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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case No: 1381/7/7/21

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Monday 29<sup>th</sup> January – Friday 22<sup>nd</sup> March 2024

Before:  
The Honourable Mr Justice Waksman

Eamonn Doran

Derek Ridyard

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

Justin Le Patourel

**Class Representative**

v

(1) BT Group PLC  
(2) British Telecommunications plc  
(Together, "BT")

**Respondent**

**A P P E A R A N C E S**

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

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

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

Wednesday, 20 March 2024

(10.30 am)

(Proceedings delayed)

(10.35 am)

THE CHAIRMAN: Good morning. Some of you are joining us 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 a contempt of court.

Yes, Mr Beard.

Closing submissions by MR BEARD

MR BEARD: Sir, first of all, an apology. The frustrations with points being made yesterday was no excuse for disruptions and I do apologise. No discourtesy was intended.

THE CHAIRMAN: Thank you, and accepted.

MR BEARD: Subject to any particular issues that the Tribunal would like focused upon, and I will of course deal with Mr Ridyard's questions, I am intending to deal with things in broadly the following stages: a few introductory remarks and a couple of key themes highlighted, a bit of context, and then I will try and

1 deal with each of the major planks of the Class  
2 Representative's case. When I say major planks, of  
3 course I mean first of all whether the Class  
4 Representative has proved that there is a narrow market  
5 for SFV services and, in particular, whether he has  
6 shown that services to SPCs and bundles are in different  
7 markets, because that is going to be the key question.

8 Then the next plank is that in the period 2015 to  
9 2023, BT was not allowed to price as it did, that it had  
10 been pricing unfairly, and you can tell that by  
11 a regulatory costs allocation from 2009 updated and a  
12 margin specification primarily taken from 2006. That  
13 obviously is the *United Brands* test and I will look at  
14 the different components of it. Then I will pick up  
15 issues on quantum.

16 So a couple of preliminary observations. The  
17 essence of the Class Representative's case is that BT  
18 exploited trapped consumers, that is the core of the  
19 allegation. But as soon as we put the case like that,  
20 it is obvious that there is a huge flaw in it. Before  
21 we get to any more refined analysis about market  
22 definition or *United Brands*, you cannot refer to a group  
23 of consumers as trapped when vast numbers of them are  
24 switching away. You cannot talk about a class of  
25 trapped consumers from the start of 2015 when heading in

1 the direction of three-quarters of that group has left  
2 during the claim period.

3 Ms Kreisberger said that one of the exceptional  
4 features of this case is that BT started out with  
5 a whole country as its fixed customer base. Well, yes,  
6 in 1984. That had fallen to about 20% by 2022.

7 Ms Blight's evidence, just for your note, paragraph  
8 42, {D/4/10}:

9 "We in the Voice division thought we were winning if  
10 we managed to stem the number of customers churning to  
11 competitors."

12 SFV customers were not trapped. The door was open.  
13 Indeed, BT was fighting to ensure that they stayed with  
14 BT whether on SFV or as bundle customers, and you cannot  
15 talk about people in a room being trapped when the door  
16 is open and the host is suggesting they move next door.  
17 Each year, in addition, people were moving in.

18 So there is something unreal about the case, and  
19 particularly in relation to SPCs, and especially the  
20 split supply customers which are the vast majority of  
21 SPCs, the people who already take broadband from another  
22 provider, they have both BT and their broadband provider  
23 seeking to usher them out of the room into bundles.

24 We know that SPCs make up the vast majority of the  
25 Class post -- well, the entirety of the Class

1 effectively post-2018 and a very large part of it before  
2 then, it is the majority of the Class, and they switched  
3 in huge numbers.

4 The Class Representative has never properly grappled  
5 with the dynamics of what has been going on in the  
6 market. It has tried to ignore switching, pretending  
7 prices did not matter through its secular trend theory,  
8 and on that, as I will come back to, BT's position is  
9 that there may be general trends but prices still  
10 matter. To say all this switching was unrelated to  
11 pricing, it is just unreal, particularly when it is  
12 a proposition that is put in relation to SPCs who  
13 already have the newer technology which is supposed to  
14 be driving this trend.

15 As the evidence shows, in fact, even those people  
16 who were not SPCs, who did not move, were actually well  
17 informed and able to choose and were not any more  
18 disengaged than the rest of the population. But the  
19 point is this: the starting point for this case does not  
20 properly engage with reality, the mass switching, with  
21 the changing dynamics, with the SPCs, and instead we end  
22 up with the Class Representative relying on theories,  
23 and, frankly, quite extreme theories, to try and justify  
24 its position.

25 Quite apart from switching being unrelated to price,

1 workable competition is supposed to be a concept which  
2 does not permit effectively a price dispersion, there is  
3 a single competitive price; and branding, well branding  
4 is nothing, unless you manage to fulfil the strange,  
5 somewhat unworldly criteria of Mr Parker that you  
6 identify a unique objective difference, otherwise it is  
7 all about the costs, many of them set in 2009.

8 It is not of the real world, it is trying to impose  
9 a straitjacketed theory, and in doing so, it has to be  
10 highly selective in relation to its evidential  
11 references, and that is not fair or representative.

12 Just let me emphasise a couple of points on the  
13 treatment of evidence. The Class Representative was  
14 provided with vast amounts of material from BT and it  
15 demanded huge quantities of disclosure, both of  
16 documents and of data, and yet we have seen very little  
17 of it, tiny selective extracts, curtailed quotes, and it  
18 is on those extracts, often parenthetical comments, that  
19 the Class Representative seeks to hang its case.

20 As we have seen, and as we have made clear in the  
21 closings in writing, many of these materials were not  
22 put to BT fact witnesses. It is and was not for BT to  
23 prove a case here, that BT put forward witnesses that  
24 had been involved in the key processes during the claim  
25 period, from Mr Cackett, the CFO, one of the ultimate

1 decision-makers, through those responsible for voice  
2 pricing and indeed broadband at different times, Mr Bunt  
3 and Ms Blight, and indeed those dealing with Ofcom,  
4 Ms Blight and Ms Cheek.

5 On reviewing the Class Representative's closings and  
6 the materials relied on and hearing the submissions over  
7 the last couple of days, what is truly striking is  
8 the degree of selectivity in terms of both documents and  
9 evidence extracts and the tendentious interpretations  
10 placed upon these materials.

11 Now, of course a party like the claimants in  
12 litigation, its presentation will be partial. That in  
13 and of itself is obviously not a criticism. But to be  
14 so limited, with extracts not fairly representing the  
15 documents or evidence, not put and tested with the  
16 relevant witnesses, in respect of which Ms Kreisberger  
17 had plenty of time, instead we see the Class  
18 Representative relying on its own experts to parse these  
19 documents.

20 If we could, can we just turn up our closing at  
21 paragraph 33. So this is {IR-A/16/9}. I just want to  
22 pick it up down at the bottom. The Tribunal in *BGL*,  
23 paragraph 36. It is in the bundles. The footnote  
24 reference is {G/85/113}.

25 "At the end of the day, the weight to be attached to

1 qualitative evidence must be for the Tribunal,  
2 unintermediated by expert opinion." Interpretation of  
3 qualitative factual materials only falls within the  
4 particular scope of that expertise [of the experts being  
5 put forward] when it involves economic input and  
6 analysis."

7 But the Class Representative's experts were willing  
8 to interpret factual background to presume they knew  
9 what the documents meant, and that is not the role of  
10 experts. They went far, far beyond what is appropriate  
11 in terms of giving their opinion on the basis of an  
12 established factual background.

13 We saw it time after time from Mr Parker. The irony  
14 about the criticisms of Dr Jenkins that we have heard  
15 over the last couple of days is she stuck to the  
16 economics. She did not try to pull NPS numbers out of  
17 a hat and tell us what they all mean without having  
18 factual evidence to support that interpretation, as  
19 Mr Parker did. She did not try to tell us what third  
20 parties meant when they were submitting materials to  
21 Ofcom, like Mr Duckworth tried to do with SSE and the  
22 Post Office.

23 When confronted with Mr Parker's interpretation of  
24 the material, Dr Jenkins noted that the picture he  
25 painted did not seem to be entirely complete, and she

1           rightly said these were matters for factual, not expert  
2           evidence.

3           Now, I will be picking up various of the criticisms  
4           of Dr Jenkins along the way. They were unfair. But  
5           I make no apologies, I do criticise the way in which the  
6           factual material has been dealt with by the Class  
7           Representative through the medium of its experts, and  
8           I will of course be going on to deal with the  
9           substantive points that those experts make.

10          That takes me to another point, the complete lack of  
11          factual evidence from the Class Representative,  
12          notwithstanding the vast level of the claim and the huge  
13          numbers involved. No evidence is proffered at all.

14          I just highlight one obvious area. There is nothing  
15          from the Class Representative from any market  
16          participants, nothing from third parties upon whom the  
17          Class Representative places reliance. Nothing about how  
18          they viewed how the market developed, how they viewed  
19          entry and expansion. All that has been done is taking  
20          documents that they submitted to Ofcom and saying, well,  
21          we can understand what these mean, and this is somehow  
22          the truth.

23          It is not. We have no ability to challenge those  
24          materials. In the course of making regulatory  
25          submissions, as we all know, third parties may well take

1 particular positions in order to influence a regulator.  
2 Those are matters that rightly should be tested. It is  
3 not appropriate simply to assume one can parse these  
4 matters and rely upon them as primary evidence as  
5 repeatedly the Class Representative sought to do.

6 It is almost as if the Class Representative thinks  
7 that because you have got so many people involved, you  
8 can rely on those references in *Gutmann* about the idea  
9 that you should not have to put forward individual  
10 evidence from individual Class Members to mean that  
11 actually you do not have to think about what factual  
12 substratum evidence you could provide in order to prove  
13 your case.

14 On numerous occasions, the Class Representative has  
15 talked about evidence it relies upon being "the best  
16 available". Now, we will come on to see how actually  
17 that is very far from true, but there is an important  
18 more general point here. These proceedings are not an  
19 investigatory process, this is an adversarial process in  
20 which a claim is being prosecuted and has to be proved.  
21 The question for the Tribunal is not whether the Class  
22 Representative has put forward the best evidence it had,  
23 it is whether that evidence proves its case on the  
24 balance of probabilities.

25 If the best evidence that the Class Representative

1 can proffer does not prove the case, the case fails.  
2 This is not a situation where somehow BT has to prove  
3 that its evidence is more compelling than that of the  
4 Class Representative. That would be to misapply the  
5 burden of proof.

6 Now, we heard all sorts of suggestions about what  
7 the Tribunal should find about BT's conduct and I will  
8 be coming back to some of them, but in relation to those  
9 findings which the Tribunal appears to be invited to  
10 make about some sort of prolonged and deliberate  
11 exploitation of SFV customers, those allegations are  
12 serious, and they were not properly and squarely put to  
13 any of the witnesses. Ms Kreisberger seemed to think  
14 that if she danced round the edges of these issues in  
15 cross-examination and made particular points on  
16 particular documents, she was putting the main  
17 allegations. She was not.

18 Of course, as we will come back to, often the  
19 questions were being put on a basis that was highly  
20 tendentious. Often documents were being put on the  
21 basis that they focused on SFV customers when actually  
22 they were concerned with the whole of voice.

23 On occasion it seemed to be suggested that companies  
24 wanting to maximise value and revenue were doing  
25 something wrong. We would not have competition law if

1 that was wrong, because the whole essence of  
2 a competitive structure is that companies are trying to  
3 pursue those profits and revenues. If they did not do  
4 that, we would all go home and markets would not work.  
5 It is not a criticism when you see documents talking  
6 about: we want to maximise revenue. You have to go  
7 beyond that in order to make out some case on abuse.

8 That takes me to one final set of general  
9 observations, if I may. It is about presumptions and  
10 assumptions and actually the attempt to reverse the  
11 burden of proof in various ways. We have heard a couple  
12 of stark examples over the past two days, and I will be  
13 coming back to them. Yesterday we seemed to be hearing  
14 a full-on reversal of the burden of proof in relation to  
15 limb 2. The idea that actually once excessiveness was  
16 proved under limb 1, the justification of those prices  
17 then fell upon BT. That would be a reversal of the  
18 burden, and I will come back to why that is wrong both  
19 in terms of the application of the *United Brands* test as  
20 a whole but more fundamentally in relation to abuse  
21 overall.

22 But that was not the only example. In relation to  
23 limb 1, the Class Representative has tried to suggest  
24 that somehow BT should have re-organised its business so  
25 that there was more data in the form that the Class

1 Representative would have liked. In other words, it is  
2 saying that because BT simply operated like any company  
3 would have done, inferences should be drawn against it.  
4 The allegation was that somehow the lack of  
5 a Fully Allocated Costs allocation mechanism akin to the  
6 2009 RFS having been conducted by BT in the intervening  
7 period and during the claim period was something that  
8 meant an inference should be drawn against BT.

9 It is completely unreal. Ms Kreisberger referred to  
10 the looking glass; she is a long way into Alice in  
11 Wonderland in terms of the way of dealing with these  
12 issues. It is the apotheosis of the Class  
13 Representative's unreal approach.

14 At no point since the extensive disclosure was  
15 agreed, thousands of documents, vast amounts of data, at  
16 no point has the Class Representative indicated in  
17 correspondence or otherwise that it expected BT to  
18 undertake and disclose to the Class Representative  
19 separate cost allocations for SFV services before or  
20 during the claim period for the purposes of these  
21 proceedings, to actually undertake those exercises.

22 A lack of allocation of indirect or common costs is  
23 common in many industries. Mr Cackett explained how it  
24 was not generally useful, and it was only undertaken on  
25 a piecemeal basis for those sorts of unit economics

1 projects.

2 It is clear from the indignation and confusion on  
3 the part of the Class Representative, when that was  
4 referred to by Mr Cackett, they had simply not looked at  
5 that material, and yet now they say not only should BT  
6 have been doing those exercises, but it should have  
7 embarked on a wholesale Fully Allocated Costs exercise  
8 for its whole business, and you can make presumptions  
9 against it because it did not.

10 If we can just go to {G/88/151}. Just a passing  
11 observation by the CMA -- by the CMA in relation to the  
12 remittal of the *Phenytoin* decision:

13 "The CMA understands that it is not common practice  
14 in the pharmaceutical industry to allocate common costs  
15 to individual products and that, as a matter of their  
16 own commercial practice, the Parties themselves do not  
17 allocate common costs in this way. However, it is  
18 necessary to do so for the purposes of the CMA's Cost  
19 Plus assessment."

20 Now, that is just a reflection of the realities of  
21 the world. Companies do not sit there going: let us  
22 carry out a single, rigid allocation mechanism for our  
23 costs and then decide what margin to put on top of  
24 the prices. That was exactly what Mr Cackett said does  
25 not happen.

1           You cannot possibly be drawing inferences against BT  
2           for not continuing to develop data in the form of  
3           a regulatory financial statement when it was under no  
4           duty to do so and Ofcom had specifically lifted the  
5           requirement in 2009 to do so.

6           The submission is just revealing in a number of  
7           ways. First of all, the casual way in which the Class  
8           Representative is willing to overlook fundamental  
9           principles like the burden of proof, the second is the  
10          lack of any sense of reality as to how businesses work,  
11          and third, and importantly, it is a recognition that the  
12          Class Representative does not have the evidence it wants  
13          or needs to make out its case which, as I will explain,  
14          is flawed. It is emblematic of the problem that the  
15          Class Representative has had throughout. It has assumed  
16          its conclusion and it wants the Tribunal to do the same.

17          As we have outlined in writing, and I am going to  
18          expand upon, that desire to see everything as an  
19          indictment of supposedly nefarious conduct on the part  
20          of BT has actually blinded it to the realities of what  
21          has been happening here.

22          That takes me to the next part of my submissions,  
23          a very brief rehearsal of some of the background. I am  
24          obviously conscious that the Tribunal has been listening  
25          and reading avidly over the past few weeks, and forgive

1 me if this is all too obvious, but it may bear  
2 repetition.

3 The market context has radically shifted since the  
4 mid 2000s. The world is nothing like 2006 and 2009.  
5 I mean, it is quite easy to forget, just setting  
6 a temporal benchmark, that the iPhone actually only  
7 arrived in the UK in 2007. The world of telecoms and  
8 the internet, what we get, what we use, how companies  
9 compete and meet our demands, it is a different world.

10 I know here we are not talking about mobiles and  
11 smart phones, we are talking about fixed lines and  
12 broadband, but it is easy to forget how much things have  
13 changed.

14 If I may, I am just going to go back to our skeleton  
15 argument for opening because we set out some of the  
16 points here in a form which may be just useful  
17 reference. {A/13/11}.

18 I am just going to pick it up at paragraph 32:

19 "As early as 2006 - when price controls on BT's  
20 fixed voice services were lifted - Ofcom noted that BT's  
21 competitors were already introducing new tariffs,  
22 including offering bundled packages of line rental,  
23 calls and broadband, at lower prices for consumers,  
24 which would 'increase competitive pressure on BT'."

25 I am just going to make a really obvious point here.

1 BT was providing landlines, fixed lines. It could not  
2 provide bundles at that point. What is being described  
3 here is competitive pressure being put on BT through  
4 competitors offering new tariffs, including bundled  
5 packages.

6 "Ofcom also anticipated that pressure on BT would  
7 grow as its competitors took up ... wholesale access  
8 [through] 'local loop unbundling' ..."

9 Which of course we did see.

10 "A key part of Ofcom's strategy for the growth of  
11 strong retail competition was to remove barriers to  
12 entry by regulating access to Openreach's wholesale  
13 network."

14 We know that too.

15 "[Local loop unbundling] was important because it  
16 enabled providers to offer customers other retail  
17 telecoms services alongside fixed voice from the same  
18 input. This provided an opportunity for economies of  
19 scope if consumers took up more than one service, e.g.,  
20 fixed voice and broadband, creating a clear economic  
21 incentive to encourage consumers to purchase bundles."

22 Now, I will be obviously coming back to answer the  
23 questions that Mr Ridyard raised, but Mr Ridyard's  
24 questions are highly pertinent, just given the context  
25 here. This is precisely the dynamics of the market that

1           were being thought about in terms of bundles and  
2           transition to bundles.

3           You see at 33 and 34 {A/13/12}, there is a reference  
4           to the 2009 review, the moves to bundles of multiple  
5           services, and at 34, the recognition that the constraint  
6           on BT had put it at a material competitive disadvantage.  
7           Because it could not offer bundles, it was just able to  
8           offer fixed lines alone and broadband alone, it was at  
9           a competitive disadvantage.

10          Of course, it was in 2009 that Ofcom fully  
11          deregulated retail telecoms. I will not take you to the  
12          statement, I will just give you the reference. It is  
13          {C/329/1}, and the relevant paragraphs really run from  
14          page 15 there. Trend towards bundles, driven to  
15          telephony linked to broadband, falling fixed call  
16          volumes, and so on. All things with which we are  
17          familiar with.

18          Then if we go over the page again to paragraph 36,  
19          {A/13/13}, what we saw was BT following in the footsteps  
20          of its rivals in beginning to offer bundled services.  
21          As we heard from the witnesses consistently, BT's  
22          strategy was to reduce churn. I will come back to it,  
23          because Ms Kreisberger tried to cross-examine Ms Blight  
24          saying, well, you were not concerned about churn.  
25          Ms Blight made it clear that churn was so important you

1 did not have to be putting it on every slide, it was the  
2 very essence of what you were considering as your  
3 strategy.

4 I am sorry, I may have been unfair to  
5 Ms Kreisberger. It may have been Mr Armitage.

6 THE CHAIRMAN: Yes.

7 MR BEARD: So what we saw was a very large decline in  
8 relation to BT's fixed voice customers over the period,  
9 and what was BT doing to stem this massive loss, this  
10 massive loss of market share and retain the business of  
11 its SFV customers? Well, we know, it was following the  
12 strategy of offering bundles going head-to-head with its  
13 competitors with discounted bundle offers, low  
14 incremental prices for the additional services, and  
15 investing in content that would make those bundles more  
16 attractive. That is what TV and sport was about.

17 No doubt BT would have liked to win bundle customers  
18 from its rivals, but really what it was concerned about  
19 was retaining the business of its existing voice  
20 customers. Of course at that time, pre-2009, they were  
21 all SFV customers. You needed to do that to avoid  
22 haemorrhaging customers and losing revenue, losing  
23 customers, and of course declining call volumes.

24 That is why, if we go over the page again to  
25 paragraph 38, {A/13/14} BT has emphasised, and

1 Dr Jenkins has explained, the importance of considering  
2 the wider context. SFV customers are one part, they  
3 play a much wider, more complex moving picture across  
4 this picture from 2009 through to today. Retail  
5 telecoms was undergoing a massive change throughout the  
6 period before the claim period and continuing through  
7 it.

8 That is not to say fixed lines for BT were not,  
9 before and during the claim period, a core part of its  
10 business. Obviously they were. Voice as a whole was  
11 extremely important and we saw that throughout the  
12 documents.

13 Now, historically those links, those voice lines  
14 that people had, those were to make and receive calls,  
15 but over time they also became the route through which  
16 broadband connections were delivered. We will come back  
17 to the issues about economies of scope in relation to  
18 these points in due course.

19 What we are seeing is competition through providers  
20 incentivising customers to take up bundles of fixed  
21 voice and broadband. How did they do that? By offering  
22 bundle prices at a discount to the cost of purchasing  
23 the two services separately, albeit what we actually see  
24 in the market is a vast dispersion of prices both for  
25 bundles and for separate offerings.

1           So what we are seeing in the way in which SFV and  
2           voice customers are dealt with, and the way in which  
3           prices are set, and the strategy that is being pursued,  
4           is a set of decisions being taken against that broader  
5           backdrop where you are seeing different dynamics within  
6           the market, you are seeing changes in the number of  
7           Voice Only Customers, and therefore changes in scale to  
8           some extent. You are also seeing differences in the way  
9           that competitors could offer products and the economies  
10          in scale and scope that they saw as well. That is vital  
11          context for all parts of this case.

12           So with that, let me move to market definition.

13          THE CHAIRMAN: Yes.

14          MR BEARD: I am going to take it broadly in five rough  
15          chunks, if I may. I am going to make some observations  
16          about the basic approach. I will deal with the  
17          hypothetical monopolist test. I will deal with the  
18          hypothetical multi-product monopolist test, insofar as  
19          it actually exists as a real test for market definition.  
20          I will then deal with the three sources of data that the  
21          Class Representative relies on supposedly to make out  
22          its case, which is obviously the price differential  
23          material, the supposed SSNIPs and the ARPM material and  
24          the variants on that, and then I will pick up issues on  
25          dominance, if I may.

1           Now, market definition is often described as a tool  
2           for assessing dominance. We see that in lots of  
3           guidance and case law. But it really does not mean that  
4           you can skip straight to dominance, market definition is  
5           a necessary first step.

6           If we just pick it up at {G/137/5}. This is in the  
7           CMA Market Definition Guidelines.

8           So you see the reference in 2.1, broadly speaking,  
9           to it being a tool. But if we pick it up at 2.2, second  
10          bullet point, which is referring to Article 82, it is  
11          obviously somewhat out of date, and the Chapter II  
12          prohibition:

13          "The OFT would not consider an undertaking to be  
14          dominant unless that undertaking had substantial market  
15          power. The definition of the relevant market(s) is  
16          a necessary first step in assessing whether an  
17          undertaking is dominant."

18          You probably do not even need the guidance to tell  
19          you that, because you cannot possibly have an abuse of  
20          dominance without the dominance, and you cannot have the  
21          dominance without a market within which you are defining  
22          it.

23          But it is important here, given what has been said  
24          by the Class Representative, about somehow how you can  
25          just sort of look at limb 1 and drag the supposed

1 findings you have in limb 1 backwards into the market  
2 definition analysis.

3 The other thing that I am going to refer to on  
4 multiple occasions is the confusion in the Class  
5 Representative's approach about what constraints are  
6 important here. When you are carrying out the market  
7 definition exercise, it is the constraints on the  
8 hypothetical monopolist that are critical. That is what  
9 defines the market.

10 As I say, Ms Kreisberger was creditably clear on  
11 Monday that she thinks this is all rather unnecessary,  
12 skip to limb 1 and have done. The necessary end point,  
13 she says, is a narrow market because of her conclusions  
14 on limb 1.

15 If we could go to the *Hydrocortisone* judgment,  
16 {G/96/70}. It is under heading 2, "The dangers of  
17 backward reasoning":

18 "Particularly where the abuse alleged is one of  
19 excessive pricing, there is great danger in reasoning  
20 backwards from a perceived excessive - and so  
21 potentially abusive - price. The backwards reasoning  
22 goes [something] like this:

23 "(1) Only a dominant undertaking can raise price so  
24 as to constitute an abuse of a dominant position. If  
25 the undertaking were not dominant, competition would

1 ensure a 'proper price'.

2 "(2) Therefore, if the price is abusive, the  
3 undertaking is dominant.

4 "(3) If the undertaking is dominant, then the market  
5 must be defined consistently with that finding of  
6 dominance."

7 That is almost precisely Ms Kreisberger's primary  
8 submission.

9 If we go over to page, {G/96/71} to 154, just  
10 picking it up at the top, if we may:

11 "Particularly in difficult cases, it is important to  
12 keep the processes of (i) market definition, (ii)  
13 dominance and (iii) abuse as distinct analytical stages.  
14 Take an allegedly wantonly or obviously abusive  
15 monopoly, where it appears that the monopolist is  
16 charging abusive monopoly rents because (i) the  
17 monopolist has the market power and (ii) it pays the  
18 monopolist to exercise that power because high margins  
19 on low sales are what brings in more revenue than  
20 smaller margins on higher sales. In such a simple case,  
21 it is tempting to reason from outcome, as follows: (i)  
22 the price is abusively high ... (ii) therefore ...  
23 dominance ... (iii) therefore the market has got to be  
24 defined [primarily] ..."

25 Paragraph 155:

1           "The problem with this sort of reasoning is that  
2           whilst the conclusion ... may be right, the reasoning  
3           assumes that which needs to be tested for. For that  
4           reason, this approach is to be deprecated as creating an  
5           avoidable risk of wrong outcomes. The fact is that  
6           there are many explanations for high prices that are  
7           consistent with competitive behaviour and inconsistent  
8           with a finding of infringement of the Chapter II  
9           prohibition."

10           It talks there about statutory monopolies and  
11           possible temporary high prices, but obviously, as we go  
12           on to look at *Hydrocortisone*, there are a whole range of  
13           other considerations that I will come back to in  
14           relation to this.

15           It is worth bearing in mind that *Hydrocortisone*, it  
16           is one of the drugs cases where the hikes in price were  
17           absolutely colossal. We are not talking about flat  
18           ARPU's in relation to the drugs cases, we are talking  
19           about hundreds of percent, thousands of percent in  
20           cases. Yet here the Tribunal is saying, even there, be  
21           careful about backwards reasoning.

22           MR RIDYARD: Mr Beard, what about *Slovak Telekom*? Because  
23           we were taken to that, I think, and that in a way seemed  
24           to indicate a different view on this.

25           MR BEARD: Yes, it does indicate that there are -- that you

1 can have situations where, if you have made robust  
2 findings, then obviously things are connected. That is  
3 entirely correct, and therefore *Slovak Telekom* is  
4 accepting that you can take those sorts of issues into  
5 account.

6 But what *Hydrocortisone* is saying is not they are  
7 all completely unrelated, indeed the paragraph I have  
8 just taken you to is not saying: if you could find  
9 a completely robust finding on excessive pricing, then  
10 it would have no impact on the way in which you consider  
11 market definition. It is not saying that, and that is  
12 consistent with *Slovak Telekom*. But what it is saying  
13 very clearly is: take the reasoning analytically forward  
14 on the basis of the tools we have for market definition,  
15 and nothing in *Slovak Telekom* is contradicting that at  
16 all.

17 MR RIDYARD: Thanks.

18 MR BEARD: I will not -- I do not need to take you to it,  
19 but actually the Tribunal in *BGL*, so just for your  
20 notes, it is {G/85/63} at paragraph 109 ... I will call  
21 it up. It is down at 109.

22 What is emphasised there is actually the importance  
23 of making sure you carry out market definition properly,  
24 because it acts as a jurisdictional control,  
25 effectively, on the ambit of Chapter II, which is

1 a highly intrusive measure when, whether in excessive  
2 pricing cases or otherwise, you limit dominant  
3 undertakings' or potentially dominant undertakings'  
4 ability to behave in such a way.

5 So I am not suggesting you cannot have any  
6 analytical connection, I am saying how you have to do  
7 these things properly and sensibly is being actually  
8 laid out very well by the Tribunal in those passages.

9 Then we can deal with this, given the *Slovak Telekom*  
10 references, through the EU guidelines. The key thing  
11 about market definition is it is really all focused on  
12 substitution. That is what market definition tests are  
13 really about. That is what the hypothetical monopolist  
14 is about, but more generally that is what market  
15 definition tests are about.

16 If we can just go to the new EU guidelines, and the  
17 fact that they are new does not make any difference for  
18 these purposes. It is {G/162/6}.

19 So "General principles of market definition":

20 "... in line with the case law of the Court of  
21 Justice and the General Court of the European Union ..."

22 So taking into account all of this, a familiar  
23 proposition:

24 "The relevant market [this is today] comprises all  
25 those products that customers regard as interchangeable

1 or substitutable to the products of the undertakings  
2 involved ..."

3 Interchangeable or substitutable.

4 "... based on the products' characteristics, their  
5 prices and their intended use, taking into consideration  
6 the conditions of competition and the structure of  
7 supply and demand on the market."

8 Now, obviously there is a degree to which that is  
9 a general proposition that only takes us so far forward.  
10 But it is important that it is the interchangeability  
11 and substitutability of the products which is the key  
12 consideration that you are identifying here and with  
13 good reason.

14 If we go on to paragraph 23(a) which is on page  
15 {G/162/10}:

16 "Undertakings are subject to three main sources of  
17 competitive constraints, namely demand substitution,  
18 supply substitution and potential competition:

19 "Demand substitution constitutes the most effective  
20 and immediate disciplinary force on the suppliers of  
21 a given product. An undertaking's influence over  
22 prevailing conditions of sale -- such as prices, the  
23 level of innovation or quality offered ..."

24 I just pause there. It is not just about price that  
25 you are thinking about here, you are thinking about

1 conditions of sale and innovation. That is going to  
2 matter when we look at the whole of *United Brands* in the  
3 round.

4 "An undertaking's influence over prevailing  
5 conditions of sale ... depends on the extent to which  
6 its customers can easily switch to available products  
7 that the customers consider as substitutes. Demand  
8 substitution is therefore the main consideration when  
9 defining the relevant product market."

10 Then if we go over the page, {G/162/11}, you see  
11 supply substitution, which is other suppliers entering  
12 the market in order to provide the products in question.  
13 Obviously in this case we know there are no supply side  
14 barriers because of the access of the wholesale  
15 products, and therefore we are focusing to a great  
16 extent on these demand side substitution issues.

17 If we go down the page to paragraph 25. This is  
18 under the heading "Demand substitution". Obviously I am  
19 not going to go through it all.

20 "... the main approach ... is that of assessing the  
21 substitutability of products from the perspective of  
22 the customer... Situations of sufficiently strong  
23 demand substitution arise when customers would switch  
24 easily from the products of the undertaking(s) involved  
25 to readily available alternative products. The

1 Commission includes those products in the same relevant  
2 product market as they constitute effective and  
3 immediate competitive constraints."

4 Now, interestingly, that starting point is actually  
5 the functional comparison for the purposes of  
6 substitution, and obviously we know in terms of  
7 functional comparison that even if we leave VOCs to one  
8 side for a moment while we look at SPCs, these are  
9 functionally remarkably similar, shall we put it as low  
10 as that.

11 Were bundles substitutable with SFV services from  
12 the perspective of a consumer? Yes, they were,  
13 particularly so for SPCs. Was it easy to switch? Yes,  
14 it was. Did lots of people switch? Yes, they did.

15 Now, we deal with the position in relation to  
16 switching and the Class Representative's response. If  
17 we go to our summary in our closing submissions at  
18 {A/16/80} -- I am so sorry, it may be 81, and it is  
19 {IR-A/16/81}.

20 You will see at 325, a summary of the key issues  
21 relating to the level of switching. Now, you will be  
22 familiar with those. We say that data provides clear  
23 and compelling evidence that consumers did view bundles  
24 as a close substitute for their SFV services. To be  
25 clear, that is VOCs and SPCs.

1           But then, and it might -- I am sure you have this in  
2 mind, but just for reference, could we go to  
3 {OR-H/247/1} so you have the references. This is the  
4 joint response to the Tribunal's factual questions. If  
5 we go to page {OR-H/247/16}, you will recall that. That  
6 is the table taken from -- the figure taken from  
7 Dr Hunt's report, Figure 10, which sets out the total  
8 rates of BT SFV customers switching, supplier and  
9 service over the period, and those are huge amounts of  
10 switching.

11           If we just go back two pages to page {OR-H/247/14}  
12 now, please. That is the overall context, you will  
13 recall.

14           Can I just check page {OR-H/247/11} as well. No, it  
15 is the wrong reference. {OR-H/247/19}, yes.

16           You will recall that table which indicates -- this  
17 is actually from Dr Jenkins, but what is interesting  
18 here is the level of additions each year.

19           Now, Mr Parker tried to refer to this as the "frothy  
20 top", because people that came in left overall slightly  
21 faster than those that were already there, but it is  
22 still very significant the numbers of people that were  
23 joining.

24           So as I say, all of this switching data suggests  
25 a wide market encompassing both standalone fixed voice

1 and bundles, but, as we know, the Class Representative  
2 says not, and there are two responses. One is the  
3 notion of a secular trend, and the other is to say,  
4 well, there was not enough switching to suggest that  
5 BT's prices were constrained.

6 I am going to come back to the second point because  
7 that is really all about the application of the  
8 hypothetical monopolist test. I am just going to deal  
9 with the secular trend.

10 It is important to bear in mind here that it is no  
11 part of BT's case or the position adopted by Dr Jenkins  
12 that there is not any sort of general movements towards  
13 new technology occurring during the period. Indeed, it  
14 would be a bizarre submission given what I have taken  
15 you to in terms of the changes in the market.

16 THE CHAIRMAN: Yes.

17 MR BEARD: That is not our point. Our point is that what is  
18 being suggested by the other side, that switching is  
19 unrelated to price, is simply a remarkable suggestion.

20 MR RIDYARD: It would be, but it is not what they are  
21 saying, is it? They are saying most of the switching is  
22 related to secular trend and some of it is related to  
23 price, and not enough is related to price to satisfy the  
24 SSNIP test.

25 MR BEARD: Yes, insofar as what they are saying is it is not

1           enough, then we are in HMT -- we are effectively in the  
2           hypothetical monopolist test territory. That is where  
3           we end up. So either the secular trend bounds or it  
4           does not here. If the secular trend is simply saying  
5           you do not have enough people switching, then you have  
6           got no real constraint. Then we say, well, we  
7           understand that there was a problem here.

8           But what we see in relation to the hypothetical  
9           monopolist test is that we see a vast amount of  
10          switching going on, and what we say is that to speculate  
11          about there being some attenuation of those levels and  
12          those constraints by reference to this notion of  
13          a secular trend is not sufficient in circumstances where  
14          you have other material that indicates that actually you  
15          have got very large amounts of switching, you have got  
16          these concerns about churn, you have got evidence from  
17          the witnesses that are explaining how they fought to  
18          retain people in these circumstances.

19          So in those circumstances, to say that there is  
20          a secular trend is not sufficient to suggest that you  
21          could overcome those fundamental evidential positions,  
22          and what Mr Parker ends up having to rely upon is the  
23          supposed SSNIP triptych in order to defend his position  
24          here.

25          MR RIDYARD: Yes, and one part of that is his estimate that

1 demand elasticity is minus 0.7 which is not enough to  
2 defeat a SSNIP. You can disagree with the minus 0.7,  
3 but he does --

4 MR BEARD: Yes, but the minus 0.7 is generated because of  
5 the way in which he treats the asymmetry issue  
6 effectively in those circumstances. So there is  
7 a serious problem with the way in which he looks at the  
8 minus 0.7.

9 MR RIDYARD: I am sure you have criticisms of it, but he  
10 does come up with an attempt to do it.

11 MR BEARD: He does come up with an attempt to do it, and it  
12 is right that these things are not -- that the secular  
13 trend here is not the only thing that Mr Parker is  
14 relying upon. I completely accept that. But what I am  
15 trying to do is put this in context where you have  
16 a situation where the basic approach is you are looking  
17 at switching, you are looking at the level of switching  
18 to see whether or not it is effectively constraining the  
19 hypothetical monopolist, in order to decide whether or  
20 not you have got a narrow market.

21 MR RIDYARD: To do that, you must surely be interested in  
22 switching which arises because of price changes.

23 MR BEARD: You are of course interested in that. Dr Jenkins  
24 does not shy away from that; the criticism that was  
25 levelled by Ms Kreisberger was the idea that somehow Dr

1 Jenkins was ignoring migration issues when she was  
2 considering these points. But as we see -- there was  
3 a criticism that she had not referred to various bits of  
4 her book, I think it was.

5 But in relation to those issues, obviously  
6 Dr Jenkins is sensitive to those sorts of points.  
7 Indeed, when we come to look at the CLA, what we see is  
8 actually her being specifically careful and very  
9 conservative about how you deal with these issues.

10 Indeed, it might actually be worth looking at that  
11 now. I was going to work through the points in relation  
12 to Mr Parker, but I am very happy to move and just deal  
13 with that as an issue in relation to the consideration  
14 of these points, because what Dr Jenkins has done in  
15 relation to her CLA is recognise the possibility of  
16 there being some sort of concerns in relation to the  
17 extent to which pricing is driving switching.

18 Ms Kreisberger talked about how effectively the CLA  
19 had just had a 20% discount on it for switching. She  
20 then referred to a 40% discount.

21 It is worth perhaps just turning it up to see what  
22 Dr Jenkins actually did in relation to this. So if we  
23 go to {OR-E/25/21}. This is in the annexes to her first  
24 report, and it is in the annexes to her first report  
25 that she sets out how she went about carrying out a

1 critical loss analysis in relation to these issues.

2 You will see there at 1.35:

3 "For the calculation of the change in quantity ..."

4 Sorry, the critical loss analysis is effectively  
5 Dr Jenkins trying to apply the hypothetical monopolist  
6 test in relation to switching, and what she is doing is  
7 she is combining switching data she has with the changes  
8 in line rental prices. I will come back to why she uses  
9 line rental prices a bit later, but she is dealing here  
10 with these issues to do with what sorts of sensitivities  
11 you should include.

12 What she does, 1.35:

13 "For the calculation of the change in quantity,  
14 I consider separately (i) customers who switched to an  
15 alternative non-SFV BT product ..."

16 So that is people who are switching within BT to  
17 a BT bundle, is the essence of what those customers are.

18 "... ('within BT cessations') ..."

19 So ceasing your SFV services and moving to another  
20 BT product.

21 "... and (ii) customers who switched away from BT  
22 ('out of BT cessations'). I am able to identify and sum  
23 up the total cessations within each group from BT's F23  
24 Summary ..."

25 So this is a large data source.

1           What she says at 1.36 is that she takes all of the  
2 "within BT cessations" and she does not make any  
3 adjustments to this group for the final stages of  
4 calculation.

5           "If these customers are leaving BT's SFV product,  
6 but staying with BT, it logically follows that they must  
7 be leaving for a non-SFV product."

8           So she is looking at the non-SFV -- people going to  
9 bundles. She is trying to identify who are going to  
10 bundles.

11          Then out of BT cessations, there she takes out  
12 people who are switching to fixed voice services offered  
13 by rivals.

14          So she is taking out people that are just going SFV  
15 to SFV, okay. Because what she is trying to do is  
16 identify what the switching would be if you are the  
17 hypothetical monopolist of the SFV services. So if you  
18 are the hypothetical monopolist of SFV services and  
19 someone switches from SFV to SFV, in the hypothesis you  
20 are just switching internally effectively.

21          So she takes those out, and she takes out customers  
22 who switched to using a mobile connection not offered by  
23 BT because they are not switching to bundles and she is  
24 focusing on trying to work out what is going on with  
25 bundles and she is obviously taking out those who simply

1 exited the market entirely.

2 Then if we go over the page, {OR-E/25/22}, maybe two  
3 pages, the flow diagram. {OR-E/25/23}. That is the  
4 diagram of how she takes the various cessations and then  
5 tests them. So she is taking all of the BT cessations  
6 and then she is taking out of BT cessations and looking  
7 at them.

8 Then if we go down -- so she has taken out a large  
9 number, it turns out, of BT cessations and then what she  
10 does is she looks at, if we go down again, she takes  
11 into account reason codes given for people switching.

12 If we go over the page again, {OR-E/25/24}, down at  
13 the bottom what she is taking is data she has about why  
14 it is that people switched. So the first line there is  
15 LLU losses. So that is people that are switching away  
16 and they are switching to an LLU using rivals.

17 As we indicated previously, if you are using LLU you  
18 will be providing bundles because you take LLU in order  
19 to provide the bundles. So she takes all of those into  
20 account and she takes people who are seceding going to  
21 cable as well.

22 If we go over the page, {OR-E/25/25} you will see  
23 there that there is actually a very detailed list of  
24 different reasons for people seceding that they have  
25 given that she then uses in order to carry out an

1 analysis of whether or not these people should be  
2 included within the group she is analysing.

3 You will see down at the bottom she excludes people,  
4 for instance, if they indicated they were going to -- if  
5 there was an indication they were going to a WLR  
6 provider because a WLR provider would just be another  
7 SFV service. Bereavement obviously is exiting the  
8 market entirely. So she is taking the data she has got  
9 in relation to the reasons why people move.

10 If we go over the page again, {OR-E/25/26}, you see  
11 at A1.43:

12 "Having calculated the number of cessations from the  
13 structured data disclosure that I would consider to be  
14 in each group, when calculating the change in quantity,  
15 I only use the cessations from group 1 and a fraction of  
16 the cessations from group 2."

17 These were the categories which she had identified  
18 above.

19 None of the cessations from group 3 are used. What  
20 this leads to is that over 70%, almost 70%, I am sorry,  
21 of out of BT cessations are taken out of the analysis  
22 because they would not be cessations that could be  
23 attributed to pricing.

24 MR RIDYARD: That does not mean that the other 30% were due  
25 to pricing; this is the problem.

1 MR BEARD: No, it does not mean that. What you have done is  
2 you have used data that indicates a range of choices and  
3 you have taken coding where people --

4 MR RIDYARD: We understand what has been done.

5 MR BEARD: But the point is she has taken a conservative  
6 approach in relation to taking out the cessation and  
7 then of course she then takes on further sensitivities  
8 because it is only at that point that she then reduces  
9 the cohort by 20% and 40%.

10 THE CHAIRMAN: Of the remaining 30%.

11 MR BEARD: Of the remainder. So the hypothesis has to be  
12 that price does not matter at all for more than 40% of  
13 the remainder of the cohort that you are talking about  
14 even though you have used this data in order to remove  
15 people where you think the coding for cessation was an  
16 indicator that they were not likely to be price -

17 MR RIDYARD: That is the hypothesis. So how do we test that  
18 hypothesis?

19 MR BEARD: You cannot test the hypothesis in terms of some  
20 sort of alternative metric here because you do not have  
21 better data to do it. What you have to do is start from  
22 the proposition that if you take into account the  
23 evidence that you have seen whereby it is clear that BT  
24 in considering churn and how people move took into  
25 account value for money and pricing effects they were

1 clearly concerned about how price could impact churn.  
2 They were clearly concerned, as the people engaged in  
3 the strategy, that price mattered to customers. Indeed,  
4 as a prior it would be quite a surprise if price did not  
5 matter in relation to -

6 MR RIDYARD: We understand the proposition that price  
7 generally matters to people. But it is not testing the  
8 hypothesis -- you have to -- the whole point about the  
9 SSNIP test is it is a hypothesis which is testable. You  
10 just said it was not a testable hypothesis, so that is  
11 the difficulty with it.

12 MR BEARD: What I cannot do is I cannot give you some other  
13 numerical cross-check in relation to it but you do have  
14 to take a step back here. Bear in mind that what we are  
15 talking about here is the cohort of people that pre-2018  
16 almost half of are SPCs and post-2018 all of are SPCs.

17 Now, in relation to those it is difficult to  
18 understand on what basis the secular trend bites at all.

19 THE CHAIRMAN: Sorry, you mean in the SPCs' case.

20 MR BEARD: Yes. How does it bite at all in relation to  
21 them? It is just not a credible story. If the story  
22 is, as Professor Loomes articulated it, that what you  
23 are interested in is acquiring the technology --

24 MR RIDYARD: It is difficult to understand SPCs, is it not?

25 MR BEARD: It is not that difficult to understand SPCs in

1 fact because what we do know is that SPCs could, as the  
2 evidence of Mr Bunt indicated, and we will come to when  
3 we look at the price differential material, could  
4 actually get quite good deals. They could get good  
5 deals, particularly from Sky.

6 So there may well have been a situation where they  
7 think, well actually, in relation to the position I am  
8 in, the price differential is not sufficient for me to  
9 bother to switch. But over time that changes. That is  
10 true.

11 But the point in relation to them is that the  
12 predicate story that is being put forward which is  
13 actually you should not see switching as being concerned  
14 with price or changes in quality because it is not just  
15 price of course, I mean, that goes back to what the  
16 Commission was talking about, and say that does not  
17 matter, it does not make sense as a starting point here.

18 If you then carry out a CLA that is essentially  
19 saying, well, we are taking out vast numbers of the  
20 cohort which include the SPCs, and then we are applying  
21 sensitives in relation to that cohort, and we are still  
22 seeing results that tell us that actually it is a wider  
23 market, when we are effectively making an unsustainably  
24 conservative assumption that by taking out SPC customers  
25 we are treating them as subject to secular trend by way

1 of the sensitivities, you are carrying out an  
2 inordinately conservative approach here.

3 In those circumstances it is true you cannot carry  
4 out some other numerical cross-check, but if effectively  
5 half the people you are talking about the secular trend  
6 does not make any sense in relation to, and you are  
7 already applying a sensitivity down to 20 and 40% after  
8 all of those cessation reductions, there is no  
9 plausibility in a story that says: actually, the secular  
10 trend is more powerful than that.

11 THE CHAIRMAN: Is that a convenient moment, Mr Beard?

12 Good, thank you.

13 (11.44 am)

14 (A short break)

15 (11.59 am)

16 MR BEARD: So I am just -- I was obviously dealing with --

17 I had taken stuff slightly out of order in the fact that  
18 I had gone to some of the CLA material from Dr Jenkins.

19 It may be a theme that I am going to re-emphasise.  
20 The question we are asking is: has the Class  
21 Representative proved the narrow market? I have just  
22 articulated why, taking into account that CLA material,  
23 you have very good reason, given the lack of prior in  
24 relation to SPCs in particular, that that gives you good  
25 supporting evidence against what is basically an

1           assumption being made by the Class Representative here  
2           as to the scale of the secular trend.

3           Now, Mr Ridyard has referred to the minus 0.7  
4           elasticity. Just to be clear, that of course is derived  
5           from Dr Jenkins' analysis of an event study that relates  
6           only to VOCs. I am going to come back to that now.  
7           Because of course what Mr Parker's primary evidence was  
8           here was the curve table which we can see in their  
9           submissions at {A/15/66} which says, well, look, you do  
10          not see big jumps. That was his primary case here. SFV  
11          customers across the period, you do not see big jumps.

12          But as we know, quite apart from the point that  
13          Mr Doran raised which is it is quite zoomed out and you  
14          are not actually seeing the fluctuation, we have very  
15          clear evidence that in relation to -- sorry, Mr Parker's  
16          point was when there are price changes, you do not see  
17          big shifts in the shape of the curve over time, when  
18          there are price changes in relation to line rental, and  
19          therefore you can assume that this curve is somehow not  
20          driven by price at all, or not driven by price to  
21          a meaningful extent so as to constrain in these  
22          circumstances.

23          But the clear evidence we have, and we refer to it  
24          at {A/16/81}, that is {IR-A/16/81}.

25          THE CHAIRMAN: What is the ... in your closing?

1 MR BEARD: Sorry, that was their closing.

2 THE CHAIRMAN: Yes, I know. This is now your closings.

3 MR BEARD: I am now going back to our closings.

4 THE CHAIRMAN: Yes, and the paragraph number is?

5 MR BEARD: I am going to go to 332 which is just over the  
6 page, it is in the section on behaviour. {IR-A/16/82}.

7 THE CHAIRMAN: Yes.

8 MR BEARD: But the key thing that -- one of the key things  
9 that the evidence showed, apart from the very  
10 significant concerns about churn which is indicative of  
11 concerns about pricing on the part of BT, was that the  
12 Class Representative sought to suggest that when you saw  
13 occasional numbers of 2,000 or 8,000 people within churn  
14 numbers, that this was all the churn that BT was  
15 anticipating seeing. Mr Bunt explained and Ms Blight  
16 explained that that was what was referred to as direct  
17 churn, in other words, when people rang up and you had  
18 a particular code that you could use. But their concern  
19 was about indirect churn as well, and that actually you  
20 have a pricing impact that you do not necessarily see as  
21 a simple spike, and people are still taking this into  
22 account. That of course is entirely consistent with all  
23 that Ms Blight talked about in terms of overall value  
24 for money that BT was delivering here.

25 So all of those concerns that were being

1 articulated, not just about direct churn but indirect  
2 churn, indicate that BT was very conscious that these  
3 customers were sensitive to price, and it gives a reason  
4 why you might not see immediate spikes on price changes,  
5 and this is to do with a whole range of factors: the  
6 time of notification, when you get billed, cumulative  
7 effects from the press, and all sorts of things may  
8 affect when it is that you might or might not decide  
9 that you are going to switch.

10 So the evidence from the witnesses gives a clear  
11 explanation why, yes, there were concerns about pricing  
12 for consumers, yes, there were concerns about value for  
13 money for consumers in terms of pricing and, yes, there  
14 was significant churn occurring, and it was indirect  
15 churn that was what was considered to be particularly  
16 important here, not just the specific numbers in  
17 relation to direct churn, and that of course explains  
18 why you do not see particular spikes on the graph.

19 So again, Mr Parker's primary evidence here saying,  
20 well, actually you can just assume it is all due to the  
21 secular trend, does not fit with the fact that you are  
22 dealing with SPCs, because there is not a coherent story  
23 here, and does not deal with the clear evidence that the  
24 BT witnesses provided in relation to the importance of  
25 churn and the nature of indirect churn.

1           But of course it is more than that, because in  
2           relation to the point where Mr Parker created or  
3           calculated his 0.7 -- minus 0.7 elasticity, what he  
4           actually did was not put forward his own primary  
5           analysis, and he certainly put forward no analysis in  
6           relation to SPCs; what he looked at was what Dr Jenkins  
7           did in relation to what was called the commitments  
8           events study. What you will recall was that Dr Jenkins  
9           looked at the commitments price change in relation to  
10          VOCs only, to ask whether there was a shift in the  
11          extent to which VOCs switched before and after the  
12          commitments prices. So this is purely VOC related. It  
13          is not telling you anything about SPCs. Mr Parker just  
14          does not have a story there in relation to SPCs on  
15          a secular trend.

16          We deal with this in our submissions at 335 which is  
17          just over the page {IR-A/16/83}. What Dr Jenkins said  
18          was, well, what I see is that when the VOC price drops  
19          significantly because of the commitments, the degree of  
20          switching we see from the VOCs to bundles falls, and  
21          that is indicative of them having some kind of  
22          price-sensitivity in relation to these issues.

23          Of course, that is consistent also with the  
24          documentary and factual evidence we heard, for instance  
25          in relation to the Post Office material, where we saw

1 those documents where BT were saying these people are in  
2 fact price-sensitive and they do switch, and of course  
3 we know that the Post Office effectively exited the  
4 market once the commitments prices were in play.

5 But that again, factual evidence, Dr Jenkins' event  
6 study looks at that, and this is in just in relation to  
7 VOCs. Then what Mr Parker does is say, hang on  
8 a second, if I take those numbers, what they suggest is  
9 minus 0.7 price elasticity here, in other words,  
10 actually this is not a real constraint. Because what  
11 you are talking about is in relation to the extent to  
12 which people switch away, but we are also concerned  
13 about the way in which they would switch back, and it is  
14 only if they are switching in both directions that you  
15 really get this sense of constraint, is what is really  
16 being done here.

17 What the approach of Mr Parker fails to do is  
18 recognise that there is a fundamental asymmetry in  
19 relation to what you would expect VOC customers to do.  
20 Mr Parker is effectively ignoring his own theory on the  
21 secular trend when he makes these points, because what  
22 he is saying is essentially, look, it may be the case  
23 that people do switch away less when the pricing drops,  
24 but it is not telling you enough here, because actually  
25 what you have is a situation where the bundles are not

1 imposing a sufficient constraint, because when I look at  
2 the numbers what I see are failures in what I call  
3 consistency checks in relation to bundle customers  
4 switching back to VOCs.

5 This is the asymmetry issue. It is not some kind of  
6 theoretical point, it is that what is actually being  
7 said by Mr Parker is that you should see symmetry in  
8 relation to the elasticities here, and that is not  
9 a coherent position for him to adopt when he is trying  
10 to deploy this material to support the idea that this is  
11 a secular trend in one direction. Because what he is  
12 saying is that people will switch away from fixed line  
13 to bundles, and then he is saying, but you can treat the  
14 elasticities for my consistency checks as symmetrical,  
15 and therefore you would expect bundle customers to  
16 switch back to the same degree.

17 Dr Jenkins rightly says, and answered under  
18 cross-examination, and set it out in the joint expert  
19 report, that is just not what any of us would expect  
20 here. Therefore, the one number that Mr Parker has put  
21 forward, which only relates to VOCs, does suffer from  
22 a problem in relation to asymmetry. Therefore, when we  
23 go back to the basic proposition which is: does this  
24 assumption of a secular trend, being so large as  
25 effectively to inoculate the SFV base from competitive

1 pressure, it is just not an assumption that is  
2 sustainable, he does not have evidence to do that, and  
3 he certainly does not when the one number that he has  
4 come forward with, the minus 0.7, is a VOC only number  
5 here, and suffers from this asymmetry problem.

6 So in those circumstances, this element of the  
7 story, the secular trend element, does not remotely  
8 begin to overcome the wealth of factual evidence and  
9 switching data you have that, when we go back to the  
10 basic proposition about how we approach market  
11 definition, suggests that actually you have a situation  
12 where the products you are dealing with, particularly in  
13 relation to SPCs, are functionally near identical.  
14 There is not any basis for a secular trend, and yet you  
15 are saying that somehow this is sufficient to prove  
16 a narrow market.

17 Obviously, in saying all of this, I have unashamedly  
18 focused on SPCs, partly because they make up the bulk of  
19 the claim in the end, but also because if you do not do  
20 that you are in danger of lapsing into what has become  
21 known as the toothless fallacy. This is something that  
22 is actually a problem that was identified by reason of  
23 some of the reasoning in the *United Brands* case, because  
24 there are actually two bits of *United Brands* that are  
25 well known, one is in relation to market definition and

1 the other is in relation to excessive pricing. The  
2 toothless fallacy is this: that if you define markets by  
3 reference to a small group of customers who are not at  
4 the margins, you can end up defining margins very  
5 narrowly.

6 In *United Brands*, the discussion was about  
7 substitution between different types of fruit, because  
8 the case concerned bananas, and one of the market  
9 definition questions was: are bananas in the same market  
10 as other fruit?

11 Now, it might well be that the data says that is  
12 true, but it is the reasoning in the *United Brands*  
13 decision that has come to be criticised, because what is  
14 said in *United Brands* is that actually you should define  
15 the market as being only for bananas because there are  
16 old people and children who cannot eat other fruit very  
17 well, and that is why it is known as the toothless  
18 fallacy, because you are focusing on a small subgroup of  
19 customers. Now, unless you can isolate those customers,  
20 all the other customers in the market who could choose  
21 between bananas, apples, grapes, whatever else, and not  
22 have any problem eating them, they are the ones that  
23 essentially dictate the pricing. They are the marginal  
24 consumers because they can switch away in sufficient  
25 numbers.

1           So the reason I focus on SPCs is because we know  
2           prior to 2018 there could not be any distinction between  
3           the two, VOCs and SPCs, so if you have -- unless you can  
4           prove that SPCs should be seen as separate from bundles,  
5           you do not have a story on narrow market definition.  
6           Because in relation to VOCs -- if you only focus on  
7           VOCs, you are ignoring half the people, effectively,  
8           prior to 2018, and of course after 2018 we are not  
9           dealing with VOCs at all and so you would end up with  
10          just a completely incoherent position. But the  
11          toothless fallacy applies in relation to the pre-2018  
12          period.

13          I do not fight shy of the fact that even in relation  
14          to the VOCs, we say price matters. We have got evidence  
15          that price matters. The witnesses said price matters.  
16          We have got the Post Office coming in and competing on  
17          price, and we have got evidence showing that there was  
18          price-sensitivity there, and in those circumstances to  
19          say that the secular trend is sufficient, even in  
20          relation to those, is not adequate.

21          Indeed, Ms Mackersie very helpfully points out that  
22          if you go to {E/18/47} ...

23          THE CHAIRMAN: Is this Dr Jenkins' second report?

24          MR BEARD: It is Dr Jenkins', you are well ahead, sir, it is  
25          Dr Jenkins' second report.

1           What you have, and this is actually a diagram that  
2           is also in the {OR-H/247/1} documents, but there you  
3           have Dr Jenkins' diagram looking at just how many  
4           different sources of people moved into bundles, and what  
5           you see there is actually very large numbers coming from  
6           BT VOCs in addition to SPCs and so on. Indeed, the  
7           overall number switching from SFV, so that is both BT  
8           and non-BT SFV, is around 54% in those four years.

9           So secular trend does not work. Switching is  
10          clearly not dealt with. Let us move on then to the  
11          hypothetical monopolist test more generally.

12          It is interesting where we are with the hypothetical  
13          monopolist test. If we go to {G/137/6}, this is the CMA  
14          Guidelines which in fact Ms Kreisberger took you to in  
15          opening. If we go down to 2.9, 2.10, just over the  
16          page, {G/137/7}, the outline of the focal product and  
17          small but significant non-transitory increase in price  
18          test is articulated.

19          Now, in the economists' JES, the joint statement,  
20          and indeed in opening, Ms Kreisberger said that using  
21          the hypothetical monopolist test, with one M, was  
22          entirely uncontroversial and it was agreed as the way  
23          forward.

24          It then transpired after opening that Mr Parker  
25          realised that his approach had a huge problem in the way

1 that he approached the hypothetical monopolist test,  
2 insofar as he did anything with it, because he had not  
3 dealt with the recapture incentive issue, and it was at  
4 that point that the hypothetical multi-product  
5 monopolist emerged, the HMMT.

6 Now, I am going to come back and explain why the  
7 HMMT is just entirely useless for these purposes and it  
8 is a reflection of the fact that there was just  
9 a massive hole in the way in which the Class  
10 Representative had analysed the operation of the  
11 hypothetical monopolist test here, but let me just stick  
12 with the one M version to begin with.

13 Mr Parker's arguments are, well, BT's prices are  
14 above the competitive level by more than 5-10%,  
15 therefore, all the observed switching to bundles was not  
16 constraining BT's pricing, therefore, bundles cannot be  
17 a sufficiently close substitute to SFV to be in the same  
18 market. That is essentially his pitch.

19 The first and major conceptual flaw is that he takes  
20 what was profitable for BT and looks at that, not the  
21 hypothetical monopolist, and it is just plainly wrong.  
22 It is the wrong way to do market definition. Obviously  
23 the second flaw in his approach is that it involves that  
24 sort of backwards reasoning that was deprecated in  
25 *Hydrocortisone*, and the third point is the SSNIP

1 triptych which I will come back to. But let us just  
2 focus on the conceptual flaw.

3 We know what the issue here is. BT is not  
4 a hypothetical monopolist because BT sells bundles and a  
5 hypothetical monopolist does not. The focal product  
6 that is agreed is calls and line rental for voice  
7 services only, that is it, and it is because you focus  
8 on that focal product that you understand the  
9 strength -- you can use the hypothetical monopolist test  
10 to try and understand the strength of demand side  
11 substitution between SFV and bundles.

12 Now, in the Class Representative's submissions in  
13 writing and orally, there seems to be some distinction  
14 being drawn between migration incentives and recapture  
15 effects and strong effects and weak effects. None of  
16 that really matters. Unless the migration effect is  
17 just going back to the secular trend, in which case  
18 I have dealt with it, it does not matter for these  
19 purposes whether BT earns more profit on a customer in  
20 a bundle than it does on a fixed voice customer.

21 All of the evidence from BT is they do. They earn  
22 much greater gross margin, there are a whole range of  
23 reasons why they want it. All of the witnesses were  
24 absolutely consistent in relation to the strategy, no  
25 doubt about it. But I do not even need to rely on that

1 evidence, because it does not matter whether it is this  
2 strong incentive, in other words, you actually profit  
3 more from bundles, which is the truth in reality, or  
4 that actually you do not make quite so much profit on  
5 a bundle customer as you did on an SFV customer.

6 The reason it does not matter is because what BT is  
7 concerned about always is not losing that customer,  
8 because if they lose the customer they lose all profit,  
9 and so long as having someone is profitable, even at  
10 a lower rate, you will always have that recapture  
11 incentive.

12 So this distinction that they try to draw between  
13 strong and weak, it does not matter for identifying the  
14 massive hole in the approach to market definition. The  
15 fact that there is a recapture incentive just undermines  
16 Mr Parker's approach completely.

17 As I say, we have set it out in our submissions, and  
18 just for your note {A/16/22}, paragraph 80, where we  
19 cite the evidence that BT actually wanted to encourage  
20 switching to bundles, and {A/16/76}, paragraphs 304  
21 through to 308, we talk about a range of issues in  
22 relation to which -- the way in which pricing was done,  
23 and those are important contextual points here.

24 But the key point here is that you cannot use BT  
25 prices to identify what the constraints on

1 a hypothetical monopolist would be. A hypothetical  
2 monopolist that does not have any recapture incentive,  
3 it is clearly going to be concerned about setting its  
4 prices so that it does not lose customers to bundles  
5 because if it loses customers to bundles it does not get  
6 a recapture incentive, it does not get any profit there.

7 MR RIDYARD: So it would charge a lower price, is that what  
8 you are saying?

9 MR BEARD: It might do. We do not make an assumption one  
10 way or another in relation to that.

11 MR RIDYARD: Is that not just the logical consequence of  
12 what you just said? So if losing an SFV customer loses  
13 me business, if I am a hypothetical monopolist, that is  
14 just bad news, unadulterated bad news. Compare that to  
15 one who gets some of that back by the fact that some of  
16 the losers switch to my other, the other part of my  
17 business, then that is ... this is the standard  
18 inelastic effects analysis, is it not? Therefore, I am  
19 less worried about losing customers, therefore, I will  
20 charge a higher price.

21 MR BEARD: I completely understand that analysis, but what  
22 we are trying to analyse here is whether or not there is  
23 a constraint on the hypothetical monopolist for the  
24 purposes of the hypothetical monopolist test. You  
25 cannot assume that any of the prices that are being

1           charged now, or might be charged by a hypothetical  
2           monopolist, would be in any way problematic, because  
3           that would be to jump the reasoning forward.

4       MR RIDYARD: I understand that, but what I am simply saying  
5           is that when you are doing the hypothetical monopolist  
6           test it does matter what price level you are doing it  
7           from. That is the whole cellophane fallacy.

8       MR BEARD: Yes, understood.

9       MR RIDYARD: So if here we are saying that the actual  
10          company, I will not say monopolist, of course, the  
11          actual company involved has this recapture incentive,  
12          therefore it will charge a higher price than if it did  
13          not, and therefore the higher price level from which you  
14          are starting the analysis should be factored in, in some  
15          way, into the assessment.

16       MR BEARD: Well, we -- there are two things. One is it is  
17          dangerous to assume that you move to cellophane fallacy  
18          territory immediately because you are making an  
19          assumption that the prices being charged are  
20          supra-competitive.

21       MR RIDYARD: I am simply saying that if I have a recapture  
22          incentive my price will be higher than if I do not have  
23          a recapture incentive.

24       MR BEARD: I think in most circumstances, unless there are  
25          other strategic issues, then I am not demurring in

1 relation to that, but it is what that means here that is  
2 important.

3 MR RIDYARD: Yes.

4 MR BEARD: The point I am making is twofold. First of all,  
5 when you are carrying out a hypothetical monopolist test  
6 you have got to do it properly, and in those  
7 circumstances you cannot just assume that, as Mr Parker  
8 does, that you can use BT's prices as indicative of  
9 anything in relation to the way in which the  
10 hypothetical monopolist would be constrained, because  
11 you are carrying out that thought experiment, you have  
12 to step back into the world of that thought experiment.  
13 The thought experiment does not involve a recapture  
14 incentive.

15 If that analysis tells you I do not have a good  
16 basis for concluding that this is a narrow market,  
17 because a hypothetical monopolist would be concerned,  
18 given the levels of switching we are seeing in this  
19 market, that there is a problem, then in those  
20 circumstances you have the wider market.

21 The point -- the second point I was making is there  
22 is a danger, in conflating the points that sir, you are  
23 putting forward, as meaning that you are in cellophane  
24 fallacy territory necessarily, because the cellophane --

25 MR RIDYARD: I did not mention the cellophane fallacy,

1 I simply said the price level at which you do the HMT  
2 matters, and if recapture is a thing, is important, then  
3 it is going to affect the starting price from which you  
4 do the HMT.

5 So I think there are two -- there are at least two  
6 factors going on here. One is the price levels point,  
7 and the other is -- and I understand what you are saying  
8 about the difference between the losses to the  
9 hypothetical monopolist versus BT, I obviously  
10 I understand what you are saying, but there are two  
11 factors in this.

12 MR BEARD: I agree, and I was essentially putting on board  
13 that we cannot move as a matter of I think either  
14 economics or law into the territory of assuming  
15 the prices that were being charged, even if they were to  
16 be higher than those that would be charged by  
17 a hypothetical monopolist who did not have a recapture  
18 incentive, are then to be treated as not competitive for  
19 the purposes of essentially the cellophane fallacy test.

20 But there is a further point, of course, which is  
21 that actually, in relation to the CLA, what Dr Jenkins  
22 does is she then takes the -- essentially applies very  
23 significant discounts in her sensitivities, because she  
24 takes HPS and then she takes commitments prices in  
25 relation to her analysis.

1           So I am concerned about jumping too far ahead  
2 because, again, without wanting to sound stuck  
3 record-ish, the question is: "has Mr Parker and the  
4 Class Representative made out their case in relation to  
5 narrow market definition?" and the point I am making is  
6 there is a massive hole in their case because he did not  
7 carry it out properly, taking into account the recapture  
8 incentive.

9           To some extent, I am going to stop there, the fact  
10 that Dr Jenkins then goes on and actually does something  
11 with the CLA and then controls for cellophane fallacy;  
12 and we all know these are not perfect controls, you  
13 cannot ever completely isolate these issues. That is --  
14 we are not in that territory, we recognise that. But  
15 the question is: does that give you further confidence?  
16 And the answer is obviously yes.

17           But the prior point is: did Mr Parker have  
18 a problem? Yes, he had a huge problem that he did not  
19 properly recognise in the way that he carried out this  
20 analysis. But it is not really a proper HMT analysis,  
21 because all he does is say, well, look, these prices are  
22 quite high and they stay high even though they are  
23 switching, but that is not actually an HMT analysis  
24 being carried out properly.

25           So the flaws there are many and multifarious. If

1           you are asking can you, as a Tribunal, say: no, no, on  
2           the balance of probability he has shown a narrow market.  
3           You cannot do that on the basis of what he has done  
4           here.

5           As I say, you have obviously got the further issue  
6           that if you had the strong version of the incentive then  
7           you have actually got a further issue that there was  
8           a positive desire, not just to retain customers but  
9           shift them over, which is what the evidence shows. But  
10          the key point that we are emphasising here is that the  
11          fact that BT did want to encourage customers to migrate,  
12          that did not cause BT to increase its prices. It did  
13          mean that you would want to keep the jump between SFV  
14          prices and bundle prices tight, that is undoubtedly  
15          right, and that incentive is obviously very, very  
16          different from the one that the hypothetical monopolist  
17          has, where the hypothetical monopolist will actually  
18          want to discourage switching, which is essentially the  
19          point, sir, that you are making.

20         MR RIDYARD: Just on the strong version of the recapture  
21          point, there is something which is quite curious about  
22          saying it is more profitable for BT to sell bundles than  
23          to sell Voice Only. One of the few sort of -- or one of  
24          the key sort of common points is we know that the bundle  
25          market is competitive, so we know bundle pricing is

1 competitive. That is a nice fixed point to latch on to  
2 in lots of this analysis. But if the bundle price is  
3 less profitable to BT, sorry, is more profitable to BT  
4 than the standalone price, and the bundle price is  
5 competitive, then the standalone price cannot be  
6 supra-competitive, can it? You probably agree with that  
7 proposition.

8 MR BEARD: I do not struggle with those sorts of  
9 propositions, no.

10 MR RIDYARD: But it is not a proposition you have ever made?

11 MR BEARD: I do not believe we have. I am going to defer to  
12 those behind me. But I can see the logic of what you  
13 are saying.

14 Obviously what we have done is we have analysed the  
15 dynamics of the market as a whole and looked at the  
16 strategy overall in those circumstances. That is right.

17 MR RIDYARD: You might want to just think about it --

18 MR BEARD: Yes, we will think about it further.

19 MR RIDYARD: It did strike me as a curious feature.

20 MR BEARD: I understood what you were saying, sir, but, yes.

21 I do not think -- my industrial economics is not quite  
22 good enough to be entirely confident to concur with --

23 MR RIDYARD: Fine, okay. Talk to your friends.

24 MR BEARD: Yes, my friends who know, exactly.

25 But yes, in terms of gross margin I can see that is

1 necessarily the case. I guess you might have issues in  
2 relation to the longevity as well, but you would change  
3 the dynamics there as well. But I am not going to argue  
4 against myself.

5 So the central problem, the conceptual flaw in  
6 relation to Mr Parker's basic approach is very, very  
7 clear. He cannot use this specification of actual  
8 prices from BT, treat them as a hypothetical monopolist,  
9 and say, well, that shows that the hypothetical  
10 monopolist faces no material constraints such -- from  
11 bundles, such that it is a narrow market. It just fails  
12 as a piece of evidence.

13 Really the resort to the hypothetical multi-product  
14 monopolist test is, I am sure Mr Parker would not say  
15 so, but it is implicitly an admission that there is  
16 a serious flaw here.

17 It is worth just picking up his fifth report, it is  
18 at {E/5.1/3}. It says it is dated 6 February. I seem  
19 to remember it coming in somewhat later, a couple of  
20 days later, but that does not matter. It was long after  
21 openings, long after the joint statement, and so on.

22 Just look at the instructions:

23 "I am instructed by [solicitors] to provide  
24 additional evidence on two points arising out of the  
25 questions posed by Mr Ridyard."

1           The first is:

2           "The appropriate test for market definition in  
3 a situation where BT provides multiple products."

4           Now, with the greatest of respect, this is something  
5 of an odd idea, after openings, that you ask your expert  
6 to provide an opinion on market definition for a company  
7 that provides multiple products when it has been fairly  
8 clear for quite a long time that BT does do that.  
9           Indeed, in the JES and in Mr Parker's own fourth report  
10 he explicitly recognises that BT is a multi-product  
11 firm, and yet, throughout all of that, multi-product  
12 forms no part of his analysis.

13           Now, if we just work our way down this report, if we  
14 go to page {E/5.1/4}, you will see there "Market  
15 definition in a multi-product context", and then you  
16 have the introduction.

17           This Damascene conversion to a new M was triggered  
18 apparently by Mr Ridyard's questions, and I mean that --  
19 there is no criticism of Mr Ridyard's questions, I am  
20 just saying that this is so blindingly obvious as an  
21 issue that for an expert not to have engaged with it  
22 throughout the process is quite remarkable.

23           But leave that to one side. We then have at 2.1.2  
24 references to the Merger Guidelines, the Salop, Moresi  
25 and Woodbury article, the Niels and ten Kate article,

1 and Jenkins, Niels and Kavanagh book.

2 At 2.1.3:

3 "These authors show that in a multi-product context  
4 where firms provide substitute products, the  
5 Hypothetical Monopolist Test ... if not appropriately  
6 adjusted, gives rise to overly wide markets, because it  
7 assumes the Hypothetical Monopolist only produces  
8 a single product, while in reality multi-product firms  
9 will take into account any incentives that arise from  
10 the possibility of recapture."

11 Well, yes.

12 Then if we go over the page, {E/5.1/5}, 2.1.5:

13 "While I consider this terminology to be  
14 interchangeable ..."

15 Because he refers to various bits of material he has  
16 cited above.

17 "... I consider that it is simpler to describe two  
18 concepts: the hypothetical single-product monopolist  
19 used in the usual single-product HMT ..."

20 And I interpolate in parentheses: everything  
21 Mr Parker has done up to that point, and the basis on  
22 which the whole case was opened.

23 "... and the hypothetical multi-product monopolist  
24 that should be used in the multi-product context."

25 So it is a different test that is being put forward.

1           Now, it is not something that is referred to in any  
2 of the CMA Guidelines or the Commission notice, and  
3 I think it is common ground that if this Tribunal were  
4 to start using the hypothetical multi-product monopolist  
5 test it would undoubtedly, I think, be the first time  
6 that this had ever been used in any sort of antitrust  
7 case.

8           But leave aside all of that, because novelty is not  
9 necessarily an impediment to submission, there is  
10 a much, much bigger issue here. It is totally useless  
11 for identifying the market definition in this case.

12           If we could turn up our submissions at {A/16/78}.  
13 I am sorry, {A/16/79}. I apologise, my notes may be  
14 a page out. It is paragraphs 314 and 315. What the  
15 hypothetical multi-product monopolist test tells us, and  
16 let us just assume for the basis of simplicity that the  
17 multi-product firm we are talking about, BT, just does  
18 SFV services and bundles, we will leave aside the mobile  
19 and all that and so on for a moment, you monopolise all  
20 of the SFV services and all of the bundles and then ask  
21 yourself: could you raise the price of the SFV services  
22 by a small but significant non-transitory amount?

23           Now, the first and most simple way of putting this  
24 is you have already bolted the two markets together. So  
25 testing whether or not they are separate markets or

1 a single market, you have essentially stopped that  
2 happening properly. But let us just play the HMMT game.  
3 You ask yourself, if you are the -- with this  
4 hypothetical monopolist of both services and bundles,  
5 whether or not that hypothetical monopolist could raise  
6 the price of just the SFV services. Now, unless the  
7 bundles are significantly less profitable for the  
8 monopolist than the SFV services, if people switch to  
9 bundles in response to the price rise that will always  
10 be profitable.

11 It is more perverse than that: the more the products  
12 are substitutes for one another, the more likely it is  
13 you end up with a narrow market definition with the  
14 HMMT. Because the more substitutable they are, the more  
15 the diversion from the SFV services to the bundles will  
16 occur and you will get the recapture incentive.

17 Let me illustrate it. Two substitutes, super close  
18 to one another, coke in a red can, coke in a green can.  
19 You only have different coloured cans, effectively.  
20 They could not be effectively closer substitutes. If  
21 you apply the hypothetical monopolist test to red can  
22 coke and you try and push the price up, then you expect  
23 lots and lots of people are going to switch to green can  
24 coke, and therefore you will not be able to profitably  
25 maintain that small but significant non-transitory

1           increase in price.

2           If, on the other hand, you are the hypothetical  
3 multi-product monopolist of both red can and green can,  
4 what happens if you control both and you move the price  
5 of the red can up by a small amount? Well, most people  
6 may well switch to green can coke, because green can  
7 coke is the next closest substitute. They do not want  
8 to go to lemonade or Irn-Bru or whatever else. So  
9 actually the hypothetical multi-product monopolist will  
10 have very good reasons why they push the red can coke  
11 up, because effectively they capture all of the benefits  
12 of everyone switching to the nearest substitute and the  
13 increase in profits on the red can.

14           So there is something profoundly perverse about the  
15 HMMT. The closer the apparent substitutability of the  
16 product, the more likely you will end up finding  
17 a narrow market definition for red can only if you use  
18 the test this way, and that is obviously incoherent and  
19 wrong.

20           It is not a tool for market definition in these  
21 circumstances. Indeed, the papers that are referred to  
22 explain how the more close substitutes the products are  
23 that you are including within the multi-product  
24 monopoly, the more likely it is you will get the narrow  
25 market definition. The more they are not substitutes,

1 they are just complements, the less you will find that.

2 So the question is immediately posed: why on earth  
3 has anyone ever conjured with this idea? The reason is  
4 mergers. That is why it is a useful tool, effectively.  
5 Because if you are thinking about whether or not red can  
6 coke company and green can coke company should be  
7 allowed to merge, one of the things you are interested  
8 in is whether or not the merged entity could raise one  
9 or other of its products' prices above a competitive  
10 level, and at that point you think, well, I am thinking  
11 about these two separate companies coming together, let  
12 us run the hypothetical multi-product monopolist test  
13 and let us see what outcome we get, because that gives  
14 us an indication of upward pricing pressure post the  
15 merger in relation to the products we are talking about.

16 If we go to {E/18.1/9}, this is actually Dr Jenkins'  
17 third report that responds to the HMMT material. I do  
18 not think Ms Kreisberger necessarily went to this. But  
19 this explains how -- you see at 3B.1 that the HMMT or  
20 the HCT, because it is sometimes referred to as a  
21 hypothetical cartel test, has been developed in the  
22 context of merger control, and obviously that is just  
23 not an issue in this case, and instead ...

24 So the basic proposition is Mr Parker has  
25 a fundamental problem with his market definition

1 approach. He does not solve it with a multi-product  
2 monopoly test. The fact that it was introduced at this  
3 last minute is notable in and of itself, but it does not  
4 solve the problems in the slightest.

5 Dr Jenkins explains why you have the Multi-Product  
6 Monopoly test, it is for merger control, it does not  
7 work here, and the only criticism that Ms Kreisberger  
8 had seemed to be able to raise was that Dr Jenkins had  
9 previously referred to this in her book but had not  
10 discussed it further.

11 Well, because it is totally useless here it is  
12 a difficult criticism to level at Dr Jenkins in this  
13 context, and the fact that Mr Parker had never raised it  
14 previously also makes it not really a good criticism of  
15 Dr Jenkins that she had not engaged with these issues.  
16 But in fact, if you look at the bits of her book that  
17 Ms Kreisberger referred to, and refers to in the  
18 submissions, what that does is it does not say you  
19 should use it for this sort of market definition  
20 exercise, and that is obviously completely coherent with  
21 the evidence that has been given by Dr Jenkins in her  
22 third report.

23 I can go to the book but I am not sure it takes us  
24 much further in relation to this.

25 MR RIDYARD: Just one ... If we resist the temptation to

1           innovate and stick with the good old HMT, should we  
2           nevertheless take into account the recapture incentive  
3           when we think about BT's dominance, because if we have  
4           done the HMT based on the hypothetical monopolist, BT is  
5           different from that because it does have recapture  
6           incentive, and that might make it more inclined to raise  
7           the price in the focal product than a firm that did not  
8           have that recapture incentive.

9           MR BEARD: There is a kind of like logical issue here,  
10           obviously, because you do not have dominance unless you  
11           have got a narrow market definition to start with, so  
12           you have -- this is part of the point about do not do  
13           backwards reasoning here.

14                    The issue is: have you got a narrow market  
15           definition, has it been proved by Mr Parker and the  
16           Class Representative --

17           MR RIDYARD: Yes, we understand this.

18           MR BEARD: -- at which point you do not have dominance.

19                    I understand the sort of --

20           MR RIDYARD: We know all your problems are solved by that,  
21           if that was the conclusion. But if for some strange  
22           reason we did not come to that conclusion, we were on  
23           a narrow market definition, my question would then  
24           stand, would it not?

25           MR BEARD: I guess it might, yes. I think that is probably

1 fair. But unfortunately I am not sure that, although  
2 they say that consistency is the hobgoblin of a small  
3 mind, I am struggling to see how you actually hold that  
4 together in those circumstances, because you would have  
5 had to have reached such radical conclusions in relation  
6 to the analysis of these issues in relation to recapture  
7 incentive and what Mr Parker has put forward. I do not  
8 think I could avoid those sorts of matters being  
9 potentially relevant in relation to questions of  
10 dominance.

11 MR RIDYARD: Okay.

12 MR BEARD: I am not going to deal with issues of obduracy  
13 that Ms Kreisberger put in relation to the HMMT. She  
14 kept saying it was not new, it was not controversial.  
15 I mean, there really was analysis in one bland flavour  
16 to a number of those submissions.

17 Dr Jenkins was not obdurate or blinkered about the  
18 way she considered these things; she recognised it was  
19 just hopeless.

20 There is one other point I guess I ought to pick up,  
21 which is the suggestion that somehow Ofcom had been  
22 referring to the HMMT in its provisional conclusions.  
23 I will just pick this up at {C/1/24}. This is at 3.36  
24 in Ofcom's Provisional Conclusions. This is about  
25 Voice Only Customers.

1           If we just go over the page, {C/1/25}, I think it is  
2           at 3.36.5. If we could just blow up the top for the  
3           minute.

4           What is said here is:

5           "We also note that all providers of SFV access to  
6           Voice Only Customers also offer Dual Play bundles.  
7           A hypothetical monopolist provider of SFV access to  
8           Voice Only Customers could therefore expect that if any  
9           of these customers switched to Dual Play in response to  
10          a SSNIP, some of these would switch to its own (the  
11          hypothetical monopolist's) Dual Play service. Offering  
12          competitive Dual Play prices alongside line rental price  
13          increases may be a more effective way for SFV suppliers  
14          ... to compete for Voice Only Customers who are  
15          considering buying fixed broadband as well ... This  
16          would be consistent with the historical pattern of price  
17          changes."

18          I think what is said by the CR is: aha, there is  
19          a reference here to the hypothetical monopolist,  
20          Dual Play services and the notion of a recapture  
21          incentive. You can see it. But nowhere in any of the  
22          materials that have been referred to, in 2017, in 2013,  
23          in 2009, is there anything other than a hypothetical  
24          monopolist test-type analysis whether for dominance or  
25          in relation to significant market power.

1           So it does not carry out an HMMT, and actually you  
2           can tell this if you actually look at footnote 39 down  
3           at the bottom of the page, because footnote 39 says:

4           "The extent of this [so this is presumably the  
5           recapture incentive] would depend on (a) the  
6           competitiveness of the hypothetical monopolist's  
7           Dual Play offers and its prominence in the Dual Play  
8           market, and (b) the extent to which its  
9           Voice Only Customers contacted it before switching,  
10          giving it the opportunity to upsell them to a Dual Play  
11          as a retention activity."

12          With the greatest of respect to Ofcom, that is not  
13          really a coherent position, because what it is  
14          hypothesising is a hypothetical monopolist of SFV  
15          services that has a rump of Dual Play services that is  
16          somehow competing in a market, that is not an HMMT test,  
17          because obviously an HMMT test would have you  
18          monopolising both.

19          So they are not doing that, Ofcom just are not doing  
20          that, which is entirely consistent with the references  
21          to HMT which you see throughout it, but actually there  
22          is a question of quite what it was doing there.

23          Anyway, that I think takes me through to the three  
24          categories of evidence that Mr Parker sought to rely  
25          upon.

1           I just would like to stress before I get to those:  
2           so fundamental are the flaws that we have encountered so  
3           far that there is just not a good basis for this narrow  
4           market definition. We will then see how this data that  
5           is put forward does not assist, but it is very important  
6           to recognise that the whole conceptual approach here is  
7           wrong.

8           So we have what was referred to as the SSNIP  
9           triptych by Ms Kreisberger, which is the price  
10          differential analysis, the line rental prices and the  
11          ARPM data. I am just going to briefly go through,  
12          because we have covered this in our written submissions,  
13          but I am going to go through and just show how none of  
14          these are remotely close to showing how there would be  
15          any sort of narrow market definition.

16          So let us start with the price differential  
17          analysis. Ms Kreisberger on Monday said it was "a very  
18          serious lacuna" on the part of Dr Jenkins for refusing  
19          to engage with Mr Parker's SPC price differential  
20          analysis, "a very serious lacuna".

21          Right, let us go to {E/18/36}. So Dr Jenkins'  
22          second report. What Dr Jenkins there says is:

23                 "Rather than engaging with this evidence of consumer  
24                 switching and considering whether the levels of  
25                 switching away might be sufficient to make a price

1 increase unprofitable for a hypothetical monopolist,  
2 Mr Parker has drawn inferences from BT's pricing  
3 decisions ... However, these inferences represent  
4 a conceptual error by Mr Parker. Essentially, Mr Parker  
5 infers from BT's decision to implement and maintain:

6 "(a) a price increase larger than a [5-10%] SSNIP  
7 for SFV services, and

8 "(b) a price differential larger than a SSNIP  
9 between the combination of SFV services and standalone  
10 broadband ... and Dual Play ... on the other hand."

11 She does not go on, but -- sorry, at 3.24:

12 "That consumer switching was insufficient to prevent  
13 BT from implementing a SSNIP."

14 Now, she is really engaging with that material. She  
15 is saying it is conceptually flawed to do this.

16 If we go on to paragraph 3.68, which is at page  
17 {E/18/56}. I am sorry, let us just -- no. Sorry, could  
18 we just go back to page 37, I am so sorry. {E/18/37}.  
19 So down through to 3.26. She is explaining how she does  
20 not consider that any of this material was relevant.

21 If you now go to page {E/18/57}. You will see there  
22 this is under the heading of "Price dispersion":

23 "Implicit in Mr Parker's inference on the basis of  
24 observing price gaps greater than the SSNIP that there  
25 are separate markets for SFV services and fixed voice

1 services purchased as part of a bundle, is a suggestion  
2 that the existence of large price differences in general  
3 is suggestive of separate markets. However, as  
4 I discussed in my first report, price dispersion does  
5 not necessarily suggest separate markets.

6 "Indeed, numerous economists ..."

7 There is the OFT guidance.

8 If we go down to 3.71:

9 "Similarly, in an influential textbook on  
10 competition policy, the former Chief Economist at the  
11 European Commission, Massimo Motta wrote:

12 "'The theoretical basis... is the idea that two  
13 products in the same market will tend to have the same  
14 price. One might then be tempted not only to look at  
15 whether price changes are similar ... but also at  
16 whether price levels of the two products are similar ...

17 "'However, using price differences as a criterion to  
18 define the relevant market is unsound. Recall that  
19 ultimately what we are interested in is the extent to  
20 which a product exerts a competitive constraint on the  
21 other (as expressed by the hypothetical monopolist test)  
22 but price differences do not give us any information on  
23 this point.'"

24 The literature is super clear about this. So  
25 Dr Jenkins was taking these points into account. She

1 was not ignoring the price differential analysis. It  
2 was suggested that Dr Jenkins had not highlighted this  
3 point. Just to pick this up in the Joint Experts'  
4 Statement. So this is {E/49/54}. The proposition at  
5 5.2.5 that Ms Kreisberger went to was:

6 "The amount paid by BT Split Purchase Customers for  
7 SFV access and separate standalone broadband is larger  
8 than the amount paid by customers who purchased  
9 functionally equivalent Dual Play-play bundles by an  
10 amount greater than a SSNIP."

11 So it is a factual point that is being put there in  
12 the Joint Experts' Statement. It is not engaging with  
13 the broader issues that Dr Jenkins has highlighted about  
14 the flaws in even trying to carry out that sort of  
15 analysis. She just says:

16 "I am not in a position to agree or disagree."

17 She does not engage with the numbers because she  
18 just thinks this is a waste of time.

19 "I have no reason to doubt the numbers reported by  
20 Mr Parker ..."

21 I will come on to that in a minute.

22 "... but note that this data does not cover every  
23 provider of standalone broadband. Additionally price  
24 list comparison may not capture the actual pricing  
25 offers made by rivals."



1 cross-examination.

2 Just before we finished, I was talking about why,  
3 conceptually, just taking price differential information  
4 is not informative, and the literature says so, but  
5 nonetheless I will go to the price differential chart  
6 that Mr Parker referred to.

7 So that is {IR-E/3/80}. If we can zoom up. So this  
8 is Figure 7, so this is the standard broadband figure  
9 that Mr Parker relied on, and you will recall that it  
10 says:

11 "Total prices paid by Split Purchase Customers and  
12 Dual Play Customers ..."

13 So the red squares at the top are Split Purchase  
14 Customers, then you have TalkTalk -- sorry, let me take  
15 that again.

16 The red squares at the top are not all Split  
17 Purchase Customers, they are BT split service customers.  
18 The green dots are Split Purchase Customers buying fixed  
19 voice from BT and broadband from TalkTalk. Then the  
20 blue diamonds and yellow triangles are average list  
21 prices and average promotional prices for Dual Play  
22 bundles, that is broadly what is headlined.

23 Obviously there are very, very significant flaws  
24 with this, quite apart from the basic proposition that  
25 just looking at prices does not -- comparing prices does

1 not tell you anything.

2 First of all, the red squares are only BT's split  
3 service customers, so that is around 20% of the SPCs.  
4 Second of all, in relation to that, as was explored in  
5 cross-examination, although Mr Parker really did not  
6 know all the details of how the numbers were calculated  
7 here, it was plain that these red squares he did know  
8 were the average of BT's split service prices, not the  
9 cheapest of them.

10 The reason that mattered is because the comparison  
11 is being drawn on its face between red squares at the  
12 top and blue diamonds and yellow triangles lower down  
13 which, it transpired, are averages of the cheapest  
14 available bundles.

15 THE CHAIRMAN: Sorry, the comparison with the blue and the  
16 yellow are the cheapest ones.

17 MR BEARD: Yes, so what was done for blue and yellow, as it  
18 transpires, I can take you through the notes, but  
19 I think Mr Parker accepted this under cross-examination,  
20 these are average prices out in the market, but what is  
21 taken is the average cheapest price from the other  
22 providers, and that is up to Q1 2017, and then there is  
23 actually a change in methodology in Q2 2017.

24 But one of the points we made was that if you are  
25 trying to point out that there is some supposed gap

1           between SPC prices and Dual Play prices, first of all,  
2           you are starting with a small subset which is the red  
3           dots. Second of all, you are comparing an average of  
4           a range of prices for those red dots with the average of  
5           cheapest prices for the blue diamonds and yellow  
6           triangles, and that is just not like for like. You  
7           should at least have put the cheapest split service  
8           prices in on the red --

9           THE CHAIRMAN: On the red squares.

10          MR BEARD: Yes, exactly.

11                 Then in relation to the blue diamonds and the yellow  
12           triangles, because they are averages, actually what they  
13           are concealing is a vast range of prices in relation to  
14           these Dual Play bundles that are offered out in the  
15           market. So they are only the cheapest prices but that  
16           would still conceal a spread of prices, and if you did  
17           not take the cheapest prices but you, for instance, took  
18           mean or median prices, you would expand it further.

19          THE CHAIRMAN: Now, the average cheapest means you take the  
20           cheapest offering from the range of other providers --

21          MR BEARD: Yes.

22          THE CHAIRMAN: -- and then you average them out across the  
23           providers.

24          MR BEARD: Yes.

25          THE CHAIRMAN: So you say it would be possible in any given

1 case that one of the providers was offering something  
2 cheaper than the average across the providers. Is that  
3 the point you are making?

4 MR BEARD: Yes. Well, I am making two points. One is if  
5 you are going to compare -- let us just focus on the  
6 blue diamonds for simplicity, it does not matter, and  
7 the red squares.

8 THE CHAIRMAN: I have got your like-for-like point.  
9 I understand that.

10 MR BEARD: Fine, you have got the like-for-like point. So  
11 the next one is, if you are looking at an average of  
12 cheapest you are going to get a spread of prices both  
13 below and above the blue diamonds. It is just  
14 a function of an average. I mean, it is not a very  
15 sophisticated point but it is a meaningful one here.

16 But it is not just that, you are dealing with an  
17 average of the cheapest, so actually the spread could be  
18 wider if those same providers provide a range of  
19 Dual Play prices.

20 MR RIDYARD: What do we know about the difference between  
21 the promotional bundle prices and the back book bundle  
22 prices?

23 MR BEARD: When you say "what do we know about", I am not  
24 sure ...

25 MR RIDYARD: Do we have data on -- so when you say these are

1           the average of the cheapest, they are the average of the  
2           promotional bundles, are they?

3       MR BEARD: They are the cheapest as well for the first  
4           period. It changes in Q2 2017, but in that first period  
5           it is the average -- you can see this just from the  
6           notes below.

7       MR RIDYARD: Yes. But do we know how much more expensive  
8           the bundles are when they are not on promotion?  
9           Presumably ...

10      MR BEARD: No. This was part of the problem. Mr Parker  
11           puts this forward as the purest form of data to use,  
12           with no sense of irony, and yet he does not actually  
13           know this sort of thing, and it became clear that  
14           actually when I was asking him about how his averages  
15           were created and where the data was from, he did not  
16           know, he had just taken it from Ofcom material.

17           So he cannot answer; and even if I could, I mean, it  
18           is actually for him to answer, not me. But I cannot, is  
19           the short answer, I am sorry.

20      MR RIDYARD: I wondered whether, on the record, there was  
21           something showing the difference between ...

22      MR BEARD: There will be -- we can go to a table which shows  
23           some differences between the back book and front book  
24           prices, because that was one of the tables I took  
25           Mr Parker to that had the Sky prices in. So there is

1           some material there, but it is not clear that that  
2           material correlates to these tables. All I would be  
3           doing is showing you there is a price dispersion in  
4           a different table. I could not correlate it to this.  
5           I am sorry, but ...

6           I mean, this is why this is not pure in any event.  
7           You cannot put this forward as your purest form of data  
8           when you do not know how all of this is calculated.

9           More particularly, as I say, when what you are doing  
10          is saying: "look, look, there is a big gap between the  
11          blue and the yellow and the red and green", and actually  
12          the blue is not just a series of dots, it is actually  
13          a spread of prices, and that spread of prices has in  
14          fact been skewed downwards by reference to the cheapest  
15          bundles, then in those circumstances you are not getting  
16          anything from this. It is far from pure.

17          The further point that we have in relation to it is  
18          of course we know from the evidence that very large  
19          numbers of people had Sky TV who were also BT voice  
20          customers. Mr Bunt gave evidence that he thought that  
21          the reason why people stuck with -- actually did do  
22          split purchase was because they were getting a really  
23          good deal on the broadband/TV bit of their bundle from  
24          Sky. I mean, we also know that Sky then tried to lure  
25          the customers across into a full bundle involving line

1 rental as well, we know that.

2 But the point that was made was that so far as BT  
3 was concerned, Sky was, you know, a very powerful  
4 predatory force here, and there is no Sky data. You  
5 will recall that Mr Parker said, well, we asked Sky and  
6 they did not disclose it. But when we actually look  
7 back at the Ofcom material, there were Sky price points  
8 in there and they were much lower than TalkTalk price  
9 points.

10 So the point was that as an SPC customer you could  
11 take the BT landline and Sky broadband and you would be  
12 at about the same price as or close to the price of the  
13 blue and yellow Dual Play prices.

14 At that point, this idea that there were huge gaps  
15 across the market just is not made out. What you have  
16 is wide price dispersion across the market and some of  
17 those prices are undoubtedly lower for Dual Play bundles  
18 than some of the higher SPC prices, including some of  
19 the BT split service prices, to which he shrugged to  
20 some extent.

21 I mean, that is just not telling you anything.  
22 There is nothing wrong with price dispersion in  
23 a market. It is only when you move to Mr Parker's  
24 austere theory that in a competitive market everything  
25 should drive itself down to zero cost, and you just do

1 not get price dispersion, that you would read anything  
2 into it. But that is just a wrong theoretical construct  
3 being imposed on a real market.

4 Now, to sort of illustrate the fundamental flaws in  
5 this, if we go to {A/16/60}, and can we split? Could  
6 we ... maybe 61? {A/16/61}. Yes, could we have the top  
7 half of that and the previous thing on the same page.  
8 On the other side could we have {E/3/80} on the  
9 left-hand side, is that possible? Right, brilliant.  
10 That is fab.

11 It takes a bit of staring, but essentially -- and  
12 I should stress Ms Kreisberger said this new material,  
13 new Figure 7, must come from Dr Jenkins. No economists  
14 were harmed in the making of this, this was actually  
15 done by lawyers, so obviously one places a proper caveat  
16 in relation to it. But it is illustrating the issue,  
17 because what you see on the left-hand side is Figure 7,  
18 and on the right-hand side the dots in Figure 7 are all  
19 replicated. You see that, red squares, green dots, blue  
20 diamonds, yellow triangles.

21 THE CHAIRMAN: Yes.

22 MR BEARD: But what is also included there in the middle are  
23 those Sky price points which, as I say, are very close  
24 to the range of bundle prices. But you have also got  
25 a sort of smeary effect, if I can put it in

1 non-technical terms, because you have got a sort of blue  
2 smear and a yellow smear, and what those smears are  
3 doing is just looking at the range of data that, just as  
4 lawyers, we were able to identify that had gone into  
5 those averages -- that go into those prices.

6 So we do not know how the averages were created, but  
7 we can find some price points for back book bundle  
8 prices, promo bundle prices, cheapest and most  
9 expensive, mostly, it must be said, from Mr Parker's own  
10 data pack at {E/16.49/1}, but we do not need to go to  
11 it, and there is some BT data from tariff documents.

12 But even just doing that very limited exercise, what  
13 you see is a big spread of prices both for promo and for  
14 out of contract prices, and it just illustrates the  
15 point that you have this spread across the market of  
16 a range of prices for Dual Play bundles, many of which  
17 are close to and sometimes above the prices for SPCs.

18 So if you look at the blue band, for example, that  
19 is just capturing a range of Dual Play bundle prices,  
20 and you will see the Sky SPC prices are situated right  
21 in the middle of it. Then the yellow is the promo  
22 prices and it is actually very close to that.

23 Just to be clear, so that you understand the  
24 diagram, the empty red squares at the top, they are  
25 actually the cheapest BT split service prices. So that

1 is correcting the sort of like-for-like issue to some  
2 extent.

3 But this is just illustrating why this is unsound.  
4 So we have dealt with the conceptual problems with  
5 Mr Parker's market definition, and then he says this is  
6 the purest data, and, when questioned about it, he could  
7 not actually unpack it because it was just shipped from  
8 Ofcom.

9 But when you just look at what that data is saying,  
10 it is actually averages of prices that inevitably cover  
11 a wide spread, and therefore you look at that diagram  
12 and you say, well, can I say that SPC prices, and I do  
13 not just mean split service but I mean SPC prices, are  
14 kind of substantially higher than bundle prices? You  
15 just cannot even get that from that sort of diagram.

16 THE CHAIRMAN: Just remind me, I think you said it a minute  
17 ago, but where did you get the data from showing the Sky  
18 element of the SPC?

19 MR BEARD: That is from Ofcom material. So I think --  
20 I will double check, but if we go to {C/2/97}, I think  
21 that has some pricing in it.

22 THE CHAIRMAN: But the source is Ofcom anyway, the source is  
23 Ofcom.

24 MR BEARD: For Sky.

25 THE CHAIRMAN: For the Sky data which you fed in to create

1           this broken line.

2           MR BEARD: Yes, for the Sky data it is that, and then for  
3           the tops and bottoms -- I mean, I can give you the  
4           references, but it is taken from Mr Parker's data pack  
5           to find the cheapest blue and yellow and then the most  
6           expensive. I think we -- part of it we drew from BT  
7           data.

8           The point is we are not trying to say we have  
9           comprehensively unpacked the average, because we cannot  
10          possibly do that, because Mr Parker does not know where  
11          it is from and neither do we. The point is the reason  
12          why we put these in is because they are illustrative of  
13          the problem of this sort of analysis.

14          THE CHAIRMAN: Yes.

15          MR BEARD: So to say it is pure in any sense is just -- we  
16          just do not see that as a tenable proposition.

17          MR RIDYARD: Mr Beard, sorry, I might not have been  
18          concentrating enough, but the blue shaded area and the  
19          yellow shaded area, the blue one is representing --  
20          obviously it is representing the standalone option, but  
21          how do you decide --

22          MR BEARD: No, the blue shaded area is the spread of prices  
23          that we have managed to identify that are Dual Play  
24          bundle prices.

25          MR RIDYARD: Bundle prices, I see, yes.

1 MR BEARD: Essentially blowing up the blue diamonds is the  
2 blue spread. Blowing up the yellow triangles is the  
3 yellow spread. Sorry, I was not clear.

4 MR RIDYARD: No, I just was not concentrating.

5 MR BEARD: So that is what we were doing.

6 It is illustrative. We are not saying this is  
7 precise because we do not know the averages, we do not  
8 know the source of the data. But all it is doing is  
9 illustrating in coloured form what is implicit in the  
10 data that Mr Parker was putting forward paragraph.

11 Just on the left of your screen -- actually, sorry,  
12 I should for completeness say we did the same for  
13 Figure 8, which was the superfast broadband, and it is  
14 set out in our submissions, I am not going to repeat all  
15 the points I have made, but those are dealt with in our  
16 closing submissions, and they also deal with Virgin  
17 being in there as well, so Virgin is in there. Yes, it  
18 is the next one over, Figure 8, just over the page.  
19 Thanks. Brilliant, you anticipated it. Yes, there we  
20 go, Figure 8.

21 If we go down to the bottom of the right-hand one,  
22 {E/3/81}. There we go, brilliant. So that is capturing  
23 the same sort of issue but in relation to superfast  
24 broadband. That is all -- it is the same thing going  
25 on.

1 THE CHAIRMAN: Yes.

2 MR BEARD: The difference there is you do not have the green  
3 dots from TalkTalk, you have crosses which are Virgin  
4 superfast.

5 Anyway, as I say, the more detailed discussion of  
6 this runs from paragraph 217 through to 240 in our --  
7 paragraph 240 in our submissions, so that is  
8 {A/16/55-61}, and then there is actually a useful  
9 section on price in workably competitive markets.

10 Can we just, for completeness, go back to the Ofcom  
11 table, I just wanted to show you that, so that is  
12 {C/2/97}, and we can get rid of the sneary diagrams.  
13 Thanks.

14 So this was a table that I took Mr Parker to which  
15 had pricing for "Standalone Fixed Broadband Weighted  
16 Average", so that is the first column, and you see there  
17 you have got some Sky prices at £13 and £20, and so you  
18 can effectively add those to the relevant BT standalone  
19 line rental price to create the SPC prices, which is  
20 what I put to Mr Parker, effectively.

21 I did not have to do any very complicated maths  
22 because it is actually in the second column over, how  
23 that number is calculated, "Standalone Fixed Plus  
24 Broadband". The point I put to Mr Parker was that even  
25 on those numbers which were available to him, you can

1           actually see that the SPC price for 17 megabit unlimited  
2           Sky and BT at £31.99 is actually a lower price than the  
3           BT Dual Play bundle sitting in the third column over,  
4           third row down.

5           So when Mr Parker is saying, well, look, I can see  
6           that SPC prices are way higher than Dual Play bundle  
7           prices, there was material just sitting there in this  
8           data.

9           Sorry, just to pick up Mr Ridyard's point, you can  
10          see between column 3 and column 4, that was what I was  
11          referring to as giving you some indication about  
12          differences between front and back book. But just to be  
13          super clear, I am not saying that those are the numbers  
14          that are generating the averages in the table because we  
15          just do not know. We assume --

16         MR RIDYARD: You mean the Ofcom numbers?

17         MR BEARD: Yes, we do not know how it fits together. It may  
18          well do, it may well be that some of these numbers do  
19          feed into averages in the relevant year in those  
20          Figure 7 and Figure 8 diagrams. I am not -- that would  
21          not be shocking if that were the case, but we just -- we  
22          do not actually know those numbers.

23         THE CHAIRMAN: Right.

24         MR BEARD: Okay.

25         MR RIDYARD: Just a quick question. I mean, I understand

1           what you are saying about the amount of dispersion and  
2           so forth, but are you going so far as to say that you do  
3           not think that bundle prices ought to offer better value  
4           than buying the two bits standalone, or just they do not  
5           always?

6           MR BEARD: It is they do not always. We cannot tell.

7           Generally you would expect that the bundles would offer  
8           better value. I am not demurring on that. But what we  
9           are seeing is that you have just got a much more  
10          complicated situation --

11          MR RIDYARD: Yes, I understand that.

12          MR BEARD: We are not going further than that.

13          MR RIDYARD: Yes.

14          MR BEARD: We have referred to the importance of Sky in this  
15          overall. I mean, it is right that Ofcom did refer to  
16          average comparators in some of this material. We do not  
17          dispute that. But what we say is that when Mr Parker is  
18          taking these numbers and saying: this is the pure data  
19          that shows that you can maintain a SSNIP because of this  
20          differential, we say it is just not -- it is not showing  
21          that. Given that he needs to prove that on the balance  
22          of probabilities, and given that in any event price  
23          differential comparisons are flawed -- "unsound" I think  
24          was Massimo Motta's word -- then in those circumstances  
25          it does not matter, he is not getting close to proving

1 his point.

2 I think there was one point that I should pick up  
3 where there was a suggestion that you could have  
4 legitimate price dispersion where you had different  
5 quality, and obviously you can get different price  
6 dispersion when you get different quality, there is no  
7 dispute about that, and I think reference was made to  
8 Virgin, and there was a suggestion that Virgin was  
9 somehow changing the way that you should analyse this.

10 I just refer you to our submissions at  
11 paragraph 244, which is {A/16/33}, where Virgin itself  
12 spelled out that price dispersion in markets was very  
13 far from alien, whether or not you were dealing with  
14 quality differences, brand differences or whatever else,  
15 and of course what we see is Mr Parker's approach, both  
16 here and as we go into limb 1, effectively ignoring  
17 this.

18 I guess I should pick up the criticism that was made  
19 that I unfairly ambushed Mr Parker with this material,  
20 that I asked him questions about the underlying data and  
21 that that was somehow inappropriate and that this should  
22 all have been flagged by Dr Jenkins beforehand.

23 I have explained why Dr Jenkins said this was just  
24 an unsound exercise. I really do not understand on what  
25 basis it is suggested you cannot cross-examine an

1 expert, when he is specifically relying on data, as to  
2 whether he understands it and what it is concerned with.

3 The judgment referred to is a judgment from the *BGL*  
4 case, and it is {G/81.2/6}, paragraphs 18 and 19. What  
5 was going on there was that there was a criticism of  
6 putting forward a wholesale new econometric model as an  
7 ambush and that was said to be inappropriate:

8 "Normally, advance notice of cross-examination is  
9 not given in proceedings ..."

10 There is an exception in the patents court.

11 "In this sort of case, where the evidence is very  
12 much econometric, the point holds good to even greater  
13 force. The fact is it is quite likely that the analysis  
14 in *Ralston 2* may well be subjected to challenge by the  
15 Respondent, in terms of the production of alternative  
16 analyses which can be put to her for her comment, but  
17 which will require time for her to consider. In other  
18 words, one cannot simply pull, like a rabbit out of a  
19 hat, an analysis, and expect an expert to deal with it  
20 in the course of evidence being given from the witness  
21 box. Advance notice, simply to avoid the wasting of  
22 time, will have to be given."

23 In other words, if you are going to come forward  
24 with a whole new expert analysis and then use that for  
25 cross-examination of an expert, you have to give it

1 earlier. I have no issue with that.

2 THE CHAIRMAN: Yes.

3 MR BEARD: List prices. That was the second of the SSNIP  
4 triptych. It is the line rental prices which  
5 Ms Kreisberger kept on emphasising in opening. I think  
6 it is the table where the line rental prices were just  
7 set out, and she kept saying these are the SSNIPs, this  
8 is compelling. Well, technically lots of them are not  
9 5-10% SSNIPs but we will leave that to one side. It  
10 does not matter. The Class Representative simply does  
11 not have an answer as to why you do not use ARPU here  
12 when you are dealing with the focal product being calls  
13 and line rental. There just is no answer.

14 If we go to our submissions at {A/16/66}. The  
15 proposition is pretty basic. The focal product of  
16 market definition is SFV services, line rental and  
17 access. The best proxy for that price is agreed to be  
18 ARPU. We have cited the JES, {E/49/74} there. It is  
19 accepted for the purposes of limb 1 at least.

20 "Even if one accepts the Class Representative's  
21 premise that market definition (and dominance) can be  
22 judged on the basis of prices alone ..."

23 I go back to all the points I have made previously,  
24 this evidence is misconceived in its usage in any event.

25 "... the relevant question is therefore the rate and

1 scale of the increase in the ARPU ... And data on BT SFV  
2 Services ARPU shows that, contrary to the CR's case,  
3 the price of SFV services did not increase significantly  
4 over time."

5 I will come back to this diagram here in a second,  
6 but if we just flip over the page, {A/16/67}, that is  
7 the claim period ARPU. I guess I should have said IR,  
8 so we can see the confidential. Do you mind going to  
9 {IR-A/16/67}, thanks.

10 So you see the SFV services ARPU is the dark, the  
11 solid black line, and then the SPC SFV services ARPU,  
12 and it is just -- even if you are playing this strange  
13 game of trying to identify 5-10% price increases, you  
14 just do not see it during the claim period on this ARPU.

15 THE CHAIRMAN: But Dr Jenkins just used line rental for her  
16 CLA.

17 MR BEARD: She used it for the CLA, but she is using that  
18 differently, because she is not trying to do any sort of  
19 comparison and say, look, these absolute prices tell you  
20 anything, because she thinks that is the wrong way of  
21 doing things. She also says just changing your prices  
22 as BT, these increments, they do not tell you anything.  
23 That is conceptually flawed too. So she is saying that  
24 is the wrong way of doing things, but if you are going  
25 to do that sort of thing then obviously you have to use

1           ARPU.

2           She then looks at, for her CLA, an interaction  
3           between switching and some sort of data point where you  
4           are trying to find where a change in price might affect  
5           the switching, because that is what you are trying to  
6           identify, and at that point she uses line rental only.

7           But let me --

8           THE CHAIRMAN: If you are coming to her analysis --

9           MR BEARD: I was going to touch on it. I was going to deal  
10          with these points serially, but ...

11          THE CHAIRMAN: Well, please do so.

12          MR BEARD: No, no. Because what she is doing is she is  
13          dealing with the issue of how do I carry out --  
14          Mr Parker has not done anything useful in relation to  
15          HMT, how are we going to think about these things? We  
16          could carry out a critical loss analysis. How am  
17          I going to do that? I have some difficulties with  
18          identifying the relevant calls pricing but I do have  
19          line rentals pricing and I have switching data. So when  
20          I carry out my analysis, the critical loss analysis,  
21          I am going to look at the changes in pricing on line  
22          rental with the levels of change in switching to see if  
23          that is telling us anything at all that suggests  
24          a narrow market.

25          She recognises there are limitations to that, but

1 she says that is the best she can do in order to have an  
2 indication using an orthodox technique, in other words,  
3 a CLA.

4 So it is worth just picking up the transcript. If  
5 we could go to -- well, whilst I am here, let us just  
6 deal with this diagram. So this diagram has the flat  
7 ARPUs. So if Mr Parker is going to think it is in any  
8 way useful to compare price changes of the product and  
9 say those are or are not sustainable SSNIPs, he has to  
10 do it in relation to the product that we are thinking  
11 about in relation to market definition, if he can. He  
12 can, because we have got the ARPUs. The ARPUs do not  
13 show this and therefore they undermine this part of his  
14 evidence.

15 The other thing that he said in relation to it was,  
16 ah well, actually we should go back in time. You know,  
17 it is not just the claim period.

18 Sorry, before I go off here, you see that there are  
19 ARPUs that are indexed off CPI here. If you had just  
20 had CPI increase from 2015 on the ARPU, either straight  
21 CPI or telecom CPI, which is the blue line, that is the  
22 path they would have followed. I just want to be clear  
23 those are not actually ARPU prices, they are simulated  
24 prices.

25 THE CHAIRMAN: Wait a minute, the black line that says "SFV

1 services ARPU", that is the real one.

2 MR BEARD: That is the real one, and it becomes dotted  
3 because it moves from being SFV services involving VOC  
4 and SPC --

5 THE CHAIRMAN: To SPC only.

6 MR BEARD: Yes, that is -- but the black and the dotted line  
7 is the real ARPU price. I just wanted you to be clear  
8 about that. The blue and green are hypothetical prices  
9 if you had taken the 2015/16 ARPU and then just applied  
10 either a straight CPI or a telecom-specific CPI to it.

11 MR RIDYARD: It is a very detailed point, but the figure is  
12 including that, but the table prior to that was  
13 excluding that.

14 MR BEARD: Yes, because it is not completely true. That is  
15 why we cannot actually just sort of cut and shut  
16 together, and we have presented them separately, because  
17 there is that difference. But since what we are talking  
18 about is the overall dynamic --

19 MR RIDYARD: No, I just --

20 MR BEARD: No, your point is completely sound, but that  
21 explains why we did not try to build them together.

22 Let us go back to the previous page, if I may.  
23 {IR-A/16/66}. So this, as Mr Ridyard anticipates, is  
24 a slightly different presentation here, because this is  
25 an excluded VAT, and this has been CPI adjusted for 2016

1 prices, so this has actually been through a deflation  
2 process, effectively. So you are getting real prices  
3 here.

4 MR RIDYARD: So the 2015/16 number of whatever it is, £24,  
5 is the actual number.

6 MR BEARD: Yes, that is how it works, yes, but they are  
7 deflated backwards. But you still see broadly flat,  
8 slightly falling.

9 What you are not seeing is what Mr Parker says is  
10 significant, which is SSNIP increases in relation to the  
11 focal product and them being maintained. There is no  
12 evidence for that.

13 MR RIDYARD: The other way these two periods do seem to  
14 differ a bit from one another is the margins were  
15 increasing in the earlier period when they were not  
16 increasing in the claim period, is that right?

17 MR BEARD: I think that is right, yes. I would have to go  
18 back and check, but I think they go up and then they  
19 flatten off. I think that is true.

20 I mean, there are a whole range of reasons why  
21 looking backwards does not assist, not least because of  
22 course we had reviews in 2009/2013 and there is no  
23 suggestion there was any problem at that point.

24 MR RIDYARD: No, but do you accept that it is reasonable for  
25 the economists to look at periods outside the claim

1           period to understand the relationship between price and  
2           demand, price and quantity?

3       MR BEARD: I do not think I could stand here and say  
4           economists are entirely delimited from looking at  
5           parameters before and after in order to understand how  
6           markets work. I am not afraid of a little hypocrisy,  
7           but given that I started off my submissions talking  
8           about how the market has changed over time, it would be  
9           wrong for me to say you can do it for those purposes but  
10          then ignore any numbers. I do not say anything like  
11          that. That would not be right.

12                But there is something very different here. What  
13           I am saying is even if Mr Parker switches to trying to  
14           refer to things earlier, and I am just going to come  
15           back to this, because it was a criticism of Dr Jenkins  
16           that was totally unfair, that she had not been looking  
17           at the earlier period. Mr Parker focused on the claim  
18           period and put forward the hypothesis that the SSNIPs  
19           were going up during the claim period. Dr Jenkins  
20           turned round and went, no, they are, not when you are  
21           looking at the focal product. But it does not tell you  
22           anything, was her first point, and in any event they are  
23           not. Then he said, oh, no, but actually you should look  
24           beforehand because it has been going on for ages, to  
25           which she says, well, actually when you look at the

1 focal product, it has not.

2 So again, if you are going to go down this line you  
3 should use the right focal product. Mr Parker has not  
4 done. When he does, his propositions fall to pieces.

5 I mean, I can provide you with the references about  
6 the change.

7 THE CHAIRMAN: I just wanted to ask you about that.

8 MR BEARD: Of course.

9 THE CHAIRMAN: I think it is your paragraph 265 where there  
10 is a footnote --

11 MR BEARD: Yes.

12 THE CHAIRMAN: -- which supports the proposition you have  
13 just made, which is that actually, if you look at the  
14 earlier period, ARPU was flat anyway. That is something  
15 that comes from Mr Parker's second report, I think, if  
16 I have got my reference to your footnote correct. Yes,  
17 that is it, 169. {IR-A/16/68} That data, that is sort  
18 of Ofcom originated, is it?

19 MR BEARD: Yes, that table is -- A5.4 is just cut and pasted  
20 from Ofcom.

21 THE CHAIRMAN: That is cut and pasted from -- and he uses  
22 that table as well in his report? I just want to make  
23 sure it is the same thing.

24 MR BEARD: I do not know if he does.

25 THE CHAIRMAN: Right. I mean, I had a quick look back at

1 his second report, just to see where ...

2 MR BEARD: Ms Mackersie says, yes, he does. {E/2/14}.

3 THE CHAIRMAN: Yes, that is the reference that I am --

4 I see, so that is where -- he says what you say he says

5 and then he refers to this diagram.

6 MR BEARD: Yes.

7 THE CHAIRMAN: Right. The source is Ofcom, he says the

8 source is Ofcom.

9 MR BEARD: Actually I am not sure it is exactly the same

10 chart but it does not matter. Look, I am not sure any

11 of this particularly matters, but if you want me -- the

12 criticism that Ms Kreisberger levelled was that she

13 refused to accept under cross-examination that price

14 increases before the claim, which are sustained during

15 the claim period, are relevant to the SSNIP test. When

16 I put that to her on a hypothetical basis, that is

17 a very basic proposition that she did not accept.

18 But the criticism was actually based on the Joint

19 Experts' Statement at 5.2.3. So if we go to {E/49/52},

20 here Dr Jenkins was just commenting on the price rises

21 during the claim period. So it was not that she was

22 resisting it, that is what she was commenting on.

23 But if we then go to {Day12/142:1} in the transcript

24 and pick it up at the bottom -- if we pick it up at

25 line 4:

1           "Question: But by ignoring the 43%, that is how you  
2 can get down to 5.6%. It makes the price increase look  
3 lower, does it not, if you ignore the pre-claim period  
4 price increases?

5           "Answer: I do not believe I am ignoring them, I am  
6 just citing the period that is relevant for this case.

7           "Question: Let us just, to complete the point, look  
8 at SPCs ... 129% ... [it] is significantly above the  
9 level of a SSNIP. I think you already accepted that?

10          "Answer: ... 129% is more than 5-10%."

11          Then it sort of goes on in the same vein.

12          "Question: Let us have a look, staying with this  
13 part of the JES ... Mr Parker's reliance on 55% [across  
14 eight years] ...

15          "Answer: Yes."

16          Then on again:

17          "Question: ... Mr Parker is actually referring to  
18 the 129% ... not your figure of 55%?"

19          If we go over:

20          "Answer: Yes, I think that was a version issue,  
21 because we were turning the joint statement quite  
22 quickly at the end, so I think that is something where  
23 there was an update and I did not pick that up in my  
24 final review. So this was a previous number Mr Parker  
25 had cited in an earlier draft.

1           "Question: So you do not respond to that ... You do  
2 not respond ...

3           "Answer: No, but I guess my answer would be the  
4 same, which is we are only looking at access, so we have  
5 not looked at an ARPU measure which could capture the  
6 calls effects as well. It is over a long period of  
7 time. There may be other factors going on to explain  
8 those price rises which is a matter for ongoing  
9 investigation.

10          "Question: But you have plumped for the lower  
11 figure here ...

12          "Answer: Honestly, that was the number that was in  
13 the previous version of the JES. I would have ...  
14 I think, has he changed the start date, is that what  
15 went on here?"

16          So it was just a version issue. The argument is  
17 completely the same.

18          Yes, so I think there was a suggestion there that  
19 Dr Jenkins was closing her mind to these issues, if we  
20 go over the page. I am sorry, if we go back to  
21 page 141. I am grateful to Ms Mackersie.

22          {Day12/141:18-19}.

23          So she is asked about a 43% increase at the point  
24 that the claim period starts.

25          "Answer: ... I have not got that number in my head,

1 but I accept it.

2 "Question: So in your answer to this question, you  
3 are closing your mind to that 43% increase by the time  
4 of the claim period?

5 "Answer: I am not closing my mind to that, because  
6 that in a sense is the question that we will come to on  
7 the excessiveness of pricing. There could be other  
8 reasons for the increase in price ..."

9 So Ms Kreisberger was putting these large percentage  
10 changes before and after and saying that Dr Jenkins was  
11 not thinking about them or dealing with them. But  
12 actually Dr Jenkins had not only explained why they were  
13 irrelevant, but had explained why there was a slight  
14 mismatch in the joint expert report because of the way  
15 it was turned over.

16 None of this changes the fundamentals here. The  
17 43%, 55%, 129%, these are numbers only related to line  
18 rental and they do not take anyone anywhere.

19 THE CHAIRMAN: Yes.

20 MR BEARD: Then just in relation to the CLA itself, I think  
21 I have probably made the main point here, that having  
22 recognised that -- or having explained how this price  
23 differential analysis is pointless in relation to any  
24 assessment of market definition, what Dr Jenkins did do  
25 was she sought to do something with a CLA to provide

1 some kind of greater rigour in relation to what was  
2 going on in relation to this, even though it is not her  
3 obligation to prove anything.

4 It may well be just worth going to {Day9/167:13}.

5 So there you see she had been talking about the ARPU  
6 and what Mr Parker thinks of switching, and so on, and  
7 then said:

8 "Now, for the analysis I have done [which is the  
9 CLA] just to get that in here before we finish for the  
10 day, is I have used the Line Rental price rises as  
11 a proportion of ARPU, right, and the reason I have done  
12 that is the switching that I am capturing is the choice  
13 by customers to cease being an SFV customer and switch  
14 to Voice in a bundle.

15 "So I think for that decision the relevant question  
16 is the Line Rental price. The call prices will actually  
17 be the same for them, whether they are an SFV or  
18 a bundle customer."

19 Because all the packages are the same, the call  
20 packages are the same, she is saying, well, what I can  
21 test against, because those prices will be the same  
22 whether or not you are SFV or bundle, when I am doing  
23 the CLA, I will just use those price differences in  
24 relation to line rental which I engage with the  
25 switching data on.

1           "Answer: The call prices will actually be the same  
2           for them, whether they are an SFV or a bundle customer.  
3           I have divided by overall ARPU because that is actually  
4           the amount that will be on a customer's bill each month.  
5           It will be the mix of the calls they have made and their  
6           Line Rental charge.

7           "So when they are thinking about, I have got a Line  
8           Rental increase they think of it as a proportion of the  
9           average revenue that they are paying per month.

10          "So I have used that because that is the sort of  
11          push price that is sensible to link to the switching  
12          that I observe and so it is relevant for my analysis.  
13          It is not clear that just taken on its face, I disagree  
14          with Mr Parker's analysis, I do not think you can  
15          conclude anything from those list prices without  
16          thinking through what was the consequence of those price  
17          rises in the market."

18          So it is not that her CLA is completely divorced  
19          from ARPU, but she is using the line rental increases as  
20          the trigger change when she is thinking about how you  
21          analyse the switching data for the purposes of the CLA,  
22          but she is doing so in the context of the overall ARPU  
23          for the customers and taking that into account, as she  
24          has explained here.

25          So it is just doing something different. It is

1 wrong for Ms Kreisberger to say, ah well, Dr Jenkins  
2 used line rental in her CLA and that means it is the  
3 right way of doing things for these comparisons. She  
4 has explained why it is completely useless doing the  
5 SSNIP comparison that Mr Parker has carried out. She  
6 has explained why ARPU is the right way of doing things.  
7 She has then tried to carry out a CLA in relation to  
8 these issues, and she has explained the basis on which  
9 she has done that.

10 THE CHAIRMAN: Yes.

11 MR BEARD: Just in passing, obviously you have this point,  
12 and it is actually touched on in some of the material  
13 I have just gone to with Dr Jenkins, but of course when  
14 you use list price only, it ignores all of the reasons  
15 that have been discussed previously as to why it is that  
16 list prices might have gone up that are not suggesting  
17 a change in the competitive level, involving, for  
18 instance, the fall in call revenues, and so on, and  
19 issues of that sort.

20 We deal with that, for your note, in paragraphs 291  
21 to 293 in our closing submissions under the heading of  
22 "Importance of the wider context", and that is at  
23 {A/16/75}.

24 Now I am just going do deal with the third of the  
25 SSNIP triptych. So as I say, none of the limbs of the

1 SSNIP triptych are appropriate for carrying out an HMT  
2 or proper market definition analysis. The price  
3 differential analysis is also flawed on its data, so is  
4 the reliance on line rental SSNIPs as they are referred  
5 to, and the third piece I am coming to is ARPM, but,  
6 I mean, this is just for completeness.

7 You have our submissions on this. This is at  
8 {A/16/70}, paragraph 273 onwards. You will recall this.

9 The table that, if we go over the page, we can see,  
10 {A/16/71} ... Could we go to the IR version of that.  
11 {IR-A/16/71}.

12 I apologise, we have found that there is  
13 a formatting error. This table appears twice. It  
14 appeared there, and if you go over the page you just get  
15 a bigger version of it but it is exactly the same. It  
16 is just an error in our -- we apologise. {IR-A/16/72}.

17 You will recall what the debate was here. What was  
18 being said by Mr Parker was, well, look, you have got BT  
19 internal data on ARPMs, so pence per minute, and you  
20 have got Ofcom BT data on ARPMs, and they are very close  
21 together, but look at the difference between that and  
22 non-BT Ofcom data. That suggests there is some huge  
23 gulf here that would not be sustainable if you were not  
24 dealing with a narrow market in which you had huge  
25 market power.

1           But Mr Parker never really grappled with what is an  
2           obvious and fundamental problem here, which is that when  
3           you look at the 2020/21/22 figures they are actually  
4           very close between the BT Ofcom data and the BT -- and  
5           the non-BT Ofcom data. So in other words, the ARPMs  
6           that Ofcom are picking up in 2020/21/22 are very, very  
7           similar between non-BT providers and BT.

8           Now, if that is the case, then in those  
9           circumstances it does not tell you -- it does not  
10          suggest, as Mr Parker is suggesting, that somehow BT has  
11          any significant market power and that this is a narrow  
12          market.

13          I go back to the basic proposition, just looking at  
14          these numbers is not the right way of doing this. It  
15          does not help you with market definition, but even taken  
16          that as read these figures obviously undermine  
17          Mr Parker's position. The natural thing to do is to  
18          say, well hang on a second, why has there been this  
19          massive shift between 2019 where there is a huge  
20          differential between the BT Ofcom data and 2020 on the  
21          BT Ofcom data, because those are the key comparators  
22          here.

23          Now, Mr Parker says, well, I can look at the BT  
24          internal data, and Ms Kreisberger says, well, Dr Jenkins  
25          and BT are beginning to deny the veracity of their own

1 internal data. We are not remotely. You know, BT  
2 internal data, fine. What we are concerned about is are  
3 you comparing like with like? Because the concern we  
4 have is that, and Dr Jenkins expressed, is that this  
5 data up to 2019 which is the data that Mr Parker relies  
6 upon in relation to the Ofcom comparison and the BT  
7 internal comparison looks very, very odd.

8 THE CHAIRMAN: Just remind me why you are not, if you are  
9 not, using the BT internal data.

10 MR BEARD: We do not have any problem with BT internal data  
11 but the problem is what is the comparison because we do  
12 not have the non-BT data, we only have the Ofcom version  
13 of non-BT providers' data. What was problematic is, is  
14 the Ofcom cut of non-BT data comparable to what BT are  
15 providing internally?

16 I am going to cut to the chase. The real problem  
17 here is that it turns out that the Ofcom data before  
18 2020 from BT appears to have included packages of calls  
19 and out of package prices. From 2020 onwards it looks  
20 like it is only out of package calls.

21 THE CHAIRMAN: Yes, I follow that, but the reason I was  
22 asking the question is that you say that you do not know  
23 the details of the non-BT Ofcom data, you are not sure  
24 that a direct comparison -- but if you look at the  
25 pre-21 period before there appears to be a switch in the

1 way -- how they dealt with calls or something, that at  
2 least the Ofcom data for BT was not very dissimilar from  
3 BT's own internal data.

4 MR BEARD: No.

5 THE CHAIRMAN: So it suggests that Ofcom were sort of  
6 getting it right, at least in relation to BT then.

7 MR BEARD: So it depends what "right" means here. Because  
8 obviously BT is submitting data to Ofcom. You would not  
9 expect that there is going to be a big difference  
10 between internal BT data and the Ofcom BT data.

11 THE CHAIRMAN: I see.

12 MR BEARD: There might be differences because of years or  
13 even margin issues but you would be shocked if those  
14 were vastly different.

15 THE CHAIRMAN: I see. Right.

16 MR BEARD: Unless Ofcom are capturing something different  
17 from the BT internal data. The problem is because we do  
18 not know what the non-BT data collection was, we  
19 cannot -- we do not have sight of what a relevant  
20 comparator would be because we just do not have that  
21 internal data from Virgin or TalkTalk or anyone else of  
22 that sort.

23 THE CHAIRMAN: Right, thank you.

24 MR RIDYARD: It occurred to me that the increase in the  
25 ARPMs for BT, the early period, seems logical because we

1 know that the revenue per user did not change very much  
2 and we know voice usage went down, so it is kind of sort  
3 of obvious but it is weird that the green bars --  
4 I mean, it is just very strange, is it not, to not know  
5 what is going on with these numbers?

6 MR BEARD: It is so strange that you think this just cannot  
7 be right. Actually Ofcom had provided the datasets in  
8 outline that show at least for aggregate BT material  
9 where this junction has occurred. I am going to ask for  
10 two documents to be put up on the screen at the same  
11 time. So the first one, it is {E/45.91/1}. This is the  
12 telecommunications market data update for Q4 2019. So  
13 this is something that Ofcom publishes relatively  
14 regularly with data in it. On the other side can we put  
15 up {E/45.71/1}. So this is one quarter later. This is  
16 Q1 2020. Same document.

17 In relation to the Q4 2019 one, if we can go to page  
18 {E/45.91/8}. Perhaps unsurprisingly, in the right-hand  
19 one can we go to page {E/45.71/8} as well.

20 What we see here is a summary of residential network  
21 access and calls revenue. That is the table and it is  
22 the same heading on both tables.

23 So if I just focus on the left-hand side you have  
24 got access and calls, 2018/2019. Then Q4 2018 through  
25 to Q4 2019. Then you have got access separately, calls

1 separately, same temporal breakdown.

2 Then if you just look on the right-hand side you  
3 have got the same layout, 2018/2019 but you have just  
4 got all of the quarters bumped forward one because this  
5 of course this is the Q1 2020 update so it has five  
6 quarters going Q1 2019 going to Q1 2020. I think that  
7 is relatively clear.

8 So I am just going to point out where the anomaly  
9 arises here. If you look at Q4 2019 on the left-hand  
10 side, let us just focus on this because that is  
11 effectively the point of this junction that we are  
12 talking about. Q4 2019. If you look at access and  
13 calls it is: all operators, 1,328 million; BT, 522. If  
14 you then go up to just look at 2019 in aggregate you  
15 have got 2,124 for BT for access and calls and just over  
16 5.5 billion for all operators.

17 Then if we go down to the next bit which is access  
18 and that is obviously the rental bit, for BT you have  
19 got 1,539 million for accessing in 2019 and 370 in Q4,  
20 and then for calls you have got 615 in 2019 and 152 in  
21 Q4.

22 If we then go across to the other side to the other  
23 table and look at BT what we have got there is 2.163 in  
24 2019.

25 THE CHAIRMAN: Sorry, in ...

1 MR BEARD: 2.163 is the total across the year.

2 THE CHAIRMAN: Yes, thank you.

3 MR BEARD: So just reading back across that, that is just  
4 a difference of 9 million across 2.1 billion, okay.  
5 Then if we go down to access you have now got 1.627. If  
6 you compare that to the access of 2019 that has changed  
7 by 88 million.

8 THE CHAIRMAN: Not 88 million.

9 MR BEARD: No, sorry, the difference between 1539 on the  
10 left-hand side and 1627 is just 88 million.

11 THE CHAIRMAN: 88 million.

12 MR BEARD: So the point I am making is that overall access  
13 and calls in 2019 has changed by 9 million but access  
14 has gone up by 88 million and then if you go down to  
15 calls you will see what was 615 in 2019 has now become  
16 536, so that has dropped by 79 million. So what has  
17 happened is although the access and calls overall has  
18 only changed by 9 million, access has gone up by nearly  
19 90 million and calls has gone down by about 80 million.

20 What you can then see in the note at the bottom  
21 right-hand corner here, note 2:

22 "The step change in BT's calls and access revenues  
23 in 2019 Q4 is due to a reallocation of revenues."

24 THE CHAIRMAN: Yes.

25 MR BEARD: Now, we did some -- so this is all publicly

1 available but what this effectively does is it explains  
2 why although BT is feeding in the same measure or the  
3 same basis throughout it is Ofcom has shifted things  
4 internally moving from 2019 to 2020.

5 Now, as Dr Jenkins said during the course of dealing  
6 with this in -- I cannot remember if it was hot tub or  
7 cross-examination, but that the only reason one could  
8 think of that being done was in order effectively to  
9 capture consistency for Ofcom because what Ofcom may  
10 well be interested in is comparing different people's  
11 ARPMs. They may well be. But you have got to make sure  
12 you are doing it on a consistent basis.

13 What we think has happened is BT has been submitting  
14 numbers and BT internal numbers include call package  
15 revenues up until 2020 and then after 2020 what is being  
16 broken out is only out of package call revenues and what  
17 has happened is that the call package revenues have been  
18 shifted into access.

19 Now, we are not pretending why that is a sensible  
20 thing to do or we are not trying to justify it, but that  
21 appears to be what has happened. But what we do know is  
22 that there is a significant reallocation that means that  
23 once that reallocation is done by Ofcom the ARPM figures  
24 for 2020 through to 2022 are much, much closer.

25 We have set out what we understand to be the details

1 in a letter which is at {H/251/1}. I will provide you  
2 with the reference and allow you to read through it. We  
3 are not certain what has happened here but we have done  
4 the best we can to work out what this reallocation was  
5 in order to assist the Tribunal.

6 But the key thing here is that Mr Parker's assertion  
7 that you could compare the non-BT ARPMS with the BT  
8 ARPMS, whether Ofcom or internal, pre-2020, is just not  
9 a safe assumption at all. There is good reason to think  
10 that is just flawed. Of course, that makes sense when  
11 you go back and actually look at the ARPU figures that  
12 we have got, because the ARPU figures that we have got,  
13 that I have taken you to, do not suggest that there is  
14 some massive difference here.

15 Anyway ...

16 THE CHAIRMAN: Is that a convenient moment?

17 MR BEARD: It is.

18 THE CHAIRMAN: Thank you.

19 (3.10 pm)

20 (A short break)

21 (3.20 pm)

22 THE CHAIRMAN: Yes.

23 MR BEARD: So I had just been explaining why Mr Parker's  
24 reliance on those ARPM data, just whatever conceptual  
25 issues, clearly highlighted real problems.

1           I think the essence of the problem is he does not  
2 know what is actually in the non-BT Ofcom data, that is  
3 actually the critical thing, so he cannot draw any sort  
4 of sensible comparisons.

5           Just a couple of quick points on calls more  
6 generally before I move on. Once you set aside this  
7 ARPM comparison, which you clearly must, the first  
8 problem for the Class Representative's hypothesis is of  
9 course that -- well, one problem for the Class  
10 Representative's hypothesis that BT prices were -- it  
11 was pricing its calls above the competitive level means  
12 that you do not have any basis for that element of the  
13 claim at all, because of course what you are looking at  
14 is a different metric.

15           Mr Bunt refers to this, just for your notes -- well,  
16 actually, {D/3/13}. Mr Bunt -- this was his third  
17 statement, which you will recall is just to do with  
18 calls, and he was not cross-examined on it, I do not  
19 think, at all.

20           I will just invite you to read 48 and 49. (Pause).

21           So just to illustrate the point, he obviously was  
22 not challenged on any of that.

23           If we could go to {E/17/274}. This is Dr Jenkins.  
24 She was looking at -- she provided here figures which  
25 provide comparisons between competitors on different

1 call plans. There they are all in relation to unlimited  
2 weekend call plans. It was actually only the  
3 Post Office that ended up charging for them. But if  
4 you -- if we go down to the next one {E/17/275}. If we  
5 just focus on the top of the page. It is quite hard to  
6 read. Thank you.

7 (Pause)

8 So that is just a comparison of unlimited evening  
9 and weekend call plans pricing, and what we are seeing  
10 is the black, it is obviously the BT pricing, and the  
11 idea that somehow the call pricing element here was in  
12 any way excessive or out of line with competitors is not  
13 borne out, and you do not have support from ARPM data  
14 that somehow BT was charging over the odds in relation  
15 to it, but it is in fact a very, very large part of the  
16 claim, but of course it also is a key component of the  
17 overall assessments of the focal product pricing, and so  
18 you actually have a more difficult issue here, that when  
19 you are thinking about the focal product you have got to  
20 take into account these prices.

21 As we have said, ARPU is the way of dealing with  
22 that. But insofar as you are focusing on calls, this  
23 sort of data is also important.

24 I think the other point I would just highlight, if  
25 I may, and I will pick it up in our submissions at

1           {A/16/74}. So picking it up at -- no, if we could go  
2 back a page {A/16/73}. It is actually 284 to 290 where  
3 we set out the evidence that is clear, we say, that BT  
4 charged the same call prices to all of its voice  
5 customers, so that is people in bundles or people not in  
6 bundles.

7           Just for your notes, that is borne out by the  
8 evidence that we have cited, that is not challenged, in  
9 Bunt 3, paragraphs 12 and 14 in particular, that call  
10 prices were just set across the voice base. Business  
11 strategy did not distinguish.

12           So we have obviously heard various speculations  
13 about how price increases were somehow neutralised in  
14 the total bundle price. Now, there is no evidence that  
15 that was what was being done. But in particular, in  
16 relation to calls, we do not understand on what basis  
17 that proposition is being put forward in the light of  
18 the evidence we have.

19           I should emphasise --

20 MR RIDYARD: That is because you would have to, if you  
21 wanted to do this neutralisation, you would have to do  
22 a different exercise for each individual bundle customer  
23 depending on how much they had used their phone or which  
24 call package they were on.

25 MR BEARD: I am guessing we could work it -- but I do not

1 know what it is that is being hypothesised here, but you  
2 do not have that. We say it does not apply in relation  
3 to line rental. You saw line rental, the strategy being  
4 to set line rental across all voice, and so on. But  
5 I am just emphasising that there are two components to  
6 the claim, and in relation to calls particularly, as  
7 soon as you start thinking about those issues, you just  
8 think: hang on, how on earth could that possibly work?

9 MR RIDYARD: Yes. In relation to line rental, you can see  
10 how it might work, which would be changing the gap  
11 between --

12 MR BEARD: I completely understand --

13 MR RIDYARD: Yes, but not for the calls.

14 MR BEARD: This is an extra point in relation to calls. We  
15 say they are wrong on line rental, and all of those  
16 stories about, oh, well, you should have just dropped  
17 your bundle price, drop your price in a competitive  
18 market. You just have to start thinking through that  
19 suggestion that Mr Parker was making. He is saying that  
20 prices should have been dropped for SFV by at least £7.  
21 If you are going to keep that increment close, which is  
22 what all the evidence says because of how you want to  
23 switch people, you would have to drop your bundle prices  
24 by vast amounts. It is just unworldly what is being  
25 suggested there, and there is no evidence to suggest

1           that actually there was some sort of tinkering going on  
2           to target SFV customers at all.

3       MR RIDYARD:  There is evidence to show that -- is there not  
4           evidence to show that the incremental price of broadband  
5           over voice, that that reduced over time?

6       MR BEARD:  Yes.

7       MR RIDYARD:  But you are saying in order to adjust that  
8           further to get to where the CR is saying the competitive  
9           level is, you would need to -- are you saying you would  
10          need to go under water with that?

11      MR BEARD:  I am not ...

12      MR RIDYARD:  But that analysis has not been done.

13      MR BEARD:  That analysis has not been done.  I imagine the  
14          answer was probably yes, but I am not going to give  
15          evidence from the bar on it.  But the point is the  
16          preposterous nature of what is actually being  
17          hypothesised there.

18                Leave that to one side.  The point I am making is  
19          the evidence you have on line rental was it was set  
20          across the piece for all voice.  I understand the point  
21          that has been made is, well, that was actually being  
22          tinkered with in order to target these people.  We say  
23          that is not what was going on at all, it was keeping  
24          a small increment so you would have people switching  
25          across.

1           We will be coming on to other issues in relation to  
2 this in relation to limb 1, but I am just making  
3 a narrower point here in relation to calls, because the  
4 allegation is that the overcharge is in relation to  
5 focal product, line rental and calls, and the suggestion  
6 that has been sort of thrown out there that somehow this  
7 modification strategy works in relation to calls, we  
8 just do not understand remotely how it could do.

9           So if I may go to the CMA Guidelines, {G/137/10}.  
10 You will see 3.7, I am just going to run through this  
11 very briefly. So this is the sort of evidence that is  
12 relevant to carrying out the market definition  
13 assessment and the HMT:

14           "Evidence from undertakings active in the market and  
15 their commercial strategies may be useful."

16           Obviously you have heard a great deal about BT's  
17 strategy and how they wanted to fight churn and deliver  
18 value for money, and so on, in relation to these issues.  
19 You have obviously had vast amounts of documentary  
20 material, albeit only selected parts provided or relied  
21 upon by the CR, and I make a point that the CR, the  
22 Class Representative, has not put forward any evidence  
23 from any other undertakings in the market. But all of  
24 the BT witnesses were absolutely clear about the  
25 concerns related to churn, and there were obviously

1 points being made that there were concerns about PR on  
2 the part of BT, but that is not a criticism of the  
3 business, as Mr Bunt made clear, and we have quoted it  
4 in our submissions at paragraph 159. If you have bad PR  
5 as a business, it damages your ability to retain and win  
6 customers.

7 Ms Blight gave consistent and clear evidence about  
8 the value for money idea, that you were providing gives  
9 in order to provide value for money for customers and  
10 therefore reduce churn. I am not going to run through  
11 it all. We have put lots of material in the written  
12 closing submissions, but the position is absolutely  
13 clear, and occasionally the CR tries to pick out  
14 documents saying, you were targeting revenue from  
15 customers and hypothesises that these are SFV targets.  
16 Actually, if you read the documents fairly, it is all  
17 about voice, it is all about that strategy overall, not  
18 targeting this supposedly trapped group.

19 The second bullet is:

20 "Customers and competitors will often be  
21 interviewed."

22 Well, Ms Kreisberger prays in aid *Gutmann*, so she  
23 should not have contact with any of her Class Members or  
24 does not need to. It does not excuse the lack of  
25 evidence in relation to the competitors or indeed survey

1 evidence in relation to brand issues and so on. Quite  
2 why it was that it was decided that was not appropriate  
3 one does not know. But for market definition, dynamics  
4 of the market and how other entities considered it, this  
5 is the sort of material you might have expected the  
6 Class Representative to put forward. There is not an  
7 obligation on them to do so, I am not suggesting that,  
8 but if they do not and the other evidence is as it is,  
9 they are just not coming close to making out their case.

10 The third bullet:

11 "A significant factor in determining whether  
12 substitution takes place is whether customers would  
13 incur costs in substituting products."

14 Well, the switching evidence makes it very, very  
15 clear there are not barriers to switching here.

16 Then the fourth point is product characteristics and  
17 there are some qualifications there. Product  
18 characteristics, they may provide useful information.  
19 Well, particularly in relation to SPCs, they really do  
20 provide useful information. There are some caveats, as  
21 I say. Products with apparently similar characteristics  
22 and intended use, but if there are switching costs and  
23 brand loyalty, that may affect how substitutable they  
24 are in practice. But we are not seeing switching costs,  
25 and although there is brand loyalty to BT, there are

1 also other powerful brands out there as well.

2 "Second, just because products display similar  
3 physical characteristics, this does not necessarily mean  
4 that customers would view them to be close substitutes.  
5 For example, peak customers may not view rail travel  
6 during peak times to be a close substitute ..."

7 So this is a sort of form of price discrimination  
8 issue being highlighted as a way of defining markets,  
9 and obviously this was picked up in some of the  
10 discussions.

11 Ms Kreisberger seemed to criticise Dr Jenkins for  
12 the way in which she dealt with price discrimination  
13 issues, but it was entirely clear what she was saying.  
14 She does not see price differences as amounting to price  
15 discrimination here. What she was explaining very  
16 clearly is you do not have what is called third degree  
17 price discrimination, which is where you can effectively  
18 just control your customer groups that you are selling  
19 things to, and a good example of that would be rather  
20 than peak and off-peak, it would be, say, student fares  
21 and ordinary fares where you have got to turn up with  
22 a student card in order to get the different price.

23 Obviously there is third-degree price discrimination  
24 there, and you can see why, because you can effectively  
25 completely bifurcate the customer groups. In those

1           circumstances, the one will not control or constrain  
2           the price of the other. We understand that.

3           You can also have second-degree price discrimination  
4           which is more in the territory of peak and off-peak, but  
5           you cannot say that because there are price differences,  
6           there is price discrimination, and as Dr Jenkins  
7           explained, what you get in relation to workable  
8           competition is not only price dispersion but also, in  
9           a case like this, a situation where the customers, when  
10          faced with prices alternatives, can make choices. So  
11          even if you want to price discriminate, they can  
12          effectively, as she put it, escape from that attempt at  
13          price discrimination.

14          So in a way, using the language of price  
15          discrimination, it is sort of a redundant terminology  
16          here, it does not take the analysis any further forward,  
17          and so the criticisms being levelled at Dr Jenkins in  
18          that regard are not relevant and of assistance in  
19          relation to market definition at all.

20          The fifth bullet:

21          "Patterns in price changes ..."

22          And reactions to price changes. That can be  
23          relevant, and obviously Dr Jenkins has tried to carry  
24          out an event study, but what is really striking is that  
25          that is not what Mr Parker has done. Because we were

1 discussing earlier, in relation to the one price  
2 elasticity that Mr Parker had conjured up for VOCs,  
3 where it suffers from a range of problems, including the  
4 asymmetry problem, but the issue is that he has taken  
5 snapshots of price comparators which are just not  
6 useful. He has not carried out any of this sort of  
7 analysis.

8 Then if we go on to the sixth bullet point,  
9 {G/137/12}, just over the page:

10 "Evidence on own or cross price elasticities ... may  
11 ... be examined if it is available."

12 Obviously we discussed this issue earlier.  
13 Mr Parker did not carry out some more general approach.  
14 He reacted to something that Dr Jenkins had done in  
15 relation to the VOCs but that really does not assist in  
16 these circumstances.

17 Then you have also got:

18 "In some cases critical loss analysis may be  
19 relevant."

20 But again, not what Mr Parker did. I mean, he seeks  
21 to criticise Dr Jenkins for carrying out what is plain  
22 and obvious from this, is an orthodox way of carrying  
23 out these sorts of analyses. Now, we know that critical  
24 loss analyses are not perfect. Dr Jenkins does not  
25 pretend that they are. But is it informative? Yes,

1 obviously it is.

2 I mean, some of the criticisms that the Class  
3 Representative levels at the critical loss analysis, for  
4 instance, you do not have data from the hypothetical  
5 monopolist. That is almost like a category error of  
6 a criticism. It is a hypothetical monopolist, by its  
7 nature you do not have the data from it. You always  
8 have to be drawing on other real world data for these  
9 purposes.

10 As we say, there are a series of sensitivities that  
11 Dr Jenkins carries out that she has explained at length  
12 in her annexes, and those deal both with the issues  
13 concerned with the notional secular trend effect, but  
14 they also deal with the cellophane fallacy points as  
15 well. When I say "deal with", I am not pretending they  
16 solve completely, but do they engage with, do they  
17 assist, do they help the Tribunal in recognising that  
18 Mr Parker has simply failed to put forward sufficient  
19 material to make out his case? Absolutely they do.

20 On the supply side, which is dealt with further  
21 here, obviously it is common ground that other providers  
22 were supplying SFV services. The only issue identified  
23 by Mr Parker and the Class Representative is whether  
24 customer inertia was a barrier to entry or expansion on  
25 the supply side, but obviously there is a real question

1 about whether or not there can ever be a substantial  
2 barrier given the amount of switching we have actually  
3 seen here.

4 It is of course true that some of the third parties  
5 when they wrote to Ofcom said, oh, it is terribly  
6 difficult to acquire customers and we are concerned  
7 about being able to expand. But that is precisely the  
8 sort of representation you would actually want to test  
9 against the background of the very large levels of  
10 switching that we have seen, and indeed the entry and  
11 expansion particularly of the Post Office who grew over  
12 a period of not many years into quite a substantial  
13 provider.

14 I am not suggesting it took half the market or  
15 anything like that, but it was a substantial entry and  
16 substantial expansion which of course fell away when the  
17 commitments came into play because it was targeting SFV  
18 customers.

19 So in those circumstances, we say when you use that  
20 sort of checklist it becomes obvious what the omissions  
21 are on the part of the Class Representative, and I have  
22 dealt with the evidence and theory that the Class  
23 Representative and its experts have put forward in order  
24 to seek to maintain this narrow market definition. It  
25 does not work.

1           I will just touch on a couple of the dominance  
2           issues, but I will do that by reference, if I may, to  
3           our submissions just for ease and speed, if that is  
4           okay.

5           THE CHAIRMAN: Yes.

6           MR BEARD: So we pick up dominance issues at {A/16/92}.

7           I am not going to work my way through all of it in any  
8           detail.

9           You will see the issues raised about whether or not  
10          BT was actually having to take into account other  
11          rivals' pricing and strategy. We highlight in  
12          particular the position of the Post Office in this  
13          regard, and precisely that we did have to engage with  
14          that rivals' pricing and strategy and, what we saw was,  
15          just in relation to SFV services, the development of the  
16          HPS product which was a direct reaction.

17          The idea that we are dominant and we can just simply  
18          ignore these sorts of impacts from competitors, just is  
19          not evidenced by that sort of strategic reaction.

20          We actually saw of course during the evidence more  
21          generally the sensitivity and concern about churn, about  
22          competitors, about competitor pricing in relation to  
23          calls, about awareness and consciousness of competitor  
24          pricing in relation to line rental and in relation to  
25          broadband.

1           So all of that suggests this was not a notionally  
2 dominant entity that could simply act independently of  
3 the competitors in the market. All of the evidence is  
4 pointing in the other direction.

5           There is also a further dimension here that we pick  
6 up just over the page at page {A/16/93} that you have  
7 got the competition, that SFV switching to bundles,  
8 which is beyond the Post Office competition, and I am  
9 not going to rehearse all the points we have made there  
10 in relation to it.

11           There is an allegation obviously that we engaged in  
12 price leadership and we have dealt with that at  
13 paragraph 395 onwards. That is really an attempt to say  
14 that we were being dominant, we were price leading. We  
15 say that just is not what was happening here, both --  
16 well, in relation to calls there is obviously no good  
17 evidence of price leadership at all. In relation to  
18 line rental, it is true that there were certain  
19 documents that referred to leadership in relation to  
20 line rental, but actually when you look at the observed  
21 pattern of line rental increases that is far less clear.

22           Of course, all of this is against the background of  
23 a decline in call volumes, which of course is changing  
24 the shape of the way the market works, and we pick that  
25 up at paragraph 408 which is on page {A/16/99}, I think.

1 Yes, thank you.

2 Now, in the face of that, we say you need to be  
3 extremely cautious about placing undue weight on market  
4 shares because there is real pressure in addition.  
5 Then, as I say, one of the things we do particularly  
6 emphasise, over the page at page {A/16/101}, so we deal  
7 with market shares at 100. At 101 we deal with the  
8 Post Office situation and the reaction through HPS in  
9 some detail.

10 Then if we go on to {A/16/104}, we also pick up the  
11 switching into SFV services, which obviously is  
12 something which is a competitive process, we say, and  
13 illustrative of why one should not be making ready  
14 findings of dominance.

15 I deal with these things briefly because obviously  
16 we say the market definition on a narrow basis is not  
17 made out remotely in the first place.

18 THE CHAIRMAN: Yes.

19 MR BEARD: Unless the Tribunal has questions, I was going to  
20 move on from market definition and dominance now. You  
21 have our written submissions.

22 THE CHAIRMAN: Yes, thank you.

23 MR BEARD: I am going to turn on to limb 1 of the  
24 *United Brands* test, but more particularly, I just want  
25 to go to some of the law. Because with respect to

1 Ms Kreisberger, she did rather fundamentally  
2 mischaracterise what we are saying about the law.

3 She said on Monday that our construction of the  
4 phrase "costs actually incurred", in *United Brands*:

5 "... seems to be that you have to have precise cost  
6 data for the product in question from the dominant firm  
7 during the time period in question. He reads all of  
8 that into the ... word 'actually' at 252 of  
9 *United Brands*."

10 That is not the case. It is not about precision.  
11 What we say is that you do need to be using actual, as  
12 in extant costs, because actually incurred in relation  
13 to the price actually charged. It is that linkage that  
14 is key in *United Brands*.

15 It is just worth going back to the case and picking  
16 up that and one or two other issues. So if we could go  
17 to {G/107/75}. This is a very unlovely copy of the  
18 judgment. If we could go back to 74, I am sorry.  
19 {G/107/74}.

20 So the key paragraph in relation to that particular  
21 submission of Ms Kreisberger's is at 252:

22 "The question therefore to be determined is whether  
23 the difference between the costs actually incurred and  
24 the price actually charged is excessive ..."

25 The proposition is not a very difficult one to

1 understand. When you are asking yourself whether  
2 particular prices are excessive, you have to look at the  
3 costs that were actually incurred in relation to those  
4 prices. Now, it is not an exercise that requires some  
5 kind of counsel of perfection. Indeed, in opening  
6 I specifically took you to paragraph 254.

7 If we go over the page. {G/107/75}. Paragraph 254  
8 is very clear:

9 "While appreciating the very considerable and at  
10 times very great difficulties in working out production  
11 costs which may sometimes include a discretionary  
12 apportionment of indirect costs and general expenditure  
13 and which may vary significantly according to the size  
14 of the undertaking, its object, the complex nature of  
15 its set up, its territorial area ... whether it  
16 manufactures one or several products, the number of its  
17 subsidiaries and their relationship with each other, the  
18 production costs of the banana do not seem to present  
19 any insuperable problems."

20 What is being said is that you take the costs that  
21 underpin the prices and, yes, you may have to make some  
22 kinds of judgments and assessments in relation to them,  
23 but it needs to be the actual costs of the actual  
24 prices. That is what 252 is talking about. It is not  
25 talking simply about precision, but it is talking about

1 the temporal element here. It should be the  
2 contemporaneous costs, not other costs, and it is just  
3 not fair or rational to be looking at a different set of  
4 costs for a particular set of prices. When you are  
5 using the test of price above costs, it must be the  
6 costs at the time of the price.

7 I will come back to *Deutsche Post*, but it is no  
8 exception to that rule.

9 Can I just stay with *United Brands* for a minute  
10 because there are other elements here that are important  
11 not only for limb 1 but more generally.

12 Could we bounce back to paragraph 249 which is just  
13 the preceding page. {G/107/74}. Thank you.

14 So:

15 "The imposition by an undertaking in a dominant  
16 position directly or indirectly of unfair purchase or  
17 selling prices is an abuse ..."

18 Contrary to Article 102, Chapter II.

19 So unfair purchase or selling prices.

20 "It is advisable therefore to ascertain whether the  
21 dominant undertaking has made use of the opportunities  
22 arising out of its dominant position in such a way as to  
23 reap trading benefits which it would not have reaped if  
24 there had been normal and sufficiently effective  
25 competition."

1           So although the language of "workable competition"  
2           is not used there, he does talk about "sufficiently  
3           effective competition". It is recognising implicitly  
4           that markets are messier than the theoretical constructs  
5           that economic modelling may use. Implicitly, what it is  
6           recognising is the spread and possible outcomes in  
7           situations of workable competition, not using  
8           competition law to impose a straitjacket on how  
9           undertakings operate.

10           This is perfectly reflected in paragraph 250:

11           "In this case charging a price which is excessive  
12           because it has no reasonable relation to the economic  
13           value of the product supplied is such an abuse."

14           It uses the concept of reasonableness and that is  
15           important. It is contemplating the fact that there may  
16           be a whole range of possible outcomes in a real market  
17           and it is only if there is no reasonable relationship  
18           between the price and the value of the product that  
19           a finding of excessiveness should be made on this basis.

20           Now, we know in other legal contexts that the term  
21           "reasonable" can be very, very wide indeed. Wednesbury  
22           unreasonable is an extremely wide ambit, and I am not  
23           saying that the European Court was taking UK public law  
24           concepts, but it is plain that the language here is  
25           admitting of a very broad range of possible outcomes.

1 A whole range of relationships can be reasonably  
2 related, and reasonably related to economic value.

3 So the unfairness that a claimant has to prove, it  
4 has to show that there was no reasonable relationship  
5 between the price charged and the economic value. That  
6 is the essence of the infringement that needs to be  
7 shown.

8 The judgment at 251 says:

9 "This excess could, *inter alia*, be determined  
10 objectively if it were possible for it to be calculated  
11 by making a comparison between the selling price of the  
12 product in question and its cost of production, which  
13 would disclose the amount of the profit margin; however  
14 the Commission has not done this since it has not  
15 analysed UBC's costs structure.

16 "The question therefore to be determined is whether  
17 the difference between the costs actually incurred and  
18 the price actually charged is excessive and, if the  
19 answer to this question is in the affirmative, to  
20 consider whether a price has been imposed which is  
21 either unfair in itself or when compared to competing  
22 products."

23 So there is a price-cost measure being used as part  
24 of an unfairness test. Now, you may think I am  
25 labouring this point because we have been here before,

1 but in circumstances where the culminating submissions  
2 yesterday from Ms Kreisberger were on the line of: well,  
3 once you have got excessiveness under limb 1, then it is  
4 up to you objectively to justify these issues, that is  
5 wrong in law. The test here is whether or not  
6 the prices are unfair, and that is an entire test that  
7 has to be met.

8 More than that, all of this language is providing no  
9 suggestion that a restrictive approach to assessing the  
10 costs of the production should be adopted. To the  
11 contrary, since this exercise is concerned with the  
12 assessment of whether or not there is a reasonable  
13 relation between price and value, it would be actually  
14 wrong to take a restrictive approach.

15 Now, as we will come on to consider further in  
16 relation to limb 1 and also in relation to limb 2, but  
17 on limb 1, one aspect of this approach is any cost  
18 assessment needs to take into account that companies  
19 under conditions of workable competition have to have  
20 flexibility in relation to their pricing and how they  
21 recover their costs, in particular their common costs,  
22 across the range of products they sell.

23 The same is going to be true in relation to rates of  
24 return when establishing a cost-plus benchmark. But  
25 using a cost-plus measure or measures to assess whether

1 or not there is a reasonable relationship, that is going  
2 to enable you to take into account price dispersion, it  
3 is going to enable you to take into account margin  
4 dispersion, and it means that although costs may feel  
5 high or indeed margins high as compared to models of  
6 perfect competition, they are nonetheless reasonable.

7 Then obviously the unfairness element that is being  
8 described here, although we refer to it as limb 2, what  
9 is being talked about is part of the analysis that  
10 reaches a conclusion, or enables a regulator or a court  
11 to reach a conclusion as to whether or not, overall,  
12 the prices are fair in the sense that they bear some  
13 reasonable relation to the economic value.

14 As we will come on to, of course, when we are  
15 thinking about this issue of fairness, we need to be  
16 able to take into account subjective economic value  
17 which customers would attribute to the products in  
18 question.

19 This is not falling into a willingness to pay  
20 fallacy. It is just not assuming that anything anyone  
21 pays, that is the quantification of economic value. But  
22 it is a further recognition that the sorts of  
23 theoretical restrictive approach adopted by the Class  
24 Representative which seek to effectively explain away  
25 value are just not appropriate in this context. The

1 legal test is ensuring that subjective preferences and  
2 inclinations of customers in the real world are to be  
3 recognised. That is obviously necessary when you are  
4 assessing a reasonable relationship between price and  
5 value.

6 Of course, we have also got the component here that  
7 the use of comparators must take into account the  
8 overall nature of the test. Taking an unduly  
9 restrictive approach to comparators risks failing to  
10 recognise that workable or sufficient competition may  
11 permit even small product differentiations or efficiency  
12 differences to result in wide spreads of prices and  
13 margins.

14 Indeed, as we saw during the course of the evidence,  
15 that is precisely what we see in relation to bundles.  
16 There is a vast dispersion of prices amongst the  
17 providers. In the real world, that is how competition  
18 in consumer markets works, even in relation to  
19 functionally similar products. Different businesses  
20 have different advantages, brand values, market  
21 perceptions and product offerings. They do not just  
22 have to be unique in some objective sense. That is  
23 a point that I will be coming back to further in  
24 relation to limb 2.

25 So I dwell on *United Brands* because there are a lot

1 of important strands setting the legal framework there,  
2 and of course they are not disputed in any way in the  
3 further case law. It has obviously been considered in  
4 some detail in other cases, but all the points I am  
5 making fit with those subsequent cases. So I will  
6 briefly deal with one or two of the others, if I may.

7 So if we go to what is sometimes referred to as  
8 *Flynn* or, in the Court of Appeal, the *Phenytoin*  
9 judgment. This is {G/73/39}.

10 I want paragraph 97. I am sorry, page {G/73/29}.

11 You will recall from opening, or you may not, but  
12 during opening I went through the earlier parts of this  
13 judgment where the Court of Appeal touches on and  
14 discusses a number of the preceding cases where  
15 *United Brands* has been applied.

16 Then you have got -- at 97 you have got a sort of  
17 summary of conclusions from Lord Justice Green in  
18 relation to these issues, and here Lord Justice Green,  
19 as you will see, sets out a number of points:

20 "(i) The basic test for abuse ... is 'unfair' ... In  
21 broad terms a price will be unfair when the dominant  
22 undertaking has reaped trading benefits ..."

23 Going beyond "normal and sufficiently effective  
24 competition" and "workable".

25 This is just repeating, effectively, the basic

1 structure of *United Brands*, but I just alert you to it  
2 because I am just effectively saying the submissions  
3 I have made in relation to *United Brands* are consistent  
4 with what has been said in the more recent cases.

5 Then (ii) emphasises:

6 "... no 'reasonable' relationship to the economic  
7 value ..."

8 (iii) stresses:

9 "There is no single method or 'way' in which abuse  
10 might be established and competition authorities have  
11 a margin of manoeuvre or appreciation in deciding which  
12 methodology to use and which evidence to rely upon."

13 That is obviously true up to a point, because later  
14 in the judgment there are discussions about what  
15 a competition authority should do. Of course this is in  
16 the context of a long-running investigation and then  
17 enforcement which is subject to appeal.

18 "(iv) Depending upon the facts and circumstances ...  
19 a ... authority might therefore use one or more of the  
20 alternative economic tests which are available. There  
21 is however no rule of law requiring competition  
22 authorities to use more than one test or method ...

23 "(v) If a cost-plus test is applied the competition  
24 authority may compare the cost of production with the  
25 selling price in order to disclose the profit margin.

1           Then the authority should determine whether the margin  
2           is 'excessive'. This can be done by comparing the price  
3           charged against a benchmark higher than cost such as  
4           a reasonable rate of return on sales ..."

5           And so on.

6           "When that is performed, and if the price exceeds  
7           the selected benchmark, the authority should then  
8           compare the price charged against any other factors  
9           which might otherwise serve to justify the price charged  
10          as fair and not abusive."

11          There are two things I just highlight here. There  
12          is no suggestion that here the Court of Appeal is moving  
13          away from a comparison of actual costs with actual  
14          prices. Second of all, there is no suggestion that the  
15          Court of Appeal is saying, well, once the authority has  
16          done this first stage, then it is all on the defendants  
17          to justify their position to the authority. It is  
18          specifically saying the authorities should compare  
19          the price charged with any other factors.

20          We say that is consistent with the burden of proof  
21          for proving the whole infringement, the legal burden  
22          lies with the claimant.

23          "(vi) In analysing when the end price is unfair a  
24          competition authority may look at a range of relevant  
25          factors including, but not limited to, evidence and data

1 relating to the defendant undertaking itself and/or  
2 evidence of comparables ... from competing products  
3 and/or any other relevant comparable, or all of these.  
4 There is no fixed list of categories of evidence  
5 relevant to unfairness."

6 We agree. We are not demurring in the slightest.

7 "(vii) If an authority chooses one method, (e.g.  
8 cost-plus) and one body of evidence and the defendant  
9 undertaking does not adduce other methods or evidence,  
10 the competition authority may proceed to a conclusion  
11 upon the basis of that method and evidence alone.

12 So this is one of these issues where if you do not  
13 come forward to an authority and put something together,  
14 then they are allowed to proceed.

15 THE CHAIRMAN: Yes.

16 MR BEARD: It is slightly specific --

17 THE CHAIRMAN: Yes.

18 MR BEARD: -- to a regulatory occasion.

19 "(viii) If an undertaking relies, in its defence,  
20 upon other methods or types of evidence ... relied upon  
21 by the competition authority then the authority must  
22 fairly evaluate it."

23 That is effectively the flipside of the preceding  
24 point but in slightly different context.

25 He does in paragraph 98 talk about burden and

1 standard of proof, or rather he says that he is going to  
2 talk about burden and standard of proof at 110 to 117.

3 I happily invite the Tribunal to read those sections,  
4 but actually there, if we go on to that, that is at page  
5 {G/73/34}. Although he says, Lord Justice Green says:

6 "I am going to deal with burden and standard of  
7 proof ..."

8 Actually what is dealt with there is what is  
9 referred to as the full investigation issue, so it is  
10 much more to do with what the obligations on the  
11 authority are to investigate in the particular context.  
12 Again, none of it cuts across my submission on the basic  
13 points about burden and standard of proof in relation to  
14 this situation but I just thought I would note that for  
15 completeness in relation to it.

16 If we keep going then over to {G/73/38},  
17 paragraph 118. This is the second ground of appeal:

18 "The existence of a duty on competition authorities  
19 to use a hypothetical benchmark price ..."

20 The ground of appeal is hypothetical benchmark based  
21 on price, and you will see there:

22 "The second ground of appeal concerns the  
23 interpretation of para 249. The CMA argues that the  
24 Tribunal erred in that it mandated that a competition  
25 authority 'should' as part of its analysis, construct

1 a hypothetical benchmark price or range of prices  
2 against which to measure the actual prices charged."

3 The only reason I refer you to this is because  
4 I want to just pick up the analysis and response because  
5 Ms Kreisberger relied on it. If we go over the page to  
6 to 120, you will see: "The answer to this lies in the  
7 summary at paragraph 97 above:

8 "The authority has a margin of manoeuvre or  
9 discretion as to how it goes about proving its case."

10 So the answer to the question about the obligation  
11 on the authority to set a benchmark is actually answered  
12 by paragraph 97. The paragraph that Ms Kreisberger then  
13 relied upon is at 125, over the page again, I think.  
14 {G/73/39}. You see there:

15 "In my view by the nature of the abuse in issue  
16 there [in *Latvian Copyright*] needs to be "a" benchmark.  
17 But, in the first instance at least, the choice of  
18 benchmark is for the competition authority to choose and  
19 can be based upon the costs of the undertaking being  
20 investigated or it can be based upon comparables such as  
21 the prices charged by the same or different undertakings  
22 in the same or different geographical markets or indeed  
23 any other benchmark or combinations thereof capable of  
24 providing a "sufficient" indication that the prices  
25 charged are excessive and unfair."

1           Now, *Latvian Copyright*, as Ms Kreisberger rightly  
2           said, was a comparison between charges in Latvia and  
3           charges in other jurisdictions and that was being used  
4           effectively as the benchmark in *Latvian Copyright*.  
5           Again, we have no issue with the idea that you can use  
6           other comparables in those circumstances. But if you  
7           pick a cost-plus methodology to try to prove  
8           excessiveness then, as *United Brands* itself emphasised,  
9           and nothing in paragraph 97 or indeed elsewhere in this  
10          judgment qualifies the need to be using actual costs of  
11          the actual prices that are being challenged.

12          The references here in 125 to "other entities" are  
13          entirely understandable given that *United Brands* says  
14          there may be different ways you can do this.

15          That takes me to the one example that Ms Kreisberger  
16          seemed to rely upon as an example of not using actual  
17          costs in relation to actual prices and that is  
18          *Deutsche Post*. I leave aside it is only a Commission  
19          decision. I do emphasise, because the reasoning is very  
20          compressed, that excessive pricing there was just one of  
21          a part of a series of egregious actions which was  
22          effectively taken to curtail post from the UK to  
23          Germany.

24          If we go to {G/114/1}. That is the decision. In  
25          fact, the operative part does not even refer to

1 excessive pricing but we will leave that for another  
2 day.

3 If we go on to page {G/114/33}, at 155 you will see  
4 "Imposition of unfair selling prices". So there is a  
5 discussion and there are recitals in here about  
6 excessive pricing even though it does not make it  
7 through in specific terms to the operative part of the  
8 decision.

9 "The Court of Justice has declared that a price  
10 which is found to be excessive in comparison to the  
11 economic value may infringe Article 82 if it has the  
12 effect of curbing parallel trade or of unfairly  
13 exploiting customers."

14 Then 156:

15 "The domestic tariff in Germany for priority mail in  
16 the first weight step is currently EUR 0.56."

17 The point here is that:

18 "The present tariff was introduced on September 1  
19 1997. [The tariff is the current tariff at EUR 0.56.]  
20 The previous tariff, amounting to EUR 0.51, had remained  
21 unchanged for eight years. As one of the parties to the  
22 REIMS II agreement, DPAG ..."

23 So REIMS II was an agreement that was trying to  
24 effectively enable cross border postal arrangements by  
25 setting termination charges, so that effectively it

1 facilitated the operation of a free movement of post  
2 across the EU. It was a series of agreements.

3 "As one of the parties to the REIMS II agreement,  
4 DPAG argued that the average cost for delivering to the  
5 addressee an incoming cross border letter-mail item in  
6 the corresponding category may be estimated at 80% of  
7 the domestic tariff."

8 So what it is saying is we, *Deutsche Post*, estimate  
9 the cost of delivery as 80% of our current tariff.

10 Well, that is precisely what *United Brands* says you  
11 can do. You can take some kind of rough and ready  
12 benchmark, but it is in relation to the current tariffs,  
13 and those are the things that were being subject to  
14 criticism. So it is just very difficult to understand  
15 how this gives any sense that non-actual contemporaneous  
16 prices were being -- that contemporaneous prices were  
17 being compared with non-contemporaneous costs. Now,  
18 I am not suggesting that this is a sophisticated costs  
19 analysis. Very far from it. But it was one that  
20 *Deutsche Post* actually put forward.

21 Then if we go on:

22 "Arguments put forward by [*Deutsche Post*] ..."

23 Then:

24 "By referring in its reply to the Statement of  
25 Objections to the... *Citicorp* judgment, [*Deutsche Post*]

1 maintained that it is not contrary to Article 82 of the  
2 Treaty to charge the full domestic tariff minus terminal  
3 dues for the forwarding and delivery of A-B-A remail."

4 So this was mail that was sent from Germany to the  
5 UK to be sent back, and essentially *Deutsche Post* did  
6 not like that, because UK mail operators were taking  
7 a cut of their profits.

8 "DPAG reiterated its claim that the mailings in the  
9 present case are parallel to those examined by the  
10 Court. Since all mailings concerned have German  
11 senders...

12 "DPAG maintained that its average cost for  
13 delivering an item of incoming cross-border mail is at  
14 at least 80% of the domestic tariff. The 80% estimate  
15 advocated by DPAG and the other REIMS II parties in the  
16 their notification to the Commission is an average of  
17 the estimated costs of all the parties to REIMS II.  
18 This average cannot be used as a basis for estimating  
19 [*Deutsche Post*]'s costs, [*Deutsche Post*] argued."

20 But the fact that what had been used was some sort  
21 of averaging amongst people to reach the 80% threshold  
22 for the last two agreements does not change anything  
23 here. What was being decided was: is 80% of the actual  
24 tariff the right costs measure, so actual costs for  
25 actual prices?

1           Ms Kreisberger is saying, well, yes, but other  
2 people were involved in the calculation of the 80% as  
3 being a reasonable way of ascertaining these things. It  
4 does not change the contemporaneous methodology at all.  
5 What it is doing is doing something extraordinarily  
6 rough and ready. We accept that. But it is not  
7 contrary to authority position.

8           For your notes the operative part, Article 1, is at  
9 {G/114/38}. So I think it is important that this was  
10 not a case where people were taking old costs measures.  
11 They were taking rough and ready contemporaneous ones.

12           Now, in the final five minutes I would just like to  
13 go to the *Hydrocortisone* judgment if I may, obviously  
14 a more recent judgment. If we could pick it up at  
15 {G/96/150} under the heading "Abuse of dominance". If  
16 we just pick it up at 300. I think I may have taken you  
17 to this in opening.

18           "Prices are determined by the market, and  
19 competition law has long steered clear of seeking to  
20 determine what is, and what is not, a market price -- it  
21 being rightly considered that this is a matter for the  
22 market and not the courts. That being said, courts have  
23 not been slow to impose price outcomes on parties in  
24 a whole variety of cases, notably ... [including]  
25 FRAND... The difference -- and it is an important one --

1 is that in these cases all the court is doing is  
2 imposing a rate where the parties cannot agree. Here,  
3 a price chosen by a market participant -- ... is being  
4 characterised as an infringement of competition law,  
5 with all of the stigma that attaches ... We are  
6 conscious that these are quasi-criminal proceedings and  
7 that we are reviewing findings which are quasi-criminal  
8 in nature."

9 One of the points Ms Kreisberger said is, this is  
10 not an infringement finding by a regulator. Therefore  
11 it is not things like -- the presumption of innocence do  
12 not apply. I recognise that burdens of proof in  
13 adversarial proceedings are different in the structure  
14 that they use, but the principle that applies is clearly  
15 important and significant. There is good reason why  
16 courts have steered clear of fixing prices.

17 If we go down to paragraph 330 on page {G/96/164}.  
18 This is in the context of thinking about excessive  
19 pricing:

20 "There is no single method for ascertaining whether  
21 a price is unlawful in terms of its excess or not, and  
22 any given method will have some inherent weaknesses.  
23 When considering whether a price is or is not excessive,  
24 a tribunal must have careful regard to 'regulatory  
25 overreach', in that interference in an outcome that may

1 actually be competitive is as bad as failing to call out  
2 as infringements excessive prices."

3 In fact, we have had evidence from Mr Matthew about  
4 the concern that if you make type one errors in the  
5 context of excessive pricing, in other words,  
6 overregulating, you can chill the market more widely  
7 because people who are dominant or concerned they may be  
8 dominant then apply the thresholds conservatively which  
9 operates to the detriment of effective competition in  
10 markets.

11 If we just skip back to paragraph 327, so just on  
12 the preceding page I think. {G/96/161}. One of the  
13 cases that is emphasised and we pick this up in our  
14 written submissions is the Attheraces case. If we just  
15 scroll down, I just want to pick up the warning that was  
16 given here. {G/96/162}:

17 "It has to be borne in mind... that the law on abuse  
18 ..."

19 It is referring to Oscar Bronner which was  
20 a different sort of abuse case.

21 "... the law on abuse of dominant position is about  
22 distortion of competition and safeguarding the interests  
23 of consumers in the relevant market."

24 Just to be clear, we entirely accept that. It is  
25 not an issue.

1            "It is not a law against suppliers making 'excessive  
2 profits' by selling their products to other producers at  
3 prices yielding more than a reasonable return on the  
4 cost of production, i.e. at more than what the judge  
5 described as the 'competitive price level'. Still less  
6 is it a law under which the courts can regulate prices  
7 by fixing the fair price for a product on the  
8 application of a purchaser who complains that he is  
9 being overcharged for an essential facility by the sole  
10 supplier of it."

11           There is a real problem if the use of excessive  
12 pricing law operates as an undue constraint on the way  
13 markets can operate. As I say, whilst there is no  
14 suggestion that the importance of competition law lies  
15 in no significant part in the protection of the  
16 interests of consumers, that does not mean that there is  
17 some kind of consumer sympathy or consumer bias in cases  
18 where alleged overcharges are said to have been paid by  
19 consumers rather than, say, retailers or wholesalers.  
20 To that extent competition law is unsentimental. The  
21 same legal and economic approach applies to the  
22 assessment of abuse at whatever level in the value chain  
23 it occurs.

24 THE CHAIRMAN: Yes.

25 MR BEARD: In those circumstances it also does not matter

1 that this is a Class claim. That does not change the  
2 legal or economic approach in relation to these matters.  
3 Some elements of the procedure obviously change but  
4 fundamentally the nature of the test and the burden to  
5 be overcome does not alter.

6 These principles have been applied, I will just give  
7 you a couple of references. *Albion Water No. 2*. That  
8 is {G/47/70-71}. Of course in *Hydrocortisone* itself we  
9 saw the more detailed consideration of economic value  
10 and subjectivity which I will be coming back to when  
11 I deal with limb 2.

12 Just to finish then today, the *Hydrocortisone*  
13 judgment of the Tribunal also highlighted *Humber Oil* and  
14 the importance of regulatory schemes and also it is  
15 noted the Advocate General in the *Latvian Copyright* case  
16 emphasised, as did the OECD, that where you have  
17 sectoral regulation in place that would tend to reduce  
18 the scope for competition law enforcement against high  
19 prices.

20 I am going to move on briefly to deal with legal  
21 certainty although I can probably give you the  
22 references. *Deutsche Telekom* was referred to by  
23 Ms Kreisberger as it is a case where she said, well the  
24 legal certainty there was emphasising that the company  
25 should have knowledge of its own costs and its own costs

1 should be used in the assessment of a case against it.

2 Yes, that is true in relation to Deutsche Telekom.  
3 It is also true in the *Intel* case and I will just give  
4 you the reference to the Advocate General's opinion,  
5 Advocate General Medina. Paragraph 157. That is at  
6 {G/133.1/20}.

7 The point is not about whether or not it is the  
8 company's own costs, it is about the basic principle of  
9 legal certainty.

10 Indeed, what is being suggested in limb 1 is that an  
11 RFS based on a Fully Allocated Costs model now in 2024,  
12 so coming up for 15 years after it was put in place,  
13 should have been and should be the criteria on which you  
14 assess costs. That albatross, how long is it supposed  
15 to hang round the neck of any previously regulated  
16 undertaking is frankly difficult to understand, and to  
17 be fair to Mr Duckworth, as he said, and is obvious as  
18 a matter of common sense, BT could not be expected to  
19 take that into account when it was setting its prices.

20 If we go to {IR-B/36/82}. Can we go over the page?

21 THE CHAIRMAN: Day 16.

22 MR BEARD: Yes, Day 16. Private transcript. {IR-B/36/83}.

23 Question at the top:

24 "Are you saying that BT should have realised that it  
25 should have used LRIC+ based on 2009 costs when it was

1 considering prices?

2 "Answer: No, I am not saying that."

3 If we go over the page he then discusses various  
4 issues. If you go over the page, {IR-B/36/84} you see  
5 there:

6 "Are you saying that when BT was setting its prices  
7 it should actually just have had reference to its actual  
8 costs during the claim period?

9 "Answer: Yes."

10 Now that is correct and is the right way in which  
11 the issue should be dealt with but unfortunately it does  
12 indicate a number of the problems that we will be coming  
13 to tomorrow in relation to trying to use 2009 RFS in  
14 relation to limb one.

15 THE CHAIRMAN: Just to pick up on that last point before we  
16 adjourn. Given what you have said is the legal  
17 requirement to use actual data, are you therefore  
18 saying, just so we have a heads-up, that the use of the  
19 RFS information is actually wrong in law?

20 MR BEARD: So in relation to -- this is only in relation to  
21 indirect costs.

22 THE CHAIRMAN: Of course because the rest is catered for.

23 MR BEARD: We say in circumstances where you are not using  
24 the RFS data to actually identify some portion of the  
25 actual costs that is not consistent with the

1           *United Brands* test and is wrong in law. But even if you  
2           were to be entitled to have reference to it to somehow  
3           ascertain actual costs as we will come on to show  
4           tomorrow, it does not do anything of the sort.

5           THE CHAIRMAN: Just a moment. Yes, that is helpful.

6           Thank you very much. 10.30 tomorrow then.

7           (4.36 pm)

8           (The hearing adjourned until Thursday, 21 March at 10.30 am)

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