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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

Respondent

(2) British Telecommunications plc

A P P E A R A N C E S

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

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

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

Tuesday, 19 March 2024

(10.30 am)

(Proceedings delayed)

(10.37 am)

THE CHAIRMAN: Good morning. Some of you are joining us on live stream on our website, so I start with the customary warning: an official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings, and breach of that provision is punishable as contempt of court.

Yes, Ms Kreisberger.

MS KREISBERGER: Thank you very much.

THE CHAIRMAN: Just a point of housekeeping. Thank you for the letter and the document with a number of references. We have not had time to look at that yet. We do have some further questions on ARPU but we are not going to break the flow of your argument at the moment. When we have looked at this new document for references, which is what we also want to ask about, we will see how many of those questions remain.

MS KREISBERGER: I am very grateful for that.

THE CHAIRMAN: Thank you.

1 Closing submissions by MS KREISBERGER (continued)

2 MS KREISBERGER: So to pick up where I was yesterday,
3 perhaps to situate where I am along the route map to my
4 submissions.

5 I will start today by covering the question of what
6 costs data has been made available by BT.

7 I will then move on to Mr Duckworth's approach of
8 uprating the 2009 RFS by reference to CPI.

9 I will then turn to some of the arguments which BT
10 has advanced in written closings on that topic. That is
11 my third section.

12 My fourth section, I will say a few words on
13 Dr Jenkins' approach, that is SAC combi and DSAC.

14 Fifthly, I will address her cross-check, her FAC
15 cross-check.

16 Then I will turn to margins, that is section 6.

17 Then I will address the question of significant and
18 persistent threshold in limb 1.

19 That will conclude limb 1. Then my last topic today
20 will be the unfair limb. So that is the route map
21 through.

22 THE CHAIRMAN: Yes, thank you.

23 MS KREISBERGER: So beginning with cost data. You will
24 recall I referred yesterday to BT's attack on the Class
25 Representative for not using what BT calls actual cost

1 data in this very confined way, very narrow meaning.

2 The reason that the Class Representative has not
3 used data on BT's indirect costs for SFV services from
4 during the claim period is quite simply that BT has not
5 made that data available in these proceedings. Now,
6 that was always in BT's gift. We are talking about BT's
7 data, after all. Now, my submission is that this is the
8 prism through which the Tribunal should approach the
9 suitability of the 2009 RFS as the best data source
10 available to the Tribunal.

11 If I could just develop that submission.
12 BT Consumer does not report or separate out indirect
13 costs for SFV, or even at the level of Fixed Voice
14 services, and Mr Cackett confirmed that under
15 cross-examination. For your note, that was at
16 {Day8/169:22}.

17 Now, that poses a real difficulty here, because
18 BT Consumer has a wide-ranging set of offerings that
19 include broadband, TV, BT Sport, mobile, and there is
20 simply no way of extracting SFV indirect costs given the
21 reporting across all of those parts of the business.

22 Now, it is somewhat baffling given that, BT is still
23 running the argument in its written closings that, and
24 I quote. Mr Duckworth has:

25 "... effectively dismissed data made available to

1 him ... during a detailed exercise in which he was
2 involved ..."

3 That is at paragraph 484 of their written closings
4 at page 117.

5 Now, if BT had produced indirect cost data for SFV
6 services in the claim period you can be sure that
7 Mr Duckworth would have used it. It was common ground
8 that that SFV cost data has not been made available.
9 Now, that reflects a choice made by BT, because there
10 was nothing to stop BT conducting its own LRIC+
11 allocations specifically for the purposes of these
12 proceedings. That is a point that Mr Duckworth made,
13 that is at [Draft] {Day16/35:10}.

14 What is more, we know that the costs of conducting
15 that exercise would not have been prohibitive in the
16 context of these proceedings because BT told Ofcom what
17 it would cost when Ofcom asked the very same question
18 back in 2017. We could take that point from our written
19 closings, {IR-A/15/129}. It is paragraph 370.

20 THE CHAIRMAN: Yes.

21 MS KREISBERGER: So bottom of the page:

22 "This is despite the sums involved in doing so not
23 being unreasonable ones to expect a company such as BT
24 to incur. In response to a section 135 Notice from
25 Ofcom ... BT was asked what systems development work and

1 operational headcount would be required to include
2 retail reporting on SFV in BT's then current accounting
3 system known as Refine. BT estimated that it would take
4 approximately two months for systems [then over the
5 page] development work at a cost of £120k and an
6 operational headcount of three personnel for
7 three months at a cost of £60k as well as a further
8 finance manager at £80k per annum. Only
9 in September 2023, did BT embark on the early stages of
10 a modeling project that might be able to provide product
11 specific cost allocations, on a forward-looking basis
12 only."

13 So BT could have shown its hand to the Tribunal, and
14 if BT thought that a LRIC+ assessment of its costs would
15 demonstrate that its prices were not significantly above
16 the cost-plus benchmark, one might have expected them to
17 do that exercise, and that would have been money well
18 spent by BT in the context of a damages claim for
19 £1.3 billion, and Mr Duckworth could then have engaged
20 with that analysis.

21 So it is BT's choice not to do that, and my
22 respectful submission is that it should colour the
23 Tribunal's approach to the data on indirect costs.

24 I would like to go back here to the
25 Court of Appeal's recent judgment in *Royal Mail*. As you

1 know, that was handed down while we have been in trial.
2 That is at {G/98.2/59}. I just want to show you what
3 the Court of Appeal said there about DAF's failure to
4 disclose evidence in those proceedings.

5 Paragraph 172:

6 "Next, the CAT expressed concern as to the extent to
7 which expert evidence dominated the issues at trial ...
8 a 'more measured approach' would have been 'beneficial'
9 ... There were two consequences. First, DAF conducted
10 the trial at the level of economic theory, not reality.
11 The trial might have proceeded differently had DAF
12 tendered evidence of the modus operandi of the cartel
13 which would have made it more difficult for DAF's expert
14 to persist in the argument that, notwithstanding the
15 cartel, there was zero overcharge. Secondly, reliance
16 upon regression analysis risked generating results which
17 were broad brush and left gaps the CAT, perforce, would
18 have to plug."

19 Then if we go down to paragraph 174 on the next
20 page, {G/98.2/60}:

21 "The CAT will no doubt learn from the difficulties
22 arising. It might consider how to prevent the scenario
23 arising from becoming an embedded feature of this sort
24 of litigation. It might consider requiring the
25 defendant to identify early on whether disclosure of the

1 operation of the cartel is to be given and, if not, why
2 not. It might consider whether to compel production
3 and/or make clear that a failure might lead to adverse
4 inferences being drawn. The Supreme Court in
5 *Sainsbury's* ... in respect of evidence needed to
6 determine a pass-on defence, held that if a claimant
7 refused disclosure the court might draw adverse
8 inferences, a principle equally applicable to
9 a defendant failing to provide disclosure relevant to
10 a claim of overcharge. In ... *Stellantis* ... this court
11 explained that in the light of *Sainsbury's*, the
12 whereabouts of relevant disclosure could affect how the
13 burden of proof applies in practice."

14 That was repeated in *McLaren*.

15 Now, the Class Representative understands that BT
16 did not have an off-the-shelf LRIC+ dataset which it
17 could simply disclose, but it could have done the work,
18 and we certainly had some tantalizing references to unit
19 economics from Mr Cackett in his testimony.

20 Now, BT's solicitors confirmed in correspondence
21 that they place no reliance on that exercise, the
22 correspondence covered at footnote 878 of our closings,
23 and it is not something that Dr Jenkins takes into
24 account. But it does seem to suggest that allocating
25 indirect costs for SFV would not be a complete

1 impossibility, and it is an exercise which could have
2 been undertaken here to assist the Tribunal in relation
3 to the costs benchmark, but instead the approach BT took
4 was to instruct an economist, who does not herself have
5 expertise in telecoms costs modeling, and without giving
6 her access to up to date disaggregated data. As you
7 know, she then came up with a methodology which she
8 conceded depended on her own subjective choices on how
9 to allocate costs which she was ill placed to do, and
10 you see that from the arbitrary nature of those
11 allocations.

12 So in my submission, against those facts, against
13 that background, the Tribunal should have no hesitation
14 at all in these circumstances in relying on the 2009 RFS
15 updated for inflation and the Tribunal may consider it
16 appropriate to draw an adverse inference about the
17 absence of up-to-date indirect cost data.

18 Now, finally, I referred yesterday to the underlying
19 policy of not committing dominant firms to exploit
20 deficiencies in their own data as a means of evading
21 liability for excessive prices, to duck the special
22 responsibility that they bear under the statute.

23 Not only is that what BT is attempting to do here,
24 but it has gone further. BT is attempting to turn the
25 tables on the Class Representative, accusing him of

1 violating BT's right to legal certainty. BT alleges at
2 paragraph 478 of its written closings, at page 117, that
3 the Class Representative's use of indirect cost data
4 from an earlier period "creates a fundamental
5 unfairness".

6 Now, if BT thought that protection of its legal
7 rights critically depended on having up to date indirect
8 costs data, then it should have done the work to produce
9 that data. The Class Representative cannot be blamed
10 for BT's own decisions as to what to make and not to
11 make available.

12 Now, BT relies for this point on fundamental
13 unfairness on the *Deutsche Telekom* case, which is an
14 excessive pricing case, but that authority is referring
15 to unfairness which can arise where cost data is used
16 from a different firm altogether, not the same firm's
17 cost data.

18 I will just show you BT's written closings. That is
19 paragraph 43, so {IR-A/16/11}.

20 THE CHAIRMAN: Paragraph 43.

21 MS KREISBERGER: 43. It may be page 12. {IR-A/16/12}.

22 I think we can do OR so more people can see it. It
23 is just the authority. {OR-A/16/12}.

24 So you see there -- if we could zoom in a little on
25 43, please. So they say:

1 "The EU courts have emphasised the importance of
2 legal certainty and the ability to carry out
3 self-assessment ..."

4 I will come back to that.

5 The quote that they cite is that:

6 "... carrying out a price/cost test using the
7 allegedly dominant undertakings own costs and prices was
8 'consistent with the general principle of legal
9 certainty in so far as the account taken of the costs of
10 the dominant undertaking allows that undertaking, in the
11 light of its special responsibility ... to assess the
12 lawfulness of its own conduct. While a dominant
13 undertaking knows what its own costs and charges are, it
14 does not, as a general rule, know what its competitors'
15 costs and charges are.'"

16 So it is an odd quote to rely on, because we are
17 relying on BT's own cost data.

18 Sorry, I said it is an excessive pricing case, I had
19 meant to say it is an Article 102 case. It was actually
20 an exclusionary abuse, but that is not relevant to this
21 point.

22 So that is certainly not the world we are in.

23 Now, finally, before I leave this point, there is
24 a further reason why BT's arguments about legal
25 certainty turn matters on their head. Ofcom first

1 raised concerns about BT's rising line rental prices
2 in January 2014. You have seen that document. It went
3 on to confirm them in 2017 when BT narrowly avoided
4 mandatory price control by voluntarily cutting its price
5 to one group of customers and putting information
6 remedies into the other group.

7 It is trite to say that in those circumstances, BT
8 has long been on notice that there is at the very least
9 a risk that it is dominant in SFV markets and that its
10 SFV prices are excessive compared to its costs. As
11 a dominant firm, BT carries a special responsibility not
12 to harm consumers, a responsibility which extends to not
13 charging them prices which are unfairly inflated above
14 costs. Given the focus of Ofcom regulation on SFV
15 prices over many years, and that BT has continued to
16 increase its line rental price to SPCs, it was incumbent
17 on BT to self-assess its SFV prices in a meaningful way.
18 As I say, there is, at the very least, a risk. The
19 position is rather stronger than that.

20 A meaningful self-assessment here, a meaningful
21 self-assessment exercise entails a proper assessment of
22 its SFV costs compared to its SFV prices, and there is
23 no evidence before you at all that BT has done that
24 exercise. BT's failure to do that exercise is not
25 a good basis for it to evade liability under

1 Section 18.2(a) and it is certainly not a reason not to
2 use the best available data source in the light of that.

3 I am moving on then to Mr Duckworth's uprating of
4 the 2009 RFS. I have three principal points as to why
5 Mr Duckworth's approach is appropriate and a reliable
6 method. My first reason is that it is the best
7 pragmatic approach available before you, and Dr Jenkins
8 confirmed, in response to a question I think from the
9 chairman, that she does not have a better index than
10 CPI. That is at [Draft] {Day13/125:20-21}. So if the
11 RFS is the best data source, and you have my points on
12 that, then it is the only method -- then the only method
13 before you is Mr Duckworth's approach of uprating by
14 CPI. There is no alternative.

15 So that is my first point.

16 THE CHAIRMAN: Yes.

17 MS KREISBERGER: My second point is that it is also an
18 approach which is generous to BT, it is a conservative
19 approach, because indirect SFV costs have reduced over
20 time. This point is fully addressed in our written
21 closings, I just want to highlight four key items of
22 evidence. Of course it is important that one looks at
23 all of them, the need to look at the evidence in the
24 round, and in the round all the evidence points firmly
25 to a lowering of indirect costs over time.

1 In particular, my first point is that economic
2 theory dictates that productivity gains tend to lead to
3 costs reducing in real terms.

4 THE CHAIRMAN: Just a moment.

5 MS KREISBERGER: That is the first point as a matter of
6 theory.

7 THE CHAIRMAN: Just a moment. (Pause). Yes.

8 MS KREISBERGER: Thank you, sir.

9 My second point relates to the facts of the case.
10 BT had in place a consumer cost transformation
11 programme, which continued after 2009, which aimed to
12 reduce costs and increase efficiency.

13 Could we turn up Mr Duckworth's Table 18,
14 {IR-E/6/73}. This is from Mr Duckworth's first report.
15 That shows you the cost transformation reduction over
16 the three years there. In other words, Mr Duckworth's
17 assumption of zero efficiency gain over time is
18 conservative. We could leave that up there for
19 a moment.

20 My third item of evidence is Mr Cackett's evidence
21 which was that BT expects to make efficiency gains every
22 year. For your note, that is at footnote 816 of the
23 Class Representative's closings, and just so you have
24 it, the reference to {Day8/185:9-12}, that is
25 a reference to Mr Cackett's evidence, and then

1 Mr Duckworth commented on that evidence at [Draft]
2 {Day14/111:14}, over the page to line 6.

3 Then my fourth category of evidence is documentary
4 evidence which also shows that cost savings were made.
5 The evidence is summarised in our written closings at
6 paragraph 376(b) on page 131, and it also features, if
7 we could just zoom into the bottom of this page,
8 Mr Duckworth footnotes the relevant documents here in
9 the footnotes but, as I say, it is also captured in our
10 written closings.

11 I would just like to show you one, which is at
12 footnote 154 here. Let us go to it. That is
13 {OR-F/176/1}. I am just going to give one example.

14 THE CHAIRMAN: So this is the footnote from Mr Duckworth's
15 ...

16 MS KREISBERGER: Mr Duckworth's. Mr Duckworth takes account
17 of this evidence in the table that I have just shown you
18 and he refers to this documentary evidence. I am just
19 going to show you one of the documents he cites.
20 {OR-F/176/7}. This is a document dated April 2011, so
21 it is obviously after 2009, and you see on the left-hand
22 side "Highlights", and it says, it is the fourth bullet
23 point down:

24 "Full Year Cost Transformation at £339m: ahead of
25 budget by £12m."

1 Then the following bullet point:

2 "In year supplier savings £55m increased 30%
3 year-on-year."

4 This suggests that BT did better than forecast.

5 Then if we go to number 2 under "Key Takeouts":

6 "Continue to accelerate and underpin cost
7 transformation programmes to deliver the 9.7% YoY TLR
8 reductions in budget."

9 So that is good evidence of the efficiencies made.

10 Now, BT's response to this is to rely on
11 Mr Cackett's statement that BT does not always make the
12 efficiency gains which it forecasts. We do not need to
13 go to it, but for your note it is {Day8/192:1}. But BT
14 has not advanced any evidence to support its claim that
15 in fact there were some cost savings which were not
16 realised.

17 THE CHAIRMAN: Yes.

18 MS KREISBERGER: I am now on my third point as to why the
19 uprating approach is a reliable one. I am also picking
20 up here question 22(1) from the Tribunal which asks:

21 "How should we evaluate the ... RFS ... given ...
22 the absence of any split between common and incremental
23 costs?"

24 My answer to that is that the evidence is that fixed
25 and common costs were low, low to immaterial, so there

1 is no concern that there are some significant economies
2 or diseconomies of scale over time, which means there is
3 no issue with the projecting forwards.

4 I might just develop that point. If we could go to
5 our written closings at page 135.

6 MR RIDYARD: Sorry, to interrupt, is this about economies of
7 scale or economies of scope?

8 MS KREISBERGER: Economies of scale. I am going to develop
9 the point so it may become clearer, and then I am very
10 happy to answer -- I say "very happy"; I will do my best
11 to answer any questions.

12 THE CHAIRMAN: Which paragraph are we looking at on page
13 135?

14 MS KREISBERGER: 379 at the top of the page.

15 So you see here we make the same point
16 {OR-A/15/135}, citing the evidence that:

17 "... the level of fixed and common costs are
18 'relatively low' or 'immaterial'. As Mr Parker
19 explained, in a retail telecoms business (especially ...
20 asset light services such as SFV Services) common costs
21 are unlikely to be 'especially significant', and
22 therefore that Dr Jenkins's 'focus on complex methods to
23 take account of common costs is thus largely
24 unnecessary'. Common costs are, in fact, not 'anywhere
25 near' what Dr Jenkins has estimated. This made the

1 question of common cost allocation 'less interesting'
2 because 'in a world where common costs are ... much
3 lower than Dr Jenkins has identified, this all becomes
4 a moot discussion'."

5 Now, I want to show you a key piece of evidence in
6 relation to this point which supports the Class
7 Representative's case on common costs. I want to show
8 you that smaller operators were able to operate and
9 compete at a much smaller scale than Dr Jenkins'
10 workings would suggest.

11 If we could go up to page 134 of the closings.
12 {OR-A/15/134} and it is addressed at paragraph 377(f).
13 That is really for your note. I will take you to the
14 point.

15 So the example I want to show you is that of the
16 Phone Co-op. Now, you might recall that BT objected to
17 the examples of SSE and the Post Office in this context
18 because they argued, well, these operators have other
19 businesses at large scale. But that criticism cannot be
20 levelled at the Phone Co-op.

21 So the Phone Co-op is a standalone small-scale
22 operator with a small Fixed Voice customer base, we are
23 talking about 20,000 customers or less. I will just
24 show you two pieces of evidence on that.

25 If we go back to Mr Duckworth's first report,

1 {IR-E/6/87}. If we could look at Figure 8, please. You
2 see there the Phone Co-op's line is the very bottom. So
3 its revenues here, on this scale, they are close to
4 zero.

5 Then if we could go to {IR-C/139/1}. Now, this
6 I think has been transposed across in Opus from the
7 spreadsheet, so it is a little hard to see how this fits
8 together. I will take you through it, if I may.

9 This is taken from Phone Co-op's 2017 response to
10 Ofcom. It was a response to a section 135 notice. What
11 it shows you is first of all at this stage ...

12 Now, I cannot read out any of this, I think, is that
13 right? Yes, I cannot read this out.

14 So if we look at "Lines at EoY" on the right-hand
15 side, that is the number of lines, so you see a very
16 small number of lines. That is the five-figure number.
17 Then it is showing you the revenues across three years,
18 2014-2016. We may have to come back to the years.

19 I think we have to go into the document itself, but I am
20 not going to spend time on that.

21 MR BEARD: I am sorry, we cross-examined at quite a length
22 on the SSE and Post Office material. This is the first
23 time we have seen this.

24 MS KREISBERGER: It is cited in Mr Duckworth's report,
25 so ...

1 THE CHAIRMAN: I think if we can avoid sort of comments,
2 interjections, unless the suggestion is going to be that
3 something is now inadmissible, it would help.

4 I appreciate neither side agrees with everything the
5 other side says, but we will cover all of that, and we
6 will cover it again when we hear BT's submissions.

7 Yes, do proceed.

8 MS KREISBERGER: Thank you, sir.

9 So here you see very low levels of revenue over
10 a three-year period. I had better not say the number.

11 THE CHAIRMAN: Yes.

12 MS KREISBERGER: But anyway, so the cumulative number is
13 the revenue on the left-hand side for the three-year
14 period.

15 My submission based on this evidence, which
16 Mr Duckworth relies on, relied on in his first report,
17 is if the Phone Co-op could operate and compete at this
18 scale it shows that Dr Jenkins' allocations --

19 THE CHAIRMAN: Is this meant to be -- sorry, can I just be
20 clear about it. In the "Cost" column as against
21 revenue, that is meant to be total costs, is it?

22 MS KREISBERGER: I would need to check that, sir.

23 THE CHAIRMAN: That is quite important.

24 MS KREISBERGER: Can I come back? Yes, it is.

25 THE CHAIRMAN: If Mr Duckworth has referred to it in his

1 report, because otherwise we are not getting into the
2 common costs point.

3 MS KREISBERGER: Yes.

4 THE CHAIRMAN: Yes, right.

5 MS KREISBERGER: So as I say, if the Phone Co-op could
6 operate and compete at this scale, it shows that
7 Dr Jenkins' allocations of 400 million rising to
8 700 million for fixed and common costs are not
9 plausible.

10 Just stepping back for a moment, no one has ever
11 contended that there are these large fixed and common
12 costs in the provision of retail Fixed Voice of this
13 magnitude. We do not see that in Ofcom's 2009 market
14 review and you do not see it in the 2017 review of SFV
15 prices. If there were really fixed and common costs of
16 that scale that would have constituted a very
17 significant barrier to entry and you would expect to see
18 that recorded by Ofcom in 2017 in relation to BT's SFV
19 prices.

20 The true position is as put by Mr Duckworth at
21 proposition 7.1.8 of the joint statement, also captured
22 at footnote 843 of our written closings: the level of
23 costs which are fixed in the long run and common will be
24 immaterial.

25 In the light of that, coming back then to the

1 Tribunal's question 22(1), how should we evaluate the
2 RFS given the absence of a split between common and
3 incremental costs, the absence of a split should not
4 trouble the Tribunal because fixed and common costs are
5 simply not that significant.

6 THE CHAIRMAN: Can I just ask a question here, because we
7 have got figures for the SG&A and D&A for the whole of
8 BT Consumer and those figures do rise over the relevant
9 period of increases. What do you say about that? What
10 is the relevance of that set of figures?

11 MS KREISBERGER: Yes, so the short answer is, and I am going
12 to come on to that.

13 THE CHAIRMAN: If you are going to come on to it, that is
14 fine.

15 MS KREISBERGER: If I may, sir.

16 THE CHAIRMAN: If you are going to address that specific
17 point, deal with it in your sequence.

18 MS KREISBERGER: I am grateful. I will also make sure
19 I have addressed it when I come to the end of the
20 sequence. If not, press me on it.

21 THE CHAIRMAN: Okay.

22 MS KREISBERGER: So given that the watch word here for the
23 exercise is pragmatism and the Tribunal is wielding the
24 broad axe, my specific submission is that it should not
25 be troubled by the fact that common costs are not

1 separately identified in 2009.

2 So that completes the key reasons why uprating by
3 CPI is the correct approach.

4 Just to give you the reference to where the evidence
5 on the Phone Co-op is referred to, because Mr Beard has
6 said he has never seen it, this is in the first report
7 of Mr Duckworth. It is at {IR-E/6/84}. If we could
8 just pull that up.

9 THE CHAIRMAN: I thought you told me where the reference was
10 in his report.

11 MS KREISBERGER: Yes, it is just another reference. It is
12 clearer.

13 THE CHAIRMAN: You have given me page 87.

14 MS KREISBERGER: Paragraph 5.122. Just for you note there,
15 5.122(d).

16 MR BEARD: Sorry, just to be clear, we have seen those
17 references on EBIT margins, absolutely.

18 THE CHAIRMAN: Thank you very much. Yes.

19 MS KREISBERGER: Right, so that completes my submissions on
20 why uprating is the correct approach, but I am turning
21 then to BT's argument, and that is where I will pick up
22 your point, sir, if I ...

23 THE CHAIRMAN: Yes.

24 MS KREISBERGER: So BT makes a number of arguments refuting
25 this. They are at paragraphs 504-536 of their written

1 closings. I will take you through them in turn. As
2 a general comment, not all the points are easy to
3 understand, I will do my best to go through them and
4 respond, but they all depend on this assumption that
5 there is some large amount, some enormous rump of fixed
6 and common costs for retail Fixed Voice services, and
7 that, in my submission, is a bad -- is a wrong
8 assumption.

9 Just so you can see that is their point, if we go
10 to -- I think we could go to {OR-A/16/121},
11 paragraph 498. Sorry, 122. {OR-A/16/122}.

12 BT says there:

13 "... there are likely to be many more fixed and
14 common costs of BT Consumer requiring allocation to SFV
15 Services during the claim period than were allocated to
16 BT Retail's residential Fixed Voice services in 2009."

17 So that is their specific submission: lots more. My
18 submission is that fixed and common costs were very low
19 as a proportion of indirect costs in 2009 and have been
20 reducing over time because of realised efficiencies.

21 MR RIDYARD: This paragraph I think in BT's submissions is
22 referring to the distinction between the incremental
23 costs of voice which might have been picked up in the
24 2009 exercise, and the incremental costs of SFV which is
25 not the same as the incremental costs of voice.

1 MS KREISBERGER: Yes, I am coming to that, thank you, sir,
2 and do let me know if I have addressed it sufficiently,
3 but, yes, that is absolutely right.

4 I am going to go first to paragraph 509 and the
5 heading above that. So it is page {OR-A/16/125}.
6 I think the heading is on the previous page, 124.

7 So it is heading (a):

8 "There is no basis to assume that the level of
9 common costs relevant to SFV services in 2015-2023 is
10 the same as that for residential Fixed Voice services in
11 2009."

12 So that is the overall submission.

13 Then if we go to the following page, 509, BT here --
14 perhaps if I could just let you read that.
15 {OR-A/16/125}. (Pause).

16 So the argument being made here is that unit costs
17 will have gone up since 2009 as a result of the fact
18 that there are these weighty fixed and common costs
19 being spread over fewer lines, a smaller number of
20 lines. So that is the argument. So this is the
21 diseconomies of scale point: large fixed costs, fewer
22 lines.

23 Now, my response is, first of all, this is put in
24 hypothetical terms, so no evidence has been advanced in
25 support of this point, and in fact it is contradicted by

1 the evidence in the case and there are three key aspects
2 to that evidence.

3 The first is that fixed and common costs are
4 immaterial, and I have addressed that point.

5 The second is that the evidence shows that the fall
6 in the number of lines does not necessarily translate
7 into high unit costs. If I could show you the RFS
8 itself. {E/13/818}, I think.

9 THE CHAIRMAN: What is this from?

10 MS KREISBERGER: This is the RFS, the 2009 RFS.

11 THE CHAIRMAN: The RFS, of course, yes.

12 MS KREISBERGER: You see there the third paragraph says:

13 "Retail operating costs have also decreased as
14 a result of the fall in numbers of connections and
15 rentals."

16 So just pausing there. That suggests that
17 a sizeable proportion of indirect costs are incremental
18 because they decrease as the number of lines increase.
19 So that is the first point.

20 Then the second point:

21 "A strong focus on cost control has driven down the
22 SG&A costs for these markets."

23 That is highlighting the cost efficiencies being
24 realised. So that is the second piece of evidence on
25 that.

1 Then lastly, and I think this may address
2 Mr Ridyard's question, this argument depends on an
3 assumption not only that there are significant fixed
4 costs, but that there are significant fixed costs which
5 should be spread equally over every voice line, whether
6 standalone or in a bundle so it is common to voice.
7 That is the argument being made.

8 So the argument is you have large fixed and common
9 costs, and there are diseconomies of scale over time
10 because you are having to allocate this large package of
11 costs over each of the voice lines equally. That is
12 where the diseconomies of scale come in. So costs that
13 should be spread proportionately over every Fixed Voice
14 line.

15 But that is contrary to Dr Jenkins' methodology in
16 the SAC combi, because what Dr Jenkins does is she
17 treats all fixed and common costs as common to all
18 BT Consumer services. So in other words, she says all
19 fixed and common costs are to be allocated equally
20 across voice, broadband, mobile, television, sport. She
21 does not identify a category of cost that is common to
22 voice lines.

23 THE CHAIRMAN: Common to voice lines only.

24 MS KREISBERGER: Only.

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

1 MR RIDYARD: I mean, that is right, that is a feature of
2 what Dr Jenkins has done. But that does not mean to say
3 there are not such -- there could be still some common
4 costs that are common between -- for example, there
5 could be some setup costs for having voice which would
6 be common between bundles and SFV because you need voice
7 to provide bundles, therefore you do not have any extra
8 costs, setup costs, to provide SFV. Or indeed if there
9 was an advertising campaign that was saying BT's voice
10 services are good, or whatever they say, that would be
11 a common cost between bundles and SFV because it would
12 be relevant for people using voice, whether they were
13 using it in a bundle or a standalone.

14 MS KREISBERGER: It is conceivable that there are those
15 costs, but I have got two, perhaps three answers to
16 that.

17 MR RIDYARD: Okay.

18 MS KREISBERGER: The first is there is no evidence before
19 you of such costs. BT has not advanced any evidence of
20 those costs. So you do not have a basis for making
21 a finding based on there being these costs.

22 Secondly, the evidence I have shown you is that
23 common costs in general are very low, immaterial, so it
24 would only be a small proportion of the vanishingly
25 small proportion of costs.

1 Thirdly, I tentatively make the observation that
2 perhaps advertising is not the best example because if
3 it is BT brand, then that is more likely to be a cost
4 that is allocated -- that should be allocated across all
5 BT services, so --

6 MR RIDYARD: Or is common across all services.

7 MS KREISBERGER: Common across all services but not voice.

8 MR RIDYARD: The example I gave was about BT's voice ...

9 MS KREISBERGER: Yes, it is conceivable. But, as I say, we
10 just do not know.

11 Could I just show you, if we go back to our written
12 closings at page 124, and could we look at the footnotes
13 on that page. So it is IR-A ... I just want to show you
14 Ofcom's view of this point. {OR-A/15/124}. If we could
15 zoom in quite heavily at the bottom, thank you.

16 "Although the BT RFS concerned residential Fixed
17 Voice services, rather than SFV Services specifically,
18 the activities in question were broadly the same then as
19 they were during the Claim Period, so the incremental
20 costs are similar ..."

21 Then there is a reference to Mr Duckworth's
22 evidence.

23 Then here you have the Ofcom view:

24 "Further, in the Provisional Conclusions ... Ofcom
25 found that the data provided by BT for all its Fixed

1 Voice customers was 'a good proxy for its SFV
2 Customers.'

3 MR RIDYARD: Yes, what we are saying is that does not sound
4 right or not necessarily right because what is
5 incremental to voice is not the same as incremental to
6 SFV. If you are saying Ofcom overlooked that point then
7 I am not sure this is a great point.

8 MS KREISBERGER: I will move on from that, sir, but you have
9 the point that there is no evidence from BT before you
10 that there is this category of costs that should trouble
11 you.

12 MR RIDYARD: I take that point. Just a general observation
13 on what you have been saying, clearly you are making
14 some very important points here which we will have to
15 consider very seriously, but just an observation is
16 I personally have found -- I would have found it much
17 more helpful to have had a clearer distinction between
18 economies of scale and economies of scope in what you
19 have been talking about and it may be that we will find
20 some way of coming back to you on that to maybe help to
21 clarify it. That is not to say you have not made some
22 very important points, just in terms of understanding
23 where they fit in, I personally would have found it much
24 better had it been more clearly distinguished between
25 scale and scope economies.

1 MS KREISBERGER: If I might come back to you, sir, with
2 that.

3 MR RIDYARD: I am not asking you to come back now but I am
4 just noting it because maybe we will come back to you
5 with some clarification points or you can --

6 MS KREISBERGER: We would welcome that of course.

7 With that I am going to move to BT's second
8 argument. That is at page 126 of their written
9 closings. {OR-A/16/126}. If we -- {OR-A/16/127}.
10 That is heading (b):

11 "There is no attempt to take into account structural
12 changes that will have changed the common costs between
13 products (i.e. synergies)."

14 BT says that there are economies of scope for
15 a retail communications provider who provides a customer
16 with voice and broadband down the same wholesale line
17 and they say they are so significant that BT even
18 considered repositioning the cost of line rental as
19 a membership or turning it into something else.

20 Now, it is not clear what the relevant point here is
21 in relation to SFV services because that is a reference
22 to economies of scope between the constituent elements
23 of bundles. There is no reason to think -- so that is
24 referring to an efficiency gain in the provision of
25 bundles. So that is an economy of scope. But those

1 efficiencies do not suggest that the indirect costs of
2 providing SFV services would increase.

3 MR RIDYARD: They are direct cost synergies, are they not?

4 MS KREISBERGER: They are.

5 MR RIDYARD: Does that make them not interesting?

6 MS KREISBERGER: Not interesting for SFV services.

7 MR RIDYARD: Well, is that right?

8 MS KREISBERGER: The cost synergies in the provision of
9 bundles does not suggest any concomitant increase in the
10 cost of providing SFV services.

11 MR RIDYARD: I do not think -- the chairman has got that
12 point. I certainly have not got that point. I do not
13 think I agree with that at all. I mean, if there is --
14 if it were the case, and I am not sure it is, but if it
15 were the case that you paid a single fee to Openreach
16 and in return for that fee you got both voice and
17 broadband, then that would be a -- that could be a very
18 important synergy or economy of scope or common cost
19 between voice and broadband. Therefore, it would also
20 be extremely important to understand the economics of
21 this case. The fact that it is a direct cost synergy
22 rather than indirect cost synergy is true, but I am not
23 sure that makes it less important.

24 MS KREISBERGER: Sir, could you give me a moment so I can
25 respond directly? Would that be --

1 MR RIDYARD: It is in paragraph 283 of your written response
2 where you refer to this and I certainly have a number of
3 questions about that paragraph which I would like to go
4 through with you at some point.

5 THE CHAIRMAN: Why do we not ponder on this over the break.

6 MS KREISBERGER: That would be very helpful, yes.

7 (11.35 am)

8 (A short break)

9 (11.51 am)

10 MS KREISBERGER: Thank you, sir. Right, I would I like
11 a challenge so I am going to go straight into the
12 questions and have a crack at that.

13 MR RIDYARD: I do want to emphasise that these are important
14 points but I think there are one or two things which
15 I would like to have sort of spelt out both by you and
16 also by Mr Beard's side.

17 So paragraph 283 of your written response. Sorry,
18 have I got that wrong? 383, is it?

19 MS KREISBERGER: 383.

20 MR RIDYARD: Sorry, that is also wrong. 382 it was.

21 {OR-A/15/137}.

22 I have four questions really. The first one is you
23 talk in this paragraph about economies of scope in
24 providing voice and broadband to a given customer.
25 These are part of direct costs, not indirect costs. You

1 talk about that as a direct cost synergy.

2 So I think the first question I have is: so do those
3 synergies arise from common costs between supplying
4 voice and broadband to the same customer, and, if not,
5 how would you describe their origin?

6 MS KREISBERGER: Right. Shall I have a go now?

7 MR RIDYARD: Yes.

8 MS KREISBERGER: So as we understand it, and as I understand
9 it, that is the question you put just before the break
10 in fact, where there are efficiencies across the
11 services supplied within a bundle those are direct cost
12 efficiencies.

13 MR RIDYARD: Yes.

14 MS KREISBERGER: Mr Beard appears to agree. So if they are,
15 as we say, efficiencies in the direct costs of the
16 bundle, when the cost of the bundle goes down the price
17 of the bundle goes down, the cost saving, the direct
18 cost saving feeds through to the price of the bundle
19 because these are competitive markets.

20 MR RIDYARD: Yes.

21 MS KREISBERGER: The price is driven down to cost.

22 There is no such efficiency in relation to SFV
23 services. So the fact that there is an efficiency
24 within the direct costs of the bundle does not imply or
25 suggest any change in the direct costs of SFV. So for

1 direct costs, Mr Duckworth uses cost data that is agreed
2 between us and BT, so no issue arises in relation to SFV
3 direct costs and because it is an efficiency over here
4 in bundles in their direct costs, no question arises of
5 apportionment of costs to SFV. These are not common
6 costs, they are direct costs.

7 MR RIDYARD: But they can be common costs whilst being
8 direct costs. Because if it were the case, and I know
9 this is not the case, but if it were the case that as
10 a retail operator I pay a single fee to Openreach and
11 for that I get stuff down the line which happens to
12 enable me to provide voice and broadband down this line,
13 because I have paid a single fee to Openreach, and say
14 it was £10 a month, a wholesale cost price, and for that
15 £10 I get both voice and broadband. That is a -- and
16 I then try and sell services to the consumer who lives
17 at that house.

18 When I think about -- if that consumer just wants
19 voice, I will have to say to them: well, it is going to
20 cost me £10 to provide that service, because you need
21 voice to come down that line, and therefore I will
22 charge you a price which is £10 plus whatever margin
23 I think is necessary to do whatever else I want to do
24 with you as a consumer.

25 But I could say: I could offer you a bundle of voice

1 and broadband and that would still only cost me £10, so
2 that sounds like -- that is an efficiency, it is
3 a common cost because of the way I have set up this
4 hypothetical, which may not correspond to reality,
5 I quite accept, but that would be an efficiency which
6 sounds like the sort of efficiency you are talking about
7 here, in principle, if the details are not correct, that
8 would make the Voice Only price that I charge to this
9 consumer very similar to the bundle price I charge to
10 this consumer. Because given that they want voice, it
11 is so much more efficient for me to give them both voice
12 and broadband that I will make it worth their while,
13 which is what you just described. The incentive for me
14 as a supplier to say: well, if I can give you so much
15 more that costs me so little less then I will try and do
16 it at a very low incremental price.

17 MS KREISBERGER: Okay, someone will tell me if I mangle
18 this, but I think we have now moved from questions about
19 direct cost savings within the bundle, which I hope
20 I have addressed, to economies of scope between services
21 supplied. So now we are on to your question about
22 economies of scope.

23 So as I understand it, your question is now
24 addressing the existence of costs that are common across
25 products within the bundle.

1 MR RIDYARD: Yes.

2 MS KREISBERGER: So the factual context is that while the
3 number of voice lines was going down, BT was introducing
4 new products, broadband, TV, sport, mobile. That does,
5 as you say, increase economies of scope across the
6 products in the bundle, there are common cost savings
7 there, but total indirect costs are going up. They are
8 costs that are incremental to these new services.

9 MR RIDYARD: Sure.

10 MS KREISBERGER: But the common costs you are pointing out
11 are economies of scope, so costs are going down.

12 MR RIDYARD: It is cheaper to provide two services -- it is
13 almost as cheap to provide two services as one service.
14 Therefore, my prices, given that I am competing with
15 other people, it is bound to be the case my prices will
16 reflect that.

17 MS KREISBERGER: Now, if those are costs that are common to
18 voice and they are common to SFV, it means they are
19 costs that are decreasing, and therefore Mr Duckworth
20 has taken a conservative approach, because he has not
21 taken into account possible economies of scope which
22 apply across all of voice, so SFV as well as these other
23 products.

24 I am just going to take instructions, if I may.

25 MR RIDYARD: Yes. (Pause)

1 MS KREISBERGER: That is correct. So the world, as it is
2 moving on, there are more products, economies of scope
3 in common costs that you are positing --

4 MR RIDYARD: Yes.

5 MS KREISBERGER: -- therefore costs go down over time.

6 MR RIDYARD: They do not go over time, they go down if you
7 supply more products rather than fewer.

8 MS KREISBERGER: Well, to the extent that there are
9 economies of scope. Mr Duckworth, so --

10 MR RIDYARD: It is not a question of over time, it is
11 a question of the more products I supply through this
12 line, if there are common costs then the better deal
13 I can offer to consumers, because that seems to be what
14 is happening in the market as a whole. Everyone is
15 supplying bundles, are they not? Well, not everyone,
16 obviously. But that is the predominant trend in the
17 market, is it not, to supply bundles because of the
18 synergies involved in doing so?

19 MS KREISBERGER: Can I crystallise the point in this way: if
20 it is an economy of scope that leads to some economy of
21 scope for the supply of SFV, then Mr Duckworth's
22 approach is conservative because he has not -- he has
23 assumed zero efficiency. If it is an economy of scope
24 in the common costs of supplying bundles alone, then it
25 does not tell you anything about common costs -- it does

1 not tell you anything about costs as they arise out of
2 SFV services.

3 MR RIDYARD: I am not sure I would agree with that bit,
4 because it is saying -- I am a consumer and I just want
5 voice, what it is saying is: okay, I can supply you
6 voice, but because you are only buying one -- you are
7 only taking one service when it does not cost me much
8 more to add several services, I am sorry, but it is
9 going to be quite inefficient to supply one service when
10 I could supply three or two, and therefore it does
11 affect SFV -- it fundamentally affects SFV pricing, does
12 it not?

13 It sort of, in a way, explains what we were talking
14 about yesterday where you see this big -- there are big
15 bundle discounts and the cost to the consumer of buying
16 the individual elements standalone is much higher than
17 cost of buying a bundle.

18 MS KREISBERGER: But that is taken account of in
19 Mr Duckworth's benchmark, if that is the concern,
20 because the benchmark takes account of the cost of
21 supplying SFV services.

22 MR RIDYARD: But it does not take account of the extent to
23 which those costs, those direct costs, are common as
24 between voice and broadband. I know -- I understand
25 that the cost -- that BT's cost -- the wholesale cost to

1 Openreach is within the cost numbers, I totally
2 understand that. But what you are pointing to in your
3 paragraph 382 is the fact that it might not cost much
4 more to add broadband to that -- to make it into
5 a bundle.

6 Can I suggest the best -- can I read out all of my
7 questions, because they are all quite related, and it
8 might be more efficient ...

9 MS KREISBERGER: I will come back to it then.

10 MR RIDYARD: Yes, I think that would be perhaps the best way
11 of dealing.

12 MS KREISBERGER: Yes.

13 MR RIDYARD: The first question was whether these economies
14 of scope arise from common costs and, if not, what ...
15 I think we have covered that to some extent.

16 The second question is: when we look at the observed
17 bundle discounts in the market, in other words, the
18 extent to which a voice plus broadband bundle is priced
19 at a discount to the sum of the standalone prices, as we
20 were talking about yesterday, does that reflect the size
21 and importance of the synergies that we are talking
22 about here? Because that would be perhaps a logical
23 inference.

24 The third question is: you talk in this
25 paragraph 382 about the desire of BT to price

1 discriminate, and I have two sub-questions on that
2 really.

3 One is: is this incentive -- is the incentive to
4 price in this way, in other words, to charge much more
5 for the standalone elements, some of the standalone
6 elements than one charges for the bundle, is that the
7 same for all retailers who provide voice and broadband?

8 The second sub-question is: is this price
9 discrimination, as you describe it, is that something we
10 should be concerned about if it involves price
11 differentials that reflect the cost efficiencies?

12 My fourth, and you will be pleased to hear last,
13 question is: you state in this paragraph that these
14 synergies arise from direct costs and therefore they do
15 not give rise to, and are distinct from, the fixed and
16 common costs that we have mainly been talking about and
17 Mr Duckworth mainly talks about, but my last question
18 really was: does that really mean they are any less
19 important or we should pay less attention to them in the
20 analysis? I understand the difference between direct
21 costs and indirect costs, but if they are common costs
22 then I still thought they might be interesting whichever
23 box they happen to fall into.

24 MS KREISBERGER: Sir, if I may, we will take those away.

25 MR RIDYARD: Yes, I think that would be the best thing to

1 do, thanks.

2 MS KREISBERGER: That would be the most efficient.

3 What I suggest I do is I carry on, if you are
4 content with that, conscious that I am passing over some
5 of this territory and will be coming back to it, but
6 I think I should still address you on the points that
7 arise --

8 MR RIDYARD: That makes total sense, yes.

9 MS KREISBERGER: But I think now with the caveat that we
10 will come back to some of this.

11 So I was next going to turn to page 126 of BT's
12 written closings. The heading is at 4(c).

13 THE CHAIRMAN: You were talking before the break about the
14 second argument against the RFS.

15 MS KREISBERGER: That is right. That was the economies of
16 scope point.

17 THE CHAIRMAN: Now we are moving on to the third.

18 MS KREISBERGER: On to the third, which you see there in
19 their subheading (c) {OR-A/16/127}, and they say there
20 is good reason to consider that costs and costs
21 allocations would be materially different in 09 -- would
22 be materially different in the claim period from 09.

23 BT make two points here. The first point, they say
24 that the 2009 allocators were exercises in judgment
25 which could have been taken differently, I think that is

1 over the page at 520 {OR-A/16/128} so exercises in
2 judgment which could have been taken differently.

3 We say that is not a good point given that
4 Dr Jenkins agrees that the 2009 RFS is a good proxy for
5 LRIC+ and it is a rigorous approach. So we do not see
6 any basis for opening up the very careful allocations
7 made in the RFS.

8 Now, the second point that BT makes, perhaps we see
9 it most clearly from paragraph 529 on page
10 {OR-A/16/129}, which is that BT says these are costs
11 which would have been considered incremental to the
12 provision of Fixed Voice, residential Fixed Voice in
13 2009, but have become common to both SFV service and
14 bundles in 2015.

15 I am going to address that argument and I have three
16 points.

17 Once again, it is just put as a purely hypothetical
18 point, it is pure hypothesis, so they have not actually
19 advanced any evidence to support the point.

20 The second point is the one I made, and, sir, this
21 is the evidence before you, this is BT's evidence:
22 Dr Jenkins does not identify any costs which are common
23 only to bundles and SFV services. It is not part of her
24 evidence.

25 Thirdly, and this comes back to the chairman's

1 question I think, changes that BT has made in order to
2 service the increasing demand for bundles should not
3 have the effect of increasing the indirect costs of
4 delivering SFV services.

5 If I could just develop that point.

6 THE CHAIRMAN: Just give me one second, please. (Pause).

7 Changes BT made ... in terms of common costs?

8 MS KREISBERGER: No, in order to service the increasing
9 demand for bundles, so these are indirect costs, should
10 not have the effect of increasing the indirect costs of
11 SFV. So I am talking about indirect costs in general.

12 THE CHAIRMAN: You mean both incremental and common.

13 MS KREISBERGER: Yes.

14 THE CHAIRMAN: Just a moment, just a second. (Pause).

15 MS KREISBERGER: Now, I would like to illustrate the point
16 by reference to an example given in BT's written
17 closings and that they put to Mr Duckworth under
18 cross-examination, and Mr Duckworth explained the point
19 himself under cross-examination.

20 Now, Mr Beard gave the example of a new IT system
21 for billing. It is in their written closings at 533,
22 that is {OR-A/16/130}. So BT rely on the point that
23 a new IT system for billing would render the cost
24 allocations in 2009 inapplicable, ineffective. But
25 Mr Duckworth made clear in his testimony that the first

1 question which arises is one of cost causality.

2 Now, a new billing system would have been put in
3 place to service bundle customers who are taking
4 multiple services, not SFV customers. This is a really
5 good example of why BT's argument does not work. If we
6 could go to -- I think we can take this from BT's
7 written closings, page {OR-A/16/129}, because they
8 reproduce the cross-examination here. If we go to
9 {OR-A/16/130}.

10 THE CHAIRMAN: This is all within paragraph 533, is it?

11 MS KREISBERGER: Yes. So could we focus in on page
12 {OR-A/16/130}. So it begins -- so Mr Duckworth said:

13 "If you say, try and understand the rationale for
14 introducing a new billing system, is this to compete for
15 bundle services, then potentially even though that
16 brings benefits to SFV customers ... There is obviously
17 a question would you allocate that or attribute that
18 cost to SFV services if the true underlying driver of
19 upgrading the billing system was actually to serve
20 dual play customers ..."

21 The documents confirm that Mr Duckworth's evidence
22 on this point is correct. If we could turn up
23 {OR-F/843/14}, and we took Mr Duckworth to this document
24 in re-examination.

25 It says -- it is the second round bullet point

1 underneath the first diamond bullet point:

2 "New IT systems will enable single billing of
3 multiple services to consumers."

4 So that is a paradigm example of a new cost that is
5 incremental to bundles and therefore has no implications
6 at all. There is nothing to allocate to SFV services.
7 It is not a common cost for SFV.

8 Then I was just going to briefly deal with BT's last
9 argument on this point. If we could go back to BT's
10 written closings at page 132, please {OR-A/16/133}, at
11 (f).

12 There seems to be a disconnect. I think the pages
13 are different.

14 It says:

15 "The 2009 RFS does not account adequately for the
16 competitiveness of calls."

17 This is a totally new argument about calls pricing.
18 We have not seen it before. It is again made in the
19 abstract, untethered to any evidence. The Class
20 Representative experts have had no opportunity to engage
21 with that argument, so we say that is inadmissible.

22 I would like to deal with a different argument --
23 I am still with BT's arguments, but it is a different
24 point. If we go to page {OR-A/16/119}, I think, in this
25 document. It is at paragraphs 485 and 486. BT argues

1 here that the Class Representative's approach of relying
2 on the 2009 RFS is inflexible, it is too rigid, and you
3 see there they say at 486:

4 "The effect is to deny the undertaking flexibility
5 in the recovery of its common costs and to overlook the
6 fact that identifying incremental costs and their cost
7 causality is far from straightforward in practice."

8 So they packaged together two different points.
9 I will just take them both, if only by way of sort of
10 helpful summary on the incremental point first.

11 So their argument is it is not straightforward to
12 allocate incremental costs. Well, I have two points.
13 My first is, well, it may not be straightforward to
14 allocate them on the basis of cost causality, but that
15 is precisely why the 2009 RFS is such a useful resource
16 because of the amount of detailed work that went into
17 identifying the cost drivers. That is the first point.

18 The second point is the one I just addressed you on,
19 which is new costs are likely to be caused by bundles
20 like the IT billing system. So they should not be
21 allocated to SFV. That is where the focus of
22 competition was.

23 THE CHAIRMAN: Does this then build into the point that
24 I have raised specifically which was -- I put it very
25 broadly, which is that you have seen these figures,

1 700 million, 800 million, 900 million, 850 million,
2 these sorts of figures, the total costs for BT Consumer,
3 where it is pointed out by BT that actually these
4 underlying common costs for Consumer were rising, and
5 your response as to why that is not relevant is?

6 MS KREISBERGER: These are incremental costs. BT during
7 this period is adding these new services, TV, sport,
8 there are the direct costs, but those are the services
9 which are causing these new costs. If these services
10 are causing the costs they are, by definition,
11 incremental costs which should be allocated to those
12 services. They are not costs which are common to SFV.
13 They are not costs which should be allocated to SFV. BT
14 is adding services, revenues are going up, costs are
15 going up in this arena of competition. It has added
16 BT Sport to attract customers to broadband. It tells
17 you nothing, there is nothing there in relation to SFV,
18 so the underlying principle is cost causality. That is
19 where I started, common costs are a vanishingly small
20 element of this.

21 THE CHAIRMAN: Yes, thank you.

22 MS KREISBERGER: That takes me to the point I was about to
23 make. So coming to BT's first point in this paragraph,
24 they say, well, you are denying us flexibility. My
25 first point is that precise point: common costs are

1 immaterial. It is only on Dr Jenkins' view of the world
2 where there are these enormous common costs which
3 require allocating to SFV as well as across these other
4 products.

5 My second answer is that the flexibility which BT
6 demands would actually allow BT to recover
7 disproportionate amounts of costs from BT SFV customers.
8 That is contrary to legal principle, because the
9 question which arises is: which of the costs which are
10 reasonably attributable to SFV services? To do that, to
11 carry the burden across on to the SFV customer base,
12 that is unlawful cross-subsidisation between products.
13 Just for your note, that is addressed in our written
14 closings at paragraphs 298 and 299 on page 102.

15 You saw, you have seen the documentary evidence
16 where BT says this is the oxygen, this is the revenue,
17 it is the oxygen that drives these investments in other
18 services. It is loading the costs on to this declining
19 customer base.

20 My third point is one I have already made. To the
21 extent that common costs are in some way material rather
22 than just a theoretical concern, then that is contrary
23 to Dr Jenkins' evidence where she -- sorry, that is
24 contrary to the Class Representative's case. Let me
25 develop that submission.

1 THE CHAIRMAN: Just a moment.

2 Yes.

3 MS KREISBERGER: Just to be clear, because I misspoke. So

4 I am now moving on to -- I am assuming against myself
5 that common costs are in some way material, so if BT are
6 right about that, then Mr Parker explained that -- this
7 was in his concurrent evidence -- in conditions of
8 workable competition, the market determines the right
9 way to allocate common costs across multiple products.

10 So that brings me to the Bliss paper. I just want
11 to draw this point out for you. BT actually
12 misrepresents the way in which Mr Parker relies on the
13 Bliss paper so I need to address you on that.

14 It is {IR-A/16/120}, paragraph 490. It is page 120.

15 They seem to have gone up.

16 THE CHAIRMAN: Are we going back to their closing?

17 MS KREISBERGER: It is probably helpful to have it in front

18 of you but I will highlight the point. It is
19 paragraph 490 on the bottom half.

20 What BT says there, it is just before the quote,
21 they say:

22 "The Bliss paper was said to justify a FAC
23 allocation of BT Consumer's actual indirect costs based
24 on ... (EPMU) as a cross-check to Mr Duckworth's
25 benchmark.

1 That was not Mr Parker's evidence. That is not
2 why -- he does not rely on Bliss in relation to an EPMU
3 benchmark. What Mr Parker relies on Bliss for is to
4 explain why, it is a responsive point to BT's argument,
5 he is explaining why BT is wrong to say there should be
6 this great flexibility around the allocation of what
7 they say are very large fixed and common costs. He is
8 responding to that argument and he is explaining.
9 I have explained to you why it is evidentially wrong,
10 Mr Parker is now explaining why it is also theoretically
11 wrong, and he relies on the Bliss paper for what is
12 quite a simple proposition.

13 The proposition he relies on this paper for is that
14 in conditions of workable competition, the market
15 dictates the competitive allocation of common costs.
16 Mr Parker gave the example of supermarkets. They of
17 course have costs which are common to all their
18 products, costs of the store and so on. But you do not
19 see in the market wildly differing mark-ups on eggs,
20 cheese, bread, and so forth, because in conditions of
21 workable competition the market finds a way and the
22 market gets to the right answer.

23 MR RIDYARD: I thought the point he made was you do not see
24 wild differences between Tesco's and Sainsbury's as to
25 what their margins are.

1 MS KREISBERGER: Yes, on these products.

2 MR RIDYARD: But you do get big variation between --

3 MS KREISBERGER: Yes, precisely, Tesco's and *Sainsbury's*

4 prices for eggs, their prices for cheese, exactly.

5 Between retailers, you do not see wildly differing

6 mark-ups between retailers on the same products.

7 MR RIDYARD: Yes, but you do see -- I imagine you do see

8 quite substantial variations in mark-ups between one

9 product group and another. Is that not more the point

10 that is apposite to this discussion? Because the

11 question is: if there were common costs, I know you do

12 not accept, but if there were some, then BT is saying

13 they should have flexibility about how they recover

14 them, so they should be allowed to charge higher margins

15 on olive oil than on sliced bread or something.

16 MS KREISBERGER: So Mr Parker's point is you see a market

17 price -- if these are competitive markets, you see

18 a market price for eggs, so *Sainsbury's* cannot suddenly

19 allocate a large amount of common costs to eggs.

20 MR RIDYARD: No, but --

21 MS KREISBERGER: Because the market finds a way.

22 MR RIDYARD: Fine, but -- okay, this market -- BT has found

23 a way of doing it and you do not like it, so the

24 question is: is it wrong?

25 MS KREISBERGER: That is precisely my point, and that is

1 precisely the point I was going to come on to, which is
2 the reason why BT can do that is because we are not
3 looking in a market which has conditions of workable
4 competition. So BT's ability to say: I am going to take
5 the costs of BT Sport and I am going to drive up my SFV
6 prices to recover them, that is a very good illustration
7 of the fact that BT has market power in SFV services.
8 If it did not have market power in SFV services, the
9 market would bring prices down to costs, to the
10 competitive cost-plus basis.

11 MR RIDYARD: Yes, but we do not know what that is,
12 unfortunately. That is why we are trying to work out,
13 is it not, that is what we are trying to find out, what
14 is the competitive mark-up.

15 MS KREISBERGER: But I am just responding to BT's argument
16 that they should be allowed to take £700 million worth
17 of common costs and charge it to the SFV customers.

18 MR RIDYARD: Okay. If they made that argument it would
19 indeed be quite a stretch. Yes.

20 MS KREISBERGER: So it really leads to what is a fundamental
21 defect at the heart of BT's case. It is their case that
22 SFV cases are competitive, because they say there is one
23 big market, and they can push through these costs which
24 are in substance caused by BT Sport. They are not
25 common. That is my principal submission on this point.

1 So that brings me to the end of my submissions on
2 the 2009 RFS but we will be coming back to you on the
3 questions.

4 It may just be worth mentioning, you have our Excel
5 spreadsheet. We have sought to make that as
6 customisable as possible, so all elements of that
7 spreadsheet can be adjusted. That was the ...

8 MR RIDYARD: I do not think I have seen that actually, but
9 anyway. I am not saying you have not provided it to us.

10 THE CHAIRMAN: Yes, we had one from BT.

11 MS KREISBERGER: Has it gone on to Opus? We will check
12 that. I will come back to you with the Opus number.

13 THE CHAIRMAN: Can you just give me one moment, please.

14 There is something I just want to look at. (Pause).

15 Yes, thank you.

16 MS KREISBERGER: I have got the Opus reference for the
17 spreadsheet. It is {H/263.1/1} and {H/263.2/1}.

18 I think 263.2 is the spreadsheet.

19 THE CHAIRMAN: When did this come in?

20 MS KREISBERGER: {OR-H/263.2}? Monday, I am told.

21 THE CHAIRMAN: It does not seem to have been alerted to us
22 at all, but anyway, never mind. It is there.

23 MS KREISBERGER: If we can be of any assistance.

24 THE CHAIRMAN: No, no. If it is there we will pick it up.

25 MS KREISBERGER: Thank you, sir.

1 I was going to move on to the SAC combi question.

2 THE CHAIRMAN: Yes.

3 MS KREISBERGER: I would propose, subject to questions you
4 may have, that I take this topic quite shortly, and it
5 is set out in our written closings.

6 The Class Representative's submission is that
7 Dr Jenkins has used an inappropriate method which
8 produces implausible results and should be given short
9 shrift. Just to summarise some of the key defects. It
10 is an upper bound approach, as Dr Jenkins concedes,
11 actively advances. In fact, every element of her
12 benchmark is set at the upper end, which is a good way
13 to stack the cards in the dominant firm's favour in an
14 excessive pricing case.

15 The second point, her allocation of common costs is
16 not grounded in any empirical data. BT describes it at
17 paragraph 553 of their closings as an "informed
18 judgment". We would say the problem is that the
19 judgment is not informed because it is not based on any
20 data.

21 THE CHAIRMAN: Does she not attempt to get some assistance
22 from descriptors which are being used by BT in relation
23 to all the different common costs or indirect costs that
24 are put forward?

25 MS KREISBERGER: Yes, but they do not tell you where to draw

1 the line on common costs. That is our position. They
2 are not informative as to the degree of common costs.

3 I have addressed you on my third point already. BT
4 compares this to the judgments made in the RFS. We do
5 not think that is a serious comparison given the
6 data-driven approach to attribution in the RFS, and the
7 fact that -- any element of judgment in relation to the
8 apportionment of common costs is a very small part of
9 the exercise. This was essentially an exercise about
10 cost causality.

11 My fourth point is that, and this has also come up,
12 she assumes that all common costs are common to all
13 products supplied by BT Consumer. So costs which are
14 common to BT Sport and another service are assumed to be
15 common to SFV as well, rather than, say, just common to
16 a bundle and the standalone broadband product. So it is
17 assumed that it is common to voice as well, all of it.

18 The fifth point is including BT Sport in the bundles
19 categories substantially drives up the costs of SFV
20 services.

21 MR RIDYARD: The headroom allowed.

22 MS KREISBERGER: That is a more precise way of looking at
23 it, sir.

24 My next point is she conceals the true
25 implausibility of the resulting numbers through the

1 number of fixed lines error, and her reasoning in
2 support of that is not coherent.

3 Finally, her method produces implausibly high
4 numbers. That is covered at paragraph 427 of our
5 closings.

6 MR RIDYARD: Just on the BT Sport point, I do not need to go
7 into great detail on this, but just to understand your
8 objection. There are two sorts of objections to that.
9 One is that it is wrong to regard BT Sport as integral
10 to bundles. I think BT's argument is that BT Sport was
11 a loss leader that was designed to make bundles more
12 attractive and that you should not look at BT Sport as
13 a standalone product because it was never intended to be
14 a commercial product on its own, it was only invented to
15 make bundles more attractive. So that would be one
16 criticism, one possible criticism.

17 The other one would be to say that even though it
18 might be right to include BT Sport within bundles for
19 the reasons just given, the actual losses on BT Sport
20 were much higher than they needed to be because they
21 could have done BT Sport in a smarter way, and if they
22 had made less -- if they had made smaller losses on
23 BT Sport, then that would have had the effect of
24 reducing the headroom under the combi approach, it would
25 have the effect of reducing the headroom on SFV. So are

1 you making both of those points or do you put more
2 emphasis on one than the other?

3 MS KREISBERGER: Can I take a moment?

4 MR RIDYARD: Okay. (Pause)

5 MS KREISBERGER: So the answer is the first point on the
6 basis that, and I think this is what was behind your
7 question, there are significant sales that increase over
8 time if BT Sport is a standalone product, so it is not
9 appropriate to account for all of BT Sports' costs
10 within the bundles category and that is our principal
11 criticism.

12 MR RIDYARD: Thanks.

13 MS KREISBERGER: I am just checking where I was, I did not
14 want to repeat myself. I was on the last point which is
15 really to give the reference. We say her method
16 produces these implausibly high numbers, and that is at
17 paragraph 427 of the written closings, page 149.

18 The DSAC cross-check is addressed from paragraph 438
19 in the Class Representative's written closings.

20 THE CHAIRMAN: Before you get to that, two points please.

21 First of all, just remind me what you say in response to
22 Dr Jenkins' reliance on the Ofcom VULA margin exercise
23 which she says is at least a guide on the question of
24 the allocation of incremental as opposed to common costs
25 on SFV.

1 MS KREISBERGER: I will.

2 THE CHAIRMAN: Are you coming to it?

3 MS KREISBERGER: No, but I was going to suggest I take you
4 to the written closings. I will just need a moment to
5 find the relevant paragraph.

6 THE CHAIRMAN: Yes, of course.

7 MS KREISBERGER: Could I come back to you on that point?

8 THE CHAIRMAN: Come back on that. But the other one, which
9 I can give you a reference for, is paragraph 437 of your
10 closings, which is where you are summing -- just before
11 you get to DSAC, where you say {OR-A/15/151} -- you sum
12 up the arguments which you say are to be levelled
13 against Dr Jenkins' combi, and then you say:

14 "... in the absence of granular cost information to
15 understand cost causality and the extent to which some
16 costs are fixed and common, it is not possible to modify
17 Dr Jenkins' model to achieve a sensible result."

18 So are you saying there that if it was something
19 that we wanted to consider if we got to this stage in
20 the case, you say there is nothing meaningful that can
21 be done to, as it were, mitigate what you say are the
22 problems of Dr Jenkins' combis by in some way tweaking
23 the variables?

24 MS KREISBERGER: Yes. It cannot be adjusted for.

25 THE CHAIRMAN: Because?

1 MS KREISBERGER: Because this fundamental issue as to on
2 what basis is she identifying costs which are fixed and
3 common. This exercise of subjective judgment is not
4 something you can tweak. We say it is a fundamental
5 defect. The data is not there, there is no empirical
6 data.

7 THE CHAIRMAN: Thank you.

8 Right, DSAC I think you were going on to.

9 MS KREISBERGER: I was just going to deal with it at a very
10 high level, given that it is just a cross-check, and we
11 have set it out in the written closings. It is
12 a cross-check which incorporates the same defects as the
13 SAC combi method. As I say, this is 438 onwards. Given
14 that Dr Jenkins conceded herself that it can produce
15 very high numbers, so the DSAC benchmark is £57 a month,
16 just not a plausible benchmark. That is where it comes
17 out at.

18 THE CHAIRMAN: Yes.

19 MS KREISBERGER: Then I was just going to address one
20 rebuttal point made by BT, on the basis that the others
21 are addressed in our written closings. It is at
22 page 134, paragraph 546, and it is just a procedural
23 point that I want to show you.

24 THE CHAIRMAN: Sorry, your 546?

25 MS KREISBERGER: No, BT's.

1 THE CHAIRMAN: BT's.

2 MS KREISBERGER: Thank you, sir. Sorry, we were in mine.

3 THE CHAIRMAN: Yes.

4 MS KREISBERGER: {OR-A/16/134}. So BT says insofar as high
5 level criticisms were canvassed of SAC combi and DSAC,
6 and FAC which I have not yet come on to, her evidence,
7 insofar as they were canvassed in submissions in the
8 hot tub, "her evidence on these is unchallenged".

9 That is incorrect. It is wrong as a matter of the
10 Tribunal's process.

11 If we could just turn up the PTR directions at
12 {B/29/4}, recital 17. You may recall this, sir. It was
13 a matter of agreement between the parties:

14 "The expert evidence on each topic shall be heard
15 concurrently."

16 Then last sentence:

17 "The parties will not be required to put their full
18 case to the experts in cross-examination."

19 As you have said at some stage, that was the whole
20 point of the hot tub process.

21 Now, the reason why there was no cross-examination
22 in relation to the SAC combi and DSAC is that the
23 defects in those methodologies had been fully ventilated
24 in the hot tubs. There was nothing left standing.

25 THE CHAIRMAN: Yes.

1 MS KREISBERGER: My final point on costs is then Dr Jenkins'
2 FAC cross-checks. The first point to make is that BT,
3 we see from the written closings, has stepped away from
4 both the revenue FAC cross-check and the EPMU
5 cross-check. It was frankly surprising that she ever
6 thought revenue could be a useful driver in an excessive
7 pricing case. There is plenty of authority on that,
8 that it cannot be used in an excessive pricing case.
9 The *Aspen* decision is a recent example, and the
10 Commission there summarises prior authorities, and
11 Mr Parker also gave evidence on this point. Revenue
12 cannot be used as a cost driver in excessive pricing
13 cases. It is circular. It benefits the dominant firm.

14 But Dr Jenkins has now -- well, BT at least have now
15 conceded that and common sense reigns on that point.

16 It seems that the position is they have recanted on
17 EPMU as well, which just so happens to produce similar
18 results to the 2009 RFS, so BT seems less keen on it
19 now.

20 So the only FAC cross-check left standing is number
21 of customers, and my submission is that that is not
22 a useful cross-check. We have addressed that in our
23 written closings at 448-450.

24 The reason why it just does not work is that it
25 allocates the same proportion of indirect costs to an

1 SFV customer as a customer who takes, say, five products
2 from BT. So a customer who takes BT Sport, TV,
3 broadband, mobile and voice has the same -- bears the
4 same cost allocation as an SFV customer if you treat
5 number of lines as your driver.

6 We say that is a bad assumption. It is very far
7 removed from cost causality which is the 2009 RFS
8 approach.

9 MR RIDYARD: It sounds like you think revenue would be
10 a better basis, because there at least they get less
11 revenue from SFV than they do from bundle customers.

12 MS KREISBERGER: Yes, but the revenue is inflated by the
13 abuse --

14 MR RIDYARD: I understand that complication.

15 MS KREISBERGER: It is not helpful. They are both bad, is
16 the point.

17 You will recall I handed up yesterday a sheet
18 setting out three elements of new analysis from BT.
19 This is the last one. It is at page {IR-A/16/142} of
20 BT's closings, paragraph 577. Paragraph 577 is the
21 paragraph at the bottom of the page which summarises
22 their figures. Then if we go over the page,
23 {IR-A/16/143}, we see the figure that they present. So
24 this is two alternative benchmarks which BT presents
25 here which are said to adjust the FAC benchmark to

1 account for customers who bought BT Sport as
2 a standalone product, which is the point we were
3 discussing earlier.

4 Now, the data and the underlying calculations for
5 these new benchmarks has not been disclosed. It seems
6 that -- we do not know who has produced this analysis.
7 But it looks like Dr Jenkins is still having a go at
8 adjusting her FAC cost allocations after the close of
9 evidence which might suggest that she was not well
10 placed to perform those allocations in the first place.

11 THE CHAIRMAN: Just a moment. (Pause). Let me just go back
12 and see what the point is here. Just a second.

13 (Pause).

14 MS KREISBERGER: Sir, if it is helpful when you look at the
15 figure it is the two Sport sensitivities that are new.
16 It is the broken green line and the solid green line at
17 the bottom you see.

18 THE CHAIRMAN: FAC --

19 MS KREISBERGER: Customers 25% sport sensitivity, FAC
20 customers 20% sport sensitivity.

21 THE CHAIRMAN: The new ones are the solid green and the
22 broken green lines.

23 MS KREISBERGER: Yes.

24 THE CHAIRMAN: Because the 20% thing was there.

25 MS KREISBERGER: That is on the original benchmark.

1 THE CHAIRMAN: That is on the 20% rate of return. Just
2 a moment. Give me one second. (Pause).

3 Yes, so their point is even if you add in separate
4 standalone sport customers it does not make much
5 difference. That is what they are saying.

6 MS KREISBERGER: That is what they are doing, yes, but we
7 have not seen the data. We do not know how that was
8 prepared. But that is new.

9 THE CHAIRMAN: Thank you.

10 MS KREISBERGER: So then I was going to make a start on
11 margins unless you would prefer to break and then come
12 back.

13 THE CHAIRMAN: I think we would probably prefer a clean
14 start, but can I just ask one final question. Can we go
15 to your paragraph 453 and 454, please. {OR-A/15/156}.

16 This is partly to do with what you have just been
17 talking about and you say that -- this is the EPMU point
18 which you say is a coincidence but then you go on to say
19 this, on paragraph 454, if there were, which you say
20 there is not. This is on paragraph 454, page 156.

21 "If [there were] significant fixed and common
22 indirect costs ... the EPMU may be considered as a proxy
23 for LRIC+, as the direct costs are incremental and the
24 indirect costs are allocated [on an EPMU basis]."

25 Then you say this:

1 "This indicates that Mr Duckworth's primary
2 estimates are robust to the alternative assumption that
3 a high proportion of the indirect costs are fixed and
4 common. In such circumstances, even if only as
5 a cross-check Dr Jenkins' EPMU sensitivity thus 'helps
6 to minimise the risk of false positives'."

7 It is just me being slow but I did not quite
8 understand this point.

9 MS KREISBERGER: Not at all. I think the wording is perhaps
10 not entirely helpful. So it is not a point which we
11 place heavy reliance on at all. The point is this,
12 which I think you have from the two paragraphs together.
13 In other words, on the Class Representative's case the
14 indirect costs are overwhelmingly incremental. On that
15 basis EPMU does not have a role, so on the Class
16 Representative's case EPMU is not a good driver for
17 incremental indirect costs. We say the indirect costs
18 are largely incremental. That is paragraph 453.

19 Paragraph 454 is no more than an observation: that
20 if Dr Jenkins were right, so it does not arise on our
21 case, but if she were right that actually the indirect
22 costs which arise are actually largely fixed and common,
23 they are not causal, they are largely fixed and common,
24 then you could use EPMU -- that would be a more sensible
25 base for using EPMU as a driver for common costs. But

1 I would take that in the spirit of an observation. It
2 is not our positive case.

3 MR RIDYARD: You are saying if you did that it would end up
4 the same as the RFS because by coincidence the RFS seems
5 to allocate these costs by something that is equivalent
6 to EPMU even though that was not what they were about.

7 MS KREISBERGER: Yes.

8 THE CHAIRMAN: That is helpful. I think then we will --

9 MS KREISBERGER: Because the conceptual point is EPMU can be
10 a useful approach for allocating fixed and common costs
11 and that is the underlying point, but, yes.

12 THE CHAIRMAN: All right, we will break then and then start
13 at 2 o'clock.

14 MS KREISBERGER: Thank you, sir. I think the only question,
15 but perhaps we will come back to it after lunch, is the
16 best form in which I address your questions. Perhaps if
17 we could reflect over lunch. It may be that in writing
18 is ...

19 THE CHAIRMAN: We will see. Right, thank you.

20 (12.58 pm)

21 (Luncheon Adjournment)

22 (2.00 pm)

23 THE CHAIRMAN: Yes.

24 MS KREISBERGER: Thank you, sir.

25 I thought I would begin by just coming back to you

1 on the TSO point in Dr Jenkins' SAC combi which you
2 asked me about before the adjournment. This was the
3 Ofcom VULA margin exercise. So in Jenkins 2, Dr Jenkins
4 at that stage introduced TSO as a cross-check based on
5 the VULA exercise.

6 THE CHAIRMAN: Yes.

7 MS KREISBERGER: Now, the VULA margin exercise was in
8 connection with Ofcom's costs attribution to a subset of
9 bundle services, essentially superfast broadband
10 services, not SFV services, and she uses it as
11 a cross-check on the subjective judgments that she had
12 already made in the first report, and she has assumed
13 that 75% of TSO -- in her first report, the judgment she
14 made was that 75% of TSO costs are fixed and common to
15 all services including SFV, and she says that is
16 supported by VULA. As I said, VULA was about bundles.
17 But the headline point is that she has ignored two key
18 pieces of evidence from BT, from her client, so I will
19 just give you the references.

20 There are BT documents that record that BT applied
21 a significant downweighting for TSO costs in relation to
22 SFV services of 20%. In other words, BT allocated only
23 20% of TSO costs to SFV. That is the allocation.

24 I will give you the references to the evidence, if
25 I may.

1 THE CHAIRMAN: Sorry, only 20% of TSO.

2 MS KREISBERGER: Yes.

3 THE CHAIRMAN: To SFV.

4 MS KREISBERGER: To SFV.

5 THE CHAIRMAN: Right.

6 MS KREISBERGER: Now, the document is -- I do not think we
7 need to go to it now, the reference is {OR-F/505/7-8},
8 and Mr Duckworth discussed that evidence during trial,
9 that is at [Draft] {Day13/152-154:1} and again
10 {Day14/54-55:1}. So that is a contemporaneous internal
11 BT costs allocation to SFV services.

12 THE CHAIRMAN: Thank you.

13 MS KREISBERGER: That is the 20%. Then the second point is
14 Mr Cackett's evidence. Now, head office costs are
15 a subset of TSO costs, and he actually gave the example
16 of head office costs as costs which vary and some of
17 which are incremental to new products. Again, for your
18 note, that was {Day8/178-180:1}. That is his evidence.

19 So those are the points we rely on in relation to
20 that cross-check.

21 THE CHAIRMAN: Yes. Just one moment. (Pause).

22 Thank you.

23 MS KREISBERGER: Thank you, sir. So then I will move on to
24 margins.

25 THE CHAIRMAN: Yes.

1 MS KREISBERGER: Now, in overview, Mr Duckworth accepted in
2 concurrent evidence that 10% would be a reasonable and
3 a pragmatic calibration of his estimate of the margin
4 based on the evidence, so compared to the more precise
5 figure of 8.9%.

6 THE CHAIRMAN: Now, just on that point, can I just be clear,
7 because I understand how the original 8.9% became 9.8%
8 because there was a difference in what the percentage
9 was of. Now, if we have got -- and if we have got the
10 10%, is that just going up from the 9.8% or is that
11 going up from the 8.9%?

12 MS KREISBERGER: From the 8.9%. It is a rounding up.

13 THE CHAIRMAN: That means there is an equivalent addition to
14 add on. I think one of your team is familiar with this.
15 Mr Williams I think has got the point.

16 There is a reference somewhere to how you compute
17 that and I have forgotten where it is.

18 MS KREISBERGER: Thank you, sir. It is 456 in our written
19 closings, with thanks to Mr Williams for the very prompt
20 production of the reference. So it is 11.1%.

21 THE CHAIRMAN: That is what I wanted. Thank you for
22 reminding me, yes.

23 MS KREISBERGER: Thank you, sir.

24 Now, so that is where Mr Duckworth landed.

25 Dr Jenkins did not move from her 20-25%.

1 THE CHAIRMAN: She said as a minimum it would have to be
2 20%.

3 MS KREISBERGER: Yes. Now, turning then to Mr Duckworth's
4 estimate. I want to -- the point I want to emphasise
5 for you is it is based on a range of data points, so it
6 is a very unfair characterisation, it is another one, by
7 BT in their closings to say Mr Duckworth has simply
8 applied a regulated return from 16 years ago. He has
9 taken into account all the available evidence, conducts
10 a holistic review, and he has accepted that 10% is
11 a reasonable landing place.

12 So I thought I would just list the eight data
13 points.

14 THE CHAIRMAN: Yes.

15 MS KREISBERGER: They are at paragraphs 457-468 of our
16 closings, page {OR-A/15/157}.

17 The first is BT's margins reported for its
18 residential Fixed Voice services between 2004 and 2006.
19 Those margins were 10.1%, 8.8 and 8.9% respectively, and
20 we say these were points in time when BT's ability to
21 exercise market power was constrained by retail price
22 regulation. So that is a virtue of these data points,
23 not a vice.

24 Margins of 8.9% in 2006 were consistent with judging
25 that there was sufficient entry and expansion to

1 partially deregulate the market at this point. So that
2 is Mr Duckworth's evidence.

3 Secondly, margins of other UK retail telecoms
4 providers, they are all below 10%. That is set out at
5 paragraph 460 of our closings. Just to summarise them.
6 You have Virgin Media at 7.4%, TalkTalk at 6.9%, the
7 Phone Co-op at 2% and Utility Warehouse at 5.3%.

8 Now, BT make a number of criticisms here. I will
9 just deal with them briefly. BT says that Mr Duckworth
10 should have looked at Sky's returns and they say that is
11 because Sky was an important competitor. That is
12 paragraph 593(a) of their closings. But whether Sky was
13 an important competitor is not a relevant question. The
14 relevant consideration is whether Sky is a good
15 comparator for margins for SFV services. It is very
16 clearly not a good comparator because it was principally
17 a pay TV business. Pay TV has very different levels of
18 capital intensity.

19 Their second criticism is the inclusion of
20 Virgin Media, they say it -- Mr Duckworth should not
21 have taken account of Virgin Media because it is
22 a vertically integrated competitor. But the fact that
23 it is vertically integrated means it has a much higher
24 capital intensity than BT Consumer. So it is
25 a conservative approach to take them into account.

1 THE CHAIRMAN: Sorry, it would be a conservative approach if

2 ...

3 MS KREISBERGER: They criticise him for including

4 Virgin Media.

5 THE CHAIRMAN: Oh, yes. Just a second.

6 MS KREISBERGER: That is a lower ...

7 THE CHAIRMAN: Just a second.

8 MS KREISBERGER: That was the 7.4%. (Pause).

9 THE CHAIRMAN: Yes.

10 MS KREISBERGER: Then their last criticism is that

11 Mr Duckworth should not have included TalkTalk because

12 it exited the SFV market, but Mr Duckworth looks at

13 TalkTalk's margin across all retail telecoms, not just

14 SFV, so it would not be a reason to exclude TalkTalk.

15 THE CHAIRMAN: Sorry, just run that one past me again.

16 MS KREISBERGER: So they say TalkTalk is not a good

17 comparator for margins because they exited SFV. We do

18 not actually accept that they exited SFV but I do not

19 think I need to get into that point. Mr Duckworth looks

20 at TalkTalk's margin across its retail telecoms

21 services.

22 THE CHAIRMAN: Even after it had exited the SFV market.

23 MS KREISBERGER: Yes.

24 THE CHAIRMAN: Right.

25 MS KREISBERGER: So it is relying on TalkTalk's retail

1 telecoms margin, not an SFV specific margin.

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

3 MR RIDYARD: All of these comparator margins are going to be
4 largely based on bundle business, are they not?

5 MS KREISBERGER: I think that is fair. You have the
6 Phone Co-op which was quite heavily -- yes, quite
7 a substantial SFV market provider. But, yes, that is
8 right, they are not SFV only comparators, and, of
9 course, it is just on one piece of evidence in the list.

10 THE CHAIRMAN: Yes.

11 MS KREISBERGER: Then the third item of evidence is Ofcom's
12 estimate of an appropriate return for SFV services in
13 2017. Ofcom specifically said at paragraph 8.17, that
14 is {IR-C/1/100} --

15 THE CHAIRMAN: Of the Provisional Conclusions?

16 MS KREISBERGER: Yes, that is right. We can turn it up but
17 I can equally just give you the reference.

18 THE CHAIRMAN: Just give us the reference I think is fine.

19 MS KREISBERGER: Ofcom said:

20 "Our analysis suggests that a ROS [return on sales]
21 of no more than 10% is consistent with a cost based
22 estimate of profitability for a provider of retail voice
23 services ..."

24 That is at 8.17.

25 THE CHAIRMAN: Yes.

1 MS KREISBERGER: Then the fourth point, it is not one on
2 which Mr Duckworth places heavy reliance but it is
3 useful evidence in the mix, are the EBIT margins in
4 other asset-like businesses. So in other words, the
5 retail level of other regulated network services. That
6 is at written closings, paragraph 464.

7 Then taking account of Dr Jenkins' evidence, which
8 Mr Duckworth also considers, first of all, if you use
9 her 50th centile instead of her 90th centile you get to
10 14.1%. Mr Duckworth thinks that is too high but it is
11 closer. It is a big reduction from her upper bound.

12 The sixth point is that if you look at her estimate
13 of the capital intensity for BT Consumer, Mr Duckworth
14 calculates that a reasonable return on BT Consumer sales
15 would be 9.9% if you use the WACC of other UK telecoms
16 operators, or 10.3% if you use BT Group's WACC as
17 a sensitivity. That is set out at 466 of our closings.

18 The seventh point is that Dr Jenkins' comparison of
19 the relationship between EBIT margin and capital
20 intensity for the MSCI World constituents for 2013-2022
21 shows that the predicted level of returns for very
22 asset-light businesses is 9.5%, and that was the blue
23 scatter plot we looked at in the trial.

24 THE CHAIRMAN: Just one second. That was paragraph, which
25 paragraph of your ...

1 MS KREISBERGER: I will need to check that.

2 THE CHAIRMAN: All right.

3 MS KREISBERGER: 467.

4 THE CHAIRMAN: 467, thank you. Yes.

5 MS KREISBERGER: Then lastly, 8 of 8, if you take BT's own
6 EBIT returns, BT Consumer's own EBIT returns but you
7 strip out the excessive returns on SFV prices, you get
8 to a 10% figure, that is evidence that supports a 10%
9 figure, and that is at paragraph 468 of the closings.

10 THE CHAIRMAN: Thank you.

11 MS KREISBERGER: Just a few final points on margins. BT,
12 one of BT's rebuttal points is to point to Figure A5.14
13 from the Provisional Conclusions. That is at
14 {IR-A/16/146}. Now, it is quite curious that BT placed
15 positive reliance on this table, because actually this
16 table captures Ofcom's analysis which finds that BT
17 prices in 2016/2017 were well above cost based prices.
18 So the key message from this table is that back in 2017
19 Ofcom was pricing excessively, and you see -- sorry, BT
20 was pricing excessively, and you see the calculations
21 there.

22 THE CHAIRMAN: What, by reference to other CPs?

23 MS KREISBERGER: No, you see there the EBIT margins being
24 estimated at current prices, so BT's is 32-44%, and then
25 Ofcom starts reducing the price, adjusting it downwards.

1 THE CHAIRMAN: Yes.

2 MS KREISBERGER: So £11.99, it is still at 20%, and so on.

3 Now, the fact that it would reduce other CP's EBIT
4 margins is not relevant to the excessive pricing
5 enquiry, and that is the point that the Tribunal made in
6 both the *Hydrocortisone* case and the *Liothyronine* case,
7 it is wrong to treat entry incentivising prices as
8 a benchmark, so this does not arise for that purpose.
9 That is set out in our closings at 312-313.

10 MR RIDYARD: So to what extent, if you summarise your
11 approach on the margins, I mean, to what extent are you
12 saying in effect that BT's margin on SFVs should be
13 constrained to be similar to what it is on in this
14 bundles business? Is that essentially the benchmark
15 that is being used here?

16 MS KREISBERGER: I think -- no, I do not think that is the
17 correct characterisation of the case, because the key
18 benchmark is the first one I put to you which are the
19 2006 margins. So Mr Duckworth is not relying on the
20 bundle margin as a relevant benchmark. Sorry, as his
21 primary -- as his primary benchmark.

22 MR RIDYARD: But it so happens that they turn out to be much
23 the same thing.

24 MS KREISBERGER: Yes. So, again, it is evidence in the mix
25 but it is not the starting point.

1 THE CHAIRMAN: Hang on a minute. Just to go back to this
2 table. On the basis of the £7 adjustment in what became
3 the Commitments, it is showing BT EBIT margin of 20%,
4 right. So how does that assist you?

5 MS KREISBERGER: That is a generous margin, so -- it is
6 showing that even at a lower price, a £10 adjustment
7 would equate to a 10% margin, so BT could go down by £10
8 and still make a 10% adjustment. So Ofcom took a more
9 conservative approach in accepting the Commitments.

10 THE CHAIRMAN: I do not understand that, because I think the
11 point BT were trying to make out of this was, well --
12 forget the price for a moment. They are saying, as they
13 put on the right-hand side, effectively 20% is the
14 "Upper estimate consistent with promoting competition",
15 right. So forget about prices for the moment. They are
16 saying -- let us assume they are saying Ofcom is content
17 with the 20% margin. That is what BT rely on.

18 MS KREISBERGER: Yes. I think they are making a more
19 specific point about the effect on other communication
20 providers. That is the point they make.

21 THE CHAIRMAN: Let us just concentrate on this one for the
22 moment.

23 MS KREISBERGER: Yes. So the reason why -- I have got two
24 responses to that.

25 THE CHAIRMAN: Right.

1 MS KREISBERGER: The first is upper estimate, so that is an
2 "upper estimate consistent with promoting competition",
3 and you have my submissions that an upper estimate is
4 not the right way to go about estimating the margin for
5 the cost-plus benchmark.

6 THE CHAIRMAN: Hang on. But we have got -- in the higher
7 percentage we have "Lower estimate consistent with
8 promoting competition", so how are we going to read
9 this?

10 MS KREISBERGER: I think that means lower -- I think it is
11 referring to the lower adjustment. I think that is all
12 they are saying.

13 THE CHAIRMAN: All right, but ...

14 MS KREISBERGER: So they are just -- can I just step back?

15 THE CHAIRMAN: Yes.

16 MS KREISBERGER: The critical -- one is taking this out of
17 context, this table. So the critical point to draw from
18 the Ofcom assessment was my third point. So we do not
19 need to sort of read delphic signs into this table.
20 I will come back to the table. But Ofcom said in terms:
21 "Our analysis suggests that a ROS of no more than 10% is
22 consistent with a cost based estimate of profitability
23 for a provider".

24 So that is the principle.

25 THE CHAIRMAN: I follow that. It is just that you were

1 coming to this table, because you were saying the table
2 does not really do the job that BT wants it to do for
3 the purpose of its submissions.

4 MS KREISBERGER: No, because it is showing that BT could
5 make a cut of up to £10 and still make a 10% margin.
6 What they are saying is, well, you could cut by £5 and
7 that might promote competition.

8 Promotion of competition is looking at the entry
9 incentivising --

10 THE CHAIRMAN: That is all I was trying to get at. You are
11 saying, if I understand it, that, yes, they do fix upon,
12 in one of these rows, 20%, but that is on the basis of
13 promoting competition, and you say that is the wrong ...

14 MS KREISBERGER: That is the wrong basis. I am so sorry,
15 sir. I made a meal of that.

16 THE CHAIRMAN: That is what I wanted to get at. Right.

17 MS KREISBERGER: Yes. So that is the Lio/Hydro point and
18 that is at 476 of our closing.

19 MR RIDYARD: So just to draw the indications of that out.
20 You are saying that at the 10% level, which you
21 characterise as the competitive level, you recognise
22 that that puts competitors into negative territory, so
23 it means you could not sustain competition -- you could
24 not sustain competitors to BT at these price levels.
25 But your argument would be, just as if Thames Water came

1 to me and said: we want to raise your price up to the
2 point at which it would only just be viable for someone
3 else to come in and compete, then I would not be too
4 happy with that.

5 So you are really saying that SFV is a sort of
6 natural monopoly activity, in effect.

7 MS KREISBERGER: Well, what one is saying is that it is
8 a wrong premise for an excessive pricing case to say,
9 well, what is the price that the dominant firm could
10 price up to to attract new entry? There was no new
11 entry in this market, it was a declining market. So it
12 is the wrong premise to assess a reasonable margin on
13 SFV services, and that is now a matter of law following
14 Hydrocortisone and Liothyronine.

15 It is not a good argument for a dominant firm to
16 say, well, it is only if I put my price up really high
17 we might be able to attract people into SFV. It is not
18 a realistic approach, it is not a lawful approach, but
19 it is particularly contrived on these facts where you
20 have BT at 95% of the SPC market post-Commitments. It
21 is not a realistic approach.

22 MR RIDYARD: But if the Commitments have pushed its price
23 down towards the point where rivals do not want to
24 compete, then it is sort of a self-fulfilling -- the
25 high market share is a bit of a self-fulfilling

1 prophecy, is it not?

2 MS KREISBERGER: I am not sure you would want me to rehearse
3 the evidence on the Post Office, but you have our
4 evidence on that.

5 THE CHAIRMAN: Thank you.

6 MS KREISBERGER: I was going to then address you on
7 Dr Jenkins' 20-25% margin. That is covered at 469-476
8 of our closings, page 162. Particularly with an eye on
9 the time, I am not going to go over those points.
10 I would like to just address you on one point only, and
11 that is her use of the 75th to 90th percentile.

12 Could we turn up {G/133/25}. This is the
13 Commission's *Aspen* decision which I have mentioned
14 already. If we could go to -- is that page 25? Yes.
15 If we go down the page, please, to 127.

16 So the Commission said this. So this was an
17 excessive pricing case in the pharmaceutical sector:

18 "Profitability of comparator companies.

19 "When assessing the excessiveness of the products'
20 profit levels against a benchmark, the Commission's
21 preliminary assessment accounted for the fact that
22 undertakings need to earn a reasonable profit margin
23 and, in particular, a rate of return of capital
24 employed ... Indeed, in markets working under conditions
25 of 'normal and sufficiently effective competition',

1 undertakings are active in the market, because they can
2 expect to earn a financial return that is sufficient to
3 compensate their investment.

4 "Depending on the circumstances of each case,
5 different methods may be suitable and used to determine
6 a reasonable rate of return for the purposes of
7 establishing a benchmark to be used in assessing the
8 potential excessiveness of profit levels. In the
9 present case, the Commission analysed the profitability
10 of a sample of undertakings that are similar to Aspen
11 and for which the Commission has no indications that
12 they do not operate under conditions of sufficiently
13 effective competition."

14 Then if we go over the page, they refer to some of
15 their competitors -- comparators. {G/133/26}. Table 3,
16 you see there, sets out median figures for these
17 profitability measures, and the Commission explains
18 at 132:

19 "While the median EBITDA margin of the Profitability
20 Comparators provides a useful input to assess whether
21 the difference between the costs actually incurred and
22 the prices actually charged by Aspen was excessive, the
23 Commission does not consider that such median
24 profitability (or in general, any average profitability
25 measure) in itself determines the threshold above which

1 profits should be considered excessive. It is in fact
2 inherent in any median, or average profitability, that
3 many market participants can earn margins that are above
4 the median or the average, as it was also the case for
5 the Profitability Comparators. Therefore, not every
6 deviation from the median or average profitability in an
7 industry results directly in excessiveness within the
8 meaning of limb 1 ...

9 "Against this background and for the additional
10 reasons set out ... the Preliminary Assessment found
11 that the difference between Aspen's costs actually
12 incurred and Aspen's prices actually charged should be
13 considered excessive [under] limb 1 only if their prices
14 earned a profit margin that significantly exceeded the
15 median of the Comparators."

16 They go on in the same vein. Perhaps if you could
17 just cast your eye over to the end of 138. {G/133/27}.

18 MR BEARD: Sorry, just before we go on, just so I do not
19 have to go back to this later, can we just scroll down
20 the page so you can see, on the next page ...

21 THE CHAIRMAN: I have not quite finished reading this one
22 yet.

23 MR BEARD: I see. Apologies.

24 THE CHAIRMAN: Right. (Pause).

25 Right, so let us just pause at 138 for the moment.

1 MS KREISBERGER: Thank you, sir. So this echoes exactly
2 what Mr Parker said in the hot tub. What you do not do
3 is skew the calculation in favour of the dominant firm
4 by taking the highest margin that you can identify.
5 They took the median. You do the work when you compare
6 the competitive benchmark to the threshold of
7 significantly and persistently.

8 THE CHAIRMAN: Right.

9 MS KREISBERGER: So the approach of picking the highest
10 margin you can identify is not principled and it is
11 contrary to the authority.

12 THE CHAIRMAN: Right.

13 Now, Mr Beard, which are the paragraphs you wanted
14 us to read?

15 MR BEARD: Just over the page, so you can see the numbers
16 they are actually dealing with here.

17 THE CHAIRMAN: Where do you want us to go to? To 140?

18 MR BEARD: Yes, please.

19 THE CHAIRMAN: Right, let us have that expanded.

20 MR BEARD: I can make submissions on the rest of it without
21 going back.

22 THE CHAIRMAN: Right, yes.

23 MS KREISBERGER: Sir, you will note the third one.

24 THE CHAIRMAN: Yes. Yes, thank you.

25 MS KREISBERGER: So with that, I move to the question of the

1 threshold. So that completes my submissions on the
2 cost-plus benchmark --

3 THE CHAIRMAN: Thank you.

4 MS KREISBERGER: -- and I am now moving to the excess.

5 THE CHAIRMAN: Yes.

6 MS KREISBERGER: This is addressed at paragraphs 477-485 of
7 our closings from page {OR-A/15/170}.

8 So significantly and persistently. If I could deal
9 with the "significantly" part first, what does it mean
10 in this context. I should also mention paragraphs
11 305-309 of our written closings address the question of
12 what does it mean, the legal principles.

13 So my first point is this is undoubtedly an area
14 where the Tribunal must exercise its judgment. It is
15 not a bright line test. We have shown you there are
16 cases with lower levels and with higher levels. I make
17 this point because I am anticipating an argument that
18 I will come on to in a moment from BT, somewhat teaching
19 my grandmother to suck eggs.

20 The Tribunal and the courts are of course well used
21 to making judgments on reasonableness, proportionality,
22 appreciability. Appreciability is in particular
23 a commonly used threshold in competition law. Only
24 unlawful agreements under Chapter I have to have an
25 appreciable effect on competition.

1 I will just give you the reference to the *Achilles*
2 judgment in relation to -- that is on Chapter I,
3 {G/69/32}:

4 "Appreciable does not mean substantial; it means
5 more than de minimis or insignificant."

6 I mention that, and this is -- I do not want to
7 over-rely, but I will just, if I may, make the point and
8 then explain it.

9 In the *Latvian Copyright* case, which is one of our
10 excessive pricing cases, you will recall, actually in
11 that one the Court of Justice, it does not use the
12 rubric of significant and persistent, it applied
13 appreciability as the threshold for the limb 1 excess.

14 Just so it is clear in that case, so I am not
15 accused of misrepresenting the position, in that case
16 they were comparing the price of the *Latvian Copyright*
17 Society with the prices charged by other collecting
18 societies in other member states. So it was not a cost
19 price comparison, it was a price to price. But
20 nonetheless, we have given the references at footnote
21 626, page 101 of our closings.

22 But that is the excessive price. They use the
23 language of appreciability, and my point is
24 appreciability is a very familiar concept.

25 Then also, so you have it, the Tribunal held in

1 *Albion Water*, another excessive pricing case, that there
2 must be a material differential between cost and price
3 in order for the price to be excessive under limb 1, and
4 that is at paragraph 305 of our closings.

5 So again, as I say, just anticipating that argument,
6 applying the threshold, whichever rubric you use,
7 materiality, significance, it is not something which
8 places undue demands on the Tribunal, it is what courts
9 do. It is also very obviously a fact-sensitive enquiry,
10 and the Tribunal has a degree of discretion as to which
11 factors to take into account.

12 We have summarised in closings what we say are the
13 factual and economic considerations that go to the
14 application of this threshold.

15 THE CHAIRMAN: Let us just go back to that. I mean, just --
16 perhaps we do not have to go back to it, but what do you
17 say should go into the significance calculation other
18 than the literal extent above the competitive benchmark
19 that is yielded by the difference between the
20 competitive benchmark and the price?

21 MS KREISBERGER: Yes, okay, so I will go through those
22 points now. That is very helpful.

23 THE CHAIRMAN: It is simply because, and it is a point which
24 is taken up by BT, but we picked it up anyway from
25 Mr Parker's evidence, who put quite a lot into the

1 concept of significance, and we need to be clear about
2 that as a matter of law.

3 MS KREISBERGER: Yes. So my submission on that is -- I will
4 go through the points which Mr Parker made. I do not
5 think that the state of -- my submission is that the
6 state of the authorities do not mandate, but you must
7 take them into account under limb 1 rather than limb 2.
8 So the *Phenytoin* authority from the Court of Appeal says
9 as long as you take it into account, do not get overly
10 hung up on it.

11 So my first submission is: if you do it under
12 significance, that works very well. That is our primary
13 position and that is the evidence of my expert, as you
14 said. But you could do it under limb 2. But either
15 way -- and that will make, I hope, even more sense when
16 I come on to limb 2. But either way, they should be
17 taken into account.

18 THE CHAIRMAN: Yes.

19 MS KREISBERGER: So I will not then dwell on the excesses
20 themselves, as you say. That is at page 170 and 171 of
21 our closings, if helpful.

22 But could I just mention then, separately from the
23 excessive, there are the overcharged amounts, so those
24 are how it would translate.

25 THE CHAIRMAN: How it would feed into your damages

1 calculation.

2 MS KREISBERGER: Yes, and actually how it would bear on
3 individual consumers within the Class more relevantly
4 for these points. So a Class Member who has been in the
5 Class from the beginning of the period, an SPC, that
6 would be a very significant sum of money. I will give
7 you the reference just for your note. It is at 480,
8 page 171. So we rely on those amounts as well.

9 Then I will go through the five points that we say
10 you can take into account under limb 1 on significance.

11 The first is that these overcharges are borne by
12 consumers. This is a legal -- this is, let me put it
13 this way, a factual consideration with great legal
14 significance, because the primary interest to be
15 protected under Chapter II is that of the consumer, and
16 we have given you the references to the
17 Court of Appeal's case law on that and the Tribunal's.

18 So these are -- when I focus on the overcharges that
19 people in the Class paid, because I am moving away from
20 the economic differential, they are material
21 overcharges. It is exactly the type of consumer harm
22 that this collective procedure has been designed to
23 provide a compensation mechanism for. So they are not
24 insignificant excesses, they meet the limb 1 threshold,
25 and the fact that consumers paid them month after month

1 are relevant to that question, in my submission.

2 I was somewhat anticipating, sir, your question,
3 because my next point was going to be: that would be
4 a sufficient basis for finding -- that, with the
5 differentials, would be a sufficient basis for a limb 1
6 finding.

7 The way I would frame the other evidence is that you
8 find corroboration of significance in the surrounding
9 economic circumstances. That is a very typical approach
10 that one takes in competition law cases. The enquiry is
11 not usually conducted in a vacuum. You look at economic
12 context and you take account of economic context.

13 THE CHAIRMAN: Yes.

14 MS KREISBERGER: Just as you would if you were assessing an
15 unlawful agreement.

16 When you examine the context here, there are four --
17 I am not going to go through all of them -- there are
18 four key contextual considerations, and they really
19 overlap with what I -- with my prefatory remark
20 yesterday. They concern really the particularities of
21 this case, and that is at paragraph 483 of our closings.

22 The first is that this is a declining market, so
23 these are excesses observed in a declining market.
24 Secondly, lack of innovation. Thirdly, there is the
25 fact that BT did not compete for this legacy base of

1 customers but acquired them. There is a fourth point,
2 but really that sits with my first submission about
3 consumers, that these are subscription contracts, but
4 that is not an economic factor.

5 So those are the points of significance, and I am
6 going to come back to points on unfairness because you
7 could equally look at them there.

8 THE CHAIRMAN: Quite. Because one approach would be to say
9 simply look at the excess, if there is an excess, and
10 work out how much of an excess it is and say whether
11 that is significant.

12 MS KREISBERGER: Yes.

13 THE CHAIRMAN: Or material, whatever word you want to use
14 for it.

15 MS KREISBERGER: Yes, I would adopt that.

16 THE CHAIRMAN: But do you, perhaps it does not matter, do
17 you have a primary position here as to which way we
18 should approach this, given the case law seems to allow
19 us to do either, if we got to this stage in the case?

20 MS KREISBERGER: I am afraid I do not.

21 THE CHAIRMAN: That is all right.

22 MS KREISBERGER: But I do have a very strong submission on
23 the point, which is it is critical context. So it
24 matters not at what stage you do it, but really there is
25 a chronological point that significance comes first, and

1 it explains why it is that you observe these excesses.

2 So it is absolutely fundamental to take account of
3 the fact that you are observing these excesses in
4 a market with a firm that is extremely dominant,
5 declining, and all the other factors. It is anathema
6 really to an antitrust practitioner to look at the
7 excesses in a vacuum. You have to understand it as
8 a product of the market.

9 THE CHAIRMAN: Certainly by the time you come to fairness
10 you have got to have looked at it one way or the other.

11 MS KREISBERGER: It just does not matter. So I am afraid
12 I cannot get hung up on --

13 THE CHAIRMAN: No, I follow that.

14 MS KREISBERGER: But it is very important.

15 MR RIDYARD: Ms Kreisberger, can I just sort of refer back
16 to *Aspen* and Dr Jenkins and her approach. One of the
17 things you took us to in *Aspen* was the fact that they
18 pointed out that if you take the average -- some sort of
19 average profit, then half of the firms in any one point
20 in time will be above and half below the average,
21 crudely.

22 MS KREISBERGER: Yes.

23 MR RIDYARD: Therefore you need to be careful about that.

24 Then you have got Dr Jenkins' approach, which is to take
25 this centile approach, and I realise you might not like

1 the 90th centile, but could you not characterise that
2 centile approach as being a way of dealing with the
3 significance point and the *Aspen* concern? You might not
4 like 90%, you might want to try 75% or something. But
5 is that not sort of a practical way of dealing with
6 significance?

7 MS KREISBERGER: Now, that would be contrary to the law
8 actually. That would be a legally --

9 THE CHAIRMAN: I am just going to say something, that there
10 needs to be a degree of courtesy between counsel here.

11 MR BEARD: Sorry.

12 THE CHAIRMAN: We do not get hung up particularly, and we
13 very rarely interfere, but there have been a few
14 occasions today where we have actually been distracted
15 by audible reactions on the other side. It is not
16 courteous to counsel, and it is not actually helpful to
17 us, and we apply the same standards to both sides. So
18 if you can bear that in mind, please.

19 MS KREISBERGER: I am very grateful.

20 THE CHAIRMAN: Thank you.

21 MS KREISBERGER: So the law on this is very clear. You have
22 to come up -- I think Mr Parker referred to it as doing
23 the work properly. You have to come up with
24 a meaningful benchmark, and it is very important that
25 you do not pollute the benchmark by over-egging the

1 pudding at that stage. That is the point I draw from
2 Aspen. It is saying you do not skew the results by
3 pitching it at a high percentile. Where you do the work
4 is when you compare the meaningful benchmark with the
5 significant or material threshold.

6 MR RIDYARD: Okay. Thank you.

7 MS KREISBERGER: So I was then going to turn to BT's
8 rebuttal points. I can take them at quite a quick trot.

9 At paragraph 608, the Class Representative -- sorry,
10 BT says -- BT criticises the Class Representative, for
11 leaving a "hodgepodge", to use BT's language, of very
12 important factors to the court. That seems to me
13 a strange submission. As I said, the Tribunal's role is
14 to make a finding on whether the threshold is met based
15 on the size of the excess and, at some stage, taking
16 account of the economic context. As I said, it is not
17 an unusual exercise for the Tribunal.

18 Secondly, BT then repeats its legal certainty
19 objection. That is at paragraph 608. I have addressed
20 you on that, but it goes on to add that any firm might
21 be found to fail limb 1. So that is the new spin here.
22 It is another curious submission.

23 Well, dominant firms that charge significant
24 excesses above the competitive level may be found to
25 infringe limb 1, yes, but that would depend on the facts

1 in any particular case, and the intention is to deter
2 excessive prices.

3 Can I just ask you there to have a look at
4 {G/96/179}. This is the *Hydrocortisone* judgment,
5 paragraph 376(2). It may be ... is it the previous
6 page? It is paragraph 376(2). {G/96/179}. This is
7 what the Tribunal said in *Hydrocortisone*:

8 "We do not accept that the law in this area was
9 unclear. The law as we have found it to be aligns very
10 closely with what should be the objective of
11 entrepreneurs the world round: making profits
12 substantially in excess of cost by creating consumer
13 value through the development and sale of products that
14 differentiate themselves from the products of
15 competitors by appealing to what consumers want to buy.
16 Entrepreneurs should not expect to make profits in
17 excess of cost-plus through the illegitimate
18 exploitation of market power. The *Hydrocortisone*
19 Decision and the record of this appeal demonstrates very
20 clearly an illegitimate exploitation of market power to
21 leverage price well in excess of what was fair."

22 So that is the basis on which the Tribunal rejected
23 claims of violation of legal certainty in that case. So
24 that is BT's second criticism.

25 Its third is to attack the benchmark as not

1 reflecting workable competition. I have addressed you
2 on the benchmark. I would just observe again that BT's
3 preferred benchmark based on the SAC combi approach
4 would permit a 763% increase in prevailing prices.

5 THE CHAIRMAN: Yes.

6 MS KREISBERGER: Now, with that, I move to limb 2. That is
7 my last topic.

8 THE CHAIRMAN: Yes.

9 MS KREISBERGER: So I would like to begin, if I may, with
10 the legal test for unfairness, and it somewhat overlaps
11 with the discussion we just had, the exchange we had
12 about significance.

13 THE CHAIRMAN: Yes.

14 MS KREISBERGER: It is at paragraph 315 of our closings on
15 page 111. But the starting point for the unfairness
16 assessment is that an excessive price which bears no
17 reasonable relation to economic value is an example of
18 an unfair price. That is a finding in *Phenytoin*, that
19 is the Court of Appeal in *Phenytoin*.

20 That is because once the price is deemed excessive
21 under limb 1, then it is also unfair under limb 2,
22 unless the defendant can show that the excessive price
23 reflects some economic value that was not captured by
24 the cost-plus benchmark.

25 Now, that is consistent with the meaning given in

1 the case law to unfairness. In *Phenytoin*, and these
2 references are all in our closings, but in *Phenytoin* the
3 Court of Appeal said, citing *United Brands*, that:

4 "In broad terms, a price will be unfair when the
5 dominant firm has reaped trading benefits which it would
6 not have [reaped] in conditions of 'workable
7 competition'.

8 BT cite the same point from *Phenytoin*.

9 So that is your overriding objective, trying to work
10 out the price will be unfair if it is a price that could
11 not have been charged in conditions of workable
12 competition, benefits that would not be realised. That,
13 in my submission, is a really important organising
14 principle.

15 So you have identified, by this point, an excessive
16 price under limb 1. If the dominant firm could not have
17 charged that excessive price in a workably competitive
18 market then the case law tells you that is unfair.

19 Another way of putting the same point is if the
20 overcharge reflects the dominant firm's market power and
21 it is the fruits of exploitation of market power, then
22 it is unfair. It corroborates the limb 1 finding.

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

24 MS KREISBERGER: Just pausing there, that is why I say I
25 cannot get hung up on where you look at the economic

1 factors because you can see you can do it here.

2 That means that to disprove unfairness, to show that
3 an excessive price is not an unfair price, the dominant
4 firm must prove that these are prices -- these high
5 prices would not hold in conditions of workable
6 competition.

7 The same point is captured in *Phenytoin*. They put
8 it in another way. They say the concept of economic
9 value refers to what customers will reasonably pay for
10 the product. That is paragraph 321 of our closings.

11 Lord Justice Green went on to explain that concept.
12 He said, in other words, what would they pay -- a proxy
13 for what they would reasonably pay is what they would
14 pay in an effectively competitive market.

15 So this is the critical point under limb 2. The
16 question being asked is: you have identified an
17 excessive price but can you show that it would
18 nonetheless be charged, it would hold in conditions of
19 competition, in contrast to the dominant firm's market
20 power?

21 THE CHAIRMAN: Just a moment.

22 MR RIDYARD: How does that differ from limb 1, because
23 I thought limb 1 was where the price was above the
24 workably competitive benchmark.

25 MS KREISBERGER: So limb 1, you do limb 1 on the basis of

1 cost-plus, and so limb 2 is saying well --

2 MR RIDYARD: So you do not do limb 1 with regard to workable
3 competition?

4 MS KREISBERGER: Well, it is your first -- the cost-plus
5 benchmark is your first and primary benchmark for the
6 competitive level, and I come back to: an excessive
7 price is an example of an unfair price.

8 At this point, BT would need to prove that even
9 though you have identified a significant excess above
10 the cost-plus benchmark, there is some economic value
11 that was not captured by cost-plus.

12 MR RIDYARD: Yes, I know that is what it says, but I just
13 wanted to understand what that ... What you said
14 a moment ago is that to disprove unfairness, you need to
15 show an excessive price is not an unfair price, and the
16 dominant firm must prove that these are prices that
17 would not hold in conditions of workable competition, so
18 your limb 2 is about workable competition?

19 MS KREISBERGER: It is all about workable competition,
20 because the Court of Appeal in *Phenytoin* said the basic
21 question is: has the dominant firm reaped the benefits
22 that it would not have reaped in conditions of workable
23 competition? So limb 1 plus limb 2 together, that is
24 what it is getting at.

25 But once you get to limb 2, the assumption is an

1 excessive price is an example of an unfair price unless
2 the dominant firm can show that there is some economic
3 value that was not captured by the cost-plus benchmark.
4 So it is an assumption, an -- it is the wording, it is
5 the wording in the authorities: an excessive price is an
6 example of an unfair price. But of course limb 1 -- 2
7 is doing some work.

8 BT at this stage of the analysis has to satisfy you
9 that if it were operating in a competitive market, it
10 could still have charged these excessive prices. In
11 other words, there is some economic value which has not
12 been reflected in the cost-plus benchmark.

13 My submission is of course it cannot do that, and
14 I am going to come on to explain why. But just to
15 pre-empt one of the points I am going to make, this was
16 Mr Parker's evidence, an example of a situation -- as
17 I say, the starting point is an excessive price is an
18 example of an unfair price. But Mr Parker said, his
19 evidence was, if you can see some -- if you can identify
20 some very distinctive differentiation, that would be the
21 kind of situation where you say, well, a further uplift
22 is justified beyond the cost-plus benchmark.

23 When the dominant firm is bringing something unique
24 to the party, essentially, then you say, well, normally
25 an excessive price is an example of an unfair price, but

1 they, the dominant firm, has proven that there is
2 something else that needs to be taken into account which
3 was not reflected under limb 1.

4 THE CHAIRMAN: That would mean then that, on your other way
5 of putting it, that that is a case where that excessive
6 price could be charged in conditions of workable
7 competition.

8 MS KREISBERGER: Well, let me put it like this: so in
9 a workably competitive market, and Mr Parker made this
10 point in his evidence, in a workably competitive market
11 price will be driven down to cost-plus, so zero economic
12 profits. But if the firm can point to some unique
13 feature that distinguishes it from the market, then it
14 may be able to put its prices above cost-plus. So in
15 that situation there needs to be a further reflection of
16 some differentiating factor --

17 THE CHAIRMAN: In which case, the expression "conditions of
18 workable competition" do mean something more than simply
19 the benchmark that you would use for limb 1.

20 MS KREISBERGER: Yes, absolutely. Exactly, sir.

21 THE CHAIRMAN: That concept is then doing the same kind
22 of -- there is other stuff going into that concept,
23 which would probably be the equivalent of economic
24 value, or value.

25 Leave aside the debate whether Mr Parker's right

1 about unique or distinctive. Put that to one side. You
2 would have to let -- for the concept of workable
3 competition to be meaningful in the limb 2 context, you
4 have to put some other stuff in there, or it can have
5 some other stuff in it.

6 MS KREISBERGER: It has to have something more, so it is not
7 in limb 1. That is the basic point. I think the way
8 Mr Parker might put it, to paraphrase him very
9 tentatively, but: there needs to be some reason for
10 making economic profits beyond cost-plus.

11 THE CHAIRMAN: I can see that, yes. Okay.

12 MS KREISBERGER: So that is the contours of the enquiry
13 under the unfairness limb.

14 THE CHAIRMAN: Yes.

15 MS KREISBERGER: Now, just to complete the legal principles
16 and respond to BT, we do not agree with their
17 representation in the closings of the legal test under
18 limb 2. BT says, at 675, the question is not whether
19 there is some countervailing or justifying factors which
20 somehow outweigh excessiveness by reference to the
21 cost-plus benchmark.

22 Well, the point I want to draw out is it is right to
23 say it is not simply a question of weighing different
24 factors. It is not a balancing exercise, it is a much
25 more specific enquiry, as I said. To adopt your

1 language, sir, is there something more going on than
2 some straightforward workable competition? So it is not
3 a sort of -- you are not putting factors into the
4 weighing scales. That is not the right way to look at
5 this.

6 The relevant passage in *Phenytoin*, Court of Appeal,
7 is 97.5, which says:

8 "If the price exceeds the selected benchmark [and
9 this comes back to Mr Ridyard's point], the authority
10 should then compare the price charged against any other
11 factors which might otherwise serve to justify the price
12 charged as fair and not abusive."

13 So that would be the distinctive offering point, for
14 instance. Benefits which could not otherwise have been
15 reaped.

16 Now, BT say at 819, the exercise for the Tribunal at
17 limb 2 is to consider whether the Class Representative
18 has proved that BT's price was unfair, weighing all
19 relevant factors. We agree with that proposition,
20 provided it is factors that are relevant to this
21 enquiry. It is not a free-ranging enquiry. Evidence
22 which is relevant means evidence which shows that
23 the price is one, to use Lord Justice Green's language,
24 which customers would "reasonably pay".

25 So I will come back to why this is an important

1 distinction on the facts here.

2 THE CHAIRMAN: But one of the things which surely would be
3 material here also would be the extent of any excess.
4 In other words, the excess might be sufficient under
5 limb 1 to be significant, let us say, but it might only
6 be just significant depending on what the Tribunal
7 thought that was. Would the extent of the excess have
8 a role to play? In other words, if it was a very large
9 excess, you would attribute less weight to any
10 counterfactors, using that term neutrally, or not?

11 MS KREISBERGER: I think it is a difficult one to address in
12 the abstract for this reason: the question is -- if
13 I might take the example of some distinctive offering,
14 as a concrete example. You look at the excess, and let
15 us say you have identified a 50% excess. It is not
16 a question of how do I feel about how significant it
17 was, it is actually a question of looking at the excess,
18 and then it would be for the dominant firm to say, well,
19 we can justify -- okay, you found that to be significant
20 under limb 1, but we can justify it, because the
21 offering is so distinctive that economic value under
22 limb 2 should be adjusted, inflated, by that 50%.

23 So in other words, you look at the excess, you can
24 take account -- nothing will -- it is certainly not my
25 submission that you cannot take account of the magnitude

1 of the excess.

2 THE CHAIRMAN: That is what I was getting at.

3 MS KREISBERGER: But then you are looking at, well, what is
4 this economic value that the dominant firm is putting
5 forward that goes beyond the cost-plus benchmark? Of
6 course you look at that against the excess.

7 THE CHAIRMAN: Yes, right.

8 MS KREISBERGER: I am reminded by Mr Armitage that there is
9 *Hydrocortisone* category 3. If there is no consumer
10 surplus, is the wording, is it not? If there is no
11 consumer surplus, then any excess above cost-plus is
12 unfair.

13 THE CHAIRMAN: Just a moment.

14 MS KREISBERGER: I will give you the paragraph reference if
15 I may. It is in our closings. So that is contrary to
16 the unusual situation of the very distinctive offering.
17 Thanks to my team it is paragraph 324. So it is
18 necessary to distinguish between cases where a firm is
19 able to charge a premium because it is offering
20 distinctive value, and I am coming back to this, and
21 cases where a firm is able to charge a premium not
22 because of distinctive value but because it possesses
23 market power. That was my point.

24 Now, I am now moving on to the evidence which
25 corroborates, and this is quite a brief section, but

1 which corroborates the economic finding that BT's
2 excessive prices reflect its market power over SFV
3 customers. What I really want to do in this part of my
4 submissions is situate the evidence and the evidence we
5 have cited in the written closings.

6 Now, the Class Representative's principal primary
7 case is that the excessiveness of SFV prices under
8 limb 1 are sufficient in themselves to establish
9 unfairness, in the wording of Phenytoin. This is one of
10 those cases where an excessive price is in itself
11 unfair.

12 The premise for that submission is, as I said, that
13 the excesses under limb 1 are a reflection of BT's
14 extensive market power and its ability to exploit
15 customers through leveraging that market power over
16 them.

17 I say it is not incumbent on the Class
18 Representative to go further and advance other evidence
19 to prove that is the case, subject to the caveat of our
20 exchange which is that the economic evidence, which is
21 very important because that goes to market power and
22 exploitation, if that is considered under limb 1 and you
23 have done that work, then under limb 2 you can say,
24 I see this excessive price and it is unfair because it
25 reflects market power in this economic context.

1 Now, as I have set out -- so my submission is the
2 Class Representative could stop there and it is now for
3 BT to persuade the Tribunal that there is some
4 additional economic value in SFV services which explains
5 these large excesses above cost-plus, but while the
6 Class Representative does not need to go further what we
7 have in this case is a corpus of documentary evidence
8 mainly drawn from BT internal documents and business
9 documents and emails which actually corroborate the
10 limb 1 conclusion of excessive prices. That documentary
11 evidence confirms that the explanation for those high
12 prices is BT's market power and its ability to exploit
13 consumers.

14 So just bringing the strands together, that evidence
15 is not a necessary part of the Class Representative's
16 case but it is relevant. It is relevant evidence. It
17 can be taken into account by the Tribunal under limb 2.

18 I think it is helpful here to go back to the Aspen
19 decision, the Commission decision. Now, I am not
20 suggesting that the facts are on all fours or the
21 evidence in that case is on all fours here but what I am
22 suggesting is that the approach taken in Aspen is
23 a useful template for the Tribunal's approach to the
24 evidence in this case under limb 2.

25 What I propose to do is take a brisk walk through

1 a few pages there, I will do it mainly by reference to
2 headings simply to show you the shape of the approach,
3 the assessment.

4 If we could pick it up at {G/133/33}. You see the
5 heading there is "Assessment of unfairness 'in itself'",
6 so we are in limb 2, part 1 and the Commission took
7 account of the nature of Aspen's products. I just note
8 in passing that the Commission was there looking at the
9 dependency of patients on the pharmaceutical products so
10 they took that into account on unfairness.

11 We need to move forward to paragraph 176,
12 {G/133/34}. You see there the analysis.

13 "... [confirm] that Aspen's prices and profits
14 neither reflect any commercial risk-taking activity, nor
15 innovation, investment, or any material improvement ..."

16 So I just note that. Then if we go forward to page
17 {G/133/35} you see there the heading under
18 paragraph 178, "Aspen's price increases are
19 disproportionate with costs". So they took that into
20 account under limb 2.

21 Then if we go over the page, and so you might find
22 this useful, {G/133/36} they looked at the magnitude of
23 the excessiveness of profits under limb 2.

24 THE CHAIRMAN: Sorry, that was which paragraph was that?

25 MS KREISBERGER: Just above 182 in the middle of the page.

1 THE CHAIRMAN: Yes.

2 MS KREISBERGER: Then the point I emphasise here is on page
3 {G/133/37}. You see there "Aspen's strategy to
4 exploit". The Commission said strategy was highly
5 relevant. As I say, it is not a necessary finding but
6 if the evidence is there it can be highly relevant. It
7 is a settlement decision so it is not as detailed as an
8 infringement decision, but it is quite actually -- there
9 are only four paragraphs supporting strategy to exploit.
10 You will see in our written closing we have summarised
11 a lot of evidence in relation to BT's knowledge and
12 intentions.

13 Then at page -- sorry, that was paragraphs 186-189.
14 That is what I wanted to show you from Aspen.

15 If I may just draw the strands together in the light
16 of that. The Tribunal can take account of the
17 documentary material. It is not necessary evidence to
18 make out a case of unfair pricing. That depends
19 critically on the differentials and the economic
20 evidence and the Tribunal could look no further, but
21 here we have very persuasive documentary evidence that
22 is corroborative of the economic findings and the
23 Tribunal can have regard to that evidence.

24 I will just summarise what our case is on that
25 evidence. I am certainly not going to take you through

1 it at this late hour, but just very briefly.

2 Here we have a plethora of evidence which confirms
3 that BT knew that its price rises were landing on SFV
4 customers and that it had a strategy of exploiting this
5 declining customer base. It is what I have referred to
6 as the last gasp of the lazy monopolist. Once Ofcom
7 intervened you have seen the evidence that BT realised
8 that the trickiest question, to quote James Tickel, was
9 how to justify the repeated line rental price increases.

10 The evidence is set out at 536-594 of our closings.
11 I am just going to make three points. We do not need to
12 turn up any documents.

13 At 550(a) on page 191 Mr Bunt accepted under
14 cross-examination that his email referring to how
15 over-priced BT was was a reference to Voice Only
16 customers.

17 Then at paragraph 550(b) of the closings we record
18 there Mr Bunt confirming that he was definitely
19 acknowledging that SFV price rises hit the digitally
20 excluded the hardest.

21 Then at 550(d), and that is on page 192, you will
22 recall and I have referred to it already today, the BT
23 document that said: we should recognise declining
24 markets and price accordingly, and then the parentheses
25 in that document referred explicitly to Split Purchase

1 Customers.

2 Then just finally on unfairness, you have other
3 corroborative compelling evidence in the form of Ofcom's
4 intervention to bring SFV prices down. You will recall
5 that in cross-examination I put to Mr Matthew the very
6 heavy overlap between the key stages of the Class
7 Representative's assessment in this litigation and
8 Ofcom's assessment of the same problem.

9 If one steps back, by this stage we have identified
10 excessive prices, compared to cost and we have Ofcom
11 identifying that those same prices have caused serious
12 consumer detriment and steps needed to be taken. It
13 does not add up to a compelling case on fairness.

14 Now, that is all I am going to say on the evidence
15 which corroborates the Class Representative's case that
16 the excessive prices reflect BT's exploitation of its
17 market power.

18 THE CHAIRMAN: Let us take our break.

19 MS KREISBERGER: That would be a good break moment. I am
20 grateful, sir. Thank you.

21 (3.20 pm)

22 (A short break)

23 (3.39 pm)

24 MS KREISBERGER: Thank you, sir.

25 I have got ... I am moving to BT's criticisms and

1 I am going to deal with four, so just to keep you
2 updated on progress, that is a handful of points but
3 a few important ones.

4 So their first criticism is at 684 of BT closings.
5 They criticise Mr Parker's approach to economic value on
6 the basis that there is no requirement in the case law
7 for uniqueness. I will not call up the authority, but
8 I will give you the references, which are to
9 *Hydrocortisone* which is at {G/96/1}, and that judgment
10 provides clear support for Mr Parker's approach.

11 The Tribunal said in a workably competitive market
12 a firm may be able to charge a premium because it
13 provides distinctive value to buyers. Distinctive
14 value. That is paragraph 322(2) on page {G/96/157}.

15 The Tribunal went on to say, and we can call it up,
16 but I will press on, if I may.

17 THE CHAIRMAN: Yes.

18 MS KREISBERGER: Distinctive value, according to the

19 Tribunal, means:

20 "... any definable aspect of a Seller's offering
21 that adds value to the Buyer, in the sense that this
22 aspect represents something that Buyers wish to purchase
23 ... in contradistinction to the offerings of other
24 Sellers; and for which the Buyer will pay a premium."

25 Then the next subparagraph:

1 "... product differentiation is the prime example of
2 such generation of additional value. Product
3 differentiation can exist in many different forms: it is
4 not confined merely to innovation (although that is
5 important), but to providing a better quality product in
6 other ways, and in catering to the subjective tastes and
7 of Buyers ...

8 "Unsurprisingly, the Seller who taps closest into
9 what Buyers value will accrue a demand which may be
10 quite inelastic, and will be able to price accordingly."

11 So that is the authority.

12 Then turning to the evidence, and again I will just
13 give the references. BT did not offer any distinctive
14 value which justifies the overcharges, the excesses.
15 That is addressed in our closings at 508-534.

16 There are two main categories of evidence on which
17 BT relies to justify the overcharges. The first are the
18 gives. I want to give one short answer as to why the
19 gives are irrelevant to the economic value of SFV
20 services, and that is because they are not unique to SFV
21 services. The gives are available at competitive prices
22 when Fixed Voice is bought in a bundle. So BT's heavy
23 reliance on the gives is fundamentally misplaced. They
24 cannot justify the excesses when they are available to
25 customers who do not pay those excesses. That is

1 addressed at 519-529, and if I could just refer the
2 Tribunal to Annex 2 to our closings which deals with the
3 gives in detail.

4 So that is the first point.

5 The second category are the documents on BT brand.
6 It is addressed at 717 onwards of BT's closing. They
7 say that BT says that the Tribunal should not place any
8 material weight on the NPS documents.

9 I am sorry, sir. So BT says no weight, no material
10 weight on the NPS documents. I am going to make two
11 points, I have more but I am not going to make them for
12 time-saving reasons.

13 The first criticism that BT makes is that these
14 documents should have been put to Mr Bunt and Ms Blight,
15 they say. That is wrong, in my submission. Dr Hunt
16 referred to the NPS documents in his report, and he
17 relied on them for the proposition that:

18 "... customer service improvements have had a direct
19 impact on uplifting its Net Promoter Score ..."

20 That is Hunt 1, paragraph 430.

21 THE CHAIRMAN: Hang on, just a minute.

22 MS KREISBERGER: Sorry, sir.

23 THE CHAIRMAN: Paragraph 430?

24 MS KREISBERGER: Paragraph 430 of Dr Hunt's first report.

25 THE CHAIRMAN: He relied on those same NPS documents.

1 MS KREISBERGER: Yes. He refers -- so what he says is:
2 "... customer service improvements have had a direct
3 impact on uplifting its Net Promoter Score ..."
4 So he is placing reliance on the net promoter score.
5 That is the point I am making.
6 So given that he raised the issue of the net
7 promoter score, it was appropriate, in my submission, to
8 put the NPS documents to him, because he raises the
9 issue of the NPS score.
10 THE CHAIRMAN: You mean to challenge his view, as it were?
11 MS KREISBERGER: Yes.
12 THE CHAIRMAN: But is there not some reference to the NPS
13 documents made by Mr Bunt or Ms Blight?
14 MS KREISBERGER: Yes, I am coming on to that. That was my
15 second point.
16 THE CHAIRMAN: Yes.
17 MS KREISBERGER: Which is actually I adopt the evidence,
18 I am not challenging, I adopt the evidence of both
19 Ms Blight and Mr Bunt. Ms Blight's evidence was that --
20 she said that the NPS:
21 "... provided valuable insight into customers'
22 perception of value for money and their experience of
23 our service."
24 So we agree with that. We do not challenge it.
25 Mr Bunt's evidence was that:

1 "... the Voice Division used to monitor changes in
2 BT's [NPS] to gauge how customers viewed the business
3 and its level of service ..."

4 But neither of them refer to any of the documents.
5 They do not cite the documents.

6 Also for your reference, Mr Bunt's second statement,
7 paragraph 58 at {D/2/16}, Mr Bunt said:

8 "I remember that we were concerned by our NPS
9 because customers that were dissatisfied with BT would
10 be more likely to move to another service provider."

11 THE CHAIRMAN: Paragraph?

12 MS KREISBERGER: Sorry, paragraph 58.

13 THE CHAIRMAN: Yes, thank you.

14 MS KREISBERGER: BT's second criticism is that Mr Parker
15 sought to rely on the NPS documents without
16 understanding the methodology used to generate them. We
17 do not accept that. The methodology underlying the NPS
18 documents is clear and it is explained by Ms Blight,
19 Mr Bunt and Dr Hunt.

20 If we turn up {IR-E/21/95}, it is a footnote in
21 Dr Hunt's report, footnote 291 at the bottom of the page
22 there. There we go:

23 "Net Promoter Score is a customer experience
24 measure. The score is calculated by asking customers
25 'How likely is it that you would recommend [brand] to

1 a friend or colleague?' Using a scale of 0-10.
2 Positive (9-10) and negative (0-6) responses are netted
3 off against each other, giving an overall score of
4 between minus 100 (if all responses were negative) to
5 plus 100 (if all responses [were] positive). See [the]
6 website ..."

7 So we think that is clear.

8 So that deals with those points. I have two final
9 points. The first is BT's argument that its prices were
10 fair because Class Members had alternative options. So
11 this is one I would just like to spend a moment on. It
12 is addressed by BT at 678 of their closings. They say:

13 "BT SFV customers paid the prices set by BT
14 notwithstanding the fact they had alternative options.
15 These were not prices imposed on a captive group. As
16 the evidence of customer engagement with their product
17 shows, if the prices charged did not match their
18 subjective perception of the value provided they could
19 vote with their feet, and of course many of them did."

20 We say that is not a good argument.

21 I have two main points. First, it amounts to an
22 argument that BT's prices are fair because Class Members
23 had alternative options which they could have switched
24 to. In other words, SPCs could switch to bundles. Now,
25 I addressed you on this at the beginning of yesterday.

1 That argument, if accepted, would drive a coach and
2 horses through the prohibition under Section 18.2(a) on
3 unfair pricing. The test on unfair pricing is whether
4 the price of the product in question is excessive
5 compared to its costs and unfair compared to the
6 products' economic value. In other words, the
7 competitive price.

8 There is no part of the test which takes account of
9 the prices of other products, particularly in other
10 markets which are not subject to the overcharge.

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

12 MR RIDYARD: Are you referring specifically here to SPC?

13 MS KREISBERGER: Yes, I assume that is what they mean.

14 Actually when I say no part of the test ... When I say
15 it forms no part of the test, actually the true position
16 is a contrary one. It is actually embedded into the
17 *United Brands* test that there are alternative
18 competitively priced products. That is what limb 2
19 part 2 is getting at, the comparator. The comparator
20 part of limb 2 part 2. It depends on the positive
21 identification of competitively priced alternative
22 products.

23 So the *United Brands* test incorporates a working
24 assumption that where comparable products are available
25 at lower prices, that underscores the existence of the

1 abuse, it does not detract from it. In *Phenytoin* there
2 was the issue of Phenytoin capsules versus Phenytoin
3 tablets, for instance.

4 MR RIDYARD: But they were not competitive products.

5 MS KREISBERGER: They were not on those facts, but ...

6 MR RIDYARD: But I am going to make a broader point:
7 comparable products are not necessarily competitive
8 products, are they?

9 MS KREISBERGER: They are only useful -- if they are going
10 to be useful ...

11 MR RIDYARD: Comparators.

12 MS KREISBERGER: It will depend on the facts, of course.

13 MR RIDYARD: Yes.

14 MS KREISBERGER: But ...

15 MR RIDYARD: The best comparator is one which is not
16 a competitor, so it is not tainted by umbrella effects,
17 and so forth, but it has the same characteristics.

18 MS KREISBERGER: Ah, I am not referring to products in the
19 same market. So I understand you are questioning me on
20 products within the same market, but of course here --

21 MR RIDYARD: I am not really, I am just saying they do not
22 have to be competitive to be comparable.

23 MS KREISBERGER: No, I would agree with that. I am not
24 urging that restrictive interpretation. Of course here,
25 on these facts, we say -- we look at bundles as to

1 the price differential analysis, and they are in
2 different markets, and they are relevant -- they are
3 a relevant yardstick as well.

4 Actually a point which the Tribunal made in its CPO
5 judgment in these proceedings was that you might have
6 a competitively priced product that the dominant firm is
7 competing with. It could be the case, because dominance
8 is not monopoly. Here, there is an issue of price
9 leadership, but that may not be the case in a different
10 set of facts.

11 So it cannot be right that a price is not unfair --
12 a price charged by a dominant firm in the market is not
13 unfair on the basis that these consumers could have
14 switched to a non-excessively priced product. That is
15 not what the prohibition is getting at. That
16 get-out-of-jail card does not exist. It is contrary to
17 the underlying policy. The underlying policy is that
18 dominant firms have a special responsibility not to
19 exploit customers by charging them unfair prices. It is
20 not an excuse that they should not have paid those
21 prices.

22 My second point is the fact that, which BT points
23 to, the fact that customers continue to pay the prices,
24 continue to swallow the high prices in the face of
25 cheaper alternatives is not relevant evidence of

1 economic value. That is the willingness to pay fallacy.
2 That is addressed at *Phenytoin*, {G/73/48},
3 paragraph 155.

4 Lord Justice Green said:

5 "The simple fact that a consumer will or must pay
6 the price that a dominant undertaking demands is not an
7 indication it reflects a reasonable relationship of
8 economic value."

9 Just to give you the reference to the CPO judgment
10 in these proceedings, it is paragraph 92, {B/7/33} where
11 this Tribunal observed that:

12 "... all dominant firms ... face ... some kind of
13 competition from some kind of alternative ... it [does
14 not follow] that the price charged [by] them [is not]
15 abusive."

16 THE CHAIRMAN: Yes, thank you.

17 MS KREISBERGER: Then I would like to just complete this
18 point by picking up the question posed by the Tribunal,
19 question 30 in the written questions.

20 THE CHAIRMAN: Question 3-0?

21 MS KREISBERGER: Yes, question 3-0.

22 The question was:

23 "Is it open to the Tribunal to decide the case
24 differently for VOCs and SPCs?"

25 My submission is it is not. I come back to the

1 important distinction between the question that you are
2 asking, which is: is this excessive price one which
3 could have been charged in conditions of workable
4 competition, and the evidence which is relevant to that
5 assessment.

6 I would like to just go through the points as they
7 apply to VOCs and SPCs. There are no differences in the
8 position of SPCs and VOCs which point to the SFV prices
9 charged to one group as being unfair whereas the prices
10 charged to the other group are, in contrast, fair.

11 Just to summarise -- crystallise the points on this.
12 The two customer groups, VOCs and SPCs, form a single
13 economic market pre-Commitments, so they are in the same
14 market, and pre-Commitments both -- each customer group
15 pays the same significant excess above cost-plus. After
16 the Commitments of course we only have SPCs. They
17 continue to pay these excesses, the excessive mark-up
18 above cost-plus. Then when you get to unfairness the
19 question is: is there some relevant difference in
20 relation to the SFV prices that these groups would pay
21 under workable competition? Because that is what the
22 test is getting at. In other words, is there some
23 evidence to suggest that SPCs could be charged these
24 high prices if BT did not have market power?

25 My answer is there is no evidence to suggest that is

1 the case. The price charged to SPCs, including after
2 the Commitments, is still explained as an illegitimate
3 overcharge.

4 In fact, the evidence for SPCs post-Commitments is
5 even stronger in relation to exploitation of market
6 power because we have BT's market share at close to
7 monopoly.

8 Just to remind you one of the documents I referred
9 to in relation -- the documentary evidence and
10 unfairness, we have got Mr Bunt's document where he
11 refers specifically to SPCs as a declining market from
12 which to maximise value. So that is specific
13 documentary evidence which shows that prices to SPCs are
14 a function of BT's market power. You see there BT
15 singling out SPCs.

16 The only difference between VOCs and SPCs ... is
17 that SPCs buy functioning equivalent services to
18 bundles, so they could save money by switching, but that
19 is not a fact which converts these excessive prices into
20 fair ones, because it is not relevant to the question of
21 did BT reap benefits that it could not have reaped in
22 a competitive market. So it is no answer to say that
23 SPCs could have switched to a cheaper alternative.

24 So that completes that point.

25 I have got one last point. This relates to Ofcom.

1 BT says at paragraph 808, in relation specifically to
2 SPCs:

3 "The Tribunal is being asked to accept the somewhat
4 surprising proposition that Ofcom found that BT SFV
5 prices were excessive and unfair but yet allowed BT to
6 continue to charge unlawfully high prices to SPCs in the
7 interests of pragmatism."

8 That is not correct. The position is that Ofcom
9 found that the prices charged to SPCs were well above
10 the competitive level and caused consumer detriment to
11 them. Those conclusions carried into the 2017 Ofcom
12 statement. Mr Matthew accepted that they were
13 conclusions, they are conclusions which are relevant to
14 unfairness, and the fact that Ofcom chose to accept
15 consumer engagement remedies rather than price caps does
16 not alter those findings.

17 So there is a distinction between Ofcom's
18 conclusions and the remedy it accepted, and Mr Matthew
19 accepted that in cross-examination. That was
20 {Day19/8:23} onwards.

21 In fact, this Tribunal addressed that same very
22 point in the CPO judgment, and for your note that is at
23 {B/7/35}, paragraphs 96 and 99. I will not read them
24 out.

25 THE CHAIRMAN: No. Right, thank you.

1 MS KREISBERGER: Sir, I was not going to address
2 comparators. Our written closings deal with all the
3 points.

4 THE CHAIRMAN: Yes.

5 I just have one question immediately to put to you.
6 You have an alternative case which is based on line
7 rental only. How does that play into all of this?

8 MS KREISBERGER: Well, it is a secondary case. So if the
9 Tribunal were against us on taking access and calls
10 together, then there is a secondary case that line
11 rental taken alone is excessively charged, but it is
12 only engaged if the Tribunal is not with us.

13 THE CHAIRMAN: If everything else fell in your favour, there
14 would be a different overcharge amount.

15 MS KREISBERGER: Yes.

16 THE CHAIRMAN: I see.

17 Right. Now, we just need to do a little bit of
18 housekeeping here. You are now finished with your
19 submissions?

20 MS KREISBERGER: I am finished, but Mr Spitz will address
21 quantum.

22 THE CHAIRMAN: Well, let us just pause for a moment.

23 Mr Spitz, how long do you think you are going to be?

24 MR SPITZ: Sir, I had initially thought that I would need an
25 hour or a little bit more, but I am inclined to try and

1 cut my cloth.

2 THE CHAIRMAN: I think you are going to have to because --
3 the transcriber will no doubt allow us a little bit of
4 time, but some of the arguments so far as quantum are
5 concerned are pretty well set out in the papers.

6 MR SPITZ: Yes, indeed.

7 THE CHAIRMAN: We do have some questions about the mechanics
8 of the quantum calculations should we get there which we
9 do want to put to you. It seems to us on that basis,
10 however, we are inevitably going to go into Friday,
11 assuming that BT wants the same time as the Class
12 Representative.

13 MR BEARD: We will of course speed the plough as best we
14 can. As long as we can start first thing tomorrow, we
15 will see where we can get to.

16 THE CHAIRMAN: Do you want an earlier start tomorrow? You
17 have got two days, just as they have had two days. If
18 you do not want to use all of it, that is fine. But we
19 are inevitably, I think, if there is a question of
20 a right of reply or anything else, probably going to get
21 into Friday.

22 MR BEARD: If we can finish by 3.30 on Thursday then that
23 would give the Class Representative an hour to reply.
24 I think we will try and aim for that so that we get
25 within the four days.

1 THE CHAIRMAN: All right, but I do not want to be too
2 prescriptive about it.

3 MR BEARD: No, I am grateful.

4 THE CHAIRMAN: We may have questions for you, I am sure we
5 will have questions for you --

6 MR BEARD: I do not doubt.

7 THE CHAIRMAN: -- which may prolong things, and that is why
8 I think we should, at the moment, be prepared to go into
9 Friday.

10 MR BEARD: Understood.

11 THE CHAIRMAN: If we all finish early, then that would be
12 great.

13 Just on that point, Mr Ridyard -- you can sit down,
14 Mr Spitz, for a minute. Ms Kreisberger, Mr Ridyard is
15 going to just put to you in a second some points on
16 ARPU-related matters where we just want some references.
17 We do not want further submission, we just want
18 references. I think the idea is he will tell you what
19 they are and then we will put them in a letter.

20 Then there is the separate question of the synergy
21 paragraph 383 point which we will be asking Mr Beard
22 about as well because it affects both sides' cases.

23 MS KREISBERGER: Yes.

24 THE CHAIRMAN: How do you want to deal with that? I do not
25 really want to produce more paper if we can avoid it,

1 but I want to have a clean start with BT tomorrow.

2 MS KREISBERGER: We were thinking along the lines of a note,
3 and we could circulate that certainly before 10.30
4 tomorrow morning.

5 THE CHAIRMAN: Right.

6 MR BEARD: I think the only difficulty is going to be,
7 looking at timing, there is a reasonable chance we will
8 be on to that sort of thing during the course of
9 tomorrow, so I think if there are going to be some
10 answers sent on a postcard, the postcard really needs to
11 come this evening, I think.

12 THE CHAIRMAN: I think there is some force in that.

13 MS KREISBERGER: Yes.

14 THE CHAIRMAN: It is not ideal, but I do not want to have to
15 trouble you making oral submissions tomorrow. We do
16 need a clean ...

17 MS KREISBERGER: No, I appreciate that entirely. Yes, we
18 will do our very best and aim to get it in this evening.
19 You can expect it this evening.

20 THE CHAIRMAN: We will say it should be 10 o'clock, if
21 earlier then do it earlier, and if BT have to come back
22 on what they want to say later on, they can, but BT will
23 be asked to address more or less the same point, in any
24 event.

25 MS KREISBERGER: I am grateful. Thank you, sir.

1 THE CHAIRMAN: Right, Mr Ridyard, do you want to ...

2 MR RIDYARD: Yes. It is just, following the discussion that
3 we had about ARPU and other things yesterday, what would
4 be helpful would be just for either or both parties to
5 go away and see if you can dig out the references to
6 where the following information can be gleaned, and what
7 we want is ideally from 2007 onwards, up until 2021 or
8 22, SFV ARPU, SFV call revenues per line, average
9 revenue per line, gross margin per line, the price of
10 the Openreach wholesale line cost, and the line rental
11 prices charged to SFV consumers.

12 If it is possible, I am not sure what the status of
13 the data is post-2018, but if there was a way of
14 splitting that, differentiating that between SPC and
15 VOC, that would be helpful as well. If it cannot be
16 done, then it cannot be done.

17 So if we could have that information, that would
18 just be very helpful for us to put all the discussion
19 that we had on that yesterday into context for us, so we
20 can see it all together.

21 MS KREISBERGER: In terms of timing for the provision of
22 this information, we obviously have the other note to
23 submit tonight.

24 THE CHAIRMAN: This is a matter simply of references as to
25 where we will find things.

1 MR RIDYARD: It is not time critical or anything.

2 THE CHAIRMAN: It would be nice to have it before we
3 finished the issues this week.

4 MS KREISBERGER: Yes, of course. It was really a question
5 about tonight and people's bedtimes.

6 Do you need further assistance on the spreadsheet,
7 locating the spreadsheet?

8 MR RIDYARD: No, we found -- we had the spreadsheet all
9 along, of course. It was entirely our error, not having
10 spotted it.

11 MS KREISBERGER: I am grateful. I just want to make that
12 point, then, that it is all customisable, so everything
13 can be ...

14 THE CHAIRMAN: I think for both sides' spreadsheets, if we
15 have any technical queries we will try and see if we can
16 raise them before the end of the week

17 MS KREISBERGER: Thank you, sir.

18 THE CHAIRMAN: Mr Spitz.

19 Closing submissions by MR SPITZ

20 MR SPITZ: Thank you, sir.

21 What I was going to suggest, in the event it is
22 helpful, is it may be worthwhile to take the questions
23 about the mechanics, to raise them, and if we need to go
24 away and come back, we can come back in the same
25 document that we are going to send.

1 THE CHAIRMAN: Well, I was hoping you would be able to --
2 I am not sure any of the questions that we have got are
3 controversial, it is just ... Do you want me to raise
4 them now, and then I can just tell you what -- and
5 Mr Ridyard will have some points probably as well.

6 MR SPITZ: Yes, that would be useful.

7 THE CHAIRMAN: So let us take -- there are agreed reductions
8 and things like that, and there are things which, if
9 matters went in your favour, have to be added, like
10 interest or inflation, and they would go, as
11 I understand it, to the totality of the aggregate
12 damages.

13 But if you take business customers, suppose we were
14 against you and they had to be excluded, how does -- and
15 as I said, I do not think there is any issue, but how
16 does the exclusion happen? You are obviously not going
17 to dig around and try and work out which claimant was
18 a business customer. Is it just something that --
19 a discount that comes off the top?

20 MR SPITZ: Yes, I think that is how it would work. So what
21 we would do -- I think it is inevitable there will be
22 some consequentials that come out of the decision and we
23 will have to plug in the principles that are
24 established, including what sort of discount to make for
25 business customers. But, yes, I think it is something

1 in an aggregate award that it comes off the top and
2 there is perhaps no more nuance to it than that.

3 THE CHAIRMAN: In other words, if we got to this stage, we
4 would be saying, for example, yes, business customers
5 come out, and we find that the percentage of the Class
6 that consists of business customers is X, and that is
7 where we stop, effectively.

8 MR SPITZ: Indeed.

9 THE CHAIRMAN: Right. Is it the same so far as those who
10 have died without a personal representative?

11 MR SPITZ: Yes, it is the same principle. One would fix on
12 the percentage, one has the two alternatives for the
13 impact of it, and that would be decided, and then we
14 would have to do the crunching of the numbers to see
15 what is left after that.

16 MR RIDYARD: But the cases are different, are they not?
17 Because the personal representative's ones or the dead
18 claimants will not get their money, and they would not
19 have anyone else to give it to either. Whereas the
20 business customers would be, let us say, a 10% reduction
21 of the total damage award, but everyone would still get
22 their money, including the business customers. It is
23 different in that sense.

24 MR SPITZ: Yes.

25 THE CHAIRMAN: So in one sense, if there were to be

1 a reduction for business customers, effectively all
2 Class Members would be paying for that reduction.

3 MR SPITZ: Yes. The other possibility is, as Mr Armitage
4 points out, is to deal with it in the distribution
5 process, because that is also, if there is any weighting
6 to be done, that is when one might weight the award. So
7 it is possible that that can be a question dealt with in
8 distribution.

9 THE CHAIRMAN: Sorry, just help me with that, what do you
10 mean by weighting the award?

11 MR SPITZ: Sir, you will recall that the actuaries had two
12 different methodological approaches. The one approach
13 was to include everyone in the Class over the entire
14 duration. That was Mr Punter's approach. Mr Scott's
15 was to factor in the time period over which they had
16 been part of the Class and to do it up-front.

17 Our submission would be that Mr Punter's is simpler,
18 and if there is any kind of weighting based on the
19 duration of participation in the Class, that is
20 something for the distribution stage to decide and to
21 factor in.

22 THE CHAIRMAN: But otherwise, if one got to the stage of an
23 award and one got to the stage of distributing it, how
24 much any individual Class Member got would depend for
25 how long they were a customer.

1 MR SPITZ: Indeed. I have not processed this through to the
2 end, but Mr Williams suggests it may not be as simple as
3 that, because it may be necessary -- the aim is not
4 going to be to try and identify individual Class
5 Members, it is going to be to try and come up with the
6 aggregate award, and then, if one weights it, there may
7 be some complexity to the weighting, because it would be
8 a difficult exercise to determine how long people had
9 been members for particular --

10 THE CHAIRMAN: Do you mean the end result would be, if we
11 got this far, that every Class Member would get the same
12 amount?

13 MR SPITZ: That is certainly a possibility.

14 THE CHAIRMAN: All right. That is fine for the moment,
15 thank you.

16 MR SPITZ: Sir, since we are discussing this, the only other
17 point that is obviously relevant is the estimates have
18 been, at least from the actuaries, based on
19 a distribution date, a hypothetical distribution date,
20 and there will -- that will be a factor that has to feed
21 into the process of quantification, depending on what
22 sort of distribution date the Tribunal thinks is
23 appropriate to factor in.

24 THE CHAIRMAN: Yes, thank you.

25 MR SPITZ: What I will do then is try and move through it as

1 quickly as possible, and perhaps if there are areas
2 where you, sir, do not need to hear me, I can move on
3 beyond those.

4 THE CHAIRMAN: Yes.

5 MR SPITZ: The issues of causation Class size and quantum
6 have narrowed during the trial. On causation, BT no
7 longer relies on arguments about novus actus or
8 contributory negligence; the case rests solely on
9 mitigation.

10 On Class size and quantum, the parties were agreed
11 at the start on the baseline number of lines, and they
12 now also agree on sub-class sizes for VOCs and SPCs.
13 That is in our written closings at paragraph 665. They
14 also agree on BT's line rental charges, call prices and
15 ARPUs over the claim period, and that is in BT's written
16 closings at 844(b).

17 On mitigation, the defence of course involves
18 transferring responsibility by BT for its unlawful
19 conduct on to BT's customers, the victims of the abuse
20 of dominance. BT has not vigorously pressed the
21 mitigation defence, and we say it is right not to have
22 done so. It deals with it in five short paragraphs at
23 927-931 of its written closings, and it leaves it to the
24 Tribunal to reduce any damages based on a failure to
25 mitigate by what the Tribunal considers just and

1 equitable.

2 We say BT has not met the burden to show either that
3 the Class Members had a duty or that they failed to take
4 reasonable steps to mitigate the loss. As far as the
5 duty is concerned, it is not a demanding one, and as far
6 as reasonableness of steps to mitigate are concerned,
7 these must be assessed in the context of the statutory
8 purpose in creating the duty which has been breached,
9 and that is a reference to the *Servier* judgment at
10 paragraph 241. It is {G/83/70}.

11 At paragraph 242 of that judgment {G/83/70-71},
12 Mr Justice Roth set out the statutory context. I am not
13 going to read it out, and we need not turn it up, but it
14 sets the context against which to measure the duty and
15 reasonableness, and we say that BT owed the Class
16 Members a duty not to cause them loss by breaching the
17 Chapter II prohibition. It can hardly say that it was
18 for Class Members to avoid the unlawful overcharges
19 caused by BT's breach of its special responsibility by
20 switching from BT's SFV products.

21 As a matter of law, we say there is no duty or
22 requirement on end consumers to switch away from
23 a dominant firm's products in the face of the abuse of
24 conduct, and not to switch is also not itself
25 unreasonable. If there were such a duty, and if not

1 switching were unreasonable, that would be inconsistent
2 with the purpose of competition law and private actions,
3 and that can be seen if one looks at the relevant
4 portion of the *Servier* judgment that I mentioned at
5 paragraph 242.

6 If there were such a duty, it would risk defeating
7 almost every unfair pricing claim. It would permit
8 firms to escape liability and compensation merely by
9 pointing to any cheaper alternative and laying the blame
10 on the consumer for not escaping the imposition of the
11 excessive price, and that would be inconsistent with the
12 firm's special responsibility not to allow its conduct
13 to impair and distort competition or to exploit
14 consumers.

15 At paragraph 649 of our written closings we have
16 gathered together several observations from BT's
17 behavioural expert, Dr Hunt, in the Joint Experts'
18 Statement, and these make it clear that it is very
19 difficult to explore in detail why Class Members did not
20 switch, how much they deliberated, how conscious their
21 decisions not to switch were.

22 One cannot readily interpret non-switching as
23 a deliberate act, and certainly not one that should
24 deprive Class Members of their claims to compensation.
25 In our submission, the evidence base is too thin for BT

1 to meet its burden of proving that not switching was
2 unreasonable.

3 We have also set out in our written argument the
4 evidence that we rely on to show that Class Members did
5 not act unreasonably. I am not going to go through
6 those. We have them in our written submissions and in
7 Mr Loomes's evidence.

8 On Class size and quantum, one point that I did want
9 to make, because it comes from the recent
10 Court of Appeal decision in *Trucks*, is that once the
11 overcharge is established, quantification is not
12 determined on a balance of probabilities. The balance
13 of probabilities test is not applied to the measurement
14 of loss. That is the Court of Appeal decision in
15 *Trucks*. It is {G/98.2/51}. We have summarised the main
16 passages we rely on in paragraph 661 of our written
17 closings.

18 THE CHAIRMAN: Thank you.

19 MR SPITZ: To turn to the benchmark, sir, the Tribunal will
20 remember there was some debate about whether at the
21 quantum stage there ought to be an additional buffer.
22 I think that we have resolved that, or at least
23 Dr Jenkins herself says in her evidence during the
24 hot tub, and that is {Day22/10:5-7}:

25 "If the benchmark itself already captures all the

1 limb 1 and limb 2 factors, then you may not have
2 anything additional."

3 We say that is exactly the point that one gets to.
4 By the time we get to quantum, the loss is to be
5 assessed by determining the difference between the
6 actually charged prices and the benchmark that comes out
7 of the *United Brands* analysis. There is no scope for
8 any further buffer between excessive prices and the
9 level of the overcharge.

10 We refer in paragraph 730 of our written closings to
11 the *Albion Water* decision which shows that the idea of
12 an upper bound or an additional buffer at the quantum
13 stage is contrary to authority.

14 Turning then to the areas of disagreement on the
15 baseline to be used. There were three. There was the
16 gifted broadband issue, the business customers issue,
17 and the question of personal representatives.

18 On the gifted broadband issue, it contains -- it
19 concerns a relatively small group of between 8,000 to
20 11,000 people during each year of the claim period where
21 the information is not confidential, and the proportion
22 of the Class over those years ranges between 0.3% in
23 2016 and 2.1% in 2020. Those numbers are set out in
24 Table 8 of Annex 1 to our written closings.
25 {IR-A/15.1/6}.

1 This category involves BT employees who were gifted
2 free broadband accounts -- or who gifted free broadband
3 accounts to non-BT employees. These are the gifted
4 accounts. The only point BT takes is in paragraph 884
5 of its written closing, and it is that these customers
6 were in effect bundle customers. BT admits in this
7 paragraph that they were treated as split service
8 customers but says that they could have been considered
9 to be bundle customers and they should be treated like
10 bundle customers.

11 Our submission is simply that they were charged and
12 paid the overcharge. They were Split Purchase
13 Customers, not bundle customers. They suffered a loss
14 and they should be included.

15 On business customers, this is addressed in
16 paragraphs 635-639 and 668-677 of our written closings.
17 The issues, as the Tribunal knows, are first, should
18 they be excluded and second, how many of them are there?

19 On the first point, we submit that there is no basis
20 to exclude the business customers who purchased BT SFV
21 services aimed at residential customers from the Class.
22 BT's case is that those businesses are not entitled to
23 use SFV services because it was a term of each and all
24 of the SFV service contracts that the services were only
25 for household personal use.

1 I will give you the references to the agreements
2 themselves. I think, given the time, we will not need
3 to walk through those agreements, but there are two.
4 The one is at {E/45.51/1} and the other is at
5 {E/45.51.1/1}. These agreements set out the relevant
6 term, and that is -- it is headed "How you can use the
7 service", and it says:

8 "Each service is just for you and your household for
9 personal use (meaning it should not be used for any
10 trade, business or profession). You're responsible for
11 how each service and the loaned equipment are used."

12 The point I want to make about that, sir, is that
13 the agreement itself contains, as one would expect, the
14 various remedies in the event that there is a breach of
15 contract, and those are in {E/45.51.1/6} and page 8.

16 The point that we make is that the remedy is
17 a contractual one. If a person uses the service for
18 business use, that might be in breach of the agreement
19 and BT will have the remedy set out in the agreement
20 resulting from that breach. But it does not follow from
21 the use of the service in breach of the agreement
22 without more that Members of the Class are deprived of
23 the right to compensation for having been charged and
24 having paid the unlawful overcharge.

25 THE CHAIRMAN: Why is it unfair, in the context of those

1 customers, in relation to the hypothetical, in this
2 scenario, excessive price? They should not have been in
3 this category to begin with.

4 MR SPITZ: Sir, there is nothing that prevents them from
5 purchasing these services. It is not unlawful to do so,
6 there is no legal prohibition. Where does one situate
7 the analysis of the entitlement of these customers? We
8 submit that it does not -- it is not situated under
9 limb 1 or limb 2. The unfairness leg in limb 2 is not
10 some broad-ranging, free-ranging collection of factors
11 that one can put into the pot and analyse in that way.
12 We say that limb 2, the focus of limb 2 is on whether
13 the SFV services bear reasonable relation to their
14 economic value, not whether it was fair in a general
15 sense for BT to charge excessive prices to business
16 customers. So that is not the right place to house the
17 analysis. As I said a moment ago, breach of contract is
18 not sufficient to deprive these customers of a remedy.

19 Just for your note on that, at paragraph 672(b) of
20 our written closings we refer to the *Churchill Gowns*
21 case, which is at {G/87/58}, and it considers the
22 important countervailing public policy in competition
23 law as to why private rights of action for damages for
24 loss suffered should not be readily removed. In that
25 case, the claimant was found to have made fraudulent

1 misrepresentations in order to secure business at the
2 defendant's expense, and yet this was not held to
3 preclude the claimant from recovering damages as
4 a result of the defendants' abuse of dominance.

5 Notionally, there may be an illegality defence, or
6 there may have been an illegality defence available to
7 BT, but that is not a defence that they have run. That
8 was the defence that was run in the *Churchill Gowns* case
9 and failed, and those facts were far closer to making
10 out the illegality defence, the *ex turpi causa* defence,
11 than a mere breach of contract. So it cannot be -- the
12 analysis cannot be housed as an illegality point.

13 The only other point to make about this is that in
14 paragraphs -- or at least to make in the time available,
15 is in paragraphs 635 and 638 of our written closings we
16 have set out the ways in any which, in any event,
17 business tariffs are not a suitable comparator, because
18 SFV and business services are materially different, and
19 we have set that out.

20 The next issue is the number of business customers,
21 and there, sir, you will recall the evidence. There
22 were the internal BT documents which indicated very low
23 percentages of business users, and they ranged from
24 between 1.1% to 4%. Mr Parker accepted that these were
25 underestimates, because they applied only to VOCs in

1 most cases, and VOCs and split service customers in one
2 instance, and that is why he went for a higher number at
3 just over 10%.

4 Dr Jenkins referred to two surveys, in 2016 and in
5 2022, and she arrived at a very high portion of business
6 customers of between 14.1% and 28.6% in the different
7 years, and these are very large numbers. We say that in
8 arriving at that, she ignored the internal BT estimates,
9 and also she does not distinguish between those
10 individuals who will be using their residential tariff
11 for both business and residential purposes.

12 THE CHAIRMAN: Yes.

13 MR SPITZ: Dr Jenkins did not take any of the actual
14 evidence from BT about its own customer base into
15 account, and in this instance there is not a precise
16 answer as to the number of business customers, this is
17 a context for the broad axe, and we say Dr Jenkins'
18 estimates of up to 28.6% are likely far too high and
19 that Mr Parker's estimate of 10% is reasonable.

20 THE CHAIRMAN: Yes.

21 MR SPITZ: On personal representatives, paragraphs 678-724
22 of our written closings, the Tribunal will recall that
23 there were two main issues that accounted for the
24 difference between the actuaries. The first is that
25 Mr Scott assumed that the upward trend in the likelihood

1 of having a will immediately ceases at the age of 75 and
2 remains constant thereafter, and Mr Punter suggested
3 that the upward trend continued, beginning to flatten
4 off at 85, and then flattening at the age of 90
5 whereafter it remained constant.

6 THE CHAIRMAN: Yes.

7 MR SPITZ: The second issue is that Mr Scott would apply the
8 20% reduction to the rates of will-writing that the
9 actuaries derived from their analysis of the same set of
10 17 surveys.

11 On the upward trend, there is no reason to suppose
12 that the trajectory, the upward trajectory, would
13 abruptly stop at 75. The evidence showed that people
14 planned to make wills, and do in fact make wills, for
15 the first time after the age of 75. Just for your note,
16 that evidence is at {E/16.29/1} and {E/44/1} and at
17 {E/45.1.3.1/1}.

18 The surveys demonstrate that people over the age of
19 75 have a greater likelihood of having a will and that
20 where the age band in the surveys is 75-plus or 75 and
21 over, a flat line at the age of 75 does not take account
22 of those in the age band who are over 75. Mr Scott's
23 graph does not appear to include them. If it did, the
24 graph would not be expected to flatline until a higher
25 age.

1 As far as the reductions in the rate of will-writing
2 are concerned, very briefly, there were three reasons
3 for Mr Scott's 20% reduction. The first was survey
4 bias, the second was will invalidity, and the last was
5 double-counting.

6 On the survey bias, Mr Scott accepted that this was
7 really a matter that was outside the scope of his
8 expertise and he could not comment within his expertise
9 on whether there was any stigma associated with not
10 having a will.

11 Of the 17 surveys that were carried out over the
12 course of almost two decades, none of those required any
13 adjustment to their results for survey bias, and there
14 was no evidence that there is any social responsibility
15 or response bias in relation to will-writing. In fact,
16 Mr Scott accepted that there was a lack of evidence, and
17 that is at [Draft] {Day21/10:11-17} and {Day21/13:24}.

18 For a variety of reasons on will invalidity, none of
19 the arguments justified a reduction. The first reason
20 that Mr Scott gave was that there may not have been --
21 that the wills may not have been properly executed in
22 the first place, but the evidence showed that most
23 people choose a solicitor or professional will-writer to
24 prepare their wills and this reduces the likelihood of
25 improperly executed wills in the first place.

1 There was no evidence to suggest that high numbers
2 of homemade wills were invalid. Mr Scott accepted that
3 he had not seen any evidence that any proportion of such
4 wills were invalid. That is {Day2/19:10}.

5 The evidence of will invalidity, the Tribunal will
6 recall, on which Mr Scott based his judgment, was very
7 thin. That was the Legal Services Consumer Panel
8 investigation that he relied on, which found that there
9 were a few wills, just eight of the entire sample,
10 assessed as not legally valid, that was eight out of 101
11 total responses, and we say that is not sufficient to
12 find that 8% of wills in general are invalid.

13 The second reason that Mr Scott gave was that the
14 will may not have been updated following marriage or
15 civil partnership. That is flawed, because marriage
16 occurs at lower ages and will-writing at younger ages,
17 so marriage invalidating a will is unlikely to be
18 a material issue for Class Members. There was no
19 evidence that there were significant number of wills
20 revoked by marriage or revoked and not replaced with
21 valid wills.

22 The third reason he gave for the downward adjustment
23 for invalidity was that the will might have been revoked
24 or destroyed, but, again, there was no evidence of the
25 prevalence of this.

1 The third reason he gave was double-counting, but as
2 it turned out Mr Scott made it clear in his evidence,
3 and it is in BT's written closing submissions, that
4 double-counting is not a separate basis or a separate
5 reason for a reduction.

6 Pass on. I do not intend to say anything beyond
7 referring to our submissions which are at paragraphs
8 734-739. We rely on them. The pass on issue is not one
9 which should detain the Tribunal.

10 THE CHAIRMAN: Yes.

11 MR SPITZ: The last set of issues is complete compensation,
12 and, sir, if I could take five or six minutes max, that
13 will be sufficient to deal with this if I move at pace.

14 THE CHAIRMAN: Yes, thank you, that would be helpful.

15 MR SPITZ: In the context of collective proceedings, of
16 course section 40(c) of the Competition Act is the
17 provision that we rely on. It radically alters the
18 common law compensatory principle, and there it avoids
19 the need for individual assessment of loss.

20 As to proving an entitlement to compound interest,
21 the Privy Council in the *Sagicor Bank Jamaica* case, that
22 is paragraph 33 {G/98/14}, said that:

23 "... the law does not require a detailed examination
24 of a plaintiffs' financial affairs and that an extensive
25 process of disclosure by the plaintiff to make or verify

1 that assessment is likely to be unhelpful and is in any
2 event disproportionate."

3 Dr Jenkins accepts that an individualised assessment
4 is not required and that one does not necessarily need
5 to know something about each individual consumer. That
6 was at {Day22/49:3-6}.

7 In respect of interest, Dr Jenkins said you do not
8 need to go down to the individual Class Member level to
9 get the information, but you do need to think about, at
10 the aggregate level, what makes sense in terms of what
11 the Class would do. That is {Day23/89:19} to
12 {Day23/90:5}. She accepted that Mr Parker had to some
13 extent taken account of the characteristics of the Class
14 by making certain age adjustments.

15 What Mr Parker has done is provide the analysis and
16 evidence necessary for an aggregate assessment aimed at
17 achieving full compensation, and he has done it with two
18 adjustments. For monies that Class Members would have
19 saved, invested or used to pay down debts, it is
20 necessary to award interest on a compound basis. That
21 is the first category.

22 THE CHAIRMAN: Yes.

23 MR SPITZ: The second one is for monies that the Class
24 Members would have spent, he has uprated the relevant
25 damages for inflation to take account of the monetary

1 depreciation between the date they paid the overcharge
2 and the date of judgment.

3 Now, this division between savers and spenders is
4 consistent with the decision in the *Merricks Remittal*
5 case, because there you will recall, sir, that the
6 Tribunal held that it is not permissible simply to
7 assume that Class Members would have saved rather than
8 spent the overcharge, so this bifurcation into savers
9 and spenders is consistent with the approach that has
10 been taken in the *Merricks Remittal* case. Mr Parker
11 does not make the assumption that was criticised in
12 *Merricks Remittal* and that is a virtue of the approach.

13 He has used Class Members marginal propensity to
14 consume to determine the amount of the overcharge that
15 would have been spent, that is 38% of it and the amount
16 that would have been saved, that is 62%.

17 Although Dr Jenkins suggested further assessments
18 she has not in fact provided any workable alternative
19 suggestions for how the split between savers and
20 spenders could be done in practice. Her only proposed
21 adjustment to what Mr Parker has done was to suggest
22 that a survey could have been carried out to know
23 something about average savings, ability, closeness to
24 financial constraints. That is at {Day23/67:12-16}.
25 But with respect, this is something of a quibble.

1 Application of the broad axe does not require it and of
2 course a key point about opt-out collective proceedings
3 is, as the Court of Appeal held in Gutmann, that the
4 logic behind an opt-out order is that the
5 representatives of the Class will not have contact with
6 Class Members at any point prior to distribution and in
7 an aggregate damages case not only is the CAT forgiven
8 the task of considering individual evidence but the
9 probative value of evidence from a handful of
10 collectively selective consumers out of millions might
11 be strictly limited.

12 An award of simple interest would not provide
13 complete compensation. Dr Jenkins was instructed to
14 apply simple rather than compound interest and the
15 reference for your note is {OR-E/25/164} and
16 {OR-E/25/171}. She did not seek to justify this in her
17 reports and at trial she accepted that she would not as
18 an economist have a dilemma in using compound interest
19 since, as she put it, the world is generally a compound
20 place and in general most aspects in life have
21 a compound element, and that is {Day22/50:12-17} and
22 {Day22/54:18-19}.

23 In Trucks, the Tribunal had no difficulty in
24 favouring a compound interest calculation over simple
25 interest. It is said that this accords with economic

1 reality. This is what happens in the real world and
2 that therefore it corresponds to actual losses. That is
3 Trucks, CAT, paragraph 768 at {G/92/211}.

4 The Tribunal also there observed that economists
5 have no problem with compound interest as it is what
6 happens in the real world in borrowing and lending
7 arrangements, and that is at paragraph 762, {G/92/211}.

8 Our submission is that the Class Representative has
9 satisfied the legal requirements for compound interest
10 as damages at the quantification stage in the context of
11 an aggregate damages claim.

12 Mr Parker has made a key adjustment to the Class, to
13 distinguish between the Class and the general
14 population, namely to take account of age. No other
15 workable alternative has been put forward.

16 A couple of very brief words on inflation.
17 Submissions are set out in our written closings. I have
18 not sought to put the legal position any higher than it
19 currently stands, hence, my reference to building
20 blocks. The reasoning in Lord Scarman's speech in
21 Pickett is relevant however even though it is a personal
22 injury case, and that is the passages that I referred to
23 in opening distinguish between the role of interest
24 which covers the loss suffered by being kept out of
25 money to which one is entitled and an adjustment for

1 inflation which preserves the real value of the loss.

2 Our submission is that it is open to the Tribunal to
3 uprate for inflation on that portion of the overcharge
4 that is spent. Mr Parker's approach makes sense as
5 a matter of principle and it is not inconsistent with
6 the authorities. Dr Jenkins accepted that using CPI was
7 the best measure of inflation, and uprating for
8 inflation we submit would be consistent with the
9 established principle of securing complete compensation.

10 I think it is at that point that I will leave it
11 unless there are questions from the Tribunal.

12 MR RIDYARD: Just one quick one. What about the interest,
13 is that just for us to decide?

14 MR SPITZ: That is factored into the calculations that he
15 has done. It is not a simple single figure. It is
16 worked through across his analysis.

17 THE CHAIRMAN: But if we got to that point the particular
18 rate of interest would be a matter for us.

19 MR SPITZ: Yes, it would be a matter for the Tribunal, yes,
20 indeed.

21 THE CHAIRMAN: Thank you.

22 MR DORAN: Inflation would be -- how would we deal with
23 inflation up to whatever date is the distribution?

24 MR SPITZ: It would need to be dealt with up until the date
25 of distribution, yes.

1 MR DORAN: Right, so we would deal with that or ...

2 MR SPITZ: No, that would be one of the consequential
3 matters that the experts would calculate.

4 THE CHAIRMAN: So a decision in principle.

5 MR SPITZ: Sir, yes.

6 THE CHAIRMAN: Thank you, we have nothing further.

7 Thank you very much, everyone. 10.30 tomorrow,
8 please.

9 (4.49 pm)

10 (The hearing adjourned until Wednesday, 20 March at
11 10.30 am)

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