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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1025/3/3/04
1040/3/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10th March 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
MARION SIMMONS QC
ANN KELLY

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC Appellants

and

THE OFFICE OF COMMUNICATIONS Respondents

Supported by

THUS PLC AND BROADSYSTEM VENTURES LIMITED

and

N J ASSOCIATES Interveners
("CPS Save Activity")

BRITISH TELECOMMUNICATIONS PLC Appellants

and

OFFICE OF COMMUNICATIONS Respondents
("WLR Save Activity")

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

Miss Eleanor Sharpston QC and Mr. John O'Flaherty (instructed by the Director of Legal Services (Competition) OFCOM) appeared for the Respondent.

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HEARING

1 THE PRESIDENT: Good morning ladies and gentlemen. We have a number of things to discuss
2 today. I think the Tribunal's letter to the parties of 4th March can serve as our agenda if that is
3 convenient. I think we have just this minute been handed up a letter which we have not had
4 a chance to look at yet, Mr. Barling.

5 MR. BARLING: It might be worth the Tribunal having just a glance at it now. It relates to the letter
6 that came from Ofcom on 8th March.

7 THE PRESIDENT: Yes, it is in relation to two services, is that right?

8 MR. BARLING: Yes, we basically hold our hands up, we got it wrong.

9 THE PRESIDENT: Pulse, metering and call diversion, yes.

10 MR. BARLING: The point was a good one, but I am afraid the wrong services were indicated and
11 the letter indicates which the right ones are. Apologies for that.

12 THE PRESIDENT: Thank you for putting that straight. What we think is probably a convenient
13 course this morning is to go through these various issues, perhaps indicating the kind of view
14 that we are taking at the moment on them, with a view to seeing whether there are disputes at the end
15 of the day and whether we actually do need to give a Judgment, but if there are things that we
16 do need to resolve we will give a Judgment and we probably will not do that this morning, but
17 we may be able to make quite a lot of progress, I think, on a more informal basis just seeing
18 where we are.

19 Can we then turn to the issue of clarification of the information which a losing
20 provider may provide to its customers? Is it convenient to start on that point? The first matter
21 is the override code which in the case of BT is the 1280 number. On this point one issue has
22 occurred to us which does not appear to have been particularly fully argued in the papers
23 before us which is the provisions of Article 19.1 of the Universal Services Directive, which
24 seems to require Ofcom to ensure that CPS is provided. 19.1(b):

25 "... by means of pre-selection with a facility to override any pre-selected choice on
26 a call by call basis by dialling a carrier selection code."

27 from which it would appear that the existence of an override code is, as it were, intrinsic to the
28 provision of CPS. If that is right, the question that we have in our minds is how is the
29 customer to know that they have that apparently essential facility unless somebody tells them
30 that they have it and how to use it. I think probably that point is primarily for you,
31 Miss Sharpston – I do not know if you have any particular reaction to it?

32 MISS SHARPSTON: Sir, my reaction is I am afraid that since you have just raised it with me
33 I should wish just to check with those with me as to what Ofcom's response is. I hope I would
34 be able to deal with it then. The position is, of course, every communications provider has an

1 override code – BT among others – and the issue is then whether all codes should be provided,
2 what the mechanism should be, but perhaps I can take instruction on the specific point under
3 the Directive that you have raised with me.

4 **THE PRESIDENT:** Well I would have thought on any view if any code is to be provided everybody
5 should provide the code, but it is a bit difficult to see how the consumer can manage unless
6 everybody does. That is the point that we are on at the moment, so I think perhaps at some
7 point in the morning we may put this case back for a few minutes so that things that have
8 cropped up can be discussed with the parties. Do you have any particular observation on that
9 point, Mr. Barling?

10 **MR. BARLING:** Sir, no. With respect, our initial reaction is that that is an additional and good
11 reason for providing the customer with some neutral information on the lines of the
12 override – it is a very good reason. I am not sure whether Article 19 had consumer protection
13 in mind whereas, of course, there are also the sort of basic consumer protection reasons in the
14 light of slamming. 1280 code for people who were slammed from BT, and the same would
15 apply obviously to the different codes in respect of different losing providers who have been
16 slammed – no doubt they should be able to provide their code as well for their customer – is
17 crucial for the customer not to be charged, as it were, for the period before BT can reverse the
18 process – I know this from personal knowledge how important the 1280 code is in those
19 circumstances, because otherwise, of course, the slammer will, prima facie, send a bill for the
20 calls that the poor customer is using before he can get himself restored. So it is important from
21 a consumer protection point of view as well, but we do very much take on board the point that
22 the Tribunal has made, and it seems to us to be helpful in that regard.

23 **THE PRESIDENT:** If we then go on to the next point which is the question of neutral information.
24 It may be helpful if I briefly recall the way the Judgment proceeded. The Judgment proceeds
25 on the basis of the idea that the first question is not so much whether a particular kind of
26 information is marketing information or consumer protection information, but whether the
27 information in question is within the idea of the purpose for which the information was given
28 to BT Wholesale in the first place. The primary purpose as we found for which the CPS
29 transfer information is supplied by the CPS operator to BT Wholesale is to effect the
30 reconfiguration of the switch. As we understand it, there is no operational need as such for
31 BT Wholesale to pass the information to BT Retail in the period before that change becomes
32 operational, because what BT Wholesale is doing is meeting the CPS operator's request to
33 make the necessary changes of the switch (Judgment para.320).

1 We then went on to hold that the making of the Save call was outside that primary
2 purpose but also inimicable to it, (para.321) and that the same reasoning applied to any
3 marketing activity carried out by BT Retail to the consumer during the cooling off period
4 (para.324). We then get to what seemed to be, as between the parties, something approaching
5 an agreed position that there was, arguably at least, a subsidiary purpose for the passing of the
6 information, which was reflected in the Notification of Transfer letter, that being the protection
7 of the consumer from slamming (para.325) at that point we get into the difficulty of drawing
8 a distinction between what was described by Ofcom as “vital consumer protection information
9 (para. 322) that might arguably still be within the purpose of General Condition at 1.2, and
10 other information outwith that purpose. I think we effectively said that certain ambiguities in
11 that need to be sorted out.

12 Against that background as we have understood it the central submission by BT is that
13 it is still legitimate to provide information on the effect of existing services and on the fact that
14 the customer will continue to receive a bill from BT – at least for the line rental. We bear in
15 mind that we are talking here of this rather short window between the time when BT
16 Wholesale first gets the CPS operator’s request and the implementation of that request by the
17 reconfiguration of the switch.

18 As we have understood Mr. Steggle’s witness statement the various points made
19 relate to or include the following:

- 20 * information about BT Together,
- 21 * information about the monthly payment plan – the question arising as to whole
22 bill direct – whether that is a service that the CPS customer may wish to consider
23 taking,
- 24 * confirmation that the customer will continue to receive two bills, one from BT for
25 the line and the other from the other operator,
- 26 * up-to-date pricing information, which BT says may assist the customer; and
27 * information as to practical steps the customer should take if they have been
28 slammed.

29 Ofcom, on the other hand, submits that the reference by the losing operator to its prices,
30 services, quality or similar information, is marketing by which Ofcom means that it is outside
31 the purpose of General Condition 1.2, and there is an intention to provide a guidance note on
32 these issues.

33 Subject to the further submissions, which I am sure we can usefully receive, I think
34 our present position on this is that the effect on existing services offered by BT is not within

1 the purpose for which the information is originally transmitted to BT Wholesale by the CPS
2 operator and is not, in consequence, within the purpose for which BT Wholesale can transfer
3 that information to BT Retail, so that matters like the effect on BT Together or the monthly
4 payment plan, or whole bill direct, or pricing information, would not at first sight seem to us to
5 be within the contemplation of the general condition.

6 Information as to what the customer should do if they have been slammed and
7 possibly the fact that the customer will get one bill from BT and one bill from the other
8 provider maybe in itself innocuous, but at the moment we are not yet persuaded that other
9 information within this relatively short window is within General Condition 1.2. We should
10 add that we take it now that it is more or less accepted that where the customer approaches the
11 loosing CPSO, that is to say BT, there seems to be no objection from Ofcom as to BT then
12 giving the customer the information the customer is seeking, that being a case where BT is
13 responding to its customer, and not using the information that it has from BT Wholesale. So
14 that in relation to the customers that apparently contact BT about BT Together, for example,
15 there would not appear to be any obvious reason why BT should not deal with those
16 customers' queries.

17 That, in broad outline, is our provisional thinking on this issue. Now, Mr. Barling,
18 I do not know whether that helps you? Whether you want to try and talk us out of it, or see
19 how we should proceed?

20 MR. BARLING: Can I just try briefly to persuade you ----

21 THE PRESIDENT: Of course.

22 MR. BARLING: -- that there are some pieces of neutral information which are, as we now have to
23 accept in light of the Judgment, within the purpose of the transfer process. It may just be to
24 have as a checklist Mr. Steggle's first exhibit, which is at tab 5 of the blue bundle that came in
25 with our submissions of 24th January – I have called it the “desired letter”, which is really
26 setting out in theoretical form what BT submits it ought to be able to provide in the
27 Notification of Transfer letter.

28 Can I just put the point generally first? Anything that, as it were, facilitates an
29 orderly transfer is presumptively within the scope of GC1.2. We know that the information
30 providing by the gaining provider to BT can be passed on to BT Retail and used for the
31 purposes of the advice of transfer letter to make contact with its customer, and so there is
32 immediately, if you like, an inroad into the purity of there being no contact using the
33 information.

1 THE PRESIDENT: But it is a slightly unsatisfactory inroad that happens to arise because of the risk
2 of abuse that seems to have crept into the ----

3 MR. BARLING: Yes, and that has been given the Tribunal's blessing as far as slamming is
4 concerned. But we submit that is too narrow a view because it does not just include slamming,
5 but there is a whole raft of mis-selling, as you will have seen from the evidence of
6 Mr. Steggles, and as is not in dispute, and there is misrepresentation of this and the other in
7 many cases.

8 There are also areas where the customer may just be simply unaware of what he has
9 done. The customer, in CPS, remains a customer of BT because BT continues to provide him
10 with, at the very least, a line. BT has to face on a day-in/day-out basis irritated customers who
11 did not realise, for example, that some of their services would be affected. They do not restrict
12 the blame to the gainer, this comes on to BT because BT is their normal point of contact, so
13 they criticise BT.

14 THE PRESIDENT: How are they able to criticise BT?

15 MR. BARLING: Well because they say "You wrote to us but you did not tell us, for example, that
16 the services which we have relied upon up to now will no longer be provided to us. You have
17 told us that there may be two bills", because I am assuming your inclination at the moment is
18 that we should be allowed to tell them that they will get two bills. They may not have been
19 told that and it is vitally important that customers now just what will be happening to them, not
20 because we seek to persuade them to come back via this, but because this is information which
21 customers can feel they ought to have received. This is not, we would submit, information
22 which is within the Ofcom definition of marketing, because it is not information which is
23 calculated to attempt to win the customer back, or persuade him not to pursue the transfer, it is
24 information which the customer is entitled to receive. BT Together, Sir, you mentioned.

25 THE PRESIDENT: Well the evidence is – I am just on para.8 of Mr. Steggles's helpful witness
26 statement:

27 "6000 customers are calling BT about BT Together typically after customers receive
28 their first bill ... would ensure that customers be alerted to the need to consider whether
29 they should elect to transfer to BT Together Option 1".

30 there are presumably Options 2 and 3.

31 MR. BARLING: There are Options 2 and 3. Option 1 will generally be that the customer will be
32 "aggrieved", as it were, probably if he is not told at least that he should change his options,
33 because Option 1 is, as I understand it, the pure basic line rental option. The other options,
34 which the customer may well be on because it is beneficial when you are taking calls from BT

1 as well, will not be appropriate in many cases – it may depend upon what type of CPS you
2 have taken, whether you have done the “all calls”, or just some of the calls. But for many
3 people they will be aggrieved if they are not told that they should have gone for Option 1 when
4 they changed.

5 THE PRESIDENT: He does not actually talk about people being aggrieved; he just says that they
6 ring up.

7 MR. BARLING: Well yes, but they ring up because – well perhaps I am putting it tendentiously, but
8 they ring up because they are concerned as to whether they are now on the wrong option.

9 THE PRESIDENT: When they ring up you can say to them: “Well look, this is what has happened,
10 and it is not our fault that your new provider did not tell you and perhaps you will want to stay
11 with us after all?”

12 MR. BARLING: Yes, but we are receiving many thousands of calls on this point.

13 THE PRESIDENT: Well that is a good opportunity to talk to all these customers, is it not?

14 MR. BARLING: It is, and it may be that there will still be some calls, even if we have it in the letter.
15 But the point that I am seeking to make, Sir, is that this is not marketing, it is simply being fair,
16 and being seen to be fair to a customer, not to wait for them to take the initiative when they
17 may already have been on the disadvantageous option for some period, but to tell them at
18 a proper time, namely, so they can put it right straight away. Of course, many people do not
19 read these letters, but there will be some who do and it is a question of an orderly transfer. I do
20 not want to labour this point, but in our submission there is certain information that an orderly
21 transfer process would include in the advice of transfer letter, and that is one, as is the override
22 call, as is, we would submit, the impact on existing services. A customer would be entitled to
23 feel – putting it at its very lowest – “let down” if he was not told that what he had done meant
24 that he could not have some of his services that he was already having. The letter we put in
25 today, Sir, does indicate – and again apologies that the right services were not mentioned the
26 first time – the products include “ring back when free”, “advice of duration ...”

27 THE PRESIDENT: Sorry, where are you?

28 MR. BARLING: You get that from the very last line of the letter of today’s date.

29 THE PRESIDENT: Yes, today’s letter.

30 MR. BARLING: “Ring back when free”, “advice of duration and charge” and “call barring”.

31 THE PRESIDENT: What does it mean that certain services “may no longer be obtainable or work in
32 exactly the same way”? What does it mean?

33 MR. BARLING: There may be some functionality changes. They may be obtainable, but work
34 differently I assume.

1 THE PRESIDENT: Well if we take “Ring back when free” ----
2 MR. BARLING: Yes, can I just take instructions on that?
3 THE PRESIDENT: Yes.
4 MR. BARLING: (After a pause) Whether it works or not may depend on the CPSO’s own
5 configuration. Some CPSO’s will be set up to provide and some will not, so that is one
6 possibility where it may or may not be obtainable. As to whether it will work in exactly the
7 same way ... (After a pause) ... I think “work in exactly the same way” means you may, for
8 example, have a different experience.
9 THE PRESIDENT: A different what – sorry?
10 MR. BARLING: It may take longer, for example, I think was what was just being said to me. The
11 fact is it is just that because it is now being channelled through a different network, a different
12 carrier, which may be configured in a different way there will be changes which will be
13 noticeable to the customer. But the more important one is that it may just simply not work at
14 all, depending on whether the new CPSO has that facility or not; and, as you know there are
15 potentially many different CPSO’s.
16 THE PRESIDENT: What is “advice of duration and charge”? You can ring up and they tell you
17 how long it lasted and how much it cost?
18 MR. BARLING: Yes, it is, yes.
19 THE PRESIDENT: And “call barring” is?
20 MR. BARLING: It is when you bar certain numbers, premium rate numbers and so on.
21 THE PRESIDENT: So the children cannot dial the 090, or speaking clock in New Zealand, or
22 something?
23 MR. BARLING: Yes. So those are the main ones. I think it is really encompassed within that in
24 terms of what information a customer would expect to know – obviously, if you have
25 a monthly payment plan you may not have taken on board that you will be paying too much
26 unless you take steps to alter it, because your calls will no longer be channelled through BT.
27 Those are the kind of things, Sir, and Ofcom have accepted this, as I understand it – I will be
28 corrected if I am wrong – but in the context of WLR, which is the other type of service that we
29 have touched on with the other Appeal ----
30 THE PRESIDENT: Yes, which we will come to a bit later on this morning.
31 MR. BARLING: -- **there** there may be termination charges, and Ofcom have accepted, as
32 I understand it, that the advice of transfer letter there can, and should, alert the customer to the
33 fact that they may incur some termination charges. We would say that these points are all
34 analogous to that – they are just things that the customer needs to know, and it is right that he

1 should be told. It is in BT's interest as well as the public interest, not from a marketing
2 perspective, but simply from a good reputation perspective that it should be free to tell its
3 customer those categories of information.

4 THE PRESIDENT: How would this work if we were in a situation where a customer was already on
5 another provider, was changing to yet another provider – a third party provider – would the
6 new provider inform BT Wholesale, would the old CPS provider, not BT, have a similar
7 opportunity to tell the customer?

8 MR. BARLING: Yes, because the letters are agreed on an industry-wide basis, the way it is done,
9 and so comparable information ought to be available to the customer from all losing providers.
10 Now, whether it would be generated in the same way, whether they would need help, as it
11 were, because some losing providers would actually not be the actual carrier.

12 THE PRESIDENT: It is a slightly special situation with BT, is it not, because things like BT
13 Together can only work for BT because it includes the line rental?

14 MR. BARLING: Yes. But, as Miss Lee says, the letter of course comes from the losing provider,
15 and would therefore be comparable in all cases. So this would apply to every losing provider.

16 THE PRESIDENT: Why should this not just go out after the transfers have taken place?

17 MR. BARLING: Well it could, but in our submission it should go out at the earliest opportunity
18 because it is the advice of transfer letter, and the advice of transfer letter is required to be sent
19 out at the earliest opportunity. This is not a matter of controversy; it is required to be sent out
20 at the earliest opportunity not least of all because of the consumer protection aspects and
21 slamming. It is designed to go out before that 10 day period comes to an end.

22 THE PRESIDENT: Yes.

23 MR. BARLING: In a sense one cannot divorce this also from bearing in mind the background of the
24 very, very big slamming problem, mis-selling problem.

25 Finally, we would submit – and I do not know to what extent this is controversial any
26 more – that it is clearly right that there should be a telephone number that is given to the
27 customer to ring if they have queries.

28 THE PRESIDENT: I am not sure that is still in issue.

29 MR. BARLING: I am not sure that is still in issue and, in fact, as you may have seen from the
30 evidence, in the context of WLR something has been done by BT in the aid of consumer
31 protection called the “Verification Process” which is a very limited exercise of telephoning
32 some customers to see whether they have in fact authorised or know about the transfer, and my
33 understanding is, if my recollection is right that a number is also given to those customers if
34 they require further information.

1 So we would say that this is innocuous and it is proper that it be given, and it is not
2 within the Notification because it is not marketing – not marketing so far as one can
3 understand what marketing is including. It is not done in an attempt to prevent the transfer
4 taking place, but to facilitate an orderly transfer.

5 MISS SIMMONS: Mr. Barling, am I right in thinking that your definition of slamming may be
6 wider than the definition that Ofcom put on slamming, in that your definition might include
7 misleading information which has caused the customer to agree to change when, in fact, had he
8 known the information he would not have changed. Is that actually how you are putting it?

9 MR. BARLING: We would certainly say that that is serious mis-selling on a par with slamming.
10 I will be corrected again if I am wrong, but my understanding is that from our perspective
11 slamming includes those cases where there is neither authorisation nor knowledge.

12 MISS SIMMONS: That was my understanding, but I thought the way that you are putting to get this
13 information in you are really saying it is misleading selling which, in a Nanny State, we need
14 to explain to the customer because he may not have appreciated these things when he agreed.

15 MR. BARLING: Well it certainly serves that purpose but they may just simply not tell – they may
16 not be mis-selling they may just simply not say. They may not know, many of these people
17 who sell these products simply do not know what the effect is going to be on the customer they
18 are winning over. They would not necessarily know that you will not be able to have “ring
19 back when free”, or “advice and duration”, or indeed “call barring”. So it may not be that they
20 have mis-sold, but the customer is not being told something that he ought to be told.

21 MISS SIMMONS: If I go into a shop I am not told, I have to find it out for myself. If I go and want
22 to buy a kettle, and I look at all the different kettles, I have to find out which one suits me,
23 which one has the advantage and which one has the disadvantage – I am not told.

24 MR. BARLING: Yes, but if you have an obvious type of vehicle and you go into a motor dealer to
25 swap it and buy a new one, and it is quite clear from the vehicle you have that you need a
26 certain facility, you would be irritated if you suddenly got the new one home and found that
27 actually it was useless or did not have something that was important to you and you had in
28 your last one. That is more the situation here. You are being sold, and let us be honest, the
29 selling is pretty heavy, this is the hard sell to people who are often busy, very busy, have very
30 little time, or are vulnerable, or living alone or whatever, and they are sold a product and they
31 are simply not told for whatever reason, things that they would expect to know.

32 MISS SIMMONS: Taking your car example, I have a car which has certain features; I want to
33 change my car and I want at least the same features. Therefore, I would say to the seller

1 “I want a car with at least those features”. I would not expect him necessarily to know – and he
2 would not know – what features I have because he would not know what extras I had on the
3 car or anything else, but it is up to me to tell him what features I want. If he then sells me a car
4 without the right features he has mis-sold. But it is for me to tell him, it is not for somebody
5 else to tell me “Actually you have got these features”.

6 MR. BARLING: That is true, a prudent person would ask in many cases, but even a prudent person
7 might not think to ask in the circumstances, they might just assume with telephones, all
8 telephones are telephones, and therefore you can get everything you need, it is just a question
9 of changing who you pay your bill to. Also, there is the BT position. BT has to receive the
10 6000 phone calls a month or whatever it is, and these are BT customers who, whether or not it
11 is justified are irritated with the system frequently, that they simply were not told that this was
12 happening. Some of these are more serious, some of them are less serious and why should BT
13 not be in a position to give neutral, factual information to a customer where it knows that there
14 is going to be a change to the customer services, or may well be a change to what the customer
15 has been accustomed to receiving on its telephone. Is that marketing? We submit it clearly is
16 not.

17 THE PRESIDENT: Does this all depend on whether the customer has been told or not by the new
18 operator? Supposing we have a perfectly good and respectable new operator who said to the
19 customer: “I see you are on BT Together at the moment. If you come over to us, and we hope
20 you will, your charges will be this and that, and that is going to be a big saving, but you are
21 probably not going to be able to do Option 2 any more because we are unbundling from that
22 point of view, so you will probably be on Option 1 but it will still work out a good, big saving.
23 It is true that our ‘ring back when free’ service takes a little bit longer but it is worth it because
24 we are cheaper.” He has got all the information and the customer says “yes”, what would be
25 the problem?

26 MR. BARLING: Well there would not be a problem. There would not be any problem in receiving
27 the same information again. The problem is in the many, many cases where the customer does
28 not receive the information at all.

29 THE PRESIDENT: Well then he rings up BT, which is perfectly all right – according to
30 Ofcom – and BT tells him the position and then he either stays with BT or he does not.

31 MR. BARLING: But, Sir, is that an ideal situation where they are taken by surprise, as they
32 frequently are. They say “We did not realise this was going to happen”.

33 THE PRESIDENT: The only evidence we have is that 6000 people ring up BT after they have
34 received their first bill. Well, they ring up BT – they are not saying they have been misled, or

1 they have been mis-sold, or they have been taken up the garden path, it just says they ring up,
2 which they presumably would need to do because they have to do something about the BT
3 Together package.

4 MR. BARLING: Sir, there is a great deal of information ----

5 THE PRESIDENT: Perhaps I do not have in the forefront of my mind all the material you have put
6 in.

7 MR. BARLING: There is a great deal of information on the mis-selling aspects.

8 THE PRESIDENT: I just happened to look up, it is in tab 7, the Carphone Warehouse letter, 7th
9 October 2004. It is JS3, it is not numbered within the exhibit, but it is about 7 or 8 pages in.
10 "Talk Talk Let's Do It Together". There they are, they say in "3 – Check your BT tariff".
11 This is Mr. Dunstan.

12 "BT remain responsible for your line rental, and to continue to pay the bill this you
13 should be on BT Together Option 1. If you are on BT Together Option 2 or 3 you are
14 paying more than you need to be."

15 MR. BARLING: Which is fine, there they are being told, but unfortunately that is not always the
16 case, and of course, as one sees from some of the others in that tab the gaining operator has
17 a completely free hand, it can say anything it wants. You only have to look at the first page:
18 "Welcome to great Toucan savings on your phone bill" – how much they are going to save.
19 BT can say nothing at the moment.

20 THE PRESIDENT: But on the second page of that Toucan document, 29th November 2004 at the
21 bottom:

22 "Important information for BT Together customers. If you are currently using BT
23 Together Options 2 or 3 please call BT and ask them to change your package to BT
24 Together Option 1."

25 MR. BARLING: Well that is fine.

26 THE PRESIDENT: Well is that not what all these calls are really about, not what is going on, they
27 are just ringing up saying "Can we change across ..."

28 MR. BARLING: All we are saying is that that is something which should be in the advice of transfer
29 letter.

30 THE PRESIDENT: It sounds to me as if these customers are reacting to what their new operator has
31 told them to do.

32 MR. BARLING: Mr. Steggles says it is normally after they have received their bill that these phone
33 calls emerge – presumably it may be because a lot of them are surprised to have received two
34 bills, or there may be other queries that they have.

1 THE PRESIDENT: It is true that Telco Global does not seem to contain this information.

2 MR. BARLING: These are just some examples, but there are many, many.

3 MISS SIMMONS: Am I right in thinking that a phone call will have to be made anyway because
4 they have to change from 2 and 3 to 1, so it is not going to reduce the number of phone calls.
5 It is going to increase the number of phone calls at an earlier stage.

6 MR. BARLING: The phone calls will not be from people who are irritated because they have been
7 paying too much.

8 THE PRESIDENT: Tesco recommends you call BT. It is true that the One.Tel letter does not quite
9 seem to say that.

10 MR. BARLING: If people do not realise, for example, if we are dealing with the Option 1, they will
11 be paying too much for a period. They will then get their first bill and then they will say “Why
12 was I not told?” Because the overcharging bit will come from BT, it is BT who will receive
13 the bad press from those people in terms of their perception of BT, and in our submission it
14 would be going far too far to suggest that BT is not entitled to give its consumers, give its
15 continuing customers information which it is in their interest to receive. It is one of the
16 slightly bizarre aspects of this application of General Condition 1.2, which is designed to
17 preserve confidential information of operators, that BT should be prevented from telling its
18 customers something which they ought to be able to tell them.

19 THE PRESIDENT: And which you say the gaining operator ought to have told them anyway.

20 MR. BARLING: And which the gaining operator ought to have told them, but may for various
21 reasons prefer not to at the right stage.

22 THE PRESIDENT: Probably has told them, yes.

23 MR. BARLING: The welcome letter may or may not be sent out as early as the advice of transfer
24 letter from the losing operator. I am probably over-egging it if I say anything more about
25 that. But I do come back to how does this fit in? What we are prevented from doing is
26 marketing in an attempt to prevent the transfer taking place. That is what the notification
27 prevents us from doing. So that in our submission immediately takes the 1280 number out of
28 the equation because the 1280 number can only apply once the transfer has taken place and
29 Ofcom were at pains to reiterate, and wrote several letters because they were so exercised by it
30 – if the Tribunal recalls – that this case was nothing to do, and this notification did not cover
31 win back. You remember the slight controversy we had about that?

32 THE PRESIDENT: Yes.

1 MR. BARLING: So the 1280 number ought not to be an issue in this notification, and as long as all
2 providers can do it then it would seem to be neutral; and indeed, for the reasons the Tribunal
3 has given, indeed something which is contemplated by the regime.

4 The other neutral factual information, provided that it is done in a restrained way,
5 purely neutrally and factually, in our submission, far from being calculated to prevent the
6 transfer taking place would actually make a transfer smoother, and make customers less likely
7 to feel that they have been sold short and gone into things without their eyes open, and
8 therefore may well have the effect of making transfers easier, but is not in any event, we would
9 submit, marketing within the definition as far as one can understand it in the notification.

10 MISS SIMMONS: Mr. Barling, if that is right why should they not get information about all the
11 other providers as well, because they may have chosen the wrong one – it may be that
12 somebody else is cheaper or better?

13 MR. BARLING: We are not suggesting that we should, in the advice of transfer letter, as it were,
14 put forward our prices, or say that BT is ----

15 MISS SIMMONS: Yes, but somebody else may be giving facilities that are more appropriate to
16 them, but they will not know that because they have chosen X service instead of BT service
17 but Y service may be better.

18 MR. BARLING: I think BT can really only speak for what the customer will notice when its calls
19 are no longer carried by BT, and what may happen when they go to a new operator.

20 MISS SIMMONS: Why will the customer not be equally irritated that somebody has not told them
21 that they should not have changed to X but they should have changed to Y?

22 MR. BARLING: I do not think that that irritation would necessarily land at BT's door, and provided
23 BT have been fair about what they were no longer going to provide, or would no longer be able
24 to provide.

25 THE PRESIDENT: What about the monthly payment plan point, Mr. Barling? You say that people
26 are likely to overpay?

27 MR. BARLING: Oh indeed, Sir, if they are not told.

28 THE PRESIDENT: I am a bit surprised that the monthly payment plan is not automatically adjusted
29 if you are losing a customer.

30 MR. BARLING: As I understand it, these are set up by direct debits and ----

31 THE PRESIDENT: It is true that in other utilities the electricity company, or whatever it is, tends to
32 look at it in the same cycle as the billing cycle and adjust a payment up or down, depending on
33 the last meter reading, but I am not quite sure why this is a real problem.

1 MR. BARLING: The direct debits are usually done by the customer's authorisation, and the
2 customer will have consented to whatever the current payment is – again, no doubt, people
3 who think it all through, or are alerted to it will make changes to that at an appropriate time so
4 they do not lose out, but there will be many, many people who do not and therefore all that BT
5 wishes to do is to bring to their attention that it is something that may well be affected because
6 they will be billed by BT too much, and again it redounds badly. Again, it is something that
7 one would have thought almost too obvious that one ought to be able to tell the customer to
8 check to make sure that they make arrangements to adjust their monthly payments. If you look
9 at the desired letter (tab 5) it is a pretty innocuous statement we would submit, along with the
10 services which are unavailable.

11 I think that is what you were asking about – I do not want to overstay my welcome,
12 as it were, on my feet. I have covered existing services and invite the Tribunal to reconsider
13 your prima facie view on that, and BT Together, and monthly payments.

14 THE PRESIDENT: Well let us see what Ofcom says about this.

15 MR. BARLING: And the single bill. You thought that the single bill was okay, that we could
16 mention that you would be getting no longer a single bill but two bills was probably innocuous.

17 THE PRESIDENT: Yes.

18 MR. BARLING: And customer approaches again seems to now have become non-controversial. In
19 the latest Ofcom letter the only example given was where, under the old reply system, the
20 customer is required to make contact with BT. That was their only example of whether the
21 customer could be required, as part of the transfer process, to give the information. We would
22 reserve our position on that because we would submit that it still does not apply, but we have
23 your Judgment on that which obviously we must abide by. Other than that it is obviously
24 theoretical because there are no circumstances in which, as far as CPS is concerned, a customer
25 is required to make contact with BT. We would wish, however, to reserve the position
26 obviously in relation to the WLR situation where there is a contractual requirement of notice.
27 That therefore would be an issue in that case.

28 THE PRESIDENT: Yes, thank you.

29 MISS SIMMONS: Can I just ask you, the single bill and the monthly payment plan. Direct debit
30 allows you to go to the customer's account and take money out of the customer's bank account
31 – that is effectively how it works, is it not? They have authorised you to do that up to
32 a maximum level?

33 MR. BARLING: I will just check whether it is direct debit or standing order. (After a pause) What

1 I am being told is that the monthly payment plan is that the customer authorises a fixed
2 amount.

3 MISS SIMMONS: Right, now if what you are going to do is you are going to say there is a single
4 bill because it is only the line ----

5 MR. BARLING: No, I think what we are proposing that we should be able to do is to tell them their
6 monthly payments will not reduce immediately unless they take the initiative.
7 "You can request an adjustment to the monthly amount or refund on the contact
8 number above."
9 otherwise, when you get your bill you find that you are still paying the amount that you have
10 agreed to pay which, averaged out over the year, will mean that you will have been paying too
11 much.

12 MISS SIMMONS: You will be paying too much because you will be paying for the line and the call.

13 MR. BARLING: You will be paying some estimation of call fees which you probably are not using.

14 THE PRESIDENT: Since BT adjusts these things *ex officio* anyway, I do not quite see why they
15 have to wait until the end of the billing cycle in order to do that.

16 MR. BARLING: Because I think it is an agreed payment, and there is no consent to take a different
17 amount.

18 MISS SIMMONS: BT are taking too much money?

19 MR. BARLING: Well they are taking an agreed amount of money.

20 MISS SIMMONS: Yes, but they are taking too much money which they are going to have to
21 refund?

22 MR. BARLING: Yes. But is it not better that the customer is told that he should do something
23 about it.

24 MISS SIMMONS: What does the customer have to do – phone up and say "Can you send me a form
25 so that I can adjust my direct debit?"

26 MR. BARLING: You can probably do it with a phone call.

27 MISS SIMMONS: No, because they are going to have to sign a form for a new authorisation for the
28 bank.

29 MR. BARLING: But the letter suggests that you can request an adjustment to the monthly amount
30 or a refund on the contact number above.

31 THE PRESIDENT: This arrangement, as I understand it, authorises BT effectively to debit
32 a variable amount, depending on what BT's estimate of the call is up to a maximum, does it
33 not?

1 MR. BARLING: What I am told is that it is a fixed amount. BT advises them on the basis of their
2 call usage, how much they are likely to be paying over a year and then they agree an amount
3 referable to that.

4 THE PRESIDENT: That is not what Mr. Steggles says at the top of p.4 of his witness statement.

5 MR. BARLING: Well perhaps we had better have a look at that.

6 THE PRESIDENT: He says:

7 "In addition the MPP amount is also reviewed every three months and adjusted
8 upwards or downwards to reflect the customer's actual call spend."
9 and that is a very common arrangement in utility billing.

10 MR. BARLING: My understanding is that is done by a call from the customer.

11 THE PRESIDENT: No, it s done by BT, by looking at what they have spent.

12 MR. BARLING: If one goes to the previous page:

13 "The customer is allocated a credit limit which, if reached, will trigger a review of the
14 fixed sum to be paid. In addition, the MPP amount is also reviewed every three months
15 and adjusted upwards or downwards. At any time a customer can call to make changes
16 to their..." ----

17 THE PRESIDENT: Yes, but it is adjusted upwards or downwards automatically, depending on how
18 BT looks at it, I suspect, if it is the same procedure as works for gas and electricity. Anyway
19 we would need to check this point.

20 MR. BARLING: Those instructing me here do not think that that is what happens, but we clearly
21 need to check it.

22 THE PRESIDENT: I think Miss Kelly has a question.

23 MISS KELLY: Mr. Barling, I am a little curious because the second sentence here under "Payment
24 Options" seems to be a perfectly reasonable and straight forward one. I am not too clear about
25 the necessity of the statement above that.

26 MR. BARLING: Is that the "BT Together" one?

27 MISS KELLY: No, it is the first statement under "Payment Options".

28 MR. BARLING: Right.

29 "Monthly payment plan or whole bill direct debit offer an easy way to manage your account
30 and a saving a month on your BT Option."

31 THE PRESIDENT: As Miss Kelly points out that looks a bit more like a bit of marketing has sort of
32 slipped in, does it not?

33 MR. BARLING: Unless it was made clear that it only applied to the remaining – I agree with you,
34 because on the face of it, it looks like it, because I suppose it could be dealt with and said that

1 “You can still do this by a monthly payment”, but the monthly payment presumably would
2 now be a very simple sum to work out depending on which CPS option the customer had opted
3 for, so I think that does need looking at.

4 THE PRESIDENT: I do not quite see why the monthly payment plan could not be adjusted
5 automatically down to the line rental, which is a known figure, from the date of transfer.

6 MR. BARLING: Except that not all CPSs mean that you do not take calls. There are three options
7 for CPS, there is the all calls option, there is the international and I seem to remember there is
8 another one – I cannot remember what that is called. So you do not necessarily only pay line
9 rental.

10 THE PRESIDENT: I see, then there is still the override code too.

11 MR. BARLING: And there is the possibility of override if people think they want to use it for a call.
12 There are benefits of course with the payment plan so they will not necessarily want to get rid
13 of the payment plan, it is just that they will want to be advised about whether it should come
14 down – well almost certainly it should come down.

15 THE PRESIDENT: When it does come down, because presumably it is reviewed at some point and
16 it comes down, does it then come down in a way that avoids the customer overpaying? Or is it
17 your system that he just carries on overpaying even if he has not made any calls, because you
18 could have a system where you are paying £20 or so a month and it should actually be £10, and
19 so for the next three months you make it £5, so that he has not actually paid over – if you see
20 what I mean?

21 MR. BARLING: Yes.

22 THE PRESIDENT: We are probably getting into a bit too much detail at the moment.

23 MR. BARLING: Well no, obviously there can be a refund for overpayments, as it says here. But
24 one would hope that if the customer took this advice and requested an adjustment then the
25 adjustment would take account of what their likely usage would be with their CPS ----

26 THE PRESIDENT: There may still be a gap between the refund arriving ----

27 MR. BARLING: There may well be. But I quite accept that the first paragraph of that needs looking
28 at.

29 MISS SIMMONS: What concerns me is who should trigger it? If the customer triggers it and
30 phones you up and says: “Look, I think I may be paying too much” it is you who has to tell
31 him how much he has to pay and what the appropriate figure is, he does not know that. So all
32 he has triggered is a call to you to find out. Now certainly if I was the customer, and we are
33 looking at annoyance of customers, I would be annoyed that I had to trigger it. I would prefer

1 that BT said to me “I am going to bring this down because you have now gone to X and
2 therefore you do not need to pay me as much” – then I would be a very happy customer.

3 MR. BARLING: Yes, but on the face of it I am not sure we would be allowed to do that either.

4 MISS SIMMONS: No, but I do not understand why you are saying that it is in order to keep the
5 customer happy because it seems to me what you are doing is you are getting the customer to
6 call you possibly in order to be able to tell him other things.

7 MR. BARLING: Well as I understand it ----

8 MISS SIMMONS: You would not be allowed to do that?

9 MR. BARLING: No, we would not be allowed to do the sensible approach that you have indicated
10 either because that would be presumably marketing on Ofcom’s view, but we submit that we
11 should be allowed to do either of those – either this or, indeed, take the initiative.

12 MISS SIMMONS: Well why can you not just take the initiative and reduce the amount?

13 MR. BARLING: We have to clarify whether they have to agree. So we would then be using the
14 information, there is an issue here. That is why we submit this is going far too far in terms of
15 saying what is marketing? It is trying to ----

16 THE PRESIDENT: Yes, trying to communicate with the customer the various mechanical follow
17 from ----

18 MR. BARLING: That they may well wish to take advantage of, and however it is done we submit
19 we need to be able to give them that information.

20 THE PRESIDENT: Right, I think we had better hear what Ofcom has to say about it.

21 MR. BARLING: Thank you.

22 THE PRESIDENT: Yes, Miss Sharpston? All this is pretty innocuous is what BT is effectively
23 saying.

24 MISS SHARPSTON: Yes, Sir, well I have heard that and, indeed, I made some other notes along
25 the lines of balance, restrained factual information, smooth transfers, customer less likely to
26 feel short changed. Perhaps I could start by picking up on the point that Miss Simmons put to
27 my learned friend, namely, in the Notification of Transfer letter why not tell the customer
28 about everyone else? Sir, I think that is perhaps a helpful question – it is a very helpful
29 question in this sense that the Notification of Transfer letter is not a briefing document for the
30 customer – that is not its purpose. It is a letter which is sent out in order to deal with a very
31 specific issue, namely, consumer protection, anti-slamming. What is in the consumer interest
32 to be told at that point is, in my submission, to be understood restrictively. This is against the
33 background, Sir, of a market that has been liberated, been freed up, in which the customer is
34 able to shop to inform himself to decide what he wants to do. I will come to some of the

1 detailed points in just a minute, but after the transfer has happened, after this 10 day period, if
2 he phones BT and raises queries BT can inform him and explain the services that it provides,
3 the ones which he should be considering seriously, and he should come back to them. He can
4 phone his new operator and say, for example, "Wait a minute, I am discovering that I do not
5 have call barring, can you help me on that?"

6 The point is that what is to be put in the Notification of Transfer letter is of necessity
7 a limited exception from the idea that the information that is given to BT Wholesale, in order
8 to effect the transfer, should only be used for the purpose for which it was supplied. This is
9 a very, very limited impurity in the system. What Mr. Barling's submissions amount to, and
10 they are very persuasively put together, but what they amount to saying is that BT ought to be
11 allowed to do a full counter information campaign at this moment of transfer.

12 THE PRESIDENT: Well I am not sure that is quite what he is saying. He is saying from the transfer
13 also follows other necessary and inextricably linked consequences, namely, if the customer
14 happens to be on BT Together Option 2 or 3 there will have to be a change. If the customer is
15 paying on a monthly payment plan there will have to be a change. If there are some services
16 the customer is currently receiving and cannot now receive it is another thing that will change
17 and all he is doing is telling the customer that they need to think about what to do about their
18 existing BT Together Option and what to do about the monthly payment plan, and to make it
19 clear that some services by BT are not any longer being supplied.

20 MISS SHARPSTON: Sir, yes, and my submission is that that is no part of the Notification of
21 Transfer letter which is there to deal only with the specific issue of anti-slaming.

22 THE PRESIDENT: Not to deal with what he says is mis-selling as well?

23 MISS SHARPSTON: Well Sir, I am sure we will come to this later in the morning, there is a very
24 extensive consultation that is taking place – there are lots of regulatory issues that are
25 conceptually separate from the specific issue of mis-selling. In the present context what one
26 I talking about is what is needed for consumer protection during the 10 day window between
27 the gain of the customer and the change actually being put through the system. That is all that
28 one is speaking of. Sir, I stress that point because there are many other types of information
29 which are perfectly proper to communicate outside that period, but which in my submission
30 form no proper part of the Notification of Transfer letter. To put it in generic terms, how can
31 neutral information be part of the purpose of the transfer? The customer has already decided to
32 make the transfer. The point behind the letter is to make sure that he meant to make the
33 transfer, that he has not been slammed. It is not to ensure that he took all the steps which an

1 extremely well informed, cautious, prudent customer would have taken in order to inform
2 himself in a complete and comprehensive fashion about every service that he presently had.

3 MISS KELLY: Surely, Miss Sharpston, the point of the letter is actually to inform the customer of
4 the date of the changeover, the second part of that is actually to act as an anti-slamming device.
5 But the point is very clearly to give that date which is the information which actually the
6 general customer needs.

7 MISS SHARPSTON: Ma'am, I accept that and I am grateful for your correction, because it follows
8 from that that the additional information that goes into the letter should not be tested as my
9 learned friend seeks to do against the criterion: would this be useful information for the
10 customer to have? But should rather be tested: is this information which is so necessary
11 to ----

12 THE PRESIDENT: I am just writing it down, Miss Sharpston, so be careful. "Is this information
13 which is so necessary ..."?

14 MISS SHARPSTON: -- to ascertain that the customer's choice to transfer – I am sorry, if you are
15 writing it down, Sir, can I pause and reformulate it? [Laughter] I was in the middle of making
16 the point more generally, and you have now put me on notice that you are writing it down, so
17 I am sorry ----

18 THE PRESIDENT: You are not bound to it, do not worry.

19 MISS SHARPSTON: Can I pause and reformulate?

20 THE PRESIDENT: Reformulate as many times as you like. Yes?

21 MISS SHARPSTON: The purpose of the Notification of Transfer letter is to ensure that the
22 customer had intended the transfer to take place and the gaining CPSO has therefore not
23 misinformed BT that that particular customer wishes to transfer.

24 THE PRESIDENT: Plus the date, as Miss Kelly mentioned.

25 MISS SHARPSTON: Plus the date of transfer. Again, for clarification, the intention of the
26 customer that is relevant is not an intention that the customer might formulate having been
27 given more information by BT, this is a check on the original intention of the customer as
28 transmitted through the CPSO. I may not have put that very neatly but I think you have the
29 point that I am making.

30 THE PRESIDENT: The point that is being put at the moment by Mr. Barling is that this letter that
31 I have at annex 5 of Mr. Steggles' witness statement open in front of me, is not in any ordinary
32 sense a marketing initiative to stop the customer transferring. It is simply pointing out to the
33 customer that, as a result of the transfer, there is a consequence in relation to BT's existing
34 relationship with that customer, in particular as regards the relevant BT Together Option that

1 he happens to be on, and the level of the monthly payment that he happens to be making. His
2 argument is that it is desirable that the customer is informed by BT, with whom that customer
3 has a customer relationship, of those matters as early as possible, and that it is rather artificial
4 to expect BT to wait until the 10 day period has gone by. That is the argument.

5 MISS SHARPSTON: Sir, to which the answer is that BT is entirely at liberty to supply further
6 information to all its existing customers and to customers it has lost to other CPSOs who it still
7 rents a line to, they are still on the database. It is at liberty to supply that information and,
8 indeed, I will come, if I may in just a moment to a number of the specific examples. But what
9 it may not do is to use the information that a customer is switching and from that as the
10 springboard supply other information, however neutral that may be, which is nothing to do
11 with the purpose of the provision of information by the gaining CPSO. It is additional
12 information, yes.

13 THE PRESIDENT: If a customer is paying so much a month to BT is it not desirable he should be
14 told as soon as possible he needs to have a look at that because otherwise he may be paying
15 more than he needs to?

16 MISS SHARPSTON: Sir, there are a number of points one can make in answer to that. First of all,
17 to the extent that BT holds a direct debit or holds an authorisation to remove money from
18 a bank account one might say that it was up to BT, because it knows it is losing the customer,
19 to adjust, to sort things out so that it does not end up with lots of that customer's money, and
20 also so that what happens does not rebound badly on BT. On a number of occasions
21 Mr. Barling made reference to irritated customers phoning up. If they phone up there is then
22 a dialogue after the 10 day window, during which the customer is talking to BT and BT can
23 make the adjustment that is requested, but alternatively BT can indeed talk with the customer
24 about the overall parameters. But that is a matter for BT after the 10 day period, it is not part
25 of the Notification of Transfer letter, and that letter is only generated because the information
26 covered by general condition 1.2 has been transmitted, because that is what triggers the transfer
27 and the Notification of Transfer letter that goes with it informing the customer of the date of
28 transfer and containing what Ofcom would say should be limited additional information of the
29 kind that is necessary to prevent anti-slamming.

30 There is a link point to that, Sir, which is that my learned friend took you to a number
31 of the letters that are to be found in exhibit JS3 in tab 7, and there is a variety there. In terms
32 of the Notification of Transfer letter sent by the losing CPSO the sample letter that was
33 annexed to Ofcom's written submission would be a letter which served for everyone, that is the
34 whole point. In terms of what the gaining CPSO can say, the gaining CPSO is not in the same

1 position as the losing CPSO and that is for the very specific reason that if the losing CPSO is
2 BT, BT has been sent the information for the purpose of facilitating the transfer and is
3 therefore constrained by General Condition 1.2 as to what more it can do. The gaining CPSO
4 can draw attention to other material, other aspects.

5 MISS KELLY: Could I just pick up a point? You refer to those letters, does that mean that Ofcom
6 is entirely comfortable with the sort of letter that Tesco have sent out on losing a customer or
7 customers?

8 MISS SHARPSTON: I am sorry, ma'am, let me just turn that up.

9 MISS KELLY: It is after the One.Tel letter.

10 MISS SHARPSTON: I am sorry, is this in relation to Tesco as gainer?

11 MISS KELLY: As a loser.

12 THE PRESIDENT: And your argument, the letters that Tesco are sending out dated 11th January
13 2005 ought to have been suppressed and are in flagrant breach of condition 1.2.

14 MISS SHARPSTON: Sir, may I just check? (After a pause) Sir, Ofcom has been very clear indeed
15 that General Condition 1.2 applies to all providers. It does not just apply to BT. Changes to
16 the losing letter would normally have been being discussed as an ongoing matter within what is
17 called the CPS Process Group. But changes have not been being discussed in that group; my
18 understanding is on the basis that BT has refused to discuss those changes pending the
19 outcome of the Decision in this case. The sample letter which is annexed to Ofcom's
20 submissions is what Ofcom envisages would be appropriate for any losing CPSO to send. By
21 the same token Ofcom would not expect a losing CPSO, whichever losing CPSO it was, to step
22 outside the parameters of that sample letter.

23 Sir, may I mention ----

24 THE PRESIDENT: Just before we leave that, it is not completely clear whether the Tesco letter is
25 a save letter or a win-back letter – "... the transfer of the service of the following number has
26 been carried out." If it is a Save letter the question is why has general condition 1.2 not been
27 enforced against Tesco?

28 MISS SHARPSTON: Sir, I can only take instructions on that point, first by checking whether it is
29 a Save or win back letter. Sir, you are clearly quite right that is the first thing one has to
30 determine.

31 THE PRESIDENT: It is not entirely clear. The question is are Save letters of this kind being sent
32 out by losing CPS operators other than BT, and is this typical of what is going on at the
33 moment?

1 MISS SHARPSTON: Sir, that is a perfectly fair question. Part of the answer has necessarily to be
2 that if a complaint is raised in respect of a particular letter, if it is brought to the Regulator's
3 attention, then the Regulator does indeed take action in respect of it and will take the same
4 action in respect of a losing CPSO's letter that in its view breached, that went beyond what was
5 permissible irrespective of who that losing CPSO was. The point can clearly be checked
6 further but the basic issue is simply this that the Regulator regards what may be put in the letter
7 as not varying, depending on who the losing CPSO is, and that is why the sample letter is
8 indeed intended to be a letter for everyone and not a specific letter for BT and a different letter
9 for other people.

10 THE PRESIDENT: Yes.

11 MISS SHARPSTON: Sir, if I may deal briefly with the products identified in BT's letter of today's
12 date, and that is on the basis of what I have been able to obtain by way of instructions during
13 my learned friend's submissions. Advice of duration and charge. Our understanding is that
14 this is in fact an obsolete service that BT is phasing out and that even in respect of BT calls,
15 because the charge information would exclude, for example, discounts, it would not therefore
16 necessarily be accurate information as to what the charging was.

17 In respect of call barring, call barring as provided by BT works where the call is
18 carried by BT. If the call is being carried by a CPSO – a different provider – then surely it
19 would not be appropriate for the BT service to work on that call. However, CPSO's can bar
20 calls, i.e. they can offer a call barring service to their customers in respect of the calls that they
21 are providing and, Sir, if you have tab 7 to hand (exhibit JS3) if you go to the Toucan letter –
22 the first letter under that tab – the second page of the letter, you will see a reference in the
23 middle of that page under "Terms and Conditions" to the possibility of having call barring on
24 Toucan calls to premium rate numbers. Then, of course:

25 "You are not obliged to have these calls barred, if you would like to reactivate them
26 simply contact customer service."

27 Similarly:

28 "If there are other numbers you would like to bar, for example, many families restrict
29 calls to mobiles, just let us know."

30 Sir, clearly that is an illustration but it is indicative of the fact that a call barring service may be
31 something that the gaining CPSO can indeed provide. The same applies in respect of ring back
32 when free, that this is a service which first of all I simply cannot establish whether it is or is not
33 true that this service would not work as provided by BT following a transfer to a CPSO, but if

1 it is true, so be it, nevertheless that is a service which the new CPSO may equally be able to
2 provide.

3 Indeed, it is perhaps interesting that in what I might call the “old” BT Notification of
4 Transfer letter, the letter of 12th August 2004, that letter expressly says:

5 “Your new service provider will be able to let you know about any existing BT
6 products or services which are likely to be affected by this change.”

7 So the intention there seems to have been that BT accepted indeed that it was for the gaining
8 CPSO to clarify for the customer whether, as a result of the change there would be certain
9 products which either no longer worked, or worked in a different way.

10 THE PRESIDENT: Yes, occasionally you get letters like the one from Tele2, which is the last one
11 in tab 7, which says that services such as 1571, 1471, emergency calls, or internet connection
12 are unaffected by the change. It does not actually mention ring back when free, but I imagine
13 that that is a service that the gaining operator could provide. There is no particular physical
14 reason why that is not a service that any operator could not offer.

15 MISS SHARPSTON: Sir, in relation to the Tesco letter I have just been passed clarification – this is
16 not a losing CPSO letter, is what I am told, the 13th October 2004, this is not losing CPSO
17 letter.

18 THE PRESIDENT: I am talking about 11th January 2005.

19 MISS SHARPSTON: I am sorry, the clarification was intended to assist but I am afraid did not.

20 I apologise, I will see if I can do better with the question a little later.

21 THE PRESIDENT: It looks as if it is an email.

22 MISS SHARPSTON: Sir, perhaps rather than take the Tribunal’s time on that now, can

23 I ----

24 THE PRESIDENT: Somebody could perhaps check that.

25 MISS SHARPSTON: Just to be clear, this is the email message from support at Tesco?

26 THE PRESIDENT: Yes, sent at 9 minutes past 9 in the evening of 11th January 2005.

27 MISS SHARPSTON: Thank you very much, Sir, I will check that.

28 THE PRESIDENT: If we just go back, if we just quickly go back to tab 5, if we just run down what
29 they are talking about, under “BT Together” they say:

30 “On transfer of your calls to another telephone company BT Together Option 1 will
31 probably be the best option for you.”

32 which is exactly what Toucan say in their letter to their customers, and what Tesco says in their
33 letter to their customers, and so forth and so on. So is there any real problem in BT pointing

1 out that if the customers on Option 2 or Option 3 that there is now a change and they should
2 really think about moving the Option?

3 MISS SHARPSTON: Sir, the objection is this, that the information being provided by the gaining
4 CPSO is in a different category from information being provided by the losing CPSO. There is
5 no objection to the gaining CPSO providing that information and, indeed, it is helpful to the
6 customer if he does so. There is similarly no objection to BT providing information, and
7 talking to its customer if the customer phones up. But the issue here is exclusively what goes
8 into the Notification of Transfer letter from the losing CPSO during that 10 day window.

9 THE PRESIDENT: This is intended to stop the customer paying too much, because he is on an
10 option that is too expensive for him.

11 MISS SHARPSTON: Sir, I can see that in terms of more global consumer protection and
12 information it is additional information. But in the 10 day period this is still a BT customer,
13 and what the letter is designed to do is to check whether the transfer was, indeed, intended by
14 the customer. That is the purpose of the letter. In a sense in that 10 day period there is no
15 question of overcharging or it being the wrong plan, because at the moment when that letter is
16 going out this is a BT customer whose expressed desire to change via the notification that has
17 come from the gaining CPSO is being verified by BT for the sole purpose of anti-slamming.
18 Those are the parameters. I am sorry, Sir, I am making the same points in a number of
19 different ways and I am not sure I am improving them.

20 THE PRESIDENT: No, I am struggling to see what the great objection is to BT telling the customer
21 that as from the date of transfer, you should look at whether you are on the right option, BT
22 Together, and what your monthly payment plan says because otherwise you may be paying too
23 much money? It seems to me to be quite a sensible customer idea and rather user friendly.

24 MISS SIMMONS: The primary purpose of the information for GC1.2 is for the transfer, so
25 everything else would be out. However, Ofcom accept – and accepted for the purposes of the
26 original hearing – that for consumer protection it is necessary to have some input into the letter
27 in relation to anti-slamming. That is for consumer protection. Now, the question it seems to
28 me is whether in relation to this direct debit point there is another consumer protection matter,
29 because the customer is overpaying BT and BT has the benefit of money which it should not
30 have. Now that seems to me to be an important question because if they have to wait 10 days
31 to do this the customer is or maybe prejudiced, because more money comes out of the
32 customer's account than need come out.

33 MISS SHARPSTON: Ma'am, I advance this a little tentatively, but is it not a necessary corollary of
34 the fact that there is a 10 day window? If there were no window then the transfer would

1 happen instantly. At that point the customer would start, as it were, to be overpaying, but also
2 there would be freedom for BT to market as it wished in order to seek to get the customer back.
3 The 10 day window creates a hiatus from every perspective. At that stage the customer,
4 although he has expressed the desire to start to place his calls with the gaining CPSO he is still
5 not, in fact with them.

6 MISS SIMMONS: But it takes time for the customer or for BT to deal with the bank, etc. It
7 depends when all this falls as to when the payments come out of the customer's account, and at
8 the end of the 10 day window the customer will effectively be paying too much.

9 MISS SHARPSTON: Ma'am, you are of course entirely right, exactly how the timing works will be
10 variable depending on the particular customer and what the date is within that customer's
11 monthly schedule of banking arrangements for the transfer to take place. But at the most it
12 would be in respect of one month's payment. If one constructs a situation where the timing
13 was just wrong.

14 MISS SIMMONS: He is still paying too much. He is going to have to pay BT and the new provider
15 a figure for his calls, assuming that he has transferred all his calls, so that he will be paying
16 double for the first month on your basis. If I were a prudent customer I would have decided on
17 day 1 of the 10 day period that I am going to transfer. I will have notified my transfer, and
18 I will have phoned up BT and said to BT "Please, can you make sure that you do not take out
19 of my account after the 10 day period more than just for the line?"

20 MISS SHARPSTON: I suspect the answer might be, "We will try and comply with your prudent
21 request but should it be the case that it goes through for this month we will, of course, refund
22 you next month". In other words, I am not sure that even your hypothetical prudent customer
23 will in fact manage to be guaranteed to have a situation where there is no month in which there
24 is not this overpayment. This can then be refunded.

25 MISS SIMMONS: On your hypothesis then it becomes worse the later you do it because of the
26 timing and the fact that these things take some time, so more money gets to BT the later that is
27 sorted out between the customer and BT.

28 MISS SHARPSTON: Ma'am, I entirely understand that but it really comes back down to this that if
29 there is going to be a transfer the customer will have obtained some information – how much
30 information depends on the customer. Many customers perhaps are going to be influenced
31 more by the fact that the calls are cheaper than by any other parameters. But the customer will
32 have obtained some information. Pointing out that there are downsides as well as benefits, as
33 assuredly there will be if there is a change of operator is, in my submission, as much marketing
34 as promoting BT in itself, specifically promoting BT would be, because what one is saying to

1 the customer at a moment when the customer is evinced that it is his intention to change is
2 saying “Hold on a minute, have you really thought this one through? Have you thought of all
3 the other elements which you did not take into your original decision to transfer? Let me draw
4 them to your attention, perhaps you would like to think again?”

5 MISS SIMMONS: That is not the purpose of this at all as I see it. On this money problem, it is
6 saying to the customer “You are changing, please give us authority ...” – because there is some
7 sort of agreement as to the amount, assuming that is what it turns out to be – “... please give us
8 authority to reduce the amount we take out of your account next month from £100 to £20”.

9 MISS SHARPSTON: Ma’am, I see the force of that. My answer has to be that such a letter from
10 BT to the customer would be very desirable, but the question is whether it goes in the
11 notification of transfer letter during the 10 day window when the customer has not yet in fact
12 moved from BT and when there is the possibility of him being saved from BT given the right
13 information, or whether that letter, with the other material to which Mr. Barling has adverted,
14 should be sent to BT after the end of the 10 day window.

15 MISS SIMMONS: Why is that information effectively going to go into your marketing basket? If it
16 is done correctly – I can see if it is not done correctly, but if it is done correctly – and all it is
17 saying “We have a direct debit authority from you of £100. Will you agree to that being
18 reduced to £20?” Why is that marketing?

19 MISS SHARPSTON: Ma’am, I can see that if it is the only thing in the letter over and above what is
20 in the Ofcom sample letter, and if it is done neutrally, then I can see that the argument for
21 including that information in the letter in the interests of consumer protection becomes rather
22 a strong one. It is not being so presented. It is being presented as part of a whole swathe of
23 neutral information which together is put to the customer, or BT would like to put to the
24 customer during the 10 day window. If one separates it out and had just that information,
25 along with the contact number if this is a case of slamming, then I can see the force of the
26 argument.

27 MISS KELLY: Miss Sharpston, I have a slightly different concern, and that is where the Regulator
28 is apparently very happy for X over here to provide information about the competitor, BT
29 services, such as BT Together, but is not happy for BT to actually make a statement about
30 those services itself. It seems to me to speak something about some aspect of a rather cosy
31 market. I would be grateful if you could clear that up for me.

32 MISS SHARPSTON: The short answer is that the gaining CPSO is not bound by General Condition
33 1.2 in the same way that the losing CPSO is, and that is a rather blunt answer, but that is the
34 start of the answer, that they are simply in different situations.

1 In terms of provision of information, and I apologise because it is the same point
2 again, there is in my submission a very fundamental difference between what goes into the
3 Notification of Transfer letter and what goes into any other piece of information that is sent by
4 BT to its customer. What one is focusing on here is very precisely what may go into the
5 Notification of Transfer letter. I recall Sir Christopher Bellamy putting to my learned friend,
6 during the discussion a little earlier, the question why should all the points that Mr. Barling
7 wished to see included not go out after the transfer has taken place? In my respectful
8 submission there is not a good answer to that. They can go out after the transfer has taken
9 place. BT knows that it has lost that customer, and certainly after the transfer has been
10 effected it could provide additional information. It is free to engage in activities which it
11 cannot engage in during the 10 day period.

12 THE PRESIDENT: I think we had better press on now, Miss Sharpston, to other points.

13 MR. BARLING: Sir, I am not going to take more than two seconds – I hope it will be helpful
14 actually on that point – to say that there is a danger here of losing sight of GC1.2 itself. If one
15 could perhaps just remind us all that what GC 1.2 forbids is information which, as the Tribunal
16 has found applies throughout GC1.2 cases using it and providing it “to be for whom such
17 information could provide a competitive advantage.” I think, Sir, that the short answer to
18 many of the points that we have been debating is that none of this new information, if provided
19 as neutral information, can possibly provide anybody with a competitive advantage, and
20 therefore for the same reason that Ofcom accept the anti-slamming purpose does not fall foul
21 of General Condition 1.2, so also the other neutral information that we have been discussing, if
22 provided neutrally and in a non-marketing way – and I very much take the Tribunal’s point
23 Miss Kelly made about one of those paragraphs – does not provide anyone with a competitive
24 advantage.

25 Can I also, just before sitting down, say that there is another danger here that Ofcom,
26 in the light of the submissions that have been made may fall foul of, and that is to get stuck in
27 the 10 day period. There is nothing to do with the 10 day period in General Condition 1.2.
28 The 10 day period is relevant only because Ofcom have chosen to restrict their notification to
29 the Save and say “well the same principles apply to win back but we are not making a
30 notification yet about win back.” So the 10 day period is a red herring in terms of whether this
31 information can be provided.

32 THE PRESIDENT: Well it is not a red herring in the context of Save, which is all we are talking
33 about.

1 MR. BARLING: Well we are and we are not, because we are talking about General Condition 1.2.
2 What is concerning me, my learned friend has just said that we can provide all this information
3 outside the 10 day period. My question is how can that be? If we cannot provide
4 it ----

5 THE PRESIDENT: After the 10 day period the original information that was provided in confidence
6 to BT Wholesale is no longer confidential because everybody knows that the transfer has been
7 effected and the customer is fair game for everybody. That is the difference, surely? It is only
8 in that period when it is not yet known to anybody – the original vice was, as perceived by
9 Ofcom, that in that 10 day period it was only BT Retail who was tipped off by BT Wholesale
10 that the customer was going, they had not yet gone, so BT Retail could happily and quickly
11 contact them and say “Don’t go because you haven’t understood it properly”. That is what
12 they were objecting to. When that period is over then it is a different ball game altogether.

13 MR. BARLING: Well I am just concerned about that, because I am just wondering if my learned
14 friend has made that concession on instructions. We would be very happy if that is the case,
15 which means that we could then make win back calls, we can do anything we like.

16 THE PRESIDENT: We have not ruled on win back – everybody is doing win back, as far as I can
17 make out.

18 MR. BARLING: But, Sir, my point is a more basic one. If we are forbidden within the 10 day
19 period from using that information in order to tell the customer that they are at a disadvantage
20 if they do not make an adjustment to their monthly payment, which we say is anyway not
21 within General Condition 1.2 because it is entirely neutral and it is not for competitive
22 advantage. But assuming for the purpose that it is, unless we have the information from
23 another source on the 11th day how can it make any difference whether it is within or without
24 the 10 day period as far as General Condition 1.2 is concerned? I will leave it at that, as we
25 obviously have to move on. My real point is that everyone agrees this is information that
26 someone should provide to the customer and in those circumstances it cannot possibly fall foul
27 of General Condition 1.2.

28 THE PRESIDENT: I think where we sort of leave this topic, and perhaps the parties would just
29 come back to us after the hearing, is this an issue upon which you want the Tribunal to provide
30 a ruling? Or is it something in the light of a discussion in which some common position could
31 be developed?

32 MR. BARLING: Well, Sir, we have not been very successful at the moment on developing
33 a common position.

1 THE PRESIDENT: No, I can see that. It may be that we need to decide it unless we are told to the
2 contrary.

3 MR. BARLING: We would prefer in a way to know what the Tribunal feels is marketing and falls
4 foul of the notification and what is not.

5 THE PRESIDENT: Do you want a chance to discuss it? Is there any point in inviting you to discuss
6 it a bit further amongst yourselves if we rise for a minute or two, because everybody has heard
7 what our view is? I do not particularly want to have to put this back if, in fact, the gap between
8 the parties is narrower than may have been first thought, I just do not know.

9 MR. BARLING: It is usually always worth having five minutes.

10 MISS SHARPSTON: I was just going to say, if it would assist that this is an issue on which the
11 Regulator's position is that one should try to reach a common position, and that it would in
12 those circumstances be appropriate for that rather than for you, Sir, to rule specifically on it.
13 I do not know whether that common position is going to be arrived at in five minutes
14 – I suspect that may be over optimistic.

15 THE PRESIDENT: It is just a question of how realistic it is to think of a common position being
16 arrived at. I can see it is obviously desirable, but if there is no real practical possibility of it
17 happening then we might as well rule on it sooner rather than later. Anyway, we will rise for
18 five minutes. I would like to try to get through by 1 o'clock if we can today for various
19 reasons.

20 (The hearing adjourned at 12.20 p.m. and resumed at 12.30 p.m)

21 MR. BARLING: Thank you very much, Sir, it has been useful. What we propose, if the Tribunal is
22 willing, would be this, that we would make one more effort in the light of the very helpful
23 remarks and questions that the Tribunal has posed this morning. We would try in the
24 immediate future to reach an accord on the contents of the letter. We would therefore ask you
25 not to start work on your Judgment on that point, and we would undertake to write you a joint
26 letter by 23rd March – that is effectively the end of term – indicating either that we had reached
27 agreement and need not trouble you further on the point; or that we had not reached agreement
28 and ask you for a Judgment, but we would indicate as it were what remains of the difference
29 between us.

30 THE PRESIDENT: Yes, and very briefly the respective positions.

31 MR. BARLING: And very briefly the respective positions. We will try and do that in a joint
32 letter ----

33 THE PRESIDENT: That would be very helpful I think, that is a very good idea, Mr. Barling.

34 MR. BARLING: I am very grateful.

1 MISS SHARPSTON: Sir, I just wish to confirm that, but also to emphasise that as you, Sir, said at
2 the earlier stage, what one is talking about here is very specifically CPS Save and it is not the
3 win back issues which are for another day.

4 THE PRESIDENT: Absolutely.

5 MISS SHARPSTON: Thank you, Sir.

6 THE PRESIDENT: Right, good. That I think takes us on to the next issue on the agenda, which was
7 the slamming point which I think probably is now somewhat tangential to the issues with
8 which we are seized, but I think on that point we would like to make it clear that when we said
9 in para.344 of our Judgment that we were making the assumption that Ofcom was in a position
10 to take prompt and effective action to eliminate slamming, that is all it was, it was just an
11 assumption – it was not a finding to that effect. We just assumed that it was the case because
12 that is what we were told.

13 We are, Miss Sharpston, a bit concerned to read that this is still going on and we do
14 not seem to have had any of these stop now orders, or other regulatory action that you were
15 telling us about quite enthusiastically in the course of the hearing. What is happening? Why is
16 this happening? Why have you not put a stop to it?

17 MISS SHARPSTON: Sir, what is happening, apart from anything else, are two consultations. One
18 was mentioned to you briefly at the hearing, the April 2004 consultation, and since you asked
19 me to tell the Tribunal so I will happily do so, but this can be put in as evidence should you
20 wish it in that form. Effectively following the hearing the conclusion that Ofcom initially
21 reached on the basis of the responses to the 2004 consultation was that there should be
22 a requirement upon providers who engage in sales and marketing activity for fixed line
23 telecommunications services to establish codes of practice on sales and marketing in
24 accordance with published guidelines and to comply with the provisions of those codes, and
25 that would be subject to a two year sunset clause. Now, because that involves modifying
26 General Condition 14, Ofcom was required, as the Regulator, to publish and to consult on the
27 Notice of Modification. That is what lies behind the November 2004 consultation of which
28 you will have seen a copy of the Ofcom document at exhibit JS4 under BT's submissions.
29 Responses to that have come in and Ofcom intends to publish a statement in April, i.e. next
30 month.

31 THE PRESIDENT: Why do you need a code of practice to stop customers being transferred without
32 their consent? Why do you not just go and get an injunction?

33 MISS SHARPSTON: Sir, the Regulator does take the view – and perhaps I can develop this for

1 a moment or two – which is shared by a majority of the respondents which are, apart from BT
2 the rest of the industry but also consumer groups, the Regulator takes the view that the
3 requirement for providers to establish codes, to comply with those codes of practice, which are
4 consistent with public guidelines would provide Ofcom with the necessary effective
5 enforcement powers. One has moved from a situation of having meetings to a situation where
6 it is presently envisaged and obviously I cannot, in making submissions on behalf of the
7 Regulator now, say that this is what will happen. I can say that Ofcom has reviewed the
8 responses and is formulating its directions. I cannot pre-empt what that announcement will be.

9 THE PRESIDENT: But you told us in the hearing that Ofcom already had the powers, that there was
10 ample consumer protection legislation to stop this sort of thing, stamp it out. Here we are
11 months later and it is still happening. What is going on?

12 MISS SHARPSTON: Sir, the specific enforcement is that if there is a change to the condition – here
13 to General Condition 14 – that breach of that condition can, in due course, lead to the
14 imposition of a penalty.

15 THE PRESIDENT: What about the general law? Why do you have to fall back on the Conditions?
16 This is close to fraud to transfer someone without their consent, is it not?

17 MISS SHARPSTON: Sir, can I perhaps take it the other way around? This is clearly a matter which
18 concerns BT greatly.

19 THE PRESIDENT: Yes, but the problem is it is rather tangential to the construction of GC1.2,
20 which is the point we are seized with as a Tribunal, but the problem is it muddies the waters
21 and introduces a whole lot of extraneous considerations that would not have needed to have
22 been introduced had firm action already been taken to stop this happening.

23 MISS SHARPSTON: Sir, with respect, it is for the Regulator initially working with the industry
24 rather than taking draconian measures to see where the problems that arise can be addressed.
25 That is of necessity an ongoing process. It is certainly the case that powers do exist and in
26 appropriate circumstances can be invoked. I draw to the Tribunal's attention the fact that BT
27 acting, of course perfectly legitimately, have drawn the serious problem of anti-slamming to
28 the attention of both Ofcom and the OFT. You will have seen, Sir, at the back of BT's bundle,
29 the correspondence that starts at exhibit JS8 under tab 12. This is a request for action. The
30 successive tabs show that this has been drawn to the attention of the OFT, which was content
31 to leave to Ofcom as the lead regulator the issues of trying to deal in a responsible way as the
32 regulator with these problems. If you go, Sir, to the OFT letter, which is – I am sorry, I am just
33 looking for it.

1 THE PRESIDENT: But the OFT is saying, one would have thought understandably, “Well look, this
2 is Ofcom’s bailiwick, they should be getting on with it”.

3 MISS SHARPSTON: Yes, Sir, by the same token, if the OFT had felt that Ofcom was not taking
4 any, or any responsible action, I venture to submit that the OFT would probably have felt it
5 desirable to step in. The OFT letter that I am referring to, Sir, is under tab 15, and that is
6 perhaps a helpful way of updating the Tribunal of where matters have moved to.

7 THE PRESIDENT: It may be that all this is an extremely desirable development to tighten it all up,
8 but we were led to believe that there were existing powers that were adequate which would be
9 used if necessary, and they do not seem to have been used at all.

10 MISS SHARPSTON: Sir, may I again, because I am speaking for the Regulator, may I just take
11 specific instructions on that point? (After a pause) Sir, the fact that a Regulator has the powers
12 does not mean that it is necessarily appropriate for the Regulator to use that power rather than
13 working with the industry to move the situation forward. There is an analogy, which is
14 perhaps a helpful one, with the way in which Ofgem has operated in the energy sector. What
15 has happened there is that Ofgem received new powers in April 2002, which allowed for the
16 imposition of financial penalties through licence conditions, and that is the sort of solution
17 which Ofcom is looking at now as I have indicated. Those powers have been used and there
18 has been a very significant and dramatic reduction in complaints about mis-selling in that
19 sector in consequence. It is seen in that sector that the use of those powers has produced a very
20 significant deterrent effect and has thus “dealt with” the problem.

21 Sir, at the end of the day it is for the Regulator to seek to work with the industry to
22 deal with the problem. The Regulator has been consulting in April 2004 again in light of the
23 proposed modification to General Condition 14 in November 2004, taking into account what
24 the stakeholders have been saying, that is the way that the Regulator is envisaging – I cannot
25 put it beyond that – is envisaging moving forward, currently a Direction is being formulated.

26 THE PRESIDENT: That was not quite how it was put to us during the hearing, was it,
27 Miss Sharpston? There was quite a lot of debate as to what the powers were and quite a lot of
28 waving around of the specific possibilities of stop now orders, and so forth and so on.

29 MISS SHARPSTON: Sir, the powers are indeed there. What I said on instructions in the hearing
30 was correct and I am sure if it had not been I would have been stopped.

31 THE PRESIDENT: Yes, but we were not told that it was not Ofcom’s policy to use the powers.

32 MISS SHARPSTON: Sir, nor am I making the submission now that it is not Ofcom’s policy to use
33 the powers. My submission is, I hope, a slightly more sophisticated one than that. It is to say
34 that those powers represent one end of the scale of what Ofcom can do. Ofcom has been

1 working with the industry on a number of ways of dealing with the problem. For example, the
2 use of the “cancel other” facility means that virtually no customers who should not have been
3 transferred are actually transferred. Therefore what one is usually dealing with ----

4 THE PRESIDENT: Just remind me how that works, if you would?

5 MISS SHARPSTON: Sir, since I sense that you will be writing it down, forgive me, I would rather
6 not summarise from my memory, I would like just to take the correct instructions.

7 THE PRESIDENT: Yes, please do.

8 MISS SHARPSTON: (After a pause) Sir, I think the difficulty is that those with me in court today
9 were not, in fact, involved in dealing with “cancel other”. I can tell you that cancel other is
10 a function that enables BT to cancel the order if it has been placed and should not have been
11 placed, but the exact way in which it operates I apologise I cannot provide that information.
12 What we could obviously do is to write to the Tribunal and set out succinctly how that
13 operates.

14 THE PRESIDENT: Let us see what Mr. Barling says about all this, because I think their argument is
15 that this has been so ineffective that they ought now to be allowed to telephone the customer to
16 check whether he has given his informed consent or not. That is your point, is it not,
17 Mr. Barling?

18 MR. BARLING: Indeed, Sir, it is. There is a dual problem, first the lack of enforcement action to
19 use existing powers as you indicated and, although we have done the leg work, we provided
20 Ofcom with a vast amount of evidence, hundreds of statements of people who have been
21 mis-sold or slammed.

22 THE PRESIDENT: Witness statements?

23 MR. BARLING: Oh yes, as I understand it – specimens of them are appended at tab 11 of
24 Mr. Steggles’ statement. Those just give you a flavour of what is happening on a day by day
25 basis to people and, of course, there are big offenders, and I think you see in Mr. Steggles’
26 statement reference, and in the correspondence with Ofcom and the OFT, reference to certain
27 very big offenders.

28 THE PRESIDENT: Big in the sense they are offending a lot, or big in the sense of being big and
29 powerful?

30 MR. BARLING: Offending a lot, thousands of mis-selling incidents. We clock about 10,000
31 a month – or we did at the time of the correspondence late last year – and that is still
32 continuing. A huge amount of evidence has been given, handed to the Regulator and they have
33 been asked to take action under the Enterprise Act, or at least threaten action to these

1 offenders. You see from the correspondence and, indeed, Mr. Steggles' statement, that did not
2 find favour and BT was extremely disappointed at that. The other area of disappointment ----

3 THE PRESIDENT: Sorry, I just want to follow this, Mr. Barling; I just want to check Mr. Steggles
4 on this point.

5 MR. BARLING: It starts at para.15, where he says that it is undoubtedly correct that Ofcom accepts
6 there is a serious problem. Then he refers to the consultations that have taken place and to
7 BT's responses. Then he deals with the unfair trading incidents at para.18 onwards. We
8 basically log these and then he deals with "cancel other", and various types of mis-selling.
9 Then para.29 a selection of witness statements is set out:

10 "These were gathered by BT primarily for the purpose of seeking action under the
11 Enterprise Act (see below) and in relation to undertakings as to passing off."

12 Then he deals from thereon with the attempt to persuade Ofcom and the OFT on the basis of
13 all the statements and the evidence to take action, at least in particular, against the major
14 offenders, so that is para.35 basically, enclosing supporting evidence in the form of witness
15 statements. The OFT declined on the basis that Ofcom effectively had a consultation and were
16 proposing some action, so nothing came of it, and that is all – in much more detail – in the
17 correspondence that is attached.

18 The reason the OFT said they did not need to deal with it and, indeed, the reason
19 Ofcom said they did not need to exercise their powers was because of the proposed new action
20 under the consultation. The problem with that is that it is, in BT's view, hopeless. What they
21 are proposing is that all the operators should write their own codes of practice. Instead of
22 having one mandatory code of practice, which BT has been urging Ofcom to do as a
23 minimum, Ofcom has persisted in its decision to let all the operators each write their own in
24 accordance with some non-mandatory guidance. It is going to lead to huge problems of
25 interpretation. I am sorry, the Guidelines are mandatory, but why it could not have been done
26 in the form of a mandatory code is beyond us to understand. Then you would have only one
27 code to interpret, instead of which you will now have to compare everybody – each individual
28 company's own code, with the mandatory guidance, in order to see whether there has been
29 a breach of their own code. So it is going to be a nightmare, and the real thing is going to be
30 wholly ineffective, and it is also not going to be up and running, obviously for some
31 considerable time, and it has a sunset clause so it is only going to last for two years anyway as
32 I understand it. So the regulatory action that is proposed to deal with this continuing problem
33 of slamming is just hopeless quite frankly.

1 Where that gets us in terms of GC1.2, as you, Sir, have said, is not entirely clear, and
2 it is right to say that in the context of the other product, the WLR product, BT has been in
3 consultation with Ofcom, sent the scripts to Ofcom and Ofcom has not objected, and has been
4 doing some limited amount of what we have called “verification” calls to try and combat
5 slamming in the WLR area where it is also a problem. That has not been done up to now in
6 relation to CPS. But of course it is pretty resource intensive.

7 THE PRESIDENT: Can you help us on how “cancel other” works? We were told that that facility
8 means that no customers that should not have been transferred are, in fact, transferred.

9 MR. BARLING: Well that is only if it comes to BT’s knowledge in certain categories really related
10 to slamming BT can, at the customer’s request, cancel the order within the 10 day period, but
11 it does not prevent slamming as such, it just cures the individual people who have been
12 slammed if BT knows about it in time. But BT at the moment is quite restricted.

13 THE PRESIDENT: I am just looking at Mr. Steggles on p.8 where there is a very helpful table. He
14 is there using the cancel own and cancel other figures.

15 MR. BARLING: Cancel own is where the gaining operator cancels it at the customer’s request.

16 THE PRESIDENT: That is within some kind of cooling off period, is it not?

17 MR. BARLING: Yes, I think these are all within the 10 day period – cancel own and cancel other,
18 as I understand it.

19 THE PRESIDENT: Is this cancel other because the customer ----

20 MR. BARLING: Requests BT to do it on a permitted ground. If they have just been simply
21 mis-sold and misled, for example, about pricing or something like that, BT cannot use cancel
22 other.

23 THE PRESIDENT: And the permitted ground is – I am just checking – in the case of slamming
24 “Internal customer miscommunication or line cease”.

25 MR. BARLING: That means where, for example, in an office one person has ordered the transfer
26 but he is not the right person, he is not the authorised person on the account. It looked as
27 though at one point Ofcom were going to restrict cancel other so it could not be used in that
28 kind of case, but I understand there might have been some movement on that. That is one area
29 of cancel other. In para.26 of Mr. Steggles he sets out a list of various categories of
30 mis-selling. These are the main categories where cancel other can be used A, B, C, D, and in
31 addition the footnote says:

32 “Where the gaining provider has failed to cancel when requested by the customer, in
33 cases of line cease and by BT Wholesale for administrative reasons.”

1 So there has to be a deliberate attempt to mislead. It is not sufficient that they have just been
2 unintentionally misled. If they have just got the wrong end of the stick, and there has been no
3 intention to mislead them, then they have to do it through the cancel own, and go back to the
4 gaining operator and get him to cancel it, they cannot do it through BT.

5 THE PRESIDENT: We do not have the figures going back earlier through 2003, we may have them
6 somewhere else, you can remind me, but I have in mind that the save call stopped in
7 December 2003.

8 MR. BARLING: Yes.

9 THE PRESIDENT: And since that date, in fact, the number of cancel other orders certainly in the
10 last few months of 2004 has been going up markedly on the basis of customers contacting BT,
11 which might suggest that customers contacting BT is at least a failsafe mechanism that could
12 be relied on to limit the problem pending effective regulatory action without the need for
13 a save call in the 10 day period.

14 MR. BARLING: Of course, there is a save call in the sense in which it is criticised, that is
15 a marketing call, and there is a verification call.

16 THE PRESIDENT: A verification call.

17 MR. BARLING: Ofcom have not objected to verification calls in the WLR context, and it may well
18 be that they do not object to them in this context. They are not in fact made by BT in this
19 context.

20 THE PRESIDENT: But that is what you say you should be able to do – is that right?

21 MR. BARLING: We submit there would be nothing offensive in doing so in any event, even under
22 the Tribunal's Ruling there would be nothing offensive.

23 THE PRESIDENT: That is part of the consumer protection, you would say, if it was a straight
24 verification call?

25 MR. BARLING: Yes. And it may be that Ofcom do not disagree with that, they have not disagreed
26 with it in WLR.

27 THE PRESIDENT: Yes, I think we have understood that.

28 MR. BARLING: I do not know how much further the Tribunal can take it in this context, other than
29 perhaps to say ----

30 THE PRESIDENT: Are we being asked to make a Ruling on this, that we should in some way rule
31 that a verification call, limited as such, is not to be taken to contravene ----

32 MR. BARLING: That would certainly be helpful.

33 THE PRESIDENT: Is that what you are asking us to do?

34 MR. BARLING: Yes.

1 THE PRESIDENT: Yes, Miss Sharpston?

2 MISS SHARPSTON: Sir, there are a number of points of clarification which I actually should make
3 in the light of Mr. Barling's submissions. Let us begin with the UTIs, with the incidents that
4 he was referring to and the unfair trading instance UTIs and the data in Mr. Steggles'
5 statement.

6 THE PRESIDENT: Yes.

7 MISS SHARPSTON: In fact, Ofcom has recently commissioned a company called "Schema" to
8 conduct an investigation into these incidents. The point behind that study is just to examine
9 and to understand to what extent the UTI data that BT Retail publishes and that are reflected in
10 Mr. Steggles' statement actually represent a true reflection of the level of mis-selling that
11 takes place, because I should emphasise that the Regulator does not take lightly the issues of
12 mis-selling. On the contrary, the Regulator shares BT's concern, but where we part company
13 is on how to deal with it.

14 The outcome of the exercise conducted by Schema has been to highlight that the
15 monthly UTI data that BT produces does not give a fair reflection of actual levels of unfair
16 trading. I am summarising an analysis, and again this can obviously be put into the Tribunal
17 in whatever form would be helpful since the discussion has gone much wider than perhaps
18 anticipated. In an analysis of 220 UTI cases, for which information was provided by the
19 gaining provider in response to UTIs recorded by BT it seemed that unfair trading had
20 occurred only in 53 per cent. of cases. If one evaluated the same 220 cases using BT data
21 only, namely the recording of calls to BT, unfair trading appeared to have occurred in 70 per
22 cent. of cases. Sir, I would submit that that difference quite clearly indicates that in order to
23 make an effective judgment on unfair trading it is essential to have access not only to the data
24 on the complaint to BT, but also on the original sales' transaction. It is on the basis of that
25 detailed analysis of what is actually happening that the Regulator has already met with
26 a number of providers involved, has been discussing the outcome of the research and has been
27 discussing the concern over particular selling practices. There are bilateral discussions taking
28 place with the companies involved, also more generally on an industry-wide basis, there is the
29 process of establishing careful scripting and of establishing best practice.

30 This is not, Sir, in the Regulator's view, a matter which can be solved simply by
31 looking at a number of complaint letters that are put forward by BT and reaching for the
32 largest and heaviest regulatory club that is available and to hand; rather it is a matter of
33 identifying what the true nature of the problem is and working to solve it. There is therefore

1 monitoring of complaints. There is the recent direction and determination on use of BT's
2 cancel other; there is the investigation that I have just mentioned.

3 Whilst it is very understandable that BT is concerned by this and, indeed, the
4 Regulator is also concerned, the fact remains that BT is the only industry player that does not
5 support the consultation proposals. The submissions that Mr. Barling was making just now
6 very eloquently reflect BT's response to the November 2004 consultation, but others who
7 responded to that consultation, which is the correct way forward if what is being contemplated
8 is modification of a general condition. Others who responded did not perceive it in his terms
9 entirely hopeless, bound not to work, on the contrary they were prepared to work with the
10 regulator in trying to resolve the problem. Sir, it has to be said that what is here taking place
11 is, or might look to be, a way of really pre-empting that consultation process and the
12 regulatory action. That is by the route of turning to the passage in the Tribunal's Judgment
13 that states the assumption that the Regulator will act effectively and querying the effectiveness
14 of Ofcom's anti-slamming action, and with the greatest possible respect, Sir, that is not
15 actually the subject matter of this case.

16 THE PRESIDENT: The subject matter of the case, as far as relevant, is whether a verification call to
17 discover whether a customer has been slammed or not would be contrary to General Condition
18 1.2.

19 MISS SHARPSTON: Sir, the material that was before the Tribunal was not in the context of a
20 verification call, which is a different suggestion that has been put forward operating on the
21 parallel with what happens in WLR. What was at issue and formed the subject matter of the
22 notification was not a verification call but a Save call.

23 THE PRESIDENT: So a verification call would not be contrary to the notification?

24 MISS SHARPSTON: Sir, my simple submission on that is that a verification call was not at issue.

25 This is not a matter that has been analysed by the Regulator, and I do not have instructions to
26 make submissions as to whether a verification call made in the terms of a script that I have not
27 seen, and have no instructions about, would or would not be a breach of the notification – nor
28 could I make a submission on that basis. As Mr. O'Flaherty correctly reminds me, it was not
29 of course before the Tribunal in considering this matter. It has been mentioned orally during
30 the course of discussion this morning.

31 THE PRESIDENT: Well it was, Miss Sharpston. It took up a great deal of time because one of their
32 principal arguments was that "We have to do this in order to prevent slamming" to which your
33 answer was "That is up to the Regulator and we have lots of powers, which we have not
34 actually used, but we have got them."

1 MISS SHARPSTON: Sir, the discussion before the Tribunal – and I am sure you will correct me if
2 I am wrong – was in relation to the Save call and indeed, the Tribunal looked at the script of
3 the Save call.

4 THE PRESIDENT: Yes.

5 MISS SHARPSTON: I do not know what the script of a verification call is because I have never
6 seen it. I am afraid in those circumstances I cannot sensibly answer the question that you put
7 to me, because I cannot answer it on the basis of a call whose content I do not know.

8 (The Tribunal confer)

9 THE PRESIDENT: I think what would help us on what is obviously a rather difficult issue for
10 everybody is to see whether we can follow the procedure similar to the one that Mr. Barling
11 has just suggested for the other issues that we have been discussing. If it is the case,
12 Mr. Barling, that within the parameters of these proceedings you are still contesting that there
13 is some kind of limited verification call that could be made without contravening General
14 Condition 1.2 then I think it would be helpful to us to know precisely what that call would or
15 might consist of and very briefly why you think you should be entitled to make it.

16 MR. BARLING: Sir, in that respect I am not sure that I can put it much better than we did in our
17 submission of 24th January. I do apologise because I have just noticed there are about a
18 hundred paragraph 30s, I do not know what went wrong, it just was not picked up. But if one
19 looks at p.10 – I am sorry, they are all para.30 in my version, anyway – under the heading:
20 “If the assumption is not correct, what are the effects?”

21 THE PRESIDENT: Yes, I have that.

22 MR. BARLING: Then over the page, para.30 that first comes over the page, we say:

23 “For the avoidance of any doubt BT contends that both the Notification of Transfer
24 letter and telephone calls should also be allowed to include neutral factual information
25 of the type already outlined above, and should not be limited just to performing an
26 anti-slamming function.”

27 So in other words, what we are saying is that we should be able, both in a letter and in a phone
28 call to tell them (a) do the verification side to make sure they have not been slammed and that
29 the right person ----

30 THE PRESIDENT: They have the scripts of the WLR.

31 MR. BARLING: Yes, we sent them the scripts before we put it into operation, they asked for them,
32 and we sent them to them last June, I think.

33 THE PRESIDENT: I think the question is whether there is objection to a similar verification call
34 based on a similar script being made in the context of this case.

1 MR. BARLING: And that is, of course, in addition to whether we can put in the other neutral factual
2 information.

3 THE PRESIDENT: Yes, we are just on the verification call at the moment. That is your position.
4 What it would be helpful for us to have from Ofcom, within the same kind of timetable if that
5 is all right, since we are talking about all these things that are interrelated, is whether there is
6 an objection to that being done and, if so, what the objection is.

7 MR. BARLING: We will feed that into the attempt we are going to have over the next week or so.

8 THE PRESIDENT: Yes, whether there is an objection and why there is an objection.

9 MR. BARLING: Yes, thank you.

10 THE PRESIDENT: That is probably about as far as we can take slamming for the time being,
11 Miss Sharpston?

12 MISS SHARPSTON: Sir, it probably is as far as we can take slamming but for the following point
13 which I make with the very greatest deference. If the Tribunal is minded to look in any way
14 further at the global issue of slamming, as distinct from looking at the material that BT and
15 Ofcom will bring back to the Tribunal in terms of agreeing a common position or seeking to
16 do so, then I am sure that the Tribunal would bear in mind that in relation to slamming it has
17 seen, of course, the additional material that BT has put in and it has had some submissions
18 from me but, of course, I have not been pointing to evidence. If your Tribunal was minded,
19 we would say it was not appropriate for it to do this in any way, but if your Tribunal were
20 looking further at the slamming issue, then clearly Ofcom would want to be able to put in
21 evidence, but having said that, Sir, it is very clearly Ofcom's position that your Tribunal has
22 handed down a Judgment based on a view of the position and that that should not be affected.

23 THE PRESIDENT: Well we made an assumption but we have since had later evidence that the
24 assumption may not have been well founded because there is a vast problem, on the evidence
25 we have so far, that we thought was being coped with by powers we were told about, but is not
26 being coped with by powers we have been told about, it is being coped with by other routes.
27 So it is a matter that is there, basically. The context of this case is General Condition 1.2, it is
28 not slamming in general.

29 MISS SHARPSTON: Indeed, Sir, that would be precisely my submission.

30 THE PRESIDENT: That is the context of the case in which this particular issue arises. But if you
31 want to put in some more evidence on it – if there is no agreement and it remains an issue then
32 you are welcome to put in whatever evidence you want.

33 MISS SHARPSTON: Sir, I would only wish to put in further evidence if it were the situation that
34 the Tribunal, contrary to the submission that I have just made, wished to examine further the

1 underlying assumption about slamming. My primary submission is that there is no cause to
2 examine that and that it would be inappropriate for the Tribunal, having given Judgment, in
3 the context of consequential orders and directions, to re-open that. I seek to do so very
4 respectfully ----

5 THE PRESIDENT: Of course.

6 MISS SHARPSTON: -- I merely wish to put the marker down that if the Tribunal is re-opening an
7 issue which Ofcom had understood to have been dealt with and closed in the Judgment, then
8 in those circumstances only Ofcom would wish to have the opportunity to put additional
9 material before the Tribunal, because the Tribunal could not sensibly revisit that point in the
10 absence of evidence from Ofcom, but that is as far as I take that point.

11 THE PRESIDENT: Let us see how we get on.

12 MR. BARLING: Sir, can I protest about this. They have had since December to put in evidence
13 about this. Your Judgment made it quite plain, and we understood, that you were making an
14 assumption which was provisional and if slamming was a problem that you wished to know
15 about it and therefore we put in evidence about it. They saw our evidence in January and they
16 have ignored it. Now, they are suggesting "We want to put in evidence", why on earth did
17 they not do it before now? It is a nonsense. The other thing is we have set out at p.9 of our
18 submission, there is no issue that slamming is existing and is a huge problem, they have said it
19 themselves, in their consultation document, which we have cited on p.9 of our 24th January
20 submission, where they say in about three different places which we quote: "Slamming is a big
21 problem". So there simply is not an issue about this. I do not know what they would want to
22 put in evidence, because most of the evidence they rely upon comes from us, because they do
23 not collect evidence so far as we are aware, other than the UTI forms that we provide them
24 with. So it really is quite ridiculous to suggest that this should go on any longer, and that they
25 should prolong it by seeking to put in something else, presumably to contradict what they have
26 already said in their consultation document. Therefore, if we are not able to resolve the
27 question of the verification matter we would ask the Tribunal to rule on the matter in the
28 Judgment which may yet have to be given.

29 THE PRESIDENT: Well let us see how we get on, Mr. Barling. Thank you for that. I think the next
30 matter on our list is the confidentiality of the script of the Save call which has been included in
31 the confidential version of the Tribunal's Judgment, but is not in the published version.

32 MR. BARLING: I do not think we can really say much more about that than we have said at para.32
33 on p.12 of our January submission.

1 THE PRESIDENT: I think we have two problems here, Mr. Barling, with your position. The first is
2 that this script has presumably been used quite widely in talking to customers, and it is
3 therefore to a degree at least already in the public domain – if you have been talking to
4 a whole lot of unknown third parties using it, it may be a bit difficult to say that it remains
5 confidential.

6 MR. BARLING: Except that it has not been revealed as a script to anyone, and it probably does not
7 exist except in the documentary form in which it has been provided in the course of this case.

8 THE PRESIDENT: Secondly, it does lend a certain amount of background, and information I think
9 that helps the reader of the Judgment to understand what it is all about. So I think, subject to
10 anything Miss Sharpston may say, our present inclination is to exercise our powers under the
11 relevant section of the Enterprise Act, which I need not turn up for the moment, and include
12 this in the published version of the Judgment.

13 MR. BARLING: Yes, I am just trying to remind myself how much it was already ----

14 THE PRESIDENT: It is already a summary, it is not the script itself. It is quite a short summary.

15 MR. BARLING: Yes. I do not think there is a big problem with it because it is a summary.

16 THE PRESIDENT: Yes, we are not publishing the script itself.

17 MR. BARLING: The original fear was that if it was more than just the summary that you have
18 given, but in fact the way it has been done in the Judgement probably means there is not
19 a problem.

20 THE PRESIDENT: Thank you very much. That, I think, takes us on to the situation in the WLR
21 Appeal – I do not know if we can deal with this fairly shortly – and then we have the question
22 of costs, and I do not think for reasons of time that we are going to get on to costs today, but
23 we have had that fully argued in writing.

24 As far as the WLR Save case is concerned, Miss Sharpston, the sequence of events as
25 I understand it is that there was a notification. There has been an Appeal, we extended time
26 generally I think in that case, and now the notification has been withdrawn. So the procedural
27 question that arises is what happens as far as the Appeal is concerned which, I would have
28 thought takes us to consider what order we make next because, in the ordinary course of
29 events you would need to file a defence and we would just get on with it. So I imagine your
30 application is what – to not file a Defence? How do you see it procedurally in terms of the
31 Rules and so forth?

32 MISS SHARPSTON: Sir, my starting point for my application would be that since there is no extant
33 notification against BT in respect of WLR the Appeal has become devoid of purpose. There
34 may be another Appeal, a different Appeal that may, in due course, perhaps be brought

1 because, as the Tribunal knows from our written submissions, it is Ofcom's intention to issue
2 a fresh WLR Notification. If it be the case that formally we should serve a Defence which
3 states what I have just said then so be it, I would respectfully ask for an appropriate length of
4 time in which to file such Defence, and then the matter can proceed. The alternative clearly
5 might be that my learned friend might perhaps consider whether, in such circumstances, it
6 would be appropriate to withdraw that Appeal and then the matter will proceed otherwise. But
7 in the absence of such an application I should like to ask for perhaps 28 days for the lodging of
8 an appropriate Defence.

9 THE PRESIDENT: Let us see how we get on, we do not want to get caught up in unnecessary
10 procedural steps if that is not the sensible thing to do.

11 MISS SHARPSTON: Indeed, Sir.

12 THE PRESIDENT: Let us see what Mr. Barling says. What do you think should happen,
13 Mr. Barling, procedurally speaking?

14 MR. BARLING: We think procedurally speaking there probably is not a problem, because it is just
15 a question of what is the most sensible course to bring these matters before the Tribunal in an
16 expeditious way, because we now know that the new notification is going to differ only so far
17 as they now deal with the question of competitive advantage.

18 THE PRESIDENT: Yes.

19 MR. BARLING: So in other respects it is going to be the same. The Appeal that stands there at the
20 moment is not academic. There is still an issue as to whether the original notification was
21 a lawful one. The reasons are not going to change other than they wish, as it were, to put
22 things right in terms of competitive advantage in the light of your Judgment in the Save case.
23 So is it going to be more wasteful of costs and effort to withdraw this Appeal and restart with
24 a document in almost the same form or, would it be better, to carry on with this appeal, put in
25 not a sort of short Defence saying "there is no case to answer" but a proper Defence tailored to
26 the issues which are, if you like, live issues. We did foresee, before we knew about the
27 withdrawal, in our submission of 24th January that it might be tailored to those issues which
28 are genuinely different from the Save case, so that people do not waste their time things that
29 we know the Tribunal will decide in the same way, and really restrict the pleadings to the
30 issues which are different, whilst reserving all our rights. To some extent we are very much
31 wanting the advice of the Tribunal on this. It seems to us that there might be something to be
32 said for keeping the existing Appeal in being to see whether that will save time and effort.
33 The best of all worlds would be if there could be a Judgment on the WLR issues at the earliest
34 possible moment. So in terms of timetabling it will help to keep this Appeal alive and pursue

1 it whilst bearing in mind that we may have to nominally appeal the new one as well, that will
2 not entail very much extra effort. Whereas if we terminate this one and then wait for them to
3 do a notification and so on, there may be some slippage in time on that and then we are very
4 much down the road before we can appeal that and come back and be in the same position we
5 are in now. So tentatively we were going to suggest that the existing Appeal remains on foot,
6 and that it would not be sensible for us to withdraw it – indeed, it is not academic, it is a live
7 Appeal – and invite my learned friends to put in a Defence, which they could limit to those
8 issues which are open after the Save Judgment, in other words, note that of course their
9 submissions are the same as they would have been and as have been upheld by the Tribunal in
10 the save Judgment.

11 THE PRESIDENT: You would not take any point on the competitive advantage issue.

12 MR. BARLING: We have won on that, in effect. No, I think that is right, I think we probably would
13 not.

14 THE PRESIDENT: When do we expect the second notification to arrive?

15 MR. BARLING: Obviously if they say something different on the competitive advantage we may
16 have to tack on an issue or two so the Tribunal could ----

17 THE PRESIDENT: I am just thinking aloud because I think the only issue which we probably ought
18 to manage to agree amongst ourselves somehow or another is what is the quickest, cheapest
19 and most easy way of solving this particular problem? If there was another notification and
20 then there was another Appeal that simply said “We repeat everything we have said in an
21 existing Appeal and we have the following points on the competitive advantage paragraph
22 which has now been added in, the two Appeals could then be consolidated and then we could
23 plead just to the points that were outstanding”.

24 MR. BARLING: Indeed.

25 THE PRESIDENT: In other words, the existing Appeal stays where it is and nobody does anything
26 until we have the new Notification. You then Appeal that on the very limited basis I have just
27 suggested and then we do it altogether, possibly. It rather depends on what the envisaged
28 timing is. Miss Sharpston, you see how we are exploring all the possibilities?

29 MISS SHARPSTON: Sir, indeed, and I am finding the discussion a very helpful one to be listening
30 to. Can I perhaps seek to contribute to it as well as listen to it?

31 THE PRESIDENT: Yes, thank you.

32 MISS SHARPSTON: First of all in terms of timing, it is hoped that the new notification will be
33 issued during the course of next month. The matter is being dealt with expeditiously. I am not

1 able to give a definite date, but that is the timeframe that we are looking at and we would hope
2 that it would be in the front half of next month rather than towards the tail end.

3 THE PRESIDENT: Right.

4 MISS SHARPSTON: In terms of a way to take matters forward, I wonder whether perhaps this
5 would find favour that if the present WLR Appeal remained stayed until that notification is
6 out, BT would then be in a position to look at the old and the new, to clarify by amending their
7 present Notice of Appeal what were still live issues in the light of the Judgment in CPS save,
8 and also to take any point that they wish to take – I am not obviously inviting them to do so,
9 but to take any point that they wish to take in respect of the contents of the new notification on
10 competitive advantage. Once that had happened, if that was then consolidated it would be
11 possible for a single consolidated Defence to be lodged which dealt with the issues that were
12 live. In my submission it would be better to do it that way around than to ask Ofcom at this
13 stage to plead to the existing case when we know that the new notification is forthcoming.

14 THE PRESIDENT: Please do not feel embarrassed if you cannot, but if you can give us some kind
15 of reasonably firm indication that the new notification is expected in mid-April, which is only
16 about a month from now, or shortly after ----

17 MISS SHARPSTON: Sir, you will have seen the nods among those who are with me ----

18 THE PRESIDENT: Nods from everyone, yes, thank you.

19 MISS SHARPSTON: They are committing themselves.

20 THE PRESIDENT: It might be that just for the moment the simplest course, Mr. Barling, is to make
21 no order today in the WLR Appeal, to wait for the anticipated further notification in April.
22 You would then technically put in an Appeal in respect of that but only dealing with anything
23 that was new in it, very briefly, or perhaps even at that stage saying “Well the live issues
24 are...”, combining it in one document.

25 MR. BARLING: Yes, exactly.

26 THE PRESIDENT: And we would technically leave the existing Appeal there because it just
27 confuses the issue if you get rid of it, but in fact your pleading in the new Appeal concentrates
28 on the live points.

29 MR. BARLING: Yes, whilst reserving all points we have lost, obviously.

30 THE PRESIDENT: Reserving on points you have lost on so far. Ofcom then files its defence on the
31 live points. We will not actually get rid of the WLR existing appeal yet.

32 MR. BARLING: They will come on together.

33 THE PRESIDENT: You never know, there may be costs’ issues and things as well, and they can
34 come on together, but the focus would be on the new notification on the live points.

1 MR. BARLING: I do not think we have any particular problem with that. I think really what we are
2 keen on is keeping up with time, because obviously we are inhibited in what we can do as long
3 as this goes on, we have not sought interim relief, we have complied with the existing
4 notification, even though it no longer exists. So with that timescale in mind and the Tribunal,
5 I know, has done everything – and always does – to help on these matters, and we could
6 presumably try and agree some directions between ourselves and put them forward to the
7 Tribunal.

8 THE PRESIDENT: Yes.

9 MR. BARLING: I think we would have no problem. But if the notification gets postponed and
10 drags its feet.

11 THE PRESIDENT: If unforeseen circumstances did delay things, I am sure Ofcom would let us
12 know, we will have a little recital in our order that we have been informed that it is anticipated
13 to be taken in April and therefore we make no order in the present WLR Appeal, and we will
14 give further directions when that notification is made.

15 MR. BARLING: Yes, because the real issues are probably quite limited now that make WLR
16 different from Save. The drawback of this is that we do not know what Ofcom say about that,
17 we do not have a Defence. The alternative would be that they put in a Defence on the limited
18 issues that are different, but I felt the way things are moving is that you prefer to do it that
19 way.

20 THE PRESIDENT: I think it is better to have one document from you and one document from them
21 in the way I have outlined.

22 MR. BARLING: So if we could have liberty to come back if the slippage is such that we would
23 rather have these issues decided.

24 THE PRESIDENT: If you want to press on with what there is at the moment we will consider that.
25 The idea being that in your new Notice of Appeal against notification number 2 you will
26 identify the issues that you say are the live issues so that they can plead in their defence to
27 that.

28 MR. BARLING: Yes, we will, yes. We have pretty much done it but we will certainly do that.

29 THE PRESIDENT: And I do not think it will need much duplication.

30 MR. BARLING: No. Sir, are you coming on to anything else at the moment?

31 THE PRESIDENT: There was only costs. I am sorry we have gone on right into the lunch hour.
32 That I think would mean that we would not deal with costs in the WLR case at this stage, but
33 we have still got the costs in the CPS case, and we have had very full written submissions on
34 those, and I think we probably need to give a Judgment on it rather than try to deal with it

1 now, unless anyone has any further submissions they want to make on what we have already
2 got?

3 MISS SHARPSTON: Sir, I wondered if I could canvass something with you that in fact Mr. Barling
4 and I had the opportunity to discuss briefly before you came in. It is, of course, a very
5 important point of principle as to how costs are dealt with in this category of regulatory
6 Appeal.

7 THE PRESIDENT: Absolutely.

8 MISS SHARPSTON: In a sense there were two cases, and your Tribunal has very detailed
9 submissions in the other case and in this one.

10 THE PRESIDENT: Yes.

11 MISS SHARPSTON: The difficulty partly is, of course, there are those who are not present and not
12 involved in this case who are very considerably affected – or would be considerably affected
13 were this to decide the point of principle as to how such costs should fall. There are other
14 counsel and the Treasury Solicitor who were part of the other case. There are two possible
15 ways of proceeding. One might be that your Tribunal decided on the point of principle in this
16 case on the basis of the totality of written submissions. The other, and I do not put it forward
17 with particular enthusiasm, but the other is that there is a separate hearing which deals with
18 costs and it would have to involve both cases if it was laying down, for example, principles
19 pertaining to interveners because, just to make the obvious point, the interveners in the other
20 cases, of course, be no part of this procedure nor could they have been.

21 THE PRESIDENT: The interveners in this case do not seek their costs.

22 MISS SHARPSTON: The interveners in this case do not seek their costs, but the global issue with
23 which the Tribunal has to deal is one which stretches across both cases, and I do not have a
24 very good proposal to put to the Tribunal on that, but simply to highlight those two ways of
25 proceeding and perhaps to invite the Tribunal to reflect ----

26 THE PRESIDENT: I am thinking aloud, in theory if you want a further hearing – and I do not know
27 whether a further hearing is now necessary – you may feel you want to make sure that the
28 Tribunal has understood everything. We could in theory contemplate a hearing that would be
29 technically a hearing of both cases on the same occasion with the Tribunal members involved
30 in both cases being there. It is probably no surprise that the Tribunal's procedures admit of
31 a certain amount of liaison between compositions in order to make sure that everyone is aware
32 of the various points that are arising in any pending case in front of the Tribunal so people at
33 least know what is going on.

1 MISS SHARPSTON: Of course, Sir. Let me make it clear, Ofcom for its part is not pressing for
2 there to be a hearing because you do have very detailed written submissions. I merely thought
3 it right to draw attention to the issue.

4 THE PRESIDENT: Thank you, that is very helpful. What do you think, Mr. Barling? I feel we
5 have probably thrashed it quite a lot in paper now.

6 MR. BARLING: An awful lot in paper, and I think if we were confident, as I am sure we can be,
7 that the Tribunal, however constituted, would take account of the paper in both cases ----

8 THE PRESIDENT: We have circulated the paper in both cases to both compositions.

9 MR. BARLING: -- and clearly similar issues arise.

10 THE PRESIDENT: Yes.

11 MR. BARLING: But if the Tribunal were happy to deal with it on what it has now we would not
12 wish to dissuade you.

13 THE PRESIDENT: We may well take that view, or there may be particular points that we may want
14 to ask for further help on, but I think for the moment we will just leave that and we will rule
15 on costs in due course.

16 MR. BARLING: One point is this "Cinderella" point about permission to Appeal. One is keen to
17 keep the thing in tandem as much as possible. Normally, we have a month from the date when
18 you ----

19 THE PRESIDENT: You want an extension of time, do you?

20 MR. BARLING: I am just wondering if that is sensible.

21 THE PRESIDENT: Well if you need an extension of time let us extend the time.

22 MR. BARLING: Particularly as we have not yet tried to reach the agreement on some of the points.
23 So I wonder whether it would not be simpler to extend it generally and as and when we reach
24 a sensible position we could either truncate it or ----

25 THE PRESIDENT: I think we will just extend the time generally.

26 MR. BARLING: I am grateful.

27 THE PRESIDENT: We could technically extend it to the next Case Management Conference,
28 but ----

29 MR. BARLING: If you say generally then I will keep reminding you and then there may come
30 a point when we need to actually do it!

31 THE PRESIDENT: You actually need to decide, yes.

32 MR. BARLING: Thank you.

33 THE PRESIDENT: Miss Sharpston, was there anything else?

34 MISS SHARPSTON: No, Sir, there is not, there is no opposition to that.

