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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1212/3/3/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

16th 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

- and -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC

Intervener

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HEARING DAY THREE

APPEARANCES

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

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

Mr. Daniel Beard QC and Mr. Robert Palmer (instructed by BT Legal) appeared for The Intervener.

1 THE CHAIRMAN: Mr.Holmes, good morning.

2 MR. HOLMES: Sir, may I call Mr. Culham as a witness, please?

3 THE CHAIRMAN: You may.

4 Mr. PETER GRAHAM CULHAM, Affirmed

5 Examined by Mr. HOLMES

6 THE CHAIRMAN: You are quite happy to do this in open, are you?

7 MR. HOLMES: I am in Mr. Beal's hands.

8 MR. BEAL: We will fairly swiftly be going in to confidential matters, I am afraid.

9 THE CHAIRMAN: Fairly swiftly means what?

10 MR. BEAL: Within the first five or ten minutes.

11 THE CHAIRMAN: During the course of his cross-examination?

12 MR. BEAL: Right.

13 MR. HOLMES: So on that basis we should perhaps clear the court now.

14 THE CHAIRMAN: Yes, to avoid disrupting.

15 MR. BEAL: To give an indication I am proposing to go into some of the call for inputs and the
16 responses and it would interrupt the flow of my cross-examination if I had to go only
17 silently through the relevant passages.

18 THE CHAIRMAN: In that case we move into camera. People who are not in the confidentiality
19 ring should leave the chamber, please.

20 MR. BEAL: I think that does not affect any of my clients, it is more a matter for BT.

21 (For closed hearing see separate transcript)

22 THE CHAIRMAN: If we just take care.

23 MR. BEAL; Sir, there is a greater degree of enthusiasm for my cross-examination than is
24 merited, but there we are.

25 THE CHAIRMAN: You have your audience.

26 Dr. DANIEL MALDOOM (Continued)

27 Cross-examined by Mr. BEAL

28 Q Dr. Maldoom, you have set out the presumption against intervening at multiple points in a
29 single value chain, either at all, I think, or possibly in the absence of a clear benefit of doing
30 so. Is that right?

31 A Yes. I think the point is that what I'm looking at is what can we say as a matter of principle
32 without getting into case specifics. And I think that theoretical considerations would
33 suggest that there should be a presumption against intervening at multiple points within a
34 value chain unless one can demonstrate a clear benefit from doing so.

1 Q And that translates, if I have paragraph 18 of your first report, indeed your only report,
2 correct, translates into a form of a presumption against intervention if you already have
3 something in place.

4 A Yes, well, I mean in the particular case we have here, we also have the matter of history, in
5 that we already have active remedies in place following two previous reviews by Ofcom, so
6 in that sense I think I say that, you know, I think the most pertinent question is therefore
7 what is the incremental benefit of adding a passive remedy to what we have already.

8 Q And what if you identified barriers to entry to the market, notwithstanding the existing
9 regulatory regime that is in place? Would you do anything about that?

10 A Well I'm not quite sure what you're getting at. I mean, clearly, we have identified, Ofcom
11 has identified a problem with market power and has put remedies in place to address that.

12 Q But if you as regulator saw that there were barriers to entry that were stifling innovation, for
13 example.

14 A Well yes, certainly that would be a consideration in the design of your remedy, no doubt.

15 Q And what if there were, on top of that, evidence of demand for a differentiated product
16 service that was not currently being supplied?

17 A Okay, I think it is relevant to consider that. I mean, the question that the regulator would
18 have, I mean, I won't repeat the points that you have heard already today but, clearly, there
19 is a balance to be struck between these dynamic effects and other costs. And I think if one
20 has some evidence on the nature of demand or how different types of access remedy might
21 then lead to different kinds of investment, it is relevant to consider the form of competition
22 that might develop from that, and some of those forms of competition might have greater
23 merit than others, so I think the idea of kind of being entirely neutral as a regulator and
24 making no judgments about the development of the market is clearly an impossibility.
25 Those judgments must be made.

26 Q But conversely you would not simply sit back and say, "Well, we've designed a system of
27 regulation, it's fine as it is, we don't need to tweak it". You would need to analyse whether
28 or not there was a case for introducing a different form of regulation if the circumstances
29 merit it.

30 A Yes, I think my report's quite clear about how I think one can go about looking at those
31 questions in a systematic way. You know, to be fair I think that's largely what Ofcom has
32 done.

33 Q In paragraph 21 of your report, you say that the risk of incentives to roll out a complete
34 infrastructure by way of competition, there is a risk of those incentives being set too low if

1 there is a sort of additional incremental regulatory activity. In practical terms, those
2 incentives cannot have been very high for the last ten years, can they, because we know for
3 a fact that there has not been much competing infrastructure rolled out in this particular
4 market?

5 A Well, I think one needs to be a little bit more careful here. The findings from Ofcom clearly
6 make a geographical distinction between areas of the country where competition has been
7 effective. WECLA is defined as competitive and elsewhere Ofcom's view is it's not. So I
8 don't think that's generally the case. The point that I am making here is a subtly different
9 one though, which is I think the Regulator should not give up on potential emerging full
10 infrastructure based competition. So I think one needs to differentiate between competition
11 which is based on passive remedies, say, with somebody having full control over their
12 infrastructure. We have things going on at the moment. We don't know where they might
13 lead to. For example, Virgin Media has done some deals which look as if they are
14 becoming more active in terms of mobile backhaul. There's been this transaction between
15 Vodafone and Cable & Wireless. There are things happening. Who knows, this may be
16 entirely unsuccessful. I think Ofcom's approach should be to make sure that they don't
17 foreclose these possibilities through the active remedies they have in place. That is clearly
18 a matter about terms and conditions of the active remedies as well. It is exactly what is
19 opened up.

20 Q In principle, if a passive remedy were put in place that did not disrupt the incentives to roll
21 out a full infrastructure, that would be acceptable too?

22 A Well, it would be. I have enormous difficulty in seeing how that might be done. If that
23 were done, and I'm not saying it's impossible, but if that were done then that would address
24 that concern, yes.

25 Q In para.22 of your report, the last three lines, you say:

26 "The costs of a telecoms service is subject to a large degree of uncertainty and
27 arbitrariness. As a consequence, there is a large measure of judgment
28 involved."

29 If it is right, and you say it is, that the costs of a telecoms service are subject to that degree
30 of uncertainty and arbitrariness, is that not something that tells in favour of a passive
31 remedy over an active managed remedy by Ofcom?

32 A No, I don't think that conclusion can be drawn at all. The point that I am making here is
33 that I think one must accept that any kind of active remedy involves the regulator setting a
34 price, okay, and that price has to, in some sense, be measured. There are practical

1 measurement issues, but there is also in telecoms this enormous problem about common
2 costs allocation. Again, I won't repeat the points that have been made earlier today, but that
3 also needs to be addressed. I think once you add on to that issues like asset depreciation,
4 the timing of asset costs recovery, and so on, there is a range of legitimate answers that can
5 result when one looks at an access price. I think one has to look at access pricing under
6 uncertainty. The consequence of that is that I think one obtains a presumption that one
7 should not intervene at many points within a value chain, because the difficulty obviously is
8 that one only needs to get one of those things essentially set too low and then any kind of
9 emergent infrastructure based competition can essentially be closed down as a result of that.
10 I think this is what I am getting at, and in the preceding paragraphs as well, is this idea.

11 Q Your assumption there is that the Regulator has to set a price for passive access but of
12 course you would accept, would you not, that they could simply set FRAND terms for the
13 supply?

14 A I don't think that gets round that problem. I think history would suggest that disputes are
15 very common in the telecoms area. I think this would be a very difficult area in terms of
16 disputes about, say, common costs allocation, all manner of issues, and I think one can't
17 expect a dispute resolution process to get to a perfect answer.

18 Q That is a practical response to a ----

19 A No, no, no, it's not just practical, but what it means is that if you say that we replace the
20 access regime by a dispute regime and that leads to a determination of an implicit access
21 price through that, that is still subject to the same degree of uncertainty as would be an
22 access regime, possibly even more.

23 Q In para.32 you say that parallel active remedies should, other things being equal, be seen as
24 substitutes and not complements.

25 A Yes.

26 Q Could I take you, please, within the defence bundle to tab 8?

27 A This is the European Commission letter?

28 Q Yes, it's a letter from the European Commission. Sir, I am informed that it is confidential.

29 THE CHAIRMAN: It is confidential.

30 MR. BEAL: All right, I will move on.

31 THE CHAIRMAN: If you gather up your confidential points and we can deal with them all at
32 once.

33 MR. BEAL: I am sorry, I had not appreciated that was confidential. I knew it was confidential to
34 the UK Government, I did not realise it was confidential in these proceedings in the sense

1 that I assumed it had been publicly disclosed. Could I take you instead, please, to
2 something that is definitely not confidential, which is in the notice of appeal, file 1, annex 2,
3 tab 5. This is a BEREC common position, and you will see that in the second paragraph
4 down it is dedicated to:

5 “... wholesale leased lines remedies imposed as a consequence of a finding of
6 SMP ...”

7 So that is the territory we are in here, is it not?

8 A Yes.

9 Q Wholesale leased lines are key inputs, and so on:

10 “It is therefore vital that, where they are not supplied under conditions of
11 effective competition, they are regulated effectively. This will promote the
12 competition and choice on which businesses throughout the economy are
13 entitled to expect and thereby make a significant contribution to achievement of
14 the Single Market. This best practice is also based on the ‘ladder of investment’
15 principle, as regulated access at different rungs of the ladder promotes both
16 competition and investment.”

17 Do you see that?

18 A I do.

19 Q That cuts across, does it not, your suggestion having different regulatory interventions as
20 substitutes rather than complements?

21 A No, I don’t think that’s the case at all. In fact, here I think one of the best practice points, I
22 think it is best practice point 30, if I remember correctly, or 31, I can’t quite remember - can
23 I just turn to that. That is p.15, best practice point 30, that talks about the access price being
24 set in a way which is coherent with the prices of other related wholesale leased line
25 services. There’s always a question about how one best describes these things, and to be
26 absolutely clear, I do talk about the ladder of investment and role, I’m not saying that
27 there’s always a presumption against multiple interventions, but there is this question about
28 coherence and inconsistency, and that is very much the basis of my concern about multiple
29 interventions.

30 Q If you look at best practice 3, p.3;

31 “NRAs should encourage infrastructure competition at the deepest level where
32 it is reasonable, reducing barriers to entry.”

33 A Yes, this is relevant as well, so there are these different considerations. The way I put the
34 question - my concern is what can we say before we delve into case specifics. I think what

1 we can reasonably say is that intervention on many levels should be a presumption against,
2 unless we can demonstrate clear benefit. Clearly, if we can show a pro-competitive benefit,
3 that's ultimately a benefit to consumers, then that overwhelms those concerns and there is a
4 balance to be struck.

5 Q You do not seem to have had a terminological difficulty with the use of the word "deeper"?

6 A Okay, "deeper". I'm very happy to use the term to describe benefits and as a shorthand. I
7 think it's a very useful term. My concern in my report was with using the term "deeper" as
8 a way of analysing a situation in the way that Dr. Lilico had done in his report. What I
9 suggest there is that the right way of looking at things is in terms of identifying bottlenecks
10 and then designing remedies in some sense enclosing those bottlenecks. What I don't like is
11 this notion of just saying because something is *per se* deeper, it is necessarily better. I think
12 that is the nature of my objection.

13 Q Your evidence on bottlenecks, as I understand it, starts around para.42 - is that right? You
14 come on to bring that within your focus?

15 A Yes, that's right. I discuss this "deep" point. Admittedly, I probably have a little bit of a
16 bee in my bonnet at Dr. Lilico about this, but I think the point was here that what I wanted
17 to focus on was this question of bottlenecks, the identification of bottlenecks and the design
18 of active remedies around those, really, based on an analysis of what the competitive effects
19 are, rather than a presumption that "deeper" in some sense is always better. There's a very
20 simple point here, which is that the whole notion of the value chain is essentially an ordered
21 line, and one can re-order things in that line, so that is not an analytical tool. When we talk
22 about, say, LLU is a kind of deeper infrastructure kind of remedy, yes, okay, that is a
23 helpful piece of language to summarise a set of issues. It is not an analytical tool that we
24 can then take to a different situation and use it as a way of analysing the problem.

25 Q Here you have identified the fact that we have, for example, a vertically integrated chain of
26 points within a chain of supply, correct?

27 A Yes.

28 Q And within that vertically integrated entity, in this case, BT, you recognise that there might
29 be non-replicable pinch points?

30 A Absolutely. We have an SMP finding here so I think that is beyond doubt.

31 Q And a non-replicable pinch point would be a candidate for access regulation?

32 A Indeed, yes.

33 Q So ducts could be a non-replicable pinch point?

34 A They could.

1 Q So they could be a candidate for regulation?

2 A Well, let's be careful. They're a candidate for regulation in the sense that one requires a
3 remedy that encloses the pinch point, okay. I think what you can't say is: "I have identified
4 a bottleneck and therefore the relevant access remedy is, as it were, to take the naked bottle-
5 neck and then to create a corresponding access product to that". That is just short-cutting a
6 lot of analysis that is required because there is a question about how that bottleneck is
7 associated with complementary activities, assets and so on, and you might think about it as
8 saying: "Look, here's the particular link in the value chain that is a problem, should we do
9 something about that link?" It may well be that it is so integrated with the links that are
10 beside it that we actually have to create an access remedy that is larger than that, and
11 actually, if you look across telecoms that is a very common thing to do. Again, we cannot
12 short cut the analysis by just identifying the bottleneck in that way.

13 Q What if, on the facts, a pinch point or a bottleneck had been identified in the provision of
14 Ethernet services ----

15 A I think it has by Ofcom.

16 Q Yes, if that bottleneck has been identified, then presumably you would move into an
17 analytical stage at which you sought notionally to separate out the supply of duct by
18 Openreach company A to somebody who has taken delivery of services Openreach
19 company B?

20 A Yes, so what one would do, there is clearly a range of remedies to address this bottleneck.
21 Passive access might be one of them, various ones would be active access, those need to be
22 compared, yes.

23 Q I am just trying to apply your analytical framework to the facts?

24 A So that is what I would say, yes.

25 Q So we come up with this notional structure divorcing duct from the wholesale provision of
26 Ethernet services, and then you analyse whether or not that would be replicable?

27 A No, no, no, hang on. You cannot really abstract in that way because we have identified
28 there is a bottleneck, and that is what Ofcom's market analysis, its market definition
29 exercise has done. Then we have the question of: "Where does that come from?" That may
30 well be to do with duct, but it does not tell us that duct access remedy is the right answer,
31 because we have to look at what the consequences are of unbundling.

32 Q You would need to see whether duct was replicable because that is the next stage in your
33 analysis, is it not?

1 A No, because we have started from a position that we have already identified a bottleneck.
2 We could have a situation, let us take a concrete example which may help, we know, for
3 example in central London there is competing infrastructure, so duct is kind of replicable in
4 central London otherwise we would not have had this relatively light regulation within the
5 WECLA area. So let us think about somewhere else outside the WECLA area.

6 THE CHAIRMAN: Chippenham, perhaps?

7 A Chippenham, okay. So let us suppose there are some businesses there so there is some duct.
8 It is maybe not full for the sake of argument, and there are other people who would like to
9 serve these customers and there is a question that maybe it would be better to share the asset
10 because we are in some way in an area where demand for business services is such that we
11 are in an area where there are some kind of scale economies. What does that then tell you?
12 It just tells you that there is a bottleneck there, but it does not tell you automatically that that
13 is then the correct access remedy because you have to obviously look at what the
14 alternatives are and what the consequences are, not just for people in Chippenham, and not
15 just for businesses in Chippenham, indeed, potentially.

16 MR. BEAL: So the furthest this analytical framework will take you is that there is a candidate for
17 regulation and you then have to work out what ----

18 A There are candidates, plural, for regulation which enclose the bottleneck which has been
19 identified.

20 Q Can I ask you then, please, to turn to para. 53. You are dealing here with the ladder
21 investment point, as I understand it – para.52 you refer to Professor Cave, etc?

22 A Yes.

23 Q In para. 53 you say:

24 “These arguments are very much less relevant to business connectivity services.
25 These are not mass-market products where it is difficult to judge potential take-up,
26 as it was in the early days of broadband.”

27 Just pausing there, is there any *a priori* reason why a new entrant to the business
28 connectivity market could not be engaged in trying to build up a business brand for Ethernet
29 access, it is using the BT managed product, and it then wishes to roll-out more broadly
30 using passive remedy?

31 A The simple answer to your question is “no”, but I do not really see how that relates to the
32 point this is making.

33 Q The point you are making here, surely, is that ladder investment principles were relevant in
34 the days of early roll-out of networks because it enabled people who were providing

1 residential broadband services to take advantage of building up their brand and then use that
2 capital in order to invest in their own networks. Is that what you are saying?

3 A There are two points here. The overall point which I am making is that I do not feel that the
4 ladder of investment analogy applies here to business leased lines, to be clear. It has been
5 relevant to LLU, and it is a useful idea in that context, but that has specific characteristics
6 which make the ladder of investment relevant. To be clear, we are talking here about the
7 days when demand for broadband was very uncertain – this was when everybody was using
8 dial-up internet access - if you can remember those ancient days. It was uncertain whether
9 there was going to be much take up, it was relatively more expensive, there wasn't a pay-as-
10 you-go option, it was unclear how much demand there was. At the time there was capital
11 investment needed if I wanted to take over an exchange area and put my equipment in and
12 so on. Essentially, there were a range of alternatives here, so bitstream LLU, that allowed
13 competitors a range of options for extending incrementally, and that is what the ladder of
14 investment is. None of this is relevant to the situation that we find in business services.

15 Q If it is not relevant why has BERC included it in points of Best Practice 3 in the
16 communication I just took you to, which is the market 6 communication?

17 A So let me be clear, there are situations where it might be relevant in other circumstances, I
18 just do not think they apply to these high bandwidth leased lines. I just cannot see that this
19 is a relevant situation. BERC advice is quite general, but we have to ask ourselves is that
20 relevant to the case. Are these reasons relevant here? The answer is: "No, they are not."
21 There were no cherry-picking issues involved in LLU, so that did not have to be taken into
22 account because expansion by competitors was all exchange area by exchange area. It was
23 perfectly possible to use uniform pricing without causing inefficient entry problems. So we
24 really have a chalk and cheese situation, I think.

25 Q Could I ask you, please, to look at para. 55? You say that:

26 "...there are considerable practical difficulties that arise that need to be considered
27 if physical infrastructure - duct especially - is unbundled alone."

28 Have you sat down and thought through those practical issues and how they might be
29 overcome?

30 A I thought a little about the economics of it. The technical detail - clearly there are many
31 things which I will not be able to give an opinion on.

32 Q I am guessing you have not been paid to look into the issue either?

33 A I have not, no.

34 Q Paragraph 58, you identify there the risk of inefficient entry. Is that right?

1 A Yes, I think the point here, the point here is that there are realistically constraints on the
2 complexity of pricing that can be implemented. The geographical element is extremely
3 challenging in the case of duct access because conditions are so highly localised. I mean,
4 I think I've got the example that basically from one street to the next the situation can
5 change, apart from all the issues about things like, you know, how much it costs a man to
6 dig a hole varies from one part of the country, and so on. So unless pricing can reflect this
7 complexity, then one will end up with essentially inefficient entry at certain points. So how
8 much of a problem that is, obviously, has to be balanced against other factors.

9 Q Inefficient entry in terms of disruption to common cost recovery, do you say anything
10 substantially different from Mr. Culham?

11 A I don't say anything substantially different on common cost recovery. I mean I think it is a
12 very substantial problem.

13 Q And in terms of geographical variations in the cost of duct, you adopt a similar line to
14 Mr. Culham as well.

15 A I think I might actually be even slightly more forceful in how I'd put the point in the sense
16 that what concerns me is the fact that at the moment with an active product, essentially
17 Openreach gets to route fibre and decides how to use the available duct capacity that it has,
18 so I mean it might decide that it's good to leave some spare capacity here, or it might be,
19 even though it costs more in fibre to run this way, it may well be cheaper, and the network
20 asserts are better used in that way. And basically to try and get that same degree of asset
21 optimisation in a decentralised system where other people can be coming and using bits and
22 pieces of assets, well, you know, what do we know? If the pricing structure was very very
23 heterogeneous and fine, then that might be okay. But, if it can't be, then those operating
24 efficiencies potentially how well that duct is used, would be swept away, or at least some of
25 that would be lost.

26 Q Why cannot BT, you have assumed here in these paragraphs that we have been looking at,
27 58 and 60, that it would be Ofcom setting the price. Why could not BT simply say, "I will
28 charge you £X hundred for duct access on a basis to be determined?"

29 A Well, I have to say I do have some doubts that even BT would have the information that's
30 available to do that, in the sense that I think we've heard this in some of the factual
31 evidence that essentially the knowledge of the state of the duct network is rather imperfect.
32 So, there's clearly a very practical issue of how one actually works out how to price access
33 to duct at different localities in a way that keeps the same kind of optimal asset usage as is
34 possible from Openreach going and looking itself as to what, you know, where things are

1 and what the situation is with ducts and so on. So, there's that practical issue. The other
2 problem as well is, I think one has to expect that there is going to be a lot of dispute in a
3 system, in any kind of system, that has such complex pricing, in that the obvious, you know,
4 the obvious objection will be, "Well, why am I paying more here when the other guy who
5 got access three blocks away is only paying half?" Well, there may be some very good
6 reasons for that, but I think the incentive for dispute would seem to be quite severe here as
7 well.

8 Q If BT sub-lets its office premises in Mayfair, it will know approximately how much to
9 charge for that licence or lease, correct?

10 A If it's sub — well I presume it would hire a property agent who would give it some advice
11 on that.

12 Q And if it hired or sub-let premises in a different geographical part of London, I shall not
13 name and shame any particular part, it would be capable of deriving a different price for
14 that access to the property.

15 A Sure, but I mean, the point is that the commercial property market, there is data available.
16 You know, my office lease is up for renewal in a year or so, and I will be able to get data on
17 corresponding lease costs within my area. The thing is that the whole duct network, I mean,
18 this is not a one-off set of assets. I mean, there is no benchmark to turn to here.

19 Q That is simply stating that there is no market, which is a truism because, of course, there is
20 no passive remedy.

21 A Well, we have a need for regulation for exactly that reason.

22 Q But there is also regulation, is there not, on valuing duct assets and how much the rate of
23 return should be on them.

24 A Sure, but at the moment that is a component which goes into other pricing, so, I mean, that
25 goes into active pricing, it goes into every telephone call that, what we all pay for our
26 domestic services goes, it turns up there.

27 Q BT is capable of deriving a price or a value that it attributes to that duct for its own services.

28 A Yes, that's right, but the point would be that in how it is currently used, that asset valuation,
29 there is no need to create the same kind of geographical locality, the localisation as you
30 would need to get efficient passive access. So, it doesn't matter one jot if there is a lot of
31 smearing of costs geographically at the moment when it comes to, say, pricing a household
32 telephone bill. If you want to know what a domestic line is worth you can just average,
33 okay. There is no need to go down to an incredibly fine geographical level. I cannot see
34 how one can implement a decentralised regime for passive access unless one prices in a

1 very detailed way. That's not to say it's impossible. I just think that's what you would
2 need to do.

3 Q Is that not setting a double standard, because it is not expected to have that granular level of
4 detail for BT's pricing within the baskets, for example?

5 A I'm not sure I understand your point.

6 Q You are saying in order to make a passive remedy available you would need an incredibly
7 granular level of detail for the costs and pricing.

8 A For it to be a reasonable remedy that didn't cause a lot of inefficiency. Yes.

9 Q That same level of granularity is not demanded of BT in the context of the basket pricing, is
10 it?

11 A Well it isn't, because the active products can be averaged to a greater degree without
12 adverse consequence.

13 Q Are you aware that the passive duct remedy has been rolled out in, for example, France,
14 Spain and Portugal?

15 A I am aware it's been used in other European countries, yes.

16 Q Surely if your objection to the passive remedy were a fundamental and insuperable one, it
17 would have prevented the roll-out of the remedy in those countries.

18 A Well, I haven't looked at what's happened in those countries, to be absolutely clear.

19 Q Well, hypothesise for a moment that they have allowed duct access after a survey, and as a
20 result a price is set either through a negotiation or through a regulatory process.

21 A Yes.

22 Q What you are saying about the risks of destabilising common cost recovery from the
23 incumbent leading to inefficient entry and so on would —

24 A There's question of degree, because, clearly it's possible to allow duct access at prices
25 where the take-up is relatively small. It's used more in a kind of localised cherry picking
26 manner to replace self-provision of the infrastructure. I mean, that is not going to have
27 these kind of adverse consequences. But equally it doesn't have a big effect either. So,
28 I mean, the regulator needs to also think about the case of, well, what if one were to, as it
29 were, take the brakes off and use this in a broader manner? Well then one does have to
30 think, there may be larger benefits, but equally there are much larger costs associated with
31 that as well as a result of the kind of effects I've just been speaking about in terms of the
32 inefficiency of the use of the underlying assets. As far as I'm aware and, again, please just
33 be absolutely clear, I haven't looked at this in detail, but as I understand it where this is
34 being used in other European countries, it is in a relatively localised manner.

1 Q Could I ask you then, please, to look at paragraph 64. You there mention depreciation and
2 the need to obtain a reasonable return on the value of the asset over time. Surely BT could
3 price for that, could it not?

4 A It could do. I mean there's a lot of controversy over this in other areas. The question of
5 exactly what sort of return is required to achieve, I mean, what we are trying to achieve here
6 are incentives for BT to provide the service to roll-out new things, and also, as I talked
7 about at the beginning, this idea about not foreclosing emergent infrastructure competition.
8 So really the question is how to price in risks, okay, to deal with those kinds of problems.
9 This has been a difficult area in telecoms. There's been in terms of broadband NGA roll-
10 out there's been a recommendation from the Commission which has tried to acknowledge
11 the role of these risks. So, I mean, I don't want to go into too much detail here, but this is a
12 difficult area.

13 Q What you are saying though, surely, is not that a big business like BT cannot price on the
14 basis of its capital valuations.

15 A No, but the issue is how Ofcom deals with these risks.

16 Q Right, I see.

17 A Okay and that's ---

18 Q So it has led to a regulatory ---

19 A -- how Ofcom allows it to price in relevant risks.

20 Q The fact of a regulatory treatment of the price rather than setting the price itself.

21 A It is far from obvious that an appropriate treatment of risk would follow, and I am sure that
22 if one were to proceed in this direction of looking at - the point that I am trying to make is
23 that if one were to proceed in this direction of having widespread passive access to ducts it
24 would be very important to look at the pricing, because one also has to give incentives to
25 stick more duct in, and also for these emerging infrastructure competitors to make sure that
26 their possibility is not foreclosed. So doing that, this would be seem to be a classic situation
27 where there is a real question about how one treats these risks, how one prices them into
28 access.

29 Q Similarly, in 65, for example, you talk about BT itself placing a value on unused capacity.
30 Again, if that were effectively a form of opportunity cost you would expect to see that
31 reflected in the pricing that were charged for any use of access to the duct?

32 A Sure, yes, but the question is how one determines that in a regulated context. These are not
33 impossible problems. I am just listing out the things which would need to reasonably be
34 looked at to achieve a kind of passive active remedy that was reasonably efficient and

1 provided the right kind of incentives. These are very difficult issues, is the point that I'm
2 making.

3 Q In para.67 you say:

4 "Ofcom acknowledges that there may be scope for benefits in so far as passive
5 remedies may in some cases 'stimulate competition' ..."

6 and lead to greater innovation. I am assuming that, as an economist you do not disagree
7 with those being matters that would be of benefit to the market?

8 A No, no, absolutely. Innovation is very important, yes.

9 Q In para.68 you identify the passive remedy as being irreversible. Assuming that the grant of
10 access to the duct takes some form of property right, be it lease, licence, any other form that
11 might be thought of, why could that not be either time barred, so that they expired after a
12 given period of time, or revocable subject to certain conditions?

13 A You could do that. The difficulty is that you're obviously trying to encourage additional
14 competition. Let's be clear. If we were to take this route, if Ofcom were to take this route,
15 it would be because it thought that there was significant additional competition that was
16 being created by the duct active remedy rather than it just being a sort of cherry-picking
17 matter. In that case, essentially, how would you encourage that, because the carpet would
18 be pulled away? By definition, this is something that's a bottleneck, so what is somebody
19 going to do instead? You would be relying on there being some kind of technological
20 development of some sort that would allow somebody to somehow bypass this. That seems
21 implausible.

22 Q At para.71, you say that Colt is likely to arbitrage BT's prices. I do not know whether you
23 were here on the first day, but Colt's evidence is clearly that it does not primarily compete
24 on prices. Are you aware of that?

25 A Yes.

26 Q You also say in that paragraph that the remedy would not create additional competition. Do
27 you really mean that, because surely, if the remedy is used, there would be entrance to a
28 market which does not presently exist?

29 A Okay. Let's be clear here. What would be happening? Colt would always have the option
30 of using duct rather than digging itself, okay. So it would presumably do so where it is
31 cheaper than digging itself. The question is whether there would then be any kind of
32 additional roll-out to further areas, whether other competitors would come in using duct
33 access. I think that has not been demonstrated, and it is far from clear that that is the case,
34 but that is what is necessary to generate additional competition. If you look at the BCMR, I

1 think Ofcom is pretty clear about what it is looking for. You can see this in terms of the
2 market definition that is adopted. I don't agree with everything that Ofcom has said here,
3 but what Ofcom is looking for are essentially swathes of competition across the country to
4 extend - WECLA, for example, can WECLA be made larger, could this be extended to
5 other business districts, and so on? When it measures competition and it is even defining
6 SMP, the approach its taking is predicated on a desire to serve swathes of the country rather
7 than just pinpoint, popping up here and there.

8 Q Is that right? At the moment we have a situation where nobody has rolled out significant
9 infrastructure for the last ten years - correct?

10 A I'm not entirely sure whether that's relevant though, because I think the question is what
11 could happen from here? I think there are some possibilities. I have made the point about
12 not foreclosing emergent competition, and I think that is the point. I think we are not
13 currently in a world where one has completely given up on emergent competition regardless
14 of what the history might be up to this point.

15 Q In para.73, for example, you take up this density point and you say that there are
16 geographical areas, such as rural area:

17 "… where the density of business customers is likely to be insufficient to create
18 any take-up of duct access."

19 Surely, if you have the availability of rolling out the infrastructure, and then on top of that
20 you have the availability of duct access in given areas where there is an economic case for
21 it, that, in itself, does not create the problem. What you are actually worried about is the
22 risk of conflict between the two remedies pulling in different directions - i.e. the incentive
23 to roll out a complete infrastructure versus the incentive to use duct?

24 A Yes. The point I was making here was, I think, that the question, as it were, where theirs is
25 balancing across in benefits is primarily one about what you might call shoulder areas, in
26 the sense that in Central London there is essentially competitive supply anyway, and there is
27 no problem about non-replicability of duct. Equally, if one goes to far-flung areas then
28 there's not really any demand, as such, so what we are really talking about is intermediate
29 situations. That's where the question of the balancing of cost and benefits is relevant.

30 Q At para.75 you talk about pre-emptive grabs.

31 A Yes.

32 Q Surely that is simply a competitor using access to a duct in a way that maximises that
33 competitor's returns that may or may not involve the onward provision of duct services or
34 duct access to a third party?

1 A Yes. I've raised the problem. I think it's something that would need to be thought about
2 before moving to any kind of passive remedy. The issue here is that we are only interested
3 in situations where the duct is a bottleneck. So, in that situation we might have Openreach
4 has got so many cables running through this, there's so much space there, then what would
5 happen if somebody essentially fills that up with dark fibre and then essentially grabs any
6 market power that Openreach might have by pricing unattractively for that dark fibre? I
7 don't know, this might or might not happen, but I think it's something that needs to be
8 thought about. It's a risk and it might well require some kind of additional regulatory
9 remedy to deal with that problem.

10 Q From BT's perspective, as long as it received its efficiently incurred costs, it would not care
11 what happened to its ----

12 A Again, if it got paid enough for it clearly it would be indifferent to that. From Ofcom's
13 perspective, a public policy perspective, this is pretty bad, I think, in the sense that you've
14 essentially just transferred the bottleneck out to somebody who is not under regulatory
15 control.

16 Q At 76 you say it is a transfer of monopoly, but truth be told, instead of having one provider
17 of duct access you would then have two?

18 A Yes, that's true, so monopoly maybe is a little strong.

19 Q So a monopoly, it is a duopoly ----

20 A A duopoly might be a better term.

21 Q -- at the very least. At para.80 you talk about the duplication of investment, and what we
22 are essentially talking about here is the fact that one would have to pay for additional fibre
23 to be put through a duct. With dark fibre you would not even have that, would you?

24 A Well, you may end up with more - you just end up with more duct than you potentially need
25 if the assets were more efficiently used, yes.

26 Q But the actual physical asset that is being replicated in the passive remedy is not the duct
27 itself, it is what goes through the duct surely, the fibre?

28 A Well, it depends which passive remedy we are talking about. There's a dark fibre remedy
29 and there is a duct remedy. At times it's possibly less than clear as to which we are actually
30 talking about. I think this is true for both though.

31 Q In terms of the impact on existing providers, if those existing providers have their own
32 networks, there is nothing to stop them on commercial terms offering access to their ducts,
33 is there?

34 A Absolutely nothing.

1 Q At para.94 you have referred to the usage based pricing on access, how it might work or
2 might not work. You say:
3 “Usage-based access pricing may be necessary to promote efficient recovery of
4 the shared costs of common physical assets.”
5 A Yes.
6 Q You have not actually looked into the practical detail of how that would be put into effect?
7 A No. I am making an economic point here, which is to allow common cost recovery, one
8 would need to have some kind of usage based pricing, so differentiating the costs of dark
9 fibre or of duct according to what was put through it.
10 That economic point then leads on to a whole bunch of practical issues as to whether that is
11 possible. I am not going to repeat what was said earlier, I think we have heard quite a bit
12 about that from Mr. Culham, but it is pretty difficult to see how one would actually do that
13 in practice.
14 Q Paragraph 100, you say:
15 “the potential for scope economies [i.e. economies for scope] across residential and
16 business services using passive access – is implausible.”
17 Why do you say that is implausible when BT does exactly that?
18 A We are talking about high bandwidth business services here. These are not just any old
19 business services, we are primarily talking about high bandwidth services.
20 Q Is it conceivable from the evidence you have seen, and I do not propose to go through it for
21 obvious reasons, that somebody could wish to develop a dual broadband business and
22 residential model?
23 A It is clearly not impossible, but it does not seem to me relevant in terms of the consideration
24 here.
25 Q If one is using the fibre that one runs through a duct for the provision of both residential and
26 business services there would be scope for economies of scope?
27 A Yes, but the issues about choosing between different types of access remedies, between the
28 active and passive remedies I cannot see how that issue affects that choice. Clearly, it is a
29 potential issue for the business strategy of an entrant in terms of what they might offer, but
30 in terms of how they deploy their network I don’t think it really matters whether it is
31 passive or active in terms of how they actually do it. That is a matter of deployment.
32 Q At the moment, somebody providing residential broadband services can take advantage of a
33 passive remedy but they would have to hive off the business part of their business ----

1 A They can, they can. I mean that has obviously been there because there is rather different
2 consideration, so passives have been used in terms of this NGA roll-out to unserved areas of
3 the country for very specific reasons. Again, I am in danger of repeating what others have
4 said but there is no effect on common cost recovery and, equally, there has been this issue
5 about how to enable competitive tendering of these areas. If it was the case that BT was the
6 only possible provider because it had control of the poles down every street, then it is not
7 possible to have competitive tendering, and then we get into a lot of State aid issues. So this
8 is the solution to a particular problem. I do not think one can read across anything to the
9 question that we have here about this design of an access remedy to address this particular
10 problem in business services.

11 Q Finally, Dr. Maldoom, in para. 102, at the bottom of p.39 of 50 you suggest that Colt's:
12 "main motivation would appear to be cherry-picking resulting from the impracticality of
13 being able to price access to passives in a reasonable cost reflective manner." Are you in a
14 position, as an expert, to give a view on Colt's motivation?

15 A Not their motivation, I mean the reason that comment is there – perhaps it could have been
16 expressed better was having looked at some of the commercial evidence and the idea of
17 kind of selective provision by Colt.

18 MR. BEAL: Thank you.

19 THE CHAIRMAN: Mr. Holmes.

20 MR. HOLMES: No questions.

21 THE CHAIRMAN: Mr. Beard:

22 Re-examination by Mr. BEARD

23 Q (No microphone) Dr. Maldoom, you say innovation is important. Do you consider passive
24 remedies stimulate innovation more or less than active remedies?

25 A In this case I do not think we have any good reason to expect there to be a lot more
26 innovation. Clearly, it is possible to do certain things with passive remedies that it is not
27 possible to do with active remedies. The question is how important is that and how large is
28 the benefit that is created? I think the difficulty which we have is to obtain that kind of
29 benefit would mean moving across to a regulatory system which at the heart of it was a
30 passive remedy which has very wide implications across not just these services but all
31 telecommunications services. So, yes, I think to have a situation in which the innovation
32 benefit was obtained from a passive remedy would necessarily entail a passive remedy that
33 was of an extremely radical nature compared to the situations we currently find ourselves
34 now.

1 THE CHAIRMAN: Can I just ask a question for clarification? What is a passive remedy that is
2 of an extremely radical nature?

3 A In terms of the pricing it would then mean – we have heard about the bandwidth gradient
4 essentially would become unsustainable across services. That creates a very different
5 situation in terms of how communication providers aggregate services ----

6 Q Forgive my interrupting – passive remedies with a very sophisticated access price
7 mechanism, is that what you mean?

8 A I think we would not have a sophisticated access pricing regime, because I think that is very
9 difficult to achieve. You do not have to go all the way to uniformity, but with a degree of
10 averaging geographically and it would be very difficult I think to implement any kind of
11 usage based pricing, so under those assumptions I think there is a radical implication,
12 because it is really to do with this usage issue. So one would see radically different pricing
13 on active services – I mean potentially that remedy would be available for providing other
14 kinds of services not just business services. I think it would be very difficult to curtail this
15 only to business services.

16 Q What you are really saying is that the implications of passive remedies would be very
17 radical?

18 A They would, exactly.

19 Q Passive remedies are radical remedies?

20 A Absolutely. It is not the remedy that is radical, it is the implications that then follow from
21 it.

22 THE CHAIRMAN: Yes, forgive me, I have a very simple approach to these things, Mr. Beard.

23 MR. BEARD: This may, in fact, be the question that the Tribunal chair has already asked you.
24 You said in relation to questions about FRAND pricing and the practiceabilities, you said
25 there would be problems with the access price regime, but even more in a passive access
26 regime. What was the “even more” you were thinking of there?

27 A Okay, right, so I think once one moves to a passive regime, this question of geography
28 becomes important. We have to have some degree of de-averaging. I think my view is that
29 it would not go as far as we need to get a fully efficient solution, but I think practically one
30 would have to try and have some degree of de-averaging. That essentially then creates a lot
31 more opportunity for dispute and it becomes really unclear as to what “non-discriminatory”
32 and “fair” means in that context.

33 The other issue which we have is that once you have just duct, say, then the common cost
34 issue about how how the costs are spread is now very much more important proportionately

1 in terms of the price of the service because you do not have electronics and other things
2 bolted on which are clearly incremental costs to that service. Essentially you are in a
3 situation where this is the most common – I do not mean “common” in the widespread
4 sense – the most common cost in the whole of the network structure. So why should it be
5 that a business service pays this proportion of the duct and a residential service that
6 proportion, and a different distance service pays a different proportion, maybe. These
7 things are all up for debate and discussion. I cannot see how one can easily resolve those
8 under the kind of standard FRAND approach.

9 Q Could you just go back to notice of appeal file 1, just back to that BEREC paper? Annex 2,
10 tab 5.

11 A Yes, I have it.

12 Q The first question is: is this a paper that is specifically directed to the circumstances of the
13 UK?

14 A It isn't, no. It is common advice to all European regulators. This represents a common
15 position that is agreed amongst all the European regulators and BEREC.

16 Q If one turns on to p.3 of 19, you were taken to BP3, would you mind just reading BP3a? Is
17 there any significance to BP3a in the interpretation of BP3 in your view?

18 A Yes, it is clearly a qualification of this notion of infrastructure competition being
19 encouraged by access at a deep level. I mean, there's clearly a question of what sort of
20 access is provided and the need to, I mean I think 3(a) is really talking about this need to
21 design an appropriate access remedy to encourage competition of, you know, “the right
22 sort”.

23 THE CHAIRMAN: Is this where the idea of competition at a deep level came from, or did they
24 get it from somewhere else?

25 MR. BEARD: The answer is “I don't know”. The higher depth concept is an interesting one.

26 THE CHAIRMAN: Yes. Indeed.

27 MR. BEARD: I do not have any further questions.

28 THE CHAIRMAN: Dr. Maldoom, have you found this exercise of informing yourself and
29 advising on this issue intellectually useful?

30 A Yes, I think there are some interesting issues here in terms of, well, I mean there's the
31 potential for quite a sort of radical transformation of the industry, one might say, through
32 some of these suggestions that have been floated around.

33 Q So what is the most significant thing that you have learnt, if an expert ever learns?

1 A Well I think the issue of averaging within telecoms is something that people often don't
2 think about. So we're quite used to seeing prices that have actually a highly averaged
3 nature compared to the underlying costs. And I think the interesting thing here is I think
4 one can really see the issues that start to arise once one exposes that differentiation and
5 heterogeneity in costs, and the issue of common cost recovery across different classes of
6 services, which again is, again, it is hidden away, as it were, within the current systems as
7 we have them. But some of the suggestions which have been made here by Colt I think
8 expose those issues in a way that perhaps has not been terribly obvious to commentators,
9 and certainly has not been extensively considered, I think.

10 Q So, I appreciate you are retained by BT, but if you were to be retained by Ofcom for the
11 purposes of the next review, would you advise them to consider this very carefully?

12 A I think there is clearly a need, there is always going to be a need to consider alternatives,
13 you know, as far as I'm concerned I think nothing should be off the table for a regulator. It
14 may well be that the nature of changing technology in telecoms is such that unfortunately,
15 you know, bottlenecks are not entirely removed. One might well hope that wireless can do
16 certain things, but there may be a limit to what can be achieved as a result of physics. So,
17 although there have been great ambitions for what might happen in terms of the wind-back
18 of regulation, there are probably some limits on that. So there is certainly a need to think
19 about how to deal best with enduring issues.

20 Moving over on to such an exercise as considering passive access, I mean, I think that
21 would be a very large scale task, I think, for Ofcom, to be honest. It might even be
22 comparable with something like the telecoms strategic review which kind of led to
23 Openreach, it is like the kind of nature of radicalism and then if one were considering all
24 that one also needs to try and keep people investing in real infrastructure who are happy to
25 do that at the same time, which I think creates a particular challenge.

26 Q I think we heard from Mr. Culham that it might be beyond the scope of a single business
27 connectivity review's sphere of jurisdiction, as it were. Do you agree with that?

28 A I think that's right because — the issue which we have here is one cannot de-couple this
29 common cost recovery issue only for business services for the very simple reason that
30 there's a slug of common costs to do with duct and so on, these common costs of BT that
31 are recovered from the services. The regulatory system at the moment is such that there is
32 flexibility provided to BT that allows a certain amount of common costs to be recovered
33 from that. If then one comes in and makes change of some sort, such as say duct access,
34 which puts a constraint on that pricing, then you have no guarantee whatsoever that the

1 same slug of common costs can be recovered. You may get some fraction, potentially some
2 tiny fraction will end up coming back. Well, you have still got to get that cost back from
3 something else. So therefore there have to be implications for other services. So I think
4 that one could not really look at this whole passive access issue without looking essentially
5 across the board.

6 The other issue as well is it becomes kind of difficult to see why one would allow passive
7 access, say, for certain things but not for other things. So there's an obvious question about
8 other stakeholders potentially having interests in using passive access for other things. So
9 I think, you know, this would then end up with essentially an entire review of everything to
10 do with the telecoms sector.

11 Q In your opinion, might it have been wiser to have made that clear from the start of the
12 present connectivity review? Or is it something that would just emerge during the
13 consultation?

14 A Well, I think it's something which has emerged, I think, to be honest. It didn't occur to me
15 until, I mean, I was approached by BT to ask about this, and I don't think it necessarily
16 occurred to them, otherwise they wouldn't have asked me as to what the implications might
17 be and how wide this went. So I think we're just possibly at a point where people have
18 discovered there may be a future issue.

19 Q So that goes into the basket of things you have learnt.

20 A I think so.

21 Q Thank you.

22 MS POTTER: Just one very quick question about the dynamic benefits of competition, and to
23 what extent you would anticipate that those would be things that a regulator would be able
24 to assess by looking at things like investment plans, or to what extent are those dynamic
25 benefits inevitably unquantifiable and the kind of things you cannot anticipate.

26 A Okay. I think it's fair to say that they are to a degree unquantifiable, okay. However,
27 having said that I think one can say things about orders of magnitude and on that level, so
28 although one might not have a number, I think one might have an idea of relative
29 magnitudes of different effects. In terms of investment plans, I mean, clearly by definition
30 one can't, you know, if there was an enormous innovation round the corner, you can't
31 expect somebody to give you an investment plan that shows that that's so. Serendipity is
32 presumably a large part of these things as well. But I do think it's relevant, though, here
33 because when we talk about innovation in telecoms, what we're really talking about
34 primarily is new services, differentiated services, new infrastructures particularly them that

1 enable those. So, I think it is relevant for Ofcom to ask what sort of investments might
2 result, because I think if you had somebody who's just coming along and saying, "Well,
3 I was going to dig a hole here but, actually, I can just use BT's hole", that is unlikely to
4 create any innovation. That is still investment in some sense. There may be other things
5 that they then do, they put equipment on the end of this cable, this fibre and so on. But that
6 is less likely to be investment that's going to lead to innovation. If you have a competing
7 infrastructure which is alongside other infrastructure, that is obviously a more favourable
8 condition for generating innovation benefits. That doesn't get you to a number, but I think
9 it gets you to — there's relevance in knowing about what sort of investments might result.

10 THE CHAIRMAN: Okay, I think we have finished, Dr. Maldoom. Thank you. You are
11 released.

12 (The witness withdrew)

13 THE CHAIRMAN: Mr. Beal, how are you feeling?

14 MR. BEAL: I am raring to go, sir, as you might imagine. No, I am not being facetious for once.

15 (Laughter)

16 THE CHAIRMAN: I did not assume you were being facetious.

17 MR. BEAL: No.

18 THE CHAIRMAN: There is nothing to be facetious about.

19 MR. BEAL: No. After a five-minute break I am more than happy to stand on my hind legs and
20 address you on at least grounds, I hope, one and four.

21 THE CHAIRMAN: Okay. Well, we will start at half past three.

22 MR. BEAL: Thank you.

23 THE CHAIRMAN: And we are going to be out of camera, I think.

24 (Short break)

25 THE CHAIRMAN: We are in open court, I gather?

26 MR. BEAL: I am hoping to do everything without oral reference to anything that is confidential.
27 Sir, the intervention of the Tribunal over the course of last three days has been very useful,
28 as always, and it has prompted me to think about competition again, start from the basics
29 really, Adam Smith's invisible hand, the idea that there are unseen forces working in the
30 market in order to produce competitive pricing through supply and demand and the
31 interchange between them, the competitive process itself determining efficiencies and
32 benefits of competition. That is the abstract pure model which I would invite you to
33 contrast with the sort of language we see in para.8.80 of the BCMR statement where Ofcom
34 have indicated that in order to give effect to what we seek, which is a greater degree of

1 infrastructure competition, it will be necessary not simply to price one market but to price
2 two markets concurrently, one against the other. What they say there is:

3 “Thus the relative prices of PIA and alternative active remedies will be
4 significant because they will influence whether a CP decides to use PIA in
5 preference to a leased line.”

6 Just pausing there, as a matter of principle, that is of course right, but latent within that
7 statement is the fact that it will be Ofcom determining the prices through its charge control
8 processes.

9 With respect, sir, your comment yesterday, I think it was, that that is a funny form of
10 competition seems, with respect, to be completely pertinent here. This is not a form of
11 competition that Adam Smith would recognise. So when one is considering, if there is a
12 choice, choices between active remedies and a passive remedy it is important to bear in
13 mind that the passive remedy is much truer to that pure abstract form of competition,
14 because it lets the market players determine the key boundaries.

15 If an access to duct is given on FRAND terms, it is open to BT to set prices based on its
16 own assessment of its costs, and it is open to market entrants, or would be entrants, to take a
17 view as to whether or not the availability of that access is worth the candle. They can look
18 at the price that BT is offering to charge and then they can make an investment decision as
19 to whether they go with that route, with whole infrastructure roll-out, which seems highly
20 unlikely for the reasons you have heard, or indeed just carry on taking a managed active
21 product.

22 In terms of what we have can I remind you of my learned friend’s Mr. Holmes’ opening -
23 transcript day 1, p.43, where he said:

24 “But this is managed competition, it is competition that is artificially introduced
25 by regulation to address BT’s bottlenecks ...”

26 We say that one very obvious benefit of the passive remedy that we seek is that it is not so
27 much managed competition, it is much more like true competition. We say that has its own
28 benefits in and of itself.

29 To adopt Dr. Lilico’s dentist analogy - when he was talking about a dentist, I confess that,
30 for my own childish reasons, I thought of Marathon Man in the context of regulation rather
31 than ----

32 THE CHAIRMAN: It dates you, Mr. Beal!

1 MR. BEAL: It certainly does, my biannual check-ups at the dentist with a pink mouthwash at the
2 end of it which is fluffy and nice! I was thinking of regulation in this market to this extent
3 as more intensive oral surgery than the pink mouthwash at the end of a six monthly visit.
4 That is where we are coming from. Why do we want it? Yes, of course we want it for our
5 own commercial reasons. Are we somebody who is going to adopt slash-and-burn tactics
6 and leave BT bereft of its common costs recovery? No. Do I take the point that other
7 people out there might not be adopting the same pricing model, or business model as we
8 are? I accept that, though I accept, of course, that one needs to make sure that the adverse
9 consequences of the risk of inefficient entry are managed and that there are mechanisms put
10 in place which ensure that at the end of the day BT can recover its efficiently incurred costs.
11 The question is, firstly, has Ofcom looked at whether or not those twin aspects can be built
12 within a system? If they have not, we would suggest that it is appropriate to recommend
13 that they do so, and that will involve remittal.
14 If they have looked at it, to what extent have they looked at it? Have they looked at it
15 properly? Again, if you think that they have not looked at the issue properly then the
16 appropriate response is remittal.
17 The third way of dealing with it, and indeed it is our preferred way of dealing with it, is to
18 recognise that a passive remedy in itself is a good idea, that FRAND does not raise the
19 objective concerns that any of the experts have identified. Indeed, the experts, as I
20 understood it, seem to recognise that FRAND in and of itself would not be the problem; it
21 would be the post-FRAND regulatory gaming or battle-ground that would develop on the
22 assumption that the parties would not be capable of agreeing things between themselves.
23 So FRAND is an answer. It is not a question. We have the slightly metaphysical
24 submission from my learned friend Mr. Beard that FRAND was a question not an answer.
25 It put me in mind of the philosophical paper that was set for an undergraduate which said,
26 "Is this a question?" to which the answer that was given was, "If this is an answer, then that
27 was a question"! I do not want to go down the rather tortuous route of whether FRAND is a
28 question or an answer. The simple fact is that FRAND would work in the sense that
29 FRAND provides an answer to each of the substantive criticisms that have been lodged
30 against our position in terms of the conceptual development of the remedy.
31 It may give rise to practical problems down the line, but that is not a reason, we would
32 suggest, for not recommending that it be adopted at this stage. If you have concerns as to
33 how FRAND might fall out in due course, then of course you could recommend that there

1 be re-consultation on the terms on which FRAND should take place with a view to
2 minimising the problem.

3 As the Tribunal has pointed out now on a number of occasions, FRAND is not unknown to
4 Ofcom. Indeed it is present within the BCMR statement itself.

5 A brief word, as is customary in closing, on the witnesses. We do respectfully suggest that
6 the Colt witnesses, who were Mr. McCann and Dr. Lilico gave straightforward and credible
7 evidence. I do not actually suggest anyone gave disingenuous evidence. Some of the
8 evidence that you have heard was more helpful and more relevant than other evidence, but
9 ultimately, of course, it is for you to take a view as to where you place that evidence.

10 You have obviously heard from two experts today, Mr. Culham and Dr. Maldoom. We
11 suggest, with respect, that whilst they focused where necessary on the practical points, the
12 conceptual objections that they raised to the remedy that we seek ultimately boiled down to
13 the extent to which there would be inefficient entry which was linked up with the disruption
14 to the common cost recovery that BT currently sets on its current pricing, and we suggest,
15 with respect, that is where the main focus of this appeal will be, it is on Ground 3. It is on
16 two points: first, have Ofcom actually considered how that plays out; and secondly, did they
17 get the answer right?

18 The legal framework has been somewhat absent from submissions. I took you to a couple
19 of provisions very shortly in opening. Mr. Holmes, I think, did not take you to the legal
20 aspects at all although it has been dealt with very heavily. My learned friend, Mr. Beard,
21 did take you to aspects of the Framework Directive. I think he, with respect, inaccurately
22 suggested that I had not taken you to the full text of Article 8 of the Framework Directive –
23 I had actually taken you to the whole lot, it is just then, having asked you to read it,
24 identified the particular subparagraph that he alighted on. But, none of that really matters.
25 What actually matters here is the extent to which you give weight to what we accept to be a
26 principle that when there is a genuine exercise of regulatory judgment a margin of
27 appreciation is afforded to Ofcom.

28 As I understand matters neither Mr. Holmes, Mr. Beard, nor myself disagree that
29 fundamentally there will be that margin of appreciation where there is a genuine issue of
30 regulatory judgment. Of course, the fault line, in this appeal – as in so many – is not the
31 identification of the principle, it is the application of it in practice: is what is going on here
32 actually regulatory judgment, or is it a factual decision that has been taken – see Ground 4.
33 Is it a conclusion that has been reached without asking the right question, at which point
34 regulatory judgment does not come into it because, as a matter of law, Ofcom has failed to

1 address a material consideration. Or, is it a case of getting the balance between competing
2 considerations clearly wrong, which ultimately is a part of Ground 3.

3 So, with respect, I do not think there is an awful lot between any of us on the law. My
4 learned friend, Mr. Beard, did make one point that the Judgments of Lord Justice Moses in
5 *EE* is on appeal to the Supreme Court.

6 MR. BEARD: No, it is not appealed.

7 MR. BEAL: Is it not? I am sorry, I have the wrong case, but, in any event, the Court of Appeal
8 decision is binding on you and I did not understand that you should somehow not follow
9 whatever guidance has been given by the Court of Appeal – but if I took the wrong point I
10 apologise.

11 The final point, I suppose, that I ought to make, is that BT, with respect, somewhat
12 dramatically suggested that I was invoking a full *de novo* hearing. I had hoped that in my
13 opening submissions I had made it clear that I was not asking you to set a price, and that, of
14 course, would be an intimately bound-up aspect of a *de novo* hearing, in the event that a
15 given price is deemed to be necessary for the passive remedy to work. So, I am very far
16 from inviting you to take a *de novo* decision, as a regulator waiting in the wings, which we
17 all know you are not going to do.

18 What I am inviting you to do, actually, is to consider the extent to which Ofcom's decision
19 is flawed for the reasons set out in our notice of appeal, and it is by those grounds of appeal
20 that I propose to marshal my closing submissions.

21 Ground 1. With respect, it is correct that there has been a narrowing of the issue here. Can
22 I just briefly explain the history and why ultimately, in my view, it does not actually matter,
23 but we are where we are. The history is as follows: we read the BCMR - my team, and
24 those advising Colt read the BCMR and it looked as though Ofcom were saying, in terms:
25 "You have a choice between a passive remedy and an active remedy, and they are
26 alternative remedies, and you cannot have both."

27 At face value, with respect, that was very far from being a wholly misconceived allegation
28 from start to finish, which is the way BT characterised it. If I say that were the case I would
29 be surprised because Colt is in good company in having read the BCMR that way, I can
30 make good that point by referring to the intervention of the European Commission, albeit
31 not orally, but I can at least direct you to the point. It is at tab 8 of the defence bundle, and
32 if you would turn within there, please, to p.5.

33 THE CHAIRMAN: This is the confidential document that you are going to ask us to read?

34 MR. BEAL: I am going to ask you, please, to read paras. 11 and 12 on p.5.

1 MS POTTER: Do we know whether the text that went to the European Commission is exactly the
2 same as the one that was published?

3 MR. BEAL: The draft statement would have gone to them. We do not believe there were any
4 amendments. So that was the view we took; we say we were in good company. Ofcom has
5 subsequently turned around and said: “We accept, as a matter of principle, active and
6 passive remedies can co-exist in principle” and we, in our reply, have made clear we are
7 very happy to accept that that is the current position, given that it is not a challenge to the
8 reasons given in the Decision, we do not propose to take that any further. That does not
9 mean that our point was not a valid one from the start, and nor should we be criticised for
10 adopting a reasonable position like that.

11 We should be, with respect, encouraged to refine the issues between the parties in the light
12 of the shifting stances that are taken.

13 Ofcom then seek to characterise our submission on Ground 1 as being some sort of
14 suggestion that the consultation was a sham. You heard the strong words used by Mr.
15 Holmes today. I understand his concern to elicit that we are not alleging bad faith. As I
16 indicated to him if we were alleging bad faith I can promise you that the Tribunal would
17 know that fact because I would be very, very clear about what I was alleging. We are not
18 alleging bad faith, we are not saying that the consultation was a sham. What we are saying
19 is that looking at the process by which the consultation exercise rolled out, there came a
20 point by which Ofcom thought: “We do not need any more evidence, we do not need to be
21 told anything more about the interaction between active and passive remedies, we have
22 formed a provisional view that we will not allow passive remedies, and therefore we are
23 not going to do any more work on it”. To be fair, Mr. Culham was absolutely fair,
24 straightforward in his evidence where he accepted that there had come a point where Ofcom
25 had simply said: “We are not going to do the work that is necessary in order to work out
26 whether or not these two remedies can be managed side by side.” He reached that
27 conclusion on the basis of his perception of the competing pros and cons of the passive
28 remedy.

29 Our point is, and it is a short point really, that at no stage during the material process did
30 Ofcom turn around and say: “If we accept in principle that passive remedies can co-exist
31 alongside active remedies, and if the general prevailing mood of the CRF and regulatory
32 experience is that passive remedies are a good thing in principle, or are capable of being a
33 good thing”, then why did they not take the next stage and say: “We should look into this
34 and work out how they might co-exist. What steps can we take to work out practically how

1 we can change the existing price control structure which, crucially at that point, was not set
2 in aspic. It was not set down as confirming the previous control regime, it was still open to
3 Ofcom to change things around. Why did they not at that stage of the process turn around
4 and seek further information from market participants if it were necessary. This is not to
5 say the consultation was a sham. On the contrary, I am simply saying they failed therefore
6 to ask themselves the right questions. I do not need to put that on a *Padfield* basis, or any
7 other basis, it is a simple failure to consider the right issue, which is an error of law and it is
8 a failure to take into account a material consideration which is that active and passive
9 remedies can, in principle, co-exist and, therefore, a practical consideration could
10 potentially be found. And that seems to be common ground amongst everyone. And we do
11 happen to say that the way it was rolled out was that, having raised the issue of passive
12 remedies in rather opaque terms in the call for inputs, there was then a series of responses to
13 that call for inputs. A number of the responses did not pick up on the key crucial issue, as it
14 has now been identified, of inefficient entry and risk of disruption to common cost recovery
15 so, again, to the extent that Colt well, Colt did not give a response to the call for inputs, but
16 to the extent that it was not generally well known in the market that this is what Ofcom was
17 aiming at, then a series of big players also missed the point. But, of course, what you have
18 not seen, but I am about to take you to in part, is that part of the story whereby some
19 seriously big players do two things: firstly, one of them turns round and says, “Oh, we
20 understand what you’re getting at here. What you’re getting at here is that there is this risk
21 of disruption to common cost recovery that could lead to arbitrage entry and that would be
22 bad for economic efficiency”.

23 That was one player’s reaction. And they then set out a series of steps that they wanted
24 Ofcom to take in order to combat or at least investigate the extent to which that risk could
25 be managed and therefore a passive remedy could still be adopted. And they specifically
26 called on Ofcom to undertake the investigation and feed it into the consultation document.
27 That is what I will call “company A”. “Company B”, with respect, simply missed the point
28 the first time round. The call for inputs came in, a perfectly experienced company with
29 individuals who, highly knowledgeable in this field, very used to making submissions to
30 Ofcom and they missed the point. What happened with them was that subsequently, having
31 had a meeting with Ofcom, they identified what the very issue was. And the meeting note
32 says in terms, “Ah, we understand your reasoning now”, and that then prompted, after the
33 close of the deadline for the call for inputs, a much more detailed engagement with the
34 process and a much more detailed response as to why Ofcom at the very least needed to

1 carry out some further analysis as to whether or not (a) active remedies and passive
2 remedies could be held alongside each other, and, secondly, whether or not in fact the
3 benefits of a passive remedy outweighed the detriment that would be caused by a putative
4 disruption to BT's common cost recovery.

5 So you have two very experienced market operators, one spots it, one does not. The one
6 who does not spot it says, "Well, that was not clear at all and what you were doing, but here
7 is our answer now". The point is, what you have when one looks at the chronology, is a
8 point at which Ofcom says, "We're not engaging with this issue any more. We have taken a
9 decision that we are not going to rule out a passive remedy". Admittedly, in the
10 consultation document it is phrased in provisional terms, but when one looks at some of the
11 underlying documents it is abundantly clear that Ofcom had taken a view that it simply was
12 not worth — I am not going to say it was administrative convenience or anything else —
13 that having formed a preliminary view as to the merits and de-merits of a passive remedy,
14 they simply were not prepared to undertake any more work to see how it might work in
15 practice. And that is the way I would characterise a *fait accompli*.

16 And so I maintain our submission. That submission is maintained on the basis of
17 documents that I propose to take you to now if that would be convenient? A number of
18 them are confidential, but I do not want to simply give you references and say, "Go away
19 and read them", I would like to point out company A, company B, and the point at which
20 Ofcom turns round and says, "That's it, actually. You know what? We're not keen on
21 this".

22 THE CHAIRMAN: If you think you can do it on that basis, that is fine.

23 MR. BEAL: With that in mind (I'll give it a go) the first document is back to company A, and
24 that is at SB14 which is supplemental bundle tab.14. Please could you turn within that tab
25 to paragraph 36. And please could you read paragraphs 36 through to 38. Sir, it turns out,
26 actually, I think most of this is not confidential. But I am proposing to proceed as if the
27 identity of the person who submitted this was confidential because it does contain
28 confidential material. I am happy to proceed on the basis of "company A", but at
29 paragraph 42, for example, the point is made that I have made, that it was not needed
30 previously to have the allocation of common costs against the background of "a dynamic
31 and evolving market" over-evaluated. And then, paragraph 43:

32 "Ofcom must be transparent about the assumptions it made about the metrics of the
33 dynamic and evolving market it [envisaged] and against which it set the current ...
34 framework. Otherwise, without such transparency, one cannot assess the degree to

1 which (if at all) the environment established by P A is beyond the boundaries of that
2 which Ofcom has based its current regulatory approach”.

3 And then the request is made in paragraph 44:

4 “When Ofcom makes any such assessment it must make a proper evidence based
5 assessment”.

6 And it then sets out a series of things that it thinks ought to be thrown into the mix.

7 Paragraph 47, again the point is made, passive and active remedies can be complementary.

8 And what then follows is a series of submissions as to why the passive and active remedy
9 could be entertained on a co-ordinated basis, but of course further work is needed as to how
10 in practice it would be put into place. So, that is company A.

11 What happened at this stage is company B has not really engaged with the process. In the
12 meantime, however, BT submitted a further paper, what happens with the call for inputs is
13 that those aspects of the responses that are not confidential are put on to Ofcom’s website,
14 of course, available to the world at large. BT obviously had access to the non confidential
15 ones, and I mean them no disservice if I say that they thought that they needed to devote
16 more intellectual energy to the call for inputs than they had given it thus far because it
17 clearly looked as though there was a bigger call for a passive remedy than they had perhaps
18 envisaged. And one gets that from BT’s file 1 tab.6/B/2. This is a confidential document
19 and if one can simply flick through the headings of the document. We have got an
20 introduction, it is non-confidential. I am not going to read headings 2, 3 or 4, but I invite
21 you to note them, and in particular 4.1, in the second and third paragraphs in the middle of
22 the page. (After a pause) So far we have had Company A and a whole series of other
23 companies that I referred to in cross-examination that I was taking the Ofcom witness
24 through. The key participant at this stage is Company A, and Company A has clearly set
25 out a very detailed case - I have only taken you to some of it - in support of both the passive
26 remedy and doing the work to work out how you can fit a passive remedy. The response
27 from BT is to turn round and say, “That would not work for the following reasons”. So you
28 have got a classic conflict between the positions being advanced by two key market players.
29 The response from Ofcom was not to go back to Company A and say, “Here is what BT
30 says, what your views?” The response from Ofcom can be the supplemental bundle, tab 6,
31 p.4. It is a document I took you to in opening, but I can now put it in context. Just so that
32 you can orientate yourselves around this document, tab 6, p.1, a file note of a meeting
33 between Company A and Ofcom in the light of the response to the call for inputs. By this
34 stage the response to the call for inputs had been delivered. It was a perfect opportunity at

1 which Ofcom can turn around and say, “We have had the following points made by BT,
2 what do you think? Here is some work you can do, give us these figures, let us work out
3 how we can potentially do this”. Instead, the answer that is given on p.4, you can see at
4 bullet point 4. They make the point in bullet point 2 not dissimilar from a point that
5 Dr. Maldoom has made this afternoon. What they do not do, with respect at this stage, is
6 grapple with the issue.

7 What then happened was obviously one has the production of the consultation document in
8 June 2012. A provisional view was taken that passive remedies should not be introduced.
9 You have been referred to the paragraphs from 8.52 all the way through to 8.83. I need not
10 dwell on those, I can simply make a number of points. Firstly, on its face, Fujitsu have also
11 engaged with the cherry-picking point. Secondly, 8.59, Ofcom recognise the benefits of a
12 passive remedy. A concern was expressed about duplicated costs in 8.60, but it was
13 recognised that the passive remedy could reduce barriers to entry. Ofcom expressed the
14 view that that might be unsustainable outside major urban areas.

15 It does not appear at this stage that anyone has particularly majored on the geographical
16 issue, the risk of geographical arbitrage, but Ofcom is clearly expressing a concern that the
17 remedy itself would not be taken up outside what I suspect will be termed “key
18 conurbations” in the light of my use of that expression in opening.

19 At 8.62 the conflict is, in fact, not between the impact of the passive remedy, but it is
20 between, and this is really a key theme of the way it has been characterised - I think it is
21 convenient shorthand, rather than a dissemblance, but it is not an active passive remedy that
22 is directly in issue, it is BT’s pricing of its own services which afford a certain measure of
23 common costs recovery which is within its discretion as a result of the baskets giving BT
24 that latitude. That is what up for grabs.

25 Now, true it is that may be driven, or perhaps partially reinforced by the active remedies
26 that are put in place by Ofcom, but it is wrong to say that this is passive remedy versus
27 active remedy as such. It is the consequences of active remedy. That is not such a small
28 point because, of course, the person who is charged with giving effect to their common
29 costs recovery is not Ofcom, it is BT. So when one is comparing like with like, one needs
30 to think about why can BT not develop its own pricing strategy for a passive remedy? You
31 have got that latitude for the active remedy, why can you not deal with common costs
32 recovery if you are given latitude with the passive remedy?

33 Then 8.64 of the consultation, Ofcom identified two elements in the welfare calculus.

34 Again, I did not understand Mr. Culham to have a vehement objection to this proposition:

1 there has not been a detailed analysis of that welfare calculus. I am not saying you needed a
2 detailed blow-by-blow quantified cost benefit analysis. They often do more harm than
3 good, because they lend spurious accuracy to the process.

4 At least some sort of direction of travel magnitude type calculus where one thinks about
5 benefits being big, costs being big, which is relatively bigger, with a much more detailed
6 focus on exactly what is likely to happen where and when.

7 Having effectively a glorified thought experiment for where the balance lies is, with respect,
8 not enough. It is neither rigorous nor is it profound, it does not do much more than
9 articulate the economic arguments that you have already seen put in place by Company A
10 and BT. To restate that sort of level of debate between two key participants does not do the
11 point justice, specifically when Company A has said in terms, "If you are going to do this,
12 these are the issues, but you really need to look in detail at what the issues would be and
13 how they would play out". Instead of Ofcom coming back and saying, "Yes, we take that
14 point, we understand the need to look at this with a greater degree of detail than simply a
15 high level summary of the economic arguments", instead of that they are told, "Actually,
16 you know what, we are not thinking of doing this". That forms the basis for our *fait*
17 *accompli*. Nowhere in this consultation document does the issue get properly ventilated as
18 to (a) exactly what the concern is; and (b) how stakeholders might come up with solutions
19 that work around it.

20 By this stage, we say, it has already been recognised that a passive remedy is not going to
21 be introduced. That is the documentary basis for my submission.

22 As I say, I do not say the consultation was a sham, it is a consultation that covers a lot of
23 issues, but on that particular point Ofcom had reached a predetermined view that it was not
24 going to do it.

25 It is only post that point, post the condoc, that various people come into the frame with
26 views as to how things should be done. One of those is obviously Colt. The other one is
27 Company B.

28 I should say there is a point of distinction. There is a small walk-on role for Company C,
29 who had been engaged in giving some of the feedback at a meeting, but then followed up
30 specifically - and for your note this is in core bundle 2, tab 19 - with a request as to how the
31 passive remedy might be seen as working by Ofcom. That was not taken any further
32 forward. That Company C was not called in to deal with it in any further detail.

1 THE CHAIRMAN: Mr. Beal, just before you get on to this, the point we discussed with
2 Mr. Culham about the implications of passive remedies spilling over into other parts of the
3 business, how do you categorise that, as another thing like a thought experiment or what?

4 MR. BEAL: What happened was WLA, the access review, that deliberately hived off this issue of
5 the passive remedy for the business market to the BCMR so that it could be considered. So
6 we do have this wonderfully circular position from Ofcom where they say they put off to
7 the long grass, or at least BCMR, the issue of passive remedies for business services on the
8 basis, "We cannot deal with it solely in WLA", and then when you come to it in the BCMR
9 review they turn round and say, "We cannot possibly deal with it in the business leased line
10 review because we would need to involve WLA". So you do end up chasing your tail.
11 Our point is not how they do it or when they do it or who they involve, it is simply the fact
12 that they need to do it. There is a clear case for the passive remedy which we have
13 identified. There is clear demand for the passive remedy. We are not saying that this
14 Tribunal should turn around and say: "Yes, it must be set at price X", that is clearly not my
15 submission.

16 We do say you can direct that FRAND terms be imposed, but if you are not with me on that
17 for practical reasons that have been identified, then ultimately it does, at the very least, need
18 to be remitted to Ofcom to bring the whole piece together. So it is not part of my case that
19 the impact on other markets is an irrelevant consideration. I do not say that.

20 What I do say is they had the opportunity to do it altogether last time and they hived it off.
21 They cannot now turn around and say: "Because we took that decision previously that is the
22 reason why you should not force the decision this time around" because we will end up
23 having that argument incessantly.

24 Company C - the other company that is involved at this stage is Colt. You will see from
25 core bundle 2, tab 18 there was a meeting with Colt at which Colt's position was made
26 clear. In contrast to Company C, who were invited to give input practically on how a
27 passive remedy might work (CB2 tab 19) Colt was not given that luxury. Colt expressed a
28 strong support for the passive remedy, but Ofcom did not turn around and say: "How
29 practically do you see this working? Tell us what you think we need to do. How are we
30 going to roll this out? How are we going to make this consistent with the core concern we
31 have, which is and now understands, disruption of the common cost recovery?"

32 In contrast to Colt's position, and I admit we came late to the party, and there is a limited
33 degree of sympathy the Tribunal will have, and I fully accept that. In contrast to that let us
34 see how company B was dealt with. Company B is the company that did not realise from

1 the wording of the Call for Inputs that the crucial point was disruption of common cost
2 recovery and the risk that that would give rise to inefficient entry.

3 Company B's position can be seen in supplemental bundle, tab 12, p.1. If you would be so
4 kind, please, as to read 1.3. (After a pause): I should have pointed out in 1.1, this was
5 subsequent to me submitting our response to the BCMR, so it is after the con doc, and we
6 met Ofcom in September and that allowed a useful discussion.

7 THE CHAIRMAN: So it is late 2012, is it?

8 MR. BEAL: Yes. It is post a meeting in September, and we will see from a document I am
9 about to take you to exactly when that meeting was and the points that were made. This is
10 a response to the con doc in the light of information that is given by Ofcom at a meeting.
11 The individual who settled this response on behalf of Company B identifies in 1.3.6 that he
12 certainly did not think that the issue had been squarely raised with the documentary material
13 so far, and it was in light of the fact of the information that he was given, and we see this at
14 p.3, para. 3.1. This cannot be confidential, I do not think: "You explained at the meeting
15 that the core reasoning as to why you were minded not to introduce [passive remedy] was
16 ..." and then a series of reasons are given.

17 MR. HOLMES: Can you read 3.2, please?

18 MR. BEAL: Yes.

19 "This is my interpretation of what has been articulated in the document, meeting
20 and subsequently. I have to admit I am struggling to really understand Ofcom's
21 argument and articulate it myself. If I have got it wrong I would appreciate you
22 correcting me."

23 Then there is a series of responses, which I do not propose to go to in detail. I have cited
24 parts of it in my skeleton, where a detailed critique is made of the reasoning that has been
25 adopted by Ofcom as amplified in the meeting.

26 I did say I would take you to the meeting. That can be seen at tab 13. If I have my learned
27 friend's intervention correctly he is saying that it was recognised that information was given
28 in the document. Perhaps we can just look quickly at what they say.

29 Monday 17th September 2012. The key people from Company B are identified.

30 "Meeting requested by [Company B] to discuss their consultation response.

31 [A person with initials] described the key points from [Company B's] consultation
32 response. His presentation closely followed the slides ...

33 The main points from the discussion were ..."

1 And then passive remedies is described in that section, in a slide at the end. That, I think, is
2 a meeting at or around the time at which the paper was given. So I had certainly inferred a
3 paper was prepared and then there was a subsequent meeting. One sees at p.3 of that
4 second document under the heading “Passive remedies”:

5 “[An individual] from Ofcom explained our reasoning for not proposing passive
6 remedies.

7 [An individual] from Company B suggested that this reasoning has not been
8 explained in the consultation.”

9 So, far from it being clear and apparent from the Call for Inputs and the subsequent
10 consultation document, it was only the subsequent meeting between these parties that
11 flushed out the particular concern and prompted a very detailed submission from that
12 particular company. The detail in that submission, in keeping with the detail given by
13 Company A was not explicitly taken into account at any stage. It was not summarised in
14 the consultation document, and it did not form the basis upon which Ofcom approached,
15 certainly Colt, with a view to working out whether there were practical solutions around the
16 perceived problem.

17 That, in short, is why we say that, come the consultation document, there was a *de facto* fait
18 accompli - to mix my languages – and the result of that was proper attention, we say, was
19 not given to the possibility of having dual passive and active remedies alongside each other
20 by Ofcom.

21 THE CHAIRMAN: I am getting muddled with the chronology here. This is after the consultation
22 document?

23 MR. BEAL: That was after the consultation document.

24 THE CHAIRMAN: So it could not have been taken into account in the consultation document
25 because it was submitted afterwards?

26 MR. BEAL: No, I beg your pardon. The consultation document was obviously inviting people for
27 comments on the provisional findings.

28 THE CHAIRMAN: So, what are you saying - there should have been another consultation
29 document?

30 MR. BEAL: The point is the consultation document did not summarise the views that were being
31 expressed by either Company A or Company B, and nor did the consultation document say
32 that “We have identified this as the specific and main concern on the part of Ofcom, please
33 give us your answers on a postcard as to what the solution is.”

34 THE CHAIRMAN: Company B had missed the point first time round?

1 MR. BEAL: Company B missed the point first time round because they felt it was not explicitly
2 flagged up in the Call for Inputs, whereas Company A was more astute at face value
3 because they spotted the point, dealt with it. Company A was then shut out of being invited
4 to make practical suggestions as to how it might work.

5 Where that takes us is that we are in a position where the work has not been done – it is not
6 pejorative, it is simply a statement of fact – the work has not been done on Mr. Culham’s
7 own evidence the detailed work has not been done, to work out exactly how this might
8 happen. They have simply taken a very high level objection to passive remedies which do
9 not reflect actually a number of the points raised by significant stakeholders during the
10 consultation process.

11 THE CHAIRMAN: So you are saying it is a value judgment, but it is not a value judgment taken
12 with full information. Is that what you are saying?

13 MR. BEAL: Well, with respect they have not asked themselves the right question, because they
14 have asked themselves the question, “Does a passive remedy provide a better outcome in
15 the round than an active remedy?” What they could have asked — should have asked — in
16 the light of the responses that you have seen, is “Can we make this work side by side?”
17 which they now accept in principle is capable of happening, “and, if so, what modifications
18 if any do we need to make to the existing suite of active remedies?”

19 THE CHAIRMAN: Okay, but just to be clear where it fits in the legal framework, you are saying
20 that there was a weighing up of the balance, but one part of the balance was incomplete
21 because they had not asked themselves the right question in relation to this.

22 MR. BEAL: This comes within ground 1, as developed in our skeleton argument and reply.
23 Ground 1 initially was obviously, “You have set your stall against doing these two things
24 side by side”, so that was the point of principle. Ofcom turned round and said, “Well we
25 never had that as a point of principle. We can do both”, to which our response —
26 understandably because it is a response because we had misunderstood what their position
27 was, to put it neutrally, first time round — was “If you can do it in principle, why have you
28 not done it in principle?” And it is at that point that one gets the answer, “Well, we took
29 this threshold view that actually there was a very high level weighing up of the pros and
30 cons, and on balance it wasn’t justified”.

31 THE CHAIRMAN: I am sorry. I am probably not making myself clear. So you are saying that a
32 high level weighing up is not enough. That does not —

33 MR. BEAL: A high level weighing up —

1 THE CHAIRMAN: ... this magic basket of regulatory judgment to which we should defer. Is
2 that right?

3 MR. BEAL: I do have a separate submission for ground 3, that the weighing up that has been
4 carried out is clearly wrong.

5 THE CHAIRMAN: No, no, I appreciate that.

6 MR. BEAL: But, this is the threshold —

7 THE CHAIRMAN: Because the point in answer to what you are saying here is that they did
8 weigh it up but they, on the basis of experience, knowledge, intuition, judgment if you like,
9 “decided not to go that way”. I think that was the phrase used. And you are saying that is
10 not good enough to provide one of the baskets that you weigh up in the balance.

11 MR. BEAL: But precisely because they did not acknowledge that in principle you can have these
12 side by side and they might work together. Now, the CFI referred to “What steps would
13 you need to take to modify or to deal with the implications of a passive remedy?” But that
14 is certainly a very long way from saying “There is a fundamental inherent problem with
15 balancing an active remedy with a passive remedy in practice in this market”, which is what
16 they should have said. If they had said that, the consultation responses could have been
17 directed towards overcoming the objection that has been identified. So, if they had turned
18 round and said, “We anticipate this is the problem. Please give us ways round it”, they
19 would have asked themselves the right question in consultation and they would have
20 directed stakeholders to give the right answer in response to the consultation question.

21 THE CHAIRMAN: Supposing, in the light of their regulatory experience and judgment, they got
22 it right, even if they did not ask themselves the right question in this way that you describe?

23 MR. BEAL: That would require, sir, the Tribunal taking a view provisionally.

24 THE CHAIRMAN: It is a full merits appeal.

25 MR. BEAL: It is a full merits appeal.

26 THE CHAIRMAN: I think you reminded us of that.

27 MR. BEAL: And if you take the view that they got it right, then you would need to still answer
28 the provisional question that goes before it — did they ask themselves the right question?

29 THE CHAIRMAN: Yes. “Got it right” is shorthand, Mr. Beal, here.

30 MR. BEAL: Well, they would still need to have asked themselves the right question in order not
31 to deter people who want to give the right consultation answer from giving it.

32 THE CHAIRMAN: So, you are saying that is fatal in any event. Is that right?

33 MR. BEAL: Yes, because they presented themselves with a *fait accompli* and there is a variety of
34 different ways of dressing that up, “dressing it up” is perhaps the wrong word: finding a

1 legal hook upon which my merits challenge can hang. And that legal hook is either they
2 have not taken into account a relevant consideration, or they have directed themselves by
3 reference to the wrong question which is, “Having accepted that they can co-exist side by
4 side, in practice can that work?” It feeds into the consultation issues, but it is not a sham
5 consultation, it means that they failed to deal with a particular point in a way that would
6 enable stakeholders actively and properly to engage with the process. It does feed into the
7 *Padfield* point which is when you have effectively turned round as they did in *Padfield*, and
8 say, “Well, look, we’re simply not going to intervene with what’s being done for a reason”.
9 If that reason is not a valid reason, then it is capable of being undermined as an error of law.
10 The valid reason is not a valid reason here because they precisely did not look into the
11 extent to which active and passive remedies could be co-managed. So whichever legal
12 hook you hang it on, it comes down to a flaw in the reasoning process. And yes, with
13 respect, that is fatal because the only way it would not be fatal is if they could say, “Well, it
14 wouldn’t make any difference, even if company A and company B had fully discussed the
15 problem and ventilated it with us and been directed to come up with an answer”, and that
16 cannot be right on the facts of this case.

17 THE CHAIRMAN: We have learnt a lot in these proceedings.

18 MR. BEAL: We have, and this is but a short four day process to the months that Ofcom
19 envisages —

20 THE CHAIRMAN: And we have read a great deal of paper.

21 MR. BEAL: We have read a great deal of paper, but we are not the only participants in this
22 industry. Whilst the communications providers have intervened, they have not been given
23 permission to make submissions, and clearly there are more interests out there even
24 amongst those who have not intervened.

25 THE CHAIRMAN: (I have forgotten it already). Is that — ?

26 MR. BEAL: That is ground 1.

27 THE CHAIRMAN: Right.

28 MR. BEAL: Ground 4 I can take probably in five minutes, with respect.

29 THE CHAIRMAN: It is your privilege, your choice. If you can do it in five minutes, go ahead.

30 MR. BEAL: Well, I mean ground 4, essentially, comes down to, is it right (this is the first
31 question) “Is it right that Ofcom in the BCMR took into account the lack of significant
32 demand for the remedy?” Now, one can hide behind the semantics of the actual language
33 used if one wants. But in substance and reality what Ofcom was saying (this must be right)
34 “We don’t think anyone is going to actually take up this passive remedy or if they do take it

1 up it will be for the wrong reasons”, but that is a separate issue, that is the inefficient entry
2 point which is dealt with separately in the statement. We do not think though that there is
3 going to be enough substantial investment on the back of this passive remedy or enough
4 innovation to justify the passive remedy being rolled out, and the point is that Ofcom has
5 explicitly tied in perceived demand with innovation, which means that they must actually be
6 thinking about the extent to which somebody is going to be coming in and using the remedy
7 and doing different things with it. That must follow.

8 And just on the natural and ordinary meaning of the words, it is apparent, with respect, that
9 Ofcom thought that there was no demand for this passive remedy and they got that wrong as
10 a matter of fact. And one only needs to read paragraph 66 of Mr. Culham’s first witness
11 statement to appreciate that, had they appreciated the true size of the demand for this
12 remedy, things have might have been different. And Mr. Culham, very fairly, has accepted
13 that were the position different in terms of demand and innovation, likely evidence of
14 innovation, he would be prepared in the future to consider it. And we simply ask that that
15 point is less far in the future than he imagines, ie remittal.

16 THE CHAIRMAN: Thank you very much. We will reconvene tomorrow at ten o’clock, and see
17 how we get on. Thank you very much, everybody.

18 MR. BEAL: Sir, may I just clarify that we are beginning at ten o’clock as envisaged?

19 THE CHAIRMAN: Yes. I am beginning at ten, I hope the rest of you will be here.

20 MR. BEAL: I shall be there. Thank you very much, I am grateful.

21 (Adjourned until 10.00 am Thursday 17th October 2013)