, this is post reply slip,  
18 this end to end process, this is the one that succeeded  
19 the end to end process description that I am also going  
20 to show you in a moment relating to the reply slip  
21 system. so this is the current one, so far as I am  
22 aware, and this is a moving feast, it gets changed from  
23 time to time when a few things are agreed within the  
24 industry, so it may not be absolutely up-to-date. You  
25 will notice that there are some passages that are amended  
26 here.

27 What I wanted to draw to your attention  
28 specifically was paragraph 3.2 at page 32, under the  
29 heading "Order Handling Processes". 3.2.1 "General  
30 Assumptions. Customers via [via, you will notice] their  
31 chosen CPS Operator(s) will arrange the setting up of the  
32 Carrier pre-selection service. CPSO(s) will raise  
33 electronic orders, on the customer's behalf, with the  
34 customer's Access Operator." So it is still exactly the  
35 same as it always was, the order is being placed on the  
36 customer's behalf with the Access Operator. Then you see  
37 the bullet points setting out what the basic steps for a  
38 customer order are, and that is also, you might think,  
39 quite helpful, just to understand what then happens.

1           "The gaining operator is responsible ... for the  
2           validity of each electronic order it sends to the access  
3           operator regardless ... The AO validates the order  
4           against its customer database", so this ties in with what  
5           mr Moulson was saying in his witness statement that we  
6           put in today, that is the validation process that goes on  
7           which before, in the old days, had to be married up with  
8           the reply slip. If it cannot be validated, the access  
9           operator rejects it with one or more error codes,  
10          depending on what happens, so if it is not their  
11          customer, for example, then they will reject the order.  
12          There are lots of reasons why it can be rejected, one  
13          would be if it is asking for incompatible services, for  
14          example. There is a whole range of things.

15                 If the order is valid the AO confirms the order and  
16          sends notification of date of impending switch to both  
17          losing and gaining operators. The gaining operator may  
18          not, of course, be the access operator. The switchover  
19          will be 10 working days from notification by the access  
20          operator. Both the losing and the gaining operators are  
21          obliged to notify the customer of the pending switch. If  
22          the customer contract is through a reseller, the operator  
23          will be responsible for ensuring their reseller notifies  
24          the customer of the pending switch." that is the  
25          situation where, for example, some companies may sell to  
26          a retail customer call services, but they do not actually  
27          have a network themselves, but they have an arrangement  
28          perhaps with a network operator, so in that sense the  
29          reseller will be the front man with the customer and he  
30          will sell it and be responsible for it, but he will, as  
31          it were, use the services of another CPS operator.

32         THE CHAIRMAN: Yes.

33         MR BARLING: "The minimum content of the notification is  
34          specified in the 'Notification to Customer of CPS service  
35          switchover' section below."

36                 So there is a minimum content for this notification  
37          letter that is agreed, but no restrictions.

38         THE CHAIRMAN: That is on page 35.

39         MR BARLING: Absolutely.

1 THE CHAIRMAN: The sample on page 36 is, curiously, in Latin.  
2 I do not know whether you would like to translate it at  
3 some stage.

4 MR BARLING: I have not tried to translate it - it may not  
5 even make sense. I recognise bath in the third line, but  
6 I do not know what it has to do with Bath.

7 THE CHAIRMAN: It is something to do with parsimonious  
8 farmers in the Bath region.

9 MR BARLING: Yes. Going back to page 35, the third bullet  
10 point, "the text of the paragraphs is not restricted but  
11 should not detract from or confuse the customer with  
12 respect to the minimum information requirements ..."

13 So as far as the industry is concerned, first of  
14 all there is an obligation to notify the losing operator,  
15 because obviously you have an obligation to notify the  
16 access operator, and as between themselves the industry  
17 has not placed any restrictions on, for example,  
18 marketing information, other than it must not be  
19 confusing in certain respects.

20 THE CHAIRMAN: Can you just remind me, what is the CLI?

21 MR BARLING: Customer line identification, or calling line  
22 identification.

23 THE CHAIRMAN: Thank you.

24 MR BARLING: I think I will carry on before I show you the  
25 other End to End Process for a moment and just follow  
26 through, so as not to get too far out of line. The  
27 conclusion we draw in paragraph 71 from all this is that  
28 there is express provision for the losing provider to  
29 have notice of the switch, whether or not it is also the  
30 Access Operator." This all, in a sense, chimes in with  
31 issues such as can this possibly be confidential and so  
32 on and so forth. They have agreed that it should go  
33 without restriction, so, clearly, the implication is that  
34 none of these industry players think, or thought,  
35 certainly not when agreeing this, that there was  
36 something to be restricted, as to the use to which it  
37 could be put.

38 Then we have a heading, "OFCOM accepts that BT or a  
39 losing provider can put the information to certain uses."

1 this only serves to demonstrate what we have called the  
2 absurdity of OFCOM's position. It is artificial to say  
3 that the information is provided for a long list of  
4 purposes, but not save activity. Then we say that  
5 OFCOM's list has a number of items which do not overlap  
6 with any conceivable purposes of the gaining provider,  
7 and I took you to paragraph 100 of Ms Wallace's witness  
8 statement in relation to that point before lunch.

9 Of course, all this is premised on the CPSO's  
10 assumed purpose, which is a fallacy because the real  
11 provider of this information to BT is not the CPSO but  
12 the customer, and I believe I have made that point  
13 already.

14 There are considerable benefits, and to some extent  
15 this is not controversial, as we saw from the local loop  
16 unbundling letter sent by Oftel. Allowing the losing  
17 provider to discuss with his customer the fact that the  
18 customer intends to switch has benefits, and it has  
19 always been accepted that one of the benefits of this is  
20 that slamming is reduced. Slamming is a big problem,  
21 everybody accepts it is a big problem. Mr Steggles deals  
22 with it in some detail, and perhaps I could give you the  
23 references to where he deals with that, because it is  
24 very important background to this. It is in his first  
25 witness statement at paragraphs 46 to 51 and 63 onwards,  
26 and in his second statement at paragraphs 49 onwards and  
27 69 onwards. He deals with not just slamming, but all  
28 forms of mis-selling. I forget what the percentage is,  
29 but a significant percentage of all CPS orders received  
30 at the BT Wholesale gateway are actually without the  
31 authorization or knowledge of the customer. Everyone  
32 accepts that this happens, and the first the customer  
33 knows is when he gets a bill.

34 THE CHAIRMAN: Is there any quantitative information about  
35 that?

36 MR BARLING: There is in Mr Steggles' first witness  
37 statement.

38 THE CHAIRMAN: Paragraph 68.

39 MR BARLING: That is it, I am grateful.

1 THE CHAIRMAN: Since you have been complying with this  
2 direction and the process, according to you there has  
3 been no effective means of combatting slamming, is that  
4 the situation?

5 MR BARLING: There is nothing nearly as effective as being  
6 able to ring up the customer, but the notification of  
7 transfer letter goes out of course. That has always gone  
8 out, but the problem with that is that people do not  
9 always look at these things, it is just another circular  
10 about something - it is not a bill and therefore I do not  
11 have to deal with it. So obviously some people will read  
12 them and if they find that, to their horror, they have  
13 been slammed, they will probably ring up BT, but we do  
14 not have up to date figures - there is nothing more up to  
15 date than Mr Steggles' statement, so we do not know as it  
16 were what the effect has been of save calls no longer  
17 being made since 9 December. As far as I am aware we do  
18 not have that, but maybe we do. Excuse me a second, sir.

19 (Mr Barling takes instructions). Mr Smith actually  
20 tells me that OFCOM have recently published some figures  
21 about mis-selling, so there are some up to dated figures  
22 in the public domain. This is a consultation document  
23 headed "Protecting citizen consumers from mis-selling of  
24 fixed line telecoms service", and there is a deadline for  
25 comments of 3 June. This gives complaints made to the  
26 Regulator in respect of CPS set-up orders for various  
27 months in 2003 and up to february 2004. They range from  
28 20 in 2003 to 220 in october 2003, with a whole range of  
29 others. So those are where people have actually  
30 complained to the regulator as opposed to simply  
31 complaining to BT. BT has its own figures for mis-  
32 selling complaints as well. In the same document these  
33 are also recorded up to February and, for example, the  
34 complaints raised by BT of unfair trading reports were  
35 12,000 for February 2004.

36 THE CHAIRMAN: This is BT customers complaining to Bt.  
37 MR BARLING: Yes, and BT then recording.  
38 THE CHAIRMAN: Complaints about CPS transfer?  
39 MR BARLING: Yes, out of 460,000 or so total CPS set-up

1 orders in february this year, there were 12,000  
2 complaints raised with BT by BT customers. so the order  
3 of magnitude there is about 2.6% for february; it has  
4 been as high as 3.5% for december, so it is significant.

5 THE CHAIRMAN: Yes, thank you.

6 MR BARLING: So this is not an entirely negligible point,  
7 and one of the benefits as it were of being able to speak  
8 to your customer is to be able to find out whether they  
9 haded been slammed but also whether there is mis-selling  
10 taking place.

11 THE CHAIRMAN: Yes.

12 MR BARLING: The other thing is of course the impact. Many  
13 people are sold products without knowing precisely  
14 whether they will still be able to carry on doing the  
15 same things that they have been doing when their calls  
16 were carried entirely by BT, and often people are  
17 surprised that they were not told, for example, that  
18 there are certain products that they will lose or nit  
19 automatically be able to carry on with, fir technical  
20 reasons, if they go for CPS.

21 THE CHAIRMAN: That is something that could be regulated,  
22 could it not, by some kind of regulation with the other  
23 operators?

24 MR BARLING: Yes, it could, but if you just rely on the  
25 other operators of course - the problem is they can ring  
26 up whoever they want, they can tell them whatever they  
27 want. It is only, according to this notification, the  
28 existing supplier who is not able to put their side of  
29 the case. Even if I look at it in an adversarial way,  
30 you are not able to point out anything to them, other  
31 than what OFCOM say, which is little more than saying "we  
32 understand you want to transfer, here is a number you can  
33 ring." So, yes, these things could be dealt with,  
34 certainly, and no doubt OFCOM will say that they are  
35 making all sorts of attempts to stop slamming and other  
36 forms of mis-selling, but as those figures indicate they  
37 are not entirely successful at the moment.

38 We do not shy away from the fact that the marketing  
39 is also important. Of course, it has these benefits of

1 | slamming, the customer ought to know what the impact is  
2 | on his existing service, but we go further and say that  
3 | actually there is no reason why we should not be able to  
4 | market and should not be able to do exactly the as the  
5 | gainer has been doing to that particular customer. That  
6 | is where the equal treatment, level playing field  
7 | arguments, also are touched on.

8 |           We are both in the same position because we are  
9 | both, as it were, rivals for a particular customer, and  
10 | the extraordinary thing is that OFCOM seem to accept that  
11 | this kind of competition is healthy and they do not  
12 | condemn it. If one looks, for example, at OFCOM's  
13 | defence at paragraph 104, they are dealing here with the  
14 | points that we took under the ECHR, the human rights  
15 | provisions, and actually if one turns and looks over the  
16 | page, the last sentence of paragraph 104: "Finally, there  
17 | is no restriction on BT receiving equivalent information  
18 | directly from the customer in question, or on BT using  
19 | information provided by that source in whatever way it  
20 | sees fit.

21 | THE CHAIRMAN: If the information actually did, in a  
22 | particular case, come from the customer ----

23 | MR BARLING: As it did under the reply slip system.

24 | THE CHAIRMAN: As it did under the old system, there is no  
25 | restriction, according to that, on what BT can say, "Do  
26 | you really mean it and do you realise that this, that and  
27 | the other follow from what you are doing?"

28 | MR BARLING: In other places they have said it is very good.  
29 | In the local loop unbundling letter it is very  
30 | beneficial for people to be able to put their case and  
31 | compete, so this is the absurdity of this.

32 |           In the middle of paragraph 96 of the defence they  
33 | say "That assertion is simply factually incorrect. BT  
34 | Retail can carry out any marketing, to any customers it  
35 | wishes, and may compete vigorously with CPS ... (indeed  
36 | OFCOM would encourage it to do so) so long as it does not  
37 | contravene the regulations that bind it."

38 |           So they are not against us telling customers all  
39 | these things we want to tell them, they just think that

1 because we now get it via the operator, that somehow  
2 means it has got to be condemned,. It really is as  
3 absurd as that, particularly - I keep harping on this,  
4 but it is important - when we only changed that system  
5 for other reasons. We say that does not matter because  
6 we still actually are getting this from the customer.  
7 They say you must get it directly, that seems to imply  
8 that they accept we are getting it indirectly from the  
9 customer now: we agree with that, we are getting it  
10 indirectly from our customer now.

11 THE CHAIRMAN: Would it be open to you to change the system  
12 back again?

13 MR BARLING: Quite possibly.

14 THE CHAIRMAN: Could you say "We have walked into a trap  
15 here, we are going to change it back again"?

16 MR BARLING: Quite possibly, but we should not have to. The  
17 industry agreed this change to streamline the process, so  
18 it would be extraordinary if the Regulator's action in  
19 this way were to oblige one to turn the clock back and  
20 unstreamline the process again in order to make clear  
21 what is already the case, that we get it from the  
22 customer. Now we have done it, of course, it is always  
23 difficult turning the clock back, and there may be issues  
24 about whether the retail contract itself could be changed  
25 so that customers give us notice, as is in fact often the  
26 case with many, many products, including telecoms  
27 products where you have to give notice if you want to  
28 terminate an arrangement. Our point is that really that  
29 underscores the absurdity, that we should not have to do  
30 that. So it does have benefits and we have set those out  
31 underneath in 74 and following.

32 THE CHAIRMAN: Yes.

33 MR BARLING: In paragraph 78 we make reference to the  
34 notification of transfer letters that are, under the End  
35 to end process, required to be sent out. I have not yet  
36 shown you those, those are tab 46. We have got three  
37 versions here and chronologically they go from the back,  
38 so the earliest version, number 1 if you like, is Annex  
39 3, the second of the two pages. That was, as it says,

1 used until the end of October last year, and if we can  
2 just glance at the wording you may think it is a pretty  
3 innocuous wording. (Pause for reading). You will note  
4 that it refers to the option to dial an override number,  
5 which is actually one of the services that the Directive  
6 requires; Article 19 of the Universal Service Directive  
7 requires that option to be there. So all that is being  
8 pointed out there is that if you go through with the  
9 transfer, you will still be able to dial an override  
10 code.

11 OFCOM were not happy with that, I think it was the  
12 marketing that they were not happy with.

13 THE CHAIRMAN: Sorry, did you just say that the Universal  
14 service Directive requires the override?

15 MR BARLING: Yes, that is in Article 19(1)(b). at the  
16 beginning of this bundle.

17 THE CHAIRMAN: If you are obliged to provide the facility, on  
18 what basis are you prevented from telling the customer  
19 that the facility exists?

20 MR BARLING: We are baffled, we simply do not understand.  
21 But this is all part of the GC1.2 vice at the moment;  
22 they are saying we are not to do it, but I will leave Ms  
23 Sharpson to explain that. So it was taken out of the  
24 final letter which you see at Annex 1, at the beginning  
25 of that tab 46.

26 THE CHAIRMAN: Yes.

27 MR BARLING: Number 2 softened what was regarded as a  
28 marketing thing. I think it was the bit "You will need  
29 to check with your new service provider which services  
30 are likely to be affected by this change and which  
31 services may not be available to you", so that went.

32 I think, in fairness to the other side, that they  
33 would probably say that what they really wanted to  
34 control was the save call, but they are in fact trying to  
35 control the save letters as you have seen as well, even  
36 though the industry did not think it was anything that  
37 needed to be restricted. We now do not know what we can  
38 say in a saved call; equally, we are not sure what we are  
39 allowed to put (unless we put absolutely nothing) in the

1 letters - the letter has got down to almost the point of  
2 saying absolutely nothing, other than giving a contact  
3 number. Certainly, they forbid anything which would be  
4 regarded as likely, possibly, to persuade the customer to  
5 think again. That seems to be the touchstone at any rate  
6 for what they say is prohibited, anything that could be  
7 construed as marketing activity. It might be that they  
8 might change their mind if they actually knew the neutral  
9 bare facts: is that marketing activity, just to tell them  
10 what the impact is, if it might change their minds? As  
11 you can see, we have erred on the side of caution in  
12 relation to the letter and we have stopped making save  
13 calls altogether.

14 THE CHAIRMAN: Yes. I think Ms Simmons has got a question.

15 MS SIMMONS: Did they actually ask BT to remove the 1280  
16 reference?

17 MR BARLING: There is correspondence about this. I think  
18 the position was, and we can check against the  
19 correspondence because I do not want to say anything that  
20 is unfair to OFCOM about this - they did raise a question  
21 mark about it, and because the date of 9 December (when  
22 we could be subject to penalties) was approaching, out of  
23 an abundance of caution, because a question had been  
24 raised about it, we removed it.

25 THE CHAIRMAN: I see.

26 MS SIMMONS: Has that correspondence gone on at all, or has  
27 it just stopped because you have removed it?

28 MR BARLING: It has stopped. They were satisfied presumably  
29 with it being removed. They have not said "You should  
30 not have removed it" or anything of that kind.

31 THE CHAIRMAN: But it is still the case that the customer who  
32 is now being carried by another operator could dial 1280  
33 and override.

34 MR BARLING: Yes.

35 THE CHAIRMAN: Although he does not necessarily know that he  
36 can.

37 MR BARLING: He will not know from us at all.

38 THE CHAIRMAN: If he does nor know it from you, it is rather  
39 doubtful whether he would know it from any other source.

1 MR BARLING: That is probably right, unless he goes to the  
2 public library, as OFCOM suggested in their evidence that  
3 people might, and digs out the Oftel Consumer Guide. It  
4 may be on the OFCOM website as well, but he would have to  
5 dig around, certainly.

6 Moving on now quite quickly, hopefully, paragraph  
7 82 and onwards reiterates the points we have made about  
8 the information not genuinely coming from the gaining  
9 operator. He is effectively acting as an agent, as OFCOM  
10 seem to accept in paragraph 91 of Ms Wallace's statement,  
11 he is placing the order on behalf of the customer.

12 THE CHAIRMAN: Yes.

13 MR BARLING: They say that that does not matter, whether he  
14 is an agent or not. It does not matter in what capacity  
15 he provides the information - if he provides it, that  
16 triggers 1.2.

17 Then in 85 we reiterate the absurdity of all this  
18 when given the reply slip system, and I have not shown  
19 you the trebly slip system s agreed in the end to end  
20 process. I do want to do that because Mr Moulson, whose  
21 witness statement you have, touches upon it. It is at  
22 tab 45. 43 was the existing one, 45 is the one that  
23 operated under that when the reply slip was being worked.

24 Looking at internal page 9, part of the definitions  
25 section, "Reply Slip. The Reply Slip is the mechanism  
26 agreed within the industry to protect customers against  
27 unauthorised change to their service and is the  
28 authorization from the customer to their AO to allow the  
29 change."

30 THE CHAIRMAN: Yes.

31 MR BARLING: This is really quite an important document in  
32 setting out how this has all come about. Then 2.2.1  
33 deals with the content of the reply slip when it comes  
34 from the customer, and again it is being returned to  
35 their Access Operator. Then over the page the design has  
36 been agreed, and over on page 35 we have the minimum  
37 requirements: reply slip, return envelope, and then it  
38 says even the address it has got to be sent to, which is  
39 BT Plc in Durham. Mr Moulson, you will recall, said that

1 that was BT Retail, so that the retail people could put  
2 it into their scanning equipment there.

3 then at page 39 you see (not in Latin this time) a  
4 photocopy of the letter as it might be designed, over the  
5 page 40, and then passage 3.2 on page 43: "Customers, via  
6 their chosen operators, will arrange the setting-up.  
7 CPSOs [this is important] will raise electronic orders on  
8 the customer's behalf with the customer's access Operator  
9 to set up the CPS service" . So they are acting as  
10 agents.

11 then skipping two or three pages we come to page  
12 48, paragraph 3.4.1 which is very important. "Carrier  
13 Pre-selection set-up orders have two elements, a  
14 computer-operator request from the CPS Operator to the  
15 customer's Access operator to arrange CPS; a reply slip  
16 from the customer to their Access Operator to vary their  
17 retail relationship with the Access Operator to enable  
18 CPS." So that is what is happening, that is the  
19 customer's request. So this reflects all those  
20 regulatory requirements and the requirements in the  
21 Directive. That is what is being done.

22 In the next paragraph: @The customer completes the  
23 reply slip and sends it to their AO. The CPSO processes  
24 the customer order and negotiates service set-up  
25 internally, then raises the CPS set up order to the  
26 customer's AO."

27 Then "Order Validation" 3.4.2.1 - these are the  
28 kinds of things that Mr Moulson was dealing with on page  
29 49 of the end to End Process. So those are the passages  
30 we draw to your attention in relation to the former  
31 system; it speaks for itself, we say. Nothing has  
32 changed in substance, it is just that we have streamlined  
33 it.

34 Then we come to confidentiality in paragraph 88.  
35 There is not much on page 25 of the skeleton that I have  
36 not already covered. It deals with the specific  
37 arguments made by OFCOM and basically refutes them.  
38 Basically what OFCOM is saying is that somehow  
39 confidentiality is inferred in a number of different

1 ways. In one place they say it can be inferred just by  
2 the transmission of this information by the CPSO to BT  
3 triggers confidentiality. Then in other places they say,  
4 in a rather circular way, that anything to which GC1.2  
5 applies is confidential information, which is not  
6 entirely helpful.

7 We have quoted in paragraph 91 - although in a  
8 wholly different context the sentiments we submit are  
9 rather in point - that bearing in mind this is an  
10 entirely fortuitous result, really what is happening or  
11 attempted here is to distort the law of confidence, and  
12 really that should not be.

13 THE CHAIRMAN: Yes.

14 MR BARLING: In relation to the potential justification put  
15 forward by OFCOM, paragraph 92, those (a), (b), (c), (d)  
16 are all the different ways in which it is said that  
17 confidentiality arises, and we deal with all of those in  
18 the succeeding paragraphs. Can I just make one basic  
19 point, which is that it is really ludicrous to suggest  
20 that it is provided in confidence, in circumstances where  
21 the CPSO could not possibly have said that, had the  
22 system remained under the reply card. Nothing really has  
23 changed.

24 the first point is that it is passed on with strict  
25 limits as to its use - that simply is not right. There  
26 are no express limitations placed on the use of the  
27 information by the gaining provider at the time when the  
28 information is provided; nothing of that kind happens in  
29 practice. Indeed, it is interesting to note, as I have  
30 already pointed out, that the interveners said, when  
31 consulted on 1.2, that you did not really need it at all,  
32 confidentiality agreements dealt with all this. Taking  
33 your point, sir, if we reverted to our normal practice of  
34 having the information directly, even OFCOM would accept  
35 that we would be free to use it in whatever way we wanted  
36 - see paragraph 104 of the defence.

37 THE CHAIRMAN: If we were on article 4(3) instead of on  
38 GC1.2, you could perhaps argue that Article 4(3) had two  
39 separate and self-standing obligations: one, to use the

1 information for the purpose for which it was supplied  
2 and, two, to reflect at all times the confidentiality.  
3 Therefore, one could perhaps argue that irrespective of  
4 the information status as confidential or not, it was  
5 supplied for a particular purpose and should not be used  
6 for some other purpose. The argument would be well what  
7 was the purpose for which it was provided and what is  
8 the purpose for which it is sought to be used.

9           However, in GC1.2, just reading it, the obligation  
10 to use the information solely for the purpose for which  
11 it is supplied, appears to be subordinate to the  
12 requirement that the information is confidential in the  
13 first place, so that two possibly distinct obligations  
14 seem to be elided under the same umbrella in GC1.2.

15 MR BARLING: With respect, yes, and that is obviously  
16 because the Director General took the view (we say  
17 rightly) that this is only dealing with confidential  
18 information.

19 THE CHAIRMAN: Yes, quite.

20 MR BARLING: And that is the way it is put in the Oftel  
21 consultation papers, protection of confidential  
22 information, because if information were not to be  
23 confidential it would not be a restriction on negotiating  
24 interconnection agreements, and that, one recalls from  
25 the preamble to the Access Directive or possibly the  
26 Interconnection Directive, I have forgotten which now,  
27 was the reason for this, there should be no restrictions  
28 on the freedom to negotiate, and of course not having  
29 protection for your information that you have to disclose  
30 in the course of negotiations would be a restriction.

31 THE CHAIRMAN: Yes.

32 MR BARLING: But it would not be a restriction if it was not  
33 confidential information, because you would not mind.

34 THE CHAIRMAN: It also takes us a little bit into the  
35 Interveners' argument that there is a difference between  
36 information supplied in confidence and information that  
37 is confidential.

38 MR BARLING: Yes.

39 THE CHAIRMAN: If there is such a distinction.

1 MR BARLING: I struggle at the moment to find that there is.  
2 Confidentiality can arise no doubt in different ways,  
3 but ultimately ...

4 THE CHAIRMAN: But not here.

5 MR BARLING: Yes. Paragraphs 93 onwards really knock down  
6 (a), (b), (c) and (d). Strict limits are dealt with, not  
7 all information passed between a gaining and a losing  
8 provider is acquired in confidence. They say that does  
9 not matter, it becomes confidential just because it is  
10 transmitted; "Similarly, by definition", they say, "all  
11 information to which GC1.2 applies is confidential", and  
12 I have already pointed out that that is a rather circular  
13 argument, that is the problem. We have to decide what  
14 information it does apply to, apart from anything else.

15 Then we say OFCOM's approach is simply wrong. It  
16 is not clear where the principle that they adopt is  
17 derived from, there is certainly nothing in Article 4(3)  
18 to support it. There is an interest in freedom of  
19 information, both in imparting and receiving it, which  
20 should only be circumscribed in clearly defined  
21 situations. Secondly, their approach is circular.  
22 Thirdly, it is impossibly wide: the most innocuous  
23 information will be covered as well as information which  
24 the losing provider has an overwhelming and legitimate  
25 interest in transferring to a third party.

26 then they may the point that it is the very person  
27 whose interests tend to be harmed who has to pass it  
28 across to BT, and therefore it should be protected, but  
29 the reply card is the answer to that. It is just  
30 incidental - their protection, if they succeeded in  
31 claiming it, would be wholly incidental and fortuitous.  
32 We say if you concentrate on the route by which the  
33 information is conveyed, rather than on the true course  
34 of the information, it produces anomalies, and we give  
35 the example of the transfer between two CPS Operators,  
36 neither of whom are interconnected.

37 THE CHAIRMAN: Is that likely to be a very common example, or  
38 is that still relatively unusual?

39 MR BARLING: I do not think it is completely uncommon, that

1 if people are mainly getting what they need via the BT  
2 Network they might not bother to negotiated between  
3 themselves, particularly if they are regional rather than  
4 national. I suspect if they are national they would have  
5 to have an interconnection agreement, but maybe cable  
6 companies who are regional do not.

7 THE CHAIRMAN: The regionals would just be some regional  
8 cable company.

9 MR BARLING: I am sorry, I misunderstood your question. I  
10 think the answer is that it is increasingly common that  
11 two there would be two rival CPSOs, one of which would  
12 not be BT.

13 THE CHAIRMAN: Who do not have an interconnection agreement  
14 with each other, but each has one with BT.

15 MR BARLING: Yes. We point out the anomaly in paragraph 99  
16 and we refer again to *Source Informatics* and Simon Brown  
17 LJ (as he then was) who proposes a sort of conscience  
18 test, does it affect one's conscience is really the acid  
19 test, or should it affect one's conscience? That might  
20 be useful to apply to this case, when it is information  
21 we are entitled to under the regulatory system, always  
22 have been and we have always received it directly, it is  
23 our customer who is changing. We obliged, to streamline  
24 the process, and received it by another route: I think  
25 one can safely say that BT's conscience is not remotely  
26 affected, neither should it be, by using this information  
27 for save activity, as well as all the customer protection  
28 benefits and the fair competition benefits that are  
29 engendered, if we are able to do that. If that is the  
30 test, then we pass it with flying colours; it is clearly  
31 not confidential information.

32 Then the fourth point, is the information of value?

33 We deal with that in paragraph 102, effectively making  
34 the same points again. In relation to that, we do know,  
35 and it is important, that the Interveners have put  
36 forward a concern which is simply imaginary. They say  
37 hang on, this means that you - this is paragraph 11 of Mr  
38 Bangs' statement - BT as Access Operator and wholesale  
39 supplier has to honour its position and not abuse it, the

1 suggestion being that even where we were not the losing  
2 operator we would carry out marketing activity to the  
3 customer whose identification we had discovered. This  
4 is, as Mr Steggles' has said in his second witness  
5 statement, absolutely not the case. There is no question  
6 that BT has ever acted in this way or would ever act in  
7 this way, so we can reassure the Interveners entirely on  
8 that score. In fact, in those circumstances, as Mr  
9 Steggles has said, BT Retail - the people who have to  
10 make the save call - do not see the customer information  
11 in those cases.

12 THE CHAIRMAN: How are you getting on, Mr Barling?

13 MR BARLING: Might I crave a few more minutes, but I am  
14 increasing I hope in speed now. Ms Sharpson says she is  
15 very happy for me to continue, but the Tribunal probably  
16 is not, but I expect quarter of an hour would do it.

17 THE CHAIRMAN: Yes.

18 MR BARLING: In terms of confidentiality, I think our  
19 conclusions are set out there at paragraph 106.

20 THE CHAIRMAN: 104 of your skeleton, if I may say so,  
21 reflects the difference of philosophy between the two  
22 sides in this case as it were. I think you can see  
23 nothing wrong as the losing provider having equal  
24 opportunity, as you put it, to put your case to the  
25 customer so you can hold on to the customer; the  
26 Regulator sees arguments going the other way and risks  
27 arising if you have that save opportunity.

28 MR BARLING: He does and he does not, because bear in mind  
29 that he also says if we get the information directly from  
30 the customer we can do what we like with it and good luck  
31 to us.

32 THE CHAIRMAN: I see.

33 MR BARLING: So you are right, this is the impossible  
34 position they have put themselves in because they are  
35 trying to ride two horses. They say it is fine for you  
36 to do it, but because you get it indirectly and not  
37 directly you cannot do it at all, but there is not really  
38 much in their evidence about what a rotten thing it is if  
39 you can do it, and there could not really be, given what

1 they have said in the past about, on the whole, it being  
2 rather a good consumer protection safeguard.

3 THE CHAIRMAN: Yes.

4 MR BARLING: Then at the bottom of that page (29) the  
5 heading relates to the differences of wording. I have  
6 really touched on this to a considerable extent already,  
7 and when we were doing the reply, which we have  
8 incorporated in this respect into the skeleton, we set  
9 out verbatim the passages of the various cases, in  
10 particular the *Wells* case and the case *against X* that we  
11 rely upon, as well as the Advocate General in the  
12 *Netherlands* case from whom we have quoted verbatim. I do  
13 not propose therefore to take you to these cases, they  
14 are all in the bundle.

15 THE CHAIRMAN: We can look at them.

16 MR BARLING: But the principles that we rely upon, I hope I  
17 have accurately summarised this morning, and the  
18 submission based on those principles is that Ms Sharpson  
19 and OFCOM are trying to do something which Community law  
20 does not allow them to do - based on principles of legal  
21 certainty mainly - which is to increase our obligations  
22 by reference to the words of the Directive and distance  
23 themselves in that regard from the implementing measures.

24 As the Advocate General put it, "... Member States must  
25 define a specific legal framework in the sector concerned  
26 which ensures that the national legal system complies  
27 with the provisions of the directive ... That framework  
28 must be designed in such a way as to remove all doubt or  
29 ambiguity ..." So if they do not like GC1.2, they cannot  
30 just write out, airbrush out of it, the words "acquired  
31 in confidence" and "acquired in connection with and  
32 solely for the purpose of."

33 THE CHAIRMAN: So you would submit you cannot be in  
34 contravention of a provision that has not removed all  
35 doubt or ambiguity.

36 MR BARLING: Yes, and the benefit of any doubt - if there is  
37 any doubt - or ambiguity, contrary to what they say, we  
38 submit goes to the defendant, us, because principles of  
39 legal certainty would require that and possibly other

1 fundamental principles as well.

2 THE CHAIRMAN: So that even if, for example, there was vires  
3 to make condition 1.2 because you could find sufficient  
4 relationship between that and Article 4(3), if it was not  
5 clear exactly what it was that was prohibited by GC1.2,  
6 you would, on your submission, still succeed because it  
7 has not been sufficiently clear.

8 MR BARLING: precisely. We do make that point in a slightly  
9 different point in relation to if their interpretation is  
10 correct.

11 THE CHAIRMAN: Yes.

12 MR BARLING: Therefore, may I leave those points on legal  
13 provisions as a matter of Community law and take those  
14 paragraphs in the skeleton as read?

15 THE CHAIRMAN: Yes.

16 MR BARLING: Competitive advantage. Here OFCOM say we are  
17 not relying on any infringement because you have passed  
18 on to BT Retail - this is paragraphs 16 and 184 of their  
19 skeleton. So they say we pin our flag to the mast of  
20 "use for a purpose other than intended". They have a  
21 problem in that approach, in our submission. They do  
22 that in order to escape from the difficulty that if they  
23 are complaining about us passing it on, then they have to  
24 show that there is an unfair competitive advantage. I  
25 have added in the word "unfair" because we agree with  
26 what Oftel said in the tab 12 document, that "competitive  
27 advantage" means "unfair competitive advantage".

28 THE CHAIRMAN: Yes.

29 MR BARLING: So they seek to avoid having to prove an unfair  
30 competitive advantage to BT by saying "We are not relying  
31 on you passing it on to BT Retail, we are relying on the  
32 first sentence and the fact that you have used it for a  
33 purpose." First of all, their notification, in its  
34 explanatory memorandum, clearly finds a breach of passing  
35 on. I will just give you the paragraph numbers: s.8 and  
36 3.21 onwards which indicate that BT has infringed GC1.2  
37 in relation to passing on the information. Also, the  
38 complaint by THUS relating to passing on: see paragraph  
39 2.4 of the Notification.

1           Here though the problem for them is this. In this  
2 case it is accepted that BT is allowed to pass on  
3 information to BT Retail, and in that regard it is  
4 difficult for them to escape the need to show an unfair  
5 competitive advantage. If they are trying to control  
6 what can be done in relation to the passing on, as they  
7 are doing, and saying you can tell your customers this  
8 but not that, they cannot escape the need to show an  
9 unfair competitive advantage. We submit that they cannot  
10 show an unfair competitive advantage, they do not really  
11 even attempt to do so.

12 THE CHAIRMAN: Yes.

13 MR BARLING: We deal with it in slightly more detail in  
14 paragraphs 114 to 116, but I am going to, if I may, ask  
15 the tribunal to take those paragraphs as read.

16 THE CHAIRMAN: Yes, we will.

17 MR BARLING: I turn then to effectively the final  
18 submission, which is that there is no problem in relation  
19 to section 47 of the Act or in relation to general  
20 principles of European law, if our interpretation of  
21 GC1.2 is right. We submit that problems only arise if  
22 OFCOM's strange interpretation is thought to be  
23 unavoidable.

24 THE CHAIRMAN: If that interpretation is right, then  
25 according to you it is disproportionate, unequal,  
26 uncertain, not transparent and contrary to human rights.

27 MR BARLING: To mention but a few.

28 THE CHAIRMAN: Among others. )(Laughter).

29 MR BARLING: One laughs because we have prayed in aid all  
30 those general principles, but if something is wrong it  
31 generally tends to offend quite a lot of different  
32 things, and this does.

33 THE CHAIRMAN: I was not short-changing your submission, I  
34 was just summarising it.

35 MR BARLING: I know. Section 47 does encapsulate certain of  
36 the general principles, including transparency and  
37 discrimination, but we rely on the fact that those  
38 principles come in from two different sources. They come  
39 in from section 47, so all conditions set under these

1 provisions of the Communications Act must comply with  
2 those principles because section 47 says so.

3 THE CHAIRMAN: Yes.

4 MR BARLING: Equally, even if it did not say that they would  
5 have to, because in so far as GC1.2 is implementing  
6 Article 4(3) of the Directive - and I know I am teaching  
7 my grandmother to such eggs here - the general principles  
8 would apply in any event. This is not controversial, if  
9 one, just for one's note, looks at paragraph 50 of  
10 OFCOM's skeleton which shows that they accept that  
11 general principles apply independently of section 47.

12 THE CHAIRMAN: Yes.

13 MR BARLING: So without worrying too much about how they  
14 apply, effectively one can look at them, and there is not  
15 an enormous amount to add to the way we put it under the  
16 heads of proportionality, equal treatment and  
17 transparency or legal certainty. May I take equal  
18 treatment and proportionality as read; perhaps the case  
19 is most apparent under equal treatment because what is  
20 being done here is effectively giving a privileged  
21 position to one advocate, the gaining provider, whilst  
22 tying a gag around the mouth of the losing provider.  
23 There is a clear breach, in our submission, of the  
24 principle of equal treatment here in the effect of GC1.2  
25 or indeed of the notification. Equally important, we  
26 submit, is transparency and legal certainty, because we  
27 are, as I have said on a number of occasions, genuinely  
28 in a quandary as to what is really said to be forbidden  
29 and what is not. I probably do not improve that point if  
30 I add to it, but perhaps all I can do is ask the Tribunal  
31 when considering this to glance at paragraph 3.3.2 to  
32 3.3.4 of the Notification itself.

33 THE CHAIRMAN: Yes.

34 MR BARLING: In which the Director explains to BT what it is  
35 and what it is not allowed to do in relation to the  
36 industry agreed letter, Notification of Transfer letter  
37 that I showed you. This is part of the explanation  
38 really, I think, of what the implications of this are.  
39 What he is saying is that the letter is a vital consumer

1 protection measure and therefore you should keep it;  
2 however, the Director would expect BT to remove any  
3 marketing information. question: what is marketing  
4 information? what they say in their definition of save  
5 activity is that it is anything in an attempt to persuade  
6 that customer not to transfer, so anything that could be  
7 construed as an attempt to persuade a customer not to  
8 transfer is save activity (marketing information)  
9 forbidden.

10 How do we know? I have made the points already  
11 about the inevitable impact on neutral information. So  
12 we do not know what it covers, we do not know whether we  
13 can tell the customer about things that will happen after  
14 transfer such as the 1280 material. These are just  
15 examples of the lack of clarity that will ensue. As I  
16 have said, if you compare paragraph 20 of the OFCOM  
17 skeleton with paragraph 168 of their skeleton, OFCOM do  
18 not know either, they do not know whether it applies to  
19 neutral information or not.

20 If, however, BT's interpretation is right and this  
21 information in GC1.2 is dealing with proper information  
22 which the industry understands perfectly properly what it  
23 amounts to, confidentiality of negotiations for  
24 interconnection, there is simply no problem with any of  
25 this, these problems do not arise. In our submission,  
26 the fact that they do arise shows the interpretation to  
27 be wholly wrong.

28 That just leaves the ECHR points which, again, we  
29 have covered here, and I would ask you to take those as  
30 read.

31 THE CHAIRMAN: Yes.

32 MR BARLING: There is a missing reference in paragraph 127  
33 where you see the square brackets; it should be 3.4.1.  
34 Then there is a summary and so on, so unless there is any  
35 other specific question or I have missed anything out at  
36 the moment, those are my submissions.

37 THE CHAIRMAN: unless my colleagues have any questions? No.

38 Thank you very much.

39 MR BARLING: Thank you.

1 THE CHAIRMAN: Ms Sharpson, I think we will just take a five  
2 minutes break, if we may, before we start.

3 (short adjournment).

4 THE CHAIRMAN: Yes, Ms Sharpson.

5 MS SHARPSON: Sir, I wonder if I could begin by making a  
6 number of general points which are very general but, like  
7 Mr Barling, I feel that they are quite important in terms  
8 of getting an understanding of why the Regulator has  
9 adopted the position that it has in this case.

10 Perhaps I could begin with a rather trite  
11 illustration by saying that changing the provider of  
12 calls is not the same as changing whom one chooses to  
13 have as one's banker. If I have a bank account and I,  
14 for one reason or another, decide that a different bank  
15 would offer me more interesting products, I do not have  
16 to tell my existing bank anything at all, I can shop  
17 around in the marketplace, I can draw down the balance  
18 that is in my bank account in cash, place it with  
19 somebody else, and there is no way that my existing bank  
20 knows whom I have gone to. There is no requirement that  
21 I notify; but in due course of course they are going to  
22 be able to work out that very little seems to be moving  
23 in my account, which used to look quite healthy and now  
24 has 5p in it, and at that stage, probably, they would  
25 like to contact me and ask me what is going on and  
26 whether they can entice me to come back to them.

27 Choosing to change one's supplier to CPS is not  
28 like that. It is not like that because network access is  
29 essential to the supply of the product. Unless, there is  
30 an interconnection arrangement in place, there is no  
31 point in even thinking about CPS, it would be a fine idea  
32 but there is no way of getting it to happen. That is why  
33 we say that it is very important to keep this link in  
34 mind. It is perfectly true that there is an access  
35 agreement an arrangement at the wholesale level, there is  
36 a wholesale relationship between BT and the individual  
37 CPSOs. Unless that wholesale relationship exists, it is  
38 impossible to do anything. That must colour one's  
39 understanding of the fact that CPS is being sold as a

1 product to a particular end consumer.

2 The second point that I should like to make is the  
3 point in relation to making arrangements for each  
4 customer, because the way in which Mr Barling puts the  
5 case seeks to limit the application of General Condition  
6 1.2 to a very narrow scenario from one where there is  
7 actual negotiation happening between BT, the network  
8 operator, and a would-be provider. He said that of  
9 course there will be confidentiality arrangements that  
10 one can expect to see in such a context, and indeed he  
11 took you to such an arrangement. We say - and I will be  
12 inviting you to look at the evidence of Ms Wallace to  
13 complement what you have already been shown - that when  
14 one looks at what actually happens when, to use Mr  
15 Barling's phrase, BT "twiddles the knobs", what is going  
16 on is in fact the making of an arrangement, such that it  
17 is possible for the calls of that particular individual  
18 customer to be routed to his or her chosen provider.  
19 Without the twiddling of those knobs the routing does not  
20 happen, and that twiddling of knobs requires a  
21 modification to the arrangements, it requires something  
22 more than the structural framework arrangement that was  
23 previously in place.

24 THE CHAIRMAN: When GC1.2 refers to "before, during and after  
25 the process of negotiating network access" are we talking  
26 about the original framework negotiations, or are we  
27 talking about the twiddling of knobs for the individual  
28 customer, or possibly both?

29 MS SHARPSON: Sir, I say that it is certainly not limited to  
30 just the original negotiation of the interconnection  
31 agreement, and I say that because there is in fact -  
32 technology moves on and of course the market moves on - a  
33 continuing relationship between any CPSO and the network  
34 provider.

35 THE CHAIRMAN: Do you say, for the purposes of this case,  
36 that what we are inaccurately and crudely calling the  
37 twiddling of knobs is within the words "before, during  
38 and after the process of negotiating network access ..."?  
39 It is in fact the network access that we are talking

1 about.

2 MS SHARPSON: I do say it is the network access. I say  
3 further that if one is merely looking at the framework  
4 agreement, the framework agreement is itself not  
5 something that is completely static because there is a  
6 continuing relationship, there is a need for further  
7 negotiation, further modification. I say that if one  
8 looks at what needs to happen in terms of the Access  
9 Directive, what is happening here is indeed within the  
10 meaning of article 2, making available facilities or  
11 services for the purposes of providing electronic  
12 communications services.

13 THE CHAIRMAN: In relation to an individual customer.

14 MS SHARPSON: Sir, yes. While I am making a point about the  
15 Access Directive, perhaps I can just say this, that of  
16 course we accept that there is the limitation of the  
17 definition of access in the Access Directive to dealings  
18 between operators. We say that is for a perfectly simple  
19 and obvious reason, the reason is that avoids the  
20 situation in which end users would be requiring access to  
21 the network, and it is not about that.

22 THE CHAIRMAN: Yes.

23 MS SHARPSON: But providing CPS to the customer is not about  
24 that, the customer is provided with CPS as a product, but  
25 that product can only be supplied to the customer if the  
26 operator has the access. You have my point, sir.

27 THE CHAIRMAN: Yes.

28 MS SHARPSON: The next point that I wanted to make is that  
29 if one takes this in perhaps rather a simple way, the CPS  
30 Operator has to provide some information, a bundle of  
31 information, that identifies both the customer and the  
32 gaining operator. If that information is not provided,  
33 then the customer does not get CPS. The information is  
34 provided for a specific purpose, the purpose is described  
35 in a generic way as being "to facilitate the transfer",  
36 to make sure that the customer can then use the gaining  
37 operator as the route for calls. When BT uses that  
38 information in order to supply further marketing  
39 information to the customer, and/or make a call to the

1 customer to clarify the position and to discuss with the  
2 customer, the purpose that BT was using that information  
3 for was not, I would suggest rather plainly, the purpose  
4 of facilitating the transfer.

5 THE CHAIRMAN: You would say it was the opposite.

6 MS SHARPSON: I would say it was the opposite, yes. I would  
7 say it is called generically the "save" activity because  
8 save activity is quite a good shorthand way of describing  
9 it, it is a way of saving the customer for BT.

10 THE CHAIRMAN: Yes.

11 MS SHARPSON: Indeed, if one looks at the correspondence  
12 from BT and the way in which they have complied with the  
13 notification, the mechanism which they disabled in order  
14 to break the link was between the database and a very  
15 specific marketing tool. It is very clear that the  
16 activity is to save the customer for BT. So I do say  
17 that if one just bears in mind the plain wording of  
18 general Condition 1.2, before one even goes and looks at  
19 Article 4(3) of the Directive, it is relatively easy to  
20 see how that use of information could seem to the  
21 regulator to be a use for a purpose other than that for  
22 which the information was provided. I venture to suggest  
23 at the outset that that rather simple way of looking at  
24 it is, in fact, the correct one.

25 Sir, the next point that I wish to make is in  
26 relation to the information, because my learned friend Mr  
27 Barling, who is a very excellent advocate, has referred  
28 repeatedly to the information as being information about  
29 the customer identity. Indeed, if one looks at the way  
30 in which, in the BT skeleton argument, the question for  
31 determination is stated, the primary issue for  
32 determination in this appeal (paragraph 6 of the BT  
33 skeleton) the way that he puts the question to you, sir,  
34 and your colleagues is whether General Condition 1.2  
35 applies in circumstances where BT receives notification  
36 (indirectly via the gaining CPS Operator) of its  
37 customer's proposal to switch ... and uses that  
38 information ..." and so on.

39 That focuses on the customer ID part of the

1 information that is communicated, but, sir, the  
2 information that is communicated is a bundle of  
3 information. As you saw when Mr Barling took you through  
4 the detail under the old system, you need to know about  
5 the customer, about the line that is affected and you  
6 also obviously need to know who the gaining operator is.

7 That the information must be regarded as a bundle can be  
8 tested by asking the question, if you remove an element  
9 of the information, will what you are left with be of any  
10 use? The answer, I suggest, is no. You have to have  
11 that combination of information.

12 THE CHAIRMAN: What is in the bundle? The identity of the  
13 customer.

14 MS SHARPSON: Sir, if I may, I will take you to it a bit  
15 later, but it is a combination of information about the  
16 customer and information about the gaining CPS operator.

17 Although one obviously understands why it is put in this  
18 way, trying to disaggregate that bundle of information  
19 and say it is really all information about the customer  
20 and BT has a right to know this, just does not work,  
21 because it is only the bundle of information which serves  
22 to facilitate the transfer, as a bundle.

23 The next point is in relation to general  
24 conditions, and it is one that you picked up in  
25 discussion with my learned friend. It is that the  
26 general conditions are indeed general conditions. Unlike  
27 the earlier regime, this is a condition that relates to  
28 everyone, and so the question that the Tribunal has to  
29 decide is the proper interpretation of General Condition  
30 1.2 in relation to everyone, not uniquely in relation to  
31 BT.

32 I will be coming back to the confidentiality point,  
33 obviously, later on in detailed submissions, but perhaps  
34 I may make a general point at this stage, again by asking  
35 a question: whether information is confidential can  
36 sometimes best be tested by asking who would mind if it  
37 was in somebody else's hands? I ask the question whether  
38 either BT or the gaining CPSO would be happy if a third  
39 party CPSO were to be handed the packaged of information,

1 the bundle, to which I have just referred, the bundle  
2 which would tell them that there was a particular  
3 existing BT customer who was footloose, interested in  
4 looking for an alternative provider for calls. Would  
5 either BT or the gaining CPSO be happy at disclosure of  
6 that information? Once again, perhaps naively one  
7 suspects, the answer is probably no, they would think  
8 that that information was certainly sensitive and perhaps  
9 if it is commercially sensitive one is part of the way  
10 towards thinking that it is confidential.

11 There is another point that I need to make at the  
12 beginning, which is in relation to the past history of  
13 the system adopted by the Regulator because, again very  
14 understandably, Mr Barling has taken you to the  
15 development of these conditions and to various statements  
16 that have been made by Oftel, the precursor to OFCOM, in  
17 this regard, and then statements which seem to point  
18 towards a more restrictive interpretation of general  
19 Condition 1.2.

20 It is perfectly true that the position of the  
21 Regulator has evolved, and I do not seek to pretend  
22 otherwise. This is a new situation, there is a new  
23 framework of EC measures, a new package of directives  
24 that were put in place. Although it is true that CPS, in  
25 some form, using a manual prefix or using an autodialler  
26 existed before, permanent CPS with routing is relatively  
27 new. The Regulator is under a duty to oversee the  
28 market, to investigate, to look at what is happening and  
29 to take a view, and one would add cannot really be  
30 limited or constrained by the steps that were taken along  
31 the way and by a series of previous statements which were  
32 all non-binding statements but which represented an  
33 understanding of where one had got to at a particular  
34 point.

35 THE CHAIRMAN: On the other hand, he has to take that view as  
36 it were with European spectacles on, bearing in mind that  
37 we are dealing with European directives, and ask himself  
38 - or at least we have to ask ourselves - what ultimately  
39 was the meaning that the European Parliament and the

1 Council of Ministers intended this Directive to have at  
2 the time it was adopted.

3 MS SHARPSON: Indeed. Sir, I do rely on the need for the  
4 Regulator to wear European spectacles, and something that  
5 I wanted to try and deal with quite early on in my  
6 submission is indeed the *Mar Leasing* consistent  
7 interpretation, imposition of burdens issue, because  
8 obviously it is important.

9 While I am dealing with general points, can I just  
10 make one or two more? In a number of places in the  
11 written submissions and, again, orally, BT has laid great  
12 emphasis upon the role that it plays in contacting its  
13 customers, in providing information, in consumer  
14 protection. Perhaps I am putting it a little bluntly  
15 when I say that one could almost be forgiven for thinking  
16 that BT saw itself as having a function as the industry  
17 policeman in this regard; actually BT is not the industry  
18 policeman, it is a player among other players in the  
19 market.

20 THE CHAIRMAN: Yes.

21 MS SHARPSON: The industry policeman is the Regulator and  
22 the Regulator has the specific duty and has the means to  
23 oversee what is happening in the market and, where  
24 necessary, to issue the necessary directions to try to  
25 keep the market operating smoothly.

26 My learned friend made a great deal of the anti-  
27 slamming letter and the issues of consumer protection  
28 there, and it is perfectly true that the Notification of  
29 Transfer letter is not 100% effective, but it is thought  
30 by the Regulator to represent a reasonable balance  
31 between protecting consumers and promoting competition.

32 It will be necessary to go to Ms Wallace's witness  
33 statement at a number of points, but could I perhaps ask  
34 you to look at paragraphs 112 through to 125? It is at  
35 the beginning of binder 1, under tab 2 in the OFCOM  
36 bundle of documents. If I can quickly take you through  
37 this passage, because such reliance is placed by BT on  
38 this. The anti-slamming component is the information  
39 component in the Notification of Transfer letter, it is

1 saying to the customer "We have been told by a gaining  
2 CPS that you want to switch", and obviously if they do  
3 not it means that something rather unorthodox has  
4 happened.

5 THE CHAIRMAN: Yes.

6 MS SHARPSON: It is not the persuasive marketing part, that  
7 is a different element. The switchover period of ten  
8 days is precisely intended to make sure that consumers  
9 have the opportunity to stop the process, and that is  
10 applicable whatever the sales or marketing channel by  
11 which the original sale came. The issue is the use of  
12 the information for a different purpose from the purpose  
13 for which it was intended.

14 Ms Wallace then goes on, at paragraph 115 and  
15 following, to identify a range of anti-slamming consumer  
16 protection measures that have already been put in place  
17 and other measures that are being put in place. There is  
18 reference there to a consumer guide and a joint  
19 CPS/Wholesale Line Rental guide which is in draft form,  
20 available on the website, the generic consumer guides  
21 that are distributed generically and given to a number of  
22 places where ordinary citizens probably go.

23 There are (paragraph 117) some CPS operators whose  
24 heads perhaps stick up above the parapet a little, and  
25 with whom discussions have been initiated, since these  
26 seem to be the ones, from consumer complaints statistics,  
27 who are having the greatest problems with the sales  
28 activities.

29 THE CHAIRMAN: What can you actually do to these people if  
30 you find they are breaking the ground rules?

31 MS SHARPSON: Initially, you can certainly have discussions  
32 as the Regulator ---

33 THE CHAIRMAN: What is the ultimate sanction?

34 MS SHARPSON: What are simply called "Stop now" orders. So  
35 given that one wishes to be a market player in that  
36 particular market, that is indeed a very striking  
37 sanction.

38 Sir, it is of course a balance between what Mr  
39 Barling rightly described as an attempt to have a light

1 regulatory touch, while at the same time ensuring that  
2 the market does operate correctly, and those discussions  
3 and those guidelines that are put in place are all part  
4 of trying to have the light regulatory touch. One has  
5 guidelines that apply on a voluntary only basis, but if  
6 that does not work then you tighten up the arrangements  
7 and you begin to apply teeth to the way in which you  
8 control the market.

9 The final point I would make in this context, sir,  
10 is in relation to the figures that Mr barling was giving  
11 you. My instructions are that in fact the regulator has  
12 been told by BT that not all of the 12,000 that you were  
13 quoted are in fact complaints. Some of them are issues  
14 that the customer does not actually want to complain  
15 about, so any data in this area is probably a little bit  
16 unreliable. It is certain that there is a situation  
17 about slamming, and that needs addressing. For the same  
18 period as there was the 12,000 figure for BT, february  
19 2004, from the same source, the consultation document on  
20 protecting citizen consumers from the mis-selling of  
21 fixed line telecommunications services, the number of  
22 complaints to the Regulator was 53.

23 THE CHAIRMAN: Have we got that document in our papers?

24 MS SHARPSON: I think not, but since it came out in this  
25 form only on 29 April I hope you will forgive both  
26 parties for not having lodged it earlier.

27 THE CHAIRMAN: There has been a bank holiday in the meantime.

28 MS SHARPSON: Perhaps we could make it available.

29 THE CHAIRMAN: No, we can find it on the website, if we need  
30 it.

31 MS SHARPSON: Sir, whatever would be most convenient.

32 THE CHAIRMAN: You might just track down for me - not now but  
33 when convenient - tell us under what powers that stop now  
34 order is made.

35 MS SHARPSON: Certainly. sir, again, in dealing with  
36 general points, can I go back to the statement I had  
37 begun to make about the new directives? There is a  
38 package of new Directives and it is a new regime that we  
39 say has to be read together with the Framework Directive

1 over the top. There are cross-links between the various  
2 Directives is, as we say, pretty evident. You, sir,  
3 indeed, identified very swiftly one of those links in  
4 discussion with Mr Barling when you pointed out that  
5 Article 19(2) of the Universal Service Directive takes  
6 you back of course to the Access Directive. So we say  
7 that as themes behind the new package we do find  
8 competition and we find consumer protection, so it would  
9 be wrong to exclude those elements from one's mind when  
10 looking at the interpretation of provisions within the  
11 package. Some measures are clearly more specifically  
12 directed at fair competition and consumer protection than  
13 others, but overall one is looking at integrating a  
14 market and having a level playing field (in the famous  
15 phrase) which is with ex ante regulation rather than  
16 always ex post regulation, and therefore one is looking  
17 for terms of the Directives and the General Conditions  
18 that give effect to them, which are intended to be given  
19 a meaning for everyone, and one that bears in mind those  
20 principles of competition and consumer protection. I am  
21 sorry, these are very obvious points, but it is important  
22 to make them at this stage.

23 THE CHAIRMAN: No, they are very well worth making.

24 MS SHARPSON: while I am trying to get general points out of  
25 the way, may I just recall the points that were made as  
26 summary points at the beginning of the skeleton argument,  
27 because it is quite easy when one gets into the detail to  
28 lose sight of those summary points. Could I ask you just  
29 to turn up the skeleton, starting at paragraph 6? The  
30 first bit we do not need to worry about because those are  
31 the points that have been put on behalf ---

32 THE CHAIRMAN: Where do you want us to go to?

33 MS SHARPSON: OFCOM's skeleton, sir, beginning at paragraph  
34 13, which begins with the European spectacles phrase.

35 THE CHAIRMAN: These are the seven elements that have become  
36 nine.

37 MS SHARPSON: Seven have become nine, indeed, sir. It  
38 sometimes happens that when one looks more closely one  
39 sees that one should have been a little bit more

1 |       circumspect, even when following so beguiling an opponent  
2 |       as Mr Barling and Ms Lea and following the way they  
3 |       divide things up. We do say that probably it analyses  
4 |       better in terms of nine elements rather than seven, and  
5 |       we say that there are free-standing obligations one can  
6 |       identify within General Condition 1.2: the obligation not  
7 |       to use the information for a purpose other than that for  
8 |       which it was provided, respecting confidentiality and not  
9 |       passing on the information. This is the structure which  
10 |       we say mirrors the structure in Article 4(3) of the  
11 |       Directive, and we say that indeed the condition is meant  
12 |       to implement it and implement it properly, and I say for  
13 |       emphases: therefore, we are not, for example, in the  
14 |       territory where a Member State has failed to put  
15 |       something in place and, quite independently therefore,  
16 |       the national implementing measure is trying to go back to  
17 |       the Directive in order to impose an obligation. That is  
18 |       not this situation; we have a national implementing  
19 |       measure in the shape of General Condition 1.2 which we  
20 |       say does in fact do what the Directive is meant to do,  
21 |       and so we use the Directive as a gloss, as an aid to  
22 |       interpretation, but we say that we do not have to go back  
23 |       to the Directive to fill in the gaps.

24 | THE CHAIRMAN: So we are not thinking of *wells v Secretary of*  
25 |       *State for Transport*.

26 | MS SHARPSOON: Sir, I do not think we are as far as *Wells*,  
27 |       although since you raise *Wells* with me, *Wells* is perhaps  
28 |       relevant in this sense, that Mr Barling put his point to  
29 |       you this morning - if I understood him correctly - as  
30 |       saying that we were not entitled to impose a penal  
31 |       obligation which was not to be found in the national  
32 |       implementing measure, but he went further and he said we  
33 |       were not entitled to impose any extra burden, or  
34 |       additional or heavy burden. At least, that is how I  
35 |       understood him. Of course, in *Wells* one does have a  
36 |       situation where it was indeed burdensome to the mining  
37 |       companies who had their licence already to be told that  
38 |       actually there ought to be have been an Environmental  
39 |       Impact assessment. They probably thought that these were

1 circumstances in which it was not necessary to have an  
2 EIA, and it certainly produced a result that was  
3 "adverse" to them, but nevertheless the ECJ was prepared  
4 to say that that Directive could be relied on and that  
5 the principle of consistent interpretation in giving  
6 effect to the Directive was - I would not exactly say was  
7 more important than the third party rights, but was not  
8 to be denied simply because there would be an extra  
9 burden on a third party.

10 THE CHAIRMAN: It cannot create obligations, but might have  
11 some adverse consequences.

12 MS SHARPSON: It may have adverse consequences, and  
13 obviously what we have here is precisely a general  
14 condition, and there are different market players. What  
15 is burdensome to BT is something that may produce a fair  
16 marketplace for a CPSO, and one needs to look at the two  
17 sides. But I do say that in the case law we are well  
18 away from the type of argument that is to be found in the  
19 *Commission v Netherlands*, that is to be found in *Arcaro*,  
20 where the court says you as the Member State, having  
21 failed to put something into the implementation, cannot  
22 then turn round and snatch the missing words out of the  
23 Directive in order to write in an obligation that you  
24 failed to put there, because I say that general Condition  
25 1.2 when read sensibly in context does what it needs to  
26 do and bears the interpretation for which we contend.

27 Sir, perhaps in this context I should also just  
28 make one point on whether this is quasi penal, because Mr  
29 Barling has been making that suggestion to you and it is  
30 right I should make the position clear. OFCOM does not  
31 accept that this is a situation which is necessarily  
32 quasi penal because it is not one where, automatically,  
33 one triggers a criminal penalty, and this comes back  
34 round to the structure of sections 94, 95A and 96.

35 THE CHAIRMAN: we are going back to the - oh dear.

36 MS SHARPSON: Sir, I do not wish to be drawn into that  
37 unless it would be helpful to the Tribunal, but I think I  
38 can make the point very shortly in this way. Under the  
39 section 94 Notification the addressee has some options.

1 If he complies, makes representations and appeals to this  
2 Tribunal there are two possible outcomes. One is that  
3 the conduct is deemed unlawful, but because he has  
4 stopped the conduct there is no enforcement notice and no  
5 penalty. So he is not criminal.

6 THE CHAIRMAN: But the regime still potentially exposes him  
7 to the possibility of a penalty unless he does something.

8 MS SHARPSON: It exposes him to the possibility if he does  
9 not comply, but at that stage there is a higher test and  
10 there is a second step. If it is not helpful, I do not  
11 wish to take up time and get drawn into a complexity  
12 which is not perhaps required. The marker I did want to  
13 put down was just to say that it is not self-evident that  
14 we are here talking about something that is quasi penal.

15 Whereas if you try to prosecute somebody for selling  
16 mineral water, or selling water that was not mineral  
17 water as mineral water and your domestic rules do not  
18 have anything in them, but you go back to the directive,  
19 then you are relying on the Directive to found the  
20 criminal prosecution. That is not quite the situation  
21 here, that is the only way I can put the point.

22 THE CHAIRMAN: Yes, I see.

23 MS SHARPSON: Sir, again just tidying up on the general  
24 points, I have made the point that the interconnection  
25 written agreement is in fact a framework agreement, and  
26 my learned friend has taken you to the agreement that is  
27 under tab 40 of the BT bundle. It may help just to go  
28 back to it to look at it briefly, because if you recall],  
29 sir, you were asking questions about how that would  
30 operate. Yes, there is a confidentiality agreement in  
31 it, and then under tabs 41 and 42 there is a sequence of  
32 possible annexes. It may not be necessary to turn them  
33 up.

34 THE CHAIRMAN: What is it that you want to show us?

35 MS SHARPSON: Sir, I wanted to make the point that in the  
36 interconnection agreement - perhaps I can make it simply  
37 from the table of contents under tab 40 - one has got all  
38 the elements that one would expect to find in terms of  
39 matters that need to go in - for example, on charges and

1 payments, on system protection and safety, but one does  
2 not have at this stage anything which means that a  
3 particular customer is going to have their calls routed  
4 via interconnection to a specific chosen CPS operator.  
5 It is perhaps a clumsy way of making the point, sir, I  
6 think you have the point in the way I made it before.  
7 Much more will actually be needed if something is going  
8 to happen.

9 Sir, can I invite you to go to Ms Wallace's witness  
10 statement again, this time to the paragraphs which deal  
11 with what happens when a customer makes this decision.  
12 Could you go to paragraphs 37 to 39 to begin with, which  
13 look at what happens? She makes the point that under  
14 primeval CPS there was a manual prefix or an autodialler,  
15 and at that stage there was no need for the customer to  
16 inform BT, either directly or through the chosen  
17 communications provider, that he or she had chosen to use  
18 another communications provider. So in those  
19 circumstances, this issue simply does not arise. When  
20 one gets to permanent CPS however, the call is routed  
21 automatically through the network and that technical  
22 change is effected by BT Wholesale, and it is precisely  
23 because the technical change has got to be made to give  
24 effect to the consumer's choice for permanent CPS that  
25 the customer's specific information, with the identity of  
26 the gaining CPS Operator, is necessarily communicated to  
27 BT, and there is obviously a reference to the Reply Slip  
28 system, being the Reply system at first in place.

29 therefore, there are two types of information that  
30 BT will get: there is the technical information and  
31 customer-specific information, and this goes to a  
32 question that one of your colleagues put earlier to Mr  
33 Barling, that these two types of information are needed  
34 to allow the interconnection arrangements to become  
35 effective in the case of individual customers' call  
36 traffic.

37 Could I then ask you to pick it up again at  
38 paragraph 8? Sir, the distinction is there made between  
39 BT Wholesale and BT Retail, and there are references to

1 documents that you have already been shown, being the  
2 Industry End to End Process Description and the industry  
3 Code of Practice. There is the reference there but I  
4 probably do not need to actually take you to that.

5 Then there is the description at paragraph 90 that  
6 explains how this is set up with the electronic order,  
7 and probably again the specific sub-paragraphs are rather  
8 technical and do not matter. If I can go on to 91, there  
9 are a number of mandatory fields of mandatory information  
10 - this answers the question you, sir, put to me a few  
11 moments ago as to what the bundle of information is.

12 THE CHAIRMAN: Yes.

13 MS SHARPSON: Mandatory fields, "including customer's  
14 postcode and telephone number, which allow BT Wholesale  
15 to validate the order." It is then validated and then  
16 the identifying code and, if necessaria, a reseller code,  
17 all of this mandatory information has to be there so that  
18 it is possible to set up CPS on the lines concerned.  
19 That is the twiddling of the knobs, to use that  
20 shorthand.

21 THE CHAIRMAN: What have we got actually in it apart from the  
22 customer's postcode and telephone number?

23 MS SHARPSON: Sir, you have the necessary electronic  
24 identification for the CPS operator, because what has to  
25 happen is that the switches need to substitute for what  
26 the customer would otherwise have done manually by  
27 dialling the appropriate code, or what was subsequently,  
28 at an intermediate stage, done by the autodialler. The  
29 routing has physically - I say physically, that is not  
30 perhaps a good shorthand. There has to be a change.

31 THE CHAIRMAN: There has to be something, perhaps in the BT  
32 local exchange, I know not where it happens.

33 MS SHARPSON: Sir, I am very conscious that there are people  
34 on the other side of the room who know this much better  
35 than I do. There is a change that takes place ---

36 THE CHAIRMAN: Everybody in the room knows it better than us.

37 MS SHARPSON: In terms of setting up that routing. If there  
38 were not that technical change, the routing would not  
39 happen, and although the customer would have expressed a

1           desire to have permanent CPS, he would not in fact have  
2           it because if he dialled the number instead of the calls  
3           routing over the permanent CPS network ---  
4   THE CHAIRMAN:  Something has got to happen so the calls are  
5           automatically re-routed to the network operator.  
6   MS SHARPSON:  Sir, rather little found its way into the  
7           agreed statement of facts, but something at least did.  
8           Can I perhaps suggest that the answer to the question you  
9           are putting to me, sir, is partly at least to be found  
10          there under (b).  The mandatory information is CPS  
11          Operator's ID, customer's postcode, customer's telephone  
12          number, date of the switchover, the routing prefix, the  
13          order number and what the CPS option selected was  
14          because, as Mr Barling said, it may be all calls, it may  
15          be some subset, it is very much a matter for the customer  
16          to say what they want.  
17   THE CHAIRMAN:  Yes.  
18   MS SHARPSON:  Sir, that is the location for the answer to  
19          your question.  If I could just go back for a moment to  
20          Ms Wallace's statement, I have almost finished this  
21          passage in it, this makes the point about ongoing  
22          discussions with BT.  If one goes to the section under  
23          negotiation of network access, paragraph 93 and following  
24          where she picks up the passage in Mr Steggles' first  
25          witness statement para 41, he suggests that the type of  
26          information passed by operators prior to and following an  
27          interconnection of access agreement is clearly different  
28          in nature.  She says this:  "To adopt this position is  
29          fundamentally to misunderstand the interaction between BT  
30          and the CPS Operator."  She says if it was the initial  
31          negotiation then it would be meaningless to talk about  
32          negotiations for access, but that actually what is  
33          happening (para 96) is that there is an ongoing provision  
34          of information in order to enable interconnection to  
35          work, and she refers to routing plans, to new requests to  
36          make information available in relation to particular  
37          calls.  It goes through to paragraph 99, but it makes the  
38          point, we say, that this - the twiddling of the knobs -  
39          is very clearly something that falls within Article 2(a)

1 of the Access Directive.

2 THE CHAIRMAN: Yes.

3 MS SHARPSON: Perhaps I could just tidy up on a couple of  
4 points which tie in here. Mr Barling referred to  
5 charging and carriage charges; there is in fact also a  
6 set-up charge for making this available to an individual  
7 customer, and you were taken, sir, to condition AA8 in  
8 volume 2 of the OFCOM bundle, tab 30. Sir, the actual  
9 provision condition is AA8.1 and then one has the  
10 charging condition as AA8.4.

11 THE CHAIRMAN: This applies to the dominant provider.

12 MS SHARPSON: Yes, the necessary market review was carried  
13 out under the Directive and two rivals were found to have  
14 SMP (significant market power). So this is a condition  
15 that applies to BT as the dominant provider, there is the  
16 requirement to provide Carrier Pre-selection at AA8.1,  
17 and then in AA8.4 there is the charging arrangements.  
18 "Charges shall be made by the dominant provider as  
19 follows ..." and the costs can be categorised, if you go  
20 to (b) as falling within one of the following categories:  
21 Carrier Pre-selection, they will provide the set-up costs  
22 and ongoing costs.

23 What happens is not that BT charges the customer,  
24 but for every line that is set up with CPS, BT does  
25 charge the gaining CPSO and I am told that the charge is  
26 approximately £3.70 for each line that is set up under  
27 this system.

28 THE CHAIRMAN: That is presumably agreed under (3), is it,  
29 customer line set-up costs.

30 MS SHARPSON: Indeed, sir, yes. So, very, very  
31 specifically, associated with each and every individual  
32 customer who wants to have CPS, there is a technical  
33 activity carried out by BT in order to give effect to  
34 that request, and there is indeed a charge that is made  
35 for that purpose.

36 Sir, again tidying up, there was a discussion  
37 earlier as to what the situation was when a customer was  
38 transferring from one CPS Operator to another CPS  
39 Operator. This was paragraphs 42 and 43 of BT's skeleton

1 argument.

2 THE CHAIRMAN: Yes.

3 MS SHARPSON: In this situation it is perfectly true that  
4 the losing and gaining CPS Operators are not necessarily  
5 directly interconnected,, but what would be much more  
6 unusual would be that it was BT as the Network Access  
7 Operator who needed to make the necessary technical  
8 changes to enable the customer's calls that were with CPS  
9 Operator Smith then to go to CPS Operator Jones.

10 the position of the Regulator is that General  
11 Condition 1.2 would indeed apply to information that was  
12 passed to the losing CPS Operator, if there is a CPS  
13 Operator to CPS Operator transfer rather than a transfer  
14 between BT and a CPS concern.

15 THE CHAIRMAN: How would that arise if there is no  
16 interconnection between those two operators?

17 MS SHARPSON: well, the reason that that is the Regulator's  
18 position is this, although the losing and gaining CPS  
19 Operators may not be directly interconnected,  
20 nevertheless the customer transfer is still predicated on  
21 the existence of network access arrangements. They are  
22 not direct arrangements between the losing and gaining  
23 CPS Operators, but there does still have to be the  
24 network access. Therefore, the Regulator takes the view  
25 that the information that is being transferred is still  
26 passed to the losing operator from another communications  
27 provider, before during and after the process of  
28 negotiating network access or interconnection  
29 arrangements. I make the point because obviously it  
30 arose in discussion with Mr Barling.

31 THE CHAIRMAN: Is there a difference there with mobile  
32 operators, or does the same situation not arise?

33 MS SHARPSON: Sir, I am told that the position is different  
34 because they use different access networks. If you  
35 switch from one mobile to another you do not necessarily  
36 stay with the same network, whereas in the situation that  
37 was being suggested it would still be using the BT  
38 network, but what is happening is that the calls, instead  
39 of being routed with CPSO Smith, are being routed with

1 Jones or vice versa.

2 THE CHAIRMAN: Yes.

3 MS SHARPSON: Sir, those were the general points that I  
4 wanted to make and get out of the way as it were. I  
5 wonder what way I can be of best assistance to the  
6 Tribunal because I see the time. What I had intended to  
7 do was to go into the context and purpose of general  
8 Condition 1.2 and then the correct analysis. It may be  
9 that if I take advantage of the overnight adjournment I  
10 could in fact compress and put together a number of  
11 points which I need to deal with, which Mr Barling  
12 raised, and make my submission rather shorter than if I  
13 start it now and leave it somewhere in mid-air.

14 THE CHAIRMAN: That sounds like a fairly thinly disguised  
15 plea to draw stumps for the day, Ms Sharpson.

16 MS SHARPSON: Sir, I am happy to go on if the Tribunal  
17 prefer me to do so, but I think I might occupy less  
18 minutes if I continued tomorrow.

19 THE CHAIRMAN: We had a provisional timetable that envisaged  
20 you having an hour or so tomorrow morning, perhaps a bit  
21 more. We have slipped a bit so we would probably go on a  
22 bit longer than that, and then we have got the  
23 Interveners, which I think will probably be fairly short.  
24 Are we heading for finishing by lunchtime tomorrow?

25 MS SHARPSON: Sir, we are on schedule I would have thought.  
26 My hope was that if I stopped now I would be shorter  
27 rather than longer in the morning; I think I can compress  
28 what I have to say.

29 THE CHAIRMAN: Yes. It sounds to me as if we have probably  
30 got a reasonable chance of getting through at lunchtime  
31 tomorrow. I think we would quite like to do that if we  
32 can, without hurrying anybody unduly.

33 MS SHARPSON: Sir, I will make sure I do compress things  
34 overnight.

35 THE CHAIRMAN: We have had very interesting skeletons and so  
36 forth which we have done our best to absorb, so I think  
37 we are getting into the case quite well.

38 MS SIMMONS: May I ask something?

39 THE CHAIRMAN: Yes. Ms Simmons has got a question for you.

1 MS SIMMONS: I was looking at para 40 - I think it is  
2 probably for both of you because I do not know where this  
3 has come from - which is the standard Interconnection  
4 Agreement. I have been thinking about what we call the  
5 twiddling of the knob, where the obligation is, and I  
6 think (but I may be wrong) that it is in clause 5, which  
7 is on page 6. What clause 5.1 says is "The Parties shall  
8 convey calls and provide the services and facilities  
9 pursuant to the schedules ..." We do not have the  
10 schedules.

11 MR BARLING: We do. At 41 we have the relevant one.

12 MS SIMMONS: Is that going to provide me with the answer?

13 MR BARLING: It should do. If you look, for example, at 3.4  
14 of tab 41, "If the CPS customer makes a call to the  
15 Operator System under one of the CPS Options, BT shall  
16 prefix each such CPS call with the CPS Routing Prefix  
17 allocated to the Operator ..." That is the gaining  
18 operator.

19 MS SIMMONS: But does not something have to be done before  
20 that?

21 MR BARLING: When it says "BT shall prefix" it does not mean  
22 there will be a little man there each time a call comes  
23 through, what it means is that the exchange machinery  
24 will recognise a call from that customer and  
25 automatically attach the relevant prefix to it. It is  
26 the setting up of the route; Ms Lea reminds me that the  
27 route to that operator will already be set up.

28 MS SIMMONS: Absolutely, it is the twiddling of the knob for  
29 that customer to make sure he goes down that route.

30 MR BARLING: Yes.

31 MS SIMMONS: And that is what 3.4 is dealing with, or is  
32 there some other provision somewhere in another schedule  
33 to do with it?

34 MR BARLING: I hesitate to say that there is not another  
35 highly technical document, but that is what, as I  
36 understand it, 3.4 is referring to when it says "BT shall  
37 prefix each such CPS call ..." The technical changes to  
38 the software that actually have to be done in order to  
39 achieve that may be described somewhere else, in another

1 technical document, but I cannot put my finger on it. I  
2 will check overnight with those instructing me.

3 MS SIMMONS: Thank you.

4 THE CHAIRMAN: Ms Sharpson?

5 MR BARLING: Ms Sharpson may have the answer.

6 MS SHARPSON: I may have only part of the answer - it is  
7 usually my fate when I am trying to follow Mr Barling.  
8 It may be helpful to say that the Interconnect Agreement  
9 refers in terms to the CPS Process Agreement which is  
10 under tab 43, the Industry end to End Process  
11 Description, and it is necessary to set up an operator so  
12 that the operator becomes the CPSO, and then once that  
13 particular operator is the CPS Operator, then there is  
14 the twiddling of knobs for the individual customer. So  
15 to take Mr Barling's illustration, there is not a little  
16 man routing each call, that is because the software knows  
17 that there is a particular four digit prefix which is for  
18 that operator, and then the individual customer is  
19 slotted into that by making some additional changes, so  
20 that when a call comes from that particular identified  
21 line the software knows that the call should be routed by  
22 putting in that automatic prefix. I am told that in  
23 section 2 of the process document that deals with setting  
24 up the operator to become a CPS Operator, and then  
25 section 3.4, but I was just checking it myself.

26 MS SIMMONS: What I am really looking for is whatever  
27 obliges BT to put those prefixes on, so that that  
28 customer will be switched.

29 MR BARLING: You mean legally obliges BT?

30 MS SIMMONS: Yes, legally obliges.

31 THE CHAIRMAN: Or has agreed to do it by virtue of the  
32 interconnection agreement or whatever.

33 MS SIMMONS: Where is the legal obligation?

34 MS SHARPSON: That is condition AS.

35 MR BARLING: That is the regulatory obligation to do it, but  
36 it is also reflected, one suspects, in the  
37 interconnection agreement.

38 MS SIMMONS: The way these have been constructed it looks as  
39 if they are reflected in the agreements.

1 MR BARLING: I would expect it to be a general BT  
2 obligation, but you pointed out, ma'am, in tab 40, and  
3 then referring to the schedule, and also incorporated in  
4 this is the end to end process which provides another  
5 layer of detail. But the legal obligation probably comes  
6 both from the interconnection agreement - but of course  
7 you are under an obligation to negotiate and enter into  
8 interconnection agreements.

9 THE CHAIRMAN: What might help, and perhaps one can do it  
10 overnight rather than taking time now - is for somebody  
11 to just track down where in the documents we have got  
12 arises the operation for which BT charges £3.70 for the  
13 line set-up cost, if you see what I mean.

14 MR BARLING: Yes. So where in the documents the obligation  
15 arises.

16 THE CHAIRMAN: A contractual provision dealing with it, to  
17 put it neutrally.

18 MR BARLING: Yes.

19 THE CHAIRMAN: Very well, shall we say half past ten?  
20 **(Adjourned until 10.30 tomorrow).**  
21  
22  
23