



Neutral citation [2013] CAT 29

IN THE COMPETITION
APPEAL TRIBUNAL

Case No.: 1212/3/3/13

Victoria House
Bloomsbury Place
London WC1A 2EB

26 November 2013

Before:

PETER FREEMAN CBE QC (HON)
(Chairman)
CLARE POTTER
JOANNE STUART OBE

Sitting as a Tribunal in England and Wales

BETWEEN:

COLT TECHNOLOGY SERVICES

Appellant

-supported by-

EE LIMITED
HUTCHISON 3G UK LIMITED
TALKTALK TELECOM GROUP PLC
VERIZON UK LIMITED
VODAFONE LIMITED

Interveners

- v -

OFFICE OF COMMUNICATIONS

Respondent

-supported by-

BRITISH TELECOMMUNICATIONS PLC

Intervener

Heard at Victoria House on 14 - 17 October 2013

JUDGMENT

APPEARANCES

Mr Kieron Beal QC (instructed by Baker & McKenzie LLP) and Mr Richard Pike (of Baker & McKenzie LLP) appeared for Appellant.

Mr Josh Holmes and Mr Ravi Mehta (Instructed by the Office of Communications) appeared for the Respondent.

Mr Daniel Beard QC and Mr Robert Palmer (instructed by BT Legal) appeared for the Intervener, British Telecommunications PLC.

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I. INTRODUCTION

1. This case is about the remedies which are appropriate to address the market power of British Telecommunications plc (“BT”) in relation to some aspects of business communications, and in particular whether BT should be required to make its ducts and unlit optical fibres available to competing business communications providers. It is an appeal brought by Colt Technology Services (“Colt”) under section 192(2) of the Communications Act 2003 (the “Act”) against the determination by the Office of Communications (“Ofcom”) published in its statement entitled “Business Connectivity Market Review” (the “Statement”) of 28 March 2013. In the Statement, Ofcom found, *inter alia*, that BT had significant market power (“SMP”) in various business connectivity markets.
2. Colt is a communications provider (“CP”), which focuses on providing integrated communications, IT and network services and solutions to business. According to Colt’s pleadings, it has a 22-country, 43,000 kilometre network that includes metropolitan area networks in 39 European cities. Its portfolio includes telephony, interactive voice, private networking, internet solutions, consultancy services and modular data services. Colt has two methods for connecting customers: (i) “on-net” using its own network infrastructure; and (ii) “off-net” using leased lines purchased at the wholesale level from other CPs.
3. The Statement sets out Ofcom’s conclusions following its review of markets for the supply of business connectivity services, which carry voice and/or data traffic between business sites to enable all types of communications within an organisation. Ofcom’s review (the Business Connectivity Market Review or “BCMR”) focussed on the retail and wholesale markets for leased line services in the UK.
4. Colt, supported by an intervening group of Communications Providers¹ (the “CP Group”), challenges one aspect only of the Statement. That is, Ofcom’s decision

¹ EE Limited, Hutchison 3G UK Limited, TalkTalk Telecom Group PLC, Verizon UK Limited and Vodafone Limited

not to impose a “passive remedy” on BT in the markets for leased lines services (the “Decision”). Passive remedies might involve giving a CP access to BT’s physical network assets, such as its ducts and poles or unlit (‘dark’) fibre. They can be distinguished from “active remedies”, which refer to regulated access to communication services which BT (or another regulated firm) provides using infrastructure including electronic equipment.² Colt argues that granting access to this infrastructure would enable it and other CPs to build their own network infrastructure at a fraction of the cost of constructing their own, duplicative, civil engineering infrastructure.

5. Colt claims that OFCOM erred in deciding not to impose passive remedies in this case and, that the contested Decision is flawed by errors of law, errors of fact and/or errors in the exercise of OFCOM’s discretion.
6. On 24 May 2013, Verizon UK Limited and Vodafone Limited brought a separate challenge to another aspect of the Statement (Case No.: 1210/3/3/13).³ As that appeal raised specified price control matters within the meaning of section 193(1) and (10) of the Act and rule 3 of the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004 (S.I. No. 2068 of 2004), the Tribunal referred it to the Competition Commission for determination. By Order of 22 July 2013, the Tribunal directed the Competition Commission to determine the issues contained in the reference on or before 23 December 2013. The matters raised in Case No.: 1210/3/3/13 are independent of those raised in Colt’s appeal; accordingly, we do not address the Verizon/Vodafone appeal further in this judgment.
7. This judgment uses a number of defined terms and abbreviations, which are defined when first used. The annex to the judgment sets out a composite glossary of those defined terms.

² Statement at [8.10]

³ <http://www.catribunal.org.uk/237-8026/1210-3-3-13-1-Verizon-UK-Limited-and-2-Vodafone-Limited.html>

II. OFCOM'S STATEMENT

8. The Statement sets out OFCOM's conclusions following its review of the extent of competition in the provision of leased lines in the UK. OFCOM last reviewed these markets in 2007/8 and set out its findings in statements published in December 2008 and February 2009.⁴
9. In 2010, OFCOM had also reviewed the Wholesale Local Access market (the "WLA Review") and had imposed amongst others a limited form of passive remedy called Passive Infrastructure Access or "PIA". This required BT to provide access to its ducts and poles (not fibres) to allow CPs to deploy networks to support superfast broadband services in the residential sector but not for leased lines.⁵
10. In its introduction to the BCMR Statement, OFCOM explained:

"1.2 Leased lines provide dedicated symmetric transmission capacity between fixed locations, and their overall value exceeds £2bn per annum in the UK. They play an important role in business communications services and are used to support a wide variety of applications, both in the private and public sectors. They also play a significant role in delivering fixed and mobile broadband services to consumers, because communications providers (CPs) use them extensively in their networks.

1.3 BT remains by far the largest wholesale supplier of leased lines in the UK. For illustrative purposes, if we consider all wholesale circuits, we estimate that BT has a share of 82% of volumes. The majority of CPs remain reliant on BT's network in providing services to their customers."

A. The consultation process

11. As part of its market review, OFCOM consulted as follows:
- (a) published a Call for Inputs ("CFI") in April 2011⁶, which sought stakeholders' views about the proposed scope and analytical approach for the review;

⁴ <http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr08/summary/bcmr08.pdf>
<http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr08/statement/statement.pdf>

⁵ See the Statement at [8.12]

⁶ <http://stakeholders.ofcom.org.uk/consultations/bcmr-inputs/?a=0>

- (b) conducted market research, which included holding discussions with industry stakeholder and user groups, and analysed data provided by CPs in response to OFCOM's formal requests for information;
 - (c) published its provisional findings and proposals to address the concerns it had identified about the extent of competition in the provision of leased lines in the UK in June 2012 (the "June BCMR Consultation")⁷;
 - (d) published its proposals to apply charge controls to certain services provided by BT in these markets in July 2012⁸;
 - (e) published a further consultation setting out some changes to its proposals following a review of the responses to the June BCMR Consultation and further discussions with industry stakeholders in November 2012⁹; and
 - (f) notified its draft Statement containing OFCOM's provisional conclusions to the European Commission, the Body of European Regulators of Electronic Communications ("BEREC") and national regulatory authorities of other Member States in February 2013.
12. OFCOM raised the issue of passive remedies in the CFI and in some detail in the June BCMR Consultation.
13. The CFI read as follows on passive remedies:

"1.47 In the last BCMR, a number of CPs also asked us to consider the introduction of a passive remedy such as dark fibre or physical infrastructure access (i.e. duct and pole sharing). We concluded at that time that it was not appropriate to impose such a remedy. However, many stakeholders have already asked Ofcom to consider this issue again, especially in the light of Ofcom's recent decision to require Passive Infrastructure Access ("PIA") as a remedy in the market for Wholesale Local Access.

1.48 We are therefore inclined to look at whether passive remedies could provide, in some or all cases, an effective means to foster competition in infrastructure. We would consider the full implications of the introduction of passive remedies, including:

⁷ <http://stakeholders.ofcom.org.uk/consultations/business-connectivity-mr/>
⁸ <http://stakeholders.ofcom.org.uk/consultations/lcc-2012/>
⁹ <http://stakeholders.ofcom.org.uk/consultations/bcmr-reconsultation/>

- what benefits would a passive remedy provide to competition and business connectivity and other retail consumers?
- would the introduction of passive remedies lead to the removal of regulation of downstream wholesale active remedies?
- if passive remedies were to be introduced alongside active remedies, what may be the implications for cost recovery and the effectiveness of existing active remedies?

Question 18: What are your views on the role that passive remedies could play in this market for the promotion of downstream competition? In your view, what implications might adoption of passive remedies have on the provision of active remedies?"

14. Colt did not respond to the CFI.
15. The June BCMR Consultation addressed passive remedies at paragraphs 8.39 - 8.95. This included an analysis of the case for imposing passive remedies, which took into account points raised by stakeholders in response to the CFI, and also set out OFCOM's provisional conclusions on the case for passive remedies. OFCOM summarised the potential benefits of passive remedies (such as the potential to stimulate competition by lowering barriers to entry for competitors who invest in infrastructure) and the risks as it saw them at that stage.
16. These risks included duplicative investment and the possibility of inefficient entry. OFCOM explained the risks in the June BCMR Consultation as follows:

“8.61 Introducing passive remedies would also carry significant risks. Investment in fibre-based networks is subject to strong economies of scale, and, while passive remedies could reduce barriers to competition based on infrastructure, any such additional competition they stimulate may not be sustainable outside some dense geographic clusters of businesses, such as major urban centres.

8.62 At the same time, introducing passive remedies in business connectivity markets could lead to inefficient competitive entry. For example, the current charge control delegates to BT, within certain constraints, the ability to decide how to recover its common costs across the charge-controlled services. In practice, BT recovers proportionately more of its common costs from higher-bandwidth products.”
17. The risk that passive access would be used in areas where the rewards were greater (such as in urban centres and for higher-bandwidth products) triggered a concern about BT's common cost recovery and price rises for customers. This concern was explained in the June BCMR Consultation as follows:

“8.63 Furthermore, introducing passive remedies in business connectivity markets could have wider implications on the recovery of common costs that underpins the current pricing of all of BT’s regulated products. Extending the example above, BT may respond to competitive entry based on passive remedies by reducing its charges for higher bandwidth services. This may, in turn, require rebalancing of the recovery of BT’s common costs, which may lead eventually to an increase in its charges for other regulated services, not only for those used in business connectivity markets but potentially also for others, such as local loop unbundling and wholesale line rental. Therefore, while current regulations continue to apply to existing services, the opportunity for BT’s competitors to use a passive remedy could be most attractive when delivering high-bandwidth services, not because those competitors could necessarily do so more efficiently than BT, but because of the way that BT had decided to recover its common costs.”

18. After analysing the specific issues raised by stakeholders regarding the possibility of better outcomes for consumers with passive remedies, OFCOM came to the following provisional conclusion:

“8.94 Our current view is that the case of passive remedies is weak because:

- While we recognise that it is possible that passive remedies could improve the prospects for competition generally, our analysis of the cases put forward by stakeholders suggests that the potential benefits that could flow from doing so could to a large extent be achieved by imposing alternative remedies such as price controls on BT’s provision of active wholesale access services.
- At the same time, we consider that imposing passive remedies in leased lines markets, either in isolation or in combination with active remedies, could carry significant risks of worse outcomes than continuing to impose active remedies alone, including
 - adding significantly to the cost of competition in leased lines markets;
 - encouraging inefficient entry;
 - narrowing the promotion of competition to the provision of high-bandwidth (and high revenue-generating) products and/or the provision of leased lines services in dense geographic clusters of businesses (such as major urban centres);
 - increasing the charges paid by the majority of end-users of leased lines services;
 - undermining the recovery of common costs that underpins the current pricing of all of BT’s regulated leased lines products.

8.95 We therefore consider that in the leased lines markets in which we propose that BT has SMP, we should not impose passive remedies.”

19. The relevant question posed to stakeholders in the June BCMR Consultation was:

“Do you agree with our approach to remedies and in particular our consideration of the case for imposing passive remedies?”¹⁰

20. In its response to the June BCMR Consultation, Colt took issue with OFCOM’s rejection of passive remedies. Members of the CP Group also submitted responses to the consultation.

B. SMP findings and remedies

21. In the Statement, OFCOM defined various product and geographic markets and made SMP findings in relation to some of them. OFCOM also introduced a package of remedies to address the competition concerns it identified. In summary (so far as is relevant for our judgment):

- (a) OFCOM found that BT had SMP in various retail and wholesale markets for leased line services in the UK, including:

- (i) most wholesale Traditional Interface Symmetric Broadband Origination (TISBO) markets, excluding Hull and (for the most part) the Western, Eastern and Central London Area (“WECLA”)¹¹;
- (ii) the wholesale Alternative Interface Symmetric Broadband Origination (AISBO) markets, excluding Hull¹²; and
- (iii) the wholesale Multiple Interface Symmetric Broadband Origination (MISBO) market in the UK, excluding the Hull area and WECLA¹³.

- (b) OFCOM imposed on BT various access remedies for active products (i.e. including electronics) in the wholesale markets in which it was found to have SMP, with the stated purpose of promoting competition in the long term at the wholesale level based on investment in economically efficient

¹⁰ June BCMR Consultation, Annex 5, Question 13

¹¹ Statement at [1.28]

¹² Statement at [1.29] - [1.30]

¹³ Statement at [1.31]

alternative infrastructure, and supplemented by seeking to ensure that CPs could compete effectively elsewhere in downstream markets by using regulated access to BT's wholesale services.¹⁴

(c) OFCOM imposed a charge control on BT, but decided not to impose passive remedies.

22. The SMP remedies imposed in the Statement took effect from 1 April 2013, and were to run for three years.

C. The Decision not to impose passive remedies

(i) Overview

23. At the time OFCOM commenced the BCMR, the wholesale leased lines market had only hitherto been subject to active remedies, not passive remedies. OFCOM's reasons for deciding not to impose passive remedies in this market review were principally set out in section 8 of the Statement.

24. OFCOM's analysis was summarised in the Introduction to the Statement:

“1.40 We have also considered the case for imposing an alternative or additional set of requirements known as passive remedies, such as requiring BT to provide access to its ducts, poles or dark fibre. We have decided not to impose such passive remedies.

1.41 We recognise that it is possible that the imposition of passive remedies in leased lines could support competition in downstream markets. However, imposition of passive remedies is likely to be inconsistent with important aspects of the package of remedies which we are imposing, including the form of the charge controls. We therefore needed to decide which of the two alternative approaches is likely to be more consistent with securing or furthering our statutory duties.

1.42 We have considered the potential benefits that imposition of passive remedies could deliver. Some CPs have argued, for example, that the pace of innovation could be increased in some parts of the market. However, it is not clear to us that the competition issues we have identified in leased lines would be addressed more effectively in the round by the imposition of passive remedies than by our current approach to remedies. Our analysis suggests that the specific benefits put forward by stakeholders of imposing passive remedies could, to a large extent, be achieved by imposing alternative remedies such as price controls on BT's provision of wholesale leased lines services. At the same time, we consider there are significant

¹⁴ Statement at [1.38]

risks that the imposition of passive remedies could lead to worse outcomes for consumers and for competition.

1.43 Facilitating the transition from the current regulatory regime to one where competition based on passive remedies is sustainable and effective would require a significant degree of regulatory support and intervention and, potentially, changes to the definition of the regulatory boundaries and role of Openreach.

1.44 At present we have seen no evidence that any CPs would invest substantially in infrastructure based on passive remedies if we were to impose them in leased lines markets. Furthermore, we have seen no evidence that imposing passive remedies in leased lines markets would, as some stakeholders have claimed, unlock significant new investments in fixed next-generation access (NGA) infrastructure for consumer superfast broadband services.

1.45 In conclusion, while imposition of passive remedies is likely to require significant regulatory changes and intervention, and we would therefore need clear evidence to persuade us that this would be justified, it is not clear at present that imposing passive remedies would lead to better market outcomes in the round than the package of remedies we have decided to impose. We have therefore decided not to impose passive remedies.”

(ii) Section 8 of the Statement

25. In section 8, OFCOM set out its full analysis of passive remedies. After giving a slightly fuller summary (at paragraphs 8.1 - 8.9) than that given in the Introduction to the Statement, OFCOM set out the factual background (at paragraphs 8.10 - 8.17) and then described the consultation process (at paragraphs 8.18 - 8.50), including the responses to the CFI of April 2011 and the June BCMR Consultation document, together with OFCOM’s observations on those responses.
26. OFCOM referred to comments by most leading CPs, including Colt itself. In general, mobile network operators (“MNOs”) were strongly in favour of passive remedies to increase availability of backhaul (the links between MNOs’ cell sites and core networks). Vodafone’s response argued that passive remedies were the only way to create the conditions to ensure “ubiquitous high speed and rich data coverage”.¹⁵
27. Several respondents referred to the bandwidth-related gradient of BT’s wholesale pricing (that is the pricing structure by which BT recovered different proportions of

¹⁵ Statement at [8.52]

its common costs from different value services).¹⁶ The likely effect of passive remedies on BT's bandwidth gradient was acknowledged, but the balance of view was that benefits of competition outweighed this risk. The effects on alternative infrastructure investment and duplication were also referred to, and the likely enhancement of innovation was stressed by many (paragraphs 8.60 - 8.72).

28. OFCOM expressed the following views on these responses in section 8:

- (a) Responses varied on whether OFCOM should have imposed passive remedies, and on the extent of the role that they could have had in supporting competition in leased lines (paragraph 8.39).
- (b) Pricing would have been a key factor in CPs' incentives to use passive access and OFCOM may have had to intervene to set the access price (paragraphs 8.41 - 8.43).
- (c) Passive remedies may have been "inconsistent" with the parameters and design of the charge controls OFCOM was imposing and, if so, these would have had to be changed (paragraph 8.43).
- (d) To ensure a level playing field for CPs, it may have been necessary to change the role of Openreach¹⁷ to include the provision of passive remedies on the basis of equivalence of inputs ("EoI") (paragraph 8.44).
- (e) Given CPs' incentives to invest in passive remedies where BT recovered a relatively high proportion of its common costs, there may have been adverse effects on BT's ability to recover those common costs (paragraph 8.45).

¹⁶ Mr Culham for Ofcom explained the bandwidth gradient in his first witness statement as follows at [25]:

"The current tariff structures for leased lines generally involve higher bandwidth services making a greater contribution to the recovery of common costs than lower bandwidth services. To put the point another way, the tariff gradient in relation to bandwidth exceeds the gradient of marginal cost in relation to bandwidth. However, charges for additional increments of bandwidth are generally substantially less than proportional to the amount of extra bandwidth purchased (i.e. there is a reduction in average price per unit of bandwidth for higher bandwidth services, so for example a 1Gbit/sec circuit is priced at a significant discount to 10 x 100Mbit/sec circuits)."

¹⁷ Openreach is the name given to the separate BT division created as a result of the 2005 Telecommunications Strategic Review to provide wholesale services to BT and third parties on equivalent terms ("Equivalence of Inputs" or "EoI").

- (f) After a period of transition, passive remedies would have been expected to replace some or all active remedies to avoid OFCOM regulating “concurrently and indefinitely at multiple levels of the value chain” (paragraphs 8.46 - 8.47).
 - (g) Parallels with the passive remedy imposed on BT in the wholesale local access market¹⁸ were misplaced (paragraphs 8.48 and 50).
 - (h) Overall, moving from active to passive remedies would have required much regulatory support and intervention, potentially including changes to important aspects of current regulation. OFCOM therefore considered that it needed concrete evidence that the outcome would have been better (paragraph 8.49).
29. OFCOM then posed two questions: first, whether competition based on passive remedies would be more effective and, second, what was the likelihood that passive remedies would be used.
30. OFCOM’s views on these two questions (expressed as “considerations” in section 8) contain the essence of its final decision on passive remedies. Having first expressed its understanding of the essential benefit of passive remedies (i.e. “lowering barriers to entry for competitors who invest in infrastructure”)¹⁹, OFCOM rehearsed its views on:
- (a) duplication of investment (paragraphs 8.77- 8.79);
 - (b) the pricing of passive access, efficient entry, BT’s pricing flexibility and scope of sustainable competition (paragraphs 8.80 - 8.92);
 - (c) the effect on investment in alternative infrastructure (paragraphs 8.93 - 8.94);

¹⁸ See paragraph 9 above
¹⁹ Statement at [8.76]

(d) competition in the delivery of mobile backhaul (paragraphs 8.95 - 8.100);
and

(e) innovation (paragraphs 8.101 - 105).

31. The longest section is that referred to at paragraph 30(b) above - the pricing of passive access, efficient entry, BT's pricing flexibility and the scope of sustainable competition. In that section, OFCOM discussed in some detail the concerns it had previously raised about the likely incentives and motives of those wanting passive access, the likely need for a regulated uniform access price, the effect this would have on BT's ability to recover its common costs, and the importance OFCOM attached to BT's ability to "vary relative charges within the charge control basket"²⁰ for the active remedies prescribed elsewhere in the Statement, together with the likely impact on prices outside densely populated urban centres.
32. OFCOM accepted there was a risk that BT would seek to price abusively (a risk that some CPs thought would be lessened by passive remedies), but preferred to deal with this, if necessary, by further refinements to the active price controls. The design of charge controls through sub-caps and/or separate product baskets would, in OFCOM's view, lead to a more efficient outcome.
33. OFCOM's summarised its views on the balance of benefits and risks in imposing passive remedies as follows:

"8.106 Overall, it is not clear that imposing passive remedies would lead to better market outcomes in the round than the package of remedies we have decided to impose in this review. We recognise that passive remedies could bring some benefits in the leased lines markets. In particular, imposing passive remedies could:

- stimulate competition in a greater part of the value chain in regions where full infrastructure competition is unlikely to emerge by lowering barriers to entry; and
- provide more scope for product innovation and service differentiation in some cases.

8.107 We consider, however, that the package of remedies which we have decided to impose could achieve similar outcomes, and that passive remedies could also:

²⁰

Statement at [8.84]

- lead to inefficient duplication of investment adding to the overall costs in the industry;
- encourage inefficient investments;
- undermine existing, and discourage future, infrastructure investments; and
- lead to changes in the way BT recovers its common costs which may not necessarily be more efficient and could lead to higher end-user prices where services are not exposed to competition.”

34. Having then considered the extent of demand for passive remedies, OFCOM set out its overall conclusions on passive remedies (paragraphs 8.129 - 8.132). These repeat the reasoning contained in the body of section 8, referring to:

(a) the major departure involved in adopting passive remedies;

(b) the effect on the existing regulatory system; and

(c) the need for concrete evidence of a better overall outcome and that CPs would use passive remedies to increase competition.

35. The conclusion itself was as follows:

“8.132 After due consideration, we have decided not to impose passive remedies. This is because:

While we recognise that competition based on passive remedies may deliver some benefits, we believe that similar benefits could also be delivered by imposing active remedies and price controls. It is also not clear that imposition of passive remedies would lead to better market outcomes in the round than the remedies we are imposing in this review.

There is no evidence that CPs would invest substantially in competition based on passive remedies if they were available in the forward-looking period of this review.

At the same time, imposing passive remedies in leased lines markets could carry significant risks of worse outcomes than continuing to impose active remedies alone, including:

- adding significantly to the cost of competition in leased lines markets;
- encouraging inefficient entry;

- raising end-user prices of services other than high-bandwidth products and/or of services other than those provided in areas containing dense clusters of businesses (such as urban centres);
- rebalancing the charges paid by the end-users of leased lines services - so that some end-users would pay less while potentially many others would pay more - without necessarily achieving greater efficiency; and
- undermining investments that have already been made in alternative infrastructure.”

III. THE REGULATORY FRAMEWORK

36. The UK regulatory regime underwent a substantial, European Union (“EU”) driven, change in 2003. In that year, the UK implemented five EU communications directives (Directive 2002/21/EC (“the Framework Directive”), Directive 2002/19/EC (“the Access Directive”), Directive 2002/20/EC (“the Authorisation Directive”), Directive 2002/22/EC (“the Universal Service Directive”) and Directive 2002/58/EC (“the Privacy Directive”). The first four of these directives were implemented in the UK by the Act. The fifth, the Privacy Directive, is not material for the purposes of this judgment. We refer collectively to these directives as “the Common Regulatory Framework”.
37. The new regulatory regime introduced an obligation on National Regulatory Authorities to carry out reviews of competition in communications markets to ensure that regulation remained appropriate in the light of changing market conditions. In essence, this process involved: (a) a definition of the relevant market or markets; (b) an assessment of competition in each market, and in particular whether any companies had SMP in a given market; and (c) an assessment of the appropriate regulatory obligations that should be imposed where there was a finding of SMP.
38. We were referred to a number of provisions of the Common Regulatory Framework in these proceedings. Where necessary, we refer to these provisions, but we do not propose to re-quote the passages cited to us. Rather, we describe the regime under the Act - which implemented the Common Regulatory Framework - and is the domestic source of OFCOM’s power to impose SMP remedies.

39. The UK's National Regulatory Authority is OFCOM. As noted, OFCOM is required to define relevant markets in the communications sector in the UK, and analyse whether those markets are effectively competitive.
40. OFCOM's power to set binding conditions, including SMP conditions, is contained in section 45 of the Act. Section 46 sets out the persons to whom conditions may apply. SMP conditions can be applied to a CP that OFCOM has found to have SMP in a specific market (section 46(7) - (8)), provided that the following tests (set out in section 47(2)) are met:
- “(a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates [(but this paragraph is subject to subsection (3))];
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (c) proportionate to what the condition or modification is intended to achieve; and
 - (d) in relation to what it is intended to achieve, transparent.”
41. In addition, OFCOM must consider:
- (a) its general duties in section 3 of the Act, which include duties to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition; and
 - (b) its duties for the purpose of fulfilling EU obligations in section 4 of the Act, which include a duty to act in accordance with the six Community requirements, the first of which is a requirement to promote competition in relation to the provision of electronic communications networks and electronic communications services.
42. Section 87 of the Act identifies the various types of condition that OFCOM may impose where it has made an SMP determination in an identified market. It provides as follows (so far as is relevant here):

- “(1) Where OFCOM have made a determination that a person to whom this section applies (“the dominant provider”) has significant market power in an identified services market, they shall—
- (a) set such SMP conditions authorised by this section as they consider it appropriate to apply to that person in respect of the relevant network or relevant facilities; and
 - (b) apply those conditions to that person.
- (2) This section applies to—
- (a) a person who provides a public electronic communications network; and
 - (b) a person who makes available facilities that are associated facilities by reference to such a network.
- (3) This section authorises SMP conditions requiring the dominant provider to give such entitlements as OFCOM may from time to time direct as respects—
- (a) the provision of network access to the relevant network;
 - (b) the use of the relevant network; and
 - (c) the availability of the relevant facilities.
- (4) In determining what conditions authorised by subsection (3) to set in a particular case, OFCOM must take into account, in particular, the following factors—
- (a) the technical and economic viability [(including the viability of other network access products, whether provided by the dominant provider or another person)], having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;
 - (b) the feasibility of the provision of the proposed network access;
 - (c) the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to network access is proposed [(taking account of any public investment made)];
 - (d) the need to secure effective competition [(including, where it appears to OFCOM to be appropriate, economically efficient infrastructure based competition)] in the long term;
 - (e) any rights to intellectual property that are relevant to the proposal; and
 - (f) the desirability of securing that electronic communications services are provided that are available throughout the member States.”

43. As can be seen from section 87(3), there is a specific power to set SMP conditions that impose passive remedies. It was not disputed that the reference to “relevant

facilities” included physical assets used to provide communications services, including ducts and fibre.

44. Decisions made under Part 2 of the Act (which includes decisions to set SMP conditions under section 87) can be appealed to the Tribunal pursuant to the statutory regime set out in sections 192 - 195 of the Act.

IV. THE GROUNDS OF APPEAL

45. The overarching issue we are required to decide in this appeal is whether OFCOM properly considered whether it could and/or should have imposed a passive remedy.

46. In summary, Colt contended, in its Notice of Appeal, that:

(a) *Ground 1*: OFCOM was wrong to view passive and active remedies as necessarily alternatives and to reject passive remedies as a result. There was nothing in economic theory, law or practical experience to suggest that they could not co-exist, indefinitely if necessary. The particular practical issues identified by OFCOM were of no real significance.

(b) *Ground 2*: OFCOM erred as a matter of law and/or assessment in not proceeding from the starting point that it should regulate as far upstream as possible. Economic theory strongly favoured regulating as far as possible up the value chain because it would increase competition and innovation. This was also reflected in the relevant legislation and in OFCOM’s previous statements.

(c) *Ground 3*: OFCOM was wrong as a matter of assessment to believe that active remedies were likely to promote innovation and competition at least as effectively as passive remedies. Consistent with what would be expected on the basis of economic theory, there was evidence to show that there were substantial benefits that could only be achieved with passive remedies and not active remedies. The concerns raised by OFCOM as to the possible adverse consequences of passive remedies were without justification.

(d) *Ground 4*: OFCOM was wrong as a matter of fact and/or assessment to reject passive remedies on the basis of a supposed lack of demand for them. OFCOM was wrong as a matter of fact to say that there was no evidence of demand as there was plenty of such evidence but, in any event, it was wrong of OFCOM to insist on evidence of demand as a condition precedent to the imposition of passive remedies.

47. During the hearing, Colt re-ordered its grounds of appeal in order to address Ground 4 before Ground 2. We adopt the same approach in this judgment, addressing the grounds in the following sequence: 1, 4, 2 and 3. Despite Colt having raised four separate grounds of appeal in its Notice of Appeal, we found there was much overlap between them. We therefore address the allegations made by Colt within the ground in which they seem most appropriately to arise.
48. We are grateful to the parties for having narrowed the issues of dispute between them during the course of proceedings. As we explain in the context of each ground, the significance of Grounds 1 and 4 was much reduced by the time we came to hear the case, and Ground 3 emerged (so it seemed to us) as the nub of Colt's case. Accordingly, a significant proportion of this judgment centres on Ground 3.
49. Colt submitted that the errors identified in its Notice of Appeal were individually and collectively of sufficient importance wholly to vitiate OFCOM's decision to refuse passive remedies. It requested that we set aside the Decision and direct OFCOM to:
- (a) require BT to provide CPs with access to its ducts and dark fibre for the purpose of, *inter alia*, providing business connectivity services: (i) at cost-oriented prices; and/or (ii) on fair, reasonable and non-discriminatory ("FRAND") terms including charges; or
 - (b) reconsider and/or re-consult on its decision on passive remedies in accordance with such directions as we consider appropriate.

50. The parties filed a considerable amount of witness evidence during these proceedings. Some of these witnesses were called to give oral evidence, and almost half of the four-day hearing was taken up by cross-examination. Colt and BT (intervening in support of OFCOM) both filed witness and expert evidence; OFCOM and the CP Group both filed witness, but not expert, evidence. We have considered the witness and expert evidence carefully and are grateful in particular to the following individuals for giving oral evidence at the hearing: Mr Kieron McCann (Colt's Director of Strategy and Planning); Mr Andrew Reid (Chief Network Services Strategist within BT's Technology Services & Operations Division); Dr Andrew Lilico (Chairman and Principal Consultant at Europe Economics; instructed by Colt); Mr Peter Culham (OFCOM's Chief Economist); and Dr Daniel Maldoom (a founding partner of the economic consultancy DotEcon Ltd; instructed by BT). Whilst the evidence was - for the most part - helpful, our findings draw on only a handful of the witnesses and it is therefore unnecessary to comment upon many of the individual witnesses or to set out our assessment of them.

V. THE PRINCIPLES APPLICABLE ON AN APPEAL PURSUANT TO SECTION 192(2) OF THE ACT

51. As we have noted, OFCOM's decision to set SMP conditions - including its decision not to impose passive remedies - was taken under section 45 of the Act and, as such, is appealable under section 192(1)(b) of the Act. Section 195(2) of the Act requires that section 192 appeals (such as this) are to be decided "on the merits and by reference to the grounds of appeal set out in the notice of appeal".

52. The ambit of the Tribunal's full merits review jurisdiction in section 192 appeals is now well established following a number of judgments of the Tribunal and the Court of Appeal.

53. In *Hutchison 3G UK Limited v OFCOM* [2008] CAT 11, the Tribunal stated at [164]:

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

54. We agree with this summary of the approach we should take. Nonetheless, it is clear that the Tribunal is not intended to act as a “duplicate regulatory body waiting in the wings just for appeals”, as Jacob LJ made clear in *T-Mobile (UK) Limited v Office of Communications* [2008] EWCA Civ 1373 at [31].

55. Further, this appeal raises a complex question of regulatory and economic judgment and we are conscious that there may be no single “right answer”, as Moses LJ emphasised recently in *Everything Everywhere Limited v OFCOM (Mobile Call Termination)* [2013] EWCA Civ 154 (an appeal from a Competition Commission decision, but which is equally relevant to the Tribunal) at [35]:

“The subject matter of the appeal is a complex question of economic judgment. It involves questions of policy in a highly technical field. The regulator, [OFCOM], and the Competition Commission are required to make educated predictions for the future as to the effect of any price control measure to be imposed. Although decisions relating to the control of charges are of great importance to communication providers and to the general public, the exercise of seeking an appropriate solution is necessarily imprecise; when looking to the future, there is unlikely to be any one right answer.”

56. The Court of Appeal also addressed the nature of the Tribunal’s task and the weight that should be given to value judgments by the regulator in *Telefónica O2 UK Limited v OFCOM* [2012] EWCA Civ 1002 at [67]:

“Thus, the question is whether the regulator was right in its decision on the merits, but the appeal body’s consideration of that is not necessarily confined to material that was before the regulator. The question on the merits, however, is the same as was (or should have been) addressed by the regulator, and if the regulator has addressed the right question by reference to relevant material, any value judgment on its part, as between different relevant considerations, must carry great weight.”

57. Where there are a number of competing, legitimate views, there is a very clear line of authority in both the Court of Appeal and the Tribunal that the Tribunal will not

interfere in a regulator's decision unless it is clearly wrong.²¹ In its recent judgment in *Mobile Call Termination* (cited at paragraph 55 above), the Court of Appeal confirmed that it is not enough for an appellant to show that there is a "real risk that the decision was wrong".²² It must show that the decision itself was wrong:

"25. It is for an appellant to establish that Ofcom's decision was wrong on one or more of the grounds specified in s.192(6) of the [Act]: that the decision was based on an error of fact, or law, or both, or an erroneous exercise of discretion. It is for the appellant to marshal and adduce all the evidence and material on which it relies to show that Ofcom's original decision was wrong. Where, as in this case, the appellant contends that Ofcom ought to have adopted an alternative price control measure, then it is for that appellant to deploy all the evidence and material it considers will support that alternative.

24. The appeal is against the decision, not the reasons for the decision. It is not enough to identify some error in reasoning; the appeal can only succeed if the decision cannot stand in the light of that error. If it is to succeed, the appellant must vault two hurdles: first, it must demonstrate that the facts, reasoning or value judgments on which the ultimate decision is based are wrong, and second, it must show that its proposed alternative price control measure should be adopted by the Commission. If the Commission (or Tribunal in a matter unrelated to price control) concludes that the original decision can be supported on a basis other than that on which Ofcom relied, then the appellant will not have shown that the original decision is wrong and will fail."

58. Finally, the Tribunal must decide by reference to the grounds of appeal. As referred to in the above extract from the Court of Appeal's judgment in *Mobile Call Termination*, section 192(6) of the Act requires that:

"The grounds of appeal must be set out in sufficient detail to indicate ... to what extent (if any) the appellant contends that the decision appealed against was based on an error of fact or was wrong in law or both; and ... to what extent (if any) the appellant is appealing against the exercise of discretion by OFCOM ..."

59. We are therefore required to review OFCOM's decision on the basis of those specific errors of fact, errors of law and/or the wrong exercise of discretion which were alleged by Colt in its grounds of appeal.

²¹ See for example: *T-Mobile (UK) Limited v OFCOM (Termination Rate Disputes)* [2008] CAT 12 at [82], *Albion Water Limited v Water Services Regulation Authority* [2008] CAT 31 at [72], *British Telecommunications plc v OFCOM (080)* [2011] CAT 24 at [230], *Telefónica UK Limited v OFCOM* [2012] CAT 28 at [45] and *British Sky Broadcasting Limited & Ors v OFCOM* [2012] CAT 20 at [84]

²² [2013] EWCA Civ 154 at [22]

VI. GROUND 1: PASSIVE AND ACTIVE REMEDIES AS ALTERNATIVES

A. Colt's case

60. Whilst the focus of Colt's first ground of appeal shifted during the course of proceedings, we understood there to be two key aspects. First, Colt challenged the Decision on the basis that OFCOM was wrong to view active and passive remedies as necessarily alternatives, rather than complementary remedies, as a matter of principle. Secondly, Colt argued that the Decision had resulted from an internal *fait accompli*, that OFCOM was prejudiced, and that its arguments regarding practical difficulties preventing the imposition of a dual regulatory approach were flawed.

61. The first aspect of Ground 1 narrowed considerably during the course of proceedings. Counsel for Colt explained to us during the hearing that:

“the way things have shaken out in the form of the pleadings and the skeleton arguments, that proposition [that passive remedies and active remedies can co-exist in principle] is not actually controversial”.²³

62. Accordingly, Colt moved away from its original formulation of Ground 1, focussing instead on the way in which OFCOM had approached the question of whether or not active and passive remedies could be applied at the same time. Nonetheless, it maintained at the hearing that it was entirely reasonable for it to have understood from the Statement that OFCOM had viewed active and passive remedies as alternatives.

63. In light of the narrowing of the issues, the second aspect of Ground 1 took on an increased significance. In essence, Colt argued that OFCOM's approach revealed an internal “*fait accompli*” as no real analysis had taken place as to how active and passive remedies might be applied concurrently in practice. Rather, Colt said - in its skeleton argument - that OFCOM took as its starting point the “price controls it was already intent on imposing as an active remedy”. Counsel for Colt put it this way at the hearing:

“it must stand to reason that either [OFCOM] had already decided that the active remedies would be sufficient and they were not going to change them, or, at the least, when formulating their final concluded view, they have not done any

²³ Transcript of hearing day one, page 4 (lines 5 – 7)

analysis to work out whether or not that conceptually acceptable bilateral approach to remedies would work.”²⁴

64. In seeking to persuade us that OFCOM had not approached the issue of the possible concurrent application of active and passive remedies with an open mind, Colt took us to various documents from the consultation process. As set out at paragraph 11 above, OFCOM’s consultation included - among other things - the CFI, the June BCMR Consultation and meetings with stakeholders.
65. In relation to the CFI, Colt attempted to suggest that OFCOM had inadequately expressed its thinking on passive remedies, such that respondents were unable to submit a proper response. Referring to one consultee’s response, Colt contended that at least one “experienced market operator” had failed to understand what OFCOM said were its primary concerns about passive remedies.
66. In relation to the June BCMR Consultation, Colt contended that OFCOM had already made up its mind against passive access. Part of the evidence Colt relied on in support of this claim was the file note of a meeting between OFCOM and a particular CP, which took place prior to the June BCMR Consultation. The file note records that OFCOM explained that it “was not actively seeking to impose passive remedies” and that it “did not intend to grapple with the issue in depth in the Statement”. Nonetheless, OFCOM clearly stated that it “intended to include the debate in the June BCMR Consultation in order to gain the views of stakeholders before making any decision”.
67. Colt also took us to passages in the Statement, which it said demonstrated an internal *fait accompli*, such as paragraph 8.5, which read as follows:

“However, imposition of passive remedies is likely to be inconsistent with important aspects of the package of remedies which we are imposing, including the form of the charge controls. In other words, imposition of passive remedies would be likely to be part of an alternative, rather than a complement, to that package of remedies. In reaching the decisions in this Statement, we therefore needed to decide which approach we considered would be likely to be more consistent with securing or furthering our statutory duties.”

²⁴ Transcript of hearing day one, page 12 (lines 17 – 20)

68. At the hearing, Colt contended that OFCOM had made an error of law by: (a) not asking itself the right question (i.e. how might active and passive remedies co-exist?); and (b) failing to take into account a material consideration - that is, that active and passive remedies could, in principle, co-exist.²⁵ Both of these arguments had been given minimal attention, if any, in Colt's Notice of Appeal and skeleton argument.
69. A further aspect of Colt's Ground 1 (as originally pleaded) was that the practical difficulties identified by OFCOM of imposing passive remedies were of no real significance. The practical difficulties identified in the Statement included:
- (a) the need to make adjustments to the charge controls OFCOM intended to impose (paragraph 8.43);
 - (b) the need to remove some or all active remedies and the resulting period of transition in which active remedies are restructured (paragraphs 8.46 - 8.49);
and
 - (c) the additional regulatory action necessary to make a remedy requiring passive access to be offered effective (paragraphs 8.43 - 8.44).
70. Colt contended, in its skeleton argument, that OFCOM's reasoning here was predicated on "administrative convenience", which was not a good reason for declining to exercise its statutory discretion.
71. In addition, Colt criticised OFCOM's reasoning regarding the purported lack of demand for passive remedies. However, given the overlap with Ground 4 on this issue - which is primarily focussed on demand arguments - we address demand in relation to Ground 4 below.

²⁵ Transcript of hearing day three, page 29

B. OFCOM's response

72. OFCOM explained that it had never doubted that active and passive remedies could be combined but, rather, it decided against passive remedies because of specific economic and practical considerations.
73. OFCOM maintained that it had approached the question of whether passive remedies should be introduced with an open mind, rejecting the allegations made against its approach in the CFI, the June BCMR Consultation and the Statement.
74. OFCOM further argued that Colt's argument regarding "administrative convenience" was a mischaracterisation of its approach. Rather than rejecting passive remedies because of the practical difficulties that their implementation would bring - as Colt appeared to assume OFCOM had done - OFCOM actually considered the decisive factor underlying its Decision to be whether or not passive remedies would lead to a better overall outcome. In other words, OFCOM considered whether to introduce passive remedies *notwithstanding* the resulting regulatory changes. By way of support for this position, OFCOM pointed us to the paragraphs in the Statement which address the risks of introducing passive remedies. These risks included inefficient duplication of investment, inefficient investment, undermining existing and discouraging future infrastructure investments, failure to recover efficiently incurred common costs, and higher prices for end users.

C. BT's view

75. BT, intervening in support of OFCOM, stated that Ground 1 was based on a misreading of the Decision, describing Colt's arguments as being directed at a "straw man". BT also argued that OFCOM was correct to require clear incremental benefits before intervening at multiple levels of the value chain.

D. The Tribunal's analysis

76. As the parties did not dispute at the hearing that OFCOM did not treat passive and active remedies as necessarily alternatives, there is little for us to say about the first aspect of Ground 1. In light of the attention devoted to this point in the pleadings,

however, we note that we understand how the references in the Statement to passive remedies being “part of an alternative to the package of remedies [OFCOM] is imposing”²⁶ may have given Colt an erroneous impression. Indeed, the European Commission’s questions to OFCOM about the Statement suggest that it was of the same view. Nevertheless we see no substance in Colt’s claim on this point. We now turn to the second aspect of this ground.

77. Having carefully considered the CFI, the June BCMR Consultation and the responses thereto, we find no error in how OFCOM expressed its provisional views on passive remedies.
78. As regards the CFI, this document explained that OFCOM was considering the benefits that passive remedies could bring, whether they would remove regulation of downstream wholesale active remedies and what the implications for “cost recovery” and the effectiveness of existing active remedies would be (as extracted in full at paragraph 13 above). The CFI then asked stakeholders for their views on the role that passive remedies might play in the business connectivity market for the promotion of downstream competition and what the implications might be for active remedies. Colt did not respond to the CFI, although several CPs did. These responses are summarised in the Statement at paragraphs 8.20 - 8.25.
79. Whilst with hindsight this part of the CFI might have been drafted more clearly, we do not have any particular difficulty in understanding from the CFI that OFCOM had concerns about the implications of passive remedies for “cost recovery”, among other things. The responses to the CFI from other consultees show that they also grasped this aspect of OFCOM’s analysis. In any event, OFCOM held meetings with stakeholders which would have gone some way to clarify any confusion (as it appears to have done in the case of the particular respondent Colt referred to) and the main BCMR consultation was yet to come.
80. Turning to the June BCMR Consultation, this document included an analysis of the case for imposing passive remedies, which took into account points raised by stakeholders in response to the CFI, and also set out OFCOM’s provisional

²⁶ See, for example, the Statement at [8.17], [8.43], [9.49] and [8.84]

conclusions on the case for passive remedies (see paragraphs 15 - 19 above). OFCOM asked stakeholders whether they agreed with its approach to remedies and, in particular, its “consideration of the case for imposing passive remedies”. In response, Colt submitted an 18 page document, which addressed various aspects of the consultation, including passive access. Colt also met representatives of OFCOM in December 2012, where it took advantage of the opportunity to make its concerns about passive access known. These concerns were summarised by OFCOM in the Statement at paragraphs 8.55 - 8.56.

81. It is apparent to us that OFCOM was leaning away from passive remedies when it published the June BCMR Consultation. However, that is not to say that its mind was closed, or that there was an internal *fait accompli*. OFCOM set out the possible benefits of passive remedies, as well as the risks, and opened the debate up to stakeholders. By setting out its provisional conclusion on passive remedies, OFCOM was transparent about its thinking and invited stakeholders to provide responses which may have led OFCOM to reconsider its position. Those stakeholders made submissions on OFCOM’s preliminary reasoning, which were summarised and analysed in the Statement. Although several stakeholders called for passive remedies to be introduced, OFCOM was not persuaded away from its provisional view that the case for doing so was weak.
82. It is of course essential that a regulator engages in *genuine* consultation, and is willing to reconsider its provisional decision in light of the responses it receives. However, a regulator is entitled not to be persuaded by calls to move away from its provisional viewpoint if, in its judgment, the responses are not convincing. Whilst Colt may understandably be disappointed that it did not bring OFCOM round to its way of thinking during the consultation, the fact that OFCOM did not change its mind is not evidence in itself of an internal *fait accompli*.
83. As regards the Statement itself, although the reasoning is not always as clear as it might be, it is sufficient to demonstrate that OFCOM was alive to the potential benefits of passive remedies, but - having analysed the potential risks such remedies entailed - did not consider these to outweigh the possible downsides. We see no basis in the extracts to which we have been pointed to find that, in relation to the

possible coexistence of active and passive remedies, OFCOM had reached an internal *fait accompli*.

84. We are similarly not persuaded that OFCOM failed to “ask itself the right question” (as Colt’s counsel put it) or that it failed to take into account a material consideration (see paragraph 68 above). There was no error on either point. This is demonstrated by the following:

- (a) OFCOM did not treat active and passive remedies as necessarily alternatives;
- (b) consultees were able to raise possible complementary remedies packages - which included both active and passive remedies - due to the open nature of the consultation; and
- (c) OFCOM *did* give some thought to how active and passive remedies could work alongside each other. This can be seen from the Statement at paragraphs 8.80 - 8.85 in particular, where OFCOM considered how passive remedies might be priced. For example, OFCOM expressed its concerns about pricing passive remedies at a flat rate:

8.82 [...] a single flat rate charge for passive access may need to be set, on a basis such as BT’s average FAC, for example, and this could have a number of undesirable consequences.

8.83 First, the charges could give excessive incentives to use passive access because CPs could find that the sum of the charge for passive access and the costs of their equipment were lower than the charge for BT’s equivalent wholesale service even where using passive access increases total costs, which would be inefficient.

8.84 Secondly, if BT lost many sales of its high-margin wholesale leased lines services then BT as a whole may fail to recover its common costs. In response to the potential that this may happen then, thirdly, where BT would face competition from CPs which invest using passive remedies, it may reduce the prices of its wholesale services relative to the charge for passive access, and raise other charges. Thus, the availability of PIA at a single flat rate charge would tend to produce the same flat structure in charges for active services. ... These potential undesirable consequences further support our view that passive remedies would be likely to be part of an alternative to the package of remedies we are imposing, rather than a complement.”

85. Whilst it is evident that OFCOM had doubts about the extent to which active and passive remedies could be combined, it considered whether the benefits of passive remedies were sufficient to justify their introduction. On balance, OFCOM concluded that passive remedies did not offer sufficient benefits. Accordingly, it decided that it was not worth conducting the very considerable exercise required to come up with a package which included both active and passive remedies in this review. OFCOM was entitled to exercise its regulatory judgment to reach this decision and we see no reason to interfere with it.
86. Colt's "administrative convenience" point appears to be substantially the same as the internal *fait accompli* argument we have dismissed above, and we dismiss it for the same reasons. To the extent that this part of Ground 1 involves a substantive assessment of the risks of passive remedies (which may relate to their practical difficulties), we address this under Ground 3 below.
87. For the reasons set out above, Ground 1 falls to be dismissed.

VII. GROUND 4: DEMAND FOR PASSIVE REMEDIES

A. Colt's case

88. Colt asserted that OFCOM's conclusion on the absence of evidence of potential investment in infrastructure based on passive remedies was "patently incorrect as a matter of fact". The relevant part of the Statement is as follows:

"8.125 Responses we received to the CFI and to the June BCMR Consultation, and our engagement with the industry, revealed no evidence that any CP would invest substantially in infrastructure based on passive remedies over the forward looking period of the review if we were to impose them in leased lines markets."

89. In particular, Colt contended that: (a) OFCOM was factually wrong to say there was no evidence of demand for passive remedies; (b) had OFCOM properly raised its concerns with Colt, further evidence could have been provided; and (c) in any event, the imposition of passive remedies should not have been made contingent on a fully substantiated business case from a known market participant.

90. Colt also argued that the consultation on this point had been procedurally unfair as Colt and other CPs were not given adequate opportunity to provide input on the minimum amount and certainty of investment required to justify the introduction of passive remedies. Colt attributed this flaw to OFCOM having “set its mind against permitting passive access”. To the extent that this challenge overlaps with Colt’s “*fait accompli*” argument, we have already addressed this in Ground 1 above.

B. OFCOM’s response

91. OFCOM denied that it had erred either in its factual assessment or in the process that it applied. As to the factual error alleged by Colt, OFCOM did not dispute that there was interest in the introduction of passive remedies from certain stakeholders. However, as it found in the Statement, this was not a sufficient evidential basis to conclude that substantial infrastructure investment would follow. During the hearing, OFCOM took us to several consultation responses which provided an insight into the nature of the demand for passive remedies:

(a) One respondent noted that it regarded passive remedies as having “niche complementary application to the current wholesale offerings” and that, in “certain, and limited situations”, they would be beneficial. However, it did not expect a switch “en masse” from existing products to Passive Infrastructure Access (“PIA”).

(b) At least two other respondents indicated that they did not want passive remedies for their own use, but rather so that other CPs could purchase them.

(c) Several CPs said they wanted passive remedies on the assumption that they would be offered on uniform regulated prices. In some cases, this appeared to stem from a wish to be “free from the price/bandwidth gradient associated with BT circuits”.²⁷ This, said OFCOM, indicated that one of the drivers of demand for passive remedies was the arbitrage opportunities²⁸ a uniform price would provide.

²⁷ See paragraph 27 above
²⁸ See paragraph 155 below

92. As to the alleged procedural unfairness, OFCOM referred to its extensive consultation process. It asserted that, throughout this process, it had approached the question of whether to impose passive remedies with an open mind, and explained clearly the nature of its concerns.
93. OFCOM further suggested that Colt had over-emphasised the importance of OFCOM's reasoning on demand for its overall Decision: a willingness to make substantial infrastructure investments was not a sufficient condition for imposing passive remedies, said OFCOM, but was merely a relevant matter for it to take into account. At the hearing, counsel for OFCOM explained in the following terms why any error in its reasoning on demand was immaterial:

“In any event, Ofcom's consideration of planned investment levels was, we say, separate from and additional to the balancing exercise which it had already undertaken in deciding whether passive remedies were, on balance, a good thing. It was, if you like, a sort of final stage cross check. Any error in relation to the prospects for investment, or indeed any error on Ofcom's part in considering that that was a relevant consideration to take into account, would be immaterial, we say, if Colt could not also show an error in Ofcom's prior balancing of potential benefits and detriments.”²⁹

C. BT's view

94. BT characterised Colt's arguments on this ground as an assertion that the mere fact that there were incentives for it to invest should have been enough to satisfy OFCOM that there would be demand for passive remedies. BT rejected this assertion as wrong as, it said, Colt had failed to establish that OFCOM was not entitled to have regard to the lack of evidence of substantial investment. Moreover, BT rejected Colt's claim that it had a viable case for using passive access.

D. The Tribunal's analysis

95. Contrary to Colt's claims, OFCOM did not conclude in the Decision that there was no evidence of demand for passive remedies. Rather, OFCOM stated that the consultation “revealed no evidence that any CP would invest substantially in infrastructure based on passive remedies” (emphasis added). Further, OFCOM actually referred to evidence of demand in the Statement, including Colt's investment plans and its position that passive remedies could have an effect on

²⁹ Transcript of hearing day one, page 48 (lines 2 – 9)

those plans (see paragraphs 8.123 and 8.127 of the confidential version). Based on the evidence Colt submitted to OFCOM, we agree that OFCOM was justified in assessing its proposed investment as not substantial.

96. We were also taken to a considerable volume of witness evidence, which Colt said demonstrated the sincerity of its intention to invest in infrastructure based on passive remedies. Whilst this evidence was not placed before OFCOM during the consultation (and we make no criticism of that), it does not change our position that OFCOM was entitled to view the evidence of intention to invest as insubstantial.
97. We were also taken to evidence of potential demand submitted to OFCOM by the CPs during the consultation. This evidence was summarised at paragraphs 8.108 - 8.124 of the Statement (see also paragraph 91 above). The CP Group sought to reinforce this evidence with witness statements filed in these proceedings. We see nothing in these documents to suggest that OFCOM made a factual error in concluding that it had seen no evidence that any CP would invest “substantially” in infrastructure based on passive remedies.
98. With regard to the alleged procedural failings in the consultation identified by Colt, we found in Ground 1 above that there were no such failings. The same applies here. We consider that the consultation gave Colt an adequate opportunity to make its views on investment in passive remedies known to OFCOM. On Colt’s related argument that OFCOM had required a “fully substantiated business case”, we quite agree that to do so would have been unfair. However, Colt has not established that OFCOM did require such evidence and the Statement instead refers merely to “compelling evidence that CPs are prepared to invest substantially in passive remedies” (at paragraph 8.128). Accordingly, there is nothing in this criticism.
99. In the light of our judgment that there was no factual error in OFCOM’s finding of no evidence of an intention to invest substantially, we need not address OFCOM’s argument that such evidence would have made no difference to the Decision. However, in view of the time devoted to this point by counsel at the hearing, our views are as follows. It is apparent to us that evidence of an intention to invest substantially was not sufficient to justify introducing passive remedies. Although it

was clearly a relevant factor, OFCOM also needed to satisfy itself that passive remedies would lead to better overall outcomes (i.e. the ‘first question’ we identified at paragraph 29 above). On our reading of the Statement, this was the most important part of OFCOM’s reasoning as it underpinned the whole basis for imposing (or not) passive remedies. The limited evidence of intention to invest therefore reinforced the overall Decision not to impose passive remedies, but was not fundamental to its validity.

100. Colt was mistaken, in our view, to interpret the witness statement of Mr Culham (OFCOM’s Chief Economist) as confirmation that OFCOM might have reconsidered its overall decision if there was evidence of substantial investment. Mr Culham said:-

“The combined effect of the lack of a compelling story of either innovation or a desire to make substantial investment led Ofcom not to undertake the significant work necessary to tackle the common cost recovery and potential rebalancing issues. The balance of that assessment could change in future, were evidence brought forward to strengthen the positive case for passive remedies in terms of their likely use in providing innovative services.”

101. We regard this as suggesting not that OFCOM would reconsider but that evidence as to the quantity of investment that an operator might make would not in itself be sufficient to tip the balance in favour of passive remedies.

102. This is supported by the following exchange between counsel for OFCOM and Mr Culham during the hearing:

“Q (Mr Holmes) Can I ask you the following question: if someone had come to OFCOM and said that they intended to make a sum that you considered to be a substantial investment in the UK market off the back of passive remedies, let us say £1 billion for the sake of argument, over the price control period, how would that information have affected OFCOM’s assessment as set out in section 8 of the BCMR statement?”

A (Mr Culham) I think the crucial issue there would be how that large sum of money was going to be invested and what the services would be that would be provided, and whether this was going to be a kind of quite aggressive niche kind of investment, or whether this was going to be a broader-based investment that would release the potential for innovation and so on. So I think it would have been, you know, the quantity would have been interesting but not decisive if you wanted to look at the qualitative aspects of it.

Q And if the balance of net benefits had been shifted by the information that you obtained after asking questions of this investor, would OFCOM in your view then have considered introducing passive remedies instead of reaching the decision that it did?

A I think it would have led OFCOM to review that balance of advantages and disadvantages, and perhaps to think about opening up this question of, you know, the fundamental re-balancing of charges and the market. I don't know whether it would have followed from that that OFCOM would have introduced passive remedies or not. I think it would have depended upon, you know, the way you concluded on the balance of the new assessment, as it were."³⁰ (emphasis added)

103. Accordingly, even if OFCOM were wrong about there being no evidence of substantial investment (which we have decided it was not), this would not necessarily mean that the Decision itself was wrong.

104. At times, Ground 4 appeared to overlap with Ground 3. The issue of *what type* of use CPs might make of passive remedies (which in our view relates to the benefits and risks of such remedies) became intertwined with the issue of *how much* investment in infrastructure based on passive remedies might be expected. We have sought to address only the latter in this section. We consider below the type of use to which passive access may be put as part of our assessment of OFCOM's analysis of the benefits and risks of passive remedies under Ground 3.

VIII. GROUND 2: REGULATION AS FAR UPSTREAM AS POSSIBLE

A. Colt's case

105. In its Notice of Appeal, Colt put this ground of its appeal as follows. First, it said OFCOM had adopted its "historical" approach of using active remedies in the business connectivity market unless there was concrete evidence to show passive remedies would give a better overall outcome. Second, and in consequence, it said OFCOM had created a presumption in favour of active remedies. Colt based its argument here on three aspects: economic theory; on the applicable principles of the Common Regulatory Framework; and on previous statements by OFCOM itself:

³⁰ Transcript of hearing day three (*in camera*)

- (a) In relation to economic theory, Colt relied on the expert evidence of Dr Lilico to support the view that competition was most effective the deeper in any value chain it occurs, “deeper” equating to “upstream” for this purpose.
- (b) Colt further argued - in its skeleton argument - that OFCOM had accepted, in the evidence of Mr Culham, that OFCOM would generally seek to promote competition at the deepest level of infrastructure, where it would be effective and sustainable, and that in consequence OFCOM had accepted “the general merits of the proposition”.
- (c) On the Common Regulatory Framework, Colt said that acting inconsistently with the principles of the Common Regulatory Framework would be an error either of law or assessment. Colt took us to various documents of the European Regulators Group (the “ERG”, the predecessor to BEREC) and BEREC, which - Colt said - showed that promoting competition at the infrastructure level, where this was reasonably practicable, more faithfully gave effect to the regulatory principles applying to it under the Act and the objectives and terms of the Common Regulatory Framework.
- (d) On previous statements by OFCOM, Colt said that these supported the use of passive remedies. It referred specifically to the WLA Review and the 2009 OFCOM document “Delivering super-fast broadband in the UK”, among others. That document stated, at paragraph 6.10: “One of our core principles in regulating telecoms is to establish competition at the deepest level that is effective and sustainable...” These documents, argued Colt, contained explicit acknowledgment of the desirability of regulating as far upstream as possible.³¹

B. OFCOM’s response

106. OFCOM denied that it had adopted any presumption against the use of passive remedies. It denied that it was required to apply a presumption in favour of passive remedies and denied that it had otherwise erred by not doing so as a matter of

³¹ Transcript of hearing day one, page 21

discretion. OFCOM described the debate about presumptions as a “sterile distraction” as:

(a) Colt had accepted that passive remedies were only appropriate where they introduced competition that was “feasible and efficient”; and

(b) OFCOM accepted that in some circumstances passive remedies would be appropriate.

107. Ground 2 was therefore, according to OFCOM, a disguised attack on OFCOM’s substantive assessment.

108. OFCOM rejected Colt’s view of the expert evidence on economic theory, the Common Regulatory Framework objectives and the previous statements of OFCOM. All these demonstrated was that the circumstances of any particular case had to be considered to see whether it was, or was not, appropriate to introduce passive remedies and whether promoting competition further upstream in the value chain was possible and efficient. There was, therefore, no question of OFCOM having erred in law or as a matter of discretion.

109. In view of these considerations, OFCOM devoted little or no time to this ground of appeal at the hearing.

C. BT’s view

110. BT concentrated on seeking to rebut the criticisms it thought Colt and Dr Lilico had made of its position and that of BT’s expert, Dr Maldoom. In the conditions that prevailed, BT contended that OFCOM was right to take a cautious approach, starting with the existing state of the market and examining critically whether passive remedies would provide any incremental benefit.

D. The Tribunal’s analysis

111. Colt’s position on this ground of appeal evolved during the case, and particularly in argument before us, to the point that we are very hard put to see any real difference between it and OFCOM. Both agreed that passive remedies may be appropriate in

some circumstances; the only divergence appeared to be as to the extent to which passive remedies should be prioritised. It seemed to us that Colt adopted a somewhat watered-down position at the hearing regarding the supposed presumption for regulating as far upstream as possible. It said:

“What we say the proper analysis of the framework and structure governing passive access remedies gives you is, if not a positive presumption that a passive remedy should be allowed, at the very least not the obverse”³²

112. Dr Lilico, when cross-examined by counsel for OFCOM, agreed that his “general preference” on this point could be defeated:

“Q (Mr Holmes) ...Your position is that there is a general preference for promoting competition at the deepest level that is efficient and sustainable. That is right is it not?

A(Dr Lilico) Correct

Q You do not maintain that this general preference is universally applicable?

A Absolutely not

Q You accept that in a specific case it might be defeated by some other principle or some practical details.

A I agree, yes

Q It is therefore not your position that in all cases theory favours regulation as far as possible upstream.

A Well, as far as possible, it depends what you mean by “as far as possible”. Sometimes “as far as possible” might mean as far as is practicable and effective and sustainable. But apart from subject to those qualifications, I agree with...

Q So, yes, “as far as possible” might include the specific details and the other principal that...

A ...but in general what you are saying is right.”³³

113. Similarly, Mr Culham, when cross-examined by counsel for Colt, denied there was any presumption either for or against the use of passive remedies:

“Q (Mr Beal) You appreciate that our case is that you need to start from the point that a passive remedy in this area is a serious contender for consideration, which would not need to justify itself in advance. You accept that is our case?

³² Transcript of hearing day one, page 5

³³ Transcript of hearing day two, page 17 (lines 21ff)

A (Mr Culham) I accept that a passive remedy should be considered seriously, and I accept that one should start without presumption.

Q So it is not your case, as I understand it, that you would somehow need to advance a positive case as to why passive remedies would be a good thing before it even gets off the ground for being up for consideration?

A I think that's right. I think what would be relevant in that is obviously the starting point, but I wouldn't start with a presumption in favour of one type of remedy over another."³⁴

114. It is not clear to us that Dr Maldoom's position in this theoretical debate alters the fact that there appears to be almost no disagreement between Colt and OFCOM on the theoretical justification for intervening "upstream" or "deeper" in the value chain.
115. Colt and OFCOM appear to agree that passive remedies may be appropriate where the competition they promote is likely to be efficient and sustainable and not where it is not. There appears to be no theoretical presumption either way, or - if there is any preference - it is subject to too many qualifications to be generally useful.
116. It follows that there cannot be any real substance in Colt's claim that OFCOM was:
(a) not properly respecting the aims, objectives and/or terms of the Common Regulatory Framework; (b) failing to take into account the positions adopted by the ERG or by BEREC; or (c) acting in breach of its statutory obligations under the Act. All of these important instruments, whilst stressing with various degrees of emphasis the desirability of promoting competition by reference to infrastructure, allow national regulators such as OFCOM the freedom and responsibility to judge whether, in any given case, passive remedies will be appropriate.
117. We have considered whether OFCOM's previous statements as to the desirability of promoting competition at the deepest level possible, intervening as far upstream as possible, and in favour of using passive remedies to open up access to infrastructure created any kind of regulatory precedent, or an expectation (legitimate or otherwise) that OFCOM would adopt passive remedies in this case. But merely to state the point reveals its weakness, and Colt did not pursue this point in argument, limiting

³⁴ Transcript of hearing day three (*in camera*), page 3 (lines 15-24)

its contention to saying that OFCOM had “put the onus on us”.³⁵ It follows that we see no substance in the claim that the adoption of some passive remedies in the WLA Review meant that OFCOM had to adopt the same approach in this case.

118. We are therefore satisfied that OFCOM did not operate under any theoretical or *de facto* prejudice or presumption in relation to the use or otherwise of passive remedies and that Colt’s appeal under Ground 2 fails. Instead, OFCOM considered whether, in this particular case, their use would or would not be beneficial. We deal with that consideration under the other grounds of appeal, particularly Ground 3, in which Colt also argued that there was or should have been a theoretical presumption in favour of passive remedies.

IX. GROUND 3: PROMOTING INNOVATION AND COMPETITION

119. The essence of Colt’s appeal on this ground is that OFCOM wrongly assessed the relative merits of active and passive remedies. In its skeleton argument, Colt contended that: (i) there was a presumption in economic theory that passive remedies were better (in the sense of promoting competition and innovation) than active remedies; (ii) there was substantial evidence that certain benefits could be delivered through passive but not active remedies; and (iii) OFCOM’s concerns about the adverse effects of passive remedies were either unjustified or exaggerated.
120. The existence or otherwise of a presumption in economic theory in favour of passive remedies is considered elsewhere under Ground 2. We see very little difference between the parties on this point, with both main parties arguing before us that the merits of any particular species of remedy are to be considered in the specific circumstances, with no prejudice either way. We do not dwell further on this under Ground 3.
121. We outlined what OFCOM said in the Statement, at paragraphs 8 to 35 above. We now consider: (a) the benefits that Colt states can be delivered by passive remedies but not by active remedies; and (b) OFCOM’s concerns about the adverse effects of passive remedies.

³⁵ Transcript of hearing day one, page 22 (line 26)

A. Benefits that are specific to passive remedies

122. Colt argued that there were four specific benefits of passive remedies, which could not be achieved through active remedies:

(a) an increase in infrastructure competition (which we understand to mean the provision of alternative networks to compete with those operated by BT, either by the construction of a “full” alternative infrastructure, or by a combination of this and access to BT facilities as a result of passive remedies);

(b) increased innovation and service differentiation (which we understand to mean new products and services on the one hand and the ability of CPs to offer distinctive services on the other);

(c) improved capacity and coverage (which we understand to mean greater use of existing facilities and the provision of more facilities); and

(d) more efficient use of network assets (which we understand to include more overlap between residential and business usage and facilitating the roll-out of residential broadband).

123. We address these in turn; although we note that - whether in the Statement or during the course of proceedings - OFCOM has not disputed that passive remedies could potentially bring some benefits.

(i) Infrastructure based competition

The Statement

124. OFCOM recognised in the Statement that “passive remedies could bring some benefits in leased line markets” and in particular could:

“stimulate competition in a greater part of the value chain in regions where full infrastructure competition is unlikely to emerge by lowering barriers to entry” (paragraph 8.106)

Colt's case

125. Colt claimed that, after a period of investment in new infrastructure by BT's rivals, there had in the past decade been virtually no new infrastructure built.³⁶ Passive access was required because of the failure of BT to meet the increased demand for additional bandwidth capacity in the provision of leased line services. It described this as a "bottleneck" or "market failure". However, Colt contended that CPs were unable to exploit this demand by rolling out competing networks. It quoted evidence from the CP Group to show not only that this demand existed but that meeting it would be beneficial. It referred particularly to demand by certain MNOs for a fixing of the "backhaul bottleneck" so that 4G services could be delivered efficiently. Colt argued that a passive remedy would "cure (or at least ease)" this bottleneck.
126. Colt said its intention was to use passive remedies to expand its own network to offer business customers high value bespoke products based on quality and reliability, rather than on price. It said this was how it had expanded its business in other EU countries where active remedies and passive remedies were available alongside each other in the same market.

OFCOM's response

127. OFCOM, whilst not denying that passive remedies could enhance use of infrastructure in some cases, was concerned at possible adverse effects on the incentives to develop full alternative infrastructure networks. OFCOM suggested that Colt had, in the light of the evidence given in response to the June BCMR Consultation, over-stated the costs of making small additions to its existing alternative infrastructure. OFCOM was also concerned that introducing passive remedies would mean ignoring the costs already incurred by other CPs in building alternative infrastructure and that, unlike in the case of full infrastructure investments, the benefits of greater infrastructure access would tend to accrue to Colt and other investing CPs, rather than to users of downstream services.

³⁶ Transcript of hearing day one, page 2

BT's view

128. BT, in support of OFCOM, suggested Colt's interest in gaining access to BT's infrastructure was simply to enable it to "cherry pick" high value services in areas that it already served. BT also expressed doubt as to the technical feasibility of how Colt claimed it could use passive remedies, due to the constraints of BT's network architecture. It dismissed Colt's experience of passive remedies in other EU countries as being insufficiently specified, as each country had a different regulatory framework. It thought passive remedies would introduce some regulatory instability that would inhibit future infrastructure investment.

(ii) Increased innovation and service differentiation

The Statement

129. OFCOM recognised in the Statement, at paragraph 8.106, that in some cases passive remedies "provide more scope for product innovation and service differentiation".

Colt's case

130. Colt referred to extracts from the Statement in which OFCOM acknowledged the aforementioned potential benefits of passive remedies. It argued that OFCOM's conclusions on innovation and service differentiation were wrong. Together with the CP Group, Colt emphasised the lack of innovation in the market and the 'stifling' effect of BT's incumbency. Colt noted that there were particular developments on the horizon where the lack of passive access would hinder innovation and/or give an unfair competitive advantage to BT.
131. Colt noted that OFCOM had acknowledged (at paragraph 8.105 of the Statement) BT's shortcomings in the delivery of products such as "SyncE" and "high density handover" Ethernet aggregation capability and referred to further evidence from other CPs, particularly Mr Graham Payne, Managing Director of MBNL³⁷, as to BT's failings in this regard.

³⁷ MBNL is a joint venture between EE and Three

132. Moreover, Colt emphasised that being able to differentiate the service provided to its customers was a very real competitive advantage for CPs, which was only possible with passive remedies.

OFCOM's response

133. OFCOM's response to these claims was, in essence, that by and large BT had "kept pace" with the demands of innovation (at paragraph 8.103 of the Statement) and that business connectivity in the UK was, in Colt's own response to the June BCMR Consultation, "world class". OFCOM further claimed that active remedies could deliver similar benefits in innovation.

BT's view

134. BT, perhaps unsurprisingly, placed itself in the forefront of innovation and technical progress. It denied any failure on its part in relation to the products as claimed by Colt and said in turn that Colt had not established that any of this innovation depended on passive remedies being available. Before the Tribunal, counsel for BT said that whilst BT supported OFCOM's case in general, it specifically did not accept that passive remedies could promote innovation in some cases, as OFCOM appeared to think.³⁸

(iii) Improved capacity and coverage

The Statement

135. OFCOM recognised in the Statement that:

"leased lines need to provide increasing bandwidths at reducing costs per unit of bandwidth to meet end-users' generally increasing demands for faster services across a wide range of applications" (paragraph 8.73)

³⁸ Hearing transcript day four, page 72 (lines 3 - 24)

136. However, it doubted whether passive remedies would result in the roll-out of greater bandwidths outside major urban centres:

“Investment in fibre-based networks is subject to strong economies of scale, and, while passive remedies could reduce barriers to entry, any additional competition they stimulate may not be sustainable outside some dense geographic clusters of businesses, such as urban centres. End-user prices may therefore rise in areas where BT may be the only choice.” (paragraph 8.85)

Colt's case

137. Colt claimed that its evidence established that passive remedies would enable greater capacity and coverage in leased line networks to be rolled-out to more of the country. This was not only because passive remedies would increase capacity in particular urban areas but also because they would increase capacity more widely, as shown by evidence from other CPs. Colt argued further that reducing the bandwidth gradient of BT's pricing would increase consumption of higher bandwidth services.

OFCOM's response

138. OFCOM did not agree with these claims. It said Colt had not shown there would be any greater use of bandwidth outside urban areas and did not regard reducing the bandwidth gradient as beneficial. Whilst there might be some products available to customers more cheaply, this could undermine the Openreach “settlement” (that is the arrangements put in place with BT to establish Openreach following the 2005 Strategic Review of Telecommunications)³⁹ and not be efficient or in the interests of customers overall.

BT's view

139. BT denied that passive remedies would lead to the roll-out of any greater bandwidth, referring to the evidence of Mr Alan Lazarus (Openreach's Director for Regulatory Affairs), Dr Maldoom and Dr Matthew Yardley (management consultant at Analysys Mason Limited).

³⁹ See paragraph 28(d) above

(iv) More efficient use of network assets

The Statement

140. OFCOM recognised in the Statement that introducing passive remedies “could stimulate competition by lowering barriers to entry for competitors who invest in infrastructure”, but it was important that “such investments were efficient” (paragraphs 8.76 and 8.80).

Colt’s case

141. Colt argued that passive access for leased lines would allow a more efficient use of network assets. In particular, Colt claimed that the use of passive remedies to expand capacity in business connectivity markets could help to address difficulties in the expansion of Next Generation Access (“NGA”) to residential customers, as business and residential duct and fibre usage was complementary and CPs could achieve economies of scope, as did BT. Colt said BT’s response to the CFI confirmed that duct access was in principle usable for business and residential purposes.
142. Colt further said that passive remedies for leased lines would create benefits by removing “existing discriminatory distortions of competition” arising from the restrictions on the use of PIA and the lack of any similar restrictions on BT. This was consistent with the European Commission’s 2010 “*Recommendation on Regulated Access to Next Generation Access Networks*”, which OFCOM was currently breaching, Colt said, as its PIA measures in the residential wholesale market failed to honour the principle of equivalence.

OFCOM’s response

143. OFCOM said these claims were misplaced. It had received no evidence in the CFI or June BCMR Consultation responses of any CP intending to use the business connectivity passive remedy for NGA roll-out. As regards the supposed advantage enjoyed by BT from its infrastructure ownership, BT’s economies of scope were already taken into account in the setting of regulated prices, and BT could not

discriminate in favour of its own services through passive access denied to other CPs because of the EoI and other obligations imposed on it by the Openreach “settlement” (see paragraphs 28(d) and 138 above).

BT’s view

144. BT denied, citing the evidence of Dr Maldoom, that the possible economy of scope claimed by Colt in supplying business and residential customers - given their differing needs - was plausible and further denied that BT derived any advantage from the limited availability of the PIA remedy imposed by the WLA Review.

B. OFCOM’s concerns

145. In the Statement, OFCOM set out its concerns about the possible adverse consequences of introducing passive remedies, which it identified as: duplication of investment, inefficient entry, effect on existing and future infrastructure investments and effect on common cost recovery. In its Notice of Appeal, Colt detailed its reasons for considering each of OFCOM’s concerns to be unjustified. Colt addressed these concerns under two headings: those for which there was a simple solution (duplication and effect on investment) and those where the issue was more complex. We follow that order of treatment. We note that, in many cases, OFCOM’s responses reflect the view it took on the benefits of passive remedies claimed by Colt, and which we have summarised above.

(i) Duplication of investment

The Statement

146. In the Statement, OFCOM expressed concern that passive remedies could lead to “inefficient duplication of investment adding to the overall costs in the industry”. It explained at paragraph 8.78 that:

“The investments required would include the costs of purchasing, installing and managing active equipment and, in the case of PIA, the costs of purchasing, installing and managing fibre in BT’s ducts. The investments would, to some extent, duplicate BT’s, and would therefore add to the cumulative costs of the industry. Models developed as part of our review of the wholesale local access market suggest that these additional costs could be significant. In the case of NGA

investment using PIA, the cost per end-user with four competing networks was modelled at more than double than with just one network.”

Colt's case

147. Colt described this concern as overstated. Duplication could only arise in relation to fibre as no-one suggested extra ducts were needed. Competition and new entry always involved some element of duplication, but this was in any case much less than the duplication involved with OFCOM's apparently preferred alternative of complete alternative infrastructure.

OFCOM's response

148. OFCOM maintained that unnecessary duplication was always a concern, and whilst it would not overstate this as an issue (provided there was a significant increase in overall competition), it nonetheless took a different view from Colt.

BT's view

149. BT considered that passive remedies would increase the costs of competition and generally reduce the ability to share costs between customers and services. BT said duplication of investment was a legitimate concern for OFCOM and that adding to the overall costs of the industry was not necessarily justified.

(ii) *Undermining existing, and discouraging future, investment*

The Statement

150. The issue here is whether passive remedies would damage regulatory stability and the satisfactory returns needed to encourage CPs to invest in infrastructure. In the Statement, OFCOM noted that:

“we should be wary of making changes to regulation which will affect the ability of operators, such as entrants who have invested in competing infrastructure, to recover their costs and make a reasonable return.” (paragraph 8.94)

Colt's case

151. Colt said OFCOM placed too much weight on the need for regulatory stability and attached too much importance to the need for complete alternative infrastructure investment in circumstances where no significant infrastructure investment had occurred in the past decade. Colt contrasted this concern with developments in the WECLA area where an economic case for infrastructure networks had been maintained and regulation reduced as a result. OFCOM had overcome similar concerns in the WLA Review where it had adopted a PIA remedy. Further, its concerns over giving BT a satisfactory rate of return were misplaced, argued Colt.

OFCOM's response

152. OFCOM maintained that allowing BT the ability to make a reasonable rate of return was a significant difficulty and referred to the considerations that arose in relation to inefficient entry and common cost recovery.

BT's view

153. BT said that passive remedies would undermine regulatory stability and weaken the incentive for full infrastructure investment in the future. Colt had shown no effective way round the difficulty of setting a satisfactory regulated price that enabled BT to recover its significant sunk costs.

(iii) Inefficient entry

The Statement

154. In the Statement, OFCOM identified inefficient entry as a possible consequence of introducing passive remedies (see paragraphs 8.80 - 8.85). The issue is closely related to that of BT's common cost recovery, but as Colt dealt with it separately, so do we.
155. An important aspect of possible inefficient entry is whether OFCOM was correct in its assumption that passive remedies would probably require a uniform access price

provided by regulation. If so, then this would tend to encourage “cherry picking” (that is the targeting by CPs of profitable services which contribute disproportionately to BT’s cost recovery) and “arbitrage” (that is buying services at a lower (uniform) price and re-selling them at a profit) by CPs which, in OFCOM’s view, would not enhance competition or benefit customers in the round. Inefficient entry would, according to OFCOM and BT, affect BT’s ability to maintain its bandwidth gradient.⁴⁰ The bandwidth gradient of BT’s pricing is allowed by its ability to price within “baskets” of products and services within an overall framework for common cost recovery set by OFCOM.

Colt’s case

156. Colt claimed that these concerns were misplaced. In the Notice of Appeal, Colt said it did not understand what the concern was over inefficient entry. If the danger was that OFCOM would regulate the access price too low, this was a matter within OFCOM’s control; Colt had in any case proposed access on FRAND terms (see paragraph 49(a) above). Other risks were probably good for competition. In its skeleton argument, Colt put things rather differently. Whilst repeating that access on FRAND terms would deal with the issue, Colt put emphasis on what it characterised as a failure by OFCOM to seek submissions on the point during the June BCMR Consultation, which meant it was unable to benefit from suggestions for pricing of the kind Colt was now advancing through the evidence of Dr Lilico and Mr Adam Mantzos (an independent expert specialising in financial and economic issues in regulation and competition). Colt argued that if OFCOM decided to regulate the price of passive access, it could manage the concerns about arbitrage and cherry picking during the necessary consultation.
157. Colt went on to argue, on the basis of Dr Lilico’s evidence, that OFCOM was effectively using its assumption on the difficulty of pricing to prove its conclusion that pricing was too difficult. OFCOM should not have assumed that a market price for passive access would not arise and that a uniform price was inevitable in order to justify a decision not to mandate passive access (described as “near circularity”

⁴⁰ See paragraph 27 above.

of reasoning). Colt described this as an “error of approach” in its skeleton argument and counsel for Colt used the same phrase before the Tribunal.

158. Colt argued further that OFCOM had not investigated in any detail how active remedies and passive remedies would inter-react, suggesting that a cost-benefit analysis of the costs from disruption to BT’s pricing against the benefits of increased competition was required. Colt said OFCOM had clearly decided in the WECLA area that the benefits of increased competition outweighed any such disruption (see paragraph 151 above). Colt finally said that Dr Lilico’s second witness statement offered suggestions for why the analysis might favour increased competition.

OFCOM’s response

159. OFCOM initially stated that Colt had provided no answer to its concerns on how to price passive access without encouraging inefficient entry. In its skeleton argument, however, it stated that applying FRAND terms would inevitably lead to disputes which would in turn be referred to OFCOM and ultimately to the Tribunal. This was because there was likely to be clear disagreement as to what price was fair and reasonable, given that Colt saw reducing BT’s ability to recover its common costs as a public benefit.
160. Further, OFCOM denied that it had not consulted on the point, and stated that its decision took account of the responses it had received, in particular from Colt who had said that cherry-picking would happen in any event.
161. OFCOM said Colt was now advancing a new case with novel suggestions for access pricing. The first was to the effect that access could be priced by reference to the highest amount of common cost recovered by BT on any downstream product, but this was not raised by any respondent to the June BCMR Consultation and was impracticable anyway. The second was by reference to the use to which passive access was put. Colt said that the evidence in Dr Lilico’s second witness statement showed how BT’s bandwidth gradient could be preserved. But OFCOM again thought these suggestions were impractical.

162. OFCOM said Colt was ambivalent on whether BT's ability efficiently to recover its common costs was worth protecting. Colt had not challenged the price controls applicable to the active remedies, which assumed efficient recovery of BT costs downstream. On the other hand, Colt said geographical arbitrage would not be a problem because there would be more competition for users where BT recovered more of its costs. Colt did not accept OFCOM's concern that this would raise prices to users in other areas. OFCOM denied that the WLA PIA remedy also involved geographical arbitrage as the circumstances were different. OFCOM denied the inevitability of its conclusion or any circularity in its reasoning. OFCOM also denied the need for any quantified cost-benefit analysis, saying that its decision had been carefully weighed.

BT's view

163. BT emphasised that OFCOM was right to adopt a cautious approach and only encourage entry where it was efficient and of benefit to consumers. BT thought Colt had over-stated the efficiency of infrastructure based on city "rings"⁴¹ and doubted passive remedies would enable Colt to build such rings.

(iv) Common cost recovery

The Statement

164. Under the current system, OFCOM permits BT to retain flexibility in its recovery of common costs by allowing it to price individual products within set "baskets". In the Statement, at paragraph 8.84, OFCOM said that "we consider that flexibility to vary relative charges within the charge control basket is an important benefit of our charge control design" and explained this in more detail in sections 18 and 20 of the Statement which covered the active remedies imposed by OFCOM.

⁴¹ City "rings" are where there is typically one large ring around a main node and then smaller rings around sub-nodes (in contrast to hub-and-spoke and point-to-point topologies)

Colt's case

165. Colt objected to OFCOM's emphasis on the risk that passive remedies would undermine BT's recovery of common costs for the following reasons:

- (a) disrupting this system was not necessarily "a bad thing" as it was based on a system of cross-subsidy that was opaque and inefficient, and possibly inconsistent with EU state aid rules;
- (b) the result of introducing passive remedies would be more reflective of competition - if the rebalancing of BT's cost recovery raised prices for less popular services (which OFCOM had identified as a possible consequence in areas where BT was the only effective supplier - see the Statement at paragraph 8.85), this was a normal competitive outcome;
- (c) a passive remedy would be no less efficient than before as BT would simply adjust its recovery of common costs to reflect the new situation of passive access;
- (d) any disruption to common cost recovery would be slow to occur and could be accommodated, if necessary, in the next BCMR period;
- (e) similar problems must have been overcome in the WLA Review, yet were not mentioned by OFCOM in that context; and
- (f) OFCOM had not sought to inquire as to whether passive access pricing could be established without disrupting the bandwidth gradient in BT's pricing. Indeed, Dr Lilico had suggested a possible non-disruptive approach ("retail minus") by subtracting, from BT's active access price with the highest common cost recovery, the costs of a "reasonably efficient passive-to-access business".

OFCOM's response

166. In response, OFCOM made the following points:

- (a) in responding to the June BCMR Consultation, Colt clearly understood that OFCOM’s “central concern” was common cost recovery and regulatory arbitrage. However, in the absence of a more developed counter to this concern in its response, or in the Notice of Appeal, Colt only now adopted arguments developed by another CP. This implied that these were not significant concerns of Colt at the time;
- (b) Colt failed to appreciate OFCOM’s clear view (as flagged up in relation to its proposed active charge control) that allowing BT pricing flexibility to enable it to recover its common costs across different products and places was efficient. As Colt had not challenged the design of the active price control, it could not now do so without amending its Notice of Appeal. Further, those issues (as price control matters) would have to be referred to the Competition Commission, leaving only the issue of OFCOM’s judgment and appreciation;
- (c) OFCOM had, in its view, rightly judged that passive remedies would lead to BT having to load costs on to other products, including copper products such as wholesale line rental (WLR) and metallic path facility (MPF);
- (d) the argument that any disruption would be slow to occur was unconvincing;
- (e) the analogy with local loop unbundling (“LLU”) was misplaced as LLU was introduced at an early stage of residential broadband development, whereas the business leased lines sector was well established; and
- (f) OFCOM had considered this matter fully and made clear its concerns in the June BCMR Consultation.

167. Before the Tribunal, counsel for OFCOM was even more emphatic.⁴² OFCOM had indeed taken the view that passive access would have to be priced at a uniform rate, and that this would in turn limit BT’s ability to price its downstream products in a way that would ensure recovery of its common costs. This was because respondents

⁴² Transcript of hearing day one, page 43

to the consultation had told OFCOM not only that this was likely, but that it was desirable. Respondents also told OFCOM that the use of passive remedies could not easily be limited or monitored. This would inevitably disrupt BT's ability to maintain its existing common cost recovery arrangements at the active level. New entrants would use passive access to cherry pick customers downstream, undercutting BT's prices on which it relied to recover that element of cost. The result would be new entry focused on urban centres, major conurbations or areas and high bandwidth customers. Such entry would not be efficient or beneficial in the round.

BT's view

168. BT denied it was cross-subsidising products by recovering more of its common costs from higher bandwidth products. Rather, it was operating a system permitted by the regulator, whereby some services bore a greater share of common cost recovery, on grounds that it was efficient. Passive remedies were by nature untargeted and could impact on downstream markets in an unpredictable way. OFCOM had correctly assessed the risk of BT having to alter its prices for lower bandwidth products or low use areas. BT did not think Dr Lilico's suggestions for minimising the disruption to BT's bandwidth gradient were very helpful. In particular, his suggestions of "line forcing" (by which a passive access-seeker would be required to provide the full range of active access products provided by BT at a price no higher than BT's price) and "active minus" (by which the passive access price is calculated continuously from the active access price from which BT achieves the highest common cost recovery)⁴³ were unprecedented and would involve a root and branch change to regulation. "Active minus" could, for example, price lower bandwidth services out of the market. The remedy might appeal to Colt but would not benefit other operators.

C. The Tribunal's analysis

169. We have to decide, taking due account of the merits of the case, and by reference to the grounds of appeal set out by Colt, whether OFCOM has erred in its assessment

⁴³ Dr Lilico calls this remedy "retail minus" - see paragraph 165(f) above

of the relative merits of active and passive remedies and, in particular, whether the same benefits could be achieved with active remedies. As OFCOM put it in the Statement:

“Our analysis suggests that the specific benefits....of imposing passive remedies could, to a large extent, be achieved by imposing alternative remedies such as price controls on BT’s provision of wholesale leased line services” (paragraph 1.42)

170. We set out earlier the legal considerations governing our decision but we draw attention particularly to the observations of the Court of Appeal in the *Mobile Call Termination* case that the applicant must show that the decision itself is wrong (see paragraph 57 above), and in *Telefónica O2* that if the regulator has addressed the right question by reference to relevant material, any value judgment on its part must carry great weight (see paragraph 56 above). In relation to Ground 3, Colt claimed, in effect, that OFCOM had failed to consider properly the merits of passive remedies, had committed an “error of approach” and, as a result, had “asked itself the wrong question”. We take this to be a claim that an error of law and/or an erroneous exercise of discretion were committed.
171. Both main parties emphasised the need for OFCOM to conduct an exercise of weighing various factors in the balance, but they appear nevertheless to be, and to have been, at cross purposes. Thus, Colt argued that OFCOM had taken an “*in limine*” or threshold decision not to impose passive remedies, did not fully inform itself, and, as a result, had approached its task in the wrong way. OFCOM, by contrast, denied taking any such threshold decision, but stressed that it had serious concerns, which it had made clear to all, about the possibly damaging effect that passive remedies could have on: (a) the regulatory regime it had already put in place; (b) the active remedies it was proposing to continue; and (c) the interests of certain classes of downstream customers and the competitive process as a whole.
172. This meant that, when OFCOM was informed by respondents to the CFI and the June BCMR Consultation that they might use passive remedies as a way of targeting BT’s higher value services and disrupting its ability to recover its common costs, far from welcoming this potential new entry to the business connectivity market, OFCOM considered that this merely reinforced its concerns.

173. Some of these points overlap with other grounds of appeal. We have already found under Grounds 1 and 2 that OFCOM did not approach the question under a prejudice against the use of passive remedies and had not taken a threshold decision not to adopt them. We also consider that OFCOM was open about its objectives, making it clear in the Statement that it was trying to promote competition in the long term at the wholesale level based on investment in economically efficient alternative infrastructure, combined with regulated access to BT's wholesale services, and concluded that passive remedies, taken in the round, would not help it do so. In deciding whether OFCOM erred in coming to this conclusion, we may usefully consider the following questions:

(i) What steps did OFCOM take to arrive at its decision?

174. We have had extensive evidence of the consultation exercise; of OFCOM's aims and regulatory objectives; we were taken to various parts of the responses to the CFI and the June BCMR Consultation, some confidential, some not; some favourable to OFCOM's proposals; some less so. We know that OFCOM consulted the European Commission and BEREC; that besides issuing the CFI and the fuller June BCMR Consultation with provisional conclusions (and two further consultation documents not relevant to the present dispute), it held many meetings with "stakeholders". Finally, it published its Statement, containing its decisions and supporting reasons, running to many hundreds of pages and covering (besides the disputed issue of passive remedies): market definition, SMP findings and detailed active remedies, in particular charge controls to be imposed on BT. In considering the Statement, we were urged by counsel for BT, Mr Beard QC, not to parse finely the individual parts, but to assess it as a whole and appreciate the overall scope and context.⁴⁴ Taking all this into account, we see nothing wrong with the way OFCOM conducted this review.

(ii) Did this process make OFCOM sufficiently informed to decide whether or not to impose passive remedies?

175. We know OFCOM meant to consider the possible benefits of adopting passive remedies, although we also know that its "Overall approach" was "...aimed

⁴⁴ Transcript of hearing day two, page 4

primarily at promoting competition in the long term at the wholesale level based on investment in efficient alternative infrastructure...” (Statement at paragraph 1.38), supplemented by “regulated access to BT’s wholesale services”, neither of which necessarily encompasses passive remedies. Nevertheless, OFCOM had recently completed a review in the residential broadband market (the WLA Review) and had said at the time it would consider the case for extending the PIA remedy resulting from that review to the leased lines market.

176. As we have said (see paragraph 171 and under Ground 1), Colt argued strenuously that OFCOM had taken a threshold decision that passive remedies were inappropriate and, as a result, never considered fully or properly whether the “fears” they later raised could be overcome. OFCOM denied any such prior decision was taken. As we have already explained under Ground 1, we agree. In consequence, we conclude that OFCOM was right to consider it was in a sufficient position to approach with an open mind the question whether passive remedies should or should not be included in the remedies to be adopted in the Statement.

(iii) What did OFCOM actually take into account in coming to the Decision?

177. We have seen the arguments set out in the Statement and in the pleadings and presentations before us. These show that OFCOM was aware of the possibility of passive remedies, and that some very significant CPs wanted them; and that it had imposed a more limited passive remedy in the WLA Review, in what it saw as different circumstances. It was aware of the long term desirability of “efficient alternative infrastructure” (i.e. alternative networks to BT’s) and of the need to make sure BT provided leased lines (themselves a product resulting from OFCOM’s regulatory activities) at economic prices for CPs and other users. Against this background, OFCOM set out a series of considerations to which it directed its attention. These were the possible benefits of passive remedies in terms of more infrastructure based competition, innovation and service differentiation, capacity, coverage and efficient use of assets. OFCOM acknowledged that some of these would indeed follow from passive remedies being available to CPs. OFCOM was concerned, however, about possible disadvantages from duplication of investment and discouragement of more radical alternative infrastructure provision. These seem to us to have been relevant and appropriate factors to consider.

178. Nevertheless, OFCOM appears to have attached most weight to the effects of CP market entry based on passive remedies on overall competition in the market and on the way in which OFCOM allowed BT to recover its common costs. Here, the essential difference of view between Colt and OFCOM is revealed. For what Colt saw as a self-evident benefit of passive remedies, namely the easier entry and expansion of CPs like itself, was precisely the disadvantage seen by OFCOM, namely the risk of cherry-picking and arbitrage by market entrants which could threaten to disrupt the system of BT's common cost recovery, and cause it to increase prices for some products and locations, to the overall detriment of competition in the mature, large and "world-class" (in Colt's words) business connectivity market. Again, we conclude that these were relevant and appropriate matters for OFCOM to consider.

(iv) Did OFCOM get it right?

179. The fourth and final question we consider is whether OFCOM was right in its Decision. Here, we look for "error", that is any mistake in the logic of the assessment, the chain of reasoning or the consideration of the evidence before OFCOM, on the basis of our own appreciation. We take into account that OFCOM is an experienced and careful regulator that operates under a comprehensive legal and regulatory framework. OFCOM conducts many market reviews and has to balance many competing considerations in deciding what is appropriate. In this case, it was deciding on measures to last for three years in a market sector that, on the whole, was performing successfully. In our judgment, OFCOM followed an open and fair consultation process, made its objectives and concerns clear, took account of the responses it received and, as a result, "asked itself the right question" on the basis of appropriate and relevant material. It also (although this is not one of Colt's claims) set out clearly enough for us, at least, to follow what motivated its decision and what pushed it away from adopting passive remedies.

180. Of course, it might be said that the regulator, acting in the name of promoting competition, appears to have decided not to permit competition based on access to some of the incumbent's facilities; and that it did so mainly because this competition might disturb the incumbent's ability sufficiently to recover its common costs. But this is a very partial view. OFCOM has to preside over and

“manage” the introduction of competition into this and other markets. That is fulfilling an important part of its regulatory objectives, set at EU and national level. We are sure OFCOM takes those objectives very seriously. But in a fast developing business and technical environment it must be allowed some latitude of assessment as to when, how and how quickly this process should occur.

181. Colt’s claim under this ground is in essence an attack on OFCOM’s judgment in deciding not to adopt passive remedies. Colt is perfectly entitled to disagree with OFCOM’s decision, but to succeed in its appeal it must establish that OFCOM’s decision was wrong. Whilst it has brought a considerable amount of new evidence to bear, we do not consider it has shown sufficiently clearly that OFCOM’s decision was wrong. Having found that OFCOM asked itself the right question on the basis of relevant and appropriate material, we believe we should not upset its judgment, as an expert regulator, that passive remedies were inappropriate in the particular circumstances of this market review.

182. We therefore conclude that Colt’s appeal fails on this ground also. We have given careful consideration to the evidence adduced by Colt during the course of this appeal, including as to the dynamic benefits of infrastructure based competition, the need to consider whether passive remedies could be introduced with access pricing arrangements that were not harmful to competition “in the round” and on the possible consequences for other markets of imposing passive remedies in this market. We were assured by counsel for OFCOM⁴⁵ that these factors could be considered by OFCOM in future market reviews, and we note this statement.

⁴⁵ Transcript of hearing day one, page 51 (lines 13 - 18)

X. CONCLUSION

183. For the reasons we have given, we unanimously dismiss Colt's appeal.

Peter Freeman C.B.E. Q.C.
(Hon)

Clare Potter

Joanne Stuart O.B.E.

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

Date: 26 November 2013

ANNEX: Glossary of Defined Terms

Defined term	Meaning
Access Directive	Directive 2002/19/EC
Act	Communications Act 2003
AISBO	Alternative Interface Symmetric Broadband Origination
Authorisation Directive	Directive 2002/20/EC
BEREC	Body of European Regulators of Electronic Communications
BT	British Telecommunications PLC
BCMR	Business Connectivity Market Review
CFI	OFCOM's Call for Inputs of April 2011
Colt	Colt Technology Services
Common Regulatory Framework	The Framework Directive, the Access Directive, the Authorisation Directive, the Universal Service Directive and the Privacy Directive (as amended)
CP	Communications Provider
CP Group	The intervening group of communications providers: EE Limited, Hutchison 3G UK Limited, TalkTalk Telecom Group PLC, Verizon UK Limited and Vodafone Limited
Decision	OFCOM's decision not to impose a passive remedy on BT in the wholesale broadband market
EoI	Equivalence of Inputs
ERG	The European Regulators Group
EU	European Union
Framework Directive	Directive 2002/21/EC
FRAND terms	Fair, Reasonable and Non-Discriminatory terms
June BCMR Consultation	OFCOM's consultation on the BCMR of June 2012
LLU	Local Loop Unbundling

Defined term	Meaning
MISBO	Multiple Interface Symmetric Broadband Origination
MNOs	Mobile Network Operators
NGA	Next Generation Access
OFCOM	Office of Communications
PIA	Passive Infrastructure Access
Privacy Directive	Directive 2002/58/EC
SMP	Significant Market Power
Statement	OFCOM's Business Connectivity Market Review of 28 March 2013
SyncE	Synchronous Ethernet
TISBO	Traditional Interface Symmetric Broadband Origination
Universal Service Directive	Directive 2002/22/EC
WECLA	Western, Eastern and Central London Area
WLA	Wholesale Local Access market
WLA Review	OFCOM's 2010 review of the Wholesale Local Access market