

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

Thursday, 6 May 2004

Before:

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

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

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 2

1 MR BARLING: Sir, Ms Sharpson has very kindly allowed me
2 just to stand up and make one short clarification point
3 before she continues.

4 THE CHAIRMAN: Yes, of course.

5 MR BARLING: It relates to the point that was being
6 discussed yesterday about the 1280, the override number.
7 I mentioned that an issue had arisen about that.

8 THE CHAIRMAN: Yes.

9 MR BARLING: We have been able to hunt down the e-mail - I
10 am afraid there are not copies of it available, but that
11 could be done if necessary - and the position was that at
12 about the time of required compliance (about 9 December)
13 there was an exchange of e-mails between OFCOM and BT,
14 and on 9 December - which if you remember was the
15 deadline date - OFCOM indicated that an argument could be
16 made that making a reference to BT's override code in the
17 Notification of Transfer letter could be construed as an
18 act of marketing rather than anti-slamming. That was as
19 far as they took it, they did not positively require it
20 to be removed, as far as we can see. Given that that was
21 as it were at the eleventh hour and 59th minute, BT then
22 determined themselves to not take a chance and so they
23 made those changes which you have seen in the sequence of
24 letters in tab 46, culminating in the last one where it
25 was actually removed.

26 The confusing thing is that if one looks at the
27 Defence, one sees that there was another curious issue
28 that arose, and there is a little bit of confusion
29 between the two 1280 questions.

30 THE CHAIRMAN: It is the Defence you are taking us to.

31 MR BARLING: No, I apologise, it is Ms Wallace's witness
32 statement at paragraph 106. One sees there that the
33 Oftel view was that that passage that they quote there,
34 including the reference to barring 1280 if you had a BT
35 payphone, was marketing content. So there were two
36 issues, and one can see there that Oftel is saying that,
37 but the bit that I really was referring to yesterday is
38 not that, it is the reference to being able to use the

1 1280 number which was taken out of those letters.

2 THE CHAIRMAN: Yes.

3 MR BARLING: Because of the two issues being somewhat
4 confused, our skeleton at paragraphs 78 and 126, and Mr
5 Steggles' second witness statement at paragraph 56, might
6 have overstated the case, because I think what those
7 passages say in effect is that we were required to remove
8 the 1280, whereas the true position ---

9 THE CHAIRMAN: You removed it.

10 MR BARLING: We removed it because they raised the issue and
11 said it might be construed. I just wanted to make that
12 correction, and I am very grateful to Ms Sharpson and to
13 the Tribunal.

14 THE CHAIRMAN: Right, thank you. Ms Sharpson, just before
15 you start can we put two or three points as it were on
16 the table, not necessarily for immediate answer but for
17 perhaps some clarification in due course?

18 MS SHARPSON: Certainly.

19 THE CHAIRMAN: The first point is Article 4 of the Access
20 Directive appears to be the successor to the previous
21 article in the Interconnection Directive, which basically
22 said that undertakings as defined, I think, in the
23 various annexes to the Interconnection Directive, had the
24 right and the obligation to negotiate, but operators of
25 public telecommunications networks had an obligation to
26 meet all reasonable requests for access if they had
27 significant market power as defined in that Directive.
28 So that one lot of people had an obligation to negotiate
29 and if you had significant market power you had an
30 obligation to connect.

31 The question is does the new Article 4 in the
32 Access Directive still envisage the obligation to
33 negotiate and only the obligation to negotiate, rather
34 than the obligation to actually connect? Is the
35 obligation to actually connect now something that is
36 effectively dealt with, I think, in Article 12 of the
37 Access Directive, that is to say the obligation arises if
38 you are found on a market analysis to have significant
39 market power. So does Article 4 go beyond an obligation

1 to negotiate and actually contain within the scope of
2 Article 4 some further obligation, or is it effectively
3 equivalent to the structure under the old interconnection
4 Directive? That is the first question.

5 The second question involves trying to tie down a
6 bit what OFCOM's case is as regards "the process of
7 negotiating Network Access" in General Condition 1.2.
8 Are you saying that the network Access that we are
9 talking about in the context of GC1.2 is the original
10 Interconnection Agreement and that the subsequent
11 transaction dealing with an individual customer is
12 something that is covered by the original Network Access
13 arrangement because it is something that happens after
14 the process of negotiating that, which is one way of
15 looking at it, or are you saying that the transaction
16 regarding a particular customer that we have been
17 referring to as "twiddling the knobs" is in itself
18 Network Access, separately and independently, in relation
19 to which the obligations of General Condition 1.2 arise
20 as it were in their own right?

21 In that connection, general Condition 1.4 reflects
22 section 151(3) of the Act and it has a definition of
23 Network Access. Network Access means "(1) ...
24 interconnection ... or (2) any services, facilities or
25 arrangements which (a) are not comprised in
26 interconnection ..." So the question is, whatever your
27 case is, are you relying on interconnection or are you
28 relying on any services, facilities or arrangements that
29 are not comprised in interconnection? in other words,
30 which is it?

31 Then finally, and on a slightly different point, BT
32 in the course of argument yesterday were laying a certain
33 amount of emphasis on the old Reply Slip system. Would
34 there be, in your submission, anything to prevent BT now
35 going back to that system if they chose to do so? Would
36 there be a regulatory block or obstacle to that system
37 being reinstated? I am not suggesting they would want to
38 do it or that they are considering it, but just as a
39 matter of analysis would there be a regulatory obstacle

1 to them actually doing it? We do not expect immediate
2 answers to any of those, please take your time.

3 MS SHARPSON: Sir, I am grateful for that indication because
4 obviously I shall have to take instructions of those for
5 whom I appear, but I am asking those with me to address
6 that.

7 THE CHAIRMAN: Yes.

8 MS SHARPSON: Sir, could I begin with some tidying up after
9 yesterday because you and your colleagues asked a couple
10 of questions and I just need to deal with them?

11 THE CHAIRMAN: Yes.

12 MS SHARPSON: One was in relation to how the charge of
13 approximately £3.70 comes to be imposed, and this is
14 partly documents you have looked at and partly ones you
15 have not, so perhaps I could just run through them. You
16 have looked at condition AA8, and within that AA8.4 sets
17 out the type and structure of charges, and we looked at
18 AA8.4(d) which specifies CPS Line Set-Up Charge there.

19 THE CHAIRMAN: Yes.

20 MS SHARPSON: Sir, if you go then to BT's document, you were
21 taken to the actual Interconnect Agreement under tab 40,
22 and there is then an annex to that at tab 41. Within
23 that annex Mr Barling took you to the definition of CPS
24 at 2.4 and we looked at that paragraph, and we looked
25 also at the processing request under 3.2 which reads: "BT
26 to process each CPS transaction request in accordance
27 with the process description", and the process
28 description is identified at the end of that document.
29 The final page is appendix 1.4.3.1, "Contract
30 documentation (iii) Industry end to End CPS Process
31 description" is there identified, and that is the
32 document that appears under tab 43 later n, which Mr
33 Barling took you to.

34 THE CHAIRMAN: Yes.

35 MS SHARPSON: However, within this document, ie schedule
36 1.4.3, if you go to paragraph 7, "Charging", you will see
37 a reference there: "The operator shall pay BT in respect
38 of activities under this schedule. Charges in accordance
39 with rates as specified from time to time in the carrier

1 price list."

2 THE CHAIRMAN: Yes.

3 MS SHARPSON: We do not have a carrier price list actually
4 in the documents in front of the court, but there is
5 indeed a price list which specifies that particular
6 charge.

7 THE CHAIRMAN: The set-up charge?

8 MS SHARPSON: Indeed, yes. Can I just give you the
9 additional reference, which is in the process documents,
10 to this element. The process document is under tab 3,
11 and within the internal numbering of that document at
12 paged 63 of 81, charging is under 4.2, but you see a
13 once-off charge for somebody who has become a CPS
14 operator which is 4.2.1. Then there is an ongoing
15 operator charge and then under 4.2.3 you see the customer
16 set-up charge. "An inter-operator charge will be made to
17 the CPSO to configure BT's system to enable a specific
18 customer to have CPS - what we have been referring to
19 indeed as the twiddling of the knobs, making that
20 configuration happen so that a particular customer can
21 get CPS. Indeed, it is indicated there that there will
22 be charges for each separate set-up, change, to cancel
23 and there are some other bullet points further down there
24 on the next page. These are a reflection of what BT is
25 allowed to collect from the CPS Operator in order for the
26 access to happen and to allow that particular customer to
27 make use of the CPS Operator@s services. I hope that
28 that deals with that question.

29 THE CHAIRMAN: Perhaps the carrier price list could be sent
30 to us at some point.

31 MS SHARPSON: I am sure that between us we will manage that.

32 MR BARLING: Can I just stand up to say that, as you
33 probably ought to know, all the carrier price lists
34 reflect determined prices by the Regulator. The
35 Regulator determines these prices in determinations, and
36 I think the last one was August 2002; it has become £3.79
37 now for this particular item, as from then. I think it
38 actually predates that, it was backdated as from then,
39 but I think everything is determined by Ofcom.

1 THE CHAIRMAN: Could we also at some point see if we can
2 improve a little on this phrase "twiddling the knobs".
3 My mental impression (which may be completely wrong) is
4 that with modern technology what probably actually
5 happens is that somebody sits in front of a screen and
6 types in some digits that become the prefix to the
7 customer number, and that is effectively what is needed
8 to configure the system, but it may be more complicated
9 than that.

10 MS SHARPSON: Sir, certainly it will be done on software
11 rather than somebody manually doing it.

12 THE CHAIRMAN: Quite, I am sure that is right.

13 MS SHARPSON: exactly how it is done I do not know.

14 THE CHAIRMAN: I have a mental impression that it is a fairly
15 simple operation, but I may be quite wrong.

16 MS SIMMONS: If we use the word "configure" rather than
17 twiddling - I am not saying here because twiddling is
18 rather help - but if the right term is configure or
19 something, it would be interesting to know what the right
20 term is.

21 MS SHARPSON: Ma'am, indeed. For what it is worth, the
22 passage I just took you to did use the words "Configure
23 the system ..." and that was possibly because the more
24 graphic term "twiddling the knobs" did not occur to the
25 draughtsman of this document.

26 The other point that you put to me at the end of
27 yesterday, sir, was in relation to the enforcement.
28 Could I pin down what I meant by a stop now notice? I
29 hope that the Tribunal has an extract from the Enterprise
30 Act 2002; it is important to say that this represents the
31 most draconian end of a whole series of measures that the
32 Regulator has to deal with the problem of slamming, so
33 this represents the nuclear end of the spectrum. Before
34 one gets here there are, in ascending order, discussions
35 with CPSOs if there is a particular difficulty, and as
36 you from the passage in Ms Wallace's witness statement
37 that I took you to yesterday, such discussions have
38 indeed been taking place with various CPSOs.

39 THE CHAIRMAN: Yes.

1 MS SHARPSON: There are, more generally, consultations at
2 the industry level, there is the possibility of altering
3 the existing general conditions. If that is insufficient
4 there is the possibility then of introducing a new
5 general condition which would be formulated so as to
6 address the specific problem, and it is only after that,
7 as it were, that one comes to the Enterprise Act
8 arrangements.

9 THE CHAIRMAN: Yes.

10 MS SHARPSON: Sir, what you have in this clip is the
11 Enterprise Act and then a couple of statutory
12 instruments. Enforcements are identified in section 2.13
13 and section 2.17 identifies the enforcement orders and
14 how they apply, what they do and what compliance is.

15 THE CHAIRMAN: What is the infringement against which an
16 enforcement order is made here?

17 MS SHARPSON: If one were going to this extreme, if all the
18 other measures had failed, then the infringement would
19 have to be, I think, defined in terms of unlawfully
20 pretending that you had a customer when you did not have
21 the customer's authority to use that service. Slamming,
22 in its essence, is the situation where, unknown to the
23 customer - customer meaning the person who actually has
24 authority to change supplier of the service - a CPSO
25 makes a request. I may have misunderstood your question,
26 because the Act itself defines what is a domestic
27 infringement, what is a Community infringement.

28 THE CHAIRMAN: Yes, I am just looking at domestic
29 infringement.

30 MS SHARPSON: 2.11.

31 THE CHAIRMAN: Yes, to contravene an enactment you do an act
32 in breach of contract, you do an act in breach of a non-
33 contractual duty by virtue of an enactment or rule of
34 law, you do an act of enforcement by civil proceedings,
35 something to do with things that are void or
36 unenforceable.

37 MS SHARPSON: I am afraid I am going to give you a rather
38 loose answer, for which I apologise in advance, that it
39 depends on the behaviour. For example, giving misleading

1 information about prices which led a customer to switch
2 might be an instance.

3 THE CHAIRMAN: That would fall under which head?

4 MS SHARPSON: I am being helped from both sides, which is
5 always nice. I am grateful to my junior on this: there
6 is, for example, the Control of Misleading Advertisements
7 Regulations. There is a list of legislation to which
8 Part 8 of the Act applies, which is at Annex A to the
9 Act, and I could make that available if necessary.

10 Domestic infringements of UK legislation is set out in
11 detail there and it runs through everything from the
12 Misrepresentation Act 1967 through to trade descriptions,
13 unfair contract terms. The consultation document to
14 which you were referred yesterday on mis-selling has in
15 the early part of that document, before the statistics to
16 which Mr Barling took you, has a synopsis of the conduct
17 we are here talking of. I put it that way since you
18 indicated, sir, that you would probably in fact look at
19 that document; that may be the most convenient place to
20 go to to find the material.

21 THE CHAIRMAN: Right.

22 MS SHARPSON: If I could just complete the explanation, I
23 have looked at the provisions of the Enterprise act, the
24 enforcement orders, and there are then two statutory
25 instruments. There is statutory instrument 2003, number
26 1399, which is the designation order under Part 8.
27 Referring back to the Enterprise Act then, within that
28 order, Regulation 5, "Public bodies listed in the
29 schedule ..."

30 THE CHAIRMAN: You are in the schedule there, we see that.

31 MS SHARPSON: Then the schedule shows Director general of
32 telecommunications, and then the second order makes the
33 necessary substitution for director General of
34 Telecommunications, Office of Communications.

35 THE CHAIRMAN: Yes, I see that. So there is a raft of
36 legislation that you say you could invoke under these
37 orders.

38 MS SHARPSON: Sir, I say we could invoke it but I do make
39 the point - and indeed I am specifically requested to

1 make the point - that because the way that the Regulator
2 operates in the market is initially by discussing with
3 the market players, those powers would be invoked if
4 necessary, but we would hope ---

5 THE CHAIRMAN: You would hope to sort it out before that.

6 MS SHARPSON: Yes. Sir, against that background may I pick
7 matters up where I left off yesterday? Obviously, I
8 shall be sticking fairly closely to the structure of what
9 is in the OFCOM skeleton. In terms of the context and
10 purpose against which we say both the general condition
11 and Article 4(3) of the Access Directive should be
12 considered, could I ask you to go and I will pick up the
13 skeleton at paragraph 76?

14 THE CHAIRMAN: Yes.

15 MS SHARPSON: noting that within there we are talking about
16 a single regulatory framework and a new package, and we
17 are talking about a harmonized framework and the passages
18 from the necessary recitals are set out.

19 THE CHAIRMAN: Yes.

20 MS SHARPSON: It may be important just to stress paragraph
21 86 of the skeleton: Article 4(3) of the Access Directive
22 is typical ex-ante regulation; the purpose is to make
23 sure that the arrangements are in place to prevent the
24 possibility of abuse arising that then has to be
25 addressed. So I am saying that against that background
26 the purpose of Article 4(3) is in fact obvious, it is to
27 prevent the abuse of information when it is obtained in
28 this specific context.

29 Perhaps it is important here, sir, to stress the
30 difference between Article 4(3) and its predecessor
31 Article 6(d) of the interconnection Directive. Here we
32 have a provision that applies to all communication
33 providers but specifically therefore tries to ensure
34 equality of treatment. That is mirrored by the fact that
35 in the United Kingdom Article 4(3) was implemented by a
36 general condition that applies to all communication
37 providers, it is not a condition which is an SMP
38 (significant market power) condition.

39 THE CHAIRMAN: Yes.

1 MS SHARPSON: So general conditions address generic issues
2 (para 89) and we say it is a very clear rule in general
3 condition 1.2 which is designed to offset the obvious
4 potential problems that arise if you share information
5 between competitors, because that is, very specifically,
6 what is happening. There is no reason why a CPSO would
7 give this information to its competitor BT, except that
8 BT is the network Operator and unless the information is
9 given by the CPSO to BT, the changing configuration point
10 does not happen and the customer who has just been signed
11 up will not in fact get their calls routed through the
12 news CPSO.

13 THE CHAIRMAN: Yes.

14 MS SHARPSON: Sir, that is if you liked the Access Directive
15 background. The background to general condition 1.2,
16 that is really picked up at paragraph 119 and then 120 to
17 123. This is again emphasising the points I just made
18 about general conditions and so on. The summary of the
19 position adopted by OFCOM is in paragraph 123. This
20 information, we say, consists of the fact that a specific
21 customer has chosen to switch from BT to one of BT's
22 competitors for some or all of his or her call services,
23 and we say that falls squarely within general condition
24 1.2.

25 It is perhaps important to flag again, sir, what is
26 the purpose of communicating that information? We
27 describe it as facilitating the customer transfer. one
28 thing one can say is that the purpose probably is not to
29 enable BT to try to retain a particular customer through
30 save activity. If one asks the question why is this
31 information being handed to BT, I doubt one would fill
32 that in in the answer slip.

33 THE CHAIRMAN: But in between those two extremes there is
34 what seems to be a sort of grey area in the middle, as to
35 what extent you can check on slamming or give the
36 customer information about the 1280 code or other things.

37 I just do not know.

38 MS SHARPSON: Sir, Ms wallace in paragraph 100 of her
39 witness statement does seek to clarify what are seen by

1 the regulator as being matters which, although perhaps
2 not the immediate direct purpose, are nevertheless
3 sufficiently and similarly very closely connected to the
4 purpose so as to fall within the context of solely for
5 the purpose. For example, the anti-slamming letter: it
6 is recognised that there is a problem about having
7 customers transferred who did not know that they were
8 going to be transferred. In terms of the workability, it
9 is not in fact a grey area because the process document
10 sets out what is going on and of course one must bear in
11 mind that there is a series of ongoing meetings in the
12 industry, meetings involving both BT and the CPSOs, and
13 BT participates very actively. So it is not that unclear
14 - and I am sorry to disagree with Mr Barling - what you
15 can do: you cannot market but you can put in the
16 necessary vital consumer protection information, and this
17 again comes down to two issues ---

18 THE CHAIRMAN: Sorry, you can put in the necessary vital
19 consumer information?

20 MS SHARPSON: Consumer protection information, which is the
21 neutral information which is checking that this is a
22 true, genuine sign-up of that customer, it is not a slam.
23 That ties across to the general point that I was making
24 yesterday in respect of striking a balance between 100%
25 protection against slamming and letting the market get on
26 with being a market, reasonably light touch regulation,
27 intervening where necessary. It is not a guaranteed,
28 100% protection against slamming, but the other side of
29 the coin is - and I will be coming to that later - it is,
30 perhaps I can put it this way, open to question whether
31 the information that BT supplies or supplied in the
32 context of the earlier transfer letters and certainly in
33 the context of the call was neutral information to assist
34 the customer. Clearly, I will have to come back to that
35 point.

36 MS SIMMONS: Does that mean you are coming back to the
37 question of whether information to the customer about the
38 service that is provided - in other words, for example,
39 whether they can get 1571 or call back, or all of that is

1 neutral?

2 MS SHARPSON: Ma'am, I say that when a customer decides to
3 switch, in a sense BT is being a little bit patronising
4 to the customer. This is meant to be a market in which
5 customers find out what they want to find out, they are
6 deemed to be adult, they are deemed to be allowed to make
7 their own choices. If they wish to seek information from
8 their chosen gaining CPSO, if they wish to initiate the
9 process of finding out information from BT, that is one
10 thing. What BT was doing via the save operation - and I
11 do suggest that this is maybe not without significance -
12 what BT was doing was activity which certainly, to some
13 extent, provided information, but the provision of
14 information was targeted to retaining that customer. The
15 purpose of sending the same letter, the purpose of making
16 the same call, is not to provide wholly neutral
17 information about potential market participants. You
18 have decided to sign up with One-Tel; maybe it would be
19 better if you did not sign up with One-Tel, maybe it
20 would be better if you signed up with a different CPSO;
21 one sees the implausibility of that suggestion.

22 More generally, BT can generally market all of its
23 services. The suggestion that Mr Barling made that BT is
24 muzzled is, with all respect, simply incorrect. BT can go
25 out in the marketplace and can compete just as it always
26 did. It can do general marketing; alternatively, it can
27 analyse its own data and, on the basis of analyzing its
28 own data, it is entirely free to contact a particular
29 customer who happens to be somebody who is switching
30 across or switched. What we say it cannot do is to use -
31 --

32 THE CHAIRMAN: Sorry, there is no reason why it cannot
33 contact someone who has switched?

34 MS SHARPSON: Providing it decides to contact that customer,
35 Mrs Jones, on the basis of information that it has
36 derived from its own market analysis, its own work. What
37 we say it cannot do - and I am very grateful the tribunal
38 has asked me this because it is an important point - what
39 we say that BT cannot do is to use the bundle of

1 information that is given it by the CPSO specifically to
2 facilitate the transfer, and with that 100% accurate
3 information - here is a customer and they are footloose -
4 address that customer in order to try to retain them.

5 May I put it this way: that is a 100% useful
6 marketing tool, you know who wants to move, and it is
7 that information that we say BT may not use, but there is
8 a big difference, in my respectful submission, between
9 that which is the OFCOM position and the way in which Mr
10 Barling put it very eloquently yesterday when he conveyed
11 the impression that BT is muzzled, that it cannot talk to
12 the same customers. With all respect, that is not in
13 fact the situation.

14 MS KELLY: Could I just clarify a point? If that
15 information is received from the customer, what can they
16 then do with it, if it comes directly from the customer?

17 MS SHARPSON: If the customer directly contacts BT and says
18 "I am thinking about switching", BT is absolutely at
19 liberty to talk to that customer, there is no problem
20 there. The problem arises because of the way in which
21 the information, tied in with which provider it is, comes
22 to BT. Indeed, this may be a convenient point just to
23 deal with the reply slip issue, because it has been
24 suggested that this is some quirk of fate, that because
25 the system has changed, suddenly BT is trapped.

26 If one looks at the original system, the reply
27 system, the short point is that it was generally accepted
28 by the industry as not working very smoothly. Customers
29 filled in the slips wrong, their handwriting was
30 illegible, there were missing fields, it would not scan
31 because they used light blue ink, etc etc. because it
32 did not work, there was what Mr Barling described
33 accurately as streamlining; the streamlining occurred in
34 order to facilitate the real introduction of CPS and also
35 to try and have a better anti-slamming measure. This was
36 an industry-agreed change, it was not something that was
37 imposed heavy-handedly by the regulator. The industry
38 agreed it, and I think it is fair to say that other CPSOs
39 were keen to suppress the reply card system, but BT also

1 realised that it was hampering BT. It was hampering BT
2 because if a customer was going to transfer back to BT,
3 then a reply slip was needed for that transaction and, in
4 those circumstances, BT had exactly the same difficulties
5 as its competitors had with the outbound transfer. So
6 the system was streamlined and there was, therefore, a
7 reason for moving to the new system. One of the results
8 of moving to the new system was that the information that
9 used to come from the customer, now came from another
10 service provider. When that happened, that communication
11 of information came, we say, within the scope of General
12 Condition 1.2. There are a number of consequences of
13 changing systems, this was one of them. If I am a bit
14 harsh and say that that is the way life is, that was one
15 of the consequences of making such a change.

16 Mr Barling has said it is absurd - I think he used
17 that word quite a few times - that this was the result;
18 perhaps it was absurd that the information went directly
19 from the customer to BT, that BT could use the
20 information. But I make the point that of course BT is
21 not obliged to misuse the information, it could use the
22 information just for the purpose for which it was
23 supplied, namely to facilitate transfer.

24 Would it be possible to go back to the old system?

25 Well, it would certainly be a retrograde step because it
26 would mean the market would not work as well. The
27 reasons which applied which meant that the system was
28 changed, apply of course to maintaining it the way it is,
29 and it is certainly suggested to me that there would be a
30 dispute for resolution under section 188 of the
31 Communications Act 2003 if such a change were to be made.

32 It is also important to say that the change from
33 the reply slip to the new system was not BT's choice
34 alone, it was an industry choice. By the same token, a
35 move in the other direction would not be BT's choice
36 alone, it would be an issue for discussion with the
37 industry.

38 THE CHAIRMAN: Yes.

39 MS SHARPSON: Sir, I am just pausing because I am seeing if

1 I can help by answering the question that you put as your
2 third question. Just to supplement what I have already
3 said, as part of the interconnection agreement it would
4 be necessary to change the present contractual
5 arrangements. The operators, I suspect - I think it is
6 fair to assume - would not agree to such a change back to
7 the reply slip system.

8 THE CHAIRMAN: That is the contractual position.

9 MS SHARPSON: That is right, and therefore there would be a
10 dispute which OFCOM would therefore have to resolve under
11 section 18, and it would have to resolve that dispute,
12 bearing in mind its statutory duties to, among other
13 things, promote competition and to protect consumers.
14 That is the full answer. I hope that deals with the
15 third point that you put to me.

16 Sir, may I pick up from where I was, which was just
17 trying to do a little bit more by way of background on
18 General Condition 1.2?

19 MS SIMMONS: Assume that they had not changed the system, so
20 they were still on the reply card system. Could OFCOM
21 have regulated that and prevented that from continuing,
22 so that they had to go to this system?

23 MS SHARPSON: I am just taking instructions on that, as you
24 can probably see.

25 THE CHAIRMAN: Come back when you are ready.

26 MS SHARPSON: Rather than waste time, may I come back to it?

27 MS SIMMONS: Yes. It just flowed from what you were saying.

28 MS SHARPSON: Indeed, ma'am, I see it does, but since I
29 speak for the regulator but am not the regulator, you
30 will forgive me if I make sure that I say what the
31 Regulator wishes me to make clear on that point. I will
32 come back to that, if I may.

33 MS SIMMONS: Yes.

34 MS SHARPSON: I think I had in fact set the background by
35 saying that both general Condition 1.2 and Article 4(3)
36 of the Access Directive do have, we say pretty clearly,
37 the same purpose and the same essential structure. True
38 it is that there are minor differences in wording
39 between General Condition 1.2 and the Access Directive

1 Article 4(3) because the draughtsman did not actually
2 copy it out word for word, but we say that the
3 differences are not so considerable that you cannot get a
4 perfectly sensible, EC law-compliant construction out of
5 General Condition 1.2.

6 THE CHAIRMAN: Yes.

7 MS SHARPSON: If I take the individual elements as they
8 appear in the skeleton argument, I can deal pretty
9 quickly with elements 1 through 3 which were the
10 acquisition of information by one communications provider
11 to another communications provider. We say we tick the
12 box and pass on, because BT is clearly an undertaking, it
13 clearly acquires information and that information is
14 clearly acquired from the CPS operator. That is also an
15 undertaking. On the very plain language of General
16 Condition 1.2, those elements are satisfied.

17 I add there is nothing - this is para 126 and
18 following - either in General Condition 1.2 or indeed in
19 the Article 4(3) of the Access Directive that says the
20 information passed in this sense has to be information of
21 a particular class, for example it has to be information
22 about those undertakings themselves. There is no basis
23 for that suggestion, the Directive does not say it,
24 General Condition 1.2 does not say it.

25 THE CHAIRMAN: Yes.

26 MS SHARPSON: One needs to read this, obviously, bearing in
27 mind what is the proper use of the customer-specific
28 information. We also point to the fact that both Article
29 19 of the Universal Service Directive is silent and the
30 SMP service condition, AA8.1. Both of those are silent
31 as to how precisely the customer is going to give
32 instructions. There is nothing there that says that the
33 information must come directly from the customer, there
34 is a different effect depending on whether it comes
35 directly from the customer or under the streamlined
36 system as it does here. So I say that the original
37 source of part or all of the information in this class is
38 irrelevant, and that we say is an important point because
39 obviously BT has put a very heavy emphasis on the

1 customer as the ultimate source of information. The
2 words are not there in General Condition 1.2 or in the
3 Directive to say this only covers information whose
4 source is the undertaking.

5 THE CHAIRMAN: Yes.

6 MS SHARPSON: Element 4 is, we say, best read in conjunction
7 with element 6, information must be acquired in
8 connection with and solely for the purpose of such
9 negotiations or arrangements. I am sorry, before I move
10 to that I should say one further thing about the first
11 two elements. BT has tried to argue that it is bizarre
12 in terms of a result to read the literal provisions as we
13 read them. That is a phrase that is used, for example,
14 in paragraph 23 of the Reply. Well, it is a fact that
15 the literal reading of General Condition 1.2 is against
16 BT in terms of elements 1 to 3; we say there is nothing
17 bizarre about this. BT is not meant to use information
18 that it gets from another CPSO which is given in order to
19 facilitate the customer transfer in order to try and stop
20 that transfer actually happening and save the customer
21 for itself. That is not bizarre, we say that, on the
22 contrary, is a perfectly plausible construction.

23 If I move on there to element 4 and element 6,
24 General Condition 1.2 requires that information to be
25 acquired before, during or after the process of
26 negotiating access and that has to be taken, bearing in
27 mind that the information must be acquired in connection
28 with and solely for the purpose of such negotiations or
29 arrangements. Obviously, our primary submission is that
30 we do not need to rely on looking at the broader wording
31 of the Directive because the information that is passed
32 by CPSOs to BT in this context is information that is
33 acquired before, during or after and it is information
34 that is acquired in connection with and solely for the
35 purpose of such negotiations or arrangements.

36 THE CHAIRMAN: What are we talking about here - this is the
37 question that I was asking. What is the process of
38 negotiating network access on which you are relying
39 exactly?

1 MS SHARPSON: Sir, we say - and you saw this both in Ms
2 Wallace's statement and also in passages in the skeleton
3 I took you to yesterday - that there are ongoing
4 discussions between operators, CPSO and BT, and we say
5 that that deals at a high level with the network access
6 arrangements. We say that below that top level, every
7 time a customer is transferred there is network access.
8 There is provision of network access in respect of that
9 individual customer's line, otherwise the customer's call
10 could not be routed to the chosen CPSO. The only way
11 that that customer choice can be given effect to, is by
12 allowing that customer, through the wholesale
13 arrangements that are made between the CPSO and BT, to
14 access the CPSO's service, which as to be carried over
15 the network which is owned by BT. Those arrangements
16 need to be made for each individual customer because
17 changes need to be made for the customer to be able to
18 transfer - "twiddling the knobs" - and there is a
19 separate charge for those changes. This is network
20 access, it is interconnection and it falls within section
21 151(3)(a).

22 THE CHAIRMAN: So it is interconnection?

23 MS SHARPSON: This is interconnection.

24 THE CHAIRMAN: That is the answer to at least one of the
25 questions.

26 MS SHARPSON: Sir, as you have probably seen I am taking
27 instructions.

28 THE CHAIRMAN: So it is not other facilities etc, it is
29 interconnection.

30 MS SHARPSON: This is actually interconnection.

31 THE CHAIRMAN: Okay, fined, that is very helpful.

32 MS SHARPSON: That ties in with the wording of condition
33 AA8.2 which refers to the provision of CPS
34 interconnection facilities, and that is a definition that
35 includes the line set-up and facilities. Therefore, each
36 customer transfer involves the provision of new
37 interconnection facilities.

38 THE CHAIRMAN: So if I go back for a minute to the Act, just
39 to tie this down, in 151(3) it is the same as in the

1 general conditions. "In this chapter references to
2 network access are references to (a) interconnection or
3 (b) any service or facilities or arrangements which are
4 not comprised in interconnection." As far as you are
5 concerned this is (3)(a), this is interconnection.

6 MS SHARPSON: We say that it is 3(a) but we also do point
7 out that the definition is an either/or definition
8 because references to network access comprise both
9 references under (a) and references under (b). One could
10 perhaps describe interconnection as being a subset of
11 network access, that is another way of looking at the
12 point. At the top level you have the agreement between
13 the operators ---

14 THE CHAIRMAN: How are you looking at it in this case? You
15 are looking at it as interconnection rather than as a
16 service, facility or arrangement which is not comprised
17 in interconnection.

18 MS SHARPSON: Sir, I am instructed that we put it on the
19 basis that network access comes under section 151(3)(a).

20 THE CHAIRMAN: In the case of the actual transfer of this
21 actual customer, are you saying that that actual
22 transfer, when the information comes from the new carrier
23 and the system is actually configured, that that is
24 something that happens before, during or after the
25 process of negotiating network access?

26 MS SHARPSON: The actual transfer? The individual twiddling
27 of the knobs, to go back to that phrase?

28 THE CHAIRMAN: Yes. It is the process of negotiating that I
29 am trying to worry about because, coming back to the
30 first question that I asked, if the whole of Article 4 is
31 dealing really with the obligation to negotiate in good
32 faith - I think this was picked up by one of the
33 recitals, it might be recital 5 - can the actual
34 implementation of all these standard forms and conditions
35 which you have helpfully told us about, which are very
36 closely regulated by the regulator, be described as a
37 process of negotiating, or is the process of negotiating
38 something that has happened, almost by definition,
39 antecedent to that?

1 MS SHARPSON: Perhaps I could start with such an obvious
2 statement that I apologise for it. The Regulator does
3 not decide which customers get CPS.

4 THE CHAIRMAN: No, of course not.

5 MS SHARPSON: Therefore the structural arrangements that are
6 in place, the framework agreement, the process documents
7 which, as Mr Barling quite correctly described, is
8 something that goes through reiterative editions on the
9 basis of changes that are looked at within the industry
10 and so on and so forth, those all provide a framework
11 which is negotiated and goes on being negotiated,
12 modified and changed and so on.

13 THE CHAIRMAN: But it is not in the context of those
14 negotiations that information about individual customers
15 is exchanged, that is another set-up.

16 MS SHARPSON: The point about the ongoing negotiation is the
17 one that appears in our skeleton argument at paragraphs
18 140 to 142, as Mr Flaherty helpfully reminds me, but the
19 information about the individual customer is information
20 that is going to be supplied after the initial
21 discussion. It may fall before or after (who knows) a
22 further discussion or negotiation about a change to the
23 process document, a change to the structural
24 arrangements, because when an individual customer chooses
25 to switch is almost a random event against the background
26 of an ongoing process changing the overall arrangement.

27 THE CHAIRMAN: So the process of negotiating network access
28 in your submission is referring to the general industry
29 ongoing discussions about network access.

30 MS SHARPSON: The overall framework is certainly that, but
31 the configuration for any individual customer could occur
32 - it is not going to occur before the discussions ever
33 took place, that is plain. It could occur because the
34 framework discussions are ongoing, it could occur during
35 in the sense that a particular customer could ask to
36 switch at a stage when there also happens at the higher
37 level to be discussions going on, so it might be during,
38 or it might be after. But when one says after - and this
39 is the point that is made in the skeleton - after implies

1 not only when something is literally after in terms of
2 time, temporally, but also consequent upon. We say that
3 if one looks at how CPS comes about and the fact that
4 network access is a precondition for CPS to be possible,
5 then it is consequent upon, even if sometimes it is not
6 after but it may be during.

7 An alternative way of putting it forward is to say
8 a request for an individual customer to have CPS could be
9 regarded as a request for interconnection in respect of
10 that customer. Lest us hypothesise that BT does not
11 agree - of course this would never happen, but let us
12 suppose BT refuses to supply the interconnection. There
13 could be a dispute. If one looks at it that way round,
14 then a request can be seen as part of the negotiation for
15 the provision of interconnection.

16 THE CHAIRMAN: I am not trying to make life difficult for the
17 Regulator or to be over-technical or anything of that
18 kind, it is simply to try to understand what you say -
19 and you may say it in a number of different ways, all of
20 which may be plausible or dependable.

21 MS SHARPSON: Sir, I am sure I do say it in a number of
22 different ways.

23 THE CHAIRMAN: I just want to clarify it in my own mind, just
24 to identify what those different ways are as precisely as
25 we can. What I think I have interstate so far - and I
26 may be wrong - is that the process of negotiating network
27 access can mean the ongoing framework discussions that
28 take place in the industry, or it can mean - and
29 paragraph 142 of the skeleton rather suggests that it
30 does mean - what takes place in the context of an
31 individual request. Those are the two basic ways of
32 looking at it.

33 MS SHARPSON: Yes. Hence, therefore, my rather loose answer
34 to the other question that you put to me of before,
35 during or after because the timing can be variable.

36 THE CHAIRMAN: In the context of the individual request it is
37 during, I suppose, is it?

38 MS SHARPSON: It is probably during, but supposing that
39 request arrived one hour after there had just been a

1 modification at framework level, then possibly it is
2 after. It is certainly not before because there has to
3 be a framework interconnection agreement in place in
4 order to get in there.

5 THE CHAIRMAN: Yes.

6 MS SIMMONS: Is that right actually, because it may be that
7 in the process of negotiating the original framework you
8 would know that certain information about customers might
9 get passed. You might have had a lot of enquiries about
10 doing this.

11 MS SHARPSON: I think you must be right, ma'am, that is
12 certainly a possibility. If we could go back to
13 paragraph 90 of Ms Wallace's statement, I am reminded
14 that it is not automatic that a particular request for
15 CPS is going to be given effect to, because there may be,
16 for example, if you look at 90(3), that the order cannot
17 be validated, there may be conflicting products on the
18 market, there may be a wrong number, there may be a
19 reason for rejection. Therefore, it is not an automatic
20 "here is the request, sign up", to that extent there is
21 what we see to be "negotiation" of that particular
22 connection. Of course, it would be possible, if there
23 are conflicting products on the market, for the CPSO to
24 go back to that customer and say "Look, you know, we
25 talked about this, you would like our service, actually
26 you seem to have product X, that conflicts, what would
27 you like done?" Assume that the customer says "We would
28 like to go ahead with you Mr CPSO, we do not want the
29 other product", there would be a new request.

30 THE CHAIRMAN: I think what BT is saying or may be saying is
31 that the word "negotiation" as a word in this context is
32 not a particularly apposite word to decide the making of
33 a request in relation to a particular customer, in
34 relation to a set-up that has already been set up.

35 MS SHARPSON: Sir, I see that one can make that point. I
36 would, if necessary, fall back on the fact that element 6
37 is to be read with element 4. If one takes after as
38 being either after in terms of time or in terms of
39 consequent upon, and one looks at the wording of General

1 Condition 1.2 and the fact that what we identified as
2 element 6 speaks of "information acquired in connection
3 with and solely for the purpose of such negotiations or
4 arrangements", I say that if it is not negotiation then
5 it would fit under arrangements, because it is an
6 arrangement that flows from the fact that network access
7 has been provided, and this only becomes possible, can
8 only be given effect to, because of the network access.

9 THE CHAIRMAN: There is a slight glitch, is there not, in
10 GC1.2 as compared with Article 4(3) where it uses the
11 words "negotiations or arrangements" in line 5 in GC1
12 .2.

13 MS SHARPSON: Yes.

14 THE CHAIRMAN: Whereas in 4(3) it is talking about during or
15 after the process of negotiating access or
16 interconnection arrangements, so that in 4(3) the
17 interconnection arrangements are in relation to the
18 process of negotiation rather than the arrangements
19 themselves. Article 4(3), faithful to the distinction in
20 the Access Directive between access and interconnection,
21 talks about "after the process of negotiating access or
22 interconnection arrangements ... use that information
23 solely for the purpose ..."

24 MS SHARPSON: Yes.

25 THE CHAIRMAN: Whereas the arrangements have slipped into
26 GC1.2 without quite identifying what arrangements we are
27 talking about.

28 MS SHARPSON: Sir, indeed, but in that case I have to put it
29 in two ways, because I have to say that on a reading of
30 GC1.2 I am entitled to look to the fact that "or
31 arrangements" is there as a separate phrase, and say that
32 giving effect to a specific customer's request for
33 interconnection so that they can get CPS, is an
34 arrangement within the plausible meaning of the word
35 "arrangements" in GC1.2. That is one way of putting it,
36 just looking at GC1.2 and looking at the fact that the
37 words "or arrangements" are in GC1.2.

38 THE CHAIRMAN: But it is "such negotiations or arrangements"
39 which takes you back to the process for negotiating

1 network access, which therefore means that it is the
2 process of negotiating rather than the arrangements
3 themselves.

4 MS SHARPSON: That is why one of the ways I put it is to say
5 that the request for having CPS for an individual
6 customer can be seen as part of interconnection
7 negotiations or arrangements.

8 THE CHAIRMAN: Yes.

9 MS SHARPSON: So that is one way I put it.

10 THE CHAIRMAN: The other way is just to say we have
11 negotiated interconnection arrangements and this is after
12 or consequent upon (as you would say) and it is as simple
13 as that.

14 MS SHARPSON: I do not put it as neatly as that, but I would
15 certainly put it that way round. Finally, I say that if
16 one reads it against the background of Article 4(3) as I
17 say I am entitled to do - you have my point there.

18 THE CHAIRMAN: Looking at the purpose and all the rest of it.

19 MS SHARPSON: Sir, yes. I think really the discussion has
20 already incorporated the points here ---

21 THE CHAIRMAN: I think we have probably dealt with a lot of
22 that now.

23 MS SHARPSON: The interconnection is present, the
24 information is information connected with - you have
25 those points and I do not wish to read over the top of
26 the skeleton.

27 I move on to one question that you put yesterday to
28 Mr Barling, which was how far downstream does one look?
29 In this respect I can perhaps link it through to this,
30 that in some respects BT's argument is inconsistent
31 because, on the one hand, BT says a very narrow reading
32 should be given to General Condition 1.2. it should
33 really be tied into this process of negotiation, very
34 closely ring-fenced and so on. There, of course, one
35 tends to have a contractual confidentiality agreement
36 anyway, and Mr Barling helpfully showed you a number of
37 examples.

38 On the other hand, he did suggest that one might
39 want to cover certain circumstances beyond that, the

1 negotiations may break down, the confidentiality
2 agreement may not be wide enough and soon. So on the one
3 hand he would like you to read it a little bit wider than
4 his original suggestion; on the other hand, he does not
5 want it to go as far as covering the specific information
6 about CPS for individual customers that is only passed to
7 BT by the network operator so that they can transfer. I
8 do not wish to seem unkind in how I put it, but he would
9 like it to be a little bit wider than narrow but not as
10 broad as we say it is, somewhere in the middle.

11 THE CHAIRMAN: Yes.

12 MS SHARPSON: Sir, if I can move on to the confidentiality
13 point, I make some pretty obvious points about
14 confidentiality. This is elements 5 and 8, the skeleton
15 para 153 through to 160. Absent the request for CPS the
16 information would not have been communicated, that is how
17 the information ever gets transferred. That is the first
18 point. Second point: the information is being provided
19 by a CPS Operator to a competitor; one does not normally
20 do that. The only reason the information goes to BT is
21 because BT is the network operator, and unless BT has the
22 information the knobs will not twiddle.

23 It is also a bundle of information, and we say that
24 BT cannot claim that it has a right to know that bundle
25 of information, except for the specific terms. It is
26 not, of course, information that they would have ever
27 had, for example, under indirect access, it is only
28 because of the new permanent arrangements.

29 I asked the question right at the beginning, rather
30 naively, that neither Bt nor the gaining CPSO would
31 really want a third party to be handed that particular
32 bundle of information, and that may not be a bad way of
33 looking at whether it is commercially sensitive and
34 therefore should be regarded as handed in confidence. I
35 might also ask the even more naive question, why are we
36 all here, because if it does not matter to BT as a
37 business to send the letter and to make the save call, we
38 probably would not in fact all be here this morning.

39 THE CHAIRMAN: It is probably is a side issue but we have, as

1 the tribunal, certain duties to exclude business
2 information from our judgments, and you say that this
3 information in relation to a specific customer would be
4 in that sort of category.

5 MS SHARPSON: I do, I am sure that there would be a request
6 for confidential treatment - without doubt.

7 THE CHAIRMAN: Yes.

8 MS SHARPSON: If one looks at what the notifying CPSO wants
9 to do, he has an interest in informing BT in order to
10 facilitate the transfer, he absolutely does not have an
11 interest to inform BT qua potential competitor that this
12 customer wishes to transfer, and this is the reason why
13 it should be ring-fenced, because the information is
14 coming from the very person, the CPSO, whose interest is
15 going to be adversely affected because if BT uses that
16 information and we would say misuses and makes the save
17 call, and retains the customer, then the gaining CPSO
18 does not get the customer.

19 It is probably just helpful to say one thing in
20 terms of what is already in the intervention on
21 confidentiality, which is that the regulator obviously
22 has a regulatory view and it has to be an EC law-based
23 view because this is a general condition that implements
24 an EC provision. That is therefore why the regulator has
25 this view of what is to be considered as confidential.
26 It is not a view that is derived from drawing
27 automatically and instinctively on common law doctrines
28 of confidentiality, but having said that the OFCOM view
29 is not, we say, at odds with the common law view and with
30 the springboard argument that the Interveners put
31 forward.

32 THE CHAIRMAN: Yes.

33 MS SHARPSON: Sir, element 7 is that the information is used
34 solely for the purpose for which it was supplied. Here
35 there is no difference in wording between General
36 Condition 1.2 and Article 4(3), they are identical terms.

37 The purpose we say is the facilitation of customer
38 transfer and you already have most of my points on this.

39 I would emphasise para 164 that "save" activity is in a

1 sense the antithesis of the purpose for which the
2 information is provided, and those points are made again
3 with force in this section of the skeleton.

4 It may be worth just turning up very quickly the BT
5 internal guidelines on save calls, in the BT bundle under
6 tab 47.

7 MR BARLING: Sir, I just ought to mention that of course the
8 save call was the only confidential part of the ---

9 MS SHARPSON: Sorry.

10 MR BARLING: It is alright, I am just mentioning it, but it
11 was referred to in my learned friend's skeleton to some
12 extent and we obviously take that on the chin.

13 MS SHARPSON: Could I invite the Tribunal simply to read it.
14 Sir, perhaps it would be convenient for you to look at
15 it later rather than to look at it now.

16 THE CHAIRMAN: We will just have a quick glance at it without
17 reading it out. This is on what date?

18 MS SHARPSON: I do not know whether Mr Barling can help on
19 that?

20 THE CHAIRMAN: We will assume it is immediately prior to the
21 Decision Letter.

22 MS SHARPSON: Sir, it appears in a bracket at the bottom of
23 page 1. Perhaps I can say this, it says "Issue 4,
24 13.08.03." I think that is the relevant date.

25 THE CHAIRMAN: Yes. (Pause for reading). So it is really
26 from question 4 onwards that your objection is mainly
27 focused is it?

28 MS SHARPSON: Yes, sir, I think that is right, although
29 before one starts the questions, that already starts the
30 thinking in the mind of the person making the call.

31 THE CHAIRMAN: Yes. We have understood that, thank you.

32 MS SHARPSON: Sir, I am grateful. While you have that
33 bundle out, could I just show you one other letter which
34 it is convenient to show you now, the letter under tab 35
35 which is BT's reply to the Regulator on 4 december 2003?

36 THE CHAIRMAN: Yes.

37 MS SHARPSON: Explaining what changes have been made in
38 relation to the notification. BT's response is at the
39 bottom of the first page, "To cease making save calls.

1 This has been done by disabling the link between the CSS
2 database and the Campaign Management Tool which guides
3 outbound call lists." I merely ask you to note the
4 choice of words and make whatever of that.

5 Sir, you have the points in the skeleton under
6 this, therefore the final point I need to make is only in
7 relation to element 9, the issue of competitive
8 advantage. As you will be well aware, the Director's
9 notification was limited to a determination that there
10 were reasonable grounds for believing that BT was using
11 information provided for a purpose other than that for
12 which the information was supplied. We say that the
13 Director was not required to investigate the question of
14 whether there was a competitive advantage, or indeed
15 whether there had been a breach of confidentiality. Sir,
16 you see in that section how we put our understanding of
17 the way in which these provisions related, but this is
18 not a situation in which we say we ought to have looked
19 at competitive advantage but we did not, we say we were
20 not required to take that extra step.

21 THE CHAIRMAN: Yes.

22 MS SHARPSON: I think I can move fairly quickly now, I am
23 happy to say. You have my points in relation to *Mar*
24 *Leasing* and consistent interpretation, so I do not need
25 to go back to that. The latest from the Court of Justice
26 in relation to that is in fact the opinion of Advocate
27 General Colomer in *Joint Cases Pfeiffer*. Those have been
28 handed in as additional authorities, they have the
29 delight of being either in French, Spanish or German, but
30 not in English, because that was what was available on
31 the court's website.

32 THE CHAIRMAN: We will manage.

33 MS SHARPSON: I am very sure that you will, sir, probably
34 better than I would. It is true that in the second
35 opinion at paragraphs 37 and 38 the Advocate General
36 briefly discusses *Arcaro*. I truly do not think that it
37 takes matters much further forward.

38 Sir, you have my points, I am sure, in relation to
39 General Condition 1.2 and section 47, this is paragraphs

1 185 and 186 of the skeleton. We say there is no problem,
2 this is objectively justified, it does not discriminate
3 unduly, it is proportionate and with all respect it is
4 not correct to describe this as draconian, and BT can
5 always use self-generated information or other
6 information to make contact with its customers. We say
7 that it is indeed transparent. Of course, the words in
8 here "use the information solely for the purpose for
9 which it was supplied ..." that wording is identical to
10 the wording in Article 4(3) of the Access Directive,
11 there is n,o textual difference there.

12 Sir, because the point is made against me so
13 forcefully that this is a bizarre reading, it is
14 completely absurd that one can possibly construe either
15 General Condition 1.2 or the Access Directive in this
16 way, it is perhaps just worth saying that if OFCOM has a
17 bizarre reading it is a curious fact that so does the EC
18 Commission and so do the other regulatory authorities
19 with whom OFCOM was in contact. The Notification itself
20 makes reference to these, that is under tab 3 of BT's
21 Notice of Appeal bundle, and it is set out at paragraphs
22 2.20 through to 2.22. Can I just give you for your note
23 the reference within the Defence at paragraphs 114
24 through to 127, and perhaps I could invite you and your
25 colleagues to have a look at that. The basic conclusion
26 is the summary at paragraph 127 of the Defence. "While
27 no NRA has taken a decision specifically interpreting
28 Article 4(3) of the Access Directive, the French,
29 Portuguese and Irish regulators have all taken decisions
30 to the effect that Access Operators should not be allowed
31 to use information made available by CPSOs during the CPS
32 transfer process to carry out marketing activity aimed at
33 preserving or winning back customers, nor should they be
34 allowed to transmit such information to departments or
35 subsidiaries for that purpose."

36 While we do say it mis helpful background, it shows
37 the approach taken by other regulators dealing with a
38 dominant incumbent network operator, against the
39 background of the EC regulatory system you need, as this

1 regulator does, to make CPS work on a competitive playing
2 field while protecting customers. Obviously, those other
3 regulators think, as we do, that it is not only
4 information during the framework negotiations that needs
5 to be ring fenced, and they presumably do not think that
6 there are devastatingly large problems with every general
7 principle of EC Law which can be found in the book,
8 otherwise presumably they would be reading the
9 legislation in a very different way from the way we read
10 it.

11 THE CHAIRMAN: Yes.

12 MS SHARPSON: They are very obvious points, sir, but it is
13 just worth setting that as the background.

14 On the issue of transparency and uncertainty -
15 again I mention this because my learned friend made quite
16 a lot of it in his submissions, we say there is not a
17 problem because there is not uncertainty. The
18 information has to be used so as to facilitated transfer,
19 and if it used for that purpose that is fined. If it is
20 used for a different purpose, such as the impeding of
21 transfer or saving a customer, that is not facilitating a
22 transfer and therefore that is not a permitted use of the
23 information.

24 THE CHAIRMAN: Yes.

25 MS SHARPSON: We are reminded by Mr Barling that we are
26 meant to operate with a light regulatory touch, and
27 indeed this is a general condition, it applies to the
28 whole industry and the guidance in the explanatory
29 memorandum was for the whole industry. The regulator
30 would expect the industry to work together on the basis
31 of the guidance given. The Industry Group agreed wording
32 of the earlier letter and they should work together to
33 look at subsequent wordings. I am sure if OFCOM were to
34 dictate, to hand down, the terms of a new letter, BT
35 would probably be likely to complain about just that.

36 The issue of the 1280 code has been dealt with by
37 Mr Barling and I am grateful to him for the
38 clarification, because certainly we did not require BT to
39 remove it. I do not need to make further submissions,

1 perhaps, on the points on ECHR; Mr Barling has invited
2 you to bear in mind what was in his skeleton and I do the
3 same in respect of the OFCOM skeleton.

4 THE CHAIRMAN: Yes.

5 MS SHARPSON: Similarly, the points in relation to the
6 exercise of discretion by the Director are those set out
7 in the skeleton at 203 to 205, I do not need to elaborate
8 on them.

9 THE CHAIRMAN: Yes.

10 MS SHARPSON: In terms of winback, you, sir, have indicated
11 that this was parked. It is of course addressed in some
12 detail in the skeleton at paragraphs 206 to 215, and
13 there is little to add to those written submissions. We
14 say it would not be appropriate for the Tribunal to make
15 a finding on winback in the context of this appeal. What
16 we do say in addition is that it may be helpful if we
17 just explain where matters have got to in relation to the
18 separate investigation that was opened. I am happy to
19 volunteer that because we would not wish ---

20 THE CHAIRMAN: Our position, I think at the moment, in
21 relation to matters that have been parked is that we will
22 consider whether we need to do or say anything about
23 matters that have been parked. If we feel that we need
24 to address them and fairness requires that we have a
25 further short hearing on those issues, we will have one.
26 The alternative is to deal with it on the papers, but we
27 will not as it were decide things to the prejudice of one
28 party or another without letting the parties know where
29 we are and giving them an opportunity to make oral
30 submissions if they wish.

31 MS SHARPSON: Sir, that is very helpful, because I was
32 merely going to explain where matters had got to.

33 THE CHAIRMAN: If you can just do that in a minute or two
34 because I would like to rise at noon for just a short
35 break for the shorthand writer and everyone.

36 MS SHARPSON: Very good.

37 THE CHAIRMAN: Can you do it in two or three minutes?

38 MS SHARPSON: Certainly I can. Against that indication,
39 perhaps I can deal with that and transferrable products

1 which will take me three minutes together, and then after
2 the Tribunal resumes deal with the first question that
3 you put to me that I have not yet answered.

4 THE CHAIRMAN: Yes.

5 MS SHARPSON: Sir, in relation to the winback investigation,
6 this investigation has been ongoing and the regulator is
7 currently minded to make a notification, but there is
8 final checking of evidence that is being undertaken and
9 obviously the conclusions would need to be agreed by
10 senior management. So this is a continuing matter, no
11 decision has yet been taken, but it is only right to say
12 that that is where matters have got to.

13 THE CHAIRMAN: It is probably even more important that we do
14 not say anything about it.

15 MR BARLING: I only stand up because I think my learned
16 friend has made a mistake. I think we have had
17 notification that that particular investigation is
18 closed.

19 MS SHARPSON: There are two investigations, sir.

20 MR BARLING: The CPS winback investigation is closed.

21 MS SHARPSON: Sir, there are two separate investigations.
22 One is CPS winback and there, Mr Barling is entirely
23 right, that is closed. There is another one which is
24 also winback, which partly follows because the way that
25 BT have put this is that what has been said here applies
26 to lots and lots of other products immediately, and it is
27 for that reason that I volunteer the information. This
28 is in relation to Wholesale Line Rental.

29 THE CHAIRMAN: But WLR is not something that the Director was
30 talking about in this notification, is that right?

31 MS SHARPSON: That is looking at both save and winback
32 activities and it is for that reason I am in this
33 difficulty. We say that this appeal is concerned
34 exclusively with the actual Notification that was made,
35 and to that extent anything I have just said is
36 completely irrelevant because it is not part of this
37 appeal. It is only because the way that BT have put the
38 argument seeks to extend the actual Notification to the
39 implications for other products.

1 THE CHAIRMAN: I think what we would like you to do, Ms
2 Sharpson, if you would, is just keep us informed while we
3 are in the course of preparing our judgment as to what is
4 going on in relation to this parallel case about WLR, and
5 we will see whether it has any bearing at all on what we
6 have to decide in this judgment.

7 MS SHARPSON: I shall be happy to do that, sir. The only
8 comments I need to make in respect of transferrable
9 products - which is the list that was handed in by BT
10 very helpfully in conjunction with their skeleton - are
11 that OFCOM does not necessarily accept some spin, for
12 example, in relation to broadband migration, that the
13 process had not explicitly been blessed, OFCOM is waiting
14 to see how this works in practice. We say that is simply
15 a reflection of the fact that OFCOM is a responsible
16 regulator, acting within statutory powers. If there were
17 an issue in relation to a specific product, OFCOM would
18 obviously investigate that, just as it has been doing in
19 relation to these winback issues, before making a
20 determination. That is all I need to say on that point.

21 THE CHAIRMAN: Thank you very much, Ms Sharpson. We will
22 take a break now for ten minutes. I am sorry to have
23 kept you waiting, Mr Edwards, you have been very patient.

24 **(Short adjournment).**

25 THE CHAIRMAN: Yes, Ms Sharpson

26 MS SHARPSON: Sir, to answer the first question that you put
27 to me, can I ask you to go to tab 9 in the BT bundle,
28 which is where you find the Interconnection Directive?

29 THE CHAIRMAN: Yes.

30 MS SHARPSON: There are two elements to that Directive, 4(1)
31 and 4(2) and if one goes to Article 4(1), "Organisations
32 that are authorised to supply public telecommunications
33 networks for publicly available services have a right
34 and, where requested, an obligation to negotiate in
35 connection ..." Then 4(2): "Organisations authorised to
36 provide public telecommunications networks ... which have
37 significant market power ... shall meet all reasonable
38 requests for access."

39 THE CHAIRMAN: Yes.

1 MS SHARPSON: Sir, that is the old system with those two
2 elements. If one then goes to the Access Directive at
3 tab 5, and one goes first of all to Article 4(1), the
4 first sentence mirrors what was in Article 4(1) of the
5 old directive.

6 THE CHAIRMAN: Yes.

7 MS SHARPSON: So this is the right and obligation to
8 negotiate. However, also within 4(1) there is the second
9 part: "Operators shall offer access and interconnection
10 to other undertakings on terms and conditions consistent
11 with obligations imposed by the national regulatory
12 authority, pursuant to Articles 5, 6, 7 and 8."

13 THE CHAIRMAN: Yes.

14 MS SHARPSON: One then goes to Article 8(2) "Where an
15 operator is designated as having significant market power
16 ... the authorities shall impose the obligations set out
17 in Articles 9 to 13 of this Directive as appropriate."

18 THE CHAIRMAN: Yes.

19 MS SHARPSON: One then goes to Article 12(1), "The national
20 regulatory authority may, in accordance with the
21 provisions of Article 8, impose obligations on operators
22 to meet reasonable requests for access."

23 THE CHAIRMAN: Yes.

24 MS SHARPSON: So the system, taken together, does what the
25 old system did, it is just that it has been written
26 slightly differently around the edges of the directive.

27 THE CHAIRMAN: Yes.

28 MS SHARPSON: I merely make the point that since BT is an
29 operator with significant market power, the access
30 obligation for CPS is the condition you have been shown
31 at AA8. AA8.1 is must comply on reasonable terms,
32 therefore there is still scope for negotiation as to
33 exactly what the terms are, but there is the obligation
34 to comply.

35 THE CHAIRMAN: I thought the terms had now been settled by
36 regulatory action in BT's case. I thought I understood
37 Mr Barling to tell us that.

38 MR BARLING: Charges.

39 MS SHARPSON: We did set the functional specification, that

1 is correct, but obviously the regulator would have set it
2 in the way that it thought was reasonable and would not
3 have set it in a way that was wholly unfair to one
4 provider in the market simultaneously with trying to
5 encourage a competitive market.

6 THE CHAIRMAN: Yes.

7 MS SHARPSON: I think I have dealt with the other questions
8 that you put to me, save that perhaps when replying in
9 respect of the reply slip I said that there could be a
10 dispute that arose if BT sought to go back and wanted to
11 change the contract.

12 THE CHAIRMAN: Yes.

13 MS SHARPSON: There is also a possibility that the regulator
14 could use its own investigation powers under section 105
15 of the Act, section 105(2)(b) as it relates to network
16 access, and there is a cross-reference there to section
17 87(6)(d). You may need to turn it up, you may not, just
18 to complete the answer, because then the regulator would
19 need to look at what were the terms of the access
20 contract, ie the Interconnection Agreements.

21 THE CHAIRMAN: We will do that.

22 MS SHARPSON: I do not think I need to take time now. Sir,
23 unless there is anything else that I can assist with.

24 THE CHAIRMAN: Thank you very much, Ms Sharpson. Yes, Mr
25 Edwards, thank you for your skeleton.

26 MR EDWARDS: If I may, sir, in the interests of expedition I
27 will not take you through the skeleton argument you have
28 in front of you, but I will dot around and make some
29 observations.

30 THE CHAIRMAN: That is very helpful.

31 MR EDWARDS: Firstly, sir, I would like to make a couple of
32 general points on behalf of my clients, the Interveners,
33 and those who support them, particularly in the context
34 of slamming, BT has made much reference to this, and if
35 and insofar as there is any inference that the
36 Interveners and others have built their business on the
37 basis of slamming, I want to refute that on their behalf
38 emphatically.

39 THE CHAIRMAN: We have drawn no inference of that kind.

1 MR EDWARDS: I am pleased to hear that, sir. Indeed, in
2 fact, the whole question of scrutinising alleged cases of
3 slamming consumes considerable resource and effort on the
4 part of the Interveners and others, and they are working
5 with the regulator and hope to be effective in
6 eliminating this practice so far as possible from the
7 marketplace.

8 My second general point is actually if I might
9 suggest to the tribunal that they step back and look at
10 this particular case against, if you like, the overall
11 sector landscape, and where we are now and where we have
12 been. It is nearly 20 years ago that in this country we
13 took the first step towards liberalisation of the
14 telecoms sector. Other countries in Europe have followed
15 and, 20 years on, we look at what competitive entry has
16 been made into the market and we look at the two markets
17 that are relevant in this case and we find that BT has
18 82% of the fixed line market share and 73% of the calls.

19 There are those who might think that does not
20 represent much progress and, certainly, sir, I would
21 characterise the package of measures introduced by the
22 Commission in 2002 as, if you like, an effort to turn up
23 the wick of competitive entry to the marketplace, and I
24 think these measures should be looked at, if I may
25 suggest, in that context.

26 THE CHAIRMAN: Yes.

27 MR EDWARDS: Turning now, sir, to the skeleton argument,
28 first of all the question of confidentiality. In my
29 skeleton I dealt with this at large and on a rather wider
30 basis than General Condition 1.2 itself. As to the
31 information itself, I do take the view that there is one
32 element of that information in that bundle which can be
33 regarded as confidential in its own nature; that is the
34 item which I regard as, if you like, the jam or the
35 nugget in this bundle, which is, namely, the fact that a
36 BT customer is looking to switch.

37 THE CHAIRMAN: Yes.

38 MR EDWARDS: At the time that that information is conveyed
39 by the CPS operator to BT Wholesale, that is, in my view,

1 confidential information. It is valuable, and I have
2 referred to authorities where comparable circumstances
3 have found that information to be confidential - in the
4 *Wacky* case with the list of customers and, indeed, even
5 with the celebrated *Douglas* case of the photographs of
6 the wedding which, for a time, were confidential, but
7 then go into general circulation.

8 THE CHAIRMAN: So vis a vis BT the customer's future
9 intention at that stage is confidential basically to the
10 customer and the new provider.

11 MR EDWARDS: Absolutely, sir. Indeed, if you look at the
12 circumstances in which that information is provided I
13 would be glad to point out that this in fact is
14 information received by BT from one of its own customers.

15 Actually, THUS, the CPSO Operator, is a customer of BT
16 Wholesale. The information is passed across by THUS in
17 the context of that relationship and in order to further
18 its own business. So those circumstances in themselves
19 import an obligation of good faith and an obligation not
20 to abuse.

21 Next, sir, I will deal briefly with the Reply. In
22 my skeleton I made a number of observations regarding
23 BT's Reply and what seemed to be a tendency to ally BT
24 Retail with BT Wholesale, looking at BT as a whole, in a
25 way that is, in my submission, rather unhelpful. The
26 response is Mr Moulson's statement, regarding the way in
27 which the reply slip system worked.

28 It appears that as a matter of practice the
29 consumer reply slip was sent to an address which turned
30 out to be a BT Retail address. Mr Barling has already
31 drawn your attention to the End to End Process in force
32 at chat time under his tab 45, and I will not now ask you
33 to go there again, but if you do go there you will see
34 that the process envisages that the customer reply slip
35 goes to the Access Operator, which is BT Wholesale, but
36 as a matter of practice it was dealt with by BT Retail
37 for reasons of convenience, but clearly were General
38 Condition 1.2 to have been applicable at the time, that
39 information would certainly be subject to the obligation

1 as to what should be done with it and the constraints as
2 to its use.

3 THE CHAIRMAN: Yes.

4 MR EDWARDS: Next sir, briefly, competitive advantage. I
5 read with interest the arguments of the appellant and the
6 respondent on these points. They argue about the meaning
7 of the language, but I prefer to turn to the substance of
8 the matter. Does BT retail find itself at a better
9 competitive advantage as a result of getting this
10 information? Absolutely, without a doubt. They are
11 certainly better placed than if they did not have the
12 information, and they are certainly better placed than
13 all the other competitive service providers who do not
14 have the information. There is also the additional
15 element that because of their experience of the customer
16 and the customer profile information they have, they are
17 uniquely well placed to talk to that customer and bring
18 it back.

19 THE CHAIRMAN: Because they know the pattern of his calls and
20 all that?

21 MR EDWARDS: Absolutely, indeed, sir. The whole question of
22 the separation between wholesale and retail is, in my
23 view, fundamental to this case. The creation of the
24 competitive marketplace in the telecoms sector, where
25 basically competitive service can only really be taken
26 forward speedily enough by allowing other competitors
27 access to the incumbent network, we rely heavily upon the
28 maintenance of the integrity of that separation.

29 THE CHAIRMAN: You say, for example, that in a situation
30 where save calls were completely unregulated, BT might
31 perhaps say it looks to us as if you could shift from
32 this tariff to that tariff and that would give you as
33 much a saving as this change or that change.

34 MR EDWARDS: Indeed, sir, if the restraint on the use of
35 information does not exist, I fear that we will see not
36 just save activity but also gain activity. The case that
37 Ms Simmons referred to in the Smith and Jones case, where
38 the two service providers are themselves ---

39 THE CHAIRMAN: They got neither of them,.

1 MR EDWARDS: Yes. Because BT is the Access Operator who
2 gets the information, the concern is that that might also
3 operate in that way.

4 Finally, sir, on the question of Network Access, I
5 find this to my surprise rather simpler than others seem
6 to. It seems to me perfectly straightforward actually
7 that this is a downstream product. Indeed, it is
8 interesting that on the information which my learned
9 friend Mr Barling put forward, in February 2004 there
10 were 460,000 CPS transfers. Bearing in mind that BT's
11 fixed line market share is 83%, if you simply do the
12 maths, 83% of that number at 33.70 a go gives you a
13 revenue stream of £1.4 million for the month of February
14 alone. This is not an insubstantial matter, this is not
15 part of an overall interconnection arrangement.

16 THE CHAIRMAN: So each of these transactions at the
17 downstream level is network access.

18 MR EDWARDS: Indeed, sir, in my view. In my argument I
19 mention that I take the view that negotiation is a word
20 that, in the context, has to be construed broadly. It is
21 not limited purely to bargaining; the word agreement in
22 fact does not appear in either General Condition 1.2 or
23 Article 4(3) of the Access Directive. This is
24 negotiating in the sense of setting up arrangements and
25 it is arrangements that these provisions deal with.

26 THE CHAIRMAN: Yes.

27 MR EDWARDS: I think I have been as quick as I can, sir.

28 THE CHAIRMAN: You have been extremely brief and very much to
29 the point, Mr Edwards. Thank you very much indeed.

30 MR BARLING: I am afraid that I am not going to be able to
31 be quite as brief as Mr Edwards, but I do admire the
32 brevity nonetheless.

33 THE CHAIRMAN: That is a model that can usefully be followed
34 - present company excepted of course.

35 MR BARLING: My learned friend Ms Sharpson had an hour or so
36 last night and in response to some of the points she made
37 then, because of time, we tried to produce at least
38 something in writing, touching on those points. So if I
39 could now hand that out, but I do emphasise that a lot

1 more water has gone under the bridge since then, so I am
2 going to have to deal, obviously, with other points, and
3 I hope this note will not go down in history as the sum
4 total of our reply.

5 THE CHAIRMAN: Of course not. (Document distributed).

6 MR BARLING: Can I go to what I suppose again might be said
7 to be the heart of the matter, which is the question of
8 negotiating, what is "negotiating network access" within
9 the meaning of General Condition 1.2? What happens in
10 practice - we have tried to give some references there -
11 when a request from a customer for CPS is lodged with BT?

12 I am not going to take you to all of these, but we might
13 go to one or two of them in due course again. My learned
14 friend calls it configuration, which is a nicer phrase
15 for twiddling the knobs, and it is all described by Mr
16 Steggles. One can see what he is referring to when one
17 looks at the more fleshy description of it in the End to
18 End Process.

19 Really what is happening is that there is a routing
20 of that particular customer's calls each time he makes a
21 call, and that is done by BT's pre-programmed software.
22 As a matter of history, when CPS came in BT's switches
23 did not have the necessary software or the equipment was
24 not in place, so there was a delay, I think the United
25 Kingdom got a deferment until the software could be put
26 in place. But it is an automatic process and it is able
27 to happen, as long as a CPSO is interconnected already
28 with BT.

29 The crucial phrase in GC1.2 is "the process of
30 negotiating network access", what is it talking about?
31 We cannot emphasise enough that there is no new
32 negotiation each time a CPS order is placed by a retail
33 customer. When a CPS order is placed by a retail
34 customer, there are no changes to the existing
35 arrangements between the interconnected parties, on the
36 contrary, those arrangements are simply being utilised.
37 They are already there, under the interconnection
38 agreement, including its schedules. There is no new
39 contractual negotiation or any kind of negotiation, bathe

1 existing arrangements are simply continuing in being as a
2 backdrop to an individual order.

3 THE CHAIRMAN: So this is simple execution.

4 MR BARLING: Simple execution. It does not have to happen,
5 but it can happen, and everything is there ready to
6 enable it to happen. There is a charge, as you know, and
7 that is £3.79, and there are other charges. I do not
8 want to oversimplify this, but they are all now
9 determined by the regulator.

10 THE CHAIRMAN: Yes.

11 MR BARLING: Paragraph 5 of the note, the interconnect
12 Agreement emphatically is not a "Framework Agreement".
13 One might think, looking at tab 40, this is just a slim
14 thing, but actually of course no one has put the whole
15 thing there. As one can see from looking at tab 41,
16 there is in fact an awful lot of it in each individual
17 case. Tab 41 is just number 143.

18 THE CHAIRMAN: Yes, from which we assume there are at least
19 142 other schedules

20 MR BARLING: I think there are probably more. But it does
21 not end there, of course, detailed though that is. In
22 addition to that, of course, this agreement incorporates
23 the Industry Agreed End to End Process, and the industry
24 end to End Process which one sees referred to in, for
25 example, paragraph 3.2 of the schedule in question, is
26 itself a pretty fleshy animal and highly detailed,
27 referring to some other documents as well.

28 THE CHAIRMAN: That is what we have got at 43.

29 MR BARLING: That is the current one at 43. It might just
30 be worth pointing to the parts of the End to End Process
31 which are relevant here, and if one looks at the index to
32 it, the contents on the first page, one sees "Service
33 preparation". Service preparation is, if you like, the
34 arrangements that need to be made and negotiated - well,
35 this is in effect how it is done. If one looks at
36 section 2 it is quite a convenient shorthand and it has
37 got a rather handy flow table at 2.1.1 showing you the
38 different steps in the process.

39 THE CHAIRMAN: This is the initial set-up of a CPSO.

1 MR BARLING: Of a CPSO, quite.

2 THE CHAIRMAN: It is not a customer transaction.

3 MR BARLING: No, it is nothing to do with customer
4 transactions, this is purely to set up the arrangements.

5 THE CHAIRMAN: So he gets his prefix and all the other
6 things.

7 MR BARLING: Yes, and you can see in fact in the fourth
8 column down that the CPSO signs contract, schedule 143
9 for BT - that is the schedule that we have got in tab 41.

10 THE CHAIRMAN: Yes.

11 MR BARLING: Then they have to agree, as part of the
12 arrangement, the routing requirements and data build
13 requests that the CPSO will send and so on and so forth,
14 and then ultimately there will be what is called a sign-
15 off and the service preparation is complete. Then it
16 sits there.

17 THE CHAIRMAN: That can all be described, presumably, as the
18 process of negotiating network access.

19 MR BARLING: These provisions, yes, what has to be done
20 there. Well, it is negotiating a specific arrangement
21 for network access.

22 THE CHAIRMAN: There may be standard ways of doing it but ---

23 MR BARLING: If you want a CPS arrangement, this is what you
24 have to negotiate. Nothing more need happen, you have
25 negotiated network access when you have got to this stage
26 and you have your overarching Interconnection Agreement
27 that covers this, you have this industry process
28 incorporated. I do not suggest that there might not be
29 other technical documents as well, but there it is, it is
30 there.

31 If one keeps in that tab and turns to section 3 one
32 sees the separate industry agreed arrangements actually
33 executing individual customer orders, that is page 32.
34 You have already seen these paragraphs of course when we
35 were dealing with the matters yesterday and you pointed
36 out that these orders are raised on the customer's
37 behalf, it says so expressly, and provides for
38 notification to losing operators and provides for minimum
39 content but there are no restrictions between these

1 industry players as to what can be included. We can see
2 that actually on the next page, it is not restricted, it
3 is actually in 3.2.8, "the text of the paragraphs is not
4 restricted but should not detract from or confuse the
5 customer with respect to the minimum information
6 requirements ..."

7 THE CHAIRMAN: This is the notification to customer.

8 MR BARLING: Yes. So we are not dealing here which requires
9 anything at all to be done outside the structures
10 negotiated and agreed in the Interconnect Agreement and
11 the end to End process. So nothing has to be negotiated
12 at all, it is a different animal that we are dealing
13 with.

14 THE CHAIRMAN: At this stage is the customer the customer of
15 the new CPS operator or is the customer still the
16 customer of BT? Or possibly both, I do not know?

17 MR BARLING: There is a cooling-off period, of course, and
18 I suppose it might be a matter for debate as to whether
19 obligations arise pre or post.

20 THE CHAIRMAN: If it is customer in a loose sense ---

21 MR BARLING: They are at all times a BT customer - they are
22 a retail customer of BT Retail - I emphasise Retail - at
23 the very least as the customer's Access Operator. There
24 may also be calls remaining with BT as well.

25 MS SIMMONS: If we can just look at 3.2.1 which is what you
26 were referring to, it looks as if what you were saying
27 just now fits in with that, that the customer is both,
28 but I am just wondering, where it says "on the customer's
29 behalf", which end it is referring to.

30 MR BARLING: I am so sorry, which?

31 MS SIMMONS: "Customers via their chosen CPS Operator [the
32 new operator's customer] will arrange the setting up of
33 the carrier Pre-selection service. CPSO(s) will raise
34 electronic orders, on the customer's behalf ..." That
35 suggests on their customer's behalf.

36 MR BARLING: Yes.

37 MS SIMMONS: "With the customer's access Operator ..." Do
38 you see what I mean?

39 MR BARLING: I agree with that, but whatever they are doing

1 they are doing it on behalf of the customer.

2 MS SIMMONS: The customer is bifocated. In this sense, if
3 you go back to the concept of CPS the facility is a
4 facility which BT is required to provide to its
5 subscribers, so in fulfilling CPS orders BT in effect is
6 discharging its regulatory obligations to make this
7 facility available to all subscribers.

8 MS SIMMONS: Yes.

9 MR BARLING: So we would submit that it is doing it on
10 behalf of BT's customer as well as - well, I do not know
11 that we can solve this because it ultimately becomes both
12 parties' customer and you get two bills from then on, one
13 from BT and one from the CPSO, so it is customer-imposed.
14 The main thing is that it is doing it on behalf of the
15 customer and this is very important, for the reasons we
16 have said, because when the order is now placed, that is
17 the source of the information to BT about its customer.

18 It may be helpful to look at it in this way: we say
19 that really the CPSO is informing BT with two hats. It
20 is informing it with its CPSO hat, "I am a CPSO who wants
21 to place an order", but it is also making the request on
22 behalf of BT's customer to tell BT that this facility is
23 present.

24 THE CHAIRMAN: By this stage, arguably, the customer has got
25 this sort of dual personality. The CPS is asking on its
26 own behalf and on its customer's behalf for the facility,
27 but the customer is still in a residual sense a BT
28 customer but he is not just a BT customer, he has already
29 entered into some sort incipient relationship with the
30 new provider, who is doing all this for him.

31 MR BARLING: That is true. He is doing something for him
32 which the customer is required to do as BT's customer.

33 THE CHAIRMAN: But not solely as BT's customer.

34 MR BARLING: He is required to do it as BT's customer r
35 because the subscriber has got to make a request to BT.
36 BT's subscriber, qua BT subscriber, has got to make a
37 request to BT for the provision of this facility.

38 THE CHAIRMAN: He makes that request for this facility to BT
39 in its capacity as the operator of the network, it does

1 not really make it to BT in the capacity as the retail
2 provider.

3 MR BARLING: BT is the retail provider of the customer's
4 line.

5 THE CHAIRMAN: But so far as the calls are concerned, which
6 is what we are talking about, he is saying "I want now
7 please from the person who is supplying the line to have
8 some or all of the calls carried by someone else." So
9 it is not quite as simple as the operator simply doing it
10 for BT's customer, there is more than one dimension to
11 it, it is a multi-faceted transaction that is taking
12 place.

13 MR BARLING: That is right. It may be that we cannot
14 completely unravel everything, but the crucial thing in
15 our submission is that this reference to "on the
16 customer's behalf" - one has to keep recalling the
17 regulatory backdrop and, in particular 50A, which
18 predicates that this serviced is supplied by BT ----

19 THE CHAIRMAN: Where are you, Mr Barling?

20 MR BARLING: I am now in tab 13, looking at condition 50A.

21 THE CHAIRMAN: Yes.

22 MR BARLING: It is 50A.1. "The Licensee shall provide
23 carrier Pre-selection in accordance with the ...
24 Functional Specification ... to any of its subscribers
25 who notify the licensee in writing that they require it
26 to provide Carrier Pre-selection ..."

27 THE CHAIRMAN: This is going back to the whole business of
28 the reply card.

29 MR BARLING: I suppose the reply card was the request. So,
30 yes, there is this duality, but we do say that the CPSO
31 is now doing two things when he places an order, he is
32 placing the request on behalf of the customer, fulfilling
33 the requirement that BT is entitled to receive from its
34 retail customer - BT Retail is entitled to receive that,
35 not BT Wholesale as Mr Edwards said.

36 THE CHAIRMAN: Why is it that BT Retail needs to be involved
37 at all?

38 MR BARLING: They are the Access Operator in respect of the
39 customer. The customer has no relationship with anyone -

1 | if you are going to sub-divide BT in this way - and BT of
2 | course is not sub-divided ----

3 | THE CHAIRMAN: BT Retail is just an internal division, there
4 | is no

5 | MR BARLING: There is no legal division. Accepting it, as
6 | we do, all customers only deal with BT Retail for all
7 | their services, whether that is line rental, as access
8 | operator or call services, they only deal with BT Retail,
9 | So when they are required to request BT to do something
10 | or supply them with something, the natural and proper
11 | recipient of that request is BT Retail, and that is in
12 | fact the entity (if you can call it that) which received
13 | the reply card and processes the reply card and put the
14 | information into the database. I am sorry to harp on
15 | about this, but it is actually quite important.

16 | THE CHAIRMAN: There is a tripartite, triangular relationship
17 | going on at this stage, is there not? There is the
18 | relationship between the customer and BT Retail, there is
19 | the relationship between the customer and the respective
20 | carrier (which is already agreed in principle but now has
21 | to be implemented) and there is the relationship between
22 | the prospective carrier and, I suppose, BT Wholesale as
23 | to the implementation of that individual transaction.

24 | MR BARLING: Yes. I think that is a very fair way of
25 | putting it. I mentioned paragraph 3.4.1, but just to
26 | refresh our memory, if one turns up that at tab 45, you
27 | will remember 3.4.1 at page 48. "A reply slip from the
28 | customer to their Access Operator to vary their retail
29 | relationship with the Access Operator to enable CPS ..."

30 | THE CHAIRMAN: Sorry, you are reading from where?

31 | MR BARLING: 3.4.1, the second bullet point on page 48 of
32 | tab 45. I ask you to underscore as it were "their retail
33 | relationship with the Access Operator." there is no
34 | question about this, that is what is happening and that
35 | is still happening under the streamlined version. The
36 | fact that there is not a reply slip any more, we submit,
37 | is irrelevant.

38 | THE CHAIRMAN: The nature of the transaction does not change.

39 | MR BARLING: It does not change.

1 MS SIMMONS: Can you go back to tab 13 and 50A.1 and just
2 read on from the first sentence? "Alternatively ..."

3 MR BARLING: Yes, you should cross that out because that
4 related to something called interim carrier pre-
5 selection. Because the switches would not work to do
6 this by the deadline, even the deferred deadline that the
7 United Kingdom was allowed ---

8 MS SIMMONS: So it does not apply to us.

9 MR BARLING: It does not apply.

10 MS SIMMONS: That is all I wanted to make sure.

11 MR BARLING: That was the interim arrangement. This is
12 hugely important, sir, thus issue raised by Mr Edwards
13 and Ms Sharpson that this is something that sparks off
14 good faith or something or that kind. We do insist that
15 we are entitled to know, as a result of the regulatory
16 structures, as the retail operator of our customer, we
17 are entitled to receive their request. The fact that we
18 get it indirectly now makes not a scrap of difference, we
19 are entitled to receive their request and we do not take
20 any unfair advantage of that such as Mr Edwards was
21 saying in a sort of floodgating argument about gaining,
22 that there could be gain activity. In other words, even
23 where we are not as it were the losing provider, we could
24 say "Well, we know that now, we will send that to our
25 retail arm anyway and they can ring up these customers."
26 The retail arm never gets that information in
27 circumstances where they are not the losing provider,
28 they only ever get it in circumstances where all losing
29 providers get it. We are required under the Industry End
30 to End Process when we are the Access Operator to supply
31 that information to all losing providers, even when it is
32 not BT Retail, so there is no unfairness or advantaged as
33 Mr Edwards has suggested in that respect. Just to remind
34 the Tribunal, we dealt with that at some length at
35 paragraph 103 of our skeleton argument.

36 THE CHAIRMAN: Can we just go back to the earlier stage,
37 before we got to Carrier Pre-selection in its modern
38 form. There was a historical stage at which, if you
39 wanted to use an alternative provider, you contacted that

1 provider and they gave you a prefix and you dialled the
2 prefix.

3 MR BARLING: Yes, it was called indirect access, .

4 THE CHAIRMAN: Did that involve any notification by the
5 customer to BT Retail that they were now going to dial
6 the prefix?

7 MR BARLING: No, the answer to that is no.

8 THE CHAIRMAN: So it is slightly odd that technology has now
9 taken a direction in which BT Retail are now to be more
10 involved than they were before.

11 MR BARLING: I suppose the technology has obviously meant
12 that the whole thing is different, in the sense that it
13 is now done as a service provided by BT at its exchanges.

14 THE CHAIRMAN: It is a service done by BT in its capacity qua
15 network operator rather than its capacity as qua
16 retailer.

17 MR BARLING: No, sir, it is done qua retail access operator.
18 We are still the retailer. The customer interface is
19 with Retail, yes. The actual twiddling as it were, the
20 configuring, is probably denote or may well be done at
21 the network operator approach, but so far as the customer
22 is concerned in order to achieve it, his interface is
23 with Retail. This is why it is slightly artificial when
24 you have not got the real competitors at all, but when he
25 requests it he requests it in that way.

26 THE CHAIRMAN: I see.

27 MR BARLING: Just picking up where I had got to, sir, in
28 answer to the Tribunal's question, Ms Sharpson, with
29 respect, was blurring the distinction. We submit there
30 is a clear distinction when you look at the End to End
31 Process, for example, between any ongoing arrangements.
32 We accept that the arrangements are tweaked, of course,
33 they have to be, forecasts change, one may have technical
34 changes that have to be notified and discussed, protocols
35 and so on. All that obviously can be ongoing. but there
36 is a clear separation between that and what you, sir,
37 have called the execution in respect of any particular
38 transaction.

39 We do say that it is extraordinary to say that the

1 execution of a particular transaction is, as Ms Sharpson
2 has said, a negotiation of interconnection.

3 Still on this issue, but one of the questions that
4 the Tribunal raised was does the configuration happen
5 before, during or after the negotiation of
6 interconnection? With respect, that was a good question
7 because it shows quite clearly that this type of
8 information is outside the scope of General Condition
9 1.2. Clearly, it would be impossible for this kind of
10 information to be transferred before any negotiation for
11 network access.

12 THE CHAIRMAN: So before is not possible.

13 MR BARLING: No CPS operator would advertise the service
14 before he had actually negotiated himself into a position
15 to be able to supply it.

16 THE CHAIRMAN: Yes.

17 MR BARLING: It will only ever happen when the whole thing
18 has been completed.

19 THE CHAIRMAN: If you knock out before, that leaves you with
20 during and after.

21 MR BARLING: Yes, but it does indicate that we are not hung
22 up on the temporal side because we can perfectly well see
23 why during and after should be added to before.

24 THE CHAIRMAN: Before is a pointer to the conclusion that we
25 are not dealing with this sort of thing at all.

26 MR BARLING: Not this type of information, precisely. That
27 is our submission. There is no negotiation, it was
28 suggested by Ms Wallace, when orders are refused or
29 cancelled at the gateway, it is all done automatically,
30 it is all an automatic process with codes. These things
31 are scanned and if they do not scan correctly they are
32 rejected and an appropriate code is given, and then the
33 request is simply resubmitted by the CPSO, with whatever
34 was wrong put right. So you cannot suggest that there is
35 anything remotely connected with negotiation at that
36 point, and if one wants a reference to that, that is
37 3.4.2.1, and that is in the End to End Process at tab 43.

38 Sir, you also referred to the glitch in the wording
39 of General Condition 1.2 and you pointed out correctly

1 that the word "arrangements" does hang in the air in that
2 passage, so having referred only to negotiations in the
3 earlier part it then goes on to say "Such negotiations or
4 arrangements." We submit that that is probably quite
5 important; it shows that the crucial phrase is the
6 process of negotiating network access, and the reason
7 that arrangements are no longer necessary is because that
8 word was associated with interconnection arrangements in
9 Article 4(3).

10 THE CHAIRMAN: Yes.

11 MR BARLING: Instead of talking separately about access and
12 interconnection arrangements, what the draughtsman did at
13 GC1.2 was actually to use the phrase "network access" to
14 encompass both, as it does. He then probably forgot that
15 he had now encompassed both and therefore did not need to
16 mention arrangements, so we say that is probably the
17 explanation for that and it does underscore the fact that
18 the crucial phrase is "negotiating network access".

19 THE CHAIRMAN: Yes.

20 MR BARLING: Once one appreciates that that is the crucial
21 phrase, then again there is a very strong pointer in our
22 submission to what the right answer is.

23 THE CHAIRMAN: How are we doing, Mr Barling?

24 MR BARLING: If you were prepared to sit until half past I
25 would finish.

26 THE CHAIRMAN: I think the Tribunal would prefer to take
27 lunch. We will adjourn until two o'clock, if we can try
28 and start again promptly at two.

29 **(Lunch adjournment).**

30 MR BARLING: Sir, the Tribunal asked before the break what
31 happens at the local exchange when an individual customer
32 wants this service. If I can just give you a little bit
33 of further information on that, there is information in
34 the papers but the answer seems to be this - and you will
35 recall Mr Steggles dealing with this to some extent.

36 THE CHAIRMAN: Yes.

37 MR BARLING: The order is received at the BT gateway and it
38 then is processed on the CSS database and you have the
39 validation process where it is checked.

1 THE CHAIRMAN: All this is electronic now.

2 MR BARLING: All this is absolutely automatic. If it is not
3 validated, it is rejected and given a code saying what is
4 wrong; if it is accepted, it is automatically transferred
5 to some software called the Switch Manager. The Switch
6 Manager then puts the requisite information
7 (electronically again) on that individual customer's line
8 card, except that there is not a card any more but
9 probably at one time there was, in the old days. It is
10 put on the individual customer's line card at the local
11 exchange and then it will automatically, from then on,
12 transmit the relevant calls to the relevant point of
13 interconnection to go to the chosen operator.

14 THE CHAIRMAN: Yes.

15 MR BARLING: This kind of process happens every time there
16 is any change or new service, anything of that kind, with
17 that particular customer. That particular customer's
18 line card will be adjusted in a similar way, for example
19 if they want to have call diversion for some reason.

20 THE CHAIRMAN: Yes.

21 MR BARLING: Sometimes that happens by request or sometimes
22 it has to happen when there is a breakdown in the line.
23 Equally, if they want the call minder service, 1571,
24 there is an analogous adjustment to the customer's lined
25 card and the matter is dealt with in that way. So that
26 all happens automatically, there is no question of any
27 negotiations or anything of that kind.

28 Compare and contrast the CPSO set-up system which I
29 took you to earlier. It is wholly different in nature
30 and in scale.

31 THE CHAIRMAN: It seems to last about a year according to
32 that.

33 MR BARLING: The table in the End to End Process, yes, and
34 on the way to it there are umpteen opportunities for
35 negotiations, and there have to be negotiations.

36 THE CHAIRMAN: In that automatic and now highly automated
37 system that you were telling us about, where the line
38 card is simply adjusted electronically, why does BT
39 Retail really need to be involved in the process at all?

1 MR BARLING: I think I come back to how this all began with
2 the Directives, the Interconnect Directive (as amended)
3 and then the Universal Service Directive (implemented by
4 condition 50A) because it is all predicated on this being
5 a service provided by an existing operator to his
6 subscribers.

7 THE CHAIRMAN: I see, yes.

8 MS SIMMONS: Apart from the switching process, does BT
9 Retail need the information for any other purpose?

10 MR BARLING: It needs the information to comply with the
11 industry agreed process, including the notification of
12 transfer to the losing provider, which may indeed be
13 themselves, it may be themselves or it may be another
14 losing provider. Everyone agrees that the retail person
15 should be involved, at least to that extent, and you will
16 remember I showed you in the End to End Process just
17 before lunch where the minimum content of that letter is
18 agreed within the industry, without limitation. In other
19 words, there is no limitation put on what else could go
20 in, but it had to have at least those particular bits of
21 information dealt with.

22 THE CHAIRMAN: When I see, as I did this morning on the
23 railway station, a hoarding that says "22,000 customers a
24 month are coming back to BT", does that mean that other
25 operators are sending 22,000 Notification of Transfer
26 letters out to their customers who have rejoined BT?

27 MR BARLING: Yes.

28 THE CHAIRMAN: Pursuant to these industry agreed
29 arrangements.

30 MR BARLING: That is right. Bear in mind, that when there
31 is a CPS order the retail relationship is affected so in
32 a sense BT Retail needs to be involved since they are the
33 retailer for this purpose.

34 THE CHAIRMAN: Because it is becoming a line only and not a
35 line plus calls or some calls.

36 MR BARLING: Exactly. That is reflected in the End to End
37 Process which says that it is altering the retail set of
38 terms, . altering the retail relationship.

39 Moving on through the note, as quickly as possible,

1 at paragraph 6 we deal with the point made by Ms Sharpson
2 yesterday that there is really a bundle of information,
3 and you see what we say there. We say that this is
4 really a peculiar point because the agreed statement of
5 facts indicates what the information is that is actually
6 passed. The only thing it tells you about the CPSO is
7 who they are and what their prefix is, which you need to
8 know. That information however, that part relating to
9 the CPSO, is not bundled in any way, the bit that is
10 passed over as it were to the losing provider, whether it
11 be BT Retail or somebody else, is only the customer
12 identification details. So that remains on the database,
13 no use is made of it at all in the normal way, and so
14 there is not a bundling actually, there is quite clear
15 separation so far as the use is concerned. Mr Steggle
16 deals with that, as we have said.

17 In paragraph 7 we refer to the statement by OFCOM
18 yesterday that GC1.2 does apply, even where there is no
19 Interconnection Agreement between the loser and the
20 gainer. In a sense one can see Ofcom's dilemma there; if
21 they had said it does not apply, that would immediately
22 create an anomaly, BT would be in a different position
23 from other losing providers, but we submit there is an
24 equally fatal problem for them, having said that it does
25 apply in those circumstances, because in our submission
26 it cannot possibly apply where the losing and the gaining
27 operators are not in interconnection arrangements
28 together. However much one tries to stretch the wording
29 of GC1.2, it will not fit, there must be, clearly
30 envisaged, some negotiation between recipient and
31 provider of the relevant information.

32 As we said really in our opening submission, that
33 gives you the value as to why it is not covering anything
34 other than information disclosed of that type, that you
35 disclose when you are in a negotiating stance, albeit the
36 negotiations may have been going on for some time, they
37 may have completed and so on. It is the information
38 disclosed in that relationship, of that type, which is
39 covered.

1 THE CHAIRMAN: I think I asked the question and I think you
2 did answer it, but let me just phrase it again. Is this
3 mo.re than a marginal case in practice as it were, a
4 customer changing from one third party provider to
5 another third party provider where neither of those
6 providers has a direct interconnection agreement between
7 them, only one with BT?

8 MR BARLING: My understanding is that it is probably not so
9 marginal because there are still plenty of regional
10 operators who, for one reason or another, will not find
11 it necessary to be in interconnection with each other
12 because they will each be in interconnection with BT.
13 Sir, you may remember that we had this issue in another
14 case.

15 THE CHAIRMAN: Indeed, but the case being postulated here, of
16 the customer changing from one of these regional
17 operators to another regional operator, in circumstances
18 where neither of those operators has an agreement?

19 MR BARLING: Let us assume they have not negotiated with
20 each other.

21 THE CHAIRMAN: It cannot be a particularly common case,
22 especially if they are in geographically different areas,
23 which I think was what we were expressing on another
24 occasion.

25 MR BARLING: I am only tentatively saying, I do not know is
26 the answer to that and I do not know whether anyone elks
27 can give me some insight.

28 THE CHAIRMAN: Sometimes these European Directives do not
29 think of every conceivable situation there could be.

30 MR BARLING: Looking at the international stage, there will
31 not be interconnection agreements all the time between
32 every carrier, each set of carriers has a set of
33 bilateral arrangements. So the answer actually to this
34 is going back to the preamble; the whole purpose of this
35 was to say that when you want to enter into an
36 interconnection agreement we do not want you to feel
37 restricted in doing so because you might give away
38 confidential information.n One has to keep coming back
39 to that.

1 THE CHAIRMAN: I just do not know how it is on the ground,
2 but if you are looking at it with Community spectacles
3 on, there may well be quite a lot of national networks
4 that are not directly interconnected with each other but
5 they are interconnected via a third party. I just do not
6 know whether cable networks in this country interconnect
7 with French networks or whether it all goes through BT or
8 ---
9 MR BARLING: Another national carrier, yes.
10 THE CHAIRMAN: I just do not know. One can imagine that
11 there is a fairly limited series of interconnection
12 agreements outside agreements with the main incumbent ion
13 each territory.
14 MR BARLING: I would doubt if it is entirely marginal, but I
15 am sorry, I cannot help you more than that.
16 THE CHAIRMAN: That is fine, thank you.
17 MR BARLING: But it does throw up with clarity the point,
18 what is this really protecting. One is entitled, I
19 think, to rely on the preambles.
20 THE CHAIRMAN: Yes.
21 MR BARLING: Then we make a point in paragraph 8 which is
22 there. We do not quite understand what the regional
23 balance has got to do with GC1.2.
24 We are not the industry policeman but we do have,
25 obviously, a strong commercial interest in ensuring that
26 our customers are happy customers and are dealt with
27 properly, bearing in mind that in the context of CPS they
28 continue to be our customers and, by and large, look to
29 us as it were as the first port of call for any complaint
30 that they make about anything that happens to them. We
31 note what is said about the Enterprise Act and other
32 measures, it would be interesting to know how many stop
33 orders there were.
34 THE CHAIRMAN: Yes.
35 MR BARLING: Quasi-penal, we deal with that in paragraph 10,
36 I will not take time with that. So far as the obligation
37 to provide CPS, this was the point that you raised
38 yesterday just before we rose for the day. We have done
39 our best to set out and give a sort of road map to where

1 the obligations, both contractual and regulatory, are to
2 be found.

3 THE CHAIRMAN: That is very helpful.

4 MR BARLING: I will not take time up with that now. Ms
5 Sharpson said that sometimes it sounded as save activity
6 was really only about consumer protection, but I do not
7 think that comes across. We are certainly not pretending
8 that save activity is not something that is competition,
9 it is marketing, of course it is, it involves that, there
10 is noh question about that. I am doing very well now, I
11 have probably only got another five or ten minutes.

12 While we are on save activity, it was said by both
13 my learned friends that there was something dishonourable
14 or lacking in good faith about us, BT Retail, as the
15 losing provider using that to carry out save activity.
16 We say this is completely misconceived. One only has to
17 look, as I said before, at the industry agreed process
18 which makes no limitation at all on what can be done,
19 which actually provides for the losing retailer to be
20 told about it, and indeed then says he requirers you to
21 contact his customer and says there are no limitations on
22 what he may say to his customer. so it is bizarre now to
23 say suddenly there is something wrong in telling the
24 customer about your products and services.

25 THE CHAIRMAN: As I have understood it, General Condition 1.2
26 would equally apply in relation to the operators who had
27 been serving the 22,000 customers a month who are coming
28 back to BT (according to their current advertising
29 campaign). They would not be allowed to do any save
30 activity either.

31 MR BARLING: That is what Ofcom say, they say it applies to
32 everybody as I understand their case now.

33 THE CHAIRMAN: So far as the industry is concerned you say --
34 -

35 MR BARLING: I say that is very odd, if that is the case,
36 that the industry agreed what it agreed in relation to
37 that.

38 We were said to be being patronising because we
39 took the view that we wanted to speak to our customers

1 and tell them, perhaps put our case to them. We think it
2 is the other way round actually, we think that trying to
3 suggest that customers Are not allowed to hear, that
4 there should be artificial restraints on customers being
5 able to speak to their current supplier and continuing
6 supplier about relevant matters, is rather patronising,
7 as though they will not be able to take a view if they
8 hear two opposing sides trying to market to them.

9 THE CHAIRMAN: Yes.

10 MR BARLING: So there is not much in that, we would say.
11 The customer, of course, does not have to speak to the
12 people who make the save call, and I have no doubt a
13 certain proportion of them do not want to, they just put
14 the phone down or something. One has some sympathy
15 sometimes when people ruing up at inconvenient times, but
16 it is very different from saying that one is not allowed
17 to speak to one's customer in that way. They say we are
18 not muzzled, as we suggest, because we can go out and
19 speak to all our customers, but that of course ignores
20 the real issue here, which is being able to compete on a
21 fair and level playing field in that ten day period, the
22 cooling-off period, when otherwise only the gainer or the
23 potential; gainer has got access. He has got
24 untrammelled access to that customer in that 10 day
25 cooling-off period. He can do what he likes to reinforce
26 the choice the customer is apparently making, but the
27 loser cannot put his side of the case either. We say
28 that is probably extreme actually.

29 So we say that it is they who are taking an unfair
30 advantage in raising this issue and supporting it as a
31 result of our agreeing to streamline the process for
32 everyone's benefit, really at the request of the
33 industry. There is no doubt about it, as far as Ofcom is
34 concerned they accept that that is what has made the
35 difference, as Ms Sharpson said. Yes, we accept that if
36 the information came directly there would not be a
37 problem. That is what they said in their defence and
38 that is what they maintain now, so it really is a highly
39 technical point that is being made.

1 The answer to the technical point is that we are
2 being informed that the reply slip change really made no
3 difference in substance, we are still being informed by
4 the customer, we are not in reality having to rely upon
5 the information from the gaining provider because they
6 are telling us also on behalf of the customer. So we
7 hear it now indirectly from the customer as opposed to
8 directly from the customer when we had the reply slip
9 system.

10 THE CHAIRMAN: Yes.

11 MR BARLING: We rather agree with OFCOM that the probability
12 is that if the clock were attempted to be turned back, if
13 BT attempted to reinstate a direct notification, the
14 industry might put up difficulties, or some of them
15 might, and no doubt if the matter came before OFCOM they
16 would obstruct.

17 THE CHAIRMAN: Yes, so it is difficult to turn it back.

18 MR BARLING: But that is not definite, though I would have
19 thought quite likely to be the case. The question was
20 then put by the Tribunal to my learned friend, if the
21 reply slip was still in being would Ofcom prohibit direct
22 information from the customer. I am not sure that that
23 question has been answered by Ofcom, but our answer to
24 that for them would be surely they would not. If the
25 reply slip was still in being, surely they would not
26 prohibit it or attempt to prohibit it by some form of
27 regulatory action, given what they say in paragraph 104
28 of the Defence, which is that it is perfectly possible to
29 do it.

30 THE CHAIRMAN: If it is direct it is alright.

31 MR BARLING: What they say elsewhere is that we like you to
32 compete vigorously, we rather approve of it, although
33 sometimes one does begin to wonder.

34 On confidentiality - I am really nearly at the end
35 now - Ms Sharpson said one would not normally tell them
36 this. That is true, but as I have already said they do
37 not really tell us, we hear it, as we are entitled to
38 hear it, from the customer as well. We do not therefore
39 get it in confidence within the meaning of GC1.2, and if

1 there is any confidence in it, it is the customer's
2 confidence rather than the confidence as GC1.2 indicates,
3 a confidence owed to the providing supplier.

4 There is no springboard here, it is not a
5 springboard which the CPS operator has any exclusive
6 right to use for those reasons.

7 Finally, can I just refer to the Commission's
8 informal view? If you remember, you were shown that, it
9 is at paragraph 2.21 of the Notification. It is not in
10 fact the Commission's view, as is made clear there. In
11 fact, the person who expressed the informal view
12 apparently stressed that this was not a statement by the
13 D-G], nor by the European Commission. As far as the
14 other Member States are concerned and their views, as we
15 have said in our reply at paragraphs 83 to 84, the Irish
16 and the Portuguese examples had an entirely different
17 approach; they actually legislated for a no contact
18 period, which appears to have been entirely outside the
19 scope of anything to do with GC1.2.

20 THE CHAIRMAN: On what basis did they do that, under national
21 powers?

22 MR BARLING: National powers. The point about all these
23 different Member States' approaches is obviously that
24 they are highly dependent on consumer protection
25 safeguards and the degree of consumer protection
26 safeguards in place in particular Member States. So it
27 is extremely difficult to make a comparison between what
28 is done in one Member State and what is done in another,
29 it really depends on how strong their consumer protection
30 legislation is. You have seen the save call, you have
31 seen the degree of scrupulousness that is adopted in the
32 guidance to the BT operators, and no one has suggested no
33 contact periods here. But that is a different matter and
34 that is what you will see the Irish and the Portuguese
35 are dealing with. You have those somewhere in the
36 bundles.

37 THE CHAIRMAN: So we can therefore work out ...

38 MR BARLING: I will give you the reference in a moment.

39 THE CHAIRMAN: I know where they are, I was trying to

1 remember whether those were after the coming into force
2 of these Directives.

3 MR BARLING: I cannot remember myself, I am afraid. There
4 has not been a decision as yet on Article 4(3), I think
5 that was accepted.

6 THE CHAIRMAN: As a matter of general law, do the Directives
7 now form a complete framework for this industry or is
8 there a residual ----

9 MR BARLING: Is everything now harmonised?

10 THE CHAIRMAN: Is there a residual national power? If for
11 some reason the directives did not apply, would there be
12 anything stopping OFCOM from adopting a specific
13 provision dealing with this?

14 MR BARLING: If the directives did not apply?

15 THE CHAIRMAN: Yes. Supposing you are right, for argument's
16 sake, and there is no direct provision in the directive -
17 --

18 MR BARLING: I see what you mean. It is not really consumer
19 protection, is it? Certainly if it was consumer
20 protection I am sure they could.

21 THE CHAIRMAN: I suppose it would be a rather tricky argument
22 to know how far ---

23 MR BARLING: If one thinks about it for a moment, one can
24 see why information involving negotiation needs
25 regulatory protection, but this kind of information can
26 easily be protected in the interconnection agreements
27 that are entered into because inevitably there will be an
28 agreement before any of these individual transactions
29 occur. So the need for it is much less, and if you
30 remember what THUS said, we do not need 1.2 even for
31 negotiations but a fortiori for this kind of information
32 you would not be too worried, it could be covered in an
33 agreement if it was thought to be important. One sees
34 that the only agreement relating to it is the end to end
35 process which leaves them expressly free to say what they
36 like to customers, as long as they do not confuse them
37 about the minimum information required.

38 THE CHAIRMAN: Yes.

39 MR BARLING: The real point, in our submission, if one goes

1 back to Article 4 of the Access Directive, as you put to
2 my learned friends, that is concerned with negotiations
3 and CPS retail customer transactions did not involve
4 anything of that kind, and they are not within the words
5 or contemplation of GC1.2. If you would like the
6 references to the other national provisions, we can give
7 them to you.

8 THE CHAIRMAN: I can find them, I know where they are.

9 MR BARLING: Ms Lea has got the dates of those decisions, if
10 that helps. The French one is at the end of 2002, the
11 Portuguese is at the end of 2003 and the Irish one is in
12 September 2003. Those are our submissions; I am sorry if
13 I have taken slightly longer.

14 THE CHAIRMAN: So far as the issue in the case partly turns
15 on the true interpretation of the Directive, no one has
16 so far suggested that we should ask Luxembourg about
17 this. You are encouraging us to have a go at it
18 ourselves.

19 MR BARLING: Sir, I think that is right. As we have said,
20 it is our submission that if the Tribunal felt they were
21 driven to accept the interpretation that my learned
22 friends put forward, then we would submit that there are
23 real issues of ---

24 THE CHAIRMAN: That is the old position, I do not want a
25 reference if I am going to win but if I am not ---

26 MR BARLING: I will say no more.

27 THE CHAIRMAN: I am sure both sides have the same position.

28 MR EDWARDS: Sir, I am asked to say that we accept that the
29 point is in principle referrable, but we encourage the
30 tribunal to have a go at it.

31 THE CHAIRMAN: Thank you very much. I do not know if my
32 colleagues have any other questions? No. We would like
33 to thank all the parties and their respective teams for
34 the very, very helpful submissions that we have had in
35 this case. We will reserve our judgment and give
36 judgment in due course. Thank you very much indeed.

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