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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th January – Friday 22nd March 2024

Before:
The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

Class Representative

v

(1) BT Group PLC

(2) British Telecommunications PLC

Respondent

A P P E A R A N C E S

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

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

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

Monday, 26 February 2024

(10.00 am)

THE CHAIRMAN: Good morning.

Some of you are joining us on 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 that provision is punishable as contempt of court.

Housekeeping

Two issues of housekeeping, please, before we begin. First of all, so far as the request made on behalf of the defendant that Dr Hunt can be present today in relation to at least one section of the questions, and we have seen what the Class Representative's solicitors have said about that, we are content that he can make the contributions to the matters which are raised in questions 4.2-4.4, but with these caveats.

First of all, if he is going to give evidence on those points we do not want it duplicated. If he is the one who is going to deal with those points then he deals with them. Secondly, if he is going to make those points, then we do not particularly want them duplicated

1 again when we come to the behavioural expert evidence
2 because it is just increasing the time. We will have to
3 watch all of that quite carefully today because we have
4 to finish at 5 o'clock prompt.

5 The second issue is we have been considering some
6 further aspects of the 2009 RFS submitted by BT. It has
7 given rise to the potential to ask a further question or
8 two of Mr Duckworth, I do not know what his availability
9 is, but it is something which, if at all possible, we
10 would probably want to fit in when convenient, either
11 towards the end of this week or the beginning of next
12 week. Is that something you think can be done?

13 MS KREISBERGER: We will speak to Mr Duckworth --

14 THE CHAIRMAN: Yes, just to find out.

15 MS KREISBERGER: I would hope so.

16 THE CHAIRMAN: Yes, and then we will revert in a little more
17 detail later on.

18 MS KREISBERGER: Thank you, sir.

19 THE CHAIRMAN: Thank you.

20 So, with that, we will commence the hot tub in
21 relation to limb 2 with questions as usual starting from
22 Mr Ridyard.

23 MR RIDYARD: Okay.

24 THE CHAIRMAN: They will need to be re-sworn, yes.

25

1 MR DAVID PARKER (reaffirmed)

2 DR HELEN JENKINS (reaffirmed)

3 MR DAVID MATTHEW (reaffirmed)

4 Questions by THE TRIBUNAL

5 MR RIDYARD: Okay, so let us start with the questions on
6 limb 2. The first thing we wanted to say here was we
7 think there is some scope to rationalise quite a few of
8 the earlier questions here, because we feel as though
9 topics such as the importance, the relevance of the
10 regulatory regime, the arguments about chilling effects,
11 the arguments about the rarity or otherwise of excessive
12 or exploitative case pricing cases, we feel as though
13 those were covered in the discussions last week.

14 So for this first whole batch of questions to do
15 with existence of regulation, chilling effects and the
16 policy implications of that, and questions about rarity
17 or otherwise of exploitative abuses, we just wanted to
18 ask whether the experts felt there was something new to
19 be said about that which specifically related to limb 2
20 questions which had not adequately been covered in the
21 limb 1 discussion.

22 Dr Jenkins, do you have anything to offer on that?

23 DR JENKINS: I think the point that I would add that is
24 perhaps additional, and may well come up in some of the
25 other questions but I will just mention it now, is

1 around the dynamic effects within this case, as opposed
2 to more generally chilling effects from a precedent
3 point of view. So in the sense that when determining
4 what an alternative price would have been, if that is
5 the judgment of the Tribunal, that there was an
6 alternative price, that is not a purely static decision
7 in an ex post sense. So it is not just a matter of
8 thinking back and saying, oh, well, now we go back and
9 we just say the price would have been different, and it
10 is just a transfer of surplus from the producer to the
11 consumers.

12 In this case part of the interlinkages that I have
13 certainly been talking about mean that you have to think
14 what else would have changed had the price been
15 different, and I think that is relevant at the limb 2
16 stage of thinking about how pricing would have changed
17 and how consumers might have reacted differently to
18 a different set of prices. I cover that briefly in my
19 first report, and we can perhaps pick that up at a -- in
20 one of the other questions, I think is probably better
21 suited. But in terms of generally, that was the point
22 I thought we had not yet really covered in the earlier
23 discussions.

24 MR RIDYARD: Okay, that is helpful.

25 Mr Parker, do you want to add anything?

1 MR PARKER: I think the only thing perhaps is on your
2 question 3(d) of the first section, which is about --

3 MR RIDYARD: That question still stands. That is the one
4 bit of the first section which I will ask a specific
5 question on.

6 MR PARKER: In which case, other than that, I will answer
7 that ...

8 MR RIDYARD: Mr Matthew, do you have anything further?

9 MR MATTHEW: I was just literally trying to cast my mind
10 over precisely what was said last week, but I think the
11 main point that I made was ex ante regulation has
12 a substantially lower threshold and broader scope than
13 an economics view of ex post. I was going to come back
14 to the implications of the Ofcom review in the later
15 questions.

16 MR RIDYARD: Yes, okay.

17 So then question 1.3(d), the best way to recast this
18 question in a way that makes grammatical sense as well
19 as logical sense would be to say, let us say we are in
20 a world where we found a price to be significantly and
21 persistently in excess of the competitive level,
22 whatever that may be, it would be useful to get your
23 take on what are the circumstances in general in which
24 such a price, which is shown to be excessive, might
25 nevertheless be deemed to be lawful, or not unlawful,

1 because of limb 2 considerations?

2 So what sort of factors in general do you think --
3 I will ask you, Mr Parker, this in the first instance.
4 What are the factors which would get you through
5 a limb 2 gateway given that one had failed to get
6 through a limb 1 gateway?

7 MR PARKER: Yes, so the way that I have been thinking about
8 this, and this is a suggestion or a personal view really
9 rather than anything more than that, is it seems to me
10 that the way that the Court of Appeal describe it in
11 *Flynn and Pfizer* was that an excessive price could be an
12 example of one which is unfair. So the way I would
13 think about limb 2 is that it is a set of reasons,
14 objective justifications, alternative evidence, that
15 would say: notwithstanding the limb 1 finding, there are
16 reasons why you should not conclude that it is unfair
17 under limb 2 and you need both limbs for it to work.

18 I thought about those objective justifications in
19 really two buckets. The first bucket is economic value,
20 which seems to me that the unfair in itself limb is
21 a sensible place to put economic value, recognising that
22 there is no hard and fast rule on this, and we will come
23 back to questions around economic value. So that is my
24 first issue. Then my second issue is sort of anything
25 else that could potentially justify a high price,

1 notwithstanding a limb 1 finding.

2 Now, it is not totally clear to me quite what would
3 sit in that group, and we have got some examples for
4 this particular case that Dr Jenkins and Mr Matthew
5 raised. I think the key distinction for me would be
6 what you have put in your limb 1 discussion, and you
7 should not deal with it again in limb 2. So for me it
8 would be sensible to put in -- we have got a rebalancing
9 argument that is already in limb 1, because we are
10 dealing with access and calls together in limb 1, so
11 I would not put that in again as a sort of limb 2 issue.

12 But potentially, if there were other rebalancing --
13 if you thought this -- no one thinks this is an
14 introductory/follow-on case, but if it was, and you had
15 not included that in limb 1, I think we should put that
16 in limb 2, because that, if you like, would be an
17 interpretation of the limb 1 finding which you have sort
18 of -- which, for whatever reason, has been carried out
19 on, if you like, on a narrow lens that actually explains
20 why that is a fully competitive outcome, is part of
21 a fully competitive outcome. It is just that the lens
22 that has been applied to limb 1, in my hypothetical
23 example, has not allowed the full picture to be taken.

24 So I think those are my -- those would be my two
25 buckets of what I would include in "unfair in itself",

1 and obviously we have unfair relative comparators, which
2 I think is fairly clear what that means, but you will be
3 wanting to look at -- I think we will come back to this,
4 but are those comparators actually good comparators
5 setting conditions of workable competition themselves?

6 MR RIDYARD: Yes, okay.

7 Mr Matthew, do you want to have a go at this one?

8 MR MATTHEW: On the law versus the economics, my
9 understanding is that materially is a separate question,
10 but that is ... Taking it as the economics, my comments
11 last week were about excessiveness generally, without
12 being overly concerned about precisely where they fit,
13 and my view there was the economics suggest you are
14 looking for a high degree of confidence that prices are
15 in fact significantly above costs, if you are using
16 a cost-plus approach, and I would say that there is then
17 an additional check of: and they need to be unfair,
18 which might be satisfied if the degree of that
19 overcharge is very large, it might also be satisfied in
20 some other way which I cannot really comment on, but it
21 should be an additional layer. Otherwise you would end
22 up with still the case that, well, prices just being too
23 high is problematic, and we want careful thresholds
24 there for the broader reasons discussed around chilling
25 and other things.

1 MR RIDYARD: Yes.

2 Dr Jenkins?

3 DR JENKINS: I think picking up one of Mr Parker's themes,
4 which is it is a little difficult to answer the question
5 without knowing the basis on which the limb 1 decision
6 is made, and I think particularly in this situation
7 where there is a question about how one deals with the
8 potential for a range of cost outcomes, a range of
9 pricing outcomes related to the different business
10 models that are relevant to the workable competitive
11 benchmark in this situation.

12 So I think there is a link between the two in that,
13 and I think I set that out in my second report at
14 paragraph 5.111, I am not sure we need to go there, but
15 just saying there is some inter-relationship between how
16 one judges excessiveness and how one determines that
17 benchmark, and I think that then -- so having said that,
18 saying, okay, then if you are in limb 2, there has been
19 a decision that a limb 1 -- that limb 1 has indicated
20 excessiveness, then I think while it is captured to some
21 extent in the comparator analysis, the principle that
22 says you consider the market context, and if you observe
23 price structures widely adopted by other market
24 participants that may not be identical but are
25 reflecting perhaps other of the factors of competition,

1 such as the quality of the service, the choice that is
2 on offer, these types of additional elements, then they
3 can be taken into account at the second stage.

4 In my second report, in thinking about how one
5 thinks about economic value, the suggestion I make there
6 is that where you have actual alternatives that are
7 available to the market participants, that this is
8 a relevant -- this is relevant as a matter of principle
9 as well as then when you come to the comparator test, to
10 say what can you infer from the fact that customers have
11 made choices and continued to make choices of one
12 particular service offering in the face of alternatives
13 being available?

14 I think there is -- that does tell you something
15 about value, and the value that those customers
16 attribute to the services that they are purchasing, and
17 is relevant as a matter of principle at the limb 2 stage
18 to think about what choice is available and the
19 framework in which that choice is being made, and so
20 I pick up those themes in my second report.

21 MR RIDYARD: Okay. We have some specific questions about
22 value and what it means, so, Mr Parker, that will be
23 your opportunity to come back on those points, rather
24 than do it now. But thank you, that is useful.

25 So I am on to sub-question 4 of section 1 now, which

1 is about the relevance of the rationale or motivation
2 for a firm's pricing, and whether that is -- how that
3 feeds into the assessment of limb 2 and unfairness.

4 The first question is, if we were to make a finding
5 that one of the factors that BT was taking into account
6 was some desire for customers to take up -- to buy
7 bundles as opposed to being SFV customers, would that be
8 a factor that would affect whether a pricing was deemed
9 to be fair or unfair?

10 Mr Parker.

11 MR PARKER: So not for me. I am not sure that -- I think
12 the obvious way to try and attract people to bundles is
13 to put a price on the bundle. We have done this in
14 previous cases.

15 MR RIDYARD: Yes.

16 MR PARKER: I do not think -- I think my comments continue
17 to stand. I think you would see them cutting the price
18 of the bundles to attract people to bundles, not putting
19 up the price of SFV services with all the risks that
20 that entails, so I will leave it there.

21 MR RIDYARD: Understood.

22 Dr Jenkins.

23 DR JENKINS: I think the understanding I have of that
24 question is not that BT is sitting there saying, oh, for
25 some external reason I want to encourage people to take

1 up bundles. That is not a rationale. I think the
2 question here is the framing of the arena of competition
3 and the nature of, in a sense, the dynamic efficiency
4 that is going on in this market, which is to say how do
5 we compete to retain and attract customers to our voice
6 services, and in order to do that effectively we need to
7 be offering attractive services across the line that we
8 offer them.

9 So it is that the form of competition is changing
10 through this period. The need, the use that customers
11 are making of their connection between their home and
12 the backbone network is changing over this time period,
13 and so BT's approach to how it prices and the services
14 it offers those customers is responding to that
15 competitive environment, and that affects what it offers
16 and how it offers services to its standalone voice
17 customers as well as to the customers who, through the
18 period, become customers of more than just voice over
19 that line.

20 The fact that those customers themselves make that
21 choice and move to that service offering, it is not that
22 that is something that BT has decided to do, that is BT
23 responding to the threats of competition and its
24 customer base. Its voice customers will cease to be its
25 customers and move to others for voice services or voice

1 services sold in other ways.

2 So that is the sense in which you cannot -- you need
3 to take those motivations into account in understanding
4 the pricing choices that are being made, and that the
5 value that is being offered, broadly, is including these
6 additional options, and that BT is not setting the price
7 higher solely for the purpose of reducing the gap, BT is
8 looking at its revenue streams and the investments it
9 needs to make to attract its customers and deciding what
10 is the price, the minimum price overall that we can set
11 in order to respond to that competition. That is the
12 alternative that you have to engage with to think about
13 that pricing.

14 So I think it is absolutely relevant to consider
15 that system of pricing, even at the limb 2 stage, to
16 understand the pricing that BT has implemented.

17 MR RIDYARD: But is it not possible to be, having all those
18 thoughts about where the world is going towards, and the
19 importance of competing in the bundles world, and at the
20 same time thinking: here is a group of customers that
21 I can treat as a cash-cow and generate some extra income
22 from by charging them a nice, healthy, perhaps
23 excessively high margin in the meantime?

24 Are those things -- obviously I am putting it in
25 a provocative way, but I mean, those two things, they

1 are not mutually exclusive, are they? You could be
2 making the most of what you might perceive as a bunch of
3 captive customers whilst still doing all these dynamic
4 things for the ones who are not captive.

5 DR JENKINS: Yes, that is right, but the question is are
6 these -- is that actually what is going on here, in the
7 sense of are these customers actually captive? So there
8 are two types of customers here, one group of which are
9 Split Purchase Customers, 80% of which are taking
10 a service from someone else in the market.

11 MR RIDYARD: Yes.

12 DR JENKINS: So the predicate which is: "oh, these are
13 captive customers and we can rip them off", is quite
14 hard to reconcile with the scenario in which the bulk of
15 them are actually -- and certainly post-2018 the bulk of
16 them are being served by an alternative supplier in the
17 market who can offer them alternative voice services in
18 a very straightforward way every time they bill them.

19 So to the extent that it is a requirement that the
20 customer is captive for that logic to hold, I am not
21 sure there is evidence of that, and there is evidence
22 that it is -- that a standard response to competitive
23 dynamics to use this type of pricing in workably
24 competitive markets, and, I mean, perhaps -- I do not
25 know now whether to go to that bit -- there is a bit in

1 my first report where I talk a little bit about this and
2 about some of their economics around the fact that there
3 may be imperfections in consumer knowledge in the
4 market, and yet it is still what you would expect to
5 observe in competitive markets to see this type of
6 discrimination and differentiation.

7 THE CHAIRMAN: Can I just follow up on that because -- and
8 this is a little bit difficult, I can understand, for
9 you to do, in the sense that there is -- and very much
10 a theme of your view of this, a view of the world,
11 a view of the telecoms world, which is: this is not just
12 about voice, this is actually about bundles, and you
13 cannot differentiate the two in certain important
14 respects, which I understand from the point of view of
15 market definition and from the point of view of
16 excessive pricing.

17 But Mr Ridyard's question here is specifically in
18 relation to unfairness. So let us suppose that the
19 Tribunal were to conclude that the market definition is
20 the narrower definition without which the claim cannot
21 proceed and secondly, that the price is excessive on
22 limb 1.

23 To what extent, from a point of view of economics,
24 can you somehow bring back in to limb 2 the notion that
25 this is BT simply responding to the competitive dynamics

1 of the market? Because surely if that is the case, that
2 is a point which drives either market definition or
3 limb 1, and there is really nothing much left for
4 limb 2, and it is quite difficult because you have to
5 separate the two out.

6 But that is the point, because what we are trying to
7 concentrate on is: if you have the hypothetical that we
8 find that it is a narrow market and there has been
9 excessive pricing, effectively what are the things from
10 an economic point of view that can be relevant to
11 limb 2?

12 I can understand your point about inertness, and we
13 are going to hear more evidence on that later on, but
14 this point about responding to the competitive dynamic.

15 DR JENKINS: Maybe if we do turn up {E/17/255}, and I do not
16 know if this answers your question or whether it will
17 come to inertness, but ... So paragraph 7.23, if we
18 focus in on that.

19 If you think about basically what is being asked,
20 which is: "what if we did price cap the price"; you
21 know, we are at the stage, limb 1 excessive, "let us cap
22 the prices of the customers who are taking that
23 product". So there is this line of research which shows
24 that there are dynamic implications of the fact that you
25 cease to allow the full flexibility around pricing to

1 different types of customers driven by imperfections in
2 the customers. Because in this sense the economists
3 would say, well, these Voice Only Customers are
4 imperfectly interacting with the market, right.

5 So there are two things that I have sort of captured
6 in this paragraph. One is the theoretical literature,
7 which says be careful what you do, because actually
8 the price structure is driving the behaviour of those
9 who are engaging in the market; and even on the
10 hypothesis you have put before us, the Class Members,
11 many of them do actually engage and interact with the
12 market and cease to be Class Members through the
13 process.

14 So if you say: "well, we are going to reduce
15 the price", and potentially this literature shows that
16 you can get that overall you dampen competition across
17 the board, and all consumers are worse off at that time,
18 right. So that counterfactual assessment, and being
19 sure that nothing else changes other than that the
20 customers you are concerned about are better off and
21 everything else is the same, that is a strong assumption
22 for here in limb 2.

23 THE CHAIRMAN: That much I follow, but that is an argument
24 that says if the price is excessive there may be
25 detrimental effects from a holding that it is unfair,

1 which would imply the price has to be much lower because
2 of these competitive consequences.

3 But I am not sure that fully deals with the question
4 we are trying to get at here, which is BT's rationale
5 for doing what it did in the first place, in other
6 words, the question was if BT was motivated to one
7 extent or another, and not necessarily as starkly as,
8 well, we will sit back in a meeting and decide we want
9 people to go to bundles, so, okay, let us raise
10 the prices. But the general rationale for BT doing what
11 it did, not the consequences of what happens if we have
12 a counterfactual saying it was unfair, the rationale for
13 what it did, to what extent from an economics point of
14 view, as opposed to a legal point of view, if at all,
15 does that fit in to limb 2?

16 Perhaps I can just re-express it in this way: there
17 could be lots of rationales, and we will be looking at
18 the documents carefully on all of that. It could be --
19 we have just been set a target and we have got to raise
20 prices and we have not got any alternative. It could be
21 there is a partial incentive to migrate the customers,
22 it could be we are losing so many switchers that in
23 order to earn the same revenue or the same margin we
24 have to put the prices up.

25 Does any of that thinking, in whatever it is, matter

1 at all from an economic point of view in limb 2?

2 MR MATTHEW: Could I suggest Dr Jenkins ...

3 DR JENKINS: I think in some sense the economic subtracts
4 from the thinking of, you know, the absolute facts of
5 what the specific firm is thinking at the time, and
6 economics uses incentive structures to do that.
7 However, one does look at what -- you cannot completely
8 abstract from what you think is going on, and it is
9 instructive how the fact that BT was generally thinking
10 about voice overall, reported on voice overall, thought
11 of the pricing to be affecting, however sold, their
12 voice customers, those things are instructive, and are
13 instructive even at the limb 2 stage I think.

14 THE CHAIRMAN: Thank you.

15 Mr Matthew.

16 MR MATTHEW: Just stepping back, I mean, the contrast
17 I would draw is with other excessive pricing cases
18 where, in pharmaceuticals, you have what I would think
19 of as a form of unfairness that arises because of
20 deliberate manipulation of systems in order to deliver,
21 indeed target, large price increases. For me, I can
22 easily understand -- more easily understand why in those
23 cases you are going to take a dimmer view of high
24 pricing, and it fits with the general economics of
25 thresholds as well.

1 Here, when you have, let us call it, various forms
2 of efficiencies/reflects competition/not targeted types
3 of rationales, those sorts of considerations do not
4 appear to apply. I am not going to go to the facts but
5 if you take that reading.

6 So that just leaves you with vanilla high pricing in
7 the normal course of business as the allegation, and for
8 me that needs to have a high threshold if that is all
9 there is on the unfairness limb.

10 MR RIDYARD: Mr Parker, I will give you a chance to comment
11 on this in a moment.

12 But it is -- you could characterise this as a form
13 of price discrimination. I know there is not complete
14 independence between the prices for voice only and the
15 bundle customers, but it is plausible that BT saw a way
16 to -- by increasing the Line Rental prices that price
17 increase clearly impacts on the SFV customers, and then
18 by adjusting the margin between the voice price and the
19 bundle price you could neutralise some or all of that
20 effect as regards the bundle customers.

21 So there is a clear, or what seems like a fairly
22 clear mechanism here to allow you to price discriminate
23 between the SFV customers and the bundle customers, even
24 though there is not total separation in every respect,
25 maybe.

1 So in that sense there is a sort of price
2 discrimination rationale that is going on here, and
3 I know price discrimination is not per se unfair or
4 illegal and so forth, but nevertheless it is a way into
5 concerns under fairness as well, is it not, so how do
6 you respond to that?

7 DR JENKINS: I would then look at the ARPU for SFV services
8 over the whole period, because we know that there are
9 many drivers going on, including the rebalancing we
10 discussed. As Mr Parker says, well, that is why we
11 focus on the ARPU of SFV services because it captures
12 those changes in the calls revenue as well.

13 Actually, if you look at that, the ARPU of SFV
14 services has not really changed in real terms, even
15 going back to 2009 you can see from the evidence in the
16 Ofcom Provisional Conclusions.

17 So to that extent, those customers, even if they
18 have been around for a long time, the amount they are
19 paying for their access service has not changed very
20 much through this period. They may be using it somewhat
21 differently, but the SFV services price has not risen
22 over that period.

23 Now, the margins may have changed, right, through
24 some of that period. They may have gone down, they may
25 have gone up, they may have gone down again, but

1 the price has not changed. So that seems to me a useful
2 fact from the limb 2 perspective, which is, well, is
3 that then a reasonable measure of the value that --
4 a measure of the value that that customer group is
5 going -- is there an obligation for a business to
6 actually lower the price because some aspects of costs
7 have changed, or is it that they had the flexibility
8 subject to, you know, between LRIC and standalone costs
9 with the SAC combinatorial protection in there.

10 You cannot over-recover costs, but you have the
11 flexibility to recover your costs in different ways, and
12 you are not bound to one particularly rigid approach
13 based on a Fully Allocated Cost allocation, however
14 drawn, from whatever time.

15 MR RIDYARD: Yes, okay.

16 Mr Parker, what is your take on all that?

17 MR PARKER: I think my sort of main observation would be

18 I think all of these debates should already have
19 happened at market definition in limb 1. So limb 1 is
20 looking at excessiveness. If the price has remained the
21 same, then you would have picked that, and then that was
22 not significantly above the contested level.

23 You pick that up in limb 1 so I am not sure there is
24 a separate point there, and more generally I am not
25 sure -- we have talked about, yes, I am sure BT wanted

1 to compete in bundles or it was facing stronger
2 competition, and the obvious thing to do there is to cut
3 prices in bundles. I think there is this ability to
4 separate the price of SFV services and the price of a
5 bundle through changing the incremental price of
6 broadband.

7 I think these are all points we have covered before.
8 It feels to me like, I am not sure that adding issues,
9 to me, that we should revisit in unfairness, I think
10 potentially it is important to look at the internal
11 documents and to think about BT's motivations for why it
12 was doing what it was doing and whether that reinforces
13 a finding of unfairness, or whether it says, "no, no,
14 this was for good competitive reasons" or whatever.

15 I am not sure -- I mean, I have looked at some of
16 those. I think -- I am not compelled by the argument
17 which we are probably about to come to, I think, that BT
18 needed to raise prices to SFV customers in order to
19 invest in products and innovations that would benefit
20 other customers. It seems to me, in a workably
21 competitive market, you would pick up the benefits and
22 then the costs of those in whatever the innovation was
23 being seen in, and I am not sure it would end up being
24 picked up in SFV services.

25 MR RIDYARD: What about the -- this notion of rebalancing

1 has come up once or twice already.

2 MR PARKER: As between access and calls or as between ...

3 MR RIDYARD: As between access and calls, yes.

4 MR PARKER: So that is already in the limb 1 analysis,
5 because that includes both services.

6 If there was a rebalancing effect, and Mr Duckworth
7 has looked at the cost benchmarks and the prices, I have
8 identified in Parker 1 that there might be such
9 a rebalancing effect, and one would need to take it into
10 account. In fact, as it has turned out, I think there
11 is evidence of a reinforcing effect such that the
12 calls -- whilst calls revenues have been going down, the
13 margins are extremely high.

14 I think perhaps if we go to Dr Jenkins' report,
15 {E/17} at ... it is figure 6.1 which is {E/17/175}.
16 Sorry, can we go to the IR version {IR-E/17/175},
17 otherwise this point would be a bit mysterious.

18 MR RIDYARD: A bit of a black box as it stands.

19 MR PARKER: If we zoom in on the table. So this is
20 FY 2020/21 data. You can look at the -- if you look at
21 the bottom box, "Lines", "Calls & Other", you have got
22 the gross margin figures at the right. You can see the
23 "Calls & Other" revenue -- I will not say any of those
24 numbers, any more of those numbers -- "Revenue", "Cost
25 of Sales", quite a large gross margin, actually higher

1 on calls than on lines.

2 So I do not think, for me -- so that is what is
3 being picked up in the analysis that Mr Duckworth has
4 carried out, is the fact that there were also very
5 significant margins being made on calls, calls products.

6 So I think that is already taken into account in
7 that limb 1 approach. I think if there were other
8 rebalancing arguments, perhaps around rebalancing
9 between SFV and Dual Play, then that perhaps could be
10 something that you would take into account in limb 2.
11 Given that it is by the sort of construction of where we
12 have got to, that is not in the market definition, and
13 so on.

14 But I do not think I would agree with that, because
15 I think that is a separate product and it should stand
16 on its own two feet, and if you wanted to attract more
17 people to your bundles, which had come across in
18 bundles.

19 MR RIDYARD: Thanks, that is useful.

20 Let us move on to the concept of value from an
21 economic perspective. This is -- this warning is kind
22 of true generally, but we realise that these are
23 difficult concepts to apply when we get to the law, so
24 what we are really interested in getting from the
25 experts is to what extent can economic principles help

1 to inform us in making these judgments that we will need
2 to make here?

3 The first question is: is the assessment of economic
4 value relevant in the context of unfairness, even if it
5 has been considered to some extent under limb 1?

6 Dr Jenkins, do you want to go on that.

7 DR JENKINS: Yes, I think it is definitely still relevant,
8 even where it has been considered under limb 1. It does
9 depend a little bit on how it was considered under
10 limb 1.

11 MR RIDYARD: That is a fair point.

12 DR JENKINS: But, for example, I wanted to then come back
13 on -- for example, I think the calls point which
14 Mr Parker has just raised gives a good example of why
15 you would definitely want to consider economic value
16 with respect to calls if the conclusion has been based
17 on the types of gross margins that we see in the table
18 that is still on the screen.

19 I think if you -- limb 1 focuses on the producer
20 side of the question and saying, is there -- if one has
21 found some excessiveness, then one is saying that the
22 producer has got more surplus than is to be expected
23 under workably competitive conditions. There is still
24 then the question of whether the benefits that have
25 arisen to the consumers, from whatever has arisen from

1 that producer surplus, is sufficient to compensate for
2 that.

3 So I think limb 2 does open up a meaningful question
4 in addition to limb 1, and perhaps a little aside on
5 the price equals willingness to pay point, that
6 obviously any price as paid is a sign that a customer is
7 willing to pay at least that price, and generally you
8 will find that the price that you observe is associated
9 with the marginal consumer having that willingness to
10 pay, but there are a lot of inframarginal consumers who
11 would be willing to pay even more, so there is value
12 associated with that.

13 So this question of: "could you achieve those
14 outcomes by simply transferring some of the producer
15 surplus to the consumers?" is a bit the question I think
16 that that balance of the surpluses is really I think
17 what is going on at limb 2, and I think the
18 *Hydrocortisone* recent decision is taking us down that
19 route through what is denoted as case 2, and saying you
20 need to think about: well, what has that surplus
21 delivered for the consumers?

22 It leaves open the question to say you can still
23 have unfair pricing even within case 2, but what you are
24 thinking about is that balance between the producer
25 surplus and the consumer surplus. That is relevant in

1 this case as well, as we already touched on.

2 MR RIDYARD: So I mean, in that discussion there was an
3 answer to the next question, which was: "what is value
4 in terms of economics?", and value is the area under the
5 demand curve.

6 DR JENKINS: Yes, I think that is clear.

7 Maybe I will just go back to the calls point.
8 I think I do address that in my second report, so that
9 is {IR-E/18/186}.

10 I think it is quite interesting thinking about the
11 calls element under Mr Duckworth's benchmark where he
12 finds this very high margin on calls, and then that gets
13 baked into a limb 1, a very low limb 1 benchmark, and a
14 big chunk of the quantified harm relates to the call
15 margins.

16 But then if we go over the page to {IR-E/18/187},
17 and then, say, 6.127, that paragraph. So those call
18 prices that allegedly are driving a lot of the harm for
19 these SFV customers, those are the same prices that are
20 being paid by all the other customers who are taking
21 voice services from BT. So we will come to it in terms
22 of the comparator analysis, but I think one can also
23 think about it in terms of a value analysis, that in
24 terms of in the context of other voice customers that is
25 considered reasonable, and also, for these SFV services

1 customers, they also have these alternative choices that
2 they can actively make, and yet they are choosing at any
3 point in time to make the call from their fixed line
4 with the pricing that is associated with that, or they
5 have bought the up-front calls package to enable them to
6 have free at point of use calls for certain of them.

7 Because of the nature of the delivery of calls,
8 which is that there is very low marginal cost but there
9 are all these fixed costs that you are recovering, just
10 going from the sort of cost base benchmarks, and
11 inferring directly from that something about value,
12 I think that is missing quite a big chunk of the
13 assessment and, hence, you really have to look at the
14 question of value here.

15 Then Mr Parker says, well, we capture that in our
16 SFV services benchmark. But then I would go back to
17 saying, well, then if you actually look at the ARPU for
18 SFV services, there is not the evidence that prices have
19 changed. Prices have not gone up for SFV services.
20 Yes, the standalone rental prices have gone up at
21 various points in time and call revenue has not -- has
22 fallen more or less to compensate that.

23 So you have got to take it in the round, and then
24 part of the rationale for all of that is that customers
25 are making active choices with respect to their use of

1 calls. There is a balance between somewhat raising
2 the price of that, but recognising the shift in usage,
3 changing the access price, and also encouraging those
4 customers to take up multiple services to defray the
5 costs of running the system to provide access to these
6 customers.

7 You have to look at it in the round, and that can be
8 done at limb 2. Even if you have got all the way to
9 here, you can take these into account in terms of that
10 overall value.

11 MR RIDYARD: Right.

12 Mr Parker, first of all, could you tell us whether
13 you also think that economic value is the area under the
14 demand curve, and, secondly, would you like to comment
15 on what Dr Jenkins has just said.

16 MR PARKER: So I think from an economic perspective, yes,
17 but I think the term "economic value" is being used in
18 a different way in the context of the *United Brands* on
19 my reading of the way people have thought about it,
20 because I think otherwise you end up in the willingness
21 to pay fallacy.

22 So the way I have been thinking about it is -- maybe
23 taking your first two questions together. In limb 1 you
24 are looking at a price-cost benchmark and whether things
25 are excessive, and then I think there is a sort of

1 producer surplus version of -- or maybe using the
2 dominant firm's costs -- actually the dominant firm is
3 just much more efficient than everyone else, and maybe
4 comparing the dominant firm's price to cost might not
5 even give you significant and persistent because there
6 is a good reason, and that is case 2, I think it is, of
7 *Hydrocortisone* on the producer's side.

8 I think economic value in the *United Brands* context
9 is a slightly different -- is a different thing. I have
10 looked at the various cases. I think they fall into two
11 categories, and I think they fall into -- there is one
12 category which is there are two businesses both
13 contributing something to the delivery, essentially, of
14 a joint product, and that is your *Attheraces* type
15 example, and the question is: what is the share, what is
16 the appropriate share of the value that is created by
17 those two firms?

18 I am saying this to say I do not think this is the
19 case here, but the question is what is that share? Then
20 the economic value I think is actually the stream of
21 profits that is going to be generated by the product
22 that is so created. So you can think of -- I think that
23 is a specific set of circumstances but it seems to come
24 up in multiple situations. You could think of the *Apple*
25 *v Epic* dispute, which I am not involved in, as one of

1 those types of cases, it seems to me. I think there is
2 then a separate question about economic value in
3 products essentially just being sold downstream, and in
4 this case that is to the end consumer.

5 Now, one of the things that *Flynn and Pfizer*, the
6 Court of Appeal, says is essentially there may be no
7 extra economic value over and above that included in the
8 cost of the service, and you do not need to go further.

9 I think that that makes sense as a sort of way out
10 of the willingness to pay fallacy, because otherwise
11 no one is going to buy a product if it is above their
12 willingness to pay. So, by definition, we covered this
13 I think way back in Parker 1 in the original CPO
14 hearing, that there was no -- there would be no
15 excessive pricing law.

16 So the way I have thought about rationalising those
17 different bits of the argument or debate is to say,
18 where you take economic value, I would say economic
19 value is where the firm in question is providing
20 a product that is somehow unique or uniquely
21 differentiated in a positive way, say through additional
22 quality or developing a completely new product or
23 whatever, that provides value to customers over and
24 above what is available elsewhere in the market.

25 So I think -- then I think that is not the case

1 here. I think SFV services are fairly -- a fairly
2 homogenous product as between providers of SFV services.
3 I do not think there is any great additional value.

4 But that, for me, is the sort of thing I would want
5 to think about it, is: is there something unique and
6 different about this product that means you should sort
7 of take account that the firm in question will have
8 gained some of that for itself, because by producing
9 a newer or higher quality product it will be able to
10 raise the price above those of the existing products in
11 the market, but that is because it is new and higher
12 quality, and so will have some producer surplus, and I
13 think that view you take into limb 1.

14 But the economics tells you that it also shares part
15 of that higher quality surplus consumers' benefit from
16 that, because everyone who buys that gains that higher
17 quality product, and it tends to be the case that the
18 benefits of that higher quality are shared between the
19 firm and consumers, and I think you would want to take
20 some of that into account if that is the situation, some
21 of that into account in limb 1, that is where I have
22 thought about it, and then some of it in limb 2, and
23 that is for this class of cases which are essentially
24 sailed downstream.

25 So that is how I have thought about the concept of

1 economic value in *United Brands* as distinct from the
2 sort of pure consumer surplus economic concept of it is
3 just the area under the market.

4 MR RIDYARD: Okay, that is very helpful. Thank you.

5 Dr Jenkins and Mr Matthew, I will give you a chance
6 to comment on this too. Do you have any comments on
7 that way of looking at things?

8 DR JENKINS: Yes, so I think the area under the demand curve
9 is consumer surplus and it is well accepted. This
10 concern about the willingness to pay fallacy, as
11 Mr Parker puts it, I think that really only comes about
12 where you have perfect price discrimination so that you
13 are pricing to completely extract the consumer service
14 from the population, otherwise you can have consumer
15 value being -- for any price that you see in the market
16 there will be customers who are benefiting from that.

17 So that is the sense in which, in a sense, to the
18 same extent that where you have a business to business
19 dispute over how you share the profit stream from
20 something, you can have the same logic saying how do you
21 balance between consumers and producers in the same way,
22 right.

23 So I think the question is still relevant and valid
24 for the Tribunal to consider whether or not, in a sense,
25 in the counterfactual, could you lower the price and get

1 exactly the same outcome? So the producers keep doing
2 exactly what they are doing and the consumer -- just all
3 that happens is the consumer gets more value, right. So
4 that is almost the predicate for this type of idea that
5 this excessive pricing case is one -- that is all you
6 do.

7 There may indeed be cases, as Mr Matthew has alluded
8 to, where -- in the pharmaceutical environment, where
9 people are thinking, you know, if the price had been
10 lower, everyone would have done exactly what they did.
11 People would have still had to have the same drugs, they
12 would have used the same drugs.

13 If you are not in that same scenario then there is
14 a reasonable question to think about in terms of this
15 balance between the producer surplus and the consumer
16 surplus.

17 MR RIDYARD: The notion of pure rent was in my mind when you
18 were giving that answer, so you are saying if it is
19 a pure rent that we are talking about in economic terms,
20 then that -- then it is okay to extract, to take that
21 away from the dominant firm, because ...

22 DR JENKINS: I am not saying that is the only situation in
23 which there may be, but I am just saying there are --
24 there is a balance, right, and that balance is -- the
25 producer surplus in workably competitive markets relates

1 to horizontal differentiation, not just about, oh,
2 I have done something so great and it is so different.
3 You know, the way markets work is that firms do
4 differentiate themselves and people benefit from that
5 variety, and so that ...

6 Now, maybe you have managed to capture all of that
7 in limb 1, right, in which case you can say, well,
8 I have dealt with that. But certainly if you are taking
9 a benchmark that is low, is not giving much weight to
10 some of the benefits of that differentiation, the
11 options that customers have, even if they are not
12 purchasing the additional products today but that they
13 have the option to do that, which may attract them to
14 a particular supplier, these are things that you would
15 then take into account in limb 2.

16 MR RIDYARD: Mr Matthew.

17 MR MATTHEW: So I have not ventured into this discussion in
18 my report, so I will not go into the details of surplus
19 now.

20 I will just say that listening to this discussion,
21 plainly producer surplus has been mentioned several
22 times, and that harks back to many of the points we made
23 last week around the potentially broad scope of what
24 constitutes workable competition, and the efficiency
25 issues in *Hydrocortisone*, the observations about

1 differentiated markets, are part of that, but I would
2 say there is a variety of other circumstances where you
3 could get positive producer surplus and therefore
4 positive economic profits that are consistent with
5 workable competition.

6 MR RIDYARD: Okay, thanks.

7 Mr Parker, I am just going through your answer and
8 thinking how to characterise it. Would it be fair to
9 say your position then is to say, if you took kind of
10 the textbook notion of value, then it is just not
11 helpful. There is not a way in which that sort of
12 economic notion of value can be used to deal with the
13 *United Brands* judgment, and this notion of prices being
14 above value because of the circularity and the
15 willingness to pay.

16 So what you have done there instead is to say, well,
17 we cannot use that notion of value, we need to construct
18 a kind of alternative version of value -- I do not mean
19 this to sound quite as aggressive as it is coming
20 across -- an alternative version of value which can be
21 operational for the purposes of this task, and that is
22 where you have come to your notions of -- your different
23 notions of value which might be -- which we can use as
24 a tool to differentiate abusive from non-abusive
25 pricing.

1 MR PARKER: Yes, because I have been wrestling -- I did not
2 think it was aggressive -- I have been wrestling with
3 the willingness to pay fallacy and the sort of link to
4 consumer surplus and the observation, I think Dr Jenkins
5 saying, well, if you are not perfectly priced by
6 discrimination, there is some consumer surplus left for
7 consumers.

8 But that feels to me like it is a version of saying:
9 as long as you are willing to pay the product then there
10 cannot be an excessive price. I do not think that makes
11 sense in the context where we have a law against
12 excessive pricing. It must mean something.

13 So this is my submission, if you like, as to how
14 I have tried to operationalise that concept of economic
15 value in a way that I think would make sense from an
16 economic perspective, in the sense of: I want to give
17 credit to a firm that does something unique and
18 different that is beneficial to consumers, and it should
19 absolutely be able to keep a share of such benefits,
20 because that is -- absent doing that, the consumers do
21 not get any of it, so we should I think take that into
22 account. But also, yes, not falling into the trap of,
23 well, as long as consumers buy it then it must be fine.

24 So that is my attempt to kind of reconcile these two
25 sort of slightly competing views, and I think for me it

1 has to come down to the concept of economic value as per
2 *United Brands* is a different concept to just pure
3 consumer surplus, and this is how I try and put the two
4 together in a way I think is consistent with economics,
5 but hopefully is consistent with --

6 MR RIDYARD: Yes, so let me -- I am aware that Dr Jenkins
7 wants to come in on this, and I will give you a chance.

8 Let me put it to you in the concrete question that
9 we have put here. Let us suppose I am a dominant
10 company and I find an innovation, a change in the way
11 I am going to offer my product, which costs me £10 but
12 I can sell it for £20 in the market.

13 So how do you assess whether that is reasonable --
14 is a reasonable extraction of value or an unreasonable
15 extraction of value in your notion of what works and
16 what does not work under limb 2?

17 MR PARKER: Yes, so this is a more tricky area. It seems to
18 me I think what you would want to look at is: is this
19 innovation one that is being -- is sort of readily
20 replicable by people, has been replicated? Because if
21 it was so important you would expect that you might
22 initially get a £20 but then rivals would say, well,
23 hang on, if I invest £10 and then I can get the £20,
24 they would want to do that as well, and that would
25 compete away that value benefit back down to the £10.

1 That is how competition is going to work.

2 So you would see, I think, in that world
3 a short-term benefit to the firm but then it would
4 diminish.

5 So I guess what I would be thinking about is: is
6 this really massively important to consumers? Is it
7 really obviously different from various quantitative and
8 qualitative measures as to this is clearly a product
9 that no one has ever thought of before, and we can see
10 that it is providing really great value over and above
11 that being delivered by other firms in the market. So
12 I would want to look at how -- to what extent is this
13 something that does come in market-wide, or is it quite
14 unique? To what extent does it fill a new niche?

15 So I think I would want to make this a test that
16 requires quite a lot of the innovation or of the new --
17 of the differentiation. It has to be kind of material
18 enough and sort of long lasting enough and then --

19 MR RIDYARD: But long lasting enough for the right reason
20 I suppose because if it is long lasting because I am
21 dominant and I have not got any competitors then you
22 would not be happy about it.

23 MR PARKER: Yes, that might be right and you would have to
24 look in context.

25 Now, I think we may be in an easier position here

1 because I do not see any of this happening in SFV
2 services, so it may be that this is a detailed question
3 that can perhaps be slightly parked for another day but
4 obviously that does not completely answer the question.

5 MR RIDYARD: I do not think we can park it because it is
6 obviously a thought experiment but I think it could
7 apply to a number of situations.

8 Let me just ask Dr Jenkins to react on that.

9 DR JENKINS: So I think, as Mr Parker's description there
10 was a little bit Goldilocks like is like there is
11 a certain amount of innovation and type of innovation
12 where you would be able to reflect it in a price that
13 the firm chose, the £20. If the innovation is not
14 exciting enough then they would not be allowed to and
15 almost if the innovation is too good and therefore it is
16 not replicable easily then you also cannot because you
17 would fall foul of the dominance.

18 So it is only in a situation where it is not too
19 interesting but it is interesting enough that you can do
20 that for a while because then you expect competition to
21 come in.

22 So I just do not think that is a very helpful way to
23 think about it. If we turn back to the document we have
24 got on the screen at page {IR-E/18/181} and
25 paragraph 6.106. This was the approach I was thinking

1 was helpful because I am certainly not saying, I think
2 there was some characterisation that my view was: well,
3 because there is some area under the demand curve or
4 ways unless you have perfect price discrimination
5 everything goes. Well, no, that is not the case. That
6 is not what I am saying but I am saying that there can
7 be a trade-off for higher prices which deliver some
8 producer surplus and some trade-off of lower consumer
9 surplus but you have got to be sure that it is actually
10 lower than it would be.

11 I think these criteria actually help for this
12 question about, well when would it be okay to charge £20
13 for something that costs £10 to do. So these questions
14 about: "were there alternative services and alternative
15 service providers?" And indeed they may not be offering
16 identical products, hopefully they are not because that
17 is what the workable competition is driving. Is there
18 some enhanced benefit to consumers? It does not need to
19 be so amazing or so different but not fully homogenous.
20 There is brand. There is service quality. There is
21 differentiation in what is provided.

22 Then: is there evidence that customers are making
23 informed choices with respect to the breadth of
24 offerings? And I think then you can infer something
25 from the choices that are being made by people, that

1 those value trade-offs are something that they recognise
2 the value they are getting because they are making that
3 active choice.

4 MR RIDYARD: So --

5 DR JENKINS: Maybe that takes you back to market definition
6 or dominance. It possibly does, right, but I think even
7 if you are at limb 2 and you find there are
8 alternatives, customers are at times actively making
9 those choices it is relevant for giving metric for
10 value.

11 MR RIDYARD: Can you describe in what circumstances you
12 would say this increase in the price or obviously in
13 willingness to pay and value in that sense is not
14 acceptable?

15 DR JENKINS: I think where you would find that there was no
16 alternative, so in a sense you do not have the choice to
17 take the offer without the bells and whistles or the new
18 option, or where customers were -- so evidence that
19 customers were dissatisfied with the offer that they are
20 taking now, but seemingly cannot make an active choice
21 for whatever reason. That sort of inertia.

22 Something about supply side barriers to entry which
23 here I think we have got agreement that there are not
24 any supply side barriers to entry, so some reason why
25 rivals cannot replicate or choose to do that.

1 If you had those sorts of considerations in play
2 that might cause you to think about those, but if you
3 have all of that freedom and flexibility, then I think
4 the presence of active choice is something that is an
5 indicator of value.

6 MR RIDYARD: Okay. What about the need for uniqueness here.

7 What role does that play?

8 DR JENKINS: I do not know. I think it is quite hard.

9 I mean, we see people, that horizontal differentiation
10 that people have very different preferences on things:
11 something I might judge to be not at all special or
12 unique, or things that other people value highly. So
13 I think it is a little bit hard to fully rank that.
14 I mean, what are the measures that you would use to try
15 and get an objective measure of that? Brand value,
16 which people do do studies of brand value, it is mostly
17 based on willingness to pay. You go and ask people, how
18 much more are you willing to pay for this, as we were
19 discussing a couple of weeks ago now, for the soft drink
20 can with the Coke logo or the Pepsi logo versus the
21 Tesco own brand one. You can ask people questions about
22 that which others might think is not a genuine
23 enhancement, the packaging that it comes in.

24 MR RIDYARD: Those discussions can become circular as well
25 really because -- yes.

1 DR JENKINS: Yes, which is why I am saying it is quite
2 difficult to determine and hence, in the absence of any
3 choice in the market and a finding of dominance which
4 I think is perhaps case 3 in *Hydrocortisone* -- I must
5 say I am a little confused about exactly what case 3
6 means, you know -- then it is sort of like there is
7 nothing you can compensate for that, but where there is
8 differentiation and people have choice then too much
9 judgment about what that value is to consumers that is
10 completely unconnected to the consumers themselves may
11 lead to outcomes that are not actually beneficial for
12 those consumers because it curtails those choices.

13 MR RIDYARD: Let me put that one to you, Mr Parker. How do
14 you deal with horizontal differentiation where there are
15 five brands in a market and they all charge a premium
16 over the nonbrand products but they all -- I mean, you
17 or I might have a preference for one or other of them
18 but overall none of them is particularly better than the
19 other in some objective sense. Are we --

20 MR PARKER: I would not consider that to be a source of
21 economic value on my interpretation of *United Brands*.
22 Just as an aside, I am not sure if I would agree with
23 Dr Jenkins' characterisation of her approach as a
24 Goldilocks approach. The reason for that is I think it
25 is quite possible that you could have a firm that

1 engages in a drastic innovation and you might then look
2 at it and say, well, created the market, you have got
3 ahead of the game. For a long period of time you might
4 well have a dominant position. But you should still
5 I think -- it is actually the duration and persistence
6 of the benefits that arise from that innovation for
7 customers that actually for me is the marker of economic
8 value in my interpretation of *United Brands*.

9 I think making a small innovation which is then
10 readily copyable and so on, I do not think adds extra
11 because I think that is essentially all going to be
12 pretty quickly soaked up in the cost-plus benchmark.

13 So in terms of -- just going back to
14 differentiation, I would make a distinction between
15 horizontal and vertical differentiation here. So for me
16 if you have a sort of pure horizontal differentiation
17 where you prefer the red version and I prefer the blue
18 version, it seems to me to that extent, yes, we have
19 different tastes but neither of them is providing any
20 objective value. Essentially there is no quality
21 difference there. It is just that we have very -- we
22 have somewhat different preferences and then a can of
23 spray paint and we get the different version.

24 So similarly, I think we have the example of the
25 hairdresser. Yes, the hairdresser has some unique

1 horizontal differentiation, the one at the end of my
2 road, because it is at the end of my road. But so does
3 every hairdresser and I do not think we would say that
4 every hairdresser therefore has some kind of unique
5 economic value.

6 Essentially that is because it is easy to become
7 a hairdresser. You can enter. It happens all the time
8 and that soaks up. There is just enough left over
9 market power from that horizontal differentiation to
10 meet the fixed costs at the margin and so that is not
11 really -- it is not creating any economic value because
12 I think the differentiation is essentially, a bit of
13 a weird way of putting it, but it is sort of identical
14 across firms. Every firm is equally differentiated but
15 not in a way that creates a kind of unique position. It
16 is just everyone has their own little niche and everyone
17 is able to get a small niche.

18 So I would say that, for me, is not a source of
19 additional economic value. I would say it would have to
20 be something about: I am the best hairdresser in London,
21 or something, by some more objective measure, rather
22 than: I happen to have a small amount of localised
23 market power, only in the sense of I can raise prices
24 above marginal cost which is necessary to recover fixed
25 costs.

1 MR RIDYARD: Okay, thanks.

2 Let us take a break there and we will be back in
3 ten minutes.

4 (11.24 am)

5 (A short break)

6 (11.38 am)

7 MR RIDYARD: I just have a couple of elements to this
8 discussion of value in this section 2 of the questions
9 which I would like to deal with before we move on.

10 The first one is in relation to consumer
11 satisfaction. Is there anything in this notion of
12 consumer satisfaction that can sort of add any value to
13 the discussion we were having prior to the break?

14 Dr Jenkins, do you want to go on that.

15 DR JENKINS: Yes, I think that it is probably necessary but
16 not sufficient, so that if you found that customers were
17 dissatisfied, and yet found themselves continuing to
18 take a product, that would not be -- that would be
19 a sign of not having economic value from the product.

20 If they are satisfied then you cannot conclude there
21 is not value, and that is where you have to engage with
22 this sort of difficult question around inertia: are they
23 satisfied because they do not realise that they should
24 not be satisfied, or are they genuinely satisfied and
25 have thought about the alternatives and made an active

1 choice to remain with their current provider?

2 So there I think you would look at the satisfaction
3 information and evidence to see if there is
4 a difference, depending on whether a customer has
5 switched or not, which in this case I do not think there
6 is. You would look at the evidence that those customers
7 are engaging, even if they are not actively switching,
8 which again there is evidence that one can examine in
9 this case from the Ofcom surveys which give you some
10 indication that there are groups of customers who are
11 thinking about choice and then choosing not to, and, as
12 I said, the levels of satisfaction are relatively
13 similar depending on whether a customer does actually
14 change or does not.

15 MR RIDYARD: Yes.

16 Mr Parker.

17 MR PARKER: So I think I am not massively compelled by the
18 idea of taking customer satisfaction as sort of measured
19 by stated preference, responses to surveys, and so on,
20 into consideration here. I think it just feels to me
21 like it has -- there is a danger of people responding in
22 various ways that you cannot really interpret fully.
23 I think the behavioural experts will talk -- we will
24 talk more to that.

25 I think, to the extent that it might be relevant,

1 I think it would be relevant in a world where the firm
2 in question has massively higher satisfaction than
3 anyone else, and you can link that to some objectively
4 better performance received from that product.

5 THE CHAIRMAN: Sorry, just ...

6 (Pause)

7 MR PARKER: So I would only take it into account in
8 a situation where it is very clear that there is a very
9 big gap between the satisfaction of the customer in the
10 dominant firm and the satisfaction of rivals, and you
11 can link that to the objective reason.

12 MR RIDYARD: The last one, you might feel it has been
13 covered already, but: are there circumstances, and, if
14 so, which, in which the concept of value and costs has
15 come down to the same thing?

16 MR PARKER: I do not think I have anything to add over my
17 previous comments.

18 MR RIDYARD: Okay.

19 Dr Jenkins.

20 DR JENKINS: I think they are separable concepts informed by
21 consumer surplus, and the markers of effectively
22 competitive markets are ones where you are delivering
23 consumer surplus through the products that you offer.

24 MR RIDYARD: I suppose if you got to situations where you
25 were not impressed with the value justifications for

1 pricing then you only have cost to fall back on. Would
2 that be a fair summary?

3 MR PARKER: So I think that would go back to the sort of
4 *Flynn and Pfizer* type interpretation. You have done
5 your limb 1 test, it is excessive. You just say there
6 is no additional economic value which needs to be taken
7 into consideration here that would offset the finding
8 from limb 1. That would be how I would think about it.

9 MR RIDYARD: Yes, thank you.

10 Let us move on to the more specific questions about
11 BT's observed pricing. The first question is we list
12 a number of sort of ways of characterising or featuring
13 or describing BT's pricing. I mean, are any of the
14 aspects that we have brought out in this question 3.1,
15 are they relevant to this question of whether BT's
16 prices for SFV services were unfair in themselves? Are
17 there features there you can pick out that help to
18 specifically inform this discussion?

19 Mr Parker, do you want to go first on that.

20 MR PARKER: So I think in respect of the first, the extent
21 to which BT's prices have exceeded the competitive
22 benchmark would then be relevant to how important are
23 any -- is any economic value or other objective
24 justification for that excess, and I think the further
25 you are above the limb 1 benchmark the more important

1 and substantial and compelling the evidence needs to be.

2 In terms of the extent to which BT's prices caused
3 harm to individual consumers, I am not sure I would say
4 that is terribly relevant from an economic perspective.
5 I think that just tells you something about how the
6 excess is distributed amongst the class of customers.

7 The nature, extent and frequency of adjustment to
8 BT's prices, again, I think -- I do not think that adds
9 anything from an economic perspective.

10 MR RIDYARD: Okay.

11 Dr Jenkins.

12 DR JENKINS: Yes, I think I agree with Mr Parker certainly
13 on the latter two, the impact on individual consumers,
14 the way in which prices change in and of itself being
15 related to limb 2, it is more of an assessment in the
16 round.

17 The first one, the extent to which the prices
18 exceeded a competitive benchmark, I think that must be
19 relevant. In a sense that is partly captured in limb 1
20 as significance and persistence. If you then find only
21 a small amount above that, so I am not sure how helpful
22 it is to say that, but I think it must be relevant, that
23 element. It is an essential aspect of the test.

24 MR RIDYARD: It determines how much work your limb 2

25 arguments have to do, how much heavy lifting they have

1 to do to get you over the line, I suppose.

2 DR JENKINS: Yes.

3 THE CHAIRMAN: Could I just ask on that, on Mr Parker's
4 first approach, Dr Jenkins, the way he was putting it
5 was the more excessive, let us say for these purposes,
6 the more above the significant bit, the more above that
7 bit it is, the harder any justificatory factors have to
8 work, as it were, to displace that as a possible basis
9 for unfairness.

10 From an economic point of view, if it is an economic
11 point of view, do you agree with that characterisation,
12 which is you start from an excessive price and then you
13 effectively see what countervailing factors there might
14 be, or is that not the correct approach from an economic
15 point of view on limb 2?

16 DR JENKINS: So without revisiting some of the differences
17 that I have with Mr Parker on that competitive
18 benchmark, so I think the point I would make is there is
19 a range of potential benchmarks that we have discussed,
20 and we debated the question of where in that range might
21 one select a limb 1 benchmark, or how would one consider
22 how to deal with that range. So I think my answer would
23 be, well, it depends how you have answered that first
24 question, because --

25 THE CHAIRMAN: Let us assume that we have -- that question

1 has been dealt with. Again, it is an assumption which
2 says, for these purposes, the hypothetical is we have
3 found that the pricing is excessive, and we have dealt
4 with the point about differential competitive benchmarks
5 or upper bounds and all the rest of it, and I have come
6 to the conclusion that the price is excessive under
7 limb 1.

8 Is the correct approach, which I think is what
9 Mr Parker was hinting at, that once you have got that,
10 it becomes a sort of balancing exercise. You look at
11 that on the one hand, you look at countervailing factors
12 which might justify it as fair nonetheless, which
13 exercise can move up and down depending on quite how
14 excessive the price is, but there is that kind of
15 balance? That is what I am trying to see, whether that
16 is the sort of approach you would agree with or not.

17 DR JENKINS: I think I would agree that then there is
18 a balance between the two. In the situation where you
19 have identified there was a potential range, and you
20 have selected a mid point or low end of that range, when
21 you come to make that balance the fact that there was
22 a wider range that you potentially did not adopt would
23 be relevant for, then, the balance.

24 Because if you are saying, well, actually in
25 competitive markets we might observe actually a range of

1 prices, including much higher prices than the one we
2 have selected as our competitive benchmark, and the
3 sorts of situations that that would reflect are, you
4 know, luck, operational efficiency, economies of scope,
5 all of these things being reasons why you would find it,
6 then that would influence the balance you would then
7 make when you look at, under limb 2, the conditions that
8 you have in that particular case.

9 THE CHAIRMAN: Thank you.

10 MR RIDYARD: Then how about evidence on what we describe in
11 the question as being evidence that BT had acted with
12 deliberate non-transparency. I am not going into the
13 details, but let us suppose we found that BT had sort of
14 identified this customer group as one that was less
15 price-sensitive and thought, well, this is a chance to
16 make some extra money. So there were sort of bad
17 internal documents, for want of a better term.

18 If we had found that, is that something that -- is
19 that subjective evidence, something that can inform the
20 economic assessment about whether the prices are unfair
21 and meeting this limb 2 problem?

22 Dr Jenkins.

23 DR JENKINS: Yes, I think the question of intent -- I think
24 from the Tribunal's perspective I am sure it will be
25 something that is taken into account. From an economics

1 perspective in general, certainly the focus I have taken
2 is to look at the evidence of what actually happened and
3 how consumers actually respond. The essence of many
4 types of marketing are designed to be cognisant of
5 behavioural choices that customers make, whether you
6 call those biases or not.

7 There are lots of examples in workably competitive
8 markets where behavioural biases are taken into account
9 in firms when they design their products, when they
10 think about their pricing, so I do not think in and of
11 themselves they indicate abuse, there can be
12 characteristics. Then the question is: overall, are
13 there sufficient customers who are responding rationally
14 to those things or able to heuristically respond? You
15 will hear more of that from the behavioural experts.

16 I think the basic idea of a profit motive, which
17 generally means firms are looking to extract value from
18 their customers, that could be seen as a bad thing, but
19 in general is seen as a good thing because it drives
20 many positive things in an effectively competitive
21 market.

22 So that is why it is a difficult balance to think
23 about intent in and of itself. There are cases where
24 actions by the firms themselves constitute abusive
25 behaviour, sought to make life difficult for their

1 customers, which is slightly different from saying, you
2 know, this is the way they have conducted their
3 business, and at times they have been thinking about how
4 do we maximise our profits given the range of services
5 that we supply and the customers we serve.

6 MR RIDYARD: Okay.

7 Mr Parker.

8 MR PARKER: So I think I am not a million miles away.

9 I would say I do not think these are factors that are
10 relevant to an economic assessment, but I can see they
11 are factors that are relevant to the assessment which
12 the Tribunal will have to make, which is kind of using
13 a broad canvas.

14 MR RIDYARD: Okay.

15 What about -- this is a good place I think to bring
16 in a question which I skipped over earlier, which was
17 the distinction between the VOCs and the SPCs. I mean,
18 just on this discussion of unfairness and trying to
19 apply these concepts, the economic concepts, I mean are
20 there important, obviously there are factual
21 distinctions between those two subgroups, but how do
22 they feed into this discussion of the economic
23 principles?

24 Mr Parker first of all.

25 MR PARKER: I am not sure they do. I think in my conception

1 of economic value and unfairness, I do not think there
2 is anything particularly different about BT's SPC
3 offering relative to anyone else's that you would want
4 to take into account as being a kind of different
5 feature.

6 I think -- I cannot really think of a reason why you
7 would want to treat VOCs and SPCs differently from the
8 perspective of unfairness.

9 MR RIDYARD: Let me try you on that, because you might think
10 that SPCs have got, on the face of it, anyway, have got
11 an obvious -- an easy option to opt for a bundle,
12 because at least they do demand broadband as well as
13 voice services, and so they have a ready solution to
14 their problems, as it were, whereas someone who was
15 a dyed-in-the-wool voice only customer who was not
16 interested in the internet does not have that option.
17 So would that not -- could that not be a factor that
18 would affect your assessment of unfairness?

19 MR PARKER: So I do not think it would affect -- I do not
20 think it would give you a reason to say an excessive
21 price could therefore be fair because these people could
22 switch if they wanted to. I think that, to me, goes
23 a bit back to sort of willingness to pay fallacy ideas,
24 showing that you are prepared to accept these prices.
25 I think it does come into mitigation, and so that is

1 a sort of separate line of thinking to me. That will be
2 dealt with later on this week, I think.

3 So going right back to sort of market definition
4 discussions, the question is why BT has been able to
5 raise the prices above a competitive level to those
6 customers if they have already options. The answer is
7 they do not seem to be exercising those choices for
8 whatever reason. I think you would need considerable
9 evidence to suggest that they were making very informed
10 and rational choices to stay with BT and that somehow
11 BT's offering to those customers was different,
12 different and better from other providers of SFV
13 services.

14 MR RIDYARD: Okay.

15 Dr Jenkins.

16 DR JENKINS: So there are obviously some differences between
17 voice only and SPCs as you have discussed there. It is
18 the case that the Voice Only Customers that are in the
19 class were also making active choices, both to leave
20 BT's SFV offering to another SFV offering, and also to
21 migrate and take up their voice services with other
22 bundled products.

23 But there is this view where you say, okay, so some
24 of them left, but the ones who do not leave are still
25 taking the standalone voice service, and are they

1 somehow different from the SPCs who, even if they stay,
2 because they are taking your additional product, they
3 are probably being supplied by an alternative, so is
4 there some difference?

5 Now, one thing one would think about is whether
6 under competition law in abuse of dominance what you are
7 focused on is the fairness of the process, fairness of
8 the opportunities that are available to the customers,
9 more than necessarily the fairness of the outcome which
10 requires, then, judgment that the outcome and the choice
11 they have made is unreasonable in some sense and unfair,
12 despite the fact that if you took two Class Members at
13 the beginning of the period, and one of them may take up
14 a bundle, and at that point, the moment they do that,
15 they seem to -- they change from having been exploited
16 to not being exploited in that moment, and it is seeming
17 to take away the intentionality of those customers in
18 the choices that they made when many of them are making
19 choices.

20 That could also be some of that distinction with
21 respect to the Ofcom powers where they may, because of
22 their duties, also have a concern about fairness of
23 outcome and fairness of specific customers which may not
24 necessarily be a type of fairness that is of concern
25 under competition law where it can be shown that there

1 was fairness of process and opportunity and the
2 customers were making reasonable choices.

3 MR RIDYARD: I suppose I was also thinking about what we
4 were talking about, innovations and qualities aspects,
5 and whether it is more likely that an SPC -- maybe we
6 are entering into different territory here, but an SPC
7 is more likely to have made a conscious choice to prefer
8 what BT has to offer, given that they could buy a bundle
9 from BT or someone else, whereas a VOC might not have
10 that sort of outside option in the same way, and that
11 would somehow affect the sorts of pricing and the ways
12 in which you would look at particular price-cost margins
13 as to whether they were fair or unfair.

14 Mr Parker.

15 MR PARKER: I think you would have picked that up in your --
16 I think you pick it up in your limb 1 analysis. I think
17 it is all encompassed within that. The extent to which
18 they are in fact asserting those choices and the extent
19 to which BT was able to maintain prices above the
20 competitive level, that is kind of -- that is on this
21 construction being established at this point.

22 Unless there was something kind of unique and
23 different, I am not sure I would add anything further
24 into the mix in terms of unfairness.

25 MR RIDYARD: Okay.

1 Mr Matthew, did you have anything to offer on this
2 or ...

3 MR MATTHEW: Just in general terms, and reading from what
4 Ofcom said which we will come on to. But going back to
5 when is it at a conceptual level desirable to intervene
6 on prices, if you take the view that on the dimmest
7 reading of the facts SPCs are separate from bundles,
8 nevertheless, as you have pointed out, those customers
9 would have a direct substitute available to them, it is
10 just that they are not choosing to take it up.

11 In those circumstances, it would seem a particularly
12 balanced case; I think all of the cases would be
13 balanced, but that would be a particularly balanced
14 case, where you are finding narrow market and dominance
15 very much on the edge. It is also true for VOCs
16 potentially as well.

17 But going back to the considerations we described
18 last week, if you have a situation where there is no
19 prospect of competition coming in allowing the market to
20 do its work, tending towards dominance, that is the kind
21 of situation where you can imagine pricing being
22 something that abuse of dominance might be more
23 concerned with. Those factors apply even less to SPCs,
24 would be my observation from Ofcom's reasoning.

25 MR RIDYARD: Okay.

1 Now we are rapidly moving into the area where
2 I think Dr Hunt might be -- would this be a good time to
3 bring Dr Hunt in to the ...

4 THE CHAIRMAN: Yes.

5 (Pause)

6 DR STEFAN HUNT (sworn)

7 MR BEARD: Sir, should I just take him to his report and
8 confirm that?

9 THE CHAIRMAN: Please.

10 Examination-in-chief by MR BEARD

11 MR BEARD: {IR-E/21/1}, please. It will come up on the
12 screen. If we could go to page {IR-E/21/105}. Is that
13 your signature, Dr Hunt?

14 DR HUNT: Yes, it is.

15 MR BEARD: Is that your report?

16 DR HUNT: Yes.

17 MR BEARD: Is it true to the best of your knowledge and
18 belief?

19 DR HUNT: Yes, it is.

20 MR BEARD: If we just go briefly to {E/49/1}. I am sorry,
21 it is the wrong one. {E/50/1}, I apologise. If we go
22 through to page {E/50/32}. Is that your signature,
23 Dr Hunt?

24 DR HUNT: Yes, it is.

25 MR BEARD: That is the Joint Expert Statement in relation to

1 behavioural economics. Your contributions to that will
2 obviously be the subject of discussion in the next
3 session, but are the contents of those contributions
4 true to the best of your knowledge and belief?

5 DR HUNT: Yes.

6 MR BEARD: Thank you.

7 I think that is all I need to deal with in terms of
8 formality.

9 THE CHAIRMAN: Thank you.

10 MR RIDYARD: Thanks.

11 Okay, so we are moving on to the question of brand
12 value in the context of this assessment of value under
13 limb 2. So the first question we had was: would
14 evidence that BT SFV customers placed value on the BT
15 brand, would that be relevant to the assessment of
16 economic value under limb 2?

17 Mr Parker, would you like to go first on that.

18 MR PARKER: So I think if consumers place value on the BT
19 brand over and above value that was placed on other
20 brands, and that this was a market such as fine
21 fragrances or designer handbags or Apple technology, it
22 seemed to me there are markets in which brand can be
23 important, but it is typically supported by a very large
24 quality of advertising and a very high-end luxury
25 product. I am not really sure we are in that world

1 here. I think we will come to the evidence. I am not
2 convinced by the evidence that BT has a kind of superior
3 brand to anyone else, to the extent that there are
4 statements where people say they trust the BT brand,
5 I do not think dispute that, but it seems to me that is
6 a kind of flip side of the customer inertia that what we
7 are seeing elsewhere.

8 So in theory, yes, under kind of quite restricted
9 circumstances, and in practice I do not think so.

10 MR RIDYARD: So you would want it to be sort of vertically
11 integrated over its competitors -- vertically
12 differentiated from its competitors in order for the
13 brand value to be --

14 MR PARKER: Yes, every firm has a brand and every firm would
15 be wanting to say: I want to have a good positive brand
16 in the marketplace. I think for that to provide
17 additional value it goes back to kind of my overall
18 framework for assessing these things, is that BT's brand
19 would have to be kind of somehow uniquely preferred over
20 every other brand, and in a world where the products
21 themselves are pretty similar, I am not -- I am actually
22 not sure quite what we are picking up in terms of brand.

23 But at the very least, I think you would want to see
24 that BT's brand was somehow really significantly better
25 than any other firm's.

1 MR RIDYARD: But if -- I mean, you mentioned fine
2 fragrances, for example. There you can think of half
3 a dozen brands which are considered high-end, Chanel and
4 Gucci and whatever, and they are not obviously -- one
5 obviously is not better than the other. They are
6 horizontally differentiated and I am sure some people
7 would have particular views about individual brands.
8 But they all charge a huge premium over the sort of
9 mass-market fragrances, so how would they fit into that
10 scheme?

11 MR PARKER: Yes, that is a fair point. So I think you would
12 probably, or you should see that the expense created --
13 the expense that is incurred to create the brand is all
14 incurred -- it should be properly considered in limb 1.
15 So if you are doing a significant amount of advertising,
16 that will be picked up in your limb 1 fine fragrances
17 analysis, and then you arrive at: maybe there is nothing
18 additional over and above that would come into limb 2 in
19 a fine fragrances case because, as you say, it is sort
20 of somewhat beyond my personal knowledge, but Chanel
21 versus Gucci, for example, I would have no sense on
22 whether people would think one was materially better
23 than another, they are all brands.

24 I think that would, to me, go to reinforce the idea
25 that to say there was some additional value in the

1 existence of a brand, it would have to be that that
2 brand was kind of unique and different to others in the
3 market.

4 MR RIDYARD: Okay.

5 Dr Jenkins or Dr Hunt, do you want to go on this?

6 DR JENKINS: Maybe I will just start quickly but hand over
7 to Dr Hunt in that the view I take on this, which is
8 that the brand is relevant to the assessment of economic
9 value, and I do rely on Dr Hunt's evidence on how BT's
10 customers viewed BT, but that, perhaps somewhat in line
11 with the fine fragrance example, that brands do not just
12 come out of nothing.

13 In the case of BT and its voice services, the
14 attributes that I drew out in my report, based on
15 Dr Hunt's assessment, were those around perceived
16 reliability and trust in the brand which was around how
17 they will be dealt with -- customer service. So those
18 are meaningful service attributes that customers have
19 a belief or a perception of what will be delivered by
20 that brand. That is not to say that businesses always
21 fulfil the brand promise, but the presence of the brand
22 promise is something that motivates the costs that are
23 incurred by the business, and in a sense it goes back to
24 my limb 1 approach which is to say there are these
25 common costs that are about what BT offers to its

1 customers that are not solely built for the SFV
2 customers but the SFV customers do benefit from those
3 common costs that have been incurred.

4 MR RIDYARD: Dr Hunt, do you have anything?

5 DR HUNT: Thinking about whether brand has value in and of
6 itself, I have two observations. The first is it is
7 clear that brand can be of value across a wide range of
8 products. Just going into a supermarket every day there
9 is huge variety of brands. Many of those would be
10 considered to have value and to differentiate, at least
11 in some way, different brands.

12 Another aspect of brand that you might want to think
13 about it is reputation. So my second point is that one
14 element of brand for BT maybe that if customers feel
15 that BT has done what it said it was going to do and
16 delivered a good service, then that would contribute
17 towards its kind of brand and reputation.

18 MR RIDYARD: Okay.

19 So let us get on to the specifics of the value that
20 customers placed on BT's brand. Do we have good
21 evidence of that in the current case?

22 Dr Hunt, do you want to go on that.

23 DR HUNT: Yes, we do have evidence on the value of BT being
24 a trusted brand or a trusted provider. There are three
25 pieces of evidence that I present in section 7.6 of my

1 report, all three of them come from Ofcom. In the
2 interests of time, I will focus on one of those three,
3 but I would be very happy to expand on the other two,
4 but they all say broadly the same thing.

5 If we look at some 2015 research that was
6 commissioned by Ofcom from Jigsaw, BT Voice Only
7 Customers, and Voice Only Customers of other providers,
8 were asked what was the main reason for sticking with
9 your provider, 30% of the VOCs, BT's Voice Only
10 Customers, said that they stayed with BT because of the
11 trusted brand, and if we compare that to non-BT
12 Voice Only Customers, only 6% said that. So we see
13 there are very marked differences between the two. In
14 fact it was remarks in the 2017 report by Ofcom that one
15 of the reasons for a very high percentage of people
16 wanting to stay with a trusted brand was that BT could
17 be considered to be a household name.

18 MR RIDYARD: Okay.

19 DR HUNT: There are a couple of other pieces of evidence.

20 MR RIDYARD: That is useful as a lead-in.

21 Mr Parker, is that an example of vertical
22 differentiation that you were looking for here?

23 MR PARKER: I do not think so. I think probably the best
24 data we have is in the Net Promoter Score reports. So
25 can we go to {OR-F/905}. So Net Promoter Scores are

1 people who would recommend a particular provider versus
2 another provider. It is something that -- there are
3 quite a few of these documents there ...

4 THE CHAIRMAN: Sorry, are we waiting for this to come up on
5 the ...

6 MR PARKER: Yes, I believe so. (Pause)

7 Sorry, it is {OR-F/905/1}.

8 Yes, so here is one of these reports. If we can go
9 to slide {OR-F/905/2}. So this is the brand Net
10 Promoter Score. You can see that:

11 "BT's Brand [Net Promoter Scores] remains on a long
12 term decline ..."

13 If you look at relatively there, it is towards, very
14 much towards the bottom end. You can look at the bit at
15 the bottom, the people -- promoters versus the people
16 who are detractors. That is saying that -- it is sort
17 of telling you how -- the penultimate line on the top
18 charts is sort of made up of people who feel positively
19 about BT versus people who feel negatively.

20 If you go on to slide {OR-F/905/4}, then you can see
21 how this -- if you look at the landline version of this,
22 again we see BT is largely towards the bottom end.

23 So whilst I think BT is very much keen to want to
24 improve its brand picture, I am not sure this is telling
25 me that BT has a sort of unique and valued brand across

1 the board that would lead to it having some kind of
2 reason customers really place lots of value on it.

3 MR RIDYARD: Mr Parker, these are looking at BT -- across
4 all BT customers, it is? It is not SPCs in particular?

5 MR PARKER: This is not SPCs in particular, as far as
6 I know.

7 MR RIDYARD: Or SFV --

8 MR PARKER: I do not think on any of these metrics you see
9 BT coming out kind of substantially above everyone else.
10 If you look at any of the documents from {F/900} to
11 {F/906} you will see a similar picture at different
12 points in the period. So I think that is a sort of one
13 point on brand.

14 Then to the extent that there is sort of -- people
15 are saying that we are trusting this -- trusting BT.
16 Again, there is a bit of a question as to exactly what
17 they are doing there.

18 If you look at paragraph 6.94 of my reply report at
19 page ... which is page -- it is {IR-E/5/139}. It is
20 perhaps more about satisfaction than brand, but in some
21 ways the two things are related. I think there is some,
22 if you look at 6.94, Professor Loomes -- just go up
23 a bit -- is expressing some scepticism as to the use of
24 satisfaction in the stated preference surveys as to
25 whether this is exhibiting a genuine choice or whether

1 it is sort of post-rationalising a kind of a behaviour
2 that they are exhibiting and wanting to kind of make
3 that sort of -- to make their survey consistent with
4 their behaviour.

5 So I suppose I am not sure, given that picture, that
6 whilst some people might well have said we trust the
7 brand or whatever, I am not sure there is, for me,
8 sufficient evidence that BT's brand is substantially
9 more trusted and valued than anyone else's in the market
10 for me to want to take it into account in the limb 2
11 analysis.

12 MR RIDYARD: Dr Hunt, your responses to that.

13 DR HUNT: So obviously looking at the document we have just
14 looked at, that is factual. However, we have got to ask
15 what Net Promoter Score is. Net Promoter Score is
16 whether you would recommend to a friend. It is
17 a combination of some form of satisfaction and some form
18 of willingness to recommend. My understanding is there
19 are two reasons why firms use Net Promoter Score. One
20 is for word of mouth recommendations, and another is
21 there is a proxy for consumer satisfaction.

22 In this particular case, in terms of the proxy for
23 consumer satisfaction, we have very good and very direct
24 measures of satisfaction that we will come to. So if
25 you have those measures and you think they have been

1 correctly measured, then I think it is just a superior
2 measure to use.

3 MR RIDYARD: But why is it superior? Why should we choose
4 yours over Mr Parker's?

5 DR HUNT: So that is what I was explaining, net promoter is
6 this proxy for consumer satisfaction, but it is this
7 slightly hodgepodge measure of two things. It is: would
8 you be willing to recommend to somebody else? So it is
9 a little uncertain to me how one should interpret the
10 answers to those questions. Whereas satisfaction
11 I think is a much more direct, a much cleaner question
12 and, for me, it is an easier answer to interpret.

13 THE CHAIRMAN: Could I just pick up on that: but why?
14 I mean, you might have people who would say, well, I am
15 satisfied, but I am not going to recommend you take the
16 positive step of recommending to a friend. Why is not
17 recommending to a friend a very good indication of
18 satisfaction on the basis that if you were dissatisfied
19 you are hardly likely to recommend it to a friend?

20 DR HUNT: I think the thing for me is if we are interested
21 in the work around recommendations, then that seems to
22 me obviously a very direct measure, but perhaps we might
23 want to think of that as capturing some form of
24 satisfaction. At most, we should use it whilst we are
25 using the whole bank of other metrics that we have.

1 THE CHAIRMAN: Thank you.

2 MR RIDYARD: Was there anything -- we sort of moved from
3 questions about the brand to satisfaction. Was there
4 anything else that you wanted to say about that
5 distinction between brand value and satisfaction, or are
6 they -- is there anything we have not covered on that
7 distinction?

8 DR HUNT: So the next question is about whether consumers
9 are uniquely satisfied or ...

10 MR RIDYARD: Yes, let us take that in as well then at the
11 same time.

12 DR HUNT: Okay, so the question, my understanding of the
13 question is if satisfaction is relevant are consumers
14 unique? Do they need to be uniquely satisfied?

15 I guess for me the answer to that question is first,
16 I do not see any reason to focus on unique satisfaction
17 per se. At least looking at when the CMA looked,
18 considers competition assessment it thinks about
19 satisfaction. It discusses that for example in its most
20 recent competition assessment guidelines in a number of
21 ways but I have never seen any reference to unique
22 satisfaction. Similarly, when Ofcom does its analysis
23 in, say, 2013/2017 in its first reports there is a focus
24 on satisfaction. So I have not seen a focus on unique
25 satisfaction in any of the competition analysis that

1 I have seen.

2 MR RIDYARD: Is it not a good way because in your work you
3 are understandably quite keen on benchmarking results?

4 DR HUNT: Yes.

5 MR RIDYARD: So is not benchmarking a way of seeing whether
6 given results about satisfaction is more or less
7 meaningful because it has more force, more substance if
8 not only you have to find people are satisfied with my
9 product but also that they are more satisfied with mine
10 than my rivals. That surely adds some extra confidence
11 to the measure.

12 DR HUNT: Yes, exactly. I think it does exactly that, and
13 I think it would give us some extra confidence. I would
14 not say it is a requirement. So, for example, when
15 I think about satisfaction it is only one measure,
16 absolutely. It is a measure that is quite useful
17 because it allows us to look at what consumers think
18 about all of the benefits they may be getting from the
19 product and at the same time all the various costs to
20 them as well. It is a good overall measure for how do
21 they feel about a particular product which is why
22 I think it gets used quite a lot in competition work.
23 But it is only one measure that allows us to triangulate
24 in addition to various measures.

25 So I think it is useful in and of itself to get

1 a sense of how were people perceiving thinking about BT
2 as a whole. As well as I think it is also useful to
3 specifically benchmark that to other providers as well
4 and that gives an additional viewpoint. So if BT were
5 to compare relatively well that would give sort of
6 additional reasons to think that maybe customers with BT
7 were particularly satisfied.

8 MR RIDYARD: So the uniqueness thing, it would work for you
9 and it would be a nice to have but not a necessary
10 condition in assessing whether your customers were
11 satisfied.

12 DR HUNT: I think that is right. For me that makes sense
13 because there is already a balance within satisfaction
14 itself.

15 MR RIDYARD: Okay. Mr Parker, anything to add on that?

16 MR PARKER: Perhaps we could go to the top of the page that
17 is on the screen at the moment, {IR-E/5/139}, which is
18 something the CMA said in the context of retail banking.
19 If you look at the quote there. Basically there seems
20 to be some evidence of good levels of satisfaction and
21 high levels of satisfaction in the retail banking
22 context. The CMA in that case said, we are not going to
23 place a lot of weight on that because that would be
24 influenced by the services that people are currently
25 getting.

1 So my experience, whilst it does come up in
2 competition investigations, I am not sure it really has
3 been -- not much weight is typically placed on it over
4 and above the sort of hard data on prices relative to
5 costs in my experience.

6 I think it is hard to interpret but I am sure you
7 will come back to that in the discussion with Dr Hunt
8 and Professor Loomes at some point. I do not want to go
9 into too much detail.

10 On the question of uniqueness, I think that is
11 really important in this context which is the amount of
12 roundness limb 2 test for the reasons that we discussed
13 earlier today, but I think for satisfaction to be
14 something that would offset some kind of limb 1 finding
15 it seems to me you would have to look at, is there
16 something unique about the satisfaction or the brand
17 proposition of the dominant firm that was better than
18 that of other rivals in the market in order to then kind
19 of use as a reason why you should take it as an
20 offsetting factor, and I think, for example, the net
21 promoters scores that I have just taken you to suggests
22 that that is not the case.

23 MR RIDYARD: Okay. Dr Jenkins, did you want to add anything
24 on this?

25 DR JENKINS: Just something very short. If we go to

1 {IR-E/17/160}, paragraph 5.90 at the top. I think that
2 is the use I have made of the satisfaction evidence
3 which was actually looking at whether it was different
4 for SFV customers depending on whether they had switched
5 suppliers or not and finding that it is very similar
6 across those. So that is probably saying something
7 about there may not be uniqueness around that, but there
8 is certainly no evidence of, in a sense, the customers
9 who are in the VOCs or the SPCs having some different
10 experience than those who have switched providers, so
11 there is some general level of -- the general level of
12 satisfaction is quite high.

13 As I said before, I think if you thought there was
14 some difficulty or some reason not to rely on this, you
15 might expect to see those customers who had not switched
16 expressing more dissatisfaction with their supplier and
17 we do not see that here.

18 MR RIDYARD: Then I suppose the next topic to ask on this is
19 about quality improvements and innovations and what the
20 evidence is on those. What is the evidence that BT's
21 various so-called gives to the consumer or quality
22 improvements or product innovations that it introduced
23 into the SFV customers, what is the evidence that they
24 are something we should be taking into account in this
25 assessment of limb 2? Dr Hunt.

1 DR HUNT: Can I just double check. In terms of satisfaction
2 I was aware that one of the questions looked at the
3 evidence, that should we go through the evidence?

4 MR RIDYARD: Yes, please. Let us do that, yes. Mr Ridyard.

5 DR HUNT: So if we could stay on the satisfaction quickly,
6 go to my report which I think is {E/21/76} at the top,
7 so the top chart here.

8 This is the evidence from 2016 looking at BT
9 Voice Only Customers, Dual Play and split supplier.
10 VOCs, as you can see, is in the middle. So what we see
11 here is that 96% of VOCs are satisfied with BT. In
12 particular, you have got 3% are neither satisfied or
13 dissatisfied and 1% of customers are dissatisfied. 0%
14 are very dissatisfied with BT.

15 We can compare this directly to Dual Play. With the
16 Dual Play customers we see that about 90% of them are
17 satisfied with their BT service but we can see higher
18 levels or some higher levels of dissatisfaction.

19 We can use alternative benchmarks as well to look at
20 these numbers. So alternative benchmarks, and I will
21 verbally describe these. For example, if we wanted to
22 use mobile or television or broadband as benchmarks, we
23 can look at the general levels of satisfaction of those
24 markets and they vary from sort of the high 80s% to the
25 low 90s% and we can see that compared to those

1 benchmarks VOCs are broadly looking really quite
2 content.

3 We can also see split suppliers on this chart as
4 well as the lower bar and they are at 93% satisfaction
5 are relatively highly satisfied.

6 If we move to the bottom of this page, I do not know
7 if we can look at the bottom, I do not know if we can
8 look across two pages at the same time because table is
9 split on two pages. {E/21/77}.

10 MR RIDYARD: So you want go to over to page 77 as well.

11 DR HUNT: So what we can see here is this is for all
12 landline consumers, it is not just focusing on SFV
13 customers but BT compared to other customers. If we
14 look at the very bottom row we can look at the average.
15 We can see across. We can see that BT is not the
16 highest in the market. It is the second highest. One
17 thing you cannot see here because it is rounded to the
18 nearest %, so BT is half a % off of EE which you will be
19 aware is one of BT's other brands. There is quite
20 a spread across the different firms in the market, so
21 there is about 9% spread going from EE at the top to
22 Virgin down at the bottom. So this is from 86% for EE
23 down to 77% for Virgin.

24 BT, as I said, is half a % off of the top. So there
25 is quite a range of different satisfaction in the market

1 and BT customers compared to the customers of other
2 providers are relatively highly satisfied.

3 MR RIDYARD: So what does that mean for the topic we are
4 discussing here which is whether the pricing is unfair?

5 DR HUNT: So I think what this means is BT customers in
6 their overall assessment of their product with BT, and
7 that is going to take into account what they feel are
8 the benefits, that is going to take into account the
9 costs that they are paying, they feel overall pretty
10 happy with BT. Now, we can then start to look into what
11 that might mean and of course there are plenty of other
12 things but nonetheless that seems to me something that
13 is meaningful of itself.

14 MR RIDYARD: Yes. Mr Parker, impressed?

15 MR PARKER: I am not particularly compelled by this.

16 I mean, I think two reasons. One, I am not sure that
17 BT's average score of 85% over and above an average of
18 84% tells me that it is kind of uniquely well above the
19 pack and therefore is delivering some kind of additional
20 product for value or somehow that would justify a limb 1
21 finding.

22 I would also observe that this is not the way that
23 BT looks at it. BT does its own Net Promoter Score
24 analysis and there are a consistent run of those, and
25 the references I document, I showed you earlier and in

1 the references I showed you earlier, and BT comes out in
2 a very different place there. I think I would probably
3 put more weight on BT's internal views of these Net
4 Promoter Scores as being -- they think of those as an
5 important metric. That is why they are monitoring them.
6 That seems to give a rather different picture here. But
7 even if you just took this by itself I do not really see
8 that somehow BT is so different from everyone else that
9 there is any kind of need to make an adjustment to the
10 analysis.

11 MR RIDYARD: The previous, the figure 18 that Dr Hunt took
12 us to, I mean looking at the VOCs being apparently more
13 satisfied than the Dual Play customers -- the split
14 supplier customers, is that not a bit surprising because
15 you might imagine that the VOCs are those who do not
16 have an easy option to or who might not find it
17 attractive to switch to a bundle, so they are sort of
18 more captive in a sense than the SPCs and yet on these
19 numbers they are showing that they are happier with
20 life.

21 MR PARKER: So I think if we go back to my reply report at
22 paragraph 6.93, the same page we were on before, which
23 is page 139. I think I am not -- if we can go just
24 a little bit further up that. {IR-E/5/139}. If we look
25 at 6.93, there is one document that BT, and I think this

1 is, if I remember correctly, it is people who had some
2 frustrations but then they find something nice to say in
3 terms of when they report sort of their satisfaction
4 answers. We could go to the underlying document, if you
5 would like to. Again, I think Professor Loomes's views
6 about people who have not engaged, ticking the satisfied
7 box an endorsement of their own inaction. I am not sure
8 if it is adverse weight on the satisfaction findings but
9 I do not think for me that they are sufficient to
10 overturn a finding that somehow the pricing was fair.
11 I think in some ways it is a contributory factor that
12 people are not terribly switchy and that allows BT to be
13 able to price up. For me, it is that way round.

14 MR RIDYARD: Okay. So why do we not move on to the
15 innovations and quality improvements there. As I said
16 earlier, there are some quality improvements and
17 innovations which do seem to have been targeted to
18 some degree at the SPCs. So where do they fit into the
19 story? Mr Parker, why do you not go first on that.

20 MR PARKER: Yes, I think there are some gives in quality
21 improvements. I am not sure that they really materially
22 change the picture. There are two reasons -- three
23 reasons perhaps. One, many of them are very low in cost
24 and therefore it is unlikely that BT has found something
25 that provides huge value to customers at such a low cost

1 in a way that other people would not readily be able to
2 replicate and if anything there are -- one of the
3 examples Dr Hunt cites in his report for example is
4 caller display, but Dr Hunt also says that BT is not the
5 only provider to offer caller display services; in fact
6 the majority of people offer this.

7 So I think to the extent that these are improvements
8 of the product that lots of people are introducing then,
9 as I say, they would not satisfy my uniqueness test that
10 somehow BT is doing something unique and different to
11 other firms.

12 Then I think the one give that is material in terms
13 of cost is the Care Level 2 increase. Now, if you look
14 at Mr Duckworth's report you will see that that came in,
15 it was there for about three years and then it was moved
16 because BT felt that customers did not care enough about
17 it to want to maintain that level of service and they
18 moved to a lower cost level of service.

19 In any event, the costs of these gives at least are
20 all in the limb 1 analysis so they are already included.

21 MR RIDYARD: The costs are in but if you did something -- is
22 it necessarily right to dismiss things as because they
23 are low cost? If I do something that is low cost but
24 adds a great deal of value, if it was just a very clever
25 idea, I mean, it will not show up in the limb 1 analysis

1 because it did not cost very much but it could still
2 have generated great benefit, could it not?

3 MR PARKER: It could have done but if it was solo cost then
4 everyone else would immediately copy it because it is
5 solo cost. It is hard to see how something like that
6 could lead to sustained economic value over and above
7 the offers of rivals.

8 MR RIDYARD: But is this not kind of defining a value kind
9 of argument out of existence because if it is high cost,
10 then it will already appear in the limb 1 analysis and
11 if it is low cost --

12 MR PARKER: They are both in the limb 1 analysis. I think
13 I am saying -- so if Care Level 2 was something that was
14 uniquely -- suppose it was massively valued by customers
15 and it was expensive but no one else had thought to
16 offer it and customers said they really, really valued
17 it, that to me to -- it is an Openreach product, so what
18 BT Consumer is doing is buying an Openreach product and
19 applying that. So actually it is really an Openreach
20 innovation, if you like, but has been brought in -- or
21 an Openreach service which has been brought in maybe as
22 an innovation for BT Consumer, but anyone could do that,
23 and the reason they chose not to perhaps is because they
24 did not feel it was adding sufficient value to customers
25 relative to the cost.

1 But actually I think it would be the high value, the
2 high cost innovations that really are difficult to
3 replicate. That is where I think the potential source
4 of economic value is for the purposes of creating
5 consumer surplus that is unique and different to that
6 offered by other people in the market.

7 MR RIDYARD: I do not know, Dr Jenkins, or, Dr Hunt, whether
8 you want to comment on that.

9 DR JENKINS: Maybe turn to {E/18/189}, paragraph 6.133 of my
10 second report. So to this point I think I do not think
11 you can sidestep the question under limb 2 on the basis
12 that the costs have been covered under limb 1 and
13 I think that is precisely the question under limb 2, if
14 we are in limb 2 we have determined at limb 1 there is
15 some producer surplus, there are some prices above that
16 which is required from the cost benchmark, and so that
17 means you cannot then say, well, I am not going to
18 engage in the question of economic value because the
19 costs are taken. I agree with that, that is suggesting
20 you could never really find economic value as a relevant
21 consideration.

22 I think here the sort of approach of Mr Parker to
23 say, well, the costs will be included. If they are low
24 then it is replicable, then everyone does it. There is
25 an implicit assumption there that all the rivals price

1 at cost. But actually you may find that what happens is
2 someone moves first and they develop something that
3 might be relatively low cost but has high value. We are
4 in a dynamic environment. All the market participants
5 are facing features such as declining number of calls
6 being made and so then there is in the competitive
7 environment to say, oh, right, so people are valuing
8 this at £1.50 even if it only costs us a little bit to
9 make it. We put it in at £1.50. Over time maybe
10 someone says, I am going to bundle that in for free,
11 someone else -- you see a lot of change in the market
12 about exactly how all these features are priced and
13 a lot of diversity.

14 Then consumers can choose, do I want to be with BT,
15 with the options that they give me, both for today and
16 for in future, for the different call packages I might
17 take, for the different additional products that I might
18 add. They look at the other providers. These are
19 relevant factors for thinking about that horizontal
20 differentiation which can mean that you observe the fact
21 that people have selected themselves to the provider who
22 best meets their interests and product characteristics.

23 Hence, that is an alternative explanation of the
24 satisfaction scores. So it is not that it is
25 inconceivable that high levels of satisfaction are

1 correlated with inertia and a lack of understanding, but
2 they can also be correlated with an understanding and an
3 active choice and a selection, so one has to engage with
4 that question and be sure, especially in an environment
5 where there are alternative providers where the Class
6 Members are making active choices and some of them are
7 switching, then I think you cannot just immediately say,
8 reject evidence on satisfaction as being unrelated to
9 being able to inform you on the economic value those
10 customers are receiving from the service offering.

11 MR RIDYARD: Thank you.

12 I have a question about specific customer benefits
13 on innovations that were targeted at SFV customers, VOCs
14 or SPCs. Is there anything more to be said about that
15 that we have not already said?

16 DR HUNT: I think it might be worth stepping through the
17 various different elements of the things that BT did
18 just so we establish the facts if that works.

19 MR RIDYARD: Yes, okay.

20 DR HUNT: These by the way are sections 7.3, 7.4 and 7.5 of
21 my report. So there are three drivers here of value.
22 All of what I am about to say for all of these three
23 things are where BT are doing things that its
24 competitors are not doing.

25 The first one is with respect to reliability. So we

1 have already discussed this in part which is the -- this
2 is a focus on Openreach Care Level 2 where they moved
3 to -- and they moved up to that. Then BT introduced
4 this Fault Fix Guarantee and then of course it ended up
5 with other things.

6 Importantly when it comes to reliability with
7 respect to the Class is that this is something that
8 was -- my understanding was of particular value to the
9 class as well, so the VOCs in particular had said that
10 reliability was an important factor for them and we can
11 go into that more if you would like to. That is what BT
12 was doing in terms of its reliability.

13 The second thing is what it was doing on customer
14 service. I believe that in 2016 BT said they were going
15 to start onshoring its call centres and then in
16 late January 2020 had onshored all of the call centres
17 and BT was the first to actually have done all of that
18 onshoring. That was again something that was
19 specifically valued by the class, so older people and
20 those who had problems with hearing, particularly valued
21 having a local accent, in terms of the calls.

22 Therefore, this particular change that BT was doing was
23 of particular use.

24 THE CHAIRMAN: Were there not other providers that had
25 onshore call centres at this time?

1 DR HUNT: My understanding is that BT was the first to
2 completely onshore all its call centres. Again,
3 in January 2020.

4 THE CHAIRMAN: Thank you.

5 MR RIDYARD: Thinking through the cost of that, I mean, that
6 was a benefit that applied to all voice customers but
7 you are saying that the value was more acute for the
8 SPCs than for the other voice customers because they
9 were just, for whatever reason, they revealed themselves
10 to be more keen on that feature than customers in
11 general.

12 DR HUNT: Yes, exactly.

13 MR RIDYARD: So I am just thinking through the -- so when
14 you -- if you are looking at the -- if you are
15 allocating the costs of that, you might say there would
16 be a case to allocate the costs of that more to the
17 customers who valued it more than to those who did not
18 or maybe that is taking things too far. It is me
19 thinking aloud but carry on.

20 DR HUNT: So sales per second for the three which is
21 customer service. The third of the three is additional
22 service features which BT refers to as gives, and there
23 are two that I think are particularly relevant here.

24 So the first one is Call Protect which was BT's
25 nuisance call service and this is introduced

1 in November 2016 and was the first firm to introduce
2 this Call Protect service. Sky came in June of the next
3 year, in 2017, and TalkTalk in January of 2018. So BT
4 was measurably ahead.

5 Moreover, the way that these nuisance call service
6 works is if I reveal a call is from a bad number that
7 then is useful for all other callers as well, so there
8 are some benefits to scam in terms of the value of these
9 products. My understanding is that the BT's product
10 could well have been better than those of its
11 competitors as well.

12 When it comes to who would value this Call Protect
13 service we know again this was particularly valued by
14 older customers. There is a variety of sources for that
15 that is particularly valuable.

16 The second give, which has already been mentioned
17 a number of time in the proceedings, is Right Plan which
18 was used by around 200,000 individuals. That is of the
19 whole base of 9 million. So those are the three things
20 which BT was differentiated.

21 It is worth also pointing out in terms of quality BT
22 is perceived as higher quality. So it is perceived as
23 higher quality just in terms of its reliability. That
24 is also in section 7.3 I believe of my report and also
25 in terms of the perception of the quality of its line as

1 well.

2 MR RIDYARD: So that is the perception of the quality or the
3 actual -- is there objective measurement of quality or
4 are we just talking about perceptions rather than
5 actuals?

6 DR HUNT: That is right. I have not found an objective
7 measure. These are questions that Ofcom have asked in
8 consumer surveys. My understanding is that quality can
9 vary in two ways. The copper to the house is exactly
10 the same for everyone but the equipment in the exchange
11 can vary by firm and also the headset can vary by firm
12 as well. So there are two main sources where that could
13 contribute to a different quality of side.

14 THE CHAIRMAN: Did you say headset?

15 DR HUNT: Yes.

16 THE CHAIRMAN: Meaning?

17 DR HUNT: The phone.

18 THE CHAIRMAN: Oh, the phone itself.

19 DR HUNT: Yes. Then there are a number of other things that
20 BT did which other firms also did as well. So there is
21 Caller Display, Mr Parker mentioned. But that was
22 developed originally in the mid 2000s. There was also,
23 through the period that we are looking at, there were
24 a number of things where there was development of new
25 ways. For those customers who had access to the

1 internet which was estimated as 69% of the Class there
2 were a number of ways in which you could contact BT.
3 They introduced an app that came out in 2013 and then
4 there were a number of ways that were also developed as
5 well. That was my understanding of these changes in
6 this period.

7 MR RIDYARD: Okay. Mr Parker, anything to comment on there?
8 Obviously we took the factual evidence on this in
9 previous weeks but ...

10 MR PARKER: Yes, I mean, it seems to me if these were really
11 important then you would start to see those in the Net
12 Promoter Scores data and that does not seem to have come
13 through in a material way that these should all be gives
14 that are somehow creating a unique value for BT
15 customers that should make them be very positive about
16 BT to their (inaudible).

17 So it does not seem to be taken in the round and you
18 actually need to do not just the answers of what BT is
19 doing but what everyone else is doing in the market
20 because they might be doing different things as well.

21 I think we could go to Mr Duckworth's first report
22 at {IR-E/6/53} just to look at the enhanced care level
23 information. Thank you. So that second line down there
24 you can see there is this jump up in FYI 2017-2018 which
25 is when this Care Level 2 was applied but then it was

1 removed. My understanding is that that is because it
2 was not considered to provide sufficient value to
3 customers, so I do not think that can really be
4 considered to be something that was -- it is providing
5 additional value over and above the cost of that
6 service. If anything, it looks like it is not providing
7 enough value for BT to want to persist with that
8 particular thing.

9 Then in some of the other innovations where BT has
10 gone first but has been copied rapidly, it seems to me
11 I am not sure those feel sufficiently material or
12 persistent to want to take into account as somehow
13 offsetting a limb 1 finding which is significant and
14 persistent. So there was this small amount of economic
15 value for a period of time, yes, but we are looking at
16 a very lengthy period so ...

17 MR RIDYARD: Okay.

18 DR HUNT: Can I make a comment on Net Promoter Scores.

19 I think that is quite important and relevant.

20 MR RIDYARD: Yes, please.

21 DR HUNT: The way that net promoters scores are calculated
22 through these ongoing online panels, so these particular
23 changes to service that -- one might describe those as
24 innovations over time, the main people this is targeted
25 to would not be captured by or would only be partially

1 captured by the Net Promoter Score. So certainly no one
2 who has access to the internet is obviously going to be
3 captured in these Net Promoter Scores, and it is only
4 people who are regularly using the internet who are on
5 these panels who would be captured. So I think that is
6 a really important point.

7 So we see from other documents that when the Net
8 Promoter Scores have been captured for people who do not
9 have access to the internet they are very high for that
10 group indeed. Moreover, that same research also shows
11 that they care a lot about this Call Protect service.
12 So I think that is very important to bear in mind when
13 we look at these Net Promoter Scores.

14 THE CHAIRMAN: Right. Thank you very much. We will
15 continue with the other questions at 2 o'clock.

16 (12.57 pm)

17 (Luncheon Adjournment)

18 (2.00 pm)

19 THE CHAIRMAN: Just before we resume, just reviewing the
20 questions we have got, we think we might finish well in
21 advance of 5 today or 4.30 even. If that is the case,
22 Mr Beard, do you want to start your cross-examination
23 today or would you prefer to leave it until tomorrow?

24 MR BEARD: I think I would prefer to leave it until tomorrow
25 because I would quite like to digest the transcript,

1 because I think there have been various things today
2 which will either dispose of some lines of questioning
3 I have, or actually I want to modify, and it is actually
4 quite hard to do that on the hoof, if you do not mind.

5 THE CHAIRMAN: No.

6 MR BEARD: I am not anticipating I will be unduly long with
7 Mr Parker, I do not think more than a couple of hours,
8 so that should leave us time for the remainder during
9 the day, but that is my intention.

10 THE CHAIRMAN: Right.

11 Let me just check with Ms Kreisberger. How long do
12 you think you might be, because assuming -- so we will
13 leave it until tomorrow, whether we need to start early
14 tomorrow.

15 MS KREISBERGER: I do not think so if we are preserving
16 Wednesday morning for hangover cross-examination of
17 Mr Matthew. I understand Dr Jenkins has the
18 availability issues tomorrow. So let us say Mr Beard
19 takes most of the morning, I anticipate being up to
20 two hours with Dr Jenkins, possibly less, and about
21 two hours with Mr Matthew, so if we go into Wednesday
22 morning that would be fine. That was the discussion we
23 had last week.

24 THE CHAIRMAN: Yes.

25 Dr Jenkins, your availability issue is for

1 Wednesday, not tomorrow?

2 DR JENKINS: That is correct.

3 THE CHAIRMAN: So unless somebody says something different
4 once we finish today, we will start at 10.30, is that
5 right?

6 MS KREISBERGER: The only other thing to mention is
7 Dr Hunt's cross-examination, we are working on the basis
8 that that will come after the following hot tub, even if
9 it picks up some of the points today.

10 THE CHAIRMAN: I think that is sensible.

11 MS KREISBERGER: Thank you, sir.

12 THE CHAIRMAN: Thank you.

13 MR RIDYARD: Okay, so we have got two sets of questions to
14 deal with this afternoon. One of them relates to
15 Ofcom's involvement and the commitments and what
16 implications those hold, and the other is more generally
17 in relation to benchmarking approaches for limb 2.

18 On the Ofcom involvement, which is the first topic
19 we are going to deal with, I mean, just to re-emphasise
20 there is no need to repeat the general points that have
21 been made about Ofcom in the limb 1 discussion. We are
22 just looking specifically on where the economic evidence
23 and expertise can help us on limb 2 questions, just so
24 that is clear up-front.

25 The first question is: we have seen, of course, the

1 2018 commitments that Ofcom extracted from BT with
2 regard to VOC customers. Do we think that the
3 considerations that went into that -- to the deal that
4 Ofcom accepted from BT, do you think those
5 considerations reflect the sorts of issues we have
6 talked about this morning as regards the fairness issue
7 of the Chapter II test?

8 Mr Parker.

9 MR PARKER: So I think what it definitely shows is that they
10 had a concern -- so there is a market definition issue,
11 an SMP finding, then there is a provisional finding of
12 concern which they then remedied through negotiated
13 commitments rather than through proceeding to the end of
14 the process.

15 I am not sure how much that tells you additionally
16 about unfairness, which is a specific limb 2 point.
17 I think it probably does tell you that they certainly
18 got to the end of limb 1, and there may be points that
19 Ofcom raised which go -- which are relevant to the
20 limb 2 assessment, but, if so, I think they are perhaps
21 not additional economic points to the ones we have
22 already covered.

23 Then in terms of sort of the nature of the
24 commitments and the process there, maybe we will come
25 back to that a bit later on in relation to

1 sub-question 5, so I will come back to that.

2 MR RIDYARD: Okay.

3 Mr Matthew.

4 MR MATTHEW: So speaking from the perspective of ex ante
5 regulation, I do not think that decision tells you in
6 any way that the prices were actually unfair under
7 competition law, and the reasons for that are the very
8 different thresholds and considerations that go into
9 Ofcom's decisions about these kind of things as compared
10 to the high thresholds that apply under ex post law.

11 So without repeating at length, but essentially
12 ex ante regulation is a world where you have crossed the
13 threshold into managing markets, intervention by design,
14 and you make decisions about whether you will intervene
15 on things like prices, not as exceptional, unfair
16 events, but simply whether you believe it will best
17 promote the interests of consumers or not, taking
18 a long-term view of those things.

19 So against that sort of background there is no --
20 there is nothing special about an Ofcom decision to
21 intervene on prices that say it must be either unfair or
22 that the prices were egregiously high. It is just
23 simply they think that the prices would be better off
24 lower, and that they have properly judged the trade-offs
25 with how that might affect competition, whether other

1 distortions might arise, because as I previously
2 indicated, regulation can get these things quite -- can
3 get it wrong in various different ways. They can hitch
4 the remedy in the best way possible, and, importantly,
5 they can take into account things like vulnerability
6 that are plainly an important consideration in this
7 case.

8 So I do not think you can read across from that
9 decision and say, well, because Ofcom did it, it must
10 therefore -- or there is even any kind of presumption
11 that it would be unfair under competition law in
12 general, under limb 2.

13 MR RIDYARD: Just to drag that out a little bit: so even if
14 it is conceivable, if not -- your interpretation is
15 conceivable that Ofcom might have decided those prices
16 were excessive but not abusive, and therefore that could
17 still have justified Ofcom in extracting the commitments
18 from BT, even though it does not say anything about what
19 Ofcom might have thought about the limb 2 question had
20 they been asking that.

21 MR MATTHEW: Correct. I think Ofcom could very easily
22 have -- well, they certainly did make that decision
23 because they thought it was right on the merits of their
24 own objectives, and not because they thought it was
25 abusive in any way.

1 THE CHAIRMAN: Dr Jenkins, anything more?

2 DR JENKINS: Nothing to add.

3 MR BEARD: Sir, if I might just interrupt. Dr Hunt was left
4 in the hot tub in case there was anything that might
5 have hung over, but if we are moving on completely I do
6 not know whether it is really necessary for him to stay.

7 MR RIDYARD: He can certainly leave.

8 MR BEARD: No discourtesy intended. Thank you.

9 MR RIDYARD: Mr Parker, do you want to re-arrange yourself?

10 MR BEARD: We want to be able to see Mr Parker full screen.
11 It is very important.

12 MR RIDYARD: We will give Mr Parker a moment to re-arrange
13 his portfolio. (Pause)

14 I guess the next question, and I will ask Dr Jenkins
15 in the first instance, was sort of the obverse question
16 on the SPCs, partly on the fact that Ofcom did not take
17 any action until after the 2017 review, and even then it
18 decided to take no action as regards SPC prices. Do
19 those things tell us something about a view about
20 unfairness?

21 DR JENKINS: I think, as with Mr Matthew's answer to the
22 previous question, obviously the thresholds and the
23 instrument that Ofcom was using is different from that
24 which we are considering now. I think the fact that,
25 even under that ex ante viewpoint, Ofcom made a judgment

1 not to intervene on prices before 2017 and to choose to
2 use engagement enhancement remedies rather than a price
3 remedy for SPCs is indicative that Ofcom did not
4 consider the prices or the market behaviour that it was
5 observing to be so problematic and potentially unfair.
6 It is hard to conclude they actually thought it was
7 unfair because they did not draw a conclusion on that,
8 but you would think that had they been very concerned
9 about it, they would not have made the choices that they
10 did.

11 MR RIDYARD: Yes.

12 Mr Parker, any points on that?

13 MR PARKER: Specifically about unfairness, I think the same
14 points as for VOCs. In terms of not intervening before
15 the 2017 review, well, they started having concerns
16 seemingly as of late 2014, and they opened a process,
17 and the process takes time, and so I am not sure that
18 you can draw much necessarily about not intervening
19 before you get to the end of the process, because
20 I think they had to get to the end of the process, and
21 then they were engaged in an ex ante -- in looking at an
22 ex ante kind of forward-looking proposal.

23 Then in relation to SPCs specifically, I think
24 I would distinguish between the substantive concerns
25 that they had, and then the way in which they chose to

1 remedy them, because the remedy discussion in this case
2 is a negotiation between -- essentially between BT and
3 Ofcom, and Ofcom taking into consideration, I suspect,
4 a wider set of considerations around a desire to reach
5 a swift conclusion and to get something that they can
6 sort of put on the table to say: we have done this for
7 consumers and that has made a difference, where the
8 counterfactual of not coming to a negotiated solution is
9 you have to make a final finding. That could be
10 appealed. It will take time and public money and so on.

11 So in terms of the intervention or lack of it on
12 SPCs, that seems to be part of that overall negotiation
13 discussion.

14 MR RIDYARD: The SPC discussion though is quite striking, is
15 it not? Does it not require a bit more of an
16 explanation, because if the prices were excessive, they
17 were just as excessive obviously by definition to both
18 sets, because they were not even distinguished up until
19 that point. So it was more of a conscious decision, was
20 it not, by Ofcom not to do anything about the price
21 which, at least on the VOC side, you could interpret as
22 being a view that it was excessive, and yet the same
23 price was -- they chose not to intervene on it. Is that
24 not more of a positive choice by the regulator that
25 requires more of an answer?

1 MR PARKER: I mean, it is ultimately a question for Ofcom.

2 I am not sure I can speak exactly for what Ofcom was
3 thinking about.

4 MR RIDYARD: No, of course.

5 MR PARKER: They did make this distinction, that is right,
6 but the price, as you say, was the same. So from
7 a Competition Act case it seems to me the price is the
8 same, and unless you can think of -- so that I think
9 gets you to the end of limb 1 and you are in the same
10 place. So if there is a distinction to be made, it
11 would have to be that somehow, in the limb 2 context,
12 that price as applied to VOCs was unfair, but that price
13 as applied to SPCs was not unfair.

14 MR RIDYARD: That obviously was behind my question, and
15 so ...

16 MR PARKER: For the reasons that I think we have discussed
17 this morning, I am not sure there is sufficient
18 evidence, whether for VOCs or SPCs, to say that
19 the price that they faced was not unfair. I do not see
20 there to be a sort of -- either an economic value point
21 or some other objective justification that would
22 actually, from an economic perspective at least, lead to
23 a different conclusion, but there may be economic
24 factors which are beyond my expertise.

25 THE CHAIRMAN: Can I ask a supplemental on that, please, and

1 again only from an economic point of view, and looking
2 at this more generally as we have now reached kind of
3 the final stage of the analysis if our findings were to
4 get us this far.

5 Do you see any difference, from an economic point of
6 view, in the case in relation to VOC as opposed to SPCs,
7 or do you consider that the position from a competition
8 point of view is the same for both of them?

9 MR PARKER: So I see it as the same in the sense of, yes,
10 these customers are in slightly different positions.
11 One is taking a line, the other one is taking two
12 products in a separate way. But it seems to me that the
13 relevant question is how did that affect the prices BT
14 was able to charge? The answer is, well, up to the
15 commitments it did not distinguish anyway, and it was
16 not -- let us suppose one hypothesised that Split
17 Purchase Customers, they had, as has been raised, they
18 had two customer relationships -- sorry, provider
19 relationships, they are more able to switch.

20 But if that was true, how is it that BT is able to
21 maintain the price differentials of the -- in the way
22 that we see? That seems to me to suggest that even if
23 that is the case, it has not been enough to protect
24 customers, and there is this group of customers who do
25 continue to pay those prices, and that would suggest

1 that we see that sort of being maintained post the
2 commitments period for SPCs, so the gap continues to be
3 large, notwithstanding the remedy that Ofcom put in
4 place. It may well have put that in place with every
5 good intention hoping that it would make a difference,
6 but it does not seem to have done.

7 MR RIDYARD: So what level of disappearance of SPC customers
8 would satisfy you that Ofcom's intervention was right?

9 MR PARKER: Well, enough to have made a difference to
10 the pricing. That would get you back to workable
11 competition. So I think the purpose of an engagement
12 remedy is to create sufficient competitive constraint by
13 encouraging people to switch. If people were switching
14 sufficiently in response to prices, that should be
15 creating that kind of constraint. You do not see that
16 happening in the data.

17 MR RIDYARD: But the solution for an SPC customer is to go
18 and buy a bundle to get a better deal. So does that
19 mean that as long as there is one SPC customer left,
20 then the -- because for that one customer the price is
21 still high, and if that is your criterion then just one
22 SPC customer would be enough to make you not satisfied
23 with the Ofcom intervention. Is that right?

24 MR PARKER: I am not sure that one would get litigation
25 funding for such a claim, but I think logically that is

1 correct, that it still has not been enough to protect
2 the rump of customers, and that is really what we are
3 talking about. There is a rump of customers who, for
4 whatever reason, BT are not sufficiently -- are not
5 switching away in response to price in sufficient
6 numbers, and that BT has not been able to raise
7 the price.

8 I think that continues to hold true for SPCs, and,
9 yes, there has been a continued decline in the number of
10 Split Purchase Customers, but that just continues
11 seemingly broadly in the same way of things. There is a
12 sort of marginal difference in the level of switching
13 pre and post the commitments, but it seems to me there
14 is still a sizeable rump of customers for whom the price
15 continues to be excessive.

16 MR RIDYARD: Dr Jenkins, your comments on that.

17 DR JENKINS: Perhaps call up {IR-E/17/266} and the figure at
18 the top of the page.

19 So this is from my first report in the unfair in
20 itself section, just looking at how the price has
21 evolved over time. The full dark line is "SFV
22 Services", and then at the point that commitments are
23 made, then it is a dotted line to show for the remaining
24 members of the class which is the SPC customers.

25 So we see that actually on the agreed measure of

1 price, which is ARPU, this is falling from that period,
2 notwithstanding the fact that Line Rental charges -- the
3 Standard Line Rental charges were going up over this
4 period. So, again, this is about rebalancing of the
5 call products that are being taken by this customer
6 group over this period, but on the basis that we have
7 agreed that this is a good measure of price for
8 customers.

9 I think Mr Parker's predicate that you can infer
10 that there is a problem because one of the price
11 elements was increased over time, I guess, I am not
12 going to reiterate the challenges I think there is with
13 that as the point of principle on which you have, as
14 your foundation, all of these concerns, so (a) the
15 actual price paid did not go up, and (b) even on its
16 face, because of the nature of the products that SPCs
17 are taking, which is, yes, they are taking standalone
18 fixed voice from BT, but the nature of the product they
19 are taking from their other supplier is not at all
20 clear.

21 So the analysis Mr Parker has done, which infers
22 they are taking a standard broadband price, and from
23 that inferring harm to these customers, I think that
24 does not hold either.

25 So given all of that, and the evidence certainly

1 from around 2017/18 from the survey evidence which Ofcom
2 relied on, where they had asked Split Purchase
3 Customers: "why have you split purchased?", and the bulk
4 of them answered: because I am getting a good deal,
5 because of the price benefits of the deal I am on, then
6 I think you cannot infer that the pricing is unfair in
7 itself, just from that evidence, and the fact that Ofcom
8 did not impose price regulation would be confirmatory of
9 that evidence.

10 THE CHAIRMAN: Can I just ask the same supplemental of you
11 that I did with Mr Parker, which is that looking at
12 everything from an economic point of view in the round,
13 do you make any distinction between the position of VOCs
14 and SPCs from a competition point of view, or do you see
15 what is said to be anti-competitive on the part of BT in
16 relation to that argument equally problematic?

17 DR JENKINS: You mean with respect to Ofcom's decision?

18 THE CHAIRMAN: No, just more generally in relation to these
19 two classes, as we have ... Mr Parker says there is no
20 distinction, really. The reason why ultimately
21 the pricing was anti-competitive in his view is -- he
22 does not distinguish one from the other, and I am just
23 curious to know what your position is.

24 DR JENKINS: Yes, I think there is a difference in what
25 those customers are buying, so it is relevant to think

1 about them, you know, to think about them both
2 separately. I think the complication is, where
3 Mr Parker and I agree, is that prior to 2017/18, BT
4 could not distinguish between the two.

5 Now, my conclusion from that is that actually SFV
6 services, you know, you can go all the way back to
7 market definition, did have constraints on it, and part
8 of that is because it is a mix of both types of
9 customers. So, you know, BT is seeking to retain them
10 both.

11 Second, I disagree with Mr Parker that while VOCs,
12 at the time they are Voice Only Customers with BT, are
13 not taking internet services and broadband, many of them
14 in the period of the claim shift and take up that
15 service offering, so you cannot completely separate
16 them, and the considerations about the competition in
17 that Dual Play and bundled market are relevant for both
18 sets of customers, although how you think about it may
19 differ, because their nature is different.

20 MR RIDYARD: Thank you.

21 MR PARKER: Can I just raise one point in response. So in
22 relation to this discussion about the change in ARPU
23 over time, I think we should not be looking at the
24 change in ARPU, we should be looking at the change in
25 both ARPU and cost. So we should be looking at the

1 change in cost benchmark and the price is relative to
2 cost benchmark.

3 If we go to {IR-E/5/193}, go to the top table, table
4 20. So what you can see there is that the Commitments
5 come in FYE 2018, and then you see the kind of
6 benchmark, the differential between the charges and the
7 competitive benchmark, and it does not really change
8 very much. Some slight reduction in the last period,
9 2022.

10 So that I think suggests to me that the analysis, at
11 least as far as limb 1 is concerned, continues on, and
12 then it is a question of: is there a reason to think
13 that those prices would not be unfair in themselves,
14 when applied in the post-commitments period, to SPC
15 customers?

16 MR RIDYARD: So you are saying that the fall in the ARPU is
17 matched by a fall in costs.

18 MR PARKER: Essentially, yes.

19 MR RIDYARD: Okay. What you are not saying, Mr Parker, is
20 that we should be looking at ARPM as opposed to ARPU in
21 any of this?

22 MR PARKER: No, the limb 1 analysis is ARPUs, so it is
23 looking at the total volumes of users. I was using that
24 for market definition purposes, a price per unit
25 purpose. You will see from some of the supplemental

1 analysis that has been put in that you get essentially
2 the same picture on ARPUs for calls as between BT and
3 rivals as you get from the ARPM picture that I put in my
4 reports. But here, this is -- all the limb 1 analysis
5 is on an ARPU basis.

6 MR RIDYARD: Thank you.

7 Dr Jenkins.

8 DR JENKINS: If I could perhaps pull up {IR-C/2/20}. This
9 is a chart that Mr Matthew drew attention to, so
10 Figure A5.4.

11 So this is showing ARPU back in time, back to
12 2007/8, and when you get to that 2015/16, then you would
13 pick up the chart that I just showed you from my first
14 report which is very similar. These are in real terms,
15 and the ones I showed you were in nominal terms.

16 But basically you see that throughout this period
17 the actual ARPU that is being paid by SFV customers is
18 quite similar across this period, and I think -- I do
19 not think returning back to limb 1 and what that says is
20 necessarily informative when we are at the limb 2 stage
21 and we are asking ourselves, is there something about --
22 something that we can see about unfairness, either for
23 SFV customers or for SPCs, from the prices that they
24 paid?

25 I think in terms of the value that those customers

1 are receiving, they are also paying more or less a very
2 similar price throughout this period for that product.

3 MR RIDYARD: Thanks.

4 We have a question here about Ofcom's assessment in
5 2009 and 2013 about this forward-looking assessment that
6 the markets were competitive. I just do not think there
7 is much more -- I mean, I understand the points on that
8 were important, and we took them on limb 1, but I do not
9 think there is anything on limb 2 here to say, but am
10 I wrong there? Is there a limb 2 element to this
11 discussion that we have not already covered in the
12 limb 1 discussion?

13 MR MATTHEW: Could I just make one general comment about it.

14 MR RIDYARD: Yes.

15 MR MATTHEW: Which is simply, taking as read the original
16 analysis and the characterisation you gave last week,
17 which is, well, let us suppose for the sake of argument
18 that it starts off as competitive, but then you end up
19 with a rump of people who, by the end of all the
20 migration, are not going to move over, and so the
21 potential for a narrower market could arise.

22 I just simply observe that if that did happen, then
23 you would have to confront the slightly difficult
24 question of: "well, if we are crossing over from
25 workable competition into something called dominance at

1 a point in time for a sub-segment of customers, is it
2 right from a general unfairness perspective to suddenly
3 expect large price cuts to occur at that juncture?"

4 I think the narrative here would point to that if you
5 take 2018 scale of price cuts as the benchmark.

6 That is an issue that has been raised about
7 excessive pricing in some of the thinking around, well,
8 how do you approach unfairness, or when is price
9 excessive underexposed, because what you do not want to
10 do is have a situation where crossing into dominance,
11 which from a legal standpoint is a binary shift but from
12 an economic one is a continuum, suddenly puts on the
13 firm obligations to cut its price by large amounts in
14 a way that was not there the year before.

15 MR RIDYARD: But other things are not the same, are they, in
16 that scenario, because when it is competitive you are
17 satisfied that the competitive process is doing its job,
18 and if and when you go into the dominance zone then that
19 safeguard disappears, or has been diminished to the
20 extent to the point where you are concerned on public
21 policy grounds, and therefore you might want to impose
22 some remedy. Is there a necessary contradiction there?

23 MR MATTHEW: I totally agree in terms of some remedy. I am
24 thinking in general terms that makes sense. It is the
25 cliff face effect of suddenly going to -- for example,

1 if you were to say the cost benchmark is your benchmark,
2 and the sort of scale of Ofcom reductions that they
3 negotiated with BT is your benchmark, you would be
4 potentially saying to potentially dominant firms: as you
5 transition into dominance you may find your prices,
6 which were forged in conditions of workable competition,
7 the oligopoly, suddenly now require large price cuts,
8 and it is the cliff face element of that intervention
9 that I was commenting on.

10 MR RIDYARD: Mr Parker, is that right?

11 MR PARKER: Dominant firms have a special responsibility,
12 and if you are dominant then that requires you to take
13 that into consideration. If you were not pricing
14 anywhere near -- if you were in a world that you were
15 facing workable competition, and then gradually you
16 became dominant, let us say it is that way round, just
17 because you have a dominant position, it does not mean
18 that you were abusing it, so it does not mean you were
19 pricing excessively, so I think you need to consider the
20 two components.

21 Then if it is the case that you became dominant and
22 you were pricing excessively, and presumably those two
23 things are somehow related, then it does seem to me that
24 that is captured under sort of CA 98. I am not sure
25 whether that -- quite what that says about the

1 unfairness bit of limb 2; I think it is more a general
2 point.

3 MR RIDYARD: Okay, thanks.

4 Just looking at Ofcom's different treatment of the
5 VOC customers compared to the SPCs, is it inevitable,
6 whatever verdict we come to on this whole case, that we
7 are going to be saying in effect, if not explicitly,
8 that Ofcom, at least in half of its decision-making, got
9 it wrong? Is it possible for us to come to a conclusion
10 which does not implicitly say that Ofcom was incorrect
11 in one or other of the two parts of the market?

12 Mr Parker.

13 MR PARKER: So my view is I think I am quite close to
14 Ofcom's analysis in terms of market definition,
15 dominance/SMP and then excessiveness. So there is
16 a distinction, access and calls which is access. But
17 subject to that, I think I am very much on all fours
18 with where Ofcom got to.

19 Then there is a question not about a difference in
20 substance but about a potential difference in remedy,
21 and it seems to me that the considerations that Ofcom
22 may well have been taking into account in its decision
23 of what commitments to accept may well have been
24 influenced by factors that are sort of outside -- that
25 are different to the factors that the Tribunal faces,

1 because there was a need to get to an outcome quickly,
2 something that they pushed BT to offer, not necessarily
3 wanting to go through a process of getting a final
4 decision, being appealed and so on, and the delays that
5 that would impose, and the costs that they would face,
6 and then the general administrative priorities of other
7 things they could be doing with that time and resource.

8 So it seems to me the difference, on my view of the
9 world, would be one about not so much of substance, but
10 about the appropriate remedy or the -- yes, the
11 appropriate finding under a Chapter II heading, which
12 may well be different to doing an ex ante regulation
13 discussion when Ofcom faces the point of principles.
14 But on the substance, I think I am largely in line with
15 Ofcom, and not being ...

16 MR RIDYARD: But on the SPCs, surely you are saying that
17 even if Ofcom might have been well motivated -- I am
18 sure it was well motivated, that knowing what we know
19 now that they got it wrong, is that not a consequence
20 of -- an inevitable consequence of your assessment?

21 MR PARKER: I think it is an inevitable consequence of
22 looking at any regulator's decisions which are made on
23 a forward-looking expectations basis, and then judging
24 those by hindsight, and sometimes, with the best will in
25 the world, those may not prove to have been correct, and

1 in my view I cannot see a reason why you, from a ... But
2 I think it is not just about that, I think it is also
3 because a Competition Act case is a different thing to
4 an ex ante regulatory enquiry, so I think I would make
5 that distinction.

6 But in terms of the remedy, Ofcom took the view that
7 an engagement remedy would be enough. Looking at the
8 data, it seems to me that that has not proved to be the
9 case. But I think regulation is hard, ex ante
10 regulation is hard, and one would not necessarily expect
11 even the best informed and motivated regulator to get it
12 right all the time.

13 THE CHAIRMAN: Can I do a follow-on from that, again looking
14 at it more generally. Obviously there are certain
15 things about Ofcom's involvement here with BT that are
16 questions of fact. They obtained certain data, which
17 the experts have used or not used; things happened,
18 which may have to be taken into account in terms of what
19 BT did. But going beyond that, why should we be
20 interested in what Ofcom decided at all here?

21 You have conducted your own independent analysis.
22 On either views, it seems to me, I am going to ask the
23 same question of Dr Jenkins, each side has to pick and
24 choose, frankly, a bit, because there are Ofcom
25 decisions or not decisions which suit one side's case

1 and not the other side's case. Why should we, from an
2 economic point of view, get involved in trying to
3 second-guess the reasons why Ofcom did something or did
4 not do something at all?

5 MR PARKER: I mean, I think that would be basically my
6 position, which is I have done an independent analysis.
7 Many of the facts that Ofcom rely on I also rely on, and
8 largely have come to the same conclusions on the
9 substance but not entirely, there are distinctions. It
10 seems to me you are doing a different job under
11 a different kind of piece of legislation, different --
12 *United Brands* as the sort of guiding principles, rather
13 than principles of ex ante regulation.

14 So I am not sure it matters that much. I mean,
15 I think I would say I am not sort of dependent on Ofcom
16 for any of my views, but I do think they are supportive
17 of some of the positions I have reached.

18 THE CHAIRMAN: Yes, thank you.

19 Dr Jenkins, same question.

20 DR JENKINS: I obviously agree that it is a different test,
21 different threshold, different timing. There is useful
22 evidence that is informing what we are doing.

23 In terms of the question as put, which is if, in
24 coming to a decision different from that which was taken
25 by Ofcom, what do we take from Ofcom's decision, I think

1 there might be another layer, which is more than just
2 the evidence, which is to do with the economic rationale
3 for Ofcom's decision. So there may be all sorts of
4 factors, as Mr Parker has alluded to, and so my view
5 would be if the Tribunal came to the conclusion that
6 there was an abuse of dominance with respect to -- let
7 us start with those Split Purchase Customers, then that
8 would imply on its face that Ofcom had made a bad
9 decision in 2016/17, and to say: "well, but they took
10 a pragmatic decision in the face of challenges", you
11 know, I do not know that that would get Ofcom out of
12 jail.

13 THE CHAIRMAN: Sorry to interrupt. The problem I have got
14 with that is that, I am sure you were going to come to
15 it, is, well, we would have to be cautious about that,
16 because it would imply Ofcom had made a bad decision,
17 but then on the flip side, on VOCs, they made a good
18 decision. So where does this take us?

19 DR JENKINS: If we turn to {IR-E/17/255}, so paragraph 7.23,
20 if we pull that one up, and we did touch on that
21 earlier.

22 So I think there is a reason why Ofcom felt
23 particularly nervous about the Split Purchase Customers,
24 which is around this view that there is a benefit from
25 price dispersion in markets, and it is what ensures

1 customers are engaged, and means they have an incentive
2 to look, an incentive to think about it, to make active
3 choices, and that is a benefit to -- or, rather, that
4 disciplines firms, and is hence of benefit to the whole
5 market.

6 So there is something additional, it is not just --
7 I do not think Ofcom made that decision just because it
8 was convenient and meant they could move on to the next
9 question. There was -- there is a fundamental reason
10 why they might treat the Split Purchase Customers
11 differently from the Voice Only Customers on the facts
12 and views they took at the time.

13 Then if you come to voice only, so there could be
14 a difference of opinion on the facts, and whether the
15 facts they looked at were the relevant ones, which I
16 would -- that would be one line, I would say. On the
17 other hand, even if you took the facts as they had them,
18 even there you could say: if the Tribunal were to take
19 the opposite decision, which is to say, actually, we
20 think there is no abuse of dominance, the fact that
21 Ofcom had put a protective price remedy in for that
22 group of customers under ex ante rules, which allow them
23 to balance a range of considerations, which includes
24 attention to the interests of particular customer
25 groups, is a reason why Ofcom might have done that, but

1 the Tribunal might not give the same weight to.

2 So for that way, I think you could see why the
3 Tribunal and Ofcom might come to a different decision.

4 THE CHAIRMAN: Thank you.

5 MR RIDYARD: Is there anything more to say about Ofcom's
6 intervention and limb 2? I feel as though we have
7 covered that ground pretty well. Yes, good. Okay.

8 So let us move on then to what can broadly be
9 described as trying to find benchmarks for workable
10 competition or non-abusive price levels.

11 Obviously the attraction of looking for a benchmark
12 in principle is that it provides a bit of a cross-check
13 on some of the sort of more bottom-up approaches we
14 might have been adopting, but often these good
15 benchmarks are somewhat elusive, as I am sure we all
16 know.

17 But the first possible benchmark would be looking at
18 other SFV suppliers' products and prices, so looking at
19 the prices charged by competing telecoms operators.

20 Mr Parker, where would that comparison take us and
21 what are the problems, if any, with such a benchmark?

22 MR PARKER: I think where the comparison takes us is BT is
23 only slightly above the prices charged by other firms
24 for SFV access, but my view on that is that that was set
25 in conditions where BT was acting as a price leader for

1 the reasons we discussed at some point in the past --
2 I am slightly losing track of time here -- and I think
3 consistent with the factual witness evidence and the
4 views, substantive view that Ofcom came to.

5 I think it is a bit like a parallel of a sort of
6 umbrella damages case in which the cartel gets together,
7 they put the price up, other people who are fringe
8 players, who are not part of the cartel, are also able
9 to put the price up and damages are claimed, because it
10 is essentially a consequence of the cartel.

11 Here we have -- we do not have a cartel, but we have
12 BT itself being 80% ish of the market in
13 a pre-commitments period, and 95% plus in the
14 post-commitments period, and it seems to me it was able
15 to raise prices above the competitive level, and other
16 people would equal that price leadership, or just were
17 able to price up, because BT had the market power.

18 I think it gets you to the same place, which is I do
19 not think the prices of rivals were set in conditions of
20 workable competition, they are not a good competitive
21 benchmark, and so I do not think you should take the
22 fact that prices between BT and rivals are somewhat
23 similar on access as being a relevant comparator for
24 these purposes.

25 Then in relation to calls, BT's prices on ARPM, or

1 indeed an ARPU basis if you look at the additional note
2 that we put in, are well above those of rivals.

3 MR RIDYARD: On ARPU as well.

4 MR PARKER: Yes, you see that from the -- I do not have the
5 reference, I am afraid. It is one of the notes that has
6 gone up in the last week or two.

7 MR RIDYARD: Yes, okay.

8 Dr Jenkins.

9 DR JENKINS: So we did have a reasonable discussion about
10 this I think when we were discussing dominance, so
11 I think probably you will remember my views, which, if
12 we pull up {IR-E/17/271}, Figure 7.5, which -- so first
13 of all, just on the face of the argument that you can
14 ignore rivals' prices, which on their face are good
15 comparators to BT's Standard Line Rental prices because
16 they are very similar products in the same market at the
17 same time, and the levels are very similar, the argument
18 that you should not give weight to those because they
19 are infected by price leadership, I think the fact that
20 when the commitments came in, and there was no following
21 of -- other than by the Post Office, means that there is
22 not a clear sign of price leadership in this market.
23 There is a plausible alternative explanation, which is
24 this is the type of pricing you would expect to see in
25 this market given the competitive conditions.

1 If we could just call up {IR-C/2/99}. This is from
2 the Ofcom analysis. The chart at the top of that page.
3 So this is showing the inter-relationships between
4 Line Rental pricing which -- so you have got that at the
5 bottom, the red line, which is Line Rental and calls, so
6 SFV services. The green line is the acquisition
7 broadband price, which is certainly what I had focused
8 on in my reports for what is driving a lot of the
9 dynamics for those standalone fixed voice customers when
10 they switch.

11 But what this chart also has on it is, in a sense,
12 the back book price, so what is the price once someone
13 comes out of their acquisition contract for broadband
14 where you see that, in a sense, the voice price is going
15 through into that price as well, as we know. So once
16 people come off their acquisition price they go on to
17 the higher price, and at some point they will
18 re-contract either with their current supplier or with
19 someone else.

20 So when setting the prices, the voice prices,
21 participants in this market are thinking of these three
22 prices at the same time, and there is, therefore -- it
23 is not just a price leadership, "oh, it does not matter
24 what happens"; these prices are affecting competition
25 and are affected by competition in the bundles market as

1 well.

2 THE CHAIRMAN: Sorry, are these just BT prices?

3 DR JENKINS: No, I think this is the market as a whole.

4 THE CHAIRMAN: Yes, that is what I was ... So these are --

5 so on Line Rental plus calls, that is the average

6 back book price?

7 DR JENKINS: Yes, the standalone fixed -- well, I think all

8 participants in the market in this period had the same

9 price for voice for their customers, whether they bought

10 it standalone or in a bundle.

11 THE CHAIRMAN: You mean each supplier did not distinguish on

12 the volume --

13 DR JENKINS: Did not distinguish, sorry. Necessarily had

14 exactly the same --

15 THE CHAIRMAN: Yes, but this is average across BT and all

16 the other suppliers.

17 DR JENKINS: Yes. If we go back to Figure 7.5, which is

18 {IR-E/17/271}, that is just context for the fact that

19 here what we are asking is: is it reasonable to infer

20 something from the fact that BT's Line Rental price was

21 similar to that of its rivals, and the reason it is put

22 that you should not put weight on it is somehow that it

23 was driven by this umbrella effect and it is not a real

24 price, and just showing it is a real price. Yes, there

25 is a lot of similarity in pricing in this market, but

1 that could equally be a sign of competition between
2 these players, and they are following each other, they
3 are matching price changes, or they are trying to get
4 ahead.

5 Now, that is just on access prices. Then I am not
6 sure I need to take you, but I am very happy to take you
7 again, to the call pricing evidence where, as you know,
8 Mr Parker and I disagree about the relevance of the ARPM
9 or indeed his ARPU measures because of underlying
10 concern with the data, and the actual list price
11 evidence for both call packages and call pricing shows
12 that BT's call prices were at the same level as its
13 rivals throughout this period.

14 So again, from a limb 2 looking at comparators,
15 there is no evidence from the list pricing that BT's
16 prices were unfair as compared to its competitors.

17 THE CHAIRMAN: Yes.

18 MR RIDYARD: Mr Parker did not accept the list pricing --
19 well, the list pricing comparison was necessarily
20 telling you about the actual prices in the market. I am
21 just inserting that for balance, really.

22 DR JENKINS: No, absolutely. Absolutely. I think there is
23 a real question about what happened when that
24 reallocation of revenue happened which led to, from the
25 Ofcom perspective, BT's call prices looking the same,

1 and I think, digging into that a bit more, part of that
2 reallocation was about a distinction between out-of-plan
3 calls and in-plan calls, and that the Ofcom data was
4 gathering from rivals out-of-plan call revenues, whereas
5 BT included as well their call package revenue.

6 So I think there could be a real explanation for why
7 that data is not reliable for a comparison earlier in
8 the period.

9 MR RIDYARD: Is that something that has been documented?

10 DR JENKINS: I can take you to some of the bits I found
11 which suggest that that is -- but it might be something
12 that is --

13 MR RIDYARD: Maybe it would be good in a follow-up note,
14 because it would be good to get to the bottom of some of
15 those puzzles.

16 Just to go back to the Ofcom chart you took us to,
17 Dr Jenkins, just so I am clear what is being said here.
18 You are using that evidence as a reason why BT -- it is
19 a constraint on price discrimination, as it were,
20 between SFV customers and bundle customers, is it?
21 Because BT does have to worry about the Line Rental
22 price, because that is the price that bundle customers
23 will pay if they just fall off the end of one of their
24 contracts.

25 DR JENKINS: Yes, it is a meaningful price for bundle

1 customers at various points in their contract life, so
2 they do need to worry about that.

3 Now, we know that they can re-contract and seek to
4 re-contract people, but I think it is around 30% of the
5 customer base is out of contract in the broadband
6 market, so --

7 MR RIDYARD: Is it not within BT's power to do something
8 about that? I mean, if they wanted to make sure all
9 their customers were paying the current price, as it
10 were, rather than the back book price, could they not
11 fix that problem themselves by being more active?

12 DR JENKINS: But I guess it is not a problem, it is how you
13 manage in a workably competitive market where you are
14 seeking to compete, you are seeking to attract customers
15 and you are seeking to pay for all the different
16 aspects, whether it is your customer service or your new
17 sports contract that you are going to take on, and
18 businesses in workably competitive markets use a variety
19 of pricing, including acquisition pricing for some
20 elements of the portfolio.

21 So you could say: "oh, well, it will be much better
22 if" -- and, sorry, even if one were to say: "oh, it
23 would be so much better if there was just one price",
24 that is where I would say: actually, the evidence is it
25 is not necessarily better to have just one price because

1 you need that price dispersion to get people to engage
2 and make choices in these markets.

3 MR RIDYARD: Mr Parker, do you want to add anything on that?

4 MR PARKER: Can we go back to that chart, please. It is in
5 the Ofcom annexes to ...

6 DR JENKINS: I can give you it. It is {C/2/99}.

7 MR RIDYARD: Thank you. There it is.

8 MR PARKER: I am not totally sure what one can draw from
9 this chart about whether SFV prices of rivals are a good
10 comparator in respect of limb 2.2. What this suggests
11 is that once you are getting into 2015, Q3 and onwards,
12 Q2 and onwards, is it is often the case that incremental
13 broadband prices were zero on the acquisition tariffs,
14 and given that we know from Dr Jenkins' first report,
15 Figures 5.5 to 5.7, that the broadband element does
16 itself contain material costs, that to me is suggesting
17 that there must be quite a lot of fat in the Line Rental
18 price to be able to take over those costs.

19 So I suppose I am just not really sure what one can
20 draw from this chart in relation to the specific
21 question of limb 2.2 in terms of rival SFV prices.

22 DR JENKINS: The chart is not showing all the dispersion
23 around each of those lines. That is what is missing
24 from that picture as well. But because rivals who are
25 probably offering the free broadband may not have all

1 the costs that BT had for the marginal user, so ...

2 MR RIDYARD: Okay. That is probably as much as one can say
3 about the -- using competitive prices as a benchmark.

4 There are some benchmarks sort of within BT. One is
5 the Home Phone Saver price.

6 DR JENKINS: Perhaps, before we move off, I do not know
7 whether to reiterate the points about voice calls
8 themselves, and the fact that if you think about the
9 competitor prices for voice calls, that those are also
10 the same prices that are faced very clearly by other
11 voice users, including those in bundles. So the
12 comparator set is I think much more clearly -- if one
13 says that the bundle market is competitive, then the
14 fact that you have the same price for the voice packages
15 across those two is much more direct, and it does not
16 suffer, perhaps, from the same sort of umbrella concerns
17 with respect to that on the voice call elements.

18 MR RIDYARD: Yes.

19 DR JENKINS: As well as mobile calls and all the rest of
20 those considerations.

21 MR RIDYARD: But on the voice calls, do we have -- well,
22 does that not come down to whether we can -- what trust
23 we can place in the list price analysis, whether that is
24 capturing the actual prices of competing operators?

25 DR JENKINS: I think for the three call plans, which are

1 like the 60% of call revenues, I think, that come off
2 call plans, and those are the three plans that are in
3 the claim, and then those are plans which are easy to
4 benchmark. I do not think there is anything complex
5 around that.

6 In terms of the outer plan calls, yes, I have taken
7 a sample of those. I do not actually have the
8 reference, but there is a similar table in the Ofcom
9 Provisional Conclusions which benchmarked a bigger range
10 of list prices for out-of-plan calls and similarly drew
11 the conclusion that BT's out-of-plan call prices were
12 not out of line with those of other providers.

13 So I do think that the bulk of the evidence is to
14 say -- you have to say something like very different
15 about mix effects, really, to then reconcile with the
16 very different view taken on revenue measures.

17 MR RIDYARD: Mr Parker.

18 MR PARKER: I think you need to look at the ARPU -- ARPM,
19 ARPU and the differences in the volumes -- there is not
20 a huge difference. I think if we go back to -- I think
21 it was a figure on Table 6.1 of Dr Jenkins' first report
22 looking at the gross margin on calls, it is extremely
23 substantial, that is just BT data. But we can put that
24 together with the ARPU comparison and ARPM comparison,
25 that is suggestive that BT for whatever reason is able

1 to charge a considerable amount more, on average, taking
2 into account the product mix, the front book/back book.

3 It seems to me that is what comes out of limb 1.

4 I think that is better than looking at list prices, for
5 the reasons we have discussed at other points.

6 MR RIDYARD: Just one final query on that. Do you think the
7 reason BT is able to get, in your view, higher call
8 prices is because of back book pricing, primarily?

9 MR PARKER: So I cannot be sure, because we do not have the
10 data broken down, but we do have the aggregate amount
11 which comes out of the BT summary tables. My guess is
12 that the most likely interpretation, given that the
13 tenure of the customers that we know are in the class,
14 is that many of them, we know that that persists at
15 80%-ish throughout the entire period, I think it is
16 quite possible that many of those are on back book calls
17 packages that they have never adjusted, and that could
18 be very significant for BT's book but not for rivals,
19 because all rivals have essentially had to compete
20 up-front to get a customer in, calls will be part of
21 that, and so you can see how that could drive quite
22 a wedge. So my guess is that would be the primary
23 driver of the difference.

24 MR RIDYARD: Yes, okay. Thanks.

25 Home Phone Saver then. Mr Parker, do you want to go

1 first on that as a comparator or as a means test.

2 MR PARKER: Yes. I do not think it is a good comparator,
3 the main reason if you look at {IR-E/3/196}. So
4 Mr Duckworth has also estimated a competitive benchmark
5 for Home Phone Saver and compared that to the charges.

6 MR RIDYARD: Actually we do not have that document up yet.
7 Hang on.

8 MR PARKER: I am so sorry {IR-E/3/196}. If you zoom in on
9 the table.

10 So you can see there that Home Phone Saver actually
11 is itself priced considerably above the competitive
12 benchmark at all points throughout the period, so
13 therefore I do not think it is a good comparator.

14 There are still significant differences to at least
15 Standard Line Rental and Line Rental Plus, the
16 differential between those prices and their competitor
17 benchmarks.

18 I think this, to me, is because Home Phone Saver is
19 a retention tool. It is used when people ring up
20 saying: we are going to -- we are thinking of leaving.
21 Then agents, at least at certain points, were able to
22 offer Home Phone Saver as a retention tool saying, well,
23 if you do not leave we will give you this better deal.
24 The fact that it was not widely available also suggests
25 that it is not a great competitive benchmark, because if

1 you have to take a kind of positive action in order to
2 access it that probably, to me, suggests it is not
3 a particularly good comparator to something that is not
4 always available as a standard product.

5 MR RIDYARD: Surely limited availability would make it more
6 likely that they would be prepared to make deep cuts,
7 would it not? Because if you had to make it widely
8 available then you would just be giving everything away
9 on a retention product?

10 MR PARKER: I think that is right, but I think, putting all
11 these points together, it tells you it is not a very
12 good kind of workably competitive benchmark.

13 MR RIDYARD: So you say Home Phone Saver is abusive but not
14 quite as abusive as the real thing.

15 MR PARKER: I have not looked at it from the perspective of
16 limb 1, but when you look at it from the perspective of
17 limb 2, it itself is considerably above that level.

18 MR RIDYARD: So it is too late now, I suppose, but it should
19 not have been an excluded service then?

20 MR PARKER: I am not taking a view on that.

21 MR RIDYARD: Right.

22 Dr Jenkins.

23 DR JENKINS: So I think Home Phone Saver does meet the
24 criteria for what would be a relevant comparator here in
25 that it provides a similar range of services to SFV

1 services and so is sufficiently similar. It is not
2 identical but sufficiently similar.

3 I think, as has been discussed, it was a retention
4 product that was particularly related to the pressure
5 that BT was feeling for its standalone fixed voice
6 customers who were attracted to alternative standalone
7 fixed voice services by other rivals, in particular the
8 Post Office, and so it is in itself then a response by
9 BT to competitive pressure, so that is another criteria
10 for suggesting it is something that is worth weight,
11 because it is influenced by the competitive environment
12 in which BT was operating.

13 So I think it is a potential comparator. It is
14 a retention product not offered necessarily to all
15 customers. But I do not think it is so small as to not
16 be given weight. I do not think we need to go there,
17 but for your reference in the Joint Expert Statement,
18 proposition 8.2.9, that at the time Home Phone Saver was
19 at its peak after its introduction and before the
20 commitments came in, it was over 300,000 customers were
21 taking Home Phone Saver, and that was equivalent to
22 20-25% of the other SFV lines at the time.

23 I think there is a rationale for BT's action in this
24 regard because, as we have heard, what BT was most
25 interested in was retaining its voice customers through

1 upselling two additional products, but for those
2 customers who were not interested in that, then this was
3 the product that they developed to retain them in other
4 ways.

5 So they may have had a ranking of what they really
6 hoped to encourage their customers to do in order to
7 both drive better profitability, absolute profitability,
8 over the lines, and also have a stronger relationship
9 with those customers through additional products, but
10 the Home Phone Saver was a realistic service that was
11 taken up by a reasonable proportion of those customers.

12 If we then go to {IR-E/17/283} and that figure at
13 the top of the page. Yes. So that gives you a picture
14 of the difference between the ARPU on Home Phone Saver
15 and the ARPU on SFV services in that later period which
16 is post-commitments, so the class is predominantly the
17 Split Purchase Customers. Actually there is very little
18 to see between Home Phone Saver and the SFV services,
19 and earlier in the period it is not dramatically
20 different over this period.

21 I think a reliance on the limb 1 benchmark at this
22 point is not helpful for this question now. The
23 question is whether Home Phone Saver, which is a product
24 that has competitive constraints on it, is considered
25 a worthy benchmark.

1 MR RIDYARD: In that case, is the gap between the green and
2 the black lines here, is that a good measure of the
3 abuse then?

4 DR JENKINS: That would be -- the question is: do you think
5 that is -- if you use Home Phone Saver, that would be
6 one of the comparators. I do not think it is the only
7 comparator to consider. So you also consider rivals'
8 pricing as well, which gives you an outcome that is very
9 similar to SFV services.

10 Overall, I think the difference is not -- I think
11 its peak is around 11% higher, so it is not
12 a significant difference overall, such as to say this is
13 a sign of abusive pricing of SFV services, especially as
14 that gap is falling over time and in the end
15 disappearing.

16 MR RIDYARD: It took a while for those two lines to
17 converge, you could say, but ...

18 DR JENKINS: You could. But as I say, it is not the only
19 comparator. It is one of the ones to take into account.

20 MR RIDYARD: Yes. BT commitments price, I think we have
21 done that to death several times. I do not want to
22 discourage you from raising it again, but it may
23 risk ...

24 THE CHAIRMAN: Sorry, can I just be clear. Is there
25 still -- there is no longer, is there, a question about

1 Post Office prices as a comparator?

2 DR JENKINS: I think that comes in on BT commitments

3 actually, so ...

4 THE CHAIRMAN: I just cannot remember. I just wanted to

5 check with Ms Kreisberger. I was looking at 136(b) of

6 the Particulars of Claim.

7 MS KREISBERGER: Yes, we do rely on Post Office, as pleaded,

8 yes.

9 THE CHAIRMAN: We went through this at the beginning of the

10 case. I just wanted to check that the position is that

11 what you are relying on, on limb 2.2, is, as

12 comparators, the commitment price --

13 MS KREISBERGER: Yes.

14 THE CHAIRMAN: -- and/or the Post Office price.

15 MS KREISBERGER: Yes, correct.

16 THE CHAIRMAN: Right. So I do not know whether there is

17 anything that -- let us go back, Mr Parker, on

18 Post Office price here, because we have ...

19 MR PARKER: So the Post Office price was slightly lower than

20 the BT commitments price for about a year and a half.

21 I think both prices suggest that that is an upper bound

22 on the price that -- that is not going to be below

23 a competitive price, that is going to be no lower than

24 a competitive price.

25 My view is, if you want to look at, for your note,

1 paragraphs 6.107 to 6.112 of Parker 3, that those prices
2 are still above the competitive benchmark, essentially
3 because they control mostly for the Line Rental price
4 differential but not for calls. That is true for both
5 Post Office and for BT. But there is obviously a very
6 substantial difference between the commitments price and
7 the prices that were previous prevailing for SFV access,
8 and subsequently for SFV access to Split Purchase
9 Customers. So I think they are not perhaps benchmarked,
10 but I think they suggest that the prices are very
11 substantially below the prices that were being seen in
12 the market either pre or post the commitments.

13 THE CHAIRMAN: Dr Jenkins, did you want to come back on the
14 Post Office?

15 DR JENKINS: Yes, if we go back to {IR-E/17/271} and the
16 chart there.

17 So prior to the commitments, you see the Post Office
18 price is the lower price in the market but I do not
19 think that one should take the lowest price in
20 a workably competitive market with price dispersion and
21 say, well, that is the only price that would be
22 a reasonable benchmark.

23 We then have the fact that within the market the
24 Post Office were the only provider that sought to match
25 the regulated commitments price, and I think, without

1 going back over old ground, I will just make the point
2 as I made before that I do not think the commitments
3 price is a good benchmark because of the exit that it
4 triggered in this market, and basically all the
5 participants, including the Post Office, while it raised
6 the price for a short time, it did basically exit after
7 that point.

8 THE CHAIRMAN: Thank you.

9 MR RIDYARD: Then the last one we had was looking at the
10 business customers. I know we have not yet talked about
11 business customers and whether they belong in the class
12 at all, that is a subject for next week, I think. But
13 there is this curiosity that prices to business
14 customers were I think higher than prices to
15 non-business customers. Does that tell us anything
16 about the appropriate benchmark that might be used?

17 Mr Parker.

18 MR PARKER: I think they are just very different prices.
19 They are not comparable. Actually Parker 1, in the dim
20 and distant past in paragraphs 107-115, talks about the
21 differences between business tariffs and residential
22 tariffs in that context for a market definition
23 perspective, and I think that also tells you something
24 about --

25 MR RIDYARD: Are they providing different levels of service

1 or ...

2 MR PARKER: That is my understanding, so lower call prices,
3 additional features such as assurances, back book
4 quality of service, better fault repair, billing and
5 call waiting, for example. So I think you need to
6 submit a customer -- a company registration number in
7 order to access the business tariff.

8 So I think that is one set of considerations. Then
9 the other set of considerations is, and we will probably
10 come to this more next week I suspect, but there seem to
11 be quite a few customers who are essentially personal
12 customers who are also using their landline occasionally
13 to make business calls because they are working from
14 home or taking some call from home and therefore I am
15 not sure how relevant it is to say, well maybe you
16 should also look at the price of a business tariff at
17 that point because it is essentially these customers are
18 both residential and business customers at the same
19 time.

20 MR RIDYARD: But surely it is a wider point, that the
21 existence of this price in the marketplace -- I mean, if
22 it is a superior quality of service then it is not
23 a good -- for that extent it is maybe not a good
24 comparator but the fact that it is a price that exists
25 in the marketplace could there not still be a relevant

1 product to throw into the mix when you are looking for
2 benchmark comparators?

3 MR PARKER: I guess so. I have not made an exhaustive
4 assessment of the business tariff for perhaps what one
5 might call solus business, pure business users.

6 MR RIDYARD: Okay, thank you. Dr Jenkins.

7 DR JENKINS: Yes, so in my second report I did look into
8 what would be sort of the equivalent business tariff for
9 what I understand are likely to be the types of
10 businesses most likely to be using residential services
11 for their business needs and so, yes, if we go to
12 {IR-E/18/176}.

13 I agree with Mr Parker that it is not the most
14 straightforward thing to do because business tariffs can
15 be quite complex but there is sort of a basic business
16 offering which I used and then added unlimited calls
17 packages and compared that combination for business
18 customers and residential.

19 If we go over the page, {IR-E/18/177} and focus in
20 on figure 6.1. Now, I needed to use what is known as
21 the WayBackMachine to actually find the call tariffs
22 because I think the material that is on the record does
23 not have the call tariffs but does have the access
24 prices for the different business contracts.

25 It is not a perfect comparator set in that, for

1 example, the business prices are based on 24-month
2 contract terms; whereas the residential ones do not
3 require such a long or indeed any contract period. As
4 Mr Parker says, there may be the option for better fault
5 fix time and things which are not available to
6 a residential customer. I do not think I priced those
7 in here. I think there might at some point be some
8 additional service around that but in general not.

9 So I think it is actually a reasonable comparison.
10 It is swings and roundabouts in terms of which one might
11 have some additional quality features, so in the round
12 it is a meaningful comparator which suggests that for
13 any business customer that is taking an SFV residential
14 service they are certainly no worse off than they would
15 be were they to have taken the business tariff and that
16 business tariff is a reasonable comparator, potentially
17 more broadly, but certainly nor the business customers
18 that are taking SFV service.

19 THE CHAIRMAN: Is this excluding the commitments price?

20 DR JENKINS: Yes.

21 THE CHAIRMAN: Thank you.

22 MR RIDYARD: Has any evidence been collected on whether the
23 business tariffs, whether BT's business tariffs are
24 competing with other operators' business tariffs? Is
25 that a competitive market?

1 DR JENKINS: As far as I am aware, and I think in terms of
2 Ofcom's scrutiny that there is -- but I stand to be
3 corrected, but my understanding is that we can assume
4 the business -- this type of business tariff is
5 competitive. The concerns Ofcom has had are on
6 different connectivity markets not on the retail
7 business tariff market.

8 MR RIDYARD: So as far as you know there is effective rival
9 operators offering voice only.

10 DR JENKINS: Absolutely.

11 MR RIDYARD: Yes. Anything?

12 MR PARKER: No reason to dispute that.

13 MR RIDYARD: Okay. That gets us to the end.

14 THE CHAIRMAN: Good. Thank you. Well, grateful for the
15 transcriber so that we could actually finish all of that
16 without a break, so that is where we will stop today.

17 MR BEARD: Sorry, I do have --

18 MS KREISBERGER: Yes, I do have one clarificatory question.

19 THE CHAIRMAN: Sorry, I forget to mention that. You have
20 got one question, right, okay. Let us deal with that.

21 MS KREISBERGER: Yes, thank you, sir.

22 Questions by MS KREISBERGER

23 MS KREISBERGER: It is a question for Mr Parker. Mr Parker,
24 Mr Ridyard asked earlier today about gives that were
25 targeted at split purchasers, SPCs. If we could just

1 bring up {IR-E/17/124} and zoom in on the top of the
2 page. That is Dr Jenkins' first report. It is the
3 latter part of paragraph 5.28 there.

4 Mr Parker, can you see the last sentence?

5 MR PARKER: Yes.

6 MS KREISBERGER: "Some of these competitive responses were
7 specific to SFV customers ... whereas others benefited
8 all fixed voice customers (such as the range of BT
9 'customer gives', which improved the quality ...)"

10 I wondered if you wanted to comment on that in the
11 context of Mr Ridyard's question.

12 MR PARKER: So I think the proportion of -- well, these are
13 gives that apply across the voice base as a whole, so to
14 the extent that there are costs involved in those that
15 apply to SFV customers there will be -- a limited amount
16 would be applied to SFV customers, and in terms of value
17 it is not obvious that SFV customers are getting
18 additional value over and above that which other BT
19 customers are getting.

20 MS KREISBERGER: Thank you, I had no further questions.

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

22 Questions by MR BEARD

23 MR BEARD: It was only that Dr Jenkins' had referred to out
24 of call plan prices in a table and she did not remember
25 the reference to it.

1 THE CHAIRMAN: Right, thank you.

2 MR BEARD: I am guessing HJ1 {E/17/276}. I do not know
3 whether it is in your report or in Dr Jenkins' report or
4 in Ofcom material because it was not clear from the
5 reference. {IR-E/17/276}. There are various tables in
6 there if you scroll down.

7 DR JENKINS: I think those are the charts that we have had
8 a look at. I think there is actually also a table in
9 the Ofcom Provisional Conclusions annex 8. That is the
10 reference that I do not have.

11 MR BEARD: Okay, try {C/2/85}.

12 DR JENKINS: That sounds more like what I have in mind. If
13 you just pull up the table. Yes, that is the one that
14 I was thinking about, which shows for a range, a broader
15 range of prices than before I benchmarked in my report,
16 the benchmarking that Ofcom did in 2017 and showing that
17 BT's pricing does not look out of line with that of its
18 main competitors in the market.

19 MR BEARD: That was all. It was just picking up that
20 reference.

21 THE CHAIRMAN: Thank you very much, Dr Jenkins.

22 We will adjourn now until 10.00 tomorrow.

23 (3.27 pm)

24 (The hearing adjourned until Tuesday, 27 February at
25 10.00 am)