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IN THE COMPETITION
APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 April 2011

Before:

MARCUS SMITH QC
(Chairman)

PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC
EVERYTHING EVERYWHERE LIMITED

Appellants

– v –

OFFICE OF COMMUNICATIONS

Respondent

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

Interveners (Case 1151)

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

Interveners
(Cases 1168 and 1169)

HEARING DAY TEN

APPEARANCES

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

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

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

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

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

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

The Intervener Hutchison 3G UK Limited was represented by internal counsel.

The Opal Telecom Ltd did not attend and was not represented.

1 THE CHAIRMAN: I think that was the alarm for Mr. Ward, was it not!

2 MR. WARD: Good morning, sir. As I am opening the closings, what I propose to do is provide a
3 very brief overview of why Vodafone considers that BT has failed to make good its appeals.
4 There has been some division of labour as between Ofcom and the MNOs, so I will not be
5 addressing all points. What we have handed up this morning is a document which tries to
6 answer the questions that you posed at the end of last week. As a result, I will not be going
7 through those, although I will be touching on some of those issues. What I will do though is
8 say something about the nature of the appeal, address the legal framework very briefly, and
9 then make short submissions on the main components of the welfare analysis.

10 The starting point is that Ofcom rejected the NCCNs because it concluded that they posed a
11 risk to consumer welfare and competition. That risk arose because it was uncertain what the
12 net impact of the very complicated consequences of the NCCNs would be. Our central
13 submission is that nothing in BT's appeal has served to dispel this uncertainty. If anything,
14 it has magnified it.

15 One need only consider the flow of funds diagram handed up by Mr. Read in opening. I
16 need not take you to it, the form of it is very familiar. There are 16 boxes. They all raise
17 significant questions. The net effect may ultimately depend on the balance between the
18 forces in those boxes, but not one of them has been quantified. Indeed, there is very little
19 one can even say with confidence about the approximate magnitude of the flows that it
20 identifies *a priori*. Most of what BT had to say about magnitude was derived from its
21 attempts to apply a ruler to Mr. Myers' illustrative diagram. The end result then is that the
22 net effects on consumer welfare remain highly uncertain. This matters because BT argues
23 for a very specific outcome. Its primary case is that the Tribunal should order the MNOs to
24 pay money which it says is due and owing under the NCCNs since they were issued, and of
25 course govern the situation for the future.

26 In substance, what it is seeking from the Tribunal is a finding that the NCCNs are fair and
27 reasonable. It sought to extract that finding by demonstrating that the NCCNs would be
28 beneficial for the welfare of consumers. That is a very high hurdle. It needs to do, at a
29 minimum, one of two things. It needs to demonstrate that prices would fall to below 12.2 or
30 8.5 ppm and that is because Ofcom accepted that if that happens there will be a net benefit
31 to consumers, but that is a remarkably precise result to argue for on the basis of purely *a*
32 *priori* modelling.

33 Secondly, its alternative is to prove that in the partial reduction scenario there will
34 nevertheless be a net benefit to consumers once all of the various flows depicted on

1 Mr. Read's diagram are counted. That turns on entirely intractable questions as to the net
2 effects of those flows.

3 It is important to appreciate that it is not sufficient for BT to simply establish that the
4 general direction of impact on prices is down.

5 BT also has various judicial review type criticisms of Ofcom's reasoning. Our submission
6 is that those are wholly insufficient to get it home. Relief in this context is discretionary.
7 That is made clear by ss.195(3) and (4) of the Communications Act. The Tribunal cannot
8 possibly be justified in sending this case if BT cannot show that the welfare analysis is
9 wrong.

10 This, of course, raises the question of what the Tribunal should do in the face of the
11 uncertainty, and these, of course, are the issues that were raised in your questions, and
12 which we have addressed in our note. I understand that Mr. Herberg is going to deal with
13 this in his oral submissions in detail. He, of course, has the luxury of three and a half hours,
14 so I am very pleased to leave that to him. What I do want to do is make four very short
15 points simply to put the submissions that I am going to make into their context.

16 First, Ofcom's dispute resolution powers make absolutely clear that its function is far
17 broader than that of a court or arbitrator called on to interpret a contract. Under s.190(2) of
18 the Act it can not only declare the rights and obligations of the parties under the contract
19 like a court can do, but it can also fix the terms and conditions or impose an obligation. So
20 the parties' contractual rights are at the very most only a starting point. The reason is that
21 Ofcom has to give effects to its binding statutory duties to further the interests of
22 competition and consumers. That is why BT was right to concede in opening that
23 regulatory considerations can trump the provisions of the contract. That was on the first
24 day, p.41, line 7.

25 Secondly, what that means is that BT's apparent unilateral right to impose the variation is
26 subject to this power on the part of Ofcom. All the terms of the Interconnection Agreement
27 are subject to Ofcom's dispute resolution powers. Even a unilateral right granted under the
28 contract may itself be challenged through dispute resolution.

29 Thirdly, of course, as Mr. Herberg pointed out in argument, under the terms of the SIA the
30 power of unilateral variation is, in fact, explicitly made subject to the dispute resolution
31 framework. We find that in articles 12 and 26.

32 So that was the right that the parties agreed to, not a simple right of contractual variation.
33 The plain contractual intention was that if the parties disagreed the matter would be referred

1 to Ofcom. You saw from the contemporaneous documents that that was precisely what BT
2 anticipated.

3 Fourthly, whilst there was some discussion about who it was in truth that proposed a
4 variation to the contract, our submission is that it is necessary to concentrate on questions of
5 substance rather than form.

6 The practical reality is that BT proposed what it described as a radical departure from
7 existing pricing arrangements. That was in the contemporaneous documents. Put simply, it
8 was BT that wanted to change the terms on which the parties dealt with each other. The
9 MNOs disputed this as BT had correctly anticipated. It then fell to Ofcom to decide
10 whether this new departure would, in fact, be in accordance with the discharge of its
11 statutory duties.

12 Against that framework one has to consider Ofcom's approach, which was a cautious one in
13 the light of the uncertainties thrown up by the NCCNs. Our submission is that Ofcom was
14 entitled to be risk averse. It preferred not to direct the parties to adopt a potentially
15 damaging new set of trading terms that might have led to a breach of its statutory duties. I
16 offer five reasons why such a cautious approach was appropriate.

17 Firstly, there are the limitations of the dispute resolution process itself. Time is short, and
18 of course its scope is defined by the NCCNs and the dispute between the parties, rather than
19 Ofcom's wider perspective on the issues. Secondly, there is of course the fact that it was
20 also engaging in a full policy review - a document you have seen much of. That gave it the
21 opportunity for a much wider and deeper consideration of the issues. Thirdly, the issues
22 raised by this particular case were in fact highly complex. The economics were uncertain.
23 Fourthly, in addressing those highly complex issues, the evidence before it (the empirical
24 evidence in particular) was severely limited. Fifthly and finally, Ofcom was bound to have
25 regard to its statutory duties to further the interests of consumers and competition. It plainly
26 would have risked a breach of those duties if it had not thought carefully about the risks that
27 the NCCNs imposed. So it is against that background that I want to consider the
28 uncertainties in a little more detail, turning really to the facts. Our submission is that there
29 are two linked underlying reasons why the effects of the NCCNs are so uncertain.

30 Firstly, BT's intentions at the time it introduced them, and secondly, the absence of any
31 empirical evidence as to the effects. Starting with BT's intentions, the contemporaneous
32 documents clearly demonstrate that BT's intention was to generate revenue from the
33 wholesale charges. You have seen the documents, but the references are bundle 3 27.2.1
34 and bundle 23 8.1. Its revenue expectations were entirely premised on the assumption that

1 the MNOs' prices would stay the same, the very opposite of what it now argues for. Of
2 course, it is important to bear in mind that these were contemporaneous documents
3 produced under Ofcom's compulsory powers. So in my submission they are entitled to
4 great weight.

5 The evidence of Mr. Fitzakerly and Mr. Kilburn was that BT also wanted to reduce MNO
6 prices. But there is not a trace of that in the contemporaneous documents. It may be that it
7 arose later. But what we can say with confidence is that unless the Wholesale Executive
8 Board were asked to proceed on an entirely false premise, then plainly the principal
9 expectation was that prices would stay the same.

10 It is entirely understandable from a commercial perspective why BT would want a share of
11 the MNOs' revenue. BT is of course subject to a relevant SMP condition but the MNOs
12 have not been subject to any relevant SMP finding and are left free to charge as they wish,
13 subject only to obligations of transparency. So taking a share of the MNOs' revenue
14 mitigates the commercial impact of the SMP condition upon BT. But that may be
15 understandable commercially, but it is an entirely different question whether it is in the
16 interests of consumers.

17 So why, then, do we say this contemporaneous evidence matters? Two reasons. First, it is
18 one of the very few pieces of empirical evidence we have about how market participants
19 saw the NCCNs. It is striking that it is so divergent from the theoretical analysis now relied
20 upon. Secondly, it also serves to explain why BT has found itself with such a mountain to
21 climb evidentially. It explains why we have ended up arguing over NCCNs with such
22 ambiguous effects.

23 BT has complained repeatedly in its arguments that Ofcom has placed an excessive burden
24 on it. But our submission is the difficulty is not the fault of Ofcom at all, or indeed some
25 defect in the statutory framework, the problem is of BT's own making. It is now purporting
26 to address what it describes as a market wide failure. It is trying to do so through an
27 instrument apparently designed for an altogether different purpose.

28 To properly understand the effects of that instrument would require an industry wide
29 investigation. But that is all the function of the regulator. When the regulator takes on this
30 function, as in its NGN policy review, there is no particular burden upon any party; it is a
31 wider regulatory enquiry. So it becomes for Ofcom to investigate and determine a
32 resolution to the wider industry issues that have been identified. Our submission is it is
33 entirely right that Ofcom should be cautious about trying to address those wider issues
34 through the relatively limited means of a bilateral dispute.

1 The absence of any empirical information to underpin BT's analysis itself has two causes.
2 Firstly, there is the very novelty of the NCCNs. As Professor Dobbs put it, this was an
3 innovative pricing proposal (day 7, p.95, line 32). As a result, of course, there is no body of
4 empirical data to draw upon dealing precisely with this kind of proposal. But once again,
5 here is a risk factor that BT brought upon itself. Of course, there is no objection to
6 innovation in principle. This is not an argument just to preserve the status quo. What we
7 have here is an innovation with needlessly ambiguous effects imposed by a party that, on its
8 own case, was not actually in a position to properly demonstrate those effects.

9 The second cause of BT's difficulty is that it has conspicuously failed to draw on its own
10 resources, its own experience as an MVNO, or even its commercial experience as to the
11 effect of price changes within its wider business. Instead, what we discovered was that
12 Professor Dobbs was asked to draw up economic models entirely unsupported by empirical
13 data. It transpired he had never asked for or been given any such data.

14 That data may well have proven to be limited, but it would at least have been something.
15 We can see why that may have had an impact when one considers Note C that was handed
16 up just a few days before trial, which dealt with a DWP pricing change. This was the very
17 first time that Professor Dobbs had any kind of recourse to empirical information.

18 In fact, his argument was it was really rather important and quite telling, which tends to
19 suggest that other sources of indirect information might also have helped him. But in truth,
20 this particular piece of empirical information does not really tell us anything useful at all
21 because all it showed was the effect of the uniform adoption of a zero price across all OCPs.
22 Here, what we are talking about is a price reduction, down to 12.5 or 8.5 pence. There will
23 still be a marginal cost to users of making these calls, and of course they will still have the
24 option of making calls on landlines where the prices are, in 080 cases, regulated all the way
25 down to zero. So it does not tell us anything very interesting about our particular case. It at
26 least underlines how willing Professor Dobbs might have been to consider empirical
27 information if BT had thought to provide it.

28 So in the absence of empirical information what we are left with are a priori arguments,
29 largely about orders of magnitude. But those arguments are being deployed to support a
30 highly specific conclusion, not just as to the direction of change but as to the average price
31 point to be obtained. But what is striking about the evidence is that there is a significant
32 degree of consensus about the existence of uncertainty. BT is not arguing that there is no
33 uncertainty in these proposals.

34 What Professor Dobbs said on day 7 p.105 line 33 was:

1 ”There is always uncertainty. For one thing, all economic models are abstractions
2 from reality. That is certainly the case in the ones we have today. Am I confident
3 without a shadow of a doubt? No, I’m not absolutely confident.”

4 Although in fairness he also said there were “quite strong” incentives.

5 Dr. Maldoom concluded his evidence on day 7 p.62 line 7 saying: “Everything is
6 uncertain.” That may well have been rhetorical, but of course he is absolutely right.

7 Against that background I want to turn briefly to the main elements in the economic
8 analysis, starting with the direct effect. I am pleased to say that Miss Smith is going to deal
9 with the detail of the economic argument here and why it is that the absence of empirical
10 information is so important in this particular context. I simply observe that we heard three
11 times from Professor Dobbs that his “gut feeling” supported various parts of the analysis.
12 Those transcript references are all on day 8 p.21 line 14; p.39 line 27; p.59 line 23. Gut
13 feeling really is not enough in this case. But what I want to focus on is a slightly different
14 point that modelling inevitably cannot capture all of the facets of the MNOs real world
15 pricing decisions. This is not to contend that BT had to refine that modelling to the nth
16 degree as BT has contended. But the point is rather that it is unrealistic to try and prove
17 highly specific conclusions purely *a priori* or, to put it another way, the incentive effects
18 that have been modelled by Professor Dobbs may not actually prove decisive in the real
19 world.

20 What I would like to do is illustrate this general proposition with three specific examples.

21 First, there is what Professor Dobbs described as the dilution effect, and this arises because
22 of the uncertainty as to the extent to which other TCPs will or may adopt comparable ladder
23 pricing. There is no comprehensive evidence before the Tribunal as to the wider position.

24 We have seen ladder pricing from Cable & Wireless, but it is not exactly the same as BT,
25 there are undoubtedly similarities, but there are all manner of differences. Of course, it is
26 entirely foreseeable that other TCPs may adopt other charging structures at different times,
27 they need not be all the same as BT’s and, of course, what was conceded by Professor
28 Dobbs is that modelling takes no account of this issue. The result of that is a blurring or,
29 in his words, a dilution of the incentive effects. It is another source of uncertainty, and I
30 would like to just read you a very short paragraph of Professor Dobbs’ evidence which
31 contains a very important concession in this regard, it is day 8, p.4 from line 13.

32 “The impact of one TCP applying ladder pricing and only having a limited market
33 share creates an incentive effect for the MNOs to increase prices. The direction of
34 the incentive remains the same. What it does alter is the extent to which the prices

1 are incentivised to the full, for example, if we are focusing on the 0845/0870 case,
2 where we have 12.5p and 17.5p, and I have argued that there are good reasons to
3 believe that 12.5p is more focal than 17.5p I think the consequence of the dilution
4 effect is that it increases the chance that the price fall will only be to 17.5 rather
5 than 12.5.”

6 So Professor Dobbs is recognising that the dilution effect impacts directly upon BT’s core
7 argument here. It is a very important concession that really does call into question BT’s
8 argument that prices will fall to the bottom step.

9 The second difficulty faced by the modelling is that it is, of course, premised by profit
10 maximisation. Professor Dobbs said on day 8, p.45, line 16:

11 “If you take away the assumption of profit maximising you take away everything
12 I’ve done.”

13 Of course, it is not disputed that the MNOs are profit maximising in the long term across the
14 basket of services that they offer, but the difficulty is that the evidence shows that the
15 pricing of particular services at particular times is constrained by other considerations; the
16 most obvious example is Mr. Stone’s evidence (C2, tab 41, para. 16), and this was put to
17 Professor Dobbs. Other factors, such as Vodafone’s corporate responsibility obligations,
18 regulatory pressure or media coverage can play a part in how tariffs are set. In other words,
19 Vodafone may not want to put its head above the parapet necessarily on these prices, so we
20 may not have profit maximising prices in any short term sense. Of course it is part of long
21 range profit maximising, but the striking divergence that we have seen between the headline
22 rates of the MNOs really demonstrates this point. We have T-Mobile I think 40ppm and
23 then a range of headline prices down to 15ppm. None of this, of course, has been the
24 subject of any detailed empirical examination, still less any economic modelling, but in
25 substance it really is a key feature of how these particular services are actually priced.

26 The third point is about time: how long will it take for these incentive effects to take effect
27 because, of course, the longer it takes the greater the prospect that some supervening event
28 will override the incentive properties that Professor Dobbs has modelled. Professor Dobbs
29 equivocated somewhat on the question, but at various stages he accepted that the answer
30 might be a long time, it might take several iterations to hit the nail on the head is really the
31 gist of it, and he conjured up the prospects of long term commercial pressure having a
32 downwards effect perhaps even over a series of NCCNs, and a series of ladder prices from
33 other TCPs, but of course, that is all beyond the time horizon of modelling and it is far

1 beyond the time horizon of this appeal. What we are concerned with is Ofcom's decision to
2 reject these particular NCCNs on the evidence.

3 The issue of the timeline is made particularly acute by the fact that we know Ofcom is due
4 to intervene in September, and whilst its proposals remain at consultation stage, it is clear
5 that it is currently planning retail price controls for 080 numbers, and the delinking of 0845
6 and 0870 from the geographical number range, rather undermining any argument based on
7 externality for the existing policy preference. Of course, the effects of all of this are very
8 uncertain, but what we do see is the immediate prospect that the landscape is about to
9 change fundamentally, and what that means at the broadest level is that it is really very
10 difficult to predict whether or how the effects contended for by BT will actually play out
11 and quite impossible to justify the burden of compliance that BT wishes to impose
12 immediately on the MNOs and which may be about to become redundant – something I will
13 return to on the third principle.

14 This issue of timeline also bears heavily upon the indirect effect, the next element in the
15 analysis that I want to talk about. If Ofcom do impose retail price controls on 080 that
16 would, of course, put an end to any kind of pass through of BT determination revenues on
17 080 numbers under the current ladder proposals, and what we would be left with instead is
18 an action to recover for the retrospective period. But, even if that succeeds, and you will
19 see in the written submission that we have said it should not, but even if it were to succeed
20 there would not be any reason to think that such a lump sum would find its way through to
21 consumers by some kind of pass through mechanism, and there is no reason at all to think
22 that it would at the end of the day address any kind of market failure.

23 In the case of 0845 and 0870 numbers we know that they will be delinked from geographic
24 numbers. So what will happen in that market is entirely unclear, but what we can see
25 though is any form of justification based on policy preference to address the externalities
26 simply falls away, it just will not apply any more. So I do not make a very precise
27 submission about any of that. What I do say though is that when one is considering the
28 uncertainty of the economic effects of BT's argument, just the briefest look beyond the
29 likely date of the Tribunal's judgment tells you that all bets are off.

30 Even setting that problem aside the indirect effect is, of course, particularly uncertain
31 because it depends on two layers of pass through and two potential waterbed effects. The
32 first pass through is by BT to the service provider, and the second pass through is by the
33 service providers to their customers, each layer is fraught with uncertainty. Starting with
34 pass through by BT we know that until very recently there was no competitive pressure at

1 this level; we know that because Ofcom found as much in the 080 determination and the
2 reference is paras. 5.91 and 6.9. That was in February 2010 and by September 2010 in its
3 0845 determination it had concluded that there was some competitive pressure even though
4 the picture remained uncertain. What we find though is that we are in uncharted waters
5 again. There is no empirical basis certainly for any particular finding as to how strong this
6 pass through would be. Even Dr. Maldoom accepted that there really were clearly
7 uncertainties here (Day 7, p.53, lines 12 to 31).

8 Whilst BT may say that the competitive pressure is strong, we simply do not know how
9 much revenue in truth will stick with BT, and how much will pass through.

10 Turning to the SPs, the position is even more difficult. There is no evidence at all before
11 the Tribunal from any SP, or any evidence from BT, about how it is empirically, in practice,
12 that the SPs do behave. In reality, we know almost nothing about the conditions of
13 competition in the SP market. What we do know is that Ofcom has found there are reasons
14 to doubt that they are even interested in these number ranges as a source of revenue. The
15 reference for that, and you have seen it before, is bundle B1, tab 1, annex 3, paras.5.224 to
16 5.227.

17 So where we are is that there is no way to assess reliably how much revenue will ever find
18 its way into the form of benefits for end consumers through the indirect effect.

19 PROFESSOR STONEMAN: Can I just clarify an issue. This question of pass through from BT
20 to the SPs, you say that Ofcom found that it was not competitive. Was this the Ofcom
21 finding that the other terminating call providers did not have the software or the ability to
22 replicate the pricing ladder that BT had ----

23 MR. WARD: Yes.

24 THE CHAIRMAN: I do not think that is quite the same as saying that there is no competitive
25 pressure. If one looks at the data we were given on the SP market, the SP hosting market,
26 where I believe BT have the 25 per cent share, that would imply that SP hosting is really
27 quite a competitive market rather than the impression that you are trying to give.

28 MR. WARD: Sir, that is entirely fair.

29 PROFESSOR STONEMAN: Of course it is fair, yes!

30 MR. WARD: I really need go no further than what Ofcom actually said. I do not need or wish to
31 put a gloss on it. It says at para.5.91 of its decision in 080:

32 “We note T-Mobile’s view that there is a lack of evidence that BT would pass
33 on any revenue gained from 080 termination charges to 080 SPs. We
34 acknowledge that, in the current circumstances this is likely to be the case

1 (i.e. we think it unlikely that BT would have an incentive to pass on revenue
2 gained on 080 SPs). This does not change our conclusions in relation to the
3 Indirect effects on consumers that may result from termination charges.”

4 PROFESSOR STONEMAN: That is much more specific.

5 MR. WARD: It is much more specific. The point I made was indeed too broad. The more
6 specific point is all I need for the purpose of the argument.

7 I was going to turn then to the mobile tariff package effect. Here there seems to be common
8 ground that there will be an MTPE, albeit there is a wide range of views about how strong it
9 will be. Vodafone’s evidence was that it would certainly seek to recover all of the revenue
10 it lost as a result, and that was Mr. Stone at para.33. That, of course, is the only commercial
11 real world evidence we have about how the MTPE might play out. Ofcom’s view was that
12 it would be strong, even if it could not be quantified and we heard from Mr. Myers about
13 that.

14 Our submission is that this conclusion is evidently intuitively plausible for two reasons.
15 Firstly, we have the uncontested fact that overall the wholesale and retail mobile access and
16 origination markets have been found to be competitive by Ofcom and the Commission.
17 That of course is very different from the TCP and the SP markets where we do not really
18 know very much.

19 Secondly, the point is also reinforced by the fact that all of the MNOs will be reacting at the
20 same time to the same competitive pressure. You will have seen that Mr. Stone said, “In
21 those circumstances, I just would not feel constrained in respect of some form of tariff
22 rebalancing”. Again, a little bit of commercial evidence on this.

23 The principal challenge to all of this came from Dr. Maldoom, and he at least tried to put
24 some numbers on the MTPE. We do submit that it became clear in cross-examination that
25 there was no reliable basis at all for those numbers. In part it appeared to be based on a
26 misreading of the Competition Commission’s decision in the call termination case, and in
27 part it was derived from applying his ruler to Mr. Myers’ illustrative diagram.

28 Plainly then the evidence does not permit the Tribunal to reach a firm view on this question
29 as to exactly how strong the effect will be, even though the evidence does suggest that it
30 will be strong.

31 Our submission is that the Tribunal need not go any further than that in any event. Firstly,
32 we know of course that there are two sources of the MTPE, boxes A and B on Mr. Read’s
33 diagram – the revenue lost through a cut in retail prices, box A; and then the termination
34 charges themselves, box B. So a waterbed effect of far less than 100 per cent could still

1 outweigh the consumer benefit derived from reduced prices and could still outweigh
2 whatever the highly speculative benefits that are said to arise through the indirect effect.
3 Secondly, another point you heard made a number of times in cross-examination: there is
4 of course a real prospect of a welfare loss here, because consumers may end up paying more
5 for services they care more about than 08X services. You saw Ofcom's own survey
6 evidence that showed a marked lack of willingness to do so. That survey is at B2, tab 23.
7 The MNOs' case, of course, is that the way that these services are priced is simply an aspect
8 of effective competition at the level of the basket. Any change at least runs the risk of
9 additional consumer detriment that again needs to be offset when one is doing the welfare
10 analysis. We say there is no need to any further than to conclude that Ofcom was plainly
11 right that all of this poses a very significant risk to consumer welfare.

12 I will turn now very briefly, if I may, to the question of market failure and the treatment by
13 Ofcom of externalities. BT's argument is that Ofcom has failed to afford sufficient weight
14 to these issues, and I understand Mr. Herberg is going to be dealing with that in some detail,
15 so I will again leave that, if I may, to him. What I would like to do is to focus on one
16 particular question, which is the extent to which these NCCNs could be said to address the
17 externalities in any event. BT has sought to rely on the figure of £500 million in consumer
18 detriment derived from table A2.22 of the NGN paper. You have seen that at bundle 3, tab
19 3.1, p.192, a number of times.

20 That is of course a consultation paper, and much that it contains is very much actively under
21 dispute at the moment. What we saw immediately by reading the table more closely is that
22 only £66 million of that detriment is said to be attributable to mobile OCPs in the first place.
23 The crucial point is that there are two separate questions. One is the extent of the supposed
24 market failure, but the other is the efficacy of the NCCNs in remedying it. Our submission
25 is that there are compelling reasons to doubt that the NCCNs will be effective in addressing
26 the issues, particularly of brand enhancement, that have been heavily emphasised by BT. I
27 want to suggest just four.

28 First, these changes will be confined to BT number ranges only. So the doubts we have
29 already considered about the responses of other TCPs will also have a blurring effect on the
30 market signals that might be derived from the MNOs' responses – in other words, there will
31 not be a uniform position in the market place helping consumers eradicate uncertainty about
32 these charges.

33 That is made worse for the second reason, that there may well be a wide range of reactions
34 by the MNOs because, of course, as I said a moment ago, they start from very different

1 positions, headline rates varying between 15 and 49 ppm. They may end up in different
2 positions as well.

3 Thirdly, there will be price dispersal, to use a phrase used by Professor Dobbs, day 7, p.92,
4 line 15. He accepted that the NCCNs will incentivise only an average price among the
5 offerings of any individual MNO. So within that MNO's range of bundles there may
6 remain a range of different prices for 08X products. Some prices may even go up. His
7 argument was only that the average would fall to the bottom step. So price dispersal again
8 means a lack of clarity in the signals to the consumers.

9 Then, fourthly, it is of course accepted by BT that the NCCNs do not provide an incentive
10 to align prices with Ofcom's policy preference. 080 calls are not incentivised to fall to zero.
11 0845/0870 calls are not incentivised to fall to geographic rates. So even if everything BT
12 says turns out to be true, the picture remains very murky indeed. Where the source of
13 detriment that concerns Ofcom is uncertainty by consumers in the market place, then the
14 NCCNs are really not going to help very much. Mr. Myers said there was a "persistent and
15 deeply entrenched misperception about 08X numbers", and that was on day 5, p.11, line 20.
16 It was so severe that Ofcom is actually proposing to abandon the use of 0845/0870
17 altogether for the purpose of the geographic link and start again with 03 numbers.

18 This may all be debatable, but of course this is the basis that BT has put forward its case.

19 There is in truth real reason to doubt what impact it will make. But stepping back from this
20 for the minute, what we are really arguing about is whether Ofcom made an error in, if you
21 like, merely placing weight on the direct effect as a way to reflect these externalities which
22 BT says one way or another does not go far enough. But given the limitations of what can
23 be achieved through the NCCNs, our submission is that if anything what Ofcom did was
24 erring on the side of generosity to BT.

25 With that, I would like to say something very briefly about Principle 3, which is of course
26 concerned with the practicalities of implementation. BT's argument is that if it succeeds on
27 Principle 2 then Principle 3 must fall away as well, because of course Ofcom found against
28 it on Principle 3 as well in the 0845/0870 case.

29 There is quite a lot of evidence before you from the MNOs about the practical difficulties
30 that would be created by the imposition of the NCCNs and in Vodafone's case we have Mr.
31 Stone (whose evidence you have seen a lot of) but also Mr. Bowey whose evidence has not
32 been shown to you because he was not called and it was not challenged. We do invite you
33 to read it because this evidence, which is largely unchallenged, makes clear that there are
34 very, very real problems for the MNOs in what BT are seeking to do.

1 BT had two points. Firstly, it said there was some form of impermissible double counting
2 because Ofcom regarded some factors as relevant to both the second principle and the third
3 principle. Our submission is that that is plainly misconceived. Some factors were relevant
4 to both, and Ofcom was entitled to take them into account at both stages of its analysis.

5 Secondly, BT pointed to this overlap arising from the fact that Ofcom said it placed more
6 weight on the practicality concerns because it saw a lack of clear benefits to consumers
7 under the second principle. That is para.9.53 of the 0845/0870 Determination. BT says in
8 that case if P2 calls, P3 must fall with it. We respectfully disagree. This does not take
9 seriously what the gist of Ofcom's concern was.

10 The problem, as Ofcom saw it, was that the NCCNs were shortly to be overtaken by the
11 policy review and it was therefore unjustifiable to impose very heavy compliance costs
12 upon the MNOs given that the landscape may be about to change altogether (para.9.52
13 0845/0870 Determination). So we cannot simply assume without more that Ofcom would
14 have otherwise allowed the NCCNs. In other words, if it thought that was the only obstacle,
15 would it have allowed the NCCNs to proceed?

16 The issue that was troubling Ofcom back in September 2010 is all the more acute now. If
17 one envisages the Tribunal remitting this case in the Autumn, then Ofcom would have
18 reached its determination on the new regulatory framework.

19 THE CHAIRMAN: Is not that submission tantamount to saying that the Tribunal, and therefore a
20 fortiori Ofcom, when seeking to resolve disputes has got to have regard to market wide
21 policy reviews in dispute resolution, and to allow dispute resolution in effect to defer to a
22 market wide review?

23 MR. WARD: Sir, no I do not go quite as far as that. What I say is that it is inescapably part of
24 the context in which all this is taking place. It is part of the context where effectively BT is
25 asking Ofcom to take a lot of risks with consumer welfare to put something in place.
26 The reality is there is a review on the table, and it is a review where we submit these issues
27 are much more appropriately dealt with. We respectfully agree with what Ofcom did. It
28 said: we are going to determine the dispute; we are not saying the dispute just falls away; or
29 we can stay it; or we can ignore it. It said: we will determine it. But it is part of the factual
30 context that all of this is taking place.

31 When one assesses the question of whether it is fair and reasonable to ask the MNOs to do
32 all of this work, it is highly relevant that in truth the NCCNs may become redundant, and
33 much of the argument used to justify their imposition may simply fall away.

1 THE CHAIRMAN: You say that is a factor that weighs all the more strongly on an appeal when
2 so many months have passed?

3 MR. WARD: It just does. I mean, the reality is the world has moved on. I am not arguing under
4 this head for any stronger conclusion than if it really all comes down to P3 the right course
5 is to remit. I am not asking the Tribunal to substitute its own view of what Ofcom will do.
6 The reality is the landscape will have changed in a lot of potentially complex ways and none
7 of us (I hope including Ofcom) even know at this stage what will be in its Final
8 Determination.

9 But one cannot simply adopt an attitude of Nelsonian blindness and say: all we are doing is
10 construing these disputes in a factual vacuum. That is what BT would like you to do, but of
11 course they are part of a much wider commercial context. The simplifying NGNs is, as
12 things have turned out, very important indeed to that context.

13 Sir, unless there are further questions, those are the closing submissions for Vodafone.

14 PROFESSOR STONEMAN: Just one question. The relevance of the review, one can imagine
15 the consultation paper, there will be a period of consultation, then probably something will
16 be implemented, it will then be appealed to the Tribunal (I think one can assume), and then
17 once it is appealed to the Tribunal it will be appealed to the Court of Appeal. We may
18 actually be talking about quite a long time, especially if we have to go to the Court of
19 Appeal to find out what evidence can be submitted and what evidence cannot be submitted.
20 So in fact the time may be somewhat longer than this September.

21 MR. WARD: Sir, it is definitely longer than this September, but the consultation has already
22 taken place. We are awaiting a decision that was due in May and that Mr. Myers has said
23 actually has been pushed back to September. Then, of course, there will be a period of
24 implementation. So I am not suggesting that there will be a completely clean slate on 1st
25 October. Of course, the point that you make is it is all uncertain. In other words, there may
26 be appeals - I do not know. I am quite sure that the MNOs will all be carefully reserving
27 their positions in that regard, not least Vodafone. We do not know, and I need to face up to
28 that point. But the overall gist of my submissions obviously has been the picture is
29 uncertain. This is not totally hypothetical. It is not as if I am saying to you: there may one
30 day be a review by Ofcom and who knows what they will decide. What we have is
31 hundreds and hundreds of pages of close analysis from Ofcom already, and some highly
32 specific proposals on the table. So it is not hypothetical. I am sure that Mr. Read will want
33 to persuade you that it is all far over the horizon somewhere, but it really is not. It is all
34 about to happen, even if it is not an overnight proposition.

1 THE CHAIRMAN: I do not want to anticipate what Mr. Read might say, but could not one say
2 that the fact that there is an impending review provides a window of opportunity to generate
3 some empirical evidence which will effectively enable that evidence, with the NCCNs, to
4 operate for a short bit of time and to be reviewed and thus enable all the parties to see what
5 actually happens on the ground?

6 MR. WARD: Sir, one could indeed, if one was willing to take that risk with consumer welfare.
7 But the overall question here, of course, is: will it benefit consumer welfare? The reasons
8 why it is said it might benefit are themselves, at least one might say, a little bit medium
9 term. BT is not arguing that supposing you give judgment on 1st July and on 1st July the
10 MNOs say: we are now going to have to sit down and decide what we are going to do with
11 these things if judgment is in BT's favour. He is not arguing that on 2nd July prices will fall
12 to the bottom step and benefits will start to flow through to consumers in the form of brand
13 enhancement, in the form of indirect effect and all that. That is the very highest BT's case
14 must be. As Professor Dobbs fairly accepted, over time these effects will permeate back to
15 consumers; there will be more clarity about the brand; there will be enhanced offerings by
16 service providers, and so on and so forth.

17 The point does really hurt BT as much. If you like, it is a point against me. The effects
18 they are talking about are complex and will take time to resolve. So the kind of experiment
19 that you envisage, sir, it may give you helpful information in one sense, but of course what
20 it will not necessarily do is get you to a kind of final equilibrium, or if it does, by then
21 Ofcom's policy review will have come into place. Moreover, one is bound to say that the
22 MNOs' reactions are bound to be coloured by the fact that one way or the other they know
23 they will be facing a new regime, say, early the following year. I would submit that if one
24 wanted to take a big risk one might go that way but it does not really have much attraction.

25 THE CHAIRMAN: Just one final point, from me at least, on the deletion point that you
26 mentioned and that Professor Dobbs mentioned, it seems to be part of the MNOs' argument
27 that effectively one has a competitive market and rates are for that reason going to be
28 beneficial to the consumer because although it is packaged and different prices are imposed
29 on different elements of the services offered there is at heart competition.

30 MR. WARD: Yes.

31 THE CHAIRMAN: But does not the same argument operate at TCP level if one has BT
32 competing with other providers, and is the fact not therefore that BT is not in a significant
33 market position at that stage of the chain a fact which simply points in the direction of
34 allowing the free market to operate there also?

1 MR. WARD: Well the question that you are faced with is: is it fair and reasonable for these
2 charges to be imposed on the MNOs? As one says, it is a free market, it is a free market of
3 course subject to regulation and the question is whether the regulatory principles will be
4 served by the change. So in a sense, if I may say so very respectfully, alluding to that
5 proposition does not really solve the problem, it merely invites the question we are here to
6 determine which is whether, at the end of the day, the net effect of these proposals will be
7 beneficial for consumers.

8 THE CHAIRMAN: Well that is true, as far as it goes you are absolutely right, but if one takes as
9 part of the regulatory regime the notion that the regulator ought only to intervene where
10 clearly it is necessary and where there is no evident necessity one should simply allow the
11 free market to operate as one does at the MNO context at the moment, these EE put most
12 forcefully in opening. Why should that not be a fact that feeds into the fair and
13 reasonableness test that one has at the dispute resolution stage?

14 MR. WARD: The bias against regulation is obviously a very important consideration when
15 Ofcom is starting afresh to determine, as it has here, whether it will have a look at the whole
16 number range in the case of non-geographic numbers, and that must have been a question it
17 asked itself before embarking upon this large piece of work as a matter of priority. Here, of
18 course, the dispute has been thrust upon Ofcom; it certainly did not volunteer for it, but
19 under the Statute it is obliged to dispose of the dispute, indeed, under European law it is
20 obliged to. I do not want to sound as though I am merely repeating my earlier answer, but
21 in so doing it is then obliged to look at its statutory duties. Of course, when it is considering
22 whether or not in the margin it should intervene, if you like, it is also relevant that BT here
23 was subject to findings it had SMP in the termination hosting market as recently as
24 December 2005, so we were not actually starting from a completely clean slate in terms of
25 market power, and Ofcom, of course, have carefully avoided having to re-do the market
26 analysis here, and have carefully avoided making a finding one way or the other whether
27 BT is dominant, but there is a context there which suggests they were right to look very
28 carefully at the question of whether or not the statutory duties would ultimately be served,
29 so it is not simply a blank slate in terms of the potential of any of this to affect competition
30 or consumers.

31 THE CHAIRMAN: You are drawing some weight from the fact that BT might be said to have
32 SMP, whereas BT might say the precise opposite and say the fact that there is no SMP
33 condition in this case entitles it to be treated as an operator without SMP.

1 MR. WARD: Well that, with respect, would be a mistaken position by BT in the sense that that is
2 part of the context which justifies Ofcom looking very carefully at this, and there is another
3 factor though as well which Ofcom needed to think very carefully about here, which is that
4 of course BT is a necessary trading partner for the MNOs in this context; the
5 Interconnection Agreements, whether the parties like it or not, are unavoidable. So even in
6 the context of free competition one has to look very carefully and see whether there is a
7 benefit or a detriment.

8 THE CHAIRMAN: Well I see that, but are you not confusing BT's role as transit provider and
9 BT's role as TCP?

10 MR. WARD: No, no, absolutely not, even in respect of TCP, if a Vodafone customer rings a
11 number that is hosted by BT as TCP, Vodafone has no choice but to reach an agreement
12 with BT as to how that call will be passed through and priced.

13 THE CHAIRMAN: But that is true of every TCP

14 MR. WARD: Absolutely, but that is why, of course, we have a dispute resolution mechanism,
15 and why Ofcom is charged to ensure that the overriding statutory duties that it is subject to
16 are realised. It is not just a case of free market operating in a regulatory vacuum. The
17 regulatory context here is absolutely crucial.

18 THE CHAIRMAN: Well are you saying that precisely the same criteria apply against a non-BT
19 TCP such as Mr. Beard's clients? Would you say that exactly the same result in this case
20 should be reached, we will want to delete BT and substitute Cable & Wireless?

21 MR. WARD: Sir, one would need to look closely at the facts. There may well be differentiating
22 factors, we do not know; we know virtually nothing about Cable & Wireless' position. I
23 would entirely reserve my position on that. What we are dealing with here is the question
24 of whether the imposition of these charges by BT gives rise to a benefit to consumers or not,
25 that is really what the case comes down to. That may not be the way that one would
26 approach a question unfettered by regulation but that is the question that regulation required
27 Ofcom to consider, and that is the question now that the Tribunal has to consider,
28 essentially whether Ofcom erred in concluding that there was a risk.

29 THE CHAIRMAN: Mr. Ward, thank you very much.

30 MR. WARD: I see it is five to eleven.

31 THE CHAIRMAN: Mr. O'Donoghue?

32 MR. O'DONOGHUE: Sir, I do have a speaking note to hand up to the Tribunal. The speaking
33 note concerns very sensitive information on my client's retail costs and at this stage I would
34 ask that copies are limited to external lawyers only, we will endeavour in the short break to

1 get non-confidential copies. I should also say that the speaking note contains some
2 reference to the closed sessions and again that may need to be borne in mind to the extent
3 questioning arises. Sir, I think my solicitor is handing out copies.

4 MR. READ: Just so I am clear, my solicitors are in the confidentiality ring so therefore we will
5 be providing them with a copy of this document. I do not understand Mr. O'Donoghue to
6 be dissenting from that?

7 THE CHAIRMAN: I cannot see any reason for anyone within the ring ----

8 MR. O'DONOGHUE: Subject to one point, if I may ----

9 MR. BEARD: Sir, we have people in the room who are not in the confidentiality ring, if Mr.
10 O'Donoghue is going to stray into that territory.

11 THE CHAIRMAN: As I understood it, Mr. O'Donoghue is simply saying that the note contained
12 matters, no doubt his ----

13 MR. O'DONOGHUE: It simply concerned ----

14 THE CHAIRMAN: -- submissions will be structured so as to avoid the problem of emptying
15 court.

16 MR. O'DONOGHUE: Indeed. On the strict confidentiality point, the point is simply that in
17 relation to retail costs there is new information from my client that has not previously been
18 through the confidentiality ring and certainly as regards some of its competitors it would
19 have very significant concerns about introducing that new information into the ring at this
20 stage, so we will provide a version very shortly which has that particular part excised.

21 THE CHAIRMAN: Rather than take up time now, Mr. Read, perhaps you could sit on it for the
22 moment and resolve the matter when we rise, and if that cannot be resolved then we will
23 deal with it.

24 MR. READ: Indeed.

25 MR. O'DONOGHUE: Sir, if I may, I will spend a couple of minutes giving a flavour of the
26 points covered in the speaking note. I hope that with some excavatory work the answers to
27 your questions are in there. Going through the different sections, section A is essentially
28 the point of *vires*, whether Ofcom could in effect impose regulation by the back door.
29 Section B, sir, deals with the question as to what one does in the face of uncertainty and
30 whether burden of proof has any bearing on this.
31 Section C deals with the specific O2 point, which is the policy preference, and in fairness to
32 Mr. Herberg I will develop that point in a bit of detail to give him a chance to respond.

1 Section D, sir, deals with the point about the contemporaneous evidence, not only from BT,
2 and again I will supplement what Mr. Ward said because I think the picture has much more
3 fabric than his outline suggests.

4 Section E concerns the significant omission that the BT modelling disregards 75 per cent of
5 the market in terms of TCPs, and again I want to supplement a few points there.

6 Section F, sir, concerns BT's economic modelling and how the input assumptions used
7 within those models may not fit the facts of this particular case. In a nutshell, sir, we say
8 there are two problems with the models. First of all, Dobbs 3 assumes that demand and
9 elastic and the balance of evidence before the Tribunal suggests that that is not an
10 appropriate assumption. Second, he corrects in Dobbs 5 by assuming that demand is
11 inelastic in current prices by adding the spill-over, and yet it is common ground that the
12 spill-over cannot be large. So there is a conundrum, if I can call it that.

13 Mr. Read in his opening criticises Ofcom for saying that the disease may be worse than the
14 cure, but we say that there is a risk with Professor Dobbs' modelling in particular that he
15 has invented a cure for which there is no known disease because his modelling does not fit
16 the facts of this particular case.

17 Finally, sir, in G, we say that even within BT's economic modelling, very significant
18 uncertainties remain. Sir, you will see the different sections – this point about temporal
19 uncertainty, this iterative process, the point about average retail prices and fluidity as to how
20 they will be calculated, the point about the sensitivity of the results to shapes of functional
21 forms, the acute uncertainty, we say, in the partial reduction scenario and BT's insistence
22 that Ofcom should have provided some spurious degree of precision in this regard, the point
23 about the costs of origination which was raised by Mr. Read quite late in the day, and I have
24 set out there my client's position in some detail. That is where the confidential figures
25 come in. Finally, dealing with waterbed and the indirect effect.

26 Sir, if I may go very briefly back to the contemporaneous evidence, it is important, in our
27 submission, to remember that fundamentally what all of the economic modelling does is
28 pose a simple question: what would business executives with responsibility for pricing
29 decisions do as a reaction to these NCCNs? We say that the contemporaneous evidence is
30 very striking in this regard and very consistent. In our submission, it is not simply a point
31 of intent. In fact, it goes much more directly, we say, to the question of the effects of these
32 NCCNs, or the likely effects, because the *ex ante* views of business executives as to how the
33 market will react to these NCCNs is a good evidential picture for the likely future effects of
34 these NCCNs.

1 I will not return to the BT evidence which Mr. Ward has developed in outline. What I
2 would simply add is that it is clear from the evidence that it was not simply the case that
3 after they had instructed Professor Dobbs and Dr. Maldoom that BT saw the light. It is
4 clear from the NTS focus group meeting minute, which I put to Professor Dobbs, that after
5 Dobbs 1 and 2 and Maldoom 1 and 2 BT was still telling the whole world that these NCCNs
6 were a way it would generate substantial revenues.

7 In our submission, the picture does not stop there, because if one looks at every single TCP
8 who has given evidence in these proceedings, they have all agreed with BT's
9 contemporaneous view as put to its board. In the case of Cable & Wireless, its evidence
10 says that the NCCNs demonstrate clearly that BT is able to generate a substantial windfall
11 in additional revenues. That is CAT bundle 15, tab 6, p.6. It added in a different document,
12 "We estimate the potential windfall margin for BT from introducing ladder pricing across
13 0845/0870 runs into tens of millions of pounds" – CAT bundle 15, tab 11, p.2.

14 Indeed, Cable & Wireless goes further in referring to its own ladder pricing systems
15 introduced in the summer of last year. It says, "We will require the increased revenues from
16 higher call termination charges in order to recover the investment" – so a necessary
17 component of the ladder pricing was revenue increase because that was needed to
18 supplement the investment in that case. Sir, for your reference, that is CAT bundle 15, tab
19 11, p.2.

20 MR. CLAYTON: Are those the investments in their systems to be able to cope with the ladder
21 pricing?

22 MR. O'DONOGHUE: Sir, it would certainly include that at least, because Cable & Wireless, I
23 think, had a particular difficulty because its systems at the time required substantial
24 modification to implement ladder pricing. So it would certainly include that, but there may
25 be other marketing and associated costs. It is not spelt out in detail in that particular
26 document.

27 MR. CLAYTON: In the case of Cable & Wireless had they not already implemented ladder
28 pricing, or they had put in a pricing proposal to do that?

29 MR. O'DONOGHUE: Sir, Mr. Beard will correct me if I am wrong, but I understand the
30 schedule in principle entered into force in July 2010, but that in the intervening period there
31 has been a suspension of payments by the MNO reflecting the dispute before the Tribunal.
32 I am not sure as to exact dates and when payments stopped.

1 MR. BEARD: That is broadly right. I will deal with the other matters in closing, but that account
2 is broadly right, if it assists, that we did put in place the ladder pricing but given what is
3 going on here there has been a suspension.

4 MR. CLAYTON: Having planned to put it in, presumably you have the investment in the
5 systems in place to do it?

6 MR. BEARD: Yes, we were able to deal with these matters. I will pick up and deal with what we
7 were investing in, and so on, when I come to closing, but I think Mr. O'Donoghue has made
8 various representations about Cable & Wireless's evidence, and perhaps it would be
9 sensible to make one or two comments, since it is actually unchallenged.

10 THE CHAIRMAN: Mr. O'Donoghue, does what you are saying about ladder pricing suggest that
11 whatever the outcome in these disputes is they should carry over in respect of the conduct of
12 other communications providers such as Cable & Wireless?

13 MR. O'DONOGHUE: Sir, there are specific OCCNs* for those other ladder pricing charges, I
14 think. All I can fairly say is that the matter is on hold very much pending this dispute.

15 THE CHAIRMAN: It may be more a question for Mr. Herberg, but whilst this is not quite a
16 bilateral dispute but a dispute between identified parties, I think both final determinations
17 suggest that the market needs to take account of what is said in the final determination and,
18 as it were, carry it over. What "carry over" means no doubt can cover a multitude of sins,
19 but nevertheless there does seem to be an expectation that what Ofcom decided should have
20 a slightly more broad effect than simply resolving the actual dispute before the parties?

21 MR. O'DONOGHUE: Sir, I certainly do not disagree with that, but there may be some devil in
22 the detail.

23 Sir, just to complete that particular thought, it is not just Cable & Wireless. Opal Telecom,
24 which has given evidence in these proceedings, has also said that its ladder pricing was
25 introduced in order to increase its termination revenues with regard to 0845/0870 numbers,
26 and it added that the increased termination revenues would enable Opal to remain
27 competitive. Sir, for your reference, that is core bundle C2, 48, para.13. We say that on the
28 TCP side the business executives who looked at this considered the effects of the NCCNs
29 were absolutely at one with BT, and we say that this is important evidence, not merely of
30 intent but of the likely effects as perceived by business executives who are in this market as
31 to what these NCCNs would do.

32 We do say that at the very least, if that is the TCP view, if I can call it that, almost by
33 definition, things are uncertain because we have the BT economic model showing
34 reductions to very specific levels on the one hand, and we have the TCPs on the other hand

1 saying that increased revenues are an essential and likely feature of these arrangements. So
2 at the very least, before one even gets to the MNOs there is a tension on the TCP side when
3 one looks at the evidence presented to the Tribunal. We do say that is of some significance,
4 not necessarily saying it is a trump card, but we do say it is of considerable significance in
5 the context of these proceedings because that evidence was, to a large extent, unprompted
6 by the exigencies of this litigation and therefore it incurs particular weight.

7 Sir, may I move on briefly to supplement some points made by Mr. Ward on the fact that
8 the BT's NCCNs can at best affect only 25 per cent of the market. This, in our submission,
9 is a very clear gap, uncertainty and omission on the part of BT's modelling because on any
10 view, when BT started on this exercise with NCCN 956 it could not have assumed that the
11 rest of the market would do something identical. In the interim it seems that some of the
12 market has followed suit. That then raises the question what happens with the interaction
13 between the different ladder and other pricing arrangements?

14 Sir, for the record, to my knowledge the only evidence before the Tribunal as to the actual
15 ladders is Cable & Wireless. I have not seen any of the other actual ladder pricing systems
16 by other TCPs. I have not done the full calculation, but certainly in the case of my client
17 there are material differences between the BT ladder pricing arrangements and the Cable &
18 Wireless ladder pricing. Just to give you some examples, sir, my client paid 7ppm on the
19 BT NCCN 956 whereas under the equivalent Cable & Wireless ladder it would pay 5.74
20 ppm. It is also interesting to note that Cable & Wireless assumed an average retail price of
21 between 14.5 ppm and 16.49 ppm which was lower than BT's ladder, so there was a
22 difference on the retail price.

23 Similarly, sir, for 0845 calls, BT and Cable & Wireless have different per call charges. My
24 client would be charged 2.5p per call by Cable & Wireless compared to 2.0171p for BT. So
25 we say there are non-trivial differences between the Cable & Wireless ladder and the BT
26 ladder.

27 The question, of course, is what is the upshot of all of this? There is, in our submission, a
28 series of logical steps that one needs to think about. The starting point is the oral evidence
29 from the MNOs that they would not wish to price discriminate as between BT and other
30 TCP calls for reasons of not wishing to introduce tariff complexity. If that is the case, or
31 there is a risk that that is the case, then it must follow that in setting their retail pricing and
32 determining their retail costs, they will have to inevitably come up with what I would call a
33 blended rate that reflects the particular volumes, the particular mix of BT and other TCP
34 prices, the particular intersection in terms of their own volumes as to what that means for

1 their own retail prices. We say, in a sense, that the issue really is not what the Cable &
2 Wireless and BT ladders say today, the issue is that unless these TCPs are colluding there is
3 infinite scope for variation going forward and we would have this highly complex process
4 where at any given point in time the total universe of ladder and other pricing arrangements
5 would need to be overlaid and modelled perhaps on a very frequent basis.

6 It seems to us perfectly obvious that no single economic model can capture all of those
7 simultaneous effects in a way that is remotely reliable and therefore this omission in BT's
8 models (and to be fair, it is an omission in all the economic models) by itself introduces
9 what I would submit is an intractable uncertainty in these proceedings. The availability of
10 ladders and non-ladder arrangements within each MNO becomes highly specific and highly
11 variable all the time. In the absence of any modelling of these effects, it is very difficult
12 glibly to assume that it will all go in the same direction.

13 Mr. Ward quite properly took you to a very important concession by Professor Dobbs. To
14 recap, the concession was - and I think it is fair to say that this was done on the hoof
15 because he said it was a mathematical question which he had not considered until now
16 because he said no-one asked him - that he thought the overall direction would still be
17 downwards but that he did think (again on the hoof) that the reduction would not be towards
18 0.5ppm for 0845 and 0870 but he thought something like 17.5ppm. Now, if he was
19 prepared to make that concession on the hoof it seems to us again self-evident that looked at
20 in some detail there is at least uncertainty as to what the true position would be, and in fact
21 the results are more likely than not to be highly variable over time.

22 One supplemental piece of evidence on that from Mr. Pratt (day 6 p.60 starting line 8) is he
23 says:

24 "It's difficult to see which way you would send it, if you like. I think you
25 probably need to look at what are the individual NCCNs offered by all other
26 operators. You probably need to know something about the termination traffic
27 share and then come up with a significant additional dimension to the complexity
28 ... and build a model that encompasses that."

29 So I think Ofcom also agrees that this would be a significant additional complication that
30 would require quite substantial modelling. I suspect at the end of the day the problem may
31 not be resolvable in any way that is satisfactory because of its infinite scope and variation.

32 THE CHAIRMAN: Can I ask you a question. You almost seem to be saying that BT and Cable
33 & Wireless should have the same ladders. They are competitors, surely, so you would

1 expect them to have different ladders. MNOs have to cope with a blended rate as part of
2 their pricing model.

3 MR. O'DONOGHUE: Indeed, sir. In a sense, BT cannot have it both ways. It cannot say that the
4 termination market is highly competitive and therefore that there is no prospect of Cable &
5 Wireless or anybody else seeking to undercut BT. It seems to us that the interplay of
6 competition and the different volume mixes will inevitably over time lead to variation. As I
7 say, it is a fact that there are some non trivial variations in the Cable & Wireless ladder and
8 the BT ladder, at least so far as concerns my client. I have not investigated everybody else.

9 THE CHAIRMAN: But that is hardly a bad thing, surely. They are competing.

10 MR. O'DONOGHUE: Indeed, it is neither good nor bad. The simple observation is that that
11 variability will introduce in itself uncertainty as to what the picture is at this point in time
12 and a fortiori going forward.

13 THE CHAIRMAN: But what do you say, assuming there is the uncertainty, that Ofcom should
14 have done about it? Are you saying that that is a further factor pointing in the direction of
15 not allowing these particular NCCNs?

16 MR. O'DONOGHUE: Sir, in a sense we come back to justification and burden of proof which we
17 will come to. My starting point is that BT's primary economic case is that the effect of its
18 NCCNs is to reduce prices to below 8.5ppm and 12.5ppm. If one simply overlays the over
19 75 per cent of the market, that primary economic submission must be inherently
20 questionable or uncertain because of that simple fact. So we say in the first instance it is a
21 mortal blow to BT's case, and of course that will feed into the decision making. But it is
22 primarily a repast to an affirmative argument put forward by BT.

23 THE CHAIRMAN: Fair enough. At some point no doubt you will come to it, and when you do I
24 would quite like to know what your position is. If you do have this divergence among TCPs
25 is not the consequence of what you were submitting that NCCNs such as this should not be
26 allowed, that one is effectively imposing a straitjacket on an entire segment of the market,
27 namely all TCPs, because you are saying: because your ladder pricing is going to diverge
28 we are not going to allow it at all?

29 MR. O'DONOGHUE: Sir, I will come to that. In some ways, I have not gone that far yet.

30 THE CHAIRMAN: I just wanted to flag that up.

31 MR. O'DONOGHUE: What I am simply saying is that based on the evidence before this Tribunal
32 BT's primary economic submission simply is not made good and cannot be made good. It
33 may be that in another context with a bit more time one could advance things a bit further.

1 THE CHAIRMAN: I understand exactly where your present point is going to, but I put down a
2 marker.

3 MR. O'DONOGHUE: I will deal with that point, sir. I can see it is troubling you.

4 THE CHAIRMAN: I am grateful.

5 MR. O'DONOGHUE: Sir, if I may I will say a few brief points about the question of policy
6 preference. Mr. Herberg, I think, has set me up as contrary in this regard saying that only
7 O2 has a bee in its bonnet about the policy preference. I am not sure that is right, but I am
8 going to try to explain what I mean.

9 It is clear, sir, that Ofcom and BT, about the only thing they agree on is that this policy
10 preference is not merely a tie breaker but generates on appropriate facts, a positive bias in
11 favour of certain outcomes favouring the direct effect over the MTPE.

12 BT has relied very heavily on this policy preference in its notices of appeal and I think it is
13 fair to say that the way it has been presented by Ofcom, and the way it has been argued by
14 BT that this is something akin to a trump card, it is something equivalent to a right that BT
15 says it has acquired by virtue of this policy preference. Now, whether one wants to go as
16 far as to call this a legitimate expectation I am not sure we need to argue, but the point I was
17 simply wishing to make is that of course this preference is set out in the draft determinations
18 and final determinations – we can all read English and see it is there – but the point O2 has
19 been making for some time is that prior to the draft determination and final determination
20 one simply cannot find in clear, unambiguous and devoid of qualification articulation of the
21 preference insofar as concerns MNOs.

22 Sir, in section C of my speaking note I have set this out in nauseating detail and I just want
23 to highlight a couple of the headline points. First, on 080 calls the preference is set out in
24 the final determination para.1.17, namely that they ought to be free to the caller and if they
25 are not free then they are as close to free as possible. Sir, O2 has said to Ofcom for some
26 time that it can simply find no prior record of where Ofcom has before the draft and final
27 determinations, used the phrase: “As close to free as possible, and in a sense it is very
28 difficult to know what that would mean. It may be that in a competitive market the current
29 price is as close to free as possible; that there is inherent vagueness and vacuity in what that
30 particular expression would mean, and again prior to the draft and final determinations my
31 client can find no record of it.

32 What we do say is in the absence of a clear, unambiguous and unqualified record of this
33 particular policy preference prior to the draft and final determinations, BT simply cannot
34 elevate it to the status of a right that is a trump card in these proceedings, Ofcom cannot

1 agree to such a state of affairs. If there is ambiguity in the position prior to the
2 determinations, Ofcom cannot in the final determination introduce a new preference, even if
3 that is unambiguous at that time, because to do so will be contrary to legal certainty, it will
4 be contrary to the basis on which my clients have invested in complying with the relevant
5 regulatory obligations.

6 Again, in terms of headline points, for 0845/0870 it was true in hindsight that a document
7 which did not appear in the bundle rather exploded. In the meantime I have uncovered the
8 offending document and I would like to hand that up, if I may? (Same handed) I am sorry,
9 sir, due to a printing malfunction I am short of copies.

10 THE CHAIRMAN: Thank you.

11 MR. O'DONOGHUE: Sir, just to sketch the contours of this point, and it is quite straight
12 forward, in the final determination for 0845 and 0870, para. 244, Ofcom says that the
13 primary purpose of the geographic link is not to provide transparency for consumers, rather
14 it is to protect consumers' interests by maintaining reasonable retail prices from all OCPs.
15 The footnote in the final determination giving contemporaneous support for that proposition
16 is the document I have handed up – I would have put it to the witness but it was not in the
17 bundle for reasons I do not understand. Now, if one goes to that document, and I think it is
18 para. 5.2 you will see about half way down, sir, it says:

19 “The primary purpose of the link is not to provide information for consumers,
20 rather it is to protect consumers' interest by maintaining reasonable retail prices for
21 0845/0870 calls on the BT network (and arguably for 0845/0870 calls from the
22 networks of other OCPs as well).”

23 That is fine as far as it goes, and I would simply note at this stage that it is rather tentative
24 insofar as it concerns the MNOs because it says “arguably” also, but I am content to take
25 that on its face. The real problem, and this was the point that I was endeavouring to put to
26 the witness was that when one then follows through the chain of policy evolution to the
27 2006 document “NTS A Way Forward”, and that is in CAT bundle 24, tab 11.9, para.
28 4.104, there what Ofcom says is that the main aim of restoring the geographic link is to
29 improve price transparency not to bring down the retail price of calls. The relative question
30 is whether the pre-announcement option would achieve the desired level of transparency or
31 not.

32 I think what one can see is that there are two possibilities. At the very least there is a
33 fundamental ambiguity as between the 2004 document and the 2006 document, and I think
34 what my client particularly objects to is that Ofcom has cherry picked the 2004 document in

1 support of saying that its preference was for retail price controls, whereas when one looks at
2 the actual evolution of policy this was superseded by the 2006 document which clearly said
3 that the objective was transparency only.

4 Sir, the practical upshot of all of this is that again there is fundamental ambiguity and
5 evolution as to what the policy preference means at different points in time, and we say that
6 given this rather complicated and contradictory tapestry it is simply not possible for BT to
7 extract from this mess a clear, unambiguous and unqualified preference in the way it is set
8 out in its notice of appeal. We say that before the draft determination and the final
9 determinations this preference was half-baked, obscure and had never really been tested in
10 anger.

11 Two final points, if I may, on this policy preference. First, there is a point which you put to
12 one of the Ofcom witnesses: the fundamental problem with this preference insofar as
13 concerns the MNOs is that Ofcom can do nothing on its current legal powers, to compel
14 compliance with it. We do say that to have a preference as a trump card in the absence of
15 any legal powers to compel compliance with that preference but for the disputes really
16 stretches credibility and is vague and vacuous and simply improper.

17 Finally, one thing that has also emerged very clearly in these proceedings in connection
18 with the preference is that the disputes show that it is fundamentally uncertain whether this
19 was a preference worth having in the first place, because if the interplay direct effect MTPE
20 and indirect effect is to lead Ofcom to a conclusion that it is uncertain whether the NCCNs
21 would unbalance, cause detriment to consumers there is a very real and implicit risk in that,
22 that the extent of preference was held. It was conceivably one that would operate to the
23 detriment of consumers and in a sense the NGCS review is the nail in the coffin because it
24 is now clear that that preference has effectively been abandoned, that there would be a
25 delinking of NGN calls and geographic rates and there would be an entirely separate new
26 regime of regulation subject to direct power. We do say whenever one approaches the issue
27 of preference there are fundamental problems with it, and we say that the upshot of all of
28 this is very simple, that Ofcom should simply have counted a pound of direct effect
29 consumer welfare benefit exactly the same as a pound of consumer welfare disbenefit in
30 some other area.

31 PROFESSOR STONEMAN: Could I just ask whether those arguments extend to 0800, or is this
32 purely 0845/0870?

33 MR. O'DONOGHUE: Sir, in principle, yes. I think the point in 080 is that the basis for the
34 preference part of the draft and final determinations seems to me fundamentally obscure. I

1 have set out in detail in the speaking note the various policy documents over time. Each
2 and every one of them makes clear that the MNOs have no obligation to mirror BT's
3 charges. They can do what they want. There is a fundamental tension. It reminds me a bit
4 of Henry Ford's Model T. He said, "You can have any colour you want as long as it is
5 black". It does seem to me to say, "You were free to do whatever you wish in connection
6 with pricing but we would prefer you to do something different. It does seem to me that
7 that is incapable, because of that tension between obligation and preference, of supporting a
8 legal right as a trump card.

9 Sir, I am conscious of the time. Two further points, if I may. First of all, sir, back to the
10 core question as to what one does with uncertainty and to what extent the burden of proof
11 plays in the balance and what impact, if any, does regulation or its absence have in this
12 context. Mr. Herberg will obviously deal with this in detail, but I want to put to the
13 Tribunal a series of propositions at least for the purposes of my client.

14 The starting point we say, sir, is that it is fundamentally clear from TRD, para.177, that the
15 initial burden is on the person proposing a variation on the charge, and in this case that is
16 clearly BT, because it was proposing to vary the termination rates paid by the MNOs.

17 The second point we would make, and I think there is no serious dispute about this,
18 particularly from Professor Dobbs, there was a concession that it would have been very
19 easy, or at least easier, for BT to design a wholesale tariff structure that would clearly have
20 done the job and would clearly have been much simpler than the NCCNs we have been
21 faced with. He did backtrack a bit on that, but what struck me as particularly interesting
22 was that he thought BT NCCN 1007, which is not subject to these proceedings, did the
23 trick, whereas the ones that are may be did not hit the nail on the head (I think was his
24 expression). So I think there is at least some blame, if I can call it that, in so far as concerns
25 uncertainty in the way that BT went about this.

26 To add to that, it is also patently clear from the evidence that until the dispute had arisen,
27 BT had not really addressed its mind at all as to what the economic incentives of this ladder
28 pricing would be. In fact, they have made a virtue of this.

29 Mr. Richards, in his statement, is very candid that the economic modelling arose subsequent
30 to the dispute arising, and in cross-examination it was accepted by Mr. Fitzakerley (day 3,
31 p.4, lines 5 and 6) that the argument about where the price was certainly much more
32 developed once we had seen Ofcom's reasoning for rejecting the original NCCN, and I do
33 not think we really considered the economic incentives in anything like the detail we have

1 since, so we would not have had the opportunity to express that view because we had not
2 done the analysis at the time.

3 Again, if BT is proposing these charges, and bearing in mind what it knew about TRD
4 having been in the case, it must get its house in order as an initial matter. It cannot simply
5 foist these upon the market. If there is diligence and preparatory work that needs to be done
6 to understand the incentives that, in our submission, can and should be done rather earlier in
7 the day. It is a bit too cute to turn up after the dispute has arisen and say, “Well, now we are
8 starting during this four month period in earnest and looking at all of this”. So again, there
9 is a degree of blame in so far as uncertainty has arisen, which I think can fairly and squarely
10 be levelled at BT. I do not want to overstate that but there is certainly some blame which
11 can be attached.

12 The next point we would make, sir, and again this has been studiously ignored in these
13 proceedings, is that TRD makes very clear the Tribunal ‘s warning, if I can call it that, that
14 parties in dispute resolution should not swamp Ofcom with very complicated data, because
15 the dispute resolution is inherently limited. That is para.105.

16 On any view, all of this, in Mr. Read’s diagram, is an extraordinarily complex welfare
17 assessment. We are looking at multiple markets, multiple interactions, multiple actors.
18 There is a complete absence of any data as to how would one understand the elasticities in
19 these markets, and it is fundamentally unclear as to how they would interact. That being the
20 case, there really is a question as to whether these NCCNs were remotely suitable for
21 resolution in the context of a dispute.

22 There is, of course, a difference between the TRD situation where there were two sets of *ex*
23 *ante* obligations, BT’s end to end connectivity obligation and the regulation of termination
24 rates on the other hand. In that case, there was off the shelf data that Ofcom could and, the
25 Tribunal found, should have looked at. In this case, there is a complete absence of any
26 empirical data. That is not a criticism of anyone, but it is a relevant part of the context in
27 which the dispute arose and has been considered.

28 We would go further, sir, and say that these BT NCCNs are a very significant and new
29 innovation, and we say that they are akin to a retail price control measure, at least in so far
30 as concerns BT termination of traffic, because the ultimate logic is that that they would
31 something into a price cap on MNOs’ retail pricing.

32 We do say that there is some force in what the Tribunal said in the *Hutchison* case, and this
33 was in the context of *ex ante* regulation. For your reference, sir, this is authorities bundle 2,

1 tab 25, para.32, and it says that when one is deciding whether or not to impose a price
2 control obligation:

3 “... theory and surmise is not enough. One must look to see how things operate
4 in practice, and provide whatever has to be proved to an appropriate level of
5 proof. It points out the need to be particularly careful in relation to that when
6 one is considering future conduct.”

7 If one starts from the premise that this was a BT NCCN, there was an initial burden on it, it
8 was a new intervention and it was predicting that it would have certain positive effects on
9 the market, the lack of empirical data and the uncertainty that that engendered is, I am
10 afraid, a point that counts against BT, because for one to impose a dramatic and radical
11 measure that would interfere with retail pricing of this kind, theory and surmise is not
12 enough, there must be a compelling basis for saying that the intervention will do the trick.
13 So if there is uncertainty it is a point against BT, it is not simply a score draw where one
14 says it is all terribly uncertain and are not sure what to do with it. There is a positive bias of
15 non-intervention, because there needs to be a robust basis for intervention.

16 In some ways, for me the most striking evidence in perhaps the entire proceedings, perhaps
17 because it was lost, was that of Mr. Muysert. A number of things struck me. He said, for
18 example, that simply on the issue of market definition on the termination market, he would
19 want to spend two months with his colleagues simply bottoming out that issue. That is one
20 of a very large number of issues that would need to be bottomed out in these case. What he
21 said was very interesting. He said that the inefficiencies arise in dispute resolution and the
22 increased possibility of error of undertaking what amounts to a fairly fundamental policy
23 review in a short period of inquiry. I think he very much warned against that.

24 He did address, sir, the point which you have made twice to Mr. Ward and myself, “What
25 does that mean in terms of regulatory bias?” It is worth setting out in some detail what he
26 said, and for your reference is transcript day 9, p.51, lines 27 and following. What

27 Mr. Muysert said is:

28 “... if you stand back a little from the whole problem, the European regulatory
29 framework works on the principle that where possible you de-regulate and you
30 pull regulators out of the market. The reason that the system works that way,
31 I believe, the underlying economics is that errors occur. It is very difficult to
32 get decisions right all the time. We actually have quite a poor understanding of
33 some markets, look at the debate over is there a waterbed or is there not a
34 waterbed? It’s a fairly simple question, but we don’t really know it. So, it’s

1 quite easy to make mistakes. Those mistakes are costly, and they tend to be
2 more costly in the long run, so there are dynamic concerns. And the policy
3 response to that is to limit regulation to major problems in markets where there
4 is market power and then to overlay various other consumer protection
5 procedures as well.” and so on and so forth.

6 So I think what is being said very clearly is that to the extent there is a bias, there is a bias in
7 favour of not making new interventions, particularly radical interventions, in retail markets
8 that in this case are unregulated because the costs of doing so and the information demands
9 on getting it right are so great that one errs on the side of caution. Professor Stoneman will
10 be very familiar with this in statistical modelling, with type 1 and type 2 errors. I think
11 what Mr. Muysert is saying is that the risk of detriment in this calculus carries marginally
12 more weight than the possibility that there may be some consumer benefits.

13 I think the upshot of all of this is that Ofcom’s ultimate conclusion was that it was not
14 certain whether the NCCN would, on balance, do harm or good; it had concerns about the
15 detriment. In a very marginal sense it was erring on the side of non-intervention because
16 fundamentally Ofcom has no remit to cause harm to consumers. So if there is a bias to be
17 made, it is in favour of non-intervention and for very good reasons.

18 THE CHAIRMAN: Do you need a moment, Mr. O’Donoghue? I notice that the timetable has a
19 break scheduled at 11.30.

20 MR. O’DONOGHUE: Yes, sir.

21 THE CHAIRMAN: We will rise for five minutes.

22 (Adjourned for a short time)

23 THE CHAIRMAN: Mr. O’Donoghue.

24 MR. O’DONOGHUE: Sir, I am almost done, subject to questions. One last point on the scope of
25 the dispute resolution in the context of contractual framework. That to some extent this will
26 not answer all the questions in this case as of course we have Mr. Beard’s client who does
27 not have a contract, at least with my client, but it is important in our submission to
28 understand the implications of contractual framework for dispute resolution. Sir, can I ask
29 you to turn up the *Orange* decision which is in authorities bundle 2 tab 26.

30 MR. BEARD: Sorry, just before you do that, I think in case anything turns on it, Mr.

31 O’Donoghue you ought to be aware that in fact though there may have been denial about it,
32 his client does have a contract with my client. It is a very old one!

33 MR. O’DONOGHUE: Tab 26. Sir, it starts to get interesting around para.43. This was an
34 interconnection dispute. I think there were some ex ante obligations, but to a large extent

1 the area was unregulated. To preface the point, sir, we say that that this decision of the
2 Tribunal makes very clear that it was deliberately intended that the resolution of
3 interconnection disputes would have a very broad remit for effectively recasting the
4 contractual rights of the parties under their contract. In fact, the decision also makes very
5 clear that even where the parties do not yet have a contract, dispute resolution of
6 interconnection disputes can in effect compel terms of contract. So we say that in the
7 context of interconnection and in the absence of any SMP obligations it was always
8 understood that interconnection disputes would resolve pricing matters and could do so in a
9 way that did something different from what the contractual rights of the parties would have
10 meant in isolation.

11 You will see, sir, starting at 43 that Orange in that case was arguing for a very narrow
12 construction of the scope of the Access Directive. You will see in the top third it says:

13 “...the Access Directive is intended only to confer on regulators powers to perform
14 specific tasks directed at ensuring that interconnection takes place on reasonable
15 terms ... once interconnection has been established the regulator is not entitled to
16 intervene either on its own initiative or by means of the dispute resolution
17 procedure in the on-going commercial arrangements between the parties as to the
18 terms and conditions under which interconnection takes place.”

19 Ofcom, at 44, disagreed with this. It said that the Access Directive and therefore the Act
20 covered “a much wider range of disputes” simply in regard to access and interconnection.

21 If we move on, sir, to 67, this is where the Tribunal contends with all of this. You will see,
22 sir, straightaway at 67:

23 “The Tribunal rejects the narrow construction of Article 5(4) of the Access
24 Directive put forward by Orange. The Tribunal agrees with Ofcom that the
25 general objective of the Directive is to ensure adequate access and interconnection
26 and that there is no reason, either looking at the wording of the Directive or
27 considering the policy behind it, to limit this in the way suggested by Orange.
28 Such a limitation, in the Tribunal’s judgment, ignores the reality of how the
29 telecommunications market works.”

30 This, sir, really is the point, that in the context of multiple interconnected networks there
31 will inevitably be a very large number of disputes over time. It was always intended that
32 these disputes, most of which would be contractual, could be resolved in the context of
33 dispute resolution and that in considering access it made absolutely no sense to disconnect
34 the issue of pricing because they go hand in glove. One cannot have access without a price.

1 This regime was specifically intended to ensure speedy resolution of disputes. It would
2 never been suggested that in so doing Ofcom was engaged in price regulation, and it was
3 always implicit that this could override contrary provisions in the interconnection
4 agreements as between the parties. One sees that very clearly. Mr. Ward has taken you to
5 the provisions. When one looks at the powers of Ofcom in a dispute resolution, it has a
6 very broad spectrum of powers to set terms and conditions, including terms and conditions
7 that do not appear necessarily in the contract itself. So that in the specific context of
8 interconnection it was always understood that Ofcom's regulatory role could extend to
9 overriding contractual provisions in force. That, in a sense, was the whole point about
10 interconnection disputes, and in fact where one has no symmetry and bargaining power the
11 point is actually *a fortiori* that there may be very good reasons indeed why the face of the
12 contract allowing unilateral variation may need some topping and tailing. We say that the
13 *Orange* case has considered this issue and it is very, very clear that Ofcom, in resolving
14 interconnection disputes, may do things that go further (or not as far) as the contract itself,
15 and this was always the deliberate intention of the interconnection regime because of the
16 multiplicity of disputes that may arise in technological revolution.

17 THE CHAIRMAN: I can see that, but is there not a distinction to be drawn between the existence
18 of strict legal rights to do something and the circumstances in which that right should be
19 exercised, and do you say that here, assume that clause 12 of the SOA gives BT strict legal
20 rights to vary prices, that should be overwritten and, if so, according to what criteria?

21 MR. O'DONOGHUE: Sir, we do, and I think Mr. Herberg has made this point already. It is
22 obvious that the contract could not necessarily be the first and the last word in this issue,
23 because suppose, for example, the parties had agreed to do something anti-competitive, it
24 would never be suggested in that context that the contract would have full force. It would,
25 by necessity have to be overwritten and we say it is at least implied, and we say explicit,
26 from the interconnection regime and dispute resolution that contractual rights may, on
27 appropriate facts, be overridden, because in a sense we come back to the point of
28 uncertainty because the upshot of Ofcom's reasoning was that it was unsure as to whether
29 there would be detriment to consumers in approving these charges and we do say that for
30 Ofcom to resolve an interconnection dispute in circumstances where it thought there was a
31 non-trivial risk of detriment, there would have been a dereliction of Ofcom's regulatory
32 duty, and to that extent the statutory regime in sections 3 and 4, read in conjunction with the
33 dispute resolution, by necessity must have meant that the contractual rights in that instance
34 may not have been given full force because to do so would have been to sanction by

1 contract the risk of detriment to consumers. There was no other conclusion they could have
2 reached in our submission.

3 THE CHAIRMAN: But am I right in thinking that your submission is that Ofcom reached the
4 right result for the wrong reasons in that it failed to place sufficient regard on the fact that
5 ladder pricing is not cost-oriented if I can use that expression?

6 MR. O'DONOGHUE: Sir, O2 in these proceedings has not expressed any view on what is in
7 effect the EEL ground of appeal. I think that what we would say is, 'yes', in the context of
8 interconnection all the economic models that exist are, to a large extent, cost based and in
9 that sense EEL is absolutely right, but whether we would go as far as to say that that is the
10 only possible basis I am less certain.

11 THE CHAIRMAN: Yes, so you are more agnostic on the question of ladder pricing?

12 MR. O'DONOGHUE: Indeed. Sir, one final point before I sit down. In some ways one of the
13 reasons why BT's contractual rights in this case should have been overridden are clear from
14 the terms of the SIA itself – it may not be useful to dig it out, but I can give you the points
15 and it is set out in my note. Clause 12 concerns a charge for a BT service for facility. We
16 say it is very clear in this case that the focus of the regulation (if there is any) is on the retail
17 market for 08X calls. When one looks at clause 12, which refers to a BT service facility, it
18 was never intended that that would be a Trojan horse for regulating MNOs' retail prices. In
19 my submission one can go further because if one looks at clause 18 of the SIA that refers to
20 the NTNP, the numbering plan, and it says in terms that both parties will comply with the
21 provisions of the NTNP, and then clause 19.1.7 says in effect the contract is presumed to be
22 reasonable, so one can infer that clause 18 is reasonable. We say that it is clear from
23 reading clauses 12 and 18 that between the parties as a matter of contract it was always
24 understood and accepted as part of the matrix, that for my client to comply with the
25 National Telephone Numbering Plan in terms of obligations rather than preference, was all
26 that was ever expected under the contract and that the BT NCCNs would never be used as a
27 Trojan horse to seek to regulate my client's retail prices, it was never intended between the
28 parties to the contract. I do not need to go that far but we do say it 'copper fastens' the
29 regulatory role or conclusion reached by Ofcom, because of course, the absurdity of much
30 of this is that if BT is right there would be zero termination charge and, in a sense, the
31 spotlight in this case has very fairly and squarely been on my client's and the other MNOs
32 retail pricing and there has been virtually no discussion of the termination market and
33 therefore in our submission it is being used as a Trojan horse, and the regulatory focus

1 ought to be on the retail market, and we say it is very clear in that market that Ofcom does
2 not have direct powers to price regulate in any event.

3 Sir, unless there are questions I will leave it there.

4 PROFESSOR STONEMAN: A question that is trying to draw out two lines in your argument.

5 One line is, I think, that ladder pricing as proposed in these NCCNs will never work and
6 therefore we should not institute it. The other line is even if it does work it is price
7 regulation, or price control, and therefore we should not have it. Is that basically it?

8 MR. O'DONOGHUE: Sorry, I hesitate, it is only part of it.

9 PROFESSOR STONEMAN: You want it both ways, if it works then it is unacceptable, but in
10 general you do not expect it will work and therefore we should not have it?

11 MR. O'DONOGHUE: Sir, that would be our primary case that, based on the evidence, it could
12 not work, and in fact we would go further and say in the context of a four month dispute
13 resolution it would be very difficult to say that it would ever work because of these
14 intractable problems and the absence of empirical information.

15 PROFESSOR STONEMAN: And the *status quo* should take the benefit of the doubt?

16 MR. O'DONOGHUE: Indeed, for good reasons as Mr. Muysert I think outlined very eloquently.

17 PROFESSOR STONEMAN: Thank you.

18 THE CHAIRMAN: Thank you very much, Mr. O'Donoghue. Miss Smith?

19 MISS SMITH: Thank you, sir. In the time available to me first I would like to make some very
20 brief submissions on Everything Everywhere's secondary case that BT's appeals should be
21 dismissed and then focus on our primary appeals.

22 As regards BT's appeals in that regard I rely on the submissions already made by Mr. Ward
23 and Mr. O'Donoghue, and the submissions that I anticipate that will be made by Mr.

24 Herberg. I would like to hand up two notes that we have prepared and I have to

25 acknowledge the very great debt I owe to my Junior, Philip Woolfe, in preparing those
26 notes. The two notes address the following issues: the first note sets out in writing our

27 answers to the Tribunal's questions, and the second note sets out the various points that we
28 wish to make in some detail on BT's appeal, or the points we want to focus on in BT's

29 appeal. We concentrate, as we did in our cross-examination on BT's case, on the magnitude
30 of the direct effect and, to a lesser extent, we make some points on the NTPE and the

31 indirect effect. The points are covered in detail in our note but just to highlight some points
32 arising from the notes on the magnitude of the direct effect we address first the extent to

33 which the NCCNs would be likely to reduce retail prices and, secondly, the extent to which

1 any such retail price reduction would actually ameliorate the market failure found by
2 Ofcom.

3 As to the extent to which the NCCNs would be likely to reduce retail prices, we stress again
4 that BT needs to show that 08 prices will fall to the lowest tier. When pressed in cross-
5 examination Professor Dobbs insisted that whatever criticisms were made of his model and
6 whatever further refinements he made to it in response to those criticisms, it still showed the
7 same result – as he put it, an incentive to reduce prices. That is true, that was all his model
8 was actually designed to show in the first instance, a tendency to induce reductions in
9 prices, but with respect we say that is now not enough. There is a difference between a
10 model being appropriate to show that prices are likely to reduce and a model that can
11 accurately predict the magnitude of those price reductions.

12 Moreover, we make the important point that if prices remain the same or are only partially
13 reduced, MNOs will face an increase in wholesale cost which will be passed on to
14 consumers, even though there is no increase in BT's underlying costs, which gives rise to an
15 inefficiency over and above the points made in this case. Returning to our note, we seek to
16 explain various technical features of the modelling with some, but I hope minimal, use of
17 equations, and seek to show various limitations in the model. For example, there appears to
18 have been some confusion about the use of the term “spill-over”. In so far as that term was
19 used by Professor Valletti, that is the meaning the impact that 08 prices are likely to have on
20 a consumer's decision to purchase a particular tariff. As a matter of fact, that spill-over
21 effect may be insignificant, and that was suggested by Mr. Read to Professor Valletti in
22 cross-examination, and Professor Valletti agreed. That issue is quite distinct from the issue
23 of how the spill-over function in the algebra of Professor Dobbs' modelling is dealt with.
24 Professor Dobbs' spill-over term appears to be set up so as to capture all possible reasons
25 why the price of 08 services may impact on MNO profitability. It is not limited to spill-
26 over in the sense used by Professor Valletti.

27 On Professor Dobbs' spill-over term, the effect of it is that the more inelastic demand is
28 assumed to be at current prices, the more of a contribution the spill-over term will making
29 towards showing an incentive to cut prices and a disincentive to raise prices. The value of
30 the spill-over term depends on the elasticity of demand.

31 Professor Dobbs' spill-over term is also modelled as being linear across all the relevant
32 prices, and Professor Valletti explains why this bias is the results of a model. Although
33 Professor Dobbs sought to address that point in annex 3 to his seventh report, he accepted in
34 cross-examination that this annex did not address prices below current 08 prices, which is of

1 course what we are concerned with if we are concerned with an incentive to reduce prices.
2 His answer to that was what is contained in his note C put to the Tribunal a few days before
3 this hearing started, and I cross-examined him on why, in our submission, his note C using
4 data from the zero rating of DWP lines cannot for those reasons provide any real guidance
5 on how consumers might react to price reductions incentivised by the NCCNs.

6 It is also important to note that the predictions of Professor Dobbs' modelling are sensitive
7 to the form of the demand curve chosen, and I put to him in cross-examination the tables
8 produced by Dr. Mike Walker, which show the divergence in results emerging from his
9 modelling depending on the different demand curves.

10 Professor Dobbs agreed in cross-examination that since Ofcom was concerned with
11 incentives to cut prices the shape of the demand curve at lower prices was important, but his
12 Dobbs model only looked at the shape of the demand curve at prices higher than 20 ppm.
13 In response to the question about what might happen with regard to prices at lower levels
14 than that, he again falls back on note C, and I have addressed the limitations as to what can
15 be drawn from the data contained in note C.

16 In the note handed to the Tribunal we also address the limited extent to which the
17 predictions of the Dobbs modelling can be taken to represent what might happen in reality,
18 and that point has also been addressed by Mr. Ward in his opening.

19 It is, finally, important to note that BT also needs to prove not only that 08 prices might fall
20 in response to the NCCNs, but also that any fall in prices will ameliorate the market failure
21 identified by Ofcom. In our submission, that market failure turns essentially on consumers'
22 lack of price awareness. There is a real issue as to whether that will be addressed by the
23 NCCNs, even if they incentivise a drop of prices to the lowest tiers, and we say it is not
24 clear even that they will do that.

25 Moving then back to our primary appeal, I would like in this closing to revisit the first two
26 grounds of appeal that we developed in opening, our retail price regulation by the back door
27 point and our costs orientation arguments. I would also like to develop briefly, as I
28 indicated that I would in opening, after having heard the witness evidence, our third ground
29 of appeal, and that is the practicality of calculating an average retail price. In closing,
30 however, I am going to address them in reverse order – first of all, practicality, secondly,
31 the cost orientation points, and thirdly retail price regulation by the back door.

32 I would like to make some brief comments by way of introduction. At a very early stage in
33 these proceedings, Ofcom confirmed in response to a question from Professor Stoneman
34 that the effect of its determinations was that it held, as a matter of principle, that tiered

1 structure of wholesale charges set by reference to MNOs' retail prices, such as those
2 proposed by BT in this case, could in theory be held to be fair and reasonable. So the effect
3 of that is that if in future BT or other TCPs could prove that such a charging structure would
4 lead to net benefits for consumers in competition then such termination charges could be
5 approved, it is just that BT had not managed to prove that to be the case this time around.
6 It is also clear that Ofcom's approach in the present case – that is to assess whether or not to
7 accept proposed wholesale charges by reference to their impact on consumer welfare, and in
8 particular their impact on retail prices, would be applied by them in future cases. Ofcom
9 has clearly stated that it would take the same approach to similar cases in the future, and I
10 gave you the reference to that in opening – for example, the 0845 determination at
11 para.8.11.

12 For its part, BT has made it clear that it will keep introducing variants on this ladder
13 charging structure until it manages to persuade Ofcom that it has fulfilled Ofcom's three
14 principle test. As I indicated in opening, BT has, in effect, disregarded the determinations
15 by introducing new wholesale charges also based on similar ladder structures in reliance on
16 Ofcom's reasoning in the determinations, as have other FNOs following BT's lead.

17 It is worth in this regard very briefly just to turn to Ofcom's order in the 080 determination,
18 which is to be found in core bundle A, tab 1. At p.90 we find Annex 1 to the document,
19 which is Ofcom's Determination itself, the determinative part of the decision. You see on
20 the bottom of p.91 Ofcom declared that:

21 “The Parties should revert to the trading conditions that applied before NCCN
22 956 came into effect ...”

23 That is in this case, in fact, for 080 calls that there were no termination charges.

24 That determination took effect on the day it was published, which was 5th February 2010.

25 However, barely a month later, BT introduced NCCN 1007, which contained a substantially
26 similar scale of charges for 080 numbers. The detail on that is given in the second witness
27 statement of Miss Durie, para.25, core bundle C2, tab 32.

28 BT has also indicated that if the MNOs referred that NCCN to Ofcom it would simply
29 notify another pricing variation. If I could take you back in that regard to a document that
30 we have already seen at CAT bundle 20, tab 10. At tab 10 there are BT's notes of a meeting
31 between it and Orange dated 12th May 2010 regarding NCCN 1007. Could I ask you to turn
32 to the last page of that document, the fourth bullet point from the bottom:

1 “Discussion then exposed that if of course accepted a [and I interpose of NCCN
2 1007] and did not stay, finding in favour of Orange, BT would simply notify
3 another pricing variation.”

4 So that is the position that BT has taken in this case, and the situation that the MNOs face. I
5 make our submissions against that background.

6 I start first with our submissions on our third ground of appeal, those on practicality. In
7 light of this factual situation we say it is important that Ofcom failed to take proper account,
8 in our submission, of the fact that it would be practically impossible for EE to calculate an
9 average retail price which was required for the implementation of BT’s proposed Wholesale
10 Charging Structure. We say in light of the evidence, which was before Ofcom at the time of
11 the Determinations and developed in evidence from Mr. Ornel in these proceedings,
12 Ofcom should not have found that it would have been possible for EE and BT to negotiate
13 an ARP.

14 In opening (day 3 p.47 lines 12-21) Ofcom stated that EE had adduced new evidence which
15 was not before Ofcom in order to make its case in this regard, and Ofcom therefore
16 proposed to retire from this particular field of conflict and essentially leave it to BT and EE
17 to slug it out between themselves.

18 The first point is that Mr. Ornel’s evidence is not new evidence. It is clear from the
19 Determination that the issues he addresses were clearly before Ofcom. In Mr. Read’s cross-
20 examination of Mr. Ornel (day 4 p.59 lines 7-23) by reference to paras.5.286 and 5.289 in
21 the Annexes to the 0845 Determination, which discussed the information supplied by T-
22 Mobile to Ofcom in response to Ofcom’s Section 191 Notice, Mr. Ornel agreed with the
23 point put to him by Mr. Read at lines 20-21 of the transcript to the effect that

24 “The points that you are effectively raising in your statement were very similar to
25 the points that you were putting to Ofcom when you were being asked to calculate
26 an average retail price. That is right, is it not?”

27 I would also make the very brief point that at the case management conference of 3rd
28 December 2010 in this case Ofcom also accepted that the evidence of EE was not new
29 evidence, in contrast to the position it took on BT’s evidence. That is pp.2-3 of the
30 transcript of that CMC.

31 PROFESSOR STONEMAN: Miss Smith, before you move to new points, could I take you back
32 to this Notes - Orange Bilateral 12th May 2010, the one you took us to a little while ago. It
33 was bundle 20 tab 10 third paragraph on third page starting “Orange asked whether”.
34 Within that there is a statement here that says:

1 “Orange are not prepared to negotiate on those points as they feel that any shape
2 ladder is non-compliant with the principles set out in NCCN 956 decision.”

3 Does that mean that you dispute the Ofcom view that Ofcom found that ladder pricing was
4 acceptable, and you are saying that the statement that I have given the other day was
5 wrong?

6 MISS SMITH: I am not sure that we would go that far. I cannot give evidence on what is meant
7 by this particular note.

8 PROFESSOR STONEMAN: But if you looked at that paragraph, I thought that might be relevant
9 too. I think it is a crucial point.

10 MISS SMITH: Yes. I think our position is simply this: that until Ofcom confirmed the position
11 in response to your question its position was not absolutely clear to us either. So it was a
12 clarification in response to your question that we welcomed as well.

13 PROFESSOR STONEMAN: All right. So the position we are now in is you accept that Ofcom
14 say that ladder pricing is OK, but Everything Everywhere say it is not?

15 MISS SMITH: That is right.

16 PROFESSOR STONEMAN: I am sorry to interrupt the flow.

17 MISS SMITH: Of course, there is the point on NCCN 1007 that the position of Everything
18 Everywhere is that it does not even fulfil the test set out by Ofcom in NCCN 956.

19 PROFESSOR STONEMAN: Fortunately we are not looking at that one!

20 MISS SMITH: Not yet! We are not on to that appeal yet. May I go back to Principle 3 and the
21 substance of our arguments on that case. We say effectively, as Mr. Kilburn accepted at
22 day 4 p.35 line 28, calculating an average retail price would require the establishment of a
23 link between MNOs’ retail billing systems on the one hand and their wholesale interconnect
24 systems on the other hand. This is a link which does not currently exist and which we say
25 would be excessively costly to construct solely for the purposes of BT’s WTS for these
26 number ranges. That is the essence of our evidence in that regard.

27 There was some debate, when Mr. Kilburn and Mr. Ornelo gave evidence, about whether
28 the average retail price for 0845 calls is to be calculated: whether it is the average rate
29 across all 0845 calls, or whether it is the average rate for BT hosted 0845 calls only. EE has
30 always understood it to be the latter case: that it is for BT hosted calls only, but we accept
31 that is not actually clear from the NCCNs themselves.

32 The issue first became an issue in the 080 dispute because the average retail price for 080
33 numbers hosted on different TCPs may be materially different, depending on whether or not
34 those TCPs host any or what proportion they host of zero rated numbers. So if, for

1 example, all the zero rated numbers are hosted by BT, then BT's average retail price will be
2 different from that of Cable & Wireless. But it is also an issue on 0845 and 0870 that while
3 for any individual customer there will be a single headline retail price for all 0845 calls, that
4 headline rate will vary between the tariffs. So to massively over-simplify and give an
5 example, you could assume that the headline rate on a business tariff is 15ppm and the
6 headline rate on a consumer tariff is 25ppm. If Cable & Wireless hosted 0845 numbers
7 attract more calls from business customers than consumer retail customers, but for BT
8 hosted numbers the reverse is true, then the average retail price of calls to C&W hosted
9 numbers will be closer to 15p and the average for BT hosted numbers closer to 25p. As Mr.
10 Orndel commented at day 5 p.53 line 23: "the characteristics of the consumers making the
11 calls are different as are the call patterns so the average retail price could be different,
12 depending on who is hosting the call."

13 As to the practicality of calculating those average prices, BT relied upon the evidence of
14 Mr. Darren Kilburn. We would simply make the following points with regard to that
15 evidence. Mr. Kilburn's evidence is not based on any relevant experience working with an
16 MNO. It was shown in cross-examination to be based essentially on a table that he had
17 extracted from the SNGN review, the underlying data for which the Analysys Mason report
18 did not support the conclusions that he was seeking to draw from that table and which, in
19 any event, he had not reviewed (day 4 pp.37-38). We say the evidence of Stephen Orndel
20 and Robin Stone as to the difficulties of calculating an ARP is clear and persuasive, and was
21 not undermined on cross-examination.

22 On the basis of that evidence we say the Tribunal should hold that it would indeed be
23 practically impossible for EE to calculate an average retail price. Therefore, Principle 3
24 could not be fulfilled in this case. If necessary, the Tribunal should refer the matter back to
25 Ofcom with a direction to make a finding to this effect.

26 I turn to our cost orientation ground of appeal. We say that BT's costs of termination
27 should have been the starting point for Ofcom's analysis of the termination charges set out
28 in the NCCNs. As we put it in para.18.3 of our reply: "Any departure from cost based
29 pricing should only be engaged in where it is absolutely proportionate in all the
30 circumstances." We say it clearly was not in the present case. Instead, by taking the three
31 principles approach that it did, Ofcom employed an inappropriate and/or unreasonable
32 methodology to reach its Determination in the present cases.

33 This case is not judicial review; it is an appeal on the merits to a specialist tribunal. The
34 Tribunal has made it clear that it will subject Ofcom's decision to "profound and rigorous

1 scrutiny". Ultimately (para.164 *H3G v. Ofcom* tab 28 authorities bundle 2) the question for
2 the Tribunal is not whether the decision was within the range of reasonable responses but
3 whether the decision was the right one.

4 Can I develop that point by reference to the *TRD* Core Issues judgment at authorities bundle
5 2, and if I could ask you to turn to paras. 82 to 83 in that judgment, where the Tribunal
6 considered in effect the standard of review, and in paras. 82 to 83 it says:

7 "It is also common ground that there may, in relation to any particular dispute, be
8 a number of different approaches which Ofcom could reasonably adopt in arriving
9 at its determination. There may well be no single 'right answer' to the dispute. To
10 that extent, the Tribunal may, whilst still conducting a merits review of the
11 decision, be slow to overturn a decision which is arrived at by an appropriate
12 methodology even if the dissatisfied party can suggest other ways of approaching
13 the case which would also have been reasonable and which might have resulted in
14 a resolution more favourable to its cause."

15 In para. 83 it goes on to say that in that case the challenges raised were more fundamental.
16 We say in our challenge, in our appeal our challenge is also more fundamental. Our
17 challenge is not that there are a range of reasonable approaches that Ofcom could have
18 taken, that the one we would contend for would have led to a better result or a different
19 result. We say that Ofcom was not using an appropriate methodology. In essence we say
20 that by using a methodology, that is by determining that this dispute over BT's proposed
21 wholesale charges, by reference to the impact of those wholesale charges on consumer
22 welfare and in particular their impact on the retail prices – methodology which Ofcom itself
23 accepts was in appropriate and was unlikely ever achieve a clear result in the present case –
24 Ofcom made a fundamental error of approach.

25 Alternatively, we say, that Ofcom asked itself the wrong question. If you turn to para. 101
26 in the *TRD* core issues judgment, and we have been here before, but there the Tribunal set
27 out what it said was the test that Ofcom should have applied in these disputes, and that test,
28 in essence, can be expressed as requiring Ofcom to determine what are reasonable terms
29 and conditions as between the parties, and in addressing that question it needs to consider a
30 fair balance between the interests of the parties against the background of its statutory duties
31 and community requirements. So Ofcom must seek to achieve those objectives as well as
32 achieving a fair result between the parties.

33 If we can turn to look at the question it appears Ofcom actually asked itself in this case, and
34 that is found in Mr. Myers' second statement, which is in core bundle C2, tab 28, para. 161.

1 We say that Ofcom correctly identified the relevant question in the first sentence of para.
2 161: were the wholesale interconnection rates linked to the level of the retail charges fair
3 and reasonable? But the mistake occurs in the last sentence of para. 161, where he says:

4 “... the relevant question is whether BT’s adjustment to wholesale interconnection
5 rates in NCCNs 974 and 986 would lead to benefits or detriments for consumers
6 and competition.”

7 That question, we say, assumes the answer. That question assumes that this approach, the
8 weighing of benefits and detriments to consumers in assessing whether the wholesale
9 charges are fair and reasonable, is the how Ofcom should determine whether those rates are
10 fair and reasonable. It assumes that this is the correct methodology to use in order to
11 answer that question and, of course, we say that it is not. Effectively, this collapses back
12 into the same point. We say that Ofcom used the wrong methodology in order to determine
13 the question in this case, i.e. whether BT’s NCCNs were fair and reasonable. I would like
14 to develop our arguments in this regard as follows: first, we make the point that there is no
15 magic in the fact that this is a two-sided market. Most telecoms’ markets are two-sided
16 markets. Ofcom accepts that in a two-sided market which did not have the market failure or
17 externalities which it identified in the present case it would set wholesale termination rates
18 by reference to cost and that is exactly what it did in its 0870 determination in June 2009,
19 which is found at CAT bundle 22, tab 3, and exactly what it did in the 030 determination,
20 which is at CAT bundle 20, tab 7. In those determinations Ofcom set the termination
21 charges based on cost of termination.

22 So even when Ofcom has been dealing with two-sided markets which are on all fours with
23 the present case it has applied cost based termination charges. Mr. Myers accepted in cross-
24 examination (day 5, p.35) that the existence of a two-sided market is not in itself a reason
25 for departing from the cost oriented approach. The reason for departing from a cost-
26 oriented approach in the present case was essentially a desire to achieve Ofcom’s policy
27 preference which, in itself, reflected the market failure found by Ofcom in the NTS market
28 arising from, first, consumers’ lack of price awareness, secondly, the vertical externality;
29 and thirdly, the horizontal externality. Again, in cross-examination (day 5, p.37, lines 16 to
30 23) Mr. Myers accepted that those three interrelated sources of market failure are problems
31 that manifest themselves on the retail side of the market. He agreed that, absent those
32 problems on the retail side of the market, Ofcom has set wholesale prices by reference to
33 cost, that is in the 0870 determination and the 030 determination.

1 Ofcom also accepts that it would be better to address those retail market failures from the
2 retail side of the market where they appear (day 5, p.43, lines 13 to 19). Mr. Myers
3 accepted that, given a full choice of options, Ofcom would not use wholesale termination
4 charges in order to induce the improved price in the retail market, but take actions that
5 address that more directly in the retail market and that is precisely what it proposes to do in
6 the Simplifying Non-Geographic Numbers consultation paper.

7 Moreover, on Ofcom's own evidence BT's NCCNs are neither an effective nor an efficient
8 way of addressing the externalities and, if I may, I think it is worth going back to Mr.
9 Myers' second statement on that, and see what he said there, which is in C2, tab 28, para.
10 225, p.69 of Mr. Myers' second statement. I am not going to read it out but it was put to
11 him in cross-examination you will recall. He explains there that:

12 "… there is a significant risk that NCCNs 985 and 986 are an ineffective and
13 inefficient approach to address the externalities …

14 and he explains why: ineffective because it is uncertain they will be effective in reducing
15 call prices to the extent that would be desirable, but even in the full reduction scenario they
16 do not achieve alignment with geographic calls, and they are inefficient because they may
17 be inefficient and detrimental for consumers by imposing increased termination charges in
18 the no reduction or partial reduction scenarios which inflates the negative mobile tariff
19 package effect. So even on their evidence the NCCNs are neither an efficient nor effective
20 way of addressing the externalities.

21 Furthermore, as Mr. Myers said in cross-examination by Mr. Read, day 6, p.21, lines 3 to 4,
22 it did not seem to him that BT's NCCNs are necessarily even a desirable staging post to
23 achieve that destination – that is seeking to address the market failure or externality.

24 As I have already said, that market failure is to be addressed by Ofcom after carrying out its
25 full policy review and consultation of Simplifying Non-Geographic Numbers Review.

26 As Mr. Muysert explained in his written evidence and in the witness box, there are sound
27 economic reasons for regulators taking the approach that they will address market failures
28 and market problems in the part of the market where they arise unless there is a fundamental
29 problem with the platform as a whole. That is his evidence on day 9, p.40, lines 16 to 28.

30 Mr. Muysert summed up the dangers well, I think, in response to his questions from
31 Mr. Herberg, and I would like to just quote what he said on day 9, p.49, lines 5 to 13:

32 "I think there's been quite a lot of discussion and debate about whether or not
33 NCCNs would lower the price fully and there would be no increase in revenue
34 share or whatever. If you get an interim outcome, then the problem is that

1 consumers may not be all that more knowledgeable. In fact, they may not be
2 any more knowledgeable at all. You may have the same issues on the retail side
3 of the market. My concern is that if you increase the revenue share on the SP
4 side of the market, you may create a rent-seeking opportunity. You may
5 incentivise SPs to use 0845 and 70 numbers when they wouldn't otherwise have
6 done so, because they're getting paid to do it. If you haven't fixed the problem
7 on the retail side then you actually exacerbate the whole situation."

8 We say a regulator should and does normally take a cost oriented approach to the setting of
9 wholesale charges, setting charges in line with efficient costs, which provides a good proxy
10 for the long run competitive outcome. It should then, and does then, generally address retail
11 problems in the retail market using the tools available to it in that market. As Mr. Muysert
12 explained, and again day 9, p.50, lines 5 to 8, cost is the usual benchmark in interconnect
13 proceedings because it closes off problems at one end of the equation, if you like, and when
14 you are dealing with uncertainty all over the market, and on both ends, it can be a better
15 world if you are fairly confident that one end of the equation is correct, and then you have
16 limited the problems to the other end and you deal with those when you can.

17 As a matter of fact, this is the approach that Ofcom and the Competition Commission have,
18 themselves, taken in the past, in particular the 2003 and 2009 Competition Commission
19 reports on mobile wholesale termination rates, which Mr. Muysert mentioned in the box,
20 but are also addressed in his first witness statement at paras.24 to 27, and his third statement
21 at paras.29 to 31. In those cases, concerns about what might happen in the retail market as a
22 result of the changes to mobile operators' wholesale termination rates, that is the concern
23 that reductions in the wholesale termination rates would not be passed through by fixed
24 network operators to their retail customers, was explicitly left for Oftel and Ofcom to
25 address by way of regulatory intervention in the retail market. Wholesale termination rates
26 were set by reference to cost.

27 Furthermore, and a slightly different point, the approach taken by Ofcom in the present case
28 – that is seeking to establish whether or not BT's proposed wholesale charging structure
29 would lead to net benefits for consumers in competition – is difficult, if not impossible, to
30 answer, particularly within the confines of a four month dispute determination process.

31 In the 0845 determination itself Ofcom set out its own assessment of the feasibility of its
32 approach. I am not going to take you to it, but appears at core bundle B1, tab 1, at para.8.7.
33 Ofcom said:

1 “We also consider that it would be extremely difficult to resolve the question of
2 the relative sizes of the Direct, Indirect and Mobil tariff package effects, all of
3 which are uncertain. Even if we had clear models to test these empirically
4 (which is not the case ...), this would be a major undertaking without any
5 guarantee of success in deriving a robust result.”

6 That point was repeated with some feeling by Ofcom’s witnesses in the witness box. To
7 take just one example, in response to cross-examination by Mr. Read, Mr. Myers said at day
8 6, pp.15, in summary, that even in the Mobile Termination Rates Market Review, which he
9 described as the largest market review that Ofcom conducts every four years, and in the
10 SNGN Review, Ofcom had not even attempted to quantify issues such as the strength of the
11 waterbed effect or the extent to which the externalities and market failure might be
12 alleviated by the remedies proposed. He concluded:

13 “I think it would be an extremely difficult task and I am unconvinced that there
14 is even sufficiently reliable evidence available, never mind the time and effort
15 and complexity needed to assess both these effects and the shapes of all these
16 lines.”

17 However, even though Mr. Myers considered that quantification of those parameters was
18 not possible within the confines of the dispute resolution process, he accepted that such
19 quantification might be required by the analytical framework chosen by Ofcom in the
20 present case.

21 Essentially, the conflict between those two positions left Ofcom unable to reach a robust
22 determination of the dispute – see transcript day 6, p.19, lines 6 to 12. Mr. Myers said:

23 “Ofcom did not reach a view on where the tipping point, because, as I said, that
24 would have required a quantification of effects. ... Ofcom took it as far as it
25 thought it sensibly could. To go beyond that, further quantification did not
26 seem to Ofcom to be justified and therefore it was unable to reach a clear
27 conclusion on the overall effect in the partial reduction [case] ...”

28 Mr. Muysert, for his part, stressed the inefficiencies that arise and the increased possibility
29 of error of undertaking what amounts to a fairly fundamental policy review in a short period
30 of inquiry (that is a quote from his evidence, day 9, p.51, lines 14 to 16).

31 The analysis that Ofcom undertook was practically impossible to do within the confines of a
32 dispute determination, given the uncertainties that arise. Our point goes, I am afraid, even
33 further than that. We say that if Ofcom were properly to assess the termination charges, the
34 wholesale termination charges, by reference to their impact across the market, including

1 their impact on retail prices, it should have gone further than it actually even did in the
2 determinations. It should have quantified all potential externalities arising in the market as
3 a result and all the market effects resulting from the introduction of BT's wholesale
4 termination structure.

5 As Mr. Muysert said in his first statement at paras.34 to 35, if Ofcom had really wanted to
6 set prices so as to optimise the platform in a two sided market, or even had it simply wanted
7 to carry out a full analysis of consumer welfare arising from the imposition of those
8 termination rates, it would have had to carry out a far more detailed analysis than it actually
9 did. For example, as we put to the witnesses in cross-examination, Ofcom focused on the
10 externalities arising from the high retail prices charged by MNOs for 08 calls. Mr. Myers
11 agreed that Ofcom had taken its policy preference as a given, and he also agreed that the
12 policy preference may reflect only some of the externalities or market effects that arise as a
13 result of the imposition of the wholesale charging structure – that is day 5, p.41, lines 10 to
14 23.

15 We gave just the example of a further externality or factor that would have to be taken into
16 account – what Mr. Myers termed the “relative elasticity” point, which is as follows: BT's
17 termination charges will result in a loss of revenue to mobile operators which has to be
18 recovered through higher prices for other mobile services, which will result in a reduction in
19 volumes, and may result in a reduction in volumes of other mobile services. If the demand
20 for those other services is more elastic than the demand for 08 calls, that volume reduction
21 may be proportionately higher than any volume increase arising out of reduction in the price
22 of 08 calls.

23 Mr. Myers accepted this point when I put it to him in cross-examination and then he
24 explained further in cross-examination by Mr. Read that this relative elasticity point meant
25 that there was at the very least a possibility that the direct effect could go the other way in
26 the current case – that is day 5, pp.85 to 86.

27 A further danger arising from Ofcom having taken the policy preference as a given in
28 determining these disputes is that, as Mr. Muysert said on day 9, p.50, Ofcom may be
29 building into the determination of dispute a policy preference which, following its
30 Simplifying Non-Geographic Numbers Review may change. We know, for example, that at
31 the time of the determinations Ofcom's policy preference for the 0845/0870 calls was that
32 they reflect prices for geographic calls. We also know that the proposal in the SNGN
33 Review is that the 0845/0870 be de-linked from geographic call rates.

1 So what is the answer to all of this? We do not say, as Mr. Herberg suggested in opening
2 and in cross-examination of Mr. Muysert on day 9, that Ofcom should simply throw up its
3 hands and say, “We cannot do this, it is an impossible task”. Indeed, it is Ofcom itself
4 which appears to be throwing up its hands and saying it cannot do this; it is an impossible
5 task. Indeed, it is Ofcom itself which appears to be throwing up its hands and saying it
6 cannot realistically complete the task which it has set itself. In this regard it is worth
7 revisiting what Mr. Herberg said in opening (day 3 p.43 lines 8-14):

8 “We cannot abstain from exercising the dispute resolution procedure because there
9 might be more optimal ways. We would certainly accept that this is not an
10 optimal way of resolving these questions, and part of the difficulty is that the risk
11 that one is being dragged into an exercise which looks much more like an
12 elaborate SMP type exercise in deciding a dispute resolution case. That is a
13 problem which we say is caused by the nature of the charges and BT’s way of
14 justifying it, and that is a separate issue. It is absolutely clear that we had to
15 address the issue. We could not, on the basis of the sort of submission that EE
16 made as to better routes of dealing with it, not deal with it.”

17 And we do not say, at the risk of repetition, that Ofcom should decline to deal with the
18 dispute. Nor do we accept Mr. Herberg’s suggestion, which was put to Mr. Muysert (day 9
19 p.51 lines 20-26) that because of the uncertainties inherent in its approach Ofcom should
20 adopt something akin to what Mr. Herberg described as the “precautionary principle” and
21 only allow a proposed change to go ahead if there is a clear benefit. We say that approach
22 would do nothing to address the problems with Ofcom’s approach. On the contrary, it
23 might simply add to the uncertainties. Just how clear does the benefit have to be in order to
24 allow a proposed change to go ahead?

25 We say that the proper approach in the present case, as we have already explained, is that
26 Ofcom could have set cost based termination charges, closing off the problems at that end
27 of the equation, and address the problems in the retail market in that market and with the
28 tools available to it in that market, if necessary following a full market review which would
29 enable it to examine all these issues in proper depth and on the basis of adequate levels of
30 information (see Article 17.1 Universal Services Directive). That, we say, is the proper
31 route to any retail price control at the present moment in time, if retail price control is
32 considered to be necessary.

33 Before leaving this ground of appeal, I would like to deal briefly with the issue of revenue
34 share. Ofcom, through Mr. Myers, accepted that this was a second order objective for

1 Ofcom, and he also accepted that revenue share may not be appropriate in all cases; it may
2 lead to inefficiencies and arbitrage (day 5 p.47). Moreover, it does appear, in the
3 0845/0870 Determination at least, that Ofcom considered BT's costs of termination in so far
4 as it compared the costs of termination (using the proxy of 0870 termination charges which
5 had themselves been determined by reference to cost) with the lowest tier of termination
6 charges for 0845 calls. You will recall that having carried out that comparison, it identified
7 an excess of between 0.4ppm and 2.1ppm. It identified that as excess which could be used
8 (I stress the word "could") for revenue sharing (day 5 pp.48-49). Mr. Myers said (day 5
9 p.47 lines 32-34) that in effect Ofcom had concluded that revenue share was not desirable
10 on 0870 and increased revenue share was not desirable on 0845 because it had in effect
11 concluded that it was only in the no reduction scenario that BT's termination charges could
12 be justified.

13 Professor Stoneman also suggested (day 5 p.52) that by giving no weight to BT's profits in
14 the indirect effect and full weight to the mobile tariff package effect, Ofcom was essentially
15 saying that BT's charges should be cost related.

16 If Ofcom was saying that, then we welcome its implicit acceptance of a cost oriented
17 approach, but we still say that the approach that it took in determining this dispute, the three
18 principles approach, was misguided. We say that for two reasons. First, Mr. Myers
19 accepted that Ofcom had not considered whether this element of between 0.4ppm and
20 2.1ppm was set at a level appropriate to reflect either actual or potential revenue share on
21 0845 numbers (day 5 p.49 lines 1-8). This point is important because, as Mr. Muysert said,
22 these number ranges 0845 and 0870 were not designed by Ofcom to support significant
23 revenue sharing. There are other number ranges for that purpose than 09 premium number
24 ranges. There may be unintended consequences from introducing revenue sharing on these
25 number ranges. Mr. Myers himself accepted that revenue sharing may not be appropriate in
26 certain circumstances.

27 This issue, whether revenue share is appropriate at all on these number ranges, if so at what
28 level and if so if the 0.4ppm to 2.1ppm is an appropriate level of revenue share to
29 incentivise to provide the possibility for was not considered by Ofcom in the Determination.
30 The second, and perhaps more fundamental, point is that if the implication is that Ofcom's
31 approach in the present case was pretty much a cost oriented approach, so Everything
32 Everywhere should not complain, we disagree. All of the uncertainties associated with
33 Ofcom's three principle approach, even as it was applied in the present case, still survive.
34 In particular, it is not, with respect, the case that in effect Ofcom had concluded that

1 revenue share was not desirable on 0870, and increased revenue sharing was not desirable
2 on 0845 because it had concluded that it was only in the no reduction scenario that BT's
3 termination charges could be justified. As Mr. Myers made clear in his cross-examination
4 (day 5 p.22 lines 22-25) the extra weight that Ofcom gave to the direct effect as a result of
5 its policy preference means that the direct effect could outweigh the mobile tariff package
6 effect even in a partial reduction scenario. So even where prices do not fall to the lowest
7 tier, even where there is still the possibility for revenue share, the direct effect could
8 outweigh the MTPE in that partial reduction scenario. Of course, whether it does depends
9 on how much extra weight is given to the direct effect. It also depends on what the
10 countervailing value of the mobile tariff package effect and indirect effect might be. It
11 depends on the balance which needs quantification. The countervailing value of the MTPE
12 and the indirect effect in turn depend on questions such as the strength of the waterbed
13 effect and the extent of pass through from BT to service providers and thence to callers. So
14 all the issues are still up for grabs. The uncertainties still remain. We say that Ofcom took
15 the wrong approach in not taking a cost oriented approach.

16 In conclusion on this point, in considering these disputes we say Ofcom took the policy
17 preference as a given. It therefore proceeded on the basis that it should seek to achieve its
18 policy preference through its determination of the disputes. This led to its asking itself the
19 wrong question set out in para.161 of Mr. Myers' second witness statement. It led to it
20 using an inappropriate or unreasonable methodology to determine the dispute. That is, by
21 determining a dispute over BT's proposed wholesale charges by reference to the impact to
22 those wholesale charges on consumer welfare generally across the market, and in particular
23 by reference to their impact on retail prices. It was a methodology which Ofcom itself
24 accepts was inappropriate and was unlikely ever to achieve a clear result in the present case.
25 In taking such an approach and employing such a methodology we say Ofcom made a
26 fundamental error. We say on that basis the Tribunal should refer the matter back to Ofcom
27 with a direction to this effect.

28 That leads on to the last ground of appeal that I want to address in closing.

29 **THE CHAIRMAN:** You are saying that Ofcom's error in this regard is so great that it lies well
30 outside the margin of appreciation, if I can call it that, which Ofcom would otherwise have
31 in questions of discretion?

32 **MISS SMITH:** I think our point is that in fact it is almost at a prior stage of assessing whether or
33 not Ofcom has a margin of appreciation. We say the first issue is whether Ofcom employed
34 an appropriate methodology, took the correct approach. Then, if one has established that

1 Ofcom took the correct approach, it then has a margin of appreciation in applying that
2 approach. We say our problem is one step prior to that in effect: that it employed the wrong
3 methodology and took the wrong approach and therefore fell into error in that way.

4 THE CHAIRMAN: Yes.

5 MISS SMITH: So then ‘retail price control by the back door’, and that leads to the last ground of
6 appeal. I addressed this ground of appeal in some detail in my opening and I am not going
7 to repeat those submissions. I propose instead to concentrate on replying to the points made
8 by Ofcom in their opening (day 3, pp.29 to 34). But by way of introduction on this point I
9 think it is important to note how this ground of appeal is actually linked to our arguments on
10 the rest of the case.

11 Ofcom accepts that its desire to achieve its policy preference the lower retail prices on 08
12 calls was potentially determinative in its treatment of the dispute. As Mr. Herberg put it to
13 Mr. Muysert in the last day of evidence, for example at p.35, and p.48 of day 9 of the
14 transcript, Ofcom had an inbuilt bias in its model to favour the policy preference. My
15 submissions have already shown, I hope, how unwise at the very least it was for Ofcom to
16 seek to make the effect on retail prices in line with its policy preference the determining
17 factor in its analysis of the dispute without having carried out a full market analysis. Ofcom
18 accepts that such issues would be best addressed in such a forum.

19 That is what we say the European Common Regulatory Framework also envisages. As I
20 outlined in opening the CRF was intended to reduce the level of regulation which Member
21 States may impose and, most specifically, regulation, particularly price control, should be
22 only imposed following a market review procedure and specifically where a market has
23 been found to be not effectively competitive.

24 Turning back then to the points made by Ofcom in opening. First, Ofcom says that it is not
25 imposing price caps or price controls in this case, it is exercising its dispute determination
26 duties, and in exercising those dispute determination duties Ofcom has to look at what the
27 effect of BT’s wholesale tariff structure would be, and if one of those effects is to reduce
28 retail prices it cannot ignore that feature. It would be in breach of its sections 3 and 4 duties
29 if it did so.

30 Mr. Herberg said (day 3, p.31, lines 16 to 18) Ofcom would, on the face of the Act have
31 failed in its duty if it had not considered the impact of the dispute on price paid by
32 consumers and if it had not acted in making its decision upon what it found. Leaving aside
33 our arguments about cost orientation we say first that Ofcom’s general duties cannot be
34 applied so as to be inconsistent with the specific requirements of the Common Regulatory

1 Framework – I made that point in opening. There are very good reasons why there must be
2 a market review under Article 17.1 of the Universal Services Directive, or Article 8.2 of the
3 Access Directive. First of all, from an economics’ perspective there is good reason to think
4 that regulators do actually get it wrong fairly often. Secondly, the sheer complexity of the
5 analysis presented in this case indicates why these issues – issues as to the level of prices or
6 optimum level of prices – taking into account all welfare impacts on both sides of a two-
7 sided market cannot be dealt with robustly in a four month dispute resolution procedure.
8 Thirdly, there is simply an absence of evidence as to many of the key parameters, the extent
9 of the waterbed effect in both mobile and fixed tariffs, the elasticity of demand and the way
10 in which MNOs’ demand is likely to vary with price, the magnitude of any spill-over
11 effects.

12 Fourthly and finally, there must be real doubt as to whether it is sensible to try and resolve
13 these issues on the hoof, as it were, in a dispute resolution process rather than in the course
14 of a full market review contemplated by the Common Regulatory Policy Framework. So
15 there are good reasons why these sorts of issues should be dealt with in the context of a
16 market review.

17 We are not saying that Ofcom should ignore the impact of the NCCNs on prices paid by
18 consumers. What we say they cannot do, however, is to place greater weight on certain
19 prices paid by consumers, i.e. those paid by consumers for 08 calls, than other prices paid
20 by consumers, that is those paid by consumers for other mobile services, in order to control
21 the level of the prices paid for 08 calls.

22 Ofcom should not elevate that to the status of a determinative factor in the dispute or make
23 it the main focus of its analytical framework in the context of a dispute determination
24 without having carried out a full market review, because that engages all the complex issues
25 regarding setting an optimal price and the problems of quantification that Mr. Muysert
26 alluded to.

27 The second point that Ofcom made in opening on this retail price control by the backdoor
28 point, was that Ofcom referred you to the H3G case, and to respond to that point I would
29 just like to take you back to that case which is in the second authorities bundle at tab 25,
30 para. 131. By way of background, Ofcom took you to para. 131 in response to a point that
31 we had made that the H3G judgment was not relevant because we were not saying that
32 Ofcom cannot determine whether or not BT’s wholesale charge was fair and reasonable, but
33 we do say that it cannot and should not use its dispute resolution powers to control mobile
34 operators’ retail charges where it otherwise has no power to do so. Mr. Herberg suggested

1 to you in opening that because there is reference in para . 131 of this judgment to a dispute
2 that is not about price, but which has pricing consequences, and you can see that about half
3 way down p.38, because there is a reference not just to pricing disputes but to disputes
4 which may have pricing consequences, the judgment would apply to this case so that Ofcom
5 can address with its dispute determination powers disputes that might have pricing
6 consequences, and he said “and that is this case.” We say that is not what was referred to in
7 para. 131. the reference in para. 131 is to a situation where, for example, there is a dispute
8 over whether or not there should even be interconnection. One operator refuses to provide
9 interconnection to another. In those circumstances Ofcom may determine that dispute by
10 ordering the operator to grant interconnection, and that dispute will, of course, have pricing
11 consequences. You cannot decide to order the operator to grant interconnection without
12 also deciding what it should be paid for granting that interconnection. We say para. 131
13 was not referring to situations such as the present case where Ofcom is approving a
14 wholesale charge on the basis that it will have a particular effect on retail prices, i.e. that it
15 will reduce them to a certain level.

16 Finally in opening Mr. Herberg referred to the 0870 determination and relied upon the fact
17 that Ofcom’s policy preference was mentioned as a relevant factor in that case. We, of
18 course, relied on the approach taken by Ofcom in the 0870 determination in support of our
19 costs orientation arguments and we say nothing can be made of the point that EE, which
20 was not even involved in that determination, did not challenge Ofcom’s reliance on its
21 policy preference in that case as a relevant consideration.

22 In any event, as I think I have made clear, it is not our case that the policy preference was an
23 irrelevant consideration, that Ofcom could not and should not have taken into account. Our
24 case, under this head of our appeal, is that it was illegitimate for Ofcom to have treated its
25 policy preference as a potentially determinative factor in the dispute between the mobile
26 operators and BT and thereby seek to regulate indirectly that which it could not yet regulate
27 directly.

28 Those are my additional submissions on that last ground of appeal. Unless I can assist you
29 any further, those are my closing submissions.

30 MR. CLAYTON: You mentioned earlier on the average prices, or the difficulty in calculating
31 average prices, Miss Smith. I find that quite hard to understand when the amount of
32 information systems that the MNOs must have on this just to guide their own internal
33 information, management. You cannot be able to link the prices at both ends, if you like, of
34 the calculation – well, it is quite difficult. I can see with bundles it will be an issue, but

1 apparently only 5 per cent of the calls, the 080 calls – I am not quite sure about the
2 0845/0870 – are within bundles, 95 per cent are without bundles ----

3 MISS SMITH: Yes.

4 MR. CLAYTON: -- and therefore will have very little effect on this?

5 MISS SMITH: I think the first point is exactly the point you made, that this is about a, perhaps,
6 shortcoming in the systems that presently exist where the systems for the retail side, that are
7 concerned with the retail prices are not linked as a matter of fact with the systems on the
8 wholesale side, which determine the termination charges. As we all know, the introduction
9 of this ladder system of charging is the first time when wholesale termination charges are to
10 be set by reference to retail prices; it is a complete innovation. There has in the past been
11 no link in the termination charging, the wholesale charging, to the retail side of the market
12 and, as a matter of fact – and I am not saying that is good business or whatever, but as a
13 matter of fact – that link does not exist between the systems employed by Everything
14 Everywhere, where they are separate and, in fact, the staff as well and the whole business is
15 run separately on the retail side and the wholesale side. Also, in fact, I am reminded, that
16 Vodafone's evidence is that their wholesale and retail units also operate separately as Mr.
17 Stone made clear in oral evidence, and ours are the same as that.

18 MR. CLAYTON: But the complications presumably in connecting what is one call, if you like, in
19 terms of data flowing through the system, it would seem to be not too complicated to be
20 able to link them together in a database system and to be able to get that information out, if
21 necessary on a sample basis, because BT have said that they would accept averages within
22 bands, so it should not be too complicated to do that?

23 MISS SMITH: I am not sure that I can start giving you evidence on this, I have to refer you to the
24 evidence that Mr. Ornelo gives in quite a lot of detail in his statement, and I would ask you
25 to go back to that. It may be that over the lunch time I can go through his statement again
26 and identify specifically the paragraphs it might be useful to look back at. It is notable that
27 the vast majority of that evidence was not challenged in the witness box so you did not get
28 the benefit of hearing it orally, but it is there in his evidence as to the practical detail
29 problems that will arise. Perhaps I could take the opportunity over the lunch adjournment
30 of actually highlighting to you which parts of his evidence we would draw your attention
31 back to.

32 PROFESSOR STONEMAN: I am going to leave my question until after lunch.

33 THE CHAIRMAN: We may have a couple more for you after lunch.

1 MISS SMITH: I think that is cheating, giving yourself an hour to think of further questions.

2 (Laughter)

3 PROFESSOR STONEMAN: Well I can give you it now and you can delay the answer until after
4 lunch, if you wish.

5 MISS SMITH: I am happy to do it after lunch.

6 THE CHAIRMAN: 2 o'clock.

7 MISS SMITH: Thank you.

8 (Adjourned for a short time)

9 THE CHAIRMAN: Miss Smith, I think Professor Stoneman had a question.

10 MISS SMITH: Sir, would it be possible, before we turn to that, if I could just make a couple of
11 short points on the questions raised by Mr. Clayton before lunch.

12 THE CHAIRMAN: Please do.

13 MISS SMITH: I have been asked to draw attention to the evidence from Vodafone's witnesses as
14 well as the evidence from Mr. Ornel. For your note, the question of practicality is dealt
15 with in the first witness statement of Mr. Stone (bundle C2 tab 41 paras.37-49) and also the
16 first witness statement of Mr. Bowey bundle C2 tab 43 paras.8-18). I would ask you to read
17 that evidence. Also, from EE's point of view, I would just like to make the following four
18 short points. As I said before the break, the wholesale business and the retail business are
19 completely separate parts of EE's business (second witness statement of Mr. Ornel
20 paras.12 and 13).

21 Why can we not link the systems is the second point. Up to now there has been no reason
22 to link the two. It could be done feasibly, but at great cost and it would take considerable
23 time (para.12 Mr. Ornel's second statement and para.5.2 Mr. Ornel's third witness
24 statement).

25 It is the case that EE did try to link its systems in the past but this failed on the grounds of it
26 being excessively costly and too complicated to link those systems (Ornel 3 paras.5-10).

27 The systems are very different. The billing system is very sensitive; it deals with millions
28 of call minutes every day. It is very sensitive to change. There are also in fact four billing
29 systems for each of Orange and T-Mobile, separate systems from Pay As You Go and the
30 contract customers.

31 The fourth point was on the figure of 5 per cent which I think was taken from the
32 Simplifying Non Geographic Numbers review. I would make the following points. That is
33 of the total market; it is not operator specific. Perhaps more importantly, we cannot verify
34 that figure. We are not sure where it came from. Obviously it came from Ofcom, but we

1 are not sure on what data it was based. On the part of Everything Everywhere, we did have
2 a Flex T tariff which did include 08 calls. Evidence is given on that in Mr. Ornel's
3 statement. It was very popular. It is no longer available to new customers, but that does
4 make the point that there are in fact hundreds of tariffs, that are legacy tariffs that were once
5 available, may no longer be available on market but are still used by various customers, and
6 they can continue using those legacy tariffs for as long as they wish. Sir, those are the
7 points in response to Mr. Clayton.

8 THE CHAIRMAN: Thank you very much.

9 PROFESSOR STONEMAN: You made a plea for regulation based upon costs, costs based
10 pricing. I quite understand the economics of costs based pricing and why it might produce
11 an optimal outcome. I think what really gets one in this case is in a situation where, for
12 0800 numbers at least, the termination cost is zero to the MNOs we have a market where
13 prices are up to 40ppm. I cannot see that that is a situation that cannot be improved upon by
14 some action within the market. It may not be a move to cost based pricing, in which case
15 the MNOs ought to be charging a price of zero, but it might be some move away from a
16 situation where such very, very high margins are in place.

17 MISS SMITH: Proceeding on the assumption that your question proceeds on, which we may not
18 agree with, that something needs to be done about these prices, we have already made the
19 point that they are, in our view, the outcome of a competitive market and the fact that there
20 are high margins on these prices need not mean that they are problematic. But proceeding
21 on the assumption that one needs to do something about those prices, you say can we not do
22 something on the market? We say yes, one might be able to, but the question is where and
23 how. We say that because of the points that we have developed in a great deal of detail,
24 tinkering with wholesale prices with a view to affecting the level of retail prices, is the
25 essence of the problem here.

26 If Ofcom is of the view, which it obviously is, that there are problems with these retail
27 prices, then the best way (and we say the way they should have dealt with it in this case) is
28 to have addressed a market response in the retail market, or addressed a response in the
29 retail market, as they are proposing to do in the Simplifying Non Geographic Numbers
30 review. By seeking to deal with the retail problems by the setting of wholesale prices, we
31 say that gives rise inevitably to the problems that have arisen in this case, and gives rise
32 inevitably to issues that are far more complex even than the issues that Ofcom considered in
33 the Determination. We say both as a matter of good regulation and good economics, and in
34 fact in line with the previous approach of Ofcom in, for example, the mobile termination

1 rates review, you can give a good answer to how one should set wholesale rates by
2 reference to cost, close off that end of the market and deal with the problems that you see
3 arising in the retail end of the market by regulatory intervention in that side of the market.
4 So it is (1) wholesale rates; and also (2) a dispute determination in the present case that I
5 think give rise to the real problems.

6 PROFESSOR STONEMAN: Yes, but it is all very well to say you should deal with the retail
7 market; if the problem is in the retail market you deal with the retail market, but that was
8 not the dispute that was passed to Ofcom in the first place. They were asked to resolve a
9 dispute with respect to wholesale pricing.

10 MISS SMITH: Absolutely.

11 PROFESSOR STONEMAN: Are you suggesting they should not have accepted that dispute?

12 MISS SMITH: Not at all. They accepted the dispute as to wholesale pricing and that is the point.
13 We then say: what is the methodology that they should employ for dealing with that dispute
14 and determining what is a fair and reasonable wholesale price?

15 They became almost diverted by the problems that they were considering in the retail side
16 of the market in the Simplifying Non Geographic Numbers review, and thought: we will try
17 to do it all in this dispute determination; we will try to not only address the question of what
18 a fair wholesale charge might be but we are also going to try to deal with all the other
19 problems that we have identified in the Simplifying Non Geographic Numbers review in the
20 retail side of the market; we can do it all in this dispute determination and that is what we
21 are going to do.

22 We are definitely not saying they should have refused to determine the dispute. We are
23 saying that in determining the dispute what was the methodology they should have
24 employed, what was the question they should have asked themselves?

25 The question they should have asked themselves is, what was a fair and reasonable
26 wholesale termination charge? They are obviously aware of the problems on the retail side
27 of the market, which should they have thought, "We are going to try and set a fair and
28 reasonable wholesale charge in order to deal with the problems on the retail side of the
29 market", and we say, "No, that was not a methodology that you should have used in the
30 present case, you, yourselves, have accepted that it is inappropriate to seek to deal with the
31 retail market problems with BT's NCCNs, it does not achieve what you want, you have
32 accepted it is far too difficult a problem to consider in the confines of a dispute
33 determination. Having reached all those conclusions you were, in effect, asking yourselves
34 the wrong question by saying, 'what is a fair and reasonable termination rate?' A fair and

1 reasonable termination rate we are going to set by reference to a methodology that takes
2 into account the impact it has on the retail prices.”

3 PROFESSOR STONEMAN: Last question, given you gave us a day yesterday to think about
4 things, I read the skeletons again. Perhaps I should not have done.

5 MISS SMITH: Dangerous.

6 PROFESSOR STONEMAN: Yes. Your skeleton suggested that the correct outcome for this
7 dispute was that BT pay you for terminating calls. How does that fit in with what you are
8 suggesting?

9 MISS SMITH: Only on the 08 dispute.

10 PROFESSOR STONEMAN: All right, yes.

11 MISS SMITH: That was only on the basis that, and this is something that has not really been
12 covered in that case, in the 08 dispute, as I understand it, there were two issues before
13 Ofcom. Before the 08 dispute we were starting with a situation where, until November
14 2005, BT had been paying an origination charge to the mobile operators. The position
15 changed in November 2008 and then the termination charge was zero. Then the
16 introduction of NCCN 956, a termination charge was introduced. So the situation had
17 developed.

18 The questions, as I understood it, that went to Ofcom for the 08 dispute, was, first of all, as
19 a matter of principle, should BT be able to impose a termination charge at all? Then there
20 was also the question as to whether, if they should, this termination charging structure was
21 the right one.

22 Also the dispute that was raised with Ofcom under the 08 dispute was a dispute was a
23 dispute that came from the mobile operators that says, “No, instead of moving to
24 termination charge you should go back to the situation as it was in November 2008 on the
25 origination charge”; and yes, in our appeal on the 08 dispute, one of our arguments was that
26 the basis upon which Ofcom rejected our argument that we should go back to the situation
27 as it had been in November 2008 of paying origination charges, the reasons it gave for
28 rejecting that case from the mobile operators was also flawed. So, yes, that has not featured
29 highly but that is in our pleaded case.

30 MR. HERBERG: Sorry, before responding, just seek clarification on this. This, it seems to me,
31 cannot be right. First of all, there is no appeal by EE on the 08 determination at all. There
32 is no appeal, there is only a notice of intervention. Secondly, as I understand it, the part of
33 Ofcom’s decision in the 08 case which rejected the mobile operators’ case that they should
34 actually be paid origination costs was not appealed, so my understanding is that that issue

1 simply is not before this Tribunal at all, although it is certainly right that that is part of the
2 background.

3 THE CHAIRMAN: That is my understanding also, I must say.

4 MISS SMITH: Thank you, sir, it is in our statement of intervention, and if I am given a moment I
5 can find the references. I should clarify that the position was that T-Mobile, I think, in that
6 dispute only asked for origination charges for zero rated calls, not for calls where they
7 charged customers because obviously their costs would be covered in those calls. It was
8 only where it was zero rated calls where their costs were not being covered. If you give me
9 a moment I will give you the references for the statement of intervention but I hear the
10 points made by Mr. Herberg.

11 THE CHAIRMAN: Thank you very much in that case. Mr. Read?

12 MR. READ: We have quite a lengthy set of closing submissions that are being handed round at
13 the moment. I think my juniors, who have been extremely helpful in preparing this, thought
14 it was better for me to be long winded on paper than be long winded in closings. So do not
15 be daunted by the size of the document.

16 The second point I want to make is that Mr. Beard and I have agreed that he will effectively
17 get 35 minutes out of the three and a half hours, so, with a bit of luck, I may just about
18 finish this evening, or have just a few minutes tomorrow morning.

19 The third point that I want to make is that, unfortunately, within the time involved, we have
20 not been able to get every single question condensed back into the document. There are
21 some references to the questions, but others have not actually made it in there. What we
22 may do overnight is produce you a document that gives the paragraph reference numbers in
23 this document that set out our responses to the Tribunal's questions. I hope to deal with a
24 number as I go along.

25 Can I start with what we say first and foremost has to be the starting point in this case, that
26 there is a serious problem with the non-geographic calls and that the market is failing
27 consumers. In the absence of any regulatory action by Ofcom BT's NCCNs were an
28 attempt to try and provide a market solution in order to alleviate the problem that was there,
29 either by incentivising a reduction of prices down, or, if there was no such reduction down,
30 sharing the costs across the NTS system, or sharing the benefit, should I say, across the
31 NTS system. "Costs" is perhaps used in a different context.

32 We say that the second starting point for this has to be that non-geographic calls is a two
33 sided market. There was some reference to saying that all markets are two sided because
34 they always have a caller and a person who is called. We do not mean that when we are

1 saying to you, “Two sided market”, and as far as we understand it Ofcom did not mean it
2 either. What is absolutely focus here is that you have two parties at either end trying to
3 obtain two different benefits, namely the service providers at one end trying to provide their
4 opportunities for being able to access callers; and callers at the other end wanting to ring
5 those numbers. That is what we say is crucially important in this case, that there is a
6 genuine two sided market at play here.

7 The next point that I think we want to make about that is that it is precisely because the SPs
8 lack influence over the calling end of the network that this problem has arisen. It is one of
9 the externalities that Ofcom identified in Simplifying Non-Geographic Numbers.

10 What we say is that ladder pricing certainly was an innovative attempt to try and respond to
11 what actually was going on in the market, and Dr. Maldoom (you can see it in para.3 of our
12 document there) indicates that it was there, in effect, providing some correction for the
13 problems that are there.

14 We say, therefore, that the NCCNs may not be the most perfect solution, they may not be
15 the absolute solution that Ofcom would actually like, but in terms of what BT was trying to
16 achieve we say that they are an attempt, and a good attempt, to ensure that either the prices
17 decrease or alternatively there is a fairer sharing of the benefits across the NTS chain.

18 Can I make the following points about the NCCNs? First, Ofcom did not identify any
19 problem in principle with ladder pricing. Secondly, the NCCNs set the termination charges
20 according to where on the ladder bands the OCP sets its retail charges. That gives rise to
21 two points about it. Firstly, we say that ultimately it is up to the MNOs to decide what
22 pricing ladder they want to go on. Of course, they will be driven by the incentives to profit
23 maximise, but at the same time it is not BT setting a retail price upon them, it is them
24 choosing a price that they think in a competitive market is the one most likely to succeed.
25 Secondly, we say, that either the effect of that is going to be to reduce prices or if not it is
26 going to result in the MNOs having to share with BT, and through BT the SPs, the revenues
27 that they are currently making from these calls.

28 The other point that I want to make in connection with this is that of course these NCCNs
29 apply to all CPs in the markets, they do not just apply to the MNOs. But it is the very
30 reason why the MNOs are here complaining about them is precisely because of the level of
31 pricing that they are actually setting the current 0845 and 0870 calls actually at.

32 The MNOs characterise that, and particularly EE characterised that, as some form of
33 expropriation by BT, but what we say is that actually that is looking the wrong way round in
34 the picture. What has actually been going on is that the MNOs have, for many years, been

1 extractive excessive rates from 08X mobile callers in disregard of Ofcom's policy
2 preference, the interests of SPs and, we say, the effects that high retail prices had had on the
3 non-geographic system in any event.

4 We fully accept that Ofcom would prefer to deal with the problems in the context of its
5 broader and more detailed review into Simplifying Non-Geographic Numbers, but the
6 outcome of that is some considerable time away. It is perhaps worth remembering in this
7 case that the NCCNs in question were issued respectively on 3rd June for the 080 one and
8 2nd October 2009 for the 0845/0870. The consultation process is already slipping, and one
9 sees that from the document itself, the document indicated that it was proposed to come out
10 with final conclusions in May, it certainly slipped to September, it may go longer, but in
11 any event after that process has been finished – whenever it is finished – there will then be a
12 question of implementation, and there will also be the question of the extent to which the
13 MNOs themselves choose to object to those findings and requirements that Ofcom imposes
14 in that process. We do say it is quite interesting when you actually look at, for example,
15 EE's submissions to the Tribunal today – I think it was para. 70-odd – that in fact the
16 MNOs are making it quite clear that they do not accept the consultation process and,
17 inevitably, we say it is going to end up with further delay as a result of wrangles as to how
18 exactly it should be implemented.

19 We are looking, on any view, at a period of two to three years at the very least between the
20 NCCNs having been put forward and some other form of regulatory intervention taking
21 place, and that is if things actually pan out well. I do make the point, and we make this in
22 para. 4(2) of our introductory note, that in the *TRD* appeal even a nine month period
23 between the OCCNs in that case and the market review that took place on 1st April 2007
24 regarding termination charges, was held by the Tribunal to be something that needed to be
25 dealt with, and I have set out the references there in our note – I think at footnote 14 – I am
26 not going to take you to them, but it does make the point very clearly in our respectful
27 submission that the fact that there may be a review in the future does not in any way impact
28 upon the Tribunal's task of actually having to deal with these NCCNs now, and to that
29 extent I think that probably deals with question 9(b) that the Tribunal was asking about, the
30 impact that the Simplifying Non-Geographic Numbers should have.

31 BT certainly agrees that Ofcom has to decide the determinations in accordance with its
32 statutory duties and policy preferences, and I will come back in a short while to actually
33 deal with how we say that pans out. What we do say is that if you analyse those duties what
34 in fact Ofcom has done is conduct the final determinations in a somewhat muddled and

1 confused fashion, we only really now start to see what actually Ofcom says it now was
2 intending to do in the final determination through Mr. Myers' witness statement and his
3 evidence in the witness box.

4 Secondly, we say that when you strip it all away in fact it is quite clear that they did not, in
5 our respectful submission, carry out any real, proper weighing exercise, and that is not
6 simply a question of a matter of appreciation, this is actually far more fundamental than
7 that, that when you strip away the muddle and confusion you do actually come up with a
8 real problem in the analysis that Ofcom have conducted and I will come back to that when I
9 deal with welfare analysis which is section D in our document.

10 What we say, and this is really the answer to the first question that the Tribunal asked about,
11 is the factors that needed to be taken into account in resolving the dispute, we set out in
12 para. 6 the factors that we say should be taken into account: (1) The existing contractual
13 framework between the parties, and I will come back to that in a moment. (2) The nature of
14 the dispute resolution process including that it is intended to be a relatively brief process.
15 (3) Ofcom's stated policy preference. Obviously we say if Ofcom seeks to intervene as a
16 regulator then it must act consistently with its stated policy preference, and that is the
17 express duty under s.3(3)(a) of the 2003 Act. (4) there has to be a very clear regard to the
18 serious and clear market externalities, which Ofcom identified not only in the final
19 determination but also as we have seen it very clearly spelt out in the Simplifying Non-
20 Geographic Numbers. (5) One factor that ought to be taken into account is the effect 08X
21 high call prices have on vulnerable people, that is certainly something that Ofcom indicated
22 in the course of the 080 final determination should be taken into account and we say it is
23 something that has to be borne in mind in this particular situation. (6) You have to take
24 into account BT's modelling and we do make the point there are references throughout this
25 case to lots and lots of models, but we do say that one of the real problems in this case from
26 the outset actually goes back to the way Ofcom misled BT over the scope of the dispute
27 because in effect what it has done is it has pushed all the dialogue that ought to have taken
28 place in the initial 080 dispute back because effectively it is likely that BT would have got
29 to Dobbs 3 and Maldoom 3 before the final determination if it had known in advance
30 precisely the scope of the dispute it was reaching. Therefore, although I do not want to get
31 into the precise archaeology of this case we do say that that is something, particularly when
32 you bear in mind the suggestions of forests of evidence, and 20 experts' reports which I
33 think have been wrongly bandied about – I will come back to that very shortly.

34 THE CHAIRMAN: I do not think you need spend very much time on that.

1 MR. READ: No, I am sure that is right. Finally, we say that one of the other key factors that
2 needs to be taken into account is a proper overall assessment of the competitive status of the
3 market including, we say, a proper welfare analysis. We say that approach is entirely
4 consistent with Article 8 of the Framework Directive.

5 Can I make some very brief points about uncertainties because they obviously feature very
6 heavily in Ofcom's reasoning, certainly in the FDs. Ofcom effectively asserts that it was
7 not appropriate for them to basically allow the NCCNs because of the significant and
8 radical uncertainties and the likely size of the prices in the fall and the particular difficulty
9 and uncertainty in the case. We have set out in para. 7 a number of points we make about
10 that.

11 In para. 8 we make effectively four points about why that is wrong, because although
12 Ofcom refers to all these uncertainties it actually concluded that the outcome of Principle 2
13 was finally balanced, and we say there is a tension there because you cannot be saying that
14 everything is so uncertain that we cannot reach a conclusion and, at the same time, say
15 things are finally balanced, because in the course of reaching a conclusion that things are
16 finally balanced you have actually to form some form of weighting process in order to be
17 able to reach that conclusion, so we say there is a tension there that underpins the final
18 determinations.

19 The second point we make is in the course of all of this process the modelling has been
20 subjected to some pretty detailed scrutiny over time, but we say it still has proved to be a
21 robust tool for analysing the likely results. We also say that what Ofcom did not really
22 address was the fact that BT's model plainly does incentivise a fall in 08x prices in
23 according with the policy preference and benefits to consumers. That really leads into the
24 fact as to really the whole question of weighting and the whole question of the tipping point.
25 The final point I want to make about this whole issue of uncertainty is really the way that
26 Mr. Herberg actually opened it. Sorry, I think it was in cross-examination when he was
27 cross-examining Mr. Muysert. That Ofcom should apply something akin to a precautionary
28 principle in dealing with this matter. Sir, I said in opening that that is what we said Ofcom
29 had got close to doing; it is what Mr. Herberg (certainly in cross-examination) seems to
30 accept what Ofcom is doing. We say it is completely the wrong approach because this is
31 not a case where the precautionary principle, as it is understood and known in the context of
32 environmental law (which is where it actually comes from: originally Article 1304R
33 Maastricht Treaty. That is where the whole question of a precautionary principle was

1 introduced. It is now in Article 191(2) of the present treaty) applies. You are actually
2 having to resolve a commercial dispute between commercial parties.

3 In any event, we say that there was no real need for Ofcom to have required the level of
4 assurance that it says it needed about this because once one recognises that there is a benefit
5 when prices start to fall, and once Ofcom accept that the incentive properties of the NCCNs
6 is to cause prices to fall, then we say if you conduct the correct analysis that necessarily
7 means that in fact BT's NCCNs are welfare beneficial.

8 The other point that I want to make very briefly is that ladder pricing has been replicated by
9 the other TCPs. BT's competitors have followed it, and introduced ladder pricing. Opal
10 and Cable & Wireless have participated in these proceedings, and Mr. Martin of IVR has
11 given evidence in support of BT.

12 We say that the corollary of this is that, as Mr. Myers accepted, the competition amongst the
13 TCPs means that in fact money is going to be pushed through to the SPs. It is not the case
14 of BT trying to garnish the money. It will, at the end of the day, end up with the money
15 being pushed through to the SPs. We have set out some of the material there on p.8.

16 What we say therefore (para.12) is that when you combine all these factors together, the
17 conclusion should be, in our respectful submission, that the NCCNs were almost certainly
18 on any analysis (whether you take Ofcom's analysis or BT's analysis) producing the same
19 result, namely that the NCCNs are beneficial.

20 Can I briefly deal with some overarching issues relating firstly to the Tribunal's approach.

21 We have set out in Section B starting at para.13 our comments on the correct test for the
22 Tribunal to apply in dealing with appeals before it. I will not rehearse any of the material
23 there, but I do want to pick up at para.16 in these written submissions that in fact there is the
24 issue about the margin of appreciation, which the Tribunal has correctly referred to in
25 question 8 in its questions.

26 Ofcom itself appears to suggest that in fact what has gone on here was it is simply a
27 criticism about its failure to apportion the correct weight and really the Tribunal only needs
28 to consider whether or not Ofcom adopted a reasonable approach, and that therefore the
29 Tribunal should be slow to overturn the decision.

30 In that respect, I want to make eight points. The first is the Tribunal is deciding the case on
31 the merits. The merits of the case is certainly not the same as the merits of the decision.

32 That is what the Court of Appeal held in the recent preliminary ruling case. If Ofcom has
33 made any errors of fact or of economic assistance, applied the wrong test, or misconducted
34 its statutory duties then it is clear that the Tribunal has to overturn the decision. That is not

1 a question of appreciation, that is a question of straightforward: they got it wrong on the
2 merits.

3 Again, we say that if there is a margin of appreciation involved in any of these judgments
4 then in fact it necessarily is a small one. We have set out where Ofcom cited from the
5 Vodafone decision, but in fact when you read the following paragraphs it is quite clear, in
6 our respectful submission, that it does not go as far as saying that there has to be a very
7 wide measure of appreciation. We say there is not one if you read the authorities correctly.
8 The point has really been left open as to where exactly a margin of appreciation may or may
9 not exist. But all the cases so far have said in terms that in fact Ofcom got it wrong, which
10 is what happened, for example in the *TRD* appeal, what happened certainly in the *Vodafone*
11 appeal, and we say that is what has happened here.

12 We do counsel the Tribunal from latching on to this question of a measure of appreciation
13 in order to give Ofcom the benefit of a doubt. It would effectively mean, in our respectful
14 submission, that if Ofcom in a case like this could turn round and say it is all a question of
15 appreciation, it would become very difficult then for appellants to overturn any question
16 where there was one of cost benefit analysis that has to have taken place. We say that
17 would be the antithesis of the appeal.

18 In any event, we say that in this case the point is completely dead for the very simple reason
19 that if there has to be some form of cost benefit analysis, then the Tribunal has to equip
20 itself with proper materials, correct analysis, and articulate its assumptions. We say that is
21 precisely what has not happened in this case. Ofcom has not transparently set out what it
22 was seeking to achieve. We have referred to the *Tesco v. CC* case in the note. I will not
23 take you to it. What we say, therefore, is that Ofcom have now got very close to conceding
24 that it was not transparent what they were doing in respect of Final Determination. To give
25 you one example, the Box K example. You remember I cross-examined Mr. Myers at some
26 length about how exactly they took the demand effect into account when dealing with the
27 issue of how that played into their analysis. You will recall that I initially started off by
28 putting it to him on the basis of what they had said in the 080 Determination and then he
29 agreed that that was not what he was saying Ofcom had done in fact. There is nothing, and
30 he accepted nothing, that actually entailed Ofcom having said very clearly at all: we are not
31 taking that approach; we may have said this earlier but that is not the approach we are
32 taking. They did not say that. The reference is quite a crucial passage to look at when you
33 are considering the whole question of transparency (day 5 p.70 line 7 to p.71 line 13). We
34 do say if one looks at a passage like that (and this is just one example) you see how

1 Ofcom's basis for reaching its conclusions within the framework of the FD was completely
2 untransparent and inconsistent.

3 We say that if that has actually taken place, the reality of the situation is that Ofcom cannot
4 thereafter claim that it is entitled to some form of margin of appreciation. If what it has
5 actually done is not express itself in coherent terms, then it cannot claim a measure of
6 appreciation because it simply has failed to deal with the transparency that is required from
7 the existing case law, both from the Competition Commission (to which we have referred in
8 our reply) and also the *Tesco v. Competition* case that we have set out.

9 The other point I want to make about this whole question of measures of appreciation is that
10 Ofcom was not taking a policy decision in the final determinations. There is no question of
11 it saying, "This is the policy we would like to set out and therefore we should be allowed a
12 measure of appreciation in accordance with our duties as a regulator to set policy". That is
13 not what was going on here. Ofcom in several places make it quite clear that the one thing
14 they are not doing is formulating a policy. Of course they were, and we accept this, in
15 reaching their decision following a stated pre-existing policy preference, but they were not,
16 in our respectful submission, reaching a key policy determination on how 08X charging
17 should go forward. They were considering a dispute in the light of an existing policy. If
18 that is the case, again we say this whole argument about measures of appreciation really
19 rather go out of the window because if there is an element for allowing Ofcom a measure of
20 appreciation, it must be confined to those cases where, in fact, they are taking some form of
21 policy decision, and it is in those cases we say that the measure of appreciation is relevant
22 and we say that this is not a case to that effect. As a result, we say that measure of
23 appreciation does not take them any further, particularly given the way they have actually
24 conducted themselves in the final determinations in these cases.

25 Can I turn to BT's contractual position? I want to take this in two stages. I want to look, as
26 the Tribunal question 2.1, I think, predicated, firstly, at what is the contractual position; and
27 then turn to say how does that play out in the dispute resolution process. Contractually we
28 say that the position is absolutely as plain as a pikestaff. Clause 12 makes it absolutely
29 clear that BT has a unilateral right to change the price. Clause 12 is drafted in a very
30 different format to the way that clause 13 is drafted. You will recall that the TRD appeal
31 and the H3G appeal were looking at clause 13, where the parties themselves had agreed
32 that, in fact, if there was a problem about pricing it should be referred to Ofcom. That is
33 what clause 13 actually has within its mechanism, a very clear process for, "If we cannot
34 agree a price, refer it to Ofcom". The very fact that the SIA has been drafted in a different

1 way when it comes to clause 12 we say gives a very strong indication that, in fact, it is a
2 very clear cut contractual process.

3 You have to put this also against the fact that although unilateral rights to vary contracts
4 may seem odd, in fact, they have been considered in quite a large number of commercial
5 cases over the years. In para.18 we have set out one of those cases, which is *Ludgate*
6 *Insurance v. Citibank*. You may recall, sir, that a lot of these cases come up with the issue
7 of banks, for example, being able to vary terms unilaterally and the precise basis upon
8 which they should actually be able to do that. It has been considered in a number of cases.
9 I think *Paragon Finance* was one of the key ones, but I have cited *Ludgate Insurance* there.
10 We will hand up copies for the Tribunal and the parties. (Same handed) I do not ask you to
11 look at it in great depth because the point that I want to make on this is a very simple point.
12 (Same handed) What we say is that this case is very, very settled. The courts have laid
13 down very clear parameters for what exactly is the test for restraining the material. Can I
14 ask you to look in the authority itself at p.239, para.35. It makes it clear:

15 “It is very well established that the circumstances in which a court will interfere
16 with discretion exercised by a party to a contract of contractual discretion given
17 to it by another party are extremely limited ...”

18 Then it goes on to discuss it. Effectively, it is a test of perversity. If a party exercises it
19 honestly and in good faith then it cannot be categorised as perverse, and it sets out a number
20 of cases there, including *Product Star*, which is another one of the cases where this is
21 specifically considered.

22 I will not take you through it in great detail, because the simple proposition that I say you
23 can and indeed should derive from this case is an established legal principle that there is no
24 need to imply any fetter on a right to unilaterally vary a contract other than the limited
25 circumstances set out in that particular case.

26 When you come to construing the Standard Interconnect Agreement, we say that is an
27 important principle that should be there, that this is something that the courts have
28 previously considered in commercial contracts and therefore there is no need, if one likes, to
29 try and construe something different into this contract other than has been established for a
30 considerable period of time. We have also given a reference in para.18 of our submissions
31 to **Chitty on Contracts** where it takes into account the principle which I am sure you are
32 aware of, sir, that if there is an existing judicial understanding of a particular clause in a
33 contract then that can be taken into account when you come to the question of construing it.

1 We do not dispute the fact also that there is a dispute provision tucked away in para.26, I
2 think it was, of the main body of the agreement, but what we do say is that, from a
3 contractual interpretation point of view, the parties must be understood to have agreed that
4 any dispute that arises, certainly under that clause, has to be resolved in accordance with
5 Ofcom's powers under s.185, 191 of the 2003 Act. Ofcom obviously was set up and given
6 its powers and its entity was exclusively defined by the 2003 Act. Therefore, if the parties
7 have referred disputes to Ofcom rather than some third party arbitrator, you can only
8 construe the contract in the light of the fact that the parties must have intended that any
9 limitations on Ofcom in that dispute resolution process are implicit within the process it is
10 actually said of referring disputes to Ofcom. In other words, the parties, by including that
11 clause in there, are not saying that Ofcom has to go away and act as some form of *quasi*
12 arbitrator, the parties are accepting that it has to be resolved by Ofcom only in accordance
13 with its regulatory obligations, and that obviously includes that it only resolves it in its
14 limited regulatory capacity, it has to do so in accordance with the settled principles, and
15 that, in our respectful submission, includes the principle of proportionality which is laid
16 down by s.3(3)(a), and pursuant to all those authorities that BT has addressed in opening.
17 What we say is that 26(6) provides no further contractual restraint on BT's right to change
18 the price. It simply means that the referral to Ofcom by the parties, the contract must be
19 understood to have intended that that would be limited to Ofcom's regulatory position under
20 the Act.

21 We make two other points. Firstly, the SIA is a negotiated agreement. That has been set
22 out in the evidence. So the fact that BT might be able to change its terms unilaterally is not
23 anything to be said against BT and held up, as I think Miss Durie indicated in her witness
24 statement as being perverse and unfair. There are very good reasons why it is like that.
25 Mr. Kilburn has addressed them in his witness statement.

26 The second point we make about the SIA is that it does contain very detailed provisions
27 about how one actually deals with various things, including billing disputes, for example,
28 under annex B, and also of course the clause you saw earlier this morning dealing in
29 accordance with the National Numbering Plan, which was clause 18.

30 So can I now turn, sir, to the basis upon which we say Ofcom should have resolved the
31 dispute under s.185, because I think it actually lies to a large extent at the heart of this
32 problem as to how exactly, given that BT have the unilateral right to change the prices, the
33 extent to which Ofcom should have effectively waded in and dealt with the dispute. So that
34 is the point that I want to address now.

1 THE CHAIRMAN: Yes, because presumably you are looking at the question of how far Ofcom's
2 rights for instance under s.190 with regard to imposing an outcome can operate in the
3 context of a contract such as this.

4 MR. READ: Absolutely, sir. Can I make one preliminary point that it was the MNOs who were
5 asking Ofcom to intervene in order to abrogate BT's clear contractual right, so that is the
6 starting point. Ofcom does not dissent from that, and in fact it intervened to restrain the
7 contractual right and, indeed, Ofcom itself accepts the contractual intention of the parties
8 are a relevant matter.

9 The point that we want to make is that in essence one has to stand back from this slightly,
10 and there is a core problem with the approach that is being taken, because BT is not
11 derogating from what it said in opening, that in fact Ofcom approaches this matter as a
12 regulator and if the circumstances are right then plainly it can intervene as a regulator to
13 override contractual rights. We do not say that that is an impossibility, but it is the
14 circumstances in which it interferes in those contractual rights which, in our respectful
15 submission, are crucial. The starting point for that, we say, is you have to go back to the
16 Common Regulatory Framework. I think that Mr. Beard is probably going to deal a little
17 bit more with this so I will not spend long on it, but this is a dispute about access and
18 interconnection. If you go back to the Access Directive and, in particular, Recital 5 and
19 Article 3, one sees that in fact the starting point is that the party should be allowed to
20 negotiate freely, and the basis on which the dispute resolution process is allowed under
21 Article 5(4) is only where there is an absence of agreement between the undertakings. That
22 is my first point, that is the starting point.

23 We fully accept that in considering what is an absence of agreement between undertakings
24 you are not necessarily confined to a strict analysis of the contract itself, because we do
25 accept that the *Orange v Ofcom* case does say that you cannot narrowly construe
26 the position of an absence of an agreement simply by reference to the contract itself.
27 However, we do say – and indeed we have cited in our actual material the very same
28 paragraph that I think it was Mr. O'Donoghue took you to today, para. 67 – you have to
29 exercise a little bit of caution about the *Orange* case because, as I think you are probably
30 aware from previous cases that was a case going to jurisdiction where Ofcom had
31 jurisdiction to accept a dispute, it was not actually going to the basis upon which Ofcom
32 should accept the dispute, nor about how Ofcom should actually use its discretion because it
33 was a preliminary issue to the *TRD* appeal, and in fact *Orange* were putting forward two
34 grounds of appeal, namely (i) Ofcom did not have jurisdiction to accept the dispute; and (ii)

1 in any event they should not have accepted it, full stop. It was the first point that was being
2 dealt with and one sees that from paras. 30 and 31 in the judgment. It is in footnote 59 of
3 our written opening. It is in there so you do not need to look at it now.

4 We say that any dispute referral under s.185 to 191 can only be considered in the context of
5 (a) the background to the CRF placing the primary focus on negotiations between the
6 parties, (b) that Ofcom is not taking on a role as an arbitrator, it is only intervening as a
7 regulator; and (c) – we say this is really important in the case of contractual rights – Ofcom
8 can only intervene when it is proportionate. You will remember, sir, that in opening I took
9 you at some length through this whole question of proportionality, because we say that that
10 is actually quite an important issue, and it particularly is important if Ofcom is purporting to
11 override established contractual rights, because we say that Ofcom should only do it if it can
12 carry out the sort of proportionality analysis that the cases have actually indicated; I spent
13 some time on that in my opening, I do not propose to go back and deal with it again now.
14 We also say that obviously the very fact the dispute resolution process is a very short time
15 period rather emphasises again that Ofcom’s role in all of this should not be to enter into a
16 detailed analysis of what should and should not happen in order to overturn established
17 contractual rights. We say there should be a very high preference put on the contractual
18 rights and if Ofcom wants to interfere with them, they should carry out a proper
19 proportionality analysis which we say they did not do in this case.

20 Can I make some points on the *TRD* appeal in this context? Obviously the *TRD* appeal tried
21 to give some overall comments on the approach to dispute resolution but if one looks at
22 those comments one has to see it in the context that those comments were actually made.
23 The first point is that obviously the parties could not contractually agree a price, the parties
24 had agreed in their contract that if they could not it would be referred to Ofcom. That is not
25 the position here, that was a clause 13 case, not a clause 12 case, and that actually is para.
26 13.7 of the main volume of the SIA there.

27 Secondly, in that case Ofcom had effectively circumscribed its consideration of the
28 investigation by (a) slavishly following what it had said in the 2004 market review; and (b)
29 declining to take any account of the information it already had from its ongoing 2007
30 market review, but instead decided “We can all leave it up to what we decide in the 2007
31 market review”. Again, it has to be read very much in light of those two constraints that
32 Ofcom was pedalling, if you like, a very different case to the one that is actually put before
33 you today and in fact that was demonstrated by the gains from trade test, which is the test
34 they applied which effectively meant that any level of price determined by the MNOs could

1 be charged by them to BT. So there were very different circumstances regarding the
2 comments that are made about dispute resolution. It was also said in that case in respect of
3 a situation where BT had an existing regulatory obligation and that regulatory obligation
4 was the end to end connectivity regulation which I think was imposed under s.74 of the
5 2003 Act which required BT to carry all traffic requested, but at a price that was fair and
6 reasonable, and of course this was the obligation that was an important element of the
7 reasoning within the Tribunal's judgment in that particular case. So it is not perhaps
8 surprising in that case that you get a read over of fair and reasonable into the test that they
9 say should have been applied in that case because actually that was the statutory obligation
10 imposed on BT to carry the traffic but at a fair and reasonable price, and so it perhaps puts
11 in context the question of the *TRD* appeal.

12 Effectively BT's case remains as it was, as we set out in or notice of appeal and our various
13 respective pleadings, that Ofcom should not have intervened in this case using the dispute
14 resolution process to overturn BT's contractual rights and effectively return the *status quo*
15 back to the market failure that was there already.

16 Can I make some very brief points on the regulatory position? Obviously there is a contrast
17 here because BT has got no regulatory obligation imposed upon it when it terminates non
18 geographic numbers, and likewise, the MNOs have no regulatory obligation imposed on
19 them with origination calls. So it is effectively a regulation neutral situation. That is why
20 we say that effectively EE's argument that Ofcom is imposing a retail regulation via the
21 back door is flawed. You cannot ask Ofcom to override BT's contractual rights, which is
22 effectively what EE did by referring the dispute to Ofcom, and then complain when Ofcom
23 turn round and consider the MNOs' prices that that is unfair because it is setting retail
24 regulation. What is sauce for the goose is sauce for the gander. We say that really at the
25 end of the day that is almost the end to the point in EE's appeal.

26 In any event, this whole question about regulatory price setting is a red herring because of
27 course BT does not set the retail price; it leaves it to the MNO to select it and simply adjust
28 the termination charge they have to pay. It is up the MNO to take a market based decision
29 in the context of a competitive TCP market as to what price it sets and therefore how much
30 termination charges it paid.

31 But, and we do make this point, although the situation is regulation neutral, Ofcom has
32 clearly set out a policy preference as to how it says it wanted 080 calls and 0845/0870 calls
33 to be charged to callers. With my time allotted I am not even going to try to deal in detail
34 with Mr. O'Donoghue's submissions, we just say there is nothing there. The policy

1 preference was clear; Ofcom got it absolutely right. Given that that was a policy
2 preference, then it would be unlawful for Ofcom not to take it into account. One of the core
3 obligations of Ofcom under the Act is one of consistency. You cannot state a policy
4 preference, which has been stated for an enormously long period of time, without then
5 taking that into account if a dispute has to be resolved between the parties. It would be
6 inconsistent for Ofcom to turn round and say: I know this was our policy preference and we
7 have said it and we have had all this material out in the domain saying that this is what we
8 prefer to happen, but actually when we come to resolve a commercial dispute between the
9 parties and we are deciding it as regulator, we cannot actually take into account our policy
10 preference. That, in our respectful submission, would be a nonsense and completely
11 inconsistent with Ofcom's statutory powers.

12 Can I now deal with one other short point on dispute resolution. I have obviously set out
13 some of the background to how we say the dispute resolution should play out, but there is a
14 further point which we have set out in a little bit of detail in para.34. It is really to answer
15 this whole question about: dispute resolution is supposed to be a brief process and look how
16 long it has taken BT to get its act together; there is a forest of reports; we have got 20
17 reports or more, etc. We say that is just wrong. We have set that out in a little bit of detail.
18 We say that BT should not be criticised for effectively the dialogue that had to go on in this
19 case, particularly given the fact that what set all this problem off was Ofcom's change in the
20 scope of the 080 dispute. Effectively, the whole thing has got off to a very bad start because
21 BT did not understand from the outset what exactly it was supposed to be dealing with at
22 the time. The fact that we are now in April having to deal with Determinations that kicked
23 off from February 2010 really shows how this whole problem has got completely skewed
24 because of Ofcom's (in our respectful submission) approach it took to the evidence in that
25 case.

26 That is one of the main points I wanted to deal with on dispute resolution, but the other
27 point that I very briefly want to touch on (because it was raised in one of the questions) was
28 whether or not Ofcom can set a price outside that contended for by the parties. It is
29 absolutely clear from para.181 of the *TRD* appeal that the Tribunal in that case thought that
30 you could set a price outside that contended for by the parties. However, it is fair to say that
31 (as I was involved in that case) BT was saying you could not, and the reason it was saying
32 you could not was because we were saying you have to bring in some of your other
33 regulatory powers if you wanted to do that, for example, an own initiative investigation
34 under s.105 of the Act. That is what we were saying. I do not want to spend long on it, but

1 we are slightly troubled by the emphasis that the Tribunal in that case placed on s.190(4)
2 because we think that may have been a misreading of what it was intended to do.
3 Effectively, what the Tribunal says in para.181 (I will not ask you to turn it up given the
4 limit on my time) in s.190(4) it says: “Nothing in this section prevents Ofcom from
5 exercising the following powers in consequence of their consideration under this chapter of
6 any dispute.” We say that does not lead to the conclusion that Ofcom necessarily can set a
7 price outside that contended for by the parties. It is not going to be the biggest point in this
8 case, sir, but I just thought that for the benefit of the Tribunal you perhaps should have two
9 minutes’ worth of my thoughts on that particular paragraph. Sir, I will leave the section, the
10 problem and the paragraph in the Tribunal’s decision with the Tribunal. As I say, it does
11 not hugely affect BT’s position in this case because we say the answer is whatever you do it
12 does not really affect this particular case. I thought it was probably right that I should flag
13 those points up.

14 THE CHAIRMAN: That is helpful, though I would have thought that s.190(2) contains things
15 which might be said to give Ofcom certain powers to impose, as it were, terms and
16 conditions which do not seem to exclude price.

17 MR. READ: Sir, obviously the question is whether or not, if you have got two parties squabbling
18 between you --

19 THE CHAIRMAN: Whether one should intervene.

20 MR. READ: Yes, whether one should, and whether or not it is a lawful use of s.190(2) to use
21 your powers in that way. As I say, I do not want to take up any more time on this, but I
22 have flagged up what I think might be helpful for the Tribunal to see, if you like, where the
23 fault line lies. I will not take it further than that at this stage.

24 Can I then move on to very briefly the burden of proof, which I think was raised in question
25 6 in the Tribunal’s questions. I do want to make the point that although there are
26 uncertainties flagged up in the Final Determination, we say the end result of what Ofcom
27 should actually have done in these particular cases is itself not uncertain. We say actually it
28 is pretty clear what Ofcom should have done and it is not what Ofcom actually did in the
29 080/0845 disputes. So we would not want that point overlooked against us in answering
30 this question on question 6.

31 We also say that the question of the burden of proof really does not turn around questions of
32 policy, it really turns around at the end of the day how it is that Ofcom is intervening in the
33 course of a contractual dispute between the parties. The first point we say is that the
34 MNOs have really turned this completely on its head. What they are saying is: the burden is

1 on BT to justify the charges because they say that is the consequence of the TRD appeal, in
2 particular para.177. They say BT is the one who wants to vary the prices therefore BT has
3 to provide all the justification for why those prices should be changed. We say that is
4 simply putting it the wrong way round. It is not us wanting to vary the contract, it is them.
5 Therefore, if there is a question about motivation and who ought or ought not to be raising
6 it, then it is really not BT who has to prove the motivation, it is the other way round,
7 although we do not accept that in fact motivation is particularly relevant. I will come back
8 to this. That is the first point.

9 There is a more fundamental point because Ofcom effectively, I think, in opening said this
10 is something of a formulistic approach, it is BT who are instituting the radical change and
11 therefore the question of the burden does not really matter. It is effectively a sterile
12 question.

13 We fully accept that in a lot of cases the question of on who the burden of proof lies may be
14 less important, but that is not the case here. This is not a case of an arbitrator deciding who
15 has proved what on a particular position. It is actually something more fundamental than
16 that, because it comes back to how Ofcom is intervening in this dispute. Ofcom is
17 intervening as a regulator, it is intervening to override BT's contractual rights, and we say
18 that, as a result, it brings in questions of proportionality and the like. So this is not a
19 formulistic issue, this is a really genuine question about what has to be established before
20 BT can have its contractual rights overturned. For that reason we say that the burden of
21 proof does heavily matter in this case because Ofcom has to show that it was proportionate
22 for it to have intervened in the way it did.

23 Can I make one further point about this, which is simply this, and I would not want this lost
24 in the myriad of other issues that there have been in this case: BT's case has always been
25 not just that Ofcom placed the burden of proof on BT, but it placed a heavy burden on BT.
26 We have given the references in para.44 to the places in our respective notices of appeal
27 where we raise this.

28 Can I turn to the question of consumer? We say that how Ofcom has approached the
29 question of consumer is really quite important in the context of this case, and I will come
30 back to it when I deal with the welfare analysis. Firstly, Ofcom accepted that the overall
31 impact on consumers was finely balanced. Therefore, what Ofcom is actually focusing on
32 when it looks at the question of consumers is quite important in the context of this case.
33 Secondly, we say it also feeds back to the whole question of the weighting analysis that
34 Ofcom conducted. I set out in some detail at the beginning of this case the problems we had

1 with Ofcom's approach to how it had analysed consumers in the context of this case. We
2 have to say that a major problem with this case has been that it has not been properly and
3 transparently set out by Ofcom in the final determinations. Firstly, there is virtually no
4 discussion of how Ofcom focused its assessment in respect of the respective groups (and I
5 will come back to that in a little while) in the final determinations.

6 We then had an expansion in Mr. Myers' statement. For example, in para.398 in his second
7 statement he indicates that Ofcom in the final determination had focused on "end users" –
8 that is the phrase he actually uses, "end user".

9 Then finally, sir, we had the situation where even when he was giving his evidence in chief
10 he had to correct what he had said in his witness statement, because it is said he wanted to
11 give clarification about various points. We give this an example but it is a very clear
12 example, in our respectful submission, of just how much Ofcom have, if you like, changed
13 the way it has at the very least set out what it is doing. We say it has probably gone further
14 than that and as criticisms have been made of its final determinations what it has probably
15 done is slightly tried to change its focus in order to justify what it actually reached in the
16 final determinations. The consequence is that if you look in the final determination it is
17 very difficult to find clearly what it is that Ofcom is saying about what its focus should be
18 on the respective groups. Sir, I have given you the passage from Mr. Myers' evidence in
19 chief about just, for example, on a simple factor, where that box K, the demand effect, was
20 actually taken into account and the way it shifted. We say that the focus on consumers is
21 another instance of that.

22 Can I just look very briefly at the SPs themselves. Ofcom seemed to accept that SPs do fall
23 within the definition of consumers, but then it proceeds not to treat them as proper
24 consumers. We say there is simply no legal within the Act for them to do it. As I said,
25 Mr. Myers says in his statement they are not, in the normal economic sense, end users.
26 There is nothing about this in the final determination. We would say there is nothing about
27 it in the Act itself. The Act is fairly clear, and I took you at some length through the
28 provisions. I do not want to take you back to it. There is no distinction drawn within the
29 Act on one consumer being different to another consumer. We say that point is even clearer
30 if you go back to Article 8 of the Framework Directive, which does not (and I took some
31 time taking you through it) in any way even use the word "consumers", it uses the word
32 "users", and draws a very clear distinction between "consumers" and "users". Therefore,
33 we say that there is simply no justification for Ofcom to have created a second class
34 consumer, which is what the SPs have become.

1 I will not take you through all the material in our written submissions on this point, but we
2 have laid out in some detail this whole question about the lack of transparency that we say
3 is there, the wrong focus in consumers, and indeed in the case of consumers we have dealt
4 with it at two places in our submissions, and that includes from para.45 onwards, and also
5 from para.147 onwards.

6 Can I now turn to a couple of other points, which is, firstly, the NTS system. The evidence
7 on that is relatively clear. We have set it out on p.32 of our closing submissions. We also
8 have set out the policy preference at p.33 of our closing submissions. I do not want to go
9 into that save to make one point about the policy preference, and that is this: the suggestion
10 from O2 that there was no policy preference and people did not understand it was a policy
11 preference is completely inconsistent with what Mr. Ornelo for O2 was, himself, saying.
12 Mr. Kilburn, in his first statement (C1, tab 17) at annex 1 sets out, if you recall, for the 080
13 calls what the MNOs were actually setting out as their message beforehand. He was
14 making the criticism that they only say there will be a charge for it not what the charge was.
15 Mr. Ornelo, in responding to that, and this is at C2, tab 35, p.35, para.5.3 said, "As I
16 understand it, the NTNP does not require CPs to inform callers of the actual costs of calls,
17 but merely to inform customers whether any such calls are chargeable or not". That is what
18 O2's own witness is saying, that the requirement was for them to actually give an indication
19 at the beginning of the calls that these calls were going to be charged.

20 MISS SMITH: I am not sure if this is actually relevant to the point but of course Mr. Ornelo is
21 not an O2, he is an Everything Everywhere witness.

22 MR. READ: Sorry, I apologise. I think it possibly relieves Mr. O'Donoghue from the criticism
23 and perhaps brings Miss Smith into the firing line, but the point is the same. Ultimately, the
24 MNOs themselves appear to have accepted that the policy preference has some meaning.
25 Those pre-call announcements are there precisely because they think the National
26 Telephone Plan has some application to them.

27 Can I just turn very briefly to the question of market failure again. I think I have it right this
28 time, Mr. O'Donoghue was the one who referred to BT's pricing as being a radical
29 departure. We say you can put that around the other way, that the MNOs' pricing is a
30 radical departure from the basis upon which the original NTS system was set up and
31 Ofcom's policy preference, and it is that that is causing the externalities that we have
32 identified throughout this case.

33 Can I just briefly mention the five hundred million figure, because obviously there was a
34 degree of contention over that. It is quite clear, and I think Mr. Myers accepted, that the

1 figures in that were not indicative of who had actually caused the problem. They were
2 simply the effects upon the particular customers of the particular entity. So, for example,
3 the fact that BT's customers may be suffering as a result of this market externality is caught
4 within that estimate, but it does not mean that it is BT that is the one that is causing the
5 problem in the first place. Mr. Ward earlier today said that only 66 million was
6 "attributable" – that was the word he used – to the MNOs. There was no indication at all
7 that the table in question actually was in any way fixing attribution for what had actually
8 caused this detriment, simply giving the estimate of what the particular effects on particular
9 sets of customers. We have set out in a little bit of detail in the course of our closing
10 submissions Mr. Myers' comments on that, the reference is in the transcript to exactly
11 where he had said that.

12 PROFESSOR STONEMAN: Before you move on, you started that last section by saying you
13 suggest that the WTS is a marked departure, but then you say current practice is a marked
14 departure, can you explain what you mean?

15 MR. READ: I think the word was "radical" rather than ----

16 PROFESSOR STONEMAN: All right, that does not clarify the point.

17 MR. READ: No, no, and BT's evidence obviously says this at various points that in fact it was
18 innovative, I do not think we have ever shied away ----

19 PROFESOR STONEMAN: That is not the bit I am worried about. I get that your pricing system
20 is innovative, but you are saying that the current situation was a radical departure from what
21 was intended, is that what you said?

22 MR. READ: A radical departure from the way that Oftel and Ofcom had originally envisaged
23 that this system was actually going to work with the consequence of course that you end up
24 with the market externalities, particularly consumers not exactly knowing what they are and
25 not being charged. That is obviously what Ofcom have identified in Simplifying Non-
26 Geographic numbers as t he respective externalities that are in play here, and that is what I
27 meant, that it is all very well to say "BT's charging structure represents a radical departure",
28 but the other way of looking at it is that there has been a radical departure from the way the
29 NTS platform was originally envisaged as being set up, and that in itself is, we say, a
30 problem.

31 PROFESSOR STONEMAN: The NTS platform was set up as a receiver pays system as opposed
32 to a caller pays system, is that right? So the receiver would pay the TCP who would pass
33 the funding through down to the call originator?

1 MR. READ: That is certainly the position on 080 where the calls were supposed to be free, that
2 in fact the money was going back from the service provider to the TCP and therefore on to
3 the originator, that is certainly true of that. With 0856 and 0870 I think the position is
4 slightly different because there was, if you like, the opportunity for flows of funds to go
5 both ways and, indeed, one of the points about 0845 is that even if only £16 million is being
6 passed down the line to 084 SPs, actually you have to weigh that up against the fact of is
7 that reducing the money that I would otherwise have to pay to the TCPs, it is two way
8 process.

9 PROFESSOR STONEMAN: Let us think of 080, it gets more complicated, but with 080 the
10 system was very much moving away from caller pays to a system of receiver pays.

11 MR. READ: Yes.

12 PROFESSOR STONEMAN: I am surprised, there has been very little discussion about that in
13 this case because that is a radical departure, if you like, from the rest of the system, and it is
14 that radical departure from the system that is causing all the problems.

15 MR. READ: That is right, although I think that it is fair to say that that is the very nature of what
16 we say a two-sided market is about. It is not like the normal situation you get with ordinary
17 geographic calls where you may have two parties – one at either end – but in fact in this
18 particular instance the potentials can flow in the opposite direction. I fully accept, sir, that it
19 has not, in the amount of material that we have actually had in this case, been perhaps the
20 most focused on factor, but we do say that that is really part of the inherent nature of the
21 focus on a two-sided market, and therefore there are benefits, etc. both ways. But I suspect
22 you have a follow-up question on that, sir?

23 PROFESSOR STONEMAN: No, I just wondered if that is what you were talking about when
24 you were talking about a “radical” departure.

25 MR. READ: Yes, essentially it comes back to this fact, and Dr. Maldoom has emphasised it at
26 some length in his various reports about this is a genuine two-sided market in the sense that
27 you have flows going in the opposite way and you have different consumers at different
28 ends. In the 080 example it is a reason why SPs actually are very clearly consumers
29 because they are actually buying in the 080 service through their payments back to the
30 terminator and along the line.

31 I am conscious of the time and so I am going to move directly to BT’s motivation. It is
32 quite an extensive document and I am sure, like all the documents, you will read it at your
33 leisure. BT’s motivation seems to have assumed a proportion in this case that seems
34 completely unrelated to what is actually in the issue in this case, because effectively

1 whatever BT's motivation may have been the fact is all the TCPs are copying BT and so
2 that therefore in considering any of this question the mere fact of BT's motivation cannot in
3 any event, in our respectful submission, be the be all or end all of it. Mr. Beard is obviously
4 sitting behind me no doubt to make the point that his clients have very different interests to
5 BT.

6 The second point that I want to make is that even on the TRD, the passage that everyone
7 seems to rely on in para. 177 of the *TRD* appeal, BT's original motivation for the change is
8 actually irrelevant to the question, it is what BT was trying to put to Ofcom during the
9 course of the final determinations, or the course of the determination process, that BT was
10 actually putting to Ofcom as to what it said would actually be the justification for this
11 change. We say that it is not actually BT that should have been giving the justification – the
12 burden is the other way around, but I have discussed that already – but in any event BT's
13 original motivation does not have any impact on it.

14 Question 2(4) I think that you asked was on the assumption of BT's motivation was to get
15 money. We do have real reservations about that because you have only seen part of the
16 evidence in this case, and at para. 87 onwards we set out the contemporaneous evidence in
17 some detail about what we say demonstrates that although it is very easy to look at some
18 documents in this case and say "It was a money grab going on by BT" the reality of the
19 situation is that BT had very real concerns about what was happening because of the way it
20 was suppressing demand for the SP services and the effect it was generally having on the
21 non geographic numbers effects. We have listed out there over the next couple of pages the
22 evidence on that point, which again I will leave you to digest at your leisure. But we do say
23 it is a point that (a) in our respectful submission is in reality irrelevant; but (b) it does not
24 actually mean that BT, when it says that it had an either/or intention behind this, is actually
25 wrong. In fact BT is quite clear, Mr. Kilburn was quite clear in his statement, BT always
26 intended this was either going to incentivise a reduction in prices, or, if it did not, BT was
27 going to get some money. It may well be that as a business case one can justify this on the
28 basis that we may get some short term cash, but the reality is that BT believed, and indeed
29 has been proved correct, that the termination market for these calls was in fact very
30 competitive and that therefore they would effectively get squeezed, which we say is what is
31 already happening. We say BT's motivation is really just a red herring in this case.

32 I am just going to deal with one final point which is the Simplifying Non Geographic
33 Numbers and the status it actually has in the Tribunal's thinking about what it should do in
34 this case. The first point we make, sir, is that Simplifying Non Geographics is clearly

1 evidence in this case before the Tribunal. It was actually introduced by Ofcom; it certainly
2 overlapped considerably with the 0845 Final Determination in that a lot of the material that
3 Ofcom has set out in the Simplifying Non Geographic Numbers was in documents that were
4 already being published at the time of August 2010. So therefore we say that this is clearly
5 material that for the purposes of this hearing the Tribunal should take firmly into account.
6 The second point, which I think is more implicit in one of your questions, sir, although I
7 managed not to write down the precise question (but we will cross reference in the
8 paragraphs overnight so you will have a proper document setting out where we are saying
9 it), is the fact that Simplifying Non Geographic Numbers is taking place cannot be a reason
10 for this Tribunal to say that Ofcom could defer Simplifying Non Geographic Numbers. I
11 have already set out the timeline. You recall that I set out the dates from when the initial
12 NCCNs were put forward, and the fact that we have a very clear and uncertain future as to
13 when exactly, if ever, these matters are implemented. Also, sir, we say that if you look at
14 the *TRD* appeal, it is not a reason for Ofcom to say we will defer to that. They have to
15 resolve it on what they have got, and that material included the material within Simplifying
16 Non Geographic Numbers.

17 I have found the reference now. It is para.72 of EE's submissions: the MNOs will be
18 vehemently opposed to the changes, the Simplifying Non Geographic Numbers.

19 Sir, I am being prompted by my junior that my time is running out, so I am going to turn
20 straight away to the welfare analysis and take you forward to that. Would it be a convenient
21 moment?

22 THE CHAIRMAN: It would. We will rise for five minutes.

23 (Adjourned for a short time)

24 MR. READ: Sir, having said I had found the reference, I am not sure I have found the reference.

25 So, as they say in a different jurisdiction, I think the last comment about para.72 of EE's
26 written submissions should be deleted from the record. I am sorry about that. If I find the
27 reference that I was actually intending to refer to, I will come back to it. In the interim, that
28 is the wrong reference.

29 Sir, can I now turn to the welfare analysis and deal firstly by way of introduction to this
30 (para.105 section D in our document) that the first point we make is very clear that if
31 Ofcom had in fact conducted its welfare analysis correctly it would not have rejected the
32 NCCNs and they would/should have reached the conclusion that the NCCNs were all net
33 beneficial without needing to consider in any detail the precise extent of price reductions
34 according to BT's model.

1 I say that because I will come on to BT's modelling in a while and say that it is fairly clear,
2 we say, the incentive is either to 12.5, or, if it is not to 12.5 entirely it is 12.5 and 17.5,
3 depending upon where the prices have started off. So we still say BT's modelling is
4 sufficient in this case to get us home, but in any event we say that the analysis that has been
5 conducted (even if that was wrong) still means that Ofcom should have reached the
6 conclusion that it was welfare beneficial.

7 Can I also make the point that although in part this is dependent upon the approach that
8 Professor Dobbs has set out in his sixth report about welfare effects being broadly neutral
9 and whether you take what is called the overall welfare analysis or not, in addition to that it
10 is precisely because Ofcom weighted different factors, we say contrary to the correct
11 approach, that also leads to the same conclusion that in fact Ofcom's analysis was skewed
12 and therefore wrong.

13 Can I start by making three introductory points. The first is that if one looks at the result in
14 the 0845 final determination where Ofcom says that its focus is on consumers, it is
15 significant, we say, and strikingly odd, that it reaches a diametrically opposite conclusion in
16 Simplifying Non-Geographic Numbers, which also of course was supposed to have a
17 consumer focus as well. We say that that in itself amounts to compelling evidence that the
18 welfare analysis conducted in the 0845 final determination was flawed.

19 A point that is of particular significance, we say, in that respect is that when you look at the
20 mobile tariff package effect in the Simplifying Non-Geographic Numbers it has been given
21 minimal weight compared to what we say Ofcom did in the 0845 determination, namely
22 giving it significant weight, and I will come back to how we say they weighted it in the final
23 determination in a minute. We say again it is inconsistent, the way that Ofcom has
24 approached the matter in Simplifying Non-Geographic Numbers and what it has actually
25 done in this case.

26 We obviously say that the approach that has been adopted in Simplifying Non-Geographic
27 Numbers is the one to be preferred to Ofcom's consumer focus in this case, because it
28 actually accords with precisely what BT says is the way the welfare factors should be
29 considered and dealt with. In particular, there are four points, we say, that are of particular
30 importance: firstly, that current NTS prices demonstrate major inefficiencies and market
31 failures giving rise to both horizontal and external externalities. Secondly, the problems for
32 the SPs are significant, and the system is not therefore functioning as it should. Thirdly, the
33 MTPE itself has to be balanced against the fact that there is already over-consumption in the
34 market. It is the paragraph, if you recall – I think we have set it out in our written document

1 at para.112(3) – in the Simplifying Non-Geographic Numbers at A2.189 where Ofcom,
2 itself, there is negative impact that is already there, and that is a factor that obviously has to
3 be weighed into the balance. Then, of course, there is the consumer inefficiencies, the
4 £500 million plus figure. I have already indicated that there may be issues about that, but it
5 is still a useful figure for weighing up what exactly Ofcom was facing when it was
6 analysing the result it should achieve in this final determination.

7 Can I then make the second introductory point which is that we say a total welfare analysis
8 is a fairly conventional approach for economists. We have set out from para.113 onwards
9 the evidence on that. There is one point that I think may not have made it into our
10 document here, but if you recall I asked Dr. Walker about his approach, and he said it was
11 based entirely upon his understanding of Ofcom’s understanding on the law. So he,
12 himself, was not actually putting forward any different normal economic approach. We say
13 the normal economic approach would be a total welfare analysis and therefore it is really up
14 to Ofcom to try and place a coherent reasoning on why should depart from that test. Indeed,
15 one has to put that, we say, in the context of a mobile tariff package effect where you have
16 over-consumption already and therefore you cannot simply say, in our respectful
17 submission, that you can concentrate your primary focus on particular group. You have to
18 say, “What is resource implication of that over-consumption in that particular market
19 already?” That is a point that we say Ofcom did not really even consider or get to close to
20 considering in the final determination.

21 The third point that I want to make, sir, is obviously what we are looking at here in the
22 context of the welfare analysis is the partial reduction scenario. Ofcom itself accepts that if
23 prices fall to the bottom tier, 12.49 ppm, then it means that it is welfare beneficial. Ofcom
24 also accepts that the direction will be down, so there is no question of prices staying the
25 same or increasing. Ofcom found that the likely direction was going to be down. In other
26 words, it is going to be a partial reduction scenario, and it is the partial reduction scenario
27 that one has to look at when one is considering the welfare analysis.

28 Sir, having made those three introductory points can I turn to how I would like to progress
29 the analysis. Fundamentally, I want to follow the same format that I did in opening, which
30 is to say, firstly, what factors were appropriate or inappropriate for Ofcom to take into
31 account; secondly, what weight did Ofcom give to the factors; thirdly, did Ofcom explain
32 properly what it was doing or has it shifted its ground in the FDs.

33 PROFESSOR STONEMAN: Mr. Read, before you go to the detail, have we passed para.110 in
34 your summary?

1 MR. READ: Yes, sir.

2 PROFESSOR STONEMAN: Can I return you to para.110. This is really point three here, cannot
3 realistically portray the MTPE as being different in the NGN from that in the FD. I am sure
4 it can because in the SNGN there is no waterbed effect X because the price control does not
5 pass any extra revenue over to BT.

6 MR. READ: I am trying to follow, sir, the position you are coming from. The price control is on
7 BT from the origination of its calls.

8 PROFESSOR STONEMAN: No, the price control in the SNGN, in the new proposal there is a
9 price control on 0800 prices for MNOs – correct?

10 MR. READ: Correct, sir, yes.

11 PROFESSOR STONEMAN: They basically said that they were not making any excess profits.

12 MR. READ: Yes.

13 PROFESSOR STONEMAN: Under the NCCN the WTS induces the MNO behaviour by shifting
14 profits from the MNOs to BT.

15 MR. READ: On the assumption of partial reduction rather than full reduction to 12.49 ppm.

16 PROFESSOR STONEMAN: I am very wrong there. Forget it, you are right, I am wrong, sorry.

17 MR. READ: Sir, the only point I was also going to make was that actually the comments made
18 about the mobile tariff package effect were not made specifically in the context of 080 calls,
19 they were being made more generally. I hope that also helps with the dilemma.
20 As I say, I am going to tackle it by (a) very briefly dealing with what factors it is
21 appropriate to take into account and then look at how Ofcom weighted them. The starting
22 point for all of this, sir, we say is to look at what was included in the indirect effect. There
23 are two elements there in the indirect effect which need to be looked at. The first is the SPs
24 and the second is the TCPs. Primarily everyone has focused on BT but there are other TCPs
25 now in the market doing exactly what BT is doing.
26 The SPs, again we have some difficulty, and it is set out at para.129 onwards, as to what
27 exactly Ofcom were doing about the SPs in the context of the indirect effect. You will
28 remember there are two effects, there is firstly the SPs themselves (my box 6) and then
29 there are the effects of benefits to callers to those numbers which was my box 7 on my flow
30 of funds diagram.

31 THE CHAIRMAN: Can I ask the question that I put to Dr. Maldoom in this regard. Here,
32 particularly as regards 080 but also as regards 0845 and 0870 it does not seem to be
33 envisaged that very much revenue is going to be flowing through to the SPs, because that is
34 not really the purpose of the numbers. Granted there is some element of revenue share

1 which we heard evidence on regarding dial-up internet, for example, But the purpose of all
2 three sets of numbers, including 0850 and 0870 seems to be to ensure that the caller knows
3 that his call prices are capped, either at zero or at a price which is related to local
4 geographic rates. So the purpose of these numbers is not actually to generate revenue flow
5 down to the service providers in contrast to, for example, 090 and 091 numbers where
6 obviously it is. My question is really this: if that is right, why is it that revenue flow to SPs
7 is something that one really ought to be taking into account given that the purpose of these
8 particular numbers is not to create revenue flow but to create a call price cap, however
9 ineffective, on the caller?

10 MR. READ: Sir, can I first of all start with the proposition that the flow of funds are not relevant
11 to the SPs, that is not what they actually want because certainly I think there is
12 consternation every time that is said by the Tribunal from those sitting “in the Gods” if I
13 can say that at the back, because their fundamental apprehension is that the NTS formula
14 and the NTS system was actually trying to achieve revenue share down the line with the
15 SPs. It is quite right that if you are looking at 090 numbers, for example, the premium rate
16 numbers, the revenue share is going to be substantially greater as a result of that. But, I
17 think it would be wrong to dismiss the whole issue of revenue share in the context of the
18 0845/0870 numbers because not only is there the question of, if you like, the flow down to
19 the SPs in terms of what they actually get but of course there is also the corresponding
20 payment back of what they may have to be paying the TCP in order to host that service. Of
21 course, it is a two way effect, you may not actually be seeing pounds and pence coming in
22 in the sort of quantities that the 0890 numbers are actually involved, but of course there is
23 potentially a reduction in what you are having to pay in order to set up the NTS service in
24 the first place. You recall that in fact the Simplifying Non-Geographic Numbers – it comes
25 back to the fact that there is a potential two-way payment going on between TCPs and SPs,
26 and it does not necessarily mean that one is going to translate to the other, because I think
27 Miss Lee put to Mr. Muysert for example for 0845 numbers, which is supposed to be local
28 geographic rate, of course there are costs associated with having to send it right the way
29 across the trunk system in order to get to an end call. So I think the short answer to the first
30 part of your question is certainly on this side we do not accept that revenue share is not a
31 factor that is important in this context.

32 Can I also refer you to para. 99 of our note? That sets out the revenue share and in the
33 second part of that it sets out – I think this is the question you actually asked sir, and this is
34 the answer that Dr. Maldoom has actually given – that in fact it is like a shop front which

1 sets out the selling mechanism for each SP. I think the actual answer he gave is at para.
2 16(7) which is on p.13 of our document where he set out the point that termination
3 payments would be a form of monetary compensation for the SPs.

4 “If the NCCNs are not successful in producing a full reduction, then as an SP what
5 you get is a sort of mixed outcome where you get better retail pricing. So, if I take
6 the example of this, you know, hypothetical SP wanting to offer a service primarily
7 over a mobile, clearly that might well tip the balance for them; but on the other
8 hand they probably wouldn’t get everything that they wanted, they would only get
9 part of it, but then they would receive some monetary compensation. So that may
10 well be a second best outcome.”

11 So to conclude an answer to your question on this point I think the core point is that, yes,
12 0845/0870 and 0800 numbers are not in the same category as 090, that is self-evident, but
13 there are still very clear important factors for the SP in wanting to use those numbers which,
14 if the factors are being distorted, and if they are not getting the benefits they would like out
15 of them, then in fact there is no reason why they should not actually get the benefits of the
16 payments. Certainly, in a competitive market, sir, we say the payments would flow
17 through.

18 THE CHAIRMAN: Do you accept then that there is a distinction to be drawn between 080 and
19 0845/0870 or do you have the same answer for all three groups of numbers?

20 MR. READ: I certainly have the same answer for all three groups of numbers when the MNOs
21 are charging the prices that they are actually charging at the moment. It would be very
22 different if, in fact, the policy preference was being followed, because the dynamics of the
23 situation would obviously be very different, but it starts – and I suppose this is the core to
24 all of it – from the problem that the MNOs are actually charging a significant amount more
25 than the SPs themselves anticipated when they entered into the market.

26 THE CHAIRMAN: I quite understand that, but of course that is what you say has actuated the
27 NCCNs in this case, but surely when one is conducting a welfare analysis one needs to look
28 at how the system is supposed to work and my question really is related to that. When one
29 looks at how the system is supposed to work it seems to me that particularly with regard to
30 080, and I take your point that with 0845 and 0870 one would need to look at the evidence
31 again on that, particularly with regard to 080 if there is a revenue flow going in the wrong
32 direction in this case towards the SPs then that is an indication that the system is not
33 working, and really I am putting to you a much more fundamental point than Ofcom took:
34 why is one attaching any weight at all to an indirect flow of moneys to the SPs? Surely the

1 more important point is to look at the benefit, if prices are approaching to zero, in terms of
2 usage of the numbers?

3 MR. READ: Can I just take you on this point to CAT 13, because I think it is quite an important
4 point, and I will get shouted at from the Gods if I do not actually make the point, this is the
5 Simplifying Non-Geographic Numbers, and ask you to go to p.121, which is tab 3.1 as you
6 recall, sir, para. A1.25. One actually sees there in Ofcom's own words:

7 "The original rationale for setting up non-geographic numbers was to promote the
8 availability of value added services by providing a micropayment mechanism
9 between callers and SPs, i.e. to allow callers to pay for the services they receive
10 from the SPs on NGCs via the call charge. The availability of services for which
11 there is demand is in the callers' long term interests. Service availability also
12 requires that SPs involved in the origination, conveyance and termination of the
13 call recover an appropriate contribution to their cost and a reward for their
14 investment. Therefore, how revenues and profits are distributed along the vertical
15 value chain to provide NGCs is relevant to assess the impact of different options
16 on investment and innovation incentives."

17 So we do say, sir, that you cannot simply dismiss that end of the chain. Although, certainly
18 if the market was working properly there may be an issue about what happens with SPs and
19 how they actually make the payments, but in a situation where effectively one party is
20 garnering all the money, in our respectful submission you cannot then ignore the benefits
21 that the SPs will get if that money is more equitably divided up down the system. I hope
22 that really deals with the point.

23 THE CHAIRMAN: I think it does, but I will come back to it one more time. 1.25 cannot apply
24 to 080 numbers. It may be true of 0845 but it cannot apply to 080 numbers. So the most
25 you can say on 080 is that given that the system is not working, as a kind of consolation
26 prize it may be that some revenue will filter down towards the SPs and that one should give
27 that some weight. But if that is right, why is not Ofcom correct to say: actually, it should
28 never have had much weight at all given that that is not how 080 numbers are intended to
29 work?

30 MR. READ: It is a slightly odd situation because of course Ofcom are actually saying that in 080
31 the benefits should be given greater weight for the call reduction, the preference should be
32 given stronger effects precisely because in the 080 situation callers are expecting the calls to
33 be free. So coming back to the Box K, if you like, element then that seems to be giving a

1 much stronger preference there in the 080 call situation than it is in the 0845/0870 where, as
2 we say, there is a difference in the flow of revenues back down the chain.

3 THE CHAIRMAN: Clearly there is a difference between the two sets. I am very conscious of the
4 difference in evidence between Dr. Maldoom and Mr. Muysert where the revenue flow of
5 those numbers was different. But thank you, that was helpful.

6 MR. READ: Sir, can I then go back to where I think I was, which was explaining that I wanted to
7 look at what was included in the indirect effect. We have set out in some detail about the
8 treatment of the SPs and how we say that Ofcom was wrong in that respect. We do make
9 the point at para.138 that the evidence in this case seems to have been evolving on the hoof,
10 with the greatest respect to the people who were involved in it, which cannot mean that you
11 can have an ex post facto justification for how they have weighted all these factors. We
12 made reference to the BT skeleton argument there. That is the *Napp* case, as you may
13 recall, and how we say that could be taken into account. I will not go through all this
14 material because we have set it out at some great length as to how we say Ofcom has sort of
15 nuanced (if I can use that word) from one Final Determination to another Final
16 Determination to what it says now, and why we say that is not transparent.

17 Can I then turn to what we say is wrong with the way Ofcom have done it. We pick that up
18 at para.146 in our submissions on this point. We have focused there, it is fair to say, on the
19 0845/0870 situation precisely and obviously because there are not the problems in the 080
20 situation. But, having said that, if the Tribunal reaches the end conclusion that it is proper
21 to weight the SPs into the equation in the way that BT says they should be weighted into the
22 equation, in the 0845/0870 situation, it is likely that that is going to still tilt the balance in
23 the 080 situation as well, simply because Ofcom on its own terms said that greater weight
24 should be given to the position of vulnerable consumers in the 080 situation.

25 The core point, we say, about it is that it is the SPs' willingness to provide the services via
26 telephony in the first place that really underpins the system itself. Therefore, simply to
27 describe the SPs as being purchasers of the hosting services, or suppliers, in our respectful
28 submission mischaracterises what the whole purpose of the 0845/0870 system was actually
29 about. Even if one puts to one side the question of how the payments actually flow and who
30 is going to get the benefit out of them, one of the key factors has to be: what was the
31 purpose originally behind this whole system? Why was it being set up? The answer we say
32 is that it is the SPs who were providing the service and it is their whole willingness to
33 provide those services that are important. That is a core reason why we say that in fact it is

1 wrong to downplay their interests and then, at the end of the day, to focus on the MNO
2 consumers.

3 There is an important point in this because the way that the MTP effect has been weighted
4 into the balance, so that you have indirect effect/MTPE in, what it means is Ofcom is not
5 simply focusing on the consumers of 0845/0870 calls, it is focusing on all MNO consumers.
6 That is what it is weighting against the SPs when it is considering the indirect effect and the
7 MTPE. It is not simply weighting the position between 0845/0870 callers from the MNOs'
8 networks and, on the other hand, the SPs at the other end of the network. It is actually
9 weighting the whole of the MNOs' callers because that is in effect what is implied by the
10 MTP effect. Indeed, even to concentrate on the MNO 0845/0870 callers would be wrong in
11 any event, because it is not just the MNO callers who are calling those numbers. There are,
12 of course, a lot of people calling those numbers from fixed lines, and those people calling
13 from fixed lines ought also to be taken into account when weighing any interest factor
14 between them. Of course, they are not caught by the MTPE.

15 So we say that there is a mismatch of what is actually going on here. By downplaying the
16 importance of the SPs in the equation what one is actually doing is not weighting it properly
17 because one is not comparing effectively like with like. We say that is a very important
18 point in this case which, when you unpick Ofcom's analysis, ends up with not even like
19 with like being compared or given a preference; it is a very different situation.

20 In making that point, sir, I do want to go back to what I might call the jury point of Mr.
21 Herberg when he was cross-examining Professor Dobbs, I think it was. It was the point
22 about: are you really saying that the £1 million bonus to BT's chief executive should be
23 taken into account? The answer to that is there are other people on the other side of the
24 equation who also might be getting their rather large bonuses, for example an MNO
25 business customer who is receiving some benefit and being weighed into the equation the
26 impact of any bonus that he might get or not get as a result of the MTP effect. On Mr.
27 Herberg's analysis, on Ofcom's analysis, it does get taken into account because of course
28 the business interests of the MNO business customers are taken into account, but the SP or
29 the BT bonus is not. It is really a jury point, in our respectful submission, but what it does
30 illustrate is the fact that when you are comparing the MNO customers and effectively giving
31 them a primary focus over that accorded to BT and the SPs, what it does demonstrate is you
32 are not comparing like with like.

33 One can see that there may be some argument about this question of focus on human
34 consumers over focus on business consumers. So if one was saying: we are going to look at

1 the vulnerable people who are making calls to 080 numbers and we are going to weight
2 them more heavily than business SPs there might be some merit in it. But Ofcom is not
3 doing that; Ofcom is actually weighting the benefits of the residential human consumers
4 alongside the business consumers of the MNOs' numbers, and weighting those against the
5 business interests of the SPs and saying effectively that because the SPs are businesses we
6 are going to discount them because we think the focus should be more on the consumers of
7 the 080/0845 numbers. In fact, of course, as I have already indicated, it is not that; it is all
8 MNO callers and it is all MNO callers to the exclusion of fixed line callers to the 0845
9 numbers, save in so far as the 0845/0870 callers from fixed lines may get a benefit from the
10 demand effect or feedback from the SPs. So it comes back to the way we say that Ofcom
11 have actually focused on this. We say that by focusing on the MNO calling customers they
12 have distorted the balance because they have ignored the SPs, they have ignored the fixed
13 customers, and they have not really weighted the whole thing to take into account the fact
14 that there different interests on both sides of the equation and they are weighting businesses
15 in different ways depending on where exactly they are in the chain. We say that that is a
16 mistake.

17 We have set this out in a great deal more detail in the written submissions. I just briefly
18 want to touch on the TCPs. Again, excluding them from the analysis – para.161 – we say
19 that really at the end of the day the effect of all of this is not to carry out a welfare analysis.
20 We say it comes back to this whole issue about what exactly it is that Ofcom is supposed to
21 be achieving under, in particular, Article 8 of the Framework Directive. We say that under
22 Article 8 of the Framework Directive they are supposed to be looking in particular upon the
23 issues of competition. You cannot, in our respectful submission, do a proper analysis on
24 competition by focusing simply at one end of the chain on a particular group of consumers
25 to the exclusion of all the other people down the chain. When, in fact, BT and the other
26 TCPs are completely excluded from the equation, we say that cannot be right.

27 What we say is that it should have been Ofcom's role to take into account the TCPs and the
28 SPs. It should have been the position that they should not have unpicked the boxes in the
29 way to use Dr. Maldoom's terminology, and we say that there is no legal reason why Ofcom
30 needed to do that, and certainly on any normal economic welfare analysis they should not
31 have done, full stop.

32 Then can I turn to the factors that Ofcom, we say, should have left out of account. The core
33 one, we say, that should have been left out of account is the MTPE, or at least it should not
34 have been given the preponderant weight that we say it was, in fact, given. It should have

1 | been either left out of account, as indeed it was effectively in Simplifying Non-Geographic
2 | Numbers, or at least given very little weight in the overall balance, but what we, in fact, is
3 | that the way Ofcom has weighted this, it has effectively given the MTPE a significance that
4 | weighs out everything else apart from the direct effect. At the end of the day, what Ofcom
5 | has done is to take the direct effect, take the MTPE and take the indirect effect and weight
6 | those. It accepts that, in fact, the MTPE and the direct effect in a partial reduction cancel
7 | each other out for the bits that relate to each other so that the indirect effect is positive in a
8 | partial reduction, but then has gone on and said the MTPE bit that balances against the
9 | indirect effect completely outweighs the indirect effect. It is fair to say that this has all
10 | come into very clear focus with the figure 8 diagram of Mr. Myers in his statement. We, of
11 | course, accept that there are limits to what you can actually do with that diagram, but,
12 | firstly, it was Mr. Myers, himself, who was inviting comment upon it. We have set that out
13 | in the statement, but there is a more fundamental point which we think is absolutely crucial
14 | in this case, and that is this: you cannot at the end of the day try and conduct some
15 | meaningful analysis on this unless you actually do some form of weighing factor for the
16 | various scenarios. What you cannot do, in our respectful submission, is throw up in the air
17 | a whole series of uncertainties and say, "It is all too difficult to conclude". You have to
18 | look at the uncertainties that are actually involved in it, and say, "What happens on this
19 | scenario, this scenario or this scenario?"

20 | What figure 8 demonstrates is one particular scenario, one particular weighting, and what it
21 | actually demonstrates is that where you actually draw those respective lines affects the
22 | tipping point for when a partial reduction becomes welfare beneficial. Those were the
23 | points that I was putting to Dr. Walker in cross-examination, as you recall, about his
24 | illustration.

25 | It is really dependent upon how you draw those lines that you can say, where is it on the
26 | scale of partial reduction that you reach the tipping point where anything to the left of it is
27 | welfare beneficial but anything to the right is not. That is the exercise never did in this case,
28 | and they say it was because it was all too difficult. In our respectful submission, you cannot
29 | simply avoid doing that task because someone, somewhere, if they have actually carried out
30 | a proper welfare analysis has to do it. They may do it in their head, but they have to do it
31 | somewhere for saying, "What if in this scenario, what if in that scenario?" If you do not
32 | conduct that weighing analysis then effectively you do not actually make any proper
33 | weighing, in our respectful submission. All you do is end up saying it is all too difficult and
34 | not conducting a proper analysis, a proper rigorous analysis that is capable of being

1 properly scrutinised as to how exactly you weigh the respective beneficial effects and the
2 particular scenarios. We say that is actually a very important point in the context of this
3 case. We set it out at some length in the written submissions, and I do not want to spend a
4 huge amount more time actually dealing with it.

5 It really is that sort of exercise that allows you to identify a feature like box K – you will
6 remember box K, the demand effect on my flow of funds diagram. That, in our respectful
7 submission, is where this process fell down and why there is so much uncertainty in the
8 course of the respective final determinations, because nobody was actually going through
9 the process of saying where exactly does this fit in? If there had been a figure 8 diagram
10 drawn out at the time that the determinations were actually being conducted, it would
11 become obvious, we say, where it ought to fit in and how it was actually going to play out.
12 It was precisely because Ofcom did not conduct that type of sensitivity analysis to try and
13 work out where the balance of the different effects were actually taking place that leads the
14 confusion you get throughout the 0845/0870 final determination as to how exactly Ofcom
15 were weighing the effects. I have already indicated from that transcript passage that I
16 referred you to earlier that Mr. Myers, himself, accepts that it was a big change from that
17 how that box K, the demand effect box at the bottom of my flow of funds diagram, how
18 exactly that was being taken into account from the 080 final determination where it plainly
19 appeared to be in the indirect effect and not the preference, to the 0845 where it was very
20 unclear but nobody actually said where it went, to Mr. Myers' statement where he says
21 ultimately the position it actually took, except that in fact that was not spelt out properly in
22 the 0845 determination.

23 I think I should make two very brief points also about the MTPE before I leave it. the first
24 is that it seems to have acquired something in the nature of the precautionary principle, and
25 we say for all the reasons I have set out earlier that that is wrong, it is simply not a principle
26 that is applicable in a situation like this. One is not dealing with leaks of radiation from
27 plants, one is not dealing with drug testing which might actually kill people, this is not the
28 situation here. One is dealing with a very different situation where there is a commercial
29 dispute between the parties that Ofcom is being asked to resolve.

30 The second point I wanted to make about the MTPE, and it is set out at para. 203 onwards
31 in our document is that in fact we say that there is a substantial amount of evidence about
32 this and one thing that is absolutely clear about it is that the waterbed effect is less than 100
33 per cent and we would say that there is no really demonstrable evidence that says that it is
34 going to be massively significant, full stop. It just has not really been tested in this

1 particular area of call origination and I do commend that the Tribunal looks at that in a little
2 detail – you have obviously had the opportunity of hearing from Professor Valletti at some
3 length on it and we have set out some of his material on that.

4 Can I then turn to BT’s modelling? The first point we make about the whole of BT’s
5 modelling is that it has been subjected to significant amounts of criticisms at various times,
6 but underlying all of this the basic assumptions on which the models were based has not
7 actually been challenged to any great degree and, indeed, Dr. Walker himself effectively
8 was saying that the modelling was not flawed in any technical sense, and it is generally
9 absolutely fine. There was a suggestion that Professor Dobbs had referred to ‘gut feeling’ I
10 think was the phrase that was bandied around this morning. In our respectful submission
11 that is grossly unfair on Professor Dobbs, he was very measured in giving his evidence as to
12 when he was talking about gut feeling, and when he was actually giving very clear evidence
13 on what he believed the position of his modelling actually to be.

14 We say that really at the end of the day he has been criticised and criticised and criticised,
15 and the more that has been investigated the more that it has actually, at the end of the day,
16 demonstrated the robustness of his material, and no one in this case has actually produced a
17 counter model to suggest differently. Again, we say that in itself is interesting because if it
18 was so obviously flawed, or so obviously wrong then we might have expected someone to
19 come out with some counter model to demonstrate otherwise.

20 One of the points was obviously this whole question about the WTS could have been
21 designed to incentivised a price reduction. We say there were very good commercial
22 reasons why that was not done and they are set out in Mr. Richards’ statement and he was
23 not asked to be cross-examined. The criticisms primarily seem to come from Dr. Walker,
24 and Dr. Walker had not even understood this particular point, so we say it is not a good
25 point. Yes, of course, you could have designed it differently but that was not what BT was
26 trying to do when it originally did design the – I said “modelling” I meant the NCCNs – that
27 is not what the NCCNs were originally designed for because of the complexities that there
28 were over competition and so on.

29 Again, we say you have to look at it in context, because it was originally introduced to deal
30 with the response that prices were being incentivised to go up, not to the precise level where
31 it went down, and we say that the modelling achieved its task convincingly.

32 Can I deal with a couple of points that have arisen in the course of the case that I feel I
33 should deal with? The first is BT’s share of the market, because obviously the point that BT
34 only has 25 per cent of the market for TCPs, and how that might impact on the modelling

1 was discussed in the course of the hearing. We say, first, that ladder pricing has two issues,
2 and the first the economic modelling and the second is perhaps the more practical problem
3 of the question of how exactly the TCPs set their prices up. We respectfully agree with Mr.
4 Clayton that in fact the latter problem – the practical problem – of how exactly the prices
5 are dealt with is a fact of life in a competitive market. The only real issue that this goes to is
6 the economic modelling point, and we say that Professor Dobbs dealt with this point. You
7 were taken to the point by Mr. Ward. We have quoted part of it there, but we do ask you to
8 read the whole of the quotation from the transcript on that page because Professor Dobbs
9 said in terms: “Let me just finish off. The incentives are always towards price reduction” so
10 his view was very clearly that regardless of the dilution effect, if one can call it that by BT
11 being only 25 per cent at the end of the day there was a very clear incentive towards price
12 reduction, full stop.

13 We do say that ladder pricing creates an incentive for TCPs to follow suit and that is what
14 Professor Dobbs noted, and that is what Mr. Myers noted. We say that if that happens then
15 the reality is that one is going to end up in a not too dissimilar situation to just having
16 concentrated on BT’s modelling in the first place. As Mr. Stone admitted in evidence, the
17 MNOs were very unlikely to introduce complexity by differentiating i.e. between BT and
18 another TCP, so therefore it is not going to affect that side of the equation, if you like, one is
19 going to have a clear price set for it and we say that in reality all that is going to happen is
20 that the TCPs are going to mimic BT’s prices which is what Mr. Myers himself seems to
21 suggest, and perhaps have one or two variations – I think there was some suggestion of one
22 having perhaps a linear price – but broadly they are going to replicate BT’s termination
23 schedules.

24 PROFESSOR STONEMAN: Can I just throw a spanner in the works there?

25 MR. READ: Yes.

26 PROFESSOR STONEMAN: If everybody does it then what matters in the modelling is the
27 industry elasticity demand and not the firm’s elasticity of demand and all of Ian Dobbs’
28 model is based upon the firm’s elasticity of demand, and so you will get a different result
29 out in terms of the incentive for everybody in the industry to do it, so it is not the same.

30 MR. READ: Perhaps I can put the point the other way around, that this is a point that obviously
31 emerged quite late in the day in the course of this case, and every point that has been taken
32 against Professor Dobbs’s modelling when there has been investigation has actually ended
33 up being demonstrated to not take the matter much further, and we would respectfully
34 submit that this is potentially another one of those areas where in fact, yes, we agree that

1 you may be looking at the industry's elasticity of demand, but we would not necessarily say
2 that that is going to be greatly different from the modelling that has actually been produced
3 already. I think that without trespassing into expert testimony myself I am not going to be
4 in a position to take that point much further. The evidence is what we have, Professor
5 Dobbs thought that it was not going to affect the outcome of his model significantly, there
6 was still going to be the incentive to go down. The problem with all of this, in our
7 respectful submission, is that it is a point nobody has thought of before, and it really is too
8 late to effectively completely ignore BT's modelling when, at the end of the day, the
9 modelling so far has proved resilient to the criticisms that have actually been made. I think
10 that is as far as I can take it, sir.

11 PROFESSOR STONEMAN: We face a problem in that in the determinations are we looking at a
12 situation in dispute resolution whereby BT is introducing these changes, or are we looking
13 at a situation where everybody is introducing these changes? What should we be doing? I
14 know this issue has only arisen during the hearing but it does raise an issue, it does raise a
15 problem because the answer that comes out at the end depends on which of these scenarios
16 you take. So do you have a view on that?

17 MR. READ: Sir, what I think I can say is really this. Obviously, the Tribunal has to decide the
18 case on the evidence it has before it. I am not, in any shape or form, saying that you are
19 limited on what you can base your judgments upon because at the end of the day the Court
20 of Appeal have made it relatively clear that the Tribunal is not simply looking at the
21 decision that Ofcom took; it is actually looking at the position of the material that it has
22 before it when it reaches its conclusion. I certainly would not dissent from that.
23 Obviously, I also accept that one cannot ignore in this case the fact that Ofcom itself
24 expressly noted that the TCPs were beginning to replicate because although in the 080
25 determination there was the issue about they had not replicated, it was part of BT's Notice
26 of Appeal to say they got that wrong because the TCPs are replicated. So to the extent that
27 BT is putting the positive case forward of the MNOs replicating the charges, I do not think I
28 can dissent from that that is a key factor that has to be taken into account.
29 What I do urge is an element of real caution on the part of the Tribunal from making clear
30 assumptions against something that has never actually been fully tested in the evidence.
31 You have the evidence before you. It is obviously a point that was out there to be taken if
32 someone had thought about it, but nobody has actually taken it. Therefore, in my respectful
33 submission, it would be wrong at this stage to unduly criticise the modelling because of, if
34 you like, a curve ball that has come into the equation late on. Obviously, the Tribunal will

1 have to reach its conclusions on the material it has, but a very strong factor which should be
2 taken into account in that is the fact that no-one has really stretched the issue in the course
3 of cross-examination. Therefore, one is left with the position that we do have modelling
4 here that does seem to stand up, and the fact that there may be another problem lurking in
5 the wings is of interest and concern but it should not necessarily be the deciding factor
6 against the modelling. I think that is probably as far as I can take it. I hope that has
7 clarified the position.

8 Sir, can I briefly deal with the question of the marginal costs. We say in the modelling you
9 have to take into account the marginal costs. Again, it is the evidence that is actually in the
10 case. But I do want to make this point. I am looking at para.221 in particular. It seems to
11 be being suggested that BT has not pleaded some form of case against it. I hope the
12 reference is right for EE's note on this point. I understood from para.50.30 that they were
13 asserting in terms that BT did not plead a case. That is wrong. We have made it absolutely
14 clear from the outset, the material is there in both appeals, that we are looking at a marginal
15 cost significantly below 3.5ppm in the 080 appeal, and in the case of the 0845 appeal we
16 have stated that in fact it may well be much nearer the figure of 0.5ppm. So this material
17 has clearly always been in BT's appeal. The fact that we have been demonstrated
18 conclusively correct, as we say, in Simplifying Non Geographic Numbers just means that
19 we do get home on this point. Mr. Walker himself candidly accepted that he himself
20 thought that the marginal costs above 2ppm were an unreal scenario. I think that is
21 probably all I need to say on that.

22 We have set out here a number of points about the evidence between Professor Valletti and
23 Professor Dobbs. We say that part of the problem in this is there has been a
24 misunderstanding between Professor Valletti and Professor Dobbs which has finally, in the
25 course of the brief note and in the course of Professor Valletti's evidence, really resolved
26 itself to a considerable degree. We set that material out in a little bit of depth in paras.226-
27 230 concerning spill over and multi price points.

28 I should also indicate that at paras.224 and 225 we have dealt with the question of the ARP
29 because obviously in Professor Dobbs' modelling marginal costs is one element that has
30 been put in, but ARP is another cost. On this point we do say that the suggestions that the
31 ARP is in fact considerably higher, if that appears from the evidence, is wrong. We have
32 set out the evidence particularly in para.224.

33 We then outline the model's assumptions. We have set out the material on that.

34 Particularly in respect of profit maximisation, I do want to make the point that Mr. Richards

1 gave quite a lot of detailed evidence on this whole question of profit maximisation. He was
2 not called to be challenged on it. We say that that in itself is quite significant and that that
3 is a factor that needs to be taken well into account when one is weighing up whether or not
4 the complaints of the MNOs are actually wrong on this.

5 As regards elasticity of demand, can I just basically deal with the empirical evidence on
6 that. At the end of the day, of course we accept that there is not a massive amount of
7 empirical evidence on the elasticity of demand. There are in fact, when one analyses it, four
8 pieces of material that seem to stand out in this case on the point. The first of that is the
9 material from the MNOs themselves. There does not seem to have been anything more than
10 a self serving statement that demand was likely to be inelastic for most of the MNOs. As
11 regards the one piece of material that was referred to in the draft determination in the 0845
12 case, in fact that turned out to be a proposal rather than hard evidence.

13 So the three pieces of actual empirical evidence we have are listed on para.236. That is the
14 IVR statement. We have set out the reference there. It is quite a detailed letter that was
15 actually sent. We say it really was dismissed a little bit too readily by Ofcom. But it does
16 provide some material as to exactly what was happening. It was a concrete example. Mr.
17 Aspinall has provided further material in his statement, and we also say that the Simplifying
18 Non Geographic Numbers material at Table A2.9 again provides material which gives some
19 help to the whole issue of the elasticity of demand.

20 We accept, of course, that in each case those three pieces of hard evidence can be said: this
21 was this problem and that was that problem and so on and so forth. However, what it does
22 show is that in fact the three pieces of hard evidence all point towards price elasticity. What
23 there is not, in our respectful submission, is hard evidence that the price is actually inelastic.
24 Again, it comes back in part, in our respectful submission, to the fact that by saying BT has
25 not provided empirical evidence about this really means it is putting a heavy burden on BT
26 to produce something that it simply does not have within its remit.

27 Of course, there are points made about BT could look at its own internal material relating to
28 fixed calls, etc. But that is a completely different price range. One can imagine the almost
29 derision if we had produced that and said: look, price demands are elastic. Someone would
30 have said no, you are not looking at the relevant price ranges because they are completely
31 different.

32 In our respectful submission, to suggest that BT has not proved that prices are not inelastic
33 when the material we do have suggests the contrary is really just placing far too high a
34 burden on BT in this situation. It is a competitive market. One might expect that the MNOs

1 would indeed react in an inelastic fashion and in an inelastic demand way to any changes in
2 price.

3 Likewise for the demand curve, we say that Professor Dobbs has simply followed the
4 normal approach because it is quite clear (and Dr. Walker accepted this and I do not think
5 there is any difference now between Dr. Walker and Professor Dobbs) that the linearity and
6 constant demand are actually boundary cases. So therefore it necessarily means that there
7 will be some degree of convexity in the demand curve. That is effectively what Professor
8 Dobbs actually did. So therefore we say it was completely misconceived to suggest that he
9 should have been considering concave curves, for example, as Mr. Pratt did on one
10 occasion, although he did not go as far as saying that he, himself, that the demand curve
11 would be concave.

12 We say at the end of the day that most of the criticisms that have been Professor Dobbs'
13 modelling do not stand when analysed in the cold light of day.

14 I want to make a couple of other points on Professor Dobbs' modelling. The first is that
15 again we hear the phrase "real world considerations". The problem with this, and I took the
16 Tribunal through it in a little bit of depth on the first day of this hearing, is that when you
17 actually look at what these real world considerations are, they normally end up being the
18 same problem, namely demand elasticity or price discrimination, they have already been
19 listed as being one of the problems in the first place. A great deal of the real world
20 considerations in the 0845 FD that the MNOs put forward are uncertainty being repeated
21 under a different package.

22 We have also dealt with three points that were put to Professor Dobbs during the course of
23 cross-examination and we have set out his answers on that about the supposed real world
24 considerations. We say that there is really, at the end of the day, nothing in them.

25 Where do we end up on this? We say what happens when one ends up looking at all the
26 modelling is that it plainly has withstood a great deal of scrutiny over the course of the
27 process between the 080 appeal and today. The majority, if not all, the major points that
28 have actually been raised against it fall away. Although there may be other concerns that
29 have come to light as a result of what has been discussed during the course of this hearing,
30 it still does not pull away from the ultimate conclusion that there has been modelling going
31 on here that really has been quite robust over time, and that it needs to be given a significant
32 amount of weight.

33 The end point for this is that we say that even if you assume linear demand, in the majority
34 of cases, certainly when marginal costs are at or below 1 ppm and certainly when you start

1 off with an APR of around about 20 ppm, all the prices will fall to 12.4 ppm. This can be
2 looked at and checked by the annexes in Mr. Pratt's witness statement where he has listed
3 out the various scenarios.

4 That obviously, on the assumption of linearity in the demand curve, is a boundary case.
5 Therefore, as soon as you introduce any degree of convexity into the demand curve, as I
6 think everyone accepts, or certainly Dr. Walker and Professor Dobbs accepted, you have to,
7 then the figures are clearly at the ranges we are talking about with the marginal costs we are
8 talking about, and it demonstrates that the fall is going to be to 12.49 ppm. If that is the
9 case, as we say the modelling actually demonstrates, then on the balance of probabilities the
10 Tribunal can and should conclude that prices are indeed likely to fall to 12.49 ppm.

11 The alternative scenario, and one sees this very, very clearly from Mr. Pratt's annexes, and
12 particularly if you take Mr. Pratt's annexes and add to them a degree of convexity in the
13 demand curve, then in fact the prices are incentivised either to fall to 12.49 ppm or to 17.49
14 ppm. That, in reality, is the alternative scenario on the modelling.

15 If it does not fall completely to 12.49 ppm it is certainly going to fall to the next best thing,
16 which is to have a range of prices going down to 12.49p, or if it does not quite go there to
17 17.49 ppm. That comes back to precisely the point I was making earlier on about how the
18 tipping point is really quite crucial, because if one looks at that scenario then we say it must
19 have been the case that the tipping point was crossed, and even on a partial welfare analysis
20 one must assume that the benefits, the overall benefits, were sufficient to have allowed the
21 NCCNs, and for Principle 1 to have been passed.

22 Sir, I think that is all I want to say about modelling and welfare. Can I briefly move on to
23 two final points? I think I am probably, on timing, going to take another five or ten minutes
24 in the morning, but I would quite like to have the opportunity to make sure I have not
25 missed anything. I think I am still within my two hours 55 minutes if I go another ten
26 minutes in the morning, and I will not trespass beyond it.

27 THE CHAIRMAN: No, I think that is absolutely right, Mr. Read.

28 MR. READ: Can I then very briefly deal with Principle 3. I should make one point very early on.
29 If I have understood Miss Smith correctly, she was saying that BT disregarded the 080 FD
30 by issuing NCCN 1007. We do not accept that, sir, because it is quite clear from the 080
31 FD, and this is para.6.8 at bundle A, tab 1, p.82, that Ofcom held in terms in the 080
32 decision that if there were changes in the structure of the termination charges our
33 conclusions in relation to Principle 2 will not necessarily apply. So we certainly do not

1 accept any criticism about BT having issued NCCN 1007, but I suspect at the end of the
2 day, sir, that is probably not going to be the major point in this appeal.

3 As regards Principle 3, we say that at the end of the day Ofcom was absolutely right in the
4 conclusion that it reached in the 080 final determination, which is that the parties ought to
5 be able to reach a practical solution on the issues about practicality. The departure from
6 that in the 0845 dispute, in our respectful submission, is not correct. We certainly agree
7 with Cable & Wireless that what of course appears to have done is to be convinced by what
8 we say are really self-serving arguments that barriers to implementation have allowed a
9 pricing screen. We know, and we have seen it today in the course of the Orange document,
10 that there has not been any engagement in negotiation over these problems and what is
11 wanted. It is very easy in those situations for the MNOs to talk up the problems because
12 they do not like the outcomes that might actually be there. We do commend Cable &
13 Wireless's statement of intervention at 6.4 where they say that Ofcom wrongly accepted the
14 subjective without due scrutiny. Perhaps I can give an illustration of this, because if one
15 looks at para. 252(2) on p.103 we have set out there for the Tribunal's consideration the
16 difference between what the MNOs were saying about their figures on Principle 1 for
17 example, on the costs of call origination against what actually has turned out to be the case,
18 and so the references are there, but it is a significant difference and we do say that that is a
19 factor that needs to be kept in mind. The other factor that we say has to be kept in mind in
20 all of this is the fact that BT is not asking for absolutely precise, detailed calculations of
21 what is going on, it is prepared to be flexible over this, that is the whole reason why the
22 ladder pricing scheme was introduced, as Mr. Richards says in para. 64 of his statement,
23 was in fact to try and give some flexibility precisely so the MNOs were not tied to having
24 detailed analysis to actually provide the correct billing solution in order to calculate the
25 actual charges for this. Mr. Kilburn has been quite clear in saying that and, indeed, it is
26 interesting really the position between Mr. Martin and Mr. Harding, neither of whom, of
27 course, were called for examination about how they say the pricing tariffs can actually be
28 calculated in negotiations and one sees their evidence at 249 in our document. At 249(3)
29 we set out what Mr. Kilburn actually says in his statement, about how BT is prepared to
30 work with the MNOs to establish a fair and reasonable price, and again as we have seen
31 there has been very little negotiation on that case.

32 The main evidence that seems to have actually been put forward by the MNOs relates in
33 fact to the calculation of the ARP (average retail price) and what we do say is quite
34 significant in this is that when you scratch away at the hyperbole one begins to see that in

1 fact the ARP, the concerns that are expressed about it are: (a) not really consistent with the
2 material we actually have, but (b) – more to the point – are inconsistent with Ofcom’s own
3 conclusions that it ought to be possible to calculate an ARP. There was reference to the
4 table A2.3 in Simplifying Non-Geographic numbers – Miss Smith referred to it earlier, and
5 then said “We do not know to whom that relates”, and then referred to the flex tariff. I just
6 make this point that if you go to that table and look at footnote 160 it actually refers to T-
7 Mobile’s flex tariff, so it is very difficult to say that this is something that simply does not
8 apply because of the flex tariff or whatever, it plainly was something that was specifically
9 being commented on and we do say that that actually gives an indication of what the
10 realities of this situation are. As I say, Ofcom itself indicated that it believed that an ARP
11 could be calculated.

12 As regards the billing ----

13 PROFESSOR STONEMAN: Just before you go to billing, Mr. Read, are you able to enlighten us
14 any further as to what is the average over?

15 MR. READ: Sorry, what is the average?

16 PROFESSOR STONEMAN: Over? Is it over just BT calls or over all calls, or is that still a
17 matter for negotiation?

18 MR. READ: As we apprehend it there is not actually a problem with this because it is over all
19 calls and that is what they actually charge, full stop – end of story.

20 PROFESSOR STONEMAN: That is fine, it is just ----

21 MR. READ: Certainly, that is what we understood Mr. Stone’s evidence to be, that they would
22 not be differentiating between BT calls and, for example, Cable & Wireless calls, and so
23 that therefore the retail price that they would be setting would be effectively whether it is
24 BT terminated calls or not, it would not make any difference.

25 PROFESSOR STONEMAN: There was some discussion about that but if the point is that it is
26 over all calls that does make things clearer, thank you.

27 MR. READ: I think that is the position and I am trying to look in our document for where we
28 actually make reference.

29 PROFESSOR STONEMAN: ... not from the Gods!

30 MR. READ: The final point we make about this Principle 3 and why we say it is not hugely
31 relevant in all of this is because on Ofcom’s own analysis they say that if Principle 2 is
32 satisfied then Principle 3 will be subject to negotiation. We say that if we have won on
33 Principle 2 that brings us home on Principle 3 and it is all very well at this stage to be
34 saying: “No, we say that Principle 3 is always much, much more complicated than this” but

1 one has to actually at the end of the day on something like this, in our respectful
2 submission, take a view about whether or not there really are going to be the difficulties that
3 are said to be difficulties, when in reality these are not complicated problems in the
4 telecoms industry – there are always issues about billing; that is why you have such a large
5 billing annex to the Standard Interconnect Agreement and indeed why I think there is a
6 separate billing manual as well, which if you look in that annex you will find there is
7 reference to a billing manual as well on top of it. These problems are, in our respectful
8 submission, relatively common and given the propensity to actually negotiate properly on it
9 it is not going to be a problem in this case.

10 Sir, at para. 258 we set out some very brief comments on EE's appeal, fundamentally we
11 say there is not anything in it, Ofcom have really riposted it, we say completely correctly, in
12 its defence and I will leave Mr. Herberg to no doubt deal with it further.

13 Sir, that might be a convenient point at this stage.

14 THE CHAIRMAN: You have relief to do?

15 MR. READ: I have relief to do and there are just a couple of points I might want to come back
16 on. The relief is set out relatively clearly there as to what our stance is on it, and the
17 Tribunal may, if it has time, take the opportunity of reading it so one knows in advance
18 what I am going to say. I think tomorrow morning I will not take more than five or ten
19 minutes.

20 THE CHAIRMAN: That is helpful. Miss Smith?

21 MISS SMITH: Before we rise, sir, I did say I would give the reference to EE's case on
22 origination charges for zero rated 080 calls, and that is found in EE's statement of
23 intervention in the 080 case, paras. 133 to 135, core bundle A, tab 4.

24 THE CHAIRMAN: Thank you. One point that we have to raise, and it is directed to Mr. Herberg
25 as the 'general shop steward', how are we doing on the diagrams?

26 MR. HERBERG: Sir, yes, the diagrams which were to be agreed between the parties, we have
27 produced drafts and I think BT has made amendments, and handed them over very much to
28 include the contractual details which we are not privy to, or do not know and I think that
29 further versions have then been circulated. I am not entirely sure whether all the MNOs are
30 content with them or not, but I think we are down to, as it were, seeing whether the
31 interveners agree with what has been added. We will try and take stock now, sir, and let
32 you know tomorrow morning exactly where we are – hopefully we will be able to hand
33 them up. There are separate diagrams which you asked us to produce and I will hand them
34 up tomorrow when I start my response.

1 | THE CHAIRMAN: I understand, thank you very much. We will say 10 o'clock tomorrow
2 | morning.

3 | (Adjourned until 10.00 am on Wednesday, 20th April 2011)

4 |