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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)

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

Tuesday, 27 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 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.

One housekeeping matter before we start cross-examination. I have got a commitment which I cannot change at 4.45 in the RCJ, which means I need to finish at 4.15 today rather than 4.30. We will have a look at lunchtime to see where we are vis à vis tomorrow and possibly Friday.

MS KREISBERGER: Yes, I would hope with a fair wind, based on Mr Beard's estimation yesterday, that we may be able to get through all of it by that time.

THE CHAIRMAN: Fine, very good. Thank you very much indeed.

Yes, Mr Beard.

MR BEARD: Mr Parker, good morning.

MR PARKER: Good morning.

MR BEARD: I do not know whether an affirmation is required, just formally, because Mr Parker has been released from

1 purdah and then gone back into the witness box?

2 THE CHAIRMAN: Yes, he should be reaffirmed, yes, thank you.

3 MR DAVID PARKER (reaffirmed)

4 Cross-examination by MR BEARD

5 MR BEARD: Mr Parker, you gave evidence in the hot tub

6 yesterday. Obviously a number of components of that

7 I am not going to ask you any further questions about

8 but are going to be matters for submission in due

9 course. There are some matters that I do want to pick

10 up from yesterday and one or two points from your

11 report.

12 A. Yes.

13 Q. The first thing I wanted to just check was if we could

14 go to yesterday's transcript, so that is {Day17/82:1}.

15 No, I think it may be over the page at 83, if we could,

16 thank you.

17 Yes, you were answering some questions from

18 Mr Ridyard there about innovations and quality

19 improvements. You probably remember it?

20 Sorry, can you read it okay?

21 A. Yes, I am just working out which bit of the lines --

22 Q. Line 11. I am just giving you the framing of the

23 question. Then if you just want to review what you

24 answered, so running down from line 17 to the end and

25 then just over the page.

- 1 A. Yes. Could we just jump across the page so I can see
2 the rest. Thank you. (Pause). Yes.
- 3 Q. Thank you. I just actually wanted to pick up the last
4 bit of that. The limb 1 analysis you are talking about
5 there, that is referring to Mr Duckworth's cost-plus
6 benchmark, correct?
- 7 A. Yes.
- 8 Q. So that is the 2009 RFS costs based analysis and the
9 2006 returns?
- 10 A. Yes, rolled forward.
- 11 Q. Yes, sorry, rolled forward with the CPI. I just wanted
12 to make sure we were in the same place in relation to
13 the benchmark. You are saying there that the cost of
14 the gives are all in the limb 1 analysis.
- 15 Could we just consider that a little bit. Let us
16 take the example of the onshoring of customer call
17 centres.
- 18 A. Yes.
- 19 Q. So you heard -- I do not know if you were here for
20 Ms Blight's evidence?
- 21 A. I was not here, no.
- 22 Q. Have you seen it in the transcript?
- 23 A. I have seen the transcript; not sure I can necessarily
24 remember all of it offhand.
- 25 Q. No, this is okay. I am not going to test you fully on

1 Ms Blight's evidence. But you may remember that she did
2 give evidence that this change was important to
3 customers' perception of value --

4 A. Yes, I understand.

5 Q. -- and that was not challenged.

6 So onshoring, it is important to value. I think you
7 were here for all of Mr Duckworth's testimony; was that
8 right, Mr Parker?

9 A. Yes.

10 Q. You will recall that Mr Duckworth accepted that the
11 costs of the onshoring exercise would not be included in
12 his benchmark. Do you recall that?

13 A. Yes, yes.

14 Q. I can take you to the ...

15 A. That is right. Not specifically in the sense that they
16 are specifically called out, but in terms of the rolling
17 forward process there are two things going on from 2009.
18 There is where Mr Duckworth rolls forward for CPI, and
19 he is not including things -- costly changes such as the
20 onshoring, but neither is he including any efficiency
21 enhancements.

22 Q. We will leave the efficiencies -- the point I am making
23 here is that the onshoring of costs, the costs of the
24 onshoring are not included in his 2009 model, are they?

25 A. As I have just said, there are the costs that may not be

1 specifically called out, and there are efficiencies that
2 are not being sufficiently identified, and it is the
3 rolling forward of both of those that Mr Duckworth --

4 Q. But that is just in completely general terms, is the way
5 you are putting it. You are making assumptions about
6 the level of efficiencies outweighing the benefits of
7 any investments?

8 A. I think Mr Duckworth's view is that it is probably
9 conservative, but, yes, it is a general approach across
10 the two factors.

11 Q. So where we have a specific head of costs for bringing
12 the cost -- the onshoring back on, you are saying at the
13 end of that quote not that they are specifically
14 included in the limb 1 analysis, but somehow the limb 1
15 analysis is broad enough to encompass those?

16 A. So that rolling forward process, and there is evidence
17 on the cost transformation programme from 2010-12,
18 I think, and then there is the medium term plan that
19 Mr Cackett identifies at the end of the period which is
20 also not explicitly included, so neither of those
21 factors is specifically included.

22 Q. So just to be clear, when we are talking about the
23 economic value of the specific investments, so the
24 benefits to consumers specifically, we are talking about
25 that in completely abstract terms because the costs

1 themselves will not be included in the limb 1 analysis,
2 correct?

3 A. I should repeat the answer I gave earlier. They are not
4 specifically included and called out, but neither are
5 the efficiencies, and that rolling forward process is
6 essentially bundling both of those up together.

7 Q. I am just testing, because you say the costs of these
8 gives and innovations are included in the limb 1
9 process, and that is in answer to the point about the
10 economic value of these specific endeavours. So you are
11 saying they are being picked up through the costs
12 mechanism, and the point I am making to you is that if
13 any of these particular innovations or gives deliver
14 specific economic value, the costs themselves are not
15 even being specifically picked up in the limb 1
16 analysis, are they?

17 A. So, as I said before, not specifically picked up, but
18 picked up as part of the rolling forward process which
19 does not include the efficiencies either.

20 Q. That of course includes not just onshoring, but that
21 will be any other changes that will go to expenses
22 incurred by BT, costs incurred that will go to
23 developments, innovations. In fact, any expense that
24 goes to economic value for consumers post-2009, correct?

25 A. No, I do not think that is right. I think anything that

1 goes into direct costs is picked up in Mr Duckworth's
2 benchmark specifically, because that is using the data
3 from the claim period or direct cost.

4 Q. Perfectly fair. In relation to any indirect costs?

5 A. If there is indirect costs, then that is picked up in
6 the rolling forward process, but not specifically on an
7 item by item basis.

8 Q. Those indirect costs could include, for example, the
9 costs of the Call Protect systems?

10 A. I actually do not know where that would sit. I think
11 you would have to ask Mr Duckworth.

12 Q. For instance, I think we -- Mr Duckworth accepted that
13 marketing costs and advertising campaigns can be
14 indirect costs?

15 A. Yes, I think those would sit in SG&A to the extent that
16 they are relevant to SFV Services.

17 Q. Now, I am just confirming, I think it is pretty clear
18 from your reports, because in your third report you deal
19 with issues of economic value under limb 2 very, very
20 briefly, and then effectively reactively in your fourth
21 report, but you did not carry out any assessment of the
22 extent to which any of those gives or innovations or
23 investments might result in value to BT customers, did
24 you? No specific analysis?

25 A. No specific analysis, but I did not think any of those

1 were particularly sufficiently material and
2 differentiated in the framework that I had set out for
3 economic value.

4 Q. Yes, we will come back to your uniqueness test, your
5 unique uniqueness test in a moment.

6 Now, again, it will be a matter for submission in
7 relation to Ms Blight's evidence as to the value that
8 might be attached to those matters by BT's customers,
9 because she was not challenged in relation to that. But
10 just specifically focusing on the brand, I think the
11 answer is the same. In terms of investment in BT brand,
12 you did not carry out any analysis at all about how the
13 brand itself might be valued by customers, did you?

14 A. No.

15 Q. Just to check this, and again I am fairly confident that
16 we will agree on this, you did not at any point in your
17 analysis compare the different features of the BT SFV
18 Services to features of SFV Services of other providers
19 at different points in time, did you?

20 A. Not -- no, not in my first report. I had a look at some
21 of the evidence that had been presented by Dr Jenkins in
22 my -- my third report, and then had a look at some of
23 that in my fourth report.

24 Q. In your fourth report, we can go to it, but in your
25 fourth report you do not look, for example, when

1 Call Protect was introduced by BT and when any similar
2 systems were introduced by other rival competitor
3 providers, did you?

4 A. I did not, I think, in relation to Call Protect. I need
5 to remind myself. But I did have a look at some of the
6 evidence presented by Dr Hunt and Dr Jenkins.

7 Q. Did you at any point consider whether or not there were
8 qualitative differences between the products in terms
9 of, for example, Call Protect or indeed the nature of
10 the call packages that were offered?

11 A. When you say the nature of the call packages, what do
12 you mean?

13 Q. Well, from time to time BT offered call packages where
14 you could get certain minutes at certain times. Did you
15 at any time consider when BT introduced or changed call
16 packages and when rivals did so?

17 A. No.

18 Q. In fact, that is true of all of the gives we are talking
19 about. You did not systematically consider when BT
20 introduced these changes, when others introduced these
21 changes, and whether there was any difference between
22 them, did you?

23 A. I did not do that systematically. I looked at the
24 overall costs of most of the gives and found that they
25 were extremely small. That seemed to me to be

1 inconsistent with a view that they would create unique
2 economic value, but I did not go through a process of
3 exhaustively trying to identify each of those, whether
4 they were taken by rivals, when they were introduced by
5 rivals, and exactly the features of all of those.

6 Q. You say "exhaustively", but you actually mean "at all",
7 do you not? You did not look at that process at all,
8 did you, Mr Parker?

9 A. No, I looked at it a small amount in my fourth report in
10 relation to some of the examples given by Dr Hunt.

11 Q. But your position is, "if they were any good, they would
12 be copied", essentially?

13 A. If they are low cost to provide and there is nothing
14 unique about the way in which you -- there is nothing
15 unique about the resources that you need to provide
16 them, which seems unlikely if they are of the order of
17 hundreds of thousands of pounds, then if they were
18 really valuable to customers they would be copied, and
19 there are examples, I think it may have been
20 Call Protect, where BT introduced it and it was copied
21 very quickly by Sky and by TalkTalk in a matter of
22 months.

23 So yes, that is essentially my position. I cannot
24 see why there would be persistent value even if there
25 was value arising, material value arising, from those

- 1 innovations.
- 2 Q. If we just take the snapshot of when BT introduces
3 Call Protect. Are you saying at that moment that is
4 a matter which is of no particular economic value to BT
5 customers and BT prospective customers when others have
6 not introduced that?
- 7 A. In the short-term it may have some value. I do not
8 think for me that is enough to say it creates large
9 amounts of economic value in relation to the
10 *United Brands* test.
- 11 Q. What if BT were perceived to be bringing in these sorts
12 of innovations ahead of the competition on a systematic
13 basis?
- 14 A. If that was true on a systematic basis that might be
15 different, but I am not aware of evidence that there is.
16 I am not sure there has been an exhaustive review of the
17 times at which other people have introduced the same or
18 similar services.
- 19 Q. But you certainly did not consider that?
- 20 A. I did not, no.
- 21 Q. Just then you talked about the uniqueness of the
22 resources that are required. Then you talked about
23 hundreds of thousands of pounds. Are you saying that
24 capital is a unique resource, Mr Parker?
- 25 A. No, I am saying that if something costs only a few

1 hundred thousands pounds, that is something that is
2 clearly -- that capital is very much available to any of
3 the firms in the market. Then the question is: is there
4 any other unique resource that would have prevented
5 a rival from introducing the same product that BT
6 introduced?

7 Q. I see. Just to test that slightly further, are you
8 saying that there is a level at which something is so
9 expensive it becomes a unique resource, the amount of
10 capital available?

11 A. Not necessarily, but I think it is a contributory
12 factor. So if you are thinking of a firm engaging in an
13 innovative process, the financing of that innovative
14 process may be relatively low cost. It may be that if
15 that is right, it is likely to be something that can be
16 replicable by rivals, because it has not cost that much
17 to create whatever innovation is being created, and it
18 is quite easy for them to find that amount of money to
19 invest.

20 I think there is a different world which is the
21 innovative process is very expensive, and that probably
22 involves other -- that would involve resources which are
23 not just capital, but scarce resources in terms of, I do
24 not know, innovative technicians and people creating new
25 products and so on, and, if so, those other resources,

1 because money as capital is replicable, but those other
2 resources might not be, and if those are necessary to
3 create the innovation in question, and if that then
4 leads to patents or something which other people cannot
5 copy, then, yes, it is at that point that I think it
6 would be difficult to replicate.

7 If we are talking about a few hundred thousand
8 pounds to create an additional feature that is attached
9 to a call package or that is popped in on a call
10 package, I do not think there is anything there that is
11 non-replicable.

12 Q. Okay. I am just interested in how we test this
13 non-replicability point. I am just thinking about the
14 answer you have given here. You say it would involve
15 resources, and you are talking about "innovative
16 technicians". So let us assume that you are talking
17 about some kind of -- you are always here talking about
18 technological innovation, so an innovation in relation
19 to presentation or branding, that is not relevant in
20 your world?

21 A. Well, that is just replicable.

22 Q. Is it? Is that true, Mr Parker? Are brands entirely
23 replicable?

24 A. I think this goes to the concept of brand that we were
25 discussing yesterday. So at the level of -- I can

1 invest and say: "I am this great company and I have got
2 high quality", anyone can do that, but that does not
3 mean the BT brand is identical to the TalkTalk brand
4 which is identical to the Sky brand, but they are all
5 brands which one can go out and invest in advertising in
6 order to create, boost, enhance and so on.

7 But that seems to me, if every firm can do that to
8 create its own slightly differentiated brand from
9 everyone else, but they are all sort of at an equivalent
10 level, I do not think there is anything there that is
11 non-replicable. That is not to say that TalkTalk could
12 recreate the BT brand, it would not want to, but it can
13 create its own brand and market, and there is nothing
14 non-replicable about that.

15 Q. So you are saying it is replicable for companies to
16 develop a brand through investment in products and
17 marketing, but there is differentiation between the
18 different brands, correct?

19 A. Yes, so this is like the hairdresser example. It is
20 quite straightforward to be a hairdresser, a hairdresser
21 has a unique location. But every hairdresser has
22 a unique location, they are all equally unique, and
23 therefore they are not providing kind of -- whilst they
24 are differentiated in the sense that they are located in
25 different places, one is no more differentiated than the

1 other.

2 Q. Right. So is this a hair cut is a hair cut is a hair
3 cut, essentially?

4 A. I am not disputing that the Vidal Sassoons of the world
5 might be different to Corner Cuts at the end of my road,
6 but if we sort of take those quality differentials out
7 of it, essentially a hair cut is a hair cut is a hair
8 cut.

9 Q. Right, so if we take those quality differentials out.
10 Just toying with that for a moment, I think your Corner
11 Cuts versus Vidal Sassoon example might suggest that
12 there is potentially a vast amount of price dispersion
13 in that workable market, correct? Workably competitive
14 market, yes?

15 A. Resulting from quality differentiation, not from -- so
16 vertical differentiation, not from the horizontal
17 differentiation that we are talking about here.

18 Q. Ah. So just to be clear, this is an example of
19 objective difference that you have referred to, so that
20 if I could work out whether the person wielding the
21 scissors in Vidal Sassoon was actually just slightly
22 less competent than the person in Corner Cuts, then is
23 there any justification for the prices that
24 Vidal Sassoon are charging, Mr Parker?

25 A. Well, there is a lot of -- it is a free entry market.

1 There are loads and loads of hairdressers. You can
2 charge what you think because it is unconcentrated and
3 there is -- no one has any market power. So if
4 Vidal Sassoon in that market can charge a higher
5 quality -- charge a higher price, that is because it has
6 higher perceived quality.

7 Q. Mr Parker, are you saying that everything that has
8 a higher price must have a higher quality?

9 A. No, but --

10 Q. Because I was going to say --

11 A. -- in a world where the unit of the hairdresser is very
12 small, and it is a sort of atomistic market, then price
13 differentials will reflect quality differentials because
14 no firm will have market power.

15 Q. That is what I am just testing. Are you saying
16 the price differentials simply reflect quality
17 differentials, or might they reflect branding and
18 subjective perception differentials amongst those that
19 want to go and get haircuts, Mr Parker?

20 A. Well, it depends what you think the branding is based
21 on, but -- so if the Vidal Sassoon brand, giving them
22 lots of publicity today, is because they have
23 a reputation for extremely high quality that they have
24 built up, and that that is word-of-mouth that is going
25 around, going around the market, because lots of people

1 use it, they think this is great, they tell their
2 friends, then that can help create a brand.

3 Q. Help create, yes, Mr Parker. But maybe it is just the
4 overall glamour of the place?

5 A. It could be. I mean, I am probably the wrong person to
6 start opining on the glamour of the place.

7 Q. I do not necessarily want you to opine on the glamour of
8 Vidal Sassoon or any salon, or indeed impliedly
9 criticise Corner Cuts. I am not here to do that. I am
10 suggesting to you, though, that your hairdresser example
11 is a very, very good example of where it is that it is
12 not only quality that drives price differential in
13 a highly priced dispersed market, it is actually
14 subjective perception on the part of customers, and
15 subjective perception in particular in relation to
16 brands such as Vidal Sassoon. That is what is actually
17 going on, is it not, Mr Parker?

18 A. Well, typically brands can be created in two ways. One
19 by developing a reputation for quality, so that is the
20 perception of the customers that have actually used the
21 product, and that then creates a certain reputation for
22 quality. You can create brands by a large quantity of
23 marketing and creating a subjective perception of those
24 brands, and so that is another option. I do not know
25 whether Vidal Sassoon, which of those Vidal Sassoon has

1 engaged in.

2 Q. The point is it is subjective, is it not? It is the
3 subjective values of customers that drive that price
4 dispersion, is it not, Mr Parker?

5 A. Well, on the pure brand interpretation that has no kind
6 of quality substance to it, then, yes. But if it is on
7 the basis of quality, then it is not a subjective
8 perception, it is other than people are perceiving
9 something to be higher quality, but that is because that
10 is the perception that matters.

11 If I believe that someone is -- some firm is of
12 a higher quality than another firm, then that is
13 presumably -- and to the extent that people buy the
14 products, they experience them, which is often the case,
15 then there is obviously a difference between
16 a subjective and an objective perception at that point.

17 Q. Yes, there is a significant difference between
18 a subjective and an objective perception in relation to
19 economic value, and you repeatedly referred yesterday to
20 objective criteria, and I suggest to you that the key to
21 economic value consideration is subjective, not
22 objective. Do you accept that, Mr Parker?

23 A. So I think from the perspective of *United Brands*, it
24 seems to me that the right way to think about products
25 which have additional economic value, over that attached

1 generally to the cost of the service, is to try and
2 understand: can we think of a way in which this is
3 distinctly a new, better product? I think objective
4 measures of quality are helpful. Is there nothing we
5 can draw from subjective values? I think one could look
6 at those, one would want to be quite careful, I think,
7 about how one took those into account, for the reasons
8 that we discussed a bit yesterday as to, if your
9 subjective preferences are coming out of customer
10 surveys about what they think and the reliability that
11 you can place on those surveys, if there is no objective
12 reason why something -- why consumers should give you
13 different answers, then I think I would not place a lot
14 of weight on subjective perception evidence, but there
15 may well be situations in which you can say this is
16 distinctly a different product, it is very clear it is
17 distinctly higher quality on these measures, and then
18 people's subjective perceptions are also in line with
19 that objective evidence. But I think I would be nervous
20 about using subjective evidence by itself.

21 Q. You referred to *United Brands* and to *Flynn and Pfizer*
22 and *Hydrocortisone* yesterday. Can we go to the third of
23 those cases, which is at {G/96/153}, picking it up. You
24 have probably seen this. This is a section of the
25 judgment that talks about economic value, Mr Parker.

1 I am not going to take you through it all.

2 A. Yes.

3 Q. You will see that it discusses consumer surplus.

4 A. Mm-hm.

5 Q. This will be a matter for submission, but I do not think
6 you would dispute the fact that this is just an orthodox
7 discussion of the economic concept of consumer?

8 A. That is my memory, and from what I see here that is
9 right.

10 Q. That is fine. I actually want to go down to page
11 {G/96/157}. This is in what is referred to as Case 2
12 situation. It is under (2), where it talks about the:

13 "Generation of additional value through the
14 provision of distinctive value."

15 You will see that there the court is talking about
16 the:

17 "... unrealistic limiting assumptions of the perfect
18 competition ..."

19 Where "perfect competition" is being used as a sort
20 of reference point in this discussion, and it is talking
21 about a number of the basic assumptions on the model of
22 perfect competition which you will be familiar with, and
23 it is saying that those are all restrictions.

24 You can see in the final sentence:

25 "Sellers can maximise producer surplus by providing

1 to the market products that Buyers wish to purchase and
2 for which they will pay a premium i.e. more than they
3 would for an alternative or substitute product."

4 Then at (i) it talks about:

5 "This form of generation of producer surplus can
6 often involve the generation of additional value through
7 'product differentiation'. But we have quite
8 deliberately eschewed this label in favour of the
9 provision of 'distinctive value', for we intend to refer
10 to any definable aspect of a Seller's offering that adds
11 value to the Buyer, in the sense that this aspect
12 represents something that Buyers wish to purchase from
13 that Seller in contradistinction to the offerings of
14 other Sellers; and for which the Buyer will pay
15 a premium."

16 Then in (ii) it says:

17 "That said, product differentiation is the prime
18 example of such generation of the additional value.
19 Product differentiation can exist in many different
20 forms: it is not confined merely to innovation (although
21 that is important), but to providing a better quality
22 product in other ways, and in catering to the subjective
23 tastes or preferences of Buyers."

24 So there the court is talking about subjective
25 tastes being important in terms of product

1 differentiation and value in this context. Do you
2 understand that, Mr Parker?

3 A. Yes, so it is saying that if buyers have specific tastes
4 and then firms might cater -- might develop products
5 that match those specific tastes, and that again -- all
6 of this seems to me to be consistent with the idea that
7 I have been putting forward of uniqueness.

8 Q. Well --

9 A. So the end of sentence 1, perhaps, and then they talk
10 about innovation, better quality products, or, in this
11 case, uniquely different from, by providing a separate
12 product that caters to the subjective taste in the way
13 that other people are not providing that.

14 Q. Let us look at footnote 399 on that:

15 "In the real world, there is no single Product, but
16 competition between different products which meet -- to
17 different extents -- the same demand. Unsurprisingly,
18 the Seller who taps closest into what Buyers' value will
19 accrue a demand that may be quite inelastic, and will be
20 able to price accordingly. That is no more than
21 a proper reward for the Seller's response to Buyer
22 demand. Investment in brand is also an example of
23 this: for reasons that may well be objectively
24 indefensible, Buyers will pay a premium for a 'brand',
25 even though the identical product is available

1 unbranded. The owner of a (valued) brand may command
2 a higher price, but will always be at risk from
3 unbranded competition (or other brands)."

4 So what is being said here, Mr Parker, is that
5 product differentiation or distinctive value can come
6 simply in the form of differentiation in relation to
7 brand. Do you accept that?

8 A. I think that is possible. I think the example that has
9 been doing the rounds is a sort of white T-shirt where
10 you could get an unbranded white T-shirt which would
11 cost you £5, or you could get a branded -- I think Gucci
12 is the go-to example -- Gucci T-shirt and that would
13 cost you £40, and that is because people would like to
14 wear a Gucci T-shirt. Some of that may be quality
15 differences, because it would be better made than a £5
16 T-shirt, but I accept a large chunk of that will be
17 brand value, but that brand value is created by an
18 enormous amount of advertising.

19 Q. Right. Now, I am not going to get into the comparative
20 price of Gucci T-shirts, but I fear you may be about an
21 order of magnitude off in your pricing. Apart from
22 that, the fact that Gucci might spend an awful lot of
23 money on advertising does not mean that all of that
24 subjective objectively indefensible difference in value
25 is being captured by the cost of the advertising, is it,

- 1 Mr Parker?
- 2 A. If it is not, then everyone would rather charge £40, or
3 £400, for a T-shirt by just saying, well, I have got
4 a brand, but in order to persuade people to do that you
5 would have to invest an awful lot of money in
6 advertising to create that broad perception, otherwise
7 there is a lot of profit available to anyone who can
8 create such a brand and maintain such a brand, and that,
9 because there is a competitive market overall for entry
10 into creating those brands, that is what -- those --
11 otherwise there is a pot of money that is available that
12 is not being exploited.
- 13 Q. Two issues arise. First of all, that advertising spend,
14 there is nothing unique about that, is there, Mr Parker?
- 15 A. No, that is why there are multiple brands all slightly
16 differentiated from each other, all at the higher
17 quality perception end of the spectrum. So that is not
18 unique, I would agree.
- 19 Q. The second is that the value that customers are willing
20 to attribute to those branded products in a workably
21 competitive market is way greater than the cost of the
22 advertising that goes into them, is it not?
- 23 A. No, because if that was true, there would be excess
24 profits in the production of those T-shirts and other
25 people would be seeking to create their own brands in

1 order to take advantage of the profits that are there,
2 and how do you create a brand in that kind of luxury
3 goods market? You do an enormous amount of advertising.

4 Q. Sorry, I am just clarifying. So your hypothesis is that
5 in a luxury goods market, what we will see is margins
6 close to cost?

7 A. If you properly take into account all the relevant
8 costs.

9 Q. I see.

10 A. Because you will see there will be lots of firms --
11 I think we discussed the fragrances examples. There are
12 lots of fragrances out there, if you go through an
13 airport duty free you will see there are a lot of
14 fragrances. They are all being massively advertised
15 compared to their direct costs, I am sure they make very
16 good margins, but if you take all the costs, including
17 all the advertising costs, into account, I do not see
18 any reason to think they are making -- all of these
19 perfume companies are making some kind of economic
20 profit.

21 Q. You do not think they are. I see.

22 Just to be clear, you do accept that BT massively
23 advertises, do you not?

24 A. I know it spends quite a bit on advertising, whether
25 that is brand advertising or product advertising for

1 specific products, it is not clear.

2 Q. There may be some that is a specific product, but you
3 accept that it spends a great deal of money on brand
4 advertising?

5 A. I am happy to accept that, yes.

6 Q. Can we just go to the *Flynn* case which you referred to.
7 {G/73/1}, please. Pick it up at page {G/73/52}.

8 So you referred to *Flynn*, and you mentioned the idea
9 that in *Flynn* in the Court of Appeal there had been
10 a suggestion that there could be no economic value over
11 and above that included in the cost of services. Do you
12 remember saying that?

13 A. Yes.

14 Q. I can take you back to the question.

15 A. That is fine.

16 Q. So let us just look at paragraph 171. So just to put it
17 in context, this is an appeal by the CMA saying that the
18 Tribunal had been too harsh on the CMA in the way in
19 which it had been considering excessive pricing in
20 relation to the drugs in question. Then there is --
21 this is in the consideration of the legal test.

22 You will see at paragraph 171 it says:

23 "... the Tribunal observed that this was clearly
24 a legal test."

25 The question about economic value.

1 "The categorisation of this as a 'legal' concept
2 seemingly led the Tribunal to treat the economic value
3 as a discrete component of the test in law to be
4 applied. It is 'legal' in the strictly limited sense
5 that it has been ascribed a meaning in a court judgment
6 but, at base, it is an economic concept which describes
7 what it is that users and customers value and will
8 reasonably pay for and it arose in the *United Brands* ...
9 as an economic description of the abuse of unfair
10 pricing ..."

11 So yesterday you talked about *United Brands* and you
12 mentioned *Flynn*, and you mentioned your interpretation
13 of the concept of economic value in *United Brands*. Now,
14 I am not going to say whether or not yours is attempting
15 to be a legal or economic concept, but you see there
16 that the Court of Appeal is referring to this as an
17 economic concept, and we saw in *Hydrocortisone* that the
18 Tribunal was looking at this as an orthodox economic
19 concept. You accept that?

20 A. Well, I do not think we got to -- I agree that they are
21 saying it is an economic concept. I think it is one
22 that has caused economists trouble because, at the same
23 time, I think we are also clear that it is not the same
24 as consumer surplus because, if it would be, that would
25 be the willingness to pay fallacy, and there could be no

1 law against excessive pricing. I think there is also,
2 it says here "an economic concept which describes what
3 it is that users and customers value and will reasonably
4 pay for", and it seemed to me that is different to just
5 a measure of, if you are getting some surplus, consumer
6 surplus, that that is necessarily reasonable.

7 Q. Let me be clear, Mr Parker. It is no part of BT's case
8 that in relation to economic value you simply stop at
9 saying, "well, there is a willingness to pay". It is
10 understood that if that were the only benchmark, that
11 would be something that would undermine the existence of
12 excessive pricing as an abuse.

13 The point I am making here is that whilst that is
14 a conundrum that exists on the willingness to pay, what
15 is not being suggested is that one ignores the ordinary
16 concept of consumer surplus when you are assessing
17 economic value?

18 A. I think that is reasonable, yes.

19 Q. If we just go on to paragraph 172:

20 "... the Tribunal did not agree with the submissions
21 of all parties that economic value was simply ... to be
22 taken into account as part of other components of the
23 test. The Tribunal held that it was not part of the 'in
24 itself' test but was part of 'a more general assessment'
25 ... I agree with the parties on this. It is evident

1 from the judgment in *United Brands* that the reference to
2 'economic value' is a part of the overall descriptor of
3 the abuse; it is not the test. The test should
4 therefore, when properly applied, be capable of
5 evaluating economic value. So, for instance, as the CMA
6 argues, when evaluating patient benefit it would be
7 possible to measure its economic value in the plus
8 element of cost-plus, or even in the fairness element.
9 Equally, if there is evidence of the prices being
10 charged in relevant, comparator, markets which were
11 effectively competitive, then those prices could be
12 capable of acting as proxy evidence of the economic
13 value of patient benefit. Insofar as an issue of fact
14 arises which can be categorised as an aspect of
15 'economic value', it needs to be measured and it can be
16 evaluated in various parts of that test. If it is
17 properly factored into 'plus' or 'fairness' or into some
18 other part of the test, or is reflected in other
19 evidence which can stand as a proxy for economic value,
20 then there is no incremental obligation to take it into
21 account again, as a discrete advantage or justification
22 for a high price."

23 I am assuming that is the passage you were referring
24 to when you were referring to these matters at
25 paragraph 32 of your -- page 32 of the transcript. Am

1 I right in thinking that?

2 A. Let me just see if I can remember more specifically
3 exactly where this -- what I was referring to. (Pause).

4 So if you go to 97.2; is that right? Yes. So
5 paragraph 97.2, one example of an unfair price is
6 a price that is excessive because it bears no reasonable
7 relation to the economic value of a good or service.

8 Then paragraph 155 --

9 THE CHAIRMAN: Sorry, where are we?

10 A. I am so sorry. If we could go maybe to paragraph 155 of
11 *Flynn Pharma*.

12 THE CHAIRMAN: Just a minute.

13 MR BEARD: Page {G/73/48}.

14 A. So if we can blow up paragraph 155:

15 "The simple fact that a consumer will or must pay
16 the price that a dominant undertaking demands is not
17 therefore an indication [that] it reflects a reasonable
18 relationship with economic value. But a proxy might be
19 what consumers are prepared to pay for the good or
20 service in an effectively competitive market ..."

21 So it was that sentence or two sentences that I was
22 thinking about.

23 Q. Right. At {Day17/32:1} you said at line 3:

24 "Now, one of the things that *Flynn and Pfizer*, the
25 Court of Appeal, says is essentially there may be no

1 extra economic value over and above that included in the
2 cost of the service, and you do not need to go further."

3 Paragraph 155 is not dealing with that. Paragraph
4 172 is dealing with that issue, is it not?

5 A. Well, I think it is saying, as I had interpreted it, and
6 obviously the interpretation of the judgment is
7 ultimately a matter for the Tribunal and not for me,
8 a proxy might be what consumers are prepared to pay for
9 a good and service in an effectively competitive market.

10 So my -- the way I have looked at it, my
11 interpretation of that, is it could be that there is no
12 additional economic value over and above that which is
13 included in the price of the product.

14 Q. It could be?

15 A. It could be, and that you would need to look to see
16 whether there were clear sources of economic value over
17 and above, which I think, if we go back to the
18 *Hydrocortisone* judgment, we are talking about higher
19 quality products, innovation.

20 Q. Mr Parker --

21 A. In your view --

22 Q. -- we can make -- we can go back and carry out the
23 interpretation of *Hydrocortisone*, but are you really
24 telling me that footnote 399 in *Hydrocortisone* is
25 concerned only with innovation when it specifically

1 talks about objectively indefensible brand value?

2 A. I think I have mentioned brand in my -- if it was not
3 overwritten, but I think I mentioned brand in that
4 answer.

5 Q. Brand value may not be based simply on quality,
6 Mr Parker, and it may not be objective, may it not?

7 A. It may not be, and you would also need to take account
8 of whether it has already been included in the costs of
9 providing the product.

10 Q. I see. In relation to that, just going back to brand,
11 you are saying, effectively, in relation to brand value,
12 that it may not simply be based on quality, but you are
13 now saying that the brand value, the uniqueness that you
14 had previously referred to, that uniqueness can simply
15 be differentiation in branding?

16 A. There can be differentiation in branding, but if many
17 firms have essentially equivalent brands, and they are
18 all slightly differentiated from each other, but they
19 are not -- there is not a kind of single firm that has
20 a better brand than everyone else's, then I am not sure
21 I would take a lot of that into account.

22 I do think the evidence here is not strong for BT
23 having a better brand than anyone else. In fact --

24 Q. We are going to come on to that, it is okay, Mr Parker,
25 but I am just dealing with the principles here, and I am

1 trying to test your uniqueness theory.

2 Just to be clear, as far as we can see, there is no
3 literature that identifies the uniqueness theory in
4 relation to the assessment of economic value, is there?
5 This is distinctly your theory?

6 A. There is pretty limited case law on this, and I have
7 been trying to understand the two strands of the case
8 law, the *Attheraces* strand and then the *Port of*
9 *Helsingborg* strand, and trying to make sense myself of
10 what I think it is trying to get at.

11 Q. You think it is to do with objective tests and
12 uniqueness?

13 A. That is the interpretation I am placing on it. I think
14 *Hydrocortisone* is quite -- there is quite a lot of
15 evidence there to suggest that what *Hydrocortisone* is
16 saying, you need to have something unique and different
17 in terms of innovation, higher quality, a unique product
18 that is maybe horizontally differentiated but you are
19 satisfying customers' tastes in a way that is different.

20 I accept the point about brand as a subjective
21 issue, and if there was a unique brand then maybe that
22 would be something you would want to take into account
23 but I do not think that is the case here.

24 Q. I do not want to become semantic here, but if you have
25 a range of different brands are they not each unique?

1 A. This goes back to if you have a hairdresser in one place
2 and a hairdresser in another place, they are both unique
3 and uniquely differentiated, but not in a way that
4 I think we should take into account in this test.

5 Q. Can we go then to your fourth report. You deal with
6 issues in relation to gives and additional matters at
7 around -- so this is {E/5/143} I think is probably the
8 place to pick it up.

9 This is under the heading "Customer service
10 enhancements and perception of BT as a 'trusted brand'",
11 and because you have not done anything at all on this in
12 your report, you are really just here dealing with
13 Dr Jenkins' material, you are responding to that,
14 correct?

15 A. Yes.

16 Q. Then:

17 "Dr Jenkins states that 'customers also enjoyed
18 customer service enhancements from BT and perceive of BT
19 as a trusted brand.'"

20 She relies on material from Dr Hunt that is then set
21 out, and you will see there it is: investing in the
22 quality of customer service; evidence of Ofcom service
23 tracker; internal documents including NPS; Class Members
24 ascribe value to BT's status as a trusted brand because
25 it is an important factor in consumers' decision to stay

1 with BT; then there is more reference to other material.

2 Then you say at 6.108:

3 "I do not think that any of these points demonstrate
4 economic value that is not already factored into the
5 construction of the cost-plus benchmark."

6 So here again you are just referring back to
7 Mr Duckworth's benchmark, yes?

8 A. Yes.

9 Q. You say at (a):

10 "... with the exception of evidence from Ofcom's
11 customer service ... none of the evidence presented by
12 Dr Hunt includes [if we just go over the page]
13 a comparison to other suppliers ..."

14 Will come back to that.

15 Then at (b) you note:

16 "... with the exception of the examples of customer
17 service enhancements, this evidence is based on stated
18 preference surveys and is therefore subject to the same
19 deficiencies [as you have mentioned] in paragraph 6.93
20 ..."

21 You are concerned about ex post rationalisation
22 there.

23 Then:

24 "Third, I note that, alongside the fact that Dr Hunt
25 provides no comparison of BT's customer service

1 enhancements to those of other providers, these appear
2 to be minor ..."

3 So we are back in the same territory that we had
4 talked about previously.

5 So (a) is criticising quality metrics that are used,
6 (c) is about comparing services enhancements, and then
7 (b) is a concern about the reliability of the stated
8 preference surveys, broadly speaking?

9 A. Yes.

10 Q. So your reference here in (b) is to the Provisional
11 Conclusions to the 2017 Review, and it is actually
12 a reference to A6.9 in that material. I think it is
13 {C/235}. No, sorry, my lack of clarity. {C/2/35}, my
14 apologies.

15 You will see there in the middle of the page,
16 "Attitude: Perceptions of the market or outcome", so
17 this is a consideration by Ofcom in 2017.

18 A6.9 says:

19 "'Stay with trusted provider' is by far the biggest
20 main reason given for not being interested in changing
21 provider ..."

22 So this is responses given to a survey from Ofcom,
23 correct?

24 A. Yes.

25 Q. "'Stay with trusted provider' is by far the biggest main

1 reason given for not being interested ... This
2 differential in trust could be a reflection of brand
3 loyalty, especially to BT as the 'household name'
4 provider of fixed line services. It could reflect
5 a degree of mistrust of other providers (though this may
6 be less likely in the case of well-known firms such as
7 the Post Office). It may also be a post-rationalisation
8 given by respondents who have not thought about
9 switching."

10 It is interesting, you only quote that last
11 sentence, and yet Ofcom here is emphasising the
12 importance of the responses of the survey that it has
13 carried out about the "Stay with trusted provider"
14 reflecting brand loyalty. It places a caveat there.
15 But do you think you are fairly reflecting that
16 paragraph in your expert report, Mr Parker?

17 A. I can see that it is also reflecting -- mentioning brand
18 loyalty and possibly mistrust of other providers,
19 although it seems that is a bit sceptical as to whether
20 that is generally true. So, yes, I think there are
21 other points raised by Ofcom here.

22 Q. Your paragraph there is rather selective. I know that
23 you have referred to internal BT documents. Only a few
24 in your reports, but clearly you have been busy, and we
25 are going to come back to the NPS material in due

1 course, but there are a large number of internal
2 documents from the BT disclosure where BT considers its
3 internal brand positioning and investment. Have you
4 reviewed those, Mr Parker?

5 A. Some of them. Not all of them, I am sure. I am sure
6 that BT placed value on its own brand perceptions and
7 wanted to know where it sat with consumers relative to
8 the market, and that is what you see in things like the
9 Net Promoter Scores and so on, and it did absolutely
10 care about its positioning, I totally understand that.

11 Q. Let us see if you have looked at this one. {F/181/1}.
12 So this is a strategy, a broad strategy paper from
13 March 2012. Do you recall looking at this, Mr Parker?

14 A. I may have done, yes.

15 Q. If we just go over, click through the next two slides,
16 so you can see "Overview" and then "Strategy", so this
17 is the exec team sharing strategy with the board. If
18 you go down to the bottom, you will see one of the
19 important considerations {F/181/3}, and this is across
20 the business, is:

21 "Improve our brand stretch to new markets to
22 underpin the growth agenda.

23 "Enhance consumer brand perceptions of trust,
24 service and value for money."

25 So this is BT, as part of its key strategy, saying

1 that perceptions of trust, service and value for money
2 are crucial to its brand; you understand that,
3 Mr Parker?

4 A. Yes.

5 Q. You do not dispute that BT was seeking to ensure that
6 through investment and advertising and PR that those
7 brand perceptions would be pursued under this strategy,
8 correct?

9 A. I do not dispute that. I am sure any firm would be
10 seeking to try and have as important a brand --

11 Q. It may not be important in relation to this aspect, it
12 is the consequence of it then.

13 Let us just do one other then, {F/580/1}, because
14 there are a lot of them.

15 This is a "Consumer" document, October 2017. It was
16 on Consumer brand. It actually covers BT, EE and
17 Plusnet as you can see from the cover.

18 If we just go down to slide {F/580/6}, what is
19 perhaps interesting about this is you do have three of
20 the BT Group brands referred to. With BT, the emphasis
21 in terms of distinct positioning in the market is on
22 reliability and trust. Do you understand that,
23 Mr Parker?

24 A. I can see that is what BT is trying to do with its three
25 different brands, slightly different position.

1 Q. Then if we go on to slide {F/580/18}. Again:

2 "Guidelines applied to [the] brands and different
3 stages of marketing."

4 So the whole strategic emphasis is on building this
5 overall reliability and trust brand value. You can see
6 that in the general structure of this?

7 A. Yes, I can see that is what they were aspiring to do.

8 Q. If we go to slide {F/580/20}, you will see there that
9 this is about the pricing guidelines, taking into
10 account ARPU measures. What you will see there is that
11 the pricing strategy, over on the right-hand side, and
12 this is for all of BT, is to position itself as having
13 premium pricing. Do you see that, Mr Parker?

14 A. Yes.

15 THE CHAIRMAN: Sorry, where -- oh, I see. On the right-hand
16 side. I have got it.

17 MR BEARD: It is a faint subheading.

18 THE CHAIRMAN: Yes.

19 MR BEARD: That is in relation to all of its products. You
20 can see that by the example given in relation to
21 Quad Play pricing.

22 A. Yes.

23 Q. So what we see here are just little samples of the
24 evidence that BT was very concerned about investing in
25 and positioning the BT brand as one giving rise to

1 reliability and trust which it thought customers would
2 find attractive. You understand that, Mr Parker?

3 A. I understand that. I am not sure that the evidence
4 coming out of the Net Promoter Scores suggests it was
5 necessarily as successful as it would have liked to have
6 been.

7 Q. Well, I am sure it is not as successful as they would
8 have liked, I am sure that BT and you are absolutely
9 going to be in agreement with that. But I am interested
10 in the Net Promoter Scores, because you have not
11 actually dealt with Net Promoter Scores at all in either
12 of your reports, have you?

13 A. No. I mention that they have been mentioned by Dr Hunt.

14 Q. Yes, you mention that they have been mentioned. But in
15 the course of your hot tub evidence, they have become
16 the crucial piece of material that you have relied on
17 repeatedly in relation to this.

18 These are in relation to documents. You went to
19 {F/905/1} in the course of the hot tub yesterday. Did
20 you identify document {F/905} as potentially relevant,
21 Mr Parker, or did someone else give it to you?

22 A. I think someone else would have given it to me, but in
23 response to an instruction saying: "I would like to see
24 the net promoter score documents".

25 Q. So let us just work this out. You asked people for net

1 promoter score documents. Did you do that before the BT
2 witnesses gave evidence?

3 A. I think so, but I think it was earlier on. I think it
4 would have been probably in January this year.

5 Q. So in January this year you were interested in the net
6 promoter score documents?

7 A. Yes.

8 Q. Now, the documents you referred to are uploaded on to
9 the system for sharing, so they had obviously been
10 available in the disclosure, obviously, for many months
11 if not years?

12 A. Yes.

13 Q. But you had not referred to them and they were uploaded
14 on 15 February to the Opus system. They are all BT
15 documents, the ones you referred to, are they not?

16 A. Yes.

17 Q. Not one of them was put to any of the BT witnesses, was
18 it, Mr Parker?

19 A. I do not recall. I do not know.

20 Q. I can assure you, Mr Parker --

21 A. I am sure you are right.

22 Q. -- the BT witnesses were long gone by the time they were
23 uploaded onto Opus.

24 So you asked about this net promoter score material
25 in January, and you know that there are references in

1 the BT witness statements to customer satisfaction,
2 value for money and net promoter score, do you not?

3 A. There may well be, I am sure you are right. I do not
4 recall.

5 Q. Both Mr Bunt and Ms Blight refer to it, and neither of
6 them were asked any questions about this. Did that
7 surprise you, Mr Parker?

8 A. I do not have a view on that.

9 Q. They were not asked about any of these documents though,
10 were they, Mr Parker?

11 A. I accept that that is right, yes.

12 Q. So one of the issues we have with these documents,
13 Mr Parker, is you are interpreting them without the
14 benefit of someone that commissioned, read or used them,
15 correct?

16 A. Yes.

17 Q. You do not know, presumably, how those scores were
18 obtained?

19 A. What do you mean by "obtained"? I mean, it is
20 a consumer survey, so it would be by asking consumers.

21 Q. Right. So was it done through an online survey,
22 Mr Parker?

23 A. So Dr Hunt yesterday suggested that they were done by
24 online surveys. I think some of the earlier examples
25 would have been done through some other survey

1 methodology. If we look at, for example, {F/900/1},
2 please.

3 Q. Sure.

4 A. This is the 2019 document we have got here. This is now
5 2016. If we look at {F/900/5}, so you can see -- so
6 I think the contention was that these were online
7 surveys only, and so they would not cover SFV customers
8 or Voice Only Customers because they did not have access
9 to online and could not answer the questions. But if
10 you look at this slide in the top right-hand corner, you
11 will see there is a "Line Only" group.

12 Q. There is a "Line Only" group. I see.

13 A. Yes, so these are Line Only people who must be
14 Voice Only Customers, and therefore the survey must have
15 been carried out in a way that allowed those customers
16 to be identified.

17 Q. You have no idea, do you, Mr Parker?

18 A. If we go to {F/878/1}, please.

19 THE CHAIRMAN: Just one moment, please.

20 A. I am sorry.

21 THE CHAIRMAN: It is all right. (Pause).

22 A. Sorry, can we go to {F/878/4}, so go to slide 4 of this
23 document. You can see the third blue shape, "VFM
24 statements added to NPS tracker (and 3 months'
25 fieldwork)", and my interpretation of -- so this is

1 a value for money document, I think we saw it a couple
2 of weeks ago, that part of the NPS suite of measures.
3 So this is talking about fieldwork. I would normally
4 interpret fieldwork as resulting from a face-to-face
5 survey rather than from an online survey.

6 If we go to slide {F/878/42} of this document.

7 Q. Just to pause. That is your interpretation. You do not
8 know?

9 A. Yes, that is right. But if we go to slide {F/878/42},
10 again you can see here that the VFM score has a "Line
11 Only" measure.

12 Q. Right.

13 A. Therefore, this survey must have been carried out in
14 such a way as to allow Line Only people to answer, and
15 of course if it was an online only survey, then
16 a Voice only customer would not have the ability to
17 answer or even be part of --

18 Q. Right, Mr Parker, let us assume that it is a panel
19 survey and it is done by email by a third party. Let us
20 assume that. There is a group of people for whom BT is
21 a Line Only business but actually have online
22 connections through other people. They are Split
23 Purchase Customers, are they not, Mr Parker?

24 A. That is right, yes.

25 Q. So you do not have any idea whether or not "Line Only"

1 here means VOC, do you?

2 A. Well, it means Line Only.

3 Q. You do not know how these were done, why they were done,
4 how they were used, what the calculations were, and yet
5 these have been pulled out after the BT witnesses have
6 been through the box and you are now relying on your
7 interpretation of them as the critical evidence in this
8 case against BT's brand value evidence, are you not,
9 Mr Parker?

10 A. Well, I am using them as an indication of the fact that
11 BT's internal evidence about its brand, relative to
12 rivals, did not suggest that it had a brand advantage
13 over rivals, so, yes.

14 Q. Mr Parker, you do not know how BT was using this
15 material because the witnesses who spoke to these issues
16 were not asked about how any of these documents were
17 created or used, were they?

18 A. As we have established, no.

19 Q. After two reports, where it was very clear that issues
20 of brand value were important, and indeed you do, as you
21 say, mention the term "NPS" in your fourth report, but
22 do not engage with any of this material at all, you went
23 through a Joint Expert Statement process where you do
24 not mention any of this material at all, but now, after
25 the BT witnesses have been through the box, this is the

1 critical evidence that the Tribunal should now rely
2 upon, correct?

3 A. It is evidence that is relevant to the value of the BT
4 brand relative to that of rivals.

5 Q. But Mr Parker, you understand that in "Net Promoter
6 Scores", the "net" is referring to promoters versus
7 detractors, do you not?

8 A. Yes.

9 Q. -- and that in the middle you can have a significant
10 number of people who are what are called passive?

11 A. Yes.

12 Q. What can matter is which scores you put in which boxes
13 over time, correct?

14 A. Sorry, what do you mean?

15 Q. Let us say it is on a 1-10 profile and that, say, 1-4
16 are seen as detractors and 9 and 10 are seen as
17 promoters, between those two parameters you can have
18 a group of people who may be entirely happy and passive.
19 You understand that?

20 A. Yes, giving scores of 5-8, yes.

21 Q. So when you are thinking about positioning of a brand
22 you might be interested in understanding detractors
23 versus promoters. As Dr Hunt indicated yesterday, it is
24 a piece of information that would be relevant in
25 response to a question from the judge. But you need to

1 be extremely careful about how you interpret this
2 material in relation to overall brand value because of
3 course it is not capturing anything in the middle in
4 these scores, is it?

5 A. Well, BT is reporting the net promoter score. Clearly
6 it is doing that in a very consistent way over several
7 years and maybe different versions of these documents.
8 It presumably is reporting that because it thinks that
9 is of interest, so --

10 Q. I am not disputing any of that, Mr Parker.

11 A. -- so I agree with you there could be people moving
12 around within the passive category that, people moving
13 around within the category with either of the promoter
14 or detractor categories, so I agree with all of that.
15 I am not sure that it necessarily alters the overall
16 conclusion from these documents.

17 Q. What it may well do is provide BT with comparative
18 metrics as to how its brand is doing over time, might it
19 not, Mr Parker?

20 A. If one was -- sorry, what might do that?

21 Q. The NPS scores might provide you with comparative
22 indication as to how your investments in brand are doing
23 over time, might it not?

24 A. Yes, I think that is what BT was looking for. It was
25 looking for --

1 Q. It does not tell you the absolute strength or value of
2 the brand, does it, Mr Parker?

3 A. Well, it tells you about the strength of the brand
4 relative to others, in this case firms that are
5 providing retail telco services who are also in the
6 market.

7 Q. No, it tells you an aspect of where you are positioned
8 in relation to one metric but it does not tell you
9 overall satisfaction, for instance, of your customers
10 with your products or your brand, does it?

11 A. Well, satisfaction -- if you are satisfied you will have
12 a more positive net promoter score and if you are less
13 satisfied then you will not and you will come out as
14 a -- may come out as a detractor depending on your
15 overall lack of satisfaction.

16 Q. We do not know how they were used or what the sample
17 size was or how the promoter detractor categories were
18 chosen. We know they were taken into account because
19 Ms Blight said so. That is all.

20 A. Well, I think you have just said that promoters were
21 a score of 9 and 10 and detractors were a score of 1-4.

22 Q. No, I put that to you as a hypothetical because it is
23 not actually clear from the documents. Some of the
24 documents suggest that. Some of them do not.

25 A. That is absolutely fair, but this is the metric that BT

1 was monitoring and it was monitoring this metric on
2 a regular basis. It also monitored other metrics like
3 value for money I think was part of these net promoter
4 score documents. This is something that BT was
5 monitoring. I assume that it would be monitoring
6 something that it thought was an important metric.

7 Q. Let us just deal with the satisfaction issues in
8 addition to this, because I think it is clear that you
9 do not know -- I understand your submission in relation
10 to it at this late stage on these documents, but you do
11 not know how they were used and what should be taken
12 from them.

13 But let us then just look at the satisfaction
14 issues. I am going to briefly deal with that and then
15 it might be a good time for a break.

16 THE CHAIRMAN: Yes.

17 MR BEARD: If we go to your fourth report at {E/5/138}.

18 Just picking it up at paragraph 6.92. So this is under
19 the heading "Dr Jenkins's reliance on SFV Customers'
20 reported satisfaction levels."

21 You say:

22 "... I do not consider the level of satisfaction
23 expressed by SFV Customers to be a relevant metric for
24 the purposes of assessing economic value."

25 The first thing to note here is the focus on SFV

1 customers. I just want to check, other than that
2 attempt to grab on to the Line Only component in those
3 documents, I think you accept that all of the materials
4 that you are referring to in the bundle talk about Voice
5 customers; is that correct?

6 A. So there are examples of landline only in a number of
7 those documents.

8 Q. Yes.

9 A. But the rest of them will be more BT wide and sometimes
10 they break out, Triple Play, Quad Play and so on.

11 Q. That is fair, Mr Parker, that is right.

12 A. Yes.

13 Q. But we do not know, and then in relation to numerous of
14 those documents it is actually across Voice. But here
15 we are talking about satisfaction levels expressed by
16 SFV customers and you say that is not a relevant metric
17 for the purposes of assessing economic value.

18 Let us just be clear, in relation to NPS your Net
19 Promoter Scores, which is promote or detract, you say
20 those are relevant even though you are not clear whether
21 or not they do apply to SFV customers or how they are
22 calculated, but if you have got expressions of
23 satisfaction by SFV customers that is not a relevant
24 metric?

25 A. Well, I do not really think that either brand or

1 satisfaction are relevant metrics for economic value.

2 Q. Right.

3 A. I think there is a specific issue with satisfaction
4 which is essentially the point that Professor Loomes
5 makes which is on the next page at paragraph 6.94 which
6 you may be taking me to subsequently.

7 Q. I am going to deal with that. Can I just deal with 6.92
8 first. I will go to 6.94. You say:

9 "This line of reasoning would imply that it is not
10 possible for excessive pricing to occur in cases where
11 customers report that they are satisfied."

12 Now, that is not correct, is it? You can still have
13 satisfaction as a relevant metric of assessing economic
14 value without it meaning that satisfaction measures
15 simply exclude the possibility of excessive pricing?

16 A. Yes, that is fair.

17 Q. Then you say:

18 "I do not think that this is a sensible test. The
19 lack of link between customer satisfaction and the
20 'market working well' has been considered and dismissed
21 by regulators."

22 You give the example of the retail banking market
23 investigation. But before I go to that I just want to
24 go to the Ofcom 2013 report which you did not refer to
25 in any of your reports as I recall?

1 A. It does come up in the Joint Expert Statement.

2 Q. I was careful to say you do not refer to it in any of
3 your reports, do you, Mr Parker?

4 A. I do not -- in my solus reports, no, I do not.

5 Q. I was assuming they were your solus reports, Mr Parker.
6 Could we go to {C/340/1}. This is the 2013 statement.
7 If we go down to page {C/340/25}. This is in the course
8 of them assessing whether or not there is effective
9 competition. You are now familiar with the 2013 report
10 I think. I have taken you to it once or twice.

11 A. I am.

12 Q. "BT's retail share has not increased for residential or
13 business narrowband services."
14 So it is looking at residential services generally.
15 Then it says if you go down to paragraph 3.18:
16 "The observed changes in shares since the last
17 review ... supports the view that consumers continue to
18 have access to a range of competing services from
19 different providers."
20 Then on paragraph 3.19:
21 "Evidence on consumer switching and satisfaction
22 with fixed line services also supports the view that the
23 supply of retail narrowband services remains
24 competitive. In the 2012 Consumer Experience Report, we
25 found that switching levels had remained broadly

1 unchanged ... at around 10%; the same level as in 2009."

2 Then on paragraph 3.20:

3 "Customer satisfaction levels have also remained
4 high for fixed lines. The 2012 CMR shows that 89% of
5 consumers with fixed line at home were either 'very
6 satisfied' or 'fairly satisfied' with their service,
7 only two percentage points lower than in 2009 and
8 therefore relatively unchanged since the last review."

9 So here we have an example of Ofcom specifically
10 considering satisfaction measures and specifically
11 referring to them as supporting its view that the market
12 remains competitive.

13 A. Yes.

14 Q. When you said in your report that the lack of link
15 between customer satisfaction and the market working
16 well has been considered and dismissed by regulators,
17 I am assuming you had not looked at this paragraph. Is
18 that right, Mr Parker?

19 A. That is correct.

20 Q. Actually what this shows is that a regulator
21 specifically thinking about whether or not these markets
22 we are dealing with are working well has looked at
23 satisfaction measures; correct, Mr Parker?

24 A. That is right and then Ofcom clearly changed its mind
25 about its conclusions fairly shortly after the

1 publication of this report, notwithstanding the
2 satisfaction evidence.

3 Q. Mr Parker, when you say in your report "the link between
4 customer satisfaction and the market working well has
5 been considered and dismissed by regulators" that is
6 just not true on the basis of this document, is it?

7 A. It is not true in relation to that document. It is true
8 in relation to the retail banking example which I give
9 from the CMA, so I accept.

10 Q. We will come on to that, but now might be a good moment
11 just to pause.

12 THE CHAIRMAN: Yes, just a moment, please. (Pause).

13 Thank you very much, yes.

14 (11.24 am)

15 (A short break)

16 (11.42 am)

17 MR BEARD: So we were dealing with some issues to do with
18 brand -- with satisfaction, and I had been taking you to
19 Ofcom material suggesting that regulators just did not
20 dismiss this material, and you gave your answers in
21 relation to that. But you also mentioned what you cite
22 at paragraph 6.92, so this is {E/5/138}. This is the
23 CMA retail banking inquiry and you mentioned that.

24 A. Yes.

25 Q. You have got a quote there that I will come back to from

1 paragraph 5.100. It was not in the bundles, but it has
2 been uploaded I think, I hope. It is at {E/16.68/177}.
3 It should pop up on your screen.

4 A. Yes.

5 Q. I am not going to offer to allow you to browse through
6 it, it is about 600 pages long.

7 EPE OPERATOR: Can I just double check that reference.

8 MR BEARD: I have got {E/16.68/1}. I think it has only been
9 uploaded this morning.

10 EPE OPERATOR: Yes, it is here.

11 MR BEARD: You are fabulous, thank you.

12 THE CHAIRMAN: Right, just a moment. I thought we just had
13 a reference up to Mr Parker's fourth report, or was that
14 from before the break?

15 MR BEARD: We did have a reference to Mr Parker's fourth
16 report. That is where he quotes from this -- he quotes
17 from the banking inquiry.

18 THE CHAIRMAN: Oh, he quotes from this. Right, sorry.

19 MR BEARD: Sorry, let us just go back so it is clear. Could
20 we just go back to {E/5/138}, please. I am sorry, I was
21 moving too quickly.

22 THE CHAIRMAN: That is fine.

23 MR BEARD: If you go down to the bottom to 6.92. Mr Parker
24 is familiar with this. So I was asking questions about
25 that paragraph before the break and by reference to the

1 Ofcom 2013 material. Mr Parker then said: "but I also
2 quote the Retail Banking Market Investigation", which,
3 if we just go over the page {E/5/139}, it is the quote
4 at the top of the page, and that is from
5 paragraph 5.100, and I am just going to take you to the
6 underlying material.

7 THE CHAIRMAN: Yes.

8 MR BEARD: If we could go back to {E/16.68/177}, please.

9 This is under the heading "Quality outcomes", and then
10 do you see at the bottom of the page "Indicators of
11 overall quality"?

12 A. Yes.

13 Q. You see at 5.88 it says:

14 "Customer experience metrics, such as customer
15 satisfaction and advocacy ratings, can be useful as
16 indicators of the overall service received by customers,
17 and are widely used as a measure of overall service
18 quality, by both private companies and regulators."

19 So you see there that the CMA is referring to
20 satisfaction surveys as being relevant to this
21 assessment. You see that there?

22 A. Yes.

23 Q. Then if we go down, it refers to NPS and it refers to
24 satisfaction surveys generally.

25 Then if we go down to 5.96, please. {E/16.68/179}.

1 One of the interested parties, I think it is probably
2 Lloyds Banking Group, I am not absolutely sure what LBG
3 stands for:

4 "... submitted that customer satisfaction was not
5 a meaningful indicator of quality, as it reflected
6 customers' expectations and could be influenced by
7 non-quality factors such as what we refer to as brand
8 taint effects."

9 That is where you have a bad brand, effectively, and
10 I think at the time some of the banks had some concerns.

11 "While we recognise that there are limitations to
12 the use of satisfaction measures as a proxy for quality
13 outcomes, we maintain our view that customer
14 satisfaction is a useful and important indicator of
15 quality for the reasons set out above."

16 Now, I find it difficult to see how that statement
17 in this report signals the CMA considering and
18 dismissing the consideration of satisfaction in surveys;
19 it is not, is it, Mr Parker?

20 A. I think the previous quote of paragraph 5.100 ...

21 Q. I went to 5.88. Is that the one you wanted to go back
22 to?

23 A. Yes. Maybe I had a misreference in my report.

24 Q. No, no, I am going to go down to 5.100, which is the
25 next paragraph, but I am just taking you to this. This

1 is not dismissing this material, is it, Mr Parker?

2 A. No, it is saying there are limitations and that it can
3 be useful.

4 Q. It is "a useful and important indicator", is what it
5 says, Mr Parker?

6 A. Yes, that is right.

7 Q. Just to be clear, the paragraph you then refer to is
8 down the page, {E/16.68/180}. It is under "Comparisons
9 ...". It is 5.100:

10 "Several parties submitted that the high levels of
11 satisfaction suggested that the market was working well.
12 However, we consider that customer experience metrics
13 such as satisfaction will be determined at least in part
14 by customers' expectations of product or service
15 quality. Since this expectation is likely to be
16 influenced by the range of service offered by current
17 providers, high absolute levels of satisfaction cannot
18 necessarily be interpreted as implying that the market
19 is delivering good outcomes for customers. For this
20 reason our analysis of customer experience measures is
21 largely focused on the comparative performance between
22 banks."

23 But it is there saying, I think as you fairly put it
24 just now on the transcript: "these are important, but we
25 will be careful about how we use them"; correct?

1 A. Yes, and so I think the way that the CMA was looking at
2 it in this case, and ultimately it found that the market
3 was not working well and remedies were imposed, it was
4 saying parties had said: "well, look at customers, they
5 are really satisfied, that indicates there are no
6 problems", and the CMA said: "no, we do not agree with
7 that". So they are saying: "we are not going to look at
8 the absolute level of satisfaction as telling us
9 anything terribly interesting, but we are going to look
10 at relative levels of satisfaction, because that might
11 tell us about the relative performance of one firm in
12 the market vis à vis another". That is the way I think
13 I understand what they are saying here.

14 Then if you look at the previous points we were
15 talking to, the Net Promoter Scores, one of the examples
16 where people were using that analysis.

17 Q. I completely accept that they do refer to it, as indeed
18 did our witnesses, Mr Parker. But none of this detracts
19 from what is said at paragraph 5.96, and this is simply
20 not, as you put it at 6.92, the regulator dismissing
21 these metrics, is it?

22 A. Well, this is -- the link I am talking about is between
23 customer satisfaction and the market working well, and
24 therefore not requiring any kind of intervention, as in
25 the context of the market investigation by the CMA, and

1 the CMA is there is saying: just because people tend to
2 answer "I am satisfied with the performance of my bank
3 account", that is not enough for them to say, right,
4 case closed, we will move on.

5 Q. Not enough, I can see that, Mr Parker, but it is not
6 dismissing.

7 Let us go on to the next two paragraphs in your
8 report. So let us go back to {E/5/139}. I think this
9 is the material that you wanted to refer to in relation
10 to Professor Loomes. If we can just look at 6.93.

11 A. Yes.

12 Q. You will see there at 6.93, and obviously these sorts of
13 issues will be discussed further, no doubt, between
14 Professor Loomes and Dr Hunt, but:

15 "... I consider that levels of satisfaction based on
16 stated preference surveys are not an appropriate
17 methodology for measuring distinctive value as
18 customers' responses are likely to reflect their
19 expectations and the nature of the service ..."

20 I frankly do not understand that proposition,
21 Mr Parker.

22 "... and could be influenced by a range of factors."

23 That I do understand.

24 "As I noted in section 4, BT viewed its SFV customer
25 base as likely to respond positively in surveys, despite

1 any frustrations they may feel. For instance, a 2019
2 customer insights document stated: 'there are some
3 negative, describing more extreme frustrations. And
4 even then, perhaps because of who's in the base, they
5 [SFV customers] can still find something nice to say'."

6 You then say:

7 "I note that this conclusion is consistent with
8 those of Professor Loomes ..."

9 That is at 6.94. Correct?

10 A. Yes.

11 Q. So you are referring there, at footnote 448, to
12 a document which you say provides insight as to how BT
13 viewed its SFV customer base, correct?

14 A. Yes.

15 Q. The document in question is {F/632/1}.

16 I should say you refer to Professor Loomes talking
17 about particular "surveys", plural, but there is
18 actually only one he refers to, is there not?

19 A. I am referring to the survey, and I am saying that my
20 conclusion from that survey is consistent with
21 conclusions of Professor Loomes, so I think just for
22 clarity on the language.

23 Q. We will leave that for the moment.

24 So this is the 2019 document referred to. Can you
25 just see the title of it?

1 A. Yes.

2 MR BEARD: It is in black and white, we actually have
3 a colour version of this. Does the Tribunal want it?
4 It is a hard copy. I am happy to provide it.

5 THE CHAIRMAN: Speaking for myself, I could do with a hard
6 copy as I am collecting a number of them.
7 Mr Doran would like one as well, please. Thank you.

8 MR BEARD: I am sure we can get a coloured copy. (Handed)

9 A. Black and white is fine, unless we are going to be
10 talking about specific colours on graphs.

11 Q. I do not think it will matter. I will do the old
12 snooker commentator gags, if required.

13 A. Very good.

14 Q. Just reading the title there, Mr Parker, "Solus -
15 Landline only - customers".

16 A. Yes.

17 Q. That is not all SFV, is it?

18 A. That would be Voice only, yes.

19 Q. That would be Voice only, will it not? So when in the
20 parentheses in 6.93 you said "who's in the base ... [SFV
21 customers]", that should not say SFV customers, should
22 it, Mr Parker?

23 A. No, it should say Voice Only Customers.

24 Q. Thank you.

25 So let us look at this. So this is Voice Only

1 Customers and this is 2019, so this is obviously after
2 the Commitments?

3 A. Yes.

4 Q. Let us just go down to slide {F/632/4}. This is:

5 "Methodology and sample - use of telephone
6 interviews means results cannot be compared to those
7 from the - online - Consumer Brand & Relationship NPS
8 survey."

9 Do you see that, Mr Parker?

10 A. Yes.

11 Q. You see on the left-hand side:

12 "Methodology:

13 "We conducted interviews between 29th January and
14 11th February ... with a sample of BT solus -
15 landline-only customers.

16 "By the nature of this customer base (... being
17 genuinely landline-only), it was not possible to conduct
18 fieldwork using the usual approach for quantitative
19 surveys, i.e. online interviews (self-completion)."

20 You took me earlier, Mr Parker, at your own
21 instigation, to a document which you thought indicated
22 what the definition of fieldwork was, and you expected
23 it to be face-to-face fieldwork. Do you accept that
24 this document that you are referring to in your report
25 actually indicates that normal fieldwork is online

1 interviews, do you see that?

2 A. Well, in this case for people who are online. But what
3 it is saying is, you know, fieldwork is clearly
4 a general concept, so I stand corrected on that, but in
5 this case it is saying we cannot get to these customers
6 in relation to -- through an online approach so we have
7 to use a telephone survey.

8 Q. But you did not look at this. When you were making
9 those submissions to me earlier about how to interpret
10 those documents and landline only, you did not put
11 together the fact that you had cited a document which
12 specifically focuses on landline only customers and
13 specifically articulates a different methodology that is
14 not comparable to the normal methodologies used. You
15 did not look at that?

16 A. No.

17 Q. So here we have a situation where you can see interviews
18 were done by telephone by trained interviewers. What is
19 interesting about this is we know on the right-hand side
20 what the scale of the sample was here, do we not,
21 Mr Parker?

22 A. Yes.

23 Q. Because it explains it?

24 A. Yes.

25 Q. If we go down to slide {F/632/9}, please. You place

1 great weight on NPS. Did you look at the NPS in this
2 slide, Mr Parker?

3 A. I do not recall. I do not think so.

4 Q. You do not think so. So NPS has become this very
5 significant piece of new evidence that you rely upon
6 that was not put to our witnesses. The one document
7 that you refer to in this section has a slide in
8 relation to NPS but you did not think that that was
9 worth mentioning?

10 A. I did not recall this particular slide, no, and as you
11 see on the previous slide that you took me to ...

12 Q. Slide 4 {F/632/4}.

13 A. Fourth paragraph down on the left:

14 "... interviewer-administered [interviews] can lead
15 to more positive ratings as respondents seek to please
16 the interviewer."

17 Q. That is completely true, Mr Parker. We do not have any
18 doubt about this. This document that you cited has an
19 explanation of how the methodology is undertaken, what
20 the concerns are, some of what the biases are, what the
21 details of the sampling methodology are, all of the
22 sorts of issues I think you would accept are extremely
23 important when you are interpreting survey material,
24 correct?

25 A. Yes.

1 Q. In contrast, all the material you have produced in
2 relation to NPS, we do not have that, do we, Mr Parker?

3 A. I do not think it is in the documents, no.

4 Q. You have seen, I think, Dr Hunt's evidence. I think he
5 took you to some of it, {IR-E/21/76}. I think he took
6 the Tribunal to these overall satisfaction and
7 comparative satisfaction tables. You have seen those?
8 You recall those, Mr Parker?

9 A. Yes.

10 Q. I do not think you dispute any of the figures in those.
11 But if we could just go over the page, {IR-E/21/77}, you
12 will see at the bottom he has also done an overall
13 satisfaction with landline service value for money
14 analysis. Do you see that?

15 A. Yes.

16 Q. Can you see that is drawn from Ofcom Switching Tracker
17 data?

18 A. Yes.

19 Q. You do not dispute any of the figures in there?

20 A. I do not dispute the figures, no.

21 Q. I just have a couple more questions, Mr Parker.

22 Yesterday, in the course of your observations, you
23 referred to the "rump" of customers, do you remember?

24 A. Yes.

25 Q. I can take you to the reference if you want to --

1 A. No, that is fine. I was meaning the remaining customer
2 base that was still in the -- still taking SFV Services.

3 Q. Okay, I just want to clarify what that means in relation
4 to this case. Could we go to {IR-E/18/49}. I think you
5 will recall this table, it is in Dr Jenkins' second
6 report.

7 A. Yes.

8 Q. This is taking the 2014 cohort, so this is the people
9 that were SFV customers in 2014 and looking at how many
10 left over the period.

11 A. Yes.

12 Q. I just want to check, when you talk about the rump of
13 the customers, are you talking about effectively the
14 black -- in relation to this 2014 cohort, are you
15 talking about the black bar in 2022?

16 A. Well, I was not specifically thinking cohort by cohort
17 when I made that statement, I was thinking of the
18 remaining customer base that was there, which I think
19 is -- Dr Jenkins has a line chart which is what I was
20 thinking of.

21 Q. Yes, that is what I am going to take you to. But if we
22 just focus on the 2014 cohort for the moment --

23 A. Then, yes.

24 Q. -- are you saying the rump is the 2022 black bars, is
25 that right?

1 A. Yes, it is the remaining -- at any point, it is the
2 remaining people in the --

3 Q. Hold on. At any point. So are you saying that in 2014
4 this is the rump?

5 A. So at 2014 the rump is the remaining SFV customers,
6 because if we can go to Dr Jenkins' chart you will see
7 that there has been a reduction in SFV, the size of the
8 total SFV base before that period, and then there has
9 been a continued decline thereafter.

10 I am not sure there was any magic in the term "the
11 rump", what I meant was the remaining customers.

12 Q. I am trying to work out at what point we are talking
13 about, because on the face of it, the rump, when you
14 talk about remaining customers, could be the remaining
15 customers today?

16 A. Could we go back to the transcript, because I cannot
17 quite remember the context.

18 Q. Yes, sorry. Absolutely. I think it is {Day17/106:4}:

19 "So what level of disappearance of SPC customers
20 would satisfy you that Ofcom's intervention was right?"

21 You will see your initial answer. Then there is
22 another question. Then you will see your reference to
23 "rump" is right at the bottom. I am just giving you the
24 full context here.

25 THE CHAIRMAN: Just a moment.

1 MR BEARD: My apologies.

2 THE CHAIRMAN: Just a second. (Pause). If Mr Parker has
3 read that, can we just go to the next page so we can
4 finish off the sentence?

5 MR BEARD: Of course, I am so sorry. {Day17/107:1}.
6 (Pause).

7 A. Yes, I think there might be -- either I misspoke or
8 there is a typo in the third line. It should be "BT has
9 been able to raise the price".

10 THE CHAIRMAN: So not switching away in response to price in
11 sufficient numbers and that BT has been able to raise
12 the price.

13 A. Yes, exactly. To whom BT has been able to raise
14 the price.
15 So I think that the rump I was referring to would be
16 the remaining customers in the class at whatever time,
17 and in the context of this discussion it is the SPCs,
18 I think we were talking about the SPCs post-Commitments,
19 and therefore that is essentially the full ...

20 MR BEARD: Right. So if we just go back to Figure 3.3, so
21 that is {IR-E/18/49}. Just to be clear, because
22 obviously each of the black bars across the years are
23 subsets of the initial black bar in 2014 --

24 A. Yes.

25 Q. -- are you saying that the cohort in 2014 is the rump?

1 A. No, I am saying all of the SPC customers remaining in,
2 say, 2020, so all the Members of the Class, are the
3 remaining customers. That is what I am referring to.
4 I am referring to all remaining SPC customers, some of
5 whom may have joined, although I do not think there is
6 evidence --

7 Q. Do not complicate it with "may have joined", let us just
8 focus on the 2014 cohort. I want to work out what you
9 are saying about the rump in relation to the 2014
10 cohort.

11 A. Okay, but the point was not about the 2014 cohort
12 specifically.

13 Q. No, I will take you to the next lines. I understand you
14 want to deal with that, but I just want to get clear on
15 what you are saying in relation to the 2014 cohort.

16 A. Yes, I am saying there were a group of customers that
17 were there in 2014, and many of them had left by 2020,
18 for example, and I am looking at the customers that
19 remain, so the black bar.

20 Q. The claim period is throughout this. So when you are
21 talking about the rump of customers, I am just trying to
22 work out whether or not we should be thinking about the
23 group at the start of the claim period being a rump or
24 the group later on?

25 A. Well, in the context of that discussion I think we were

1 looking at the post-Commitments period, but in principle
2 you could look at -- I mean, I am really meaning "rump"
3 here to mean all Class Members, so the point being that
4 there are -- Class Members are not switching away in
5 sufficient numbers in response to price so as to
6 constrain the price that BT is able to charge for them
7 down to the competitive level. So if you wish to
8 replace the word "rump" with "the remaining customers",
9 in that case, in that context, it was SPC customers
10 post-Commitments, but in another context it could be --
11 I mean, it would have to be the start of the claim
12 period, but it is the remaining customers.

13 Q. Right, so just to be clear, if we are looking at the
14 Class and across the claim period, people that are
15 members of the proposed Class in 2014 in this cohort, if
16 they switch away in 2015, for your purposes they are
17 still part of the rump?

18 A. If they switch away in 2015, it would depend whether
19 they were -- whether they switched before or after the
20 claim period, but let us suppose they switched before
21 the claim period and they were never around at all --

22 Q. Understood.

23 A. -- and then after the claim period if they switch away,
24 or at any other point, then they are in the relevant
25 group of customers before they have switched away and

1 then no longer afterwards.

2 THE CHAIRMAN: Do you mind if I ask a question here?

3 MR BEARD: Please.

4 THE CHAIRMAN: If I understand what you are saying, what
5 I think you are saying is you could -- let us just use
6 the word "remaining customers". In any given year where
7 there has been a certain amount of switching, there is
8 a group of customers which starts at being the majority
9 which remains, in any given year.

10 A. Yes, there is a group of customers who are still --

11 THE CHAIRMAN: Who are still there.

12 A. Taking the SFV Services, still in the Class, and that is
13 what I mean by the "rump", it is the remaining group of
14 customers.

15 THE CHAIRMAN: As I understood it, the point you were making
16 was: it is perfectly true that people left, but at any
17 given point there were people who, a large number of
18 people who did not leave, and for them they stayed and
19 they paid the increased price.

20 A. Exactly.

21 THE CHAIRMAN: Is that your point? That was your point?

22 A. Yes.

23 THE CHAIRMAN: And it could apply at any particular time.
24 There would be a separate point, what you might want to
25 call the ultimate rump, of if you stop at a particular

1 point, who is still left after everybody has been
2 leaving for 10 years or six years? Ignore joiners for
3 the moment.

4 A. Exactly.

5 THE CHAIRMAN: But as I understood your point, it was simply
6 that, yes, a lot of people have left, but there are many
7 more who -- within the group, there are people who
8 stayed?

9 A. Yes, there are people who have stayed and they are
10 paying a higher price, and that is the only point I am
11 making.

12 MR BEARD: Right, I think we are clear.

13 THE CHAIRMAN: Yes.

14 MR BEARD: We can go down to the next graph if you want, but
15 I think we are now clear that "rump" is not the end
16 cohort.

17 THE CHAIRMAN: No, exactly.

18 MR BEARD: So that was ...

19 A. Yes.

20 Q. Sorry, if you want to go down, but I do not think this
21 makes any difference, because I think you have explained
22 your position in relation to definition, but can we just
23 go down the page because you wanted to see -- sorry,
24 maybe over the page, apologies. {IR-E/18/50}, yes.
25 This is the plot that includes the new people coming in?

1 A. I was actually thinking of a much more simple line graph
2 that Dr Jenkins has in her report, possibly Figure 4.1,
3 saying these are the remaining customers in the Class,
4 and that is all I am referring to.

5 Q. Okay, fine. I think we understand where you are.

6 Can I just finish -- there is just I think a couple
7 of brief additional questions. We have been looking at
8 people switching away, and a lot of that switching we
9 know is to bundles --

10 A. Yes.

11 Q. -- and I think the numbers are not contentious on that,
12 and obviously that will be a matter for submission in
13 due course.

14 But you have, on a number of occasions, talked about
15 the possibility that bundle prices could have been
16 lowered by BT. I just want to understand what you were
17 saying in relation to that, because I think we work on
18 the basis that there is workable competition in relation
19 to the bundles market. I think that has been accepted.
20 But you are saying that BT should lower its bundle
21 prices below the prices set in workable competition in
22 order to create a migration effect, is that right?

23 A. No, this is in response to the view that there is
24 a migration effect.

25 Q. Yes.

1 A. Or there was a migration intent. So workable
2 competition, as we have discussed earlier, does not rule
3 out that there might be pockets of supra-competitive
4 pricing, but there is not enough dominance.

5 Q. I do not think we accept that as an overall proposition,
6 there are variations in market power, but leave that for
7 the moment.

8 A. So then the question is: is there -- if you were exactly
9 at a kind of zero economic profit, so if workable
10 competition meant zero economic profits, then you would
11 not want to cut your price below that level because you
12 would be making a loss on those customers.

13 Q. Right, yes.

14 A. Therefore, in that world, there would be -- then you
15 would not want to cut your price further. If there is
16 some fat for whatever reason, so some ability, you are
17 currently above the competitive level on your bundle
18 pricing, because it may be workably competitive but
19 there might be pockets of market power or some --

20 Q. Or price dispersion?

21 A. Well, that would be the same as saying I have got a bit
22 of market power. Not enough to lead to a dominance
23 concern.

24 Then for me the most efficient way to get people to
25 choose a bundle would be to cut the price of the bundle,

1 because you might then attract people from SFV, you
2 might attract people from other people's SFV, you might
3 attract people from other bundles. It would be more
4 profitable to do so.

5 Q. Right, and just looking at the numbers we are talking
6 about, you would be cutting the prices for all bundle
7 customers, correct?

8 A. Yes.

9 Q. That is what you are suggesting BT would do. So in
10 order to attract the remaining people that are SFV
11 customers, you are suggesting it is rational for BT to
12 cut all of its bundle prices, correct?

13 A. Well, you can cut prices on an acquisition basis, so you
14 have an acquisition tariff and a back book tariff.

15 Q. Right. So you are suggesting there that they should
16 actually maintain that differential in order to enable
17 that rationally?

18 A. That is what they were doing.

19 Q. But that is what you suggest should be done?

20 A. In the context of an argument that BT was putting up its
21 prices of SFV Services in order to drive people to
22 bundles, it seems to me another way to achieve the same
23 relative price differential is to put the price of
24 bundles down.

25 Q. Right, but below the workably competitive levels?

1 A. Well, that is -- maybe there are some pockets of market
2 power. But if there is no workably -- if you are
3 absolutely at the zero economic profit, and there is no
4 profit to be gained from moving someone to a bundle,
5 then I accept that BT would not be wanting to do that.
6 But in that world, why would there be a migration
7 intent? You are just moving to zero economic profits.
8 That seems not like a great strategy.

9 Q. Right. So it is dependent on that sort of perfect zero
10 profits analysis?

11 A. Well, no. There is either a world where there are some
12 profits in bundles, and you could cut the price in order
13 to attract more people to bundles, or there is a world
14 in which there is no economic profits in bundles, in
15 which case BT would have no incentive to cut the price
16 and there would be no migration intent.

17 Q. Just to be clear, in relation to your analysis overall,
18 because you think there is a secular trend in relation
19 to that transfer, then it presumably would not be
20 rational for BT to cut those prices because you would
21 expect the shift in any event, is that right?

22 A. Well, if there is a secular trend away from SFV towards
23 bundles, then BT has to think about how to set the price
24 of bundles in order to try and attract as many of those
25 people to its own bundle rather than to other people's

1 bundle.

2 Q. So it is the recapture incentive issue?

3 A. It is the same as the recapture incentive issue.

4 MR BEARD: I see, okay. I do not have any further questions
5 for you, Mr Parker.

6 THE CHAIRMAN: Thank you very much indeed.

7 Any re-examination?

8 MS KREISBERGER: I have no re-examination.

9 THE CHAIRMAN: Just one moment.

10 Questions by THE TRIBUNAL

11 MR RIDYARD: Mr Parker, I just have one question for you,
12 going back to near the beginning of this session, about
13 quality improvements. So there is the example of the
14 Call Protect, I think the Call Protect case is a useful
15 example to go through. I just want to understand what
16 your position is on this.

17 So here what is said is that BT introduced
18 Call Protect, it was a small -- it was an innovation, it
19 was a service quality improvement that met a consumer
20 demand for being protected from nuisance calls or
21 whatever it was, and your point on that I think was to
22 say: "yes, it was done, it was quite a low cost to
23 achieve this benefit to consumers", and competitors --
24 it was quite easy for competitors to copy it as well,
25 and they rapidly did copy it. I can see that if that

1 happens then there is no competitive -- no lasting
2 competitive advantage. You might get a few months'
3 advantage, but then it just gets copied, because it is
4 easy to copy, and it is copied by your rivals.

5 My question is about value in that situation,
6 because in that situation where all your competitors
7 have spotted what you have done and they have copied
8 you, I can see that you do not get any lasting
9 competitive advantage out of having done so. But is it
10 not also true that the world is a better place for this
11 having happened, because previously consumers were not
12 being protected and it was harmful to them, and now they
13 have all got call protection, whoever they happen to be
14 buying their service from, so they are all better off?

15 So does your argument rely on the idea that the cost
16 of that adequately reflects the extra value that they
17 have achieved, or could there be some extra value from
18 consumers being better off living in a world where they
19 have call protection than a world where they do not have
20 call protection?

21 A. I think competition drives the innovations across the
22 market in that case. My view is that you need to have
23 sort of some unique competitive advantage, unique value
24 advantage for customers, for it to then to be taken into
25 account as a piece of economic value, or an economic

1 value argument, in the context of *United Brands*.

2 Because, yes, generally quality improvements will happen
3 across all markets probably, but the benefits of those
4 go ultimately to consumers if the markets are
5 competitive because they all get -- there is copying and
6 so on.

7 So I think, for me, I would not include that type of
8 innovation, the sort of gradual innovation, as something
9 that would be relevant in the *United Brands* context.

10 I think it goes to consumer surplus. Consumer surplus
11 might be getting -- might be improving over time because
12 you are getting more -- these innovations are happening
13 and you are getting more, and that is true across the
14 board. But the question then is -- here we are saying,
15 well, BT's prices are -- assuming we have got as far as
16 limb 2, they are excessive and significantly excessive,
17 and if everyone else is essentially offering the same
18 product I do not think that is a unique advantage for BT
19 which we take into account, otherwise you end up back in
20 the sort of willingness to pay type issue. This
21 innovation has come in, it has increased willingness to
22 pay, but I do not think that is enough to say, well,
23 that must be unique economic value or additional
24 economic value.

25 MR RIDYARD: It is clearly not unique by the way the case

1 has been set up, but it could nevertheless have improved
2 consumer value, or consumer surplus, as you put it,
3 because we have moved from a world where consumers were
4 not protected to one where they are protected, and that
5 matters to consumers.

6 So the competitive process has delivered a benefit,
7 but because everyone has -- but you are saying because
8 everyone can easily achieve that benefit, it is not --

9 A. It is not an explanation of why BT can raise prices
10 significantly, persistently above the competitive level
11 as per limb 1.

12 MR RIDYARD: Yes, okay.

13 A. That is the benefit of competition, that is what
14 happens, but the bit we are trying to explain is not
15 what happens in competition, it is why the price now is
16 significantly persistently above that competitive level.

17 MR RIDYARD: Thanks.

18 THE CHAIRMAN: Thank you very much indeed, Mr Parker. Your
19 evidence on this point is finished. Thank you.

20 (The witness withdrew)

21 MR BEARD: So I think we will call Dr Jenkins.

22 THE CHAIRMAN: Yes, thank you.

23 DR HELEN JENKINS (reaffirmed)

24 MR BEARD: Dr Jenkins, I think the files in front of you are
25 probably the ones that have been in front of you during

1 the hot tub process. I am not actually sure what is in
2 them, so ... They probably have the reports and the JES,
3 is my guess.

4 MS KREISBERGER: Yes, you should have the documents I am
5 going to take you to, particularly Ofcom material.
6 I will give you a moment, Dr Jenkins, to check you have
7 the hard copies where helpful.

8 THE CHAIRMAN: Are the documents that you want to put to
9 Dr Jenkins just in one file?

10 MS KREISBERGER: Yes, I think so.

11 THE CHAIRMAN: So there must be some other documents which
12 are just the reports and things like that.

13 MS KREISBERGER: You should have your reports.

14 A. Yes, I have got the joint economic experts' statement,
15 my reports, Mr Parker's reports, and Mr Matthew's
16 reports I think.

17 THE CHAIRMAN: Yes, but you said you had a collection of
18 documents as well.

19 MS KREISBERGER: Yes, you should have a collection -- have
20 they not gone up?

21 A. I do not believe I do.

22 MS KREISBERGER: Yes, the Ofcom documents. If not, I think
23 we may have a spare set.

24 A. Hang on, there is something here. Is that it?

25 MR ARMITAGE: It is these. (Handed).

1 MS KREISBERGER: Thank you very much. There should be three
2 documents in that pack. They are all for Dr Jenkins.

3 THE CHAIRMAN: They are all there.

4 Right, thank you.

5 Cross-examination by MS KREISBERGER

6 MS KREISBERGER: I think we are all set, thank you. Just
7 rearranging papers.

8 Dr Jenkins, good afternoon. I would like to turn up
9 your first report to begin with. It is at {IR-E/17/247}
10 and I would like to show you paragraph 7.2.

11 Now, this is where you list the factors which you
12 say are relevant to unfairness in itself under limb 2,
13 yes?

14 A. Yes.

15 Q. The first factor that you list there is:

16 "Competitive links that exist across fixed Voice
17 services sold standalone and within a bundle and their
18 impact on the pricing of SFV Services."

19 That is the point you made in the hot tub yesterday,
20 Dr Jenkins?

21 A. Yes.

22 Q. Now, you address this point in substance in your
23 section 7A.1. Could we move forward to page
24 {IR-E/17/249}, please. You see there the heading "BT's
25 SFV Services pricing was economically rational in the

1 context of the market's competitive dynamics"?

2 A. Yes.

3 Q. Then if we turn the page to {IR-E/17/250},
4 paragraph 7.11:

5 "... the market context in this case means that
6 there are strong demand and supply-side factors that
7 would encourage market participants to structure their
8 pricing to encourage customers to take multiple services
9 from them ... commercial pricing in this way would be
10 rational given the economies of scope and in order to
11 meet varying consumer demand. This could be expected to
12 lead to welfare benefits for multiple types of consumer.
13 In my view, implementing a commercial strategy of this
14 type is not suggestive of unfair behaviour on the part
15 of BT or ... other operators ..."

16 You go on:

17 "Therefore, the competitive dynamics in the supply
18 of SFV Services should not be considered in isolation
19 from those in the supply of fixed Voice services sold in
20 bundles, irrespective of whether fixed Voice services
21 sold in bundles are included in the relevant market."

22 You say you assessed that in detail, and this is:

23 "... highly relevant to any assessment of unfairness
24 under Limb 2."

25 So Dr Jenkins, in the light of that, you are

1 referring here to your hypothesis that BT's pricing of
2 SFV Services was consistent with the strategy of
3 encouraging customers to switch to bundles?

4 A. Yes, that is right.

5 Q. That has been explored in detail in relation to market
6 definition and dominance.

7 Now, the specific proposition you advance under
8 limb 2 is that it is economically rational for BT to set
9 high SFV prices, yes?

10 A. Yes, the structure of pricing, such that SFV pricing is
11 set to ensure the right relativity between a standalone
12 Voice and Voice sold in a bundle.

13 Q. Yes.

14 A. So whether it is high or not is a different question.
15 It is that BT is setting a system of prices where
16 the pricing of Voice, as it will be sold in the bundle,
17 is relevant to the question of the price of Voice which
18 also affects people purchasing Voice standalone.

19 Q. Dr Jenkins, you say the SFV price is not high, but of
20 course we are dealing with limb 2, so I think we are all
21 agreed that the SFV prices will have been found
22 excessive under limb 1 by this stage of the analysis,
23 yes?

24 A. Yes, however --

25 Q. So if excessive SFV prices are economically rational as

1 you say, your evidence is that indicates that they are
2 nonetheless fair. They may be excessive but you say,
3 for this reason, they are nonetheless fair under limb 2?

4 A. Yes, that is a consideration to be taken into account.

5 Q. So I just want to probe your contention that the
6 excessive SFV price is economically rational. Your
7 position is that SFV customers switch to bundles in
8 response to SFV price increases, yes?

9 A. I think my contention is that BT is setting its prices
10 which are to recover the costs of its activities, and,
11 as you say, at this point the determination will have
12 been there is a cost-plus benchmark such that
13 the pricing is excessive, and then that system of
14 pricing affects the choices that those customers make,
15 including that having a lower incremental price for
16 acquisition prices for broadband products will encourage
17 switching.

18 Q. Yes, will encourage switching. Thank you, Dr Jenkins.

19 So it is also your evidence, and it is common
20 ground, and we heard from Mr Beard not very long ago,
21 that the bundles market is competitive?

22 A. Yes.

23 Q. So you accept, therefore, that when BT increases its SFV
24 prices, it risks losing customers who switch to rival
25 bundle suppliers?

1 A. Yes, it does.

2 Q. Or to another SFV supplier like the Post Office?

3 A. Yes, it does.

4 Q. Now, if, on the other hand, BT lowers its bundle prices,
5 that would make its bundles more attractive to its SFV
6 customers, yes?

7 A. It would.

8 Q. So BT SFV customers who want to migrate across to
9 bundles, they might be more likely to stay with BT in
10 response to lower bundle prices?

11 A. They might.

12 Q. If BT were to reduce its bundle prices, that would also
13 make BT bundles more attractive to customers who buy SFV
14 Services from rivals like the Post Office?

15 A. Sorry, I missed the first part of that part.

16 Q. So if BT reduces its bundle prices, those bundles may
17 become more attractive to rival SFV customers who are
18 thinking of switching to a bundle?

19 A. Yes, that is right.

20 Q. Equally, the same goes for TalkTalk's SFV customers or
21 Sky's SFV customers.

22 Now, that is why Mr Parker's position is that hiking
23 up the price of SFV prices is not a rational way of
24 encouraging customers to switch to bundles. I can just
25 show you the reference if it helps. That is Mr Parker's

1 third report, that is {IR-E/3/206}. That is at
2 paragraph 6.156. So if we could zoom in on that, the
3 lower part, thank you.

4 So you see there that is Mr Parker's position?

5 A. Yes, I see that.

6 Q. Now, turning then to your evidence in the hot tub
7 yesterday, in response to a question from Mr Ridyard,
8 which was about defining economic value as the area
9 under the demand curve, let us pull it up so I can show
10 you what you said. So that is {Day17/34:21}.

11 At line 21 you say:

12 "So I think the question is still relevant and valid
13 for the Tribunal to consider whether or not, in a sense,
14 in the counterfactual, could you lower the price and get
15 exactly the same outcome? So the producers keep doing
16 exactly what they are doing and the consumer ..."

17 If we go over the page.

18 "... just all that happens is the consumer gets more
19 value ... So that is almost the predicate for this type
20 of idea that this excessive pricing case is one -- that
21 is all you do."

22 So I think what you are saying there, Dr Jenkins, or
23 what you were saying yesterday, is that under limb 2 you
24 need to ask whether, in the counterfactual, you could
25 lower the SFV price and keep everything else the same.

- 1 That is the point you were making there?
- 2 A. That is the point, yes.
- 3 Q. Now, let us assume a counterfactual is relevant to
4 fairness. I am not going to get into that. But if, as
5 you say, BT's objective is to migrate SFV customers to
6 bundles, then I think you have already accepted in the
7 counterfactual world BT could lower the bundle price
8 instead?
- 9 A. I do not think I accepted that. I accepted your
10 description of what might happen if that price change
11 happened, price change happened.
- 12 Q. In the counterfactual world, if BT wants to migrate
13 customers to bundles, it could simply lower the bundle
14 price, could it not?
- 15 A. But the counterfactual world we are talking at about
16 here is one about SFV prices because that is the concern
17 about those being excessive, so you do not have
18 a counterfactual world in which bundle prices are
19 reduced in this case.
- 20 Q. Dr Jenkins, your position is that the counterfactual
21 shows the price to be unfair because you say you cannot
22 assume that you could lower the SFV price and still
23 achieve the objective of migration to bundles. I am
24 putting to you that a different approach would involve
25 BT lowering the bundle price to attract customers to

1 bundles, which we went through at the outset?

2 A. But what we did not discuss was whether or not reducing
3 the bundle price is a reasonable thing to expect to
4 happen in this scenario and so that there is
5 a constraint that is active in the actual market which
6 is we have assumed that the bundle market is competitive
7 which means that pricing is set under competitive
8 conditions. The concern is here that the SFV prices are
9 not and the Voice prices are not set competitively. So
10 that is a sense in which you cannot just say, "okay, we
11 will just move one of these or we will move the other
12 one", and you do not expect to see any other change in
13 the market in general, and there is an interlinkage
14 between these two.

15 I think the relevant counterfactual here, and that
16 is what I was referring to yesterday, is what would
17 happen if the Voice price was reduced. Now, if you were
18 to also reduce the bundle price then the issue will be
19 that overall BT is not earning the revenue it needs to
20 earn to compete in the market for the investments that
21 it is judging are necessary for it to offer attractive
22 services that its customers then stay with it or are
23 attracted to it and that is why you cannot just see
24 changing the price on a standalone basis, you have to
25 think about: "they are rebalancing for loss of calls"

- 1 and "they are ensuring they can invest".
- 2 Q. Dr Jenkins, it is your evidence that BT makes greater
3 profits on bundles than it does on SFV customers, is it
4 not?
- 5 A. In absolute level terms, yes.
- 6 Q. So you cannot at the same time be suggesting that BT
7 could not be reduce the price of its bundles?
- 8 A. But I can say that, because if that profit level is set
9 in competitive conditions to ensure that the offering is
10 competitive with the appropriate level of underlying
11 investment and the risks that they are taking, that
12 level of profit is what has been the result of that
13 competitive process. So you cannot just say, well: "we
14 will reduce that and everything else will stay the
15 same."
- 16 Q. Right, let us move on. Staying with your point about
17 economically rational strategy. Let us assume for the
18 sake of argument that your hypothesis that BT raised SFV
19 prices to drive migration to bundles, let us assume for
20 these purposes that is a plausible argument. Now, when
21 you describe BT's strategy of pricing SFV Services at
22 a higher level than bundles, when you say that is
23 economically rational, what you mean is that is a profit
24 maximising strategy for BT, yes?
- 25 A. I think what you can say is that it is the higher -- it

1 is what BT think will drive the highest profits it can
2 earn. Whether it is actually profit maximising or
3 whether in the face of the competition they faced they
4 may still struggle to increase their profits is
5 a different question.

6 Q. Let us go with your formulation now of driving the
7 highest profits it could earn. Pricing services at
8 a large mark-up over costs is another way of driving the
9 highest profits a firm could earn, is it not, if enough
10 customers will pay the high price?

11 A. I mean, yes, the difference between price and your
12 measure of direct costs is your gross margin and if you
13 increase prices your gross margin will increase.

14 Q. So it can be economically rational to set prices far
15 above costs if enough customers are not price-sensitive,
16 yes?

17 A. So I think you just need to be very careful about what
18 you are talking about in terms of costs here and that
19 price above gross margin -- sorry, price above direct
20 cost gives you gross margin. That gross margin reflects
21 the need to recover your indirect costs which are going
22 to be allocated in some way and also reflects the margin
23 which will be the reward to the innovation, the risks,
24 all the other aspects that capital is needed for.

25 Q. It is quite a simple proposition, Dr Jenkins. I am

1 going to give you another opportunity to make clear
2 whether you agree with it. It can be economically
3 rational to set prices far above cost whatever measure
4 of cost we are looking at if enough customers are not
5 price-sensitive and will pay a high price, yes?

6 A. If you have to recover your costs, which you do, you
7 have to set your prices across the market to do that.
8 You then will structure them in a way that you hope will
9 lead to the least lost revenue. So I agree with you,
10 that that means that you will look to raise prices on
11 customers that you think are either less likely to
12 change their purchase decision or if they do change that
13 purchase decision are going to be retained by taking up
14 the alternate product within your own portfolio.

15 Q. So I think in there you just accepted that it is
16 economically rational to raise prices above costs to
17 customers who will pay them. It is a simple
18 proposition.

19 A. I suppose -- we have talked about critical loss before.
20 When you raise prices some customers pay that and then
21 other customers do not pay it and they move, and the
22 question of what is economically rational depends on the
23 size of the price, the margin and where those customers
24 are going but some customers will pay the higher prices.

25 THE CHAIRMAN: Yes, that is the point I think. Just on this

1 very narrow point about the SFV Services, I think the
2 proposition that is being put to you is, since there has
3 been a lot of talk about what is economically rational
4 or not rational for BT to do, if BT was able to raise
5 the prices to a high level on the basis of, let us say,
6 limb 1 has been shown with a significant number of
7 customers remaining and being prepared to pay those
8 prices that is an economically rational course for BT to
9 take. That is the proposition that is being put to you.
10 Leave aside competition law for the moment. Just in
11 terms of what it would be rational for it to do.

12 A. I guess the question is: what is the objective for them
13 doing that? So absolutely, they raise that price and
14 they earn higher revenue from the customers who stay.
15 I think we just saw the chart that showed quite a few of
16 the customers did not stay, so then this question -- you
17 know, you can go back to say: "well overall, did they
18 make more revenue from the SFV customer base from one
19 year to the next given the price change, if you assumed
20 all the decline was there?" If that is your definition
21 of rational, then maybe it does not look rational on
22 that level.

23 If you ask the question, there are some customers
24 who do pay the higher price and therefore it is
25 rational, then it is rational.

1 So it is a little bit what happens to the customers
2 is relevant and that BT -- you cannot just look at one
3 little slice of this point. You have to think about
4 okay, how did this fit together? What was their cost
5 base? How was it changing? Where were these customers
6 going, and how did BT make sure it had an offer that was
7 attractive to those customers for the fact that they
8 were also changing their demands through this period?

9 MS KREISBERGER: Thank you, sir.

10 It could be economically rational to charge a price
11 that is a high mark-up above cost to a group of
12 price-insensitive customers. That does not make it
13 a fair strategy, does it?

14 A. I guess that is right. In and of itself that is not
15 necessarily fair. You have to consider other factors.

16 Q. So in principle a strategy can be economically rational
17 and at the same time unfair?

18 A. It could be.

19 Q. Now, I would like to turn to the next factor you rely on
20 in your first report I showed you, the paragraph where
21 you list the relevant factors to fairness. That is
22 {IR-E/17/251}. If we go to section 7A.2 and you see
23 there the heading is:

24 "BT's SFV Services pricing facilitated many benefits
25 for consumers; an alternative pricing approach would

1 have resulted in the loss of such benefits."

2 That is the heading there. (7A.2).

3 If we go over the page, please, top of the page,
4 {IR-E/17/252}. Your hypothesis is that "higher Line
5 Rental prices and lower incremental broadband prices
6 during the Claim Period -- did bring gains to some SFV
7 customers. It was a key part of the competitive
8 dynamics that encouraged consumers to take a wider range
9 of products in a cost-effective bundle."

10 A. Yes.

11 Q. So this statement is qualified, unlike the heading
12 I showed you, as it cites gains to some SFV customers.
13 That is what you are saying there, Dr Jenkins?

14 A. Yes.

15 Q. Now, you are referring there to SFV customers who you
16 say responded to the excessive SFV prices by stopping
17 buying SFV purchases, yes?

18 A. That is right.

19 Q. They replaced those purchases with a bundle on this
20 view?

21 A. That is right.

22 Q. So the gains you say they experienced are the gains from
23 switching to a bundle, yes?

24 A. That is right.

25 Q. Now, you are not claiming that customers who did not

1 switch to bundles gained by paying excessively high SFV
2 prices, are you?

3 A. This particular part is focused on the benefits that
4 accrue to those who switch.

5 Q. Because the push factor that you claim is not a benefit
6 if you are not pushed?

7 A. If you do not respond to that push you do not get the
8 direct benefit.

9 Q. Just to be clear, on this view of the world we are in
10 limb 2, SFV Services and bundles are in different
11 markets?

12 A. They are.

13 Q. So your position here is that harm to SFV customers who
14 pay excessive prices is justified by benefits to
15 customers who buy products in a different market: the
16 bundles market?

17 A. I think if you think about the customer themselves what
18 it is saying is again that there is a system of pricing
19 and you cannot just look at these things in a static way
20 and have this view that an SFV customer one day has all
21 this harm associated with the purchase choice they make
22 and the next period they then make a choice, a choice
23 that was available to them throughout this period of
24 time and that that is a benefit that has accrued in some
25 sense in a separate way. I think they are still

1 purchasing their Voice services. They are also --
2 especially if this is an SPC customer, they have moved
3 from deciding to take these two products separately to
4 combine them with BT or with the other provider. So
5 I think the benefit that accrues is not something that
6 is unrelated to the fact that they have been
7 a standalone fixed Voice customer in the past.

8 Q. But what you are identifying as a benefit is the benefit
9 which arises when the SFV customer stops buying the
10 excessively priced product?

11 A. I mean, if they combine their purchases with BT they can
12 actually continue to buy the SFV -- the same product,
13 Line Rental product at the same price but they add
14 another product at a relatively low incremental price.

15 Q. I think you just corrected yourself, Dr Jenkins, because
16 you said SFV. That is right, they have to stop buying
17 the excessively priced SFV service. That is right, is
18 it not? If they are buying it in a bundle it is not
19 a standalone service, Dr Jenkins. I think that is
20 common ground?

21 A. But they are paying the same price for their Voice
22 product in their bundle. That perception may stand.

23 Q. They stop buying -- the benefit you identify is that
24 they stop buying the standalone Voice product, yes?

25 A. They do not stop buying Line rRental Voice service.

1 They do not purchase it standalone any more. They add
2 something to it.

3 Q. That is the point, Dr Jenkins. Right, let us move on.

4 I would like to turn to page 254 of your first
5 report so I think a couple of pages on from where we
6 are. {IR-E/17/254}. Do you see there the heading --
7 sorry, it is 262. My mistake. So sorry. It is
8 internal. {IR-E/17/262}. 7A.4. "Scale of SFV access
9 and SFV Services price increases".

10 Do you see that?

11 A. Yes, I see that.

12 Q. Could I ask you to begin by reading paragraph 7.43, so
13 we just need to go down a little. (Pause).

14 A. Yes.

15 Q. In this paragraph, Dr Jenkins, you are looking at
16 increases to actual prices?

17 A. Yes, I mean, actual prices as in the list prices and the
18 Average Revenue Per User pricing.

19 Q. You are not looking at the size of the excess above the
20 competitive benchmark here. You are focusing on the
21 increases to the price?

22 A. That is correct.

23 Q. You compare BT's increases to the SFV price to these
24 pharmaceutical product increases?

25 A. I do.

- 1 Q. Now, these cases which you refer to in your report.
2 These are cases in which the customer paying the price
3 has been the NHS?
- 4 A. Yes.
- 5 Q. The NHS is a state body of course?
- 6 A. Yes.
- 7 Q. It is a monopsony buyer in pharmaceutical markets, yes?
- 8 A. Yes.
- 9 Q. With a vast budget, yes?
- 10 A. I think some people will differ with that but there is
11 a large amount of money spent on pharmaceuticals in the
12 health system.
- 13 Q. Now, in this case the limb 1 excess above the
14 competitive benchmark, that is paid mainly by end
15 consumers?
- 16 A. The price is paid by end consumers, yes.
- 17 Q. By Class Members?
- 18 A. Yes.
- 19 Q. You accept they do not have buyer power?
- 20 A. I accept that.
- 21 Q. So you would also accept that a comparison between these
22 pharmaceutical cases that you refer to and the present
23 case is not a close one?
- 24 A. I agree there are lots of differences between those
25 pharmaceutical cases and this BT case, yes.

1 Q. Let us have a closer look at one of the cases you
2 mention. That is the *Hydrocortisone* case. You refer to
3 the CMA decision. You note there that Auden/Actavis
4 increased its prices by 10,000% after debranding, yes,
5 in the middle of the paragraph?

6 A. Yes, I see that.

7 Q. Let us turn up the Tribunal's judgment at {G/96/224}.
8 I will just complete this point if I may before lunch.
9 I just have a small number of questions.

10 THE CHAIRMAN: Right.

11 MS KREISBERGER: Now, this is Annex 4A to the *Hydrocortisone*
12 judgment. The thick line there, that shows prices for
13 the 10 milligram *Hydrocortisone* tablets in that case and
14 you can see that prices increase up to a point at around
15 £70 per pack, yes?

16 A. Yes.

17 Q. That is the price hike you rely on in paragraph 7.43,
18 the 10,000% price hike that you refer to?

19 A. Mm-hm.

20 Q. Do you see there on this graph the prices then decrease
21 back down towards zero at the end of the time period?

22 A. Yes, I do.

23 Q. Then if we turn up the judgment. That is at {G/96/169}.
24 Could we look more closely at paragraph 342(4). So that
25 is the bottom half, thank you. You see there the

1 Tribunal said:

2 "We regard Phases 1 and 2 as par excellence cases
3 where the prices charged throughout [underlined] were an
4 abuse of Chapter II ... That brings us to Phases 3, 4
5 and 5, which are characterised by a trend of decreasing
6 prices, albeit that those prices remained significantly
7 above Cost Plus. Here, too, we consider these phases to
8 be cases where the prices charged throughout
9 [underlined] were abusive and an infringement of
10 Chapter II ... We do not consider the downward trend of
11 prices in Phases 3, 4 or 5 to affect this conclusion.
12 Of course, prices containing substantial producer
13 surplus will -- absent some barrier ... attract new
14 market entrants, who will compete with the incumbent
15 sellers. That will be so, whether the situation falls
16 within Case 2 or Case 3."

17 We have heard quite a lot about that:

18 "The difference between the two cases is that in
19 Case 2 the producer surplus is justifiable and in Case 3
20 it is not. The situation before us -- whatever phase is
21 under consideration -- falls within Case 3 and it
22 follows that even if prices are falling, provided they
23 sit above cost (or Cost Plus, in this case) they
24 infringe the Chapter II Prohibition."

25 Dr Jenkins, the Tribunal found that decreasing

- 1 prices were abusive, did it not?
- 2 A. Because it fell within Case 3 and was above the cost
3 benchmark.
- 4 Q. That is right, that is the point. The Tribunal relied
5 on the fact that the prices in that decreasing period
6 remained significantly above cost-plus, yes?
- 7 A. That is right.
- 8 Q. Even when they were coming down?
- 9 A. Yes, but within Case 3, not Case 2 where producer
10 surplus is justifiable.
- 11 Q. Let us just stick with your report. We can bring it
12 back up on the screen {IR-E/17/262}, 7.43, if we could
13 zoom in a little, where you refer to price increases.
14 You do not mention that decreasing prices were also
15 found to be abusive, do you?
- 16 A. I do not. I am just talking about the premise of the
17 case here is around BT increasing the price of Standard
18 Line Rental in particular, that is the list price that
19 has gone up, and so I am just contrasting that position
20 with the price increases in these pharmaceutical cases.
- 21 Q. Yes, you just refer to the price increases?
- 22 A. Yes.
- 23 Q. Not the price decreases in that case?
- 24 A. I do.
- 25 MS KREISBERGER: Is that a convenient moment to break?

1 THE CHAIRMAN: Yes, just a moment, please. (Pause).
2 Thank you, Dr Jenkins.
3 So just on housekeeping, what is the position for
4 this afternoon, Ms Kreisberger? You will finish?
5 MS KREISBERGER: I am reasonably confident that I will
6 finish by 4.15.
7 THE CHAIRMAN: You will finish Dr Jenkins?
8 MS KREISBERGER: Dr Jenkins without any question.
9 THE CHAIRMAN: Possibly even the other witness?
10 MS KREISBERGER: Possibly Mr Matthew as well, but that is
11 a little harder to gauge.
12 THE CHAIRMAN: All right.
13 MS KREISBERGER: But certainly Dr Jenkins.
14 THE CHAIRMAN: Just before we stop, we will probably stop
15 a few minutes before 4.15, and then we can assess
16 whether we need to start early or anything tomorrow.
17 MS KREISBERGER: Yes, I am grateful.
18 THE CHAIRMAN: 2 o'clock then.
19 (1.00 pm)
20 (Luncheon Adjournment)
21 MS KREISBERGER: Dr Jenkins, let us turn back to your first
22 report, {E/17/266}, please.
23 Now, Dr Jenkins, you took the Tribunal yesterday
24 to Figure 7.4 there on the screen. That is where you
25 present the change in BT's ARPU for SFV Services over

1 time in your first report, yes?

2 A. Yes.

3 Q. If we go down to paragraph 7.52 below the graph, you
4 rely there on the fact that BT's ARPU decreased in
5 nominal terms by around 3% over the claim period, yes?

6 A. Yes.

7 Q. At 7.54 over the page, {E/17/267}, you say there that
8 the analysis of ARPU shows:

9 "... no evidence of significant rises in the prices
10 customers paid for SFV Services over the Claim Period
11 (against either CPI or telecoms-specific CPI) ..."

12 You therefore conclude, so you are concluding on
13 that basis, that:

14 "... there is no support for a finding that
15 the price increases of SFV Services were unfair."

16 A. Yes.

17 Q. Now, the question you are asking yourself there is
18 whether there were price increases?

19 A. Yes.

20 Q. You are not asking yourself there about the extent of
21 the gulf between BT's excessive SFV price and the
22 competitive benchmark?

23 A. On my analysis at this point, there was no evidence
24 of -- there is no evidence of excessive pricing. But,
25 yes, I am not looking at a cost-based measure here,

1 because that is in limb 1. In limb 2 I am looking at
2 unfairness in itself, which is about how you might think
3 about the level of price that we observe in itself.

4 Q. But the extent of the gulf between the impugned price
5 under limb 2 and the competitive benchmark, that is the
6 point I showed you that the Tribunal made in the
7 *Hydrocortisone* case, yes?

8 A. Yes.

9 Q. So on that basis you are not addressing the right
10 question here, which is what is the gulf between the
11 competitive benchmark and the price?

12 A. I think this is relevant evidence for the Tribunal to
13 consider in considering in the round whether the prices
14 were reasonable with respect to economic value, which
15 I think is the test. It is -- the question of costs is
16 limb 1. Overall, the question that needs to be answered
17 with respect to abuse of dominance is around how
18 reflective prices are of economic value. So at this
19 point I have presented -- I present a range of evidence,
20 both in this report and in my second report, of which
21 this is one component, which says that while there were
22 elements of the SFV Services where list prices went up,
23 and in particular the Standard Line Rental pricing,
24 overall when you look at the ARPU of SFV Services you do
25 not observe price increases over this period.

1 Q. But a slight decrease in ARPUs is not material, is it,
2 if the price is significantly above the cost-plus
3 benchmark?

4 A. So there is a question under limb 1 as to whether or not
5 there is -- there has been found to be excessive
6 pricing. In the event that you were then in limb 2, you
7 are then asking the question: are there -- how does one
8 see these prices, not with respect to cost, but with
9 respect to the economic value they present? I think it
10 is important context to say that the customers in this
11 group did not pay more revenue, more price over this
12 period. That is something that is relevant to consider,
13 that there was not -- there was not actual increasing in
14 price to these customers over this period from an ARPU
15 perspective.

16 Q. Let us go to Figure A5.4 from the Provisional
17 Conclusions, that is at {IR-C/2/20}, staying with this
18 point of ARPU, movements in BT's SFV ARPU.

19 Now, you took the Tribunal to this yesterday in the
20 hot tub?

21 A. I did.

22 Q. You relied on the fact that it shows ARPU remaining
23 fairly steady during the claim period. That is the
24 point you made?

25 A. And prior to the claim period.

1 Q. And prior to the claim period. We can bring up the
2 transcript, so {Day17/112:4}. You referred the Tribunal
3 to Figure A5.4 and you say there, you can cast your eye
4 over it, but you said this does not show unfairness.

5 A. Yes.

6 Q. Because of the similarity, you say, of ARPU over the
7 period?

8 A. That is right.

9 Q. Now, I have just shown you A5.4, but you did not take
10 the Tribunal to the tables which follow. Ofcom did not
11 just look at revenue, did it?

12 A. No, it did not.

13 Q. It looked at profitability?

14 A. It did.

15 Q. So revenue was a step in Ofcom's analysis of SFV
16 profitability. Let us go to {IR-C/2/23}. Figure A5.8.
17 Perhaps we could zoom in on the figure.

18 In this table, Ofcom is showing BT's SFV profits per
19 line going up from 2007 all the way through to 2015/16,
20 is it not?

21 A. Yes, it is showing profit as measured against the cost
22 allocation that Ofcom has chosen here for the retail
23 costs stack.

24 Q. If we just go over the page, {IR-C/2/24}, we see Figure
25 A5.9. If we follow the purple line, that is the profit

1 per line per month, so Ofcom plots that out there, as
2 you say, profits having conducted their cost allocation?

3 A. Yes.

4 Q. So when you gave your evidence that SFV revenue was
5 flat, that is not giving the full picture of Ofcom's
6 analysis here, is it?

7 A. I think it is giving the full picture of what is
8 happening to Average Revenue Per User price, which was
9 the point that I was seeking to make. I do not think
10 there is any -- we have had a lot of discussion about
11 the fact, depending on how you allocate costs for
12 limb 1, you can get different answers under limb 1 about
13 excessiveness. So that at this point, when we are here,
14 we are talking about the fairness of the prices as
15 observed, and it seems to me that -- in a sense, this is
16 like a comparator analysis. It is saying let us compare
17 prices over time for these products. You can compare it
18 against costs, that is what limb 1 does, but you can
19 also compare price over time, and if you look at the
20 ARPU measure, which is the agreed measure, price does
21 not change dramatically from 2007/08, which is a period
22 I think both sides agree is a time when the market was
23 effectively competitive.

24 Q. Just to be clear, Dr Jenkins, you are relying on Ofcom's
25 assessment of ARPU in the Provisional Conclusions, but

1 you are not relying on Ofcom's assessment of profits on
2 the basis of that ARPU assessment?

3 A. Well, the ARPU is reported revenues, right, so that is
4 what people have actually paid, and that comes from the
5 reporting that businesses do. The profit depends on
6 judgment around allocation, so it is not that I do not
7 look at that in the limb 1 analysis and discuss my views
8 on what the appropriate allocation of costs is, and I do
9 disagree with using a single fully allocated cost
10 approach to determining what the relevant costs are
11 here.

12 So I do not think there is any difference -- or any
13 reason that I need to rely on the cost allocation
14 because I rely on the revenue information that they have
15 gathered for their Provisional Conclusions.

16 Q. But you do not assess profitability before the claim
17 period, do you?

18 A. I do not.

19 Q. So the assessment of profitability that we have is in
20 this Ofcom Figure A5.9?

21 A. On the basis of the fully allocated costs. So there is
22 not an analysis of profitability on standalone costs
23 combinatorial approach, but I think even without that
24 the evidence on the ARPU is still of use in considering
25 limb 2 comparators for fairness.

1 Q. Right. Now I would like to move on to looking at the
2 Commitments, Dr Jenkins. Now, your position is that the
3 Commitments price is not a credible market price. We
4 can just bring that up, that is at {IR-E/17/284}. So
5 that is your first report.

6 A. Yes.

7 Q. Paragraph 7.90. You point to the fact that following
8 the introduction of the Commitments, and we heard about
9 this yesterday, that some operators exited the market or
10 stopped proactively marketing SFV Services. That is
11 what you say there?

12 A. Yes, that is right.

13 Q. If we could just look at your Figure 7.14, just below
14 this paragraph. Now, when you are talking about
15 operators exiting the market in response to the
16 Commitments, you are not talking about TalkTalk, are
17 you?

18 A. No, TalkTalk had already taken the decision not to
19 market to standalone fixed Voice customers.

20 Q. That is shown on your Figure 7.14 there. This graph
21 also shows that Virgin Media restarted marketing SFV
22 Services in 2018, yes, just before the Commitments?

23 A. Yes.

24 Q. So they did not stop marketing as a result of the
25 Commitments. The graph shows they carried on marketing

- 1 SFV Services, yes?
- 2 A. I think the evidence that Virgin Media give to Ofcom is
3 that having decided to restart marketing, the imposition
4 of the Commitments is going to significantly hamper
5 their ability to be successful in that market, but I do
6 not know exactly if and when they ceased actively
7 marketing standalone fixed Voice. I have not marked it
8 on that chart.
- 9 Q. You do show them restarting marketing of SFV, that is
10 the light blue line, which goes through to 2023 on that
11 graph. So I think you have shown that, have you not,
12 Dr Jenkins?
- 13 A. I have shown that Virgin Media do restart marketing, but
14 there is also evidence that they give where they explain
15 to Ofcom in their responses to the proposed Commitments
16 that that will be problematic for them, having decided
17 to restart marketing, that the Commitments is going to
18 make things difficult for them.
- 19 Q. This figure shows that Sky stopped marketing SFV
20 Services after the Commitments, yes?
- 21 A. Yes.
- 22 Q. Now, if we turn up page {IR-E/17/286} of your report,
23 paragraph 7.92.
- 24 A. Yes.
- 25 Q. Just wait for the EPE to catch up. There we go.

1 Focusing on 7.92 there.

2 A. Yes.

3 Q. You say there that:

4 "Following the implementation of the ...
5 Commitments, OVO (who took over SSE's telecoms business)
6 and Sky stopped selling Voice-only products to new
7 customers (only offering legacy products)."

8 A. Yes.

9 Q. You cite there evidence, we can see in the green, from
10 third party operators objecting to a price cut?

11 A. Yes, and I think at (c) is the Virgin Media comment.

12 Q. Now, if we just turn up Mr Parker's third report,
13 {IR-E/3/127}, please. Paragraph 5.57. Now I have to be
14 a little careful here for confidentiality, but I can
15 read out the beginning. So Mr Parker said:

16 "My review of the evidence provided to Ofcom by
17 third party operators indicates that barriers to
18 customer acquisition (resulting from customer inertia
19 and high customer acquisition costs) were a significant
20 barrier to entry and expansion in the market for SFV
21 Services. This is often the case in markets which are
22 decreasing in size and, in the case at hand, is
23 illustrated by the following examples of operators
24 exiting the market, and/or commenting on the existence
25 of barriers to expansion."

1 Now, if we then go down to subparagraph (a), this is
2 the TalkTalk position. Mr Parker notes that:

3 "TalkTalk stopped offering SFV Services to new
4 customers in 2014."

5 He says -- he quotes TalkTalk, and TalkTalk's
6 reasons for leaving the market included customer
7 inertia, do you see that there in bold?

8 A. Yes.

9 Q. High customer acquisition costs?

10 A. Yes.

11 Q. Declining market size?

12 A. Yes.

13 Q. So those were TalkTalk's reasons for exiting the market.
14 TalkTalk went on to say it would not be profitable to
15 re-enter even at BT's current inflated price levels?

16 A. I see that, yes.

17 Q. So that is pre-Commitments, pre-Commitments price?

18 A. Yes.

19 Q. TalkTalk also said this is likely to be similar for
20 other potential entrants.

21 Now, at (b) you can see the Sky position. I will
22 not read out the green, so if you could read that to
23 yourself, please.

24 A. Yes. (Pause).

25 Q. It ends on this page.

1 A. Yes.

2 Q. So that is Sky's position, their evidence in relation to
3 Sky's reasons for not marketing to SFV customers, yes?

4 A. Yes, I think that is in conflict with the evidence
5 I have, which is that Sky was still offering services to
6 standalone fixed Voice customers till after the
7 Commitments.

8 THE CHAIRMAN: You mean to new customers?

9 A. To new customers. It is only post-Commitments that they
10 actually withdraw those products and only continue to
11 serve their legacy customers.

12 I think what could be meant here is no direct
13 marketing, no marketing campaigns, but I do not know.
14 That is speculation on my part.

15 MS KREISBERGER: You do not mention this in your report, do
16 you, Dr Jenkins?

17 A. I have that evidence of when they ceased offering the
18 products, which I think is relevant for this question.

19 Q. Yes, you do not mention what Sky told Ofcom as to why?

20 A. No, I do not mention that, I do not believe.

21 Q. Then over the page, {IR-E/3/128} at (c) we see the SSE
22 position. So if we could just go -- yes, thank you. So
23 I can say out loud that SSE is also saying that it was
24 not actively marketing to SFV customers prior to the
25 Commitments, correct?

1 A. Correct.

2 Q. It is identifying [redacted] -- actually I misspoke,
3 sorry. That should not be on the face of the
4 transcript.

5 You can see the reasons it is giving there?

6 A. Yes.

7 Q. Now, that is contrary, Dr Jenkins, to what you say in
8 your report, which is that SSE stopped selling SFV
9 Services after the Commitments. That is not the case,
10 is it?

11 A. I think there is a difference between actively marketing
12 and selling, and that is meaningful in that
13 post-Commitments, that price level meant that those
14 providers did not want to serve a customer even if that
15 customer arrived on their doorstep and said I want to
16 buy the product. Whereas in this early period they were
17 saying, look, it is hard to market to them, we do not --
18 you know, the return on investment, I presume for the
19 specific marketing campaigns, may not be high enough.
20 But they were still offering the product to those
21 customers, and they only withdrew the product after the
22 Commitments.

23 Q. They are saying very clearly they were not actively
24 marketing to SFV customers before the Commitments, were
25 they not?

1 A. That is what they are saying.

2 Q. Dr Jenkins, you also say that SFV suppliers who remained
3 in the market did not generally seek to compete with the
4 Commitments price, yes? That is in your second report.
5 Let us go to that. {E/18/172}. Paragraph 6.77 is where
6 you make that point. It goes over the page then.

7 I am not sure, did you have a chance to read that?

8 A. Yes, that is fine. I have got it here, so, yes.

9 Q. You accept that the Post Office responded with a price
10 cut, they undercut BT by 50p.

11 A. Yes, that is right, Post Office was the one supplier who
12 did seek to continue to compete with that price for
13 a period of time before themselves first raising
14 the price, and then selling their portfolio to another
15 supplier, Shell, who subsequently ceased to actively
16 market the product.

17 Q. Let us have a look at what you say about that. If we go
18 back to your first report, {IR-E/17/284},
19 paragraph 7.91. Starting with the second sentence you
20 say:

21 " ... after just over a year of lower pricing, the
22 Post Office increased its monthly Line Rental price
23 again to £15. This suggests that the BT Commitments
24 Price level was insufficient to support a rival provider
25 of SFV Services."

1 Now, let us just stay in your first report and turn
2 back to 5.36 at page 126. {IR-E/17/126}. That is at
3 the bottom of the page. If you could read the first
4 sentence. (Pause). Sorry, the first two sentences.
5 (Pause)

6 A. Yes.

7 Q. You say:

8 "The Post Office significantly reduced its Line
9 Rental price [from May 2018 to March 2020] to £11.50
10 ..."

11 So in fact you are conceding here that the
12 Post Office was discounting below the Commitments price
13 for almost two years. That is right, is it not?

14 A. It is more than a year, indeed.

15 Q. It has morphed into just over a year in the later part
16 of your report. So that is a mistake, yes?

17 A. Between a year and two years, absolutely. I mean, what
18 I am saying here is the Post Office did continue to seek
19 to compete for those customers head-to-head with BT, as
20 they had done in the previous period, so BT did and
21 does -- has faced that competition for its SFV customer
22 base, but ultimately they ceased that strategy because
23 they ultimately did increase the price and then leave
24 the market from March 2020, saying that it was very
25 difficult to compete at that price.

1 Q. Now, BT did not respond with its own further price cut,
2 did it?

3 A. No, it did not.

4 Q. Yet at the same time its market share of the Voice only
5 segment post-Commitments increased. Let us turn up
6 {IR-E/5/73}. This is Mr Parker's fourth report.

7 Paragraph 4.38 there:

8 "... Ofcom found that BT's market share increased
9 following the introduction of the Commitments (to more
10 than 75% of Voice Only Customers) suggesting no material
11 constraint from the Post Office at this stage."

12 So it is not all that surprising that the
13 Post Office gave up on its strategy of undercutting BT
14 in those circumstances, is it?

15 A. So, yes, I think there is a chart with market shares,
16 but perhaps that is for an earlier period, which shows
17 Post Office's market share increasing. At this point
18 obviously what we have seen is that other suppliers have
19 exited the market, so it is not clear that you can say
20 there is no material constraint from the Post Office at
21 that stage. We are also in a situation where you have
22 had the regulated price come into play, so I am not sure
23 what you can really conclude at this point from these
24 market dynamics because you have got a lot of turmoil as
25 a result of the significant reduction in price for that

1 segment.

2 Q. You are not suggesting the market share is wrong in that
3 paragraph, though, are you, Dr Jenkins?

4 A. I do not believe that I am saying that the market share
5 is wrong on the basis of the market so defined, which
6 I do disagree with, but it is just whether the fact it
7 went up was related to the other exits as opposed to the
8 Post Office being less of a competitor.

9 Q. Now, you just made the point, I think a couple of times,
10 that the Post Office's telecoms business was acquired by
11 Shell Energy in March 2021. We can call it up just for
12 completeness. That is in your first report, so that is
13 {IR-E/17/285} at 7.91.

14 A. Yes.

15 Q. There it says February 2021, I think. Now, that is
16 three years after the Commitments, yes?

17 A. Yes.

18 Q. So you are not suggesting that the Commitments caused
19 this decision, are you?

20 A. I think -- it obviously takes time to make that
21 strategic decision, so I do think that the Post Office
22 initiated a strategic review of its telecoms business
23 possibly a year before this, the actual sale. I do not
24 actually recall exactly when that was, and I do believe
25 that was affected by the Commitments price.

- 1 Q. But you do not point to any evidence of that, do you,
2 Dr Jenkins?
- 3 A. So I think -- I will just see footnote 418. So I think
4 the first line, it sold its telecoms business following
5 a strategic review of its business, and then there is
6 a reference, but I think that might just be the press
7 release, so we have not presented the detail about that
8 actual strategic review. I have not reviewed that
9 recently to be able to tell you.
- 10 Q. Now, all of this evidence, Dr Jenkins, your evidence on
11 this point in relation to the Commitments, is to support
12 your contention that the Commitments is not a credible
13 market price, yes? That is what you say in your report?
- 14 A. Yes, at this point, yes. I think we also -- I also
15 cover similar evidence elsewhere with respect to
16 dominance, but ...
- 17 Q. But your point is --
- 18 A. My point here is, yes, that the Commitments are not
19 a good benchmark.
- 20 Q. That is contrary to BT's own description of the
21 Commitments, is it not? Let us turn up {C/3/31}. This
22 is the annex to Ofcom's 2017 statement. If we look at
23 (B) under "Whereas" at the top of the page, BT described
24 the Commitments as:
25 "... the greatest possible price reduction for our

1 true Voice Only Customers consistent with a competitive
2 outcome ..."

3 Yes?

4 A. They say that, yes.

5 Q. I would like to move on, then, to prices charged by
6 other SFV suppliers. Now, we heard yesterday in the
7 hot tub, Dr Jenkins, that you rely on other SFV
8 providers' prices as meaningful comparators under
9 limb 2?

10 A. Yes.

11 Q. You said this, if we go to {Day17/126:19}, please. You
12 said, so starting at the end of line 19:

13 "Yes, there is a lot of similarity in pricing in
14 this market, but that could equally be a sign of
15 competition between these players, and they are
16 following each other, they are matching price changes,
17 or they are trying to get ahead."

18 That was your evidence in the hot tub.

19 So what you are saying there, Dr Jenkins, is your
20 interpretation of the observed SFV prices in the market
21 is that they are a function of competition between these
22 providers?

23 A. Yes.

24 Q. Let us just have a look at Mr Parker's third report,
25 {IR-E/3/138}, paragraph 5.87. This is where Mr Parker

1 summarises some of the relevant documents on the price
2 leadership point. Let us have a look at (b):

3 "In November ... BT noted that one pricing option
4 would lead to a line charge £1 higher than their closest
5 rival. It then states that 'competitors have
6 historically followed us on ... [Line Rental] prices'."

7 A. Yes.

8 Q. That was in 2013.

9 Then at (d) you see a reference to a June 2015 paper
10 from Mr Bunt where he said "Our competitors have
11 increasingly aligned their price changes with ours in
12 timing and scale."

13 The Tribunal has seen that.

14 These are unambiguous statements, are they not,
15 Dr Jenkins?

16 A. They are.

17 Q. BT is recognising here that competitors were following
18 it on price?

19 A. Yes.

20 Q. Let us look at what some of the third parties said to
21 Ofcom about this. That is paragraph 5.83. If we go
22 back a couple of pages to {IR-E/3/136}, please.

23 This is confidential, so could you just read
24 Mr Parker's 5.83, please. (Pause)

25 A. Yes, I have read that.

1 Q. So that is further evidence from other operators this
2 time on the fact that they were following BT's lead on
3 price, yes?

4 A. And other competitors.

5 MS KREISBERGER: Sorry, I think, EPE, just to catch up with
6 us, we need to go to {IR-E/3/137}, so down to (b) and
7 (c).

8 A. So I think the first one of those discussed BT and other
9 competitors. The last one of those -- that is it,
10 open -- Post Office talks about Plusnet rather than BT,
11 because Post Office is seeking to offer a value product
12 to the lower end of the dispersion, and Sky does seem to
13 match with BT. I think that type of competitive dynamic
14 is what you would expect to see as much in a competitive
15 market as in whatever is inferred from price leadership
16 in this context.

17 Q. Dr Jenkins, you may have heard Mr Bunt's evidence on
18 price leadership in the Tribunal?

19 A. I was not in court that day but I have reviewed the
20 transcript.

21 Q. Let us bring that up. That is {Day6/46:1}. Now, this
22 was in the context of a discussion about -- sorry,
23 I will just ...

24 So page 46, if we begin at the top of the page, you
25 see there, there was a discussion about BT's response to

1 Ofcom's Provisional Conclusions in which BT have stated,
2 that is at lines 2-3, or 3-4, rather:

3 "There is no reliable evidence of BT playing a price
4 leadership role."

5 Then I took Mr Bunt to four documents that, as you
6 see there at lines 5-7, reliably recorded that BT did
7 consider itself to be a price leader, and then you see
8 there at line 8 Mr Bunt agrees with that
9 characterisation.

10 A. Yes, I see that.

11 Q. Then if you could perhaps just read the rest of that
12 page on the transcript to yourself. (Pause).

13 A. Yes, I have read that.

14 Q. So Mr Bunt accepted, in response to the chair's
15 intervention, that BT's statement to Ofcom was
16 misleading on this particular point?

17 A. I see that.

18 Q. But you have not modified your position that prices are
19 consistent with competition between SFV providers?

20 A. I have not, because I think that there is -- as we have
21 already discussed, there is a system of interrelated
22 prices, and so the rivals were price leaders, you could
23 argue then, in this language, on other products, and BT
24 was following them, and then they are following BT here.
25 So you cannot just take one snapshot of that and get the

1 whole dynamics of competition in the market, and so you
2 cannot just look at the path of pricing on the Standard
3 Line Rental without considering the other elements as
4 well.

5 Q. So when BT said it thought it was a price leader, BT had
6 misunderstood the competitive dynamics, had it?

7 A. No, I am just saying that for this purpose you need to
8 consider not just what is going on for Standard Line
9 Rental in determining whether or not -- what the
10 competitive dynamics are of the market.

11 MS KREISBERGER: Thank you. I have no further questions for
12 Dr Jenkins.

13 THE CHAIRMAN: Just a moment, please.

14 Any re-examination?

15 MR BEARD: Only a couple of quick ones, I think.

16 Cross-examination by MR BEARD

17 MR BEARD: You were asked about Virgin, Dr Jenkins, and you
18 referred to the third paragraph describing Virgin's
19 reaction. I think it is {E/17/286} you were taken to.
20 Sorry, could we have IR, apologies. {IR-E/17/286}.

21 So the first one is SSE. Then we go over the page
22 {IR-E/17/287}, the second one is Post Office. Then the
23 third one, was that what you were referring to,
24 Dr Jenkins?

25 A. Yes, that is right. So if you see the third line from

1 the bottom:

2 "Virgin Media stated that Ofcom's intervention was
3 'certain to curtail any prospect of further entry.'"

4 THE CHAIRMAN: Just a second, please. (Pause). Thank you.

5 MR BEARD: The next one. You referred to various comments
6 by SSE and you distinguished between marketing and
7 making available.

8 Can we go to {C/279/3}. I am sorry, it will have to
9 be an IR again. It might be a challenge otherwise.
10 {IR-C/279/3}. So I think -- actually we probably should
11 go back to page 1 just to clarify what this is
12 {IR-C/279/1}. [Redacted]

13 A. [Redacted]

14 Q. Yes, okay. Fine. If you have not seen it, you have not
15 seen it. That is fine.

16 You were taken to ...

17 MS KREISBERGER: This document is confidential.

18 MR BEARD: Yes, I think that is my fault because I moved to
19 the IR. We will have to have that taken off the
20 transcript, thank you. Thank you, Ms Kreisberger.

21 If we could just go back to Mr Parker's first
22 report, 5.57, so that is {IR-E/3/127}, please. You were
23 taken to these quotes. Now, obviously we do not have
24 evidence from any of these people, direct evidence from
25 them, but you were taken to the Sky quote there, so it

1 is "Sky also told Ofcom", and we think this quote comes
2 from {IR-C/275.1/1}.

3 If you look at the bottom of the page, this is all
4 confidential, Dr Jenkins, you see the green?

5 A. Yes.

6 Q. So the quote provided by Mr Parker stops where the first
7 set of -- the second set of scissors appears?

8 A. Yes, so ...

9 Q. I am very concerned actually about you commenting on
10 this in open transcript.

11 A. Perhaps I can just say that even with a narrow market
12 definition those customers -- for a narrow market
13 definition for standalone fixed Voice, those customers
14 were attractive to other rivals in terms of being able
15 to offer them multi-play services.

16 MR BEARD: I do not have any further questions for this
17 witness.

18 THE CHAIRMAN: Just a second. (Pause).

19 MR BEARD: Thank you very much.

20 THE CHAIRMAN: No, no further questions. Thank you very
21 much, Dr Jenkins.

22 (The witness withdrew)

23 MR BEARD: Now, I am in Ms Kreisberger's hands to some
24 extent, but if we are going to take an afternoon break,
25 given that we are about to call Mr Matthew, would now be

1 the sensible time to do it?

2 THE CHAIRMAN: I think that is probably a good idea

3 especially because we are not running on to 4.30 anyway.

4 MS KREISBERGER: No, very happy.

5 THE CHAIRMAN: Thank you.

6 (2.48 pm)

7 (A short break)

8 (3.02 pm)

9 MR BEARD: Sir, I am going to call Mr Matthew again, and if
10 I could ask that he is reaffirmed.

11 THE CHAIRMAN: Yes. Thank you.

12 MR DAVID MATTHEW (reaffirmed)

13 MR BEARD: Mr Matthew, probably, having been in court for
14 the last few days, you are fairly familiar with the
15 form. There will be some files in front of you with
16 hard-copy documents in, including, I imagine, your
17 reports. Obviously feel free to flick through them when
18 you are referred to them. Otherwise I do not have any
19 questions for you. Ms Kreisberger does.

20 Cross-examination by MS KREISBERGER

21 MS KREISBERGER: Mr Matthew, I recall you were not too keen
22 on the EPE, so we have a hard copy bundle for you with
23 a number of Ofcom documents in. So we are just going to
24 hand that up. (Handed)

25 A. Thank you.

1 THE CHAIRMAN: Mr Matthew, if you want to sort of clear the
2 desk a bit, or clear the decks a bit.

3 A. Those are my two reports, I can move those over.

4 Gosh, okay.

5 MS KREISBERGER: That will be comprehensive, so I hope you
6 will not need to rely on the EPE.

7 A. Fantastic, thank you.

8 Q. Now, Mr Matthew, your evidence is largely directed to
9 Ofcom's role, particularly in 2017 and before then.

10 Now, I am conscious that the chairman asked a question
11 yesterday as to whether or not we should be interested
12 in what Ofcom decided at all. That is of course going
13 to be a matter for our closing submissions, but it is
14 something I am going to be exploring with you,
15 Mr Matthew.

16 Before we go to Ofcom's findings, and we will come
17 on to those, I just want to have a look at what you say
18 about Ofcom in your reports. Let us go to your first
19 report, {IR-E/19/22}, at paragraph 47.

20 A. Page 22 of the IR numbering?

21 Q. I have given you the Opus numbering, not the internal
22 numbering for the EPE. So that is paragraph 47.

23 A. Yes.

24 Q. You see there you describe Ofcom as the custodian of the
25 communications sectors that it regulates?

1 A. Correct.

2 Q. Then in paragraph 48 at the bottom of the page and then
3 going over the page you identify some themes in telecoms
4 regulation. Let us go over the page to G. I am sorry,
5 that is actually page {IR-E/19/25}.

6 A. Yes, I have that, G is "Sectoral expertise".

7 Q. Yes, that is the one. What you say there, so this is
8 one of the themes you identify, and you say:

9 "Ofcom is an expert in the telecoms sector and the
10 regulatory processes that go with it. It can take
11 a holistic view of the telecoms market and assess the
12 impact of its decisions on the entire sector rather than
13 considering individual issues in a vacuum. This makes
14 it well suited to evaluating matters such as whether
15 prices are "too high" and making decisions on remedies
16 in a way that minimises the damage of unintended
17 consequences."

18 A. Correct.

19 Q. Then in paragraph 48(I), you identify as a further theme
20 "Use of market monitoring". So we need to go over the
21 page {IR-E/19/26}.

22 You say:

23 "Ofcom maintains an extensive programme of research
24 on developments in communications markets. These
25 include for example its annual Communications Market

1 Report (started in 2004) and its annual reports on
2 pricing trends for communications services (started in
3 2017). Moreover, Ofcom actively uses market monitoring
4 the ensure matters are working out well in markets where
5 regulation has been relaxed or removed."

6 Then you give there some examples: "the removal of
7 Sky's wholesale must-offer obligation in 2016 and the
8 retail telecoms markets following deregulation in 2009."

9 A. Correct.

10 Q. So Ofcom is an expert in the telecoms sector?

11 A. Yes.

12 Q. It undertakes extensive research and active monitoring
13 of telecoms markets?

14 A. Correct.

15 Q. Owing to its expertise, Ofcom is particularly well
16 suited to evaluating matters that are relevant to the
17 discharge of its regulatory responsibilities?

18 A. Yes.

19 Q. In the context of its ex ante regulation of telecoms
20 markets, those matters include the identification of
21 relevant markets?

22 A. Yes.

23 Q. The assessment of whether a firm has significant market
24 power, SMP, in those markets?

25 A. Yes.

- 1 Q. The evaluation of the state of competition in those
2 markets?
- 3 A. Yes.
- 4 Q. That would include an evaluation of whether prices
5 charged to consumers are too high?
- 6 A. Against its duties, yes.
- 7 Q. So that is looking at whether prices are above
8 competitive levels?
- 9 A. Well, no, it is against its duties.
- 10 Q. You are positively relying on Ofcom's expertise in these
11 kinds of assessments, yes, Mr Matthew?
- 12 A. Just to be clear as to the question, I mean, I am
13 characterising Ofcom's general approach and what sort of
14 regulator it is and saying it is a sector expert and it
15 does lead the sector. I am not sure if there is
16 a further implication you wanted to question me on.
17 That is it?
- 18 Q. That will do for now, thank you, Mr Matthew.
- 19 So let us go to some specifics against that
20 background.
- 21 Could we turn up {IR-E/19/74}. This is your first
22 report, paragraph 154. You say, if we pick it up at the
23 second sentence, you say:
- 24 "In relation to market definition, SMP and consumer
25 detriment ... the key points I make below are that (i)

1 the fact that Ofcom intervened using its ex ante powers
2 for VOCs on a forward-looking basis does not imply that
3 its Provisional Conclusions can necessarily be applied
4 retrospectively to previous periods as part of an ex post
5 competition law assessment ..."

6 So you are saying there that Ofcom's decision to
7 intervene in VOC pricing on a forward-looking basis does
8 not imply that its Provisional Conclusions can be
9 applied to previous periods?

10 A. That is right.

11 Q. If we look at the last sentence of paragraph 158
12 {IR-E/19/75}, you say:

13 "Ofcom's evaluation --"

14 Sorry, that is page 76, so over the page at the top
15 of the page {IR-E/19/76}:

16 "Ofcom's evaluation in 2017 therefore cannot be
17 presumed to apply to earlier periods."

18 So that is the same point?

19 A. Yes.

20 Q. So you are saying its decision to intervene on VOC
21 pricing cannot be presumed to apply to past periods?

22 A. Correct.

23 Q. Let us turn to Annex 7 of Ofcom's Provisional
24 Conclusions. That is {IR-C/2/38}. So Mr Matthew, you
25 should have that in hard copy there. It is Opus

- 1 page 38.
- 2 A. So I have a page that has a subtitle about modified
3 greenfield approaches. Am I on the right one?
- 4 Q. It does not sound like it. It is there on the EPE
5 screen if that helps. So it is Annex 7 to the
6 Provisional Conclusions. So the front page of the
7 document is "The Review of the Market for Standalone
8 Landline Telephone Services - Annexes [to the]
9 Provisional Conclusions".
- 10 A. I have it, thank you.
- 11 Q. So the right heading is "General analytical approach to
12 market definition, SMP assessment and remedies".
- 13 THE CHAIRMAN: Could we have this expanded, please?
- 14 MS KREISBERGER: Yes, I am going to take you to A7.2, so
15 that works well, thank you.
- 16 THE CHAIRMAN: Thank you.
- 17 MS KREISBERGER: So Ofcom say there:
18 "The market review procedure requires us to analyse
19 markets in order to determine whether they are
20 effectively competitive, and then to decide on
21 appropriate remedies if necessary. Before an assessment
22 of competitive conditions is possible it is necessary to
23 define the relevant market."
- 24 A. Correct.
- 25 Q. Let us move forward to page {IR-C/2/39}, please,

1 paragraph A7.9, and you see there the heading "The time
2 period under review". Ofcom says:

3 "Rather than just looking at the current position,
4 market reviews look ahead to how competitive conditions
5 may change in future. Our evaluation of the current
6 market takes into account past developments and
7 evidence, before then considering the foreseeable market
8 changes that we expect to affect its development."

9 So, Mr Matthew, what Ofcom is saying here is that
10 when it conducts a market review it begins by evaluating
11 the current state of the market, yes?

12 A. Yes.

13 Q. In evaluating the current state of the market it takes
14 into account past developments and evidence?

15 A. Correct.

16 Q. Then, having gone through that process, Ofcom will
17 consider how the market might change in the future?

18 A. Correct.

19 Q. So you would agree on that basis Ofcom's market reviews
20 are backward-looking as well as forward-looking?

21 A. Yes, so at the point in time you are analysing the
22 market in, what, 2017 here, so obviously you are taking
23 a forward-looking approach, but you are going to ground
24 it in observation as to what is happening now and what
25 has happened in the lead-up to that.

1 Q. Let us look at the findings themselves, then, and
2 I would like to start with Ofcom's findings on market
3 definition. Let us go back to the Provisional
4 Conclusions, the main body. So that is {IR-C/1/1}.
5 Hopefully that is easily identified?

6 A. Provisional Conclusions of the 2017 review.

7 Q. It is the first document in your pack, I think?

8 A. Yes, I have it.

9 Q. If we could go to Opus page {IR-C/1/7}, please, and you
10 see there the heading "Our market assessment".

11 Then if we look at paragraph 1.15, Ofcom sets out
12 its Provisional Conclusions on market definition there,
13 and it says:

14 "On the basis of our analysis, we have provisionally
15 concluded that there is a separate market in the UK for
16 the provision of standalone landline telephone services
17 [SFV Services] ... This market does not include landline
18 telephone services when they are provided as part of
19 a bundle ...

20 It covers the different types of bundles there. It
21 also does not include mobile services, and it talks
22 about transformation in the future.

23 A. Yes, so that is the Ofcom provisional conclusion.

24 Q. Conclusion on market definition.

25 Then if we move forward to page {IR-C/1/23}, that is

1 where you see Ofcom's supporting analysis for that
2 conclusion. That is Opus page 23.

3 If we look at paragraph 3.32, Mr Matthew, Ofcom say:

4 "As set out in Annex 7 the relevant question for the
5 SSNIP test is whether a price increase could be
6 sustained above competitive levels. Our analysis is
7 that current SFV access prices are in fact substantially
8 above competitive levels, on the basis that:

9 "(3.32.1) Prices have increased materially year on
10 year since 2009, and these increases cannot be
11 attributed to higher input costs (... WLR, has fallen
12 over this time period) or falling call volumes ..."

13 So where Ofcom is assessing whether SFV Services
14 bought by Voice Only Customers and Dual Play customers
15 are in the same market, Ofcom applied the SSNIP test,
16 did it not?

17 A. So they are applying a SSNIP test here.

18 Q. A relevant question for the SSNIP test. In applying the
19 SSNIP test, Ofcom looked all the way back to 2009?

20 A. To be honest, I have not been through the detail of
21 their SSNIP test.

22 Q. But just looking at --

23 A. There is a comment here "Prices have increased
24 materially", which I presume means Line Rental. Then
25 they are making comments about how other things have

1 moved, and that is their conclusion. But I really
2 cannot go further than that because I have not looked
3 into it.

4 Q. I am going to take you to some of it which may help.

5 MR BEARD: I do not want to interrupt, but is this supposed
6 to be limb 2 cross-examination? I am sure
7 Ms Kreisberger will come back to it, but at the moment
8 we seem to be back in the market definition world.

9 MS KREISBERGER: Sir, I am dealing with Mr Matthew in
10 relation to Ofcom in general. In BT's skeleton,
11 reliance on Ofcom is made in relation to fairness. It
12 is paragraph 45 of BT's skeleton argument.

13 THE CHAIRMAN: Well, I am sure that is correct.

14 MR BEARD: Yes.

15 THE CHAIRMAN: The point is, are you now going back to
16 market definition, because you have already
17 cross-examined Mr Matthew once, have you not?

18 MS KREISBERGER: Not on market definition.

19 THE CHAIRMAN: Well, no, but he was not giving evidence on
20 market definition.

21 MS KREISBERGER: Yes, so in the hot tub protocol some of the
22 same -- the weight of the questions in relation to the
23 Ofcom material were on limb 2 in relation to unfairness,
24 and that is how BT rely on the Ofcom material. So one
25 has to do it in one hot tub or the other, or

1 cross-examination following one hot tub or the other,
2 and it seemed to us this was the right ... So I would
3 ask you to bear with us on this.

4 THE CHAIRMAN: Okay, let us see where it goes and when we
5 get to fairness. Right.

6 MS KREISBERGER: Just so you have it, BT's skeleton is at
7 {OR-A/13/64}.

8 THE CHAIRMAN: I do not think we need to go to it now.

9 MS KREISBERGER: So let us turn to -- let me just find my
10 place again. Yes, I am going to show you the annexes.
11 Figure A8.23, that is {IR-C/2/73}. These are the
12 annexes again to the Provisional Conclusions. Do we
13 have the right page? Yes, that is the one, thank you.

14 This shows the Line Rental and wholesale price
15 movements from 2006-2016. If we go to page {IR-C/2/72},
16 please, that is the page before this graph, Ofcom notes:

17 "However, since deregulation of the retail
18 narrowband market in 2009, Line Rental prices have
19 generally been increasing, in real terms, despite
20 decreasing wholesale access prices as discussed in
21 paragraph A8.126."

22 So again, you see here Ofcom's analysis is looking
23 back to 2006 in relation to the price movements?

24 A. I think you meant 2009, just reading the paragraph.

25 Q. If you have a look again at A8.23, Mr Matthew.

1 A. Maybe. A8.23. Oh, okay, so we have a long-term trend
2 here, yes.

3 Q. So that is well before the start of the claim period?

4 A. Yes, so they are looking back at what is happening for
5 these services over a long time period.

6 Q. Then if we go to the Provisional Conclusions, page
7 {IR-C/1/25}. 3.37. Ofcom says at 3.37.2:

8 "While the number of SFV access customers has been
9 declining over time, the rate of decline has slowed from
10 20% year-on-year up to Q4 2015, to around 15% year on
11 year up to Q3 2016 ... which does not appear to provide
12 clear support for the proposition that SFV customers
13 respond in large numbers to specific dual-play offers."

14 So, again, Ofcom is there considering the rate of
15 decline in the number of SFV customers going back to
16 2015?

17 A. They are. Sorry, they are. Just to confirm, unless it
18 was not clear, I have not been through in detail the
19 material on migration and the rates thereof. That just
20 is not covered by my report.

21 Q. Now, let us go to page 26, please, of the Provisional
22 Conclusions. {C/1/26}. Mr Matthew, here Ofcom sets out
23 the analysis that supports its provisional conclusion
24 that SFV Services bought by SPC customers, Split
25 Purchase Customers, are in a separate market to

1 Dual Play.

2 If you go down to 3.41.2 on page {C/1/27}, here
3 Ofcom is referring to the finding I took you to just
4 a moment ago, that SFV access prices had been increasing
5 year-on-year since 2009.

6 A. Sure.

7 Q. Then at 3.41.3, can you see there Ofcom is again
8 analysing the historical decline in the SFV customer
9 base?

10 A. Yes, they are commenting on their analysis here.

11 Q. So what you see from the passages I have shown you is
12 that when Ofcom looked at changes in price over time for
13 Line Rental and Wholesale Line Rental, Ofcom undertook
14 a backward-looking analysis?

15 A. They may have done. I mean, as I said before, I have
16 not covered market definition, and if you want me to
17 comment, I do not think it is appropriate, I would need
18 to read the material from that perspective.

19 Q. I will put to you a little later, Mr Matthew, some of
20 the statements you have made to which this is relevant.

21 THE CHAIRMAN: Can I ask a question here, Mr Matthew,
22 because obviously you have got great familiarity with
23 the work of Ofcom. So I wonder, even if you have not
24 examined these documents in detail, are you not able to
25 answer the general question, which is that in this role,

1 in relation to BT, it was backward-looking as well as
2 forward-looking?

3 A. So Ofcom, whenever they do a market analysis, will look
4 at what is happening and look backwards as to how we got
5 here, because almost any market analysis would take that
6 view. It is just sensible and the obvious thing to do.
7 Then they draw a conclusion on a forward-looking basis
8 as they are required to do. So at that level, yes, they
9 do that.

10 Did you want a comment on anything more substantive?

11 THE CHAIRMAN: That is sufficient, I think, and that helps
12 us in terms of the question that has been asked.

13 Thank you.

14 MS KREISBERGER: Just given that the point has been raised
15 about relevance, I think it might be helpful just to
16 remind you of some of the points made in your report,
17 Mr Matthew.

18 Let us turn up paragraph 154 of your first report.
19 That is at {IR-E/19/74}. You say -- no, we do not have
20 the right one. So it is 74, page 74, not 84.

21 A. Yes, I have it. Sorry, yes, you do not have the right
22 one on here. Got it.

23 Q. You were not in the market definition hot tub, it is
24 true, but you say here:

25 "In relation to market definition, SMP and consumer

1 detriment ... the key points I make below are ..."

2 A. Yes.

3 Q. "... (i) the fact that Ofcom intervened using its
4 ex ante powers for VOCs on a forward-looking basis does
5 not imply that its Provisional Conclusions can
6 necessarily be applied retrospectively to previous
7 periods as part of an ex post competition law
8 assessment ..."

9 Now, I have been taking you through the Ofcom report
10 to show you that it is backward-looking given that you
11 make that statement, Mr Matthew?

12 A. Okay, I understand. So when Ofcom does an analysis,
13 they take into account evidence as to how you got there
14 and what is on the table and you take a forward look.

15 Here I am commenting in general terms that in
16 a market where migration is a feature, which is
17 prominent in the work of others, the possibility arises
18 that the market could change over time, and I think that
19 is a point I did raise in the hot tub yesterday as well.

20 So if, and I do not -- I stress I have not looked at
21 the evidence on this, but if it were the case that there
22 was a rump of non-switching customers, that at a point
23 in time previously was combined with a lot of customers
24 who were switching, and as the switchers move over you
25 could end up with a change in the relevant markets at

1 a point in time, so that is all this section is saying.

2 The implication of that is even if Ofcom were right
3 to reach the view it did at that point in time, looking
4 forwards, you cannot necessarily go back and say, well,
5 the same position would have been reached in earlier
6 years, and that is as far as it goes.

7 Q. Given the points that have been made by Mr Beard and the
8 chairman, I want to situate your evidence before I go
9 back to the line of questions I was pursuing,
10 Mr Matthew. I just want to show you something you said
11 yesterday, so transcript {Day17/99:1}. You were asked
12 whether Ofcom's decision to intervene on VOC prices by
13 accepting the Commitments was relevant to unfairness,
14 and you said this:

15 "So speaking from the perspective of ex ante
16 regulation, I do not think that decision tells you in
17 any way that the prices were actually unfair under
18 competition law, and the reasons for that are the very
19 different thresholds and considerations that go into
20 Ofcom's decisions about these kind of things as compared
21 to the high thresholds that apply under ex post law."

22 So, Mr Matthew, yesterday you were expressing a very
23 firm view, a firm view that Ofcom's decision to
24 intervene on VOC prices is in no way relevant, you say,
25 to whether those prices are unfair?

1 A. I said I do not think it is a useful -- it is in no way
2 an indication that you would also fail an ex post
3 threshold, which, as I made clear, my view is much
4 higher. It is not to say it is impossible that it
5 would, it just does not in itself imply that, is my
6 reading.

7 Q. Yes, you say it does not tell you in any way that prices
8 were unfair.

9 If we go back to paragraph 154 of your first report
10 on page 74, so that is {IR-E/19/74}, paragraph 154. You
11 say this, reading from (ii):

12 "... if anything, the fact that Ofcom, despite
13 having lower thresholds for intervention under its
14 ex ante powers, did not intervene for SPCs in 2017, did
15 not intervene in general in 2013, and did not intervene
16 to reduce prices of calls in 2017, gives weight to the
17 conclusion that BT's prices for access and calls were
18 not excessive or unfair."

19 So let me just show you as well on that same point
20 what Dr Jenkins said in the hot tub yesterday. So that
21 is {Day17/101:18}.

22 Dr Jenkins was asked whether Ofcom's decision not to
23 intervene on SPC prices was relevant to unfairness, and
24 she said this:

25 "I think, as with Mr Matthew's answer to the

1 previous question, obviously the thresholds and the
2 instrument that Ofcom was using is different from that
3 which we are considering now. I think the fact that,
4 even under that ex ante viewpoint, Ofcom made a judgment
5 not to intervene on prices before 2017 and to choose to
6 use engagement enhancement remedies rather than a price
7 remedy for SPCs is indicative that Ofcom did not
8 consider the prices or the market behaviour that it was
9 observing to be so problematic and potentially unfair."

10 So Dr Jenkins there is echoing what you say
11 at 154(ii) of your report, yes?

12 A. I do not know if she was referring to that. It may be
13 also an earlier comment in the hot tub.

14 Q. But in substance she is echoing what you say there?

15 A. In substance, that appears to reflect my observation
16 that a decision by Ofcom to intervene to cut the VOC
17 price for me does not imply unfairness under Chapter II,
18 and the converse, a decision by a regulator that has
19 quite a low threshold to intervene if it wants to and
20 thinks it is the right thing to do and has consciously
21 considered whether it should, decides not to, tends to
22 suggest that there is, well, if they did not do it, is
23 that likely to be an abusive price? But I do agree that
24 competition law is a different test. So I do not say
25 that proves it, I just say as a conditioning point, if

1 anything, the Ofcom precedents, insofar as they go
2 anywhere, for me are suggestive that these are not
3 unfair prices.

4 Q. Yes, so you are saying that when it comes to the unfair
5 pricing claim, the Tribunal cannot read anything at all
6 into the fact that Ofcom did intervene in relation to
7 VOC pricing?

8 A. My opinion is that is not a guidance, it is not
9 a version of an ex post competition law test, it is
10 Ofcom doing its ex ante powers.

11 Q. Yes, you said not in any way relevant?

12 A. With a different set of objectives.

13 Q. But at the same time, the fact that Ofcom did not
14 require a price cut in relation to SPCs is a judgment
15 that the Tribunal should treat as relevant to the
16 question of whether BT's prices were unfair?

17 A. To the extent anything is relevant, that is the one
18 I would pick out. That is all.

19 Q. That is the one you would pick out.

20 I hope that helps situate the line of questions.

21 So I will go back then to the SMP assessment by
22 Ofcom against that background. If we could go to the
23 Provisional Conclusions {IR-C/1/8}, please.

24 Paragraph 1.16. So here Ofcom sets out its core
25 findings in relation to market power, and Ofcom say

1 they:

2 "... provisionally concluded that BT has [SMP] ...
3 in ... standalone landline telephone services. This
4 allows it to act in setting the terms and conditions of
5 sales in this ... without facing significant competitive
6 constraint from other providers. This is particularly
7 true when it comes to setting prices.

8 "BT benefits from a very high market share; over
9 70%, in a market where ... customers are not actively
10 engaged. This in turn has allowed BT to act as a price
11 leader, steadily increasing the price of standalone
12 landline services ... given the difficulty in winning
13 new customers from BT, the range of choice from
14 competing providers has declined as prices have
15 increased."

16 Just briefly, Mr Matthew, that is the headline
17 finding. I will show you, crisply, Ofcom's more
18 detailed findings at page {IR-C/1/47} under the heading
19 "SMP assessment", and the subheading "Market Shares" at
20 the bottom of the page.

21 In Figure 4.1 we see that Ofcom sets out the market
22 shares of the suppliers of SFV Services, and I want to
23 show you that it does that from 2013-2016.

24 A. So I see the table.

25 Q. You see there it goes back to 2013?

1 A. Yes.

2 Q. Then in paragraph 4.18, Ofcom says:

3 "BT has a very high market share of 79% ... the next
4 largest provider has a share of 5%-15% ... BT's market
5 share has remained at 79% or above throughout the period
6 2013-2016."

7 Then in paragraph 4.19, Ofcom says that:

8 "BT's market shares ... are consistent with
9 a finding of dominance in the absence of other factors.
10 As set out in the SMP Guidelines, very large market
11 shares, in excess of 50%, are in themselves evidence of
12 the existence of a dominant position, and therefore
13 SMP."

14 So Ofcom is noting there that BT's market shares
15 from 2013-2016 are consistent with a finding of SMP. So
16 again, that is backward-looking, is it not, Mr Matthew?

17 A. They are taking into account past evidence. Again,
18 I will repeat I have not looked into any of this.

19 Q. Now, let us complete the point by looking at Ofcom's
20 assessment of price in relation to SMP. That is at page
21 {IR-C/1/53}. You see there the heading "Price
22 Analysis".

23 Paragraph 4.47, Ofcom says:

24 "The ability to price persistently and significantly
25 above the competitive level is an indicator of market

1 power. In a competitive market, individual firms should
2 not be able to persistently maintain prices above costs
3 (including a normal return) and thus sustain excessive
4 profits."

5 So in addition to market shares, Ofcom is looking at
6 Line Rental prices to see if they provide evidence of
7 market power?

8 A. Is it? Sorry, the paragraph you just mentioned, I do
9 not think it mentions ...

10 Q. So 4.47, and we can go back -- it is under the -- there
11 is a heading on page {IR-C/1/49}, "Barriers to entry and
12 expansion". Sorry, no, that is not right. That is the
13 one before. This is "Price analysis". It is in the
14 context of SMP assessment, on page {IR-C/1/53}. There
15 we go.

16 A. So, sorry, what is the question?

17 Q. You see there that Ofcom is looking at prices, Line
18 Rental prices, to see if they provide evidence of market
19 power?

20 A. In Figure 4.2?

21 Q. In paragraph 4.47, but I am going to take you down to
22 Figure 4.2, so let us have a look at that.

23 Can you see that shows wholesale and Line Rental
24 price movements over a ten-year period from 2006
25 to December 2016 {IR-C/1/53}?

1 A. Yes, it does. So this is Line Rental, not total costs.

2 It is not ARPUs, this is the Line Rental.

3 Q. If we go over the page, Mr Matthew, you will see Ofcom's
4 interpretation of Figure 4.2. {IR-C/1/53}. If you
5 could just read that to yourself.

6 A. Sorry, which paragraph?

7 Q. 4.50 at the top of page {IR-C/1/54}. (Pause).

8 A. Yes.

9 Q. So you see there that Ofcom is going back to
10 December 2009 in assessing the Line Rental increases.

11 Then lastly, if we go to page {IR-C/1/58} on 4.67,
12 that is Ofcom's conclusion on the price analysis:

13 "Our analysis of the evidence on prices suggests
14 that prices are significantly above costs ... and have
15 been diverging further over recent years. [And they]
16 appear to be above those of other operators ..."

17 So there is not any question, is there, that Ofcom
18 is taking into account historical trends in SFV prices
19 when it assesses SMP?

20 A. Okay, so if that is your question, yes, their analysis
21 in this report is taking a backwards look as to what has
22 happened, and that is informing where they reach at this
23 point in time.

24 Q. Now, staying with the Provisional Conclusions, let us go
25 to page {IR-C/1/8}. Now, this is, Mr Matthew, this is

1 Ofcom's findings on BT's pricing at 1.18 and 1.19. You
2 see there:

3 "... BT has been able to raise prices to its
4 standalone landline telephone customers despite falling
5 costs."

6 I have already shown you the chart. You can see it
7 again, just for completeness, if you turn back to page
8 {IR-C/1/6}, which shows the Line Rental price increasing
9 since 2009. We have covered that.

10 A. The chart is the Line Rental.

11 Q. The graph at figure 1.2.

12 A. I think we have seen it several times in the last couple
13 of weeks.

14 Q. Yes, it is horrifyingly familiar.

15 Now, if we go to page {IR-C/1/71}, this is where
16 Ofcom turns to consumer detriment. Do you see there
17 paragraph 6.2, Ofcom finds two types of consumer
18 detriment as a result of the lack of competition in
19 these markets, direct effects and indirect effects.

20 If you could cast your eye over 6.3-6.6. (Pause).

21 THE CHAIRMAN: Can we have that expanded, please? (Pause).

22 Thank you.

23 A. So this is Ofcom's conclusion about what it thinks the
24 price, higher prices are.

25 MS KREISBERGER: I am just going to show you the underlying

1 analysis before I put my question to you, Mr Matthew.
2 That is {IR-C/2/24}. So this is Annex 5 which you see
3 Ofcom refer to in 6.4. If you can have a look at
4 Figure A5.9. I showed this figure to Dr Jenkins
5 earlier. So this is Ofcom's calculation of BT's SFV
6 profits, CPI adjusted. If you have a look at A5.61,
7 just below the graph Ofcom comments:

8 "Our analysis to date has covered the 2007/08 to
9 2015/16 financial years."

10 So you can see there Ofcom is going back to
11 2007/2008 in looking at BT's profits, is it not?

12 A. It is using that evidence. I do not -- if your question
13 is: "does this suggest Ofcom should have made or did
14 make a different decision earlier on", I do not think
15 that is the implication.

16 Q. That is not the question I am putting to you. I am
17 asking you to comment, given some of the points in your
18 report, Mr Matthew, as to the evidence that Ofcom is
19 marshalling here in relation to BT's profitability in
20 SFV. Ofcom is going back and charting the movement in
21 BT's SFV profits from 2007 right up to 2016, is it not?

22 A. It is. It is charting it. I agree.

23 Q. Then let us go back to page {IR-C/1/25} of the
24 Provisional Conclusions, and there you see Ofcom's
25 conclusion:

1 "We provisionally conclude that Dual Play services
2 are not in the same market as SFV Services bought by
3 Voice only --"

4 Sorry, I am reading you the wrong -- sorry, it is
5 the paragraph above, 3.37.3. Yes:

6 "As we have set out in paragraph 6.3-6.6 [which I
7 showed you] our view is that prevailing Line Rental
8 prices are well above competitive levels for SFV
9 access."

10 When I asked you earlier, Mr Matthew, about whether
11 Ofcom will look at whether prices are above competitive
12 levels, that was just a general question, and you did
13 not agree then, but do you agree here that Ofcom is
14 looking specifically at the question of whether Line
15 Rental prices were above competitive levels?

16 A. So I am not -- sorry, I have forgotten what we said
17 before. What was that exchange?

18 Q. Earlier when I asked you at the outset whether Ofcom, as
19 part of its expert powers, will consider whether prices
20 are above competitive levels, you said: "no, they do not
21 look at it through that" -- these were not quite your
22 words -- you said they look at it on the basis of
23 Ofcom's duties. Just putting the simple point here: not
24 speaking in general terms, Ofcom is looking at whether
25 the price was above competitive levels for SFV access.

- 1 In fact, they say "well above" competitive levels?
- 2 A. Yes, so if I was read to have said that Ofcom does not
3 use competitive levels as a reference point, by which
4 they often mean costs, so a regulatory connection is
5 often drawn, then I misspoke. I apologise. Clearly
6 they refer to these things as above competitive levels,
7 by which they often mean costs in this case, allocated
8 costs.
- 9 Q. We have now seen that this conclusion here in this
10 paragraph relies on a profitability assessment that goes
11 back in time to 2007?
- 12 A. Yes, as I said, I do not think I read into that views
13 about profits in previous periods. The graph you showed
14 me was going up.
- 15 Q. Sorry, I missed that, Mr Matthew?
- 16 A. The graph you showed me before was rising, so the
17 suggestion might have been they rose later on, but
18 I really have not been into that material in depth on
19 this perspective.
- 20 Q. I would just like to turn to Ofcom's findings in the
21 statement. Let us turn that up. That is at {IR-C/3/1}.
22 If we start on page {IR-C/3/2}, and you will see why
23 I am taking you to this, but let us take it in stages.
24 Page 2, under the heading "About this Document", this
25 says:

1 "This document sets out our conclusions for the
2 market for standalone landline telephone services
3 following our consultation in February."

4 So it is clear, is it not, Mr Matthew, that this is
5 setting out BT's conclusions -- sorry, Ofcom's, not
6 BT's.

7 A. Most definitely Ofcom's, yes, following their
8 consultation.

9 Q. If we turn to page {IR-C/3/17} of this document, under
10 the heading "Dual play services are not in the same
11 market as standalone fixed Voice services bought by
12 Voice Only Customers". If we go down to 3.27 on page
13 {IR-C/3/18}, over the page, you see there:

14 "We provisionally concluded that Dual Play services
15 are not in the same market as standalone fixed Voice
16 services bought by Voice Only Customers, as standalone
17 fixed Voice access prices (and profits) are
18 substantially above competitive levels, which would not
19 be sustainable if they were constrained by competition
20 from Dual Play."

21 Then if you could just cast your eye over 3.28 as
22 well. (Pause).

23 So Ofcom's final conclusion here is that Voice Only
24 Customers and Dual Play customers are in separate
25 markets.

1 A. Firstly, these are obviously Ofcom's conclusions. What
2 did you say they were?

3 Q. Sorry, Mr Matthew, I actually did not catch your last
4 ...

5 A. So this is a list of their conclusions.

6 Q. These are obviously --

7 A. What was the statement you asked me to say is
8 a paraphrase of this paragraph?

9 Q. Yes, so Ofcom's conclusion here is that Voice Only
10 Customers and Dual Play customers are in separate
11 markets, or the long-hand version is SFV Services
12 supplied to Voice Only Customers are in a separate
13 market from Dual Play bundles. That is Ofcom's
14 conclusion.

15 A. So you may well be right, but can I just double check,
16 because I am just looking at some of the terminology
17 here, because some of it appears to be a summary of what
18 was said in the con doc. Maybe I am misreading it.
19 3.27 is typical.

20 THE CHAIRMAN: Sorry, said in the what?

21 A. In the consultation document.

22 THE CHAIRMAN: Consultation document, right.

23 A. Typically the way Ofcom -- you will almost always do
24 a consultation, and then when they write the statement
25 they will have a sometimes quite detailed restatement of

1 what they said before --

2 THE CHAIRMAN: When you say "what they said before" here,
3 are we talking about the Provisional Conclusions? You
4 said a consultation document.

5 A. I am not saying that is what it is, because I have been
6 asked about that paragraph. I am just saying 3.27 does
7 start with the past tense, which I think means --

8 MS KREISBERGER: Let me help you, because I left you to read
9 it to yourself, so that is quite right.

10 At 3.27 Ofcom refers to the provisional conclusion
11 that Dual Play services are not in the same market as
12 SFV Services bought by Voice Only Customers. So that,
13 as you say, Mr Matthew, is a reference back.

14 Then let us go to 3.28:

15 "While BT argued that price increases for SFV
16 Services were driven by the nature of Dual Play pricing,
17 it did not provide any evidence to contradict our
18 assessment that the presence of Dual Play offers had not
19 constrained standalone SFV prices to competitive levels.
20 We have updated our analysis of price trends for
21 standalone, fixed Voice and ADSL services, and the
22 updated figures continue to support our position."

23 In other words, BT is confirming that its conclusion
24 is -- sorry, I keep doing that, I am sorry, I have your
25 client on the brain. Ofcom is confirming its

1 provisional conclusion here as its final conclusion.
2 They are in separate markets. You see that from the
3 heading on page {IR-C/3/17} if we go back a page. I am
4 sorry, I perhaps raced through that.

5 A. Yes, so they are endorsing their previous analysis.
6 I cannot recall if they make a formal finding here, but
7 broadly speaking they are endorsing their previous --
8 they are endorsing their previous analysis.

9 Q. Then let us look at what they say about Split Purchase
10 Customers on page {IR-C/3/22}. They have done their
11 conclusion on Voice only. At 3.51 on page 22 Ofcom
12 says:

13 "Split Purchase Customers pay materially more, for
14 standalone Voice and standalone broadband services, than
15 they would pay for functionally equivalent Dual Play
16 services."

17 A. Yes, that is what it says.

18 Q. "These customers have also been highly profitable. We
19 explained the outcomes and evidence supported our
20 provisional conclusion that dual-play bundles do not
21 competitively constrain standalone fixed Voice prices to
22 split purchasers. Therefore, we did not consider that
23 standalone fixed Voice services bought by split
24 purchasers were in the same market as dual-play
25 services. Consultation responses have not provided

1 evidence or arguments to lead us to change our view."

2 So Ofcom is confirming its finding from the
3 Provisional Conclusions that Dual Play is not in the
4 same market as SFV Services bought by Split Purchase
5 Customers, is it not?

6 A. So can we just go through again. So up to 3.52 ...

7 MR BEARD: I think it is appropriate that he reads the whole
8 section from 3.49.

9 MS KREISBERGER: I am very happy for him to do so. (Pause).

10 A. Yes, 3.49 says they now think there is a separation
11 between SPs and Voice only. Then they summarise the
12 consultation Provisional Conclusions position. Then
13 they say, at 3.52, the responses have not led them to
14 change their view. Then they comment that there is 97%
15 check which is very, very high.

16 Q. Very high, is it not? That is certainly meeting the SMP
17 threshold.

18 A. Although I am not going to go into the detail, I do look
19 at a share of 97% with a degree of scepticism as to
20 whether that really captures the strength of a firm's
21 market position. To the extent market shares tell you
22 something, you would expect high market shares to show
23 very strong market position. 97% is close to near
24 monopoly. But while I have not been through any of the
25 evidence in depth, it for me defies expectations to say

1 BT is a near monopolist of Split Purchase Customers
2 given that they have a direct substitute available for
3 them, and I do know it is perhaps traditional market
4 definition, but when you have products that are direct
5 functional equivalents like that you have to question
6 whether those are indeed separate markets.

7 THE CHAIRMAN: I think the purpose of these questions is
8 really just to ask if you have any comments on what the
9 approach of Ofcom seems to be. We are certainly not
10 going to go back into the substance of the questions on
11 market definition.

12 A. Okay, gladly not. So this is a summary of Ofcom's
13 conclusions in relation to market definition.

14 MS KREISBERGER: I am very grateful. That is very helpful.
15 So it is a summary of Ofcom's conclusions, as you say,
16 in relation to market definition, they go on to SMP.

17 I just want to show you, against that background,
18 what BT says about that in these proceedings.

19 {OR-A/13/16}, paragraph 45.

20 A. So OR-A ...

21 Q. Yes, there we go, paragraph 45. This is BT's skeleton
22 argument, Mr Matthew. Have you seen their skeleton
23 argument?

24 A. Yes, I have.

25 Q. You will have seen that at paragraph 45, BT, this time,

1 says:

2 "Further and in any event, the findings [referring
3 to Ofcom's 2017 findings] were provisional: BT did not
4 accept key elements of Ofcom's Provisional Conclusions
5 for good reason and no final view was taken by Ofcom on
6 those points."

7 That is wrong, is it not?

8 A. What is wrong? It says BT did not accept these
9 findings.

10 Q. No final view was taken by Ofcom on those points. You
11 just agreed with me that these are Ofcom's conclusions?

12 A. Well, they are a statement of where they reached.

13 I presume this skeleton, I do not want to comment on
14 what precisely the skeleton is intended to mean, but
15 I presume it means they did not reach a final formal
16 conclusion. Ofcom's reasoning is laid out here.

17 I cannot add to it.

18 Q. I showed you the beginning of the document which says,
19 and we can have it up on the screen if it helps you,
20 Mr Matthew, {IR-C/3/2}:

21 "This document sets out our conclusions ..."

22 A. That is a general statement about the totality of it
23 all.

24 Q. Let us turn next to SMP. As the chairman said, we are
25 not getting into substance at this stage.

1 THE CHAIRMAN: Are we going to conclude this by about ten
2 past, just after ten past? And the second question is,
3 just so we can get an idea, how much more have you got
4 to go?

5 MS KREISBERGER: I think I have about an hour tomorrow
6 morning. I do not think I am going back to the 2017
7 document, if that helps.

8 THE CHAIRMAN: Right. So that is fine. Do you want to
9 start your SMP point?

10 MS KREISBERGER: I think if I could just complete the point
11 and then we are finished with 2017, and that would be
12 very helpful, thank you.

13 THE CHAIRMAN: Yes, thank you.

14 MS KREISBERGER: So let us go to page {IR-C/3/21}. The
15 heading, if it helps, Mr Matthew, is on page
16 {IR-C/3/19}, "Assessment of competition for Voice Only
17 Customers".

18 I would like to show you paragraph 3.48 on page
19 {IR-C/3/21}:

20 "Overall, BT enjoys a significant market share
21 within the markets for Voice-only access and calls which
22 have persisted over time. While competition was more
23 intense in the early part of the century, with the
24 movement of the focus of the market to bundles the
25 market has become significantly more static.

1 Competitors face significant barriers to expansion ...
2 BT has been able to increase prices above the
3 competitive level. In these circumstances, we do not
4 consider that BT faces any significant constraints on
5 its ability to act independently within the markets for
6 the purchase of Voice-only access and calls."

7 Now, I hope I made clear this is in the statement,
8 Mr Matthew, Ofcom's statement. So a firm that does not
9 face any significant constraints on its ability to act
10 independently is a dominant firm, yes?

11 A. Yes, so dominance, ability to behave independently of
12 your competitors.

13 Q. That is what Ofcom say at 3.54 on page {IR-C/3/22}:

14 "BT is the dominant provider of standalone fixed
15 Voice services to Voice Only Customers with around 70%
16 of the market."

17 A. Yes, so these are Ofcom's conclusions.

18 Q. Yes. Then let us turn to the position, so those are
19 Ofcom's conclusions on the Voice Only Customers. Let us
20 turn to Ofcom's analysis of the position in relation to
21 Split Purchase Customers. That is at paragraph 3.53 on
22 page {IR-C/3/22}.

23 "BT also accounts for a very high market share, 97%
24 ..."

25 You have looked at this Mr Matthew:

1 "We also note that, as for Voice-only customers, the
2 declining and relatively small size of the market can
3 make it difficult for communications providers of
4 standalone fixed Voice services (both Voice-only and
5 split purchase) to target them to ... switch provider."

6 So Ofcom is saying that there is a very high market
7 share, so BT is dominant in the supply of SFV Services
8 to Split Purchase Customers, yes?

9 A. That is what they are saying.

10 Q. They say that that market power is reinforced by the
11 difficulty which other providers face in competing for
12 these customers?

13 A. In the next sentence they say: "[but then] there is much
14 greater choice of dual-play packages". So what I read
15 from that is they are saying people are not going out
16 there to offer you a split purchase contract
17 particularly but they are offering you a Dual Play
18 alternative which is where the core of the competition
19 is. If that were a substitute then there would be
20 a different story.

21 Q. Ofcom is not describing Dual Play as a substitute.
22 I showed you the market definition.

23 A. They take a view on that.

24 Q. Now, finally, the final point on this. If we go to
25 consumer detriment. That is at page {IR-C/3/23}.

1 I would like you to look at paragraph 4.2. So:

2 "Our concerns for this market stem from the fact
3 that Line Rental prices have been increasing in real
4 terms since 2010, despite falling wholesale charges for
5 products used to provide Line Rental. Price increases
6 may be due in part to communications providers
7 rebalancing ... However, our assessment indicates that
8 the price increases are generally not justified by cost
9 increases and the provision of [SFV] has become more
10 profitable over this period. Our assessment also
11 identifies a concern that the provision of standalone
12 fixed Voice services is not competitive."

13 Now, pausing there, Mr Matthew, I would like to show
14 you something that you said in the hot tub on Day 15,
15 page 13, line 14 onwards. {Day15/13:14}. If we pick it
16 up on line 14. Towards the end you say:

17 "There is a chart that shows ARPUs from around 2007
18 running through to the middle of the claim period for
19 SFV Services, and it shows BT's and it shows a declining
20 trend up to around I think 2013, and then it sort of
21 fathoms off and then starts to go up a little bit and
22 takes us into the other evidence. In terms of how well
23 it is working, from a perspective of a regulator prices
24 are coming down, that is good, and there are a lot of
25 other good things going on in retail competition at this

1 time."

2 I appreciate you were talking about ARPUs,
3 Mr Matthew.

4 A. Yes.

5 Q. But given the passages I have just shown you, you do
6 accept that the regulator's view in 2017 was not that
7 prices were coming down and a lot of other good things
8 were going on?

9 A. Well, I think it was because it is not the chart that
10 I was referring to on the ARPUs that was from the Ofcom
11 document I think.

12 Q. I have just shown you Ofcom's view on consumer detriment
13 addressing the -- if we bring that up again.

14 A. I get it. So this is the 4.2 which is saying --
15 concentrating on Line Rental and the widening margin
16 that they find on Line Rental and then saying: "call
17 revenue -- call rebalancing is not enough to control for
18 that widening margin". So I presume their inference was
19 that margins are going up. They say the profits are
20 rising. But the overall picture that ARPUs were coming
21 down for an extended period and then sort of levelled
22 off I do not think they say anything different about
23 that.

24 Q. Let us complete the point by going to {IR-C/3/6},
25 paragraph 1.12. Ofcom says there in relation to

1 Voice Only Customers, just the last sentence:

2 "BT currently holds a dominant position in the
3 market for Voice-only customers and the lack of
4 competition enables it to maintain prices above the
5 competitive level.

6 "We therefore consider that a significant price cut
7 is important to alleviate the detriment suffered by
8 Voice-only customers."

9 Ofcom did not think there were a lot of good things
10 happening at this point, did they?

11 A. So that is their statement. Could you take me back to
12 the --

13 THE CHAIRMAN: I am sorry, I did say we have a hard stop at
14 4.15.

15 MS KREISBERGER: I understand.

16 MR BEARD: I am extremely concerned. We have had no
17 questions in relation to limb 2 issues so far as I have
18 heard this afternoon in relation to this
19 cross-examination. Instead what is being put are
20 a series of reports upon which Ms Kreisberger can make
21 submissions in due course.

22 THE CHAIRMAN: I agree and she has her time for
23 cross-examination. If the effect is that she does not
24 want to cross-examine Mr Matthew on fairness, then there
25 will be nothing that she can draw in relation to his

1 evidence on it.

2 MR BEARD: I put the point, sir.

3 THE CHAIRMAN: I understand that. I do take the point that
4 a lot of what has been asked this afternoon can be made
5 by way of submission. We can all read the documents and
6 see what they say. The only point is I would not want
7 it to then to have been said that Mr Matthew did not
8 have an opportunity to comment.

9 MR BEARD: That is right.

10 THE CHAIRMAN: That is probably what the position is now,
11 but I am afraid I do have to stop now, and can we have
12 an update on Mr Duckworth just before we start tomorrow?
13 Can we start at 10 o'clock tomorrow? Thank you.

14 (4.15 pm)

15 (The hearing adjourned until Wednesday, 28 February at
16 10.00 am)

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