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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 29th January – Friday 22nd March 2024

Before:
The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

Class Representative

v

(1) BT Group PLC
(2) British Telecommunications plc

Respondent

A P P E A R A N C E S

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

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

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

1 Wednesday, 31 January 2024
 2 (10.30 am)
 3 (Proceedings delayed)
 4 (10.35 am)
 5 THE CHAIRMAN: Good morning. Some of you are joining us via
 6 live stream on our website, so I must start, therefore,
 7 with the customary warning: an official recording is
 8 being made and an authorised transcript will be
 9 produced, but it is strictly prohibited for anyone else
 10 to make an unauthorised recording, whether audio or
 11 visual, of the proceedings in breach of that provision.
 12 It is punishable as contempt of court.
 13 Housekeeping
 14 THE CHAIRMAN: Mr Beard and Ms Kreisberger, before we
 15 resume, I have seen the correspondence today concerning
 16 the position of Ms Blight. The Tribunal's provisional
 17 view, taking into account both letters, which I hope
 18 would be acceptable, would be that tomorrow we will
 19 start with Ms Cheek at 11 am, assuming she can get here
 20 for 11 am, and then we will stop whenever we stop for
 21 that day, and that will be it.
 22 MR BEARD: Yes, fine.
 23 THE CHAIRMAN: We will have Mr Bunt on Monday and Tuesday as
 24 planned. Wednesday morning will be spillover provision
 25 for Mr Bunt. Ms Blight should be here from, let us say,

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1 11 o'clock in case Mr Bunt is finished before lunchtime.
 2 The rest of the day will be on Ms Blight. Depending on
 3 when she starts, she may run over into the beginning of
 4 Thursday morning, and then once she is finished we will
 5 have Mr Cackett. Does that sound acceptable?
 6 MS KREISBERGER: I am very grateful for that.
 7 MR BEARD: That is absolutely fine for us. We offered to
 8 move people around, but ...
 9 THE CHAIRMAN: Yes, we thought about that, but we thought
 10 probably the less moving around, the better.
 11 MR BEARD: Yes. It is fine with our witnesses as well.
 12 THE CHAIRMAN: Good, thank you.
 13 Opening submissions by MR BEARD (continued)
 14 MR BEARD: I am grateful.
 15 So I was going to continue for a little this morning
 16 with some of the documents that Ms Kreisberger took you
 17 to, just to contextualise some of them. You will recall
 18 what I was doing was highlighting both the broad
 19 strategy themes, the concerns about branding, the fact
 20 that line rental was being considered across the voice
 21 piece, and so on.
 22 The next one I was going to go to, that
 23 Ms Kreisberger went to, was {OR-F/478/1}. So this
 24 is July 2016 and it is considering what might be done as
 25 price changes for 2017. As it turned out, the price

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1 change actually happened in Q1 of 2017; it was notified
 2 in January and took effect in April 2017.
 3 I should note that there are a couple of price
 4 changes that were omitted from table 2 that occurred in
 5 2017 and 2018 but I will come back to those later.
 6 If we just look at what it was that Ms Kreisberger
 7 referred to on this document. If we go to slide
 8 {OR-F/478/2}. So this was:
 9 "We need to align on a number of key points ahead of
 10 our team kick off this week and senior leadership
 11 reviews.
 12 "Insight from 16/17 and the key take outs.
 13 "Overall scale of price change and key principles.
 14 "Agree give territories ..."
 15 And so on.
 16 "From the evidence so far, we believe that the
 17 incremental gives in 16/17 have created a more positive
 18 price change than previous years and good news that
 19 should continue to be promoted ...
 20 "Recognition of the gives has been high ... and
 21 there is evidence that they have improved [value for
 22 money] perceptions ..."
 23 Then the next bullet was the one Ms Kreisberger
 24 relied on:
 25 "We have seen greater churn than in previous years

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1 ... -- however this is dwarfed in comparison to the
 2 additional revenue driven by the higher % increases. It
 3 is not clear how much this churn was driven by us or
 4 competitors (free fibre). But for 17/18 we should be
 5 careful not to over-tip the balance by repeating all of
 6 the higher % increases from 16/17."
 7 Ms Kreisberger seemed to be suggesting this was all
 8 just about price increases in relation to SFV customers.
 9 We can actually see that that is not the case if we just
 10 go to the next slide, because when we look at the next
 11 slide {OR-F/478/3} ...
 12 (Pause)
 13 You will just see, if we can zoom in on the gives
 14 that were being discussed on the previous page, because
 15 this is information in relation to the perception of the
 16 gives. (Pause)
 17 Is it possible to zoom?
 18 EPE OPERATOR: I am going to try and get it to work.
 19 MR BEARD: Okay.
 20 So the point I am going to make is that the gives
 21 there on the left-hand side, they are not just about
 22 calls, they are certainly not just about SFVs, they are
 23 about all sorts of things. The first one is about
 24 increasing broadband speeds, and then it is about
 25 increasing Wi-Fi hot spots. Then it is about parental

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1 control and antivirus, and then it is about Nuisance
 2 Call Protect.
 3 Nuisance Call Protect, it is true, is something that
 4 does relate to call services, but the point here is that
 5 this is talking about all of the consumer products, and
 6 it is talking about price rises that have been
 7 undertaken in 16/17 that had meant that although there
 8 was churn, there was real profitability .
 9 There is an easy way to see the summary of the price
 10 rises . If we actually go to annex 2 to Mr Bunt's
 11 statement, which is {D/2/47}. So we are in 2017 but we
 12 are talking about this price rise that has occurred
 13 previously . So if we look at July 2016, it says:
 14 "£1 on line rental. Voice 7%. Broadband (£1-£3).
 15 TV 8%. Sport 20%."
 16 So there were a whole raft of very significant
 17 increases, particularly on TV and sport, but also on
 18 broadband.
 19 What is being said in that slide , and of course
 20 Ms Kreisberger can ask Mr Bunt about it, but what we
 21 understand is being talked about is that that
 22 accumulation of price rises and the revenues generated
 23 by those dwarfed the impact of churn, in other words,
 24 loss of business.
 25 So when Ms Kreisberger's punchline was that all

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1 these line rental prices were just in fact upside for
 2 BT, that is not what you are getting from this document.
 3 What it is is a package, a strategic package of price
 4 rises more generally and then the strategy being
 5 considered as a whole.
 6 Whilst we are on this price change, it might be just
 7 useful for the Tribunal to see a slide pack from one
 8 month after this date, so this is August 2016. So if we
 9 could go to {OR-F/829/1}. You will see "Price Change".
 10 It looks like the same front, but it is actually a later
 11 date, 15 August 2016.
 12 If we go to {OR-F/829/2} slide 2, you can see that
 13 the first point is :
 14 "16/17 strategy of more gives and more pricing has
 15 been successful:
 16 "Churn was higher than previous years but more than
 17 offset by higher revenue upside.
 18 "The Gives had a positive impact ...
 19 "Service ... like 'faster fault fix' [is]... very
 20 relevant ... although customers do not always believe in
 21 them."
 22 Medium term plan is referred to.
 23 "A higher % increase could drive incremental revenue
 24 and create a fund for more gives – We need to carefully
 25 balance the cost of gives ... and the churn risk

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1 associated with a high take two years in a row."
 2 So they are thinking about what to do strategically.
 3 They have had these price changes the year before, some
 4 of which, particularly the sport one, for example, very
 5 high, and what they are considering is: what are the
 6 impacts on churn of all of those price increases,
 7 including on voice and line rental .
 8 "There are other pressures that challenge our
 9 ability to increase prices :
 10 "Competitor activity on line rental."
 11 So the first thing that this slide deck is concerned
 12 about when it is thinking about these higher prices is
 13 competitor activity on line rental .
 14 Then it is dealing with also:
 15 "Declining voice usage and paid/free mix putting
 16 pressure on the voice [profit and loss].
 17 "Aggressively priced Broadband market."
 18 It is also recognised here that they are getting
 19 pressure, regulatory pressure, in relation to solus
 20 customers as well.
 21 So there is no doubt that BT was aware that Ofcom
 22 were beginning to raise concerns about these issues.
 23 But if you are asking how you read these documents, and
 24 what was going on strategically, and whether this was
 25 evidence that the price rises were just all upside in

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1 relation to SFV, and that was the focus, and that was
 2 what was dwarfing churn, that is just not true. To the
 3 contrary, it is showing a sensitivity to competitor
 4 activity in relation to line rental .
 5 If we could just go down to {OR-F/829/7}, slide, 7,
 6 please. If we just zoom in on that.
 7 So this is one of these tables that is looking at
 8 medium term plan assessments. But what is interesting
 9 about it is first of all , in the second bullet -- well,
 10 in the first bullet it says:
 11 "[Medium term plan] ... assumes a lower revenue
 12 target versus 1617, but a higher GM target ..."
 13 Again, Mr Bunt can be asked what that means, but we
 14 are pretty confident it means "gross margin". In other
 15 words, that is what is being considered when you are
 16 making these sorts of assessments.
 17 Then if we look at the table, what you are seeing
 18 there is consideration of line rental, voice, broadband,
 19 TV, sport, and you are seeing it accumulated. Then you
 20 are seeing the cost of gives and the impact on the gross
 21 margin. You are also seeing, in relation to the
 22 right-hand side, the actual price increases that are
 23 being considered by product and how they work, and then
 24 you are looking down at the different customer groups
 25 and how those matters impact.

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1 Just to do the maths, if you look at "1516 actual",
 2 you have got line rental, voice, broadband, £1, 45p,
 3 82p.
 4 If you then go down to Solus, so this is line only
 5 people, the actual increase is being calculated as the
 6 sum of the £1 plus 45p. The dual play then adds the
 7 82p.
 8 So the way that BT is looking at the price increase
 9 and considering these things is a stack of increases for
 10 broadband. Then obviously for triple play, when you are
 11 adding TV, you then add the 46p, and then if you are
 12 adding sports to your TV package you add another chunk.
 13 But the way in which all of this is laid out is
 14 thinking about the line rental and the price rises in
 15 line rental carried across into the broadband packages,
 16 and those price increases being fed into the price
 17 increases for the broadband as the basic calculation.
 18 Just to pick up on the final bullet here:
 19 "To match the £196m revenue benefit from 1617 we
 20 will need to take £0.68 on Voice and £1.33 on
 21 [broadband] – on top of £1 on line rental. Competitor
 22 activity on line rental and declining voice usage and
 23 paid/free mix make it increasingly challenging to meet
 24 this scale of take on voice. We may need to rebalance
 25 the increases towards [broadband] and position the line

1 rental increase as part of the bundle."
 2 So this is actually the opposite account from which
 3 Ms Kreisberger was saying, oh, no, no, they did not
 4 think about -- they just thought about broadband
 5 packages, essentially .
 6 That is not how they are thinking about these
 7 things. What they are thinking about is how the price
 8 rises can be put through, and they are saying: actually ,
 9 we cannot sustain high line rental price rises because
 10 of competitor activity on line rental.
 11 Anyway, I am sure Mr Bunt will be asked about all of
 12 this .
 13 THE CHAIRMAN: Thank you.
 14 MR BEARD: If we go now to {F/858/1}. So this is a month or
 15 so on. This is September 2016.
 16 If we go to slide 2, {F/858/2}. The agenda is
 17 about:
 18 "Gives strategy.
 19 "Recommended prices for Voice, Broadband, TV and
 20 Sport."
 21 Timing of changes, other options, and so on.
 22 If we go down to slide {F/858/7}, what we are seeing
 23 here is in the section considering voice it is saying:
 24 "Our current [price per minute] rates are less than
 25 all our major competitors. However, our Anytime Calling

1 Plan isn't competitive, with Sky and Virgin charging £8
 2 and including calls to UK mobiles."
 3 So what we are seeing here is a manifestation in the
 4 voice element. Now, it is not in relation to line
 5 rental, it is in relation to the calling component, but
 6 we are seeing a close comparison being undertaken about
 7 whether we are more expensive or cheaper in relation to
 8 individualised calling but also in relation to bundles,
 9 and there is a real concern about the competitiveness of
 10 the Anytime Calling Plan. Elsewhere in the documents it
 11 is abbreviated to UAC, because that is the Unlimited
 12 Anytime Calls.
 13 Then if we go on to {F/858/8}, that again is
 14 concerned with call prices where it is thought that
 15 these prices, price increases, are acceptable because
 16 they are currently less than the market rate.
 17 Then slide 9 {F/858/9}. This is setting out call
 18 prices for a whole range of call packages.
 19 Considering options for the various calling plans:
 20 "We recommend adding 30p to the [Unlimited Anytime]
 21 Calling Plans and 20p to [Unlimited Evenings and
 22 Weekends] to deliver a straightforward, simple Price
 23 Change and keep [Unlimited Anytime Calling] under £9."
 24 You will see at the bottom, "Mitigations". Here
 25 they are looking at the range of mitigations that there

1 may be in relation to this .
 2 Then if we go over the page {F/858/10}, we have more
 3 consideration of call plans.
 4 If we could just go to {F/858/11}, because that is
 5 the end of the slides on voice. We are then, on 11, you
 6 will see we have moved towards:
 7 "Broadband Pricing strategy is to communicate
 8 a simple change of £2 to £2.50 ..."
 9 If we move to 12, so this is consideration of
 10 comparators with competitors, what you see at the top of
 11 12 is the pricing options being discussed in relation to
 12 broadband, and you see that table, top right, "16/17
 13 Price Increase", line rental increase, average broadband
 14 increase, and then how that translates into an overall
 15 percentage in terms of increase on broadband.
 16 So essentially the assessment for the strategy
 17 purpose is taking those line rental increases and
 18 feeding them through into the broadband increase
 19 calculation .
 20 I am not going to take you through any more of this
 21 document. If we could go to {F/469/1}, this is the
 22 Financial Factbook. This is actually from July 2016, so
 23 it is just slightly earlier than the documents we were
 24 just looking at, but it is the same sort of time to the
 25 documents dealing with the 2017 price change, the one

1 that will take effect in April 2017.
 2 If we go down to slide {F/469/10}. This element of
 3 the document -- I probably should go back, actually. If
 4 we go back up to slide 2, I think it is slide 2.
 5 {F/469/2}, you will see there that it is actually an
 6 extensive document dealing with consumer strategy
 7 generally, and then it breaks out into a consideration
 8 of issues, and I am going to take you to the volume
 9 summary, and then some of the voice deep dive which you
 10 can just see on the left-hand side, so that is 10 and
 11 13-15. This is looking at everything in the round from
 12 the financial point of view, and you will see the other
 13 categories there.

14 If we then go to 10, {F/469/10}. As you might
 15 expect, this is a summary across the whole of BT's
 16 business:
 17 "Voice line volumes have been falling for around
 18 a decade, but this trend is now much reduced. We have
 19 offset this trend and grown revenues by increasing the
 20 average number of products our customers take (growing
 21 penetration of broadband, TV, Sport and Mobile) driving
 22 an increase in Consumer ARPU [average revenue per user]
 23 ..."
 24 You will see there that you have on the left-hand
 25 side a consideration of the active voice lines here.

13

1 You will see "Opening Base", top line there, if you can
 2 read it? It is quite small.
 3 THE CHAIRMAN: It is quite difficult ... Thank you.
 4 MR BEARD: Thank you, that is great.
 5 THE CHAIRMAN: Yes.
 6 MR BEARD: So "Voice Active Lines", and you can see "Opening
 7 Base", is that legible?
 8 THE CHAIRMAN: Yes.
 9 MR BEARD: I am just highlighting the numbers there. So we
 10 are starting at about 9.5 million. You see over on the
 11 right-hand side the product description:
 12 "Active lines generate call & other usage revenues
 13 for consumers."
 14 So this is all of the universe of active voice
 15 lines.
 16 "Long-term adverse trend in BT brand net adds due to
 17 declining market and legacy Solus space. Sport/UCL [so
 18 that is Champions League] content launches and Plusnet
 19 growth have now brought the net loss position close to
 20 zero."
 21 So one of the important things here to recognise is
 22 one of the strategies that was employed to deal with
 23 long-term decline in the BT voice share overall was
 24 actually to be investing in content that would attract
 25 people into bundles, keep a BT line, but also up-sell

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1 into broadband and further packages. That is why there
 2 are references to sport and Champions League content
 3 there.
 4 THE CHAIRMAN: But the opening balance, 9.4 million, that is
 5 any customer that has a line.
 6 MR BEARD: Yes.
 7 THE CHAIRMAN: So that will include broadband -- bundle
 8 customers.
 9 MR BEARD: Yes, absolutely.
 10 THE CHAIRMAN: Because we heard about the 8-9 million.
 11 MR BEARD: That is exactly why I went to that, because it
 12 makes more sense when you come to these slides. So the
 13 first picture I showed you, with the 9 million columns,
 14 those would tally broadly against these figures.
 15 THE CHAIRMAN: Yes.
 16 MR RIDYARD: Mr Beard, on this evidence you are taking us
 17 to, I think it is accepted that there is competition
 18 between BT and the others on bundles and this wider base
 19 of products, but are you saying that because of that
 20 there is no way -- because also there are many different
 21 options about how BT puts its pricing together, with
 22 lots of components. Are you saying that because of the
 23 broader competition bundle to bundle, of which what you
 24 are describing here is illustrative, that it is not then
 25 possible within that competition then to say, 'ah, but

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1 also there is this segment of these customers here,
 2 these voice only customers, and we can find ways of
 3 making their price rises bigger than the general price
 4 levels'.
 5 Because I think that is, as I understand it, the
 6 gist of the case against you. It is not that you do not
 7 compete in the bundles, it is that there are various
 8 ways one can find to structure the pricing so as to
 9 raise prices above competitive levels just for this
 10 segment.
 11 MR BEARD: Yes, I completely understand that is the case
 12 being put against us. The point I am making by
 13 reference to these documents is these are
 14 contemporaneous strategy documents, and what they are
 15 doing is they are considering these line rental prices
 16 and call prices, which are, on the Class
 17 Representative's account, the focal product, because it
 18 is not voice only customers, it is voice only and SPC --
 19 MR RIDYARD: Yes.
 20 MR BEARD: -- and what I am showing you is a series of
 21 strategic documents which are considering these line
 22 rental prices across the board in relation to these
 23 issues.
 24 This does not lapse into what is referred to as the
 25 bundle pricing fallacy. That is not what we are talking

16

1 about. We are not saying: if you move the line rental
 2 price for broadband by £1, it must be moved by £1 for
 3 VOC or vice versa. But what we are talking about is: is
 4 there, by an entity in this market, consideration of
 5 these matters in the round, are they interlinked when
 6 you engage in the strategic discussion internally about
 7 this?
 8 All of this material is identifying a broad approach
 9 to these issues. You do not see any attempt here to
 10 say: 'oh, no, no, no, we can target SFV; we will put in
 11 place different arrangements here'.
 12 MR RIDYARD: I suppose what I am getting at is are they
 13 mutually exclusive? Obviously there has to be
 14 a strategy in the round, because that is where everyone
 15 agrees there is effective competition. The kind of
 16 interesting question is: consistent with that, is there
 17 also a possibility of some tweaking of the elements of
 18 the price package that allows BT to raise prices to the
 19 customer with interest --
 20 MR BEARD: I understand --
 21 MR RIDYARD: But are you saying this evidence shows that
 22 there is not that possibility or there is?
 23 MR BEARD: I do not know that I need to go as far as
 24 "possibility", because it is not a question of whether
 25 it is possible, it is: is there evidence that this was

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1 what BT was doing? Because what Ms Kreisberger has said
 2 is there is this compelling corpus of evidence that
 3 shows that BT was effectively targeting and seeking to
 4 exploit this group of customers, and I am going through
 5 the documents she went to, as her choice of documents,
 6 saying: this is good evidence of it, and it is not.
 7 MR RIDYARD: Yes, I understand that point, yes.
 8 MR BEARD: None of it is. It goes completely in the
 9 opposite direction.
 10 That is why we say there is such a fundamental issue
 11 here. We are not just dealing with a theoretical
 12 construct of whether you can tinker with these things,
 13 it is what was actually happening in terms of your
 14 strategic approach in this market, and, of course, all
 15 of this makes more and more sense as you think about the
 16 levels of switching that were going on.
 17 MR RIDYARD: Yes. Okay, thanks.
 18 MR BEARD: That is in fact the answer to the bundle fallacy
 19 point. We are not saying it is some kind of locked in
 20 change. What we are saying, and what Dr Jenkins
 21 analyses, is the fact that in relation to this market,
 22 there is -- you need to consider these issues more
 23 broadly in the round. You cannot simply think of them
 24 in complete isolation and the evidence does not support
 25 such an approach.

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1 If we could then go on to slide {F/469/11}, you will
 2 see that again this just emphasises the fact -- just
 3 reading the headline:
 4 "We operate in a dynamic and ... competitive market
 5 where offers and bundles change frequently. The BT
 6 brand's phone and broadband proposition is perceived as
 7 a premium product due to its added features ..."
 8 I will come back to that when we talk about economic
 9 value.
 10 "... while Plusnet competes at the value end of the
 11 market."
 12 Just to recall, Plusnet is a BT company.
 13 Then you have comparison between the unlimited
 14 copper bundles and the unlimited fibre bundles here.
 15 The one thing I would say about this is, just going
 16 to the point we have been touching on, you can see -- if
 17 we could just zoom in on the left-hand box "Dual Play",
 18 you will see there that the bundle description of the
 19 package name is actually broken down by components for
 20 all of the entities we are talking about, and line
 21 rental is broken out in relation to those issues.
 22 THE CHAIRMAN: Sorry, where is the line ...
 23 MR BEARD: It is "Standard Monthly Line Rental", it is third
 24 line down. Is that legible?
 25 THE CHAIRMAN: Yes.

19

1 MR BEARD: So you have "Connection", "Standard Monthly ..."
 2 Just to pick up a point that we were discussing
 3 yesterday, it is broadband, and this is unlimited
 4 weekend calls as the comparator that is being drawn on
 5 here.
 6 Sky is slightly different, it is unlimited broadband
 7 and pay as you go calls. TalkTalk's version is called
 8 Simply Broadband.
 9 So these are bundles, I am not suggesting otherwise,
 10 but the point I am making is that those line rental
 11 prices are actually broken out and compared across them
 12 within those packages. They are being analysed
 13 internally.
 14 If we can go to slide 13, {F/469/13}. This is
 15 actually a slide that Ms Kreisberger referred to and she
 16 relied on the heading:
 17 "Voice is our largest and most margin-rich product,
 18 benefiting in recent years from significant annual price
 19 increases and the fact that price competition is focused
 20 on headline Broadband prices. However, declining
 21 volumes in both lines and call minutes limit the scope
 22 for future growth from this product."
 23 Okay, voice. This is not SFV, it is not VOC, it is
 24 the whole of voice, and you can see that immediately
 25 with the top line number. As I say, it is over

20

1 9 million for 13/14. Sorry, it is very dense, but it is
 2 essentially a replication of that row that we saw in the
 3 earlier slide.
 4 There is nothing in this slide that suggests that BT
 5 has been putting up prices to target SFV customers. It
 6 suggests BT has been putting up prices to offset falling
 7 volumes and usage. These price rises apply to all of
 8 the voice cohort, this is the way that BT actually
 9 thought about these matters.
 10 Can we go to {F/833/1}.
 11 THE CHAIRMAN: We are finished with this one now for the
 12 time being?
 13 MR BEARD: There are other things I can get out of it but
 14 I am also conscious of time. I am just trying to
 15 contextualise --
 16 THE CHAIRMAN: No, that is fine.
 17 MR BEARD: I am going to the quotes that Ms Kreisberger
 18 took. I am explaining why they are out of context and
 19 why they are not relevant to the documents ... are
 20 informative, but actually there is more in these
 21 documents that I have taken you to.
 22 This is "Price Change 18/19", so this is a July 2017
 23 document, so we are looking at the next year now. This
 24 seems to be a very early draft of slides because there
 25 are all sorts of gaps in it. There are gaps saying

1 "Executive Summary" and just a blank page, effectively.
 2 But if we go to slide {F/833/4}. Is it possible
 3 just to zoom a bit? (Pause) I think we may be
 4 struggling here.
 5 Anyway, the point I am going to make about slide 4
 6 is it is strategy across the board that is being dealt
 7 with in this slide deck. It is dealing with all
 8 elements again, perhaps not surprisingly given the
 9 history of what we have seen in the documents to date.
 10 If we could go to slide {F/833/9}, please. (Pause).
 11 Thanks. If we could zoom in on that. That is
 12 brilliant, thank you.
 13 "Strategic Considerations and Key Principles."
 14 "The base of customers from which we can price
 15 charge has decreased.
 16 "Carmen is likely to remove limit truly solus
 17 customers to CPI rises."
 18 So this is recognising the commitment is having an
 19 impact.
 20 "Our own pricing decision (such as PCPs and
 21 [Broadband Plus]) freeze out a large number of other
 22 customers.
 23 "This means we have an even greater challenge to
 24 using price change to meet [medium term plan] - we need
 25 an intelligent approach ..."

1 Then "Key Principles". This is what Ms Kreisberger
 2 referred to:
 3 "Pricing strategy should form part of a longer-term
 4 strategy set within a well-defined timeframe to optimise
 5 [long-term value] over at least 5 years."
 6 Well, yes, I think most businesses might think in
 7 those terms.
 8 "Price rises should be shared across products based
 9 on:
 10 "Price history (what is reasonable).
 11 "Current assessment of [value for money] as
 12 perceived by customers and relative to competition (what
 13 is the situation today).
 14 "Price elasticity (what is likely to happen as
 15 a result).
 16 "Products should not be excluded arbitrarily from
 17 price changes, owing to the fact that we have a smaller
 18 pool of products/props to play with.
 19 "Pricing strategy should always make upselling to BT
 20 bundles and upspinning rational as this is always
 21 profitable for BT."
 22 So it is thinking about the basic principles that
 23 you apply when you are looking across a portfolio of
 24 prices about how you make price rises in the face of
 25 competitive pressure and different customer dynamics,

1 that is absolutely true. But that is true of all
 2 businesses. It is not suggesting here that somehow
 3 there is a targeting of: it would have to be SPC
 4 customers here.
 5 But there is a reference, if we keep going down:
 6 "Price changes are a key source of value for ...
 7 business ..."
 8 Sorry, I missed one out:
 9 "Price changes do not necessarily need to happen for
 10 all products/[propositions] ...
 11 "Price changes are a key source of value for ...
 12 business ...
 13 "We should recognise declining markets and price
 14 accordingly to maximise value ..."
 15 There is a reference to split purchase customers.
 16 "Where revenue risk exists due to declining volume
 17 we should lock in revenue to de-risk the business ..."
 18 So there is a recognition here about a degree of
 19 lack of -- the importance of considering history,
 20 current assessment, price elasticity, there is
 21 a recognition of declining markets and pricing
 22 accordingly, and there is reference to split purchase
 23 solus customers, but then what we are seeing is part of
 24 that broader strategy of wanting to up-sell.
 25 Just to bear in mind, what we are talking about here

1 is declining markets because of the switching.
 2 So here we do have one reference in relation to
 3 split purchase customers, but what we do not see in any
 4 of this material is suddenly a different approach
 5 overall to line rental pricing and considering it
 6 separately in relation to the position of split purchase
 7 customers.
 8 I am just going to go on to another document. This
 9 is actually going slightly backwards in time,
 10 March 2015. This is {F/351/1}. This reinforces the
 11 proposition that BT actually wanted to reduce solus
 12 churn, including in relation to SPCs, and wanted to
 13 up-sell to them.
 14 We can see this at slide {F/351/2}. If we could
 15 just zoom in here. Third box down:
 16 "Lines ..."
 17 This has "Consumer Voice Strategy" at the top.
 18 "Lines: Reduce Solus churn to 16% within 2 years to
 19 maximise revenue and upsell opportunity.
 20 "Execute continuous multi-channel recontracting
 21 plan.
 22 "Move customers to lowest churning products and
 23 deepen relationships to mitigate competitor churn.
 24 "Build capability to maximise recontracts with
 25 lowest possible operational impact ..."

25

1 So there we have exactly what is seen overall in
 2 these documents, which is a desire to up-sell and
 3 a desire to reduce churn in relation to both VOCs and
 4 SPCs.
 5 If we then go down to slide {F/351/5}, we are
 6 looking here at "Lines", and we specifically have
 7 consideration of the context:
 8 "Solus voice lines have seen a steady decline over
 9 recent years due to three main factors:
 10 "... consolidation of services ... in bundles.
 11 "Competitor losses ..."
 12 So that is losses to competitors.
 13 "High levels of bereavement ... on Solus base.
 14 "Call centre capacity and highly contended
 15 development cycles limit our ability to deepen
 16 relationships with customers."
 17 But you then see on the "Strategy" side:
 18 "Reduce the Solus churn by regular re-contracting
 19 activity across relevant channels.
 20 "Deepen relationship and move customers to lower
 21 churn products ...
 22 "Use a targeted approach to optimise ARPU delta ..."
 23 Sorry, I should have read the second bullet,
 24 Ms Mackersie is right. I should have read it more
 25 fully :

26

1 "Deepen relationship and move customers to lower
 2 churn products making it easier to upsell and harder for
 3 competitors to acquire ..."
 4 So this is talking about Solus voice lines and it is
 5 setting out how you deal with the risk of churn and
 6 securing benefits.
 7 Can we go to slide {F/351/8} here. Ms Kreisberger
 8 here focused just on the third bullet down on the
 9 left-hand side where -- "Customer Voice Strategy -
 10 Positive Brand", and the heading is:
 11 "Manage a roadmap of products that drive a positive
 12 social impact. Engage our external stakeholders around
 13 this to ensure a balanced view is presented against any
 14 revenue optimisation."
 15 Under "Context", there is a general discussion about
 16 BT's brand.
 17 Second:
 18 "Using core products to drive revenue to enable our
 19 bold and ingenious developments can undermine our
 20 warmth, care and honesty."
 21 Which are parts of our brand.
 22 "Open to criticism that we exploit the vulnerable to
 23 subsidise new customers (e.g. caller display ... line
 24 rental, especially on true Solus)."
 25 That was what Ms Kreisberger focused on.

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1 But then you have to see this in context, because
 2 that is the concern that is being expressed, and the
 3 strategy to deal with it is then expressed on the other
 4 side:
 5 "Improve, update and extend our offering for the
 6 most vulnerable to achieve greater recognition and
 7 strategic alignment with stakeholders."
 8 "Build external stakeholder capital ."
 9 "Break down the vulnerable customer segment in to
 10 multiple groups and differentiate our provision and
 11 public messaging according to need."
 12 "Develop consumer proposition to address the segment
 13 of digitally excluded customers who need wider support
 14 to get online."
 15 So far from giving a sense of the strategy being,
 16 'okay, we can fleece these people'; the strategy that is
 17 being discussed here is how we can engage more with them
 18 and deal with their needs.
 19 Then if you look at "Deliverables":
 20 "Invest in existing provision to vulnerable
 21 customers to enhance their experience and create new
 22 news.
 23 "Improve customer experience ...
 24 "Update products ...
 25 "Extend our offering ..."

28

1 "Work together with external stakeholders ..."
 2 This is not evidence at all of BT trying to exploit
 3 a group, this is an internal document talking about
 4 strategy, recognising that there are concerns about
 5 criticism. What do we do about it? is what is being
 6 said here.
 7 It is evidence in the other direction from that
 8 which Ms Kreisberger is suggesting. By being so
 9 selective in the way in which she has dealt with these
 10 documents she has given an entirely false impression of
 11 what it is that BT was doing in relation to these
 12 matters from these documents.
 13 If we could then go to {F/374/1}. This is another
 14 document she referred to. This is back in 2014/15.
 15 This is what is called an execution update, so it is
 16 discussing a proposal that has come through and how it
 17 is being executed. This is -- the 14/15 price rises
 18 were known as Robin or Window.
 19 Ms Kreisberger said this was an example of BT being
 20 untroubled by price-related churn and fixated on the
 21 risk of bad press. But BT was not untroubled by churn.
 22 We have seen that repeatedly in the documents. Even the
 23 ones that she has selected to quote from, concerns about
 24 churn.
 25 It just, as I said yesterday, is not a valid

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1 criticism of the business for it to be concerned about
 2 bad press. Obviously it will be concerned about bad
 3 press.
 4 Slide 2 here, the objectives, {F/374/2}:
 5 "Financial: [Driving] ... margin ...
 6 "Customer: Offer gives help to mitigate churn and
 7 dissatisfaction .
 8 "Operational ..."
 9 Then:
 10 "PR & External Stakeholders: Balanced reaction to
 11 price changes by regulator, public affairs and media."
 12 The agenda for the meeting:
 13 "Review ... our ... financial position ... "
 14 "And update on our gives approach to defend
 15 the price changes, [in particular]:
 16 "Right Plan Customer Experience."
 17 So that was an ability -- that was a product that
 18 enabled you to work out, on your past usage, what call
 19 plan would be the best one for you.
 20 Then:
 21 "Home Phone Saver ..."
 22 Which was a discounted phone line product.
 23 "Review presenting our price changes to the media,
 24 stakeholders and how our customers will be notified."
 25 Because of course we are under an obligation to

30

1 notify in those circumstances.
 2 Now, if we could go to slide {F/374/13} here. These
 3 are actually notes. So if you remember, this was about
 4 the timing of the announcement:
 5 "... to avoid Sport and spring and use the bank
 6 holiday ... to buffer and fracture criticism ."
 7 Was what Ms Kreisberger emphasised.
 8 If we go back to slide {F/374/12}:
 9 "Executorial Wrap: Our PR positioning."
 10 So yes, BT is considering its PR positioning.
 11 "Key Window PR Points ...
 12 "Our prices are increasing by a maximum of 6.49%
 13 ... "
 14 We have seen previously that 6.49% was actually
 15 higher for various elements than the line rental which
 16 was £1.
 17 "... we still offer Line Rental Saver ..."
 18 We are emphasising that:
 19 "BT is offering great value for [money] ...
 20 "We are sensitive to the ... economic times ..."
 21 The "offering great value for all customers" that is
 22 being emphasised in the second bullet point includes:
 23 "... we've taken care to make sure that vulnerable
 24 customers avoid the increases and we've added extra
 25 money-saving options for low-income customers and for

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1 customers who only want a phone line for calls."
 2 You see "Additional Highlights":
 3 "Right Plan ...
 4 "Active switching within existing base ...
 5 "Free Sport for [lines] ...
 6 "Home Phone Saver ...
 7 "[The] BT Basic [package] ..."
 8 That we have referred to previously.
 9 Now, none of this avoids any of the obligations that
 10 we have under the General Conditions to notify each and
 11 every one of our customers who are going to be subject
 12 to these price rises. That is the General Condition 9.
 13 But in terms of the publicity, the broader publicity
 14 about a price rise, no, we are not trying to put it out
 15 at a point where it would cause -- get maximum profile
 16 in relation to those issues.
 17 Then the last couple of documents I want to go to.
 18 There were some email chains that were referred to.
 19 {F/826/1}, and if we start at page {F/826/6} where the
 20 email chain starts .
 21 This is actually -- this is Stuart Murray. This is
 22 in preparation for a meeting between BT and Ofcom.
 23 Mr Murray's preparing slides. You will see, if we go
 24 back to page {F/826/4}, you will see at the bottom
 25 Mr Murray is asking, copying Mr Shurmer and Mr Tickel:

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1 "James, what we need from you is a completed slide
2 on how pricing has contributed to solus customers (in
3 part) migrating to dual play from us or taking
4 [broadband]/dual play from others, and this is
5 contributing to the reduction in Solus numbers."

6 So this is talking about how there is migration
7 going on. Then there are a couple of emails involving
8 Ms Blight which she will no doubt be asked about. But
9 it is pretty clear that Mr Murray is thinking about
10 switching between Solus and dual play in pricing terms
11 there.

12 Then if we go to page {F/826/3} and go to the
13 bottom, you will see that Mr Shurmer is saying I want
14 a sort of "Q&A type brief", and Mr Tickel says, well,
15 I am looking. Then he says, and this is what is said to
16 be the "trickiest [question]":

17 "Why have you/others been focusing price increases
18 on line rental and calls charges?"

19 As we have seen, in fact that is not the case.

20 But if we then go up, and this is the bit that
21 Ms Kreisberger emphasised:

22 "Whatever the answer, it's unlikely to be
23 attractive ...

24 "Story is probably not that there is a focus on
25 increasing line charges, rather there has been a focus

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1 on the vast majority of customers who buy dual/triple
2 play and getting the pricing right for those customers.
3 Solus has been a secondary consideration, rather than
4 primary focus?"

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

6 Sorry, surely what, and I am not sure what you are
7 interpreting from this, but as I read it, they are
8 beginning by saying: whatever the answer is, it is
9 unlikely to be attractive, because the story is really
10 that for the vast majority of customers they are getting
11 the pricing right, but Solus has been "a secondary
12 consideration, rather than primary focus". In other
13 words, Solus is not getting the same treatment. I think
14 that is what the perception of the story is. I am not
15 saying that is the reality.

16 MR BEARD: No. Obviously the witnesses can be asked about
17 it.

18 THE CHAIRMAN: They can be asked about it, yes.

19 MR BEARD: The primary consideration is setting the prices
20 strategically as a whole. The consideration of solus
21 customers is secondary. That is just not consistent
22 with the idea that there was a particular targeting of
23 solus customers which is the story that the Class
24 Representative is putting forward.

25 In other words, there is a lack of attraction here

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1 because you just were not thinking sufficiently about
2 those solus customers when you were going into a meeting
3 with Ofcom who were clearly concerned about these
4 matters.

5 Obviously the witnesses can be asked about this, but
6 the idea that this is evidence that BT was targeting
7 solus customers with its price rises just does not make
8 sense.

9 THE CHAIRMAN: Yes, I see that.

10 MR BEARD: If we go up to the bottom of page {F/826/2}, this
11 is the quick response from Mr Shurmer:

12 "I think that's right, along with switch from calls
13 to lines."

14 This is a rebalancing issue because you have got
15 call volumes falling.

16 THE CHAIRMAN: Just one moment, please. (Pause).

17 MR BEARD: Can we just go up to the top of the screen.

18 THE CHAIRMAN: I was just looking at the top of the screen
19 to see what is coming before it.

20 MR BEARD: Yes, so this is the end of the chain. If we go
21 to the top, because there are a couple of -- you can
22 read all these obviously at your leisure, but if we go
23 right to the top of that page, if you would not mind.
24 Page {F/826/1}, I am sorry.

25 So this is a draft Q&A in an email at that stage:

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1 "Q: We see lines and call charges increasing during
2 a period where wholesale charges have been falling.
3 Isn't that indicative of market power?"

4 So this is hypothetical questioning coming from
5 Ofcom. What are our responses?

6 "A: We set charges across our products and services
7 in the face of strong, established competition from
8 Virgin, Sky, TalkTalk and a range of other providers."

9 So it is "across our products" we set our prices.

10 "The need to expand the quality and perceived value
11 of our offerings places ongoing pressure on prices and
12 margins.

13 "Only by offering value will we meet our targets for
14 acquiring and retaining customers.

15 "Q: But that must only apply to the bundled
16 customer, not the Solus voice ...

17 "A: We do not see such a simple, static segmentation
18 of the market.

19 "Aside from our targeted Solus offerings -- ... Basic
20 and Home Phone Saver -- we have standard line rental and
21 calls charges across all customers. As we change those
22 prices for all customers, we have to be mindful of
23 competitor reaction in the supply of voice within
24 bundles and ensure we continue to provide overall value
25 to customers from across the package of services.

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1 "We cannot and would not set voice prices to all
 2 customers with a limited focus on a shrinking group of
 3 true solus customers."
 4 THE CHAIRMAN: Just a moment, yes. Just a second. (Pause)
 5 Yes.
 6 MR DORAN: Sorry, I do not know if you can help me or if
 7 this is a question for the factual witness.
 8 Where it says:
 9 "We cannot ... set voice prices to all customers
 10 with a limited focus on a shrinking group of true solus
 11 customers."
 12 It looks like he is saying that it is not possible
 13 to focus on VOCs.
 14 MR BEARD: This is 2016. That would be true at that time.
 15 We need to ask the witness whether it is "cannot" in
 16 a commercial sense or "cannot" in a not possible sense.
 17 MR DORAN: In a technical sense.
 18 MR BEARD: In a technical sense. At that time BT Consumer
 19 did not have the details -- it was not allowed to have
 20 the details from Openreach which enabled it to
 21 distinguish between voice only customers and SPCs.
 22 MR DORAN: That probably is a question for the ... just
 23 because they could clearly write to them, because when
 24 there were price changes they knew to whom they were
 25 sending the revised prices.

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1 MR BEARD: Yes, but they knew who to write to because they
 2 held a voice line. They did not know whether they were
 3 an SPC or a VOC.
 4 MR DORAN: That is a question for them.
 5 MR BEARD: Yes. I think there is no doubt about that issue,
 6 because that is why I think the Class Representative now
 7 recognises that you could not have a separate market
 8 because BT could not price discriminate between
 9 voice only customers and SPCs before the commitments.
 10 MR DORAN: Before 2017.
 11 MR BEARD: Yes.
 12 MR DORAN: Thank you.
 13 MR BEARD: I think it may be a technical "cannot" as well as
 14 a commercial.
 15 MR DORAN: That is very helpful, thank you.
 16 MR BEARD: {F/472/1}. In any event, the point I am making
 17 here the idea that this document is showing that there
 18 was targeting of this group is just not made out at all.
 19 {F/472}, this is the chain which is -- it
 20 is July 2016. You will recall that Ms Kreisberger
 21 referred to the fact that in the top paragraph:
 22 "I'm not sure how we get round this? I don't see an
 23 obvious argument to justify in a way that would satisfy
 24 Jonathan why line rental has increased at the rate it
 25 has (leaving aside the justification this year created

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1 by the change in care level)?"
 2 Now, she seemed to be suggesting that this was BT
 3 somehow accepting that there was not a justification for
 4 the price rises. That is not what is going on here.
 5 Jonathan is Jonathan at Ofcom. So what is being said
 6 here is that Jonathan at Ofcom takes a particular view
 7 in relation to these matters. We have encountered it
 8 from the discussions. We do not think the account we
 9 can give is going to move him. That does not make that
 10 somehow a suggestion that BT does not think there is any
 11 justification in relation to these matters. I am sure
 12 this will be put to Ms Blight who is part of the email
 13 chain but there is no sense that Mr Murray is buying
 14 into this at all.
 15 Then I think the final document that I think
 16 Ms Kreisberger referred to was actually one {F/631/1}.
 17 So this is "Solus -- Landline only -- Customers".
 18 but it is worth bearing in mind this is March 2019. So
 19 this is after the commitments pricing has come in. So
 20 it is an interesting document to pick as somehow
 21 indicating the position of VOCs pre-commitments or SPCs
 22 at all because of course we know from the material I was
 23 taking you to earlier that around 50% of voice only
 24 customers did in fact switch to bundles, including
 25 broadband, during the period 2014-2018.

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1 Dr Jenkins has actually shown in her evidence how
 2 that switching slowed after the coming into effect of
 3 the BT commitments, something you would not think was
 4 necessarily surprising. In other words, you have this
 5 group of VOC customers. You are mandated to put
 6 a significant discount on their pricing for lines and in
 7 consequence their incentive to switch to bundles
 8 actually diminishes, and that is borne out by the
 9 material that Dr Jenkins analyses. It is referred to as
 10 her events study and I will just give you the note for
 11 it. It is referred to at paragraph 7.17 in her first
 12 report and it is {IR-E/17/252} but we do not need to go
 13 to it now. We will stay with this slide.
 14 So when we turn over the page, {F/631/2}, it is
 15 remarkable that this is now being relied on as the
 16 indication that solus customers, true solus customers,
 17 voice only customers are somehow not switching as an
 18 indication of the broader characteristics of the market
 19 when we are not dealing with these customers in this
 20 claim. Because 2019 VOC are not part of this claim.
 21 But what is really striking is that even then if you
 22 look at the top title:
 23 "Solus -- Landline only -- customers give high
 24 scores, and are not looking to go anywhere, but we could
 25 still do more to demonstrate that we value this base."

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1 So they are considering ways in which that can be
 2 considered. Then in particular on the right-hand side
 3 on what next.
 4 "Bear in mind this base are essentially fine as they
 5 are but seek to pick up relevant upsell opportunities."
 6 So there is still consideration that there is an
 7 opportunity to up-sell in relation to these people.
 8 If we go to slide {F/631/7}:
 9 "Broadband could be relevant to some ..."
 10 So this is even after the commitment.
 11 "... could be relevant to some, but there is little
 12 interest."
 13 So Ms Kreisberger was trying to say, when it says:
 14 "There are around 1 in 5 of the Solus base who own
 15 devices that use the internet ...
 16 "Majority do not have to stay with BT ...
 17 "However, there is near universal lack of interest
 18 in Broadband, with 4 in 5 saying they are 'not at all
 19 interested'."
 20 This is not good evidence of the position on
 21 switching ... It is not good evidence on the position of
 22 switching -- I am sorry, there has been a request from
 23 Ms Kreisberger that we use the OR version. Could we go
 24 to {OR-F/631/7}. That is the redactions are lifted. It
 25 is the same slide.

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1 The point is this: that in relation to non-Class
 2 Members and their response after the commitments about
 3 their interest in switching, it does not provide you
 4 with any useful insight into the switching and market
 5 definition issues before the commitments. Instead,
 6 I have shown you the vast level of switching that was
 7 occurring before the commitments, including in relation
 8 to voice only customers.
 9 So again, the selectivity of Ms Kreisberger's
 10 reference means that by decontextualising the document
 11 you do not see whether or not it has significance or
 12 not. Just to bear in mind that even in relation to the
 13 "1 in 5", you see on that slide, top left-hand side:
 14 "... this ownership could be [the ownership of other
 15 devices] the hook for upsell to dual packages ('make the
 16 most of your devices')."
 17 MR RIDYARD: Are you saying this group that are being looked
 18 at here, given the timing, are not representative of the
 19 VOCs in the earlier period because of the price change,
 20 the commitments price change, or because of the
 21 composition of that group in 2019 is different from the
 22 composition of that group in 2015?
 23 MR BEARD: I am focusing on the price change issue here. It
 24 is obviously right that the composition will change over
 25 time in relation to VOCs as well, just because --

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1 MR RIDYARD: Because the ones that have disappeared -- well,
 2 the ones that have switched at least to a bundle
 3 presumably must have had a device, or were planning on
 4 getting one at least.
 5 MR BEARD: Yes, completely. That is obviously right. You
 6 are completely right and we recognise this, and in a way
 7 that is what Ofcom is looking at. It is thinking, well,
 8 you know, we had these concerns about people
 9 progressively and that is why we intervened as we did.
 10 We do not agree with some of the reasoning for that
 11 intervention but it explains the position that we are
 12 in.
 13 Now, I spent some time on the documents because that
 14 was a key part of the evidence relied upon.
 15 I want to go backwards, because those documents do
 16 not provide an evidential base for the claimants to say
 17 that we were exploiting these customers.
 18 THE CHAIRMAN: Just a minute. (Pause)
 19 MR BEARD: That is a key plank of the material that is put
 20 forward and prayed in aid in relation to the market
 21 definition and more generally in relation to positioning
 22 in this case, and we say it is not a fair appraisal of
 23 that material at all, but I do need to briefly deal with
 24 the more technical issues in relation to market
 25 definition.

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1 THE CHAIRMAN: Before you do that, we will take our
 2 transcriber break. Thank you.
 3 (11.43 am)
 4 (A short break)
 5 (11.57 am)
 6 MR BEARD: As I say, I was dealing with factual material,
 7 and now I just want to briefly deal with some of the
 8 points that Ms Kreisberger emphasised about actual
 9 SSNIPs.
 10 Now, we know that the hypothetical monopolist test
 11 is a test where you take a focal product and you ask
 12 yourself whether, if you were the monopolist of just
 13 that product, you could profitably raise the prices of
 14 that product by 5 to 10% and that there would be such
 15 limited switching or rapid entry that it would be
 16 profitable for you to maintain those prices. If so, you
 17 define the product round the focal product. If, on the
 18 other hand, it is not profitable, then other products
 19 form part of that market. But it is a hypothetical
 20 test, one that draws upon data available which you can
 21 use, undoubtedly, as well as being a thought experiment.
 22 But in fact, the Class Representative never carries
 23 out that hypothetical monopolist test. Instead, what we
 24 saw from Ms Kreisberger was reference to the actual
 25 price changes.

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1 If we go to her skeleton, which is {AA/1/10}, she
 2 relied on these two tables.
 3 THE CHAIRMAN: Just one moment, please. (Pause)
 4 Sorry, which -- yes, table 1.
 5 MR BEARD: Table 1 and table 2. So table 1 is "Standard
 6 Line Rental price increases pre-Commitments", although
 7 there are a couple of price changes missing from there
 8 in April 2017 and January 2018 where actually the prices
 9 of line rental did not go up. So there were more
 10 general price changes but not line rental changes.
 11 Then you have "Standard Line Rental price increases
 12 post-Commitments".
 13 THE CHAIRMAN: Yes.
 14 MR BEARD: What Ms Kreisberger said was, well, look, you can
 15 see the prices changing, and arithmetically the prices
 16 for these line rentals, I mean, apart from a couple of
 17 years, they look as though they are between 5 and 10%.
 18 5 and 10 % is the benchmark for small and non-transitory
 19 increase in price. There you have it. Those are
 20 SSNIPs, they were maintained, it must have been
 21 profitable. That is sufficient.
 22 But as I mentioned yesterday, you cannot just assume
 23 that a 5% price rise being imposed in the real world is
 24 in fact an indication of market power.
 25 The oddity of the position that Ms Kreisberger is

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1 maintaining is illustrated by the fact that her case
 2 applies from -- her account, she says, applies
 3 throughout this period. Yet, as we saw yesterday,
 4 although she did not refer to it, Ofcom itself in its
 5 2013 review did not consider that there was a concern
 6 about market power in relation to the period through to
 7 2013. Indeed, if you remember, it was talking about
 8 a prospective consideration in 2013 and it did not
 9 envisage any concerns for the next three years.
 10 Now, at that point, Ms Kreisberger said, ah yes, but
 11 you are just referring to the 2013 Ofcom report. There
 12 was another report in 2014.
 13 Well, yes, that is true, there was. That is at
 14 {C/340.1/1}. So this is 28 January 2014, "Cost and
 15 value of communications services in the UK".
 16 If we just go to page {C/340.1/11}, this is what
 17 Ofcom said in 2014:
 18 "There is an active market in the UK for standalone
 19 (i.e. not bundled) fixed line rental services. Retail
 20 competition is enabled by regulated access to wholesale
 21 line rental, the price of which has fallen and will
 22 continue to fall. This has enabled the provision of
 23 competitive services by other providers. For example,
 24 the Post Office currently offers a standalone ...
 25 service for £12 a month.

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1 "Social tariffs are also available ... The price of
 2 BT Basic, the principal social tariff, is lower now in
 3 real terms than it was six years ago. This is a good
 4 choice for eligible consumers ... Eligibility is defined
 5 as being in receipt of certain benefits available to low
 6 income households."
 7 So we have touched on that.
 8 "Despite this range of choice and the overall
 9 positive trend in fixed voice costs, some retail prices
 10 for line rental have increased in recent years. This is
 11 related to the fact that landlines generally tend to be
 12 sold as a bundle with other products - historically with
 13 voice calls ..."
 14 So that is the sense of bundling, sir, that you were
 15 referring to yesterday.
 16 "... more recently with broadband. Market
 17 competition has tended to focus on the headline price of
 18 the bundle, which has generally fallen. Consequently
 19 consumers buying a landline service without broadband
 20 may not benefit fully from the effects of competition.
 21 Furthermore, some providers (TalkTalk and Virgin Media)
 22 have recently ceased their standalone landline service.
 23 Ofcom will continue to monitor this situation
 24 carefully."
 25 So 2013 they said: we do not have concerns here.

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1 2014 they are saying: we are going to monitor the
 2 situation.
 3 Now, in those circumstances, it is very hard to see
 4 what Ms Kreisberger's case is in relation to at least
 5 the period up until 2014 on these numbers, because she
 6 relies upon Ofcom, as we know, very heavily in relation
 7 to her appraisal of these matters, and yet on her
 8 reliance on Ofcom, Ofcom is not saying it has any
 9 concerns about these issues at that time, such as to
 10 warrant some sort of intervention, but it is going to
 11 monitor the situation.
 12 Just pausing there. If you then take the pricing
 13 through to 2014, which were the 9%, 4% and so on, and
 14 these are supposedly the SSNIPs that are indicative of
 15 market power, you have a situation where, on her own
 16 case, the regulator that is in charge of this market is
 17 not identifying a concern in relation to market power
 18 such as to warrant intervention. It is monitoring.
 19 So the starting point is not promising in relation
 20 to this. But it does get more problematic, because, of
 21 course, by not doing a hypothetical monopolist test and
 22 just relying on this data, what the Class
 23 Representative's experts have not done is they have not
 24 actually dealt with the focal product. Because of
 25 course their focal product is access, in other words,

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1 line rental and calls. That is what they say is the
 2 focal product you carry the SSNIP out on. This is only
 3 line rental. When we look at the price of line rental
 4 and calls together we can see a very different picture.
 5 Now, Ms Kreisberger is not keen on this, but if we
 6 go to {IR-E/17/56}, this is the plot of the ARPU, which
 7 obviously we saw being referred to in the BT documents,
 8 but you do not see the rises in relation to the ARPU.
 9 As you will recall, that is the average revenue per
 10 user, taking into account both calls and line rental,
 11 and, as we know, volumes of calls were falling and there
 12 was rebalancing going on between the charges for line
 13 rental and calls.
 14 So even if we take Ms Kreisberger's approach which
 15 says, 'well, let us look at real data in relation to the
 16 focal product', you do not see these notional SSNIPs in
 17 relation to the ARPU. In other words, the focal product
 18 price, which is supposed to be the basis for the market
 19 definition.
 20 MR RIDYARD: Mr Beard, this ARPU presumably includes the
 21 effect of the commitments?
 22 MR BEARD: The ARPU ...
 23 MR RIDYARD: Obviously on those VOCs.
 24 MR BEARD: This is only in relation to Class Members --
 25 MR RIDYARD: So --

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1 MR BEARD: -- since the commitments, Members are out.
 2 MR RIDYARD: Okay, it does not include the VOCs after 2018.
 3 MR BEARD: No.
 4 MR RIDYARD: Okay.
 5 THE CHAIRMAN: Just a second. (Pause). Yes.
 6 MR RIDYARD: Thanks.
 7 MR BEARD: So I am just saying you should not do it in the
 8 way they have done. They have not done a proper
 9 hypothetical monopolist test. If you are going to do
 10 it, you should at least look at the data on your focal
 11 product price, and your focal product price is not
 12 showing the existence of these SSNIPs.
 13 It is common ground that ARPU is the best proxy for
 14 SFV prices for the purposes at least for the limb 1
 15 cost-plus comparison. We see that, just for your notes,
 16 in the joint expert statement, reference {OR-E/49/105}.
 17 What we are saying is if you are going to go down
 18 this route, first of all, if you are relying on all this
 19 Ofcom material, you needed to take that into account
 20 when you were coming up with your account that says
 21 these SSNIPs are an indication of market power, when the
 22 regulator was not making a finding of market power, when
 23 it carried out a careful review.
 24 Second of all, you should have been looking and
 25 taking into account the price of your focal product,

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1 which is what you are supposed to focus on in relation
 2 to these matters.
 3 In any event, what we see is price changes that
 4 actually in that table are very close to various
 5 measures of inflation. If we go to {IR-E/17/263}, if we
 6 could just blow up figure 7.3. This is in Dr Jenkins'
 7 first report. This is just focusing -- this is not
 8 ARPU, this is just focusing on the standard line rental,
 9 and the black line, which is somewhat masked, is the
 10 actual level of line rental price. You can sort of see
 11 it in the steps underneath. So those will reflect,
 12 broadly speaking, the tables that we were looking at.
 13 But then what Dr Jenkins has done, is she has
 14 adjusted pricing for CPI, so Consumer Price Index
 15 inflation, and a specific telecom CPI adjusted level of
 16 inflation.
 17 It is true that the SLRs are above the CPI adjusted
 18 level on its own, but it is notable that CPI was moving
 19 upwards during that period. So the differential between
 20 inflation adjusted price changes and the actual price
 21 changes was very small, and if you actually use
 22 a telecom weighted inflation measure it really just does
 23 not exist.
 24 Now, of course what is said by the Class
 25 Representative is, well, against this plot you should

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1 plot the wholesale line rental price, and that was
 2 falling. Of course we are not denying that. But of
 3 course that is in a way just a re-run of the limb 1
 4 exercise because that is only one of the costs you are
 5 dealing with here.
 6 So there are a series of reasons why this hybrid
 7 reference to SSNIPs that is not a proper hypothetical
 8 monopolist test is not robust. It is not providing good
 9 evidence of market power across the period.
 10 But there is another reason, which we touched on
 11 yesterday, which is that when you are considering
 12 a hypothetical monopolist, the hypothetical monopolist
 13 monopolises only the focal product. As we know, BT
 14 provides not only the standalone fixed voice services
 15 but bundles. We also know, having seen this repeatedly
 16 in all the evidence that I have gone to, evidence chosen
 17 by Ms Kreisberger, that BT was interested in up-selling
 18 to bundles.
 19 We also saw from the switching data I took you to
 20 yesterday that actually BT recaptured lots of people
 21 that switched out from SFV into their own bundles.
 22 Of course that means that, for BT, setting of prices
 23 is a different exercise from that of a hypothetical
 24 monopolist, because what you are thinking about is the
 25 extent to which actually you will migrate people to your

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1 bundles. It is the recapture rate issue.
 2 That is important, because when you are carrying out
 3 the hypothetical monopolist test you have to ask
 4 yourself what is the level of switching that would occur
 5 such that, just in relation to that focal product,
 6 maintaining the SSNIP would be unprofitable, and the BT
 7 data does not tell you that.
 8 That is why we say it does not have probative value
 9 in relation to a proper hypothetical monopolist test.
 10 We are not saying you ignore all the data you have got
 11 out there or the business conditions. Obviously market
 12 definition and hypothetical monopolist test has to be
 13 considered in context. But there is something flawed in
 14 the way in which this has been done, and that is
 15 something that Dr Jenkins has explained in relation to
 16 the account on market definition.
 17 So I should say, just picking up the point that
 18 Mr Ridyard raised yesterday about a weak and strong
 19 version of that recapture incentive, that does not
 20 matter for these purposes. Because the strong version
 21 is BT makes more money per customer on its switchers to
 22 bundles, that is the strong version. So it has an
 23 absolute positive incentive to switch people across and
 24 we say that was the position. But for these purposes,
 25 that does not matter, because as long as you get some

1 kind of return from switching of a material sort, it
 2 will change the analysis of your pricing profitability
 3 when you are thinking about switching.
 4 Because the hypothetical monopolist -- when you are
 5 asking whether or not the hypothetical monopolist can
 6 profitably maintain the 5 or 10%, you are asking whether
 7 or not enough people switch away completely from it to
 8 make that profitable. In other words, you lose so many
 9 chunks of profit that, even though overall the remaining
 10 base are more valuable to you, it nets out negatively
 11 for you.
 12 So long as you are recovering some sort of profit
 13 elsewhere, even if it is less than you get on the focal
 14 product group, that still affects the overall
 15 profitability calculation.
 16 So as I say, there are a series of critical problems
 17 here, and of course all of this is against a background
 18 of essentially trying to say, 'well, if there is
 19 switching it is just a secular trend and it is not
 20 dependent on price', which we say is the wrong approach.
 21 So the actual SSNIP material does not assist.
 22 The other point that was emphasised by
 23 Ms Kreisberger was, well, there is a difference between
 24 the price that split purchase customers pay for getting
 25 voice and broadband and what bundle customers pay.

1 Therefore, if there is a difference, that must suggest
 2 that BT has market power at least in relation to them.
 3 But it is basic economics that you can have products
 4 that are differently priced and they can still be
 5 competing against one another. The question is whether
 6 or not you could increase the SPC price by 5 to 10%
 7 profitably as a hypothetical monopolist. It is not
 8 about the differential between the two.
 9 THE CHAIRMAN: Just a minute. (Pause).
 10 MR BEARD: So as I say, the technical approach that
 11 Ms Kreisberger adopted does not fit with the proper
 12 hypothetical monopolist test. It is sort of carrying
 13 out a hybrid which is neither one thing nor the other,
 14 and it does not take into account a range of important
 15 factors.
 16 The other big strand of material was the factual
 17 evidence. I have explained how that does not help her
 18 in relation to these issues. In those circumstances,
 19 the supposed SSNIP triptych, or whatever it is to be
 20 called, does not get her close to explaining the market
 21 definition that she wants, and she has to prove this.
 22 A lot of what Ms Kreisberger then did was criticise
 23 Dr Jenkins. Just to emphasise: it is for Ms Kreisberger
 24 and her experts to prove this. What Dr Jenkins has done
 25 is explained the problems with the approach. She has

1 actually gone further, however. She has done what the
 2 CMA guidance or the OFT guidance refer to as a critical
 3 loss analysis. A critical loss analysis is really
 4 carrying out a SSNIP test properly, and there were
 5 a couple of criticisms. I will leave Dr Jenkins to
 6 explain the modalities of her critical loss analysis,
 7 but I would recognise that that critical loss analysis
 8 is just done in relation to line rental, it is not done
 9 in relation to overall ARPU.
 10 THE CHAIRMAN: Yes.
 11 MR BEARD: But nonetheless, if you are looking at line
 12 rental, what she has done is important in explaining how
 13 you can do these things properly.
 14 Now, there are essentially two criticisms levelled
 15 at that. One is what is called the cellophane fallacy,
 16 which has been referred to. In other words, if you are
 17 up at the top of the price of cellophane you will start
 18 switching away to paper and aluminium foil, and they are
 19 not really in the same market.
 20 It is said that that infects all of the data because
 21 if you assume that the price is already too high then,
 22 in those circumstances, you cannot clean out
 23 a cellophane fallacy risk.
 24 Now, that has not been explained how that is
 25 consistent with her own reliance on Ofcom's analysis of

1 the markets in the preceding periods. That is not
 2 explained. But leaving that aside, Dr Jenkins is
 3 careful to carry out various tests and sensitivities to
 4 try to control for the cellophane fallacy and identify
 5 whether there are any difficulties in relation to it.
 6 If you go to {IR - E/17/96}, you will see at paragraph
 7 4.95 she says:
 8 "A further possible criticism of my CLA is that,
 9 since the allegations concern excessive pricing, if they
 10 are correct then the prevailing price for BT's SFV
 11 Services would be in excess of the competitive price.
 12 This raises the challenge of the cellophane fallacy,
 13 where the incumbent has used their market power to raise
 14 prices to the point where further price increases would
 15 not be profitable. When an HMT is conducted [so that is
 16 a hypothetical monopolist test] at the prevailing price,
 17 an overly wide market definition may be adopted,
 18 underestimating the incumbent's market power ... As
 19 I explain in section 6, I find BT's SFV price to be
 20 within competitive levels and so I do not believe that
 21 the cellophane fallacy applies here. Nevertheless, for
 22 completeness I apply robustness checks that allow me to
 23 partially adjust the CLA to allow for a lower price and
 24 present those robustness checks below."
 25 In other words, she does not just stick with the

1 actual line rental prices, she discounts those, saying:
 2 'well, let us assume you are right about this'. She
 3 still comes out with a market definition on the basis of
 4 the critical loss analysis which is wider.
 5 So the cellophane fallacy is not valid.
 6 The other point that I think was levelled at her was
 7 she had engaged in what was referred to as the bundle
 8 pricing fallacy, but the bundle pricing fallacy, without
 9 wanting to get (inaudible), is rather fallacious itself.
 10 That is not what Dr Jenkins has done. The bundle
 11 pricing fallacy is the idea that there was an automatic
 12 link between the prices being charged in bundles and
 13 the prices of line rental for standalone fixed voice.
 14 That is just not what she has done or said.
 15 The two accusations are, from Ms Kreisberger, that
 16 Dr Jenkins was saying there was an automatic link
 17 between the increase in voice prices and an increase in
 18 the bundle price. She was not saying that. She has
 19 simply said that BT would have considered them together
 20 and that the dynamics for bundles could not be ignored
 21 when BT was setting its voice prices.
 22 Not only is that economically sound and not slipping
 23 into fallacy, but as we have just seen from the tour of
 24 Ms Kreisberger's chosen documents, that is what BT was
 25 doing.

1 The second thing that was part of this accusation
 2 was that Dr Jenkins was positing that bundles placed
 3 a downward force on the price of SFV services. Now, to
 4 be fair to Ms Kreisberger, she said this was the
 5 "implication" of Dr Jenkins' evidence. But it is not
 6 right. All that Dr Jenkins is saying is that they are
 7 linked, they are interrelated. You cannot put voice
 8 prices up -- voice service prices up without thinking
 9 about how it works in relation to broadband, either
 10 increasing the price of the bundle or reducing the
 11 incremental broadband price. Indeed, as we have seen in
 12 the documents, the way in which BT laid out its
 13 consideration of price rises was considering the stacks
 14 of line rental charges and then broadband incrementally
 15 on top.
 16 So the primary criticisms of what Dr Jenkins has
 17 done are not valid, and she has done a proper
 18 approach -- adopted a proper approach to the critical
 19 loss analysis, but key is that she is the only person
 20 who has actually properly done any sort of hypothetical
 21 monopolist test here.
 22 There is one other thing I should pick up in the
 23 context of this issue on market definition which is the
 24 point that was made about the secular trend, and
 25 I picked up issues on the secular trend yesterday. If

1 you remember, I explained how what has been said by
 2 Mr Parker is that the massive amounts of switching we
 3 see is not because voice services, split customer
 4 services, are in the same market as bundles, which would
 5 be perhaps the natural thing to think if people are
 6 switching from one product to another, that actually it
 7 is just a secular trend unrelated to price, and it is
 8 only by reference to price that you define markets.
 9 I explained how that really does not make sense,
 10 because when you talk about a trend, particularly when
 11 you focus on the SPC customers, it is unclear what trend
 12 you are talking about here, because they already take
 13 broadband, and the idea that there is a broad move to
 14 broadband and somehow that affects matters does not make
 15 sense when they are already taking it.
 16 We have also emphasised the lack of any proper
 17 evidence in relation to this secular trend.
 18 But there is a third point, which is that actually
 19 Dr Jenkins carried out an events study in relation to
 20 pricing and the event in question was the introduction
 21 of the commitments pricing. Because what she asked was:
 22 'was the amount of switching by voice only customers
 23 higher or lower before those commitments?' In other
 24 words, did the level of switching by voice only
 25 customers materially drop when the prices they were

1 being charged for standalone fixed voice dropped due to
 2 the commitments?
 3 Her analysis, which is set out in annex 10 to her
 4 report, which, just for your notes, is {OR-E/25/136},
 5 shows how, in fact, there was a drop in that level of
 6 switching. Indeed, conversely, the rate of switching by
 7 SPCs actually increased after April 2018.
 8 Of course, there is one other plank in relation to
 9 Ms Kreisberger’s market definition contention, which is
 10 the reliance on the Ofcom material, and I do just want
 11 to touch on that.
 12 Now, there are two points to make in relation to it.
 13 First of all, there are only provisional findings and
 14 then a statement. In the statement, there is
 15 specifically not a conclusion as to precisely the market
 16 definition for SPCs. It was all prospective, and so the
 17 findings are limited.
 18 But it is important actually just to pick up the
 19 *Qualcomm* case, because this goes not only to this piece
 20 of material that is relied on by Ms Kreisberger, but
 21 more generally.
 22 Could we go to {G/94/1}. This is actually to do
 23 with a strike-out of a particular part of a pleading.
 24 If we go down to page 5, paragraph 11 {G/94/5},
 25 Qualcomm was seeking to strike out part of a pleading —

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1 in context, this is a certification application for
 2 certification of a class claim.
 3 “The application by Qualcomm is to strike out the
 4 second sentence of paragraph 4 of the Reply. The issues
 5 which arose during the course of argument were as
 6 follows:
 7 “(1) Is the ruling in *Hollington v Hewthorn* binding
 8 ... Alternatively, even if not binding, should the rule
 9 in *Hollington v Hewthorn* be applied ...
 10 “(2) Should this matter proceed to trial on the
 11 current pleadings ...”
 12 If we go down to paragraph 13, {G/94/6}, which is
 13 the next page, it just explains:
 14 “The modern interpretation of the rule in
 15 *Hollington v Hewthorn* is that, absent the operation of
 16 estoppel, factual findings in civil cases in England and
 17 Wales are inadmissible in subsequent proceedings. The
 18 rule does not extend to criminal convictions. The
 19 development of the law in this area, and the reasons for
 20 it, were explained by Christopher Clarke LJ in *Rogers v*
 21 *Hoyle*.”
 22 The essential point is: are findings made in one
 23 civil case admissible or not in another civil case?
 24 That is what is being considered here.
 25 If we then go down to paragraph 22 {G/94/9}, what is

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1 being said is that that rule, strictly speaking, does
 2 not bind the CAT. Formally, that rule does not bind the
 3 CAT, because it has its own rules of evidence.
 4 Paragraph 23:
 5 “We are of the view that at the trial of these
 6 collective proceedings it would not be appropriate to
 7 attach any weight to the findings reached by other
 8 courts, tribunals or regulators. The principal reason
 9 for this is the reason given by Christopher Clarke LJ in
 10 *Rogers v Hoyle*, being that it is for this Tribunal to
 11 assess the evidence and make primary findings of fact.
 12 Relying upon the evaluative judgments of other
 13 decision-makers necessarily circumvents that role. To
 14 place weight on their findings, however distinguished or
 15 authoritative, risks the decision being made at least in
 16 part on evidence which is not before the Tribunal.”
 17 Now, the issue here was reliance in the pleadings on
 18 foreign regulatory judgments, but the conclusion of the
 19 CAT here applies in relation to the nature of findings
 20 made in any regulatory judgment.
 21 If we go down to paragraph 26 on the next page.
 22 I am sorry, it is on the same page. My apologies.
 23 There is a reference to the passage in relation to
 24 *Hollington v Hewthorn*.
 25 “That passage does not suggest that the judge was

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1 departing ... Rather, he was saying [here] that he was
 2 entitled to have regard to ‘matters of primary fact’
 3 recorded in a previous judgment (which happened to be
 4 his own judgment following a lengthy trial), and having
 5 considered those matters was entitled to reach the same
 6 conclusions as reached in that previous judgment.”
 7 But if we pick it up at paragraph 28:
 8 “As we have explained, *Qualcomm* does not object to
 9 references to the decisions of foreign courts or
 10 regulators for that purpose, i.e. to identify the
 11 evidence before those decision-makers. What it objects
 12 to is the suggestion that the Tribunal can give any
 13 weight to the evaluative findings of those
 14 decision-makers as part of the process of reaching its
 15 own decision on the evidence before it.”
 16 Then if we go on to paragraph 30, {G/94/10}.
 17 “[The] finding of another court or regulator should
 18 not be excluded but should be given appropriate weight
 19 in all the circumstances at trial, which could at that
 20 stage include consideration of fairness to both parties.
 21 “We see however that this could present considerable
 22 difficulty. How would this Tribunal, at trial, go about
 23 assessing how much weight should be given to
 24 a particular decision of another court or regulator?
 25 That would almost inevitably involve a detailed

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1 consideration of the evidence that was before the other
 2 decision-maker and the nature of the decision-making
 3 process. It might also require an assessment of the way
 4 in which the arguments were put to that decision-making
 5 body, on both sides. There would be in consequence by
 6 what HHJ Paul Matthews described at paragraph 51 of
 7 *Crypto Open Patent Alliance ...* as satellite litigation
 8 about circumstances in which the earlier decision was
 9 come to, and how far it could properly be helpful in the
 10 later proceedings."

11 The conclusion is at paragraph 31:
 12 "The task of this Tribunal is not to second-guess
 13 the quality of the assessment of another decision-making
 14 body. It is to evaluate the body of evidence before the
 15 Tribunal in the proceedings in hand and reach its own
 16 assessment based on that evidence."

17 So just to sum up the position, Ofcom may make
 18 findings in various documents albeit that a lot of them
 19 are being referred to as provisional conclusions, but
 20 what was being said here in general terms was it is not
 21 appropriate for weight to be placed on those. Indeed,
 22 the Tribunal went as far as to say they should not be
 23 admissible here in relation to foreign proceedings,
 24 decisions.

25 Now, of course the fact that there were commitments,

1 the fact that Ofcom carries out investigations, no issue
 2 with that. The fact that there is an Ofcom switching
 3 tracker document, no issue with that. That was referred
 4 to in the Ofcom decisions. We have been to that and
 5 I have explained why there is a migration bias problem
 6 with it.

7 But the idea that this Tribunal should be relying on
 8 Ofcom's findings in relation to those matters are points
 9 which are being deprecated here.

10 Now, in answer to this the Class Representative
 11 cites the *Evans* case, another certification case,
 12 {G/97/1}. This is in relation to the Class
 13 certification on foreign exchange. It is
 14 a Court of Appeal judgment.

15 If we go to page {G/97/41}. You will see there are
 16 references to Commission decisions. So what was being
 17 argued about here was whether or not there could be
 18 reliance on particular Commission decisions that had
 19 been taken which were not directly concerned with
 20 parties or the specific claim that had been brought to
 21 that at that date. It is quite a weird situation.
 22 There had been two Commission decisions saying that
 23 there had been trader price information exchange that
 24 was unlawful. There had been a delay in the third one
 25 coming out. The third one came out. The question

1 before the Court of Appeal was whether or not that could
 2 be referred to and relied upon even though it did not
 3 form the basis of the case as put on certification .

4 If we just go down to paragraph 97 you can see that
 5 there is a reference to the rule in
 6 *Hollington v Hewthorn* and it is contended that "the rule
 7 in *Hollington v Hewthorn* applies the findings in the
 8 decision".

9 In other words, the civil rules exclude them. If we
 10 go over the page to paragraph 98:

11 "I start with admissibility ."
 12 There is a conclusion there being reached by the
 13 court. If we go down the page {G/97/42} to paragraph
 14 99, referring to exceptions to that rule.

15 If we go on to paragraph 100:
 16 "Most importantly, it is well established that the
 17 rule does not apply to CAT which has its own rules of
 18 procedure."

19 Then if we go over the page, {G/97/43}, many of them
 20 are correct and there is a citation there of Qualcomm,
 21 the judgment I have just taken you to in particular to
 22 paragraph 18. Then there is obviously the reference to
 23 this case at certification .

24 "The CAT had relied upon findings in a prior
 25 settlement decision between BT and Ofcom. The

1 Court of Appeal agreed with the CAT that the findings
 2 were relevant as showing a serious case to be advanced
 3 but made clear that they were not binding upon the CAT
 4 at trial . Of course, there is already a statutory
 5 exception to the rule in section 60.

6 "There is no need for the CAT to be hidebound by the
 7 common law rule on fairness. Whilst the CAT does not
 8 apply the strict rule in *Hollington* it does, of course,
 9 endeavour to secure fairness but it is a sophisticated
 10 Tribunal well able to form its own view on the value, if
 11 any, of prior findings."

12 I think what is being said by the Class
 13 Representative is that the conclusions by the CAT itself
 14 in Qualcomm are somehow to be qualified by reference to
 15 this . We do not read it in that way.

16 MS KREISBERGER: Could I just, while the Tribunal has this
 17 open, I think it is important that you are not left with
 18 a misleading impression, also read paragraphs 102 and --

19 THE CHAIRMAN: I am reading paragraph 102 at the moment.
 20 I would like it to be moved up if it could so we could
 21 read the whole of paragraph 102. Perhaps we could just
 22 read that and then move on.

23 MR BEARD: Yes, please.

24 THE CHAIRMAN: Just a moment. (Pause).

25 MR BEARD: I was going to come to paragraph 102.

1 Ms Kreisberger does not need to be troubled because the
 2 point I make is that paragraph 102 cites at the bottom
 3 paragraph 30 of *Consumers Association*. That is
 4 Qualcomm. So what is being said here look, you may well
 5 at certification stage in particular see a decision and
 6 be able to look at it for linings of enquiry, evidence
 7 that might be relevant, issues towards disclosure and
 8 so on but it is not reaching a conclusion that the
 9 approach of the CAT in Qualcomm is somehow wrong in
 10 relation to these issues. It is saying,
 11 *Hollington v Hewthorn* definitely does not apply but you
 12 have to be extraordinarily careful about placing any
 13 reliance on decisions of other regulators or other court
 14 cases, findings in other court cases, evaluative
 15 decisions and indeed goes as far as to say not
 16 admissible.
 17 THE CHAIRMAN: Can I just ask what your position actually is
 18 here. I mean, if it is a question of weight there can
 19 be all sorts of caveats applied as to the extent to
 20 which any real weight should be given to a prior
 21 decision. But just so that we understand your position
 22 on the law, is your position on the law that the kind of
 23 findings by Ofcom that you have described are
 24 inadmissible?
 25 MR BEARD: The evaluative findings of the basis of the

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1 Qualcomm judgment, yes, they would be inadmissible but
 2 we recognise that that is a strict legal position and in
 3 the alternative what we are saying is even if they are
 4 strictly admissible, because we recognise there may well
 5 be arguments in relation to this issue that may actually
 6 go off on other cases, that even if it is admissible in
 7 the light of evidence, the considerations that the CAT
 8 articulated in Qualcomm about the concerns in relation
 9 to placing any reliance on evaluative judgments still
 10 obtain when you consider the weight to be applied. So
 11 we put the case in the alternative.
 12 THE CHAIRMAN: Yes, that is very helpful, thank you.
 13 MR BEARD: I recognise that can be sauce for the goose,
 14 sauce for the gander in the sense that the points that
 15 I was making about the 2013 --
 16 THE CHAIRMAN: There is a lot sauce for the goose and sauce
 17 for the gander in this when it comes to what the parties
 18 have said about Ofcom.
 19 MR BEARD: So I recognise that of course. The points being
 20 raised in relation to 2013 and 2014 Ofcom reports this
 21 morning would suffer in similar ways.
 22 THE CHAIRMAN: It is helpful to have what your actual
 23 position is because we have to deal with that.
 24 MR BEARD: But anyway, working on the basis of weight rather
 25 than admissibility, it is important to bear in mind the

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1 nature of material that we are concerned with here
 2 itself. Because of course Ofcom was exercising its
 3 ex ante regulatory powers. If we could look at
 4 {G/104.03/1}. Here slightly oddly we have section 4 of
 5 the Communications Act and I think if we go over the
 6 page, I think we hit section -- no, maybe again. Sorry,
 7 one more. I am trying to find section 3. I thought
 8 I had it correctly in my notes.
 9 But the point I am going to make is it is an ex ante
 10 scheme for investigation under section 78-86 and 91 of
 11 the Communications Act having regard to or complying
 12 with the duties that Ofcom has under sections 3 and 4 of
 13 the Communications Act. Those are much broader duties
 14 and engage much wider powers than competition law does.
 15 Ofcom has concurrent competition law powers but it
 16 has specific statutory duties under -- it has far
 17 broader powers and indeed more specific duties.
 18 Actually it is on page 10, I am grateful to
 19 Ms Mackersie.
 20 {G/104/10}. If we keep going down to subsection 4.
 21 This is general duties of Ofcom. If we go over the
 22 page, {G/104/16}. I am sorry, I have gone too far.
 23 Page {G/104/11}:
 24 "Ofcom must also have regard, in performing those
 25 duties, to such of the following as appear to them to be

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1 relevant ..."
 2 Promoting competition.
 3 "The desirability of promoting the fulfilment of the
 4 purposes of public service television ..."
 5 "The desirability of promoting competition ..."
 6 It works its way through a whole range of promotion,
 7 encouragement, ensuring. We get down to subparagraph
 8 (h):
 9 "The vulnerability of children and others whose
 10 circumstances appear to Ofcom to put them in need of
 11 special protection.
 12 "The needs of persons with disabilities of the
 13 elderly and of those on low incomes."
 14 "The opinions of consumers in relevant markets and
 15 of members of the public generally."
 16 So you have a very different scheme that you are
 17 dealing with here.
 18 If we could just go to the Ofcom decision itself
 19 which I think is at {AA/10/1}. Well, decision, it is
 20 the provisional conclusions. If we pick it up at
 21 page 40, {AA/10/40}. You recall that Ms Kreisberger
 22 touched on this yesterday where she said:
 23 Paragraph 3.116:
 24 "In carrying out a market review ..."
 25 Just to be clear, the market review is under the

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1 provisions I have just referred to in the Communications
 2 Act.
 3 Then she referred to the EC Recommendation. 3.117
 4 is important because it says:
 5 "The 2014 EC Recommendation ... sets out a list of
 6 those product and service markets which the Commission
 7 has identified , at an EU level, as being susceptible to
 8 ex ante regulation."
 9 So ex ante, in other words, prospective regulation .
 10 "These markets are identified on the basis of the
 11 cumulative application of three criteria .
 12 "The presence of high and non-transitory structural,
 13 legal or regulatory barriers ...
 14 "A market structure which does not tend towards
 15 effective competition ...
 16 "Competition law alone is insufficient to adequately
 17 address the identified market failures ."
 18 That last one is important because essentially what
 19 is being said here is we can use ex ante controls and
 20 investigations in circumstances where ex-post
 21 competition law will not fulfil the role that we want in
 22 relation to these concerns.
 23 If we go to page {AA/10/42} you see this fleshed out
 24 more clearly. Paragraph 3.128 in the middle of the
 25 page. Ms Kreisberger referred you to the top of the

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1 paragraph:
 2 "As set out in section 6, we have concerns about
 3 increasing direct and indirect harm that results from
 4 the lack of competition. We consider that competition
 5 law alone would not adequately address the market
 6 failures that we have identified for the following
 7 reasons:
 8 "Ex ante regulation allows for the imposition of
 9 specific and targeted SMP remedies to address the
 10 competition problems identified and for the ongoing
 11 monitoring. This is particularly relevant in relation
 12 to the concerns we have identified in this review and
 13 the package of ... remedies we consider appropriate ...
 14 "... we consider that one of the sources of SMP in
 15 the market is low consumer engagement. Part of the
 16 package of remedies we are proposing to impose is
 17 therefore designed to promote competition, rather than
 18 dealing with specific anti-competitive practices. These
 19 types of remedies would be difficult to introduce under
 20 a competition law analysis."
 21 To be clear, I am not saying for a moment that Ofcom
 22 is absolving BT from any threat of any ex-post
 23 competition analysis or criticism . What is important
 24 here is to bear in mind what Ofcom was doing in this
 25 process. It was deciding to use ex ante regulatory

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1 control which provides prospective, prospective controls
 2 both on information, delivery, notification and also in
 3 relation to pricing and was not considering it
 4 appropriate to use ex-post competition law tools.
 5 Then the third point I should make in relation to
 6 this material, which feeds into the considerations
 7 identified in Qualcomm is the nature of a number of the
 8 findings here and in particular I have already touched
 9 on some of the concerns that arise, not least in
 10 relation to some of the important elements of the
 11 consideration of switching where Ofcom was saying that
 12 it considered that there was low switching in relation
 13 to VOC and SPC customers, particularly VOC customers.
 14 But as I have said, when I was going through this
 15 material earlier , that was concerned with reliance on
 16 the migration, the switching tracker .
 17 THE CHAIRMAN: Yes.
 18 MR BEARD: I have explained why that in fact was flawed and
 19 that is precisely the sort of issue that Qualcomm is
 20 saying you need to be acutely concerned about because
 21 you have this material in front of you, you have an
 22 explanation of the concerns, you have more data. The
 23 idea that you should be placing weight on Ofcom's
 24 findings in those circumstances is something that at the
 25 very least you should have substantial pause in relation

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1 to.
 2 When it comes to market definition we say you should
 3 not be seeking to place weight, as the Class
 4 Representative does, on Ofcom's provisional findings or
 5 on its later statement. You do not have factual
 6 evidence supporting those findings and the account that
 7 is given in relation to them. The technical economic
 8 analysis that is put forward is flawed in any event and
 9 indeed the economic material put forward by BT explains
 10 why in fact a broader market should be adopted.
 11 Now, I am going to move on now to limb 1 material.
 12 THE CHAIRMAN: Yes.
 13 MR BEARD: Obviously a number of the points I am going to
 14 make in relation to limb 1 and limb 2 will echo points
 15 I made in submissions concerning the law and indeed the
 16 factual material, as I was working through it.
 17 I want to start, if I may, on limb 1 with a case
 18 {G/50/1}, which is the *Partial Private Circuits* or *PPCs*
 19 case. This concerned an allegation against BT in
 20 relation to what is called partial private circuits , so
 21 these are network components. Ofcom had carried out
 22 a review back in 2004 on leased lines and was concerned
 23 that BT held market power in a number of these markets
 24 and was concerned therefore that it had not complied
 25 with a condition that had been imposed on BT, so an

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1 ex ante regulatory condition to cost orientate those
 2 prices. That was condition H3.1.
 3 What of course that condition gave rise to was
 4 a question as to how it was one assessed what might or
 5 might not be cost orientation of particular prices. So
 6 it is a parallel consideration to the one that we are
 7 dealing with here under United Brands whether or not
 8 prices bore any reasonable regard to economic value.
 9 What is interesting about it is the consideration of
 10 a range of cost allocation methodologies in particular.
 11 If we could go to page {G/50/23} you will see there
 12 is a section there beginning at paragraph 65 describing
 13 the condition and talking about the application of that
 14 condition and the economics of cost orientation then
 15 follows.
 16 "... H3.1 requires that prices charged be
 17 'reasonably derived from the costs of provision based on
 18 a forward looking long run incremental cost approach and
 19 allowing an appropriate markup ..."
 20 So this was a methodology that was actually
 21 specifying long-run incremental cost-plus. So LRIC+,
 22 talking about LRIC+ but then asking how you applied that
 23 sort of methodology.
 24 That is what is then set out here. If we go over
 25 the page {G/50/24}, paragraph 68. There is a discussion

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1 of the various tests that can be considered here or the
 2 various costs that arise in relation to these issues.
 3 "... reasonably derived from the costs of provision
 4 based on a forward looking long run incremental cost
 5 approach" is then parsed.
 6 If we then go down to paragraph 85, {G/50/27}.
 7 "An appropriate mark up for the recovery of common
 8 costs".
 9 So there are direct costs, indirect, incremental
 10 costs and common costs and paragraph 85 says:
 11 "There are a number of ways in which common costs
 12 can be allocated so as to the identify whether a firm is
 13 over-recovering in relation to its common costs."
 14 Three were considered: combinatorial, fully
 15 allocated, distributed standalone cost.
 16 So combinatorial, the SAC combi that has been
 17 referred to in this case is one of those. Fully
 18 allocated is FAC. Distributed standalone is DSAC.
 19 Then paragraph 86:
 20 "As the Determination noted [so this is the
 21 determination of Ofcom because this is an appeal] none
 22 of these approaches can be said to be uniquely correct
 23 or uniquely reasonable."
 24 Mr Ridyard may well remember this, Professor Yarrow
 25 who was an expert in these proceedings referred to all

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1 allocations as being arbitrary and Mr Ridyard set out
 2 his position in relation to those issues.
 3 With respect to Mr Ridyard, I am not going to dwell
 4 on those. What I am going to move on to do is look at
 5 page {G/50/33}, paragraph 108. What had happened was in
 6 the investigation by Ofcom that was subject to this
 7 appeal Ofcom had used its powers to request that BT
 8 provide internal and external revenue and volume data
 9 for each PPC service, and to calculate the respective
 10 DLRLICs."
 11 So this is distributed long run incremental costs,
 12 FACs and DSACs for these services.
 13 So because you were dealing with ex ante regulation
 14 you could use its powers to actually tell BT to do
 15 various things in relation to allocation of costs. But
 16 most importantly, perhaps, it had done so saying, we
 17 want to see a range of measures in relation to these
 18 matters. That is what we see in paragraph 108.
 19 Then the key passage that I want to go on to is on
 20 page {G/50/83} starting at 277. It had asked for all of
 21 these measures and then there was a discussion in
 22 particular about DSAC as an appropriate test for cost
 23 orientation purposes.
 24 If we go on to page {G/50/85}, picking it up at the
 25 bottom of paragraph 281:

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1 "Although there was some suggestion to the contrary
 2 in the draft determination, DSAC is not a proxy for
 3 combinatorial tests. It operates in a very different
 4 way. Whereas combinatorial tests seek to assess cost
 5 orientation by what is in effect a properly
 6 representative sampling of the prices for multiple
 7 products sharing common costs [so that is what
 8 combinatorial tests do] DSAC distributes the standalone
 9 cost of a broad increment of services."
 10 So it is not taking all the services that a company
 11 takes. It is a taking a group of those services.
 12 "[It] distributes a broad increment of services
 13 pro rata amongst each of the services within that
 14 increment. It is very different from combinatorial
 15 testing. In particular, it avoids the practical
 16 difficulties of combinatorial testing that arise when
 17 many products share common costs."
 18 Then if we go down to paragraph 283:
 19 "DSAC achieved ..."
 20 I am sorry, I should properly let you read paragraph
 21 282. (Pause)
 22 Then if we go down to paragraph 283, again, I will
 23 not read it out. If you could just read that.
 24 THE CHAIRMAN: Yes, just a moment. (Pause). Yes.
 25 MR BEARD: Now, briefly the points I want to draw from this

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1 are, first of all, this judgment does not say
 2 combinatorial tests are somehow flawed or irrelevant.
 3 They can give rise to practical problems, that is
 4 undoubtedly true, but I have taken you to the passages
 5 where they indicate their benefits.
 6 DSAC, the distributed stand-alone cost methodology,
 7 is not irrelevant. It is clearly important and was seen
 8 as very important in the context of this case.
 9 Fully allocated cost methodologies may also be
 10 useful, but it is notable that in that paragraph that is
 11 quoted from Mr Myers, the important difference between
 12 DSAC and FAC is that FAC, which fully allocates costs of
 13 the business across all the services, represents just
 14 one specific view of cost allocation. In other words,
 15 whatever FAC methodology, because there are lots of
 16 different ways you can do FAC, allocating the costs
 17 across a business, it provides one way of doing it and,
 18 in doing so, fails to reflect the flexibility that
 19 a business realistically has and needs to have in its
 20 pricing of products.
 21 What I am going to come on to after the short
 22 adjournment is to explain how what the Class
 23 Representative is doing is saying there is a single
 24 methodology, that single methodology is a FAC
 25 methodology of a particular sort, and it should not use

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1 actual costs for the indirect and common costs elements.
 2 Where you can identify direct costs, yes, we can use the
 3 actual costs, but he decides that he cannot use actual
 4 costs at all in relation to common costs, and, as I will
 5 be coming back to, that is just not consistent with the
 6 approach of United Brands, but, more particularly, the
 7 rigidity of the approach he is adopting is wrong as
 8 well.
 9 THE CHAIRMAN: Yes. Right. We will stop there and resume
 10 at 2 o'clock. How are you doing?
 11 MR BEARD: If we could start slightly earlier, that would
 12 be -- either start slightly earlier or end slightly
 13 later.
 14 THE CHAIRMAN: Let us have the full -- I think what we will
 15 do is I have to rise just before quarter to five anyway.
 16 Let us -- if we can do this, if this is not a problem,
 17 let us just start at five to two, because we were
 18 five minutes late in starting this morning because of
 19 the other matters.
 20 MR BEARD: Yes. I am grateful.
 21 (1.02 pm)
 22 (Luncheon Adjournment)
 23 (1.55 pm)
 24 MR BEARD: Sir, I am dealing with limb 1. I took you to the
 25 PPC judgment talking about the range of different

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1 methodologies, and we are dealing with the contention by
 2 the Class Representative that the methodology for
 3 assessing costs, providing the cost part of the
 4 cost-plus benchmark, is based on the 2009 RFS.
 5 Just to be clear, we can think of costs for
 6 a product as broadly breaking down into three
 7 categories. We have got direct costs, so for voice
 8 services. Obviously wholesale line rental is a direct
 9 cost, you need to have line rental to provide the line.
 10 You then have indirect incremental costs, so you have
 11 got costs that are incurred, not -- that are not
 12 directly related necessarily to the particular products
 13 in question, but there is an incremental part of those
 14 costs that will change depending on the volume of that
 15 provision.
 16 THE CHAIRMAN: Yes.
 17 MR BEARD: Then you have got common costs which do not vary
 18 depending on the incremental level of the provision of
 19 the product, and the distinction between indirect
 20 incremental and common costs can be difficult to
 21 identify. If you think about marketing, for example,
 22 you can incur very large marketing costs.
 23 Now, in certain circumstances you could be marketing
 24 just for a particular product, in which case a chunk of
 25 those marketing costs will be incremental to the

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1 product. But equally, you could have a broader
 2 marketing campaign for a range of products, and then the
 3 costs would be seen as common. Obviously a paradigm of
 4 common costs might be head office costs, central
 5 management, where trying to allocate them to particular
 6 products is not possible without using methods of
 7 allocation.
 8 So the problem here is that Mr Duckworth uses costs
 9 from the claim period for the direct costs element, so
 10 things like wholesale line rental. He is not using
 11 wholesale line rental costs from 2009. But for all of
 12 the other costs heads, so everything that is indirect or
 13 common, he is not using the actual costs that are
 14 incurred during the claim period, instead, he is using
 15 the costs that are incurred by BT in 2009 and allocated
 16 according to a particular methodology.
 17 Now, I am not going to go back through my legal
 18 submissions, but it was clear that in relation to all of
 19 the cases on excessive pricing, the costs methodology,
 20 the costs that you are considering, the question you are
 21 asking yourself when you are asking whether there is
 22 a reasonable relationship to the economic value, as it
 23 said in *United Brands* at paragraph 252, it is the
 24 difference between actual costs and actual prices that
 25 matter.

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1 We say this is just a fundamental flaw in the
 2 approach that has been adopted here.
 3 MR RIDYARD: Just to clarify one point. Indirect
 4 incremental costs, those are entirely attributable --
 5 caused by the product in question, are they not? Are
 6 they caused entirely by the product in question?
 7 MR BEARD: If you can identify them clearly enough, then the
 8 incremental element of those costs would be caused by
 9 it, yes.
 10 MR RIDYARD: So they would be part of what was the actual
 11 costs, as in *United Brands*?
 12 MR BEARD: Yes. Yes, sorry. I am not disputing that part
 13 of the common costs are actual costs. I mean, we
 14 recognise that --
 15 MR RIDYARD: Common costs --
 16 MR BEARD: -- is a common cost for all of these products.
 17 MR RIDYARD: The common costs are not caused by any one
 18 product, are they? Because that is the definition of
 19 a common cost. But the indirect incremental costs are
 20 caused by --
 21 MR BEARD: The incremental portion is, yes, absolutely.
 22 MR RIDYARD: I was not picking an argument, I was just
 23 trying to get clarification of the --
 24 MR BEARD: No, I am happy to look for an argument, but now
 25 we can violently agree about these things.

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1 I do not want to lose sight of the fact that cost
 2 causality is not something that somehow BT or BT's
 3 experts are somehow objecting to as a basic principle.
 4 The question is how do you carry out this exercise?
 5 That is the issue here.
 6 But it is an issue that needs to be undertaken in
 7 relation to the actual costs, and the problem you have
 8 is that that is not what is being used. I mean, you can
 9 just see an example. We see it in some of the documents
 10 earlier, and I will come back to it, as one of the
 11 gives, that there was a discussion about onshoring call
 12 centres. Now, that is a post-2009 development. If
 13 bringing your call centres back onshore is much more
 14 expensive, that is going to be a significant added cost.
 15 Now, it may well be that your customer services
 16 costs are partly indirect incremental costs for
 17 services, depending on how much they get used or how
 18 much you recruit people to deal with the number of
 19 customers and expected complaints or queries or whatever
 20 you have from that cohort. They may also in part be
 21 common.
 22 But the point is they do not appear at all in the
 23 approach being adopted by Mr Duckworth. He talks about,
 24 well, there are efficiency drives and cost
 25 rationalisations. Of course that sort of thing happens.

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1 That happens all the time. If a business is not doing
 2 that, then the business is going to have all sorts of
 3 difficulties. But you cannot assume what the costs are
 4 going to be in relation to actual costs across a period
 5 by referring to costs five years earlier.
 6 That is the central problem here. It is not just
 7 a problem for the excessive pricing test in relation to
 8 limb 1, just referring to those points of *United Brands*,
 9 it is a fundamental problem because if you go back to
 10 the policy concerns and the comments of Advocate
 11 General Wahl and the concerns about using ex-post
 12 competition law, what is being said here is that BT
 13 should have known, or been able to know, that if it
 14 priced by reference to anything other than the costs
 15 that were being incurred and allocated in 2009, then it
 16 was going to be vulnerable to an excessive pricing claim
 17 from 2015 onwards.
 18 If you think about it in terms of legal certainty,
 19 how is it that you are supposed to know these things?
 20 It is different when you are being required to price by
 21 reference to the costs you are incurring from time to
 22 time, but to know in 2015 that you should have been
 23 pricing by reference to costs six years earlier is not
 24 consistent with any of that case law that I have shown
 25 you, and we have referred in our skeleton to -- sorry.

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1 MR RIDYARD: What if we are faced with a choice between two
 2 very imperfect options? One is, let us say we find that
 3 the 2009 exercise was absolutely beautiful and perfectly
 4 done for 2009, so it was the best possible way of
 5 identifying the indirect incremental costs for each of
 6 the services there. Obviously it is imperfect to use
 7 that for 2015 because it is six years old, but the
 8 alternative is to go to BT's data, which do not -- the
 9 2009 data -- 2015 data for BT which do not carry out
 10 this cost allocation, so we are having to -- someone is
 11 having to estimate or guesstimate how those fixed costs
 12 should be translated.
 13 So we have got two imperfect alternatives. I mean,
 14 what are do we to do? Neither is going to be right. Do
 15 we just throw our hands up and say it cannot be done, or
 16 what?
 17 MR BEARD: There are two stages. The first is: does the
 18 method that they have chosen prove the case that they
 19 are putting forward? The burden is on them. So I will
 20 come back to why 2009 is not anything like a perfect
 21 model, but let us just go with that. Is that proving
 22 that the actual costs are divorced from actual prices,
 23 and is it proving that there is no reasonable
 24 relationship between prices and the economic value here?
 25 Obviously that is the question that the Tribunal has

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1 to ask itself , but we cannot see on what basis you can
2 reach that conclusion rationally on the basis of what is
3 being put forward here.

4 There is a further issue that is implicit in the
5 reasonable relationship , that there is no one way of
6 doing this . It does not matter how good that individual
7 RFS was, it is a fully allocated cost methodology. We
8 know that there are numerous ways to do a fully
9 allocated cost methodology. We know that there are
10 other methodologies that are appropriate for the
11 assessment of these issues . We have already referred to
12 DSAC, I will come back to SAC combi.

13 So even in relation to that, you have to be saying
14 there is no reasonable relationship . If the other
15 methodologies provide a reasonable story that means that
16 in fact these prices do have some reasonable
17 relationship to the economic value, then in those
18 circumstances they fail again.

19 So there are a whole series of singular problems
20 here, and the big starting point is the actual costs
21 issue, but it is also the rigidity of using a single
22 methodology and FAC methodology there.

23 Obviously I am just focusing on costs issues at the
24 moment. Obviously we get into another world of magic
25 where we go back to 2006 in order to carry out the

1 assessment of the rate of return which, again, we say is
2 completely wrong. You should be thinking about those
3 things differently .

4 We noted in the skeleton that by choosing the 2009
5 RFS that, of course, there is a selection there in and
6 of itself as well , because if you use the 2008 RFS the
7 costs were higher. Indeed, that is actually indicating
8 the fact that even under that very rigid methodology,
9 you get significant fluctuations in costs.

10 So there is a danger in a number of submissions made
11 by the Class Representative that says, well , you know,
12 there is an imperfect world here, we cannot tell one
13 thing, we cannot tell the other. You should maybe go
14 with one because it is reasonable. That is why
15 I emphasise the burden of proof here. That is why
16 I have constantly emphasised that it is for them to
17 prove and meet these legal standards.

18 Of course the data they use is provided by us, of
19 course that is right, and we have provided our very
20 detailed material through the disclosure process.

21 As I say, a big issue on actuals, a very big issue
22 on single methodology, because this single methodology
23 does not have some kind of magical role in excessive
24 pricing cases generally .

25 There is a point at which, during the joint expert

1 statement, there was reliance placed on a 1988 economic
2 paper by someone called Professor Christopher Bliss. We
3 have dealt with it in our skeleton argument. With the
4 greatest respect, it does not for a moment suggest that
5 there is a single methodology. If that is what is being
6 relied upon, it does not provide any foundation.
7 Furthermore, it certainly does not provide any
8 foundation for using old RFS methodologies.

9 Can I just raise one other thing in relation to the
10 actuals and the old here. I have highlighted that
11 example, for instance, of a call centre shifting , but we
12 know that there were huge changes in the volumes of
13 calls and the number of customers that we are dealing
14 with here. So there were vast changes in economies of
15 scale over time in relation to these costs issues and
16 those are not being taken into account.

17 Mr Duckworth is implicitly assuming there has been
18 no material changes in real unit costs of providing SFV
19 services since 2009. Again, it is an assumption that is
20 not justified , and it is not consistent with the
21 approach that is required under the law in relation to
22 these issues .

23 Now, I am going to just very briefly pick up one or
24 two points on the RFS itself. I should say in answer to
25 the question that was posed by Mr Ridyard yesterday, it

1 is not surprising that the Class Representative cannot
2 identify common costs, because the methodology that is
3 being used is "(indirect and common costs)" together.
4 So as far as we know, they do not have a methodology for
5 breaking it out.

6 In case it is useful, Dr Jenkins has attempted that
7 just in relation to common costs. I will give it to you
8 for your notes. It is at {E/49/117-118} and it is
9 section 7.1.8 of the joint expert statement. There is
10 a range of calculations of common cost. This is not the
11 direct incremental costs, this is just common costs, and
12 the range is between 6% and 19%, so these are material
13 costs, and that is leaving aside the indirect
14 incrementals.

15 Let me briefly mention, because the regulatory
16 financial statements and the underlying documents are
17 just too entertaining to spend too much time on, but if
18 we could go to {E/13/751}. This is a consideration of
19 the basis of preparation of this regulatory financial
20 statement that was provided in 2009.

21 I am not going to go through all of the text on the
22 screen. On the left-hand side what is explained is how
23 BT carries out its obligations, as I said, to provide
24 statutory accounts, to develop its own internal
25 accounts, and so on, and that those do not provide the

1 information that Ofcom specifically required under the
 2 RFS.
 3 When we go to the right-hand side, you see that
 4 confirmed in the second full paragraph:
 5 "The economic Markets defined by Ofcom's Final
 6 Statements and Notifications do not correspond to the
 7 way in which the Group is organised ... The Current Cost
 8 Financial Statements are therefore produced by
 9 overlaying the requirements of the regulatory reporting
 10 framework on the management and accounting structure of
 11 the Group."
 12 In other words, we do not work in this way. This is
 13 not a practical way in which we do things commercially.
 14 But because you required it of us, that is what we are
 15 doing.
 16 Then it is said:
 17 "As far as possible, revenues, costs, assets and
 18 liabilities are directly associated with a product group
 19 or component using information held within the Group's
 20 accounting records and are directly attributed to that
 21 item. Where no such direct association is possible, the
 22 remaining revenues, costs, assets and liabilities are
 23 apportioned between two or more markets, services or
 24 components, using a fully allocated accounting system
 25 and employing apportionment bases that reflect as far as

1 possible the causality of the revenue, cost, asset or
 2 liability."
 3 So there is no dispute that they try to follow some
 4 kind of cost causality: where are the costs being
 5 caused? What is causing them? But it is having regards
 6 to the accounting principles, including cost causality
 7 and objectivity.
 8 We see that in the next paragraph:
 9 "The amounts of revenue, cost and capital employed
 10 attributed to markets, services and components depend
 11 critically on the methods of attribution adopted.
 12 Typically, in a fully allocated accounting system,
 13 a range of attribution methods is available."
 14 So this is going back to the point I was making by
 15 reference to the PPC case. When you talk about fully
 16 allocating costs, you are taking the whole cohort of the
 17 costs of the business and you are deciding how to
 18 allocate them in a particular way. There are different
 19 methodologies you can do for that. They are reasonable.
 20 There are different reasonable methodologies you can use
 21 for that.
 22 "In selecting appropriate attribution methods and
 23 appropriate non-financial data for use within the
 24 attribution models employed in the production of these
 25 Current Costs Financial Statements, BT has had to make

1 certain estimates and exercise its judgement, having
 2 regard to the regulatory accounts principles, including
 3 cost causality and objectivity, in order to comply with
 4 the requirements of the Primary Accounting Documents."
 5 So as Dr Jenkins unsurprisingly says, and as is BT's
 6 position, we do not back off what we did in relation to
 7 the 2009 regulatory financial statement. We tried to do
 8 what Ofcom was requiring of us using a reasonable
 9 attribution methodology, or, more exactly,
 10 methodologies, because there were all sorts of drivers
 11 that applied in relation to different cost components of
 12 this massive swathe of costs that we are talking about
 13 here and we used judgement in relation to it.
 14 But that does not make it the right way. There are
 15 plainly a vast range of reasonable alternatives even
 16 just within FAC that could have been used in 2009 and
 17 could be used now if you are using a fully allocated
 18 costs methodology, and that is before we get to other
 19 cost methodologies apart from FAC.
 20 So this goes back to why it is not just about the
 21 age of the RFS and the concerns about not just using
 22 actuals, it is because it is a single rigid methodology.
 23 You will remember from the statement that was quoted
 24 from Mr Myers in the PPC case, FAC does not provide
 25 flexibility for businesses, because once you have

1 allocated costs in a particular way they cannot be
 2 considered in any other way, but there is not a single
 3 right way of doing these things. If there are other
 4 reasonable ways of doing it then they should be
 5 considered.
 6 Ironically, there has actually been work by Ofcom,
 7 and we have referred to this in the skeleton and in
 8 relation to the expert material, where Ofcom actually
 9 considered questions of margin squeeze, which is a sort
 10 of pricing infringement, essentially, where you charge
 11 a high amount -- if you are vertically integrated you
 12 charge a high amount for a wholesale product that you
 13 then supply to your rivals, and you charge a low amount,
 14 a comparatively low amount for the retail version of it,
 15 and so the margin that your competitors can actually get
 16 is squeezed, effectively, because they need to meet your
 17 retail price but they have these very high input costs.
 18 So what you are thinking about when you are doing
 19 a margin squeeze analysis is to do with what is
 20 a legitimate price for your wholesale and your retail
 21 and, in doing that, you think about cost issues.
 22 This was done in relation to virtual unbundled local
 23 access, which is known as VULA, and in relation to that,
 24 what we see is Ofcom looking at a whole range of
 25 methodologies even when you are engaging in a FAC

1 exercise in 2015.
 2 Those methodologies include allocating certain costs
 3 by reference to the revenues that particular aspects of
 4 the business provide, the number of customers that
 5 certain products have, or even some sort of sharing
 6 methodology. You can just share costs across a range of
 7 products, either just proportionately or using what is
 8 called equi-proportional mark-ups, that is the EPMU.
 9 What that is doing is allocating indirect costs to
 10 products in the proportion to which they share direct
 11 costs across the business.
 12 That is quite a funny way of doing things, because
 13 you cannot assume that indirect costs are allocated --
 14 are actually being incurred by products in the same
 15 ratio as direct costs, but it is another method that is
 16 used, and that is what was undertaken in relation to the
 17 VULA exercise.
 18 Now, both Dr Jenkins and Mr Duckworth have looked at
 19 that VULA material, and whereas Dr Jenkins uses how
 20 Ofcom thought about the various drivers when she carries
 21 out cross-checks in relation to Mr Duckworth's work,
 22 Mr Duckworth reaches the view that the whole exercise
 23 would be inappropriate here. You cannot use these
 24 drivers, he says.
 25 You can see this in {E/6/66} at paragraph 5.61 where

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1 he says: I do not think you can use revenues to allocate
 2 costs. This repeats the point that Ms Kreisberger
 3 raised yesterday, that if you are thinking about
 4 a question on excessive pricing and you allocate costs
 5 to a product where you are concerned about it being
 6 excessively priced, it may be making more revenue, and
 7 therefore you allocate more cost to it, but
 8 artificially, effectively. Because if it was not being
 9 excessively priced, you would make less revenue, and
 10 less cost would be allocated. That is the theory behind
 11 it.
 12 Of course, the problem here is you are thinking
 13 about indirect and common costs. If you are thinking
 14 about common costs, if you take the head office as the
 15 paradigm common cost, there is not any real reason why
 16 you say, well, these should not be allocated by revenue
 17 across a whole range of circumstances. But more than
 18 that, he says you cannot use any other methodology. You
 19 cannot use customer numbers, notwithstanding that Ofcom
 20 did so in its VULA approach, and it is well recognised
 21 that using customer numbers as an allocation methodology
 22 is appropriate. He also says, well, there could be some
 23 costs that are not relevant to the delivery of the SFV
 24 services, and those should be taken out and those could
 25 be being misallocated.

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1 As we will see in due course, actually Dr Jenkins
 2 was careful to deal with those sorts of concerns. But
 3 in any event, it does not deal with the problem that
 4 there are a range of ways within the fully allocated
 5 costs umbrella that you can use to allocate actual
 6 costs.
 7 None of these methodologies is perfect, we are not
 8 suggesting that. But you are not looking for perfection
 9 in terms of the way to deal with these issues, you are
 10 looking for the reasonable relationship to economic
 11 value, and can you test that?
 12 I should say that Dr Jenkins carries out a series of
 13 cross-checks using various other drivers for fully
 14 allocated costs. She does not say that fully allocated
 15 costs would be the best way of carrying out a cost
 16 allocation exercise, but she does apply and test this in
 17 relation to the actual costs, and you can see that in
 18 her report. For example, I will just provide you for
 19 your notes, {IR-E/18/122}, figure 5.2.
 20 So we say the cost allocation element here, using
 21 the 2009 RFS, is fundamentally flawed, and Dr Jenkins
 22 not only cross-checks by looking at alternative FAC
 23 methodologies, but she also looks at DSAC, so that is
 24 the distributed standalone cost methodology, which
 25 I specifically, which was specifically approved as

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1 a relevant methodology for cost orientation
 2 consideration in the PPC judgment, but she also carries
 3 out a SAC combi exercise.
 4 Now, no doubt she will be tested about how SAC combi
 5 works in due course, but essentially what you are doing
 6 with a SAC combinatorial exercise is you are taking the
 7 standalone costs of a business and you are looking at
 8 them through different combinations of products to test
 9 whether the particular combinations of products are
 10 making revenues above the relevant standalone cost
 11 methodology. So when you are doing it, what you do is
 12 you compare the observed revenues for a combination of
 13 services that share common costs with the standalone
 14 common costs of that part of the business, including,
 15 obviously, a rate of return.
 16 The test is essentially if the observed revenues you
 17 are getting from that particular combination are below
 18 the standalone common costs, there is no excessive
 19 pricing on that combination. If there is positive
 20 headroom, in other words, the total revenue you are
 21 getting from that combination is greater than the
 22 standalone costs for that combination, then somewhere in
 23 there, there may be excessive pricing. You have got
 24 headroom in relation to it.
 25 Now, the criticism or concern about SAC combi is

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1 that it can be complicated, because you can have
 2 multiple combinations of products.
 3 It is worth just turning up what, in broad terms,
 4 Dr Jenkins did so that you have reference to it.
 5 {IR-E/17/226}
 6 You will see at the top of the page there these 49
 7 combinations are essentially the combinations of
 8 services that Dr Jenkins and her team tested under the
 9 SAC combinatorial exercise.
 10 THE CHAIRMAN: Just a moment, please. (Pause) Yes.
 11 MR BEARD: What she does is she carries out this exercise in
 12 relation to the 49 combinations, seeing whether or not
 13 the standalone cost of these combinations is more or
 14 less than the revenues that are being made, and she does
 15 it year on year throughout the claim period.
 16 The key finding that Dr Jenkins makes is that under
 17 her baseline scenario, for all the years under all the
 18 combinations, there is what is referred to as positive
 19 headroom. In other words, no evidence that BT's SFV
 20 services are being priced excessively.
 21 So this is an exercise looking at direct, indirect
 22 and common costs and assessing it on this combinatorial
 23 basis.
 24 Now, Ms Kreisberger had two criticisms. One was
 25 that this was somehow methodologically unsound. We do

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1 not understand that, and that is not what the *PPC*
 2 judgment, or indeed any judgment we have found,
 3 suggests. It says it can be impractical if you try and
 4 take on too many combinations. We accept that. But not
 5 that it is methodologically unsound.
 6 The second criticism was what might be called ---
 7 what I will refer to as the wrong common denominator
 8 where she essentially said, look, if the revenues exceed
 9 the standalone costs for the combination, Dr Jenkins
 10 then shares that headroom across too many lines, and she
 11 should concentrate on the SFV lines.
 12 In other words, whatever the headroom is, you should
 13 divide it just by the number of SFV lines, not by the
 14 number of full voice lines. That was the key criticism.
 15 That is why I call it the denominator problem.
 16 First of all, that does not arise at all as an issue
 17 on the baseline scenario. Second of all, insofar as it
 18 arises in relation to any sensitivities, what Dr Jenkins
 19 does, and she can explain this in the hot tub, is that
 20 she takes what she understands to be the way that the
 21 business in the markets works in considering how you
 22 would allocate any headroom in those circumstances.
 23 That is all that is going on. It is not a denominator
 24 problem, it is trying to take into account the realities
 25 of the business when you are thinking about whether or

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1 not there is any issue here.
 2 If we could just go to {E/17/233}.
 3 (Pause due to technical issue)
 4 So I am just taking you to a picture of the outcome
 5 of the SAC combi exercise that Dr Jenkins carried out.
 6 You will see the red line there, you may be familiar
 7 with the shape of it. That is the actual ARPU line that
 8 we saw previously, just as the black line, but now this
 9 is then --- this is then compared with the SAC combi
 10 outcome.
 11 The critical thing is that the diamonds, black
 12 diamonds are the cost-plus benchmark generated by the
 13 SAC combi exercise for each year, and the ARPU is below
 14 them. {IR-E/17/233}
 15 THE CHAIRMAN: Sorry, just a minute.
 16 MR BEARD: In other words, ARPU, which is the price, is
 17 below the cost-plus benchmark each year when you use
 18 a SAC combinatorial methodology as Dr Jenkins has done
 19 here. (Pause)
 20 THE CHAIRMAN: Yes.
 21 MR BEARD: Then if we could just go over the page to
 22 {IR-E/17/234} and if we could just inflate figure .
 23 {IR-E/17/234}.
 24 This is the DSAC, so this is the distributed
 25 standalone costs methodology that Dr Jenkins has

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1 employed as a cross-check, and again, the red line is
 2 the ARPU, and again what you see is that in relation to
 3 the cost-plus benchmark calculated using the distributed
 4 standalone costs methodology, ARPU is well below that.
 5 THE CHAIRMAN: Just a moment, sorry. (Pause).
 6 MR BEARD: I apologise.
 7 THE CHAIRMAN: No, just a moment. (Pause)
 8 Yes, thank you.
 9 MR BEARD: The reason I emphasise this of course is going
 10 back to the reasonable relationship test. Having regard
 11 to those concerns I articulated about ex-post
 12 competition law imposing unduly stringent price caps,
 13 which is also what is being recognised in the decisional
 14 practice and approach of the CMA, is that using these
 15 other methodologies show reasonable methods which
 16 indicate there is no excessive pricing here.
 17 It is for the Class Representative to prove; his
 18 cost methodology is just not fit for purpose. It does
 19 not prove his case. Dr Jenkins has not only
 20 cross-checked that, but has actually undertaken further
 21 and fuller exercises in relation to it.
 22 THE CHAIRMAN: Again, is this, what one is looking at here,
 23 is this the Class Members or not?
 24 MR BEARD: Yes, it is same ARPU curve, so it is the same
 25 Class Members.

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1 THE CHAIRMAN: It is Class Members only.
 2 MR BEARD: Yes. There is a consistency, it is the same --
 3 you see it has that slight up-tick in 2017, it is
 4 broadly flat but slightly up, and then slightly
 5 declining. That is the same shape. I have been trying
 6 to refer to the same plot through the ...
 7 THE CHAIRMAN: On this basis, if the common costs allocation
 8 is correct, then on a net basis they are selling it at
 9 a loss, because the revenue is considerably below the
 10 costs.
 11 MR BEARD: In relation to the periods from 2018 onwards.
 12 THE CHAIRMAN: Correct.
 13 MR BEARD: I will clarify what the position is. I see your
 14 point, sir, but I will clarify that with Dr Jenkins.
 15 THE CHAIRMAN: You are making the point it never exceeds the
 16 cost-plus.
 17 MR BEARD: Cost-plus benchmark.
 18 THE CHAIRMAN: In fact it is considerably less than the
 19 cost -- without the plus.
 20 MR BEARD: Yes, I can see that.
 21 THE CHAIRMAN: Yes.
 22 MR BEARD: I think what is important to bear in mind is what
 23 you are doing here is asking yourself whether or not
 24 there are reasonable methodologies that can be applied
 25 in relation to this and, as I say, when we went back to

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1 the *PPC* judgment, there was an understanding as to why
 2 it is that DSAC may well provide -- SAC, the standalone
 3 costs for a product, will provide the highest threshold.
 4 DSAC is likely to provide the next highest, depending on
 5 the sharing that is going on. SAC combi provides lower.
 6 MR RIDYARD: All of these standalone cost measures are going
 7 to be, in a way, quite generous to the business line you
 8 are looking at, because they are loading a good
 9 proportion of the common costs on to that particular
 10 line of business. I am not saying that makes it wrong,
 11 but it is just in the nature of it. In extreme cases,
 12 the pure standalone costs put all the common costs on to
 13 each individual product, so it is always going to make
 14 it look as though they are at a loss, as it were.
 15 MR BEARD: In a multi-product firm, you are obviously right
 16 that standalone costs is going to appear generous.
 17 Obviously if, in a multi-product firm, all the other
 18 products were only priced at LRIC, then actually that
 19 would be representative.
 20 MR RIDYARD: No, I understand.
 21 MR BEARD: But in principle, I see that. I think it will
 22 depend on the modalities of a SAC combi. I am not sure
 23 that is necessarily true, I would have to check that.
 24 It would depend on the methodologies that you use and
 25 the extent of the combinations, I think, that would in

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1 the end determine it in relation to SAC combi.
 2 In relation to DSAC, because it is a broader
 3 segmentation, I do not think there would be any
 4 demurring in relation to that. It is, after all, why
 5 the SAC combinatorial methodology is developed and
 6 considered, because of those sorts of concerns. But
 7 that does not alter the relevance of DSAC in relation to
 8 this context.
 9 I am briefly going to deal with the rate of return
 10 issue because there is a plus in relation to the costs
 11 allocation, and the plus here, as we know, is
 12 Mr Duckworth's identification of the margin that was
 13 earned in 2006, a decade before the relevant period.
 14 But more than that, 2006 was the last year when BT was
 15 regulated in relation to these services. So, in
 16 essence, Mr Duckworth and the Class Representative, is
 17 saying that it is only those regulated returns that can
 18 be reasonable rates of return for the purpose of
 19 (inaudible) methodology.
 20 It is beyond clear that that cannot be the right
 21 approach given all of the case law that we have looked
 22 at. Indeed, one of the wonderful ironies about this, as
 23 I touched on in opening yesterday, is if you used
 24 2008/2009, so you match the rate of return year with the
 25 cost year, you would have a margin of almost 21%.

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1 THE CHAIRMAN: Just a moment. (Pause). Yes.
 2 MR BEARD: Indeed, so far as we can see, the years chosen
 3 are in the lowest levels of margins between 2003 and
 4 2009. So we find it just incomprehensible on what basis
 5 this can properly be put forward. Mr Duckworth seems to
 6 support this selection on the basis of comparisons with
 7 five other UK communications providers and suggests
 8 their margins were below BT Retail's reported margins
 9 for 2005/2006. But Dr Jenkins has noted that this is an
 10 incredibly small sample to be drawing upon and has
 11 explained why those comparisons are not appropriate
 12 here. Mr Duckworth's second proposed cross-check is in
 13 relation to EBIT margins that have been used in other
 14 sectors but he picks regulated sectors for his
 15 comparison.
 16 You cannot properly assume, for an excessive pricing
 17 assessment, that regulated prices and regulated rates of
 18 return are effectively the cap of the rate of return
 19 that should be allowed when you are carrying out an
 20 excessive pricing assessment.
 21 Now, Dr Jenkins deals with this much more
 22 extensively. She looks at wide-ranging datasets. She
 23 has explained why those datasets show a range between
 24 20%-25%. All of those comments and observations are
 25 unimpeachable. But again, in circumstances where what

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1 we are doing is asking ourselves what reasonable -- what
 2 the range of reasonable rates of return might be in
 3 circumstances of workable competition, this is just the
 4 wrong approach that is being adopted.
 5 So with that, I am going to move on swiftly to
 6 limb 2. I have not discussed the "significant and
 7 persistent" element. I hope I covered that sufficiently
 8 in terms of my observations, particularly on Advocate
 9 General Wahl and *Tournier* and *Lucazeau* yesterday.
 10 THE CHAIRMAN: Yes.
 11 MR BEARD: Right, limb 2. If the Class Representative could
 12 prove that prices were excessive under Mr Duckworth's
 13 cost-plus benchmark, it would also need to prove that
 14 those prices were unfair having regard to relevant
 15 factors which might justify the price. We saw that
 16 consideration in the Court of Appeal's conclusions in
 17 Phenytoin at paragraph 97.
 18 The problem here for the Class Representative is
 19 that their evidence really just does not engage with
 20 these issues properly. There were points yesterday when
 21 Ms Kreisberger seemed to be coming very close to saying,
 22 well, once the Class Representative has proved its case
 23 on dominance and limb 1, then unfairness is proved as
 24 well. That is just not right.
 25 In essence, Ms Kreisberger relied on three points in

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1 relation to limb 2 yesterday. I can deal with those
 2 very shortly. Then I will pick up some of the key
 3 factors that are being ignored here.
 4 Ms Kreisberger's first point was that there is an
 5 absence of effective competition in the market. But
 6 there is a wonderful circularity about that in terms of
 7 approach. Of course, it is a funny contention to make
 8 in circumstances where, as we have seen from the
 9 extracts of documents, there is detailed consideration
 10 and concern about competitors, including in relation to
 11 call pricing, including in relation to churn, including
 12 in relation to losing customers, and including the SFV
 13 customers.
 14 The other issue to bear in mind is the question
 15 about barriers to entry and expansion here because, as
 16 I said yesterday, in terms of barriers to entry and
 17 expansion, there is no issue about there being a supply
 18 side barrier to entry, in other words, obtaining, for
 19 instance, wholesale line rental, and we know that
 20 because that has been mandated for a long time.
 21 The barrier to entry that is said to exist in this
 22 market is the inertia of the customers and their lack of
 23 engagement, but part of the reason why I spent some time
 24 on the switching data yesterday is because actually what
 25 we see is vast amounts of switching by all of the Class

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1 Members.
 2 As I indicated yesterday, yes, from the Ofcom
 3 switching tracker data it might look like there is not
 4 much switching, but actually there is a vast amount,
 5 including, as I tried to emphasise yesterday, by
 6 voice only customers.
 7 So this idea that they are disengaged and inert is
 8 not actually capturing what is going on here.
 9 Of course, Dr Hunt deals with these issues in more
 10 detail in his report, but he does explain how it is that
 11 this equation between age and inertia or lack of
 12 engagement is something that you need to be extremely
 13 cautious about, because it is not evidenced by the Class
 14 Representative. The same is also true about lower
 15 incomes, because people can, understandably, become more
 16 price sensitive the less money they have.
 17 Now, that is not to start saying that the VOC group
 18 was the same age demographic as the population. We
 19 recognise that the VOC group were older. But what we do
 20 not accept is that you can assume there were barriers to
 21 entry and expansion here merely because of the lack of
 22 engagement. There may be concerns but that needs to be
 23 made out.
 24 The second of Ms Kreisberger's points was BT's
 25 supposed intent to profit from market power over SFV

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1 customers. But this was an assertion backed by her
 2 collection of SSNIPs, that I have dealt with, and backed
 3 by supposedly her selection of extracts from the
 4 evidence, which I spent yesterday and this morning going
 5 through and trying to contextualise. She is picking out
 6 individual phrases, misplacing them and
 7 miscontextualising them.
 8 The third point was the detriment suffered by Class
 9 Members. Ms Kreisberger pointed the Tribunal to the
 10 assessment of the overcharge in Mr Parker's reports.
 11 But of course that is just assuming what you have got to
 12 prove here.
 13 MR RIDYARD: Mr Beard, on the intent point, if we were to
 14 find evidence that BT had systematically decided that
 15 this was a group of customers that could be exploited
 16 and they were going to go out and exploit them, and
 17 there were all sorts of horrible smoking guns, would you
 18 accept in that case that that would be a factor that
 19 would go into unfairness?
 20 MR BEARD: I think the parameters of what can be considered
 21 in relation to unfairness are not closed, so I am not
 22 going to be able to stand here and say no to that.
 23 I think that would have to be taken into account. But
 24 as I say, what we are not seeing is anything like that,
 25 and what I am dealing with is Ms Kreisberger saying,

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1 well, this is proved here on the basis of the
2 documentary material, and the reason I spent so much
3 time on those documents was explaining how you did need
4 to contextualise these things.

5 But obviously, in relation to unfairness, I think
6 you cannot ignore that kind of market context entirely.
7 Of course it does matter that you are dealing with this
8 in relation to limb 2. It does not change the analysis
9 that you need to do in relation to limb 1, of course.

10 One thing that perhaps has not -- I have referred to
11 but has not necessarily had enormous profile is the fact
12 that there had to be notifications of all of these
13 customers whenever there was a price change, and that is
14 under GC 9, in fact, GC 9.6. There have been various
15 examples of the notification documents.
16 Professor Loomes says they are not -- I was going to say
17 self-flagellating enough, but that may be unfair to him.
18 They provide the relevant information but he would like
19 them to be even clearer. That is not what Ofcom or the
20 regulatory scheme required.

21 It is just worth bearing in mind, for instance, in
22 relation to SPCs, that there was a specific campaign,
23 because it was in BT's interest, to explain any price
24 changes in terms to those SPC customers in line with
25 Ofcom's demands.

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1 I am just going to take you to one of those, I do
2 not have time to take you to lots of the notifications.
3 I am sure we will come back to them. But if we can go
4 to {F/671/1}.

5 This is the template for SPCs, because it does not
6 have an actual name in it.

7 "Ofcom, the communications regulator ..."
8 Second paragraph.

9 First paragraph:

10 "We always like to help our customers get the best
11 service -- and best value too. So we wanted to tell you
12 that you could save money by bundling your phone line
13 and broadband ..."

14 "Ofcom, the communications regulator, have asked us
15 to let you know that many customers like you may be able
16 to save at least £15 a month when you bundle your
17 services together with us or another provider."

18 There would be detail of your current spend, which
19 would obviously be tailored to a particular customer,
20 and there is our bundle price for Broadband Unlimited.

21 So not only were we complying with the requirements
22 of notification that we had under the regulatory scheme,
23 it is clear that we had incentives, going back to all
24 those points about recapture, about up-selling, to
25 explain how people could do better on bundles, and we

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1 did that.

2 As I say, the three points that Ms Kreisberger
3 raised do not take her further forward, but what is very
4 striking is what the Class Representative did not deal
5 with in relation to limb 2. The first point is the
6 nature of the price rises. I took you earlier to that
7 comparison of the SFV standalone line rental price
8 changes against inflation comparators. We are worlds
9 away from any of the other excessive pricing cases we
10 have ever encountered, worlds away from them;
11 *Phenytoin, Hydrocortisone, Liothyronine*, hundreds of
12 percent above the costs measure, and rapid hikes. That
13 is not what we see here. Indeed, as I have shown you in
14 the documents, the line rental increases were actually
15 lower than other price increases we were imposing on
16 other products, such as broadband.

17 Now, the Class Representative says, ah, yes, but
18 100s of percent is not a requirement. Agreed.
19 Ms Kreisberger points to the *Albion Water* case and to
20 *Deutsche Post*. I picked those up in passing when I was
21 dealing with the law. *Albion Water* was a case where
22 there was a regulatory finding of infringement. It went
23 through a tortuous process whereby the CAT required the
24 regulator and Dŵr Cymru, the Welsh water provider, to
25 provide extensive data to Ofwat, who carried out

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1 multiple methodology considerations of the costs.

2 In the end it was concluded that those costs did not
3 justify the prices, but the cost benchmark that was used
4 was actually the subject of agreement between
5 Albion Water and Dŵr Cymru after several hearings and
6 enquiries in relation to these matters.

7 So this is a case where it was a regulatory decision
8 following extensive multiple methodologies. In the end
9 there was an agreed water carriage price, because that
10 was what the case was concerned with, and it was found
11 that there was an excess of 46.8% above that agreed
12 price, and that was held to be excessive. But it is
13 a very, very different context from the present case.

14 The other case of *Deutsche Post* was actually a case
15 where Deutsche Post was concerned that German
16 mass-mailing companies were sending their mail to the UK
17 and having it remailed into Germany, and they put up
18 a series of barriers to stop this happening, including
19 delaying mail coming back across the border,
20 discriminatory pricing, and one element of excessive
21 pricing where there was no detailed consideration of any
22 costs issues at all. In the absence of evidence what
23 was held was, in combination with that range of
24 infringing behaviour, the Commission could reach
25 a conclusion that 25% above the cost-plus benchmark was

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1 excessive.

2 But that is a remarkably different situation and one

3 that was not then tested, and one that was not subject

4 to the sorts of detailed data analysis that occurred in

5 this case. Deutsche Post simply refused to provide any

6 relevant cost materials, as far as we can see.

7 So the truth is that the pricing that we are dealing

8 with is not hiked in a way that pharma cases were. It

9 is not in any way close to the sorts of margins that

10 occurred in relation to the pharma cases. Just to bear

11 in mind, in those cases multiple methodologies were used

12 in order to assess cost-plus there and margins as well.

13 Conservative methodologies were used.

14 Indeed, I think it was from *Phenytoin* where

15 I referred to the rarity of excessive pricing cases and

16 the importance of the conservative approach.

17 So the nature of the price rises, the comparison

18 with inflation, and the nature of the differences are

19 being ignored. But there is a further issue which is

20 very important which is economic value, which really has

21 been entirely ignored in Ms Kreisberger's approach.

22 This is, in the language of *Hydrocortisone*, clearly

23 a Case 2 case. I took you to *Hydrocortisone* yesterday

24 and I am obviously not going to go back to it. But not

25 only is there heavy investment in the BT brand which

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1 makes it distinctive, and you saw that in a number of

2 documents, the importance of brand, brand loyalty, brand

3 value for customers, the survey material that is

4 indicating that, that is subjective economic value for

5 customers.

6 But it is not just that. There were service

7 improvements and gives throughout the period. Fault

8 repair time improvements, call protect service, caller

9 display services showing the number of the person

10 calling as a standard feature. I mentioned the Right

11 Plan feature that existed for a while to help with call

12 usage to recommend best value plans. Additional

13 features that were available through the Line Rental

14 Plus product. The onshoring of the contact centres.

15 These are all considered in particular by Dr Hunt.

16 Perhaps, given time, I will not go through all of that,

17 but I will give you the reference, starting at around

18 {IR-E/21/92} and running through that section.

19 Now, the responses to this are, first of all, that

20 the gives were low cost, these various ... I just do not

21 understand how that is relevant to this issue at all.

22 If you are a business that can provide value to

23 customers at low cost, that is a skill. That is not

24 a failing, that is not a criticism. Because we are not

25 here talking about a cost assessment, we are asking

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1 about the value to customers. So with respect, we do

2 not understand that. We are talking about value, not

3 cost here.

4 MR RIDYARD: May I ask a question on this?

5 MR BEARD: Yes.

6 MR RIDYARD: Starting from the other end of the telescope,

7 if you like, everyone seems to accept that you have to

8 avoid the willingness to pay fallacy. Just the fact

9 that consumers are paying the price shows the economic

10 value in the economic sense of the term, but that cannot

11 in itself justify --

12 MR BEARD: Yes, sure.

13 MR RIDYARD: So then you are saying: ah, but these things,

14 they add a small amount -- they add more to value than

15 to cost. How do we make that assessment? How do we

16 decide that this innovation or service quality

17 improvement, which has added much more to the price than

18 it has to the cost, how do we decide that it is not

19 subject to the willingness to pay fallacy?

20 MR BEARD: I think the difficulty is that as soon as you

21 move into consumer goods where there are brand values,

22 it does actually become quite hard to identify how you

23 constrain and how a tribunal judges these things. It is

24 one of the reasons why that footnote 399 in

25 *Hydrocortisone* talks about subjective taste.

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1 Unless it is very clear that people -- that there is

2 just no basis for suggesting that this provides

3 significant economic value for people, a tribunal or

4 a court should essentially back off in saying this is

5 excessive pricing. Because of course you can see it in

6 relation to commoditised or wholesale services, where

7 brand may be much less important, and then the

8 willingness to pay fallacy really is something that you

9 have got to avoid.

10 But as soon as you put yourself in a position of

11 trying to assess what the value of those subjective

12 benefits are, you have got to take at the very least an

13 extremely conservative approach, in other words, attach

14 a very generous value to all of those matters.

15 I heard someone say the other day actually it really

16 means that, in relation to consumer goods, as soon as

17 you are into brand territory you have to be extremely

18 cautious about these sorts of things, because brand

19 values can change hugely. Indeed, you can get those

20 strange and perverse effects where in fact brand value

21 increases with price. It tends to be in relation to

22 luxury goods, I know, so I am not suggesting that is

23 a factor here. But the ways in which you have to take

24 into account subjective appraisal of value would mean

25 a very conservative approach and, as I say, it is the

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1 subjectivity that becomes very hard to capture.
 2 So I see the dilemma, but I think the answer has to
 3 be you have to attribute a very significant degree of
 4 conservatism in relation to these issues, otherwise you
 5 are effectively trying to second-guess how consumers
 6 should see value in a market.
 7 MR DORAN: Can I just ask you a question about
 8 *Hydrocortisone*, Mr Beard. You took us to paragraph 322
 9 yesterday which deals with excessive, so there we are
 10 looking at price and the cost and the difference, which
 11 is a matter of pounds and pence, we have to try and work
 12 out what the delta is in some way.
 13 MR BEARD: Yes.
 14 MR DORAN: Somehow we have to factor in the value there, as
 15 I understand it, in this case too.
 16 Value is a very subjective sort of question, as
 17 I understand the footnote you drew us to when we talked
 18 about it yesterday. How do we compare these apples and
 19 pears?
 20 MR BEARD: I think the answer I would give to your question
 21 is probably very similar to the answer I gave to
 22 Mr Ridyard's, which is: with great degrees of
 23 conservatism. But if people are attaching -- if there
 24 is evidence that people attach value to gives, if they
 25 attach value to brand, this Tribunal and any court, and

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1 indeed any regulator to be fair, even an expert
 2 regulator, is going to be very cautious, and must be
 3 very cautious, before it says: actually, this value is
 4 not sufficient to mean that there is a reasonable
 5 relationship between the value and the price that is
 6 being charged here.
 7 Because otherwise you do end up in a bizarre
 8 situation where, if people have very successfully
 9 developed brands at low cost, and have great loyalty and
 10 are investing in these things, and are successful in
 11 providing low cost innovations that people like, you end
 12 up potentially penalising them for doing that.
 13 MR DORAN: Which I think was the face mask example set out
 14 in the test; providing something that nobody else
 15 provided.
 16 MR BEARD: Yes, face masks are slightly different I think in
 17 *Hydrocortisone*, because face masks are partly to do with
 18 shocks as well. You can get a situation in relation to
 19 face masks where you get a very, very high price because
 20 you are getting a demand shock. I think it was dealing
 21 with the Covid situation, where effectively you had slow
 22 supply and then a massive demand shock, and then you get
 23 very, very high prices, and the question is being asked:
 24 is that actually excessive in those circumstances? When
 25 actually that is just triangulating supply and demand

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1 due to a very short term shock.
 2 MR DORAN: You have drawn us to this, to the value questions
 3 in relation to unfair, which, as I read the
 4 *Hydrocortisone* case, is a more judgmental exercise than
 5 the unfair.
 6 MR BEARD: Yes.
 7 MR DORAN: When one is dealing with a cost question, which
 8 is: is it excessive? I find it rather more troubling to
 9 try to work out how to calibrate.
 10 MR BEARD: I think this is why within the framework that was
 11 considered by the Court of Appeal in *Phenytoin* they were
 12 not sort of directive about where you take into account
 13 economically.
 14 MR DORAN: So you could take it in either place.
 15 MR BEARD: You could take it in relation to either place.
 16 But actually the reason we focused on it in relation to
 17 limb 2 is because you have got to show these prices are
 18 unfair and actually it is easier to see these subjective
 19 judgements to going to overall unfairness. When you are
 20 thinking about limb 1 and you are thinking about costs
 21 against prices, the danger of trying to take it into
 22 account there is you are trying to take into account
 23 costs and value and return on sales and there is
 24 a danger that you are feeling like you are doing bad
 25 maths at that point.

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1 MR DORAN: Indeed, that is my point.
 2 MR BEARD: That is why we say do not try and do bad maths
 3 because actually it is hard to do these things. But as
 4 soon as you start recognising that when you consider the
 5 notional delta, we say there is no delta here anyway,
 6 but you consider that notional delta, you need to take
 7 into account that the value that people attribute to
 8 particular brands, particular features. Even though
 9 they are low cost in the limb 1 sense they are extremely
 10 important here.
 11 It does mean that in many circumstances you do have
 12 to take an extremely cautious and effectively benefit of
 13 the doubt to the defendant approach in relation to these
 14 issues. That is not surprising. It is for the claimant
 15 to prove its case that there is no reasonable
 16 relationship between the price and the economic value,
 17 no reasonable relationship. You have got to ask
 18 yourself, what is a reasonable approach to economic
 19 value in relation to those issues, and the fact that
 20 people may attach a very significant value to stability,
 21 reliability, the ability to screen calls, the nature of
 22 the company it is dealing with, because it has a certain
 23 comfort with that company and the brand that that
 24 company has projected through PR, those are all
 25 legitimate heads of value.

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1 Now, people might stand back and say objectively,
2 well that is not the way you should analyse these things
3 but that is the way the markets and the economies work
4 and that is why marketing departments and advertising
5 and PR matters in relation to all of this.

6 MR DORAN: Thank you.

7 MR BEARD: I was dealing with the first of the criticisms,
8 the low cost of gives is irrelevant and does not assist
9 in relation to this consideration.

10 The second point was it does not show that BT is
11 better than its rivals in relation to, I do not know,
12 Call Protect or Caller Display. That is not the
13 question. The question is whether or not these
14 customers attach value to this and in particular, it is
15 whether these customers attach value to that brand.
16 They may attach value to other brands. Brand value is
17 not some kind of zero sum gain within an industry. You
18 can attach real value to BT and its brand for a whole
19 range of reasons because you think it is going to be
20 reliable or because you like the way you have dealt with
21 the customer centre, you think that the call protect
22 systems are good, you have liked their adverts.

23 You might equally think a great deal about Sky. The
24 two things are not mutually exclusive. The fact that
25 you might have brand value attached to both does not

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1 diminish the brand value in relation to BT even if you
2 are thinking about brand value in relation to directly
3 competing products. Again, it goes to these value
4 issues.

5 We say that was saliently missing and it is clearly
6 a critical part of the consideration here.

7 Then very briefly, there are other considerations in
8 relation to limb 2 that are effectively being ignored.
9 First of all, there is that whole rebalancing that is
10 going on that gives an objective reason for line rental
11 price increases. We have also explored the reasons why
12 BT would actually want people migrating to broadband
13 which is also entirely legitimate, because what we see
14 is the huge decline in fixed voice call volumes.

15 If I could just briefly bring up {IR-E/17/94}. I am
16 sorry, I think I may have given the wrong page
17 reference. {IR-E/17/54}. This is essentially a cropped
18 version of that first diagram I showed you that had the
19 columns. I am so sorry, no, I am dealing with something
20 else. We had that difference but we have a similar sort
21 of curve in relation to fixed and mobile calls here
22 where you see the fall in volumes of fixed calls as
23 people shift over towards mobile.

24 So in relation to this, what you are seeing is part
25 of that rebalancing process is taking account of the

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1 overall dynamics of calling.

2 Rebalancing is extremely important in relation to
3 all of this. I have also picked up the regulatory
4 context. Just finally when we are thinking about
5 limb 2, we have also got these issues in relation to the
6 comparators. It was perhaps quite surprising to hear
7 yesterday from the Class Representative that given the
8 statements of the Tribunal in Hydrocortisone of the
9 importance of comparators, and just for your notes, that
10 is {G/96/164}, that is paragraph 331.1. That there was
11 a pleaded case initially on comparators. This case of
12 comparators to other communications providers' prices or
13 to BT's own Home Phone Saver product, those disappeared
14 after the first round of expert reports.

15 Now, we do not know why that is, but presumably ...
16 because BT's prices were not, even on the Class
17 Representative's analysis, unfair by reference to either
18 other communications providers or Home Phone Saver.

19 If we go to Dr Jenkins' first report at
20 {IR-E/17/270}, just picking it up at the bottom:

21 "Comparison of fixed voice access prices."

22 "In this and the following section I examine in turn
23 the evolution of BT's fixed voice access and calls
24 prices. Whilst I consider them to be in the same
25 relevant product market, customers choose their access

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1 provider, call package and make decisions on call usage
2 on the basis of the prices of the individual elements.
3 I cannot carry out an overall comparison at the ARPU
4 level because I do not have access to rivals' ARPU
5 data."

6 "Figure 7.5 below shows the evolution of the BT
7 standard line rental and rivals' fixed voice access
8 prices."

9 So this is just the line rental prices over time.

10 "It shows that BT's prices were not significantly or
11 persistently above those set by its rivals."

12 There was a suggestion that what this was -- what
13 these sorts of diagrams show is that BT is a price
14 leader, but that is actually quite a complex proposition
15 to test, and Mr Parker does not come close to proving
16 that BT is in fact a price leader, and therefore these
17 comparators are relevant, as is HPS.

18 If we could go to -- it is worth, just while we are
19 on that, worth noting the Post Office, which is the
20 yellow line at the bottom. You probably have this
21 point, but the Post Office entered the fixed line market
22 in 2015, and you will see its pricing moving up but
23 below that of BT, albeit not significantly. It
24 succeeded in achieving a material share of the market.
25 But then you will see that after 2018 when the

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1 commitments came in, which is the dotted black line, the
 2 Post Office dropped its pricing to try and compete
 3 against those commitments prices and ended up just
 4 exiting the market.
 5 THE CHAIRMAN: Just one moment, please. (Pause)
 6 Is that a convenient moment for our break?
 7 MR BEARD: Yes, that is fine.
 8 THE CHAIRMAN: Right.
 9 (3.17 pm)
 10 (A short break)
 11 (3.30 pm)
 12 MR BEARD: Just let me tidy up one or two issues on limb 2
 13 and then I will move on to sweep up the remaining
 14 points. Obviously I am not going to cover everything
 15 that remains, we will pick those up along the way, and
 16 it goes without saying we have dealt with a number of
 17 other issues in our skeleton argument.
 18 THE CHAIRMAN: Sure.
 19 MR BEARD: I was just showing you that chart where the
 20 Post Office exited in the face of the commitments
 21 prices, which rather suggests that that is not
 22 a competitive price.
 23 One of the other comparators that was initially
 24 drawn on by the Class Representative but then dropped
 25 was HPS. If we could just go to {IR-E/17/283} and look

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1 at the plot at the top there. So this is "BT SFV
 2 Services ARPU compared against HPS ARPU ..."
 3 So if you remember, that is Home Phone Saver, which
 4 was a product which was launched as a competitor product
 5 for fixed line by BT.
 6 THE CHAIRMAN: Yes.
 7 MR BEARD: Now, the dark line is the SFV services line.
 8 This is effectively just a more granular version of that
 9 ARPU line that we saw -- we have seen in a number of
 10 plots. But the important thing here is the proximity of
 11 the ARPU on SFV services to that on HPS. So HPS was
 12 a competitor product that we launched, it was taken up
 13 by people, but the important thing was it was seen as
 14 competing against rivals, and actually the ARPU, the
 15 effective price of it, is not significantly below the
 16 SFV prices or, more importantly for our purposes, those
 17 SFV prices, the ARPU, are not significantly above HPS.
 18 In other words, we launch a competitive product,
 19 HPS, and actually our SFV prices overall are not that
 20 much higher. So when you are talking about comparators,
 21 HPS is instructive, and of course we can understand why
 22 the Class Representative has dropped it as a relevant
 23 comparator now.
 24 THE CHAIRMAN: If it has been dropped, we do not need to
 25 spend much time on it. But just before we leave it, you

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1 say it is not significantly above. But if we take the
 2 position of 2015, the ARPU for HPS is £23 or £24 or
 3 something. Am I looking at the wrong thing?
 4 MR BEARD: No, I think you are looking at the right --
 5 THE CHAIRMAN: The SFV services ARPU is ...
 6 MR BEARD: £4 or £5 more.
 7 THE CHAIRMAN: £4 or £5 more. You say that is not
 8 significant?
 9 MR BEARD: No. When you are launching a retention product,
 10 like we did with HPS, we are just saying, look, when you
 11 are looking at comparators, we launch a retention
 12 product, which is obviously a standard industry
 13 practice, not just telecoms, and you are targeting at
 14 people who might switch. The fact that your existing
 15 standard product is more expensive, it would not be
 16 a retention product if you were not doing it
 17 differently, but the point we are making is that it is
 18 not actually vastly different when you look at the
 19 aggregate price, the ARPU price, between the two.
 20 So when you are thinking about comparators and
 21 asking yourself whether that blue line is excessive, we
 22 say that is a further indication that it is not unfair
 23 and excessive.
 24 THE CHAIRMAN: Thank you.
 25 MR BEARD: Just picking up a question you raised when we

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1 were looking at the DSAC plot about losses. It is not
 2 making losses. Bear in mind that -- it might be worth
 3 going back to it.
 4 THE CHAIRMAN: I can remember the graph. It is where it
 5 comes through the grey bit.
 6 MR BEARD: Yes. But of course the grey bit is the common
 7 cost, so what you are getting is less of a contribution
 8 to common cost. It is not actually a loss in those
 9 circumstances.
 10 THE CHAIRMAN: Yes, I follow that.
 11 MR BEARD: If you actually want to have an idea of the
 12 relevant overall levels of return for BT, I will just
 13 give you the reference for BT Consumer, it is
 14 {IR-E/17/39}, Figure 3.2.
 15 THE CHAIRMAN: Just one second. (Pause).
 16 MR DORAN: Just to elaborate on that, so what we are seeing
 17 there is just a different amount of contribution to
 18 common costs, and one might see that across the market
 19 in different products.
 20 MR BEARD: Yes. There is a real danger, we completely
 21 accept, in trying to use DSAC as the specific cost
 22 methodology for deciding whether or not you are making
 23 profits and losses, because all you are doing is talking
 24 about the level of contribution. What DSAC does is it
 25 gives you an indication -- if you are pricing above it,

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1 then that might be a strong indication that
 2 a multi-product firm is pricing excessively. If you are
 3 pricing below it, in other words, in that window above
 4 the direct and incremental costs, but below the common
 5 costs and rate of return stack, if you are pricing in
 6 that window, that is what you would expect, and it would
 7 vary how much of those common costs you recover over
 8 time, depending on other conditions.
 9 MR DORAN: I guess that is part of the problem of looking at
 10 a multi-product firm, in a sense, that you are not quite
 11 sure where that part of the stack is --
 12 MR BEARD: Yes, but that is exactly why you do DSAC. As
 13 I say, SAC combi is a more sophisticated way of doing
 14 it, and you see there you get a more sophisticated
 15 allocation of the common costs, because it is taking the
 16 standalone costs and carrying out that combinatorial
 17 methodology in relation to it.
 18 So I will try briefly to cover three issues.
 19 Business customers.
 20 THE CHAIRMAN: Sorry, is that it? Are we still on limb 2?
 21 MR BEARD: Yes, I am going to finish on limb 2, unless there
 22 are ... I have those tidy ups.
 23 THE CHAIRMAN: You are now going on to causation?
 24 MR BEARD: Yes. The four points that were essentially
 25 missed by Ms Kreisberger were the nature of the prices,

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1 so inflation and not a hike; the economic value issues;
 2 the Ofcom regulatory context which I dealt with; and
 3 then the other justifications. I then moved on to talk
 4 about comparators. They dropped all comparators. I was
 5 just explaining a couple of the key comparators in
 6 relation to this.
 7 THE CHAIRMAN: Sure.
 8 MR BEARD: So unless you have questions further on limb 2,
 9 I was going to move briefly to business customers.
 10 If we could just call up {E/45.51/7}. If we could
 11 focus on the bit on "The service" at the bottom of the
 12 page.
 13 So this is the terms and conditions. They varied
 14 over time, but this element of them did not.
 15 So when you sign up for the service, what you sign
 16 up for is:
 17 "Each service is just for you and your household for
 18 personal use (meaning that it should not be used for any
 19 trade, business or profession). You are responsible for
 20 how each service and the loaned equipment are used."
 21 Now, Mr Spitz tried to say, well, you are entitled
 22 to purchase this service but then you are not entitled
 23 to use it as a business, and there is a distinction
 24 here. Now, we do not really understand that. If you
 25 are buying the service and using it as a business, you

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1 are not entitled to that service because the service is
 2 for your personal use.
 3 Now, the barrister making the single call, no one is
 4 taking any issue with the occasional call. It is
 5 whether or not you are taking a line for business use.
 6 Actually that is what the statistics that we rely upon
 7 for business users are doing. The data that is relied
 8 upon in relation to this is material that was gathered
 9 by Ofcom who got a survey done of 1,500 small and medium
 10 sized enterprises. Some of them would have been sole
 11 traders, that is true. But what they are doing is
 12 identifying people qua businesses and asking what
 13 product you take.
 14 So they are not trying to say: are you a residential
 15 customer who occasionally uses this? They are actually
 16 just trying to identify businesses, and then identify
 17 whether in fact they take residential lines or business
 18 lines. So they are not worried about the people that
 19 use them at the margin, they are actually looking at
 20 people who are SMEs. Just for your notes -- actually,
 21 let us go to it.
 22 THE CHAIRMAN: Sorry, just as a matter of interest, someone
 23 who is a sole trader, they are not allowed to use the
 24 phone for their business either.
 25 MR BEARD: No.

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1 THE CHAIRMAN: Right. It does not matter what entity you
 2 are, it is the purpose for which you use the phone.
 3 MR BEARD: Yes, it is the purpose for which you are using
 4 it. At the margins obviously you might be -- barristers
 5 are sole traders, they can make work calls from home,
 6 that is not the issue. It is if you were a barrister
 7 trading from home, effectively, and taking a residential
 8 line for those purposes. That is what is being
 9 identified.
 10 That is how the statistics are built. They are not
 11 built on: we were looking at people and deciding whether
 12 or not they might or might not make work calls. They
 13 were self-selecting looking at who was an SME.
 14 Could we go to {C/357/1}.
 15 So you see what was done by Jigsaw Research for
 16 Ofcom is "The SME experience of communications
 17 services". So it is a survey identifying businesses,
 18 looking at what they used, and what has happened
 19 thereafter is that data has been taken to extrapolate,
 20 to say, well, if there are this many businesses, and
 21 this many of this cohort that were surveyed used
 22 residential lines, that is what we would expect to see
 23 overall. That is what the economists have done.
 24 So this stuff about the marginal business use is
 25 just not relevant to how the calculation has been done.

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1 So we are not getting into a legal dispute about whether
 2 or not, if you do three calls a day, you are trading as
 3 a business or not. You see the position? Yes, that
 4 survey does cover sole traders who are self-declared as
 5 SMEs.

6 So that deals with the first point.
 7 Mr Spitz's submission then, it is not clear whether
 8 he is saying, well, they should still be within the
 9 Class if they were not entitled to the contract. We say
 10 they should not, there is no good reason for it.

11 Because if you are not entitled to this service, we do
 12 not understand on what basis you should be claiming,
 13 because your only claim here is that you were
 14 effectively overcharged under this contract. That is
 15 the claim you are making. It is a breach of statutory
 16 duty claim, but that is the claim you are making, you
 17 have been overcharged under the contract.

18 We say even if you left them in the Class, there is
 19 still just no unfairness in relation to this cohort.
 20 Going back to the point we made earlier about the
 21 parameters of how you assess unfairness being open,
 22 essentially, it is clear that if you are a business
 23 customer who is using residential services for business,
 24 you are actually better off than if you had used a
 25 business service, but most of all, you are just not

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1 entitled to do so.

2 So you end up with a situation where -- some of
 3 these SMEs -- an SME can be between zero and 250
 4 employees. You can have quite a few people. If you
 5 were an SME with, say, 10 employees and you used
 6 residential lines, which you were not entitled to, you
 7 are apparently a member of this Class and able to make
 8 a claim, whereas if you are an SME with 10 employees and
 9 you took the business service which you were supposed
 10 to, you are out of the Class and cannot make any claim.
 11 So you do the right thing and on the basis of this
 12 analysis you are worse off. That cannot possibly be
 13 consistent with assessments of fairness, never mind
 14 class definition.

15 Mr Spitz came up with an analogy. He said, well,
 16 this is a bit like saying that if there were overcharges
 17 on train tickets, a second class passenger who sat in
 18 first class would not be able to make a claim in
 19 relation to the overcharge. That is not right. That
 20 person, if there was an overcharge in relation to second
 21 class tickets, you would always be able to make an
 22 overcharge claim in relation to that second class
 23 ticket. That is not the point.

24 The closer analogy here would be if you were an
 25 adult and you bought a child's ticket, to which you were

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1 not entitled, and there were overcharges on child's
 2 tickets, and you turn up and say: I would like to have
 3 some money back from a child's ticket. Well, you are
 4 not entitled to that. That cannot possibly be unfair on
 5 you. You should have paid an adult fare.

6 Then we end up torturing counterfactuals, but we are
 7 not disputing the general approach to counterfactuals,
 8 but we are dealing with this in the context of this
 9 excessive pricing case. Indeed, Mr Spitz went so far as
 10 to say, well, the answer here is if you are a business
 11 and you should not have been using it, BT should be
 12 countersuing. Well, no, we do not have to countersue in
 13 order to be able to say: you should not be in a class
 14 making a claim on the basis of a contract you are not
 15 entitled to when you suffered no unfairness.

16 More particularly, I wonder if Mr Spitz has thought
 17 through how that is supposed to work here. If that were
 18 the answer, that would be grotesquely unfair on
 19 defendants to opt-out class actions who could not
 20 possibly identify those individuals because the Class
 21 Representative certainly cannot.

22 The same is true of his contentions about
 23 ex turpi causa. We are not talking about turpitude here
 24 and proving turpitude. But if that were an issue that
 25 had to be dealt with, how on earth is that supposed to

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1 be dealt with in the context of an opt-out claim? That
 2 is going to be a fun problem for a court in due course
 3 if someone does have an ex turpi causa claim in relation
 4 to opt-out cases but you do not need it here.

5 So Mr Spitz is creating this sort of legal
 6 infrastructure around what is a very simple point in
 7 relation to contractual entitlement.

8 As we say, here you have a situation where business
 9 customers were not entitled to the contract in respect
 10 of which they say they have been overcharged. They
 11 should not be part of the Class. The calculation of the
 12 reduction of the Class is the technical exercise that
 13 the experts have undertaken. That can be dealt with in
 14 due course in the hot tub.

15 I will not go further unless you have particular
 16 questions in relation to business customers.

17 There are a couple of issues in relation to the
 18 methodology for calculating damages where there was
 19 a discussion by Mr Spitz about how it was not right to
 20 use upper bounds for measures.

21 THE CHAIRMAN: Yes.

22 MR BEARD: There is a danger here of conflating and
 23 confusing various things. The first thing to bear in
 24 mind is that in relation to the cost allocation rate of
 25 return calculation, it is right that this Tribunal takes

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1 a conservative approach. In other words, it takes
 2 higher reasonable cost allocations, it looks at the
 3 range of cost allocations, it takes the higher rate of
 4 return allocations for all of those reasons I explained
 5 by reference to the case law and the underlying policy
 6 in relation to ex-post enforcement at excessive pricing.
 7 So we do say upper bounds are right in relation to those
 8 issues.

9 It does not have to be the extreme end, it does not
 10 have to, for instance, be the standalone costs measure
 11 that is used, but we do say, in line with the case law,
 12 if you have to use reasonable methodologies, the benefit
 13 of the doubt approach, the defendant in those
 14 circumstances, you are taking upper bounds. So if
 15 Mr Spitz was taking issue with that, he is wrong in law.

16 If what he is then saying is: once you have decided
 17 on that cost benchmark and said what it is, that you
 18 should do something else in relation to it, what the
 19 relevant price is, then we do not accept that. You use
 20 that cost benchmark, having regard to "significantly and
 21 persistently above", which might give you
 22 a potential degree of flexibility, a delta, but again,
 23 that is in relation to limb 1. Once you have identified
 24 that, you do not somehow unwind it and decide you are
 25 going to run the calculation off a different measure.

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1 The only authority he could point to in that regard
 2 was the *Albion Water* case, but *Albion Water* is
 3 completely different in this regard and the reason is
 4 this: you had a situation where the regulator carried
 5 out an analysis of various methodologies. A mid-point
 6 in those methodologies for costs was agreed between the
 7 parties as giving rise to a reasonable price. That was
 8 an agreement that was reached.

9 When it came to the damages claim, what was found by
 10 the court was that Dŵr Cymru, the defendant, would have
 11 offered -- on the balance of probabilities, it would
 12 have offered the price that it had agreed to in the
 13 interim measures arrangements. In other words, it was
 14 a proof issue in relation to that, and that is what
 15 Mrs Justice Rose identified there.

16 THE CHAIRMAN: Just to be clear about it, however you put
 17 it, you are saying, as I understand it, you say, well,
 18 it would be conservative and there are various ways of
 19 doing it with a reasonable margin. But once you have
 20 got that margin and you set the upper limits of the
 21 cost-plus --

22 MR BEARD: Yes, including limb 2 and any significant and
 23 persistent measure that you are talking about, yes.

24 THE CHAIRMAN: Yes, but once you --

25 MR BEARD: Once you have done that.

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1 THE CHAIRMAN: Once you have done that, you are not
 2 suggesting there should be some further cushion or
 3 something like that.

4 MR BEARD: No.

5 THE CHAIRMAN: That is what I wanted to be clear about.

6 MR BEARD: So I say the delta issue, the "significant and
 7 persistent" issue, comes in at limb 1, as it does in the
 8 case law. Once you have done that and you have taken
 9 into account limb 2 factors, because of course you have
 10 to do that in deciding whether or not it is excessive,
 11 but once you have done that, that is the measure that
 12 you use in relation to this issue.

13 THE CHAIRMAN: In case there is a limb 2 factor which would
 14 reduce the relevant delta but not eliminate it entirely,
 15 because if it is eliminated entirely, it is not unfair.
 16 Have I got that --

17 MR BEARD: Yes, that is right. Taking into account
 18 "significant and persistent", because that is another
 19 consideration.

20 THE CHAIRMAN: Yes, right.

21 MR BEARD: But yes, that is it. Albion Water does not cut
 22 across that. That is the simple point.

23 I think those are the main issues in relation to
 24 quantum.

25 Then we are into interest and inflation where again,

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1 with respect, the Class Representative is just not going
 2 correctly on the law.

3 The inflation component, to be fair to Mr Spitz,
 4 I think he used the phrase "there are the building
 5 blocks in *Pickett* for introducing the inflation
 6 element". I think, sir, as you identified, that case of
 7 *Pickett* is very, very different. What you were dealing
 8 with in *Pickett* was how, prospectively, you calculated
 9 damages for a personal injury case where someone
 10 essentially had a reduced lifespan because of the
 11 injury. So you are looking prospectively at how you
 12 uplift the order you make at the time.

13 It is not suggesting that when you are making an
 14 order in relation to damages, a monetary, pecuniary loss
 15 in relation to the past, you inflate it upwards all the
 16 way before you reach the judgment. Indeed, if that were
 17 the case, you would be reforming the way in which all
 18 damages cases in all fora effectively operated.

19 So his building blocks, it must be said, will have
 20 to be remarkable to take him anywhere towards this
 21 structure, because in reality what he is doing is he is
 22 asking for damages on top of the damages he is claiming,
 23 and those are effectively a component of compound
 24 interest. That is what it amounts to here. It is
 25 damages on damages.

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1 When we talk about compound interest, we are
2 strictly speaking, talking about damages on damages.
3 That is what *Sempra Metals* is all about. The same
4 criteria in *Sempra Metals* applies in relation to this
5 inflation element as it does in relation to the compound
6 interest.

7 I will not take you through *Sempra Metals*, but it
8 really does not assist him to be putting forward
9 generalised data on the part of his expert about the
10 cohort of Britain, and then trying to tinker with it,
11 suggesting there are modifications for this Class. It
12 is not within touching distance of the *Sempra Metals*
13 criteria, either in relation to inflation or in relation
14 to compound interest.

15 I think it is important to be clear that the
16 inflation approach would be a radical change in relation
17 to the way that damages are dealt with, compound
18 interest, more straightforward as a framework but just
19 not met here, applying *Sempra Metals*.

20 In those circumstances, reliance on Pickett does not
21 assist, and nor do the *Merricks Remittal* observations in
22 relation to this issue, because in relation to the
23 *Merricks Remittal* observations the material that has
24 been put forward in no way meets those criteria. It may
25 be the best that Mr Parker can do, but they just do not

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1 meet the *Sempra Metals* criteria.

2 So in those circumstances there is nothing to see
3 here, notwithstanding the remarkable ambition of the
4 case in relation to compound interest and inflation.

5 Those were the key points that I was going to pick
6 up in relation to this. Obviously we will deal with
7 issues on behavioural evidence and mitigation and so on
8 in due course, but I am not sure that I can particularly
9 assist further in relation to those matters.

10 I am just going to look behind me in case there is
11 anything ...

12 THE CHAIRMAN: Yes, of course.

13 MR BEARD: Unless I can assist further, I am grateful for
14 the indulgence, and I apologise to the CMA, but those
15 are our opening submissions.

16 THE CHAIRMAN: Thank you.

17 MS KREISBERGER: Sir, I certainly do not want to take time
18 away from Ms MacLeod, I just need to correct something.
19 On our pleaded case, Mr Beard said I dropped all
20 comparators. We have not abandoned our pleaded case on
21 comparators. I said the primary focus, and I hope that
22 is clear.

23 THE CHAIRMAN: I thought -- I appreciate there are questions
24 of comparators which can arise in relation to limb 1,
25 but I do need, therefore, to be quite clear about it in

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1 relation to limb 2. I thought you had said yesterday
2 that so far as limb 2 was concerned, you were only now
3 running unfair in and of itself, rather than the second
4 part of limb 2, but I am not quite sure whether that is
5 the case.

6 MS KREISBERGER: No, I am terribly sorry, I want to correct
7 that impression.

8 THE CHAIRMAN: Right.

9 MS KREISBERGER: I did not want to give up time to that in
10 opening submissions. There is obviously a need to
11 prioritise. We do not step away from our pleaded case.
12 That is paragraph 136(b) of the claim form and
13 paragraphs 186 and 187 of the skeleton. I simply do not
14 need to add to those.

15 The comparators we rely on under limb 2 are the
16 commitments price and Post Office's price. It is not
17 a focus of the case.

18 THE CHAIRMAN: Just a moment. (Pause). Right.

19 MS KREISBERGER: I do not need to add in oral submissions to
20 what is said in my skeleton.

21 THE CHAIRMAN: Right, let me just ... Thank you very much.
22 You have clarified that.

23 Just before you start, Ms MacLeod ...

24 Mr Beard, does that alter anything so far as you are
25 concerned?

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1 MR BEARD: Yes, I would need to deal with those issues, but
2 frankly ...

3 THE CHAIRMAN: Can I just make a housekeeping point here.
4 We are now at 4 o'clock. Ms MacLeod had already given
5 up 15 minutes, so 45 minutes. There is an alternative
6 way of dealing with this.

7 Ms MacLeod, you could do your submissions tomorrow
8 at 11 am before we have the witness evidence, because we
9 have only got one witness tomorrow, we are not going to
10 run into any time difficulties. If that is the case,
11 Mr Beard could say, if there is anything else he wants
12 to say on those matters, he could do it now.

13 MR BEARD: I can do. I have to --

14 THE CHAIRMAN: Let me just ...

15 Ms MacLeod, is there a problem with you doing yours
16 at 11 o'clock tomorrow, unless you have now slimmed it
17 down so much ...

18 MS MACLEOD: We are very much in the Tribunal's hands.
19 I have not checked behind me, but we are in the
20 Tribunal's hands as to what would assist. We have tried
21 to slim it down to 45 minutes. I can try and slim it
22 down further. I am really in your hands.

23 MR BEARD: Sir, if Ms MacLeod and the CMA do not want to
24 have to come back tomorrow, then the alternative is
25 I can look at this overnight and see whether or not

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1 there are particular things, and I can pick it up
 2 tomorrow morning.
 3 THE CHAIRMAN: Right. But we have already -- the problem is
 4 we only have half an hour, the transcriber has been --
 5 MR BEARD: I understand.
 6 THE CHAIRMAN: Right, you might be shorter tomorrow morning
 7 if you have time to think about it overnight.
 8 MR BEARD: I may be very short tomorrow morning, because
 9 I just need to go back and look at the pleadings that
 10 they specifically refer to, but I do not think they are
 11 taking matters any further.
 12 THE CHAIRMAN: Right.
 13 MS MACLEOD: I am very much in your hands, sir. I am happy
 14 to start and see where we get to.
 15 THE CHAIRMAN: We can do that much, I think that is not
 16 a bad idea. But I do not want you to feel ... You were
 17 allowed an hour and you should have your hour, that is
 18 what you are entitled to, which is why I am not going to
 19 say now you have got to be done by today, because we are
 20 going to rise at 4.30, come what may. I have other
 21 commitments later on.
 22 If you do not get through what you want to get
 23 through, then we will continue with you at 11 o'clock,
 24 and then whatever Mr Beard wants to say he can say then,
 25 and then we will go to Ms Cheek.

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1 MS MACLEOD: Can I just turn around and check that that is
 2 fine with the CMA. It is fine.
 3 THE CHAIRMAN: Jolly good.
 4 Right.
 5 Opening submissions by MS MACLEOD
 6 MS MACLEOD: As you will be well aware, the CMA has
 7 a central statutory role in enforcing competition law in
 8 the UK for the benefit of consumers. It therefore has
 9 a significant interest in how competition law is being
 10 interpreted and applied, including in private damages
 11 actions, and in particular the CMA is interested in
 12 ensuring that the law is consistently applied across
 13 Competition Act appeals and private damages actions.
 14 Now, of course the CMA has a particular interest in
 15 excessive pricing cases because it has been involved in
 16 a number of the key decisions and cases in which the
 17 prohibition has been applied, including *Phenytoin*,
 18 *Liothyronine* and *Hydrocortisone*.
 19 The CMA has already provided --
 20 THE CHAIRMAN: Can you just go a little bit slower.
 21 MS MACLEOD: I certainly can. I am going at the pace
 22 assuming that I have to finish.
 23 THE CHAIRMAN: You can slow down. The transcriber might
 24 find it easier and I would find it easier.
 25 Right, you have been in a number of cases.

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1 MS MACLEOD: We have, sir, *Phenytoin*, *Liothyronine* and
 2 *Hydrocortisone*.
 3 THE CHAIRMAN: Yes.
 4 MS MACLEOD: In this case, the CMA has already provided two
 5 sets of written submissions signed by Professor Bailey.
 6 The first is at {A/8/1} of the bundle for your note, and
 7 that sets out the general principles applicable to
 8 excessive pricing.
 9 The second is, again for your note, at {A/9/1}, and
 10 that deals with four issues arising out of the
 11 *Liothyronine* and *Hydrocortisone* judgments which had come
 12 out in the interim between the two sets of submissions.
 13 Now, I am conscious that you have got a great deal
 14 of reading, but if you have not had time to read those
 15 submissions, I would respectfully urge you to do so.
 16 They set out the CMA's position on the principles
 17 underlying the prohibition on excessive pricing and the
 18 manner in which that prohibition has been applied in the
 19 courts. The Class Representative has explicitly adopted
 20 those submissions and my understanding is that BT does
 21 not take issue with those principles either.
 22 THE CHAIRMAN: Is that correct, Mr Beard?
 23 MR BEARD: I think that is right on the principles. After
 24 all, I have been going to the cases and praying the CMA
 25 in aid. I can take some hypocrisy but up to a limit.

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1 THE CHAIRMAN: Well, if you change your mind overnight ...
 2 Otherwise, assume the principles are agreed by the other
 3 parties.
 4 MS MACLEOD: With that in mind, I am not going to repeat
 5 them, neither am I going to descend in any way to taking
 6 sides on the merits of this case. The CMA's interest is
 7 solely on matters of legal principle and so I will not
 8 enter into any of the debates on the evidence.
 9 I recognise that that is an unusual position to take
 10 in a case, but the aim is to provide more detail on the
 11 framework within which the disputes arise while
 12 maintaining a position of neutrality on this dispute.
 13 My submissions are given against the backdrop of
 14 Mr Beard's submissions yesterday on the legal test which
 15 urged caution and restraint upon the Tribunal in light
 16 of the policy concerns that he identified, namely the
 17 risk of overreach by the Tribunal into the proper
 18 operation of market forces and the need for legal
 19 certainty.
 20 In line with that overarching theme of caution,
 21 Mr Beard came back to a number of threads which he
 22 emphasised. The first was the desirability of
 23 a combinatorial approach, and I say desirability rather
 24 than mandated nature. Second was the need for legal
 25 certainty and for the dominant company to be able to

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1 anticipate the permitted level of pricing. Third was
 2 the need for particular restraint in respect of
 3 regulated markets.
 4 Now, these are important points of principle and it
 5 is these points of principle that I will focus on in my
 6 submissions before dealing briefly with the points that
 7 arose at the end of Mr Beard's submissions today in
 8 debate with Mr Ridyard and Mr Doran on the positioning
 9 of the cases in *Hydrocortisone* and how that fits into
 10 the legal test. That is something I will pick up right
 11 at the end as a point of principle.
 12 THE CHAIRMAN: Thank you.
 13 MS MACLEOD: So to start with the overarching theme of the
 14 need for caution, what I will do is to start by
 15 considering the importance of the prohibition on
 16 excessive pricing and to seek to assist the Tribunal on
 17 how to strike a balance between the valid public policy
 18 concerns that have been identified by Mr Beard and the
 19 important consumer protection function served by the
 20 prohibition and emphasised by Ms Kreisberger.
 21 To start with the importance of the prohibition on
 22 excessive pricing. My first point is a simple one.
 23 Ms Kreisberger has already emphasised that there is
 24 a clear statutory prohibition on unfair pricing in this
 25 jurisdiction. That was her point one. It is a trite

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1 point, it is obviously not in dispute, but it does bear
 2 repeating.
 3 In this jurisdiction the legislature has clearly
 4 specified that whatever the public policy concerns to
 5 the contrary, and whatever the position in other
 6 jurisdictions, excessive pricing is, here, an unlawful
 7 abuse of dominance and the courts must apply that
 8 prohibition.
 9 My second point is also Ms Kreisberger's second
 10 point. A key purpose of the prohibition that has been
 11 imposed by the legislature is the protection of
 12 consumers. Ms Kreisberger referred to
 13 Lord Justice Green's comments in *Gutmann* to that effect,
 14 as well as the recent comments of this Tribunal in
 15 *Liothyronine*. I wish to slightly develop that point
 16 because, in the CMA's submission, in the right
 17 circumstances intervening to protect consumers is vital.
 18 Now, the reason for the increased enforcement
 19 activity from the CMA in this area is that the CMA,
 20 along with the Commission, identified that in certain
 21 sectors there has indeed been significant consumer harm
 22 from the exploitation of market power, often arising
 23 within regulated sectors such as in the pharmaceutical
 24 sector. It has therefore been a focus of the CMA in
 25 recent years, and we have the decisions of the Tribunal

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1 in each of *Liothyronine* and *Hydrocortisone* which have
 2 upheld the CMA's decisions.
 3 Now, in the context of private proceedings brought
 4 on behalf of consumers, that point is no less apt.
 5 There is, in the CMA's submission, a distinct and vital
 6 role for litigation between private parties in ensuring
 7 compliance with competition law. This is elegantly
 8 expressed, if I may say so, by Mr Justice Roth in the
 9 *Servier* case, which is at {G/83/1}.
 10 Now, this case relates to claims for damages brought
 11 by health authorities in respect of pay for delay
 12 agreements, and all I want to pick up is a very specific
 13 point which he makes at paragraph 242 in the context of
 14 discussing litigation of loss. That is at page
 15 {G/83/70}. It is right down at the bottom.
 16 He states there that:
 17 "This claim, or more precisely, these claims, are
 18 claims in competition law. The purpose of competition
 19 law is to protect consumers and the economy generally
 20 from the consequences of anti-competitive conduct, of
 21 which the most notable example is the artificial
 22 maintenance of higher prices than would occur under
 23 competitive conditions."
 24 Over the page:
 25 "Private actions for damages play an important role

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1 in competition law, alongside public enforcement, in
 2 strengthening the working of the competition rules and
 3 discouraging anti-competitive agreements and practices."
 4 In my submission, therefore, private and public
 5 enforcement of the statutory prohibition go arm in arm,
 6 and the fact that consumers are now able themselves to
 7 bring such actions is a starting point, in the CMA's
 8 submission, to be welcomed.
 9 My third point on the importance of the prohibition
 10 relates to the severity of the harm. This was
 11 emphasised by the Tribunal in *Liothyronine* to which you
 12 were referred yesterday.
 13 Can we turn up {G/95/155}.
 14 Just as a reminder, in *Liothyronine* the Tribunal had
 15 upheld a finding by the CMA that there had been abuse of
 16 dominance in the market for the supply of thyroid
 17 medicine, and it was a case solely on excessive pricing.
 18 In this section the Tribunal, having upheld the
 19 CMA's position on liability, is considering the relevant
 20 penalty and, as you can see from the title, is
 21 considering step 1, which is the serious step 1 overall.
 22 Then if you go over the page to page {G/95/156}, you
 23 can see the "seriousness percentage", and at
 24 paragraph 445, it can be seen that "a starting point of
 25 up to 30%" can be applied at that stage of the CMA's

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1 penalty analysis.
 2 So if we move to paragraph 448 on page {G/95/158},
 3 you can see that the CMA had applied the 30% seriousness
 4 percentage. As you can see from the final sentence of
 5 the next paragraph, the CMA had also applied a 30%
 6 starting point in two other excessive pricing cases,
 7 *Phenytoin* and *Hydrocortisone*.
 8 If we move on to paragraph 450 {G/95/158}, that is
 9 explained. We see that the Tribunal makes clear that:
 10 "... the Penalty Guidance [of the CMA] explicitly
 11 refers to excessive pricing as conduct that is
 12 inherently likely to have a particularly serious effect,
 13 justifying a starting point between 21–30% for such as
 14 excessive pricing."
 15 At paragraph 451, the Tribunal continues:
 16 "As the CMA noted in the Decision, protection of
 17 customers against exploitation is a core aim of
 18 competition law. Unfair pricing is one of [the] key
 19 harms that competition law is designed to prevent.
 20 The prices -- and consequently the direct financial
 21 benefit -- resulting from excessive pricing may well be
 22 higher, more immediate, and more certain to be achieved
 23 than those which may be achieved from other forms of
 24 anti-competitive behaviour, such as cartelisation. We
 25 do not consider that excessive and unfair pricing is

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1 inherently less serious than exclusionary abuses or
 2 secret cartels."
 3 Now, for your note, the Tribunal in *Hydrocortisone*
 4 also agreed with the CMA in terms of the seriousness of
 5 the infringements in issue. That is at paragraph 376,
 6 {G/96/178}.
 7 So, in short, there is a real risk of significant,
 8 particularly immediate, harm to consumers if excessive
 9 pricing is allowed to go unchecked.
 10 So having considered the importance of the
 11 prohibition, it is then important to consider the basis
 12 on which caution is urged. Mr Beard introduced this
 13 point by reference to a report of Mr David Matthew which
 14 urges caution on intervening on prices using ex-post
 15 competition law. That report exhibits other economic
 16 commentary to which Mr Beard briefly referred.
 17 The key points that were emphasised were that
 18 interference with pricing carries substantial risks to
 19 the proper functioning of an economy if intervention is
 20 unwarranted and also may carry risks in terms of legal
 21 certainty.
 22 Mr Beard referred to the home of antitrust law, the
 23 US, and noted there is no such prohibition in that
 24 jurisdiction, and he also placed significant weight on
 25 the comments of Advocate General Wahl in the *Latvian*

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1 *Copyright* case, including the Advocate General's
 2 particular focus on a combinatorial approach, before
 3 coming to the Court of Appeal in *Phenytoin* and its later
 4 exposition.
 5 Now, from the CMA's perspective, Mr Beard is
 6 entirely correct that there is a lively academic debate
 7 about the value of excessive pricing interventions. He
 8 is also correct to note that it is not the focus of
 9 other jurisdictions. He is correct again to note that
 10 in some cases there has been a preference expressed for
 11 a combinatorial approach, and the CMA would also accept
 12 that he is right that there is a risk of adverse effects
 13 if the test for excessive pricing is misapplied although
 14 this is a feature of much of competition law.
 15 The question is therefore the appropriate balance to
 16 be struck between the entirely valid policy
 17 considerations that have been identified by the
 18 defendants and those which the Class Representative
 19 identified and I have supplemented.
 20 In my submission the question as to the balance that
 21 must be struck has been articulated and answered, not
 22 only by the legislature but also by the Court of Appeal
 23 in *Phenytoin*.
 24 If we can turn to *Phenytoin* and turn to paragraph 97
 25 which is at {G/73/29}. This is by now, I am sure, very

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1 well familiar. It is the key section of the judgment to
 2 which you have already been referred. It is set out
 3 under the heading "Conclusions flowing from case law".
 4 If I could go over the page to page {G/73/30}. So
 5 this is after Lord Justice Green's conclusions we see
 6 a heading there entitled "The economic literature".
 7 Now, an important background feature of the
 8 judgments of the court in the *Phenytoin* case is that the
 9 court itself requested that it be provided with a broad
 10 set of material, including notably economic material on
 11 the test for excessive pricing. We see from
 12 paragraph 99 that the Court of Appeal in *Phenytoin* were
 13 provided with a very significant amount of such
 14 literature going to three volumes on how competition
 15 authorities and economists viewed the tests to be
 16 applied.
 17 That literature, we have been back and checked,
 18 included articles which Mr Beard referred to briefly
 19 yesterday including those from Evans & Padilla, extracts
 20 from O'Donoghue & Padilla and articles from Motta & de
 21 Streel.
 22 Lord Justice Green considered that economic
 23 literature very specifically and his conclusion is
 24 at paragraph 107 on {G/73/33}.
 25 "Pulling the strands together I conclude that the

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1 economic literature supports the conclusions of law that
 2 I derive from the case law summarised above.”
 3 What that means in my submission is that the
 4 conclusions he has set out on the law already
 5 appropriately draw the balancing line between the points
 6 of public policy identified. The test which, as you
 7 have already been shown, requires the proving of trading
 8 benefits that would not have been reached in
 9 circumstances of normal and sufficiently effective
 10 competition, itself strikes the balance between ensuring
 11 that there is no overreach and, on the other hand, the
 12 protection of consumers.
 13 Lord Justice Green has, with respect, done the work
 14 in terms of reconciling economic theory, including the
 15 points that were emphasised by Mr Beard yesterday, and
 16 legal principle. So there is no special further caution
 17 that requires to be applied to excessive pricing over
 18 and above the terms of the legal test.
 19 That is my submission on the overarching point of
 20 caution.
 21 Moving to the first of the three sub-themes
 22 I identified which is the desirability of
 23 a combinatorial approach.
 24 I can be quite brief on this. If we go back to
 25 paragraph 78 within this judgment, {G/73/23}, this is

1 where Lord Justice Green is introducing and setting out
 2 both the Advocate General’s opinion and the judgment in
 3 the *Latvian Copyright* case.
 4 All I want to do here, because there was a great
 5 deal of focus on this yesterday, is emphasise the
 6 conclusion reached by Lord Justice Green. That is at
 7 paragraph 86 on page {G/73/25}. It is right at the
 8 bottom. He concludes:
 9 “The judgement of the court is not authority for the
 10 proposition that in law competition authorities must use
 11 more than one method for determining abuse (under either
 12 limb or stage of the United Brands test): the use of
 13 a combinatorial approach might be good practice or might
 14 be requisite on the facts of a particular case, but that
 15 is not the same as saying that it is a universal rule of
 16 law.”
 17 A similar point is made at paragraph 97 which is on
 18 page {G/73/29} where at (iv), along from F he explains:
 19 “Depending upon the facts and circumstances of the
 20 case a competition authority [or we would say a private
 21 party] might therefore use one or more of the
 22 alternative economic tests which are available. There
 23 is however no rule of law requiring competition
 24 authorities [or again we would say private parties] to
 25 use more than one test or method in all cases.”

1 So that is the first of the three sub-themes.
 2 The second sub-theme that I identified as being
 3 a thread of Mr Beard was that of legal certainty and the
 4 need for a dominant company to locate a fair or
 5 permitted price. Now, the CMA of course agrees that
 6 legal certainty for dominant companies is important but
 7 the CMA would cavil with any suggestion that there is
 8 a requirement for the Tribunal or a competition
 9 authority or a private party for the purposes of
 10 liability at least to identify a specific fair price.
 11 No part of the test as set out by Lord Justice Green
 12 at paragraph 97 requires the identification of a fair
 13 price and indeed, it is clear from both
 14 Lord Justice Green at paragraphs 120–125 and the
 15 Chancellor at paragraph 248 that there is no requirement
 16 to set a hypothetical price benchmark. That was the
 17 focus of an entire ground of appeal against the
 18 Tribunal’s judgment in that case. If we can turn to
 19 paragraph 248 which is at page {G/73/69}. This is in
 20 the judgment of the Chancellor. He states that:
 21 “It seems to me that, as a matter of law, the CAT
 22 was wrong to suggest ... that the CMA was required in
 23 considering the excessive limb as a matter of law to
 24 seek “to establish a benchmark price (or range) that
 25 would have pertained in circumstances of normal and

1 sufficiently effective competition using the evidence
 2 more widely available. Such an approach might be
 3 appropriate in some cases, but has not been specifically
 4 endorsed by ... and certainly did not automatically
 5 vitiate the CMA’s methodology in this case.”
 6 In light of that, the CMA’s decisions which Mr Beard
 7 in my submission rightly characterised as conservative
 8 do not identify a fair price. There is no post facto
 9 regulation of that nature in those decisions.
 10 Now, that result, that there is no requirement to
 11 identify a fair price but only to identify an unfair one
 12 does not in my submission lead to a lack of certainty.
 13 The legal certainty of the test was expressly considered
 14 in Hydrocortisone at paragraph 354 which is at
 15 {G/96/171}. It is the bottom half of the page.
 16 Of course you are well aware that Hydrocortisone is
 17 another pharma case and this is the section towards the
 18 end of the court’s judgment on abuse where it is
 19 upholding the court’s finding on approach.
 20 You see here from the paragraph at 354 that it was
 21 submitted “that the law on abusive pricing was so
 22 unclear that undertakings in this market -- particularly
 23 [in the context of Hydrocortisone] when prices were
 24 falling -- [that those undertakings] simply did not know
 25 what their legal position was.”

1 The Tribunal's response to that is clear. It does
 2 not accept that submission. I want to focus on sub (1)
 3 and sub (2) here as (3) is about the circumstances of
 4 falling prices.
 5 So at (1) we see that the Tribunal says that:
 6 "The law -- as we have described it -- is clear."
 7 It states that all of the undertakings would have
 8 been well aware of both the cost and the price charged
 9 for these products and they would have been aware that
 10 the price significantly exceeded cost.
 11 Pausing there. The CMA would contend that the
 12 dominant company will often have the best sense of its
 13 own costs and its own prices and therefore will be in
 14 the best position to consider excessiveness.
 15 The Tribunal then goes on to state:
 16 "The pricing of products sold is one of the key
 17 functions of the entrepreneur, and entrepreneurs will or
 18 ought to know why their products are commanding
 19 the prices that they do. That kind of market awareness
 20 is a prerequisite to setting price, particularly in
 21 a market not characterised by overt competition."
 22 Here again we see that the Tribunal is explaining
 23 that the dominant company will have a better sense of
 24 the value of its products than others. That is a theme
 25 which is carried into sub (2) which makes clear that the

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1 distinction between cases 2 and 3 in the Hydrocortisone
 2 schema will be more visible to the entrepreneur than to
 3 the court which comes as an outsider to the market.
 4 The CMA would respectfully add to those points that
 5 a dominant company is likely to have a sense of the
 6 comparable products available to its customers and the
 7 competitiveness of its prices against those comparable
 8 products staying competitive is the role of any
 9 business.
 10 Therefore, it may be, as the Tribunal made clear in
 11 Hydrocortisone and elsewhere, that the prohibition on
 12 excessive pricing is difficult to apply but this does
 13 not unduly prejudice the dominant company if the test is
 14 applied properly.
 15 Now, the final sub-theme is that of regulation and
 16 it is a theme that crops up across these cases. The
 17 markets in Albion Water in Deutsche Post, in all of the
 18 pharmaceutical cases, they all arose from regulated
 19 industries. The CMA's position on this is quite simple.
 20 There is no general requirement as a matter of principle
 21 for a tribunal considering the price charged in
 22 a regulated market to find that there has been
 23 a regulatory failure before finding that the price
 24 charged was excessive. One sees no such finding in the
 25 *Phenytoin* or *Liothyronine* judgments.

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1 Now, that is not to say that the position of the
 2 regulator may not be relevant on the facts of an
 3 individual case. The CMA would emphasise, as Mr Beard
 4 did, paragraph 329 of this judgment on page {G/96/163}.
 5 It is right at the bottom:
 6 We can see from the second sentence that
 7 "... the manner in which a market operates --
 8 including in particular the legal regime governing such
 9 markets -- can be highly relevant to both questions of
 10 dominance and abuse, as *Humber Oil* demonstrates."
 11 The CMA would emphasise that the position of the
 12 regulator, including the evidence gathered by that
 13 regulator, may be particularly relevant at the stage of
 14 considering the broad multifactorial assessment of
 15 whether or not a price is in all the circumstances fair.
 16 So the second limb.
 17 Mr Beard made clear yesterday that he was not
 18 suggesting that there is a simple solution where there
 19 is a regulator but I do want to pick up the point he
 20 makes in his skeleton about there being a need for real
 21 caution in respect of regulated industries. That is at
 22 paragraph 49.
 23 If the submission is that such markets should be
 24 afforded some special status or be given a wider berth,
 25 the CMA would respectfully disagree with that. While it

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1 will depend on the facts of an individual case, failures
 2 in regulated industries have clearly been observed by
 3 the CMA and the CMA has acted to respond to them. It
 4 is, the CMA respectfully submits, entirely appropriate
 5 and indeed vital for competition authorities and
 6 ultimately the courts to sanction exploitative conduct
 7 when it does arise whether or not there is a sectoral
 8 regulator.
 9 Ultimately it comes down to the point which is over
 10 the page at {G/96/163}, paragraph 329(1).
 11 "Depending on its nature, a regulatory regime
 12 governing a market may either create or exacerbate
 13 dominance and/or the potential for abuse (as is the case
 14 here) or eliminate or reduce it (as was the case in
 15 *Humber Oil*."
 16 It will all depend on the facts.
 17 I am very conscious of time. I only have a few very
 18 brief points to pick up from the discussion arising in
 19 respect of limb 2 and Hydrocortisone, the Hydrocortisone
 20 schema. I suspect I cannot quite see that clock but my
 21 clock I have a few minutes.
 22 THE CHAIRMAN: You have a few minutes, yes, sure, if you are
 23 happy to do it on that basis.
 24 MS MACLEOD: I am.
 25 So to go back to the question of economic value.

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1 One can take economic value into account anywhere, as
 2 Mr Beard said. That is what was said in Phenytoin. But
 3 we would agree with what was put to you earlier this
 4 afternoon that there is good sense in locating the
 5 consideration of economic value at limb 2 because that
 6 is where one is conducting a broad multifactorial
 7 assessment and that is where you will find that
 8 discussion located in the CMA's decisions.
 9 Because of that, therefore, we would agree with BT,
 10 it is natural to consider the Hydrocortisone schema at
 11 that limb 2 section, the section of the analysis.
 12 Now, I am not going to get into whether or not this
 13 case is case 2 or case 3 for obvious reasons but the
 14 single point I wish to emphasise is that the three cases
 15 identified by the court in Hydrocortisone should not be
 16 treated as watertight categories. This is apparent from
 17 paragraph 323(1) which is at page 159 {G/96/159}. This
 18 is after the court has set out case 1, case 2 and case
 19 3.
 20 We see here that it says:
 21 "There will, doubtless, be many cases which might be
 22 said to straddle Cases 2 (generation of distinct
 23 value) and 3 (generation of producer surplus without
 24 added value to Buyers). For example, a Seller able to
 25 differentiate their product may charge 'too much'. For

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1 reasons which we will come to, it is helpful to regard
 2 such a case as an abusive instance of the second case,
 3 rather than as an example of the third case."
 4 There are similar points made at paragraph 341 on
 5 page {G/96/168}:
 6 "If the explanation for the producer surplus excess
 7 is consistent with a competitive market, then it may be
 8 that it must be asked whether the excess is too great to
 9 be justified."
 10 The same point arises at paragraph 345 which is on
 11 {G/96/170}:
 12 "Clearly prices significantly in excess of cost
 13 would be justifiable in case 2: but we are not saying
 14 that any price level above cost is defensible under the
 15 Chapter II prohibition ... All we are saying is that the
 16 present is not a Case 2 instance; and that where a case
 17 falls within Case 2 (as this does not) careful
 18 consideration will have to be given as how and where the
 19 line between the abusive price and the merely high price
 20 is to be tested for. In short, we are not saying that
 21 the mere fact that high prices well above cost can be
 22 justified as falling within Case 2 means that any price,
 23 no matter how high, can be justified. That is obviously
 24 wrong: but the question does not arise in the present
 25 case, and we do not consider it further."

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1 In not being considered further that is not of great
 2 assistance to this Tribunal. But in those circumstances
 3 the CMA would say that what happens is one falls back on
 4 the broad multifactorial assessment. So one is
 5 considering the economic value which is attached to the
 6 product in the round in respect of all of the different
 7 factors that arise under the second limb.
 8 THE CHAIRMAN: Yes.
 9 MS MACLEOD: Now, I think, unless the Tribunal has any
 10 questions that actually concludes the CMA's submissions.
 11 MR DORAN: Can I ask you one question, Ms MacLeod, and it is
 12 rather a delicate question given that you are
 13 representing the CMA, which is that, given that the
 14 Ofcom looked at this several times before 2017 and then
 15 came to provisional conclusions and then went on to
 16 commitments at the end of 2017, and did not take any --
 17 that was the action that it took, is there any space for
 18 attributing any discretion to a specialist regulator
 19 where we should not interfere beyond a certain point?
 20 Is there an element of that that we should take into
 21 account?
 22 MS MACLEOD: Sir, there are I think two facets to the
 23 answer, and I would be anxious not to get drawn into the
 24 first part but I am happy to answer the second.
 25 MR DORAN: That is why I ask it with a degree of delicacy.

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1 MS MACLEOD: As to the first point what the CMA is not
 2 getting drawn into in this case is the question of what
 3 Ofcom was saying at any one point and indeed the legal
 4 question as to the admissibility of the evidential
 5 findings that were made. That is not something that the
 6 CMA would wish to get drawn into.
 7 But assuming that one is entitled to take those into
 8 account where the CMA would say that one does take that
 9 into account is in the multifactorial assessment of
 10 limb 2. That is where it arises because it does not
 11 necessarily, again, without going into the specifics of
 12 what happened in respect of Ofcom's findings, the
 13 private party will have to justify its case on cost and
 14 price at limb 1 and then at limb 2 one will look at all
 15 of the factors including whether or not a sectoral
 16 regulator has looked at it and the conclusions that that
 17 sectoral regulator has looked at.
 18 That is what one sees the Tribunal in Hydrocortisone
 19 saying at that point around paragraph 329 that it is
 20 really a factor to be taken into consideration in the
 21 round at that stage.
 22 MR DORAN: It is part of that in the round assessment.
 23 MS MACLEOD: It is.
 24 MR DORAN: That is where it should be located.
 25 MS MACLEOD: It is in my submission.

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1 MR RIDYARD: Can I try you out on a variant of the question
 2 I asked Mr Beard and that is, let me give you an
 3 illustration . I am a dominant company and I am
 4 concerned about whether my prices are going to be
 5 considered to be abusive, and so I introduce a product
 6 innovation that costs me £10 to implement but as
 7 a result of introducing it I increases my prices by £20.
 8 So the value, the way I look at it, the value of
 9 what I have created is more than the cost. How do
 10 I evaluate whether that is just a self-serving argument
 11 which falls into the willingness to pay fallacy or is
 12 that a genuine legitimate reasonable enhancement to the
 13 product that I am offering?
 14 MS MACLEOD: I think the difficulty with the example, if
 15 I may with respect, sir, is that it is couched in the
 16 abstract and the answer to whether or not that is
 17 a price which is right at the top of the willingness to
 18 pay or in fact an entirely competitive price consistent
 19 with what one would observe in the market is going to be
 20 an empirical question that has to be tested both by
 21 economic evidence as to what one would might expect in
 22 the market, what comparable prices are, that kind of
 23 thing as well as internal documents, the kind of thing
 24 that will explain what the choice of £20 was, whether it
 25 was just, we can extract this from the consumer and then

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1 we will charge that or, that looks about right based on
 2 what other people are doing and we think we can get
 3 a good market share based on that price.
 4 So I am not trying to dodge your question, sir, but
 5 I think it really does depend on the circumstances that
 6 the example arises in .
 7 MR RIDYARD: Okay, so -- I am not sure that is a completely
 8 clear answer. But then I was not necessarily expecting
 9 a completely clear answer I guess. I guess we will just
 10 have to keep thinking about that over the next few
 11 weeks. Thanks.
 12 THE CHAIRMAN: I do not have any questions. Is there
 13 I anything else you want --
 14 MS MACLEOD: There is just one point that I would say out of
 15 courtesy, and that is the CMA does not intend to attend
 16 the rest of the trial . That is not intended out of any
 17 disrespect to anybody in this room, least of all the
 18 Tribunal, but of course if there are any further
 19 questions for the CMA, we would be very happy and stand
 20 ready to assist in any way that we can.
 21 THE CHAIRMAN: Thank you. I think that offer is well
 22 received. I am not saying that we will need some
 23 further submissions from you, but at least as the trial
 24 proceeds, when we get to the end of it, when we come to
 25 closing submissions, if there are things where we feel

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1 your input would be useful, we can let you know.
 2 MS MACLEOD: May I just check behind me in case I have
 3 missed anything.
 4 THE CHAIRMAN: Yes.
 5 MS MACLEOD: That is all, thank you, sir.
 6 THE CHAIRMAN: Thank you very much indeed. Thank you for
 7 that. So we will resume at 11 o'clock tomorrow morning.
 8 Thanks to the transcriber for staying late . We will
 9 start with anything that Mr Beard wants to say, and then
 10 we will go on to the first witness for BT.
 11 Thank you.
 12 (4.37 pm)
 13 (The hearing adjourned until Thursday, 1 February at
 14 11.00 am)

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