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 AN 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 Group PLC and British Telecommunications PLC)

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

Thursday, 15 February 2024

(10.00 am)

THE CHAIRMAN: Good morning. Some of you are joining us live stream on our website, so I must start, therefore, 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 this provision is punishable as a contempt of court.

Yes, Mr Beard.

MR BEARD: Before I start asking Mr Parker some questions, we received a letter this morning, a copy of which -- or, rather, we received a copy of a letter sent to the Tribunal with a whole bundle of new figures in on ARPU which had been calculated overnight.

Now, we need an opportunity to digest those, see if we object to them coming in at this stage, and so on.

It looks like they are ARPU figures just generated off the ARPM data which has fundamental flaws in it, but we need to review it, so we will deal with that in due course.

THE CHAIRMAN: Understood.

MR BEARD: Now, formally Mr Parker has been released and formally he should be re-sworn, but I am not --

THE CHAIRMAN: I think it is important, if they have been released, even if it is a formality, they should be re-sworn, not verifying all their reports again, literally being re-sworn.

Can we have that done, please. Thank you very much.

MR DAVID PARKER (affirmed)

Cross-examination by MR BEARD

MR BEARD: Good morning, Mr Parker. I want to go first to your first report, Figure 7, so this is {IR-E/3/80}, I think.

A. Yes.

Q. So here it says -- we have been to these figures a number of times. You have taken us to them.

"Total prices paid by Split Purchase Customers and Dual Play Customers for the access component of fixed Voice services and standard fixed broadband services, 2015 ... [to] 2018 ..."

Yes?

A. Yes.

Q. Just to be clear, this table that we are seeing, this is not covering courts at all?

A. That is right.

Q. Now, you made a correction in relation to some of the explanation of the figures that you gave when you first introduced this report, and that is {Day10/136:21}.

This was just because, I think, you wanted to make it clear that the calculations here -- so pick it up at line 21. You said:

"So this is BT SPC, so Standalone fixed Voice and standalone broadband versus ... Dual Play pricing."

You said:

"[It is] The SFV price for BT against the Dual Play price for rivals."

You remember that?

A. Yes.

Q. But then you were invited to correct that. If we go over the page, {Day10/137:1}. Yes, Ms Kreisberger says you have been taken to it. I think you took yourself to it, but we do not need to get into that.

"So the Dual Play prices -- I had forgotten ... [they] also include BT and Plusnet."

So there are some BT products in the blue diamonds and yellow triangles, yes?

A. Yes, and EE as well actually.

Q. Right, and EE. We will come back to that.

So you corrected the blue and -- blue diamonds, yellow triangles. What you are doing in this chart, as you have explained already, is comparing the blue diamonds and the yellow triangles against the red squares and the green dots, yes?

A. Yes.
Q. I am putting it in fairly simple playschool terms, but that is what is going on here, yes?
A. Yes.
Q. So you are saying, as per your correction, that you are comparing the Dual Play prices, which are the blue diamonds and the yellow triangles, with, in the first instance, the red dots or the red squares, which are the SFV prices for BT, correct?
A. The red squares are the SFV price for BT plus the standalone broad price for BT.
Q. Thank you. That is absolutely fine.
Just to be clear, the prices that you use to make up the red squares, they are BT Line Rental and BT standalone broadband prices, correct?
A. Yes, I think so.
Q. So the red squares are actually representing what we would refer to as Split Service Customers, correct?
A. Yes.
Q. Can we just go to {OR-C/2/1}, please.
THE CHAIRMAN: Sorry, the red squares are both BT supplied services, but under different contracts?
A. Yes.
THE CHAIRMAN: Thank you.
MR BEARD: If we just go down to page {OR-C/2/58}. So this

is an Ofcom document. If we could just focus on the table. So this is a snapshot of September 2016. But what it is explaining, and I do not think there is any issue here, but I am just making sure we are all clear, is that the number of SFV lines that existed in September 2016 was 2.9 million. Then I think -- I am not sure whether these are estimates or derived from the information Ofcom can get from Openreach, but you see Voice Only 1.7 million. Then 0.9 million, that is Split supplier, so that is a situation -- sorry, do you have the right table?

A. I do. Sorry, I was thinking of something else. But I just -- as far as I understand, this is the section 135 response data --

MR BEARD: Yes, exactly.

A. -- which will be the responses of operators, which I think were the CPs, so the TalkTalks, Skys, and so on, not Openreach, if I remember correctly.

Q. I think you are probably right, but I am not going to take issue with that because I do not think -- what I am just looking at is the orders of magnitude here, and I do not think there is actually going to be any disagreement between us. I am just trying to work out the universe we are dealing with.

So you have got the universe of SFV in total, which

is made up of, in 2016, by these estimates from Ofcom, 1.7 million of Voice Only Customers. So there are Standalone Fixed Voice customers who do not, it is estimated by Ofcom, take any broadband service, correct?
A. Yes.
Q. Then Split supplier is Standalone Fixed Voice service purchasers who take a broadband or more than broadband service from someone other than BT, correct?
A. Yes.
Q. Then 0.2 million is split service, so that is the people that buy their Standalone Fixed Voice from BT and broadband from BT but not in a bundle, correct?
A. Yes, and I think we discussed at some point over the last three days that the balance within split purchase was about 80/20 in relation to Split suppliers. I think this --
Q. Is around 80/20, it is probably a bit below. I am not going to take issue with that. It is 20% or below and it may well be declining. That is correct as well, is it not?
A. You cannot see that from this chart. I do not know whether it is declining or not.
Q. You do not know, okay.
A. I cannot remember.
Q. But it is 20% or less.

So if we now go back to the table that we were looking at, so {IR-E/3/80}, what we know is that the comparison you are using in relation to the red squares, although in the title you say this is Split Purchase Customers, at least in relation to the red squares you are dealing with less than 20% of the Split Purchase Customers, correct?
A. Yes.
Q. Did you hear any of the witness evidence in relation to split supply customers at all?
A. I did not hear it. I would --
Q. Let us go to it. Mr Bunt, {Day7/52:1}. Just picking it up at line 20, so these were actually in answer to questions from Mr Doran:

"Then on the particular point of the likelihood to switch of those groups I think that split supply, so those customers who are taking broadband from us and a line from us separately, are quite a strange group, right, there are some strange behaviours there. There are a lot of ex-employees there who previously have a landline paid for and then get a free employee broadband product. So there is a slightly different behaviour set there. But it is definitely possible because those customers were paying above average Dual Play prices when you added up the two components. They would be encouraged to go to the market."

Now, the thing I just wanted to emphasise there is Mr Bunt is indicating that in relation to this group of customers he thinks that, because they are buying two services from the same supplier, when on the face of it you might be able to get them cheaper in a bundle, in fact what might be going on is that there are certain sorts of employee discounts. You have not considered that, have you, in your analysis?

A. So I have considered employee discounts as a whole in relation to the quantum analysis.

Q. Yes. But not here?

A. No, I do not think there is evidence that I have seen that allows you to look at that in respect of these customers alone.

Q. The point is, Mr Parker, that if there were employee discounts for this set of people, and I will not take you to it, but Ms Blight, when asked about it, referred to them as a slightly "bizarre scenario".

Just for your notes, that is {Day8/81:5}.

In fact, of this less than 20% of SFV customers, a number of them, we do not know how many, actually may be paying substantially less than this price if they have employee discounts. You would accept that?

A. If there are such customers and if they were granted employee discounts, then, yes, they would be paying less, that must be right.

Q. Now, let us just move away from the Split Service Customers and let us focus on the vast majority which are the Split Purchase Customers who are Split suppliers?

A. Yes.

Q. In other words, they are taking BT landline, and broadband from somebody else?

A. Yes.

Q. So in the diagram, I am not going to take you back to it, but that was the 0.9 million in the Ofcom diagram?

A. Yes.

Q. Now, I am going to look at those, but before I do so what I want to do is just work through how you have actually constructed the dots that you have used here.

A. Yes.

Q. Okay?

THE CHAIRMAN: So do we need to go back to that diagram?

MR BEARD: I am going to go back. Exactly. We are going to see a lot of that diagram. {IR-E/3/80}

If we could just move down the page slightly. You will see there you have got the "Source", which is a bunch of data references?

A. Yes.

Q. Then you have a "Note", which I think is explaining how these things have been calculated. Not just the red dots, but various of the other elements.
A. Yes.
Q. I just want to work through this. I am going to work through it stage by stage, okay?
A. Okay.
Q. So the first sentence:
"Prices include VAT and are presented in nominal terms."
So when we say "nominal terms", there is just -- there is no account taken of inflation in relation to the calculation, correct? They are not real price changes, they are prices that you assess were in the market at the particular time?
A. Yes, at the -- yes.
Q. Then if we go on to the -- we will come back to inflation in a bit but leave that for a moment.
Next sentence:
"Prices of SFV Services for Split Purchase Customers are calculated using the price of the access component of BT's Standard Line Rental product in each period for presentational clarity."
So that is referring to the landline element, correct?

A. Yes.
Q. Then you say:
"... SFV Customers purchasing Standard Line Rental accounted for almost 70% of BT's total SFV Customers on average in the period 2015 Q4 to 2018 Q2."
A. Yes.
Q. So you are saying Standard Line Rental is the price paid by 70% of the SFV customers we are talking about?
A. On average, yes. We have also got Line Rental Plus, Line Rental Saver, as SFV services.
Q. Let us be clear, what are you taking out? You are taking out Line Rental Saver from this calculation?
A. Yes, which is a comparatively small group. I am taking out Line Rental Plus as well, which is a bigger group.
Q. Are you taking out HPS as well, or not?
A. I think I am, because we are talking about SFV Services with a capital S. But ... yes, so that ... I do not think HPS is included.
Q. So you are taking out Line Rental Saver, which is a lower cost product, but you say that is a small percentage?
A. Yes.
Q. You are taking out Line Rental Plus, which is a higher cost, higher specification product, correct?
A. With a higher proportion.

THE CHAIRMAN: Sorry, can I just be clear. When you say you take them out, do you mean --
A. They are not included in the price that I am using.
THE CHAIRMAN: They are not included in the price. The customers are still there?
A. This is on a per customer basis.
THE CHAIRMAN: No, this is pricing. This is of course just pricing.
A. This is on a per --
THE CHAIRMAN: So you have excluded; you have not taken account of it. You have just gone for the Standard Line Rental price?
A. I have gone for Standard Line Rental as being the bulk of the customers for presentational clarity.
THE CHAIRMAN: Yes.
MR BEARD: Understood.
So the next sentence in the note:
"Prices of standalone fixed broadband services for Split Purchase Customers from BT ..."
So when you say "Split Purchase Customers from BT", in the language we have been using those are Split Service Customers, correct?
A. Yes.
Q. So:
"Prices of standalone fixed broadband services [and

I am going to interpolate 'for Split Service Customers'] ... are calculated as an average across all available standard broadband products."

A. Yes.

Q. So this is the next bit of the pricing. We have just talked about the Line Rental element, and this is the standalone broadband element from BT, correct?

A. Yes.

Q. So if we could just go to {OR-E/16.49/1}, and this is actually an Excel, so we just have to click through this.

If we could go to the tab at the bottom just further along which is "Pricing Data - BT Ofcom". If we could just scroll down slightly. Keep going. Thanks very much. That is perfect. I do not know if that can be zoomed in on slightly? Thanks, that is perfect.

Now, just to be clear, and so I am not giving you a test on all the spreadsheets, as I understand it, and you can confirm this, the available standard broadband products from which you calculate the fixed broadband services price for Split Service Customers are the first three rows under "Standard Broadband"?

A. I think they are the first four rows under "Standard Broadband".

Q. Well, let us just go left --

A. That may be --
Q. Sorry, if you just move the screen slightly left, if you could, that table -- no, I am sorry, the other way. Thank you.
A. Maybe not. Yes, maybe not.
Q. Maybe not. All right.
A. I think.
Q. I want to be fair to you at this point that we have got three 1s, and we understand that your initial answer is not correct, you were not actually using the fourth row?
A. So I think if you could scroll right, I do --
MS KREISBERGER: If Mr Parker could have a hard copy of this. It is a little tricky to scroll across.
MR BEARD: Well, he can move it across.
THE CHAIRMAN: This Excel has come from?
A. This is the data pack --
THE CHAIRMAN: It is your data pack?
A. -- that underpins the data in my chart.
MR BEARD: Yes. So this is being referred to in the source note under that table, that is the material. So it is Mr Parker's own data I am asking about.
THE CHAIRMAN: I see. Yes.
MR BEARD: He initially said it was the first four products, the top four that were used as a calculation, and I am suggesting to him actually it is more limited than that,

it is only the first three.
A. Yes, so I think two points on that. The first point, if you can scroll to the right, a little bit further, you can start seeing that that fourth row starts coming in as an "N/A", because I think it was not available, okay, so then we are taking the first three, because those are the three available products.
Q. Yes.
A. If you go further back then, sorry, back to where we were originally -- I pity the Opus operator here -- had we included the fourth row, that average would have been higher. Had we -- had that average been higher, these red dots would have been slightly larger, slightly higher, so the differences I calculate are actually slightly underestimated.
Q. Well, let us come back to that, Mr Parker. I do not think we are going to be agreeing on that bit.
So you have taken the first three, so I think we are agreed now --
A. Yes.
Q. -- that it is those first three that you have used to create an average, and I think it is a simple average you have used across those three?
A. That is correct.
Q. I am just going to take one of these columns as

a snapshot. If we -- you can see it here. If you look at 2015 Q4, you will see the cheapest BT broadband offering standalone is £21.36 at that point. Do you see that?

THE CHAIRMAN: Sorry, I am -- which year are we looking at?

MR BEARD: 2015 Q4.

THE CHAIRMAN: Thank you.

A. That is right.

THE CHAIRMAN: Yes.

MR BEARD: The next most expensive is £26.97.

A. Yes.

Q. Then the most expensive of the three you have used is £32.12?

A. Yes, and the average is slightly below the middle one.

Q. Exactly. So the average is £26.82, and that average is actually only of the top three. Although it looks like it is of four, but it is of only the top three?

A. Yes.

Q. Okay. Then what you have done to calculate the red squares is you have taken that average for each quarter and you have added it to the Line Rental price, correct?

A. Yes.

Q. Now, I was just trying to work out that we had agreement on how you calculated the red squares.

Now, I am going to come back to the green dots in a moment, so if we could go back to {IR-E/3/80} and just go back up to the table. So I was just making sure I understood that we had an agreement on how you calculated the red squares and I think we have, we understand that. They are referred to as the Split Purchase Customers, but they are in fact Split Service Customers, but leave that.

Then the green dots are TalkTalk, and I am going to come back to you in a moment on that, but --

THE CHAIRMAN: Sorry, just -- sorry to interrupt, but the green dots, which is BT Line Rental, plus specifically TalkTalk, not any of the others. The example you are taking is TalkTalk broadband?

A. Yes.

MR BEARD: That is exactly the point I am about to come to, sir.

THE CHAIRMAN: Oh, well I just ...

MR BEARD: Let us go to Mr Bunt's testimony, {Day5/99:1}. Just picking it up, line 25 says:

"Q: So moving to Split supplier customers ..."

Then if we drop down to page 101. So all this page at 100 is about Split supplier customers.

Mr Bunt, commenting on this, says:

"I think they were quite a mysterious group this to us. I think there is a mixed bag here. We have not talked about it on other questions so if you do not mind I will elaborate quickly, which is to say there were many customers in this group that we thought were getting incredibly good broadband deals, so free broadband or similar when they took Sky TV as an example of a deal.

"So their inertia would not necessarily be because they were price insensitive. It might actually be because they were very rational. They were not acting because they already had the best possible deal i.e. free broadband.

"There will be some customers in that base who would have been paying more for standalone broadband from other providers. I do not -- we did not know who they were taking their broadband from and how much they were paying at an individual customer level. But we were certainly aware of those deals like the one I describe from Sky that would have meant a very rational inertia for those customers."

So the key point here was that Mr Bunt was emphasising deals from Sky, and I understand that you had considered the possibility of using Sky as a comparator, is that correct, Mr Parker?

A. Yes.

Q. If we go back to --

A. But --
Q. -- page {E/3/79} and if we could zoom in on footnote 287, down at the bottom:
"I note that Sky did not consent to the disclosure of data on the price of Sky standalone fixed broadband services which Sky provided to Ofcom in the context of the 2017 Review. It has also not been possible to source information on the price of Sky's standalone fixed broadband services from publicly available sources such as the Sky website. For these reasons, my Report does not include Sky in this analysis."
So you did not have the data, so you are not including it, correct?
A. Yes, Sky did not allow us to -- did not want to disclose the data.
Q. But you had asked Sky, had you?
A. Yes.
Q. There were no applications made in relation to getting disclosure from Sky?
A. I think there were. I think we went through -- not a third party --
Q. Not in these proceedings, was there?
A. Not to the court, but we went through the process of asking all the providers to agree to reveal their -- to release their section 135 and other submissions to

Ofcom, and many people said yes, but Sky said no.
Q. Right, and you say there is no material publicly available?
A. That is my understanding. Can I --
Q. Can we just go to --
A. Sorry, just one other point, which is the bundles that Mr Bunt is talking about are, I think, broadband and TV or broadband and some other product, obviously not including Voice.
Q. Yes.
A. That must be average.
Q. Yes, by definition.
A. I think if you look in the Annexes to the Provisional Conclusions of Ofcom, the vast majority of the bundles that are being taken are -- include a Voice element.
Q. Mr Parker, it is lucky you say that, because that is where we are heading next.
A. Ah, splendid.
Q. {IR-C/4/1}. So:

"Review of the market for standalone landline telephone services. Evidence supporting the Statement."

So this is the 2017 statement. You have seen this material, have you not?
A. I have. It has been a while since I saw it.
Q. Okay.

A. I think I was actually referring to the annexes to the Provisional Conclusions, which would have been the previous, the initial --
Q. Mr Parker, we will be going there too. Do not worry.
A. That is reassuring.
Q. I want to offer you comfort at this stage.
If we could go to page {IR-C/4/36}. If we could just zoom in on this table. This is Table 1.32 in the evidence supporting the Ofcom statement 2017, "Standalone fixed broadband prices, and promotional and [standard] dual-play prices".
You will see along the top what the columns are, "Download speed/Data usage cap", "Standalone fixed broadband weighted average price (Q1 2017)"?
A. Yes.
Q. If we just go down so we can see the footnotes.
No, I am sorry, it is not in those footnotes. But the weighted average price is weighted by customer numbers. Do you understand that? I can go back --
A. Sorry, which footnote are we looking at?
Q. So we are looking at the column "Standalone fixed broadband weighted average".
A. Yes.
Q. I think it is actually up in the text just above this.
Yes, 1.90:

"The table below shows the price for each 17Mb
standalone broadband service (in terms of speed and use
stage limit) provided by BT, Sky and TalkTalk. We
present average price weighted by the number of
customers on each usage and price combination for each
standalone fixed broadband service. In some instances,
customers receiving the same service are paying
different prices."

So this is a standard way of doing a weighted
average for pricing. You understand that?

THE CHAIRMAN: I am not sure I understand it.

MR BEARD: So, for instance, if you had a BT product, like
the cheapest BT product that you can see at the bottom
of the screen, it might be that there is actually
a range of prices being charged for that product. The
range of prices being charged for that product are then
weighted by Ofcom according to the -- in proportion to
the number of people that are taking it.

THE CHAIRMAN: I see.

MR BEARD: That is all this is saying.

THE CHAIRMAN: Each figure within column 1 is itself
a weighted average of prices for that particular
product.

MR BEARD: Yes.

I do not think -- Mr Parker, you accept that?

A. Yes.

Q. So as it said in paragraph 1.90, it provides the standalone fixed broadband prices on a weighted average of BT, Sky and TalkTalk.

If we work our way down, the standalone prices for BT broadband in relation to broadband provision are set out, and then we get to Sky, and Sky is £15.16?

A. Yes.

Q. That is the weighted average. So if that is the weighted average, as paragraph 1.90 indicates, in fact Sky might have been offering that standalone fixed broadband price at a lower price than £15.16. You accept that?

A. Well, it would have been offering some customers lower and some customers higher, presumably, if that is the weighted average.

Q. Yes, absolutely. But for some customers, they would be obtaining the service at a price lower than £15.16?

A. Also some higher.

Q. Yes.

But let us just compare it with TalkTalk. TalkTalk are about £7.50 more expensive. You see that?

A. Yes.

Q. Even on a weighted average basis?

A. Yes.

Q. If we go one column across, we see "Standalone fixed broadband plus Monthly Line Rental" price. Do you see that column?
A. Yes.
Q. Now, although it says "standalone fixed broadband", by doing a bit of maths, because the monthly Line Rental there is specified as £18.99, we know that what is being done in that column is a sum of £18.99 plus the standalone fixed broadband weighted average price in the first column. You can see that?
A. Yes.
Q. So let us just look at the pricing we have got here. For Sky the standalone fixed broadband price, so this is the SFV price, is £34.15. Do you see that?
A. Yes.
Q. The TalkTalk price is £41.70?
A. Yes.
Q. So let us go back, so this is Q1 17, although actually the data -- some of the data was accessed in August 2017. They are the section 135 responses. It is around Q1 of 2017.

So if we go back to your table, {IR-E/3/80}, and we just keep in mind that £34.15 price. So let us look at Q1 2017, you have got a green dot there for TalkTalk, and I am not going to try and go back to the underlying

tables, but that is around £41-something?
A. Let us agree that that is around £41.70.
Q. But what is missing from here is a dot at £34.15, is it not?
A. In Q1 2017, yes.
Q. In Q1 2017. So we have a time slice here where Ofcom has identified the price for Sky?
A. Yes.
Q. It has identified the price for Sky standalone broadband with BT Line Rental?
A. Yes.
Q. It has a price at £34.17, but that is not in this table, is it?
A. No.
Q. If we were looking at that, then, we would be looking at a gap between the SFV price for someone buying the Sky product at a weighted average price, as I said, that is about £4 higher than the blue diamond, correct?
A. Yes. So £4 on £30, so just over 10%.
Q. Just over 10%.
A. 13%, something like that?
Q. Yes, that is about right. That is about right, yes.
A. So just maybe a couple of additional points?
Q. You can. I am going to work through all the lines. There is lots more to come.

THE CHAIRMAN: Yes, I would hang on, Mr Parker, and then you can come back.

A. Yes, okay.

THE CHAIRMAN: But the £4 estimate, if you were taking 2017 Q1, because you have got something there that is around £30, and the Sky derived price is £34.

MR BEARD: Yes.

THE CHAIRMAN: Thank you. Yes.

MR BEARD: Mr Parker has been comparing the green dot TalkTalk price there, which is around £41.70, and what I am pointing out is the deals that Mr Bunt has specifically identified, being broadband deals from Sky, we do have publicly available data. The Sky price for then is substantially lower, and the gap between that blue diamond, which I am coming back to, is way smaller.

A. It might be worth observing the gap between that and the promotional price is still very considerable.

Q. Yes, that is absolutely true, that is true, very considerable. But we are going to come back to those too.

So let us go back to the table we were at, {IR-C/4/36}, because I want to point something else out to you here. In relation to the Sky price, £34.15, do you see there, if you move across and up, that is actually cheaper than the BT standard Dual Play prices in the first three rows? So this is column 5, £34.99 being larger than £34.15. Do you see that?

A. Yes.

Q. In other words, this snapshot is saying: in fact, the BT standard price in the broadband market for Dual Play is slightly above the Sky deal. Do you see that?

THE CHAIRMAN: Just a minute.

A. £34.99 is slightly above £34.15, yes.

THE CHAIRMAN: Just a moment, please. (Pause).

MR BEARD: So this is an example, is it not, of what Mr Bunt suggested might well be happening, although he did not know, that actually there were SPC prices that were lower than bundle prices in a bundles market which I think you accept is workably competitive, correct?

A. Well, there are other prices there. So Sky's cheapest standard Dual Play price is £28.99, TalkTalk's is £27. I think, as we discussed yesterday, in terms of standard broadband, there does seem to be a bit of a difference between BT's prices and the prices of at least Sky and TalkTalk when we were looking at one of Dr Jenkins' figures, I think Figure 5.5.

Q. But Mr Parker, what we are asking ourselves is, in fact, do we have price dispersion here that is consistent with workable competition? The point that you were making, you were saying that table was the purest form of analysis, that you compared those blue and yellow diamonds with the red squares and the green dots and that showed a huge differential, way larger than any SSNIP, and the point I am making to you here is that that table, if you took some of the publicly available data, does not show that at all in relation to at least that time slice. That is correct, is it not?

A. Well, I think you need to look at a proxy for the competitive price. What I am doing is I am taking the average across, so the blue dots is an average across lots of operators in the market and the yellow dots is the average of the promotional price of dots in the market. I am sure we will be coming to those.

Q. We are, yes.

A. Yes, I agree there is one additional data point for Sky available for Q1 2017, but Sky did not reveal the rest of the -- did not allow us to have the rest of the data.

Q. Right. I see. Well, we will be coming back to that.

But if we could just go up to page 33. You have emphasised BT. {IR-C/4/33}. If we could just blow up that table slightly, you will see at the top it says "BT", and then the third row along, "Cheapest standard dual-play price", and that is the £34.99 we have seen. Do you see that in the top right?

A. Yes.

Q. Do you see down at the bottom, "Virgin Media"?
A. Yes.
Q. £40. So Virgin Media offer faster speeds, because their lowest speed available is higher than many other speeds because they offer all of this through cable. But Ofcom here in this table is taking the cheapest standard Dual Play price, and it is not just looking at BT, it is actually looking at Virgin Media as well as a competitor here. Do you see that?
A. Could you just go to the notes?
Q. Yes, of course.
A. Thank you. Yes, so this is Virgin Media and that is 50 megabits.
Q. That is right, and that is exactly what I have just said.
A. Yes, I was just --
Q. They were high speed --
A. I was just wanting to check. So then that would be in the next chart, Figure 8.
Q. Well, if we go to the next chart as well. But it is just worth bearing in mind that in this chart it is BT, 38 megabits, that is being counted. Do you see that in the notes?
THE CHAIRMAN: Sorry, can we just have the top bit of the chart? Just one moment. (Pause)

A. I see that it is BT's 38 megabits package, so that data
should also be in Figure 8.
MR BEARD: Right. Should it? But Ofcom are looking at it
as the cheapest standard Dual Play package, and they are
coming out with a weighted average here of £33.11 for
the cheapest Dual Play package.
A. Yes, subject to that, there are a couple of data points
in there that are not actually the 17 megabits that we
are using.
Q. So you think Ofcom should have taken those out?
A. Well, it depends on what it was trying to do at this
point.
Q. It is saying in Table 1.29, "Line Rental and promotional
and standard dual-play prices", so it is comparing Line
Rental, cheapest promotional Dual Play price and
cheapest standard Dual Play price.
Now, Figure 7 of your tables was standard broadband,
was it not? So on that basis, Ofcom are taking numbers
that include not only a BT price but a higher
Virgin Media price. Do you agree?
A. A higher Virgin Media price for a higher speed product,
yes.
Q. Yes, and a BT price that includes BT services that are
also high speed as well?
A. Yes. So I am struggling slightly to interpret what that

weighted average is actually referring to, because if you look at the ones that are in fact the 17 megabits, they should be more like an average of somewhere around £28 maybe, £27/£28.

Q. Right, but Ofcom saw that differently, and what you are seeing here is quite a dispersion of pricing, are you not?

A. Well, I am seeing the differences between £26 and £28.99 for the 17 megabits, and then we have two higher prices for the two much faster products.

Q. Let us just dwell there for the moment. If we read the note properly:

"... BT whose 38Mbit/s package with a 30Gb data allowance was cheaper than its 17Mbit/s package which is only available with unlimited data."

So actually what they are doing is they are saying the faster speeds are being offered at this lower price. Do you see that?

A. Yes, I see that.

Q. So the dynamics of this market are rather more complicated, are they not, Mr Parker, because what is actually happening is that for faster speeds you can actually get cheaper products?

A. Cheaper products from BT, yes.

Q. Yes. Right, so you have no Sky prices in your table.

You excluded Virgin, you say they should be in Figure 8.

Let us go back to {IR-E/3/80}. If we could go down to the notes again, please. We had got as far -- I am sorry, this is going to take a little while.

There is the point at 2018 Q2, then the next sentence:

"Prices of standalone fixed broadband services for Split Purchase Customers from BT are calculated as an average across all available standard broadband products. Prices of standalone fixed broadband services for Split Purchase Customers from TalkTalk reflect the price of 17Mb/Unlimited broadband package and are available for the period 2015 Q4 through 2017 Q2 only."

Just in relation to that, do you know whether TalkTalk offered any promotions or discounts during this period?

A. I do not know.

Q. Okay. So Sky is out. We do not know whether TalkTalk actually offered cheaper prices.

Let us go to the next sentence:

"Data on the price of a standalone superfast broadband tariff from Sky is not available."

You have just been stressing to me, when I took you to that table, that prices for Virgin and BT's 38 megabit prices should be out. I do not understand

this sentence, Mr Parker. Why are you concerned here with standalone superfast broadband tariffs from Sky not being available?
A. I think that should read "standard".
Q. Okay, fine. Thank you.

Let us go on:

"Data on the price of a standalone standard broadband tariff from Virgin Media is not available as Virgin Media did not appear to offer standard standalone broadband services at this time."

I think this is picking up a point you were just making?
A. Yes.
Q. Then:

"Dual Play list prices and Dual Play promotional prices for the period 2015 Q4 to 2017 Q1 are calculated as the average of the cheapest available standard broadband tariff from BT, Plusnet [those were the corrections you made yesterday to include those], Virgin Media, TalkTalk, Sky and EE at the end of each quarter."

So I have a preliminary question. It says here they are "calculated as the average of the cheapest available standard broadband tariff from ... Virgin Media", but in the preceding sentence you say the "standalone standard

broadband tariff from Virgin Media is not available".
I do not really understand what is going on with Virgin Media then.
A. So these last two lines, so starting, "Dual Play list prices", etc., etc. I think this is the description that Ofcom gives. This is data straight out of Ofcom.
Q. Data straight out of Ofcom, I see.
A. So I am reporting what I think Ofcom -- how Ofcom reports it, I believe.
Q. Understood. But if we are then doing like with like, should Virgin Media not be thought about in the comparison here? You were keen to exclude it, but if Ofcom are including Virgin Media in the bundle pricing that you are comparing against, should Virgin Media not be taken into account in relation to the other pricing that we are thinking about here?
A. I think it would be the other way round. I think you would want to try and take Virgin Media out of both because their products are too fast.
Q. I see. Understood.
A. So what would happen, if it is a higher price for the -- what is going into the blue dots, is those blue dots would be a bit too high.
Q. Would they? Yes, I see.
A. Well, according to the chart you have just taken me to,

if the Virgin Media product is --
Q. I am going to ask you a very simple question. At the moment, by ignoring the Virgin Media pricing, you are ignoring a like with like in relation to the standalone versus the bundle. You would like to take both out, rather than having both in, correct?
A. Well, I would like to take it out, if it is in, of the blue dots and the yellow triangles.
Q. Right. Well, it seems to be, does it not, Mr Parker? I am asking you, this is your data.
A. Well, it is Ofcom's data. I would like to ideally take it out, but that is the data we have. But it is not in the red squares, because that is BT/BT, and it is not in the green dots, which is BT/TalkTalk.
Q. Yes.
A. So it is not -- you know, to the extent that it is in and it is pushing it up the row of blue diamonds, then my results are a bit conservative.
Q. I do not think they are, Mr Parker. Because going back to the table that we were looking at, the point I was making to you was that the standard bundle price that Ofcom had identified for Virgin Media was actually higher than the SFV price. Do you remember that? We can go back to it.
A. Could you remind me?

Q. Yes, of course. So if we go back to {C/4} -- oh, I do not need to call out the numbers! {IR-C/4/33}

If we look there, what I was putting to you was that when you are carrying out a comparison you should take into account the Virgin Media pricing in the bundles, so it should go into those numbers, correct?

A. Well, I think, as we partly discussed earlier, this is -- are we looking at column 3, is that what you are referring to?

Q. Yes.

A. This is the cheapest Dual Play price for speed, as we can see in the footnote, of 50 megabits, so that is not the 17 megabits that we are talking about.

Q. Yes. But if you are doing this consistently, you would take that into account when you are comparing SFV prices and bundle prices, correct?

A. Ideally. But since -- if I was able to take it out it would reduce those blue -- that line of blue dots and my results would be conservative.

Q. Yes, I understand what you are saying in relation to the averaging. I am going to come on to averaging in just a moment. But let me go back to the notes in relation to this.

So if we could go back to {IR-E/3/80}. We were just looking at the sentence, and this was a preliminary question about it:

"Dual Play list prices and Dual Play promotional prices for the period 2015 Q4 to 2017 Q1 are calculated as the average of the cheapest available standard broadband from [the selection] ..."

So let us just pause there. The number you have got in the blue diamond and the yellow triangle is not, as you have in the red squares, a selection of the standard broadband products and then an average of those taken. What has been done here by you is you have taken the cheapest of each of these providers' products and provided an average of the cheapest products?

A. That is what Ofcom has done, and I have taken Ofcom's data.

Q. But you are relying on that, are you not, Mr Parker?

A. I am. It seems like a good proxy for a competitive price, is one way of thinking about the --

Q. Let us think about that for a moment. First of all, in the broadband -- we are talking here about Dual Play broadband products, correct?

A. Dual Play products or broadband products?

Q. Dual Play products, I am sorry, involving broadband, because it is broadband and fixed Voice.

A. Yes.

Q. Do you know whether any of the companies that we are

talking about here during that period offered low or even zero prices in relation to any of these packages?
A. I do not.
Q. You would accept that, as we understand it from your own data pack, this is just a simple average across these products?
A. This is the data Ofcom has provided.
Q. Your data pack says it is a simple average. That is what you are relying on. It is not a weighted average by customer, for example?
A. I think that was in relation to BT, the BT data you were --
Q. So do you actually know whether or not this is a simple average or a customer weighted average?
A. In relation to the Ofcom data?
Q. Yes.
A. No, I do not know that. I would need to look up what Ofcom did --
Q. We will come back to your own data pack guidelines in relation to that in a moment. But what has been done is a selection of the cheapest products available in the market, correct?
A. That is I think what Ofcom is reporting here, yes.
Q. But you would accept that if you did not choose the cheapest products in the market, your blue dots and your

yellow triangles would all be higher, would they not?
A. Yes.
Q. You do not know how much higher, do you, Mr Parker?
A. No, because I have been using Ofcom's data about the cheapest in the market, but I think that is a sensible way of comparing to the competitive price.
Q. Right. So let us just be clear. You are saying that in the competitive broadband market the competitive price is the cheapest price that is offered by these producers on average, correct? Is that what you have just said?
A. I think that is a good proxy for the competitive price. Actually, I think what one would ideally do is to take a weighted average as between the Dual Play prices and the promotional prices.
Q. Now, Mr Parker --
A. Because the promotional prices are the ones that are going to be put out there and being promoted to customers, and those are the ones that are going to be most attractive to customers. These are clearly prices that are being offered in the market, presumably they are not going to be offered at the lower competitive level, so that feels to me -- you know, the picture -- you could look at the promotional prices, you could look at some weighted average, but I think that would be a sensible thing to do when it comes to looking at the

competitive benchmark.
Q. Let us just think about that. I think you recognise if you move away from circumstances of near perfect competition, or your theoretical construct about how competition works, that actually you can have significant price dispersion in a competitive market. You agree?
A. I am not sure what my theoretical construct is that you are referring to, but I agree there could be price dispersion within a market reflecting horizontal and vertical differentiation, yes.
Q. Right. So in a market where you have got price dispersion that is workably competitive, are you saying that the prices at the top end of that dispersion are above the competitive level, Mr Parker?
A. I think you would have to go into a lot of detail as to exactly what those prices were relating to.
Q. Is that true, Mr Parker? If you have got price dispersion in a market and you have a range of prices out there in relation to, as you put it, differentiated products, by brand or additional service quality or whatever else it may be, if you have a range of prices, are you saying that it is only the average of those prices that is the competitive price and everything above that is above the competitive price?

A. Well, clearly if people are offering prices at the levels here, that is suggesting that that is a price that can be offered in the market that is giving rise to a competitive level of return. I think what one sees in certainly BT's evidence is that you have -- you get someone into a product for a certain price, a Dual Play product, or a broadband -- bundle product, and then once they come to the end of their contract, then they become a back book customer and those prices start floating up.

But front book customers get a new -- whatever the products that are offered -- a new price in the market that is a competitive -- you know, a price that BT wants to do to attract new customers, and if you look at the price guides, there is a whole myriad of kind of back book prices out there. But I think the important thing for what is the competitive price, I am not sure that the price that is being charged to people who are then hanging around on these contracts is a good proxy for that, I think the front book prices, which is where the action is, competing for new customers, seems to me like good and sensible prices to use, and I do not think I would want to average across all those back book prices in order to get to the competitive price level.

Q. Sorry, let us just clarify what you just said there. Are you saying that the competitive price has to be

referred to the promotional price for first year deals?
A. I am saying it could be an average of the standard and promotional prices, because I do not know precise details, but whether promotional prices are offered at every point or at some points throughout the year, there is clearly some balance to be struck between -- if the promotional price is not always available, then clearly some balance between the standard price and promotional price. Often you might do a marketing campaign around a particular promotional deal. But that is clearly prices that were being offered in the market that were sufficiently remunerative for the firms to be -- to allow them to want to do so, and that sounds like a good proxy for a competitive price. Here I am being somewhat more generous by looking at --
Q. You are not being generous, Mr Parker.
In relation to back book prices, let us focus on those for a moment, are you saying that back book prices in the bundle market, which we recognise is workably competitive, are you saying that back book prices that are materially above the average of promotional prices are beyond the competitive price?
A. I am not saying they would be good proxies for the competitive price level, I am saying the competitive price level would be a good -- would be the prices that

you were offering to the front book customers that you were acquiring.

Q. So is this a triumph of theory over fact? In a market where it is workable competition, and everyone offers promotions, and everyone has a back book, those back book prices actually indicate what are workably competitive prices in that market, do they not, Mr Parker?

A. No, I do not think that is right. I think the workably competitive prices would be, except there is no market power at all, they would be the front book prices. Now, it is possible that you might take into account that your customer might eventually turn into a back book customer at some point. You might make a bit more money, you might discount a little bit more. But it seems to me that somewhere -- you know, the combination of the blue diamonds and the yellow triangles is -- standard and promotional front book prices is the right way to think about that, and that is the way that Ofcom is thinking about it.

Q. I do not think Ofcom is saying that. Ofcom is looking broadly at these issues. But we have got the Ofcom data we are using, and what we are doing is we are using that data to look at your table, which you used as the purest form of identification of a problem, and we are seeing here that the large gap that you identify between SFV prices and the blue diamonds and yellow triangles is actually much smaller than you had suggested if you take Sky SFV deals and you look at Dual Play bundles from BT and Virgin in particular?

A. No, I agree there is one extra data point from Sky that I do not think changes the conclusions particularly as it is on promotional prices, and I think we have discussed why one should not include the BT and Virgin products that are in fact superfast broadband products.

Q. Just in relation to averages, obviously by their nature they are concealing the fact that you have a wide spread of standard and promotional prices at any point in the market, correct?

A. Yes.

Q. You do not know what those actual underlying prices are?

A. No. I think this is the data that is available.

Q. You do not know that. So some of those prices, those standard prices and those promotional prices, could be far higher than any of your blue diamonds and yellow triangles?

A. Some will be lower, and that is the nature of an average.

Q. Yes.

THE CHAIRMAN: Just a moment. (Pause).

Just very quickly, in your previous answers you said a good proxy would be, you said, promotional prices or a weighted average. Did you mean a weighted average of promotional prices or a weighted average of what?

A. So a weighted average of the promotional prices and the standard prices, so somewhere in between the yellow triangles and the blue diamonds, to the extent that promotional -- if -- promotional prices are not always available, and you have periods of promotion and periods on standard, and periods of promotion and periods on standard, for example, then one way of thinking about this is you would take a weighted average as between those two things, but I have currently split those out and just treated them separately.

THE CHAIRMAN: Separately, yes. Thank you.

MR BEARD: So let us just go on in the note, because it gets odder, this. The final sentence says:

"Dual Play list prices and Dual Play promotional prices from 2017 Q2 onwards are calculated as an average across all available standard broadband tariffs for new customers from BT, Community Fibre, EE, Gigaclear, Hyperoptic, NOW, KCOM, Plusnet, Post Office, Shell, Sky, TalkTalk, Virgin Media, Vodafone and Zen."

A. Yes.

Q. So we are now no longer talking about the cheapest

product, but we are talking about a completely different cohort of prices, correct?
A. Again, this is Ofcom's approach, yes.
Q. So you are saying there that we can rely on the fact that there is a complete change of cohort, about just over halfway through the dataset, and that that provides us with consistent and the purest form of analysis, correct?
A. So, sorry, you are talking about the difference between 2017 Q1 and then --
Q. Yes, you have a completely different base?
A. Well, not a completely different base, because --
Q. Well --
A. -- BT, Plusnet, Virgin Media, TalkTalk, Sky and EE are in the first set, and we are adding in Community Fibre, Gigaclear, Hyperoptic, NOW, KCOM, and so on. But I think probably for standard broadband this does not -- may not make a big difference.
Q. But you do not know, do you?
A. Well, if you look in the data, what you find is to the extent these people are operating -- if you take out the first group, the people that are operating these products only start operating standard broadband I think from 2021, standalone broadband. So if you filter the dataset for those people, I seem to remember that you

only -- they only start coming in as of 2021, so that is not going to affect Figure 7 or Figure 8.
Q. So although you have added those in, are you saying the figures from Q2 17 through to 2018 is actually the same set of BT, Plusnet, Virgin Media, TalkTalk, Sky and EE that are relied on in relation to the first period?
A. So if I remember correctly, this note is the Ofcom description of this data, but -- and that will apply across all the charts. But if new people are not providing any relevant products until the end of the period, then it is still correct as a description, it is just that there is no relevant product for those additional people.
So I am not sure the dichotomy, if you like, the structural break that we are talking about, actually exists or is material here.
Q. I understand.
Can I just ask one question in relation to both of these then. When we were looking at the red squares, obviously you have taken a simple average of three products --
A. Yes.
Q. -- and you are comparing it then against averages across multiple providers of their cheapest products. You would accept that is not a like for like comparison?

A. I think -- there are two things. Simple averages; ideally we would have done a weighted average, but we asked BT to provide the codes that would be necessary to do so and they were not able to provide it. I think that is at {H/16} of the correspondence bundle, if I remember correctly. We will be able to no doubt dig that out. We had a back and forth with Simmons, I think, as to whether BT could help provide the relevant s-codes that would allow us to translate their data into a form that would be usable for weighted averages, and it was not possible to do so. So ...

Q. That is not the question, Mr Parker.

A. I have done what I can --

Q. -- you did not use the cheapest BT price, did you? Whereas you are using an average of cheapest prices in relation to blue diamonds and yellow triangles, are you not?

A. I am looking at the prices that BT was charging, and this is the most common price that BT was charging. I am comparing that to the competitive level, that is right, but I want to compare the average price that BT is charging, simple or otherwise, against the competitive level. That is the purpose of this test.

Q. Why -- if you are looking at the differential between the two, surely a like for like comparison, even on your basis, and we do not accept that the blue diamonds and yellow triangles should be averaged, instead you should be providing a spread of those prices in order to show the price dispersion, surely you should also be comparing that against the cheapest BT offering, because then you are at least comparing cheapest offerings with cheapest offerings, correct?

A. I think here you should compare average BT price, because that is the average of what BT was able to achieve in the market, against a proxy of the competitive price, which I think is the cheapest of the available prices for each of the operators as put out into the market, as Ofcom has measured. I think that is a sensible thing to do.

Q. Right. I think we do not agree with that, and I have suggested to you that is not a like for like comparison.

I want to go to Figure 8, if I may. I have some more questions on this, but let us just deal with Figure 8, so that is {IR-E/3/81}.

Broadly speaking ... So here we have "Total prices paid by Split Purchase Customers and Dual Play Customers for the access component of fixed Voice services and superfast fixed broadband services", so this is 2015 Q4 to 2018 Q2 again. Broadly speaking, the methodology is the same, but here you do not have TalkTalk, you have

Virgin, and I am going to come back to Virgin in a minute. But all of the concerns that I have articulated in relation to the red squares, blue diamonds, yellow triangles, I am not going to repeat them in relation to this, but what I do want to do is just pick up the point you made earlier about a lack of any data in relation to Sky.

If we could go to {C/2/97}. So let us go to {C/2/1} so you can see the document.

A. Yes.

Q. This is the annexes that you were referring to earlier. If we now go to page {C/2/97} and if we just blow up that table. We are already broadly familiar with this sort of table. It is "Standalone fixed broadband and dual-play prices (£/month): BT, Sky and TalkTalk". It is a bit like the table we saw in the later document, but this one is broken down a little further.

You will see "Standalone fixed broadband weighted average price (31/10/2016)", so this is the beginning of Q3 2016 -- sorry, end of Q3, beginning of Q4 2016, and you have got BT and various products and prices, and then you have got Sky. Now, here the weighted average price for the Sky standard product is £13?

A. I see that.

Q. You will see in column 2 the standalone fixed broadband

plus rental line is £18.99, so the Sky price there is just under £32. So we have another data point, do we not?
A. Yes.
Q. We do. So if we go back to Figure 7, if we may, {IR-E/3/80}, so this is around Q3 2016, Q4 2016. What we should be doing is inserting there, rather than those TalkTalk prices as the nearest comparator, a Sky comparator at £32, correct?
A. We could add that data point in as well, yes, that would be --
Q. That is, what, £2, £2.50 higher than the average?
A. Yes, so less than 10%.
Q. Less than 10%?
A. Of the blue diamonds, not against the promotional prices --
THE CHAIRMAN: Just give me one minute, I just want to put that in. (Pause)
MR BEARD: I want to be fair to you, Mr Parker. We have set out, and Dr Jenkins has explained, why thinking about price differentials and a gap of 5% or 10% in relation to a price differential alone is not informative. I am not going to cross-examine you on that, because that is obviously material that was explored in the hot tub. But the point I am making here is that this table misses

salient data, publicly available salient data.

You, at the beginning of this cross-examination, said there is material in those annexes. That material included, in particular, Sky pricing. The material supplied in relation to the Ofcom statement, upon which you place such weight, that included public Sky pricing. You accept that that material should be presented in this table, do you not?

A. Yes, those are two extra data points which I had overlooked, that is right.

Q. If we go back to {C/2/97}, what we see is not just a standard price there for 2016, the end of 2016, but we also see a 38 megabit, so that is a superfast price, for 2016, do we not?

A. Yes.

Q. So when we are looking at Figure 8, we have Sky data that should have been included as a data point as well, do we not?

A. Yes.

Q. So the total SFV price there is £38.99, and if we go to Figure 8, so that is {E/3/81}, if we look at Q3 2016, Q4 2016, around there we should have -- just above those blue dots we should have Sky pricing at £38, correct?

A. £38.99? Yes.

Q. Sorry --

A. Sorry, can you remind me of --
Q. -- my fault.
A. Can you go back to the previous ...
Q. Yes, you are completely right, £38.99.
THE CHAIRMAN: Just one moment, please.
A. Yes, that is correct.
MR BEARD: If we go across we see that Sky's Dual Play standard price is precisely the same there, do we not?
A. Yes.
Q. There are a series of prices above there. They are not precisely the same speed prices, but the range of them for Dual Play standard exceed the Sky standalone fixed broadband plus Line Rental price. You accept that?
A. Yes.
Q. If we go back to Figure 8, {IR-E/3/81} we see the Virgin pricing that you have emphasised there and that is the difference between Figure 7 and Figure 8 that you move from TalkTalk to Virgin?
A. Yes.
Q. So this is Virgin's broadband price that is being added here?
A. Yes.
Q. It is Virgin's broadband price that I think we accept is setting conditions at workable competition, you agree?
A. Yes.

Q. Did you make any enquiries of Virgin why those prices were as they were?

A. No.

Q. It is one of the interesting things about this. You place quite a lot of reliance on third parties but we do not actually have direct evidence from them. But we do have at {IR-C/15/1} just so you can see it. So this is Virgin's response to Ofcom. The review of the standalone landline telephone services in 2016/2017.

If we go to page {IR-C/15/7} you will see there starting at the bottom of the page:

"The Rationale for Split Purchasing.

"Below we discuss why it is entirely feasible that a customer may find it welfare enhancing to pay more for two separate services. We go on to discuss why the (higher) aggregate price charged by the separate CPs providing split-purchasers is also likely to be reasonable. Finally, we note again that Virgin Media has in fact sought to serve these subsets of customers differently through both price and service differentiation.

"Ofcom dismisses out of hand, the prospect of customers having an economically justifiable reason..."

I invite the Tribunal to read all of it:

"Services available from different providers are not identical...

"If a customer is satisfied with their fixed Voice line provider but switches broadband supplier to achieve a better service quality and incurs a premium to do so, this is surely the consumer revealing their preferences correctly, even if it is at a higher price."

"As an example a customer may desire access to Virgin Media's broadband services...

"From Ofcom's service quality report they would observe that in terms of overall speed, customer satisfaction, complaint volumes, time to install and [etc.] these services may be viewed as distinct from and objectively better than alternatives.

"As Ofcom notes, Virgin Media offers broadband-only..."

I think these are confidential.

A. Can you go up a bit, please.

Q. Yes. I will not read that because it is confidential.

Picking it up in the last:

"It is therefore entirely possible that customers may achieve a utility improvement in opting, for example, to purchase a broadband service from Virgin Media and a fixed Voice service separately ...

"While we are unable to determine how many of these customers take a Voice-only service from another provider, it seems logical, given that Ofcom's survey research shows younger customers make up a larger share of split-purchasers than other groups and equally engaged, that customers may be making a conscious, proactive and informed choice to split-purchase -- for example if they desire specific aspects of a CP's service offering."

Now when you were preparing this table, you did not have reference to any of this material from Virgin, did you?

A. No.

Q. What Virgin is explaining is why it is those prices that you see on that table may well be entirely consistent with workable competition, is it not?

A. I am not sure that is right. What this is saying is there is a reason why someone might have a price with BT and they might want to choose a different and, as Virgin would have it, a better service from Virgin for their broadband which is more attractive.

I think the question we are exploring here is whether BT is able to maintain the price of the SFV services component of that split purchase package. So I think it is completely -- definitely plausible that someone might split -- for example I think Virgin was saying that where Virgin has a broadband service but not a Voice service it might split to remain with BT but the question is not the quality and the benefits that might be achieved from getting that extra broadband service with Virgin. It is about whether BT could raise the price of the SFV services component in that instance given that it looks from that that it may be ...

Q. What it is saying, is it not, is that these customers that are taking these products, including BT Line Rental, from Virgin's perspective are making conscious, proactive and informed choices to do so in relation to both components, is it not, Mr Parker?

A. Well, I think if we go back it says often that Virgin did not have the Voice component and people are making the informed decision to take the broadband service that they want from Virgin. Could we go back one page perhaps.

THE CHAIRMAN: Yes, let us make sure we do not make any reference to any bits that are in green.

A. No, I just, I would point to the paragraph with the two green references.

THE CHAIRMAN: Yes. {IR-C/15/8}.

MR BEARD: If satisfied with their existing Voice supplier, value specific aspects of the service, you see the alternative. If we go back to the bottom of the page, what Virgin is saying is that customers may be making

a conscious proactive choice to take that combination, correct?
A. Yes, that is possible and I do not think that necessarily tells you anything about whether the BT element of that is priced at the competitive level.
Q. They are choosing to split purchase involving the BT product and the Virgin product, are they not, Mr Parker?
A. Yes.
Q. Thank you. That may be a convenient moment.
THE CHAIRMAN: Yes. Thank you. We will rise now.
(11.29 am)
(A short break)
(11.40 am)
MR BEARD: I just have one more piece to pick up on Figure 7 and 8, because I think it is probably right to go to {Day10/39:1} of the transcript, if we may.
Sorry, this is not the right reference. I apologise. If you bear with me. Could we just go down to the next page, please {Day10/40:1}. Sorry, it was my note. Apologies.
So Mr Ridyard was asking about the sum of the components being much higher than the bundle price, and I am not going to go back through the material I have gone through this morning suggesting that actually that chart does not show that.

But the discussion you then engage in picks up the issue of a recapture incentive, and at the bottom of your answer you say:

"But there should not be a recapture incentive in any event for this analysis, it should not matter, because we are talking about if you push someone off SPC, standalone broadband and Voice, and you push them on to your Dual Play product, it is exactly the same product, you are just making less money on it.

"So it seems to me the fact that BT has in reality been able to put prices up very considerably above this kind of competitive benchmark by a lot more than a SSNIP ..."

Then you reiterate a lot of the points you made before.

Can I just be clear, is that only for Split Service Customers?

A. Well, I think the conclusion holds more generally about specific -- in that specific context I am talking about --

Q. Because in relation to -- I am so sorry, I spoke over you.

A. I am talking about the Split Service Customers from BT, because clearly the same product, same costs, split up, charging much --

Q. Understood. I just wanted to clarify. So that is the minority, the less than 20%. You accept that there is a recapture incentive in relation to the 80%?

A. Well, this goes into the debate about whether one uses the hypothetical monopolist or the single product monopolist or the hypothetical multi-product monopolist, so I think that literature suggests that one should not be taking that kind of recapture incentive into account for the purposes of market definition. But even if one took the opposing the view, then this --

Q. We will be coming back in submissions to the hypothetical monopolist test, or, more exactly, your novel hypothetical multiple monopolist test, and the reason you say there is no recapture incentive is because in your hypothetical multiple monopolist test in fact the substitute product would be monopolised as well, correct?

A. Yes, the --

Q. So --

A. Excuse me.

Q. I am so sorry. Please.

A. Let me ... The substitute product you are looking at, the SFV providers, services they provide, and you are saying all of those would be under the ambit of the hypothetical monopolist?

Q. Yes. So as I said, you are treating the bundles as monopolised? Yes?
A. Unless there are some standalone bundle providers out there, which I am not sure there are.
Q. No.
A. To any (inaudible).
Q. But what I wanted to just check was, which I think is so obvious it barely warrants the question, that if you are BT supplying only the Line Rental in relation to an SPC, you have an incentive to get the broadband as well?
A. That depends on the profitability of the broadband service as well as the profitability of the Line Rental service, which goes to the discussions we had about --
Q. Let us just pause there. That is not the question I asked you. Are you saying that broadband is not profitable?
A. So you would need to look at the relative profitability of an SFV customer versus a Dual Play customer.
Q. That was not the question I asked you. I asked you about broadband, Mr Parker. Would there always be an incentive, if you are only providing Line Rental, to also get broadband? I did not say whether it was or was not in bundles or alone.
A. Okay, I think I ... So is the question: would it be? ... well, there are two different issues. Would it be

profitable to sell someone a -- so you have got the Line Rental, would it be profitable to sell someone a standalone broadband product? That would depend on the incremental profitability of the standalone broadband product.

Q. Just pause there. Let us just take it in stages. If there was any incremental profitability then the answer is yes, is it not, Mr Parker?

THE CHAIRMAN: To there being an incentive?

MR BEARD: Yes.

A. Just to check what you mean by "incremental profitability", how are you measuring profitability here?

MR BEARD: I am going to go with whatever you want, Mr Parker, for these purposes.

A. So if there is an incremental contribution margin to be made from adding in a standalone broadband product, then, yes.

Q. Yes. Then in relation to the bundle, if there is an incremental contribution, as you put it, that is greater than the Line Rental then you, on your case, would say there was an incentive, correct?

A. I would say there is a recapture incentive, yes.

Q. Thank you.

A. There is a debate about whether that should be included in the hypothetical -- the relevant hypothetical monopolist test.

Q. Just so we have got this, you are not, I think, taking issue with any of Mr Bunt's evidence about how BT saw these issues, are you?

A. I mean, I am not sort of commenting on it directly one way or the other. I am looking at the data.

Q. Let us go to {Day7/8:1}, shall we. Mr Bunt is being asked about a document:

"Could you just go two bullets up, sorry, three bullets:

"'Pricing strategy should always make upselling to BT bundles and upspinning rational as this is always profitable for BT.'"

Then he answers and he explains:

"So in the way that we price both our Voice and broadband products we should make sure that the ladder does not have too big a jump for customers, so that it always makes sense for customers to both move to bundles on fast -- from bundles to more expensive bundles with faster product, but also to move up from Voice to broadband, and that because those moves are always profitable for us, our position is that that is a margin-accretive move in all cases."

Are you disputing his evidence, Mr Parker?

A. I am obviously not disputing that is his view, but I do not think you see that in the data.
Q. Right. Just being really clear, you are saying in the data, on your interpretation of it, Mr Bunt is wrong to conclude that for BT it is a margin-accretive move in all cases?
A. Yes, I would say that.
Q. That was not put to him?
A. I was not in the hearing at that point so I do not know.
Q. Okay.
Can we go to {Day10/59:13}, please. You were asked about when effective year of competition -- of -- when the competitive level was, and you said:
"We could say it is at the competitive level in 2009 ..."
I just want to be clear, are you saying that is when there was a competitive level of pricing, or are you saying it is at least then?
A. What do you mean by "at least", sorry?
Q. Are you saying it is only 2009 or could it be 2010 as well?
A. So I think ultimately we will look at this in multiple ways. It seems to me that at that point that would have been a -- it seems the price regulation had been lifted in 2006 on the Standard Line Rental product, and so it

was facing competition at that point and was able to price without a price control, and that was the price and the margin that it had decided to offer. Then in 2009 it was allowed to offer bundles as well, and that allowed, in my view, BT the opportunity to price discriminate between the people who switched to bundles and those people who remained with Standard Line Rental.

So it seems to me that that probably is a good proxy for a competitive price level in this sort of competitive margin that BT needed at that point.

Q. So are you saying in 2010 we can take it that it is not a competitive price level, on that basis?

A. Well, I am saying 2009 is probably the best proxy. There is then -- BT has been raising prices, if we --

Q. No --

A. -- go to that chart.

Q. -- we can go back to the chart in due course. I am asking you a specific question. Are you saying that the prices in 2010 were not competitive?

A. I am not taking a view on whether they are not competitive, but I think they are not as good a competitive benchmark as 2009.

Q. What about 2011?

A. Can we put the chart up, please? It is joint statement, {E/49/246}, Annex A8.

Q. Okay. I think you are going to guess my next question, are you not, Mr Parker?
A. I think so. You are going to say at what point does this become --
Q. I am asking you, Mr Parker. You said 2009; I am just asking you.
A. I think probably the 2009 price is the best benchmark. It goes a bit I think to the discussion we were having with Mr Ridyard, which is that there is the competitive level, competitive benchmark, which we should think about, and then as you gain market power you can potentially raise above that competitive benchmark. At some point that becomes significant from the purposes of, say, either the SSNIP test or a dominance assessment, but you should start from the competitive benchmark.

Let us suppose you have the competitive benchmark and you raise prices by 4%, and that is not enough for a SSNIP, that still means the competitive benchmark is the original price. It does not mean the competitive benchmark plus 4% is therefore still competitive; we can start again from there and we can add another 4% and add another 4%, and so on. You need to start from the competitive benchmark.
Q. Yes, that is why I am trying to work out what you are

saying in terms of time, Mr Parker, that is precisely right, I am trying to work that out. But you just raised there the issue of significant market power. Are you saying that the pricing in the market is above the competitive level even when no one has significant market power?

A. So I have only looked at dominance from the claim period onwards, so I have not looked back at whether BT had significant market power in 2009 --

Q. That is not the question, Mr Parker. The question is: are you saying that you can have non-competitive -- you have non-competitive pricing levels when no one has significant market power?

A. So you can have market power without it being significant market power, and that market power can lead you to price above the competitive level.

Q. Is that right?

A. Yes.

Q. Is that on the basis that you are treating the competitive level as one at which you make zero economic profit?

A. Yes, and you can have market power that could lead you to be able to price above that level, but maybe not as much as this level that would lead you to significant market power.

Q. But in relation to questions of workable competition,
you recognise prices can be well above the price that
would give rise to zero economic profit, do you not?
A. So just to check I understand the question correctly,
you are saying that in a workably competitive market
where everyone has no market power --
Q. That is not what I said, Mr Parker. I did not say that
no one had market power.
A. I am trying to explore, Mr Beard, the underpinnings of
the question.
Q. Are you saying that your definition of workable
competition is when no one has market power?
A. So I think at the margin the firms would have no market
power. You would then have to ask whether, at an
inframarginal basis, whether there are firms that do
have some market power, and then you would have to work
out what the source of that market power is, and if the
source of the inframarginal is because you are offering
a higher quality product that no-one else has
replicated, then, yes, you would be expected to see that
firm be able to make profits, not necessarily charge
prices, but make profits above the competitive level,
because it has a small amount of market power generated
by its higher quality, but that is not a problem.
Q. So you do not contemplate -- you contemplate price

dispersion under workable competition by reference to quality differences, correct?
A. Well, vertical differentiation quality is one version. Horizontal differentiation, if I have a particularly attractive location, that could give me some ability also to raise prices above the competitive level.
If there is some reason why rivals cannot replicate either of those types of differentiation, then that would lead -- you would be able to make some profit above the competitive level.
Q. But just to be clear, you contend that even if BT in particular here did not have SMP, you are saying that in those periods the pricing could be above the competitive level?
A. Yes, it is possible.
Q. It is possible. But are you saying that, Mr Parker?
A. Am I saying that it did, or am I saying that it is possible?
Q. You said it is possible. I heard that, we have got that on the transcript. I am there with that one.
A. So in 2009 BT was operating at that level, and it was happy to do so, and that was a profitable price for it. That would therefore be -- if it had some market power at that point then the competitive price level would actually be lower. So in --

Q. -- any market power at that point --
A. I am sorry?
Q. If it had any market power, then it would have to be significant?
A. No, it does not have to be significant. There is a -- let us go back to the sort of sliding scale. You get to dominance, and it is one zero from a legal perspective, but it gets -- potentially you get more if you can have increased market power throughout the market share of its dominance, but equally you can have some market power at a level below dominance, and competition authorities have often looked at mergers which have led to firms with shares at a level less than dominance and discounts of those.
Q. Mergers, yes, that is right.
A. Because the worry about a merger is you lead to a substantial lessening of competition, so it is not as competitive as it was. So even if you moved from, say, 20 in 2015 to 35, that can lead to concerns.
Q. In your reports when you consider these issues you obviously place an awful lot of weight on the 2017 material from Ofcom, but I did not see references to the 2013 market review from Ofcom. Did you consider that in your assessment?
A. Not particularly.

Q. Not particularly. Did you look at it, Mr Parker?
A. I looked at parts of it, possibly in response to comments made by others.
Q. Let us go to {C/329/1}. So this is the "Fixed Narrowband Retail Services Markets" statement made by Ofcom in 2009, which, amongst other things, permitted BT to sell bundles, but actually deregulated BT fully in relation to a substantial range of markets. You know that?
A. Yes.
Q. If we go back through to page {C/329/4}, you will see at paragraph 1.11, which is down the page at the bottom:

"Our overall analysis of the economic characteristics of these retail markets is therefore that BT no longer has SMP in any of them. Accordingly, we have concluded that these markets are effectively competitive already at this stage. In carrying out our regulatory task for these market analyses prospectively, we also consider that on a forward-looking basis BT's position in these markets will be further affected by the increased competition that we anticipate will take place, with the result of its market power continuing to decline to a material degree."

Just to clarify in relation to this, if we go down to 1.23, I think that may be over the page, I apologise.

{C/329/6}.

So:

"We conclude that BT ... no longer has SMP in the supply of:

"Retail fixed ... analogue telephone lines for businesses and consumers;

"Retail fixed narrowband calls for business and consumers."

So this is 2009, you remember this?

A. Yes.

Q. Let us go on to 2013, so this is {C/340/1}. So "Review of the fixed narrowband services markets", a degree of similarity in title. This is September 2013.

If we then go to page {C/340/4}, you see "Executive Summary". If we could go to 1.3:

"The services covered in this statement are 'fixed narrowband telephony services', including retail services, in particular Voice telephone calls, and wholesale services such as call origination and call termination, offered between CPs."

But fixed narrowband telephony services are the products that we are talking about here, correct?

A. Yes, although I think, if I understand correctly, this statement focused on calls.

Q. It says "in particular Voice telephone calls", that is absolutely right. But it is across all of fixed narrowband telephony services.

If we could go to page {C/340/23}, please. I am sorry, if we could go back a page, I apologise {C/340/22}. If we could pick it up at the top:

"We have considered the state of competition in the retail markets for telephone calls from fixed lines, both business and residential, in the United Kingdom excluding ... Hull ... We conclude that the markets for these services continue to be effectively competitive and are likely to remain so for the period covered by this market review."

A. Yes.

Q. Then:

"The rest of this section is set out as follows:

"... including a description of the services considered in this section, an overview of the 2009 retail narrowband market review, and a discussion on the purpose of this review."

If we go down to 3.4:

"In the 2009 retail review, we defined separate markets for business and consumer telephone calls ... and we found that these markets were effectively competitive. In particular, we found that BT no longer had SMP in respect of the market for retail fixed narrowband calls in either the residential or business sectors."

A. Yes, so this is -- you will see all the references here are to articles.

Q. Yes. Just to be clear, are you suggesting that here, although in 2009 Ofcom had specifically identified effectively competitive markets, implicitly it is suggesting that there is a problem with competition in relation to Line Rental here?

A. No, it is not making any comment on that at all, one way or the other.

Q. Is that right, Mr Parker? You say one way or another. Your hypothesis is that Ofcom is here making findings of effective competition in relation to calls to fixed narrowband services, but it is not making any consideration of the access element given that you could only make calls if you have access. Is that what you are saying?

A. I am just saying none of the references you have taken me to mention access.

Q. Right. So if we could go to page {C/340/26}, please. If we look at retail prices. Sorry, could we go back to {C/340/25}:

"BT's retail share has not increased for residential or business narrowband ..."

"BT's retail share ... of residential calls ... has [not increased] since the 2009 review ...

"The observed changes in shares since the last review - and in particular, the decreased share of the largest provider, BT -- supports the view that consumers continue to have access to a range of competing services from different providers.

"Evidence on consumer switching and satisfaction with fixed line services also supports the view that the supply of retail narrowband services remains competitive."

So you were picking up particular language in a previous paragraph. You accept the language here is dealing with both, right?

A. Yes.

Q. Indeed, in paragraph 3.20 it says:

"Customer satisfaction levels have also remained high for fixed lines."

So that is obviously in relation to both, yes?

A. Well, yes, in relation to fixed lines, yes.

Q. So this is forward-looking in 2013, and it is saying here that the supply of retail narrowband services remains competitive. But you did not think it was necessary to consider this in either of your reports, in fact in any of your five reports, Mr Parker?

A. So I think let us maybe go back to the 2009 review.
Q. Could you just answer the question: did you consider it in any of your five reports, Mr Parker?
A. Let us have a look at the pricing data, because the prices -- this data -- the analysis they are basing this on is going to be data up to 2012.
Q. Mr Parker, the question was a simple one. Did you consider this in any of your five reports?
A. Do I explicitly mention it? No.
Q. Did you consider it, Mr Parker?
A. I considered it, and I do not think that it is actually what the competition has transpired in this way as a result of, if you look at Annex A2 to the Joint Expert Statement, because this is primarily about calls. If we get that up.
Q. Yes.
A. Sorry, you may have done; it is not up on the screen.
Q. No, sorry.
EPE OPERATOR: Can I take a reference for that?
A. I am so sorry. It is the joint economic statement -- Joint Expert Statement, sorry, at {E/49/228}.

So the data that is being relied on in the 2013 narrowband services document you have just taken me to is off the left-hand side of this chart. So at that point it is looking like, I do not know if you remember the exact data, but at the start of this the price differential, the ARPMs differential, and you will see in the note that is being handed up the ARPU differential is not that dramatic, but clearly something changed at that point.

So the nature of doing a forward-looking assessment, as Ofcom is planning -- is doing in these cases, is it is taking a judgment as to what it thinks at that point is likely to happen over the next few years.

If we could go back to the 2009 statement, please.

Q. Sure. So that is {C/329/1}. I do not know which page you would like to go to?

A. I would like to go to paragraph 5.54, page 41 I think. {C/329/41}

So this is where Ofcom is saying do we think that following the removal of regulations, would BT be able to:

"... adversely discriminate against its relatively inert customers if the current regulations were lifted. Our analysis concluded that BT would find it hard to target these customers specifically because it is difficult to differentiate them from other customers segments."

It was a completely fair, regulatory judgment at the time. But, in practice, I think what we have seen and what has led to the 2017 review is that BT has been able to price discriminate against customers that -- by offering bundles to the people who remain on the SFV service, you are able to engage in price discrimination. Ofcom looked like it changed its mind somewhere in the 2015 period, because that then led to opening the inquiry, and then concluded that there was a problem individually in 2017.

So just to say, there is necessarily a difference between a forward-looking assessment of where you think competition might be going, and then you can look backwards at the data to then understand what actually happened.

Q. You are clearly very au fait with the 2009 document because you can go to specific references.

You say you considered the 2013 material, but it is right that there is no reference to it at all in any of your materials, is there?

A. No, that is right. I think --

Q. Just to be clear, the paragraph you have referred to is in 2009. Are you suggesting that Ofcom was unaware of that when it was considering matters in 2013?

A. I am not suggesting it was unaware, but it may not have taken a view given that was a calls focused -- that was a calls focused issue at that point. It clearly changed

its mind at some point fairly quickly after the conclusion of that review.
Q. Let us be clear, your claim is that in relation to both access and calls the prices are excessive, is it not, Mr Parker?
A. That is correct.
Q. So even if the 2013 report was completely and coherently only about calls, do you not think it was relevant to refer to it even in relation to the calls part of your analysis?
A. Well, I have not done so. I had looked at the data that was in it and found that it was from 2012 and before. The data I was looking at was from 2013 onwards. I am looking at ... So could I have referred to it? Yes. But I am not sure that it makes a difference to my analysis.
Q. Is that what you are saying, it is not relevant?
A. I do not think it makes a difference to my analysis.
Q. Is it relevant, Mr Parker?
A. I think it is relevant that that is what Ofcom thought was going on on a forward-looking basis, but I think you can now test what actually happened.
Q. Let us just pause there. You said forward-looking basis. In 2013 we are covering four years of what you have been referring to as SSNIPs.

Let us just think of it on a backward basis. What do you --
A. I am not saying that in relation to calls, because I do not have the data going back that far.
Q. Right. But you are saying -- in relation to the 2013 report you are saying that even though Ofcom was clearly on the case about this, you just picked up the paragraph in 2009 thinking about these issues. It carries out another review in 2013, and you are saying that actually there was not effective competition in relation to Line Rental over those four years and Ofcom missed it in 2013?
A. Well, the focus -- as we have seen, the focus of the 2013 analysis was about calls.
Q. Okay. Let us go back to it, {C/340/26}. If we could just go down to paragraph 3.23:
"Figure 3.1 shows the average real price paid by consumers for a basket of fixed access and geographic calls, and indicates that the real price paid for consumers for these services has continued to decline since the 2009 retail review ..."
A. Yes. Could you maybe turn to Figure 3.1?
Q. Yes, sorry, absolutely.
"These pricing trends for residential services suggest that competition in retail residential services

has continued to maintain pressure on retail prices. We believe that this supports the view that the level of competition for residential retail narrowband services has not decreased since the 2009 ... review."

But you say that is irrelevant?

A. I say that Ofcom clearly changed its mind shortly afterwards.

Q. We have heard about Sharon White's speech, and so on. I am just going to briefly take you to {C/340.1/1}. This is in January -- 28 January 2014. This is a more general -- so it is not a full market review of narrowband services, which is what we saw in 2009 and 2013, this is January 2014.

If you go over two pages, {C/340.1/3}, you see the general introduction and a general discussion of issues.

A. Yes.

Q. Have you seen this document before, Mr Parker?

A. I do not think I have.

Q. Okay. I will just take you to page 11, just so that you are aware of it. {C/340.1/11}.

Paragraph 2.1.6. You will see there that there are issues being raised about standalone landline services, and the bottom, final sentence is really the pay off:

"Ofcom will continue to monitor this situation carefully."

So Ofcom was well aware of these issues, you understand that?

A. Yes.

Q. You did not refer to anything to do with its approach to the analysis in the 2013 Review, even though that is a full fixed narrowband access review, four years after the 2009 version. Ofcom here is saying it will monitor matters, and then subsequently begins its review that culminates in the 2017 decision. You understand that?

A. Yes.

Q. But you did not think any of that interim history was relevant, notwithstanding the fact that you rely on pricing going back to 2009 and have suggested that the competitive price was some point which you are not clear about in that period. Is that correct?

A. Well, the price that BT offered in 2009, which was basically regulation, would have been a competitive price. It gradually increased the price, if you look at Joint Expert Statement at {E/49/246}.

So if you look at the sort of left-hand side of that chart, there have been a number of price increases. It does not look like those price increases have been sufficient -- were sufficient to cause Ofcom concerns at the point of looking at the 2013 Review. But the temperature seems to rise, as did the temperature of the sort of public discourse, plus Ofcom's concern, as the Standard Line Rental price continued to rise.

So I am saying I think the 2009 price would have been a competitive price, because that is the price that BT was comfortable in offering when it did not have -- when it was no longer regulated on that price, and then I think this goes to the question of whether it may have had some level of market power that was allowing it to increase prices through this price discrimination mechanism once it started to offer bundles. That was not enough to make Ofcom concerned in the early part of that period, but Ofcom had a change of mind, starting 2014/2015, seemingly.

Q. It started monitoring in 2014, having carried out the analysis in 2013 on a forward-looking basis. But the point I have been making to you, and I am not going to reiterate it again, is that Ofcom in relation to this period through into 2013, even on your account, was looking at the market in the round and focusing on calls but actually, as we have seen, was making findings in relation to residential fixed line services through into 2013 and there is no indication that there is a finding of significant market power or a lack of effective competition up until that point at the very least, and I have taken you to the document that suggests

monitoring thereafter. You understand that, Mr Parker?
A. Yes.
Q. Thank you. The next thing I want to pick up is on the Post Office. Now, yesterday we saw some figures that over a period of about three years they had picked up a material number of customers. The actual figure is confidential I believe. But it was a significant amount across that period.
But {Day11/66:1}, so this is yesterday. You said -- you referred to them as not very "switchy". I am not taking issue with the technicality of that language. I am sorry, it is at page 69. I apologise. {Day11/69:1}.
Now, I was just trying to work out from the transcript, were you saying that Post Office customers were not very switchy?
A. Sorry, which lines are we looking at?
Q. From line 18 through to bottom, line 25. I apologise.
A. Could we have a little bit more as well?
Q. That is the bottom of the page. I mean you can go over the page, certainly.
A. I see, yes. So if you look at -- maybe we should get up Figure 2 of my third report which is at {E/3/134}.
Q. Funnily enough I was going to take you to this, Mr Parker, but ... so this is the plot where we see

Post Office entering and it is at a lower price point and it takes steps upwards and effectively joins --
A. It is. I am not seeing it coming up.
Q. I am sorry.
A. Are we able to? Sorry, it is my third report is the problem is. {E/3/134} I think. I should have been clearer, apologies.
Q. Yes, top of the page, thank you. So yes, this is -- I am going to take you to this, so you have got -- the green line is the Post Office, correct?
A. Yes.
Q. What we see is it is entering in around 2012 and then there are a series of steps upwards that are its price rises, correct?
A. Yes.
Q. I was going to pick up on that. So if we could just look at how the Post Office thought about this. Could we go to {C/155/1}. This is a Post Office document and if we go -- I think it is 2016/2017 but we will confirm.
Could we go down to slide {C/155/8}. November 2016, just so you have it.
Here, this is the Post Office's internal strategy document that has been disclosed. It says:
"(a) £1 price increase to all customers."
"In the last QBR [which I think is probably

quarterly business review but that is a guess] we discussed not including HomePhone only customers in our annual Line Rental price increases."

So they were debating at the end of 2016 not including their home phone only customers, so this is Voice Only Customers in the annual Line Rental price increases. You see that?

A. Yes.

Q. But:

"Our recommendation is to put the price up on these customers.

"£1 is the recommended amount due the following reasons; this is in line with the expected price increase across the industry. This maintains the current and historic price difference between our closest competitors.

"We still represent a 30% on the Line Rental over the last 24 months."

But "Risks".

"Increased customer churn around price increase periods.

"Increases the number of customers that we have to communicate to around price increases."

So clearly the Post Office were thinking of not pushing up their prices, are now proposing to do so but are worried about churn. You take the same thing from the slide as I do I think?

A. Can you tell me what the date of this is and which price increase we are talking about because the key thing is did it actually happen?

Q. Right. So it is November 2016 and actually if we go over the page, I think that might be clarified. {C/155/9}. You have not provided any evidence on the Post Office on your side so I am just looking at what this document would be, what this document is ...

A. November 2017, did you say?

Q. 2016.

A. 2016. So we could ... if we go back -- I am sure we will come back to this document, but if we can go back to my third report at the same page and actually go on one page to {E/3/135}. So in fact, go one earlier page, because that will show you the right-hand column is the Post Office, {E/3/134}. So there is the Post Office on the right-hand side of that table. If you then go on to {E/3/135} again. Thank you.

So you can see that there is a price increase on 1 September 2016 for the Post Office of 99p. So is that the price increase that is contemporaneous with the document that you are talking about?

Q. Sorry, which one are you looking at, 2016?

A. 1 September, 01/09/2016. It is about seven up from the bottom.
Q. No, I do not think it is this one. This is a November document.
THE CHAIRMAN: It is looking prospectively.
MR BEARD: It is looking prospectively at 2016/17, so I do not think it is that one, Mr Parker.
A. Okay, can we go back to it. This is what they might plan to do subsequently but they are starting to think about it in November 2016.
Q. Yes. That is how we understand it. We do not have any special insight into it. It is a Post Office document but you have not looked at this document I take it?
A. No. Could we go back to it?
Q. Yes, of course we can, absolutely.
A. I am sure we will.
Q. {C/155/8} I was looking at and the only point I was making in relation to it was that they are looking at whether or not to raise £1. The point I simply put to you is that they are concerned here about customer churn around price increase periods, so they are concerned about switching if they move the price, correct?
A. Yes, any time you increase a price you will be concerned about customers potentially moving away. That is right.
Q. Then if we go down to the next page, {C/155/9}.

Actually, we have found the answer to the question:

"Why not £1.50?"

So they are thinking about a higher Line Rental price rise that would bring them more money.

"However, we have already increased Line Rental by £3 since January 2015 ..."

So I think if one actually looks back at your Figure 22 plot what you can actually see are the first three steps are essentially what they are referring to here. I think you can interpolate?

A. So since January 2015, yes, we have got -- they have gone up from £15 to £17 it looks like, yes, so £15 to £16, £16.99. So they have put their prices up quite significantly. There is a bit where they are sort of coming back to the pack or at least the bottom of the pack.

Q. They are thinking of pushing them up further and you will see there:

"It will reduce our pricing differential to 45% to Plusnet and significantly reduce our traction in the network as a value provider."

So this is Post Office's brand positioning, it is focusing on value provision, it looks like?

A. Yes, in that -- that is right. So they are saying their customer base would be reduced by about 10,000 customers

if they put their price up by a further £1.50.
Q. It is not actually clear what is being said there. That might be right but it does say in the bottom of the top box that they anticipate "increase in churn"?
A. Over £1, yes so this is the 50p.
Q. You cannot tell -- to be fair to you, Mr Parker, you cannot tell from this -- the point I am making is a much more simple one. You talked about people not being switchy. Here you have a primary competitor focusing extremely clearly on price and price increases driving churn. You accept that?
A. Well, I accept that any price increase you will think about whether some customers might leave so, in terms of whether customers are switchy or not we are not saying no customer will ever move for any price increase at all. We are saying maybe not many customers will move in response to any particular price increase.
Clearly anyone, any provider thinking about putting a price increase ought to be thinking: how many customers will I lose? Is this it is going to be profit maximising? That is a feature I think that is a bit absent from the BT documents which do not tend to worry too much about that.
THE CHAIRMAN: Let us not worry too much about them. Let us keep on, Mr Parker.

A. I certainly see that they are thinking they do not want to go up to £1.50 and they are recommending at that point a price increase of £1, I think; is that right?
MR BEARD: That appears --
A. That is on the previous slide.
MR BEARD: -- to be what is going on.
A. They do that.
Q. I put a proposition to you, Mr Parker. I am interested in your review of the documents, Mr Parker. You just said it is not obvious from the documents that BT was thinking about these issues.
A. These --
Q. Just to be clear, because you do refer to various documents in your reports. How did you select those documents, Mr Parker?
THE CHAIRMAN: Sorry, which documents?
A. Internal documents.
MR BEARD: All documents that he refers to in his reports.
THE CHAIRMAN: Not the tables and figures but the underlying documents, the contemporaneous documents.
MR BEARD: Yes, the contemporaneous documents.
THE CHAIRMAN: Yes.
A. I am trying to remember the process. I think it would be looking for categories of documents that looked most interesting.

Q. Ah, "most interesting" is an interesting term, is it not?
A. So, for example, the price change documents of BT were one type of categories that I did look at because obviously those are quite relevant to the issues here. So I think that would be a category of documents that seemed interesting.
Q. I see. So documents, for example, about value for money, were they interesting?
A. Yes, I think they are interesting.
Q. They are interesting, and yet we see almost no references in your reports to value for money, do we, Mr Parker?
A. I probably did not look at it in much detail in the reports, as I should have done.
Q. I think that is an understatement, Mr Parker. We know what the M is in value for money, do we not, Mr Parker? It is the price. Ms Blight was making that crystal clear when she was giving extensive evidence about the importance of value for money.
A. Could we perhaps look at {F/878/1} I think it is.
Q. Of course.
A. So I have looked at this document.
Q. Sorry, is this document one that you have referred to in your reports?

A. No, it is something I have discovered more recently.
Q. You have discovered it more recently. I see. When you say "discovered" it, how did you find it, Mr Parker?
A. It was probably brought to my attention.
Q. Who was it brought to your attention by, Mr Parker?
A. I do not recall.
Q. Right. So you were prompted towards this document, Mr Parker. Please take us through it.
A. Yes, if we can proceed. Because it became a debate later on in the piece about the extent to which there was value for money. If we could kind of go through, if I remember correctly it might be slide 5 is the first one we might want to go to.
Q. Sorry, should we go to slide 1?
A. I mean this is slide 1. Do you mean slide {F/878/2}?
Q. Yes.
A. So this is about monitoring value for money. There are a bunch of similar sort of related valuations about Net Promoter Scores which look at value for money as part of a Net Promoter Score.
Q. Just to be clear, you have not referred to any of those previously?
A. No.
Q. No. Right.
A. Okay, let us keep going. {F/878/4}, so this is saying

it is important.

Q. Sorry, let us -- the top of that:

"Value for money is a key driver for NPS, churn and acquisition".

So when we are thinking about churn and switching value for money is critical, correct?

A. Yes.

Q. Also for acquisition of other customers, correct?

A. Yes.

Q. But you did not think that was relevant to refer to in any of your reports?

A. I did not include it in my reports.

Q. No, you did not. When I asked you about whether or not value for money was interesting because you said you had picked out the most interesting documents, you had not looked at any value for money materials as interesting documents when you prepared your reports; is that right?

A. It was not a category that I had looked at at that time.

Q. But Mr Parker, why? Value for money is so patently obviously important when you are thinking about the dynamics of a market. Why did you not think about value for money, Mr Parker?

A. There are thousands or tens of thousands of documents, I did not review all of them.

Q. No, that is not the question, Mr Parker. It is a concept, one that is emphasised in the evidence, the unchallenged evidence from the BT witnesses about the importance of value for money. There are, you are right, thousands of documents in relation to value for money. It is a basic and key concept in relation to the operation of the markets and yet you did not refer to it at all. Why, Mr Parker?

A. I was looking at the pricing evidence. I was comparing across services that looked pretty similar. Price is therefore quite a good proxy for value for money in a world where the products are pretty similar, but I am very happy to go on to slide {F/878/5}.

Q. Please.

A. So if we look there, this is a 2017 document. We have got BT coming in down quite low on the value for money spectrum. I think we started to look at this in the context of whether BT was a more attractive offer than others. I think this suggests that it is towards the bottom end. If we can keep going further on.

Q. Just pause there because I have got two questions for you.

A. Yes.

Q. You are very keen to go through this document, and that is obviously delightful since value for money is important, but are you saying now that value for money is important in the assessment of these issues in this case or not, Mr Parker?

A. I am saying value for money would be important if it revealed something further about BT's offer that was not captured in price and relative price differentials and if there was some feature of the products that BT was offering that was somehow more attractive than those offered by other people, then that would potentially be relevant in relation to some of the conclusions. But I have not looked at that specifically and I have now looked at those documents and they do not seem to suggest that my findings are ...

Q. So someone has given you a document to look at that happens, you think, to confirm your conclusions; is that right?

A. I do not think it undermines the conclusions, no.

Q. So let me just ask you a basic question about this document, the NPS trend that you have just been referring to. Which products are we referring to here, Mr Parker?

A. If we go later on --

Q. No, please --

A. I think this is BT as a whole.

Q. So you are saying this is in relation to BT as a whole. Now, I think we have had a discussion about how BT is

a multi-product company. So this is about all BT products, correct?
A. There are other documents, I cannot remember whether it is this one but some of the other NPS documents which break it down by Line Rental, by copper broadband which is the standard broadband product, so we can go to those.
Q. So that is important, is it, that we should look at those now?
A. If you want.
Q. Are you saying it is important, Mr Parker, that we consider documents and concepts about value for money?
A. I am saying it is potentially another part of the evidence. I think this evidence is supportive of my -- of the conclusions that I have reached.
Q. Let us just pause there, shall we. Let us go to Day 8 --
THE CHAIRMAN: Before we do that, just a little housekeeping as we are at 12.40 and we are meant to be splitting the day into two. Can I just have an indication.
MR BEARD: I am going to have to put a pencil through a large chunk of material. I am going to struggle to finish by 1 o'clock at the moment, just because of the nature of -- you know, wholly new material is being produced at this point.

THE CHAIRMAN: We just need to take stock.
Ms Kreisberger, at the moment, first of all, how long do you think you will need for any re-examination?
MS KREISBERGER: Very brief on re-examination. Very brief, but ...
THE CHAIRMAN: But some --
MS KREISBERGER: One question at the moment.
THE CHAIRMAN: All right. For your part because Mr Beard indicated yesterday he thought he may need a bit more time which is why we started at 10, have you an idea at the moment as to how long you think your cross-examination of Dr Jenkins is going to be?
MS KREISBERGER: Yes, it is always difficult to assess, but I would say equivalent to Mr Beard's three hours.
THE CHAIRMAN: Right. There is going to have to be a little bit of the cutting of the cloth here since I do not think anyone is suggesting we go into another day on this. See what you can do by 1 o'clock, Mr Beard. Thank you.
MR BEARD: Completely understood.
Can we go to {Day8/101:1}. This is the cross-examination of Ms Blight and then I think this may actually be in re-examination. Mr Armitage was asking about NPS, Net Promoter Score, and value for money.
So it has not featured in your reports but

Mr Armitage was asking Ms Blight questions about it. There was a document where there was a statement where different feedback, it was said by Ms Blight, could have a big impact on our approach for 2017/2018. I do not know if you were there for this bit of the cross-examination or the re-examination.

A. I was not there.

Q. No, okay. But if we just go down the page, I think it may be the next page, I apologise, {Day8/102:1}. So that was the debate which was going on which was how to price:

"A critical part of that is what the value for money perceptions of customers are because that is heavily linked to churn, very highly correlated and also linked to help what they are saying to other, their friends and family and other people. So impacts acquisition in fact as well.

"So what I am saying here is that at this point I had been receiving feedback that we had had a really good positive response and there had been a big impact from the gives and the above the line marketing we had done, and some of what Kevin was saying here was a slightly less positive story. So I was very concerned that maybe, and we did not have all the data yet because the price change has not fully launched but I was very concerned that we were -- we needed to get that balance right that I talked about before of price rises but also delivering so we maintain a positive perception amongst our customer base."

Ms Blight here was emphasising, as she had done in her witness evidence, the importance of value for money considerations in relation to churn and acquisition. You do not dispute the importance of those matters for churn and acquisition, do you?

A. I do not dispute that they are relevant. The question is magnitude and whether it actually affects the pricing decisions that were taken.

Q. Ms Blight here is dealing with a suggestion that this could have a very big impact for 2017/2018. That was what the question was asking about and that was to do with price changes and strategy.

A. So if I understand this correctly, she is saying that there is a correlation. It does not actually say what the magnitude of that correlation is, and this is in the context of a price change that is about to happen or has started being launched by -- is that I think -- that is I think -- hold on.

Q. It is a critical part is what she is saying.

A. This is line 15 so:

"We did not have all the data yet. The price change had not fully launched."

This is feedback that they are gathering as they are going on because there was this price change window of two or three months when they were starting -- and they are getting feedback, there was some positive feedback from the gives and the marketing they were doing, and I am not totally sure what Kevin here was saying, because I have not seen the underlying document to which this refers but maybe -- reading between the lines he is saying something like that people do not like the fact of the price change.

Q. They have got concerns about NPS data, precisely, Mr Parker. So they are reacting to concerns about NPS data because value for money was so important to them. You see that, do you not, Mr Parker?

A. I do and the question is what impact did it have on the price changes that they actually introduced?

Q. It depends on what that feedback was which Ms Blight is saying, but as her email says that she is referring to says: it could have a big impact on our approach in 2017/2018?

A. On the approach to what?

Q. The strategy and the price rises in relation to these products, Mr Parker.

A. Could you just take me to the documents because you are now referring to things that I have not actually seen.

Q. Mr Parker, I am only going to this because you, prompted by I am not clear who, have decided that today you have got religion in relation to value for money and are going to documents in relation to it, having almost not referred to this material in any report that you have produced.

But if it helps the number of the document is {F/461/1}. You do understand, Mr Parker, that it has throughout been BT's case that value for money is key to the assessment of whether or not certain prices are or are not competitive. You do understand that, do you not, Mr Parker?

A. I understand that -- that BT is making that case, yes, I think --

Q. But you did not think it was necessary to deal with it in your report but you do think it is important to deal with it now?

A. I think that the price rises -- whether they did the price rises was an important -- is the most important thing and the discussions about what the impact might have been was not -- and potential for churn, potential for adverse NPS consequences did not seem to change the fact that they did then put those price rises through. For me what matters --

Q. But, Mr Parker, what else did they put through as well as the price rises, Mr Parker? Did they put through gives?
A. They did put through gives.
Q. Do gives go to value for money, Mr Parker?
A. They do, but the cost of those gives was extremely small.
Q. Do you see the difference between cost and value, Mr Parker?
A. Yes.
Q. So the cost of the give could be very low. The value could be very significant, could it not, Mr Parker?
A. If it was that significant, everyone would be doing it. In fact, everyone was doing it, so it is not that obvious that these gives were necessarily dramatic. Something that does not cost very much typically becomes factored into the competition throughout. So I am not sure why it would add an enormous amount of value.
Q. You are not sure why it would and yet we see throughout the documents a real concern, and Ms Blight gave evidence in relation to it, about ensuring that those gives did deliver value for money for customers?
A. So the documents seem to me to suggest that the gives are not designed to provide a value for money message to customers, so a marketing message for customers that

they can go out with something positive rather than: we are just putting your prices up. Most of the time the gives seemed to be extremely small in value relative to the increased revenue -- sorry, in cost, I apologise -- relative to the increased revenue that was going to result from the price change.

Q. So you are assessing the value of those gives?

A. I changed --

Q. I am sorry, I missed -- let me --

A. I misspoke. Cost.

Q. Right. I just -- yes. You misspoke. You do not make any assessment of the value?

A. No.

Q. Sorry, if you want to look at the {F/461} document.

A. I am happy to move on if you would like to do so.

Q. I see. Could we just go to your report, your third report, {IR-E/3/96}. This is one of the paragraphs where you have a selection of curated quotes from selected documents. Just to be clear, were these documents you quoted from provided to you by somebody else?

A. I do not recall.

Q. You do not recall. So we just pick it up at little (a). You emphasise a document which talks about SFV customers tend to be "inert, long tenure customers".

We have seen extensive evidence about the degree to which in fact SFV customers switched. Are you there referring to the idea that the ones that remained at the end had been there for a long time?
A. This is a BT quote from a BT document, so it must relate to the ones -- it is SFV customer base so it is perception of the SFV customer base at that time.
Q. Just to be clear, what are you drawing from it, Mr Parker?
A. Well, that is in paragraph 4.125, it indicates that BT regarded SFV customers as being unlikely to switch and that is in the context of considering a Line Rental increase by £1 and BT is saying well, these customers tend to be inert, long tenure customers, and I think in the end that price increase was introduced, but we could check that on the data.
Q. You do not dispute the numbers in relation to levels of switching I do not think, do you?
A. No, that is right. The relevant issue is: were they sufficient to constrain the price of SFV?
Q. Right. So the actual slide that you refer to here is {F/222/1}. It is at {F/222/32}. I think the red circle is where you are referring to. But again, it is striking, so it says at the top it is "Flows data on 'true' solus".

So that I think we know is Voice Only Customers,
yes?
A. Yes.
Q. "Across the market, Solus Voice customers are typically older ... much less likely to own a mobile and much less confident with technology; they tend to be more inert as they have higher value levels of Value for Money, Satisfaction and Advocacy compared to customers with other products."
So this very slide emphasises the importance of value for money considerations, does it not, Mr Parker?
A. It mentions that they have higher levels of value for money compared to presumably other BT customers, so, yes, that is something BT mentions.
Q. If we go down the page you will see there this was material the witnesses were taken to.
"... we know there is a problem as 23% of solus churn is true solus..."
Do you see that at the bottom?
A. Yes.
Q. You will see on the right-hand side significant churn of true solus customers to the Post Office both significant proportion of the pool of solus customers that we are talking about?
A. So if I understand correctly, the punch out on the

bottom left, so the 77/23 piechart is the number of churners which is not specified as to how many of those there are, and then they are saying 23% of those are true solus, they are Voice Only because they do not have broadband, and then of that 23% the destination of those people is that 59% are going to the Post Office.

Q. Yes. You will see on the right-hand side price-led deals attractive to price conscious cost base, yes?

A. Yes, and we see at that point, so this was 2012, that Post Office was pricing a lot lower than BT.

Q. Right.

A. The question is what impact did that have on its pricing behaviour.

Q. Understood. But you cite this slide not for value for money but for evidence of lack of switching and inert long-term tenure customers. I am not going to have a chance today to take you to all of the curations of documents that you have got in your bundle, but you pick out particular phrases and you ignore salient information that points in a different direction in almost all of these documents, Mr Parker, because if you had referred to the fact that there were price-led deals here for cost-conscious customers that surely would qualify the reference to inert long-term customers?

A. Well, I am taking a quote out of a BT document as to

BT's view of its own customer base. There may well be -- I think it is not totally clear. Price-led deals may be attractive to the cost-conscious Voice base but is that saying all of the Voice base is cost-conscious or that there is a part of the Voice base that is cost-conscious and who may find those deals attractive?

Q. You cite this document as evidence -- this is at the top of paragraph 4.125 that you read:

"... internal document which indicates that BT regarded SFV customers as being unlikely to switch."

That section of that document does not show that at all, does it, Mr Parker?

A. Well, I am not sure that is right. It says they are inert, long tenure customers. We are saying of the people that did switch, and it does not say anything about the number that do switch, of the people who switch 23% were Voice Only, of those people 59% went to the Post Office. It is certainly saying of the people who switched the most likely destination for their switching was the Post Office but it is not telling you anything much about how many switched. For me, the most important thing is what impact did it actually have on BT pricing decisions.

Q. So let us just very briefly go to I think figures that you do not dispute but Mr Hunt's report, {IR-E/21/48}.

A. Yes.
Q. What we are seeing is you suggested that you do not know numbers but actually we do know numbers, do we not? We know that vast numbers of people were switching. Now, the slide that you referred to was slightly earlier but you are not suggesting the level of switching was lower in those periods, are you?
A. No, I am suggesting that people did -- we know that people were leaving. That is very well established and the question is why, and also the question is what impact did that have on BT's pricing decisions?
Q. Yes, the point I was putting to you, Mr Parker, was that in this document you cite, the first document you cite, you cite one element from it where actually the analysis that is spelled out very clearly indicates that there are price-led deals attracted to cost-conscious customers in the base and you are dealing there with true solus customers. It is indicating price-sensitivity and readiness to switch and not inertia, is it not, Mr Parker?
A. Well, that is one document. That is saying on the one hand they are inert.
THE CHAIRMAN: I would not mind if you could just deal with the question directly. What is being put to you is that the document that you had originally referred to

actually does not show evidence of inertia.

A. It shows there is some level of churn, I agree. But that does not -- I am not saying -- by references to inert I am not saying customers will never leave for any price change, there will be no impact. There is clearly some level of churn, some of which is I think just happening anyway, some of which will be happening due to price. This was a very significant price reduction or price differential from the Post Office of about I think at the time the Post Office was £12 and BT was £16 so it is a 25% price reduction. It did not seem to be enough to change BT's behaviour so I very much agree there is some churn but for me the relevant question is what impact did that have on BT.

MR BEARD: Right. I have a lot of other questions on a lot of other documents and other matters, but I am also conscious that Ms Kreisberger wants to ask her one question and then start after lunch.

THE CHAIRMAN: I think that is right. We will think about things over lunch but it would be helpful, I think, if, Ms Kreisberger, you can ask your question now.

Re-examination by MS KREISBERGER

MS KREISBERGER: I am grateful.

Mr Parker, you were asked about Ofcom's 2013 Review by Mr Beard a number of times. Could we just pull up the joint statement {OR-E/49/19}. Mr Parker, I just wanted to ask you to have a look at proposition 4.1.3 and your comment on the right-hand side that goes over the page to page {OR-E/49/20} and ask if you would like to comment on that.

A. Yes. So if we go over the page, I did mention the 2013 Review. This is because Mr Matthew had made quite a lot of references to the 2013 Review. I had looked at it. I had concluded in the joint economic statement that I did not think it was informative because Ofcom was carrying a forward-looking analysis at that point and then in 2017 it obviously decided to change its mind. So that was my conclusion that I took from that document. I had forgotten that I had referenced it in the joint statement but that is where the debate had come up.

MS KREISBERGER: I am very grateful.

THE CHAIRMAN: 2 o'clock then.

(1.00 pm)

(Luncheon adjournment)

(2.00 pm)

THE CHAIRMAN: Yes, so if we can have Dr Jenkins re-sworn, please.

DR HELEN JENKINS (affirmed)

Cross-examination by MS KREISBERGER

MS KREISBERGER: Good afternoon, Dr Jenkins.

I would like to begin with the question of evidence on market definition in your reports. Now, Dr Jenkins, you are familiar with the CMA Guidance on Market Definition?

A. I am.

Q. Let us turn that up. That is at {G/137/10}. If we could pick the guidance up at paragraph 3.6, you see there the very first sentence:

"The important issue is whether the undertaking could sustain prices sufficiently above competitive levels."

Do you see that at the beginning of paragraph 3.6 at the top of the page?

A. Yes. It would be probably useful just to see what they mean by "undertaking" in that sentence.

Q. As in firm.

A. But if we are talking about market definition, is it the hypothetically monopolised firm at this point?

Q. Shall we show the whole page, if that is helpful. I do not think this is controversial, Dr Jenkins.

A. Yes.

Q. This is in relation to the hypothetical monopolist test.

A. Yes.

Q. I am not making any point on that.

A. I see that.
Q. Then if we go down to paragraph 3.7, it begins:
"Evidence on substitution from a number of different sources may be considered."
It goes on:
"Although the information used will vary from case to case and will be considered in the round the following evidence and issues are often likely to be important ..."
Just pausing there. "Will be considered in the round", that actually echos a phrase you used yesterday in relation to dominance?
A. Yes.
Q. You said: but the guidance on how you assess dominance says you should assess things in the round?
A. Yes.
Q. That is clearly right, is it not?
The same principle you see applies to market definition. It is useful to take account of a range of evidence?
A. Yes, that is right.
Q. Then if we have a look at the first bullet point here, so this is the CMA's list of evidence that is likely to be important, often likely to be important:
"Evidence from the undertakings active in the market

and their commercial strategies may be useful. For example, company documents may indicate which products the undertakings under investigation believe to be the closest substitute to their own products. Company documents such as internal communications, public statements, studies on consumer preferences or business plans may provide other useful evidence."

Yes?

A. Yes.

Q. I just want to show you one more authority on this. It is the *Aberdeen Journals* case. You might be familiar with that Tribunal judgment from the olden times.

That is at {G/34/30}, paragraphs 103-104, and you see there:

"In general, evidence as to how the undertakings in question themselves see the market is likely to be particularly significant."

You see there the evidence that the director then of the OFT pointed out.

Then at 104:

"In the Tribunal's view, contemporary evidence as to how the allegedly dominant undertaking itself views its competitors, and vice versa, may, depending on the particular circumstances, be of decisive importance when it comes to defining the market in any given case."

A. Yes.
Q. So that is obviously a ruling from this Tribunal, so it is a framework for your analysis.
So with that, let us then turn to your approach in relation to the documents in this case. If we could turn up your first report, paragraph 1.17. That is at {IR-E/17/15}.
You see there at the bottom of the page, "Materials I have considered/relied upon":
"I have been provided with the following documents ..."
You refer to two categories. So at (a) and (b) you refer to the Ofcom materials, and then if we go over the page {IR-E/17/16}, and you see there, (c). So if you just cast your eye over that and then to the next page onwards {IR-E/17/17}, down to (w).
A. Yes.
Q. They are all documents in this litigation, the pleadings and the witness statements?
A. Yes.
Q. Then at paragraph 1.18 you also refer to structured and unstructured data. That is disclosed by BT?
A. Yes.
Q. Then you say:
"... and [I] have referred to any documents on which

I rely."

A. Yes.

Q. Let us then turn to your second report, {IR-E/18/7}. If we could turn up paragraph 1.4, please, Dr Jenkins.

Now, here you say:

"... I have reviewed the BT documents relied on by Mr Parker in Parker 3 ..."

So that is the first category of documents you refer to here.

Then you say:

"... as well as other documents provided to me by Simmons & Simmons."

Then if we could just zoom in on the footnote at the bottom of the page, a number of documents there are identified by Opus number and disclosure number. There are 27 documents cited in that footnote. So these are a mix, as you describe it in that paragraph, of documents referred to by Mr Parker and other documents provided to you by Simmons & Simmons, correct?

A. Yes.

Q. So as I say, that is 27 documents, so those are all the documents you have looked at in your second report?

A. Those are all the documents I have relied on in my second report. I believe so. Actually, I have not checked that. There may be some others that I had

already reviewed in my report. I did -- yes, so I would have to --
Q. You do not mention here any other documents beyond those relied on in your first report?
A. Yes.
Q. Then let us turn to the reliance you place on these documents. Then you say in the same paragraph, 1.4:
"I make some limited observations on these [them] ..."
So, Dr Jenkins, you stress that, do you not, limited observations rather than full observations?
A. Yes.
Q. So you are emphasising that you are not making much of these documents?
A. I think I go on in that sentence to explain what I mean, which is I do not see that I am in a good position to express any view on what BT and its employees may have thought at the time. But I take my own -- you know, I look at them from my own perspective and exercise my own judgment on them.
Q. But you do not say that there, do you, Dr Jenkins? You do not say: I look at these documents and I exercise my own judgment. What you say there is "I make some limited observations ..."
So what you are saying is you do not rely heavily on

these documents. If you relied heavily on them, you would not limit your observations, would you?
A. I think, as I already answered, I think the second half of that sentence explains what I intended to mean by the limitations on my observations.
Q. So let us look at that. You do not express any view on what BT or its employees may have thought at the time. So you did not ask your client what the documents meant?
A. I did not.
Q. So you did not speak to Mr Bunt, for instance, to ask him what he meant in particular documents?
A. I did not myself speak with Mr Bunt. I, at times, did have discussions both with my team and with the Simmons team about certain of the documents. That may have led to questions being put to BT and answers being given to me. I certainly did discuss the documents with people.
Q. But you did not ask BT what the documents meant?
A. I did not myself discuss with BT directly.
Q. Now, let us turn up paragraph 3.56 at page {IR-E/18/51} of your report, and you say this:

"As I explain in paragraph 1.4 above [that is the one we just saw], I have not engaged in a detailed review of the documents relied on by Mr Parker and cannot speak to BT's understanding of whether SFV customers were inert."

We just saw paragraph 1.4, that is where you say you did review the documents referred to in Parker 3 but you limited your observations on them. But here you are adding the further point that your review of the documents was not detailed; is that right?

A. That is right.

Q. So it is something -- your review was something less thorough than a detailed review?

A. That is right.

Q. Something more perfunctory?

A. Yes.

Q. Then on Tuesday in the hot tub, when Mr Ridyard asked about your interpretation of internal BT documents, you immediately said:

"I would not say that I have certainly covered reading all the documents."

A. That is correct.

Q. Dr Jenkins, you are aware that this is a claim against BT for £1.3 billion in damages?

A. I am aware of that.

Q. I have shown you the CMA guidance and the Tribunal ruling on the importance of internal documents as evidence on market definition?

A. I have seen that.

Q. You did not think the claim merited a detailed review of the documents?

A. I did work with my team and with the Simmons & Simmons team. I did have access to all of the disclosure in this case, and there is a large amount of that disclosure. I did look into relevant documents in a number of categories in terms of competitor insight, in terms of the products, in terms of the pricing, the pricing insight documents that we have discussed in here. However, in terms of the reliance I place on those -- so those are important for understanding the market context, but the evidence that I have given to support the Tribunal's decision-making is from the economic perspective.

So my view is -- as expressed in my reports, is actually more founded on the evidence of the choices that consumers made in the context of having reviewed those documents that were disclosed and having -- and being mindful of the fact that they are going to be a particular view from BT, much of that which would be tested in the factual witness evidence prior to the expert stage.

Q. Dr Jenkins, I will appreciate if you could keep your answers crisp, just because we do not have very much time.

But just to complete this point, we saw that you only refer to 27 documents in that footnote, but you make the point you did not make a detailed review of those documents. So that would not have been an onerous undertaking for you, would it?

A. One of those documents, for example, is the Financial Factbook which I did make a detailed review of, that document, and that is something that I cited on numerous occasions. So I did seek to rely on the material that I thought was most relevant to assist the Tribunal in understanding, from my perspective, what were the important features of the market context that BT was considering.

Q. But you did not engage in a detailed review of the documents relied on by Mr Parker. You make that very clear in paragraph 3.56.

So you are saying you reviewed particular documents that you thought were important but not the ones that Mr Parker thought important?

A. I did review the documents relied on by Mr Parker, yes.

Q. But you did not make a detailed review of them?

A. I made a more detailed review of certain other documents that I considered most relevant.

Q. So paragraph 3.56 should read: I engaged in a less detailed review of the documents relied on by Mr Parker?

A. Possibly, yes.

Q. Let us move on.

Staying with the question of whether BT's internal documents are relevant, can I just show you paragraph 3.31(e) of your second report. That is at page 39 of this document {IR-E/18/39}.

Here you make a different point. Thank you. You say:

"... I examine in greater detail some of the documentary evidence cited by Mr Parker in terms of his assertion that SFV consumers are inert. I show there is more nuance in the documentary evidence than Mr Parker recognises. In any case, I see no need to place weight on interpreting such documents in the face of the extensive evidence on consumer switching."

So that does seem to contradict your earlier position. You now say that there are some documents you have examined in greater detail, correct?

A. I think that is consistent with what I said, which was I did look at the documents cited by Mr Parker. I selected my own documents because, for example, that Financial Factbook was cited by Mr Parker, and it was one that I also thought was important for review.

Q. Now, you say Mr Parker has missed the nuance in the documents, correct?

A. Yes.

Q. Dr Jenkins, you are very familiar with the Ofcom Provisional Conclusions, are you not?
A. I am familiar with those.
Q. Let us turn them up. They are at {OR-C/1/24} and that is at 3.36.3.

As you see there, Ofcom said:

"We have received internal pricing documents from BT and other CPs relating to their decisions to increase Line Rental in recent years. In our view, the documents provided by BT do not provide any evidence of a concern that a price rise would reduce profitability by driving Voice-only customers to switch to Dual Play services."

Then I will just show you one more passage on the same theme. If we could move forward to page {OR-C/1/27}.

So that was VOCs, and then at 3.42.3:

"There is no evidence from BT's internal pricing documents that BT, in its decisions to increase the Line Rental in recent years, was concerned that a price rise would drive split-purchase customers who buy SFV services from BT to switch to Dual Play services from other providers. Nor do these pricing documents [over the page] include any consideration of whether SFV customers may switch to Dual Play with BT as a response to Line Rental price increases."

Now, Ofcom did not think the position was more nuanced, did it?
A. Apparently not.
Q. You say "apparently"; you are familiar with this document, Dr Jenkins, you confirmed?
A. Yes, but I think we did discuss in the hot tub what my views were on Ofcom's Provisional Conclusions with which I do not agree.
Q. Let us just stick with this point, please, on documentary evidence.
So Ofcom and Mr Parker both conclude that the BT documents do not support your client's argument that the fear of SFV customers switching to bundles constrained it from increasing the SFV price, yes?
A. Yes.
Q. Now, given that evidence, do you not think you should have conducted a detailed review of those documents for yourself?
A. As I said, I did review a number of those documents about what BT was or was not saying at the time, but the major piece of work that I did was actually to look at the evidence of how BT's customers actually behaved in this market at that time. That was where I started, and that is what I think is useful additional evidence in this situation and, in my view, is more useful than

potentially the documents that are relied on, notwithstanding the CMA guidance which, if you read further on in that paragraph, it also discusses actually looking at switching behaviour as an important element.

Q. Of course, reviewing evidence in the round.

So let us have a look at how this plays out. Could we go to page 50 of your report. Sorry, so this is {IR-E/18/50}, going back to your second report.

Paragraph 3.55, you make a similar point there. You say, under the heading "Documentary evidence":

"In my opinion, data on actual consumer switching ... provides more insightful evidence as to consumer behaviour than surveys or internal corporate documents."

That is right, is it not?

A. That is right.

Q. That is your position, is it not?

A. Yes.

Q. So let us just test that. Let us say there is an internal BT document, let us say it was prepared by the senior executive responsible for pricing strategy, and that document records the senior executive's view that customers are price-insensitive, so that BT can drive up prices with a large revenue upside for the business. That would be evidence which gives some insight into market definition, would you not say?

A. I do not have the transcript right in front of me, but I think you would have to ask the question: which customers, which prices, and what do they mean by switching?

Q. Okay, I am going to put to it to you one more time and then let us please move on. As I say, if you could keep the answers brief.

An internal BT document prepared by a senior executive responsible for pricing strategy of SFV services, where he or she records that SFV customers are price-insensitive, so that BT can drive up prices for SFV services with a large revenue upside for the business without fear of losing customers?

A. I would consider such a statement as something to consider.

Q. It would be "insightful", to use your language?

A. It would depend on the context of that person's knowledge set.

Q. You are not keen to accept that such a document -- even now, such a document would be useful evidence?

A. I would look at it. But if I also had evidence of SFV customers responding to price changes and switching, then I would ask myself: did that person, at the time they were making that statement, have access to the information which I have access to if it shows that there was significant switching going on from that SFV customer base?

Now, as it happens, the documents I have reviewed mostly talk about Voice customers overall, and hence, when I reviewed those documents, I was looking at it thinking: for the most part the way BT seems to think about this is Voice customers overall; they were often talking without a lot of specificity about what the specifics were that were underpinning those statements.

Q. Let us turn to a few examples where you do place reliance on documents despite the non-detailed review that you formed.

If we go to page {IR-E/18/78} of this report, "Mr Parker's reliance on internal documents" is the heading there. Here you are responding to evidence from Mr Parker about contemporaneous BT documents. Do you see there you begin by saying that:

"Mr Parker cites very limited examples in support of his proposition that BT's internal documents illustrate that anticipated churn to rivals had no material impact on BT's ... price-setting strategies."

A. Yes.

Q. So if you could just cast your eye down to paragraphs 4.27 and 4.28 (Pause).

So you see here you are criticising Mr Parker on the

basis that he has not correctly interpreted the documents?
A. Yes, I am.
Q. Even though you make the explicit point at the outset of this report that you limited your review of them? That is correct, is it not? It is in the report. We can go back to the paragraph.
A. No, no, absolutely. However, that does not mean that one cannot draw conclusions where you are addressing a particular point, yes.
Q. Yes, based on what you agreed was a less than -- was a perfunctory review, shall we say.
Now, we need to understand your criticisms then in that context, do we not? Let us go to page {IR-E/18/80}, please, paragraph 4.29. You see there the heading "PR and regulatory concerns"?
A. Yes.
Q. You say this:
"The documentary evidence on concerns around PR response and Ofcom's reaction to BT's pricing are not probative of market power."
Yes, you see that?
A. Yes, I see that.
Q. That is a categorical view, is it not?
A. That is my view, yes.

Q. You are giving a firm, a very firm view there?
A. Yes.
Q. So on this point you did not limit your observations on the documents?
A. I did not ... well, it is in the general context that I have given. I did not reiterate any of those at this point.
Q. Sorry, I did not catch that. You did not read ...?
A. I did not reiterate my general statements at this point.
Q. Now, you are more diffident again at paragraph 4.31, if we could go to that {IR-E/18/81}. You emphasise at the beginning there:
"... I am not in a position to draw conclusions on BT's strategic intentions ..."
Yes?
A. Yes, that is what I say there.
Q. Then despite that qualification, you go on to express a view about the documents.
A. I do.
Q. You say:
"... the documents I have reviewed indicate (as I would expect) that BT was considering its pricing in the context of balancing many pressures ..."
You name a number of -- you identify a number of points there. Yes?

A. Yes, that is right.
Q. So you are drawing conclusions on the documents you have reviewed. Yes?
A. Yes. So I think my -- I say "as I would expect", that is from my general review of the market context and understanding what is going on in the market, that the documents I have reviewed are supportive of those factors that are influencing the competitive pressure BT is under.
Q. Yes. Now, if we go to footnote 177, which one would expect would identify the documents you are referring to there, you actually refer to three witness statements, two from Mr Bunt, one from Ms Blight?
A. Yes.
Q. So by "documents" here, you mean witness statements?
A. I think at the time I thought that those witness statements are the best summary of the strategic intentions of BT.
Q. Yes, you are referring to the witness statements.
Now, if we go back up to paragraph 4.31, returning to the statement that you emphasised here:
"... I am not in a position to draw conclusions [about] BT's strategic intentions ..."
That comes back to the point you made very fairly earlier, that you cannot give any view about what the

business thought at the time. But, Dr Jenkins, in the hot tub, you did give evidence on a number of occasions about how BT thinks about its prices.

If we could turn up {Day9/45:6-14}, you said:

"I think, thinking about how BT thought about it, it is the case, as I think no doubt we will talk about plenty, that when they were attributing bundle revenue, they did attribute the full Line Rental price to the Voice aspect of that product, and then put the bundle discount, effectively passed that through on the broadband element of the product. So they did think of that Dual Play price being a discount off the standalone broadband price when they thought about that competition."

I will just show you one more. {Day9/51:19-25}, please.

You said:

"Yes, so I think BT is setting a system of prices in each year when it is thinking about what it is going to do, and it is facing constraints in competitive dynamics in a number of ways."

You go on.

Then if we go over the page, {Day9/52:1}, you see there at line 4:

"It is also thinking about how the structure of pricing will encourage its customers to take the services that it wants through the bundling, saying: actually, what we really want is to get people to take more services with us, so we will structure our pricing so that the incremental cost of the additional services is small."

Dr Jenkins, by your own admission, you do not have any evidence on how BT was thinking about these price setting decisions, do you?

A. In terms of the first quote you took me to, whether it constitutes a document. But the F/28, the financial data from BT, which I am familiar with from the analysis I have done, that first quote is something I do -- it is a fact, right, how do they allocate bundle revenue.

So while I may have expressed it as: I think that, that is my view of the fact of how that revenue is allocated. Then what I am inferring from that is what does that mean in terms of how BT may be affected by that.

Throughout the testimony that you have taken me to, and indeed throughout my expert evidence, I am bringing an economist's judgment to the information, the facts and the documents to give a structure to how BT was engaging in the marketplace, as well as its rivals, in supplying these services.

Q. Yet in your second report you say:

"... I am not in a position to draw conclusions on BT's strategic intentions ..."

So that is your position in your written evidence, is it not?

A. Yes, I am -- yes.

Q. Let us move on, Dr Jenkins. I want to ask you now about Line Rental price increases. If we could begin by taking up the joint statement, that is at {OR-E/49/52}. I want to begin by looking at the size of the price increase.

Now, let us take Voice Only Customers first. You see if you -- on page 52, the last box, the bottom box. Mr Parker sets out there that if we take Voice Only Customers, and we take the Standard Line Rental product, between January 2009 and March 2018, that is just before the discount kicked in, the price to Voice Only Customers on Standard Line Rental increased by 65%, or £7.49, whilst the wholesale Line Rental price was declining.

A. Yes, I see that.

Q. Then taking Split Purchase Customers, the price of the same product, Standard Line Rental, increased from £11.50 in January 2009 to £26.35 in April 2023. So that is an absolute increase of £14.85, yes?

A. Yes.
Q. A percentage increase of 129%?
A. Yes.
Q. So let us leave that on the screen.
Dr Jenkins, I would like to put a hypothetical example to you, so I would be grateful if you could indicate if you agree with it.
For simplicity I am going to ask you to assume that BT is a shoe-in for the hypothetical monopolist for these purposes, please. So you can put aside any objections you have.
A. When you say "a shoe-in", you mean BT's behaviour is identical to a hypothetical monopolist --
Q. Yes, let us treat BT as under the same constraints as the hypothetical monopolist.
Now, let us imagine that BT had increased the price to Split Purchase Customers by 129%. That is the real world price increase I just showed you. But what I would like to hypothesise is that it had made that increase by October 2015. That is all I am asking you to imagine.
So by the start of the claim period, let us imagine that BT's prices were 129 -- had increased by 129%, and --
MR BEARD: Is that for 14 years?

MS KREISBERGER: If you will just let me finish.

Now -- and we assume, in the same way that it happened in the real world, that the main wholesale cost went down.

Then let us posit that from October 2015 to the present day BT did not move the price and costs remained steady. So no further price increases, no further price decreases.

Let us say now you apply the SSNIP test to work out market definition in the claim period. So you ask yourself: can BT, the hypothetical monopolist, is it able to increase prices during the claim period by 5-10% above the competitive level? The answer is yes. Correct?

It increased prices until the start of the claim period by 129%. That is the real world increase. The only difference is it did it before the claim period started and then it maintained those prices throughout the claim period?

A. But you said BT is the hypothetical monopolist, which did not raise prices in the period between 2015 and forward?

Q. The price increases happened before the start of the claim period.

A. I thought you asked, can they raise prices by 5% from

2015?

Q. No, I said can they raise prices by 5% to 10% above the competitive level? That is the SSNIP test.

THE CHAIRMAN: At what time or over what period?

MS KREISBERGER: When you are applying the SSNIP test for the claim period --

A. But how do you know what the competitive price is, in your example?

Q. We are making one small change to the real world facts, okay, so let us just ... So BT's prices floated upwards, as happened, from 2009 by 129%. That is the price rise we saw to the end of the claim period.

A. So that is the price rise for the access price only.

Q. Yes, let us talk about the access price. We are talking about Line Rental. That is what I put to you.

A. Okay, but --

Q. I am making one small change, which is the price increase has happened by the start of the claim period. That is the only difference.

A. So I think the question you are asking me is: assuming that at the start of the claim period the prevailing price is already above the competitive price?

Q. That is right, is it not?

A. I am asking -- I am clarifying that that is the hypothetical you are asking me. You are inferring that because of what was observed in the real world, you can infer from that that BT had priced above the competitive level.

Q. Dr Jenkins, if BT had increased prices by 129% from 2009, that is a much larger price increase than a SSNIP, is it not? Yes or no? That is a --

A. It is more than 5-10%, yes.

Q. If it had put in 129% price increase in stages between 2009 and 2015, and the claim period begins in 2015, when you apply the SSNIP test from 2015 onwards you would find the prices of 5 to 10% above the competitive level, would you not?

A. But I think you have just assumed that, and then -- so in which case I would say yes, like --

Q. Let us work with that.

MR BEARD: Hold on, let the witness answer the question.

MS KREISBERGER: Let us go to the joint statement, okay, because I think you are not wanting to agree with this one. So let us have a look at how you deal with it on the joint statement.

I am trying to get Dr Jenkins' answers.

If we stay with proposition 5.2.3, you say there you agree with the proposition that BT was able to increase the price of SFV services to Voice Only Customers by more than a SSNIP, correct?

A. Correct.
Q. You say that BT implemented a price increase -- let us just pick this up. You say that:
"BT [under your column] did implement a price increase larger than 5% ... for SFV services to Voice Only Customers during the Claim period."
Yes?
A. Yes.
Q. "The price increase for these customers between October 2015 (the start of the Claim period) and March 2018, according to Mr Parker ... was from £17.99 per month to £18.99 per month in terms of Standard Line Rental, which [as you say there] is a 5.6% increase, only slightly more than a 5% SSNIP and over a three-year period."
Now, just --
THE CHAIRMAN: Sorry, which bit are we looking at?
MS KREISBERGER: I am so sorry, that is on proposition 5.2.3. Are we on the wrong page? It should be page {OR-E/49/52}.
I am so sorry, sir. So it is from the beginning:
"BT did implement ..."
THE CHAIRMAN: Yes, proposition 5.2.3, Dr Jenkins' answer.
MS KREISBERGER: That is right, yes, where it begins at the bottom of the page.

Now, you say there, this is the price increase according to Mr Parker. This price increase is now common ground, is it not?

A. So here we are looking at Standard Line Rental, and there is a 5.6% increase in Standard Line Rental.
I make the point that if you use a different price measure you get a different percentage, but I agree --

Q. Let us take this in stages.

THE CHAIRMAN: Let her just finish what she is saying.

A. I agree that on SLR, there was a 5% price rise in that period.

Q. Yes, and you say that is "according to Mr Parker". By the time you signed the joint statement, had you verified your client's price increases for yourself?

A. Yes, the "according to Mr Parker" was a reference to the difference between using SLR and using a measure that encompasses calls as well. It may not be very clearly worded, we were doing it under quite a lot of time pressure.

Q. You do accept it now, though, do you not?

A. Yes, absolutely.

Q. Turning to the 5.6% increase, which you say is "only slightly more than a 5% SSNIP ... over a three-year period", you arrive at this lower figure by ignoring all the SSNIPs to Voice Only customer prices before the

claim period, do you not?
A. I am looking at price changes from the beginning of the claim period, yes.
Q. But it does not in fact matter whether a price increase took place before or during the period when the question is: is the price above the competitive level?
A. So I think if we go to the next page I answer that a bit further down this answer {OR-E/49/53}, in the paragraph which starts:
"In any case, I disagree with the inferences that Mr Parker has drawn from this fact ..."
So what I am using the price changes for is to help scale the actually observed switching, whereas Mr Parker is seeking to infer directly from the price increases something about what a hypothetical monopolist would do. So I disagree with that.
Q. Dr Jenkins, let us go back to the proposition. The proposition was very straightforward: BT was able to increase the price of SFV services to Voice Only Customers by more than a SSNIP.
That does not say anything about switching, does it?
A. That is why I do not think the fact that prices go up by 5% can, in and of itself, tell you anything about market definition.
Q. Dr Jenkins, you bring the SSNIP down to 5.6% by ignoring

all the price increases before the claim period, do you not? It is a very simple question.
A. Prices were much lower in 2009, yes.
Q. That is an arbitrary exclusion, is it not?
A. It is not arbitrary, because the question of why prices have gone up between 2009 all the way through to 2023 is effectively the subject matter of the debate and the dispute, and so the period of the claim that we are looking at and how we use that information seems to me an important question, and here I was explaining the disagreement between Mr Parker and myself about how we use the evidence of the price changes that BT has implemented through this period.
Q. We are just talking about the extent of the price increase here, are we not? For Voice Only Customers, their Line Rental price had gone up by 43% at the point that the claim period starts. I can take you to the data on that, but I think that is also common ground.
A. I am sure that is -- I have not got that number in my head, but I accept it.
Q. So in your answer to this question, you are closing your mind to that 43% increase by the time of the claim period?
A. I am not closing my mind to that, because that in a sense is the question that we will come to on the

excessiveness of the pricing. There could be other reasons for the increase in price, even in the period before 2015, never mind for the claim period, which is what I have investigated thoroughly.

Q. But by ignoring the 43%, that is how you can get down to 5.6%. It makes the price increase look lower, does it not, if you ignore the pre-claim period price increases?

A. I do not believe I am ignoring them, I am just citing the period that is relevant for this case.

Q. Let us just, to complete the point, look at SPCs. I showed you that Mr Parker finds a price increase of 129%. Now, you accept that a price increase of 129%, while your main cost input is coming down, is significantly above the level of a SSNIP. I think you already accepted that?

A. Absolutely. 129% is more than 5-10%.

Q. Let us just look, staying with this part of the JES, you criticise Mr Parker's reliance on a 55% increase in access over January 2015 to April 2023. Do you see that? It is just there at the top of the page.

A. Yes.

Q. I think we might need to ... yes. That is the one.

So you criticise that. But actually if you look at Mr Parker's column on page {OR-E/49/53}, so if we could just zoom in there, Mr Parker is actually referring to

the 129% increase, is he not, not your figure of 55%?
A. Yes, I think that was a version issue, because we were turning the joint statement quite quickly at the end, so I think that is something where there was an update and I did not pick that up in my final review. So this was a previous number Mr Parker had cited in an earlier draft.
Q. So you do not respond to that, do you? You do not respond to the 129%?
A. No, but I guess my answer would be the same, which is we are only looking at access, so we have not looked at an ARPU measure which would capture the calls effects as well. It is over a long period of time. There may be other factors going on to explain those price rises which is a matter for ongoing investigation.
Q. But you have plumped for the lower figure here in response to the factual question?
A. Honestly, that was the number that was in the previous version of the JES. I would have ... I think, has he changed the start date, is that what went on here?
Q. I think with an eye on the time, let us move on to the next question.
A. Yes, so I think in the previous draft it started from January 2015, it was 55%. Then in the final draft, Mr Parker had updated it to say from January 2009 it

goes to 129%. So I would not dispute the number. That is the explanation for that difference.

Q. Dr Jenkins, I would like to move on to secular trend, which you were asked some questions about in the hot tub. I will not go over the same ground that we covered this week, but I have got some further questions about your rejection of the secular trend.

Can we turn up your textbook, "Economics for Competition Lawyers". I have my own copy here. It is at {G/160/74}. This is an extract from your chapter on market definition.

A. Yes.

Q. You see there your main heading at 3.13, "Product Substitution Versus Product Migration"?

A. Yes.

Q. If we pick it up at paragraph 3.184, you say there that:

"There are markets where consumers migrate from one product to another over time."

Do you see that there?

A. Yes, I see that.

Q. You give a number of examples from the digital world?

A. Yes.

Q. Then if we go down to paragraph 3.185, you say this:

"Sometimes the shift from one product to the next happens overnight, but often the old and new products are sold alongside each other for some time. In competition investigations, the question that regularly arises is whether the two products form part of the same relevant market - are the old and new products regarded as close substitutes? As we have seen in this chapter, the hypothetical monopolist test is defined in terms of relative price changes. Product migration is not (or only to a small extent) driven by small price changes. It depends on developments in technology and consumer preferences. Yet this is not to say that it should be ignored when defining relevant markets. Product migration can still have implications for whether a product is worth monopolising."

Now, that is precisely the point that Mr Parker is making in relation to the secular trend towards bundles, is he not, a change in consumer preferences?

A. He is claiming that what is observed is not price related.

Q. Yes.

Let us turn to page {G/160/75}, that is the next page, please. We see your heading there, "Does the new constrain the old?" At paragraph 3.187 you begin by referring to an investigation by the Dutch telecoms regulator in 2005. That was an investigation about whether leased lines were in the same market as newer data services, to which there was, you say, a high degree of product migration.

So if you could just read that first paragraph, please. (Pause)

A. Yes.

Q. So the Dutch regulator concluded that migration was not relevant for market definition in that case. You see there the quote:

"Switching and migration from service A to B does not automatically constitute demand substitution. Demand substitution requires that switching from A to B is caused by changes in the price difference between A and B. In this case, there is a price pressure. Migration, however, can result from other factors, such as the emergence of a completely new service (B) or changes in user preferences. Consumers migrate as a result, where this migration no longer depends on further small (5 per cent to 10 per cent) changes in the price difference between A and B."

So the Dutch regulator here is taking the view that migration between products which is not caused by price changes does not constitute demand substitution. That is right?

A. Yes, that is right.

Q. Therefore, that form of migration does not mean that the

two products are in the same market, yes?
A. I do not know whether they actually -- what they concluded but, yes, I see the point that they had excluded some of the migration.
Q. Yes. They nonetheless concluded that the movement was not relevant to the market definition.
Then below the quotation at paragraph 3.188, you and your editors query does this represent:
"... an overly restrictive interpretation of the hypothetical monopolist test?"
You say this:
"What ultimately matters is whether the old product is a product worth monopolising."
Now, that is precisely the point which Mr Parker made this week in the hot tub.
Now, a product is worth monopolising if you can profitably raise the price above the competitive level, 5 to 10% above the competitive level. That is right, is it not?
A. That is right.
Q. That is the rationale for the SSNIP test?
A. Yes.
Q. Now, if we carry on, you refer to some charts from earlier in the book. We do not need to look at those.
But if we go over the page {G/160/76} to paragraph

3.189, you say this:

"There comes a point --"

Sorry, paragraph 3.189. You say:

"The migration process may not be uniform across all groups of consumers in the market. After the early adopters of the new product and then mass migration by others, there may be situations where the consumers who remain with the old product are those with the highest willingness to pay or the lowest ability to switch. Because of these remaining consumers the old products may still be a market worth monopolising."

I am sorry, I should have shown you as well the text in paragraph 3.188, at the top of that page, where you say:

"There comes a point when the demand for the old product has fallen so far that it is no longer a product worth monopolising and therefore does not constitute a separate market."

That is where product migration is relevant to market definition. Then you go on to say the question is whether there are consumers left who are willing to pay the high price.

So what you and your co-editors are saying here is that even where there is substantial migration from one product to another, those who remain with the old

product may still constitute a relevant market, correct?
A. That is correct.
Q. That is because of their willingness to pay?
A. Yes, and their lack of desire to switch.
Q. Yes. So, in other words, the customers who remain on the old product may be the least price-sensitive ones?
A. They may be, yes.
Q. With a low propensity to switch, as you say. So those are the consumers that can be exploited by high prices.
Dr Jenkins, would you not agree this tells you that you cannot simply look at switching and assume a competitive constraint?
A. And I do not.
Q. If customers who do not switch are willing to pay, they can constitute a market worth monopolising, correct?
A. That is not the right way to look at the question.
Q. That is the way you look at the question in your textbook, Dr Jenkins.
A. That is not the way I look at the question. The way I have implemented my CLA takes into account what is written in the textbook, but it is not the point that what you do is you look only at who is left in the market. The question that we are asking through the period, through my CLA analysis, is precisely the question that is put here in full recognition that some

members of the relevant SFV customers may not wish to switch. So elsewhere in that same chapter there is the part that says market definition is determined by the marginal customers. The constraint on the hypothetical monopolist comes from the people who do switch for price related reasons and it recognises you have the ability to raise prices on the ones who are left behind.

Q. Dr Jenkins, we will come onto your CLA. I just put the principle to you in your own words:

"... there may be situations where the consumers who remain with the old product are those with the highest willingness to pay or the lowest ability to switch."

That is right, is it not?

A. That statement on its own is not sufficient to define relevant market. I think, as it says above:

"... a point when demand for the old product has fallen so far that it is no longer a product worth monopolising and therefore does not constitute a separate market."

Q. That is right, is it not?

A. So the point of the textbook is to raise the issues to make sure when people are considering these questions you consider them with all the relevant factors, and I have taken that into account in my CLA by ensuring that I am, as best as possible, identifying price related switching.

Q. Right. Let us move on, Dr Jenkins. I would like to ask you some questions about Mr Parker's differentials analysis. Now, let us begin by going to the joint statement, {OR-E/49/54}. The proposition at 5.2.5, in the middle of the screen:

"The amount paid by BT Split Purchase Customers for SFV access and separate standalone broadband is larger than the amount paid by customers who purchased functionally equivalent Dual Play bundles by an amount greater than a SSNIP."

Now, that is a reference to Mr Parker's analysis which we have seen a lot of today, Figure 8 in his third report, which was also much discussed in the hot tub.

Now, you say here in the JES you are not in a position to agree or disagree with the proposition, yes?

A. That is right.

Q. That is because you have not compared yourself the Dual Play prices with the split purchase prices, the two standalone prices. That is right?

A. Yes, I think we did cover this in the hot tub, but the reason I have not done this is because it is very hard to know what a Split Purchase Customer is actually paying for the broadband element, so I did not think the

information would be available to do that robustly.
Q. But it is a central question of market definition, is it not, in this case, whether split purchasers and Dual Play customers are in the same market? So you did not make any attempt to look at the two different sets of prices in your evidence, did you?
A. Our focal product prior to 2018 was SFV services, and I looked at that, and I looked at price changes and I looked at substitution behaviour and I conducted a critical loss analysis, which included Split Purchase Customers. From 2018 onwards, my analysis focused on Split Purchase Customers to the best of my ability.
What my position is, and remains, is you cannot infer from price list analysis anything that is useful for the market definition question, which is why I did not undertake this type of analysis in there, and I think, as I set out, I did investigate and think about Split Purchase Customers. I looked at the survey evidence to try to understand what do I think is going on with these customers. The evidence suggested to me that they may well be having different deals from other providers that mean just looking at list price analysis just does not take you very far.
Q. It was a short question. You did all of that, but you

did not look at the prices that split purchasers pay compared to Dual Play customers?

A. Neither did Mr Parker.

Q. Well, we have seen a lot of Figure 8. Let us just stick with your evidence for the moment.

You say here you have:

"... no reason to doubt the numbers reported by Mr Parker ..."

Now, you do not check those numbers, which is why you begin by saying you do not agree or disagree, correct?

A. No, because --

Q. You rely on Mr Parker for these numbers?

A. No, because I think the statement says something, which I do not agree or disagree with. I do not think Mr Parker's evidence is relevant to the statement.

Q. Let us look at your criticisms here. I want to look at your second criticism. You say:

"Additionally, price list comparison may not capture the actual pricing offers made by rivals."

Yes, that is your criticism?

A. That is right, yes.

Q. You do not offer any analysis of actual pricing offers made by rivals, do you, to call Mr Parker's results into question?

A. No, I do not.
Q. Let us look at the transcript for {Day9/157:2-3}. That is where you confirmed this week that you accept Mr Parker's assessment of the difference in the prices paid by SPCs and purchasers of equivalent Dual Play bundles, yes? Do you see that on lines 2-3? If we can ... You accept Mr Parker's assessment of that?
A. Yes, and I think I go on to limit the reliance I think that can be placed on that, but, yes.
Q. You accept it?
A. Yes.
Q. You are not backtracking from that? No.
Despite multiple questions this morning from Mr Beard about the underlying data which formed the basis for Mr Parker's analysis, that has not formed any part of your analysis, an in-depth look at the underlying data behind Figure 8?
A. No, because I think, as I have explained I really do not think that any weight should be put on it, but on its face you can see that it is not going to give you a reliable basis for drawing conclusions, which is a point I have made; and I think even were I to have got my team to spend a lot of time trawling through websites to present that, it still would not have been enough evidence to draw conclusions on market definition.

Therefore the approach I took was actually to look at the switching data and switching evidence, and from that to draw conclusions which I think can be relied on by the Tribunal.

Q. Let us have a look at what you said in the hot tub. It was {Day10/49:14}. What you actually said is:

"Yes, if you thought about Figure 8 that we were looking at and if it turned out that the sum of SFV plus the deal that was being got from the other supplier put it at the same level as the blue and yellow triangles, then I do not think on the face of this you could conclude that there was a separate market. If you have lost the price difference for an SPC customer as compared with the bundle product from BT, then it could be perfectly rational for the customer to have done that.

"In this chart what we see is that Virgin Media's standalone product, that is the top line ..."

We have seen that a lot today.

"... that you have got two sort of maroon coloured blocks, so to your point before, which is well, why are people doing that?"

You said this then:

"Virgin Media is also offering standalone broadband at what seems like quite a high price here for this product. They are not withdrawing that product. The fact that it exists, I imagine if Virgin Media is offering that standalone product, they may also be seeking to ask their customers to consolidate other services along with the standalone broadband product."

So you seem to be saying that these customers taking the Virgin Media product are in fact buying broadband in a bundle with another service like TV, yes?

A. It could be.

Q. Yes, a non-Voice service that is a hidden service in the data.

Dr Jenkins, you have not presented any analysis in support of that hypothesis, have you?

A. I have not.

Q. No. Not in your reports or the joint statement?

A. No.

Q. It is a new point you made in the hot tub, yes?

A. I think I made the point in the JES, but I did not present evidence to support it.

Q. You have not referred to any data on the prevalence of these non-Voice bundles, have you, broadband and TV?

A. I think there is plenty of evidence that Virgin Media and Sky were offering bundled products of TV and broadband, and TV, broadband and Voice. I mean, there is a lot of competitor analysis. I have not --

Q. Let us have a look at it. Let us turn up {C/401/1}.
Now, this is a 2022 Ofcom document. You see there, "Pricing trends for communications services in the UK".
Could we go to page {C/401/30}, figure 18. This is showing the percentage of households who take bundles, and then the colours show the proportions who take different types of bundles. Can you see the tiny pink line, that is "Mobile and fixed broadband", yes?
A. Yes.
Q. Yellow is "Other", yes?
A. Yes, I see that.
Q. All of the other colours are bundles that include a landline element.
So let us have a look at 2017, for instance. You see there that 81% of households in total take bundles. That is the top figure. Then you see that 2% overall take a mobile and fixed broadband bundle. That is the pink colour just under yellow, yes?
A. Yes.
Q. 5%, that is the yellow colouring, take an "Other" form of bundle, and all the rest of that block, those are bundles which include a landline, which you can see. You can see that from the key on the right: landline, landline, landline, landline?
A. Yes, I see that.

Q. So in 2017, at most 7% of households overall are taking a bundle that includes broadband and another non-landline service, so that is your example of the Virgin customer?
A. Yes.
Q. Looking at the other years, there is some variation, but the picture is broadly the same?
A. Yes.
Q. So Ofcom data exists which shows that the vast majority of bundles do include a Voice element, yes?
A. Yes, they do.
Q. That contradicts the evidence you gave in the hot tub?
A. I do not think it does, because we know that Split Purchase Customers are actually a relatively small proportion of the overall market, so that 7% could be the Split Purchase Customers. I would need to -- I cannot do the maths --
Q. You have not presented any data on this, have you, Dr Jenkins?
A. Well, I have certainly presented data on the number of SPCs and the number of VOs in the total number, so one could work that out.
Q. Dr Jenkins, you did not work it out as part of your attack on Mr Parker's Figure 8, did you?
A. I maintain that it is quite possible that the customers

who are split purchase and taking Voice from BT are taking a bundle, another bundle of services from another provider. At least a proportion of them are likely to do that and that is confirmed by the survey evidence at the time when Ofcom is asking Split Purchase Customers what was driving their choice.

Q. Dr Jenkins, this is evidence that contradicts the point you make. You do not cite this evidence anywhere but you now maintain this point?

A. Sorry, which evidence?

Q. You have not addressed the point on market shares of non-Voice bundles anywhere in your evidence as part of your attack on Mr Parker's Figure 8, have you?

A. I have not. But what I have relied on is the survey evidence where Split Purchase Customers were asked the question: "why do you take your broadband service from a different supplier than your landline service?", and a high proportion of them give the reason: get a better deal or value for money or these sorts of answers.

So it is true I have inferred from that what that might mean but I have relied on evidence to inform me about what is driving the split purchase behaviour.

Q. Dr Jenkins, let us move to a different point. It is common ground between you and Mr Parker that the services taken by SPCs are functionally equivalent to

those taken by customers purchasing fixed Voice services in a bundle, yes?
A. Yes.
Q. That is in the JES at 5.2.4. It is also common ground between you that price differences between two products do not necessarily mean that the products are in separate markets?
A. Yes.
Q. So as a matter of principle price differences between products in the same market could be explained by qualitative differences, yes?
A. They could.
Q. Let us turn up your second report, {IR-E/18/57}. If we could go to paragraph 3.69, please. You say there that it is implicit in Mr Parker's analysis that the existence of large price differences in general is suggestive of separate markets. "However, as I discussed in my first report, price dispersion does not necessarily suggest separate markets."
Yes?
A. Yes.
Q. Then you refer to certain economic materials.
If we could go over the page, please, {IR-E/18/58} to paragraph 3.72. You say there:
"My own position on this ... is longstanding."

Then you set out a quotation from your textbook.
You say:
"The hypothetical monopolist test is about reactions to relative price changes between products. It is not about absolute price differences. Branded soft drinks may provide a competitive constraint on own-label soft drinks, and hence be included in the market for the latter, despite being more expensive. Customers make a price-quality trade-off, so if the price difference between the two products becomes too narrow they may switch from own-label to branded (customers of branded soft drinks may switch to own-label if the price difference becomes too large)."
Yes?
A. Yes.
Q. Let us turn up your textbook. That is at {G/160/45}.
Can you see there the paragraph I just read from your report. That is under the heading --
EPE OPERATOR: Sorry, what is the reference?
MS KREISBERGER: I am so sorry, it is {G/160/45}.
Thank you. If we could zoom into the top part of the page, please. It is a little light but I hope you can see that, Dr Jenkins.
A. Yes.
Q. It begins:

"Are absolute price differences relevant?"

Then we have the paragraph which I just read from your second report. That is under the heading, yes, "Are absolute price differences relevant?"

Then let us see the second paragraph:

"However, just as differences in product characteristics sometimes provide a useful sense-check on market definition, so do differences in price."

Then you give the example of two different flights, both of which go from London to Milan but which command very different prices. Let us just read that:

"For example, if you can buy a business ticket for a flight from London Heathrow to Milan Linate Airport at 7.30 am next Wednesday for £580, while an economy ticket from London Stansted to Milan Bergamo Airport at 7.45 am that day costs £58, chances are that these two flight tickets do not provide much competitive pressure on each other. They seem to be in separate relevant markets."

Then you go on:

"How can you establish this? It may be that there is a break somewhere in the chain of substitution ... Or it may be that you have to define separate markets along various dimensions, such as by geography or type of customer (time-sensitive versus non-time-sensitive passengers)."

So the point you are making here in your textbook is that large price differences between similar products can be an indication that the products are in separate markets, yes?
A. Yes.
Q. That is Mr Parker's point, is it not, in this case?
A. Mr Parker's point is that you can infer directly from the fact that there are large differences in price that they are in separate markets. I think, as that paragraph shows, it says how can you establish this? You need to consider it. What you are interested in is reactions to relative price changes.
Q. If we just go back to 3.72 of your report {E/18/57}, your longstanding position actually has more in common with Mr Parker than your report suggests, does it not?
A. No, I think my longstanding position is as outlined in that quote, which is the hypothetical monopolist test is about reactions to relative price changes between products.
Q. But Dr Jenkins, you do omit the paragraph which bears a great deal of similarity with Mr Parker's approach, do you not?
A. I think I already answered that, which is Mr Parker infers directly from price differences about market definition. The example that is given in the following

paragraph is about where you have very significant price differences you are going to -- that is going to be information you do take into account. However, the position is you still need to think about whether that dispersion is sufficiently wide such that a relative price shift is not going to change customer behaviour, and that --

Q. The language you use in your textbook, Dr Jenkins, is that looking at the difference in prices is a useful "sense check", but that is not a sense check you carried out in this case, is it?

A. I did not need to do a sense check in the sense that (a) I looked at the actual responsiveness to shifts in prices, and (b) I do not think there was clear evidence on the extent of that price dispersion which quite likely was going to be very wide in this market.

MS KREISBERGER: Sir, is that a good moment for a break?

THE CHAIRMAN: Yes, just one second, please. (Pause).

Yes, thank you.

(3.19 pm)

(A short break)

(3.30 pm)

THE CHAIRMAN: Yes.

MS KREISBERGER: Thank you, sir.

I would like to move on to price discrimination.

Let us turn up the CMA Market Definition Guidelines again. They are at {G/137/12}, please.

Dr Jenkins, do you see there at the bottom of the page "Price discrimination"? It begins:

"The test described in Part 2 [that is the HM test] assumes that the hypothetical monopolist charges all customers the same price for the focal product. However, in some cases the hypothetical monopolist may be able to charge some customers a higher price than others, where the price difference is not related to higher costs of serving those customers. This is called price discrimination."

Then it goes over the page {G/137/13}:

"Price discrimination requires that customers cannot arbitrage."

We should just see there footnote 27:

"For example, customers purchasing at low prices must not be able to sell on sufficient quantities to customers paying higher prices to undermine price discrimination."

Now, that is right as a matter of principle, is it not, Dr Jenkins?

A. It is.

Q. Because arbitrage would defeat the dominant firm's attempt at differentiating prices to two different groups.

So if we call these the two conditions. The first that I read out to you on the previous page is the ability to charge one group a higher price than another, I call that CMA condition 1, and no arbitrage is CMA condition 2.

If we then come back to 3.8 here, the CMA says:

"The undertaking could be able to discriminate between customers due to a variety of reasons ..."

The first one is high switching costs, such that some:

"... might be locked in to purchasing a particular product ...

"Customer demand may differ according to time ..."

Or it may:

"... differ according to the purpose ..."

So there are three different reasons that an undertaking might be able to discriminate.

Then if we could home in on 3.9, please:

"Where a hypothetical monopolist would (or would be likely to) price discriminate significantly between groups of customers, each of these groups may form a separate market. If so, a relevant market might be defined as sales of the relevant product in the relevant geographic area to a particular customer group."

Then the CMA gives the example of:

"... [an HM] of a train service might be able to price discriminate between peak and off peak customers ... peak travel and off peak travel might be in separate markets."

Yes? This is standard learning, yes?

A. Yes.

Q. Then 3.10, if we could go down, please:

"By contrast, where an undertaking is unable to price discriminate, this may lead to the relevant market being wider than the focal product ... For example, suppliers may face price constraints such that they must set a uniform price across products or ... areas. Although it might in theory be profitable for [an HM] to raise price in the focal area, perhaps because substitutes are unavailable, the existence of a price constraint may make such a price rise unprofitable, because it would require that prices are also raised in other areas where substitutes are present. Price constraints may thus lead to the relevant market being widened beyond the focal area. In a given case, evidence on the extent to which prices are constrained and the effect of the constraint on substitution would need to be considered when assessing the appropriate relevant market."

Dr Jenkins, the question is whether the firm can charge different prices to the different customer groups or whether it faces a price constraint, yes?

A. There are three forms of price discrimination in economics, and so the --

Q. Might it help if we go to the joint statement where you and Dr Parker agree? Let us start there. I am certainly going to let you say your piece, Dr Jenkins.

It is at 5.17, {OR-E/49/49}. Proposition 5.1.7:

"Where a hypothetical monopolist can price discriminate between customers, it may be appropriate to define separate markets for the products purchased by each customer group."

Let us take this in stages, Dr Jenkins. I am going to take you through your evidence. You say you agree and Mr Parker agrees. So this proposition is common ground, yes?

A. Yes. I think if you just look at the statement before, there are three conditions, not two --

Q. I am going to take you to that.

A. -- so that was the point I was going to --

Q. I will take you to that. You will have an opportunity.

Let us start, we will take this chronologically. Let us start with your first report at paragraph 4.24, that is at {IR-E/17/66}. If we could focus in on the section "Price differentiation", you say:

"I next consider whether, notwithstanding that SFV services to VOCs and SPCs are the same from a functional characteristics perspective, these customer groups may nevertheless give rise to distinct product markets on the basis that a hypothetical monopolist may be able to price differentiate between the two groups. It is evident from BT's price list that prior to the BT Commitments, BT did not, in fact, price differentiate between the two groups."

Then you go on to ask yourself there: well, that is true of BT, and you say, would it be true of the hypothetical monopolist?

Then if we could go down to -- so we see there the beginning of 4.25. Here you set out two conditions. You say:

"In order to be able to price differentiate a firm must be able to both:

"(a) identify which group a customer belongs to at the point of sale ..."

So just pausing there, that is what I called the CMA's first condition. You have got to be able to identify them to charge them different prices, yes?

A. Yes.

Q. Then the second condition that you point out here is the requirement that the HM can prevent arbitrage. That is the CMA second condition, yes?

A. Yes.

Q. At paragraph 4.26 here {IR-E/17/67}, you make the point that preventing arbitrage is not an issue here because an SFV service is tied to an address. You then say:

"... the key issue is whether a hypothetical monopolist of SFV services could distinguish between SPCs and VOCs at the point of sale prior ..."

This is prior to the BT commitments, and you observe, and it is common ground that BT could not distinguish between them then.

Then at 4.27, you say:

"The hypothetical monopolist --"

Sorry, the second sentence of 4.27:

"The hypothetical monopolist should be considered ..."

To be under the same constraints as BT?

A. Under the same "regulations".

Q. Yes. That seems right.

Then you say it follows from this that:

"... the focal product should be SFV services."

In other words, you are saying here the market should not be segmented, or the focal product should not be segmented by customer group because the conditions

for price discrimination are not met. That is uncontroversial?
A. Yes.
Q. That is common ground as we -- and we have that in the joint statement.
Now, following your logic through, after the commitments the hypothetical monopolist could charge different prices to the two customer groups, so the first -- VOCs and SPCs. So the first CMA condition is met at that stage, yes? There is still no scope for arbitrage, that still applies. So following your conditions in your first report, it is right that VOCs and SPCs would be in separate markets post-commitments, yes?
A. Sorry, I do not think you can infer directly from those conditions whether they are in separate markets, but if you do not meet those conditions then you do not need to consider whether they are separate markets --
Q. Let us look at how you put it in the joint statement.
A. So if I just finish. What I did say was that post-2018 the focal product should now be different, and then we ask the question.
Q. Yes, understood. So if we go to page 50 of the joint statement, {OR-E/49/50}, you say -- the proposition is:
"After the ... Commitments, SFV services sold to

Voice Only Customers eligible for the Carmen discount are in a different relevant market from SFV Services sold to Split Purchase Customers (and Voice Only Customers not eligible for the Carmen discount)."

Actually, there you say:

"I agree that it is likely".

So you do agree that it is likely, and that is not just the focal product, that is the market.

I do not think this is a big point.

A. Yes, that is fine --

Q. But you can agree that it is likely --

A. -- but just that it is not that the SPCs are a separate market. I find the SPCs are in a market with Voice services sold in bundles.

Q. I know that is your case.

Now, following the same logic, to work out if bundles are in a separate market from SPCs, which you appreciate is the Class Representative's case, the relevant question, what you describe as the "key question" in your report, is whether the hypothetical monopolist could differentiate between Split Purchase Customers and Dual Play customers through the claim period, yes? Because those two groups buy functionally equivalent services?

A. So this is the difference between second degree and third degree price discrimination, which I do not think anyone has gone into a lot of detail on so far. So third degree -- both second and third degree price discrimination are about how you identify the group of customers that you are targeting with your offer.

In third degree price discrimination, that is where you can know that about the customers. So, for example, students versus -- giving student discounts requiring a card. Second degree price discrimination is where you design your product such that it appeals to a particular set of customers, and I differentiate the two questions that you are asking between those two forms of price discrimination.

So here in my first report I was considering a form of third degree price discrimination, the question whether BT could know that this is a customer who did not take broadband and this was one who did. Then when we start to think about Standalone Fixed Voice services versus Voice sold in a bundle, that is about designing products so as to meet the needs of different customers and seeking to be able to encourage them to take up the package that best suits them.

Q. Dr Jenkins, let us have a look at how this is put in the joint statement. I would like to start with Mr Parker's evidence, that is at page 48. So it is 5.1.6.

{OR-E/49/48}.

Mr Parker on the right-hand side there. So we can see the proposition:

"Where a hypothetical monopolist can price discriminate between customers, it may be appropriate to define separate focal products for the products purchased by each customer group."

Mr Parker's evidence is:

"I do not consider that one needs to consider different focal products (in this case) ... Here the ... focal product is access and calls, and the issue to be explored is whether BT can price discriminate between customers taking SFV services and customers taking bundles ..."

As you know, Mr Parker's Figure 8 shows the large price differentials between split purchasers and Dual Play customers, yes?

A. I think you know my views on whether that is a reliable chart.

Q. Yes.

Now, the hypothetical monopolist, assuming it to be under the same constraint as BT, can identify which group a customer belongs to at the point of sale, can it not? BT knows if it is supplying a Standalone Fixed Voice service to a split purchaser or whether it is

supplying a bundle to a customer, yes?
A. I am not sure that is the right way to think about it. The right way to think about it is BT offers two different packages with different features, and customers then select which one of those they want, and over time they may change which group they are in.
Q. Dr Jenkins, surely you can agree that when a customer is buying a fixed Voice service as a standalone product, BT knows that is what it is selling that customer, yes?
A. It knows that is what it is selling, but BT does not determine which product a customer buys.
THE CHAIRMAN: I think at this stage -- I see that, but I think at this stage the question is: what does BT know or what can it know?
A. They know what their customers buy. They do not only offer one package because they know you are a Voice Only SFV customer. They offer you both, and you select the one that you would like.
MS KREISBERGER: There is still no scope for arbitrage. Arbitrage, we understand, is not an issue.

So the two conditions are met.

Let us stay with the joint statement at 5.1.6, and let us now look at your column, as I said we would. I would like to pick it up at the third paragraph, starting on page {OR-E/49/48}.

You say this part way down. If we can focus in on the bottom of the page, please.

"I do not consider that BT was, or was even able to, price discriminate in this way."

This is where you say you need to examine three issues. Now, let us take them in turn.

Your first one is arbitrage, so we are agreed, it is possible to prevent arbitrage. So that is consistent with your first report.

Then if we could move to the next page, page {OR-E/49/49}, your second criterion is whether the firm can identify:

"... sellers in the different groups, or structure their pricing to induce the different groups to identify themselves?"

Dr Jenkins, I think there you mean "buyers", not "sellers"?

A. I do indeed.

Q. That is a typo.

So this is equivalent to 4.25(a) of your first report where you say the question is to identify which group a customer belongs to at the point of sale. But you add this further gloss. You say: can the firm structure its pricing to induce the different groups to identify themselves? But we have established that BT knows at the point of sale if it is selling a standalone line or in a bundle, because it has to know which price to charge, yes?

A. So I would say that what I have added in there in that second bullet is to enable a discussion about the difference between third degree price discrimination and second. So third degree price discrimination is where you know this about your customer, and that was the VO versus SPC, did they know whether someone was taking broadband.

The second one is about, which happens in many arenas, where businesses bundle their products in different ways to appeal to different customer groups but allow their customers to select the product that best meets their need.

Q. Let us have a look at what you say there under the bullet points. This is still on your second -- it is explaining your second bullet. You say:

"... the high levels of switching [which we know is a very key part of your case] from SFV to bundles suggests that it was not possible for BT to structure prices ... to induce the two groups to take different offers."

So what you seem to be saying there is the switching data tells you that BT could not maintain higher prices

to Standalone Fixed Voice customers. But Dr Jenkins, the pricing data tells you that BT could maintain higher prices to standalone fixed customers, and it did maintain higher prices to standalone fixed customers, does it not?
A. That if the purpose of BT's price structure was to provide an offer to SFV services that they would take and stay with and be that customer group, and then another product which would be for people who wanted to take a bundle, what I am saying is the switching evidence shows that many of those customers who were offered the Standalone Fixed Voice service at -- or took the Standalone Fixed Voice at some point, moved to take the other product. So that was -- those two products are not sufficiently separated that you can say they are in a different market.
Q. Dr Jenkins, does it not suggest a blinkered fixation with switching not to deny here the basic fact that BT was charging different prices to these two groups?
A. BT was charging the same price for Voice to those two groups and charging a particular incremental price for the customers when they first moved to bundles.
Q. I am not going to re-open the debate on the bundle pricing fallacy at 4 o'clock.
But I would like to turn to your third criterion,

your third bullet point. We saw that does not feature in your first report, but you have added a third bullet point now as follows:

"Would price discrimination fail as a result of new entrants being able to target low priced offers at the group receiving a high price."

The CMA does not mention this as a condition of finding price discrimination markets, does it?

A. I do not think so, no.

Q. You do not mention this condition in your first report, do you?

A. No.

Q. You do not cite any source for this proposition, do you?

A. Well, I think, if we went back to the CMA document, I think it said price discrimination "may" lead to narrow market, separate markets. So I think what I am trying to capture here is just the fact that you can offer targeted products to different customer groups is not sufficient to answer the question whether or not they do form separate markets.

Q. Yes, that is the answer you are trying to get to here.

Let us see how you deal with it then in the joint statement. You say:

"I also consider that the technical ease with which a supplier of fixed Voice services in a bundle can supply SFV services would make price discrimination on the basis of inducing self-selection between Voice as part of a bundle and SFV services impossible."

I do not want to go over the ground that we have already been over on the third party operators, but, Dr Jenkins, there is not a single piece of evidence that supports your theory here that the hypothetical monopolist would be stymied by new entrants hammering on the door of this declining market, is there?

A. I think in the event that there were high margins available on the customers that you were supplying the Voice Only product to, then it is very easy for other suppliers to offer services to them.

Q. You do not refer to any evidence of that here, do you?

A. Not in this answer.

Q. No. We come back to the fact that Mr Parker's analysis shows that standalone prices for fixed Voice have not been eroded by the supposed new entrants offering low standalone prices. You do not mention the pricing data here either, do you?

A. I do not mention the pricing data, no.

Q. Let us move on to a different topic then. I would like to ask you a few questions about your critical loss analysis. Now, let us begin again with the joint statement at {E/49/47}. You and Dr Parker agree that the cellophane fallacy will skew a market definition analysis to a finding of a broad market. That is the proposition at 5.1.5:

"... this may lead to markets being defined that are two wide."

A. Yes.

Q. You both agree with that.

A. Yes.

Q. Now, you make two points in support of the proposition. First, you say that margins will be lower if prices were lower, yes? The margins for the hypothetical monopolist would be lower if prices were lower. So prevailing prices increased the critical loss, yes? This is why the cellophane fallacy can skew market definition?

A. Yes.

Q. Secondly, you say in your second bullet:

"Consumers may be less likely to switch away from the focal product in response to price increases from a lower price point, so elasticity estimates may be higher at prevailing prices leading to higher actual loss estimates."

So in other words, you are saying if you apply the SSNIP test to prices that are already at supra-competitive levels, you will observe switching to products that would not happen if prices were at competitive levels, yes? That is the broad proposition?

A. Yes, those are the two things you need to think about if you are concerned about the cellophane fallacy.

Q. Products can look like substitutes when they are not if you are infected by the cellophane fallacy, yes.

So coming back to your textbook again at {G/160/1}, the point is made very clearly here, page {G/160/33}. You see here the heading, on point "Is the fallacy a problem?"

If we go over, just in the interests of time, it is an interesting section, but 3.79 on the next page, {G/160/34}, your conclusion in this section on the cellophane fallacy, whether it is a problem, you say:

"At the very least a one-way test can be applied. If, at the prevailing price level, a monopolist can profitably impose a SSNIP, you can be confident that the market is no wider."

So in that case you can be confident with your market definition.

"If, in contrast, you find that the monopolist cannot profitably increase price, there may be a cellophane fallacy and the market may be defined too broadly. Ultimately, if there is a high probability that the analysis will suffer from a cellophane fallacy you may have to conclude that market definition is not a useful intermediate step and instead focus directly on indicators of market power, such as profitability ..."

Now, that would seem to address Mr Ridyard's philosophical question on the usefulness of the exercise in the hot tub.

A. I would just encourage reading the paragraph above which gives the other side of that, which is to say it is not all doom and gloom, as I think I gave the answer, that you can -- because many markets will not have perfect competition, so you may still look at a market definition exercise in a thoughtful way.

Q. In the hot tub you expressed a different view from the conclusion at 3.79. You said to ignore market definition would be a counsel of despair, whereas here you are saying there are cases where you go straight to profitability. If that was the position here, that would take you straight through to limb 1, yes?

A. I think you could talk about dominance direct indicators of market power. That would be at the dominance stage.

Q. Yes, and Mr Parker confirmed in the hot tub, did he not, that he relies on limb 1 for dominance as well?

A. Yes.

Q. Now, before we leave this point, you say in the textbook we saw that the question is whether there is a high probability of the analysis being infected by the cellophane fallacy.

Now, Dr Jenkins, in general terms, in a case where the substance of the allegation of abuse is that prices are excessive, there must be a risk, yes, that prices are infected by the cellophane fallacy?

A. I think if you look at -- I think actually the previous page in the textbook also makes this point, but perhaps it is best to look at the joint economic statement at 5.1.5, which is when are we most worried about the cellophane fallacy? It is actually when prices are at or very close to the monopoly price level. Sort of technically, from an economics perspective, our concern is that if you are at the monopoly price level, that means that the monopolist has already priced it so high that they have got to the point where any change is going to be less profitable. That is the control they have.

So if -- while you may have some concerns about market power, but you are not at that actual monopolising level, then in that -- on the way, in a sense, on the way up where there is some market power, you still will get relevant information about substitute behaviour and switching behaviour.

So that is the sense in which it is only if your view is that the behaviour you have facing you is

absolutely going to be a monopoly situation that you -- I would think you would certainly say, okay, I am not going to put very much weight on this. Other than that, you would -- it makes sense to look and consider the evidence carefully, and I would say that is the situation we are in here.
Q. I will just try that again.
In an excessive pricing case, at the stage of doing the SSNIP test, you do not know yet whether your prices are excessive, but you accept that in an excessive price case there is a risk of the cellophane fallacy?
A. I think in this particular case, where we are talking about a multi-product firm, where the bulk of the products that they supply are in a relatively competitive environment, and we are looking at one product there, now, absolutely, we are in an excessive pricing situation, so that is a situation where you do need to consider cellophane fallacy, and hence I have done so. But I --
Q. Thank you, Dr Jenkins. I think that answers the question.
MR BEARD: No, let the witness finish her answer, please.
A. But I do not think that is grounds to completely sidestep market definition, the SSNIP test and the CLA.
MS KREISBERGER: Dr Jenkins, you understand it is part of

Mr Parker's case that BT has a 95% share of the SPC market, yes?
A. I understand that is his position.
Q. So if Mr Parker is right on his market definition, that in itself would indicate a risk of cellophane fallacy here, yes?
A. It could.
Q. Yes. Just to complete the point, Dr Jenkins, you are aware that Ofcom found that BT's profitability for fixed Voice line was high and increasing over time? We can turn it up. It is at {IR-C/1/158}, and if we go to paragraphs 4.68 to 4.71 {IR-C/1/59}. I think if we just read those paragraphs. Cast your eye over that.
A. Yes, I am aware of that.
Q. So that is evidence which suggests there is a risk of the cellophane fallacy, yes?
A. The fact that the margins increased could be explained by other reasons, but it is a reason, absolutely. I have considered the cellophane fallacy carefully because we are in an excessive pricing environment.
Q. Yes, so let us have a look at what you say about that, coming back to {OR-E/49/47}, 5.1.5, which is where we started.
You begin by saying this:
"In the case of BT, I do not find the price charged

to be excessive, and therefore do not consider any adjustment ... to be necessary."

Just to be clear, your primary position, we will come on to the rest of the paragraph, but your primary position is to reject the problem, yes?

A. Yes, on the basis of my limb 1 analysis. But I recognise that you have got to get there, so I consider the point at the market definition stage.

Q. Yes, and to that you say at the bottom of the paragraph:

"... I have conducted sensitivities adjusting my CLA where possible to account for potential issues around the cellophane fallacy, and I still find wider markets."

So you bring in your sensitivities here?

A. Yes, I do.

Q. So I would like to look at those next. I would like to focus on the switching rates in your CLA. That is for the purposes of your assessment of actual loss in your CLA, and we established in the hot tub that your assessment of the quantity response to a change in price is based on measuring the level of switching by BT's SFV customers, yes?

A. That is right.

Q. So in other words, you work out how switchy SFV customers are by looking at the actual levels of switching of BT's SFV customers, yes?

A. Yes.
Q. On that basis, you work out their elasticity of demand?
A. I do.
Q. You crystallised the problem succinctly in the hot tub on Tuesday. That is {Day10/78:1}. Line 9. You said:
"I do not have a good counterfactual switching data, I do not have that and I am clear about that."
Yes?
A. Yes.
Q. So if BT is charging supra-competitive prices for SFV services, then what you are measuring is how many customers switch away from BT at those supra-competitive price levels?
A. Yes, at prevailing prices.
Q. You do not know what the switching rates would be in a competitive counterfactual, if that is right?
A. Well, effectively I have -- everything -- the data I observe is based on behaviour at prevailing prices. I then take a sensitivity at a lower price level, but I do not have evidence of how everyone would respond at that lower price, so I have to make some inference based on actual switching data --
Q. Yes, and that is why you said "I do not have good counterfactual switching data", that is the point you were --

A. Yes, I was just clarifying the positioning of one of them as supra-competitive and one of them as competitive, but at this point you just know you have prevailing prices and you are testing a lower price.

Q. If we could just turn up {G/137/21}. The CMA explains the same problem in the Market Definition Guidelines at 5.6. The CMA says switching patterns at supra-competitive price levels may not be a reliable guide to what would occur in normal competitive positions, and that is the problem you are acknowledging.

You also very candidly acknowledge that problem in your first report {IR-E/17/101}. Sorry, can we go up to 4.104. It says:

"There is an additional potential effect of the cellophane fallacy in that consumers might be less likely to switch away from the product offered by the hypothetical monopolist in response to price increases, if prices were lower. It is generally difficult to generate a proxy for how observed switching would have differed if prices had changed from the hypothetical lower level."

You say:

"I lack the data to formally control for this effect."

Then we are going to come on to how you deal with that.

But when you say you "lack the data to formally control for this effect", that is a very candid statement of the problem. Because you cannot work backwards from the observed switching at supra-competitive levels. There is no relationship, as you say, between counterfactual -- switching in the competitive counterfactual world and the observed switching rate if your prices are infected by the cellophane fallacy, yes?

A. I think that is put too strongly, because obviously people do not change dramatically, and there are some models of demand which would say switching rates or demand elasticity will be the same, regardless of the price level. So one could put forward that premise: if you have what is technically known as an isoelastic demand, there would be no effect.

But what I do not have is the empirical evidence to assist with this question, but also, depending how much the prices are going to change, you may not expect very dramatic changes in switching behaviour, which is why I went ahead and did my sensitivities, because I am not thinking it is so outlandish to make some judgment on this basis.

Q. We are going to come to those. As you say, though, you simply lack the data.

Now, in the hot tub you explained the point you have just made, which is that you adjust the data, you said "as best I can, to make it applicable to the hypothetical monopolist question I am looking at". That is how you put it in the hot tub.

In your first report, if we could just go back to that, {IR-E/17/99}, paragraph 4.102, you admit this is only a partial adjustment, that is how you describe it there. You say that:

"I am only able to partially adjust my analysis to account for the cellophane fallacy."

A. Yes.

Q. I would like to have a look at what form that adjustment takes, because I do not think that was a focus in the hot tub. That is set out in the remainder of 4.104. So if we could go down to {IR-E/17/101}. You say this:

"... one approach to allow for a lower potential elasticity at a lower price point would be to assume that the elasticity in each sub-period is equal to the smallest elasticity recorded over the entire period."

Let us just focus in on how you did that. To arrive at your actual loss estimates you take the period from 2013 and you salami-slice it into six chunks, yes, six sub-periods. We can see that at {OR-E/25/18}.

So you can see there in the table, Table A1.2, at the bottom of page 18 there. Thank you. If we could just focus in on that, thank you. You see there the six periods of time, roughly equal periods?

A. Yes. What I am doing there is I am looking at actual changes in BT's Standard Line Rental price, and I am looking then 12 months or so forward, depending on when the next price change happens, and then looking at the switching that occurs, and I think because we know that, as I think was discussed, there might be a lag with notification, people may be on contracts, all of those things, so I am cumulating switching over the months after the price change, but that is why I have these different periods in my analysis.

Q. Yes. So for each sub-period, just to be clear, you estimated the numbers of BT SFV customers who switched as you just described those periods, but you estimated the actual numbers who switched for each period?

A. Switched for price related reasons.

Q. You then use those numbers to work out the customer price elasticity for the period in question, yes?

A. Yes.

Q. That is the elasticity you used to estimate actual loss from a 5 to 10% SSNIP. So the sensitivity that you

apply to address the problem of the cellophane fallacy on switching rates is to take the lowest price elasticity of the six sub-periods, yes?
A. That is right.
Q. You take the lowest price elasticity and you apply that across the whole period?
A. Yes.
Q. So if we go back to -- I am not sure we need to look at the table. You find that the lowest elasticity is in period 2, yes?
A. Yes.
Q. That is an elasticity of minus 2.63%?
A. Yes.
Q. You take that elasticity and you apply it across the whole period. So in other words, the cure which you use is to use a price elasticity based on actual switching rates --
A. Yes.
Q. -- in a particular sub-period?
A. Yes.
Q. Switching rates observed at BT's high prices, yes?
A. Yes, at prevailing prices.
Q. Even though the problem that you are seeking to cure here is that actual switching rates are "contaminated" with the cellophane fallacy, and that is using your

wording from your report, yes?
A. Yes.
Q. That is the problem?
A. Yes.
Q. So the problem here, Dr Jenkins, is just picking the lowest tainted calculation does not actually cure the problem, does it?
A. It may not fully cure the problem, but I thought that is a reasonable approach to addressing it through the period.
Q. I mean, it is a bit like saying Lance Armstrong was on performance-enhancing drugs when he won six times at the Tour de France, so we will take his slowest speed as the record, is it not?
A. I think the question is the extent to which that contamination is affecting the results, as you say. It is not quite like performance-enhancing drugs, so it may not be that significant of an effect. So it is not that the evidence that we have got in the market at the time is of so little value that you cannot rely on it, at least in part.
Q. Just to be clear, when you run the commitments sensitivity check, so that is where you take the lower commitments price, and you change the starting price, and you covered that in the hot tub, but you take the

same approach to the switching rates, do you not?
A. I do.
Q. So you do not make any different attempt to cure contamination of switching rates for the cellophane fallacy under the commitments sensitivity?
A. No, and I think in my first report, if we went to {E/17/100} which I think is the -- no, we moved off it, but it is the page before where we were, on the table.
So at this point in my first report I was using Home Phone Saver as my counterfactual price, because the CR had acknowledged that as a potential reasonable comparator at that time in the claim form, so my thought was that was recognition that Home Phone Saver was a reasonable competitive benchmark.
Now, actually Home Phone Saver is not very different from -- the ARPU of Home Phone Saver is not dramatically different from the ARPU of SFV services. So particularly in that situation I thought, okay, let us take the lowest in the period of the responsiveness that I am seeing. I think -- maybe given the time we will not go to the table, but I think there is -- I do have somewhere the actual numbers on the Home Phone Saver change. I have lost it now, so I will get it to you -- I can get it to you at another point if you want to see the differences. There is one period where it is a 20%

difference and other periods where it is much smaller.

Now, if you look at the difference between the actual loss and critical loss in the table here, you still see that I am finding wide markets, my actual loss is above my critical loss, and it is actually quite significantly above the critical loss through most of this period.

So while I do not have grounds for saying, okay, I am going to pick 10% and change the elasticity to 2 or to 1.8, and therefore just move it down, what I would say is you actually could reduce it quite a bit lower and you will still find wide markets on the cellophane fallacy.

Q. Let us just stick with switching rates. So first of all, on the commitments sensitivity. Can we go to {IR-E/18/240}. At A2.10 at the bottom of the page you say:

"As above, I have been unable to estimate the potential change in the actual loss that would be due to the lower price point assumed under this sensitivity."

Yes?

A. Yes, that is right.

Q. If we go to {IR-E/25/18}, this is your CLA annex. A1.31. Can we try {OR-E/25/18}, I am so sorry. Yes. Just focusing in on A1.31 on the question of switching rates, your estimate is based on the Standard Line Rental price increases, yes?

A. It is.

Q. You observe that two came into effect after the commitments and affected only SPCs. In other words, for your commitment sensitivity you have not isolated VOC switching rates during the period of the discounted commitments, have you?

A. No, I focused only on SPCs.

Q. So your commitment sensitivity is still based on switching levels observed at the high SFV prices?

A. Actually it is based on actual SFV switching, so it is a mix of VOCs and SPCs at that time, so it is a mix between the commitments price and the SPC, and I say I have no way to strip that out. So it has some conservativeness built into it, because that switching rate will capture the fact that the SFV -- the VOC customers are generally facing the lower commitment price.

Q. You fall back on the same fix that you use of adopting the lowest price elasticity of the six periods switching rates at the BT high prices?

A. I think this is still my first report, that is the annexes to my first report. So actually if you went to {E/18/240}.

Q. That was my next stop.
A. Oh. So I think this is -- so in addition to the fact that post the commitments we are capturing commitments switching in the VOCs, this is where I think we did discuss that in making adjustments to how I interpret the switching data, I have some additional reductions to do with in the event people are concerned some of the switching should not be attributed to price.
So this is where I have taken my lowest sensitivity on the price-related switches, so it has the effect of lowering the actual loss here as well, and I have combined that with the commitments price, which, as I say, is a very low price in this period.
Here you see we do get one narrow market in the period. So we are getting to the point of this is the amount of adjustment you need to do to the actual switching data to actually find that you would get a narrow market.
Q. Dr Jenkins, just to be very clear, because we are sticking on this one point, in this case you are still adopting the same fix, which is to use actual switching at BT's prices, but you simply take switching rates in the lowest sub-period, yes?
A. But if you see in the heading of this table, it says "Low proportion of price related switchers". So it is

that I am using the underlying switching data, but
I have made an additional adjustment to it. That is the
one that is saying instead of taking 80% of that
price-related switching, I am only taking 60% of it. So
it is effectively reducing the elasticity during this
period.
THE CHAIRMAN: I wanted to ask about that. The 20% that you
took to bring it down from 80 to 60, which is where
you --
A. Which is what we are looking at here.
THE CHAIRMAN: Yes, which is where you end up.
A. Yes.
THE CHAIRMAN: Just remind me, the extra 20% that you took
off --
A. The first one?
THE CHAIRMAN: The first one was bereavement and things like
that.
A. No, no. So even -- having stripped out all those who
are bereaved, and all that you have left are the people
who you think are responding to price changes, for my
base case I say let us still strip 20% of those out.
THE CHAIRMAN: As non-price-related.
A. As potentially non-price-related, and then in my
sensitivities I say let us take another 20% off and see
whether we still find --

THE CHAIRMAN: That second 20% off was to cater for?
A. Just more non-price-related switching. Just the sensitivity on that.
THE CHAIRMAN: That has nothing to do with the cellophane fallacy. The cellophane fallacy has been worked through on a separate way of dealing with it, which is this lowest ...
A. Lowest price, lower price. But to address the question that is put -- that I have put myself is to say, okay, you can reduce the price level for your cellophane fallacy, which is what I have done with the commitments price, but there is still open the question that there might have been less price-related switching at the lower price.
So then I say, okay, well, let us combine these two sensitivities. Let us combine the lower price from the commitment with the lowest sensitivity I have done on having accurately addressed price-related switching. So again, you are -- and that is to address the point that is put to me, that I am not able to find evidence in the market of what people would have done at that lower price, and I say, okay, but take this sensitivity where I have already reduced the amount of switching that we count, and that is some answer to even this second criticism of the cellophane fallacy.

THE CHAIRMAN: So you are applying the 60% as your sensitivity.

A. Yes, for the cellophane fallacy point, in addition to the price.

So I think Ms Kreisberger took us to -- saying there were two issues with the cellophane fallacy. The first one is the price is too high, and the second is given the price is too high the switching may be too high. So when you reduce the price that you use, you still have to say: I need to reduce my estimate of switching as well to match, in a sense, the fact that I have reduced my price.

THE CHAIRMAN: Yes, but where does that come in, in your taking it into account here?

A. So in the table that is in front of us, that is the combination where I have used a low proportion of price-related switches and Mr Parker's suggested alternative price path. So I have reduced the price and I have made an attempt to reduce the price-related switching.

MS KREISBERGER: Dr Jenkins, you say you accurately addressed price-related switching, but it is still the case, as you made very clear in the hot tub, that you do not have good counterfactual switching data, yes?

A. I do not have data for what people would have done if

they faced those prices, so I have to make an inference
on the data that I have.

MR KREISBERGER: I have no further questions for Dr Jenkins.

THE CHAIRMAN: Right, thank you very much.

Any re-examination, Mr Beard?

MR BEARD: Not really, but ...

THE CHAIRMAN: Do not feel obliged.

Re-examination by MR BEARD

MR BEARD: I am going to ask one. Can we go to {E/18/57}.
So this is under the evidence on price dispersion and if
we go down the page this is the paragraph you were taken
to, the next page, I apologise, {E/18/58}, about your
own longstanding position but there is a quote that
starts just above that from a Mr Massimo Motta.

A. Professor.

Q. I am sorry, yes. You are quite right. Professor Motta
who was formally the chief economist of the
European Commission. You have cited his views here.
Can you just explain precisely what Professor Motta is
saying?

A. So this is taken from Massimo's textbook and so first of
all, it picks up at a point where he is talking about
a practice which is just to look at how two prices move
together. So it is known as price correlation analysis,
and whether that is relevant for defining markets. His

view on it is to be able to use anything about price differences and how they -- and whether the price levels are similar and then whether there is a difference between the two price levels is unsound.

Going on to the other page, it is that, what you want to understand is whether two products give a constraint on each other and price differences alone do not give -- I have added alone, but price differences do not give us any information on this point. Like just knowing two point products are priced differently is not enough of a basis to say they are in different markets.

THE CHAIRMAN: Just a minute. (Pause).

MR BEARD: Sorry, there is one technical thing that is utterly trivial but if we can go to {E/49/52}. You were asked various questions about large percentages over long periods of time. You were referring to the fact that you were responding on the left-hand side to Mr Parker's position in relation to these various percentages. DP3, table 7. Do you remember what time period that actually covered?

A. DP3, table 7?

Q. Yes, I can go to it.

A. I think you might have to go to it. It has been a long week.

Q. Yes. {E/3/70} I think is probably the clue.

A. Yes, so from 2015 onwards, yes.
MR BEARD: Thank you, Dr Jenkins. I am tempted to ask you about what the situation would be if a price rise in that Line Rental had been 500% since 1970 before the claim period but I will leave that for another day.
Thank you, I have no further questions.
THE CHAIRMAN: Right, thank you very much. Thank you very much, Dr Jenkins.
Just before we break, now, are we adopting the position that the experts are now again out of purdah before next week?
MS KREISBERGER: That was my understanding, yes.
MR BEARD: I think that is the fair position that was agreed.
THE CHAIRMAN: That is fine but then they will be re-sworn when we start again next week.
MR BEARD: Obviously Mr Matthew will be joining.
THE CHAIRMAN: I wanted to ask about that. On Monday, just when we are starting off, who are we going to have?
MR BEARD: All three.
MS KREISBERGER: Two from my side, Mr Parker and Mr Duckworth.
THE CHAIRMAN: Right and Mr Matthew. Sorry, two from your side and?
MR BEARD: It sounds like it is four then, not three.

I have mis-counted.

THE CHAIRMAN: So they will all have to be along here for Monday.

MS KREISBERGER: Yes, unfortunately.

THE CHAIRMAN: That is what it will have to be. Thanks very much. 10.30 on Monday.

(4.34 pm)

(The hearing adjourned until Monday, 19 February at 10.30 am)