

Thursday, 6 October 2016

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(10.30 am)

MR BEARD: If I may, I will move on to the next witness,
which is Mr Williams.

MR SEAN WILLIAMS (sworn)

THE CHAIRMAN: Make yourself comfortable, Mr Williams.

Examination in chief by MR BEARD

MR BEARD: Mr Williams, there are behind you a series of
files. If there could be passed to you file N1, please.
It may be labelled core 1. Thank you.

Could you turn to tab D in this bundle? Could you
confirm to the court whether this is your witness
statement?

A. At tab B?

Q. D.

A. D, I beg your pardon.

Yes, this is my witness statement.

Q. Just for the tribunal's note again, this is not signed
for confidentiality reasons, but signed copies, I think,
are with the tribunal.

Do you have any corrections to that statement,
Mr Williams?

A. I do not.

Q. Thank you.

Could you be passed bundle N2? If you could go to

1 tab K in that bundle. Is that your second witness
2 statement, Mr Williams?

3 A. Yes, this is my second witness statement.

4 Q. Do you have any corrections to that statement,
5 Mr Williams?

6 A. I do not.

7 Q. Thank you.

8 Could you be passed now the reply bundle, R, tab D.
9 Is that your third witness statement, Mr Williams?

10 A. Yes, it is.

11 Q. Do you have any corrections to that?

12 A. I do not.

13 Q. Thank you.

14 Finally, if you could be passed what in my set of
15 bundles is called the "additional bundle", I would be
16 grateful. If you could go to tab 14, is this your
17 fourth witness statement?

18 A. Yes, it is.

19 Q. Do you have any corrections to that witness statement?

20 A. I do not.

21 MR BEARD: I'm grateful. I don't have any questions for
22 you, Mr Williams. I believe Mr Pickford has questions
23 for you. May I say, as was said to Mr Petter, if any
24 matters on which you want to comment involve
25 confidential information, please do indicate and we will

1 make sure that provision is made for your answers to be
2 given in relevant closed proceedings. Thank you.

3 Cross-examination by MR PICKFORD

4 MR PICKFORD: Good morning, Mr Williams. To pick up on the
5 points Mr Beard made, I'm going to take you to some
6 paragraphs of your witness statement that contain some
7 confidential material. I am hoping that we can just
8 deal with matters of principle, so I'm not going to ask
9 you to engage with the precise confidential numbers.
10 Obviously, if you do feel you need to descend into
11 particulars, then please feel free to do so, but I hope
12 we shall be able to do it without the need to go into
13 any kind of closed session.

14 It is correct you hold degrees in economics, don't
15 you?

16 A. I do.

17 Q. And you have been employed as an economic consultant at
18 the corporate strategy consultancy LEK?

19 A. I was a strategy consultant at LEK.

20 Q. You have board level positions at the OFT and Ofcom?

21 A. Yes.

22 Q. Now a director at BT?

23 A. Yes.

24 Q. And you frequently attend BT board meetings and
25 operating committee meetings?

1 A. I do.

2 Q. So I think we can conclude that you are highly numerate?

3 A. Yes.

4 Q. And you are familiar with annual reports and how to
5 interpret them?

6 A. I am.

7 Q. You are familiar with BT's own financial reporting, at
8 least at a high level?

9 A. I am.

10 Q. You understand that it is critical, when you are dealing
11 with numbers, that you need to be accurate?

12 A. Of course.

13 Q. And you need to be consistent when making comparisons,
14 because if you are not, you are liable to mislead?

15 A. Yes.

16 Q. Sorry, if you could speak for the transcript, thank you?

17 A. Yes.

18 Q. So if we could just pick up, please, your first
19 statement, which is at tab D of bundle N1, and if you
20 could go, please, to paragraph 21.

21 A. Yes.

22 Q. You say there that Sky has 12 million pay TV
23 subscribers. You then go on to make a comparison at the
24 end of the paragraph with BT. That is a confidential
25 number, so we don't need to say what it is. What

1 I would like to do is at a level of principle examine
2 the fairness of your comparison. So the first point
3 I would like to consider is this. We are talking here
4 in this paragraph, at least initially, about Sky's
5 presence as a pay TV retailer, aren't we?

6 A. Yes.

7 Q. I presume that you agree with the evidence that
8 Mr Petter gave yesterday that your figure includes
9 NOW TV?

10 A. Yes.

11 Q. You are classifying those customers as within Sky's
12 pay TV subscribers?

13 A. Yes, I believe that is right.

14 Q. You would agree that they are not, obviously, on Sky's
15 DTH platform?

16 A. That is true.

17 Q. Mr Petter gave evidence yesterday. He said that the
18 NOW TV proposition is in effect a platform in its own
19 right?

20 A. He did say that.

21 Q. Do you agree with that?

22 A. Well, I'm not sure quite how he was using the term
23 "platform", but NOW TV can reside on other people's
24 platforms, so I'm not sure that's quite how I would say
25 it. But that is indeed what he said.

1 Q. But from your perspective, you would agree that in fact
2 that is not an appropriate classification, NOW TV,
3 because, as you said, you can watch NOW TV, for example,
4 on the EE TV platform and that would not be Sky's
5 platform?

6 A. That is correct.

7 Q. Similarly, you can watch NOW TV using an Apple Mac or
8 a Windows PC or a games console or any of those devices
9 and, again, the same reasoning would apply?

10 A. Yes.

11 Q. It is correct, isn't it that when we're talking about
12 delivery with OTT the idea of the platform is not in
13 fact particularly important because that is one of the
14 beauties, really, of app-based delivery?

15 A. It is true that you don't need -- the OTT providers
16 don't have platforms typically, no.

17 Q. Yes. So the number that you then quote for BT, which
18 I'm not going to read out again, that excludes all BT
19 customers who receive OTT delivery, doesn't it?

20 A. That excludes -- my understanding is it excludes
21 customers who are, for example, receiving BT Sport on
22 the Sky satellite platform, yes.

23 Q. It excludes the ones on DTH. It also excludes all those
24 who are receiving BT's Sky -- sorry, BT's sports
25 channels via an OTT app, for instance, if they are

1 receiving it by the BT equivalent of NOW TV?

2 A. I don't know the answer to that question.

3 Q. If we could look, please, at Mr Petter's evidence, if we
4 go to tab B.

5 A. In the same bundle?

6 Q. In the same bundle. If we go, please, to paragraph 27?

7 A. Yes.

8 Q. You see at paragraph 27 and following, Mr Petter breaks
9 down the BT customers into various different segments?

10 A. Yes.

11 Q. So in paragraph 27 he's dealing with those who are
12 actually on the BT TV platform. Do you see that?

13 A. Yes.

14 Q. Then at paragraph 28, he deals with those who were on
15 the Sky DSat platform. If you look at the confidential
16 number in C, that is them?

17 A. Yes.

18 Q. Then at paragraph 29, one adds up -- there is another
19 category:

20 "In addition, those broadband customers who do not
21 either have BT TV or a Sky set-top box, who receive BT
22 Sport 1 for free via the BT Sport app or can stream it
23 online", and we see two figures there that we can add up
24 as well. Do you see that?

25 A. I see that.

1 Q. So they are separate from the first figure we see back
2 in paragraph 27? The beginning of paragraph 27.

3 A. I can't verify that from what I'm reading, but this is
4 Mr Petter's witness statement, but whether the numbers
5 in 29 are included in the numbers in 27, I'm not
6 precisely sure, to be honest.

7 Q. He says "in addition", so that would be a fair reading
8 of his evidence, wouldn't it? That they are separate?

9 A. I am afraid you would have to ask Mr Petter.

10 Q. Okay. If we added them up, I'm not going to --
11 hopefully, we can do this without descending into
12 actually revealing what the numbers are -- but if we
13 added up what the numbers are in paragraph 29, we see --
14 well, you see roughly what they add up to?

15 A. I can see the numbers in paragraph 29, yes.

16 Q. Yes. If you compared that to the number in 27, it is
17 very improbable, isn't it, that those numbers are
18 included within the number at 27, given the orders of
19 magnitude there? That would suggest --

20 A. I don't know --

21 Q. Okay.

22 A. I think that's really a matter for Mr Petter.

23 Q. Well, you do quote a figure in your witness statement?

24 A. Yes. Shall we return to that?

25 Q. Yes. If we go back to paragraph 21, you are quoting

1 a figure that you compare to Sky's figure in
2 paragraph 21. Your evidence to the tribunal is you
3 don't actually know what is within the number that you
4 quote there. Is that right?

5 A. I think I'm taking it from Mr Petter's statement,
6 aren't I?

7 Q. Sorry?

8 A. Well, I think that -- just reading the footnotes as to
9 the sources for these various pieces of information,
10 I think they are drawing from Mr Petter's statement. Is
11 that not right?

12 Q. You don't actually give a source for the final sentence.
13 I had understood that it was to do with evidence that
14 you were giving, but your evidence --

15 A. It says in the footnote, "See Mr Petter's footnote 6".
16 Anyway, there is a number there, yes. It is in my
17 witness statement, yes.

18 Q. Okay. Let us assume for the questions that follow, that
19 I am right, that the figure that you have given doesn't
20 include any of BT's customers other than those on the BT
21 platform itself. Okay? We will have that as a working
22 assumption for these questions.

23 A. Okay, for your assumption.

24 Q. If one is interested in the presence as a retailer of
25 pay TV, which is what you are looking at in this

1 paragraph, it would be appropriate, wouldn't it, on
2 a like-for-like approach to look at those households to
3 whom BT retails its pay TV channels, irrespective of the
4 particular platform that they happen to be on?

5 A. It depends what question you are asking, actually.
6 I think it depends whether you want to know the number
7 of people who are subscribing to a pay TV service with
8 a pay TV platform, or whether you are seeking to define
9 those who are subscribing to a channel or a contents
10 service, over-the-top or otherwise.

11 Q. If we are looking at presence as a pay TV retailer,
12 imagine that is the context, if that is the context, it
13 would be appropriate, just as you include NOW TV, to
14 include BT's DTH customers and BT's OTT customers; you
15 would agree with that?

16 A. Depending on the question that was being posed, that
17 might be the right answer. But we are not very clear in
18 these whole proceedings as to exactly how Ofcom is
19 defining the market, so I can't answer the question
20 whether -- which of those two interpretations is the one
21 that is most relevant to Ofcom's analysis because Ofcom
22 has not defined the relevant market.

23 Q. You, yourself, were seeking to make a comparison here?

24 A. Yes.

25 Q. I'm suggesting to you in the context of the comparison

1 that you appear to be making, because you are talking
2 about Sky being the biggest pay TV retailer, the
3 comparison I have just suggested would be the fairest
4 one, that you include NOW TV, therefore you include OTT
5 and DTH; you would agree with that?

6 A. Certainly, that is your stated opinion --

7 Q. I'm asking you, do you agree with it?

8 A. Do I agree with your opinion? As I say, it depends upon
9 exactly what you trying to prove. Are we interested in
10 the number of people who are subscribing to a particular
11 platform, BT's TV platform or Sky's TV platform or are
12 we interested to the subscription to pay TV services
13 which might be channels which we can get over-the-top,
14 we can get them from NOW TV, we can get them from
15 self-retail. So I'm not making a like-for-like
16 comparison. Yes, that is true, but I don't know which
17 is the right comparison to make for the purposes of, you
18 know, the analysis that needs to be done in this
19 enquiry, because Ofcom has not defined it.

20 Q. Let's go on to another related topic. I think you agree
21 with Mr Petter that NOW TV customers don't need to
22 subscribe regularly from month to month, they can simply
23 take services from time to time as they feel like it?

24 A. That's true.

25 Q. They can just take a daily sports pass to watch a match?

1 A. That is true.

2 Q. To use BT's definition, which is quite a theme in
3 Mr Petter's evidence and also appears in yours, they
4 would be customers as BT describes them not subscribers?

5 A. That's true.

6 Q. So again, if you were including all of Sky's customers,
7 you would want to include all of BT's customers if you
8 were going to do a like-for-like comparison.

9 A. If we were making a comparison of subscribers, we would
10 want to identify a like-for-like subscriber number.

11 Q. As between subscriber numbers and customer numbers,
12 is it your view that BT believe that the most meaningful
13 metric or indicator of performance is subscribers and
14 not customers?

15 A. Yes.

16 Q. Are you saying it is misleading for Ofcom to focus on
17 customer numbers instead?

18 A. I think the most important comparison and data point is
19 about subscribers, yes.

20 Q. If I can just hand up a document, please, a BT document,
21 which is BT's key performance indicators.

22 It is a very short document, a short question.

23 (Handed)

24 This is a non-confidential document. This is
25 numbers that BT promulgates to the market. Do you see

1 from the front it is BT's key performance indicators.
2 Q1 2016/17?
3 A. Yes.
4 Q. If you could turn, please, to the 8th table, which
5 I think is on the 9th page, but it goes tables 1 through
6 to 8?
7 A. Yes.
8 Q. We see here it is headed "Broadband TV and lines".
9 A. Yes.
10 Q. About two-thirds of the way down, we see TV, consumer
11 and EE. Do you see that?
12 A. Yes.
13 Q. And here we have TV customers?
14 A. Yes.
15 Q. So this is BT's key performance indicators to the
16 market, and here we are looking at customer numbers and
17 not subscriber numbers, aren't we?
18 A. Yes.
19 Q. So do you want to reconsider your view that the most
20 relevant number is in fact subscriber numbers and not
21 customer numbers?
22 A. No, I don't. I think these have quite two different
23 purposes. For the assessment of competition in the
24 markets, it is my strongly held view that subscriber
25 numbers are the relevant factor.

1 For the purposes of describing to the market and to
2 our investors, the state of our business, it is also
3 relevant to speak of customers. Indeed Mr Petter,
4 I think, covered this a bit yesterday when he was
5 talking about, as I recall -- the transcript will
6 confirm -- the importance of customers as being a very
7 relevant marketing -- it would be "tool" I think is the
8 word he used. So customers are relevant because they
9 are buying something and we have the potential to
10 convert them to subscribers. But for the purposes of
11 competition analysis, subscribers is my firmly held view
12 to be the most relevant number.

13 Q. Let's move on to another topic in this paragraph. That
14 is the fact that you rely on a Sky annual report from
15 2015 for your alleged Sky pay TV subscriber numbers,
16 don't you? Footnote 6 of your statement to
17 paragraph 21?

18 A. Yes, I see that.

19 Q. Are you aware that there is no figure given in that
20 annual report that breaks out Sky's pay TV subscribers
21 from its other types of customers, ie, those that do not
22 in fact take pay TV?

23 A. Yes, I think we talked about this extensively with
24 Mr Petter yesterday.

25 Q. You agree with the evidence he ultimately gave in

1 relation to that?

2 A. Yes, that's correct.

3 Q. But you don't make clear anywhere here that, whilst you
4 are talking about, ostensibly, Sky's pay TV subscribers,
5 that in fact within your figures we also include people
6 who are the opposite of pay TV subscribers, ie, people
7 who don't take pay TV?

8 A. Yes, that is all based on yesterday. We don't know the
9 answer to that question. There is quite a lot of
10 uncertainty in these estimates. We talked also about
11 the problem with the ROI data, and that -- and the
12 relevance of that, so there are various aspects of this
13 number that are not 100 per cent certain, that is true.

14 Q. Just on ROI, just to clear that off -- I think we can
15 deal with that very briefly, because I imagine we will
16 probably be in agreement -- you would agree that, given
17 this does include ROI, the fair comparison again would
18 be to deduct ROI from Sky's numbers?

19 A. Again, Mr Pickford, it would depend upon what purposes
20 you are putting this to. Typically, one is buying
21 rights across both the UK and Republic of Ireland, so in
22 those circumstances, actually the figure including the
23 Republic of Ireland is more relevant than the figure
24 without the Republic of Ireland, but if you are talking
25 about retail pay TV competition, then it is obviously

1 just the UK number that is the most appropriate, but
2 also, because of the uncertainties in this, I think that
3 what's most important is simply to have a good
4 like-for-like comparison from year to year and not to
5 deduct ROI in one year and include it in another year.

6 Q. Okay. If you go on, please, to paragraph 28. A moment
7 ago we were looking at levels. We are now looking at
8 gains of customers over the period 2010 to 2015. You
9 say in your estimates Sky has gained a million
10 additional pay TV subscribers?

11 A. I do say that.

12 Q. Your source for that, we can see in the footnote, is
13 paragraph 35 of the first consultation document?

14 A. Yes. I can see that.

15 Q. Are you aware -- we can go to it -- that again, just as
16 we looked at with your first figure, your figure there
17 includes NOW TV customers?

18 A. I think we have handed up some additional materials on
19 this.

20 Q. My question is, are you aware that the figure that you
21 are quoting, which is paragraph 3.5 of the first
22 consultation document, includes NOW TV customers? We
23 can go and look at it, but I thought I could short
24 circuit and see whether you knew it or not.

25 A. I can't remember, but I'm very happy to look at the

1 consultation document, if you want to.

2 Q. Okay, let's look at that. So for the tribunal's

3 benefit, if the tribunal is using the complete DF1, that

4 is at DF1/5. I think, Mr Williams, the BT confidential

5 version is at N2, tab P.

6 THE CHAIRMAN: You are talking about the December

7 consultation?

8 MR PICKFORD: I think it is the December consultation.

9 I will just check that that is right. Yes, the December

10 consultation document. Thank you, Chairman.

11 A. Which tab should I look at?

12 Q. If you pick up your N2-bundle and go to tab P of that,

13 you should have there the December consultation

14 document.

15 A. Yes.

16 Q. If you go through to page 14 in that document -- I'm not

17 sure precisely which page it is in the other one,

18 because I'm now looking at your version, at any rate,

19 footnote 23 is the key?

20 A. It says here, "Sky's reported subscriber numbers include

21 NOW TV subscribers", so we can verify that.

22 Q. Yes. You don't take issue with Ms Fyfield's evidence

23 that one of the major trends in pay TV in the past five

24 years has been the emergence of OTT delivery?

25 A. I am not sure it is relevant to the matter of this

1 inquiry, because what we are looking at is competition
2 in retail pay TV and the impact of sports supply.

3 Actually, apart from NOW TV, which is of course Sky,
4 I don't think there are any other OTT providers who are
5 providing any pay TV affected by sports, or they can't
6 deliver sports channels or key content, so actually, my
7 view is, as Ofcom themselves recognise, the OTT
8 providers are not competitive with the four players in
9 this four-player market, they are complementary.

10 Q. I may have misheard your evidence. Did you say that
11 there is no one else who is providing sports channels
12 over OTT?

13 A. I think there is NOW TV, and the four players in the
14 market are the providers in the relevant market
15 according to Ofcom's decision.

16 Q. But BT provide its sports channels on OTT --

17 A. Yes, and there are four players in the market.

18 Q. Yes.

19 A. OTT players per se, like Netflix and Amazon Prime, are
20 not in this market.

21 Q. I hear your view. You obviously dispute the
22 relevance --

23 A. Yes, they don't provide any of the relevant content.

24 Q. -- of Ms Fyfield's observation in the context of sports.
25 I'm putting to you a different point, which is, simply

1 as a matter of fact, irrespective of the relevance of it
2 in a sports context, one of the major trends in
3 pay TV -- not talking about sports -- pay TV has been
4 the emergence of OTT delivery. That is a fair, factual
5 point?

6 A. Over what period?

7 Q. Say, between 2010 and 2015?

8 A. There has been a growth in the supply by Netflix and by
9 Amazon in -- of pay TV in some definitions, yes. That
10 is correct. I am not sure they are relevant to the
11 enquiry because they can't show any live sport.

12 Q. We will address that separately, if necessary.

13 One would expect that those trends, given that we
14 are looking -- we have been looking at Sky's pay TV
15 subscribers, not just its sports subscribers, could have
16 been relevant -- indeed important -- to Sky's growth in
17 that same period?

18 A. Well, I'm not quite sure in what sense they are
19 relevant, because they are seen by Ofcom as
20 complementary to the markets in question in this inquiry
21 and so, arguably, would have a positive benefit not
22 a negative one, but I'm not sure what the relevance of
23 the point is.

24 Q. You have quoted figures for an increase in Sky
25 subscribers from 2010 to 2015 --

1 A. Yes.

2 Q. -- of 1 million.

3 A. Yes.

4 Q. The market -- the analyst's figures that Mr Petter cites
5 for NOW TV suggest that that growth -- this is not
6 confidential information, this is simply somebody's best
7 guess -- is entirely attributable to NOW TV?

8 A. So the extension of Sky's dominance into other platforms
9 is a major factor in their growth, yes.

10 Q. So if we are looking at Sky's growth over the period and
11 we see that it is attributable to an increase in OTT
12 provision, by NOW TV --

13 A. Their own provision.

14 Q. Their own provision by OTT. We are in agreement with
15 that?

16 A. Their own provision by their NOW TV service, yes.

17 Q. Yes. On a like-for-like basis, if we start to look at,
18 say, BT's growth, we would again want to look and
19 include BT's OTT provision as well?

20 A. You might very well want to do that, if that is the way
21 that Ofcom wants to look at it.

22 Q. I'm asking you what a fair comparison is. You have, as
23 we have discussed, plenty of background yourself in
24 analysing numbers?

25 A. Sure.

1 Q. If the context is looking at growth from 2010 to 2015,
2 the proposition I'm putting to you is, if we include
3 NOW TV, an important development in the market, equally
4 we should look at BT's OTT growth as well?

5 A. That's fine.

6 Q. You agree with that?

7 A. If that is the relevant inquiry that Ofcom is making.
8 I'm sorry to go around this, but because Ofcom has not
9 defined the market, I don't know whether the right
10 answer is -- which I think it is -- that we should be
11 looking at all of the pay TV services of the four
12 players in this market, or whether it is a different
13 categorisation. We have gone around this already.
14 I think a like-for-like comparison of the right metric
15 would be the right thing to do, if we knew what the
16 right metric was.

17 Q. But you don't know what the right metric is?

18 A. No, because Ofcom has not defined the market. So
19 I think it is highly relevant to include NOW TV delivery
20 and the extension of Sky's dominance, on to all sorts of
21 other platforms. Yes, that is a very important feature
22 in the market.

23 Q. When you gave your evidence at paragraph 28, you were
24 making a comparison but you didn't actually know what
25 the right metric was to make that comparison. Is that

1 what you're saying?

2 A. If Ofcom had defined the market, we would have a better
3 sense of what the right comparison would be. I'm sorry
4 to go around this again, but I think -- for example, we
5 had another aspect of this yesterday, if I may just
6 point it out, we had a long discussion that Mr Holmes
7 led on the importance of triple-play and the growth of
8 triple-play in the various providers. Ofcom has not
9 defined the triple-play market, so it is not relevant to
10 the enquiry. Is that another way of showing a metric
11 which we should have looked at? No, it's not, because
12 that's not the way that Ofcom has defined the market.
13 If we knew which way Ofcom had defined the market, then
14 we would all be in a better place to know what the right
15 metrics were. That is my only point in the matter.

16 Q. If we look, please, at table 3.8 in the final decision,
17 which is for you in N2, tab V, and if the tribunal would
18 like to see the full confidential version that is in DF1
19 tab 4.

20 If we could go, please, to table 3.8, which I think
21 is on page 29 of your version.

22 A. Table 3.8?

23 Q. Yes.

24 A. In my version on page 33. Yes, I think I have the right
25 one.

1 Q. We have three different versions of this document.
2 In any event, as long as you have table 3.8, I think
3 we are able to --
4 A. I have that, yes.
5 Q. -- address the questions. One sees there, in your
6 version, you should have the BT customers -- sorry,
7 subscribers, broken down by platform, so DSat, Virgin,
8 then BT and then Plusnet. Do you see that?
9 A. Yes, I see these numbers here in this table.
10 Q. Yes.
11 A. Are they in fact customers or are they in fact
12 subscribers?
13 Q. Well --
14 A. The table is entitled "Customers".
15 Q. I believe they are customers --
16 A. Right.
17 Q. -- in that case.
18 We see a total at the bottom for BT.
19 A. We do.
20 Q. Now, obviously those that are on Virgin, that is
21 wholesale supplies, isn't it?
22 A. Yes, that's my understanding.
23 Q. So we could deduct the Virgin figure from that total
24 there. Then the rest would be those customers to whom
25 BT is retailing.

1 A. That appears to be correct, yes.

2 Q. Obviously, BT didn't have any of its own sports channels
3 in 2010, did it?

4 A. No, it didn't.

5 Q. No. So all of these customers have been acquired since
6 2010?

7 A. Well, apart from the ones that we had in 2010.

8 Q. Well --

9 A. We had customers in 2010.

10 Q. Sorry, I beg your pardon. If we take the number at the
11 bottom there, the customers, we take away the Virgin
12 figure for wholesale --

13 A. Yes.

14 Q. -- and if deduct the number of customers that BT did
15 have in 2010, that would give us some measure of the
16 growth in BT's customer numbers, in terms of customers
17 to whom BT retails over the period?

18 A. Customers or subscribers?

19 Q. Customers.

20 A. Okay, yes. That would be right.

21 Q. You agree with that approach?

22 A. It seems to be right, yes.

23 Q. Now for BT alone -- this is ignoring TalkTalk, because
24 in paragraph 28 of your statement when you are looking
25 at the growth in the market, you look at Sky and then

1 you look at BT and TalkTalk together.

2 A. In which part do I do that?

3 Q. Paragraph 28 of your statement?

4 A. Yes.

5 Q. First we have your estimate for Sky which is

6 non-confidential?

7 A. Yes.

8 Q. Then we have a confidential estimate for TalkTalk and BT

9 together.

10 A. Yes, right, yes.

11 Q. Now just looking at BT for a moment and forgetting about

12 TalkTalk, if, as I suggest, it is appropriate to look at

13 BT's total retail customer base, we see a very different

14 number in terms of growth to the kind of number that you

15 are quoting?

16 A. But I think you're not making a like-for-like

17 comparison, because I think the numbers in paragraph 28

18 are subscribers, and the numbers in the table -- you

19 referred to the table at 3.8 -- as we have agreed, are

20 customers. So this is not a like-for-like comparison.

21 Q. Well, I'm suggesting the premise is, if we are concerned

22 with customers --

23 A. But we are not. As I said, we are concerned with

24 subscribers.

25 Q. I understand that point. You made it. We are now

1 simply looking at effectively some maths, but just so we
2 are clear, so we agree on the maths --

3 A. Okay, as you wish.

4 Q. If I'm correct that it is appropriate to look at
5 customer numbers?

6 A. I don't agree with that premise.

7 Q. Yes, you have made that very clear.

8 A. Carry on.

9 Q. On the basis of my premise -- and I understand that your
10 evidence is that you don't agree with the premise -- the
11 steps I have taken you through are appropriate ones for
12 looking at the growth in BT's customer numbers?

13 A. Fine, yes, you can deduct our customers in 2010 from our
14 customers in 2015 and then you can consider the nature
15 of those customers and work out what you want to do,
16 yes.

17 Q. Now looking at TalkTalk's subscriber numbers, you would
18 agree that as Sky supplies Sky Basics' channels to
19 TalkTalk, Sky is in a much better position to know how
20 many basic customers TalkTalk has which take Sky Basics,
21 than, for instance, a media consultancy with no inside
22 information from either Sky or TalkTalk?

23 A. Well, I'm not sure I would be willing to agree with that
24 as a matter of principle, no. I mean, you would have to
25 check exactly what the sources for these various pieces

1 market that they previously defined, the CPSC market
2 does not appear. It is not that they have not defined
3 the market, they have avoided defining the market. They
4 do not define a retail market. We don't know whether it
5 is retail market including key content or sports
6 channels including key content or packages including
7 sports channels including key content, and so we get
8 into this very vague debate about whether triple-play is
9 in and whether Netflix is relevant. None of these
10 things are relevant. So we are left without them having
11 done a competition analysis and without them concluding
12 whether or not we see fair and effective competition in
13 the market. So I don't think, to answer your question
14 straightforwardly, they can do a proper competition
15 analysis without having given due consideration to what
16 markets they are assessing.

17 THE CHAIRMAN: That's not quite the same thing.

18 When you say Ofcom did not conduct an orthodox
19 competition analysis, you don't mean that they did not
20 go through a linear process of first defining the market
21 and then examining each part of it, what you are
22 actually saying is you don't think that they conducted
23 a competition analysis that you would recognise. Is
24 that right?

25 A. I am saying exactly what you said.

1 THE CHAIRMAN: Thank you.

2 That has stimulated our colleague into a question.

3 PROFESSOR MAYER: Could I just refer you to your discussion
4 about the grant-back condition which is around about
5 page 53 in the first statement.

6 You make the point that you felt that Ofcom did not
7 engage substantially with the issues that were being
8 raised. Could you just clarify what your view is on the
9 implication of the analysis that was done by
10 Compass Lexecon for the grant-back condition and, in
11 particular, the WMO.

12 A. The Compass Lexecon analysis shows that it would have
13 been irrational for BT to accept a grant-back condition,
14 and Compass Lexecon produced essentially three models:
15 the static model, which Ofcom consider had too many
16 simplifying assumptions and Mr Harman is coming forward
17 to speak about; the choice modelling, which shows that
18 through research, conjoined research in the market, if
19 you plug real world data into this analysis, it comes to
20 that answer as well; and then the dynamic model, which
21 looks at -- forward to whether or not there are
22 implications for incentives to invest.

23 All of these say it would have been irrational for
24 BT to accept the grant-back condition, which is why you
25 won't ever see a conclusion to the negotiation, because

1 Sky will insist upon it and BT will refuse to give it.
2 That is exactly what Ofcom sees in its evidence, that
3 this is not resolved. The problem is Ofcom then use
4 that as a reason for not taking forward the grant-back
5 intervention. Rather, they set it to one side for
6 a very bizarre conclusion that the negotiation is not
7 resolved. It never will be resolved.

8 PROFESSOR MAYER: Can you just clarify, if that is an
9 obvious conclusion to draw, why are the negotiations
10 going on at all?

11 A. Because we diligently hope that Sky will supply on
12 reasonable terms and proceed with good faith and hope
13 that we will get to a conclusion. But they will have to
14 drop the grant-back condition if we are going to get to
15 a conclusion.

16 THE CHAIRMAN: Your view is it is irrational for BT to do
17 it?

18 A. It is irrational for BT to accept the grant-back
19 condition, so we are hoping that Sky will think better
20 of it and come forward with an offer without
21 a grant-back condition.

22 PROFESSOR MAYER: So this is not a matter of negotiating
23 within the terms of the grant-back, it is to drop the
24 grant-back?

25 A. That's correct. Yes.

1 PROFESSOR MAYER: Thank you.

2 THE CHAIRMAN: Right, I have no further questions.

3 MR BEARD: I have no questions for the witness.

4 THE CHAIRMAN: Then, I think, Mr Williams, you may stand
5 down.

6 A. Thank you very much, sir.

7 (The witness withdrew)

8 THE CHAIRMAN: Mr Flynn?

9 MR FLYNN: The next witness is Sky's witness, Ms Fyfield.

10 THE CHAIRMAN: We need time to change the papers.
11 We will rise for a moment.

12 (11.17 am)

13 (A short break)

14 (11.22 am)

15 MR FLYNN: Sir, we call Ms Fyfield.
16 (In camera session)[redacted pages 32-146]
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(The witness is released)

(3.26 pm)

1 Discussion re timetable and transcript

2 THE CHAIRMAN: Where does that leave us today?

3 MR BEARD: Leaving early, sir.

4 THE CHAIRMAN: Leaving early?

5 MR BEARD: Yes.

6 THE CHAIRMAN: Time to get ready for tomorrow?

7 MR BEARD: Yes. Tomorrow is the beginning of the novel

8 experience, I think, of the hot tub for this tribunal.

9 THE CHAIRMAN: It will be the hot tub experience, the

10 beginning, the middle and the end. It is the beginning

11 of the expert evidence.

12 MR BEARD: Yes, the beginning of the expert evidence and

13 Mr Matthews coming afterwards.

14 THE CHAIRMAN: Is there anything you want to ask us about

15 what you should be preparing for?

16 MR BEARD: If the tribunal has any thoughts about what it

17 would be useful for us to be preparing, then obviously

18 we can take those on board overnight.

19 In the meantime, we have been looking at the topics

20 that were discussed and agreed and questions that may or

21 may not be covered by the tribunal and on which it might

22 be sensible to follow up. But beyond that, I don't know

23 whether there are particular things the tribunal has in

24 mind?

25 THE CHAIRMAN: I think we need to be clear about the

1 confidentiality arrangements in the light of today's
2 experience. I mean, any comments, suggestions,
3 submissions?

4 MR BEARD: I think we will take it away, if we may, and
5 think about it further. There is a real difficulty
6 here, because of the way the confidentiality ring is
7 structured, that those that are closely involved in the
8 preparation of this case, including instruction of
9 experts, are people that are being excluded from these
10 proceedings, and that is creating a problem for us.

11 So we will bear in mind the arrangements
12 the tribunal has put in place and ensure that they are
13 complied with, but I think it is right to put down
14 a marker that it is creating significant problems for BT
15 at the moment.

16 THE CHAIRMAN: Mr Pickford?

17 MR PICKFORD: Sir, I think it is fair to say that the nature
18 of the evidence that is given by the experts that is
19 going to be considered in the hot tub is of a very
20 different nature to the kind of evidence we have heard
21 today from Ms Fyfield. Obviously that dealt with
22 information that was intimately involved with Sky's
23 business; the hot tub is about a theoretical model
24 between economists.

25 As I understand it, most of that information is

1 something that both Sky and BT are able to consider, so
2 what may well be possible is at the very least we can
3 have a session which is open to Sky and BT personnel.

4 My aspiration is actually we could go somewhat
5 further than that, but it is BT that has basically
6 suggested that a fair percentage of the information in
7 their reports is confidential, so the onus really is on
8 BT as to whether it persists with that view or whether
9 we are limited to BT and Sky confidential --

10 THE CHAIRMAN: If it is BT confidential then the BT people
11 can be here, that's not a problem.

12 I think that is our sort of starting point, that
13 confidentiality appears to come from unexpected quarters
14 so we have to be careful. I mean, if we could have
15 a Sky/BT/Ofcom deep down(?) hot tub exchange about the
16 merits of the modelling, I think that would suffice for
17 our purposes.

18 MR PICKFORD: Certainly from my preliminary discussions
19 I have understood from BT that that should be okay. But
20 we will obviously take that away.

21 THE CHAIRMAN: It might be slightly lost on the general
22 public.

23 MR PICKFORD: Indeed.

24 There is one other confidentiality issue, sir -- as
25 we have been talking about confidentiality which is why

1 I raise it -- today obviously Ms Fyfield in nominally
2 open session went into what we considered to be
3 sensitive areas. I think the tribunal was well aware
4 that there were very sensitive areas.

5 In the light of that, we suggest that the
6 appropriate approach in relation to today's transcript
7 is that there is only a confidential transcript produced
8 initially, that can then be reviewed properly for
9 confidentiality and then there can be an open one.
10 Currently the normal arrangements are at the end of the
11 day anything that is marked open immediately goes to BT,
12 but of course today there was a lot that was nominally
13 open but in fact is highly sensitive.

14 THE CHAIRMAN: I think you should have a chance to review
15 it, yes.

16 MR PICKFORD: Thank you.

17 THE CHAIRMAN: Could you do it quite quickly?

18 MR PICKFORD: Of course, sir.

19 MR BEARD: I think it is important in that regard that those
20 that will be excluded from seeing that transcript
21 include those that would want to be in contact with and
22 providing instructions to or information to experts and
23 instructions to counsel in relation to tomorrow's
24 proceedings. Therefore, if Sky is going to carry out
25 that exercise I think it needs to be a matter of

1 priority.

2 THE CHAIRMAN: Proceedings in the morning or in the
3 afternoon?

4 MR BEARD: Well, in practice it needs to be by the morning,
5 because the ability to be able to both be present during
6 the hot tub and to have given instructions and reviewed
7 matters means that we really need this, this evening.
8 Because otherwise we are put in a very difficult
9 position here. We are not keen to try to postpone any
10 timings but we do need to be able to see this material
11 and consider it.

12 MR PICKFORD: I'm a little confused, sir. We have not
13 really been giving instructions to experts in the way
14 that BT seem to envisage that they will --

15 MR BEARD: I said counsel --

16 THE CHAIRMAN: Let's be practical. How long will it take
17 you to go through the transcript which comes out very
18 soon and put brackets around those parts you would
19 rather not have --

20 MR PICKFORD: Those behind me are conferring.

21 THE CHAIRMAN: That is the question. If you can do it this
22 evening, then that solves the problem.

23 MR PICKFORD: We believe it should be possible to do this
24 evening. We will do our best to do so.

25 THE CHAIRMAN: I am sure you will err on the side of

1 caution. So if we could have a publishable transcript
2 by start of business tomorrow, that would be fair, would
3 it not?

4 MR PICKFORD: There is not a problem with the experts
5 because they are in the confidentiality ring, so they
6 will see the confidential version.

7 THE CHAIRMAN: It is the people instructing the experts.

8 MR BEARD: I actually said instructing counsel. But there
9 has to be contact with the experts and those that are
10 having contact with the experts are also those who are
11 then instructing counsel. Because of course that is the
12 issue here: if we get a situation where issues are not
13 covered in the hot tub, counsel may be following up on
14 questions, we want to have been able to take proper
15 instruction in relation to those matters and we just are
16 not able to do that at the moment.

17 THE CHAIRMAN: The problem is we do not live in a perfect
18 world.

19 MR BEARD: I'm very well aware of that, sir, and I quite
20 understand. And I also understand that Sky is perfectly
21 entitled to be able to say "Well, things were said today
22 that actually we want to excise from the transcript",
23 and we can have a debate about that in due course.

24 But we really do need to -- the proposal that
25 effectively the transcript is shut down, which is what

1 is being proposed --

2 THE CHAIRMAN: Only because --

3 MR BEARD: I quite understand. But if that sort of step is
4 being taken, then the onus is really on Sky to go
5 through it very quickly and sort out a version which can
6 come to us.

7 THE CHAIRMAN: My concern is that it should not become known
8 that the purpose of litigation between competitors is to
9 change competitive conditions. Certainly I am sure you
10 have that in mind.

11 So can you do it this evening, please?

12 MR FLYNN: It arises in the context where the same request
13 has been made of us because of slips made on BT's side
14 over the last couple of days. So I think there is
15 a procedure that is well in place and as long as we
16 identify the relevant bits to BT's legal team overnight
17 and agree the correct outcome, we will end up with
18 a transcript which is available to those within the BT
19 ring. So that can be done.

20 THE CHAIRMAN: BT are the applicant; you, with respect, are
21 the intervener. You have not made the same point. You
22 are making it now, but you had not previously made it.

23 Mr Beard has made a specific request. We had
24 slightly uncertain arrangements during the day. We must
25 err on the side of caution. It is a practical matter.

1 I think you could go through the transcript -- I shall
2 be going through the transcript, I don't see why you
3 shouldn't -- and mark it up as appropriate. I think
4 start of business tomorrow is the time you will get
5 a transcript and I hope that is sufficient for your
6 purposes.

7 MR BEARD: I don't think in practice it really is, sir.

8 The difficulty is Mr Flynn raises the point that BT
9 has identified a couple of places where things that were
10 said by Mr Petter we say should be redacted. We are not
11 suggesting that you shut down the whole transcript more
12 broadly and that there is no open version.

13 I have to say, this is a matter that Sky really does
14 need to give priority to and provide it this evening.
15 Otherwise, if we are starting at 10.30 tomorrow morning,
16 there really is not going to be proper time for
17 consideration of these matters. It does put us in
18 a very difficult position, I'm very sorry, and it's not
19 a symmetrical approach.

20 THE CHAIRMAN: Tomorrow afternoon we are seeing Dr Padilla,
21 I think?

22 MR BEARD: Yes. It is not just that --

23 THE CHAIRMAN: Are you saying that you need instruction from
24 your clients on Ms Fyfield's evidence in order to
25 properly be in touch with your expert witness for

1 tomorrow afternoon's proceedings? Is that what you are
2 saying?

3 MR BEARD: To be properly in touch with our expert witness?
4 We need to be able to take instructions in relation to
5 issues which arose today, and consider those with our
6 client in relation to questions that we may think it is
7 appropriate to pursue in the hot tub or indeed matters
8 that it becomes relevant to raise with Dr Padilla in the
9 afternoon.

10 It is simply the fact that one does need to be able
11 to say to the people providing the instructions to us
12 "Look, this is what's being said. Is there anything
13 here that means that there are particular questions that
14 have been asked?" It may be that the return is nil, but
15 we can't decide that afterwards. We need to decide it
16 beforehand and before we come into court to deal with
17 these matters tomorrow.

18 THE CHAIRMAN: But your clients outside the confidentiality
19 ring are not going to get sight of strategically
20 important matters anyway.

21 MR BEARD: No, no, no. Absolutely not. I completely see
22 that. That's the whole purpose of this.

23 But there is a big difference between an open
24 transcript coming out and us saying "Hang on a minute,
25 there are a couple of bits, could you redact them so

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