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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No. 1186/3/3/11

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

6<sup>th</sup> December 2011

Before:

MARCUS SMITH QC  
(Chairman)  
DR. CLIVE ELPHICK  
JONATHAN MAY

Sitting as a Tribunal in England and Wales

BETWEEN:

**TALK TALK TELECOM GROUP PLC**

Appellant

– v –

**OFFICE OF COMMUNICATIONS**

Respondent

– supported by –

**BRITISH TELECOMMUNICATIONS PLC**  
**BRITISH SKY BROADCASTING LIMITED**

Interveners

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**HEARING (DAY TWO)**

## APPEARANCES

Mr. Meredith Pickford (instructed by Towerhouse Consulting LLP) appeared on behalf of the Appellant.

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

Mr. Tim Ward QC 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 British Sky Broadcasting Limited.

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1 THE CHAIRMAN: Yes, Mr. Holmes?

2 MR. HOLMES: Sir, during the course of yesterday afternoon, I promised, in response to a  
3 question from Dr. Elphick that I would provide the Tribunal with a percentage for the  
4 number of premises in Market 1 that would be covered using the figure of 238 exchanges  
5 having confirmed delivery dates, which was the information that Mr. Heaney provided to  
6 Ofcom on 8<sup>th</sup> July 2011. The Tribunal will recall this figure is in contrast to the figure of  
7 427 exchanges referred to in figure 1 of Mr. Heaney's statement, which is said to identify  
8 the position as at 7<sup>th</sup> July 2011, the date before Mr. Heaney wrote to Ofcom referring to the  
9 figure of 238 exchanges.

10 I am afraid it is a rather long introduction to a rather disappointing response, which is to say  
11 that unfortunately things turn out to be rather more complicated than I had hoped. This is  
12 not an assessment that can be done on a Blackberry calculator as I had hastily assumed.

13 This is so for two reasons: first, the figure of 238 exchanges referred to in Mr. Heaney's  
14 letter concerns exchanges across all three markets and not just exchanges in Market 1,  
15 whereas the figure of 427 I believe was a figure in relation to Market 1. The figure is at  
16 para. 20. No, it was the total number, but the point is that in order to produce a percentage  
17 figure comparable with the figure given in the final column one would obviously need to  
18 know which of the 238 exchanges were within the Market 1 category, so as to work out the  
19 percentage and we do not know that, because Mr. Heaney with his letter never provided  
20 Ofcom with details of the exchanges that were committed. In fact, the last information on a  
21 per exchange basis that Ofcom received from Talk Talk during the consultation process was  
22 the spreadsheet attached to the March 2011 email which you saw as part of Ofcom's  
23 disclosure and, as you will have seen from that, that did not identify committed exchanges.  
24 So we simply do not know which exchanges are covered, we therefore do not know which  
25 ones are within Market 1 and we therefore also cannot work out the number of premises,  
26 because you need to know the exchanges to know the number of premises.

27 So if Talk Talk were to provide us with the data, which unfortunately is an outdated data set  
28 as at 8<sup>th</sup> July, but if they were to provide us with that we would be very happy to work out  
29 what percentage of premises were covered, but that is something I could perhaps pick up  
30 with Mr. Pickford and if there is any useful information we can provide to the Tribunal we  
31 will do so.

32 THE CHAIRMAN: That is very helpful, Mr. Holmes, just to confirm my understanding,  
33 essentially looking at the 427 listed in para. 20 of Mr. Heaney's first statement, that can  
34 safely be changed to 238?

1 MR. HOLMES: Yes.

2 THE CHAIRMAN: The problem is you cannot then fill out the remaining three columns on the  
3 right hand side of the table, the most you could do would be to say – being generous – 238  
4 is the highest figure that could exist from Market 1 exchanges, but it is almost certainly  
5 lower and one cannot say by how much it is lower?

6 MR. HOLMES: Yes, and equally one cannot say what percentage of premises are covered  
7 because one does not know the specific exchanges, which one would need for the number of  
8 premises, because the number of premises varies between exchanges.

9 THE CHAIRMAN: For our point, I think it would be helpful to have these figures, even though  
10 as I understand the parties' submissions essentially Mr. Pickford is saying that something  
11 far fewer than 40.1 percent of exchanges migrating from Market 1 to Market 2 could be  
12 material and, as I understood yesterday, he was through clenched teeth saying perhaps one  
13 or two exchanges might amount to *de minimis* but not more than that, we will see where we  
14 go on that. Whereas you, Mr. Holmes, are saying that that is an irrelevant question  
15 altogether?

16 MR. HOLMES: Yes, sir.

17 THE CHAIRMAN: And what one has to focus on is the effect of the change on the price control  
18 that was envisaged by Ofcom when you feed in all the changes and see does it make a  
19 difference to the price control you would want to make?

20 MR. HOLMES: Yes, you are absolutely right that our case today is that it is irrelevant because  
21 the change is not a material change to the setting of the condition. In some particular  
22 circumstances it may well be that the *de minimis* threshold would also provide a reason why  
23 a change was not a material change for the purposes of s.86 but Ofcom's case in these  
24 proceedings is that that question simply does not arise, because there is no change material  
25 to the setting of the condition which is a prior requirement irrespective of whether the *de*  
26 *minimis* threshold is crossed.

27 THE CHAIRMAN: Yes, my concern with that is this: on Mr. Pickford's thesis you look at how  
28 the market has been defined, and here we have a definition for present purposes: 'Market 1'  
29 and 'Market 2' are the only ones that matter and one has certain criteria by which certain  
30 exchanges are allocated within one or the other.

31 MR. HOLMES: Yes.

32 THE CHAIRMAN: And he says that where there has been a change such that the number of  
33 exchanges in market 1 migrate to market 2, and that is more than *de minimis*, that is  
34 material, then that is something which needs to be considered pursuant to s.86.

1 MR. HOLMES: Yes, sir.

2 THE CHAIRMAN: You say: “No, that is the wrong question. Let us look and see what is  
3 material for the purposes of the price control”, and my question to you is: does that not  
4 oblige you to look at every change, even immaterial ones, or changes which appear to be  
5 immaterial, in order to work out whether they are material for the purpose of the price  
6 control.

7 MR. HOLMES: Your question is: you cannot determine whether a change is *de minimis* until  
8 you have considered its consequences for the price control?

9 THE CHAIRMAN: Yes, exactly. Just to be clear, as I understand Mr. Pickford’s position if it is  
10 just one exchange then Ofcom can perfectly properly say: “Looking at that, we are satisfied  
11 it is not material we can disregard it and move on”, and that seems a very sensible way of  
12 excluding changes which are immaterial. On your case though it could be the situation that  
13 a single exchange, or a couple of exchanges – I know it is a rather far fetched example – but  
14 it could be that a single exchange migrating from one group to another actually does make a  
15 material difference to the price control, and it seems to me that there is a logical  
16 requirement in your submission that every change, even if it looks on the face of it as being  
17 *de minimis* needs to be looked at to see if, in fact, it creates a material change in the price  
18 control.

19 MR. HOLMES: So on both Mr. Pickford’s case and my case, as I understand it, there are two  
20 stages of analysis in relation to materiality. The first is to consider that there is a change  
21 that is material to the setting of the condition and that question, I agree with you, must be  
22 the first question because you can only assess whether a change is *de minimis* or material in  
23 the second sense once you have an understanding of the consequences of a change, the  
24 implications of the change for the setting of the condition. So you do have to begin with the  
25 core question in relation to s.86 of whether the change is material to the setting of the  
26 condition, in the sense of whether it is material to the question of whether or not to set the  
27 price control in the form that Ofcom is proposing to set it? That has to be the first question.  
28 Having addressed that question one might go on to say, and I think there is no difference  
29 between Mr. Pickford and myself on this, that whilst the change is potentially one that could  
30 be material to the setting of the condition, in principle, looking at matters broadly, and  
31 taking account of the quality of the change, the quality is of minor importance and therefore  
32 it can be excluded. Although it is potentially capable of being a material consideration it is  
33 not in fact a material consideration because of its small scale.

1 I think this submission will become clearer and more concrete when I come to explain why  
2 it is that we say there was no material change in this case – why we say that taking account  
3 of the change that Mr. Pickford refers the Tribunal to, this rollout of LLU unbundling by  
4 Talk Talk in Market 1, we still say that there is no material change for the purpose of setting  
5 the price control because there is no change to the relevant market definition that arises as a  
6 result of that rollout, there is no change to the assessment of the degree of market power,  
7 and there is no change as to the desirability of the remedy.

8 I will make those points good by taking you to various passages in the market review  
9 statement, and the charge control statement, which I think you have not yet seen, which  
10 might shed clearer light on Ofcom's position.

11 THE CHAIRMAN: Well in that case, Mr. Holmes, we will stow our further questions and let you  
12 take your own order.

13 MR. HOLMES: I am grateful, sir. I think the legal issues might come into clearer focus in the  
14 light of my overall submissions, my core case on ground B.

15 THE CHAIRMAN: That is very helpful.

16 MR. HOLMES: Just to remind you of that core case, we say that the reason why Talk Talk's  
17 rollout plans were not material to setting the charge control is because Ofcom took account  
18 of the rollout plans in defining the relevant markets. It found that, even where rollout  
19 occurred towards the period of the market review, BT would still have a very large market  
20 share of 70 to 80 per cent by the end of that period. On that basis Ofcom concluded that  
21 this modest change to the competitive conditions in exchanges that committed to unbundled  
22 during the market review (but not before the market review) was not sufficient to justify  
23 reclassifying them.

24 On the one hand, the competitive conditions that those exchanges remained sufficiently  
25 similar to competitive conditions at exchanges at which BT were still the only principal  
26 operator, to support keeping those two types of exchange together in the same market over  
27 the forward looking period of the review. So you had exchanges where BT was the only  
28 principal operator, but BT's market share was, let us say, 98 per cent – there is some  
29 competition from operators that are not principal operators – and those exchanges which  
30 had unbundled and had committed to unbundle after the start of the market review period,  
31 in relation to which, best case, you would have BT still having a market share of 70 to 80  
32 per cent.

33 On the other hand, competitive conditions in the exchange in which operators committed to  
34 unbundled after December 2010 were likely to be sufficiently different from exchanges

1 which operators had committed to unbundled before December 2010 to justify keeping  
2 them in separate markets, to justify the division of those exchanges between Market 1 and  
3 Market 2, this is because in exchanges that unbundled earlier there was more likelihood that  
4 the entrant operator would be able to gain a greater share of the market over the course of  
5 the market review period than the exchanges that it unbundled later. The timing of the  
6 commitment was therefore crucial in understanding how competition was likely to rollout.  
7 So our case is not a definitional one. We are not engaged in some sterile exercise of  
8 excluding the possibility of a material change by definition. We rest our case on a specific  
9 finding of fact and analysis about how competition would roll out and the different way in  
10 which competition would roll out, between the exchanges which committed to unbundled  
11 earlier and exchanges which committed to unbundled later. The finding of the 70 to 80 per  
12 cent market share at the end of the review period showed that the market definition arrived  
13 at by the criteria applied by Ofcom in December 2010 was sound. It correctly reflected  
14 sufficiently homogenous competitive conditions within each of the markets to justify the  
15 divisions that were arrived at.

16 Equally, that 70 to 80 per cent finding underpinned the finding of significant market power  
17 and the degree of market power. It found that there was a qualitative difference in the  
18 degree of market power between Market 1 and Market 2 because on average at the start of  
19 the review period in Market 2 you have a share for BT of around 64 per cent. Now, that is  
20 on average, but that average is obviously determined by conditions in individual exchanges  
21 that go to make up Market 2. The different competitive conditions between Market 1 and  
22 Market 2 in turn will not justify imposing a price control in Market 1 but not in Market 2.  
23 In Market 1 you had the limited competitive constraint by the end of the period. In Market  
24 2 you had more established competition and therefore more likelihood of an effective  
25 competitive constraint on BT over the course of the review period. That is, we say, an  
26 entirely rational, well grounded distinction which relies on applying criteria as at December  
27 2010.

28 There is a good reason why we have the December 2010 cut-off point because in the  
29 exchanges that committed before 2010 you would see competitive conditions developing in  
30 those at an earlier stage of the market review period, they kick in earlier and they therefore  
31 fitted more neatly in Market 2. In those that committed after December 2010 obviously  
32 competitive conditions would develop more slowly, so it was a rational approach to draw  
33 the line where Ofcom did.

1 THE CHAIRMAN: Just to take a slightly fanciful example which may assist just to understand  
2 this. Suppose in late November 2010 Talk Talk had come to Ofcom, not saying: "Our  
3 commitment regarding rollout has changed and here are the exchanges which, in the future,  
4 we are going to be unbundling", but they said: "We have made a dreadful error, in fact we  
5 have already committed to unbundled these 500 exchanges, we just forgot to tell you and  
6 we are dreadfully sorry but we have made a mistake and in fact there is a process that is  
7 ongoing and has been ongoing for sometime with regard to unbundling, it is just that you  
8 did not know about it". Presumably, on that basis you would have to accept that there  
9 would have been a massive change ----

10 MR. HOLMES: Yes.

11 THE CHAIRMAN: -- and because on a temporal scale things were, unbeknown to you, much  
12 earlier in play ----

13 MR. HOLMES: Yes.

14 THE CHAIRMAN: -- than otherwise you expected. Yes, I see.

15 MR. HOLMES: Yes, that is absolutely right. If any committed exchange plans which have been  
16 provided before December 2010 would have had more likelihood of exercising a  
17 competitive constraint over the period of the market review. Now, of course, there are  
18 going to be difficult cases. I squarely accept this, as between exchanges that unbundled  
19 immediately before December 2010 and those that were committed to unbundling after  
20 December 2010. There are several elements as a matter of fact which attenuate that risk.  
21 The first is that the data as regards rollout plans was in fact collected in June 2010, some six  
22 months prior to the market review. There was therefore a fair prospect that the rollout  
23 would be occurring in those exchanges by December 2010 and that is obviously an  
24 attenuating factor.

25 Also, we know from Mr. Clarkson's evidence, some information about what happened to  
26 the committed exchanges, the exchanges that were committed but not yet unbundled after  
27 December 2010, and we know that only a small number were still in the process of  
28 unbundling, and now that number has dwindled to a very small number.

29 So insofar as there may be some difficult classifications on the margins they are unlikely to  
30 be significant and, moreover, they are inherent in the line drawing exercise which is  
31 required in an exercise of *ex ante* price regulation where you have to draw lines between  
32 markets. Again, that is a submission that I will come back to and make concrete by  
33 reference to specific passages of the market review statement, if I may.



1 The analysis I have just been describing was in the market review statement in December  
2 2010, and Mr. Pickford says that that is all very well, but that was December 2010, you  
3 cannot pull yourself up by your bootstraps and rely on an analysis in December 2010 to  
4 show no material change in July 2011.

5 What happened after December 2010? We say what happened was exactly what Ofcom  
6 anticipated. There was rollout by Talk Talk, there has been rollout by Talk Talk and we  
7 will see that the speed of that rollout is exactly as Ofcom anticipated. Ofcom proceeded  
8 with its charge control consultation while this was going on. Talk Talk pressed its case on  
9 s.86 relying on rollout, and in the charge control statement Ofcom reconsidered the  
10 implications of entry in Market 1 exchanges for the purposes of s.86. It also considered the  
11 implications for the degree of market power in the different markets, and for the  
12 appropriateness of the remedy. It concluded that, nonetheless, there had been no material  
13 change because nothing had been said by Talk Talk that called into question the factual  
14 basis on which Ofcom had concluded that the rollout, subsequent to December 2010, the  
15 committed exchanges after December 2010, could not sufficiently affect the conditions of  
16 competition in Market 1. There had been nothing said which affected a 70 to 80 per cent  
17 figure.

18 One can go further than that and say that Talk Talk in fact has consistently painted a very  
19 similar picture itself as to the likely evolution of competition in unbundled exchanges,  
20 exchanges that committed and unbundled during the market review period as opposed to  
21 prior.

22 If you could turn to tab 2H of CD1, these are the exhibits to Mr. Heaney's statement, you  
23 will see at p.192 – this is Talk Talk's response to the charge control consultation of March  
24 2011 - just rolling through we see one of the arguments they advance at para.46 on p.192 is  
25 that Ofcom should: "Apply less severe price reductions". They say a price control in the  
26 terms that you are proposing is going to make for less investment by us in LLU rollout in  
27 Market 1, so you should attenuate this effect by setting the charge control higher than you  
28 are currently proposing to do and that is to reflect the desirability of encouraging  
29 competition.

30 You will see over the page at p.193 the first bullet point suggests that one way in which the  
31 charge control could be increased in its level would be to assume lower volumes for BT –  
32 and those behind me will correct me if I get this wrong – the effect of which would be to  
33 increase BT's unit costs because its costs would be spread over a smaller number of units  
34 supplied.

1 They propose a market share, you will see at footnote 42, of 25 to 30 per cent. That is 25 to  
2 30 per cent for the entrant. They say that the 90 per cent market share for BT – it is a  
3 slightly confusing footnote, because it does not distinguish between BT’s market share, no  
4 doubt drafted as these things always are under time pressures, it does not distinguish clearly  
5 between BT’s market share, which is the 90 per cent figure and Talk Talk’s market share, or  
6 the entrant’s market share, which is the 25 to 30 per cent figure.

7 THE CHAIRMAN: So effectively saying you should project BT’s market share as much lower  
8 than 90 per cent on that assumption?

9 MR. HOLMES: Well, you should set the market share by reference to an entrant obtaining a 25  
10 to 30 per cent market share.

11 You see further on p.195, again we are coming to the projection in relation to the number of  
12 customers, you will see that they have made two comments, and in the first comment they  
13 consider Talk Talk’s forecasts as regards the customer numbers that it will serve, and it  
14 assumes a [X] per cent market share – this is all in Market [X] because we are now into the  
15 charge control process ----

16 MR. PICKFORD: These are confidential numbers.

17 MR. HOLMES: Forgive me, my apologies, that is not flagged on my copy.

18 THE CHAIRMAN: No, it is not marked on mine.

19 MR. PICKFORD: The entire submission was said to be confidential.

20 THE CHAIRMAN: Mr. Pickford is quite right, in the bottom left hand corner there is in bold  
21 “Confidential”.

22 MR. HOLMES: Indeed, I apologise.

23 THE CHAIRMAN: These things happen. Mr. Holmes, either we can clear the courtroom of those  
24 who should not be hearing this, or you can simply invite us to read the parts?

25 MR. HOLMES: Absolutely.

26 THE CHAIRMAN: We will do that.

27 MR. HOLMES: I shall do that subsequently. I think it is highly unlikely that I shall come to  
28 further confidential numbers, but if I do I shall proceed with greater caution and my  
29 apologies to the Tribunal and to the others present.

30 THE CHAIRMAN: No, and thank you, Mr. Pickford.

31 MR. HOLMES: Paragraph 83 finally, on p.199, you come here to annex A, which is Talk Talk’s  
32 representations to Ofcom during the consultation process on how Ofcom should decide on  
33 Market 1 exchanges if it were to re-open the classification of exchanges. You will see at  
34 para. 83 that their proposal is that we should adopt a new basis for classification, not the one

1 that we applied in December 2010, but one based on whether there is a likelihood or  
2 prospect of rollout in the next few years. So they wanted to do away with the current  
3 classification because they thought we should somehow assess there would ever be entry.  
4 You then see at para. 84, they specifically refer to the 70 to 80 per cent market share point.  
5 Another reason given by Ofcom in the December 2010 market review for excluding Talk  
6 Talk's planned exchanges was that they felt that they would have limited impact since they  
7 would be rolled out over three years and they refer there to a quotation from the WBA  
8 market review, which says:

9 "… the effects of deployment as a competitive constraint may only become  
10 apparent towards the end of the review period."

11 That was the conclusion that was supported by the 70 to 80 per cent figure, as we will see  
12 when we come to the market review statement.

13 In response to that, they do not challenge the correctness of that analysis. Their point is a  
14 different one. They say:

15 "As we describe above the speed of rollout should not determine how exchanges  
16 are categorised."

17 I have scoured this document as carefully as time allowed and I am afraid it was not clear to  
18 me where it was "described above" that the speed of rollout should not determine how  
19 exchanges are categorised. I think that is simply a reference back to para.83 where they are  
20 proposing the basis of categorisation on the basis of the likelihood or prospects of rollout.  
21 They are saying that speed of rollout should not be taken into account, but they do not give  
22 any substantive reasons why the speed of rollout analysis, which Ofcom did rely upon in the  
23 December 2010 statement, was in any way misconceived.

24 Just to conclude this point on the 70 to 80 per cent. coming to Mr. Heaney's statement itself  
25 in these proceedings – turning back to tab 2 in CD1 – you will see at para. 57 of that  
26 statement, and again I need to proceed more cautiously than before, if I could just ask you  
27 to read the final sentence of para. 57 you will see the position that Mr. Heaney has advanced  
28 in these proceedings.

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

30 MR. HOLMES: We say that our core case has never been placed in issue. The factual finding  
31 which underlies our core case has never been placed in issue before and is not in issue in  
32 these proceedings.

33 So now, let me come to develop Ofcom's case in a little more detail and I want to do that in  
34 three stages. First, I would like to show the Tribunal some relevant legal materials on

1 market definition. Secondly, I will then explain Ofcom's approach to market definition and  
2 take the Tribunal to some key passages from the market review statement and the charge  
3 control statement; and thirdly, I will address Mr. Pickford's arguments of yesterday in  
4 response to our core submission.

5 To begin with market definition. If I could take you, sir, to a document that has already  
6 been opened by Mr. Pickford in which we would wish to draw attention to some further  
7 passages, and that is in authorities bundle 1, at tab 4. The Tribunal will recall that these are  
8 the Commission's guidelines on market analysis and the assessment of significant market  
9 power which are issued pursuant to an obligation on the Commission to provide guidance to  
10 national regulatory authorities, and which the national authorities must, in their turn, take  
11 account of both when identifying or defining the market and when analysing the market for  
12 market power.

13 At para.20 there is the passage which Mr. Pickford has already taken you to, which  
14 emphasises the need for a forward looking structural evaluation of the relevant market.  
15 Now, we do not shy away at all from the forward looking nature of the analysis that is  
16 required, and we accept that that analysis must be forward looking – both at the market  
17 review stage, and when one comes to consider material changes at the s.86 stage, if one sets  
18 a charge control or a condition separately from defining and assessing the market. So we  
19 absolutely endorse this aspect, the need for a forward looking approach.

20 At para. 24, for those more familiar with mainstream competition law, just to confirm that  
21 there is a relationship with competition law: "... markets will be defined and SMP will be  
22 assessed using the same methodologies as under competition law". It is a small point but  
23 worth picking up.

24 Then turning forward to p.80, one comes to market definition. One sees at para. 34 that the  
25 reason for undertaking a market definition is in order to determine whether there is SMP.  
26 Market definition is not an end itself but a means for assessing competitive conditions in  
27 order to determine whether there is significant market power. So you see in the fifth line:

28 "... the definition of the relevant market is of fundamental importance since  
29 effective competition can only be assessed by reference to the market thus  
30 defined."

31 You need the market definition to assess the market power, and you have my submission  
32 already that one should not try to compartmentalise too much these different stages of  
33 analysis. The Tribunal's task is to determine whether materially, looking at Ofcom's  
34 assessment in the round, there was any error of assessment substantively. Quite where the

1 arguments have been placed as between market definition and market analysis is not that  
2 important. The overall question is how competitive conditions look, whether Ofcom had  
3 good basis for arriving at the assessment of competitive conditions that it did.

4 At para.35 a closely related point:

5 “Market definition is not a mechanical or abstract process but requires an analysis  
6 of any available evidence of past market behaviour and an overall understanding of  
7 the mechanics of a given sector. In particular, a dynamic rather than a static  
8 approach is required when carrying out a prospective or forward-looking market  
9 analysis.”

10 We say, sir, that there is a certain mechanical quality to the way that Talk Talk is proposing  
11 that criteria applied at the start of the market review period should simply be applied afresh  
12 without reference to the underlying economic analysis in which they sit in July 2011 to  
13 revise the market definition and I will come back to that point.

14 At para.36 you see that:

15 “The main products in service markets whose characteristics may be such as to  
16 justify the imposition of *ex ante* regulatory obligations are identified in the  
17 Recommendation which the Commission is required to adopt pursuant to Article  
18 15(1) of the framework Directive. ... Therefore in practice the task of NRAs will  
19 normally be to define the geographical scope of the relevant market.”

20 Indeed, in this appeal there is no challenge to the relevant product market, the challenge is  
21 to the geographic scope of the market, and the relevant product market is effectively an  
22 elaboration of a market that is identified as one that may be problematic in the  
23 Commission’s recommendation, but we do not need to go there, but it is one of those  
24 markets that Ofcom is required to take a close look at because the Commission has fingered  
25 this as a market that might be problematic.

26 So we can skip then on to geographic market at p.83, and para.56 is an important paragraph:

27 “According to established case-law, the relevant geographic market comprises an  
28 area in which the undertakings concerned are involved in the supply and demand  
29 of the relevant products or services, in which are the conditions of competition are  
30 similar or sufficiently homogeneous and which can be distinguished from  
31 neighbouring areas in which the prevailing conditions of competition are  
32 appreciably different. The definition of the geographic market does not require the  
33 conditions of competition between traders or providers of services to be perfectly  
34 homogeneous. It is sufficient that they are similar or sufficiently homogeneous

1 and accordingly, only those areas in which the conditions of competition are  
2 'heterogeneous' may not be considered to constitute a uniform market."

3 Then lastly, sir, I think we probably do not need to read it, but at para.75 for your note, there  
4 is a discussion of the meaning of significant market power, and what that paragraph makes  
5 clear is that that is also a forward looking exercise, also about competitive conditions.

6 Market shares are a relevant consideration when assessing the extent or degree of market  
7 power and that market shares above 50 per cent give rise to a presumption of dominance.

8 So this is the nature of the exercise that Ofcom was engaged in, a forward looking exercise  
9 aimed at determining whether competitive conditions in the various exchanges were  
10 sufficiently similar to justify including them in the same geographic market, and also to  
11 assess the extent of any market power in order to determine whether there was SMP and  
12 what remedies might be appropriate.

13 How did Ofcom go about this exercise? In overview, and as we will see from the market  
14 review statement, we say that there are effectively three elements to Ofcom's market  
15 definition. First, there are the three markets themselves which are basically buckets of local  
16 exchanges, and Mr. Pickford showed you the lists of exchanges in the appendices to the  
17 notification at the back of the market review statement, so they are, if you like, the outputs  
18 of the market review process, the market identification process.

19 Secondly, there are the criteria that Ofcom used in sorting exchanges between these three  
20 buckets and these criteria allocated exchanges between the three BT national markets based  
21 on two indicators of the state of the market as at December 2010. The first indicator, and  
22 the only one used in relation to Market 1 was the number of so-called 'principal operators'  
23 as at December 2010.

24 The second indicator, which was used in addition to the number of operators in order to  
25 classify exchanges between Markets 2 and 3, was BT's market share at a given exchange as  
26 at December 2010. So those are the criteria.

27 Thirdly, there is the underlying economic analysis which we say underpins the criteria that  
28 Ofcom adopted. This analysis was the basis on which Ofcom concluded that the criteria  
29 were good indicators of competitive conditions at the exchange level in December 2010 at  
30 the start of the period, and also on a forward looking basis over the whole period of the  
31 market review up until December 2014. So there is economic analysis that addresses both  
32 of those points, the soundness of the classification as at December 2010 but also on a  
33 forward look basis are these pots that we have arrived at of applying criteria okay? Do they  
34 match up with competitive conditions that can be expected over the forward look period?

1 We say that all three of these elements are essential and inseparable components of Ofcom's  
2 market definition. You cannot take any of them in isolation, in particular you cannot just  
3 take the criteria and ignore the analysis which underpins the criteria and the lists of  
4 exchanges. That analysis is key. We say that this is exactly what Talk Talk has sought to  
5 do. It takes the second element of Ofcom's market definition, the criteria applied to  
6 categories of exchanges by reference to the state of the market in December 2010 and says  
7 that if you applied those criteria afresh in July 2011 you would arrive at a different list of  
8 exchanges at the first level. Talk Talk thereby overlooks the substantive reasoning, which I  
9 will come to – which I have already averted to – this 70 to 80 per cent finding.

10 Mr. Pickford took issue yesterday, and I should perhaps pick this point up quickly now,  
11 with the distinction between criteria used to define markets, and the economic analysis  
12 supportive of the markets thus defined, and his point was that the criteria used, and the  
13 economic analysis should be aligned with one another. We have no problem with that, we  
14 agree, of course, and we say that in this case the criteria applied were to assess the state of  
15 the market as at December 2010, and that is the aspect of the criteria that he overlooks, the  
16 'as at December 2010', and that qualification was supported by sound economic analysis of  
17 how conditions in the market would develop over the period of the market review.

18 If he goes further and suggests that the criteria used and the economic analysis should be  
19 one and the same, then here we part company from him. Often, when involved in a large  
20 classification exercise, such as the one which Ofcom was performing here, it is both  
21 necessary and appropriate to identify readily applicable rules that can be used to identify in  
22 broad terms how to classify this pot of 10,000 exchanges. You cannot perform a tailor  
23 made assessment in each exchange; that is clearly not remotely possible, and Ofcom's  
24 criteria were of this nature. It would have been impracticable for Ofcom to perform an in  
25 depth competition assessment in relation to conditions in every exchange and so criteria  
26 were needed to be devised by reference to underlying principles to ensure that they were not  
27 arbitrary. That is what Ofcom did, it arrived at criteria that fit with the economic  
28 assessments, both in December 2010 and then the forward look.

29 Let me now take you to the market review and the charter control statements to make these  
30 points good. The market review statement is at CD2, tab 6. Can I take you to the  
31 introduction s.2, which begins on p.824, and then turn on to p.828. There is a heading two-  
32 thirds of the way down the page: "A forward look at future market developments":

33 "Rather than just looking at the current position, market reviews look ahead to how  
34 competitive conditions may change in the future. Our evaluation of the current

1 market takes into account past developments in evidence. Then we assess whether  
2 any lack of effective competition is durable by considering expected or foreseeable  
3 market developments over a reasonable period in the future.

4 The actual period used for this forward look should reflect the specific  
5 characteristics of the market and the expected timing of the next review. In this  
6 market review we have looked at potential developments over the next four years.”

7 That is up to December 2014. So this is doing what the Commission said Ofcom should do  
8 in the paragraph to which Mr. Pickford drew your attention in the guidelines, picking a  
9 period for the market review over which to assess competitive conditions on a forward look.  
10 Just to note in para. 2.31, the final sentence:

11 “This period of forward look also covers the entire period over which we will set  
12 the charge control that we have decided to impose in Market 1.”

13 So if the market definition is good for the market review period it is good also for the  
14 charge control period.

15 We then see a discussion about the consultation process starting at para. 2.34 and a  
16 reference to two consultations, the first on 23<sup>rd</sup> March 2010 referred to in 2.34, the second  
17 on 20<sup>th</sup> August 2010 and that is referred to in para.2.37.

18 Then at para. 2.39 you see an important point:

19 “With this statement we are publishing our final conclusions on our review of the  
20 WBA market, taking account of the two consultations and the responses to them.  
21 On 16 November 2010 following the end of the second consultation period, and  
22 just before we published this statement, Talk Talk announced its intention to  
23 unbundled a further 700 BT exchanges. We have included our analysis of the  
24 implications of this within this statement.”

25 So the first indication that the Talk Talk roll out plans, which are at the core of Talk Talk’s  
26 case were already well in Ofcom’s sight at the time of the market review statement in  
27 December 2010.

28 Then we come to market definition in s.3. You see at 3.4 the ‘wholesale product market’  
29 definition, we do not need to go there, it is not contentious. At para.3.5 we see quite a crude  
30 summary of the four separate wholesale geographic markets setting out in partial form,  
31 broad overview of the criteria. I should say that there are these periodic bullet point  
32 summaries and, as I hope to show, they do not actually quite capture the criteria which  
33 Ofcom was in fact applying, one needs to look at the analysis, the substance, the discussion  
34 to see how that is the case, and I will do so as we go along. But you will see already at



1 para.3.5 a statement that Market 1 is characterised by exchanges where only BT is present,  
2 and that is qualified in a number of respects, as we will see.

3 At 3.7 you see:

4 “We also include a discussion on our view of Talk Talk’s intention to unbundle  
5 further exchanges, and how this impacts our geographic market definition ...”

6 So Talk Talk’s plans specifically relevant and taken into account in relation to market  
7 definition.

8 We can now turn on to geographic market definition which starts on p.843 at para.3.65. At  
9 para. 3.69 Ofcom begin a brief overview of the summary of data sources and analysis, and  
10 at paragraph that we rely on as important:

11 “With regard to coverage and network expansion plans by the POs [principal  
12 operators] we received information on both committed plans and further  
13 uncommitted plans. We have used both of those to form a view on the potential for  
14 further investment during the period covered by the review along with data on  
15 average exchange size and hence the viability of entry and past trends. However,  
16 we have decided to only rely on committed plans and the exercise of counting the  
17 number of POs in an exchange for the purpose of the market definition.”

18 What that is saying is the criteria were limited to committed exchange plans, they did not  
19 take account of uncommitted exchange plans, so to that extent Talk Talk is right to say that  
20 we did not take account of uncommitted plans. It is also making clear that in the underlying  
21 assessment Ofcom certainly did take account of the uncommitted as well as the committed  
22 plans. It was not as though it closed its eyes to all of the future developments that were  
23 anticipated, it just said that the criteria would reflect only the committed plans, and it had  
24 good reasons, as we will see, for reaching that conclusion.

25 There is then a summary of the first consultation beginning at 3.77, and at 3.78 you will  
26 note from the first sentence that the methodology seeks to identify areas with sufficiently  
27 homogeneous competitive conditions and applies it to those cases where it has been  
28 established that a national market cannot be defined on the basis of common price  
29 constraints.

30 So efficient homogeneity of competitive conditions were at the forefront of Ofcom’s  
31 analysis, and that is, you will recall, the passage I showed you in the guidelines. That is  
32 exactly the exercise that is required for geographic market definition.

1 In 3.79 to 3.81 there is then a description of the process which Mr. Pickford has already  
2 described of basically aggregating these little markets which are in local exchange areas to  
3 arrive at manageably sized markets where competitive conditions are similar.

4 Just one point in relation to that, on principal operators, these are a defined category of  
5 operators that are considered large enough nationally to be taken into account as a credible  
6 competitive constraint on BT. The operators classed as POs were BT itself, so there Market  
7 1 if you like is a market with one PO present, that is BT. Cable & Wireless, O2, at that  
8 stage, because this is summarising the first consultation, Orange – although, as we will see  
9 in a moment Orange actually dropped out of the category of principal operators because it  
10 entered into an agreement with BT to buy their WBA products, and therefore it was not  
11 really active at the LLU level so as to compete at the WBA level with BT.

12 “Talk Talk and, in those local exchange areas where cable coverage exceeded 65 per cent of  
13 ...” I think “DPs” are distribution points – is that right? Delivery points, they are basically  
14 the premises, “Virgin Media”. So Virgin Media only counts where it has a 65 per cent  
15 coverage of premises within a given local exchange area otherwise it is not big enough to  
16 constitute a competitive constraint on BT.

17 Then at 3.84 we see one of these lists of bullet points defined and we see here the origin of  
18 these criteria was from the first consultation and in fact it traced back before that to the  
19 2008 WBA review, the previous market review, and these were clearly stated by Ofcom to  
20 be proxies for the degree of competition. They were reasonable criteria to adopt because  
21 when you looked behind the criteria and analysed other indicators of market power and  
22 competitive constraint one found that they correlated well and that was an exercise that was  
23 performed in the first consultation – I will not take you there, but if you just go to the  
24 relevant section, which is cited in the footnotes, you will see there, should you choose to do  
25 so that behind those criteria was always an economic assessment of why the number of POs  
26 present was an appropriate criterion to adopt.

27 The Market 1 bullet there, we can already see that this is a shorthand: “exchanges where  
28 only BT is present” is a shorthand way of saying exchanges where BT is the only PO  
29 present because there will be other operators present in the number of exchanges where  
30 there are no POs. For example, there might be Virgin Media with a market share of less  
31 than 65 per cent, and that is the case as we will see later, in relation to a number of  
32 exchanges in Market 1. Also, there may be other small operators, niche operators, who  
33 have entered particular exchanges for one reason or another. So that is the position as at the  
34 first consultation.

1 We then move on to the second consultation which is summarised from 3.103 onwards. In  
2 para. 3.103 we do not need to read it but there is the point about Orange falling out as  
3 principal operator, and that was one reason for further consultation.

4 The other reason is summarised in the final sentence:

5 “The new rollout plans we obtained from LLUOs showed continuing expansion by  
6 operators and suggested that the potential for new rollout is higher than we had  
7 anticipated when we first consulted.”

8 So the consultation process in the market review was throwing up a better understanding of  
9 the market as a result of information request and consultation responses – more potential for  
10 entry than perhaps there had previously been (that was found at the stage of the second  
11 consultation).

12 The consequence of that is not actually spelled out here, but if one goes to the second  
13 consultation – I will not take you there now but just for your note – the reference is defence  
14 bundle, tab 9, p.18, para.3.48, second bullet, and then at para.3.52 as well. There is an  
15 explanation in the second consultation that Ofcom decided to take account of the potential  
16 for further roll out by including firm roll out plans when deciding whether an exchange fell  
17 in Market 1 or Market 2. So where an operator could come forward and say: “We have  
18 plans, and they are firm plans” when the market review was being completed those would  
19 be taken into account.

20 Again, if one looks at the thumbnail sketch at 3.109: “Market 1: exchanges where only BT  
21 is present.” Again, this needs to be qualified doubly. First, it is exchanges where BT is the  
22 only PO present; and secondly, it is exchanges where BT is the only PO present or forecast  
23 to be present on the basis of firm or committed rollout plans.

24 The other point to note about the second consultation is that at para.3.107 you see the  
25 introduction of another criterion as a dividing line between Market 2 and Market 3. A 50  
26 per cent threshold was chosen to separate Market 2 and Market 3. This was because Ofcom  
27 recognised that the classification based only on number of operators present was not fine  
28 grained enough as regards the border between Market 2 and Market 3, so you had to bring  
29 in a Market share criterion as well to make sure that in relation to one group of exchanges,  
30 i.e. exchanges where three POs are present, you divided between those where there was still  
31 more than 50 per cent market share, where market conditions justified placing them in  
32 Market 2 and subjecting BT to continuing SMP conditions, and those where the market  
33 share had already fallen below 50 per cent, and assume the market was therefore effectively  
34 competitive.

1 This also was a forward look decision, and you see that from para.3.107.

2 “A 50 per cent threshold was chosen to separate Market 2 and Market 3 on the  
3 basis that this is the standard threshold at which SMP can be presumed according  
4 to Commission guidance and case law and that, compared to a lower threshold  
5 (most obviously 40 per cent, below which the existence of SMP is usually thought  
6 to be unlikely) is also high enough to allow for the effects of continued rollout  
7 by POs”.

8 Now, what that is saying is, of course, market share is going to change over the period of  
9 the price control. We recognise that this 50 per cent is being applied at the start of the  
10 charge control to classify exchanges and that, over the period of the price control you will  
11 see further erosion of BT’s market share by competition as a result of competition in  
12 market 2 where there are already POs present. But there is enough headroom before you hit  
13 the 40 per cent threshold below which it would be unlikely that there would be SMP to  
14 justify adopting a 50 per cent market share threshold at the start of the period.

15 So, this is the first example of Ofcom clearly temporising, if you like, these criteria. If you  
16 look at the criterion as set out at market 2 in this thumbnail sketch, really it is subject to an  
17 implicit qualification, as is clear from that paragraph we have just seen. It should say,  
18 “Exchanges where two POs are present or forecast and exchanges where three POs are  
19 present or forecast but where BT’s share is greater than or equals 50 per cent at the start of  
20 the review period as at December 2010”.

21 The point is that that criterion looks, I mean, it determined where the exchanges fell as at  
22 December 2010, but it was appropriate nonetheless, because Ofcom had a good basis for  
23 saying, “Over the period of the market review, although there will be a change in  
24 competitive conditions we are still comfortable that those exchanges should fall within  
25 market 2, they are sufficiently homogenous to be grouped in market 2 and to be subject to  
26 the remedies which are applicable in market 2”.

27 And imagine for a moment that an appeal were brought by someone who did not like the  
28 classification of market 2 and market 3, and they were to come along and say, “By July  
29 2011 the market share at exchanges X, Y and Z had fallen below 50 per cent, would that  
30 provide a material change requiring the market to be re-classified?” But, our answer would  
31 be “No”, because there was a sound underpinning in economic analysis to justify applying  
32 the criterion at a given point in time, and the classification achieved on the basis of that  
33 criterion being sound over the forward look period of market review.

1 Moving forward, I want to take us now, if I may, to the responses to the second consultation  
2 and Ofcom's comments on those responses which begin at 3.169, I am sorry, I am skipping  
3 past those – I want to look at the developments since the second consultation. The  
4 discussion of that begins at para.3.169, and this is the all-important passage in the market  
5 review statement which Mr. Pickford has taken you to some of.

6 The first point to note, the development that Ofcom is mindful of is Talk Talk's  
7 announcement in November 2010 of its rollout plans. So, we are considering here the  
8 rollout plans which are now cited as a material change after December 2010. You will see  
9 at para.3.170 the plans are not –

10 "Talk Talk has not currently committed to deployment in any specific exchanges".

11 And that is not in dispute. At 3.171 Ofcom explains that:

12 "Consistent with our approach to uncommitted plans from other POs, we do not  
13 consider that it would be appropriate for us to attempt to select which exchanges Talk  
14 Talk may unbundle in the future".

15 The point is, you need to know which exchanges, given the criteria that are being applied, to  
16 know how to classify the exchanges. Ofcom could not very well guess which exchanges  
17 Talk Talk might be rolling out into. So, Ofcom then considered what it should do. And at  
18 3.172 it identified two options. The first was to delay publication, to postpone the market  
19 review until some later date while Talk Talk's plans became more concrete. Alternatively,  
20 as it indicates in the final sentence,

21 "We could conclude the review if we consider that the conclusions remain appropriate  
22 [that is the conclusion about market definition] taking account of Talk Talk's plan".

23 And Ofcom, as we will see, concluded that the latter was the case, that there was not any  
24 reason to delay because these rollout plans would not make any difference to its substantive  
25 analysis.

26 Turning over the page, at 3.176 Ofcom notes that:

27 "Given the timeframes for assessing the feasibility of deployment and for the  
28 deployment itself, it is unlikely in our opinion that Talk Talk will be in a position to  
29 exert a practical constraint in any new exchanges for a period of six to nine months",

30 Since the market review period. So there is a time lag before Talk Talk rolls out. Now,  
31 pausing there, we say that this is consistent with Mr. Heaney's evidence to the Tribunal  
32 about how matters have subsequently turned out. And if I could just take – I am sorry to  
33 interrupt the flow of the market review statement, but this is a point I think worth  
34 illustrating by reference to the now celebrated figure 1 in Mr. Heaney's statement. If we

1 could pick up again the Core Documents 1 bundle and turn to tab.2 para.20. You see there  
2 that of the – I am just checking that, no, there is nothing confidential – that, of the 556  
3 exchanges planned for rollout in market 1 Talk Talk had only managed to actually  
4 unbundle, to deploy 17 by July 2011. That is six months in. If one looks over the page at  
5 figure 3, para.23, again I think this is non-confidential, the number of market 1 exchanges  
6 out of the 556 that are unbundled after 9 months was 92. So, we can see that the process is  
7 beginning. The rollout is under way on the basis of these figures, but is still at an early  
8 stage of deployment, exactly as Ofcom anticipated in that paragraph which I showed you a  
9 moment ago, in para.3.176 of the market review statement. So, going back, if I may, and  
10 resuming where I left off, in the market review statement.

11 So, Ofcom then considers whether a price control is still appropriate to exchanges that are  
12 subject to future rollout, and gives its preliminary conclusions on that question at 3.182.  
13 The Tribunal has read this paragraph during the course of Mr. Pickford’s opening. The  
14 point that I would emphasise is the finding which is to be found in that paragraph in the  
15 second sentence as regards the 70-80 per cent. So:

16 “Based on the potential for migration of customers from BT wholesale products onto  
17 Talk Talk’s own network, and considering the effect when a second PO is present in  
18 other exchange areas, we are of the view that even if Talk Talk deploys towards the  
19 start of the review period, BT’s market share would be likely to be at least 70-80 per  
20 cent in the exchanges where Talk Talk deploys at the end of the review period ...  
21 Where BT’s share is at this level and it faces competition from only one other  
22 provider, a charge control may still be considered to be an appropriate remedy”.

23 So, sir, we say that is the crucial finding of fact, the economic analysis which is not  
24 challenged in these proceedings which goes to support the classification that Ofcom  
25 adopted.

26 And then turning forward to 3.183, the first part of this paragraph was not one that  
27 Mr. Pickford I think took you to.

28 “It also needs to be remembered that market definition is not an end in itself but rather  
29 is a means to setting market boundaries within which SMP and the need for certain  
30 remedies can be assessed. In carrying out a geographic market analysis where  
31 exchanges are grouped, it is inevitable that a range of exchanges with slightly  
32 differing competitive conditions may be grouped together”.

33 So, that brings us back to the point that we saw in the guidelines, that competitive  
34 conditions do not need to be identical. It is sufficient that they are homogenous enough.

1 You can have a range within a market provided that your classification between markets is  
2 broadly rational and that you do not capture exchanges where conditions are heterogeneous.  
3 Ofcom then proceeds to note that there are of course, well, I think I should read it:

4 “For example, our assessments have included exchanges where two POs are present or  
5 forecast to be present in market 2, along with exchanges where three POs are present  
6 or forecast to be present. It could be argued that the competitive conditions in  
7 exchanges where two POs are forecast to be present are sufficiently different to  
8 exchanges where three POs are already present and that therefore they should be  
9 grouped differently. However, this could lead to very small markets that would be  
10 unmanageable at a practical level”.

11 So, you could argue in favour of dividing market 2 further. But you would end up with  
12 endless numbers of baskets. And in the end what you are looking at, this is in order to  
13 determine market power which is in turn in order to determine whether remedies should be  
14 imposed and what remedies should be imposed, and you need to look at the end point when  
15 deciding what degree of granularity you go to in your market definitions.

16 THE CHAIRMAN: Yes.

17 MR. HOLMES: Ofcom then continues:

18 “But it could be argued that exchanges where two POs are forecast to be present (but  
19 only one is currently present) are also similar to exchanges where only one PO is  
20 present, so that they should be included within market 1”.

21 And that indeed is the conclusion that Ofcom reached.

22 “We have attempted to address this by only including firm forecasts of PO rollout in  
23 our assessment. This effectively reduces the period when only one PO is present and  
24 increases the period when two POs are present and BT is subject to the constraint of  
25 the second PO. In the case of the exchanges that Talk Talk aims to unbundle, it is not  
26 clear these could be treated in this way, since the time when BT is the only PO would  
27 be significant when compared to the overall period of the forward look”.

28 Now, the point being made here is that timing is all. It really is explaining why it is  
29 reasonable to say that an exchange that was committed as at December 2010 should fall into  
30 market 2, one which commits after December 2010 should fall into market 1. It is because  
31 the time period during which the new entrant would grow to exercise a competitive  
32 constraint would, other things being equal, could otherwise be expected to be greater in  
33 relation to those exchanges that committed to roll out before December 2010.

1 We then come on to 3.184 which is now considering exchanges that could move from  
2 market 2 to market 3. And again, Ofcom notes that you would be need to know which  
3 exchanges before you go about classifying them. And then, when you did that, you would  
4 be also need to work out market shares, and this is because of the second criterion that was  
5 introduced as between market 2 and market 3. And what Ofcom says is that this would all  
6 take time. Could add to the timescales required for the review. And you see in para.3.185  
7 in the passage that Mr. Pickford relies on, that Ofcom says that this,

8 “Could add to the timescales by which the review would be delayed and again, could  
9 lead to the need for re-consultation and, potentially, re-consideration of remedies. For  
10 example, a move of exchanges where three POs are currently present or forecast from  
11 market 2 and into market 3 when coupled with the movement of exchanges where  
12 currently there is only BT present (with a forecast deployment by Talk Talk during the  
13 review) into market 2 could represent a sufficient shift in competitive conditions in  
14 market 2 that a more stringent approach to price regulation would be warranted”.

15 Now, the point that is being made here, sir, is that the delay to the market review would  
16 appropriately mean that you would have to look, you would have to apply the criteria at the  
17 start of the market review period, because the exchanges that committed between December  
18 2010 when Ofcom decided to delay its market review in this counter-factual situation, and  
19 the date when the market review was ultimately set, would be comparable in substance to  
20 the exchanges that had committed to unbundle prior to December 2010 in the world where  
21 Ofcom set its market review in December 2010. So, it is the temporal point again. You  
22 have to apply the point from the start of the market review period, you have to apply the  
23 criterion from the start of the market review period in order to differentiate between the  
24 exchanges that are already committed where you could foreseeably see a constraint on  
25 competitive conditions, a constraint on foreseeing a change in competitive conditions, over  
26 the forward look period, and those which become committed only after the start of the  
27 market review period. If you push the market review back, you have to push the exercise of  
28 classification back. That is the point that is being made there. And Ofcom then goes on to  
29 note that if you did do that exercise later and you found that the market classifications had  
30 shifted so you ended up with different pots at a later date, you would also then have to go  
31 along and reconsider the remedy, which is simply a matter of common sense. This is  
32 because the exchanges that moved might be sufficiently competitive to fall out of market 1,  
33 but their inclusion in market 2 might alter the overall extent of BT’s market power in that  
34 market, potentially necessitating more stringent SMP conditions to be set. So, you could



1 not then with different markets just assume that your remedy would be the same. But the  
2 key point is that the market review would then be starting at a later date and would run for a  
3 longer period. And that is why what Ofcom is saying here is fully consistent with its refusal  
4 to take into account for the purposes of its criteria as at December 2010 rollout plans that  
5 were still uncommitted as at that date.

6 We then come to the conclusion in paras.3.187-3.190. And you see there, in the second  
7 paragraph, so, first of all Ofcom accepts at 3.187 that there is greater scope for LLU  
8 deployment than had previously been considered. But Ofcom notes that:

9 “The aim of geographic market definition is to assess the markets in which market  
10 analysis can be undertaken. The grouping is based on assessing the extent of  
11 heterogeneity between different exchanges”.

12 Ofcom then goes on in para.3.189 to consider what the competitive conditions are:

13 “We also consider that for the period covered by this review the exchanges where  
14 Talk Talk intends to deploy will be likely to have similar conditions to the markets in  
15 which they are currently allocated. This is because of the rollout timescales which  
16 mean that Talk Talk are unlikely to have any exchanges unbundled within the next  
17 nine months, and rollout will be ongoing throughout the forward look period of this  
18 review. Therefore it is our view that exchanges allocated to market 1 where Talk Talk  
19 subsequently deploys can, for the purposes of the market analysis exercise, be  
20 considered to have competitive conditions that are sufficiently similar to exchanges in  
21 market 1 where Talk Talk does not deploy. In the next review, when Talk Talk’s  
22 deployment has been confirmed, the effect of this deployment can be taken into  
23 account. A similar argument holds for exchanges in market 2. in the specific  
24 situation of this market review we do not think it is inappropriate that exchanges  
25 where BT is expected to have very high market share and will face only a single  
26 competitor entering at some point during the market review period should be subject  
27 to a charge control”.

28 And then, in 3.190:

29 “Therefore, we conclude our market definition remains appropriate”.

30 And then, just to note the conclusions on market definition over the page in 3.191-194, you  
31 see the geographic market definition. This is just to conclude a submission that I have been  
32 developing as I have gone along. These are only thumbnail sketches. They are, sort of,  
33 broad summaries of the position, but they do not even capture the criteria, still less the  
34 economic analysis which lies behind the criteria. And so “Market 1 exchanges where only

1 BT is present”, that should actually read, “Exchanges where BT is the only PO present or  
2 forecast to be present on the basis of committed rollout plans as at December 2010” and we  
3 see that as at December 2010 from the reasoning which shows that Ofcom was fully aware  
4 that during the market review period they would be entering. So, obviously this criterion  
5 was intended to apply as at December 2010. Moreover, there was a basis of economic  
6 analysis in support of that temporal aspect of the criterion.

7 Now, sir, I am aware of the time, but I do think it is important to show you how we went on  
8 to develop, how Ofcom went on to develop its reasoning on significant market power and  
9 remedy in light of the questions that the Tribunal was posing yesterday in relation to the  
10 sections 87 and 88 criteria. I could either give you the references, or if it would be helpful  
11 I could just try and go through the document relatively rapidly.

12 THE CHAIRMAN: Yes. Why do you not go through it? That might be of assistance.

13 MR. HOLMES: Sir, I am grateful. So, s.4 deals with market power and I should say just in  
14 passing Talk Talk says that the market analysis for the purpose of SMP is irrelevant because  
15 there is SMP in both markets 1 and 2. We say that is not quite right because the degree of  
16 market power remains relevant in understanding both the market boundaries and the  
17 differentiation of the remedy. So one does need to consider the degree of SMP, and that is  
18 captured by the market power assessment. Indeed you see that in s.88.1 as Mr. Pickford  
19 himself recognised. The market analysis there referred to, which is the basis for the market  
20 power determination, goes to determine the appropriateness of the remedy. So, one does  
21 need to look at SMP. One cannot simply cast it aside on the basis that both markets 1 and  
22 market 2 are found to have SMP. BT is found to have SMP in both.

23 At 4.1 we see, “Market definition is not an end in itself”. Geographic market – you define  
24 the market in order to assess whether there is SMP. At 4.2 you see the finding that BT has  
25 market power in both 1 and 2 but that no operator holds a position of SMP in market 3. At  
26 4.4 you have the point again that Ofcom took account of Talk Talk’s intention to unbundle  
27 further exchanges, and looks at how that would impact on SMP analysis.

28 So, all through this document Ofcom is fully aware of and taking account of the material  
29 change which, the allegedly material change which is relied on in these proceedings.

30 At 4.9 you find the beginning of Ofcom’s market power assessment in market 1; 4.11  
31 shows the average market share for BT is six months previously, which was 98.7 per cent,  
32 less than 100 per cent because of some competition from operators not qualifying as  
33 principal operators. Then there is a consideration of all of the standard elements affecting  
34 market power – barriers to entry; sunk costs; economies of scale, scope and density; and

1 countervailing buyer power. Then a discussion of the consultation responses and then,  
2 starting at 4.36 Ofcom's analysis of developments since the consultation. And we see in  
3 para.4.36 at the bottom of the page:

4 "The further rollout plans announced by Talk Talk a few days before the conclusion of  
5 this market review may, over the life of the market review period, lead to entry into  
6 exchanges covering a similar, or slightly larger, portion of market 1. Therefore, we  
7 accept that there exists potential for deployment in market 1".

8 Again, full awareness that there would be further rollout.

9 "However, we also note that the POs other than Talk Talk have a much smaller  
10 coverage footprint. As set out in Table 4.4 below, the POs will have, based on their  
11 forecasts to December 2010, coverage of less than half of market 2 exchanges. As  
12 such, it is our view that in the period of this forward look, investment by other POs in  
13 exchanges currently assigned to market 1 is not likely to be significant, because they  
14 are likely to focus investment in the market 2 exchanges in which they are currently  
15 not deployed as the greater size of these exchanges is likely to provide more  
16 opportunity to gain the scale needed to make investment economic".

17 In other words, there are lower hanging fruit for the other LLU operators than the market 1  
18 exchanges, and this is relevant when we come to consider Talk Talk's other ground on what  
19 investigative steps should have been taken in relation to other LLU operators. We have  
20 here an uncontested finding that those other operators would be more likely, would be less  
21 likely to deploy in markets – their deployment in market 1 is not likely to be significant.

22 At 4.39 we have again a finding that:

23 "In exchanges that Talk Talk unbundles towards the start of the review, it may be  
24 expected that BT's share will fall to 70 to 80 per cent during the period of the review".

25 The crucial finding of fact which we say has not been challenged. Then, at the end of that  
26 paragraph:

27 "Therefore on average, BT's share is likely to be above 80 per cent even by the end of  
28 this review in the exchanges allocated to market 1".

29 Average market share of course is relevant when considering SMP across the entirety of the  
30 market. And then, 4.40, just a point about no countervailing buyer power as a result of the  
31 option to go to a supplier other than BT because of the relatively small scale of the entrance.  
32 And then "Conclusion on SMP in Market 1":

33 "Based on the above and taking into account the greater potential for entry suggested  
34 by Talk Talk's intention to deploy ... we conclude that BT has SMP in market 1".

1 If I can take markets 2 and markets 3 very briefly, at 4.44 you see the market share as at  
2 June 2010, 64.7 per cent on average. So, a much lower share on average – and I do accept  
3 that this is an average – than the share that one would see at the specific exchanges that  
4 unbundle towards the start of the market review period.

5 At 4.50, just pausing there “We noted it is consistent”, this is in the first consultation:

6 “We noted it is consistent with the possibility that, absent regulation, BT could price  
7 above the competitive level”.

8 Just to show you that Ofcom was addressing itself to the s.88 criteria in this analysis, was  
9 considering whether or not there was a risk of excessive pricing.

10 Turning forward to p.879 we find the assessment for market 3. At p.880 we see the market  
11 share of 31.0 per cent on average, a really striking difference from the average market  
12 shares for either market 1 or market 2, and we say that this supports the conclusion that  
13 Ofcom is standing back and looking overall at these clumps of exchanges that we had an  
14 entirely sensible scheme for allocating, in terms of the overall competitive conditions in  
15 these three baskets, there is a really marked difference between them. That concludes the  
16 discussion of SMP.

17 Turning, then, to remedies, we see at 5.1 a summary of the remedies that Ofcom proposes.  
18 In the table you see for Market 1 a list of remedies, and the ones I would like to draw your  
19 attention to are the three penultimate remedies in the Market 1 row, on the basis of charges,  
20 charge control and cost accounting, so all three of those are remedies falling within s.87(9)  
21 of the Communications Act to which therefore s.88(1) applies.

22 In Market 2, can I draw your attention to the penultimate two remedies, basis of charges and  
23 cost accounting. So you see three different remedies relating to pricing. In Market 1 you  
24 have all three being imposed, or the intention to impose all three including price control. In  
25 Market 2 no price control but nonetheless basis of charges and cost accounting.

26 At para. 5.5 you will see there is an unnumbered paragraph underneath, which again just  
27 makes the point that Talk Talk’s intention to unbundle further exchanges is taken into  
28 account also in relation to remedy.

29 At 5.13 Ofcom sets out the s.88(1) criteria which it has well in mind. At 5.28 you see the  
30 approach in the first consultation to Market 1, and you see in the first sentence of 5.28 that  
31 Ofcom at that stage said that Market 1 was:

32 “... characterised by a lack of competitors to BT due to very high barriers to entry  
33 though high sunk costs and the lack of economies of scale, scope and density for  
34 new entrants.”

1 We have seen that that conclusion was somewhat mitigated as the consultation process went  
2 along and Ofcom appreciated that there was further potential to rollout but we will see that  
3 was nonetheless factored into their analysis.

4 At para. 5.34 you will see there Ofcom stating the view from the very beginning of the  
5 consultation process that BT may have the incentive to set prices above the competitive  
6 level, a risk of excessive pricing, and this would mean that BT's competitors at the retail  
7 level would be forced to pay these high prices in order to provide services on a national  
8 basis. Then four possible solutions including charge control.

9 At 5.38 and 5.39, just for your note, there is there a discussion which explains why a charge  
10 control may be more appropriate for securing efficiency than a mere cost accounting  
11 obligation, the reason being that a charge control set on an RPI-X basis includes an  
12 incentive on BT which mimics a competitive market to cut its costs on a forward looking  
13 basis. The difference is costs orientation takes BT's costs as they are and RPI-X control  
14 would impose an efficiency constraint.

15 At para 5.42 this is still the first consultation, at that stage Ofcom noting there have been  
16 some entries by competitors to BT. Did not expect an absence of regulation would promote  
17 a significant level of efficient investment by POs leading to effective competition. It was  
18 our view that in the absence of regulation "BT would have little incentive to provide  
19 services to competitors of its own downstream divisions."

20 So still a need for various SMP remedies.

21 At 5.46 consideration of whether the price controls were required, and at 5.51 it was our  
22 view that a strict charge control could stifle further investments in LLU thus reducing  
23 consumer choice. So the view was therefore that a charge control was not appropriate in  
24 Market 2. Cost-orientation was still the most appropriate approach. I should just note that  
25 Ofcom's concern has always been to promote efficient and sustainable investment and that  
26 is clear from the end of para. 5.54. Ofcom has no mandate to promote inefficient LLU entry  
27 and that is a point I will come back to.

28 So standing back, in the first consultation Ofcom thought that there was a risk of excessive  
29 pricing in both markets, Market 1 and Market 2, but favoured a charge control only in  
30 Market 1 so as not to inhibit the potential for efficient investment.

31 There is then a summary of the second consultation and the responses received and at para.  
32 5.87 you see a response to an argument made by BT that a charge control is unnecessary in  
33 Market 1 because of the potential for entry, obviously a relevant point to these proceedings.  
34 You will see in the penultimate sentence Ofcom responds:

1 “The opportunity for other communications providers to deploy competing  
2 infrastructure in Market 1 is, as discussed in section 4, unlikely to provide a  
3 sufficient constraint on BT’s pricing, even though we accept that Talk Talk’s  
4 intention to unbundle a further 700 exchanges will mean that at some point during  
5 this review period there will be a PO other than BT present in some exchanges in  
6 Market 1.”

7 So the point here is, yes, there will be entry but no it will not be enough to sustain BT’s  
8 prices sufficiently to avoid the need for a price control in Market 1.

9 Then at 5.91 and 5.92 there is the analysis of developments since the second consultation so  
10 we consider here the impact of Talk Talk’s announcement of its intention to unbundle  
11 further exchanges.

12 “Whilst entry by Talk Talk in some exchanges in Market 1 during the period of the  
13 review will provide some competition to BT, we remain of the view that a charge  
14 control is required in Market 1 because the deployment is as yet uncertain on an  
15 exchange level basis and the effects of deployment as to a competitive constraint  
16 may only become apparent towards the end of the review period. Further, even  
17 taking account of Talk Talk’s deployment, we anticipate that BT will continue to  
18 enjoy a very high share in Market 1.”

19 So constraint only towards the end of the period, still a need for a price control.

20 I know the Tribunal’s practice is to take a short break, would this be an appropriate  
21 moment?

22 THE CHAIRMAN: If it is for you, Mr. Holmes, we will rise for five minutes.

23 MR. HOLMES: Yes, sir.

24 (Short break)

25 THE CHAIRMAN: Yes, Mr. Holmes.

26 MR. HOLMES: Sir, during the short break I was informed that I had misled the Tribunal on one  
27 point of fact. I said at one stage that there were 10,000 exchanges, in fact the figure is 5,589  
28 across the three markets, but the underlying point I think still holds.

29 I had shown you, sir, para. 5.91 of the Market Review statement which goes to show that  
30 Ofcom took account in relation to Market 1 and the need for remedies in Market 1 of Talk  
31 Talk’s anticipated rollout.

32 Ofcom’s conclusion was that a price control remained appropriate because the competitive  
33 constraint that would arise as a result of subsequent entry would only become apparent  
34 towards the end of the review period and this ties back to the finding of fact which I have

1 shown you in relation to the 70 to 80 per cent constraint even in those exchanges that  
2 deployed at an early stage of the market review period.

3 One then comes to 5.101, which is in relation to cost orientation in Market 1 and Market 2.  
4 You see at 5.100 there is an argument from Sky which Ofcom addresses, and the argument  
5 is:

6 “In response to the first consultation Sky argued that a charge control would be  
7 more appropriate since the more competitive exchanges in Market 2 had, under the  
8 amended geographic market definition, moved into Market 3.”

9 So here, just as BT was arguing in relation to Market 1 there should be no control. Sky, on  
10 the other hand was arguing that the charge control should apply not only to Market 1 but  
11 also to Market 2. Ofcom’s response at 5.101 is to say that our proposal for cost orientation  
12 in the first consultation was based on the existence of some limited competition in Market 2  
13 and a possibility for further competition to develop.

14 “The specific criteria for defining the boundary between Market 2 and Market 3  
15 were amended, such that some exchanges where competition may be stronger have  
16 been assigned to Market 3.”

17 It continues:

18 “Sky argued that this means there is less constraint on BT’s pricing in the amended  
19 Market 2 and, as such, a charge control would be justified. Whilst we recognise  
20 that the exchanges moved into Market 3 were more competitive than average in  
21 market 2, our view is that on balance our argument that the limited level of  
22 competition and the potential for future investment suggests cost orientation is the  
23 appropriate remedy remains valid.”

24 In other words, it is still appropriate to have cost orientation but not a charge control, on the  
25 basis that there is some competition in Market 2 and potential for that competition to  
26 develop. So more scope in Market 2 for competition to impose a meaningful competitive  
27 constraint by contrast with the position in Market 1.

28 Then we come to the paragraphs which tie this discussion together with s.87(9) and s.81  
29 test. For the pricing remedies this begins at p.927, and you see first of all the basis of  
30 charges remedy which requires BT to set its charges based on its costs and applies to each  
31 and every charge. You see that from the first sentence of para.5.264. Paragraphs 5.268 and  
32 5.269 you see the finding of the risk of excessive pricing , and at 5.270 a consideration of  
33 the risk of excessive pricing and at 5.270 a consideration a consideration of the other criteria  
34 in s.88(1)(b). So that is for Market 1 a finding that the criteria for basis of charges which

1 were set at the time of the market review. This pricing remedy was actually set at the time  
2 of the market review, unlike the price control which was only set after a subsequent  
3 consultation.

4 We then come to cost accounting and we see a similar conclusion for cost accounting at  
5 5.281.

6 “We also consider that the conditions of s.88 of the Act are met. Since the  
7 obligation works in conjunction with the basis of charges and charge control  
8 obligations to ensure the aim and effect of these obligations are met.”

9 Then at 5.297 we have discussion for charge control at some greater length in relation to  
10 s.88 and it is worth spending a moment on this. At 5.297 we find first of all a finding that  
11 there is a risk of adverse effects arising if BT sets some or all of its prices at an excessively  
12 high level, reducing benefits for end-users of WBA services. So that is the finding for the  
13 purposes of 88(1)(a) of the Communications Act.

14 At 5.299 we see that a charge control addresses the risk of a lack of efficiency. It is:

15 “... structured to incentivise efficiency improvements and/or investment by BT,  
16 which will be of benefit to all purchasers of WBA products (and, ultimately, could  
17 result in better products and lower prices for consumers).”

18 This is the RPI-X point, but the price control goes further than a cost accounting obligation.

19 Then at 5.300 Ofcom says:

20 “We are of the view that a charge control condition will promote efficiency by  
21 requiring BT to price at the level of an efficient firm in the absence of competitive  
22 constraints in this market. The charge control will aim to promote sustainable  
23 competition by only encouraging equally or more efficient CPs to compete based  
24 on LLU. It will also aim to promote sustainable competition at the retail level by  
25 restricting BT’s ability to price excessively with the aim of making it more difficult  
26 for other providers to compete. We expect that the benefits of this pricing will  
27 eventually flow through to end users of WBA services.”

28 So two points here. There is, first, a finding that cost related prices will itself promote  
29 efficiency, but also finding that the charge control will promote sustainable competition.

30 On the one hand, it will only encourage equally and more efficient communications  
31 providers to compete, this goes to the sustainability of competition. Competition is being  
32 introduced only where it is efficient for such competition to arise where the competition is  
33 still economic taking into account efficient pricing by BT.



1 The second point that goes to sustainable competition is that retail competition will be  
2 promoted because purchasers of WBA inputs from BT will be able to purchase those inputs  
3 at an efficient price and will therefore be able to compete more effectively at the retail level  
4 with BT. So that criterion, which I know was a particular focus of the Chairman yesterday,  
5 Ofcom found to be met in the market review statement, this is the document that contains  
6 the market analysis and Ofcom found the criterion to be met in the December 2010 review,  
7 and subject to any material change being shown we say that amounts to sufficient to sustain  
8 the charge control when it was subsequently set in July 2011.

9 So standing back, we say that overall there is an entirely coherent scheme as regards  
10 remedy. Price control for Market 1 but not Market 2, because competitive constraints are  
11 unlikely to be sufficient over the period of the market review to constrain BT's prices. No  
12 adverse impact on efficient competitive entry because an efficient entrant will be able to  
13 enter anyway.

14 Of course, Ofcom's fulfilment of the ss. 87 and 88 criteria is not an issue in these  
15 proceedings, but I wanted to show you the care and detail with which these criteria were  
16 analysed, and the specific account which Ofcom took of Talk Talk's rollout plans in  
17 applying the criteria, the legal tests in ss.87 and 88 and a rise in SMP and as also in defining  
18 the relevant market.

19 I can be very brief, sir, in relation to the charge control statement, but I need to show you  
20 Ofcom's analysis of no material change after the rollout begins is basically identical with its  
21 analysis in the market review statement of the rollout before it begins.

22 Mr. Pickford sought to suggest that the analysis in the market review statement should be  
23 discounted because it preceded the period during which the material change is said to have  
24 taken place. We say that is wrong because it is against the backdrop of that analysis that  
25 one can determine whether anything has happened that disrupts or requires to be revisited -  
26 the analysis on the basis of which Ofcom is setting the charge control. You can only work  
27 out if the change is material to the setting of the condition by looking at how it affects  
28 Ofcom's analysis in the market power determination.

29 Insofar as Ofcom revisits the analysis, reiterates the analysis on the basis that nothing has  
30 changed, that is entirely adequate as a finding of no material change. Provided Ofcom  
31 addresses its mind to whether the analysis in the market review statement remains  
32 satisfactory, despite supervening changes that are said to constitute a material change,  
33 Ofcom is entitled to find no change that is material to the setting of the condition.

1 THE CHAIRMAN: What you are saying is that “what is a material change?” is covered by the  
2 market definition?

3 MR. HOLMES: Yes.

4 THE CHAIRMAN: So had you adopted a purely static market definition, in other words, it was  
5 three buckets and what mattered was simply the status of the buckets at this point in time  
6 without any future assessment, forward looking, at all, then it would be really hard to resist  
7 the conclusion that a change in the composition of the markets was material and to be taken  
8 into account.

9 MR. HOLMES: Yes, sir.

10 THE CHAIRMAN: But if you have an inbuilt, as it were, wiggle-room which is factoring in the  
11 changes, then the question becomes: has the supervening change been so great as to  
12 invalidate the projection that you have made as to what those changes would be?

13 MR. HOLMES: Yes.

14 THE CHAIRMAN: So it is not enough simply to say the composition of the buckets has  
15 changed, it is have they changed to such an extent as to require you to revisit your  
16 assessment of what is going to happen over your three or four year projection?

17 MR. HOLMES: You put my submission I think better than I put it myself, and I absolutely agree,  
18 that is right.

19 THE CHAIRMAN: That is what all the advocates say, Mr. Holmes!

20 MR. HOLMES: Just to be clear that does not mean there could not be a material change for the  
21 purposes of s.86. Mr. Pickford made a submission yesterday that our submission proved  
22 too much because it excluded the possibility of a material change ever being shown.  
23 A material change could be shown, but what it would need to do is to address the  
24 underlying economic analysis on a forward look basis which supported the conclusion that  
25 the market definition remained sound for the period of market review. So to give an  
26 example, supposing that Talk Talk had come forward and had said: “Your 70 to 80 per cent  
27 conclusion is just wrong. We can rollout quicker than that, we can rollout more efficiently  
28 than that. We have, for example, some wonderful new technology which will give us a cost  
29 advantage, or will mean the consumers in our services will have an edge over the consumers  
30 of BT’s services, and so we will have a market share of 50 or 60 per cent by the end of the  
31 market review period”. Now, if that Kind of substantive engagement had been shown by  
32 Talk Talk with Ofcom’s definition of market analysis, we fully accept that a material  
33 change could have been shown. Our point is that, as you say, sir, no material change has  
34 been shown because nothing has happened in the market looking forward over the period of

1 the market review statement, which calls into question the correctness of Ofcom's market  
2 classification for that period.

3 So very briefly, sir, looking at the charge control statement, if I could take you to section 3  
4 which is already open ----

5 THE CHAIRMAN: CD1 tab 4, is it not?

6 MR. HOLMES: Yes, you are right, and I am in the wrong place. CD1, tab 4. I have regrettably  
7 marked up the non-confidential version, so I will give you the paragraph references but not  
8 the page numbers if that is convenient.

9 You see at para. 3.33 that:

10 "Talk Talk argued in the alternative that Ofcom should find on the basis of its  
11 rollout plans that there had been a material change in the market since Ofcom's  
12 market review."

13 The background is then set out by Ofcom at para.3.40 you see reference to the s.86 test, and  
14 at 3.41 Ofcom states:

15 "Having considered the evidence we are satisfied that since the market power  
16 determination in the WBA statement, there has been no material change in the  
17 market conditions for the following reasons."

18 Then there is the legal argument at 3.42 which Ofcom does not now maintain. I will come  
19 back to this in the context of Talk Talk's process ground.

20 Ofcom then sets out its substantive analysis beginning at 3.43. This is clearly in the  
21 alternative to the legal argument at 3.42. Ofcom notes that in the Market Review statement,  
22 Ofcom assessed Talk Talk - this is at 3.43 -

23 "Ofcom assessed Talk Talk's planned rollout and concluded that it did not merit a  
24 change to our market definition, our SMP assessment or to our proposed  
25 remedies."

26 There are there paragraph references back to the relevant sections of the market review  
27 statement to which I have already taken you.

28 At 3.44:

29 "In summary, we examined Talk Talk's potential rollout and concluded that  
30 exchanges allocated to Market 1 where Talk Talk Group subsequently deploys can,  
31 for the purposes of the market analysis exercised, be considered to have  
32 competitive conditions that are sufficiently similar to exchanges in Market 1 where  
33 Talk Talk group does not deploy. We base this on the fact that at the start of the  
34 period covered by the review there will be no competitive constraint on BT and

1                   that any potential future entry by Talk Talk would only introduce a constraint for  
2                   part of the period covered by the review.”

3                   You saw the finding that six to nine months could be expected to elapse, and we saw that  
4                   that is indeed an accurate finding in the light of Talk Talk’s evidence. We based this on the  
5                   fact that there were no competitive constraints on BT and any future entry by Talk Talk  
6                   would only introduce a constraint for part of the period covered by the review.

7                   “ We said that at the start of the period covered by the review there would be no  
8                   competitive constraint on BT and that any potential future entry by Talk Talk  
9                   would only introduce a constraint for part of the period covered by the review. We  
10                  said that at the start of the period BT would be the only provider and would, as  
11                  such, face no competitive constraints. Based on the potential for migration of  
12                  customers from BT wholesale products on to Talk Talk’s own network, and  
13                  considering the effect when a second PO is present in other exchange areas ...”

14                 - this is the basis of Ofcom’s analysis:

15                 “... we were of the view that even if Talk Talk deploys towards the start of the  
16                 review period, BT’s market share would be likely to be at least 70 to 80 per cent in  
17                 these exchanges at the end of the review period.”

18                 Same finding of fact, never questioned in these proceedings.

19                 “ The information from Talk Talk Group indicated that deployment would take  
20                 place over the period of the review and so the effect on BT’s share would be less  
21                 than this in many of the exchanges.”

22                 And we see that that is Mr. Heaney’s evidence here. Much of the deployment will occur in  
23                 2012 to 2013 and there the competitive constraint will be less than the 70 to 80 per cent  
24                 found.

25                 “ Where BT’s share is at this level and it faces competition from only one provider,  
26                 a charge control may still be considered an appropriate remedy.”

27                 There is a linguistic point taken by Mr. Pickford in relation to the use of the words “may  
28                 still” there. We say that the ordinary English language usage, that is an entirely appropriate  
29                 way of expressing a conclusion and that no inference can be drawn from the use of the  
30                 words: “May still be”, and indeed that is clear from the context given that the charge control  
31                 statements indeed imposes a charge control.

32                 At 3.45 you will see a paragraph that you were not taken to:

33                 “ Talk Talk Group has not provided any materially new information since its initial  
34                 announcement of the rollout plans to change our assessment in the WBA

1 Statement. Although we accept that Talk Talk Group's plans have developed,  
2 insofar as Talk Talk Group has now identified the specific exchanges which it  
3 intends to rollout to in Market 1 and has started placing orders for some of these,  
4 this does not alter our assessment."

5 The point here is they have said nothing that addresses – they have latched on to the criteria,  
6 they said the criteria should be re-run in July 2011, but they have said nothing to displace  
7 the conclusion that the classification arrived at applying the criteria as at December 2010  
8 arrived at an appropriate classification of exchanges taking a forward look assessment of  
9 competitive conditions over the period of the market review.

10 On the appropriateness of the remedy, you have the paragraphs from 3.21 to 3.32 on the  
11 impact of the charge control on efficient investment. Those points also go to sustainable  
12 competition in our submission insofar as entry is obviously an aspect of sustainable  
13 competition. In summary, Ofcom's point is that if entry can only occur without a price  
14 control which limits BT's charges to its costs, which is the case for some of the exchanges,  
15 as Mr. Heaney makes clear in his witness statement that is not efficient entry.

16 Insofar as the entry can occur with the price control in place there are no adverse effects on  
17 investment and the entry can be expected to occur in any event. Moreover, Ofcom also has  
18 to take into account the adverse effect on retail competition that would result if BT were  
19 allowed to price excessively given Ofcom's conclusion that the level of LLU competition  
20 anticipated to occur in Market 1 will not be enough to constrain BT's prices. So in other  
21 words you have this 70 to 80 per cent, the lowest that that figure will be on the basis of  
22 Ofcom's analysis is 70 to 80 per cent. You will still find 70 to 80 per cent who get their  
23 services in one way or another from BT using WBA products, either from BT directly or  
24 from other non-LLU operators who purchase WBA inputs. All of those consumers are  
25 going to be paying higher prices for receiving inferior service as a result of the absence of a  
26 price control and, as a result of the materially higher prices that would arise in the absence  
27 of a price control.

28 In case it is said against me in reply that BT applies national pricing and that therefore you  
29 would not expect a retail price impact as a result of the reduction in the wholesale prices by  
30 BT, there is nonetheless a competitive constraint imposed by other WBA operators and the  
31 extent to which they can compete effectively with BT, forcing down prices will depend  
32 upon the wholesale price at which they purchased WBA. So there is a clear impact for  
33 consumers on the choice and price of services available to them if prices are not materially  
34 constrained by the price control.

1 Just for your note these points are at 7.3. You see again the tying together exercise – we  
2 can look at it if you like with the criteria in s.88 test. You see that similar points are made  
3 there. In order to incentivise efficiency:

4 “... there is a risk of adverse effects arising if BT sets some or all of its prices at  
5 an excessively high level, reducing benefits for end-users of WBA services.”

6 Then further down:

7 “However, the basis of charges condition is unlikely to incentivised BT to reduce  
8 its costs.”

9 So in order to reduce costs you need a price control. Then:

10 “Sustainable competition: The charge control will aim to promote sustainable  
11 competition by only encouraging equally or more efficient CPs to compete based  
12 on LLU.”

13 In other words, we are not about sponsoring entry by operators who are not efficient enough  
14 to get in when BT prices efficiently.

15 “It will also aim to promote sustainable competition at the retail level by restricting  
16 BT’s ability to price excessively with the aim of making it more difficult for other  
17 providers to compete. We expect that the benefits of this pricing will eventually  
18 flow through to end-users of WBA services.”

19 So, sir, those are my submissions. That is how we say we make good our case on ground B  
20 by reference to the charge control and market review statements.

21 A few objections are taken against me which I can deal with very briefly, and I think I have  
22 picked most of them up as I go along.

23 The first submission is the suggestion that Ofcom’s argument is circular and that it works  
24 by definition. The argument, as I understand it, is that if you define the criteria as applying  
25 only at December 2010, that somehow is self-fulfilling, that means that the market  
26 definition will always be the same looking forward because you have applied a temporal  
27 time point when you are defining the market.

28 The reason why that argument fails, we say, is because Ofcom’s argument does not work by  
29 definition. Ofcom’s argument basis itself on the economic analysis that we have seen,  
30 which supports and justifies using the lists that were generated by criteria applied as at  
31 December 2010, but there are good reasons why those lists are going to be sound in their  
32 classification of exchanges as regards competitive conditions over the forward look period.  
33 We say that it is incorrect to say that our position is at all circular; it is based on a firm set of  
34 findings which are not contested about the speed at which competitive conditions will

1 change in relation to those exchanges that commit to unbundled only after December 2010,  
2 and we say that the formulistic side of the coin is really to seize on the criteria and to say  
3 that you can just apply them afresh in July 2011 without situating them in the context of the  
4 economic arguments which justify applying the criteria in December 2010 and justify  
5 sticking with the lists of exchanges which that generates as your market definition.

6 The second point was that there could never be a material change in terms of market  
7 definition and you have my submission on why we say that is wrong. We also understood it  
8 to be suggested that there could not even be a reconsideration of the relevant market at the  
9 end of the market review period, and again we assume that this rests on the idea that  
10 December 2010 is hard baked in, not for rational reasons but just as a definitional argument  
11 so that you would be obliged to keep the same arguments because you would be asking  
12 yourself again what the position was at December 2010. If I have misunderstood the  
13 argument Mr. Pickford will no doubt explain otherwise. We say that is not correct, you  
14 would apply a fresh analysis at the end of the market review period. Even if you applied the  
15 same criteria for a new market review you would apply them as at the start of the new  
16 market review period, and that would generate different lists assuming competitive  
17 conditions were changed.

18 The third point that Talk Talk takes is to say that we have not adequately explained the  
19 distinction between exchanges that were committed by December 2010 and those that were  
20 committed after 2010, and we say the key point here is that the distinction rests on the fact  
21 that exchanges committed after 2010 could be expected to exercise a competitive constraint  
22 later on and therefore were not likely to sufficiently constrain competitive conditions during  
23 the market review period whereas exchanges that were confirmed earlier could be expected  
24 to exercise an effective constraint.

25 Fourthly, Mr. Pickford argued that Ofcom was confusing the questions whether its market  
26 review was sound as at December 2010 and the question whether there had been a material  
27 change in the market. Mr. Pickford accepted that there was some inherent imprecision  
28 involved in defining the market in December 2010 and that imperfections might creep in  
29 over the review period, but he said that where the market review period and the setting of  
30 the SMP condition were divorced s.86 required the latest actual information to be taken into  
31 account.

32 In our submission this argument misses the point. Ofcom's case is not that rollout after  
33 December 2010 should be ignored for the purposes of s.86, plainly it falls to be assessed to  
34 see what the impact is, whether there is any material change.

1 Ofcom's case is that the rollout was taken into account in the charge control statement, but  
2 was found not to constitute a material change, so we did take into account what had  
3 happened afterwards, but the underlying analysis remains sound because it had not really  
4 been questioned by Talk Talk and it still has not been questioned by Talk Talk. We, on this  
5 side of the Bar, still cannot see on what basis it can be said that we erred in finding that  
6 exchanges committed after December 2010 would have conditions of competition that were  
7 sufficiently homogeneous with exchanges where BT remains the only principal operator to  
8 justify keeping them in the same market throughout the market review period.

9 Fifthly, Mr. Pickford suggested that Ofcom were seeking to add a new criterion to its  
10 Market 1 definition based on market share, when there was no support for this in the Market  
11 Review Statement, market share was only relevant to the classification of exchanges  
12 between Markets 2 and 3. We say that this is incorrect, Ofcom's analysis in the Market  
13 Review Statement, and again in the Charge Control Statement was that for Market 1 a  
14 criterion based on the number of principal operators who were present or forecast to be  
15 present on the basis of committed rollout plans was a sound criterion to apply, taking  
16 account of market share as we expected it to develop over the period of the market review.  
17 We did not need to include a specific criterion based on market share, because we found  
18 that a criterion based on the number of principal operators sufficiently correlated with  
19 market share for that not to be necessary. And this was a distinction between the market 1  
20 and market 2 division and the market 2 market 3 division where it was found that, as we  
21 saw, that the number of principle operators was not a fine enough grade of distinction to  
22 capture the differing competitive conditions between those two markets, and so market  
23 share had to be explicitly introduced into the criteria themselves. In this case, it was enough  
24 that the underlying economic analysis supported the conclusion that the number of principle  
25 operators correlated with market share across the period of the market review.

26 So, unless there are any questions on the substance, I propose now to turn to Talk Talk's  
27 process complaints under ground A, and I am confident, sir, looking at the clock, that  
28 I should be able to finish, if not this morning, then very early into this afternoon because  
29 I hope these points can be taken quite crisply.

30 There are three separate complaints.

31 The first is that Ofcom did not properly direct itself as to the law.

32 Second, that Ofcom should have pro-actively investigated whether there had been a change  
33 in the market for the purposes of s.86 but did not do so; and,

34 Third, that Ofcom did not consult properly.



1 So, those are the three heads under the first ground. Let me deal with those in turn.  
2 On the first point, Talk Talk says that Ofcom did not set out clearly the test that it was  
3 applying. You have my submissions on the meaning of s.86. There is no rocket science  
4 about those. The purpose of the provision you summarised in the course of a question to  
5 Mr. Pickford yesterday. Mr. Pickford and I both agree what the purpose is; it is about  
6 working out whether a price control or other SMP condition is appropriate, taking account  
7 of developments which have arisen in the market since the time of the market review, where  
8 the market power determination was made. Equally, the test can really be simply stated,  
9 and there is a question about how far it requires further adumbration, and that test as it  
10 appears on the face of the statute is set out in the charge control statement, both in the  
11 notification which set the control and in the text of the preceding statement. For your note,  
12 the references are in CD1. I am afraid I have the paragraph numbers in tab.3, but let me  
13 give you paragraph numbers rather than the pages. Paragraph 3.49 and then again in  
14 annexe 1 at para.12.

15 And I should say, sir, that prior to the publication of the charge control statement, Talk Talk  
16 also considered that the test was obvious. If I could ask you to take up CD1, I think this is  
17 the last possible time that I shall possibly need to take the Tribunal to this letter. The  
18 8<sup>th</sup> July letter, just before the charge control statement, from Mr. Heaney of Talk Talk to  
19 Mr. McIntosh of Ofcom at 2P, and you see on the second page under the heading,

20 “**Section 86 and other issues**”, the third paragraph on the page:

21 “In our view, s.86 is quite straightforward and should simply be given the meaning it has on  
22 its face: has there been a material change since the date of the relevant market review? The  
23 s.86 procedure is there because it provides an important safeguard against the imposition of  
24 remedies in circumstances where they are not appropriate”.

25 So there, in a nutshell, your point about purpose, with which counsel on both sides agree,  
26 and an indication that the test on the face of the statute is sufficient. And we say Talk Talk  
27 was right and that it was sufficient simply to refer to the statutory test.

28 In its reply, Talk Talk advances a further argument to the effect that Ofcom did articulate a  
29 legal view as to the meaning of s.86 but that it was the wrong one. This is the fatal  
30 admission.

31 THE CHAIRMAN: Yes.

32 MR. HOLMES: And, sir, my submission will be that “Reports of our death are greatly  
33 exaggerated”. Specifically, Talk Talk relies on the alternative legal argument at para.3.42  
34 of the charge control statement on which Ofcom does not now rely on these proceedings.

1 The view stated there was that a change must already have produced its effects in the  
2 market by the time a s.86 test is applied in order to be taken into account for the purposes of  
3 s.86.

4 Of course it is correct that there must have been some development, something must have  
5 happened to trigger the application of s.86, but we do not say that Ofcom can overlook the  
6 prospective consequences of such a development when assessing whether it is material.  
7 The material change assessment, just like the market review assessment, is a forward  
8 looking assessment, we accept that. And insofar as para.3.42 of the charge control  
9 statement said otherwise, we recognise that it was incorrect to do so. However, it is  
10 explicitly stated in 3.43 that the view expressed in para.3.42 was in the alternative to the  
11 subsequent analysis. And it is equally clear, in my submission, that the subsequent analysis  
12 considered the prospective consequences of Talk Talk's confirmed rollout plans when  
13 assessing their materiality for the purposes of s.86, what impact would they have on  
14 competitive conditions in the market? And Ofcom's conclusion was they would have an  
15 impact, but not a sufficient impact, given the 70 or 80 per cent finding, to move them out of  
16 market 1.

17 And Talk Talk recognised as much in its notice of appeal. So, in CD1, given that we are in  
18 that, let me just quickly take you there. In the first tab, para.80, you see that Talk Talk  
19 states:

20 "The starting premise for Ofcom's second argument, recognising that this is a second  
21 argument, is problematic since although it is said to be in the alternative, a point I have just  
22 made I think to the first argument, it is again unclear that legal test Ofcom believes it is  
23 applying in this context for its assessment of whether it has satisfied s.86. It appears to be  
24 one in which at the very least prospective issues such as planned rollout are relevant under  
25 s.86, for there is an obvious and unsatisfactory absence of clarity".

26 So at that stage, Talk Talk's second, their fatal admission, really collapsed back into their  
27 first argument of lack of clarity. It was accepted that the analysis was prospective. The  
28 point that was taken against us was in relation to this second alternative argument, that we  
29 were not being clear enough what the test was that we were applying in the alternative. And  
30 you had my submission that the test is clear on the face of s.86 and you also have my  
31 submission that the test being applied in the second argument was clearly prospective.

32 Sir, we say that it is clear that the error in para.3.42 does not infect the substance of  
33 Ofcom's analysis; nor did it have any impact on Ofcom's approach to investigating  
34 material change. This was conditioned by Ofcom's substantive analysis of the implications

1 of rollout and not any error as to the legal test. And this is clear from Mr. Clarkson's  
2 evidence at para.20 of his witness statement where he says that the reason why we did not  
3 feel we needed to collect information about other operators' rollout was because of our  
4 consideration of how other rollouts after December 2010 could be expected to impact on  
5 competitive conditions in the market, and if Talk Talk did not accept this evidence they had  
6 the opportunity to challenge it during cross-examination, but they did not do so. And so,  
7 sir, we say it is simply not open to Talk Talk to make a submission to the effect that the real  
8 reason that Ofcom did not investigate was that it misdirected itself as to the law.

9 Talk Talk's second process-related complaint is that Ofcom did not proactively investigate  
10 whether there had been a material change in the market. Specifically Talk Talk says that  
11 Ofcom should have obtained information by means of s.135 requests in respect of other  
12 operators' rollout plans. And there are four points to make in this connection.

13 First, the short answer is that such plans would be irrelevant for the purposes of s.86 for the  
14 same reason that Talk Talk's plans were irrelevant. Ofcom had assessed the speed with  
15 which such rollout would lead to a change in competitive conditions. Its conclusions were  
16 not confined to Talk Talk, its unchallenged finding was that rollout in market 1 towards the  
17 start of the period of the market review would be likely to lead, at best, to a rival operator  
18 obtaining a 25-30 per cent market share by the end. And Ofcom found that this was  
19 insufficient to require exchanges but, subject to such rollout, to be re-allocated between  
20 exchanges. It was also insufficient to affect either the find that BT had SMP, or the  
21 appropriateness of imposing a price control.

22 Given those findings, there was no purpose in Ofcom investigating other operators' rollout  
23 funds. It already had good reason to conclude that those plans would not constitute a  
24 material change for the purposes of s.86, and that was why I said when I began yesterday  
25 that the answer to ground 2 supplied a solution to at least some of the points raised against  
26 us under ground 1.

27 The second point to note is that Ofcom does not operate in a vacuum. And s.135 requests  
28 are not the only way in which it acquires information about the market. On the contrary, as  
29 Talk Talk well knows. Ofcom's officials are involved in a constant round of meetings with  
30 the operators active in the markets that it regulates, and they also carefully monitor public  
31 announcements. And there are two factual details that I would just highlight for the  
32 Tribunal to make good that submission.

1 The first is that Ofcom first became aware of Talk Talk's rollout plans in November 2010 –  
2 not as a result of anything that Talk Talk came to say to Ofcom, but as a result of a public  
3 announcement in the market by Talk Talk.

4 The second point is, just to refer you back to the cross-examination of Mr. Clarkson which  
5 occurred yesterday. And, sir, no-one who listened to that cross-examination with a fair ear  
6 could have doubted the care with which Ofcom made itself available to operators and  
7 sought to obtain information from operators even when it was not forthcoming, in order to  
8 inform its assessment. So, the various processes by which Ofcom informs itself besides  
9 s.1.35 requests should not be dismissed or discounted or treated lightly. And as a further  
10 example, Mr. Clarkson explains in his witness statement at tab.10 that Ofcom was  
11 specifically aware of the Fujitsu rollout plans to which Talk Talk refers, and also had a good  
12 understanding of other operators' rollout plans; and in these circumstances Ofcom was not  
13 required to rain down information requests on operators to establish what it already knew.  
14 We do not say that Ofcom's general appreciation of the market always excludes Ofcom  
15 from having to have recourse to s.1.35, only that in the circumstances of this case Ofcom  
16 did have sufficient understanding of market dynamics and did not need to gather  
17 information, further information.

18 Thirdly, as regards the possible developments that Talk Talk refers to in the notice of  
19 appeal, Mr. Clarkson explains in his statement why none of these is material. The rollout  
20 by other LLU operators, the first point to note is that it is likely to be smaller than Talk Talk  
21 in market 1. This is the "lower hanging fruit" point which we saw in the market review  
22 statement at para.4.37.

23 The second point is that in relation to the uncommitted exchange plans which Ofcom was  
24 provided with in June 2010, those plans had not been realised and, sir, I need to tread  
25 carefully for reasons of confidentiality, but I refer you simply to Mr. Clarkson's statement at  
26 para.21. Now, these were the core plans, one has to assume, of the other LLU operators.  
27 One must assume that their plans in 2010 were the most – their targets, if you like – if none  
28 of these have rolled out, we say it is a reasonable inference to draw that they will not be  
29 targeting reams of other exchanges in market 1 and this is consistent with the consultation  
30 responses which indicated limited rollout.

31 The second development to which Talk Talk refers is the abandonment of committed but  
32 not yet unbundled exchanges which Mr. Clarkson addressed in para.22. Now, the first point  
33 to note here is that this affects market 2 but not market 1. Supposing that a few exchanges  
34 that really had competitive conditions analogous with market 1 had found their way into

1 market 2, what would the consequences of that be for competitive conditions in market 1  
2 which are the relevant competitive conditions for the purposes of charge control? We say  
3 that they would be none. The geographic scope would be slightly too small, but if those  
4 exchanges were reintroduced, the competitive conditions would remain the same. And the  
5 substance of the setting of the charge control would remain appropriate. It is just that some  
6 exchanges may, a small number of exchanges, as you will see from the evidence, may have  
7 eluded, may have evaded, appropriate regulation. But that is a problem which really is not  
8 before the Tribunal in these proceedings.

9 Just to be clear, the number that you see discussed at Clarkson para.22, has to be set, we  
10 say, against the number of exchanges in market 1 because that is the market that they would  
11 fall back into. And that very small number therefore has to be compared with 3,389  
12 exchanges in market 1.

13 Then there is the Virgin Media point. Virgin Media has a tiny presence in market 1 as  
14 Mr. Clarkson explains at para.24 of his statement. I do not need to take you there, but I do  
15 need to check confidentiality markings. (No, it is all clear, thank you, sir). So, a 2.4 per  
16 cent coverage on average across market 1. They would have to hit 65 per cent coverage in  
17 any exchange in market 1 to qualify as a principal operator. The Tribunal will recall that  
18 that was the condition on which Virgin Media would become a principal operator. In only  
19 32 of the 3,389 exchanges in market 1 is Virgin Media's coverage above 50 per cent. And  
20 rollout to 16,000 homes across the country, not confined to market 1, is a development that  
21 is being suggested. And, even if those premises were all in market 1, that would amount to  
22 less than 1 per cent of the premises falling in market 1. So, we say that this really is not a  
23 material change in either or on any possible sense of that word. It is not material to the  
24 setting of the condition and it is also *de minimis*.

25 Then we have the Fujitsu point which Mr. Pickford has signalled is not now maintained.  
26 We were criticised for not specifically referred to this alleged development and discounting  
27 it. Well, it probably does not merit a response. But, with respect, that criticism is simply  
28 observed. It would not have been possible for Ofcom to consider and dismiss all of the non-  
29 developments that might not have happened in market 1.

30 And, just to make that point good, the BDUK process involves a number of big companies  
31 that may one day roll out, Network Rail, KComm, Balfour Beatty, Thales, Centrica. Is Talk  
32 Talk's point that Ofcom should have gone through each of these potential entrants,  
33 explaining why their entry was not a material change? It is not an appropriate criticism, and  
34 we do not accept it, sir.

1 And then the fourth point to note is that as a matter of law Talk Talk is wrong to contend  
2 that in every case Ofcom is under a proactive duty to investigate. Its submissions on this  
3 have become somewhat stronger in its reply than they were in the notice of appeal. If one  
4 looks at the case law that Talk Talk actually relied upon in the notice of appeal, it is all  
5 qualified, it is investigation where necessary, sufficient steps to inform itself by obtaining  
6 the information that is needed. There is clearly no maximal duty always to use either the  
7 highest level of investigative intervention available to a regulator. Ofcom has a discretion  
8 as to when and how to collect information. And s.1.35 requests are an onerous form of  
9 regulation which Ofcom should use proportionately having regard to its duty to act  
10 proportionately and not to impose excessive regulatory burdens. And, sir, I should just note  
11 for the record, regulated companies frequently remind Ofcom, because these price control  
12 processes are onerous for the regulated entities, we recognise that, and they involve a lot of  
13 information gathering. And Ofcom therefore has to be careful and measured in the requests  
14 that it makes of operators.

15 Finally, Talk Talk criticises Ofcom for focusing on its rollout plans and the charge control.  
16 Now, Ofcom did not think that there had been any material change; and in explaining why  
17 not, we say that it was reasonable and proportionate for Ofcom to focus its explanations on  
18 the specific representations that had been made to it.

19 That brings me to Talk Talk's third and final procedural ground, which I shall try and take  
20 in the last ten minutes, and I am confident that I should be able to do that.

21 So, the complaint is that Ofcom did not adequately consult about whether there had been a  
22 material change in the market for the purposes of s.86. Talk Talk accepts that in the draft  
23 notification for setting the price control condition which accompanied Ofcom's charge  
24 control consultation, Ofcom proposed to find that:

25 "In accordance with s.86.1 of the Act, Ofcom is satisfied that there has been no  
26 material change in the relevant markets since the market power determinations were  
27 made".

28 This of course was the notification that, as a matter of statute, Ofcom was actually  
29 consulting upon. He published a draft notification. He consults in relation to the  
30 notification. This is the notification being consulted on and, for your note, the reference is  
31 CD2, tab.5 p.751 at para.8 of annexe 5.

32 For our part, and in response to the Tribunal's first question in its letter of last week, we  
33 accept that this is the only mention in terms of the s.86 test that appears in the charge

1 control consultation. Talk Talk says that this is insufficient. Ofcom should have set out its  
2 analysis on whether there had been a material change, and invited parties to comment.  
3 Now our submission, sir, is that this is a triumph of form over substance. And in this regard  
4 we refer the Tribunal to the chronology. The charge control consultation was published on  
5 20<sup>th</sup> January 2011. That is just five working weeks since the market review statement, not  
6 counting the week of Christmas. So, Ofcom was finalising the consultation only weeks  
7 after setting out a thorough and detailed analysis of how they saw market dynamics  
8 developing over the ensuing four years. The analysis specifically considered, in particular,  
9 how future rollout could be expected to affect competitive conditions. It took the key  
10 candidate potential development over the period of the price control, over the period of the  
11 market review, and it analysed in detail why anticipated rollout could not be expected to  
12 constitute, could not disrupt the market definition. Now, plainly, if you had asked Ofcom's  
13 team in January 2011 whether they thought it likely that any material changes had occurred  
14 since the market review in December 2010, they would have said "Of course not". What  
15 more, then, could they have been expected to say in the charge control consultation? They  
16 could hardly have been expected to identify possible candidate changes on which parties  
17 could express their views, having so recently explained why competitive conditions would  
18 not be affected by future rollout. So, you would not expect a long section analysing  
19 potential material changes for comment. Talk Talk's case must therefore come down to a  
20 claim that Ofcom should have recapped or repeated its analysis of expected market  
21 dynamics as set out in the market review statement, and should have included a specific  
22 question to consultees which explicitly raised whether they agreed with the analysis, or  
23 whether they were aware of any current or forthcoming material changes that might cast  
24 doubt on it. As for this, the consultation made prominent reference at the very outset to the  
25 market review statement. No-one reading the consultations could overlook the existence of  
26 the statement and, for your note, the market review receives its first mention of many on p.1  
27 of the consultation at para.1.3.

28 Moreover, in our submission the Tribunal must keep in mind the nature of this consultation  
29 exercise and the stakeholders who are most closely involved in this. This is a highly  
30 technical process of regulatory decision making which affects the terms of trade of a few  
31 large and sophisticated companies in wholesale markets. So, these are not markets  
32 supplying directly to the public. The companies are repeat players in the consultation  
33 process. Their responses to each consultation are part of an iterative regulatory dialogue  
34 carried out through the consultations and in parallel with the consultations. The companies

1 know what was said in the last document, they understand the regulatory framework, they  
2 are very familiar with the Communications Act and the issues to which it gives rise. They  
3 would know full well, for example, that Ofcom was required to consult on the entirety of  
4 the notification, and they would know that they were not foreclosed from making  
5 representations on any aspect of the notification by the fact that Ofcom had raised particular  
6 questions on which it sought regulated parties' and consultees' specific input. So, that is  
7 context.

8 Secondly, therefore, we submit that having regard to the context it would be artificial to find  
9 error in the consultation process by reason of a failure to repeat an analysis that had been  
10 published six weeks previously, or to raise the issue of s.86 in a specific consultation  
11 question.

12 Thirdly, we say that the adequacy of Ofcom's consultation in its specific regulatory context  
13 is well illustrated by Talk Talk's own consultation response and subsequent interactions  
14 with Ofcom. Talk Talk had no trouble in spotting Ofcom's proposed finding on 2.86 in  
15 annexe 5 of the charge control consultation. Talk Talk specifically refers to this finding in  
16 its March consultation response, and the reference, for your note, is CD1 2H paras.6 and 39.  
17 That was the source that was cited when developing this s.86 submission.

18 Talk Talk then proceeds to state its views on the point as it continued to do right up to the  
19 publication of the charge control statement. What Talk Talk shows is that sophisticated  
20 stakeholders with the most direct interest in these hostile markets did not struggle to  
21 understand the issues or to make their submissions known upon them. And in the light of  
22 its responses to the consultation, Talk Talk can hardly complain that there has been any  
23 material prejudice as a result of the alleged failure to consult. The public law case law on  
24 which Talk Talk relies involves cases where people claim that they were shut out, that they  
25 were unable to participate effectively in the consultation process because, for example, not  
26 enough time was allowed or they did not understand the issues. Here, Talk Talk perfectly  
27 well understood Ofcom's proposal in the draft notification to find no material change, and it  
28 had no difficulty in making its views known. In the circumstances we say that the Tribunal  
29 should be slow to find error in Ofcom's consultation process.

30 Now, Talk Talk is wrong to say in this connection that it was prejudiced by reason of the  
31 alleged failure by Ofcom to set out its stall more fully on s.86 in the consultation. You have  
32 my submission that the test itself is clear. Further, if Talk Talk had been prejudiced we  
33 would have seen new arguments advanced in this appeal once Ofcom's position was set  
34 forward in the defence. At least from the defence we say it was always clear, we say at



1 least from the defence Talk Talk should not have been in any doubt about what Ofcom's  
2 position was on s.86. And one would have expected some new argument to appear before  
3 the Tribunal which would show the argument that Talk Talk was not able to make to Ofcom  
4 during the consultation process as a result of this alleged failure to set out our stall. Now,  
5 where does that take us? We say that it shows the sterility of this particular challenge,  
6 because insofar as new arguments were advanced of a substantive nature in this appeal, they  
7 could be dealt with by the Tribunal on the merits. Insofar as no new arguments are  
8 advanced, following an extensive response on s.86 during the consultation process by Talk  
9 Talk, Talk Talk itself cannot claim that it was prejudiced. So, we say that either way, no  
10 prejudice of Talk Talk.

11 As regards third parties, sir, my main submission on that is where are they? Where are  
12 these third parties? None are before the Tribunal today. None have intervened. None have  
13 suggested that they were unable to make their point of view heard. None have appealed in  
14 respect of the findings that Ofcom made as regards s.86, and we do not even have, we say,  
15 any credible suggestion of a relevant development by Talk Talk itself which might identify  
16 third parties who have been prejudiced as a result of any alleged failure to consult.

17 There is one further matter that I should ----- I have a case which I would like to take you  
18 to which I think will take no more than three minutes. Rather than going over the break,  
19 shall I, would you be prepared to sit for another three moments while I just took you to that?

20 Or would you rather -----

21 THE CHAIRMAN: No, we will deal with it now.

22 MR. HOLMES: Thank you, sir. So, if I could take you to, it is defence tab.6, our authorities  
23 were included with the defence. Defence tab.6. You will see there, sir, the case of *R (on*  
24 *the application of Greenpeace Ltd) v The Secretary of State for Trade and Industry*. This is  
25 the celebrated judgment of Mr. Justice Sullivan, now Lord Justice Sullivan.

26 THE CHAIRMAN: Just one second. Right. We are with you.

27 MR. HOLMES: So, sir, this is the celebrated judgment of Mr. Justice Sullivan, now Lord Justice  
28 Sullivan, upholding a judicial review brought by Greenpeace against the Secretary of State  
29 for Trade & Industry for failure to consult on its decision to support the building of new  
30 nuclear power stations. I need not concern you with the facts of the case further than that. I  
31 want simply to take you to some of the legal discussion concerning duty to consult which  
32 begins at para.55 on p.16 in the number on the right hand corner of the pages.

1 Firstly, at para.55 Mr. Justice Sullivan sets out the *locus classicus* for consultation. The *ex*  
2 *parte Coughlan* criteria as set out by Lord Woolf MR giving the judgment of the Court of  
3 Appeal:

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

11 These are the so-called “Sedley” criteria. Now, you have my submission that Talk Talk  
12 clearly were able to make an intelligent response. At para.61, Mr. Justice Sullivan confirms  
13 the fairly, you know, a truism of public law, fairness case law, in the final sentence:

14 “What is fair, and in particular whether fairness demands that new material which has  
15 not been available during the consultation period should be made available to  
16 consultees so that they have an opportunity to deal with it before a decision is taken,  
17 must depend upon the particular circumstances of the case:

18 ‘It is an accepted general principle of administrative law that a public body  
19 undertaking consultation must do so fairly *as required by the circumstances of*  
20 *the case*’”,

21 and that is, there are many many references in the case law to that basic proposition. On  
22 this, sir, we say that – you have my submissions on the relevant context which we say made  
23 the consultation fair in this case. And it also provides the answer, we say, to Talk Talk’s  
24 reference to other consultations by Ofcom in which there was detailed discussion of s.86  
25 and a specific consultation question. The context of those consultations, we say, was very  
26 different. In each case the time that had elapsed between the market review and the  
27 consultation was much longer, covering months or years. And in that case where the period  
28 is not six weeks between the market review and the consultation document, but a matter of  
29 months and years, there may be candidates for material change and it is reasonable to expect  
30 Ofcom, depending on the circumstances, to set out its stall more fully on what those  
31 potential material changes might be. But that is not the case here. We had a thoroughgoing  
32 analysis which I took you through in some detail only weeks previously. And we said that  
33 supplies the relevant context. That and the nature of the consultees, the fact that this is a

1 wholesale market, that the very abstruse technical area on which the general public would  
2 not be making submissions.

3 So then we come to a further point on which I wish to rely today at paras.62-63. You see  
4 that here, Mr. Justice Sullivan is considering a disagreement of law between counsel for the  
5 two parties, and you see that:

6 “Mr. Fleming [for the applicant] submitted that there was no support in the authorities  
7 for Mr. Drabble’s [for the government] submission that the decision-making process  
8 in the present case should be interfered with by the court ‘only if something has gone  
9 clearly and radically wrong’”.

10 Now, as to this Mr. Justice Sullivan says:

11 “This difference between the parties is one of semantics rather than substance. A  
12 consultation exercise which is flawed in one, or even in a number of respects, is not  
13 necessarily so procedurally unfair as to be unlawful. With the benefit of hindsight it  
14 will almost invariably be possible to suggest ways in which a consultation exercise  
15 might have been improved upon. That is emphatically not the test. It must also be  
16 recognised that a decision-maker will usually have a broad discretion as to how a  
17 consultation exercise should be carried out. This applies with particular force to a  
18 consultation with the whole of the adult population of the United Kingdom. The  
19 Defendant has a very broad discretion as to how best to carry out such a far-reaching  
20 consultation exercise.

21 [63] In reality, a conclusion that a consultation exercise was unlawful on the ground of  
22 unfairness will be based upon a finding by the court, not merely that something went  
23 wrong, but that something went ‘clearly and radically’ wrong”.

24 Now, we obviously do not rely on the final portion about consultation for the general  
25 public, this is a very different context. But you have the points about this context which are  
26 relevant which we say go to condition the nature of the consultation. And you have the  
27 point here that whatever the standard of review involved, courts and tribunals should not be  
28 involved in unpicking decision making on the basis of minor mishaps or matters that  
29 consultation might, with the benefit of hindsight, be put slightly differently. The question  
30 for the Tribunal in my submission is whether something has gone clearly wrong here, such  
31 that parties have been shut out from making submissions. And only if the Tribunal  
32 considers that to be the case should it conclude that there has been any unfairness. And we  
33 say in the circumstances of this case there are good reasons to conclude that there has been  
34 no unfairness.

1 So, I end where I started, with the fact that this is a merits appeal, and that the ground 1  
2 complaints are really of very marginal relevance in the context of a merits appeal. Clearly,  
3 the error of law is neither here nor there if we reach the right decision. The consultation  
4 point we say goes nowhere because there is no prejudice that has been shown to anyone,  
5 and the investigation point, we say, was met first and foremost by the fact that Ofcom had  
6 good reasons to limit the investigation in the way that it did, and that it was proportionate  
7 and appropriate that it should do so. Sir, subject to any questions you have, those are my  
8 submissions.

9 THE CHAIRMAN: Thank you very much Mr. Holmes. No, we do not have any questions for  
10 you. We will resume at five past two. But, before we rise I asked yesterday about some  
11 dates in case we need them. I do not want to discuss them now, but I wonder if you could  
12 filter them through Mr. Bailey so that we can see what fits with our diaries, so something  
13 can be pencilled in. In terms of who is next, is it Mr. Ward or Mr. Wisking?

14 MR. WISKING: Sir, I will be making submissions on behalf of SKY.

15 THE CHAIRMAN: Excellent, thank you very much. Five past two.

16 (Adjourned for a short time)

17 THE CHAIRMAN: Mr. Wisking?

18 MR. WISKING: Thank you. I would like a few short submissions on behalf of Sky. I will try  
19 and avoid replicating those of Mr. Holmes and focus on the evidence that we have  
20 submitted. The Tribunal should have a statement of intervention from Sky and a witness  
21 statement from Mr. Higho who is head of regulatory policy for the broadband part of Sky.  
22 It might be useful to have that to hand because in the course of what I say I will also make  
23 reference to some parts of his evidence which are confidential and therefore ... in open  
24 court. To expedite matters I have prepared a speaking note which you should have which  
25 contains all the references and so hopefully I can spend less time.

26 THE CHAIRMAN: If you give us a moment, we will just extract the statement of intervention  
27 and Mr. Higho's statement. (After a pause) Right, we are with you, Mr. Wisking, we have  
28 those document.

29 MR. WISKING: There are essentially five points we want to make which are set out at 1.4 of the  
30 speaking note, namely:

- 31 (i) The benefits of the WBA charge control for consumers in Market 1.
- 32 (ii) The alleged effects of the charge control on incentives to invest in local loop  
33 unbundling in that market.
- 34 (iii) The consultation process insofar as it relates to Ground 1 of Talk Talk's appeal.

1 (iv) The mechanics of the LLU rollout process which is relevant to Ground 2 of the Talk  
2 Talk appeal; and then briefly

3 (v) Relief.

4 Dealing with the first of those, benefits of charge control for consumers, that is dealt with in  
5 s.2 of our note and should not be contentious. I think the Tribunal itself mentioned that it  
6 was obvious the charge control of RPI minus 12 per cent is of direct benefit to consumers in  
7 Market 1.

8 The other point to note about this is that the number of consumers that take the WBA  
9 product in Market 1 is approximately 2 million and that can be found in figure 5.2 of the  
10 charge control statement.

11 The second point to make which has not been highlighted is that the way in which Sky  
12 provides and other operators in the position of Sky provide a retail product in Market 1 is  
13 that they purchase something called IPStream Connect from BT. Essentially that is a  
14 product which they resell and there is limited flexibility in terms of pricing and the quality  
15 elements of that product. So as a consequence consumers in Market 1 tend to get a worse  
16 deal than consumers in Market 3. Just to demonstrate that, if you could take Ofcom's  
17 defence bundle, tab 11 – this is Sky's response to the charge control consultation, and at p.3,  
18 table 1, there is a table which shows a comparison of Market 1 and Market 3 for each of the  
19 main providers, the retail price of their broadband products and also the speed and usage  
20 caps for those products. You can see there is quite a significant difference between Market  
21 1 and Market 3 both in terms of retail price and the quality of those services.

22 As Mr. Holmes said, the purpose of the charge control, amongst other things is to protect  
23 consumers by ensuring that BT cannot charge excessive prices at wholesale level and that  
24 produces benefits both in terms of operators like Sky, who achieve a cost saving and that  
25 enables those operators in turn to reduce their retail prices and improve the quality of their  
26 services so they can purchase extra bandwidth and provide higher usage caps and so on. As  
27 Mr. Holmes said, given Ofcom's unchallenged finding about the impact of deployment by  
28 Talk Talk in Market 1, there will still continue to be a very large number – 70 to 80 per cent  
29 – of consumers who would benefit from the WBA charge control because that subsequent  
30 deployment by Talk Talk will not operate as a constraint on BT's prices. That is the first  
31 point,

32 The next point which is dealt with in s.3 of the note is then the impact of charge control on  
33 LLU investment, and this is relevant because this appears to be the basis or the motivation  
34 for Talk Talk's appeal. But, as Mr. Clarkson put it yesterday, and Mr. Holmes put it today,

1 the relevant question for the purposes of s.88 is whether the charge control operates to  
2 promote sustainable investment. In other words, does it allow for efficient investment, and  
3 therefore the question is: does it foreclose efficient investment, not whether it inhibits any  
4 investment in local loop unbundling.

5 Our submission is that Talk Talk have not demonstrated that the charge control will  
6 foreclose efficient investment in local loop unbundling. The reasons why we believe that to  
7 be the case is set out at 3.3 of the note and at this point it might be useful just to take you to  
8 the relevant parts of Mr. Higho's evidence, starting at para. 22.

9 THE CHAIRMAN: Shall we just read that to ourselves?

10 MR. WISKING: Yes, well the first point to make is that at para.22 he sets out the factors which  
11 Sky takes into account when considering whether to unbundled exchanges. They are set out  
12 there, the commercial reasons are confidential, but as you can see what Talk Talk focuses  
13 on is the cost differential between the WBA price and the LLU price which you can see  
14 from those factors that that is not a material factor in Sky's analysis.

15 The second point is the reduction in the WBA charge on Sky's analysis has a very small  
16 impact on the viability on unbundling exchanges, and the impact is set out again in the  
17 confidential portion of para. 23 of Mr. Higho's statement. You can also see that, contrary to  
18 the point that was made by Mr. Heaney in his witness statement, his analysis is not based on  
19 a very small number of, if you like, the most attractive exchanges in Market 1, but actually  
20 quite a large number of exchanges.

21 The third point is that even after and at the end of the term of the price control, there will be  
22 still quite a significant difference between the cost of a WBA product with IPStream  
23 Connect and the ongoing variable cost of local loop unbundling and that difference can be  
24 seen again from the confidential para. 26 of Mr. Higho's evidence. In summary the cost  
25 reduction is a fraction of the ongoing difference between the WBA price and the cost of  
26 LLU.

27 Then the final point is that the way the charge control is constructed means there are still  
28 significant incentives for operators to unbundle in Market 1 and the reason for this is the  
29 charge control is calculated by reference to the cost of using older, less efficient, and more  
30 expensive technology exchanges. This is the so-called 'anchor pricing approach' which  
31 Ofcom has adopted. Sky, in its submissions argue that actually Ofcom should use the cost  
32 of the current or efficient technologies as the basis of the charge control but Ofcom decided  
33 that it would adopt anchor pricing as an incentive for BT to invest in those exchanges. It  
34 calculates that if you were to use the modern efficient asset price the charge control would

1 have been much deeper – something in the order of RPI minus 20 per cent. So the  
2 difference between that and the current charge control leaves considerable headroom for  
3 operators to invest in Market 1 exchanges.

4 The other point to make is, as has been mentioned earlier, Ofcom is currently consulting on  
5 the cost of LLU services, which are the services an operator would use if they were  
6 unbundled, and those services in Ofcom's current consultation would be the subject of  
7 charge controls which would also involve significant price reductions.

8 If that consultation is implemented in the final statement, the cost differential that Talk Talk  
9 is concerned about would open up again because LLU prices will fall.

10 Talk Talk may well have a different perspective on all of this but that does not mean that the  
11 charge control prevents efficient investment or Talk Talk's view is shared by other  
12 operators.

13 Talk Talk makes various points about our submissions and we deal with those at 3.5 of the  
14 notes – I do not propose to deal with that orally. The other point that has been made by Mr.  
15 Holmes is that Ofcom itself considered whether or not the charge control had any effect on  
16 efficient investment, concluded that it did not and that is in the charge control statement at  
17 3.21 to 3.32. Contrary to what Mr. Pickford says Sky's position in these proceedings is not  
18 the result of some complex commercial calculus. Sky and other operators like it benefit  
19 from the charge control as do consumers, and we are not precluded from making efficient  
20 investments in Market 1 exchanges; it is simple.

21 Next I want to turn to the consultation process and Ground1, which is dealt with in s.4 of  
22 the note. Sky supports Ofcom's defence. Mr. Pickford made a number of points about  
23 Ofcom's failure to investigate Sky's unbundling plans. Sky probably, after Talk Talk, is the  
24 party most likely to be unbundled in Market 1. In response to that we have these submissions.  
25 First, Sky is a sophisticated operator, one of the class that Mr. Holmes referred to. We in no  
26 way felt prejudiced by the consultation process thus we are able to make submissions in  
27 response to those consultations.

28 In terms of Ofcom's knowledge of Sky's position, Ofcom knew what Sky's forecast  
29 unbundling plans were as at July 2010. Sky then, albeit in a separate consultation inquiry  
30 by Ofcom, this was the inquiry that relates to local loop unbundling, in December 2010,  
31 after the market review statement, confirmed that its plans were unchanged. It then in  
32 March 2011 provided its views more generally as to the likelihood of unbundling in Market  
33 1 and that was obviously informed by its industry knowledge and its own plans. Then, lest  
34 there be any doubt about Sky's position, the extent of its rollout in Market 1 subsequent to

1 all of that has been relatively limited, so Sky's plans have not changed and Ofcom has been  
2 aware of what our plans are. So we say, as far as Sky is concerned, Ofcom is sufficiently  
3 informed about what we were proposing to do and there is no lack of knowledge or  
4 investigation in our case.

5 In relation to Ground 2, which is covered in s.5 of the note, I do not propose to deal with the  
6 section which is 5.3 onwards, which effectively echoes what Mr. Holmes has said. We  
7 agree absolutely with Ofcom's defence to Ground 2; that is set out there, but he has taken  
8 the Tribunal to the various reports and we agree with that.

9 What I want to highlight in relation to Ground 2 is the unbundling process itself, and that is  
10 dealt with at para. 27 onwards of Mr. Higho's statement. In our submission that description  
11 supports the approach that Ofcom took, because it shows that the process of unbundling  
12 takes time, it is not straight forward, and it was therefore reasonable for Ofcom to take the  
13 temporal approach that it did. There are several stages which I will just highlight.

14 First, once a rollout plan is announced, there is still an internal decision making process, and  
15 this is Sky but there is no reason to think that Talk Talk is any different, where internally  
16 the company has to assess which exchanges it is going to seek to rollout and that takes  
17 time. That is dealt with at paras 28 to 30 of Mr. Higho's evidence.

18 The next point is that even after an order is placed with Openreach there is quite a lengthy  
19 process before the exchange is actually handed over to the operator, and that is dealt with at  
20 paras. 31 to 34 of Mr. Higho's evidence. If you look at para. 31 there is an indicative  
21 timetable which BT works towards which is 80 working days to achieve handover from the  
22 placing of an order. But you can see from the confidential part of that paragraph it takes  
23 significantly longer; that is not necessarily a criticism of BT, it just reflects the complexity  
24 of the process because there are various competing considerations that come into play.

25 There is then another stage which is that once the exchange is handed over to the operator  
26 they have to install their own equipment and that also takes time, and that is para. 35 of Mr.  
27 Higho's evidence, and in the confidential part you can see how long that takes for Sky.

28 Finally, once the exchange has gone live, there is a further process where the operator has to  
29 market its services to consumers in that area and begin to win market share, and all of that is  
30 consistent with Ofcom's finding that even where Talk Talk unbundles exchanges at the end  
31 of the charge control period it will have made only inroads into BT's market share and not  
32 constrained BT.

33 The final point I wanted to make was in relation to relief which is dealt with in s.6 of the  
34 note. Obviously that will be the subject of further submission should Talk Talk prove



1 successful in the light of the Tribunal's specific findings. One point we wanted to make is  
2 that Talk Talk is seeking to set aside the charge control statement, and seeks a remission  
3 back to Ofcom. Now, given the evident consumer benefits and the lack of any apparent  
4 detriments to operators in terms of LLU investment, there is an obvious concern that if the  
5 charge control is lifted consumers will lose the benefit of the charge control in  
6 circumstances where Ofcom may ultimately conclude there should be a charge control in  
7 Market 1 and that Talk Talk itself accepts that many exchanges in Market 1 should be the  
8 subject of charge control, but that is a point we can obviously develop at a later stage should  
9 that be necessary, but we wanted to make that point now.

10 Those are Sky's submissions, and unless I can be of any further assistance.

11 THE CHAIRMAN: Mr. Wisking, thank you very much, we have no questions. Mr. Ward?

12 MR. WARD: Thank you, sir. I expect to be about half an hour. On the face of it there is  
13 something paradoxical about this appeal. Talk Talk is, of course, a wholesale customer of  
14 BT yet it is challenging the imposition of a price control on BT, and here is BT opposing  
15 that appeal.

16 Talk Talk's reason is perfectly clear, it sees a commercial advantage in BT putting its prices  
17 higher, and we see that from its notice of appeal which talks euphemistically about the  
18 potential for higher margin, but I wanted to start by explaining BT's position. Then I want  
19 to make some very brief submissions about the scope of the issues, and say why we say  
20 there is a short answer to Talk Talk's appeal on Ground B and, just as in our written  
21 statement of intervention, we are not going to address Ground A.

22 BT's position is that Talk Talk's appeal should be rejected because Ofcom did not make the  
23 errors that Talk Talk alleges, but it does not follow that BT actually approves of the  
24 imposition of the charge control. As we made clear in our statement of intervention BT  
25 does not agree with it at all, and indeed opposed its imposition during the course of the  
26 consultation and you can see that in the market review statement at para. 5.86. Overall BT  
27 does have a number of concerns about Ofcom's approach. So it is wrong in our respectful  
28 submission for Mr. Clarkson to have concluded in his evidence that BT does not dispute  
29 that a charge control is appropriate in Market 1. He said that in para. 12 and I hope we will  
30 not be asked to recall him to challenge that.

31 The reality is that what we oppose is this appeal, not the charge control itself. BT's  
32 perspective is that the charge control is part of an overall regulatory settlement that does  
33 give a degree of stability for the purpose of planning an investment, that is a benefit to BT  
34 and it is a benefit to its customers.

1 Given the nature of this industry there are inevitably going to be changes throughout the  
2 period of the market review, but our essential point, as is Ofcom's, is that Ofcom itself very  
3 sensibly anticipated that and reflected this particular change in its analysis. It was not in  
4 any way taken by surprise and that is why we say in a nutshell it is not a material change for  
5 the purposes of s.86. It is not a delicate question of statutory interpretation it is just a  
6 question on the facts. On the facts it was already anticipated, taken into account in the  
7 market analysis. I am going to come back to that in a moment.

8 Before talking about the argument itself I just want to identify some issues which are  
9 outside the scope of Talk Talk's challenge, because the challenge is, in reality, extremely  
10 narrow. Most importantly, there is no challenge at all to the market review statement, and  
11 nor of course could there be at this time – the time to challenge it expired a very long time  
12 ago.

13 What that means is that there is no challenge to the overall methodology adopted by  
14 Ofcom, and I would highlight just the following points: the decision to split the exchanges  
15 into three markets, rather than try to do something much more granular. As I think Mr.  
16 Holmes said yesterday, one could in principle seek to analyse on an exchange by exchange  
17 basis. We know there are 5,000-odd and very fairly Mr. Pickford said that Talk Talk did  
18 not wish to suggest that that was the right approach.

19 The use of exchanges as proxies for the underlying conditions of competition, that was an  
20 essential feature of the market review statement (see, for example, para. 3.74) The decision  
21 to have a forward look over a four year horizon – that is in the market review statement at  
22 2.27 and 2.28.

23 The decision to take into account committed rollout only, and that we can find at para.3.75  
24 of the market review statement. Indeed, the conclusion that the rollout that Talk Talk was  
25 discussing publicly in November 2010 was not committed in the relevant sense. That is in  
26 the Market Review Statement at 3.170. But more fundamentally to this appeal, there was  
27 no challenge at all to the way in which Ofcom dealt with the prospect of further rollout as  
28 part of that methodology, because you have seen – and Mr. Holmes has explained with  
29 admirable clarity this morning – that of course the Market Review Statement looks  
30 specifically at this issue and anticipated. If I could just ask you turn up a paragraph that we  
31 looked at before to make a very short point about it. The Market Review Statement is in tab  
32 6 of bundle CD2. The paragraph I wanted to show you is 3.182, which is in the bundle  
33 numbering p.865. You have seen this paragraph a number of times. In the middle of it is  
34 the critical sentence:

1                   “... that even if Talk Talk deploys towards the start of the review period BT’s  
2                   market share would be likely to be at least 70 to 80 per cent in the exchanges  
3                   where it deploys at the end of the review period.”

4                   That obviously is critical to Ofcom’s answer to Talk Talk’s case and, indeed, in our  
5                   submission also. The point I want to emphasise now is there it is in the Market Review  
6                   Statement, it appears again in either exactly or almost exactly the same language in para.  
7                   3.44 of the Charge Control Statement. None of that, of course, precludes Talk Talk from  
8                   saying there has nevertheless been a material change of circumstances and I do not wish to  
9                   suggest it does. The point I am making at the moment is that this aspect of the analysis  
10                  crystallised back in December, in the Market Review Statement, it is not challenged. The  
11                  question is whether, nevertheless, the new information that has now been provided  
12                  overtakes the analysis of December, and required Ofcom to revisit it; that is the issue. We  
13                  know what the supposed material change of circumstances it is, it is the more committed  
14                  rollout, or the plans of Talk Talk becoming more concrete as it was put in para. 72 of the  
15                  notice of appeal.

16                  Talk Talk says that its case is very simple, and that is stated in para. 51 of its replay.  
17                  The essence of the case, and Mr. Pickford put it a number of different ways yesterday, but I  
18                  think they amounted to the same thing, which was this: if one looks at Talk Talk’s plans as  
19                  they were on 8<sup>th</sup> July if those plans had been in place in December 2010 that would have  
20                  counted as committed rollouts. Sir, you tested that point with Mr. Holmes this morning and  
21                  he accepted the logic of that. Mr. Pickford says that this makes no sense because they  
22                  satisfy the test you used in December 2010, albeit that they only satisfied that test in July  
23                  2011. Why, he says, is that not a material change in the market?

24                  Of course, the very short answer to it is that this change was anticipated. I want to  
25                  emphasise one particular aspect of the way this was looked at by Ofcom, because stepping  
26                  back from this for a moment one might think that Talk Talk and Ofcom’s cases appear to  
27                  be ships passing in the night. Mr. Pickford says his case is very simple. He said yesterday  
28                  that he found Ofcom’s defence difficult to understand. Ofcom and BT say but there is just a  
29                  very straightforward answer to everything.

30                  In our respectful submission at the heart of this difference of perception is a point about the  
31                  timeline on which market entry is going to occur, and when it starts to assert competitive  
32                  pressure on BT and that, in our respectful submission, is the ingredient that is missing from  
33                  Mr. Pickford’s analysis and his simple-minded point.

1 If we start with Market 2, these are exchanges where at least one other PO is present, or  
2 forecast to be present, at the start of the market review period, and “forecast” of course  
3 means “committed”. As Mr. Holmes explained this morning, that analysis was conducted  
4 on the basis of information provided in June 2010 and Ofcom expected on the basis of that  
5 information that the rollout would be complete by December 2010. Just for your notes that  
6 is annex 3 of the Market Review at A3.2 and A3.6.

7 Talk Talk’s argument is essentially that Ofcom should have reassessed its rollout plans to  
8 put them in the same category but, of course, the rollout comes much later with Talk Talk. I  
9 would just like you to turn up now some fairly familiar material from Talk Talk’s case in  
10 Mr. Heaney’s statement, starting at 2P in bundle CD1. This is the letter that Talk Talk  
11 actually wrote to Ofcom on 8<sup>th</sup> July. Of course, Ofcom can only be judged here in our  
12 submission by what Talk Talk actually told them, and what they are being told here, at the  
13 bottom of the first page – I will just remind you of what was being said:

14 “Orders have been submitted and accepted for 462 of these exchanges.”

15 Not, “they are live”, not “they are already asserting competitive pressure on BT” or  
16 anything of the kind. As Mr. Wisking explained and Sky’s evidence makes clear, there is a  
17 time lag here, there is no criticism of anybody, Talk Talk or anybody else, it is just a fact of  
18 life. So that is what Ofcom were actually told at the time. Mr. Heaney’s witness statement  
19 gave a slightly different account in a little bit more detail, and it is useful to look at para. 18  
20 of his statement, p47 – none of this is marked as confidential in my version at para. 18.

21 This is again familiar and I just want to make two points about it. First, this information is  
22 different because we see Mr. Heaney explaining in 18A that 33 exchanges had been actually  
23 unbundled, i.e. live as of 7<sup>th</sup> July. It is not clear why Ofcom were not told, plainly Ofcom  
24 cannot be blamed for not knowing this, but as one reads down one sees a litany of different  
25 steps. So then there is another tranche where there are confirmed delivery dates, some of  
26 which are in Market 1, and plans for 42 exchanges, there are plans for more exchanges in  
27 2012/13 and in para. 19: “The overall rollout plan was for 700 exchanges”. Then you see  
28 the 40 per cent figure at the end of that line.

29 I am not seeking to make the point Mr. Holmes made about how big is the 40 per cent  
30 figure really? All I am saying is that this reflects, perfectly fairly, the fact that there are a  
31 series of steps on the road from saying, perhaps as they did in November: “We plan to  
32 unbundled 700 exchanges”, to having actual Talk Talk customers on the ground and  
33 therefore Talk Talk offering and actually asserting competitive pressure on BT.

1 So the short point is that there is all the difference in the world between a rollout that is  
2 committed in July 2011 and a rollout that was communicated to Ofcom in June 2010. That  
3 is not just my submission, it is exactly what Ofcom found in para. 3.182 of the Market  
4 Review Statement that we looked at a minute ago, and then reiterated in para. 3.44 of the  
5 charge control statement.

6 I want to clarify one point where Mr. Pickford, quite rightly, picked up a typographical error  
7 in our statement of intervention. The period we are concerned with here is the four year  
8 look of the charge control itself – sorry, that is exactly the error! It is the four year look at  
9 the market review, not the two and three quarter year period of the charge control, because  
10 of course the charge control came later. Things had moved on by then. Indeed, as we have  
11 just seen, as Mr. Heaney has now explained in fact some exchanges, I think the figure was  
12 17, had actually already been unbundled in Market 1. But the reason that that does not  
13 matter is that even so the competitive pressure is coming later down the pipe of the Market  
14 Review. In fact, we have done a diagram which might be helpful, I hope you will not find it  
15 unhelpfully over simplified, but it certainly helped us when we were drawing it up. (Same  
16 handed).

17 This was not drawn to scale, it cannot be measured with a ruler, it is purely indicative.  
18 What you will see is we have a vertical axis, which is BT's market share going up to 100  
19 per cent, and then a horizontal axis which is time, and time starts with a market review  
20 statement in December 2010 and it ends at the end of the four year look, December 2014.  
21 Then point B on the top line equates to the date of the charge control beginning which,  
22 although it was published in July it actually starts in August. Then we have point E which  
23 is when the charge control ends.

24 Then we have drawn these entirely non-representative diagonal lines, which are intended to  
25 demonstrate the very obvious point that the later you begin with entry the less competitive  
26 pressure is asserted on BT. You see, for example, at point C we have drawn a line and it is  
27 very much in the spirit of representing what Talk Talk said in their July 8<sup>th</sup> letter, which is  
28 to say: "We are committed, by implication we have not actually started yet, but we should  
29 be starting fairly soon", and one can obviously argue about where "C" is on the graph, and  
30 we do not know; we have no idea exactly where it is. But what you can see is if the rollout  
31 occurs later, so perhaps in 2012, 2013 you are at point D instead of C, the competitive  
32 pressure is less. Equally, what we did not do and perhaps should have done is draw a line  
33 from A to say that if you already have a rollout that has already occurred at the date of the  
34 Market Review Statement, then obviously the line is going to be much lower down, and the

1 competitive pressure asserted on BT throughout the charge control is going to be all the  
2 greater. It is a very simple point and I hope the diagram actually helps rather than hinders.  
3 The simple point is, therefore, the earlier the rollout occurs, the greater the competitive  
4 pressure. What Ofcom has done here itself is draw a line, and say “below the line is M1  
5 and above the line is M2”, and it faced up very properly in its determination to the fact that  
6 that might create some difficult cases in the margin. If I may remind you of that, even  
7 though you have seen the passage before, I hope it will not tax your patience – that can be  
8 found in the Market Review Statement, which is CD2, tab 6, para. 3.183 on p.865. It says:  
9 “...market definition is not an end in itself but rather is a means for setting  
10 boundaries.”

11 And then it says:

12 “In carrying out a geographic market analysis where exchanges are grouped, it is  
13 inevitable that a range of exchanges with slightly differing competitive conditions  
14 may be grouped together.”

15 To put it another way, on a horizontal axis they are going to come in at different points.

16 “For example, our assessments have included exchanges where two POs are  
17 present or forecast to be present in Market 2, along with exchanges where three  
18 POs are present. It could be argued that competitive conditions in exchanges  
19 where two POs are forecast to be present are sufficiently different to exchanges  
20 where three POs are already present.”

21 Then skipping on a couple of lines they then deal with the boundary between M1 and M2.

22 “It could be argued that exchanges where two POs are forecast to be present (but  
23 only one is currently present) are also similar to exchanges where only one PO is  
24 present, so they should be included within Market 1. We have attempted to  
25 address this point only including firm forecasts of PO rollout in our assessment.  
26 This effectively reduces the period where only one PO is present, and increases the  
27 period where two are present and BT is subject to the constraint of the second PO.  
28 In the case of the exchanges Talk Talk aims to unbundled, it is not clear these  
29 could be treated in this way, since the time when BT is the only PO would be  
30 significant when compared to the overall period of the forward look.”

31 In other words, I am just making a broad point. Ofcom there is grappling with the fact that  
32 it is inevitable on its analysis that there may be some difficult boundary cases. That is why  
33 I started by reminding you that the overall scheme of the analysis has not been challenged.  
34 Division into three using exchanges as a proxy are undoubtedly difficult cases in the

1 margin, undoubtedly, as Mr. Holmes said, it was possible that there would be some of these  
2 committed exchanges in M2 that did not materialise by December, or may not have  
3 materialise at all, but as he put it they have just rather fortunately escaped Ofcom's  
4 regulatory clutches. But, of course, nothing about M2 is actually an issue in this appeal. It  
5 is purely a challenge to the treatment of M1.

6 Of course, you can draw other lines on this graph, it is not strictly proportionate and some  
7 of the lines might be quite close to the ones we have drawn, but Ofcom has used its  
8 regulatory judgment and its regulatory analysis to draw a tentatively rational distinction  
9 between the two categories.

10 THE CHAIRMAN: Yes, there are actually really three parameters on looking at your graph:  
11 number of exchanges unbundled, time of unbundling, which is the point of time on where  
12 you have your points marked "A" to "C" and "D", and the effect of the unbundling, which  
13 would affect the gradient of the line?

14 MR. WARD: Yes, that is absolutely so subject to one caveat, and I should have made this clear  
15 when I handed the graph up. This is intended to reflect an individual exchange rather than  
16 the aggregate of the market, because when you look at the critical paragraph of Ofcom's  
17 reasoning, it is talking about the intensity of competition of BT in an individual exchange.  
18 You could, of course, draw an aggregated version of this graph and if one did so the line for  
19 M2 would be a long way down the page because, as Mr. Holmes reminded you this  
20 afternoon, the average market share in M2 at the beginning of the market review period was  
21 64.7, so that we start two-thirds of the way up the left hand axis and ending up a long way  
22 further down. This is intended to reflect that para. 3.182 and the finding of Ofcom's that  
23 BT's market share would remain 70 to 80 even where there is deployment towards the start  
24 of the review period. We cannot be more precise than that because "towards the start of the  
25 review period" is itself imprecise but again unchallenged.

26 One of the points made by Talk Talk in its reply in order to deal with this is that of course  
27 the forecast exchanges in M2 may themselves only assert a constraint for part of the period,  
28 and I have already really given my answer to that, which is to say that that may be a point  
29 about anomalies in M2, it may even be a criticism of Ofcom's overall analysis, but none of  
30 that really helps Talk Talk with this appeal. The only issue is whether the actual plans of  
31 Talk Talk have been sufficiently taken into account, or were they a material change of  
32 circumstance. In our respectful submission they entirely exemplify the point that Ofcom  
33 correctly anticipated with its finding that BT's market share would remain at 70 to 80 per  
34 cent. In our respectful submission that point does not help at all.

1 The final point I wanted to make is there is another argument Mr. Pickford made orally  
2 which we do not accept. He said that the problem with Ofcom's case is that it proves too  
3 much, and in our submission he mischaracterised Ofcom's case in so doing. He suggested  
4 essentially that Ofcom was really just relying on the general robustness of the market  
5 review and as long as we did it properly at the beginning, it really does not matter how  
6 things turn out in reality because they are bound to diverge somewhat, however well we did  
7 our job. But that is not the case, that is not the case at all. Ofcom's argument is not based  
8 on generalised robustness, it is based on the fact it specifically anticipated this very event. It  
9 is not, in our submission, a case of proving too much, we suggest it proves exactly the right  
10 amount.

11 Unless I can assist further, those are the submissions for BT.

12 THE CHAIRMAN: Mr. Ward, thank you very much. Mr. Pickford?

13 MR. PICKFORD: Thank you, sir. Whilst it is fresh in my mind, I would like to begin with a  
14 thought experiment which occurred listening to Mr. Ward. It seems to be common ground  
15 now, as I understand it, both with BT and Ofcom, that if the market definition exercise had  
16 been carried out in July 2011 Market 1 would have been substantially different, it would  
17 have been substantially smaller than the market as defined. There is a separate question  
18 about whether it is 40 per cent or not, and I will come on to address you on that, but it  
19 would have significantly changed as compared to the same exercise being carried out in  
20 December 2010.

21 We say there really is no magic in the particular dates of December 2010 or July 2011, or  
22 any particular date in between, or indeed afterwards. In every case, Ofcom is trying to do  
23 the same thing which is to look forward and look at particular markets, and say: "Is this a  
24 market where, on the basis of forecast that we know about it is only going to be BT in that  
25 market, where on the basis of the forecast we know about there will be someone else. Now,  
26 they have become very hung up about the particular and they say it is all about this  
27 difference between the two dates and this makes all the difference – I will come back to that  
28 in a moment.

29 What we say is this, and a point that both BT and Ofcom ignore time and time again, there  
30 is a requirement on Ofcom to impose the least intrusive remedy possible. They have not  
31 taken issue with that at all. They have a bias against regulation, the remedy must be strictly  
32 proportionate, it must be objectively justified, it must be necessary. In that context if one  
33 asks oneself if a definition exercise had been carried out in July 2011, and let us suppose I  
34 am right about the 40 per cent, and Market 1 should be 40 per cent smaller, plainly that is a



1 material change because the most proportionate market over which to impose a price  
2 control should be radically different to the market over which it was in fact imposed.  
3 Sir, with that start if I could go back and try to go through some of the points that have been  
4 made by Mr. Holmes yesterday and today and the other advocates for BT and Sky. One of  
5 the first points made by Mr. Holmes yesterday is he said that we have not challenged  
6 Ofcom's analysis of the scope of Market 1 that it had not changed materially by the time of  
7 the CC decision. We say that that is just wrong and we challenged it in every respect that is  
8 necessary; certainly we have challenged their conclusion about the scope of the market and  
9 I gave you, sir, the references to that in our notice of appeal – 7.2, 78, 81 and 82 - and I  
10 gave you those references yesterday. Indeed, most of my submissions on Ground B have  
11 gone to that very issue. But we have also explained why the factors that are relied upon by  
12 Ofcom in supporting what it says about its decision on the scope of the market do not assist  
13 it.

14 So going through those, and I will develop some of these points a little more thoroughly, but  
15 just taking them in summary in order. They rely on the existence of SMP, they did, they  
16 have now tried to nuance that and say it is all about the amount of SMP, but insofar as they  
17 relied on the existence of SMP we say that is irrelevant, see our reply and skeleton  
18 argument paras. 53.1 and 60.

19 They also rely on whether a price control would still be the right remedy even if we are  
20 correct in what we say about the market, and we say you have to decide the market question  
21 correctly and first before you go on to consider the issue of remedy, and Ofcom did not do  
22 that because it went wrong at the market definition stage.

23 In any event, we also say, and we explained why that we do not accept that Ofcom could  
24 properly determine that price control was the right remedy without a fundamental re-  
25 evaluation of its entire approach, given what it said about Market 2. All we are saying is  
26 that these exchanges should be in Market 2 where it decided there should be no remedy, that  
27 is all our case is, it is not special treatment for Market 1 exchanges, we are simply saying  
28 they are “in the wrong bucket” to use Mr. Holmes' terminology. We made that point at  
29 para. 60.2, 62.3 and 63.2 of our reply and skeleton argument. Ofcom and BT also seek to  
30 make much of BT's market shares, and I am going to come on to that in a little more detail  
31 in a moment but one of the key points we say in response to that is that was not a criterion  
32 for distinguishing between Market 1 and Market 2. It was between 2 and 3, but it was not,  
33 in fact, when you look properly, as between Market 1 and Market 2, and so that does not get  
34 them off the hook and I am going to come back to that.

1 They also say that exchanges where there are committed plans by Talk Talk to rollout is  
2 sufficiently similar to those already in Market 1 but they can be treated as in the same  
3 bucket and again we answer that. We say whether they are similar is not the issue. The  
4 issue is that Ofcom itself explicitly sought to distinguish between those different categories,  
5 and it is at the heart of where the price control should be imposed.

6 Mr. Heaney has very helpfully drawn an alternative graph to the one produced by Mr.  
7 Ward. Unfortunately, because obviously we have done this in the last few moments, I do  
8 not have copies to hand up but I would be delighted to copy it and produce photocopies  
9 later for the Tribunal if that would be of assistance?

10 THE CHAIRMAN: If that could be done now.

11 MR. PICKFORD: Indeed, if it could be done now all the better. Perhaps I will come back to that  
12 point.

13 THE CHAIRMAN: A graph is worth a thousand words, Mr. Pickford.

14 MR. PICKFORD: We say whatever similarities they might have with exchanges in Market 1 the  
15 question you actually have to ask yourself is which of the two buckets should they be in?  
16 Should they be in 1 or 2? When one looks at their characteristics, and you compare that to  
17 the market definition they are so plainly Market 2 style exchanges, and not Market 1 style  
18 exchanges, even if obviously there are similarities between Market 1 and Market 2, not least  
19 because there is SMP in both and we do not challenge that. Again, that is at reply 53.3.  
20 As I say, we are now told that this is all about the timing. December 2010 was the cut off  
21 and if I may I would just like to take you back very briefly to the Market Review Statement  
22 just to investigate that slightly more thoroughly, so that is in CD2, tab 6. The first  
23 paragraph, 1.19. So what we see there at para.1.19 is the definition that is given by Ofcom  
24 to Market 1, and it is exchanges where only BT is present, or forecast to be present, 11.7 per  
25 cent of premises, and then there is footnote 6: "I assessing forecasted plans we have only  
26 counted operators as present where they have firm plans to deploy in specific exchanges".  
27 So that is the extent to which they qualified there, and that is the most detailed definition  
28 that I think we find in this particular decision. No mention there, by the way, of December  
29 2010.

30 But if we go to para.A3.6 we see the genesis of the December 2010 date, and why it has  
31 been mentioned.

32 "We have used data at two points to inform our geographic market definition:  
33 actual data from June 2010 and forecast data based on confirmed rollout plans by

1 the Principal Operators. Whilst not all POs indicated firm dates for completion of  
2 this rollout we have assumed this will be largely complete by December 2010.”

3 It is a mere assumption. There is no data that Ofcom present to demonstrate that that is in  
4 fact when all the rollout will have occurred by, they simply assume that for expositional  
5 purposes, they then use that date later on. It is simply an assumption.

6 That is our first point on timing is all and the December date. It has far less basis and far  
7 less weight can be attached to it than has been suggested in the first place. Also, one has to  
8 stand back and inject a touch of realism here. We are talking about a four year review  
9 period. What we are being told is that the difference of just a couple of months between  
10 what happened in December, and what happened in the intervening period, and of course  
11 the intervening period goes up to July, but the commitment by Talk Talk in respect of these  
12 exchanges took place much earlier in that period, as early as April, so we are talking about  
13 just a few months later after the December cut off – the commitment started in fact in  
14 February. We are talking about just a few months difference, in the context of a four year  
15 forward look and we say that makes all the difference. That makes a difference as to  
16 whether these particular exchanges should be counted or not.

17 In answer to that one of the points we make is that if that difference of a few months was  
18 really so key then it was incumbent on Ofcom, and this goes to Ground A to actually find  
19 out about the timings, because all of this analysis, all of the reasoning that Mr. Holmes has  
20 explained to you, and Mr. Ward has explained to you, is built up on assumptions about how  
21 likely it is that a particular exchange will have effects in the market after it has been rolled  
22 out. They say: “This is a few months later so it is not going to have effects until a few  
23 months later”. Even that, we say, is a very weak basis for the distinction. But, in any event,  
24 what it was incumbent to do, timings really were so critical and we were down to this fine-  
25 tuned analysis of a couple of months, was that they should have found out, and you have  
26 heard the evidence on that. We say they may have thought that they asked, but insofar as  
27 we have documentary evidence on that it supports our case which was not challenged,  
28 which was that we do not recall being asked and, insofar as we were, certainly much greater  
29 efforts should have been made by Ofcom to follow those up, because we followed up every  
30 meeting, we offered our assistance and we were told that nothing more was required.  
31 So what is said by, again, BT and Ofcom, is: “We anticipated this change would happen,  
32 and then it did happen, so what are you complaining about? It is simply something that we  
33 always knew would occur.”

1 We say that the question they addressed in the WBA MR decision was not the s.86  
2 question; they do not purport to address the s.86 question. What they are doing, we say, if  
3 you look at it properly, is they are saying to themselves is the rollout, which is potentially  
4 substantial, but at that stage, which is all they know, uncommitted, sufficient to make us  
5 change our approach at this stage? In answer to that question they are saying “No”. They  
6 tell us then that if it was committed it would be a different story, but they say: “If it is not  
7 committed we do not think, even if it is not committed, that it can make a sufficient  
8 difference, we think that these markets will be sufficiently robust that we are going to  
9 continue to rely on them.” That is the question that they are asking there. That is not the  
10 same as a s.86 question.

11 So by the time they then come to address the s.86 question we say that they cannot simply  
12 refer back to what they did previously, they cannot “pre-satisfy” s.86 like you can “pre-  
13 check” it. They have to address it on the merits in respect of the change which has by then  
14 occurred, which is that these uncommitted exchanges have become committed.

15 THE CHAIRMAN: I did not think they are saying you can “pre-satisfy” the s.86 test. I think the  
16 point that is being made is that one needs to have regard to the market’s definition and what  
17 I rather quaintly term the “wobble room” that is built into the definition, and one needs to  
18 judge material change in that context in the sense there is a nexus between the two. So if  
19 one has a purely static assessment with no future wobble room then the test for materiality  
20 would be rather different than if one had a projection as to what is going on in the future,  
21 where the question would be: “Is the change such as to invalidate the projection?” I think  
22 that is the point that is being made against you, Mr. Pickford.

23 I come back to the point that I made at the outset, that actually the question you ask yourself  
24 is correctly: given what we know now, if we did the market definition again, would it be  
25 materially different and I have made my points on that. I will come on, if I may, to the  
26 “wobble room” point because there are some points I would like to develop on that.

27 It was said by Mr. Holmes that we say you disregard everything in the WBA MR statement,  
28 we do not say that. We are not going that far. We are simply saying certainly you have to  
29 grapple with it. The time when s.86 is engaged is not in the WBA MR statement, and  
30 therefore you have to grapple with it properly thereafter prior to imposing the price control,  
31 at the time you close the ... control. Insofar as you refer back to previous reasoning that  
32 was potentially anticipating the kinds of issues that might or might not arise, that is then  
33 incorporated into the decision on s.86 in the CC decision and it is reasoning that we can  
34 legitimately challenge, and what I want to be clear about because particularly Mr. Ward

1 came very close to suggesting, this may not be his submission, and if it is not then that is  
2 good, but in case it was we want to be very clear that we are entitled to challenge reasoning  
3 that was adopted to become part of a s.86 decision now, even if it is referring back to  
4 reasoning previously in the MR decision, because obviously at that time there was no s.86  
5 decision to challenge. So far as it has a dual life we may not have decided to take issue with  
6 it then. Insofar as it is now relied upon again we do take issue with it and we are permitted  
7 to do that, so we are not shut out from challenging anything.

8 MR. WARD: I am happy to give the clarification sought. I entirely agree with Mr. Pickford as to  
9 the proper scope of his appeal, the part of what we were saying, of course, is whether or not  
10 he could have he did not in fact challenge the 70 to 80 per cent finding.

11 MR. PICKFORD: You heard my submissions on that, which is we say it is not relevant. It does  
12 not undermine what we say is the elephant in the room, which is the plans becoming  
13 committed which they simply always refuse really to acknowledge. We are looking at all  
14 these other subtle different factors: "Look, there is 80 per cent, 70 per cent", there is a very  
15 big difference.

16 If I could go in support of the points I have been making also please to para. 5.91 of the MR  
17 statement, which hopefully you should already have open from the last visit you made to  
18 some of the other paragraph. Mr. Holmes emphasised this paragraph and so do we. It is  
19 obviously key. It says:

20 "We consider here that the impact of Talk Talk's announcement of its intention to  
21 unbundled further exchanges. Whilst entry by Talk Talk in some exchanges in  
22 Market 1 during the period of review will provide some competition to BT, we  
23 remain of the view that a charge control is required in Market 1 because the  
24 deployment is as yet uncertain on an exchange level basis."

25 What we say is absolutely key. One of the essential features feeding into their analysis was  
26 that the plans were uncommitted at that time – "uncertain on an exchange level basis".

27 There may be other factors also feeding into their assessment. We say we do not have to  
28 demonstrate that every single factor feeding into their assessment changed. If there is one  
29 stark factor which did change, we say that is sufficient for a material change.

30 Another point that was made by Mr. Holmes was he suggested this is a related issue, and it  
31 is all very complex, there were lots of criteria, and what we adopted as our market definition  
32 is merely a proxy. That may be true. It may be to some extent a proxy and I already  
33 accepted in my submissions yesterday that we understand that the market definition as said  
34 will become increasingly imperfect as time goes forward, but even though it is a proxy it is

1 nonetheless at the very core of the test that has been set. It is the test and it is the test  
2 moreover for whether there is a price control or not, so you cannot really dismiss it as a  
3 mere proxy and try to bring back into play all of these other considerations and say: “These  
4 are the more important ones.” There is one central feature which is the very test, and we  
5 say applying that again it changed.

6 There is a further point to make in this context, and it relates in some parts to the points that  
7 were made by Sky as well about the benefits, potentially, of an exchange and I will come  
8 back to those very shortly.

9 Mr. Heaney’s first witness statement, if I could take you to that at para.66 – CD1 – p.64.

10 The point that is being made here by Mr. Heaney at para. 66 is one of the reasons why it is  
11 critical to do your best to get the right market definition and not to needlessly include  
12 markets within the scope of a price control when they should not be, is because the  
13 approach he explains that Ofcom takes to market definition now will actually create a  
14 vicious cycle which will influence whether there is ever rollout in those markets thereafter.  
15 He explained that now is the critical time in Talk Talk commercial decision making for  
16 deciding whether to enter and that those exchanges are only ever liable to become viable  
17 again for entry if there is a radical alteration in its expectations about how prices are likely  
18 to develop in the future. As he explains, once they have been subject to a price cap there is  
19 no reason to assume that that price cap is going to change because the same reasoning  
20 continues to apply in respect of them. This paragraph has not been challenged by anyone in  
21 these proceedings and what he is doing is explaining Talk Talk’s perspective on why it is  
22 particularly important now not to set a price control that is over too broad a set of  
23 exchanges.

24 Another point that was made by Mr. Holmes was that he prayed in aid the fact that the  
25 information they were relying upon – this is going back to his issue about how it is all very  
26 date specific and all about December versus July – he prayed in aid the fact that the  
27 information Ofcom were relying upon was over a year out of date by the time that the price  
28 control was imposed, because he said: “Look, this was June data, and because it was June  
29 data those plans are likely to be more advanced than data from a later period looking  
30 forward”. We say that when one steps back and remembers that this is supposed to be a  
31 forward looking exercise that that is a perverse approach, that actually – given that this is  
32 supposed to be forward looking, and our concern is with whether there will or will not be  
33 entry, that is our essential concern – points to taking account of the most recent data not

1 making a virtue of the fact that the data that you relied upon is over a year out of date by the  
2 time you come to take your decision.

3 A further point that was made by Mr. Holmes is that ultimately this is a line drawing  
4 exercise. We say “yes”, that is entirely correct, it is a line drawing exercise, and the time  
5 when you draw the line is when the price control is imposed, and the reason for that is  
6 because that is when s.86 bites, and that is when s.88 bites, and that is when s.47 bites;  
7 those are the statutory obligations that all arise in relation to the imposition of the price  
8 control including, in particular, ensuring that it is proportionate, not imposed unless it is  
9 strictly necessary and that, we say, is the time when you should draw the line, and if  
10 circumstances have changed since your previous analysis, then you are required to  
11 reconsider.

12 An interesting dialogue that you, sir, had with Mr. Holmes was this issue about ‘wiggle  
13 room’. The question is: does allowing wiggle room answer the s.86 problem? We say  
14 “No, it does not”, and the reason for that is that argument does seek to prove too much, and  
15 if I can explain again why we say that is the case.

16 What seems to be being said now is that there may be supervening factors that are entirely  
17 left field, that we did not anticipate, and if we did not anticipate them at all then we accept  
18 that those could count for s.86. They appear to be saying that so long as the kinds of issues  
19 that are arising in the subsequent period are ones that we anticipated. We said: “We knew  
20 this was going to happen”, and Ofcom have effectively left themselves sufficient wiggle  
21 room to satisfy the s.86 test. The problem, we say, with that is it does prove too much  
22 because they say it applies at the beginning of the price control period, so they say then the  
23 wiggle room is sufficient to cover us there. The same reasoning takes them through any  
24 date in their forward look, because their forward look, as you saw back in para.88 is based  
25 on saying: “Have we got sufficient wiggle room to take us through to the end of the market  
26 review period?”

27 Just as they could say s.86 is satisfied - when I say “satisfied” that is my shorthand; I am  
28 sorry, that is probably not very helpful – just as they say s.86 is satisfied, i.e. we have  
29 passed the test in 86(1)(b). They say that that helps them out at the beginning of the price  
30 control period and so they are fine there.

31 Equally, that reasoning would apply at the end of the price control period so that if you  
32 applied the s.86 test then they would say they took a forward look, there cannot be a  
33 material change for the purposes of s.86 then. Now, they say there is no problem there

1 because we can still, of course, when it comes to the next market review, look at it again,  
2 we will look afresh and we can change our list at that point.

3 But my point is there is then a contradiction in their case because they are contemplating  
4 that if they did the market analysis again, say, after four years, they would come up with a  
5 new list and that is what they contemplate. They assume that that would happen, or at least  
6 could happen. But, at the same time their s.86 analysis tells them that there would be no  
7 material change under s.86 at that time because it could be – we have an *interregnum* of  
8 course of six months (seven months in this case) but their reasoning would apply equally if  
9 they happen to have left the imposition of the price control until much later, because they  
10 would still fall back on the same consideration saying: “We looked forward”, we looked  
11 forward over the whole of the period. We say that is therefore an essential problem with  
12 their case, it does prove too much, even if they admit the possibility of s.86 still having  
13 some role, so it does not go so much as to make s.86 otiose, we still say it leads to an  
14 illogicality.

15 THE CHAIRMAN: I do not think merely looking forward would get Ofcom off the hook, it  
16 depends what exactly the looking forward exercise is. Let me give you a slightly absurd  
17 example: let us suppose that, as here, Ofcom take a December 2010 cut off point and only  
18 look at committed roll out as of that date, but fortunately Ofcom employ the services of a  
19 gypsy fortune teller in the crystal ball. They look at the crystal ball and by some miracle  
20 they actually predict exactly where all the POs in the relevant market are going to be rolling  
21 out in the future, and they incorporate this into the analysis and it is all factored in, they say:  
22 “We know actually, because we have employed this crystal ball gazer, when in the future  
23 there is going to be rollout and we have meshed all this in, and that is how they assess their  
24 Market 1 and Market 2.

25 In the future, the rollout duly occurs, obviously there has been a change in the sense that in  
26 the gap between the MR and the imposition of the price control there has been a change, but  
27 I struggle to see how that could be a material change, because it has been fully factored in.  
28 Obviously, Ofcom do not employ a crystal ball gazer, and so the question it seems to me is  
29 has the change been sufficiently great so as to invalidate, or risk invalidating, the  
30 assumptions on which the original market definition was executed, and if the change is  
31 material viewed on those criteria then obviously it needs to be factored in.

32 MR. PICKFORD: Sir, in answer to that we would say: if that is the right test as you have just  
33 articulated it, then we are still correct in that because, as I have already said, the change is  
34 of a profound nature, uncommitted going to committed, and that therefore meaning that



1 these exchanges are rightly far more like Market 2 than Market 1, then that would be  
2 sufficient to satisfy the test, even allowing for wiggle room. So we still do hold, also to our  
3 point, about proving too much, because obviously this exercise is not one that is done with  
4 the benefit of a crystal ball, it is one that is done taking account of information that is  
5 known at the time, and doing one's best to evaluate that information and see what the  
6 impact of it is likely to be. We say that there are two different, distinct issues that are going  
7 on. It comes back to what I said yesterday about the two different questions.

8 There is a question about whether, given the information I know now, today, what I have  
9 done is sensible and robust, and whether it is the best that I can do today, taking account of  
10 everything that I anticipate. That does not answer, we say, the s.86 question, that is what  
11 Ofcom are doing in WBA MR and they were saying "We have got a number of pieces of  
12 information, we have taken account of them and in our view our market definition is robust  
13 today, even if one of the things they considered was: "What would be the impact of Talk  
14 Talk rolling out? They could only do that at that time on the basis of uncommitted plans,  
15 because that was the only information they had. That cannot in any way alter the fact that  
16 thereafter matters did change because they then got given new information, they got  
17 information about specific plans for specific exchanges which were committed, and so it  
18 cannot obviate the need to grapple with what the implications of that are. Even if it was the  
19 best decision they could have taken at the time they took it and it was robust. At that point  
20 they need to revisit just because they now know what the identities of the exchanges are,  
21 because the identity of an exchange, whether or not it is confirmed, is of paramount  
22 importance to the dividing line between whether it is Market 1 or Market 2, notwithstanding  
23 that there may be other factors that are also in play. It is said to be the proxy, it is the  
24 definition that Ofcom adopted. I hope that explains what we say at least on that issue on the  
25 'wiggle room'.

26 THE CHAIRMAN: That is helpful.

27 MR. PICKFORD: So how then do we say s.86 works? Mr. Holmes says there was some  
28 common ground between myself and him on that and there is some common ground, but I  
29 am not sure the common ground is quite as extensive as Mr. Holmes suggested it might be.  
30 We say one approaches the question this way: first, you look at whether there has been a  
31 material change in the market in the sense of the *de minimis* test. I use that as shorthand, I  
32 am not saying – again following the discussion that we had yesterday – that we equate it  
33 with *de minimis*. But as the Tribunal will recall there were two elements to materiality and

1 the first one we say: “Is the change of a scale that could even qualify as a sufficiently  
2 substantial change to be a material one in that sense.

3 Then there is the second question, which is assuming we are over that hurdle, and we say  
4 our 40 per cent change is certainly over that hurdle, and if it were 30 per cent or 20 per cent  
5 it would still be over that hurdle.

6 The next question is, is that material for setting the charge control? We say that should not  
7 be an involved task that requires one to re-do all of the market analysis to decide if we re-  
8 did all of the market analysis it could possibly make a difference at the very end, in terms of  
9 whether you decide to impose a charge control on those exchanges or not, because that  
10 would defeat effectively what, to some extent is a shortcut that is offered by s.86, which  
11 says that you do not have to re-do all of that because you are allowed to rely on what you  
12 did before so long as there has been no material change.

13 All it requires, on the facts of this case at least, a very straight forward assessment: is that  
14 change material? It is obviously material because market definition matters for the price  
15 control in our case, so we say, yes, it is material, and that comes back to the point again I  
16 made yesterday, if market definition did not matter where the price control had been  
17 imposed, because there was one on both Market 1 and Market 2, it would not be material,  
18 but in this case it goes to the heart of the matter, and therefore it satisfied the second part of  
19 the materiality test.

20 THE CHAIRMAN: You are absolutely right, there are two aspects to materiality: one is simply  
21 its quantitative shift, whether it is *de minimis* or material, or perhaps one should “material”  
22 or “not material” to avoid too much difficulty with labels. That is one point. The other is  
23 that there must be a nexus between what is material and the imposition of the price control  
24 in the sense that it has to be relevant to it. One can postulate any number of changes in the  
25 world which are material in the sense of being quantitatively significant but they are simply  
26 irrelevant, and the question one has to bear in mind is that it is a twofold test materiality.  
27 Your example of price control is common to Market 1 and Market 2 is a very good example  
28 of a change which is material in the sense of its scale, but immaterial because it does not  
29 give rise to a distinction between Market 1 and Market 2.

30 MR. PICKFORD: Yes. Then after that there is a third question which is, as we say, not part of  
31 section 86, but it is on the facts of this case the following question— and the third question  
32 may vary depending on the particular facts – in this case the third question, which Ofcom  
33 confuses with the s.86 test is: would a remedy still be justified in respect of exchanges

1 which should properly have changed markets? We say that once we have got to the stage of  
2 demonstrating to you that the markets' definition should have been approached differently  
3 then have got over the s.86 test.

4 There is then a further question after that that one says: "Perhaps it would still be  
5 appropriate to impose a price control on just some of Market 2. Perhaps the exchanges that  
6 have moved into Market 2, maybe they are of a different quality to all of them, and there are  
7 all sorts of questions that one can ask at that point, but Ofcom never answered the first  
8 question, we say, correctly, it did not face up to the fact there had been a change in the  
9 market first, and that is all that is required for s.86. Sir, that is the essence of what we say  
10 on that point.

11 A number of submissions were made by both Mr. Wisking and Mr. Holmes about efficiency  
12 and benefits to consumers. I have a number of short points to make on that. First, it is  
13 helpful if one takes up the WBA MR decision again at CD2 tab 6 and looks at paragraphs  
14 1.25 to 1.26. I will take the Tribunal through these. This is addressing the remedy that has  
15 been imposed in Market 2, so this is the market where we say these exchanges should  
16 properly end up. 1.25 we see:

17 "Give its position in the market there may be potential for BT to raise its prices to  
18 an excessive level. However, there is some wholesale competition in Market 2 and  
19 the potential for this to develop further, though the extent of any such further  
20 investment is uncertain. We consider that an approach to regulation that promotes  
21 investment where it is economic in order to provide effective and sustainable  
22 competition is appropriate in Market 2. However, we also recognise that a  
23 safeguard to protect against the potential risk of prices rising to an excessive level  
24 is needed in case this additional investment does not materialise. We think strict  
25 price regulation would not be appropriate to achieve this. Instead we are imposing  
26 a cost orientation obligation which allows BT a greater degree of pricing freedom.  
27 As in Market 1 we have also decided that BT's services should be subject to  
28 accounting separation and cost accounting obligations to provide transparency of  
29 financial information.

30 The different approach we are taking in Market 2, compared to Market 1, is mainly  
31 due to our assessment of the likely constraint on BT's pricing arising from current  
32 and future investment by other operators. We have also taken account of the  
33 possible impact our regulation may have on prospects for future investment on  
34 those providers that have already made investments in Market 2."

1 It seemed to be said against me both by Mr. Wisking and Mr. Holmes, that if entry takes  
2 place where there is not a price control and BT's prices are excessive judged by the level at  
3 which they are set for a price control, that that is inefficient investment, and we say that  
4 cannot be right, because this is what is contemplated as happening in Market 2. It is  
5 recognised that there is potential for BT to raise its prices to an excessive level and it is also  
6 contemplated that it would be inappropriate to reduce the Bt charges to the efficient level  
7 because – amongst other reasons – it would tend to deter investment. That is the reasoning  
8 that is given in relation to Market 2 there, so it cannot be said against us that what we are  
9 proposing is inherently inefficient. Mr. Heaney explained in his evidence why he says that  
10 what we are doing is entirely efficient, and no one cross-examined Mr. Heaney on his  
11 evidence on that issue.

12 Of course, we are not actually arguing about whether there should be a price control on  
13 Market 1. All we are saying is that some of these exchanges should properly be in Market 2  
14 where everyone has accepted there should be no strict price control. We say there is not a  
15 benefit to consumers, or efficiency problem here because the whole premise of our case is  
16 that these exchanges should be in market 2. If we are right about that, then we are home  
17 and dry because no one has suggested that the analysis that there should not be a price  
18 control on Market 2 is wrong.

19 I should also just add – it is probably unnecessary, given the other points that I have made –  
20 but I am not sure that anywhere in Ofcom's defence and skeleton – does it make the point  
21 that our investment would be inefficient. There is reference to those issues in the witness  
22 statement of Mr. Clarkson, but no point is taken in reply and skeleton, so we did not prepare  
23 a case to respond to that, and we say that under the strict rules that apply in the Tribunal  
24 with regards to both notices of appeal and defence and their amendment, there has been no  
25 application to amend so if the point is not found in the defence it is not a point that can be  
26 pursued.

27 MR. HOLMES: Sir, by way of clarification we never sought to maintain as an objection to Talk  
28 Talk's case that the entry is inefficient – we happen to think that it is for the reasons given  
29 in Mr. Clarkson's evidence, but that is no part of our defence. The reason I went through  
30 those passages in opening was because of the Tribunal's interest in s. 87 and 88 and we  
31 hoped it would be of some assistance. I hope that assists Mr. Pickford.

32 THE CHAIRMAN: It may be a hare that I set running in that case, Mr. Pickford.

33 MR. PICKFORD: Thank you. Before I move on I am in danger of forgetting about my graph, or  
34 Mr. Heaney's graph, so I should probably address it. It would have been most relevant to

1 the discussion we were having when I first raised it, but obviously I am very grateful for  
2 having the Tribunal to photocopy it.

3 What we have here is our re-interpretation of Mr. Ward's graph in a manner that is slightly  
4 more realistic and accords with what is actually going on in this case. The top line is what  
5 happens in Market 1 assuming that Talk Talk do not enter. We start off at the 100 per cent  
6 level and we accept that there will be a very slight downward trajectory but it is very slight,  
7 because what is occurring there is potentially the occasional entry that has not been forecast,  
8 so there will be some entry there, but of course the definition of Market 1 is where there is  
9 no entry expected on the basis of committed rollout. So that is the top line.

10 We then have the bottom line, which is what would have happened if Talk Talk had entered  
11 in November 10, or the committed plans for entry by November 2010, and one sees there  
12 that Mr. Heaney suggests that the line would effectively slope down and then tail off  
13 towards whatever value we choose, whether it be 70 per cent or 80 per cent. The reason for  
14 that is because Talk Talk are not growing from nothing. Talk Talk are, of course, already  
15 present in this market, they have large numbers of customers, they are the next biggest  
16 player after BT, and so once they rollout they will actually migrate their customers on to  
17 their LLU system, because that is more economic for them because they do not have to pay  
18 the prices that BT charges for WBA, and as soon as they roll out there will be a swift move,  
19 and that front loads the change in the market in respect of those exchanges where there is  
20 rollout.

21 The alternative line, which is the line in the middle, Talk Talk enter June 11, probably more  
22 accurately again that should be "entry by Talk Talk on the basis of plans that are committed  
23 in June 2011. We say that again exactly the same kind of pattern would occur and there  
24 would be a swift move from Talk Talk's roll out and migrating its customers.

25 The question that we ask is: "Does that middle line look more like the bottom line, or does  
26 it look more like the top line?" in terms of whether we really should be thinking about  
27 Market 1 or Market 2, because if it looks more like the bottom line then it should be in  
28 Market 2. If it looks more like the top line then it should be in Market 1. We say on the  
29 basis of this graphical representation the answer is quite clear, it is Market 2. That is our  
30 graphical response to Mr. Heaney.

31 Sir, if I could then come, please, to the 40 per cent figure that was contested by Ofcom  
32 yesterday. Ofcom appear to seek to challenge our reliance on the 40 per cent figure. The  
33 first point I make in relation to this is that you can ignore everything that Ofcom say in  
34 relation to that challenge because we put our 40 per cent figure squarely in issue in our

1 notice of appeal – it is at para.82 and that refers to para. 19 of the evidence of Mr. Heaney,  
2 and I am not aware and Mr. Holmes did not take us to any place in Ofcom’s defence where  
3 they took issue with our 40 per cent figure, or whether what we were advancing as material  
4 to go back to the conversation a little earlier, satisfies the first limb of the s.86 materiality  
5 test i.e. whether it is of a sufficient level. The only reference to our figure that I am able to  
6 find in the defence is at para.61(b) and it may be helpful to look at that very briefly (Ofcom  
7 defence bundle, p.20). We see there the 40 per cent figure for Market 1 gets a mention but  
8 it is only in the context of quoting the now much quoted letter from Mr. Heaney of 8<sup>th</sup> July  
9 2011. We see:

10 “In terms of our roll-out plans they have progressed substantially since we  
11 provided information to Ofcom for Ofcom’s WBA Market Review last year. As of  
12 now we have firm plans to enable a total of 542 exchanges in Market 1 (covering  
13 40% of Market 1 population). 330 of these exchanges already have accepted  
14 orders. We can provide the details of the actual exchanges if that would be  
15 helpful ...”

16 You will recall that yesterday I took you and Mr. Clarkson to where Mr. McIntosh declined  
17 the offer of any further assistance.

18 So that is the only place where the 40 per cent figure appears, as far as I can see, in Ofcom’s  
19 defence, and it is not challenged there it is simply quoted as part of the story.

20 We then have to apply rule 11 and rule 14.7 of the Tribunal’s Rules.

21 THE CHAIRMAN: Well steady on there, because what about footnote 16 to para. 20.

22 MR. PICKFORD: Sorry, footnote 16?

23 THE CHAIRMAN: In Mr. Heaney’s first statement.

24 MR. PICKFORD: Sorry, I will have to find that.

25 THE CHAIRMAN: Because the point is taken in Mr. Heaney’s statement, rightly, that the  
26 position is summarised in figure 1 below, but that summary is itself qualified quite properly  
27 by the description in footnote 16, which says the figures differ, and the point that was being  
28 made by Mr. Holmes, as I understand it, is that if one takes account of the figures  
29 referenced by Mr. Heaney himself in footnote 16 you get a total, instead of 427 of  
30 confirmed delivery of 238.

31 MR. PICKFORD: Sir, we do not accept that analysis. Mr. Holmes said, as I understand it, that  
32 he was not actually challenging any of the facts in Mr. Heaney’s statement, he was simply  
33 inviting the Tribunal to look in more detail at the particular numbers, and he said: “We can  
34 knock your 40.1 per cent figure down, not because there is anything that Mr. Heaney says

1 about it that is wrong, but because we say that actually if you take our definition in Mr.  
2 Clarkson's witness statement at para.19, and you apply that you discover that the 40.1 per  
3 cent figure is not a robust one in terms of materiality. None of this, sir, is 'pre-figured' in  
4 the defence. None of this is a reason given for resisting our appeal. We say that in contrast  
5 to some other jurisdictions the rules for amendment in this Tribunal are very strict ones, and  
6 it is not permissible for Ofcom to take a ground for resisting our appeal, which is not in  
7 their defence, unless they are permitted to amend, and the test for amendment is a very strict  
8 one and there has been no application.

9 MR. HOLMES: Sir, again, I am anxious that time may be wasted on a wrong basis here. I  
10 hoped that I had made clear in my submissions today that our case, Ofcom's case, in  
11 relation to the materiality of the change goes to the question of whether the change was  
12 material to the assessment of the condition and I set out my reasons why I thought that was  
13 the case.

14 As regards para. 20 and footnote 16 they were points that were being made in order to assist  
15 the Tribunal because I was concerned that the Tribunal should not make any findings of fact  
16 on a wrong basis. I was not there challenging any of the evidence that Mr. Heaney provides,  
17 I was rather drawing attention to certain features of that evidence, and there were two points  
18 I would make = I hesitate to interrupt Mr. Pickford because I know he is closing, but I just  
19 want to make the position clear so that he does not proceed on a false basis.

20 The two points I was making as regards the evidence, in order to make sure that no false  
21 findings of fact were made, were first of all that on the basis of Talk Talk's own case,  
22 which refers repeatedly to committed exchanges, the committed exchanges are not 40 per  
23 cent on any view – looking in figure 1. The second point that I was making is that Mr.  
24 Heaney's evidence makes clear, quite properly, that the material that was provided to  
25 Ofcom during the administrative process was not the material set out in that table, albeit that  
26 the table contained information that predates the letter ----

27 THE CHAIRMAN: Which is what Mr. Heaney makes clear in footnote 16, he is setting out ----

28 MR. HOLMES: Yes, so my concern was simply that the 40 per cent figure cannot be the right  
29 one for the Tribunal because that was not the material that Ofcom had actually been  
30 provided with at the time, so I hope that assists Mr. Pickford. I simply wanted to save time  
31 to avoid him making submission that anything I said needs to be struck out of the record.

32 MR. PICKFORD: It provides some assistance and we are very grateful to Mr. Holmes for  
33 providing that clarification. However, I am afraid we do not accept that there is a mistake

1 of fact here and, in particular, that one cannot use the 462 figure as committed rather than  
2 the 238.

3 THE CHAIRMAN: The 462, where is that?

4 MR. PICKFORD: In footnote 16 ----

5 THE CHAIRMAN: Oh yes.

6 MR. PICKFORD: The premise of Mr. Holmes' point - which appeared to have been accepted, as  
7 far as we had understood it yesterday, but we say it is wrong on the facts in any event - is  
8 that the 462 figure relates to orders submitted rather than where delivery has been  
9 confirmed. The 238 figure "... relates to a confirmed delivery but is at a date earlier than  
10 8<sup>th</sup> July 2011, which is the date used to prepare the table above." We say that the 462  
11 figure, which relates to submitted orders, is properly to be treated as committed, and we do  
12 not accept the distinction in para.19 as drawn by Mr. Clarkson. There are a very large  
13 number of factual issues underlying this debate about whether the 40.1 per cent is good or  
14 bad. Now, if Mr. Holmes is saying that he does not take any point on that and essentially,  
15 as I understand what they are now saying, the only materiality points that they take is on the  
16 second limb of materiality. I think they are willing to assume that I am right that the first  
17 limb of materiality is past. That was my understanding. It may be helpful if Mr. Holmes  
18 could confirm that. Ofcom are willing to proceed on the basis that I am right, the first limb  
19 of materiality to do with the level rather than whether it is relevant to the price control is  
20 met by Talk Talk.

21 THE CHAIRMAN: I am not sure that I am going to invite Mr. Holmes to respond to your  
22 invitation.

23 MR. PICKFORD: I am sorry.

24 THE CHAIRMAN: No, I can understand why you are making it. Clearly we will have to rule on  
25 the question of whether amendment is required or not, we will do that in our Judgment. In  
26 case, however, we are against you, it might helpful if you could assist us on what would be  
27 the correct figures which, in a sense, is a point that I raised yesterday in regard to the table.  
28 As I understood the position, and I did not understand this to be controversial, the figure for  
29 238, which relates to confirmed delivery, is a total figure for all exchanges, not simply  
30 Market 1 exchanges, and so if one is to play with these figures, and that is why, frankly, I  
31 do not regard this as a question of factual controversy, I regard it as a question of playing  
32 with figures that Mr. Heaney has helpfully put into evidence, it would be of assistance to  
33 have that breakdown.



1 MR. PICKFORD: Certainly. Indeed, sir, you asked for a breakdown yesterday, and we will  
2 endeavour – with Ofcom – to provide that, and that may to some extent provide the way  
3 through and the solution to this slightly knotty issue.

4 It is important, we say, that the proper legal approach is taken to whether this is, first,  
5 permissible, and secondly, if it is a permissible point for Ofcom to raise, whether they are  
6 right about it. Even if it is now being said we do not actually rely upon it to defeat your  
7 claim, if they are still inviting factual findings to be made, as the Tribunal says it would like  
8 our submissions.

9 If I may deal very briefly with the Rule 11 point and then I will move on to the facts. Is the  
10 Tribunal content with that?

11 THE CHAIRMAN: Yes.

12 MR. PICKFORD: Thank you. So if you have your purple books, I hope like me you should be  
13 equipped – the 17<sup>th</sup> edition. I have to say I barely had an opportunity to mark my 16<sup>th</sup>  
14 Edition before it became out of date. If one turns to the Competition Appeal Tribunal Rules  
15 2003, which are at p.2359. They are right at the beginning of Part 5, which is the UK and  
16 EU Court materials.

17 THE CHAIRMAN: The difficulty is I think we have the 16<sup>th</sup> edition not the 17<sup>th</sup> edition. But I  
18 have the Competition Appeal Tribunal Rules.

19 MR. PICKFORD: I am grateful. I think they may nonetheless still be, from my recollection of  
20 how the old version was arranged, at the beginning of Part 5.

21 THE CHAIRMAN: Yes, I have them – I think we all have a copy of the rules.

22 MR. PICKFORD: I am grateful. First if you could turn, please to Rule 14 for the Defence. We  
23 see in Rule 14.7 that Rules 9,10 (except Rule 10.1(b) and (c)) and 11 shall apply to the  
24 defence. My focus is Rule 11. 11 concerns amendment. So when one reads 11 it is framed  
25 in terms of a notice of appeal and the appellant but obviously one has to read it when one is  
26 considering Rule 14.7 *mutatis mutandis* and substitute the appropriate words. I am going to  
27 read just the terms of it:

28 “The appellant may amend the notice of appeal only with the permission of the  
29 Tribunal”.

30 That is Rule 1.

31 “Where the Tribunal grants permission under this paragraph it may do so on such  
32 terms as it thinks fit and shall give further or consequential directions as may be  
33 necessary.”

34 Then Rule 3:

1 “The Tribunal shall not grant permission to amend in order to add a new ground  
2 before contesting the decision unless such ground is based on matters of law or fact  
3 which have come to light since the appeal was made, or it was not practicable to  
4 include such a ground in the notice of appeal or the circumstances are  
5 exceptional.”

6 We say the same principles should apply in relation to the amendment of a Defence, and  
7 none of those tests are met in the present case, indeed there is not even an application before  
8 the ----

9 THE CHAIRMAN: That was really going to be my next point, Mr. Pickford, I do not understand  
10 Mr. Holmes to be making an application and that being the case I think we can move on to  
11 the factual issue which frankly is of great interest, simply because in our judgment we  
12 would rather proceed on the basis of a clear accurate understanding of the percentages  
13 rather than such issues as may be contraversed.

14 MR. PICKFORD: Well the next point then to go to – and I will try and do this as briefly as  
15 possible but obviously this was a new point to us, so I do not have any written submissions  
16 to fall back on – is Mr. Clarkson’s witness statement at para. 19, that is at tab 10 of your  
17 defence bundle. He says at para. 19 – he has been talking about “uncommitted” or  
18 “unconfirmed” versus “committed” – “that exchanges undergoing a process of unbundling  
19 may be categorised as follows:” That is a slightly ambiguous phraseology. What he does  
20 not say in terms is that that is the categorisation that Ofcom actually relied upon in the  
21 WBA MR statement. On first reading one tends to infer that that might be what he means,  
22 but he does not actually quite say that and we wonder whether those words are used  
23 advisedly because if one actually looks at what Ofcom did in the WBA MR statement we do  
24 not see the distinction in particular between subparagraphs (2) and (3) being made. At (2)  
25 it is defined as:

26 “A ‘committed’ or confirmed exchange is one where an operator has made a  
27 request to enter that exchange and Openreach has confirmed and has provided the  
28 operator with a specific ready for service date in respect of the exchange.”

29 Then:

30 “An “uncommitted” or unconfirmed exchange is one which an operator has made  
31 a request to enter that exchange but Openreach has either not confirmed that  
32 request and/or has not provided an RFS date.”

33 Now, if we go back very briefly to the MR ----

1 MR. HOLMES: Sir, if I might just interrupt for one moment. There was a submission that Mr.  
2 Pickford made, to which I think I must take slight exception. He appeared to be calling into  
3 question the way in which para. 19 was phrased. He appeared to be suggesting that Mr.  
4 Clarkson had phrased this deliberately in order to avoid making clear whether this was the  
5 approach taken by Ofcom during the market review process and that seems to me an  
6 allegation of some seriousness that should have been appropriately been put to Mr.  
7 Clarkson.

8 If it is suggested that this language has been carefully chosen to conceal from the Tribunal  
9 the correct factual basis on which Ofcom proceeded, I think Mr. Clarkson should have an  
10 opportunity to comment on that and an application should be made to cross-examine Mr.  
11 Clarkson on the point.

12 MR. PICKFORD: Sir, if I might respond.

13 THE CHAIRMAN: I think I saw yesterday a definition of “uncommitted”, or “committed” in one  
14 of the documents, could you find that, please.

15 MR. PICKFORD: Sir, I was proposing to take the Tribunal to what we say is the relevant  
16 document, which is the MR statement at para.A3.6. Might I respond to Mr. Holmes’ point.

17 THE CHAIRMAN: No, let us start with the definition used in the Ofcom original document if I  
18 can call it that, and we will deal with the other matter later if we have to.

19 MR. PICKFORD: If one turns to p.982, it is a paragraph we have looked at before.

20 THE CHAIRMAN: Yes.

21 MR. PICKFORD: We see that:

22 “We have used two data points to inform our geographic market definition actual  
23 data from June 2010 and forecast data based on confirmed rollout plans by the  
24 Principal Operators (POs).”

25 Then this is the important point, the next sentence:

26 “Whilst not all POs indicated firm dates for completion of this rollout we have  
27 assumed this will be largely complete by December 2010.”

28 So what is clear from that is that in the decision you did not need to have a confirmed  
29 completion date in order for your rollout to be treated nonetheless as confirmed. One sees  
30 that clearly from the second sentence. Where a date was not provided, where you had said  
31 that you had planned to rollout but you did not provide a date, Ofcom simply made an  
32 assumption that the date was December 2010. The Tribunal will see that that falls within  
33 the definition, the approach that Ofcom took to a confirmed rollout plan. Does the Tribunal  
34 see that?

1 THE CHAIRMAN: Yes, there is also A3.7 which then defines “uncommitted” does it not? It  
2 appears to match with 19.3 of Mr. Clarkson’s statement.

3 MR. PICKFORD: Well, save, we say that it does not match insofar as you do not have to have a  
4 ready for service date, it has not been confirmed.

5 MR. HOLMES: Sir, I have just consulted with Ofcom, I mean there is evidence that could be  
6 given on this point and there is an explanation, although I hesitate to give evidence to the  
7 Tribunal but these points I think should have been put.

8 MR. PICKFORD: Sir, the difficulty we have, of course, and I mention this – and I rose at the end  
9 of yesterday – is I did not put any of this to Mr. Clarkson precisely because this was an  
10 entirely new point to me when it was raised by Mr. Holmes in his submissions yesterday.  
11 That is the difficulty we find ourselves in, if it had been prefigured then we would not be  
12 having to deal with it all in these slightly difficult circumstances now.

13 THE CHAIRMAN: Well, Mr. Pickford, the difficulty is it has been prefigured in para. 19 of Mr.  
14 Clarkson’s statement and I, for one, found it helpful to have a parsing of the different  
15 classes of exchange, and yesterday when I raised it what I was seeking to do was to have a  
16 single set of figures that would enable us to avoid having to frankly do the work ourselves  
17 of meshing what Mr. Clarkson says in para. 19 or what Mr. Heaney says in perhaps 20  
18 following and what the documents say themselves. But frankly, if that is a course we have  
19 to take and make a factual determination ourselves then we will do that.

20 MR. PICKFORD: We will endeavour to assist. I should emphasise I am not trying in any way to  
21 be difficult or to cast aspersions in relation to Ofcom, or Mr. Clarkson. All I am able to say  
22 really about para. 19 is we do not precisely know, because obviously it was not tested, and  
23 the reason why we did not test it, although Mr. Clarkson obviously set out para.19 of his  
24 evidence, we only chose to cross-examine on those issues that we thought were material to  
25 the issues in the case. We had no idea, until it appeared to be suggested at one point  
26 yesterday that there was a dispute about our 40 per cent figure, that any of this was actually  
27 going to be critical, and so we say we really cannot be fairly criticised for not having cross-  
28 examined on everything in Mr. Clarkson’s statement because we based our view on what  
29 was or was not material on the defence. Then what appeared to be a new point was raised  
30 yesterday, we now understand from Mr. Holmes that it is not actually a point that is taken  
31 against us on s.86. We seem to be getting drawn into quite a substantial alley which may  
32 ultimately be a blind alley.

33 THE CHAIRMAN: Well, Mr. Pickford, I entirely agree; I think this is a blind alley. Frankly, the  
34 points that I understand Mr. Holmes to be making is simply that taking Mr. Heaney’s

1 statement at face value, ignoring Mr. Clarkson altogether, there are two different ways of  
2 reading not the factual evidence that he gives, but the way in which you compute the  
3 percentages. It is not a question of facts, it is a question of how you do the adding up, and it  
4 is a point which Mr. Heaney himself fairly and squarely raises.

5 I can see that on one view your 40.1 percentage operates, but one does need to separate out  
6 that which Talk Talk intended at certain points in time, and that which Ofcom knew as a  
7 result of what Talk Talk told them.

8 MR. PICKFORD: yes.

9 THE CHAIRMAN: And that is the source of the mismatch, and all Mr. Holmes is saying is that  
10 if you look at what Ofcom knew then the figures are different. He is not adducing new  
11 factual evidence to show that, he is saying: "Look at footnote 16" and you see what was  
12 conveyed, as Mr. Heaney quite rightly himself points out, was different to what is in the  
13 table. All we are doing is looking at the figures from two different sides of the fence. One  
14 is a Talk Talk side – what they knew – and the other is the Ofcom side. Now, I strongly  
15 suspect it makes no difference, but I would quite like to have the figures which are accurate  
16 and ideally agreed, but if you cannot do an agreed table then by all means lay down  
17 whatever disagreements you have including as regards the para. 19 classification of Mr.  
18 Clarkson. So if there is a problem there by all means articulate it and we will look at it, but  
19 I do not think we can take it much further now.

20 MR. PICKFORD: Sir, I am inclined to agree that. If I might make just three very short further  
21 points. First, if I could refer you - we say that some of the confusion that has been caused  
22 in relation to this issue is in fact by Mr. Holmes not looking at the right bit of Mr. Heaney's  
23 letter and if one goes to the letter at p.251 -----

24 THE CHAIRMAN: You had better give me the reference.

25 MR. PICKFORD: It is at 2P. Mr. Holmes focused on the figures on the first page on "Roll-out  
26 Progress", that is 2P, p.250 – does the Tribunal have that?

27 THE CHAIRMAN: I have that.

28 MR. PICKFORD: If we turn over the page we now see at the bottom of that page, and this is  
29 now dealing specifically with Market 1:

30 "As of now we have firm plans to enable a total of 542 exchanges in Market 1  
31 (covering 40% of the Market 1 population). 330 of the exchanges already have  
32 accepted orders. We can provide the details of the actual exchanges if that would  
33 be helpful."

1 We say that was the starting place in relation to Market 1. That is the first point. The  
2 discrepancy is not with the figures on the first page, at least they are less relevant, because  
3 obviously what we are concerned with is Market 1 and not all rollout. That is the first short  
4 point.

5 The second short point is that Mr. Holmes said: "Look at figure 20, you can immediately  
6 start deducting all of the planned because they do not count as confirmed." If we look back  
7 at para. 18 and we look at the 'planned' we see that the first part of the 198 exchanges that  
8 are planned for 2012/13 have a status as follows: APOs had been placed and accepted for 84  
9 of these exchanges. Our submission to you is that that is sufficient on our view to be  
10 confirmed, they have been placed and they have been accepted. So one cannot simply  
11 deduct all of the 198 from the figure as Mr. Holmes wants to do and one could have  
12 arguments, indeed, about the second two bullet points.

13 The third and very short point, and I will not take you through it, sir, but just for your note,  
14 the Tribunal may want to look at the s.26 requests later, but if one actually has a look at the  
15 s.135 information requests that went to operators that sought information from them about  
16 their confirmed or unconfirmed plans – they are in tab 12, and if one looks at pp.11, 17, 23,  
17 29,50 and 69, you will see the questions that were asked, and the question that was asked  
18 there we say does not have the distinction that now appears to be being relied upon. Those  
19 are the points that we make on that. We say it is actually a very complicated issue and that  
20 is why we have struggled somewhat to deal with it purely in reply. If I can move on ----

21 THE CHAIRMAN: Yes, you can and, in fact, with gratitude, but I suspect, given the  
22 complexities and the heat, that our request for an agreed table may be a push too far for the  
23 parties, and what we will do instead is reach a view on the evidence that we have had  
24 presented to us here, because I strongly suspect that what we will get is not an agreed table  
25 but a table that is so hedged around with qualifications that it is not going to be helpful at  
26 all. (After a pause): Yes, we do not want a table, exactly.

27 MR. PICKFORD: I am grateful, sir. My next point concerns the guidelines in authorities 1 tab 4  
28 that you were taken to. I am not actually sure, given the time, that I am going to take you to  
29 them, but simply just to note the points. You were taken to para. 34 of those guidelines and  
30 our point in relation to what appeared potentially to be said in relation to that is that para. 34  
31 does not support the proposition that market definition is solely relevant to SMP, including  
32 in this case that market definition is there for another very important purpose, it is used to  
33 delimit the market for the purpose of the price control. I may have misunderstood what Mr.  
34 Holmes said but insofar as he said differently that is our position on that.

1 That takes me to the end of what we have to say in reply on Ground B save for my concluding  
2 point which I will make very shortly.

3 In relation to the misdirection issue under Ground A. The reason why we say it is fatal is  
4 not because it is fatal under Ground B, we accept there is an alternative argument under  
5 Ground B which is set out in the CC decision at paras. 3.43 et seq. The reason we say it is  
6 fatal is because, as I explained previously, it is the only example that we see of the direction  
7 that Ofcom gave to itself about the law, and we say that must have shaped its view of its  
8 information gathering powers and therefore what facts it was appropriate for it to  
9 investigate. That is the short point on that. There are no primary facts in para.20 of Mr.  
10 Clarkson's witness statement that we say we need to challenge in order to make that  
11 submission.

12 It is suggested by Ofcom that they considered in the WBA MR statement whether other  
13 operators' plans could be relevant, but we do not see that focus in the WBA MR statement,  
14 we see the focus on us insofar as there is an issue about our rollout plans in November, but  
15 we do not see other operators addressed there.

16 One telling point, we say, that Mr. Holmes made in relation to other operators, he said, and  
17 these are his words: "One must assume that the June 2010 plans were the core plans", and  
18 we say the problem is precisely that, that all we can do in this case is assume, because we  
19 do not know because Ofcom never investigated.

20 It was also suggested that the point that we make about exchanges dropping out of the  
21 Market 2 because in fact the planned rollout did not in fact materialise. He said that can  
22 only affect Market 2, it cannot affect Market 1, but we say that is wrong, by definition, if it  
23 falls out of Market 2 it has to have a home and its home is Market 1. His only real point is  
24 an argument about materiality. He says if there is only a couple of those it cannot be  
25 material. Well, true, if there is only a couple it cannot. Our point is we do not actually  
26 know how many there are because it was not investigated. So that is what we have to say  
27 in reply on that.

28 On consultation, it is suggested that our point is one of form over substance and, at the very  
29 least, we say that it could have been set out in the consultation what the legal test that  
30 Ofcom thought that it was applying was. Mr. Holmes says it is all very, very straight  
31 forward and I think as this hearing has proved, it is not actually quite that straightforward,  
32 there are a number of difficult nuances and, indeed, Ofcom clearly got the test wrong in the  
33 decision (see para. 3.42), so one cannot just say it was all obvious. They could have set out  
34 the analysis at 3.42 and we could have responded and pointed out that it was wrong. They

1 could also have said in the consultation, even if they were not going to conduct lots of new  
2 analysis, they could have said: “Look back at the WBA MR decision, that contains all that  
3 you need to know for s.86”, because it was not flagged up in the MR decision as the s.85  
4 analysis – rightly so because s.86 had not actually been engaged at that point. We say that  
5 again the subtleties of this case and all the issues that have been raised well demonstrate that  
6 you cannot simply say: “It was obvious, it is all over there”, because it is not at all obvious.  
7 If one simply accepts that there are two arguments here about the right construction of s.86  
8 and where there has been a material change, is not at all obvious to us what argumentation  
9 was being relied upon in relation to the s.86 issue because, as I have explained previously,  
10 there is a difference between saying that your market is sufficiently robust given all the  
11 information that you know at a particular point in time, and also answering the different  
12 distinct question of s.86.

13 It was also suggested on this point that everything that we say, all of the authorities that we  
14 rely upon, they are all about fairness, and they are all authorities about people being shut out  
15 and that being the essential issue. I tried to explain in my opening submissions it is not all  
16 about fairness, it is also about the decision maker equipping itself with the right  
17 information, and to make that good by reference to the authorities which, as I have said, are  
18 all about fairness, one of the authorities which I quoted from in the introduction but did not  
19 actually take you to was the *ex parte Southwark* case, which is at tab 10 of bundle 1, and if I  
20 can simply take you very briefly to one paragraph in that. If one turns, please, to p.321 of  
21 the report (external p.246). Does the Tribunal have that?

22 THE CHAIRMAN: Yes, we do.

23 MR. PICKFORD: One sees at the bottom of the paragraph there – this is Mr. Justice Laws:

24 “For my part I think this is no more nor less than an application ...”

25 He has been talking about the consultation the duty to consult:

26 “For my part I think this is no more nor less than an application of the rule in  
27 *Padfield v Minister of Agriculture, Fisheries and Food*. In such a case it is the  
28 decision maker’s duty to acquaint himself with such facts as will enable him to  
29 reach an informed view about the relevant consideration in question; and in the  
30 nature of things that is likely to involve his consulting persons or bodies who may  
31 themselves have informed views about those facts. But this is not a duty of  
32 procedural fairness; it is inherent in the duty to arrive at a rational decision in the  
33 light of the statutory purpose for which the power in question is conferred on the  
34 decision-maker.”



1 That is the only point we rely on there, just to say that obviously fairness is an important  
2 part of consultations, but another critical aspect is simply equipping yourself with the  
3 relevant information, and it is that aspect that we have focused on in our case. Therefore  
4 the *Greenpeace* case and the points that are all made about it having to be quite a high  
5 threshold if there is a problem with the fairness of the consultation and people being shut  
6 out, that calling into question the lawfulness of the decision. We say that is not strictly on  
7 point because our focus is on the decision maker equipping himself with the correct  
8 information.

9 Sir, finally then to turn to the order in which you approach the Grounds. Mr. Holmes says if  
10 he is right on Ground B there is nothing left for Ground A, and we say that is wrong for  
11 three reasons. The first is that Ground B only concerns Talk Talk's planned roll out and I  
12 may be at risk of coming close to a Donald Rumsfeld-ism, so I do so with some caution, but  
13 we say: "We do not know what we do not know." The focus of Ground B is on Talk Talk,  
14 there may be other factors that, had they been properly investigated, would have influenced  
15 Ofcom's decision and so one cannot simply jump from Ground B to having satisfied  
16 Ground A for that reason.

17 Secondly, even if the rollout issue did cover the whole of the space, as it were, of the  
18 material change issue, even if the only real issue was Talk Talk, we say whether Ofcom  
19 engaged in a proper consultative process is a discrete issue which we have raised and you  
20 can and should decide, irrespective of the issue of remedy. There may be an issue going to  
21 remedy about what remedy you get if, in fact, they came to the right decision, but it is still  
22 something that we say is quite appropriate for the Tribunal to decide if there has nonetheless  
23 been a consultative failure, not least because it will assist Ofcom for the future.

24 The third point, we say, is this, although our submission, and indeed Mr. Holmes'  
25 submission is that the Tribunal has everything it needs to decide Ground B – we say we are  
26 right, he says he is right – it is conceivable that the Tribunal will decide that actually it does  
27 not have everything that it needs to decide Ground B. It may decide that there is too much  
28 confusion about precise when rollout would have occurred, or what was committed, what  
29 was not committed, and all of those types of issues. We say that if that is the Tribunal's  
30 conclusion on Ground B then that would support our position on Ground A because it  
31 would illustrate the problem of not having grappled sufficiently clearly with these issues in  
32 the consultative stage and got these issues properly out in the open and addressed then, and  
33 having to try to scabble around to address them now in the Tribunal. So that is the third

1 and arguably indeed the most important of the reasons why we say you cannot jump from  
2 Ground B and us failing on Ground B, to saying that we necessarily fail on Ground A.  
3 We say the correct order is the order that the issues are framed in the notice of appeal, it  
4 starts with question 1, only if we are wrong on question 1 do you get on to question 2, and  
5 that is the logical sequence in which to take the steps.

6 Moving very briefly, and I can do this in time, to the interveners. First, we have Sky, and  
7 we say essentially that there is nothing, again as we said before, that Sky added today that  
8 actually changes any of the issues. They have their own commercial perspective, it is an  
9 interesting one, it is helpful for the Tribunal to see an alternative, but it does not alter that  
10 from Talk Talk's perspective the charge control does make a difference as to whether it  
11 plans to rollout or not, and that was not challenged by anyone in cross-examination. Mr.  
12 Heaney's evidence on the commercial impact – just again to remind you for your note is 1<sup>st</sup>  
13 Heaney 52 to 57, and 2<sup>nd</sup> Heaney 14 to 19. That is essentially I think all we need to say  
14 about Sky.

15 BT emphasised the need for stability and we agree with the need for stability, but it kicks in  
16 once the control is set. Finally, finishing where I started, the answer, we say, to BT's way  
17 of looking at the world is the thought experiment that I proposed. Everyone appears to  
18 agree that if you carried out the market definition again in July 2011 it would be  
19 significantly different and therefore, we say, taking account of the requirement to impose  
20 the least intrusive remedy that is a very strong indicator of a material change, and you have  
21 all the rest of my submissions that supplement that as well.

22 Sir, unless I can be of any further assistance, that is all I have to add. I should just clarify,  
23 because I can see that obviously I caused some concern on Ofcom's part. I was not  
24 intending to call the honesty of Mr. Clarkson into doubt, I was simply saying that we do not  
25 exactly know what he meant by that para.19 and hopefully it is not something the Tribunal  
26 will necessarily need to get to the bottom of to decide this appeal.

27 THE CHAIRMAN: No, well thank you very much, Mr. Pickford, and thank you all very much.

28 MR. HOLMES: Sir, just one question: would the Tribunal like to hear me on the graph? It is  
29 new material. My simple point is that it is not been figured in evidence.

30 THE CHAIRMAN: No, thank you. Thank you all very much, we will obviously reserve  
31 Judgment despite the submissions that this was very clear cut. We will attempt to hand  
32 Judgment down as quickly as possible. We will try to do it before Christmas, but no  
33 guarantees. Thank you very much.