Neutral citation [2012] CAT 1

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1186/3/3/11

Victoria House
Bloomsbury Place
London WC1A 2EB

10 January 2012

Before:

MARCUS SMITH QC
(Chairman)
CLIVE ELPHICK
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

TALKTALK TELECOM GROUP PLC

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- supported by -

BRITISH SKY BROADCASTING LIMITED
BRITISH TELECOMMUNICATIONS PLC

Interveners

Heard at Victoria House on 5 and 6 December 2011

JUDGMENT (Non-confidential version)

Note: Excisions in this judgment (marked "[…][**C**]") relate to passages excluded having regard to Schedule 4, paragraph 1 to the Enterprise Act 2002.

APPEARANCES

Mr Meredith Pickford (instructed by Towerhouse Consulting LLP) appeared for the Appellant.

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

Mr Stephen Wisking and Mr John McInnes (of Herbert Smith LLP) appeared on behalf of the Intervener, British Sky Broadcasting Limited.

Mr Tim Ward QC and Miss Fiona Banks (instructed by BT Legal) appeared on behalf of the Intervener, British Telecommunications plc.

I. INTRODUCTION

1. On 20 July 2011, the Office of Communications ("OFCOM") made a decision contained in a document entitled "WBA Charge Control – Charge Control Framework for WBA Market 1 Services Statement". We shall refer to this document as the "WBA Charge Control Decision". "WBA" stands for "Wholesale Broadband Access". The WBA Charge Control Decision followed an earlier decision by OFCOM, dated 3 December 2010, contained in a document entitled "Review of the Wholesale Broadband Access Markets, Statement on Market Definition, Market Power Determinations and Remedies". We shall refer to this document as the "WBA Market Power Determination".

2. Essentially, the WBA Market Power Determination made findings of significant market power ("SMP") in what OFCOM described as "Market 1" and "Market 2". (Other markets were defined and considered in the WBA Market Power Determination but, as appears more fully below, these are less relevant to the matters in issue before us.) We consider the precise definition of these markets in paragraphs 98 to 115 below. For the present, it is sufficient to note that although a finding of SMP was made by OFCOM in the WBA Market Power Determination, no price controls were imposed at this time as a result of this finding.

3. It was the WBA Charge Control Decision which set out and imposed charge controls[1] in respect of WBA services provided by BT in Market 1, but not in Market 2. There was, therefore, a disjunction in time between the WBA Market Power Determination (dated 3 December 2010) and the WBA Charge Control Decision (dated 20 July 2011), which imposed a charge control in respect of Market 1 in reliance upon the findings made in the WBA Market Power Determination.

4. The Communications Act 2003 ("the 2003 Act") makes specific provision where such a disjunction between market power determinations and charge controls occurs. Section 86 provides (so far as material) as follows:

[1] The term "price control" is also often used. Here, the term "charge control" is preferred, but there is no difference between the two terms.

"(1) OFCOM must not set an SMP services condition by a notification which does not also make the market power determination by reference to which the condition is set unless –

...

(b) the condition is set by reference to a market power determination made in relation to a market in which OFCOM are satisfied there has been no material change since the determination was made.

...

(6) A change is a material change for the purposes of subsection (1) ... if it is one that is material to –

(a) the setting of the condition in question..."

5. It is clear from this provision that findings of SMP and the imposition of SMP services conditions can be, but do not necessarily have to be, contemporaneous. Where, as here, they are not contemporaneous, in that an SMP services condition succeeds in time the finding of SMP, then OFCOM is under a statutory duty to satisfy itself, when imposing the SMP services condition, that there has been no "material change" since the determination of SMP was made.

6. By its Notice of Appeal, TalkTalk Telecom Group plc ("TalkTalk") challenges the WBA Charge Control Decision on two grounds, which are summarised as follows in paragraph 7 of the Notice of Appeal:

"In broad summary, TalkTalk's challenge is as follows:

7.1 that Ofcom failed to take proper and sufficient steps to satisfy itself that it had complied with its obligation in section 86 of the 2003 Act only to impose an SMP services condition subsequent to a market power determination when there has been no material change in the relevant market since the SMP determination was made; alternatively,

7.2 that insofar as Ofcom did take sufficient steps to ask itself the correct question, and equip itself with the relevant information necessary to decide whether there had been a material change in Market 1, it erred in deciding that there had been no material change."

7. In the pleadings and written submissions, as well as orally before us, the first of these grounds was referred to as "Ground A", and the second as "Ground B". We adopt this description for the purposes of this Judgment.

8. In its submissions, OFCOM rejected TalkTalk's challenge to the WBA Charge Control Decision, contending that Grounds A and B had no merit (see paragraph 3 of OFCOM's Defence and Skeleton Argument). OFCOM's position as regards TalkTalk's appeal was supported by two Interveners, British Sky Broadcasting Limited ("BSkyB") and British Telecommunications plc ("BT"). BSkyB and BT were given permission to intervene by the Tribunal's Order of 17 October 2011.

9. TalkTalk's appeal was in respect of the WBA Charge Control Decision only. There was no challenge in respect of the WBA Market Power Determination. The WBA Charge Control Decision is a decision falling within section 192(1) of the 2003 Act. By section 192(2), a person affected by such a decision may appeal against it to the Tribunal. The Tribunal decides such appeals on the merits and by reference to the grounds of appeal set out in the notice of appeal: section 195(2).

10. Here, as we have noted, TalkTalk's grounds of appeal fall under two broad heads – Ground A and Ground B. In Ground A, TalkTalk contended that OFCOM had erred procedurally in failing to take proper steps to satisfy itself that there had been a material change within the meaning of section 86(1)(b). In Ground B, TalkTalk contended that OFCOM's decision that there had been no material change within the meaning of section 86(1)(b) was, in substance, wrong.

11. Even the order in which these two grounds of appeal should be addressed was controversial before us. Mr Pickford, counsel for TalkTalk, addressed us first on Ground A, and then on Ground B. He contended that the Tribunal only needed to consider Ground B if TalkTalk's contentions in respect of Ground A were rejected. Mr Holmes, counsel for OFCOM, contended that the Tribunal should first consider the substantive correctness of OFCOM's decision that there had been no material change within the meaning of section 86(1)(b) (i.e. Ground B), and should consider Ground A – the procedure by which OFCOM reached that decision – thereafter.

12. Given that this is an appeal "on the merits", the analytical framework within which TalkTalk's grounds of appeal must be considered is important. This analytical framework is considered in Section V below. Thereafter, the matters at issue between the parties are determined, based on this analytical framework, in Sections VI and VII below.

13. Before considering these questions, it is necessary to consider in greater detail a number of more general matters, which form the essential background to these questions:

    (a) First, it is appropriate to describe briefly the nature of the Wholesale Broadband Access market, and in particular the process which was referred to before us of "unbundling" exchanges. This is considered in Section II below.

    (b) Secondly, it is necessary to describe the process of market definition and market power determination, and the remedies that may be imposed consequent upon a finding of market power. This is done in Section III below.

    (c) Thirdly, the process by which the WBA Charge Control Decision came to be made needs to be set out. In order to understand the context, it is necessary to consider not only the history of the WBA Charge Control Decision, but also the WBA Market Power Determination, and its history. This is done in Section IV below.

14. In addition to the pleadings and skeleton arguments submitted by the parties, the parties submitted witness statements from the following persons:

    (a) Mr Andrew Heaney, Executive Director, Strategy and Regulation, at TalkTalk. Mr Heaney provided two witness statements to the Tribunal, dated 31 October 2011 and 21 November 2011.

(b) Mr David Clarkson, a Competition Policy Director in OFCOM's Competition Group. Mr Clarkson provided a single witness statement to the Tribunal, dated 1 November 2011.

(c) Mr Toby Higho, Head of Regulatory Policy, Telephony and Broadband at BSkyB. Mr Higho provided a single witness statement to the Tribunal, dated 8 November 2011.

15. Shortly before the substantive hearing in this matter, TalkTalk indicated that it wished to cross-examine Mr Clarkson on a discrete and short point, and Mr Clarkson was duly called as a witness and cross-examined. We were, therefore, able to assess the demeanour of Mr Clarkson as a witness. He came across as a careful and thoughtful person, who gave his evidence with consideration. OFCOM indicated that any cross-examination it might have of Mr Heaney was contingent upon what came out of Mr Clarkson's cross-examination. In the event, OFCOM had no questions to put to Mr Heaney. Mr Heaney was formally called as a witness by TalkTalk, but (save to confirm that his statements were his) he gave no evidence. Mr Heaney was asked no questions by either OFCOM or the Interveners. No-one indicated any need for Mr Higho to attend, and Mr Higho was not formally called as a witness.

16. Although that consensus began to fray at the end of the second day of the hearing, the appeal was presented to us on the basis that the factual evidence contained in the witness statements was – apart from the discrete point upon which Mr Clarkson was cross-examined – uncontentious. We accept the evidence contained in the witness statements adduced before us. The fraying of the factual consensus is dealt with in paragraphs 100 to 105 below.

17. After the hearing, the Tribunal (in a letter to the parties dated 20 December 2011) invited the parties to comment on certain "authority [which] concerns the situation where a decision of an administrative body is subject to an appeal on the merits", and invited written submissions from the parties on this point. Both TalkTalk and OFCOM made such submissions, dated 29 December 2011, and we have taken these submissions into account.

II. THE NATURE OF THE WHOLESALE BROADBAND ACCESS MARKET

18. As OFCOM has noted on a number of occasions – see, for instance, paragraph 2.5 of the WBA Market Power Determination – "[a]ccess to the Internet plays an increasingly important part in the lives of UK citizens and consumers. Services provided over the Internet continue to evolve and now include access to government and social services, online shopping, social networking and viewing of high quality video. Broadcasters (such as the BBC and Sky) increasingly make content available online as well as through traditional broadcast methods. The Internet also plays an important role for business consumers, both in providing new ways to interact with their customers and in providing more flexible working for employees."

19. It is clear that competition in the provision of broadband services is of benefit to consumers. In the WBA Market Power Determination, OFCOM noted as follows:

> "2.6 Consumers have benefited from competition in the provision of broadband services through choice of provider, lower prices and product innovation. Providers compete by differentiating their broadband products in terms of the features of the product (such as maximum speed and download limits) and by bundling broadband products with other services, notably fixed and mobile telephony and television services.
>
> 2.7 This competition in the provision of retail services is dependent on effective competition at the wholesale level, or, where this is not occurring, effective regulation.
>
> 2.8 In the 2005 Strategic Review of Telecoms, we identified that competition at the deepest level at which it is likely to be effective and sustainable, based on investment by competitors in their own infrastructure, is likely to give the greatest benefits in terms of the mix of lower prices and faster innovation that residential and business consumers want. Based on the current network that exists in the UK, we consider that this benefit is maximised where competition between networks in the provision of broadband services is based on local loop unbundling (LLU). Where this competition develops, regulation of wholesale broadband is unnecessary.
>
> 2.9 However, LLU is unlikely to be successful in all parts of the UK. This means that in some geographic areas there is unlikely to be direct competition between broadband networks. In these areas regulation at the WBA level is necessary to ensure that consumers can choose between differing retail offers. Regulation at the WBA level is also needed to ensure rival providers are able to compete at the national level." (omitting footnotes)

20. For the purposes of this Judgment, "broadband services" may be defined as asymmetric[2] broadband internet access providing an always-on capability; allowing both voice and data services to be used simultaneously; providing data at speeds greater than a dial-up connection; and making no distinction between business and residential customers (see paragraphs 3.10 and 3.64 of the WBA Market Power Determination).

21. To expand upon the manner in which broadband services are provided:

(a) In the UK, there are a total of 5,603 telephone exchanges ("exchanges"). These connect to the premises of customers in the locality of the exchange ("premises"). The connections between an exchange and premises are known as "local loops" and typically comprise copper wire connections, although fibre optic connections are increasingly being introduced.

(b) Of the 5,603 UK exchanges, 14 operate in the Hull area and – for historical reasons that are irrelevant for present purposes – are operated by KCOM Group plc ("KCOM"). These exchanges are irrelevant for the purposes of this Judgment. The remaining 5,589 exchanges are operated by BT, and are relevant for the purposes of this Judgment.

(c) "Local loop unbundling" or "LLU" describes the process whereby multiple communications providers are permitted to use the local loop operated by one of them. Thus, in the case of the 5,589 exchanges operated by BT, an exchange is "unbundled" where a communications provider, other than BT, provides broadband services via the local loop. In the words of Mr Higho (paragraph 9 of his statement):

> "LLU is a process whereby alternative communications providers install their equipment in BT's local exchange and rent the copper line between the local exchange and the customer's premises. Like [TalkTalk], but unlike most other LLU operators, [BSkyB] favours (where possible) using fully unbundled loops

[2] Broadband services can be either symmetric or asymmetric. Symmetric broadband is a service where the download and upload speeds are the same (i.e. data is downloaded to the client at the same speed as data is uploaded from the client). Asymmetric broadband is where the download and upload speeds are not the same, with download speeds far faster than upload speeds. Symmetric broadband speeds are generally much slower than asymmetric broadband speeds.

(also known as metallic path facility or MPF), which involves the LLU operator taking control of both the higher frequency part of the line (to offer retail broadband services) and the lower frequency part of the line (to offer retail telephony services)." (omitting footnotes)

(d) The process by which unbundling occurs was helpfully described in the evidence before us, in particular in paragraphs 28 to 35 of Mr Higho's statement. The various stages of the process are set out below:

Stage 1	**Internal decision by a communications provider to unbundle a certain exchange or exchanges** Clearly, this depends upon the decision processes within the communications provider in question. But, obviously, a business case for unbundling an exchange will need to be made out, and such decisions inevitably take time.	Up to several months
Stage 2	**Placement of an order to BT to unbundle a given exchange or exchanges** Within BT, it is BT Openreach that is responsible for the unbundling of exchanges. As Mr Higho noted in paragraph 31 of his statement, "[t]he entire end-to-end process is supposed to take 80 working days, although this timetable is rarely met in practice".	Minimum 16 weeks
Stage 3	**Hand-over of the unbundled exchange** As Mr Higho notes in paragraph 35 of his statement, "[o]nce the exchange has been 'handed over' to the LLU operator, the LLU operator's equipment needs to be installed. Before the LLU operator's services 'go live', there will then need to be a process of migrating existing subscribers to the new 'on-net' service and marketing will take place to encourage new subscribers."	Several weeks or months

There is, therefore, unsurprisingly, a gap between the placing of a firm order for LLU and the provision of unbundled services by a communications provider of several months. (The actual length of time between the placing of a firm order and the provision of unbundled services was in evidence before us, as well as the time communications providers

took in deciding whether to unbundle. Most of this detail was confidential, but we do not consider it necessary, for the purposes of this Judgment, to refer to the detail of this evidence: it is sufficient to note that it takes some time to unbundle an exchange.)

(e) Where a communications provider is not minded to seek to unbundle an exchange – and there may be all kind of reasons that render unbundling commercially unattractive – that communications provider may nevertheless provide broadband services to customers by purchasing broadband services from BT. This is the WBA market that is the subject of the WBA Market Power Determination and the WBA Charge Control Decision. As Mr Higho stated (in paragraph 10 of his statement):

> "In areas where it has not unbundled BT local exchanges (referred to as 'off-net' areas), [BSkyB] purchases IPStream Connect from BT, which enables it to provide a retail broadband service to its customers. IPStream Connect falls within the [WBA] market and is covered by the WBA charge controls. IPStream Connect is essentially a re-sale product that, due to the managed nature of the service, offers only limited scope for innovation or product differentiation compared to LLU."

22. In paragraph 3.7 of its 23 March 2010 consultation, "Review of the wholesale broadband access markets", OFCOM made the following observation as regards the importance of the WBA market:

> "WBA products offer the opportunity to enter the broadband market without the need to deploy an access network (or, alternatively, to use an upstream remedy such as LLU). WBA products require only a limited number of interconnection points to provide nationwide coverage. As such, WBA products can be used by new providers entering the market, or by providers wishing to offer services in exchange areas where they have not deployed their own access network. Given the economics of providing full national coverage by deploying alternative access networks or via LLU, all providers except BT are likely to be dependent on WBA products to provide service on a national basis."

III. THE REGULATORY FRAMEWORK

(i) Overview

23. In 2003, the regulatory regime in the UK underwent a substantial, European Union driven, change. The UK implemented no less than five EU communications

directives (Directive 2002/21/EC ("the Framework Directive"), Directive 2002/19/EC ("the Access Directive"), Directive 2002/20/EC ("the Authorisation Directive"), Directive 2002/22/EC ("the Universal Service Directive") and Directive 2002/58/EC ("the Privacy Directive"). The first four of these directives[3] were implemented in the UK by the 2003 Act. The fifth, the Privacy Directive, is not material for the purposes of this Judgment. We shall refer collectively to these directives as "the Common Regulatory Framework".

24. One of the consequences of the new regime was an obligation on National Regulatory Authorities to carry out reviews of competition in communications markets to ensure that regulation remained appropriate in the light of changing market conditions. This process essentially involved a definition of the relevant market or markets; an assessment of competition in each market, and in particular whether any companies had SMP in a given market; and, finally, an assessment of the appropriate regulatory obligations that should be imposed where there was a finding of SMP. Where SMP was found to exist, some form of regulation was obligatory.

25. The UK's National Regulatory Authority is OFCOM. As noted, much of the Common Regulatory Framework is implemented into domestic law by the 2003 Act: those parts of the Common Regulatory Framework not implemented by the 2003 Act (specifically, the Privacy Directive) are not relevant for the purposes of this Judgment. We were referred to a number of provisions in the Common Regulatory Framework, and we have taken these into account. But none of the parties before us suggested that the 2003 Act failed to implement the Common Regulatory Framework, and accordingly, we propose to describe the regime as implemented into English law by the 2003 Act. We shall, where appropriate, refer to EU materials – including the Common Regulatory Framework – where these cast particular light on the regulation of communications in the UK, but we do not, in this Judgment, propose simply to re-quote those passages that were cited to us.

[3] The Framework Directive, Access Directive and Authorisation Directive were amended by Directive 2009/140/EC which was implemented in the UK by the Electronic Communications and Wireless Telegraphy Regulations 2011 (SI No 1210 of 2011) with effect from 26 May 2011.

(ii) A three-stage process

26. As noted, OFCOM, as the UK's National Regulatory Authority, must carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions. This is a three-stage process involving:

(a) Definition of the relevant market or markets.

(b) Assessment of competition in each market, and in particular whether any providers have SMP in a given market.

(c) An assessment of the appropriate regulatory obligations that should be imposed where there is a finding of SMP.

27. Of course, the steps in this three-stage process are inter-related and can be carried out in parallel at more-or-less the same time. (Indeed, as we noted in paragraphs 4 to 5 above, section 86(1)(b) caters for the case where market power determinations and charge controls occur at different times; it is implicit in section 86 that market power determinations and charge controls can be notified at the same time, when section 86(1)(b) will not apply.) Section 79(1) of the 2003 Act provides that OFCOM must, before making a market power determination:

(a) Identify (by reference, in particular, to area and locality) the markets which in OFCOM's opinion are the ones which in the circumstances of the UK are the markets in relation to which it is appropriate to consider whether to make the determination; and

(b) Carry out an analysis of the identified markets.

Thus, unsurprisingly, the processes of market definition and market analysis must be carried out before (if only shortly before) a market power determination can be made; only then, can OFCOM consider whether *ex ante* controls should be imposed.

(iii) Market definition

28. By virtue of section 79(4), the way in which a market is to be identified for the purposes of section 79 is by the publication of a notification containing the identification.

29. Having published a notification setting out the way in which a market is to be identified, OFCOM may proceed to identify the market. Plainly, the requirement to publish a notification is a means of ensuring that interested parties can make appropriate representations to OFCOM as to how the market is to be identified. Although the 2003 Act has no specific provisions relating to how such interests are to be considered by OFCOM, it is clear that OFCOM will be obliged to deal with these in accordance with its duties as laid down in sections 3*ff* of the 2003 Act, as well as in accordance with the more general duties on decision-makers laid down by EU and domestic law.

30. Pursuant to section 80(1) of the 2003 Act, before OFCOM identifies a market for the purposes of making a market power determination, it must publish a notification of what it is proposing to do. OFCOM may then give effect, with or without modifications, to a proposal regarding market identification, provided the requirements of section 80(6) of the 2003 Act are met.

(iv) Market analysis

31. As in the case of market identification, by virtue of section 79(4), the way in which a market power determination is to be made for the purposes of section 79 is by the publication of a notification containing the determination.

32. Having published a notification setting out the way in which a market power determination is to be made, OFCOM may proceed to carry out an analysis of market power. As in the case of market identifications, the requirement to publish a notification is a means of ensuring that interested parties can make appropriate representations to OFCOM as to how market power is to be determined.

33. Pursuant to section 80(1) of the 2003 Act, before OFCOM makes a market power determination, it must publish a notification of what it is proposing to do. OFCOM may then give effect, with or without modifications, to a proposal regarding market identification, provided the requirements of section 80(6) of the 2003 Act are met.

(v) Imposition of *ex ante* controls

34. OFCOM's power to set conditions, including SMP conditions, is contained in section 45 of the 2003 Act. SMP conditions can be either "services" conditions or "apparatus" conditions: section 45(7) of the 2003 Act. The present case, as is common ground, concerns SMP services conditions, which are governed by section 45(8), which (amongst other things) provides that an SMP services condition is a condition which is authorised or required by one or more of sections 87 to 92 of the 2003 Act.

35. Section 87 identifies the various types of condition that OFCOM may impose where it has made a determination that a given person – the "dominant provider" – has SMP in an identified services market. Such conditions may include the imposition of charge controls, although in such a case the additional requirements of section 88 must be met (section 87(9)).

IV. THE WBA CHARGE CONTROL DECISION AND TH E HISTORY LEADING TO THAT DECISION

(i) The 23 March 2010 consultation

36. On 23 March 2010, OFCOM began its most recent review of the WBA market with the publication of a consultation document entitled "Review of the wholesale broadband access markets". The purpose of the document was to "review the WBA market and make proposals relating to market definition, SMP and the remedies we think are needed to address this market power". The summary of OFCOM's proposals reads as follows:

"1.21 In this document we are consulting on our proposals for market definition, market power assessments and proposed remedies in the WBA market, which are:

Market definition

1.22 We propose a single broad product market for fixed asymmetric broadband services of all speeds at the wholesale level, including residential and business products in the same market. This market includes services provided using copper, fibre and cable access networks, including super-fast broadband services.

1.23 We propose four separate geographic markets:

- The Hull area (0.7% of UK premises);
- Market 1: exchanges where only BT is present (14.2% of premises);
- Market 2: exchanges with 2 or 3 Principal Operators are present [*sic*] (13.8% of premises); and
- Market 3: exchanges with 4 or more Principal Operators present or with 4 or more forecast (71.3% of premises).

Market power assessment

1.24 We propose the following market power determinations in each of the markets described above:

- KCOM holds a position of SMP in the Hull area;
- BT holds a position of SMP in Market 1;
- BT holds a position of SMP in Market 2; and
- No operator holds a position of SMP in Market 3.

Remedies

1.25 In order to address the competition problems identified above we propose to impose a series of remedies designed to make sure there is a choice of provider for retail consumers wherever possible and that consumers benefit from lower retail prices."

37. The remedies that OFCOM proposed to introduce obviously could not extend to Market 3, given the finding of no SMP in this market. As regards the other markets,

a range of remedies were proposed. The detail does not matter: the only point to note is that in Market 1, OFCOM was minded to impose a charge control, whereas in Market 2, it was not minded to do so.

38. The proposals described in the consultation are formally set out in a legal instrument which formed Annex 5 to the consultation. This legal instrument constituted formal notification under sections 48(2) and 80 of the 2003 Act regarding OFCOM's proposals for identifying markets, making market power determinations and the settling of SMP conditions to be applied to BT and KCOM under section 45 of the 2003 Act. Paragraph 4 of the instrument provides:

> "Ofcom is proposing to identify in accordance with section 80 of the Act the following markets for the purpose of making market power determinations:
>
> (a) wholesale broadband access provided in Market 1;
>
> (b) wholesale broadband access provided in Market 2;
>
> (c) wholesale broadband access in Market 3; and
>
> (d) wholesale broadband access provided in the Hull area
>
> ..."

39. The terms "Market 1", "Market 2", "Market 3" and "Hull area" are specifically defined in the instrument. "Market 1", "Market 2" and "Market 3" are defined by reference to a specific list of BT exchanges. Thus, for example, Market 1 is defined as "the area covered by the BT exchanges set out at Appendix 1 to Schedule 2 of this Notification". Appendix 1 then lists 3,578 BT exchanges. The same approach, *mutatis mutandis*, applies in the case of Markets 2 and 3.

40. It will immediately be appreciated that the description of Markets 1, 2 and 3 as "geographic" markets (see, for example, paragraph 1.23 of the consultation), whilst undoubtedly correct, is a somewhat counter-intuitive label. The exchanges falling within a given market are defined, not by reference to their location, but by reference to the number of "Principal Operators" present. For example, the exchanges comprising Market 1 – defined as those where only BT is present – are

actually geographically dispersed across the UK. They are not geographically confined to a specific area, like Greater London or Cornwall.

41. No-one criticised OFCOM for taking this approach, and any such criticism would be misconceived. But it is an extremely important aspect in OFCOM's analysis. It is a matter that was specifically addressed in the consultation:

> "3.213 As we have discussed above in relation to the product market definition, market definition can be informed using a hypothetical monopolist test, which asks what products (or geographic areas) a hypothetical monopolist would need to dominate in order to be able to profitably raise prices by 5% to 10% above the competitive level. The test works by identifying whether customers would substitute to other products (or buy from other geographic areas) in the face of such a price rise, and also which firms not currently supplying the product would begin to do so as a result of the price increase.
>
> 3.214 In the case of geographic market definition this approach can lead to excessively narrow market definitions for fixed communications services since there is little or no scope for a household or business to purchase from other regions in response to a price rise. Similarly, supply-side switching is limited by the need to invest in new infrastructure.
>
> 3.215 One alternate approach is to identify common pricing constraints; if firms are judged not to, or choose not to, differentiate their pricing between two regions then these are taken to be part of a single market. In the past, this has been the standard basis for arguing that communications markets are national in scope.
>
> 3.216 Another approach to geographic market definition, which we employed in our 2008 review (and our 2008 [Business Connectivity Market Review ("BCMR")]), is to identify those geographic areas where competitive conditions are sufficiently homogenous to be included in the same geographic market. This approach is consistent with the Commission's framework where, at paragraph 56 of its SMP Guidelines, it states:
>
> > "According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogenous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different...".
>
> 3.217 Therefore, areas are to be judged to be part of the same market if the intensity of competition, defined for example by the number of firms, prices and other relevant indicators of competitiveness, is sufficiently similar.
>
> 3.218 Building on our approach in the 2008 review and the BCMR, as well as the Austrian regulator's WBA notification, the [European Regulators Group ("ERG")] developed a Common Position (the ERG geographic analysis CP)

which it published in October 2008. This identifies three main steps in conducting a geographically differentiated approach to market analysis, once it has been established that a national market cannot be defined on the basis of common pricing constraints:

- first, the basic geographic unit needs to be selected, for example post codes or exchange areas;

- second, the homogeneity of competition needs to be judged according to factors such as barriers to entry, the number of significant suppliers in the market, distribution of market shares and price-cost margins and as such necessarily conflates the market definition and SMP analysis to some extent; and

- third, areas with similar competitive characteristics need to be aggregated in order to define the geographic areas over which to conduct the SMP analysis."

42. In this case, as its "basic geographic unit", OFCOM adopted the area covered by a BT exchange (see the definition of markets in the legal instrument described in paragraphs 38 to 39 above, and paragraph 3.221 of the consultation).

43. As regards the second element – homogeneity of competition – OFCOM's proposed approach was as follows:

"3.222 We identified a number of structural factors that we considered to be relevant to the assessment of competitive conditions. These were:

- Current availability of cable-based services;

- Current availability of LLU-based services;

- Planned availability of LLU-based services;

- LLU-based likely entry according to operators' business plans and our own modelling;

- Presence of a common pricing constraint; and

- Present of alternative network infrastructure.

3.223 In identifying these we recognised that there was significant overlap between some of the factors and that they could all be relevant to a greater or lesser degree. After careful consideration of these factors we concluded that there could be a number of different approaches that could be adopted to inform our

assessment of competitive conditions and that it was important that our analytical framework captured a broad range of these.

3.224 The criteria we adopted for assessing competition was based on the numbers of Principal Operators (PO) present, or forecast to be present, in a BT local exchange. A PO was defined as BT, an LLU operator with a nationwide coverage of more than 10% (this amounted to six LLU operators prior to TalkTalk's acquisition of Tiscali) or Virgin Media where cable coverage in an exchange area was more than 65% of end user premises. This approach captured many of the relevant factors listed above.

3.225 This approach also captured the fact that the number of competing operators is a significant determinant of competition in a market. Differences in economies of scale or other barriers to entry are likely to be reflected in the number of rival operators. As such differences in competitive conditions derived from economies of scale and other barriers to entry are captured by our criteria.

3.226 Another reason for adopting this approach at the time was that LLU investment was in the process of being rolled-out and the market had not settled to reveal its full impact. In this environment it was relatively easy to take a forward look on the numbers of operators present using their investment plans. This criterion also allowed us to capture the fact that many of the LLU operators offered lower retail prices in those exchange areas where they had rolled out their own network, as well as the fact that BT had decided to offer discounted wholesale prices in many exchanges where there had been entry by LLU operators. We considered that it was not appropriate at that time to use local exchange service shares as an indicator of competitive conditions as it was our view that it was too early to determine the longer term impact of LLU on these.

3.227 In aggregating the local exchanges into markets for the purposes of assessing SMP, we recognised that competitive conditions in exchanges where BT was the only PO present could be regarded as homogenous, since all featured the absence of any effective rivals. Similarly, in local exchanges where the number of POs present exceeded a particular threshold we considered that the market could be regarded as competitive and these exchanges could be aggregated. We considered that the appropriate threshold for the purposes of the market review was either four firms currently present at the time of the review or four forecasted to be present if the exchange was larger than 10,000 premises. The assumption about the size of the local exchange reflected our concern that operators' investment plans might not materialise for smaller exchanges, where economies of scale and density are more of a barrier.

3.228 We also defined a further market between these two, which represented cases where some competition existed but too few firms for the nature of the competition in these exchange areas to be regarded as sufficient similar to the more competitive market. While we ultimately determined that BT had SMP in both Market 1 and Market 2, in terms of aggregating according to competitive homogeneity, these were deemed qualitatively different.

3.229 As a result of our aggregation of exchange areas along these lines we defined three separate markets in the UK excluding Hull. We also defined a separate

> geographic market in the Hull area on the basis of the local access network footprint of KCOM. The respective markets can be summarised thus:
>
> - The Hull area (0.7% of UK premises, 14 exchanges);
>
> - Market 1: exchanges where only BT is present (16.4% of UK premises, 3,720 exchanges);
>
> - Market 2: exchanges with 2 or 3 POs present, or where 4 are forecast but the exchange serves fewer than 10,000 homes (13.7% of UK premises, 670 exchanges); and
>
> - Market 3: exchanges with 4 or more POs present or with 4 or more forecast in an exchange larger than 10,000 homes (69.2% of UK premises, 1,197 exchanges)."

44. Thus, exchanges fell into a particular market according as to whether they met certain defined criteria. As Mr Holmes noted, when commenting upon a similar passage in a later OFCOM document describing these various markets, this description is not in fact an accurate description of the markets that OFCOM was defining – and, to be fair, paragraph 3.229 only purports to summarize the position. Nevertheless, for the reasons that we give below, we consider the precise market definition that OFCOM adopted in respect of these markets to be critical in this appeal, and we determine precisely how OFCOM defined its markets in paragraphs 98 to 115 below. For the purposes of this Judgment, clearly it is OFCOM's final market definition that matters, taking account of all of OFCOM's consultation and decisions on this point. For the moment, it is unnecessary to explore exactly why the description of the markets in paragraphs 3.229 was inaccurate, but it is important to note that the description is an imperfect one.

45. This consultation document invited responses within 10 weeks (by 1 June 2010). TalkTalk responded in a letter dated 29 May 2010. This letter stated, amongst other things, that:

> "We agree overall with Ofcom's proposals around the product and market definition, SMP findings and the proposed imposition of suitable remedies. The market analysis appears to be based on solid economic data and the continuation of three sub-national markets (outside the Hull area) appears to be warranted."

(ii) The 20 August 2010 consultation

46. On 20 August 2010, OFCOM published a second consultation as part of its WBA market review entitled "Review of the wholesale broadband access markets".

47. In this consultation, although OFCOM's market definitions remained broadly the same, they differed in important details. The summary stated as follows:

> "1.12 We consider that the proposals we made in the first consultation on the product market definition remain valid. In this document we are consulting on an amended proposal for geographic market definition. We still propose to identify four separate geographic markets. However, we propose to adopt the following criteria:
>
> - The Hull area (0.7% of UK premises);
> - Market 1: exchanges where only BT is present (11.7% of premises);
> - Market 2: exchanges where two POs are present or forecast and exchanges where three POs are present or forecast but where BT's share is greater than or equal to 50 per cent (10.0% of premises); and
> - Market 3: exchanges where four or more POs are present or forecast and exchanges where three POs are present or forecast but where BT's share is less than 50 percent (77.6% of premises).
>
> 1.13 The above geographic market definitions take account of the latest confirmed broadband deployment plans of each of the POs. These updated plans are the reason for the reduction in the size of Market 1 compared to our first consultation. These plans also contribute, along with the impact of the Orange agreement and our updated approach to market definition, to the changes in the sizes of Market 2 and Market 3."

48. There were, thus, three reasons why the BT exchanges comprising Markets 1, 2 and 3 changed:

(a) First, because of a long-term exclusive agreement between Orange and BT, which effectively meant that Orange exited the WBA market and could no longer count as a PO (see paragraph 3.49 of the consultation).

(b) Secondly, because of a change in OFCOM's market definition in respect of Markets 2 and 3 from a focus on exchanges serving fewer than/more than

10,000 homes to a focus on BT's share of the business at those exchanges. The reasons for this change are considered in paragraphs 3.55 to 3.109 of the consultation.

(c) Thirdly, because of the latest confirmed broadband deployment plans of each of the POs. As to this, the consultation stated:

> "3.48 As indicated in the first consultation, we have gathered updated rollout plans from the POs. These plans indicate further rollout (beyond that presented by the same POs to us prior to the first consultation). In providing updated rollout plans since the first consultation, some POs have indicated exchanges where they do not currently have firm plans but where they may, in the future, investigate the business case for deployment. However, in relation to this information, it is difficult for us to predict the likely extent to which this will result in rollout beyond the current firm plans of the POs. Therefore, we only include the firm rollout plans in our analysis of the presence of POs in each exchange."

The same point is made in paragraph 3.53 of the consultation. Essentially, in defining its markets, OFCOM elected only to have regard to "firm rollout plans".

49. The upshot of these changes was that:

(a) Market 1 came to comprise 3,388 exchanges, covering 11.7% of all UK premises.

(b) Market 2 came to comprise 660 exchanges, covering 10.0% of all UK premises.

(c) Market 3 came to comprise 1,539 exchanges, covering 77.6% of all UK premises.

50. OFCOM invited responses to this consultation by 1 October 2010. In the event, TalkTalk chose not to submit any response to this consultation.

(iii) TalkTalk's announcement of plans to unbundle a further 700 exchanges

51. On 16 November 2010, TalkTalk published its "Interim Results". The penultimate page of these Interim Results stated:

> "Increasing our commitment to unbundling – 700 more exchanges."

No further detail was provided in the Interim Results document.

52. By a notice under section 135 of the 2003 Act dated 22 November 2010, OFCOM required TalkTalk to provide information on the following points:

> "A1. Please provide a list of exchanges in which you are considering the feasibility of deploying LLU. Please indicate any of these exchanges where rollout plans are confirmed and where were not included in previous confirmed rollout plans provided to Ofcom. Please provide your response in Excel spreadsheet form using the BT exchange code and name to identify the exchanges.
>
> A2. In relation to each exchange identified in response to question A1, where you are assessing the feasibility of deploying LLU but have not yet confirmed rollout plans, please provide an estimate for when you will confirm (or reject, as the case may be) rollout plans. Please also provide an estimate for the time it will take from confirming rollout in the exchanges identified under A1 (if any) until offering service based on this LLU deployment and explain the key steps in the process to implementing this deployment."

53. TalkTalk responded by e-mail on 23 November 2010. This response provided a list of exchanges in response to question A1, and said as follows in response to request A2:

> […][**C**]

(iv) The WBA Market Power Determination (dated 3 December 2010)

54. The WBA Market Power Determination was published by OFCOM on 3 December 2010. The markets that OFCOM had defined in its 20 August 2010 consultation remained unchanged in this decision in terms of premises covered, as can be seen from paragraphs 1.19 and 3.5 of the decision.

55. Paragraph 1.19 of the WBA Market Power Determination summarised the market definitions as follows:

> "We conclude that there are four separate geographic markets, as follows:
>
> - The Hull Area: (0.7 per cent of UK premises);
> - Market 1: exchanges where only BT is present or forecast to be present (11.7 per cent of premises);
> - Market 2: exchanges where two Principal Operators (POs) are present or forecast and exchanges where three POs are present or forecast but where BT's share is greater than or equal to 50 percent (10.0 per cent of premises); and
> - Market 3: exchanges where four or more POs are present or forecast and exchanges where three POs are present or forecast but where BT's share is less than 50 per cent (77.6 per cent of premises)."

56. The number of exchanges comprising Market 1 and Market 3 each rose by one (from 3,388 to 3,389 in the case of Market 1 (see page 142 of the decision) and from 1,539 to 1,540 in the case of Market 3 (see page 151 of the decision)); the number of exchanges comprising Market 2 remained unchanged.

57. However, although the number of exchanges in each market remained fairly constant, the data at page 155 of the decision shows 349 exchanges migrating from Market 1 or Market 2 to Market 3, and 7 exchanges migrating from Market 3 to Market 2.

58. The reason for these changes appears to have been further information provided by POs as to their rollout plans. Paragraph 3.75 of the decision states:

> "With regard to coverage and network expansion plans by the POs we received information on both committed plans (up to December 2010) and further uncommitted plans. Paragraphs A3.17 to A3.27 show the size of both committed and uncommitted investment plans. We have used both of these to form a view on the potential for further investment during the period covered by the review, along with data on average exchange size (and hence the viability of entry) and past trends. However, we have decided to only rely on committed plans in the exercise of counting the number of POs in an exchange for the purpose of market definition."

59. The decision is thus apparently clear in the distinction that it seeks to draw between committed and uncommitted rollouts. According to the wording in paragraph 3.75,

the former are relevant for the purpose of market definition, and the latter, irrelevant.

60. OFCOM then proceeded to consider TalkTalk's own, recently announced, plans to unbundle further exchanges (see paragraphs 51 to 53 above). For the purposes of this Judgment, this is an important part of the decision, and it is necessary to quote extensively from it:

> "3.169 Just a few days before our statement was due to be published, on 16 November 2010, TalkTalk stated its intention to extend its LLU footprint. TalkTalk has provided information to us in response to a formal information request in relation to these plans for expansion.
>
> 3.170 TalkTalk has not currently committed to deployment in any specific exchanges. Rather, it is in the process of assessing the feasibility of deployment in a number of exchanges. In its public statements it presented this deployment as a medium term plan. Further, it indicated that the implementation period for the full rollout could be around three years.
>
> 3.171 Consistent with our approach to uncommitted plans from other POs, we do not consider that it would be inappropriate for us to attempt to select which exchanges TalkTalk may unbundle in the future, or the order they may unbundle them, as part of our geographic market definition exercise. This could lead us to assign exchanges to a market based on an assessment that turns out to be incorrect.
>
> 3.172 In our view there are two possible approaches for us at this late stage in our market review. First we could delay publication of the statement until TalkTalk is in a position to provide firm plans for which exchanges it plans to unbundle and rough timescales for the completion of this. Alternatively, we could conclude the review if we consider that the conclusions remain appropriate, taking account of TalkTalk's plan.
>
> 3.173 It is our understanding that it is unlikely that TalkTalk would be able to provide firm information on the exchanges it will unbundle for several months (not before [✂]). In waiting until then, we consider that it would be appropriate to also then gather updated data from other POs on their rollout plans. The information gathered through this process from TalkTalk and the other POs may suggest that further analysis and consultation is required. As such, it is not clear that a delay in concluding the review could be restricted to updated information from TalkTalk, or to a specific timeframe.
>
> 3.174 In considering whether delaying the conclusion for an indefinite period is the most appropriate approach, we have considered the implications of TalkTalk's announcement.

3.175 Given Talk Talk's existing coverage, it may be expected that additional rollout would mainly occur in exchanges where other POs (except BT) are not present. However, there could also be a small number of exchanges that could move from Market 2 to Market 3.

3.176 Given the timeframes for assessing the feasibility of deployment and for the deployment itself, it is unlikely in our opinion that TalkTalk will be in a position to exert a practical constraint in any new exchanges for a period of six to nine months. As noted above, rollout in some exchanges could occur up to three years from now though we accept that TalkTalk may seek to deploy more quickly than this.

3.177 Our approach to market definition is that we should not count a PO as present in an exchange until the PO has confirmed specific rollout plans. As TalkTalk has not yet indentified the exchanges it plans to unbundle, our current approach results in exchanges staying in the market to which they have been allocated.

3.178 In carrying out a market review we are required to take a forward look at how competitive conditions may change over the period of the review. Whilst accepting that deployment in Market 1 exchanges will have an impact, we are also mindful that, based on the timescales above, a significant portion of the market review period will be characterised by BT being the only provider even in exchanges that TalkTalk chooses to unbundle. As such, our regulatory approach needs to balance the potential for further competition towards the end of the review period with BT's position of being a monopoly provider for the earlier part of the review period. We note that C&WW made a similar point in relation to our approach to the boundary between Market 2 and Market 3, where it argued that we were prematurely deregulating exchanges based on a forecast of where three POs are or will be present and the effect of this on competition.

3.179 If the outcome of waiting until February/March for TalkTalk to identify the specific exchanges it plans to unbundle was that we simply moved exchanges into the relevant market (that is, we did not change our approach to market definition, SMP or remedies), the main effect on those exchanges that move from Market 1 to Market 2 would be that they would no longer be included within the charge control we have decided to impose in Market 1. They would still be subject to all the other remedies such as cost orientation and non-discrimination that we impose in Market 2.

3.180 Alternatively, we have also considered whether the imposition of a charge control in exchanges where BT is the only PO but where future entry will occur is still appropriate. We think this is a useful exercise in the particular circumstances facing us because we need to assess whether the uncertainty of delaying the conclusion of the review is justified, or whether an immediate conclusion results in a regulatory outcome that remains appropriate even in the face of the updated information available to us.

3.181 Our argument in Market 2 for not imposing a charge control rests on the potential for a charge control to inhibit future entry or, alternatively, to limit returns of those POs that have already entered. We note that:

- Sky argued in response to the second consultation that a charge control in Market 2 would not act to inhibit future investment;

- TalkTalk has made a decision to invest in further unbundling in the knowledge that we had proposed to impose a charge control in Market 1; and

- No PO has invested in LLU or cable in the Market 1 exchanges and so the opportunity for that investment to be undermined is not relevant.

3.182 It is clear that at the start of the period covered by the review BT's position in Market 1 exchanges where TalkTalk subsequently deploys would be the same as that for all other exchanges in Market 1. BT would be the only provider and would, as such, face no competitive constraints. Based on the potential for migration of customers from BT wholesale products onto TalkTalk's own network, and considering the effect when a second PO is present in other exchange areas, we are of the view that even if TalkTalk deploys towards the start of the review period BT's market share would be likely to be at least 70 to 80 per cent in the exchanges where TalkTalk deploys at the end of the review period. The information available from TalkTalk indicates that deployment would be over the period of the review and so the effect on BT's share would be less than this in many of the exchanges. Where BT's share is at this level and it faces competition from only one other provider, a charge control may still be considered to be an appropriate remedy.

3.183 It also needs to be remembered that market definition is not an end in itself but rather is a means to setting market boundaries within which SMP and the need for certain remedies can be assessed. In carrying out a geographic market analysis where exchanges are grouped, it is inevitable that a range of exchanges with slightly differing competitive conditions may be grouped together. For example, our assessments have included exchanges where two POs are present or forecast to be present in Market 2, along with exchanges where three POs are present or forecast to be present. It could be argued that the competitive conditions in exchanges where two POs are forecast to be present are sufficiently different to exchanges where three POs are already present and that therefore they should be grouped differently. However, this could lead to very small markets that would be unmanageable at a practical level. But it could be argued that exchanges where two POs are forecast to be present (but only one is currently present) are also similar to exchanges where only one PO is present, so that they should be included within Market 1. We have attempted to address this by only including firm forecasts of PO rollout in our assessment. This effectively reduces the period when only one PO is present and increases the period when two POs are present and BT is subject to the constraint of the second PO. In the case of the exchanges that TalkTalk aims to unbundle, it is not clear these could be treated in this way, since the time when BT is the only PO would be significant when compared to the overall period of the forward look."

61. Thus, in the light of TalkTalk's declared intention to unbundle a substantial number of unidentified BT exchanges, including a substantial number of Market 1 exchanges, OFCOM determined:

(a) First of all, not to delay its market review and market power determination.

(b) Secondly, to keep within the scope of Market 1 those exchanges (albeit unidentified) in respect of which there was going to be unbundling by TalkTalk. This point, as we consider further below, has great bearing on precisely how OFCOM defined Market 1. The summary description, in paragraph 1.19 of the decision – defining Market 1 as "exchanges where only BT is present or forecast to be present" – quoted in paragraph 55 above is obviously wrong. At the time of this review OFCOM knew of, and considered, TalkTalk's uncommitted rollout proposals (including the proposal to roll out in exchanges allocated to Market 1), and nevertheless left the exchanges comprising Market 1 unchanged.

(c) Thirdly, to maintain the distinction – in terms of SMP condition imposed – between Market 1 and Market 2, in that a charge control would be imposed in the former market, but not in the latter. In the decision, OFCOM decided that a charge control should be imposed in Market 1, in order to address BT's SMP in Market 1 (see paragraphs 5.288*ff*), but that the specific structure of the charge control would be addressed in a separate consultation, to be published shortly (see paragraph 5.292).

62. No-one, including TalkTalk, appealed (or seeks now to appeal) this decision.

(v) The 20 January 2011 consultation

63. On 20 January 2011, OFCOM published its proposals for a charge control in Market 1 in a document entitled "Proposals for WBA charge control". The discussion in this document took as read the market definition laid down in the WBA Market Power Determination. Thus, for example, paragraph 5 of the draft notification setting out the charge control that OFCOM was minded to impose (which is at Annex 5 of the 20 January 2011 consultation) provides:

> "OFCOM hereby makes, in accordance with section 48(2) of the [2003] Act, the following proposal to set SMP services conditions implementing charge controls in relation to the market "wholesale broadband access provided in Market 1" as identified in the [WBA Market Power Determination]."

64. In very brief summary, the consultation proposed a Retail Price Index ("RPI") – *X* charge control (see paragraph 1.7 of the consultation), lasting for 3 years (i.e. up to 31 March 2014: paragraph 1.8 of the consultation), where the value of *X* should be "between RPI-10.75% and RPI-14.75% for the three years to 31 March 2014, with a central estimate of RPI-12.75%.

65. Since OFCOM was proposing to set an SMP services condition by a notification which was not also making the market power determination by reference to which the condition was being set, section 86 of the 2003 Act applied. The consultation considered whether there had been a material change within the meaning of section 86, but did so very briefly. Essentially:

(a) Paragraph 7.1 may have incorporated a consideration of the requirements of section 86, but (if so), that consideration was clearly rather cursory. The paragraph stated:

> "In the [WBA Market Power Determination], we considered whether the imposition of a charge control would be consistent with the relevant tests set out in the [2003 Act]. For the purpose of this consultation, we have reviewed whether our reasoning remains applicable. We have also considered whether the specific form of the charge control meets the relevant tests."

(b) Annex 5 to the consultation contained a notification regarding the proposed charge control. Paragraph 8 of this notification provided:

> "By proposing the SMP services condition in paragraph 6 above, OFCOM is proposing to set SMP service conditions on BT by a notification which does not also make the market power determination by reference to which the condition is set. In accordance with section 86(1) of the [2003] Act, OFCOM is satisfied that there has been no material change in the markets referred to in paragraph 2 since the market power determination referred to in the same paragraph were made."

Paragraph 2 provided:

> "At Annex 1 of the [WBA Market Power Determination] OFCOM published a notification identifying, in accordance with section 79 of the [2003 Act], certain services markets including "wholesale broadband access provided in Market 1" and "wholesale broadband access provided in Market 2" in relation to both of which OFCOM determined that BT had significant market power..."

Mr Pickford made the point that this amounted to no more than a "box-ticking" exercise, whereby OFCOM made reference to, and stated that it was satisfied with regard to, the various statutory provisions that had to be met before a charge control could be imposed. Clearly, the notification in Annex 5 does no more than identify the statutory provisions that OFCOM had regard to. It is necessary to look at the substance of OFCOM's consultation document in order to see what factors OFCOM took into account.

(c) Paragraphs A7.13 to A7.18 of Annex 7 to the consultation considered TalkTalk's proposed unbundling of Market 1 exchanges:

> "The rollout of LLU in Market 1
>
> A.7.13 However, TalkTalk has recently announced that it plans to unbundle 700 additional exchanges. This deployment is likely to occur during this charge control period. This is discussed in the [WBA Market Power Determination], in particular in paragraphs 3.169 to 3.190 and in paragraphs 5.91 to 5.92. In considering the impact of TalkTalk's announcement on the WBA we said that it would not be appropriate to review the market definition, but that we would take into account the impact of the rollout of LLU on volumes in the Market 1 charge control.
>
> A7.14 To gain an understanding of the impact the roll out of LLU could have on BT's volumes in Market 1 we have developed a simple model. We map the exchanges that TalkTalk are planning to unbundle against data provided by BT on TalkTalk WBA volumes, by exchange. The exchanges are ranked by volume, and we select the top 70%, which we assume will be unbundled over the duration of the charge control (note this includes some exchanges in Market 2).
>
> A7.15 Our analysis assumes that TalkTalk will unbundle the exchanges with the highest number of customers first, this will mean that over the duration of the charge control they will be able to migrate a higher proportion of their customer base. In our analysis we assume that 90% of their existing customer base in Market 1 will be migrated from BT's network by the end of the charge control. This is based on a 3 phase migration, with the same number of exchanges unbundled in each phase.
>
> A7.16 For the unbundled exchanges we assume that there will be a 10% increase on TalkTalk's existing customer base over 3 years. This implies an annual migration rate of 3.5% of WBA volumes. We assume the increase in customer base will be driven by the increased attractiveness of the products TalkTalk will be able to offer in

unbundled exchanges. These assumptions imply that TalkTalk will have somewhere around 200k – 210k customers in its unbundled exchanges in Market 1 by the end of the charge control, this is 10-10.5% of BT's current volumes.

A7.17 We have taken this approach because we consider it is likely that an operator, in deploying LLU, would focus on the exchanges where it already has a customer base. The migration of these customers would help the operator to achieve the scale needed to make investment in the smaller exchanges in Market 1 more viable. We added an increase in customers in unbundled exchanges to account for the potential to grow the base using LLU. We have also assumed that migration of customers will be not quite fully completed to align with the expectation that this rollout may take a significant proportion of the period of the charge control to complete and so the migration of end users may not be completed within the period. We note that whilst these assumptions may over- or under-state the impact of any rollout, the sensitivity to these assumptions on the overall end user volumes is relatively small..."

66. The consultation period ended on 31 March 2011. TalkTalk submitted a consultation response dated March 2011. TalkTalk's response stated:

(a) In paragraph 3 that:

"TalkTalk is planning to further roll-out its LLU network to […][**C**] exchanges in market 1 covering […][**C**] (*around half*) of the households in market 1. However, if this large reduction in IPStream prices is confirmed it will significantly reduce the viability of this extra-roll out and mean that TalkTalk will not roll-out to around […][**C**] of the exchanges it was intending to cover (which serve […][**C**] (*several hundred thousand*) households). The price reduction will result in the permanent and irreversible preclusion of competition in these exchanges since even if Ofcom changed the charge control in 3 years prices are unlikely to rise back to a level to make this investment viable." (omitting footnotes)

This point was expanded upon in paragraphs 9 to 10 of TalkTalk's response.

(b) Paragraph 6 of TalkTalk's consultation response made clear that TalkTalk considered that there had been a "material change" since the WBA Market Power Determination:

"We consider that there are a number of practical ways for Ofcom to adapt its approach to avoid this impending harm. The most appropriate options are to either re-categorise some of the exchanges in market 1 into market 2 or to

differentiate remedies within the existing market 1 (as has been done elsewhere). It is notable that Ofcom's current approach relies on a 'no material change' conclusions [*sic*] to satisfy the requirements of s86(1) of the [2003 Act]. However, we consider that this conclusion is incorrect since there has been, we believe, a material change since the Market Review. Therefore, the legal basis for Ofcom's approach may not be sound."

Again, this point was expanded upon in later paragraphs of the consultation response, notably in paragraphs 38, 41 and 79.

(vi) The WBA Charge Control Decision (20 July 2011)

67. On 20 July 2011, OFCOM published the WBA Charge Control Decision. This considered, but rejected, TalkTalk's argument that there had been a material change within the meaning of section 86 of the 2003 Act. The decision provided that:

"2.16 Under section 86 of the [2003 Act], Ofcom can set an SMP services condition by a notification which does not also make the market power determination when the condition is set by reference to a market power determination made in relation to a market in which Ofcom is satisfied there has been no material change since the determination was made..."

Paragraphs 3.15*ff* of the decision considered TalkTalk's contention that if a charge control of the sort envisaged by OFCOM were imposed, TalkTalk's rollout in a number of Market 1 exchanges would become unviable. In particular, the decision stated:

"3.40 Under section 86 of the Act, before Ofcom can set an SMP service condition by a notification, which is separate from the notification making the market power determination, Ofcom needs to be satisfied that there has been no material change since the market power determination was made. Ofcom therefore has a statutory discretion which involves making a judgement.

3.41 Having considered the evidence, we are satisfied that since the market power determination in the WBA Statement, there has been no material change in the market conditions for the following reasons:

3.42 First, we do not consider that a proposal to rollout LLU-based services in a number of exchanges constitutes a change in the actual competitive conditions of the market, even if the plan for some of these exchanges is now said to be "firm". In defining the geographic markets, it is often appropriate to take a limited forward look of the market and include in the assessment exchanges where operators have confirmed roll out plans. In contrast, for us to satisfy ourselves that a material change has occurred, the appropriate question is

whether an event has actually occurred that has materially changed the competitive conditions in the market.

3.43 Second, and in the alternative, in the WBA statement we assessed [TalkTalk's] planned rollout and concluded that it did not merit a change to our market definition (paragraphs 3.169 to 3.190), to our SMP assessment (paragraphs 4.36 to 4.41) or to our proposed remedies (including a charge control) (paragraph 4.91).

3.44 In summary, we examined [TalkTalk's] potential rollout and concluded that exchanges allocated to Market 1 where [TalkTalk] subsequently deploys can, for the purposes of the market analysis exercised [*sic*], be considered to have competitive conditions that are sufficiently similar to exchanges in Market 1 where [TalkTalk] does not deploy. We based this on the fact that at the start of the period covered by the review there would be no competitive constraint on BT and that any potential future entry by [TalkTalk] would only introduce a constraint for part of the period covered by the review. We said that at the start of the period, BT would be the only provider and would, as such, face no competitive constraints. Based on the potential for migration of customers from BT wholesale products onto [TalkTalk's] own network, and considering the effect when a second PO is present in other exchange areas, we are of the view that even if [TalkTalk] deploys towards the start of the review period, BT's market share would be likely to be at least 70 to 80 per cent in these exchanges at the end of the review period. The information from TalkTalk indicated that deployment would take place over the period of the review and so the effect on BT's share would be less than this in many of the exchanges. Where BT's share is at this level and it faces competition from only one provider, a charge control may still be considered an appropriate remedy.

3.45 [TalkTalk] has not provided any materially new information since its initial announcement of the rollout plans, to change our assessment in the WBA Statement. Although we accept that [TalkTalk's] plans have developed, in so far as [TalkTalk] has now identified the specific exchanges which it intends to rollout to in Market 1 and has started placing orders for some of these, this does not alter our assessment.

3.46 Our analysis shows that BT's market share in Market 1 is likely to remain above 85 per cent throughout the period of this control. Moreover, our analysis shows that, in those specific exchanges in Market 1 where [TalkTalk] plans to extend its LLU network, BT's market share is likely to remain above 70 per cent throughout the entire charge control period. We note that the SMP assessment is carried out at the level of the market as a whole, and therefore, BT's market share, the number of operators in the market and our view of the potential for further entry are not affected by the identification of the specific exchanges.

3.47 It is clearly possible during the period of the market review that an operator will rollout to further exchanges (as [TalkTalk] proposed to do). Ofcom must in exercising its judgement whether there has been a material change do so in a way that allows the market review process to function effectively in the interest of promoting competition for consumers."

The conclusion that there had been no material change was reiterated in paragraph 7.5 of the decision, and in paragraph 12 of the legal instrument embodying the charge control contained at Annex 1 of the decision. For completeness, it should be noted that OFCOM did not, in this appeal, maintain the point at paragraph 3.42, and effectively conceded that the point was wrong (see paragraph 83 of OFCOM's Defence and Skeleton Argument). We consider that OFCOM was right to make this concession. Plainly, a "material change" for the purposes of section 86(1)(b) of the 2003 Act could, in principle, include (for instance) an announcement concerning future developments over the period covered by the market review in question.

V. ANALYTICAL FRAMEWORK

(i) An appeal "on the merits"

68. Section 86(1) provides that "OFCOM must not set an SMP services condition by a notification which does not also make the market power determination by reference to which the condition is set unless ... (b) the condition is set by reference to a market power determination made in relation to a market in which OFCOM are satisfied there has been no material change since the determination was made". A change is a material change if it is material to "the setting of the condition in question" (section 86(6)(a)).

69. As we have noted, OFCOM's decision to set a condition in these circumstances is one taken under section 45 of the 2003 Act and, as such, is a decision appealable under section 192(1)(b) of the 2003 Act. We remind ourselves that section 195(2) of the 2003 Act provides that section 192 appeals (such as this) shall be decided "on the merits and by reference to the grounds of appeal set out in the notice of appeal".

70. As was noted in paragraphs 66 to 78 of the Tribunal's judgment in *British Telecommunications plc v Office of Communications* [2010] CAT 17, section 195(2) contains two separate and distinct requirements. The second requirement ("…by reference to the grounds of appeal set out in the notice of appeal…") makes clear that the Tribunal considers ("on the merits") the decision that is being appealed to it by reference only to the grounds of appeal set out in the notice of appeal.

71. The first requirement ("…on the merits…") makes clear that the appeal is conducted "on the merits" and not in accordance with the rules that would apply on a judicial review. In *Hutchison 3G UK Limited v Office of Communications* [2008] CAT 11, the Tribunal stated (at paragraph 164):

> "However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose price control was within the range of reasonable responses but whether the decision was the right one."

72. We consider that this correctly states the approach we are obliged to take: the question is whether OFCOM's determination was right, not whether it lies within the range of reasonable responses for a regulator to take.

73. That said, we are mindful of two other important *dicta* regarding the Tribunal's role on a section 192 appeal. First, Jacob LJ in *T-Mobile (UK) Limited v Office of Communications* [2008] EWCA Civ 1373 made absolutely clear that the section 192 appeal process is not intended to duplicate, still less, usurp, the functions of the regulator. In paragraph 31, he stated:

> "After all it is inconceivable that Article 4 [of the Framework Directive], in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator has got something materially wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision."

74. Secondly, and following on from this point, in *T-Mobile (UK) Limited v Office of Communications* [2008] CAT 12, the Tribunal noted (at paragraph 82):

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

(ii) The significance of the fact that this is an "on the merits" appeal

75. In the context of an appeal against a decision by OFCOM that there has not been a "material change" for the purposes of section 86 of the 2003 Act, the role of the Tribunal is to assess the correctness of OFCOM's decision, and not to apply a judicial review standard (by, for example, seeking to determine whether OFCOM has taken into account immaterial factors or failed properly to consult). In essence, this merits review ought to be a binary one. Either:

(a) It may be clear that there has been a "material change", as this is defined by section 86 of the 2003 Act. In such a case, any SMP services condition imposed by way of a notification not also making the necessary market power determination must – by virtue of section 86 – be invalid. Section 86 appears to allow no other option ("OFCOM must not set an SMP services condition…unless…").

(b) Alternatively, it may be clear that there has not been a "material change", as this is defined by section 86 of the 2003 Act. In such a case, as section 86 provides, OFCOM's decision to impose an SMP services condition by way of a notification not also making the necessary market power determination would be upheld.

76. We do not suggest that this binary outcome necessarily renders all consideration of OFCOM's decision-making process by the Tribunal irrelevant and certainly does not preclude a party from raising such matters in an appeal. As TalkTalk rightly noted in paragraph 40 of its Notice of Appeal, "Ofcom must be able to justify its decision as being adequately and soundly reasoned and supported in fact". Without adequate consultation, it may be unclear whether there has been a material change or not. To take a hypothetical example, suppose a case where OFCOM simply fails to consider or consult upon the question of material change at all. In such a case, it may be that it is impossible – without the benefit of a proper consultation – for either OFCOM or, on appeal, the Tribunal to determine whether there has, or has not, been a material change. In such a case, on an appeal, it may be that the proper course would be for the Tribunal to remit the matter to OFCOM with a direction that a proper consultation be carried out.

77. In short, we do not seek to suggest that OFCOM's obligation to consult – both in general and as regards section 86 in particular – to be an unimportant one. To the contrary, the Common Regulatory Framework makes very clear the importance of consultation, so as (amongst other things) to ensure that the least intrusive form of regulation is imposed in a market where SMP exists: see, in particular, Recitals 15, 27 and 28 of the Framework Directive, as well as Articles 6, 8, 15 and 16 of that Directive. As a general proposition, a failure by a regulator to consult is likely to result in poor decisions.

78. The reason we consider that – in the case of section 192 appeals – the level of consultation is at most a second order question is simply because of the Tribunal's own statutory obligation under section 195(2) to "decide the appeal on the merits". Thus, even if OFCOM's consultation process has been unimpeachably conducted, the Tribunal may nevertheless conclude that OFCOM's decision was wrong. Conversely, if the Tribunal is satisfied that OFCOM's decision was correct, then the fact that OFCOM's process of consultation was deficient ought not to matter (unless, as we have noted, that process was so deficient that the Tribunal cannot be assured that OFCOM did indeed get it right).

79. We unanimously conclude, therefore, that because this appeal is "on the merits", the Tribunal must first grapple with the question of whether OFCOM's decision is right, and only then consider the process by which OFCOM's decision was reached. In short, we conclude that it is necessary to consider Ground B before Ground A.

VI. GROUND B: DID OFCOM REACH THE CORRECT DECISION ON THE MERITS?

(i) The parties contentions as to "material change"

80. TalkTalk's position as regards the existence of a material change for the purposes of section 86 of the 2003 Act was straightforward. TalkTalk contended as follows:

(a) The geographic extent of Market 1 was defined, in the WBA Market Power Determination, as comprising those exchanges "where only BT is present or forecast to be present": see paragraph 1.19 of the WBA Market Power

Determination (quoted in paragraph 55 above) and paragraph 58 of TalkTalk's Notice of Appeal.

(b) The effect of TalkTalk's planned roll out was to increase TalkTalk's presence in a number of exchanges, by unbundling them, including a number of exchanges in Market 1: see paragraph 60 of TalkTalk's Notice of Appeal; and paragraph 51.4 of TalkTalk's Reply and Skeleton Argument. The number of exchanges and the number of premises served by those exchanges so affected was, according to TalkTalk, substantial.

(c) As a result, a substantial number of exchanges previously falling within the definition of Market 1, now fell within the definition of Market 2 (i.e. exchanges "where two Principal Operators (POs) are present or forecast and exchanges where three POs are present or forecast but where BT's share is greater than or equal to 50 percent": see paragraph 1.19 of the WBA Market Power Determination and paragraph 58 of TalkTalk's Notice of Appeal).

(d) This was a "material change" within the meaning of section 86.

81. In its Defence and Skeleton Argument, and orally before us, OFCOM's position was that a change would only be material if it affected the conclusion that charge control was appropriate for the exchanges comprising Market 1. Thus, OFCOM's Defence and Skeleton Argument stated:

> "86. …Ofcom found that TalkTalk's rollout would not materially affect Ofcom's geographical market definition for Market 1 because, even in relation to exchanges unbundled towards the start of the market review period, BT could be expected to enjoy a market share of between 70 and 80% at the end of the review period; such a market share would still support a finding of market power; and would still justify the imposition of a price control remedy given the weak competitive constraints on BT."

82. Mr Holmes made the same point in oral submissions (Transcript, 6 December 2011, page 3):

> "So on both Mr Pickford's case and my case, as I understand it, there are two stages of analysis in relation to materiality. The first is to consider that there is a change that is material to the setting of the condition and that question, I agree with you, must be the

> first question because you can only assess whether a change is *de minimis* or material in the second sense once you have an understanding of the consequences of a change, the implications of the change for the setting of the condition. So you do have to begin with the core question in relation to section 86 of whether the change is material to the setting of the condition, in the sense of whether it is material to the question of whether or not to set the price control in the form that Ofcom is proposing to set it? That has to be the first question. Having addressed that question one might go on to say, and I think there is no difference between Mr Pickford and myself on this, that whilst the change is potentially one that could be material to the setting of the condition, in principle, looking at matters broadly, and taking account of the quality of the change, the quality is of minor importance and therefore it can be excluded. Although it is potentially capable of being a material consideration, it is not in fact a material consideration because of its small scale."

83. The difference between TalkTalk and OFCOM may thus be stated as follows. According to OFCOM, a change can only be material if it affects the nature of the condition OFCOM is minded to set. In other words, one looks first at the SMP services condition that OFCOM would have set on the basis of the anterior market power determination; one then looks at the SMP services condition that OFCOM would now set, at the time of the later notification, looking at all changes in the intervening period. If those changes are such that they would not cause the SMP services condition to change (or to change only minimally), then the changes are not material. On the other hand, if those changes would cause the SMP condition that OFCOM was minded to make to change more than minimally, then those changes would be material.

84. TalkTalk, on the other hand, contended that a material change arose where there was a more than *de minimis* change in the geographic market defined in the anterior market power determination. Thus, if a market was defined by reference to certain criteria, and – applying those criteria – the geographic extent of the market defined as a result changed more than minimally, then there was a material change for the purposes of section 86.

85. It is necessary to consider which of these two approaches is correct. In order to do so, it is necessary to construe the "no material change" test in section 86 of the 2003 Act.

(ii) The proper construction of the "no material change" test in section 86

86. Section 86(1)(b) enables OFCOM to impose an SMP services condition in respect of a particular market in a notification that does not also make a market power determination. This may only be done in cases where:

(a) The condition is set by reference to a prior market power determination made in relation to the market in which the condition is to be set; and

(b) There has been no material change since the prior market power determination was made, "material change" for this purpose being defined as a change material to the setting of the condition in question.

87. For the purposes of analysing section 86(1)(b), we shall refer to the prior market power determination as the "Prior Market Power Determination"; the market in respect of which the market power determination was made as the "Market"; and the notification by which the SMP service condition is imposed as the "Subsequent Charge Control Notification".

88. The purpose of section 86(1)(b) is to enable OFCOM to make a Subsequent Charge Control Notification without also conducting a contemporaneous market power determination. Instead, the basis for the Subsequent Charge Control Notification is the Prior Market Power Determination. Plainly, it only makes sense to rely on the Prior Market Power Determination where the circumstances between the issue of the two decisions have not changed in any significant way. That is the rationale for the "no material change" requirement in section 86(1)(b).

89. On this basis, a change will amount to a material change if:

(a) It would cause the Prior Market Power Determination to be different (in a manner that is more than *de minimis*); and

(b) That difference is capable of affecting the setting of a Subsequent Charge Control Notification.

90. It is self-evident that many changes may occur between the date of the Prior Market Power Determination and the date of the Subsequent Charge Control Notification, but that not all of these will be material according to this test. It is possible to identify a number of instances where a change between the date of the Prior Market Power Determination and the date of the Subsequent Charge Control Notification is not material:

(a) The change may be irrelevant to the Prior Market Power Determination. In other words, the change would cause the Prior Market Power Determination to be no different, even if it were made on a later date, after the change had occurred. For example, in the circumstances of this case, a change in the market shares of mobile communications providers would not cause a word in the WBA Market Power Determination to alter.

(b) The change may be relevant to the Prior Market Power Determination, in the sense that it would cause the Prior Market Power Determination to be different, but irrelevant to the Subsequent Price Control Notification, because the change to the Prior Market Power Definition is not capable of affecting the Subsequent Price Control Notification. For example, in the circumstances of this case, a change in respect of Market 3 (where there is no SMP), not affecting any of the other markets defined in the WBA Market Power Determination, could not in any way affect the WBA Charge Control Decision.

(c) The change may be relevant to the Prior Market Power Determination and be capable of affecting the Subsequent Price Control Notification, but be so minor as to be not material. In other words, whilst the change might be relevant to the Prior Market Power Determination in a manner capable of affecting the Subsequent Price Control Notification, the change wrought in the Prior Market Power Determination is so small as to be *de minimis* and so liable to fall out of account. For example, in the circumstances of this case, the migration of one or two exchanges from Market 1 to Market 2 between the date of the WBA Market Power Determination and the WBA

Charge Control Decision might (although we make no finding in this respect) be said to be immaterial for this reason.

(d) There may be a fourth category of immaterial change, namely a change relevant to the Prior Market Power Determination and affecting the Subsequent Price Control Notification, but which is actually taken into account by OFCOM as part of the process of deciding the terms of the Subsequent Price Control Notification. For example, in the circumstances of this case, the WBA Market Power Determination concluded that it was appropriate to impose a price control in Market 1, but not in Market 2. It is perfectly possible to envisage changes occurring between the WBA Market Power Determination and the WBA Charge Control Statement that would render this conclusion inapposite, and this would obviously be a change material to both the WBA Market Power Determination and the WBA Charge Control Statement. However, this would be a matter that would inevitably be considered by OFCOM as part of the process of deciding, for the purposes of the WBA Charge Control Statement, what SMP services condition to impose. Sections 45, 87 and 88 of the 2003 Act (amongst other provisions in the 2003 Act and the Common Regulatory Framework) set out the criteria that have to be satisfied, before an SMP services condition can be imposed. In a case such as this, where there is a change material to both the Prior Market Power Determination and to the Subsequent Price Control Notification, but which is taken into account by OFCOM as part of the process of deciding the terms of the Subsequent Price Control Notification, it may well be that there is no material change for the purposes of section 86(1)(b), because that matter will have received separate substantive consideration by OFCOM.

(iii) Conclusion as regards the contentions of TalkTalk and OFCOM

91. In this case, TalkTalk contends that the Prior Market Power Determination (here, the WBA Market Power Determination) would be different because – applying the definition of a Market 1 exchange – the number of exchanges included in Market 1 changes when regard is had to TalkTalk's intention to unbundle a significant

number of those exchanges previously falling within Market 1. In short, looking at the change that TalkTalk contends is material and applying the definition of Market 1 contained in paragraph 1.19 of the WBA Market Power Determination, a number of exchanges cease to meet the Market 1 criteria, and fall into Market 2 as a result of the subsequent change. That, in turn, inevitably affects the Subsequent Charge Control Notification (here, the WBA Charge Control Decision), because the charge control imposed by that notification only extends to Market 1. Inevitably, if the number of exchanges falling within Market 1 changes, the geographic scope of the charge control is affected.

92. We have no hesitation in rejecting OFCOM's alternative approach. As we noted in paragraph 88 above, the rationale of section 86(1)(b) is to enable an SMP services condition to be imposed without OFCOM having to conduct a contemporaneous market power determination. The only reason that this is possible is that there is, in existence, a Prior Market Power Determination which is unaffected by subsequent changes. It is self-evident that the Prior Market Power Determination can only be relied upon in this case, i.e. where it is unaffected by subsequent changes. Where the Prior Market Power Determination has been affected by subsequent changes, and these changes are capable of affecting the Subsequent Charge Control Notification, it is equally self-evident that the Prior Market Power Determination can no longer serve as the basis for the price control.

93. We do not understand how, where a material change has occurred, it can be said that the Subsequent Charge Control Notification would not be affected or not materially be affected by the change, without actually carrying out a <u>further</u> market power determination.

94. Take a hypothetical example: suppose there is a subsequent change which would cause the Prior Market Power Determination to be different in a manner capable of affecting the setting of the Subsequent Charge Control Notification – say, a change affecting the scope of markets defined in the Prior Market Control Determination. How can it be said that any price control will be materially the same in the light of this change, without re-visiting the question of market definition?

95. The problem with OFCOM's approach is that it puts the cart (the Subsequent Charge Control Notification) before the horse (the Prior Market Power Determination). A price control can only be imposed where there is a defined market and an SMP determination in respect of that market. OFCOM is entitled to rely upon an earlier market definition and market power determination (i.e. the Prior Market Control Determination), provided it still remains reliable (i.e. there has been no "material change"). When there has been a material change, the Prior Market Control Determination can no longer be relied upon, and the basis for the Subsequent Charge Control Notification falls away. To contend that the Subsequent Charge Control Notification would have been no different (or not materially different), a "material change" having occurred, anticipates the outcome of a market definition and market power determination exercise that has not yet been carried out, and which must be carried out before a charge control can legally be imposed. In other words, whilst it may very well be the case that there exists a market in respect of which a price control should be imposed, OFCOM cannot know what this market is without having a reliable market definition and market power determination before it.

96. Accordingly, we conclude that TalkTalk's approach to the question of "material change" is to be preferred to that of OFCOM. Essentially, a material change exists for the purposes of section 86(1)(b) of the 2003 Act where:

(a) It would cause the Prior Market Power Determination to be different in a material respect (i.e. one that is more than *de minimis*); and

(b) That difference is capable of affecting the setting of the Subsequent Price Control Notification.

97. It does not follow from this conclusion that, on the facts of this case, there has actually been a material change. That depends on precisely how Market 1 came to be defined by OFCOM in the WBA Market Power Determination. It is to this question that we now turn.

(iv) Has there been a material change in this case?

Would the WBA Market Power Determination be any different?

98. Applying the two-stage test articulated in paragraphs 89 to 96 above, we must first ask whether the change relied upon by TalkTalk would cause the WBA Market Power Determination to be any different.

99. TalkTalk, quite naturally, placed considerable emphasis upon the summary definition of Market 1 contained in paragraph 1.19 of the WBA Market Power Determination. This definition has already been quoted in paragraph 55 above. Nevertheless, it is worth repeating that paragraph 1.19 of the WBA Market Power Determination defines Market 1 as comprising "exchanges where only BT is present or forecast to be present", and Market 2 as "exchanges where two Principal Operators (POs) are present or forecast and exchanges where three POs are present or forecast but where BT's share is greater than or equal to 50 per cent".

100. TalkTalk contends that it is self-evident that the scope of Market 1 would be materially different given TalkTalk's plans to unbundle additional exchanges in that market, since a number of exchanges would fall out of Market 1 (because BT would not be the only communications provider "forecast to be present" in a number of these exchanges) and into Market 2.

101. Mr Heaney, in his first witness statement, described the nature of TalkTalk's roll out plans. According to paragraph 19 of Mr Heaney's first statement, the overall rollout plan was for 700 exchanges, of which 556 were in Market 1. These exchanges covered 1.24 million premises in Market 1 or 40% of all premises served by exchanges in Market 1. These details were expanded upon in paragraph 20 of Mr Heaney's first statement.

102. In his submissions, Mr Holmes took issue not with the facts as stated by Mr Heaney, but with the interpretation placed on them. Thus, he suggested that whereas OFCOM's market definition was based upon confirmed roll out plans, Mr Heaney's figures included instances which did not meet the "committed" rollout

plans criterion used by OFCOM in the WBA Market Power Determination. He also pointed out that Mr Heaney's figures described what was known to TalkTalk, rather than what TalkTalk had communicated to OFCOM prior to the WBA Charge Control Decision. In short, he suggested that Mr Heaney's figures of 556 and 40% were overstated for these reasons. This was disputed by Mr Pickford. We consider that Mr Holmes is right, simply on the basis of Mr Heaney's own evidence. In a footnote to paragraph 20 of his first statement (footnote 16), Mr Heaney quite properly drew attention to the fact that the figures set out in his table "differ from those quoted in my letter to Stuart MacIntosh of Ofcom on 8 July … The 462 figure (in letter) relates to orders submitted rather than where delivery has been confirmed. The 238 figure relates to confirmed delivery but is as at a date earlier than 8 July 2011 which is the date used to prepared the table above."

103. TalkTalk's letter of 8 July 2011 stated as follows:

> "In terms of our roll-out plans they have progressed substantially since we provided information to Ofcom for Ofcom's WBA Market Review last year.
>
> We plan to roll-out to a total of 500 exchanges this year (i.e. 2011/12, year ending March 2012) and 200 exchanges next year. The majority of these exchanges are in Market 1. This is not the limit of our possible roll-out. As a result of CAPEX costs reductions enabled by various innovations and changes (which we have suggested may happen) we have now identified a total of 890 exchanges that are viable for build (in the absence of the proposed price control). 183 of these additional 190 exchanges are in Market 1.
>
> The process of ordering and delivering these exchanges is already well under way. Orders have been submitted and accepted for 462 of these exchanges with confirmed delivery dates (CDD) for 238."

104. The figure of 238 is a figure for all exchanges, not just Market 1 exchanges, and appears to be the figure that OFCOM would have had reference to (being a committed rollout).

105. It is not possible to be more specific because – as the hearing progressed – it became clear that TalkTalk and OFCOM had minor (and for present purposes immaterial) definitional issues as to what precisely constituted a "committed" rollout, and could not agree precisely which of TalkTalk's exchanges fell within that definition. In the end, the point was academic because, whichever figures are

taken, it is plain that the number of exchanges in respect of which TalkTalk was proposing roll out was obviously a more than *de minimis* number. Accordingly, even though we consider that Mr Heaney's figures overstate matters, that overstatement is in no way sufficient to reduce the change relied upon by TalkTalk to an immaterial one. Had we considered there was any prospect of the overstatement being so great as to render any change *de minimis*, we would, of course, have required further evidence on this point.

106. In our view, on the basis of the definitions of Markets 1 and 2 contained in paragraph 1.19 of the WBA Market Power Determination, there has been a material change.

107. However, in his submissions to us, Mr Holmes made the point that these definitions needed to be treated with some caution (see, for instance, Transcript, 6 December 2011, pages 16 to 17), in that they were inaccurate statements of how OFCOM had defined its markets. As we noted in paragraph 61(b) above, it is clear that the definitions contained in paragraph 1.19 of the WBA Market Power Determination cannot stand when that document is read as a whole.

108. We consider that the WBA Market Power Determination must be looked at as a whole in order to ascertain precisely how OFCOM defined Market 1. We consider that it would be wrong simply to rely upon a single paragraph of the WBA Market Power Determination, to the exclusion of OFCOM's process of reasoning, as contained in the WBA Market Power Determination. That would be to put form over substance. More particularly:

(a) In many cases, it may be that an appropriate starting point as to how OFCOM has defined a particular market will be the legal notification by way of which that market is defined. In this case, however, the markets defined in the notification at Annex 1 of the WBA Market Power Determination are defined simply by reference to a list of exchanges: see the definitions of "Market 1", "Market 2" and "Market 3" in paragraph 23 of the notification at Annex 1, and Appendices 1, 2 and 3 thereto. The

notification contains no indication as to why a particular exchange falls within Appendix 1, 2 or 3.

(b) In such circumstances, it is necessary to see how OFCOM has defined its markets in the body of the WBA Market Power Determination. A good starting point is OFCOM's own summary of its decisions regarding market definition (paragraphs 1.17 to 1.19 of the WBA Market Power Determination) and, as we have noted, TalkTalk has placed considerable reliance upon paragraph 1.19.

(c) However, we consider that OFCOM's summary of its decisions is precisely that – a summary – to be read in the light of the WBA Market Power Determination as a whole. If it is clear from the determination as a whole that the summary is inaccurate, then we consider that regard must be had to the substance of OFCOM's market definition, and not its form. In considering this, we stress that it would not be permissible for the Tribunal to re-visit OFCOM's market definition, and we have not done so in this Judgment. The role of the Tribunal is confined to ascertaining what market definition OFCOM has in fact adopted.

109. As we noted in paragraph 61 above, it is clear from paragraphs 3.169 to 3.183 of the WBA Market Power Determination (which are set out in paragraph 60 above) that OFCOM knew of, and considered, TalkTalk's rollout proposals – including the proposal to roll out in exchanges allocated by OFCOM to Market 1 – and nevertheless decided to continue to allocate these exchanges to Market 1. In other words, OFCOM factored into its Market 1 definition TalkTalk's intended further roll out, even though this roll out could not be said to be "committed" as OFCOM had defined that term. Even though TalkTalk's proposed roll out fell to be classified as "uncommitted", OFCOM clearly took it into account when considering the definition of Market 1. The definition of Market 1 – in terms of the identity of the various exchanges falling within it – remained unchanged because OFCOM considered that even if TalkTalk unbundled a significant number Market 1 exchanges early on, BT's market share in those exchanges would remain so great that some form of price control would remain appropriate.

110. In short, OFCOM deliberately decided to keep within Market 1 those exchanges in respect of which there was going to be unbundling by TalkTalk. It follows that the definition of Market 1 in paragraph 1.19 of the WBA Market Power Determination is wrong. At the time of the WBA Market Power Determination, OFCOM included in Market 1 those exchanges in respect of which TalkTalk was minded to unbundle. In other words, the definition of Market 1 is not "exchanges where only BT is present or forecast to be present", but rather "exchanges where only BT is present or forecast to be present or where, during the period of the market determination, TalkTalk may (at some point in the future) be present".

111. It follows from this that TalkTalk's further articulation of its roll out plans, in the period subsequent to the WBA Market Power Determination, and the extent to which TalkTalk has in fact "actioned" those plans in that period, are matters that would not cause the WBA Market Power Determination to be any different in terms of how it was framed or in terms of the definition of Market 1. The definition of Market 1 factored in, and took into account, TalkTalk's future roll out.

112. This provides the answer to Mr Pickford's "thought experiment", which he presented to the Tribunal at the beginning of his oral reply submissions (Transcript, 6 December 2011, pages 62 to 63):

> "Whilst it is fresh in my mind, I would like to begin with a thought experiment …We say there really is no magic in the particular dates of December 2010 or July 2011, or any particular date in between. In every case, OFCOM is trying to do the same thing which is to look forward and look at particular markets, and say: "Is this a market where, on the basis of forecast that we know about, it is only going to be BT in that market, where on the basis of the forecast we know about there will be someone else…
>
> What we say is this … there is a requirement on OFCOM to impose the least intrusive remedy possible … In that context, if one asks oneself if a definition exercise had been carried out in July 2011, and let us suppose I am right about the 40 per cent, and Market 1 should be 40 per cent smaller, plainly that is a material change because the most proportionate market over which to impose a price control should be radically different to the market over which it was in fact imposed."

113. The problem with Mr Pickford's "thought experiment" is that it is premised upon the definition of Market 1 contained in paragraph 1.19 of the WBA Market Power Determination. Clearly, if OFCOM had in fact defined Market 1 as comprising those exchanges where "only BT is present or forecast to be present", and – in the

period between the WBA Market Power Determination and the WBA Charge Control Decision – it became clear that as regards 40% of those exchanges, BT was not the only communications provider forecast to be present, there would be a material change for the purposes of section 86(1)(b). That is obvious.

114. But, as we have found, that is not how OFCOM actually defined Market 1. The definition of Market 1 is not "exchanges where only BT is present or forecast to be present", but "exchanges where only BT is present or forecast to be present or where, during the period of the market determination, TalkTalk may (at some point in the future) be present". Using this definition of Market 1, it is clear that the answer to Mr Pickford's "thought experiment" is that the definition of that Market would be exactly the same whether undertaken at December 2010 (when it was in fact undertaken) or in July 2011 (when the WBA Charge Control Decision was made).

115. It would appear from paragraphs 3.169 to 3.183 of the WBA Market Power Determination that OFCOM's definition of Market 1 took into account TalkTalk's "uncommitted" plans for the future unbundling of exchanges, but that the definition contained in paragraph 1.19 remained otherwise unchanged. The matter is far from clear, on the face of the WBA Market Power Determination. Had another communications provider, other than TalkTalk, announced plans to unbundle significant further (unidentified) exchanges after the date of the WBA Market Power Determination, then we are not persuaded that such plans would have been factored into OFCOM's Market 1 definition.

116. Although TalkTalk sought to suggest that there had been other changes – going beyond its own plans – since the WBA Market Power Determination which might constitute "material changes" in their own right (see paragraph 71 of TalkTalk's Notice of Appeal and paragraphs 38*ff* of its Reply and Skeleton Argument), we are not persuaded that this is the case. These matters were dealt with by OFCOM in its Defence and Skeleton Argument (paragraphs 72 to 81) and in the evidence of Mr Clarkson (paragraphs 22 to 27 of Mr Clarkson's statement dated 1 November 2011). We accept this evidence and find that these matters do not undermine

OFCOM's conclusion that there was no material change for the purposes of section 86(1)(b) of the 2003 Act.

Is there a difference capable of affecting the setting of the Subsequent Price Control Notification?

117. Given the conclusion that we have reached in respect of the first question in the two-stage test articulated in paragraphs 89 to 96 above, the answer to the second question follows automatically. We have found no change that would cause the WBA Market Power Determination to be any different. Accordingly, there is no difference capable of affecting the setting of the WBA Charge Control Decision.

(v) Conclusion

118. For the reasons we have given, it is our unanimous conclusion that OFCOM reached the correct decision when it concluded, in the WBA Charge Control Decision, that there had been no material change within the meaning of section 86(1)(b) of the 2003 Act between the date of the WBA Market Power Determination and the WBA Charge Control Decision.

VI. GROUND A: FAILURE PROPERLY TO CONSULT BY OFCOM

(i) The extent of OFCOM's obligation to consult

119. TalkTalk drew to our attention a number of public law authorities regarding a decision-maker's obligation to conduct sufficient inquiry and to carry out a proper consultation. In particular:

(a) In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, at 1062-1063, Lord Diplock stated:

> "It is not for any court of law to substitute its own opinion for [the Secretary of State]; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration mattes that were irrelevant to what he had to consider ... Or, put more compendiously, the question for the

> court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

(b) In *R v Secretary of State for Education and Science, ex parte London Borough of Southwark* [1995] ELR 308, at 323, Laws J stated:

> "...the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case..."

(c) In *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, Lord Woolf MR (in a judgment of the whole court) stated (at paragraph 108):

> "It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken..."

(d) In *R (DF) v Chief Constable of Norfolk Police* [2002] EWHC 1738, Crane J notes that (at paragraph 45):

> "[a]ll counsel accepted the proposition that a decision-maker has an obligation to equip himself with the information necessary to take an informed decision."

120. It is difficult to take issue with these statements and, significantly, OFCOM did not seek to do so.

121. We would only note that, however correct and apt these general statements of the duty to consult may be (and we consider them both correct and apt), what constitutes a proper consultation is coloured by the facts of the given case. We consider that it would be wrong, in cases where OFCOM is considering whether there has been a material change for the purposes of section 86 of the 2003 Act, to lay down strict rules as to how OFCOM should go about this process. Before us, much was made of OFCOM's power, under section 135 of the 2003 Act, to require the provision of information. Clearly, this power is an important one, but the fact

that it exists does not mean that it is appropriate, in every case, for OFCOM to use it. There are other, less formal ways, in which OFCOM can keep itself adequately informed of market changes.

122. We note that section 86(1)(b) of the 2003 Act provides that OFCOM must be "satisfied" that there has been no material change. We do not consider that the use of this term imports any kind of general discretion in OFCOM as to the question of whether there has, or has not, been a material change. The question of whether there has been a material change for the purposes of section 86(1)(b) is essentially a question of fact, and not really one of discretion. On the other hand, precisely how OFCOM goes about satisfying itself that there has, or has not, been a material change is, essentially, a question for OFCOM, to be assessed in the light of its public law duties and in the light of the individual circumstances of the case before it.

(ii) The relevance of a failure to consult in the context of an "on the merits" appeal

123. In his *Judicial Review Handbook* (5th edn, 2008), Mr Fordham QC refers to the "substitutionary approach", which is forbidden in judicial review proceedings. Thus, in paragraph 15.1, it is noted that:

> "Every public body has its own proper role and has matters which it is to be trusted to decide for itself. The Courts are careful to avoid usurping that role and interfering whenever they might disagree as to those matters. There are various ways of formulating the warning against impermissible interference. But however it is expressed, the idea of a forbidden approach is essential in understanding and applying principles of judicial review."

124. As we have noted, appeals to the Tribunal under section 192 of the 2003 Act are not dealt with on a judicial review standard, but "on the merits". The Tribunal is obliged, by statute, to take the "substitutionary approach" that is not permitted in judicial review cases. In this respect, appeals to the Tribunal under section 192 are more intrusive than a judicial review would be: the Tribunal is concerned with whether OFCOM's decision was correct.

125. We consider that this has implications in those cases where – as here – the Tribunal has reached a conclusion that OFCOM's decision was, indeed, correct on the

merits. In such a case, we do not consider that it is the function of the Tribunal also to review OFCOM's decision by reference to the judicial review standard.

126. This conclusion is reinforced by case-law dealing with appeals "on the merits" of decisions of administrative bodies other than OFCOM. It is clear law that where a decision of an administrative body, such as OFCOM, is subject to a full, on the merits appeal, such an appeal is capable of making good any deficiency in the procedure of the administrative body taking the original decision. In other words, a procedural failure at the level of the first instance administrative body can be remedied by a wide, on the merits, appeal. See, for example, the decision of the Privy Council in *Calvin v Carr* [1980] AC 574 at 591 to 592 and 697 and the decision of the House of Lords in *Lloyd v McMahon* [1987] AC 625 at (in particular) 696 to 697, 708 to 709 and 716.

127. Of course, whether a subsequent, "on the merits", appeal is capable of curing underlying procedural defects depends upon the nature of the appeal in question: "on the merits" appeals may be circumscribed in various ways. The crucial question is whether, taking into account all of the circumstances, the appellant's case – here, TalkTalk's – has received "overall, full and fair consideration" (to quote Lord Wilberforce in *Calvin v Carr* [1980] AC 574 at 697.)

128. In the present case:

(a) As we have repeatedly noted, the appeal is "on the merits": section 195(2) of the 2003 Act.

(b) Any person affected by OFCOM's decision may appeal to the Tribunal: section 192(2) of the 2003 Act. Here, TalkTalk has availed itself of this opportunity.

(c) New evidence – that is, evidence that was not before OFCOM – is admissible before the Tribunal: *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245. Such evidence has been admitted here, in the shape (most importantly) of the statements of Mr Heaney.

(d) There has been a two day hearing at which TalkTalk has been able to present its case orally, in addition to the voluminous written materials that were submitted to the Tribunal.

129. In its written submissions dated 29 December 2011, TalkTalk suggested that the fact the Tribunal's jurisdiction, in section 192 appeals, was limited (by section 195(4)) to "remitting the decision under appeal to the decision-maker with such directions (if any) as the Tribunal considers appropriate for giving effect to its decision in some way affected the extent to which such an appeal was capable of curing underlying procedural defects. We reject this submission: the fact that the Tribunal, pursuant to section 195(4), remits a decision back to OFCOM in no way circumscribes the nature and extent of the review of that decision by the Tribunal which, as we have said, is "on the merits".

130. In short, it seems to us that where – as here – there is a full rehearing by the Tribunal of an issue initially determined by OFCOM and the appellant's case has received "overall, full and fair consideration" (per Lord Wilberforce in *Calvin v Carr*, cited in paragraph 127 above, at 697), that will, in general, dispose of a challenge based upon deficiencies or alleged deficiencies in OFCOM's procedure. This, we consider, is the short answer to TalkTalk's Ground A.

131. It may be that there are cases where OFCOM's approach in reaching its decision was so defective as to preclude the Tribunal from reaching an "on the merits" conclusion. In paragraph 76 above, we considered the case where OFCOM reached a decision regarding "material change" without any consultation at all. It may be that, in such a case, the procedural deficiency on the part of OFCOM is so serious as to render it unsafe for the Tribunal to conclude that, "on the merits", OFCOM reached the correct decision. In such a case, where (because of the deficiencies in OFCOM's decision-making process) it is impossible to say one way or the other whether OFCOM's decision was right or wrong, it may be that the only appropriate course is to remit the matter back to OFCOM for OFCOM to carry out its decision-making process again.

132. It is not necessary for us to express a view on this point, and we expressly decide to leave it open. We need only say that this case does not disclose the sort of procedural deficiencies which cause us in any way to doubt the soundness of the conclusion we have reached on Ground B. In paragraph 71 of its Notice of Appeal and paragraphs 38*ff* of its Reply and Skeleton Argument, TalkTalk sought to raise the spectre of "other changes in Market 1 of which TalkTalk, Ofcom and by implication the Tribunal will be unaware as a result of Ofcom's failure to consult/investigate" (to quote from paragraph 71 of OFCOM's Defence and Skeleton Argument).

133. Mr Pickford referred us to the well-known statement of the former US Secretary of Defence, Mr Donald Rumsfeld, made on 12 February 2002:

> "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – there are things we do not know we don't know."

134. We do not consider that it is appropriate to rely on "known unknowns" or even "unknown unknowns" that might – were they known – serve to undermine the soundness of OFCOM's original decision. Where a decision can be challenged by way of a merits appeal, it is incumbent upon an appellant to show – if necessary by way of new evidence – that the original decision was wrong "on the merits". It is not enough to suggest that, were more known, the Tribunal's decision might be different.

135. In any event, in this case, as we have noted, the "known unknowns" relied upon by TalkTalk were dealt with by OFCOM in its Defence and Skeleton Argument (paragraphs 72 to 81) and in the evidence of Mr Clarkson (paragraphs 22 to 27 of Mr Clarkson's statement dated 1 November 2011). There is nothing in these points that even begins to undermine our conclusion that OFCOM's decision that there was no material change for the purposes of section 86(1)(b) of the 2003 Act was correct.

136. Given the conclusions we have reached, it is strictly unnecessary for us to say more about Ground A in order to resolve this appeal. However, in case this matter goes further, we make the following findings in respect of Ground A:

(a) As regards both the WBA Market Power Consultation and the WBA Charge Control Decision, OFCOM consulted by publishing, in the case of the WBA Market Power Consultation, two consultations (dated 23 March 2010 and 20 August 2010) and, in the case of the WBA Charge Control Decision, one consultation (dated 20 January 2011). In the case of each round of consultations, TalkTalk made submissions to OFCOM (on 29 May 2010 and in March 2011), which were taken into account by OFCOM. TalkTalk's March 2011 submissions expressly dealt with the question of "material change".

(b) It is clear from the documents that OFCOM received, and took into account, other submissions from parties other than TalkTalk. The vast majority of these were not put in evidence before us. Although the Tribunal did not, therefore, review these submissions, it is important to note, first, that the process adopted by OFCOM, in accordance with the procedures laid down in the 2003 Act, gave third parties every opportunity to participate in OFCOM's decision-making process; and, secondly, that although TalkTalk is entitled to rely upon any procedural failure on the part of OFCOM, whether this directly affected TalkTalk or not, no person, other than TalkTalk, made any complaint regarding OFCOM's process of consultation.

(c) Moreover, even though TalkTalk chose not to raise with OFCOM its plans to unbundle further exchanges, OFCOM itself identified reference to these plans in TalkTalk's November 2010 Interim Results, and sought further information from TalkTalk pursuant to a notice under section 135 of the 2003 Act. Although the information that TalkTalk provided was only provided shortly before the WBA Market Power Determination, it was fully taken into account by OFCOM.

(d) We reject the suggestion made by TalkTalk that consideration of whether there has been a material change for the purposes of section 86(1)(b) of the 2003 Act requires, in all cases, detailed and extensive consultation. We consider that the extent of the consultation required turns on the facts of any given case, and it is, in the first instance, for OFCOM, as the decision-maker, "to decide upon the manner and intensity of the enquiry to be undertaken" (*R (Khatum) v London Borough of Newham* [2004] EWCA Civ 55, [2005] QB 37 at paragraph 35, cited in Fordham, *Judicial Review Handbook* (5th edn, 2008), at paragraph 51.1.5).

(e) We also consider that, in determining whether there has been a material change at all, there will often be a nexus between the Prior Market Power Determination and the Subsequent Charge Control Notification (as these terms are defined in paragraph 87 above). In this case, in particular, it is the scope of the market defined by OFCOM in the WBA Market Power Determination that colours what subsequent changes are, or are not, material.

(f) In these circumstances, but for one reason, which we address below, had it been necessary to do so, we would have rejected TalkTalk's Ground A on basis that OFCOM did properly satisfy itself that there had been no "material change" in accordance with its obligations under section 86(1)(b) of the 2003 Act.

(g) Our qualification is as follows:

(i) As we have noted, the question of whether there has been a material change hinged, in this case, on the market definition adopted in the WBA Market Power Determination. Although we have reached a firm conclusion as to precisely what criteria OFCOM used to identify which exchanges fell within Market 1 (see paragraphs 61 and 99 to 115 above), we also recognise that the summary description of Market 1 contained in paragraph 1.19 of the WBA Market Power Determination was "obviously wrong" (paragraph

61(b) above) and amounted to an inaccurate statement of how OFCOM had defined its markets (paragraph 107 above).

(ii) This is an important point. For a consultation exercise to be meaningful, the consultation must be adequate. It must, amongst other things, contain sufficient information so as to enable potential consultees to make a proper and informed response (see Fordham, *Judicial Review Handbook* (5th edn, 2008), paragraph 60.6 and, in particular, paragraph 60.6.5). Here, persons interested in the WBA Market might well not have understood exactly how OFCOM had defined Market 1 in the WBA Market Power Determination, and this might well have coloured submissions made in response to the 20 January 2011 consultation conducted by OFCOM.

To this extent only, would we have been minded to accept TalkTalk's contentions as regards the adequacy of OFCOM's consultation process. However, for the reasons we have given, we consider that this deficiency of process was cured by the full rehearing that has now taken place.

VII. ORDER AND POSTSCRIPT

137. For the reasons we have given, we unanimously dismiss TalkTalk's appeal.

138. We make two points by way of postscript:

(a) First, as our reasoning in Section VI(iv) above makes clear, it is imperative that OFCOM defines the markets that it has found to exist clearly and unambiguously. Where, as here, the geographical extent of a market is defined by reference to a list of otherwise unrelated "basic geographic units" (here: BT exchanges) it is vital that the criteria by which it is found that such a unit falls within one market, rather than another, be clearly articulated. For instance, market share can be expected to be a relevant consideration when considering the homogeneity of units falling within a given market and, if this is the case, such a criterion needs to be clearly articulated.

(b) Secondly, before us, all of the parties proceeded on the basis that if TalkTalk's appeal were successful, the Tribunal should hear the parties separately on the question of relief. The Tribunal acceded to this and – had TalkTalk's appeal been successful – such a hearing would have taken place. However, it is only right to note that, if TalkTalk's Ground B had succeeded, and the Tribunal had concluded that there had been a "material change" within the meaning of section 86(1)(b) of the 2003 Act, it would have been difficult to avoid the conclusion that no price control in respect of Market 1 (howsoever formulated) could be imposed by OFCOM without a further market power determination. We express no concluded view, but consider that both OFCOM and communications providers should be under no illusions as to the importance of the "material change" criterion in section 86, where there is a disjunction in time between a market power determination and a subsequently imposed charge control.

Marcus Smith QC Clive Elphick Jonathan May

Charles Dhanowa
Registrar Date: 10 January 2012