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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th January – Friday 22nd March 2024

Before:

The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

Class Representative

v

(1) BT Group PLC

Respondent

(2) British Telecommunications plc

A P P E A R A N C E S

Ronit Kreisberger KC, Derek Spitz, Michael Armitage, Jack Williams and Matthew Barry (On behalf of Justin Le Patourel)

Daniel Beard KC, Sarah Love, Daisy Mackersie, Natalie Nguyen and Ali Al-Karim
(On behalf of BT and British Telecommunications PLC)

Jennifer MacLeod (On behalf of the Competition & Markets Authority)

Wednesday, 14 February 2024

(10.30 am)

THE CHAIRMAN: Good morning. Some of you are joining us live stream on our website, so I start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

MR DAVID PARKER (continued)

DR HELEN JENKINS (continued)

Questions by THE TRIBUNAL (continued)

MR RIDYARD: Right. Good morning. So we are on to the topic of dominance today. Just thinking about this topic, we think that both of you have got an equal stake in this topic, so we will just kick off on the questions.

The first one we had, Dr Jenkins, maybe you could go first on this, relates to what use we can make of Ofcom's provisional ruling, particularly their ruling that BT had significant market power, which seems to be an analogue of dominance. So it is not so much can we just take their conclusion or their provisional conclusion and run with it, but can we use the evidence

1 on which Ofcom relied as being, you know, very
2 informative of this question, and if not why not?

3 DR JENKINS: I think both Mr Parker and myself have paid
4 close attention to the material in the annexes of
5 Ofcom's provisional findings and also their final
6 statement. So, yes, I think one needs to look at that
7 and understand the basis on which Ofcom made those
8 decisions, and then ask the question: to what extent is
9 that evidence pertinent and informative for the case
10 that we have in front of us now?

11 With respect to that, obviously the findings were --
12 they were provisional conclusions at that stage, and the
13 things I would note were that Ofcom took a different
14 approach to the focal product than both Mr Parker and
15 myself have done, separating out access and calls, and
16 so that has potentially some impact, particularly when
17 we think about the rebalancing incentives. They did
18 address that to some extent, but perhaps not quite in
19 the same way of thinking that this is one focal product.

20 I think the other elements --

21 MR RIDYARD: Sorry, can I stop you there. Does that matter?

22 What impact does that have on how we analyse dominance?

23 DR JENKINS: It means that Ofcom focused very much on, then,
24 the access line, access pricing, separately from SFV
25 services pricing overall, so it looked at access and

1 calls separately, and, at times, I think it did think
2 about them together, but its mindset was thinking about
3 the two of them separately. Whereas for both Mr Parker
4 and myself, we have agreed that the right way to start
5 this process is to think about the two combined since
6 the rationale for purchasing access is to be able to
7 make and receive calls for Voice services.

8 MR RIDYARD: Maybe, Mr Parker, you would comment on that
9 aspect.

10 MR PARKER: So I think the evidence that Ofcom relied on
11 feels to me clearly relevant. It is the type of
12 evidence that one would typically look at in a dominance
13 assessment. I think SMP and dominance are very closely
14 related concepts. SMP has a forward looking element,
15 and therefore, given the nature of kind of forward
16 looking regulation, the evidence that was relied on by
17 Ofcom related to the historic period, because that is
18 what you have to go on, and then from a regulatory
19 perspective you are making a kind of forecast into the
20 future.

21 So I think in this case, where we are thinking about
22 the claim period, there is, I think, definitely
23 relevance of the Ofcom approach, but I am not relying,
24 if you like, on a straight read across. I am looking at
25 the underlying evidence and doing my own analysis.

1 In relation to the question of access and calls,
2 Ofcom very much focused on access, as Dr Jenkins has
3 said, and their provisional conclusion was that BT had
4 SMP in access. It seems to me that is still relevant
5 here, in the sense that access is an important part of
6 the access and calls focal product, and indeed in terms
7 of the market that we are exploring, access is about
8 three quarters, 80%, of the revenue of SFV services, I
9 think that is about right, it is a considerable
10 majority.

11 So I think there is definitely -- it is an important
12 part of -- I feel it is very much relevant, but I do not
13 think it is a complete picture, and I think one should
14 look at the evidence for access and calls together.

15 MR RIDYARD: It seems to have been the line -- the
16 Line Rental increases which were the attention-grabbing
17 fact that seems to have partly motivated the whole Ofcom
18 investigation.

19 MR PARKER: That might explain why they focused on access
20 from their perspective, while I have taken a more ...

21 MR RIDYARD: I suppose -- I am sure that is a good
22 inference. But the question in our minds is: is that
23 the right way to look at things? Is there an important
24 difference or even a possible weakness in the way Ofcom
25 looked at it just by looking at access, not in

1 isolation, but focusing on access primarily?

2 MR PARKER: I think it would -- you do not need to look at
3 calls separately, and you would need to look at what the
4 evidence is on calls and then put that together with the
5 access findings. So my position on that, we have dealt
6 with it a couple of times in terms of the ARPM data on
7 calls as opposed to access, so it seems to me that that
8 is -- that would be reinforcing. Does it mean that you
9 can just read straight across from Ofcom to the
10 situation that we are currently exploring? No, I do not
11 think so. I think you need to do an extra piece of
12 analysis.

13 MR RIDYARD: Okay, thanks.

14 Actually, I should have said up-front there are
15 quite a few questions today which are going to sound
16 like re-runs of some of yesterday's or the day before's
17 questions. That is kind of inevitable, because there is
18 obviously close -- there are close parallels between the
19 SSNIP test question and the dominance question, and it
20 might be useful -- we are still going to ask the
21 questions again, and it might be useful if you
22 particularly can highlight reasons why the answers you
23 are giving on the dominance questions are differentiated
24 from the answers that were given on the SSNIP test
25 question, just to sort of help us understand the

1 different stages of the analysis and where the economics
2 fit into that. I should have made that comment
3 up-front.

4 In some cases, it might be useful just to rehash
5 some of these greatest hits, because it is maybe quite
6 useful for us to just -- or for you to summarise your
7 thinking and also for us to get a refresher on our
8 thinking on some of these topics too. So we do not
9 apologise too much for repeating some of these
10 questions.

11 Dr Jenkins, did you want to say anything more on
12 that aspect?

13 DR JENKINS: So I think, following on from your question,
14 perhaps -- both Mr Parker and I have taken a focal
15 product of access and calls for that decision point of
16 who will be your access provider, which -- so that is
17 a matter of agreement.

18 Ofcom only looked at access and then looked at
19 calls, and I think perhaps it was because they were
20 thinking, "oh, but there is a second aspect to calls",
21 which is once you have made the decision about who your
22 access provider is, then how much do you use the call
23 services, so this two-stage element, and then they
24 separated the two. Whereas perhaps they could have
25 thought of it more as a first stage and second stage

1 decision, and that might be the bridge between the
2 positions.

3 MR RIDYARD: Okay. We will come back onto this topic.

4 DR JENKINS: Then moving on to other aspects of the evidence
5 on which Ofcom relied. I think the main reason I have
6 not relied on certainly the conclusions and quite a bit
7 of the Ofcom evidence on its face, though I have used
8 the underlying information that they relied on, was the
9 mindset that Ofcom had as they looked at that
10 information was very much thinking about what was the
11 evidence of people switching supplier of the same
12 product? So they were using their switching tracker
13 evidence and they were looking at evidence which showed
14 how often did an SFV customer switch to an alternative
15 SFV customer -- supplier, and how much did a bundle
16 customer switch to an alternative bundle supplier. That
17 was the mindset they had when they looked at that
18 information.

19 They did acknowledge that there was a lot of
20 movement from the Standalone Fixed Voice category into
21 bundles, but they did not then integrate that into their
22 assessment of the switching evidence that they saw, and
23 that is the topic which has been called migration bias
24 and those elements.

25 So for me, that is why looking at it with that lens

1 they are saying: oh, it appears like SFV customers do
2 not appear to be switching very much. But what they
3 were missing was SFV customers who were switching to an
4 alternative supplier for a bundle service, which, for
5 SPC customers, there may be many of them who were doing
6 that. I mean, also Voice only, but particularly SPC,
7 because the supplier that was supplying them with the
8 alternative broadband product would know who they were
9 and could clearly target them to take the Voice service
10 from the alternative supplier. So they would not be
11 captured as an SFV switcher in the Ofcom dataset.

12 So that is one reason. That is one reason why
13 I would say you can draw different conclusions on the
14 basis of that evidence.

15 MR RIDYARD: But that is something that, in your view, Ofcom
16 should have done but did not do right, as it were, to
17 put it somewhat crudely.

18 DR JENKINS: Yes, I think I would have done it differently.
19 We obviously had the benefit of a number of years since
20 and a lot more information in the context of this
21 investigation than perhaps Ofcom and BT had at the time
22 in terms of what customers were doing.

23 MR RIDYARD: Yes.

24 Mr Parker, do you want to comment on that?

25 MR PARKER: I mean, I think that feels to me more of

1 a debate about market definition than about dominance in
2 an SFV services market, which I understand is what we
3 are talking about here.

4 Perhaps taking a bit of a step back, because I know
5 we are going to talk a lot about pricing behaviour, it
6 seems to me there are sort of two routes to thinking
7 about dominance. One route which is sort of largely
8 Ofcom's approach is to say: let us take the market, let
9 us look at the market shares, and let us think about
10 whether there are sufficient countervailing factors to
11 suggest that even if there was a high market share, that
12 would not be -- that would not allow a large firm to
13 exert market power, because it is very contestable, for
14 example.

15 So that is sort of one route, it is a sort of
16 indicative route.

17 Then there is another route which is: and let us
18 look at the actual pricing behaviour. I think in
19 principle you could take either route, because you could
20 have a dominant position but not abuse it, and if that
21 is right, then it does not have to be the case, to make
22 a conclusion on dominance, that you look -- you even
23 look at pricing behaviour, particularly in the context
24 of an excessive pricing case.

25 But I have looked at both and, for me, these points

1 are reinforcing, but I think there are sort of two
2 directions, I think, to thinking about how you might
3 approach dominance in this context.

4 MR RIDYARD: Yes.

5 Is there anything else to say on Ofcom before we
6 move on?

7 DR JENKINS: I think some of the other indicators on which
8 Ofcom relied with respect to demand side barriers to
9 entry have actually used relatively similar metrics to
10 the ones I used, in my assessments. I have more data
11 because the time period has moved on, and I think the
12 difference there would be we are looking very much at an
13 SFV market, and for some of the -- and hence SMP in an
14 SFV market, whereas some of that evidence that Ofcom
15 looked at, they also were looking at Voice only and
16 Split Purchase Customers, and in their ultimate
17 statement they actually went back to separating the
18 market into Voice only and Split Purchase.

19 So that is -- again, it is the same underlying
20 evidence, but perhaps different angles on it depending
21 on what -- you know, the different conclusions they have
22 drawn on market definition. Hence, that is what I say
23 to Mr Parker's point, this question of how you take
24 account of the substitution behaviour that Voice
25 customers were displaying with respect to whether they

1 purchased the product standalone or in a bundle. Yes,
2 one can take it in the market definition, but today is
3 all about: let us assume that it has not been sufficient
4 to be considered evidence to widen the market beyond the
5 focal product, then how is that switching evidence
6 relevant for the SMP or dominance assessment?

7 So I think it is still relevant that the way Ofcom
8 was thinking about it was not actually capturing that
9 substitution behaviour in its own mind for -- with
10 respect to the Standalone Fixed Voice customers.

11 MR RIDYARD: Okay.

12 Let us move on then to the very notion of dominance.
13 This is something where there is a sort of -- you are
14 agreeing with one another on -- conceptually on what
15 dominance means in the economic terms, but within that
16 agreement, I mean, it is essentially the ability to
17 sustain, for the firm to sustain prices above the
18 competitive level for a significant period of time, or
19 something along those lines.

20 That is fine, of course, but I just wondered, can
21 I press both of you to sort of try and make that
22 definition a bit more operational. Can you try and make
23 it a bit more concrete. What would be your best shot at
24 doing that?

25 Mr Parker, maybe you could go first.

1 MR PARKER: So we are going to trespass on territory not
2 just of yesterday but also of next week, I suspect. So
3 this does go, to me, to the two different routes. So
4 one route of looking at dominance is to say, what is the
5 firm's share in the relevant market? In this case it is
6 very high, it is confidential, but it is significantly
7 above the rebuttal presumption level.

8 Then I think you would look at ... the closer you
9 get to a full monopoly, you know, full monopolies may
10 not have market power in a world where, you know, total
11 (inaudible) market is well known. As soon as you try
12 and move prices above a competitive level, someone comes
13 in, they take all the sales, you have to get back to the
14 competitive level in order to remain competitive.

15 That is obviously an extreme situation, but the
16 closer you are to that level of market share, the closer
17 I think you need to be to this kind of hit-and-run type
18 situation. So BT is not a full monopoly, some of its
19 shares are very high, so that would suggest the evidence
20 that you would need on the total absence of barriers to
21 entry and expansion would need to be extremely strong in
22 order to support a conclusion that those shares were not
23 enough to give you dominance.

24 Now, that is a way of saying -- a way of ducking
25 your question, in a way, because it is saying you could

1 make a conclusion on dominance without having to
2 determine what a workably competitive price is. But you
3 could also look at the pricing evidence, I think it goes
4 very much back to the pricing evidence we were looking
5 at yesterday and the day before, so I think you would
6 want to look at: can the firm increase prices above
7 a robust competitive benchmark?

8 The limb -- actually, not looking at the yesterday's
9 evidence, but the limb 1 evidence is all about trying to
10 construct that competitive benchmark and work out
11 whether you are above it, and we have different
12 approaches to that. But the evidence that we were
13 discussing yesterday, so Annex A8 of the
14 Joint Statement, Annex A2 of the Joint Statement. So A8
15 is the Line Rental chart, A2 is the ARPMS chart for
16 calls, and then the SPC versus Dual Play.

17 Those are all different ways I think of saying,
18 well, here is a version of the competitive benchmark in
19 the access sense. What is going on is you should expect
20 that competitive benchmark to be falling, because the
21 most important direct cost impact was falling, but in
22 fact prices were going up significantly.

23 On the calls ARPMS version we have rivals' calls
24 ARPMS which are declining over time, and that is -- so
25 that is price per unit for rivals declining over time,

1 and BT's ARPMS being higher, increasing, a little bit of
2 variability towards the end, so using their rivals as
3 being competitive providers of calls in a competitive
4 market as being their proxy. If they are not, then the
5 proxy is a bit high, but that seems to be a good
6 proxy -- sorry, just to finish.

7 We have talked about the SPC versus Dual Play
8 analysis, but using Dual Play as a competitive price of
9 a bundle of Voice and -- of Line Rental and broadband
10 services and using that to infer something about
11 the price of SFV access.

12 MR RIDYARD: I just want to ... While it is fresh in my mind
13 at least, the first two of those two sort of measures,
14 one is comparing BT Line Rental against the wholesale
15 cost where the gap was widening, and the other was BT's
16 ARPMS against competitors' ARPMS where BT's was going up
17 and theirs were going down. So both of those are
18 showing divergence between the alleged dominant firm and
19 the rest of the market.

20 Which of those two bits of information would you
21 place the most emphasis on, or would you give them equal
22 weight, and why?

23 MR PARKER: So I think I would place weight on all of those
24 three bits of information. I think probably the purest
25 version of the access price differential, competitive

1 level, putting aside limb 1, is actually the SPC versus
2 Dual Play, because I think that is controlling for these
3 characteristics. I think what the access, the
4 Line Rental price versus direct cost tells you is that
5 there has been an increasing expression of market power.
6 You have to make an assumption about what the
7 competitive margin was above that direct cost, for
8 example, but we also see that Ofcom then required
9 the price of the Line Rental for Voice only customers to
10 go back to a similar level, the one which was started
11 at, which is I think suggestive, but that is still
12 a competitive price that BT can live with. So I think
13 there are two different ways to get at access.

14 Then I think calls does tell you something about ...
15 does tell you something about sort of market power that
16 BT appears to have in calls relative to rivals.

17 MR RIDYARD: I am just hesitating slightly, because I am
18 thinking these are all extremely interesting points that
19 we do want to explore.

20 I think, Dr Jenkins, I will give you -- yes, I would
21 like to give you an opportunity to comment on those
22 three aspects and how you see the evidence on them. We
23 will come on to them maybe yet again in a few minutes'
24 time, but just for now, how do you see them?

25 DR JENKINS: Okay, I would also probably describe workable

1 competition somewhat differently, but perhaps deal with
2 the evidence first.

3 MR RIDYARD: I am still interested in that, so let us deal
4 with the evidence while it is hot.

5 DR JENKINS: Yes, fresh in everyone's mind. So with respect
6 to the SPC versus Dual Play difference, I think I would
7 make the point that I have made over the last couple of
8 days, which is that actually there is very little good
9 evidence about what SPC customers were paying for the
10 element of their purchases that were not purchased from
11 BT. So there is some evidence that is based on some
12 list prices from some suppliers, but that piece of
13 evidence I do not think has been tested.

14 I have not looked in detail at that, it is hard to
15 get at, that information. But what I have looked at is
16 the fact that many of those SPCs were switching to
17 bundles through this period, so they were actively
18 responding to the price signals in the market and
19 therefore were -- you know, anyone supplying services to
20 those SPCs would have had to take into account the fact
21 that those customers could very easily switch to
22 purchasing a bundle.

23 MR RIDYARD: So is your point there that these are just --
24 those are just snapshots of people in transition and
25 therefore not reliable, or ...

1 DR JENKINS: It could be. As I said before, it could be -
2 they could be in transition. They could be getting,
3 having got a very good deal on TV and broadband from one
4 of the other suppliers, and for whatever reason wanting
5 to keep their Line Rental with BT, it could be they did
6 not want to change -- you know, they did not want to
7 change their number or thought it was going to be
8 a hassle to move their number. For whatever reason,
9 they wanted to keep the Line Rental with BT --

10 MR RIDYARD: So it is just giving a partial picture.

11 DR JENKINS: Yes, exactly. I am not saying there were not
12 some customers who might have been paying list prices
13 for both, but we just do not know what proportion were
14 looking like that, or if in fact the actual difference
15 in prices between those two groups was much lower than
16 that that is shown by list price evidence.

17 MR RIDYARD: Okay, so that is ...

18 DR JENKINS: Hence the switching evidence is important to
19 consider, because it is more that you just cannot infer
20 dominance or market definition simply from a list price
21 analysis, you have to do more work than that.

22 On the access price ARPMS, I think if we could turn
23 to good old Table 4 in the Joint Statement, my annex,
24 which is {E/49/253}. So Mr Parker took us to this table
25 quite a few times over the last couple of days. Now,

1 while we see access prices rising over this period and
2 WLR rates falling, I think Mr Parker has pointed to this
3 to make the point that actually the gross margin for SFV
4 services, which is our agreed focal product, actually
5 does not change very much through this period.

6 Now, I have not actually done the percentage on this
7 chart, but if you look at -- the gross margin percentage
8 would be, in the first column, the ratio of 473 to 724.

9 It is C2 divided by A2.

10 THE CHAIRMAN: Sorry, just a minute.

11 Right. Gross Margin. C2 is A2 less B2.

12 DR JENKINS: Yes, C2 is the -- well, the gross margin, which
13 is the difference between revenue and cost of sales.
14 You often report a gross margin as a percentage, and
15 that would be where you would take that absolute value
16 of gross margin and divide it by the revenues, which is
17 724, and that is I think around 65%. Mr Parker said if
18 you actually do that across the table, you see that it
19 is relatively constant over that period.

20 So even though we are seeing an opening gap in that
21 chart between WLR and the Standard Line Rental, if you
22 actually look at the SFV services of access and calls,
23 and all the direct costs associated with those which go
24 beyond WLR, actually the margin is not changing over
25 that period.

1 There is still a question, as Mr Parker said, about
2 whether that margin is appropriate or excessive, but on
3 the focal product it is not actually increasing over
4 this period, and as we discussed, there is a lot of
5 change in behaviour going on at this time with customers
6 using the call services less frequently. So that is
7 also the context of the rise in call prices, that while
8 prices of call packages were rising, overall the average
9 revenue that was being recovered was not increasing per
10 user through this period.

11 MR RIDYARD: So that is sort of -- that is going to the
12 point that, as I think I might have put it yesterday,
13 that the margin of the Line Rental was doing a different
14 job, as it were. It was recovering -- it was
15 compensating for the lack of calls revenues more and
16 more over time.

17 DR JENKINS: Yes. So what that margin on SFV services is,
18 and whether it is too high, that is a question we will
19 come to. But just as I think the assumption that
20 Mr Parker was suggesting, which is the margin on Line
21 Rental prices was increasing, and from that you could
22 infer something about market power, I think we have
23 agreed that the focal product is SFV services, we have
24 agreed that actually the margin on that was not
25 increasing, so you do not have that piece of evidence on

1 which to base that conclusion.

2 MR RIDYARD: Okay.

3 DR JENKINS: Then the third piece is around the average
4 revenue per minute for calls. I will quickly go over my
5 concerns about that again.

6 So I think in HJ1 -- actually, I know where they
7 are. It is in the agreed call data, Figure 7.9 ...
8 I do not know if you need a page?

9 MR RIDYARD: A page number really, yes.

10 DR JENKINS: It is HJ1 -- I will see if I can find it.

11 (Pause)

12 MR RIDYARD: Sorry, which figure was it?

13 DR JENKINS: It is the call prices. Okay, so {E/17/274}.

14 MR RIDYARD: Thanks.

15 DR JENKINS: Perhaps go on to {E/17/275} before you zoom in,
16 the next page, and Figure 7.7.

17 MR RIDYARD: So this is your list price --

18 DR JENKINS: The list price analysis.

19 MR RIDYARD: -- which tells a different ... Yes.

20 DR JENKINS: So I am not disagreeing with the fact that
21 prices of calls were going up, whether it was the call
22 packages, even the per minute charges. BT was
23 increasing prices through this period, but so were its
24 rivals. I think therefore my doubt is around the
25 comparison of the average revenue per minute where we

1 are taking different sources, the BT data and the Ofcom
2 data.

3 MR RIDYARD: Just to be clear, your position is that the
4 numbers are just wrong/unreliable, the ARPM numbers?

5 DR JENKINS: They are, sorry? I did not ...

6 MR RIDYARD: They are wrong or unreliable. Because it could
7 be that you could get a different -- from two different
8 operators you could get different calls per minute
9 figures just because, for whatever reason, one operator
10 had a different set of customers and they used their
11 phone -- they were both paying a sort of fixed, more or
12 less a fixed price for phone services, not much of a
13 variable element in the pricing, but one was using the
14 phone a lot more than the other, and therefore the cost
15 per minute would be different just based on usage, or it
16 could be these numbers, you know, you just do not
17 believe them.

18 DR JENKINS: Yes, absolutely, and that is something I have
19 set out, average revenue per minute, where the
20 predominant way people were purchasing call services was
21 in fixed bundles which allowed them some element of
22 unlimited use, then turning that into a per minute
23 charge is quite difficult because you do not capture
24 usage differences, and in effect for many customers the
25 marginal price of a call was zero, you know, if they had

1 a package. It was any time they could pick up the phone
2 and make a call, if it was evening and weekends that
3 would be when they could, and different people may have
4 different preferences to say, "you know what, I just
5 never want to think about it, so I am going to take the
6 big package so I just know whenever I want to make
7 a call, however long it is, I am okay"; and the ARPM
8 does not capture that element.

9 So what is relevant here is the pricing that
10 a person, knowing their own preferences, is going to
11 make when they make a choice, and that is going to be
12 these types of prices, the list prices of the products,
13 that is what is going to influence their choice, and
14 when we look at that, BT does not look out of line with
15 its rivals' prices.

16 MR RIDYARD: But -- obviously I understand arithmetically
17 that one customer will end up with a different revenue
18 per minute than another, depending on whether they use
19 their phone a lot or a little, but why would you get
20 what appears to be a big difference between BT customers
21 and TalkTalk customers?

22 DR JENKINS: I think, if anything, the evidence says that
23 SFV customers use their phones more, and BT has more SFV
24 customers, so you would expect, if anything, it goes the
25 other way. Hence why I then looked into it to try to

1 understand if I can make sense of these ARPM -- this
2 ARPM evidence, which I find difficult to reconcile.

3 MR RIDYARD: So mostly you are coming out saying these
4 numbers do not look right to you and you do not believe
5 them?

6 DR JENKINS: They do not look right to me, and I do not
7 think it is the best comparator anyway.

8 MR RIDYARD: Understood.

9 MR BEARD: We have the ARPU numbers which aggregate the two,
10 the Line Rental and the calls, and we have the list
11 price information. Those are the better measures of
12 what we are interested in here, either the price you
13 face when you made a choice, or the aggregate of what
14 you spent, that ARPU is what people would have had on
15 their bill each month, that is what they -- the direct
16 debit would have taken that out of their account. So
17 that is the salient price for them.

18 MR RIDYARD: Yes.

19 Mr Parker, I will give you a chance to come back on
20 these points. I am aware this is a long answer, but it
21 is very interesting and very useful to have it spelt out
22 in this way.

23 Then you were going to come back to my much more
24 general question about the meaning of ...

25 DR JENKINS: Do you want to go back to Mr Parker on the

1 evidence and then back to me?

2 MR RIDYARD: I will do, I promise, but why do we not just
3 get the answer to the ...

4 DR JENKINS: So thinking about what is workable or effective
5 competition, in a sense it is trite to say that the
6 perfect competition paradigm, while a useful framework
7 for thought, is generally not thought to be very helpful
8 in competition law contexts for actually determining
9 questions about what happens in the real world. Hence,
10 as I understand the concept of effectively competitive
11 or workably competitive, what you are trying to take
12 account of is the fact that in any market context,
13 participants in the market will have varying degrees of
14 market power themselves, most participants will, whether
15 it is -- the archetypal example is a small corner store
16 that may charge more for the products because it has
17 a location advantage or an opening hours advantage, and
18 so it may charge above cost price for those products,
19 but you would not say they have inappropriate levels of
20 market power because they are constrained in the system
21 of many other suppliers retailing those products.

22 So what you need to do when you are thinking at
23 a dominant stage is think about the market context, and
24 I think it comes down to this question about when we
25 define the pricing power with respect to the competitive

1 price, so it is thinking about, okay, how do we
2 determine what is the competitive price in this
3 situation? You need to take into account what are
4 the -- what is the market context in which market
5 participants are operating.

6 So in this case, that market context does bring in
7 the fact that the suppliers in this market were all
8 supplying both SFV services and bundle services, so that
9 is an important part of the consideration of the market
10 context, and hence you have to ask yourself the
11 question: in the absence of any dominance, what would we
12 expect to see the pricing in this market be, recognising
13 that you will have differentiated -- that we have
14 differentiated suppliers in this market.

15 So that is what the workable and effective
16 competition idea is trying to get at. Can you strip out
17 market power and ask yourself what would the competitive
18 outcome be in this market, in this sector, even if you
19 have decided that the market is narrower than the arena
20 in which competition is playing out, and for me that is
21 also why there is a difference between a cost-based
22 benchmark, which is informative, but it is not the whole
23 story, because we know that in an effectively
24 competitive market pricing may not always be perfectly
25 aligned to costs. So while that is informative ...

1 MR RIDYARD: We know a bit more than that, do we not?

2 DR JENKINS: Pardon?

3 MR RIDYARD: We know a bit more than that, do we not,
4 because prices are not -- prices do not equal costs in
5 markets in general, do they?

6 DR JENKINS: Yes, exactly, so that you know that the cost --
7 a cost-based benchmark is going to tell you something
8 about pricing, but actually pricing is a lot about firms
9 responding to demand signals, thinking about what
10 products they are going to offer, what their investment
11 plans are, how they are going to recover that, and the
12 dominance assessment or the effectively competitive
13 question is about what sort of pricing behaviour would
14 we expect to see given the market context we face. So
15 you have to incorporate that in your assessment.

16 MR RIDYARD: Right.

17 Mr Parker, I am going to ask you to resist the
18 temptation to come back on your three pricing points
19 just now. I will have a look and see what is left of my
20 pricing questions when I take stock in a moment and give
21 you a chance to do it then.

22 But just on this point about the effective or
23 workable competition benchmark, it is a question that
24 has puzzled me since I first started looking at
25 industrial economics a very long time ago, and it does

1 not seem to me that the definition has moved on really
2 or has become any more practical, but can you help us
3 out in light of what Dr Jenkins has just said?

4 MR PARKER: So the way I would think about it is a workably
5 competitive market is one where, on average, economic
6 profits, so including all the relevant cost-plus and
7 appropriate margin, are zero. So if we go to
8 Dr Jenkins' corner shop example, yes, a corner shop will
9 be able to increase - will be able to charge a margin
10 over the cost of the soup that it is selling or the
11 newspaper or whatever, but that is because it has some
12 overhead costs, such as the costs of the shop and so on.
13 It is able to charge that margin over its marginal costs
14 because it has a tiny bit of, I would say, uninteresting
15 market power, in the sense that it has a little bit of
16 differentiation from its rivals. That allows it to
17 recover its -- the rent, for example, a really simple
18 example.

19 If it was charging -- if it was able to recover more
20 than the rent, that would be a signal to other firms
21 that they could come in and offer corner shops nearby,
22 until you end up with "there are enough corner shops in
23 the world that it is very easy to become a corner shop",
24 you come in whenever it looks like there is a profitable
25 opportunity to do so.

1 In thinking about entry, you are thinking about the
2 ability you have to not just cover your marginal costs
3 but also to make a significant -- sufficient margin to
4 cover your fixed costs. So if that is the case then
5 competition, workable competition, not perfect
6 competition but workable competition, will drive entry
7 up to the point that economic profits are zero, i.e. you
8 are covering all your costs, including the necessary
9 margin return on capital, you are thinking about it,
10 because that is what is driving the entry decision.

11 So the sort of Salop Circular City idea I have
12 always found very helpful. There are firms located
13 around a circle, petrol stations around the M25 or
14 something. If there are not enough petrol stations,
15 then each of those petrol stations is making enough --
16 you know, has enough of a customer base that it makes
17 more than the rent that it is paying. Then another
18 petrol station will come in and things will reshuffle,
19 until such time as, you know, the margin, the firm makes
20 zero economic profits.

21 So that would be my benchmark for thinking about
22 workable competition, which is the benchmark we are
23 using in limb 1, so it is direct cost plus incremental
24 indirect cost plus an allocation of common costs plus an
25 appropriate margin.

1 I think -- from a benchmark perspective, I think
2 that is the right one to think about. There might then
3 be adjustments that you want to make to that benchmark
4 to take account of, for example, specific reasons why
5 a firm might, for legitimate reasons, be able to
6 increase prices above that level, for example, if it is
7 offering a higher quality product than rivals.

8 So that would be the way I would think about the
9 concept of workable competition. It is ultimately
10 about: is there sufficient competition to drive
11 economics profits of a marginal firm down to zero?

12 MR RIDYARD: So you are taking it back to a measure of
13 profits but taking everything into account. So within
14 that, you could have -- your corner shop might be
15 earning a very high price/cost margin on the tin of
16 soup, but you would be looking at it overall to assess
17 whether it was earning more money at the end of the year
18 to cover its total costs, including its rents.

19 MR PARKER: Yes, because in a sort of Micawberish fashion,
20 if it is recovering less than that over time it will
21 exit, and if it is recovering more than that, the result
22 is: happiness on a temporary basis, except other people
23 will start seeing that as a profitable opportunity, and
24 if there is sufficient space for another firm then they
25 will come in until you end up, with a bit of variation

1 around it, at essentially the sort of zero economic
2 profit level, on average.

3 MR RIDYARD: Okay, we will come on to the "bit of variation"
4 point in a moment.

5 So that means your test of workable competition is
6 very much aligned with the limb 1 pricing assessment.

7 Is it pretty much the same thing?

8 MR PARKER: Yes, that would be my view, and I think it is
9 a -- the reason we are using LRIC+ is because it is this
10 long-run concept of costs, taking into account all the
11 relevant costs of the business, not some sort of
12 short-term snapshot, which I think is also consistent
13 with why regulators tend to look at kind of a LRIC+ type
14 of approach when they are trying to set prices as if to
15 mimic a competitive market, recognising that one of the
16 reasons often why a firm is regulated is because it has
17 very large fixed costs and they need to think about
18 a way of allowing that regulated firm to recover its
19 fixed costs, so a pure marginal cost pricing approach
20 would not make sense.

21 So I think, for me, those sort of three concepts,
22 from IO, from regulation and from limb 1, in terms of
23 the way we thought about it, all do come together, and
24 then, as you say, we can talk about the kind of
25 variances around that, but that for me is the sort of

1 core of it.

2 THE CHAIRMAN: Dr Jenkins, do you want to come back on that?

3 DR JENKINS: Yes, the point I would come back on that is, as
4 Mr Parker said, we have market conditions where I think
5 it is agreed there are common costs in the provision of
6 these services, and so for me at the dominant stage what
7 you are allowing for is there are different ways in
8 which firms may recover those common costs.

9 Now, actually the core guidance in economics about
10 what to think would be reasonable prices in
11 a competitive environment for recovering common costs is
12 that the prices of the products you are supplying need
13 to be between long-run incremental cost and standalone
14 cost, and any point within that is potentially
15 consistent with a competitive outcome.

16 Now, that is where we say if we go to limb 1, we
17 understand standalone cost on its own is not
18 a sufficient test for testing fairness of pricing, but
19 in terms of thinking about what is consistent with
20 effective competition, then pricing within a LRIC to
21 standalone cost is generally understood to be
22 acceptable.

23 So then from -- that is where from a dominance
24 perspective I do think there is a bit of difference,
25 where you say: okay, let us look at the prevailing

1 competitive outcomes in the market; let us see how other
2 firms who are operating, facing the same sorts of
3 challenges in terms of seeking to attract similar
4 customers, investing in different types of elements to
5 attract those customers, how are they pricing, how are
6 they thinking about marketing and attracting those
7 customers. And it is those elements that should be taken
8 into account in a dominance assessment about what
9 workable competition will look like in that sector.

10 MR RIDYARD: That is very helpful, both of you.

11 So did you want to come back?

12 MR PARKER: One point, but I think we might pick it up more
13 next week, which is I think economics tells you that you
14 can do better than just say: it is somewhere between
15 LRIC and standalone cost.

16 MR RIDYARD: I have a feeling we might come back to that
17 question.

18 MR PARKER: But I thought perhaps that is very much in full
19 limb one territory, it might be kind of excessive for
20 limb two, for today.

21 DR JENKINS: No pun intended.

22 MR PARKER: Could I perhaps make some comments on

23 Dr Jenkins' earlier ... the pricing --

24 MR RIDYARD: You certainly could. I was just looking at
25 section 2.2, and what has happened is that Dr Jenkins'

1 answer, for very good reasons, on that early section,
2 has covered almost -- a really good chunk of the agenda
3 I had in section 2.2, which I found very helpful to have
4 it set out in that way. So, yes, I would absolutely
5 like, Mr Parker, for you to comment on those things. If
6 you can comment on Dr Jenkins' comments on the three
7 pricing indicators and what she thinks of them and why
8 she takes a different view to you on them.

9 MR PARKER: Yes, so could we go back to Table 4 in the
10 Joint Statement which is at {E/49/253}, please.

11 So the point I would want to kind of perhaps
12 highlight here is if you look at the dates here, this is
13 2015/16 to 2020. So if we could now go to {E/49/246} of
14 the Joint Statement. So this data runs from 2009. So
15 if you look at sort of 2015/16, I think, it is just
16 after -- I think this was a point of discussion in the
17 factual evidence, but there are two price increases, and
18 the start of the claim period is just after -- sorry, if
19 you run back from the commitments to price increases at
20 the start at the claim period, it is just after that
21 second -- the sort of second price increase, if you can
22 imagine a dotted line there.

23 So from that point, yes, to 2020, there is not a lot
24 of change in the gross margin. The question is how did
25 the gross margin get to that level in the first place?

1 Which is the point about 2009.

2 So I think, while Dr Jenkins is right to say from
3 the start of the claim period there has not been a lot
4 of change in gross margin, there was a lot of change in
5 gross margin up to that point. Then Ofcom opened an
6 investigation about excessive pricing in Line Rental,
7 and understandably, perhaps, there has not been a lot of
8 movement -- there was not a lot of movement in
9 Line Rental, there was this price freeze, and so on,
10 which may have been influenced by the opening of that
11 investigation. So I am just connecting up the time
12 periods.

13 MR RIDYARD: I take your point, but nevertheless the margin
14 that we observe here between Line Rental and the
15 wholesale cost and the resale price, if you like, did
16 continue to diverge, did it not, after 2015?

17 MR PARKER: A little bit, yes, on the Line Rental alone.

18 MR RIDYARD: Yes.

19 MR PARKER: I think if you look at the gross margins, you
20 will see there is a small amount of variation.

21 MR RIDYARD: I have looked at it and I did not spot any sort
22 of -- much growth in the growth margin percentage.

23 MR PARKER: No, and that is fair. The other thing that is
24 going on is there were calls, and calls -- ARPMs are
25 going up and volumes are coming down.

1 MR RIDYARD: But is that not -- that is the point Dr Jenkins
2 is making, is it not, that it is false to look at this
3 as a simple resale of a can of soup and the wholesale
4 price going up and the retail price going up if other
5 things are happening in the background, potentially.

6 MR PARKER: So I think on the call side I would point to the
7 fact that that is the data we have, and the data we have
8 is whilst those calls -- ARPMS are going down -- sorry,
9 whilst the volumes are going down, the ARPMS are also
10 going down for rivals, because another thing that
11 happens when the volumes go down is the cost of
12 providing those calls goes down. So what that seems to
13 suggest to me, from Ofcom's data, is that
14 the competitive price for calls was falling.

15 So I am not sure -- this goes a bit back to the
16 discussion of: there is not a right to make a certain
17 amount of money on a particular customer, necessarily.
18 That would only be true if you were exactly at the sort
19 of breakeven level and under certain circumstances.

20 So if rivals are able to survive on their calls
21 prices while -- by reducing their calls prices over
22 time, even though call volumes are reducing, whereas BT,
23 and we should perhaps go up to Annex A2, which is on
24 {E/49/235}, is it? Maybe not. Page 228. No, it was
25 the same joint expert statement but at {E/49/228}.

1 So this shows average price per minute for rivals.
2 There is a reduction in calls volumes, but they are
3 still putting their price per minute down. Competition
4 is driving that down. For whatever reason, BT does not
5 seem to face that same competitive pressure as rivals
6 are facing, whereas it is facing similar volume
7 reductions, that is true, but that does not
8 automatically mean, just because there is a volume
9 reduction, you will be able to put your price up.

10 MR RIDYARD: Yes. I understood Dr Jenkins to be saying that
11 she thinks these BT numbers are -- or the comparison,
12 there is something wrong with the comparison here.

13 I guess there is nothing much you can say about --

14 MR PARKER: The BT numbers are the numbers in BT's summary
15 data, so that is amalgamating all the calls --

16 MR RIDYARD: Yes, but it is the matter of comparison with
17 the rivals that is --

18 MR PARKER: That is the bit.

19 MR RIDYARD: Okay, fine.

20 What about the point that -- Dr Jenkins is saying
21 she thinks that what matters to consumers is the list
22 prices that they are faced with when they opt in and out
23 of their contracts, rather than the outcomes which might
24 depend on other factors.

25 MR PARKER: So I am -- if I understand correctly, Dr Jenkins

1 is characterising the -- characterises the access, the
2 access prices that I use as list prices, I think,
3 perhaps in some kind of pejorative way, I do not fully
4 understand that.

5 So for access, just to make a point, list price and
6 ARPU are the same thing because it is one unit, just by
7 way of aside.

8 In terms of whether one should use list prices for
9 calls versus ARPMS or indeed ARPUs, I think there are
10 lots of different calls packages, there look like there
11 are some backward call packages, there are differences
12 that are not included in the data she reports. You
13 would need to look at the average price across all of
14 those packages and the usage of those packages.

15 If it was the case that BT had a set of customers
16 that bought an unlimited package but used it only half
17 as much as everyone else, I would have expected, if they
18 were properly facing competition, for them to reduce
19 the price of that package, because it would be very
20 profitable for them because they would be getting £10
21 a month, or whatever it is, but only paying out a much
22 smaller proportion in terms of calls. Someone else
23 might have £10 a month, maybe paying £8 out in calls, BT
24 paying £4 out in calls. It is very profitable to have
25 such a customer; can you attract more of those

1 customers, maybe by discounting your price?

2 If it was properly competitive, I would think that
3 those price differentials -- those margin differentials
4 would start to be competed away, because everyone would
5 be able to kind of get hold of the same customers and
6 prices would get driven down to costs, and you would not
7 see this kind of differential between the customer base
8 of BT and the customer base of rivals, if indeed that is
9 the explanation, because it could be there are a whole
10 bunch of tariffs which are not included in Dr Jenkins'
11 list price analysis. It may be a matter of tariffs, and
12 if there are lots of legacy customers hanging around on
13 those tariffs, that could also make a difference.

14 But all of that tells me that I would not want to
15 rely on list prices, a small number of list prices with
16 different volume usage of those tariffs, when what you
17 do to calculate an ARPM is you take the total revenues
18 and divide by the total minutes and that gives you the
19 average price across the whole. That seems to me to be
20 a better way of doing it.

21 MR RIDYARD: The third way would be looking at ARPU, would
22 it not?

23 MR PARKER: Yes, and that is ultimately what we end up doing
24 in the limb 1 analysis, which is another way -- you
25 know, it is possibly the ultimate way, but in the spirit

1 of trying not to completely just say: let us do limb 1
2 analysis and that will tell us about everything else,
3 you know, providing slightly different ways of looking
4 at the same question, in my view they are all
5 consistent.

6 MR RIDYARD: I guess the question is whether these different
7 measures provide insights or are just confusing because
8 they are -- yes, the question is --

9 MR PARKER: It is not as though the picture would change
10 very much if you did ARPUs, because the important thing
11 is the relativity between BT and rivals, and I do not
12 think the volume differences for BT and rivals were
13 particularly dramatic.

14 MR RIDYARD: So you think the ARPU comparison between BT and
15 rivals would be the same as the ARPM?

16 MR PARKER: Give or take for these --

17 MR RIDYARD: Is that something which we --

18 MR PARKER: I am not sure we have --

19 MR RIDYARD: Because we do not know the ARPUs for the
20 rivals, do we? Yes.

21 MR PARKER: No, but we -- yes, I think that would be right.

22 So you would have to believe something very
23 significantly different is going on in terms of the
24 volume of calls picture for this to be a different
25 picture in ARPUs.

1 MR RIDYARD: Yes, okay.

2 Dr Jenkins, do you want to come back on that?

3 DR JENKINS: I would just make two points. So I think
4 Mr Parker said a few times that rivals were reducing
5 call prices, and I think, without necessarily going to
6 the figures again, the figures that are collated, and
7 obviously I have not collated every call -- out of
8 package call, or every -- I have collated the three main
9 bundles. What it shows is that the rivals' prices were
10 increasing very similarly if not more than BT's during
11 that period. So call prices were increasing.

12 I think that is also actually what Ofcom found,
13 though it is a while since I read that annex in detail,
14 on the call evidence analysis that Ofcom did in the
15 provisional conclusions, but I think they found that
16 BT's call pricing was not that different from rivals'.

17 I do not know if we can go to the confidential
18 version. I think we had trouble with this, but if we
19 try {OR-E/49/258} which is my version of this. Yes,
20 that is good.

21 So just that Mr Parker is showing the difference
22 between the first black line and the last grey line, but
23 the point that I have made is that between 2019 and 2020
24 Ofcom issued a recalculation which reduced its estimate
25 of BT's ARPM for calls, and you see there was a very big

1 reduction between 2019 and 2020, and that from 2020
2 onwards from Ofcom's perspective the ARPM for calls made
3 by BT and non-BT customers is the same for those
4 three years.

5 Now, it is possible --

6 THE CHAIRMAN: Sorry, where do we see that?

7 MR RIDYARD: The green and the grey bar comparison in the
8 later years, though not in the previous years.

9 THE CHAIRMAN: Yes.

10 DR JENKINS: So in the previous years before Ofcom has made
11 this adjustment they have -- their green bar looks quite
12 like the BT internal data point but between 2019 and
13 2020 Ofcom does a recalculation, reallocation and they
14 reduce significantly their estimate of the ARPM for
15 calls made by BT customers such that they are now very
16 similar to those of non-BT customers.

17 Now, I have not managed to understand what Ofcom did
18 at that point in time. You see that from BT's own
19 internal data there was some decline between 2020 and
20 2021 but it is not as if their own view of it changed to
21 be on the same basis as Ofcom.

22 So it is for this reason I think that one does have
23 to be careful about inferring anything in the past about
24 the comparison between BT internal data and non-BT Ofcom
25 data for the ARPM, for calls made by BT and non-BT

1 customers.

2 MR RIDYARD: It is a bit of a puzzle as to what we make of
3 all that, is it not? I understand what you are saying,
4 but then we do not really know what is going on here so
5 we cannot -- it is quite hard to --

6 DR JENKINS: But that is why I would say look at ARPU for
7 SFV services which is -- that does tell you something.

8 MR RIDYARD: But we do not have the ARPU for the rivals
9 which is the point we are looking at here.

10 DR JENKINS: Or we look at list prices.

11 MR RIDYARD: Yes. I can see both sides of the story there
12 as well, yes, okay.

13 DR JENKINS: Or it would say that if you do this analysis
14 looking at the Ofcom data then you should do the like
15 for like comparison which would seem to suggest that
16 something happened between 2019 and 2020.

17 MR RIDYARD: Yes.

18 MR PARKER: I would agree that something clearly happened
19 between 2019 and 2020. Given that the internal BT data
20 and the Ofcom data looks pretty consistent up to 2018
21 and that Ofcom themselves say something changed in Q4
22 2019 I think it is, so that is telling you there is
23 something that -- probably up to Q19, there is good
24 consensus. So in that sense I think there is a pretty
25 clear conclusion one can draw up to that point.

1 Then the question is, you have got this divergence
2 in the BT data, why would that -- I am not sure why one
3 would not prefer the internal BT data that we are using
4 in these proceedings rather than Ofcom, the Ofcom data,
5 but it seems to have -- I think it seems -- more
6 problematic to then say, well, we should think about the
7 Ofcom data as being better than what BT is using
8 internally.

9 MR RIDYARD: Unless it is a question of consistency of
10 methodology between how the data is being analysed
11 and -- yes.

12 MR PARKER: Something seems to change for BT as of Q4 2019
13 according to Ofcom. I do not know the source of that,
14 so ...

15 MR RIDYARD: Okay, we perhaps cannot resolve that
16 definitively here and now, but it is a puzzle and --
17 yes, it is a puzzle.

18 Are there any other kind of pricing trend benchmarks
19 that might help us in sort of making sense of all of
20 these price trend figures over time? Maybe the answer
21 is simply no, but we should ask the question: is there
22 anything else that might help us to benchmark
23 the pricing we observe for BT to assess its
24 competitiveness?

25 MR PARKER: I think that might be a question for Dr Jenkins

1 in the first instance.

2 MR RIDYARD: Okay.

3 MR PARKER: If I can pass that to you more directly.

4 DR JENKINS: Well, I think the prices that I -- or the
5 framework in which I think we can look at BT's pricing
6 is picked up in the limb 2 discussions.

7 MR RIDYARD: Yes.

8 DR JENKINS: There I suggest that one can think about
9 general real changes in pricing, so look at how they
10 have evolved over time with respect to inflation and
11 then looking at rivals' prices which we are already
12 doing here, so ...

13 MR RIDYARD: I think the best place to pick that up is
14 probably in the limb 2 discussion, or sorry, the limb 1
15 and 2 discussion.

16 Okay. The last question I think -- the next
17 question I have on this topic would be looking at the
18 commitments and what happened in 2018 with the
19 commitments. Is there anything there that gives us some
20 experimental variation that we can learn from on these
21 questions that we are discussing? Mr Parker.

22 MR PARKER: I mean, BT has offered these commitments.

23 I assume it would not have offered these commitments if
24 they had taken it below a workably competitive level for
25 that product. That suggests there was quite

1 a significant price gap.

2 MR RIDYARD: Maybe it suggests on any one product there is
3 quite a lot of potential variability which is consistent
4 with workable competition. It is --

5 MR PARKER: Which I think we will come back to in -- it is
6 a limb 1 discussion. It tells you that following that
7 period BT was able to maintain a substantial price
8 differential between the price of SFV to SPCs and
9 the price under the commitments and VOCs at that point
10 are out of the relevant market that we are thinking
11 about here. It tells you something about BT's ability
12 to maintain a price over double that of the commitments
13 price by the end of the period, which I think tells you
14 something about BT's ability then in relation to those
15 customers to be able to maintain prices that are above
16 the commitments level and in my view that seems to be
17 a battleground on a competitive level.

18 MR RIDYARD: We will come back later to talk about rivals'
19 responses to those things when we talk about entry
20 barriers and competition. Anything else on that before
21 we take a break Dr Jenkins?

22 DR JENKINS: So we will park how rivals responded until we
23 get to --

24 MR RIDYARD: Yes.

25 DR JENKINS: Yes. Then I would say that if the price is

1 above the long-run incremental cost measure which
2 I think we both agree that the commitments prices is
3 covering those, then BT may offer that price. It is not
4 irrational for it to offer that price for that customer
5 segment. It obviously only offered that for the
6 Voice only customers and I think it is important to see
7 how the rivals responded to that because I think from
8 a dominance perspective what is interesting is what then
9 happened in the market in response to that price change
10 and that is what gives you interesting information about
11 how do we think about the constraints that are operating
12 on suppliers in this market that are supplying both
13 Standalone Fixed Voice and Voice in bundles.

14 MR RIDYARD: We will obviously come to that because it is
15 interesting. Is this a good time to take a break?

16 THE CHAIRMAN: Right, we will take a break.

17 (11.42 am)

18 (A short break)

19 (11.52 am)

20 MR RIDYARD: Right, so in a moment we are going to move on
21 to price leadership and dominance, but before we do
22 that, I would just like to ask one final question on the
23 previous section, which is whether there is anything
24 interesting or relevant in the fact that some customers
25 have joined the SFV -- have joined as new SFV customers

1 during the period we are looking at. Does that give us
2 any clues or any useful information that helps us to
3 assess the dominance question?

4 Dr Jenkins, do you want to go first.

5 DR JENKINS: I think what is interesting about the fact that
6 there were people entering into the SFV base is it is
7 certainly showing that it is not the case that this is
8 a group of customers who have all been there for a long
9 time who suffer from inertia in that, at that point of
10 choosing to take up the product, there would have been
11 a choice made by those customers. So, it is just saying
12 that additions implicitly mean that someone has decided
13 to take up that contract.

14 MR RIDYARD: Does that mean anything for dominance, then, in
15 itself?

16 DR JENKINS: I think where the barrier to entry is very
17 strongly linked to inertia and saying that one can infer
18 from the fact that allegedly customers are not making
19 effective choices, then the fact that you are seeking to
20 attract customers into your product means you are facing
21 constraints from the fact that those customers may go to
22 a rival supplier, so it is relevant for the question of
23 dominance.

24 MR RIDYARD: Mr Parker, any comments?

25 MR PARKER: As we discussed yesterday, I am a bit nervous

1 about the additions data, I think.

2 MR RIDYARD: Yes, you made that point yesterday. It could
3 be a bit of noise of some kind, yes.

4 MR PARKER: There does seem to be quite strong data on the
5 remaining -- we are all in agreement that of the
6 remaining people by 2022, 80% of the people will have
7 been there in 2014, and there is similar evidence in the
8 Ofcom materials and I think in some of BT's documents
9 about the length of tenure of customers that have been
10 with BT SFV's services.

11 So to believe some of the data on additions, you
12 have to believe there is a sort of frothy top, which
13 seems for me a little bit surprising. But I am not
14 sure -- I am not really sure one way or the other this
15 tells you a lot about dominance. I would approach it in
16 the two ways discussed earlier. One is market shares
17 and countervailing factors and are those countervailing
18 factors sufficiently low as to keep prices at
19 competitive levels --

20 MR RIDYARD: That is perfectly fair, thank you.

21 Let us move on to the price leadership aspects of
22 the case. Obviously the claim is that BT benefited from
23 or was a price leader in the market, and that is
24 relevant to the extent to which it faced effective
25 competition.

1 Maybe, Mr Parker, it makes sense for you to go
2 first. What is the basis for that story and also where
3 does it fit into the assessment of dominance?

4 MR PARKER: Perhaps it is worth looking at Figure 22 in my
5 third report which is on page {E/3/134}. So this is --
6 we might need to zoom in on the figure at the top.
7 These are the list prices, ARPUs, of Line Rental
8 products offered by BT and their rivals. The top line,
9 what is mostly the top line, which is a sort of mauvey
10 colour, I guess, I am not great on colours, is the BT
11 Standard Line Rental price, and then you have the prices
12 that rivals are charging otherwise. You can see the BT
13 price is generally above, and it tends to increase
14 earlier than rivals. There is a very small amount of --
15 I think there are a couple of examples where that is not
16 the case, in and around 2013 in particular. There is
17 a month's difference for TalkTalk in sort of somewhere
18 around probably early 2015. But by and large, you have
19 got a bit of clearance and you have got BT increasing
20 its prices and then other people following.

21 It seems to me that that suggests that BT was acting
22 as -- able to act as a price leader, in that it was able
23 to put its price up in the expectation that rivals would
24 tend to follow. I think you see some of that coming out
25 in the internal documents and the discussion that was

1 had last week with the factual witnesses, I cannot
2 remember precisely who, but there was some discussion
3 about how BT thought about that, what it expected its
4 rivals to do.

5 What does that tell you about dominance? Price
6 leadership is unlikely to arise if a firm is not
7 dominant, so I think it might tell you something there,
8 but I do not think it is a kind of critical component of
9 my assessment of dominance, I think it is kind of more
10 interesting and more relevant in the sort of limb 2
11 comparators, and whether rivals' Line Rental prices are
12 good comparators --

13 MR RIDYARD: So what is price leadership?

14 MR PARKER: I would say it is where you would put your
15 prices up in the expectation that other people will
16 follow. So even though here, if we go back to the
17 previous chart, we were seeing Line Rental reductions,
18 which, absent other factors, one -- would tend to lead
19 to competitive pressures to put prices down, as that is
20 the biggest direct cost to this. What we are seeing is
21 a sort of ability for BT and others to move their prices
22 up, sort of away from that, away from that cost, you
23 know, in an opposite direction to the cost change --

24 MR RIDYARD: So the leading price is up against an
25 underlying -- how important is the cost comparison with

1 the price comparison in your notion of price leadership?

2 MR PARKER: I think important in the sense that if costs
3 were also going up in exactly the same fashion as
4 prices, then I would interpret this as everyone is
5 operating on a competitive basis, they are responding to
6 the underlying costs. I think the divergence between
7 costs and prices is critical.

8 MR RIDYARD: Yes, and most people to whom these Line Rental
9 charges applied did not particularly care about the
10 Line Rental because they were bundle customers, but you
11 are obviously focusing on the SFV customer impact of
12 these price changes?

13 MR PARKER: Yes, where this matters, and I think one of the
14 points discussed yesterday was at least up to the point
15 of the ASA ruling, there did seem to be this -- there
16 seemed to be a desire to advertise low incremental
17 bundle prices, and the little asterisk at the bottom
18 saying subject to paying the standard rental line of
19 whatever it is, £17.99, and you can see how that
20 marketing dynamic to try and advertise a low incremental
21 broadband price, which then goes into the Dual Play,
22 combined Dual Play bundle price, because people felt it
23 was more salient. Other firms would be very accepting
24 of BT putting its Standard Line Rental prices up because
25 they would actually quite like to put their headline

1 Standard Line Rental prices up as well, and then be able
2 to charge an even lower incremental price for
3 a competitive bundle, which they think would be more
4 saliently attractive to consumers from a marketing
5 perspective.

6 MR RIDYARD: Yes, so it actually suited their marketing
7 objectives in the bundles market, and most of these
8 rivals did not have much of a position in the SFV market
9 anyway, did they?

10 MR PARKER: Post Office had 20% ish. Everyone else very,
11 very small. So you could see why they would be
12 attracted to the idea that BT put its price up. That
13 gives us some headroom to put our standard rental line
14 prices up, knowing we will continue to need to be
15 competitive in the bundles market, which is the vast
16 majority of what they are doing, and it just allows, it
17 sort of facilitates that marketing strategy, it seems to
18 me, which is why ...

19 MR RIDYARD: I understand that, but that is not relevant for
20 the SFV pricing as such, is it?

21 MR PARKER: No, I am just explaining why you might -- if you
22 are a rival, you might accommodate that kind of -- you
23 might use the headroom that BT has given you to float
24 up, because you are not very big in SFV, and you are not
25 trying to really -- it is quite difficult to win

1 customers in SFV alone. Those customers are quite inert
2 and you are trying to win customers in bundles, and so
3 it is not having much effect on reducing your
4 competitiveness in SFV because there is not actually
5 much ...

6 MR RIDYARD: Not much to lose there, yes.

7 MR PARKER: Yes, and it is somewhat, although this has
8 obviously been competitively eroded, but it is somewhat
9 helping you, at least up to the point of the ASA ruling.

10 MR RIDYARD: It is allowing you to play the game you want to
11 play in marketing terms in bundles. I get that.

12 But just going back to -- but it does not tell us
13 much, does it, about SFV competition, because if these
14 operators do not really have many SFV customers to speak
15 of ...

16 MR PARKER: I think that tells you something about
17 the price, does it not? I think it just means there is
18 not much of a constraint on BT on the SFV side of
19 things. But for BT putting up the price of Standard
20 Line Rental to SFV customers makes a big difference to
21 its profitability.

22 MR RIDYARD: Yes. But if they really were fixated on the
23 benefits of this allowing them to market themselves as
24 cheap in the bundles market, they would be -- the SFV
25 effect would be just a random side effect to them, or

1 would it just be -- or do you think it was another
2 factor that they quite liked the idea of, or -- we do
3 not know what was going through their minds --

4 MR PARKER: We do not know.

5 MR RIDYARD: -- but in terms of your analysis, though, of
6 the market.

7 MR PARKER: I think there is some suggestion they did not
8 want to go above the BT rate, and that is kind of what
9 you see in the diagram, that BT was always above. That
10 provides this sort of -- it looked a bit like a sort of
11 PR umbrella, if you like, that BT would go first, BT
12 would take any flak that was coming from increasing the
13 Line Rental price, and everyone else could then say:
14 "and we are cheaper than BT", and then: "we are smaller
15 and also cheaper than BT", so they are sort of
16 neutralised from that.

17 So you can see why, for all those reasons, it is an
18 easy decision, that the market sort of fell into this
19 way of working. I think that is the view that Ofcom
20 came to as to the interpretation of this, at least up to
21 the commitments.

22 MR RIDYARD: Okay.

23 Dr Jenkins, comments on that, please.

24 DR JENKINS: So I think it is a matter of principle, what
25 does price leadership tell us about dominance, and how

1 do we decide that something is price leadership.
2 Usually price leadership concerns come up in
3 oligopolistic environments where, by definition, you
4 have strategic interdependence between the players in
5 the market, and the fact that it is not surprising to
6 see prices moving in similar ways in competitive
7 markets. So, on its face, seeing businesses that
8 compete with one another, matching prices, and observing
9 what each do with their pricing and moving to match
10 that, is not in and of itself a surprise.

11 As Mr Parker says, so then it comes to, well, what
12 is going on with the costs in this scenario, and we have
13 discussed that from the start of the claim period, at
14 least, that actually the costs of SLR were increasing in
15 line with the prices because margins were not actually
16 changing over that period.

17 Now, we know that BT and all these rivals were
18 seeking to compete for the Voice custom of these people
19 and actually all of the participants were interested in
20 acquiring not just the Voice custom but, if possible,
21 additional services custom from these customers. So in
22 order to understand what is going on here, you also need
23 to be thinking about what was going on with the pricing
24 of bundles and incremental price of that.

25 In a sense, the question is: would these rivals have

1 done something similar even if BT did something
2 different? That is why it is interesting to see what
3 happened at the point that the commitments came into
4 force, because at that point the Post Office did respond
5 to that and move its price down towards the same level
6 for Standard Line Rental as BT, but these other rivals
7 did not, they kept their Line Rental price at that
8 higher level, even though that would now look expensive
9 as compared with that BT price, and those rivals would
10 still be competing for the business of those customers,
11 including for -- as they shift into the bundles market.

12 The claim is that even at that commitments period
13 there are very -- reasonably high margins being made on
14 these customers, and so in the earlier period, before
15 the commitments, there are again high margins being made
16 on these customers, according to the claim, and so it is
17 probably worth pulling up -- I just took my marker
18 out -- {E/17/284}.

19 THE CHAIRMAN: This is your first report.

20 DR JENKINS: This is my first report and me looking at what
21 is going on in this marketplace and the points at which
22 the market participants cease marketing to the SFV
23 customer base.

24 So even though they may not have had much of
25 a share, they were still offering these services to

1 these customers, and Post Office in particular was
2 a successful competitor in this market. Indeed, you see
3 that Virgin starts marketing again in 2018, BT ceases
4 that -- sorry, Sky ceases that marketing once -- a year
5 into the commitments period, so once this lower price
6 has come into force, and TalkTalk has actually moved its
7 strategic positioning much earlier. They ceased active
8 marketing in 2013 and I think they actually ceased even
9 reporting it in 2016.

10 So there is -- the rivals in the market are seeking
11 to compete with BT both here in fixed Voice and then
12 also in the bundle market.

13 If we go earlier in my report to {E/17/134}, I think
14 we did look at some of these charts at an earlier point,
15 like Figure 5.5, which is the lower speed broadband
16 product, so this is showing the incremental additional
17 cost for a customer that would take the broadband
18 element on top of the fixed Voice element of the
19 relevant provider, and we see that it is the other
20 market participants who had much lower incremental
21 broadband prices, and BT is moving its incremental
22 broadband price down to respond to the competitive
23 pressures that it is facing from these competitors, so
24 you cannot -- I do not think you can look at the price
25 leader/price follower dynamic without thinking about

1 both aspects of these elements.

2 THE CHAIRMAN: Sorry, when you say "both aspects", you mean?

3 DR JENKINS: The incremental price of broadband that -- the
4 first thing that happens is that the rivals are offering
5 incremental broadband at a low price. BT then needs to
6 respond to that by lowering its incremental --

7 THE CHAIRMAN: But why is that relevant in the context of
8 assessing dominance where the market has already been
9 held to be the narrow market of SFV?

10 DR JENKINS: Because we understand that these SFV customers,
11 even if the market has been defined narrowly, there is
12 still a lot of substitution going on in the market from
13 the fixed Voice into the bundle product, so it has not
14 been judged to be sufficient to constrain the ability to
15 raise prices in that fixed Voice market overall,
16 however, it is still an important element of the dynamic
17 that is going on in this market, and the competitive
18 dynamic, the workable competition in this market for
19 supplying Voice services is supplying both the fixed
20 element of Voice and the incremental broadband. Those
21 are the two products that are being priced together by
22 all the market participants.

23 THE CHAIRMAN: You mean priced together in the sense that
24 the market participants are offering prices on each
25 because that is what they are supplying.

1 DR JENKINS: That is what they are supplying. So in
2 a sense, because of this substitution behaviour, because
3 of I think what has been described as the recapture
4 incentive, then the pricing of the two products are
5 linked, and the behaviour that is going on in terms of
6 wanting to attract standalone customers to a bundled
7 product are going to affect the pricing of that
8 standalone product.

9 In particular, think about a Split Purchase Customer
10 who is taking the broadband product from the rival
11 provider and the Voice product from BT, then the rival
12 has a unilateral incentive to set its fixed Voice price
13 high, because it wants to say to that person: okay, you
14 are currently paying this price for a bundle. Move to
15 us, and if you -- you can take your Voice service now
16 from us, and we are going to give you a really cheap
17 deal on your broadband, we are going to give you a nice
18 discount on your broadband if you move your Voice to us
19 as well, and your bundle price is lower.

20 THE CHAIRMAN: Is that a re-run? I do not mean that
21 disrespectfully. Is that a re-run of the argument you
22 were making in the context of market definition where
23 you were seeking to give an explanation for why BT, for
24 example, was raising its prices, because it then means
25 that there is just a little incremental movement for

1 someone to join the bundle; is that really the same
2 point?

3 DR JENKINS: It is the same point, but the reason it is
4 relevant here in dominance is because the question here
5 is: is this something that the other market participants
6 also had an incentive to do, to price in that way, or is
7 the only reason they did that because they were
8 following what BT was doing and sheltering under BT's
9 umbrella?

10 THE CHAIRMAN: This is your counterpoint to the argument
11 that there is nothing to be made of the fact, from the
12 point of view of dominance, that there were other
13 operators, certainly before the commitments, that were
14 setting similar prices for line commitments --
15 Line Rental, where the argument being made against that
16 being relevant is: yes, but they are just following the
17 leader, and you say actually there is another
18 explanation. That is how it fits in?

19 DR JENKINS: That is right. Therefore you need to take into
20 account the market context and the dynamics of the fact
21 that actually what was going on was that most of these
22 fixed Voice customers when they ceased to take these
23 services actually moved to take bundles, that was the
24 arena of competition, and hence you can look at rivals'
25 prices and see them as a meaningful competitive

1 benchmark because they are reflecting how competition
2 would work in this market for businesses that are
3 supplying both fixed Voice services and those services
4 sold in a bundle with other communications products.

5 THE CHAIRMAN: Thank you.

6 MR RIDYARD: There are lots of interesting things in there,
7 but just going right back to the very start of the
8 answer, you were saying price leadership is normally
9 thought of in terms of oligopolistic markets. But does
10 that preclude it from being a feature in this market?
11 So we have one obviously much bigger competitor and
12 other small ones. You could still have an uncompetitive
13 outcome caused by the small guys following the big guy,
14 could you not?

15 DR JENKINS: Yes, you still can have price leadership being
16 a consideration in dominance. It sort of generally
17 implies that some sort of strategic independence and
18 some choice on -- the reason it is not necessarily so
19 frequently thought of is you think, "oh, the dominant
20 player has some ability to price that the rivals do not
21 have". That is the essence of this. Whereas this is
22 showing, oh, there is this pricing power that ...

23 MR RIDYARD: That they have, but they are choosing not to
24 use.

25 DR JENKINS: No, the rivals are -- yes, so the rivals are

1 choosing not to compete when they otherwise could.

2 MR RIDYARD: Yes, that is what I mean.

3 DR JENKINS: That then is saying, "oh, well, that is because
4 it is very hard to compete for these customers", and you
5 go, "well, how hard is it to compete for these
6 customers?" Half of them probably are their customers
7 already, because they are Split Purchase and they are
8 already being supplied.

9 So that is the bit that makes you say, "well,
10 actually, no, this is just how people are pricing in
11 this market in order to effectively recover the
12 investments that are being made to attract customers in
13 this market", so that actually through this period there
14 is a lot of dynamism, people adding things to encourage
15 people to be able to capture a household's connectivity
16 to the world.

17 Again, because here we are looking at just the
18 access price, or not here, but in the other chart,
19 the price leadership chart, you have what is going on
20 with calls as well, as well as having a structure of
21 prices that makes it very attractive for people to sign
22 up to your bundle, like all of them face that same
23 incentive. Structure your prices so it makes sense to
24 take multiple products from one supplier.

25 If I may, I might just point out something. If we

1 go to {E/17/274} and if we focus in on the figure and
2 the notes here. So something to bear in mind is just
3 again with the inter-relationship between the
4 Line Rental price and call packages. In 2015 you see --
5 so this is unlimited weekend calls plans, which for the
6 bulk of the early part of the period you see was
7 actually offered for free with a Line Rental, so if you
8 got a Line Rental you had the ability to make calls at
9 the weekends for no charge.

10 In 2015 Sky -- it says "The Sky series discontinues"
11 because they "withdrew their inclusive weekend calls".
12 So in that sense they put up the price -- we can go back
13 to see what did they do at that point at the end of
14 2015. They put up the price of Line Rental a bit. They
15 withdrew their inclusive weekend call package. If we go
16 to the top of the next page, {E/17/275}, you see what
17 they did. If we go close on Figure 7.7. Sky is the
18 green one. They introduced an unlimited evening and
19 weekend call plan at £4 at that point. They said to
20 their customers: it will be standard for you. We are
21 going to put everyone on to our new Standard Line
22 Rental, plus £4 for unlimited evening and weekend calls
23 plans, and that is our standard offer now.

24 So you also have to be quite careful when you are
25 doing these comparisons about making sure they are like

1 for like even across access and calls, as well as across
2 when they were moving broadband prices and then moving
3 their Line Rental prices. These businesses were doing
4 that -- they are doing that for themselves, right, Sky
5 is doing something different from the rest of the market
6 there, because it also is facing the pressures of how
7 they are going to recover the revenue for all the costs
8 that they are incurring to service the communication
9 needs and content needs of its customer base.

10 MR RIDYARD: Thanks.

11 Mr Parker, do you want to come back on some of those
12 points.

13 MR PARKER: I mean, I have covered a lot of these yesterday.

14 I think the right way to look at -- there is an issue of
15 price leadership in calls. I think the right way to
16 look at that is the ARPM approach, which looks at the
17 average price per minute that is being charged by the
18 different operators. The picture which Dr Jenkins has
19 just described in relation to Sky will be part of that
20 Ofcom data for rivals.

21 I think we have -- we are not -- I am not suggesting
22 that there is price leadership after the commitments
23 period.

24 MR RIDYARD: Right, okay.

25 MR PARKER: I think what is going on there is BT has 95%

1 plus ... The SPC customers. You can see the two go --

2 MR RIDYARD: So you are saying after the commitments we are
3 talking about SPCs, and there is no competition in your
4 view there.

5 MR PARKER: It is essentially all BT at that point. A tiny
6 amount of other stuff.

7 MR RIDYARD: Yes.

8 MR PARKER: So price leadership is not a particular issue
9 for me.

10 The only other point I would add is, yes, we are
11 thinking about price leadership in a situation of "have
12 I got the strategic independence?", because obviously in
13 a monopoly you are not worried about -- there is no
14 concept of price leadership, when you are a monopolist
15 you are just the only provider, so it must only be a
16 relevant concept where you have some level of
17 competition.

18 The challenge with most theoretical rules of price
19 leadership is who gets to be the price leader, but
20 I think the way that it tends to come up in cases is
21 the price leader, which has tended to be kind of former
22 working company industries. The price leader is the
23 person who is obviously the largest, which is typically
24 the former network company.

25 MR RIDYARD: But is it an advantage, though, to be a price

1 leader?

2 MR PARKER: Sometimes yes, sometimes no. Different models
3 go in different directions, do they not? But if BT
4 thought it was a price leader here, one of the things we
5 heard last week, and if they did not want to be a price
6 leader, they could have done something different with
7 their SFV prices.

8 MR RIDYARD: Okay, yes. Can we just look at the Post Office
9 in particular because that is an interesting player
10 here. A couple of times yesterday, Mr Parker, you said
11 they competed hard for a while, then they sort of
12 competed less hard. Is this the --

13 MR PARKER: Yes, shall we go back to the chart in my third
14 report, Figure 22 on {E/3/134}. So the Post Office is
15 the green line which you can see that comes in, in sort
16 of 2012. They come in at a very significant discount to
17 the other people, and they compete seemingly
18 aggressively for that, and then they gradually move up.
19 So by the time you get to early 2016 or so, they have
20 joined the pack. They are not at BT's level but they
21 have joined the pack. They are not at the bottom of the
22 pack, but they have come -- there was a very substantial
23 gap of £2/£3 in 2013, and that -- to even the lowest of
24 the rest of the pack, and that has fallen away by 2016,
25 so ...

1 MR RIDYARD: How does that correlate with its success in
2 winning share? Is that something that has been
3 analysed? Obviously, on the face of it, you might
4 expect them to have been better at winning share earlier
5 on than later on in this subperiod.

6 MR PARKER: Certainly the references in the documents that
7 I think I have seen to Post Office and worries about
8 churn to the Post Office were in that sort of 2013,
9 perhaps 2014 period, and they seem to be less prevalent
10 thereafter in terms of BT documents and worrying about
11 churn.

12 MR RIDYARD: Maybe on that specific point, Dr Jenkins, can
13 you enlighten us?

14 DR JENKINS: I think the Post Office is quite successful in
15 that early period, even as those prices are going up.
16 I think they, like everyone else, is facing the
17 challenge of falling call volumes, right, I know that is
18 a recurrent theme, but in that sort of rebalancing.

19 I think it is June to December 2014 that Home Phone
20 Saver is introduced by BT, which is a head-to-head
21 competitor product with the Post Office in mind.

22 I think what you see from this chart is there is
23 a strategic differentiation between the Post Office and
24 the other suppliers in that the Post Office is much more
25 closely targeted at Standalone Fixed Voice customers.

1 They are offering more of a personalised service. We
2 know it is the branch access that is attractive to those
3 customers. They do also offer broadband products as
4 well, so they are offering both of those. But they are
5 perhaps the ones who are most focused on also providing
6 a competitive constraint for the customers who are
7 currently keen to stay with a Standalone Fixed Voice
8 line.

9 BT recognised that and see that while their core
10 strategic direction is around the bulk of the market,
11 which is about how do we keep that line in the face of
12 people being attracted to upsell -- being upsold into
13 a bundle, but we also face competition for those
14 customers who are not yet there, that is coming from the
15 Post Office, and they introduce some further
16 head-to-head competition.

17 I think then, as you see, when the commitments came
18 into play, the Post Office was still targeting those
19 customers. They were vociferous to Ofcom that that rate
20 was a very low rate and would make it unlikely for them
21 to be able to compete, and I think that is what you see.
22 They stayed for a while. They then raised the price.
23 Ultimately they exited, sold the portfolio to Shell, who
24 have pretty much turned that into a bundle market target
25 rather than continuing to provide a competitive

1 constraint for the fixed Voice only customers.

2 MR RIDYARD: In dealing with Ofcom, they are bound to say
3 that they do not want the price to come down.

4 DR JENKINS: Maybe, but I think that is why the facts are
5 interesting. They tried to maintain that at that level,
6 they tried to maintain it at a somewhat higher level,
7 and ultimately they exit.

8 This market is declining through this period, it is
9 getting smaller and smaller through that period, so
10 there are other dynamics which may make it hard to
11 sustain a presence in that market, but having a very low
12 regulated price probably does not help.

13 MR RIDYARD: Mr Parker, do you have a comment on that
14 particular point? Does this -- obviously the claim is
15 that shows that the commitments price was too low to
16 sustain competition, so ...

17 MR PARKER: I mean, the Post Office clearly took this -- the
18 choice to match and slightly undercut for about a year
19 and a half. It could be that -- there are different
20 interpretations I think as to whether it was
21 unsustainable. One interpretation is that is too low
22 a price. Another interpretation is they could make
23 a lot more money, given that SFV customers are not very
24 switchy, by putting up the price, not losing many
25 customers, back to the sorts of levels they were they

1 getting before.

2 I think ultimately that is a question for the
3 Post Office, but it seems to me it does not prove that
4 the commitments price was a sort of unsustainable price
5 in a world where everything was really competitive. If
6 people have -- SFV customers are generally inert. If
7 you do not think you are going to lose a lot by charging
8 higher prices, then it is not obvious ... the
9 Post Office came down maybe thinking: well, we need to
10 be this level to be competitive. Then they had
11 a conversation and decided: well, maybe we could make
12 more money from our existing customer base if we put
13 the price up by £3 and just make £3 more margin on all
14 those customers, because we are not gaining much, we are
15 losing a lot of money on our existing customer base,
16 there are not many customers to go for anymore, why do
17 we not just get what we can from our existing customer
18 base.

19 MR RIDYARD: Okay, I see there are different ways of looking
20 at the evidence.

21 DR JENKINS: But perhaps if we go to {E/17/285}, I think
22 there, just for people to have a look at, is -- what
23 happened there was that the Post Office actually exited
24 the market and sold out to Shell, and Shell ceased to
25 market to Standalone Fixed Voice customers. So I think

1 you can make a bit stronger inference about that than
2 just saying: well, they decided these are inert
3 customers, we might as well just put the price up. In
4 fact, it was more that at those levels it is -- you do
5 not even want to continue to market to those customers
6 at that point.

7 MR RIDYARD: Okay. Yes, I understand.

8 The only other aspect of this, which I skipped over,
9 I think we probably covered this yesterday actually, was
10 whether the ASA ruling in 2016 affected things very
11 much. On the face of it, I think we concluded yesterday
12 it does not seem to have changed very much. You might
13 have expected -- if they were being misleading before
14 the ASA ruling, then the misleading thing to do would be
15 to have a high Line Rental price and then a very low
16 incremental price for the broadband, and therefore you
17 might see that in some of these figures. But I think,
18 just eyeballing the figures, we did not really see
19 a massive change in behaviour in 2016. Would that be
20 a fair, Mr Parker, description of what we see?

21 MR PARKER: Yes, so that is going to affect your bundle
22 pricing and sort of incremental -- think about that as
23 a Standard Line Rental increment in the price of
24 broadband.

25 I wonder whether the reason you do not see anything

1 is because, left to their own devices, everyone would
2 want to have this kind of Standard Line Rental price
3 hidden in the footnote and the kind of low headline
4 price, and then everyone has to now shift, because of
5 the ASA ruling, to offering the bundle price, and
6 actually previously you were competing all on the same
7 basis, so you had the low headline with the footnote,
8 and now you are all competing on the Dual Play, but
9 no one in that original equilibrium had any incentive to
10 kind of individually shift to saying: here is your
11 Dual Play price, it is £25. Everyone wanted to say: it
12 is £5 subject to adding £20 Standard Line Rental. But
13 that ended up being a competitive solution, you were
14 charging the competitive incremental price so you had
15 the same competitive bundle price overall.

16 Then all the ASA ruling does is sort of shift the
17 labelling of that, and saying, well, now you have got to
18 charge -- you can only advertise one price, and so you
19 end up in the same place, because everyone is having to
20 operate on the same basis.

21 So possibly a slightly lengthy way of saying: yes,
22 I do not think much changed in the bundles world.

23 MR RIDYARD: Okay. Is there anything else you want --

24 I think that covers the price leadership point. I am
25 happy we have had a good discussion there.

1 Then we have some questions on -- just a sort of
2 catch-all thing about competitive constraints on BT,
3 many of which I think we have covered in the SSNIP test
4 context, but I would like to give you an opportunity to
5 say whether you think there are any additional points
6 that kind of relate to the dominance assessment on this.
7 First of all, you know, the observed evidence on
8 switching to bundles, which -- the facts of which
9 I think we are now pretty familiar with.

10 Is that telling us something about dominance that we
11 have not already covered in the discussion on market
12 definition?

13 Dr Jenkins.

14 DR JENKINS: So perhaps starting not necessarily with the
15 switching, but just the general question about what can
16 we infer from the pricing. So maybe starting with
17 calls, and just reiterating that the price that BT set
18 for its call packages and call pricing was the same for
19 all Voice customers, regardless of whether they were
20 Standalone Fixed Voice customers or customers in
21 a bundle. I think we did touch on this yesterday, but
22 reiterating that point that, therefore, I do not think
23 it can make sense to say, "oh, they priced the bundle
24 price to already adapt for that", because if you think
25 about it, you have a bundle customer, or you have two

1 bundle customers, one of them has a desire to make lots
2 of calls and one of them has a desire not to make many
3 calls, so, in a sense, the rational thing to do is to
4 set your call packages thinking about what people --
5 working for whatever call preferences people might have,
6 and you cannot -- that is not going to be sufficiently
7 differentiated across bundle customers or
8 Standalone Fixed Voice for you to be able to adapt that
9 in your bundle pricing.

10 The only way you could do that is to actually have
11 different bundle prices depending on whether someone was
12 a high call user or a low call user in that way.

13 So I think the competitive constraint on the call
14 packages comes from all Voice customers and will be part
15 of the selection choice that a customer who is going to
16 buy their Voice services in a bundle. Then that is
17 constraining BT's ability to set its calls prices from
18 all Voice not just Standalone Fixed Voice.

19 MR RIDYARD: Okay, Mr Parker.

20 MR PARKER: I do not think I would agree with that. I think
21 if you think the bundle is the first thing you buy and
22 the calls kind of would follow from that, I think to get
23 an advantage in the bundle market you would take account
24 of the fact that they are going to take some calls
25 package. What is the expected value of the calls

1 package that they take? I would be prepared to discount
2 some of the up-front bundle in order to get more
3 customers in to the bundle in order that -- in the
4 knowledge that I will then benefit from some calls
5 prices thereafter, and to the extent that depends on how
6 much kind of additional profit you think there is in
7 calls. So I am not completely sure that I would agree
8 with Dr Jenkins on that point.

9 MR RIDYARD: I am not quite clear what your point of
10 disagreement is.

11 MR PARKER: I think the point of disagreement would be, is
12 there something about calls prices being set across all
13 customers that tells you that there is a constraint from
14 the calls prices set to bundle customers as opposed to
15 the calls prices set to SFV customers? I think you can
16 do what you like with the incremental broadband price or
17 deal with the bundle price overall and that could
18 account -- could take account of that for one
19 customer --

20 MR RIDYARD: This is the point --

21 MR PARKER: It is a version of the Line Rental point.

22 MR RIDYARD: Yes, this is the point I think that you made
23 yesterday: that you could always adjust the increment in
24 a way that would allow --

25 MR PARKER: Exactly, and then I would go back to the ARPMs

1 analysis and clearly if you believe that data --

2 MR RIDYARD: There is nothing all that clear about the ARPMs
3 analysis, but, yes, if you believe the data, yes, yes,
4 I take your point, yes. Okay.

5 DR JENKINS: I think what that is saying is you would price
6 call packages high because you are then going to reap
7 the benefit for the fixed Voice customers and then you
8 are going to discount even further the incremental
9 broadband or TV or whatever other element. But if you
10 charge too much for the call price and you have two
11 bundle customers, one who is going to take a small
12 package and one who is going to take a large package,
13 and if you have done it on the average, what you are
14 going to end up doing is you are never going to actually
15 be able to compete for the customers on the large
16 package because if your rivals are pricing that
17 competitively, which is the understanding in bundles,
18 you have priced too high for the large package and you
19 have only discounted the bundle price by the average
20 amount, or else you discount the large package and then
21 your overall -- you are pricing too low compared to the
22 average.

23 So I think with a single bundle price and multiple
24 call packages and multiple call choices it is very hard
25 to actually do that, to factor that in, and I think much

1 more likely if you concentrate on the way that prices
2 were structured, if you allow your Voice prices to be
3 competitive, the competitive constraint of the 80% of
4 the market that is taking Voice services in a bundle and
5 anything else that is going on will be captured through
6 the Line Rental price.

7 MR RIDYARD: I see that. Then maybe Mr Parker, maybe this
8 is a mischaracterisation of what you are saying, but if
9 you are saying that the real prize here was to keep the
10 profits high on the SFV customers and then you would
11 find a way of compensating or neutralising the impact on
12 the bundle customers as a sort of backfill, do you not
13 think that you would see more evidence of that in --
14 either BT was being very, very sort of diligent in not
15 showing that but would you not see more evidence of that
16 in the sort of considerations that went into the Voice
17 pricing decisions? It does seem a bit imbalanced to be
18 setting Voice prices for the 20% rather than the 80%,
19 even though you have the ability to do the backfilling
20 if you want to.

21 MR PARKER: So I think two things about that. One, if you
22 believe the ARPMS chart it looks like they were making
23 pretty healthy margins on calls across the board
24 compared to rivals which appears to be a proxy for
25 a competitive price. You think rivals are competing on

1 calls in the manner you suggest, but I know there is
2 debate about that data but put that to one side.

3 MR RIDYARD: Yes.

4 MR PARKER: I think it goes a bit back to the discussion
5 about the Line Rental. In the documents that I have
6 seen, and I am not saying I have seen all of them and
7 so on, but you see a sort of discussion about "we will
8 put the Line Rental price up" and then there is
9 a discussion about, "we need to kind of be competitive
10 in bundles and we might need to give away promotional
11 prices and so on in bundles", but these two things are
12 sort of not -- they are not directly connected up in the
13 documents but it does seem to be what is going on if you
14 look at the incremental broadband data that Dr Jenkins
15 has put together. So I think it is a variant of that
16 discussion but in this case with the added overlay of
17 the ARPMS data, if you like, calls prices were quite
18 healthy relative to rivals.

19 MR RIDYARD: If they were healthy then that is suggesting
20 that BT has market power in the bundles market, is it
21 not?

22 MR PARKER: Well, I think if you look at Dr Jenkins'
23 figure -- I am looking for the Dual Play bundles price.

24 MR RIDYARD: The figure for the incremental price for
25 bundles.

1 MR PARKER: It is Figure 5.5.

2 MR RIDYARD: Yes, let us look at that.

3 MR PARKER: Which is {E/17/134} of Dr Jenkins' first report.

4 MR RIDYARD: Yes.

5 MR PARKER: People who have similar levels of Line Rental
6 which we have just seen. Maybe other rivals have
7 slightly lower levels of Line Rental, a couple of pounds
8 or so. Then there is a gap between the incremental
9 prices being charged by Sky and TalkTalk and BT. It is
10 not obvious to me that there is a kind of big quality
11 difference in BT Broadband versus others, so it is
12 suggesting that for such customers there might be some
13 market power that BT has in standard broadband. I think
14 you do not see the same patterns in the sort of faster
15 broadband products.

16 I am not really drawing anything much from that
17 observation. It is the general view that the bundles
18 market is competitive. This is suggesting that this
19 part of it might not be as competitive as all that.

20 MR RIDYARD: I can see that is one interpretation of this.

21 Another one would be to say this is the market where
22 both sides agree things are competitive but even in
23 a competitive market you can get things which are -- you
24 can get someone with a big price premium over the other.
25 I mean, in a way, you could say this comes back to the

1 thorny question of 'what is workable competition?' How
2 perfect do we expect competition to be without wanting
3 to do something about it in terms of competition law
4 intervention.

5 MR PARKER: I think that goes to some of the questions we
6 will deal with in limb 1.

7 MR RIDYARD: Okay. Dr Jenkins do you want to comment on
8 that?

9 DR JENKINS: Yes, so I think this is where, dare I say the
10 word fallacy, can be of looking at a single chart and
11 not thinking: okay, what is going on at this time?
12 Obviously BT is losing market share through this period,
13 right, and then you say, "well, why did it not just
14 lower its price it is so obvious what it should
15 do: lower its price". But then you go, "they are
16 seeking to compete in this market and seeking to invest
17 in new services and so they are balancing the challenge
18 of falling revenues in calls, increased costs of serving
19 these customers and having attractive enough services
20 such that they will select BT as their broadband
21 provider".

22 So it has sort of been agreed that BT is being
23 disciplined by the market through this period despite
24 the fact that at times it is charging higher prices
25 which may be because it still has brand premium. There

1 are these other aspects.

2 THE CHAIRMAN: Are you talking about bundles now?

3 DR JENKINS: This is in the bundles market but in the sense
4 that they are competing for Voice customers, however
5 sold, yes. So yes, this is their bundle pricing but
6 what is happening is that people who have been taking
7 Voice on a standalone basis either without broadband or
8 with the broadband provided by someone else and those
9 customers are changing their behaviour being attracted
10 to bundle either with Sky or TalkTalk or with BT against
11 the backdrop even of these types of price differentials.

12 MR RIDYARD: Yes. There is quite a bit to chew on there,
13 yes.

14 We have not talked about the Home Phone Saver and
15 the other sort of initiatives that BT took, the various
16 so-called customer gives. Do they play into this
17 assessment of dominance? Does that yield any
18 information about the assessment of dominance, the fact
19 that those things were happening? Maybe Mr Parker would
20 like to go first.

21 MR PARKER: So I do not think that the existence of some
22 competitive behaviour or constraint is sufficient to say
23 there can be no dominance. Dominance is about the
24 ability to act appreciably independently of competitors.
25 It does not mean you have to act in a total vacuum.

1 Having said that, I think the impression you get from
2 the documents is that HPS may be partly driven by
3 Post Office at the time when Post Office prices were
4 substantially lower than BT's by 25% plus I think and it
5 was also driven by, I think, the discussions that Ofcom
6 was starting to have about the cost of living crisis,
7 the concerns about Standard Line Rental prices
8 increasing and there was a feeling that there was a need
9 to provide gives of which HPS was one but HPS I think
10 specifically, its introduction did not seem to be
11 actively marketed to customers. It was something that
12 the call centre might use as and when someone rang up
13 saying they might leave and then the call centre would
14 start by giving them a deal. There were some
15 constraints on that. Some people took it up, so I am
16 not saying it is not the existence of some competition
17 but I am not sure it is sufficient to overturn the
18 conclusion around BT being dominant.

19 Similarly, on customer gives. The cost of these
20 gives looked largely quite small, sort of sub-millions,
21 sort of hundreds of thousands. Often those gives seemed
22 to be products that other rivals were already offering
23 or they offered shortly after and they seemed to be more
24 driven by achieving a good story for the media rather
25 than necessarily because it was a massive kind of

1 competitive strategic move, if you like, relative to the
2 additional revenues they were expecting to make from
3 their increase in the Line Rental.

4 I am sure we will come back to this. I am not sure
5 it makes a massive -- for me does not make a difference
6 to the overall conclusion around dominance.

7 MR RIDYARD: Okay. Dr Jenkins did you have a ...

8 DR JENKINS: Yes. I think what I would say, as we were just
9 discussing, 80% of the market is, in the early part of
10 the period, Voice customers of BT with Voice sold in
11 a bundle and so BT's long-term strategy is about how do
12 they not lose those customers, how do they attract more
13 customers and how do they encourage those customers who
14 are still taking Voice only with them to be part of that
15 grouping, because that is the direction of the main
16 competition in the market.

17 Now, they still have customers who, at that given
18 point in time are only taking the Voice service from
19 them. The way I think about Home Phone Saver is that
20 recognition that they cannot just ignore those
21 customers, right, even though they are structuring their
22 prices in line with the prevailing competitive dynamics
23 around seeking to attract people to take multiple
24 services with you. But they cannot just ignore these
25 customers because they are facing head-to-head

1 competition for them from the Post Office on the
2 Standalone Fixed Voice element and also from other
3 rivals as well for the move to bundles.

4 So they do look to respond to that by thinking of
5 a product and introducing a product that is designed to
6 meet that competitive constraint head on.

7 So I do see that that is a meaningful sign of
8 reaction by BT. I mean, in a world where they were
9 dominant and faced no threat they would have no need to
10 introduce that product. I know from the factually --
11 how actively did they do that? I think there were quite
12 a proportion of the Standalone Fixed Voice customers who
13 took up Home Phone Saver up to the point at which the
14 commitments came into place when obviously a lot of them
15 took up the commitments offer rather than Home Phone
16 Saver, though a number of them kept Home Phone Saver
17 because of, I presume, the added bundles and other
18 services that they considered attractive.

19 MR RIDYARD: I suppose with any sort of retention tool like
20 this there are two ways of looking at it. One is to say
21 it shows they were not dismissive, they were keen to do
22 things for these customers. The other one is the very
23 selectivity of it is: we will give money away when we
24 have to but where we think we can get away with it we
25 will make sure we do not give money away. Those are the

1 two characterisations of that kind of tool.

2 DR JENKINS: Yes, I think if you think of a long-term
3 strategy what they are really interested in doing is
4 getting that customer to take a bundle with them. So in
5 doing it this way you have the opportunity to seek to
6 encourage someone to upsell when they call you and if
7 you are not going to do that then you offer them
8 a retention product. So it does give more flexibility
9 in pushing towards the overarching competitive dynamics
10 of the market. That is an economist speaking.

11 MR RIDYARD: Okay. That is probably a good point to stop
12 then for ...

13 THE CHAIRMAN: Very good, thank you. So we will resume at
14 2 o'clock, please.

15 (1.00 pm)

16 (Luncheon Adjournment)

17 (2.00 pm)

18 MR RIDYARD: Right, we are on to the subject of barriers to
19 entry and expansion.

20 The first question I would like to ask, perhaps
21 Dr Jenkins could go first, will be: in a market, does
22 the absence of entry or the inability of rivals to gain
23 an increased market share, is that a factor that in your
24 view gives you reliable information about dominance or
25 the ability for the incumbent to rise prices above the

1 competitive level?

2 DR JENKINS: You have to understand -- explore what the
3 reason is for why rivals are struggling to have an
4 impact in a market. So just on its face, you cannot
5 infer directly from that that prices are not excessive
6 -- but you would need to understand what is the
7 plausible explanation for why rivals' costs or ability
8 to engage -- you know, what the barrier to entry,
9 barrier to expansion or cost disadvantage that a rival
10 faces, such that that would explain why the dominant
11 firm has an advantage over the rival.

12 MR RIDYARD: In that discussion, what do you mean by an
13 entry barrier?

14 DR JENKINS: So I think if we are talking at a general
15 level, right, so that -- I mean, you know, it could be
16 they do not have access to a distribution channel or
17 something like that, so they cannot enter because
18 they -- the dominant firm has taken all the best spots
19 on the harbour front for selling holiday trips or
20 something, you know, at a beach resort or something.

21 So it would depend on the specific situation as to
22 what are the necessary elements to being able to compete
23 in that market, and then whether or not rivals actually
24 have access to all the necessary elements to be able to
25 compete effectively.

1 MR RIDYARD: Mr Parker.

2 MR PARKER: So I think I would put this in the context of,
3 if you like, the indirect version of assessing
4 dominance. So start from market shares, look at those,
5 if they are very high you would need to have strong kind
6 of evidence of countervailing factors, so very low
7 barriers to entry or expansion, I think.

8 Absence of entry, I think everyone was in, so I am
9 not sure that new entry is necessarily needed, so
10 I think it is more interesting to think about expansion.
11 I think it suggests a lack of ability to kind of gain
12 customers rapidly, because the shares are going up quite
13 slowly, of rivals going up a bit, would suggest the
14 absence of barrier expansion is not sufficient then to
15 overturn a kind of presumption of dominance.

16 In terms of what those might be, which I think is
17 your second question, or perhaps ... I would think there
18 is an element of customer inertia and customer
19 acquisition costs in a market where BT has essentially
20 started with all the customers. So BT has not had to
21 incur the costs initially of acquiring what sort of --
22 what would originally have been SFV customers. From the
23 ten-year data, we know that the bulk of the people at
24 the end were there at the beginning, and the bulk of the
25 people that were there at the beginning had been there

1 for a long time, so BT has not had to incur that sort of
2 cost, a sort of customer acquisition cost to gain those
3 customers.

4 Rivals coming into an SFV market do have to do so,
5 and there is some evidence in the Ofcom documents which
6 I refer to of rivals saying: it costs us a lot of money
7 to try and get these customers to move, they are not
8 very switchy within the SFV services market. So the
9 rivals, to acquire customers in that market, need to
10 incur costs that BT is not incurring in the same way.

11 But in a world where everyone is incurring the same,
12 you know, customer acquisition costs, that is when you
13 are just coming to the marketing line, and that would go
14 into your LRIC analysis as one of the costs.

15 MR RIDYARD: So it is the asymmetry between the incumbent
16 and the challengers or the smaller rivals, it is the
17 asymmetry in their costs which is the decisive factor in
18 assessing entry barriers?

19 MR PARKER: Yes, for me, that is what I would say.

20 MR RIDYARD: Dr Jenkins.

21 DR JENKINS: So if we turn now to the situation we have here
22 and what can we infer from what we observe. So
23 I understand we are in the thought experiment which says
24 there is a narrow market for SFV customers, and what
25 we -- so there is almost a paradox here, because what we

1 observe is the number of those customers is falling
2 quite dramatically through the period, and yet, as
3 Mr Parker has described it, BT's share is quite constant
4 through this period, as are rivals. So it is like these
5 people are vanishing into thin air, right. No one's
6 share is changing and yet the size of the market has
7 fallen through this period.

8 The way you reconcile that is that most of those
9 customers are moving from being a Standalone Fixed Voice
10 customer to being a Voice customer in a bundle, right,
11 so there can be a paradox there when you are thinking
12 about it.

13 So when we talk about rivals' ability to enter, to
14 expand, to attract customers, what is going on is those
15 rivals are doing that, but what they are predominantly
16 doing is moving the customers from one product -- one
17 means of buying fixed Voice to a different one.

18 So if they are thinking about their business
19 strategy and their desire to have a relationship,
20 a stronger relationship with these customers, they are
21 actually moving them out of the defined market into
22 a different product market.

23 So is that -- now, possibly the presence of the
24 higher prices in the SFV segment is one of the things
25 that enables -- it is driving competition. That is part

1 of the story of the bundle -- the higher bundle pricing.

2 MR RIDYARD: So higher prices in the SFV segment?

3 DR JENKINS: A structure of pricing such that the
4 incremental price for customers in order to take
5 multiple services from you is then a push back to
6 encourage people to move you -- move into the other
7 product.

8 MR RIDYARD: I am sorry, I did not follow that. Try me
9 again.

10 DR JENKINS: So -- because I think the question you have
11 asked of us is how does this tell you something about
12 pricing of the SFV product itself.

13 MR RIDYARD: Yes.

14 DR JENKINS: So you have this fact that we are in this
15 thought experiment where it is a separate market, it has
16 a price, that price arguably has been going up. We see
17 all these people moving. What are rivals doing in that
18 situation? The rivals are offering a similar price for
19 the fixed product but an incrementally smaller price for
20 additional products.

21 Now, in the case of Split Purchase Customers, it is
22 not that they are adding a product, they are just
23 consolidating their demand, so the rivals are actually
24 quite possibly taking a customer they currently have and
25 just taking the fixed Voice service away from BT and

1 bringing it into their product as a bundle.

2 MR RIDYARD: In that case, they are disappearing as SFV
3 customers and not showing up in the market share
4 numbers.

5 DR JENKINS: They are not showing up in the market share of
6 the rival because they have moved to this other product.
7 That is why you can say: oh, look, BT's market share is
8 really stable. What is going on here?

9 Actually if we pull up -- I think it is table 14 of
10 Mr Parker's third report, {IR-E/3/113}, I think. So
11 that figure that we cannot see ...

12 MR PARKER: It is one of the best ones.

13 DR JENKINS: {IR-E/3/113}.

14 This is Mr Parker's assessment for the Voice only
15 customers. If we can focus in on the -- thank you.
16 Maybe a little bit more. We want to see those little
17 numbers at the bottom. Is that it?

18 So here I think -- I will start talking and hope --
19 yes, that is a bit bigger. So I think this was actually
20 a question we touched on this morning, was what was
21 happening to the Post Office's share during this period.
22 You actually see that the Post Office's share has been
23 increasing through that period. Now, given we are only
24 looking at Voice only SFV here, BT does have a very
25 significant market share. But if you remember, this is

1 at a point in time where the Post Office is raising its
2 price. BT is losing share predominantly to the
3 Post Office. So there is some switching within SFV
4 Voice only going on here, but for the other market
5 participants it is relatively flat, and the other market
6 participants are the ones who are predominantly
7 targeting these customers to move to bundle products.

8 Now, it is a little hard to tell just straight from
9 these percentage numbers, and I did not have a chance to
10 go back to look at the underlying spreadsheet, whether
11 what is going on here is that BT is losing more
12 customers than anyone else, and that is why its share is
13 falling, and in a sense, that Post Office is actually
14 just retaining its customers, not adding to it, but the
15 total market is falling and their number is staying the
16 same and BT is losing, or if the Post Office is gaining
17 customers as well as the overall market declining. But
18 I think when we you looking at this very narrow segment,
19 you have to be really cognisant of the fact that the
20 market itself is falling really dramatically through
21 this period.

22 THE CHAIRMAN: Why does that affect this analysis if we are
23 just talking about a narrow definition of market?

24 I just wanted to put a supplemental point in here.
25 I am not going to refer to the actual percentages, but

1 in the period for when the Post Office was involved, as
2 you say, the other ones are more or less the same. Each
3 year, if you add the Post Office percentage to the BT
4 percentage for each of those years it is about the same.
5 So they are sort of matching each other all the way
6 through.

7 But what I wanted to ask is why does the fact that
8 the overall size of this narrowly defined market
9 decreases have anything to do with the impact of market
10 share so far as dominance is concerned?

11 DR JENKINS: I think what it is showing is that the
12 customers who were there in 2013/2014 -- so when
13 presented in a picture like this, it seems to suggest
14 that those customers, they have no choice, they are with
15 BT, BT is the big player, they continue to be with BT.
16 Nothing really happens, right, that type of a picture.

17 But what is actually happening is a big chunk of the
18 customers that are there as Voice only customers in
19 2013/2014 are actually responding to the competitive
20 offers from the rivals in this market, so TalkTalk,
21 Virgin Media, Sky and BT itself, and their competitive
22 activity is to actually change the product that they buy
23 and move out of this market that we are seeing here and
24 move into another market as we defined it now. So that
25 is a constraint on your behaviour in that market.

1 If your customers are constantly voting with their
2 feet to go and do something different, then the fact
3 that you may have -- you have a large market, a large
4 share of an ever declining market, can still be a sign
5 that you are constrained in what you can do in that
6 market as so defined, because it is not really meeting
7 the underlying needs of those customers because they are
8 basically shifting to something else.

9 THE CHAIRMAN: Thank you.

10 MR RIDYARD: But in making that argument, you are really
11 just saying it is wrong to look at SFV as a market, are
12 you not? Because if you -- that is not a bad thing,
13 because I know -- I understand that is the central part
14 of your case. But if you really believed SFV was
15 a market, then you would be more concerned about the
16 sustained -- the sustained high share of the leading
17 player in that market if it was a good, robustly SSNIP
18 defined market.

19 DR JENKINS: I guess that is -- yes, it is an odd
20 hypothetical in the sense that however we have defined
21 the market, the fact is that a lot of these customers
22 were leaving, right.

23 MR RIDYARD: Yes.

24 DR JENKINS: So if we have decided that leaving is not
25 relevant at the market definition stage, we cannot

1 pretend it did not happen when we look at these market
2 shares.

3 MR RIDYARD: No, I understand the --

4 DR JENKINS: So that is the sense in which it is still
5 relevant at this point even if we have not given it
6 weight at the market definition stage.

7 MR RIDYARD: I will give Mr Parker a chance to comment in
8 a second, but how does all this match with -- there is
9 some evidence from competitors who said that they did
10 find the costs of acquisition in the SFV market or SFV
11 business were too high and that is what was putting them
12 off. Maybe the Post Office is in a different position
13 from the others. So they were not saying the cost of
14 acquiring bundle customers was too high, because that is
15 what they are in the business of doing, and obviously
16 they were doing it reasonably -- well, they were doing
17 it. But they did highlight the fact that the cost of
18 acquiring SFV customers was prohibitively high or
19 higher, I cannot remember the exact phrases they used,
20 but I think it was quite a consistent story there.

21 So how do you account for them saying that? Under
22 your interpretation they would not have been saying that
23 comment, would they? They would just have been saying:
24 there is only -- there is just customers, and we get
25 customers, and we would like to have more, but we are

1 managing to do it. So they would not be drawing
2 attention to that, would they?

3 DR JENKINS: I think that, as I say, possibly, and one
4 should go back and refresh one's memory on the exact
5 factual evidence on that. I presume that it is likely
6 to be Voice only customers that they are talking about
7 there --

8 MR RIDYARD: Definitely, yes. That is my point, though,
9 that they highlighted --

10 DR JENKINS: Yes, I was just clarifying it is for the
11 Voice only customers. Then they say there are some
12 customer acquisition costs, and I am sure that is
13 correct, that that is what the market participants are
14 saying, that it is hard to know and target a Voice only
15 customer and get them to move for a Voice only service.

16 However, as you say, they were targeting customers
17 generally, which would include Voice only customers, to
18 move, to take on bundles, and I think that is not
19 surprising in that the ARPU -- the revenue they will
20 yield from those customers when they come to them will
21 be much higher for -- once they are taking a bundle.
22 They still are going to have some acquisition costs.
23 You know, in a sense it is like: we are going to
24 communicate with the customer and we are going to offer
25 them our portfolio.

1 Now, I do not know, maybe it is the case they
2 just -- there was some way and they did not target, they
3 were customers they did not target, but otherwise it
4 would seem more like they are targeting the whole
5 market, which would include Voice only customers, but
6 what they are not doing is specifically making offers
7 that are very bespoke for those customers.

8 So the upshot of that is it does seem to me hard to
9 think that the customer acquisition costs are so high
10 that if there were very, very high margins on these
11 customers, they would not have been attractive to the
12 rivals.

13 I think it goes back to the first question which
14 is: does it tell us anything about the likelihood of
15 excessive pricing? I think if the only barrier that you
16 find is an inability to target these customers, then
17 that might make you think there was not such a massive
18 margin on them, because otherwise they have everything
19 in place and it seems it would be relatively easy.

20 However, they have said: oh, it is very difficult to do
21 this.

22 MR RIDYARD: Thanks.

23 Mr Parker.

24 MR PARKER: We might want to turn to page 127 of my third
25 report, so the same document, please. {IR-E/3/127}.

1 If we can zoom in on paragraph 5.57(a), which is the
2 TalkTalk quote. It just shows you some of the comments
3 that were being made. So the second part of that:

4 "High customer acquisition costs driven by customer
5 inertia, undesirable additional business complexity, and
6 the declining market size mean there is no incentive for
7 us to re-enter the market. It would not be profitable
8 to do so even facing BT's current inflated price levels.
9 We consider that this position is likely to be similar
10 for other potential entrants."

11 There are similar quotes.

12 If we go over the page, to page 128, and paragraph
13 5.57(d) at the top, we have the Post Office there
14 saying:

15 "'We have ... worked on the following assumptions;
16 The market is inert; The demographic is elderly; The
17 market is in decline at approx 10% per annum' and 'We
18 have attempted to market to current BT customers with
19 two campaigns in the last 20 months ... Unfortunately
20 neither campaign was successful'."

21 So I think there is a quote from SSE, a quote from
22 Sky --

23 MR RIDYARD: Sorry, when was the Post Office saying that?

24 In 2017?

25 MR PARKER: In paragraph 5.57(d). It is the responses to

1 the section 135 request, which I must admit I cannot
2 remember, but they would probably have been somewhere in
3 2016 to kind of feed into the process, so we are then
4 talking a couple of years before that, so it seems to me
5 there is evidence there that rivals think they face
6 customer acquisition costs. I think there is no dispute
7 that the size of the market was declining. I think the
8 share changes that you see are sort of more
9 predominantly the result of everyone losing customers
10 because over ...

11 Perhaps if we go back to {IR-E/3/117}. No, sorry,
12 I have got the wrong ... {IR-E/3/113}.

13 So we have got there a small decline in BT's share.
14 Over that period, I am just looking at Figure 4.1 of
15 Dr Jenkins' first report, but the number of SFV
16 customers -- we do not need to switch to it, I do not
17 think, but you will recall this sort of decline in the
18 number of customers over that period, and we are talking
19 about decline from circa 5 million to circa 2.5 million,
20 so BT is losing loads of customers. It must be the case
21 for these shares to make sense that everyone else is
22 also losing lots of customers, they are just losing them
23 at slightly different rates, and the Post Office is not
24 losing them quite so quickly as BT.

25 MR RIDYARD: That is consistent, I guess, with the

1 Post Office being focused on the Voice only -- the
2 customers --

3 MR PARKER: So --

4 MR RIDYARD: -- more Voice only, whereas everyone else is
5 more in --

6 MR PARKER: I mean, everyone else --

7 MR RIDYARD: -- consumers switching to bundles.

8 MR PARKER: Yes, I think that is probably right. Everyone
9 else is sort of maintaining roughly the same share as
10 they always had, so they are losing customers at the
11 same rate as the average of the rest of the market,
12 I guess.

13 So I am not saying there is no switching between SFV
14 providers, but I would think the vast majority of what
15 is going on is there are people moving away from SFV
16 services as a whole. We have discussed reasons
17 yesterday, different interpretations of why that might
18 be.

19 I think my only comment, other than that in relation
20 to what Dr Jenkins was saying, is it seems those points
21 are more relevant to market definition. I think we now
22 say: well, what is the position for dominance? I think
23 the position for dominance is BT has maintained a high
24 share. You will see for SPCs it is higher than that
25 over the period. I think that is telling you something.

1 High share, some barriers to it, expansion within that
2 market, so an absence of countervailing factors.

3 Then I would say the pricing evidence is also pretty
4 clear and that, when we get to it, the limb 1 evidence
5 will also show a similar picture.

6 So I would say I think it is supportive of a finding
7 of dominance.

8 THE CHAIRMAN: So if there was a group of customers who were
9 identifiable as Voice only customers, then it could be
10 more -- it could be more expensive to market to them and
11 acquire them than it is the other customers who are
12 actual or potential switchers to bundles, and therefore
13 it would be -- it is, in principle, possible that the
14 group that I have just hypothetically identified is
15 unreachable by the competitors even though the others
16 are reachable.

17 That is -- I suppose the counter to that would be
18 you have got to look at it dynamically, and the fact
19 that the first group I described was disappearing over
20 time and morphing into the second group, it sort of
21 makes that a slightly -- obviously it is a static
22 assessment, and it is a static assessment that does
23 not -- I am just rehearsing the arguments here, I am not
24 looking for conclusions.

25 MR PARKER: Yes, I think the distinction for me would be

1 what is happening with pricing. So if you thought:
2 there are all these customers switching away, and we
3 want to keep hold of them and we are going to keep our
4 prices low in order to do that. That is one world.
5 There are customers switching away. That leaves a rump
6 of customers. Whatever that rump is, that rump is
7 changing over time, but that rump of customers is such
8 that we can continue to put prices up to the rump, and
9 we, BT, because we started with the lion's share of
10 those customers, there is more incentive for us to keep
11 doing that, and actually, as other people lose interest,
12 because if you have got 4% of a market that is
13 shrinking, by the end of the period we are talking about
14 a few hundred thousand customers, for example, so if you
15 have got 4% of that, which BT at that point has -- on
16 the SPC side has -- rivals would be doing well to have
17 1% individually.

18 So we are talking about they might have a few --
19 a small number of thousands of customers, and
20 understandably that is probably not a business focus
21 when you are talking about having hundreds of thousands
22 or millions of customers elsewhere. So I can see at
23 that level there might be a sort of minimum level at
24 which you just -- at which it is not worth a candle and
25 I think that might be what is going on.

1 MR RIDYARD: Yes.

2 Can I just broaden it out to a more general
3 discussion about the notion of entry barriers, because
4 I am just thinking ... yes, the general concept of entry
5 barriers from an economic point of view.

6 What we are talking about here, if you take it to an
7 abstract level, is circumstances in which there is an
8 asymmetry between the incumbent and the entrant. So the
9 incumbent, just has inherited customers, you know, buy
10 a buckle, for whatever reason, and the challengers have
11 to buy them to get into the market, and the sort of
12 definitional question is: do you regard that asymmetry
13 as an entry barrier? In other words, something which
14 allows the incumbent to charge prices above the
15 competitive level? The only way you can answer that
16 question is by being clear what you think the
17 competitive level is.

18 Let me just put two views of the world on that to
19 you. One would be to say: well, there are lots of
20 markets where there are inframarginal suppliers and
21 marginal suppliers, and the inframarginal ones, the
22 incumbents if you like, are lucky or by historical
23 reasons have a cost advantage over the marginal ones,
24 but the market price is set by the marginal players.

25 So what are the circumstances in which you would say

1 because those inframarginals -- the incumbents or the
2 inframarginals are allowed to benefit from this lower
3 cost, and therefore make profits in excess of cost, to
4 what extent would you regard those as being excessive
5 profits, and when would you regard that as being just
6 the way competition looks in this market: inframarginals
7 make more money than marginals?

8 MR PARKER: I think it depends on the source of the cost
9 advantage. So I distinguish broadly between two
10 situations, one where the cost advantage has been
11 granted by, if you like, government fiat. So BT was
12 a statutory monopolist in its former incarnation. It
13 had all the customers, it does not have to engage in
14 those customer acquisition costs. Rivals do. That is
15 world one.

16 World two is someone has innovated to create a new
17 product that, having then created that, it has a cost
18 advantage or a quality advantage or something relative
19 to rivals, but it has essentially generated that through
20 a process of competition, and in that world I think you
21 would want to look at it a bit differently, because to
22 rivals, then you would say: you should also engage in
23 competition or innovation in order to do what the person
24 who looks like an incumbent did, they have created their
25 cost advantage themselves. You should now go away and

1 do the same thing.

2 So I think there is a distinction for me between how
3 did the firm with the very high share get that high
4 share.

5 MR RIDYARD: Okay, so if -- let me put a hypothetical to you
6 then. So a lot is resting on this distinction
7 potentially, is it not, in terms of competition law, how
8 we respond to it.

9 So if you had a firm that sold a black fizzy drink,
10 for example, which it happened to have invented
11 100 years ago, and it was still selling a black fizzy
12 drink in today's market, and because it did it a long
13 time ago, it had this incumbency advantage over
14 challengers. Would you regard that as being
15 a legitimate excess pricing situation compared to the BT
16 situation which was granted by government fiat?

17 MR PARKER: You are positing that there is excessive
18 pricing.

19 MR RIDYARD: I am positing that this hypothetical supplier
20 of the fizzy drink has advantages, incumbency advantages
21 over the people who are trying to jump into that market
22 and ...

23 MR PARKER: Okay, so if we put aside the fact there is
24 probably an enormous amount of cost of brand
25 establishment that might be going on in a hypothetical

1 but real world situation involving similar sized fizzy
2 drinks -- I do not work for any fizzy drink companies so
3 it is not a client-related comment -- yes, you might
4 want to think about the length of time over which
5 someone has had a -- had the advantage that you
6 identify.

7 I think if there is something so amazing about the
8 product that no one else can copy it or do better over a
9 100-year period, I think you need to start digging into
10 "why not?" What are the reasons why no one else has
11 been able to come up with something like this? That
12 I think should -- that will tell you something about
13 dominance.

14 But I do not think we are in this situation. The
15 situation here is those are sort of intermediate
16 situations which clearly competition authorities and
17 other regulators are sort of wrestling with at the
18 moment in relation to other types of firms which have
19 achieved a strong position as a result initially of
20 innovation, and there is a question of timing. But I do
21 not think we are in that world here, because we do not
22 have the innovations, so ...

23 MR RIDYARD: You are saying you do not know where on the
24 spectrum you draw the line, but you know it would not be
25 here, as it were. You are confident that BT is at one

1 end of this spectrum.

2 MR PARKER: I am confident because of the kind of legacy
3 incumbent issue and the position not being gained
4 through a process of competition. Once you have
5 something that was going through a process of
6 competition, then I think you need to think about that
7 process of competition, is that replicable? You do want
8 to encourage people to innovate and develop new
9 products, so you just cannot I think just say: you have
10 had a high share for a while and that is the end of the
11 story. I think you need to look at the competition, the
12 innovation that is going on. But I think we are
13 stretching some way from the current situation.

14 MR RIDYARD: Yes, but it is still quite interesting to think
15 about where you would draw the line.

16 Dr Jenkins, what do you think on that one?

17 DR JENKINS: Yes, quite a few points to make on that.

18 So I think, as you said, I had the same sort of
19 view, which is you would expect the prices that you
20 observe in the market to be set at the level including
21 the customer acquisition costs for the rivals, right,
22 and then when you get to limb 1 and then you look at the
23 costs of the incumbent, that is when you start to say,
24 "okay, does it look as if there is something -- there is
25 some gap there?", but especially in a market where you

1 have got multiple well-established players.

2 I think in this case that is where the complexity
3 comes about, because the fact is that, as we have
4 already discussed, I just do not think you can hive off
5 and think only about certainly Voice only SFVs here, and
6 I think when Mr Parker was citing Figure 4.1, I am
7 pretty sure that is all SFV, not Voice only, and this is
8 a period of time where we do not have great information
9 on Voice only versus SPCs.

10 But if we could just go back to page {IR-E/3/128} of
11 Mr Parker's third report, the same one, and I think in
12 paragraph 5.58 -- so Mr Parker took us to the commentary
13 by the rivals, and as I said when we were discussing it
14 a little earlier, it is a little bit opaque as to
15 whether they are talking about Voice only or Split
16 Purchase Customers.

17 Mr Parker has concluded that it relates to
18 challenges in identifying and advertising to SFV
19 customers, but I make the point again that I think there
20 is a big difference here between the Voice only
21 customers and the Split Purchase Customers, because the
22 Split Purchase Customers predominantly are already
23 buying a service from one of these rivals. They have
24 split their purchase and they could take the Voice from
25 BT, 97%, and at least 80% of them, if not more, are

1 buying the broadband service or other TV from someone
2 else. So it just seems to me very unlikely that there
3 are challenges in identifying and advertising to those
4 customers.

5 The commentary may well relate to Voice only. So
6 then if we think how does that relate to the case?
7 Well, in 2018 when the commitments come in, those
8 Voice only customers are no longer in the class, so we
9 are talking about the Split Purchase from 2018 onwards
10 who are a set of customers who are already very likely
11 to be being served by these rivals.

12 So the customer acquisition costs are just -- it is
13 not clear that you can extrapolate from this and say
14 that they are likely to be high for this customer, for
15 this customer group throughout the period but
16 particularly from 2018 onwards.

17 MR RIDYARD: But they could be high for the VOCs in the
18 period prior to the commitments.

19 DR JENKINS: Prior to the commitments. But at that point
20 the dynamic is at the SFV level, right, and so no one
21 knows who these customers are. So people are targeting
22 to get people to move to a bundled product through that
23 time.

24 Now, if the position is for SPCs is they have a very
25 strong desire to have separate suppliers and are not

1 amenable to bundling, then that might make that
2 difficult. Almost, by definition, if you currently
3 supply one product, and they prefer separate suppliers
4 you will not be a good option for them. But that is
5 where, if you look at the switching evidence, those
6 customers are predominantly, and in a high proportion,
7 switching to take bundled services. So there are enough
8 of them to be acquired that these rivals are very active
9 in this space.

10 So again, we are in a world where we are saying it
11 is a separate market, but there is a strong constraint
12 coming from these rivals in serving these customers, and
13 the acquisition costs I do not believe will be very
14 high.

15 MR RIDYARD: What about the more general point about the
16 inframarginal and the marginal suppliers? At what
17 point -- do you subscribe to Mr Parker's idea that it
18 depends on the reason why some people are inframarginal?

19 DR JENKINS: Not really, no. In a sense, the horizontal
20 differentiation bit of that, which is like brand or
21 other aspects that people have invested in, which maybe,
22 when you look at it, you say: "well, I do not really
23 understand why would people pay more for this particular
24 product against another; in a taste test or a use test,
25 they cannot actually differentiate, and yet they are

1 willing to pay more money for one brand over another".
2 I do not think you can attribute all of that to
3 excessive pricing in that -- I absolutely do not think
4 that is the case.

5 Here, it is not clear to me that you can assume that
6 BT has been happily doing nothing since the time it was
7 privatised, because it has got this protective -- there
8 is a protective aura around the customers that it has
9 had since --

10 MR RIDYARD: I take that point. But let us say it had done
11 nothing, and all it had done is just -- let us say we
12 had a supplier that had done nothing, and just inherits
13 a bit of good luck, and there was no branding involved,
14 it was a commodity product, but it just happened to have
15 a much lower cost than the challengers in the market.
16 In what circumstance would you regard that as being
17 evidence of an excessive price, or just naturally
18 occurring inframarginality which happens in many
19 competitive markets?

20 DR JENKINS: Yes, I think in general, unless you can
21 identify what is the -- certainly if we get to limb 1
22 and limb 2 -- what is the abuse that is happening there,
23 right, if this is just something that happened, they did
24 not do anything, they just happened to have some cost
25 advantage, which means their margin appears higher than

1 others even though the price is the same, then it is not
2 clear that that gives you grounds for concern in
3 a competition arena.

4 MR RIDYARD: Okay. Right. Thank you.

5 One thing which has not got much of a mention at all
6 in the discussion so far is the work of the behavioural
7 economists. Obviously we will be having a session with
8 them in due course. I just wondered whether there was
9 anything, insofar as you wanted to comment on it, in the
10 insights from the behavioural economists that cause us
11 to change the way in which we look at competition and
12 the notion of entry barriers and dominance in this
13 context.

14 Maybe, Mr Parker, you would like to go first?

15 MR PARKER: Not particularly.

16 MR RIDYARD: Okay.

17 DR JENKINS: So there is a distinction made, in terms of
18 behavioural economists will tell us about humans, not
19 econs. But I think probably for both Mr Parker and
20 myself, the evidence that we have analysed is the
21 outcomes of humans making decisions, and we understand
22 humans are not perfect rational beings.

23 So I do not think there is a big divide between what
24 the behavioural economists have been thinking about and
25 what Mr Parker and I myself have been thinking about.

1 We are trying to understand what is going on in the
2 actual market with the actual choices that people make
3 and the responses that the firms make.

4 So having said that, what did the behavioural
5 economists help us understand? Well, they do dig in, in
6 more detail, into what the evidence can tell us about
7 what people knew, whether they were informed, whether
8 they were engaged on various definitions, and I have to
9 say, I am not an expert on where they ended up. I have
10 reviewed the Joint Statement.

11 MR RIDYARD: I do not want to push you if you do not want to
12 say something, but I give you the opportunity.

13 DR JENKINS: It is more to say that they do show that
14 customers can make -- can decide actively not to change.
15 So you do not require to see a switching behaviour in
16 order to conclude that someone is engaged and making
17 a reasoned choice.

18 I think the evidence on how you deal with
19 satisfaction is a tricky one, and I am not sure -- you
20 will get some more information from the economics
21 literature and the behavioural experts and have some
22 more evidence to consider, but we are still left with
23 the challenge that a person may say they are satisfied
24 with something and we are not always sure that they
25 really know what the alternative might look like.

1 MR RIDYARD: Yes.

2 DR JENKINS: Having said that, there is evidence that a lot
3 of the Class Members, when asked, said they were very
4 satisfied with the product that they had.

5 MR RIDYARD: Yes, and there is the question of how we
6 interpret that.

7 We have sort of obliquely mentioned branding and
8 brand premiums a couple of times. When we were looking
9 at the charts before lunch, there was, Dr Jenkins, your
10 chart which was showing the incremental price of
11 broadband over the Line Rental price over time. It did
12 seem to indicate that BT's was quite a lot higher than
13 the rivals', and I think you made the point, well, the
14 difference was coming down but it was not coming down
15 very fast. It looked as though BT had sustained quite
16 a price premium over the rivals there.

17 One explanation of that might be that is BT's brand
18 premium because it is a trusted -- obviously it is
19 a very trusted brand in the telecoms market, given its
20 history and so forth.

21 If that was the explanation for that price
22 difference, it is interesting that it appears to be
23 sustained in the competitive part of the market, the
24 bundled market. So is there any sort of analogue there
25 in the SFV market that we should be taking into account

1 when thinking about what is an entry barrier and what is
2 simply an advantage that an incumbent might have over
3 a rival?

4 I do not know whether that is a clear question or
5 not, but, Mr Parker, do you want to make anything of it?

6 MR PARKER: I mean, I think it goes back to what the source
7 of this might be. So it could be that the bundle market
8 is competitive overall. But people who are moving away
9 from SFV services to take their first leap into the
10 broadband world through a Dual Play product are also
11 quite likely to stick with their same provider.

12 I know that one of the other charts Dr Jenkins has,
13 I think it shows that two-thirds-plus of the within BT
14 movement is to Dual Play. It might have some -- you
15 could call it brand premium, or it could be a sort of
16 incumbent advantage of moving those customers on to its
17 Dual Play price, which means they are able to provide
18 a premium. It seems to me that maybe the conclusion of
19 this is that competition is not working fully in that
20 part, that particular part of the bundles market but
21 I am not disputing that the bundles market overall,
22 there is a lot of competitive activity, and you
23 certainly see that -- you do not see the same pattern in
24 the faster broadband services.

25 I have not looked in enormous detail into the

1 existence of market power or otherwise in the bundles
2 market, I have sort of taken it as read that it is
3 competitive.

4 MR RIDYARD: That --

5 MR PARKER: I am not sure that necessarily gives -- to the
6 extent that that is a result of a kind of -- a sort of
7 legacy advantage from being the only game in town, and
8 for many customers BT were synonymous with the only game
9 in town. Even if you said that is a brand premium, is
10 it a brand premium because of a kind of a historic
11 legacy/incumbency advantage, or is it a brand premium
12 because of great service and quality and reliability?
13 I think that would be the question you would need to
14 explore.

15 MR RIDYARD: You think that would be an important question
16 to know the answer to?

17 MR PARKER: I think it would be an important question to
18 know the answer to if we are interested in thinking
19 about the competitiveness of Dual Play standard
20 broadband. I am not sure how much it comes into the
21 assessment of whether prices are above the competitive
22 level for SFV services, because those are by -- the vast
23 majority of those customers seem to be customers who
24 have been with BT for ever and ever and never switched.

25 So the question of brand premium, if you like, does

1 not really arise for those customers, because it is not
2 like they made an active choice to move into BT, subject
3 to the --

4 MR RIDYARD: Except that if there was a brand premium in the
5 competitive market and it was sustained in the market,
6 maybe there is also a brand premium in what you see as
7 the uncompetitive market, and therefore it would
8 possibly provide an explanation for the pricing and the
9 inability of rivals to get into that part of the market.

10 MR PARKER: I think it is difficult to distinguish from the
11 inertia point.

12 MR RIDYARD: Yes.

13 MR PARKER: I think if we look at some of the net promoter
14 score data, which we might come on to more in limb 2,
15 I think is where it comes in, it is not obvious at that
16 point that BT looks more attractive than rivals from
17 a kind of quality of service as perceived by customers
18 on various dimensions perspective. I think it tends to
19 come in rather poorly on those comparisons.

20 So that would suggest, if it is brand premium, it is
21 really brand premium resulting from inertia and kind of
22 historical factors, not because of a great love of these
23 customers for BT's service.

24 MR RIDYARD: Okay.

25 Dr Jenkins, anything on the brand point?

1 DR JENKINS: Maybe if we go to {E/17/140}. So these charts
2 are now adding the numbers together, so you can see the
3 total bundle price for the -- thank you. So, as you
4 see, for the lower speed product you definitely --
5 I mean TalkTalk actually re-position to be more aligned
6 with BT by the end of the period, and Sky maintain --
7 are able to maintain a lower price than BT.

8 If you look at the chart below, which is the next
9 speed up, and it is a bit more mixed, but there is a bit
10 more overlap there. Now, what does one infer from this?
11 I think it is certainly the case that BT did pride
12 itself on customer service and seeking to be seen as
13 a reliable, trustworthy brand which went across both
14 Voice however sold, and other services however sold, and
15 in terms of engineers and visits and faults and all of
16 that, which may explain part of that.

17 Now, what we do not have here are Triple Play
18 prices, so the other part of this story is the
19 differentiation between the different players. Now,
20 obviously if you -- Sky have a very strong position in
21 TV and they -- so if you looked at a Triple Play bundle,
22 you might find the opposite effect, which Sky seems to
23 have a brand advantage for those people who are
24 interested in TV. I do not know, I genuinely have not
25 had a look at that. But Sky are seeking to expand into

1 providing these bundles and ultimately consolidate into
2 Triple Play packages.

3 So again, they may have -- this may be a part of the
4 dynamic of pricing in this market where the different
5 players are looking to compete to win customers.

6 For these lower speed bundle products they will be
7 attracting other bundle customers, they will be
8 attracting Split Purchase Customers, and they will also
9 be attracting Voice only customers.

10 So I think the dynamics that are present here are
11 relevant for both the Standalone Fixed Voice customers
12 as well as within the bundle market itself.

13 MR RIDYARD: Okay. We have discussed at various junctures
14 the distinction between VOCs and SPCs. You made very
15 clear points on that.

16 Is there anything else that, Mr Parker, you would
17 like to say about that distinction that we have not
18 already covered?

19 MR PARKER: I think only that the share of SPCs is obviously
20 even higher than the share of VOCs, and, you know,
21 a chunk of those customers, probably the majority,
22 a considerable majority of those customers, are taking
23 the rival -- the alternative product with a rival.

24 It is I think difficult to explain, other than
25 through inertia, as to why BT has been able to,

1 certainly throughout the -- kind of the Ofcom period
2 where we have good data, such a high share for such
3 a long time. If those rivals had access to that
4 customer through the other products that they are
5 selling, that seems to me to reinforce the view that
6 those customers are also very inert as far as their SFV
7 service is concerned.

8 MR RIDYARD: Yes. Okay.

9 Are there any other points on entry barriers,
10 mobility or expansion that you feel we have not covered
11 in these questions? Are you happy with what we have
12 got? I think we have covered the ground quite well. It
13 has been useful.

14 Okay, so just on to the last set of questions about
15 market shares really. I guess the easiest way to ask
16 this question is, it seems to be an accepted notion that
17 market shares matter as long as the market has been
18 properly defined, which we assume it has for this
19 purpose, so how strong is the presumption that high
20 market shares can imply dominance?

21 Dr Jenkins.

22 DR JENKINS: I think the general guidance from competition
23 authorities, there are some presumptions around 40/50%
24 market share. But the guidance on how you assess
25 dominance says you should assess things in the round,

1 and not -- so I do not agree with Mr Parker that when
2 you look at a market share number, you get a narrow
3 market, okay, job done, kind of thing. But you do have
4 to think quite carefully about what the competitive
5 dynamics are -- and what is driving those high market
6 shares.

7 So in this case -- so in some senses I agree with
8 Mr Parker saying: well, if you observe a high market
9 share you need to think about, okay, is there evidence
10 that there is enough constraint there to compensate for
11 that? We discussed already in the last hour, and
12 perhaps it is because my view is the market is broader,
13 but the fact that we have this really strong
14 out-of-market constraint here, in that when we are here
15 looking at a very narrow market for SFV customers it is
16 diminishing year-on-year substantially, the market
17 shares appear to be stable. However, if you add the
18 other product, what you do see is that BT's market share
19 is declining through this period.

20 So rivals are being successful at capturing these
21 customers, but in this construct they are doing that by
22 moving them to a different substitute product which is
23 not in the market. So you do have -- I do not think you
24 can infer dominance then just directly from that high
25 market share.

1 MR RIDYARD: Mr Parker.

2 MR PARKER: I mean, I think the points Dr Jenkins raises
3 really are relevant to the definition of the market.
4 I think if you have a market with very high market
5 shares you need to have some really strong evidence of
6 an absolute sort of barriers to entry and expansion for
7 rivals in that market, it seems to me. But I would then
8 couple that with the other pricing evidence as discussed
9 earlier. So I mean, I am reprising my previous
10 position.

11 MR RIDYARD: Yes. Just one last thing on this, and that is
12 the distinction between BT's share of VOCs versus SPCs.
13 I mean, its share of SPCs is higher, is it not, as we
14 just said, than on VOCs? Can any inference be drawn
15 from that? Is it more dominant with regard to the one
16 where it has the higher market share?

17 MR PARKER: Dominance is a kind of a one zero thing.

18 MR RIDYARD: Surely it is not in terms -- does it have more
19 market power? That is not a one zero thing for an
20 economist, surely.

21 MR PARKER: No. I mean, I think -- given that
22 pre-commitments you could not distinguish between VOCs
23 and SPCs, so there you are setting the same price to
24 both and then the same thing, I think you would end up
25 with a smoothed version --

1 MR RIDYARD: Okay, now BT can distinguish between them, let
2 us say it was released from its commitments, do you
3 think it would choose to charge a higher price for the
4 VOCs than the SPCs or vice versa?

5 MR PARKER: My guess is it would probably change the same
6 price, but it is more a question for BT as to how it
7 would respond because it is not just being released from
8 the commitments, it is being released from the
9 commitments and knowing who the SPCs are versus the
10 VOCs.

11 MR RIDYARD: Which it does know now, does it not?

12 MR PARKER: Which it does know now but we do not have that
13 evidence from the pre-commitment period.

14 MR RIDYARD: You do not have to answer if you do not know.

15 MR PARKER: I am not sure I know the answer. I think it
16 would have more market power over both. Maybe it has
17 more market power over SPCs. Would it want to take the
18 PR hit of trying to distinguish between the two types?
19 I am not sure.

20 MR RIDYARD: Okay. Dr Jenkins, last word on that?

21 DR JENKINS: In a sense, I think the fact that you have got
22 this almost 100% market share for Split Purchase
23 Customers is a sign that the market is wrongly defined
24 because what that is seeking to say is you have got this
25 set of customers and there is no constraint that is

1 coming on them, and yet what we see is they are rapidly
2 declining through this period. This is the group of
3 customers who are not old, who are not different in any
4 way, right, and we somehow are seeming to think that BT
5 is able to do something to this group of customers and
6 it is hermetically sealed from everything else when
7 actually the evidence shows these customers were
8 changing their behaviour, switching to bundles, moving
9 to rivals.

10 So for me that is just the clear evidence that the
11 market definition is wrong but I understand we are at
12 a point where we are saying the market definition is
13 right. So I would still say you cannot infer anything
14 about dominance from that 100% market share because
15 those customers were able to respond and BT would have
16 faced some constraint from the fact that those customers
17 could switch to alternate products.

18 MR RIDYARD: Okay, thank you very much.

19 THE CHAIRMAN: Can I just ask a couple of questions.

20 Dr Jenkins, and I am just looking at big points now
21 and not asking for a re-run of the arguments which we
22 have explored very thoroughly this afternoon and
23 yesterday, on the first way that Mr Parker puts it,
24 which is effectively market share here is significant
25 enough so that there is a presumption and you would have

1 to show strong countervailing factors. I do not want to
2 get into the relative weight you would attach to market
3 share. I think you are not quite in the same position
4 as Mr Parker. But I infer from what you have just said
5 to Mr Ridyard that looking at the market share way of
6 dealing with dominance, your big point or your big
7 countervailing factor which you say exists is the
8 out-of-market constraint because of bundles and the
9 movement to bundles and the competition element,
10 competitive element there.

11 DR JENKINS: That is correct.

12 THE CHAIRMAN: Right, thank you.

13 Then on Mr Parker's second way of looking at
14 dominance which is that he says that BT have been able
15 to price increase independently of what the competitors
16 say.

17 Just very briefly, which of your points is an answer
18 to that in the context of the narrow market we are
19 hypothetically dealing with?

20 DR JENKINS: That even with a narrow market the structure of
21 pricing that we see having evolved in this market which
22 is rising SFV access prices, falling call volumes and
23 rising call prices, but overall falling call revenues
24 and a desire to make the incremental price of the
25 additional services low, those three features are

1 features across the market, across the sector. All
2 suppliers have the same incentive to structure their
3 prices in that way. So you cannot infer -- or rather
4 you can infer from the fact that rivals have done that
5 as well that that is a sign that the competitive price
6 is one for SFV services that would and may have risen
7 over this time period.

8 So the predicate which says the fact it rises is in
9 and of itself evidence of dominance, of market power is
10 the one I question.

11 THE CHAIRMAN: Then insofar as it comes as a rebuttal to
12 that - "well that is all about price leadership" - we
13 have got your point as to why you say it is not actually
14 a question of price leadership.

15 DR JENKINS: Yes.

16 THE CHAIRMAN: That is a very helpful summary, thank you.

17 That concludes the questions that we have -- we are
18 very grateful -- on dominance. We will take our break
19 now and give counsel a chance to see if there are any
20 purely clarificatory questions that they wish to ask us,
21 distinct from the cross-examination which will come
22 tomorrow.

23 (3.05 pm)

24 (A short break)

25 (3.20 pm)

1 Questions by MS KREISBERGER

2 THE CHAIRMAN: Yes, Ms Kreisberger.

3 MS KREISBERGER: Thank you, sir. I have only one question
4 for Mr Ridyard -- Mr Parker, sorry. The reason
5 I mention Mr Ridyard is I want to take you back to one
6 of Mr Ridyard's questions this morning. Mr Ridyard
7 asked which of the three SSNIP analyses you would place
8 most emphasis on this morning and you replied that the
9 purest version is the price differential SSNIP between
10 Dual Play and SPCs and I just wondered, Mr Parker, if
11 you would like to comment on your fifth report in that
12 context. We can bring that up at {E/5.1/1}.

13 MR PARKER: Could you, thank you. So in the fifth report we
14 are talking about the hypothetical multi-product
15 monopolist and the literature around that. I think to
16 the extent that you want to use a hypothetical
17 multi-product monopolist approach, I think, as we
18 discussed, there were essentially almost no outside
19 substitutes outside. To be clear about what the
20 substitutes are, they would be from standalone bundle
21 providers who do not provide SFV at all. They would be
22 from standalone mobile providers who are not providing
23 SFV. In that sense, it seems pretty clear that a
24 hypothetical multi-product monopolist selling all of the
25 products sold by firms selling SFV services would be

1 able to raise prices because there are very few places
2 for them to go, so that would be an answer in relation
3 to the hypothetical multi-product monopolist.

4 I think the other three analyses that I am talking
5 about are consistent with that approach but I think they
6 sort of stand by themselves as well.

7 MS KREISBERGER: Just thinking about the latter part of that
8 report, I wondered if you wanted to comment on the other
9 aspect of the fifth report.

10 MR PARKER: Yes, perhaps if we could turn, let me get it up
11 so that I can find it in -- thank you.

12 So what I have done in section 3 is I have explored
13 whether the findings of the Split Purchase and Dual Play
14 analysis would change if you added in calls to both the
15 numerator and the denominator so add the same ARPU for
16 calls and assume that is at a competitive level so I am
17 making no adjustment there. All that does is because
18 you are dividing now over a slightly higher base it
19 reduces the implied SSNIP percentage as a result of
20 the -- that comes out of that lower, implied price
21 differential. It is still well above a SSNIP and that
22 is really driven by the fact that for SFV it is very
23 large and calls ARPU is a small proportion of the whole.

24 MS KREISBERGER: Thank you, Mr Parker, I do not have
25 anything further.

1 MR BEARD: No questions.

2 THE CHAIRMAN: Thank you very much.

3 MR BEARD: I do have questions for Mr Parker and I am
4 willing to start now but it is up to the Tribunal
5 essentially.

6 THE CHAIRMAN: Yes, do sit down, Mr Beard. Just first of
7 all, as a matter of housekeeping, has anything arisen in
8 the questions which makes either counsel think that one
9 day is not sufficient for cross-examination because that
10 has an impact on whether we take anything today.
11 I think our inclination would be we would prefer not to
12 and give the experts a rest as well.

13 MS KREISBERGER: I think that is very sensible, sir.
14 I think we will have to cut our cloth, as it were. It
15 has been a long week for the experts.

16 THE CHAIRMAN: Yes, quite.
17 Anything you want to add to that, Mr Beard?

18 MR BEARD: I think there is a danger that we have questions,
19 depending on the length of Mr Parker's answers,
20 obviously they may be very brief in which case we will
21 be too, but I think there is a danger that we could take
22 more than the morning, but we will see.

23 THE CHAIRMAN: One answer would be ... Let me think. One
24 answer would be to start at 10.

25 MR BEARD: I am entirely happy to do that. As I say, I am

1 in the Tribunal's hands. I am happy to start now, but
2 I understand the concerns for the witnesses. Equally,
3 I am happy to start at 10, as we did the other day, just
4 to make sure there is not any risk of running over.

5 THE CHAIRMAN: Just give me a moment.

6 I think that is what we will do. So we will finish
7 our session now. We will resume with cross-examination
8 at 10 o'clock tomorrow morning. Thank you both very
9 much.

10 (3.27 pm)

11 (The hearing adjourned until Thursday, 15 February at
12 10.00 am)

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