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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1186/3/3/11

Victoria House,
Bloomsbury Place,
London WC1A 2EB

5th December 2011

Before:

MARCUS SMITH QC
(Chairman)

DR. 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 TELECOMMUNICATIONS PLC
BRITISH SKY BROADCASTING LIMITED

Interveners

HEARING (DAY ONE)

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. Tim Ward Q.C. and Ms Fiona Banks (instructed by BT Legal) appeared on behalf of British Telecommunications plc.

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

1 THE CHAIRMAN: Mr. Pickford, straight into the evidence – is that the consensus?

2 MR. PICKFORD: It is indeed, sir, I was just going to make a couple of preliminary housekeeping
3 points at the beginning. Obviously I appear for Talk Talk, Mr. Holmes and Mr. Mussa
4 appear for Ofcom, Mr. Ward QC and Ms. Banks appear for BT, and Mr. Wisking and Mr.
5 McInnes of Herbert Smith appear for Sky, so you can see I am out gunned about six times
6 over.

7 Before we begin can I just check what bundles you have? You should have two volumes
8 CD1 and CD2 from Talk Talk being the core documents in its appeal followed by four
9 volumes of authorities and supporting documents. Staying with Talk Talk's appeal there is
10 then a slim reply and skeleton argument. So that is what you should have from Talk Talk.

11 THE CHAIRMAN: I have all that.

12 MR. PICKFORD: From Ofcom you should have a fairly thick lever arch file which contains their
13 defence and skeleton. I was not aware of there being a particular home for the Sky and BT
14 appeal so I put mine in Ofcom's defence but you may have your own home for those
15 already.

16 The only other matter is that as of Friday we have disclosure of around 60 or 70 pages of
17 new documents. They are not attached to a witness statement they are simply proffered
18 under cover of a letter. I have inserted those, for what it is worth at tab 16A of Ofcom's
19 defence bundle, I do not know whether there is anywhere else better to put them.

20 THE CHAIRMAN: I think we have ours in our green file so I think we will be able to locate
21 them there if you give us a little longer than the usual.

22 MR. PICKFORD: I am grateful. The Tribunal is entirely correct we were intending to move
23 swiftly into the evidence. There is relatively little evidence in these proceedings and there
24 is less on which cross-examination is required. Just to put the evidence very briefly in
25 context Mr. Heaney for his part explains why the appeal is important to Talk Talk. He
26 explains how Talk Talk's roll out plans changed, and he explains Talk Talk's engagement
27 with Ofcom on the s.86 issue.

28 Mr. Clarkson, for Ofcom, for his part he explains Ofcom's oversight at the general market
29 Ofcom's engagement on the roll out issue and his views on the impact on consumers if the
30 Talk Talk appeal succeeds. In very broad terms those are the subjects which the witnesses
31 cover.

32 If the Tribunal is content in just one moment I would like to call Mr. Heaney, but before I
33 do so there is one issue I would like to address you on which concerns the order of cross-
34 examination. Ofcom in their letter of Friday have adopted what we consider to be a rather

1 unusual approach. They say they want at their discretion in effect the opportunity to reverse
2 the order in which the witnesses are examined and to give themselves the option to cross-
3 examine Mr. Heaney after Mr. Clarkson has been cross-examined. Mr. Holmes will
4 obviously be able to tell us in which Courts or Tribunals they adopt that approach, but
5 certainly for my part I have never appeared in a Court or Tribunal where the order works in
6 that particular way. In ordinary proceedings the appellant or the claimant presents its
7 evidence first and the defendant or respondent has their opportunity to cross-examine that
8 witness – it is different if there are allegations of fraud but we are not concerned about that
9 here. These being civil proceedings we also have witness statements which stand for
10 evidence-in-chief, and we also have a reply statement from Mr. Heaney as well, so there
11 should not be any need for recalling a witness either, that would be very rare in these kinds
12 of proceedings.

13 We say that Ofcom really have to make up their mind now, they cannot waive the right to
14 cross-examine and then come back and decide actually we have seen what you have said
15 and we would quite like to ask a few questions, we say that is not the right way to go; either
16 they should cross-examine or not. When we call Mr. Heaney we will be tendering him for
17 cross-examination on that basis.

18 THE CHAIRMAN: Well, does Ofcom have anything to say in response to that before we make a
19 ruling order.

20 MR. HOLMES: As we made clear in our letter we accept there are some differences of fact
21 between the witness evidence before you, but we do not think they are material to any of the
22 issues you have to decide, and we were frankly surprised that any cross-examination was
23 necessary in a case of this kind.

24 We accept that the ordinary course would be for us to cross-examine Mr. Heaney first and
25 then for Talk Talk to cross-examine our witness. We want to save time, we do not want to
26 engage in pre-emptive cross-examination unnecessarily. We cannot say for sure what
27 points may be put to Mr. Clarkson in cross-examination. It is unlikely that anything will
28 arise in cross-examination, but there is always the possibility in any proceedings that
29 something will arise in the cross-examination of one witness that needs, in fairness, to be
30 put to another witness who has already been called. It seems a bit unnecessary to waste a
31 lot of time debating something when I have not yet made any application. I recognise an
32 application would need to be made in order to recall Mr. Heaney should that prove
33 necessary, and my submission would be that it would be more sensible to wait and to see if
34 this difficulty actually arises and then to confront it at that stage if it does.

1 THE CHAIRMAN: Well, Mr. Holmes, do I understand correctly that, as matters stand, you have
2 no questions for Mr. Heaney?
3 MR. HOLMES: Yes, sir.
4 THE CHAIRMAN: Thank you, that is helpful. Mr. Pickford, perhaps we can see how it goes.
5 MR. PICKFORD: Yes.
6 THE CHAIRMAN: My inclination would be, and obviously if necessary I will hear further
7 submission after Mr. Clarkson has given his evidence, but my inclination would be that if
8 Mr. Holmes had limited questioning arising simply out of the evidence of Mr. Clarkson then
9 I would be minded to permit that, but shall we see if that course eventuates, in which case if
10 necessary I will hear you further.
11 MR. PICKFORD: Sir, I am entirely happy with that. What we wanted to do was to make sure
12 that we were not to be reversing the order of cross-examination. Obviously, if Mr. Holmes
13 wants to make an application later we can deal with that application.
14 THE CHAIRMAN: I understand. We quite understand that the order is that your witnesses go
15 first, so on the basis that Mr. Holmes has no questions at present and that the matter is open,
16 if the matter needs to be re-opened we will proceed with Mr. Clarkson.
17 MR. PICKFORD: I am grateful, if I could call Mr. Heaney, please.
18 Mr. ANDREW JOHN HEANEY, Sworn
19 Examined by Mr. PICKFORD
20 Q Mr. Heaney, do you have some bundles in front of you comprising Talk Talk's appeal?
21 A Yes, I do.
22 Q Could you please turn to the second tab of bundle CD1? Is this your first witness statement
23 in these proceedings?
24 A Yes, it is my first witness statement.
25 Q And could you turn, please, to the end of that tab, p.68?
26 A Yes.
27 Q Is that your signature?
28 A That is my signature.
29 Q And can you confirm that the facts stated in the witness statement are true?
30 A Yes, they are true.
31 Q Thank you. If you could then please go to the reply bundle, which is the slim bundle, and
32 open tab 2 of that. Is this your second witness statement in these proceedings?
33 A Yes, it is.
34 Q Go through, please, to the final page, is that your signature?

1 A That is my signature.

2 Q Could you confirm that the facts stated in the witness statement are true?

3 A Yes, they are true.

4 THE CHAIRMAN: No cross-examination, I take it?

5 MR. PICKFORD: I think that is probably it.

6 THE CHAIRMAN: Mr. Heaney, thank you very much. Mr. Holmes?

7 MR. HOLMES: May I call Mr. Clarkson, please?

8 Mr. DAVID PETER CLARKSON, Affirmed

9 Examined by Mr. HOLMES

10 Q Mr. Clarkson, do you have a bundle in front of you titled "Ofcom's defence"?

11 A I do.

12 Q Could you turn to tab.10 of that bundle. You see there a witness statement in your name.

13 A I do.

14 Q Could you turn to the back of the tab, I think it is behind the divider within the tab. Is that
15 your signature at the end of your statement?

16 A That is my statement, sir, yes.

17 Q And is this the statement that you have given in these proceedings?

18 A It is, yes.

19 Q If you could stay there, I think Mr. Pickford will have some questions for you.

20 A Thank you.

21 Cross-examined by Mr. PICKFORD

22 Q Mr. Clarkson, there is nothing in your statement which you believe to be untrue, is there?

23 A No.

24 Q If we could go to para.1, please.

25 A Okay.

26 Q We see that you were the Project Director responsible for Ofcom's 2010 wholesale
27 broadband access market review, and was responsible for overseeing Ofcom's policy in the
28 subsequent WA charge control, and that you were also responsible for Ofcom's related
29 wholesale local access market review, that is correct. And at para.3 you say:

30 "Except where I state otherwise, the facts and matters set out in this witness statement
31 are within own knowledge and I confirm they are true. Otherwise where the facts and
32 matters are based on information provided by others, they are true to the best of my
33 knowledge and belief".

34 And again, you stand by that, obviously.

1 A I do.

2 Q Now, could you go to para.30, please.

3 A Okay.

4 Q Now, you say there:

5 “Although Talk Talk state that it has endeavoured to keep Ofcom aware of

6 developments of its rollout plans to ensure that Ofcom had up to date information,

7 I should note, again for the purposes of clarity, the following”.

8 And then you make two points at sub.(1) and sub.(2). And then at (3) you say as follows:

9 “Further, Talk Talk was unable to provide certain basic information in relation to its

10 rollout plans that Ofcom had requested at the meeting on 18th March 2011 and again

11 on 1st July 2011 Ofcom requested that Talk Talk provide a detailed timeline

12 illustrating its planned rollout on a per exchange basis. That information was not

13 provided to Ofcom”.

14 Now, do you stand by that?

15 A I do.

16 Q You were not actually at the meeting on 18th March, were you?

17 A I was not.

18 Q And you have told the Tribunal that, except where you state otherwise, the facts and matters

19 set out in your witness statement are within your own knowledge. That is correct. But,

20 what you say here, at para.30, cannot be within your own knowledge because you were not

21 at the meeting on 18th March 2011.

22 A Sure, and where the facts and matters based on information provided by others, that they are

23 true to the best of my knowledge and belief.

24 Q That is correct. But you have also said, except where you state otherwise, the facts are

25 within your own personal knowledge. Well, in fact, that is not correct, is it, in relation to

26 para.30(3), but you have not stated otherwise. You have not said, “I wasn’t at this meeting,

27 but here is my recollection”. You have just given an account of the meeting. So, para.30(3)

28 and para.3 in your witness statement do not tally up, do they, in that sense?

29 A Sure. I mean, okay.

30 Q Now, even putting aside the assurance that you give at para.3, given that you are giving

31 evidence about what happened at the 18th March meeting, did it not occur to you to mention

32 that you were not there?

33 A I can only apologise. That must be a minor oversight.

1 Q Now, given that you were not there, to be able to write what you did, you must have
2 obviously spoken to others at Ofcom, and you must have also asked to see all the relevant
3 documents pertaining to that meeting. Is that correct?

4 A Yes. When I was producing the witness statement, I sat down with people who worked on
5 the team and were at those meetings, and we went through the accounts they had on their
6 system.

7 Q And did you ask to see all of the contemporaneous meeting notes that the attendees at the
8 meeting had?

9 A In relation to these two meetings, yes. In fact, the meeting note or the subsequent note from
10 the July meeting was originally copied to me at the time, and the one on the 18th which the
11 July meeting note makes reference to – I dug out, I got somebody to take off their system,
12 so I could see it.

13 Q Thank you. If we could just be clear for a moment between – I am making a distinction
14 between subsequent emails and actually contemporaneous notes of the meeting. Now, there
15 have obviously been some emails that have been disclosed on Friday which related to the
16 meetings, and they happened just after the meetings. Will you just put those to one side for
17 a moment as I would like to focus on contemporaneous notes, meeting notes themselves.
18 Did you ask to see whether there were any contemporaneous meeting notes?

19 A I think that the emails you are making reference to, particularly the one from the 18th March,
20 that was the written record of that meeting.

21 Q Right. So, there were no contemporaneous notes themselves, it was simply those emails.
22 I just want to be clear about that, there were no other documents.

23 A Not that I am aware of.

24 Q You are clear, then, that you asked to see all of the relevant information, all the relevant
25 documents, whether they be emails or notes or otherwise that pertained to those particular
26 meetings.

27 A Yes. As far as I am aware, and understood, that was what I saw.

28 Q And you saw those emails before writing your witness statement.

29 A I did.

30 Q So, why did you not exhibit them to your witness statement?

31 A I didn't believe it was necessary. I must say I didn't even think that these points were
32 particularly in dispute or contentious.

33 Q Well, you say they were not contentious, but para.30 and sub.(3) of your witness statement,
34 you talk about Mr. Heaney's account, and you say Mr. Heaney says that he tried to keep us

1 up to date as much as possible, and then you seek effectively to contradict that. You say
2 “Well, actually, we asked for basic information and they didn’t even provide that”. So, you
3 are contradicting it there.

4 A It was as set out here. It was merely just for completeness.

5 Q Now, the emails that we are going to come on to in a moment, you obviously checked
6 carefully that your account here was consistent with those emails. That’s correct.

7 A Yes, sir, that’s correct.

8 Q So, if we could then go, please, to 18th March email. I am not quite sure where you will,
9 you will have that because it does not actually appear attached to your witness statement.

10 A I haven’t got it in front of me, but, okay.

11 Q I am sure it can be found, so that you can have a copy.

12 THE CHAIRMAN: Mr. Clarkson, if you want to read it, do take your time to read it before
13 counsel asks you questions.

14 A Sure. Okay.

15 MR. PICKFORD: So, this is an email from Filomena Ciccarelli sent on the 18th, early in the
16 afternoon. It was to a number of people and it was copied to Gareth Davies, Chris Rowsell,
17 Steve Perry and Filomena Ciccarelli and those, it would appear from the first line, were the
18 people that were at the meeting with Mr. Heaney, that is correct.

19 A That’s correct.

20 Q We then see an assessment of what it says are main points, and they are numbered 1 to 7.
21 And then there is a part dealing with bandwidth allocated profiles, that is point 8. And then
22 at the bottom we see the abbreviation “APs”. Now, that is “action points”, I take it. Do you
23 see that?

24 A Correct, yes.

25 Q And the first action point, number 1, is Talk Talk to “Send the list of exchanges plus a list
26 of questions”. And then in brackets “(See attached email)”.

27 A Okay.

28 Q So, if we then look at the attached email. In my bundle that is over the page at p.3. Do you
29 have that?

30 A I don’t have it, but I am aware of the attached email and -----

31 THE CHAIRMAN: It should be handed up, I think.

32 MR. PICKFORD: If you have the email itself. Thank you. So, you have that email.

33 A I have that.

1 Q Thank you. And it is from Andrew Heaney. It is to the attendees at the meeting, and it
2 says:

3 “Thanks for your time this morning. As promised, a few bits of follow up. Attached
4 spreadsheet with the list of exchanges / names in each of four buckets: [namely]
5 already done; planning to do and will still do given price cut; were planning to do but
6 not now viable given price cut; and, were not planning to do”.

7 And then he says:

8 “Can you let me know if you’d like to meet up with Paul and me if necessary to go through
9 the model so that you can understand how we test viability and the sensitivity of viability to
10 IP stream prices”.

11 And then there are some questions for you as well. Do you see that?

12 A Okay.

13 Q Now, if we go back to the email from Filomena Ciccarelli, she said that,

14 “The action point was Talk Talk December list of exchanges plus a list of questions,
15 see attached email”,

16 and that is precisely what Talk Talk did, did it not?

17 A Yes. I think there is actually two data sets being discussed here, so the action point set out
18 there and what was subsequently sent to us from Mr. Heaney on the 18th relates to a list of
19 exchanges but without any timing information in terms of when they might be enabled.
20 What was discussed at the 18th, my understanding based on what has been told to me by my
21 colleagues who were at that meeting, and it relates to point 4(a) on this meeting note, is it
22 was to do with the timing of when those exchanges would actually be live when Talk Talk
23 would be in a position to supply customers from them. And point 4(a) on this email of the
24 18th says that,

25 “Talk Talk does not know how many of these are planned to be unbundled by 2012”.

26 So, whilst we had a list of exchanges that Talk Talk were planning to unbundled, what we
27 didn’t have was the timing information about those exchanges.

28 Q But nowhere on this email does it say at the bottom, under the action points that Talk Talk
29 were to send us a number of data sets, they have sent us one but there is one remaining. It
30 simply says “Talk Talk to send list of exchanges, see attached email”. The writer of the
31 email is implying that Talk Talk have done what was asked of them, that is the fair
32 assessment, is it not of that email?

33 A As I say, based on the accounts of the people at that meeting, what was discussed at that
34 meeting, which was also requested formally in the s.135s in November was a list of

1 exchanges, including the date at which they would be going live. I am advised by the people
2 at this meeting that that was asked for again at that meeting and at the time Talk Talk did
3 not have the information. I am sort of guessing what people were thinking at the time, but it
4 would be an unusual step to put an action to put through some information which just was
5 not available to Talk Talk at the time. It could be an action for Talk Talk to get the
6 information together to send it through to you.

7 Q What I am saying is that these emails – I understand you have explained what was told to
8 you about the meeting that you were not at, but in terms of the documentary evidence we
9 have, this email, this email is not consistent with that account, is it? I am not saying that
10 that account is wrong but this email is not consistent with it?

11 A I think it depends how you read it. I think you can pick bits out. I think that at point 4 on
12 this email there was clearly a conversation about the timing when exchanges were planned
13 to be unbundled in 2012 and I think the records show that Talk Talk did not know even how
14 many, let alone which precise exchanges, which is fair enough if they did not know, but the
15 point was the information was asked for at the time, as it was indeed asked for formally in
16 November 2010.

17 Q There is no request there is there?

18 A Not documented in that email, no.

19 Q So if we could go then, please, to the reply bundle, tab 3, and to p.4, at the top it says
20 “Tuesday 15 November 2011 07.24”, do you have the same page?

21 A I do.

22 Q About half way down the page we have an email from Mr. Heaney, and it is to Filomena.
23 He says:

24 “Attached our response. Please note that it is confidential in its entirety.

25 It would be good to set a meeting to discuss this perhaps in a few weeks’ time.”

26
27 Then the key point, at the bottom he says:

28 “Have you got everything you need on the model from Paul/me or is there
29 anything outstanding?”

30 Do you see that?

31 A Sure.

32 Q Then Filomena replies to him:

33 “Hi Andrew,

1 We seem to have all the information we need. We will obviously contact you if we
2 need.”

3 I presume there is a missing word there, it should say something like “more”. That is
4 entirely consistent, is it not, with the account that I have given you of the meeting, that Mr.
5 Heaney provided everything that he had been asked for and Ofcom were content with that?

6 A So let me just explain. As I said a moment ago there were two potential data sets, one the
7 more general – these are exchanges that we think we are going to – and then there is the
8 more precise, and these are when we are going to go to them. What happened between the
9 meeting on the 18th and this email correspondence on 31st, again my understanding from
10 seeing the records and talking to the team is that there was a second set of data and a model
11 which was Talk Talk’s viability model which was sent over, in fact a Talk Talk
12 representative, a guy called Paul Simpson, had a meeting with Filomena Ciccarelli on the
13 30th and they explicitly discussed this viability model which does not contain the timing
14 information, it is just a viability model. Following that meeting on 30th a simplified version
15 of the Talk Talk viability model was sent to Filomena. This email on 31st from Mr. Heaney
16 actually was covering two points. The first one was it was formally sending us Talk Talk’s
17 response to the consultation which had just closed. The second point, which is the “have
18 you got everything you need on the model from Paul”, Filomena understood that that was
19 the viability model which she had discussed with Paul the day before, and her response is
20 based on the fact of “yes, thank you for your response, and yes, in relation to the viability
21 model discussed with Paul we have everything we need.”

22 Q There was something else that they wanted. The natural thing for Filomena to accept was
23 “Thanks for that. By the way, you still owe us the other information”, surely?

24 A I think that might be slightly over the top. You can imagine there is quite a lot of email
25 traffic between us and our stake holders during this process, and if we have asked for
26 information which is not available, it is not our normal process on every correspondence to
27 say “Thank you, and by the way this is still outstanding.”

28 Q There is no correspondence in this case, is there, at all?

29 A In this case this is about the Talk Talk response and the viability model.

30 Q There is no correspondence from you ever asking for that information?

31 A About the ----

32 Q The information that you say was not provided by Talk Talk?

33 A Not after the formal information request in November.

1 Q If we could go on, please, to the meeting of 1st July? You were not at that meeting either,
2 were you?

3 A I was not.

4 Q So again, the same things that we went over in relation to the first meeting. Did you ask to
5 see all of the contemporaneous meeting notes or emails associated with that meeting? I take
6 it from your first answer the answer is “yes”?

7 A I did, I saw the email note which made reference to that meeting. In fact, as I said earlier, I
8 was copied in it at the time.

9 Q But again you did not exhibit those to your witness statement?

10 A I didn’t and I don’t have a copy of that email in front of me.

11 Q I apologise, that is the problem with late disclosure. If someone could please provide a
12 copy of 6th July email?

13 THE CHAIRMAN: Does someone have an unmarked spare? (Same handed to witness)

14 MR. PICKFORD: Can you go to that email, please, p.1? This is an email from Filomena
15 Ciccarelli, she is responding to a request from Stuart McIntosh asking about what
16 information has been provided by Talk Talk, and she sets out what has been provided. She
17 says: “We asked detail of the unbundling timescale at the meeting in February”, and then in
18 the final indent she says that

19 “We asked them if they had progressed the timing of their deployment in relation
20 to 594 exchanges in market one. Since our discussion in February no numbers
21 were spelt out and Andrew said that he would follow up with a deployment
22 timeline for all the relevant exchanges.”

23 So that is what Filomena appears to understand as to what was then going to follow from
24 the meeting.

25 If we could go, please, to what Mr. Heaney thought had been requested. That is at CD1, tab
26 2P. Do you have that?

27 A I do.

28 Q Are we both on p.250 of the bundle?

29 A Correct.

30 Q We then have a letter on 8th July from Mr. Heaney to Mr. McIntosh, and he says as follows:
31 “Thank you for you and your colleagues’ time in several meetings over the last
32 week to discuss the WBA Charge Control. I said when we met on Monday...”

33 So he is referring back there to the meeting that Mr. McIntosh mentioned in his email to
34 Filomena.

1 “I said when we met on Monday (with Dido and Dave) that we would respond to
2 you with an update on rollout progress. I have also discussed in this letter our
3 current thinking on some of the issues raised.”

4 He then goes on under “Roll Out Progress” to set out what he understands he has been
5 asked for.

6 “In terms of our roll out plans they have progressed substantially since we
7 provided information to Ofcom for Ofcom’s WBA Market Review last year.
8 We plan to roll out to a total of 500 exchanges this year (i.e. 2011/12, year ending
9 March 2012) and 200 exchanges next year. The majority of these exchanges are in
10 Market 1. This is not the limit of our possible roll out. As a result of CAPEX
11 costs reductions enabled by various innovations and changes (which we have
12 suggested may happen) we have now identified a total of 890 exchanges that are
13 viable for build (in the absence of the proposed price control). 183 of these
14 additional 190 exchanges are in Market 1.

15 The process of ordering and delivering these exchanges is already well under way.
16 Orders have been submitted and accepted for 462 of these exchanges with
17 confirmed delivery dates for 238.”

18 Now, there is no doubt that that is what Mr. Heaney understood that he was supposed to be
19 providing, is there? He is writing a letter to Mr. McIntosh, he is setting out what he
20 understands is required of him?

21 A I believe this letter was setting out the latest information available to Talk Talk.

22 Q At the end of that letter he says, on p.4, about half way down the text on that page:

23 “Ofcom might also consider whether it would be useful to have some form of
24 mini-consultation on the section 86 question. One of our concerns is that despite
25 the importance of this issue it was not analysed in the February consultation. This
26 route would provide an opportunity to deal with that issue and to allow effective
27 players to contribute to this important discussion.

28 I hope this is useful in laying out our position. I have done my best to be clear on
29 this but, as I hope you will appreciate, there is a limit to how much I can say given
30 that Ofcom has not set out its own position in detail. Please do let me know if we
31 can be of any further help in this matter.”

32 We see Mr. McIntosh’s response at tab 3 of the reply bundle.

33 A I am sorry, Mr. Pickford, I don’t have the reference.

34 Q I am sorry. It is our reply bundle, it is tab.3. And it is stamped “Page 1” at the bottom.

1 A Thank you.

2 Q So, you see we – do you have the email from Stuart to Andrew there? It says:

3 “Andrew, thanks for this. We’ve been giving the issues careful thought since our

4 meetings and it’s very helpful to have your views set out so clearly. If we need

5 anything further from you, we’ll get back to you”.

6 Now, he does not say, “I’m sorry, Andrew, this is not the information that we thought we’d

7 be getting from you”.

8 A That’s clearly not what the email says.

9 Q No. And there was no follow up from Ofcom in writing, either under s.135 or otherwise,

10 was there?

11 A There was not.

12 Q So, you cannot really fairly say that whatever it was that Ofcom internally thought that it

13 was trying to get out of Talk Talk, that Ofcom tried to extract it from Talk Talk, and Talk

14 Talk willingly simply failed to provide it. Because, as far as Talk Talk was concerned, and

15 quite reasonably so, it had given Ofcom all the information that Ofcom needed. That is

16 clear from these letters, is it not?

17 A Okay. I mean, I think perhaps it is fair to put it in a little bit of context around this and, you

18 know, to be clear, nobody is trying to suggest that Talk Talk was withholding information

19 from Ofcom during this period. We’ve been collecting data about rollout plans by

20 exchange and their timing over the last five years from all of the LLU operators including

21 Talk Talk. We’ve sent three formal requests to Talk Talk during the market review process

22 for that information, and the last one being November when they announced their new plans

23 to roll out. Clearly that information is relevant to the analysis that we do in the markets.

24 There was obviously a huge amount of dialogue between ourselves and Talk Talk in the

25 first half of this year leading up to the charge control statement; and Talk Talk was telling

26 us that there had been changes in the market, and they were supplying us all the information

27 that they had, and we was obviously pushing to make sure that we did have all of the

28 information they had and, you know, we’ve got no reason to suspect that they had any

29 additional information at the time. And that sort of really is the only point here – that we

30 had all of the information at the time, but it actually didn’t include a detailed exchange by

31 exchange rollout saying when those exchanges would be ready for service. And that’s fine,

32 and we, sort of, closed down the charge control piece of work on that basis.

33 Q My point to you is, on the basis of all the documents we have seen, there is nothing to

34 suggest that Talk Talk could fairly have understood that there was actually further, as you

1 described it, “basic information” in your witness statement, basic information, that they had
2 failed to provide you that you wanted but they had not given to you.

3 A As I say, I would find it almost impossible to believe that Talk Talk would not understand
4 that having rollout information on an exchange by exchange basis was important to us.
5 And, as I say, the accounts from the people that attended these meetings at the time was it
6 was clear that that was what we was asking for. However, you know, what we was taking
7 away or the team was taking away from those meetings, was that that information just
8 wasn’t available at that time.

9 Q I have no further questions. Thank you.

10 THE CHAIRMAN: Thank you very much, Mr. Pickford. Now, Mr. Clarkson, there is just one
11 point that I would like to raise with you before I invite Mr. Pickford to ask any further
12 questions or Mr. Holmes to re-examine. It does raise, I think, questions of mixed fact and
13 law. I just want your factual take on this, but unfortunately in these cases law and facts tend
14 to get mixed up. Can I just make sure we both have the same provisions of the
15 Communications Act in mind? And, perhaps the witness could be given AuSD1, tab.1
16 which I think has the Act. Mr. Clarkson, if you open that bundle at tab.1, and turn up
17 s.86(1)(b).

18 A I have that in front of me.

19 Q I am grateful. And you see there that contains the obligation of Ofcom to satisfy itself that
20 there has been no material change, in sub-paragraph (b). And then we see further down the
21 page the definition of “material change” which is in subsection (6) it is:

22 “A change is a material change for the purposes of subsection (1) or (4) if it is one that
23 is material to –

24 (a) the setting of the condition in question”

25 So, you see that. Now, one thing that seems to me to be clear is that what is included in the
26 definition of what is material on the statutory criteria for the imposition of SMP conditions
27 which are then contained in section 87 and 88 of the Act. There may be argument on that,
28 but you need to have those provisions well in mind. And we see in section 87(9) that there
29 is a set of criteria there specified which are relevant to the setting of SMP conditions that
30 impose price controls. You see that. And then we see, in section 88, a series of factors that
31 need to be borne in mind when setting price control conditions. If you look in
32 section 88(1)(b) you see three listed there:

33 (i) promoting efficiency

34 (ii) promoting sustainable competition; and

1 (iii) conferring the greatest possible benefits on the end-users of public electronic
2 communications services.

3 You do have section 88 in the bundle? It was not in my bundle when I looked this morning.
4 I am grateful. I am sorry, that was a long lead-in to the question. It would seem fairly clear
5 that a price control of RPI minus 12 per cent has a direct benefit on consumers and would
6 probably tick boxes (i) and (iii). Now Talk Talk are saying, though that such a price control
7 has a direct effect on their own approach in terms of unbundling Market 1 exchanges. And
8 so, essentially, there seems to be an interplay between price control that Ofcom imposes and
9 the Market 1 exchanges that Talk Talk would propose to unbundled in the light of such
10 price control – in other words there is a sort of feedback loop between the two. And, just to
11 take a purely hypothetical example, it may be that on the basis of an RPI minus RPI control,
12 Talk Talk would unbundled 500 exchanges, whereas on the basis of RPI minus 12 per cent
13 price control, Talk Talk would unbundled fewer, say 250. And my question, after that
14 rather long introduction is this: did Ofcom consider this a relevant factor in determining
15 what price control should be imposed; and, if so, where did Ofcom consider that trade-off?

16 A So – this is really what we would call an efficient investment point, and obviously
17 s.88(1)(b)(ii) is about sustainable competition, not just competition for its own sake, so to
18 speak. So, there was, and I can't remember all of the paragraphs, but there was some
19 references to promoting efficient entry into the markets during the, in the market review
20 period of this piece of work, which concluded in December of last year. And then, in fact,
21 in introducing the charge control, particularly in the charge control statement, there was
22 actually quite a lot of paragraphs which set out our views about trying to make sure that our
23 charge control would still allow for efficient investment to take place.

24 Q Mr. Clarkson, this is not a memory test. So, let me just ask you to look at that document,
25 20th July price control which is at CD1. If you just turn that up. It is CD1 tab.4. And
26 I think, though I am sure you will correct me if I am wrong, that the paragraphs where this
27 point was considered are at paras.3.5 following. Is that right?

28 A Yes, it is certainly around this area. So, yes, sort of starting – one of the strands, starting at
29 3.2(1) “Assessing the impact of the charge control”.

30 Q And then it goes on over several pages including a discussion of consistency with previous
31 WBA reviews.

32 A It does.

33 Q But, that is where this point is considered in this document.

1 A Yes. As I say, there are some other references within this document, and there are even
2 some references which refer back to what we said in the market review statement as well.
3 I could find them if you would want to bear with me?

4 Q We will not do so now, I think, but if there is a list of further references and should bear in
5 mind perhaps it could be handed up during the course of today, that would be very helpful.

6 A Sure.

7 Q I am sorry, Mr. Pickford, that was rather a long lead-in to a fairly short question, but if you
8 have any questions arising out of that, do ask.

9 MR. PICKFORD: I do not, sir.

10 THE CHAIRMAN: Mr. Holmes.

11 Re-examined by Mr. HOLMES

12 Q I have some very short questions in re-examination, if I may. Firstly, Mr. Clarkson, may
13 I just ask you to take up your statement again in defence bundle tab.10, and turn to
14 para.30(3). Could you quickly review that and just confirm to the Tribunal what specific
15 information you are referring to there which you say was not provided by Talk Talk during
16 the period of the run-up to the charge control statement?

17 A So, the specific information here is actually on a per exchange basis, the timeline when
18 those exchanges will be unbundled such that Talk Talk would be in a position to offer end
19 users, customers, services over its unbundled network.

20 Q Thank you. Second question. Mr. Pickford proposed a distinction between
21 contemporaneous meeting notes and the Ofcom internal emails to which you were taken. Is
22 that any distinction which you would be recognise?

23 A No, it's not. We would frequently use emails to record meeting notes and we can directly
24 copy them to our file notes register through that mechanism.

25 Q Thirdly, may I take you again to the email of 6th July 2011 in the Ofcom disclosure.
26 Filomena Ciccarelli's email to Stuart Mackintosh and Chris Rowsell on which you were
27 copied. You will see there a reference in the second paragraph to a meeting in February in
28 which it is stated that:

29 "Ofcom asked for detail of the unbundling timescale".

30 Can you comment on that February meeting?

31 A Yes. Sure. The rather, rather embarrassingly, this February reference is actually making
32 reference to the meeting on 18th March, and in fact it was when we was reviewing this
33 particular email that caused us to dig into a bit deeper. So that is actually making reference
34 to the meeting on 18th March.

1 Q And, one final question, the letter from Mr. Heaney of 8th July 2011 to which you were
2 taken was 12 days prior to the charge control statement itself. Can you explain what impact
3 that would have had in relation to further follow up by Ofcom?

4 A Sure. So, I mean, as it was because of the extended dialogue we'd had, it won't come as a
5 surprise that the charge control statement was already late, and, you know, this was the
6 phase where we was just making sure that we had all of the information on which to take
7 our final decision. And it would have been great to have timelines – you know. However,
8 you know, what we set out in the charge control statement, which we also set out in the
9 market review statement is, even not knowing precisely that information, we can take a
10 view of what, if you like, might be the maximum competitive impact that it could have if it
11 was, sort of, loaded towards the front end so that it would actually have the biggest impact
12 during the market review period that was remaining. And our view was that, you know, it
13 was unlikely to materially change the competitive conditions in market one on that basis.

14 Q Thank you, Mr. Clarkson, no further questions from me.

15 THE CHAIRAN: Mr. Clarkson, just one short point – when you speak about this typographical
16 error, where “February” should read “March”, you know that because you have looked for a
17 meeting in February and there was not one. Is that how you draw that conclusion?

18 A That's correct. I got the team to dig out every single meeting that was had, and in fact there
19 was, I don't think there was any meetings with stakeholders in February at all. Certainly no
20 meetings with Talk Talk in February.

21 Q Thank you very much, Mr. Clarkson, that is helpful.

22 MR. PICKFORD: Sir, I just have one question arising out of that re-examination which did go
23 into somewhat new territory when Mr. Holmes asked about the time frame between the
24 final decision and the provision of the information.

25 THE CHAIRMAN: All right, Mr. Pickford, one question.

26 Further Cross-examined by Mr. PICKFORD

27 Q Mr. Holmes mentioned the letter of 8th July, he said what would the impact of that have
28 been. That letter that I read to you, it said that orders had been submitted and accepted for
29 462 of these exchanges with confirmed delivery dates for 238, so you knew at that point
30 without having to do anything further in that intervening period that all of those were
31 confirmed exchanges. That is correct?

32 A Sure

33 THE CHAIRMAN: Mr. Holmes, nothing further out of that?

34 MR. HOLMES: No, sir.

1 THE CHAIRMAN: Mr. Clarkson, thank you very much.

2 (The witness withdrew)

3 THE CHAIRMAN: Before submissions, Mr. Holmes, do you have an application or not?

4 MR. HOLMES: No, sir, no application.

5 THE CHAIRMAN: I am pleased to hear it. Mr. Pickford, I think it is you to go first.

6 MR. PICKFORD: The scheme of my submissions is as follows. First, I propose to give a very
7 short overview of our appeal. I then propose to go through the legal framework. Thirdly, I
8 propose to go through the factual and regulatory background, including the key Ofcom
9 decisions relevant to the appeal, and finally I will address you on the grounds of appeal
10 themselves. I will focus principally on Ofcom's case and at the end I will deal briefly with
11 some of the points made by the interveners, time permitting.

12 Obviously, whether we ultimately get onto the question of remedy will depend on what
13 view the Tribunal forms of this appeal but I am not proposing to address you on that at all
14 today.

15 Summarising the Talk Talk appeal we challenge two aspects of the decision of Ofcom of
16 20th July 2011 which I am going to refer to as the wholesale broadband charge control
17 decision ("WBACC decision"). In the WBACC decision Ofcom set a price control in what
18 Ofcom defined as Market 1 in a number of markets for wholesale broadband access.

19 There is a redacted non-confidential version of the statement at CD1 3 and a confidential
20 version at CD1 4.

21 The WBA decision followed an earlier decision on 3rd December 2010 contained in a
22 document entitled "Review of the wholesale broadband access markets", and that is the one
23 that we referred to as the wholesale broadband access market review or again for short the
24 WBAMR statement. I hope that is clear, before I start adopting acronyms that no one
25 understands.

26 Again, there is a redacted version of that decision at CD2 6. In the market review
27 statement, the WBAMR statement Ofcom, amongst other factors, made findings of
28 significant market power in Market 1. I will go over that in more detail because it is
29 important, but in short Market 1 comprises those exchanges where only BT is present or
30 forecast to be present, and we see that at para.1.19 of the statement, and I will take you to
31 that in due course.

32 Where there was a single competitor to BT either present, or forecast to be present, then the
33 exchange was classified as within Market 2 in respect of which no price control was
34 imposed.

1 Ofcom did not in the WBAMR decision impose the price control, as we know the two
2 decisions would go hand, the designation and the imposition of the price control itself, but
3 Ofcom is not bound to proceed that way, it is permitted, if it wishes to re-consult and that is
4 what it did in this case. It divorced a setting of the control from the SMP designation.

5 There is a very significant implication if you do that, and it is that s.86 of the
6 Communications Act 2003 is thereby engaged. In the circumstances of the present case that
7 meant that Ofcom was prohibited from going on to impose a price control unless it was
8 satisfied there had been no material change in the relevant market.

9 This appeal concerns two issues. First, ground A, the issue there is at the time of and in
10 reaching the WBA CC decision Ofcom took proper and sufficient steps to satisfy itself that
11 it had complied with what we say is the strict obligation in s.86(1)(b) of the 2003 Act, only
12 to impose an SMP services condition subsequent to a market power determination when
13 there has been no material change in the relevant market since the SMP decision has been
14 made. That is issue 1.

15 We say that when one looks carefully at the consultation what Ofcom says in its defence
16 and in the evidence about what it did that Ofcom did not engage properly with the s.86
17 issue. Indeed, we say that its approach was in stark contrast to previous and subsequent
18 decisions where s.86 has also been engaged, and one can see that Ofcom has taken clear,
19 positive steps to satisfy itself the test was met and it has engaged with it on the substance.
20 Ofcom, for its part, says none of that was necessary and it relies, amongst other factors, on
21 its market oversight, including general meetings with market participants, and it suggests
22 that 60 ** was sufficient to obviate the need for explicit engagement with those factors that
23 Talk Talk says was necessary.

24 We say on scrutiny that that attempt to fall back on general market oversight is not
25 sufficient, and I will explain why during the course of my submissions. We also say that it
26 is tolerably clear in reality when you step back what was at the heart of Ofcom's approach
27 and its lack of engagement with s.86. that is because we say that Ofcom actually
28 misdirected itself as to what s.86 means, and one sees that from Ofcom's defence in these
29 proceedings.

30 The biggest change in the market that was apparent to everyone was Talk Talk's previously
31 uncommitted non-specific plans to roll out LLU, becoming far more concrete and turning
32 into firm, specific plans in respect of which there were commitments for specific exchanges.
33 Now, Ofcom thought in the decision - and I will come to it, but this is key - that because
34 the change in Talk Talk's plans were something affecting the future rather than something

1 that had already taken place in concrete terms it was irrelevant to s.86 and therefore could
2 be ignored – that is what we will see in the decision itself. Ofcom now admit in the defence
3 that that was wrong.

4 We say that having taken a wrong turn at the outset that it was hardly surprising they have
5 ended up at the wrong destination and failed to see the sights it should have seen on the way
6 because it was simply following a different path. That is a summary of ground A, and I will
7 come on to explain it in more detail.

8 Ground B we only ever get to if I am wrong on my first ground, and if Ofcom did take
9 proper and sufficient steps we say that in any event the answer it got to was the wrong one,
10 and that there had been a material change in the geographic scope of Market 1 since the
11 WBAMR statement, and that was relevant for s.86.

12 Again, the key issue that arises in that context is the change in Talk Talk’s roll out plans,
13 and the reason why the change between uncommitted and committed is so critical is
14 because if plans are merely in respect of uncommitted exchanges they are necessarily
15 disregarded for the purposes of the designation between Market 1 and Market 2, because
16 naturally it stands to reason Ofcom cannot say: “We think this exchange is one where there
17 is forecast to be roll out, it does not know.” It can only do that when the plans are concrete
18 ones for specific exchanges, and when they are concrete and forecast to be present then they
19 go into Market 2. We say the remarkable statistic in this case that by the time Ofcom came
20 to take its decision to impose the price control. 40 per cent of the market no longer satisfied
21 the original test for inclusion in Market 1. Ofcom’s only real way around that problem is to
22 argue that it is legally irrelevant. They say we are simply addressing the wrong question.

23 We see that at para. 5 of their skeleton argument, and I will come on to the detail of that, but
24 I will come on to the detail of that but our response of course is that that is not sustainable.
25 That is a very broad outline of the key issues in the appeal and why, we say, we should
26 succeed.

27 Turning then to the legal framework. First, I hope to take you at a reasonably brisk pace
28 through the sources of law. I then propose to summarise what we say are the key legal
29 principles to come out of that, and then I shall address you on some of the key authorities
30 underpinning those principles, and subject to a slight modification that broadly reflects the
31 scheme in our notice of appeal.

32 I am going to deal with the construction of s.86, which is obviously absolutely key to this
33 appeal after that, because it draws together some of the strands from the other parts.

1 Turning first to sources of law. First, we obviously have the European Regulatory
2 Framework. That was amended recently by Directive 2009 140 EC, so the relevant
3 Directives for our purposes are the Directives as amended, and they are the ones in our
4 authorities' bundle.

5 We begin first with the Framework Directive, and that is at tab 3 of authorities 1. I will try
6 to go through this fairly briefly because I am sure the Tribunal is relatively familiar with
7 these because it is helpful at least to set out the basic grounds for the appeal.

8 If one goes to Article 1 of the Framework Directive, external p. 58 The scope and aim of
9 the Directive is to establish “a harmonised framework for the regulation of electronic
10 communications services networks and associated facilities and certain aspects of terminal
11 equipment to facilitate access for disabled users.

12 “It lays down tasks of national regulatory authorities and establishes a set of
13 procedures to ensure the harmonised application of the regulatory framework
14 throughout the Community.”

15 Then if we go back to the recitals that help provide some context. If I ask the Tribunal very
16 briefly to read the first sentence of recital 15, that deals with the importance of consultation.
17 Then recital 27 – it is probably easier if I read the parts I would like to direct the Tribunal
18 to.

19 “It is essential that *ex ante* regulatory obligations should only be imposed where
20 there is not effective competition, i.e. in markets where there are one or more
21 undertakings with significant market power, and where national and Community
22 competition law remedies are not sufficient to address the problem.”

23 It then talks about the Commission drawing up guidelines, and then a little further down,
24 about half way down the paragraph we begin a sentence:

25 “An analysis of effective competition should include an analysis as to whether the
26 market is prospectively competitive and thus whether any lack of effective
27 competition is durable.”

28 Then at 28:

29 “In determining whether an undertaking has SMP in a specific market NRAs
30 should act in accordance with Community law and take into the utmost account the
31 Commission guidelines.”

32 Then if we go back to the provisions of the Directive itself. We have already looked at
33 Article 1. Article 6 deals with transparency and consultation. Article 7 deals with co-

1 operation with other national regulatory authorities. Then Article 8 sets out the key policy
2 objectives and regulatory principles. We see at Article 8 (1):

3 “Member States shall ensure that in carrying out the regulatory tasks specified in
4 this Directive and the Specific Directives, the national regulatory authorities take
5 all reasonable measures which are aimed at achieving the objectives set out in
6 paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.”

7 Then we see at 2:

8 “The national regulatory authorities shall promote competition in the provision of
9 electronic communication networks ...” etc.

10 There are a number of policy objectives and regulatory principles there. The ones that
11 I have highlighted are the key ones for our purposes today.

12 If we then go on to article 15, that sets out a procedure for identification and definition of
13 markets. Article 15(1) provides for the Commission to adopt a recommendation on relevant
14 products for service markets. That is what we call “the recommendation”. Article 15(2)
15 provides for the Commission to publish guidelines for market analysis and assessment of
16 SMP, and those are guidelines. And they need to be in accordance with the principle of the
17 competition law. And then article 15(3) says that:

18 “National regulatory authorities shall, taking utmost account of the recommendation
19 in the guidelines, define whether the market is appropriate to national circumstances,
20 in particular relevant geographic markets within their territory in accordance with the
21 principles of competition law”.

22 And then we have Article 16 which lays out a market analysis procedure, details of which
23 I do not need to particularly trouble you with. So, that is a somewhat whistle-stop tour
24 through some of the key points of the Framework Directive.

25 If we could turn to the access directive, please. That is at tab.2 of the same authorities
26 bundle. Again, it is easiest to go, firstly to article 1 and then back to the recitals, because
27 article 1, we see: The scope and aim of the directive. “Within the framework set out by the
28 Framework Directive” which we have just seen,

29 “... this directive harmonises the way in which Member States regulate access to,
30 and interconnection of, electronic communications networks and associated
31 facilities. The aim is to establish a regulatory framework, in accordance with
32 internal market principles, for the relationships between suppliers of networks and
33 services that will result in sustainable competition, interoperability of electronic
34 communications services and consumer benefits”.

1 And then, we can flesh out the context by turning back to some of the recitals. We see at
2 recital 13 a reference to a review. Now, this is actually a review that is to take place
3 directly after the directive first came into effect. So, the review itself has now been and
4 gone. That is history. But what it says in the second sentence we say is still valid. It says
5 that:

6 “The aim is to reduce *ex ante* sector specific rules progressively as competition in the
7 market develops”.

8 So, that is one of the key principles here, that obviously one does not want to regulate
9 unless one absolutely has to. That is why regulation has to be objectively necessary,
10 proportionate, etcetera. Then, recital 20 deals with when price controls may be necessary.
11 And if I could just ask you to read down the first two-fifths of that, down to the phrase, “is
12 not sufficiently strong to prevent excessive pricing”. So, what the directive is recognising
13 here is that price cap regulation, price controls, are at the much heavier end of the spectrum
14 of possible intervention. And, of course, that is reflected in the present case, because
15 Ofcom found that there was SMP in both Market 1 and Market 2. But in Market 2 there is a
16 general cost orientation obligation. It is only in Market 1 where there is actually price
17 controls. Then, returning to the directive itself, we go to article 8. That deals with the
18 imposition, amendment and withdrawal of obligations. And following the procedure of
19 market analysis and identification of undertakings with SMP that is blushed by articles 14-
20 16 of the Framework Directive which we just saw:

21 “National regulatory authorities are required, pursuant to article 8(2) of the access
22 directive to impose obligations as set out in articles 9-13 as appropriate”.

23 And then a further key point for our purposes is also para.4 which sets out that:

24 “Obligations imposed in accordance with this article shall be based on the nature of the
25 problem identified proportionate and justified in the light of the objectives laid down in
26 article 8 of the Framework Directive. Such obligations shall only be imposed following
27 consultation in accordance with articles 6 and 7 of that directive.

28 And then we see that in article 13, which is referred to in article 8, price control and cost
29 accounting obligations is one of the types of control that can be imposed.

30 So then if we can turn to the guidelines that were mentioned in the Framework Directive,
31 these are to be found at tab.4 of the same bundle. And the key point that we draw from
32 these guidelines is that the competitive analysis required of Ofcom when defining markets
33 and considering SMP is it must be forward looking, it must be prospective. And we see
34 that, for instance, at para.20. If I could just ask the Tribunal to read the whole of para.20,

1 please, on p.78. And a further key point to draw out from that is that, when one is looking
2 forward, the period that one looks over has to be a reasonable period. And it says here that:

3 “The actual period used should reflect the specific characteristics of the market and
4 the expected timing of the next review of the relevant market by the NRA”.

5 So, obviously if it is a three-year price control, you would expect to be looking forward over
6 that three-year period.

7 Then we see at para.27 the same point being emphasised. And, again, it is about, “an
8 overall forward looking assessment of the structure and functioning of the market. If I just
9 ask the Tribunal to read down to the words, “structure and functioning of the market under
10 examination”.

11 Again, we see some very similar themes. I am not going to ask the Tribunal to read them,
12 but just for the Tribunal’s note, paras.35 and 75 contain some very similar points again.

13 And then, finally, at para.80, we see the following, in the final two sentences:

14 “In electronic communications markets, competitive constrains may come from innovative
15 threats from potential competitors that are not currently in the market. In such markets the
16 competitive assessment should be based on a prospective forward looking approach”.

17 Again, we say that is exactly the situation here, and why it was important for Ofcom to look
18 at planned rollout as well as exchanges where there was already rollout. And, again, simply
19 for your note, we see the same points emphasised yet again in the explanatory
20 memorandum. That is at tab.5A of the authorities bundle. That is the explanatory
21 memorandum accompanying direct recommendation on markets, and in particular para.2.1
22 of that, again, emphasises this prospective point. So, that is the Community framework in
23 broad outline.

24 We then have some general principles of Community law. I do not think any of these are in
25 dispute, that Ofcom is required to comply with the principles of proportionality and non-
26 discrimination. No-one is arguing about that.

27 The third source of law is of course the Communications Act itself. The European
28 regulatory framework is implemented inter alia by the 2003 Act. And so, if we could pick
29 up the Act, which is at tab.1 of the authorities bundle. Section 1 sets out general functions
30 and powers. We do not really need to concern ourselves too much with that. Section 3,
31 over the page, deals with general duties; and in particular the key points for our purposes
32 are that:

33 “It shall be the principal duty of Ofcom in carrying out their functions –

34 (a) to further the interests of citizens in relation to communications matters; and

1 (b) to further the interests of consumers in relevant markets, where appropriate
2 by promoting competition”.

3 And then subsection (3):

4 “In performing their duties under subsection (1), Ofcom must have regard, in all cases,
5 to –

6 (a) the principles under which regulatory activities should be transparent,
7 accountable, proportionate, consistent and targeted only at cases in which action
8 is needed; and

9 (b) any other principles appearing to Ofcom to represent the best regulatory
10 practice”.

11 Then we have section 4 which sets out duties for the purpose of fulfilling Community
12 obligations. I have already taken you to the Community obligations themselves. I do not
13 think I need to dwell on those as they are effectively repeated in section 4.

14 Then we have section 6 which imposes an obligation on Ofcom to review regulatory
15 burdens.

16 “(1) Ofcom must keep the carrying out of their functions under review with a view to
17 securing that regulation by Ofcom does not involve –

18 (a) the imposition of burdens which are unnecessary; or

19 (b) the maintenance of burdens which have become unnecessary”.

20 And then subsection (4):

21 “Ofcom must from time to time publish a statement setting out how they propose,
22 during the period for which the statement is made, to secure that regulation by Ofcom
23 does not involve the imposition or maintenance of unnecessary burdens”.

24 Now, in the present case that statement is to be found at tab.32 of authorities bundle 4, if we
25 can look at that just very briefly. Tab.32 contains a draft annual plan and one sees from the
26 final annual plan that the statement of principles, they refer back to the draft annual plan at
27 section 8 for those. And if you could turn, please, to section 8 of the document which is
28 external page 2172, if I could ask you, please, just to briefly read para.8.2, the regulatory
29 principles, quoting in particular on the bias against intervention. And then para.8.3 makes
30 an important point for our purposes, that:

31 “Our bias against intervention aims to ensure that we regulate only where necessary.
32 Unnecessary intervention can distort or stifle the development of competitive and
33 innovative markets”,

1 And that is an important point. So then back to the 2003 Act. We have just looked at
2 section 6 and the next page on in the bundle is section 45. That provides Ofcom with the
3 power to set binding conditions including SMP conditions. We see SMP services. We are
4 concerned, obviously with SMP services conditions in this case. We are not concerned with
5 apparatus, and that is in subsection (8).

6 And then section 46 over the page, sets out the persons to whom conditions may apply, and
7 again at subsections (7) and (8) we see, predictably enough in the case of SMP conditions,
8 you need to have SMP.

9 Section 47, over the page, sets out the test for modifying or setting conditions, and this is an
10 important section. So, if I could ask the Tribunal, please, to read the entirety of section 47.
11 So, that is the statutory section that embodies the requirement of it being objectively
12 justifiable, proportionate, non-discriminatory etcetera.

13 And then section 79 deals with market power determinations, and if I could ask you, please
14 to read subsections (1) (2) and (3).

15 THE CHAIRMAN: (After a pause): Yes.

16 MR. PICKFORD: We then have, if we turn over the page in the bundle, s.84, which deals with
17 the review of service market identifications and determinations.

18 “(1) This section applies where Ofcom have identified and analysed a services
19 market for the purposes of making a market power determination.

20 (2) Ofcom [may (and, when required to do so by s.84A, must)] carry out further
21 analyses of the identified market for one or both of the following purposes:

22 (a) reviewing market power determinations made on the basis of an early
23 analysis.

24 (b) deciding whether to make proposals for the modification of SMP
25 conditions set by reference to market power determinations made on such
26 a basis.”

27 Then we see at s.6 that: Where, on such a review, Ofcom concluded the appropriate
28 markets have changed, they must identify the markets they now consider to be the
29 appropriate ones and those markets shall be identified markets for the purposes of further
30 analysis.

31 Section 84A deals with the timing and I do not think I really need to trouble the Tribunal
32 with that. Then we have finally, s.86, which is obviously the critical provision in this case,
33 and that provides that:

1 “(1) Ofcom must not set an SMP services condition by a notification which does
2 not also make the market power determination by reference to which the condition
3 is set unless:

4 (a) the condition is set by reference to a market power determination which
5 has been reviewed under s.84 and, in consequence of that review, is
6 confirmed by the notification setting the condition.”

7 So we have just seen s.84, so that is one route obviously that can be adopted by Ofcom, but
8 it was not the route that is adopted in this case, that is common ground.

9 Route (b) is that:

10 “the condition is set by reference to a market power determination made in relation
11 to a market in which Ofcom are satisfied that there has been no material change
12 since the determination was made.”

13 Then of relevance to the interpretation of that is plainly subsection 6, which says that a
14 change is a material change for the purposes of subsection 1 or 4, if it is 1 it is material to
15 (a) the setting of the condition in question or (b) the modification of revocation in question,
16 obviously in our case we are concerned with (a) there.

17 As I said, I will come back to our detailed analysis of s.86 in just a moment. Section 87(9) is
18 the one that gives Ofcom the specific power to set SMP conditions. Then s.88, to which the
19 Tribunal took Mr. Clarkson, we see conditions about network access, pricing, etc, and the
20 particular conditions that need to be satisfied there. So we have seen that already.

21 Then finally, s.135, again over the page, sets out the information required for purposes
22 under Chapter I functions and Ofcom’s powers in relation to it, and says:

23 “Ofcom may require a person falling within subsection (2) to provide them with all
24 such information as they consider necessary for the purpose of carrying out their
25 functions under this Chapter”.

26 The persons falling within the subsection include a communications provider. So clearly,
27 we say, Ofcom cannot ask for information which they consider to be irrelevant or
28 unnecessary for the carrying out of their functions; we say this particular provision would
29 be *ultra vires*. That is the statutory background.

30 I can deal extremely briefly with the sources for domestic administrative law, they mirror
31 some of the principles we have already seen. It is well recognised in domestic
32 administrative law that decisions such as this one need to have a sufficient factual and
33 evidential basis, they need to be soundly and adequately reasoned, proportionate, non-

1 discriminatory and adopted following a sufficient inquiry on all relevant questions requiring
2 to be addressed, and also an adequate consultation.

3 So the key legal principles that we derive from that tour are that there are effectively three
4 main strands in relation to Ofcom's decision making. First, Ofcom must, as regards its
5 objectives, in this case, seek to further the interests of consumers by promoting competition.
6 It needs to seek to avoid imposing *ex ante* regulation where ever possible, and where
7 necessary to impose such regulation only impose the least intrusive regulation necessary to
8 achieve its policy objectives.

9 As regards substantive requirements of decision making those are the ones that I have
10 essentially just summarised that we also derive from domestic administrative law, and
11 additionally, in this case particularly it needs to adopt a prospective approach to market and
12 competition analysis – we saw that repeatedly emphasised. Obviously in the particular case
13 that we are concerned with it needs to satisfy s.86(1) as well.

14 As regards procedural standards of decision making, again I have just summarised those and
15 they come from the domestic administrative law as well as the European Framework.

16 So I think I can deal very swiftly with the key authorities because there is very little that is
17 in dispute, I think, between myself and Mr. Holmes and, indeed, any of the other parties on
18 the underlying law.

19 I will just take you very briefly to the notice of appeal, which is probably the easiest way of
20 dealing with these. Paragraph 39 et seq at CD1, tab 1. Paragraphs 39 through to 42 set out,
21 amongst other things, what we say is the right approach to the appeal in terms of the
22 standard of scrutiny, etc. It is a debate which has been had many times between Ofcom and
23 appellants. We do not actually think anything turns on it in this case, and so I do not
24 propose to say anything further about it save to note that our position is set out here.

25 We then have proportionality and non-discrimination. Again, we have seen that those are
26 key requirements that are imposed on Ofcom, and it is well established what both of those
27 mean. Proportionality requires a three-pronged test of legitimacy, suitability and necessity
28 so that first the legislative objective is sufficiently important to justify limiting a
29 fundamental right. Secondly, the measures designed to meet the legislative objective are
30 rationally connected to it; and thirdly, the means used to impair the right or freedom are no
31 more than is necessary to accomplish that Directive. We have taken that from *Daly* in the
32 House of Lords, but there are a number of other similar formulations, but they all come
33 down, essentially, to the same thing.

1 Again, non-discrimination means that comparable situations must not be treated differently
2 and that different situations must not be treated in the same way unless such treatment is
3 objectively justified. Again, I do not think there is any disagreement about that.

4 So then we have sufficient inquiry and proper consultation. Again, the requirements for
5 sufficient inquiry are summarised in our notice of appeal at paras. 48 through in particular
6 to 49 dealing with sufficient inquiry. Ofcom does not take issue, as we understand it, with
7 our statement of those principles – we certainly did not see anything in their defence to
8 indicate that.

9 It is common ground therefore that the decision maker must ask himself the right question
10 and take reasonable steps to acquaint himself with the relevant information to enable him to
11 answer it correctly, that is the famous *Tameside* test and that a decision maker has an
12 obligation to equip themselves with the information necessary to take an informed decision
13 – that derives from the first principle.

14 Further, the decision maker must call to his own attention considerations relevant to his
15 decision, a duty which, in practice, may require him to consult outside bodies. Obviously
16 one can see that the time when that would require consultation is where the information that
17 is necessary to carry out the functions is going to be the information that is held by third
18 parties and not by the decision maker itself.

19 We then go on to set out the requirements for proper consultation. Those are addressed at
20 paragraphs 50 through to 52. In particular, the consultation must be undertaken at a time
21 when the proposal is still at a formative stage, and it must include sufficient reasons for
22 particular proposals to allow those consulted to give intelligent consideration and an
23 intelligent response and adequate time must be given for this purpose and the product of the
24 consultation must be conscientiously taken into account.

25 “Under our domestic law fair consultation involves giving the body consulted a
26 fair and proper opportunity to understand fully the matters about which it is being
27 consulted ...”

28 Again, we do not understand that any of that is really in dispute in this case.

29 Plainly, if Ofcom’s only engagement with an issue comes in its decision itself rather than in
30 a consultation document it is not properly able to elicit the best responses from stakeholders
31 to inform that decision.

32 So that is the key legal framework. If I could then turn to the factual and regulatory
33 background.

1 THE CHAIRMAN: That is helpful, Mr. Pickford. As you know, it is the practice of the Tribunal
2 to rise mid-morning, shall we say five minutes and then you can resume in five minutes.

3 MR. PICKFORD: Indeed, sir.

4 (Short break)

5 THE CHAIRMAN: Mr. Pickford.

6 MR. PICKFORD: Thank you, sir. (To the witness) So, we were about to turn to the factual and
7 regulatory background. And our story effectively begins with the WBAMR statement that
8 was published on 3rd December 2010. There was obviously a consultation procedure
9 leading up to that, but we do not challenge that, so I do not need to address you on it. If the
10 Tribunal, please, could go to CD2 at tab.6. We have there the statement itself, and if the
11 Tribunal, please, could turn to the summary of decisions which begins at para.1.17. And if
12 I could ask the Tribunal, please, to read through to the end of para.1.26. So, what one sees
13 there is that Ofcom consider that BT had SMP in both Market 1 and Market 2, but that it
14 was only proportionate and appropriate to impose a price control in Market 1, and that
15 where there were two or more operators either present or forecast to be present, Ofcom
16 considered that notwithstanding the potential for BT to raise prices above the competitive
17 level in that market, because it had SMP, it was still appropriate not to impose a price
18 control.

19 A Yes.

20 Q And that reflected the likely constraint on BT's pricing arising from the current and future
21 investment value of the operators together with the possible impact that the price regulation
22 might have on investment in Market 2. And this goes, to some extent, to the point that you,
23 sir, raised with Mr. Clarkson. Now, Ofcom explained its general approach to market
24 definition in more detail in annexe 2 to the statement, and if we could turn to that, please, it
25 is at external p.975. If you could read, please, para.A2.1, and then, over the page at A2.5
26 you will see Ofcom confirming that it is adopting an approach which is consistent with the
27 prospective forward looking approach that I previously emphasised. That is just the first
28 bullet of A2.5 is all the Tribunal is required to read. And, indeed, Ofcom has stressed its
29 forward looking approach in its defence at para.41. It is only for your note, I do not propose
30 to take you there.

31 And then Ofcom introduces its approach to the geographic market at A22 and following.

32 And if I could ask the Tribunal, please, to read from para.A2.26 which is when we get to the
33 heart of the matter, through to the end of that section before the words "modified Greenfield
34 approach". So, what one sees there is that Ofcom had not adopted what one might consider

1 to be the orthodox approach, the SSNIP test of looking at demand and supply side
2 substitutability, because the reality is, as they recognise, if BT were to raise its prices above
3 the competitive level in a given exchange, it would not face a competitive constraint from
4 other outside exchanges even on the demand side, because customers are not going to move,
5 or on the supply side because other supplies are not going to enter sufficiently quickly. And
6 so, what Ofcom sought to do instead is to group effectively what are a large number of
7 discrete individual markets together into wider markets that it could then deal with more
8 effectively, because obviously it would be totally impractical and we accept that, to have
9 10,000 different markets, or whatever it is, so it tried to group them into different markets
10 that had similar conditions, and in particular satisfied the different tests that we saw at
11 para.1.1.19 for whether in Market 1, Market 2 or market 3.

12 Now, in implementing that forward looking approach, as we have seen, it made a critical
13 distinction between those exchanges where the rollout plans were confirmed or committed,
14 and those where they were uncommitted, and we see that in the following, annexe 3,
15 geographic analysis. If we could turn, please to external p.982 and if the Tribunal, please,
16 could read A3.6 and A3.7. One point just to note there is that although reference is made to
17 December 2010, there is no real magic in that. The information that Ofcom sought was
18 information that it got in June, and it assumed, it said to itself, "Well, we assume that these
19 will be rolled out by December 2010" but it was always forward looking, it was not saying
20 "The only thing it would be sensible to take into account would be December 2010 and of
21 course if it did that would defeat the entire forward looking process, because the decision
22 was also December 2010. So, that was really a function of the limitation of the information
23 that it had, and it was also an assumption about when those exchanges would actually be
24 rolled out, it was not something it knew.

25 And then we see at para.A3.35 the same point being made again. So, when Talk Talk then
26 announced its significant plans to roll out to a large number of exchanges shortly before the
27 publication of the MR statement, WBMR statement, Ofcom's response consistent with the
28 approach that it has already articulated was, "Well, they are uncommitted so we are not
29 going to take them into account", and one sees that at A3.8. One also sees it in the main
30 body of the statement at 3.169-3.171. The Tribunal may care briefly just to look at that. It
31 is the same point again.

32 THE CHAIRMAN: Just give me that reference again, Mr. Pickford.

33 MR. PICKFORD: I am sorry. It is paras.3.169 and the following two paragraphs as well, to
34 3.171. Ofcom explains that it was provided with this information shortly before it was due

1 to take its decision. The information concerned uncommitted plans, there were no specific
2 exchanges about **... and therefore it did not take it into account in delineating Market 1
3 from Market 2, and we do not disagree with that approach.

4 Now, just to finally tie it together. If we go to the appendix of this decision, which is
5 external p.959, one sees there in concrete terms the exchanges that satisfied the test that was
6 set out at para.119 at that point in time. We have a short list of exchanges and then a few
7 pages later, we have the equivalent for Market 2. That begins at p.966. So, that is the
8 market review decision.

9 We then move on to the consultation that followed and we find that in CD2 tab.5. Now,
10 this the only consultation document that Ofcom produced prior to imposing the price
11 control, so we say this is clearly the place where you are going to see it engage with
12 section 86. The Tribunal, very fairly and sensibly, asked us in its letter of 1st December if
13 we could identify all the passages in the key documents dealing with Ofcom's obligation to
14 consider whether there had been any material change pursuant to section 86. So, if we start
15 with this document, if one goes to the contents page on p.628, in none of the main sections
16 through from "Summary" to "Legal tests", do we find any discussion of section 86. Very
17 surprisingly, it is not even in Legal tests, but, it is not there. And in consultation questions,
18 which we will come to in a moment, which are at annexe 4 it is not mentioned there either;
19 indeed does not feature in any substantive way in this document. Now, Ofcom say, "No,
20 no, no", this is, it is all fine, it is all absolutely fine. We did everything that was required of
21 us, it is all in annexe 5". And so if you look at annexe 5 that contains the draft notifications.
22 That is external p.751. And at para.8 Ofcom says:

23 "By proposing the SMP services condition in para.6 above, Ofcom is proposing to set
24 SMP services conditions on BT by a notification which does not also make the market
25 power determination by reference to which a condition is set. In accordance with
26 section 861 of the Act, Ofcom is satisfied that there has been no material change in the
27 markets referred to in para.2 since the market power determinations referred to in the
28 same paragraph were made".

29 Now, this is a draft notification. It is a draft legal instrument. And Mr. Holmes may tell
30 you, with a straight face, that that constitutes substantive engagement, but we say it is
31 nothing of the sort, it is just boilerplate drafting that could have been copied, and probably
32 was, or adapted, from any number of draft legal instruments. That is not proper
33 engagement, we say, with section 86.

1 THE CHAIRMAN: Mr. Pickford, could I just ask this question which arises out of this? And
2 you can deal with it when you like, but it occurs to me now. We have seen the various
3 statutory requirements for imposing an SMP condition in the first place in sections 87 and
4 88.

5 MR. PICKFORD: Yes.

6 THE CHAIRMAN: These obviously have to be considered during this process *de novo*
7 irrespective of whether there is a material change or not because one is considering whether
8 or not to impose a condition.

9 MR. PICKFORD: That is correct, that they will be informed, obviously, by the s.86 analysis.

10 THE CHAIRMAN: I understand that. But they have to be considered anyway, whether
11 section 86 exists or not, because one of the things Ofcom must do is consider whether these
12 boxes can be ticked, if I can refer to it in that way, when considering whether price control
13 is appropriate. And that will be the case as I understand it, whether section 86 existed or
14 not. So, is there not an overlap between those factors which are material to sections 87 and
15 88 in any event, and those factors which are material by reason of section 86?

16 MR. PICKFORD: That is true, sir. That is certainly the case. And it would follow, and it is not a
17 point that we have drawn out in our notice of appeal, but it would follow that if their
18 analysis of section 86 is wrong, then the analysis of s.88, for example cannot be sustained.
19 We say if you have not engaged properly with what you need to know for s.86 about
20 whether there is a material change you are not properly in a position to be able to see
21 whether something is proportionate or otherwise, there is a missing step.

22 THE CHAIRMAN: Well I was wondering about that because in a sense if you have to consider
23 anyway before you impose an SMP price control condition, ss. 87 and 88, is not the
24 question for you what, over and above that, constitutes a material change within s.86?

25 MR. PICKFORD: Sir, we do not see it in those terms, because it would appear to make s.86
26 redundant. You have already got s.88, so you have already got to ensure that this is
27 proportionate, etc. Our case is essentially was there a change in the market definition or
28 not. We say that there was, that s.86 was not properly engaged with and that because there
29 was a change in market definition it would be disproportionate to go straight on to impose a
30 price control on an out of date market. To that extent ss.86 and 88 come together.

31 THE CHAIRMAN: Well, I suppose that follows, but only if you read ss.87 and 88 as obliging
32 Ofcom only to look back to the anterior determination regarding market definition.

33 MR. PICKFORD: No, we do not read them in that way. We read s.86 as effectively a reinforcing
34 obligation. Obviously at the time of imposition of the price control that is the point in time

1 when it has to be judged whether it is indeed proportionate, etc. What s.86 does is it is a
2 procedural section effectively rather than in some ways a substantive one, although there is
3 some substantive content. It is a means of ensuring and focusing Ofcom's mind on whether
4 it has actually considered the key issues that it has to consider as between its original SMP
5 designation and the charge control, to ensure that its decision as at the time of the charge
6 control is indeed a proportionate one. It is a mind focusing exercise. It does not simply say:
7 "We thought about all of this before, so we have no need to worry about it", so that is its
8 function.

9 THE CHAIRMAN: I quite see that. I suppose the point I am getting at, it may simply be a
10 question of under which roof consideration occurs, but matters that are considered in
11 ss.87 and 88 are matters which relate directly to the question of price control – is it RPM-12
12 or something different?

13 Those points that are not considered in the market definition exercise, they are considered in
14 the price control exercise?

15 MR. PICKFORD: That is true, but market definition also flows though into s.88 and, indeed, in
16 particular s.47(2) – I will come on to my submissions on that.

17 THE CHAIRMAN: Of course, there has to be a nexus between the two, the two are closely
18 linked, but the point is, in this case at least, that the market definition exercise concluded
19 simply with a view that price control was appropriate, and made no finding at all with
20 regard to what price control should be imposed, that was left to a later exercise which you
21 are helpfully taking us through now.

22 I suppose the point I am articulating is that it may well be that factors that are relevant and
23 material under s.86 were simply considered under the heads of 87 and 88, and there maybe
24 in this case a significant overlap between these two exercises.

25 MR. PICKFORD: There is certainly an overlap. It is conceivable, as you say, that some of the
26 same factors would have found their way into consideration under s.88 but in our
27 submission it does not really excuse the fact that s.86 is not substantially confronted,
28 whereas in many other cases it has been, and I would like, in due course to show you the
29 other decisions that Ofcom has taken where it really has engaged with this material change
30 issue, because what Ofcom does not answer in this, because it has not focused on s.86 it
31 goes through the motions of saying "We think it is all proportionate" but in that exercise
32 what it is not doing is performing the intellectual question which is demanded by s.86,
33 which is has anything material changed in the market since we made our SMP designation.
34 Section 86 eventually forces that rigor of whether there has been a material change so that

1 one does not simply jump to the s.88 question without really having thought hard about that
2 particular issue, the difference between the time when the SMP designation was made and
3 the time of the charge control.

4 THE CHAIRMAN: Yes, I quite see that. Clearly it aims at killing off the mischief of Ofcom
5 saying: “We reached a view on market definition on a date X, now on date X plus 10 we are
6 going to make a price control based upon that decision without looking what has happened
7 between date X and date X plus 10, that is clearly what it is going to. My point is that
8 during that period between X and X plus 10 there has to be consideration of the factors in
9 87and 88 as part of the price control process.

10 MR. PICKFORD: There does.

11 THE CHAIRMAN: But there will be, in this case at least, to an extent an overlap between what I
12 term the s.87, s. 88 exercise and the s.86 material change exercise. I suppose the point I am
13 groping towards is, is it incumbent on you to identify precisely what, in addition to the s.87,
14 s.88 exercise Ofcom should have looked at as part of its statutory duty under s.86? You
15 may tell me that is completely wrong but ----

16 MR. PICKFORD: We say that the duty imposed by s.86 is one squarely and firmly on Ofcom, it
17 is not on us, and it requires Ofcom to investigate, and I am going to come on to why we say
18 that is the case.

19 THE CHAIRMAN: Please do.

20 MR. PICKFORD: So we were at the consultation and we say that s.86 has not been engaged with
21 in the terms that s.86 requires substantively in this document. We have seen annex 5 and
22 Recital 8 to the draft legal instrument.

23 We then move on to the decision itself, that is CD1 tab 4. If we go first to para. 1.3 in the
24 Executive summary. We see:

25 “This statement sets out our conclusions on the charge control for Wholesale
26 Broadband Access (WBA) services in Market 1. We set out below our conclusions
27 following consideration of the responses to the January consultation.”

28 The price control itself is at Annex 1 and that is to be found at p.593. If one turns over the
29 page to look at “Decisions”, para. 9 one sees there:

30 “Ofcom hereby sets, in accordance with section 48(1) of the Act and in relation to
31 the services referred in paragraph 4 above, the SMP services conditions
32 implementing charge controls in relation to the market ‘wholesale broadband
33 access provided in Market 1’ as identified in the 2010 WBA Statement.”

1 So there we see the nexus between the particular decision on the price control and how that
2 relates back to the markets that I took you to in the WBAMR statement.

3 Again, in s.7 which deals with the legal tests and duties there is no substantive engagement
4 with s.86, save it is mentioned in passing at para. 7.5 but it is not substantive engagement.
5 It is addressed responsively following Talk Talk's submissions on this issue, and we see
6 that at para. 3.33 et seq of the statement – I am going to come back to this in a little more
7 detail in due course, or certain paragraphs of it – if I could ask the Tribunal to read, please,
8 3.33 through to 3.49.

9 THE CHAIRMAN: (After a pause): Yes.

10 MR. PICKFORD: That is the substantive engagement with that particular issue. The Tribunal
11 asked us to clarify in its letter of 1st December what we say is the material change.
12 Hopefully, I have already explained what we say was material and what changed. It is the
13 change from Talk Talk having a short list of uncommitted exchanges to then firming up its
14 plans, and we see that first at paras. 12 to 13 of Mr. Heaney's first statement where he
15 explains about how he had the short list and then if one were to go –but I am not sure the
16 Tribunal does need to go to it if the Tribunal has this point properly – at paras. 18 and 19 he
17 then goes on to explain how, by the time of the statement there are some 556 exchanges in
18 Market 1 where there were confirmed roll out plans. He explains that both orally – we saw
19 500 exchanges at least mentioned in the letter to Stuart McIntosh. There were also some
20 submissions that Talk Talk made but referred to the fact that its exchanges had ... the
21 details of all those are given in my skeleton. I do not think it is in dispute that that
22 information was provided by Talk Talk to Ofcom, the fact that the exchanges that were
23 previously merely a short list of uncommitted exchanges became confirmed exchanges. So
24 unless the Tribunal has concerns about that, I think I can skip over that.

25 THE CHAIRMAN: I do not have concerns, but I do have an item of homework which it might
26 assist the parties to do for purposes of our decision making. If you look at para.19 of
27 Mr. Clarkson's statement, you see there he has a fourfold categorisation of exchanges. For
28 our part, it would be helpful to have a breakdown of the exchanges that Talk Talk was
29 proposing to roll out at various points in time (and I will identify those points in time in a
30 moment) and then break down those exchanges where there is to be 700, 500, whatever
31 number it is, under those four heads, "Live", "Committed", "Uncommitted" and
32 "Otherwise". And the dates that it would be helpful to have that breakdown for would be
33 3rd December 2010, 20th January 2011, 31st March 2011 and 20th July 2011. That way we
34 can simply track the material change over time.

1 MR. PICKFORD: Thank you, sir. We will endeavour to do our best in relation to that.

2 THE CHAIRMAN: That is very helpful, Mr. Pickford, I am sorry to spring that on you. It would
3 also be helpful – and this is, of course, where the sting is – if that table could be agreed
4 between the parties rather than disagreed. And if there is a disagreement, then perhaps the
5 area of it could be noted.

6 MR. PICKFORD: Thank you, sir. I think in that case, if it needs to be agreed, it may be
7 something that we provide after the close of the hearing. It may be difficult to do that.

8 THE CHAIRMAN: I think it is almost certain that will be case. I think the short adjournment
9 will be a little bit too short for you to achieve.

10 MR. PICKFORD: I am very grateful, sir.

11 THE CHAIRMAN: Thank you, Mr. Pickford.

12 MR. PICKFORD: The other thing that we take from Mr. Heaney’s statement at para.19 is that by
13 the time of the WBACC decision – so, that is by the time of 20th July – the 556 confirmed
14 exchanges which he refers to accounted for 40 per cent of the market by premises served.
15 Sorry, sir, it has taken a little while to get there. That was the background. But I thought it
16 was important at least to try to go over that to some extent.

17 THE CHAIRMAN: No, that is very helpful.

18 MR. PICKFORD: We now move on to the construction of s.86 and then into the grounds
19 themselves. So, it would probably be helpful if the Tribunal could re-open the authorities
20 bundle tab.1 and bring up section 86 which is at external p.19. So, there are essentially four
21 key points that we draw from this section. The first of those is that section 86 contains a
22 strict prohibition against imposing an SMP condition unless the test permitting the
23 derogation from that prohibition is met. And, moreover, Ofcom requires to be satisfied that
24 there has been no material change. And so we say it is clear from that that section 86 is
25 imposing a positive duty on Ofcom to satisfy itself to ensure that there has been no material
26 change since the determination was made. It is not up to us to ensure that Ofcom has that
27 information. I mean, obviously, if they ask us, we need to provide it. But there is an
28 obligation on Ofcom proactively to do that.

29 Now, of course, section 86 could have been different. It could have been differently
30 worded. It might have said something to the effect of “Well, Ofcom may impose an SMP
31 condition at any time irrespective of whether the SMP designation is made at the same time
32 unless it becomes aware that there has been a material change in the market, and obviously
33 if it was worded in that way there might be more scope for argument about the extent of
34 Ofcom’s obligation, but it is not. We say the wording that is in s.86(1) that one sees there is

1 deliberate. And the implications of it are clear. And, of course, if that proactive duty was
2 not imposed on Ofcom, we say section 86 would be rendered essentially sterile because
3 Ofcom would be entitled simply to assume that there had been no change unless another
4 party happened to bring to its attention factors which suggested that there had been a
5 change. And that, depending on the circumstances, might or might not happen. In some
6 circumstances it might be in the interests of consultees to do that; in other circumstances it
7 might not be.

8 Now, in the light of those points, we say that there are effectively two positive steps that
9 were required of Ofcom. Firstly, it had to elicit information from relevant parties on
10 whether or not there would or could be a material change by the time of its ultimate
11 imposition of price controls. And combined with that, separately or at the same time, to
12 consult on the issue by outlining its analysis of the section 86 material change issue, setting
13 out its reasoning and, if necessary, its evidence so that parties could properly comment on it.
14 Now, by definition those steps cannot be fulfilled in advance of the interregnum between
15 the SMP determination and the imposition of the price control, because the whole purpose
16 of section 86 is to force Ofcom to be alive to and assess the impact of changes in the market
17 occurring between those points in time. Indeed, section 86 is not even engaged until after
18 the decision to set the, to designate the SMPs or to engage until the ultimately the decision
19 to impose the SMP condition itself. So, that is the first point we make about section 86.
20 The second concerns its purpose, and we have already discussed this to some extent. As
21 I have already taken the Tribunal to, the European regulatory framework makes very clear
22 that SMP conditions can only be imposed where there is SMP on the specific market; and
23 moreover we have also seen that Ofcom is under a clear duty not to set any condition which
24 does not satisfy in particular the tests in section 47.2. That is for any condition. Obviously
25 the price control conditions also require section 88, but section 47.2 is the objective
26 justification for proportionality test that it needs to apply.

27 And, pursuant to section 6(1) and 6(7) which I took you to, Ofcom is also required to keep
28 its functions under review and also to have regard to principles including its bias against
29 regulation. So, there is a very strong bias against imposing any regulation which is not
30 justified at the time, fully justified and necessary at the time which it is imposed. And, as
31 we just discussed, what section 86.1 effectively does is, it acts as a means of directing
32 Ofcom's attention to ensure that it is as live as it can be to any changes happening in the
33 market so that, when it finally comes to impose the SMP condition, it does so in a manner
34 which ensures that it is strictly necessary and if indeed there has been a change, it does not

1 impose an SMP condition at that point; it has to go back and ensure that it re-defines its
2 markets and the SMP designation that goes with that.

3 Now, the re-consideration could include a number of matters. It could include whether the
4 party holds SMP, it could include whether the remedy that is appropriate is the one that
5 Ofcom thought originally they should impose; but it could also include, obviously, the
6 scope of the markets because the price control is defined by reference to a particular market,
7 and if that market has become out of date, we say it would obviously be wrong to continue
8 to use the very substantially out of date market definition to impose the price control. So,
9 that is the second point about section 86.

10 The third issue is – just putting some materiality for a moment – what constitutes a change,
11 and in particular do changes as regards plans which are obviously forward looking in
12 nature, do they count? Now, happily there is now a measure of agreement between us and
13 Ofcom on this issue, because Ofcom have conceded (for your reference it is para.83 of their
14 reply) but its original interpretation of section 86 which you will have seen at para.3.42 of
15 the CC statement was wrong, and it now agrees with Talk Talk that section 86 demands a
16 forward looking assessment, just as the primary process of assessing markets also requires a
17 forward looking assessment. So, you are not looking backwards and saying, “Has a
18 concrete event taken place in the market?” You are also looking fwd to what is expected or
19 what is foreseeable, and you are saying, “Is what is now expected or foreseeable materially
20 different to what was expected or foreseeable at the time that the SMP designation was
21 made? And we say on the facts of this case quite plainly there was a change of that nature.
22 That brings me, finally, to the fourth issue that arises in relation to the construction of
23 section 86, which is what is material? And, again, that reflects a question the Tribunal put
24 to us in its letter and obviously an extremely incisive question, but it brings to the fore a
25 very important point. We have looked at subsection (6) which assists us in construing what
26 is meant by material change, because it says:

27 “A change is a material change for the purposes of subsection 1.4 if it is one that is
28 material to the setting of the condition in question”.

29 And we say that one derives from that effectively two elements to the materiality test.
30 Clearly it must be material, firstly, in the ordinary sense of the word, so that, if there is a
31 change that has taken place that is a *de minimis* or of a trivial nature, those kinds of changes
32 can be ignored. You do not have to stop and put down your tools and reconsider every
33 possible change that there might be. So there is that element to it. There is also a second

1 element to it which is that it needs to be material to the test for setting a condition. And this
2 is again a point that you, sir, have mentioned earlier on.

3 Now, there are a number of elements to that. There is the section 47.2 test. There is the
4 section 88.1 test, and so what one says to oneself is, "Had there been, for example, had there
5 been a change in the market, and could that affect whether the price control set is still
6 objectively justifiable and proportionate across the entirety of the market as originally
7 defined? And if I could just illustrate that point a little bit further. Let us suppose that
8 Ofcom had divided the UK outside Hull into markets 1, 2 and 3, just as it did in the present
9 case. But, suppose instead in this hypothetical world, it decided to impose the same price
10 control in both Market 1 and Market 2. There is SMP in both, and it may have said to itself,
11 "Well, we think a price control is inappropriate in both, across the entirety". Now, in that
12 case, now let us assume that the change that took place is the same change in this case, that
13 in relation to the market definition we say 40 per cent of what was in Market 1 should
14 probably be allocated to Market 2. We say that would be material for the purposes of
15 market definition, but there is an argument at the very least that it is not material to the
16 setting of the price control because it makes no difference to the price control whether you
17 are in Market 1 or Market 2. It might have made a difference to some other aspect of their
18 reasoning, for instance some other particular SMP condition might have been different
19 between 1 and 2, but in relation to the price control because the price control embraces
20 1 and 2, it makes no difference, and so that, if I might say, is our means of trying to explain
21 what he is getting at in subsection 6. Now, of course in our case it is completely different.
22 Because in our case there was a price control in Market 1 and not in Market 2. And so we
23 say it is extremely material to the setting the price control whether you have got the
24 delineation between Market 1 and Market 2 right. So, to some extent I have strayed into
25 ground B there a bit, and also in answering, sir, your questions earlier on, but obviously one
26 cannot escape that to some extent by setting the framework for the whole appeal. So, that is
27 everything we have to say prior to getting now down to ground A itself. So, if I could take
28 you back to that issue, which is whether Ofcom took the proper and sufficient steps that we
29 say it should have taken. I am very happy to continue for the next five minutes or I do not
30 know whether the Tribunal would find it more convenient for me to pause early and come
31 back early, or -----

32 THE CHAIRMAN: No, Mr. Pickford, go on for five minutes.

33 MR. PICKFORD: Thank you.

34 THE CHAIRMAN: And we will make a start.

1 MR. PICKFORD: On that issue, we say that Ofcom had made a fatal admission. At para.83 of
2 their defence they concede that the challenge that we made in respect of para.3.42 was a
3 good one. So if you just very briefly take para.83 before we then move back to the
4 challenged decision itself, we see Ofcom says at paras.74-78 of the NOA:

5 “Talk Talk addresses a legal argument advanced by Ofcom in the alternative at 3.42 of
6 the CC statement. Ofcom does not seek to maintain that argument in this appeal”.

7 And then it goes on to say:

8 “It is clear from the substantive analysis undertaken by Ofcom in the CC statement
9 Ofcom recognise the material change could in principle include an announcement
10 having future developments over the period covered by the market review in
11 question”.

12 I am going to come on to that in just a moment. But, if we could go to para.3.42 of the
13 statement, which is at CD14 again.

14 MR. PICKFORD: It is para.3.42. I asked the Tribunal to read the background to this section
15 before and what we had coming up to para.3.42 was a discussion of Talk Talk’s arguments
16 about there being a material change. Then at 3.42 et seq we have Ofcom’s response, and its
17 first point is that:

18 “First, we do not consider that a proposal to rollout LLU-based services in a
19 number of exchanges constitute a change in the actual competitive conditions of
20 the market, even if the plan for some of these exchanges is now said to be ‘firm’.
21 In defining the geographic markets, it is often appropriate to take a limited forward
22 look of the market and include in the assessment exchanges where operators have
23 confirmed rollout plans. In contrast, for us to satisfy ourselves that a material
24 change has occurred, the appropriate question is whether an event has actually
25 occurred which has materially changed the competitive conditions in the market.”

26 Now, we attacked that and we said that is wrong because they are seeking to draw a contrast
27 between the ordinary approach to market analysis and the approach under s.86 which they
28 suggest in para. 3.2 is in some way a backward looking one rather than a forward looking
29 one.

30 Ofcom accepts now in its defence that that is incorrect, so they accept what we say is the
31 right approach, which is that it is forward looking in both cases.

32 Ofcom tried to be relevantly nonchalant about it They say it is merely: “a legal argument
33 advanced by Ofcom in the alternative.” We say that is not an entirely fair characterisation.

34 First, it is not the main point but we may note that it actually is the primary argument

1 advanced by Ofcom to support its conclusion, it comes first and then we have the second in
2 the alternative, but that is not my main point. My main point is that actually it is the only
3 place, we say, in the entire decision where Ofcom seeks to explain what it understands by
4 the test in s.86 of the 2003 Act beyond merely repeating words from s.86 itself.

5 So we say it is not an alternative legal construction of s.86, it is Ofcom's sole legal
6 construction insofar as they offer us one in express terms in this particular document. So it
7 is the only available demonstration of the legal direction that Ofcom gave to itself as to
8 what it had to be satisfied of when considering whether there had been a material change in
9 the market.

10 It follows that Ofcom's view of the meaning of a material change was that a change which
11 looked at the future, such as uncommitted plans to rollout becoming committed plans was
12 incapable of constituting a material change for the purpose of s.86, that is their first answer
13 to our point. We say that it does not fall within the test.

14 We say that it is clear why Ofcom did not make any attempts proactively to inquire of
15 operators whether their previously uncommitted plans have become committed, or why it
16 did not attempt proactively to inquire of operators where their previous committed plans
17 have become uncommitted, because obviously it could work the other way around. It is
18 also clear that while there was no question in the WBACC consultation out of the 21
19 questions that are in annex 4, eliciting information about this issue, and why there was no
20 consideration in the WBACC decision whether there had been any changes in the rollout
21 plans of any other operator beyond Talk Talk, because the only person focus on at all is
22 Talk Talk because it is Talk Talk that has raised this issue. We say it is clear why all of
23 those things are the case because Ofcom misdirected itself that such plans, going as they did
24 to the future were irrelevant to the test in s.86.

25 Now, if they are irrelevant, inevitably that must have shaped its approach to information
26 gathering because, as we saw in s.135, the Act only entitles Ofcom to seek all such
27 information as they consider necessary for the purpose of carrying out their functions. If
28 they consider this issue to be irrelevant it cannot be necessary for the purpose of carrying
29 out their functions to get information on it, which they believe to be irrelevant, if they had
30 sought to do that it would have been unlawful on their view of protecting s.86.

31 THE CHAIRMAN: Mr. Pickford, that is very helpful, we will resume at 2 o'clock.

32 (Adjourned for a short time)

33
34 THE CHAIRMAN: Mr. Pickford?

1 MR. PICKFORD: Thank you, sir. I was dealing with what I submit is Ofcom's fatal concession
2 on the proper construction of s.86 and its implications for ground A.

3 Ofcom attempts to down play that concession in its defence, and if I can just quote it to you.
4 It says:

5 "As it is clear from the substantive analysis undertaken by Ofcom in the CC
6 statement contained in paras. 3.43 to 3.45 Ofcom recognizes that a material change
7 could, in principle, include an announcement having huge developments over the
8 period covered by the market review in question."

9 We say that that submission is incorrect and seeks illegitimately to rewrite the CC
10 statement. Paragraph 3.42 is the only paragraph which attempts to construe what is meant
11 by material change. 3.43 and 3.45 do not contain any such alternative legal direction of the
12 sort now suggested by Ofcom in its defence, nor do they contain any other explanation of
13 what Ofcom understood by the s.86 test beyond, as I said before, mere recitation of its
14 words. Rather, what those paragraphs do is relate to the factual analysis that was carried out
15 by Ofcom in the WMR statement, because they refer back to the WMR statement, and they
16 say: In the alternative, in a WBA MR statement we assessed Talk Talk's planned rollout
17 and concluded that it did not merit a change to our market definition. Moreover, that factual
18 analysis pre-dated the s.86 test coming into effect.

19 It is also worth just noting that those paragraphs that deal exclusively with Talk Talk,
20 because of course this is an argument that at that time Ofcom was having with Talk Talk,
21 they do not demonstrate a wider appreciation of changes in the market, and we say therefore
22 that the explanations that Ofcom gives, that it suggests are contained in paras. 3.43 et seq
23 are not ones that concern an alternative legal direction, they are simply grappling on the
24 facts with the points that were raised by Talk Talk.

25 THE CHAIRMAN: Well, Mr. Pickford, I suppose there are three possibilities in theory. One is
26 there is no statement of the legal test but that Ofcom applied the correct legal test. In that
27 case presumably you would say "no problem" or would you nevertheless say that the matter
28 should be remitted to Ofcom for it to articulate the test?

29 MR. PICKFORD: I think if Ofcom had clearly applied the correct test, and one could infer that
30 from what it had done, notwithstanding that it did not actually expressly set it out, we would
31 accept that that was legitimate.

32 THE CHAIRMAN: Right. The second test would be that Ofcom failed to address the correct test
33 but did so in relation to matters being raised by parties other than Talk Talk which are not
34 directly in front of this Tribunal now. In that situation presumably you would say

1 nevertheless, that that is a matter that ought to be remitted back to Ofcom for Ofcom to deal
2 with?

3 MR. PICKFORD: Yes, if it did not address those other issues, yes, certainly.

4 THE CHAIRMAN: Then of course the third case is where it suddenly is directly affecting Talk
5 Talk and has not been properly considered; in which case I think the question is clear.

6 MR. PICKFORD: That also takes us on to ground B. We say you cannot really ascertain from
7 3.43 et seq what test really they are applying there. The only legal direction is the one at
8 3.42 and we say that is wrong.

9 Ofcom's directions in its defence of why it did not need to gather information about
10 changes in other operator's roll out plans we say are incapable of taking it anywhere, given
11 that it went wrong at the first stage. We say that they are pure *ex post facto* reasoning and
12 none of them appear in the challenged decision itself. The Tribunal cannot know what
13 approach Ofcom would have actually taken to gather information about other operators' roll
14 out plans if it had not gone 'wrong at the outset, because we simply do not know from the
15 statement. Therefore we say ground A succeeds without any further consideration of
16 Ofcom's case on it really being required, as a logical result of that admission on ground B
17 because Ofcom plainly did not, and to quote from *Tameside* per Lord Diplock, ask itself the
18 right question and take reasonable steps to acquaint itself with the relevant information to
19 enable it to answer it correctly.

20 But, if we do then turn to what Ofcom has to say about ground A, notwithstanding my
21 primary submission that essentially you can largely ignore it, we say in any event Ofcom's
22 attempt to meet ground A is without merit.

23 Ofcom seeks to focus this aspect of our challenge as if it were essentially a complaint about
24 procedural unfairness, and that is also something that BT has said is a consultation point. To
25 be clear it is not essentially a point about procedural fairness. Procedural fairness is
26 relevant, but actually the central failure by Ofcom is by not engaging in a sufficient inquiry
27 and calling to its own attention the facts that were necessary to take a fully informed
28 decision.

29 Now, we refer to the consultation because we say it is illustrative of Ofcom's failure in this
30 regard, but the principal point we are running is one about the accuracy of that investigatory
31 process. It is not principally about fairness to us, although I would say this on the fairness
32 issue: there is a point where the two effectively overlap because Ofcom never explained in
33 the consultation how it was approaching a s.86 issue, whether one talks about s.86 in terms
34 or whether one talks about the material change in the market. It did not explain to us how it

1 was addressing that in the decision and so we were denied the opportunity, for instance, to
2 explain why it would be going wrong if it gave itself the direction that it gave itself at 3.42.
3 We never had that chance because that reasoning only appeared for the first time in the
4 decision, so that is where effectively the two points of fairness and sufficient inquiry to
5 some extent overlap, but it is important to understand we are not merely saying that this was
6 unfair.

7 When one considers the inadequacies in Ofcom's consultation we say it is quite plain they
8 did not engage with it. As I said before, of the 21 issues that are in the questions set out in
9 annex 4 not one of them contains the material change point. Nor did Ofcom at any point
10 prior to the CC statement seek information regarding roll out under its formal information
11 gathering powers, or actively pursue any other request. We have what Mr. Heaney says at
12 para. 71 of his first statement and at 7 to 13 of his second statement, on that issue.

13 Nor did the CC consultation set out any reasoning or economic analysis as I said. It is just
14 that boiler plate in s.8 of annex 5.

15 We say that that failure of consultation on Ofcom's part is actually part of a wider failure to
16 engage, and it is confirmed by Ofcom's own explanation of its decision making process at
17 para. 66 of its defence. If one goes to para. 66 Ofcom there gives three material
18 considerations it says,, that explained why and what it did was in the circumstances entirely
19 justified, and its decision was informed by, it says, firstly:

20 "the careful and exhaustive analysis it had undertaken during the market review
21 process a few months previously. The MR statement in December 2010 reflected
22 information gathered by Ofcom under its formal powers in the Summer of 2010;
23 consultation responses received in October 2010; and further material obtained
24 from Talk Talk in November 2010."

25 Now, whether or not that exercise was as careful and exhaustive as Ofcom claim, the whole
26 point is it was carried out prior to the WBA MR statement and up to it, so it was not capable
27 of satisfying the requirement in s.86 to consider whether there was a material change since
28 the statement was made.

29 The second point that Ofcom makes is it says that it relied on the information submitted to it
30 by Talk Talk and other stakeholders in response to the CC consultation as well as further
31 representations made by Talk Talk after the close of the consultation.

32 Again, we say that does not demonstrate that Ofcom called to its attention the
33 considerations that were relevant to its decisions. As regards Talk Talk its engagement we
34 say was entirely reactive. As regards parties other than Talk Talk it cannot point to a

1 comprehensive set of representations made by those other parties on the material change
2 issue because both parties were never asked.

3 Ofcom makes later some reference to Sky's statement of intervention at para.3.2, but we say
4 if you look at that – we can come on to look at that later – that does not actually
5 demonstrate that Sky is saying to Ofcom: “Here is the change in our plans going from
6 uncommitted to committed exchanges, or otherwise grappling in concrete terms with the
7 issues that we say were relevant.

8 Finally, Ofcom refers to its general understanding of the market. In this regard it relies on
9 the evidence of Mr. Clarkson and Mr. Clarkson for his part says in his statement that
10 operators are highly sophisticated and well informed. In general they understand the
11 importance of informing Ofcom of even their most confidential future business plans at the
12 earliest possible stage in order to ensure that they can be successfully developed.

13 He concludes in his evidence – I do not think the Tribunal needs to go to it unless it finds it
14 convenient. He says in these circumstances Ofcom is able through its oversight to discern
15 whether there has been potentially significant developments in the WBA markets which
16 might, in due course and where appropriate, require further investigation without first
17 having to conduct a formal investigation into that issue.

18 So Ofcom's contention is that in effect it does not need to bother to engage specifically so
19 as to call to its attention the matters necessary to satisfy the obligations in s.86 because it
20 will inevitably know, it says, about those issues from its general engagement in the market.

21 We say that that is an inappropriate approach for an evidence based regulator. It is not
22 adequate, particularly in a very fast moving market such as this one and it is accepted, as
23 Mr. Heaney says, a para. 11 of his first statement that it is a fast moving market. The
24 reasons for that are as follows: first, we say that despite implying at para. 15 of his
25 statement that operators' interests are to inform Ofcom of all relevant changes, Mr.
26 Clarkson goes on to admit at para.16.4 of his statement that some operators do not wish to
27 provide advanced notification of their plans. What he says about that is that in that case
28 Ofcom monitors all public announcements, so that is why you do not need to be concerned
29 about that. But the problem with that is that in many of those cases the highly sophisticated
30 operators that he refers to with whom Ofcom engages, if they have decided that it is not
31 necessarily in their interest to inform Ofcom about something then it may well not be in
32 their interest generally to release that information to the market. Indeed, to say where they
33 are required to do so by, for instance, Stock Exchange Rules, they may well not do that. So,
34 quite plainly there will be occasions on which Ofcom simply cannot derive the information

1 that it needs without at least asking for it. It cannot assume that necessarily operators will
2 tell it the information that they have that it needs to know. Indeed, this appeal well
3 illustrates that operators in superficially similar situations may well have a very different
4 agenda when it comes to these kinds of issues. For instance, Sky and Talk Talk are both
5 combined in their opposition to the BT appeal, indeed, they are seeking to collaborate as far
6 as they can on that. For their own potentially quite complex commercial reasons they have
7 decided to take different positions in relation to this appeal because it is advantageous to
8 Talk Talk for the market to be revisited and narrowed to reflect the true situation and it is
9 obviously not advantageous for Sky for that to happen.

10 So it is precisely for those kind of reasons that one has subtle differences between the
11 commercial incentives of these different operators that Ofcom needed to ask the questions
12 rather than simply assume that it would know the answers.

13 A second problem with Ofcom's laissez-faire approach is that it may not focus with
14 sufficient scrutiny even on information which it does know if it does not direct itself to the
15 particular underlying issues and statutory tests that it has to meet. It may be that it has been
16 told something but if it has not confronted what is s.86 all about, what does it mean, what
17 do we have to think about, then some of that information, even if it made its way into the
18 organisation, might not be properly analysed and its full implications appreciated.

19 Indeed, we say that the serious error on the construction of section 86 well illustrates that
20 point, that if you do not set these matters out properly, you may well make errors that are
21 not brought to your attention.

22 Thirdly, we say it cannot be assumed that Ofcom has some sort of perfect internal system
23 for information dissemination. Even if information is brought into one part of Ofcom, that
24 does not mean necessarily that the case team who are dealing with it are necessarily
25 provided with all that information themselves. That Ofcom does not suggest otherwise as
26 far as we can understand.

27 So, in conclusion on that, we say the reality is clear and Ofcom did not grapple in
28 substantive terms with section 86, save as regards its reactive engagement to certain issues
29 in relation to Talk Talk.

30 Now, that brings me to what I think is probably the only dispute of primary fact as I think
31 there is one, and it is a relatively narrow dispute, but there was the issue that I canvassed
32 with Mr. Clarkson earlier today in the morning. And that concerns what information Ofcom
33 actually sought from Talk Talk, and we say there is quite serious confusion on Ofcom's part
34 about this. Because in the CC statement of course at 3.42 they told us that that information

1 was irrelevant so we can assume that that is what was in their minds at the time of taking
2 the decision and they thought that was not relevant because it was forward looking
3 information and that was not the concern of section 86. So, that was the case. We do not
4 know really why they were interested in it at all.

5 In the defence, they admit that that is wrong, but they still say, “Well, the information was
6 not really relevant because it is addressing the wrong question, and I will come on to that to
7 ground B, that they still do not accept that this 40 per cent figure that we make a song and
8 dance about is really relevant to their decision. And yet Ofcom’s case is also, it appears to
9 be to us, that it was in some way our fault that we did not provide the information that they
10 requested. They say they requested basic information and we failed to provide it, and in
11 respect of that we say that is simply not fair. You heard my cross-examination on that
12 issue. I will just deal very very briefly with a summary of a couple of the key points.

13 Mr. Clarkson was not at the meeting either on 18th March or 1st July, so all the information
14 that he is giving is second-hand, and also despite his assurance at para.3 of his witness
15 statement that he had indicated where matters were not within his knowledge, he had not
16 actually done that in relation to 30(3) a small point we just noted.

17 He does not produce any contemporaneous meeting note that was actually taken at the time.
18 He said “Well, we deal with it with emails afterwards”. Well, one of the emails is on the
19 same day; one of the emails that they refer to is not. And, as we understand it, no-one
20 actually wrote anything down during the meeting that then turned into a note. All of it
21 seems to be after the event recollection. None of the alleged requests were ever followed up
22 in writing, whether formally or informally, and on the contrary, it was Talk Talk that
23 following each meeting offered to provide further information or assistance. That happened
24 both after the 18th March meeting and after the 1st July meeting, and on both occasions that
25 offer which we say was in general terms, was declined. So, in the circumstances, we say
26 that Talk Talk’s account of what went on at those meetings, which is contained in second
27 Heaney at paras.7-13 is the more compelling one. But, in any event, if there was some
28 miscommunication between Talk Talk and Ofcom in relation to that, you really cannot lay
29 the blame at Talk Talk’s door. We attempted to do what we thought was being required of
30 us. We provided the information, we said “Do you want anything more?” We were told
31 they did not and that is really it.

32 So, that then brings me on to other decisions, as I flagged earlier, that I would address you
33 on, sir, where Ofcom did engage, we say, with section 86 by contrast to what happened in
34 this case, and in particular we refer to the decision, “**A new pricing framework for open**

1 **reach second consultation**” of 5th December 2008 which is contained in the third
2 authorities bundle at tab.29. If the Tribunal could turn, please, to annexe 6 which is external
3 p.1776. At annexe 6 we have the review of the wholesale local access market, and this in
4 fact a whole section dedicated to addressing whether there has been a material change. If
5 the Tribunal would just read para.A6.2. And then they go on at A6.8 to explain the
6 approach that they have adopted to section 86, so they say:

7 “In applying the no material change test of present proposals we have taken into
8 account any expected or foreseeable market developments over the course of a two-
9 year period until such a further market analysis has been carried out by Ofcom”.

10 So, they are looking forward to the remainder of the period for which a price control may be
11 imposed. And we say if they had done that in the present case, they would have seen
12 squarely the issue that we rely on heavily in this case.

13 Now, for your information, I do not intend to take the Tribunal to it, but the approach that
14 they adopted was confirmed in the final decision which is the decision of 22ndMay. That is
15 in the bundle at tab.30 and it is at A2.4. But, I do not need to take the Tribunal to that as
16 well.

17 Just sticking with this annexe, at para.A6.18 and following we see an analysis of
18 developments in the market, so we start with the fixed narrow band retail exchange line
19 markets and at 6.31 and following we deal with the fixed narrow band retail exchange line
20 geographic markets, so that is obviously similar to the issue that we are addressing here, our
21 concern is about the geographic market. And they say that they specifically address
22 whether the geographic market has stayed the same. So, again, here Ofcom is recognising
23 that an essential part, we say the section 86 test, is considering whether the geographic
24 market has changed since the market powered designation and that is precisely what they
25 were doing at this section. One then goes on to A6.36. It looks at the broadband internet
26 access retail market. Just above that we see its conclusion on A6.35:

27 “We are therefore minded to conclude that there has been no material change in these
28 considerations since market review”.

29 So, that was relevant to the first geographic market for narrowband retail exchange lines.
30 Then, turning to broadband it addresses the broadband market, and then at 6.42 and
31 following it addresses the geographic coverage of the retail market and it says that:

32 “We stated in 2008 that the existence of geographic variations in product offerings
33 and prices suggested that geographic markets were emerging at the retail level.

34 However, it is not necessary for Ofcom to reach a firm conclusion on the precise

1 geographic definition of the retail market because this is not a determining factor for
2 the assessment of the geographic nature of the markets for wholesale broadband
3 access. Similarly, the geographic coverage of the retail market broadband access
4 market in order to assess whether there has been any material change in the wholesale
5 local access market of the geographic nature of the retail broadband access market
6 was not a determining factor for the geographic definition of the wholesale market
7 again”.

8 So, what it is saying there is that there are some material changes happening. They are
9 happening at the retail market, and in this case because the price control is set by reference
10 to a wholesale market, and it does not actually, they say, the reason that they give, does not
11 flow through in this case from one to the other. It does not matter. So, that is why it does
12 not satisfy that second bit of the materiality test, because it does not go to the price control.
13 And then, again, at 6.52 and following, we have analysis of the geographic market for the
14 wholesale broadband access markets. So, this is essentially one step up in the chain, but the
15 retail market, we have then got wholesale broadband access markets which is what we are
16 actually concerned with in our case as well which is an intermediate wholesale market
17 where BT is supplying services that are then sold on. And then ultimately in this case, in
18 this consultation, what Ofcom was concerned with was the market at the top, the local loop
19 unbundling market which enables operators such as Talk Talk to compete in the wholesale
20 broadband access market. And, again, in relation to geographic market for wholesale
21 broadband access, it says that there were a number of changes, significant changes, I am
22 sorry. This is 6.52:

23 “As a result of significant changes that have occurred since the previous wholesale
24 broadband access market review carried out in 2003/2004, most significantly LLU operators
25 have used LLU to offer retail and wholesale broadband services. LLU operators have
26 focused their initial network deployment on more densely populated areas where their
27 commercial case is strongest”.

28 So, again, we have got a very similar issue arising to the one I have just showed you before.
29 They are saying that there are changes even in the intermediate market, but again they
30 reason that they do not need to concern themselves with that for the wholesale local access
31 market, and the reason that they do that in this case is a function of what the Tribunal may
32 have heard of, which is the modified greenfield approach, which essentially means that if
33 you are concerned, what they say is that – and this is at 6.53 if I can summarise what they
34 say is that the only reason why we are seeing the changes in the wholesale broadband access

1 market is because of what is happening at LLU level, and what is happening at LLU level is
2 only because we are imposing a remedy, and so we have to ignore that, that change, for the
3 purposes of whether we should actually impose a price control at the top level. So, again,
4 lots of changes taking place but the ones that are not ultimately material to the price control
5 decision.

6 I think I have gone through most of the rest of the analysis, but again we have got very
7 similar points just for your note. Again, looking at the wholesale local access geographic
8 market finally where they ultimately conclude there has not been a material change and that
9 is at A6.78 and following, down to 6.86. So, Ofcom very explicitly addressing its mind to
10 what we say is exactly what it should have done in our case. Then, similarly, we have the
11 same thing occurring in relation to a further decision which you should find at tab.35 of
12 authorities bundle 4, which again, it is the same market but we have rolled on now to just
13 about a week or so ago. If I could just check, you should have had inserted into your
14 bundles a tab.35 containing “**LLU and WLR charge control, further consultation**”.

15 THE CHAIRMAN: Yes, we have that.

16 MR. PICKFORD: I am grateful. Now, at para.1.2 one sees that it is a further consultation. In
17 fact the first consultation was on 31st March 2011. And if one then goes to section 4 which
18 is on p.43, again, we see a whole section there devoted to the no material change
19 assessment.

20 At 4.3 we see that Ofcom says: “We consider that there was no evidence that the market has
21 changed since our 20th December 2010 review of the WFAEL market.” Just to be clear
22 about the time line here, the designation of SMP was on 20th December 2010 so in fact just
23 a few weeks after the designation of SMP in our case.

24 There was then a first consultation that we saw referred to in para. 1.2 which was in March
25 2011, that did not contain any assessment of material change. Material change was engaged
26 at that point because again it was after the SMP determination, it did not contain any such
27 assessment. I can hand up for completeness, effectively to prove a negative, a copy of that
28 if the Tribunal would like but all it contains is boiler plate wording about s.86 in the legal
29 instruments, I do not intend to take the Tribunal through it.

30 THE CHAIRMAN: I agree, I do not think that would help.

31 MR. PICKFORD: Then in July 2011 we have the WBA decision, which is the one that we
32 challenge, and then in September 2011 we have our challenge saying I am afraid that you
33 have s.86 badly wrong in that, and now in November 2011 we see Ofcom revisiting
34 material change and issuing a further consultation in relation to the WLA market. We infer

1 from that that Ofcom recognised that there was some force in the points that we make, and
2 it is now seeking to make sure it does not make the same mistakes again. Obviously Ofcom
3 can tell you, they may have their own views about that, but that is the inference that we
4 draw.

5 THE CHAIRMAN: Yes, I am not sure, Mr. Pickford, how far that inferential reasoning takes us
6 here really. I think the decisions stand or fall on their own merit.

7 MR. PICKFORD: That is true.

8 THE CHAIRMAN: It is helpful to see how matters might be produced and dealt with in a
9 different way but beyond that I am not sure we are very much assisted by this.

10 MR. PICKFORD: I quite understand. Ofcom's only real response to all of this is to say the time
11 periods are greater – in the first case I showed you the time periods were greater, they were
12 up to three years and I was only seven months in your case. In this case it was 11 months
13 between their consultation and the original SMP designation. The big answer, of course, is
14 that s.86is always engaged when you divorce these two decisions. It does not actually
15 matter how long the *inter regnum* is. It may affect the depth of your analysis. If you are
16 considering a very long period that would encourage you to engage in deeper analysis than
17 if you are considering a shorter period. But the same essential principles apply in all cases.
18 Again, I do not propose to take you through it at length, but just for your note we could go
19 through the consultation that I have just shown you and one sees at para. 4.6, 4.39, 4.57,
20 4.70 and 4.70 Ofcom engaging in substantive terms with the kind of issues they should have
21 engaged with in our case. In particular the geographic market is engaged at 4.39 and 4.79.
22 Finally, at 4.100 we see that there is a question, a question at 4.2 posed to stakeholders:

23 “Do you agree with our assessment that there has been no material change in the
24 WLA market since our market power determination that BT had SMP in the WLA
25 2010 market review? If not, please explain your reasons.”

26 So again, engaging with the issue there in a way that they did not in our case.

27 In our notice of appeal we gave examples of other possible market developments aside from
28 the central issue concerning Talk Talk's own plans. Now, that list was not intended to be
29 comprehensive, it was merely intended to be illustrative, because ultimately we are not in a
30 position to know what did or did not change because we are simply one stakeholder.

31 Ofcom is in the position to find this information out generally and it is that failure that we
32 pointed to so we say it does not really matter in respect of these individual examples
33 whether Ofcom has an answer or not because generally it did not do what we say was a
34 sufficiently adequate job.

1 Just to take one example, just to illustrate the point. The first example that we give is of
2 additional roll out in Market 1 by LLU operators other than Talk Talk. We say that is the
3 obvious next thing you ask yourself, we have been talking about Talk Talk, what about
4 everyone else? Ofcom responds at paras. 72 to 74 of its defence. The first thing it says is it
5 relies on Sky's statements in response to the CC consultation. In particular it refers to tab
6 11 of its defence which is Sky's consultation document response, at tab 11 of the defence
7 bundle. In particular they refer to para. 2 where Sky says:

8 "By definition, BT is the only provider of WBA I Market 1 today and, while there
9 could be some limited market entry by LLU operators over the next three years,
10 BT will remain the only WBA provider for the vast majority of exchanges."

11 It goes on to make some other points in para. 2 but neither there nor anywhere else in that
12 consultation does Sky actually set out in terms what happened to its own plans in precise
13 terms, in terms of uncommitted roll out becoming committed, or vice versa. It is a very
14 vague statement. It is not the engagement we say that was necessary. We are not criticising
15 Sky because of course it was never asked the question, so Sky simply said whatever it
16 wanted to draw to Ofcom's attention, whatever was in its interests to draw to Ofcom's
17 attention.

18 In relation to other parties such as Cable & Wireless Worldwide and 02, Ofcom does not
19 point us to anything in relation to those, it failed to ascertain the same information from
20 those parties as well.

21 At para. 73 of its defence, Ofcom says that it purported reliance on the MR statement, but
22 any additional LLU rollout, it says, "could not cast doubt on Ofcom's finding as to the lack
23 of material change in Market 1 between December 2010 and July 2011". That is a very
24 strong statement that it could not cast doubt. The argument appears to run that Ofcom was
25 entitled to disregard all these rollout issues because they were incapable of demonstrating a
26 material change. We say that is not only bold it is wrong, and I will address that very shortly
27 in relation to ground B, because that is really where that argument bites.

28 At para.74 of Ofcom's defence, it refers to the evidence of Mr. Clarkson. Some of this is
29 confidential so I will have to be careful what I say as I go through it. So the easiest thing is
30 if you perhaps just read para. 74 to yourselves.

31 THE CHAIRMAN: We will do that. (After a pause) Yes.

32 MR. PICKFORD: The points we make are that Mr. Clarkson's evidence is not actually very
33 illuminating on this issue, and they are as follows: first, Ofcom is wrong to say that the 56
34 exchanges – that is not confidential – were identified at the time of the CC statements,

1 because it was at the time of the MR statement that they were identified as uncommitted,
2 not at the time of the CC statement. Our entire case is that of course Ofcom did not go on to
3 see how matters developed, that is the key point, he did not see what took place up until the
4 charge control was imposed.

5 The second issue is that the set of exchanges in relation to which there were newly
6 confirmed rollout plans by July 2011 is not limited merely to the 56 exchanges which had
7 previously been identified as uncommitted, because of course you could well have an
8 operator that has, by the time of the charge control decision committed plans for specific
9 exchanges, whether or not they were in the cohort of 56 uncommitted at the time of the
10 market review and indeed in Talk Talk's case we have a very clear example of them moving
11 very swiftly from not having particular plans that were taken into account in the WBAMR
12 decision and they moved very, very swiftly and changed quite radically by the time of the
13 CC statement.

14 The third point we make is that Mr. Clarkson, in the evidence that has been referred to here,
15 actually examines the wrong question because changes in market scope should not be
16 limited to changes where the rollout has occurred – that is only one half of the definition for
17 Market 1. He has focused here, he says: "I have looked at those 56 and only X have
18 actually rolled out. Of course the issue in relation to Market 1 on which we focus is how
19 many exchanges have gone from being uncommitted to committed in the future? That is
20 the key. It might be that not many have actually rolled out at the date of his statement, we
21 say that is not actually the key issue in this case.

22 I gave various other examples in our notice of appeal and I think probably the easiest thing
23 to do is to refer to my skeleton argument at paras. 44 to 50 – I am not asking the Tribunal to
24 turn it up at the moment. We deal with other types of information that Ofcom did not seek.
25 One of them is reduced rollout in Market 2, so that is the flip side. Also, Talk Talk referred
26 to additional cable rollout.

27 Again, our case on all of these is essentially the same and Ofcom's answer is very similar.
28 We say they did not specifically address these issues. They say they did not think they were
29 likely to be that material given the kind of information that we knew. We say "Actually you
30 never did the exercise properly so you do not actually know" - if I can summarise the
31 exchange, that is the essence of it.

32 I am happy to go through those in more detail but I am sensing obviously that there is
33 familiarity in terms of the kinds of issues that arise in relation to those from the first
34 example so it may be best if I allow the Tribunal to review those in their own time.

1 THE CHAIRMAN: I think that is helpful, yes, thank you, Mr. Pickford.

2 MR. PICKFORD: Just one point to make finally, Fujitsu was an example we gave. We said
3 “Fujitsu will potentially be coming into this market in a quite radical way and you did not
4 think about that”. Now, we do not pursue that point any longer, as we made clear in the
5 skeleton. Mr. Clarkson says: “Actually we did think of Fujitsu expressly and the reason we
6 did not pursue it is because we knew that none of this could become committed in the kind
7 of time lines that we are talking about”, and we accept that, albeit they did not explain that
8 in the decision, and that is why we obviously raised it, we only know that now.

9 The final point we make, just to close this part of the submissions is that Ofcom assesses
10 each of the changes that we have gone through individually but it does not consider their
11 global impact. So obviously the key issue is when you take all of the kinds of things that
12 were going on in the market together, was there material change? You cannot subdivide
13 them, knock them off and say “That one was not material on its own”, “That one was not
14 material on its own”, “That one was not material on its own”, you have to look at the
15 changes together.

16 That takes me to the end of my oral submissions on ground A. Before moving on to ground
17 B in earnest, given that it concerns the test for section 86, it might be helpful if I just very
18 briefly re-visited one of the questions which you asked me this morning about our
19 construction of section 86 and the interplay between section 86 and 87 and 88.

20 THE CHAIRMAN: Yes. That would be helpful. I did have a supplementary question myself to
21 that.

22 MR. PICKFORD: Right.

23 THE CHAIRMAN: So, I will throw that in now. You defined “material” in contrast to *de*
24 *minimis* and essentially said that which is not material is *de minimis*.

25 MR. PICKFORD: There were two parts to our definition of materiality, yes.

26 THE CHAIRMAN: Well, I am interested in, as it were, the significance of the change and how
27 one tests that. In a sense defining material by reference to that which is not *de minimis* is
28 not a particularly helpful test in terms of the level, the degree of change that needs to be
29 shown in order for it to be material. I mean, would your test of materiality be something
30 like something which objectively a reasonable regulator would regard as material? Is that
31 the test that one would apply?

32 MR. PICKFORD: Well that seems to bring in sort of *Wednesbury* reasonableness
33 considerations, and we say that you can interfere beyond, on *Wednesbury* grounds.

34 THE CHAIRMAN: Indeed. I mean, it is an appeal to us on the merits.

1 MR. PICKFORD: Yes.

2 THE CHAIRMAN: I quite take that.

3 MR. PICKFORD: So you are entitled to form your own view, I mean, there is no – I say *de*
4 *minimis*, if it is *de minimis*, it is clearly below materiality. I was not suggesting that *de*
5 *minimis* is necessary to be equated with materiality. Material, I cannot really think of a
6 better word for, another synonym for other than material. That is, it is only if it is
7 significant then we are above material. If it is *de minimis*, we are below it. What we say is,
8 in this case, it really does not matter because 40 per cent of the market changing and no
9 longer properly being within Market 1 if you look at your market definition again at the
10 time of the charge control, is clearly material we say on any measure in terms of that scale.
11 We cannot see how that can be anything other than a sufficiently large change. If it is a
12 relevant change we say it must be sufficiently large. And Ofcom’s answer appears to be to
13 us essentially to say it is not a relevant change, that we were addressing the wrong question.
14 They do not, on my reading -----

15 THE CHAIRMAN: No.

16 MR. PICKFORD: – say it is a relevant change, it is just not big enough, 40 per cent is not big
17 enough. If it had been 80 then, you know, you would be have been there. That is not how
18 we understand their case.

19 THE CHAIRMAN: No, that is a fair point, Mr. Pickford, I think it simply assists us to have a
20 sense of what the test is. But, what you are saying is “material” is the word of the English
21 language and we had just better get on and apply that.

22 MR. PICKFORD: I am afraid I am not able particularly to assist beyond the illustrations that
23 I have given are things that are either above or below it.

24 THE CHAIRMAN: Anyway, to proceed on to section 86, 87 and 88.

25 MR. PICKFORD: Thank you. Sir, you asked me about the inter-relationship of those, and it may
26 just be convenient before I get stuck into ground B, to develop my response to that a little
27 bit further. I gave you part of my response before and obviously having the benefit of being
28 able to think about it over the short adjournment I thought about it a little more too. Now,
29 section 88, it may be convenient if the Tribunal could just open the authorities bundle again
30 and tab.1 that contains the provisions of the 2003 Act. (It would probably be a good idea if
31 I do the same). Does the Tribunal have available to it section 88, which is on external
32 p.24A?

33 THE CHAIRMAN: Yes, I think we are all there now, Mr. Pickford.

34 MR. PICKFORD: Thank you. Now here we see at 88(1) that:

1 “Ofcom are not to set an SMP condition falling within section 87(9) except where –
2 (a) it appears to them from the market analysis carried out for the purpose of
3 setting that condition that there is a relevant risk of adverse effects arising from
4 price distortion”.

5 Now, we say where section 86 fits in is in the following manner. Where the decision to
6 impose the price control takes place at precisely the same time as the SMP designation,
7 obviously section 86 is not engaged, and at that point Ofcom necessarily rely on the very
8 same market analysis that informs the SMP designation for their section 88 analysis as well.
9 So, that is the situation where you do not have an interregnum between the two decisions.
10 Where you do, the situation is as follows – the market analysis that is referred to in 88(1)(a)
11 is still the same market analysis that was carried out for the purposes of the SMP
12 designation. And they are entitled – Ofcom are entitled – to rely on that very same market
13 analysis without having to go back and review it and consider the issues that underpin it
14 again so long as the test in section 86 is met. So, if there has been no material change in the
15 market, they can look back to that early analysis and rely on it. They do not have to do it
16 again and update it for the purpose of imposing a price control. But where there has been a
17 material change, that is when section 86 steps in and prevents them from simply relying on
18 what went before and requiring them to go back and then do the market analysis effectively
19 again, or at least the bits that need to change, to be in a position to then apply section 88
20 properly.

21 THE CHAIRMAN: So, just to be clear, Mr. Pickford, your case is that when we read market
22 analysis in the section, that is a reference in this case to the 3rd December 2010 statement.

23 MR. PICKFORD: That is correct. And if I could illustrate the point further by reference to
24 subsection (3). Subsection (3) reads as follows:

25 “For the purposes of this section there is a relevant risk of adverse affects arising from
26 price distortion if the dominant provider might” -----

27 Do some things, ie maintain its prices at an excessively high level, or impose a price
28 squeeze. Now, that is assuming, it is implicit in that, that there still is a dominant provider.
29 Now, of course, it is possible as a result of section 86 coming into play that there could have
30 been changes in the market. We are not saying that is the case on our facts, but it is
31 conceivable on different facts that there would be no dominant provider by the time one got
32 around to applying the section 88 test, even if one had been found at the time when an SMP
33 designation was made, and again it is section 86 that steps in to make sure that Ofcom does
34 not go off the rails in relation to that. So we say that section 88 and 86 are carefully framed

1 in fact, so that one cannot simply say, “This is all subsumed within section 88”. Section 86
2 has a specific role or it would not be there. And it is the role that I have attempted to
3 articulate.

4 THE CHAIRMAN: Is there any other provision that sheds light on what market analysis means
5 because, just reading it, it could, I quite see, refer, as you say it is the 3rd December 2010
6 WBA statement, but why could it not equally be a reference to the 20th July 2011 statement?
7 Because it is referring to market analysis carried out for the purpose of setting that
8 condition.

9 MR. PICKFORD: Plainly there is a progression in that the latter builds on the former; and it may
10 well be that it could refer to the latter additionally, but a key step in all of this analysis is
11 you have to – you start with SMP, you start with an analysis of what was going on in the
12 market, the competitive conditions, whether someone has significant market power, and
13 then at that stage you can go on and set a price condition right there and then. You do not
14 have to wait.

15 THE CHAIRMAN: Yes.

16 MR. PICKFORD: And what – the role of sections 86 and 88 together is that if in fact there has
17 been no material change, then Ofcom would be permitted simply to rely on its earlier
18 market analysis without having to update it all. Now, there might be specific issues that it
19 wanted to consult on in relation to “Well, should the price control be RPI minus X, and
20 should X be 12, or 13 or whatever?” But they might not really touch on the essence of the
21 market analysis underpinning the whole exercise which is of the competitive conditions in
22 the market and the SMP that the particular undertaking that you are imposing the condition
23 on holds. All of that, as long as there has been no material change, will remain intact and
24 something that Ofcom can rely upon but without needing to re-visit it. Now, of course, that
25 is not stopping Ofcom from doing bits and pieces of further analysis if it wishes to. But the
26 whole point is, it does not have to where section 86 is satisfied. If section 86 is not
27 satisfied, it cannot proceed on that basis, so that is, sir, what we say is the essential role that
28 is provided for by section 86. It is also worth noting, just for your reference, that in para.69
29 of our notice of appeal we also say, that of course if section 86 is not properly addressed or
30 complied with, then the other building blocks also tumble. We say that Ofcom would not
31 then be properly in a position for example to address whether the price controls were
32 proportionate. So, we do challenge that as well, and Ofcom’s answer to that is, “Well, that
33 stands or falls with your view on the interpretation of section 86. And we do not disagree
34 with that. It is a direct implication. And that is why we focused our argument on the

1 section 86 issue, but obviously there is a cascade effect. If they have not satisfied section
2 86 then their assessment of proportionality by definition cannot be a complete and proper
3 one. It might be that the same control might be proportionate, if they address their mind to
4 it properly, or it might not. But the fact is if they have not done section 86 properly, they do
5 not get to that stage.

6 THE CHAIRMAN: Yes, that was very helpful, Mr. Pickford. Can I just try and unpick that a
7 little? Now, I think we are all agreed that if one carries out the market definition with the
8 conclusion that there is significant market power and the price control that should flow from
9 that in one go, then section 86 simply does not arise.

10 MR. PICKFORD: Yes.

11 THE CHAIRMAN: So, it is only when you say there is a bifurcation that that matters.

12 MR. PICKFORD: Yes.

13 THE CHAIRMAN: Now, here we have a bifurcation where the market has been analysed and the
14 conclusion has been reached that price control is appropriate, as in December, with no
15 further reasoning beyond that. Price control is appropriate but we are going to consult on
16 what price control should be imposed.

17 MR. PICKFORD: Yes.

18 THE CHAIRMAN: And that is what occurs during the course of 2011. Now, as part of that
19 process, my understanding, I do not understand you to be differing from that. My
20 understanding is that Ofcom had to consider sections 87 and 88 in order to work out
21 whether or what sort of price control should be imposed and the factors that are listed in
22 those two sections would have to be looked at irrespective of what section 86 says.

23 MR. PICKFORD: Yes, and also 47.2.

24 THE CHAIRMAN: Indeed. I suspect there are a whole raft of -----

25 MR. PICKFORD: Yes.

26 THE CHAIRMAN: -- provisions that Ofcom would have to review. But then, over and above
27 that there is, as you rightly point out, the obligation to review under section 86, and clearly
28 if there were an material factor that affected whether price control in the round ought to be
29 imposed that had changed between the December decision and the decision to impose a
30 price control, that would be a material change.

31 MR. PICKFORD: Yes.

32 THE CHAIRMAN: What I was groping for this morning, perhaps did not put as clearly as
33 I might have done, was this – suppose there are a number of factors that one does have to
34 consider as Ofcom as part of the sections 87 and 88 process, and those are considered, there

1 could be an overlap between that exercise and the exercise that needs to be considered
2 pursuant to section 86.

3 MR. PICKFORD: It is conceivable that there could be some form of overlap, but we say it is
4 important that Ofcom goes through the intellectually rigorous approach of actually looking
5 at the particular statutory tests that it is required to look at rather than simply assuming that
6 it could all be rolled up under its analysis under section 88. Parliament has provided for a
7 particular approach in these circumstances and Ofcom needs to ensure that it follows that
8 approach and that it addresses the section 86 question squarely and forms a view about
9 whether there has been a material change, to then inform its analysis of s.88, s.87, s.47(2)
10 etc., because we see the problem if it does not. If it does not do that, and it does not
11 confront those issues expressly and in terms, then it makes the kind of mistakes that it
12 makes in para. 3.42, it decides that certain bits of information are not relevant to its
13 approach, and it decides that at the time of the decision.

14 THE CHAIRMAN: So to put it hypothetically, suppose in carrying out its s.87, s.88, s.47
15 analysis, Ofcom considers five factors, 8(e), and decides, as a result of those factors it is
16 right to impose a price control in certain terms based upon s.87 and s.88.

17 MR. PICKFORD: Yes.

18 THE CHAIRMAN: To the extent that, let us say, three of those factors, (a) to (c) are new, and
19 relate to factors that have changed since the market definition exercise was undertaken,
20 even though those factors were considered as part of the s.87/88 exercise. At the very least
21 Ofcom should say: "These are or are not material changes for the purpose of s.86 and we
22 have taken them into account in the following way.

23 MR. PICKFORD: I would agree with that, sir, and moreover, it needs to address the s.86
24 question comprehensively, so it might be that there are those three factors that are new and
25 they are relevant to it, and it might be that there are another three, and because it never
26 addressed s.86 in terms, it never thought about material change, it never looked at it in that
27 way, it never addressed itself to those other questions either. So even if there is an overlap
28 that is why we say that it is important that it adopts what Parliament has clearly laid down
29 as the test for it in those provisions.

30 THE CHAIRMAN: Thank you very much.

31 MR. PICKFORD: Also, just for your note before getting drawn into ground B, I mentioned that
32 we had referred to the various cases where Talk Talk had provided Ofcom with information
33 about its committed plans, obviously we have our homework and we will give you the
34 specific sets of data on that. At para. 63 of the notice of appeal that is where I have set out

1 the references for the parts of our evidence that refer to our submissions to Ofcom on that.

2 So that is simply for your note, I do not need to take you to it.

3 Ground B then concerns, assuming that Ofcom did arm itself with all the information that it
4 required to answer the question correctly, did it still come to the right conclusion about
5 whether there had been a material change in the market in this case?

6 With the greatest respect we struggle slightly to understand Ofcom's defence on this, and I
7 am sure Mr. Holmes will clarify the matter in his submission, but our case, we say, is really
8 straight forward. Ofcom is under an obligation to ensure that its SMP controls are confined
9 to the minimum extent necessary to achieve its objectives; we are all agreed about that.

10 As I have just explained, s.86 supports that obligation in part by ensuring that there is no
11 SMP condition that is imposed by Ofcom unless it is satisfied that there has been no
12 material change since the market was designated as one in which there was SMP. One of
13 the things that that ensures is that the SMP control is not more intrusive than might be
14 necessary in the light of that change.

15 Ofcom decided in the MR statement that the price control should be confined only to those
16 exchanges where there was no operator other than BT either present or forecast to be
17 present on the basis of committed rollout plans. That was the definition of Market 1. As we
18 know, Ofcom did not impose the price control, that then divorced the decision and thereby
19 engaged s.86. By the time of the decision finally to impose the price control, and that is
20 when s.88 bites, it is when s.47(2) bites as well. We say that the scope of exchanges
21 properly falling within Market 1 as originally defined at para.1.19 of the MR statement had
22 changed, and it had changed quite fundamentally because 40 per cent of those exchanges no
23 longer met the relevant definition because there were now committed rollout plans in place
24 by Talk Talk in respect of those exchanges.

25 What is different from the information that Ofcom had before is that previously obviously
26 that was just a shortlist, a large shortlist of 900-odd exchanges and it did not know they had
27 been committed.

28 We say that that is a material change for the purpose of market definition plainly, and it is
29 also, given the example I gave before, material to the setting of the price condition because
30 you recall, I contrasted with an example, supposing Ofcom had not said price control purely
31 in Market 1, but it went over Market 1 and Market 2. We say the implication of all of this is
32 that if Ofcom intended to proceed with its plan for price control it should have redefined the
33 set of exchanges categorised as within Market 1, so it was consistent with the criteria that
34 you used to define that market in the MR statement. It would thereby have ensured that its

1 price control was imposed to the minimum extent necessary at the point of imposition to
2 achieve its objectives.

3 By contrast, what has actually happened in this case is that a price control has been imposed
4 on very large numbers of exchanges, at the time of the imposition of the control were
5 known were ones where Talk Talk was forecast to be present on the basis of committed
6 rollout plans.

7 There is a separate question about whether if Ofcom had recognised that its market
8 definition had fundamentally changed and certainly materially changed, whether it could
9 then go on and say “notwithstanding that, we still think that it is appropriate to impose a
10 price control on those very same exchanges that should have moved into Market 2. That,
11 we say, is an entirely separate question and it would have needed Ofcom to have analysed
12 for instance whether it was appropriate to then divide Market 2 up in that way and we never
13 got into that because it never got to the right answer on the first question.

14 Ofcom’s defence, we say, simply does not really meet that essential logic. Now, it
15 summarises its case at para. 5 and it is probably convenient to turn para. 5 of its defence. If
16 we turn to the substance Ofcom says:

17 “Ofcom found that Talk Talk’s rollout plans would not have enough of an impact
18 on competitive conditions in the BT local exchanges falling within Market 1 over
19 the four year period covered by the WBA market review to call into question either
20 the scope of Market 1 or the finding that BT had a position of significant market
21 power in Market 1. Talk Talk simply does not address this argument in its appeal.
22 Instead, its case rests on the claim that, if Ofcom re-ran the market definition
23 exercise now using the same criteria applied in December 2010, some exchanges
24 would be differently classified as a result of Talk Talk’s rollout plans. But the
25 question is not whether, if Ofcom assessed markets now for a four year period
26 starting today, the markets would be differently defined. The relevant question is
27 instead whether there has been any material *change* in the markets as defined by
28 Ofcom in December 2010. In Ofcom’s submission it was correct to conclude that
29 there was no such change.”

30 Now, just deconstructing that response, and looking at it bit by bit. The point that it makes
31 that BT had a position of market power in Market 1 even taking account of the material
32 changes is irrelevant, because it also has a position of significant market power in Market 2,
33 we do not take issue with that. That does not mean that the exchanges were not wrongly
34 allocated between the two markets. That aside, Ofcom’s case appears to be that an

1 exchange falling within Market 1 as it originally defined it, so BT present or forecast to be
2 present is not materially different from one in which BT is present and Talk Talk is also
3 forecast to be present on the basis that the rollout was committed to after the WMR decision
4 was taken.

5 We say that, whether or not there are similarities, between those types of exchanges, Ofcom
6 simply and persistently wilfully disregards that Ofcom sought to distinguish precisely
7 between those different types of exchange. It is only one where there was to be a remedy.
8 The distinction lies at the very core of their approach to market definition and to remedy in
9 this case. So we say it is just not sustainable to say that if the scope of Market 1 is changed
10 by at least 40 per cent that that does not call it into question. We say it obviously calls it
11 into question and, insofar as that finding was made in the challenged decision, we challenge
12 it, and that can be fairly seen in our notice of appeal and skeleton argument. Just for your
13 reference, if you look at the notice of appeal paras. 7.2, 72, 78, 81 and 82, you will see the
14 references that I rely upon for that proposition.

15 We also say that it is nonsensical that an exchange where rollout became committed just
16 after the WBA decision is said to be not materially different to an exchange in Market 1, but
17 where rollout was committed to just prior to the WBA MR decision, that is said to be
18 materially different and materially different so as to justify being in a different market,
19 namely, Market 2. We say that does not really make any sense and it is a function of the
20 highly contorted approach that Ofcom have taken to materiality in this case in their attempt
21 to get away from what we say is really the obvious.

22 If one considers an individual exchange level before going on to gross up to the market at
23 large, there is clearly a material change when one goes from a situation when there is just
24 one operator present, or forecast to be present, to one where there are two present or
25 forecast to be present. Now, it may be there is SMP for BT in both cases, but clearly there
26 is a very big difference between monopoly and no competition at all and the possibility of
27 real competition. Obviously if that change had only applied to perhaps one or two
28 exchanges we would accept that is not material.

29 THE CHAIRMAN: *De minimis* perhaps.

30 MR. PICKFORD: That would be said to be *de minimis* and if it was perhaps up to 10 that might
31 be more than *de minimis* but it could still be below material, but we are not talking about
32 those kind of figures, we are talking about 556 – 40 per cent of the market –and that, we
33 say, is plainly material.

1 Sir, I do not know whether you wanted to have an afternoon break as well, or whether we
2 just plough straight through?

3 THE CHAIRMAN: Yes, the plan was to do so – is that a convenient moment?

4 MR. PICKFORD: That is very convenient, thank you.

5 THE CHAIRMAN: We will rise in that case for five minutes.

6 (Short break)

7 THE CHAIRMAN: Yes, Mr. Pickford.

8 MR. PICKFORD: Thank you, sir. We say that the only way in which a change in the rollout
9 status across 50 per cent of the market cannot be a material change for the purposes of s.86
10 is if it is, in effect, ruled out of account from a definition, and that is if the set of exchanges
11 satisfying the conditions are being treated as within Market 1 is effectively fixed as at
12 December 2010 and thus outside the scope of what s.86 is permitted to address. That
13 appears to us to be, in essence, what Ofcom are arguing when they say at para.5 the
14 question is not whether the markets will be differently defined if Ofcom considered the
15 question of – if I can re-phrase to be slightly more accurate – if Ofcom considered the
16 question of definition part of the imposition of the price control. They say the relevant
17 question is instead whether there has been any material change in the markets as defined by
18 Ofcom in December 2010. Now, there is certainly no statutory basis for construing s.86
19 merely to reflect conditions as at 2010. If you do that, then we say you effectively nullify
20 the entire point of s.86. So Ofcom seems to be attempting to fix the point of analysis in a
21 way that robs s.86 of its efficacy.

22 And the question said to be irrelevant by Ofcom we say demonstrates the circularity in its
23 case, because on Ofcom's case, if it really is irrelevant, the issue that we say is key, then on
24 Ofcom's case it would not matter if circumstances are changed so that by the time of the
25 price control decision, Talk Talk or other operators had rolled out in respect of 100 per cent
26 of the market, or were planning to roll out in respect of 100 per cent of the market.

27 Because, if it is the wrong question it does not matter whether it is 40 per cent, 60 per cent,
28 80 per cent or 100 per cent. It is the wrong question. And we say that that clearly illustrates
29 what is the absurdity of Ofcom's position. And the question said to be relevant, if it is not
30 fixed at December 2010, well, it is somewhat ambiguous. But insofar as it is interpreted to
31 mean, "Has there been a material change in the number or identity of exchanges satisfying
32 the test in para.1.19 of the MR statement since December 2010?" If that is what they mean
33 we say well, the answer to that question is "Yes, there has, 40 per cent". So, if we then turn
34 to Ofcom's detailed arguments, we say that the analysis that I have just articulated is

1 actually sufficient to deal with the detail of their case. But in essence, their case does not
2 make sense. But, if we then go through their points in more detail, we can go, pick that up,
3 at para.83 of their skeleton argument and defence.

4 Now, the first point, 83, I am going to go through this fairly briskly, we have already
5 addressed what we say is the critical concession at para.83 we say is fatal on ground A, and
6 I have already also addressed you on why we say what Ofcom says in trying to suggest that
7 that is not really such a big issue is wrong. It was a fatal admission.

8 The next point, para.84, is Ofcom effectively set up a straw man. They say that it was
9 correct for them to have regard to competitive conditions in Market 1 when considering
10 whether there had been any material change in the market for the purposes of s.86. Well,
11 we do not argue with that. What we do say is that their error was failing to have regard to
12 the delineation between Market 1 and Market 2 arising from previously uncommitted plans
13 becoming committed.

14 At para.85 Ofcom reject as unwarranted Talk Talk's allegation that there was an obvious
15 and unsatisfactory absence of clarity in its legal test. Again, you have already got my
16 submissions on that. If you remove 3.42, then it is quite unclear what Ofcom's guiding
17 lights were in terms of how it approached s.86.

18 At para.86 Ofcom contends that para.81 of the notice of appeal correctly summarises
19 Ofcom's conclusion, but not the analysis on which it is based. Ofcom found that Talk
20 Talk's rollout would not materially affect Ofcom's geographical market definition for
21 Market 1 because, even in relation to exchanges unbundled towards the start of the new
22 period, BT could still be expected to enjoy a market share between 70 and 80 per cent. At
23 the end of the review period; such a market share would still support a finding of market
24 power; and would still justify the imposition of a price control remedy given the weak
25 competitive constraints on BT. Now, taking what Ofcom now says in its defence as its
26 analysis without admitting one way or the other whether that is actually what, precisely
27 what they say in the decision, we say none of what it relies on there can explain why at the
28 time of imposing the price control, again, it is the same point but it is simply, they cannot
29 explain it why exchange which is forecast during the price control to contain two operators
30 on the basis of committed rollout should be classified as being one that is defined in terms
31 of exchanges where only BT is present or forecast to be present; and they do not meet that.
32 Rather, of course, than an exchange where two principle operators are present or forecast.
33 We say the natural place, clearly, for those exchanges is Market 2.

1 Now, the points that Ofcom makes there go to the following – they go to whether BT still
2 enjoys market power. Again, that is not in dispute, it is irrelevant. They go to whether a
3 price control would still be justifiable, and that, plainly, cannot be taken as read given that
4 no price control was ever imposed on Market 2. I will come on that just slightly more fully
5 in a moment.

6 At para. 88 Ofcom say of Talk Talk that our argument:

7 "confuses the criteria used to allocate exchanges between relevant markets with the
8 underlying economic analysis used to test and support markets thus defined."

9 In response we say, first, that the criteria used to allocate exchanges between relevant
10 markets and in Ofcom's words "the underlying economic analysis used to test and support
11 the markets thus defined" should be the same. If Ofcom's allocation criteria are not based
12 on underlying economic analysis capable of testing and supporting the market thus defined,
13 then it has gone very badly wrong.

14 If we then go through sub-paragraphs 88(a) to (f), indeed perhaps I could just ask the
15 Tribunal to read to itself paras. 88 (a) to (f).

16 THE CHAIRMAN: (After a pause): Yes.

17 MR. PICKFORD: We say what Ofcom is doing here is itself confusing two separate issues. One
18 of the issues is pertinence to s.86 and one of the issues is not. The first issue, which is
19 pertinent to s.86 is this: what is the set of exchanges over which an SMP condition should
20 be imposed at the start of the control period i.e. in July 2011 taking account of all the
21 information known to Ofcom at that time together with the statutory obligations on Ofcom
22 in order to set a price control where there has been a material change in the market and also
23 to ensure that the price control is set to the minimum extent necessary to achieve its
24 objectives. We say that also includes it being imposed over the minimum necessary
25 geographic scope. That is the first question, it has to ask itself: has that set of exchanges
26 material changed since the market definition was originally set? That is a s.86 question.
27 The question which Ofcom is principally focused on in para. 88 of its skeleton is a
28 somewhat different one, and that is this: they are looking at the criteria used to define a
29 market and whether it is sufficiently robust as a forward looking market definition for the
30 duration of the SMP control up until the final review in four years' time. So if one looks at
31 paras. (c), (d) and (e) and (f) we see they are talking about conducting:

32 "a forward-looking economic analysis to test whether (despite being applied as at
33 December 2010) these criteria served as reliable indicators of competitive
34 conditions throughout the market review period"

1 Again, in para. (d) they say:

2 "Ofcom of course recognise that the criteria themselves, if applied mechanistically,
3 would not produce exactly the same classification of exchanges if they were
4 applied afresh six months or a year into the price control."

5 But we are not talking under s.86 about six months or a year into the price control, we are
6 talking about prior to the imposition of the price control, that is when s.86 bites.

7 MR. HOLMES: Sir, if it would assist the Tribunal there is actually a typographical error in this
8 paragraph, which I should perhaps draw to your attention so that Mr. Pickford addresses my
9 point correctly. In the third sentence it should in fact read: "... afresh six months or a year
10 into the market review period" and not "six months or a year into the price control". I
11 apologise to the Tribunal and to Mr. Pickford for interrupting him.

12 MR. PICKFORD: That is a very helpful clarification but it does not actually change anything
13 because it is Ofcom looking through to the end of the market review period. Then again,
14 para. (e), would it remain sound throughout the market review. At the end of para. (e) it
15 says:

16 "Where BT was still the only PO at the end of the period to justify classifying them
17 as the same market."

18 and then (f)

19 "Talk Talk would need to show some error in Ofcom's underlying economic
20 analysis and the impact of such entry in competitive conditions over the review
21 period."

22 so it is clear what Ofcom is concerned with there. They are saying is the market definition
23 that they have adopted a sufficiently robust one to allow them to rely on that market
24 definition until the end of the price control. Accounting for the fact that once the price
25 control is set there will be no duty on Ofcom to review that price control during those, say,
26 three or four years after it is set. It would be entitled to it but ordinarily what would happen
27 is once it is set Ofcom effectively, to a large extent, thinks about other things, it has lots of
28 things to think about and it lets the price control take its course. That is in contra-
29 distinction, we say, to what is required by s.86 - which is just before you impose a price
30 control - to think very carefully about whether your market definition at that point is still up
31 to date.

32 Ofcom's problem is it seems to have confused these two different questions and these two
33 different issues because it appears to say that s. 86 is satisfied so long as this second
34 question about the robustness of its market definition is satisfied, and we say that that is

1 wrong. The reason we say that is as follows: we entirely accept that setting an SMP
2 condition such as a price control for a fixed period, from the time it is set - and I emphasise
3 'set' - until the end of the price control period is an inherently imperfect forward-looking
4 task.

5 Obviously there are three years for which the matter is unlikely to be reopened and the only
6 legislative safeguard in relation to a market coming out of sync. is that at the end of the
7 three years or, in this case, the four years, you do not have to review the price control. You
8 cannot keep re-opening a price control, we understand that, once it is set, that would entirely
9 undermine the uncertainty, the incentives that are an inherent part of that. It would be
10 totally infeasible, and it would prevent the price control ever working effectively.

11 So once you set a price control you effectively close your eyes, you allow it to evolve, and
12 even if there is a material change in the market you only revisit that at the end of the review
13 period.

14 By contrast, that does not mean that in a case where Ofcom has chosen to divorce the
15 setting of a price control from the SMP designation, it has the same discretion effectively to
16 ignore developments in the market up until the setting of the price control. That is the role
17 of s.86, that is what it prohibits; that is what it forces Ofcom to confront, whether there has
18 been a material change at that point.

19 The material change analysis includes not just whether there is a still SMP, but also it goes
20 to the geographic scope and we saw Ofcom carrying out that analysis in other cases to
21 which I have referred you, and I have explained in our case the relationship between scope
22 and setting the price control in the present case.

23 We say that one can test the logic in para. 88 in the following way: each time Ofcom is
24 saying: "We are satisfied there competitive conditions are sufficiently stable through out the
25 period that we can rely on our market definition for the whole of the three years". They say
26 that that monitors also the s.86 question.

27 If Ofcom is right about that there would never become a point when it was appropriate to
28 alter its market definition, because they say there is no material change by the time of
29 coming to set the price control, because by definition we adopted a robust market approach,
30 so that dispenses with s.86, it is dealt with. But they proved too much because on their very
31 same logic if all that matters for s.86 is whether it is robust over the course of the price
32 control period, they could just as well say "At the end of the price control period, it is still
33 robust" - it had to be robust for the whole of the period, there cannot have been any material
34 change by that point either. If that is true, then when one goes to the next round of price

1 control, they can look back and say: "Well, there was no material change". That is why
2 there is this confusion at the heart of their case between recognising that once you have set a
3 price control you have to leave it alone , and that things may diverge, and there is nothing
4 really you can do about that. You hope you have a market definition that is sufficiently
5 robust to at least mean that your price control is not entirely insane by the time you get to
6 this price control period.

7 The separate question of: before you do it, making sure that you do set the price control in a
8 way that is proportionate and is the least intrusive possible, taking account of all the
9 information that you know at that time, and they have we say, with respect, confused the
10 two.

11 We also pointed out that Ofcom's contention in the statement at 3.43 that a price control
12 could still be appropriate even where entry occurs. We say it does not assist them, the first
13 point I have already explained, the first reason why it does not assist them is because if
14 there had been a change in the market, then there is a separate question about whether a
15 remedy would still be appropriate.

16 One should note that Ofcom's case is not, there has been a material change in the market
17 that you do not have to worry about it because it is not material to set it aside because it is
18 not material to setting the condition. They say there has been no material change in the
19 market, we see that at para. 5: "No material change in the scope of the market". We are not
20 saying that we accept Part A, but where you fall down is at point "B" of your analysis, they
21 tried to cut us off right at the beginning by saying: "there has been no change in the market
22 definition."

23 The second point to make about the argument at 3.43 is this: that it is very difficult to
24 square the contention that it would still have been appropriate to impose a price control on
25 those exchanges that should be shifting, we say, into Market 2, with the original decision
26 not to impose a price control on Market 2.

27 Ofcom says at para. 89A:

28 "There is no such difficulty because in Market 2 exchanges another PO was either
29 already present in December 2010 or had firmly committed roll out plans."

30 We say that does not help them because so too at the time of the imposition of the price
31 control in July 2011 were the exchanges under debate, the ones for which Talk Talk had
32 firmly committed roll out plans. It is very difficult to see how that does not make them more
33 like in Market 2 in terms of competitive analysis than those in Market 1. As I have already

1 noted, Ofcom is insistent that its approach is a forward looking one; we saw that, for
2 instance, at para. A2.5 of the MR statement.

3 Against that background Ofcom appears to be arguing that, first, future roll out from firmly
4 committed plans known about in December 2010, based on data from June 2010 should be
5 taken into account, that the future roll out from firmly committed plans known about in July
6 2011 should be disregarded in delineation of Market 1. That is the case when both sets of
7 roll outs are known about before the imposition of price control, and in both cases they have
8 been committed to, and we say that does not make any sense.

9 Finally on that issue, Ofcom also refers to BT's average market shares, but we say that that
10 is irrelevant. First, the measure of market shares was never used by Ofcom to distinguish
11 between Market 1 and Market 2, it is a distinction which only pertains to the difference
12 between Market 2 and market 3 in relation to market where there are a greater number of
13 operators. It is of relevance only that distinction but it was never relevant to the distinction
14 between Market 1 and Market 2.

15 Insofar as Ofcom again points to SMP, again we have said he has got SMP in both. There
16 is a subsidiary question which is addressed in para.89(c) of Ofcom's skeleton about whether
17 Ofcom really addressed itself properly to the market definition question. It is subsidiary,
18 because even if it did, the essence of our case under ground B, is they did not get to the right
19 answer. It is essentially a textual point and I have dealt with it at paras.64-65 of my
20 skeleton. If I could refer the Tribunal to that because it is a lower order point than the
21 points that I have just been canvassing.

22 The next point that we make concerns Ofcom's own reasoning in the WBA MR statement
23 which it refers to, it cross-refers to at para.3.43 of the WBA CC statement, and it may just
24 be convenient if we briefly pick that up. It is tab.6, para.3.184.

25 THE CHAIRMAN: I am sorry, I missed that reference.

26 MR. PICKFORD: It is tab.6, para.3.184. Does the Tribunal have that?

27 THE CHAIRMAN: Yes we do. Thank you.

28 MR. PICKFORD: So, at 3.184 Ofcom is here dealing with exchanges the possibility of
29 exchanges moving between Market 2 and market 3 which we say applies by analogy, the
30 same issues arise and the same kind of principles apply by analogy to movements between
31 Market 1 and Market 2. They say:

32 "We note above that we would need to understand the specific exchanges which Talk
33 Talk plan to unbundle before we would be able to make a case for moving them from

1 one market to another. This is also true in relation to Market 2 exchanges where a
2 move to market 3 could be based on two reasons”.

3 And so at the beginning of that paragraph they are in fact referring to the potential
4 exchanges between, movement between Market 1 and Market 2. And then they go on to
5 say that the same applies to 2 to 3.

6 THE CHAIRMAN: Yes.

7 MR. PICKFORD: They set out:

8 “Exchanges where there are currently two Pos present or forecast but where BT’s
9 service share is below 50 per cent; or

10 Exchanges where there are three POs present or forecast”.

11 And they go on:

12 “Clearly, as set out above, carrying out this level of analysis (particularly looking at
13 exchange level service shares) could add to the timescales by which the review would
14 be delayed and again, could lead to the need for re-consultation and, potentially, re-
15 consideration of remedies. For example, a movement of exchanges where three Pos
16 are currently present or forecast from Market 2 and into market 3 when coupled with
17 the movement of exchanges where currently there is only BT present (with a forecast
18 deployment by Talk Talk during the review) into Market 2 could represent a sufficient
19 shift in competitive conditions in Market 2 that a more stringent approach to price
20 regulation would be warranted. As such, we do not consider that it can necessarily be
21 assumed that exchanges can simply be moved between the markets without a
22 reconsideration of the SMP analysis and remedies”.

23 And we say, quite, we agree with that. But that is just the type of reconsideration that
24 Ofcom failed to do properly in respect of Market 1 and Market 2. Ofcom does not have a
25 good answer to that. It claims (para.90B) of its defence that there is no inconsistency in its
26 approach, it says, because in the CC statement Ofcom was not conducting a market review
27 and re-defining markets for a new four- year forward look period. But we say, in
28 considering whether there was any material change in the market under s.86 the
29 considerations that have been noted by Ofcom at 3.184-185 are equally relevant. As noted,
30 Ofcom recognise that shifting exchanges could represent a sufficient shift in competitive
31 conditions to warrant re-visiting the remedies. And on Ofcom’s own market definitions,
32 exchanges should have significantly changed by the time of the s.86 review and the
33 imposition of the price control.

1 Finally, we turn to questions of practicability. If we turn back to the CC statement itself,
2 para.3.47 -----

3 MR. HOLMES: Sir, if it would save time, we have made clear in our defence that we do not take
4 any point about practicality in support of the decision which Ofcom has taken which is
5 challenged in these proceedings. So, I merely point that out to Mr. Pickford in case it would
6 save time.

7 THE CHAIRMAN: Would it be best to save those for replies, Mr. Pickford, or -----

8 MR. PICKFORD: That is helpful. The difficulty that we have is that Ofcom has nonetheless in
9 its skeleton sought to make submissions on this that we do not accept. Also, what it had not
10 done is it had not admitted which is what we say is the correct approach, that the
11 considerations that are relied on at para.3.47 are irrelevant ones, and it misdirected itself
12 insofar as it relied on those considerations. So, it may be helpful for me -----

13 THE CHAIRMAN: Well, perhaps you had better do so, then, Mr. Pickford.

14 MR. PICKFORD: I think I can be brief. I do not suppose it will take more than about five
15 minutes to address.

16 So, if we go to para.3.47 Ofcom states *inter alia* that it must,

17 “In exercising its judgment whether there has been a material change, do so in a way
18 that allows the market review process to function effectively in the interest of
19 promoting competition for consumers”.

20 Now, on its face we accept that that statement does not appear necessarily an objectionable
21 one. If the debate were merely about what constitutes a materiality threshold, we would be
22 content that if, for example, the change only affected, you know, one per cent of the market
23 as we discussed, that might be considered to be immaterial since otherwise that could make
24 it very difficult to implement s.86 at all in practical terms. (I am sorry, sir, does the
25 Tribunal have the relevant passage?)

26 THE CHAIRMAN: I do.

27 MR. PICKFORD: I am sorry, it is at CD1, tab.4, and it is external p.480. What we say the
28 problem is, however, is that Ofcom’s case that it has presented to the Tribunal appears to be
29 that it does not seem to argue that the identity of the changes included with Market 1
30 changed, but in a way that was immaterial, it was ** ... say 40 per cent was not big enough,
31 they appear to us to argue that we are just addressing the wrong question altogether, and
32 therefore that there was no change in the identity of exchanges properly to be included in
33 Market 1 – we say notwithstanding the obvious inconsistency with how they were defined.

1 And they are forced down that route because of the fact that we are talking about 40 per
2 cent of the market.

3 But, it would be quite wrong for that kind of interpretation to be informed by questions of
4 practicality. We say you cannot reach that view, that you do not consider these questions at
5 all, because if you considered them it would be impracticable to do so. We say that if there
6 is such a change, as we suggest there is, then even if it does require a lot of work, that is
7 unfortunately what happens if there has been a material change and Ofcom has decided to
8 divorce the setting of these two decisions, which it does not need, does not have to do.

9 THE CHAIRMAN: Yes.

10 MR. PICKFORD: And, finally, a very small point at 3.48, it says:

11 “Our conclusions are set in the light of recent EU requirement for market reviews to
12 be carried out every three years. We reviewed the market in 2010 and in July 2011 we
13 are setting a detailed control”.

14 We simply say that, actually, that appears to be a misdirection because that was not actually
15 relevant at that point. The requirement for market reviews to be carried out every three
16 years under the European legislation did not bite until SMP determination was carried out
17 after 26th May 2011, and one can see that from s.84A, which seeks to implement
18 Article 16.6 of the Framework Directive. So, sir, that is what we have to say on those
19 points.

20 In relation to BT statement intervention and SKY statement intervention I think we have
21 very little that we really need say, and it may be easiest for me to respond to any points that
22 they feel the need to make in response, because we say in essence they add nothing of
23 substance – without any disrespect to them – but they add nothing of substance to the legal
24 issues that are canvassed by Ofcom. So, if the Tribunal is content with that approach, I am
25 content to answer anything that they have to say in reply.

26 THE CHAIRMAN: Yes. Thank you very much, Mr. Pickford. That was very helpful.

27 Mr. Holmes, I see we are running a little bit behind. How are we doing in terms of timing?

28 MR. HOLMES: Sir, I think we will almost certainly require the half day that was set aside in
29 reserve.

30 THE CHAIRMAN: Yes. I think that is likely. Would it assist if we were to attempt to start early
31 tomorrow?

32 MR. HOLMES: I have no objection to starting earlier, we can start at ten o'clock to be on the
33 safe side -----

34 THE CHAIRMAN: Yes.

1 MR. HOLMES: – if that were convenient.

2 THE CHAIRMAN: That might be helpful. Shall we say that we will start at ten tomorrow.

3 MR. HOLMES: I assume we are running till four-thirty?

4 THE CHAIRMAN: We are running until four-thirty today, and I am afraid we will have to run
5 until four-thirty tomorrow, which is why I thought I had better raise the question of an
6 earlier start.

7 MR. HOLMES: I understand, sir. I am grateful for that indication. I propose today to take Talk
8 Talk’s two grounds in reverse order if I may. This is so for two reasons:
9 First, we say that the answer to Talk Talk’s second ground also provides the solution to
10 many of the points that have been raised by Talk Talk under the first ground, and therefore
11 it makes sense to take the second ground first.
12 More fundamentally, we say that in the context of a merits appeal, which this is, the focus
13 should be first and foremost on the substance of Ofcom’s decision. Talk Talk addresses the
14 substance only in its second ground of appeal, where it contends that Ofcom got it wrong in
15 finding no material change in the geographic scope of Market 1 between December 2010
16 and July 2011, whereas, as we have seen, Talk Talk’s first ground is a challenge to process
17 in the sense that it asks whether or not Ofcom reached – not whether Ofcom reached the
18 right conclusion, but rather whether it went about it in the right way; whether it properly
19 directed itself as to the law; whether it consulted effectively; whether it investigated
20 sufficiently and so on.
21 Unlike the administrative court the Tribunal can look at Ofcom’s decision on the merits,
22 and we say that if the Tribunal is happy that Ofcom has arrived at the right decision,
23 notwithstanding any of the alleged errors of process, it should not disturb that decision on
24 grounds of process alone. That is a point I will develop further when we come to ground 2,
25 but that is my over-arching reason for beginning with ground 2 rather than ground 1.
26 The Tribunal has also asked three questions of the parties, and I propose to address those if
27 I may as I go through my submissions rather than taking them separately.
28 So, to begin, then, with Talk Talk’s substantive ground of appeal. Before tackling Talk
29 Talk’s case I should probably first consider what the legal test is under s.86, what the
30 purpose of the provision is, and what is meant by “a material change”. And much of this
31 ground has been, we say, satisfactorily covered already today, so we can be relatively short.
32 The place of s.86 fits within the three part process of *ex ante* regulation which Mr. Pickford
33 has introduced today of market definition identification first; then market analysis second
34 to see whether there is effective competition in the market; and, third, and if not, the

1 imposition of appropriate *ex ante* obligations on operators found to have significant market
2 power.

3 Now, within this scheme the role which s.86 plays is to deal with situations in which Ofcom
4 wishes to set an SMP condition separately from and at some interval after its identification
5 and analysis of the relevant market. This is clearly permissible under the applicable
6 legislation and may be necessary, given the complexity and the scale of tasks involved in
7 designing SMP conditions, particularly price controls, and indeed that is what has happened
8 in this case. And in such cases, as the Tribunal said, the purpose of s.86 is to ensure that
9 Ofcom does not set an SMP condition where the condition being set is no longer
10 appropriate because of some development in the market since Ofcom's market analysis.
11 That much is very clear.

12 If one then turns to s.86.1 which is in authorities bundle 1, tab.1, p.19, one sees that it
13 provides that Ofcom must not set an SMP services condition by a notification which does
14 not also make the market power determination by reference to which the condition is set,
15 except in one of two circumstances. The first circumstance is s.86(1)(a) where the
16 condition is set by reference to a market power determination which has been reviewed
17 under s.84 and in consequence of that review it is confirmed in the notification setting the
18 condition. In other words, Ofcom does not need to make a market power determination at
19 the same time as making the SMP where there is already a market power determination in
20 place and Ofcom, when it sets the condition, is also concluding a market review under s.84
21 that confirms the market power determination.

22 So in that situation there is clearly no risk of a condition being set that is inappropriate by
23 reason of neglected developments in the market. Any such development will have been
24 taken into account in the market review in confirming the market power determination,
25 which is already in place.

26 The second circumstance, which is the one of relevance for today, is where the condition is
27 set by reference to a market power determination made in relation to a market in which
28 Ofcom are satisfied there has been no material change since the determination was made.
29 So Ofcom can set a condition then without also making or confirming a market power
30 determination where it is satisfied that the market has not materially changed since it made
31 the market power determination by reference to which the condition is set.

32 Again 86(1)(d) serves to ensure that Ofcom will have looked, when it comes to set the
33 condition, at supervening developments, to ensure that the condition remains appropriate in

1 the current state of the market despite the lapse of time since the market power
2 determination.

3 What then constitutes a material change? Section 86(6) provides some guidance on this
4 point in making clear the material change is one that is material to the setting of the
5 condition in question. We say that this has to be read in light of the prohibitory function of
6 s.86(1). Because s.86(1) prohibits the setting of a condition where there has been a material
7 change. It follows that the change must be material to the setting of the condition in the
8 sense that it is material to whether or not to set the condition in question.

9 Just to make that good, there may have been developments since the market power
10 determination which are specifically taken into account in designing the price control in
11 question and these are in a sense material to the setting of the condition because they have
12 gone to influence its design and to determine the precise level at which the price control is
13 set. An example of that is the volume assumptions which Ofcom applied in setting the
14 price control which specifically took account of Talk Talk's roll out plans so that in deciding
15 what the volumes were for the purposes of calculating an efficient charge, Ofcom took into
16 account the fact that there would be some further entry in Market 1 and this would affect the
17 volumes that BT could be expected to supply of the relevant products.

18 It is clear, we submit, that s.86(6) is not designed to capture developments of this nature. It
19 would be nonsensical if s.86 were interpreted so as to preclude Ofcom from setting a
20 condition because of changes in the market which the price control has specifically been
21 designed to take account of, that runs counter to the purpose of s. 86 which is to deal with
22 situations where it is not appropriate to set the price control because of market
23 developments which have occurred since the market power determination. So we say a
24 change is a material change only if it provides a reason why the condition in question
25 should not be set and s.86(6) therefore means that the changes material to the setting of the
26 condition, in the sense that it is material to the question whether or not to set the condition
27 in question.

28 The condition in question is not merely the type of condition but the condition in all its
29 specificity, all its detail; the particular level of price control which is being set. So what
30 might be types of change that would constitute material changes? One obvious type would
31 be where market developments have rendered the whole market effectively competitive
32 such that there was no longer significant market power. In that situation it would plainly
33 not be appropriate to set an SMP condition of any kind and the change would be a material
34 change for the purposes of s.86. Mr. Pickford showed you that the definition of an SMP

1 condition is that ordinarily it will only apply to an undertaking or an operator that has been
2 found to have SMP. If, by the time of the setting of the condition, there was no longer SMP
3 that would, on any view, be a material change for the purposes of s.86.

4 Now, we accept that another type of change would be where the geographic scope of the
5 market has materially shifted since the market power determination, so that Ofcom's market
6 analysis was no longer reliable as respect to the market identified by Ofcom. In that case it
7 might not be appropriate to set a condition covering the totality of the market as originally
8 identified by Ofcom subject to the *de minimis* point, if you like. We agree with Mr.

9 Pickford that there would be some developments that were not material in the sense that
10 they were not of such a scale that a reasonable regulator would take them into account.

11 There is therefore no dispute between Ofcom and Talk Talk that a change in scope of the
12 relevant market could in principle constitute a change that is material to the setting of an
13 SMP condition for the purposes of s.86.

14 Our case is that no such change as in fact been shown by Talk Talk.

15 Our third type of change is canvassed by the Tribunal in its third question to the parties.

16 Under s.88(1)(a) a condition about network access pricing including the price control that
17 was imposed in this case is only to be set if it appears to Ofcom from the market analysis
18 carried out for the purpose of setting that condition, that there is a relevant risk of adverse
19 effects, arising from price distortion. We have seen that there are also various criteria in
20 s.88(1)(b) that need to be met.

21 We agree with Mr. Pickford that the reference to a market analysis in s.88(1)(a) may be a
22 reference to a market analysis in the market power determination in the sense that Ofcom
23 could legitimately base a decision under s.88(1)(a) on a prior market analysis - looking at
24 the language of 88(1) - provided that there had been no material change in the market. If
25 there had been a material change, which affected the extent to which the relevant risk arose,
26 that would be a material change for the purposes of s.88 because it would materially affect
27 whether or price control should be set. In those circumstances if there was no longer a
28 relevant risk of excessive pricing, then one should not set a price control.

29 We do not think that market analysis should be exclusively interpreted as referring back to
30 the market power determination, so that if Ofcom had labelled its assessment of current
31 market conditions in a charge control set after a market review, a market analysis, rather
32 than an assessment under s.86, nothing would turn on that. Clearly there is no formal
33 requirement that the analysis be conducted within the box of s.86, it simply has to be
34 conducted somewhere, either in a market analysis conducted either at the market power

1 determination stage or at the charge control stage, and at the charge control stage either in
2 the context of a market analysis or in the context of an assessment of material change. It
3 does not matter where it occurs, what is important is that the assessment is up to date when
4 the charge control is set.

5 We also agree with the Tribunal that in the circumstances of a case such as the present there
6 is likely to be a substantial overlap between the assessment for the purposes of sections 87
7 and 88 as to the appropriateness of setting a condition and the assessment in the market
8 analysis for determining what the appropriate market is and whether there is market power
9 within that market. In the spirit of substance rather than form, the Tribunal, in our
10 submission, should step back and look at the work that has been done by the technicians in
11 Ofcom as a whole in order to determine whether, in substance there has been any error here
12 in Ofcom's analysis.

13 So briefly, to recap, in answer to the Tribunal's question 3, we say the test for a material
14 change is whether a change has occurred in the market that is material to the setting of the
15 condition in question in the sense that it materially affects whether or not the condition in
16 question should be set, and a change affecting whether the requirement in s.81(a) was met.
17 It would be one of the types of material change that might arise in the case of a price
18 control, but there are other ways in which material change might also arise, including for
19 example a change affecting the soundness of Ofcom's market power determination or at the
20 market identification which underlies it.

21 Turning then to Talk Talk's case in this appeal and Ofcom's response to it. What is the
22 material change on which Talk Talk relies? In our submission Talk Talk clearly alleges a
23 change to the geographic scope of Market 1 as a result of Talk Talk's newly committed
24 rollout plans. Mr. Pickford made that very clear on his feet today, and it is also very clear
25 from Talk Talk's reply, if I could just give you the reference at p.2, I think the paragraph is
26 3.2. Talk Talk crisply summarises its second ground as raising the issue of "whether Ofcom
27 was correct in deciding that there has been no material change in the geographic scope of
28 Market 1 since the WBA MR statement."

29 Talk Talk says that Ofcom defined Market 1 in December 2010 as consisting of exchanges
30 where only BT is present or forecast to be present, taking account of the committed roll out
31 plans of other principal operators, and define market II has been comprising exchanges
32 where more than one principle operator is present, or forecast to be present. By July 2011
33 Talk Talk had committed rollout plans at a large number of market I, and those exchanges

1 Talk Talk says therefore meet the criteria for classification as Market 2 rather than Market 1
2 exchanges.

3 Talk Talk considers this to be a material change for the purposes of s.86 for two reasons:
4 first, the exchange falling into Market 2 are not subject to a price control and the
5 classification of exchanges between markets 1 and 2 therefore matters, it is material to
6 assessing the condition. Secondly, there is also the *de minimis* point. A sufficient number of
7 exchanges are affected by Talk Talk roll out plans to cross the materiality threshold. In this
8 connection Talk Talk mentions the figure of 40 per cent of Market 1, the figure about
9 which, as Mr. Pickford put it: "Talk Talk makes a song and dance in this appeal".

10 Mr. Pickford said in his submissions this morning that he understood this figure not to be
11 controversial. I should say that that is not quite right. We have some difficulty reconciling
12 this 40 per cent figure with the witness evidence of Talk Talk, which is relied on in support
13 of the figure and to show you that - if I may - I will take you briefly to Mr. Heaney's
14 statement at CD bundle 1, tab 2. If I could ask you to turn to p.48 of the statement, this is in
15 the part of the statement where Mr. Heaney is describing Talk Talk's rollout plans. At para.
16 20 he goes through the status of Talk Talk's roll out plans as at 7th July 2011. He has
17 summarised in figure 1 below; it appears at least from the text before me that these figures
18 are not confidential, so I think I can mention them in open court unless anyone says
19 otherwise.

20 THE CHAIRMAN: I see nodding so I think you can proceed.

21 MR. PICKFORD: That is correct in relation to para.20 but not on 21.

22 MR. HOLMES: I am grateful, sir. So in figure 1 you will see the 40 per cent figure, We take it
23 is derived from the bottom right hand corner of that table, you will see there the percentage
24 of Market 1 premises. A very minor point, Mr. Pickford, I think misspoke on a couple of
25 occasions this morning and referred to 40 per cent of exchanges. The figure is 40 per cent
26 of premises not exchanges. The percentage would be significantly lower if one took the
27 percentage of exchanges. But, taking the premises figure, you will see that that includes not
28 only those exchanges which are live and confirmed deliveries, but also those which are
29 planned in 2012-2013. And that is a significant block, amounting to some 10.7 per cent of
30 the 40 per cent total. If one looks back a page in the statement, we see at para.18(d) details
31 of these 198 further exchanges, the status of which is described as being that –

32 APOs had been placed and accepted for 84 of these exchanges;

33 APOs had been placed but previously rejected for 16;

1 APOs had not been placed for 98 exchanges, though the preferred exchanges had been
2 identified.

3 Now, sir, none of those bullet points, as we understand it, would meet the confirmed and
4 committed rollout plans criterion, which Ofcom applied in December 2010. Just for your
5 note, sir, the criterion applied by Ofcom is described in Mr. Clarkson's evidence which was
6 not challenged by way of cross-examination, at para.19 of his statement. But we, on our
7 reading, then of figure.1 it appears to us that the figure is at best 29.4 per cent but in fact the
8 line above the 29.4 per cent, APO placed, would also not appear to be committed and
9 confirmed because in relation to an order that has been placed but has not yet received
10 confirmation from BT, that also would not count as a confirmed plan. So, in the interests of
11 accuracy, the figure would appear to be 26.6 per cent of Market 1 premises, not the 40 per
12 cent which has been often repeated before the Tribunal today.

13 Now, we say that it is questionable whether even this 26.6 per cent figure is the relevant
14 figure on the basis that this was not the information which was in fact provided to Ofcom at
15 the time by Talk Talk. If you look at footnote 16 of Mr. Heaney's statement on p.48, you
16 will see that he explains that the figures given in figure 1 differ from those quoted in my
17 letter to Stuart McIntosh of Ofcom on 8th July. So, these are the 7th July figures, you see
18 from para.20. It appears those were not the figures that Talk Talk was actually providing to
19 Ofcom during the period immediately prior to the charge control. The figures that were
20 provided, you see that he refers there to – I want to focus in particular on the 238 figures,
21 the 238 figure relates to confirmed delivery, but is at a date earlier than 8th July 2011, which
22 is the date used to prepare the table above. So, that 238 figure relates to the figure of 427
23 given in figure 1. You see that 427 was the figure given for confirmed delivery across all
24 the markets. In fact, what Ofcom was being told at the time was a figure of 238, nearly
25 half, only just above half the figure that was actually being cited as the basis for the 26 per
26 cent figure here. Just to show you that, if you turn to CD1 you see the final paragraph on
27 p.250. This is the letter that was sent by Talk Talk, the last written communication from
28 Talk Talk before the publication of the charge control statement. And you see it sets out the
29 rollout progress, and in the final paragraph on the first page he says:

30 “The process of ordering and delivering these exchanges is already well under way.
31 Orders have been submitted and accepted for 462 of these exchanges with confirmed
32 delivery dates”,

33 So the key point for the purposes of the criteria applied by Ofcom was 238, not the figure of
34 427 that one saw in figure 1. Now, we have seen that Mr. Heaney explains the discrepancy

1 on the basis that the 238 figure was an out-dated figure. They were not supplying Ofcom
2 with the up to date information when they wrote to tell us about their rollout plans on the
3 eve of the charge control. But we say that, surely the relevant figure must be what Talk
4 Talk was saying to Ofcom during the process and not what it now says to have been the
5 position at the time. Ofcom could only go about assessing whether there was a material
6 change on the basis of what it was being told, and the figures that it was being given are
7 significantly lower than the figures that are stated in Mr. Heaney's evidence before the
8 Tribunal.

9 Now, as I will explain in a moment, we do not suggest that this case turns on whether or not
10 sufficient exchanges were committed as at July 2011 to cross the materiality threshold in
11 Mr. Pickford's second sense. We say that his case fails on the first sense of materiality.
12 There was no change that was material to the setting of the condition. I will make that
13 submission good probably tomorrow morning, I suspect. But we do say that the factual
14 position is not quite as Talk Talk puts it in its submissions, and so some care needs to be
15 taken in reaching firm findings of fact on the basis of this 40 per cent figure which has been
16 put to the Tribunal.

17 THE CHAIRMAN: Mr. Holmes, do you suggest that there is importance in the distinction
18 between Market 1 exchanges and Market 1 premises? Or, is that a distinction, as it were,
19 without a difference for this analysis?

20 MR. HOLMES: If anything, probably, in assessing materiality the premises measure is the more
21 significant measure rather than the exchanges measure, because it captures the actual impact
22 on the ground.

23 THE CHAIRMAN: How many per household the exchange is feeding.

24 MR. HOLMES: So, we do not fault Talk Talk -----

25 THE CHAIRMAN: No.

26 MR. HOLMES: – in the witness statement of Mr. Heaney for using the percentages by reference
27 to premises. The point I was making was simply by way of factual clarification, there was a
28 reference made earlier, I believe (I may have mis-noted) but I believe Mr. Pickford referred
29 to 40 per cent of exchanges. The 40 per cent figure relates to the number of premises in
30 Market 1.

31 MR. PICKFORD: I certainly meant premises, sir.

32 THE CHAIRMAN: It is a helpful clarification in my mind anyway.

33 MR. ELPHICK: May I ask a question?

34 THE CHAIRMAN: Do, please.

1 MR. ELPHICK: If I can just clarify the numbers again in figure 1.

2 MR. HOLMES: Yes, sir.

3 MR. ELPHICK: You have explained to us how to get from 40 per cent down to about 26½ per
4 cent.

5 MR. HOLMES: Yes, sir.

6 MR. ELPHICK: If we were going to replace the 427 with your figure of 238, are you able to tell
7 us what that then does to the percentages in regard to premises?

8 MR. HOLMES: Sir, on my feet I could not. But I am quite sure that there are those behind me
9 who could tell you that. If they cannot tell you immediately, then perhaps I could back to
10 you with that figure tomorrow morning?

11 MR. ELPHICK: Fine. Thank you.

12 MR. HOLMES: I imagine that they are pulling out their Blackberries as we speak in order to use
13 the calculator function!

14 THE CHAIRMAN: Mr. Holmes, just to follow up on that.

15 MR. HOLMES: Yes, sir.

16 THE CHAIRMAN: You said, of course, that you have got a more fundamental answer to what is
17 taken by Talk Talk. Does that mean that even if we correct these figures to reach whatever
18 percentage one reaches if one asserts the lowest possible computation here, you would be
19 accepting that it is a material number of premises being affected or, if you are not, then we
20 will require some assistance in how one draws the line between that which is material and
21 that which is immaterial.

22 MR. HOLMES: Sir, may I return to that question after I have developed my submission on, my
23 main submission on -----

24 THE CHAIRMAN: By all means. I do not mind when you do it.

25 MR. HOLMES: It might be sensible for us to do so when we have the figures -----

26 THE CHAIRMAN: In the context of all the figures. Yes, indeed.

27 MR. HOLMES: Let me give you, then, our case in a nutshell in relation to our main argument.
28 We say that Ofcom's classification of exchanges in December 2010 took account of future
29 entry, and it specifically took account of Talk Talk's rollout plans, of which Ofcom was
30 aware at the time and in relation to which Ofcom had gathered information using its formal
31 powers under s.135. Ofcom had good substantive reasons for concluding that the
32 boundaries of the market as it defined would remain sound despite such entry. It found that
33 in the exchanges where such entry occurred, BT could still be expected to hold a 70-80 per
34 cent share of the market by the end of the market review period in December 2014. So,

1 Ofcom was doing exactly the forward looking exercise that Mr. Pickford has repeatedly
2 stressed in his submissions today. It was taking a look at the lists of exchanges it had
3 prepared and it was asking, “Will these exchanges correctly capture competitive conditions?
4 Will the buckets of exchanges that have fundamentally similar competitive conditions so
5 that they should all be grouped together?” And it concluded in December 2010 that they
6 would have sufficiently similar competitive conditions by the end of the market review
7 period. So, it was doing a forward look. It defined the market, taking account of the
8 rollout.

9 Now, since December 2010, further entry has occurred as Ofcom anticipated and as Talk
10 Talk informed Ofcom that it would. However, Ofcom’s reasons for concluding that its
11 market definition was sound in December 2010 have not been challenged, and they remain
12 sound. Talk Talk has never presented an argument to resist the conclusion that 70-80 per
13 cent is the share that could be expected, that BT could be expected to hold in those
14 exchanges where Talk Talk rolled out after December 2010 during the market review
15 period. So, by the very end of the period one would have, within Market 1, exchanges that
16 ranged in their market share from, at the most competitive, in those where the conditions
17 were most competitive still, a market share for BT of 70 or 80 per cent up to those
18 exchanges where the market share was 98 per cent. And Ofcom concluded that those
19 exchanges were all sufficiently alike to merit a charge control and to merit remaining within
20 Market 1. They were in the right bucket notwithstanding rollout after December 2010.
21 Now, this 70-80 per cent market share finding is one that Talk Talk in its summaries of
22 Ofcom’s case, in the notice of appeal, in the reply and, with respect to Mr. Pickford in his
23 description of Ofcom’s reasoning, has been notably absent, although it is a key aspect of
24 Ofcom’s reasoning both in the market review statement and in the charge control statement.
25 And we say, as a matter of common sense, there has not been any change in the market in
26 the sense of an unanticipated development that affects the soundness of Ofcom’s market
27 definition. The geographic scope of the market remains sound because the only
28 developments that have taken place are anticipated developments that were taken account of
29 and are reflected in Ofcom’s market definition as at December 2010.

30 Now, sir, would that be a convenient moment to stop?

31 THE CHAIRMAN: That looks like a very convenient moment, Mr. Holmes. Mr. Pickford.

32 MR. PICKFORD: Sir, I apologise. If there is anything further that you were going to say to
33 Mr. Holmes -----

34 THE CHAIRMAN: No, you go first. I had one point for everyone, but you go first.

1 MR. PICKFORD: Thank you. Just before the Tribunal rises, we do have one concern out of the
2 submissions that I have just heard this afternoon, and it relates to the analysis that
3 Mr. Holmes just gave of Talk Talk's rollout plans and his attack on the 40 per cent figure,
4 and he says that we never challenged Mr. Clarkson on what he says about the distinctions
5 between different types of rollout at para.19 of his statement. Now, to the best of my
6 knowledge none of that, of the argument that you heard at the outset of Mr. Holmes's
7 submissions was pre-figured in its defence and skeleton argument. We did not understand
8 there to be any attack on the 40 per cent figure of the type now made; and neither was
9 Mr. Heaney cross-examined in relation to that. So, we will obviously need to consider what
10 the implications of that are. Now, it may be, if Mr. Holmes is going to say, "Well, actually,
11 we still accept that 25 per cent or 30 per cent or whatever it is, is still a big enough amount",
12 it is not in issue. It will be regrettable if Mr. Clarkson has to be recalled to be cross-
13 examined about this issue if there is a dispute between us. But, we did not understand there
14 to be such a dispute.

15 THE CHAIRMAN: We will see where we go to on that. In a sense it is why I raised the point
16 I did this morning about the table, because for our part we discerned a certain mismatch in
17 the description or designation used by Talk Talk on the one hand and Ofcom on the other, in
18 the sense that one has got – as one could see in the table at para.23 of Mr. Heaney's first
19 statement – live confirmed delivery and APO placed, which does not quite match to the
20 committed/uncommitted distinction that is drawn by Mr. Clarkson in his first statement.
21 For our part, we do not understand there to be a question of fact at issue here, more a
22 question of how the figures are analysed. And that I anticipate will be resolved by the
23 parties working on an agreement as to how the figures are classified. If there is a
24 disagreement, I strongly suspect it will be either by reference to what one classifies as
25 committed/uncommitted, or when Ofcom was told about the relevant exchanges as featured
26 in the footnote that Mr. Holmes drew attention to. If there is anything beyond that, then
27 clearly we will hear you.

28 MR. PICKFORD: We certainly hope that Mr. Clarkson does not need to be recalled. But, as
29 I said, I premised my cross-examination on the issues that I saw squarely raised, but this
30 was not one of them.

31 THE CHAIRMAN: You have put down your marker, Mr. Pickford. We do not, as you know,
32 apply the strict rules of evidence here. Unless there is a point in which cross-examination
33 could actually have added value – and at the moment we do not see that as existing – then
34 I do not think your concern goes anywhere.

1 MR. PICKFORD: I am grateful, sir.

2 MR. HOLMES: Sir, just to be clear, we were not intending to challenge Mr. Heaney's evidence
3 in any of the submissions that we just made. We were relying on his evidence in order to
4 show a discrepancy as we saw it between the figures as stated in the evidence, and those
5 that were adopted in Mr. Pickford's submissions.

6 THE CHAIRMAN: We understand. I think it is very much a question of label rather than
7 anything else, but we will see how we go in terms of the agreement on that point.

8 One point of housekeeping, and it is really future housekeeping, the parties have all quite
9 rightly indicated that, were this case to go one way rather than the other, they would want to
10 address on the question of relief; and I say this now without any indication as to where the
11 Tribunal is thinking. But it does seem to us that it would be important to have a date in the
12 diary in case it is needed for the future, and that should be fairly quickly, if at all possible.
13 I wonder if the parties could liaise and work out a series of dates (optimistically, some as
14 early as Christmas) as possible but, more realistically, the first half of January next year so
15 that something could be put in all our diaries in case it is needed, rather than wait for a
16 judgment to be handed down and then to try and arrange a date, which may or may not be
17 needed. In that case, if that is all, we will say ten o'clock tomorrow morning.

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