Neutral citation [2022] CAT 33

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1426/3/3/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

15 July 2022

Before:

BEN TIDSWELL
(Chair)
DR CATHERINE BELL CB
PROFESSOR MICHAEL WATERSON

Sitting as a Tribunal in England and Wales

BETWEEN:

CITYFIBRE LIMITED

Appellant

- v -

OFFICE OF COMMUNICATIONS

Respondent

- and -

BRITISH TELECOMMUNICATIONS PLC

Intervener

Heard at Salisbury Square House on 11-12 May 2022

JUDGMENT

APPEARANCES

Mr Josh Holmes QC, Ms Jessica Boyd QC and Ms Isabel Buchanan (instructed by Bristows LLP) appeared on behalf of the Appellant.

Ms Monica Carss-Frisk QC, Ms Naina Patel, Mr Tom Coates and Ms Khatija Hafesji (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Robert Palmer QC and Ms Laura Elizabeth John (instructed by Addleshaw Goddard LLP) appeared on behalf of the Intervener.

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A. INTRODUCTION

1. This is an appeal under section 192(2) of the Communications Act 2003. It concerns a decision made by the Respondent, Ofcom, contained in its 30 September 2021 statement "Openreach Proposed FTTP Offer starting 1 October 2021" (the "Statement"). The Appellant, CityFibre, says that Ofcom was wrong to decide to take no further action in relation to a commercial offer by Openreach Limited ("Openreach"), a wholly owned subsidiary of British Telecommunications PLC ("BT").

2. CityFibre is building full fibre infrastructure in locations across the UK to deliver fast, reliable and future-proofed (by reason of advanced technology) broadband services to consumers. It is the largest of a number of alternative networks (or "altnets") who are building fibre infrastructure to challenge Openreach, which is the incumbent provider of wholesale network access. Ofcom has previously determined that BT (and therefore Openreach) has significant market power ("SMP"), so that certain commercial terms offered by Openreach are subject to a 90-day notification period to Ofcom.

3. In the Statement, Ofcom considered a notification from Openreach in relation to an offer called "Equinox". As explained further below, Equinox involves offers of discounts to internet service providers ("ISPs"), such as Sky, TalkTalk and Vodafone, to whom Openreach provides wholesale access to its network, as well as discounts to BT, to whom Openreach also wholesales.

4. Central to CityFibre's appeal is the contention that Ofcom failed to consult or otherwise investigate properly the extent to which the networks of CityFibre and other altnets would overlap with Openreach's network. CityFibre also argues that Ofcom had no evidence on which to base its conclusion on this point (the "Overlap Conclusion") and that Ofcom failed to follow its own framework for assessing the Equinox offer.

5. CityFibre's points of appeal are based on judicial review principles and a relatively narrow set of well-established public law grounds. In essence, CityFibre does not seek to persuade us that Ofcom's decision was wrong as a

matter of its underlying merits – but rather that the process and basis on which the decision was reached is sufficiently unsafe that the decision should be set aside.

6. Accordingly, the case before us proceeded with only limited factual evidence from CityFibre in the form of a witness statement from its Chief Financial Officer, Nicholas Dunn (largely to support an argument about what information might have been provided if Ofcom had consulted properly). Ofcom also provided limited evidence in the form of witness statements from its Economic Director, David Matthew, and its Principal Economics Advisor, Benjamin Harries, in accordance with its duty of candour to explain the circumstances of the process leading up to the Statement, and also by way of short response to CityFibre's counterfactual evidence.

7. We permitted BT (but not a number of altnets and an ISP) to intervene in the appeal (see our Ruling at [2022] CAT 8). We declined to give the other altnets permission to intervene, because it was apparent they had little to add to the material available on the face of the Statement and we were concerned that their involvement might delay the hearing of the appeal. CityFibre opposed their interventions.

8. We permitted BT to intervene because of the immediacy of its commercial interest (as the maker of the Equinox offer) and its ability to provide assistance to the Tribunal on limited factual matters. Along with its Intervention Statement, BT submitted a witness statement from the Chief Strategy Officer at Openreach, Richard Allwood, mainly dealing with the commercial rationale for, and context of, the Equinox offer. BT also made short oral submissions at the hearing of the appeal.

9. The appeal was heard on 11 and 12 May 2022. Mr Holmes QC appeared for CityFibre, Ms Carss-Frisk QC appeared for Ofcom and Mr Palmer QC appeared for BT.

B. BACKGROUND

(1) FTTP and FTTC

10. Fibre to the Premises ("FTTP") refers to the broadband product a consumer receives where the full-fibre cable connects physically to the consumer's premises. It is to be contrasted with Fibre to the Cabinet ("FTTC"), which refers to broadband products where the full-fibre connects to a cabinet on the street, with BT's legacy copper wire network providing the connection between the cabinet and the consumer's premises. FTTC products are often referred to as *"legacy"* products.

11. Copper networks were developed for traditional voice telephony, whereas full-fibre networks are built for broadband. As a result, FTTP products offer the potential for considerably greater speed of data flow, stability and consistency of performance.

(2) Structure of the market

12. The following diagram (taken from Mr Matthew's evidence) shows broadly how the market for telecoms supply worked in 2021 (bearing in mind it is a dynamic market, evolving through competition and innovation):

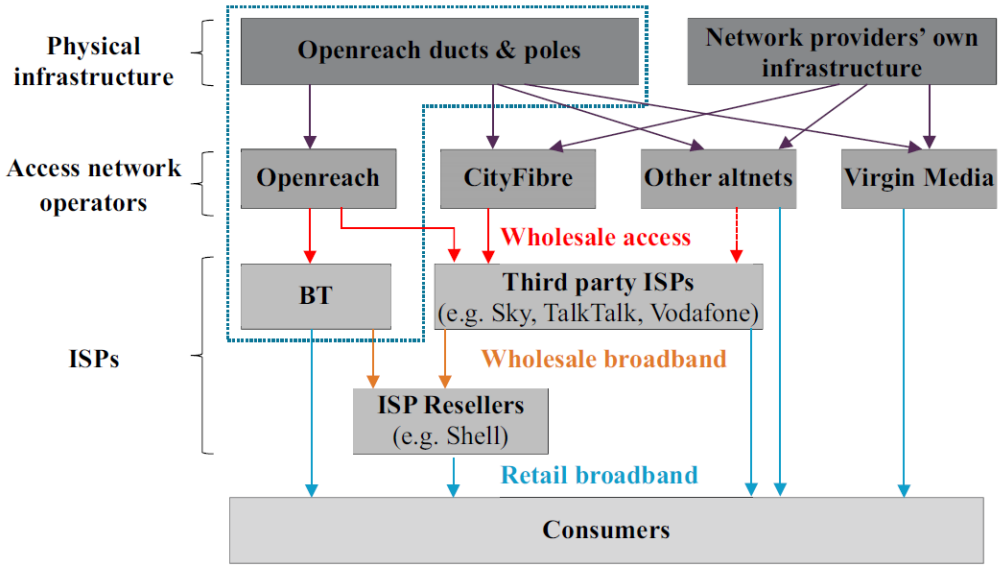

Figure 1: Stylised Overview of the Fixed Telecoms Supply Chain (from statement of David Matthew)

13. We are concerned in this appeal mainly with the wholesale market which exists between access network operators (Openreach, CityFibre and, to a limited extent at the time of the Statement, other altnets) and ISPs, who purchase wholesale access from network operators and offer end consumers broadband and voice services. Some points to note by reference to Figure 1:

    (1) Some network operators, like CityFibre, do not deal directly with end consumers, instead offering wholesale access only to ISPs.

    (2) Openreach supplies its parent, BT, which offers retail products to consumers. Openreach also provides wholesale network access to ISPs.

    (3) Other network operators, such as Virgin Media and, at the time of the Statement, most altnets, only sell directly to consumers.

    (4) Some ISPs like TalkTalk and Vodafone also offer their own wholesale broadband products to ISP Resellers (e.g. Shell).

14. Virgin Media operates its own cable network, supplemented by FTTP. Although a significant market player (according to Mr Matthew's evidence, it accounted for about 20% of broadband connections to consumers at the end of 2020), it does not purchase Openreach products and does not sell its own capacity to other ISPs. It is therefore of no further relevance to this appeal.

(3) Ofcom's Wholesale Fixed Telecoms Market Review

15. On 18 March 2021, Ofcom published its Wholesale Fixed Telecoms Market Review (the "WFTMR"). This document sets out the results of a review into the fixed telecoms markets that underpin broadband, mobile and business connections and Ofcom's decisions for regulating those markets in the period from 2021 to 2026. These decisions were said to be designed to promote competition and investment in gigabit capable networks (for present purposes, FTTP), so as to bring faster, better broadband to UK consumers.

16. Ofcom set out its objectives in Volume 1, section 2, as follows:

> "2.7 Our Strategic Review of Digital Communications (DCR) in 2016 set out how we intended to exercise our functions to regulate communications markets in accordance with our duties. It set out our intention to regulate to encourage large-scale deployment of new full-fibre networks both to homes and businesses, drive widespread availability of competing ultrafast broadband services and support the roll out of 5G networks.
>
> 2.8 We think the best way to achieve this and deliver these outcomes for consumers is through sustained support for competition in gigabit-capable networks in as many areas of the UK as possible. Therefore, in this review we want to promote investment in such networks by BT and other companies in order to promote network-based competition. We want to encourage BT's competitors to build their own networks, rather than relying on network access from Openreach. In areas of the UK where there is unlikely to be material and sustainable competition to BT in the commercial deployment of competing networks, we want to promote investment by BT and ensure appropriate access to competitors in the interests of consumers."

17. In Volume 2, the market analysis section of the WFTMR, Ofcom identified that BT had a high market share and its national coverage gave it an advantage over other operators, as in large parts of the country there were no competing networks (paragraphs 8.41 and 8.44). Barriers to entry for other operators (i.e., altnets) were also considered to be high, because of the costs of building a network and the time required to complete that (paragraphs 8.48 to 8.55). The risks of investment could however be substantially mitigated by an altnet securing commitments from wholesale customers to take long term volumes (paragraphs 8.56 and 8.62). In other words, the ability to secure long term deals with ISPs was recognised to be an important factor in encouraging altnets to make investments in FTTP networks.

18. Ofcom decided in the WFTMR that BT had SMP in wholesale markets that underpin broadband. This was, in part, because Openreach was the only available network in some regions of the country, and therefore the only supplier of FTTP products to ISPs. Ofcom was concerned that BT (through Openreach) could attempt to leverage its position as a "must deal" supplier to ISPs, for example by offering volume or loyalty discounts which would tie in market demand, even in areas where Openreach faced altnet competition. In Volume 3 of the WFTMR Ofcom said:

> "7.56 We have a relatively small window of opportunity to encourage new network build. If alternative operators are unable to secure sufficient access seekers/end users over a reasonable time period then it is unlikely they will be able to secure funds from investors for their FTTP rollout plans. Competition

law cases can take years to reach resolution and new network builders may be unable to secure access seekers while a competition case is ongoing (e.g. because it is unclear whether commercial terms introduced by Openreach will be ultimately be deemed unlawful)."

19. As a consequence, Ofcom imposed requirements on Openreach to provide 90 days' advance notice to Ofcom of any conditional pricing arrangements to be offered to ISPs:

> "7.148 We discuss stakeholder comments and our response in more detail below. In summary, we remain concerned that Openreach could use other commercial terms to discourage access seekers from switching to alternative providers. We have decided to consider proposed commercial terms that may deter new network build as they are notified by Openreach. Where necessary we will intervene to prevent such terms, including through our direction making powers under SMP Conditions. We have identified loyalty inducing terms e.g. pricing contingent on large volume commitments as a particular concern. To facilitate us considering such terms, Openreach is required to provide 90 days' notification of commercial terms where the price or other contractual conditions are conditional on the volume and/or range of services. …"

20. Ofcom also gave an indication of the way it would propose to approach any offer which was notified under this regime:

> "7.154 In the consultation we set out a proposed analytical framework for considering other commercial terms. Our starting point was that the creation of any barrier to using alternative network operators would only be justified where:
>
> a) the impact on nascent network competitors is unlikely to be material; and
>
> b) the arrangements will generate clear and demonstrable benefits, such as:
>
> i) the arrangements are essential to Openreach's business case for fibre roll-out; or
>
> ii) the arrangements are necessary to offer more efficient prices that would deliver benefits for consumers."

And:

> "<u>Our analysis and conclusions</u>
>
> 7.159 Our objective is to promote investment in gigabit-capable networks by Openreach and other operators in order to promote network-based competition, and this will be our guiding principle in assessing commercial terms proposed by Openreach. Our key concern is commercial terms that could undermine investor confidence in new network build and impact rollout plans e.g. by discouraging access seekers from switching demand to alternative networks. Given this, it is appropriate that our analytical framework is concerned with

the promotion of competition rather than the protection of competition as under competition law.

7.160 If Openreach proposes commercial terms which clearly have no impact on access seekers incentives to use alternative networks, then they are unlikely to be a concern. If Openreach proposes commercial terms that potentially create a barrier to using alternative networks, then we will apply the framework set out in paragraph 7.154. Commercial terms that have a material detrimental impact on competitive network build are unlikely to justified. Where the commercial terms constitute some barrier to access seekers using new alternative networks, but the effect is unlikely to be material, we will consider the purpose and potential benefits of the terms. …"

(4) The Equinox Offer

21. On 1 July 2021, Openreach formally notified Ofcom of the Equinox offer, under which ISPs receive discounts from Openreach for FTTP connection and rental charges if they meet certain targets for the percentage of new orders they place with Openreach which are FTTP (as opposed to FTTC or legacy orders). The Equinox offer, which was scheduled to take effect on 1 October 2021 (90 days after notification), could be accepted by ISPs between 1 October 2021 and 30 March 2022 and will last for ten years.

22. The targets in the Equinox offer are known as Order Mix Targets (or "OMTs"*)*. They operate as follows:

(1) The discount is calculated by reference to the proportion of new FTTP orders an ISP placed with Openreach compared with the total of new FTTP and new legacy orders the ISP placed with Openreach. Only legacy orders in areas where Openreach offers FTTP are counted, so the calculation has no effect outside of Openreach's FTTP footprint.

(2) This proportion is measured every quarter. If it meets or exceeds the relevant OMT threshold then the ISP will obtain the discount for that quarter in relation to all Openreach FTTP products which the ISP sells on to consumers.

(3) The thresholds for the proportion of new FTTP orders are: (i) 80% for discounts on rental charges, and (ii) 90% for discounts on connection charges (with some partial discounts at 80%). Rental discounts carry the

greatest value (because they persist over the lifetime of the contract). There is a lower threshold of 75% for both forms of discount in the first six months. Ofcom estimated that the average value of the discounts over the lifetime of a consumer contract could be between 15% and 30% compared with Openreach list prices.

(4) If an ISP falls short of a target in a quarter then it loses the discounts during that quarter. If, after 12 months of operation of the offer, an ISP falls short in three consecutive quarters then Openreach may terminate the Equinox offer and end all future discounts.

23. In broad terms, the commercial effect of the Equinox offer is to incentivise ISPs to sell FTTP, rather than legacy, products to consumers in areas where Openreach offers FTTP, thereby accelerating the switch by customers to FTTP. This is in Openreach's interests because it has to bear the costs of two networks – the FTTP network and the legacy FTTC network – and the sooner that consumers switch, the faster Openreach can reduce its costs. It also of course means that consumers are receiving the benefit of FTTP sooner and with reduced cost.

24. It was apparent from the material before us that Openreach had engaged with Ofcom and ISPs on the Equinox offer prior to 1 July 2021. Ofcom's witness evidence suggested Ofcom had commenced its analysis in mid-June 2021, on the basis of details of the Equinox offer (in draft form) which Openreach shared with Ofcom in early June. By contrast, BT's witness evidence indicated that Openreach first provided details of the Equinox offer to Ofcom in April 2021. CityFibre says it raised concerns with Ofcom in May 2021 about Openreach approaching ISPs with new pricing proposals.

(5) Consultation on the Equinox Offer

25. Mr Harries explained in his evidence that Ofcom started its information gathering process with a "Call for Inputs" issued on 2 July 2021, which invited stakeholders to raise initial concerns by 16 July. There were 13 responses, including one from CityFibre. Ofcom then conducted calls with several

stakeholders, including Openreach, CityFibre, Sky, TalkTalk and Vodafone and followed those up with written (but informal and so not pursuant to statutory powers) information requests.

26. Ofcom published a Consultation Document on 6 August 2021, in which it set out its provisional view on the Equinox offer, taking into account the information it had received to date. Before turning to the Consultation Document of 6 August, it is necessary to examine in more detail Ofcom's approach to the information gathering exercise up to that point.

27. Mr Matthew, in his witness statement, said that it was clear to Ofcom that the Equinox offer did not commit ISPs to purchasing minimum volumes from Openreach, or contain overt loyalty rebates or volume based discounts, or otherwise make supply terms contingent on the split of purchases between Openreach and altnets.

28. Ofcom's concern was therefore not to evaluate an incentive that directly affected ISPs' incentives to purchase from altnets, but rather to check whether there was an indirect or hidden effect arising from the way the discounts worked. Hence, the focus was on how the risk of an ISP falling short of an OMT might cause it to prefer to sell Openreach FTTP products rather than altnet FTTP products, where the ISP had a choice of doing so.

29. Mr Harries and colleagues prepared a set of slides - described as "an early discussion paper" - for an internal Ofcom meeting on 8 July 2021 (the "July Slides"). The July Slides set out the proposed analytical framework for assessing the Equinox offer.

30. The July Slides indicate a concern by Ofcom that the OMTs in the Equinox offer might discourage ISPs from using altnets, because the ISPs might prefer to place FTTP orders with Openreach rather than altnets where there was a choice between the two. In order to assess this risk, the slides proposed an analysis of the way the OMTs worked (how difficult they were to achieve and what the likely level of discounts would be) and the extent to which overlaps between

altnet and Openreach networks might exist and might cause ISPs to make a choice not to use altnets.

31. Mr Holmes drew our attention to parts of the July Slides which he said were evidence that Ofcom had already reached a provisional conclusion that the Equinox offer would create a potential barrier for ISPs in using altnets, and also identified the importance of gathering information about the extent to which the altnets' networks might be overbuilt by Openreach in the short term. However, Mr Holmes accepted that the slides were not part of the decision under appeal, even if they were informative about Ofcom's developing thinking.

32. On 19 July 2021, CityFibre submitted its response to the Call for Inputs. This noted that where consumers only had FTTC services available, it was much easier for ISPs to convince them to switch to an FTTP altnet network. As a result, altnets would prefer to build where Openreach did not have an FTTP network and would build in a more limited way where there was existing Openreach FTTP. It said: "*Openreach and its rivals are therefore in a race to build*".

33. Ofcom conducted a number of calls with interested parties between 14 and 22 July 2021. Ofcom provided a list of questions before each call. The call with CityFibre took place on 21 July and Ofcom's note of the call records the following exchange:

> "**2. In what circumstances (if any), would CityFibre overbuild other FTTP networks, including Openreach FTTP?** CityFibre will not overbuild. It is critical that CityFibre achieve first mover advantage which is why the timing of both its own and of Openreach build is so important. In addition, CityFibre highlighted the importance of Openreach transparency in order that CityFibre can "side-step" Openreach areas.
>
> **3. What are you assuming about the proportion of CityFibre's FTTP network footprint where Openreach FTTP will also be present?** AB said it was hard to know how seriously to take Openreach's announcement of 25m. CityFibre recognise that the proportion of overbuild is increasing and that it has had to adjust its original assumptions. It offered to provide more precise numbers if required. AB said that given that 25m premises passed represents about 80% of total premises, it is now expecting eventual overbuild to be 100%."

C. THE CONSULTATION PROCESS

(1) The Consultation Document

34. The Consultation Document was published on 6 August 2021, with a closing date for responses of 6 September 2021.

35. On the basis of the information already received through the call for inputs, in other conversations and from the WFTMR, Ofcom had reached a provisional view that the Equinox offer did not warrant intervention and that Ofcom should take no action at that time.

36. Under the heading "Analytical Framework", Ofcom referred to paragraphs 7.154 and 7.160 of the WFTMR, which set out Ofcom's proposed approach in such cases. We quote the passage in full, as it is central to this appeal:

> "2.38 To assess the potential concerns that the Order Mix Targets and forecasting requirements create barriers to using altnets, we have followed the approach set out in the WFTMR Statement. In that statement, we explained that our starting point was that the creation of any barrier to using alternative network operators would only be justified where:
>
> a) the impact on nascent network competitors is unlikely to be material; and
>
> b) the arrangements will generate clear and demonstrable benefits, such as:
>
> i) the arrangements are essential to Openreach's business case for fibre roll-out; or
>
> ii) the arrangements are necessary to offer more efficient prices that would deliver benefits for consumers.
>
> 2.39 Therefore, our analysis considers up to three questions:
>
> a) **Question 1**: Does the Equinox Offer potentially create a barrier to using altnets?
>
> b) **Question 2**: Is the Equinox Offer likely or unlikely to have a material impact on nascent network competitors?
>
> c) **Question 3**: Is the Equinox Offer likely to generate clear and demonstrable benefits?
>
> 2.40 Under Question 1, we consider whether the terms of the offer could deter ISPs from moving volumes from Openreach to altnets by penalising them in some way. For example, do ISPs face higher average charges for services purchased from Openreach if they switch some volumes to new networks?

> 2.41 If the offer does potentially create a barrier to using altnets, we will go on to consider the likely impact on nascent network competitors (Question 2). Commercial terms that have a material detrimental impact on competitive network build are unlikely to be justified. Where the commercial terms constitute some barrier to access seekers using altnets but the effect is unlikely to be material, we consider the purpose and potential benefits of the terms (Question 3).
>
> 2.42 As explained in the WFTMR Statement, our objective is to promote investment in gigabit-capable networks by Openreach and other operators in order to promote network-based competition, and this is our guiding principle in assessing the Equinox Offer. Given this, our analytical framework is concerned with the promotion of competition rather than the protection of competition as under competition law."

37. For the purpose of the issues in this appeal, the basis for Ofcom's provisional view is set out in paragraph 2.45 and following of the Consultation Document, in which Ofcom concluded that the OMTs did not create a potential barrier to using altnets. Ofcom's reasoning, in summary, was as follows:

(1) ISPs might be deterred from moving volumes from Openreach to altnets if doing so jeopardised meeting the OMTs. The discounts for meeting the OMTs could be substantial, giving ISPs strong incentives to meet them.

(2) There was considerable uncertainty about how ISPs would perform against the OMTs. There was a plausible scenario in which at least some ISPs might struggle to meet the OMTs, especially in the next few years, but this was expected to be temporary.

(3) In the plausible scenario of ISPs being close to missing OMTs, an ISP that ordered FTTP from altnets and legacy products from Openreach would find it harder to satisfy the OMTs (because the proportion of new Openreach FTTP orders/total new Openreach orders of legacy and FTTP would change).

(4) Under the Equinox offer, ISPs would be unlikely to offer legacy products where FTTP was available. Moving volumes to an altnet rather than ordering Openreach FTTP products would have no effect on the OMTs in that situation (because there would be no change in the

proportion of new Openreach FTTP orders/total new Openreach orders of FTTP and legacy).

(5) ISPs were expecting to stop selling legacy products in any event through the implementation of "regulated stop sell". This policy, mandated by Ofcom, relieved Openreach of its obligation to offer legacy products once there were certain levels of FTTP coverage in a region. (Trials to date suggested that the effect was largely to remove sales of legacy products – see A7.9 and A7.13(c) of the Consultation Document).

(6) A potential issue for ISPs was the contracts they had in place with other, downstream ISPs who purchased volumes to resell to consumers, where the upstream ISPs could not prevent the downstream ISPs from continuing to order legacy products. Ofcom thought this issue was likely to be small and time limited.

(7) In a footnote to the point made in (3) above, Ofcom noted that the scale of this problem would depend on the proportion of the Openreach footprint in which the ISP engaged in this behaviour. This in turn depended on overlap of the Openreach network with altnet networks. In Annex 8 of the Consultation Document, Ofcom addressed this problem. It considered evidence based on the published investment plans of Openreach for the period to 2026 and the public and privately shared investment plans of CityFibre for the period to 2025. Ofcom concluded that, in the longer term, altnets providing wholesale access to ISPs may be present in approximately a third of Openreach's network. In the shorter term, this overlap was uncertain.

38. As a consequence of this analysis, Ofcom provisionally concluded that the OMTs did not create a potential barrier to using altnets (Question 1), and that it was therefore unnecessary to go on to consider Questions 2 and 3. Ofcom also noted that it had the power to intervene later, including using powers under the SMP regime, if Ofcom's provisional assessment was to be proved incorrect.

(2) Formal requests for information

39. After publication of the Consultation Document, Ofcom made formal requests for information of CityFibre and Openreach, under section 135 of the Communications Act 2003. It is an offence under that Act not to provide the information, or to provide false information in response.

40. The request sent to CityFibre asked for an estimate of the current overlap between CityFibre's network and Openreach's network, by including a question about the "*proportion of premises that [CityFibre] is able to supply with FTTP that currently can also be served using FTTP from Openreach*". Ofcom did not ask CityFibre about its expectations of future overlap between the CityFibre and Openreach FTTP networks.

41. In the section 135 notice sent to Openreach, Ofcom asked for an estimate of current overlap with altnet networks and also asked: "*What assumption does Openreach's latest FTTP investment case and/or FTTP business plan incorporate about the proportion of Openreach's FTTP footprint that is also served by another FTTP network in each of the next three years?*"

42. As will be apparent from the July Slides and Annex 8 of the Consultation Document, the short term overlap of Openreach and altnet FTTP networks was an important piece of the puzzle which Ofcom was analysing. It is therefore surprising, on the face of things, that Ofcom did not ask CityFibre for an estimate of this short term overlap.

43. Mr Harries explained this in his statement as follows:

> "26. As a result, we asked Openreach and CityFibre to provide estimates of the current level of overlap in the s.135 information requests sent on 16 August 2021. We considered that, as estimates of the current level of overlap depended only on what has been built, they were subject to less uncertainty than estimates of future overlap. At that stage, we did not know exactly how we would use the estimates in the Equinox Statement; the requests were primarily aimed at adding detail to our assessment of overlap set out in Annex 8 of the Equinox Consultation.
>
> 27. It remained our view that requesting estimates for how overlap might evolve in the short term as part of these information requests was not a priority,

> for the same reasons as before (see paragraph 21). We also did not think it appropriate to issue statutory information requests to stakeholders requiring them to provide expectations as to future behaviour not contained in pre-existing documentary evidence. At the time, our consultation – which covered overlap – was open, giving all stakeholders an opportunity to provide any views on overlap. We did ask Openreach to provide assumptions of future overlap over the short term in its investment case as part of the s.135 information request sent on 16 August 2021. We added this question because, based on knowledge of Openreach's investment case modelling provided to Ofcom in the WFTMR process, we considered it likely that Openreach would have some pre-existing material (i.e. documents and/or spreadsheets) setting out these assumptions. Therefore, this was something we could ask for using statutory information gathering powers. We did not ask CityFibre a similar question as we were not at that time aware that CityFibre held any pre-existing estimates of overlap in the short term that we could ask for using our statutory information gathering powers (CityFibre had not indicated so on the initial call).
>
> 28. Openreach and CityFibre responded to our statutory information requests on 2 September 2021. Both provided estimates of current overlap, which were consistent with our view that the current overlap was low. Openreach did not hold assumptions for overlap in the short term but did provide assumptions for overlap in the long term."

44. The information provided by CityFibre and Openreach about current overbuild was used by Ofcom in its reasoning to support the decision it reached in due course in the Statement, as we explain below.

(3) Responses to the Consultation Document

45. CityFibre responded to the Consultation Document on 6 September 2021. Notwithstanding Mr Harries's view that the consultation offered an opportunity for stakeholders to comment on short term overlap, CityFibre did not address this question in its response. CityFibre did however note that Ofcom had drawn conclusions about the longer term overlap (up to a third of Openreach's network) and referred to Ofcom's expression of uncertainty about the short term, as recorded in Annex 8 of the Consultation Document.

46. CityFibre disputed Ofcom's provisional assessment, noting that even temporary incentives on ISPs not to use altnet FTTP would create barriers to altnet network usage. The Equinox offer would confer a substantial advantage to Openreach in winning new customers, in a crucial period in which altnets needed to maintain investor confidence in order to deliver the scale of investment and network roll out that Ofcom's policy sought.

47. A number of ISPs, including TalkTalk, Vodafone and Sky, responded to the Consultation Document. These ISPs provided information about their incentives and commercial intentions in relation to using altnets if the Equinox offer went ahead, including their approach to selling legacy products versus FTTP products. Some of these ISPs also expressed views about the likely network build strategies of altnets and Openreach respectively, and the likely short term overlap between these networks.

48. A number of altnets responded as well, including a joint response submitted by some sixteen altnets and a trade organisation, INCA (the "Joint Response"). The Joint Response challenged a range of aspects of Ofcom's reasoning and approach in the Consultation Document – including things like the effect that discounted prices would have on competition, geographical considerations, whether Ofcom's analytical framework (the three questions) corresponded with its approach set out in the WFTMR and, as reflected in CityFibre's response, concern about the effect the offer would have on ISPs' use of altnets and the investment case for altnet network build.

49. Broadly speaking, most ISPs supported Ofcom's provisional view about the Equinox offer, as expressed in the Consultation Document, albeit with some significant concerns expressed about downstream competition. The altnets' responses challenged the provisional view.

D. THE EQUINOX STATEMENT

50. Ofcom published the Statement on 30 September 2021. This addressed a range of issues raised by the consultation responses. This appeal concerns only one of those, which is the question of whether the OMTs discouraged ISPs from using altnets. The relevant passages in the Statement are at paragraphs 3.67 to 3.89.

51. Between paragraphs 3.69 to 3.75, Ofcom referred to the consultation responses on this question. Ofcom noted that Sky and Vodafone had submitted that OMTs would not deter them from placing orders with altnets. CityFibre had submitted that Ofcom's provisional conclusions were inconsistent with its provisional findings, which suggested at least a plausible scenario where ISPs might

struggle to meet the OMTs and the existence of overlap between Openreach and altnets in some areas. CityFibre and the Joint Response had submitted that it was no answer to the issue to say that any effects would only be temporary, given the crucial competition for customers in the next few years and the relatively small window to encourage new network build.

52. Between paragraphs 3.76 and 3.89, Ofcom set out its analysis and conclusions. It first noted that the OMTs were designed to bring forward in time the point at which ISPs would largely stop offering legacy products to new customers or customers changing product, by offering FTTP instead. The OMTs were not volume contingent pricing discounts, so it was the potential for indirect effects that Ofcom was considering.

53. On that subject, Ofcom's conclusion was as follows:

> "3.78 However, we have considered the potential for an indirect effect. Our detailed assessment of Question 1 is set out below, with further evidence set out in Annexes 2-4. In overview, our reasoning is as follows:
>
> a) The discounts if the Order Mix Targets are met could be substantial, in which case ISPs could be strongly incentivised to meet them. Therefore, the Order Mix Targets could deter ISPs from moving volumes from Openreach to altnets if doing so jeopardised meeting these targets.
>
> b) ISPs that sign up to the Equinox Offer will be doing so in the knowledge that they will need to largely stop new sales of Openreach legacy products in areas where Openreach FTTP is available.
>
> c) The main ISPs told us that [✂][1]. In the medium term, we expect ISPs to surpass the Order Mix Targets as a result of this strategy. As a result, almost all new orders will be for FTTP, so moving volumes to altnets will have no impact on whether the Order Mix Targets are met.
>
> d) In the short term, some ISPs may surpass the Order Mix Targets while others may struggle to hit the targets in the first 12-24 months due to temporary challenges.
>
> e) However, due to the limited overlap of the Openreach FTTP footprint by altnets in the next 12-24 months, placing orders with an altnet is likely to have very little effect on an ISP's mix of new Openreach orders across the whole Openreach FTTP footprint. As a result, ISPs are unlikely to be deterred from using altnets by those targets.

[1] This redaction appears in the Statement as published by Ofcom.

> f) We thus conclude that the Order Mix Targets do not create a potential barrier to using altnets."

54. Items (a) to (d) of this analysis followed the same logic as the provisional views set out in the Consultation Document (albeit with some developed thinking based on further information obtained through consultation). In particular:

(1) Before an effect could arise, an important condition was that ISPs might order legacy products from Openreach disproportionately to the amount of FTTP ordered (referred to as the *"skew"*). Ofcom illustrated this in footnote 100:

> "By way of illustration, assume that an ISP purchases only from Openreach and places the following orders within the Openreach FTTP footprint: 100 FTTP orders and 20 legacy orders in those parts of the footprint where no altnet is present; and 10 FTTP orders and two legacy orders in those parts of the footprint where an altnet is also present. The resulting proportion of Openreach orders that are FTTP is 83% (110/132). If instead the ISP places the 10 FTTP orders with the altnet where it is available, but continues to place the two legacy orders with Openreach, the proportion of Openreach orders that are FTTP reduces to 76% (100/132)"

(2) The expressed intentions of ISPs to continue to place orders with altnets and the anticipated regulated "stop sell" regime (in which almost all orders in a geographical area could be expected to be FTTP) suggested that, in the medium term at least, there was no cause for concern.

(3) Ofcom identified temporary challenges for ISPs in meeting OMTs, as a result of technical constraints and downstream contractual obligations.

55. However, item (e) was a point which had not been expressed in those terms in the Consultation Document. In summary, the reasoning was as follows:

(1) The scale of any skew that might arise depended on the proportion of the Openreach FTTP footprint where ISPs might purchase from Openreach's FTTP offering instead of that of an altnet.

(2) In the 12 – 24 months following the commencement of the Equinox offer, the overlap of altnet networks within the Openreach FTTP footprint was likely to be limited. This meant that using an altnet would

have limited impact on the share of an ISP's customer base to which it could offer legacy products and still meet the OMTs.

(3) To the extent that the overlap might increase during that period, the simultaneous increase in the areas which would become subject to regulated stop sell would more than balance that out.

56. Subparagraph (e) was, therefore, an analysis that addressed the consequences of the temporary challenges for ISPs that Ofcom had identified in the Consultation Document. Ofcom supported its analysis with calculations in two annexes:

(1) Annex 3 showed the effect of stop sell increasing over time and therefore reducing the number of consumers who might order legacy products:

(i) Ofcom produced tables which showed how changes in the proportion of Openreach's FTTP footprint subject to stop sell affected an ISP's ability to meet OMTs. These tables took into account the different levels of OMT which would apply over time (with the target increasing after an introductory period). The tables showed that the introduction of stop sell reduced the level of new orders that need to be FTTP to meet the OMTs in regions outside the stop sell areas by several percentage points.

(ii) The tables also modelled possible proportions of ISP usage of altnets, showing 2% and 5% usage. These percentages were effectively proxies for the amounts by which Ofcom considered that Openreach's FTTP network might be overlapped by altnets in the following 12-24 months. Figure A.3.5 showed that an overlap of 2% added between 0.3% and 0.8% to the level of sales required to meet OMTs at various levels of stop sell. Figure A.3.6 showed that an overlap of 5% added between 0.6% and 2.1% to the level of sales required to meet OMTs at various levels of stop sell. As a result, Ofcom concluded that, for the following 12-24 months, using an altnet was likely to have very

little effect on the share of an ISP's customer base that it could offer legacy products to and still meet the OMTs.

(2) Annex 4 considered the extent to which the FTTP footprint of altnets who were selling at the wholesale level (i.e., to ISPs) would overlap with Openreach's FTTP footprint. This involved consideration of short and long term overlap:

(i) In the long term, based on announced and privately shared investment plans, Ofcom expected a significant overlap by 2026 and beyond, although recognising there are considerable uncertainties. However, this was not considered problematic because of stop sell and other factors that made any overlap unlikely to affect ISP incentives.

(ii) In the short term, Ofcom noted that it was only concerned with altnets likely to sell at the wholesale level in the next 12-24 months. Ofcom used estimates of current overlap of Openreach and altnet networks (including those provided by CityFibre and Openreach through the section 135 process). The Openreach figures included wholesale and retail altnets, so these were discounted to reflect uncertainty about how many retail altnets would shift to a wholesale model during that period. Ofcom then made assumptions about how the overlap of CityFibre and Openreach's networks might grow over the next 12-24 months:

> "A4.8 The number of premises which are passed by both Openreach FTTP and CityFibre is likely to increase over time as both Openreach and CityFibre deploy more network. However, the proportion of the Openreach FTTP footprint where CityFibre is available is likely to remain low over the next 12-24 months, as the Openreach FTTP footprint grows. For example, if Openreach were to add 3m premises to its FTTP footprint, and 300,000 of these overlapped with CityFibre's build, the proportion of the total Openreach FTTP footprint where CityFibre is available would increase to 5%.
>
> A4.9 The evidence therefore points to low levels of overlap of Openreach's FTTP footprint by CityFibre's network, currently and over the next 12-24 months. More generally, we consider that there will be very few locations where altnets that provide access to third party ISPs overlap with the Openreach FTTP network in the short term."

57. On the basis of the analysis set out in the Statement, as described above, Ofcom reached the conclusion that the answer to Question 1 of its framework was as follows:

> "3.88 In the light of the above analysis, we conclude that the Order Mix Targets do not create a potential barrier to using altnets. Given this conclusion, it is not necessary to consider Questions 2 and 3 in our analytical framework"

58. Ofcom went on to add this statement:

> "3.89 We cannot rule out the possibility that ISPs' strategies, in particular the extent to which they continue to rely on Openreach legacy products where FTTP is available, change in future. If this were to happen, and our assessment above were overtaken by changing circumstances, it would still be open to us to intervene to prevent terms which create a barrier to using altnets, including through our direction making powers under SMP Conditions."

59. The Equinox offer became effective in the market on 1 October 2021. On 29 November 2021, CityFibre filed its appeal, challenging Ofcom's decision as set out in the Statement.

E. LEGAL ARGUMENT AND ANALYSIS

(1) Summary of competing arguments

60. CityFibre's appeal centred on two conclusions reached by Ofcom in the Statement:

(1) The "Overlap Conclusion", being that "in the next 12-24 months the overlap of altnets within the Openreach FTTP footprint is likely to be limited"; and

(2) The "Immaterial Impact Conclusion", being that "placing orders with an altnet while continuing to purchase legacy products from Openreach will have an immaterial impact on an ISP's mix of Openreach orders".

61. In practice, the argument centred on the Overlap Conclusion, as demonstrated by the grounds of appeal advanced by CityFibre:

(1) Ground 1: the Overlap Conclusion was inadequately investigated and/or consulted on and/or evidenced.

(2) Ground 2: This was initially a rationality challenge but evolved, after Ofcom filed its Defence and supporting evidence, to an argument that Ofcom misapplied its own test as set out in Question 1 and/or failed to apply its own analytical framework and therefore misdirected itself in law.

62. Ofcom's case was that the decision was within the margin of appreciation for a reasonable regulator and not open to interference, given that the nature of the appeal was a judicial review on traditional grounds.

63. In any event, Ofcom argued that:

(1) There had been adequate consultation, taking into account the developing thinking of Ofcom, the consistency of the conclusion between the Consultation Document and the Statement, and the legal requirements in such a situation.

(2) Any failure to consult was not material and CityFibre had not shown that it had suffered any prejudice.

64. In relation to Ground 2, Ofcom said that the analytical framework was not to be read as if it were legislation or a contract, and the regulator should have a reasonable margin of discretion as to setting and applying the required evidential standard.

(2) Evidence submitted

65. It is convenient at this point to say a little more about the evidence submitted by the parties in the appeal.

(a) Mr Dunn

66. Mr Dunn's witness statement, on behalf of CityFibre, addressed the market context before turning to the Equinox offer, the Statement and, specifically, the Overlap Conclusion in the Statement. Mr Dunn provided CityFibre's view of the likely overlap between the CityFibre and Openreach networks over the 12-24 months following the Statement. This was based on some work by consultants who were engaged by CityFibre as part of its general business planning.

67. In short, Mr Dunn provided an estimate for the percentage of Openreach's footprint that will be overbuilt by CityFibre's network as at Q4 2023. This estimate (which involves a small range) is materially greater than the figure used by Ofcom in the tables in Annex 3 to the Statement, discussed above. Mr Dunn's evidence was advanced by CityFibre to demonstrate what CityFibre would have said if consulted on the Overlap Conclusion, as CityFibre said it should have been.

(b) Mr Matthew

68. Mr Matthew's witness statement on behalf of Ofcom covered a number of areas, including the regulatory context and the approach taken to the Equinox offer, the tests applied, the minimum conditions needed for Ofcom to reach a conclusion of a potential barrier, the position of ISPs, the implications of the regulatory policy of stop sell and the key reasoning behind the Overlap Conclusion and the Immaterial Impact Conclusion. In a second part, Mr Matthew gave what he described as expert evidence, which involved an analysis of the figures for overlap which Mr Dunn had put forward in his witness statement.

69. For present purposes, we note the following:

    (1) In dealing with the minimum conditions for Ofcom action, Mr Matthew described three sets of minimum conditions (each with three sub conditions) (the "Nine Conditions"). This essentially involved an

analysis of items (a) to (e) in paragraph 3.78 of the Statement, in which Mr Matthew attempted to explain that all of the Nine Conditions needed to be satisfied before Ofcom could identify a potential barrier to ISPs using altnets, and that a number of them were not in fact satisfied in this case. This evidence was relied on by Ofcom both to give context to the significance of the Overlap Conclusion (being one of the Nine Conditions) and also as a point about materiality, in the sense that the Overlap Conclusion was not the only basis on which Ofcom reached its conclusion.

(2) In relation to Mr Dunn's evidence about overlap, Mr Matthew reperformed the calculations from Annex 3 of the Statement, now to include Mr Dunn's estimates of overlap. Mr Matthew noted that the timing of Mr Dunn's estimate sat outside the 12-24 month period, but he expressed the view that Mr Dunn's estimates were consistent with Ofcom's own estimates (this led to a dispute between Ofcom and CityFibre about whether Ofcom's estimates related to a precise point in time as advanced in the Statement).

(3) Mr Matthew also noted that applying Mr Dunn's estimates of overlap, along with other factors such as stop sell, made little difference to the level of sales required by ISPs to meet the OMTs.

70. Mr Harries provided a witness statement in relation to the consultation process, which is referred to above.

71. Mr Allwood, for BT, covered the commercial rationale for the Equinox offer, and explained the process undertaken by BT to design it. He also provided us with an indication of the experience to date (his statement was signed on 28 February 2022) of ISPs meeting OMTs. We did not attach any weight to this latter aspect of his evidence, given our focus on the Statement and evidence available to Ofcom at the time.

(3) Applicable Legal Principles

(a) Standard of Review

72. All parties agreed that the standard of review did not involve an inquiry into the merits of Ofcom's decision, but instead the application of traditional judicial review principles pursuant to s. 194A of the Communications Act 2003. See our Ruling (Permission to Intervene) [2022] CAT 8 at [34] and following.

(b) Duty of Consultation

73. We were referred to a number of authorities on the subject of the duty of consultation. Most of these were uncontroversial. To the extent that there was argument about their application in this case, we reflect that below in the discussion of the parties' arguments.

74. A convenient summary of the law relating to the duty to consult may be found in the judgment of Hickinbottom LJ (with whom McCombe LJ and King LJ agreed) in *R (Help Refugees Ltd) v the Secretary of State for the Home Department* [2018] EWCA Civ 2098; [2018] 4 WLR 168. That case involved the publication by the Home Office of guidance setting out eligibility criteria for the relocation of unaccompanied asylum-seeking children. The Court of Appeal concluded that the manner and extent of consultation relating to a complex and considerable exercise of assessment and judgement was something which necessarily required the Secretary of State to have wide discretion about how any consultation was conducted.

75. At [90] of his judgment, Hickinbottom LJ summarised the duty to consult as follows:

> "90 We were referred to a number of authorities in relation to the scope of that duty, but it is unnecessary to drill deeply down into them. For the purposes of this appeal, the following propositions can be gleaned from them.
>
> (i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (R (Moseley) v Haringey London Borough Council at para 23 per Lord Wilson JSC).

(ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough—and in sufficiently clear terms—to enable them to make an intelligent response (R v North and East Devon Health Authority, Ex p Coughlan [2001] QB 213, para 112, per Lord Woolf MR, and Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (Coughlan at para 108); or where the consultation paper is materially misleading (R v Secretary of State for Transport, Ex p Richmond upon Thames London Borough Council (No 2) [1995] Env LR 390, 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

(iii) As I have indicated (see para 87 above), the content of the duty—what the duty requires of the consultation—is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in Port Louis Corpn v Attorney-General of Mauritius [1965] AC 1111, 1124 ("the nature and the object of consultation must be related to the circumstances which call for it"), Lord Reed JSC in Moseley said, at para 36: "[Statutory duties of consultation] vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out". Lord Wilson, at para 23 also referred to the requirements being linked particularly to the purpose of the consultation.

(iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (Moseley at paras 37–43 per Lord Reed).

(v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown" (Royal Brompton at para 13); or, as Sullivan LJ said in R (Baird) v Environment Agency [2011] EWHC 939 (Admin) at [51], a conclusion by the court that: "a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."

(vi) The product of the consultation must be conscientiously taken into account before finalising any decision (Coughlan at para 108)."

76. On the question of the sufficiency of a consultation, in *R (Baird) v Environment Agency* [2011] EWHC 939 (Admin), Sullivan LJ considered the consultation exercise for a draft flood and erosion risk management strategy, which was challenged for not having taken account of a particular point in the options presented to consultees. Referring to *Coughlan*, the judge said:

> "41. When applying those principles, it is important to bear in mind that one of the principal purposes, [if] not the principal purpose, of any consultation exercise is to enable consultees to identify and draw to the attention of the decision maker relevant factors which the decision maker may, either by accident or design, have overlooked when deciding upon a preferred option for consultation. The Coughlan principles do not require as their starting point an omniscient decision maker who will have correctly identified each and every relevant factor at the outset; there would be little point in having a consultation if that were to be the underlying assumption. If a consultation document makes it clear that a decision maker has not considered a particular factor, 'factor X', when deciding upon a preferred option, and a consultee contends that factor X should have been taken into account, and in response to that representation the decision maker agrees that factor X should be considered, then that is an example not of a flawed consultation process, but of a consultation process that has done the job that it was intended to do."

77. However, it must be made clear to the consultee "*not just what the proposal is in whatever detail is necessary, but also the factors likely to be of substantial importance to the decision, or the basis upon which the decision is likely to be taken*." See *R (Devon CC) v Secretary of State for Communities and Local Government* [2010] EWHC 1456 (Admin), per Ouseley J.

78. In *R (British Gas Trading) v GEMA* [2019] EWHC 3048 (Admin) ("*GEMA*"), the energy regulator consulted on a price cap, but failed to share with consultees an assumption about the behaviour of a "typical" market participant. Andrews J found that the regulator did not communicate the assumption at the time of the consultation or at any other stage before reaching its decision. The judge summarised the principle as follows:

> "78. This is a case which both parties accepted turns on the facts. The relevant legal principles were uncontroversial. Consultation, in accordance with basic public law standards, is required to operate so that the decision-maker's thinking is made transparent, in order that formative stage thinking engages informed responses from the body of consultees, leading to conscientious consideration, resulting in a lawful decision."

79. And in [81] of her judgment, the judge said:

> "… However, and for no apparent reason, [GEMA] chose not to share with consultees the critical factual assumption about a typical supplier's behaviour which underpinned its assessment that even if such a supplier did align, it would be marginally overcompensated (or at least break even). It thereby left them completely in the dark as to why it had reached that view. They responded to the proposal as best they could, but they could not address this key aspect of GEMA's reasoning for the simple reason that they were not told about it."

80. It may however be the case that the relevant fact or assumption is not known or identified at the point of consultation, but only becomes apparent after that. In *R (Robin Murray & Co) v Lord Chancellor* [2011] EWHC 1528 (Admin), the Divisional Court considered a decision of the Lord Chancellor to close a number of county and magistrates' courts. Points had arisen during the consultation process in a local area and it was argued that the consideration of those points by officials should have been made transparent to other consultees. The Divisional Court rejected this argument. Beatson J, delivering the judgment of the Court, said:

> "47. What of matters that emerge internally during a consultation? While they cannot be equated with matters that emerge as a result of external responses, there are some similarities. To require a public body engaged on a consultation exercise routinely to circulate information about the way its consideration of the matters before it is developing and afford an opportunity for further responses has the potential to lead to a never-ending dialogue and to be inimical to the principle that there must come a time when finality has to be achieved. It is clear from the decisions in Bushell v Secretary of State for the Environment [1981] AC 75, at 102, and Edwards v Environmental Agency [2006] EWCA Civ. 877, at [103], [2009] UKHL 22 at [44] that there is in general no obligation on a minister to communicate advice received from officials or internal material or information to consultees. There may, as we have stated, be exceptional cases, for instance, where the matters which have emerged lead the public authority to wish to do something fundamentally different from the proposals consulted upon, or fairness otherwise requires further consultation on a matter or issue that has been thrown up. One such situation may be where the internal material undermines the value of the responses that have been made to a consultation. We are, however, satisfied that this is not one of those exceptional cases."

81. The test for whether a re-consultation is required in a particular situation is one of fairness: see *R (Smith) v East Kent Hospital NHS Trust* [2002] EWHC 2640 (Admin), per Silber J at [45]:

> "45. So I approach the issue of whether there should have been re-consultation by the defendants in this case, on the proposals now under challenge on the basis that the defendants had a strong obligation to consult with all parts of the local community. The concept of fairness should determine whether there is a need to re-consult if the decision-maker wishes to accept a fresh proposal but the courts should not be too liberal in the use of its power of judicial review to compel further consultation on any change. In determining whether there should be further re-consultation, a proper balance has to be struck between the strong obligation to consult on the part of the health authority and the need for decisions to be taken that affect the running of the Health Service. This means that there should only be re-consultation if there is a fundamental difference between the proposals consulted on and those which the consulting party subsequently wishes to adopt."

82. All parties agreed that any failure to consult would need to be shown to be material before the court could intervene. See *R (Hutchison) 3G UK Ltd v Ofcom* [2017] EWHC 3376 (Admin) ("*Hutchison"*) per Green LJ at [239] (referring to the "Sedley Criteria" endorsed in, among other cases, the Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] UKSC 56 ("*Moseley"*)):

> "239. And importantly the criteria do not do away with the requirement of materiality which indicates that for a breach of the criteria to be dispositive that breach must make an actual difference to fairness. If the consultation is fair notwithstanding non-observance with one or more of the criteria, then it will be non-material and the consultation will remain fair. …"

83. It was also common ground that prejudice could be shown by a claimant by reason of other consultees being prevented from responding properly. See, for example, *Wilson v Secretary of State of the Environment* [1973] 1 WLR 1083, per Browne J at 1096D to 1097A and *R (United Co Rusal plc) v London Metal Exchange* [2014] EWCA Civ 1271; [2015] 1 WLR 1375, where the Court of Appeal took notice of the fact that other consultees had not complained (see [53]).

84. Finally on the subject of consultation, we were referred to authorities which appeared, on their face, to take contradictory positions in relation to the question of the sophistication of the consultee. *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 concerned consultation on changes to the legal aid regime. A crucial part of the analysis had not been disclosed in the consultation. The Lord Chancellor argued that the consultees – solicitors who were carrying out legally aided criminal defence work – were sophisticated and would have understood that an analysis had been carried out and could have asked to see it. The Divisional Court (Leggatt LJ and Carr J) were unimpressed by this argument:

> "95 The fact that many consultees were likely to be knowledgeable and sophisticated is also not a reason for withholding important information from them. Again, if anything, the opposite is true. That fact gave all the more reason to disclose the analysis relied on to estimate the increase in expenditure which it was the aim of the proposal to reverse because it was a reason to expect that at least some consultees, such as the Law Society, would be able to provide an informed critique of that analysis - having commissioned expert assistance if necessary.
>
> 96 Perhaps the simplest and most telling answer to the suggestion that consultees could be expected to infer that a key piece of analysis relied on by the ministry had not been mentioned in the consultation documents is that, so

> far as the evidence shows, none of them did. Instead, they evidently assumed - incorrectly as it now proves - that the description given in the impact assessment of the expected costs, benefits and impact of the proposal was fair and not misleading. …"

85. Similarly, in *GEMA* at [63] to [64], Andrews J rejected an argument that the industry participant consultees had ample opportunity to respond to the consultation, despite not being given the critical assumption that underpinned the assessment made by the regulator.

86. However, as Ofcom pointed out, there is established authority to the effect that a more sophisticated consultee might need less information in order to respond appropriately. In *Moseley*, Lord Wilson JSC said at [26]:

> "26 Two further general points emerge from the authorities. First, the degree of specificity with which, in fairness, the public authority should conduct its consultation exercise may be influenced by the identity of those whom it is consulting. Thus, for example, local authorities who were consulted about the Government's proposed designation of Stevenage as a "new town" (*Fletcher v Minister of Town and Country Planning* [1947] 2 All ER 496, 501) would be likely to be able to respond satisfactorily to a presentation of less specificity than would members of the public, particularly perhaps the economically disadvantaged. …"

87. In our view, the crucial point in the *Law Society* and *GEMA* decisions is that information had been withheld from the consultees, which meant that it was considered unfair for the authority to argue that the consultees, as sophisticated parties, should have appreciated the existence of the information and asked to see it or to have responded in any event. So the overriding principle of fairness explains the approach. However, *Moseley* establishes that, absent such circumstances, the normal approach is that the greater the sophistication of a consultee, the less specificity is required in order for the consultation to be fair.

(c) Sufficiency of evidence/proper investigation

88. It was common ground that the duty of sufficient enquiry, as set out in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("*Tameside*"), is a form of rationality challenge: see *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70], where the *Tameside* principles are summarised. As such, it is subject to

the high test of *Wednesbury* unreasonableness (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223). See also *R (Pharmaceutical Services Negotiating Committee) v Secretary of State for Heath* [2017] EWHC 1147 (Admin) at [55] – [56]:

> "55 The parties are agreed as to the legal test here. The duty of sufficient inquiry is subject to a Wednesbury challenge only: Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223. As Laws LJ put it in R (Khatun) v Newham London Borough Council [2005] QB 37, para 17, "it is for the decision-maker and not the court to conclude what is relevant" and "to decide upon the manner and intensity of inquiry to be undertaken". This formulation is echoed in the language of section 165(9) of the 2006 Act quoted above.
>
> 56 The Secretary of State emphasises the following passage from the judgment of the Divisional Court in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2015] 3 All ER 261, para 100:
>
> "The following principles can be gleaned from the authorities:
>
> (1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a Wednesbury challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (R (Khatun) v Newham London Borough Council [2005] QB 37, para 35, per Laws LJ).
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (per Neill LJ in R (Bayani) v Kensington and Chelsea Royal London Borough Council (1990) 22 HLR 406).
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (per Schiemann J in R (Costello) v Nottingham City Council (1989) 21 HLR 301; cited with approval by Laws LJ in (R (Khatun) v Newham London Borough Council (supra) at para 35).
>
> (5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (per Laws LJ in [R v Secretary of State for Education, Ex p Southwark London Borough Council [1995] ELR 308, 323D]).
>
> (6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly

> to exercise it (R (Venables) v Secretary of State for the Home Department [1998] AC 407, 466G).""

89. An example of a decision being flawed through a failure to be properly evidenced may be found in the *Law Society* case, where Carr J said:

> "98 The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of "irrationality" or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it": see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223, 233—234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see e.g. Boddington v British Transport Police [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it - for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error. Factual error, although it has been recognised as a separate principle, can also be regarded as an example of flawed reasoning - the test being whether a mistake as to a fact which was uncontentious and objectively verifiable played a material part in the decision-maker's reasoning: see E v Secretary of State for the Home Department [2004] QB 1044."

90. Mr Holmes referred us to a passage from the judgment of Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin), where the judge said:

> "31. A modern approach to the Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 K.B. 223 (CA) test is not to simply ask the crude and unhelpful question: was the decision irrational?
>
> 32. A more nuanced approach in modern public law is to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied.
>
> 33. I emphasise that this approach is simply another way of applying Lord Greene MR's famous dictum in Wednesbury (at 230: "no reasonable body could have come to [the decision]") but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"

91. We do not consider that Saini J intended to formulate a different test from that set out in the prior cases and, in our view, nothing he says in that passage alters the nature of the hurdle faced by CityFibre in this case.

92. We note that in cases of a technical nature and/or where a decision is based on predictions as to the future, the court may show more deference to the decision maker, especially if they are expert. See *R (Ross) v Secretary of State for Transport* [2020] EWHC 226 (Admin) at [77], *Hutchison* at [42] and *Virgin Media v Ofcom* [2020] CAT 5 at [59].

F. GROUND 1 OF THE APPEAL

(1) CityFibre's arguments

(a) Consultation

93. Mr Holmes submitted that Ofcom had rightly identified a competition concern that could affect ISPs' incentives to order FTTP from altnets. It did not matter that it was (as expressed by Ofcom) an "indirect" competitive concern. It needed to be dealt with properly, just as Ofcom would do with a "direct" competitive concern, like a loyalty discount.

94. The Overlap Conclusion was a key aspect of Ofcom's reasoning in considering the nature of the competition concern identified. In CityFibre's submission, it was crucial – but even on Ofcom's case, it was accepted to be a material assumption, along with the underlying working which supported it. The analysis by Mr Matthew, setting out the Nine Conditions, should properly be seen as a post-decision rationalisation and was a gloss on the actual decision as set out in the Statement. Both the Statement and a critical reading of Mr Matthew's evidence showed that the Overlap Conclusion was a key plank of Ofcom's reasoning.

95. As a result, the Overlap Conclusion required proper investigation and consultation. The Overlap Conclusion was not included in the Consultation Document, even though the July Slides showed that Ofcom had it in mind.

However, there was a continuing dialogue between Ofcom and CityFibre between the Consultation Document and the Statement, in which the issue of future overlap could have been raised.

96. In the Statement, Ofcom acknowledged that the question of short term overlap between Openreach and the altnets was uncertain. Ofcom could easily have asked CityFibre and other altnets about that:

(1) Ofcom did ask Openreach, in the section 135 notice sent on 16 August 2021.

(2) It was unrealistic of Ofcom to think that CityFibre would not have had such information to hand – it was a key item of information for CityFibre and its investors.

(3) Even in relation to the assessment of current overlap, Ofcom relied on imprecise information despite having access to data from the WFTMR which it should have used to create more certainty in its analysis.

97. The reasons advanced by Ofcom for not making further enquiries were, according to Mr Holmes, unconvincing. Mr Harries referred to it not being a priority, but it was hard to see how that could be so, given the importance of the assumption to the overall analysis and the acknowledged uncertainty.

98. Mr Holmes accepted that a formal consultation (or re-consultation) was not necessary, but submitted that it was incumbent on Ofcom to give the relevant parties the opportunity to comment on the assumption as to overlap and the workings, so as to enable them to make an "intelligent response".

99. As a result, the approach taken by Ofcom was not open and transparent and has been unfair to CityFibre:

(1) CityFibre has been deprived of an opportunity to respond on the issue itself, and also other altnets have not been able to respond, which prejudices CityFibre.

(2) Ofcom did not test the soundness of its conclusion in the way that the duty to consult requires.

100. The fact that CityFibre is a sophisticated operator is all the more reason why Ofcom should have sought out CityFibre's views, as well as the views of other altnets, given the likelihood they could provide useful evidence.

(b) Duty of Enquiry/Sufficient Evidence

101. Mr Holmes acknowledged that these arguments presented a high hurdle for CityFibre to overcome, given the test of Wednesbury unreasonableness. However, he submitted that Ofcom's evidence base was not sufficiently sound to make it reasonable for Ofcom to dispense with further inquiry. The degree of overlap was clearly centrally important, but Ofcom's understanding was inferential and Ofcom acknowledged that the issue was uncertain.

102. As a result, CityFibre and others were deprived of an opportunity to make representations on a material aspect and Ofcom denied itself access to a proper, informed evidence base. It was not reasonable for Ofcom to rely on the limited material it had.

103. According to Mr Holmes, Ofcom did not have reasonable evidence on which to base the Overlap Conclusion. In particular, the likely approach of altnets and Openreach to overbuilding each other was not explored properly. The evidence put forward (for example, Mr Harries in relation to altnets' views on overbuilding) does not assist Ofcom – if anything, it shows concern and uncertainty on their part in relation to this subject. The evidence Ofcom had did not rationally sustain the Overlap Conclusion.

(c) Materiality

104. Mr Holmes submitted that it was not possible to say what might have emerged if Ofcom had carried out a proper consultation on the Overlap Conclusion. It is wrong to suggest (as Ofcom does) that Mr Dunn's evidence represents the universe of possible responses. In particular, Ofcom could and should have

investigated plans by other altnets to build their networks and the potential for overbuild with Openreach arising from that. The other altnets represent material capacity in the access market and it cannot simply be assumed (as Ofcom has done) that they will not wholesale within the 12–24 month period.

105. In relation to Mr Dunn's evidence, Ofcom's analysis, based on Mr Dunn's estimates of future overbuild, shows a material increase in the extent of sales required to meet OMTs. This is significant, according to CityFibre, as even a prospect of missing OMTs might be enough to alter ISP behaviour in relation to ordering from altnets.

106. Mr Holmes noted that Ofcom had used an estimate of overlap in the Statement which appeared to refer to the end of the 12-24 month period, while Mr Matthew, in his recalculation to assess Mr Dunn's evidence, had used the same estimate with reference to a different point in time, namely after only 12 months.

107. In relation to the Nine Conditions, Mr Holmes challenged the assertions made about the extent to which the individual conditions were said not to have been met. In any event, he submitted that we should give no weight to a post-decision rationalisation which was not consistent with the findings actually made by Ofcom in the Statement.

(2) Ofcom's arguments

108. Ms Carss-Frisk submitted that the Overlap Conclusion had a clear and rational basis founded in four key aspects:

(1) The expressed preference of altnets to build in locations where Openreach is not present;

(2) The current level of overbuild;

(3) Reasonable assumptions by Ofcom about how that might change; and

(4) The expectation that the business model of altnets other than CityFibre would not change materially towards more of a wholesale model within the following 12-24 months.

(a) Consultation

109. Ofcom had not formed the Overlap Conclusion at the time of the Consultation Document. As such, according to Ms Carss-Frisk, Ofcom cannot be criticised for failing to consult on it. Further, there is a very high hurdle for CityFibre to overcome to establish that re-consultation (of any sort) was required, and CityFibre has not met that.

(b) Duty of Enquiry/Sufficient Evidence

110. Ms Carss-Frisk noted the high *Tameside* hurdle and submitted that CityFibre had not met that either:

(1) The consultation and related enquiries were conducted by an expert regulator with deep experience of the subject matter. Ofcom should be given a wide margin of appreciation when carrying out that task, both in terms of designing and implementing the consultation.

(2) Ofcom had a clear and rational basis to reach the Overlap Conclusion (the four aspects listed above).

(3) There is nothing in Mr Dunn's evidence to suggest that Ofcom got anything wrong in its analysis – on the contrary, the material provided by Mr Dunn clearly supports Ofcom's conclusions.

(c) Materiality

111. Ms Carrs-Frisk submitted that CityFibre can show no prejudice arising from any failure to consult or enquire. It has now had the opportunity to submit its views in Mr Dunn's evidence and that makes no difference. There is no evidence

before the Tribunal to show that altnets would put forward evidence which was materially different from the evidence and assumptions Ofcom had worked on.

112. The analysis by Mr Matthew of the Nine Conditions also showed that the Overlap Conclusion was but one of a number of important factors (and part of efforts by Ofcom to narrow uncertainty in the background to its reasoning). The Nine Conditions demonstrate that, even without the Overlap Conclusion, the decision is sufficiently evidenced to stand, should the Overlap Conclusion be determined to be unlawful.

(3) BT's arguments

113. Mr Palmer focused on the question of sufficiency of evidence for the decision. He emphasised the importance of stop sell in encouraging ISPs to be ready to market FTTP (including in areas where stop sell was yet to be implemented) and noted the commercial alignment of ISPs with BT in wanting to move customers away from legacy products. This all supported Ofcom's view that there was not going to be a long term problem with ISPs' incentives to order FTTP products from altnets.

114. In relation to the two short term issues identified by Ofcom:

(1) While there might be technical issues for some ISPs in selling FTTP early on, the reduced OMT threshold at the beginning of the Equinox offer dealt with that problem.

(2) There had been concern from ISPs that resellers might take time to adjust away from legacy products, but Ofcom had identified a number of factors which demonstrated a "dwindling pool of effect" in relation to this point.

115. BT submitted that these points provided ample evidence for Ofcom to reach the conclusion it did.

(4) Our Decision on Ground 1

(a) Consultation

116. Given the apparent significance of the Overlap Conclusion, we find it surprising that Ofcom did not ask CityFibre if it had information about its short term network build plans and the anticipated overlap with Openreach. It seems obvious that CityFibre would, at least to some extent, have had such information available, if only because it was important information for the purposes of securing investment. It was also information which was likely to be useful to Ofcom, given the uncertainty in relation to overlap which Ofcom had identified as early as July 2021.

117. However, we accept that a court should be cautious about interfering with a consultation process carried out by an expert regulator with deep experience of the subject. We also note that additional caution is required where the criticism is of a failure to re-consult. This might place an unreasonable burden on a decision maker, requiring constant rounds of engagement as the thinking of the decision maker evolves.

118. We accept the evidence of Mr Harries that Ofcom had not formulated the Overlap Conclusion at the time it published the Consultation Document. There were elements of the Overlap Conclusion which were apparent in the July Slides, but it was common ground that this should be treated as a working document and we do not consider that it contradicts Mr Harries's account of the development of Ofcom's thinking on the issue.

119. Accordingly, as far as CityFibre's case on consultation is concerned, it is necessary for it to establish that a re-consultation of some sort, subsequent to the Consultation Document and before the Statement was published, was required in order to test Ofcom's evolving thinking.

120. We reject that assertion. Ofcom was not under a duty to re-consult on the Overlap Conclusion during this period. We have reached this view because:

(1) The overall conclusion reached by Ofcom in relation to the incentives of ISPs not to order from altnets did not change between the Consultation Document and the Statement. Ofcom maintained its view that there was no potential for such an incentive to arise.

(2) There was material in the Consultation Document which raised the question of overlap. It may not have been front and centre in Ofcom's reasoning, but it was clear that overlap between altnets and Openreach in the short term was a relevant consideration. Other parties responded to this point in their consultation response (see the Statement at paragraph A4.6). It was not necessary for Ofcom to rehearse with CityFibre either those responses or Ofcom's developing thinking arising from them.

(3) While it is acknowledged by Ofcom that the Overlap Conclusion is a material part of its reasoning, we agree with Ofcom that the Overlap Conclusion is one part of a patchwork of reasoning in relation to a number of variables (for example, the effect of stop sell, ISPs' commercial preferences and courses of action open to ISPs). Ofcom was seeking to distinguish a number of theoretical concerns from those with realistic prospects of happening, which was a complex task involving predictions.

(4) We accept Ofcom's argument that Ofcom was working to eliminate uncertainty in its analysis. The Overlap Conclusion and the assumptions and calculations surrounding that were part of a broader exercise which had been consulted on in some detail.

121. The question of the sophistication of CityFibre does not arise in any material way, because there is no question of Ofcom withholding information at the time of the consultation. If anything, it suggests that Ofcom's approach was not unfair, given that CityFibre recognised the uncertain nature of Ofcom's view on short term overlap and could have responded more fully on the point, as the Joint Response did.

122. In our judgment, any failure by Ofcom to ask CityFibre (or other altnets) about their expectations for short term overlap with Openreach's network falls short of establishing unfairness to CityFibre. While the consultation process could perhaps have been improved on, it was not so flawed as to be unlawful.

123. In any event, the consultation was not unfair to CityFibre, as it has suffered no prejudice:

(1) We accept Ofcom's argument that Mr Dunn's evidence is broadly consistent with Ofcom's assumptions about the trajectory of CityFibre's network build. Ofcom's analysis (which was largely unchallenged as to methodology or arithmetic) showed that, taking account of the variables of stop sell and differing levels of OMTs in the first two years, the effect on OMTs of the network build trajectory put forward by Mr Dunn was modest and not materially different from the conclusions Ofcom had already reached from Tables A.3.5 and A.3.6 in the Statement.

(2) CityFibre's complaint that Ofcom had adjusted its reference point for the original extrapolation in the model may have had some merit, but there was nothing in the evidence before us to show that, mathematically, Ofcom's approach was in error or that a different outcome was more appropriate.

(3) We also had no evidence before us to suggest that other altnets might have information which would cause CityFibre prejudice if not taken into account. This was unlike the situation in *GEMA*, where there was very clear evidence that a number of market participants could comment on (and contradict) the assumption in issue in that case.

124. In short, CityFibre has now put forward the information which it says it would have provided, if consulted properly. Properly considered, it makes no difference to the analysis. There is nothing before us to suggest that altnets may have other information which would make a difference.

125. We should add that we found Mr Matthew's analysis of the Nine Conditions of little assistance in addressing the question of materiality in relation to any failure of consultation. We agree with Mr Holmes that it had the hallmarks of post-decision rationalisation, in contrast with the rest of Mr Matthew's evidence and that of Mr Harries, which we found helpful in discharging Ofcom's duty of candour. It is clear that the Overlap Conclusion was a material consideration in the Statement, addressing an area of uncertainty (the short term overlap position) identified in the Consultation Document and in the responses to that.

(b) Duty of Enquiry/Sufficient Evidence

126. CityFibre has not met the high hurdle required to establish that Ofcom has failed in its duty to make sufficient enquiry. We consider that there were further questions which Ofcom could have asked, and which it may indeed have been desirable to ask. However, it is not for this Tribunal to substitute our views on that subject for those of an expert regulator with deep knowledge of the subject.

127. It was for Ofcom to design the consultation process and to decide what further enquiries it wished to make. In doing so it needed to balance different policy and practical considerations, requiring a degree of prioritisation. The evidence from Mr Harries is that there was a deliberate decision to prioritise other information gathering activities, which were thought to be more likely to yield useful outputs in the time available. While it is possible to second guess that decision with the benefit of hindsight, we do not consider that any failing by Ofcom in that regard approaches the level of unreasonableness required to establish a breach of a duty to enquire.

128. In relation to whether Ofcom had reasonable evidence on which to base the Overlap Conclusion, we decide it did by reason of:

(1) The expressed preference of altnets (including CityFibre) not to overbuild Openreach;

(2) The limited current overlap at the time of the Statement, as assessed by Ofcom with the benefit of information from Openreach and CityFibre;

(3) Published plans about network build, supplemented by information provided privately by CityFibre, which allowed extrapolation between the current position and the longer term anticipated outcomes; and

(4) The expectation that the business models for altnets other than CityFibre would remain focused on retail sales, not wholesale. This conclusion was based on work done in the WFTMR and supplemented by discussions with ISPs and altnets in the Equinox consultation process.

129. While there might be argument about the weight to be attached to some of these points and the uncertainty attaching to aspects of them, it cannot be said that there was a demonstrable flaw in the reasoning or no evidence to support an important step, such that the outcome was irrational.

130. We therefore reject Ground 1 of the appeal.

G. GROUND 2 OF THE APPEAL

(1) CityFibre's arguments

131. CityFibre's argument under Ground 2 focused on the word "potential" in Question 1 of Ofcom's analytical framework. Mr Holmes argued that the word "potential" has an ordinary meaning which equates to "possibility". That is a low hurdle, which is consistent with the economic and regulatory context set out in the WFTMR, aimed at protecting the investment by altnets in networks so as to create access level competition with Openreach. This is demonstrated by the wording in paragraph 7.154 of the WFTMR, which refers to "any barrier to using altnets" needing to be justified.

132. According to Mr Holmes, Ofcom has instead adopted a meaning for "potential" which equates to "likely". This can be seen in the Statement in a variety of places where Ofcom refers to things being likely, such as the conclusion that ISPs are likely to have various responses available to them.

133. Further, the use of the word "likely" in Questions 2 and 3 demonstrates that "potential" has a different meaning in Question 1. Otherwise, Ofcom would have used "likely" consistently throughout the analytical framework. By equating "potential" to "likely" in Question 1, Ofcom has effectively collapsed Question 2 into Question 1, as they both essentially deal with the same point (the incentives of ISPs to use altnets being a critical aspect of altnets' investment case).

134. CityFibre relied on the first sentences of paragraph 7.160 of the WFTMR, which Mr Holmes said described the two alternatives flowing from Ofcom's analysis – either a finding of "clearly no impact", or one of "potentially create a barrier". This suggested that only findings that clearly had no impact would be sufficient to avoid a finding of a potential effect. Regulatory certainty required that Ofcom should hold itself to its own stated approach.

135. However, Mr Holmes accepted that Ofcom would be right to disregard theoretical or immaterial considerations. A potential barrier needed to be "plausible given the evidence available" and based on "reasonable" underlying assumptions. However, there was a difference between "potential" and "likely", with the former posing a test that was distinct from, and less demanding than, the latter.

136. CityFibre's case was therefore that, by importing likelihood into the test, Ofcom has misdirected itself. It has failed properly to apply its own test, which is less demanding as to degree than the approach Ofcom has taken. As a result, Ofcom has foreclosed the inquiry in Questions 2 and 3, which may have led to small but important adjustments to address the problems Ofcom had itself identified in its investigation.

(2) Ofcom's arguments

137. Ofcom's position was that it would be wrong to read the test set out in the WFTMR or the Statement as if they were legislation or a contract. Ms Carss-Frisk relied on two decisions which emphasised that policy statements should not be construed as statutory or contractual provisions, but should instead be

read in a broad and untechnical way. See *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983 at [19] and *Re McFarland* [2004] 1 WLR 1289 at [24].

138. In this case, the WFTMR and Statement are working policy documents setting up an analytical framework to deal with future events. Ofcom should be allowed to apply that framework flexibly, to take account of the different factors it inevitably needs to balance. Ms Carss-Frisk acknowledged (rightly in our view) that this did not permit Ofcom to ignore the words in their policy statements – they still have to be given proper effect.

139. One of the factors to be balanced concerns the policy considerations which underpin Ofcom's approach to regulation, such as the need to act proportionately in restricting the activity of a person subject to SMP oversight. That requirement had to be balanced against the policy aims set out in the WFTMR in relation to competition in the access markets.

140. As to the hurdle set by Question 1, Ms Carss-Frisk submitted that the exercise required an assessment of both likelihood and materiality. Concerns would need to be reasonably likely and material before they should be acted on. A scenario needed to be plausible, which, in its ordinary meaning, requires an assessment of likelihood.

141. Ofcom argued that it would not be appropriate to try and define some precise level of likelihood for meeting the requirement of "potential". It was not an exercise that was susceptible to precise calibration. Instead, it required judgement to be exercised by Ofcom in assessing what might or might not happen and the implications of that in the overall regulatory framework. Ofcom should be given a significant margin of appreciation in that regard.

(3) BT's arguments

142. Mr Palmer submitted that Ofcom had reduced the uncertainty surrounding the potential impact on ISPs' incentives to such an extent that it was fully entitled,

bearing in mind the balancing exercise it was required to carry out, to reach the conclusion it did.

(4) Our Decision on Ground 2

143. In our view, there was less clarity in Ofcom's analytical framework for assessing the Equinox offer once that was modified to three questions in the Consultation Document. We consider that the formulation set out in paragraph 7.154 of the WFTMR is easier to follow than the reformulation in paragraph 2.39 of the Consultation Document. The new Question 1 may be taken to suggest a lower and more definite threshold than Ofcom perhaps intended.

144. In any event, in both formulations there was a necessary element of screening (either as a precondition for intervention or as the first question). This required Ofcom to determine the extent to which a notified offer might create a barrier for ISPs' use of altnets. The parties agreed that this required the identification of something which was not just a theoretical possibility, but instead was something plausible.

145. We agree with Ofcom that the formulations in paragraph 7.154 of the WFTMR, paragraph 2.39 of the Consultation Document and paragraph 3.60 of the Statement should not be read as if they were enshrined in statute or contract. They are statements of policy and, as set out in *Tesco Stores* and *Re McFarland*, are to be read in a broad and untechnical way. They are also working guidance for the way Ofcom intends to proceed, taking account of Ofcom's various regulatory duties and priorities.

146. That said, we also note that very significant investment commitments and resource allocation decisions are made on the basis of such policy statements. Put another way, a lack of clarity and consistency in implementation has significant consequences and is therefore to be avoided. Regulators like Ofcom are afforded the discretion to make expert judgements in the expectation that they will provide clear and consistent guidance to those they are regulating.

147. Against that background, we disagree with CityFibre's assertion that paragraph 7.160 of the WFTMR created a binary outcome between "no impact" and a "potential barrier". There could clearly be a range of different degrees of plausibility which might arise in particular scenarios. It was Ofcom's task to ascertain whether those scenarios were real enough to justify intervention, bearing in mind its wider duties and responsibilities.

148. Nor do we think that further semantic analysis of the word "potential" helps very much:

(1) Words must of course be read in context.

(2) We note CityFibre's points about the economic and regulatory context and in particular the central importance of competition at the access level.

(3) However, that is not the whole picture. Ofcom needs to balance those considerations with its wider regulatory responsibilities. This inevitably involves balancing multiple, complex considerations.

(4) The preconditions in the WFTMR and in Question 1 both involved an exercise of forward looking judgement by Ofcom to determine the prospects of any particular outcome occurring.

(5) Ofcom was required by this exercise to predict the outcome of a number of different variables, many of which were related or indeed interdependent, with most of them involving inherent uncertainty in a number of respects.

(6) In that context, it seems unreasonable to require Ofcom to ignore the likelihood of certain outcomes occurring or to be tied to a threshold by which it is effectively unable to apply its judgement to balance various complex and uncertain considerations.

(7) In particular, the analysis carried out by Ofcom through the course of its investigation, as recorded in the Consultation Document and the Statement, has progressively narrowed down areas of uncertainty about outcomes to the point where modelling showed little material effect of likely overlaps on ISPs meeting OMTs.

(8) We have already concluded that Ofcom has carried out this exercise reasonably, within the margin of discretion accorded to it as a regulator.

149. Against that background, we do not consider that Ofcom has misdirected itself in taking into account the likelihood of certain events happening or not happening. It was appropriate for Ofcom to make evaluative judgements about whether there was a realistic possibility of certain outcomes, such that it should be concerned about ISPs not using altnets.

150. In our view it has done that in a way which is sufficiently consistent with the tests set out in both the WFTMR and the Statement (to the extent they are different), given the context and the purpose of the tests as they appear in those documents.

151. We therefore reject the challenge by CityFibre under Ground 2.

H. CONCLUSION

152. We unanimously reject both Ground 1 and Ground 2 of CityFibre's appeal and dismiss the appeal in its entirety. In doing so, we note that Ofcom has reserved to itself the power to review its decision and to intervene if it considers that the Equinox offer is affecting competition in a way which Ofcom had not previously appreciated. We would encourage Ofcom to maintain careful scrutiny of the market at this important time, to ensure that the judgements it has made in the Statement continue to be validated by the emerging evidence of actual competitive conditions.

Ben Tidswell
Chair

Dr Catherine Bell CB

Professor Michael Waterson

Charles Dhanowa O.B.E., Q.C. (*Hon*)
Registrar

Date: 15 July 2022