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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 29<sup>th</sup> January – Friday 22<sup>nd</sup> 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)

1 Tuesday, 30 January 2024

2 (10.30 am)

3 THE CHAIRMAN: Good morning. Some of you are joining us via

4 live stream on our website, I must start therefore with

5 the customary warning: an official recording is being

6 made and an authorised transcript will be produced, but

7 it is strictly prohibited for anyone else to make an

8 unauthorised recording, whether audio or visual, of the

9 proceedings, and breach of that provision is punishable

10 as a contempt of court.

11 Yes, Ms Kreisberger.

12 MS KREISBERGER: Thank you. Good morning, sir.

13 THE CHAIRMAN: Good morning.

14 Opening submissions by MS KREISBERGER (continued)

15 MS KREISBERGER: So this morning I have three parts to my

16 submissions: legal principles on the abuse, limb 1 and

17 limb 2.

18 Beginning with legal principles. The relevant

19 principles are set out at paragraphs 99–123 of our

20 skeleton; and the CMA has also filed written

21 observations on the law, we adopt those in full. So

22 this morning I would like to highlight eight short

23 points on the legal framework in opening.

24 Point 1: unfair pricing is a statutory head of

25 abuse. If I could ask you to turn up section 18 of the

1

1 Competition Act at {G/101/1}. It will be very familiar.

2 You see there the prohibition itself contains a list of

3 forms of conduct which are prohibited as abusive when

4 carried out by dominant firms and the first on the list

5 is at section 18(2)(a), conduct which consists in:

6 "Directly, or indirectly imposing unfair purchase or

7 selling prices or other unfair ... conditions."

8 So dominant firms which charge unfair prices violate

9 section 18(2)(a).

10 Now, the legal test for what is an unfair price can

11 obviously be found in the authorities and we now have

12 a well developed line of jurisprudence, and that

13 jurisprudence is made up of both public enforcement

14 cases and private claims, private actions. It is

15 notable that actually this procedure, the collective

16 actions procedure, has stimulated the latter because,

17 for the first time, it has provided an opportunity for

18 end consumers to pursue claims for compensation where

19 claims for compensation for unfairly priced consumer

20 goods were not feasible before. That is why the

21 Tribunal has a number of these claims pending.

22 BT protests that these cases are rare. Well, of

23 course the number of previous cases is not a material

24 consideration, the legal test has to be applied to the

25 facts. But it is also not true, and you see that in the

2

1 authorities bundle.

2 Point 2: consumer protection is the primary

3 objective of the Chapter II prohibition. If we could

4 please turn up {G/89/31}. This is Lord Justice Green's

5 judgment in the *Gutmann* case. At paragraph 93, his

6 Lordship says there:

7 "The law relating to abuse is concerned with

8 consumer unfairness because when an undertaking is

9 dominant it is, by definition, freed from the

10 competitive shackles which otherwise incentivise and

11 discipline it to maximise consumer welfare and benefit.

12 This is why most laws worldwide which prohibit abuse of

13 dominance include within the prohibition the imposition

14 of some form of 'unfair' terms and prices. These are

15 often described as 'exploitative' abuses."

16 If we could just turn up this Tribunal's very recent

17 decision in *Liothyronine*, that is {G/95/39},

18 paragraph 109, you will see there:

19 "It was submitted on behalf of Hg that section 18 is

20 primarily concerned with the protection of competition

21 as an institution, rather than with the welfare of

22 consumers."

23 It cites the relevant cases.

24 "The cases [which they] relied on in support of this

25 submission ... do not, however, support the proposition

3

1 that protection of consumers from direct harm through

2 unfair pricing is only a secondary objective of the

3 legislation."

4 I will just, for your note, cite *Albion Water*, that

5 is at {G/47/71}, and the Tribunal held there the primary

6 interest to be protected under Chapter II is that of the

7 consumer.

8 So it is a central purpose of section 18 to prevent

9 firms from exploiting their market power over consumers

10 by extracting unfairly high prices from them.

11 My third point is it is common ground that the

12 relevant test is laid down in *United Brands*. The test

13 has two limbs: whether the difference between the costs

14 actually incurred and the price actually charged is

15 excessive; and whether the price is unfair either in

16 itself or in comparison to other products. That is the

17 classic statement of the test.

18 For your note, the full test in *United Brands*, which

19 we rely on, is at paragraph 56 of the *Phenytoin*

20 judgment. That is at tab 73, page 17.

21 In *Phenytoin*, Lord Justice Green gave an

22 authoritative statement of the applicable principles.

23 If we can turn up page {G/73/29}. That is obviously

24 a very important passage, I will not read it in full,

25 but he makes the following points there that I would

4

1 like to draw out.  
 2 The basic test for the abuse is whether the price is  
 3 unfair. In broad terms, a price is unfair when the  
 4 dominant firm has reached trading benefits which it  
 5 would not have obtained in workable competition --  
 6 conditions of workable competition.  
 7 He says a price which is excessive, because it bears  
 8 no reasonable relation to economic value, is an example  
 9 of an unfair price, and where a cost-plus test is  
 10 applied, the Tribunal should first determine whether the  
 11 difference between the price and the benchmark is  
 12 excessive and, if it is, then compare the price charged  
 13 against any other factors which might otherwise serve to  
 14 justify the price charged as fair and not abusive.  
 15 Finally, there is no fixed list of categories of  
 16 evidence relevant to unfairness.  
 17 The fourth proposition that I draw from the  
 18 authorities is that there is no bright line rule about  
 19 when a price cost differential will count as excessive.  
 20 If we could please turn up {G/47/66}, this is one of the  
 21 Tribunal's judgments in *Albion Water*.  
 22 At paragraph 199, the Tribunal held:  
 23 "The term 'excessive' is an ordinary English word  
 24 which may be applied in accordance with its ordinary  
 25 meaning, having regard to the overall purpose of the

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1 Chapter II prohibition. We note that the Authority  
 2 submitted that a price may not be 'excessive' within the  
 3 meaning of ... *United Brands* ... where the price exceeds  
 4 costs but not by a material extent ... While we are  
 5 prepared to accept that a material difference between  
 6 price and cost must be shown, we see no need to specify,  
 7 in this case, when a particular difference is  
 8 sufficiently large to be deemed excessive."  
 9 It then continued at paragraph 263 on page  
 10 {G/47/85}:  
 11 "The Tribunal agrees with the Authority that it  
 12 would not be appropriate to specify a particular amount  
 13 by which a price must exceed the economic value of  
 14 a product ... in order to infringe Chapter II ... The  
 15 measure of excess is not an exact science and it is not  
 16 practically possible to specify a precise arithmetic  
 17 relation between price and the economic value of  
 18 a product ... for it to be judged fair or unfair.  
 19 Determining how far above 'the economic value' a price  
 20 has to be before it can be said to bear 'no reasonable  
 21 relation' to the economic value is a matter of judgment,  
 22 having regard to the circumstances of the individual  
 23 case."  
 24 So the difference between the price charged and the  
 25 cost-plus benchmark must be material, but materiality is

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1 a matter of judgment. The law does not impose  
 2 a numerical or a percentage threshold.  
 3 In that case, the Tribunal found a differential of  
 4 46.8% between the charges and the cost-plus benchmark to  
 5 be material and excessive. In *Deutsche Post* it was  
 6 a 25% differential. But all of these cases turn on  
 7 their facts.  
 8 My fifth submission is that the economic value of  
 9 a product can equate to the cost of supplying it. If we  
 10 could please go to paragraph 172 of the  
 11 Court of Appeal's judgment in *Phenytoin*, that is at  
 12 {G/73/52}, Lord Justice Green held:  
 13 "It is evident from the judgment in *United Brands*  
 14 that the reference to 'economic value' is a part of the  
 15 overall descriptor of the abuse; it is not the test.  
 16 The test should therefore, when properly applied, be  
 17 capable of evaluating economic value ... If it is  
 18 properly factored into 'plus' or 'fairness' or ... some  
 19 other part of the test, or is reflected in [some]  
 20 evidence which can stand as a proxy for economic value,  
 21 there is no incremental obligation to take it into  
 22 account again, as a discrete advantage or justification  
 23 for a high price."  
 24 So economic value needs to be considered somewhere  
 25 but you avoid double-counting.

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1 The authorities also make clear that economic value  
 2 can equate to the costs of supplying the product. So  
 3 the very excessiveness of the price above cost-plus  
 4 establishes unfairness.  
 5 If we could turn to paragraph 225 of *Albion Water*.  
 6 That is at {G/47/74}. Here the Tribunal is dealing with  
 7 a submission that the assessment of economic value must  
 8 consider non-cost-related factors. The Tribunal  
 9 rejected that submission and it said:  
 10 "We do not dispute Dwr Cymru's submission that it is  
 11 important to examine whether there are any  
 12 non-cost-related factors in a particular case. However  
 13 this does not rule out the possibility that the costs of  
 14 supplying a product ... (plus a reasonable return)  
 15 would, in the absence of any relevant non-cost-related  
 16 factors, represent its 'economic value' ... If  
 17 Dwr Cymru's submission amounts to more than this -- for  
 18 example, that non-cost-related factors must be reflected  
 19 in the economic value even if irrelevant or non-existent  
 20 in the particular circumstances of a case -- then it  
 21 seems to us that is not supported by the authorities to  
 22 which our attention has been drawn, and is inconsistent  
 23 with ... *United Brands* and Article 82 ... itself."  
 24 THE CHAIRMAN: Just pause there a moment, please. (Pause).  
 25 Yes, thank you.

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1 MS KREISBERGER: Then reading to the end of the paragraph:  
 2 "... the Authority was correct to observe that  
 3 neither *Scandlines* nor *Attheraces* excludes the  
 4 possibility that, in the absence of ... non-cost-related  
 5 factors, the very excessiveness of a price could be  
 6 sufficient to that [it] bears no reasonable relation to  
 7 the economic value ... [That] is also consistent with  
 8 ... *Deutsche Post* ..."  
 9 Moving on then to the sixth proposition that I draw  
 10 from the authorities: a relevant consideration, and  
 11 I will be coming back to this when I come to the facts  
 12 of this case, a relevant consideration is whether the  
 13 market is likely to produce a reasonable relationship  
 14 price to economic value.  
 15 Again, in *Albion Water*, the Tribunal held that it  
 16 needed to consider whether the relevant market is  
 17 capable of functioning in a manner likely to produce  
 18 a reasonable relationship of price to economic value.  
 19 That is at {G/47/87}, paragraph 268.  
 20 The Tribunal refers to certain contextual factors  
 21 arising in that case, and then in the last sentence of  
 22 that paragraph says:  
 23 "In particular, those factors inform our  
 24 consideration of whether the relevant market is capable  
 25 of functioning in a manner that is likely to produce

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1 a reasonable relationship of price to economic value ...  
 2 "Dwr Cymru retained a market share of the 100% of  
 3 the relevant market [that is the relevant market in that  
 4 case] throughout the period ..."  
 5 It goes on at 270:  
 6 "In our judgment, it follows that the relevant  
 7 market was clearly not capable of functioning in  
 8 a manner that produced, or was likely to produce,  
 9 a reasonable relationship between the ... Price [the  
 10 impugned price] and the economic value of the services  
 11 [there] ..."  
 12 Just so you can situate that, on page {G/47/85} this  
 13 is all under the heading, "Was the First Access Price  
 14 unfair in itself?" So it is limited.  
 15 THE CHAIRMAN: Yes.  
 16 MS KREISBERGER: My seventh proposition is: it is not  
 17 appropriate to take into account the dominant firm's  
 18 profits in other markets.  
 19 So a dominant firm cannot justify excessive prices  
 20 on the basis that they cross-subsidise less profitable  
 21 or loss-making products in other markets.  
 22 If we could, please, turn up the *Napp* judgment, that  
 23 is at {G/33/106}. It is the judgment of this Tribunal.  
 24 At paragraph 413. Here the Tribunal considered the  
 25 submission that, when assessing whether *Napp's* prices

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1 were excessive, the Tribunal should take into account  
 2 the profits made on its broader portfolio of products.  
 3 The Tribunal said this, second sentence:  
 4 "In our judgment that argument, and indeed *Napp's*  
 5 whole argument based on 'portfolio pricing',  
 6 impermissibly directs attention away from the specific  
 7 product market which we are required to consider when  
 8 deciding whether there is an abuse of a dominant  
 9 position ... In our view, it is not appropriate, when  
 10 deciding whether an undertaking has abused a dominant  
 11 position by charging excessive prices ... to take into  
 12 account the reasonableness or otherwise of its profits  
 13 on other, unspecified, markets comprised in some wider  
 14 but undefined 'portfolio' unrelated to the market  
 15 [where] dominance exists."  
 16 Just to show you a more recent application of that  
 17 principle, if we could please turn up *Aspen*. That is  
 18 {G/133/39}, paragraph 204. This is a decision of the  
 19 European Commission.  
 20 Here the European Commission rejected an argument  
 21 that *Aspen's* price increases on its products were  
 22 justified by the need to cross-subsidise markets where  
 23 products were loss-making.  
 24 The Commission said this, so this is paragraph 204  
 25 at the end of the page:

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1 "... cross-subsidisation between markets cannot give  
 2 a dominant undertaking carte blanche to  
 3 disproportionately hike up prices, especially in  
 4 a context, such as that at stake, where the Products  
 5 were profitable at portfolio level already before  
 6 the price increases ..."  
 7 My last point on the legal principles is that  
 8 excessive prices cannot be justified by reference to the  
 9 regulatory context.  
 10 If I could take the Tribunal, please, back to  
 11 *Albion Water*, {G/47/80}, paragraph 242, this precise  
 12 argument was rejected. So the submission there was that  
 13 the prices were not excessive because they were subject  
 14 to Ofwat's regulatory approval, the specialist regulator  
 15 there.  
 16 The Tribunal said this:  
 17 "As regards the need for regulatory approval of the  
 18 First Access Price, even though *Dwr Cymru* apparently  
 19 believed it needed its access charges to be approved by  
 20 the Authority, this does not absolve it from its special  
 21 responsibility under the Chapter II prohibition. Even  
 22 if the position of the regulator (in favour, at the  
 23 material time, of access prices set according to  
 24 regional average costs) and/or the relevant regulatory  
 25 framework encouraged or made it easier for water

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1 companies to engage in anti-competitive conduct, those  
2 undertakings remained subject to the Act.”

3 So that is where a regulator is helping along with  
4 the abuse.

5 So it does not assist a dominant firm to say its  
6 prices are subject to regulation, or that a regulator  
7 did not take action on excessive prices, or even that  
8 a regulator facilitated them. So no absolution from the  
9 regulatory framework.

10 Those are my submissions on the law.

11 With that, I move on to limb 1, and my submissions  
12 on limb 1 are focused on the cost benchmark.

13 It is of course necessary to perform a cost  
14 allocation exercise to construct the benchmark. This is  
15 a technical area; it might be the moment for a sudden  
16 drop on the live stream.

17 What I am aiming to do is give the overall  
18 architecture of the Class Representative’s case on the  
19 key disputed topics. I do not want to dissuade the  
20 Tribunal from asking any questions, but it may be they  
21 are more productively explored in the hot tub.

22 Starting with areas of agreement. The experts are  
23 agreed that the appropriate benchmark is a cost-plus  
24 benchmark. For your note, that is joint statement,  
25 7(a), page 105.

13

1 They are also agreed that the benchmark is  
2 constructed from four components: direct costs, indirect  
3 incremental costs, an allocation of common costs and  
4 a reasonable rate of return; a margin.

5 Stating the obvious, perhaps, but it is common  
6 ground between the experts that when calculating the  
7 level of costs attributable to SFV, it is appropriate to  
8 exclude costs which are incremental to other products  
9 and fixed costs which are not common to SFV services.

10 The experts are also in agreement on direct costs,  
11 so I need not trouble you further with that.

12 The other three components are in dispute. So  
13 dealing with indirect incremental costs first. This is  
14 largely SG&A -- selling, general and admin costs,  
15 overheads essentially -- and depreciation and  
16 amortisation charges.

17 Mr Duckworth’s approach, he allocates these costs  
18 according to a LRIC+ standard, long-running incremental  
19 costs. He sets that out, I am not going to go there, at  
20 paragraph 3.9. That is at {IR-E/6/20} for your note.

21 Mr Duckworth explains that LRIC+ measures all costs  
22 which are incremental to providing a particular service  
23 on a long-term basis and includes a mark-up for an  
24 allocation of common costs, and Mr Duckworth has adopted  
25 a LRIC+ standard.

14

1 Now, the reason why that is the most accurate cost  
2 standard for indirect incremental costs is because it  
3 allocates those costs on the basis of cost causality.  
4 That is the underlying principle. That is the principle  
5 by which one identifies causal relationships between the  
6 product and the costs of providing that product. In  
7 principle, one should aim to attribute as much of the  
8 rump of indirect costs by way of cost causality.

9 Now, LRIC+ was the standard that BT actually used to  
10 allocate its costs between 2005 and 2009. During that  
11 period, and you remember we talked about the shackles  
12 coming off in 09, at that time BT was obliged by Ofcom  
13 to file regulatory financial statements because it had  
14 SMP. Again, for your note, that is Mr Duckworth’s first  
15 report at paragraph 3.26(d). That is at {IR-E/6/24}.

16 Under the Communications Act, section 91, BT was  
17 obliged to use a cost accounting system which was  
18 audited and to produce an annual compliance statement.  
19 That is set out at Mr Duckworth’s first report at  
20 paragraph 3.23.

21 BT therefore, under this regulatory scheme, used  
22 a robust and a detailed cost methodology which included  
23 allocating incremental costs to BT’s various services,  
24 including SFV services, on the basis of cost causality.  
25 It was required to produce FAC, fully allocated cost,

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1 estimates for the cost of providing five residential  
2 fixed voice services as part of the RFS, and because, as  
3 I adverted to yesterday, BT was prohibited from bundling  
4 at that time with broadband, its FAC estimates properly  
5 reflect the cost of providing SFV services during this  
6 period.

7 That, in a nutshell, is why this data is so  
8 significant and so useful. Attribution had to be done  
9 in accordance with the activities which caused revenues  
10 to be earned or costs to be incurred. When it was not  
11 possible to attribute in that way, the attribution had  
12 to be on the basis of a “presents fairly” manner with  
13 respect to revenue costs and accounted for in the RFS  
14 for each disaggregated market, so “presents fairly” is  
15 the standard.

16 This approach did not come cheap. BT spent very  
17 significant resources determining its costs for this  
18 purpose. An audit opinion was given that the results  
19 fairly present the costs associated with the residential  
20 retail markets. Mr Duckworth refers to that at  
21 paragraph 5.70 of his first report.

22 Mr Duckworth explains that the operating categories  
23 in the RFS provide an appropriate estimate of the LRIC+  
24 cost of the activities for SFV services in 2009, that is  
25 paragraph 5.71 of his report, and Mr Duckworth is an

16

1 expert in telecoms costs modelling.  
 2 Now, for all these reasons, his expert opinion is  
 3 that 2009, the 2009 RFS is the best available data to  
 4 him for estimating indirect incremental costs on the  
 5 LRIC+ basis over the claim period. He says that at  
 6 paragraph 5.68 of his first report.  
 7 So he takes the 2009 -- perhaps we could bring that  
 8 up. It is {IR-E/6/69}. 5.68.  
 9 Now, he takes those results in 2009 and he projects  
 10 them forward, projects them forward over the claim  
 11 period applying CPI, and his reasons for that are at  
 12 5.83-5.85 of his first report. There is a dispute about  
 13 the projection forward. That may be a productive area  
 14 for the hot tub. But I am staying with the high level  
 15 points.  
 16 Now, it is important to note that Dr Jenkins accepts  
 17 that Mr Duckworth is correct in principle that the  
 18 indirect costs reported in the 2009 RFS for residential  
 19 retail voice services are a good proxy for BT's costs on  
 20 a LRIC+ basis. That is at the joint statement, 7.1, 15.  
 21 That is the proposition that ...  
 22 MR BEARD: In 2009, I think it is important to say.  
 23 THE CHAIRMAN: Yes, she has just said that, yes.  
 24 I appreciate you have got lots of arguments about why  
 25 you can't do stuff with 2009.

17

1 Right.  
 2 MS KREISBERGER: I am grateful, sir. I was just about to  
 3 say what Dr Jenkins objects to is the use of the  
 4 historic benchmark and the projection forwards. She  
 5 says he should have used cost data from the period  
 6 instead. I have got three short responses to this.  
 7 The first and short answer is that if Mr Duckworth  
 8 could have used more recent data, he would have done,  
 9 but the data available after 2009 is nowhere near  
 10 sufficiently disaggregated for Mr Duckworth's purposes.  
 11 Unlike the RFS, BT Consumer data after 2009 does not  
 12 separate out the indirect costs associated with voice  
 13 services from costs associated with other services such  
 14 as broadband and television. There is lots of detail in  
 15 there on direct costs. That is agreed between the  
 16 experts, but the problem is the indirect costs.  
 17 This means that Mr Duckworth cannot tell which of  
 18 the indirect costs in BT Consumer are actually  
 19 incremental to providing SFV services or which costs are  
 20 common across SFV services and other BT Consumer  
 21 services, if any. Mr Duckworth does not have the  
 22 evidence on cost causality after 2009 to allocate them.  
 23 This should not be controversial. I am going to  
 24 give the Tribunal the references and show you, first,  
 25 items of evidence on this.

18

1 If we could go to Mr Cackett's first witness  
 2 statement at {D/6/7}, paragraph 30.  
 3 THE CHAIRMAN: This is still in your first point.  
 4 MS KREISBERGER: This is still in my first point. So I am  
 5 now just showing you that the fact that this data does  
 6 not exist after 09 should be common ground.  
 7 Mr Cackett says this at the second sentence:  
 8 "Given the difficulties in attempting to attribute  
 9 costs, and the fact that these costs are not managed by  
 10 individual divisions, we do not attempt to attribute  
 11 these costs when creating the [mid-term plans] and  
 12 budget. Instead, we consider and manage these on  
 13 a consumer wide basis ..."  
 14 Dr Jenkins at paragraph 6.128, footnote 321, says,  
 15 it is at {IR-E/17/220}. I am just going to read it out.  
 16 THE CHAIRMAN: Sorry, is this her first?  
 17 MS KREISBERGER: Dr Jenkins' first report.  
 18 THE CHAIRMAN: First report.  
 19 MS KREISBERGER: I am sorry, sir.  
 20 THE CHAIRMAN: That is all right. Just a second, please.  
 21 (Pause). Yes.  
 22 MS KREISBERGER: She says:  
 23 "... I do not have a means of allocating these costs  
 24 on the basis of cost causation drivers ..."  
 25 For your note, Mr Duckworth makes the same point in

19

1 his first report at paragraph 5.62. He says: they are  
 2 not sufficiently disaggregated so I cannot do it.  
 3 That is captured again at joint statement 7.1.8. He  
 4 says, Mr Duckworth: I do not have sufficient information  
 5 to do this.  
 6 Now, in the somewhat overblown rhetoric of its  
 7 skeleton, BT accuses Mr Duckworth of, and I quote,  
 8 "specifically avoiding any consideration of BT's actual  
 9 cost data", that is at paragraph 126, and "an  
 10 unreasonable reluctance of Mr Duckworth to engage with  
 11 BT's actual cost data". That is just not true.  
 12 THE CHAIRMAN: Just a moment.  
 13 MS KREISBERGER: It is paragraph 126.  
 14 THE CHAIRMAN: Yes.  
 15 MS KREISBERGER: So they say he did not consider it and he  
 16 did not engage with it.  
 17 THE CHAIRMAN: Right.  
 18 MS KREISBERGER: The fact that he did consider it and did  
 19 engage with it should be apparent from his reports.  
 20 He says at {IR-E/6/21}, paragraph 3.13:  
 21 "... I use data on the costs as reported by  
 22 BT Consumer in my calculations of the competitive  
 23 benchmark."  
 24 He says at 5.9(a) on page {IR-E/6/45}:  
 25 "Where possible, I rely on financial data reported

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1 by BT Consumer in its management accounts.”  
 2 It is possible for direct costs, so he does use it.  
 3 He says at (b):  
 4 “Where ... it is not possible to separately identify  
 5 the costs incurred by BT Consumer in the provision of  
 6 SFV Services ... from those incurred in the provision of  
 7 other services provided by BT Consumer (such as fixed  
 8 broadband or [TV]) I calculate the closest possible  
 9 approximation of the applicable costs using historic  
 10 benchmarks”.  
 11 THE CHAIRMAN: What does that mean?  
 12 MS KREISBERGER: It means 2009.  
 13 THE CHAIRMAN: Yes, that is what I was about to ...  
 14 MS KREISBERGER: Yes.  
 15 THE CHAIRMAN: So does he actually look at the BT data in  
 16 the context of indirect costs from the post-2009 period?  
 17 He does go back to his 2009 extrapolation?  
 18 MS KREISBERGER: Yes, exactly. So for direct costs he can  
 19 use costs from the claim period. For indirect costs he  
 20 has to extrapolate, and that is the problem.  
 21 THE CHAIRMAN: Right.  
 22 MS KREISBERGER: I am just going to give you a couple more  
 23 references for your note. I am not going to take up  
 24 time.  
 25 His first report, paragraph 5.11, he makes the same

21

1 point about the level of aggregation. At 5.11(a), he  
 2 says he can rely on direct costs in BT Consumer  
 3 accounts. At 5.11(b), he refers to the problem with  
 4 indirect costs.  
 5 At 5.51(b) on page 62, he considers whether it is  
 6 possible to reliably allocate a proportion of costs to  
 7 SFV services to reflect the indirect costs, and he  
 8 concludes that data is not available to him. It is not  
 9 there.  
 10 It is also captured in the joint statement,  
 11 proposition 7.1.11 and 7.1.17: he cannot do it, and that  
 12 is why, for the indirect incremental costs, he has used  
 13 the historic benchmark. There is nothing else available  
 14 to him.  
 15 That is my first answer.  
 16 THE CHAIRMAN: Yes.  
 17 MS KREISBERGER: My second answer I will deal with very  
 18 briefly. The use of an historic benchmark is actually  
 19 a conservative approach which is favourable to BT.  
 20 Mr Duckworth puts the point at 2.20 of his first report,  
 21 {IR-E/6/16}:  
 22 “This methodology [that is the uprating, the  
 23 projecting forwards] implicitly assumes there have been  
 24 no efficiency improvements in the delivery of SFV  
 25 Services between ... 2009 and the claim period.

22

1 Documentary evidence provided by BT shows that its Cost  
 2 Transformation programmes delivered significant  
 3 operational cost savings for BT Consumer as a whole in  
 4 the period after ... 2009. However, due to the lack of  
 5 information on the attribution of costs to individual  
 6 products and services I am not able to determine the  
 7 extent to which these may have reduced the cost of  
 8 delivering SFV Services and so I have assumed no  
 9 efficiency change. This is likely to be a conservative  
 10 approach, as it leads to a higher level of indirect  
 11 costs (and therefore higher benchmark) than if I made an  
 12 adjustment for efficiency ... reflecting the Cost  
 13 Transformation programmes.”  
 14 My third answer when running through BT’s skeleton  
 15 is a theme that the Class Representative’s approach and  
 16 Mr Duckworth’s approach somehow offends against legal  
 17 certainty. It is a curious allegation because we are  
 18 dealing with BT’s costs.  
 19 The reason why Mr Duckworth has gone back in time is  
 20 because of the way that BT has elected to classify its  
 21 costs in the BT Consumer accounts in this disaggregated  
 22 way, not in a more granular level ... not in a more  
 23 aggregated ...  
 24 THE CHAIRMAN: Disaggregated.  
 25 MS KREISBERGER: Did I say aggregated? Disaggregated way.

23

1 It lays ill in BT’s mouth to then complain when  
 2 Mr Duckworth uses the most robust dataset available to  
 3 him which Dr Jenkins agrees meets the LRIC+ standard.  
 4 As a telecoms cost modelling expert, he has explained  
 5 that projecting that data forward is the most reliable  
 6 method given BT’s decision to account for costs since  
 7 2009 on a BT Consumer basis. That is for indirect  
 8 incremental costs. It is also worth clarifying in the  
 9 light of Mr Beard’s skeleton, which gives the impression  
 10 that there is some actual BT data out there on indirect  
 11 incremental costs which Mr Duckworth has simply declined  
 12 to use. I can state categorically that is not the case.  
 13 BT has made plenty of information available on direct  
 14 costs in its consumer accounts. There is no allocation  
 15 of indirect incremental costs.  
 16 So with that, I turn briefly to Dr Jenkins’ approach  
 17 to this issue. She rejects the audited 2009 data and  
 18 she proposes three different cost drivers: by revenue,  
 19 by number of customer lines, and a method known as EPMU  
 20 where indirect costs are allocated according to direct  
 21 costs.  
 22 So she goes for these proxies. Not one proxy is  
 23 more reliable than actual LRIC+ data. The first one by  
 24 revenue; one should never use revenue as a cost driver  
 25 in an excessive pricing case, because if prices are

24

1 inflated it allows the firm to over-allocate costs to  
 2 the allegedly excessively priced product. It is  
 3 circular .  
 4 THE CHAIRMAN: Just one second, please. (Pause)  
 5 MS KREISBERGER: So one should never use revenue as a cost  
 6 driver .  
 7 Secondly, using customers for the number of lines to  
 8 allocate costs assumes that a customer that takes one  
 9 service from BT, like SFV, gives rise to the same  
 10 indirect incremental costs to BT as a customer that  
 11 takes multiple services , like in a dual play bundle. In  
 12 other words, it means that the indirect costs for , say,  
 13 broadband and TV are allocated to SFV customers who do  
 14 not use those products. So it is a way of inflating  
 15 the --  
 16 THE CHAIRMAN: Sorry, I do not follow that last bit.  
 17 MS KREISBERGER: So if you divide the indirect incremental  
 18 costs by number of lines across the whole customer base,  
 19 including bundle customers, you assume that each  
 20 customer bears the same amount of indirect incremental  
 21 costs whether they are buying only SFV --  
 22 THE CHAIRMAN: Because you have distributed equally among  
 23 the customers.  
 24 MS KREISBERGER: Exactly.  
 25 THE CHAIRMAN: Just a moment. (Pause).

25

1 Yes.  
 2 MS KREISBERGER: So you are allocating broadband costs, TV  
 3 costs.  
 4 Then thirdly, using this method, known as the  
 5 equi-proportional mark-up, is not an appropriate cost  
 6 allocation driver because it just assumes that indirect  
 7 costs correlate with direct costs, but there is no basis  
 8 for making that assumption in advance.  
 9 In other words, Mr Duckworth has had to be  
 10 pragmatic. He does not have information on how to  
 11 allocate indirect incremental costs within the claim  
 12 period, so he has done the next best thing of projecting  
 13 it forward. Dr Jenkins' proxy alternatives are much  
 14 more unreliable and they produce inflated cost results .  
 15 THE CHAIRMAN: Yes.  
 16 MS KREISBERGER: Cost element number three, common costs.  
 17 As I mentioned, Mr Duckworth uses the "fairly presents"  
 18 approach in the 2009 RFS. I am just going to give you  
 19 the references for your note. Mr Duckworth's second  
 20 report at paragraph 2.2(a) and paragraph 7.9 in his  
 21 second report. So that is the "fairly presents"  
 22 approach in the audited 2009 accounts.  
 23 Now, Dr Jenkins argues for something else. She  
 24 argues for an approach called SAC combinatorial. That  
 25 approach is misconceived at two levels. Firstly , it is

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1 not conceptually sound for these purposes and, secondly,  
 2 she has implemented it in an entirely unreliable way to  
 3 produce an absurdly inflated common costs figure.  
 4 So the first submission that it is not conceptually  
 5 suitable , Mr Duckworth describes the concept at  
 6 paragraph 4.5(b) of his second report, but I am going to  
 7 go straight, in view of the time, to outlining the  
 8 defects.  
 9 SAC combinatorial is both an unusual and  
 10 overcomplicated method. The Class Representative is not  
 11 aware of a single authority which supports its use as  
 12 the primary cost standard for constructing the  
 13 competitive benchmark in an excessive pricing case.  
 14 THE CHAIRMAN: You mean no case?  
 15 MS KREISBERGER: No case, and BT has not cited any. That is  
 16 just my starting point.  
 17 There is a case which specifically rejects it, and  
 18 what that says is that the problem with it is the  
 19 complexity, because you have got to run  
 20 SAC combinatorial over all combinations of services that  
 21 share the same common costs. It is incredibly  
 22 complicated.  
 23 I should just flag , Mr Parker, I will give you the  
 24 references in a moment, says he would not expect common  
 25 costs to be very high for this retail service , but

27

1 Dr Jenkins has gone for an incredibly complicated  
 2 approach to crack this nut.  
 3 As I say, it has been rejected. Both Ofcom and this  
 4 Tribunal repudiated it as impractical for allocating  
 5 BT's costs in the PPC decision. That is at -- just for  
 6 your note, that is in the bundle at {G/50/75}, but it is  
 7 summarised in Mr Duckworth's second report. If we could  
 8 turn up {IR-E/7/26}.  
 9 MR RIDYARD: Can I just clarify, we are now talking about  
 10 common costs?  
 11 MS KREISBERGER: Common costs.  
 12 MR RIDYARD: We have moved on from incremental costs.  
 13 MS KREISBERGER: Yes. Sorry if that was not clear. Yes,  
 14 just common costs.  
 15 MR RIDYARD: Is there a reference to how big common costs  
 16 are?  
 17 MS KREISBERGER: So Mr Parker says that they are -- he would  
 18 expect them to be low. That is in the joint statement  
 19 at 7.18, page 118. It is {E/49/118}. He does also say  
 20 this in his reports, but it is really a statement he  
 21 would expect --  
 22 MR RIDYARD: He would expect them to be there?  
 23 MS KREISBERGER: Yes, but Mr Duckworth has based it on the  
 24 2009 RFS.  
 25 MR RIDYARD: Yes. When he did that, though, I am just

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1 interested to know -- obviously there is a whole thing  
 2 about how you calculate the incremental, I get that.  
 3 But in addition, there is the question of what do you do  
 4 with the common costs because they are not incremental  
 5 costs.  
 6 MS KREISBERGER: No. So he has relied on the common costs  
 7 allocation on the "fairly presents" basis in the 2009  
 8 RFS.  
 9 MR RIDYARD: Yes. So there must be a number --  
 10 MS KREISBERGER: You want the number, yes.  
 11 MR RIDYARD: Not now, but ...  
 12 MS KREISBERGER: Yes, that is absolutely no problem.  
 13 Thank you.  
 14 If we go to Duckworth 2, Mr Duckworth's second  
 15 report, {E/7/26}. Could I ask you to read -- yes, if  
 16 I could ask you to read 4.37 down to 4.41. (Pause)  
 17 Dr Jenkins has also applied this complicated  
 18 methodology in a really unreliable way. She has  
 19 produced inflated common costs results. The first  
 20 defect is that she assumes that all fixed costs are  
 21 common to all BT Consumer products. She does not ever  
 22 ask herself which fixed costs are not required to  
 23 provide SFV services.  
 24 THE CHAIRMAN: Just a minute. (Pause). Yes.  
 25 MS KREISBERGER: Mr Duckworth explains this at

29

1 paragraph 5.15 of his second report. But this means  
 2 that again she assumes that, let us say, product  
 3 management costs for providing broadband or television  
 4 or mobile services or bundles are common to SFV services  
 5 as well. So she includes them, and that has this  
 6 inflating effect.  
 7 The second defect is that she then bundles a really  
 8 large number of products together. So instead of taking  
 9 the SAC combinatorial approach of considering all  
 10 possible combinations of services separately, she groups  
 11 a large number of products together into what she calls  
 12 her bundles category, but her allocations to this group  
 13 are entirely arbitrary.  
 14 Mr Duckworth describes this problem at paragraphs  
 15 5.45 to 5.47 of his second report. What he explains is  
 16 around 78% of BT Consumer's revenues are attributed to  
 17 her bundles category. 78%. That category includes  
 18 television services, BT Sport, all fixed voice and  
 19 broadband sold in bundles. She includes all  
 20 the revenues and all the costs of BT Sport even though  
 21 BT Sport can be bought on a standalone basis. It is not  
 22 even just a bundle product. She puts all of that  
 23 revenue and costs together in her bundles category.  
 24 I want to show you how significant a problem this  
 25 is. If we could go to Mr Parker's fourth report at

30

1 paragraph 5.29. That is {E/5/103}.  
 2 BT Sport was loss-making throughout the claim  
 3 period. Can I show you there the number. It is not  
 4 highlighted, but we checked and in Dr Jenkins' report it  
 5 is highlighted, so I am erring on the side of caution.  
 6 So you see he says:  
 7 "... the BT Sport sub-division has a negative gross  
 8 margin of ..."  
 9 You see there a very large figure, and the  
 10 percentage figure is marked.  
 11 THE CHAIRMAN: I cannot actually. On this one I cannot  
 12 actually see it at all.  
 13 MS KREISBERGER: No, I cannot either. It should be IR-E,  
 14 I think it needs to be IR-E.  
 15 THE CHAIRMAN: Just one moment. (Pause). Yes.  
 16 MS KREISBERGER: So by incorporating this loss-making  
 17 service in her bundles, she has vastly driven up the  
 18 amount of common costs that she then allocates to SFV.  
 19 If you remove BT Sport from her bundles category, you  
 20 get a much lower benchmark.  
 21 Can I give you the reference for your note, but  
 22 particularly in response to Mr Ridyard you will see  
 23 Mr Parker's figures at paragraph 5.33 of his fourth  
 24 report. That is at {IR-E/5/105}. I have an eye on the  
 25 time. We see the figures there.

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1 Also, for your note, the joint statement at 7.1.25  
 2 has a helpful summary of our position on this.  
 3 So the upshot, by way of introduction to this point,  
 4 is that she has massively overstated the amount of  
 5 common costs.  
 6 Then there is another problem, an apparent error.  
 7 This is the third defect. Dr Jenkins uses the wrong  
 8 number of lines to calculate the per customer benchmark.  
 9 Mr Parker calls this the number of lines error. It is  
 10 summarised in the joint statement at 7.1.27.  
 11 Once she had got what she calls the common cost  
 12 increment, that is the common cost amount for SFV  
 13 services, she should then have allocated that amount  
 14 over the number of SFV lines, standalone customer lines.  
 15 That is the common cost; you are trying to work it out  
 16 across the number of standalone SFV customers.  
 17 She says she is going to do that when you look at  
 18 the description of SAC combinatorial, but she does not.  
 19 What she does, and Mr Parker explains this at  
 20 paragraph 5.40 of his fourth report, instead of only  
 21 using SFV lines, she uses all fixed voice lines in the  
 22 combination, so everyone who buys their fixed voice in  
 23 a bundle. So she divides up her common cost increment  
 24 for SFV services that she has calculated on the  
 25 SAC combinatorial, and then she divides it up by all of

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1 BT's fixed voice customers, not just SFV customers.  
 2 THE CHAIRMAN: What is the effect of it? That means that  
 3 diminishes the proportion that goes to the SFV, so that  
 4 lowers the costs?  
 5 MS KREISBERGER: Quite, it lowers it. But if you correct  
 6 the error, and it is an error, you see that her  
 7 methodology produces an absurdly high figure.  
 8 THE CHAIRMAN: Sorry, if she is dividing these costs --  
 9 MS KREISBERGER: She gets a lower --  
 10 THE CHAIRMAN: -- over a larger number of lines, then the  
 11 per line cost is going to be less than it otherwise  
 12 would be.  
 13 MS KREISBERGER: Correct.  
 14 THE CHAIRMAN: How does that produce an absurdly high cost?  
 15 MS KREISBERGER: Because if you correct the error, and it  
 16 must be an error, because you have to divide your SFV  
 17 common cost by your SFV number of lines, you see the  
 18 true figure that her methodology produces.  
 19 THE CHAIRMAN: I see.  
 20 MS KREISBERGER: It does not look so absurd because she has  
 21 then divided it across all these number of lines.  
 22 THE CHAIRMAN: But she should only be dividing it across the  
 23 SFV lines.  
 24 MS KREISBERGER: When you suddenly see what the number is.  
 25 THE CHAIRMAN: Just a moment. (Pause)

33

1 MS KREISBERGER: So what Mr Parker has shown is when you  
 2 correct the error you get nonsensically high estimates.  
 3 THE CHAIRMAN: Yes.  
 4 MS KREISBERGER: Dr Jenkins agrees in the joint statement  
 5 that Mr Parker's version of her methodology does produce  
 6 figures which are implausibly large.  
 7 I do just want to show you what she says in the  
 8 joint statement {OR-E/49/148}. That is at 7.1.27,  
 9 page 148. She does not accept it is an error. So that  
 10 is on 147, she does not accept it is an error. It is  
 11 not an error. She says in the last bullet point on  
 12 page 147 it is just an implementation which is  
 13 consistent with the facts and evidence.  
 14 She says:  
 15 "I note that Mr Parker's correction of my so-called  
 16 error yields 'cost-plus' benchmarks that are implausibly  
 17 large, especially in the latter period. These  
 18 implausibly large benchmarks arise precisely because  
 19 Mr Parker departs from the commercial practices of BT,  
 20 and estimates a set of prices that would not be observed  
 21 in practice."  
 22 It seems, when one reads her column, that this  
 23 reference to departing from the commercial practices of  
 24 BT, whilst far from clear, seems to be a reference back  
 25 to her interlinkage theory that I covered yesterday,

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1 that BT sets the same price for fixed voice services in  
 2 all forms.  
 3 I showed you yesterday it is not in fact -- it is  
 4 not right. By the time you get to the joint statement  
 5 her hypothesis has turned into a no linkage hypothesis.  
 6 But even if it did have some basis in fact, which we  
 7 reject, as an answer to this point it is incoherent.  
 8 She is saying I have split this large common cost number  
 9 for SFV services across all fixed voice lines because BT  
 10 charges the same price for all those lines.  
 11 If you want to work out what the common cost is per  
 12 SFV line, you need to allocate the common cost increment  
 13 across the number of SFV lines. She does not do that.  
 14 It does not make any sense.  
 15 As I said, Mr Parker explains that you would expect  
 16 common costs to be low.  
 17 THE CHAIRMAN: Right.  
 18 MS KREISBERGER: That is common costs. Moving on to margin.  
 19 THE CHAIRMAN: Yes.  
 20 MS KREISBERGER: I will take this one at a brisk pace.  
 21 Mr Duckworth adopts 8.9% as his EBIT margin based on  
 22 residential fixed voice services in 2006. That is 9.8%  
 23 when expressed as a margin based on costs rather than  
 24 a percentage of revenues. He says the best comparators  
 25 are rates of return on similar services in similar

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1 markets.  
 2 Ofcom at paragraph 8.14 of the Provisional  
 3 Conclusions said: we have looked at benchmarks used  
 4 across other industries and we believe that a return on  
 5 the sales of between 5 and 10% is broadly consistent  
 6 with a cost based measure of profitability in a fully  
 7 competitive market.  
 8 At 8.17 they said a ROS of no more than 10% is  
 9 consistent with a cost based estimate of profitability  
 10 for a provider of retail voice services.  
 11 That was Ofcom's view.  
 12 Mr Duckworth has also looked at other UK  
 13 communications providers. It is at 5.119 to 5.130 of  
 14 his first report. But he shows that the returns of  
 15 Virgin Media, TalkTalk, Phone Co-op and  
 16 Utility Warehouse are all below Mr Duckworth's figure.  
 17 Only Sky's return is above it but it is principally  
 18 a pay TV business.  
 19 Just briefly, he also returns to the returns of  
 20 other related network services as a useful crosscheck.  
 21 EBIT margins and other asset like business such as  
 22 energy, water, postal services, he looks at those. 5 to  
 23 10% for the postal service. 3.5% for retail energy and  
 24 gas. 1% for water. That is Mr Duckworth's approach.  
 25 THE CHAIRMAN: Yes.

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1 MS KREISBERGER: Dr Jenkins uses a substantially inflated  
2 margin of 25%. She gets there by relying on comparators  
3 that operate wholly different business models. She uses  
4 Professor Damodaran's dataset on European telecoms  
5 companies, and she uses a Telco filtering of the MSCI  
6 World Index database.  
7 The key point is both datasets include vertically  
8 integrated telecoms operators that operate networks and  
9 retail services, like Verizon and AT&T. They are poor  
10 comparators because they are not asset light businesses.  
11 Their returns would resemble BT's returns on an  
12 end-to-end basis. High margins. So she has skewed the  
13 returns upwards.  
14 Just briefly, she also claims BT Consumer's own EBIT  
15 margins over the claim period between 3 and 20% are  
16 useful reference points. But they cannot be, it is  
17 circular, because they include the very product which we  
18 say is excessively priced.  
19 There are points I have not had time to pick up but  
20 I will leave that there.  
21 THE CHAIRMAN: Right, thank you.  
22 MS KREISBERGER: I am not going to dwell on the excess.  
23 Once you have your competitive benchmark, you could then  
24 see BT's excess which is what registers positive under  
25 limb 1 of *United Brands*.

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1 I would just like to highlight for your note.  
2 I referred to Mr Parker's third report yesterday on the  
3 excess. His figures were updated in his fourth report  
4 and those are figures 7 and 9. That is at {IR-E/5/190},  
5 and you see the graphs that have the competitive  
6 benchmark here and the price here. Essentially that  
7 gives you the excess.  
8 So with that, in the remaining time available to me,  
9 I am going to move to fairness. I am going to address  
10 you on unfairness in itself. I have a couple of minutes  
11 on comparators, but the Class Representative's case is  
12 based on part 1 of limb 2, unfairness in itself. It is  
13 BT who rely on comparators, essentially.  
14 THE CHAIRMAN: Your case is based solely on unfairness in  
15 itself?  
16 MS KREISBERGER: Yes. Essentially, Mr Parker includes  
17 a comparison with the commitments price, but it is not  
18 as informative as Mr Duckworth's competitive benchmark.  
19 So the comparison we rely on is the limb 1 comparison of  
20 the competitive benchmark. That is the full monty, as  
21 it were. We are not relying on other products.  
22 THE CHAIRMAN: No. You are relying on it, but in the  
23 context of unfairness in itself.  
24 MS KREISBERGER: We rely on the limb 1 benchmark for  
25 unfairness in a comparative sense, but it is the same

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1 assessment. It is limb 1. We do not think there is any  
2 other type of product --  
3 THE CHAIRMAN: So just to recapitulate, you mean the first  
4 bit of limb 2, actually, not limb 1?  
5 MS KREISBERGER: Yes, we rely on --  
6 THE CHAIRMAN: The first bit of limb 2, unfairness in and of  
7 itself. Right.  
8 MS KREISBERGER: Yes. If you are going to compare the price  
9 to anything, you should compare it to the competitive  
10 benchmark, and that is the limb 1 exercise.  
11 THE CHAIRMAN: Yes, right.  
12 MS KREISBERGER: In terms of focus, we have put points in  
13 our skeleton, I do not move away from those. As I say,  
14 we refer to the commitments price as well, the  
15 Post Office price. We maintain all those points, but in  
16 terms of the focus of the (inaudible).  
17 So at this stage of the analysis, we have now  
18 established that BT's margin is excessive under limb 1,  
19 and my submission is the excessive margin is also an  
20 unfair margin. That means that there are no surrounding  
21 circumstances which save BT's excess on SFV services.  
22 There is no benign explanation for the excessive margin.  
23 On the contrary, all the surrounding facts underline  
24 that the excess profits it generates from SFV customers  
25 are unfair.

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1 Three principal elements to my submission on  
2 unfairness: one, the absence of any effective  
3 competition in this market; two, BT's profound  
4 understanding that it faced no effective competition and  
5 its determination to profit from its market power over  
6 SFV customers; thirdly, the detriment, the detriment  
7 which these pricing practices caused to SFV consumers,  
8 my Class Members.  
9 THE CHAIRMAN: Right. Before you go into detail on those,  
10 we will take our break for the transcriber. Thank you.  
11 (11.44 am)  
12 (A short break)  
13 (11.58 am)  
14 MS KREISBERGER: Thank you, sir.  
15 I am beginning with the absence of effective  
16 competition in the market, and you saw that that was  
17 a relevant factor to fairness in *Albion Water*.  
18 Ofcom crystallised the point perfectly in relation  
19 to the SFV market. If you could please turn up  
20 {IR-C/1/40}. This is the Provisional Conclusions. The  
21 heading here is "Three criteria test for retail  
22 standalone fixed voice market(s)". Sorry, that is  
23 {IR-C/1/40}. If we could zoom into "Three criteria  
24 test".  
25 Now, this is the threshold test that Ofcom applied

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1 in deciding whether to intervene in this market, in the  
 2 SFV market, and that is set out at 3.117. It is  
 3 a three-part test:  
 4 "The presence of high and non-transitory ...  
 5 barriers to entry,"  
 6 Structural, legal or regulatory.  
 7 "A market structure which does not tend towards  
 8 effective competition within the relevant time horizon  
 9 ..."  
 10 Also whether:  
 11 "Competition ... alone is insufficient to adequately  
 12 address the ... market failure."  
 13 Then if we go to 3.11 ... At 3.122, Ofcom finds --  
 14 just to note 3.120, that is Ofcom's finding of high  
 15 barriers to entry.  
 16 So (a) is met.  
 17 Then (b), "A market structure which does not tend  
 18 towards effective competition":  
 19 "We have assessed competition in the SFV access  
 20 market ..."  
 21 It is highly concentrated. BT has a high market  
 22 share of 79%. The next largest provider is at 5-15.  
 23 "There is limited scope for strong potential  
 24 competition as other CPs face significant barriers to  
 25 entry and expansion ...

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1 "The declining market size is likely to reinforce  
 2 BT's market power ... creates a further barrier to entry  
 3 ... less incentive [for other providers] to enter [a  
 4 declining] market ... and  
 5 "An absence of countervailing buyer power ...  
 6 "For these reasons, we consider that the market  
 7 structure for the provision of SFV access will not tend  
 8 towards effective competition in the review period ..."  
 9 At 3.128, I will just set out that that refers to  
 10 low consumer engagement. It is another factor here.  
 11 So that is what Ofcom asked itself before it began  
 12 to investigate, and it is a succinct depiction of the  
 13 competition failure in the market that that is the  
 14 failure BT has exploited through its high prices. It  
 15 sits with Mr Parker's analysis.  
 16 What this tells you, the market context, is that  
 17 when you observe BT charging high SFV prices, making  
 18 excessive returns, we have met limb 1, against the  
 19 backdrop of decreasing costs, those are the product of  
 20 market power, because this is a market that does not  
 21 tend towards effective competition.  
 22 BT is enjoying the high returns because it has been  
 23 insulated from competitive pressure, it does not face an  
 24 effective constraint on its SFV prices, and there are  
 25 enough price-insensitive SFV customers to make this

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1 strategy not only viable, but very profitable.  
 2 THE CHAIRMAN: Why is that saying anything more than that  
 3 they are dominant? Because in order to find that they  
 4 are dominant, having gone through everything that we  
 5 have gone through on market definition, you have to find  
 6 there is no effective constraint on their pricing.  
 7 MS KREISBERGER: Well, they are the same factors, but you do  
 8 not have to have all these factors to make a finding of  
 9 dominance. What it is saying here is BT is not just  
 10 dominant.  
 11 Look at all the -- this is an exceptional market.  
 12 It is an exceptional market. BT has a very high share,  
 13 you have very price-insensitive customers, you have  
 14 barriers to entry, and so on.  
 15 It is not just dominance. As in *Albion Water*, in  
 16 *Albion Water* there was also a very high market share.  
 17 This is a market where, if you observe a high price,  
 18 this is informative to tell you the margin has no benign  
 19 explanation, the excess has no benign explanation.  
 20 That brings me to the second element of unfairness,  
 21 which is essentially that BT profoundly understood these  
 22 market dynamics, the lack of competition, and it was  
 23 determined to profit from it.  
 24 I have shown you a selection from the corpus of BT  
 25 documents yesterday. An important facet of those

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1 documents is the various economic explanations which  
 2 Dr Jenkins advances do not have a basis in what BT was  
 3 saying, what it thought. It was not pricing high  
 4 because it said, 'oh, well, there is a competitive  
 5 linkage, or we are going to price them out of SFV into  
 6 bundles, we are going to tip them over the edge.'  
 7 The opposite is true. The documents show what BT's  
 8 motives were. To summarise them crisply, BT knew the  
 9 SFV market was in decline. It took a conscious decision  
 10 to maximise value from this legacy base of customers.  
 11 It understood they were price-insensitive. It  
 12 understood that price increases were not driving SFV  
 13 churn. It thought, well, the revenue upside is far  
 14 greater than any loss. It even commented on the fact  
 15 that split purchase inertia made them high value  
 16 customers for BT. BT knew that SFV, high SFV prices  
 17 harmed the most vulnerable, and it knew there was no  
 18 justification for them.  
 19 That knowledge did not lead BT to exercise price  
 20 restraint, to hold the increases, to reverse them.  
 21 Instead, BT sought to cover its tracks in three ways.  
 22 It made efforts to kill off the story in the press. It  
 23 deployed gives and congratulated itself on the fact that  
 24 they are cheap to introduce; their use can be  
 25 restricted, and their main goal was to deflect

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1 criticism , placate Ofcom. Thirdly, it deployed theories  
 2 to Ofcom which do not have a basis in the facts. So  
 3 those are the documents.  
 4 SFV consumer detriment is my third and final point  
 5 on fairness , and finding material, given the consumer  
 6 protection objective of Chapter II.  
 7 There are three parts to this.  
 8 Ofcom’s findings on consumer detriment, I will just  
 9 give you the references. Detriment by sub-class and  
 10 Mr Parker’s assessment of the detriment. Ofcom’s  
 11 findings of consumer detriment are at Provisional  
 12 Conclusions paragraph 6.2 and, carried forward to the  
 13 statement at paragraphs 1.11 to 1.15, Ofcom found that  
 14 each sub-class suffers detriment.  
 15 My second point on that is just to reflect for  
 16 a moment on that detriment by sub-class. Voice only  
 17 customers -- it manifests in different ways for the  
 18 sub-classes. Voice only customers have no choice  
 19 because most of them do not want to buy broadband, that  
 20 means that the voice only group are held captive by the  
 21 high prices . Bundles are not an alternative for  
 22 voice only customers; the only escape is to pay more to  
 23 receive an extra product that they do not want. We know  
 24 that this is the group have a high proportion of elderly  
 25 and vulnerable customers. They are least able to afford

1 the overcharges.  
 2 So for the purposes of my fairness argument,  
 3 targeting high prices at this group is an acute form of  
 4 price unfairness.  
 5 Secondly, SPCs, split purchasers, are in a different  
 6 category. They could realise savings by bundling  
 7 instead of splitting , but those who continue to split do  
 8 not benefit from bundles so pay the higher price. Now,  
 9 it may be that split purchasers could be said to be  
 10 making an irrational choice, they are buying two  
 11 contracts instead of one. But the point on fairness is  
 12 that BT understood that split purchaser insensitivity  
 13 presents BT with an opportunity to maximise its revenue.  
 14 So when you see these high margins, that is reflecting  
 15 BT’s decision to exploit these customers. It is  
 16 essentially punishing them for their loyalty to BT.  
 17 Now, Mr Parker has quantified the harm, that is my  
 18 third point, and I just want to show you, for your note,  
 19 the annual overcharges paid by these customers is at  
 20 Mr Parker’s fourth report, paragraph 7.4.5.  
 21 But if we could have a look at {IR-E/5/193},  
 22 table 21.  
 23 THE CHAIRMAN: Just a moment.  
 24 MS KREISBERGER: What Mr Parker is showing you here, this is  
 25 the cumulative effect over time. So if we look at the

1 first line of table 21, he shows you what a standard  
 2 line rental purchaser will be paying every year by way  
 3 of overcharge. You see up to £665 by 2020, assuming you  
 4 have been buying since 2016, and then I cannot read the  
 5 figures at the end.  
 6 My point is these are significant sums of money for  
 7 Class Members over the period -- over the claim period.  
 8 THE CHAIRMAN: This is both sub-classes?  
 9 MS KREISBERGER: Yes, this is -- well, of course the VOC  
 10 sub-class ends --  
 11 THE CHAIRMAN: Apart from when it ends.  
 12 MS KREISBERGER: Exactly, yes, it is what they pay.  
 13 THE CHAIRMAN: I see. But is this the first relevant year,  
 14 2016?  
 15 MS KREISBERGER: It begins in October 2015.  
 16 THE CHAIRMAN: Right.  
 17 MS KREISBERGER: Finally, just quickly, I would like to  
 18 address you on BT’s rebuttal points on unfairness.  
 19 The first point Mr Beard makes in his skeleton is  
 20 that BT’s price increases were modest by the standards  
 21 of the thousands of percentage points seen in some of  
 22 these pharmaceutical cases. Those cases are not  
 23 remotely analogous. They involved prices paid by the  
 24 Department of Health, by the state, out of its  
 25 pharmaceutical budget, not prices end consumers are

1 paying at home for their retail products.  
 2 So you saw these egregious price rises . It might  
 3 take a 2,500% increase on Liothyronine to raise a red  
 4 flag for a government department. Sure. But that is no  
 5 reason not to take seriously the harm suffered by  
 6 a Class Member who has been overcharged by the amounts  
 7 I have just shown you on that table over the claim  
 8 period. That is not a modest amount, despite what BT  
 9 says. These amounts have real impact on people’s lives  
 10 and they were hugely profitable for BT.  
 11 BT says that it understands its unique  
 12 responsibility to customers as a former monopolist, but  
 13 arguing that its prices compare favourably to  
 14 pharmaceutical companies who found themselves on the  
 15 front page of The Times is not really putting the  
 16 customer first.  
 17 BT’s second argument that they place a lot of  
 18 emphasis on in the skeleton is , well, customers were  
 19 happy to pay these overcharges in return for BT’s brand,  
 20 its quality and its innovations.  
 21 The fact that BT is a trusted brand is a material  
 22 fact, but it is a fact that allowed BT to get away with  
 23 its unlawful programme of price rises for so many years.  
 24 I showed you that feature in Ofcom’s assessment of the  
 25 dynamics as well.

1 Now, lastly, BT is tilting at windmills with this  
 2 argument. BT, in the skeleton, lists a number of  
 3 innovations which it says justify these high prices. It  
 4 refers to the brand, but it also refers to certain  
 5 features like caller display, call protect, onshore call  
 6 centres rather than offshore call centres. Every one of  
 7 those features was available to bundle customers because  
 8 they are just features that go with the landline.  
 9 I am just going to give you, for your note, Oxera,  
 10 in 2017, in its submission to Ofcom said, that is at  
 11 {C/6/24}:  
 12 "From the perspective of consumers wishing to have  
 13 broadband, they do not experience any service difference  
 14 from a split or dual play service. The quality of the  
 15 service will be alike."  
 16 So these features that BT relies on heavily to  
 17 justify the high SFV prices cannot justify the high SFV  
 18 prices because you can get all those features if you buy  
 19 a bundle at the lower price. So they do not help BT on  
 20 fairness.  
 21 BT's last argument I am just going to highlight. It  
 22 is in the skeleton at 185-188. It is another amalgam of  
 23 Dr Jenkins' migration intent theory and bundle price  
 24 fallacy which they deploy again on unfairness. I do not  
 25 need to repeat my submissions. You have my submissions

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1 on those.  
 2 THE CHAIRMAN: Yes.  
 3 MS KREISBERGER: They do not help them on fairness.  
 4 So with that, sir, if you are content that I do not  
 5 address you on the comparators, we rely on the skeleton  
 6 there, I will sit down and Mr Spitz will address you.  
 7 THE CHAIRMAN: Thank you.  
 8 Yes, Mr Spitz.  
 9 Opening submissions by MR SPITZ  
 10 MR SPITZ: Thank you very much, sir, and Members of the  
 11 Tribunal.  
 12 I am going to take this somewhat swiftly and I am  
 13 aiming to be able to present this part of the case  
 14 within about 30 minutes, that is my target. It is going  
 15 to be at a relatively high level, but I think that that  
 16 will convey the essence of the points.  
 17 THE CHAIRMAN: Yes.  
 18 MR SPITZ: The logical sequence of the case now moves from  
 19 limb 2 of *United Brands* to the questions of causation  
 20 and loss. The heart of the question of causation  
 21 concerns BT's defence that if they priced excessively  
 22 and unfairly, that abuse was not the cause of any loss,  
 23 because Class Members failed to mitigate their loss,  
 24 which they should have done, by switching to a cheaper  
 25 product.

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1 I focus on mitigation because it appears from BT's  
 2 skeleton argument that it no longer contends that the  
 3 chain of causation was broken or that there was a *novus*  
 4 *actus*. Those are not mentioned in the skeleton  
 5 argument.  
 6 THE CHAIRMAN: Let us just check that.  
 7 Is that BT's position, Mr Beard, or not? Just so we  
 8 know what Mr Spitz wants to talk about.  
 9 MR BEARD: I am happy to deal with it in terms of  
 10 mitigation. I do not think it makes a difference for  
 11 these purposes.  
 12 THE CHAIRMAN: Can I just check, just so that we are clear  
 13 about it. Are you running some *novus actus* argument in  
 14 addition to a failure to mitigate argument?  
 15 MR BEARD: There are no *novus actus* arguments in relation to  
 16 non-business customers, whether or not in relation to  
 17 business customers one would treat the position as akin  
 18 to *novus actus*. I think it is a separate issue. But we  
 19 have not put it in those terms.  
 20 THE CHAIRMAN: Right, proceed on the basis that at least  
 21 there is a separate argument about the business  
 22 customers. But for the non-business customers, if there  
 23 is still a point on causation, it is failure to  
 24 mitigate.  
 25 MR SPITZ: Indeed, yes.

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1 THE CHAIRMAN: Thank you very much.  
 2 MR SPITZ: Sir, the same probably applies to contributory  
 3 negligence which is mentioned in a footnote of the  
 4 skeleton but does not seem to be advanced beyond that.  
 5 So it may well be that contributory negligence is not --  
 6 THE CHAIRMAN: I am just going to do a checklist because it  
 7 is much better to find out now.  
 8 Is there a separate point on contributory  
 9 negligence?  
 10 MR BEARD: No.  
 11 THE CHAIRMAN: No. I can understand that. Thank you.  
 12 MR SPITZ: When it comes to damages, the parties agree about  
 13 the steps to be taken to quantify loss. First, the  
 14 economists need to calculate the number of telephone  
 15 lines which gives the baseline for the size of the Class  
 16 and the parties have agreed this. I am not going to  
 17 turn it up, but it is in table 9 of Parker 4, which is  
 18 {IR-E/5/151}, and the second row is the relevant row.  
 19 That has Dr Jenkins' numbers.  
 20 The next step is to decide whether any reductions to  
 21 the total number of lines need to be made in  
 22 establishing the size of the Class that are entitled to  
 23 compensation. This breaks down into two questions.  
 24 First, should business customers be excluded from the  
 25 Class? If so, what is the size of the exclusion?

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1 There is a much smaller point about whether  
 2 non-employees with gifted broadband accounts from BT  
 3 employees should also be excluded. That is still live  
 4 but it is unlikely to take up much time.  
 5 The second issue under this head is what reductions  
 6 should be made to the size of the Class to take account  
 7 of Class Members who will unfortunately have died  
 8 without having a personal representative in place by the  
 9 date of distribution of any award.  
 10 The next question then concerns the calculation of  
 11 the overcharge itself. Is it to be measured by the  
 12 difference between the actual SFV prices BT charged and  
 13 Mr Duckworth's cost-plus competitive benchmark as we  
 14 contend, or should it be measured by another, higher  
 15 price that uses an additional buffer above the benchmark  
 16 as BT contends?  
 17 THE CHAIRMAN: When you say higher price, you mean a higher  
 18 comparator?  
 19 MR SPITZ: Correct.  
 20 THE CHAIRMAN: Still using the prices they charged.  
 21 MR SPITZ: Exactly so, sir, yes.  
 22 THE CHAIRMAN: Thank you.  
 23 MR SPITZ: Then finally, what adjustments need to be made to  
 24 the quantum to ensure full compensation? We say that  
 25 there should be an adjustment to take account of

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1 inflation for the portion of the overcharge that would  
 2 have been spent and an award of compound interest for  
 3 the portion that would have been saved or invested. So  
 4 we separate it out. I will say more about that in  
 5 a little while.  
 6 The Class Representative's economists have estimated  
 7 the proportion of the overcharge that falls into each of  
 8 those categories. I do not propose to go through all of  
 9 the points on causation, Class size and quantum. I will  
 10 highlight the main ones. We rely on all of the points  
 11 we have made in the skeleton argument and I will address  
 12 the following points. It is a longish list, but my  
 13 points are focused and brief on each of them.  
 14 So I will address: mitigation; the measure of the  
 15 overcharge; business customers; personal representation  
 16 of deceased Class Members; the aggregate approach to  
 17 quantum; compound interest; and inflation.  
 18 Starting with mitigation, BT's primary argument on  
 19 causation relies on an alleged obligation on Class  
 20 Members to mitigate. The argument is that BT's  
 21 overcharge is not the cause of the loss. Instead, the  
 22 loss has been caused because the Class Members should  
 23 have switched from the excessively priced and, by this  
 24 stage of the analysis, unlawful BT SFV services to  
 25 alternative services that were cheaper than those that

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1 were in breach of competition law. Their failure to do  
 2 so is now said to preclude them from recovering any  
 3 damages for their loss.  
 4 Mitigation is, to put it at its lowest, probably not  
 5 BT's best point.  
 6 BT's contentions aim to relieve it of responsibility  
 7 for its anti-competitive conduct. But in considering  
 8 how far a defendant's responsibility for its wrong ought  
 9 fairly to extend, Lord Nicholls has observed that the  
 10 question frequently, and I quote:  
 11 "... evokes an immediate intuitive response. This  
 12 is informed common sense by another name."  
 13 We will not turn that up, but it is in the *Kuwaiti*  
 14 *Airways* case which is referred to in paragraph 235 of  
 15 *Servier*, and that is at {G/83/72} on the Opus  
 16 references, and we deal with this at paragraph 193 of  
 17 our skeleton argument.  
 18 It is obvious that BT's overcharge in breach of  
 19 statutory duty is the cause of loss to the Class  
 20 Members. The burden is on BT to establish, nonetheless,  
 21 that the Class Members were obliged but failed to  
 22 mitigate, and any duty to mitigate is not a demanding  
 23 one. After all, it is the defendant's unlawful conduct  
 24 that has put the Class Members in the predicament in  
 25 which they have found themselves.

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1 The authorities are clear on this, and we rely on  
 2 *Lombard North Central v Automobile World* at  
 3 paragraph 72, and that is at {G/48/21} of the Opus  
 4 bundle.  
 5 When it comes to assessing the reasonableness of  
 6 Class Members' conduct, the test of reasonableness is to  
 7 be applied with some tenderness. That is the *Thai*  
 8 *Airways International* decision, paragraph 38, and that  
 9 is at {G/58/40}.  
 10 So we say there is no duty as a matter of law that  
 11 end consumers are obliged to switch away from a dominant  
 12 firm's product in the face of its abuse of conduct. Not  
 13 switching away is not unreasonable. If it were  
 14 considered so, that would drive a coach and horses  
 15 through the statutory scheme and the consumer protection  
 16 rationale for the Chapter II prohibition.  
 17 If the existence of a cheaper alternative product,  
 18 and the failure of consumers to switch to it in the face  
 19 of a dominant firm's abuse of pricing, were enough to  
 20 defeat a claim for anti-competitive overcharge losses,  
 21 then much of the right of consumers to an effective  
 22 remedy and full compensation would become empty.  
 23 BT's mitigation defence would transport the  
 24 contractual principle of caveat emptor into a rather  
 25 novel domain which would not sit comfortably with BT's

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1 special responsibility to its customers as a dominant  
 2 firm not to charge excessive and unfair prices to them.  
 3 So in our respectful submission, the mitigation  
 4 defence does not get off the ground as a matter of law.  
 5 There is no duty of the kind suggested, and nothing  
 6 unreasonable in not switching in the face of BT's  
 7 excessive pricing. So we say one does not strictly need  
 8 to get into the behavioural evidence but, should one  
 9 need to, that evidence demonstrates that it was not, in  
 10 all the circumstances, unreasonable for Class Members  
 11 not to switch away even in the face of a higher price.  
 12 The evidence from Professor Loomes demonstrates that.  
 13 Turning to the next point on the list, this is now  
 14 the measure of the overcharge. The Class  
 15 Representative's approach to calculating the overcharge  
 16 is straightforward. It is the conventional approach.  
 17 It calculates the difference between Mr Duckworth's  
 18 benchmark and the unlawful prices BT charged for SFV  
 19 services. The difference is multiplied by the number of  
 20 lines, after any adjustments, to produce the estimated  
 21 baseline quantum of the overcharge in each financial  
 22 year of the claim period.  
 23 Mr Parker has done the exercise up to 31 March 2022.  
 24 He will have to update his existing quantum estimates  
 25 for several reasons. The loss is a continuing one for

1 some voice only customers and it is ongoing for all  
 2 split purchase customers, and some of the principles  
 3 that the Tribunal will establish in its judgment will  
 4 have an impact on final quantum.  
 5 THE CHAIRMAN: The losses which are continuing for some  
 6 voice only customers, are those just the business  
 7 customers?  
 8 MR SPITZ: Yes, that is correct.  
 9 THE CHAIRMAN: Just a moment. (Pause). Because they were  
 10 exempted from the commitments.  
 11 MR SPITZ: That is correct, yes.  
 12 THE CHAIRMAN: Yes, just a second. (Pause).  
 13 So what is he going to update it to?  
 14 MR SPITZ: Well, the other factor is that we do not yet have  
 15 a distribution date. So he will be able to update it to  
 16 a date that is convenient to the Tribunal, but even when  
 17 he has done that it will still be necessary, whichever  
 18 way one cuts it, to determine or at least to estimate  
 19 a distribution date that would be a reasonable one in  
 20 relation to which he can calculate a total amount.  
 21 THE CHAIRMAN: Right, thank you.  
 22 MR SPITZ: The current baseline estimate for the aggregate  
 23 damages, that is before adjustments for inflation and  
 24 interest, is slightly above £1 billion. For your note,  
 25 the best place to see this is in the claim for

1 methodology annex, and that is at {OR-A/3/43}. It goes  
 2 through the steps blow-by-blow in a clear and concise  
 3 manner.  
 4 THE CHAIRMAN: Yes.  
 5 MR SPITZ: BT take a different approach to calculating the  
 6 overcharge because, for them, it is not the difference  
 7 between the benchmark and the unlawful prices actually  
 8 charged, it is the difference between those unlawful  
 9 prices and the highest possible price BT could lawfully  
 10 have charged whether or not it would actually have done  
 11 so.  
 12 As BT puts it at paragraph 214 of their skeleton,  
 13 that is {A/13/73}, it is only reasonable, fair and  
 14 legally certain to use reasonable upper bounds as the  
 15 standard for both liability and the assessment of  
 16 quantum.  
 17 So as we understand it, BT's and Dr Jenkins' point  
 18 is not that every penny above the cost-plus benchmark is  
 19 compensable loss, because in a counterfactual world  
 20 where there was no abuse, BT could lawfully have charged  
 21 a price that was higher than the cost-plus benchmark.  
 22 The Tribunal at the quantum stage will need to  
 23 determine what the price could have been, and should  
 24 only award damages which represent the difference  
 25 between the price charged and that price. That, as

1 I understand it, is BT's argument. The Tribunal can see  
 2 that in section 9.11 of the joint expert statement.  
 3 That is {E/49/205}.  
 4 The approach to upper bounds will be a topic for  
 5 discussion in the hot tub and cross-examination, but at  
 6 this point all I want to do is point out that BT's  
 7 approach to the overcharge is contrary to authority,  
 8 principle and pragmatism.  
 9 As to principle and pragmatism, we say once account  
 10 has already been taken of the concept of economic value  
 11 or requirements of materiality and duration at the abuse  
 12 stage of the analysis, there is simply no scope at the  
 13 quantum stage to take account of a further buffer  
 14 between the cost-plus benchmark and the excessive price.  
 15 In the absence of any evidence to the contrary about  
 16 what BT would have done, one should assume that BT would  
 17 set its price at the level indicated by the cost-plus  
 18 benchmark. That benchmark, of course, already includes  
 19 an appropriate margin and a contribution to common  
 20 costs, and reflects the trading benefits BT would have  
 21 received in conditions of normal workable competition.  
 22 That is as far as principle and pragmatism are  
 23 concerned.  
 24 As far as authority is concerned, the argument that  
 25 the highest possible lawful price should be used is



1 contrary to *Albion Water*, and that is [2013] CAT 6, and  
 2 in the bundle it is at {G/56.1}, it is *Albion Water 3*,  
 3 and there the Tribunal rejected a comparable argument.  
 4 There, the defendant argued that the counterfactual  
 5 price for quantum purposes was not the cost-plus price  
 6 benchmarks that were used at the abuse stage of the  
 7 analysis to determine whether the actual price set was  
 8 unlawful, but rather it was the highest price that the  
 9 defendant could have charged without committing an  
 10 abuse. That is at paragraph 67. That argument was  
 11 rejected by the Tribunal. I am not going to turn it up,  
 12 but the relevant paragraphs are 69–73. {G/56.1/29}.

13 BT has also not provided any evidence about what its  
 14 price would be in the counterfactual should the prices  
 15 that it charged be held to be unlawful, and there is no  
 16 reason to assume that BT would have set the highest  
 17 price that would not have been held to be excessive by  
 18 reference to a cost-plus benchmark.

19 Following *Albion Water*, one should instead assume  
 20 that BT would price at a level sufficient to cover its  
 21 costs plus a reasonable margin. In other words, the  
 22 cost-plus benchmark constructed by Mr Duckworth and  
 23 applied by Mr Parker.

24 On then to business customers which is the next  
 25 topic. There are individuals within the Class who use

1 their residential SFV service to make some business  
 2 calls. The CR’s case is that these customers, like the  
 3 rest of the Class, have been charged excessive and  
 4 unfair prices and should be compensated accordingly. BT  
 5 seeks to argue that even if BT’s residential SFV prices  
 6 are held to be unfair, a finding that necessarily  
 7 involves a rejection of BT’s contention that the  
 8 residential prices are not unfair in comparison with  
 9 business tariffs, business customers nevertheless have  
 10 no claim, seemingly on the basis that they were not  
 11 entitled to purchase residential SFV services. BT here  
 12 seeks to rely on terms and conditions which stated that  
 13 residential SFV services should not be used for business  
 14 purposes.

15 BT’s argument on this point fails at each level of  
 16 the analysis. First, there can be no question that  
 17 these individuals within the Class were entitled to  
 18 purchase residential SFV services. The terms and  
 19 conditions on which BT relies regulate the use of  
 20 residential SFV services, not the entitlement to  
 21 purchase them. So the essential premise of BT’s  
 22 argument, that these customers had no entitlement to  
 23 purchase residential SFV services, is incorrect.

24 BT is also wrong to suggest that the prices it  
 25 charged for its business SFV services are a relevant

1 comparator for assessing whether the prices it charged  
 2 were unfair under *United Brands*. That is an issue, of  
 3 course, under limb 2 where that comparison will be  
 4 considered.

5 By BT’s reasoning, a barrister who wished to make  
 6 professional calls using their landline at home would  
 7 need to take out a business SFV service contract to make  
 8 that call. It defies common sense. It only underscores  
 9 the point that the terms and conditions on which BT  
 10 relies do not go to the question of entitlement to  
 11 purchase residential SFV services, all the more so since  
 12 Covid and the increasing number of people working from  
 13 home.

14 Third, BT is wrong to suggest that customers who  
 15 made business calls have suffered no loss. Here, BT  
 16 fundamentally misunderstands the relevant counterfactual  
 17 when assessing damages in tort. The question to be  
 18 asked is: what financial position would the claimant  
 19 have been in but for the defendant’s wrong? The  
 20 question is not: what financial position would the  
 21 claimant have been in but for the claimant’s wrong?

22 But for BT’s unfair charges, these individuals would  
 23 have paid a lower price for the SFV services they  
 24 purchased. They have therefore suffered loss like all  
 25 the other Class Members.

1 Stepping back, what BT is trying to do is to invoke  
 2 an alleged breach of contract by certain Class Members  
 3 as a defence to a claim that BT abused its dominance by  
 4 imposing excessive prices on them. We have set out  
 5 reasons in our skeleton argument why the argument is  
 6 contrary to principle, and to the extent that BT  
 7 considers that it suffered actionable loss because of  
 8 any misuse of its residential SFV services, the  
 9 appropriate course, of course, is to bring a contractual  
 10 claim against those Class Members. A breach of  
 11 contract, a mere breach of contract, or, put  
 12 differently, a breach of contract on its own, is not  
 13 sufficient to deprive the Class Members of a remedy.

14 Evidence will show that BT was well aware that  
 15 micro-businesses and sole traders use residential  
 16 packages, that is, SFV services, and the Tribunal in  
 17 *Churchill Gowns* noted that there is an important  
 18 countervailing public policy in competition law as to  
 19 why private rights of action for damages for loss  
 20 suffered because of anti-competitive behaviour should  
 21 not readily be removed.

22 The full effectiveness of the prohibition on unfair  
 23 pricing would be put at risk if it were not open to any  
 24 individual to claim damages for loss caused to him by a  
 25 contract or by conduct liable to restrict competition.

1 This would be contrary to the purposes of consumer and  
 2 market protection underlying the prohibition on unfair  
 3 pricing. We refer to *Churchill Gowns* in our skeleton at  
 4 paragraph 209(a).  
 5 BT's submission is equivalent, we say, and one is  
 6 always hesitant to use analogies, but this one is  
 7 illustrative, we say it is equivalent to contending that  
 8 a customer who buys a standard class train ticket from  
 9 a dominant train operator and at an excessive and unfair  
 10 price is not entitled to damages because she wrongly  
 11 sits in the first class carriage in breach of the  
 12 conditions of her ticket. That customer has still  
 13 suffered a competition law wrong and has still suffered  
 14 loss. The fact that she may have committed an entirely  
 15 separate contractual wrong is nothing to the point.  
 16 A mere breach of contract is insufficient to deprive  
 17 Class Members of compensation.  
 18 The final point to make on this aspect is this: BT  
 19 correctly does not bring a claim on the basis of  
 20 *ex turpi causa*. That would have been a hopeless claim.  
 21 But that is the only claim under which one might have  
 22 been able to say, given illegality on behalf of the  
 23 claimant, in those circumstances there is an argument  
 24 for depriving the claimant of the loss that it has  
 25 otherwise suffered. *Ex turpi causa* is not BT's claim.

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1 Briefly on personal representatives. The parties  
 2 agree that deceased Class Members who have died without  
 3 personal representatives at the date of distribution are  
 4 not entitled to recover damages. They differ  
 5 significantly as to the size of the group who should be  
 6 excluded from the Class and by some distance the number  
 7 of personal representatives, as opposed to the number of  
 8 deaths, is the main point in dispute between the  
 9 actuaries.  
 10 THE CHAIRMAN: I just wanted to ask you about that because  
 11 in that section of your skeleton argument, I think you  
 12 say that the figures on the mortality rates as opposed  
 13 to the rates of not appointing the personal  
 14 representatives are essentially the same. Is there in  
 15 fact still a dispute on the mortality rates point, or is  
 16 that agreed or is it capable of agreement?  
 17 MR SPITZ: It is not agreed. It ought to be capable of  
 18 agreement. It is really a matter for BT to decide how  
 19 seriously they want to assume the difference because  
 20 there is a very slight difference.  
 21 THE CHAIRMAN: It might be both of you to decide that point.  
 22 But at the moment, and hopefully it might be possible to  
 23 be agreed, but at the moment it is strictly in dispute.  
 24 MR SPITZ: Strictly speaking it is.  
 25 THE CHAIRMAN: Thank you. Yes.

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1 MR SPITZ: We say using the illustrative date of  
 2 distribution of 31 March 2026, the Class  
 3 Representative's actuary, Mr Punter, estimates that the  
 4 voice only sub-class should be reduced by 3.6% and the  
 5 SP sub-class by 2.3%. That is in {E/51/7}.  
 6 By contrast, BT's actuary, Mr Scott, would make  
 7 a far larger reduction. We understand that it would be  
 8 11.6% for voice only and 5% for split purchase  
 9 customers. That is in the JES, the joint expert  
 10 statement of the actuaries at {E/51/8}.  
 11 The main reason for this larger reduction is, as BT  
 12 puts it in its skeleton, that is at paragraph 211:  
 13 Mr Scott makes an exercise of his judgment in the round  
 14 to reduce the results produced by a set of some 17  
 15 surveys and academic studies on the prevalence of will  
 16 writing at different ages by a full 20%.  
 17 It also assumes that the likelihood of having a will  
 18 stays constant after the age of 75 and that is contrary  
 19 to the surveys and studies.  
 20 The effect of these adjustments is to reduce the  
 21 number of people who have wills when they die so there  
 22 will be fewer Class Members with personal  
 23 representatives at the date of distribution. The 20%  
 24 reduction will be explored in cross-examination. It is  
 25 not at all clear how this 20% figure was arrived at and

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1 why, for example, it was a 20% reduction rather than,  
 2 for example, 10% or 15%. That is a factual matter.  
 3 The last topic, because it takes in interest and  
 4 inflation, that I need to address is the aggregate  
 5 approach to damages.  
 6 Mr Parker makes two adjustments to the baseline  
 7 estimate and his aim in doing so is to ensure that the  
 8 victims of excessive pricing receive full compensation  
 9 that puts them in the position they would have been had  
 10 the abuse not occurred.  
 11 The first adjustment takes account of that  
 12 proportion of the overcharge which, when taken in the  
 13 aggregate, the Class would have spent. Mr Parker  
 14 adjusts the baseline quantum for that portion using the  
 15 Consumer Price Index, the CPI, to account for the  
 16 reduction in purchasing power between the date of  
 17 payment of the overcharge and the date of judgment for  
 18 that proportion of the Class who would have spent the  
 19 overcharge.  
 20 THE CHAIRMAN: Just one second. (Pause). Right.  
 21 MR SPITZ: From an economic perspective, an inflation  
 22 adjustment for monies that would have been spent is not  
 23 a form of compound interest. Mr Parker says that in the  
 24 joint expert statement at paragraph 9.4.1. The case law  
 25 supports the distinction. Here if we could briefly turn

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1 to {G/26/16}. This is the speech of Lord Wilberforce in  
 2 *Pickett v British Rail Engineering* at page 151D where  
 3 his Lordship says:  
 4 "Increase for inflation is designed to preserve the  
 5 'real' value of money: interest to compensate for being  
 6 kept out of that 'real' value. The one has no relation  
 7 to the other."  
 8 It is worth looking at Lord Scarman's speech at 173E  
 9 which is {G/26/38}.  
 10 THE CHAIRMAN: Just remind me, is this personal injuries?  
 11 What was the damages at stake here?  
 12 MR SPITZ: It was being kept out of money. I think yes,  
 13 indeed, it was personal injury.  
 14 THE CHAIRMAN: So this is --  
 15 MR SPITZ: Absolutely, and we do not shy away from that  
 16 point at all. What we are intending to show is that the  
 17 building blocks are available for taking account of  
 18 inflation in the interests of full compensation and the  
 19 distinction that the court is making is applicable not  
 20 only in personal injury cases but it is a more general  
 21 proposition.  
 22 Lord Scarman at 173E says, and it is a similar  
 23 point:  
 24 "In theory ... and to some extent in practice,  
 25 inflation is taken care of by increasing the number of

1 money units in this award so that the real value of the  
 2 loss is met. The loss, for which interest is given, is  
 3 quite distinct, and not covered by this increase. It is  
 4 the loss which is suffered by being kept out of money to  
 5 which one is entitled."  
 6 That is the inflation adjustment. The second  
 7 adjustment considers the proportion of the overcharge  
 8 which, taken in aggregate, the Class would have used  
 9 either to save, invest or pay down debt. This  
 10 adjustment calculates compound interest on the  
 11 proportion of the overcharge. Of course, the Tribunal  
 12 will be well aware there is near universal agreement  
 13 between economists that compound interest is the proper  
 14 way to ensure full compensation for monies that would  
 15 have been used for these purposes.  
 16 What Mr Parker does is he uses the Class Members'  
 17 marginal propensity to consume to identify the  
 18 respective proportion of the amount of the overcharge  
 19 that would be spent or saved. He does so because he  
 20 says this is the best data available.  
 21 "... use of MPC provides an economic framework for  
 22 considering how Class Members' consumption and savings  
 23 decisions would have responded to an increase in  
 24 additional ... income."  
 25 For your note that is Parker 4, paragraph 7.59,

1 {E/5/167}.  
 2 He concludes that for the Class Members, the  
 3 proportion of spending is around 38% and of saving  
 4 around 62%.  
 5 This is the best available way of identifying on  
 6 a Class-wide basis what Class Members would have done  
 7 with the overcharge. BT has offered no rival method or  
 8 tool to do this. It means that 38% of total damages  
 9 ought to be adjusted for inflation using relevant  
 10 monthly rates of inflation and the remaining 62% of  
 11 total damages should be adjusted to take account of  
 12 compound interest.  
 13 We say that this split between the portion of the  
 14 overcharge that would have been spent and that portion  
 15 that would have been saved is responsive to the  
 16 reasoning in the *Merricks* remittal case which is at  
 17 {G/79/1}. It is worth turning this authority up and it  
 18 is paragraph 96 that I would like to show the Tribunal.  
 19 That is {G/79/26}.  
 20 Here the Tribunal refers to section 47C of the  
 21 Competition Act. Then it goes on to say this:  
 22 "If there was a credible or plausible means of  
 23 estimating the aggregate Overcharge paid each year by  
 24 the proportion of the class that is likely to be  
 25 entitled to compound interest on a *Sempra Metals* basis,

1 we do not suggest that each relevant class member would  
 2 have to establish his or her claim to compound interest  
 3 on an individual basis."  
 4 So if there is a credible or plausible means that  
 5 would be sufficient for the Tribunal. Now, of course  
 6 the test that the Tribunal there was applying as  
 7 a question is a test of certification, so one would have  
 8 to show that it is the correct method, but nevertheless,  
 9 we say that what Mr Parker has done is responsive to  
 10 this aspect in *Merricks*.  
 11 By splitting the Class into spenders and savers,  
 12 Mr Parker excludes from a claim for compound interest  
 13 all those who would have used the overcharge in the  
 14 words of the *Merricks*' decision for a "little extra  
 15 expenditure" and so his analysis avoids the difficulty  
 16 confronting the Class Representative in the *Merricks*  
 17 case.  
 18 Dr Jenkins, and I am coming towards the end of these  
 19 submissions, Dr Jenkins raises various points about  
 20 Mr Parker's approach. They can be considered in the hot  
 21 tub and cross-examination, but notably fails to offer  
 22 any alternatives.  
 23 BT contends that one cannot work on this aggregated  
 24 basis and that each individual Class Member must be  
 25 individually assessed. This does not pay proper regard

1 to aggregate damages awards, of which compound interest  
 2 is one. We deal with this in paragraph 222 of our  
 3 skeleton argument.  
 4 In Merricks in the Supreme Court at paragraph 76  
 5 which is {G/81/28}, the court said section 47C of the  
 6 Act radically alters the common law compensatory  
 7 principle by removing the requirement to assess  
 8 individual loss in an aggregate damages case.  
 9 BT also says that it is wrong to assess the loss at  
 10 the date of judgment and that damages should be assessed  
 11 at the date of breach. That is in its skeleton,  
 12 paragraph 221. But BT somewhat overstates its case in  
 13 suggesting the assessment at the date of judgment must  
 14 always be very narrowly confined. Every time the court  
 15 makes an award of compound interest as damages it is  
 16 unavoidably and necessarily assessing damages at the  
 17 date of judgment. That is when it can assess the loss  
 18 arising from the period over which the claimant was  
 19 deprived of the use of his or her funds. Of course, in  
 20 the *Sainsbury's v Mastercard litigation* and in *Trucks*,  
 21 both cases where compound interest was awarded, this was  
 22 done necessarily through an assessment at the date of  
 23 judgment and it is done in furtherance of the  
 24 entitlement to full compensation.  
 25 Uprating for inflation also requires assessment at

1 the date of judgment and this is increasingly endorsed  
 2 in the leading textbooks which suggest that assessment  
 3 at the date of judgment is increasingly attractive to  
 4 courts.  
 5 Two extracts to show the Tribunal from  
 6 Mann and Proctor on the Law of Money, the 8th edition of  
 7 2022. They are at {G/157/3}, paragraph 10.07 where the  
 8 authors say:  
 9 "It is debatable how far the 'general rule' [that is  
 10 assessment at date of breach] may continue to exist; it  
 11 is fair to say that a more flexible approach -- based  
 12 upon the restoration of the claimant to his former  
 13 position -- is now likely to be adopted. The  
 14 application of this approach underlines the court's  
 15 natural desire to achieve a result which meets the  
 16 demands of justice on the particular facts of the case."  
 17 Finally, {G/157/12} which is Proctor at  
 18 paragraph 10.32:  
 19 "It is possible to conclude that, as a general rule,  
 20 one may expect judges to be inclined towards the  
 21 assessment of compensation as at the date of judgment.  
 22 It may be repeated that this approach appears consistent  
 23 with the principles of compensation and restitution. In  
 24 a period of inflation this will inevitably lead to  
 25 higher awards of damages than those which would have

1 been awarded on the basis of an earlier valuation date  
 2 (for example, the date on which the tort was committed).  
 3 But there is no trace of a public policy to the effect  
 4 'that inflation must be contained and the victim of the  
 5 tortfeasor should help to contain it by a progressive  
 6 reduction in the real value of the compensation  
 7 awarded'. On the contrary, inflation neither can be nor  
 8 should be resisted by means of inflicting harm upon the  
 9 unfortunate victim of a wrongful act."  
 10 That is where we would leave it and simply to make  
 11 the submission that the elements are available in law to  
 12 do the assessment that the calculation at the date of an  
 13 assessment and there is sufficient in the authorities to  
 14 which we have referred in our skeleton argument and also  
 15 in the leading textbooks which points to the direction  
 16 for the purposes of inflation. Compound interest is  
 17 a much more straightforward situation and far more well  
 18 established.  
 19 Unless the Tribunal has questions, those then are  
 20 the opening submissions on behalf of Mr Le Patourel.  
 21 THE CHAIRMAN: Thank you very much indeed. We will adjourn  
 22 now and then we will hear Mr Beard at 2 o'clock.  
 23 MR BEARD: Yes.  
 24 (12.59 pm)  
 25 (Luncheon Adjournment)

1 (2.00 pm)  
 2 Opening submissions by MR BEARD  
 3 MR BEARD: Sir, thank you.  
 4 So I am going to deal with what is, by any measure,  
 5 quite a remarkable claim. It is a claim for excessive  
 6 pricing unlike any that we have seen by regulators  
 7 exercising their regulatory powers, let alone in any  
 8 standalone determination.  
 9 When Ms Kreisberger said that we had suggested that  
 10 cases involving excessive prices were rare, it was not  
 11 so much us as this Tribunal that did so.  
 12 If we could just go to {G/67/5}. Paragraph 3 in the  
 13 *Phenytoin* first CAT judgment:  
 14 "Cases of pure unfair pricing are rare in  
 15 competition law. Authorities find them difficult to  
 16 bring and are, rightly, wary of casting themselves in  
 17 the role of price regulators. Generally, price control  
 18 is better left to sectoral regulators, where they exist,  
 19 and operated prospectively; ex-post price regulation  
 20 through the medium of competition law presents many  
 21 problems. However, the law prohibits unfair pricing in  
 22 certain circumstances and in such cases there is no  
 23 reason in principle why competition law cannot be  
 24 applied, provided this is done on the correct legal  
 25 basis and the analysis of evidence is sound."

1 It is also true that over recent years we have seen  
 2 cases, particularly in the pharma sector, where the CMA  
 3 has come forward and it has rightly emphasised that any  
 4 profits of a cost-plus margin are not automatically  
 5 excessive, and actually what we have seen is it has  
 6 allowed quite a generous measure of headroom, and it has  
 7 found infringements only after considering a range of  
 8 costs measures and only where price exceeds those costs  
 9 by many multiples.  
 10 The claim the claimant has brought and on which it  
 11 has to prove liability on the balance of probabilities,  
 12 so if the evidence is not there it does not make out its  
 13 case, has three components. It needs to prove dominance  
 14 on the basis of approved narrow market definition, and  
 15 then it has to make out limb 1 of the so-called  
 16 *United Brands* test and show that prices were excessive  
 17 in being set in regard to costs, because it is  
 18 a cost-plus methodology that the Class Representative  
 19 has come forward with, and it has to prove that those  
 20 prices were unfair under limb 2 in themselves,  
 21 considering questions of economic value about which we  
 22 have heard very, very little, and indeed having regard  
 23 to comparators, and it has to do all of that having  
 24 regard to principles of legal certainty and those are  
 25 important principles.

1 Ms Kreisberger has no answer to the problems of the  
 2 methodology she and her experts are putting forward in  
 3 terms of legal certainty.  
 4 What we have heard over the past day and a half does  
 5 not remotely come close to discharging that burden of  
 6 proof in relation to any of those three elements. We  
 7 spent a day on only the first issue, market definition.  
 8 The assertion was that there was a corpus of compelling  
 9 evidence supporting the narrow market definition. As  
 10 I will come on to explain, it is nothing of the sort.  
 11 The so-called SSNIP triptych is actually  
 12 a misapplication of the hypothetical monopolist test  
 13 which depends on concluding that the massive amounts of  
 14 switching that we have seen are unrelated to price and  
 15 depend on a secular trend.  
 16 It may be the first case in which an economist has  
 17 come forward in relation to a commercial market and said  
 18 switching is unrelated to price and is merely secular;  
 19 a matter of taste.  
 20 It is also said that BT has no incentives to win  
 21 bundle customers. We will come on and see how the  
 22 documents deal with that.  
 23 Indeed, one of the things I do want to do is go  
 24 through the selective extracts of documentary material  
 25 that we saw yesterday because they illustrate how much

1 this claim lacks in evidential basis.  
 2 I will also deal with the heavier and heavier  
 3 reliance placed on the 2017 Ofcom material, but that is  
 4 just a market definition. We had about an hour and  
 5 three quarters today on excessive pricing. If that is  
 6 the heart of the case it is notable, the balance of this  
 7 opening, because the heart of this case on excessive  
 8 pricing is profoundly flawed. It ignores the basic  
 9 principles that have been set out in the case law in  
 10 favour of a remarkable degree of economic selectivity  
 11 using a costs measure from a period many years before  
 12 the start of the claim, and a single rigid mechanism for  
 13 costs allocation is the one path of truth and  
 14 righteousness according to the Class Representative.  
 15 On top of that, his economists choose, for a return  
 16 on sales, a measure from even earlier, from back in  
 17 2006. It is plainly selective. Indeed, if the Class  
 18 Representative's own experts were consistent about using  
 19 2009, the rate of return would actually be double that  
 20 which is put forward in relation to 2006.  
 21 All of these elements under limb 1 need to be  
 22 proved, significance and persistence needs to be proved,  
 23 and as I say, the approach that has been adopted in the  
 24 case law, in the decisional practice of the CMA,  
 25 suggests something very, very different overall in the

1 way that you deal with these matters, particularly when  
 2 we look at the recent pharma cases.  
 3 I will come back to them, but of course  
 4 Ms Kreisberger prays in aid cases like *Deutsche Post* and  
 5 *Albion Water*. It is just worth bearing in mind both are  
 6 regulatory decision cases, in essence. *Albion Water* was  
 7 a regulatory decision that got appealed in one of  
 8 perhaps the most tortuous sagas, perhaps outside  
 9 multi-lateral interchange fees, that have run through  
 10 this Tribunal over the last 20 years.  
 11 *Deutsche Post* was a Commission decision essentially  
 12 considering exclusionary conduct and market partitioning  
 13 contrary to EU law, of which the excessive pricing  
 14 element was a limited part, and the extent of analysis  
 15 there, again very limited. But as I say, I will come  
 16 back to those.  
 17 What I want to do now is deal with some of the law  
 18 on excessive pricing. I know you are familiar with it  
 19 but I think it is important because these are the key  
 20 cases. I will look at those. I want to deal a little  
 21 with some of the background switching material, just  
 22 taking you to some of the figures that we have that  
 23 I think are uncontested but, to a great extent, either  
 24 sidelined or ignored by the Class Representative.  
 25 I want to deal with those, and then I will deal with

1 market definition and, in doing so, I will pick up the  
 2 documentary material, SSNIP analysis, and material in  
 3 relation to Ofcom before moving on to limb 1 and limb 2,  
 4 but I imagine, given time, I am not going to get beyond  
 5 market definition this afternoon.  
 6 THE CHAIRMAN: Thank you.  
 7 MR BEARD: So turning to the case law, or perhaps, before  
 8 I do that, just making one or two remarks, because it is  
 9 worth situating the case law in what has been a broader  
 10 policy discussion. I am not going to go through the  
 11 amounts of economic literature that you have in the  
 12 bundles, but I would, if I may, direct you to the first  
 13 report of Mr Matthew which is in {IR-E/19/1}, just  
 14 picking it up at page {IR-E/19/56}.

15 What Mr Matthew does by reference to the economic  
 16 literature is explain why it is that excessive pricing  
 17 cases are rare. Fundamentally, it is because ex-post  
 18 interference with pricing carries very substantial risks  
 19 to the proper functioning of an economy. The concerns  
 20 about an over-inclusive approach to ex-post intervention  
 21 are particularly acute when a finding of excessive  
 22 pricing means, in effect, that an undertaking was  
 23 required to have priced in a particular way in the past  
 24 and must have known that it needed to price in that way.  
 25 Principles of fairness and legal certainty mean that

1 companies must be able to anticipate what is the  
 2 permitted level of pricing and the basis for that level.  
 3 That is especially important when the conduct in  
 4 question does not only expose them to damages claims  
 5 but, of course, can expose them to financial penalties  
 6 which themselves can amount to criminal sanctions.  
 7 Mr Matthew explains in his section 3.1 why the  
 8 principles underlying the approach to excessive pricing,  
 9 an approach which means that in the home of anti-trust  
 10 law, one might see it, in the US, you cannot even bring  
 11 an excessive pricing case. Those principles require  
 12 caution when intervening on prices and imposing what is  
 13 in effect a retrospective price cap. Why that  
 14 intervention is difficult without clear and certain  
 15 benchmarks, and it risks undermining competition,  
 16 investment and innovation, and why, unless there is  
 17 clarity and certainty, companies that are potentially  
 18 dominant or dominant are unable to determine with  
 19 confidence how they can lawfully price.  
 20 He also, at section 3.4, so this is {E/19/71},  
 21 discusses more generally the characteristics of previous  
 22 excessive pricing cases which may be of use to the  
 23 Tribunal in thinking about this more broadly.  
 24 He also explains how sectoral regulation exists  
 25 precisely to intervene more widely than ex-post

1 competition law. Sectoral regulation regimes are  
 2 intended to mitigate some of the limitations that  
 3 ex-post competition law carries with it, including those  
 4 problems of retrospective price intervention. Because  
 5 those regulatory regimes can and do involve a far wider  
 6 range of consideration and, indeed, enable the exercise  
 7 of a far wider range of powers, including setting price  
 8 controls, requiring information to be provided to  
 9 people, protecting specific groups of consumers or  
 10 establishing quality standards.  
 11 Now, we recognise in all of this, of course, that  
 12 the assessment of prices under these legal tests must be  
 13 grounded in the commercial realities of the market.  
 14 As the Court of Appeal noted in the *Attheraces* case,  
 15 so this is {G/45/27}, and this is 119, picking it up at  
 16 the second sentence:  
 17 "... the law on abuse of dominant position is about  
 18 distortion of competition and safeguarding the interests  
 19 of consumers in the relevant market. It is not a law  
 20 against suppliers making 'excessive profits' by selling  
 21 their products to other producers at prices yielding  
 22 more than a reasonable return on the cost of production,  
 23 ie at more than what the judge described as the  
 24 'competitive price level'. Still less is it a law under  
 25 which the courts can regulate prices by fixing the fair

1 price for a product on the application of the purchaser  
 2 who complains that he is being overcharged for an  
 3 essential facility [or] by the sole supplier of it."  
 4 Those principles apply in relation to excessive  
 5 pricing cases generally.  
 6 This approach of concern in relation to the impact  
 7 of ex-post competition law is supported by the CMA's own  
 8 decisional practice and its approach to analysing  
 9 excessive pricing which relies on actual cost data, is  
 10 fact based, uses a range of measures and comparators,  
 11 and is supported by various cross-checks. The CMA does  
 12 not go round identifying a single point of focus giving  
 13 rise to a single answer, and certainly not one using  
 14 a single cost methodology in relation to costs half  
 15 a decade before the period of any allegation.  
 16 As I have already indicated, one of the remarkable  
 17 things that we have seen, absent from the submissions  
 18 and consideration of the Class Representative, is the  
 19 notion of economic value of the product, something that  
 20 was emphasised in *Attheraces*, and I will come back to,  
 21 in relation to the Court of Appeal in *Phenytoin*.  
 22 The question of what it is that users and customers  
 23 value and will reasonably pay for needs to take account  
 24 of subjective tastes and preferences of customers.  
 25 Just to anticipate one or two of the points that

1 will come up that Ms Kreisberger raised, it does not  
 2 matter if people have subjective tastes and preferences  
 3 for a particular brand, and also could have subjective  
 4 tastes and preferences for another brand, and that  
 5 another brand offers all sorts of facilities and  
 6 benefits that are similar to the one you are dealing  
 7 with, there is still economic value in the product being  
 8 provided.  
 9 THE CHAIRMAN: Just a moment. (Pause). Yes.  
 10 MR BEARD: As I say, there is a good deal of material that  
 11 is attached, particularly to Mr Matthew's first report.  
 12 There are articles from Evans & Padilla, that is at  
 13 {E/27/13}. They consider issues concerning  
 14 *United Brands* and *Napp* and the importance of objectivity  
 15 and efficiency in any excessive pricing standards.  
 16 You have extracts from the textbook by O'Donoghue &  
 17 Padilla, starting at {E/27/165}. In particular, the  
 18 material in their book at page 766 in the internal  
 19 numbering, I think that is, 177 in the Opus references  
 20 {E/27/177}, concerning multi-firm products and excessive  
 21 prices, and summing up the difficulties, at page 778, on  
 22 those issues, and they emphasise the importance of  
 23 needing to use all possible benchmarks and restrict  
 24 intervention to those cases where all benchmarks produce  
 25 a consistent result. That is the view of those authors.

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1 Obviously that is not legal authority, but it  
 2 nonetheless reflects the concerns that are adverted to  
 3 by Mr Matthew and reflected in this other literature.  
 4 That is at {E/27/196}.  
 5 You have experienced authors from the  
 6 European Commission, Emil Paulis {E/27/99}. Then of  
 7 course there is material from the OECD itself which  
 8 considered, in 2011, a round table on excessive pricing,  
 9 that is at {G/140.1/1}, and specifically applied those  
 10 principles in relation to pharmaceuticals markets, that  
 11 is at {G/1/145}. I mention those because the latter is  
 12 referred to by the Court of Appeal.  
 13 The other material that Mr Matthew notes and  
 14 emphasises is the Motta & de Streel material, {E/27/37}.  
 15 That sets a background of explaining the concerns that  
 16 arise in relation to the operation of ex-post  
 17 competition law in respect of excessive pricing, and, in  
 18 particular, those authors emphasise that where you have  
 19 a sectoral regulator in play, you should be very, very  
 20 cautious before any non-sectoral regulator or court or  
 21 tribunal intervenes.  
 22 That is not suggesting, as Ms Kreisberger said, that  
 23 so long as there is a regulator there is absolution. We  
 24 are not sanctified in quite that way. But nonetheless,  
 25 these are important considerations as to how the legal

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1 test has to be applied and how the evidence has to be  
 2 considered in a case such as this one.  
 3 With that, I am going to move to *United Brands*  
 4 itself, {G/107/1}. You will perhaps be familiar with  
 5 this case. If we can just pick it up. There are  
 6 actually two elements to it. There is a market  
 7 definition element, which we may come back to at some  
 8 point, and then there is a section on abuse which begins  
 9 at {G/107/63}. The market definition section of this  
 10 judgment has not stood the test of time in the same way  
 11 the excessive pricing elements have.  
 12 So there were actually a number of allegations made  
 13 in relation to the abuse, so, again, this was not pure  
 14 excessive pricing, but nonetheless, there was  
 15 a prohibition on resale of bananas while still green.  
 16 That is referred to just above 130. The pricing issues  
 17 begin at paragraph 204, which is {G/107/70}, and there  
 18 were discriminatory price allegations and, in addition,  
 19 unfair pricing which begins at {G/107/73}. That is at  
 20 paragraph 235.  
 21 This is not the most beautiful layout for a case  
 22 report, but if we go over the page to page {G/107/74},  
 23 we can pick up the text at 248 which refers, halfway  
 24 down the page, which refers to the basic provisions of  
 25 what was then Article 86, now 102, and reflected in the

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1 Chapter II prohibition in domestic law.  
 2 It talks in 249 about whether:  
 3 "... the dominant undertaking has made use of the  
 4 opportunities arising out of its dominant position in  
 5 such a way as to reap trading benefits which it would  
 6 not have reaped if there had been normal and ...  
 7 effective competition."  
 8 The first thing to note here is the separation  
 9 between the dominance, market definition issues and  
 10 these excessive pricing abuse issues.  
 11 "In this case charging a price ... is excessive  
 12 because it has no reasonable relation to the economic  
 13 value of the product supplied ..."  
 14 That is an abuse. "No reasonable relation".  
 15 Again, the basic test being set out here involves  
 16 a broad notion of relationship, a reasonable  
 17 relationship.  
 18 "This excess could ... be determined objectively if  
 19 it were possible to approximate for it to be calculated  
 20 by making a comparison between the selling price ... and  
 21 its cost of production, which would disclose the amount  
 22 of the profit margin; however the Commission has not  
 23 done this ... The question therefore to be determined is  
 24 whether the difference between the costs actually  
 25 incurred and the price actually charged is excessive

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1 and, if the answer to this question is in the  
 2 affirmative , to consider whether a price has been  
 3 imposed which is either unfair in itself or when  
 4 compared to competing products.”  
 5 Obviously these are the two limbs in this paragraph.  
 6 The point I emphasise, which may be just so  
 7 blindingly obvious it is painful, it is actual costs and  
 8 actual prices . The allegation is : you have charged  
 9 excessively above your actual costs. That is not some  
 10 kind of mere rhetoric, that is fundamental to the notion  
 11 of what you are doing there. Actual costs, actual  
 12 prices .  
 13 Then if we go on:  
 14 “Other ways may be devised ...”  
 15 So it is accepted that the category of  
 16 considerations that may go to an excessive pricing case  
 17 are not closed. Indeed, you see that in other cases,  
 18 for instance, in relation to collecting societies or  
 19 *Attheraces*, where you are dealing with intangibles  
 20 particularly , where cost issues may be much more  
 21 difficult as a relevant metric.  
 22 “While appreciating [this is 254] the considerable  
 23 and at times very great difficulties in working out  
 24 production costs which may sometimes include  
 25 a discretionary apportionment of indirect costs and

1 general expenditure and which may vary significantly  
 2 according to the size of the undertaking, its object,  
 3 the complex nature of its set up, its territorial area  
 4 of operations, whether it manufactures one or several  
 5 products, the number of its subsidiaries and their  
 6 relationship with each other, the production costs of  
 7 the banana do not seem to present any insuperable  
 8 problems.”  
 9 The point here is obvious: you use actual costs,  
 10 actual prices . Yes, there will be a need to exercise  
 11 judgment when you are apportioning indirect costs and  
 12 general expenditure, what might be thought of as common  
 13 costs, as we will come back to.  
 14 So the court here in this very basic test is setting  
 15 out how you go about an excessive pricing assessment  
 16 when you are using a cost-plus methodology: use the  
 17 actual costs, use the actual prices . Yes, there will be  
 18 difficulties of all sorts , but use judgment in relation  
 19 to these matters, and, it goes without saying, take  
 20 evidence.  
 21 If we go then down to 256. It is worth bearing in  
 22 mind, of course, this was a regulatory decision , and so  
 23 what is found here is that the Commission had not made  
 24 out its case on the basis of the evidence it put  
 25 forward, and it was emphasised that the Commission could

1 have gone and got more material in those circumstances.  
 2 Now, of course that is true of regulators . They  
 3 can, and they do, and we will see that in some of the  
 4 cases. But the fact that a claimant cannot for instance  
 5 order a party to recut its data but can merely require  
 6 disclosure , for example, does not somehow change the  
 7 burden of proof.  
 8 Ms Kreisberger this morning talked about BT  
 9 electing , electing not to have its costs information  
 10 provided in the same way as in the 2009 RFS that so much  
 11 reliance is placed upon.  
 12 BT throughout provides management accounts and  
 13 relevant accounts for statutory purposes in accordance  
 14 with all of the requirements that those practical  
 15 commercial and regulatory requirements impose on them.  
 16 The fact that that does not mean that that selection of  
 17 costs and accounts does not provide the information in  
 18 precisely in the form that Mr Duckworth would ideally  
 19 like does not somehow mean that you turn away from  
 20 actual costs material at all .  
 21 If we just go down to the bottom to 264, I am sorry,  
 22 it is over the page, I apologise, {G/107/76}, it picks  
 23 up the fact that:  
 24 “However unreliable the particulars supplied by [the  
 25 banana company] may be ... the fact remains it is for

1 the Commission to prove that the applicant charged  
 2 unfair prices.”  
 3 That remains true (inaudible).  
 4 The next case I am going to go to is another  
 5 European case. I am actually going to focus on the  
 6 Advocate General. We did not hear about this from  
 7 Ms Kreisberger, but it is the *Latvian Copyright case*,  
 8 abbreviation AKKA. {G/127/1}, if I may.  
 9 This is Advocate General Wahl. It starts off with  
 10 a rhetorical question:  
 11 “Is there any such thing as unfair prices?”  
 12 He is obviously extremely alive to the policy  
 13 debates to which I have already referred you. Indeed,  
 14 in paragraphs 2 and 3 he refers to the debate that has  
 15 gone on and the treatment in the US, and the difference  
 16 in treatment in the EU and indeed the UK.  
 17 He points out that one of the issues in this case is  
 18 that the parties have a legal monopoly. But  
 19 notwithstanding that particular wrinkle in this case, he  
 20 takes it as an opportunity or sees it as an opportunity  
 21 for the court and himself to consider and clarify the  
 22 conditions under which high prices by a dominant  
 23 undertaking might infringe Article 102, or the  
 24 Chapter II prohibition , Section 18 of the  
 25 Competition Act.



1 If we go over to the page to paragraph 15,  
 2 {G/127/3}. You will see his analysis. This is the  
 3 introduction. He goes through *United Brands*, through  
 4 16–20, discussing the different steps, and if we go over  
 5 the page you will see that is considered through to 21.  
 6 {G/127/4}

7 Then if we go on to paragraph 35, so this is on page  
 8 {G/127/6} of the electronic bundle, he picks up -- this  
 9 is actually under a heading "General remarks", but we do  
 10 not need to go back and find it. He there discusses the  
 11 issues in relation to methodologies and tests and there  
 12 are remarks in here that suggest that actually you  
 13 should always ensure you do multiple tests.

14 The Court of Appeal in *Phenytoin* said that would be  
 15 taking things too far. There may be circumstances where  
 16 only one test is appropriate. But the essence of what  
 17 he is talking about here, where he articulates the  
 18 problem that you have if you do not use multiple  
 19 metrics, is a discussion that I would commend to the  
 20 Tribunal.

21 Indeed, he picks up some of the domestic case law.  
 22 *Attheraces* is referred to, later *Napp* is referred to.

23 You will see over the page {G/127/7} that, under the  
 24 heading "Combining [various] methods", he says:  
 25 "... in the absence of a ubiquitous test and given

1 the limitations inherent in all existing methods, it is  
 2 in my view crucial that in order to avoid (or, more  
 3 correctly, to minimise) the risk of errors, competition  
 4 authorities should strive to examine a case by combining  
 5 several methods among those which are accepted by  
 6 standard economic thinking and which appear suitable and  
 7 available in the specific situation. It seems to me  
 8 that those which can be found in the Court's case-law  
 9 (and that have been illustrated ... above) may serve  
 10 that purpose.

11 "The choice to combine several methods is, in fact,  
 12 the approach that a number of antitrust authorities have  
 13 followed worldwide ..."

14 He emphasises the *Napp* case there.

15 "It is also consistent with suggestions made in  
 16 international discussion fora of those authorities as  
 17 well as in contemporary economic literature."

18 He takes -- he then deals at 45 with the possibility  
 19 that if you have several weak methodologies, that does  
 20 not provide you with a stronger conclusion. I mean,  
 21 from our point of view, the important issue is that he  
 22 is emphasising the lack of a ubiquitous test in these  
 23 circumstances and the importance of considering a range  
 24 of factors, because he takes into account those concerns  
 25 from a policy point of view that mean one should

1 effectively be conservative about the use of ex-post  
 2 price caps.

3 Then he has some additional indicators, and the  
 4 first is:  
 5 "... a price cannot easily be set significantly  
 6 above a competitive level where the market is not  
 7 protected by high barriers to entry or expansion."  
 8 I will come back to that. In this case, it is  
 9 accepted there are not any supply side barriers to  
 10 entry. The argument is that there are demand side  
 11 barriers because people are inert within the relevant  
 12 Class. What I am going to come back and show there is  
 13 massive switching.

14 The second:  
 15 "... a price significantly in excess of  
 16 a competitive price is more unlikely to occur in markets  
 17 where there is a sectoral regulator whose task is, inter  
 18 alia, to fix or control prices charged by the  
 19 undertakings active in that sector. Sectoral  
 20 authorities are clearly better equipped than the  
 21 competition authorities to oversee prices and, where  
 22 necessary, act to remedy possible abuses. It would  
 23 seem, therefore, that antitrust infringements in those  
 24 situations should be mainly confined to cases of error  
 25 or, more generally, to regulatory failures: cases where

1 the sectoral authority should have intervened and  
 2 erroneously failed to do so."

3 Now, I refer to this because of course huge amounts  
 4 of weight have been put on the Ofcom 2017 materials but,  
 5 as I will come back to, that was ex ante regulation  
 6 under the Communications Act, prospective price  
 7 regulation, targeted at a particular group of customers  
 8 that Ofcom had identified as of concern pursuant to  
 9 specific statutory obligations that it has in relation  
 10 to those people.

11 You had a regulator, a specialist regulator here who  
 12 did not decide that either prior to that date there  
 13 should have been some retrospective price cap in  
 14 relation to VOCs, nor did they say there should be any  
 15 pricing constraint in relation to SPCs, split purchase  
 16 customers.

17 They were not wrong. We may disagree with some of  
 18 the reasoning of Ofcom, and I will come back to the  
 19 *Qualcomm* case about what reliance can be placed in any  
 20 event. But leave that all to one side; the points we  
 21 are making here about the approach to excessive pricing  
 22 are germane notwithstanding, and indeed perhaps because  
 23 of, the fact that you have Ofcom there.

24 That is not Janus-faced, as Ms Kreisberger put it at  
 25 one point. That is recognising the differential regimes

1 you are dealing with and what is required under them.  
 2 So in those circumstances -- the third point is  
 3 about buyer power, and we accept of course that in this  
 4 case we are not dealing with consumers with buyer power.  
 5 That is not an issue. We accept that.  
 6 But, as I say, what was important here was  
 7 a consideration by the Advocate General in relation to  
 8 concerns about the use of ex-post competition law.  
 9 Just going down to 52, if we may, {G/127/8}:  
 10 "Concluding on this point, it seems important to  
 11 make the following two observations. First, I would  
 12 recall that it is for an antitrust authority to prove an  
 13 infringement of EU competition rules. Second, it is  
 14 settled case law that a principle such as the  
 15 presumption of innocence applies to undertakings  
 16 investigated for possible infringements of EU  
 17 competition law."  
 18 Now, just pausing for a moment, because this does  
 19 matter potentially for contextualising some of the other  
 20 cases that we are dealing with. If you are dealing with  
 21 a regulatory authority which is going to impose an  
 22 ex-post price cap on the basis of excessive pricing, as  
 23 we have seen, for example, in the pharma cases, of  
 24 course what you have is an institutional structure which  
 25 requires that authority to carry out an investigation,

1 put forward a statement of objections that can be  
 2 responded to, then come up with a decision which can  
 3 then be appealed.  
 4 Even in that process, of course, the presumption of  
 5 innocence applies. We say a fortiori in the case where  
 6 a claimant is turning up before the tribunal and saying:  
 7 this is all excessive, it is on the basis of this  
 8 measure, it is important that this court is rigorous in  
 9 its application of the burden of proof which operates as  
 10 the protection of that presumption of innocence in this  
 11 context.  
 12 Then at 53:  
 13 "As a result, in my view, a lack of reliable data or  
 14 the complexity of the operations involved in the  
 15 calculation of the benchmark price (or in corroborating  
 16 it) cannot justify an incomplete, superficial or dubious  
 17 analysis by a competition authority. In other words,  
 18 difficulties encountered by an authority when carrying  
 19 out an assessment cannot be to the detriment of the  
 20 undertaking being investigated."  
 21 We say the same here in relation to this case. The  
 22 fact that Mr Duckworth complains that BT did not provide  
 23 cost breakdowns in the way that he would have liked them  
 24 for the actual costs is no answer. He does not have  
 25 a good basis for his cost methodology. The fact he

1 encounters difficulties means the case is not proved.  
 2 "Regardless of the specific situation in a given  
 3 case, the method(s) applied and the other indicator(s)  
 4 examined must give the authority a sufficiently complete  
 5 and reliable set of elements which point in one and the  
 6 same direction: the existence of difference between the  
 7 (hypothetical) benchmark price and the (actual) price  
 8 charged by the dominant undertaking in question."  
 9 It is against that background that I shall examine  
 10 the specific aspects of the case.  
 11 We can skip through now to page 12, {G/127/12}.  
 12 This is the fifth question:  
 13 "By its fifth question [paragraph 100], the  
 14 referring court seeks guidance on the circumstances in  
 15 which a difference in price can be considered excessive  
 16 pursuant to point (a) of ... Article 102 ..."  
 17 You can see there, in paragraphs 101 through to 105,  
 18 a range of the concerns that underpin excessive pricing  
 19 being rearticulated by the Advocate General.  
 20 If we go to 106 {G/127/13}, you will see at 106,  
 21 after that consideration, where he talks about, in 104,  
 22 "difficulties and uncertainties", the need for "a strict  
 23 approach", giving rise to a problem with competition  
 24 authorities becoming "price regulators", he says:  
 25 "That is why -- in line with the approach adopted by

1 the relevant authorities and courts both at the EU level  
 2 and at the Member States level, and as suggested in  
 3 economic writings -- I take the view that a price can be  
 4 qualified as excessive ... only if two conditions are  
 5 fulfilled : it ought to be both significantly and  
 6 persistently above the benchmark price."  
 7 Then at 107 he refers to the *Tournier* and *Lucazeau*  
 8 cases. This I think is the origin, those cases are the  
 9 origin of the Class Representative's suggestion that  
 10 actually "significantly and persistently" should just be  
 11 seen as appreciable differences. But actually what he  
 12 is saying is those are synonymous; "significantly and  
 13 persistently" is the threshold, and actually *Tournier*  
 14 and *Lucazeau*, where they talked about "appreciably  
 15 higher", were in fact talking about very large  
 16 differentials over time.  
 17 Just for your notes, the judgment in this case is at  
 18 {G/126/1}.  
 19 THE CHAIRMAN: Sorry, which case, *Latvian Copyright* or  
 20 *Tournier* ---  
 21 MR BEARD: I am sorry, sir. Before I do that, I should  
 22 perhaps just pick up, if we can go down to  
 23 paragraph 112. So this is the Advocate General's  
 24 opinion we are still in.  
 25 THE CHAIRMAN: Yes.

1 MR BEARD: Adding, after the German Government and  
2 Commission arguments:  
3 "... an authority should intervene under Article 102  
4 ... only when it feels sure that, regardless of the  
5 limitations and uncertainties surrounding the  
6 calculation of the benchmark price, the difference  
7 between that price and the actual price is of such a  
8 magnitude that almost no doubt remains as to the  
9 latter's abusive nature. On the other hand, the more  
10 significant the difference between the benchmark price  
11 and the actual price, and the longer the period in which  
12 that high price is applied, the easier it should be for  
13 an authority to discharge its burden of proof."

14 It stands to reason. We do not take any issue with  
15 that.

16 THE CHAIRMAN: No.

17 MR BEARD: Then we see in the sixth question it is  
18 discussing the way in which a collecting society might  
19 prove the fair nature of various charges.

20 It is worth just noting there, there is a reference  
21 in paragraph 117 to the US Supreme Court in *Trinko*.  
22 Just as US antitrust law does not allow excessive  
23 pricing cases, the US Supreme Court in *Trinko* said if  
24 you have a sectoral regulator to deal with something,  
25 you do not have antitrust jurisdiction .

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1 So in a way, the US has the most extreme  
2 manifestation of those policy concerns. Those are not  
3 the conclusions that have been reached in the UK, but  
4 those policy concerns still apply, both in relation to  
5 ex-post price caps and in relation to roles of  
6 regulators .

7 As I say, the judgment in this case is at {G/126/1}.  
8 I am not sure that it is necessary to go through it. It  
9 does not quibble with the way that the Advocate General  
10 deals with matters, it is far less extensive, and it  
11 does cite him in various places, but not in relation to  
12 each and every paragraph to which I have referred, to be  
13 clear .

14 The next case I am going to go to is the *Phenytoin*  
15 Court of Appeal case. So G/74, if I may. I am sorry,  
16 {G/73/1}. I apologise.

17 I am conscious of ... no, I am sorry, I was  
18 misreading the clock.

19 THE CHAIRMAN: We are fine. Just a second. (Pause). Yes.

20 MR BEARD: We are in -- this is sometimes referred to as  
21 Pfizer-Flynn, but we have been referring to it as  
22 *Phenytoin*, because it is the underlying drug that has  
23 been the subject of various considerations, not ...

24 THE CHAIRMAN: Yes.

25 MR BEARD: Quite recently before this Tribunal. Most

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1 recently .

2 As is clear from the start of it, paragraph 1 --  
3 sorry, if we could go on, my apologies. Page {G/73/5}.

4 THE CHAIRMAN: Thank you.

5 MR BEARD: Just obviously to emphasise at least for one  
6 Member of the Tribunal, actually two might be very  
7 familiar with all of this, but it was a regulatory  
8 decision taken by the CMA which was then subject to  
9 appeal and further appeal and then remittal.

10 THE CHAIRMAN: Yes.

11 MR BEARD: You can see from paragraph 1 the court is  
12 considering, through Lord Justice Green at this point,  
13 how one goes about considering dominant undertakings and  
14 issues to do with pricing. There were various appeals  
15 made by the CMA in relation to this case and the  
16 treatment of the CAT of various issues.

17 As I say, the history is set out in paragraph 2.  
18 Obviously the reason why this matters is in part because  
19 of the institutional structure that you are dealing  
20 with, and then some of the considerations about roles of  
21 discretion and so on are in the context of that  
22 institutional framework.

23 If we could just go to page {G/73/12}. Just looking  
24 at the table at the top, I am not going to go through it  
25 in detail, but obviously we are dealing with a situation

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1 where the assessment that had been made resulted in  
2 findings of very, very significant margins above cost.

3 There is a summary of the parts of the Tribunal  
4 decision, starting at 39, including that paragraph  
5 I took you to at the beginning.

6 Paragraph 51 on page {G/73/16} summarises the  
7 position in relation to the first ground that was  
8 brought by the CMA. This was a discussion about whether  
9 or not the CAT -- in essence, whether or not the CAT had  
10 been right to suggest that actually more than one  
11 methodology or comparator was appropriate to be  
12 considered in the assessment of the excessive pricing .

13 We then have a tour by the court of the relevant  
14 case law. So at paragraph 59 on page {G/73/18} we have  
15 consideration of *United Brands* and the test to which  
16 I have referred you. I will not go through that in any  
17 detail .

18 That runs on for several paragraphs. If we could  
19 just pick it up over the page {G/73/19} at paragraph 68:

20 "The facts of *United Brands* itself are illuminating  
21 and undermine the CMA's argument that if it establishes  
22 abuse using one method or alternative then it can ignore  
23 evidence of another type adduced by a defendant  
24 undertaking."

25 Because essentially that was being said in

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1 *United Brands*, and we see that emphasised again by the  
 2 Court of Appeal by reference to the case of *Intel* .  
 3 Then at paragraph 72, there is the reference to the  
 4 *Tournier* case. *Tournier* and *Lucazeau* were the two cases  
 5 I referred you to previously .  
 6 Paragraph 74 on page {G/73/21}, that is the Athens  
 7 Airport case. Again, I refer you to these because these  
 8 provide a neat summary of the relevant case law in this  
 9 area.  
 10 Then *Scandlines*, paragraph 76 on page {G/73/22}.  
 11 This case is slightly more interesting in the sense that  
 12 here there was a case involving the European Commission  
 13 where consideration of the notion of economic value was  
 14 undertaken, and that is quoted and discussed there.  
 15 I will not dwell on it because I will come back to it  
 16 the context of the Hydrocortisone case.  
 17 Paragraph 78 is AKKA. Again, I have been through  
 18 that. That is on page {G/73/23}.  
 19 The point that I would note is that the court here  
 20 makes clear, as I have said, in particular at  
 21 paragraph 81, that SAC combinatorial methods are not  
 22 mandatory. There is some criticism of the consistency  
 23 of the Advocate General’s language in paragraph 81 as to  
 24 whether or not he is suggesting multiple methods are  
 25 mandatory, but the Court of Appeal makes clear they are

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1 not.  
 2 Whatever the context of that discussion, I have  
 3 taken you to that Advocate General’s opinion and set out  
 4 why, not reading it as a mandatory requirement, the  
 5 exhortation for considering a range of methodologies is  
 6 coherent and sensible.  
 7 At paragraph 87, as I say, this is on page  
 8 {G/73/26}, there is reference to the *Intel* case, so this  
 9 is *Intel* in the Court of Justice. So it is actually  
 10 General Court, Court of Justice, which  
 11 Lord Justice Green was familiar with. He referred to  
 12 the fact that the Upper Court had emphasised that where  
 13 a regulator receives evidence that is relevant, it must  
 14 take that into account in its assessment.  
 15 Then at paragraph 90 on page {G/73/27} we have *Napp*.  
 16 As I say, I am scooting through these because they  
 17 provide just an easy reference and consideration by the  
 18 Court of Appeal.  
 19 There you see in *Napp*, 92:  
 20 “The combinatorial approach ...”  
 21 I should say that is a different combinatorial  
 22 approach from SAC combi that we will come on to. This  
 23 is a combination of different methodologies being used  
 24 in that. So it is more like, and was cited by, the  
 25 Advocate General in his consideration of combinations of

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1 methodologies.  
 2 Then at paragraph 95 we have, this is on page  
 3 {G/73/28}, we have the *Attheraces* material. Then at  
 4 paragraph 96 you have the discussion here of  
 5 considerations of the role of cost-plus. If we could  
 6 just turn over the page so we can see those quotes,  
 7 {G/73/29}. I would just invite the Tribunal to read  
 8 those. It is easier than going to *Attheraces* itself .  
 9 (Pause)  
 10 THE CHAIRMAN: Yes.  
 11 MR BEARD: I am sorry, Ms Mackersie rightly corrects me.  
 12 I misspoke when I was referring to the table on page 12.  
 13 Those were the rates of price increases, not the actual  
 14 margins above cost-plus. I was overstepping. The  
 15 margins above cost-plus for Pfizer were merely around  
 16 700%, so I would like to correct that. {G/73/12}  
 17 Then if we could go back to page 29, and then we  
 18 have the conclusions that are drawn {G/73/29} by  
 19 Lord Justice Green at that point in relation to how  
 20 these matters should be carried out in the light of the  
 21 case law that we have canvassed.  
 22 Ms Kreisberger referred you to some elements of  
 23 this. So she referred you to (i), “basic test for  
 24 abuse”; (ii), “excessive ... bears no ‘reasonable’  
 25 relation to the economic value”.

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1 She missed (iii):  
 2 “There is no single method or ‘way’ in which abuse  
 3 might be established and competition authorities have  
 4 a margin of manoeuvre or appreciation in deciding which  
 5 methodology to use and which evidence to rely upon.”  
 6 That is true, but, as I say, one needs to be  
 7 cautious about these degrees of manoeuvre. We are  
 8 dependent on what is put forward here by the claimant.  
 9 (iv):  
 10 “Depending upon the facts and circumstances of the  
 11 case a competition authority might therefore use one or  
 12 more of the alternative economic tests ...”  
 13 (v):  
 14 “If ... cost-plus ... is applied the ... authority  
 15 may compare the cost of production with the selling  
 16 price in order to disclose the profit margin. Then the  
 17 authority should determine whether the margin is  
 18 ‘excessive’.”  
 19 It refers to possible methodologies.  
 20 Then:  
 21 “When that is performed, and if the price exceeds  
 22 the selective benchmark, the authority should then  
 23 compare the price charged against any other factors  
 24 which might otherwise serve to justify the price charged  
 25 as fair and not abusive.”

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1 (vi) includes a range of factors.  
 2 I would invite the Tribunal to read all of this.  
 3 (vii):  
 4 "If a competition authority chooses one method ...  
 5 and one body of evidence and the defendant undertaking  
 6 does not adduce other methods or evidence, the  
 7 competition authority may proceed to a conclusion upon  
 8 the basis of that method ... alone."  
 9 Because that is different for a competition  
 10 authority.  
 11 "If an undertaking relies, in its defence, upon  
 12 other methods ... then the authority must fairly  
 13 evaluate it."  
 14 Then at 98:  
 15 "There are other points of importance relating to  
 16 the burden and standard of proof on the competition  
 17 authorities and the nature and extent of the evidential  
 18 burden ..."  
 19 Which he then goes on and deals with, but I do not  
 20 think those are particularly important for us. I think  
 21 it is clear that we are dealing with a civil burden of  
 22 proof here. We have referred to the Raymond analysis.  
 23 Contrary to Ms Kreisberger's suggestion, she has not  
 24 got a stuffed lion, although that was a funny notion, it  
 25 made me think of small velure toys, in the form of the

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1 Ofcom decision. She has not got a lioness at all here.  
 2 Just moving on to paragraph 154, so this is on page  
 3 {G/73/48}, this is reference to economic value. Sorry,  
 4 I should say there is a lengthy discussion of the  
 5 economic literature in this judgment as well. This  
 6 Tribunal has been spared to some extent.  
 7 THE CHAIRMAN: We looked at some of this, I think. Did we  
 8 not look at some of this in context of our CPO decision,  
 9 actually?  
 10 MR BEARD: Yes, you did, absolutely. That is quite right.  
 11 THE CHAIRMAN: Yes.  
 12 MR BEARD: Then at page {G/73/51} you have references to the  
 13 economic value in more detail. As I say, I think  
 14 probably it is useful to pick that up more in relation  
 15 to the Hydrocortisone judgment because that fills those  
 16 issues out more fully.  
 17 The only other point I should make is of course the  
 18 Chancellor also gave a judgment here, starting at  
 19 {G/73/68}. Although he does not agree entirely with  
 20 Lord Justice Green, I think for the purposes of today it  
 21 is not necessary to work our way through that, and so  
 22 I will then move to the Hydrocortisone judgment itself.  
 23 THE CHAIRMAN: Yes.  
 24 MR BEARD: So Hydrocortisone. This was another CMA decision  
 25 where the differential above the bound of cost-plus was

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1 at its lowest around 300% and rose to around 3,000%.  
 2 Just for your notes, that is in the CMA decision which  
 3 is at {G/77/419-420}.  
 4 The situation there was that the CMA had calculated  
 5 direct costs and, in relation to indirect costs, had  
 6 identified common costs partly attributable to the  
 7 supply of hydrocortisone tablets, and then used the  
 8 sales volume methodology to allocate parts of these  
 9 costs to the different tablets.  
 10 You can see that explained at {G/77/443}. Then the  
 11 CMA used EPMU and equal allocation methods for  
 12 sensitivity checks. You can see that at page  
 13 {G/77/451}. That is paragraphs 5.144 to 5.145.  
 14 Just picking it up, if we could just go slightly up  
 15 the page to paragraph 5.141:  
 16 "The CMA has taken a conservative approach of using  
 17 the costs actually incurred by each firm in supplying  
 18 hydrocortisone tablets, during its respective period of  
 19 supplying hydrocortisone tablets."  
 20 This was because there was a series of firms who  
 21 were said to have infringed between the relevant period.  
 22 "This approach means that there is no risk of the  
 23 cost-plus calculation being based on a level of common  
 24 costs that was not available to an owner of the business  
 25 of supplying hydrocortisone tablets in an earlier

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1 period.  
 2 "However, it also results in common costs changing  
 3 according to the actual cost base under different  
 4 periods of ownership, even though some of those costs  
 5 may not reflect efficiently incurred costs."  
 6 So what that is recognising is that a conservative  
 7 approach is appropriate here and that, in those  
 8 circumstances, where you are dealing with a number of  
 9 players, there is a consistency that is being adopted.  
 10 But in doing that, as you will see at 5.143, in order to  
 11 assure confidence in the results, the CMA assessed  
 12 whether adopting either EPMU, so that is the  
 13 equi-proportional mark-up measure, or equal allocation  
 14 method, would affect the level of common costs  
 15 allocated. So they were doing these sensitivities.  
 16 This goes to exactly what I said at the outset about  
 17 the CMA's decisional practice, and fits with the  
 18 concerns that we have seen articulated in the case law,  
 19 in the literature, in the European statements from the  
 20 Advocate General.  
 21 If we can then go to the Tribunal's judgment which  
 22 is at {G/96/1}. If we could pick it up at {G/96/152}.  
 23 This is first of all dealing with the question of the  
 24 application of *United Brands*. Then if we go on to  
 25 {G/96/160}, there is reference to the case law following

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1 *United Brands*, and it actually effectively adopts or  
 2 uses Lord Justice Green's account in *Flynn Pharma* for  
 3 the purposes of considering these matters.  
 4 At page {G/96/161} it considers the *Attheraces*  
 5 issues that I have already adverted to.  
 6 THE CHAIRMAN: Yes.  
 7 MR BEARD: Then you have also got at paragraph 328 on page  
 8 {G/96/163} this is the *Humber Oil* case.  
 9 "In *Humber Oils* ... the Court of Appeal upheld the  
 10 strike out at first instance of a claim that the  
 11 defendant landlord had abused its dominant position by  
 12 demanding excessive rents in return for the grant of  
 13 a new lease. Although the landlord was dominant,  
 14 demanding an excessive price in the course of  
 15 negotiation was not an abuse, at least where the court  
 16 had jurisdiction to fix the rent pursuant to a statutory  
 17 procedure."  
 18 So if you go down to 329:  
 19 "The point is not unrelated the question of whether  
 20 a statutory control or regime can render what would  
 21 otherwise be a dominant position not dominant. Clearly,  
 22 the manner in which a market operates ... can be highly  
 23 relevant to both questions of dominance and abuse, as  
 24 *Humber Oil* demonstrates. We would only add the  
 25 following points ...

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1 "(1) Depending on its nature, a regulatory regime  
 2 governing a market may either create or exacerbate  
 3 dominance and/or the potential for abuse (as is the case  
 4 here) or eliminate or reduce it ..."  
 5 What is being said there is that the drugs  
 6 regulation regime, which allowed you to take branded  
 7 drugs and debrand them and therefore avoid price  
 8 control, was what was being done by people in order to  
 9 put up the margins. In other words, the regulatory  
 10 regime for drug pricing made it possible for you to hike  
 11 your prices. Whereas in *Humber Oil*, because there was  
 12 a regulatory control scheme, that reduced the concern  
 13 about dominance and abuse.  
 14 THE CHAIRMAN: Yes.  
 15 MR BEARD: "What matters is not the theoretical position ...  
 16 but the actual position ..."  
 17 Then you will see the reference at 330 {G/96/164}  
 18 to:  
 19 "... no single method for ascertaining [unlawfulness  
 20 and excessiveness].  
 21 "When considering whether a price is or is not  
 22 excessive, a tribunal must have careful regard to  
 23 'regulatory overreach', in that interference in an  
 24 outcome that may actually be competitive is as bad as  
 25 failing to call out as infringements excessive prices."

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1 Then there is emphasis there in 331 on the use of  
 2 comparators, and then:  
 3 "The inter-relationship between price and cost is  
 4 obviously significant. Bearing in mind always that  
 5 price can be extraordinarily difficult to relate to a  
 6 product's price, if (nevertheless) cost can be reliably  
 7 derived, a price well in excess of cost will be an  
 8 indicator of unfairness. That being said, simply taking  
 9 a cost-plus approach may mean wrongly appropriating  
 10 a producer's surplus to the consumer."  
 11 So re-emphasising all of the themes, I have drawn  
 12 out, if we can go back now to page {G/96/153}, you will  
 13 see there under the heading "Economic value", there is  
 14 then quite a detailed discussion of what the notion of  
 15 economic value means here.  
 16 The key passage is actually at paragraph 322, so  
 17 I think that is on page {G/96/156}, there is  
 18 a discussion of consumer and producer surplus. Then  
 19 there is a discussion in 321 about the nature of perfect  
 20 competition, which is an extreme model of purely  
 21 commoditised goods with -- well, I will leave it to the  
 22 economists to discuss in more detail, but commoditised  
 23 goods where there are no barriers, and no deals have any  
 24 particular impact on the overall pricing in the market,  
 25 where you will get a theoretical move towards prices

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1 being set at marginal cost.  
 2 But the Tribunal says, well, yes, but that is not  
 3 the real world at all, and then considers a world where  
 4 the assumptions of perfect competition law do not  
 5 pertain, and there are three reasons that are  
 6 highlighted why price might exceed cost:  
 7 "Relative inefficiency amongst Sellers."  
 8 If we go over the page, {G/96/157}:  
 9 "Generation of additional value through the  
 10 provision of distinctive value."  
 11 This can be through, as it shows at (2)(i):  
 12 "... producer surplus can ... involve the generation  
 13 of additional value through 'product differentiation'.  
 14 But we have quite deliberately eschewed this label in  
 15 favour of ... 'distinctive value', for we intend to  
 16 refer to any definable aspect of a Seller's offering  
 17 that adds value to the Buyer ..."  
 18 This is important, because it is not: are you  
 19 different from someone else? It is: do you have  
 20 distinctive value to consumers in and of yourself? That  
 21 is why that distinction is drawn.  
 22 "... in the sense that this aspect represents  
 23 something that Buyers wish to purchase from that Seller  
 24 in contradistinction to the offerings of other Sellers;  
 25 and for which the Buyer will pay a premium."

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1 "That said, product differentiation is the prime  
 2 example of such generation of ... value. [But] Product  
 3 differentiation can exist in many different forms: it is  
 4 not confined merely to innovation (although that is  
 5 important), but to providing a better quality product in  
 6 other ways, and in catering to the subjective tastes or  
 7 preferences of Buyers.  
 8 If we could just go down to footnote 399:  
 9 "In the real world, there is no single Product, but  
 10 competition between different products which meet -- to  
 11 different extents -- the same demand. Unsurprisingly,  
 12 the Seller who taps closest into what Buyers' value will  
 13 accrue a demand that might be quite inelastic, and will  
 14 be able to price accordingly. That is no more than  
 15 a proper reward for the Seller's response to Buyer  
 16 demand. Investment in brand is also an example of  
 17 this: for reasons that may well be objectively  
 18 indefensible, Buyers will pay a premium for a 'brand',  
 19 even though the identical product is available  
 20 unbranded. The owner of a (valued) brand may command  
 21 a higher price, but will always be at risk from  
 22 unbranded competition (or other brands)."  
 23 The point here is that it is subjective taste which  
 24 is important. As we will come on to see, the Class  
 25 Representative tries to dismiss gives, as they are put,

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1 by BT, things that BT thinks particular groups of  
 2 customers want, things that engender loyalty. There  
 3 have been repeated criticisms by the Class  
 4 Representative of concerns about publicity and PR. That  
 5 is vital to any company. That is how brands are built.  
 6 You do not go round trying to get maximum publicity  
 7 for a price rise. That is not clever business whether  
 8 you are dominant or not. You will not be in business  
 9 long if that is how you treat your PR.  
 10 So the point I am making in relation to this  
 11 subjective critical that bounds matter, I should then go  
 12 on if we can go just done over the page, {G/96/158}.  
 13 You then have considerations in (iii):  
 14 "It is worth noting that there is no inconsistency  
 15 between the maximisation of producer surplus and  
 16 maximisation of consumer surplus."  
 17 The provision in the distinctive value extends  
 18 beyond product differentiation.  
 19 If we could then go down again. We then see the  
 20 third of the categories that are discussed within this  
 21 economic value section which is "Generation of producer  
 22 surplus without added value to buyers."  
 23 Then it is defined essentially:  
 24 "... for convenience, refer to these three, very  
 25 different, cases of producer surplus as Case 1, Case 2

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1 and Case 3."  
 2 In essence, if you are in case 3 where you have  
 3 producer surplus without any added value, then for the  
 4 purpose of the excessive pricing test there is no  
 5 additional economic value consideration to be fitted  
 6 into to the limb 1 or limb 2 or any part of that test.  
 7 But so long as you are within case 2 there is, and  
 8 that might be highly subjective, very difficult to  
 9 quantify and yet profoundly important in relation to  
 10 your pricing.  
 11 As I say, what we will see when we see the documents  
 12 are concerns precisely about value to customers being  
 13 focused on by BT.  
 14 I have got one or two further remarks on a couple of  
 15 cases that I am going to make.  
 16 THE CHAIRMAN: Have we finished on Hydrocortisone?  
 17 MR BEARD: Yes, 323 is the distinction. I was just trying  
 18 to sum up the distinct between case 2 and case 3, I was  
 19 foreshortening the discussion. Those sections that  
 20 I referred to 321, 322, 323, they are very important in  
 21 terms of this discussion of economic value. They take  
 22 it on from *Scandlines*, the Court of Appeal in *Phenytoin*  
 23 discussion and consider these issues more fully and  
 24 I understand that these are issues that were actually  
 25 being canvassed in the *Phenytoin* remittal hearing at

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1 various points, obviously in relation to rather  
 2 different products than we are dealing with here.  
 3 THE CHAIRMAN: Thank you. We will take our break for the  
 4 transcriber now.  
 5 MR BEARD: Thank you.  
 6 (3.14 pm)  
 7 (A short break)  
 8 (3.27 pm)  
 9 MR BEARD: I was going to go to a bit more law, but I think  
 10 I will pause on that. I was going to deal with some  
 11 issues to do with DSAC and different cost measures, but  
 12 I think that might be a particular punishment at this  
 13 point in the afternoon, so I am going to go to some  
 14 pictures instead.  
 15 THE CHAIRMAN: Right.  
 16 MR BEARD: Because what I want to deal with is some of the  
 17 switching data we have got, and that is perhaps most  
 18 usefully picked up in some of the diagrams, so I was  
 19 just going to run through a few of those.  
 20 THE CHAIRMAN: Yes, thank you.  
 21 MR BEARD: It will not be comprehensive, there will  
 22 undoubtedly be discussion of these issues in the hot  
 23 tub, but just to move the debate along.  
 24 THE CHAIRMAN: Yes.  
 25 MR BEARD: Because the switching we are talking about is

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1 huge.

2 If we could go to {IR-E/17/51} and if we just look  
3 at figure 3.4. This is Dr Jenkins' first report,  
4 "Number of BT lines sold to SFV customers and number of  
5 BT fixed voice services sold in a bundle".

6 You can see the total number of BT fixed voice lines  
7 in the columns, and then SFV lines and bundled fixed  
8 lines are the two plots.

9 So what you see is at the start you have got -- if  
10 you look at the start of the claim period, you are  
11 looking at around just under 4 million, around 3 million  
12 SFV lines. But what is interesting about this is first  
13 of all, just having a note of the scale overall of  
14 customers we are talking about, so voice customers,  
15 voice line customers in total, including those taking  
16 their voice as part of a bundle, goes up, peaks in  
17 around 2014 at around 9/10 million, but you obviously  
18 also see a notable crossover.

19 THE CHAIRMAN: I am so sorry, I have not got this correct.  
20 You said 2014?

21 MR BEARD: Yes, SFV 2014. So that is the SFV line, so that  
22 is the black plot.

23 THE CHAIRMAN: Yes, but you said peaks at 9 or 10 million?

24 MR BEARD: Sorry, I was then stepping back to the totals.  
25 I am sorry, I was not clear enough. So the total number

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1 of fixed voice lines, so that is the columns, you will  
2 see in around 2013/2014 peaks at around 9-10 million.

3 THE CHAIRMAN: I see.

4 MR BEARD: So essentially the grey columns are the  
5 accumulation of the two lines.

6 THE CHAIRMAN: Yes, both SFV and within bundles.

7 MR BEARD: Yes.

8 THE CHAIRMAN: Yes.

9 MR BEARD: So this is not -- I am not trying to draw  
10 anything particularly sophisticated from this. I mean,  
11 the very fact that you have got this striking crossover  
12 one might think was instructive, but we will be coming  
13 back to that.

14 So you have got the bundles which only started after  
15 2009, because that was when BT was permitted to do it,  
16 and that is the green line that goes up and then to some  
17 extent plateaus, and then you see the decline in SFV  
18 services in the black line.

19 THE CHAIRMAN: Yes.

20 MR BEARD: In overall totals.

21 THE CHAIRMAN: Right.

22 MR BEARD: Now, if we just -- what we can see there is  
23 a huge decline in BT SFV services -- I am sorry,  
24 customers, during the claim period. Dr Jenkins, for  
25 your note, estimates that the cohort of BT SFV customers

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1 in 2014, less than 25% of those were SFV customers in  
2 2022. Put another way, 75% of the 2014 cohort had  
3 stopped taking their BT SFV service by 2022, and we can  
4 see that if we actually just go back to page 49 in this  
5 document. I am sorry, it is Jenkins 2, it is {E/18/49}.

6 THE CHAIRMAN: Just a minute. (Pause).

7 MR BEARD: Sorry, could we go to {IR-E/18/49}. Thanks. It  
8 is just because then we can see the box at the end.

9 So what this plot is doing is "Cessations for BT SFV  
10 customers [from the] 2014 cohort". So this is  
11 a snapshot taken at the end of 2014 of SFV customers.  
12 So not bundle voice customers, just SFV customers. So  
13 obviously you have a 100% in 2014 and then this is  
14 looking at cessations across the period.

15 So the Class obviously starts, the Class claim  
16 starts in 2015, so 2014 is the last complete year before  
17 then, and what you are seeing is a huge reduction in the  
18 number of SFV customers.

19 At one point yesterday Ms Kreisberger referred to  
20 having 3 million SFV customers as at today. I think she  
21 was referring to the total number in the claim.

22 MS KREISBERGER: That is correct. That is Class Members,  
23 that is not SFV customers.

24 MR BEARD: That is fine. I thought that is what you were  
25 referring to.

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1 THE CHAIRMAN: Yes.

2 MR BEARD: But you can see the dramatic decline in the  
3 numbers. That is due to switching to alternative  
4 suppliers and switching to other products.

5 Now, of course there are also bereavements, house  
6 moves, house mergers. So for those sorts of reasons  
7 cessation will also arise.

8 But if we go to {IR-E/21/48} and just look at that  
9 table at figure 10, so this is --

10 THE CHAIRMAN: Sorry, just a minute. It is my fault.  
11 (Pause).

12 MR BEARD: Do you want the old reference?

13 THE CHAIRMAN: No, it is all right. I have got them.  
14 Yes. 21, right.

15 MR BEARD: So this is Dr Hunt's first report. So figure 10,  
16 "Total rates of BT SFV customer switching (supplier and  
17 service)". So this is using data to effectively just  
18 focus on switchers; switchers by supplier and switchers  
19 by service. So this is taking the group of SFV  
20 customers and looking at the ones that switch in a year  
21 and what do they do in terms of switching.

22 If you look at 2014, just as a snapshot, what you  
23 see is that 20% of them switch away just in a year, and  
24 11% or so switch to another service within BT, and just  
25 under 10% switch to a different supplier for their

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1 service .  
 2 THE CHAIRMAN: Just a moment. (Pause).  
 3 MR BEARD: Do you see that?  
 4 THE CHAIRMAN: I can see the 11.3% in the first column.  
 5 MR BEARD: Yes. Then just below it, 8.1 in the dark box?  
 6 THE CHAIRMAN: Yes.  
 7 MR BEARD: So that is switching supplier.  
 8 THE CHAIRMAN: Yes.  
 9 MR BEARD: So that is how you get to the total of 19.4.  
 10 THE CHAIRMAN: Yes.  
 11 MR BEARD: This is annual switching of SFV customers and it  
 12 is breaking down whether they are recaptured by BT,  
 13 which is the green, and the black/dark blue/dark green  
 14 is switching away to a different supplier .  
 15 THE CHAIRMAN: In each case the percentage is the percentage  
 16 of what the total cohort was at that point in time.  
 17 MR BEARD: Yes, in that year.  
 18 THE CHAIRMAN: So you re-calculate it each year.  
 19 MR BEARD: Yes, absolutely. So obviously it is a vast  
 20 amount.  
 21 THE CHAIRMAN: Yes.  
 22 MR BEARD: But what this is showing is there is the actual  
 23 switching, so it is removing bereavements, moves and  
 24 so on, and these are switches.  
 25 MR DORAN: These are just switches?

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1 MR BEARD: Yes, these are just switches. I am just trying  
 2 to give you a sense of the enormity of the degree of  
 3 switching in this group. In one year, 20% are switching  
 4 out of the SFV Class in 2014.  
 5 THE CHAIRMAN: Of course, the figures here can only -- well,  
 6 on the other graph, can only start meaningfully for BT  
 7 once BT itself was enabled to provide bundles, because  
 8 otherwise you could not switch them to a BT bundle.  
 9 MR BEARD: That is right.  
 10 THE CHAIRMAN: You could switch somewhere else, but you  
 11 could not ...  
 12 MR BEARD: Yes. But that was 2009, so both of these plots  
 13 are from 2014.  
 14 THE CHAIRMAN: No, I understand that.  
 15 MR BEARD: The first graph I showed you went further back.  
 16 THE CHAIRMAN: It went back to 2009.  
 17 MR BEARD: Yes, exactly. So I was trying to contextualise  
 18 all of this before I got into more detail in relation to  
 19 it .  
 20 So that is the level of switching.  
 21 Now, obviously, if you added up all those  
 22 percentages, you might be thinking that the Class  
 23 completely disappeared, obviously that is not quite how  
 24 percentages work, but nonetheless -- and there are two  
 25 reasons. One is because that is not how percentages

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1 work, but the other is because actually, as we will come  
 2 on to see, there were some incomers into BT SFV as well.  
 3 Before I go to that, I just want to go to  
 4 Dr Jenkins' report 1 at {IR-E/17/81}. If we could just  
 5 blow up this table.  
 6 This does not go back quite so far, but this is data  
 7 showing where the switchers went in 2016, 2017, 2018,  
 8 2019. You see there that the much larger column each  
 9 time is switching from SFV to bundles. So this is  
 10 within the cohort of switchers, how many are switching  
 11 to bundles, how much are switching just to other SFV  
 12 services .  
 13 THE CHAIRMAN: Yes.  
 14 MR BEARD: So it is not just BT, but that is giving you  
 15 a sense of the overall switching breakdown.  
 16 THE CHAIRMAN: Sorry, just one second, please.  
 17 MR BEARD: Of course.  
 18 MR DORAN: This would include people going to the  
 19 Post Office or whatever, for their voice lines or  
 20 whatever?  
 21 MR BEARD: Yes, this is giving you an indication of the  
 22 dynamics of switching overall.  
 23 MR DORAN: Does it capture people who have chosen a  
 24 different -- there are some people who will have got an  
 25 ordinary line rental with BT who then swap to a special

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1 call package or a different call package. Does it  
 2 capture that?  
 3 MR BEARD: No, call packages, I think they would not be  
 4 considered a different service , because what you are  
 5 dealing with there is the line . So within -- when you  
 6 have a line , you can then have a different call package,  
 7 whether it is --  
 8 MR DORAN: In a sense, they are all bundles, are they not?  
 9 I mean, people bought a particular call bundle, or --  
 10 MR BEARD: Yes.  
 11 MR DORAN: -- calls, or they could get BT Sport. There is  
 12 a whole ...  
 13 MR BEARD: I guess that is right. I need to be a little  
 14 cautious on terminology, because everyone has talked  
 15 about bundles as being telephone voice plus something  
 16 else like broadband, sport, TV. Those are bundles. So  
 17 when we talk about a dual play bundle, we are talking  
 18 about voice and broadband together.  
 19 MR DORAN: Mine was a slightly more fundamental one, which  
 20 is everybody has to have the line and then you pipe  
 21 different stuff down it.  
 22 MR BEARD: Yes. Obviously with a call package, what you are  
 23 doing is effectively paying a rate for the use of the  
 24 line. Obviously, in the discussion that has gone on in  
 25 relation to market definition, the focal product has

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1 been line and call for voice together, and it has not  
 2 distinguished between the different call packages.  
 3 I can see why colloquially you could refer to it as  
 4 a call bundle, but that has tended not to be the  
 5 language that is used.  
 6 MR DORAN: I do not want to confuse it, but just to be clear  
 7 in my own mind what we are talking about.  
 8 MR BEARD: That is exactly right.  
 9 THE CHAIRMAN: This table is only showing you the different  
 10 percentage allocations of people who have switched.  
 11 MR BEARD: Yes, absolutely.  
 12 THE CHAIRMAN: That is right?  
 13 MR BEARD: Yes, absolutely.  
 14 THE CHAIRMAN: This is regardless of supplier, is it?  
 15 MR BEARD: Yes, that is right.  
 16 THE CHAIRMAN: What it does not show is, in the case of  
 17 other suppliers, what proportion of SFV customers in  
 18 total switched at all and what stayed. We do not have  
 19 that?  
 20 MR BEARD: For other suppliers I do not think we have that.  
 21 What we have tried to do is gather as much data as we  
 22 can to show both the magnitude of switching, which is  
 23 vast, but also trying to show some of the breakdown of  
 24 switching in relation to this.  
 25 What we are seeing here is obviously a lot of

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1 switching in relation to bundles, and obviously what  
 2 might be instructive is the change between 2018 and  
 3 2019, where you see the jump in relation to the  
 4 percentage of switchers who are SFV to bundle going up  
 5 significantly, and the SFV to SFV dropping. Of course  
 6 that is after the commitment prices kick in. So at that  
 7 point VOC SFV -- I am sorry, too many acronyms, but VOC  
 8 SFV customers at that point will be paying significantly  
 9 less, and what you are seeing is much less SFV to SFV  
 10 switching at that point.  
 11 THE CHAIRMAN: I see. Just a moment. (Pause).  
 12 Yes.  
 13 MR BEARD: I am going to just move on -- sorry, was there  
 14 another question?  
 15 MR RIDYARD: No, no, I am ruminating on something.  
 16 MR BEARD: Dr Jenkins will in due course be able to answer  
 17 all of these questions far better than I can, but  
 18 nonetheless I will press on and I will go to  
 19 {IR-E/18/47}.  
 20 This is a different look at this issue by  
 21 Dr Jenkins. She is estimating here that of the increase  
 22 in bundles between 2014 and 2018, 60% came from BT SFV  
 23 switchers. So you are looking here at the overall  
 24 cohort of bundled fixed lines increase. So during that  
 25 period the number of bundled fixed lines went up by

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1 3.2 million, and what you are asking is where did they  
 2 come from? 1.9 million, in other words, almost 60%,  
 3 came from BT SFV customers. That is the sum of the  
 4 purple block at the top of that column and the black  
 5 block at the bottom.  
 6 THE CHAIRMAN: Just a minute, please.  
 7 MR BEARD: Of course. (Pause).  
 8 This is looking at a different cohort of data. What  
 9 Dr Jenkins has done is identify how many new bundle  
 10 lines there are, bundle customers there are within that  
 11 period, 2014–2018, and then calculated, assessed where  
 12 they came from, from the data available.  
 13 THE CHAIRMAN: Right.  
 14 MR BEARD: What you see, if you work your way up, is 25% of  
 15 those new bundles, bundle customers, they were BT SPCs.  
 16 Then you have got 10 from non-BT SFVs, so that could be  
 17 Post Office, for example, or whatever. 26% from new  
 18 households, so if you move new house you become a new  
 19 customer. Then you have got some from BT Basic, and  
 20 Basic is a special tariff that is available if you are  
 21 on a particularly low income. It is a low income tariff  
 22 that BT provides. Then 34.4% come from voice only  
 23 customers, BT voice only customers.  
 24 The reason I emphasise this stack is because what it  
 25 is showing is switching not only from SPCs, in other

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1 words, the people that had already got a voice line and  
 2 broadband but taken it separately, it is showing a huge  
 3 amount of switching from VOCs, the people that only had  
 4 voice lines across the period 2014–2018, into these  
 5 bundles.  
 6 THE CHAIRMAN: Yes.  
 7 MR BEARD: So you were asking, sir, about the previous table  
 8 I showed you with the columns which are not just BT.  
 9 This is giving you an indication of the level of  
 10 switching across that period from VOCs within BT.  
 11 THE CHAIRMAN: Yes. But the big question is whether this is  
 12 just a secular trend or not, however big it is. I mean,  
 13 if there is generally, because of the developments in  
 14 technology and the changes in the telecoms industry and  
 15 the market over these particular years, there is in any  
 16 event a very large swing away from telephone lines to  
 17 bundles, what does that tell you about whether it is  
 18 a reaction to price or not?  
 19 MR BEARD: Obviously that is an interesting --  
 20 THE CHAIRMAN: That is the big question.  
 21 MR BEARD: Well, it is "a" question. The secular trend is  
 22 a marvelous thing that has emerged --  
 23 THE CHAIRMAN: I did not say it is right, I just said it is  
 24 a big issue, because your fundamental case is --  
 25 MR BEARD: No, I completely see that. Mr Parker has created

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1 this notion in his fourth report and it is a remarkable  
2 situation. It is certainly the first case, as I say,  
3 that I have ever been in where an economist says that  
4 switching is price unrelated in any way, and that  
5 intuitively feels like quite a strange proposition.  
6 But let us just test it on this table. That black  
7 box at the bottom, those are people who have voice and  
8 who have broadband. In other words, these are people  
9 that already have the broadband. What is the secular  
10 trend that is affecting them? We just do not understand  
11 it. I mean, it is a wonderful idea, the secular trend.  
12 Secular -- I always think of it as in contrast to  
13 religion and it is of the world. It is unworldly, this  
14 notion of the secular trend. It is a confection that  
15 Mr Parker has fixed on. Then he goes away and looks at  
16 whether there are price changes and says, oh, well,  
17 I cannot see kinks in the demand, and so on. We will  
18 come back to some of that.

19 THE CHAIRMAN: Yes.

20 MR BEARD: But the idea that in this market price does not  
21 matter is really difficult to understand. Of course, it  
22 is completely contrary to a number of things that  
23 Ms Kreisberger said, which were responses BT should have  
24 undertaken in relation to things. At some point she was  
25 saying, well, if BT were not exploiting this trapped

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1 group, what they should have done is been dropping their  
2 bundle prices. Well, not if it is a secular trend, they  
3 should not have done anything at all. I mean, price  
4 does not matter. You can charge whatever.

5 MR RIDYARD: I am not sure that Mr Parker is saying price  
6 does not matter. I think he might be saying that price  
7 is not the only thing that matters, and maybe it is  
8 possible that broadband became more attractive over this  
9 period.

10 MR BEARD: We are not going to demur. If that is all it is,  
11 me and Mr Parker can probably live happily together, at  
12 least in this regard. Because it is obviously true that  
13 broadband becomes more popular. Indeed, we see it in  
14 slides where, over time, in the documents, for example,  
15 older people within the VOC segment start getting more  
16 smart phones, for example, and obviously that is  
17 another, you might say a secular trend, but I am not  
18 sure many of us would say that the secular trend towards  
19 smart phones was something that was price-insensitive or  
20 completely unrelated to price.

21 It may well be that there are broad trends. We do  
22 not have an issue with that. The question is: does  
23 price matter?

24 MR DORAN: So your point is there may be these trends, but  
25 they are -- if the price was too high, people would not

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1 be moved by the trend.

2 MR BEARD: Yes, it is going to -- there is going to be an  
3 interaction. Because obviously trends are talking,  
4 effectively, in economic terms, about changes in the  
5 level of demand for a particular product. You are  
6 gradually moving from ... I mean, a fashion, a trend, is  
7 essentially a shift in demand from one thing to another,  
8 and obviously, as those fashions shift, whether it is  
9 for shoes or cocktails, cars, tech, yes, obviously the  
10 demand profile shifts and, yes, that is part of  
11 a broader set of dynamics.

12 But in none of these cases would we say a trend is  
13 un-price-related or price does not matter. Price  
14 clearly matters in relation to all of these things, and  
15 that is what is important here. Because what we are  
16 talking about is Mr Parker saying: none of this  
17 switching really matters; even though it is colossal, it  
18 does not matter, because actually this was just part of  
19 a secular trend.

20 We say it is speculation, it is not worldly, and he  
21 does not have any evidence to support it, other than  
22 this idea that you did not have kinks in -- changes in  
23 purchases as price changes occurred.

24 I will be coming back to those issues.

25 THE CHAIRMAN: Thank you, that is helpful.

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1 MR BEARD: Let me just pick up one or two more pictures, if  
2 I may.

3 One of the things I will just mention in the context  
4 of all of this switching, and it goes back to the point  
5 that, Mr Doran, you were raising, which is what is going  
6 on with people within BT switching within BT? They are  
7 going to bundles, almost all of them. You can switch,  
8 say, between -- to Basic or to a product of that sort.

9 MR DORAN: There were various call packages you could have  
10 got.

11 MR BEARD: Yes. That would not count as full switching for  
12 these purposes.

13 MR DORAN: No, but it is a choice.

14 MR BEARD: Yes, it is undoubtedly a choice, and we will see  
15 in the documents there is lot of discussion about  
16 up-selling people into different call packages, for  
17 example.

18 MR DORAN: Otherwise they might leave BT entirely.

19 MR BEARD: Yes, they might leave BT entirely, exactly. That  
20 is very true of bundles; what we see is lots of  
21 discussion about up-selling people to bundles.

22 Bear in mind we are seeing this pattern of shift  
23 across to bundles. Mr Parker and the Class  
24 Representative's case is now, from the joint expert  
25 statement, that BT does worse out of those customers

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1 when they shift to bundles. This is this idea that the  
 2 profitability on bundles is lower for BT than it is on  
 3 SFV customers.  
 4 Now, we will come back to this as well, but what we  
 5 will see is actually that discussion on up-selling is  
 6 genuinely improving the position of BT, because they are  
 7 not losing people to any other rival bundle provider,  
 8 and it turns out that they make a higher gross margin in  
 9 relation to those people, which is the metric that BT  
 10 uses in relation to these issues. We will see that  
 11 again as being used.  
 12 THE CHAIRMAN: Can I just ask another question, and I am  
 13 dotting around a bit, but it is quite helpful to have  
 14 these headline points, I think.  
 15 MR BEARD: Yes.  
 16 THE CHAIRMAN: Of course the other argument that is raised  
 17 against you is, well, of course if there was this  
 18 massive switching, which broadly speaking was in  
 19 relation to price, why were BT just raising the prices  
 20 year on year? Because why would the rational monopolist  
 21 be dropping the price to try to retain customers?  
 22 MR BEARD: With respect, sir, there is a predicate issue  
 23 with your question, because your predicate is that they  
 24 are already pricing at the maximum price and that any  
 25 increment is not, in the following year, somehow

1 a competitive price, because all of those can be  
 2 competitive prices.  
 3 This is actually going to pick up what we come to  
 4 when we discuss SSNIPs, as if these are ...  
 5 THE CHAIRMAN: Yes, I appreciate it is out of context.  
 6 MR BEARD: No, no, this was not -- but if you think about  
 7 a 4 or 5% price rise each year, I mean, you face that in  
 8 relation to loads and loads of products all the time.  
 9 That is not any suggestion or indication that somehow  
 10 the provider of that product has market power. So you  
 11 can get a situation where prices are increased year on  
 12 year and that is no indication of market power at all.  
 13 You could have a situation where -- indeed, over the  
 14 last few years particularly, it is slightly different as  
 15 we go back, but you could have huge increases in price  
 16 and they would simply be reflecting inflation. In those  
 17 circumstances, no one would bat an eyelid that you are  
 18 facing an increase in price. A couple of years ago, if  
 19 you faced a 10% price rise in relation to groceries, you  
 20 would think, well, that is not necessarily wholly  
 21 outlandish in relation to anything that is going on  
 22 here.  
 23 So you cannot assume that people pushing up their  
 24 prices is an exhibition of market power. This is the  
 25 fallacy of the way in which the hypothetical monopolist

1 test is being run by Ms Kreisberger by reference to  
 2 those -- what she called the SSNIPs in table 1 in her  
 3 skeleton argument, because she is taking it that  
 4 effectively there is a competitive price, and that once  
 5 you push above that and you sustain that, in those  
 6 circumstances that is an exhibition of market power and  
 7 your dominance.  
 8 There are two problems with that. One is it is  
 9 assuming the conclusion that you are trying to prove,  
 10 which is that these prices are somehow above the  
 11 competitive level, and secondly, it does not deal with  
 12 that issue that I will come back to, that she is taking  
 13 BT data, and this is exactly what we are looking at. BT  
 14 has an interest in making sure that if people are  
 15 switching, they are switching to their alternative  
 16 products, and therefore they are completely different  
 17 from the characteristics of a hypothetical monopolist,  
 18 and in those circumstances that data is not informative  
 19 for the purposes of that hypothetical monopolist test in  
 20 the way that Mr Parker and Ms Kreisberger put it.  
 21 But there is actually -- I am going to go to it now,  
 22 because there is --  
 23 THE CHAIRMAN: Do not let me take you out of sequence.  
 24 MR BEARD: No, it is right to go to this now, because there  
 25 is an additional point in relation to all of this, which

1 is we have had the story of Ofcom's involvement in 2009  
 2 allowing bundles, and we have heard the story of Ofcom's  
 3 involvement in 2007. We missed along the way, from  
 4 Ms Kreisberger, Ofcom's involvement in 2013, because in  
 5 2013 Ofcom conducted a review of the fixed line services  
 6 market and, in the course of doing that, what Ofcom did  
 7 find was that actually it had no concerns about that  
 8 market. Or, more exactly, it did have concerns, but it  
 9 did not have concerns about the market power of BT.  
 10 I am just going to take you to the reference for  
 11 that, which I have promptly lost in amongst my notes,  
 12 which is one of my major skill sets.  
 13 It is {C/340/1}, "Review of the fixed narrowband  
 14 services markets. Statement on the proposed markets,  
 15 market power determinations and remedies".  
 16 If we just go to the outline at 1.1, which is on  
 17 page {C/340/4}, "Executive Summary". You will see:  
 18 "Introduction:  
 19 "This statement sets out decisions designed to  
 20 promote competition in the supply of telephone calls  
 21 from fixed lines for the next three years ... under the  
 22 European Framework ..."  
 23 So this is their market review in relation to all of  
 24 this.  
 25 If we then go down to page {C/340/26}, under "Retail

1 prices", you will see:  
 2 "Figure 3.1 shows the average real price paid by  
 3 consumers for a basket of fixed access and geographic  
 4 calls ..."  
 5 So this is the bundle of access and calls.  
 6 "... and indicates that the real price paid for  
 7 consumers for these services has continued to decline  
 8 since the 2009 retail review ..."  
 9 So that was the retail review in the course of which  
 10 bundles were permitted.  
 11 "... between 2009 and 2012 average spend on fixed  
 12 access and geographic calls has declined ... real  
 13 monthly spend on a basket of calls to mobiles fell by 21  
 14 pence per month ..."  
 15 "These pricing trends for residential services  
 16 suggest ---"  
 17 THE CHAIRMAN: I am sorry, Ms Kreisberger, I wonder if you  
 18 can keep your voice down, because I cannot quite hear  
 19 what Mr Beard is saying.  
 20 Yes.  
 21 MR BEARD: "These pricing trends for residential services  
 22 suggest that competition in retail residential services  
 23 has continued to maintain pressure on retail prices. We  
 24 believe that this supports the view that the level of  
 25 competition for residential retail narrowband services

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1 has not decreased since the 2009 review."  
 2 Then if we go down to the conclusion in this  
 3 section, page {C/340/32}:  
 4 "Based on the evidence considered above, including  
 5 market share, price indicators, and trends in the  
 6 adoption of different types of call services, we  
 7 conclude that both the business and residential retail  
 8 fixed narrowband calls markets in the United Kingdom  
 9 continue to be effectively competitive and are likely to  
 10 remain so for the period covered by this market review."  
 11 THE CHAIRMAN: Right, yes.  
 12 MR BEARD: So this is 2013, this is Ofcom looking at these  
 13 things. You have not got -- if you are going to be  
 14 relying on Ofcom material you need to be looking at it  
 15 across the period. This not only covers the period of  
 16 the claim, but of course what this does is it casts  
 17 light on the way in which Ms Kreisberger is trying to  
 18 tell her story of the SSNIPs from 2009 onwards. I am  
 19 going to come back to that.  
 20 THE CHAIRMAN: Yes, thank you. That is very helpful.  
 21 MS KREISBERGER: I do not want to take Mr Beard out of his  
 22 stride, but just for your note, paragraph 23 of our  
 23 skeleton refers to the 2013, and then there is a further  
 24 development in January 2014 from Ofcom, so I just want  
 25 to make sure that is before ... given Mr Beard's

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1 submission.  
 2 THE CHAIRMAN: Thank you.  
 3 MR BEARD: That is fine. I really -- I am going to come  
 4 back to the role of the Ofcom material as a whole, but  
 5 the point I am making here is that if you are going to  
 6 be referring to these sorts of pieces of Ofcom material  
 7 you need to be extremely cautious about what you are  
 8 doing in relation to it.  
 9 THE CHAIRMAN: Yes.  
 10 MR BEARD: So if I could just go back. We were -- I think  
 11 we had done ... was it {IR-E/17/81}? I am just  
 12 checking. I am sorry, I have slightly lost track. Yes,  
 13 we have done that one.  
 14 THE CHAIRMAN: I think the last figure we were looking at  
 15 was 3.2, was it not?  
 16 MR DORAN: Yes, 18/47, {IR-E/18/47}.  
 17 MR BEARD: Yes, I am sorry, I think that is right. Then  
 18 I think it is {IR-E/17/79}.  
 19 THE CHAIRMAN: Yes.  
 20 MR BEARD: So this is just helping fill in that blank about  
 21 where -- the breakdown within BT cessations. So it is  
 22 just making good that point about recapture through to  
 23 bundles.  
 24 MR DORAN: So these are voice people and where they are  
 25 going when they stop taking voice only?

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1 MR BEARD: Yes. They go to mobile, bundle and mobile, and  
 2 bundle within BT.  
 3 MR DORAN: This is a breakdown of the recapture, basically.  
 4 MR BEARD: Yes, effectively.  
 5 MR DORAN: Thank you.  
 6 MR BEARD: Within the group that switched. Obviously it is  
 7 not the whole cohort.  
 8 So there is just -- obviously what I have been  
 9 showing you are a series of pictures illustrating the  
 10 nature and extent of switching across this period, which  
 11 is massive, and where people are going, and how they are  
 12 switching to bundles but also to SFV.  
 13 I do need to just pick up the fact that people were  
 14 also joining BT SFV during the period, because obviously  
 15 this goes to where the overall dynamics lie, and that is  
 16 {IR-E/17/155}. You can ignore the black bits,  
 17 effectively.  
 18 THE CHAIRMAN: The minuses.  
 19 MR BEARD: Yes, ignore the minuses, because this is  
 20 a different cut on the leaving to competitors. What is  
 21 actually interesting on this one is the greens here are  
 22 additions into BT's SFV customer base across the period  
 23 covering the claim. So BT was actually winning some SFV  
 24 customers as well.  
 25 MR DORAN: These are just voice only?

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1 MR BEARD: Well, they are SFV customers, yes.  
 2 MR DORAN: So they are a mix?  
 3 MR BEARD: I just wanted to check if you mean can they be  
 4 SPCs? Yes, I think they could be SPCs as well. So it  
 5 is SFVs, so it is the whole universe. So these could be  
 6 people who have a broadband and who are then buying --  
 7 MR DORAN: From BT alone, or buying an additional contract  
 8 with BT.  
 9 MR BEARD: They could be buying -- so this figure is only  
 10 about the voice lines, so it could be people that just  
 11 come in and buy the voice line having not done so, it  
 12 could be people that have broadband from a third party  
 13 that come and get their voice from BT, and it could be  
 14 people who have broadband from BT, had voice from  
 15 someone else, and are coming into BT.  
 16 THE CHAIRMAN: But did not take a bundle.  
 17 MR BEARD: But did not take a bundle, yes, absolutely,  
 18 because all of these people are categorised as SFV.  
 19 THE CHAIRMAN: Yes.  
 20 MR BEARD: I do not know what the likelihood of that latter  
 21 category is, but just as a matter of theory those are  
 22 the three possible permutations.  
 23 MR DORAN: It is very helpful to be very clear about this.  
 24 THE CHAIRMAN: Thank you.  
 25 MR BEARD: That is without any discussion of call plans.

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1 They could all have very different call plans amongst  
 2 them.  
 3 So what we are seeing is between 10 and 13% each  
 4 year coming in to this supposedly hugely exploitative  
 5 service.  
 6 MR RIDYARD: So the first one is 10% of the total number of  
 7 SFV customers in the prior year.  
 8 MR BEARD: Yes, that is right. If you look at the notes:  
 9 "Figures are expressed as a proportion of BT's SFV  
 10 base at the beginning of the year and rounded to the  
 11 nearest integer."  
 12 We can probably work out what the absolute numbers  
 13 are, but the point is that there is a material cohort  
 14 coming in as compared with the scale of the extant SFV  
 15 group across all of these years. That is the point I am  
 16 making here.  
 17 One further thing that I do want to pick up is what  
 18 has been referred to as the migration bias problem,  
 19 because this is something where, in technical terms, we  
 20 did take issue with Ofcom, and we can leave that to one  
 21 side for reasons I will come back to. But there are  
 22 various assertions that there was low or limited  
 23 switching by customers within SFV.  
 24 Now, all of the figures I have been showing you show  
 25 that is not true, so how is it that there is data that

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1 suggests there is low switching? This is due to the  
 2 fact that those figures that are used by people like  
 3 Professor Loomes depend on reference to what is called  
 4 the Ofcom switching tracker survey. This is an odd  
 5 methodology, I think, for these purposes. At least it  
 6 might be wonderful for whatever purposes Ofcom wants to  
 7 deploy it for more generally, but for trying to work out  
 8 levels of switching it is not very helpful.  
 9 This is actually explained by Dr Hunt most clearly  
 10 in his annex, so this is {E/21/123}. Annex 4 was him  
 11 dealing with the switching tracker analysis, so this is  
 12 a more general discussion of it.  
 13 If we go down to {E/21/128}, and if we could just  
 14 look at 522:  
 15 "The critical flaw of Ofcom's [switching tracker]  
 16 approach, which serves to materially underestimate the  
 17 rates of switching for the Class, is that the analysis  
 18 only captures consumers who switched landline provider  
 19 and remained a standalone fixed voice customer.  
 20 THE CHAIRMAN: Sorry, just a minute. Are we on 128 now?  
 21 MR BEARD: Page 128, yes, I am so sorry.  
 22 THE CHAIRMAN: That is all right. You said that.  
 23 MR BEARD: Paragraph 522. It is just below the table.  
 24 THE CHAIRMAN: Yes, just a second. (Pause)  
 25 MR BEARD: In the table above he has kind of replicated the

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1 switching numbers you get out of the tracker, and then  
 2 he is explaining why those --  
 3 THE CHAIRMAN: He does not include those who switched to  
 4 bundles?  
 5 MR BEARD: Yes.  
 6 THE CHAIRMAN: Right.  
 7 MR BEARD: "Those switching to a bundle (such as a dual play  
 8 service) ..."  
 9 Are not included, that is (a), and:  
 10 "(b) Those who switched service, but not supplier  
 11 ... staying with BT for their landline but  
 12 changing/adding broadband with another provider as part  
 13 of a split-supplier service."  
 14 They are not caught either.  
 15 THE CHAIRMAN: But they are staying with ... But on this one  
 16 ...  
 17 MR BEARD: Yes, they would still be within --  
 18 THE CHAIRMAN: They are still with BT anyway. So they would  
 19 not be a switcher for BT purposes if they are already  
 20 staying with BT.  
 21 MR BEARD: Yes.  
 22 THE CHAIRMAN: It is really 522(a), that is the one.  
 23 MR BEARD: Yes. But what Dr Hunt then does is he does  
 24 a recalculation on the basis of this. If we go to  
 25 {IR-E/21/48}, we are back in that table that I showed

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1 you earlier .  
 2 THE CHAIRMAN: Yes.  
 3 MR BEARD: But if you take 2016, the figure for 2016 using  
 4 the switching tracker was 1%. When you look at the  
 5 actual numbers using the data here, you get 16.8. So  
 6 there is a vast gulf .  
 7 So obviously, if you use the switching tracker data,  
 8 it is easy to see why you think this cohort really is  
 9 very, very sticky indeed, it is not switching. But then  
 10 when you actually get beyond that and say, hang on  
 11 a second, what are people actually doing here? The  
 12 picture is totally different . We say that is critical  
 13 context in relation to a whole number of aspects, some  
 14 of which I have already touched on in response to  
 15 questions but I will come back to.  
 16 In the remaining time, if I may, I was not going to  
 17 take you to more diagrams, there are plenty, as we know,  
 18 but I was going to move on to some of the points about  
 19 market definition .  
 20 THE CHAIRMAN: Yes.  
 21 MR BEARD: I am very happy to sort of stick with the  
 22 framework of the CMA's guidance in relation to this. So  
 23 we saw that guidance at {E/45.154/1}. It is the OFT but  
 24 it is now adopted by the CMA.  
 25 If we go to page {E/45.154/9}. Ms Kreisberger took

1 you to this, I am not going to go through it in any  
 2 great detail now, save to say that it is extremely  
 3 important, and I will be coming back to, how one  
 4 actually analyses the hypothetical monopolist test here,  
 5 because it is very dangerous to move to the language  
 6 that Ms Kreisberger did of talking about SSNIPs and  
 7 finding SSNIPs all over the place. It is a test that is  
 8 calibrated as thought experiments to assess a focal  
 9 product by reference to a hypothetical monopolist which  
 10 uses that sort of parameter. It is not: can I find  
 11 a SSNIP somewhere in the market?  
 12 What I want to touch on this afternoon is, if we go  
 13 down to 3.7 {E/45.154/10}, I want to start looking at  
 14 some of the evidence on substitution. Ms Kreisberger  
 15 emphasised that:  
 16 "Evidence from undertakings active in the market and  
 17 their commercial strategies may be useful. For example,  
 18 company documents may indicate which products the  
 19 undertakings under investigation believe to be the  
 20 closest substitute to their own products. Company  
 21 documents such as internal communications ...  
 22 statements, studies ... business plans ..."  
 23 What I want to do is look at some of the documents  
 24 she went to. I will come to the first one she went to  
 25 actually last because it was to do with VOCs but it was

1 in 2019 after the commitments so I will come back to  
 2 that one. I am going to work through them broadly in  
 3 chronological order. If I drift from that I apologise.  
 4 If we could go to {OR-F/180/1}. This is  
 5 obviously -- we are going to have witnesses that can be  
 6 asked about it, but this is "Returning to profitable  
 7 Revenue Growth in the UK Consumer and Business markets".  
 8 It is a board strategy paper from the CEO.  
 9 The first point to note about it, it is consumer  
 10 generally because that is going to be a key theme.  
 11 Ms Kreisberger took these documents out of context,  
 12 tried to suggest that specific quotes were all about SFV  
 13 customers or solus customers or true solus customers  
 14 a term for VOCs, voice only customers. As we will see,  
 15 what BT does is it thinks about these markets much more  
 16 broadly including in relation to voice services .  
 17 If we go to the next slide, slide {OR-F/180/2}.  
 18 This is a presentation providing an update "on progress  
 19 against strategy across Retail and our future plans".  
 20 "We have delivered growth ... while investing in ...  
 21 retail .  
 22 "The key to returning to revenue growth is  
 23 stabilising the core base.  
 24 "Overall product volumes are improving as losses of  
 25 core products slow ... " and certain investments reach

1 scale .  
 2 There are some major launches.  
 3 "There are further opportunities to manage costs,  
 4 improve efficiency and manage margins ...  
 5 "Improvements in customer service are key to driving  
 6 customer retention.  
 7 "There are some areas of risk ... "  
 8 And:  
 9 "We are on track to return to revenue growth within  
 10 12 months."  
 11 Then if we work our way through. This is talking  
 12 about what we has been shared.  
 13 Then if we go down to slide {OR-F/180/7}. The  
 14 approach is "supported by our strategy of business  
 15 transformation and investment."  
 16 "Investment in platforms for growth" on the  
 17 right-hand side.  
 18 "Reinforce voice and broadband through  
 19 differentiation and bundling."  
 20 "Drive broadband based consumer services like TV.  
 21 "Build BT as the brand for business.  
 22 So there are different planks to this . But  
 23 "reinforce voice and broadband through differentiation  
 24 and bundling" is part of this overall strategy.  
 25 You see on the left-hand side concerns about getting

1 it right in relation to customer service as well.  
 2 If we go down--again -- it is worth working through  
 3 these but if we just go down to slide {OR-F/180/16}:  
 4 "The lines and broadband trajectory are key to our  
 5 business plan, we believe we can sustain upward trends."  
 6 You will see on the left-hand side BT is trying to  
 7 stem big losses of lines .  
 8 "Year to date line loss is down.  
 9 "Target to reduce weekly loss to less than 10K.  
 10 "Majority of losses continue to be to Sky.  
 11 "Losses to TalkTalk, Virgin Atlantic and other  
 12 competitors have reduced significantly .  
 13 "Changing market dynamics will support further  
 14 improvements in this trend."  
 15 Now, no doubt it will be said, ah but this is  
 16 focused on broadband because it talks about broadband  
 17 and it adds and it is being negative on the left-hand  
 18 side. The point is lines and broadband are all being  
 19 considered here as part of the core service .  
 20 Then if we go on to {OR-F/180/17}. This is the  
 21 slide that was held against BT:  
 22 "We will maximise value from our legacy fixed voice  
 23 business and build new personal communications offers."  
 24 How this amounts to part of a compelling corpus of  
 25 evidence, as Ms Kreisberger put it, that somehow we are

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1 exploiting SFV services customers is mystifying. Within  
 2 the context of this what is being talked about is the  
 3 overall strategy in relation to lines, maximising value  
 4 from our legacy fixed voice business.  
 5 "We are driving unlimited packages to defend ARPU  
 6 and increase usage.  
 7 "Overall the fixed voice ---"  
 8 THE CHAIRMAN: What is that about, that bit there?  
 9 MR BEARD: I am so sorry.  
 10 THE CHAIRMAN: Where it says "Overall the fixed voice market  
 11 is in decline." Is that SFV?  
 12 MR BEARD: No, that will be the whole of fixed voice is in  
 13 decline.  
 14 THE CHAIRMAN: I see, including the bits within bundles.  
 15 MR BEARD: Yes, but what they find is that that decline is  
 16 stemmed or reduced by getting more people on to bundles  
 17 where they take lines as well. New people. If you can  
 18 win people.  
 19 MR DORAN: So it is the mobile that is encroaching, is it?  
 20 MR BEARD: All sorts of things are encroaching but, yes. In  
 21 2012 I think mobile is not the major threat at this  
 22 point but it is part of it. There will be other things  
 23 as well because I think it may also just be terminations  
 24 but there will be mobile threats as well but you have an  
 25 overall fixed voice market being in decline and:

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1 "We are managing revenue and margin via price rises  
 2 and migration to unlimited plans."  
 3 Yes, that is true but you are looking at this in the  
 4 round in relation to all of your voice lines, including  
 5 those that are within bundles.  
 6 Then it is talking about the call plans. Of course  
 7 you can have a different call plan whether you are  
 8 a voice only, a split purchaser, a bundle customer  
 9 because your call plans can vary depending on what is  
 10 available at particular times and particular ways.  
 11 THE CHAIRMAN: Yes.  
 12 MR BEARD: I think it is important to bear in mind that when  
 13 it is talking about fixed voice market it is talking  
 14 about BT's fixed voice. So I think the major shift is  
 15 other people taking our customers.  
 16 MR DORAN: This is people switching to bundles with other  
 17 people as the real ---  
 18 MR BEARD: Yes, and then we lose the line customer.  
 19 MR DORAN: I see. Sorry, I had understood fixed voice to be  
 20 a technology issue so much as a competitive issue.  
 21 MR BEARD: No, I think here it is talking about both but the  
 22 witnesses can be asked about these things but that is  
 23 how we understand it.  
 24 MR DORAN: Okay.  
 25 MR BEARD: And:

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1 "38% of our place are on Unlimited Anytime Plans,  
 2 which drives increased usage."  
 3 MR DORAN: Because of calls at weekends and calls to mobiles  
 4 and all those other things.  
 5 MR BEARD: Yes, the broader you build your package the more  
 6 usage you get. Effectively feeling like you are getting  
 7 it for free. Because once you have invested in the  
 8 package. So if you only had a free weekends package or  
 9 unlimited weekends package, then you might make more  
 10 calls at the weekend and fewer during the week. If you  
 11 have an unlimited anytime package, then once you have  
 12 paid for it --- and clearly that drives the increased  
 13 usage but obviously you pay more the greater the  
 14 package.  
 15 Then it talks about, on the other side:  
 16 "... building new personalised services to exploit  
 17 changing market trends."  
 18 So it is constantly thinking about other changes.  
 19 Then if we go to {OR-F/180/18}:  
 20 "We will reinforce broadband superiority and embed  
 21 loyalty at the core of the marketing machine."  
 22 Whether or not it is industrialised management speak  
 23 or whatever.  
 24 Column three of those columns:  
 25 "Industrialise and Scale Loyalty at Heart of

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1 Business.  
 2 "Drive loyalty via:  
 3 "Retention best practice.  
 4 "Life cycle management.  
 5 "ARPU growth through [broadband]/voice upsell."  
 6 So it is specifically thinking about how do we keep  
 7 these customers and how do we up sell them? Again, this  
 8 context is just not being considered when Ms Kreisberger  
 9 is trying to suggest that those previous slides were  
 10 suggesting some sort of grand exploitation of a tracked  
 11 group. That is not what you can take from these slides  
 12 when you read them in context.  
 13 We do say it is consistent with the evidence of BT's  
 14 witnesses that they wanted SFV customers to switch to  
 15 bundles and of course they can be asked about that.  
 16 The next one I want to go to -- I am conscious of  
 17 time but if I may, I will see if I can get one or two  
 18 more down. {F/310/1}. That was 2012. So that was  
 19 pre the period, the claim period in any event.  
 20 This is the annual price change and this is  
 21 from June 2015. It relates to the price change that was  
 22 announced in July 2015 and then took effect three months  
 23 later in September 2015. Because, as we will come back  
 24 to, there was a programme if you announced it, then you  
 25 had to go through the notification process of all the

1 customers and they had to be given time to be made aware  
 2 of the price change and have special rights to terminate  
 3 if they wanted to terminate on the basis of the price  
 4 change.  
 5 So if we just go over the page, {F/310/2},  
 6 "Introduction":  
 7 "To enable the business's profit position for 15-16  
 8 and future years we will undertake our annual price  
 9 change.  
 10 "This will raise line rental pricing by £1 and most  
 11 other prices by up to 6.94%."  
 12 "The financial impact from action one is an  
 13 incremental revenue benefit to BTC of £91.1m in 15/16  
 14 ... " including some costs for marketing and offsetting  
 15 gives.  
 16 If we then go down to page {F/310/4} which is the  
 17 annex we can see this in more detail.  
 18 This is the sort of table you see a lot in these  
 19 slides where what you get are sort of cumulative  
 20 accounts of numbers. So you have at the top left, you  
 21 have the item which is voice and then you have line  
 22 rental. You have an option fee issue. You have got  
 23 calls, calling features, Line Rental Saver and they are  
 24 other issues which are various including if you take  
 25 paper bills you pay more and so on.

1 What you see is the approach being in relation to  
 2 line rental the price increase would be under 6%. In  
 3 relation to all the others, including calls and so on it  
 4 would be 6.94%.  
 5 But the interesting thing is if you go down you see  
 6 broadband solus bundles and TV, the price rise there  
 7 would be 6.94%. What is interesting here is when you  
 8 look at these tables, and we will see them in other  
 9 slides, the way in which the calculations of price  
 10 changes are done is when you are thinking about  
 11 broadband being added you get an accumulation  
 12 effectively of Line Rental Plus other elements plus the  
 13 broadband element.  
 14 Here it is being laid out like this to come up with  
 15 the total benefits that would be expected to accrue to  
 16 BT in the following year and it is between 70 million  
 17 and 90 million. I think that is due to when the price  
 18 rise might be brought in because if you bring it in  
 19 earlier you get a couple of months' benefit and  
 20 therefore your overall increase in profitability is  
 21 preferential.  
 22 So that lays out how this was being approached.  
 23 Just bear in mind what is being said is we exploit these  
 24 line rental costs but they are the ones that are going  
 25 up by least here and we are talking about bundles and

1 broadband and TV where there is no issue but those are  
 2 all competitive. We are moving those up by 7%.  
 3 If we go back up to page {F/310/2}, if we may, under  
 4 "Background":  
 5 "Each year BT changes its prices. Historically this  
 6 has been approximately inflationary but increasingly  
 7 super-inflationary price rises on largely inelastic  
 8 products has provided significant upside for our  
 9 business. This capital provides the oxygen for our  
 10 business in the sense of its investment in content,  
 11 spectrum etc."  
 12 Ms Kreisberger I think was suggesting that this was  
 13 all focused on just SFV customers. It is just not true.  
 14 The context of this document is looking at all  
 15 customers.  
 16 "These changes are reported to different degrees in  
 17 the media, usually defined by our transparency and  
 18 clarity as well as how come telling our gives are."  
 19 THE CHAIRMAN: Why would all their products be inelastic?  
 20 Why would its bundles be inelastic?  
 21 MR BEARD: Look, what I am identifying here is  
 22 Ms Kreisberger says this is all about SFV and then  
 23 exploitation of SFV. I take the document, I show you  
 24 obviously the price rise in relation to non-SFV.  
 25 THE CHAIRMAN: I entirely take the point that actually

1 a pound a month is actually less than the 6.9. I was  
 2 just focusing on this because that is what she focused  
 3 on.  
 4 MR BEARD: I am not going to try and answer this. We have  
 5 a witness?  
 6 THE CHAIRMAN: We have a witness, exactly.  
 7 MR BEARD: We will let the witness answer it.  
 8 THE CHAIRMAN: Yes.  
 9 MR BEARD: The point I am making is you have got to be  
 10 extremely careful about taking these documents out of  
 11 context because what you see is strategy being developed  
 12 in relation to all of voice and all of voice includes  
 13 all of broadband, and indeed it is part of a broader  
 14 consumer strategy.  
 15 Of course Ms Kreisberger can ask whether or not  
 16 Mr Bunt and others had this targeted intent to milk the  
 17 Class, as she suggests, but her documents are not close  
 18 to getting her there. This compelling corpus is nothing  
 19 of the sort.  
 20 As I say, no doubt all of this is going to be put to  
 21 Mr Bunt in due course but if we just go down the page.  
 22 We see that table.  
 23 "Reporting of these changes very much drives our  
 24 thinking on time.  
 25 "This year's price change has generally followed

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1 those rules except on timing where business need has  
 2 driven us to move our price change forward to  
 3 20 September, announcing in late July in order to  
 4 realise the benefit earlier and greater upside in year.  
 5 "Our competitors have increasingly aligned their  
 6 price changes with our timing and scale."  
 7 But what you are seeing there is a comparison being  
 8 taken into account of the other competitors and you see  
 9 it multiple times in the documents. Consideration of  
 10 the rivals.  
 11 THE CHAIRMAN: Yes.  
 12 MR BEARD: I do not know whether it assists but at this  
 13 point of course you can actually see that some of  
 14 the prices that we are offering for, say, calls are  
 15 actually lower than our rivals in relation to this.  
 16 Obviously this is a snapshot and I am not trying to take  
 17 too much from it. It is the comparison and you cannot  
 18 make the assumptions.  
 19 THE CHAIRMAN: Yes.  
 20 MR BEARD: I was now going to move on to a 15/16 document  
 21 but I am conscious of time.  
 22 THE CHAIRMAN: If you could literally be a couple of minutes  
 23 on that one. If it is going to be longer I think we  
 24 will have to --  
 25 MR BEARD: I can have a go.

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1 THE CHAIRMAN: Have a go but we have the transcriber and  
 2 court staff to bear in mind mere.  
 3 MR BEARD: Okay, {F/286/1}. This is talking about the same  
 4 price change. So 15 January 15. Talking about 15/16  
 5 price change. If we go to slide {F/286/2}, you will  
 6 actually see that at that time, slightly earlier, second  
 7 bullet down:  
 8 "Approval for base price change structure (£1 on LR  
 9 and 6.49 ...)"  
 10 I suppose it could be a typo, but it looks like it  
 11 is a lower amount than 6.94 that we have just seen as  
 12 being the subsequent proposal.  
 13 If we go to slide {F/286/6}, this is the slide that  
 14 Ms Kreisberger went to:  
 15 "Recent price changes demonstrate:  
 16 "Churn driven by price change is low (2.5k GC9 ..."  
 17 So that is the general condition notification --  
 18 THE CHAIRMAN: Yes.  
 19 MR BEARD: -- structure being applied.  
 20 "... ceases in Window - measured separately ...)  
 21 "Bill Capping - We have observed behaviours of  
 22 customers adjusting usage ...  
 23 "Elasticity - Observed most with paid call usage on  
 24 ... "  
 25 That is unlimited evening and weekend calls and

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1 unlimited weekend plans.  
 2 "... otherwise not significant."  
 3 So what it is actually showing is that customers  
 4 were adjusting their call usage in relation to price  
 5 changes here and thinking about their planning.  
 6 Now:  
 7 "How does this fit with plans to change our  
 8 portfolio?"  
 9 You will see Project Thunder, that is another  
 10 pricing project, sitting alongside our existing product  
 11 structure:  
 12 "... but acts as an alternative option to annual £1  
 13 increases ...  
 14 "This will reduce the size of the base subject to  
 15 line rental price increase ..."  
 16 So they are thinking about other ways of dealing  
 17 with these issues.  
 18 Then if you go right down to the bottom of this  
 19 slide, you will see "Line Rental Ceiling":  
 20 "Recommendation: Cap line rental price at £19.99  
 21 from 2017/18 with the aim to have migrated most of the  
 22 base to Thunder by October 2018."  
 23 Now, I only touch on that because, first of all,  
 24 this slide shows there are concerns about churn, there  
 25 are considerations of customers modifying their usage in

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1 relation to changes in price, and there is also at this  
2 stage, so this is back in 2015, a consideration, in  
3 January 2015, of a possible price freeze in relation to  
4 these matters.

5 Ms Kreisberger at various points said, oh, you only  
6 froze prices when Ofcom was involved. You can see here  
7 that it is one of the options that is being considered  
8 as part of the general strategy in relation to these  
9 issues.

10 THE CHAIRMAN: Yes.

11 MR BEARD: I am not saying that happened or when it  
12 happened, what I am saying is that these are parts of  
13 the commercial options that they are considering in  
14 relation to this having regard to churn, having regard  
15 to the behaviour of consumers. But none of this is  
16 suggesting that somehow BT was seeking to exploit  
17 voice only or split purchase customers who, as we have  
18 seen, were actually switching away in very large  
19 numbers, and they were fighting to keep and up-sell to.

20 THE CHAIRMAN: Thank you. We will stop there.

21 There is just one question that we have got. We  
22 could ask it directly of Mr Bunt, but we are all  
23 slightly -- we were not quite sure what the answer was  
24 and I thought I would just ask the question now. You do  
25 not have to answer it now. I probably just

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1 misunderstood it.

2 It is paragraph 44 of Mr Bunt's second witness  
3 statement, and you do not even need to get it out now,  
4 but he says the revenue generation fed into the target  
5 setting process of pricing. He was not involved in how  
6 the revenue was used, but he was aware that between 2013  
7 and 2019 BT Consumer price change revenue was used to  
8 part fund BT Consumer investments, such as installing 5G  
9 towers and underground fibre-optic lines.

10 What I at least had not understood was, I thought  
11 the fibre-optic lines that get installed are used by all  
12 the different voice providers. They do not each have  
13 their own separate fibre-optic lines, rather like the  
14 fact that they do not all have separate copper lines, it  
15 is all done through Openreach.

16 But I could not understand why that is an investment  
17 of BT Consumer if in fact it is part of the underlying  
18 structure that would be used and accessed by all the  
19 different providers. That is the point.

20 MR BEARD: No, understood. I do not have an immediate  
21 answer. I will seek to clarify.

22 MS MACLEOD: I am terribly sorry to rise. I am here for the  
23 CMA and I just wondered if I could check in on timings  
24 for tomorrow, before we ...

25 THE CHAIRMAN: Yes, thank you very much. You have an hour,

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1 I think.

2 MS MACLEOD: I did have an hour this morning. The CMA, upon  
3 listening to the Class Representative's submissions, was  
4 happy to allocate 15 minutes to the parties because of  
5 timing concerns elsewhere. So we have I think  
6 45 minutes, unless of course anyone wants to give us our  
7 15 minutes back. So between 45 minutes and an hour.

8 THE CHAIRMAN: I think that is right, that is what you have  
9 got. What we will do is ...

10 You are meant to be finishing, therefore you would  
11 have to be finishing, no earlier than 3.30 tomorrow.

12 MR BEARD: Yes. I was supposed to start at 12.30, I did not  
13 make any ...

14 THE CHAIRMAN: I am sorry, I was not aware of that.

15 MR BEARD: It does not matter. I think I can probably do  
16 that, I will look at the material I have to deal with  
17 overnight, but I do want to go through some more of  
18 these documents.

19 THE CHAIRMAN: I appreciate that. We could start earlier,  
20 provided that the transcriber was able to manage that,  
21 but the alternative is we see where we are by lunchtime  
22 and, if necessary, take a slightly shorter lunch break.

23 MR BEARD: Can we do the latter? Because what I will try  
24 and do overnight is actually trim it so that we do 10.30  
25 to 3.30.

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1 THE CHAIRMAN: I want to make sure you cover everything.  
2 You have been given an allocation of time --

3 MR BEARD: I understand, but I will try and cut my cloth ...

4 THE CHAIRMAN: I think at the moment there may not be much  
5 enthusiasm to give your 15 minutes back, I am afraid.

6 MS MACLEOD: That is understood.

7 THE CHAIRMAN: All right, thank you very much. 10.30  
8 tomorrow then.

9 (4.40 pm)

10 (The hearing adjourned until Wednesday, 31 January at  
11 10.30 am)

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