

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1212/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14th October 2013

Before:
PETER FREEMAN CBE QC (Hon)
(Chairman)
CLARE POTTER
JOANNE STUART

Sitting as a Tribunal in England and Wales

BETWEEN:

COLT TECHNOLOGY SERVICES

Appellant

-supported by-

EE LIMITED
HUTCHISON 3G UK LIMITED
TALKTALK TELECOM GROUP PLC
VERIZON UK LIMITED
VODAFONE LIMITED

Interveners

- and -

OFFICE OF COMMUNICATIONS

Respondent

- supported by-

BRITISH TELECOMMUNICATIONS PLC

Intervener

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HEARING DAY ONE

APPEARANCES

Mr. Kieron Beal QC (instructed by Baker & McKenzie) and Mr. Richard Pike (Solicitor-Advocate of Baker & McKenzie) appeared for Colt Technology Services.

Mr. Josh Holmes and Mr. Ravi Mehta (instructed by the Office of Communications) appeared for the Respondent.

Mr. Daniel Beard QC and Mr. Robert Palmer (instructed by BT Legal) appeared for British Telecommunications PLC.

1 MR. BEAL: May it please the Tribunal, I appear on behalf of Colt in this matter, with my
2 instructing solicitor, Mr. Pike. Messrs Holmes and Mehta appear for Ofcom, and
3 Messrs. Beard QC and Palmer appear for BT as the intervener.

4 Sir, in keeping with strictures, I have not produced a note verbale or any other form of
5 surrogate supplemental skeleton to pass up to you.

6 Initially, if I may, by way of housekeeping, could I ensure that we all have the same bundles
7 so that there is no potential error or misunderstanding as to the bundles I am referring to.

8 Firstly, I hope that the Tribunal has two core bundles, which I shall refer to as core bundles

9 1 and 2. Core bundle 1 contains the pleadings, the skeletons, the witness statements and
10 experts' reports. Core bundle 2 has a miscellany of different documents. The Tribunal

11 should then have, I hope, copies of the three appellants' bundles, 1 to 3, which accompany
12 the notice of appeal, and a supplemental bundle, volume A, which contains for the most part

13 confidential material that I do not propose to refer to, save silently. I might invite the

14 Tribunal to look at a passage but I do not propose to read it out. That way I hope we can

15 avoid the musical chairs that is usually accompanied with referring to confidential material.

16 THE CHAIRMAN: We are going to be in open court all today, that is our plan.

17 MR. BEAL: From my perspective, I do not know if my learned friends ----

18 THE CHAIRMAN: It may be slightly different tomorrow, but we can discuss this.

19 MR. BEAL: I hope the Tribunal also has two further bundles which accompanied our reply and
20 skeleton argument, and I shall refer to those as RS files 1 and 2.

21 I hope the Tribunal is also in possession of an intervener's bundle. Then we have Ofcom's
22 defence bundle and finally two bundles from BT, which I shall refer to as BT 1 and BT 2.

23 THE CHAIRMAN: It seems okay to us.

24 MR. BEAL: Thank you. In terms of timetable, whilst we have a large number of witnesses, the
25 parties have, between them, I think, sensibly narrowed the scope of many of the issues, and

26 I think we entertain the realistic hope that we can be done in the four days that are allowed
27 to us, possibly with an early start and a late finish, or slightly late finish on Thursday.

28 THE CHAIRMAN: For all kinds of reasons we would like to confine it to four days.

29 MR. BEAL: That view is shared, sir.

30 I have already noted there was a stricture from the Tribunal, quite properly, in exercise of its
31 case management powers, that there should be no further written submissions without the
32 permission of the Tribunal, and I, of course, speaking for Colt, am perfectly prepared to
33 accept that and respect it. Could I just ask that there should be a level playing field in that
34 respect, so that if I am obeying the perfectly sensible ordinance that I am not suddenly faced

1 with a written reply on Thursday morning. I am simply putting down a marker to that effect
2 at this stage.

3 Could I then please kick off the substantive submissions with an introductory overview, and
4 to that end please could I invite you to take out core bundle 1 and turn to the witness
5 statement of Mr. Lane, which is at tab 21. Please could I invite you to read, as I am sure
6 you already have, para.13 at p.4 of that witness statement, where Mr. Lane says this:

7 “A notable feature of the UK business connectivity market in the last 10 years is
8 that there have been almost no major new deployments of infrastructure by
9 business to business CPs. During the 1990s, the UK business connectivity
10 market saw the rapid deployment of new infrastructure. The majority was
11 focused in London and on high capacity routes between major business centres.
12 New investment dried up after the dot-com crash of the early 2000s.”

13 Neither Ofcom nor BT have sought to have Mr. Lane called to give evidence, and, with
14 respect, that is a statement of fact which is therefore unchallenged in these proceedings.

15 Next up, the witness statement of Paul Sinclair, please, just very briefly. Again, it is in the
16 same bundle and Mr. Sinclair’s first witness statement is behind tab 17. Please could I draw
17 the Tribunal’s attention in particular to paras.36 through to 40, which are pp.8 and 9. Please
18 could I invite the Tribunal to refresh its collective memory on those paragraphs. (After a
19 pause) We say that that demonstrates the intention of Colt if a passive access remedy were
20 to be granted by Ofcom.

21 Could I then please invite the Tribunal to look at the first witness statement of Mr. Kieron
22 McCann on behalf of Colt, which is in the same bundle at tab 15, and please could I invite
23 the Tribunal to read paras.5 and 6. (After a pause) For your note, sir, the five year business
24 plan of Colt is a confidential document, but it can be found in Notice of Appeal file 3, tab
25 A4 p.1 and in particular if the Tribunal would, at its leisure, look at p.27 out of 32. Please
26 may I draw your attention to one further document. I am afraid I am not sure whether it is
27 confidential or not, but I am sure I will be told. It is in the Interveners' bundle and it is part
28 of the MB1 division at tab A p.112. This bundle, at least in my version, is paginated all the
29 way through so it is perhaps easier, rather than looking at a multitude of tabs, to turn
30 straight to p.112.

31 THE CHAIRMAN: When you say interveners, Mr. Beal, do you mean your interveners?

32 MR. BEAL: I am sorry, our interveners, yes. I do apologise. I am referring to the BT bundles as
33 the BT bundles.

34 THE CHAIRMAN: BT1, is it?

1 MR. BEAL: It is from Tower House Consulting. On its spine it should say "Intervenors bundle".
2 It is a slim bundle. Thank you very much. It is a slim file and it is paginated all the way
3 through. Please could I invite the tribunal to turn to p.112. I am told this is confidential so
4 perhaps I could simply invite you to cast an eye over it and then I will hopefully make a
5 short point. (After a pause) The short point is this. There are only two jurisdictions that
6 are identified as not having the main thing that we are seeking.

7 THE CHAIRMAN: The company whose document this is, that is presumably not confidential, is
8 it?

9 MR. BEAL: No.

10 THE CHAIRMAN: It is the content.

11 MR. BEAL: The upshot of the documents I have shown you so far is that - hopefully this is not
12 controversial - firstly it is accepted or at least not challenged that there has not been any
13 major roll-out of infrastructure development in the UK for the last ten years in the business
14 market. Secondly, Colt, as has been made clear, is willing to do something about that.
15 Thirdly, we have put our money where our mouth is in the confidential document that has
16 been prepared. Fourthly, the absence of a passive remedy is in marked contra-distinction to
17 other jurisdictions.

18 There is a further point which is this. The Tribunal will be well aware of the fact that we
19 are undergoing a period of an NGA roll-out for superfast broadband across the country.
20 One of the issues that has arisen in that is the need for State aid funding to make it feasible.
21 In BT's own response to the call for inputs in June 2011, BT identified superfast residential
22 broadband as a potential substitute for business broadband. For your note, that is in BT
23 folder 1 divider 6, subdivider B p.1. At p.3 para.2 they made the obvious point, with
24 respect, that ducts could service both residential and business use. They note that because
25 of course BT's own ducts from BT's own services do exactly that. But at the moment (and
26 the Tribunal will be well aware of this fact) we have a passive remedy for residential
27 broadband - NGA, the so-called PIA remedy (physical infrastructure access remedy) that
28 Ofcom has granted, but we do not have the equivalent passive remedy for business
29 connectivity services. In a sense, it is that essential disparity between the treatment of
30 residential broadband and business broadband that Colt would wish to address.

31 Just again for your note, at p.5 of that particular document BT identified high growth in
32 demand for internet services, especially at higher bandwidths. Again, I do not anticipate
33 this is a controversial submission, it is clearly right that there is massively increasing
34 demand for Ethernet services. The mobile phone operators, the MNOs, require it for

1 backhaul services, and there is simply a general increase in business demand for high
2 quality Ethernet broadband.

3 Could I then please come on to our case in a nutshell, having I hope set the scene. The
4 Tribunal is well aware that we have advanced four grounds in our Notice of Appeal.
5 Ground 1 is that passive remedies and active remedies can co-exist in principle. The way
6 things have shaken out in the form of the pleadings and the skeleton arguments, that
7 proposition is not actually controversial. It seems to be accepted by Ofcom that as a matter
8 of principle that is right. So I do not propose to dwell on ground 1.

9 Ground 2, we say there is clear market demand for a passive remedy. I am sorry, I have
10 called it ground 2; I am taking ground 4 separately.

11 THE CHAIRMAN: You are going to lead us into trouble!

12 MR. BEAL: Yes, I am going to keep on referring to it as ground 4; I am simply going to take it
13 chronologically in a second.

14 THE CHAIRMAN: From my point of view, I would much prefer it if you stuck with the original
15 numbering and take it in whatever order you like.

16 MR. BEAL: Thank you very much. I shall not interpolate the ground.

17 THE CHAIRMAN: I have come to know and love them too!

18 MR. BEAL: Ground 4, we say there is clear market demand for the passive remedy that we seek.
19 Simply put, this is an error of fact on the part of Ofcom. They may turn round and say the
20 evidence is much clearer now than it was when it was before us, and that may well be right;
21 it may be that there is more evidence now than there was before Ofcom. But, with respect,
22 this is a merits appeal; it is a review jurisdiction; and it is clear that it is open to the Tribunal
23 - indeed the Tribunal must - take into account all the evidence that is before it. We say that
24 that error in factual evaluation of the strength of appetite for the remedy justifies remittal
25 without going on to the remaining issues which will bedevil us for four days.

26 The second ground is the next one I propose to take. That is as follows. We say the
27 imposition of a passive remedy would introduce a new level of competition at the
28 infrastructure level. Again, with respect, that cannot seriously be doubted. It must be right
29 that if you make something available and anyone uses it, that is introducing a level of
30 competition that did not exist previously. However, we say that it is a more focused
31 submission than that, because we say in principle the introduction of passive remedy would
32 help deal with what have been referred to as bottlenecks. Those bottlenecks have been
33 identified at various points in the material that is before you, and it is quite clear for
34 example that it is referred to by the MNOs in a number of places. I am not going to take

1 you to the specific evidence at this stage. Much of it is confidential. But there is evidence
2 of a bottleneck in the delivery of leased line services which is causing problems for a
3 number of competitors.

4 What we say the proper analysis of the framework and structure governing passive access
5 remedies in principle gives you is if not a positive presumption that a passive remedy should
6 be allowed, at the very least not the obverse. The obverse is the line that is adopted, with
7 respect, by BT which is as follows. Because the existing leased line market works you do
8 not need to introduce a passive remedy; in fact what you need to do is show, the burden
9 being on us, that the introduction of passive remedy would incrementally bring substantial
10 benefits. Unless you can surmount that obstacle, that hurdle, a passive remedy is not going
11 to be introduced.

12 We say when one looks at the overall structure of the market, and indeed the material that is
13 before you on regulatory principle, that presumption is not made good. Conversely, if
14 anything, there is a general acceptance that passive remedy would actually bring substantial
15 benefits. Unless you can surmount that obstacle, that hurdle, a passive remedy is not going
16 to be introduced.

17 Now, Ofcom accept that the introduction of competition would bring with it certain
18 advantages, in particular dynamic efficiencies, and in particular innovation. They accept
19 that — and product differentiation. It is true that Ofcom has identified certain risks. Part of
20 my submissions will be that those risks have been over-stated or can be addressed; but in
21 any event our primary submission is that if you were to grant passive access on a FRAND
22 basis, a fair, reasonable and non-discriminatory basis, then those perceived risks would not
23 materialise. That is the first submission.

24 The second submission is that in any event, the perceived risks have not been subject to a
25 welfare calculation. This is not a case where Ofcom is able to say, “We have worked out
26 what the risks are, what the benefits from introducing the remedy would be and then weigh
27 the benefits against the costs”. And we simply do not have that level of analysis anywhere
28 in the Decision.

29 Our third point is that in fact, when one looks at the justifications that are advanced for not
30 granting a passive access remedy, none of them represents an insuperable obstacle to the
31 grant of the remedy, at least not without undertaking the work necessary to see whether or
32 not those could be overcome. Now, the key focal point of Ofcom’s objection as it has
33 materialised — obviously all the parties’ positions have responded to each other, and this is
34 not a criticism of Ofcom’s position. But where they end up is that they say a passive

1 remedy would essentially disrupt the existing suite of active remedies. That is their core
2 submission as I understand it. We have a series of points in response to that, as follows:
3 firstly, the alleged disruption to the suite of active remedies would not arise if the Tribunal
4 were minded to grant access on a FRAND basis. That is the first point; secondly, as I have
5 indicated, Ofcom simply has not investigated what changes could be made to the existing
6 suite of active remedies so as to accommodate a passive remedy. They have taken a
7 decision *in limine* that passive remedies should not be granted and therefore have not looked
8 at what tweaks or modifications might be made to the existing price control so as to
9 accommodate a passive remedy, even though they acknowledge it would bring the benefits
10 of dynamic efficiency and innovation and product differentiation, i.e. choice.

11 Third, we say actually, properly analysed, disruption is not anything to be scared of. What
12 is it that is bad about disruption? Well, the answer is at the moment we simply do not
13 know, because the welfare analysis has not been undertaken. It may be, for example, that
14 disrupting the bandwidth gradient or the common costs recovery system that is already in
15 place would lead to welfare issues, but of course those have not been balanced against the
16 benefit that would be obtained from introducing competition at a deeper level of the value
17 chain than has hitherto been experienced.

18 Fourth, even if all of those points were somehow to be disregarded, we say that it is a
19 relatively straightforward matter. We do not say it is easy, but we say it is a straightforward
20 analysis to come up with a non-disruptive remedy. Now, we do not — and it is not part of
21 my job before you this week to turn around and say, “The answer is easy, it is ‘X’” — that
22 is not my case. Rather, we have said that with a little bit of time and effort we have gone
23 away and thought about this, and Dr. Lilico in particular has come up with a different bunch
24 of solutions which might work. To that, Mr. Mantzos on behalf of Colt, has tried to put that
25 into figures. He has done the best he can with the regulated financial statements that BT has
26 issued, and he has tried to say, “Look, this isn’t simply pie in the sky on the part of Colt. It
27 might work”. We are not putting forward the final figure as the figure that this tribunal
28 should direct, no, of course not. We are simply saying it can be done. If the work had been
29 done by Ofcom we would be facing a different case because they would have worked out
30 whether or not it was actually possible in practice to allow passive and active remedies to
31 exist side by side on a complementary basis.

32 THE CHAIRMAN: Are you putting this forward as an alternative to FRAND? Do you have any
33 preference?

1 MR. BEAL: We say FRAND is the short and sweet answer, because it does not give rise to the
2 risk of disruption. The objection to FRAND actually is not that it would give rise to a risk
3 of disruption, the objection to FRAND is that we cannot guarantee that it would not lead to
4 a fight. There would be a second order battle down the road between BT and the
5 communications providers who wanted to use FRAND and that would lead to a degree of
6 regulatory intervention and/or the disputes settlements procedure, and that is a waste of
7 everyone's time. Our response to that is that "You are planning for the divorce before we
8 have even married, and let us see what BT offer us".

9 THE CHAIRMAN: Yes, that is a fairly general objection to FRAND, is it not? I mean, I have
10 heard it elsewhere.

11 MR. BEAL: The beauty of FRAND is that it leaves the parties to behave like adults. Now, if the
12 parties cannot behave like adults, I agree that they may need a disciplining teacher to come
13 along and tell them to sort it.

14 THE CHAIRMAN: Well, it is not so much not behaving like adults, it is a question of self-
15 interest pulling them in different directions, I mean, I think you have said that yourself.

16 MR. BEAL: But I would expect BT to set a profit maximising price, I would be very surprised if
17 they did anything else. If they set a profit maximising price that is compliant with FRAND,
18 which leads to efficient common costs recovery, then that either works or it does not. It is
19 only if they do not actually comply with the FRAND requirements that there could be a
20 potential dispute. But at least as a first level response from the Regulator, we say that
21 FRAND ought to be tried.

22 Now it is one thing, we say, for Ofcom to turn round and say, "Well, FRAND will lead to a
23 big fight between the competing parties". It is another thing entirely, with respect, for BT
24 to suggest that that is what is likely to happen, because we say it is appropriate for BT as the
25 dominant incumbent to recognise that if it were required to comply with FRAND, it would
26 do so, and therefore it is no answer for BT to say that there would be an almighty fight
27 because we would need to wait and see what the terms of the FRAND offer were. So, I can
28 understand Ofcom's reluctance based on experience to put in place a remedy which leaves
29 the parties to sort it out amongst themselves, at least at first instance. We say, however, that
30 that experience should at least not prevent what is otherwise an unobjectionable response to
31 a perfectly good remedy.

32 In terms of how we see the case having developed, we do think this is important — I am not
33 bringing a reasoned challenge in any way, shape or form, but actually when I take the
34 Tribunal in a moment through aspects of the Decision, you can see why we could be

1 forgiven for having thought that Ofcom were treating passive and active remedies as
2 alternative rather than complementary.

3 THE CHAIRMAN: This is the ground you are not going to dwell on.

4 MR. BEAL: That is the ground I am not going to develop, yes (adopting the rhetorical device that
5 Cicero used). However, we do think it is important to see quite how this has panned out.
6 Firstly, we say that essentially because a view was taken *in limine* that a passive remedy
7 could not be accommodated alongside an active remedy. The result of that was that Ofcom
8 simply did not undertake any analysis of what adjustments might be made to the active
9 remedies to bring the passive remedy to bear. Now, what has subsequently happened is that
10 a greater focus has been given in Ofcom's submissions to the disruption of the active
11 remedy and what consequences that would bring for common costs recovery and inefficient
12 entry, which they referred to as "arbitrage", and BT calls "cherry picking".

13 We say that in fact once one appreciates that there is a demand, as we say there clearly is,
14 for the remedy, then the focus ought properly to change, because you have a position where
15 Ofcom recognised that a passive remedy is acceptable in principle alongside the active
16 remedy, it recognised that there is in fact a strong demand for it; there is an appetite for this
17 from competitors of BT, and those competitors, we say, would use it to clear a bottleneck,
18 so it would lower the barriers to entry that otherwise exist in the market and bring about the
19 benefits of competition. Now, given that, we say at the very least it is incumbent upon
20 Ofcom as a regulator, to go away and at least look at what could be done, and therefore
21 even if you are not with us on FRAND, we would suggest that it is appropriate in this case
22 to remit the matter to Ofcom for further work so that the issue can be looked at properly.
23 Now, in order to have the sort of welfare calculus that one would expect, we would need to
24 work out what the welfare gain is from maintaining the current system of active access with
25 price control based on a bandwidth gradient, and then weighing that against the net gains
26 that might come from the adoption of a passive remedy which would be innovation via
27 passive access, competitive dynamic advantages, the potential elimination of inefficient
28 cross-subsidies, a more focused basis driven by consumer need. Whilst we recognise that
29 you would need in this second limb of the cross-benefit analysis to recognise that there may
30 well be a small element of duplication of fixed costs. Here we are talking about duplication
31 not of an entire network, of course, but simply of rolling out the fibre of the active layer
32 and, secondly, certain inefficient consequences of an additional layer of competition. That
33 inefficiency that is driven by having two competitors rather than one is simply a feature of
34 rolling out competition at an infrastructure level. One could think of, for example, the water

1 industry where it is probably the most pure example of a natural monopoly because of its
2 infrastructure arrangements, but OFWAT have still driven a level of wholesale competition
3 which would have been unthought-of 25 years ago, so it can be done. There are obviously
4 costs of having two competitors rather than one, but certainly even for natural monopolies it
5 is no longer suggested that you should have a dominant incumbent and nobody else.

6 Unless you have any further questions, those are my submissions as to where our case goes
7 in a nutshell.

8 What are we asking you to do? First, direct on a FRAND basis. If you are not with me on
9 that then at the very least remit so that further work can be done to address the very real
10 issues we have identified.

11 THE CHAIRMAN: You will see the FRAND remedy as us actually ordering that.

12 MR. BEAL: You would direct Ofcom to reconsider the granting of a passive remedy. It seems to
13 me it is not for the Tribunal to direct a passive remedy as such, but look at the direction it
14 could be offered on FRAND terms consistently with the regulatory framework.

15 THE CHAIRMAN: But the alternative way of dealing with the difficulty, which we are going to
16 hear about tomorrow presumably, that would be remittal.

17 MR. BEAL: Yes. I am not asking you, at the end of the four days, to turn around and say duct
18 access at £100 and whatever per metre – whatever the figure might be – I have made up that
19 figure, I do not think it is borne out by Mr. Mantzos' calculations.

20 THE CHAIRMAN: Thank you.

21 MR. BEAL: Could I very briefly deal with the standard of review? As always in these appeals,
22 and the appeals, indeed, before the Competition Commission, generates more heat than
23 light. The short point is it is an appeal on the merits; that encompasses errors of fact, errors
24 of law, errors in the exercise of discretion, all of this is trite. Unless you would like me to do
25 so, I was not proposing to go through the authorities. If you would like me to do so, simply
26 set out the framework and reiterate points that are already in my skeleton I am happy to do
27 so, and I would do so principally by reference to two authorities, first, the Court of Appeal's
28 Judgment of Lord Justice Moses in *EE*, and, secondly, by reference to a recent Competition
29 Commission decision.

30 THE CHAIRMAN: We will take the thought for the deed. I think you can take it we are familiar
31 with our own duties.

32 MR. BEAL: I am grateful for that. Can I turn then to developing my substantive submissions on
33 the first ground of appeal? For your note this is dealt with in our skeleton at paras. 67 to 89,
34 Ofcom's skeleton at paras. 35 to 48, and BT's skeleton at para. 50.

1 Ofcom's position, as we understand it (see Defence para. 28) is that it accepts in principle
2 that a passive remedy can be combined, but says it was not appropriate to do so on the facts
3 of this case.

4 On that particular point could I very briefly refer you to some of the key provisions in the
5 Framework Directive and the Access Directive. The Framework Directive is in the bundle
6 of authorities 2, tab 29. At p. 51 there should be Article 8(5) of the Framework Directive,
7 and please could I invite the Tribunal to read that paragraph?

8 (After a pause): Mr. Pike helpfully reminds me that this is a consolidated version of the
9 Framework Directive, so it includes the 2009 amendments. In particular, one of the
10 regulatory objectives should be promoting efficient investment in new and enhanced
11 infrastructures – para. (d). That finds echo then in the following provisions of the Access
12 Directive, which is behind tab 30. At p. 81 I hope the Tribunal can see Article 12 and,
13 please, could you read that Article.

14 Those obligations, amongst others, have then been recognised in s.4 of the Communications
15 Act, and again I do not wish to try the Tribunal's patience, so unless you tell me otherwise I
16 am going to take it as read that you are very familiar with the Community requirements in
17 s.4, which include, of course, the duty to promote not only competition between services,
18 but competition between networks, which was the essential point I was seeking to make.

19 What then has justified in the statement the refusal to allow this extra level of infrastructure
20 competition to take place? The summary reasons can be seen in the statement at paras. 1.40
21 to 1.45. The relevant copies of the Decision are in various places. Could I simply invite the
22 Tribunal to read paras. 1.40 to 1.45 and I will make some short points on it?

23 THE CHAIRMAN: Yes. Is this the part in the summary that deals with passive remedies?

24 MR. BEAL: Yes.

25 THE CHAIRMAN: You do not want us to read 1.38?

26 MR. BEAL: Sir, if you would like to, I am happy for you to do so.

27 THE CHAIRMAN: It follows from what you were taking us through by reference to the
28 Framework Directive.

29 MR. BEAL: Those reasons are then set out in more detail in Chapter 8. I hope you also have
30 available Chapter 8. That is in core bundle 2, tab 8, p.643. (After a pause) Section 8
31 obviously bears reading with some care. It is a detailed summary of the reasons that were
32 adopted for declining to grant the passive remedy that was sought, and one sees in para.8.2
33 confirmation that Ofcom had “decided not to impose passive access in markets for leased
34 lines services”.

1 Paragraph 8.3, the last three lines:

2 “However, we recognise that it is possible that the imposition of passive
3 remedies in leased lines markets could be another way of supporting
4 competition in downstream markets.”

5 So that is agreed between the parties.

6 Then para.8.4:

7 “The existing remedies ... support substantial existing investments in
8 infrastructure and commercial activities ... If we were to impose passive
9 remedies then, at least in the short term, we would need to manage the co-
10 existence of the two types of remedies.”

11 Again that is not, we think, controversial.

12 “However, imposition of passive remedies is likely to be inconsistent with
13 important aspects of the package of remedies which we are imposing, including
14 the form of the charge controls.”

15 That is where we say you get the internal *fait accompli*. The fact that they have identified,
16 admittedly over the course of a detailed consultation procedure, a suite of measures which
17 are going to be adopted at an active level, is taken as a given because it is recognised that
18 they are going to be imposing those active remedies and there is no room, in the light of
19 that, for a passive remedy. There is no conception that it might be possible to tolerate
20 complementary remedies, namely active and passive, by modifications that might be made
21 to this suite of measures, or the suite of measures that are being proposed actually in this
22 very Decision.

23 There is then a reference, I should say, the next line to alternative rather than a complement,
24 but that is necessarily a ground of appeal that is not going to raise its head.

25 Then 8.6:

26 “We have considered the potential benefits that the imposition of passive
27 remedies could deliver. Some CPs have argued, for example, that the pace of
28 innovation could be increased in some parts of the market.”

29 I think that, later on, it is accepted that innovation would be one of the benefits from the
30 passive remedy.

31 “However, it is not clear to us that the competition issues we have identified in
32 leased lines would be addressed more effectively in the round by the imposition
33 of passive remedies than by our current approach to remedies.”

1 Just pausing there, that amounts to effectively a welfare analysis that we are as well off now
2 as we would be if we introduced a passive remedy, but what you do not have behind this
3 reasoning at any stage is a detailed weighing up of the pros and cons of allowing the passive
4 remedy to be introduced as a complementary remedy in conjunction with the active remedy.
5 So it is that issue which would be the crucial welfare calculus for Ofcom to have adopted,
6 and it is that reasoning which is absent from the Decision.

7 THE CHAIRMAN: Mr. Beal, you used this “*fait accompli*” phrase at various points. Is your
8 point that Ofcom came to a prior decision, a *fait accompli*, earlier in the process?
9 Obviously the Decision is a *fait accompli*, you cannot object to that. What you are saying is
10 that they did something earlier that they should not have done - is that right?

11 MR. BEAL: They had already developed, we say, a charge control process, which is an active
12 remedy, which enabled wholesale leased line provision to be conducted on a charge control
13 basis. There is no recognition as far as we can see anywhere in section 8 that, in fact, what
14 could have been done, consistently now with the way that Ofcom accepts a passive access
15 remedy could have been rolled out in principle with active remedies. They have not actually
16 analysed how they could have allowed a passive remedy to exist alongside an active
17 remedy. So it must stand to reason that either they had already decided that the active
18 remedies would be sufficient and they were not going to change them, or, at the least, when
19 formulating their final concluded view, they have not done any analysis to work out
20 whether or not that conceptually acceptable bilateral approach to remedies would work.
21 The next paragraph is 8.6, and it is true that Ofcom identifies in the third line:

22 “However, it is not clear to us that the competition issues we have identified in
23 leased lines would be addressed more effectively in the round by the imposition
24 of passive remedies than by our current approach to remedies.”

25 Again, that reinforces the fact that they are continuing with a process which has already
26 been set down. As a matter of fact, it is right that there had been a previous charge control,
27 and that what this decision did in part was to modify the existing charge control. So from
28 Ofcom’s perspective, what they are saying is, “We are continuing the process we have
29 already adopted”, we are not going to put in place a passive remedy. My point is that they
30 did not consider to what extent the existing remedies could be modified or adjusted to allow
31 passive remedies to be rolled out. That is what I refer to as the *fait accompli* point.

32 Another way of looking at it would be that is not a guns or butter issue, because they accept
33 that, in principle, passive remedies could be tolerated alongside active remedies. There is

1 then a question simply of working out how you deal with that in practice to ensure that the
2 two remedies do not run off in different directions.

3 Then 8.8 we say contains a clear finding by Ofcom that there would be no appetite for the
4 passive remedy if it were offered. It is correct to say that the wording actually used is that
5 they have seen no evidence that CPs would invest substantially in leased lines
6 infrastructure based on passive remedies. There may well be a fairly sterile debate between
7 the parties as to what the word “substantially” means. Our point is that when one reads this
8 in the round, it is quite clear that Ofcom is taking the view that if they were to do this there
9 would not be a substantial take-up of the remedy. There would not be anyone significantly
10 using it. We say that actually that is simply an error of fact. Given the material that is now
11 before the Tribunal, it is open to this Tribunal to find that that was a flawed factual
12 evaluation.

13 Then 8.9, Ofcom say:

14 “Overall, the imposition of passive remedies would be likely to be require
15 significant regulatory changes and intervention, and we would therefore need
16 clear evidence to justify such an approach.”

17 That, with respect, seems to be putting the onus on those who are seeking the passive
18 remedy to put in place a concrete justification for it in advance of it being adopted. We say
19 that that is not consistent with the regulatory approach that is defined by the CRF
20 Framework.

21 Could I then to turn to para.8.43, and please could the Tribunal read 8.43 through to 8.50.
22 (After a pause)

23 1120

24 ... Those reasons, in a nutshell, are why Ofcom took the view that it was not appropriate to
25 allow a passive remedy and an active remedy to co-exist.

26 THE CHAIRMAN: Those are Ofcom’s considerations in response to comments on the June
27 consultation?

28 MR. BEAL: Yes. May I please then invite you to turn to Mr. Culham’s first statement which is
29 again in the core bundle at tab 11. Please could you turn to p.22 in that first statement and
30 para.66. We have read this paragraph in accordance with its ordinary, natural meaning. I
31 do not think it is confidential, as far as I am aware, so I am going to read it out. Third line
32 down:

33 “Ofcom’s decision was reached on the basis that it saw the package of remedies
34 that it proposed as being best suited to addressing the competition concerns

1 which it had identified. It accepted that there may be benefits from passive
2 remedies through the potential opportunity for innovation, but it did not see
3 clear examples of how passive remedies would be used as a spur to innovation.
4 Ofcom also did not see convincing evidence of a desire to make substantial
5 investments using passive remedies. [ground 4] The combined effect of the
6 lack of a compelling story of either innovation or a desire to make substantial
7 investment led Ofcom not to undertake the significant work necessary to tackle
8 the common cost recovery and potential rebalancing issues. The balance of that
9 assessment could change in the future, were evidence brought forward to
10 strengthen the positive case for passive remedies in terms of their likely use in
11 providing innovative services.”

12 That supports my submission that what has happened here is driven by, we say, the
13 factually inaccurate assessment that there was no appetite for the remedy and it would not
14 lead to innovation. The consequence of that was Ofcom did not undertake the significant
15 work necessary to work out how it could either put passive remedies alongside the active
16 suite of remedies that it was proposing to adopt, or indeed with respect, any significant
17 thought as to how a passive remedy might work. One option, of course, would be to work
18 out a passive remedy that co-exists with an active remedy, and another is simply to think
19 about whether or not, for example, a passive remedy might be based on FRAND terms and
20 see where it went. Again, you do not have that remedy anywhere in the statement because
21 the (as I have called it) the *in limine* approach (I will be told off, no doubt, by senior
22 judiciary for using Latin, but putting that to one side) - there is simply a threshold objection
23 to raising the passive remedy because it is perceived to cut across the suite of active
24 remedies that have already been put in place. That, with respect, is a *fait accompli* point.
25 Another way of putting it does require me to at least draw your attention to a confidential
26 document and it is in the supplemental bundle tab 6, p.4. The supplemental bundle is Colt’s
27 supplemental bundle following the disclosure of confidential information to it. (Tab 6 p.4.)
28 That particular document has at the top a series of bullet points, and bullet points all the way
29 through. Please could I invite the Tribunal at p.4 to read the first six bullet points. (After a
30 pause) In a nutshell, we say there was no concrete attempt to engage with what is now
31 accepted to be acceptable in principle, which is passive and active remedies can co-exist;
32 one can devise a system whereby the two are co-managed. That exercise was not
33 undertaken. That is ground 1.

1 Sir, I have noted we do not have transcribers, but if the Tribunal would like a break at any
2 point, please do say.

3 My fourth ground is going to be quite short.

4 THE CHAIRMAN: Perhaps we might take a break after your next short ground!

5 MR. BEAL: That one was short! It is all relative. Ground 4 is shorter. This is dealt with in our
6 skeleton at paras.67 to 89; Ofcom's skeleton at 95 to 120; and BT's skeleton at 75 to 78.
7 Section 8 of Ofcom's statement at para.108 core bundle 2 tab 6.

8 MS POTTER: Could you give the reference again, please.

9 MR. BEAL: It is para.8.108, section 8 of the Decision, the statement. I think it was tab 6. Tab 8,
10 I am grateful. Paragraph 108:

11 "As discussed above, imposition of passive remedies would require significant
12 regulatory changes and intervention, and, before we could impose them, we would
13 need to have compelling evidence that passive remedies would lead to a better overall
14 outcome for competition in the leased lines markets."

15 The way that that then factored into the particular findings on the level of likely usage of the
16 remedy can be seen overleaf at p.658 of the statement paras.8.125 onwards. Paragraph
17 8.125 said that their consultation process had:

18 "revealed no evidence that any CP would invest substantially in infrastructure based
19 on passive remedies over a forward looking period of the review if we were to impose
20 them in leased line markets. In addition, while we acknowledge that the business case
21 for investment in fixed NGA infrastructure for consumer superfast broadband ... may
22 be challenging, we were not provided with any evidence by any CP showing that
23 extending the allowed uses of PIA ... would unlock significant new investments" ...

24 Paragraph 1.31:

25 "[Having recognised that] it may be appropriate to consider making these changes
26 [namely bringing into effect a passive remedy which led to sustainable and effective
27 competition — see paragraph 8.130 — nonetheless that] would depend on there being
28 concrete evidence that the transition would lead to a better overall outcome for
29 competition ... with evidence that CPs would invest substantially in competition using
30 passive remedies".

31 So it is quite clear that one of the drivers for Ofcom's refusal to consider the extent to which
32 passive remedies should be introduced, was the fact that it was perceived that there was no
33 appetite for the remedy, were it to be rolled out, and that point is also made in the second
34 bullet point at paragraph 8.132:

1 “There is no evidence [it says there] that CPs would invest substantially in
2 competition based on passive remedies if they were available in the forward-looking
3 period of this review”.

4 Now we, shortly put, say that is wrong and that we have given extensive references in our
5 skeleton argument to the confidential material and indeed the non-confidential material
6 where we say that is wrong. I do not propose, in the time I have for my opening, to go
7 through any of the confidential references and take them to you, save for two or three
8 passages from the Interveners' bundle. In fairness to them, they have sought to intervene,
9 and it is right that I should therefore take you to the gist of the evidence that they are giving
10 the tribunal.

11 Could I, very briefly in passing, dealing with one point that is raised against me, the
12 Interveners' bundle, that will be where we are going, but can I just very quickly deal with
13 one point, this: Ofcom say even if we were right on this, and there were an error of fact, it
14 would not have made any difference to the actual outcome, and I have given you a reference
15 in my skeleton to the *Smith v North East Derbyshire* case, where May LJ at paragraph 10
16 says quite clearly that you would need to show that the result of the decision would
17 inevitably be the same. And I have taken you to Mr. Culham's paragraph 66 where he says,
18 “If there were evidence of demand, we might reconsider”, and with respect that is a
19 complete answer to the idea that you can plough on regardless and accept that the Decision
20 is not flawed because it would not make any difference if there were in fact evidence of an
21 appetite for remedy.

22 The examples from *Vodafone* that I propose to draw your attention to are in the Interveners'
23 bundle, tab.1H at p.52. I think this probably is a confidential document, so I am afraid I am
24 simply going to have to draw your attention to certain paragraphs silently, well, not the
25 paragraphs silently, but the evidence silently. It is the third paragraph at p.52 down, it
26 begins “However”. (After a pause) And if the Tribunal would please read the last
27 paragraph on that page as well, beginning “There is”.

28 THE CHAIRMAN: This is a confidential response to the Ofcom consultation.

29 MR. BEAL: Yes.

30 THE CHAIRMAN: Yes.

31 MR. BEAL: Page 54. I do not think it is confidential with the response as well (otherwise I have
32 already breached the confidentiality requirement). At p.54 there are two paragraphs, please,
33 the third and the fifth. (After a pause) And then finally, just for your note, sir, pp.57-58

1 contain evidence to back up the assertions that have been made by reference to matters that
2 I probably cannot go into.

3 Also within this bundle we have a witness statement from Matthew Braovac of Vodafone.
4 It is at MB1 tab.1, it is also in the confidential bundle at tab.26 of bundle 1, sorry, core
5 bundle 1, tab.26 but it is easier perhaps to go to the witness statement here while we have
6 this file open.

7 THE CHAIRMAN: Page 100?

8 MR. BEAL: It is tab number MB1, and in particular at paragraphs 10-14, please, of
9 Mr. Braovac's statement. Again, if I could invite the Tribunal to read it, I would be very
10 grateful. (After a pause) And would you then please read paragraphs 22-23. (After a
11 pause) Within the same bundle please would the Tribunal then turn to tab GP1, it is right at
12 the end of that particular bundle, it is a witness statement from Graham Payne on behalf of
13 MBNL. It is one short paragraph, para.16 at p.165. There are two essential points made
14 against me on this ground by Ofcom. First, it is said that whilst I have identified, or we
15 have identified appetite for the remedy, it is not evidence of a substantial or significant
16 investment plan, and you will have seen, for example, that our response to that is that that
17 sets an unduly high expectation, and one cannot expect commercial parties to roll out a
18 detailed business plan for a remedy that is not recognised by the regulator. Now, what we
19 have obviously done for the purposes of this appeal is something not too dissimilar from
20 that, as you will be aware there is a case study that was prepared, and that has led to what,
21 with respect, I would see as a side avenue of debate between us and BT as to the extent to
22 which that case study is accurate and/or properly reflects ordinary costing principles. That
23 is not going to be the focus of any of my submissions before the Tribunal. We say that it
24 was a useful exercise for showing that certain points could be drawn from it but we do not
25 think that this appeal turns on whether or not you find that Mr. Fournier's evidence is to be
26 preferred to that of Mr. Yardley.

27 More importantly, we say, the fundamental point is nobody is going to devote a large
28 amount of time and resource to scoping out a business plan for a remedy that is not on the
29 table and, again, we do not think that ought to be a controversial proposition. In fact, with
30 respect, we see the focus of Ofcom's case as having been not that, in fact, there is no
31 demand for it – Mr. Culham, for example, in his witness statement recognises there would
32 be a commercial appetite for aspects of it – their case is not that there is no demand, it is the
33 wrong type of demand, because it leads to arbitrage. It is almost the way you are suggesting
34 the passive remedy would be deployed would give rise, they say, to the very real risk that

1 we would start raping and pillaging BT's pricing structure across the country and driving an
2 inefficient form of market entry, thus enabling us to take the benefit without the burden of
3 giving anything back for the type of dynamic competition we are introducing.

4 THE CHAIRMAN: That is a separate point, is it not?

5 MR. BEAL: Precisely, so it is nothing to do with this ground. That comes into Ground 3, that is
6 not a Ground 4 point. The Ground 4 point, shortly put – I have shown you the references –
7 they turned around and said: "We have seen no evidence of a significant appetite for this
8 remedy", they used the words "substantial intention to invest". We say that is wrong as a
9 matter of fact and that error of fact justifies remittal unless you would inevitably find that it
10 would have made no difference, which is the test that has to be applied.

11 THE CHAIRMAN: And you are saying that the evidence can come from a number of sources
12 and can be about demand for a variety of uses.

13 MR. BEAL: Yes.

14 THE CHAIRMAN: It does not have to be the same use as your clients?

15 MR. BEAL: No. I have shown that there is a high demand for Ethernet services. I have shown
16 that there is a demand from the industry as a whole to remove bottlenecks, that demand will
17 drive a requirement for passive remedies be it from us or from any of the MNOs who wish
18 to roll out duct access to enable them to get backhaul, which there will be substantial
19 demand for because of the 4G take-up in data.

20 That is Ground 4.

21 THE CHAIRMAN: Shall we then break for five minutes before we get on to either 2 or 3 or
22 both?

23 MR. BEAL: It will be the second ground of appeal and then the third.

24 THE CHAIRMAN: Thank you very much.

25 (Short break)

26 MR. BEAL: Could I turn then to the second ground of appeal, and this is in our skeleton at paras.
27 67 through to 89, Ofcom's skeleton at 49 through to 52, and BT's skeleton at 16 to 29. Our
28 essential point here is that Ofcom has erred in requiring us to show that we need to have
29 concrete evidence why the imposition of a complementary passive remedy would result in a
30 better overall outcome, and we say that actually when one looks at, not only Ofcom's
31 previous approach, but also some of the material in the CRF, that approach is flawed.
32 Could I then turn, please, to Ofcom's strategic review, which is in our notice of appeal
33 bundle 2, tab A3, annex 3, tab 5, p.80. The first page of tab 5 shows the document is a final
34 statement on the strategic review, it dates from September 2005. I would like the Tribunal

1 to look at paras. 4.3 to 4.7, which are at p.18 and 19. (After a pause): There is a series of
2 points which come out of those paragraphs, we say. First, competition based on
3 infrastructure tends to give the greatest benefits in terms of a mix of lower prices and faster
4 innovation, which is what consumers and businesses want.

5 Secondly, promotion of competition at the deepest level of the infrastructure is desirable.
6 Thirdly, promotion of infrastructure competition in that way is capable of overcoming
7 enduring bottlenecks in the provision of services.

8 Fourthly, it is recognised that some degree of geographical variation may be inevitable in
9 the structure of the market; and, finally, we see a recognition that if you do not overcome
10 some of those enduring bottlenecks it can lead to poor performances, and a diminished
11 quality of the product that is available from the incumbent.

12 At para. 5.5, p.23, it is recognised that the principle of allowing competition within the
13 infrastructure is any way inherent in the EU regulatory framework. It is an established
14 principle of the Framework that downstream markets should not be subject to *ex ante*
15 regulation where remedies imposed in upstream wholesale markets are sufficient to ensure
16 effective downstream competition. This principle is significant because it means that once
17 the quality of access to upstream bottlenecks has been achieved steps can be taken to
18 remove *ex ante* regulation in downstream retail markets.

19 THE CHAIRMAN: And you are saying that a remedy in a wholesale market will tend to be an
20 access remedy, or a structural remedy in that sense?

21 MR. BEAL: It would be a remedy which enabled infrastructure competition to take place in
22 preference, or it is a better way of liberalizing the market and reducing barriers to entry than
23 simply allowing regulated wholesale access on a price control basis.

24 THE CHAIRMAN: And you are saying that infrastructure competition can cover a variety of
25 different situations, so not necessarily purely one infrastructure competing with another
26 infrastructure but a mixture. Is that right?

27 MR. BEAL: Yes, because a duct is a species of infrastructure.

28 THE CHAIRMAN: And you are saying that that is what this means?

29 MR. BEAL: Could we then please turn within the notice of appeal bundle file 1, Annex 2, tab 2,
30 p.13, which I hope is a revised ERG common position on the approach, dated May 2006.

31 Please could I invite the Tribunal to read the second and third paragraphs of that page.

32 THE CHAIRMAN: Page 13, "In order to promote"?

33 MR. BEAL: It starts, "In order to promote sustainable". (After a pause) That is an early
34 statement of a proposition that then finds fuller form behind the next tab, tab 3, which is a

1 BEREK report on the implementation of the NGA recommendation. At the top of the page,
2 right hand side it says 10/108, para.A.4, Ladder of investment. It says that the BEREK's
3 analysis is based on the ladder of investment principle, but is also reflected in
4 recommendation 3 of the NGA recommendation. That is then cited, namely, that:

5 "The appropriate array of remedies imposed by a National Regulatory
6 Authority should reflect a proportionate application of the ladder of investment
7 principle'. All NRAs follow the concept of the ladder of investment principle,
8 that regulated access promotes competition and investment, thus fostering a
9 competitive NGA roll-out."

10 Then over the page at 11 of 108, there is a suggestion that where SMP is found within
11 market 4, and I accept that we are within market 6, but this is market 4 for the moment,
12 where SMP is found within market 4, and if duct capacity is available, duct access should
13 be mandated according to Article 13 of NGA Recommendation.

14 That then, we say, is a recognition that within market 4 for the purposes of effectively
15 super-fast broadband, there is an expectation that the duct access will be made available
16 where it will assist in competition at the infrastructure level.

17 The question then is what happens if there is no demand for the product. That is dealt with
18 at p.14 of this document, at para.B3, sub-heading, "Main arguments from the Commission",
19 and it says this:

20 "The Commission invites the National Regulators to ensure effective access to
21 civil engineering infrastructure, even if unbundled access to the fibre loop is
22 mandated. Access to civil engineering should be imposed even if the product is
23 not explicitly included in the market definition or there is no demand for the
24 product."

25 So mandating access to ducts is a good thing in and of itself is the import of this BEREK
26 statement.

27 Could I then, please, turn to the recommendation itself, because this is a report on the
28 implementation of the recommendation. The Tribunal will find that in the bundle of
29 authorities, second volume, tab 36, p.41, one sees recommendations 13 through to 17.

30 Please could the Tribunal read those paragraphs. (After a pause) Could I invite you to look
31 at some observations that have been made by Ofcom in its policy goal of rolling out super-
32 fast broadband, which is market 4, which is what this recommendation relates to. That is in
33 BT's file 2, divider 6F, tab 5. This document is not, in fact, the document that is advertised
34 in the index, but I hope it is the same document that you have. It is a document headed

1 “Delivering super-fast broadband in the UK”, with a publication date of 3rd March 2009.
2 What was advertised in the index was an Analysys Mason report, but it is summarised in
3 this report in any event. We have copies of that should it be needed, but for present
4 purposes it is not necessary, and it is para.6.10, p.38. What the Regulator recognised in
5 para.6.10:

6 “One of our core principles in regulating telecoms is to establish competition at
7 the deepest level that is effective and sustainable. It is clear that passive
8 products represent the deepest level but less clear currently that they will be
9 effective and sustainable.”

10 So Ofcom was essentially saying, “We do not yet know whether passive remedies are going
11 to work in this market 4”. We now know, of course, that they took the view that they were
12 likely to work or at least produce incremental benefit because that is what Ofcom
13 subsequently did in allowing a passive access remedy in market 4.

14 At p.46 one sees a recognition in para.6.41 that this particular section of the report:

15 “... has considered the passive products which we believe will be most
16 appropriate in the future and what our regulatory stance towards them should
17 be. We continue to believe that competition based on passive inputs is
18 attractive as it offers the greatest scope for innovation and consumer benefits.
19 However, such competition is only desirable where it is effective and
20 sustainable.”

21 In the light of that, one might have thought that similar reasoning should apply to market 6
22 which deals with wholesale terminating segments of leased lines, which if not expressly,
23 implicitly includes the leased lines market for these purposes. There is, however, a
24 common position, i.e. a European regulators common position, on best practice in market 6.
25 Sir, you will find that in Notice of Appeal file 1 annex 2 tab 5. I am sure the Tribunal is
26 aware of the difference between market 4 and market 6 in the regulatory statement of
27 markets that is derived from the European Commission. Market 4 essentially relates to
28 residential broadband services, and market 6, as I have indicated, deals with wholesale
29 terminating segments. There is reference in my skeleton to the particular measure that sets
30 that out by way of an annex.

31 The common position is tab 5 of annex 2. One sees from the third line down:

32 “This common position provides best practice remedies for dealing with
33 competition issues in respect of wholesale access products in the leased lines
34 market (Market 6) ... This document is relevant to all wholesale leased lines

1 remedies imposed as a consequence of a finding of SMP, whether the relevant
2 market defined by the NRA is a market for trunk segments, terminating
3 segments, or a backhaul market. Wholesale leased lines are key inputs for
4 providing a wide range of business connectivity services. It is therefore vital
5 that, where they are not supplied under conditions of effective competition, they
6 are regulated effectively. This will promote the competition and choice upon
7 which businesses throughout the economy are entitled to expect and thereby
8 make a significant contribution to achievement of the Single Market. This best
9 practice is also based on the ‘Ladder of Investment’ principle, as regulated
10 access at different rungs of ladder promotes both competition and investment.”

11 Then over the page at p.3 of 19, there are two particular best practice principles set out, 3
12 and 4.3 says:

13 ”NRAs should encourage infrastructure competition at the deepest level where
14 it is reasonable, reducing barriers to entry. (BP4) To avoid competitive
15 distortions access should be mandated regardless of the technical solution
16 insofar as it is proportionate, possible and efficient. Different treatment of
17 copper and fibre based wholesale leased lines should be justified and non-
18 discriminatory and should be based on the differences in identified competition
19 problems between copper and fibre.”

20 We know that those principles have now been put into effect for the residential broadband
21 market through the PIA remedy for NGA networks. What we do not have is an equivalent
22 recognition that best practice can also be served by introducing a passive remedy in a
23 wholesale leased line market. That, we say, a combination of existing statements of
24 principle, policy concerns from Ofcom, recognition within the CRF framework of the
25 benefit of competition at the infrastructure level at the very least supports a finding that
26 Ofcom was wrong to approach it as putting an onus on us to justify the passive remedy. At
27 the very least, it should have been a neutral consideration. Even if it goes too far to say
28 there is a presumption in favour of a passive remedy, somebody coming along and saying:
29 we will use a passive remedy; we will have a demand for it, ought to lead a regulator to say:
30 yes, that is consistent with the regulatory framework and we will therefore look closely at
31 the reasons why it should not be introduced. What it should not do is induce Ofcom to turn
32 around and say: unless you can show it is clearly better than the active remedies that are
33 already there, we are not going to do it.

1 THE CHAIRMAN: Are you going to deal at some point with Ofcom's argument that
2 circumstances in market 4 are different from the circumstances in market 6?

3 MR. BEAL: The circumstances in market 4 are different because it appears that people are not
4 prepared to roll out NGA access to certain geographical regions. Ofcom's position, as I
5 understand it supported by BT, is that that concern does not apply to wholesale leased line
6 markets because there is business connectivity throughout the country.

7 With respect, it does not deal with the point that we have raised which is that there is
8 business connectivity throughout the country based on BT's infrastructure. Our point is that
9 when one looks at what has actually happened in the last ten years there has not been the
10 roll-out of another full set of infrastructure to compete with BT's infrastructure at a national
11 level. So that demonstrates actually the same problem as one has found with the NGA, that
12 there is no economic incentive to roll out a competing infrastructure network across the
13 country.

14 That simply is a matter of fact - see Mr. Lane's statement that I commenced my
15 submissions with. If that is right, then it places a premium on looking at what can be done
16 about it. One thing that can be done about it would be to somehow incentivise the roll-out
17 of a duplicative infrastructure at the network level throughout the country, or in given
18 regions. But we know, for example, from Colt's evidence that the economics do not justify
19 that. Another way of dealing with the barriers to entry and the lack of infrastructure
20 competition is to allow the passive remedy to be implemented alongside the active remedy.
21 That would enable barriers to entry to be broken down; it would enable competing
22 infrastructures to be rolled out, if not across the country then certainly in core segments. So
23 one can think of major conurbations and the Tribunal is well aware from the confidential
24 information which conurbations have been selected and identified as potential recipients of
25 a rolled out network on a metropolitan access network basis (MAN basis).

26 THE CHAIRMAN: Does your case allow for simultaneous active and passive remedies?

27 MR. BEAL: Our case does allow for simultaneous active and passive remedies because we say it
28 is appropriate to modify or at least consider the modification of the active remedy to enable
29 a consistent passive remedy to be rolled out alongside it. We are not suggesting this is the
30 answer. We have given a way in which it could be done, but one example, for example,
31 would be to set a passive remedy at a price that did not lead to a disruption of the active
32 remedies either on the basis of geographical arbitrage or through bandwidth gradient
33 arbitrage. A price would be set for it which therefore could be used by competing
34 undertakings so that they could then decide how to roll out its network. If there is an

1 economic case for rolling out a completely duplicated infrastructure then we will do that. If
2 there is a business case for using the duct remedy (as I will call it), the passive remedy to
3 allow access to duct, to roll out something less than a full infrastructure but which takes
4 advantage of existing infrastructure and enables us to use our own fibres through it, then
5 that is a level of infrastructure competition that is beneficial. So long as it is priced so that it
6 is not inconsistent with the existing active remedy this also allows the third category of
7 person, who will not be Colt, simply to rely on wholesale leased line access to provide their
8 own form of retail business broadband.

9 THE CHAIRMAN: Are you saying that Ofcom made the wrong consideration, or are you saying
10 they did not consider this at all?

11 MR. BEAL: I am saying that Ofcom essentially put the onus on us. This is ground 2. They put
12 the onus on us to justify the imposition of a passive remedy and say why it would be
13 significantly better than the active remedies that are already in place. When one looks at the
14 consistent policy statements and the consistent CRF framework statements, one sees that
15 passive remedies is accepted to be in principle better than active remedies, and therefore
16 Ofcom was wrong in its approach to put the onus on us to justify what we were seeking.
17 They should have been saying: clearly a passive remedy is a good thing and let us look at
18 how we can introduce it. But they did not. They turned round and said unless you can
19 show a significantly better outcome than what we have already rolled out then we are not
20 going to consider it. Would you give me a moment, sir.

21 MS POTTER: Just before we leave the Verizon position, having drawn our attention to the
22 recommendation in relation to market 4, am I right in thinking there is not anything in the
23 common position specifically in relation to mandating access to ducts and duct fibre? Do
24 you want to make any comment on the significance of that?

25 MR. BEAL: The best practice relates to market 6. There is not the equivalent of the NGA
26 recommendation specifically for market 6. I am not able to say what the significance of that
27 is because in fact, the very same rationale should apply to the roll out of the passive remedy
28 for residential broadband as for business broadband, if there is a deficiency in business
29 broadband. And so if you were to accept the evidence that we have submitted that there is a
30 demand for this remedy and people want it and there is a bottleneck and in principle passive
31 remedies are a good thing, then one can infer that there is in fact an unmet demand for a
32 passive remedy at a business broadband level, and if that is right then the NGA
33 recommendation that is specifically dedicated to market 4 should apply by parity of
34 reasoning to market 6. So Ofcom's response is not that what they say in the

1 recommendation for NGA access is flawed in some way, it is that you do not need to worry
2 with the same concern for market 6 because in fact there is a broadband business
3 availability across the country by virtue of BT's incumbent network. So it changes the
4 focus, really, of the argument. That then is the second ground of appeal.

5 I come then to the third ground of appeal. This is in our skeleton at paragraphs 67-89, and it
6 is in Ofcom's skeleton at paragraphs 53-94. It is in BT skeleton at paragraphs 30-74. And
7 please could I here very briefly look at some further paragraphs in the statement itself, that
8 is in tab.8 of core bundle 2. I took you a moment ago to paragraph 8.40 so I will not go
9 back to that. It recognised that competition could be improved, Then:

10 "8.73 [Ofcom recognised] that leased lines need to provide increasing bandwidths at
11 reducing costs per unit of bandwidth to meet end-users' generally increasing demands
12 for faster services ... In particular, we understand MNOs' desire to reduce the charges
13 they pay for mobile backhaul".

14 "8.76 [One finds a recognition from Ofcom that] requiring BT to share its physical
15 infrastructure by imposing passive remedies ... could stimulate competition by
16 lowering barriers to entry from competitors who invest in infrastructure. In the case
17 of a PIA remedy, BT's competitors would avoid the initial cost of investing in their
18 own civil infrastructure such as trenches and ducts".

19 "8.101 (Innovation) [Ofcom recognise that] Some CPs [had] argued that access to
20 passive inputs could provide scope for innovation and competition at the active layer,
21 and that passive remedies would allow them to differentiate in their product offerings.
22 We recognise that, in principle, the active layer offers the potential for technological
23 innovation and service differentiation. We also recognise that innovation could
24 reduce the cost of the "active" electronic equipments that are used over the passive
25 layer".

26 "8.104 We recognise that access to the passive infrastructure could in some cases,
27 give a CP an advantage through more control over the characteristics of the end-to-
28 end service it offers".

29 And, finally, at 8.105, this is a recognition from Ofcom, we say, that aspects of BT service
30 provision have been unsatisfactory. It says:

31 "We acknowledge nevertheless the concerns raised by stakeholders over delays in
32 Openreach's development of some products, in particular the SyncE and the high
33 density handover solutions".

34 It went on to say:

1 “We are not persuaded, however, that it was appropriate to impose passive remedies
2 in order to address those concerns”,

3 But it is at least a recognition from the regulator that there have been concerns expressed by
4 stakeholders over the quality of the product that was available from BT.

5 In terms of what we say the clear benefits from the remedy would be, you have seen this
6 morning the witness statement from Graham Payne. We say that that witness evidence plus
7 evidence from Colt identifies greater competition, greater innovation, greater network
8 control and cost savings from a passive remedy. You have got extensive references in my
9 skeleton to the bottlenecks that have been identified in this particular market. You have
10 seen the evidence from Mr. Lane and Mr. Sinclair that Colt, if given the opportunity to take
11 advantage of the passive remedy, would actively seek to circumvent those bottlenecks and
12 extend Colt’s network so that a competing wholesale business broadband proposition would
13 be brought into existence based on duct access.

14 Furthermore, that is not a hollow promise, because you have seen that Colt has indeed,
15 using the duct remedy, the passive remedy, improved or rolled out extensive networks in
16 other European jurisdictions. This is something that Colt is used to doing, it is used to
17 liaising with incumbents, getting the survey from the incumbent, working out where to put
18 its routing so as to best maximise the use of duct and the requirement to dig certain parts of
19 the network. It is used to doing all of that and making a business case for it and rolling out
20 expanded networks in other jurisdictions. You have also seen indeed from, or at least I have
21 given you a reference to the suggestion in BT’s response to the call for inputs, that duct
22 access is at least in principle capable of being used for both business broadband and
23 residential broadband, so it could be a contributing factor to dealing with aspects of the
24 NGA roll-out concern which are currently subject to the state aid measures I have alluded
25 to.

26 It is not part of our case that you, the Tribunal, have to design or think about a practical
27 remedy in the sense of coming up with a price for pounds and pence per duct, or per metre
28 of duct, and directing that Ofcom make a decision in those terms. That is not our case. We
29 say that access on FRAND terms would be sufficient to kick-start this particular market. If
30 there are problems they are problems for another day, not for now.

31 In answer to the Tribunal’s question, “Well, is that not naïve, to expect that there won’t be
32 problems?” we do not think, with respect, it is naïve. We think it is perfectly open to Colt
33 which has dealt with incumbents in other countries, to negotiate with BT to a mutually
34 satisfactory conclusion whereby duct access is provided on FRAND terms. Now, the

1 FRAND terms themselves impose a measure of control over an incumbent acting with a
2 strategic incentive. Similarly, regulatory control of the incumbents in France and Spain has
3 prevented those incumbents using strategic incentives to come up with a hold up to the
4 implementation of the remedy that is allowed in principle, and we do not see, with respect,
5 why that could not be expected with BT. It would be a neat and easy answer to the problem
6 of pricing, and if I am forced to eat my words because in two years' time there is a big spat
7 between the parties, so be it. But, at least we have tried. At least we have tried to break the
8 bottlenecks that exist at the infrastructure level in this country for business broadband.

9 For an example of how passive remedies have been rolled out in France, one can see in the
10 exhibits to Mr. Fournier's statement, for example, how the survey procedure works. I will
11 give you the reference, given that time is marching on, it is in our notice of appeal file 3,
12 annex 5, tab.5 p.1. You will see that the exhibits to Mr. Fournier's statement make clear
13 how the structure has worked in different jurisdictions. It is essentially liaising with the
14 incumbent, getting hold of a survey of the available duct, working out where the particular
15 cable can be laid and then formally making a request for the provision of access to the duct
16 on terms that are then agreed.

17 Now, what are the objections that have been raised under Ground 3 to what we say are the
18 clear benefits that would arise as a result of the passive remedy being granted to us. Well,
19 firstly it is said that there would be network duplication. Secondly, it is said that the
20 existing and future infrastructure arrangements ----

21 THE CHAIRMAN: Mr. Beal, sorry to interrupt, but just before you get on to that, the discussion
22 of the merits you have just put to us, where does that fit into your argument of what was
23 done over the consultation and the various pronouncements that were made prior to the
24 Decision? Are you saying that these matters were not fully considered, or are you saying
25 they were considered but considered erroneously, or what? Can you just take us through the
26 sequence?

27 MR. BEAL: Yes, the first part of our case is obviously that FRAND is an answer to these points
28 because ----

29 THE CHAIRMAN: I am talking about the benefits in terms of the innovation and the lower costs
30 and so on?

31 MR. BEAL: We say that there was a clear error of approach in not preferring to grant a passive
32 remedy, because the benefits clearly outweighed the detriments.

33 THE CHAIRMAN: All this came out in the June consultation document, did it not? Ofcom were
34 fairly open about what they were thinking, and what did your ----

1 MR. BEAL: Ofcom identified in the consultation document that there were perceived benefits
2 from the passive remedy and it thought that there were risks associated with it.

3 THE CHAIRMAN: And your clients commented on that or not?

4 MR. BEAL: They did.

5 THE CHAIRMAN: And encouraged them to do more, did they?

6 MR. BEAL: Our clients, in the response to the consultation document, made out their case as to
7 why the passive remedy would have clear benefits which were worth engaging with. One
8 sees that, for example, in our notice of appeal file 3, annex 6, tab 6 – perhaps it is worth
9 going there.

10 THE CHAIRMAN: Yes, please.

11 MR. BEAL: File 3 of our notice of appeal, annex 6, tab 6. A summary of concerns, expressed by
12 Colt at p.4, and then at p. 17 please could I invite you to read the last three paragraphs on
13 p.17.

14 THE CHAIRMAN: Those are confidential?

15 MR. BEAL: Yes.

16 THE CHAIRMAN: (After a pause): Yes. So your point is that these matters were considered but
17 they were not considered in the way that you agree with?

18 MR. BEAL: Ofcom had identified in its consultation document what it perceived to be the risks
19 of rolling out a passive remedy. We think that that is an error of approach because, in fact,
20 those risks are overstated. What this ultimately boils down to is a concern about inefficient
21 entry i.e. arbitrage, and a disruption to the common cost recovery.

22 THE CHAIRMAN: I interrupted you when you were just about to get on to that, that is
23 understood.

24 MR. BEAL: Yes. The part of my submissions thus far has simply been recognising that Ofcom
25 acknowledged that there were benefits from the passive remedy, so one then has to weigh
26 that against the detriments.

27 There were two strands to my argument on Ground 3. First, some of the detriments that
28 have been identified have got simple answers to them – that goes, for example, to the
29 network duplication point, and it goes to the disruption of existing and future arrangements
30 for infrastructure point. Both of those have, we say, relatively straightforward answers to
31 them.

32 The more complex issue, understandably, is arbitrage and common costs recovery. Both of
33 those arguments are premised on a requirement to change in a disruptive manner the
34 existing level of the charge control. Given that that is the premise we say, actually, there is

1 a fundamental objection to Ofcom's approach under this Ground 3, which is that they did
2 not at least consider whether or not there would be a non-disruptive modification to the
3 active price control that would enable the passive remedy to be rolled out with all of its
4 benefits, and none of the purported disadvantages of the passive remedy.

5 So that, in a sense, is my point, they have not done the analysis, so they have not asked
6 themselves the right question, they have not done the right analysis, with respect, in which
7 the passive remedy could be brought within the scope of a complimentary suite of remedies
8 in a non-destructive way. That is the first point.

9 The second point is, even if you are not with me on that, we still would take issue on
10 whether or not the perceived disadvantages of a disruption to the common costs recovery
11 scheme operated by BT outweigh the benefits of competition. But we cannot, as Dr. Lilico
12 indicated, turn around and say on a cost benefit analysis basis that the benefits clearly do
13 outweigh – albeit we think they do – because we have not done the cost benefit analysis
14 either. Our point is not that there is a clear answer available on the evidence before you as
15 to where that analysis would fall out, our point is the analysis has not been done. We think
16 if it were done the benefits would outweigh the detriments, but we are asking not for a final
17 concluded view on that but for remittal so that the issue can be dealt with properly if
18 necessary through a re-consultation of the issue.

19 THE CHAIRMAN: I may be being very dim, are you putting to us that some factors were
20 weighed up by Ofcom, but the factors to which you attach importance then and now, such
21 as the risk of arbitrage and the effect on common cost recovery were not given sufficient
22 consideration?

23 MR. BEAL: It is not even a sufficient consideration because, in fact, Ofcom did not, with respect
24 ask itself the right question, which is: can we overcome the perceived detriment of
25 disruption, for example, to the pricing regime operated by BT? Can we overcome that by
26 actually modifying the existing price controls, and enabling the passive remedy to be put
27 alongside it? It is not that they turn around, identified the risks and then evaluated them
28 necessarily incorrectly, it is that they did not even consider whether or not changes could be
29 made to enable to those particular objections to be addressed. So our response is geared
30 along two things: first, Ofcom has not asked itself the right question because if it had asked
31 itself the right question it would have conducted a different level of analysis and, secondly,
32 actually the perceived risks of disruption can either be dealt with or are not actually in truth
33 risks at all ----

34 THE CHAIRMAN: I am not sure I have interrupted your flow or carried you further forward.

1 MR. BEAL: It is obviously a timely intervention, sir, on the basis that I was about to deal with
2 these points perhaps in the order that I just have.

3 Could I just deal with what I have described as the relatively straightforward responses to
4 concerns? The first concern is network duplication. The short point here, we say, is the
5 level of network duplication actually takes place at the active layer and it is fibre, not a roll-
6 out of the complete infrastructure. So when one is comparing the counterfactual that Ofcom
7 urges upon us, which is competition at an infrastructure level hook, line and sinker, i.e. full
8 roll-out of the competing infrastructure, that duplicated cost is naturally going to be much
9 higher than simply rolling out the fibre through BT's duct. So if duplication of cost were an
10 objection one would never get past the natural incumbency of BT.

11 Secondly, it is said that allowing a passive remedy would undermine existing and future
12 infrastructure investments, which I take to be infrastructure investments at a network level,
13 hook, line and sinker rather than simply running fibre through a duct, which is also a
14 network investment.

15 As to that, our short point is the factual one. If that is a realistic risk then it is a risk that
16 actually is not worth considering, because there has been no roll-out of a competing
17 duplicative infrastructure of a business broadband in the last 10 years, not a significant one.
18 So, yes, if one is looking at potentially impacting on an incentive to invest in a competing
19 network hook, line and sinker, then it may be that passive remedies would diminish
20 somewhat the incentive to invest in a full roll-out, but it is certainly not something that
21 needs to be given undue weight because that incentive has been very, very thin for the last
22 10 years, as practices show.

23 Secondly, it is not beyond the wit of man or woman, to devise a remedy which enables an
24 appropriate incentive to be maintained for the full roll-out of the competing infrastructure
25 where the business case can be made for it. One has seen, for example, in the West and
26 East Central London Area ("WECLA") that there has been an economic case for people
27 building a business broadband fibre network. Indeed, Ofcom has taken the view that that is
28 a good thing and that competition has now been introduced to that area so that it is no
29 longer necessary to have the wholesale price control that previously existed for that area. It
30 is not clear that incentives to invest will be diminished, and even if it were clear that there
31 might be an impact on an incentive to invest one needs to bear in mind that there has not
32 been a significant new infrastructure development in business broadband for the last 10
33 years.

1 Can I then come on to inefficient entry? Both inefficient entry and common cost recovery, it
2 seems to me, have a high element of overlap because inefficient entry has to be premised by
3 Ofcom on a concern that the common cost recovery, that it has accepted through its
4 imposition of the basket controls for BT, would permit people to enter in those areas which
5 are high contributors to common cost and charge a lower price, thus forcing BT to rebalance
6 its allocation of costs amongst its services with the result that that would lead to a welfare
7 loss. That is essentially the argument.

8 The first and most obvious point is that FRAND would leave the issue of common cost
9 recovery wholly within BT's hands. That simply means that the issue of cost disruption
10 does not arise. It would also mean that the risk of inefficient entry could not arise because
11 BT would, *ex hypothesi*, be setting a profit maximising price at which its common costs
12 were fully recovered across its whole suite of services. If that is the correct analysis, which
13 we say it is, then FRAND is a complete answer to this risk.

14 As I have indicated, Ofcom's objection to FRAND is not one of principle, it is one of
15 practice, which is you will end up fighting and we will have to deal with it.

16 Can I then deal with bandwidth gradient and the speed risk of arbitrage? We have a number
17 of points in relation to this, the first one being obviously FRAND.

18 Coming on then to deal with the issue, if you are not with me that FRAND is an answer or
19 indeed you are not minded to grant FRAND as a remedy, the first and most immediate
20 response from Colt to this risk of arbitrage cherry-picking, coming in, taking off the cream
21 of the crop of the services that are currently given by BT, is that this is not the way Colt is
22 modelling its business. It is not a rapacious price competitor coming in and insisting on
23 undercutting BT's prevailing price with a view to taking all of the benefit for none of the
24 burden. Colt's business model is based on rolling out high quality resilient low latency
25 networks which appeal to a particular sector of the market which require quality to be
26 observed over price.

27 Clearly there is an element of price competition in all matters, but the primary focus of
28 Colt's competition is non-price competition.

29 THE CHAIRMAN: What about the other CPs who do compete on price?

30 MR. BEAL: The other CPs who might choose to compete on price, that would come into
31 designing a form of passive remedy which prevented that happening if it were perceived to
32 be a problem. I am not saying a remedy could not be designed, and I do not think a remedy
33 could not be designed that dealt with disruption if disruption is a bad thing.

1 Our third point is that disruption is not necessarily a bad thing. If one assumes that the
2 prices charged by BT cover common costs as they stand, there is, at the very least, a risk of
3 cross-subsidy, because it means that they are deriving more common costs recovery from
4 high value services than from low value services. There is a separate issue of whether or
5 not that would be Ramsey efficient and what the counterfactual would be. The simple point
6 is that it is equally conceivable that that degree of secondary price discrimination reflects
7 monopoly power, because that is consistently recognised in economic literature that an
8 ability to force different prices on different segments of the market could well reflect a
9 position of economic power on the part of the provider.

10 If cross-subsidies exist in fact then setting a passive remedy, which enables duct access to
11 be given, would weed out those cross-subsidies and enable the full vigour of competition to
12 remove them.

13 There is also the very real difficulty with this approach that, as highlighted by Dr. Lilico, if
14 it is right that BT's common costs recovery is a thing to be preserved, one needs to think
15 about why it needs to be preserved.

16 As matters stand, the argument that is advanced is that Ofcom thinks it is efficient,
17 proximate to efficiency, for BT to charge a higher price for higher value products so that
18 there is a greater degree of common costs recovery from those products than would be
19 available from lower priced products. It is effectively BT being Ramsey efficient, or *quasi*
20 Ramsey efficient, with its pricing. That assumes that if there were an internal market within
21 BT for access to ducts, BT would be able to reflect those different prices in the ducts. One
22 needs to assume that they are passing on internally within BT a price that reflects the
23 common costs recovery for it to be assumed to be a welfare maximising price.

24 In fact, that is not what Ofcom and BT say, and nor what they fear. What they fear actually
25 is that they would not be able to control the use to which the ducts were put with the result
26 that there would be a requirement for duct access to be set on a uniform basis, because
27 otherwise, for example, you would charge somebody X for access to a duct, but they would
28 be able to reap the benefit of putting more fibres or more cables through that duct with the
29 result that they were then able to seize of the advantage of the common costs on a
30 bandwidth gradient.

31 If it is right that a uniform price would result from the passive remedy then that must be on
32 the basis that that the nominal hypothetical internal market between BT as a duct provider
33 and BT as a wholesale leased lines provider would have a uniform market price as well. If
34 that hypothetical is put in place, the counterfactual competitive market that is brought into

1 the BT incumbent structure would require a uniform price for like to be compared with like.
2 If that is their concern then the result effectively is that they are saying, *de facto*, a
3 competitive market in this situation would lead to uniform pricing. So if a competitive
4 hypothetical counterfactual would lead to uniform pricing, how can you go back and say it
5 is appropriate to have a bandwidth gradient on an increasing basis, because that would be
6 inconsistent with the hypothetical competitive counterfactual that you set up. So it is
7 impossible, we say, for reasons advanced by Dr. Lilico in his evidence, to simultaneously
8 have a recognition that bandwidth gradient pricing is welfare maximising and that the
9 competitive counterfactual that one is considering would lead to uniform pricing for duct.
10 So it is impossible to square those two things. What it actually means potentially is that
11 there is no competitive market for duct because that is what a uniform price for duct would
12 dictate.

13 If you were incapable of accepting uniform pricing for duct and it led to the concerns that
14 BT and Ofcom have identified, the result would be that the welfare maximising structure for
15 the market would be incumbency. It would be a natural monopoly. What we do not have,
16 of course, if that is right, if you push it to its logical extreme and assume that it is only a
17 natural monopoly that would be capable of being operated, is the analysis as to what the
18 benefits and detriment is from endorsing a natural monopoly in duct access and comparing
19 that with the benefits of allowing innovation through competition through a passive remedy
20 at the duct level.

21 In a sense, what we are describing, bottom line, boils down to the *Albion Water* example,
22 whereby if it is right that Ofcom and BT's reasoning leads to a uniform pricing for duct,
23 what are the advantages nonetheless of allowing infrastructure competition at that level?
24 There we simply do not have the trade-off that is being carried out, the cost benefit analysis
25 on a welfare basis by Ofcom between the benefits and detriment of the disruption to the
26 remedy that they describe.

27 Even if all of that were wrong, we say Dr. Lilico in his report has come up with a number of
28 ways as to how you can have a non-disruptive passive remedy, but none of that has been
29 considered for the simple reason, as I have indicated earlier, that Ofcom did not ask itself,
30 with respect, the right question, which is: can we come up with a way of ensuring that
31 passive and active remedies can co-exist happily without disrupting common cost recovery.
32 We have tried to back up Dr. Lilico with more than the argumentation that he has deployed.
33 We have also looked to Dr. Mantzos to come up with a figure which he thinks would not
34 disrupt the common cost recovery for BT. So we say it can be done. We accept that this

1 Tribunal will not be doing it, but we do say it is appropriate to remit the matter to Ofcom for
2 a thorough look at the point.

3 The other aspect that was dealt with under common cost recovery and arbitrage is
4 geographical arbitrage. Again, the short answer to the problem posed on geographical
5 arbitrage is FRAND which would enable BT to charge whatever price it thought to be
6 profit-maximising, subject only to the requirement for the price to be set on a fair,
7 reasonable and non-discriminatory basis. With respect, that does not seem too much to ask.
8 Assuming that is not, as we say, the short answer to the point, there are a series of points
9 that we would make on geographical arbitrage. The first is that the same argument, if it
10 were right, would have applied to the roll out of the PIA NGA remedy, so what we had with
11 PIA NGA roll-out was access to duct. As I understand it, a mechanism for obtaining a
12 reference price was put in place. If geographical arbitrage was at risk of disrupting BT's
13 common costs recovery in a way that was welfare detrimental, why did that not preclude the
14 roll out of the remedy in that case?

15 That clearly is important because when one considers telecommunication services in the
16 round, BT itself will have residential broadband and business broadband as part of its
17 common costs recovery scheme. One can imagine, for example, certain residential areas
18 where there is a high density of usage and therefore high costs recovery, and other areas
19 where the residential density is much lower. There are obviously issues for disrupting
20 common costs recovery between residential and broadband access, but it did not deter
21 Ofcom from providing for a PIA remedy.

22 Secondly, as matters stand, the active remedy that is currently available is a price for a
23 circuit, for example. So an Ethernet access product is sold by BT, is sold on a per circuit
24 basis, based on an annual fee. That already has within it an element of geographical
25 variation. For your note, that is dealt with in Mr. Sinclair's second witness statement core
26 bundle 1 tab 18 para.38. So geographical variation is already a feature of the market.

27 MS POTTER: Sorry, I am not sure you will feel able to answer this, but is Colt's position that it
28 would accept that FRAND would include some degree of geographical de-averaging?

29 MR. BEAL: Yes, it could. My next point, and Madam you have anticipated it perfectly, is what
30 is wrong with having some form of geographical variation on pricing to reflect the
31 underlying common costs recovery that go with pricing? The short point is why not have a
32 geographically de-averaged price? What is wrong with that? This is duct --

33 THE CHAIRMAN: I think the argument is that it is rather unfair on the people who live in the
34 disadvantaged geographical areas.

1 MR. BEAL: Ofcom recognises that there is an implicit form of costs subsidy from having
2 geographically averaged prices. So if one is looking for a welfare-maximising solution the
3 answer must be that you have to recognise either that there is a cross-subsidy but there is a
4 social benefit (which is what you are describing, sir) or it is not welfare-maximising. You
5 cannot have it both ways. As I said, the advantage of a passive remedy is it does flush out
6 these cross-subsidies, these latent cross-subsidies. That was my fourth point, which is that
7 there is an implicit geographic cross-subsidy. That may be good or bad from a welfare
8 perspective; we simply do not know.

9 What is interesting on that particular point is that the example of WECLA, the roll out of
10 competing infrastructures in the West and East Central London area, indicates that BT's
11 common costs recovery is not a shibboleth. What happened there was the economic
12 advantages of high density roll out to London meant that certain competitors, including
13 Colt, built their own separate infrastructures with all the costs that entailed. That resulted in
14 prices being charged that were lower than BT's and BT's response was to reduce its prices.
15 Ofcom has recognised, in this particular statement, that there is no need for any *ex ante*
16 regulation for that area. So it recognises that effective competition has been reintroduced to
17 a geographical area. The result of that must be, surely, that some sort of geographical de-
18 averaging of price is consistent with having an effective and sustainable competitive market
19 for business broadband, because Ofcom recognises that *de facto* with the WECLA example.
20 Our fifth point is that even if a geographically averaged price were mandated by Ofcom for
21 welfare reasons or for profit-maximising reasons - for welfare-maximising reasons if it has
22 done the analysis, in any event a number of the concerns about geographical arbitrage are
23 already taken care of because if one sets a per circuit price for duct access, which is the
24 suggestion that Mr. Mantzos has come up with, then inevitably the more circuits you use for
25 a given geographical area will reflect a higher density of usage, other things being equal.
26 Therefore there is already an implicit recognition in duct usage for a given geographical
27 area that it is a geographically more dense user. So setting a per circuit remedy rather than
28 a per duct remedy would be one way round that particular problem.

29 Our sixth point is that there is no necessary inter-dependence between geography and usage
30 levels. One need only posit an example of an out of town business park with a very high
31 use of broadband Ethernet services, and similarly for example somewhere like London
32 where competition has actually driven down the prices, might be an example even though
33 there is a very high density of usage the common costs recovery is small. So there is no
34 necessary interconnection between the two. These are all matters that we would expect to

1 be properly analysed by Ofcom to work out what the answer was. What we are saying is
2 they are not insuperable.

3 Finally, if one looks at Mr. Culham's second witness statement at para.12: the problem can
4 be avoided by setting a price for duct access based on the highest common costs recovering
5 geographical route, which would be an answer to the problem. Similarly, with bandwidth
6 you set the highest common costs recovering bandwidth gradient price. Based on the
7 highest common costs recovery and geographical area, you end up with the most that BT
8 could sensibly ask for in terms of common costs recovery. If, after that, competition is still
9 viable, so be it. It is certainly not going to be any worse than rolling out a complete
10 infrastructure as matters stand, because nobody is doing it. So the only way is up.

11 Finally, we recognise of course that all of this needs properly to be considered, and so we
12 do not invite you to do anything other than remit the matter to Ofcom for further
13 consideration. Would you give me a moment, sir, please? (After a pause) Unless I can be
14 of any further assistance, those were my opening submissions.

15 THE CHAIRMAN: Just one point. Again, it is similar to one we raised before. This discussion
16 we have just been having about common costs recovery and geographical arbitrage and
17 product arbitrage, you did not raise all that in your response to the consultation document,
18 or did you?

19 MR. BEAL: We raised different points in our response to the consultation document. This is,
20 with respect, a full merits review.

21 THE CHAIRMAN: Yes.

22 MR. BEAL: The way that the issues have shaken out through the pleadings has meant that we
23 have focused more closely ultimately on Ofcom's case.

24 THE CHAIRMAN: I think Ofcom suggest you have adopted somebody else's case.

25 MR. BEAL: They say that we are piggy backing off TalkTalk's consultation submission.

26 THE CHAIRMAN: Yes.

27 MR. BEAL: We did not have TalkTalk's consultation submission when we made our points. We
28 are responding, in fairness, to a point Ofcom have developed which is: you have
29 misunderstood what we actually said; the major problem all along has been disruption of
30 common costs recovery and/or inefficient entry and therefore that is the primary reason why
31 we have refused the passive remedy.

32 On my reading, with respect, of the BCMR statement, it is not apparent to me that that was
33 at the forefront of Ofcom's thoughts. I say no more than that. There are some paragraphs
34 around 8.85 and so on which do mention the question of inefficient entry, but it certainly is

1 not flagged up in the reasoning for the decision as being the key and paramount concern of
2 this regulator.

3 It so happens that they have rolled that out in their defence as being their primary concern.
4 It is supplemented by the evidence from Mr. Culham. We do not suggest that it is
5 inappropriate for this Tribunal to consider those reasons. If this Tribunal is going to
6 consider those reasons then, with respect, you need to address our response to them. In
7 fairness, if Ofcom are now going to say: this is our major point and it was all along, then we
8 are entitled to say: actually, there are flaws with your major point.

9 MS POTTER: Mr. Beal, is it not fair that there is an alternative view which is that the Ofcom
10 consultation document, as early as June 2012, actually set out in some detail these pricing
11 cost recovery issues and effectively invited views on how those might be addressed or
12 overcome and that there was not a substantial contribution from any parties as to how they
13 might be dealt with?

14 MR. BEAL: I think, with respect Madam, the consultation document itself did not do that. The
15 call for inputs I think in question 17 or 18 raised whether or not the passive remedy should
16 be introduced, and if it were to be introduced, what adjustments would be needed for the
17 active remedies, which I think is probably the point, Madam, you were anticipating.
18 That document, however, did not go so far as to say: we think passive remedies could
19 sensibly be used here; please come up with a detailed working as to how common costs
20 recovery can be dealt with. It certainly did not go that far. In any event, this is, with
21 respect, a full merits review. I acknowledge, we did not respond to the call for inputs. We
22 did respond to the consultation document, but I fully take on the chin that we did not
23 respond to the call for inputs. The reality is that we had a strategic review and that the focus
24 has changed and that therefore the passive remedy is now much more actively sought than it
25 was at the time of the call for inputs, that much is true. Does it change the dynamic or the
26 decision making procedure for this Tribunal? With respect, no, because it is a full merits
27 review. If indeed you are being asked to say and to find that Ofcom's primary reason for
28 not implementing the passive remedy is that it would lead to welfare-minimising disruption
29 of BT's common costs recovery, then you must also, with respect, take on board my
30 arguments as to why either that is not so, or there has not been sufficient analysis of the
31 issue to enable a concluded view to be reached.

32 THE CHAIRMAN: So your point is if an argument is a good one, it is a good one, it does not
33 matter who thought of it or when it is deployed in proceedings like this?

1 MR. BEAL: Clearly, it would have been preferable - one can see that from a regulator's
2 perspective - if this issue had been fully flagged up from the CFI stage onwards. The
3 reality, however, is that the CFI stage did not turn round and say: we think passive remedies
4 are a good idea but we are worried about how to implement them, please give us your
5 implementation ideas. That was not the focus. The focus was: we are in two minds; we
6 think passive remedies are not a good idea but in any event we will need to deal with active
7 remedies. They did not say suggestions on a postcard; they simply said give us your
8 thoughts.

9 THE CHAIRMAN: Some postcard, I think! Any other questions? If that is all you have to help
10 us with, Mr. Beal, thank you very much and we will adjourn for lunch. Back at 2 o'clock.

11 Adjourned for a short time

12 MR. BEAL: Sir, I apologise.

13 THE CHAIRMAN: We still have you, Mr. Beal.

14 MR. BEAL: I have been passed a *billet doux* (probably as a *billet don't*) but two short points of
15 clarification, if I may, to correct some things that otherwise would be misconstrued. Firstly,
16 on remedies and FRAND, you asked me whether or not I was inviting you to make a
17 direction to Ofcom that they charge on a FRAND basis. I understood that to be a
18 jurisdictional question, namely that the Tribunal obviously cannot tell Ofcom exactly what
19 to do, but certainly we are envisaging that the order that we would seek ideally would be a
20 direction to Ofcom to take such steps as it saw fit to put in place FRAND terms ... The
21 second point of clarification was I think I indicated in my section on geographical arbitrage,
22 that we could set a circuit price and that would deal with some of the issues. That, I am
23 afraid, represented compressed reasoning on my part. What I should have said following
24 Mr. Mantzos at para.35 of his statement, CB1 Tab.10, was that the circuit price would need
25 to be subject to a conversion factor. Quite how that was done would of course have to be
26 determined, but he has recognised that a conversion factor would be appropriate once you
27 have derived a circuit price.

28 THE CHAIRMAN: Thank you for that, Mr. Beal.

29 MR. HOLMES: Sir, members of the Tribunal, in my submissions this afternoon I propose to
30 begin with an overview of Ofcom's positive case, and then to develop those submissions by
31 reference to the key documents before the Tribunal. You have obviously been taken to a
32 number of them, but there are passages additional to those you have seen that we think
33 Ofcom would submit are relevant considering the issues in the case.

1 Beginning with the positive case, this can be boiled down to six broad submissions. The
2 first is that Ofcom properly directed itself when considering whether to introduce passive
3 remedies in the leased lines market, it did not regard passive and active remedies as
4 necessarily alternatives, it recognised that they could be combined and considered what
5 would be the consequences of doing so. It also did not apply any general presumption
6 against the introduction of passive remedies, but rather approached the matter as it was
7 required to do by reference to its statutory duties considering all the circumstances of the
8 case.

9 The second submission is that in considering how to proceed, Ofcom was nonetheless
10 entitled and indeed required to take account of the existing framework of regulation that
11 was already in place, as well as the other features of the regulatory package which it was
12 consulting upon and deciding whether to maintain or vary in the statement. A substantial
13 industry has grown up around the active access remedies which are already in place with
14 turnover of over £2 billion a year. The active remedies involve price controls imposed by
15 Ofcom, and those price controls, as the Tribunal has seen, have been maintained in the
16 statement. There are customers who rely on the active inputs, and investments have been
17 made on the basis of them. This model of regulation is designed precisely to address the
18 network bottlenecks which exist. We recognise, of course, that there is a problem in these
19 markets as a result of BT's significant market power. You need a finding of significant
20 market power in order to be able to regulate them. So while we hear what Mr. Beal says
21 about bottlenecks, we say the fact that there are bottlenecks is not really decisive in this
22 case. The question is how you address the bottlenecks and by what regulatory methods.
23 And we say that in deciding how to proceed, it was appropriate for Ofcom to assess
24 carefully the case for passive remedies by reference to their potential impact on other
25 aspects of the regulatory framework and the customers who rely on it.

26 To be clear, Ofcom's concern here was not about avoiding work, and it was not about
27 administrative convenience. It was about managing potentially disruptive regulatory
28 change to the industry. Nor is there any *fait accompli* in Ofcom's reasoning. Ofcom was
29 deciding what to do with the charge controls at the same time that it was deciding whether
30 to have passive remedies. It was looking at matters in the round, and it was deciding how
31 passives would relate to any actives that it might put in place. This was not a two-stage
32 process in which Ofcom had already formed a firm and settled view in favour of active
33 remedies which then displaced the possibility of introducing passive remedies.

1 The third submission is that Ofcom consulted thoroughly and properly before reaching its
2 decision. It approached the consultation with a genuinely open mind. It explained fully and
3 clearly its concerns about the potential adverse consequences of introducing passive
4 remedies and one of the questions the Tribunal had this morning was whether the
5 consultation document set out Ofcom's concerns. Mr. Beal suggested that it did not. For
6 our part, we submit that the consultation document did very clearly set out Ofcom's
7 concerns in relation to the core issue of arbitrage and cherry picking, and I will take the
8 Tribunal, if I may, to the passages of the consultation document which we say demonstrate
9 that very clearly.

10 Having received responses, Ofcom listened very carefully, and this was both in the context
11 of the formal consultation process, the written answers which came back both to the call for
12 inputs and then the consultation document, but also through a series of bilateral fact
13 gathering meetings. This is obviously a complex sector which is fast moving, it is quite
14 technical, and in order to keep informed and to make sure that it makes the best decisions
15 for the industry, Ofcom is in constant dialogue with industry parties, and I would like to
16 show the Tribunal some of the meeting notes and what they reveal about what the parties
17 were telling Ofcom about what they wanted to do with passive remedies.

18 Partly these materials are relevant because they show that the allegations of failure to
19 consult are, we say, not well founded, but they are also relevant because they show that the
20 information provided by stakeholders including those in favour of passive remedies
21 supported key elements of Ofcom's analysis and confirmed its understanding of the
22 available options.

23 The fourth submission is that Ofcom's decision against passive remedies is at heart a classic
24 regulatory balancing exercise. Ofcom did assess the benefits and detriments which it
25 identified on the basis of industry input as potentially arising from the introduction of
26 passive remedies and decided that the balance lay against doing this. And its key concern,
27 as the Tribunal will have gathered, was that passive access would need in practice to be
28 priced on a uniform basis and this would disrupt a key feature of the price controls which it
29 considered to be the most appropriate to impose upon BT when supplying downstream
30 active products with a number of potential negative consequences for customers.

31 Now, the Tribunal is familiar with the problem and I do not want to overtax it, but it may be
32 helpful if I briefly summarise the problem as Ofcom saw it, and I should say that, as I hope
33 I will illustrate by reference both to the consultation document and passages in the statement
34 which Mr. Beal did not show to the Tribunal. These concerns were very clearly flagged and

1 were very clearly central to Ofcom's reasoning both at the consultation stage and in the
2 statement.

3 So the starting point for Ofcom's problem, its concern, is the way in which the active
4 remedies applicable to BT work. The price controls for active access give pricing flexibility
5 to BT to decide how it recovers its common costs across different types of service within
6 the leased lines field, and this is a conscious policy decision on Ofcom's part, and I should
7 note that it has not, of course, been challenged in this appeal. If it had been challenged it
8 would have been a price control matter that would have needed to go to the Competition
9 Commission to consider because it relates to the terms of the price control. In practice, BT
10 charges more as a result of this price inflexibility for higher bandwidth products, products
11 that allow more information to be transmitted at a given speed than for lower bandwidth
12 products. Although the incremental marginal costs of supply differ very little and, as a
13 result, BT recoups more of its common costs from high bandwidth than low bandwidth
14 users.

15 Similarly, the geographical point, which is in some ways the converse point, BT charges the
16 same price for products supplied over high usage parts of the network as it charges for
17 products supplied over low usage parts. So there is a particular fee for, say, a 1Gb service
18 and it charges that fee over a bit of the network where there are lots of other services also
19 being provided as it does over another bit of the network where there are far fewer bits
20 being provided. It thereby recovers more of its common costs from the service it supplies
21 over the high intensity usage part because of the economies of scale that are involved in
22 serving that high intensity usage part.

23 Ofcom allows BT to engage in this differential pricing because Ofcom believes that the
24 costs recovered by BT and the prices will be more efficient than if Ofcom micro-managed
25 the pricing of each individual product. You, sir, of course will be well familiar with the
26 basket methodology. BT will have a better idea than Ofcom of the level of demand for a
27 given product at a given price, and will therefore allocate common costs in a way that is
28 more likely to maximise output. It will know how much a given product can bear in terms
29 of its price better than Ofcom will. Of course, that may change over time. So that, then, is
30 the model of active regulation which Ofcom has pursued for a number of years and which it
31 was attracted to also in this process of designing remedies, which is the subject of the
32 current appeal.

33 THE CHAIRMAN: Attracted to whilst still considering everything in the round?

1 MR. HOLMES: Whilst still considering everything in the round, indeed, sir, yes. If there were
2 a way of amending matters so as to preserve this efficient recovery of common costs,
3 Ofcom would certainly have done it. Let me explain why Ofcom did not think that that was
4 possible. Ofcom's concern was that the introduction of passive access would disrupt this
5 model of differentiated common costs recovery, the downstream level, with a number of
6 adverse consequences for customers. There are two elements to the concern.

7 On the one hand, Ofcom proceeded on the basis that passive access would not be priced on
8 the same differentiated pattern as prevailed downstream.

9 As I hope to show the Tribunal, this is consistent with what stakeholders were saying they
10 wanted to be able to do with passive access. They also assumed that access would be
11 granted on a uniform basis, on the basis of some averaging of costs.

12 Ofcom was also doubtful whether it would be practicable to sustain differentiated pricing in
13 passive remedies.

14 Duct and fibre can be used for differing purposes and to serve varying numbers of
15 customers. In order to be able to price differentially by reference to downstream usage, one
16 would need to be able to monitor effectively the use to which the duct or fibre in question
17 was being put to over time. Even if this could be done, there would then be the issue of
18 arriving at pricing arrangements that captured the complex differentiated pattern of common
19 cost recovery at the downstream level.

20 So that is the first part of the problem, the problem, as Ofcom saw it, the pricing would be
21 on a uniform basis at the upstream level, at the level of passive access if remedies were
22 introduced for reasons of practicability and also by reference to the expectations of the
23 market as they were being revealed to Ofcom during the consultation process.

24 MS POTTER: Just on that, Mr. Holmes, did Ofcom put any weight on those expectations – I
25 mean, I would not expect Ofcom to put much weight on those expectations unless it
26 considered that they were consistent with all its other regulatory objectives?

27 MR. HOLMES: No, madam, indeed. The expectations were really more relevant in
28 understanding. I think I may have misled the Tribunal slightly here – more relevant in
29 understanding what industry parties saw passive remedies as being used for, the people who
30 might use passive remedies were making it clear that they basically wanted to use them for
31 overcoming the bandwidth gradient as we will see, in other words, for exactly engaging in
32 the arbitrage that Ofcom was concerned about. But they were also very clearly telling
33 Ofcom, they were making assumptions and also in some cases explicitly informing Ofcom
34 that you cannot effectively monitor and limit the use of passive remedies, which would

1 make it difficult to engage in the differentiated pricing of those remedies by reference to
2 how they were going to be used down the line. The point may become a bit more concrete
3 when I come to the materials in a moment.

4 One aspect of the problem then is the uniform prices that Ofcom saw as likely to be needed
5 at the passive level.

6 The other aspect of the problem is that the pricing of passive access on a uniform basis
7 would have obvious knock-on consequences for BT's ability to sustain its existing
8 arrangements for recovering common costs at the active level and the efficient arrangement
9 of prices that Ofcom expected to result.

10 New entrants would use the passive products to enter downstream, focusing their efforts on
11 cherry-picking the customers who make a higher than average contribution to common
12 costs, they would be the most attractive targets for competition, because BT is pricing them
13 high downstream and if the upstream access product was being purchased by a competitor
14 at a price that did not reflect that same allocation of common costs there would be the
15 obvious prize, there would be the obvious place where competition would focus. The
16 result, Ofcom thought, would be entry that was focused on urban centres, major
17 conurbations or urban areas, as Mr. Beal described them in his opening submissions, and on
18 high bandwidth customers. Such entry would not necessarily be efficient, it would be
19 driven not by any cost or service advantage offered by the entrant, but by the arbitrage
20 opportunity represented by the mismatch in pricing between the passive and the active
21 levels.

22 THE CHAIRMAN: What do you say, Mr. Holmes, to the argument that competition is always
23 messy and disruptive and untidy and inefficient sometimes, but it is competition and then it
24 spreads into something more beneficial.

25 MR. HOLMES: I understand that point, sir, and Ofcom took account of the fact that there might
26 be dynamic benefits from introducing passive remedies, it recognised that and it took
27 account of that as part of the balancing exercise. But this is managed competition, it is
28 competition that is artificially introduced by regulation to address BT's bottlenecks ----

29 THE CHAIRMAN: Yes, I think we are aware of that.

30 MR. HOLMES: I know you are, sir.

31 THE CHAIRMAN: It is a funny sort of competition we are talking about.

32 MR. HOLMES: So it follows that in designing the way in which competition is to be introduced
33 Ofcom has to keep careful regard to considerations of efficiency and ensuring that

1 inefficient entry is not promoted by opening up arbitrage opportunities where they would
2 not otherwise arise.

3 Arbitrage based entry would have the added disadvantage of increasing overall costs of
4 competition as a result of duplication of infrastructure. Moreover, BT, for its part, could be
5 expected to change its pricing strategy to respond to the new competition. To meet the
6 arbitrage based competition BT would have to rebalance its prices so as to remove the
7 differential common costs recovery at the downstream level. The result would be higher
8 prices for users of the lower bandwidth products who make less of a contribution to
9 common costs at present, and higher prices for users outside urban centres who also make
10 less of a contribution to common costs at present. Some of those users would be priced out
11 of the market altogether.

12 As I say, in the BCMR statement Ofcom balanced this core concern against the potential
13 benefits, to which, sir, you have rightly alluded, that it accepted might flow from passive
14 remedies, but it was not persuaded that the balance favoured introducing passive remedies.
15 My fifth submission is that no error has been shown in that assessment. The notice of
16 appeal has very little to say about it. It has referred to snapping** but it is not the main
17 focus of the notice of appeal. The main argument which is advanced is that you could avoid
18 the problem by introducing a fair, reasonable and non-discriminatory remedy on BT. We
19 will come to discuss later in the hearing no doubt the extent to which this would be likely to
20 result in agreement between BT and all of the communications providers with whom it was
21 dealing.

22 Just two brief observations to make at this stage: the first is that fair, reasonable and non-
23 discriminatory pricing would still need to overcome the monitoring of usage. There would
24 still need to be some way in which BT could know, could check, could monitor what use
25 the passively provided product was being put to, otherwise you would end up with the same
26 problem that it might be procured for one purpose but used for another.

27 MS POTTER: Presumably that would only be the case if it was set at a level where that was an
28 issue. If it was set where it was covering the highest contribution to cost, as was identified
29 by Mr. Beal, then that would cease to be an issue?

30 MR. HOLMES: Yes, madam, that is correct, and I will address that alternative case, the high
31 price case, if you like, in due course. That accepts that you need a uniform price but it
32 assumes that the solution to the common costs recovery problem is to say that you set the
33 recovery on a product basis at the highest level of any common costs recovery that BT

1 makes across any of the products which it provides downstream. If I may, I will leave that
2 point for now and come back to it.

3 The second point to note, just on the subject of the FRAND and the likelihood that it could
4 avoid arguments, is to draw the Tribunal's attention to what Colt was, itself, suggesting in
5 the notice of appeal, which is in the core bundle at tab 4, if I could just ask the Tribunal to
6 turn it up quickly. Can you go to p.17 of tab 4. There is a paragraph at 6.8 about the extent
7 to which active price controls would need to be changed. One of the responsive arguments
8 to Colt is given at 6.8(b), which is to say that there would be a relatively modest impact
9 over the period of the charge control. One of the reasons given at 6.8(b)(ii) is:

10 "if the only obligations imposed are to prove passive remedies on fair and
11 reasonable terms and/or cost oriented prices (as sought by Colt in this appeal
12 and as was always an option that Ofcom could have and should have
13 considered), it will inevitably take some considerable time to negotiate terms
14 with BT and/or to have Ofcom settle the terms through dispute resolution ..."

15 So for what it is worth that was the view that Colt was advancing in its notice of appeal
16 about the ease with which commercial terms could be agreed.

17 THE CHAIRMAN: I raised with Mr. Beal that FRAND is a fairly well trailed device, and it has
18 its adherents and it has its opponents. Am I right in thinking that it is also used by Ofcom
19 on occasions?

20 MR. HOLMES: Yes, my belief is that it is used as a sort of belts and braces thing. It is often
21 used as a remedy alongside other more exigent remedies, but let me just check with Ofcom
22 that that is indeed the case?

23 THE CHAIRMAN: Can I help you, does it not turn up in this very BCMR in certain places?

24 MR. HOLMES: Quite possibly, yes.

25 THE CHAIRMAN: At least once, para.1.57. So it has a sort of track record.

26 MR. HOLMES: Yes, sir, it certainly features in Ofcom's price controls, there is no doubt about
27 that. I think it is usually alongside other price control remedies that are imposed but let me
28 just ----

29 THE CHAIRMAN: With the same advantages and disadvantages that it has here or different
30 ones?

31 MR. HOLMES: The difficulty here is, as we will see, that there is a very clear mismatch of
32 expectations between the purchasers, at least in terms of what they were telling Ofcom
33 during the consultation process about the prices that they expected to see and what they
34 expected to use this for on the one hand, and BT's views about the costs that it should be

1 entitled to recover on the other hand. So here in particular there is this fundamental
2 stumbling block of two groups, if you like, on the purchasing side and on the selling side,
3 with a different understanding of how the pricing should be worked out. Obviously the
4 notions of “fair, reasonable and non-discriminatory” are very open textured. They are very
5 open to debate and discussion. In particular, if BT were setting different prices for different
6 customers based on the number of customers they were in turn serving the high intensity of
7 usage or based on the differing downstream uses to which they were putting their products,
8 you could see that an argument might be made that there was discrimination occurring. In a
9 sense, there is. The question would be whether it is justified discrimination in all of the
10 circumstances. There must be, particularly here, given the differences of view that we will
11 see when we come to the consultation responses, a very high risk that the parties would not
12 succeed in hammering out their differences and agreeing amongst one another on a
13 particular model of cost recovery for BT.

14 That is the notice of appeal then, that FRAND was the main suggestion there.

15 In the reply and skeleton argument, Colt introduced this new criticism of Ofcom’s
16 approach, that we say that none of them is sufficient to impugn Ofcom’s judgment. Colt
17 questions the conclusion that perhaps passive remedies would need to be priced on a
18 uniform basis and it offers various proposals for arriving at differentiating price income. It
19 also questions whether a uniform price could be set at a level so high that it recovers the
20 maximum common costs that BT currently recovers on any of the products that it supplies
21 in downstream markets, the point to which Ms Potter alluded.

22 Colt’s new alternatives were not raised in consultation by it or by anyone else, and Ofcom
23 submits that the Tribunal’s should, for this reason, be sceptical of the new alternatives, their
24 feasibility, their credibility. They have been devised in the appeal by Colt’s expert advisers,
25 perfectly properly, but they are not what the industry was telling Ofcom in a reply from an
26 expert. We are not saying the arguments cannot be advanced. It is not a dispute about
27 admissibility. As you, yourself, sir, arguments are good arguments at whatever stage they
28 are advanced.

29 THE CHAIRMAN: I only threw that out, I did not assert it.

30 MR. HOLMES: The point that I am making is only to raise a question about the extent to which
31 Ofcom can be faulted for not having considered options that were not ones that any of the
32 industry costs, any of the business people involved, or their regulatory advisers, were
33 suggesting to Ofcom were a viable way forward.

1 MS POTTER: Mr. Holmes, you may be coming on to this so please do not let me put you off
2 your stride, but it would be useful to know whether these were things that were considered
3 by Ofcom. I think this is obviously quite an important issue in relation to what is now being
4 said about it, and whether there had already been a position taken.

5 MR. HOLMES: Madam, I will certainly show you the position that Ofcom took, both in the
6 consultation document and in the statement. It is not correct to say that Ofcom left this
7 point at large. It had a definite view about what could and could not be done.
8 Colt also contends in reply that Ofcom has not done a sufficient exercise in balancing the
9 costs and benefits of passive remedies. Again, this is a new criticism. We say it would
10 really require a separate ground of appeal to say that Ofcom did not quantify enough its
11 costs benefit analysis. One sometimes sees appeals run on that basis before the Tribunal,
12 but for our part we really did not detect any suggestion of it in the notice of appeal. We say
13 that Ofcom was not required, in any event, to engage in an elaborate quantification exercise.
14 It was enough that it set out its concerns, listened to what stakeholders had to say, and
15 decided whether on balance passive remedies should be introduced. Ofcom's qualitative
16 analysis of the issues in the consultation document and the statement is, we say, sufficient.
17 There was also some suggestion today of inconsistency with BEREC guidance, but both the
18 BEREC guidance and indeed all of the previous Ofcom documents that were referred to,
19 were actually carefully couched if one looks at them. They referred to the introduction of
20 passive remedies in so far as it would be efficient - proportionate, possible and efficient to
21 do so, or in so far as the competition that resulted would be efficient and sustainable.
22 Ofcom's problem that Ofcom identified was precisely the inefficient entry. That is really
23 why we say none of these documents, even if any of them were directly binding on Ofcom,
24 we say is not the case.

25 The sixth and final submission goes to the allegation that Ofcom erred in fact in finding that
26 there was no evidence that an operator was planning to make a significant investment in the
27 UK, based on the availability of passive remedies over the three year forward look period of
28 the market review. We deny such an error, and where error of fact is alleged, it is obviously
29 important to see what the finding of fact actually was. There is a consistent slippage that
30 one sees, both in the written materials and in Mr. Beal's submissions this morning from the
31 assertion Ofcom actually made, which we say was consistent with the evidence that was
32 before it namely that there were no substantial investment plans over the period of the
33 market review, and the claim that there was no evidence of demand. Ofcom recognised,
34 Ofcom certainly does not and has not at any stage contended that there is no evidence of

1 demand. The consultation responses show precisely that there was evidence of demand.
2 There was a lack of evidence of substantial investments being planned. In any event,
3 Ofcom's consideration of planned investment levels was, we say, separate from and
4 additional to the balancing exercise which it had already undertaken in deciding whether
5 passive remedies were, on balance, a good thing. It was, if you like, a sort of final stage
6 cross check. Any error in relation to the prospects for investment, or indeed any error no
7 Ofcom's part in considering that that was a relevant consideration to take into account,
8 would be immaterial, we say, if Colt could not also show an error in Ofcom's prior
9 balancing of potential benefits and detriments.

10 THE CHAIRMAN: I understand that. I suppose the question arises: supposing Ofcom had
11 found, in its terms, evidence of substantial likelihood of investment, but it had already
12 performed its balancing act with a negative outcome, would it have revisited it?

13 MR. HOLMES: Sir, it is a very pertinent question. The response is that if one looks at the
14 balancing exercise it already looked, in qualitative terms, at what the passive remedies
15 might be used for. So it was already considering really what the demand might be used for,
16 addressing a different question if you like: whether (to use the slightly disparaging
17 terminology that Colt has used in referring to it) it was the wrong sort of demand. So
18 Ofcom looked at what evidence there was of demand. It then went on to ask, as a sort of
19 separate question, was there evidence of substantial investment? In doing so, it made clear,
20 we say, in the statement that this was a supplemental hurdle that would need to be traversed
21 before passive remedies would be introduced. Ofcom would need to be satisfied both on
22 balance it was the right thing to do; and secondly and in any event, that there were
23 substantial investments that would be unlocked.

24 Whatever the Tribunal's views about that second question, we say that it was clearly
25 differentiated and distinguished from the prior analysis. On that basis the Tribunal should,
26 in our submission, be able to proceed with some confidence that Ofcom's conclusion would
27 have remained the same even had there been some substantial investment plan. Needless to
28 say, though, in assessing the balance of benefits and detriments, Ofcom would have been
29 very interested to hear what use any company that was planning to make substantial
30 investments intended to make of passive remedies. If the use this big investor was planning
31 to make was something other than cherry picking, then Ofcom would have sat up and taken
32 notice and that would have been factored into the balancing exercise as well.

1 THE CHAIRMAN: So it must follow from that that Ofcom thought that whatever evidence Colt
2 had put forward, which was not necessarily cherry picking because we heard they do not
3 compete on price, that was not substantial enough?

4 MR. HOLMES: Ofcom considered what Colt and others were saying about how they intended to
5 use passive remedies. It recognised there would be demand and it was looking to see how
6 that demand would manifest: what would be the uses to which the passive remedies were
7 put? So Ofcom did take account of that as part of the balancing exercise. It then attached a
8 sort of add-on to its analysis where it stood back and it said: is there substantial evidence of
9 investment? It just asked itself a very simple, quantitative question really. It said at that
10 stage that Colt's investment plans did not constitute a substantial investment, and it
11 maintains that position on the appeal.

12 The distinction is between the qualitative analysis which preceded, and this quantitative
13 additional step that Ofcom undertook. Whatever the view the Tribunal reaches about the
14 appropriateness of that additional step, or even about whether Ofcom was right or wrong to
15 conclude that this was or was not a substantial investment, the prior balancing exercise
16 taking account of the qualitative nature of plans of the industry parties that engaged with
17 Ofcom is still there and it still stands, we say. It provides a sufficient basis of support for
18 the decision.

19 MS POTTER: There is a clear distinction that you are drawing between the qualitative evidence
20 of demand, which was the only thing taken into account in the balancing. No quantitative
21 evidence on demand taken into account in the balancing?

22 MR. HOLMES: In a way, the exact amount of the demand was less significant to the balancing
23 stage.

24 MS POTTER: But it was still a factor in the balancing stage?

25 MR. HOLMES: The uses to which Ofcom accepted passive access to be put were undoubtedly an
26 important factor in Ofcom's analysis.

27 MS POTTER: And the extent of that usage, or not? Are you actually saying that the extent was
28 irrelevant?

29 MR. HOLMES: The extent would have depended upon the precise uniform price that was fixed
30 downstream. Ofcom recognised that to some extent the level of demand that could be
31 anticipated was only really knowable once you knew the price at which passive access
32 would be fixed, the uniform price that was set. ...What Ofcom did was to look and to listen
33 to what stakeholders were telling it about what they planned to do in the market place with
34 passive remedies if they were introduced, and it asked itself whether that would carry

1 advantages or whether it would carry detriments, and it recognised that some of that usage
2 would have advantages potentially attaching to it in terms of innovation and so on; but it
3 recognised that also a lot of what it was being told was that the usage that was intended was
4 arbitrage, and we will come to see that when we look at the consultation documents.

5 So, let me now then turn to the documentary materials before the Tribunal, because in my
6 submission they provide a number of helpful illustrations in support of the main
7 submissions that I have developed.

8 THE CHAIRMAN: Just before you do, Mr. Holmes, just going back to the overall purpose of
9 this decision and the objectives that Ofcom is pursuing, we heard about the common
10 regulatory framework, the Communications Act and so on, and I just draw your attention to
11 paragraph 1.38 of the BCMR decision which I have mentioned to Mr. Beal also. Just so
12 that I am clear what it is that Ofcom is doing here, and this is the one that says “overall
13 approach”, and it talks about Ofcom’s “overall approach to remedies and in primarily
14 promoting competition in the long term at the wholesale level based on investment and
15 economically efficient alternative infrastructure, supplemented by regulated access”. Now,
16 am I correct that what Ofcom came out with in this Decision, for whatever reason, and that
17 is what, you know, you are talking about, is regulated access.

18 MR. HOLMES: Yes.

19 THE CHAIRMAN: And it did not actually, and this is the passive remedies that we are talking
20 about, it did not actually go for any measure directly aimed at encouraging investment in
21 economically efficient alternative infrastructure — or have I simply misunderstood how you
22 bring that about?

23 MR. HOLMES: No, sir. What you say is correct subject to two caveats. The first caveat is that
24 access, active access remedies, may in themselves promote infrastructure investment,
25 because they can be used in combination with own infrastructure provision.

26 THE CHAIRMAN: Yes.

27 MR. HOLMES: But I would not want to draw too —

28 THE CHAIRMAN: No.

29 MR. HOLMES: — too strict a —

30 THE CHAIRMAN: — more about that in due course.

31 MR. HOLMES: The second point is just to note that Ofcom was also mindful of the fact that
32 there has been a fair degree of infrastructure investment in the past in providing directly
33 competing infrastructure with BT so that —

1 THE CHAIRMAN: Not every decision has to address each of these limbs in equal measure, is
2 what you would say.

3 MR. HOLMES: Yes, sir, and —

4 THE CHAIRMAN: I am in the right ball park, am I?

5 MR. HOLMES: Absolutely, sir, no, no, that is quite right. Moreover, I emphasise the
6 economically efficient alternative infrastructure and the trouble precisely that Ofcom saw
7 with cherry picking and arbitrage as consequences of passive remedies was that that would
8 not be economically efficient entry, there would be more infrastructure competition, yes,
9 Ofcom expressly acknowledged that, but it would not necessarily be efficient in so far as the
10 incentive to engage in it was triggered by the price difference between —

11 THE CHAIRMAN: Now, I understand your point there.

12 MR. HOLMES: Yes.

13 THE CHAIRMAN: But just on the overall objectives, it would be fair to say that these overall
14 objectives are continuing, ongoing and they are what Ofcom has in mind whenever it does
15 one of these three year review?

16 MR. HOLMES: Yes, sir. I should take instructions —

17 THE CHAIRMAN: Also and possibly, possibly even on the next three year review.

18 MR. HOLMES: Yes, sir. Yes, indeed.

19 THE CHAIRMAN: Fine. Thank you. Back to the documents.

20 MR. HOLMES: Yes, indeed. The call for inputs is obviously the best place to start. You will
21 find that in the additional materials as I call them, sorry, core bundle 2 was how Mr. Beal
22 referred to them perhaps more appropriately, and at tab.1 one finds the call for inputs or CFI
23 as its regularly known. April 2011 was the date of the document.

24 The purpose of the document is explained at 1.4 and 1.5, it is to allow Ofcom to focus the
25 available time for the market review on the issues most relevant for stakeholders, and
26 accordingly to obtain stakeholders' views about the proposed scope and the analytical
27 approach for the review.

28 Then turning forward to p.14 which is actually, sorry, forgive me, 1.47 and 1.48, p.14 it is
29 not rolling numbering across the whole — if I could just ask the Tribunal to refresh its
30 memory of those two paragraphs, 1.47 and 1.48. (After a pause) First, the obvious point,
31 Ofcom made very clear its wish to consider passive remedies from the outset of the
32 consultation process. Ofcom indicated that it would consider the full implications of the
33 introduction of passive remedies. This is not the conduct of a regulator that has shut its
34 mind against passive remedies. Secondly, the Tribunal will note that Ofcom made clear that

1 it wanted to understand the benefits a passive remedy would provide in the first bullet at
2 1.48. And, thirdly, Ofcom indicated the need to address the relationship between passive
3 and active remedies and in particular the implications for cost recovery and the
4 effectiveness of existing active remedies. Finally, the question, number 18, asking for
5 views on what role passive remedies would play, this of course encompasses the uses to
6 which they would be put and the benefits that might therefore result, and also inviting views
7 on the implications for the provision of active remedies.

8 Now, after the call for inputs, there followed a prolonged period of engagement by Ofcom
9 with stakeholders to understand their position on passive remedies and on many other things
10 as well. For its part, Colt did not put in a response to the call for inputs. A number of other
11 stakeholders did respond on passive remedies, and the responses certainly do show
12 enthusiasm for the idea of passive remedies at the right price. Ofcom has never suggested
13 otherwise, and certainly never found that there would be no demand for passive remedies as
14 Colt contends. It would be fair to say that the extent of interest in using passive remedies
15 was perhaps not as equivocal as one might think from reading Colt's skeleton argument,
16 and if I could just briefly show you a few responses that illustrate that point. If you could
17 turn forward in the same bundle of additional materials to tab.15, so, the core bundle. This
18 is the Cable & Wireless response, the summary is at the front. I will not trouble the
19 Tribunal to read it, but it does not mention passive remedies. And then turning forward to
20 p.18 one finds Cable & Wireless's assessment of the role that passive remedies might play.
21 Now, although this is marked as confidential, sir, my understanding is that there have been
22 specific redactions from documents for confidentiality, and so I hope that it is safe to refer,
23 perhaps to be absolutely on the safe side, if I could just ask you to read the response to
24 question 18 on p.18 underneath, which gives you some idea of what this —

25 MR. BEAL: I can certainly take instructions, sir. My difficulty is that my consultation responses
26 have not been marked with yellow passages that indicate particular parts but only the total.

27 THE CHAIRMAN: Cable & Wireless are not in court! We will read it anyway.

28 MR. HOLMES: Thank you, sir. You see there the application that Cable & Wireless perceives,
29 and the extent to which they think passives would be used.

30 The next example and for this I need to go to the appellant's supplemental bundle, vol. A
31 and at tab 5 there is a file meeting note with one of the mobile network operators with
32 Ofcom as part of this engagement process that I have described. The date is September
33 2011, so a few months after the call for inputs.

1 The background explains the purpose of the meeting and the particular points that I wanted
2 to draw to the Tribunal's attention were the sixth and seventh bullet points. There again a
3 view as to the immediacy of the need for passive remedies, and an indication that this
4 particular communications provider did not itself intend to purchase passive remedies
5 directly.

6 THE CHAIRMAN: You are not noticing bullet point 1 – you will deal with that later, will you?

7 MR. HOLMES: There is not a dispute that BT's processes have given rise to complaints and
8 difficulties in the past. These meeting notes contain mixed messages about that, some of
9 them are satisfied with BT, some of them point out that the problems have been largely
10 addressed. I was not proposing to flag them up because I do not think it is an important
11 aspect of my case to do so, but I can certainly do so in closing ----

12 THE CHAIRMAN: We just want to avoid cherry-picking!

13 MR. HOLMES: I shall try to avoid doing so, sir, but you are quite right to draw my attention to
14 relevant materials in the notes if I fail to do so. Tab 7 – a meeting note with another
15 operator, again a mobile company. Over the page, an almost identical assessment in the last
16 and last but one bullet points.

17 Turning forward to tab 9, another mobile network operator. On the second page, fifth bullet
18 up, an indication of why that MNO wanted to see passive remedies introduced, which did
19 not relate to any direct purchasing decisions that it intended to make if those remedies were
20 introduced.

21 One last brief example at tab 18, another communications provider, again a meeting note
22 with Ofcom, and under the heading "Passives" half way down the page, you see that
23 provider giving its own assessment of passives, and the last two sentences in particular I
24 would emphasise. It is not a major point, sir. We do not deny that there is demand, I
25 simply wanted to place some of the contentions in context by showing the extent to which
26 Ofcom was receiving mixed messages about the level of that demand.

27 MS POTTER: Can I just ask, what are you drawing from those responses – the fact that these
28 particular operators were not planning to use it themselves, although they would anticipate
29 they would be able to buy services from other ----

30 MR. HOLMES: You are quite right, madam. What those particular meeting notes suggest, is that
31 there would not have been direct demand from those operators for passive remedies with
32 them as the direct purchaser. They are not suggesting that they would not purchase services
33 that contained passive remedies, so I fully accept that point. But simply in assessing the
34 level of demand there are a number of operators that were not saying that they themselves

1 would purchase directly, although they could see a role for passive remedies in their
2 procurement from others. In many ways the more significant point is the second one which
3 I now come to, which is that those most enthusiastically seeking passive remedies did so
4 because they assumed that they would be offered on uniform regulated prices that would
5 break the bandwidth gradient. In other words, they wanted passive remedies precisely in
6 order to engage in the arbitrage, which ultimately led Ofcom to decide against introducing
7 such remedies.

8 The clearest examples of this are from the bundle from the interveners in support of Colt,
9 the “Interveners’ bundle” I think it has been called, and at the ‘MB1’ tab towards the end of
10 the file, sub-tab B, there is a meeting note between Ofcom and a particular mobile network
11 operator. The point I would wish to emphasise is in the final two bullets on the first page,
12 and the preceding sentence, I suppose: why this operator needed PIA or dark fibre. Given
13 that I have not mentioned the identity of the operator, I think I can say without risk of
14 revealing any trade secrets that the reason was to overcome the bandwidth gradient.

15 THE CHAIRMAN: It is one of the ----

16 MR. HOLMES: Yes, indeed, sir. Just to note the necessary assumption must be that the pricing
17 would be uniform and regulated. You can actually get that as well. Perhaps I should show
18 you. There is a point towards the top of the page, the third bullet down in the second
19 paragraph, the first substantive paragraph. There is an indication of the basis on which the
20 ducts should be costed. This is a price control accounting methodology which I suspect, sir,
21 you will be well familiar with. They envisage a price control, and they envisage the price
22 control freeing them from the bandwidth gradient. That is one of the reasons, only one,
23 why they sought passive access.

24 This assumption of a regulated price and a uniform price can be understood if one turns
25 back to a slide pack from the same operator at the preceding tab, which was a document that
26 you were taken to this morning. I want to make a point of specific relevance and also just to
27 pick up a point on the reliance that Mr. Beal placed on this document. Could you turn, first,
28 to p.113. The operator in question explain the regulatory position in Spain and Portugal
29 (that is the meaning of ES and PT in the first bullet point). The operator explains that only
30 Spain and Portugal have expressly included mobile backhaul in permitted uses for duct
31 access for passive remedy. Then the reasons why the Regulator has done that are set out.
32 The third one is the one that I want to draw to your attention. The operator says that it
33 would be impossible to police the restriction in any event and there would be difficulty in

1 clearly delineating access and backhaul networks. “Impossible to police the restriction” is,
2 we say, an example of the point about the difficulty of keeping a CP to a given use ----

3 THE CHAIRMAN: The restriction would be the exclusion of mobile backhaul.

4 MR. HOLMES: Exactly, sir, so the question is whether you could arrive at a method of
5 regulation which introduced passive access but said this particular use is not permitted. The
6 only point that I draw from that is that here is an operator who, as we have seen, is
7 supportive of introducing passive remedies, explaining that it would not be possible to limit
8 the uses. There would be difficulties - “impossible to police” is the phrase used - in
9 confining the use to particular purposes.

10 MS POTTER: Is this not just an account of what the Spanish and Portuguese authorities have put
11 forward as their reasons, rather than necessarily what this operator is thinking?

12 MR. HOLMES: It may very well be. They are the reasons, of course, that the operator decided to
13 put before Ofcom.

14 MS POTTER: I was just thinking there are obviously a lot of other authorities which have,
15 according to this, not ----

16 MR. HOLMES: Madam, if I might come to that point, because that is another point that I think I
17 should make in relation to this document, because that was what was relied upon by
18 Mr. Beal to show - and turning back it was the slide at p.112 that I think he specifically
19 relied upon. He drew your attention to this table and said that only two of the countries in
20 this table did not have passive remedies, but if you look at the table the second column
21 relates to market 4, that is to say the WLA market and not market 6, the leased lines market.
22 So it relates to passive remedies in relation to residential broadband access.
23 The preceding slide, p.111, also contains interesting material relevant to market 4. There is
24 a suggestion there, as you see in the second of the two bullets, that NRAs and the NGA
25 recommendation are limited to market 4, subject to a query about the interpretation of a
26 particular phrase in the recommendation.

27 MS POTTER: So suggesting that things ----

28 MR. HOLMES: So there are two points here. One point that is being made is that this is
29 something tapping all across Europe. The point I am making here is that these two slides do
30 not support that contention. What they suggest is that something has been done in market 4
31 and not in market 6, and that is supported by the NGA recommendation. I would say these
32 documents do not shed any light on the extent to which you could effectively police the use
33 of PIA, passive remedies, in market 4 and prevent them from being used in market 6.

1 Indeed, as we will see, Colt's position is that you cannot. That was their consultation
2 response. You cannot police them, cherry picking will happen anyway. That is their
3 position. During the consultation process. They think it is not possible to police this
4 boundary between market 4 and market 6. The issue has not, in fact, arisen in this country,
5 and that is why WLA is a complete red herring. The reason is given by Mr. Lazarus in his
6 witness evidence where he explains that no one uses PIA in WLA, it is a dead letter.
7 Ofcom recognised at the time of introducing it that this was going to be a very demanding
8 business case to meet the price that was attaching to it, which was set deliberately high.
9 Ofcom's intention was that people would use the VULA, the active remedy that was being
10 introduced. The price at which PIA access was being given has not been attractive to
11 operators. They are not using PIA at all. So we have not for that reason tested this question
12 about the scope for arbitrage between market 4 and market 6.

13 The bullet point, and forgive me if I put it too highly, you are quite right, attributes a view
14 to another party, namely the Spanish and the Portuguese regulators, but the view that is
15 contained in that slide, which was among the materials that were provided to Ofcom, was
16 that it would not be possible to police against arbitrage. We will see that there are other
17 indications to that effect in the documents that were provided to Ofcom. I hope that
18 addresses your question on that.

19 I am so sorry, I am jumping around slightly here, but in order to take the points in their
20 order, but could you turn back to tab 9 of the supplemental bundle, This is one of the
21 mobile operators, and at slide 11, you will see this operator telling Ofcom what it wanted in
22 terms of pricing, and the third bullet is the one that I wanted to draw your attention to.
23 Again, I am not suggesting that it is the only reason for wanting passive access. There is a
24 whole range of considerations that clearly are applicable to this operator. Sir, you drew that
25 to my attention before in relation to the other operator. One aspect of it in terms of price,
26 their expectations in terms of price was that they wanted to see a means of overcoming the
27 bandwidth regime.

28 Turning forward in the same file to tab 11, one finds another communications provider
29 making submissions by letter dated 3rd January 2012, so quite late on now in the inputs
30 process. The heading explains the subject matter, BCMR, the need for passive remedies. In
31 the fourth paragraph of the letter the operator in question, the CP in question, explains that
32 its customers value being able to increase their bandwidth relatively cheaply. The CP also
33 goes on to explain - excuse me, my apologies, I accidentally revealed the identity of the

1 operator. I should perhaps just ask you to read that paragraph rather than attempting to
2 describe its contents. (After a pause)

3 Moving forward, there are then a couple of diagrams showing how passive remedies might
4 be deployed. The point at the top of the page says the cost advantage that is perceived to
5 arise using passive remedies rather than BT's active OSA remedy. You see in the following
6 table the third row headed First 10G shows the price for the first lot of bandwidth under this
7 model. The second one shows the cost of the next 10G. You can see it is not a very
8 significant increment. In the following table one then sees the costs that would be incurred
9 if one purchased active products from Openreach which increase very significantly.
10 Then moving forward to the penultimate page of the letter, point 4 Costing Issues, you see
11 this operator's views of BT's current costs recovery at the downstream level. (After a
12 pause) You see a suggestion about what would happen to the prices of some other BT
13 products, actually outside the field of leased lines altogether, and a suggestion that it would
14 be welcome to have more accurate costs based pricing.

15 THE CHAIRMAN: You are saying whether or not it would be welcome is not the point?

16 MR. HOLMES: Not for the regulator in any event. Of course, Ofcom understands and listened
17 carefully to all of those people who were seeking access, and it understood that they had a
18 commercial incentive to do so at the right price. It tried to understand what uses they
19 wanted and what their expectations about price were. But this letter, we say, is fully
20 consistent with the previous operator's views, MNO's views that I showed you, that passive
21 remedies would be priced in a way that would overcome the bandwidth gradient.

22 THE CHAIRMAN: Yes. I think I am following you. You are asking us to follow you through a
23 rather delicate minefield. In other words, to put aside our instincts which might say this is
24 pro-competitive and say that is not the question that Ofcom was asking itself; Ofcom was
25 asking itself what was the delicate balance between these various ways in which costs could
26 be recovered, and would intervening in one area have effects in others? So are you asking
27 us to be completely neutral about what those effects might be, but just to note that there
28 would be effects and that that was taken into account? That is quite a narrow point, but that
29 is what you are asking us to do?

30 MR. HOLMES: What I hope that I am showing for the moment is that operators were saying that
31 they wanted passive access in order to overcome disadvantages, as they saw it, in the way
32 that BT currently recovers its common costs.

33 THE CHAIRMAN: Competitive disadvantages.

1 MR. HOLMES: You can always increase competition, sir, by artificially cutting price. The
2 regulator can always bring more competition to the market by obliging an operator --

3 THE CHAIRMAN: Within this moderated competition --

4 MR. HOLMES: By obliging an incumbent operator to provide cheaper services, or to give more
5 access. But that is not really the question that the regulator faces. The question the
6 regulator faces is it has got to balance various things. It believes that there is efficiency in
7 having differentiated common costs recovery, in having price discrimination that allows
8 costs to be recovered in a way that does not choke off demand for people outside urban
9 areas and does not choke off demand for people who want the low bandwidth product, but
10 allows BT to recover its common costs in a way that reflects differences in demand. It is
11 intuitively obvious that people will have different levels of demand for one unit of
12 bandwidth and for two or three units of bandwidth. If you recover your common costs
13 across those three products, it will be efficient, or it may be efficient, or it is likely to be
14 efficient in Ofcom's view to allow BT to put its common costs on the products for which
15 there is higher demand at a higher price, which is to say a higher bandwidth product.
16 Ofcom, of course, also has duties to have regard to the interests of the introduction of high
17 broadband services all across all areas of the United Kingdom, which is a point I will come
18 to shortly. These are all considerations that Ofcom can legitimately take into account.
19 I am not yet coming, though, to describe Ofcom's regulatory reasoning process. What I am
20 trying to show the Tribunal is what uses were being envisaged for passive remedies. I will
21 come then, if I may, to Ofcom's decision document, to show you what concerns Ofcom had
22 about use of passive products in the ways that were being described by stakeholders during
23 the consultation process.

24 MS POTTER: Mr. Holmes, I am sorry to divert you yet again, but I think in relation to this
25 particular document, you took us first to the sort of opening two or three pages and then the
26 costs differences. My quick reading of this is not suggesting it is all about the bandwidth
27 gradient, but it is about a number of ways in which this particular operator is suggesting that
28 it would be able to provide services more efficiently because of the way it could configure
29 equipment and things like that, which is not entirely about the bandwidth gradient.

30 MR. HOLMES: No, it is true, but the figures for the active services are striking, the way in which
31 they increase by reference --

32 MS POTTER: They are indeed.

33 MR. HOLMES: But that is a key part of the pricing.

1 MS POTTER: Part of that is obviously bandwidth gradient, but part of that is because of the way
2 that equipment is provided for each element.

3 MR. HOLMES: I would not dissent from that. I would say that all I need to take from this
4 document, from the multitude of other documents, is the extent to which the bandwidth
5 gradient was a material consideration for those operators that favoured the introduction of
6 passive remedies. I am not suggesting it was the only consideration by any means, and it
7 would be quite wrong of me to do so. You are quite right to draw my attention to the other
8 benefits that operators also perceived as passive remedies. But, of course, Ofcom had to
9 weigh those in the balance and it did.

10 Turning forward, then, back to tab 6, if I may. This is a meeting note between Ofcom and
11 an operator to which some importance has been attached by Colt. So I should deal with it in
12 any event. Let me just also draw your attention to a point that develops points that I have
13 just been making. You will see the last three bullet points on the first page of the note begin
14 with a summary of the issue as understood by an Ofcom official, GS. Sorry, it is tab 6 of
15 the supplemental bundle. Then the following bullet shows the MNOs attendees agreeing,
16 then the concern of the MNOs representative, MT, about the way in which BT allocated its
17 cost to bandwidth.

18 Moving over the page you will see also that Ofcom set out its current thinking in relation to
19 costs. I think for reasons of time I will just skip and quickly deal with the point that was
20 made against Ofcom, that this note also showed a closed mind, and that one finds on the
21 third page. This is not really relevant to the points I have just been developing, but I think
22 I should just address it quickly while we are here. What was said against Ofcom was that in
23 the fourth bullet in the third, fourth, fifth bullets, Ofcom revealed that it had already taken a
24 view, set its mind against passive remedies at this stage.

25 THE CHAIRMAN: Which page —

26 MR. HOLMES: Page 4, I am so sorry, it is p.4. Does the Tribunal recall this was the passage —

27 THE CHAIRMAN: Yes, the Tribunal recalls very well.

28 MR. HOLMES: Now, the short point in response to this is that the Ofcom official in question,
29 GS, made very clear that Ofcom would include the debate within the BCMR consultation in
30 order to gain the views of all stakeholders before making any decision. Now, it did set out
31 Ofcom's current thinking. There is nothing wrong in a consultation process with the
32 consulting public authority explaining the approach that it was minded to take. And we will
33 see that the consultation document which followed a couple of months later, we are now at
34 really the eleventh hour, at the CFI stage, that we are just on the eve of the consultation

1 document, the consultation document which followed shortly after did set out publicly
2 Ofcom's position which was that passive remedies, it was not minded to introduce passive
3 remedies, it reached a provisional conclusion against them, but what Ofcom's, the Ofcom
4 official in question is also making clear is that Ofcom intended to consult and would gain
5 the views of all stakeholders before making a final decision. One cannot extract from this
6 document, assuming good faith on the part of Ofcom, one cannot extract a belief, any
7 indication Ofcom had already shut its mind and that this was a sham consultation which
8 I took to be the suggestion of Colt.

9 THE CHAIRMAN: A provisional finding.

10 MR. HOLMES: A set of provisional views which were the subject of consultation at this meeting
11 and were subsequently set out in the consultation document and were subject to consultation
12 then.

13 THE CHAIRMAN: And the next bullet point, which talks about the issue being wider than the
14 scope of the BCMR?

15 MR. HOLMES: This is all part of Ofcom setting out, it certainly is an issue which spans a
16 number of markets, that is quite true, and there is no doubt that the issue of passive
17 remedies is a broad one. But what these few sentences in this note cannot be taken to show
18 is that Ofcom did not consult. You know, I have worked with Ofcom on a number of cases,
19 and it is very hard to level against them an accusation that they do not consult enough. One
20 sometimes feels that the reverse may be true in fact —

21 THE CHAIRMAN: I could not possibly comment.

22 MR. HOLMES: — that they consult and they consult.

23 THE CHAIRMAN: I understood the point partly, but there was a slightly more nebulous one
24 which was that given these negative indications, which were not necessarily binding but
25 were negative, that then rather discouraged the provision of evidence on serious substantial
26 demand because of the chicken and the egg, you know, if the remedy was not likely to be
27 imposed, there was not likely to be great interest in commercial exploitation. I thought we
28 got led down that line.

29 MR. HOLMES: Well, sir, I see that point. I think the response would be that Ofcom was making
30 very clear here, as it did throughout, that it was open to the views of stakeholders, and
31 certainly the response of other stakeholders to Ofcom's interim views was not to draw back
32 from making sustained submissions in support of passive remedies, but on the contrary to
33 make very loud and determined pleas in support of them. In general this is not a market
34 where, you know, characterised by shrinking violets who will keep their views to

1 themselves in the consultation process. They set out their views forcefully, as we will see in
2 a moment.

3 THE CHAIRMAN: Okay.

4 MR. HOLMES: And then I should perhaps just briefly show you what the other side of the
5 equation was saying at the call for input stage about the practicability of limiting passive
6 remedies by reference to particular uses. So if you could go to BT1 —

7 THE CHAIRMAN: I do not want to curtail you in any way, but how are you doing for time?

8 MR. HOLMES: Sir, I have a fair amount of material. I imagine that I will take the, well, subject
9 to the Tribunal's views, we have now a smaller array of witnesses than I feared. I will
10 certainly finish today. But the question is — what is to be done in relation to Mr. Beard's
11 submissions?

12 THE CHAIRMAN: No doubt Mr. Beard has a view.

13 MR. HOLMES: How would the Tribunal, well, subject to Mr. Beard's and the Tribunal's views,
14 it may be convenient for those to be left over and to be dealt with briefly before witness
15 evidence tomorrow morning.

16 THE CHAIRMAN: It depends how much he has to say.

17 MR. BEARD: It could be lots — but I will restrain myself to a half hour. On that basis I am very
18 happy to start tomorrow morning. I do not get the impression from either side that we are
19 likely to take all of the two days with the witnesses. I may be wrong. If not, perhaps the
20 idea will be to start slightly early tomorrow morning. I am happy to keep going this
21 evening and do our submissions this evening, but it is really a matter for the Tribunal.

22 THE CHAIRMAN: Proceed, Mr. Holmes.

23 MR. HOLMES: I am grateful, sir. So, I was going to show you what the other side were saying,
24 and for that I need to go to BT1, 6B2. From p.1 you will see that this is the Business
25 Connectivity Market Review of Passive Remedies' summary of BT's views. I think these
26 are matters of general regulatory policy, so unless BT tells me otherwise I assume that this
27 document is non-confidential in its contents. At p.4 —

28 MR. BEARD: I am not sure it is entirely safe to proceed on that basis. I will have to double
29 check. There are bits of it that plainly are not confidential, but I cannot anticipate what
30 Mr. Holmes is going to cover.

31 THE CHAIRMAN: We are in your hands.

32 MR. HOLMES: Well, on p.4, sir, you might, if I could ask the Tribunal to read the first two
33 paragraphs under the heading, "3, Passive remedies would be untargeted ..." I hesitate to
34 say the last two words because maybe they are more sensitive, but — and irreversible. So,

1 here again, just as the MNO were saying, the Spanish and Portuguese regulators thought in
2 relation to their remedies. So you see BT taking a similar position in drawing attention to
3 the practical difficulty in restricting the application of passive remedies. In fact the problem
4 goes wider than leased lines according to BT here. The problem extends to other markets
5 more generally.

6 Further material that was presented to Ofcom arguing about the impracticability of limiting
7 passive remedies to particular applications, and therefore from that a difficulty of having
8 differential pricing by downstream use. You see their view on price setting and recovery of
9 common costs. I will not ask the Tribunal to review it now but for your note you will see
10 on p.5 at 4.1 “Price setting and recovery of common costs” – they advance arguments that
11 are familiar to the Tribunal.

12 MISS STUART: Mr. Holmes, can I just ask one question on process? Obviously the document
13 that you have just presented to us is a BT document but it was sent to Ofcom. A lot of the
14 other evidence that you were putting forward were file notes, which were Ofcom file notes.
15 Are those all signed off by the people that made them?

16 MR. HOLMES: That is a very good question. I believe that they are put forward for approval.
17 Yes, madam, they are. They are provided to the party in question for them to look at them.
18 In fact, I think you will see on some of them some tracked changes, which shows input.
19 (After a pause): I am corrected, madam. I think in some cases that is the case, but not all.
20 So you need to proceed on the basis that these are Ofcom’s accounts of the meetings.
21 The one point I would make is that a number of these meeting notes are exhibited in the
22 bundle of the interveners in support of Colt, and if you look at the list of those interveners
23 you will see that there is, to say the least, an overlap between the parties to whom the
24 meeting notes relate, and the intervener that has put them forward, so one would rather have
25 expected, had the intervener regarded those file notes as in any way inaccurate as a
26 summary of the meeting, that they would have drawn that to Ofcom’s attention.
27 So, standing back, at the CFI stage you see some enthusiasm for passive remedies, but
28 certainly informed by a belief that passive access would be on a uniform basis enabling
29 operators to overcome the bandwidth gradient, so one of the advantages – not the only one -
30 that was perceived to flow from passive remedies was that the bandwidth gradient would be
31 defeated on the basis of uniform average rates.
32 Moreover, you see indications that dark fibre use might be impossible to police, thereby
33 supporting the conclusion that you could not have differentiated prices at the upstream
34 level.

1 Let me now turn to the consultation document. On this I can be quite brief. The Tribunal
2 will find in the additional materials bundle at tab 3, the publication date, which is not
3 shown, as June 2012. You see at p.426 there is a heading: “Assessment of the case for
4 imposing passive remedies”. There is a quirk in the numbering, if you look at the bottom of
5 the page it leaps from 426 to 421, but it is 426 at the front that I want to begin at if I may.
6 Just to note that the preliminary view in the summary is that Ofcom does not consider that it
7 should impose passive remedies to address competition in the leased lines market in this
8 review.

9 Then a short summary of the reasons – if I could just ask the Tribunal to review that
10 quickly.

11 MS STUART: I am sorry, Mr. Holmes, can you give me the timing of when this was published?

12 MR. HOLMES: This was June 2012, so there was the call for inputs, there was then a period
13 during which written responses were received, like the first document that I think I showed
14 you. There were also meetings between Ofcom and various industry parties, which went on
15 until June 2012 which is when this came out.

16 The two bullets summarise Ofcom’s reasoning. It is possible that passive remedies could
17 improve the prospects for competition generally, but Ofcom’s analysis suggests that the
18 potential benefits that could flow from doing so could, to a large extent, be achieved by
19 posing alternative remedies such as price controls at the active level and, at the same time, a
20 consideration that:

21 “... imposing passive remedies in leased lines’ markets, either in isolation or in
22 combination with active remedies, could carry significant risks of worse outcomes
23 than continuing to impose active remedies alone and the competition issues we
24 have identified can be effectively addressed with other, less intrusive, remedies.”

25 Turning forward to “Current Considerations” at 429, I take it that the current
26 considerations is a way in which Ofcom was noting that these were preliminary, they were
27 provisional, this was subject to the consultation that would then follow.

28 You see at 8.58 a recognition of the benefits to which passive remedies could lead:
29 stimulating competition by lowering barriers to entry for competitors who invest in
30 infrastructure. The point, sir, that you raised with me earlier.

31 In the case of a PIA remedy – this means I think, here, physical infrastructure access, as
32 opposed to passive remedies generally. In other words, access to ducts but not to fibre:

1 “BT’s competitors would avoid the initial cost of investing in their own civil
2 infrastructure such as trenches and ducts, while in the case of a dark fibre they
3 would avoid the same cost as well as the costs of purchasing and laying new fibre.”
4 - because there they would get the fibre as well as the duct.

5 Both of those remedies, it is noted:

6 “... may deliver other important benefits, such as increased investment in fire-
7 based services, more innovation and greater choice for customers.”

8 Paragraph 8.60 Ofcom notes that passive remedies would involve additional costs in
9 network infrastructure and the real cost, which concerned Ofcom was the optical equipment
10 which would need to be installed, which could be substantial. I am not sure if one gets that
11 here. No, here it simply indicates that the additional cost could be significant and it shows
12 some modelling work that has been done.

13 Then at 8.61 to 8.63 one comes to key paragraphs which set out Ofcom’s concerns, and we
14 say that these do provide a sufficient basis of consultation on the problem of arbitrage, of
15 cherry-picking and the consequential impact on downstream prices for users outside urban
16 centres, and of lower bandwidth products which were Ofcom’s concerns.

17 So if I could just ask the Tribunal to refresh its memory of those paragraphs. (After a
18 pause): So, in short, a concern about bandwidth gradient, a concern about arbitrage,
19 cherry-picking, focusing competition on particular groups of customer and charges rising
20 for other groups of customer, those not in the urban areas where BT currently recovers a
21 higher proportion of its costs or the users of high bandwidth services where similarly higher
22 common costs are recovered.

23 Then Ofcom turns to consider some specific issues. Needless to say, given the consultation
24 responses that I have shown you, one particular issue was mobile operators saying that they
25 needed more backhaul, their concern about the potential use of passive remedies for
26 backhaul MNOs’ radio base stations.

27 THE CHAIRMAN: Mr. Holmes, where are we on the balancing act? This is all part of the
28 “Ofcom considerations”.

29 MR. HOLMES: What I have shown you is an identification of potential benefits in 8.58 and 8.59,
30 and then an identification of some significant risks which Ofcom saw as attaching to passive
31 remedies. So that is the balance of potential advantages and potential disadvantages.

32 Before reaching a final view on that balance, I will turn to consider specific issues raised by
33 stakeholders who wanted to see what was actual being proposed for passive remedies. The
34 first category it considered was backhaul for mobile network operators’ radio base stations,

1 because, as you have seen, mobile network operators saw this as a potential use for passive
2 remedies. There is a discussion of the difficulties which have been encountered in
3 obtaining service from BT. There is a discussion about whether those have been overcome
4 and what ways of working round them there are.

5 At 8.80 to 8.82, you see a discussion of pricing, which returns to the issue of arbitrage
6 which we have been discussing and the bandwidth gradient. (After a pause) So you see
7 there Ofcom stating its previous view that it is economically efficient to recover common
8 costs differently from different types of product, given the differing levels of demand, and
9 also BT's likely better knowledge of those.

10 Just pausing there, on the question of whether this was a *fait accompli*, it is worth noting the
11 language that Ofcom is careful to use here. Ofcom is not saying that its conclusion is
12 determined by the approach that it has previously taken. It is recording that approach and it
13 is explaining the tension between that approach and the mobile operators' desire to use
14 leased lines as a way of avoiding the bandwidth gradient, but it was being considered in the
15 round.

16 I should perhaps note that at 8.85 Ofcom offers various reasons why passive access to
17 leased lines may not be the only way of addressing the problems that have been identified
18 by the MNOs. So Ofcom was not deaf to them, it did not ignore considerations that had
19 been raised and that you drew my attention to as we were going through them. At 8.86
20 there is a consideration of whether you should extend the uses of the PIA remedy in WLA
21 to support investment in super-fast broadband. You will see at 8.89 in the final sentence
22 Ofcom expressly invited evidence that shows that NGA investment could be unlocked by
23 being able to use PIA for leased line services which could help us to formulate policy in this
24 area. So Ofcom are looking for evidence of investment.

25 Then other points raised: a significant point, we say, at 8.91. You see at 8.90 that the
26 submission of one of the operators, which I showed you, is recorded, that there might be a
27 niche role, a limited role, for passive access and supporting certain applications. At 8.91
28 you see Ofcom's conclusion which is explicit, an explicit conclusion. It is not just an
29 assumption:

30 "We consider that it would not be practical to confine a requirement that BT
31 make PIA available for leased line to such specific applications."

32 In other words, Ofcom did, it was implicit in Ofcom's reasoning about the bandwidth
33 gradient, as it was on the part of the other operators that were making submissions to it, but

1 here Ofcom is quite explicit in saying it is not practicable to avoid uniform pricing and to
2 have differential pricing by means of controls on the uses to which passive access is put.
3 Then at 8.94, sir, in answer to your question earlier, you see a summary of the balancing
4 exercise that we say Ofcom has undertaken.

5 THE CHAIRMAN: It is quite similar to the Final Decision.

6 MR. HOLMES: Yes, sir, it is, and it is only provisional, but it has positive advantages for a
7 regulator to set out clearly its provisional thinking in this way. That does not show that it
8 has a closed mind to consultation, any more than the Competition Commission does when it
9 publishes provisional findings. The point is that ----

10 THE CHAIRMAN: I have forgotten all about the Competition Commission, Mr. Holmes!

11 MR. HOLMES: Sir, I am not sure if this is out of the frying pan and into the fire, but I suppose at
12 least the process is somewhat less extended!

13 THE CHAIRMAN: I could not possibly comment!

14 MR. HOLMES: The point is that Ofcom did, you are quite right, set out views which it
15 ultimately adopted after hearing consultation responses. If your concern was that that
16 showed that it was already *parti pris*, that it had a settled ----

17 THE CHAIRMAN: It is not my concern but it is what is being said against you.

18 MR. HOLMES: Yes, sir, but the consultations very often state what the regulator is minded to
19 do, and that does not show any failure to consult. What is important is that Ofcom gives an
20 understanding that is sufficient to allow intelligent responses to be made, and Ofcom
21 considers carefully and conscientiously what comes back.

22 THE CHAIRMAN: So you are really saying that this is a complete answer to the charge that
23 between the call for inputs and the June consultation some kind of prejudicial closing out of
24 passive remedies had occurred?

25 MR. HOLMES: Yes, sir. I would say it would be an extraordinary finding to suggest on the basis
26 of that one bullet point in that one meeting note in which the Ofcom official in question
27 made it absolutely clear that this was all subject to responses received in consultation. It
28 would be quite extraordinary to find an error of consultation on that basis, to put my
29 submission ----

30 THE CHAIRMAN: To put your head on the block, yes.

31 MR. HOLMES: There was then, following the consultation, a further round of engagement with
32 industry parties to obtain their reactions to these provisional conclusions, and this time Colt
33 did respond. In our submission, its response sheds relevant light on the arguments advanced
34 in the appeal. It is found at annex 6, or tab 6, of the third notice of appeal bundle. I am

1 going to ask the Tribunal to turn it up. The tabulation, I am afraid, of many of these bundles
2 is a little bit difficult to follow. It is the third of lot of tabs.

3 Sir, I am being helpfully reminded that I should have drawn your attention to the fact that
4 having set out our position, Ofcom then consulted upon it, and I should show you the
5 question, if I may. Could I take you back to the additional materials bundle tab 4. You see
6 there the consultation questions that were raised across a wide variety of issues of market
7 definition and dominance. At question 13 the question is: "Do you agree with our
8 approach to remedies and in particular our consideration of the case for imposing passive
9 remedies?" So a very broad and open-ended question, an opportunity to respond to any and
10 all aspects of Ofcom's analysis which was set out in a very helpful and open way, so the
11 parties could give their response, could say whether they agreed whether it would be
12 practicable to limit downstream use, or whether differentiated pricing would be possible, or
13 whether a high access price could avoid the problem of arbitrage. This was all on the table.

14 THE CHAIRMAN: The case for and against imposing passive remedies.

15 MR. HOLMES: Indeed, and Ofcom's own view of the balance. Sir, may I now take you back to
16 the Colt response to the consultation document at file 3 annex 6 tab 6. It is an undated
17 document but it is clear from the context that it followed the consultation document. You
18 see that from the first sentence on p.3. Colt indicates that it is supportive of the majority of
19 Ofcom's proposals which represent a considerable improvement over the current
20 arrangements in the penultimate sentence of the first part of the first paragraph, before the
21 bullets. A number of virtues of the proposals are then extolled in those bullets. Then
22 halfway down the page an indication that there are some reservations on some of the details
23 of Ofcom's proposals. Then the final paragraph of p.1, the first sentence: "We consider
24 that Ofcom should consider a broader range of access options in the current review." Over
25 the page at p.4 they then describe what their specific and main reservations are with
26 Ofcom's conclusions.

27 The first bullet refers to the "absence of a business grade VULA product as a remedy in the
28 BCMR" as being a substantial problem. VULA, as the Tribunal will be aware, is the active
29 product introduced in WLA, so it is an active not a passive product. An indication that this
30 "omission portrays a narrow approach to the market", then an indication that "Ofcom's
31 unwillingness to consider a PIA variant for business connectivity - which could
32 significantly reduce the cost of network expansion - exacerbates the distortions created by
33 the lack of business grade VULA."

1 So there passive remedies are referred to, but really as a factor exacerbating their main
2 complaint which is that they did not get VULA.

3 THE CHAIRMAN: They are taking a rather broader view, are they not, to be fair? They are
4 saying that the old distinctions between different market categorisations may be breaking
5 down in this document, and if you have got an active product for the residential sector, it
6 would make sense then to have one for the business sector because the distinction is not a
7 very --

8 MR. HOLMES: That is not a point that is pursued on this appeal.

9 THE CHAIRMAN: I did not read it that they actually really wanted an active price regulation
10 product as a main objective, but you may have a better view.

11 MR. HOLMES: Sir, I read the documents as you do. I certainly take your point that they are
12 making some general observations here about the degrading or the breakdown of market
13 distinctions. Indeed, sir, in a sense that confirms my case on the difficulties of sustaining
14 differential control of different uses. As we will see, actually that is expressly developed
15 when one comes to see at the back of the document the few paragraphs which relate
16 specifically to passive access on pp.17 and 18. The first paragraph under 6.2, the way
17 forward, an acceptance that the regulatory model, while it has been relatively static, can
18 hardly be said to have failed.

19 "Far from it. The UK has world class business connectivity options that
20 supports its status as one of the world's leading financial centres".

21 Then further down the page in the final two paragraphs Colt addresses what it understood to
22 be the two primary reasons why Ofcom decided against mandating passive remedies in the
23 BCMR.

24 Pausing there, we had not of course finally decided; we were consulting; this was at the
25 consultation stage. You will note the reference to the primary reasons. Mr. Beal suggested
26 this morning that they had been somewhat surprised in this appeal by the emphasis that we
27 placed upon cherry picking, arbitrage and so on. That is not what the business people and
28 regulatory people in Colt understood at the time. They saw quite clearly the nature of
29 Ofcom's concern.

30 If you see how they respond to the arbitrage point, this is dealt with in the final paragraph of
31 the document. They say that they understand the basis for this argument and they offer two
32 reasons why they say it is weak.

33 I should say, sir, there was one point I failed to pick up. In the penultimate paragraph on
34 p.17 they say that they understand the economic logic behind both of Ofcom's arguments,

1 including the argument that “passive remedies would allow CPs to arbitrage BT’s cost
2 recovery model.” But they then say that neither constitutes a sound basis for the conclusion
3 that Ofcom has reached. So they understand the economic logic, mind you.

4 Then they come to explain why they say that they are not a sound basis. As regards
5 arbitrage they give two reasons why they say it is a weak reason. In the first bullet they say:

6 “Cherry picking will happen anyway. NGA developments will result in
7 substitution of business service revenues at the margin and the erosion of BT’s
8 model for recovering common costs. To some extent, part of the cherry picking
9 will be BT’s own doing. By leveraging the lower cost base afforded to it by
10 NGA (that is denied to its competitors) it will see some benefit of substitution
11 of the margin by offering lower prices for business connectivity. The extent to
12 which it will do this of course will be limited by the fact that such activity
13 would cannibalise its own business service revenues.”

14 Cherry picking will happen anyway. What Colt is not saying here is that you can solve the
15 arbitrage problem because uniform pricing is unnecessary. On the contrary, it is confirming
16 that arbitrage is a problem, that you cannot limit downstream use. But it says that the
17 arbitrage will happen in any event because of the PIA remedy in WLA.

18 Ofcom’s response to that is not to say that there is not some potential for arbitrage from
19 WLA to BCMR, Ofcom’s response is to say that it has not in fact arisen because of the
20 demanding terms for access to PIA remedy, which mean that it is a dead duck, that no-one
21 is using it (I am sure those are my words, I should say, rather than Ofcom’s) but that so far
22 there has been no uptake of the PIA remedy.

23 But my key submission on this passage is that it is fully consistent with Ofcom’s conclusion
24 in the consultation document that it will be impracticable to have a differentiated package of
25 prices for passive access in order to overcome the problem of eroding the bandwidth
26 gradient and geographical de-averaging.

27 The second point is a point that Colt did not develop in its notice of appeal and has been
28 somewhat gingerly taken up in reply and in Mr. Beal’s submissions this morning, which is
29 to suggest that BT’s cost recovery pattern may not be efficient. Now, you have my point
30 that that is not really in issue in this appeal. It was a decision that Ofcom took in setting the
31 price control. The efficiency of the common cost recovery pattern is not something which
32 has been put in issue in this appeal. And to be fair to Colt, the highest that it was put this
33 morning, if I understood correctly, was to say that “We can’t be sure. We don’t know if the
34 cost recovery pattern is efficient or not”. Ofcom’s submission is that Ofcom had good

1 reasons for concluding that BT's common cost recovery is efficient. It adopted them as part
2 of its price control measure in the BCMR statement. No-one has appealed that conclusion.
3 If they had appealed that conclusion, the appeal would not be before this Tribunal, it would
4 be before the Competition Commission because it relates to the design of a price control,
5 and so really this is not a matter which the Tribunal is well placed to decide, and it is not a
6 matter which is really before the Tribunal.

7 THE CHAIRMAN: Are you saying we are barred from addressing it?

8 MR. HOLMES: Well, sir, if the Tribunal considers that it has the materials before it to assay a
9 view, that is really a matter for the Tribunal. But we say that it is really not a matter which
10 has been opened in the evidence, it is not a matter which is raised in the notice of appeal.
11 Of course the Tribunal decides the grounds of appeal by reference to the notice of appeal.
12 I think my primary submission would be that it should have been raised by way of appeal.

13 THE CHAIRMAN: So that is a sort of estoppel point.

14 MR. HOLMES: Well, it may also be a *vires* —

15 THE CHAIRMAN: It cannot be raised now?

16 MR. HOLMES: I would reserve the *vires* point, that could well, I will hear what Mr. Beal says in
17 reply, but there may well be a *vires* point about whether the Tribunal is competent to decide
18 on the efficiency of the price control and that would be a matter that would be a price
19 control matter that should be —

20 THE CHAIRMAN: At the very least we would have to remit it back to Ofcom, and they would
21 then have to reconsider it, and if there were price control principles involved, then it would
22 have to go to the Competition Commission next time round. Is that what you are saying?

23 MR. HOLMES: Sir, that would be to impugn the price control which —

24 THE CHAIRMAN: I was just thinking aloud, really. I am not saying we would impugn
25 anything. I am just —

26 MR. HOLMES: Sir, I understand.

27 THE CHAIRMAN: — trying to work out how this would work.

28 MR. HOLMES: Yes. The Competition Commission is the body under our regulatory system
29 which is charged with considering price control matters.

30 THE CHAIRMAN: And you are saying nobody appealed this finding of the principles on which
31 BT recovered its costs —

32 MR. HOLMES: By price control, indeed.

33 THE CHAIRMAN: It was not part of this appeal?

1 MR. HOLMES: Sir, that is my primary position. My primary position is that, had it been raised
2 in this appeal it would have to go to the CC and the CC would be the competent body to
3 decide it.

4 My secondary submission is that in any event, it is not raised in the notice of appeal, and it
5 is therefore not before the Tribunal whether or not the Tribunal would have some collateral
6 jurisdiction to deal with it.

7 THE CHAIRMAN: Let us think about that, but just supposing that we were to come to the view
8 that there was something wrong with the way that the passive remedies decision had been
9 reached and it therefore needed to be reconsidered — are you saying it cannot be
10 reconsidered?

11 MR. HOLMES: No, sir.

12 THE CHAIRMAN: Or that it would have to be reconsidered including the principles on which
13 BT's cost recovery —

14 MR. HOLMES: No, sir, my submission, to be clear, is only in relation to one of the five points
15 I think that Mr. Beal developed in explaining why the concerns that Ofcom identified and
16 that were decisive to its decision were not well founded. None of these arguments was, you
17 know, he has an argument that there are ways of getting round the bandwidth — ways of
18 getting round the problem: you could have differentiated pricing despite the indication in
19 the consultation document response that you could not. He now says as a result of expert
20 evidence provided in reply for the first time that there would be a way round. He also says
21 that you could set the level high, at a level which Colt itself accepts may perhaps be too
22 high for anyone to compete effectively. Those are solutions that are fully before the
23 Tribunal to consider. He has got a raft of points, of course, about consultation, about
24 findings of fact, their materiality; but he makes one specific point about whether Ofcom
25 was correct to conclude that BT's pricing structure at the downstream level is or is not
26 likely to conduce to efficiency. As I understood it, he did not suggest that there was any
27 evidence before the Tribunal that took a view about this, but he seemed to suggest that it
28 should nonetheless be remitted to Ofcom for further consideration. Now, that is sufficient,
29 we do not share — frankly, we do not understand it, but no doubt he can develop it in his
30 closing submissions and we can respond to it then.

31 THE CHAIRMAN: Okay.

32 MR. HOLMES: So in summary, Colt's response is interesting for what it does not say rather than
33 what it does say. It does not respond to Ofcom's concerns by challenging Ofcom's
34 conclusion that passive remedies would need to be priced on a uniform basis. It does not

1 say that passive remedies could be priced on a uniform basis at a high level. It does not say
2 that it would be practicable to control the use to which a passive remedy is put, and it does
3 not say that passive remedies could be introduced on a FRAND basis. None of the
4 arguments which are now run on appeal featured in its consultation response; nor,
5 incidentally, does it suggest that Ofcom's impact assessment was inadequately quantified.
6 The consultation document (I will just give you the reference for your note, I will not take
7 you back there) but the consultation document made clear, at 8.96, that the analysis
8 contained in section 8 was Ofcom's impact assessment.

9 THE CHAIRMAN: 8.96.

10 MR. HOLMES: Yes, 8.96, but do by all means look at it now. All it says is that what goes
11 before is the impact assessment. As I understand it, Colt in reply, although not in their
12 notice of appeal, now contends that the impact assessment was inadequately quantified.
13 The point I am making here is that in consultation they saw the approach that Ofcom was
14 proposing to take and there was no suggestion at that stage of any inadequate quantification,
15 that Ofcom had not done enough number crunching in order to support its qualitative
16 assessment.

17 While we are looking at Colt's consultation responses, I should briefly show you the
18 evidence as to Colt's investment plans as this is of relevance to ground 4. And this is to be
19 found at tab.8 in the same bundle as Colt's consultation response. It is a meeting note with
20 Colt provided, of course by Colt, so I do not think there could be any dispute as to its
21 accuracy. And at para.16 (it is at tab.8 of annex 6)

22 MS POTTER: Would you like us to read this?

23 MR. HOLMES: Yes, I think that would be sensible, madam, yes. I think this is undeniably
24 confidential, yes. (After a pause)

25 THE CHAIRMAN: The 17th December.

26 MR. HOLMES: The 17th December, yes, sir. A few very short points: the investment is to cover
27 the European network. I do not think that in itself is confidential. The European network
28 covers 13 countries and the UK is Colt's smallest operation. The sum specified is a one-off
29 investment and it is spread over a five year period. The investment is to take place in a
30 market valued at over £2 billion a year of revenue. Now, I am conscious of the time, I want
31 briefly to consider the other consultation responses because they show more or less the
32 same picture. No denial that cherry picking will occur, no claim that differentiated pricing
33 will be possible at the passive level. No suggestion that it would be practicable to limit the
34 uses to which passive remedies may be put. No-one contending for high prices fixed in

1 order to avoid disruption to the bandwidth gradient. No-one contending for FRAND prices.
2 No-one asking for differential pricing by means of contracts with punitive penalty clauses.
3 Those were simply not options that were presented to Ofcom during the consultation
4 process. On the contrary, stakeholders continued to favour passive remedies on the
5 assumption that uniform pricing of passives would enable arbitrage in order to overcome
6 the bandwidth gradient.

7 A couple of brief examples: going back to the supportive intervener's bundle – supportive
8 of Colt – to MB1 (Tab G). This is one of the MNOs bringing out the big guns. This is
9 really the very end of the consultation process.

10 THE CHAIRMAN: What is the reference?

11 MR. HOLMES: MB1 tab G. It is the first four paragraphs that are of interest. (After a pause):

12 So a complaint about the bandwidth gradient, and over the page you see what the complaint
13 is aimed at – the first full paragraph on that page. Two things requested, one of them
14 passive access, regulated access has currently existed for NGA – passive access in other
15 words.

16 Turning back a tab, you find an email note of a meeting with the same operator, which I
17 think is used against us as evidence of demand. There is reference to having more of a
18 fixed cost infrastructure, an indication of consciousness of the cherry-picking issues. This
19 is only a very short email note of a meeting so one should not read too much into it, but
20 there is nothing here to suggest that cherry-picking can be avoided as an issue. On the
21 contrary, it seems to be acknowledged as a concern that needs to be addressed.

22 The other document that I should perhaps show you, given that it has been rather adopted at
23 the reply stage by Colt, although its authority is a little unclear, is to be found in the
24 appellant's supplemental bundle at tab 12. The document is undated but from the context it
25 is clear that the reference to September in 1.1 is September 2012 because it follows
26 response to the BCMR consultation. I am in some difficulty because it is not clear from the
27 document who the respondent is.

28 MS STUART: I think just the last line of that first paragraph ----

29 MR. HOLMES: Yes, good, I wanted to avoid saying it in open just so that I could make the
30 position more clearly. You will see these are additional comments on the business
31 connectivity market review from September 2012 and at p.3, you can see that this
32 respondent had no difficulty in understanding Ofcom's main concern, which is now said to
33 be of surprise.

34 MR. PIKE: Could you read it to us?

1 MR. HOLMES 3.1?

2 MR. PIKE: Yes.

3 MR. HOLMES:

4 “You explained at the meeting that the core reasoning as to why you were minded
5 not to introduce PIA/dark fibre (i.e. to mandate dark fibre, lifting use restrictions
6 on PIA to allow it to be used for leased lines) was ...”

7 I take it from that that there is some suggestion that we regarded use restrictions as viably
8 capable of being lifted. I think that is not a fair assumption to draw, given the clear
9 statement of the finding in the consultation document, and the responses that were made to
10 it.

11 There is then a discussion of the efficiency of revised common cost recovery and it is a long
12 and quite involved document and time is short, but I want to draw your attention to what
13 was being said by this operator at 3.9. They are recognising a threat to the current pattern of
14 common cost recovery, and the possibility that the common cost recovery might change.
15 Then at 3.18 an indication of the sort of Ramsey pricing which led Ofcom to think that
16 pattern of common cost recovery would be likely to be efficient:

17 “It might intuitively feel reasonable that BT’s current prices (and pattern of
18 common cost recovery) optimise efficiency since more common cost is recovered
19 (per circuit) from high bandwidth circuits which are valued more by customers ...”

20 but then a statement that doubts as to whether, in fact, BT’s actual prices optimise demand.
21 In other words, here a question about whether prices are efficient. A point which, as I said,
22 is not in issue in this, or has not properly been put in issue in this appeal.

23 Then at 3.25 a description of the arbitrage problem:

24 “If dark fibre were introduced it is likely, given that BT currently recovers more
25 common cost per line from high bandwidth services than low bandwidth services,
26 that entrants using dark fibre would initially focus their use of dark fibre to provide
27 higher bandwidth services.”

28 In other words, this operator, who is in favour of passive remedies, was saying that the
29 arbitrage problem that Ofcom had identified is exactly what would happen, and that is likely
30 to result in BT adopting a more even pattern of recovery of common costs across different
31 bandwidth leased lines so that the cost price per fibre was the same irrespective of its
32 downstream use.

33 THE CHAIRMAN: But they do not see it as a problem, they see it as a benefit.

1 MR. HOLMES: No, indeed, they do not, sir. That efficiency question has not been raised in this
2 appeal, not properly raised, we say, in the notice of appeal. There is no challenge to
3 Ofcom's finding that it is likely to be more efficient for BT to recover its common costs
4 through differentiated pricing, and it is clear that [X] takes a different view of that. [X] has
5 its own interests.

6 THE CHAIRMAN: We are in quite delicate territory, so please be careful.

7 MR. HOLMES: Yes, I apologise, sir.

8 You are quite right, sir. This operator does not agree with Ofcom but they do not dispute
9 the cherry-picking problem. Therefore, it would be a jolly good thing if the bandwidth
10 gradient were done away with. That is not Ofcom's view and you have heard my
11 submissions as to whether or not that is before the Tribunal.

12 THE CHAIRMAN: I am still not quite clear what you are saying on that, but I will read the
13 transcript carefully.

14 MR. HOLMES: Yes, sir. Would it help if I were to briefly recap?

15 THE CHAIRMAN: No, I do not think so, I will read the transcript, and if we have any problems
16 we will get back to you.

17 MR. HOLMES: Let us turn then to the Decision document.

18 THE CHAIRMAN: Are you still on track to finish today?

19 MR. HOLMES: Yes, I believe so, sir. I think I can be brief. There are two relevant points of
20 context. It is a very long document, the BCMR statement, and you see only a fragment of
21 it. There were a lot of decisions made, it was 1500 pages. This is the most complex set of
22 measures that Ofcom considers. It is the biggest of the market reviews. That needs to be
23 borne in mind when considering this little fragment.

24 Secondly, the document is the final iteration of a regulatory conversation. It needs to be
25 read with what went before it, and it needs to be read in that context.

26 Can I ask you to pick up the additional materials bundle again. I want to make five points
27 by reference to the statement. The first point is that Ofcom directed itself correctly by
28 reference to its statutory duties, contrary to an allegation of the interveners, and one of those
29 duties is, we say, relevant to the geographical concerns that Ofcom has identified. Could
30 you turn at tab 5 to 2.46. This is in a section entitled "Relevant legal tests and statutory
31 duties", and Ofcom refers there to the general duty to further the interests of citizens and
32 consumers where appropriate by promoting competition. Then in the final sentence:

1 “As to the prescribed specific statutory objectives in section 3(2), we explain
2 that the objective of securing the availability throughout the United Kingdom of
3 a wide range of electronic communications services ...”

4 and I emphasise “throughout the United Kingdom -

5 “... it is particularly relevant to the markets we have reviewed ...”

6 And in the following paragraph a mention of the considerations to which Ofcom is required
7 to have regard by virtue of 3(4) of the Communications Act, and a specific identification of,
8 among others, the desirability of encouraging the availability and use of high speed data
9 transfer services throughout the United Kingdom. In the light of this we say Ofcom was
10 plainly entitled to have regard to the impact of passive remedies on the pricing of
11 downstream products in different parts of the country outside the major conurbations to
12 which Mr. Beal referred. Any suggestion that Ofcom should have ignored the geographical
13 dimension is not well founded.

14 The second point to note concerns the active remedies that Ofcom imposed. I do not need
15 to take you to it, but if you look at the core bundle 2, tab 10, paras.18.10, 18.11 and 18.23,
16 Ofcom explains why it is adopting a price control using the basket model and giving BT
17 flexibility to set its own prices. That is not under challenge in this appeal, and it cannot now
18 dispute the wisdom of conferring on BT a discretion to engage in differentiated downstream
19 pricing.

20 The third point to note is that on passive remedies Ofcom’s core concern is clearly set out.
21 The passage was one that Mr. Beal did not take you to. It is in section 8 of the statement at
22 tab 8, beginning at p.655. Could I ask the Tribunal quickly to review 8.80 to 8.82 where
23 Ofcom sets out the importance of the relationship between the prices of passive and active
24 products in order to ensure efficient entry, and indicates those who want passive access but
25 do not want it at prices that reflect prices at the active level. At 8.82 it explains the
26 difficulty of differentiated pricing.

27 THE CHAIRMAN: (After a pause) Yes.

28 MR. HOLMES: Sir, just three points to note: Ofcom here are emphasising the importance of the
29 relationship between passive and active prices. Ofcom are drawing attention to the fact that
30 those seeking passive remedies do not want prices at the passive level that would
31 necessarily reflect prices at the active level.

32 At 8.82, you see that Ofcom records again that it is unlikely to be practicable to set charges
33 by direct reference to the charges for downstream alternatives, because passive remedies
34 would inherently be applicable to any leased line service, and there would be several such

1 alternatives, the problem of different uses to which it could be placed downstream - in other
2 words, a confirmation of the finding which I showed you towards the discussion in the
3 condoc, that it would not be practical to control downstream use.

4 Then the negative effects of flat rate charging for passive remedies are set out in 8.83 to
5 8.85. The risk of inefficient entry is 8.83. At 8.84 changes to prices. At 8.85 you see the
6 conclusion that:

7 “If BT’s ability to recover its common costs from higher value services is
8 reduced where, nevertheless, its own physical infrastructure is being used to
9 provide them, it may seek to drive up its charges in areas where BT may be the
10 only choice. Investment in fibre-based networks is subject to strong economies
11 of scale, and, while passive remedies could reduce barriers to entry, any
12 additional competition they stimulate may not be sustainable outside some
13 dense geographic clusters of businesses, such as urban centres. End user prices
14 may therefore rise in areas where BT may be the only choice.”

15 Here, of course, Ofcom was mindful of its statutory duties that I showed you in relation to
16 the geographical spread of availability of services.

17 Then at 8.106 and 8.107 you see the conclusion outlined which highlights the benefits,
18 8.106, which had also been identified in, for example, 8.101 and 8.104, more control over
19 the characteristics of the end to end services it offers.

20 Then at 8.106 a balancing of the two positive factors but the continuing concerns in relation
21 to arbitrage, in particular, on inefficient entry and higher end user prices as potential risks of
22 this change of the regulatory model.

23 So that, we say, was a legitimate and entirely reasoned and properly consulted upon
24 exercise of regulatory judgment.

25 There is a fifth and final point that I need to make by reference to section 8, and that relates
26 to the evidence of significant demand. I just want to draw your attention to 8.128 on pp.662
27 and 663. You see in the final sentence of that paragraph Ofcom identifies two points. First,
28 they say that they would need to be persuaded by compelling evidence that CPs are
29 prepared to invest substantially in passive remedies. That is the discussion which is the
30 subject of 8.108 to 8.127, the likelihood that passive remedies will be used. But it makes
31 clear that it would also need to be satisfied that they would lead to better outcomes in the
32 round if we were to impose them. That is the subject of the prior discussion which
33 contained the passage that I showed you about arbitrage that Mr. Beal did not take you to,
34 whether competition based on passive remedies would be more effective which runs from

1 8.51 to 8.107. So in our submission those are two discrete aspects of Ofcom's reasoning.
2 Whether or not Ofcom was right to take account of substantial investment decisions, and
3 whether or not it had the evidence to do so (and we say on each front it was entitled and it
4 did have the evidence) the point is that Ofcom had an independent basis of its decision
5 which was the balancing of advantages and disadvantages. Only if the Tribunal considered
6 that there was some error in that balancing which was the core of Ofcom's reasoning would
7 there be any basis for impugning Ofcom's decision and remitting by reference to the issue
8 of significant demand.

9 THE CHAIRMAN: The reference to "better outcomes in the round" comes in the section
10 discussing the likelihood that passive remedies will be used.

11 MR. HOLMES: I am so sorry, sir?

12 THE CHAIRMAN: I said the reference to "better outcomes in the round", which sounds like the
13 sort of overall balancing issue, comes in the section of the Decision about the likelihood that
14 passive remedies will be used, rather than as part of the overall conclusions but may be
15 repeated there.

16 MR. HOLMES: Sir, our submission is that that is just slightly clunky drafting. You see a
17 conclusion in 8.127 about the absence of any --

18 THE CHAIRMAN: I do not see it in the copy I am reading, but do not worry.

19 MR. HOLMES: That records the evidence that Colt relies upon in this appeal as to its own
20 investment decisions. While the positioning of 8.128 might not be ideal I think the
21 sentiment in the final sentence is clear in indicating two separate matters on which Ofcom
22 considered that it would need to be satisfied before introducing passive remedies, one of
23 which related to the balance. That is my submission in relation to that.

24 THE CHAIRMAN: Your other submission is that that is in the wrong place and that we should
25 take it for what it says.

26 MR. HOLMES: Yes.

27 THE CHAIRMAN: The evening draws on, Mr. Holmes.

28 MR. HOLMES: Indeed, sir. I have not dealt with the high price flat rate, but that is clearly going
29 to be a matter of relevance to the evidence, so it might perhaps be better to leave it.

30 THE CHAIRMAN: Yes, I feel we are going to discuss a lot of these issues again.

31 MR. HOLMES: Indeed, sir. Unless there are any further questions from the Tribunal, those are
32 my opening submissions.

33 MS POTTER: Possibly, subject to the Chairman's view, something that could be addressed
34 tomorrow just at the beginning, 8.106 and 8.107 and particularly 8.107 (and I think this is

1 repeated elsewhere) that “the package of remedies we decided to impose could achieve
2 similar outcomes” - so this is “stimulation of competition and providing scope for product
3 innovation and service differentiation in some cases”. This is something which I think I
4 have been struggling to understand a little bit in looking at this case. It may be something
5 that will be covered in any event in the cross-examination tomorrow, but otherwise it would
6 be quite helpful to understand how the price control remedies would deliver those same
7 benefits in terms of differentiation and innovation.

8 MR. HOLMES: Madam, I am grateful. I will try to come back to you.

9 THE CHAIRMAN: Thank you. Mr. Beard, tomorrow I am asking if we could start at 10 o'clock.

10 MR. BEARD: I would be grateful. It may be that I am going to be slightly over half an hour. I
11 will try to keep it to half an hour.

12 THE CHAIRMAN: Another very good reason for sitting at 10.

13 MR. BEARD: I am grateful. Thanks.

14 THE CHAIRMAN: Is everybody happy with that? OK.

15 MR. BEARD: Thank you very much, sir.

16 Adjourned until 10.00 a.m. on Tuesday 15th October 2013