IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1381/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Thursday 24th June 2021

Before:
The Honourable Mr Justice Waksman
Eamon Doran
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Justin Le Patourel

-v-

BT Group PLC
British Telecommunications PLC

A P P E A R AN C E S

Ronit Kreisberger QC, Nicholas Bacon QC, Nikolaus Grubeck and Jack Williams (On behalf of Justin Le Patourel)
Sarah Ford QC, Sarah Love, Giles Richardson and Benjamin Williams QC (On behalf of BT Group PLC)

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Thursday, 24th June 2021

(10.30 am)

MR JUSTICE WAKSMAN: Good morning, everyone. I am Mr Justice Waksman. I have to my right Mr Ridyard and to my left, Mr Doran. We constitute the Tribunal. These proceedings are being live-streamed and, of course, many are joining on Microsoft Teams.

I must start, therefore, with the usual warning. These are proceedings in open court as much as if they were being heard before the Tribunal physically in Salisbury Square House. 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, in breach of that provision is punishable by a contempt of court.

Yes, Ms Kreisberger.

Submissions by MS KREISBERGER

MS KREISBERGER: I am grateful, sir, Members of the Panel. I appear with Mr Grubeck and Mr Williams on behalf of Mr Justin Le Patourel, the proposed class representative. I will refer to him as the PCR today, and my learned friends Ms Ford and Ms Love appear for BT, the proposed defendant.

Now, sir, there are two applications before you today. There may be a third. If I could just introduce them.

The first is the PCR's application to be certified to bring collective opt-out proceedings for damages under Section 47(b) of the Competition Act. Then we have BT's application for strike-out and/or summary judgment. Sir, the third, as you will know, concerns the PCR's application to make a minor amendment to the class definition. There was correspondence yesterday

afternoon. The parties are still liaising on an outstanding point and we are hoping it can be resolved. So, sir, if I could ask for the Tribunal's indulgence, I think if we could take that issue tomorrow, if it hasn't been resolved by then.

MR JUSTICE WAKSMAN: Certainly.

MS KREISBERGER: I am grateful.

In that case, sir, I propose to structure my submissions as follows. They are in four parts. First, I will introduce the case and set out the facts in overview. I will then move on to the merits. Thirdly, I will address the certification requirements. That covers authorisation and eligibility, but happily there is now a very limited dispute between the parties on that. There is only a single point on the eligibility of the claims. Then the last topic I will address is the opt-out procedure, and I will explain there why it is that an opt-in would be impracticable in these circumstances.

So starting with the first topic, the introduction to the facts of the case, this is a case about unfairly high prices demanded by BT for residential landlines when they are bought on their own, not as part of a bundle. Ofcom calls these Standalone Fixed Voice Services, as you will have seen, and I will refer to them today as SFV services for short.

Now SFV services have two components. Access, which is the line rental, and Calls, which you obviously need in order to use your landline to call others. The PCR's case concerns BT's access charges, which have been spiralling ever upwards since 2008, 2009, although the claim period begins on 1st October 2015. That's for limitation reasons.

Now it's a particular feature of this case that SFV services are supplied to two distinct groups of customers and that's most clearly shown at Ofcom figure 3.1. For reasons, and it is I think helpful to turn it up, that's at tab 1 of the core bundle.

So that's bundle 1, tab 1, page 16. That's Ofcom's representation there of the customer groups.

Voice Only Customers, the first group, do not take fixed broadbrand. Split purchaser customers do, but, as I said, not as part of a bundle. They can be further divided, as you see on that diagram, but we need not concern ourselves with that today.

In 2017 there were just under 3 million SFV customers. 1.7 million were voice only; 1.2 million were split purchaser. Today the PCR's estimate is that there are 2.3 million.

Now, these customers have a particular set of characteristics which were summarised by Ofcom in their provisional conclusions.

If I could ask the members of the Panel to turn up bundle 6A. I should just mention at tab 8 of bundle 6A is the confidential version of Ofcom's provisional conclusions. To avoid referring to two different versions of the same document we have a redacted version in core bundle 1. This is the one I will be referring to, obviously not reading out confidential material, which I will simply draw to the Tribunal's attention, given the live-stream.

So if I could ask the Tribunal to turn up page 353, at paragraph 1.13 Ofcom said this:

"Standalone landline customers generally do not engage with the market. 70% of standalone landline customers have never switched provider or considered doing so. They tend to be older and less likely to shop around for a better deal. Approximately 43% of standalone landline customers are at least 75 years old, and 35% live in DE socio-economic group households (for comparison, 4% of dual play customers are 75 or over, and 20% are in DE households)."

Now, I will come back to the demographic that makes up the class membership

when I come on to deal with practicability later on today, but that gives an introduction.

I should mention at the outset that BT challenges that description as inapplicable to Split Purchase Customers. Now, we do accept that there are differences between the groups, but we don't accept BT's description of the Split Purchase Group as engaged, and again I will develop that point later on in my submissions.

So returning to the overview, BT exercises substantial market power over these customers, and that's well demonstrated by its high market shares. It is a mere monopolist for Split Purchase Customers, has a market share just shy of 100%. For Voice Only Customers BT's market share is well above, well above the 50% level, which, as you will know, gives rise to a presumption of dominance in competition law, and again I will come back to these points.

Now this is in stark contrast to the market for dual play bundles, bundles made up of landlines and fixed broadband, where BT faces considerable competition from rivals in the marketplace and customers benefit from competitive prices.

Now, it is the contrast between these dual play and SFV markets which lies at the heart of this case, and coming back then to the provisional conclusions, so that's again 6A, tab 8, page 350, Ofcom said this:

"Over the past decade the landscape for fixed line telecommunications in the UK has been transformed. Competition has brought new services, increased choice and delivered real benefits to consumers. 59% of homes now buy a bundle including a landline telephone service and a broadband service."

They then give some statistics on that. Moving down to 1.4:

"Consumers have recognised these benefits, and take-up of bundles including three or more services has increased significantly over the period."

That's represented at figure 1.1, but then at 1.5 Ofcom says this:

"However, customers that do not take bundled services have not benefited from competition in the same way. We are particularly concerned about people who only buy a landline from a provider – either because they don't want broadband or pay-TV or because they take these services separately, usually from different companies. Our concerns are that relative to those who purchase services in a bundle, these consumers have less choice of suppliers, are not benefitting from strong price competition or promotional offers and their loyalty to the suppliers is leading to ever higher prices. Further, while price increases up to 2013 might have been explained by the rebalancing of revenue from calls and the line rental," -- I will come back to rebalancing -- "since then we have observed a more rapid inflation and it is now clear we need to act."

So it is the PCR's case that BT has used its extensive market power over each of these customer groups, which market power has itself seriously weakened the scope for price competition in these markets to extract unlawfully high rents from them. It has thereby failed in its responsibility, special responsibility, as a dominant firm.

Now I will come on to explain why as a matter of competition law BT's charges are abusively high, but I would like to give you first a flavour of the magnitude of the upward spiral to have in mind.

So staying with bundle 6A, but moving forward to tab 10, this document is Ofcom's statement which followed the provisional conclusions and consultation. If you to turn up page 598, figure 1 there, that is Ofcom's summary of price movements. You will see in the orange line is WLR. That's Wholesale Line Rental. That orange line shows a steady decrease from 2006 to 2017.

So that's the wholesale product used by BT to offer retail line rental services to consumers. So that's the cost line.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: Then the dark green line -- it can be a little difficult to distinguish them -- but that's the one that tracks along the top. That's BT's retail charges to customers. You see some early decreases, and then from 2009, the date of deregulation, you start to see rapid increases going upwards like a staircase on that graph. Ofcom interprets that graph as showing that BT's line rental prices rose by 47% in real terms whereas wholesale costs fell by 27% in real terms.

Just to give you one more indication of the scale of these increases, staying with the same bundle, if I could ask you to move to tab 7. This is Mr Parker's, the PCR's expert economist, expert report. Sorry. This is his supplementary, second report. If you go to page 322, you see a chart figure 3, a table. In the final column on the right-hand side that gives you BT's net margins, which you see actually jump up from 2008 and you see the figure there up to 40% in 2015, 2016. So that's the increase in net margins over the period.

As you know, it is these price increases that triggered intervention by Ofcom under the Telecoms Regulatory Regime. Ofcom conducted its detailed review in 2017 and it formed the provisional view that it needed to intervene to impose price control. That's a Draconian measure for a regulator, but it was required to put a stop, Ofcom said, to the consumer detriment caused by the upward spiralling prices.

Ofcom initially envisaged a mandated price cut on SFV services to both groups of between £5 and £7 per month. Ultimately you will have seen there was a form of settlement. BT offered commitments whereby it undertook to cut its

price by £7 a month to Voice Only Customers only to put an end to the consumer detriment, and with price transparency measures for Split Purchase Customers, and Ofcom accepted that proposal. So Voice Only Customers stopped paying the inflated prices on 1st April 2018, but Split Purchase Customers pay them to this day, even though it is the very same service.

So, sir, the salient features of this case are that BT enjoys a position of dominance or super-dominance in the relevant markets. It has used that market power to extract unfairly high prices from its customer base. Those prices were so high as to trigger regulatory intervention by Ofcom. That resulted in one group of customers getting a substantial price cut and the other being subject to transparency measures.

Now that is a strong set of facts for an excessive pricing case, but, of course, it is not my job today to persuade you that the excessive pricing case will succeed. That's for another day with the benefit of the relevant documents and the evidence and the cost and price data. I need only persuade you that the case as pleaded should be allowed to proceed to trial by way of opt-out proceedings so that the allegation may be properly tested.

My submission, my overarching submission, which I will develop for you today is simply that there is a case for BT to answer at trial.

Now the reason why the PCR asks the Tribunal's permission to bring this case is that although Ofcom succeeded in obtaining a price reduction for one group, to date BT has not reimbursed a penny to any of them. Mr Le Patourel now seeks compensation for the harm suffered.

Now, sir, I should draw your attention to the class definition. That's at claim form, paragraph 75. That's in bundle 1, tab 1, page 31, at the bottom of page 31. Sir, as I have foreshadowed, we think the public trustee point is capable of

being agreed. If that's right, the words "public trustee" will not appear here, and the class will be defined as:

"All persons domiciled in the United Kingdom (except in the Hull Area) - or their UK domiciled personal representatives or UK domiciled administrators of their estates - who, during the Claim Period, bought a BT Standalone Fixed Voice Service except for the Excluded Services."

That's the proposed class. The SFV services I should mention are residential landline services, and we see down the page 32 we have got the two sub-classes which correlate to the two groups of customer and the claim period is over the page. The claim period is 1st October 2015 to 1st April 2018 for Voice Only Customers. For Split Purchase Customers, 78(c), it is from 1st October 2015 to date essentially.

MR JUSTICE WAKSMAN: Uh-huh.

MS KREISBERGER: The middle category is Business Voice Only Customers. I will come on to deal with those. They were excluded from the BT commitment. So their timing, the applicable claim period runs in the same way as for Split Purchase Customers, because they didn't benefit from the commitment price cut. So that, sir, is the class.

That concludes my high level overview of the claims and, subject to any questions, I propose move to my second topic of the merits of the case.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: I am grateful, sir.

The merits are relevant in two respects. First, there is BT's application that the whole claim be struck out or that summary judgment be given in its favour and, secondly, the Tribunal is entitled to take account of the strength of the claims in deciding whether they are suitable for opt-out as opposed to opt-in

proceedings. Now I will address these two thresholds together to avoid duplication, having to come back to the same points.

My submissions on merits are in three parts. First, I will address the legal threshold in relation to each of the merits elements. That can be done briefly, because there is no real dispute between the parties on the legal principles.

Secondly, I will set out a high level exposition of the merits of the PCR's case on abuse.

Thirdly, I will address the six grounds of challenge deployed by BT, and I will explain why they are both immaterial and in any event wrong.

So with that I turn to the legal threshold. Dealing with strike-out summary judgment first, just for your note – we don't need to go there – the relevant provisions are Rule 41(1) of the CAT rules. There is power to strike out where there are no reasonable grounds for making the claim and Rule 43(1), summary judgment given where there is no real prospect of succeeding on the claim. Sir, is it helpful to give the bundle references to the Rules?

MR JUSTICE WAKSMAN: Yes, you can do so.

MS KREISBERGER: So the first is at 8A, tab 5, page 19 and rule 43 is over the page.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: There is no dispute that these powers are exercised on the same basis as the corresponding rules of the CPR in the High Court and that there is no material distinction between strike-out and summary judgment for these purposes. As I say, there is nothing between the parties on the legal principles. They were recently summarised by the President in the Woolsey case. That is at 8B, tab 26, page 1181. They are well-known, but I think it is useful to see them.

Rather than read out the whole excerpt, although I am very happy to, I would simply draw your attention to paragraph 16. It sets out the principles articulated by Mr Justice Lewison, as he then was, in EasyAir.

The PCR emphasises the following of those principles to this application. The claims must have a realistic and not fanciful prospect of success. They must carry some degree of conviction and be more than merely arguable. The Tribunal must take account not only of evidence placed before it but evidence that can reasonably be expected to be available at trial.

The court, here Tribunal, should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact where reasonable grounds, and I emphasise this, where reasonable grounds exist for believing a fuller investigation would add to or alter the evidence available at trial and so affect the outcome of the case, fuller investigation. Sir, the words of sub-para (6) of paragraph 16 is a fuller investigation into the facts of the case, fuller.

The judge contrasted those cases with cases where a short point of law or construction would be dispositive in the sense of establishing that the case is bad in law. Those are the cases that shouldn't be allowed to proceed.

In the CPO context the Supreme Court in Merricks -- just for your note, sir, at paragraph 64D -- the bundle reference is 8B, tab 27, page 1225 -- there the Supreme Court emphasised that claims with a real prospect of some success should not be denied a trial by the only procedure available to them in practice, which in that case, like in this case, is the opt-out collective procedure.

Now BT for its part emphasises the need for competition claims to be pleaded properly, that there be a clear articulation of each party's position in the Statement of Case and argues that the principle that the court should be

cautious to assume that it's beyond argument that existing case law will not be extended or modified, a point that's often raised in competition cases, does not apply here. They say that caution doesn't apply here.

So, pausing here, the threshold that I face is a low one, and I will show you today that it is easily surpassed on these facts for these five short reasons. There is clearly a case for BT to answer regarding unfairly high charges for SFV services. One sees that from the actions of the Regulator alone. The PCR's prospects of success are not far-fetched or fanciful.

Secondly, excessive pricing cases are notoriously fact-sensitive. They call for a proper investigation of an array of data, especially in relation to costs, relevant price benchmarks and probing of expert evidence, which will be available at trial. That is a theme I will be returning to.

Thirdly, BT's myriad criticisms raise factual disputes. There is no error of law or construction or any other knock-out blow amongst them.

Fourth, we don't demur from the need for a proper pleading in competition cases but we say that there is. It is amply well pleaded. Nor am I saying that the law on excessive pricing will need to change to accommodate this case; only that this is an area where each case turns on its own facts. So the uncertainty, such that there is, lies not in questions of legal development but how the existing legal framework will apply in the circumstances of this case, which in turn depends on the facts.

That's in broad overview. Then just very briefly, what about the merits test for the strength of the claims element of the opt-out assessment that the Tribunal is being asked to consider? Well, as I said, I will address the CPO requirements, particularly eligibility, given the dispute, in the next section of my submissions, but I am taking matters out of order here. So this goes to

the question of certification, but I am only dealing with the merits question, strength of the claims.

I think I should show the Tribunal the relevant rule, which is at authorities bundle 8A and that's rule 79(3). That's at tab 6, page 40. There you have Rule 79(3):

"In determining whether collective proceedings should be opt-in or opt-out, the Tribunal may take into account all matters it thinks fit, including the following matters additional to those above."

There you have at (a):

"The strength of the claims."

That's one point. I will come back to sub-paragraph (b). Then moving forward to tab 7, guide para 6.39. Sir, that's page 61.

"The Tribunal will consider as it thinks fit in determining whether proceedings should be opt-in or opt-out. Rule 79(3) lists the specific factors the Tribunal will consider.

"Strength of the claims.

"Given the greater complexity, cost and risk of opt-out proceedings, the Tribunal will usually expect the strength of the claims to be more immediately perceptible in an opt-out than an opt-in case, since in the latter case the class members have chosen to be part of the proceedings and may be presumed to have conducted their own assessment of the strength of their claim. However, the reference to the "strength of the claims" does not require the Tribunal to conduct a full merits assessment, and the Tribunal does not expect the parties to make detailed submissions as if that were the case. Rather, the Tribunal will form a high level view of the strength of the claims based on the collective proceedings claim form."

Then it goes on to say in follow on claims that's usually sufficient.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: So, just stepping back, if the merits appear on the pleaded case to be obviously weak, if they are not immediately perceptible then the Tribunal might consider the opt-out procedure to be inappropriate. That is really the bar here. It is another low threshold for the PCR.

So that's the test. I can now move on to what is the meat of the case on merits.

My overarching submission will be that none of BT's criticisms come close to showing that the PCR's claims are fanciful and should be stopped in their tracks now. My submissions are in five parts. I will first address market definition and dominance; secondly, the applicable legal principles on excessive pricing; third, how those principles apply to the PCR's case on excessive pricing; I will then, as my fourth point, turn to BT's criticisms; and, finally, a brief word on causation and damage, which completes the aspects of the PCR's case.

So, starting with dominance. In order to assess dominance, one must first define the relevant markets in which the firm is said to exercise market power. The PCR's case here is that there are two relevant economic markets which should be defined as follows. I will just give you the reference to the claim form. Unless it is helpful, I don't think we need to turn up paragraph 124 of the claim form, but that's at bundle 1, tab 1, page 48. There are two markets: the market for the supply of SFV service to UK voice only customers, excluding Hull, and the market for the supply of SFV services to UK Split Purchase Customers, excluding Hull.

Now these markets as defined have two salient features. The first is for each of the customer groups that I have laid out, each one constitutes a distinct economic market. In short, that's because BT can and does price discriminate between

them. It can charge one price to Voice Only Customers and another to Split Purchase Customers, which is precisely what it has done ever since the commitments, but just to be clear, Mr Parker in his evidence confirms that even if both customer groups, in fact, comprised one composite market it would make no difference whatsoever to his analysis of both dominance and abuse. So it is not a point of great significance certainly at this stage. The reference to his evidence on that point is his first report, paragraph 132. That's at bundle 1, tab 3, page 131.

The second salient feature is more significant, and that is that dual play bundles, landline and broadband, are outside the relevant markets. Now this lies at the heart of the case on abuse as well as dominance, namely -- this is where Ofcom started -- dual play bundles are competitively priced but they haven't constrained BT's prices to SFV customers.

Now to make this point good I will give some highlights from the evidence in support. I am obviously not going to go through every single aspect. Time is limited, but there are four key pieces of evidence I would draw the Tribunal's attention to.

The first is for Voice Only Customers dual play bundles are not a product substitute for SFV services, because they are not interested in buying the other part of the bundle. They don't want broadband. So there is a functional mismatch, and again just for your note that is Mr Parker's first report at paragraphs 147 to 8 at bundle 1, tab 3, page 134.

Now Split Purchase Customers, on the other hand, do buy broadband. So functionally the two are identical, but we know that the two products don't compete from the pricing data. The price data is striking. There's a large gulf in price between dual play bundles, on the one hand, and SFV services on the

other, with the former being significantly cheaper overall, as Mr Parker observes – that is at paragraph 154.1.1 of his first report, bundle 1, tab 3, page 136 – he notes that a Split Purchase Customer could save more than 20% per month by switching to dual play. So that in his view is powerful evidence that the prices of dual play bundles don't constrain the price of SFV services to Split Purchase Customers.

Now this point was addressed by Ofcom in the 2017 statement in the context of market definition. That is at bundle 6A, tab 10, page 614. It is paragraph 3.49. I am beginning at the very end of 3.9, the last few lines on page 614. Ofcom said:

"We do not consider it necessary to proceed with a more formal market definition exercise in respect of the Split Purchase Customers."

That's because of the nature of the settlement with BT.

MR JUSTICE WAKSMAN: Sorry. Which paragraph number are we looking at?

MS KREISBERGER: At paragraph 3.49 on page 614 but I have started at the last four words on that page.

MR JUSTICE WAKSMAN: Yes. That's what I wanted to ... yes, I have got it. Thank you.

MS KREISBERGER: So they explain they are not conducting a full formal market definition exercise but they go on to make these observations at 3.50 and following:

"In the February consultation we noted that the availability of competitively priced dual play services had not prevented Split Purchase Customers from experiencing price rises well above costs for SFV services. We also took account of differences in demographics and engagement levels of split purchase compared to Voice Only Customers."

I will come back to that:

"Split Purchase Customers pay materially more, for standalone voice and standalone broadband services, than they would pay for functionally equivalent dual play services."

So that's the point that I am making here. They go on to observe "These customers have also been highly profitable. We explained the outcomes and evidence supported our provisional conclusion that dual play bundles do not competitively constrain SFV prices to split purchasers. Therefore, we did not consider that Standalone Fixed Voice Services bought by split purchasers were in the same market as dual play services. Consultation responses have not provided evidence or arguments to lead us to change our view."

So that's the pricing point.

Thirdly -- and we could keep this bundle open -- Ofcom also found that the high level of profitability enjoyed by BT on the sale of SFV services would not be sustainable if it faced competitive constraints for dual play. We find that going back to the provisional conclusions on tab 8 on page 373. Paragraph 3.42.2:

"As set out in Section 8, our analysis indicates that SFV services for both voice only and Split Purchase Customers have been highly profitable. We would not expect providers of SFV services to split purchasers to be able to sustain such a high level of profitability if they were facing competitive constraints from dual play services."

My final point on why dual play is outside the market definition comes in the form of rather compelling evidence from BT's own contemporaneous documents on pricing decisions. Those documents, as we understand them, support Mr Parker's view that dual play bundles don't constrain prices to either customer group.

Now this is where I am about to turn to some confidential material, so I will not read that material out. If I may ask the members to read it to themselves. Just to be clear before I turn it up, the PCR has not seen the documents themselves. BT have not disclosed any documents in these proceedings of their own, but what they have disclosed are Ofcom's unredacted documents, which I have been taking you to, and we have Ofcom's description of BT's documents in those redacted sections.

So if I could ask you to turn up the annexes to the confidential (inaudible) conclusions at tab 9 of this bundle, page 537, starting at the highlighted Section, A8.69? Could I ask the Tribunal just to read from there down to sub-para 74 over the page? (Pause.)

MR JUSTICE WAKSMAN: Yes, we have read that. Thank you.

MS KREISBERGER: I am grateful. Sir, to sum up these points, there is a compelling evidential picture based on, one; market shares, two; pricing data, three; the profitability analysis and, four; the documentary evidence to support Mr Parker's assessment that dual play bundles do not constrain the price of SFV services. That's four aspects to that.

Now coming back to the standard of the merits review, realistic, not fanciful, high level, I make three submissions about Mr Parker's approach to market definition.

First, the exercise of defining the market which the economist is asked to perform involves identifying a product -- I am very aware Mr Ridyard will be very familiar with this -- identifying a focal product and then working out which other products act as competitive constraints using the snip test as the analytical framework.

Now that is a fact-sensitive endeavour, which involves expert appraisal of all the

relevant evidence, and that is precisely what Mr Parker, an experienced economist, has done in his reports. He has taken a forensic approach to the available evidence so far on competitive constraints, the four categories I have just set out, and so he has done that on what is for now the best available evidence.

He makes that point in his first report, which is at bundle 1, tab 3, page 121, paragraph 101.

MR JUSTICE WAKSMAN: Sorry. Which paragraph number?

MS KREISBERGER: Paragraph 121. That should be on page -- sorry. I am in the wrong tab. That's my mistake. Page 121.

MR JUSTICE WAKSMAN: Sorry. Paragraph?

MS KREISBERGER: Paragraph 101 in tab 3, page 121.

"I note that the full set of evidence required to carry out a formal assessment of the SSNIP test is often not available, and instead the SSNIP test provides a useful thought experiment and way of structuring one's thinking. In these circumstances, one needs to draw inferences as to the relevant market definition on the basis of the best available evidence."

It is simply that. That's what Mr Parker has done. That's my first point.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: My second point is it is relevant to merits that in all respects material to the excessive pricing analysis, the markets defined by Mr Parker correspond to the markets defined by the specialist Regulator, by Ofcom, for the purposes of its Communications Act review.

In brief, Ofcom also ultimately defined two customer groups, the two groups as forming distinct markets. It reversed its initial position on that. If it is helpful, for your note that's at paragraphs 3.13 to 3.22 of the statement, which is at

6A, tab 10, page 608 onwards. Both Mr Parker and Ofcom found that dual play packages don't compete with SFV services in either of these markets. Also in these are details that we have not yet gone into, but both Mr Parker and Ofcom exclude business services -- SFV services are residential -- mobile services and BT Basic and the geographic market is the same for both.

So actually the only difference on market definition is that Mr Parker treats access and calls as being part of the same market -- now in short he does that because he says they are supplied as a package. Whereas Ofcom treats them as being in distinct markets. Mr Parker also explains that whether or not they are in the same market or not makes no difference at all to his analysis of either dominance or abuse. So again that point need not trouble us further today. So you have it, that's paragraph 129 of Mr Parker's first report and that's at bundle 1, tab 3, page 130.

I am not suggesting that the correlation with Ofcom tells us that Mr Parker has necessarily got it right. I make a much more limited submission, which is the fact that the expert Telecom's Regulator arrived at broadly the same conclusion for market definition, tells us that Mr Parker's approach is not fanciful. It's a reasonable approach. Sorry. We have sirens outside. I hope you can still hear me.

It is a reasonable approach. It is shared by the expert Regulator and any criticisms of it will need to be properly articulated and tested in due course, supported, if BT is going to sustain these criticisms, by evidence from an expert economist and then tested at trial in the light of that and in the light of the data. So that's market definition.

Dominance. As you know, a dominant position connotes the ability to act

independently of customers and competitors. That's the classic legal test. BT is, of course, the incumbent monopolist and there is little doubt that it occupies a dominant position in each of these markets. Now I will again summarise the position briefly on the merits, because in my submission it is an obvious proposition.

Mr Parker finds that BT is dominant in each relevant market taking account of, one, market shares; two, barriers to entry and expansion; three, an analysis of pricing and profitability; four, the absence of buyer power; and, five, the internal BT documents, which I have already drawn to your attention.

Now BT is shown to be dominant on each of those measures in each of the relevant markets. I am going to address those in turn. I am not going to address absence of buyer power, because I suggest that one is obvious. We are dealing with individual customers, individual consumers.

First, I would like to take the Tribunal to the evidence on market shares. As you will be aware, in competition law above a 50% market share establishes a rebuttable presumption of dominance. That's well-established. That's axiomatic. Just so you have it, that's at paragraph 60 of the AKZO case. That's bundle 8A, tab 10, page 277. Now, BT shares are some way north of that.

Now, I mentioned that the market is calls and access. For simplicity I am now going to focus on access. Access is measured by number of lines. So taking Voice Only Customers first, if I could ask you to turn up Mr Parker's first report at tab 3 of the core bundle 1, page 149. I am having a technical issue. I am so sorry. I think it's a problem with the power. I may have to switch laptops.

MR JUSTICE WAKSMAN: Well, can I make a suggestion, Ms Kreisberger? We are approaching the time when we would be taking a mid-morning break for the

transcribers. So let's do that now and we will adjourn for about ten minutes up to a quarter to 1. So hopefully that will give you time to sort things out. All right.

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

MR JUSTICE WAKSMAN: We will rise now until a quarter to.

(Short break)

MR JUSTICE WAKSMAN: Yes, Ms Kreisberger.

MS KREISBERGER: Sir, I am very grateful. Faulty power cable now eliminated.

MR JUSTICE WAKSMAN: Good. Good to hear it.

MS KREISBERGER: So picking up, I was just on market shares for the purposes of the dominance assessment. I think we just turned up page 149 of tab 3, bundle 1. So that's Mr Parker's first report, bundle 1, tab 3, page 149.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: At figure 10 one sees there on the left-hand column BT's voice only access market shares, so this is percentage of lines for Voice Only Customers, and you see there the market shares range from 76% in 2013 down to 68% in 2017. So these are very high shares.

Now Mr Parker then extrapolated those figures to estimate market share in 2020. He estimated it to be around 60%, but we now understand, and this is a development since the claim form, that that is, in fact, a significant under-estimate, because in its 2021 statement -- so Ofcom has completed its very recent review of this market -- Ofcom reports that BT continues to hold by far the majority share of customers serving over 75% of total Voice Only Customers in 2020. That's at paragraph 2.13 of the 2021 statement at bundle 6A, tab 3, page 56. So that's Voice Only Customers.

Turning then to split purchasers, as I said earlier, the market share data is that BT is

a hair's breadth away from monopoly. It has almost total coverage of this market. In 2017 BT had a market share of 97%. That was Q1 of 2017. That has not shifted since 2013 and is unlikely to do so any time soon.

MR JUSTICE WAKSMAN: Sorry. The percentage you said was 90?

MS KREISBERGER: 97% in 2017.

MR JUSTICE WAKSMAN: 97% of which market?

MS KREISBERGER: That's split purchasers.

MR JUSTICE WAKSMAN: Oh, that's the split purchasers. Thank you.

MS KREISBERGER: One sees that, if you still have Mr Parker's report open, and move forward to page 161, that's at figure 14, and again the left-hand column you see the shares really have not shifted.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: So that's market share. I can then move on to other items of evidence on dominance. There are four more that I will address.

Barriers to entry and expansion. For your note that's addressed by Mr Parker in his first report at paragraph 220 and following. That's Voice Only Customers. That's bundle 1, tab 3, page 154. He addresses split purchasers -- this is for your note, sir -- at paragraphs 261 to 264, which are at pages 164, over the page -- that's split purchasers -- and I can simply summarise his evidence, that there are barriers to entry and expansion for rivals to BT due to customer inertia, low levels of engagement and low levels of switching. These are points I will come back to in a different context. So that's the second item of evidence on dominance.

The third are the high and upwardly spiralling prices which BT has been able to charge at the same time as we see costs decreasing, the graph that I showed you at the outset. That well demonstrates BT's ability to act independently of

customers and competitors, unconstrained.

The fourth item of evidence, the internal documents, Ofcom's description of them. I have already taken you to those passages, but those passages, without referring to their content, are consistent with this picture of BT as a firm which yields substantial market power unconstrained by rivals, unconstrained by dual play bundles.

My fifth and final item of evidence on the list is Mr Parker's profitability analysis. If I could just show you that. It is in bundle 6A, Mr Parker's second report, which is at tab 7, page 319. You see figures 1 and 2 there. This is page 319. Sorry, sir.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: At the top of the page you have figure 1 and the green part of the block -- sorry, sir. I think that's purple, is it? The purple relates to lines. Green is calls. We are concerned with line rental here. You see there gross margins going up over time to 8.10 in 2015/16. Then figure 2 you have net profits for BT and that's the red part of the block. Again you see that increasing over time. So that accounts for -- that's adjusted for retail costs as well.

So that's profitability, but it is worth noting on the next page at paragraph 2.33 Mr Parker says he hadn't anticipated cost allocation issues to arise. He now sees that they do, following the unredacted documents, but what he says is:

"Therefore, to assess profitability on both parts of the offering, access and calls, I will need the following information."

He sets out there a shopping list at 2.33 (a), (b) and (c). So my point there is simply that Mr Parker points out that he would also welcome further data for his profitability assessment.

So I can conclude on the topic of dominance with these three brief submissions.

First, the available evidence does not simply pass the realistic, non-fanciful high level merits test. It actually paints a compelling picture of a firm whose pricing decisions are unconstrained by rivals and which is reaping high profits. That's my first point.

My second point is that same evidence led Ofcom to conclude that BT exercised substantial market power in SFV services. So again that reinforces the merits of the PCR's case on dominance, bearing in mind that SMP is defined in the regulatory scheme as a concept equivalent to dominance.

Thirdly, and I have placed some emphasis on this point already, Mr Parker is careful to point out that his analysis is given on a preliminary basis and he will need access to a more complete data set for trial. So that you have it, he sets out his detailed shopping list at -- it is at his first report. It is pages 247 to 249. That's bundle 1, tab 3. I don't think I need to show it to you, but just so that you are aware, that's the information which he hopes and expects to have access to for the purposes of his report for trial.

MR JUSTICE WAKSMAN: Ms Kreisberger, when you give the references, would you mind also just giving the paragraph numbers as well as the pages.

MS KREISBERGER: I apologise for that. For some reason I am missing a paragraph reference. I think it may be because it is the whole page.

MR JUSTICE WAKSMAN: We can find that one. The page number again was?

MS KREISBERGER: 247.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: I will just check that for you, sir. Yes, it is the whole page.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: It happens before 485, but you will see that it actually runs to

several pages. Page 247 and following.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: So in my submission it couldn't be clearer in the words of Mr Justice Lewison in EasyAir that reasonable grounds exist for believing a fuller investigation into the facts of the case would add to the evidence available at trial. There is at a minimum a case to answer on dominance, which should proceed.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: So that then takes me to abuse. We are making good progress. I will start with the statute itself. That's always the starting point. So that's Section 18 of the Competition Act and that is -- I have just lost my page -- bundle 8A, tab 1, subsection (1). Sir, do you have Section 18 there?

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: So that's -- subsection 1 sets out the basic prohibition on abuses of dominance. Then subsection (2) says:

"Conduct may in particular constitute such an abuse if it consists in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions."

There you have it. Unfair pricing is prohibited in terms within the statute. BT's various protestations about the rarity of unfair pricing cases, whether it is true or not, is not material. It is first on the list of prohibited abusive conduct. It is unsurprising, because dominant firms bear a special responsibility not to abuse their market power. They failed to comply with that responsibility where they used their market power to exploit customers by extracting unfairly high prices.

So one then must turn to the cases to see how an unfair price for these purposes

within the meaning of chapter 2 is defined. How does one identify an unfair price?

The classic statement of the test, and we are all agreed on this, is in the United Brands case, a case about bananas.

Now for convenience if you start with authorities bundle 8A in front of you, sir, I suggest we turn to tab 8, which is the Court of Appeal's -- that's United Brands. I apologise. If we could turn to bundle 8B, it will minimise switching then between bundles. Tab 28.

MR JUSTICE WAKSMAN: 8B.

MS KREISBERGER: 8B, tab 28. Now this is the Court of Appeal's judgment in the Flynn/Pfizer which is the most recent and most authoritative judgment on excessive pricing. It summarises the United Brands test. So I am simply suggesting we use this judgment to avoid switching between bundles.

If I could ask you so turn to page 1267 of the bundle numbering.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: At paragraph 56 Lord Justice Green set out the United Brands test. I will read that out because that is our starting point. Everyone described the case as seminal. At 248 it begins:

"The imposition by an undertaking in a dominant position, directly or indirectly, of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86."

We are dealing with Chapter 2. Paragraph 248, that's a statutory test I just took you to in Chapter 2. It goes on:

"It is advisable, therefore, to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal

and sufficiently effective competition."

So that's basically the exercise:

"In this case charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse. This excess could, inter alia, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price…and cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed the company's cost structures. The questions therefore" -- and here we get to the nub of it -- "are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been in place unfair in itself or when compared to competing products. Other ways may be devised – and economic theorists have not failed to think up several – of selecting the rules for determining whether the price of a product is unfair."

So that is the test and it is the test generally used. Now if we go forward to paragraph 97, which is at page 1279 of the same judgment, here Lord Justice Green -- he goes through a really comprehensive summary of a number of cases including Attheraces, which BT mentions, quite a comprehensive survey of the jurisprudence, and then he drew some conclusions. This is really, as I say, the most recent, most authoritative statement of the legal framework now, applicable principles:

"I would draw the following general conclusions from the case law.

1. The basic test for abuse which is set out in the Chapter 2 prohibition is whether the price is unfair. In broad terms a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in

conditions of" -- I can paraphrase, workable competition, in conditions of workable competition. A price which is excessive because it bears no reasonable relation to the economic value of the good or service is an example of such an unfair price.

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

4. Important. "Depending upon the facts and circumstances of the case, a competition authority" -- and one can substitute claimant here -- "might therefore use one or more of the alternative economic tests which are available. There is, however, no rule of law requiring competition authorities to use more than one test or method in all cases.

5. "If a cost plus test is applied" -- that's the first limb of United Brands -- "the competition authority may compare the cost of production with the selling price in order to disclose the profitable margin. Then the authority should determine whether that margin is excessive. That can be done by comparing the price charged against a benchmark higher than cost such as ROS, reasonable rate of return on sales, or some other appropriate benchmark such as ROCE."

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

In analysing whether the end price is unfair a competition authority may look at a range of relevant factors, including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all

of these. There is no fixed list of categories of evidence relevant to unfairness.

7. If a competition authority chooses one method, eg cost-plus" -- that's limb 1 -- "and one body of evidence and the defendant undertaking doesn't adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method, its method, in evidence alone.

8. If an undertaking does rely in its defence upon other methods or types of evidence to that relied upon by the competition authority, then the authority must fairly evaluate it."

That's a really comprehensive statement of the principles. I just draw your attention to one other finding at page 1283 of the same judgment, paragraph 107. This follows a survey of the economic literature and Lord Justice Green concludes that:

"The economic literature supports the conclusions of law that I derive from the case law summarised above. There are many different tests which might be used to determine whether a price is excessive and unfair; there are or may be difficulties with all tests and much will depend upon the availability of evidence and data. All cases are highly fact and context specific."

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: We can put that away.

So, stepping back, the object of the exercise is to work out if the price is excessive compared to the competitive price, the price which would obtain in the conditions of workable competition. If it is excessive compared to the competitive price, then the price does not correlate to economic value, but the method for conducting that assessment will, must by necessity, be driven by the facts, and critically what data is available, what meaningful comparators or

benchmarks are there.

For example, is cost data available for the purposes of limb 1? Are there comparable products which are priced competitively for the purposes of limb 2? It is clear that the choice of which method to use or what method to deploy or what evidence to deploy is not constrained, because it has to be driven by what's available by context.

Now despite BT's claims to the contrary, there is, in fact, a substantial and growing body of case law on excessive pricing, a recent case from the Commission in Aspen. It is notable that when one surveys those cases, in fact, a wide variety of different benchmarks are selected across them, and the point is conveniently articulated by Advocate General Wahl in a case which I will call AKKA/LAA. That's at the second authorities bundle, 8A, tab 13, page 346.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: If one starts at paragraph 18, he addresses cost plus measures which focus on the bottom up approach. I will come back to that.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: But he talks about the focus of the analysis on margins under limb 1 where he says that is the approach in some cases, cost plus. Then he says at 19:

"In other cases the court has made a comparison between, on the one hand, the price charged for the product in question by the dominant undertaking and, on the other hand, prices charged in the same market by non-dominant undertakings" -- that's comparison across competitors, so that's number one example -- "or by the same undertaking at different points in time" -- that's number 2, that's comparison across time -- "or the prices charged in other geographic markets by the same dominant undertaking or by other

undertakings" -- geographic comparison. "The underlying idea is that if the selected products or geographic markets are sufficiently homogenous, a comparison of the prices can be meaningful."

He ends:

"Likewise the pricing patterns of an undertaking over time may also provide useful clues."

So you have three options there and that's something I will come back to. So those are the legal principles.

With that, I can turn to the PCR's analysis of BT's excessive pricing. Now, as you know, Mr Parker has conducted a detailed appraisal of whether BT's SFV prices are excessive in his view and therefore unfair under Chapter 2. Mr Parker has drawn his own conclusions of the material, informed principally by the evidence available in the Ofcom material. His expert view based on the available evidence is that BT has been charging prices which are significantly and persistently above the competitive level. So his evidence supports the PCL's case that BT has unfairly exploited its customers by extracting excessive prices from them.

I am now going to set out my case on excessive pricing. I will address the following four elements of Mr Parker's analysis: first, his selection of BT's 2009 prices adjusted for costs as the relevant, albeit conservative, competitive benchmark and why other apparent candidates were rejected by him -- that's number 1; number two, how that benchmark fits into the two limbs of the United Brands test; three, the extent to which BT's SFV prices are in excess of the competitive level, noting Ofcom's findings in that regard; and four -- I am going to deal with those three points now and the fourth point is competitive rebalancing. I am going to address that point later in the context of BT's

criticisms.

So the first one, the 2009 benchmark. Mr Parker, expresses his reasons for selecting that benchmark succinctly in his first report. So that's bundle 1, core bundle, tab 3, page 172, paragraph 290. He says:

"Ofcom found that BT did not have SMP in residential access to landline telephone services in 2009," significant market power.

"It is implicit in that finding that Ofcom considered that the line rental (i.e. access) prices of BT's SFV services in 2009 were at a sufficiently competitive level at that time, or at least that – if they were above the competitive level – they were expected to come down to the competitive level in future. On this basis, my preferred benchmark is likely to be an upper bound on the true competitive price level.

Indeed in the Provisional Conclusions in 2017, Ofcom took BT's profitability in 2009 as its starting point for calculating the magnitude of the price cut to SPV service charges which Ofcom was, at that stage, minded to impose. In other words, it treated BT's 2009 prices as sufficiently competitive not to require regulation. While Ofcom observed that the effect of the resulting price cut would be to 'largely reverse the price increases since 2009', it went on to say:

'We recognise that price that the price cut may not reduce prices to the level which BT might charge in a fully competitive market'.

In other words, Ofcom also treated BT's 2009 prices as a working upper bound on a competitive price even though those prices may have been above the competitive level. I have therefore treated BT's prices for line rental in 2009 as the starting point for determining the competitive benchmark for the access component of SFV services. As an upper bound on the true competitive price, it is a conservative basis for testing whether subsequent prices were

excessive."

Then if I could also show you Ofcom's thinking on this, which is at bundle 6A, tab 8, page 445 -- this is the provisional conclusions again -- paragraph 8.20:

"In 2009 we removed retail regulation on the basis that the retail market was competitive. BT's level of retail profitability at this time was at a level at which we believed regulation was no longer necessary, given the market circumstances. At that time BT was struggling to maintain its market share, and, despite the removal of retail price controls in 2006, didn't appear to have the commercial freedom to raise retail prices. Accordingly, the level of profitability that BT achieved on retail services at that time provides us with a starting point for the level of profitability that we believe is consistent with a market that is sufficiently competitive not to require regulation."

That's the key point there: a level of profitability consistent with a sufficiently competitive market.

It seems Mr Parker was right. In fact, this is a conservative benchmark, taking 2009. Now his second report, if we stay in this bundle and move to tab 7, page 322, I have shown you figure 3 at paragraph 2.40. I have already shown you this. It is the estimate of net margins based on Ofcom's numbers. You can see we move from 15 to 17% and then it jumps up to 26% in '09/'10. Mr Parker's view on this, having seen these numbers, is:

"This may suggest that using 2009/10 as the date to calculate the competitive benchmark is conservative, and by doing so I have underestimated the level to which prices have been excessive and so the quantum of damages."

Then he says, "I will need more data to refine that".

Now that's the 2009 benchmark in its raw state, but then Mr Parker adjusts those prices over time to reflect deductions in wholesale line rental costs, which

I showed you. WLR costs, that's the single largest cost for an SFV service. It accounts for two-thirds of BT's line rental charge. So it's very significant.

So if we take -- so you can see the competitive benchmark is obviously key -- core bundle 1, tab 3, page 174, if I could ask you to go to paragraph 294, 294 gives you the two-thirds figure, so you have the source for that, and then over the page, 295 on page 174, figure 16 shows how wholesale line rental costs moved over time. You see very clearly the decrease.

Now it's a simple point, an obvious one: when costs reduce so must the competitive price level from the stage at which costs were higher. You see that at figure 17, 175. So, sir, that's the key graph here. That's Mr Parker's competitive benchmark. As he says there, it is his best available competitive benchmark over time, taking the 2009 price and adjusting it.

So if we come back to Advocate General Wahl's paradigm benchmarks for price, Mr Parker chose price comparison over time. Now he chose that having considered and rejected other candidate benchmarks both by reference to price and profitability. He considered but rejected other products, dual play bundles and a cheaper product of Home Phone Saver, neither of which represent good proxies for the price of SFV services. I will address that at length on dual play bundles. He considered whether geographic comparison might be available.

Just so you have it, that's paragraph 314 of Mr Parker's first report, bundle 1, tab 3, page 181, and he explains, as is well-known in these sorts of sectors, that differences between Telecoms networks means that geographic comparisons don't work. Differences in size, structure, costs and critically regulation make those sorts of comparisons across territories inapt.

He also considered the profitability of other providers in the market. He found that

these were also inapt, because they operate on different scales. He doesn't have cost data for them, and also a key feature of this market is price leadership. Given BT's market shares that I have taken you to, rivals were simply following BT's prices. There was no competition, and that was Ofcom's view.

You will have seen in the papers that Mr Parker also uses some sensitivities for his competitive benchmark. That's the price of the commitments and the 2009 prices unadjusted for costs, but they really serve the function of cross checks for his preferred benchmark.

So that's why. That is the why for the 2009 cost adjusted benchmark.

Now we get to the second point, which is the application of that benchmark to the facts and using the benchmark within the framework of the United Brands test.

Now it's a particular benefit of Mr Parker's benchmark that it can be used both for limb 1, the assets of margins, cost price, and limb 2, the assessment of price fairness. Now it is obviously a comparator for the purposes of limb 2. That is the comparison of price over time, one of Advocate General Wahl's triumvirate, obviously tracks price, but it is also relevant to limb 1, because, as I explained and I took to you the relevant sections, the 2009 price was treated by Ofcom as competitive, hence the removal of regulation.

Now Mr Parker explains this in his first report very succinctly. So we go back to tab 3 of bundle 1, page 181, paragraph 315. At paragraph 315 Mr Parker says this:

"In principle, one could develop a competitive benchmark by building a bottom-up cost-plus model, which involves reflecting all costs of production and an appropriate profit margin. However, my approach of relying on the 2009

benchmark and adjusting for subsequent cost changes is in substance a cost-plus approach."

That's limb 1:

"This is because in 2009, assuming that the market was then competitive, BT would have set its price so as to account for relevant costs and include an appropriate margin reflecting the relevant allocation of common costs and a return on capital employed."

So it is what I would call an actual cost-plus benchmark as distinct from a hypothetical cost plus benchmark or bottom-up, as Mr Parker says, cost-plus benchmark.

Now, there are a number of cases in the jurisprudence and the decision on practice, usually involving monopolies where there are no real world competitive prices to draw from, where competition authorities have had to use cost-plus benchmarks of the sort Mr Parker describes built from the bottom up. So that means they are able to identify, quantify relevant costs, perform the cost allocations and arrive at a figure for the plus component, an appropriate rate of return. That was the CMA's approach in Flynn, which was actually quite unusual for a pharmaceutical case. More usually cost plus is more usually adopted in cases concerning essential facilities or monopoly networks, but it is a hypothetical approach, because it is not based on actual prices and rates of return, and it is in those cases that one sees a debate as to whether the hypothetical plus element does reflect a fair or reasonable rate of return; in other words, does it reflect demand side economic value? That's the situation in cases like Scandlines, which I think Ms Ford might take you to.

But that's not to the point here, because fortunately for us that does not arise, because Mr Parker has available to him a real world price and a real world

price that Ofcom deemed competitive, given the absence of SMP in 2009, when regulation was withdrawn. Now, and to make clear that we fully reserve our position on this for trial, we now suspect that 2009 is too generous and 2008 may be the more appropriate measure, but we will revisit that, following disclosure.

So, in other words, rather than building a cost-plus benchmark for ourselves, BT's 2009 price does the job for us. It is a proxy, proxy limb 1, and price, limb 2. Either way measuring the difference between BT's FFE prices and the '09 adjusted benchmark gives an indication as to both BT's excess profitability for limb 1 and the unfairness of its prices under limb 2.

MR RIDYARD: Ms Kreisberger, may I ask a question of clarification? On the two limbs of the United Brands test, the first one is are the prices excessive and the second one is; if so are they unfair? Now does that imply there's a category of pricing which is excessive but which is not unfair?

MS KREISBERGER: I think the best way to address that is by coming back to the Flynn judgment, because the Court of Appeal makes that point very clear. Mr Parker draws this out in his report as well, and we can get the reference, if that's helpful, but if I take you back to -- I will just check my reference -- tab 28.

MR RIDYARD: Of which bundle?

MS KREISBERGER: Authorities bundle 8B. If we go back to Lord Justice Green's summary, it is right at the beginning of his summation, which is extremely helpful. He starts off by describing when a price will be unfair.

MR RIDYARD: Which paragraph is this.

MS KREISBERGER: I apologise, Mr Ridyard. It is paragraph 97. So that's under the heading "Conclusions". Just so it's clear -- I am grateful, because it is

an important point, and it's a point which Mr Parker notes:

"In broad terms", he says, "unfairness arises where a price is not one which could have been reaped in competitive conditions."

So that's broadly what unfairness means. (ii) he then says:

"A price which is excessive because it bears no reasonable relation to economic value is an example of such an unfair price."

Then he goes on to talk about unfair methodology. So if you have a price which is excessive, excessive compared to the competitive level, then that equates to an unfair price under Chapter 2.

MR RIDYARD: So you are saying there is category of prices which is excessive but which is not unfair.

MS KREISBERGER: So I think it is important to distinguish two points, in fact, using the term "excessive" risks conflating the two. Limb 1, which is generally termed the cost plus limb, looks at the difference between cost and price; in other words, margins, and it tells you what the margins are. You need to factor in an appropriate rate of return in order to work out if the margin is excessive and therefore unfair. So you take the costs, the dominant firm's cost. Then you factor in the rate of return as well. That's your competitive price. Any price which is excessive compared to that competitive price is, yes, unfair. You don't always get that under limb 1, because under limb 1 you may simply look at cost and price and you don't know what the competitive level is, but here we know what the competitive level is, because the competitive level of the 2009 price which gives both costs -- it covers costs, allocation of costs and a reasonable rate of return.

MR RIDYARD: But the reasonable rate of return, is that not just part of cost?

MS KREISBERGER: Yes, and I think as an economist you would treat it as part of

cost. Sometimes in the cases they look at simply the firm's costs under limb 1. So they simply say "here are the costs, here are the prices but we need to factor in a rate of return to get to the competitive price level". One obviously does not have the competitive price level.

But in any case, of course, under conditions of competition prices will be competed down to the level of costs incorporating a fair rate of return. So in any case where you have a competitive price and you can say the actual price is excessive by reference to that competitive price, then you have an unfair price. So if you do have costs including a reasonable rate of return, so to be very, very clear in response to your question, if you know what the dominant firm's costs are and you include in those costs a reasonable rate of return, if you then compare that to the actual price, if they are excessive, then you have an unfair price.

MR RIDYARD: Okay. So that seems to be saying that if you take, if you like, an economic definition of cost, which is the direct costs plus a reasonable rate of return on the capital employed, any price in excess of that level, your submission is it's unfair.

MS KREISBERGER: That's not quite right --

MR RIDYARD: As opposed to just being excessive.

MS KREISBERGER: That's not quite right, because the price has to be significantly and persistently above the competitive level. So it is not right to say any price will trigger United Brands, but it is very, very clear that any price above the competitive level which is significantly and persistently so, is excessive and is, therefore, unfair.

Now what one sees in the cases is often a debate as to what are the costs? We can't really be sure. We have to perform cost allocations. What's

a reasonable rate of return? That's in these monopoly cases, as I say, where one does not have that handed on a plate. Then it is much more difficult to say "Is this number that we have built up from the bottom, is that a competitive price or have we made so many assumptions? Do we have full view of costs? We don't know" but, as I say, happily that issue does not arise here.

So what I can say is if Mr Parker is right, as I say he is, that the 2009 benchmark adjusted for costs gives you a competitive level, as you say, because it covers an economic understanding of what are the relevant costs, if that is correct, as Ofcom treated it to be the competitive level, any price which is persistently and significantly above that price is excessive and unfair. So in those circumstances you can treat excessive and unfair as entirely correlating with each other. They are substitutable.

MR RIDYARD: That's helpful. Sorry to put you off your stride but it was very useful to get focusing on that question, and I am sure we will come back to it later on.

MS KREISBERGER: I am grateful, because it is an important point. So that's the benchmark and the selection of the benchmark.

I then move on to Mr -- sorry, sir. Could I take just one moment, if I may?

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: I am grateful. Moving on from the application of the benchmark to the actual prices charged by BT, so we go to Mr Parker's first report for that, which is bundle 1, tab 3, page 185 and you should see there figure 21. That gives you the first line. Figure 21 is Mr Parker's preferred benchmark. You see there the other two are the cross checks sensitivities, but you can see the numbers there. So this is, to be clear, the percentage difference between the competitive price level and BT's actual prices. The

percentage difference ranges from 51% to 65%. One sees it increasing over time. That's it. Those are the excessive prices above the competitive level, above BT's costs, including rate of return.

Just so you have it, those numbers are based on BT's standard line rental product. There are two other products which are within the scope of the class. At this stage Mr Parker has assumed the position to be similar for the other two products. That's BT's line rental saver and line rental plus, but he will need data disclosed by BT to confirm that.

Mr Ridyard anticipated my next point, which is in order to be unfair and therefore unlawful, the excessive price must be persistently and significantly above the competitive level. So the requirement for persistent essentially excludes short-lived price spikes. Given we have seen the prices spiralling upward since 2008, that part of the test is easily met.

As for significance, Mr Parker acknowledges there is no bright line test. There is no single percentage for identifying when the gulf between an actual price and a competitive price becomes significant, you know, when it becomes unfair. It needs to be looked at in the round driven by context.

Ms Ford refers to Deutsche Post. There the excess was 25%, just to give an indication, but Mr Parker's evidence here is that the orders of magnitude, which I have just shown you, are significant and his view is supported and informed by Ofcom's findings on that. Ofcom emphasises the consumer detriment which flowed from these high prices and that's compelling evidence of unfairness under chapter 2.

Now having also found that BT's SFV prices were significantly above the competitive level -- that's Ofcom's finding -- Ofcom's provisional conclusion was that led to substantial consumer detriment, and that's in bundle 6A, going back to the

confidential provisional conclusions, tab 8, page 416. That's at paragraph 6.3 under the heading "Direct Effects". This is what Ofcom said:

"We have considered the extent to which SFV prices are above the competitive level. Our assessment of BT's profitability shows that BT is making profits in SFV markets which are", confidential material which I will not read out in square brackets, "and the profit margins identified using competitive benchmarks."

So that's the point again that I was just discussing with Mr Ridyard:

"BT's prices are approximately £8 to £10 per line per month above the level of its costs and £5 to £7 per line above a level indicated using competitive benchmarks. Based on our estimate of around 2.9 million SFV lines in the UK, the overall current consumer detriment is therefore of the order of £150 to £340 million per annum, depending on the choice of benchmark price.

"We also considered" and this is a price I have mentioned, "in recent years there is evidence that BT have acted as a price leader in the market in that when it has increased prices other providers have followed with similar price increases. The result is that SFV customers in the market generally pay prices significantly above costs due to BF's SMP."

Just for your note there's also reference to this at annex A8, paragraph 177 to 181 and that's 6A, tab 9, page 574. The section I have just taken you to also refers to indirect detrimental effects flowing from the loss of competition which results from BT's SMP.

Ofcom confirmed its provisional finding that BT's prices are harming consumers in its 2017 statement which followed. That's at tab 10, page 599. Ofcom said this at paragraph 1.11:

"While we have concerns about the current outcomes for both customer groups, our concerns are more acute for Voice Only Customers. They generally don't

engage with the market. 77% have never switched provider or considered doing so. They tend to be older, less likely to shop around. Over 40% are at least 75 years old. 40% live in DE socio-economic group households, and now there are relatively few providers of landline only services for these consumers to choose from. Even if measures to promote engagement and competition for Voice Only Customers are successful, they are likely to take time to have an impact. BT currently holds a dominant position in the market for Voice Only Customers and the lack of competition enables it to maintain prices above the competitive level."

They go on to say:

"A significant price cut is important to alleviate the detriment suffered by Voice Only Customers."

They say at 114:

"Like Voice Only Customers, split purchasers have suffered increases in line rental charges in recent years without significant offsetting benefits. They are typically younger, more technologically literate, have internet access, have a wide range of choices available to them. To address the detriment faced by split purchasers we have decided it is more appropriate to allow time for them to become more actively engaged."

So that is Ofcom's final finding on the detriment caused by the differential, the gulf between the competitive price level and BT's actual prices.

Now it is right that Ofcom was focused on Voice Only Customers at that stage who required, Ofcom thought, immediate, forward looking relief in the form of a price cut, but the passages I have just taken you to make clear that both customer groups suffered detriment. The distinction is one which applies to remedy only. Harm is common to both groups and it is serious.

So in the light of those findings my submission is there's little doubt that the PCR's case that BT's prices are unfair and therefore abusive is not fanciful, and on a high level review of that case the merits are clear. There is a case for BT to answer.

Sir, I am in your hands. I think I could cover causation, quantum in just a couple of minutes. I have just a short point on that and then it may be convenient to break before I turn to my next section, which is BT's criticisms.

MR JUSTICE WAKSMAN: Yes. Well, let's do that then, please.

MS KREISBERGER: So this was a damages claim and therefore the PCR must establish that these abusive practices caused loss. Causation is straightforward. If the prices were excessive and unfair, then they caused harm to the consumers who paid them by virtue of the unlawful overcharge.

Quantum in this case happily is also straightforward, because, as Ofcom found, consumer detriment can be measured by the amount of the unlawful overcharge. So the harm suffered by the class is the amount paid by them which exceeds the competitive level.

Mr Parker has produced an estimate of damage which is £469 million before interest. That breaks down into £182 million for Voice Only Customers, £287 million for Split Purchase Customers. With simple interest that's £589 million. With compound it is £608.

Mr Parker's method was to estimate for every month within the claim period the number of SFV customers which BT had, adjusting those numbers for excluded products such as home phone saver, and then multiplying those numbers by the amount of the monthly overcharge, which is the difference between the prices paid and the competitive benchmark.

At present, as I explained, Mr Parker is only able to do this for standard line rental,

as I explained. Mr Parker's interim estimate of damage is based on the numbers of Voice Only Customers and Split Purchase Customers presented in Ofcom's charts. I will just give you the reference for that. It is Mr Parker's first report, bundle 1, tab 3, page 205 and that's figures 24 and 25. That sets out the interim estimate of damage.

Now all of this analysis will, of course, be refined in the light of the actual number of customers in the class which BT has helpfully confirmed that it can and will supply in due course.

Sir, that brings me to the end of my submissions summarising the PCR's case. It may be a convenient moment to break.

MR JUSTICE WAKSMAN: Indeed. Well, thank you very much indeed. We will break for lunch now. We will resume at 2 o'clock, please. Thank you.

MS KREISBERGER: Thank you.

MS FORD: Thank you, sir.

(12.59 pm)

(Lunch break)

(2.00 pm)

MR JUSTICE WAKSMAN: Yes, Ms Kreisberger.

MS KREISBERGER: Thank you, sir. So I am now moving on to BT's criticisms. They are grouped into six grounds, but those grounds contain a flurry of granular attacks which, with respect, we say is not in keeping with the Tribunal's guidance that detailed submissions on merit should be avoided. Our response is they are either without merit and/or are matters obviously unsuited for summary determination, because their investigation depends on the full facts and evidence which, of course, we don't have for now.

In particular, BT relies on no economic expert evidence, nor has it disclosed any

internal documents to support the various claims and bare assertions, so its claims can't be tested at this stage.

We have addressed these matters fully in the reply and the skeleton, so I hope this can be taken at pace.

Criticisms 1 and 2. BT accuses Mr Parker of repackaging and recycling Ofcom's findings. They emphasise that Ofcom used ex ante powers to intervene and that for SPCs its findings were not final, but the attack is Janus-faced. On the one hand Mr Parker is criticised for arriving at broadly similar conclusions to Ofcom, but on points where his analysis differs, calls and access, he is criticised for superficiality. I need not spend long on this one.

For now the Ofcom material represents the best source of information in the public domain. Mr Parker has carefully considered that information along with other facts that are a matter of public record. He is a distinguished economist in his field and he has formed his own independent view of that material. BT has put in no expert evidence to gainsay Mr Parker's evidence. The repackaging criticism turns matters on their head. It is the factor which in my submission weighs heavily on (inaudible) favour on merits, but Mr Parker's view largely coincides with that of the expert Regulator, given that there's a high degree of commonality between the Telecoms framework and the Competition law framework.

Under each regime there is an assessment of market power in the context of the relevant market and an assessment of BT's prices compared to the competitive level. Both Mr Parker and Ofcom took the view that BT wields substantial market power in supplying landlines to customers, thereby weakening competition, and it has used that power to extract unfairly high prices from them.

Putting aside BT's noisy claims of repackaging, it has not advanced a single reason why the Ofcom review does not support Mr Parker's evidence or why he should not have relied on it.

The fact that Ofcom applies a forward-looking remedy to reverse the distortion of competition and Mr Parker for these proceedings looks back at harm suffered, is of no consequence and BT has no answer to this. If proof be needed of Mr Parker's independence, one sees it both from his careful and detailed analysis of the data and his willingness to depart from Ofcom's approach, where he takes a different view.

So I can move on with that to the third criticism. That's 1 and 2, essentially the same point. The third criticism is the claim that Mr Parker didn't consider what BT refers to as the wider competitive dynamics at play. It's a catch-all attack for various criticisms, but they boil down to the following three.

1. There were reasons for BT to favour bundles such as consumer preferences which made it economically rational to hike the prices of SFVs and it was also in line, they say, with the government's digital inclusion policy.

2. They say BT's high prices could at least in part be attributable to competitive rebalancing, so Mr Parker got that wrong.

3. Mr Parker should have assessed the overall profitability of BT's retail section, not just SFVs.

These three points can be rebutted at two levels. First, what BT is essentially doing is advancing alternative explanations for its pricing conduct. Those explanations cannot be appraised without access to the data and to BT's internal documents, which we don't have, so they should be discounted as inapt for summary disposal and must be left to trial.

Second level, they are not good points and many of them have already been

rejected by Ofcom.

Taking each in turn, the first is the argument that it was their commercial strategy to favour bundles over SFVs.

I have five short rebuttal points.

BT advanced the very same argument before Ofcom and it rejected it. In the interests of time I am not going to take you to it, but the reference is to a document by Oxera, BT's economists for the Ofcom review, and Oxera put in a submission on behalf of BT, which is in the bundle at bundle 2, tab 15, page 932. There is no paragraph reference. That's a reference to the executive summary.

If I could ask the Tribunal to look at that in due course, one will see there's a little repackaging from the other side. I am very happy to go to it now, if helpful, otherwise I'll move along.

MR JUSTICE WAKSMAN: I think we can look at it later on.

MS KREISBERGER: I am grateful.

The second point is Ofcom found, as you know, that BT's internal documents are not consistent with its narrative that dual play constrains the price of SFVs. We have seen the summary. We would similarly need to test BT's favouring bundles narrative against its internal documents to see if they stack up. They didn't before Ofcom.

As Mr Parker says on this, and again I will just give you the reference -- I have the quote here -- it is paragraph 316 and this is at 6A, tab 7, page 327 -- Mr Parker says:

"BT does not provide any evidence on the relative profitability of bundles and SFV services other than commenting that line rental prices had a "relatively significant" mark-up compared to incremental broadband services… This

observation appears to contradict BT's contention that bundles were more profitable than SFV services, although it would need to be confirmed with further data from BT."

Third point. At paragraph 19(c) of the skeleton BT claims that Mr Parker failed to assess the impact of dual play bundles on SFV services. That is false. He carefully considered the competitive interaction between the two and concluded on the available evidence that dual play bundles do not constrain the prices of SFV services, and it is for that reason they are in separate markets, just as Ofcom did.

Fourth point. BT's argument is also economically irrational. It makes no economic sense for a profit maximising firm to focus on less profitable options, and hiking the pricing of SFV to encourage switching to bundles is a risky strategy, as Mr Parker observes, given the bundles market is competitive. So the customer may be lost to BT altogether and go to a different bundles provider, although the argument is not even on its own terms coherent.

Fifth, even if there were, even if there were commercial reasons for BT to focus its energies on bundle uptake, that does not excuse the imposition of excessive prices for SFVs on these customers. That was, in fact, Ofcom's starting point, which I took you to this morning. They observed dual play customers benefitting from competition whilst a dwindling customer base of SFV customers was exploited. The same goes for the digital inclusion policy. It's not a carte blanche for unfair pricing.

One does not wish to sound flippant, but the aim of getting more people online doesn't justify overcharging old people for their landlines, and just to note, the digital inclusion argument was also advanced by BT in front of Ofcom, and that's another reference to the Oxera submission, bundle 2,

tab 15, page 967.

The second point is competitive rebalancing. Mr Parker gave careful and express consideration to whether high SFV prices were attributable to competitive rebalancing, and he found that there was no evidence to suggest that this was the case, and just so you have it, that's dealt with at paragraph 347 of his first report and following, bundle 1, tab 3, page 192.

Now BT does not accept Mr Parker's analysis and I have four short points to refute its claim.

First, the argument is diffidently put. In its response BT says "It could be an explanation", could be. In its skeleton, 19(a), it suggests rebalancing partly explains the high prices. This is not terribly informative at this stage. It is not a short point of law or construction capable of inflicting a knock-out blow, nor is it something, in my submission, that should register on a high level review of merit.

Second, to make the argument good BT will need to prove that it faced a breakeven constraint. That argument can only be tested by access to the relevant cost and pricing data. It's obviously inapt for summary determination at this stage. It's, in fact, a paradigm of a factual evidential dispute that goes forward to trial.

Thirdly, Mr Parker explains in his second report that BT's response seems to confuse distinct economic concepts of complementarity and competitive rebalancing.

Now BT's silence on this -- is silent on this point in its skeleton in which competitive rebalancing barely gets a mention. So this point may now be common ground. No doubt Ms Ford will clarify.

In short, this ground of challenge comes down to saying that BT have other explanations for its pricing conduct. At first blush they are not good arguments to defeat the case of excessive pricing, but either way they are

points for trial, not now.

As the Court of Appeal stressed in Flynn, where a dominant firm relies on other evidence it is to be fairly evaluated. In the absence of evidence from BT the Tribunal is just not in a position to do that now. That's criticism number three.

Criticism number four. This group of criticisms is aimed at Mr Parker's assessment of excessive pricing, which is said to be in error for three points that BT makes. He mistakenly relies only on a cost plus benchmark and fails to consider fairness; he has not assessed the demand side component of economic value; and, three, he has picked the wrong competitive benchmark.

He should instead have plumped for one, competitor prices, and, two, something BT describes as, and I quote, "The various indicia of the value that SFV customers placed on these services."

That's a roundabout way of saying that if customers freely and willingly paid BT's high prices, it must mean that they thought SFV services were worth it.

MR JUSTICE WAKSMAN: Just one moment, please, Ms Kreisberger. Can you just remind me of the second argument which you say BT makes to say that his analysis of excessive pricing and unfairness was wrong? The first one you said well, he didn't actually assess the fairness. The second one was?

MS KREISBERGER: The first one was mistakenly relies on cost plus and no fairness.

The second one is he has not assessed the demand side component of economic value and, as you see, that bleeds into then where I move to the third point.

The third point is the various indicia of the value that SFV customers placed on these services, in other words, if customers freely and willingly paid the price it must mean they thought they were worth it. That's a version of the famous Stella Artois tag line, reassuringly expensive. So, as I say, this is simply a different

way of putting the second objection, that if people want to pay, it must be worth it.

So I will take each of those somewhat out of turn. The first point, that's only cost plus no fairness, that point is wrong, but even if it were right -- so it is wrong on the facts, but even if it were right it is not a sound objection. It is wrong on the facts because, as I have explained at some length this morning, the adjusted 2009 benchmark works as a cost plus benchmark for limb 1 of United Brands, and a pricing benchmark for limb 2 of United Brands. That's because that benchmark gives us the competitive level. So it tells us what is the competitive level for margins, limb 1, and for price, limb 2. So it measures the unlawful excess for both. So that's the first point.

As for competitor benchmarks, point three, I have already explained this morning that Mr Parker did consider them and he rejected them, because they are not suitable proxies for the competitive price. No need to turn it up again, but so you have it, Mr Parker's second report, paragraph 3.52 to 3.53 at 6A, tab 7, page 335.

Now BT has not explained why that analysis is not robust, nor could it without expert evidence. In any event, Ms Ford's submission that a claimant must identify limb 2 pricing comparators is wrong in law. All that the law requires is that the claimant selects a benchmark. That benchmark can be a cost plus benchmark or a pricing benchmark, or you can use both, but there is no requirement to use both, because such a requirement would present an impossible obstacle in cases where no pricing benchmark exists.

I am thinking of cases involving public utilities and monopoly networks like the port in Scandlines, like Albion Water is another one involving a water network, where the Tribunal found in terms there was no suitable price comparator.

Now we don't need to go to those cases, but it is helpful to come back to the Court of Appeal's judgment in Flynn at authorities 8B, tab 28, page 1289.

MR JUSTICE WAKSMAN: Sorry. Which paragraph number?

MS KREISBERGER: Paragraph 125 at the bottom of the page.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: Lord Justice Green said this:

"In my view by the nature of the abuse in issue", excessing pricing, "there needs to be "a" benchmark. But in the first instance at least the choice of benchmark is for the competitive authority to choose and can be based upon the costs of the undertaking being investigated, or it can be based upon comparables such as the prices charged by the same or different undertakings in the same or different geographical markets, or indeed any other benchmark or combinations thereof capable of providing a sufficient indication that the prices charged are excessive and unfair. It follows from the above that assuming the Tribunal was mandating the use in all cases of a hypothetical benchmark price which did not include the costs of the undertaking… then I respectfully disagree."

In other words, it is not right to say it must be one or the other. The choice is that of the Competition Authority or the claimant.

BT's second point is that Mr Parker has failed to address the demand side component of economic value by failing to take account of the fact that SFV customers, they say, had actual alternatives but chose to pay BT's high prices.

Now that argument is hopeless on a number of levels. First, the function served by the competitive benchmark is that it acts as a proxy for the economic value of the product; in other words, the price which would obtain in conditions of

workable competition, the Court of Appeal's language. So the 2009 adjusted benchmark represents the competitive price for SFV services. It is wrong in principle, both economic and legal principle, to take that price and then add in another number to reflect its qualitative worth to the customer. Its true worth to the customer is the competitive price.

Now I explain in my skeleton at paragraph 56(a) that this same argument was rejected in terms by the Court of Appeal in Flynn. I think we need to go there. The Tribunal in its judgment drew the somewhat surprising conclusion -- and this is at paragraph 419 of the Tribunal judgment, which is at 8B, tab 23, page 992 -- they drew the surprising conclusion, with respect, that despite the use of a benchmark to ascertain the competitive value of the drug, in that context an epilepsy drug, a further step was needed to factor in the therapeutic, in other words the qualitative benefit of the drug to the epilepsy patient.

Now with a certain understatement the Tribunal said:

"Placing a precise monetary value on patient benefit is not straightforward but it appears to us that a qualitative assessment would be possible and should have been attempted by the CMA rather than simply assessing this value at nil."

It is not straightforward, because if a drug is lifesaving how do you put a value on that? That finding by the Tribunal was directly reversed on appeal.

So if we go back to the Court of Appeal's judgment at tab 28 of bundle 8B, page 1302, paragraph 172, I am going to read from just under line D:

"It is evident from the judgment ..."

Sorry, sir. I will hold on.

"It is evident from the judgment in United Brands that the reference to economic

value is a part of the overall descriptor of the abuse. It is not the test. The test should, therefore, when properly applied, be capable of evaluating economic value."

Economic value simply means the competitive price incidentally:

"So, for instance, as the CMA argues, when evaluating patient benefit, it would be possible to measure its economic value in the plus element of cost plus or even in the fairness element. Equally if there's evidence of prices being charged in relevant comparator markets which were effectively competitive, then those prices could be capable of acting as proxy evidence of the economic value of patient benefit."

That's what we have got here, competitive price benchmark:

"Insofar as an issue of fact arises which can be categorised as an aspect of economic value, it needs to be measured and it can be evaluated in various parts of the test. If it is properly factored into "plus" or "fairness" or into some other part of the test, or is reflected in other evidence which can stand as a proxy for economic value, then there is no incremental obligation to take it into account again as a discrete advantage or justification for a high price."

Then he goes on to discuss the Tribunal's reasoning which was incorrect:

"In short, economic value needs to be factored in and fairly evaluated somewhere but it is properly a matter which falls to the judgment of the Competition Authority as to where in the analysis this occurs."

I am sorry. I skipped over some key wording just above line G:

"The analysis of the Tribunal, for instance, suggests that it is a requirement discrete from other components of the test to be applied only after all those components have been worked through, but if this were so it would wrongly risk compelling a Competition Authority to double count economic value."

Sir, Ms Ford is running precisely the same argument. There is no difference. She says that as well as the competitive benchmark, demand side value needs to be factored in as a separate element of the test here. We don't need to. We have our proxy.

Her demand side value argument runs into a further roadblock - the willingness to pay fallacy, which was also rejected by the Court of Appeal -- and I am going to take you back, if I may, to the judgment, which I incorrectly keep closing, so back to tab 28, paragraph 155 at 1298, paragraph 155:

"The simple fact that a consumer will or must pay the price that a dominant undertaking demands is not, therefore, an indication it reflects a reasonable relationship with economic value. But a proxy might be what consumers are prepared to pay for the good or service in an effectively competitive market. Hence the relationship between the two descriptions of abuse in paras 249 and 250", of United Brands, "and the fact that the economic value description is said to be an example of the broader description of an abuse in paragraph 249."

So willingness to pay, Stella Artois, does not work, otherwise you would never be able to have an excessive pricing abuse.

Now, BT says; no, it is a different argument here because BT's customers had options, but that's analytically incoherent. As Mr Parker points out, it would mean that whenever a customer pays a high price to a dominant firm in circumstances where it could have shopped around for a cheaper price, there is no abuse, even though the price that they paid is significantly and persistently above the competitive level, and we know that's what registers excessive on the United Brands test.

BT's argument would be a licence for dominant firms to price gouge at will, a practice

that has been of some considerable concern for the CMA during the pandemic for some products like hand sanitiser. I should say on the facts that I am not accepting that customers could shop around for cheaper products, but I am engaging at the level of principle.

Finally, and I apologise for the repeated refrain, but even if there were some substance to her argument, it can't be advanced in a vacuum without the evidence. Now Ms Ford quotes the very passage from the Court of Appeal's judgment in Flynn in her skeleton. That's the very passage that defeats her approach, which is -- I may need to check this reference. I think it is paragraph 97(8).

"If an undertaking relies in its defence upon other methods or types of evidence to that relied upon by the Competition Authority, then the Authority must fairly evaluate it."

Sir, the PCR does not demur from that. BT is perfectly entitled to rely on other evidence, and I have no doubt that it will be advancing an array of alternative benchmarks other than its own prices in 2008 and 9, but the right time to evaluate that evidence is at trial. That concludes criticism four's rebuttal.

Moving on to criticism number five, this concerns Split Purchase Customers. So BT launches a further set of pinprick attacks on Mr Parker's analysis of market definition, dominance and abuse in relation to split purchasers. It repeats the claim that Mr Parker does not engage with the fact that Ofcom imposed a transparency remedy for split purchasers rather than price control. On market definition BT claims that Mr Parker fails to give weight to the benefits of bundling which could lead to a sustained price differential.

On dominance BT claims that the assessment of dominance is multi (inaudible) and Mr Parker should have taken account of engagement levels and buyer power

as well as market shares, and also he hasn't taken proper account of the movement of customers from SFV services to dual play bundles.

Then on abuse BT simply repeats its willingness to pay argument. I have addressed that, so I don't need to go back to that one.

So this set of grounds of challenge fail, in my submission, for the following three short reasons.

First of all, the first is based on a misconception. I've addressed this. Ofcom did not come to a different conclusion as regards the analysis of harm for split purchasers. I have already taken you to the relevant passages. It is helpful just to repeat it is paragraphs 1.14 to .15 and 3.49 to 3.53 in the Ofcom statement. I explained that Ofcom found in terms that the harm suffered, the consumer detriment, was common to both groups. The difference was in remedy alone.

Secondly, I have also dealt with BT's claims about the interplay between bundles and SFV services. Mr Parker finds in terms that there is no pricing constraint from bundles on SFV services.

Thirdly, BT simply mischaracterises Mr Parker's assessment of dominance. It doesn't rely only on market shares, which incidentally give rise to the rebuttable presumption, but also, and I took you through the points in summary, he relies on analysis of price, barriers to entry and expansion, profitability and BT's internal documents.

Moving on then to the sixth and final criticism made by BT, this is rather different. This goes to quantum. BT claims that there was a complete failure to mitigate by members of the class based on consumers' disengagement and disinclination to switch and that other products were available to them. It relies on that alleged failure to mitigate as a basis for striking out the whole of

the claim or doing away with the opt-out action.

So I think it is important just to be clear. BT's position is that even if it has abused a dominant position by unlawfully overcharging its customers and has caused them harm, it should not have to defend these allegations at trial at all, nor should it face an opt-out action on the basis of its claim that the whole class unreasonably failed to mitigate their loss.

It is an ambitious allegation and it fails for the following five reasons.

First, it offends against the principle of justice articulated by the Supreme Court in Merricks. For your note it is at paragraph 54 of Merricks, 8B, tab 27, page 1221. The principle is this. Claimants who have suffered more than nominal loss by reason of the Defendants' breach should have their damages quantified by the court doing the best it can on the available evidence. For your note paragraph 47 on page 1219 is in similar vein. The Supreme Court says once nominal loss is shown:

"… the claimant is entitled to have the court quantify their loss almost ex debito justitiae."

So if BT has unlawfully charged its customers, as the PCR alleges, then they are entitled to have their losses quantified. If BT has good argument for mitigation they can be considered at that stage. They are not capable of strangling the claim at birth.

Second point is stringent rules apply to pleas of mitigation. This was recently emphasised in two cases in the CAT: Royal Mail and Stellantis. I am conscious that Mr Doran was on the Panel in this Stellantis case. I don't think I need to take you to there. The relevant parts are set out in the skeleton, but the paragraphs are, Royal Mail, paragraphs 36 and 37, which is at 8B, tab 30, page 1411, and the proposition there is that defendants -- paraphrasing -- are

not permitted to raise a plea of mitigation in general terms. They must make specific averments.

The second is Stellantis, a very recent judgment, paragraph 22. That's at 8C, tab 17, para 22. There the Tribunal held that mitigation must have some plausible basis in fact and must carry a degree of conviction. That's also paragraph 43 of the Royal Mail case I have referred to, both authorities. So that's mitigation pleas. Stringent rules apply.

As regards the allegation of a failure to mitigate, which is the argument being put here, in the case of Automobile World, which is cited in our skeleton, paragraph 72, the Court of Appeal emphasised three aspects in the following passage.

1. It is well recognised that the duty to mitigate is not a demanding one. Ex hypothesi it is the party in breach which has placed the other party in a difficult situation.

Secondly, the burden of proof is therefore on the party in breach to demonstrate a failure to mitigate.

Thirdly, and importantly here, the other party only has to do what is reasonable in the circumstances.

So following on from those principles I make my last three points on mitigation.

The argument is premature. BT will need to plead and prove its case on mitigation by reference to specific facts, as required by Royal Mail, and the PCR will respond at that stage. It must make specific averments to avoid strike-out. At this stage all we have are general allegations about disengagement, customer disengagement and (inaudible) response. That falls well below the applicable standard.

Fourth point, the question whether the class members did what was reasonable in

the circumstances or not -- third point in Automobile World to test the allegation of failure to mitigate -- whether they did what was reasonable in the circumstances is a question of fact. It is not apt for summary determination.

Fifth, a word on substance. BT's claim of a wholesale failure to mitigate across the class is problematic, to say the least. Let's take, for example, a voice only customer. A typical voice only customer may be a pensioner over 75, one; two, characterised as a vulnerable consumer, which means -- Ofcom's term -- they have difficultly navigating complex markets and identifying tariffs which best meet their needs; three, given their age, they are also more likely to suffer from a disability. This person may have been with BT for decades, all their adult life, and, of course, by definition membership of the voice only class means they have no fixed broadband.

Now I am not suggesting this goes for the whole of the class, but a material number of class members will fit that description. BT is arguing that these class members failed to mitigate their losses and so should be deprived of the opportunity to bring their claims from the get-go. It says in not switching away from their overpriced landlines they did not act reasonably. BT (inaudible) that argument despite questionable aspects of its conduct. It is confidential. I will not read it out, but for your note the point is made at paragraph 113(a) and that's bundle 1, tab 8, page 392. So mitigation, if it is raised, it goes to quantum. It is not a knock-out blow. It's a matter for trial.

Sir, that concludes the merits section of my submissions.

If the Tribunal is happy for me to move on, it is now to something completely different, which is certification. I hope the Tribunal will be pleased to hear that there is very little between the parties on whether the proceedings should be certified at all. So this is not the opt-out question. This is certification by way

of collective pleadings.

I am in the Tribunal's hands as to whether it would be helpful to go to the legal framework, but with an eye on the time we have set out the legal framework in the skeleton argument. That's at paragraphs 14 to 19. It is comprehensive.

In summary, there are two aspects to certification. The first is authorisation. The Tribunal must be satisfied that it is just and reasonable for Mr Le Patourel to be authorised as class rep and, secondly, that the claims are eligible for inclusion in collective proceedings.

BT does not maintain any objection now to the authorisation of Mr Le Patourel, there was an outstanding costs point but that has now been resolved. So I propose not taking you there at all.

In relation to the second question of whether the claims are eligible for inclusion in collective proceedings, almost all aspects of eligibility are common ground. The relevant criteria are at paragraphs 17 to 19 of the skeleton just for ease, and the broad points from the Rules, the three eligibility requirements, it is at page 5 of the skeleton. The claims must be brought on behalf of an identifiable class of person, raise common issues and be suitable to be brought in collective proceedings. So suitability is an aspect of eligibility.

The Rule 79(2) sets out seven non-exhaustive considerations as to suitability and those are at paragraph 18 of my skeleton at page 6. All but one are common ground, so there's no debate that collective proceedings are an appropriate means for the fair and efficient resolution of the common issues. There is no debate that it is appropriate in light of the size and nature of the class. BT does not object that it's readily identifiable as to whether any individuals in the class --

MR JUSTICE WAKSMAN: I think you can go to the one that's in issue.

MS KREISBERGER: I'm grateful. So, moving on then, the only one in issue relates to the costs and benefits of the proceedings. So that's (b). Now it's common ground between us that suitability refers to the relative suitability of collective proceedings versus each of the 2.31 million customers in the class bringing them as individual claims. That is settled by the Supreme Court in Merricks, paragraph 56 at 8B, tab 27, page 1222 just for your note.

Now I would just note that BT's challenge on this ground is not mentioned in its skeleton argument. There is a reference to Rule 79(2)(B), so they set out the criterion, but this challenge is in the response and has not been withdrawn. Unless I am told otherwise, I will turn to the substance.

MR JUSTICE WAKSMAN: Let's just check. Ms Ford, is this point still being taken?

MS FORD: Sir, it is. I am just checking the point that it is not in the skeleton, because I had thought that it very much was.

MR JUSTICE WAKSMAN: Let's not worry too much about that. The point is being taken, so Ms Kreisberger is going to address it.

MS KREISBERGER: Thank you, sir. So BT's argument, to summarise, is that -- so they say the benefits don't justify the costs, because if the class is too disengaged to opt-in, then the class rep, the PCR, has not shown that distribution will be effective. That's BT's argument.

I have three points in response.

The first point is that I should just draw out the amounts, the individual amounts at stake are set out in Mr Parker's first report, paragraph 412. That's at bundle 1, tab 3, page 211 and the numbers are £193 including simple interest for Voice Only Customers. I am giving simple interest for illustrative purposes only. £324, including simple interest, for Split Purchase Customers. So those are the individual benefits to be weighed in the balance.

If collective proceedings are not brought then class members will get nothing, because there can be no individual claims. So it's zero benefits versus those numbers. As the Supreme Court held in Merricks at paragraph 54, which is 8B, tab 27, page 1222:

"A refusal of certification of a case like the present is likely to make it certain that the rights of consumers arising out of a proven infringement will never be vindicated, because individual claims are likely to be a practical impossibility. The evident purpose of the statutory scheme was to facilitate rather than to impede the vindication of those rights."

That is my first point.

My second point is BT's objection to certification is misconceived on the facts, because it's now clear based on BT's own evidence that distribution should, in fact, be straightforward.

Mr Bunt for BT emphasises in his statement that BT can identify all customers. That's paragraph 14 of his statement, bundle 1, tab 6, page 349. He says this:

"BT is able to identify all customers who would be eligible members of the proposed class based on the data BT routinely holds for current and former customers. For the reasons outlined in more detail below, BT would be able to use the data in the billing database to contact all existing customers and most former customers within the proposed class save for those who have both moved address since they left BT and also changed their telephone number."

So that indication is extremely helpful. If BT can identify them, then it can reimburse them without any action taken on the part of the class member, at least for existing customers.

Now you will have seen from our skeleton that the President had this very situation in

mind at the recent Gutmann CPO hearing. It is reproduced in our skeleton at para 32. For your note the transcript is at 8C, tab 18, page 617.

Just turning to the skeleton, the President said this helpfully, precisely foreshadowing the facts of this case:

"Similarly, if a Telecoms operator overcharged subscribers, well, they will know who the subscribers are and they can credit them on their phone bills or their account even if it is only £4.50. One couldn't say no you shouldn't bring a collective action because it is £4.50 and trivial if the mechanism is straightforward."

That's our situation. There is no reason at all to put the class member to any trouble if BT can automatically reimburse the right people.

This case is a model CPO. You can distinguish it from cases like Gutmann where the concern that the President was expressing was that class members simply won't make themselves known at the distribution stage because of what he called the hassle factor. They would need to produce -- they would need to come up with some sort of evidence to show, "Oh, I took such and such a train journey on such and such a day" in order to claim these potentially tiny amounts. That's fortunately not our situation. That concludes that point.

I will move on to my third and final point on the certification objection. To the extent that former customers -- so that explanation works for existing customers -- to the extent that former customers might need to take some steps at distribution, and I should just pause there to say that BT has not told us how many people in the class are former customers, how many are existing -- we don't have any data -- but to the extent that there are a material number of former customers -- one might think that would be quite low for voice only who

are not switching -- this is a matter that will need to be explored with BT, but if it is right that they would need to take some steps as a former customer, it is not right to say, as BT does, that a customer who would not opt-in would also not take distribution; in other words, not receive the cheque at the end of the day.

BT's logic on this runs counter to the statutory scheme. It would kill off the scope for opt-out claims if it could always be said by defendants, "Well, if they won't opt-in, they won't take distribution". It's wrong, because there is no equivalence between taking steps to opt-in to litigation and collecting a cheque. I don't think I need to put in evidence on behavioural economics and Richard (inaudible) nudge theory to make good the point that the latter is more likely.

So to the extent that some members might need to take some steps to collect monies, the PCR will ensure that it is made as simple as possible. I will come back to that on impracticability of opt-in.

Sir, that deals with the only point made on certification.

MR JUSTICE WAKSMAN: Right.

MS KREISBERGER: With that I can turn to my final topic for today, which is the question of the opt-out procedure and I propose to structure my submissions on this as follows: to refer to the relevant framework on opt-in/opt-out, explain the PCR's reason for relying on and selecting the opt-out tool and finally to address BT's objections.

There is then a separate point on pass on. Sir, I am just being asked whether this would be a convenient time for a break for the shorthand writers?

MR JUSTICE WAKSMAN: We could do and obviously you need to be aware that in practical terms you need to be finishing about 3.30, because although that's

slightly less than four hours, we have got to build in the break. How long do you think you are going to be.

MS KREISBERGER: I have got essentially nine pages. I think we do have a bit longer. We should have four and a half hours, which --

MR JUSTICE WAKSMAN: Four and a half. Wait a minute.

MS KREISBERGER: Which takes us to 4 o'clock.

MR JUSTICE WAKSMAN: That's right. You are quite right. That's on the basis then that Ms Ford will be starting today.

MS KREISBERGER: One hour would be comfortable.

MR JUSTICE WAKSMAN: All right. We will just have a ten minute break now. The extent to which you need to sketch out or repeat the framework so far as opt-in and opt out is concerned might be limited. I think you have set it out pretty clearly in your skeleton and we are pretty familiar with that. That might save you a bit of time.

MS KREISBERGER: That's very helpful, sir.

MR JUSTICE WAKSMAN: All right. Well, we'll take our break now.

(Short break)

MR JUSTICE WAKSMAN: Yes, Ms Kreisberger.

MS KREISBERGER: Thank you, sir. I will move along from the framework. Thank you for that, sir. Just to note we, of course, have Rule 79(3) and then guide paragraph 6.39. Just to note on the question of practicability the guide provides that if opt-in is not practicable, then there's no preference for it. So there's no preference at large for opt-in.

Turning then to the PCR's reasons for seeking an opt-out procedure, the PCR considers opt-in would be impracticable. To be clear, opting in is defined under Section 47(b), para 10 of the Competition Act, that involves the class

member notifying the representative that their claim should be included at the outset.

There are three overarching reasons why the PCR considers that would be impractical here.

First, the individual amounts are small. Secondly, the class is large. Thirdly, there is little or no realistic prospect that SFV customers would take the steps necessary to opt-in to collective proceedings in sufficient numbers, given their particular characteristics.

The concern is not, as I said in relation to other cases, that they can't be tracked down and contacted. BT has helpfully clarified that they can be, which will be of tremendous assistance for distribution. The major obstacles, and this is at claim form, paragraph 187, bundle 1, tab 1, page 73, the major obstacle to participation is that even if put on notice of the procedure, it is unlikely that many would take the necessary steps to opt-in.

Were opt-out proceedings to be refused it is very clear these claims will never see the light of day and victims of the harm alleged by the PCR will never obtain redress.

I will now develop my submissions on impracticability of opt-in in two parts.

First part at a general level, why the opt-in procedure does not generally work for these types of case, which involve small individual claims, a large number of individuals, principally consumers. The inadequacies of the opt-in regime are well documented and it is precisely those inadequacies which led to the introduction of the statutory scheme for opt-out actions. So that's the first part. Second part, I will address the specific characteristics of the class.

Sir, if I could ask you to turn up bundle 6A, tab 40, page 80, this is the consultation document. So this is tab 4 of bundle 6A. You see at page 80 -- sir, you may

be familiar with this document. It is the consultation by BIS which led to the introduction of the collective regime.

If one turns to page 106, if I can take this -- if I could just suggest for your note looking at paragraphs 5.4 to 5.6 at page 106 and following, but then I will just read a small part of that very briefly, and I am taking this from page 107 at the end of paragraph 5.4:

"Which? has made clear that it considers the system must be changed to one that is opt-out. Which? have said "to make it attractive for designated bodies to bring follow-on actions in all competition redress cases the system must be changed so that opt-out systems can be used. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails both from a cost and time perspective. The only real practical way to get over this is to introduce an opt-out system.""

Then if one goes forward to page 110, under the heading "Opt-in" perhaps I could suggest that at your leisure if the Tribunal could look at paragraphs 5.18 to 5.23 in their entirety, but I will just now read the first two, because it is important.

"Evidence suggests that the current opt-in arrangements for representative follow-on actions make it very difficult to bring cases. For example, Which? noted… that "the single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form. Which? was only able to name 130 claimants out of an estimated several hundred thousand of those harmed by the cartel.""

It refers to the total amount received being a small fraction of the fines:

"In addition to this very low level of participation in the only case in the UK to date to make use of the opt-in… regime, research conducted by the Civil Justice

Council shows that the great majority of opt-in rates achieved under Group Litigation Orders, a type of action in which cases are grouped after having been laid in court individually, are 50% or lower. By contrast it notes that the median participation rates in opt-out cases in other legal systems where evidence is available have been between 87 and over 99% ".

So there are some very striking figures there.

Then just to finish on this point, tab 5 contains the government's response to the consultation in January 2013. If I could just take you to a single paragraph. That's at page 181. The government said this:

"It is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice."

Go forward:

"Consumer groups have been clear that they would not take another case under an opt-in system, and bodies such as the Law Society of England and Wales have said that an opt-out regime is essential if consumer cases are to be brought successfully. It is also clear that, as indicated in the consultation, there are some cases that could only ever be brought on an opt-out basis in practice."

This is one of those.

Sir, moving on to the second part of my submissions, that's the prospects of this class membership participating in opt-in proceedings. Now BIS in these documents talks about the hassle factor that acts as a disincentive to opt-in. Well, the obstacles to participation in an opt-in for this group of customers go far beyond mere hassle. It is not that they will merely be deterred in the

ordinary way from joining the litigation, the usual default mode that we all experience of non-participation, non-doing.

Rather, it is the very characteristics which put them in the class in the first place, the very characteristics which BT has been able to exploit through the exercise of market power that mean they simply will not participate in an opt-in in sufficient numbers. That is a profound obstacle to participation.

Now I have already referred to their characteristics in broad terms. I would like to go a little bit deeper into that point, given its significance here.

The evidence concerning the customers in the class is principally found in the Ofcom material and the PCR's witness statements, and I am going to just show you today the PCR's evidence on the point. This is probably the last time I am going to take you to the bundles today. It is set out in our claim form at paragraph 80 that SPC customers, in particular Voice Only Customers who make up 60% of the overall class, tend to be elderly, in lower socio-economic groups and disengaged.

Now I will take you to Mr Le Patourel's evidence on that. That's in the core bundle, bundle 1, tab 4, page 265, paragraph 37. Mr Le Patourel explains that these customers

" …are more likely to be considered vulnerable consumers. Both categories", older, lower income, vulnerable, "are heavily over-represented in the proposed class compared to the wider population of telecom's service consumers. Both are much less likely than average to engage with the telecoms market. Many will have been unaware that they were being overcharged by BT. Some will not have known they had a choice. Those that did are more likely to have struggled with the market comparison, option assessment and execution stages involved in choosing a new provider. This will have posed particular

difficulties for BT Voice Only Customers, who are less likely to have had ready access to the Internet… and so many would have been forced to use call centres or libraries, for example, in order to assess their options and switch."

Then moving forward to paragraphs 50 and 51, perhaps I could ask the Tribunal to read those paragraphs to itself. This is on the fact that these consumers are older and vulnerable.

MR JUSTICE WAKSMAN: Yes. This is what Ofcom said about them.

MS KREISBERGER: Exactly.

MR JUSTICE WAKSMAN: Well, we have got that.

MS KREISBERGER: I am grateful, sir. Then moving on to paragraphs 56 and 58, I think you have these points as well. 35% of SFV customers in DE socio-economic group households. Then at 58:

"It is therefore evident that people already on low incomes… are suffering from BT's overcharges… They are likely to be particularly affected by excessive payments. Those who are longstanding BT customers could have paid £84 too much every year since as far back as 2009. That's a material sum for most of this group. I would very much like to seek compensation for those on low incomes."

Mr Le Patourel also refers -- and I will just give you the reference, at his second statement, so we move forward now to tab 10 in the bundle, page 448 -- Mr Le Patourel makes the point that there is little prospect that this group of customers will have the legal knowledge to make an assessment of merits here. He goes on at paragraph 39 to refer to their lack of engagement, and he makes the point they have in common, these individuals, an inherent disengagement with the process of switching or securing a better landline deal. As he says, both processes involve, whether it is switching provider or

opting into litigation, both involve research, form filling, engaging with authority. They share a lot of characteristics. One should assume the same response.

Just for your note paragraph 262 of Mr Parker's first report at bundle 1, tab 3, page 164 refers to engagement levels of Split Purchase Customers. Mr Parker does not accept BT's characterisation of them as very engaged.

Paragraph 40 in Mr Le Patourel's statement refers to lack of technological engagement on behalf of the class, and you have Ofcom's summary there at paragraph 40, again for your note, and, finally, the PCR emphasises at paragraph 43 customer loyalty:

"Many members of the proposed class still have active BT accounts. They may well consider that taking proactive steps against their incumbent landline provider is too confrontational, risky or intimidating to countenance opting into a claim."

Then over the page, paragraph 46, Mr Le Patourel concludes due to their characteristics:

"… even if proposed class members were directly notified of their ability to opt-in to the proposed claim, eg with the help of BT's records, I believe that this additional step at the outset of pending proceedings would lead to a huge drop-out rate."

So those are the reasons why the PCR has brought this claim by way of opt-out proceedings.

Thirdly and finally I turn to BT's objections. There are two. BT says it can identify and contact class members. Secondly, it says if it is possible to distribute to the class, then it must be possible for them to opt-in. Neither have merit.

First, I have now explained that identification of the membership is not the issue. It is the many obstacles to participation. It is the ability to even understand what

participation in these proceedings means, what it entails.

Secondly, I have also explained that we now understand that distribution can take place automatically for existing customers.

Finally, even if that weren't the case, there is no equivalence between opting-in and distribution. The entire premise of the opt-out procedure is that it removes barriers to participation at the outset to ensure effective vindication of claimants' rights. If it could be said that by dint of the fact that the class membership is unlikely to opt-in, they should therefore be presumed incapable of receiving the proceeds, despite the PCR's best efforts to make distribution as simple and effective as possible, well, then the entire opt-out regime will have been misconceived. Receiving a cheque is not the same as stepping forward as a named claimant in a case, big ticket litigation against a household name.

That concludes my submissions on that point. There is one final point which BT makes which I must respond to. That is their argument on pass on.

Now SFV services are residential, but it is accepted that a minority of class members might have been operating as a business, for example, sole traders operating from home, possibly SMEs taking a residential line but operating as a business. BT now foreshadows a further mitigation defence to reduce the amount of quantum, which is that businesses will have passed on the unlawful overcharge or some of it to their own customers, and BT advances this point, this possible defence, as a reason for you to refuse opt-out proceedings on the basis that opt-in proceedings have the advantage of requiring class members who are businesses to produce their data at the outset, at opting-in.

Now it is notable that BT seems to have moderated its position on this in the skeleton. It makes clear that it doesn't advance this point as an insuperable

difficulty with opt-out proceedings, but it says it's a point to throw in the mix. So if the Tribunal is with me on practicability, it may be that this does not arise for consideration at all, but in any event it can be disposed of on the basis of four short points.

First, BT's approach is thoroughly disproportionate. This is principally a consumer class. On a very broad brush estimate based on Ofcom's figures, businesses will constitute less than a fifth of its number, so 17%. It might be substantially less. Just so you have it, that's at provisional conclusions, paragraph 3.11, 6A, tab 8, page 365.

It can't be proportionate to deny around two million consumers participation in an opt-out action by virtue of what is a questionable defence which goes to quantum only and which arises in respect of a small proportion of potential class members. So, you know, BT's logic again carries the seeds of destruction of the opt-out procedure wherever a class contains some businesses.

Second, pass-on is a matter for BT to plead and prove in due course. That has been confirmed by the Supreme Court in Sainsbury's v Visa at paragraph 211. That's at 8B, tab 29, page 1384 for your note. So it's not a matter which arises on certification before BT's pleading.

Third, it is Mr Parker's evidence in any event that there would be zero pass-on, because he says rivals will be buying competitively priced business products, and in any event the overcharge is too small as a proportion of turnover to be passed through. That's at Mr Parker's second report, paragraphs 3.71 to .76. BT has not put in contrary evidence.

Fourth and finally, Mr Bunt for BT has suggested a perfectly working proxy for estimating the number of business customers, which is, in fact, what BT did in

order to exclude business customers from the commitments. You will remember they are outside the scope. So BT sensibly identified customers with two or more lines, which suggests that one line might be used for business purposes, and asked them to return a coupon if they were not businesses and therefore were eligible for the price cut.

That's fine. It is worth emphasising we are not in the realms of a counsel of perfection here. Perhaps I could just direct you here to Royal Mail. I will just turn it up very quickly. 8B, tab 30, 1401. At paragraph 12 the Tribunal is here quoting the Supreme Court in the Sainsbury's Mastercard case:

"The court in applying the compensatory principle is charged with avoiding under-compensation and also over-compensation. Justice is not achieved if a claimant receives less or more than its actual loss, but in applying the principle the court must also have regard to another principle enshrined in the overriding objective of the CPR that legal disputes should be dealt with at proportionate cost.

The court and the parties may have to forego precision even where it is possible if the cost achieving that precision is disproportionate and rely on estimates. The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved."

It's a wholly disproportionate suggestion to require opt-in for the reason of pass-on.

Sir, that concludes my submissions on opt-out and my submissions for today. So unless I can be of further assistance?

MR JUSTICE WAKSMAN: Thank you very much indeed, Ms Kreisberger. Now, yes, Ms Ford.

Submissions by MS FORD

MS FORD: Sir, and members of the Tribunal, BT resists this application for a collective proceedings order on two grounds. First, we say that the Tribunal should either strike out or grant summary judgment in BT's favour on the proposed claims. The proposed claims are a misguided attempt to recycle non-binding provisional conclusions reached by Ofcom in a very different (inaudible) context into allegations of breach of competition law. We say that the extremely limited additional analysis which has been advanced in support of that exercise is not enough to demonstrate that the proposed claim had any real prospect of success.

Secondly, we say that these proceedings should be dismissed in their current form. We say if they are certified at all, it should be on an opt-in basis only. As the Tribunal has just heard, this is an exceptional case, because it is straightforward to identify and contact proposed past members by means of BT's customer records, and indeed the PCR has put forward detailed plans to contact proposed class members, including by using BT's customer records at the distribution stage, and in our submission if those sorts of measures mean that the class can be expected to make themselves known at the distribution stage, then it is practicable for them to opt in to the proposed proceedings at the earlier stage.

If, conversely, factors that the PCR relies on, such as exceptional levels of disengagement, mean that members of the class can't be expected to opt in to the proposed claims at the distribution stage -- sorry -- at the earlier stage, then in our submission those factors apply equally at the distribution stage. What that will mean is that these proposed claims will not actually benefit the members of the class on whose behalf they are purportedly brought, and in those circumstances the costs outweigh the benefits and the claims are not

suitable for certification in collective proceedings.

Finally, we hope that there is not much now between us in terms of class definition and the inclusion of estates of deceased persons who have no representative to act for them, but we will endeavour to reach a resolution on that one way or another this evening and update the Tribunal tomorrow.

I am starting with my strike-out application and in terms of the structure of my submissions under this head I am going to first make some brief observations on the applicable principles, and then I am going to deal in turn with the six points that we rely on. They are the difference between the ex ante regime under the Communications Act 2003 and ex post competition law; the provisional nature of Ofcom's conclusions; the PCR's failure to take into account wider competitive dynamics in the retail telecommunications market during the claim period; the PCR's inadequate assessment of the question of abuse; the particular weakness of the case concerning SPCs; and the PCR's failure to consider potential defences of failure to mitigate contributory negligence and/or break in the chain of causation.

So those are the six points. Starting with the applicable principles, can I ask the Tribunal briefly to turn up the Sel-Imperial case, which is authorities bundle tab 19, so 8A, tab 19? The relevant paragraphs are 16 to 18. The Tribunal will see in paragraph 16 the quote from Mr Justice Lewison that Ms Kreisberger also referred to. So that's familiar material, but this articulation of the test does have additional material in it.

If the Tribunal turns over to page 712, you see, first of all, Mr Justice Roth making the points with regard in particular to competition law claims where the area of law is in the course of development the court should be cautious, and then he says at 17:

"It is important that competition law claims are pleaded properly, contend that the party has infringed competition law involves a serious allegation of breach of a quasi-public law, which can indeed lead to the imposition of financial penalties as well as civil liability. A defendant faced with such a claim is entitled to know what specific conduct or agreement is complained of and how that is alleged to violate the law."

He goes on to refer to Mr Justice Laddie's observations that these are notoriously burdensome allegations frequently leading to extensive evidence, including expert reports from economists and accountants, and the recent history of cases in which such allegations have been raised illustrate that they can lead to lengthy and expensive trials.

I emphasise four points in particular about this test and how we say it applies in the context of an application for a collective proceedings order and/or in the context of an excessive pricing case.

The first concerns the observation about the caution and the need for competition claims to be pleaded properly, the paragraph 17 that I referred to. In my submission that has to apply with particular force in CPO applications where the consequences of permitting a claimant to pursue an unmeritorious claim are even more enormous for a proposed defendant.

We rely on the observations that were made by the Supreme Court in Merricks in authorities bundle 8B at tab 27. If the Tribunal looks to paragraph 154, this is in the judgment of the minority rather than the majority, but what they are particularly focused on here is whether the applicant's proposed methodology was viable and in that context they articulate, in my submission, what are the risks if the Tribunal permits an unmeritorious CPO claim to go ahead, and they say -- the first line is essentially about the methodology but then they

have a (i):

"There would be a significant risk that a claim could unfairly be held over Mastercard's head in terrorem to extract a substantial settlement payment without a proper basis for it; (ii) there would be a significant risk that, if carried forward towards trial, the collective proceeding, as framed by the CPO obtained at the outset, would at some stage run into the sand and be found not to be viable so that giving rise to a a great waste of expenses and resources for no good effect.; (iii) the risk referred to in (ii) would not just relate to potential waste of the resources of the defendant, but also to the waste of the resources of the Competition Appeal Tribunal, which could be better allocated elsewhere."

In my submission those are the risks if the Tribunal permits a CPO to go ahead when it is unmeritorious and they need to be borne in mind when applying this test.

Secondly, Mr Justice Roth commented at the end of paragraph 16 that competition claims are an area of law which in general is in the course of development and won't be extended, and the court should be cautious to assume that it won't be extended or modified.

In the particular circumstances of this case the Court of Appeal has recently considered the test for excessive pricing in Flynn Pharma which is a case that Ms Kreisberger has already taken you to. So in our submission there's no reason to suppose that this is an area where the applicable test is likely to change materially in a way that will assist the PCR. I don't understand Ms Kreisberger to be suggesting that testimony.

Thirdly, this Tribunal has described these sorts of claims, and by these sorts of claims I mean pure excessive pricing claims, as rare, difficult to bring and it has emphasised that ex post price regulation through the medium of

competition law presents many problems. That's in the first instance judgment in Flynn Pharma and it is authorities bundle tab 23, page 864 at paragraph 3.

We say that the rarity and the notorious difficulty of these sorts of cases is an important contextual factor that the Tribunal should be taking into account when applying this test, and in particular when it is asking; has the PCR actually done enough here.

Fourthly, the PCR point predictably places emphasis on the need for caution before you strike out a case which turns on factual complexities or on expert evidence, but this is, first of all, a case in which there has been extensive factual investigation by Ofcom and on which the PCR relies most heavily and, secondly, it is important to emphasise that our case on strike-out does not turn on disputed factual or expert evidence. It turns on what we say is the really very limited nature of the work that the PCR has done in support of its claim and the fundamental and obvious deficiencies in what has actually been done.

I am turning to the first of the six points that we advance in support of our strike-out application. As the Tribunal is aware, Ofcom's 2017 review was not conducted under the Competition Act 1998. It was conducted under the Communications Act 2003. That's a very different regulatory regime. It is an ex ante regime rather than ex post regime, and it pursues a different range of policy objectives.

The Communications Act itself implements the European Common Regulatory Framework, and under that regime Ofcom has obligations to analyse markets and it has to decide whether those markets are effectively competitive and where it finds significant market power in a relevant market, it must impose

appropriate ex ante remedies in order to address that. In doing so it is obliged to give effect to a very broad range of forward looking policy objectives.

We can see those in Section 4 of the Communications Act, which is in the supplemental authorities bundle, 8C, tab 4, starting at page 31. What the Tribunal will see is that Section 4 of the Communications Act sets out the duties of Ofcom in relation to their regulatory functions, and the relevant functions that we are concerned with are those under sub-paragraph (a), their functions under Chapter 1 of Part 2. That is the function concerning electronic communications networks and services.

If we look through, there are various matters that Ofcom must take into account, or its duties in carrying out these functions. Section 4(3) there's a requirement to promote competition in relation to the provision of electronic communications networks and electronic communications services. Section 4(5) requirement to promote the interest of all members of the public in the United Kingdom. Section 4(7) and (8), to encourage the provision of network access and services interoperability for the purposes of securing efficiency and sustainable competition, efficient investment and innovation, the maximum benefit for the persons who are customers of the communication providers and persons who make associated facilities available.

Subsection 4(9) and (10) you have an obligation to encourage compliance with international standards, facilitating service interoperability, end-to-end connectivity, changing by end users of their communications provider. Facilitating retention by end users of their telephone numbers or a change of communications provider, securing freedom of choice for the customers of communications providers, a requirement to promote connectivity and access to high capacity networks.

So the submission I am making, sir, under this head is it is immediately obvious that when Ofcom is acting under this regime, it is pursuing a broad range of forward looking policy objectives which go far beyond identifying and prohibiting actual instances of breach of competition law.

It is well recognised that ex ante and ex post regimes generally don't pursue the same policy objectives, and the Tribunal can see that in the response bundle at tab 17. The Tribunal should have there a publication which is headed "Balancing the application of ex post and ex ante disciplines under Community Law in electronic communications markets: square pegs in round holes?".

If the Tribunal turns to page 213, you see a heading "General principles of ex post and ex ante intervention". What is recorded there is:

"It is generally understood that ex ante and ex post regimes have a number of fundamentally different policy orientations which may lie at the root of existing tensions in their dual application over same subject matter."

Can I ask the Tribunal just to read the bullet points which highlight the very real distinctions between an ex ante regime, on the one hand, and ex post regime, on the other?

MR JUSTICE WAKSMAN: Yes.

MS FORD: So you see there that competition law is backward looking whereas ex ante is forward looking and the article says: "They prescribe types of market behaviour regardless of particular circumstances based on public policy priorities."

You see there are differences in approach to market definition. You see there are differences in the conduct which is identified and focused on. In particular ex ante regimes focus on addressing market failures rather than specific

strategic practices of any particular given operator. You see they vary from being very fact specific in competition law context to not very fact specific in an ex ante context, and you see that they result in different remedies. So ex ante regulation is characterised by detailed remedies in terms of both price and quantum parameters, many of which are based on costs estimations conditioned by presumptions of efficiency and which are constructed with broader notions of consumer welfare and investment incentives in mind.

Now this difference in public policy objectives between telecommunications regulation generally and competition law has been emphasised by the General Court. You can see that in the Deutsche Telekom case, which is in the same bundle behind tab 10, this was an appeal by Deutsche Telekom, which is the incumbent telecommunications operator in Germany against a finding by the Commission that it engaged in an abusive margin squeeze. You can see that from paragraph 37. I think I have the wrong tab -- 37 of the authorities bundle, supplemental authorities bundle. So it is page 200 and you can see recorded there:

"According to the Commission the applicant has infringed Article 82 by operating abusive pricing in the form of a margin squeeze by charging its competitors prices for wholesale access at higher than its prices for retail access to the local network."

That was the complaint it was facing. If you turn on to page 99 in the Commissioner's decision, which is on page 212, you can see that one of the points that Deutsche Telekom made was that the German Telecoms Regulator had actually approved its prices. So it said:

"The applicant's retail prices for access to analogue and ISDN lines had to be approved by Reg TP" -- that's the German Regulator -- "in the context of

a price cap system."

The General Court dealt with the relevance of that at page 113 on page 215. It essentially says:

"The national regulatory authorities operate under national law, which may as regards telecommunications policy have objectives which differ from those of community competition policy."

So this is the General Court recognising that the policy underpinnings of these two regimes are potentially different. As a consequence you get different answers under ex ante telecommunications regulation under the common regulatory framework than you do under the competition law in terms of market definition, in terms of dominance and in terms of remedies.

That's something which is specifically reflected by the European Commission in its guidance to national regulatory authorities under the Common Regulatory Framework. That's in the supplementary authorities bundle, tab 12.

The Tribunal can see from paragraph 2 of this document that these are SMP guidelines and (inaudible) the national regulatory authorities to carry out their duties related to the analysis of markets susceptible to ex ante regulation and the assessment of significant market power under the EU regulatory framework for electronic communications and services. So this is in the context of the Communications Act regime and the Tribunal is saying, starting at paragraph 10 on the following page:

"When examining similar issues in similar circumstances and with the same overall objectives in mind, NRA's and Competition Authorities should in principle reach similar conclusions. However, given the differences in scope and objectives of their intervention and in particular the distinct focus and circumstances of the NRA's assessment set out below, markets defined for

the purposes of EU competition law and those defined for the purposes of sector specific regulations might not always be identical."

So point one, you don't necessarily have the same market definition under these two regimes.

Point two from paragraph 11 you accept:

"Similarly the designation of an undertaking as having significant market power in a market identified for the purposes of ex ante regulation does not automatically imply that this undertaking is also dominant for the purposes of Article 102 of the Treaty."

So point two, you can see that there may be a different analysis of significant market power or dominance under these two regimes. It goes on to say:

"Moreover, a significant market power designation has no direct bearing on whether that undertaking has also abused a dominant position under Article 102 of the Treaty. It merely implies that within the scope of Article 14 of the Directive from a structural perspective and in the short to medium term in the relevant market identified the operator has a more efficient market power to behave in an appreciable extent independently of its competitors, customers and ultimately consumers."

So point three, there is no presumption there of actual abuse. The point that's made in paragraph 12 is that you will then under the different regimes have different remedies. So it says:

"In practice it cannot be excluded that parallel procedures under ex ante regulation and EU competition law may apply with respect to different types of competition problems identified in the underlying retail markets. In this respect ex ante obligations imposed by NRA's own undertaking designated as having significant market power aim to remedy market failures identified and

fulfil the specific objectives set out in the framework. On the other hand, EU competition law instruments serve to address and remove concerns in relation to legal agreements, concerted practices or unilateral abusive behaviour which restrict or distort competition in the relevant markets."

So they are aimed at different conduct and they give rise to different remedies.

That is not just a theoretical possibility. There is an example in the bundle of a concrete discrepancy between the position under ex ante regulation and the position under competition law. That is in this supplemental bundle at tab 11. It is the case of Telefónica. This is an appeal by Telefónica, which is another former state monopoly telecommunications operator this time in Spain against the finding that it had engaged in a margin squeeze. You can see that from paragraph 17 on page 286. It says:

"In that regard, the Commission considered that Telefónica had infringed Article 82 EC by imposing unfair prices on its competitors in the form of a margin squeeze between the prices for retail broadband access in the Spanish mass market and the prices on the regional and national wholesale broadband access markets throughout the period."

That's the allegation it was facing.

If the Tribunal looks at paragraph 135 on page 307, you can see that one of the things that the applicants disputed was the finding of market definition in the contested decision.

If you turn on to page 308, paragraph 142, we see that the fifth point that was made by the applicants in support of their claim was that CMT -- that's the Spanish telecommunication body -- shared their view of market definition under the common regulatory framework. So they say:

"CMT in its decision also considered that the regional wholesale product and the

national wholesale product are part of the same market."

The General Court dismisses that in one line. It says:

"In that regard, unlike the contested decision, the decision of the CMT falls within a framework of prospective analysis."

So the General Court is there saying the market definition that was undertaken for the purpose of the common regulatory framework is for the purposes of prospective analysis. It is not informative in that appeal for the purposes of competition law.

Importantly, a finding of SMP and the imposition of a remedy under the ex ante regime can occur without there being any finding of abuse. An example of that is also in the bundle. It is the H 3G v Ofcom case, which is behind tab 15 in this bundle.

This is an appeal to the Competition Appeal Tribunal and it is against a decision of Ofcom which was taken under the Communications Acts 2003. If the Tribunal turns to paragraph 73 in this document, you will see a heading "Price control", and you can see there is ground of appeal against the imposition of a price control on H 3G for the period 2007 to 2011. The basis of the appeal is that:

"Price control depends under Section 88 on whether Ofcom conclude that there is a relevant risk that the undertaking might so fix and maintain some or all of its prices at an excessively high level with adverse consequences for end users. It is said that Ofcom did not come to that conclusion or, if they did, they had no proper grounds for doing so and therefore could not impose price control. Ofcom's primary basis for imposing price control was not that H 3G had shown any specific tendency to impose excessive prices, but rather that it had the ability to charge excessive prices and an incentive to do so, and there was no other factor in the market which would remove that risk in the absence of

ex ante price regulation."

That's the basis of the appeal. The Tribunal deals with that relatively shortly. It observes, first of all, at paragraph 74, partway down:

"Reading the provisions as to price control in their context in the access directive, while it is a legitimate point that the imposition of price controls is not necessarily to be possible in every case where there has been a finding of SMP, it seems to me that Article 13 does not suggest that it would necessarily be unusual or exceptional that price controls are imposed."

So that's really the first point, the Tribunal saying it is a perfectly run of the mill exercise that you impose a price control.

Then at 76 it deals with the argument that there was no factual basis and it essentially says:

"The Tribunal agreed with Ofcom's reasoning in this section and their conclusion that each MNO might impose excessive charges, specifically as this applied to H 3G."

It goes on to say:

"There was also in any event some evidence that H 3G would take advantage of its SMP discussed by the Tribunal at paragraphs 289 and following."

So the Tribunal upheld the imposition of a price control and it did so not on the basis of any actual evidence that H 3G had engaged in any abuse but on the basis of a finding of potential ability and incentive to do so.

So what this case amply illustrates, in my submission, is that the imposition of a price control does not equate to the finding of an abuse.

All that means in our submission is that there can be no automatic read across between an analysis which has been conducted by Ofcom under the Communications Act 2003 and an ex post competition analysis, whether that

might be in terms of market definition, SMP, dominance or abuse. There is no automatic read across between them.

Sir, I am moving on to my second point, and that is that that is the case where there are definitive findings under the Communications Act 2003. That must apply with even greater force, in our submission, where the findings in question are not even final concluded findings. They are provisional findings, which is, of course, the case here.

I think it is insightful to see how Ofcom's provisional findings have evolved. We start off with the claim form bundle behind tab 6. These are Ofcom's provisional conclusions dated 28th February 2017. If we start at page 386, we see Ofcom, paragraph 3.1:

"This section sets out our provisional market definition assessment for residential Standalone Fixed Voice Services in the UK."

The provisional conclusion is at page 411, where they provisionally conclude that there is a product market for SFV residential access services and a relevant market for SFV residential call services in the UK. That's paragraph 3.130. You get a provisional conclusion on SMP at paragraph 4.80. That's in the access market. You get a provisional conclusion on SMP in relation to calls at paragraph 5.36. Then at paragraph 6.16 you get the proposal to impose a price control, and at that point the proposal was a price control which was covering both line rental and calls as well as ancillary services for standalone landline telephone services. So that's page 440, paragraph 6.16.

If we then turn to Ofcom's final statement, which is in tab 4 of this bundle, starting at page 264 we see from paragraph 1.20:

"We consider that BT's voluntary proposal addresses our concerns over prices offered to voice only customers."

So there's no imposition of formal regulation at this time. We see that again in 1.23:

"We therefore consider that BT's voluntary proposal is sufficient to address our concerns in relation to this review. Accordingly, we have decided against the imposition of formal regulation at this time."

If we look at page 271, we see that Ofcom has revised its view of the market. So paragraph 3.10:

"In the light of the comments we received from stakeholders, further information gathering and research we have revised our view of the market. We no longer consider that it is appropriate to define markets around the purchase of standalone fixed voice access and calls. Rather we consider that there are separate markets for the purchase of each of access and calls by Voice Only Customers."

If we turn on to page 277, Ofcom is dealing at paragraph 3.49 with Split Purchase Customers:

"As we described above, we no longer consider Split Purchase Customers to be in the same market as Voice Only Customers."

They go on at the bottom of that page:

"We do not consider it necessary to proceed with a formal market definition exercise in respect of these customers."

So there is no formal finding in relation to market definition for SPC customers at all.

3.55 at the bottom of this page we see:

"In the light of those proposals we have decided not to proceed with the imposition of regulatory remedies and we therefore do not consider it necessary to reach a formal determination of significant market power with respect to the market for voice only customers at this time."

So no formal finding of SMP either.

So the conclusions that are sought to be relied on in this case are, first of all, changing. They are in flux as between the provisional conclusions and this statement, and, secondly, they were never even finalised. That, in my submission, must heavily impact the weight that is given to them.

Now the PCR says that none of that matters, because they say that Ofcom's analysis gives you prima facie evidence of abuse of a dominant position, and that Mr Parker has considered the material from the perspective of ex post competition law assessments.

In my submission that point might have some force if Mr Parker could actually point to some material independent analysis that he has conducted that is effective to convert Ofcom's provisional ex ante assessment into a proper ex post assessment, but in my submission when the Tribunal looks at Mr Parker's reports, what you see is that the vast majority of what is contained in there either repeats or paraphrases Ofcom's own analysis, and the additional value or analysis that Mr Parker has added to the process is extremely small.

We have done an exercise of looking at Mr Parker's report to try to identify what it is that is new that is not simply repeating or paraphrasing what Ofcom said.

If we take up the core bundle behind tab 3 -- this is Mr Parker's first report -- starting at page 120 we have his analysis of market definition. This essentially follows Ofcom's analysis and largely adopts Ofcom's provisional conclusions.

In terms of identifying things that Mr Parker has added if you look at 125, page 125, you see a figure 5, which sets out "Prices and product features of BT business SFV services" as at November 2020. That has been added, because, of course, the statement was 2017.

If the Tribunal turns over to 126, you see a figure 6, "Prices and product features of BT SFV services, packages aimed at residential users", again dated

November 2020. So that's something new.

Page 129 you see the fact that Mr Parker has reached different conclusions from Ofcom about whether calls and access should be in the same market. Ofcom we saw provisionally defined them as separate markets and Mr Parker takes a different view and he says they should be in the same market, but if the Tribunal looks critically at the extent of the analysis that's actually involved in that, it is encapsulated in paragraph 126, where he says:

"This indicates that even though in theory they can be bought separately, competitive conditions are broadly similar for the two services. Consequently they should be included in the same market."

So in our submission that's extremely superficial and very limited in terms of actually adding independent value or independent analysis to what Ofcom has actually done.

On dominance, if we turn page 146, so far as we can tell the sole novelty in this entire section is figure 13 on page 158. That is an estimate of the average revenue per minute for BT and non-BT calls. Otherwise so far as we can tell this entire section repeats Ofcom's analysis and there's some limited updating and extrapolating of Ofcom's figures in figure 11 and figure 15 so that they apply for a longer period post 2017.

Coming to abuse, this section necessarily is new, because by definition Ofcom made no finding of abuse, but even then in our submission the analysis is extraordinarily limited. Ms Kreisberger has essentially summarised what it is that Mr Parker has done. He identifies a single competitive benchmark. You can see that at page 172. You were shown this section by Ms Kreisberger. He says:

"In my view based on the information available to me the most robust benchmark for

the access component of SFV services is the price that prevailed in 2009 adjusted to reflect changes over the time in the key cost input wholesale line rental."

So he identifies one competitive benchmark.

If you look at figure 16 over the page on page 174, that shows the evolution of wholesale line rental price over time, and then if you look at figure 17 on page 175, you see how he has combined that with the original starting price in 2009 to give what he describes as "the evolution of the best available competitive benchmark over time". He has essentially taken a wholesale line rental price and factored it into the original 2009 prices.

He does include some sensitivities, to be fair. If we look at page 176, those are explained. Paragraph 304:

"The sensitivities are the 2009 price unadjusted for costs ..."

So rather than adjusting it for WLR you just don't bother adjusting it at all:

"... and the price that BT agreed with Ofcom to be charged in the BT commitments."

That's the other sensitivities. Sir, if you turn over to page 178, you see the graph with the purple line that we already saw, and he has added two further lines on the graph which reflect the unadjusted costs and the BT commitments prices.

Then the actual comparison is shown on a graph, page 184. What you see here are the three lines showing the comparator and the sensitivities and then a comparison with BT's prices.

We saw also at page 181, paragraph 315, that he considers this to be in substance a cost plus approach.

In our submission what has been done is very superficial and very basic. It is an extremely limited analysis. I am going to come on to deal with our submission

that this analysis of abuse in particular is wholly inadequate, but on any view in our submission what has been done here, what is going on here is simply a recycling of Ofcom's preliminary analysis conducted under a completely different regulatory regime.

Sir, I am coming on to deal with the third of our six strike-out points. I am in your hands as to whether you would like me to deal with that now or start again tomorrow morning. I am sorry, sir. You are on mute.

MR JUSTICE WAKSMAN: Indeed I am. Well, we are making good time, so we have got a little time to spare. So I think we could stop now and then you can have a clean start at 10.30 tomorrow morning. So 10.30 then.

(4.20 pm)

(Hearing adjourned until 10.30 am on Friday, 25th June 2021)

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Key to punctuation used in transcript

--	Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking
…	Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence.
- xx xx xx -	A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption.
-	Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there?