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4 record.

5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case No: 1426/3/3/21

7
8 Salisbury Square House
9 8 Salisbury Square
10 London EC4Y 8AP

Wednesday 11 May 2022

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13 Before:
14 BEN TIDSWELL
15 (Chairman)
16 DR CATHERINE BELL CB
17 PROFESSOR MICHAEL WATERSON
18
19 (Sitting as a Tribunal in England and Wales)
20

21
22 BETWEEN:

23
24 **CITYFIBRE LIMITED**

Appellant

25
26
27 v

28
29 **OFFICE OF COMMUNICATIONS**

Respondent

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33 **A P P E A R A N C E S**

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35 Josh Holmes QC, Jessica Boyd QC and Isabel Buchanan (instructed by Bristows LLP
36 appeared on behalf of the Appellant)
37 Monica Carss-Frisk QC, Naina Patel, Tom Coates and Khatija Hafesji (instructed by Ofcom
38 appeared on behalf of the Respondent)
39 Robert Palmer QC and Laura Elizabeth John (instructed by Addleshaw Goddard LLP
40 appeared on behalf of BT)
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1
2 **Wednesday, 11 May 2022**

3 **(10.00 am)**

4 **Housekeeping**

5 **THE CHAIRMAN:** Good morning, Mr Holmes. Just a little housekeeping before we
6 get started. First of all, these proceedings are being livestreamed and I need to start
7 with the customary warning. These are proceedings in open court. An official
8 recording is being made and an authorised transcript will be produced but it is strictly
9 prohibited for anyone else to make an unauthorised recording with audio or visual of
10 the proceedings and a breach of that provision is punishable as a contempt of court.

11 Mr Holmes, the other thing I ought to mention and perhaps probably should have
12 mentioned last time we were together is just to note that the Tribunal members are
13 all subscribers of some sort to telecommunications providers and we don't think that
14 affects our approach or our judgment in any way but I thought it was prudent to
15 mention it this morning; of course if any of the parties have any observations to make
16 about that then we would receive those, Mr Holmes.

17 **MR HOLMES:** Thank you, Sir. Good morning, Sir, members of the Tribunal. For
18 our part we had rather been working on the assumption that you were likely to be
19 consuming telecommunications products of one kind or another; I think we don't see
20 that as an obstacle.

21 **THE CHAIRMAN:** You might have been nervous if we weren't.

22 **MR HOLMES:** I appear for the appellant with Ms Jessica Boyd QC and
23 Ms Isabel Buchanan. The respondent authority Ofcom is represented by my learned
24 friends Ms Monica Carss-Frisk QC, Ms Naina Patel and, on the row behind,
25 Mr Tom Coates and Ms Khatija Hafesji; and representing the intervenor, BT, are
26 Mr Robert Palmer QC and Ms Laura John.

1 If you are working from hard copy bundles, you should I hope have received seven
2 files. The first is the core bundle and that contains the pleadings and evidence.
3 There are then two volumes of supporting documents in a chronological order,
4 files 2A and 2B. Volume 3 is a slim file of exhibits. Volumes 4A and 4B are the
5 authorities and volume 5 has the skeleton arguments and a few additional
6 documents referred to in them.

7 Am I right to assume you have all of those?

8 **THE CHAIRMAN:** Yes, we have. Also if it's helpful to all the parties you can
9 assume we've made good progress in reading in as indicated in the skeleton, so
10 we've covered a lot of ground.

11 **MR HOLMES:** We are grateful for that and the also for the early start.

12 The bundles contain some confidential material, as you have seen, which is
13 highlighted. I am going to try to deal with those in open session by referring you to
14 particular passages but of course if there are questions from the Tribunal we can go
15 into closed session as needed.

16 **THE CHAIRMAN:** Yes, and we would much rather not do that and in fact we'd like
17 to avoid it if at all possible but we are very conscious of the sensitivity of the material
18 and will do our very best to manage that along with counsel.

19

20 **Opening submissions by MR HOLMES**

21 **MR HOLMES:** As the Tribunal has seen, this is a challenge to Ofcom's decision to
22 take no action in relation to BT's Equinox pricing offer which was introduced into the
23 market following the decision in October 2021. There's no dispute as to the terms of
24 the offer. The central point is that it rewards ISPs with very substantial discounts if
25 they achieve certain targets as to the proportion of their Openreach sales that are for
26 Fibre to the Premises, or FTTP, rather than so-called Openreach legacy products.

1 Legacy products are slower speed products supplied using Openreach's ubiquitous
2 copper network for the final part of the connection. The distinction is explained, for
3 your note, in the witness statement of Mr Matthew, who gives evidence for Ofcom, at
4 core bundle 1, tab 5, page 161, paragraph 6 to 8.

5 The targets are and are designed to be challenging. If they are not met, ISPs get no
6 discounts and that is the so-called cliff edge. CityFibre does not suggest that the
7 targets directly incentivise ISPs to withdraw orders from Altnets and place them with
8 Openreach instead. We accept that on their face at least the targets in the Equinox
9 offer seek to incentivise the purchase of Openreach FTTP products over Openreach
10 legacy products.

11 The case is concerned with the question of whether Equinox may nonetheless have
12 the indirect effect, whether intended or not, of creating incentives for ISPs to shop for
13 FTTP products with Openreach rather than the Altnets in areas where a choice
14 exists. It concerns in particular Ofcom's conclusion in the contested decision that
15 there is not even the potential for Equinox materially to affect ISP incentives in this
16 respect.

17 As the Tribunal has seen, Ofcom proceeded on the basis of a self-imposed analytical
18 framework consisting of three questions when assessing commercial terms of this
19 sort. The first is whether terms proposed by Openreach potentially create a barrier
20 to the use of Altnets by ISPs. The second is whether they are likely to have
21 a material effect on nascent competition. The third is whether they are likely to
22 demonstrate clear and demonstrable benefits.

23 If question one is answered in the affirmative, Ofcom will then proceed to assess
24 question two and if the commercial terms are not precluded by reason of their
25 material effects, question three as well. In this case you have seen that Ofcom
26 concluded in answer to question one that there was no potential for Equinox to have

1 any material impact on ISP incentives to purchase from Altnets instead of
2 Openreach. It did not go on to address the second and third questions, either as to
3 materiality of effects or as to benefits.

4 CityFibre's appeal is addressed to Ofcom's answer to question one. The appeal is
5 not a merits appeal as we have advanced it. CityFibre does not invite the Tribunal to
6 conclude that Ofcom's no potential conclusion was incorrect in view of the evidence.
7 Instead, we have brought a tailored appeal on two public law grounds.

8 First, CityFibre submits that Ofcom's answer to question one was based on a factual
9 premise that was not adequately investigated, consulted upon or evidenced in the
10 statement. We have referred to that factual premise as the overlap conclusion.
11 Again, contrary to the suggestion at paragraph 6 of Ofcom's skeleton argument,
12 CityFibre is not inviting the Tribunal to conclude that the overlap conclusion was
13 wrong. CityFibre's position is that the Tribunal is not in a position to form a view
14 about that. It could only be done on the basis of industry-wide consultation or
15 information gathering by the appointed regulator Ofcom.

16 Instead, CityFibre invites the Tribunal to conclude that Ofcom's investigation of the
17 issue of overlap fell badly short by public law standards and Ofcom's answer to
18 question one was unsound as a result.

19 The public law failings can be put in a number of overlapping ways. We'll see in the
20 case law that is often the case. But in broad overview CityFibre's complaint is that in
21 all the circumstances Ofcom failed to ask Altnets, including the largest of them, my
22 client CityFibre, straightforward questions to elicit the information that they needed to
23 inform its assessment of the likely degree of short-term overlap between
24 Openreach's and the Altnets' fibre networks. We say that by failing to ask such
25 questions Ofcom fell short at least of the requirements of fair consultation and
26 adequate enquiry.

1 That in a nutshell is ground one of CityFibre's appeal.

2 Secondly, and in any event, CityFibre submits that the no potential conclusion is
3 unsustainable on Ofcom's own findings. Those findings concern the impact that
4 Equinox is likely to have on ISP incentives and findings of that form are incapable in
5 principle of sustaining the conclusion that there is no potential for such impact.

6 Contrary to what Ofcom and BT have suggested, this is not a merely semantic
7 objection. It matters because it concerns the content of the test that Ofcom itself has
8 devised and the extent of investigation that they conducted in this case. As I will
9 show you, the line Ofcom now adopts on the meaning of potential appears to depart
10 from its own approach to that test at an earlier stage of its consideration of Equinox.
11 That forms the focus of ground 2.

12 This is a streamlined appeal and I propose to make streamlined submissions. If it
13 pleases the Tribunal, I will take matters in any order you wish and I know that you
14 will have questions but I propose to address matters in the following order. I will
15 begin briefly by highlighting key points concerning the background and the regulatory
16 context. Secondly, I will revisit Ofcom's reasoning during the consultation and in the
17 contested decision. Thirdly, I will address you on some authorities that are relevant
18 to the appeal. Fourthly, I will develop my submissions on each of the grounds in
19 turn.

20 On timetable for the hearing, the parties have liaised and agreed a division which
21 would take me through to the middle of the afternoon. We will see how matters
22 progress but with a fair wind it may be that I won't require so long to develop these
23 points.

24 May I start then with the relevant background.

25 **THE CHAIRMAN:** Yes.

26 **MR HOLMES:** There are two matters to consider here and the first is economic

1 context. The second is the regulatory context supplied by Ofcom's Wholesale Fixed
2 Telecoms Market Review which was published in March 2021. It's generally referred
3 to by the acronym, which I at least find completely indigestible and I invariably
4 garble, of WFTMR. For convenience I hope the Tribunal will allow me to refer to it as
5 the market review. It is the review which provides the current regulatory regime
6 applicable to the fixed telecoms industry and of more immediate relevance it is also
7 the review which imposed the notification requirement on Openreach pursuant to
8 which the Equinox offer came to be assessed by Ofcom in the contested decision.

9 So starting then with the economic context, the structure of the market is helpfully
10 illustrated by a figure in Mr Matthew's witness statement, which is in core bundle 1 at
11 tab 5. It's shown at page 160.

12 You see from the heading at the top of page 160 that this is an annex which provides
13 background information on the fixed telecoms sector.

14 **THE CHAIRMAN:** Yes.

15 **MR HOLMES:** The figure in the middle of the page sets out the fixed telecoms
16 supply chain and it shows the various levels involved in delivering broadband
17 services to customers in the UK. The top two levels, physical infrastructure and
18 access network operators, are about provision of the physical network over which
19 the service is delivered. You see from the second level that there are various access
20 network operators. They provide the physical network connection, be it cable,
21 copper or fibre, to the customer's premises.

22 On the left-hand side, you see Openreach in the second level. It is part of BT and
23 operates BT's access network. Looking across the page, you see that the diagram
24 also identifies various competing network operators. In the middle are what are
25 referred to in these proceedings as the Altnets, CityFibre and then other Altnets.
26 These Altnets are new entrant operators in the UK who are in the process of trying to

1 build and operate rival fibre-based access networks which will bring greater levels of
2 network-based competition to the UK.

3 On the right-hand side, there is another established operator, Virgin Media, which
4 owns a cable network covering parts of the UK. Looking down the page, you see
5 that there are two ways in which access network operators can supply the market.
6 They can supply network access on a wholesale basis to third party internet service
7 providers, the third level of this diagram, including in particular Sky, TalkTalk and
8 Vodafone, who then provide a retail service to end users by adding in other network
9 elements and various retailing activities, billing and customer management and so
10 on.

11 Looking first at BT Openreach, you see that it supplies third party ISPs at the
12 wholesale level having been obliged many years ago by regulation to open up its
13 network in this way. As a group, BT also supplies consumers directly through
14 another subsidiary shown at the next level of the supply chain and referred to as BT
15 on the diagram.

16 Looking at the other established network operator, Virgin Media, at the right-hand
17 side of the page, you see that it only retails. It does not open its network to third
18 parties at the wholesale level and it has a longstanding retail operation and
19 a substantial existing user base built up over many years.

20 Then there are new entrants in the middle. In the case of CityFibre you see that it
21 supplies network access by wholesaling to ISPs and in the case of the Altnets you
22 see that they get customers where they can. Some provide retail access but, as we
23 shall see, a number of them also have funded plans to wholesale.

24 We have given some examples of that at paragraph 33B of our skeleton argument
25 based on very rapid internet research. It's immediately apparent why wholesale
26 would be an appealing option to new entrant network access operators. It offers

1 | them a means of expanding their scale and gaining take-up through experienced
2 | retail ISPs with established brands in the market.

3 | Looking down the supply chain, there's one further point to note. You see the ISPs
4 | sell to end users directly but they also in some cases sell an intermediate wholesale
5 | product to so-called ISP resellers and that is a product which combines network
6 | access with some of the other inputs, other network inputs needed to provide a retail
7 | service but which leaves other retail activities to the reseller to provide under their
8 | own separate brand.

9 | So that is the supply chain. The next point on economic context concerns the
10 | market position of the various players. Beginning with the access network operators,
11 | Openreach is of course the incumbent operator, it owns and operates the ubiquitous
12 | copper access network which traditionally has been the only form of local access
13 | and it has ambitious plans to roll out FTTP, Fibre to the Premises, to 25 million end
14 | user premises. To put that in perspective, there are around 31 million premises in
15 | the UK. So it's a very substantial rollout.

16 | You see from paragraph 9 of the annex over the page at page 161 that Mr Matthew
17 | gives information about Virgin Media's network coverage and you see that it has
18 | some expansion plans and also has plans to upgrade from cable to FTTP.

19 | But it is of less relevance to this case. I don't think this is contentious. Because it's
20 | an established operator with its own substantial retail operation and an installed user
21 | base. As we will see, the notification requirement which led to the Equinox decision
22 | is focused on protecting competition from new entrant network operators against
23 | Openreach's pricing to ISPs so that they have the option of using wholesale
24 | distribution to achieve scale, something which Virgin Media currently does not do.

25 | So that bring us to the Altnets. CityFibre is the largest Altnet challenger. It has
26 | ambitious plans but these are not nearly on Openreach's scale and it lacks all

1 Openreach's incumbency advantages. Nonetheless it has published plans to build to
2 8 million homes by 2026. The other Altnets also have ambitious plans of their own in
3 various parts of the country. They are subnational operators. I will come back to the
4 evidence on the scale of their rollout later and show how the notification requirement
5 was specifically designed to protect their opportunities to distribute via ISPs.

6 Finally, as regards the ISPs, Mr Matthew provides some further information about
7 them at page 162, just over the page again, in table 1. There are two points to note
8 about this table. First, the figures given show the downstream shares of supply for
9 all five of the largest ISPs. But for present purposes, only some of the ISPs are in
10 fact relevant to the Altnets' ability to wholesale, which is the focus of the notification
11 requirement, and of Ofcom's analysis in the Equinox offer.

12 In that connection, BT and Virgin Media are not relevant. Those ISPs are part of
13 vertically integrated groups and they will use the network access provided by their
14 own group. They are therefore not part of the contestable demand which Altnets
15 could hope to bring if not foreclosed by Openreach's pricing. They are captive sales
16 for network access to the relevant network access operators. So the proper focus is
17 therefore upon the remaining three of the large ISPs, namely TalkTalk, Vodafone
18 and Sky.

19 To state the obvious, when you are assessing the significance of those ISPs in the
20 context of the Equinox offer, their shares in the contestable market would be
21 significantly larger than the figures shown in table 1 once the captive sales through
22 Virgin Media and BT were taken out of the picture.

23 The second point to note is that the table contains two columns of percentages
24 which show each ISP's shares of supply on the one hand including and on the other
25 hand excluding their supplies to ISP resellers. A comparison of the two columns of
26 percentages shows the Tribunal to what degree the three relevant ISPs, Sky,

1 TalkTalk and Vodafone, supply broadband connections through ISP resellers rather
2 than directly.

3 Now, I need to tread slightly carefully because the figures are in some cases
4 confidential but if you compare the two columns you get a sense of the proportion of
5 the contestable ISP's supply that goes via resellers and the materiality of that
6 proportion.

7 That is, just to anticipate, relevant because of the challenges Ofcom rightly identified,
8 as we say, in the Equinox decision that ISPs are likely to experience in the first
9 couple of years of the offer in ensuring that their resellers supply FTTP rather than
10 FTTC products in order to meet the Equinox targets.

11 The last point on the economic context concerns the practical realities which confront
12 the Altnets in building rival fibre networks. In order to be able to do so, the Altnets
13 must secure large-scale investment. These are substantial capital projects.
14 Securing that investment depends on expected penetration levels, that is to say how
15 many premises the Altnets will succeed in converting in serving with an active
16 service within their network coverage.

17 Key to any wholesaling Altnet's success is therefore winning the business of ISPs,
18 who have historically purchased broadband products from Openreach. The position
19 as regards CityFibre is set out in its consultation evidence in bundle 2B. So we can
20 put away Mr Matthew's evidence for now and if I could ask you, please, to take out
21 bundle 2B and turn to tab 61.

22 You see that this is a witness statement of Mr Nick Dunn, CityFibre's chief financial
23 officer, who has also given evidence in the appeal, but this was a statement that he
24 gave to Ofcom during the consultation.

25 I would ask you, please, to turn to page 778 and just read paragraphs 5 to 7 to
26 yourselves, going on to page 779.

1 (Pause).

2 **THE CHAIRMAN:** How far do you want us to go?

3 **MR HOLMES:** To the conclusion of paragraph 7, please.

4 The points I take from that are that penetration is important, access to ISPs is
5 important and that is important to get the investments required for network rollout.

6 That is the economic context. If I could turn now to the regulatory context as
7 it appears from the market review. Before turning to the notification requirement,
8 I propose to show you Ofcom's strategic purpose and competition concerns as they
9 emerge from the review. There are five key points to note.

10 The first concerns the strategic priority underlying the review. For that we need to go
11 to bundle 2A. We can put away 2B for now. At tab 5. You see from the first page
12 that this is the overview section at the front of the review and turning on to page 33,
13 the first bold paragraph records that the decisions in the review are designed to
14 promote competition and investment in gigabit-capable networks.

15 Ofcom is absolutely emphatic that the best way to achieve benefits for consumers in
16 the long run is by promoting network level competition. If you look down to the fourth
17 unnumbered paragraph on the page, Ofcom explains that its approach to supporting
18 investment in gigabit-capable networks is focused on encouraging competition
19 between different networks where viable, which will provide high quality services,
20 choice and affordable broadband for consumers.

21 Turning on to page 38, the point is further developed at paragraph 2.8 under the
22 heading "Strategic context and legal framework". 2.8 observes that the best way in
23 Ofcom's view to achieve its objectives and deliver outcomes for consumers is
24 through sustained support for competition in gigabit-capable networks in as many
25 areas of the UK as possible. Therefore we want to promote investment in such
26 networks by BT and other companies in order to promote network-based

1 competition.

2 Turning on to page 40, at the bottom of the page you see the heading "Benefits from
3 greater network competition", and paragraphs 2.20 to 2.23 explain the specific
4 advantages of network-level competition, notwithstanding the potential duplication of
5 assets which that may entail. If I could just ask the Tribunal briefly to review those
6 paragraphs please so 2.20 to 2.23. **(Pause)**.

7 I would ask the Tribunal in particular to note the distinction between network-based
8 and access-based competition. Ofcom views network-based competition as
9 a means of escaping from the access-based competition which has been the
10 traditional model whereby BT has been required to open its network to ISPs.

11 If we could turn on to tab 10 of the same bundle, this is in volume 3 and concerns the
12 non-pricing remedies which Ofcom introduced. Turn at tab 10 to page 222. Picking
13 it up at 1.7, you see that Ofcom again explains that its strategy, taking account of its
14 legal duties, is to promote investment by Openreach and other telecoms providers in
15 order to promote network-based competition. Ofcom wants to encourage BT's
16 competitors to build their own networks rather than relying on network access from
17 Openreach.

18 At paragraph 1.8, Ofcom's general regulatory approach is to apply remedies as far
19 upstream as possible to ensure that as much of the value chain as possible -- that's
20 the same as the supply chain we saw earlier -- is open to competition. So Ofcom's
21 clear statement of intent again is to move beyond access-based competition at the
22 ISP level and to promote competition through network-access operators.

23 That depends on ensuring that Altnets are not impeded in their route to market.

24 This same thread can be traced back through a sequence of earlier Ofcom strategic
25 documents which we've listed at footnote 10 of our skeleton argument.

26 We emphasise that point because the way Ofcom has expressed Ofcom's strategic

1 priorities in these proceedings has on occasion revealed a somewhat different
2 emphasis, which is a cause of particular concern to my client. One sees this in
3 Mr Matthew's witness statement in the core bundle. So you can put away 2A for
4 a moment and return to the core bundle, tab 5, page 110 at paragraph 16.

5 What is said here is repeated in both Ofcom's defence, for your note, at
6 paragraph 24 and in its skeleton argument at paragraph 9. You see at paragraph 16
7 that Mr Matthew identifies two central objectives as underlying the wholesale market
8 review. The first of these is said to have been encouraging Openreach to roll out an
9 FTTP network. The second is supporting competition to build networks. So that's
10 identified as a second objective. Even then the primary reason given for seeking to
11 support such competition is that it puts pressure on Openreach to build FTTP itself.

12 **THE CHAIRMAN:** So you are saying that they in 16B are deprioritising the
13 investment that they have expressed that they want Altnets to make in the market
14 review, that's important?

15 **MR HOLMES:** I don't wish to make too much of this but we do say that there's at
16 least a shift of emphasis here with a focus upon spurring Openreach's own efforts to
17 roll out FTTP, which would bring fibre more quickly perhaps to consumers, but
18 insofar as Altnets did not pursue their rollout, that would not achieve network-based
19 competition, which we saw was a defining objective of the market review.

20 **THE CHAIRMAN:** I suppose I expect that part of the answer to that from Ofcom is
21 going to be it is important to ensure that Openreach is making the investment as well
22 as the Altnets and you are not challenging that I don't think.

23 **MR HOLMES:** No, absolutely not.

24 **THE CHAIRMAN:** Also I think they would say it is necessary for the strategy to work
25 for there to be competition between all providers of the access level to the wholesale
26 level I suppose. So it is part and parcel of this that there is going to be vigorous

1 competition that is going to be promoted by the performance of the strategy.

2 **MR HOLMES:** Yes.

3 **THE CHAIRMAN:** But your suggestion is they are going beyond that and
4 emphasising the Openreach delivery to consumers as being a priority potentially
5 ahead of the network competition.

6 **MR HOLMES:** That's right. For the purposes of the market review, Ofcom
7 recognised as a key objective to promote network-based competition and it imposed
8 remedies on Openreach with a view to ensuring that Altnets were able to obtain
9 routes to market and they structured, as we'll see, a policy around that for assessing
10 Openreach's offers in the market.

11 The balance that was thereby struck does presuppose some limitations on
12 Openreach's commercial freedom and there may be some policies which do promote
13 the rapid rollout and take-up of Openreach's fibre-based network but which do so at
14 the expense of Altnets by blocking Altnets' ability to access the market. That was the
15 concern at the time of the review and Mr Matthew by emphasising Openreach's own
16 FTTP rollout picks up part of the picture. But it doesn't place the same emphasis, in
17 my submission, as the market review does upon the independent virtue of
18 network-based competition.

19 The Altnets are not there on the market review policy simply as a spur to Openreach
20 to roll out faster. Ofcom sees them as a key part of its regulatory strategy to take
21 competition up the supply chain and to ensure that the network level as well as the
22 access level is exposed to effective competitive constraints.

23 The second point to emerge from the market review is that Openreach, on Ofcom's
24 assessment, has both the ability and the incentive to engage in behaviour that would
25 impede new network build and thereby prevent network competition.

26 Just to show you that, we can return to bundle 2A to tab 13 and look at what is said

1 on the first page, 301 at paragraph 7.2.

2 **THE CHAIRMAN:** So this is section 7 of volume 3?

3 **MR HOLMES:** It is, Sir, yes. I should have said that. You see that it is the section
4 in which Ofcom introduced the notification requirement in relation to other
5 commercial terms.

6 **THE CHAIRMAN:** Yes.

7 **MR HOLMES:** 7.2 explains that the section relates to concerns around Openreach
8 using wholesale pricing structures to deter new network build by alternative network
9 operators. Openreach and alternative providers have announced plans for
10 significant scale fibre deployment over period of the review. Openreach potentially
11 faces a substantial erosion of its market share in areas where new networks are built
12 and therefore has incentives to deter new build.

13 Turning on to page 303, paragraph 7.13 describes the scale of the threat to
14 Openreach's core network position. If you read the final sentence of that paragraph,
15 beginning "Openreach's own internal analysis", you see an indication of the
16 materiality of the threat. I won't read it because it's confidential.

17 As regards Openreach's ability to impede new network build, could we turn on to
18 page 306 and could I ask you, please, to review paragraph 7.30 of the review.

19 **(Pause).**

20 **THE CHAIRMAN:** Yes.

21 **MR HOLMES:** So that is the concern. Openreach has unique national scale and is
22 an unavoidable trading partner for ISPs and it could introduce pricing arrangements
23 which incentivise ISPs to buy from it across its footprint so that they secure
24 discounts, including in areas where Altnets are present. It's a classic leveraging
25 concern.

26 That would create an obvious potential barrier to the use of Altnets.

1 The third point to emerge from the market review concerns the enormous challenges
2 network rivals already face in gaining a foothold in the wholesale market given
3 Openreach's incumbency advantages. You see this at page 308 at paragraph 7.45.

4 As Ofcom explains there:

5 "Alternative operators building new networks face considerable challenges in
6 becoming established and overcoming the incumbency advantages for Openreach,
7 for example Openreach benefits from economies of scale when it has lower unit
8 costs than an entrant. In relation to FTTP networks a key advantage comes from it
9 having high existing customer volumes."

10 Then continuing over the page:

11 "In addition Openreach has an established relationship with existing access seekers
12 [that's to say ISPs] and some level of systems and process integration. Because no
13 other operator has national coverage, access seekers [ISPs] will have to purchase
14 wholesale services from Openreach in some parts of the UK and, as discussed
15 below, there is a cost to access seekers dealing with multiple network operators
16 which means that alternative network operators are likely to need to offer terms that
17 are at least as attractive as Openreach's to win business."

18 The fourth point is the fact that everything stands or falls in this regard on Altnets'
19 ability to access downstream demand, including by winning ISP business in that
20 contestable portion of the ISP demand.

21 If could you turn on please to page 310, you see at paragraph 7.50 what Ofcom says
22 about this:

23 "We note that PIA [that's passive infrastructure access, a remedy giving access to
24 ducts and poles] could reduce cost of new network build in some cases but this is of
25 little significance if networks are unable to attract access seekers [ISPs] due to
26 Openreach using pricing or other commercial terms to deter switching. If Openreach

1 is able to deprive a new networks of demand, they will fail."

2 The fifth and final point concerns the small window of opportunity for network
3 competition to emerge at any scale in the UK. This point is made over page at
4 page 311, paragraph 7.56:

5 "We have a relatively small window of opportunity to encourage new network build.
6 If alternative operators are unable to secure sufficient access seekers/end users
7 over a reasonable time period then it is unlikely they will be able to secure funds
8 from investors for their FTTP rollout plans. Competition law cases can take years to
9 reach resolution and network builders may be unable to secure ISPs [access
10 seekers] while a competition case is ongoing because it is unclear whether the
11 commercial terms introduced by Openreach will ultimately be deemed unlawful."

12 The reason for the short window is developed in another part of the review. If we
13 just look back at that, it's tab 9 of the same bundle at page 169, paragraphs 8.72 to
14 8.74. If I could ask the Tribunal just to review that. **(Pause)**.

15 So the point made here is that once a customer has made the transition to FTTP,
16 they are much less likely to switch again. This is part of the first mover advantage
17 that you may have seen referred to in the papers. That creates a limited window
18 where entry is more likely to occur before customers have already been migrated to
19 an FTTP product supplied by Openreach.

20 Taking these points together, it's understandable that Ofcom was concerned that
21 Openreach could undermine new network build by means of commercial terms
22 which deprived Altnets of ISP business during the crucial window when customers
23 are moving to FTTP. That is the concern that underpinned the notification
24 requirement.

25 The requirement is imposed by way of an SMP condition in BT's licence. It requires
26 Openreach to provide 90 days' notice of proposed terms where the price or other

1 contractual conditions are conditional on the volume and/or range of services
2 purchased and the Equinox offer is caught by the range of services limb.

3 Now, this type of remedy was naturally resisted by Openreach and you see the
4 arguments made by Openreach and by its largest wholesale customer, Sky, at
5 page 305 of the bundle at tab 13, paragraphs 7.25 and 7.26. 7.25, you see
6 Openreach's argument that the market is moving towards contracts that provide
7 long-term prices in return for purchasing commitments. Then various advantages
8 are recorded. You see that they include at (c) facilitating faster switch off for the
9 copper network which could save costs in running two networks.

10 As the Tribunal will have seen in the context of these proceedings, this is a key virtue
11 which is claimed for the Equinox offer.

12 Paragraph 7.26, you see Sky's argument that Ofcom should consider the benefits of
13 long-term commercial agreements and it recognised that long-term commitments
14 may reduce the scope for alternative network rollout but considered that restricting
15 Openreach's commercial flexibility could mean that its FTTP rollout is slower and/or
16 smaller.

17 Now, Ofcom did not accept those arguments in the review and that is explained over
18 the page at paragraph 7.29. You see there that Ofcom recognised that commercial
19 terms may have benefits, for example volume discounts may provide short-term
20 benefits to access seekers and might benefit consumers if they have passed
21 through. But Ofcom's objective is to promote competition and investment in
22 gigabit-capable networks by Openreach and others and the resulting network
23 competition which should benefit consumers in the long term.

24 If Openreach uses commercial terms that undermine new network build, our starting
25 point is that they are likely contrary to the interests of consumers in the long run.

26 Turning on to page 310 in the same tab, at paragraph 7.51, you see an explanation

1 of what the notification requirement was designed to achieve. As stated there, its
2 purpose is to prevent -- I am picking it up in the third line -- targeted action on the
3 part of Openreach that has the potential to reduce the scope of competitive entry.
4 The potential. That precautionary approach, we say, is consistent with Ofcom's and
5 the government's strategic priorities. As we have seen, there is a limited window for
6 competition to get a foothold at the network level and this is a once only opportunity
7 to get meaningful network-based competition off the ground.

8 Over the page at 311 you see at paragraph 7.60, three lines from the foot of the
9 page, Ofcom's decision to impose the notification requirement. You see that they
10 are doing this, in the fourth line from the bottom:

11 " ... because this could deter access seekers from switching demand to new
12 alternative networks, therefore we have decided to adopt additional ex ante
13 regulation, a 90-day notification period for commercial terms where the price and/or
14 other contractual conditions are conditional on the volume and/or range of services
15 purchased".

16 For the avoidance of doubt, Ofcom's concern was not only about protecting
17 CityFibre, the largest Altnet, from potential barriers to wholesale distribution, Ofcom
18 was also concerned to protect the wholesale opportunities for Altnets generally. You
19 see that from tab 9, bundle 2A, the SMP analysis, if you look at page 165.

20 So this is part of the decision's assessment of whether Openreach has significant
21 market power, which is the statutory trigger for imposing regulation upon it, including
22 the notification requirement. As part of that assessment, you see that Ofcom
23 assessed the ability of rival networks to enter the market and provide a competitive
24 constraint.

25 On page 165, we can see from the heading above paragraph 8.56 that Ofcom
26 considered that wholesale deals, that's deals with ISPs, can support entry but do not

1 remove all impediments.

2 Paragraph 8.56 notes that one potential avenue for new entrant network operators to
3 reach scale and gain necessary take-up is through wholesale deals with larger ISPs.
4 They have larger subscriber bases, existing customer relations and recognised
5 brands, the point I made earlier about the appeal of wholesalers.

6 Turning over the page at paragraph 8.60, Ofcom notes that commitments by
7 wholesale customers to long-term volume take-up can significantly reduce the risks
8 for entrants. Turning on again to paragraph 8.62, you see that achieving such
9 commitments is dependent on ISPs being willing to engage with entrants and there
10 are factors which suggest that it may be challenging for new entrants to secure this
11 engagement, particularly for smaller networks.

12 So Ofcom then proceeds to consider the evidence about that. It shows a mixed
13 picture but also indicates that there is some potential for smaller networks to
14 wholesale. You see that at paragraph 8.64. If we pick it up in the middle of the
15 paragraph you see a non-confidential sentence:

16 "Competing networks can also be attractive to ISPs if they offer other advantages
17 such as coverage which is complementary to that of other networks."

18 That means, I think you'll see from the confidential text, other Altnets.

19 If I could just ask you to read down to the end of the paragraph the material that's
20 confidential there. **(Pause)**.

21 Then at 8.65 as well if I could ask you to review that, please. You see the ambitions
22 referred to in the second sentence.

23 At 8.66, you see the reference in the final sentence to a tender by a particular ISP --
24 sorry, 8.67. I missed a point at 8.66, you see that some Altnets have created
25 a common wholesale platform to create scale by giving access to a combination of
26 several networks. They in fact made consultation responses in relation to Equinox,

1 the CWP.

2 In my submission, the evidence clearly therefore showed some potential for other
3 Altnets to wholesale. In paragraph 8.68, Ofcom links this back to the notification
4 requirement as a control on Openreach's commercial terms with ISPs. You see five
5 lines down, the sentence beginning:

6 "Also, as discussed above, the existence of our ex ante regulation in WA markets in
7 the interim is necessary, for example to prevent Openreach designing commercial
8 terms which could undermine competing network operator roll out and make it more
9 difficult for them to compete for tenders."

10 So Ofcom clearly had in mind to protect Altnets generally against terms which
11 could -- you see the reference "could" -- undermine competing network operator roll
12 out and make it more difficult for them.

13 That is to say terms which had the potential to block rollout by limiting their access to
14 wholesalers, to ISPs.

15 **THE CHAIRMAN:** One of the things we see is an example given of the sort of thing
16 Ofcom is concern about and it talks about loyalty discounts in a particular area and
17 capturing a large enough customer base.

18 **MR HOLMES:** Yes.

19 **THE CHAIRMAN:** We are talking about something slightly different here.

20 **MR HOLMES:** Yes.

21 **THE CHAIRMAN:** What do you say about that difference between I think it's
22 sometimes described as direct and indirect in some of the Ofcom, and maybe you
23 are going to come to that, I don't want to hurry you, but I am interested to hear what
24 you have to say about that.

25 **MR HOLMES:** I will come to it but to give you my immediate response, we say that
26 the notification requirement was clearly designed to encompass a range of potential

1 discount pricing schemes, not only those which explicitly are connected with volume
2 and may achieve loyalty by that route, but also discounts linked to the range of
3 services. Those also have the potential to create loyalty effects. We'll see Ofcom
4 itself recognises that theory of harm when it comes to the Equinox offer.

5 **THE CHAIRMAN:** I don't think there's any dispute that they go through a whole
6 exercise of analysing the harm, so I don't think there's any dispute that they
7 recognise it as being relevant to the notification and then the decision.

8 I suppose I think it is being said that it is in the context of the nature of the decision, it
9 is a subsidiary part of a wider decision that firstly decides that there is no -- I'm going
10 to use the expression direct again, I know that's perhaps not the way you'd put it, but
11 there's no direct harm in the form of loyalty, rebates or whatever, but there is indirect
12 harm and therefore it is a subsidiary part of a bigger decision. I think that's probably
13 the way it's put.

14 **MR HOLMES:** Yes.

15 **THE CHAIRMAN:** And you say actually that doesn't really make any difference
16 because if it's something which was captured by the concern in the first place, the
17 potential for disincentive of competition, then they need to deal with it in the same
18 way as anything else.

19 **MR HOLMES:** You've hit the nail on the head, that's right.

20 Now, as well as the notification requirement, the market review also set out the
21 analytical framework that was applied by Ofcom when assessing offers -- that was to
22 be applied by Ofcom when assessing offers notified under the requirement. You see
23 that at tab 13. Firstly on page 327, paragraph 7.154.

24 You see there:

25 "Our starting point was that the creation of any barrier to using alternative network
26 operators would only be justified where ..."

1 And then you see the questions two and three in the Ofcom framework as it appears
2 in Equinox:

3 " ... impact is unlikely to be material and the arrangements will generate clear and
4 demonstrable benefits."

5 So three points about that. First you see the reference to any barrier and we say
6 that's relevant to the question that you have just asked, Sir. This was not
7 a form-based test. Once you are within the requirement, Ofcom is required to
8 consider or intended to consider under its framework any barrier to using alternative
9 network operators.

10 The second point, although only questions two and three are outlined here, the
11 sentence preceding those questions is the genesis of a prior and preliminary
12 question, whether any barrier might be created.

13 The third point, questions two and three are cumulative. Once the preliminary
14 threshold is crossed, Ofcom's policy involves consideration both of the impact of the
15 terms on competition and, if that is material, that is a reason for disallowing an offer
16 or requiring it to be revised. But also, even if the effects are immaterial, whether the
17 arrangements are likely to be immaterial, whether the arrangements generate clear
18 and demonstrable benefits, both of those tests were to be applied.

19 Turning on to page 329, you see a further elucidation of the prior or preliminary
20 question in paragraph 7.159 and 7.160. Now, these are, in my submission, key. If
21 I could ask the Tribunal to review 7.159 and 7.160 down to the eighth line and
22 potential benefits of the terms. **(Pause)**.

23 Three points in relation to these paragraphs. First, as can be seen from the first
24 sentence of paragraph 7.159, the objective is to promote investment by Openreach
25 and others in order to promote network-based competition. Again, FTTP competition
26 rather than simply switchover is the concern.

1 Secondly, as you see from the second sentence of 7.159, the key concern is
2 commercial terms that could undermine investor confidence in new network build
3 and impact rollout plans. The use of the word "could" in my submission reflects
4 Ofcom's precautionary approach, the remedy was designed to prevent terms that
5 could not terms that will or are likely to impede rival entry.

6 The target is terms that could undermine investor confidence, and this is important,
7 anticipated ISP penetration is the basis for investor confidence, as we saw from
8 Mr Dunn's evidence during consultation. Terms that investors consider might affect
9 ISP incentives may undermine investor confidence irrespective of whether on
10 analysis ISPs are in fact deterred from purchasing. Again a factor in support of
11 precautionary approach.

12 Thirdly, the precautionary approach then informs the first two sentences of
13 paragraph 7.160 where Ofcom juxtaposes two things. On the one hand, it refers to
14 terms which clearly have no impact on access seekers' incentives, ISP incentives, to
15 use Altnets, which Ofcom will consider unproblematic, and on the other hand there
16 are terms which potentially create a barrier to using Altnets. These will be
17 considered by reference to the questions two and three that we saw in
18 paragraph 7.154.

19 This is the genesis of the potential barriers test which you see at the first stage of the
20 analytical framework that Ofcom applied to Equinox. Here, the question is whether
21 the terms potentially affect ISP incentives or whether they will instead clearly have
22 no impact. If that threshold is met, Ofcom will consider questions two and three.

23 **THE CHAIRMAN:** It's said against you, I think, that there's a third possibility in the
24 middle of all, that those aren't exclusive to the analysis of outcomes. What do you
25 say about that?

26 **MR HOLMES:** So, in my submission, what these paragraphs clearly show is that

1 first question is not intended to be a high threshold. It's intended to be a preliminary
2 enquiry to determine at a high level if there could potentially, even potentially be
3 a problem, and if there is, if there is the possibility of a concern, based on plausible
4 consideration, we accept that, then Ofcom should go on to consider likelihood of
5 effects and likelihood of benefits.

6 There is a clear contrast or distinction drawn between the potentiality language used
7 here or whether there is clearly no benefit at the gating stage, the first question, and
8 then the likelihood which we saw, you see at page 328, in relation to the latter two
9 limbs of the enquiry, the impact assessment and the benefit assessment.

10 We say that on the evidence before Ofcom there was clearly a potential barrier and
11 that Ofcom applied the wrong test under its own framework insofar as it addressed
12 itself to a question of likelihood at the stage of question one.

13 **THE CHAIRMAN:** Can I ask you about the point you make about investor
14 confidence and I think you are saying that to some extent Ofcom is required to
15 anticipate what investors might think and how that might affect their behaviour. In
16 terms of how the test is put, I think in your skeleton, but I can't remember precisely
17 where, but you suggest that there was insufficient concern on Ofcom's part about
18 what might happen and therefore what the investors might think.

19 Is that actually a threshold question point or does it go to question two?

20 **MR HOLMES:** It informs the interpretation and the design of this structure of
21 questions. So Ofcom's underlying concern was to ensure that network access
22 operators were not subject to barriers as a result of pricing arrangements which
23 could affect ISP incentives.

24 But for the purposes of the enquiry, the first question represents a low bar because
25 of the concern that even a potential barrier could chill the network rollout of Altnets
26 and therefore provide an obstacle to potential competition.

1 **THE CHAIRMAN:** So it's a little bit curious, isn't it, because in some ways it's
2 actually quite difficult as the questions are ultimately formulated, and again we may
3 be jumping ahead a bit here, but as the questions are ultimately formulated there
4 seems to be quite a big overlap between the subject matter of question one --

5 **MR HOLMES:** Yes.

6 **THE CHAIRMAN:** -- what would incentive on ISPs be, and subject matter of
7 question two, which is what are the Altnets likely to do as a result of that change.

8 **MR HOLMES:** Yes.

9 **THE CHAIRMAN:** Because one assumes, as you have shown us, that a large part
10 of what would drive Altnet behaviour will be their expectations as to accessing ISPs.

11 **MR HOLMES:** Yes.

12 **THE CHAIRMAN:** But that actually makes it a little bit difficult, doesn't it, to
13 distinguish the point we are talking about? Because certainly the way question two
14 is framed, if I put question two as formulated eventually, that is where you would
15 expect to ask yourself the question as to what the impact on competition is actually
16 going to be, what's going to happen as a result.

17 **MR HOLMES:** Yes.

18 **THE CHAIRMAN:** So the first question really, I think you are saying, is whether the
19 conditions have been created that might lead to an impact.

20 **MR HOLMES:** Yes.

21 **THE CHAIRMAN:** And my question at the beginning of this discussion was really
22 whether you are saying -- I think you have answered it but whether you are saying
23 that incorporated in that question one assessment is whether any particular view on
24 effectively the outcome of question two and is there a danger of eliding question two
25 into question one so you're actually asking yourself the question as to what the
26 investors are going to think or do.

1 **MR HOLMES:** Yes.

2 **THE CHAIRMAN:** I think you are saying actually it's a broader point and that it just
3 helps you understand what the nature of question one is and why you say it's a lower
4 threshold.

5 **MR HOLMES:** That's right. It explains why Ofcom's approach was a precautionary
6 one and why the gating question, question one, is a low threshold to cross.

7 So two further points, if I may. It's clear from Ofcom's formulation of the questions in
8 both the consultation and the statement that Ofcom maintains in the way it presents
9 these questions a distinction, a distinction I have shown you in the review, between
10 question one, they use the potential barriers language, and questions two and three,
11 which turn on likelihood. So Ofcom does purport to apply this structure faithfully.

12 It's also true that the question one gating stage or preliminary question will cover
13 some of the same ground as question two. It will raise at a preliminary level matters
14 that will also arise in question two.

15 Now, you might therefore say the fact that Ofcom says it was addressing itself to
16 question one but actually went on to look at question two, looking at likelihood,
17 doesn't matter. The analysis is there in any event and Ofcom made the findings it
18 did about likelihood. The difficulty with that is that there is a substantive difference in
19 the exercise that Ofcom undertook for two reasons. First, it didn't really consult
20 about likelihood as such. So it didn't give industry parties an opportunity to address
21 question two or question three, the benefits.

22 We see that there's quite a lot of reference in Ofcom's skeleton argument now to the
23 benefits but of course they weren't considered in the statement at all and they
24 weren't the subject of consultation. But both of those stages, both likely effects on
25 competition and the likely benefits of the offer, would have needed to be considered
26 if Ofcom had correctly applied its analytical framework and had focused on what we

1 say is the correct question at the first preliminary stage, whether there is even
2 a potential barrier.

3 That caused Ofcom to ignore matters that could have affected its assessment. As
4 we'll come on to see, it wasn't only the Altnets that had concerns about Equinox.
5 One of the ISPs, one of the key ISPs, TalkTalk, was proposing an adjustment to it
6 basically to exclude resellers over the 12 to 24-month period during which Ofcom
7 identified a concern that ISPs might struggle to meet the targets.

8 That wasn't considered by Ofcom but it's clearly relevant to whether this offer was
9 necessary to produce the benefits which are identified for it now in terms of
10 promoting FTTP rollout. That's a consideration that just wasn't taken into account.
11 But under a faithful application of this tripartite structure in which the first question is
12 properly regarded as a preliminary assessment based on potentiality, taking the
13 words on the page at face value, it should have been.

14 **THE CHAIRMAN:** Can you just explain why you say that. Are you saying that they
15 should have passed question one and gone on to question two and three?

16 **MR HOLMES:** Yes.

17 **THE CHAIRMAN:** Or are you actually saying that that should have been
18 incorporated into their analysis of question one?

19 **MR HOLMES:** No, they should have gone past question one and they should have
20 gone on to consider questions two and three. If they had applied question one
21 according to the standard which it identifies on its face, that's to say potential barrier,
22 they would have gone on to consider questions two and three.

23 **THE CHAIRMAN:** But if they are correct in their analysis of whether question one
24 was triggered then of course you would accept that they were entitled not to consider
25 those matters.

26 **MR HOLMES:** Yes, of course that's correct. But our challenge under ground 2 is

1 that when one looks at what Ofcom found in the decision and how it now defends
2 that decision, it is clear that they considered a standard of likelihood and not
3 potentiality when addressing the first question. We say that in doing so they
4 unreasonably disregarded their own policy and misdirected themselves.

5 **THE CHAIRMAN:** Yes, that's helpful.

6 **MR HOLMES:** That covers the market review. I am going to come now to the
7 offer -- the consultation and the decision.

8 I am conscious though, I don't know when you were planning to take a break.

9 **THE CHAIRMAN:** I think now would be a good time if that's convenient.

10 **MR HOLMES:** I am grateful.

11 **(11.21 am)**

12 **(A short break)**

13 **(11.31 am)**

14 **THE CHAIRMAN:** Yes, Mr Holmes.

15 **MR HOLMES:** Sir, could I very quickly return to the question you raised with me
16 before the break about the distinction between questions one and two and the
17 overlap between them.

18 We agree that those questions concern similar matters relating to the impact on ISPs
19 incentives. Everything for the Altnets depends on their ability to win downstream
20 demand and therefore their ability to access ISPs.

21 We positively rely on that overlap in relation to our ground 2. It supports our
22 submission that question one and question two apply different standards of likelihood
23 because otherwise they would collapse into one another.

24 The correct interpretation to give them an independent role is that one is a quick
25 threshold question which relates to the potential for barriers and question two
26 involves a conditional relative to a different standard, one of likelihood.

1 **THE CHAIRMAN:** Yes, so actually you are assuming that there has not just been
2 perhaps a lack of care in thinking about the distinction with the overlap, you are
3 saying it's recognised and deliberately dealt with in the difference with the standards
4 between the two. Because you do see the thing evolve, don't you? It starts off in the
5 market review as effectively two questions with a precondition attached to it and
6 suddenly it becomes three questions and I think you sense that some further thought
7 has been given to the significance of one and the way it relates to two in that
8 exercise.

9 **MR HOLMES:** Yes.

10 **THE CHAIRMAN:** Now, you could take the view that actually they just have not got
11 that right and they've left themselves with an overlap, which gives rise to some of the
12 problems we've got, or you could take the view that they've thought through very
13 carefully and that actually it does give rise to that distinction you are making.

14 **MR HOLMES:** Yes.

15 **THE CHAIRMAN:** But if it that's correct, then once you get to question two, because
16 the way question two is put it is quite a high hurdle then to pass the offer, isn't it?
17 Because you have to show it's unlikely to be material?

18 **MR HOLMES:** Yes, do you mean to fail --

19 **THE CHAIRMAN:** In order for the Equinox offer to be approved, to fail, it's a high
20 hurdle to pass it. It becomes more difficult, doesn't it? Isn't that why Ofcom are
21 concerned --

22 **MR HOLMES:** As we understand the questions, the first question asks whether
23 there is a potential barrier. That's a fairly low hurdle to pass as a basis for going on
24 to consider questions two and three.

25 **THE CHAIRMAN:** Yes.

26 **MR HOLMES:** If you then go on to consider questions two and three, you need to

1 look at two things. You need to look at whether there is a likelihood of an impact on
2 competition.

3 **THE CHAIRMAN:** Just pausing there, the way it's put is that you have to reach
4 a conclusion that it's unlikely to be material. So actually once you are into the realms
5 of likelihood, that's why I called it a high bar because you actually have to get to the
6 point where you've satisfied yourself the likelihood is very small that there will be no
7 impact.

8 **MR HOLMES:** Yes.

9 **THE CHAIRMAN:** Is that right? I have that right?

10 **MR HOLMES:** Yes, that's right.

11 **THE CHAIRMAN:** Sorry, I am probably putting it in a very confusing and awkward
12 way. But the point I am making is that I think once you get into answering
13 a question -- I understand this is something that I think Ofcom appreciated, you see
14 this I think in some of their reasoning as to how they viewed the test, that when you
15 get into question two you really have to have a fairly firm and absolute view that
16 there's not going to be impact on competition before you can even go on and
17 consider question three. I may be putting it too high but you see hopefully the point I
18 am making in contrast with what you say question one does.

19 So the point I think is that you could find yourself slipping into question two having
20 only had to pass a relatively small threshold and having done that therefore setting
21 yourself a very difficult task if you are going to permit the deal to go ahead.

22 **MR HOLMES:** Yes. If I may, I might return to that when we come to ground 2.

23 **THE CHAIRMAN:** Yes, of course.

24 **MR HOLMES:** And give you my submission but it's helpful to understand.

25 **THE CHAIRMAN:** I may not be right about that and I am probably not putting it in
26 the way in which I suspect Ofcom would put it or indeed I may be putting it in a way

1 | which they violently disagree with but certainly my understanding and really your
2 | point about the low threshold to get into this is that you are then in a dynamic where
3 | it is perhaps more difficult if you are Openreach, let's put it that way, more difficult if
4 | you are Openreach to get your offer cleared because of the way in which question
5 | two is worded.

6 | **MR HOLMES:** Yes, that's very helpful. If we may, I will park that for now and come
7 | back to it under ground 2.

8 | **THE CHAIRMAN:** Yes, of course. I am not sure where it goes, I am not suggesting
9 | that I think it weighs particularly one way or the other but I think it is a curiosity, the
10 | wording of question two does seem to me to be a curiosity about the relationship
11 | between question one and question two.

12 | **MR HOLMES:** Yes. If we could turn then to the Equinox offer, the consultation and
13 | Ofcom's decision. Equinox was formally notified to Ofcom on 1 July 2021 and that
14 | triggered the 90-day window.

15 | But as the Tribunal may have seen, it had been the subject of informal discussion
16 | between Ofcom and Openreach since April, immediately following the publication of
17 | the market review. So for several months prior.

18 | The terms of the offer aren't in dispute. In broad summary, it gives ISPs conditional
19 | discounts on all their FTTP purchases from Openreach. To qualify for the discounts
20 | an ISP's FTTP purchases must hit certain targets and the targets are based on what
21 | percentage those FTTP purchases represent at the ISP's combined Openreach
22 | FTTP and legacy purchases within the area of Openreach's FTTP footprint over
23 | a specified period, which after an initial period is every three months.

24 | From March 2022, to qualify for the discounts at all, ISPs must achieve a minimum
25 | percentage of 80 per cent in each quarter to qualify for any discounts. The discounts
26 | are significant. Ofcom calculated that their average value could be between

1 15 per cent and 30 per cent across a customer lifetime. If an ISP misses the
2 minimum order mix target it loses the discount on all its FTTP sales during the period
3 in question and that's the so-called cliff edge and it creates a potentially powerful
4 incentive effect.

5 The day after notification, Ofcom published a call for inputs giving stakeholders ten
6 working days to respond. Meanwhile, on 8 July, Ofcom held an internal team
7 discussion for which slides were produced. They are to be found in bundle 2A,
8 tab 26.

9 **THE CHAIRMAN:** Yes.

10 **MR HOLMES:** You see first of all: do the Equinox proposals potentially create
11 a barrier to using Altnets? Secondly: are the Equinox proposals likely to have
12 a material impact on nascent network competitors? Then, thirdly: are the Equinox
13 proposals likely to generate clear and demonstrable benefits? So that is the
14 structure. That's the first time that the three-question approach is expressed in quite
15 these terms but you will see that it is identified at the top of the page as reflecting
16 WFTMR guidance and we agree with that based on the passages of the reviews
17 which I have just shown to you.

18 The Tribunal will note from the penultimate bullet that these slides set out proposals
19 for testing the first two of the questions but they don't cover the final question.

20 Page 2, 465 of the bundle, is entitled "Assessing the impact on Altnets". The first
21 bullet states that:

22 "To qualify for discounts a high proportion of an ISP's new orders from Openreach in
23 its FTTP footprint need to be for FTTP. If an ISP fails to meet this target it pays
24 higher prices across the footprint and this potentially creates a barrier to ISPs using
25 Altnets which could harm Altnet FTTP build and ultimately consumers."

26 Now, this is quite striking. Ofcom, here, directly considers question one, whether

1 Equinox creates a potential barrier to ISPs using Altnet and of course we are at
2 a very preliminary stage of their enquiries but its immediate response to question
3 one is to answer it affirmatively.

4 We respectfully agree with this answer and we say that reflects the ordinary English
5 language meaning of potential and the obvious incentive effects of the offer. That of
6 course is different from Ofcom's subsequent approach and its position in these
7 proceedings.

8 The Tribunal has seen in Mr Matthew's evidence reference to a nine-point analysis
9 which it's said was necessary to establish whether there's even a potential for
10 a barrier. That nine-point analysis is now said to have underlain Ofcom's
11 assessment of question one but there is certainly no mention of the nine-point
12 analysis here in Ofcom's internal thinking at this stage and we don't find it in the
13 consultation document or the decision either.

14 Moving on to the second bullet, Ofcom turns to consider the factors which it
15 proposes to use to assess the impact of the targets on competitors. That is the
16 subject of question two. Ofcom then identifies four relevant factors for assessment
17 of impact on network competitors. How difficult is it for an ISP to meet the order mix
18 targets? How significant the discounts are if the order mix targets are met? Thirdly,
19 to what extent Altnets and Openreach's footprints overlap? And fourthly to what
20 extent using Altnets will make it less likely that an ISP meets the targets?

21 It says that:

22 "Ofcom will conduct a qualitative assessment of those factors which we then draw
23 together to gauge the impact of Equinox on Altnets."

24 We say that this is again striking. They are indeed the factors identified as relevant
25 to Ofcom's reasoning in both the consultation document and the decision rather than
26 the nine-point analysis which is now said to have done the work. But they are

1 identified here in the internal briefing apparently as going to question two and not
2 question one.

3 We suggest that the internal briefing had it right, Ofcom ought to have concluded that
4 there was a potential barrier and as a result gone on to consider questions two and
5 three.

6 Pages 3 to 6 then set out how Ofcom may approach analysing each of the factors as
7 relevant and if you could turn --

8 **THE CHAIRMAN:** Sorry, Mr Holmes. Sorry to take you there but looking at slide
9 two, it doesn't seem likely that the first question though is the first factor designed to
10 meet question two. The first factor, for example, is clearly a question one issue, isn't
11 it? It may be that the introductory wording and the reference to the impact of targets
12 on those network competitors is not as accurate as it might be but are you
13 suggesting that they've effectively answered question one affirmatively and here they
14 are now going on to assess question two and those factors?

15 **MR HOLMES:** Certainly if one looks at the slide it does appear from the first bullet
16 that they regard -- I mean, it states in fairly bald terms that the fact that the discounts
17 require a high portion of an ISP's new orders to be for FTTP and that if an ISP fails to
18 meet the target it pays higher prices, from those two facts one can already conclude
19 that there is a potential barrier to ISPs using Altnets, which we understand to be the
20 first question. That seems to be what the first bullet indicates.

21 As regards the factors which are then identified in the second bullet, the second
22 question is the likelihood of a material impact on nascent network competitors. In my
23 submission, these factors all would be relevant to that assessment. So if you think
24 about the difficulty that an ISP would face in meeting the order mix targets, if the
25 order mix targets were set at a very low percentage of 20 per cent, 30 per cent, let's
26 say, which it's very clear that ISPs would be able to meet, then it's difficult to see

1 how that would be likely to have a material impact on nascent network competitors.
2 So, in my submission, it's a factor that feeds into question two.

3 **THE CHAIRMAN:** Yes, of course. I can see that and it perhaps goes back to the
4 point about there being an overlap in question one and question two. Perhaps
5 I suppose I would like to try and pin you down a little bit and maybe this is not
6 possible to do precisely but about how low this threshold is, because if I understand
7 you correctly, you are saying that all you need to do in order to trigger question one
8 is to satisfy the statement and the first bullet point, i.e. there are conditions in which it
9 could happen, whether even that as a matter of theory and principle, and I had
10 understood that you were not arguing that -- I may be wrong, but I understood you
11 were not arguing that a theoretical possibility would trigger question one.

12 **MR HOLMES:** No, there needs to be a plausible basis on which it could be said that
13 a potential barrier arises. We accept that.

14 **THE CHAIRMAN:** The plausible basis is therefore going to require you to ask
15 yourself at least some of the questions in the factors in the second bullet point?

16 **MR HOLMES:** Yes, as I have said, I think that there is a potential for an overlap
17 between those questions --

18 **THE CHAIRMAN:** Yes, of course, I am just making sure I understand your case on
19 this absolutely. Yes. You are going to come back no doubt to plausible and what
20 that actually means in due course.

21 **MR HOLMES:** In the context of ground 2. I think that's the place to address it.

22 **THE CHAIRMAN:** Sorry, just to finish on this slide then, the point that I am taking
23 from where we've got to is to that to the extent that the slide might suggest the
24 author had considered that question one had been answered affirmatively and that
25 the following factors in bullet two were in pursuant of answering question two, you
26 are not suggesting -- and we don't know, we don't know on what basis that

1 conclusion was drawn if it was in relation to question one, but you would accept that
2 within that there should have been some assessment of the plausibility of the
3 statement in question one in order to trigger the question?

4 **MR HOLMES:** Yes, we accept that there needs to be a plausible basis on which to
5 conclude that there could be an impact.

6 **THE CHAIRMAN:** Yes, thank you.

7 **MR HOLMES:** Pages 3 to 6 then set out how Ofcom may approach and analyse
8 each of the factors that have been identified as relevant. If you turn on to page 6,
9 that's 469 of the rolling numbering, Ofcom specifically addresses overlap. Again we
10 will see elements of this preliminary thinking reflected later in the documents.

11 There are several points to note. First, it's clear that by 8 July Ofcom had identified
12 overlap as a relevant factor in its analysis. Secondly, you see from the second bullet
13 that Ofcom saw a need to focus on overlap between nascent network competitors
14 generally, at least insofar as they wholesaled, and not just CityFibre. That is
15 consistent, we say, with the approach taken in the market review.

16 Thirdly, Ofcom's focus was on overlap in the short term, not just the long term. One
17 sees that from the third bullet on the page, distinguishing the long-run approach
18 position and the short-run position.

19 Fourthly, the final bullet sets out sources of evidence that would be relevant. At point
20 two of that bullet it specifically identifies expectations in relation to being overbuilt by
21 Openreach.

22 Turning on to page 10, Ofcom provides illustrative examples of the overall qualitative
23 assessment of question two. The subheading is striking: "Assuming we cannot
24 knock out the theory of harm using the gating questions, we can draw together the
25 previous factors to reach a conclusion." So Ofcom was considering how it could
26 knock out this theory. Ofcom then sets out four factors it has identified and you see

1 from the headings that they go to whether there may be competition concerns or
2 whether on balance competition concerns are unlikely.

3 So they don't appear to be directed to the preliminary question whether there's
4 potential for ISP incentives to be affected, on which you have my submission, it
5 appears that Ofcom treated that as answered in the affirmative. As we'll come on to
6 see in the contested decision, Ofcom in effect put the first two factors, difficulties to
7 meet the targets and significance of the discounts, in the first, the left-hand column,
8 the may be competition concerns column, and it put the third and fourth factors,
9 degree of overlap and extent, in the right-hand column.

10 One final point on the slides, before we leave them. At page 16, Ofcom addressed
11 the question of how --

12 **THE CHAIRMAN:** Can you pause there.

13 **MR HOLMES:** Yes, of course.

14 **PROFESSOR WATERSON:** Maybe this is not a question for you so much as for
15 Ofcom later but under the second factor --

16 **MR HOLMES:** Yes.

17 **PROFESSOR WATERSON:** -- what is the difference between the illustrative
18 scenario where there may be competition concerns and the illustrative scenario
19 where on balance competition concerns are unlikely?

20 **MR HOLMES:** It's a curiosity. I think it's just a glitch in the document. I suspect the
21 second column should have added a "not" or should have changed the formulation
22 on one side or it may be that they already felt this condition was met. But it's odd
23 that they didn't change the formulation on the left-hand side and the right-hand side.
24 It's maybe something that Ofcom can assist you with.

25 **PROFESSOR WATERSON:** Yes, I just raise it at this point so that later Ofcom can
26 say what they meant.

1 **MR HOLMES:** Yes. That's helpful. On page 16, and the only reason I show you
2 this slide, it's page 479 of the bundle, is that in these proceedings Ofcom has placed
3 some reliance upon a comparison between Openreach's pricing and another Altnet's
4 pricing. You see that at paragraph 13 of their skeleton argument. They now seem to
5 think that was of relevance to assessing the offer.

6 But with respect, the fact that some Altnet's pricing may be lower than Openreach's
7 shows one nothing about the potentiality of Equinox to act as a barrier to Altnet's
8 sales to ISPs. The reason is very clearly stated by Ofcom here at the outset of its
9 investigation in the second main bullet on the page. The Equinox discounts apply to
10 Openreach's entire FTTP footprint. Thus, if using an Altnet jeopardises these
11 discounts, then that Altnet is unlikely to be appealing regardless of how low its prices
12 are. In other words, to win the business the Altnet would have to compensate for the
13 lower prices across the entire non-contestable portion of the market.

14 So Ofcom's current reliance upon the existence of a price differential is a bad point,
15 in my submission. They recognised that, they called that, rightly, at the outset of the
16 investigation.

17 **THE CHAIRMAN:** Can you help us with the significance of this document in the
18 context of this case. What account should we take of it in circumstances where we
19 have a consultation document and responses and then a decision and then of
20 course we've got the evidence from Mr Matthew and Mr Harries? What is the
21 legitimate use of this document in considering the issues in play here?

22 **MR HOLMES:** We say that it sheds light on the approach that Ofcom was taking
23 across time. But we do agree that of course the key documents are the consultation
24 and the decision. Those are the documents that should be the main focus of the
25 Tribunal's assessment. So we don't suggest that Ofcom can be shown to have
26 committed error by reason of these slides. We simply say that they are informative

1 in understanding the issues that Ofcom was grappling with over time.

2 **THE CHAIRMAN:** That's helpful, thank you.

3 **MR HOLMES:** Now, as Mr Harries explains, in parallel to the call for inputs process,
4 Ofcom -- apologies.

5 **PROFESSOR WATERSON:** Sorry, just before we leave that document, I gather we
6 are leaving that document now, it would help my understanding, and again this not
7 really so much a point for you as a point for Ofcom at some stage, to understand
8 what a new legacy connection is.

9 **MR HOLMES:** Yes.

10 **PROFESSOR WATERSON:** Because that obviously affects the proportion and I am
11 not completely clear as to what a new legacy connection is.

12 **MR HOLMES:** I can give you perhaps some assistance with this, although it may
13 take me a moment to find the reference, because there is an indication about what
14 a legacy product is in the statement itself. But in the statement itself and in the
15 passage of -- I will find that reference if I may and give it to you. But in that and also
16 in Mr Matthew's statement at page 161, paragraph 6 to 8, there is a description of
17 the legacy products.

18 The focus is on products that are partially copper based. In other words products
19 that are sometimes called FTTC rather than FTTP products, where the last little bit is
20 still across the copper network to the house, the final connection. The significance of
21 that of course is that there is only one provider in the market who is in the business
22 of providing a connection of that kind, FTTC, and that is Openreach.

23 **PROFESSOR WATERSON:** Yes.

24 **MR HOLMES:** The Altnets are building FTTP networks. So we are a little perplexed
25 by the suggestion that the Altnets could offer a legacy product, which one sees in
26 some Ofcom documents. Certainly we've explained to Ofcom, and we can find you

1 references, that it would involve degrading the product that's offered at a cost to
2 CityFibre to do so.

3 But that's a point perhaps I can return to if necessary. I don't know if that goes some
4 way to addressing your question?

5 **PROFESSOR WATERSON:** Yes, and so, as I understand it, simply switching ISP
6 from one -- does switching ISP from one FTTC to another FTTC, does that count as
7 a new connection or a new order or not? That's what I am not clear on. But, as
8 I say, this is more a question for Ofcom than yourselves.

9 **MR HOLMES:** Yes.

10 **PROFESSOR WATERSON:** But I just raise it at this point in order to facilitate any
11 discussion tomorrow.

12 **MR HOLMES:** Yes, I am grateful.

13 Now, moving on to the next sort of piece of the story, there are, in parallel with the
14 call for inputs, a series of bilateral calls between Ofcom and number of parties and
15 these are, in my submission, directly relevant to the information gathering and
16 consultation exercise which Ofcom undertook in relation to the overlap conclusion.
17 So although they are not the consultation document and the statement, they are
18 material to the grounds of appeal and that's why I raise them with you.

19 The bilateral calls, as Mr Harries explains at paragraph 15C of his witness statement,
20 were to seek to understand what relevant information CityFibre and BT might hold
21 about overlap. Ofcom sent an initial list of questions to CityFibre on 20 July. For
22 your note, they are at bundle 2B, tab 33. Ofcom also had a call with CityFibre.
23 Again for your note, that's at 2B, tab 35.

24 I won't take you there for reasons of time but in summary CityFibre confirmed its
25 long-term build plans but was not asked about its short-term build plans. CityFibre
26 confirmed that it would not by choice overbuild because of the importance of the first

1 mover advantage. That's the point that once customers are already on another
2 FTTP network they would be hard to shift.

3 CityFibre also explained that its assumption long term was there would be
4 100 per cent overbuild of its network. Again it was not asked by Ofcom about its
5 short-term overbuild assumptions.

6 Mr Harries explains that Ofcom felt it had sufficient information on current and
7 long-term overlap and that it did not prioritise identifying estimates of short-term
8 overlap because it considered this was uncertain and it would be difficult to gather
9 clear and reliable evidence. That's explained at paragraph 21C of his statement.

10 The next stage of the process was Ofcom's consultation document and that was
11 published at the start of August 2021. It's in bundle 2B at tab 45. If we could pick it
12 up, please, on page 587 at paragraph 2.34.

13 **THE CHAIRMAN:** Sorry, could you give us those again.

14 **MR HOLMES:** I am sorry, I am going too fast.

15 **THE CHAIRMAN:** Which tab is it?

16 **MR HOLMES:** It's tab 45.

17 **THE CHAIRMAN:** Thank you.

18 **MR HOLMES:** That's the consultation and you see at the bottom of front
19 page 6: August 2021. At page 587, you see the material analysis relating to whether
20 conditionality of the discounts acts as a barrier to Altnet entry and expansion.

21 At 2.34, you see the point that some stakeholders had submitted that the targets
22 might create a barrier to using Altnets. At 2.35 Ofcom articulates the concern. And
23 this is familiar from the market review. It's the concern that Openreach is an
24 unavoidable trading partner because of its national coverage. You see there
25 Ofcom's position is the incumbent nationwide fixed telecoms network and this could
26 allow it to leverage its position to raise barriers to entry and expansion for Altnets by

1 making -- and you see the reference that being de facto -- by de facto making
2 discounts in the unavoidable areas conditional on not using Altnets in other areas.

3 This goes back to your question about indirect effects. We say Ofcom had it right. It
4 was looking that position de facto and the offer was within the scope of the
5 notification requirement and Ofcom's task was therefore to consider whether that
6 gave rise de facto to the discounts leading ISPs not to use Altnets in other areas.

7 At paragraph 2.38 you see the analytical framework from the market review, which
8 we've discussed. At 2.39 the three questions that Ofcom derives, including the
9 preliminary potentiality question.

10 Ofcom's entire assessment is then set out in paragraphs 2.45 to 2.55. First, at
11 paragraph 2.46, you see that Ofcom recognises that the order mix targets could
12 deter ISPs from moving volumes from Openreach to Altnets if doing so jeopardises
13 meeting the targets. This is because if an ISP failed to reach the targets it would pay
14 higher prices across the entire Openreach FTTP footprint, in other words the
15 leveraging. The discounts met could be substantial based on Ofcom's analysis in
16 annex 6 thereby creating strong incentives.

17 Secondly, at paragraph 2.47, you see that there is considerable uncertainty about
18 precisely how ISPs will perform against the targets, but crucially at point (b) there are
19 plausible scenarios in Ofcom's provisional assessment where at least some ISPs
20 struggled to meet all of the targets at least in the short-term, described as in the next
21 few years.

22 So taking those points together, Ofcom here identifies a powerful incentive effect to
23 purchase FTTP across the footprint where ISPs are close to the targets and
24 plausible scenarios in which ISPs would indeed be close to the targets. If you recall
25 the four factors in the Ofcom internal slides, for your note that's at bundle 2A, tab 26,
26 page 473, those conclusions correspond to the left-hand column conclusions in

1 relation to factors one and two, tending to suggest that there may be competition
2 concerns.

3 Thirdly, and in consequence, you see at paragraph 2.49 that Ofcom therefore
4 considered how ISPs might behave. In particular, whether ISPs using an Altnet are
5 likely to continue to sell Openreach legacy products in areas where Openreach's
6 FTTP footprint overlaps with that Altnet.

7 The targets obviously depend on the balance of Openreach legacy and FTTP
8 products and it's therefore relevant to consider to what extent ISPs would or could
9 avoid buying Openreach's legacy products.

10 At paragraph 2.50 Ofcom explains that the scenario it has in mind is where an ISP
11 uses the Altnet for orders from consumers that prefer FTTP but uses Openreach's
12 legacy network for orders from consumers that prefer legacy broadband products.

13 The ISP would then be placing those legacy orders even though there are two FTTP
14 networks available, Openreach and the Altnet. If an ISP were to do this, it would find
15 it harder to satisfy the order mix targets. In those circumstances, of course it would
16 be incentivised to switch FTTP sales away from Altnets if its continued legacy sales
17 meant that it was close to the targets.

18 But of course if ISPs could avoid selling Openreach's legacy products it would avoid
19 the problem. So Ofcom therefore considered the key question was whether ISPs
20 would continue to sell legacy products at all. At paragraph 2.52 it considered
21 whether ISPs would sell Openreach legacy products to their own end user
22 customers who prefer legacy broadband. It concludes that this is unlikely.

23 Then at paragraph 2.53 it notes that some ISPs purchase access from Openreach
24 that they resell to smaller ISPs downstream. If downstream ISPs were to continue
25 ordering legacy broadband products this would make it harder for the upstream ISP
26 to meet the target. You see at the top of the following page, page 592, Ofcom's

1 provisional view that this risk was likely to be small and time limited. On that basis,
2 at paragraph 2.54, Ofcom provisionally concluded that the targets do not create
3 a potential barrier to using Altnets and therefore didn't consider two and three.

4 So a number of observations about this. First of all, it doesn't express or articulate
5 the nine-point plan which is now relied on in the evidence of Mr Matthew. So if, as
6 he says, this structure underlay the analysis, it wasn't explained to consultees. It
7 was conducted by reference to certain of the factors identified as relevant in Ofcom's
8 internal slides.

9 Although Ofcom concluded that the ISP reseller problem was likely to be small and
10 time limited relating only to the next few years, it did not actually address the
11 question of whether there was a potential for a barrier to arise during that
12 time-limited period or whether that might raise competition concerns. Ofcom did not
13 in its analysis place any reliance on any conclusions about degree of short-term
14 overlap. It only went so far as to say that short-term overlap was uncertain. You see
15 that in footnote 56 at the foot of page 591:

16 "The scale of this effect depends on the proportion of the Openreach FTTP footprints
17 where the ISP engages in this behaviour. If announced build plans are realised, in
18 the longer term Altnets that provide wholesale access to ISPs may be present in
19 approximately a third of the footprint. In the shorter term, the extent to which Altnets
20 that provide wholesale access to ISPs are present is uncertain."

21 It refers to annex 8. So no conclusion that the overlap will be limited, only a finding
22 that it was uncertain.

23 It's not surprising that Ofcom placed no reliance on any assumption about the extent
24 of overlap. Ofcom's witness, Mr Harries, has candidly accepted in his evidence that
25 Ofcom had concluded that evidence on short-term overlap was difficult to gather,
26 uncertain and unreliable and for this reason it had not asked any industry parties for

1 estimates.

2 **DR BELL:** Before you go on, can we just step back to the initial exchanges and the
3 call for inputs.

4 **MR HOLMES:** Yes.

5 **DR BELL:** On the face of the papers we have, what was said by CityFibre seems to
6 be very limited in the first contact points on this.

7 **MR HOLMES:** Yes.

8 **DR BELL:** Why was that?

9 **MR HOLMES:** So the call for inputs was of course very limited. It didn't structure at
10 that point any particular analysis, it didn't present any particular analysis which
11 Ofcom intended to pursue. The offer was a complex one and CityFibre was
12 digesting it and attempting to understand its implications, which operated at number
13 of levels.

14 In its response to the consultation, which is the stage we've just been looking at,
15 CityFibre certainly did explain why in its view it disagreed with Ofcom that there was
16 no potential barrier and I can take you to that, although will take me a moment to find
17 it, it didn't specifically address the degree of overlap because that wasn't relied on by
18 Ofcom as a reason for its conclusion. Ofcom leaves the question of overlap without
19 a finding in relation to the short term. It leaves it open based on the lack of certainty.
20 Consultees therefore did not have any indication of the approach that Ofcom
21 ultimately adopted in the final decision and the reliance it ultimately placed on the
22 assumption that overlap would be limited in the first 12 to 24 months.

23 Does that address your question?

24 **DR BELL:** To a degree. The wider points at issue, which of course you regard as
25 extremely serious --

26 **MR HOLMES:** Yes.

1 **DR BELL:** -- presumably were evident in the mind of CityFibre?

2 **MR HOLMES:** Yes, they were --

3 **DR BELL:** The issue about the investor perspective and so on, that was not brought
4 forward at an initial stage?

5 **MR HOLMES:** It was certainly something that CityFibre has pressed on Ofcom on
6 a number of occasions and perhaps I could come back to you with chapter and verse
7 on this because I don't have the references immediately to hand. It wouldn't be fair
8 to say that CityFibre did not make its concerns in relation to the Equinox offer
9 abundantly clear to Ofcom during the complete process of consultation. But if I may,
10 I am sorry to add it to the list of questions where I promise you a response but it's
11 something that would be easier to do after short adjournment when I have had
12 a chance to collect the references.

13 **THE CHAIRMAN:** Putting the point perhaps in a slightly different way, the way
14 you've described the reasoning in the consultation document and the points you've
15 just made, that you are saying there is a defect on the face of the reasoning because
16 they have dealt with a number of different aspects which narrow down the various
17 risks that they have ascertained but they've left a gap.

18 **MR HOLMES:** They don't specifically consider the short-term impact and they don't
19 reach any view about the overlap in the short term.

20 **THE CHAIRMAN:** I am sure you are going to address us on what the position is in
21 the context of a consultation, but actually that gap was, I assume, apparent to Ofcom
22 because it addresses it in the next document.

23 **MR HOLMES:** Indeed, yes, that's the next point I was going to make.

24 **THE CHAIRMAN:** The question that flows in a way from Dr Bell's observations is
25 was it not apparent to CityFibre, why would it not have been apparent to CityFibre?
26 Now, that may be more a question for what the rules are for a proper consultation.

1 **MR HOLMES:** Yes.

2 **THE CHAIRMAN:** But there is this point, isn't there, that on the analysis you've just
3 given us it is apparent, so you say, that Ofcom have narrowed the issue down to one
4 point which they haven't dealt with which is apparent on the face of the document?

5 **MR HOLMES:** Well, they do not offer any specific reasons in relation to the
6 short-term overlap and they certainly don't suggest the answer to the short-term
7 incentive effect and they certainly don't suggest that the answer to that question is
8 that the overlap will be limited during those two years. That's not something that one
9 finds in the consultation. It's not something, in my submission, that consultees could
10 fairly divine from the consultation document.

11 **THE CHAIRMAN:** You say that, except on the analysis you've just given, if you
12 were reading it and had appreciated that analysis, wouldn't you be immediately
13 thinking there is a period here where we are exposed --

14 **MR HOLMES:** Yes.

15 **THE CHAIRMAN:** -- to this effect and our investors are not going to like it and
16 therefore we need to make that very, very plain to Ofcom? And the answer to that is
17 going to be: by the way, we think your points which are made in footnote 56 about
18 overbuild of the short-term, the answer to that is whatever it happens to be.

19 So I think the point that Dr Bell is making is that on your analysis it is apparent that
20 there is -- it may not have been consulted on directly but there is a gap here which
21 on your analysis should have been important and responded to by CityFibre as
22 a commercial matter. We'll come back to legal implications but as a commercial
23 matter.

24 **MR HOLMES:** My submission is that CityFibre did make it clear to Ofcom that it
25 perceived a problem and it disagreed with Ofcom's conclusion that there was no
26 problem.

1 **THE CHAIRMAN:** In relation to the short term and with reference to the overlap but
2 that's really the point we are making. I think we know they didn't, so I am not trying
3 be difficult about it. It is something we probably should leave for discussion about
4 what the right approach to consultation is.

5 **MR HOLMES:** Yes. The key point though is, in my submission, there's nothing on
6 the face of this document that would lead one to conclude that Ofcom were placing
7 reliance on the overlap, the extent of the overlap as a reason for concluding that
8 there was no difficulty.

9 **THE CHAIRMAN:** Yes, but that makes sense, doesn't it, because on your analysis
10 they've actually missed that point and haven't dealt with it, so in a way it's a larger
11 point -- it's the same point reflected in a different way, which is that instead of them
12 having -- if they had reached a conclusion in the end then of course you would say
13 you might have -- you do say you would have responded to that and responded in
14 the way that, for example, Mr Dunn has done in these proceedings, but this is
15 a different point. This is it's apparent from the consultation document that there is
16 a gap, on your analysis a gap in Ofcom's reasoning and I think it's been put to you
17 that CityFibre did not respond to that by pointing out the gap and therefore also at
18 the same time pointing out the consequence of the gap.

19 **MR HOLMES:** So Ofcom was presenting an overall conclusion as to the potentiality
20 for these arrangements to give rise to a barrier to using ISPs. CityFibre responded
21 to that consultation. It didn't address any view as to the extent of the overlap within
22 any particular period because Ofcom didn't found its reasoning on any conclusions
23 about the extent of the overlap and it was therefore not something that CityFibre
24 could have identified as a matter of concern. That's my submission.

25 It's a point that perhaps I will return to when we come to ground 1. But for now could
26 I just show you what happened next.

1 **THE CHAIRMAN:** Yes, of course, yes.

2 **MR HOLMES:** Ofcom's view was out for consultation and it turned to consider in
3 parallel whether a barrier could arise during the period during which ISPs might
4 struggle to meet the OMTs, the two-year period identified.

5 You can see that from Mr Harries' witness statement. We should perhaps go there
6 briefly. It's core bundle tab 6 at page 175.

7 You see there he says that Ofcom considered during the consultation, while the
8 provisional assessment was out for consultation whether --

9 **THE CHAIRMAN:** Sorry which paragraph?

10 **MR HOLMES:** 25 -- whether there were areas where further evidence could be
11 added to the assessment and one area was whether it could put a more precise
12 estimate on the current level of overlap.

13 Mr Harries says that Ofcom decided to ask further questions about current overlap
14 because it thought that this could provide a useful reference point -- that's at the end
15 of paragraph 25 -- when thinking about the level of overlap over the period in which
16 ISPs might face challenges.

17 For this reason Ofcom decided to make further section 135 requests -- those are
18 formal requests for information -- of Openreach and CityFibre asking them to provide
19 estimate of the current degree of overlap. For your note, you see those in
20 bundle 2B, tab 48, 626 to 631.

21 We do say that there are a number of things that we find perplexing about Ofcom's
22 approach at this stage of the process. According to Mr Harries, Ofcom was already
23 confident that the current overlap was low and he makes that point at
24 paragraph 21(a). If it had wished to have more precise information on current
25 overlap, it could simply have asked CityFibre and Openreach to update the build
26 information which Ofcom had already collected during the market review process

1 and to see to what extent that reflected increased levels of overlap.

2 So to ask these providers to estimate the degree of overbuild where each could only
3 see one side of the equation was difficult to understand and not liable to generate an
4 accurate and precise figure for current overbuild. Current overlap in any event
5 wasn't the key issue. The relevant question was as to overlap over the coming
6 two years. On this, it's really quite striking that Ofcom did ask Openreach for
7 assumptions of short-term future overlap but it didn't ask CityFibre or any of the other
8 Altnets for similar assumptions. That's explained at paragraph 27 of Mr Harries'
9 statement.

10 In its skeleton argument, paragraph 49, Ofcom states that it didn't prioritise seeking
11 information from Altnets on short-term overlap because it considered such
12 information was likely to be unreliable. There are several points about that. First,
13 the fact that Ofcom did ask Openreach this question demonstrates that Ofcom
14 considered that this information was not so uncertain or unreliable as to be useless
15 to its analysis.

16 Secondly, Ofcom was asking Openreach and CityFibre each to estimate current
17 overbuild based on partial information. That was hardly likely to be significantly more
18 certain or reliable as a basis for estimating short-term overlap.

19 Thirdly, the question Ofcom was addressing was whether there was potential for ISP
20 incentives to be affected and to the extent that this depended on future overlap
21 Ofcom didn't need to arrive at precise, absolutely precise assumptions about overlap
22 to assess whether there was such a potential effect.

23 Fourthly, and in any event, there was in our submission a more sensible approach
24 that Ofcom could and we say should have adopted which would have been the
25 subject of much less uncertainty. Instead of asking for estimates of short-term
26 overlap from operators, each of whom could only see one side of the equation, it

1 could have asked Openreach and the Altnets to update their build data supplied in
2 the market review process with additional data on their short-term build plans. It
3 could then have compared those plans to ascertain overlap.

4 Mr Harries also states that Ofcom did not expect CityFibre to have pre-existing
5 documentary evidence on future overbuild estimates for the next few years. He says
6 that at paragraph 27 of his statement. But with respect, we say that that is
7 unrealistic given the importance which, as Ofcom acknowledged, Altnets place on
8 first mover advantage. This meant that CityFibre was very alive to the extent of likely
9 overbuild.

10 In any event, CityFibre and other Altnets and Openreach itself would inevitably have
11 pre-existing build plans for the next few years which Ofcom could readily have
12 obtained and compared.

13 Ofcom's reliance on the word "prioritise" and its reference to the 90-day window as
14 justifications for not asking these questions is not convincing. Mr Harries says this
15 deadline was challenging and required Ofcom to prioritise what analysis it carried out
16 and what evidence it gathered. That's at paragraph 14. But the offer had been
17 informally discussed with Ofcom for two months prior to formal notification.
18 Mr Harries' evidence explains that Ofcom's formal analysis began in mid-June,
19 weeks in advance of the notification.

20 It's difficult to see how asking Altnets a simple question about their build plans for the
21 next few years so as to obtain at least an indicative estimate for short-term overlap
22 would have added very materially to Ofcom's burdens. Even if the exercise did
23 affect timing, given the late stage at which Ofcom came to consider short-term
24 overlap, Mr Harries himself accepts at paragraph 13 of his statement that the 90-day
25 window was not a hard deadline for publication of a decision. As he says there:

26 "Ofcom could have taken more than 90 days to complete our consideration of the

1 Equinox offer if necessary."

2 Ofcom considered it desirable to complete the process before the offer came into
3 effect but we say it was also desirable for Ofcom to consult properly and to gather
4 relevant information to support its findings.

5 CityFibre submitted its response to the consultation on 6 September 2021 and we
6 accept that that response did not address any assumption about the extent of
7 short-term overlap. We say that was because the consultation document did not
8 identify or place reliance on any such assumption. Nor had Ofcom asked about this
9 assumption in the course of the interim correspondence that had occurred between
10 Ofcom and CityFibre. In the circumstances, as I think I have submitted, it wasn't
11 surprising that CityFibre brought forward no evidence or analysis addressed to the
12 question of whether the degree of overlap in the next few years meant that there was
13 no potential barrier in the short-term. There was nothing to indicate that Ofcom
14 intended to place reliance on the extent of the overlap.

15 Ofcom's contested decision was then published on 30 September 2021. This is the
16 final stage of my introductory comments before I come to the submissions on the law
17 and on the grounds. It's bundle 2B, tab 74. The relevant part of the analysis and
18 conclusions begins on page 879.

19 At paragraph 3.78, Ofcom gives an overview of its reasoning. The potential impact
20 of the discounts on ISP incentives is explained in point A. The discounts if the order
21 mix targets are met could be substantial, in which case ISPs could be strongly
22 incentivised to meet them. Therefore the order mix targets could deter ISPs from
23 moving volumes from Openreach to Altnets if doing so jeopardised meeting the
24 targets.

25 At point C, Ofcom explains why it considers there is no barrier in the medium term.
26 ISPs will have stopped selling legacy products by then. The reasoning on that point,

1 which is broadly consistent with the consultation document, is uncontroversial. (d)
2 then explains that in the short term, which is now clearly specified as the first 12 to
3 24 months, some ISPs may struggle to hit the targets.

4 (e) then explains why there is nonetheless no short-term barrier. That's because of
5 the conclusion that there will be limited overlap over the next 12 to 24 months which
6 makes it unlikely that ISPs will be deterred by the targets from using Altnets.

7 This is the new reasoning which was not reflected in the consultation document and
8 it drives the conclusion at (f) over the page. "We thus conclude that the Order Mix
9 Targets do not create a potential barrier to using altnets."

10 Pausing there, it's perfectly obvious from Ofcom's own summary of the central
11 planks in its reasoning that the overlap conclusion was material. In fact it was the
12 key point underlying the conclusion there was no potential barrier in the first 12 to
13 24 months. The full reasoning is then developed over paragraphs 3.79 to 3.89 and
14 the part that's material for us begins at 3.83 and following because it relates to the
15 short term.

16 At 3.83, Ofcom notes that:

17 "We have also considered whether there are short-term difficulties in stopping selling
18 legacy products. Specifically some ISPs expect to face temporary challenges
19 meaning that they will continue to make some legacy sales and as a result may
20 struggle to hit the targets for the first 12 to 24 months."

21 Then you see at (a) and (b) that's specifically because of issues with getting systems
22 in place and, at (b), also because some ISPs, TalkTalk and Vodafone, two of the
23 three contestable ISPs, purchase access from Openreach that they sell on to ISP
24 resellers downstream.

25 If ISP resellers were to continue ordering legacy broadband products this would
26 make it harder for the upstream ISP to meet the order mix targets. You see what

1 one particular ISP said about whether it would be able to meet the targets in the first
2 12 to 24 months.

3 At paragraph 3.84, Ofcom specifically considered whether various catch-up
4 mechanisms in year one were sufficient to address the problem. As you've seen
5 from BT's evidence, this is a point on which they place some emphasis in these
6 proceedings. But you can see Ofcom's conclusion about it at the top of page 882.
7 Ofcom was not satisfied that those catch-up mechanisms addressed the concern.

8 The final two lines of the paragraph:

9 "Note that notwithstanding this [that's to say the catch-up provisions], some ISPs are
10 likely to continue to need to place legacy orders and may struggle to meet all of the
11 order mix targets in the next 12 to 24 months."

12 That's to say during a period after the catch-up provisions have largely expired.

13 At paragraph 3.85, Ofcom explains that it had considered whether the ISPs could
14 potentially be deterred from using Altnets in the limited period and they say the
15 evidence does not support that. This is because placing orders with an Altnet is
16 likely to have very little effect on the ISPs mix of Openreach orders across whole
17 Openreach FTTP footprint implying there is no potential for Altnets to be foreclosed.

18 You see that this conclusion was informed by the information Ofcom had received
19 from ISPs as part of its information gathering. It's set out at annex 3. Can I just
20 briefly take you to some of what is in annex 3. The relevant bit starts at page 917.

21 If I could ask you to read 3.19 and 3.20, please. **(Pause)**.

22 Resellers presented particular challenges. You will see from the final subparagraph
23 of 3.20 that TalkTalk considered that the Equinox offer needed to be adjusted in
24 consequence and asked for sales through resellers to be excluded from Equinox not
25 just during the initial year but during the 24-month period where temporary
26 challenges arose.

1 Turning on to page 921, you see at paragraph A3.32(a) at the top of the page the
2 proportion of TalkTalk's and Vodafone's customers that were supplied through
3 resellers and at (b) you see the types of broadband products that resellers
4 predominantly purchase.

5 At (c), Ofcom considers whether TalkTalk and Vodafone could withdraw sales of
6 legacy services from resellers and you see what Ofcom concludes about that.

7 Finally, at A3.33, you see Ofcom's conclusions about the short-term impact and the
8 period of that impact. Some ISPs may struggle to hit the targets in the first 12 to 24
9 months due to temporary challenges. You can please review the confidential
10 evidence on which that conclusion is based in the following red block of text. That is
11 what the ISPs were saying.

12 After that detour, if we could return to the reasoning in the body of the decision at
13 page 882. We've looked at paragraph 3.85. You see at the end of the paragraph
14 the conclusion that placing orders with an Altnet is likely to have very little effect on
15 an ISPs mix of orders, implying no potential for foreclosure. And 3.86 explains the
16 reason for this conclusion:

17 "The scale of the effect depends on the proportion of the Openreach FTTP footprint
18 where the ISP engages in this behaviour."

19 In other words, it depends on the overlap.

20 Then at (a) one finds the overlap conclusion repeated, namely that overlap of Altnets
21 within the Openreach footprint is likely to be limited over a 12 to 24-month time
22 horizon and reference is made in support of the overlap conclusion to annex 4 and to
23 annex 3 and the simple calculation which is offered there to illustrate that using an
24 Altnet will have a limited impact. I should just perhaps show you that briefly. It's in
25 annex 3 at page 924.

26 You see there that Ofcom has worked on the assumption, for illustrative purposes,

1 that Altnets would be available in between 2 per cent and 5 per cent of Openreach
2 footprint over the 12 -- you see at A3.45, this is expressed in terms of the next 12 to
3 24 months, just at the end of A3.45.

4 Returning to page 882, paragraph 3.87 notes that even in locations where there is an
5 overlap moving volumes will not necessarily result in worsening performance. That's
6 on the basis that ISPs are likely to have various responses available to them; that's
7 to say, ISP mitigation strategies.

8 But this observation was necessarily highly speculative. As Ofcom acknowledges in
9 his skeleton argument at paragraph 23, ISPs were still in the process of identifying
10 how they would respond at the time of the statement. This explains the very
11 cautious terms in which this paragraph is couched. Ofcom says only that selling to
12 Altnets will not necessarily worsen performance, and it gives no indication as to the
13 time frames within which responses could be rolled out by the ISPs. Then at
14 paragraph 3.88 Ofcom's conclusion that the targets do not create a potential barrier
15 to Altnets.

16 Now we emphasise the following points about the reasoning in the decision. First, in
17 fact it's admirably clear: Ofcom addresses the medium-term and finds no concern. It
18 identifies a potential issue in the short term, the 12 to 24 month time horizon, but it
19 finds that there's no short-term barrier, and the key reason for that is the overlap
20 conclusion. Overlap is likely to be limited in the first 12 to 24 months. It's
21 unmistakable on the face of the decision that the overlap conclusion was central to
22 Ofcom's reasoning on the short-term.

23 That is in contrast, we say, to the position that Ofcom has taken in this litigation.
24 I will just give a few examples. At paragraph 5 of its skeleton, it's said that Ofcom
25 reached this view for several reasons, one of which was the overlap conclusion. At
26 paragraph 6, that the overlap conclusion related to one of various conditions which

1 had to be satisfied for targets potentially to create a barrier, several of which were
2 not shown to be satisfied. At paragraph 24, Ofcom's view of short-term overlap was
3 one of a number of factors which drove its answer to question one.

4 At paragraph 29, Ofcom accepts that the overlap conclusion was a factor it took into
5 account but it related to only one of nine conditions it considered had to be satisfied
6 for the targets to create a potential barrier.

7 Now those glosses, we say, simply don't reflect the decision itself. It's completely at
8 odds with the decision and the reasoning in it to characterise the overlap conclusion
9 as just one of nine relevant considerations.

10 The overlap conclusion was also new reasoning. You have my submission on that.
11 It had not featured in the consultation document, and this is unsurprising as Ofcom
12 accepts that it had not arrived at the specifics of that conclusion at the time the
13 consultation was published; and that is in Ofcom's defence at paragraph 87.

14 The contested decision certainly does not make any reference to Mr Matthew's
15 nine-point analysis. In his witness statement, Mr Matthew explains that analysis over
16 13 pages. Now if those pages do indeed represent Ofcom's underlying reasoning,
17 and we don't seek to suggest otherwise, though it's not reflected in the
18 contemporaneous documents, in our submission it's very strange and unsatisfactory
19 that it is produced for the first time in the proceedings rather than having been set
20 out in the decision or indeed the consultation.

21 Moreover, as regards the question of the status of the overlap conclusion in Ofcom's
22 reasoning, the Tribunal in my submission simply should look at the decision itself,
23 and that makes clear that the overlap conclusion was central to Ofcom's analysis of
24 the potential for short-term barriers and the Tribunal should not accept Mr Matthew's
25 assurance that it was rather simply one factor among many which Ofcom took into
26 account.

1 **THE CHAIRMAN:** It could be one factor among many and still have the sort of
2 importance you attach to it though, couldn't it?

3 **MR HOLMES:** I fully accept that, and indeed that's a submission I will make when
4 we come to the nine points.

5 **THE CHAIRMAN:** Yes.

6 **MR HOLMES:** That brings me to the law. Do you want me to embark on that now?

7 **THE CHAIRMAN:** I think you might as well make a start --

8 **MR HOLMES:** I will make a start, yes.

9 **THE CHAIRMAN:** -- and do a little bit more. How are you going terms of time?

10 **MR HOLMES:** I think I am on reasonable track. There's a fair amount of
11 background to be presented obviously. I think I will take my allocated time but I think
12 we are on course.

13 **THE CHAIRMAN:** Why don't you keep going until 1 o'clock --

14 **MR HOLMES:** Very good, will do.

15 **THE CHAIRMAN:** -- and make good use of the time.

16 **MR HOLMES:** Broadly speaking, the legal principles aren't in dispute so I can go
17 fairly quickly.

18 As we set out in our skeleton argument at paragraphs 22 to 24, we rely on three
19 basic overlapping requirements of public law. The first is that a public authority,
20 when consulting on a decision, must set out their thinking in sufficient clarity and
21 detail during the course of the consultation to enable consultees to be able to
22 respond intelligently.

23 The second is that a public authority is under a duty of enquiry. It must take
24 reasonable steps to acquaint itself with the material relevant to its decision.

25 The third proposition is that a public authority's actual findings must be founded in
26 evidence if they are to be reasonable.

1 On the duty of consultation I will briefly show you three authorities which we say
2 helpfully elucidate the principles. The first is in bundle 4A, which is the first volume
3 of the authorities bundle, at tab 17.

4 **THE CHAIRMAN:** Tab 17?

5 **MR HOLMES:** 17. You will see it's a 2010 case of Devon County
6 Council v The Secretary of State for local government. The judge is
7 Mr Justice Ouseley. The facts aren't really significant to the points that I want to
8 draw from it, but it was a challenge to a decision to make two city councils into
9 unitary authorities, and that process involved consultation in which it was explained
10 that only proposals that met certain criteria could proceed, but after consultation
11 proposals were allowed to proceed that didn't in fact meet those criteria.

12 I would like to show you how the court summarised the applicable legal principles,
13 picking it up first at page 272 of the rolling numbering. You see from paragraph 77
14 on the court sets out the parties' submissions, but it also elaborates on --

15 **THE CHAIRMAN:** 67?

16 **MR HOLMES:** 67, yes -- certain principles as it goes along.

17 At 67, in the middle of the paragraph, it sets out the basic requirements of a fair
18 consultation which is sometimes referred to as the Gunning criteria after the case
19 which is cited there, Ex Parte Gunning:

20 "Those requirements include there should be sufficient information about the
21 proposals being consulted on to enable an intelligible response to be made by
22 consultees and the responses should be conscientiously considered by the decision
23 maker before making the decision."

24 Then at paragraph 68 the judge expands on what needed to be published in the
25 proposal. He says it's partly a matter of judgment, very much a matter of judgment,
26 but there are nonetheless limits to the consulting authority's discretion.

1 "In particular, sufficient information to enable an intelligible response requires the
2 consultee to know not just what the proposal is in whatever detail is necessary but
3 also the factors likely to be of substantial importance to the decision or the basis on
4 which the decision is likely to be taken."

5 From this, we take the proposition that sufficient information must include the factors
6 of substantial importance and the basis of the decision. We say, you can anticipate
7 my submission, the overlap conclusion was a factor of substantial importance in
8 motivating Ofcom's conclusion but had not been the subject of consultation.

9 The second authority is at tab 4B at tab 31. This will actually take a little time. I don't
10 know --

11 **THE CHAIRMAN:** Shall we break now then? Let's do that and let's resume again at
12 2 o'clock.

13 **MR HOLMES:** Okay. I am grateful.

14 **(12.56 pm)**

15 **(The luncheon adjournment)**

16 **(2.00 pm)**

17 **THE CHAIRMAN:** Mr Holmes.

18 **MR HOLMES:** Thank you, Sir.

19 A quick update by way of roadmap. Two more authorities on the law and then
20 grounds one and two. Under ground 1, I will pick up the Tribunal's questions about
21 CityFibre's consultation response. Under ground 2, I will address your question
22 concerning the hierarchy of questions and how we say it fits within a logical and
23 coherent scheme, taking question one as relating to potentiality and question two as
24 relating to likelihood.

25 So first of the remaining authorities is the Law Society case, which is in bundle 4B at
26 tab 31. This is a 2019 authority, a judgment of the Divisional Court. The court was

1 composed of Lord Justice Leggatt (as he then was) and Mrs Justice Carr and it was
2 Mrs Justice Carr who gave judgment on behalf of the court.

3 The facts are quite well known but it was a challenge to a decision to reduce the
4 amount of money payable in legal aid to criminal defence practitioners and during
5 the consultation the Ministry of Justice had not disclosed the existence or substance
6 of analysis on which it had relied to calculate the appropriate restriction on fees.

7 The court's consideration of the consultation begins on page 731 of the bundle at
8 paragraphs 66 and following. At paragraph 67 the court reiterates the principle that
9 a consultation must include sufficient reasons for the particular proposals to allow
10 those consulted on to give intelligent consideration and an intelligent response, the
11 same proposition that we saw in the Devon County Council Case.

12 At paragraph 71 you see adoption and endorsement of the passage from
13 Mr Justice Ouseley's judgment, which I showed you earlier:

14 " ... sufficient information to enable an intelligible response requires the consultee to
15 know not just what the proposal is ... but also the factors likely to be of substantial
16 importance ..."

17 And the basis for the decision.

18 At paragraph 73, a frequently cited passage, the court held that:

19 "In judging whether non-disclosure of particular information made a consultation
20 process so unfair as to be unlawful, relevant consideration in our view include:

- 21 (1) The nature and potential impact of the proposal put out for consultation;
22 (2) The importance of the information to the justification for the proposal and for the
23 decision ultimately taken;
24 (3) Whether there was a good reason for not disclosing the information; and
25 (4) Whether consultees were prejudiced by the non-disclosure."

26 On the fourth point, concerning prejudice to consultees, there's another authority in

1 the bundle, I won't take you to it but it's authority for the proposition, if it were
2 needed, that a person can be prejudiced by the fact that other persons, in this case
3 the other Altnets, were not given an opportunity to respond to a consultation. That is
4 Wilson v Secretary of State for the Environment at bundle 4A at tab 10 and the
5 relevant passage is at pages 1096G to 1097A.

6 In subsequent paragraphs of the Law Society judgment the court proceeds to apply
7 these principles to the case before it. There's just one aspect of the court's
8 reasoning that we would wish to highlight. It can be seen from the court's reactions
9 to the Lord Chancellor's defence of the claim, which was discussed on page 736
10 from paragraphs 88 onwards. You see on that page that the Lord Chancellor
11 effectively made two points. First at paragraph 89 he argued that people most
12 interested in the consultation were solicitors who undertake legal aid work and they
13 are a sophisticated audience familiar with the scheme. As you see from the final
14 sentence of paragraph 89, the Lord Chancellor contended that such sophisticated
15 consultees could be expected to infer the basis of the Ministry of Justice's
16 calculation.

17 Secondly, at paragraph 90, you see the point that the fact that consultees would
18 have understood this is confirmed by the fact that one of the consultees correctly
19 drew this inference.

20 As we've seen, Ofcom has made similar submissions in these proceedings relying
21 on the fact that consultees are sophisticated and also on the fact that other
22 consultees addressed the issue of overlap in response to the consultation document.

23 The response of the Divisional Court that submission can be seen in paragraph 93
24 and following. You see they say there:

25 "It is difficult to express in language of appropriate moderation why we consider
26 these arguments are without merit. The first point, which should not need to be

1 made but evidently does, is that consultees are entitled to expect that a government
2 ministry undertaking a consultation exercise will conduct it in a way which is open
3 and transparent."

4 We rely on that principle here. Ofcom is seeking to promote network-based
5 competition, that requires huge investments and the network operators and investors
6 require clarity as to Ofcom's position so they can understand and engage with it.

7 I am asked to read the rest of the paragraph:

8 "In particular, they are entitled to expect if, on the crucial question raised in the
9 consultation paper, officials have carried out an analysis which forms the basis of the
10 proposal, then that fact will be mentioned in the consultation documents and not left
11 to be inferred."

12 We say here that the overlap assumption which was the basis for the decision was
13 not in the consultation document and was not the subject of subsequent discussion
14 or enquiry with CityFibre or any of the rest of the Altnets.

15 Then at paragraph 95 the court says this:

16 "The fact that many consultees were likely to be knowledgeable and sophisticated is
17 also not a reason for withholding important information from them. Again, if
18 anything, the opposite is true. That fact gave all the more reason to disclose the
19 analysis relied on to estimate the increase in expenditure which it was the aim of the
20 proposal to reverse because it was a reason to expect that at least some consultees,
21 such as the Law Society, would be able to provide an informed critique of that
22 analysis - having commissioned expert assistance if necessary."

23 We say the same is true here. If Ofcom had articulated the overlap conclusion at
24 any point before its final decision, knowledgeable consultees, including CityFibre and
25 other affected Altnets, would have had a fair opportunity to address it.

26 While we are in this authority, can I briefly show you the passage on need for

1 conclusions to be evidence-based if they are to be reasonable.

2 If you turn forward a page to 738, you see that the second ground of the Law
3 Society's challenge encompassed a number of arguments under the general head of
4 irrationality. That's at paragraph 98. Or, as it's more accurately described,
5 unreasonableness. The court then identified two aspects to that. The first is
6 concerned with whether the decision under review meets the so-called Wednesbury
7 formulation, that the court preferred a simpler formulation of that test which avoids
8 tautology, namely whether the decision is outside the range of reasonable decisions
9 open to the decision maker.

10 The court then proceeds to identify a second aspect of unreasonableness
11 concerning the process by which the decision was reached:

12 "A decision may be challenged on the basis that there is a demonstrable flaw in the
13 reasoning which led to it - for example, that significant reliance was placed on an
14 irrelevant consideration, or that there was no evidence to support an important step
15 in the reasoning, or that the reasoning involved an [important] methodological error.
16 Factual error, although [identified] as a separate principle, can also be regarded as
17 an example of flawed reasoning - the test being whether a mistake as to a fact which
18 was uncontentious and objectively verifiable played a material part in the
19 decision-maker's reasoning."

20 In this case we say that the conclusion of limited overlap in the first 12 to 24 months
21 was not only not the subject of consultation, it was also an unreasonable decision for
22 Ofcom to arrive at based on the limited evidence which was available to it. As I shall
23 show you, that is illustrated by the evidence which Ofcom has sought to rely on to
24 justify the conclusion in these proceedings.

25 That's the second authority. The third one is the British Gas case which is behind
26 the next tab, tab 32. The facts of this are fairly complex. It was a challenge to

1 a price cap set by Ofgem. The retail price cap. The final decision relied upon an
2 analysis of a typical supplier's approach to purchasing energy and as the court
3 found, an assumption supporting that analysis only appeared in the decision itself
4 and not at any stage of the prior consultation process and the court concluded that
5 this rendered the consultation unfair.

6 As part of its reasoning, the court made various observations, which we say are of
7 relevance. The first seen on page 763 at paragraph 59. As the court stated there:

8 "However reasonable a factual assumption underlying an analysis or calculation
9 might appear subjectively or objectively, unless it is clearly articulated to those likely
10 to be affected by it, and they are given the opportunity to comment upon it, there is
11 no means of testing whether it is sound. GEMA [the gas and electricity regulator] did
12 articulate its assumption that it was unlikely that a supplier would align with what
13 remained of the indicative April-September window, and the responses to the
14 September consultation demonstrated that the assumption was incorrect. Had it
15 done the same with the continuity assumption [the other assumption not disclosed], it
16 would have discovered that assumption to be equally incorrect."

17 I should say that this bears analogy with the overlap assumption on which Ofcom
18 relied in the decision but also did not include in the consultation. Ofcom could have
19 tested the soundness of the conclusion by obtaining the views of CityFibre and other
20 Altnets but it didn't do so.

21 The second relevant proposition is made in response to an argument of Ofgem's
22 which is recorded at paragraph 63 and you see that Ofgem was there making
23 a similar submission to that of the Lord Chancellor in the Law Society. The
24 consultees are sophisticated and had ample opportunity to explain the impact of the
25 cap on their costs and British Gas did so.

26 At paragraph 64 you see that the court, like the Divisional Court in the Law Society

1 case, did not accept that line of argument. There were two problems. The first is
2 pithily recorded at the end of paragraph 65. Ofgem's assumption "bears no
3 resemblance to reality". And the second, in paragraph 66, was that:

4 "A consultee would be unable to comment on whether the proposed allowance would
5 sufficiently approximate to the costs of a typical notional supplier if they did not have
6 enough relevant information about how GEMA proposed to estimate those costs."

7 We say that the same is true in the present case, the consultation document
8 discussed overlap in general terms and indicated that it was uncertain, but it did not
9 give the key relevant assumption about short-term overlap on which Ofcom
10 ultimately relied in the decision.

11 Finally, in paragraph 78, the court crisply encapsulates the founding principles of the
12 duty to consult, which were uncontroversial.

13 Paragraph 78:

14 "Consultation, in accordance with basic public law standards, is required to operate
15 so that the decision-maker's thinking is made transparent, in order that formative
16 stage thinking engages informed responses from the body of consultees, leading to
17 conscientious consideration, resulting in a lawful decision."

18 At paragraph 79:

19 "... consultation ... must be fair, in the sense that it affords a fair opportunity for those
20 to whom the consultation is directed adequately to address the issue in question
21 before a final decision is made ... The aspect of the obligation of fairness that is
22 particularly relevant here is the requirement to provide consultees with sufficient
23 information ...

24 Consultees must be told enough - and in sufficiently clear terms - to enable them to
25 make an intelligent response."

26 In the British Gas case that didn't happen because Ofgem did not communicate

1 a particular assumption or the underlying reason for making it when consulting or at
2 any stage before it made the decision, and in fairness it was found that it should
3 have done, and we say that's analogous with the present case where neither the
4 overlap conclusion nor the basis for it were the subject of any prior consultation.

5 Over the page at paragraph 82 you see the point that:

6 "[Ofgem] failed to explain that the continuity assumption formed any part of its
7 thinking until the Decision itself. It was not mentioned in any meetings with suppliers
8 between the consultation and promulgation of the Decision letter. The suppliers had
9 no chance to explain to [Ofgem] that it was labouring under misapprehension. The
10 fact that the assumption was a generalisation is no answer; it was a critical factor in
11 [Ofgem's assessment], and therefore it had to be communicated to the suppliers."

12 We say that the overlap conclusion was similarly critical to Ofcom's reasoning,
13 similarly not communicated either in consultation or in the subsequent interaction
14 between Ofcom and stakeholders and this was unfair.

15 While we are in this authority, could I show you how it deals with the duty of enquiry,
16 which is often closely connected with the consultation challenge. You see at
17 paragraph 83 that the court did not consider British Gas' other grounds, did not need
18 to consider British Gas' other grounds given its conclusion on consultation but it did
19 so for completeness.

20 At paragraph 84, the court briefly articulates the duty of enquiry. As explained there,
21 that duty falls upon a decision-maker to take reasonable steps to acquaint itself with
22 the relevant information to enable it to make a properly informed decision.

23 At paragraph 85, the court explains what is required:

24 "GEMA could have asked the suppliers a specific question about whether [the
25 assumption held for them], but it did not need to go that far. If GEMA had said in the
26 consultation paper what it eventually said in the Decision itself, the suppliers would

1 have been made sufficiently aware of the ... assumption, and of its importance to the
2 assessment, to be able to explain to GEMA why it was wrong. The amount of
3 information they decided to provide to GEMA to prove that its assessment was
4 based on a ... misapprehension was a matter for them. It was not incumbent on
5 GEMA to seek the details of each supplier's hedging strategy, but it did need to
6 gather enough information to enable it to be satisfied that its assumption was correct.
7 The easy way to do that was to make that assumption known to the consultees."
8 So GEMA could have proceeded by consultation or it could have gathered
9 information in other relevant ways and we say that the same is true here. Ofcom
10 could have informed itself about the extent of short-term overlap by way of enquiries
11 rather than a further short consultation. But in fact it did neither and it thereby placed
12 itself in breach of its duties of fair consultation and of reasonable enquiry and that's
13 the submission I will now proceed to develop under ground 1.
14 So on the first ground I have already submitted to you that the overlap conclusion
15 played a central role in Ofcom's reasoning on whether there is a potential barrier to
16 using Altnets in the short term. On this we invite the Tribunal simply to consider
17 what the decision says on its face. There has been extensive evidence produced
18 after the event by Ofcom which framed the overlap conclusion as part of much
19 broader reasoning. I will address those nine factors that are now relied upon. But to
20 the extent that that glosses or departs from what the decision seems to say on its
21 face, we would invite the Tribunal to prefer what is said in the decision.
22 In any event we say Mr Matthew's evidence confirms that the overlap conclusion was
23 a key plank of Ofcom's reasoning. As such, the conclusion needed to be soundly
24 based in evidence, adequately investigated and to be the subject of proper
25 consultation and we say that it wasn't and we make three very simple points about
26 that.

1 First, the conclusion was not included in the consultation document or anywhere else
2 prior to the decision. Ofcom says that it hadn't formulated the overlap conclusion by
3 the time of the consultation and so could not have consulted on the specifics of the
4 conclusion. But Ofcom's internal slides show that Ofcom had identified both
5 long-term and short-term overlap as relevant issues by the time of the publication of
6 the consultation and it could in principle have consulted on the issue or sought
7 further information without having itself reached any specific conclusion as to the
8 likely extent of overlap in the short-term.

9 What Ofcom had concluded by the time of its consultation, as Mr Harries explains at
10 paragraph 21 of his statement, is that position on short-term overlap was uncertain
11 and was not a priority. Consistently with these conclusions and its decision not to
12 investigate the issue, Ofcom's reasoning in the consultation placed no reliance on
13 any assumptions about short-term overlap. However, by the time of the decision,
14 Ofcom had reached the overlap conclusion and did place specific reliance on it.

15 Ofcom says that reconsultation was unnecessary because there was no fundamental
16 change to the answer to question one or the reasoning behind it. But the overlap
17 conclusion was not simply a new piece of additional reasoning in support of question
18 one, it was addressed to a question that was not addressed in the consultation
19 document, namely whether there was potential for a barrier to arise in the first
20 24-month period during which ISPs may struggle to meet the OMTs. Its role was to
21 plug a gap in Ofcom's reasoning on question one.

22 On this, we rely on the court's finding in the Devon County Council case, which you
23 saw, paragraph 68 of that judgment, that sufficient information to enable
24 an intelligible response requires the consultee to know not just what the proposal is
25 but also the factors likely to be of substantial importance to the decision or the basis
26 upon which the decision is likely to be taken.

1 There's no indication at all in the consultation document that an assessment of the
2 degree of short-term overlap was likely to be of substantial importance to the
3 decision. We don't say that a formal reconsultation was necessarily required but it
4 was incumbent on Ofcom to seek and to give interested parties opportunities to
5 provide relevant information to inform its assumptions on short-term overlap given
6 the weight it had newly decided to place on this.

7 That Ofcom sensed that the question was uncertain was reason to seek further
8 information to reduce the uncertainty and not the opposite.

9 As we've seen, Ofcom was in fact engaged in ongoing discussions with industry
10 parties during the consultation. It should have made its position clear at least to
11 CityFibre and to other Altnets and given them an opportunity to explain their
12 short-term build plans and what overlap might result.

13 It's no answer, in my submission, as Ofcom suggests at paragraph 20, that some
14 other consultees did make observations about short-term overlap in their responses
15 to the consultation. Ofcom specifically relies on submissions made by Openreach
16 and TalkTalk to the effect that overlap would only increase gradually and that this
17 would reduce the potential impact on the order mix purchasing from Altnets.

18 But in circumstances where Ofcom's reasoning at the consultation stage did not rely
19 on any assumptions about the speed of overbuild, it's not surprising that parties
20 interested in upholding the Equinox offer would make submissions to the effect that
21 no overlap in the first few years provided a further basis for comfort in support of
22 Ofcom's analysis. That does not mean that Altnets could reasonably be expected to
23 have anticipated that Ofcom would change tack and introduce new assumptions
24 about short-term overbuild contrary to what the consultation document suggested
25 and to have pre-emptively rebutted such assumptions.

26 At this juncture can I respond to the three questions that the Tribunal raised with me

1 about the nature of CityFibre's responses during the consultation. The first point was
2 the one that Dr Bell raised with me and if I understood correctly, it was whether
3 CityFibre raised its concerns about the impact on investment from the outset, at the
4 call for inputs stage.

5 The answer to that is that CityFibre very clearly did. That was the point I made
6 before the short adjournment. Can I now give you references to make that good.
7 Perhaps we should quickly run through the relevant materials. So for this we need to
8 go to bundle 2A and start at tab 25, which is the call for inputs.

9 **DR BELL:** Sorry, which tab?

10 **MR HOLMES:** 25.

11 **DR BELL:** Thank you so much.

12 **MR HOLMES:** This is the Call for Inputs published on 2 July 2021. At 462, you see
13 that what this does is to refer to the new pricing arrangements. At 1.3 it simply
14 invites stakeholders to raise any initial concerns with us. So at that stage there's no
15 analysis, supporting analysis as to how Ofcom might view or approach matters.

16 CityFibre's initial response was in correspondence, and that's at tab 24. I should say
17 the call for input was of course only a day after the Equinox offer was introduced to
18 the market and it allowed ten days for a response, ten working days.

19 You see at tab 24 what CityFibre wrote initially on 13 July, a few days later. You will
20 see in the third paragraph of that letter first of all that CityFibre referred to the
21 notification mechanism as a crucial tool for protection of competition. It refers to the
22 window of opportunity to encourage new network build being small. Then this:

23 "If alternative operators are unable to secure ISPs [the downstream demand] and
24 sufficient end users over a reasonable time period then it's unlikely that they will be
25 able to secure funds from investors for their FTTP rollout plans. Openreach has
26 a clear incentive to introduce commercial terms that deter the use of new alternative

1 networks and that is why the notification mechanism is so important."
2 So even at that very initial stage CityFibre was really expressing these concerns as
3 prominently as it could.
4 CityFibre's response to the call for inputs is then at tab 32. This was, of course,
5 formulated only a very short time after the offer was released to the market. But you
6 see that already at page 502 CityFibre was identifying a concern relating to
7 loyalty-inducing terms.
8 It identifies relevant parts of the market review, touching on many of the same issues
9 that we have considered. You will see that there is specific reference to investment
10 plans at 3.5, which ties in with what was said in the letter, the CityFibre letter.
11 Turning on to section 4, you see at 4.3 CityFibre sets out a number of propositions:
12 "There is a limited window to establish network competition. Alternative network
13 operators face high barriers to entry. Openreach has a clear incentive to deter entry.
14 The equinox offer has the potential to adversely affect the profitability of alternative
15 network operator investment and thereby undermine rival network build."
16 Over the page at 4.7:
17 "CityFibre is committed to a commercial rollout of full fibre with ambitious plans to
18 build to over 10 million premises. CityFibre's investment case relies on the
19 successful deployment of its fibre network and ability to drive take up on that
20 network. CityFibre's ability to scale depends on attracting significant volumes from
21 large retail ISPs who have historically relied exclusively on Openreach for wholesale
22 local access services. CityFibre has successfully concluded agreements with two
23 major ISPs and is currently seeking to negotiate additional contracts."
24 In the final sentence:
25 "CityFibre considers that even the negotiation process for Equinox software had
26 clear signalling effects to the market which Ofcom cannot ignore."

1 Just for your note, we'd also refer you to paragraph 4.18 and the section in which
2 that appears, the heading of which is "The Equinox offer has the potential to
3 adversely affect the profitability of alternative network operator investment and
4 thereby undermine rival network build".

5 Also 4.20 and 4.23, you see at the end of 4.23:

6 "The equinox offer has impacted discussion with CityFibre's current and future
7 investors over the effect of CityFibre's own build plans as a result of the uncertainty."

8 So my submission would be that it really was clearly flagged. Of course the Dunn
9 statement that I showed you earlier today was at the administrative stage. It was
10 given to Ofcom before the decision, during the consultation, and again you saw that
11 that was focused full square on the impact on investors that the Equinox offer was
12 producing because of its incentive effects on ISPs or potential incentive effects on
13 ISPs.

14 Can I just check, does that answer your question?

15 **DR BELL:** That answers my question, thank you very much.

16 **MR HOLMES:** I am grateful. The second question was raised by you, Sir, and you
17 asked whether CityFibre pointed out the gap in Ofcom's analysis in relation to the
18 short term. The answer is that we did do that. Just to show you the passage that
19 shows that, it's in bundle 2B, which is tab 59. This is the CityFibre consultation
20 response. It's a response to the consultation document.

21 If you could turn within that document to page 750. In 2.14 and 2.15, Ofcom
22 specifically deals with the temporary point and draws attention to the gap that it
23 apprehended in Ofcom's reasoning:

24 "Ofcom's sole basis for dismissing this potential barrier is to say that such challenges
25 may be temporary. Ofcom does not explain what period of time it has in mind and it
26 makes no effort to assess the extent of any such temporary challenges and it does

1 not consider the lasting impact that even a temporary challenge [even a temporary
2 challenge] could have on the rollout of alternative networks. Ofcom merely notes
3 that the challenges could plausibly last for 'the next few years'."

4 CityFibre then specifically refers to the small window of opportunity to illustrate the
5 point that the early years are important, the immediate period following introduction
6 of Equinox.

7 So we did identify the existence of a gap in the reasoning.

8 You asked whether CityFibre addressed the overlap in the consultation response
9 and the answer is again that CityFibre did address what Ofcom had said about the
10 overlap at that stage. You see that at page 742 of this response at
11 paragraph 1.7(vi).

12 I won't take you through them now but I would ask you at your leisure to review 1.7
13 generally because we say it does set out quite clearly the concerns and
14 considerations that CityFibre has subsequently relied upon in this litigation.

15 But at (vi) you see that based on the prior points we say that there was a real and
16 immediate threat to competition:

17 "Based on network operator's stated intentions Ofcom estimates that alternative
18 network operators that provide wholesale access to ISPs may come to be present in
19 approximately a third of Openreach's FTTP footprint. The extent to which overlap
20 will emerge in the short term depends on 'the extent to which Openreach prioritises
21 overbuilding Altnets in some areas' in pursuit of its strategic objectives, a matter on
22 which Ofcom professes to be 'uncertain'."

23 So the point that is being made here is that overlap is uncertain but it could be
24 substantial. It will depend upon Openreach's build plans in the short run. Therefore,
25 what CityFibre saw in the consultation document, it did address. It did not anticipate
26 and address points Ofcom had not made about the extent of overlap being small and

1 we say it could not reasonably have been expected to because that wasn't a factor
2 that was relied upon by Ofcom as part of its analysis at the consultation stage.

3 You have my point, Sir. The fact that one or another party may have responded to
4 a consultation by providing information on a certain point does not as a matter of law
5 demonstrate that that point was the subject of fair consultation. You saw the points
6 that I took you to in the Law Society case and the court there robustly rejected
7 a submission which was based in part on the fact that some consultees happened to
8 have addressed the matter at issues there.

9 **THE CHAIRMAN:** Can we just spend a minute on what would an adequate
10 consultation would have looked like, because there are a number of different places
11 where you could put the stick in the ground. So, for example, there is I think
12 something in annex 8, isn't there, which has elements of some of the reasoning
13 behind the overlap conclusion, for example the reference to views about preferences
14 of overbuilding, whether that's Openreach or the Altnets?

15 **MR HOLMES:** Yes.

16 **THE CHAIRMAN:** Then you've got, and this is not necessarily in a logical order, but
17 you have the question of identifying that it is an important, material, you would say
18 critical, assumption that fills the gap and the reasoning and they are quite different
19 things, aren't they?

20 **MR HOLMES:** Yes, they are.

21 **THE CHAIRMAN:** Then of course you have the estimate that is given as to what the
22 level might be and the calculations that are performed around that and the decision
23 depending on whether it's X per cent or Y per cent and so I guess the question is
24 where do you think there is a level of adequacy of consultation that gets Ofcom past
25 the test in *Devon*?

26 **MR HOLMES:** If I may say so, that's a very helpful taxonomy. We say that I don't

1 need to go to so far as to say that Ofcom needed to consult on a precise estimate. It
2 would have been sufficient if Ofcom stated simply that it regarded the overlap as
3 likely to be limited in the early years so that the Altnets could have expressed a view
4 about that proposition and could have considered whether it was correct.

5 Yes, indeed, I am grateful to my learned friend Ms Boyd, not only that it would be
6 limited but it would be so limited as to justify a conclusion that there was no potential
7 barrier.

8 Ofcom didn't do that, in my submission. When deciding what consultation is
9 necessary, one needs to consider, in my submission, the question which is being
10 approached and the answer which is proposed to be given, and the question
11 was: was there a potential barrier to ISPs using Altnets rather than Openreach?

12 In answering that question Ofcom didn't say in the consultation document or at any
13 stage prior to the decision that there is no potential barrier because the overlap is
14 likely to be so limited for the first two years that no potential barrier arises. It simply
15 didn't raise that point. Its general discussion of overlap, which was inconclusive in
16 the consultation document, was not an adequate basis, in my submission, to put
17 parties on notice of the important further step which it took in the final decision where
18 it placed specific reliance upon the fact that overlap was so limited, on its
19 assessment, as to avoid any even potential barrier to ISPs using Altnets.

20 **THE CHAIRMAN:** So you say, and I think the point that Ms Boyd has made, you
21 say there has to be some signposting or linkage in between the factual material
22 that's identified and the decision itself, the point that it goes to, so that somebody
23 who is reading the document can understand --

24 **(14.43 pm)**

25 **(Connection to the hearing lost with missing audio)**

26 (See end of transcript for parties' agreed note of missing audio)

1 **THE CHAIRMAN:** I think the position might be different if you are talking about the
2 sort of alternative formulation of sufficient evidence, but in terms of the fairness of
3 the consultation you would say there has to be some linkage between whatever the
4 factual material was and the decision that has been articulated?

5 **MR HOLMES:** Yes, I would say that.

6 **(Connection to the hearing lost with missing audio)**

7 (See end of transcript for parties' agreed note of missing audio)

8 **(14.48 pm)**

9 **MR HOLMES:** Is that okay? We haven't lost the transcriber? Do you have
10 a backup tape for the purposes of re-transcribing? Yes. So I think nothing has been
11 lost, Sir.

12 Ofcom's reasons for not asking about short-term build plans, we say, aren't well
13 founded. Mr Harries refers to the urgency of the 90 days and the need to prioritise.
14 But, as I have noted, the available time was in fact much longer than 90 days given
15 the extensive period for which Ofcom and Openreach were in private discussions
16 between the publication of the market review and the consultation, the notification
17 and consultation.

18 The period was in any event not a rigid deadline and a simple information request of
19 this sort would not have been an onerous addition. Mr Harries refers to uncertainty
20 about build plans. That's at paragraph 20B of his evidence. However, actual
21 short-term build plans would self-evidently have been a less uncertain basis for
22 assumptions about overbuild than inferences drawn from evidence about Altnet
23 preferences and their current level of overbuild.

24 Mr Harries also refers to the fact that Ofcom did not know that CityFibre would have
25 pre-existing information about likely short-term overlap. That's the point he makes at
26 paragraph 27 of his statement.

1 As to that, we say it's wholly unrealistic given the importance that Altnets attach to
2 obtaining a first mover advantage and limiting overbuild where that's possible.
3 Ofcom did ask both CityFibre and Openreach but not other Altnets for their estimates
4 of current overlap but Ofcom could have assessed this itself better than either party.
5 Mr Harries says Ofcom was already confident that overlap was low, so this was not
6 likely to take matters forward.

7 Ofcom did ask Openreach for its estimates of short-term future overlap but it did not
8 ask CityFibre or any of the other Altnets for their estimates about this. Ofcom says
9 this was reasonable because of uncertainties about their strategies but Ofcom could
10 have asked about their strategies to reduce the uncertainty. Ofcom also suggests
11 that the fact it asked Openreach and not others is of limited significance given
12 Openreach's nil return. But we say that's a non sequitur.

13 This was a question Ofcom had decided it was worth asking to elicit relevant
14 information that it was worth seeking. The fact that Openreach provided no useful
15 information in response to this question was a positive reason to seek that
16 information from others who might supply it, not the contrary.

17 So, in summary, we say that there were enquiries available to Ofcom, obvious ones
18 that could have informed its overlap conclusion and we do say that it was
19 unreasonable for Ofcom not to have undertaken those enquiries once it had
20 determined that short-term overlap was important to its reasoning and the Ofcom
21 stated reasons for not undertaking further enquiries are, we say not, compelling.

22 The third point is that Ofcom's conclusions on short-term overlap in the decision
23 were not so soundly based in the evidence on which Ofcom did rely as to make it
24 reasonable to dispense with consultation or enquiry. In this regard, it's instructive to
25 consider annex 4 to the decision, which is what Ofcom relies on primarily in this
26 regard.

1 If we could reopen the decision at tab 74 and turn to page 927. This is in the
2 decision itself. The material on short-term future overlap begins at paragraph A4.6.
3 The Tribunal sees there the general proposition that how overbuild develops will
4 depend on network build strategies and Ofcom notes that Altnets generally avoid
5 overbuilding Openreach and will also depend on the extent to which Altnets become
6 credible wholesale suppliers, which is said to be uncertain.

7 A4.7 simply records CityFibre's current overbuild by Openreach.

8 **THE CHAIRMAN:** Sorry, Mr Holmes.

9 **MR HOLMES:** Do you not have it?

10 **DR BELL:** Can you just give the reference.

11 **MR HOLMES:** Of course, it's page 927 in tab 74.

12 **DR BELL:** Thank you.

13 **MR HOLMES:** So the point I was making, A4.6 just contains the general proposition
14 about the fact that how overbuild develops will depend on network build strategies
15 and will also depend on the extent to which Altnets become credible wholesale
16 suppliers, which is said to be uncertain. A4.7 simply records CityFibre's current
17 overbuild by Openreach as a percentage of Openreach's footprint. A4.8
18 acknowledges this is likely to increase over time and give an illustrative calculation
19 which is purely speculative.

20 You see that this is said to cover the next 12 to 24 months and the conclusion is then
21 given at A4.9. That's the extent of the reasoning and evidence in the decision.

22 Ofcom's skeleton argument confirms at paragraph 45 that the overlap conclusion
23 was based on three elements. First, the current low levels of overlap. Second,
24 evidence that Altnets prefer not to overbuild Openreach. Thirdly, uncertainty about
25 how successful smaller Altnets would be. However, it's certainly true that Altnets
26 prefer not to overbuild Openreach and that they acknowledge first mover advantage

1 and that's because of the difficulty in switching customers once they're on another
2 FTTP network. But that's not the end of the matter or a reason not to seek more
3 information about how things will unfold in the next 12 to 24 months. Although they
4 may prefer not to overbuild, Altnets are not fully in control of whether they overbuild
5 because they are not privy to Openreach's detailed build plans.

6 This is explained in Mr Dunn's evidence in the appeal at paragraph 19 and it's also
7 helpfully set out in the evidence of Mr Allwood for BT at paragraph 58 of his
8 statement.

9 As I mentioned earlier, the extent of overlap depends not only on where Altnets
10 choose to build but also on where Openreach builds. It has an ambitious rollout
11 programme to install fibre to over 25 million premises by 2026 and that will obviously
12 involve very considerable overbuild.

13 **THE CHAIRMAN:** I think somewhere Ofcom draws a conclusion that Openreach
14 would prefer not to overbuild for I think it's expressed for regulatory reasons and so
15 there is some reference to that.

16 **MR HOLMES:** Well, perhaps I could come back to that. But certainly Ofcom has
17 relied upon some evidence about Openreach and I will come to consider what it
18 relies on in these proceedings in just a moment.

19 **THE CHAIRMAN:** Yes. I can see people scurrying round. I may have expressed
20 that not exactly correctly but I think that the point that is being made is that it was not
21 expected that Openreach would actively seek to overbuild because it would have
22 regulatory implications. I think that that's the point that was made. It's not really
23 expanded upon so I read from that that it was a matter which Ofcom considered they
24 would have some influence over because they could influence what Openreach did if
25 it was behaving in a way it thought contrary top objectives. But again I may be --

26 **MR HOLMES:** I may be wrong about that. I must say I hadn't apprehended that any

1 substantial weight is placed on that consideration.

2 What you do have is a build programme that will cover a very large proportion of
3 premises in the UK, 25 million by 2026, so over the next 4 years, by Openreach, and
4 that will, I think as Ofcom recognises, lead progressively to extensive overbuild by
5 Openreach of areas where Altnets are present.

6 There is some reference in the materials to Openreach avoiding overbuild and I will
7 show you what Ofcom says about that in its witness evidence. I will also take you to
8 the material it relies upon to show you that it can't safely be relied upon.

9 Taking that in stages, just to complete the point on Openreach overbuild, the Altnets
10 obviously can't control whether Openreach overbuilds them and strikingly annex 4
11 doesn't consider the prospects of Openreach choosing or coming to overbuild
12 Altnets. Ofcom did ask Openreach directly whether it intended to overbuild but
13 Openreach's answer left that question somewhat open.

14 It's at bundle 2A, tab 31. You see the question there. It's confidential so I shall ask
15 to read question two. **(Pause)**. That was what Openreach was telling Ofcom during
16 the consultation.

17 Ofcom could have worked out the answer itself by seeking and comparing build
18 plans for the next 3 years but instead it simply drew the inference that overbuild
19 would not exceed 5 per cent in the next 12 to 24 months from Altnets' statements
20 that they prefer not to overbuild.

21 The last point relied on by Ofcom in the decision, uncertainty about how successful
22 smaller Altnets may be, is not in itself a reason for concluding that overlap will be
23 limited and will not exceed 5 per cent or for not asking further questions.

24 In these proceedings Ofcom has sought to fill the evidential gap in various ways.
25 One strategy is to place prominent reliance on the representations made in the
26 consultation by TalkTalk, an ISP. One sees that, for example, in paragraph 45(a) of

1 Ofcom's skeleton argument at the top of page 16. We say this is a surprising
2 position for Ofcom to take in the appeal. Not only is TalkTalk an ISP, not an Altnet
3 and not Openreach, so its views on overbuild one might immediately conclude are
4 likely to be less informed, but also this is a matter that was specifically considered by
5 Ofcom in the decision.

6 If you look at -- I am sorry to jump back but given that this is a point that's been
7 touched on I should show you this. It's in bundle 2B, tab 74. If you could turn to
8 page 928. So this is the statement. Can I ask you, please, to review A4.14.

9 So Ofcom specifically considered this evidence in the decision and they dismissed it
10 on the basis that the party in question had not provided evidence to support the
11 claim and Ofcom considered it unlikely.

12 You note the reference to the short run.

13 The witness statement of Mr Harries places reliance on further evidence which is not
14 deployed in the decision and which we say when considered is not supportive of the
15 proposition for which it's cited. If you could take up core bundle 1 and turn to tab 6,
16 page 173.

17 So you see at the top of the page, paragraph 19B, reliance is now placed on material
18 from the market review process. Mr Harries explains that Ofcom had been told by
19 several Altnets that they do not expect to overbuild or be overbuilt for at least the
20 duration of the review period. Do you have that, Sir?

21 **THE CHAIRMAN:** Yes.

22 **MR HOLMES:** Yes. You see at footnote 23 that reference is made to three
23 documents from the market review process. Let me just briefly consider those in
24 turn.

25 If we could open up bundle 2A. The first of those is at tab 4. You see that it is an
26 email from the head of business development at an Altnet to Ofcom. You see the

1 question at the top of the page. I don't think the question itself can be confidential,
2 although the identity of the Altnet should be kept so. At a meeting between the
3 Altnet and Ofcom in January 2020 the Altnet told Ofcom it was very wary of overbuild
4 by Openreach and the effect this will have on the Altnet's business case. The Altnet
5 was asked to confirm if this was accurate. So it's specifically asked to confirm it was
6 concerned about overbuild by Openreach.

7 The Altnet replies that overbuild by Openreach is substantially detrimental to the
8 investment case and the Altnet constructs a business case to invest in areas where
9 other providers do not have plans and then the overbuild of those areas by
10 Openreach introduces another infrastructure and limits the take-up to a level that
11 would threaten the long-term sustainability of the investment.

12 So the suggestion that this supports the view that Altnets will not be overbuilt by
13 Openreach, which is the proposition for which it's cited in Mr Harries evidence, is
14 quite wrong, it shows the contrary.

15 The second note is at tab 2 of bundle 2A. This is to the same effect as the document
16 we've just seen. You see it dates from March 2021. The question is whether the
17 Altnet in question considers that early overbuilding negatively affects Altnet's
18 business model, at the top. The response is clear: yes, it does. The first paragraph
19 of the response: early overbuilding will negatively affect the business model of
20 Altnets. In the third paragraph you see reference to a commitment offered by BT in
21 relation to rollout and that that materially increases the risk of early overbuild by BT.

22 Do you see that in the third paragraph under the response? Could I ask you to
23 review the second bullet of what follows. **(Pause)**.

24 So we say again this is not evidence that Altnets will not be overbuilt by Openreach.
25 It's the reverse. The final sentence of that second bullet is particularly telling about
26 where BT will naturally favour and how that relates to where Altnets are likely to roll

1 out.

2 Then the final piece of evidence relied on in paragraph 19B at footnote 23 of the
3 Ofcom witness statement is an email from March 2021 sent by an association of
4 Altnets at tab 3 of volume 2A. It's flagged as confidential, although I note in the
5 penultimate sentence the author of the document states nothing in this response is
6 confidential but I suppose I should respect the markings.

7 **THE CHAIRMAN:** I think you probably should, as you have proceeded so far, I am
8 sure it will work.

9 **MR HOLMES:** You see the proposition that Ofcom is asking this association to
10 confirm, similar to the one we've seen raised in the previous documents.

11 Then there's the confirmation by the association. Then in the paragraph that follows,
12 after confirmation that the statement is correct, an expectation about overbuild.

13 **THE CHAIRMAN:** Yes.

14 **MR HOLMES:** You see it's described as an accepted commercial reality. The
15 following paragraph. You see a reference to Altnet's rollout.

16 Then the paragraph after that, you see what is said there. So the third paragraph
17 from the bottom beginning "We understand", if you could just review that, please.

18 **(Pause).**

19 **PROFESSOR WATERSON:** Could I just raise a point that I think neither this
20 response nor the first response has any timing element put into them.

21 **MR HOLMES:** That's quite true, Sir. I am relying on these documents, I am taking
22 you to these documents simply because Ofcom in its witness statements suggest
23 that they provide evidence to support a proposition that Openreach is unlikely to
24 overbuild Altnets. On the dates in question they suggest that -- the date from some
25 period prior to the consultation on Equinox, what they all suggest is that Altnets are
26 highly likely to be overbuilt by Openreach.

1 So that is the only proposition I take from this.

2 **PROFESSOR WATERSON:** Okay.

3 **MR HOLMES:** They are not evidence for the proposition for which they are cited by
4 Mr Harries.

5 We say that the Ofcom evidence base was not sufficiently sound to make it
6 reasonable for Ofcom to dispense with further enquiry. This question of the degree
7 of overlap was relevant to Ofcom's analysis. Ofcom's present understanding was
8 inferential and although there was inevitable uncertainty, that did not mean that it
9 was not worth obtaining indicative estimates, particularly given that Ofcom's job was
10 simply to assess the potential for an impact on ISPs' incentives.

11 The net result of Ofcom's approach is twofold. First, CityFibre and others were
12 deprived of an opportunity to make informed representations on an important aspect
13 of Ofcom's reasoning. They were deprived of an opportunity to make
14 representations in response to the proposal which would have been material for
15 Ofcom to take into account in making its decision, to use the language of the Law
16 Society case at paragraph 87.

17 Secondly, Ofcom also deprived itself of a proper informed evidence base for its
18 assessment of this issue, and you saw how that point connected with consultation in
19 the British Gas case.

20 I accept and acknowledge that the threshold for finding that a decision-maker has
21 breached public law standards in a way it has gone about seeking information is
22 a high one but I do submit based on the materials that we have seen that that
23 threshold was crossed in the present case and it was not reasonable for Ofcom to
24 rely and to base itself on the material which is now claimed to support the limited
25 overlap conclusion.

26 Two further points. I am slightly conscious of the time, Sir. The first is Mr Matthew's

1 nine-point analysis which I said I would deal with. In my submission, a number of the
2 nine points are, on inspection, simply red herrings and they can be quickly knocked
3 on the head. As you have seen, Mr Matthew identifies three sets of three necessary
4 conditions for Equinox materially to affect ISPs' incentives to purchase from Altnets
5 and he rests Ofcom's conclusion of no potential barrier on its assessment that there
6 was no time when all of the nine conditions were shown to be satisfied.

7 It's common ground that Ofcom always proceeded on the basis that conditions 1.1 to
8 1.3 were satisfied. So those are really obvious makeweights and they don't require
9 any further consideration.

10 As to the next three conditions, condition 2.1 is that the overlap must be large
11 enough for purchasing from Altnets to have the potential to make a significant
12 difference to an ISP's order mix. We accept that and we say it was central to
13 Ofcom's reasoning and we rely on that in support of ground 1 of the appeal. It's
14 flawed. A finding that overlap was not large enough in the first 12 to 24-months was
15 flawed for the reasons I have developed and the assessment reconsidered in the
16 light of a proper exercise.

17 Condition 2.2 is that ISPs continue to purchase legacy products in the Openreach
18 footprint in the first 12 to 24 months. As we've seen, Ofcom proceeded on the basis
19 that this condition was met largely because of ISP resellers. So again it doesn't
20 affect matters.

21 Once you exclude the four conditions that Ofcom consider would be satisfied and the
22 overlap conclusion, that leaves just four out of nine remaining conclusions which
23 Mr Matthew says are conditions for Equinox to act as a potential barrier. On
24 Mr Matthew numbering they are 2.3, 3.1, 3.2 and 3.3.

25 Taking them in turn, 2.3 is the condition that consumers served by Openreach in
26 overlap areas would be sufficiently skewed towards legacy products so as to be

1 | capable of impacting the targets.

2 | Mr Matthew says at paragraph 53(c) of his statement that it was not clear whether
3 | this skew would be substantial enough. He says that ISPs might prefer to supply
4 | customers that would otherwise order legacy products with an Altnet's FTTP product
5 | instead, reducing the skew.

6 | But we say this ignores the basis of the problem which is identified in the decision
7 | itself in the first 12 to 24 months. Whatever the big ISPs may have wanted to do,
8 | Ofcom explained carefully in the decision that they might have no choice but to place
9 | orders for legacy products and that was because of the activities of resellers to
10 | whom they were contractually committed and those were to an extent outside their
11 | control.

12 | It's striking that condition 2.3 was not one that Ofcom itself relied upon at all in the
13 | decision. On the contrary, it expressly proceeded on the basis that this condition
14 | may be met in the first 12 to 24 months. We can see that very clearly in the
15 | decision. We can perhaps very briefly go back it to, bundle 2B, tab 74,
16 | paragraph 3.80.

17 | Ofcom explains there why condition 2.2 might be met:

18 | "In theory, in the locations where the Altnets that provide access to third parties ISPs
19 | overlap with the Openreach network, moving volumes from Openreach to Altnets
20 | could jeopardise an ISP's ability to meet the targets if doing so skews the mix of
21 | orders that the ISP continue to place with Openreach. A scenario where this might
22 | occur is where an ISP uses an Altnet for orders from consumers that prefer FTTP
23 | but uses Openreach's legacy networks for orders from consumers who prefer legacy
24 | broadband products."

25 | There are two reasons given for why an ISP might wish to do this. First, it may wish
26 | to do so as a commercial choice, but, secondly, and this is identified as crucial in the

1 immediate term, there might be short-term difficulties in moving away from selling
2 legacy Openreach products, for example due to existing contractual deals with ISP
3 resellers or the need for technical changes to ordering systems.

4 Now look at paragraph 3.83. Ofcom finds there that some ISPs expect to face
5 temporary challenges, meaning they will continue to make some legacy sales and as
6 a result may struggle to hit the targets in the first 12 to 24 months. This is partly
7 because, as had been indicated in 3.80, their purchase access they sell on to ISP
8 resellers. You see that point at 3.83B.

9 Then over the page, the end of 3.84 on page 882, the incomplete paragraph at the
10 top of the page:

11 "Notwithstanding the catch-up provisions of Equinox in the first year, some ISPs are
12 likely to continue to need to place legacy orders and may struggle to meet all the
13 order mix targets in the next 12 to 24 months."

14 So Ofcom now says that this reasoning was merely for the purposes of exploring
15 least favourable assumptions. That's at paragraph 32 of their skeleton argument.

16 But that's really not what those paragraph I have just shown you say. Nowhere in
17 the decision does Ofcom cite any conclusions about the extent of the skew between
18 legacy and FTTP as a reason or even part of a reason for concluding there was no
19 potential barrier. Ofcom states, somewhat desperately, I might say, if that's not too
20 unkind, that the statement refers to evidence which suggests that a skew was not in
21 fact likely. But whether or not that evidence suggests that a skew was not in fact
22 likely, Ofcom did not itself conclude in the decision that a skew was not likely, nor did
23 it rely on any such conclusion in support of its finding that there was no potential
24 barrier.

25 Indeed, even now Mr Matthew in his evidence does not go so far as to say that
26 a skew is not likely. What he says is much weaker than that, he says the extent to

1 | which this might have been the case in practice was not clear.

2 | It is, with respect, hopeless for Ofcom to suggest that it based its conclusion of no
3 | potential barrier on the conclusion that there was uncertainty as to whether the skew
4 | condition could be satisfied in the light of what is said in the contested decision.

5 | It's even more hopeless to suggest that uncertainty about skew was some sort of
6 | independent basis for reaching the decision.

7 | In fact, if Ofcom had relied on uncertainty about the degree of skew, that would not
8 | have been a rational basis for concluding that there was no potential barrier.

9 | Uncertainty about the extent to which a condition will be met doesn't support the
10 | conclusion that there is no potential for it to be met, but the opposite. So in my
11 | submission condition 2.3 doesn't assist Ofcom.

12 | Condition 3.1 is that any change in performance against the OMTs need to make
13 | a difference between satisfying the targets and missing them and Ofcom says now
14 | that its calculations in Mr Matthew's evidence show this wasn't satisfied.

15 | There are two decisive problems with Ofcom's reliance on this condition. First, as
16 | have I shown you, the conclusion in the decision is that significant ISPs may struggle
17 | to hit targets in the first 12 to 24 months. Given they are close to the targets, even
18 | modest effects on their performance against the targets as a result of purchasing
19 | from Altnets may jeopardise their ability to meet the targets. It may therefore
20 | disincentivise ISPs from buying from the Altnets and that's sufficient to show
21 | a potential barrier.

22 | But, secondly, and perhaps for fundamentally, the extent of the effect on
23 | performance is not independent of the overlap conclusion. On the contrary, Ofcom's
24 | assessment of materiality of the impact was the one I showed you in annex 3 at
25 | paragraph A3.45 and, as you saw, it rested on an illustrative assessment of the
26 | extent of overlap, the percentage of overlap.

1 So it wasn't independent of the overlap conclusion. On the contrary, it depended on
2 an assumption about it and what the range would be within 12 to 24 months. You
3 have my submission that that assumption was not based on any consultation or
4 proper enquiry. So Ofcom therefore had no reliable basis in the decision for
5 estimating the materiality of the impact on ISPs' ability to meet the targets.
6 So it's not a separate strut of the decision, it's bound up with the overlap assessment
7 and condition 3.1 does not help.
8 Condition 3.2 is that cutting volumes from Altnets would need to be the ISPs'
9 preferred strategy for meeting the Equinox targets. On this condition Ofcom only
10 says that the condition was not shown to be satisfied. As we saw at paragraph 3.87
11 of the statement, Ofcom offered only the tentative observation that moving volumes
12 to Altnets will not necessarily result in worsening performance given the availability
13 of potential mitigation strategies.
14 As Ofcom has accepted in these proceedings, it could not have gone further than
15 this because ISPs were still working out what their strategies would be. We say that
16 paragraph 3.87 does not detract from the clear findings in paragraphs 3.83 and 3.84
17 that some ISPs are likely to continue to need to place legacy orders and may
18 struggle to meet the targets.
19 The findings are supported by the analysis which I showed you in annex 3. You saw
20 the views expressed by the relevant ISPs in paragraph A3.33 and you saw
21 TalkTalk's submissions that Equinox should be modified to address that problem by
22 excluding resellers in year two.
23 We say that is why no reliance is placed on this consideration. It's omitted entirely
24 from the overview of Ofcom's reasoning which is set out in paragraphs 3.87 of the
25 decision.
26 We also say that even if post hoc one considers that evidence, it clearly does not

1 support any view that mitigation strategies would resolve the problem. Ofcom had it
2 right in the decision when it found that ISPs would struggle to meet the targets in the
3 12 to 24 months that come.

4 Condition 3.2 is that the potential impact on incentives to purchase from Altnets
5 would need to be of sufficient magnitude. In a sense this is self-evident. We accept
6 that an immaterial impact on incentives would not create a barrier, but Mr Matthew
7 himself only goes so far as to say that this is less likely to be the case in the
8 circumstances that Ofcom was considering and in the decision itself the reason
9 relied upon for concluding that the impact would not be material is, in my submission,
10 the overlap conclusion. So it takes you back to where we began. We say that
11 Mr Matthew's new reasoning does not disturb the conclusion that the overlap
12 conclusion was a central plank of Ofcom's reasoning on the short-term position. Nor
13 does it otherwise support Ofcom's conclusion that there was no potential barrier.

14 Final point on ground 1 very briefly, materiality. The flaws that we've identified in the
15 overlap condition, did they matter, did those flaws matter? Ofcom says they do not
16 and that's because plugging Mr Dunn's figures into Ofcom's analysis is said not to
17 result in any dramatic alteration to the effective OMTs under reasonable
18 assumptions about regulatory stop sell. Ofcom even goes so far as to claim that
19 Mr Dunn's figures are consistent with Ofcom's own assumptions. It does that on the
20 slightly strange basis that when Ofcom referred in decision to the first 12 to 24
21 months, as we saw it did in annex 4, what it really meant was the first 12 months.

22 We make the following points about this. First CityFibre's position is not and has
23 never been that Ofcom's analysis was wrong because it did not use Mr Dunn's
24 assumptions. Mr Dunn isn't in a position to do Ofcom's job because he does not
25 have Ofcom's information-gathering powers or institutional knowledge or ability to
26 consult the market. He can only guess at Openreach's build plans and as you will

1 see from Mr Allwood's evidence, BT's evidence recognises and emphasises the
2 difficulty that Altnets face in understanding where Openreach is likely to build.
3 Mr Dunn cannot know other Altnets' build plans either. His evidence was produced
4 to illustrate the fact that there was useful material that parties in CityFibre's position
5 could have brought forward during a fair and open consultation.

6 As regards the other Altnets, their potential materiality is clear from Openreach's
7 estimates of current overlap relied on by Ofcom. You can see the relevant figures in
8 the statement itself. If we go back to bundle 2B, tab 74, page 927, we've already
9 seen paragraph A4.7, at paragraph A4.7 CityFibre's overlap percentage of the
10 Openreach footprint.

11 That appears to have provided the lower bound estimate of overlap for the purposes
12 of Ofcom's illustrative calculations. If you look back to A4.4, you see the percentage
13 overlap of all FTTP Altnets excluding Virgin Media as an established network which
14 does not wholesale and which is therefore not relevant to the issues under
15 consideration. So these are just the Altnets and you see how much additional
16 coverage the other Altnets add by comparison with the figure we just saw for
17 CityFibre alone. That was current overbuild on Openreach's estimates.

18 You see that it's a multiple. It's larger.

19 **THE CHAIRMAN:** There's the point in 4.5, isn't there, that most of those other
20 Altnets are retail only?

21 **MR HOLMES:** Well, the point doesn't go quite that far. It says that they include
22 retail-only Altnets, but you will recall that I showed you the passages in the market
23 review and the careful evidence gathering which was done then which showed the
24 extent to which other Altnets were considering wholesaling and ISPs were exploring
25 the possibilities of concluding wholesale agreements with other Altnets, including via
26 the CWP, the common wholesale platform.

1 You also saw in that passage that Ofcom expressly linked the notification
2 requirement and the concern about conditional pricing arrangements of the kind we
3 are considering here, the impact that might have on the extent to which other Altnets
4 besides CityFibre, whether or not they currently have succeeded in wholesaling,
5 might be considered as wholesalers.

6 **THE CHAIRMAN:** Yes, so if we are talking about the current position, which I think
7 is where you were, the current position --

8 **MR HOLMES:** Yes.

9 **THE CHAIRMAN:** I can't recall and maybe there is not anything else on here which
10 indicates what the current position was at the time of this as opposed to in the
11 market review but that's the point I was making, that as I understand it, the difference
12 between those numbers, if you're talking about the current position, would be
13 reflected at least in part by that factor.

14 **MR HOLMES:** That is a fair point, Sir. But it does not say in terms that there is no
15 potential for those other FTTP Altnets to wholesale. The figure specifically excludes
16 Virgin Media and we have seen that the potential for other Altnets to wholesale was
17 something that was firmly in Ofcom's policy sights when it introduced this measure.

18 **THE CHAIRMAN:** Yes. I am just watching the time.

19 **MR HOLMES:** Yes, I think I can conclude very briefly now.

20 **THE CHAIRMAN:** We should give the transcribers a break as well at some stage. It
21 depends how much longer you think you may be.

22 **MR HOLMES:** I still have ground 2, which may take me 10 to 15 minutes. So we
23 could take a break now.

24 **THE CHAIRMAN:** I think we probably should and then come back -- we'll keep it to
25 10 minutes.

26 **(3.30 pm)**

1 (A short break)

2 (3.40 pm)

3 **THE CHAIRMAN:** Yes.

4 **MR HOLMES:** Sir, just one final point in relation to materiality. The scale of overlap
5 is clearly a relevant factor affecting the potential impact of the Equinox targets on
6 ISPs' incentives. The Tribunal cannot be confident what a proper consultation would
7 have yielded about the correct extent of overlap or what conclusions Ofcom would
8 have drawn from that.

9 Even relatively modest changes to ISPs' balance of purchases could make the
10 difference if they are struggling to meet the targets and Ofcom found that two
11 significant ISPs may well struggle to meet the targets in the first two years and the
12 substantial discounts would, in my submission, therefore be in jeopardy.

13 In those circumstances, the overlap conclusion needed to be the product of fair
14 consultation and proper enquiry, it cannot be concluded with confidence it was not
15 material to the assessment. And that is CityFibre's ground 1.

16 **THE CHAIRMAN:** Thank you.

17 **MR HOLMES:** Ground 2.

18 This began life as a rationality complaint and our claim was that whether
19 well-founded in the evidence and properly consulted on or not, Ofcom's conclusion
20 was expressed in terms of the likelihood that certain conditions would be met, and
21 conclusions as to likelihood could not sustain Ofcom's conclusion that there was not
22 even the potential for a barrier.

23 During the course of the proceedings Mr Matthew's statement explains that Ofcom
24 has understood the concept of potentiality for these purposes as being equivalent to
25 that of likelihood. In other words, Ofcom has interpreted the question do the targets
26 have the potential materially to impact on ISPs' incentives as meaning the same as

1 are the targets reasonably likely to impact on ISP incentives. We say that those
2 tests are not equivalent.

3 By applying a test based on likelihood, Ofcom has failed to apply its own stated
4 approach and in consequence has acted unreasonably, inconsistently with its own
5 policy and has misdirected itself.

6 I make the following submissions. As a matter to English, potential relates to
7 possibility rather than likelihood. We don't suggest, contrary to what BT has
8 submitted, that a mere theoretical possibility is sufficient to take you past question
9 one. Instead, the question whether proposed terms potentially create a barrier could
10 reasonably be glossed as follows.

11 Is it possible on reasonable and plausible assumptions that ISP incentives to
12 purchase from Altnets would be materially affected by the Equinox offer? But the
13 threshold is possibility where you are assessing potential.

14 We rely on the following matters in support of that interpretation. First, we say it
15 reflects the underlying policy framework, which I showed you in the market review,
16 which we say is consistent with a precautionary approach. Ofcom acknowledged the
17 risk of irreversible damage to new network build and the limited window of
18 opportunity for such build to take place. The principal concern is investor confidence
19 in network build plans, a matter to which CityFibre drew Ofcom's attention repeatedly
20 during the consultation process, and terms that have the potential materially to
21 impact ISPs' incentives are capable of undermining such confidence whether or not
22 such an effect is likely.

23 Secondly, Ofcom's use of the word "potentially" in question one is in contrast to its
24 use of the word "likely" in questions two and three. If Ofcom had meant likely by
25 potentially, it would have used likely, as it did for the other two questions.

26 Thirdly, the terms of the Equinox offer are such that there is clearly potential for ISP

1 incentives to be affected or in any event the Tribunal can't be confident that Ofcom
2 would not have concluded as much had it applied a potentiality standard.

3 Finally, the error is substantive and not merely formal or semantic. If Ofcom had
4 found question one to be met, it would then have needed to consider question two
5 and question three as well. It did not do so. That would, for example, have brought
6 into play TalkTalk's request to Ofcom that resellers should be removed from the
7 Equinox targets throughout the temporary period where ISPs may struggle. Such
8 a change would have removed a potential barrier to ISPs buying from Altnets but
9 would otherwise have left the Equinox incentive structure intact. But Ofcom avoided
10 this inquiry by recasting question one in terms of likelihood rather than potentiality.
11 Ofcom's approach therefore constituted a further and separate error and
12 an additional reason why Ofcom's decision should be set aside.

13 To return to your earlier question, we say that our interpretation produces a rational
14 structure of enquiry, which was what Ofcom had intended in the market review and
15 which is correctly reflected in Ofcom's formulation of the questions in both the
16 consultation and the statement, which do identify a first threshold of potentiality and
17 a subsequent threshold of likelihood in relation to effects and in relation to benefits.

18 The way the structure, in my submission, was intended to work is that at the first
19 stage there is a preliminary or gating enquiry where all that is required is a showing
20 that there is some potential barrier given the importance of promoting network
21 competition. One then proceeds to questions two and three.

22 At question two, one considers whether an effect on competition is likely, which is
23 a different threshold from potentiality. If one concludes that it is likely, then there is
24 a problem. If it concludes that it's unlikely, then that question is passed as regards
25 the offer.

26 There is a separate point that question three also needs to be considered. In other

1 words, it's not enough to look only at the likelihood of effects. One also, as soon as
2 there is a potential barrier, needs to consider the extent to which there are benefits
3 arising from the offer. But we say again that this simply instantiates the
4 precautionary principle and the need to be confident that things that create
5 a potential barrier to networks, Altnets, alternative networks, getting access to
6 customers are justified.

7 That raises questions about whether particular restrictions arising from conditionality
8 are proportionate or whether they could be avoided, even by quite modest tweaks.
9 We say that Ofcom should have considered that and should have considered, for
10 example, TalkTalk's objection and, if it had, it might have arrived at a different
11 conclusion. So not a semantic objection but one which has real implications for the
12 analysis that Ofcom was required to undertake.

13 Of course, the Tribunal appreciates that the concern that is specifically addressed by
14 the notification requirement and which was the subject of Ofcom's investigation here
15 was the conditionality of the discounts and their potential to give rise to leveraging
16 effects.

17 When one comes to consider benefits and effects, Ofcom isn't compelled to throw
18 the baby out with the bathwater or to throw out mechanisms which Openreach may
19 use legitimately to win customers, FTTP customers, to its network. All that is
20 required is an assessment to make sure that there are indeed benefits to the
21 conditionality and, if there are not, then the targets can be tweaked, can be
22 considered and assessed. So it's not the case that if the analysis throws up
23 problems at the stage of either question two or question three, that is fatal to the
24 Equinox offer. What it means is that particular features of the Equinox offer might
25 need to be adapted given the decisive importance identified by Ofcom in its framing
26 policy analysis in the market review upon promoting network competition.

1 That's what this structure was intended to achieve. We say that Ofcom had it right in
2 the formulation and it does make rational and coherent sense.

3 **THE CHAIRMAN:** That would depend on Openreach being willing to make the
4 adjustment and a different offer and then presumably you would have to go through
5 the consultation process again, 90 days one would assume.

6 **MR HOLMES:** Yes, I think that's correct, yes, so there would be a modest delay
7 while Openreach reassessed. But that simply reflects the overriding importance in
8 the passages I showed you that are repeatedly made contained throughout the
9 market review that there is a need to promote network competition and protect the
10 position of Altnets given the limited opportunity that there is for network-based
11 competition to emerge.

12 Subject to any questions from the Tribunal, I am grateful for your indulgence,
13 I realise I have gone on for 20 minutes too long, but those are Ofcom's (sic) opening
14 submissions.

15 **THE CHAIRMAN:** Thank you very much.

16 **MR HOLMES:** CityFibre even. That was a Freudian slip. CityFibre. I have been
17 too often on the other side of the Bar.

18 **THE CHAIRMAN:** Thank you.

19 **MR HOLMES:** They are definitely CityFibre's opening submissions.

20 **THE CHAIRMAN:** Ms Carss-Frisk.

21

22 **Opening submissions by MS CARSS-FRISK**

23 **MS CARSS-FRISK:** So we have five headline points that we would like to kick off
24 with, which are these, just to summarise our case.

25 On ground 1, ground 1A, we say the overlap conclusion had a clear and rational
26 basis. Second, and linked to that first point, we say no breach of the duty of fair

1 consultation, nor of the so-called Tameside duty that has also been prayed in aid.
2 That is on the basis of Ofcom's failure to consult specifically about the overlap
3 conclusion.

4 Third, the evidence of Mr Dunn then does not show that the overlap conclusion was
5 wrong. Indeed I don't think that is being suggested by CityFibre. But what that
6 means, in our submission, is that even if otherwise they were right, CityFibre will not
7 have been prejudiced by any failure on the part of Ofcom.

8 Fourth, that in any event, as you have heard, Ofcom's analysis involved looking at
9 nine different factors, conditions, that they thought needed to be satisfied for the
10 potential barrier to be found. Several of those, as you know, were not thought to be
11 satisfied and it therefore follows that even if there were a problem with the overlap
12 conclusion, the outcome at the end of the day would not be different.

13 As to ground 2 of the appeal, that's our fifth headline point, we say it was entirely
14 rational and lawful for Ofcom to take the view that they would assess question one,
15 the question of potential barrier, by reference to the likelihood of the various
16 scenarios. You have seen many references in the documents to the various
17 scenarios that were thought to be relevant.

18 Standing back from it all, we do ask you to pose at least these further questions. Is
19 this really a public law challenge, which in order to succeed it must be? Or is it
20 actually a disagreement on the merits put in many different ways but still just
21 a disagreement on the merits?

22 Is this really a decision infected by any public law error? Or is it in fact a very careful
23 multifactorial predictive assessment by an expert regulator, well within that
24 regulator's margin of discretion? We of course will invite you to conclude that it is
25 very much the latter.

26 But before we get to that stage of you, as it were, standing back and looking at it all

1 in the round, of course we need to go through the detail. So what I would like to do
2 next is to put a bit of flesh on the bones of the various headline points. As to the
3 basis then, first, for the overlap conclusion, by way of preliminary I think it's worth
4 noting that it's a fairly modest conclusion. It's a conclusion that the overlap of the
5 Altnets with the FTTP footprint of Openreach in the 12 to 24-month initial period was
6 likely to be limited. That is what it is.

7 I suspect you are very familiar with the building blocks that led to that conclusion but
8 perhaps it's right to just remind you of them and then I hope I can fairly swiftly
9 persuade you that they were perfectly reasonable building blocks.

10 The starting point was an estimate of the current overlap at the time of the
11 consultation or, rather, at the time, I should say, of the decision, which is dealt with,
12 just for your reference, in Mr Matthew's statement, paragraph 79(a), bundle 1, tab 5,
13 page 136. So that is the low percentage. I think we are still meant to treat it as
14 confidential. So the low percentage that was arrived at then.

15 Of course if you do go back over paragraph 79(a), you'll see how that low
16 percentage was arrived at. CityFibre had given some information in their
17 consultation response as to the number of premises passed by their network in
18 July 2021, confidential figure. Then they had also said in their response to
19 a section 135 request in August last year that the proportion of their network in which
20 Openreach was available was a certain figure as well, a certain percentage figure.
21 That then produced an overlap of a certain number of premises which equalled the
22 low percentage of current overlap that then formed the starting point of Ofcom's
23 analysis.

24 So all of that in paragraph 79(a) of Mr Matthew's evidence.

25 The key point then in relation to the overlap conclusion was the starting point, as
26 I have said, very low and the view that it would grow only gradually. Secondly, and

1 we now come to the first point of dispute between the parties, that Altnets generally
2 avoid overbuilding Openreach's FTTP network. Thirdly, a point which I think was
3 disputed but I don't think it was actually then pursued in oral submissions today,
4 namely that it was uncertain how successful smaller Altnets would be in supplying
5 third party ISPs so there would likely be very few overlap locations in the short term.
6 The key reference for this is Mr Matthew's paragraph 81, and just for your reference
7 of course, it's the statement at paragraphs A4.6 to A4.9. But it may be worth just
8 turning up Mr Matthew's evidence briefly at paragraph 81. So core bundle, tab 5,
9 page 137. Just so that you see exactly how he explains the points that I have just
10 made very briefly. If I can just invite you to review paragraph 81, there is obviously
11 some confidential material included there also.

12 **(Pause).**

13 In particular, you see the points that I have described as disputed at subparagraph
14 (c) of that paragraph 81.

15 **THE CHAIRMAN:** And (a) is not disputed, as I understand it.

16 **MS CARSS-FRISK:** That's right. That's right.

17 **THE CHAIRMAN:** Indeed.

18 **MR HOLMES:** That's correct, Sir.

19 **THE CHAIRMAN:** Yes, thank you, Mr Holmes. There's also I think general
20 agreement about the other end of the projection when one gets to a later period.

21 **MS CARSS-FRISK:** Yes, that is certainly how we understand things. Indeed, yes.

22 So going back then to the first point in dispute, that Altnets generally avoid
23 overbuilding Openreach's FTTP network, can I ask you to go back one more time to,
24 as it were, the starting point in the statements, bundle 2B, tab 74, and it's paragraph
25 A4.6 at page 927.

26 That sets the scene. You have the statement we are concerned with at the

1 beginning of A4.6 at (a) and then with the footnote 283, that refers to a joint
2 consultation response. So to complete the picture, I would then, if I may, invite you
3 to go to the consultation response in the same bundle at tab 54. It's particularly
4 paragraphs 63 to 65 on page 701.

5 In fact, it's probably worth starting at page 700, paragraph 63:

6 "Government's FTIR highlights that Altnets have a stronger incentive than BT to
7 invest in FTTP as they are unencumbered by defending a legacy network.
8 Furthermore, Altnets gain a first mover advantage by deploying ahead of BT. This is
9 due to the competitive advantage that FTTP provides over legacy network
10 technologies and then once the customer is connected to an FTTP network the
11 resulting cost to switch to another network.

12 Many Altnets therefore target areas where BT has not built and has not published its
13 intentions to build in the short term. The important implication of Altnets avoiding
14 overbuild and aiming to build ahead of BT is that deployment resources are spread
15 more widely as locations without FTTP and where BT is not planning to deploy to in
16 the near term are targeted thus accelerating FTTP deployment and making it
17 available earlier."

18 So that is an Altnet trade association making that point.

19 I would also just invite your attention in the same document to paragraph 23, if I have
20 this right. My reference is page 709. Yes.

21 Just the first sentence on page 709:

22 "Deployment of FTTP in the UK is characterised by a large number of Altnets
23 focused on investing in specific regions and avoiding overbuild by BT and each
24 other."

25 That's what at least some of the Altnets said.

26 Then it's also relevant to look at what CityFibre itself told Ofcom. Here, we need to

1 go to bundle 2A to see first of all their response to the call for inputs. That's at
2 tab 32, right at the end of bundle 2A. It starts at page 496. But I would invite you to
3 go to paragraph 4.13 on page 506.

4 Opening sentence of 4.13:

5 "Openreach's incentives to deter rival network build are exacerbated by the strong
6 first mover advantages to building FTTP networks."

7 Then if I could invite you to review the rest of the paragraph but paying particular
8 attention to (iii) on page 507. **(Pause)**.

9 It is of course the last four lines at (iii) that we home in on:

10 "Because of this, alternative network operators will prefer to build where Openreach
11 doesn't have an FTTP network and there will be more limited build where Openreach
12 has already built a network, race to build."

13 So we say it is a very, very short step indeed from a statement saying that Altnets
14 prefer to build where there isn't an Openreach network from that to then saying that
15 Altnets generally avoid overbuilding.

16 The point has of course been made by CityFibre that there is a difference. They said
17 that in their notice of appeal at paragraph 44(d), no need to turn it up, but we say it
18 could not sensibly be said to be irrational for the regulator to take into account,
19 among other things, this reference to preference by Altnets and inferring, if one also
20 adds in what was said in the trade association consultation response, inferring that
21 that which Altnets prefer not to do, they also will not generally do.

22 That is not a big leap, and it's not undermined by the fact that it's conceivable that
23 because of ignorance of build plans -- I think this was a point that Mr Holmes made
24 earlier today -- there could be some overbuild nevertheless.

25 As a general statement, we say the material was clearly there to support it. I should
26 just add that we are of course concerned here with overbuilding by Altnets as

1 | opposed to the other way round. Probably no need to turn it up, but Mr Matthew at
2 | paragraph 82(a) of his statement, core bundle, tab 5, page 138, does refer to how
3 | Openreach would risk regulatory attention if they were to try to overbuild the Altnets.
4 | Be that as it may, we say that's a perfectly reasonable view for the regulator to take:
5 | they would know, in a sense. But be that as it may, the statement that we are
6 | concerned with of course is that statement, Altnets generally avoid overbuilding.

7 | **THE CHAIRMAN:** Yes, that's the point I think I put to Mr Holmes which caused
8 | some consternation, and actually probably because I suspect it was suggesting that
9 | it was in the statement as opposed to it's clearly in Mr Matthew. I don't think it's in
10 | the statement, is it, the reference?

11 | **MS CARSS-FRISK:** I think that's right but we had better double-check that.

12 | **THE CHAIRMAN:** Yes, thank you.

13 | **MS CARSS-FRISK:** In a sense, I started off saying the overlap conclusion as
14 | expressed is actually quite a modest one, overlap likely to be limited. But if you then
15 | boil it down to the one aspect of the reasoning behind that that now appears to be in
16 | dispute, i.e. the idea that Ofcom accepted that Altnets generally avoid overbuilding,
17 | that is in a sense an even more modest view for them to have reached and, as
18 | I have said, in our submission, was perfectly justified on what they had.

19 | The second building block for the overlap conclusion that I said was in dispute was
20 | that it was uncertain how successful smaller Altnets would be in supplying third party
21 | ISPs so there would likely be very few overlap locations in the short-term. As I said
22 | a moment ago, I don't think that is now disputed. But just for your reference, it was
23 | based on analysis carried out by Ofcom in the review WFTMR. The relevant
24 | references are these -- I am not going to ask you to turn them up now -- it's
25 | paragraph A4.6(b) of annex 4 to the statement and footnote 286. Then in the review
26 | itself it's paragraphs 8.60 to 8.71 at bundle 2A, tab 9, pages 166 to 169. It's worth

1 homing in I think when you do revisit those bits in particular on paragraph 8.62 in the
2 review and paragraph 8.71.

3 I think the complaint that had been made in the skeleton by CityFibre about this part
4 of the analysis was, well, the analysis was a bit out of date, to which our simple
5 answer is: no, it wasn't because the review is actually for the period 2021 to 2026.
6 So it would, we say, be quite wrong, bearing all of this in mind, for the Tribunal to find
7 that this was an irrational conclusion, that limited conclusion reached by Ofcom.
8 One might even say it wasn't only rational but obvious, but I don't have to persuade
9 you that it was obvious, merely that it wasn't bonkers which it wasn't.

10 That then slightly makes me wonder what to do with Mr Dunn's evidence and the
11 further calculations by Ofcom because there isn't really, as was suggested a moment
12 ago, any dispute about that. But because we do say that it shows that any error, if
13 any error there was, was not material, it is perhaps useful for me to just point you to
14 the basics of that analysis.

15 We say essentially CityFibre complained that they didn't have a proper chance to say
16 what they would have wanted to say; that which they would have wanted to say is in
17 Mr Dunn's evidence. We then say: well, even assume against us we had got the
18 consultation exercise wrong, what does that all amount to? Answer: it doesn't
19 undermine the overlap conclusion. So that is the materiality point.

20 We start I think with Ofcom's illustrative example, so building on the very small initial
21 percentage for current overlap at the time of the statement. You then get another
22 percentage figure based on a calculation, an example, set out -- I don't think you
23 need to turn it up -- in annex 4 to the statement, paragraph A4.8, bundle 2B, tab 74,
24 page 927.

25 This is the example that assumes that Openreach builds another 3 million homes
26 and that 300,000 of those overlap with CityFibre, and then you would get a certain

1 percentage overlap. That, as explained in paragraph 82 of Mr Matthew, is actually
2 a conservative estimate, if you like, a conservative example or the ingredients are
3 conservative. But the key point is when you then work it all out you end up at
4 something that is broadly consistent with Mr Dunn's evidence.

5 It's, as I say, in paragraph 82 of Mr Matthew and it may be that it would make more
6 sense, rather than for me to try to explain it, without going into anything confidential,
7 for the Tribunal just to look at paragraph 82 at this stage. That's page 138 of tab 5 of
8 the core bundle.

9 If I can just invite you to glance through it. It's quite a lengthy paragraph, but you will
10 see the bottom line at (ii) on page 139 which is important. **(Pause)**.

11 Thank you very much.

12 So no dispute about this as far as it goes, no evidence in reply from CityFibre.

13 **THE CHAIRMAN:** There's a question about the timing, isn't there, I think that's put
14 up by CityFibre about when this example refers to, the point about the 12 to 24
15 months?

16 **MS CARSS-FRISK:** Yes.

17 **THE CHAIRMAN:** And whether it has -- I think perhaps I paraphrase by saying it
18 had been conveniently placed at an earlier date than might have been intended in
19 the statement. Perhaps that's unfairly paraphrasing but broadly that's the impact of
20 it, I think. What do you say about that?

21 **MS CARSS-FRISK:** Yes, that probably links to and it's worth now looking at where
22 a slightly different analysis is carried out in Mr Matthew's statement. I think I have
23 understood the question, and the answer is that one has Mr Dunn coming up with
24 one percentage after the end of the final quarter of the period and then you have
25 Mr Matthew coming up with the lower percentage, being after the first year of the
26 relevant period, and Mr Matthew explaining that you therefore have broad

1 consistency in fact when you look at the trajectory and it's spread over a period of
2 time.

3 I was going to come on to where Mr Matthew explains that. Of course again that has
4 not been disputed as far as it goes by CityFibre and they have not put in any
5 evidence to seek to undermine that. Rather, I think their case is that they tried to
6 say, well, it doesn't matter and the dispute is that we say, assuming those
7 calculations are right, they do matter.

8 Moving on to that aspect of Mr Matthew's analysis, it's paragraphs 123 to 129 and, in
9 particular, paragraphs 125 and 128 in of course the same tab, tab 5. Paragraph 125,
10 on page 153, you see the key points made there.

11 **THE CHAIRMAN:** Yes.

12 **MS CARSS-FRISK:** Then, as I said, paragraph 128 at page 154.

13 "This illustration shows how, once the time differences are appreciated, Dunn's
14 forecast for end 2023 is consistent with the illustrative overlap figure used to inform
15 Ofcom's analysis."

16 I think one point that may be being made, although I don't believe I heard it being
17 made orally, is that, accepting all of this, given the somewhat bigger percentage that
18 Ofcom then referred to by way of illustration after the first year, then there might, as it
19 were, be a danger area in the second year between the end of the first year and then
20 the end of the second year because at that point then, on Ofcom's analysis, you
21 would have that somewhat bigger percentage.

22 But we say that is an unrealistic suggestion, given the unchallenged evidence that
23 ISPs would find it easier rather than harder to meet the order mix targets over time,
24 even if overlap does grow because of the effect of regulatory stop sell.

25 The reference to that is Matthew, paragraph 121, which is on page 152. This may
26 not be the time to look at that in detail because I will have to come back to some of

1 this in due course, but just while we were on the question of timing.

2 That really completes what I was going to say just about ground 1A, a limited point
3 perhaps, and then go on to ground 1B, which is of course everything about did we
4 consult fairly and did we make rational enquiries. I am entirely in your hands as to
5 whether to carry on with that now or kick off with that tomorrow morning.

6 **THE CHAIRMAN:** I think it probably depends a bit on how much time you think you
7 will need tomorrow. Do you think that on current plans -- and I appreciate how
8 difficult it is because we may ask you lots of questions -- the timetable still looks
9 reasonably intact or would you like to buy a little bit of extra time now or in the
10 morning, I think is probably the question?

11 **MS CARSS-FRISK:** No, I think we are fine on time because Mr Holmes has done
12 so much of the heavy lifting in terms of various document references so I think we
13 will be fine.

14 **THE CHAIRMAN:** Okay. That's very helpful. In that case, we might rise now and
15 start again at 10.30 tomorrow morning. Thank you very much.

16 **(4.26 pm)**

17 **(The hearing adjourned until 10.30 am on Thursday, 12 May 2022)**

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22 Parties' agreed note of missing audio at 14:43

23 **THE CHAIRMAN:** -- the significance of the factual material?

24

25 Parties' agreed note of missing audio at 14:48

26 **THE CHAIRMAN:** But how is Annex 8 not adequate? Especially footnote 127, and

1 | you may have a collection of other factual material which Ofcom has accumulated
2 | from direct approaches.

3 | **MR HOLMES:** The role in the reasoning must be made clear and the way that it is
4 | relied upon by Ofcom must also be made clear. That is the consultation ground.

5 | [Turning to the second limb of Ground 1 we see from Harries] that after the ConDoc
6 | was published Ofcom did turn to seeking information on overlap but it did not take
7 | the obvious approach of asking them for short-term build plans and comparing them

8 |

9 |