



Neutral citation [2004] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1025/3/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

9 December 2004

Before:

Sir Christopher Bellamy (President)
Marion Simmons QC
Ann Kelly

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

THUS PLC AND BROADSYSTEM VENTURES LIMITED

and

NJ ASSOCIATES

Interveners

Mr Gerald Barling QC and Ms Sarah Lee (instructed by the General Counsel, BT Retail) appeared for the appellant.

Ms Eleanor Sharpson QC and Mr John O'Flaherty (instructed by the Director of Competition Law, OFCOM) appeared for the respondent.

Mr John Edwards and Ms Nusrat Zar (of Herbert Smith) appeared for the Interveners Thus plc and Broadssystem Ventures Limited

Heard at Victoria House on 5 and 6 May 2004

JUDGMENT

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I INTRODUCTION

General

1. This appeal arises out of a Notification by the Director General of Telecommunications (the “Director”) to British Telecommunications plc (“BT”) dated 7 November 2003 (the “contested Notification”) that he had reasonable grounds for believing that BT was acting in contravention of General Condition 1.2 of the General Conditions of Entitlement (the “General Conditions”). The General Conditions were made by the Director under section 45 of the Communications Act 2003 (the “2003 Act”) and published pursuant to section 48(1) of that Act. The General Conditions took effect from 25 July 2003.

2. General Condition 1 of the General Conditions provides:

“1.1 The Communications Provider shall, to the extent requested by another Communications Provider in any part of the European Community, negotiate with that Communications Provider with a view to concluding an agreement (or an amendment to an existing agreement) for Interconnection within a reasonable period.

1.2 Where the Communications Provider acquires information from another Communications Provider before during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiation or arrangements, the Communications Provider shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.

1.3

1.4 For the purposes of this Condition,

(a) “Communications Provider” means

- (i) in paragraph 1.1., a person who provides a Public Electronic Communications Network,
- (ii) otherwise, a person who provides an Electronic Communications Network or provides an Electronic Communications Service;

(b) “Network Access” means

- (i) Interconnection of Public Electronic Communications Networks; or
- (ii) any services, facilities or arrangements which

- (A) are not comprised in Interconnection; but
- (B) are services, facilities or arrangements by means of which a Communications Provider or person making available Associated Facilities is able, for the purposes of the provision of Electronic Communications Services (whether by him or another), to make use of anything mentioned in subparagraph (c);

and references to providing Network Access include references to providing any such services, making available any such facilities or entering into any such arrangements;

- (c) the things referred to in (b)(ii)(B) above are-
 - (i) any Electronic Communications Network or Electronic Communications Service provided by another Communications Provider;
 - (ii) any apparatus comprised in such a network or used for the purposes of such a network or service;
 - (iii) any facilities made available by another that are Associated Facilities by reference to any network or service (whether one provided by that provider or another);
 - (iv) any other services or facilities which are provided or made available by another person and are capable of being used for the provision of an Electronic Communications Service.”

3. According to the definitions set out in Part I of the General Conditions:

“ ‘Interconnection’ means the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of one Public Electronic Communications Network to another for the purpose of enabling the persons using one of them to be able:

- (a) to communicate with users of the other one; or
- (b) to make use of services provided by means of the other one (whether by the provider of that network or by another person);”

4. The above definitions follow in all material respects the interpretation provisions set out in section 151 of the 2003 Act.

5. The contested Notification is made under section 94 of the 2003 Act, which provides:

“(1) Where OFCOM determine that there are reasonable grounds for believing that a person is contravening, or has contravened, a condition set under section 45, they may give that person a notification under this section.

- (2) A notification under this section is one which –
 - (a) sets out the determination made by OFCOM;

(b) specifies the condition and contravention in respect of which that determination has been made; and

(c) specifies the period during which the person notified has an opportunity of doing the things specified in subsection (3).

(3) Those things are –

(a) making representations about the matters notified;

(b) complying with notified conditions of which he remains in contravention; and

(c) remedying the consequences of notified contraventions.”

6. By the contested Notification the Director required BT, by 9 December 2003, to cease using customer-specific information acquired from another Communications Provider in connection with the provision of Carrier Pre-Selection (“CPS”) for the purposes of carrying out “CPS Save Activity”.

7. CPS Save Activity is defined in paragraph 6 of the contested Notification as:

“marketing activity undertaken by BT during the period between a BT customer electing to transfer some or all of his/her calls to an alternative Communications Provider by means of Carrier Pre-selection and the actual transfer taking place, in an attempt to persuade that customer not to transfer: ...CPS Save Activity includes all forms of marketing activity – whether by telephone, letter or otherwise.”

8. The issue in this case is whether OFCOM had reasonable grounds for believing that BT has contravened General Condition 1.2 by using customer-specific information acquired from another Communications Provider in connection with the provision of CPS for the purposes of carrying out “CPS Save Activity” as so defined. However it is common ground that nothing turns on whether OFCOM had “reasonable grounds” for believing that BT had contravened General Condition 1.2, or whether BT has in fact done so. The parties have asked the Tribunal to decide the substantive issue.

9. For the reasons given in this judgment we have decided to uphold the Notification. We consider that BT was acting in contravention of General Condition 1.2 by using customer-specific information acquired from another Communications Provider in connection with the provision of CPS for the purposes of carrying out CPS Save Activity. Our reasons are principally the following:

- (a) The relevant information is acquired by BT (a Communications Provider) from another Communications Provider (the gaining CPS Operator) within the meaning of General Condition 1.2. Accordingly the CPS Operator does not provide the information as, or at least solely as, the customer's agent or post box. In particular it is apparent from former Condition 50A.1 and 50A.2 of BT's Licence that the provision of CPS involves not only a request from the customer to BT to "enable" the customer to access the service of the CPS Operator but also the provision by BT as network provider, to the CPS Operator, of the interconnection facilities necessary for that Operator to provide the relevant telephone services to the customer. Moreover Condition AA8 of the SMP Service Conditions does not specify that BT must receive a request from the subscriber as distinct from the CPS Operator.
- (b) CPS services are provided by BT in the context of an inter-operator relationship between the CPS Operator and BT and the provision of these services requires BT to provide "Network Access" as defined in the General Conditions and "Interconnection Facilities" as defined in the SMP Service Conditions.
- (c) If, as BT submits, the "process of negotiating Network Access" refers to the initial setting-up of an interconnection agreement between BT and the CPS Operator, the information here in question is transmitted "after" the conclusion of the "process of negotiating Network Access" since the information is necessarily transmitted pursuant to, and in performance of, the interconnection arrangements which have resulted from the negotiations.
- (d) In relation to each individual case of CPS the necessary reconfiguration of switches by BT also falls within the definition of "Network Access" in paragraph 1.4 of the General Conditions.
- (e) It is, however, unnecessary to decide whether the "process of negotiating Network Access" includes an individual customer request so that the

information in question is also transmitted “during” the process of negotiating Network Access.

- (f) The information is acquired in confidence by BT within the meaning of General Condition 1.2 since it is information of the CPS Operator as well as information of the customer and in particular, it is not accessible to the public, is commercially sensitive and is particularly valuable to a competitor.
- (g) BT acquires the information in connection with and solely for the purpose of negotiations or arrangements for Network Access. The purpose of providing the information to BT is primarily so that, in its capacity as network provider, BT may make the necessary reconfiguration of its switches. The subsidiary purpose is so that BT may take such reasonable steps as may be necessary for consumer protection, of which the sending of the Notification of Transfer letter is the most important. The effect of General Condition 1.2 is that BT can use that information only for these purposes and for no other.
- (h) The “save call” formerly made by BT is marketing activity and cannot fairly be described as “consumer protection”. The use of the information for the purposes of the “save call” could provide a competitive advantage to BT in its capacity as a retail supplier.
- (i) BT’s use of the information to make the unsolicited “save call” is accordingly outwith the purposes for which the information is transmitted and is therefore contrary to General Condition 1.2 which requires BT to use the information solely for the purpose for which it was supplied. The use by BT of the information for any marketing activity to the customer in writing during the cooling-off period would similarly infringe Condition 1.2.
- (j) For the purposes of the principle of legal certainty and proportionality it is desirable that what can and cannot be included in the Notification of Transfer letter should be made clear. In this context the definition of “marketing activity” and what is permitted and what is not permitted should be the subject of further consideration.

BT

10. BT is a vertically integrated business. Its internal organisation includes two divisions: BT Wholesale and BT Retail. These divisions are not separately incorporated subsidiaries but internal operating units within BT. As we understand it, BT Wholesale runs BT's network and provides network services to other Communications Providers. It does not deal with end-users of BT's electronic communications services. BT Retail provides electronic communications services to end-users, including business and residential customers of BT, using the network operated by BT Wholesale.

OFCOM

11. The Telecommunications Act 1984 established the Director as the regulator of the telecommunications industry in the United Kingdom. The Office of the Director became known as "OfTel". The Director and OfTel were abolished by the 2003 Act and his functions were transferred to the Office of Communications ("OFCOM").
12. During a transitional period between 25 July 2003 and 29 December 2003, the Director was empowered to carry out certain of OFCOM's functions, including those in relation to electronic communications and services: see section 408 of the 2003 Act and The Office of Communications Act 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order SI 2003/3142.
13. Under section 408(5) of the 2003 Act and Article 3(2) of that Order, anything done by the Director prior to 29 December 2003 is to have effect after that time as if it had been done by OFCOM. This judgment is concerned with a Notification made by the Director during the transitional period. We make no distinction for the purposes of our judgment between the Director and OFCOM since at the material time the Director was carrying out OFCOM's functions.

The Interveners

14. Thus plc (“Thus”) and Broadsystem Ventures Limited (“BVL”) among other things provide CPS services to consumers, enabling customers of BT to use telephone services provided by an alternative carrier. The contested Notification follows a complaint made to the Director by Thus and BVL on 7 July 2003. Thus and BVL state that they are supported by Cable and Wireless UK, Centrica plc, Kingston Communication Limited, MCI Worldcom Limited, Opal Telecom Limited, Caudwell Communications Limited (formally known as Reach Telecom Limited), Telco Global Limited, TELE2 UK Communications Limited, Tesco plc, VarTec Telecom UK Limited and Your Communication Limited.
15. NJ Associates is owned and run by Mr Nial Jones of Llandudno. NJ Associates provides agency and brokerage services in respect of telephone customers who may wish to change from BT to an alternative carrier. Mr Jones objects strongly to BT’s practice of making “save” calls.

Carrier Pre-Selection (“CPS”)

16. BT, OFCOM and the Interveners agree that CPS is:

“the mechanism which enables a customer to transfer some or all of his/her calls to an alternative communications provider, whilst retaining his/her existing telephone line, without having to dial additional codes or use special equipment”.
17. The alternative communications provider chosen by the customer is known as a “CPS Operator” or “CPSO”. Customers can choose whether to route all or some of their eligible calls using the CPS Operator for particular types of calls. For example, customers can choose to use CPS for only their national calls, for their international calls or for all of their calls. Certain types of call, such as 999, are excluded from CPS.
18. In many cases the customer’s contractual relationship may not in fact be with the CPS Operator but with an intermediary, known as a CPS reseller, which does not itself have a network but has an agreement with a CPS Operator to sell call services to

customers. The call traffic is then carried on that CPS Operator's network. In these circumstances, the customer may not know who the CPS Operator is and BT may not know which CPS reseller has an agreement with the customer.

19. A customer who has chosen to contract with a CPS Operator or CPS reseller for some or all of his eligible calls nevertheless retains a contractual relationship with BT for the provision of the access line over which the calls are made, together with any categories of calls he or she wishes to continue to make using BT's services. In addition, the customer retains the ability to override the CPS contract on a call-by-call basis by dialling an "indirect access code", which routes individual calls through BT or through an entirely different operator.
20. BT has told us that using CPS may affect the BT pricing packages that the customer would otherwise have received from BT, such as "Friends & Family", "BT Together Options", "Call Allowance on Standard Tariff", and so on.
21. The CPS Operator has an interconnection agreement with BT enabling calls originating from BT's former customer to be routed to the CPS Operator's network and vice versa.
22. When a BT customer wishes to transfer some or all of his/her calls by way of a CPS arrangement, the chosen CPS Operator provides BT with the information that the customer wishes to do so. The CPS Operator must provide that information to BT so that BT can make the necessary changes to BT's network configuration to re-route the CPS calls to the CPS Operator in the future, pursuant to the interconnection agreement between BT and the CPS Operator. The method adopted is for the CPS Operator to lodge an order with BT Wholesale over an Electronic Data Interchange mechanism (EDI). The electronic order is required to include a number of mandatory fields including the customer's postcode and telephone number. The "CPS gateway" (managed by BT Wholesale) then validates the order to ensure all mandatory fields are in place and that the order matches data held on BT's database. According to paragraphs 29 to 31 of the notice of appeal:

“29. Once a customer’s CPS order is lodged with BT it sends a task to Switch Manager which is the BT system which controls changes to the configuration of customers’ lines in the BT local exchanges. Switch Manager then marks the customer and the category of CPS calls (e.g. national, international etc) and which operator will carry the calls. BT sends a message back to the CPSO to confirm that the switchover has taken place.

30. After switchover when the customer makes a call the local exchange looks at the dialled digits to see what type of call is being made. If the call is appropriate to CPS, the local exchange inserts an 8XXX code before the dialled digits and sends them to the trunk network. The call is then routed as per the agreed route plan. If the customer dials an Indirect Access (IA) override code the local exchange would send all of the dialled digits to the trunk network and the call would be routed as per the agreed routing plan for that IA code.

31. BT then raises an INCA (Inter Network Call Accounting) bill for the parts of the call that are carried over the BT network which is sent to the CPS operator.”

23. Prior to July 2002, the CPS transfer process required customers wishing to change to an alternative operator to send a paper reply slip to BT to request CPS. This practice was the subject of much discussion in the industry at various industry group meetings including CPS Process Improvement Group Meetings and at CPS Consumer Group Meetings. On 17 October 2001 at one such meeting it was agreed that instead of the reply slip procedure, the “Access Operator” “or AO” (for these purposes, BT) should send a notification of the date of the impending switch to both the “losing operator” and the “gaining operator”, and for both losing and gaining operators to notify the customer of the pending switch.
24. Pursuant to this arrangement since August 2002 customers requesting CPS receive what is known as a “Notification of Transfer” letter from both the “losing operator” (the operator who had hitherto carried the category of calls the customer now wishes to be dealt with by a CPS arrangement) and the “gaining operator” (the new CPS Operator) alerting the customer to the impending switch in their service, and providing contact details should the customer wish to cancel the change to CPS.
25. There is an industry-agreed “cooling-off” period of ten working days between BT Wholesale receiving the electronic order to transfer from the CPS Operator and BT Wholesale implementing the necessary re-configuration of its network in order to transfer the customer’s calls to the CPS Operator.

26. If a BT customer is transferring calls to another CPS Operator, the information that the customer wishes to enter into a CPS arrangement, the start date for CPS, the CPS option chosen and the customer's number is passed by BT Wholesale to BT Retail, during the cooling-off period. As we understand it, the information in question is transferred electronically from one part of BT's system to another. Both BT Retail and the gaining CPS Operator then send the "Notification of Transfer letter" to the customer. The main purpose of the Notification of Transfer letter is to prevent CPS orders being placed without the customer's consent (a practice that is known in the industry as "slamming").
27. Prior to 9 December 2003, when the contested Notification took effect, the cooling-off period was also used to enable BT to carry out CPS Save Activity. Consequent on the Notification, and pending the decision of this Tribunal, since 9 December 2003 BT Wholesale has transferred the same information to BT Retail, but that information is used by BT Retail to send an amended Notification of Transfer letter, and not for CPS Save Activity. We understand that has been done by disabling the link between BT's customer database and its "Campaign Management Tool" which generates lists of customers to whom outward bound "save" calls are to be made.
28. BT's evidence was that, in the case of BT, the identifying "code" of the individual CPS Operator is not passed to BT Retail during the cooling-off period, and can only be accessed by BT Retail personnel in specific circumstances agreed between BT and OFCOM, usually only where a customer does not know who their CPS Operator is and requests BT to provide them with the information. As a matter of practice, therefore, BT Retail customer sales staff do not generally have access to the CPS Operator's identity, but they do have access to information identifying the customer as one who has chosen, or who intends to choose, a CPS service provided by another Operator.
29. It is possible that a customer who is already using a CPS Operator may wish to transfer all or some of their calls to another CPS Operator. In those circumstances, the gaining CPS Operator informs BT Wholesale, who informs the losing CPS Operator. Both the gaining CPS Operator and the losing CPS Operator send the customer the Notification of Transfer letter. BT Retail is not involved at all, unless it

is BT Retail who has (re)gained the customer concerned. If the transaction takes place between CPS Operators neither of whom is BT Retail, there will in practice be an interconnection agreement between each of those Operators and BT, but not necessarily directly between the Operators concerned.

CPS Save Activity

30. CPS Save Activity is defined by OFCOM in the contested Notification as:

“marketing activity undertaken by BT during the period between a BT customer electing to transfer some or all of his/her calls to an alternative Communications Provider by means of Carrier Pre-selection and the actual transfer taking place, in an attempt to persuade that customer not to transfer: ...CPS Save Activity includes all forms of marketing activity – whether by telephone, letter or otherwise.”

31. Prior to 9 December 2003, the Notification of Transfer letter sent by BT to a customer who had elected to enter into a CPS arrangement included details of a Freephone number where the customer could make an inbound call to BT to discuss that transfer with BT.

32. The text of that letter included the following passage which has since been removed:

“You may also be interested to know that you can choose BT to carry a call for you by dialling 1280 in front of the number you wish to call (if you have a payphone we recommend that you bar 1280, please refer to your user guide or call 08000 25254 for further details). Why not check which calls are cheaper with BT? Call us between 8.00am and 8.00pm, Mondays to Saturdays on Freefone 0800 085 5291 for residential customers and 0800 400 400 for business customers and one of our advisers will be happy to help”.

33. BT also made an outbound “save call” to customers who had not previously called BT about the transfer, other than customers who have opted not to receive unsolicited calls. According to BT, the purpose of the “save call” was to ensure that the customer was aware of the services which BT offered, and of the facility to switch to other operators on a call-by-call basis, for example if the prices were lower. BT places importance on the “save call”, particularly as a protection against mis-selling in circumstances where the customer may have ignored the Notification of Transfer letter, thinking it to be “junk mail”, or where the customer may have assumed that

they would continue to receive the same service from BT, or might hold BT responsible for failing to verify that the CPS order was bona-fide.

34. The “save call” followed a written “script” the terms of which BT has claimed are commercially sensitive. The standard script for save calls was made available to the Tribunal. []¹.
35. BT’s position is that CPS Save Activity provides customers with up-to-date and accurate information so that they can make an informed decision about their choice of Communications Provider.
36. It is accepted by all parties that a certain level of mis-selling occurs in the industry, mainly through the practice known as “slamming,” which occurs when an Operator seeks to transfer a customer to itself without that customer’s informed consent. It is common ground that customers make complaints about mis-selling both to OFCOM and to BT, although from the information provided to us there is no agreement about the magnitude of the problem. We note that this issue is presently under review by OFCOM in a separate consultation document issued on 29 April 2004 entitled “Protecting citizen-consumers from mis-selling of fixed-line telecoms services”.
37. According to the contested Notification (paragraph 52) at the end of September 2003 there were 2 million lines enabled with CPS, which represents approximately 7 per cent of BT’s fixed lines. An industry forecast suggested that the order volume for CPS for the period to September 2003 to October 2004 would be about 5.37 million orders.

II LEGISLATIVE AND REGULATORY BACKGROUND TO CPS

Domestic developments up to the 1990s

38. Historically, telephone services in the United Kingdom were provided by the Post Office and by local and private operators. By the end of the First World War, mergers

¹ *Information for which BT claims confidentiality excised*

had meant that there were only two telephone operators, namely the General Post Office (GPO) and the Corporation of Kingston-upon-Hull. The GPO was a government department headed by the Postmaster General and Hull Corporation operated under a licence granted by the GPO. By virtue of the Post Office Act 1969, the GPO ceased to be a government department and was converted into a statutory corporation known as the Post Office.

39. The British Telecommunications Act 1981 transferred the Post Office's telecommunications businesses to a separate statutory corporation called British Telecommunications established under that Act. British Telecommunications was given the exclusive privilege to run telecommunications systems in the United Kingdom outside of Hull, except that the Secretary of State could grant licences to other persons to do so. In 1982, the Secretary of State granted a licence to Mercury Communications Limited to compete with British Telecommunications in the provision of private circuits.
40. The Telecommunications Act 1984 (the "1984 Act") established a new regulatory regime for the running of telecommunications systems and the provision of telecommunications services in the United Kingdom. It provided for the privatisation of British Telecommunications, created a competitive structure for telecommunications by requiring any person running a telecommunications system to have a licence from the Secretary of State, and established the Director as the regulator to supervise and enforce the regime.
41. On 1 April 1984 British Telecommunications plc ("BT") was incorporated. It was then a public limited company wholly owned by H.M. Government. On 22 June 1984 British Telecommunications was granted an operating licence pursuant to section 7 of the 1984 Act. In August 1984 the undertaking, assets and liabilities of British Telecommunications were transferred to BT and BT became the licensee under the licence (the "BT Licence"). In December 1984 the Government sold a majority (50.2%) of its shares in BT through a public offering. The remainder of the Government's holding was sold through subsequent public offerings in 1991 and 1993.

42. Mercury Communications Limited was granted a licence under the 1984 Act on 5 November 1984, thus enabling it to compete nationally with BT across the full range of telecommunications services. At that time, the Government's policy was that until 1990, only BT and Mercury would be licensed to run fixed networks nationally (the "duopoly policy"), although from the beginning, local cable companies were licensed to run cable networks in their local franchise areas.
43. A Government White Paper of 1991 entitled "Competition and Choice: Telecommunications Policy for the 1990s" set out a revised policy to end the domestic duopoly of BT and Mercury. The White Paper envisaged the entry of new telecommunications operators to the market, indicated that applications for licences from such new entrants under the 1984 Act would, in the future, be considered on their merits, and proposed to allow some existing operators to offer a wider range of services. A number of these measures were duly implemented, in particular in the context of developments at European level.

Summary of the relevant European and domestic provisions

44. Since the 1990s there have been a series of measures taken under Community law to regulate the telecommunications industry, in particular with regard to CPS. We summarise briefly those measures that are relevant to our decision.
45. The establishment of harmonised principles for the internal market for telecommunications services began in 1990 with the adoption of Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (1990 OJ L192/1). The Council and the European Parliament reviewed the position in various Resolutions adopted in 1993, 1994 and 1995. Between 1990 and 1998 a number of Directives were adopted.
46. The most relevant Directive for present purposes is Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through the principles of Open Network Provision (ONP) (1997 OJ L199/32) (the

“Interconnection Directive”). According to Article 1, the aim of the Interconnection Directive was to establish a regulatory framework for securing in the Community the interconnection of telecommunications networks and in particular the interoperability of services, with regard to ensuring provision of universal service in an environment of open and competitive markets. Obligations to meet all reasonable requests for access to their network were imposed on telecommunications providers having Significant Market Power (“SMP”): see Article 4(2).

47. The Interconnection Directive was implemented in United Kingdom law by the Telecommunications (Interconnection) Regulations 1997 (SI 1997/2931) (the “Interconnection Regulations”), Schedule 6 of which provided for interconnection obligations to be imposed by way of conditions inserted in the licences granted by the Secretary of State to operators under section 7 of the 1984 Act. Pursuant to the interconnection obligations imposed by new Conditions 45 to 50 of BT’s Licence, BT entered into interconnection agreements with a number of other operators.
48. The Interconnection Directive was amended by Directive 98/61/EC of the European Parliament and of the Council of 24 September 1998 amending Directive 97/33/EC with regard to operator number portability and carrier pre-selection (the “CPS Directive”). The CPS Directive added a new Article 12(7) to the Interconnection Directive, obliging telecommunications providers with SMP to offer CPS facilities.
49. In order to implement the CPS Directive in the United Kingdom, BT’s Licence was again amended by the Telecommunications (Interconnection) (Carrier Pre-Selection) Regulations 1999, (SI 1999/3448) to incorporate a new Condition 50A. Condition 50A required BT, being an operator having SMP, to offer CPS services. BT offered CPS from 1 April 2000.
50. The interconnection agreements entered into by BT with other operators contain provisions relating to CPS, including in particular Schedule 143.
51. In 2002 the Council and the European Parliament decided to enact a new regulatory framework applicable to electronic communications networks and services and to repeal the existing Directives applicable to telecommunications (including the

Interconnection Directive). The new framework for electronic communications includes four directives, collectively referred to as the “Communications Directives” dated 7 March 2002. These are:

- (a) Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the “Framework Directive”). The Framework Directive lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community, including fixed and mobile telecommunications networks. It repealed the existing directives concerned with telecommunications including the Interconnection Directive: see Article 26.
- (b) Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to and interconnection of, electronic communications networks and associated facilities (the “Access Directive”). The Access Directive covers access and interconnection arrangements between service suppliers. It is expressly stated in Article 1(2) that the term “access” in that Directive does not refer to access by end-users. It establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to electronic communications networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection.
- (c) Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (the “Authorisation Directive”). The Authorisation Directive is designed to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community; and
- (d) Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic

communications networks and services (the “Universal Service Directive”). The Universal Service Directive is concerned with the provision of electronic communications network and services to end-users. The Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available electronic communications networks and services.

52. The Communications Directives were implemented in the United Kingdom by the 2003 Act, which repealed the 1984 Act and the system of licensing established under it. The 2003 Act came into force on 25 July 2003. Pursuant to the powers under section 45 of the 2003 Act the Director issued the General Conditions, which were effective from 25 July 2003 and applicable to all providers of electronic communications networks and electronic communications services in the United Kingdom. The contested Notification was issued under General Condition 1.2, already set out above.
53. With effect from 28 November 2003 the Director issued further conditions known as the SMP Service Conditions, following a review of the “fixed narrowband wholesale exchange line, call origination, conveyance and transit markets”. The SMP Service Conditions apply to Operators found to have Significant Market Power. The Operators subject to the SMP Service Conditions are BT (and Kingston Communications within the area of Kingston-Upon-Hull). In the case of BT, Condition AA8 of the SMP Service Conditions replaced Condition 50A of BT’s Licence and contains the present requirements imposed on BT to provide CPS, as well as the CPS functional specification. The contested Notification was made three weeks before the SMP Service Conditions came into force, but took effect on 9 December 2003, some 10 days after the SMP Service Conditions came into force.
54. We now set out in greater detail the provisions summarised above.

The Interconnection Directive

55. The aim of the Interconnection Directive of 1997 was to establish a regulatory framework for securing, in the European Community, the interconnection of

telecommunications networks and in particular the interoperability of services, and with regard to ensuring provision of universal service in an environment of open and competitive markets: see Article 1. The Interconnection Directive was repealed with effect from 25 July 2003 by the new Framework Directive.

56. Article 2(1) of the Interconnection Directive provided:

“Article 2

Definitions

1. For the purposes of this directive:

(a) ‘interconnection’ means the physical and logical linking of telecommunications networks used by the same or a different organization in order to allow the users of one organization to communicate with users of the same or another organization, or to access services provided by another organization. Services may be provided by the parties involved or other parties who have access to the network;

(b) ‘public telecommunications network’ means a telecommunications network used, in whole or in part, for the provision of publicly available telecommunications services;

(c) ‘telecommunications network’ means transmission systems and, where applicable, switching equipment and other resources which permit the conveyance of signals between defined termination points by wire, by radio, by optical or by other electromagnetic means;

(d) ‘telecommunications services’ means services whose provision consists wholly or partly in the transmission and routing of signals on telecommunications networks, with the exception of radio and television broadcasting;

(e) ‘users’ means individuals, including consumers or organizations, using or requesting publicly available telecommunications services;”

57. Under Article 4 of the Interconnection Directive, organisations authorised to provide public telecommunications networks and/or publicly available telecommunications services had a right and, when requested by such organisations, an obligation, to negotiate interconnection with each other in order to ensure provision of these networks and services throughout the Community. Those organisations with SMP (BT having been designated as one such organisation) were obliged to meet all reasonable requests for access to their network, including access at points other than

the network termination points offered to the majority of end-users. Under Article 7 of the Interconnection Directive, telecommunications operators having SMP, such as BT, were obliged to publish a standard interconnection offer.

58. By Article 6(d) of the Interconnection Directive, which applied to organisations such as BT designated as having SMP, Member States were to ensure that:

“Information received from an organisation seeking interconnection is used only for the purpose for which it was supplied. It shall not be passed on to other departments, subsidiaries or partners for whom such information could provide a competitive advantage”.

Carrier Pre-Selection

59. As we understand it, from the 1980s BT customers were able to make arrangements to route certain calls via operators such as Mercury by manually dialling a routing prefix. Carrier pre-selection, on the other hand, routes calls to another operator automatically.

60. On 20 November 1996 the Commission of the European Communities (the “Commission”) issued a Green Paper on “A Numbering Policy For Telecommunications Services in Europe”. In that Green Paper the Commission recommended that CPS should be implemented from 1 January 2000. CPS was defined in the Green Paper as “allowing users a simple, non-discriminatory mechanism enabling them to pre-select the carrier of their choice on a permanent or default basis.”

61. In a Resolution of 22 September 1997 the Council invited the Commission to prepare proposals for the introduction of carrier pre-selection, at least for operators with significant market power providing fixed local public telephone services. The Council stated:

“numbering is one of the key facilitators of consumer choice and effective competition in a liberalized telecommunications environment, and that more competition and greater efficiency can be achieved, inter alia, by the availability of call-by-call carrier selection and carrier pre-selection by the customer.”

62. The CPS Directive of 24 September 1998 amended the Interconnection Directive with regard to operator number portability and carrier pre-selection. Article 1(3) of the CPS Directive added the following paragraph to Article 12 of the Interconnection Directive (which dealt with number portability):

“7. National regulatory authorities shall require at least organisations operating public telecommunications networks as set out in Part 1 of Annex I and notified by national regulatory authorities as organisations having significant market power, to enable their subscribers, including those using ISDN, to access the switched services of any interconnected provider of publicly available telecommunications services. For this purpose facilities shall be in place by 1 January 2000 at the latest or, in those countries which have been granted an additional transition period, as soon as possible thereafter, but no later than two years after any later date agreed for full liberalisation of voice telephony services, which allow the subscriber to choose these services by means of pre-selection with a facility to override any pre-selected choice on a call-by-call basis by dialling a short prefix.

National regulatory authorities shall ensure that pricing for interconnection related to the provision of this facility is cost-oriented and that direct charges to consumers, if any, do not act as a disincentive for the use of this facility.”

63. In July 1998 Of tel issued a Consultation Document setting out its proposals for the introduction of CPS in the United Kingdom. This document included the following:

“4. ...UK operators are developing customer information and consumer protection procedures to assist public understanding of the choices they will have and how the new services will work.

(...)

10. CPS will be a standard service on BT’s list of standard services, which is part of BT’s Reference Interconnection Offer available under Article 7 of the ICD. The same will be true for Kingston. This means CPS will be available to all operators who have rights and obligations to interconnect under Annex II of the ICD on a non-discriminatory basis. Eligible operators will be listed on Of tel’s list of ‘Annex II’ operators.

(...)

23 Independent of defining the CPS service and BT and Kingston’s responsibility for rolling out network functionality, processes will need to be developed by all operators with an interest in CPS for the preparation, delivery and maintenance of the CPS service to customers. An Industry Process Group has been set up to design and introduce the necessary systems. The Group’s work will cover electronic order handling processes with standard protocols, operational support systems to support order handling, and industry documentation, including an agreed Process Manual and a Code of Practice for consumer protection. The Code of Practice will, in particular, have to cover anti-slamming measures. Slamming is the process by which a customer’s pre-selections are changed without the customer’s full knowledge or consent. Slamming has been a considerable problem in the US. It is not a practice in which reputable operators engage but nevertheless safeguards need to be put in place. Consumer representatives will be involved in the work of the

Process Group to ensure that the consumer protection measures introduced in the UK have their support.”

64. Annex A to that Consultation Document contained the “Functional Specification for Carrier Pre-Selection”. It stated that CPS facilities were to be provided to any operator which qualified under the Interconnection Regulations, that originating operators would provide CPS facilities to all customers, on request of CPS operators, on direct exchange lines, and that CPS calls would be provided as a standard interconnection service to qualifying CPS operators.
65. In February 1999 OfTel issued a Statement entitled “Implementation of Carrier Pre-Selection in the UK”. This referred to the CPS Process Group which had met fortnightly since June 1998. The CPS Process Group comprised technical specialists from a number of operators, including BT. Its role included developing agreed standard processes for handling customers’ CPS orders. The CPS Process Group addressed the design of a CPS order-handling system that would protect consumers from “slamming”. In this Statement of February 1999 it is recorded that there was unanimous agreement to the customer returning a contract to the CPS operator signing them up and separately returning a card to BT (or other direct access operator offering CPS on its network). The card would include the customer’s signature, as well as other information that should identify the card as genuinely completed by the customer rather than by a “slammer”. To further protect customers there was to be a 14-day cooling-off period within which customers could change their minds.
66. Pursuant to the Interconnection Directive, as amended by the CPS Directive, the Interconnection Regulations as amended, and new Condition 50A of BT’s Licence, BT was required to offer a CPS service from 1 April 2000, the Commission having granted the United Kingdom a derogation from the original implementation date of 1 January 2000.
67. The CPS facility introduced from 1 April 2000 was known as “Interim CPS”. This involved the use of a piece of equipment known as an “autodialler” attached to the customer’s line. The autodialler was supplied by the CPS Operator, and automatically inserted the relevant digits necessary to route calls via the CPS Operator. What is

known as “Permanent CPS”, which uses switch-based functionality, rather than an autodialler, was introduced in December 2000 for national and international calls, and in December 2001 for all calls.

The review of Community legislation

68. On 10 December 1999 the Commission issued a Communication entitled “A new framework for electronic communications services” in which it reviewed the then applicable regulatory framework for telecommunications and made proposals for a new regulatory framework. The following appears at page 3 of this Communication under the heading “Access and interconnection”:

“In Community legislation, "access" is a generic concept covering all forms of access to publicly available networks and services, whereas "interconnection" refers to the physical and logical linking of networks. Rules for access and interconnection ensure interoperability and are essential to allow competition to become established. The Commission recognises the fundamental importance of the provision of access and interconnection services, and therefore proposes:

- maintaining specific Community measures which cover both access and interconnection, building on the principles set out in the Interconnection Directive and the TV Standards Directive,
- in the case of access to network infrastructure, placing responsibility on National Regulatory Authorities (NRAs) to deal with specific access issues; requiring infrastructure owners with significant market power to negotiate on commercial terms in respect of requests for access; maintaining the possibility of NRA intervention to resolve disputes,
- in the case of interconnection, maintaining the requirement for cost-orientated interconnection in directives (hard law) but interpreting this concept through Commission recommendations,
- drawing up Recommendations on access, where appropriate, in particular a Recommendation to Member States on the technical and economic aspects of local loop unbundling (local loops are the links connecting customers' premises to a telecommunications network). The Commission takes the view that the availability of unbundled access to local loops would strengthen competition and could also speed up the introduction of Internet access services. In this context, it adopted a Recommendation on the interconnection of leased lines on 24 November which, inter alia, encourages Member States to take measures (such as unbundling the local loop and licensing wireless local loops) to increase competition for access to the local network,
- extending the current standardisation framework for telecoms to cover all communications infrastructure and associated services,
- making carrier selection (a form of network access mandatory for fixed networks under the current regulatory framework for interconnection) available to mobile users by placing obligations on mobile operators with significant market power.”

69. Following the Commission's proposal in 2002 the four Communications Directives already referred to were enacted by the Council and the European Parliament. Those Directives came into force on 25 July 2003. The Directives relevant for present purposes are the Framework Directive, the Access Directive and the Universal Service Directive.

The Framework Directive

70. The Framework Directive established a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It laid down tasks of national regulatory authorities and established a set of procedures to ensure harmonised application of the regulatory framework throughout the Community, including the procedures necessary to establish whether undertakings have Significant Market Power (Articles 7 and 14 to 16).

The Universal Service Directive

71. The Universal Service Directive recognised that a distinction should be made between the obligations which should apply to all undertakings providing publicly available telephone services, and the obligations which should apply only to undertakings enjoying Significant Market Power. It included in the Recitals that:

“(26)...There is a risk that an undertaking with significant market power may act in various ways to inhibit entry or distort competition, for example by charging excessive prices, setting predatory prices, compulsory bundling of retail services or showing undue preference to certain customers. Therefore, national regulatory authorities should have powers to impose, as a last resort and after due consideration, retail regulation on an undertaking with significant market power. ... However, regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and the public interest. (...)”

72. Article 1 of the Universal Service Directive headed “Scope and Aims” provides:

“1. Within the framework of Directive 2002/21/EC (Framework Directive) this Directive concerns the provision of electronic communications networks and services to end-users. The aim is to ensure the availability throughout the Community of good

quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market.

2. This Directive establishes the rights of end-users and the corresponding obligations on undertakings providing publicly available networks and services...”

73. Chapter 3, entitled “Regulatory controls on undertakings with significant market power in specific markets” deals, inter alia, with the provision of CPS. Article 16 of the Universal Service Directive provides under the heading “Review of Obligations”:

“1. Member States shall maintain all obligations relating to: (...)

(b) carrier selection or pre-selection, imposed under Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of open network provision (ONP); (...)

until a review has been carried out and a determination made in accordance with the procedure in paragraph 3 of this Article. (...)

3. Member States shall ensure that, as soon as possible after the entry into force of this Directive, and periodically thereafter, national regulatory authorities undertake a market analysis, in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive) to determine whether to maintain, amend or withdraw the obligations relating to retail markets. Measures taken shall be subject to the procedure referred to in Article 7 of Directive 2002/21/EC (Framework Directive).”

74. Article 19 of the Universal Service Directive provides:

“1. National regulatory authorities shall require undertakings notified as having significant market power for the provision of connection to and use of the public telephone network at a fixed location in accordance with Article 16(3) to enable their subscribers to access the services of any interconnected provider of publicly available telephone services:

(a) on a call-by-call basis by dialling a carrier selection code; and

(b) by means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a carrier selection code.

2. User requirements for these facilities to be implemented on other networks or in other ways shall be assessed in accordance with the market analysis procedure laid down in Article 16 of Directive 2002/21/EC (Framework Directive) and

implemented in accordance with Article 12 of Directive 2002/19/EC (Access Directive).

3. National regulatory authorities shall ensure that pricing for access and interconnection related to the provision of the facilities in paragraph 1 is cost-oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities.”

The Access Directive

75. Relevant provisions of the Access Directive are as follows:

- The Recitals

“(1) [The Framework Directive] lays down the objectives of a regulatory framework to cover electronic communications networks and services in the Community...The provisions of this Directive apply to those networks that are used for the provision of publicly available electronic communications services. This Directive covers access and interconnection arrangements between service providers...

(5) In an open and competitive market, there should be no restrictions that prevent undertakings from negotiating access and interconnection arrangements between themselves, in particular on cross-border agreements, subject to the competition rules of the Treaty. In the context of achieving a more efficient, truly pan-European market, with effective competition, more choice and competitive services to consumers, undertakings which receive requests for access or interconnection should in principle conclude such agreements on a commercial basis and negotiate in good faith.

(6) In markets where there continue to be large differences in negotiating power between undertakings, and where some undertakings rely on infrastructure provided by others for delivery of their services, it is appropriate to establish a framework to ensure that the market functions effectively. National regulatory authorities should have the power to secure, where commercial negotiation fails, adequate access and interconnection and interoperability of services in the interest of end-users. In particular, they may ensure end-to-end connectivity by imposing proportionate obligations on undertakings that control access to end-users. Control of means of access may entail ownership or control of the physical link to the end-user (either fixed or mobile), and/or the ability to change or withdraw the national number or numbers needed to access an end-user's network termination point. This would be the case for example if network operators were to restrict unreasonably end-user choice for access to Internet portals and services. (...)

(8) Network operators who control access to their own customers do so on the basis of unique numbers or addresses from a published numbering or addressing range. Other network operators need to be able to deliver traffic to those customers, and so need to be able to interconnect directly or indirectly to each other. The existing rights and obligations to negotiate interconnection should therefore be maintained (...)

(14) Directive 97/33/EC laid down a range of obligations to be imposed on undertakings with significant market power, namely transparency, non-

discrimination, accounting separation, access and price control including cost orientation. This range of possible obligations should be maintained but in addition they should be established as a set of maximum obligations that can be applied to undertakings in order to avoid over-regulation.

(16) Transparency of terms and conditions for access and interconnection, including prices, serve to speed-up negotiation, avoid disputes and give confidence to market players that a service is not being provided on discriminatory terms. Openness and transparency of technical interfaces can be particularly important in ensuring interoperability.”

- *The operative provisions*

76. Article 1 of the Access Directive provides:

“*Article 1*

Scope and aim

1. Within the framework set out in Directive 2002/21/EC (Framework Directive), this Directive harmonises the way in which Member States regulate access to, and interconnection of, electronic communications networks and associated facilities. The aim is to establish a regulatory framework, in accordance with internal market principles, for the relationships between suppliers of networks and services that will result in sustainable competition, interoperability of electronic communications services and consumer benefits.

2. This Directive establishes rights and obligations for operators and for undertakings seeking interconnection and/or access to their networks or associated facilities. It sets out objectives for national regulatory authorities with regard to access and interconnection, and lays down procedures to ensure that obligations imposed by national regulatory authorities are reviewed and, where appropriate, withdrawn once the desired objectives have been achieved. Access in this Directive does not refer to access by end-users.”

77. Article 2 of the Access Directive contains certain definitions and also incorporates the definitions set out in Article 2 of the Framework Directive. The relevant definitions are as follows:

From the Access Directive:

(a) ““access” means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services

over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;”

(b) ““interconnection” means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;”

(c) ““operator” means an undertaking providing or authorised to provide a public communications network or an associated facility;”

From the Framework Directive:

(a) ““electronic communications network” means transmission systems and, where applicable, switching or routing equipment and other resources which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed; (...)”

(c) ““electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting, but exclude services providing, or exercising editorial control over, content transmitted using electronic communications networks and services; it does not include information society services, as defined in Article 1 of Directive 98/34/EC, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks;”

(d) ““public communications network” means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;”

(e) ““associated facilities” means those facilities associated with an electronic communications network and/or an electronic communications service which enable and/or support the provision of services via that network and/or service. It includes conditional access systems and electronic programme guides; (...)”

(h) ““user” means a legal entity or natural person using or requesting a publicly available electronic communications service;”

(i) ““consumer” means any natural person who uses or requests a publicly available electronic communications service for purposes which are outside his or her trade, business or profession; (...)”

(m) ““provision of an electronic communications network” means the establishment, operation, control or making available of such a network;”

(n) ““end-user” means a user not providing public communications networks or publicly available electronic communications services.”

78. Article 4 of the Access Directive provides:

“Article 4

Rights and obligations for undertakings

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.

2. (...)

3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.”

79. Article 4(3) of the Access Directive, set out above, replaced Article 6(d) of the Interconnection Directive, also set out above, with effect from 25 July 2003. Unlike its predecessor Article 6(d) of the Interconnection Directive, Article 4(3) of the Access Directive applies to all operators irrespective of whether or not they have SMP.

80. The Commission’s initial proposal for what became Article 4(3) was narrower in scope than the finally adopted version, in that it was limited to information acquired from another undertaking “during” the process of negotiating access or interconnection. The Council broadened the scope of the provision by covering information obtained “before, during or after” the process of negotiating access or

interconnection agreements: see Common Position (EC) No 36/2001 adopted by the Council of 17 September 2001 with a view to adopting Directive 2001/.../EC of the European Parliament and of the Council of... on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

81. Article 5 of the Access Directive provides:

“Article 5

Powers and responsibilities of national regulatory authorities with regard to access and interconnection

1. National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users. In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(...)

2. When imposing obligations on an operator to provide access in accordance with Article 12, national regulatory authorities may lay down technical or operational conditions to be met by the provider and/or beneficiaries of such access, in accordance with Community law, where necessary to ensure normal operation of the network. Conditions that refer to implementation of specific technical standards or specifications shall respect Article 17 of Directive 2002/21/EC (Framework Directive).

3. Obligations and conditions imposed in accordance with paragraphs 1 and 2 shall be objective, transparent, proportionate and non-discriminatory, and shall be implemented in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

4. With regard to access and interconnection, Member States shall ensure that the national regulatory authority is empowered to intervene at its own initiative where justified or, in the absence of agreement between undertakings, at the request of either of the parties involved, in order to secure the policy objectives of Article 8 of Directive 2002/21/EC (Framework Directive), in accordance with the provisions of this Directive and the procedures referred to in Articles 6 and 7, 20 and 21 of Directive 2002/21/EC (Framework Directive).”

82. Article 12 of the Access Directive provides:

“Article 12

Obligations of access to, and use of, specific network facilities

1. A national regulatory authority may, in accordance with the provision of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities *inter alia*, in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user’s interest.

Operators may be required *inter alia*:

- (a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;
- (b) to negotiate in good faith with undertakings requesting access;
- (c) not to withdraw access to facilities already granted;
- (d) to provide specified services on a wholesale basis for resale by third parties;
- (e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;
- (f) to provide co-location or other forms of facilities sharing, including duct, building or mast sharing;
- (g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;
- (h) to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services;
- (i) to interconnect networks or network facilities.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.”

83. Other relevant provisions of the Access Directive contain obligations as to transparency (Article 9) non-discrimination (Article 10), accounting separation (Article 11), and certain price control and cost accounting obligations (Article 13). The obligations in Articles 9 to 12 of the Access Directive may be imposed only on

undertakings found to have SMP (Articles 7 and 8) as determined by the procedures set out in the Framework Directive.

The 2003 Act

84. Relevant provisions of the 2003 Act, which among other things implements the Directives, include the following:

“3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions-

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition. (...)

(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to-

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

(...)

45 Power of OFCOM to set conditions

(1) OFCOM shall have the power to set conditions under this section binding the persons to whom they are applied in accordance with section 46.

(2) A condition set by OFCOM under this section must be either-

(a) a general condition; or

(b) a condition of one of the following descriptions-

(i) a universal service condition;

(ii) an access-related condition;

(iii) a privileged supplier condition;

(iv) a significant market power condition (an "SMP condition").

(3) A general condition is a condition which contains only provisions

authorised or required by one or more of sections 51, 52, 57, 58 or 64.

(4) A universal service condition is a condition which contains only provisions authorised or required by section 67.

(5) An access-related condition is a condition which contains only provisions authorised by section 73.

(6) A privileged supplier condition is a condition which contains only the provision required by section 77.

(7) An SMP condition is either-

- (a) an SMP services condition; or
- (b) an SMP apparatus condition.

(8) An SMP services condition is a condition which contains only provisions which-

- (a) are authorised or required by one or more of sections 87 to 92; or
- (b) in the case of a condition applying to a person falling within section 46(8)(b), correspond to provision authorised or required by one or more of sections 87 to 89.

(9) An SMP apparatus condition is a condition containing only provisions authorised by section 93.

(...)

46 Persons to whom conditions may apply

(1) A condition set under section 45 is not to be applied to a person except in accordance with the following provisions of this section.

(2) A general condition may be applied generally-

- (a) to every person providing an electronic communications network or electronic communications service; or
- (b) to every person providing such a network or service of a particular description specified in the condition.

(3) A universal service condition, access-related condition, privileged supplier condition or SMP condition may be applied to a particular person specified in the condition.

47 Test for setting or modifying conditions

(1) OFCOM must not, in exercise or performance of any power or duty under this Chapter-

(a) set a condition under section 45, or
(b) modify such a condition,
unless they are satisfied that the condition or (as the case may be) the modification satisfies the test in subsection (2).

(2) That test is that the condition or modification is-

- (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
- (c) proportionate to what the condition or modification is intended to achieve; and
- (d) in relation to what it is intended to achieve, transparent.

51 Matters to which general conditions may relate

(1) Subject to sections 52 to 64, the only conditions that may be set under section 45 as general conditions are conditions falling within one or more of the following paragraphs-

- (a) conditions making such provision as OFCOM consider appropriate for protecting the interests of the end-users of public electronic communications services;
- (b) conditions making such provision as OFCOM consider appropriate for securing service interoperability and for securing, or otherwise relating to, network access;
- (c) conditions making such provision as OFCOM consider appropriate for securing the proper and effective functioning of public electronic communications networks;
- (...)

(4) The power to set general conditions falling within subsection (1)(b) does not include power to set conditions containing provision which under-

- (a) section 73, or
- (b) any of sections 87 to 92,

must be or may be included, in a case in which it appears to OFCOM to be appropriate to do so, in an access-related condition or SMP condition.

151 Interpretation of Chapter 1

(1) In this Chapter-

"the Access Directive" means Directive 2002/19/EC of the European Parliament and of the Council on access to, and interconnection of, electronic communications networks and associated facilities;

"access-related condition" means a condition set as an access-related condition under section 45;

(...)

"end-user", in relation to a public electronic communications service, means-

(a) a person who, otherwise than as a communications provider, is a customer of the provider of that service;

(b) a person who makes use of the service otherwise than as a communications provider; or

(c) a person who may be authorised, by a person falling within paragraph (a), so to make use of the service;

"the Framework Directive" means Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services;

"general condition" means a condition set as a general condition under section 45;

"interconnection" is to be construed in accordance with subsection (2);

(...)

"network access" is to be construed in accordance with subsection (3);

(...)

"public communications provider" means-

(a) a provider of a public electronic communications network;

(b) a provider of a public electronic communications service; or

(c) a person who makes available facilities that are associated facilities by reference to a public electronic communications network or a public electronic communications service;

"public electronic communications network" means an electronic communications network provided wholly or mainly for the purpose of making electronic communications services available to members of the public;

"public electronic communications service" means any electronic communications service that is provided so as to be available for use by members of the public;

(...)

"the Universal Service Directive" means Directive 2002/22/EC of the European Parliament and of the Council on universal service and users' rights relating to electronic communications networks and services;

(2) In this Chapter references to interconnection are references to the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of one

public electronic communications network to another for the purpose of enabling the persons using one of them to be able-

- (a) to communicate with users of the other one; or
- (b) to make use of services provided by means of the other one (whether by the provider of that network or by another person).

(3) In this Chapter references to network access are references to-

- (a) interconnection of public electronic communications networks; or
- (b) any services, facilities or arrangements which-
 - (i) are not comprised in interconnection; but
 - (ii) are services, facilities or arrangements by means of which a communications provider or person making available associated facilities is able, for the purposes of the provision of an electronic communications service (whether by him or by another), to make use of anything mentioned in subsection (4);

and references to providing network access include references to providing any such services, making available any such facilities or entering into any such arrangements.

(4) The things referred to in subsection (3)(b) are-

- (a) any electronic communications network or electronic communications service provided by another communications provider;
- (b) any apparatus comprised in such a network or used for the purposes of such a network or service;
- (c) any facilities made available by another that are associated facilities by reference to any network or service (whether one provided by that provider or by another);
- (d) any other services or facilities which are provided or made available by another person and are capable of being used for the provision of an electronic communications service.

(...)

(9) For the purposes of this section a service is made available to members of the public if members of the public are customers, in respect of that service, of the provider of that service.”

The General Conditions

85. In anticipation of OFCOM obtaining its powers and duties under section 45 of the 2003 Act, the Director issued a “Final Statement as to the General Conditions of Entitlement” on 9 July 2003. That statement set out the final text of the General

Conditions with which all providers of electronic communications networks and electronic communications services have been required to comply from 25 July 2003. The General Conditions were subject to two rounds of consultation. The Director stated when issuing the General Conditions that they were drafted to apply appropriate regulation reflecting the obligations required by the Communications Directives as closely as possible.

The BT Licence and the Continuation Notice

86. The 2003 Act repealed the provisions of the 1984 Act and the licensing regime established under it. Although the relevant provisions of the 2003 Act came into effect on 25 July 2003, this was subject to certain transitional provisions contained in section 406(6) and Schedule 18 of the 2003 Act. Under these transitional provisions the Director issued a “Continuation Notice” to BT. The Continuation Notice provided that the Conditions contained in the BT Licence, as set out in Schedule 1 to the Continuation Notice, were to continue to have effect from and after 25 July 2003, as modified and to the extent set out in that Schedule, until the Director had given a further Notice to BT. The effect of the Continuation Notice was that the relevant provisions of the BT Licence concerned with CPS continued in effect after 25 July 2003.
87. A further Notice (the “Discontinuation Notice”) dated 26 November 2003 was issued to BT the effect of which was that the continued provisions in BT’s Licence concerning CPS were discontinued from 28 November 2003. On the same date the Director adopted the SMP Service Conditions referred to below.
88. As at the date of the contested Notification (7 November 2003) BT was therefore subject both to the General Conditions referred to above, and to the BT Licence provisions as set out in the Continuation Notice. This means, in particular, that on the date the Notification was made BT was subject both to General Condition 1.2 and to Conditions 49.7 and 50A of BT’s Licence referred to below.
89. The relevant provisions of the BT Licence which continued to have effect between 25 July 2003 and 28 November 2003 are the following:

“Interpretation

“Carrier Pre-selection” means a facility whereby Subscribers who so request can:

1. choose certain categories of Publicly Available Telephone Service to be carried by the Pre selected Operator without having to dial an Access Code prefix or follow any other procedure to invoke such routing; and
2. suspend any pre-selected choice in (1) above for individual calls on a call-by-call basis by dialling an Access Code prefix having made arrangements to do so with alternative Operators.

“Carrier Pre-selection Facilities” means those facilities which enable the Pre-selected Operator to provide to the Subscriber requesting Pre-selection from the Licensee the categories of Publicly Available Telephone Services specified in that request and comprise System Set-Up Facilities and Carrier Pre-selection Standard Services.

“Carrier Pre-selection Functional Specification” means a document published from time to time by the Director following consultation with the Licensee and Interested Parties which specifies technical and other principles which are intended to effect the efficient implementation and utilisation of Carrier Pre-Selection and Carrier Pre-Selection Facilities.

“Carrier Pre-selection Standard Services” comprise, Per Operator Set-Up Facilities and Per Customer Line Set-Up Facilities which are both Standard Services provided by the Licensee in accordance with Condition 45 of this Licence.

“Carrier Pre-selection System Set-Up Costs” means the costs incurred by the Licensee in developing and implementing System Set-Up Facilities.

“Carrier Pre-selection System Set-Up Facilities” means the software and any alterations needed on the Licensee’s switches and the modifications required for the Licensee’s support systems to enable the Licensee to provide Carrier Pre-selection Facilities.

“End-user” means for the purposes of the definition of “Network Service” any person not running a telecommunication system or providing a telecommunication service;

“Interconnection” means the physical and logical linking of telecommunications systems used by the same or a different organisation in order to allow the users of one organisation to communicate with users of the same or another organisation or to access services provided by another organisation irrespective of whether services are provided by the parties involved or other parties who have access to the systems;

“Per Customer Line Set-Up Costs” means the costs incurred by the Licensee in providing Per Customer Line Set-Up Facilities;

“Per Customer Line Set-Up Facilities” means the Carrier Pre-selection Facilities required by a Pre-selected Operator for a particular Subscriber Line in order to meet that Subscriber’s request for Carrier Pre-selection;

“Per Operator Set-Up Costs” means the costs incurred by the Licensee in providing Per Operator Set-Up Facilities;

“Per Operator Set-Up Facilities” means the Carrier Pre-selection Facilities required from the Licensee by any individual Pre-selected Operator for the routing of calls specified in a Subscriber’s request for Carrier Pre-selection and for the purposes of Condition 50A include activities similar to data management amendments and the setting up of arrangements for the electronic transfer of customers orders.

“System Set Up Facilities” means “the software and any alterations needed on the Licensee’s switches and the modifications required for the Licensee’s support systems to enable the Licensee to provide Carrier Pre-selection Facilities.

“Subscriber” means any natural or legal person who or which is a party to a contract with the provider of Publicly Available Telephone Services for the supply of such services in the United Kingdom;”

“Condition 45

45. This Condition shall apply to the Licensee only:

(a) where the Director has determined the Licensee to be an Operator having Significant Market Power as set out in the determination made by the Director in December 1997 pursuant to Regulation 4(1) of the Interconnection Regulations (“the Determination of Significant Market Power”); and

(b) in respect of the relevant market or markets in which the Director has made the Determination of Significant Market Power.

45.1 Subject to paragraphs 45.6 and 45.7 and any exercise by the Director of his functions, the Licensee shall offer to enter into an agreement with an Operator which is a Schedule 2 Public Operator, or offer to amend such an agreement, as the case may be, within a reasonable period, if such Operator requires it:

(a) to connect, and keep connected, to any of the Applicable Systems, or to permit to be so connected and kept connected, the Operator’s telecommunication system and accordingly to establish and maintain such one or more Points of Connection as are reasonably required and are of sufficient capacity and in sufficient number to enable Messages conveyed or to be conveyed by means of any of the Applicable Systems to be conveyed in such a way as conveniently to meet all reasonable demands for the conveyance of Messages between the Operator’s system and the Applicable Systems; and

(b) to provide such other telecommunication services (including the conveyance of Messages which have been, or are to be, transmitted or received at such Points of Connection), information and other services which, to the extent the parties do not agree (or the Licensee is not in any event so required under or by virtue of another Condition), the Director may determine are reasonably required (but no more than reasonably required) to secure that Points of Connection are established and maintained and to enable the Operator effectively to provide the Connection Services which it provides or proposes to provide.”

“Condition 49

49.7 Any information received by a Licensee from any person for the purposes of any provision in Conditions 45 to 50A shall be used only for the purposes for which it was supplied. The Licensee shall not pass such information on to other departments within the Licensee’s Organisation, subsidiaries or partners for which such information could provide a competitive advantage.”

“Condition 50A

50A. This Condition shall apply to the Licensee only:

- (a) where the Director has determined the Licensee to be an Operator having Significant Market Power as set out in the determination made by the Director in December 1997 pursuant to Regulation 4(1) of the Interconnection Regulations (“the Determination of Significant Market Power”); and
- (b) in respect of the relevant market or markets in which the Director has made the Determination of Significant Market Power .

50A.1 The Licensee shall provide Carrier Pre-selection in accordance with the Carrier Pre-selection Functional Specification which does not involve Autodiallers to any of its Subscribers who notify the Licensee in writing that they require it to provide Carrier Pre-selection in accordance with the Carrier Pre-selection Functional Specification which does not involve Autodiallers. Alternatively, the Licensee shall provide Carrier Pre-selection in accordance with the Carrier Pre-selection Functional Specification involving Autodiallers to any of its Subscribers who have been indicated, in a request received by the Licensee from a Pre-selected Operator, as requiring the Licensee to provide Carrier Pre-selection to them in accordance with the Carrier Pre-selection Functional Specification involving Autodiallers.

50A.2 Pursuant to a request under paragraph 50A.1 above, the Licensee shall provide Carrier Pre-selection Facilities to the Pre-selected Operator on reasonable terms in accordance with the Carrier Pre-selection Functional Specification provided that the recovery of costs thereby incurred and any charges for the provision of such Facilities shall be made by the Licensee in accordance with the provisions contained in paragraphs 50A.3 to 50A.8.

50A.3 The Licensee shall ensure that pricing for interconnection related to the provision of Carrier Pre-selection is cost-orientated and that direct charges to consumers, if any, do not act as a disincentive for the use of Carrier Pre-selection.”

The SMP Service Conditions

- 90. On 28 November 2003 (three weeks after the contested Notification was made but before it took effect) the Director published a “Final Explanatory Statement and Notification” headed “Review of the fixed narrowband wholesale exchange line, call

origination, conveyance and transit markets”. This statement includes at Annex A the SMP Service Conditions imposed on BT, and at Annex B a new Carrier Pre-Selection Functional Specification.

91. The SMP Service Conditions at Annex A to the Director’s Final Explanatory Statement and Notification of 28 November 2003 provide among other things:

“Definitions

“Access Contract” means:

- (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
- (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;

“Carrier Pre-selection” means a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which Pre-selected Provider of such Services provided wholly or partly by means of that Network is the Pre-selected Provider he wishes to use to carry his calls by designating in advance the selection that is to apply on every occasion when there has been no selection of Provider by use of a Telephone Number;

“Carrier Pre-selection Facilities” means those facilities which enable the Pre-selected Provider to provide Carrier Pre-selection to Subscribers to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network, including (without limitation to the generality of the foregoing):

- (i) Carrier Pre-selection Per Customer Line Set-up Facilities;
- (ii) Carrier Pre-selection Per Provider Set-up Facilities;
- (iii) Carrier Pre-selection Per Provider On-going Facilities; and
- (iv) Carrier Pre-selection System Set-up Facilities;

“Carrier Pre-selection Functional Specification” means a document, which specifies technical and other principles which are intended to effect the efficient implementation and utilisation of Carrier Pre-selection and Carrier Pre-selection Interconnection Facilities, as may be directed by the Director from time to time for the purposes of the Dominant Provider complying with its obligations under Condition AA8;

“Carrier Pre-selection Interconnection Facilities” means those facilities for Interconnection which enable the Pre-selected Provider to provide Carrier Pre-selection to the Subscribers of the Dominant Provider; including (without limitation to the generality of the foregoing):

- (i) Carrier Pre-selection Per Customer Line Set-up Facilities;

(ii) Carrier Pre-selection Per Provider Set-up Facilities;

(iii) Carrier Pre-selection Per Provider On-going Facilities;

but excluding Carrier Pre-selection System Set-up Facilities;

“Carrier Pre-selection Per Customer Line Set-up Costs” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Customer Line Set-up Facilities;

“Carrier Pre-selection Per Customer Line Set-up Facilities” means those Carrier Pre-selection Facilities required from the Dominant Provider by a Pre-selected Provider in order for the Pre-selected Provider to be able to set up Carrier Pre-selection on the Exchange Line of a Subscriber to whom the Dominant Provider provides a Publicly Available Telephone Service by means of a Public Telephone Network;

“Carrier Pre-selection Per Provider On-going Costs” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Provider On-going Facilities;

“Carrier Pre-selection Per Provider On-going Facilities” means those Carrier Pre-selection Facilities required from the Dominant Provider by any individual Pre-selected Provider which enable the Pre-selected Provider to continue on an on-going basis to offer Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as product management;

“Carrier Pre-selection Per Provider Set-up Costs” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Provider Set-up Facilities;

“Carrier Pre-selection Per Provider Set-up Facilities” means those Carrier Pre-selection Facilities required from the Dominant Provider by any individual Pre-selected Provider in order for the Pre-selected Provider to be able to offer Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as data management amendments and the setting up of arrangements for the electronic transfer of customer orders;

“Carrier Pre-selection System Set-up Costs” means the costs incurred by the Dominant Provider in developing and implementing Carrier Pre-selection System Set-up Facilities, and, for the purposes of cost recovery only, the costs to the Dominant Provider for the provision of Carrier Pre-selection by means of Autodiallers in the period April 2000 to December 2001 (regardless of when the costs were incurred) until such time as those costs have been fully recovered by the Dominant Provider;

“Carrier Pre-selection System Set-up Facilities” means those Carrier Pre-selection Facilities required by the Dominant Provider in order for the Dominant Provider to be able to provide Carrier Pre-selection Facilities, such as the software and any alterations needed on the Dominant Provider’s switches and the modifications required for the Dominant Provider’s support systems;

“**Subscriber**” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such Services in the United Kingdom;”

“Condition AA1(a)”

Requirement to provide Network Access on reasonable request

AA1(a).1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as the Director may from time to time direct.

AA1(a).2 The provision of Network Access in accordance with paragraph AA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.

AA1(a).3 The Dominant Provider shall comply with any direction the Director may make from time to time under this Condition AA1(a).”

(...)

“Condition AA8”

Requirement to provide Carrier Pre-selection etc.

AA8.1 The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to any of its Subscribers upon request.

AA8.2 Pursuant to a request under paragraph AA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to the Pre-selected Provider. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as the Director may from time to time direct.

AA8.3 The Dominant Provider shall ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Carrier Pre-selection.

AA8.4 The Dominant Provider shall ensure that charges for the provision of the respective facilities mentioned below shall be made by the Dominant Provider as follows:

- (a) subject always to the requirement of reasonableness, charges shall be based on the forward looking long-run incremental costs of providing Carrier Pre-selection Facilities unless:
 - (i) the Dominant Provider and the Pre-selected Provider have agreed another basis for the charges; or
 - (ii) any other basis for such charges be used as directed by the Director from time to time;

- (b) the Dominant Provider shall categorise its costs as falling within one of the following categories:
 - (i) Carrier Pre-selection Per Provider Set-up Costs;
 - (ii) Carrier Pre-selection Per Provider On-going Costs;
 - (iii) Carrier Pre-selection Per Customer Line Set-up Costs; or
 - (iv) Carrier Pre-selection System Set-up Costs, and, where the Dominant Provider either fails to categorise its costs in such a manner or the Director considers that any individual item of cost cannot reasonably be categorised in the manner in which the Dominant Provider has made the categorisation, the cost in question shall fall within one of the categories in sub-paragraphs (i) to (iv) above or, as the case may be, in any new category of cost, as the Director may direct;
- (c) the Dominant Provider shall recover the costs for any new category of cost that the Director has directed under sub-paragraph (b) above in the manner in which the Director may direct;
- (d) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection Per Provider Set-up Facilities, Carrier Pre-selection Per Provider On-going Facilities and Carrier Pre-selection Per Customer Line Set-up Facilities by means of direct charges to Pre-selected Providers;
- (e) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection System Set-up Facilities by means of a separate surcharge on all Relevant Calls; and
- (f) the Dominant Provider shall modify any of its charges for the provision of Carrier Pre-selection Facilities in the manner in which the Director may direct.

AA8.5 The Dominant Provider shall comply with any direction that the Director may make from time to time under this Condition AA8.

AA8.6 This Condition is without prejudice to the generality of the provisions in Conditions AA1(a) to AA7 above.”

The CPS Functional Specification

92. The Carrier Pre-Selection Functional Specification mentioned in Condition AA8.2 above is set out at Annex B to the Director’s Final Explanatory Statement and Notification dated 28 November 2003 and contains the following:

“Purpose of this document

1. Carrier Pre-selection is a facility offered to Subscribers which allows them to opt for certain defined classes of calls (see under 'Subscriber Options' below) to be carried by a provider of a Public Telephone Network selected in advance (and having a contract with its Subscriber), without having to dial a routing prefix or follow any other different procedure to invoke such routing. Carrier Pre-selection can be overridden by dialling an Indirect Access Code of another provider of a Public Telephone network (again where there is a contract between the Subscriber and the provider).
2. Carrier Pre-selection must be provided by the relevant Dominant Provider to any of its Subscribers upon request in accordance with this Carrier Pre-selection Functional Specification under obligations imposed on such a Provider under UK legislation implementing the provisions of Article 19 of the Universal Services Directive (2002/22/EC) (see further about those provisions under 'Scope' below). The Dominant Provider must also provide Carrier Pre-selection Facilities in accordance with this Functional Specification under above-mentioned obligations.
3. The Carrier Pre-selection Functional Specification sets out technical and other principles which are intended to effect the efficient implementation and utilisation of Carrier Pre-selection and Carrier Pre-selection Facilities.

Scope

4. Article 19(1) of the Universal Service Directive provides that "National regulatory authorities shall require undertakings notified as having significant market power for the provision of connection to and use of the public telephone network at a fixed location in accordance with Article 16(3) to enable their subscribers to access the services of any interconnected provider of publicly available telephone services: (a) on a call-by-call basis by dialling a carrier selection code; and (b) by means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a carrier selection code." In the United Kingdom, that provision is implemented into UK legislation through the imposition of significant market power (SMP) conditions, which impose obligations relating inter alia to Carrier Pre-selection etc on the Dominant Providers.
5. Carrier Pre-selection and Carrier Pre-selection Facilities must be provided by the following Dominant Providers:
 - BT; and
 - Kingston.
6. Dominant Providers shall be required to provide Carrier Pre-selection Interconnection Facilities to CPS Providers only.
7. Dominant Providers shall provide, on request, Carrier Pre-selection to all Subscribers on Exchange Lines, including the integrated services digital network (ISDN) and Centrex lines. However, Dominant Providers are not required to provide either Carrier Pre-selection or Carrier Pre-selection Facilities in relation to lines on special schemes to assist Consumers who have difficulty affording telephone services.
(...)

Routing

17. Where a Subscriber has elected to have calls routed by Carrier Pre-selection, the following shall apply:

(i) calls to numbering ranges subject to Carrier Pre-selection (see under 'Subscriber Options' above) shall be routed according to the Subscriber's selected CPS Provider to an agreed Point of Connection; and

(ii) calls to numbering ranges excluded from the particular Subscriber option(s) selected shall not be affected.

18. Where a call is routed by Carrier Pre-selection, the Dominant Provider shall prefix the Subscriber's dialled digits with the CPS Code before passing the call across the Point of Connection. The CPS Code ensures routing through the Dominant Provider's Public Telephone Network to the Point of Connection.

19. Where a pre-selected call is dialled using the local dialling format, the Dominant Provider must insert the leading zero and area code between the CPS Code and the dialled Telephone Number.

20. Carrier Pre-selection shall not apply to operator controlled calls, including (but not limited to) transfer charge calls. Operator and other special services of CPS Providers shall be accessed using the appropriate Indirect Access Code.”

III CONTRACTUAL ARRANGEMENTS RELATING TO CPS

Entering into interconnection agreements: confidentiality

93. Before end-users are in a position to select a CPS Operator for some or all of their calls, the CPS Operator must first have entered into an interconnection agreement with their “Access Operator” (for these purposes, BT). Following the conclusion of an interconnection agreement with BT, a competing communications provider is then able to order various interconnection products under that agreement (subject to any necessary technical and planning issues having been resolved). Pursuant to the terms of the interconnection agreement (and during the negotiations leading to the conclusion of the agreement) the competing communications provider may be required to provide information and forecasts of traffic or usage on a regular basis depending on what product they require.

94. For the purposes of discussions with a view to entering into an interconnection agreement we understand that BT and the other communications provider concerned

enter into a standard confidentiality agreement. This standard confidentiality agreement excludes from the definition of “Confidential Information” information which:

- “(a) is in or comes into the public domain other than by reason of a breach of this Confidentiality Agreement; or
- (b) is previously known on a non-confidential basis to the Receiving Party at the time of its receipt; or
- (c) is independently generated, developed or discovered at any time by or for the Receiving Party; or
- (d) is subsequently received from a third party without any restriction on disclosure”

The standard confidentiality agreement also provides:

“3.3 A receiving party shall restrict disclosure of Confidential Information relating to the other Party to those persons who have a reasonable need to know. Confidential Information shall be used solely for the purposes for which it was disclosed.”

95. The confidentiality agreement is entered into before BT gives the third party access to detailed confidential information about the construction of BT’s network and before the third party provides BT with detailed confidential information about its network and requirements.
96. BT also sends prospective interconnecting operators a “Customer Requirements Document” requesting information, some of which is likely to be of a confidential nature, about:
 - (a) the operator’s switches (including the model and software version);
 - (b) details of numbering ranges used by the customer and details of whether those number ranges are hosted on other operators’ networks;
 - (c) traffic levels;
 - (d) the type of switch connections (if any) the third party is seeking;
 - (e) the interconnection products that the third party wishes to purchase from BT.

This information assists BT in configuring its network so as to be able to meet the requirements of interconnecting customers. Discussions between the parties then take place prior to the conclusion of an interconnection agreement.

BT's standard interconnection agreement

97. In accordance with the former Condition 45 of BT's Licence, BT has entered into standard interconnection agreements with a number of other operators, which agreements include provisions concerning CPS.
98. Clause 1 of BT's standard interconnection agreement provides that words and expressions are as defined in Annex D. In that Annex "Confidential Information" is defined as:

"any information, in whatever form, which in the case of written or electronic information is clearly designated as confidential and which, in the case of information disclosed orally, is identified at the time of disclosure as being confidential or is by its nature confidential and including such Confidential Information already disclosed by either Party to the other prior to the date of this Agreement but excluding any information which:

- (a) is in or comes into the public domain other than by reason of a breach of this Agreement; or
- (b) is previously known on a non-confidential basis to the Receiving Party at the time of its receipt; or
- (c) is independently generated, developed or discovered at any time by or for the Receiving Party; or
- (d) is subsequently received from a Third Party without any restriction on disclosure;"

99. Other provisions of BT's standard interconnection agreement provide that:

"3.1 The Parties shall connect and keep connected the BT System and the Operator System at Points of Connection using Customer Sited Interconnect or In-span Interconnect in accordance with this Agreement (...)"

"3.3 Each Party shall comply with the Specifications in so far as they apply to the provision of services pursuant to this Agreement" (...)

"5.1 The Parties shall convey Calls and provide the services and facilities pursuant to the Schedules". (...)

"21.1 Subject to the following provisions of this paragraph 21, a Receiving Party shall keep in confidence Confidential Information and will not (and will use its best

endeavours to ensure that its directors, employees and professional advisers will not disclose such information to any Third Party. (...)

21.3 A Receiving Party shall restrict disclosure of Confidential Information relating to the other Party to those persons who have a reasonable need to know. Confidential Information shall be used solely for the purposes for which it was disclosed. (...)

21.7 Unless otherwise agreed in writing, a Receiving Party shall not use the other Party's Confidential Information to provide commercial advantage to its retail business."

Schedule 143

100. Annex C contains the Schedules to the standard interconnection agreement, which form part of the agreement. Schedule 143 to Annex C is headed "Carrier Pre-Selection" and provides:

"Definitions:

"Carrier Pre-Selection" or "CPS" – a service whereby a CPS Customer opts for some outgoing Calls, in accordance with the specified CPS Option nominated by such CPS Customer, to be routed to the Operator System for conveyance by the Operator; the CPS Customer having the facility to override such option by using an Access Code or equivalent;

"CPS Call" – a call made by a CPS Customer, prefixed by BT with a CPS Routing Prefix in accordance with one of the CPS Options and handed over by BT to the Operator for onward conveyance;

"CPS Customer" – a BT Customer with a BT Exchange Line who orders a CPS Option from the Operator or from an agent or reseller of the Operator, for the avoidance of doubt the term shall not include agents or resellers of the Operator acting as such;

"CPS Option" – one of the All Calls Option, the International Calls Option, the National Calls Option or an option comprising both the International Calls Option and the National Calls Option;

"CPS Routing Prefix" – a routing prefix, in the format 8xxx, allocated by Oftel which indicates the operator selected for the CPS Option.

"Override" – the facility for the CPS Customer on a Call by Call basis, by prefixing any Call with the Access Code of a Third Party Operator (or the equivalent code for BT as notified by BT from time to time) to override the automatic CPS service routing, so that such Call becomes an indirect access Call to such Third Party Operator (or, in the case of BT, a BT Call);

“Transaction” – a BT activity in respect of each CLI for any of set-up, remove, re-number, cancel, change or dummy or any other such CPS processing activity notified by BT;

“2.1 Subject to the provisions of this Schedule, the Parties shall use their reasonable endeavours and co-operate to make CPS available to CPS Customers who are eligible and who have opted for Calls to be made via the Operator System in accordance with CPS Options. (...)

2.3 In the provision of CPS service, both Parties shall operate in accordance with the supporting documentation listed at Appendix 143.1. (...)

2.5 Subject to paragraph 8.3, the Operator shall provide CPS service to, and BT shall be obliged to convey CPS Calls from, direct BT customers on a BT Exchange Line directly connected to and switched by a BT DLE (...)

3.1 BT shall make an electronic Transaction Request ordering facility available in accordance with the Product Description on Working Days between 8.00 a.m. and 8.00 p.m.

3.2 BT shall process each CPS Transaction Request in accordance with the Process Description; provided that BT shall not be obliged in any one day to exceed the agreed Operator threshold volume for CPS Transaction Requests pursuant to the Transaction Request Forecasting Document. (...)

3.4 If the CPS Customer makes a Call to the Operator System under one of the CPS Options, BT shall prefix each such CPS Call with the CPS Routing Prefix allocated to the Operator, and hand over such Call to the Operator System in accordance with the provisions of this Schedule. (...)

4.1 The Operator shall apply to BT and co-operate with BT to establish access to the electronic ordering facility in accordance with the Product Description. (...)

4.3 The Operator shall submit all CPS Transaction Requests to BT via the electronic ordering facility accessed pursuant to paragraph 4.1, in accordance with the Process Description and the Product Description. (...)

7.1 The Operator shall pay BT in respect of activities under this Schedule charges in accordance with the rates specified from time to time in the Carrier Price List.

7.2 BT shall forward to the Operator System the CPS Routing Prefix followed by the Called Party’s telephone number. On receipt of the initial digits of the Called Party’s telephone number the Operator shall immediately proceed to connect the Calling Party to the Called Party, and shall procure that immediately on the Called Party answering the Operator System shall immediately return to BT an Address Complete Message immediately followed by an Answer Signal.”

101. Schedule 143.1 incorporates various documents for the operation of the CPS Service in accordance with Clause 2.3 of Schedule 143. Included among these documents are the CPS Functional Specification, the CPS Code of Practice, the CPS Process IT Automation Description Document (“IT Description”); and the Industry End-to-End

Process Description (“End-to-End Process Description”) issued by the CPS Focus Group from time to time. The version of the IT Description provided to the Tribunal (dated 2 July 2003) outlines the specification of the electronic interface that licensed telecommunications operators must use when ordering CPS services on behalf of their customers.

The CPS Code of Practice

102. On 25 August 2000 CPS service providers agreed to provide CPS in accordance with a Code of Practice. The Code of Practice provided that “Interactions between the CPS operator and the access operator will follow the procedures set out in the *Industry End-to-End Process Description*, the current version of which is available on the OFTEL website”.

The 2001 End-to-End Process Description

103. Two versions of the End-to-End Process Description have been provided to the Tribunal, one dated 8 November 2001 (Issue 8.0) (the “2001 End-to-End Process Description”) and the other dated 16 September 2003 (Issue 9.1) (the “2003 End-to-End Process Description”). Pursuant to clause 2.3 of Schedule 143, both these documents formed or form part of the standard interconnection agreement. BT in particular placed considerable emphasis on the terms of the 2001 End-to-End Process Description and the 2003 End-to-End Process Description.
104. As regards the 2001 End-to-End Process Description, relevant terminology is set out in section 1.3, as follows:

“Carrier Pre-Selection (CPS)” – is the service which allows customers to pre-select a carrier(s) (other than their AO) to deliver certain categories of calls and to be billed directly by that carrier

Access Operator (AO) - is the operator providing the direct network connection to the customer, also known as the local loop provider or infrastructure operator

CPS Operator (CPSO) - is the operator (other than the AO) selected by the customer to carry their calls of a chosen category

Customer - is the person / organisation renting the access service (this includes line resellers)

Switchover period - is the time between the confirmation of an order and the switch on / over date of the service (this will be a minimum of 10 working days)

Reply Slip - is the mechanism agreed within the industry to protect consumers against unauthorised change to their service and is the authorisation from the customer to their AO to allow the change

Match - the successful reconciliation of the electronic order and the Reply Slip

Calling Line Identity (CLI) the telephone number at the network level (not the presented number that is available to customers as a service)”

105. The 2001 End-to-End Process Description envisaged that Customers would arrange their Carrier Pre-Selection service with the gaining CPS Operator and complete any necessary contractual documentation with them. Customers would also complete a Reply Slip (as defined above) which they would send to the Access Operator to authorise the changes to be made to their service. At the same time the gaining CPS Operator would place an order via the “electronic interchange mechanism” with the Access Operator. The Access Operator would then “match” the Customer’s Reply Slip with the gaining CPS Operator’s order. If there was a “match” between the Reply Slip and the gaining CPS Operator’s order then the CPS Service would be “switched on” at the end of the Switchover period.

106. The 2001 End-to-End Process Description contained detailed provisions concerning the design and content of the Reply Slip. The Reply Slip was required to contain certain mandatory information and the format of the Reply Slip was required to be in accordance with various specifications so that it could be processed by BT using certain specified technology.

107. In the 2001 End-to-End Process Description it was stated that CPS Orders had two elements:

- “ - an inter-operator request from the CPS Operator to the Access Operator to arrange CPS;
- a Reply Slip from the customer to their AO to vary their retail relationship with the AO to enable CPS.”

108. If, after 25 working days from the receipt of an electronic order from the CPS Operator, a Reply Slip had not been received then the order would be “timed out” and would not proceed.

The 2003 End-to-End Process Description

109. The 2003 End-to-End Process Description dated 16 September 2003 reflected the removal of the Reply Slip procedure, the introduction of “post code validation” and the Notification of Transfer letter, and a revised transaction forecasting process.
110. The terminology used in the 2003 End-to-End Process Description is largely the same as that in the 2001 End-to-End Process Description. We note, as relevant for our purposes, the following definitions below:

“Access Operator” (AO) – is the operator providing the direct network connection to the customer, also known as the local loop provider or infrastructure operators.”

“Reply Slip – was the mechanism agreed prior to Phase 3 agreed within the industry to protect customers against unauthorised change to their service and was the authorisation from the customer to their AO to allow the change.

“Notification to the customer of Switchover – is the mechanism from Phase 3 onwards agreed within the industry to protect customers against unauthorised change to their service. It involves letters being sent to the customer prior to switchover by both the losing and gaining operators advising of the date and details of the CPS switchover.”

111. Paragraph 3.2.1 of the 2003 End-to-End Process Description provides:

“3.2.1 General Assumptions

Customers via their chosen CPS Operator(s) will arrange the setting up of the Carrier Pre-Selection service. CPSO(s) will raise electronic orders, on the customer’s behalf, with the customer’s Access Operator to set-up the CPS service. There will be a number of different orders/transaction interchanges covering a number of circumstances for the set-up, change, removal etc. of the CPS service. The basic steps for a customer order are detailed below.

- The gaining operator is responsible (and accountable) for the validity of each electronic order it sends to the Access Operator regardless of who raises that order. The electronic order contains details of the CLI(s) and relevant postcode(s) affected.
- The AO validates the order against its customer database.
- If the order can’t be validated the AO rejects the order with one or more error codes, depending on the stage at which the order is rejected within the AO’s systems. In practice, this may result in a corrected order being rejected a second time, but for a different reasons(s) (i.e. at a later validation stage).
- If the order is valid the AO confirms the order and sends notification of date of impending switch to both losing and gaining operators.
- The switchover date will be 10 working days from notification by the AO.
- Both the losing and gaining operators are obliged to notify the customer of the pending switch. If the customer contract is through a reseller, the operator will be responsible for ensuring their reseller notifies the customer of the pending switch.
- Minimum content of the notification is specified in the ‘Notification to Customer of CPS service switchover’ section below.

The customer may contact either the gaining or losing operator (or reseller) to stop the switch.”

112. The process for dealing with CPS orders was summarised in the diagram below:

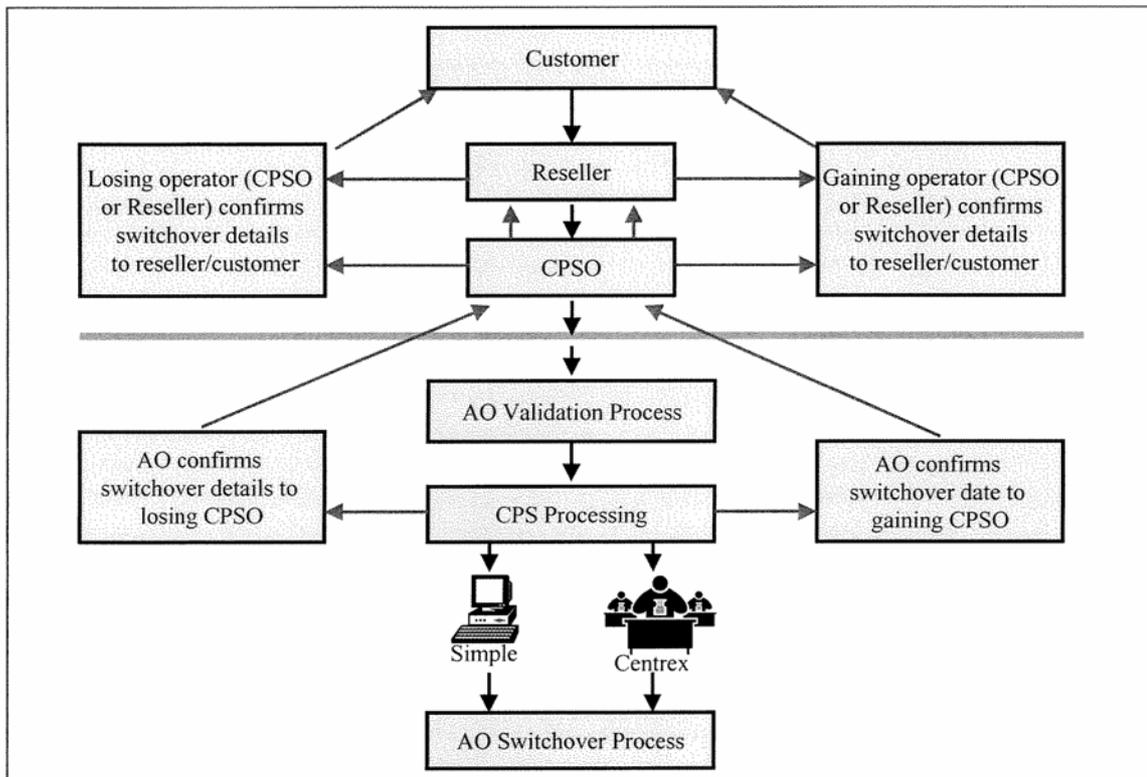


Figure 3 - Customer Order Handling Overview

113. The 2003 End-to-End Process Description contains the following text in respect of the Notification of Transfer letter:

“3.2.7 Notification to Customer of CPS service switchover

The notification to the customer of the details of the CPS service switchover is the means of protecting customers from having their CPS service introduced, amended, or their account moved from one telecommunications provider to another, without their knowledge or authorisation. Notifications must be sent as a part of any CPS Set-up or Remove order by both the gaining and losing operators. The notification will be by letter and must follow the format of the sample shown below. (...)

The minimum content listed below must be communicated clearly to the customer.

- Date of notification
- CLI(s) affected
- CPS options affected (activated or de-activated)
- Switchover date
- The sender's contact details for any queries.”

114. The 2003 End-to-End Process Description also provides that, in respect of each customer who makes a request for CPS, an inter-operator charge will be made to the CPS Operator in respect of the re-configuration of BT's system to enable that specific customer to have CPS. With regard to the processing of CPS Orders the 2003 End-to-End Process Description provides:

“3.4 CPS Set-Up Orders

3.4.1 Outline flow: -

Carrier Pre-Selection Set-up orders are achieved by an inter operator request from the CPS Operator to the customer's Access Operator which includes the customer's AO billing postcode to verify that CPS is set up on the correct CLI.

3.4.2 Detailed Flow: -

The CPSO recruits a customer and completes contract details. The CPSO processes the customer's order to initiate service set-up internally and raises a CPS Set-up order to the customer's AO. If the order is confirmed the AO provides a switchover date, both the losing and gaining operators notify the customer in writing of the changes and date. This is to protect the customer from slamming.

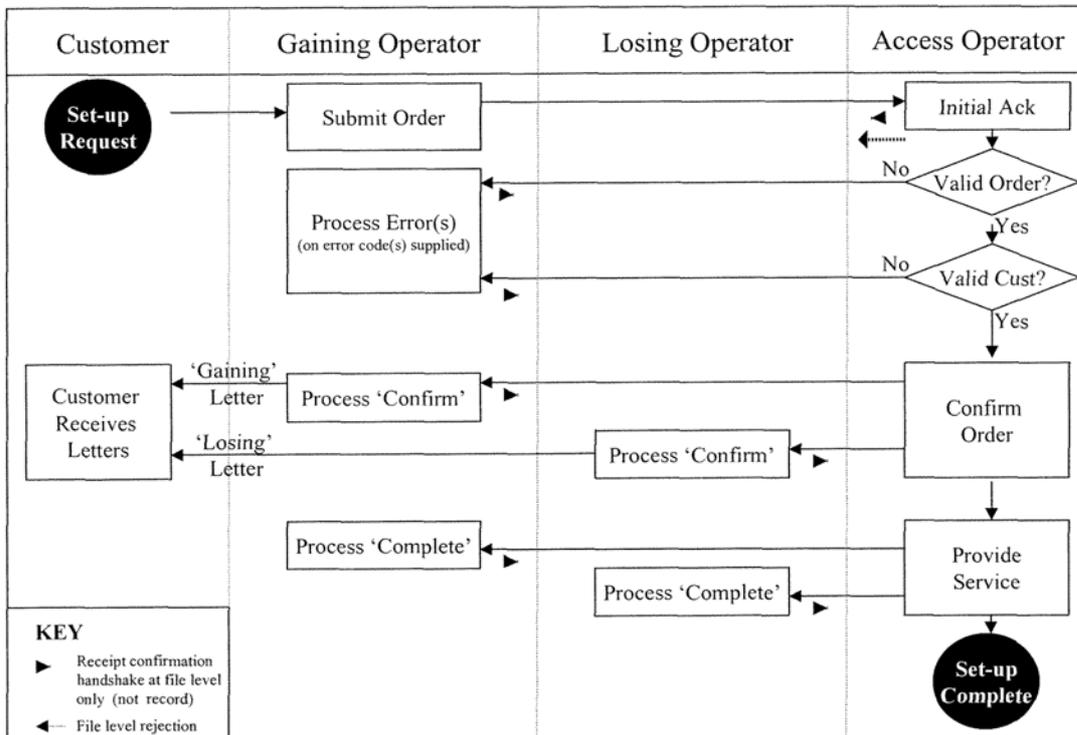


Figure 4 - CPS Set-Up Transaction Flow

The Carrier Pre- Selection Consumer Guide

115. Also relevant is the “Carrier Pre-Selection Consumer Guide” published by Oftel in July 2002. This includes the following information designed to answer consumers’ queries:

“Do I have to make a choice?”

Its up to you. If you do nothing, your current service (including any ‘indirect access’ services) will not change.

How will I get CPS?

To receive CPS you will need to get in touch with a CPS Provider. You may need to return a written contract, alternatively you might be able to enter into a contract on the Internet or over the telephone.

The CPS options available to you for each phone number are:

- CPS for all international calls;
- CPS for all national calls;
- CPS for all international and for all national calls; or
- CPS for ‘all calls’.

You will be able to choose the same or different companies for national and international calls. You cannot use the ‘all calls’ option with the other options.

What about hard selling?

Telephone and door-to-door sales people, who may be working on commission, can be very persuasive. You should think very carefully before either signing something on the spot or agreeing to take a service over the telephone.

Before CPS can be set up on your telephone line you will have a 14-day cooling off period. During this cooling-off period you should receive 2 letters; one from your existing telephone service provider and one from your new service provider. Both these letters will explain your options to you and will include contact details if you need to query changes. If you want to cancel the CPS service you will be able to do so by contacting either your new or existing service provider.

What happens if I suddenly get a bill for telephone calls from a company I have never heard of?

First of all you should make sure that no one else in your household signed up for the service.

You should also remember that you can over-ride a CPS service at any point by dialling an over-ride code. You should then follow the guidance given below on changing your service provider.

How can I change my provider or service later?

If you then want to change your provider, contact the company of your choice. They will do this in the same way CPS was set up in the first place. This will also apply if you decide to change your service back to BT. If you are changing your provider, your current provider will be told of the change automatically.

If you want to change all your call options, your CPS provider will also do this in the same way CPS was set up in the first place. If you choose an option that cannot be used with your existing service, your new request will cancel the old arrangements. This means in particular that if you have 'all calls' CPS and decide to change national or international calls to another provider, the other call types in the 'all calls' package will go back to being provided by BT.

What if I change my mind before the CPS service begins?

If you change your mind after you have entered the contract, you will still have a 14-day 'cooling-off' period to change your mind. To prevent them setting up the CPS service you can contact either BT or the CPS provider you have chosen. If you decide to choose a different provider while you are waiting for your first choice to set up CPS, you must cancel the order within 14 days.

The cooling-off period applies to both the new CPS service and any later changes."

IV THE CONTESTED NOTIFICATION AND EVENTS PRECEDING IT

The "Save and Cancel Other" investigation

116. Prior to the contested Notification of 7 November 2003, the Director had previously considered Save Activity on the part of BT in the context of an earlier investigation that covered both Save Activity and Cancel Other. "Cancel Other" refers to BT's then facility to cancel a customer's order to transfer to another CPS Operator during the 10-day switchover period, without informing the other CPS Operator of the cancellation of the order.
117. That investigation commenced on 23 January 2003 when the Director opened an "own-initiative investigation" under Regulation 6(3) of the Interconnection Regulations in relation to the use of "Save Activity and Cancel Other orders" in the CPS process. The purpose of that investigation was to see whether the Director should make a Direction that changes should be made to the existing CPS Process Description in order to limit the use of Save Activity and Cancel Other orders.
118. In the Direction and accompanying summary issued on 8 July 2003 following that investigation, the Director noted that the applicable CPS End-to-End Process Description did not make it clear in what situation BT was permitted to use "Cancel Other" orders and did not require BT to specify why "Cancel Other" was being used in any particular case. The Director considered that the impact of BT's use of

“Cancel Other” on the development of competition through CPS represented “exceptional circumstances” under Regulation 6(3) of the Interconnection Regulations justifying the intervention of the Director to direct changes to existing interconnection agreements, in particular by imposing changes to the CPS Process Description (forming part of BT’s standard interconnect agreement). Broadly speaking, the Director decided that BT could use its “Cancel Other” facility only where BT had auditable evidence that “slamming” had occurred (see paragraphs 55 to 58 of the summary attached to the Direction of 8 July 2003).

119. As regards Save Activity, the Director noted in the Decision of 8 July 2003 that Save Activity was not forbidden by the CPS End-to-End Process Description and that all losing service providers could undertake such activity. However, he noted that BT alone was able to use a Cancel Other order which immediately cancels a customer’s switch to CPS during the transfer period, without the customer having to contact the erstwhile gaining CPS Operator (paragraph 1.4 of the explanation accompanying the Direction).

120. In the course of the investigation certain CPS Operators had complained to the Director that BT’s use of Save Activity was in breach of Condition 49.7 of the BT Licence. The Director dealt with this complaint at paragraphs 2.40 to 2.45 of the explanation accompanying the Direction of 8 July 2003:

“2.40 The joint respondents submitted that BT’s use of ‘save’ activity is in breach of Condition 49.7 of BT’s Licence, which states:

‘information received from an organisation seeking interconnection is used only for the purpose for which it was supplied. It shall not be passed on to other departments, subsidiaries or partners for whom such information could provide a *competitive advantage*.’ (Emphasis added)

2.41 During the CPS process, BT Wholesale passes information obtained from CPS orders to BT Retail, which then uses this information to contact customers and attempt to persuade them to return to BT (BT Retail does not receive information on the gaining CPSO from BT Wholesale). The joint respondents noted that CPS is a form of interconnection, and that the information about CPS orders is being used for a purpose other than that for which it was supplied. They considered that this information provides BT Retail with a competitive advantage as it identifies precisely which customers are willing to move operators, and therefore which customers BT Retail should target for retention. They stated that Oftel must therefore prevent this transfer of information.

- 2.42 The Director's view is that Condition 49.7 would only prevent BT Wholesale from passing such information to BT Retail if, by doing so, it provided BT Retail with a competitive advantage. This would apply equally to CPSOs. The second sentence of the Licence Condition qualifies the first.
- 2.43 The Director considers, therefore, that there is no requirement to implement a blanket ban on 'save' activity. It is then a matter of his discretion to consider whether the passing of such information provides BT Retail with a competitive advantage. The consideration of whether the passed information provides BT Retail with a competitive advantage does not form part of this investigation. However, this does not prevent the Director from considering this point in the future.

Indeed, the Director notes that he has received a complaint from BVL and Thus alleging that BT has breached Condition 49.7 of its licence and requesting the Director to take action to prevent BT from continuing to use confidential information obtained from CPS orders for the purpose of carrying out 'save' activity. The Director will give due consideration to the alleged licence breach in the context of his investigation into this complaint."

121. We observe at this point that the Director, in the Direction of 8 July 2003, maintained that: (1) the second sentence of Condition 49.7 of BT's Licence qualified the first; (2) under Condition 49.7 the passing of information from BT Wholesale to BT Retail would only be prohibited if the information conferred a competitive advantage on BT Retail; and (3) that there was no requirement to implement a "blanket ban" on CPS Save Activity. However, in relation to the construction of General Condition 1.2 for the purposes of the contested Notification of 7 November 2003, which is drafted in similar but more restrictive terms to Condition 49.7, OFCOM's position has been that: (1) the second sentence of General Condition 1.2 does not qualify the first; (2) the use for marketing purposes of information relating to CPS customers passed from BT Wholesale to BT Retail is prohibited regardless of whether that information confers a competitive advantage on BT Retail; and (3) General Condition 1.2 is intended to impose a wide prohibition on the passing of information and use of information for the purposes of CPS Save Activity.

The Director's Investigation of CPS Save Activity

122. On 23 July 2003 the Director informed BT by letter that Oftel had received a complaint from Thus and BVL that BT's Save Activity was in breach of Condition 49.7 of BT's Licence, and that Oftel had decided to move the complaint into the "full investigation phase". By letters dated 25 July 2003 the Director informed Thus and BVL respectively that their complaint had moved into full investigation.

123. By letter to BT of 5 August 2003 the Director confirmed that, in the light of the changes brought about by the provisions of the 2003 Act, the complaint would be considered under General Condition 1.2 rather than Condition 49.7 of the BT Licence. An extensive exchange of correspondence then took place. A meeting also took place on 30 October 2003.
124. Before the Director, BT argued that General Condition 1.2 did not, on its true construction, prohibit CPS Save Activity.
125. On 7 November 2003 the Director made the formal Notification which is contested in this case. Thereafter there was a further extensive exchange of correspondence between BT and the Director.
126. On 12 December 2003 BT wrote to the Director informing him that, pending the determination of this appeal, BT had ceased making “save” telephone calls and had amended its Notification of Transfer letters so as to take out any reference to BT’s services.
127. According to BT, this has caused disruption to BT, with staff having to be transferred to other activities. Further, BT submitted that it is unable to offer a proper customer service or to protect customers adequately against the effects of mis-selling, or to market its own products and compete effectively with CPS Operators.

V THE CONTESTED NOTIFICATION

128. The main issue before the Director was whether CPS Save Activity by BT contravened General Condition 1.2, which provides that:

“where [a] Communications Provider acquires information from another Communications Provider before, during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiations or arrangements, the Communications Provider shall use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments,

subsidiaries or partners) for whom such information could provide a competitive advantage”.

129. The Director’s approach to the interpretation of this provision is set out in paragraphs 2.12 to 2.13 of the contested Notification:

“2.12 Oftel starts from the premise that General Condition 1.2 must be interpreted in the way that most accurately gives effect to the requirements of the EU legislation that it implements, in particular, Article 4(3) of the Access Directive.

2.13 Without prejudice to the generality of the foregoing observation in paragraph 2.12, Oftel believes that there are two distinct elements to the obligation imposed under General Condition 1.2, reflecting the two distinct elements of the obligation contained in Article 4(3) [of the Access Directive]:

- the general principle: the information is provided for a specific purpose and it should not be used for another purpose; and
- the competitive safeguard principle: because the passing of information to another party *could* provide that party with a competitive advantage, such onwards transmission is prohibited other than where this is necessary for carrying out the purpose for which the information was originally supplied.”

130. As to what the Director considered to be “the general principle”, paragraph 2.14 of the contested Notification stated:

“2.14 Oftel’s view is that the wording of the first sentence of General Condition 1.2 is unambiguous. Where a Communications Provider acquires information from another Communications Provider before, during or after the process of negotiating Network Access, that information should only be used for the purpose for which it was supplied.”

131. The Director also expressed the view that General Condition 1.2 and Article 4(3) of the Access Directive on which it is based were wider than the previous provisions contained in Condition 49.7 of BT’s Licence and Article 6(d) of the Interconnection Directive, (Notification, paragraphs 2.16 to 2.18).

132. As regards the second sentence of General Condition 1.2, the Director found at paragraph 2.19 of the contested Notification:

“The competitive safeguard principle

2.19 Turning to the second sentence of the relevant provisions, Oftel notes that the prohibition – on passing information to another department, subsidiary or partner – is absolute. General Condition 1.2 identifies a category of prohibited transferees and states why these transferees should not be passed the information to which General Condition 1.2 applies – because such information has the *potential* to give them a competitive advantage. It is clear to Oftel that information afforded the protection of General Condition 1.2 cannot be passed on by the recipient. Therefore the second sentence of General Condition expands on the first, rather than qualifying or limiting it. Oftel notes that the Community legislator has placed the emphasis on the potential for competitive advantage, rather than requiring that a competitive advantage from the passing on of information be proved in a particular case.”

133. In Chapter 3 of the contested Notification, the Director found that there were reasonable grounds for suspecting that BT’s Save Activity was in breach of General Condition 1.2 in that, according to the Director:

- (a) BT acquired information from Communications Providers “before, during or after the process of negotiating Network Access” within the meaning of General Condition 1.2 (paragraphs 3.11 to 3.13);
- (b) The information provided to BT was acquired by BT in confidence, in connection with and solely for the purpose of such negotiations or arrangements (paragraphs 3.14 to 3.16, and 3.20 to 3.21);
- (c) The information was supplied solely for the purpose of setting up and enabling the transfer of customers’ calls from the BT network to the network of the Communications Provider. Absent the Network Access arrangements, it is implausible that such information would be supplied to BT by its competitors (paragraph 3.17);
- (d) In passing such customer-specific information to its marketing department to enable them to identify those customers who are about to transfer from BT and in actively marketing to those customers, BT was using the information for a purpose other than the purpose for which the information was provided, namely the necessary reconfiguration of BT’s network (paragraphs 3.17 to 3.19 and 3.23 to 3.24);

- (e) In passing that customer information from BT Wholesale to BT Retail the information was being passed to “another party” within the meaning of General Condition 1.2. In the absence of any ring-fencing or other appropriate procedures to ensure that the information was used by BT Retail only for the purpose for which it was provided (i.e. the implementation of CPS transfer), the use by BT Retail of that information for marketing purposes “at precisely the time when this information is at its most valuable i.e. when customers are most vulnerable to being saved by BT” *could* provide BT with a competitive advantage (paragraphs 3.22 to 3.24).

134. The Director summarised his conclusion in these terms at paragraph 3.25 of the contested Notification:

“3.25 In summary, Oftel considers that BT’s use of customer specific information provided to it by a Communications Provider during the CPS transfer process is in breach of General Condition 1.2:

- absent the need for Network Access arrangements, information about a customer switching would not be provided to BT;
- the information is provided to BT for the purposes of enabling BT to reconfigure its network to enable the customer’s calls to be carried over the network of the alternative Communications Provider and to make any necessary notifications to the customer;
- BT uses this information to engage in marketing activity, i.e. the ‘save call’ and ‘save letter’, which is a different purpose from the purpose for which the information was supplied to BT; and
- the information is initially received by BT Wholesale and is then passed to BT Retail for whom the information *could* provide a competitive advantage.”

135. The Director, however, considered that the industry-agreed “anti-slamming” letter (i.e. the Notification of Transfer letter referred to above) was a vital consumer protection measure, and that such a letter should be maintained. However, all marketing information in this letter should be removed and a neutral form of words agreed by the industry. The Director pointed out that General Condition 1.2 applies to all Communications Providers, and not to BT only (paragraphs 3.32 to 3.34 of the contested Notification).

VI THE PROCEEDINGS BEFORE THE TRIBUNAL

136. The appeal was lodged on 7 January 2004. It is common ground that an appeal lies to the Tribunal pursuant to section 192(1)(a) of the 2003 Act.
137. As discussed above, the Notification was made during the transitional period by the Director on 7 November 2003, before OFCOM had assumed the functions assigned to it under the 2003 Act on 29 December 2003. Pursuant to section 408(5) of the 2003 Act anything done by or in relation to the Director during the transitional period is to have effect as if it had been done by or in relation to OFCOM.
138. At a case management conference held on 3 February 2004 the Tribunal granted BVL and Thus permission to intervene in the proceedings. The Tribunal also granted permission to intervene to NJ Associates, subject to further directions. In a letter dated 12 February 2004 the Tribunal indicated that it considered that it did not appear that it would assist the Tribunal to a material extent for NJ Associates to make further written submissions beyond those that had already been made. The Tribunal considered that, with the intervention of BVL and Thus, the views of third parties would be fully covered. NJ Associates was invited to inform the Tribunal in writing if, at any point, it wished to take further part in the proceedings.
139. A short agreed statement of facts was submitted to the Tribunal on 2 April 2004 (see further below).
140. A further case management conference was held on 6 April 2004.
141. Sections 94 to 96 of the 2003 Act raise procedural issues, in particular the relationship between a notification under section 94 to the effect that OFCOM has “reasonable grounds to believe” that there has been a contravention, enforcement action under sections 95 and 96, and the possibility of an appeal to the Tribunal between these two stages. These issues were raised with the parties at the case management conferences. However, it was agreed by all parties that the Tribunal should proceed to determine the substantive issue on the correct interpretation of General Condition 1.2 and should leave on one side these procedural issues for the purposes of this case.

142. The oral hearing took place on 5 and 6 May 2004.

143. BT's notice of appeal referred to "Winback" activity as well as "Save" Activity. "Winback" activity is directed to winning back to BT a customer who has already transferred to another CPS Operator, as distinct from "Save" Activity which is directed to keeping a customer who is the course of transferring to another CPS Operator. It was agreed by all parties at the hearing that this judgment should be restricted to the "Save" activity, thus leaving on one side the issue as to whether the Notification covered both "Save" and "Winback".

144. BT, OFCOM, BVL and Thus submitted a short agreed statement of facts as follows:

- “(a) CPS is the mechanism which enables a customer to transfer some or all of his/her calls to an alternative Communications Provider whilst retaining his/her existing telephone line, without having to dial additional codes or use special equipment.

- (b) The information provided to BT Wholesale by another CPS Operator during the CPS Transfer Process is as follows:
 - (i) CPS Operator ID
 - (ii) Customer's postcode
 - (iii) Customer's telephone number
 - (iv) Date of switchover
 - (v) Routing prefix
 - (vi) Order number
 - (vii) CPS option selected.

- (c) The flow of information within BT that enabled BT Retail to carry out CPS Save Activity prior to 9 December 2003 was as set out at Tables 3.1 and 3.2 of the explanatory statement to the contested Notification.

- (d) Prior to 9 December 2003 BT Retail used the information provided to BT Wholesale during the CPS Transfer Process to amongst other things carry out CPS Save Activity.”

VII THE ARGUMENTS OF THE PARTIES

145. For convenience, we set out again General Condition 1.2:

“Where the Communications Provider acquires information from another Communications Provider before during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiation or arrangements, the Communications Provider shall use that information solely for the purposes for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage.”

146. General Condition 1.2 is based on in Article 4(3) of the Access Directive which provides:

“3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times, the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.”

BT's submissions

(a) General

147. BT submits that for the information to be covered by General Condition 1.2:

- (a) the information must be acquired from another “Communications Provider”;
- (b) the information must be acquired “before during or after the process of negotiating Network Access”;
- (c) the information must be “acquired in confidence”;
- (d) the information must be acquired “in connection with and solely for the purpose of such negotiations or arrangements”; and

- (e) the information must confer a competitive advantage if passed to any other party.

148. BT contends in respect of each of the above that:

- (a) The information is acquired from its customer, and not from another Communications Provider or “undertaking”. The fact that it is acquired via the gaining CPS Operator is merely a function of the manner in which the system currently operates.
- (b) The information is acquired *after* an interconnection agreement has been entered into. It does not relate to network access and interconnection, as properly understood, but to the provision of CPS. It is information about the end-user, and not about the undertakings that have entered into the interconnection agreement. Hence, the information is not information “acquired before during or after the process of negotiating network access or interconnection arrangements”.
- (c) The information in question is not confidential. In any event, any duty of confidence would be owed to the customer and not to the CPS Operator. The fact that the customer wants to switch is something which the customer wishes both the losing and the gaining operators to know.
- (d) For the reasons given under (b), the information is not acquired “in connection with and solely for the purpose of such negotiations or arrangements”.
- (e) The gaining CPS operator knows that the customer is intending to switch and is free to continue to market its services during the relevant period. The losing operator should have the same opportunity, and does not receive “a competitive advantage” by so doing.

149. Accordingly, submits BT, the requirements of General Condition 1.2 are not fulfilled. In addition, BT submits, the construction of that Condition advanced by OFCOM would be in breach of sections 3, 45 and 47 of the 2003 Act, relevant Community law,

and Article 10 of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”).

150. BT’s submissions are supported by the witness statements of Jeffrey Steggles, Head of Regulatory Compliance for BT’s Retail Division of 6 January 2004 and 10 March 2004, and of David Moulson, Regulated and Transferable Product Manager for BT Retail, dated 4 May 2004.

(b) Whether the information is acquired from another Communications Provider

151. BT submits that the request for CPS originates with the customer with whom BT has an existing contract, and not with the gaining CPS Operator. BT relies on Article 19 of the Universal Service Directive which provides that relevant undertakings (those with SMP) are required to make available CPS “to enable their subscribers to access the services of any interconnected provider of publicly available telephone services”. BT also relies on Article 12(7) of the Interconnection Directive, Clause 50A of BT’s Licence, paragraph AA8.1 of the SMP Service Conditions, and section 3.2 of the 2003 Industry End-to-End Process Description. All those provisions indicate, in BT’s submission, that it is the customer who initiates the CPS transfer, not the gaining CPS Operator. BT’s obligation to provide CPS is triggered by a request from the customer. Therefore, the gaining CPS Operator is merely acting as the customer’s agent when requesting CPS. The information has come “via”, but is not “acquired from”, the gaining CPS Operator. That was particularly clear, according to BT, under the previous Reply Slip system that prevailed until August 2002. However, the change made in the system in August 2002 which phased out the Reply Slip should not mean that Save Activity is outlawed by a “side wind”.

(c) Whether the information is acquired “before during or after the process of negotiating Network Access”

152. BT submits that “the process of negotiating Network Access” within the meaning of General Condition 1.2, or “the process of negotiating access or interconnection arrangements” within the meaning of Article 4(3) of the Access Directive, has nothing to do with the transfer of customers under the provisions relating the CPS. Further,

the information that a BT customer wishes to transfer to another CPS Operator, acquired through the mechanics of the CPS transfer system, cannot sensibly be described as information acquired “before during or after the process of negotiating Network Access”.

153. BT submits, by reference to the legislative background of CPS, Article 4(3) of the Access Directive, and General Condition 1.2, that the requirements to provide CPS to a customer, on the one hand, and to permit Network Access or interconnection, on the other hand, are fundamentally distinct and are not to be confused or blurred. Providing CPS involves the provision of a voice telephony service to a customer. The provision of Network Access or interconnection permits another competing communications provider to have access to one’s own network for a variety of purposes, in particular to provide competing call services to customers. According to BT, the activation of a particular instance of CPS at the request of a retail customer is a very different thing from providing Network Access or interconnection, and occurs subsequently.

154. Article 4(3) of the Access Directive, from which General Condition 1.2 is derived, is nothing to do with the provision of CPS to customers, for two reasons: (a) Article 4(3) relates only to network access and interconnection, and not to CPS; and (b) Article 4(3) applies to the process of the negotiations for interconnection whereas the provision of information in the context of a CPS order is only made after those negotiations have been concluded and an interconnection agreement has been entered into. According to BT, “Network Access” as defined in General Condition 1.4 and in section 151(3) of the 2003 Act, does not include the provision of CPS to BT’s subscribers.

155. BT points out that, following the Commission’s consultation on a numbering policy in 1996 and the Council’s resolution of 22 September 1997, the requirement to offer CPS was introduced by the CPS Directive of 24 September 1998, which added a new Article 12(7) to the Interconnection Directive. That Article required organisations operating public telecommunications networks and having SMP to provide CPS *to their subscribers*. With effect from 25 July 2003, the requirement for CPS to be offered to end-users is contained in Article 19 of the Universal Service Directive. The

requirement to provide CPS has therefore been separated from the network access and interconnection obligations which are contained in the Access Directive. The current requirement upon BT to provide CPS is contained in SMP Service Condition AA8.1, which replaced Condition 50A of the BT Licence with effect from 28 November 2003. BT contends that on the wording of SMP Service Condition AA8.1, CPS is a telephony service provided by an SMP Operator to its subscribers, that is to say, to end-users.

156. On the other hand, submits BT, the Access Directive is concerned with the rights and obligations existing *between two service suppliers*, and not between a service supplier and an end-user. “Network Access” is the process of one service supplier making its facilities or services available to another service supplier, not giving access to an end-user. The Access Directive expressly states that it is not concerned with access by end-users: see Article 1(2). According to BT, the Access Directive envisages negotiations between two service providers on the technical and commercial arrangements necessary to establish access and/or interconnection between their two networks. The terms “access” or “interconnection” as used in the Access Directive do not include the provision of facilities or services (such as CPS) to end-users.

157. BT points out that Article 6(d) of the Interconnection Directive introduced restraints on the use of information obtained from competitors seeking interconnection and applied only to those with SMP. The requirements of Article 6 included requirements concerning non-discrimination, making available information to undertakings seeking interconnection, and transparency. Article 4(3) of the Access Directive, which replaced Article 6(d), contains new restrictions on the use and dissemination of information acquired in connection with interconnection or access negotiations. Article 4(3) is not limited to those with SMP but extends to all operators, and includes both those providing access/interconnection, and those acquiring it. The requirements of transparency and non-discrimination which were previously in Article 6 of the Interconnection Directive are now to be found in Articles 9 and 10 of the Access Directive.

158. Article 4 of the Access Directive is headed “Rights and obligations of undertakings”. BT submits that Article 4(1) makes plain that the subject matter of Article 4,

including Article 4(3), is the right of undertakings to negotiate access or interconnection and the obligation on an undertaking to negotiate when requested by another undertaking to do so. Article 1(2) refers to those *seeking* interconnection and access. The Directive is therefore not concerned with the provision of CPS to end-users.

159. As to the temporal scope of Article 4(3), that Article covers information which has been acquired from another undertaking “before, during or after the process of negotiating access or interconnection arrangements”.
160. BT submits that information about a particular customer who wishes to use CPS will not be exchanged in the course of, or in connection with, the negotiations for Network Access or interconnection. It is information of a different nature and kind, not contemplated in or covered by Article 4(3). What is covered by Article 4(3) is information about the providers’ networks and services, not information about individual customers. Since CPS can only be provided to subscribers of operators that are already interconnected, the provision of CPS to a subscriber does not involve any interconnection negotiations each time it is requested. Interconnection is a prerequisite for the provision of CPS, but CPS information is provided after interconnection has been established and is not information of a type which is required in order to maintain that interconnection. Interconnection agreements, or the location of interconnection points agreed between two providers, will not alter or be affected simply because an individual’s CPS information is provided.
161. Moreover, if there is a transfer of information between two CPS Operators, who are interconnected with BT but not with each other, the information given to BT by the gaining provider merely ensures that the calls are handed over by BT at a different point of interconnection used by the gaining provider. This cannot arise from, or affect, any interconnection agreement between the two CPS Operators because none is in existence. According to BT, if the customer places his request for CPS directly with BT (rather than going through the CPS Operator) then it cannot be said that the information had anything to do with negotiating access or interconnection arrangements between two undertakings. The information cannot change its character

because, instead of being communicated directly by the customer, it is communicated indirectly via the gaining CPS Operator.

162. BT submits that the words “after the process of negotiating access” should not be interpreted as indicating that all information obtained after the conclusion of an interconnection agreement is covered by Article 4(3) of the Access Directive. As is clear from Article 1(2) of the Directive, which concerns its scope and aims, the Directive is concerned solely with rights and obligations of undertakings seeking interconnection. Information about a particular customer is not exchanged by parties seeking interconnection during negotiations. Negotiations for interconnection may break down or there may be a hiatus between the negotiations and the conclusion of the agreement. It was for those reasons that the words “during or after” were added to Article 4(3). Although Article 4(3) is in wider terms than Article 6(d) of the Interconnection Directive, the scope of both provisions is the same, namely information provided in connection with negotiations for interconnection or network access.

163. In any event, BT submitted that once an interconnection agreement has been entered into, the parties can be expected to enter into a specific confidentiality agreement to protect any further exchanges of information. It would be otiose to protect such information by regulatory intervention and would contradict the aim of keeping regulation to a minimum, whenever possible. Similarly, once an interconnection agreement has been entered into the parties can no longer be deterred from negotiating by the fear that confidential information could be used by their competitors for a purpose other than the access or interconnection arrangements. Article 4(3) is not concerned with the protection of consumers, but with encouraging undertakings to negotiate interconnection and access arrangements between themselves. Negotiations for access and interconnection agreements will not be encouraged by including a provision in respect of information relating to CPS, since by definition those negotiations will have already taken place between the undertakings concerned.

164. According to BT, restrictions on undertakings are not to be widely construed. BT relies on Recital 14 and Article 1.2 of the Access Directive which indicate that restrictions are to be kept to a minimum.

165. Finally, it does not follow that merely because the existence of a prior interconnection agreement is necessary before an individual CPS transfer can be made, that each subsequent CPS transfer process constitutes new “network access”. There is no “negotiation” each time a CPS transfer is effected. OFCOM’s approach that all information which would not be transmitted “but for” or is transmitted “because of” interconnection, is covered by General Condition 1.2 and Article 4(3) is too wide a view of those provisions.

(d) Whether the information is acquired “in confidence” or is confidential

166. BT submits that it has a right to know that a customer is intending to switch to another operator and that the customer wishes BT to know this fact. The customer has a contractual relationship with the losing provider (BT Retail) in relation to the services in question. BT Retail is entitled to expect the customer to notify it that he or she wishes to cease receiving those services from it.

167. Moreover the request for CPS originates with the customer and not with the CPS Operator. BT again relies on Article 19 of the Universal Service Directive which provides that relevant undertakings are required to make available CPS “to enable their subscribers to access the services of any interconnected provider of publicly available telephone services”. BT again relies on Article 12(7) of the Interconnection Directive, paragraph AA8.1 of the SMP Service Conditions and section 3.2 of the 2003 Industry End-to-End Process Description, which all show that the request originates with the customer.

168. According to BT, BT needs to know that the customer wishes to have CPS because:

- (a) as Access Operator it needs to make the necessary arrangements and to know that the customer has not been slammed;

- (b) as the losing provider it needs to make the customer aware of the effect that transferring calls may have on other products and services which the customer takes from BT;
- (c) as the losing provider it is at the very least desirable for BT Retail to know that its customer wishes to change his/her calls provider to another CPS provider. BT Retail can then make sure that the customer has made an informed choice and can provide a satisfactory customer service by attempting to address the customer's concerns and to express the hope that the customer will use the losing provider in the future;
- (d) the Order Handling Process for CPS outlined in section 3.2 of the 2003 Industry End-to-End Process contains an express provision for the losing provider to have notice of the pending switch, whether or not it is also the Access Operator; and
- (e) It is not in the customer's interests that they should be protected from the losing provider without any similar restriction being placed on the gaining provider.

169. In those circumstances, BT repeats its submission that the gaining provider is simply acting as the customer's agent in providing the customer's request for CPS. The receipt of that information cannot be confidential as between BT and its customer, as was clear when the Reply Slip procedure was in operation. The fact that the system has now been simplified, and operates electronically, cannot change the underlying reality.

170. It follows, submits BT, that the CPS information in question is not acquired by BT in confidence, nor is it otherwise confidential. The law on confidence should not be distorted: *R v Department of Health ex parte Source Informatics Ltd* [2001] QB 424. According to BT, Article 4(3) does not support the approach that all information to which General Condition 1.2 applies is confidential by virtue of transmission. According to BT, it is the source of the information (the customer) rather than the route by which it is conveyed that is important. The fact that the customer is

intending to switch is a fact which the losing provider is entitled to know and might in the ordinary course have learnt from the customer him/herself. BT contends that it is not opportunistic, unethical, unconscientious or in breach of any obligation of good faith to try to persuade the customer not to switch: see *Source Informatics* at paragraph 31.

171. BT further contends that the requirement that information be provided “in confidence” is contained in General Condition 1.2, but that there is no similar express requirement in Article 4(3) of the Access Directive. According to BT, if a restriction correctly based on Article 4(3) would be more extensive than one based on General Condition 1.2, then under Community Law it is not open to OFCOM to ignore General Condition 1.2 and apply Article 4(3). Only the implementing provisions of national law, not the Directive, can impose obligations on individuals.

172. BT also submits: (i) that when the information is passed across by the gaining provider there are no agreed limits to its use; (ii) not all information transmitted by the gaining provider is confidential and OFCOM’s contrary argument is circular; (iii) General Condition 1.2 applies only to information which is *already* confidential, which is not the case here; (iv) the information does not become confidential, or give rise to a duty of confidence, merely because the gaining provider stands to lose if a ‘save’ call is made; (v) if the gaining and losing providers are not connected with each other, but only with the Access Operator (BT), it is the Access Operator that passes on the information from the gaining provider to the losing provider: in those circumstances the Access Operator does not stand to gain anything by doing so and BT Retail does not see the information in question; and (vi) the fact that the information may be commercially sensitive is irrelevant: the only person able to assert a duty of confidence is the person to whom the duty is owed, i.e. the customer and not the CPS Operator.

(e) “In connection with and solely for the purpose of such negotiations or arrangements”

173. It is accepted by the Director, submits BT, that information may be passed to BT Retail for the purpose of the Notification of Transfer letter, and other purposes (see

paragraph 100 of Ms Wallace's statement on behalf of OFCOM). Since the information can be used to contact the customer as an anti-slamming measure or for other purposes the information cannot be said to be provided "solely" for the purpose of negotiating access or interconnection.

174. Moreover, according to BT, the distinction between what information BT can and cannot supply to BT Retail, or for what purpose BT Retail may use the information is not set out in General Condition 1.2 and is an artificial construction. The true scope of General Condition 1.2 covers technical or other information about one communications provider's network, product or services which necessarily has to be disclosed to BT in order to enable an interconnection agreement or network access arrangements to be negotiated with BT in the first place. General Condition 1.2 does not cover information that a particular customer may be changing his communications provider. That is information which relates solely to the customer and occurs after any interconnection agreement is in place: it has nothing to do with the negotiations leading to the interconnection arrangements. Nor can information about an individual CPS customer be described as information arising "in connection with" negotiations for interconnection or network access.

(f) Competitive advantage

175. BT submits that no breach of General Condition 1.2 arises unless it is shown that BT Retail (the losing provider) could acquire a competitive advantage through the receipt of the information. Normally a competitive advantage could arise if confidential information about a competitor's network or his services were passed to someone who was not entitled to have that information.

176. However, according to BT, the losing provider acquires no competitive advantage through the receipt of the information in question. Both parties are in the same position, both knowing that the losing provider is about to lose a customer. In any event, the gaining provider remains free to market to the customer; it does not confer a competitive advantage to allow the losing provider to do the same. Moreover, the opportunity to speak to one's own customer to ensure that he has the information with

which to make an informed choice is part of a fair competitive process and does not confer “a competitive advantage”.

(g) *Other arguments*

177. According to BT, OFCOM’s interpretation of General Condition 1.2 would render that condition ultra vires and unlawful. In particular, it would put General Condition 1.2 in conflict with section 47 of the 2003 Act, as well as the Director’s duties under section 3(1)(b) and 3(3) of the Act, and with the general principles of EC law of proportionality, equal treatment and legal certainty. In addition, the restriction on the use of the information imposed on BT Retail would be in contravention of Article 10 of the ECHR.
178. BT submits, in particular, that it is disproportionate to prohibit BT from giving its existing customer any information about BT’s existing products and services, which BT wishes to do so as to ensure that the customer has all the facts and that the new provider had not misrepresented the position. By providing such information, including information about the impact on the customer of the change, Save Activity promotes consumer choice. It is also unfair and disproportionate if, during the switchover period, BT is unable to give its customer marketing information whereas the competing provider is free to do so. That is also in breach of the principle of equal treatment.
179. As regards Article 10 of the ECHR, BT submits that it has the right to freedom of expression and the right to receive and impart information without interference by public authorities. To prohibit or restrict BT from imparting information to customers about its services in order to make an informed choice would be contrary to Article 10 of the ECHR and not justified under Article 10(2).
180. Finally, as regards the principle of legal certainty, BT submits that the prohibition of “marketing activity” in the contested Notification is too vague. It is not clear whether reactive activity by BT in response to a customer’s request for further information is covered, nor how far BT can tell the customer about facilities still available to him, such as the 1280 override code, which OFCOM considers to fall within Save Activity.

BT cannot tell whether it is able to inform the customer in neutral terms of the impact on him of the transfer as regards various discounts or other services the customer currently has with BT.

OFCOM's submissions

(a) *General*

181. OFCOM submits that General Condition 1.2, which must be interpreted in the light of Article 4(3) of the Access Directive, contains three obligations, which are distinct and non-cumulative. The first obligation is an obligation on undertakings that receive information from another undertaking before, during or after the process of negotiating access or interconnection arrangements, to use that information solely for the purpose for which it was provided. The second obligation is an obligation to respect at all times the confidentiality of information transmitted or stored. That confidentiality is derived from the transmission of the information by one undertaking (here, the CPS Operator) to another undertaking (here, BT). The third obligation is an obligation not to pass on information so received to any other party for whom such information could provide a competitive advantage.
182. According to OFCOM, the contested Notification is based on BT's breach of the first obligation. It is not based on a breach of the third obligation, which derives independently from the second sentence of General Condition 1.2, nor is it based on the second obligation (respect for confidentiality).
183. OFCOM's essential position is that the information here in question is provided to BT by the gaining CPS Operator solely in order to activate CPS and for closely associated purposes such as the sending of the Notification of Transfer letter. For BT Retail to use that information for CPS Save Activity, the object of which is to persuade the customer not to proceed with the CPS transfer, is to use the information for a purpose other than the purpose for which it was supplied.
184. OFCOM emphasises that the four Communications Directives introduced a new regulatory regime based on the principle of a level playing field for all operators. The

overall purpose of Article 4(3) of the Access Directive is to prevent the abuse of information supplied in the context of negotiating access and interconnection arrangements. For any telecommunications network to function certain information must be passed between competing telecommunications operators, otherwise the network cannot function at all. General Condition 1.2 is designed to deal with the problems that such sharing of information between competitors can create.

185. OFCOM also points out that General Condition 1.2 applies to all Communications Providers, not just those, such as BT, with SMP. Whereas the SMP Service Conditions deal with the problems created by SMP, the General Conditions made under section 45(2)(a) of the 2003 Act are designed to address general issues arising in the communications sector. OFCOM submits that, on a true analysis, CPS Save Activity plainly involves a breach of General Condition 1.2 on the part of BT.

186. OFCOM's submissions are supported by the witness statement of Caroline Louise Wallace, Director of Competition Policy in the Competition and Markets Division of OFCOM, dated 18 February 2004.

(b) Whether the information is acquired from another Communications Provider

187. According to OFCOM, BT (an undertaking) acquires information from the CPS Operator (an undertaking). BT and the acquiring CPS Operator are Communications Providers for the purpose of General Condition 1.2, see section 405 of the 2003 Act. General Condition 1.2 does not require the information passed between undertakings to be information of any particular class, e.g. information that relates to the undertakings themselves or confidential information. It is immaterial whether the CPS Operator issues the transfer instructions to BT as principal or agent since the source of the information is irrelevant. Where there is a CPS reseller the CPS Operator is not acting as agent for the customer when it passes information to BT, because in these circumstances the customer will not necessarily know the identity of the CPS Operator. The customer is not required to inform BT if they choose not to use BT services. Condition 50A of BT's Licence is of no relevance since it is no longer operative; it applied when the Reply Card System was in use. Article 19 of the Universal Service Directive is silent as to how precisely the customer is to contact the

Access Operator and or to give instructions for CPS. The wording of the CPS Industry End-to-End Process Description is industry-agreed wording which changes as required to reflect regulatory and other developments. It cannot be relied upon to alter the proper interpretation of the regulatory regime itself.

(c) Whether the information is acquired before during or after the process of negotiating Network Access

188. OFCOM submits that the words “before during and after” contained in Article 4(3) of the Access Directive should be interpreted in their natural sense, that is, as defining, very broadly, the temporal scope of the application of Article 4(3) and General Condition 1.2. In effect, Article 4(3) covers all information passed between undertakings in the context of an interconnection or access relationship. Information relating to customers who wish to switch their provider is precisely the type of information that will be communicated “after” the process of negotiating access or interconnection arrangements. The process of negotiating access or interconnection arrangements is an on-going one that requires a constant exchange of information between BT and CPS Operators. The CPS customer information is an integral part of the on-going information transfer which enables the interconnection agreement to work. Routing plans need to be updated, and new connection links authorised. In the case of CPS, BT has to change the configuration of its network to enable CPS for a specific customer. The information arises from, and is transmitted as a result of, and consequent upon, and/or in connection with, the existence of an interconnection agreement between that CPS Operator and BT Wholesale. That, in turn, results from the opening up of the market to competition by means of the legal requirements for interconnection and CPS. The “process of negotiating Network Access” refers not only to the initial negotiation for access, but also includes the subsequent availability of CPS to particular customers.

189. In any event, submits OFCOM, on the wording of General Condition 1.2 and Article 4(3) of the Access Directive, it is not strictly necessary that the information should relate to the process of negotiating access. The conjunction “or” between “the process of negotiating access” and “interconnection arrangements” in Article 4(3) indicates

that it is sufficient if the information is connected with “interconnection arrangements”.

(d) Whether the information is acquired in confidence or is confidential

190. OFCOM submits that the contested Notification was not based on a non-respect of confidentiality, but on the fact that BT was using the information in question for a purpose other than that intended. However, according to OFCOM, the information provided by a CPS Operator is necessarily confidential, since that information would never have been communicated but for the request for CPS. OFCOM emphasises that the information transmitted to BT by the CPS Operator is a bundle of information which concerns not only the customer, but also the CPS Operator as well. BT has no “right to know” that bundle of information except to facilitate the CPS transfer process. Under the previous arrangements for CPS and Indirect Access, there was no need for BT to receive any information at all.

191. Moreover, Article 4(3) requires the undertakings in question to “respect at all times the confidentiality of information transmitted or stored”. This means that, even if the information was not of a confidential nature prior to transmission, confidentiality is imposed by that provision. That part of Article 4(3) is reflected in General Condition 1.2 which also requires the Communications Provider in question to respect at all times the confidentiality of information transmitted or stored. The “in confidence” element in General Condition 1.2 should be construed in conformity with Article 4(3).

(e) “In connection with and solely for the purpose of such negotiations or arrangements”

192. OFCOM submits that the purpose for which the information in question is transmitted to BT is the facilitation of the customer transfer. CPS Save Activity falls outside that purpose and is, indeed, the antithesis of it. Save Activity is not neutral, but it is designed to prevent the customer from transferring to another operator.

193. A CPS Operator must have an access or interconnection arrangement with BT. Without that access or interconnection agreement there would be no question of

another Communications Provider supplying information about its customers to BT. The information in question is thus provided “in connection with” those arrangements, and in the context of carrying out the ongoing negotiations required to make those arrangements meaningful, as set out above. Moreover, the information is acquired “in connection with” negotiations for access or interconnection arrangements and not simply obtained “after” an access/interconnection agreement has been concluded.

194. In any event, according to OFCOM, on the true construction of General Condition 1.2, it is unnecessary for the information to be acquired “in connection with” the negotiations, so long as the information is acquired from another Communications Provider and there is an access/interconnection relationship between the undertakings concerned.

(f) Competitive advantage

195. OFCOM submits that the second sentence of Article 4(3) and of General Condition 1.2 is a free-standing obligation which does not cut down or qualify the obligation in the first sentence of those provisions. The Director based the contested Notification on the first part of the first sentence of General Condition 1.2, namely that BT was using information acquired from the CPS Operator for a purpose other than that for which it was provided. The Director was not required to, nor did he, consider the second sentence of General Condition 1.2. The fact that Article 4(3) is expressly stated to apply “without prejudice to Article 11 of the Authorisation Directive” (which provides for information to be supplied to the regulatory authorities) shows that the restrictions in the first sentence of Article 4(3) are intended to apply even where information is provided to a party (such as the regulator) for whom it could not possibly provide a competitive advantage.

(g) BT's other arguments

196. OFCOM rejects BT's arguments based on sections 3, 45 and 47 of the 2003 Act, EC law and Article 10 of the ECHR. OFCOM also referred the Tribunal to similar decisions taken by the French, Portuguese and Irish regulators.

BVL and THUS' Submissions

197. BVL and Thus submit that General Condition 1.2, interpreted in the light of, and as supplemented by, general principles of the English law of confidentiality, places BT under a duty of confidence towards the gaining CPS provider in respect of the information that a particular customer wishes to switch from BT to another CPS provider. Citing a number of authorities, BVL and Thus submit that for a claim of breach of confidence to succeed in English law the information: (i) must have “the necessary quality of confidence”; (ii) must have been imparted in circumstances importing an obligation of confidence; (iii) must have been used in an authorised way to the detriment of the party communicating it: see *Coco v AN Clark (Engineers)* [1969] RPC 41; *Saltman Engineering v Campbell Engineering* [1948] 65 RPC 203; *X Limited v Nowacki & Nowacki (trading as Lynton Porcelain Company)* [2003] EWHC 1928; *Douglas v Hello! Ltd (No. 5)* [2003] EWHC 786; *Thomas Marshall v Guinle* [1979] 1 Ch. 227. All these requirements are fulfilled in this case if BT Retail uses, for the purposes of Save Activity, the information given to BT Wholesale by the CPS Operator for the purposes of activating a CPS transfer.
198. According to BVL and Thus the gaining provider does not provide the information to BT as agent of the customer. The information is the gaining provider’s information which it provides to BT in order for BT to carry out the CPS transfer process. If BT were permitted to use the information for marketing purposes it would have an “unfair start” – a springboard over other retail operators: see *Terrapin Ltd v Builders Supply Company (Hayes)* [1967] RPC 375; *Seager v Copydex* [1967] 2 All ER 415; *Fraser v Evans* [1969] 1 All ER 8; *Schering Chemicals v Falkram Ltd* [1981] 2 All ER 321.
199. The definition of “Network Access” in General Condition 1.4 embraces the CPS transfer process. Each time a retail customer wishes to switch from the losing provider to the gaining provider for the provision of calls, necessary consequential network arrangements have to be made between the respective communications providers in order to achieve that result. The pattern of Network Access between them is being changed. Each time that a customer’s details are processed by means of

the CPS Process, Network Access within the meaning of General Condition 1.2 is being negotiated in respect of that customer's service provisions.

200. The receipt of the information in question gives BT as the losing provider a competitive advantage over other competitive service providers.
201. BVL and Thus emphasise that the critical element of the information that BVL and Thus have to communicate to BT Wholesale, in order for CPS to be activated for one of their customers, is the fact that the customer wishes to make new arrangements with another provider. There is no contractual or other provision which entitles BT to know that information, which is communicated to BT in circumstances of commercial confidence and is commercially sensitive, particularly since it alerts BT to the fact that the customer is "biddable."
202. The submissions of BVL and Thus are supported by the witness statement of John Francis George Bangs, Regulatory and Competition Manager with BVL, dated 25 February 2004.

VIII THE TRIBUNAL'S ANALYSIS

General

203. The issue we have to decide is the true construction of General Condition 1.2. For convenience this is again set out below:

"Where the Communications Provider acquires information from another Communications Provider before during or after the process of negotiating Network Access and where such information is acquired in confidence, in connection with and solely for the purpose of such negotiation or arrangements, the Communications Provider shall use that information solely for the purposes for which it was supplied and respect at all times the confidentiality of information transmitted or stored. Such information shall not be passed onto any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage."

204. Article 4(3) of the Access Directive, on which General Condition 1.2 is based, provides:

"3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information

from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.”

205. The circumstances in which the issues in this case arise are where another CPS operator gains a retail customer from BT, with the result that the customer wishes to transfer all or some of his/her calls from BT to that CPS Operator. In such a situation the customer will retain the access line supplied by BT, and continue to pay BT for the line rental. The customer also continues to be able to use that line to transmit calls entirely over BT’s network by using an override code (1280), and also for any class of calls (e.g. international calls) which the customer does not wish to transfer to the CPS Operator.

206. However, the CPS Operator is unable to provide a service to the retail customer by way of Permanent CPS (as distinct from the use of an autodialler attached to the customer’s line, or the customer manually dialling a prefix) unless BT reconfigures its network to enable the calls from that customer which would previously have been carried by the BT network to be re-routed over the CPS Operator’s network. This reconfiguration, which was referred to in argument as “twiddling the knobs” is carried out electronically by the details being entered into BT’s database such that the switch in the customer’s local exchange is automatically programmed (by the addition of a prefix) to route the customer’s calls over the CPS Operator’s network.

207. For that purpose, the CPS Operator is obliged to supply BT with the information necessary to enable BT Wholesale to reconfigure its network (which means essentially making the necessary changes at the switch) to enable the agreement between the customer and the CPS Operator to be implemented.

208. Paragraph 100 of the witness statement of Ms Wallace, on behalf of OFCOM, describes the process as follows:

“Where a customer wishes to switch certain call types to another Communications Provider using CPS, BT Wholesale is contacted by the gaining CPS Operator and informed that a BT customer wants to transfer some or all of his calls from BT to that CPS Operator. CPS Operators provide this information to BT in order to:

- (1) validate the order (by, for example, checking the telephone number against the postcode or checking if there are any services on the customer's line which prevent CPS being set up such as BT's 'light user scheme' ...)
- (2) implement the necessary changes to its network to enable the appropriate class of that customer's calls to be routed to the CPS Operator;
- (3) provide feedback to the CPS Operator as to the status and progress of the order;
- (4) provide notification to the losing CPS Operator (if the customer is switching from one CPS Operator to another) of pending and actual cease of CPS service;
- (5) ensure that the Notification of Transfer letter is sent out;
- (6) answer customer questions about the order – and possibly cancel the order – if the customer contacts BT, e.g., where a customer contacts BT, having received the Notification of Transfer letter, and wants to know what is going on, wants to stop the transfer because he/she has not given consent to the transfer or wants to know the name of the gaining operator;
- (7) provide management information to the CPS Industry as a whole and OFCOM as necessary regarding the performance of CPS across the Industry; and,
- (8) deal with any CPS Operator specific questions or problems that may arise.”

209. Mr Steggles, in his second witness statement on behalf of BT, does not accept that those are the only purposes for which BT may use the information identified by Ms Wallace. Mr. Steggles points out that within BT the various tasks are carried out as follows in a case where the customer is a BT retail customer:

- “
- BT Wholesale validates the data on the order;
 - BT Wholesale implements the necessary changes at the switch;
 - BT Wholesale provides feedback to the CPS operator;
 - BT Wholesale provides notification to BT Retail of impending and actual switch;
 - BT Retail sends out the notification of transfer letter;
 - BT Retail answers customer questions about the order and possibly cancels the order if the customer contacts BT Retail in cases where it is permitted by the “cancel others” direction;
 - Both BT Wholesale and BT Retail provide management information;
 - BT Wholesale deals with any gaining or losing operator questions that may arise.”

210. As Mr Steggles states, essentially the same process applies when the losing provider is not BT Retail but a third party. Instead of providing the information in question to

the internal division of BT known as BT Retail, BT provides the information to the losing CPS Operator who is then responsible for sending out a Notification of Transfer letter and dealing with any customer queries.

211. It is agreed between the parties that CPS Operators provide the following information to BT Wholesale:

- (a) CPS Operator ID;
- (b) Customer's postcode;
- (c) Customer's telephone number;
- (d) Date of switchover;
- (e) Routing prefix;
- (f) Order number; and
- (g) CPS option selected.

212. Within BT that information is passed to BT Retail, or to a third party CPS Operator where the losing provider is not BT Retail, with the important exception that BT Wholesale does not, save in circumstances not here material, pass on to BT Retail, or any other losing CPS Operator, information which would enable BT Retail or the losing CPS Operator in question to identify the gaining CPS Operator.

213. It seems to us, therefore, that there are at least five different relationships which need to be borne in mind in this case. The first four are external relationships, and the fifth relationship is internal to BT.

214. First, there is BT's contractual relationship with its retail customer. This contractual relationship does not terminate in the context of CPS, since the customer continues to rent the access line from BT and may continue to use the line for calls over the BT network, either by using the override code, or for calls of a type which are not covered by the customer's agreement with the CPS Operator. In the ordinary case, however, the number of calls made by the customer over the BT network will diminish.

215. Secondly, there is the relationship between BT as the network provider and the gaining CPS Operator. This relationship is governed by the interconnection agreement between BT and the gaining CPS Operator, and in particular Schedule 143

of BT's standard interconnection agreement which deals with CPS. The CPS Operator cannot offer call carrying services to the retail customer, or to a CPS reseller, unless BT provides interconnection services to the CPS Operator.

216. Thirdly, there is the gaining CPS Operator's contractual relationship with the retail customer. The CPS Operator agrees to carry the customer's calls over its network, but does not provide the customer with the access line. In order to provide its services to the customer, the CPS Operator must have an interconnection agreement with BT, and BT must make the necessary changes at the switch. The gaining CPS Operator has a contract with the customer and bills the customer for the calls. The gaining CPS Operator sends the customer a Notification of Transfer letter.
217. The contractual matrix may be different if the customer's relationship is with a CPS reseller acting as intermediary, in which event the contractual chain is from the customer to the CPS reseller, and then from the CPS reseller to the CPS Operator.
218. Fourthly, there is the relationship between BT as network provider and the losing CPS Operator. In the context of the industry-agreed procedures, BT as the network provider informs the losing CPS Operator of the impending change to another CPS Operator. The losing CPS Operator will also send a Notification of Transfer letter to the customer (as a precaution against slamming) and deal with any customer queries.
219. In very broad terms, BT's arguments focus on the first of those external relationships, and emphasise CPS as a service which is essentially supplied to the end-user customer. On the other hand, OFCOM's arguments focus, in various ways, on the three other interrelationships, emphasising that the information with which we are concerned is passed to BT in the context of interconnection arrangements between BT and the CPS Operator, without which CPS could not be supplied at all.
220. The fifth relationship is the internal relationship within the different parts of BT, which combines the functions of network provider (also referred to as Access Operator) and supplier of retail services to customers. Most of the evidence regarding the situation at the time the contested Notification was made referred to BT

Wholesale as the Access Operator (i.e. the network provider) and BT Retail as that part of BT responsible for customer services.

221. From the arguments before us, we understood that when a retail customer wished to use a CPS Operator, BT Wholesale was treated as the Access Operator and BT Retail was treated as “the losing operator” for the purposes of sending the Notification of Transfer letter: see Mr Steggles’ first witness statement, at paragraphs 34 to 36. A similar description is to be found in paragraphs 90 and 91 of Ms Wallace’s statement, where Ms Wallace refers to the CPS Operator giving information to BT Wholesale as the Access Operator, and BT Wholesale passing the relevant information to BT Retail.
222. However, when describing the 2001 End-to-End Process Description, Mr Moulson on behalf of BT in his witness statement described *BT Retail* as the Access Operator, and said that under the then applicable system the retail customer was obliged to return the Reply Card to BT Retail as the Access Operator. We find this rather confusing in that BT seems to be using the phrase the “customer’s Access Operator” sometimes to refer to BT Retail (Mr Moulson) and sometimes to refer to BT Wholesale (Mr Steggles).
223. However, for the purposes of the legal analysis, there is in law no distinction between BT Wholesale and BT Retail. Those are simply internal divisions or departments of BT for the time being. Moreover, as we understand it, a great deal of the information with which we are here concerned is held in BT’s central data processing systems, and whether it is received by/passed to BT Wholesale or BT Retail, and at what stage, is largely a function of how those data systems are programmed.
224. In those circumstances we do not think we should put any weight on BT’s internal arrangements, nor do we need to determine whether in different contexts the term “Access Operator” refers to different parts of BT’s internal arrangements, and if so which, or whether it refers to BT as a whole.
225. In our view the single entity, BT, performs two functions, namely: (i) operating the BT network in the sense of providing the infrastructure which other operators may wish to use or be connected to; and (ii) supplying retail telephone services to end

users, in competition with other operators of such services. We refer to these two functions as “network provider” and “retail supplier”. The issue in this case, as we see it, is whether General Condition 1.2 prevents BT from using the CPS information that it has received in its capacity as *network provider* for marketing purposes in its capacity as *retail supplier* of telephone services.

226. Looking more particularly at the circumstances of the present case, it is self-evident that, because of the physical requirement to reconfigure the switch, BT has to be informed, in its capacity as network provider, that one of its retail customers has agreed to transfer all or some of its calls to a competitor, and is necessarily so informed before that transfer has taken place. This situation is markedly different from the supply of most other goods or services, where the customer can simply move his business from one supplier to another and is not dependant on the existing supplier having to undertake any activity to implement that move. In the present case, it seems to us, the need for BT to have the CPS information in question derives principally from its capacity as network provider, without whose cooperation the CPS transfer cannot take place at all.

227. In the course of argument BT characterised OFCOM’s position in various ways as “bizarre”, or “nonsense”. However, the root of this case is, as we have said, that BT combines two functions, on the one hand, that of the “wholesale” provider of the network which other CPS Operators must perforce use and, on the other hand, that of “retail” supplier of services to retail customers, in direct competition with those same CPS Operators. The extent to which BT, as an integrated supplier, is entitled to use, for purposes connected with its retail business, information which its competitors necessarily have to transmit to BT in its capacity as the wholesale provider, seems to us to be a matter of legitimate regulatory concern. In our view, it is neither bizarre nor nonsensical for OFCOM to seek to address that issue.

228. If OFCOM is correct as to the interpretation of General Condition 1.2, the effect of the contested Notification is that during the 10-day cooling-off period between BT *as the network provider* being requested to implement CPS by the gaining CPS Operator, and BT activating the switch, BT as the losing *retail supplier* cannot engage in “Save

Activity” – i.e. marketing activity undertaken in an attempt to persuade the customer not to transfer to the new CPS Operator.

229. That prohibition applies not only to BT Retail, but also to any other losing CPS Operator. For example, in OFCOM’s view, the prohibition of Save Activity would apply where a customer decided to change from one third-party CPS Operator to another third-party CPS Operator, or if the customer decided to switch back to BT Retail from another CPS Operator. Since, however, BT has, as we understand it, by far the largest fixed-line customer base, the effect of OFCOM’s interpretation of General Condition 1.2 would appear in practice to be greater for BT Retail than for other players in the market.
230. Against that background, we deal first with the construction of General Condition 1.2. We take the elements of that provision in the order in which they appear in the text.

The construction of General Condition 1.2

(a) Whether the information is “acquired from another Communications Provider”

231. It is common ground that both BT and the CPS Operator are “Communications Providers” for the purpose of this provision. BT submits, however, that it does not acquire the information “from another Communications Provider”, but from the customer. A request for CPS can only come from the customer, so the CPS Operator is merely acting as the customer’s agent. BT submits that the information may come “via” the CPS Operator but it does not come “from” the CPS Operator as such. We do not accept that submission.
232. We start with the obvious point that on an ordinary and natural reading of General Condition 1.2, the information supplied to BT by the gaining CPS Operator is information which “the Communications Provider” (here BT) acquires from “another Communications Provider” (here the gaining CPS Operator). We have not been persuaded that any other meaning should be given to the ordinary and natural meaning of the wording of General Condition 1.2.

233. We do not accept BT's argument that the information in question is in effect acquired by BT from the customer, and that the gaining CPS Operator is merely acting as the customer's agent. It does not seem to us to matter, on the wording of General Condition 1.2, in what precise capacity the CPS Operator is acting when it transmits the information in question to BT. BT, as a Communications Provider, is still acquiring the information "from another Communications Provider".

234. However, in any event, we do not accept BT's submission that the CPS Operator is acting merely as the customer's agent.

235. We accept that, as at the date of the contested Notification (7 November 2003) BT's legal obligation to provide CPS was expressed to be triggered by a request from the customer. That emerges from the conditions contained in BT's Licence, and in particular Condition 50A. In BT's Licence, "Carrier Pre-Selection" was defined to mean a facility whereby "*Subscribers who so request can choose certain categories of Publicly Available Telephone Service to be carried by the Pre-selected Operator...*". "Carrier Pre-Selection Facilities" was defined to mean "those facilities which enable the Pre-selected Operator to provide to *the Subscriber requesting Pre-Selection from the Licensee* the categories of Publicly Available Telephone Services specified in that request...". Condition 50A of BT's Licence provided:

"50A.1 The Licensee shall provide Carrier Pre-selection in accordance with the Carrier Pre-selection Functional Specification which does not involve Autodiallers *to any of its Subscribers who notify the Licensee in writing that they require it to provide Carrier Pre-selection* in accordance with the Carrier Pre-selection Functional Specification which does not involve Autodiallers..."

236. The effect of this provision appears to be that, at least up to 28 November 2003, BT's obligation to provide CPS was triggered by a request notified in writing by the customer to BT requiring BT to provide CPS facilities to enable the customer's chosen CPS Operator to provide the customer with the Publicly Available Telephone Services specified in the request.

237. However, in our view, it is also immediately apparent from the whole context of this case and, in particular, both from Condition 50A.2 of BT's Licence and BT's standard

interconnection agreement, that the transaction we are concerned with cannot be analysed *merely* as a request from the customer to BT to “enable” the customer to access the service of the CPS Operator. A central part of the transaction is equally the provision *by BT, the network provider, to the CPS Operator* of the interconnection facilities necessary for that Operator to provide the relevant telephone services to the customer.

238. Clause 50A.2 of BT’s Licence provides:

“50A.2 Pursuant to a request under paragraph 50A.1 above, *the Licensee shall provide Carrier Pre-selection Facilities to the Pre-selected Operator* on reasonable terms in accordance with the Carrier Pre-selection Functional Specification provided that the recovery of costs thereby incurred and any charges for the provision of such Facilities shall be made by the Licensee in accordance with the provisions contained in paragraphs 50A.3 to 50A.8.”

239. Clause 50A.2 makes it clear that under the BT Licence the implementation of the “request” from the customer was met by BT supplying Carrier Pre-Selection Facilities, not to the customer, but “to the Pre-selected Operator” – i.e. to the CPS Operator concerned. Under the BT Licence, Carrier Pre-Selection Facilities as defined comprised “System Set-Up Facilities” and “Carrier Pre-Selection Standard Services”. The “System Set-Up Facilities” were “the software and any alterations needed on the Licensee’s switches and the modifications required for the Licensee’s Support Systems to enable the Licensee to provide Carrier Pre-selection facilities”. “Carrier Pre-Selection Standard Services” comprised “Per Operator Set-Up Facilities” and “Per Customer Line Set-Up Facilities”, both of which BT was required to offer as standard services *to other operators* under Condition 45 of the BT Licence.

240. All those services provided by BT to the CPS Operator are governed by BT’s standard interconnection agreement.

241. Indeed, it seems to us that although, for the purposes of Condition 50A of the Licence, there had to be a “request” from the customer, in order for this request to be implemented BT had to be provided with the CPS Operator’s information, as well as with the customer’s information. The essential and dominant reason why that information is being conveyed to BT by the CPS Operator is to enable BT’s system to

be reconfigured with a view to the relevant calls being carried by the CPS Operator rather than by BT. But for the necessity of involving BT for that purpose, the CPS Operator would not convey the information at all. Similarly, the reconfiguration necessary to provide CPS takes place in the context of the contractual relationship between BT and the CPS Operator. From the CPS Operator's point of view, the information is provided to BT so that BT can implement its contract with the CPS Operator and the CPS Operator can implement its contract with the customer. Similarly, the CPS Operator itself acquires the information pursuant to a contractual relationship between that Operator and the customer.

242. However the transaction is analysed, it seems to us unrealistic to characterise the CPS Operator's passing of the information to BT as a purely passive operation in which that Operator is acting merely as an agent, post box or conduit for the retail customer. Even if the CPS Operator is acting on the customer's behalf (as e.g. paragraph 3.2.1 of the 2003 End-to-End Process Description suggests), in our view the CPS Operator is plainly acting as a principal as well.

243. In so far as there may be an element of agency, even in that regard it seems to us more realistic to regard the CPS Operator as acting *qua* **its** customer, rather than *qua* **BT's** erstwhile customer for the calls in question. On any view, by this stage the customer is both the prospective CPS operator's customer (for the calls) and BT's continued customer (for the line). The CPS operator is transmitting the information so that the customer's calls can be transferred to it.

244. Similarly, even under Condition 50A of BT Licence, although the retail customer's line is enabled to implement CPS, the services which BT provides, namely the Carrier Pre-Selection Facilities as defined, are supplied to the CPS Operator under BT's interconnection agreement. Those services are paid for by the CPS Operator, not by the retail customer.

245. In any event, in so far as BT's argument is based on the former Condition 50A of BT's Licence, that argument is in our view weakened by the terms of the SMP Service Conditions which replaced BT's Licence conditions from 28 November 2003.

246. In the SMP Service Conditions “Carrier Pre-selection” means “a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which Pre-selected Provider... he wishes to use to carry his calls”. “Carrier Pre-selection Facilities” are defined as “those facilities which enable the Pre-selected Provider to provide Carrier Pre-selection to Subscribers to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network...”.

247. Condition AA8 of the SMP Service Conditions provides:

“AA8.1 The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to any of its Subscribers *upon request*.”

AA8.2 Pursuant to a request under paragraph AA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification *to the Pre-selected Provider*. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as the Director may from time to time direct.”

248. It is to be noted that the references in BT’s former Licence to “Subscribers who so request”, to “the Subscriber requesting Pre-Selection from the Licensee” and to “Subscribers who notify the Licence in writing that they require it to provide [CPS]” have been dropped from the SMP Service Conditions. Condition AA8.1 now refers only to an obligation on the Dominant Provider to provide CPS “to any of its Subscribers upon request” without specifying explicitly from whom the request is to come. That approach is not inconsistent with Article 19 of the Universal Service Directive which is silent as to whether it is the Subscriber, or the CPS Operator, who makes the request.

249. This shift of emphasis seems to us to reflect more closely the underlying reality, which is that the activation of a CPS transfer is carried out between the CPS Operator and BT, in accordance with the provisions, schedules and annexes to the interconnection agreement between them, without the need for the customer to be actively involved, vis-à-vis BT, at all. In effect, as far as the customer is concerned, since mid-2002 when a customer wishes to use CPS, the customer’s only dealings have been with the CPS Operator, or the CPS reseller, rather than with BT. As we

understand paragraph 3.2 of the 2003 End-to-End Process Description, the Notification of Transfer letter is sent to the customer only after the order has been validated by BT and the date set for the switch. In any event, the Notification of Transfer letter is, as we see it, a consumer protection measure to prevent slamming, as paragraph 3.4.2 of the 2003 End-to-End Process Description and the “Carrier Pre-Selection Consumer Guide” published by Oftel make clear.

250. BT, however, placed heavy reliance on the Reply Slip system that existed prior to July 2002, arguing that this showed clearly that the whole procedure was being carried out on the customer’s behalf, and that that underlying reality had not changed when the system was altered as from that date. BT drew particular attention to the 2001 End-to-End Process Description in which the Reply Slip is defined as “the mechanism agreed within the industry to protect customers against unauthorised change to their service and is the authorisation from the customer to their AO to allow the change,” and to the statement that the function of the Reply Slip was to “vary the retail relationship with the AO to enable CPS”. BT submitted that the abolition of the Reply Slip should not “by a process of alchemy” or “sidewind” result in BT being worse off than it was before, merely because the customer no longer had to be in direct contact with BT.

251. As a general matter, we note that OFCOM’s predecessor, Oftel, was a party to the Industry End-to-End Process Descriptions, and that those documents are incorporated by reference into BT’s standard interconnection agreement. However, as we see it, the End-to-End Process Descriptions are essentially practical implementation documents. We do not think we should place undue weight on documents such as those in resolving the legal questions with which this case is concerned. That applies in particular to the 2001 End-to-End Process Description which was withdrawn a year before the 2003 Act came into force.

252. In any event, while it is true that until mid-2002 the customer was required to send a Reply Card to BT (which apparently went to BT Retail in Durham), the steps in the process were: (i) the customer would enter into a contract with the CPS Operator; (ii) the customer would send the Reply Card to BT; (iii) at the same time the CPS Operator would place his electronic order with BT; and (iv) BT would match the

electronic order with the Reply Card. It can immediately be seen that even under this system BT received the information directly from the CPS Operator (i.e. from another Communications Provider) as well as receiving confirmation from the customer. It seems to us that even under the 2001 Process Description the information provided to BT was as much the CPS Operator's information as the customer's information.

253. Moreover, we have already pointed out that, in our view, the Reply Slip was intended primarily as a consumer protection measure "to protect customers against unauthorised change to their service", since it confirmed that the change was duly authorised by the customer (see the definition of "Reply Slip" in both the 2001 and 2003 versions of the End-to-End Process Description). The Reply Slip, in our view, fulfilled the function that is now performed by the Notification of Transfer letters.

254. In our view it is fallacious to argue that because, as a consumer protection measure, the customer was required to complete the Reply Slip, the whole transaction must be viewed as one carried out by the CPS Operator solely as the customer's agent or post box. As we see it, even where the Reply Card system was in force, the transaction still had the same dual aspects to which we have already referred. In providing the relevant information in its electronic order to BT, by way of "an inter-operator request", the CPS Operator was, in our view, acting pursuant to the interconnection contract with BT and requiring BT to provide the CPS Operator with the facilities envisaged by that contract. Neither activity is in our view correctly described as the CPS Operator solely acting as an agent or post box on behalf of BT's customer, for the reasons already given.

255. While we can see that BT *qua network provider* needs to have the information in question in advance in order to make the necessary changes in the switch, we are unconvinced that BT *qua retail supplier* needs, or ever needed, to have advance notice of the customer's desire to switch to another CPS operator, other than for the purpose of taking whatever measure may from time to time be agreed or required by OFCOM to prevent slamming.

256. We note that in the earlier version of CPS, where the customer entered into a contract with another provider that involved using an autodialler, or if the customer manually

dials a prefix, it was unnecessary for the customer to have any contact with BT or for BT to be informed at all. If that was the case before the Reply Card system came into force, and has been the case since the Reply Card system was phased out, we are not persuaded that we should attach weight to the Reply Card system as such. We see that system primarily as the then preferred anti-slamming measure, and not as a decisive factor in resolving the legal issues which arise in this case.

257. For the same reason we do not accept BT's view that it is only because the Reply Card system was changed that OFCOM is able to advance the arguments as it does. In our view, the mechanics of the Reply Card system do not change the underlying nature of the legal relationships which we have already identified above.

258. Finally on this point, BT drew our attention to the situation which may arise when the customer transfers from one third-party CPS Operator to another third-party CPS Operator, both of whom have an interconnection agreement with BT, but neither of whom are interconnected with each other. In that situation the losing CPS Operator receives the information from BT, for the purposes of sending the Notification Transfer letter, but has no contact with the gaining CPS Operator.

259. In our view, however, in that situation too the information is acquired by the losing CPS Operator "from another Communications Provider", since the information is acquired by the losing CPS Operator from BT, who is a "Communications Provider". The information is also indirectly "acquired from", the gaining CPS Operator, who has passed the information to BT, who in turn passes the information to the losing CPS Operator.

260. For those reasons we do not accept BT's submission that the relevant information is not information which "the Communications Provider acquires... from another Communications Provider" within the meaning of General Condition 1.2.

(b) *"before during or after the process of negotiating Network Access"*

261. BT first submits that CPS is not within the scope of the Access Directive since the Access Directive is concerned with relations between network operators. Instead BT

submits that CPS falls within the Universal Service Directive since CPS is the provision of a service to end users. Accordingly BT submits that General Condition 1.2 does not apply to CPS since General Condition 1.2 concerns Network Access falling within the Access Directive and not the Universal Service Directive. Secondly, BT submits that if, contrary to its first submission, General Condition 1.2 is relevant to the provision of CPS then the customer-specific information that is transmitted in the course of an individual CPS transaction cannot sensibly be described as information transmitted “before during or after the process of negotiating network access”. In particular, the interconnection arrangements must already exist before a CPS transaction can be effected. We take these two aspects in turn.

- *Does General Condition 1.2 apply in the context of CPS?*

262. It is true that the Universal Service Directive imposes obligations on providers of electronic communications networks having SMP to make available facilities which would enable the generality of their customers to take advantage of electronic communications services, such as connection to a fixed-line network, directory enquiries, public pay telephones, facilities for the disabled, operator assistance, telephone directories, number portability and, under Article 19, CPS.
263. The obligation imposed on undertakings having SMP by Article 19(1)(b) of the Universal Service Directive is “to enable their subscribers to access *the services of any interconnected provider* of publicly available telephone services by means of CPS”. That obligation superseded the obligation set out in Article 12(7) of the Interconnection Directive, which was itself added by the CPS Directive, which provided that the relevant organisations having SMP were required “to enable their subscribers... to access the switched services of any interconnected provider of publicly available telecommunications services”.
264. Despite the features to which BT has drawn our attention, such as the need for a customer request under BT’s former Licence Condition 50A, and the former Reply Card system which prevailed until mid-2002, it is impossible, in our view, to regard CPS in a one-dimensional way as merely a service to the customer. The provision of CPS equally involves BT providing services and facilities to the CPS Operator. It is,

in our view, artificial to regard the information here in question as transmitted solely in the context of a “service” to the customer – to whom BT makes no charge – while ignoring the fact that the service to the customer can only be provided if BT provides interconnection to the CPS Operator, to whom BT makes charges. In our view, BT’s approach overlooks the fact that CPS involves the provision by BT of a direct service to the CPS Operator, as well as, but in our view more distantly, a “service” to the customer.

265. The provision in Article 1(2) of the Access Directive which provides that “Access in this Directive does not refer to access by end-users” does not, in our view, assist BT. The purpose of that provision, as OFCOM points out, is to make it clear that an end-user as such is not entitled to have an interconnection agreement directly with the provider of a public telecommunications network such as BT. This case, however, concerns the rights and obligations which flow from the fact that the CPS information in question is supplied *as part of an inter-operator relationship* between the CPS Operator and BT. That, in our view, is part of “the relationship between suppliers of networks and services” referred to in Article 1(1) of the Access Directive.

266. General Condition 1.4(b) provides that for the purposes of General Condition 1.2 “Network Access” means:

“(i) Interconnection of Public Electronic Communications Networks; or

(ii) any services, facilities or arrangements which

(A) are not comprised in Interconnection; but

(B) are services, facilities or arrangements by means of which a Communications Provider or person making available Associated Facilities is able, for the purposes of the provision of Electronic Communications Services (whether by him or another), to make use of anything mentioned in sub-paragraph (c);

and references to providing Network Access include references to providing any such services, making available any such facilities or entering into any such arrangements;

(c) the things referred to in (b)(ii)(B) above are-

(i) any Electronic Communications Network or Electronic Communications Service provided by another Communications Provider;

(ii) any apparatus comprised in such a network or used for the purposes of such a network or service;

(iii) any facilities made available by another that are Associated Facilities by reference to any network or service (whether one provided by that provider or another);

(iv) any other services or facilities which are provided or made available by another person and are capable of being used for the provision of an Electronic Communications Service.”

267. According to the definitions set out in Part I of the General Conditions:

“ ‘Interconnection’ means the linking (whether directly or indirectly by physical or logical means, or by a combination of physical and logical means) of one Public Electronic Communications Network to another for the purpose of enabling the persons using one of them to be able:

(a) to communicate with users of the other one; or

(b) to make use of services provided by means of the other one (whether by the provider of that network or by another person).”

268. The above definitions follow in all material respects the interpretation provisions set out in section 151 of the 2003 Act.

269. It is not suggested that the definitions used in the General Conditions and in the 2003 Act are inconsistent with the definitions to be found in Article 2 of the Access Directive, namely:

“(a) "access" means the making available of facilities and/or services, to another undertaking, under defined conditions, on either an exclusive or non-exclusive basis, for the purpose of providing electronic communications services. It covers inter alia: access to network elements and associated facilities, which may involve the connection of equipment, by fixed or non-fixed means (in particular this includes access to the local loop and to facilities and services necessary to provide services over the local loop), access to physical infrastructure including buildings, ducts and masts; access to relevant software systems including operational support systems, access to number translation or systems offering equivalent functionality, access to fixed and mobile networks, in particular for roaming, access to conditional access systems for digital television services; access to virtual network services;

(b) "interconnection" means the physical and logical linking of public communications networks used by the same or a different undertaking in order to allow the users of one undertaking to communicate with users of the same or another undertaking, or to access services provided by another undertaking. Services may be provided by the parties involved or other parties who have access to the network. Interconnection is a specific type of access implemented between public network operators;”

270. It appears to the Tribunal that “interconnection” is an intrinsic part of CPS and has been seen by the industry and relevant regulatory authorities to be so ever since CPS was introduced. The CPS Directive itself amended the Interconnection Directive, by adding Article 12(7) which refers to ensuring “access to the switched services of any interconnected provider”. Condition 50A, implementing that requirement at domestic level, was introduced by way of an amendment to the Interconnection Regulations. That obligation, in turn, is implemented by the inclusion of Clauses 3.1, 5.1 and Schedule 143 into BT’s standard interconnection agreement. This again indicates that CPS is being dealt with within the sphere of “interconnection”. The various further implementing documents such as the CPS Functional Specification, the CPS Code of Practice, the IT Description and the End-to-End Process Description all form part of BT’s standard interconnection agreement. We note, in particular, that the very detailed requirements for implementing each individual request for CPS set out in the End-to-End Process Description also form part of BT’s standard interconnection agreement.

271. The position, in our view, is also clear from the SMP Service Conditions which came into effect from 28 November 2003. While Condition AA8.1 provides that “the Dominant Provider shall provide [CPS] ... in accordance with the Carrier Pre-Selection Functional Specification to any of its Subscribers on request”, Condition AA 8.2 provides:

“AA8.2 Pursuant to a request under paragraph AA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms in accordance with the Carrier Pre-selection Functional Specification to the Pre-selected Provider. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as the Director may from time to time direct.”

272. According to the definitions in the SMP Service Conditions, “Carrier Pre-Selection Interconnection Facilities” means:

“those facilities for Interconnection which enable the Pre-selected Provider to provide Carrier Pre-selection to the Subscribers of the Dominant Provider; including (without limitation to the generality of the foregoing):

- (i) Carrier Pre-selection Per Customer Line Set-up Facilities;
- (ii) Carrier Pre-selection Per Provider Set-up Facilities;

(iii) Carrier Pre-selection Per Provider On-going Facilities

but excluding Carrier Pre-selection System Set-up Facilities.

273. It is, in our view, clear that in the implementation of CPS BT provides “Network Access”, as defined in the General Conditions, and “Interconnection Facilities” as defined in the SMP Service Conditions.

274. We therefore reject BT’s submission that Network Access “does not include” or “has nothing to do” with the provision of CPS.

- Is the information acquired “before, during or after the process of negotiating Network Access”?

275. We begin with the context of General Condition 1.2. That condition follows General Condition 1.1 which provides:

“1.1 The Communications Provider shall, to the extent requested by another Communications Provider in any part of the European Community, negotiate with that Communications Provider with a view to concluding an agreement (or an amendment to an existing agreement) for Interconnection within a reasonable period.”

276. General Conditions 1.1 and 1.2 are intended to implement Articles 4(1) and 4(3) of the Access Directive which provide:

“1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.

(...)

3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in

particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.”

277. We consider that in construing General Condition 1.2 we should have regard to the very wide definitions of “Network Access” and “access” contained in that provision and in the Access Directive, which we have already set out above.
278. We accept that, in the light of the above context, a primary situation where General Condition 1.2 comes into play is likely to be where an initial interconnection arrangement is being considered between BT and another Operator. In the course of that initial stage, a great deal of confidential information about network configuration, technical interfaces, protocols, routing plans, traffic forecasts and so on are likely to be exchanged in the course of “negotiating” the arrangements (although in the case of BT it seems to us that, even in that context, the scope of “negotiation” may be somewhat limited since, for regulatory reasons, BT ordinarily deals on the basis of its standard terms and conditions).
279. BT submits that General Condition 1.2 is directed to, and covers only, this initial phase. BT submits that CPS does not fall within “the process of negotiating Network Access” since, by definition, CPS cannot be provided until after negotiations for Network Access have been concluded. We do not accept that submission..
280. General Condition 1.2 specifically refers to information acquired by the Communications Provider “before, during *or after* the process of negotiating Network Access”. Even if BT is correct that the reference to “the process of negotiating Network Access” refers only to the initial stage of setting-up an interconnection agreement we consider that the words “or after”, on their natural meaning, cover information that is transmitted after the initial “process of negotiating” is concluded. We do not see why those words should be limited to a hiatus in, or breakdown of, the initial negotiations as BT submits. The expression “after the process of negotiating” seems to us to be wide enough to cover information necessarily transmitted pursuant to, and in performance of, the interconnection arrangements which have resulted from the negotiations referred to, especially since the CPS Interconnection Facilities in question cannot usefully function at all without the information in question.

281. BT accepts that the purpose of General Conditions 1.1 and 1.2 and Article 4(1) and 4(3) of the Access Directive is to protect and encourage the entering into of a wide range of interconnection arrangements between different network operators. In our view, the wider purpose of the Access Directive is to secure that those interconnection arrangements are entered into within a regulatory framework that ensures that the relationships between suppliers of networks “result in sustainable competition, interoperability of electronic communications services and consumer benefits”: see Article 1(1) of the Access Directive.
282. From the point of view of the “level playing field” which the Access Directive is seeking to achieve, we can see why the Community legislator would have wished to ensure that the obligations in Article 4(3) applied not only to information transmitted before and during the process of negotiating Network Access, but also information transmitted subsequently, within the framework of interconnection arrangements already in place, and necessary for the functioning of those arrangements. The use by network operators of that “after-acquired” information in breach of the obligations imposed by General Condition 1.2 seems to us to be equally capable of distorting competition between network operators as would be the “abusive” use of information acquired at an earlier stage. We find it hard to see an intrinsic difference between technical interfaces, routing plans and traffic forecasts on the one hand, and customer-specific information on the other, which would justify the conclusion that the former is within General Condition 1.2 but the latter is not. It is also hard to see why all the antecedent information falls within the scope of General Condition 1.2 but, on BT’s argument, the information contained in a customer-specific request does not.
283. For those reasons it seems to us that the CPS information we are here concerned with is, at least, information transmitted “after the process of negotiating Network Access” within the meaning of General Condition 1.2.
284. That conclusion is also supported textually by the fact that, later in the same sentence of General Condition 1.2, the draftsman refers to the information being used “solely for the purpose of such negotiation or arrangements”. This strongly suggests that the draftsman considered that General Condition 1.2 would apply to “arrangements”. In the context, in our view this must mean “interconnection arrangements”. It would

seem to follow that the draftsman envisaged that the information in question would be information that was not only in connection with the “negotiations”, but also in connection with the interconnection “arrangements” in question. The interconnection arrangements would in the ordinary case be consequent upon the “negotiation”. In our view the draftsman envisaged that the information in connection with those interconnection arrangements would be covered by General Condition 1.2 because it would be information transmitted “after” the process of negotiating Network Access.

285. The Interveners argue that the interconnection arrangements between BT and CPS Operators are part of an “ongoing relationship” in which information in the form of e.g. updated traffic forecasts or network requirements information is regularly being transmitted. That information can, say the Interveners, properly be regarded as information transmitted “during” the process of negotiating Network Access, and there is no reason to distinguish between that “on-going” information and information relating to a particular customer.

286. Furthermore, argue the Interveners, there is a new or at least varied Network Access each time the BT switch is reconfigured to allow CPS on a particular customer’s line. The request from the CPS Operator for that Network Access, and BT’s acceptance of that request, can properly be regarded as part of “the process of negotiating Network Access”, giving the word “negotiating” a purposive interpretation in the context.

287. BT on the other hand contests the latter arguments. Mr Steggles’ evidence (paragraph 39) is that the configuration of the switch to enable certain calls on a specific customer’s line to be transferred to a CPS Operator of the customer’s choice does not have any effect on the existing interconnection arrangements between BT and that CPS Operator, except to ensure that the calls are handed over at the new point of interconnection.

288. We are satisfied on the information available to us, that reconfiguration of the switch by BT is either an intrinsic part of “Interconnection between Public Electronic Communications Networks” within the definition in the General Conditions set out in paragraph 1.4(b)(i), or the use of “services, facilities or arrangements” within the meaning of paragraph 1.4(b)(ii)(B) and (c)(i) of the General Conditions. OFCOM

submitted that it was the former and not the latter but gave us no explanation for this. BT did not provide us with any submissions on this point. On the information available to us we are not in a position to decide within which limb of General Condition 1.4 the activity falls, but we are satisfied that the reconfiguration of the switches by BT in implementation of CPS must fall within one of the two limbs of this provision.

289. Mr Steggles' confirms that the customer's calls are thenceforth carried to a different point of interconnection. In this respect the CPS Operator has "access" to BT's Network and services in a way that did not exist before, and BT has provided an interconnection service that has enabled that customer's calls to be carried to the new point of interconnection. That new or varied "access" has been achieved as a result of a request made to BT by the CPS Operator pursuant to the interconnection agreement between them. That is done pursuant to Schedule 143 to BT's standard interconnection agreement. Clause 2.1 of that Schedule requires the parties "...to cooperate to make available to CPS customers who are eligible and who have opted for Calls to be made via the Operator System in accordance with the CPS Options."

290. It is in these circumstances that the Interveners argue that, in any event, the information transmitted to BT by the CPS Operator is transmitted "during" an on-going process of negotiating network access. According to that argument, the "process of negotiating network access" is wide enough to cover not only the initial negotiations leading to the relevant interconnection agreement between BT and the CPS Operator, but also each individual customer-specific request for CPS which follows necessarily after the interconnection agreement has been entered into. However, in view of our conclusion above, that even on BT's argument the information here in question is transmitted "after" the process of negotiating network access for the purposes of General Condition 1.2 we do not need to decide whether the Interveners' alternative argument, which gives a wide meaning to the "process of negotiating network access", is correct.

291. We are not persuaded by BT's argument that it would be otiose for the information to be within the wording of General Condition 1.2 because the information in question would normally be covered by confidentiality agreements between the parties. As we

see it, an important effect of General Condition 1.2 is to enable OFCOM to enforce certain requirements by regulatory means even if similar obligations may at the same time be the subject of private agreements between the parties. Such an approach has the advantage that the requirements in question, which are of public concern to the regulatory framework as a whole, can if necessary be publicly enforced, without the matter simply being left to the vagaries, costs and possible difficulties of CPS Operators individually seeking to enforce private rights by litigation. Such a regulatory framework ensures that the regulatory rules are publicly known and properly enforced by public authority rather than private contract.

292. We do not think that the difference in wording between Article 6(d) of the Interconnection Directive and Article 4(3) of the Access Directive assists BT. It seems to us plain that the Community legislator intended to give the latter a wider scope than the former. Moreover, we think that comparisons between those two Directives are of only limited value, given the much wider and more flexible concept of “access” to be found in the Access Directive as compared with the Interconnection Directive.

293. Finally, BT again draws our attention to the situation which arises where the customer changes from one third-party CPS Operator to another third-party CPS Operator, in circumstances where the two CPS Operators are interconnected with BT but not with each other. BT submits that the information in question cannot be acquired by the losing CPS Operator “before during or after the process of negotiating Network Access” because no negotiations have ever taken place between the CPS Operators concerned.

294. In our view this argument is not soundly based. In the first place, the information in question has been acquired by BT from the gaining CPS Operator in the context of the interconnection agreement between BT and that CPS Operator. In our view that information is, at the least, acquired “after” the process of negotiating Network Access, for the reasons we have already given.

295. As far as the losing CPS Operator is concerned, that Operator too has an interconnection agreement with BT. As explained above interconnection is an

intrinsic part of CPS. The implementation of the gaining CPS Operator's request by BT involves modifying the switch to remove the losing CPS Operator's access to the customer. The information is thus transmitted to the losing CPS Operator by BT "after the process of negotiating Network Access".

296. For those reasons we consider that the requirement in General Condition 1.2 that the information should be acquired "before, during or after the process of negotiating Network Access" is fulfilled.

(c) *"and where such information is acquired in confidence"*

297. BT submits that the information in question is the customer's information, and that there is no confidentiality in the information which BT receives from its own customer. According to BT, this is information which the customer "wants BT to know" and which BT as the customer's retail supplier "has a right to know". Again, this line of argument seems to us to be misconceived.

298. For the reasons already given, the information which the CPS Operator transmits to BT (CPS Operator's ID, Customer's telephone number and postcode, CPS option chosen, date of switch) cannot be regarded as solely the customer's information, but is equally the CPS Operator's information. Most importantly, implicitly included in that information is the fact that a BT customer has agreed to move its or their business to another Operator.

299. We consider that such information is "acquired in confidence" by BT within the meaning of General Condition 1.2. In the first place, the information is not in the public domain. The facts that the customer has been "shopping around", that the customer has decided to switch, what calls s/he has decided to switch, in respect of which telephone number and from what date, are not publicly known. Furthermore, all that information is commercially sensitive, and particularly valuable to a competitor. The list of potentially "biddable" customers is of particular commercial value. We have little doubt that in an analogous context such customer-specific information would be regarded as a "business secret" for the purpose of the Community competition rules. It would also be "commercial information the

disclosure of which would or might... significantly harm the legitimate interests of the undertaking to which it relates” which the Tribunal would be required to consider excluding from its judgment pursuant to Schedule 4, paragraph 1(2)(b) of the Enterprise Act 2002.

300. In our view it follows from the facts that the information in question: (i) was communicated to BT by the CPS Operator in the context of a commercial confidential relationship; (ii) is information which is commercially sensitive in the hands of a competitor; (iii) is not accessible to the public; and (iv) is information whose use for some unauthorised purpose could or might be potentially injurious to the CPS Operator, that the information is transmitted “in confidence” for the purposes of General Condition 1.2. That in our view would also be the position at common law. To use the well known expression in the cases cited to us by the Interveners, such information “has the necessary quality of confidence about it”.

301. We do not accept BT’s submission that the duty of confidence is owed only the customer, who “wants BT to know” the information in question. This argument overlooks the fact that the information is also, and in many ways primarily, the information of the CPS Operator from whom, in our view, BT acquires the information “in confidence”. The duty of confidence is thus owed to the CPS Operator, and not just to the end-user customer. Indeed, as far as we can see, the information would in any event be covered by the confidentiality provisions of the interconnection agreement between BT and the CPS Operator, to which we have already referred.

302. We add that, as we see it, there is no particular reason to assume that, when the customer signs a contract with a CPS Operator, the customer “wants BT to know” that some or all of his/her calls (and if so which) are to be carried by a third party. It is true that, through the CPS Operator, the information must be passed to BT, *in its capacity as network provider*, to carry out the necessary reconfiguration. But apart from that physical requirement, we are not persuaded that the customer necessarily wants BT, *in its capacity as a retail supplier*, to know with whom or to what extent the customer has made arrangements with an alternative supplier, any more than

would be the case when the customer chooses an alternative supplier for other goods or services.

303. BT also argues that the information acquired directly from the customer under the former Reply Slip system was not acquired “in confidence”, and that the situation cannot now be different because the information reaches BT by a different route. BT further argues that there is no “confidence” because BT Wholesale is entitled, and indeed required, to inform BT Retail as “the losing operator” of the information in question.
304. Those arguments again overlook the fact that the information in question is the CPS Operator’s information as well as the customer’s information. Even under the Reply Card system, BT received the information, by way of electronic order, direct from the CPS Operator. The Reply Card was essentially a consumer protection measure to prevent slamming.
305. As we understand it, BT accepts that it would not be entitled to disclose the information to unauthorised third parties. For example, when the transfer in question takes place between two third-party CPS Operators, BT accepts that it should not disclose any information to BT Retail. That demonstrates in our view that BT in fact recognises that the information is received from the gaining CPS Operator “in confidence”.
306. As to the specific argument that BT Wholesale has to disclose at least some of the information to BT Retail or any other losing CPS Operator, this argument in our view overlooks the distinction between whether the information is “acquired... in confidence”, on the one hand, and the *purposes* for which the information may be used, on the other hand. Self evidently, the fact that information is “acquired in confidence” does not preclude the information being used by BT for the purpose for which it was supplied. As we find below, the purpose of BT Wholesale transferring the information to BT Retail or another losing CPS Operator is to enable the latter to send out the Notification of Transfer letter, as a consumer protection measure. So long as BT remains within that purpose no breach occurs. But that does not alter the fact that BT Wholesale initially acquired the information “in confidence”.

307. The issue in this case, therefore, turns not so much on the question whether the information is acquired “in confidence” within the meaning of General Condition 1.2 – since in our view it is – but for what purpose BT is entitled to use that information. To that issue we now turn.

(d) “in connection with and solely for the purpose of such negotiation or arrangements”

308. BT submits, essentially on the basis of the arguments already set out, that the information in question is not acquired “in connection with... such negotiation or arrangements”, because CPS is quite distinct from the negotiations or arrangements for interconnection to which, according to BT, General Condition 1.2 refers. Moreover, the CPS information in question is not acquired “solely” for the purpose of such negotiations or arrangements.

309. We consider that the words “negotiation and arrangements” refer back to “Network Access”, and in particular to the negotiation of Network Access. The word “arrangements” is intended to refer, in our view, to the interconnection arrangements which result from the process of negotiating, or the negotiation of, Network Access. In our view, the information is acquired “in connection with... such negotiations or arrangements” for the reasons already given. The CPS information cannot, in our view, realistically be regarded as simply the customer’s information. It is information acquired by BT from the CPS Operator in the context of interconnection arrangements between them with a view to implementing the provisions of their interconnection agreement in a particular case. We have already decided that such information is acquired “after” the process of negotiating Network Access. For the same reasons, it seems to us the information is necessarily acquired “in connection with... such negotiations or arrangements” within the meaning of General Condition 1.2.

310. As to whether the information is acquired by BT “solely for the purpose” of such negotiations or arrangements, Ms Wallace of OFCOM has indicated at paragraph 100 of her witness statement that the information is provided to BT in order to:

- “(1) validate the order by, for example, checking the telephone number against the postcode or checking if there are any services on the customer’s line which prevent CPS being set up such as BT’s ‘light user scheme’...and to reject any orders that cannot be validated;
- (2) implement the necessary changes to its network to enable the appropriate class of that customer’s calls to be routed to the CPS Operator;
- (3) provide feedback to the CPS Operator as to the status and progress of the order;
- (4) provide notification to the losing CPS Operator (if the customer is switching from one CPS Operator to another) of pending and actual cease of CPS service;
- (5) ensure that the Notification of Transfer letter is sent out;
- (6) answer customer questions about the order – and possibly cancel the order – if the customer contacts BT, e.g. where a customer contacts BT, having received the Notification of Transfer letter, and wants to know what is going on, wants to stop the transfer because he/she has not given consent to the transfer, or wants to know the name of the gaining operator.
- (7) provide management information to the CPS Industry as a whole and OFCOM as necessary regarding the performance of CPS across the Industry; and,
- (8) deal with any CPS Operator specific questions or problems that may arise.”

311. BT submits that this demonstrates such a wide variety of purposes that there is no reason for the list not to have also included “Save Activity”. We do not however accept that submission of BT.

312. It seems to us that the activities described in (1) to (3) and (8) above are the activities which BT in its capacity as network provider needs to carry out in order to implement the CPS transfer in the context of the interconnection agreement between BT and the CPS Operator. Activities (4) and (5) are a further step in the implementation of the CPS transfer which involves BT contacting the losing CPS Operator and the sending out of the Notification of Transfer letter, pursuant to the End-to-End Process Description which itself forms part of the interconnection agreement. All those activities, in our view, are intimately and closely associated with the execution of the CPS Operator’s request for CPS transfer in respect of a specific customer. That is a request made in the context of the arrangements for Network Access (including interconnection) between the parties under the interconnection agreement.

313. Purpose (6) identified by OFCOM postulates, as we understand it, the situation in which the customer spontaneously contacts BT Retail, rather than the other way round. In those circumstances it is the customer who is asking questions, possibly in response to the Notification of Transfer letter, and BT Retail is the passive recipient of those questions. BT Retail is not using the CPS information given by the CPS Operator to BT Wholesale actively to contact the customer for marketing purposes. In those circumstances, OFCOM raises no objection to BT Retail dealing with customers' queries in connection with the implementation of the CPS transfer. Activity (7) does not seem to require the disclosure of customer-specific information, other than possibly for regulatory purposes.
314. As to the question whether the information supplied by the CPS Operator to BT Wholesale is acquired "solely" for the purpose of "such negotiations or arrangements," in our view at this point General Condition 1.2 becomes somewhat tautologous, since this part of the first sentence indicates that General Condition 1.2 applies where the information is supplied "solely for the purpose of such negotiations or arrangements", while the next following phrase requires the Communications Provider to use the information "solely for the purpose for which it was supplied". The meaning of this part of the Condition appears to be that where the information is acquired "in connection with and solely for the purpose of such negotiations and arrangements", the Communications Provider may use the information for that purpose and for no other.
315. Based on the material before us, we consider that BT acquires the information in question for two purposes. The first, and in our view the primary purpose, is so that BT, in its capacity as network provider, may make the necessary reconfiguration of the switch. A further, subsidiary, purpose is so that BT may take such reasonable steps as may be necessary for consumer protection, of which the sending of the Notification of Transfer letter is the most important.
316. We are unable to identify any other purpose for which the CPS Operator transmits the information to BT. It follows from General Condition 1.2 that BT may use that information only for those two purposes. Whether BT 'Save Activity' is within those purposes is the main issue in the case.

(e) *“the Communications Provider shall use that information solely for the purpose for which it was supplied”*

317. This part of General Condition 1.2 takes us to the heart of this case, namely whether, by using the CPS information for “Save Activity”, BT as a Communications Provider is using the information other than for the purpose for which it was supplied.

318. It seems to us that BT’s breach of General Condition 1.2 was to enable BT Retail to use, or not to prevent BT Retail from using, the information supplied by the CPS Operator for purposes other than purposes strictly limited to consumer protection, such as anti-slamming.

319. We consider first the “save call”. That unsolicited call is made to the customer during the 10-day cooling-off period by BT Retail marketing staff, the information having been passed to BT Retail by BT Wholesale. It is plain from the script with which we have been provided that the purpose of that call is to market BT services to the customer, with a view to deflecting the customer from completing the CPS transaction, while at the same time seeking information about the gaining CPS Operator and its services.

320. It is clear to us that such a call is outwith the primary purpose for which the CPS transfer information is supplied by the CPS Operator to BT Wholesale, namely to effect the reconfiguration of the switch necessary to enable the CPS Operator to supply its CPS services to the customer. BT Wholesale, as network provider, has, as we see it, no operational need to pass such information to BT Retail, its primary function being to meet the CPS Operator’s request, principally by making the necessary changes at the switch.

321. Moreover, we accept OFCOM’s submission that the making of the save call is not only outwith the primary purpose for which the information is supplied but inimical to that purpose. The purpose of the supply of the information is to effect the CPS transfer of the customer to the CPS Operator; the purpose of the save call on the other

hand is to seek to 'save' the customer for BT, i.e. to impede the transfer of the customer to the CPS Operator.

322. We are satisfied on the information available that the "save" call is "marketing activity" within the meaning of the contested Notification. As mentioned below, the line between what is "marketing activity" and what is "vital consumer protection information" to use OFCOM's expression (Day 2, p. 12) may sometimes be difficult to draw. However, it seems to us that an unsolicited telephone call to the customer which is aimed at selling BT's services constitutes, on the natural meaning of words "marketing". It is of interest that when, pending the hearing of this appeal, BT abandoned the "save" call, it did so by disabling its "Campaign Management Tool". That in our view demonstrates that this activity was part of the marketing function and cannot be fairly described as "consumer protection".

323. It follows, in our view, that as regards the "save call" the reasoning set out in the contested Notification is, in its essentials, correct.

324. The same reasoning, it seems to us, applies in principle to any marketing activity carried out by BT Retail to the customer in writing during the cooling-off period. The CPS information in question is not, in our view, passed to BT by the CPS Operator to enable the former to carry out "marketing activity" adverse to his interests, whether in writing or otherwise.

325. As to the Notification of Transfer letter, the sending of that letter does not form part of the principal purpose for which the CPS Operator supplies the information, namely the reconfiguration of the switch. But it is accepted by OFCOM that the sending of the Notification of Transfer letter does, at least at present, form part of what we have described as a subsidiary purpose for which the information is supplied, namely the protection of the consumer in the context of "slamming". We accept that the passing of the information from BT Wholesale to BT Retail for the purpose of sending out a Notification of Transfer letter in neutral terms, and the use by BT Retail of the information for that purpose, is not outwith, nor inimical to, the purpose for which the information was originally supplied by the CPS Operator. That purpose is described in paragraph 3.2.8 of 2003 End-to-End Process Description in these terms:

“The notification to the customer of the details of the CPS service switchover is the means of protecting customers from having their CPS service introduced, amended, or their account moved from one telecommunications provider to another, without their knowledge or authorisation”.

326. The question whether any information, beyond the information that has been provided in the Notification of Transfer letter in use since December 2003, may be included in that letter and still remain within the purpose for which the information is supplied, is a matter we discuss later in this judgment, under the heading “legal certainty”.

(f) *“and respect at all times the confidentiality of information transmitted or stored”*

327. OFCOM does not allege that BT is in breach of this part of General Condition 1.2.

(g) *“Such information shall not be passed on to any other party (in particular other departments, subsidiaries or partners) for whom such information could provide a competitive advantage”.*

328. BT submits that this second sentence of General Condition 1.2 governs the first, so that there is no breach unless the information in question could provide BT Retail with a competitive advantage. According to BT, it cannot be a “competitive advantage” for BT Retail to be in contact with its own customer during the cooling-off period, especially since the gaining CPS Operator is free to remain in contact with the customer during that period.

329. OFCOM submits that the obligation in the first sentence of General Condition 1.2 is independent of the obligation in the second sentence, with the consequence that, once a breach of the first sentence is shown, OFCOM does not need to rely on the second sentence. OFCOM submits that the contested Notification is not based on the second sentence, but that in any event the conditions of the second sentence are fulfilled in this case.

330. It seems to us that, on a literal reading, the obligation in the second sentence of General Condition 1.2 appears to be independent of the obligation in the first sentence. However, it also seems to us that the second sentence constitutes a specific example of circumstances in which the use of information is outside the purpose for which it is supplied, namely where the information is passed to, for example, “another department” of the network provider for whom the information “could provide a competitive advantage”. In effect, the second sentence makes clear that providing a competitive advantage to the retail arm of the network provider is *not* part of the purpose for which the information is transmitted by the CPS Operator. Similarly we can see that since under Section 3(3)(a) and 47(2)(c) of the Act OFCOM’s activities are required to be proportionate and targeted only where action is needed, there would be a question mark over the legality of the contested Notification in the present case if it was not shown that the passing of information by BT as the network provider “could provide a competitive advantage” to the other party in question. Indeed, the Interveners complaint, which triggered the Director’s investigation was based on the allegation that “Save Activity” conferred on BT an undue competitive advantage.
331. In our view, therefore, OFCOM is required to show that the passing of the information by BT Wholesale to BT Retail (another department) “could provide a competitive advantage” to the latter. In our view OFCOM is required to demonstrate that: (i) as part of showing that the information is being used, or could be used, for a purpose other than the purpose for which it is supplied; and (ii) in order to show, in this particular case, that OFCOM’s actions in this case are proportionate.
332. We do not accept OFCOM’s submission that it did not base the contested Notification, at least in part, on the contention that the passing of the information to BT Retail could provide the latter with a competitive advantage: see paragraphs 3.22 to 3.24 of that document.
333. As to whether BT was in breach of the second sentence of General Condition 1.2, it seems to us that the use of the information in question by BT Retail, for the purposes of the “save call”, “could provide a competitive advantage” to the latter. As the contested Notification points out, the possibility of contacting the customer prior to the switchover, with a view to persuading the customer not to switch, is a valuable

competitive opportunity for BT. By means of the information passed to it, BT knows that the customer may be “biddable”. In addition, BT Retail knows the pattern of the customer’s existing calls, and is in a position to make suggestions as to how to take advantage of the various packages and offerings which are available from BT. In those circumstances in our view the misuse of the information supplied by the CPS Operator to BT in its capacity as network provider plainly “could provide a competitive advantage” to BT in its capacity as retail supplier.

334. Although in the normal case there is, as far as we know, no regulatory objection to BT contacting its existing or prospective customers with marketing information of various kinds, the key factors here it seems to us are that: (i) BT is making the call at a particular time, i.e. during the switchover period; (ii) the purpose of the call is specifically to defeat a particular transaction, namely the customer’s move to another retail provider; (iii) BT would not be able to make that call at that particular time or for that specific purpose had the information as to the impending CPS transfer not been passed by BT Wholesale to BT Retail; (iv) BT Wholesale in its capacity as network provider received the information in confidence from the CPS Operator for the purpose of making the network connection; and (v) BT Wholesale did not receive the information for the purpose of enabling BT Retail to use that information so as to defeat the very transaction for which the CPS information was supplied in the first place. It seems to us that use for that latter purpose gives rise to a breach of General Condition 1.2.

335. The situation is not, in our view, very far from the well known principle of English law, originally expressed by Roxburgh J in *Terrapin Limited v. Builders Supply Co. (Hayes)* (1959) [1967] RPC 375 at 391:

“a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication, and spring-board it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public.”

Other arguments advanced by BT

336. We have found that the use by BT in its capacity as retail supplier of information supplied to it by the CPS Operator in its capacity as network provider during the cooling-off period with the aim that the switch by the customer will not take place involves (i) the use by BT of that information for a purpose other than the purpose for which it was supplied which (ii) could provide a competitive advantage for BT. That applies, in particular, to the unsolicited “save call”.

337. Article 10 of the ECHR provides:

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

338. We have heard no detailed argument on Article 10. Even if Article 10(1) could be applicable in the present case as regards the right “to impart information” it seems to us, for the reasons set out above, that the contested Notification is within the scope of Article 10(2), as a restriction imposed by law in a legitimate regulatory context, and, in particular, for preventing the disclosure of information received in confidence. It seems to us that any other view would mean that Article 4(3) of the Access Directive was itself in breach of the ECHR, which is not a view we could take without making a reference to the European Court of Justice under Article 234 of the EC Treaty.

339. It seems to us that the same conclusions follow in principle in respect of other forms of unsolicited marketing activity taking place during the switchover period with the purpose of “saving” the customer for BT.

Legal certainty/proportionality

340. In respect of the unsolicited “save call” we can see no grounds for holding that the contested Notification is disproportionate, outside OFCOM’s powers under the Act, or contrary to any provisions of Community law. As regards the principle of legal certainty, whatever the precise ambit of “marketing activity”, it does not seem to us seriously in doubt that the unsolicited “save” call constitutes “marketing activity” for the purpose of the contested Notification.
341. However, from the point of view of legal certainty, and also perhaps from the point of view of proportionality, it seems to us that on the basis of the contested Notification there may be a degree of doubt at the margin as to what constitutes “marketing activity”, and what may legitimately be regarded as information for consumer protection or, possibly, neutral information which does not fall within the ambit of “marketing activity”. Although some ambiguity at the margin would not, in our view, invalidate the contested Notification, it is desirable that any such ambiguities should be resolved.
342. We have in mind particularly: (a) information to the customer regarding the availability of the 1280 access code; (b) whether there is other neutral information useful to the customer which may legitimately be communicated by the losing CPS Operator (whether BT Retail or any other operator) without contravening the prohibition of “marketing activity”; and (c) whether “marketing activity” includes information supplied to the customer by the losing CPS Operator in circumstances where it is the customer who has approached the losing CPS Operator, and not the other way round.
343. It seems to us there may be scope for clarifying these issues, from the point of view of legal certainty, possibly by making it clear, in the existing definition of “marketing activity”, that that expression includes/does not include certain more precisely defined actions. A question such as whether the access code can be mentioned in the Notification of Transfer letter should not in our view be left in the air for possible enforcement action later. The Tribunal would wish to hear the parties on this aspect before making any necessary orders under section 195 of the Act.

344. The above judgment is predicated on the assumption, which we accept for present purposes, that OFCOM is in a position, using the public powers available to it if necessary, to take prompt and effective action to eliminate the practice of “slamming”. If slamming were found to be widespread and regulatory action ineffective, it might become necessary, in particular from the point of view of legal certainty and/or proportionality, to revisit the question of how far the losing CPS Operator could or should contact the customer during the switchover period for consumer protection purposes.

345. We have not found it useful to consider the decisions of other national regulatory authorities to which our attention was drawn, interesting although they are.

346. Neither party invited us to make a reference to the Court of Justice under Article 234 of the EC Treaty. On the view we have formed we do not consider that such a reference is necessary in order for us to give judgment.

IX CONCLUSION OF THE TRIBUNAL

347. The result of the foregoing is that BT’s appeal is dismissed, subject to possible further consideration of the definition of “marketing activity” set out in the contested notification of 7 November 2003.

Christopher Bellamy

Ann Kelly

Marion Simmons QC

Charles Dhanowa
Registrar

9 December 2004