IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1381/7/7/21

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

Friday 25th 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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Friday, 25th June 2021

(10.30 am)

Submissions by MS FORD (cont.)

MR JUSTICE WAKSMAN: Ms Ford, Ms Kreisberger, can you hear?

MS FORD: Sorry, sir, you broke up but we heard the first part.

MR JUSTICE WAKSMAN: You can hear me both of you?

MS FORD: Yes.

MR JUSTICE WAKSMAN: Let me make the formal introduction. These proceedings are being live-streamed and many are joining on Microsoft Teams.

I start, therefore, with the usual customary warning. These proceedings are in open court as much as if they were heard before the Tribunal physically here in Salisbury Square. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone to make an unauthorised recording whether audio or visual of the proceedings in breach of that provision is punishable as a contempt of court.

Ms Ford, back to you to continue your submission.

MS FORD: Thank you, sir. Before I do so there are two brief housekeeping matters. The first concerns the class definition and deceased persons and the parties have been liaising on that point overnight. The parties have agreed revised wording for the Class definition. The Tribunal should have received a revised version of the draft Collective Proceedings Order with that wording in it.

MR JUSTICE WAKSMAN: Yes. Thank you.

MS FORD: The agreed Class definition is "All persons domiciled in any part of the United Kingdom (except in the Hull area) - or their UK-domiciled personal representatives – who, during the Claim Period, bought a BT Standalone

Fixed Voice Service except for the Excluded Services (referred to below as the “Class Members”)."

The PCR has confirmed that he agrees that the estates of persons who, had they remained alive, would be within the Proposed Class, but which do not have a personal representative and do not subsequently have a personal representative before the end of the distribution stage are not within the Class.

MR JUSTICE WAKSMAN: Yes. Thank you.

MS FORD: That would mean that at some point there would need to be some methodology to reduce any aggregate damages award to reflect the reduction in the size of the Class, but that's obviously a question for another day and it goes without saying that what has been agreed is without prejudice to our primary contention that the application for a CPO should be dismissed.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So the second brief housekeeping point was that yesterday I made submissions to the Tribunal about the various policy objectives that govern Ofcom's functions under Section 4 of the Communications Act 2003, and we noticed that the version of the Communications Act which was in the bundle that I was referring to did not quite correlate to my submissions, because it wasn't the most up-to-date version. So we have arranged for the most up-to-date version of that section to be put into the Tribunal's bundles, but I just wanted to confirm that my submissions were made by reference to the version as it is in force at the moment, the version which is now in the bundles.

MR JUSTICE WAKSMAN: Thank you.

MS FORD: I am turning to the third of our six strike-out points. We say there's been

a failure to consider the wider competitive dynamics in the retail telecommunications market during the claim period. We highlight three features of the market in particular which we say demonstrate that BT's pricing was not abusive. It was a rational response to the competitive dynamics and the policy pressures in the retail telecommunications market at the relevant time.

The first dynamic is the steep decline in the volume of fixed calls as customers switched from fixed line to mobiles and that can be seen if you look at the response bundle, bundle 5, tab 3, page 10. This is Ofcom's communications market report for -- published on 19th August 2010 and figure 5.1 shows the UK Telecoms industry key statistics as at 2010. The Tribunal will see four lines down in this table there's a statistic "Fixed voice call minutes" in billions and in 2004 there were 163 billion fixed voice call minutes. Then in the row below mobile voice call minutes in billions and that's 64 billion.

MRS JUSTICE BACON: Sorry, Ms Ford. I am slightly behind you. Can you have give me again the reference within the response bundle?

MS FORD: It is tab 3, sir, and then page 10.

MR JUSTICE WAKSMAN: Yes. Thank you.

MS FORD: We have their figure 5.1, which gives us in 2004 a total of 163 billion fixed voice call minutes and 64 billion mobile voice call minutes.

If we then compare that with Ofcom's communications market report in 2018, which is in tab 10 in this bundle at page 159, the Tribunal should have there figure 4.1, UK Telecoms Market Key Statistics.

MR JUSTICE WAKSMAN: Yes.

MS FORD: There is about midway between the hole punches fixed voice call minutes in billions and in 2017 it's gone down to 54 billion. So that's

down --

MR JUSTICE WAKSMAN: Just a moment, please. Yes.

MS FORD: It has gone down from 163 billion in 2004 to 54 billion in 2017.

MR JUSTICE WAKSMAN: Yes.

MS FORD: As to the corresponding number of mobile minutes, there's a little bit of arithmetic that needs to be done. There is a figure for active mobile subscribers, which is two lines down, and you can see in 2017 there are 92 million active mobile subscribers. Then there is a figure for average monthly outbound mobile call minutes per subscription, and that's the second from the bottom and it gives 157. So we have multiplied the 92 million by their average monthly outbound mobile call minutes and what you get is 173 billion mobile call minutes. So it's gone up from the figure of 64 billion in 2004 to the 173 billion in 2017.

MR JUSTICE WAKSMAN: Sorry. Just a minute. Where is the 173? That's multiplying.

MS FORD: It is multiplying 92 billion active mobile subscribers.

MR JUSTICE WAKSMAN: By the monthly outbound call minutes times 157.

MS FORD: Yes. Times 157. You get 173 billion.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Obviously a reduction in the volume of fixed calls means a reduction in the revenues that telecommunications providers can recover from those services, and telecommunications providers have common costs across access and calls. If the volume of calls goes down, then you need to recover your common costs in some other way, and Ofcom recognised in its 2017 statement that at least some of the increase in line rental prices might be what it described as a rebalancing to reflect the reduction in call volumes.

Now you can see that from bundle 2, tab 4 -- this is Ofcom's 2017 statement -- at page 277. If the Tribunal looks at paragraph 3.45, you see the second sentence:

"Fixed call volumes have decreased by 55% between Q3 2010 and Q4 2016 and therefore it is possible some of the increase in line rental prices and revenue could be attributed to a rebalancing between line rental and calls."

MR JUSTICE WAKSMAN: Just a moment. Yes.

MS FORD: So that is the first dynamic that we say is not reflected in Mr Parker's analysis at all.

Secondly, during the claim period there were incentives to sell bundles and those incentives came from both the demand side preferences of customers and from supply side efficiencies on the part of telecommunications providers. I am going to address the demand side first and then the supply side.

Customers were showing strong preferences to purchase bundles and you can see that, first of all, going back to the response bundle, bundle 5, tab 6. This is Ofcom's publication pricing trends for communication services in the UK dated 15th March 2017. If you look at page 145, you see figure 1.19.

MR JUSTICE WAKSMAN: Just a moment, please.

MS FORD: Sorry, sir. Yes. Thank you. The Tribunal should have there a figure which says “Proportion of users, by type of bundled services: 2006 to 2016”. What it shows is that in 2009, 39% of customers purchased some sort of bundle. You can see down the side different types of bundles. 39% purchased some sort of bundle. By 2016 that figure has gone up to 75%. It would seem as showing customers showing strong preference to purchasing bundles during this period. At the same time the number of customers who were purchasing Standalone Fixed Voice Services is declining. You can see

that from the claim form bundle, tab 5, page 315. The Tribunal should have there figure 1.4, number of voice only lines in the UK by thousands of lines. That graph shows that the number of voice only lines in the UK declines.

MR JUSTICE WAKSMAN: Yes.

MS FORD: From 3.5 million in 2013 to around 2 million I think in 2017.

MR JUSTICE WAKSMAN: Yes.

MS FORD: If you look over the page at 1.6, you see a similar graph dealing with a number of split purchaser lines in the UK. That declines from 2.5 million in 2013 to 1.5 million in 2017.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So on the demand side, if you are looking at what's going on with consumers at this time, consumers are switching from Standalone Voice Services to bundled services.

MR JUSTICE WAKSMAN: Yes.

MS FORD: If we then look at what's going on in the supply side at the time, BT is competing with large providers such as Sky and TalkTalk and those parties purchase wholesale access from BT's network usually by means of local loop unbundling and then they use that wholesale access to sell fixed voice and broadband service. These parties have a fixed cost of wholesale access that they need to recover and so it makes sense for them to try and sell bundles of fixed voice and broadband, because that means they can recover their fixed costs across a wider range of services.

So it makes economic sense for these parties that BT is competing with to try and sell bundles and the same applies to Virgin Media, because it has to recover the cost of its own network. So it is economically rational for these parties to price their bundles in such a way as to try and encourage and incentivise

consumers to buy bundles. The way they do that is that they set the Standalone Fixed Voice price with a relatively significant mark-up above costs and then the price of a bundle, including broadband, incremental bundle price, is only a small step more above the cost of Standalone Fixed Voice Services, and what that does is that it makes bundles more attractive compared to standalone services and so incentivises consumers to take up bundles.

MR JUSTICE WAKSMAN: Just one moment, please.

Ms Ford, you mentioned the rationality of this pricing behaviour. To what extent do you think the fact that the behaviour is rational means it is not abusive?

MS FORD: We are talking first of all about the behaviour of BT's competitors. BT is competing with these people and therefore it competes on the same playing field.

MR RIDYARD: Yes.

MS FORD: So the competitors are obviously not on any view dominant and BT is pricing in the same way as its competitors. We will go on to see it is one of the criticisms that we advance of the abuse analysis that there are competitor prices available to be analysed and BT's prices are entirely consistent with those of its non-dominant competitors and yet the case is being made that those prices are somehow abusive.

MR RIDYARD: That's the point you are making about rationality. I understand.

MR JUSTICE WAKSMAN: Sorry, Ms Ford. Just to continue that question, are you saying that is, in fact, what the competitors were actually doing, that that is why they set the fixed line prices high relatively speaking, so as to incentivise customers to go to the bundles? Are you saying that's what they did?

MS FORD: Well, sir, I can show you their prices and we can see the relationship between the broadband price and the standalone fixed voice price. I am

obviously not in a position to make submissions or give evidence about what their internal thinking was, but my submission is that it is economically rational for them to act in this way for the reasons that we have said, and that is a dynamic in this market that Mr Parker has simply not taken into account, because he simply looks at standalone fixed voice. He does not look at all at what's going on with bundles. That's a fundamental omission.

MR JUSTICE WAKSMAN: When it comes to BT's position, which you are in a position to give evidence about, should you wish, are you saying this was, in fact, BT's motivation, or again is it no more than saying that would be a rational explanation?

MS FORD: I am saying that BT is competing with these parties and that's BT's motivation for pricing.

MR JUSTICE WAKSMAN: Sorry. BT's motivation for pricing is to set the price high in order to incentivise customers to go to bundles?

MS FORD: Yes, we have the evidence of Mr Bunt that BT's policy is consistent with digital inclusion, which is my third submission under this. So I can take you, sir, to Mr Bunt's evidence about BT policy.

MR JUSTICE WAKSMAN: I will look at that a bit later on. I have read it. Can you just give me the paragraph reference in Mr Bunt's witness statement where he says that is BT's actual policy?

MS FORD: Yes, sir. It is core bundle tab 6 and we rely on paragraphs 33 to 38.

MR JUSTICE WAKSMAN: Thank you very much. Yes. Sorry to have interrupted you.

MS FORD: That's quite all right. So we are making the point that BT is competing with these parties whose pricing is economically rational for the reasons that we have set out, and I can show the Tribunal, as I said, the pricing that is in

the market at the time. It is at the claim form bundle, tab 5, at page 335.

What the Tribunal should have there at table 1.29, “Line rental and promotional and standard dual play prices”. Along the left-hand side of the table are the various competitors in the market. The first column is the monthly line rental price and the second column is the cheapest promotional dual play price. So comparing these two columns shows you the relationship between the line rental only price and the nearest bundle.

What you see is that Sky's cheapest promotional dual play price is only around £1 more expensive than their monthly line rental price. So you can either buy a telephone line or for £1 more you can get a telephone line and broadband.

MR JUSTICE WAKSMAN: Right.

MS FORD: With TalkTalk similarly there is a £1 difference between them. Phone Co-Op there is a £5 difference between them. The Post Office is £5 and the BT difference between them is £6. The submission I make is that the market dynamic, as you can see from these figures, is to price broadband incrementally close to Standalone Fixed Voice prices.

MR JUSTICE WAKSMAN: All you can say really is these are their prices. I mean, you are inferring this rationality from those prices. You are effectively saying because the prices are so close, at least one, if not the only rational economic explanation for that is to disincentivise customers from fixed band and bring them to bundles. You may be right at some point, but all I am saying is that's all you are doing here.

MS FORD: You are absolutely right. The reason we are doing it is because this is a dynamic which ought to be taken into account and has not been.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Now we heard much from Ms Kreisberger yesterday about BT's

profitability and that was looking solely at standalone fixed voice, but if you look at BT's profitability across voice and broadband, it is actually within normal parameters. I get that from bundle 6A, which is the reply bundle, tab 9, pages 496 to 497.

MR JUSTICE WAKSMAN: Just one moment, please.

MS FORD: Certainly.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Sir, what the Tribunal should have there is a heading on page 496 "BT's profitability EBIT margins with various adjustments to line rental". I should say that this has confidential figures in it, which I am not going to read out, but if you look at paragraph A.5.86, you can see the exercise Ofcom is doing is to estimate how BT's profitability from Standalone Fixed Voice Services would be affected by making certain changes to line rental prices.

If you look at the table at figure A.5.14, you see that the first column contains various possible adjustments. So you have BT's current price and then you add £5 or you add £7 or you add £8 or £10. The next column then shows BT's profitability figures in those circumstances and in the far column you have comments from Ofcom, and the first one observing this is BT's current price. The second one says "Lower estimate consistent with promoting competition." The third one "Upper estimate consistent with promoting competition". The fourth one you see the observation "Similar to BT's estimated EBIT margin for fixed voice and fixed broadband combined."

Beyond the point at which Ofcom has said this is consistent with promoting competition, you see BT's profit margins for fixed voice and fixed broadband combined. So we can see from that it is profit margins. If you look across broadband and Standalone Fixed Voice Services, they are within normal

parameters. Again we say this examination of what's going on, the competitive dynamic with bundles is something that Mr Parker has completely failed to take into account, because he just looks at Standalone Fixed Voice on its own.

MR JUSTICE WAKSMAN: Just a moment. Just on this table, I am a little unclear what is happening here. Are these different scenarios on the left-hand side of the A.5.14. Are they looking at different scenarios about how the profitability would be affected by different line rental prices?

MS FORD: Yes, they are, yes.

MR RIDYARD: That's holding other things constant. That's assuming there would be no rebalancing or changing of prices of other products within the bundle?

MS FORD: Yes, their explanation of what they are doing is in A.5.86 a range of adjustments that could be made to BT's line rental that would result in similar EBIT margins for those we have discussed above.

MR RIDYARD: Right. Just a moment. If there are two elements to their pricing, the line rental and the other charges, this is reducing the line rental, holding other things constant?

MS FORD: That's my understanding. The reason I rely on it is simply for the observation in the fourth line that the percentage figure there, which I am not obviously reading out, is said to be similar to BT's estimated EBIT margin for fixed voice and fixed broadband combined.

MR JUSTICE WAKSMAN: Just a moment. That's if you make the adjustment.

MS FORD: Yes, sir, it is. The point I am making is that if you make the adjustment to the --

MR JUSTICE WAKSMAN: The line rental.

MS FORD: The line rental price, you get a similar profitability to the profitability for

fixed voice and fixed broadband combined. That profitability is without the adjustment. You are not making the adjustment to both. You are comparing.

MR JUSTICE WAKSMAN: But how does that help you?

MS FORD: I am simply referring to it because you can see from this that Ofcom thought BT's estimated EBIT margin across both fixed voice and broadband was within normal parameters, was acceptable. Indeed, if anything, you can see because it comes in at the higher end of the adjustment, I am making the submission that if you take a wider view and you don't just look at standalone fixed voice products, you look at profitability across both fixed voice and bundles, Ofcom was clearly satisfied that BT's level of profitability, when you take that view, was within normal parameters, was acceptable.

MR JUSTICE WAKSMAN: You mean the profitability in relation to fixed voice and fixed broadband combined?

MS FORD: Yes.

MR JUSTICE WAKSMAN: The concern in this case is the prices to those individuals who just take the voice services.

MS FORD: Yes.

MR RIDYARD: So if that price is too high, then I am not sure how the fact that if you average that out against some other services that BT sells that that helps your case, unless you are making a point about the need for the common costs to be reallocated. I think in what you took us to earlier Ofcom said that the common cost issue might to some extent be a factor, but it is enough to explain the differences in the margins across the two products.

MS FORD: Sir, I am making a point that in order to do a proper assessment of the circumstances you should not focus solely on standalone voice products. You should be taking into account the competitive dynamic in bundles. In support

of that submission I draw attention to the fact that Ofcom considered that profitability, looking at that wider picture, was not problematic. That is the submission that I am making.

My relying concern is that the analysis that's being advanced to support these claims does not in any way take any of this into account and so we say the analysis was insufficient.

MR RIDYARD: Right. If I was a bundle customer, and I can see there is no point in me complaining about the fixed line rental charge, because what BT is taking from me there, it is giving back to me on the deal I am getting on the bundle. So it would be silly to look individually at the elements, because what I should consider is the picture in the round, because I am buying the two services, but if I am a customer who just buys the fixed line rental, what comfort do I get from the fact that other people are getting a good deal on their broadband if I am not getting a good deal on my voice only, and that is the only service that I am buying? I mean, isn't that the essence of the concern that is before us in this case?

MS FORD: Sir, that is the essence of the concern, but your question contained an assumption, and the assumption is that you are not getting a good deal on your Standalone Fixed Voice product and that's what the methodology must investigate. That's why -- and we are going to come on to look at the case law on how you define an abuse -- that's why you have to look at not only at the relative relationship between the prices that are being charged and, for example, a cost plus measure, but you have to inquire as to the wider possible justifications for that pricing relationship.

Here in my submission you see that there is a dynamic in the wider market whereby BT's competitors were all pricing their Standalone Fixed Voice Services

relatively high and their bundle prices at a relatively low increment above that. Those are the people BT is having to compete with. That is the sort of factor you would expect to be taken into account in an assessment of abuse to say "Well, even though this price is relatively high, I can see there is a potential explanation for it. There is a potential justification". That exercise, in my submission, has not been done in this case.

MR DORAN: Ms Ford, just for my benefit here, what you are pointing to is that this is one of the comparators, that we should take into account, is it?

MS FORD: We certainly say that the competitors' prices are comparators that should be taken into account, yes, and I will come to that in the context --

MR DORAN: That is not your point here, though, of course.

MS FORD: It is a slightly different point. My point here is the inadequacy of the analysis if it simply focuses on a very narrow perspective of Standalone Fixed Voice and fails to take into account and factor in the potential dynamics in the wider bundles market and the way in which the competitors did compete.

MR JUSTICE WAKSMAN: Could you just help us before moving on? You said that Ofcom had considered this type of profitability analysis not to be problematic. Can you either now or later on just give us the references to where we will find that in the review?

MS FORD: Sir, I can answer that now, because it is an inference from the nature of the exercise that's going on here rather than a separate statement.

MR JUSTICE WAKSMAN: I think it would help us, please, if you are going to say that Ofcom did not regard it as problematic, I assumed that was because of something that Ofcom expressly say. It does not help us much to say it is an inference.

MS FORD: Perhaps I can explain how we get it.

MR JUSTICE WAKSMAN: Yes.

MS FORD: In this table Ofcom is commenting on the consequences of various adjustments.

MR JUSTICE WAKSMAN: Yes.

MS FORD: It says an adjustment of £5 according to Ofcom is the lower estimate consistent with promoting competition.

MR JUSTICE WAKSMAN: Yes.

MS FORD: It is saying that's at the lower end.

MR JUSTICE WAKSMAN: That's the least you would have to take off, in other words.

MS FORD: On Ofcom's case.

MR JUSTICE WAKSMAN: On Ofcom's case.

MS FORD: For the purposes of competition and I do obviously remind the Tribunal of the submissions I made yesterday about the differences in the policy between this sort of intervention and concluding that there is an abuse, but what we see is that Ofcom is looking at increasing potential adjustments and commenting on what their effect is.

A £5 adjustment is what Ofcom says is the lower estimate consistent with promoting competition. You then increase the adjustment to £7 and that is the upper estimate consistent with promoting competition. So you have on Ofcom's case then got a price which is consistent with promoting competition and the upper price, the most that Ofcom is saying you might need. You then increase your adjustment even more to £8 and that is then said to be similar to BT's profitability across Standalone Fixed Voice and broadband.

So because we have got increasing adjustments and increasing effects on promoting competition, you can infer that that profitability margin is even better than the

position which Ofcom says is the upper estimate consistent with promoting competition.

MR JUSTICE WAKSMAN: All right. Thank you.

MS FORD: Sir, the third dynamic that we say was in the market at the time is the fact that there were policy pressures from the government which had published a digital inclusion strategy, and this is where I refer to Mr Bunt's evidence in the core bundle, tab 6, and his evidence is that BT had a general strategy to try and get customers online, and that was linked to and consistent with the government's digital inclusion strategy. That's paragraphs 33 to 38. This goes to the Tribunal's question that you raised about (inaudible) which is BT's strategy. He says:

"I agree with what is said in paragraph 66 to 68 of the Response about the competitive factors that encouraged providers to incentivise the take up of bundles including broadband.

"In my role within Voice Pricing, one of the key drivers to BT's pricing strategy was to move customers away from voice only service to broadband and bundles... the overall strategy has been to get customers online using BT's broadband packages, which we achieved in a number of ways…"

He goes through them. He then says in 34:

"I would add to the above that BT's general strategy to “get customers online” was also linked to and consistent with the UK’s digital inclusion strategy, which was introduced around April 2014."

He says:

"During the period when I was involved in pricing strategy I would regularly attend meetings discussing BT's efforts to improve digital inclusion within all sectors of society."

Can I just ask the Tribunal to read the rest of his evidence on this point up to 38?

MR RIDYARD: Sorry. Can you give me the reference again because I have lost track slightly there?

MS FORD: Sorry. It is tab 6 of the core bundle, page 354, and the heading is "BT's use of pricing and marketing strategy aligned with the government's digital inclusion strategy".

MR RIDYARD: Thank you.

MR JUSTICE WAKSMAN: These are the same paragraphs you referred me to when I was asking the question about a rather differently formulated policy, which was a policy of having high prices on fixed line services in order to disincentivise people from using them and push them towards the bundle.

MS FORD: Sir, yes.

MR JUSTICE WAKSMAN: There is nothing in those paragraphs about that.

MS FORD: The first line of paragraph 33:

"I agree with what is said in paragraph 66 to 68 of the Response about the competitive factors that encouraged providers to incentivise the take-up of bundles including broadband."

If we look at what he is expressing agreement with in response, 66 to 68.

MR JUSTICE WAKSMAN: This is in the response bundle.

MS FORD: It is, sir. The first tab of the response bundle.

MR JUSTICE WAKSMAN: The first tab to the response bundle. Wait a minute. That's response annexes. Let me just get the ... I have the response annexes bundle, or is it in the CF bundle? It is probably in the CF, isn't it, the response.

MS FORD: It is in the core bundle. I am actually referring to one that is in the response bundle. It is in the core bundle, tab 5.

MR JUSTICE WAKSMAN: Thank you. Yes.

MS FORD: Starting at paragraph 66, page 309. So the Tribunal will see there the heading "Revolving competitive landscape across voice and broadband".

If the Tribunal quickly reads paragraphs 66 to 68, which are the paragraphs that Mr Bunt is agreeing with, you will see those are essentially the written version of the submissions I have just made, that BT is competing with a wide range of other telecommunications providers.

MR JUSTICE WAKSMAN: I follow that. I don't want to prolong it, because certainly at least I have interrupted you enough, but all I wanted to make the point is 68 is saying what was economically rational for the other providers. What I was asking you about was whether it was actually BT's own policy to keep the prices high on fixed voice in order to push them towards the bundle. That is all I am asking. I can see their general policy about generally encouraging people to use broadband. I follow all of that. It can be done simply by making the bundles cheap. That's why I was trying to get at. I don't want to delay you any longer. I have the point. You say your relevant evidence on this is affirmation of 66 to 68 of the response by Mr Bunt and then 33 to 38 of his witness statement. Thank you very much.

MS FORD: I am moving on to the fourth point we make in support of our strike-out, which is the submission that Mr Parker's assessment of abuse was wholly inadequate. I am going to deal first with the applicable principles. We draw out three principles from the case law and I am going to say what they are first and then show you where we find them in the cases.

The first is that the classic United Brands case for excessive pricing has two distinct and independent limbs. You have to look at whether the price is excessive and then you look at whether it is unfair whether in itself or compared to

competing products.

Secondly, we say that the test includes not only looking at costs, but looking at demand side value ascribed by the purchasers of a product.

Thirdly, we say that although direct comparison with competing products might not always be possible, where a comparison can be drawn between a dominant undertaking's prices and those of its competitors, it is appropriate to do so. My headline submission will be that Mr Parker has done none of these things and for that reason his analysis is deficient.

The Tribunal has been shown the wording of the key test in United Brands already. The paragraph that we rely on is paragraph 252 and we say that on that wording it is clear that it sets out two distinct and independent limbs, whether the difference between the cost actually incurred and the price actually charged is excessive, and if the answer to that question is in the affirmative, to consider whether a price has been imposed which is either unfair in itself or when compared to competing products.

Now Ms Kreisberger took you to the opinion of Advocate General Wahl in the Latvian copyright case which is in the authorities bundle 1, tab 13, and she took you to a particular paragraph, paragraph 19 on page 346, and she did that for the purpose of setting out the different comparators that you might look at to decide whether or not a price is excessive. She did not then go on to show you paragraphs 20 to 23 in this opinion, which in my submission really spell out the nature of the two-step test that is envisaged in United Brands.

If the Tribunal looks at 20, having set out all the possible comparators you might look at in 19, the Advocate General says:

"Once it has been ascertained by virtue of one or more of those methods that a significant difference exists between the price actually charged by the

dominant undertaking and the benchmark price, one must determine the extent to which that actual price is unfair either in itself or when compared to competing products."

So that is essentially a reference to the wording of United Brands. You then see:

"That second step in the analysis is to investigate whether the difference in price is merely the result of an abuse of use of market power by the dominant undertaking or the consequence of other legitimate reasons. Only if no valid justification exists for the difference between the benchmark price and the actual price imposed by the dominant undertaking on its customers may a price be considered unfair within the meaning of point A of the second paragraph of Article 102. The court has applied that two-step test in order to determine when a price is excessive and thus unfair for the purposes of Article 102."

It goes on to refer to Collecting Societies. Ms Kreisberger made the submission that a price which is excessive will also be unfair. That in my submission is wrong as a matter of law. It essentially collapses the independent second limb of the United Brands test back into the first limb, and it means that there will be no realistic difference between them. They have no independent value. In my submission that is clearly not the intention of the Court of Justice.

MR JUSTICE WAKSMAN: Can I just ask you about that? I follow entirely what you say and what he says at that point, but why does he go on and say in 23:

"The court has applied that two step test in order to determine when a price is excessive and thus unfair"?

MS FORD: I am just reading the context.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So he is referring to the Collecting Societies case and there you have

the prima facie excessive inquiry is because the dominant undertaking is imposing scales of fees for its services which are appreciably higher than those charged in other member states. So you have got your excessive limb, and then the court says:

"That difference must be regarded as indicative of an abuse of a dominant position. In such a case it is for the undertaking in question to justify the difference by reference to objective dissimilarities between the situation in the member state concerned and the situation prevailing in all other member states."

On any view there is then a further inquiry. Yes, we see there is what might be considered an excessive price by reference to the benchmark comparison. Is there a justification for that? Is there an explanation?

MR JUSTICE WAKSMAN: Yes. To be fair, maybe something is lost in translation. I mean he does say in paragraph 18:

"There are different methods of determining whether the price is excessive."

You say that's the first stage.

MS FORD: I do. I think you can get that from paragraph 20. Once it has been explained, he says then you have to go on to say whether it is unfair.

MR JUSTICE WAKSMAN: Yes. Thank you.

MS FORD: In my submission there is a two stage test and it would be wrong as a matter of law to collapse that two stage inquiry into one single test.

I am moving on to Scandlines, which is a Commission decision and it is in the supplemental bundle, tab 9. This is a Commission decision which rejected a complaint and the complaint had been that a port operator had been charging excessive and discriminatory port fees. If the Tribunal turns to page 123, you will see there a heading "Unfair/excessive pricing", just above paragraph 98. You see that it's referring to Article 82 of the Treaty and the

United Brands test. If the Tribunal turns over to page 124, you can see the Commission saying at 102:

"It is important to note that the decisive test in United Brands focuses on the price charged and its relation to the economic value of the product. While a comparison of prices and costs, which reveals a profit margin of a particular company may serve as a first step in the analysis (if at all possible to calculate) this in itself cannot be conclusive as regards the existence of an abuse under Article 82."

The Commission then goes on to apply that, starting at page 150, paragraphs 226 and 227. You can see that it's commenting on the cost plus approach that has been suggested and it says it:

"only takes into account the conditions of supply of the product or service. The determination of the economic value of the product or service should also take account of other non-cost related factors especially as regards the demand side aspect of the product or service concerned. The demand side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. The specific feature does not necessarily imply higher production costs for the provider. However, it is valuable for the customer and also for the provider and thereby increases the economic value of the product or service."

You can see there at paragraphs 232 and 233 under the heading "Conclusion" you have the Commission saying:

"In the present case the economic value of the product or service cannot simply be determined by adding to the approximate costs incurred in the provision of this product or service as assessed by the Commission, a profit margin which would be a pre-determined percentage of the production costs. The

economic value must be determined with regards to the particular circumstances of the case and take into account also non-cost related factors such as the demand for the product or service. As a consequence finding a positive difference between the price and the approximate production costs exceeding what Scandlines claims as being a reasonable margin, would not necessarily lead to the conclusion that the price is unfair, provided that this price has a reasonable relation to the economic value of the product or service supplied."

So the Commission is there rejecting this complaint, because it is saying just doing a cost plus analysis is not enough. That is then endorsed and applied by the Court of Appeal in the Attheraces case. That's in tab 13 of this bundle.

This is a case in which the trial judge had found that the defendants, the British Horse Racing Board, had engaged in excessive pricing of its pre-race data and there was then an appeal of that finding to the Court of Appeal.

If we start at page 417, you can see there a heading "Conclusions on excessive pricing". The Court of Appeal are saying:

"Although the judge reached the right conclusion on important issues raised by the claim for abuse of a dominant position, he erred in holding that the charges proposed by BHB were excessive and unfair."

In 204 he says:

"The judge correctly stated the law as laid down in United Brands that a fair price is one which reflects the economic value of the product supplied. A price which significantly exceeds that will be prima facie excessive and unfair. But the formulation begs a fundamental question what constitutes economic value?"

They raise a difficulty in assessing economic value in 205 and 206, because they say:

"On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what Article 82 and Section 18 envisage, because the premise is that the seller has a dominant position, enabling it to distort the market in which it operates. On the other hand it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position."

So this is the willingness to pay argument that Ms Kreisberger relies on. I am going to come back to make submission as to why we are not falling into a willingness to pay trap, but this is the difficulty that arises.

In terms of the Court of Appeal's approach, if you turn over to paragraph 213 on page 419, the Court of Appeal quotes the Scandlines decision we just looked at and says:

"As already noted the Commission's decision in Scandlines supports the view that the exercise under Article 82 while it starts from a comparison of the cost of production with the price charged was not determined by the comparison. This in itself is sufficient to exclude a cost plus test as definitive of abuse. Mr Roth accepts that there is no single methodology or litmus test of abuse: the Court has a choice of methods, but not an unlimited one. His contention is that the judge has gone outside the admissible limits of method in coming to his conclusion. Mr Hollander, also contending that the choice of methodology is for the Court, defends both the choice made by the judge and the way he has implemented it."

We can see how the Court of Appeal resolves the appeal at paragraph 218. They say:

"We conclude that holding that, in holding the economic value of the pre-race data was the cost of compilation plus a reasonable return, the judge took too

narrow a view of economic value in Article 82. In particular, he was wrong to reject the British Horse Racing Board's contention on the relevance of the value of the pre-race data to ATR", that's the entity trying to get access to it, "in determining the economic value of the pre-race data and whether the charges specified by BHB were excessive and unfair."

So the trial judge was wrong just to look at a cost plus measure. He should have looked at the demand value of the product to the entity trying to get access to it.

If we then look at Flynn Pharma, which is the Court of Appeal case that Ms Kreisberger took you to yesterday, which is in the second authorities bundle at tab 28.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Can I ask the Tribunal, first of all, just to run its eye over the headnote, because it gives quite a potted idea of what was in dispute between the parties.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So, as will have come through from that, there was no dispute by either party to this appeal that there is a two-limb test for excessive pricing and that that entails the conducting of a different analysis at each stage. The debate was whether or not the authority had done enough to satisfy the unfairness limb of the test.

If we turn to paragraph 62 on page 1268, this is the Court of Appeal commenting on the paragraph of United Brands that contained the (inaudible) test. It says:

"The court moves to consider how in evidential and methodological terms such an abuse can be determined objectively. It gives an example of one way (but only one way) to determine whether a price was unfair, namely the cost plus

method. The first stage or limb entailed comparing the price charged with the cost of production, to see whether it is excessive, and the second stage or limb involves determining whether, if it is excessive, it is also unfair to itself or by reference to competing products. It is these two alternative tests of unfairness which are at the heart of this first ground of appeal."

So this is what was in dispute essentially between the parties. Ms Kreisberger showed you paragraph 97, which is where the court very helpfully summarises what it gets from the case law. We place particular emphasis on two of the Roman numerals in this summary. The first one is Roman numeral (v) which concerns the two limb test. It says:

"If a cost plus test is applied the competition authority may compare the cost of production with the selling price in order to disclose the profit margin. Then the authority should determine whether the margin is excessive. This can be done by comparing the price charged against a benchmark higher than cost such as the reasonable rate of return on sales or some other appropriate benchmark such as return on capital employed. When that is performed, and if the price exceeds the selected benchmark, the authority should then compare the price charged against any other factor which might otherwise serve to justify the price charged as fair and not abusive."

There is clearly independent content to that exercise. You have to look at other factors in order to determine whether just because something is excessive, whether it is unfair or not. It's a separate and distinct test. In our submission it does not contemplate the possibility that you point to your cost plus exercise and say that satisfies the unfairness limb as well.

MS KREISBERGER: Sorry, I hesitate to interrupt, but could I just ask that the Tribunal reads to the end of the paragraph, including (vii) just to have the

complete picture.

MS FORD: As it happens, that was the second little Roman numeral I was going to take you to. So I'm happy for you to read it.

MS KREISBERGER: We are in violent agreement.

MR JUSTICE WAKSMAN: Good.

MS FORD: I am happy for the Tribunal to read it before I make submissions.

MR JUSTICE WAKSMAN: Yes, of course.

MS FORD: What it says, in my submission, is that if an undertaking relies in its defence upon other methods or types of evidence to that relied on by the Competition Authority, or you can interpose the claimant, then there is an obligation to evaluate it, and Ms Kreisberger made a submission yesterday that it was wrong in law to say that the claimant had to look at particular comparables. In my submission this is the authority for that proposition. If the defendant raises other comparables and says "Look, you have come up with what you say is a prima facie case of unfairness but you need to look at this too," then you have to go away and do it.

MR JUSTICE WAKSMAN: Yes.

MS FORD: There is then some observations on the concept of economic value which are also useful. If we look at 154 to 155 in this judgment, you can see he says:

"The concept of economic value is not defined."

What he is doing in this paragraph is referring to the problem we saw mentioned for the first time in Attheraces, that economic value can't just mean willingness to pay. He says it is the same point made in Attheraces and it is the issue that was first identified in US Antitrust and is described as 'the cellophane fallacy'.

"The simple fact that a customer or 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 prepared to pay for the good or service in an effectively competitive market, hence the relationship between the two descriptions of abuse in paragraphs 249 and 250 and the fact that the economic value description is said to be an example of the broader description of an abuse."

He then comments on economic value again at 170 to 171, and he says that there were certain things that were in the Tribunal's judgment that gives him cause for concern. This was clearly a legal test. He says:

"The categorisation of this as a legal concept seemingly led the Tribunal to treat economic value as a discrete component of the test in law to be applied. It is “legal” in the strictly limited sense that it has been ascribed a meaning in the court judgment but, at base, it is an economic concept which describes what it is that users and customers value and will reasonably pay for and it arose in the United Brands judgment as an economic description of the abuse of unfair pricing."

Secondly, he says:

"The Tribunal did not agree with the submissions of all the parties that economic value was simply a matter to be taken into account as part of the other components of the test."

He says he agrees with the parties on this:

"It is evident from the judgment in United Brands that the reference to economic value is a part of the overall description of the abuse. This is not the test. The test should, therefore, when properly applied, be capable of evaluating economic value."

So what he is saying is it is not an independent limb of the test, but you do have to

apply a test which is capable of evaluating this evidence. He goes on in 172, which you were taken to at some length by Ms Kreisberger to essentially say that it doesn't matter where in the test you take it into account. It doesn't matter which limb you do it in, but you do have to look at and evaluate economic value somewhere. It has to be factored in somewhere. If the Tribunal looks at H, you see him saying:

"In short, economic value needs to be factored in and fairly evaluated, somewhere" and it doesn't matter where you do it.

Sir, I have two brief authorities to refer to on the use of competitors' prices as comparators. The first is Napp, which is in the authorities bundle 8A, tab 15. If the Tribunal starts at page 540, you can see that this is the Tribunal considering a finding by the Director General of Fair Trading of excessive pricing and it cites what the Director says -- paragraph 390 cites what the Director says as a matter of principle is an excessive price under the chapter 2 prohibition. They say in 391:

"While there may well be other ways of approaching the issue of unfair prices… the Director's starting point seems to us to be soundly based in the circumstances of the present case. Measuring whether a price is above the level that would exist in a competitive market is rarely an easy task. The fact that the exercise may be difficult is not, however, a reason for not attempting it. In the present case the methods" plural "used by the Director are various comparisons of (i) Napp's prices with Napp's costs; (ii) Napp's prices with the cost of its next most profitable competitor;(iii) Napp's prices with those of its competitors; and (iv) Napp's prices with prices charged by Napp from other markets."

They say:

"Those methods seem to us to be among the approaches that may be reasonably be

used to establish excessive prices, although there are, no doubt, other methods."

So you have there the Director using a variety of methods, including comparison with competitors' prices and the Tribunal says at 397:

"In our view those comparisons, taken together, amply support the Director's conclusions that Napp's prices in the community segment were, during the period of the infringement, well above what would have been expected in competitive conditions."

You can also see in the supplemental authorities bundle, tab 8, the Deutsche Post case. This is a permission decision. If you look at page 94, paragraph 159, you see the Commission saying there:

"In a market which is open to competition the normal test to be applied would be to compare the price of the dominant operator with the prices charged by competitors."

So where you have this information about what are competitors' prices, the Commission is saying the normal test to be applied would be to do a comparison between the prices of the dominant undertaking and the prices of the competitors.

MR JUSTICE WAKSMAN: Just forgive me one moment. I am just catching up. Did you say this was in the supplemental?

MS FORD: Supplemental authorities bundle 8C, at tab 8.

MR JUSTICE WAKSMAN: Just a moment. I am in the wrong one. Just a second. Yes. Thank you.

MS FORD: I am looking at page 94.

MR JUSTICE WAKSMAN: Yes. 159.

MS FORD: 159. This is saying if you have a market which is open to competition,

then the normal approach is to compare the dominant entity's prices with those of its competitors.

MS KREISBERGER: It is worth reading to the end of that passage as well.

MR JUSTICE WAKSMAN: Yes. We will do that. Didn't you refer to this yesterday, Ms Kreisberger? I thought you referred to Deutsche Post in your submissions yesterday.

MS KREISBERGER: I don't think I took you to the case.

MR JUSTICE WAKSMAN: That's right. I think you gave us a reference.

MS KREISBERGER: Simply as an illustration of the case. I can't undertake limb 1, for instance -- sorry -- limb 2.

MR JUSTICE WAKSMAN: We have read that paragraph, Ms Ford.

MS FORD: I am grateful. I rely on that for the proposition that where the market is open to competition the normal test will be to look at the prices charged by competitors.

I am turning now to make my submissions as to the way in which we say Mr Parker's analysis was deficient. I notice the time, sir.

MR JUSTICE WAKSMAN: Yes. I was about to say I think that's probably a convenient moment for us to have the transcribers' break. So we will come back just before 11.55. Thank you.

(Short break)

MR JUSTICE WAKSMAN: Yes, Ms Ford.

MS FORD: We are turning to the ways in which we say Mr Parker's analysis is deficient. First, Mr Parker has in his own words engaged in a cost plus analysis. We saw yesterday what he did was he adjusted the 2009 prices to reflect the cost of the primary input wholesale line rental. It's clear from the authorities I have just shown the Tribunal that if you adopt a cost plus

analysis, you have to then look at the second limb, which is unfairness, and you have to explain why the price you have identified is unfair in itself or compared with other comparators. We say that Mr Parker simply has not done that exercise.

Now Ms Kreisberger sought to persuade the Tribunal yesterday that Mr Parker's cost plus exercise ticks both boxes in the sense that she submitted that it was sufficient to demonstrate both that the price was excessive and that it was unfair.

Now I made the submission yesterday that Mr Parker's adjustment of 2009 prices was in itself a very basic approach even for the purposes of seeking to establish whether the prices are excessive. So even for the first step of the analysis, but now we are told that this very basic exercise is also intended to satisfy the limb 2 test as well.

As we have seen from the authorities, the purpose of the limb 2 test is to ask whether prices that have been determined to be prima facie excessive can be justified by any other factors, and Mr Parker has not looked at any other factors. He simply relies on the same exercise for both. This ties in, in my submission, to the exchanges I was having with the Tribunal about the relevance of market dynamics in this context. I am not asking the Tribunal -- obviously at this stage the Tribunal cannot determine whether there's any alternative justification for these prices, but I don't have to ask the Tribunal to determine that, because what I am pointing to is a failure on Mr Parker's part to look at these market dynamics that are evident on the face of what Ofcom has done. It simply has not been done.

MR RIDYARD: Can I just ask here, as I understand Mr Parker has looked at the competitor prices and he has reached a view, which you probably will not

agree with, that because they are sheltering under the umbrella provided by BT, they are sort of tainted comparisons. He has also talked a bit about rebalancing and such like. In that sense I think Mr Parker would argue that he has considered your points but reached a different conclusion from you. I mean, is it fair to say that he has not done his work or he has just done his work and come up with an answer that you don't like?

MS FORD: Well, in my submission what he has done is he has given a load of reasons why he has not incorporated these elements in his analysis. I am going to come on to address Mr Parker's comment about "under a pricing umbrella". The positive test that he relies on to say there is a prima facie case here that should go to trial, is essentially the 2009 prices adjusted for WLR. That's the extent on the case for abuse that's being relied on to say that many proposed claims of economic value should go on in collective proceedings. In my submission it is extraordinary that that one piece of analysis is said to be enough for these purposes.

MR RIDYARD: Okay.

MS FORD: It is particularly extraordinary in our submission in circumstances where we drew attention to the fact that first of all the appellate courts in Flynn Pharma have very clearly set out what's required in a case such as this. It is a two-limb test and we said in our response that in our view it had not been done, so the PCR did have an opportunity to say "Okay. Well, I am going to go back and do a second limb assessment" and it didn't happen. In our submission there is a major lacuna there in the case that's being relied on.

Secondly, you have seen from the authorities the importance of assessing demand side economic value to determine whether (inaudible) is possible or not, and in this case there is considerable evidence that the proposed class members

made informed choices about taking a Standalone Fixed Voice Service on the basis of its perceived value to them compared with other options.

If a customer makes an unconstrained choice and consciously purchases BT's Standalone Fixed Voice Services despite being aware of the alternatives, that indicates that they attribute economic value to that service, and that economic value must then be taken into account in determining whether the price that is being charged is abusive.

So there is an exercise called the Ofcom Switching Tracker that we rely on and there's a description of it in the claim form bundle, tab 5, 352. This is Ofcom's evidence supporting its statement. In paragraph 1.123 you can see a description of the Ofcom Switching Tracker:

It "uses an engagement index which measures past and current switching behaviour and interest in the market through survey questions. Those who are inactive may have had some past involvement but have a low interest in the market. Those who are "passive" are more likely to have participated in the past and indicate some interest in the market. Those who are "interested" are similar to those who are passive, but are more likely to keep an eye on the market and look out for better deals. Those who are "engaged" are the most active group in terms of past and current behaviour. The index scores associated with the consumers behaviour categorises the consumers."

So that's Ofcom's description. There is a slightly more detailed description by the company that conducted the research. If you turn in the response bundle, bundle 5, tab 23. This is a FutureSite publication, "Consumer Engagement with Communication Services" final report, April 2018 prepared for Ofcom. You should see at page 256 a description of the various categories of consumer: engaged, may have switched in the last two years and/or made

changes to their existing service, very likely to be currently active and looking for a new provider or very confident that they already have the best deal, very open to the idea of switching. Interested, a strong preference to stick rather than switch to avoid the perceived hassle of switching so they would switch if they were unsuccessful in negotiating the best deal with their provider or shop around periodically to determine what other deals are available.

So when in the submissions that we come on to look at you see engaged and interested, that's what is meant by that.

We then go back to the claim form bundle, tab 5, page 353, the Tribunal should have there a figure 1.53 "Engagement levels in relation to fixed line services". On this chart the yellow colour means consumers who are interested and the blue colour means consumers who are engaged.

MR JUSTICE WAKSMAN: Sorry. Ms Ford, can you give me of the reference within the claim form bundle, please?

MS FORD: It is tab 5, page 353.

MR JUSTICE WAKSMAN: Thank you. Yes.

MS FORD: There is a line for voice only, the third line in this chart, and adding together the yellow and the blue, you can see that 45% of Voice Only Customers are categorised as interested or engaged.

Then if you look at split suppliers, which is the line below that, you can see 50% of split supplier customers are interested or engaged. So, in our submission, a large proportion of this class are open to the possibility of switching and have been found to keep an eye on the market and to consider their alternatives. There is also qualitative evidence available to the Tribunal as to the basis on which Standalone Fixed Voice customers choose their services with preference to the alternatives available to them.

In particular, split supplier customers consider that they are optimising their purchasing decisions in purchasing the service that they do. You can see that from claim form bundle, tab 5, page 351. There is a heading there "Reasons To Be A Split Supplier". Ofcom say:

"Split supplier customers were asked why they got a broadband service from a different supplier to their landline. The most common reason was that they got a good or better deal from separate suppliers and this was supported by 38% of split supplier customers. Other commonly reported reasons were having always used them (18%) quality of customer service (14%) faster broadband (12%) reliable service (8%) well-known and trusted brand (7%) and to bundle broadband with other services."

In my submission the only response which you find there which actually correlates with a lack of engagement or lack of conscious choice is the reference to having always used them. That's the second category. Everything else that is identified there is a response that is indicative of a conscious choice, characteristics of the service which the customer values.

We can see a similar point coming through from the response bundle, tab 8.

MR JUSTICE WAKSMAN: Response bundle?

MS FORD: Bundle 5.

MR JUSTICE WAKSMAN: Bundle 5.

MS FORD: You see there a research report prepared for Ofcom. Towards the bottom of the page you see:

"The most engaged group were conscious decision makers. They were actively choosing to have their landline and broadband services with different providers. Reasons ranged from choosing the broadband provider with the best internet speeds (particularly fibre internet) to being influenced by other

members of their household, for example, younger members of the household would organise and deal with the broadband and TV provisions (as these were a priority for them) and older members would take care of the landline provisions. In a few cases geographically influenced which providers customers went with for their landline and broadband provisions -- geography influenced. These customers tended to be aware of the advantages of bundle deals but were limited in the broadband provider servicing their local area. Additionally some were actively waiting for a certain provider to come into the area for example (e.g. Virgin Media)."

So again you have a situation where informed choices are being made.

In 2019, 81% of Standalone Fixed Voice customers agreed with the statement:

"Even If I could save money for getting a different deal for my landline service, I am happy enough with my current deal."

The reference to that is response bundle, tab 11, page 161.

In my submission what this sort of evidence indicates is that Standalone Fixed Voice decision makers are and have considered alternatives and they have chosen to stick with the BT product because it has economic value to them.

It is also worth emphasising two particular groups within the class. There are a significant proportion of customers who chose Standalone Fixed Voice Services in 2015 who have already switched during the claim period. So they were a member of the class for some period and then they switched out. That is, in my submission, significant for two reasons.

First, that tells you that that customer is an engaged and active customer. They must be, because they have actively switched. So this is an engaged customer. Secondly, it discloses that that engaged customer actively chose the BT product until it was no longer their favourite option. That means during

the time they took that product they ascribed economic value to it and that needs to be taken into account.

The second category that's worth focusing on is small businesses. Ms Kreisberger mentioned yesterday that Ofcom's estimate is that around 17% of standalone fixed customers are, in fact, small businesses, and the reference to that is paragraph 3.11 in the claim form bundle, tab 6, page 388.

The economic value to a business customer -- the economic value that a business customer ascribes to a Standalone Fixed Voice product might well differ to the economic value ascribed by a residential customer. So they might value a separate line. They might value having a separate number. They might value having a separate bill for VAT purposes. So there may well be reasons why business customers ascribe particular economic value to these Standalone Fixed Voice Services.

Our criticism is again that Mr Parker has undertaken no assessment of the demand side economic value at all. We heard two justifications for that yesterday. The first was that Ms Kreisberger's submission that you don't have to do anything else beyond what Mr Parker has done, because Mr Parker's competitive benchmark, the 2009 price as adjusted for WLR, does that too. So it was submitted that not only was this fairly basic exercise satisfies both limb 1 and limb 2 of the United Brands tests, but also it incorporates in some way a demand side value assessment. That in my submission is not right. We saw from Attheraces that a cost plus benchmark, which in his own words is what Mr Parker was doing, is not determinative of this issue.

Now we are told that the benchmark that Mr Parker has selected is a competitive benchmark and therefore you can infer that it incorporates economic value, but in my submission that's exactly the issue that needs to be determined.

The issue is: is it a proper competitive benchmark or ought it to incorporate an additional element which is reflective of demand side value?

The only basis on which it is being asserted that you can assume this is a competitive benchmark is Ofcom's approach to regulation under the Communications Act which, as we discussed at some length yesterday, pursues different policy options and you can't simply automatically read it across.

The answer to this point that's being given, "Ah, well, you have a competitive benchmark" is exactly what the exercise is supposed to be investigating. Is it a proper competitive benchmark or not?

The second justification we heard yesterday was this is just a variant of the willingness to pay argument that was rejected by the Court of Appeal in Attheraces and Flynn Pharma. I showed the Tribunal where you see that in the authorities.

In my submission it is not right that this is just a willingness to pay type argument. That might be true if customers had no alternative products available to them. So if they are in a situation where they want the product and they can't get it anywhere else, then they are willing to pay what's asked for it. That's simply a willing to pay problem, but the evidence that I showed you is that the customers here are actively selecting between options and they are choosing not to switch. That in my submission is indicative of the fact that the BT product is their preferred option for the period of time they take it and they ascribe sufficient economic value to it not to switch to a cheaper alternative. That at the very least is a factor that ought to have been properly assessed in Mr Parker's analysis and it hasn't. So in my submission it is an obvious lacuna in what is being advanced in support of these very extensive claims.

MR RIDYARD: Ms Ford, may I just ask, isn't what you just said, isn't that going to be true in any situation where the dominant firm has a market share of less than 100%, because if it has 95%, there is 5% of the market that's left. Therefore consumers could switch to the 5% brand if they wanted to. So does that mean to say that the willingness to pay trap is not a trap in those situations?

MS FORD: I think you have to make a case specific assessment, but I have shown you a lot of evidence going beyond the fact that this is not a 100% dominance case, which indicates that you have here active and engaged class members who are considering their options, and that in my submission is at the very least something that ought to be taken into account in the assessment. Again this is not something that we are saying the Tribunal can and should decide at this stage. What we are pointing to is a complete absence of an analysis that there should be in order to support this claim.

MR RIDYARD: Okay. Thank you.

MS FORD: The third discrepancy or lacuna that we have identified is that I showed you in the Deutsche Post case and also in the Court of Appeal in Flynn Pharma that where alternative comparators are advanced, there is an obligation to consider them. I highlighted Deutsche Post where competitive prices are the most obvious comparator, and here this is not a case where that material is not available. This is not a situation where the data is not there. There are alternative direct comparators available in the form of competitors' prices, and BT's pricing at the time was close to and sometimes even below its competitors' prices.

You can see that in the claim form bundle, tab 5, page 328. The Tribunal should have there a figure 1.24, wholesale and retail line rental price movements. I think Ms Kreisberger may have shown you this table yesterday, or at least

a variant of it, but what you see is BT's prices are the dark green line and then the various other lines are BT's competitors. If you trace the progress of the dark green line over time, you can see that BT is on any view in close proximity to its competitors and in some cases it is below them.

So using what Deutsche Post characterises as the normal test to apply in a market which is open to competition, which this clearly is, a comparison between the prices of the dominant firm and its competitors shows that BT's prices are not unfair.

Now, as the Tribunal put to me a few minutes ago, Mr Parker's justification for disregarding this evidence is that he considers that BT's competitors are not pricing competitively. He says they are sheltering under BT's pricing umbrella. That in my submission is inconsistent with the test for dominance in United Brands, because we see there that what is objectionable under Article 102 of the Chapter II prohibition is where a dominant firm uses opportunities arising out of its dominant position to reap trading benefits it would not have reaped had there been effective competition.

In my submission if BT's non-dominant competitors have managed to command these prices, that calls into question both whether BT is really dominant and whether BT's prices are really abusive. At the very least that requires further investigation and factoring into the assessment of whether this is an abusive price or not.

So those are the three key holes that we say are in the analysis that is being advanced in support of this claim.

I am moving on to the fifth point in my strike-out application, which is specifically concerned with Split Purchase Customers. Those the Tribunal will recall are the customers who purchased both Standalone Fixed Voice Services and

broadband but not in a bundle.

So Split Purchase Customers purchase the same two services as dual play customers. So they have the same purchasing options open to them. They can take the products that they want either separate or bundled and they have access to the internet. So they have the same means available to them as dual play customers to investigate alternatives. The data collected by Ofcom shows that they are demographically similar to dual play customers as well.

So if we look at the claim form bundle, tab 5, so we are back in the evidence supporting Ofcom's statement, page 343.

MR JUSTICE WAKSMAN: Are we back in the claim form bundle?

MS FORD: We are, yes, tab 5.

MR JUSTICE WAKSMAN: Thank you. Yes.

MS FORD: This is the evidence on the demographics of Standalone Fixed Voice customers. If the Tribunal looks, first of all, at Table 1.39, you've got information on age and you can see that both split supply and dual play customers have 7% of their group in the 75 plus category and there are moderate similarities across the various ranges.

If you look at Table 1.41 on socioeconomic grade over the page, you can see again that the proportion of the customers in socioeconomic groups D and E are 20% for both split supply customers and dual play customers.

MR JUSTICE WAKSMAN: Just a minute. Is this 1.39 you are looking at or are you looking at 1.40?

MS FORD: 1.41, sir.

MR JUSTICE WAKSMAN: Just a moment.

MS FORD: The bottom line is those in the D to E socioeconomic group. You can see there split supplier customers and dual play customers both have 20%.

Then turning over the page to Table 1.43, information on working status, you can see that a majority of both split supplier and dual play customers come from working households. The top of the table has a line for working and a line for not working, and then there are columns for split supplier customers and dual play customers.

MR JUSTICE WAKSMAN: 1.43, yes.

MS FORD: I am sorry, sir. Yes.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So these demographic similarities between Dual Play customers and Split Purchase customers were points that were specifically recognised by Ofcom in its conclusions. If you look in the following tab in claim form bundle, tab 6, paragraph 3.40, we see Ofcom saying:

"There is evidence that split supplier customers are on average younger and of higher socioeconomic grade than voice-only customers and, by definition, have internet access (unlike the majority of voice-only customers). For these reasons, they are arguably more likely to be aware of alternative offers and/or engaged in the market. Consistent with that, we set out in Annex 8 some survey-based evidence that split-supplier customers may be more engaged than voice-only Customers (15% compared to 6%) with broadly similar levels of engagement dual-play customers." That's 20%."

So just to turn up the levels of engagement that Ofcom is referring to there, it is in the previous tab, tab 5, page 352. At 1.124 you see Ofcom saying:

"Only 6% of voice-only customers are classified as engaged compared to 20% of dual play customers. Split-supplier customers have a higher level of engagement than voice only with 15% classified as engaged. The difference between split supplier and dual-play is not statistically significant."

So essentially they have levels of engagement which are similar and the differences between them are not significant in statistical terms. We can see that visually on figure 1.53 over the following page.

Split Purchase Customers also exhibit similar levels of switching activity to dual play customers. You can see that in the same tab, page 357 at figure 1.59. This is headed "Switching activity in the past 12 months". It shows customers who have switched supplier, who are actively looking or have started looking but not switched or have considered without looking. Those are the various colours. You can see that the figure for dual play is 22% as compared to 16% for split supplier customers.

So it is in this context that Ofcom decided in relation to Split Purchase Customers that it was not going to require any sort of price commitment. It was going to accept only an informational remedy. You can see that in this bundle, tab 4, page 262. Paragraphs 1.14 to 1.15 you see Ofcom saying:

"Like voice only customers split purchasers have suffered increases in line rental charges in recent years without significant offsetting benefits. However, split purchasers are typically younger and more technologically literate, and, by definition, have internet access which allows them to access alternative offers more easily. Unlike voice-only customers, split purchaser customers have a wide range of choices available to them."

(inaudible) reference to a wide range of choice available to them because I rely on this paragraph in the context of the argument about mitigation as well. Ofcom is specifically finding they have a wide range of choices such as dual play, telephone and broadband bundles, which should allow them to seek better value for money from providers if they increase their levels of engagement.

“To address the detriment faced by split purchasers we have decided that it is more

appropriate to allow time for split purchasers to become more actively engaged and potentially switch to dual play bundles where that is a better option for them than to include them in a price control at this stage. Split purchasers may benefit from being informed that, in many cases, they are not obtaining good value for money and could find themselves a better deal."

MR JUSTICE WAKSMAN: Yes.

MS FORD: Looking down at 1.17, you see Ofcom describing BT's voluntary proposal:

"BT also proposed to further stimulate engagement by split purchase customers by issuing an annual statement detailing the total spend of these customers which should help them to consider what alternatives are available for voice alone and in conjunction with their broadband service."

That was the proposal. Then if we look at 1.22:

"For split-purchase customers, the focus of BT's proposal is now solely on encouraging engagement through an annual statement. We consider that this, plus the absence of a price cut, might encourage them to engage more actively with the deals available in the market of dual-play and other bundles. Additionally, we will be exploring other types of prompts or tools for consumers more generally in our consumer engagement project."

They go on to conclude in 1.23:

"We therefore consider that BT's voluntary proposal is sufficient to address our concerns in relation to this review."

Now our criticism is that Mr Parker has ignored Ofcom's decision not to impose a pricing remedy and to accept BT's information proposal in respect of Split Purchase Customers, and he has not offered any explanation of how the PCR's claim that these customers have been the victims of excessive pricing

can be reconciled with Ofcom's conclusion that imposing a pricing remedy was inappropriate and that SPCs should simply be encouraged to look at the alternatives available to them.

To be clear, our criticism is not simply that Mr Parker reached a view which is inconsistent with Ofcom's; it is that Mr Parker has not engaged with Ofcom's reasons for reaching that conclusion. Ofcom made clear that it considered different supply conditions existed for SPCs. You can see that at paragraph 4.24, claim form, tab 4, page 282.

They refer to different supply side conditions and that in turn reflected the different customer characteristics and the similarity to dual play customers I have emphasised. In our submission Mr Parker has not addressed or engaged with that (inaudible) and so provides no justification for having reached a different conclusion.

MR DORAN: Ms Ford, could I just ask you one question? Isn't what you are saying is that one set of powers is ex post and the other is ex ante? The prospectively and retrospectively one could reach a different view? Is it different today? I thought that is what you said to us yesterday.

MS FORD: Sir, I certainly do say that. You are quite right to pick up on the criticism that Ms Kreisberger levels at me that there's some inconsistency in our positions on that. In my submission there is no inconsistency.

We say first of all that it is not enough to support this claim to simply resample what Ofcom has done. That is not sufficient, but if you are advancing a position which is inconsistent with what Ofcom has done without any explanation, then you lack even the starting point or the foundation of consistency with Ofcom. You haven't even got that. Your case is even weaker, and in my submission there is no inconsistency in pointing out that in comparison with voice only,

where at least the PCR says "Well, look, Ofcom thought in a regulatory context there was an issue. For split purchase customers Ofcom has said "We have looked at them. We recognise their characteristics are materially different. They are much more similar to dual play customers. We don't think it is necessary to impose a price regulation on this group of customers".

MR DORAN: Forgive me. Finish your point.

MS FORD: I am sorry, sir. I am happy for you to pose your question.

MR DORAN: It is only that a remedy was nevertheless imposed.

MS FORD: Well, Ofcom were satisfied with BT's informational remedy. I showed you, sir, that BT offered a remedy that provided an annual statement and ensuring that Split Purchase Customers had the information they needed to make their own decisions about whether to switch or not. So BT's voluntary commitments only applied to the Voice Only group, and the point we make is that at least with the Voice Only group you have that superficial starting point to say "Well, Ofcom accepted a voluntary commitment in relation to that group".

In relation to the SPCs Ofcom considered it was sufficient to impose an informational remedy and that in my submission is a really fundamental discrepancy with saying "Nevertheless these people have been a victim of excessive pricing".

Now, of course, for all the reasons we discussed yesterday you can't simply look at what Ofcom said and say that's determinative. You do need to investigate whether or not there is an abuse or not, but you have my submissions that that exercise -- this has not been done with any degree of clarity either.

MR DORAN: Yes. Thanks very much.

MS FORD: Mr Parker's explanation for having taken a different view from Ofcom seems to be to imply that this is an example of some sort of regulatory failure

in that this is a situation where the regulator has done nothing to address the problem and so it is an appropriate situation where ex post competition law steps in and deals with it. The reason I say that is if we look at his first report, core bundle, tab 3, page 194, you see paragraphs 359 to 360 headed "Assessment of Conditions discussed in Latvian Copyright Society". He says:

"As mentioned… Advocate General Wahl's opinion… identifies that where there is a free market with no barriers to entry, high prices should normally attract new entrants and so the market will self-correct, and in his view, such situations should not result in excessive pricing antitrust cases. Consequently attention should concentrate on markets with such barriers, particularly in regulated sectors, and where any existing sectoral regulator has not acted to intervene. In this case telecoms is a regulated sector… and I have shown that rival providers of SFV services face substantial barriers to entry and expansion. While Ofcom did investigate whether BT's SFV prices were excessive and proposed that price controls be introduced, its intervention was not complete. For instance, in respect of Voice Only customers. Ofcom has accepted forward-looking commitments… but has not required BT to compensate these customers for any historic overcharge. Similarly, in respect of split purchase customers Ofcom has not taken any action on either a backward-looking or forward-looking basis. The 2020 review does not set out any change in Ofcom's position."

In my submission it is not correct to say in relation to split purchase customers that Ofcom has not taken any action, and that this is, therefore, a situation of regulatory failure where competition law needs to step in. This is a situation where Ofcom did consider what was the appropriate remedy and it took the view that it was not a price cut; it was the informational remedy that was

proposed by BT. So this is not a situation which can be characterised as a regulator failing to intervene.

So in our submission, quite apart from all the wider flaws in the assessment of abuse, the application to satisfy a sub-class in relation to split purchase customers is extraordinarily weak.

I am moving on to deal with my final strike-out point, sixth point, and this is the point that concerns the interrelated issues of failure to mitigate loss, contributory negligence and/or a break in the chain of causation.

MR JUSTICE WAKSMAN: Thank you, Ms Ford. Can you just give me one moment, please?

MS FORD: Certainly.

MR JUSTICE WAKSMAN: Sorry about that. Yes, Ms Ford. You were just giving the headline description of what you are covering here.

MS FORD: Sir, yes. I was just saying that I am dealing with interrelated issues of failure to mitigate loss, contributory negligence and/or a break in the chain of causation. The reason I put it like that is because these are each defences or issues which are available in a claim for damages for abuse of a dominant position, and they have been described as essentially the tools that are available to a court, the tools in the box, and they are all interrelated.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So I have cited in my skeleton an example of how this might apply in a competition case. The case is the Servier case. It is in authorities bundle, tab 20, so the first authorities bundle. This was a claim that Servier, which was a pharmaceuticals company, had breached Articles 101 and 102 of the Treaty in relation to its pharmaceutical product perindopril and the allegation was that it had sought to improperly enforce its patent rights and to buy off

potential competition and so to delay generic entry in the market and to keep prices excessively high.

The claimants were national health authorities and they were alleging that they had been obliged to pay too much for perindopril.

Servier sought permission to amend its defence and sought to plead that the health authorities had failed to mitigate their loss or were contributorily negligent or had broken the chain of causation, and it was said that they knew that cheaper pharmaceutical products were available on the market and had failed to take steps to encourage switching to cheaper alternatives.

The High Court had a contested application to amend, where the claimants sought to say that that defence had no prospect of defence and it granted permission for the amendment and it found the points to be sufficiently arguable. You can see that from paragraph 74. It says:

"It seems to me clearly arguable with a reasonable prospect of success that the imprudent conduct of the English claimants, assuming it to be established, had a sufficiently close factual and temporal connection with Servier's breaches of competition law to operate as an independent cause of the English claimants' loss. It is not possible to say, at this early stage, that the argument is doomed to failure. Put simply, I agree with counsel for Servier that it is reasonably arguable that the ongoing levels of purchase of Perindopril at a high price were caused in part by the English claimants' own conduct in failing to encourage switching to other ACE Inhibitors. There is a causal link between the English claimants' imprudent conduct and their exposure to loss."

Turning to how that applies in the circumstances of this case, as the Tribunal is aware, the PCR has placed great emphasis in his application on the alleged

disengaged nature of Standalone Fixed Voice customers. Now, to be clear, that is not BT's case. That is the PCR's own case that they are advancing, and for reasons that we have already emphasised, we say a lot of that emphasis is actually really quite selective.

But in any event the disengaged nature of these customers might well be a factor which is legitimate for Ofcom to take into account in determining whether it's appropriate to take ex ante regulatory action under the Communications Act 2003. We have seen that such intervention follows different policy goals and it might focus, for example, on perceived market failures that are not attributable to the conduct of any particular entity.

But in my submission the position is very different where the Tribunal is going to be asked to conclude that a class has been harmed as a consequence of an alleged abuse of a dominant position. Then it does become necessary for the Tribunal to enquire what are the true causal drivers of the alleged loss? To what extent has the consumer's own conduct contributed to that loss? Has the consumer discharged their duty to take reasonable steps to mitigate that loss?

Now Ms Kreisberger made a submission yesterday that causation is straightforward. In my submission it is far from straightforward, and that is an illustration of the superficiality of the case that is being advanced on behalf of the PCR. When the PCR's own positive case is that this is a class which is exceptionally disengaged and will not switch to alternative products, then that, in my submission, raises an immediate and obvious question mark over questions of causation.

MR RIDYARD: Can I just ask, Ms Ford, where would you expect these consumers to switch to, given that you just showed us evidence that all the other

competitors had similar prices to BT for the landline products?

MS FORD: Yes, sir. In relation to SPCs I rely on Ofcom's statement at 1.14 and 1.15, which I flagged up as we passed it. It is in the claim form bundle, tab 4, page 314. Sorry. I am not sure I have the right ... It is 1.14 and 1.15. So it is tab 4, page 262. Sorry. This is a passage where Ofcom has said:

"Split purchasers have a wide range of choices available to them, such as dual play (telephone and broadband) bundles, which should allow them to seek better value for money from providers if they increase their levels of engagement."

So in my submission there is a strong factual basis there for saying that Split Purchase Customers can mitigate or extinguish their loss by switching to better value packages, and Voice Only customers have alternatives too.

The Home Phone Saver package, which was launched by BT in 2014 in response to competitive pressure from the Post Office and from other providers, offered a discount of £11 compared to standard prices. You can see that from the claim form bundle, tab 6, page 425. I may have a problem with this bundle reference as well. This is right. You see there Ofcom recording:

"BT also highlighted that it offers a Home Phone Saver tariff, which it launched in 2014 “in response to competitive pressure from the Post Office and other providers”. The Home Phone Saver tariff is at least £5.50 lower than standard BT prices and significantly more if various opt-in features are included. For example, BT has stated that the Home Phone Saver tariff offers a discount of £11 compared to standard prices."

It goes on to express its concern. It says:

"A relatively small proportion of BT's Standalone Fixed Voice customers take the Home Phone Saver tariff. This implies that relatively few of BT's Standalone Fixed Voice customers are sufficiently engaged to have sought out a lower

price offer which is available (although not prominently advertised)."

It goes on to say that their concern from a regulator's point of view is that “BT can respond selectively to customers seeking to switch to an alternative provider without having to reduce standard prices."

MR JUSTICE WAKSMAN: Sorry. Can you just give me the paragraph reference for that again?

MS FORD: Sorry. It is 4.66.

MR JUSTICE WAKSMAN: Just a moment. Sorry. 4.66 in divider 6?

MS FORD: That's right, yes.

MR JUSTICE WAKSMAN: Just a second. Yes. Thank you.

MS FORD: So what you have there is Ofcom pointing out that there is an alternative tariff available with a discount of up to £11 from standard prices. The concern it has from a regulatory point of view is that relatively few of BT's Standalone Fixed Voice customers are sufficiently engaged to have sought out that lower price offer. That in my submission specifically indicates that there is a possibility of mitigating or extinguishing your loss by being sufficiently engaged and switching.

MS KREISBERGER: Sir, I hesitate to interrupt, but just to note the wording in parenthesis:

"... (although not prominently advertised)."

MR JUSTICE WAKSMAN: Right. Thank you. Yes.

MS FORD: I think I did read that wording out, but in any event.

MR JUSTICE WAKSMAN: There we are. We have got it. We see it.

MS FORD: So there are potential options open both to Split Purchase customers and to Voice Only customers. The position is even stronger in my submission in relation to those class members who joined the class during the claim

period, because by definition they would have had alternatives available to them and they would have voluntarily switched to these services, which on the PCR's case are supposedly overpriced.

So if they are saying, as it was sought to suggest yesterday, that we have not advanced a sufficiently arguable case at this stage -- that was the submission which was made by reference to the dicta in Royal Mail and Stellantis -- in my submission there is a strong factual basis for saying there are alternatives here and that class members, had they been sufficiently engaged, could have switched to them.

Insofar as the PCR intends to try to say that actually there are no steps which it would have been reasonable for these parties to take, that case simply has not been set out in the PCR's documents. We don't have any concrete engagement with this case. In our submission it would run contrary to the well-established principles of tortious liability if customers are permitted to recover damages which could have been avoided in their entirety if they had taken the reasonable step of switching to a lower price offer, which Ofcom has found was available. We say this is a yet further element of the claim which the PCR has not grappled with. So it's a yet further example of a failure to convert ex ante regulatory intervention into a viable claim or allegation for breach of competition law.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So, sir, those are the six reasons which in our submission mean that these claims do not disclose a real prospect of success. We say the Tribunal should either strike them out or grant summary judgment in respect of them.

I am moving on now to deal with the question of opt-in and opt-out.

MR JUSTICE WAKSMAN: Let's just look at the time. It is just before 12.55. I know

how much time you have been allocated, but just to help us do you have any idea as to how long -- this is going to be essentially -- your main other point, isn't it?

MS FORD: Sir, it is, yes.

MR JUSTICE WAKSMAN: Do you know how long that's likely to be?

MS FORD: Sir, I am envisaging perhaps an hour and a half.

MR JUSTICE WAKSMAN: Right. I think, looking at my assessment of the time, yes, I think that will pretty much be the maximum on my time calculations, because I calculated something around 3.15, but we are stopping a bit early. Let's stop now and resume at 1.55, if we may. Thank you very much.

(12.54 pm)

(Lunch break)

(1.55 pm)

MR JUSTICE WAKSMAN: Ms Ford, before you move on Mr Ridyard has a question for you.

MR RIDYARD: Thank you. Just a quick follow-up from what you were discussing earlier with the Split Purchase Customers. Could you -- maybe we should know this already but could you just remind us where Ofcom has got to on that in its latest review, what is Ofcom's latest -- I think it was March 2021 -- assessment of that part of the market and whether the remedy was working or whether a different remedy should be employed?

MS FORD: I don't think there has been a material change, but if I may, I will ask my junior to check the position so I can ensure I will giving you an accurate answer to that question.

MR RIDYARD: Thanks.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Sir, if the Tribunal were to be satisfied that the proposed claims have a real prospect of success on merits, then we say the CPO application should nevertheless be dismissed in its current form, and we say that for two reasons, which are interrelated.

First, if collective proceedings are certified at all, they should be certified on an opt-in rather than opt-out basis, and, secondly, that the proposed claims are not suitable for collective proceedings.

I deal with those two points together, because we highlight what we say is a fundamental inconsistency at the heart of the PCR's case.

As we have already discussed, the uniqueness of this case is that it is a case in which BT can identify and contact the proposed class members, and so it is therefore a case in which it is eminently practicable for proceedings to be opt-in rather than opt-out.

The PCR responds to that argument by claiming that opt-in proceedings are not practicable because of what he claims is the disengaged nature of the members of the proposed class, but if the proposed class members are so disengaged that they can't be expected to opt-in to collective proceedings when they are identified and contacted, then there is no reason to expect them to opt-in for the purposes of distribution of any award of damages either, and that means that any damages awarded could not be distributed to those who have supposedly suffered loss and the costs of the proceedings will then outweigh the benefits to the supposedly injured class, because the benefits won't make their way to them. We say in that circumstance you have proceedings becoming merely a vehicle for lawyers and funders.

It is our submission that there is no material distinction between requiring members of the class to opt-in from the outset of the proceedings and inviting them to

opt-in at the distribution stage for these purposes, and we say the PCR simply can't have it both ways. Either the class members can be contacted and expected to opt-in, in which case opt-in proceedings are clearly practicable, or they can't, and they can't be expected to opt-in to be the recipient of damages, notwithstanding the ability to contact them, in which case proposed claims are simply not suitable for collective proceedings at all. That's the nub of this point.

I am going to make my submissions under four heads. First I am going to deal with the applicable legal principles. Then I am going to deal with why opt-in proceedings are practicable in this case. Then I am going to deal with if opt-in proceedings are not practicable, then the proposed claims are not suitable for collective proceedings at all. Then I am going to identify certain additional factors that we say militate in favour of opt-in rather than opt-out proceedings.

So starting with the applicable legal principles, we set out the relevant statutory provisions and the rules in our response and in our skeleton, and so I don't need to go through all of those again. There is one additional rule that we would draw attention to, which is relevant in the light of Ms Kreisberger's submissions yesterday about the transcript in the Gutman proceedings. It is in authorities bundle 8A, tab 6, page 44.

MR JUSTICE WAKSMAN: Yes.

MS FORD: It is Rule 93 headed "Distribution of Award". What this rule says is:

"Where the Tribunal make an award of damages in opt-out collective proceedings, it shall make an order providing for the damages to be paid on behalf of the recommended persons to either (a) the class representative or (b) such person other than a represented person as the Tribunal thinks fit."

This is a rule which is mandatory. It includes the word "shall":

"... the Tribunal shall make an order to direct the payment of damages to the PCR or to some other person other than a person in the class."

So we say that there is no power under this rule for the Tribunal to make an order that you would, for example, compensate by crediting a phone bill or putting a cheque in the post or some such mechanism.

MR JUSTICE WAKSMAN: Just one moment, please. Sorry. Where do you get that from? I am looking at 93(b):

"... or such person other than a representative person."

You mean it can't be paid directly to a represented person? Is that what you are saying?

MS FORD: That certainly is our understanding of 93(b). It says:

"The class representative other than a represented person as the Tribunal thinks fit."

You can then see in subparagraph 3 over the page that what then happens is an order made in collective proceedings in accordance with paragraphs 1 and 2 may specify (a) "The date by which represented persons shall claim their entitlement to a share of that aggregate award."

So the represented persons are the persons in the class. So the way in which it is envisaged distribution will take place is that the Tribunal makes an award of damages and makes an order providing for the damages to be paid on behalf of the represented persons to, for example, the class representative and then the representative persons -- represented persons then claim their entitlement to a share of that aggregate award, and then it goes on to make provision for the circumstances where there are undistributed damages.

Now the reason I have drawn the Tribunal's attention to this particular rule is because we were looking at the transcript of the Gutman proceedings yesterday, and on one reading of what the President was saying he seemed

to be envisaging a situation where you would simply credit a phone bill.

In my submission, if we look at the transcript, that's not what the President was contemplating in any event. So I would like to go there now, but I do say it would not be possible within the terms of the rules in any event for the reason I have shown you.

If we look at supplemental authorities bundle, tab 18, there is the transcript from the Gutman proceedings. If we start at page 616, lines 6 to 10, what you see here, in my submission, is the President articulating exactly the concern which arises in this case. He says starting at line 6:

"The concern is -- of course it is only one factor -- but otherwise we end up with this large award, some people claim but in fact there is a huge unclaimed fund and it is for the benefit not of the class members, as a large class, but it's really then for the benefit of the funder. Is that then an appropriate way for the proceedings to go forward? That's the concern we have -- or I have, speaking for myself."

In my submission the concern that's articulated by the President there arises in exactly the same way in these proceedings, because if by reason of their characteristics that are emphasised by the PCR, the class members do not, in fact, claim their entitlement to an award, then the proceedings are not for the benefit of the class members and the case is not suitable for certification.

Now the reason why that concern arose in Trains is a slightly different one. it was not disengagement as such. It was the concern that people might not go to the effort of having to evidence their entitlement to claim if their claim is too low value. So it is not actually a characteristic of the class as such as it is here. I can show you the passages of the transcript where you see why it was a problem in Trains, starting at page 612. Line 6 you see Mr Holmes say:

"Should we make a distinction between people recalling their travel patterns in a general sense and their ability to evidence that?"

Mr Moser says:

"They are all different types of evidence and what we have seen in our litigation plan and in the Epiq papers, which I will show you, is that when we come to the distribution stage there will be a questionnaire. There will be different kinds of evidence and there will have to be a judgment made as to whether people have, as it were, come up to proof. If you can prove it with the actual ticket that will be ideal. If you can show credit card receipts, that would be another way of doing it and, of course people's own evidence of what they were doing, regular work trips, for instance."

The President then says:

"The point made is a more general one, it's not about delay, and no one is suggesting you have delayed bringing the proceedings. Then, of course, the proceedings were held up because, as we know, of the Merricks appeal. It's that given the amount of likely recovery, as accepting everything Mr Holmes says on his calculations, and the sort of evidence that Epiq says will be required, is it plausible that all these people are going to -- even if they could find that sort of information, because showing you had a Travelcard, of course, is only one part of the story, that may be the easier one, certainly if you had a monthly or an annual one but some people have a 7 day one. But you also have to show that you took these particular train journeys and what sort of ticket you bought. Is it realistic that -- are you just going to let people say so or once you start asking for any kind of proof, for that sort of money are they realistically going to make the effort?"

So what he is saying is in circumstances where this is a potential low value claim are

people really going to bother to make the effort of evidencing their claim, of digging out their tickets? You see that again at 613, 13 to 20. Mr Moser is saying:

"The sort of evidence that is required is, these days, of electronic payment, and that includes the entire period. Not as difficult as… the other side makes out. There are online credit card statements, people have them on their phones."

The President says:

"Not always going back that long period. Some banks even charge for getting statements more than a few years old if they are no longer online."

Mr Moser is talking about how you might potentially try and evidence these sorts of claims.

MR JUSTICE WAKSMAN: Yes.

MS FORD: If we turn over to 616, you see the President again saying:

"It's the effort, is the point. When you say for almost no effort. If you can just say:

"I remember I took a train journey to Winchester. I can't remember the exact date but it was some time that year and I can't remember how much I paid."

But is that really going to be adequate? The concern is … that otherwise we end up" and this is the point where he goes in and explains that you have a large award but nobody will claim it.

Down again at 24, do you see the President saying:

"I fully accept that it can be a low value claim."

This is the point where we start getting into analogies:

If it is "because of some cartel among manufacturers of a certain input into cars, it means that you pay £12 more for your car, that's a very low-value claim, certainly no-one is going to start proceedings for that, but pretty much everyone can evidence the purchase of the car."

So he is saying when you have an expensive good like a car you can evidence your purchase of it.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So he's saying that's not the problem where you have got the expensive good. Then this is the point at which we then come to the mention of the Telecoms operator at line 10 on page 617 and he says:

"Similarly, if a telecoms operator overcharges subscribers, well they will know who the subscribers are, 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 only £4.50 and that's trivial.”"

So, in my submission, looked at in context, what the President is saying there is that you can distinguish the situation of a purchaser of a car and the situation of a telecom's operator where it will be easier to evidence the fact that you have suffered loss. So a telecoms operator has records about how much they have charged people, about (inaudible) when they were a customer, and he is saying that the difficulties in evidencing your claim that will mean that people just won't bother to try to do it will not arise in the same way in a telecoms case as they will in Trains, for example, when they have to remember if they bought a ticket on what day and can they find the records for it.

What he is not saying, in my submission, is that the correct distribution mechanism simply directs refunds to class members, that's clearly not the context in which he is speaking. He is not talking about the distribution mechanism there at all, and he is certainly not referring to Rule 93, which I showed you.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So that in my submission is what's going on in the Gutmann transcript. I also have some brief observation to make about the matters that come out of

the Tribunal's guide. That's in the authorities bundle at tab 7. If we start at page 60 within this tab, this is under the hinged "Certification of Eligible Claims", and it is part of paragraph 6.37, and the third bullet is dealing with claims must be suitable to be brought in collective proceedings. Part way down the last paragraph of the guide you see the observation:

"Where the estimated legal fees and expenses appear disproportionate compared to the likely damages award, the costs of pursuing collective proceedings may outweigh the benefits."

Now we have a slight variation on that scenario here, because it is not so much that the damages award itself will be outweighed by the costs. It is that you can't guarantee that those who are entitled to the award will claim it. So, as the President recognised in the Trains case, that's another scenario where the costs outweigh the benefits, because the benefits never actually make it to the intended class.

Turning over to page 61, you have the heading "Whether proceedings should be opt-in or opt-out", and under paragraph 6.38, half way through the paragraph where you see:

"Where the class representative seeks approval to bring opt-out proceedings it will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings."

MR JUSTICE WAKSMAN: Can I just ask a question here, please, if we go back to Rule 93?

MS FORD: Yes.

MR JUSTICE WAKSMAN: You could have, could you not, in this case, even if the award for damages is made payable to the class representative, could you not then have a collective settlement approved by the court under Rule 94

whereby BT says, "The way we are going to discharge this is by crediting the consumers directly", and I imagine if it got to that stage the one thing that BT would positively want to do would be to credit the individual accounts rather than paying damages so as to ensure they all reached the claimants.

MS FORD: Well, collective settlements are slightly different than the situation of distribution of an award, because the distribution of an award arises where the Tribunal makes an award of damages and then the award is then to be distributed, whereas the collective settlement would arise in a scenario where the parties actually reach a settlement prior to a damages award.

I have to say I have not had time to scrutinise whether it makes any positive provision one way or another about how you go about distributing the proceeds of the collective settlement, if one were to be reached, but you do in any event come up with practical problems in assuming that everyone could be directly compensated in that way, not least the one that we dealt with this morning about the inclusion of deceased persons in the class.

MR JUSTICE WAKSMAN: Well, I appreciate that element, but just looking at this practically for a moment, if, contrary to all your submissions, a CPO is made, and if, contrary to what your defence would be, the Tribunal came to the view that there was an abuse and damages should be awarded, on a practical level surely BT's position would be, "Let us credit these people direct", not least because it would certainly minimise the prospect of uncollected damages. I am not saying you have to answer me now. You might want to take some instructions on it, or even after the hearing, but if that would be the likely position if one got to the end of all of this, then in practical terms surely that's a matter which we could and should take into account? You don't have to answer me now, but it seems to me, as you have quite rightly raised an issue

here, which Ms Kreisberger is going to have to deal with in her reply, about the ambit and true meaning of Rule 93, I think one needs to try to address the problem a little bit more broadly as well.

MS FORD: Sir, I will certainly take the opportunity to take instructions as to what BT's position would be in that circumstance. Of course 94 is dealing with the possibility of a settlement. The submission I make is that if you get so far as to make an award it appears to be fairly clear that the Tribunal shall make an order providing for the damages to be paid on behalf of the represented persons to either person A or person B in that rule. So that seems to be a mandatory obligation.

MR JUSTICE WAKSMAN: As I say, unless the parties can agree a different way in which it is to be given effect, that's all I am saying at the moment. I can well understand if, contrary to everything you say, as I have indicated, you get to that stage and counsel for BT stands up and says "Well, subject to any appeal the obvious thing to do here, since we have got the mechanics available, is to do it directly by a credit on the bill, one would imagine that a tribunal would be quite sympathetic to that.

MS FORD: Well, I can certainly take instructions from BT on that particular point. Another practical point that arises (inaudible) because --

MR JUSTICE WAKSMAN: I did not catch that.

MS FORD: I was saying another practical point which arises is in relation to former customers, because they can't be credited directly either. I will come on to show you that, consistent with Rule 93, the PCR's own distribution plan is that members of the proposed class should fill in a claim form, and we say that that's clearly consistent with the mechanism that's envisaged by the rules whereby you have to claim your entitlement. I will come on to show you that.

MR JUSTICE WAKSMAN: Yes. Thank you.

MS FORD: Sir, I think we were just working through some observations on the Tribunal's guidance.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So that's back in tab 7 at page 61.

MR JUSTICE WAKSMAN: Yes.

MS FORD: I was just drawing the Tribunal's attention to paragraph 6.38, the second half the paragraph where you see:

"Where the class representative seeks approval to bring opt-out proceedings, it will need to make submissions as to why that form of proceedings is more appropriate than opt-in proceedings."

So I make the submission that the burden is on the PCR to make their submissions as to appropriateness, and it is worth noting that that is a proposition which is not limited to when the PCR is proposing to bring opt-in proceedings by way of alternative. Even if the PCR is not bringing opt-in proceedings by way of alternative, they still have to persuade the Tribunal that opt-in proceedings are not practicable and that is the reason why it is justifiable to have opt-out proceedings. The burden is on them in that respect.

MR JUSTICE WAKSMAN: Yes.

MS FORD: Paragraph 6.39, the first bullet deals with the strength of the claims, which is obviously one of the factors the Tribunal is entitled to take into account in determining whether the proceedings should be opt-in or opt-out.

You have been shown the passage which says: "Given the greater complexity costs and risks of opt-out proceedings, the Tribunal will usually expect the strength of the claim 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 they could be presumed to have conducted their own assessment of the strength of their claim."

Just pausing there, I do rely on the submissions that I made on the merits in the context of the strike-out in this context as well. I say that the merits are weak and I say that that is a factor that the Tribunal is entitled to take into account at this stage as demonstrating that this is a claim which is more suitable for opt-in rather than opt-out consistent with that guidance.

You see at the end of that paragraph of the guidance, for example where the claim seeks damages for the consequence of an infringement which is covered by a decision of the Competition Authority (follow on claims) they would generally be of sufficient strength for the purposes of this criterion. Of course the PCR can't rely on that presumption that his claims are of sufficient strength under this paragraph, because this is not a follow-on claim.

Paragraph 6.39, second bullet, then deals with whether it is practicable for proceedings to be brought as opt-in proceedings, and I make two points on that. First, you see recorded there that there is a general preference for proceedings to be opt-in where practicable, and we have seen that it is for the PCR to show why they are not practicable.

Secondly, this guidance gives indicators as to the circumstances where an opt-in proceeding might be considered both workable and in the interests of justice. It gives two possibilities. It says:

"Indicators that an opt-in approach could be both workable and in the interests of justice might include the fact that the class is small but the loss suffered by each class member is high or".

So an alternative and separate possibility:

"The fact that it is straightforward to identify and contact the class members."

I emphasise the "or", because these are not cumulative conditions which need to be satisfied. The guidance is clearly saying that if it is straightforward to identify and contact the class members, that is an indication of proceedings which are practicable to operate on an opt-in basis.

Now Ms Kreisberger took you to some of the background material to the introduction of the opt-out regime and it was evident from that that difficulties in identifying and contacting class members was one of the key rationales for introduction of an opt-out regime. So she referred you to the comments made by Which? that the single biggest hurdle to the effectiveness of the current statutory representation procedure is the requirement to name claimants on the claim form.

Now just to be clear, there is no longer requirement either in opt-in or opt-out proceedings to actually name individual claimants. That has been done away with, but what Which? is saying, and you can also get that from the House of Commons Business Innovation and Skills Committee Report, which is response bundle, tab 20, it says:

"The greatest barrier is reaching consumers who have suffered detriment, due to the current opt-in system, and it stated that it would not bring another action under the current procedure."

So what the opt-out regime is trying to address is difficulties in identifying and contacting potential class members. Now that difficulty might well arise if you have a classic cartel claim, because you don't necessary know who has bought the product and so you don't necessarily know who your claimant class are, and the Trains class action, proposed class action, the transcript for which we were just looking at, is another example where it might well be potentially quite difficult to identify your claimant class, because you don't

know who bought a ticket and when.

So if you have a proposed CPO application where you can identify and contact your class members, that in my submission is an important distinguishing factor from the classic consumer claim, and it means in contrast to your classic consumer claim opt-in proceedings are eminently practicable.

MR RIDYARD: Ms Ford, on that point can you give us a kind of concrete description of what the communication to the claimants would look like under an opt-in procedure? If I was a claimant, what is it that I would receive, assuming, you know, the process went through to that stage of the matter?

MS FORD: Yes. I can certainly -- I can show you two things. The first is Mr Bunt's evidence about how you would go about contacting these class members and then I can show you what the PCR envisages would need to be obtained from the class members. I think that's probably the mechanism plus what they might actually get from it.

So starting off with Mr Bunt's evidence, this is in the core bundle, tab 6, page 349. Above paragraph 13.

MR RIDYARD: Sorry. I am in the wrong bundle. Excuse me. I have my bundles mixed up. I am most interested in what the proposition to the claimant would be. What is it that I would need to agree to in order to go ahead? Assuming that I could be reached by ----

MS FORD: Okay. The Tribunal can perhaps note the explanation of the mechanism by which they might be reached in Mr Bunt's statement and we will turn over to what the PCR has said about it. That's in his litigation plan. It is in the JLP bundle, so that's bundle 3, tab 2, and then starting at page 60 you have a document called "Notice and Administration Plan". If you turn over to page 62, you can see paragraph 3 under the heading "Notice Objectives":

"The notice administration plan is designed to demonstrate to the Tribunal how the proposed class representative would satisfy certain requirements of Rule 78, specifically how the proposed class members would be notified and consulted at key stages."

If you then turn on to page 89, you see the heading there "Distribution Stage", and in paragraph 128 you see the reference to the involvement BT should have in assisting its customers to make a claim. It says:

"As discussed previously in this Plan, as a minimum we believe that BT should ensure that it is providing its customers (past and current) with accurate information on the process and the legal rights that are available to the Proposed Class Members. We anticipate that the Tribunal may wish to explore these issues in great detail at a more relevant point in time."

Then if you turn over the page to page 91, it goes on:

"In the event that any judgment or settlement (or earlier directions) in the proposed collective proceedings, place a requirement on BT to provide details of customers falling within the definition of a Proposed Class Member or to assist in providing notice to the Proposed Class Member as a direct noticing campaign will also be initiated at this stage whereby proposed class members are directly provided with - via their preferred contact method according to BT - records a copy of the claim form."

Now as to what's then meant by "The Claim Form" we can see under "Making a Claim" on the next page, there's a heading "8. Making a Claim". Then you have a heading on the right-hand side of the page, "Filing a Claim". It says:

"In the event of an aggregate award of damages being made or a collective settlement approved, a claim form and claim process will be made available for all Proposed Class Members that have not opted out. The claim

procedure will take place online, by post and by telephone. The demographics of the Proposed Class Members in the Proposed Collective Proceedings indicate that a significant proportion will be unfamiliar and uncomfortable with online submission alone."

They go on to say:

"Close consideration will be given to the design of the claim form in order to ensure essentially that it is … user friendly."

So it is clear that what's envisaged is that at the distribution stage the members of the class will be obliged to fill out a claim form. This is the PCR's own proposal. The PCR envisages that BT's data can be used to contact class members in the context of that process.

Our really quite short point is that if those steps are appropriate and can be expected of a class member at the distribution stage, there is no reason whatsoever why they can't do so at the opt-in stage as well.

MR RIDYARD: That does not really -- I was hoping for something more concrete on what I would receive if under an opt-in proceeding I was a claimant and I received a communication from someone about the possibility of getting an award. I mean, can you give us an idea of what it would look like?

MS FORD: I am afraid it is very much in the PCR's court rather than BT's court to know what they envisage sending the relevant class members, but I would make this point, which is that nowhere in the documents is it suggested that the information or that the (inaudible) the forms would be materially more onerous in order to opt-in at an earlier stage than it would be at the distribution stage. I am afraid that's as far as I can assist the Tribunal in the sense that what it is contemplated to be sent to the claimants -- to the proposed class, is really a matter for the PCR in the first instance.

MR RIDYARD: Okay.

MS FORD: We do say that there's a huge inconsistency in the PCR's position in the sense that either the alleged probability and disengagement of the proposed class is so insurmountable that they can't be persuaded to opt-in, in which case those characteristics will equally preclude them from seeking distribution of any award of damages or, if, as the PCR seeks to assure the Tribunal, it is possible to contact the class and encourage them to identify themselves at the distribution stage, then there is no reason why they can't do that for the purposes of opting into these proceedings.

MR RIDYARD: I understand that argument. That's why I am trying to get in my mind what the two scenarios would look like from the point of view of the claimants, because that would help us to evaluate whether your proposition is right or not. We have to have some idea of what those two scenarios look like from the point of view of the claimants and put them side by side and assess whether there is a difference between them or not, as you argue. So that's precisely what's behind my question.

MS FORD: That's fully understood. Our submission is there is so far as we can identify nothing in the documents which suggests that the process will be materially more onus at the opt-in stage than it would be at the distribution stage.

To be clear, the consequence of that argument is not that an opt out class will never be suitable or viable. It is not the death knell for an opt-out regime in the way that was submitted yesterday. This case is exceptional. The extent to which there is a mechanism for identifying and contacting class members is exceptional. So in a classic cartel case there might well be real difficulties in identifying the potential victims and persuading them to come forward.

We say that is a situation which might well justify opt-out proceedings, but it is not this case. That does not mean that opt-out proceedings are somehow going to be emasculated and never used again. That's exactly why in my submission the Tribunal is urged by the rules and the statute specifically to consider whether or not to certify on an opt-in or an opt-out basis and that is the reason why the burden is placed on the PCR to demonstrate that an opt-in proceeding is not practicable.

The PCR's counter arguments are all attempts to draw some sort of distinction between the position at the opt-in stage and the position at the distribution stage, and I don't know, sir, if this may assist in your assessment of the question, if we work through the distinctions that the PCR has purported to draw between the situation at the two stages.

They are in Mr Le Patourel's first statement, so that's core bundle, tab 4. Look first at paragraph 32 which begins "In summary" and is the summary of his reasons why he says it would not be practicable to put these proceedings on an opt-in basis. He says:

"Even with most intensive efforts to notify claimants and even if they were offered every conceivable way to register their claim, forcing members of such a disengaged and technically unconfident group to opt-in to a little known process concerning a claim about technologies they don't really understand, would inevitably lead to a huge drop out rate even among those who were aware they might be due damages."

In my submission none of those factors that the PCR has there identified actually change at all as between opt-in and distribution. So insofar as you have a disengaged and technically unconfident group, those characteristics will be consistent as between the point at which they have to opt into the

proceedings and the point of distribution. That's not going to change.

In so far as it is a little known process concerning the claim about technologies they really don't understand, again it is still a little known process at the distribution stage. That's not in my submission a relevant distinction.

Now Mr Le Patourel elaborated with reasoning in his second statement. That's at tab 10. Starting at paragraph 34, he says:

"I remain of the view that the Proposed Class Members are likely to be deterred by the hassle and uncertainty involved in opting into a claim against BT."

He also then goes on at paragraph 35 to draw a distinction between opting in to a not well-known procedure at the outset where it is uncertain what it entails, and whether it will produce any results and taking steps to collect compensation that's owed and readily available in light of a judgment that's found BT's conduct to be unlawful.

So he is trying to draw a distinction between those two stages of the process. My submission is that both procedures are unknown. So there is no real distinction between opting in at different stages. There is no evidence that it would be materially more work or hassle to opt-in at the earlier stage rather than at the distribution stage, and I have shown you the PCR's distribution plan, that there is the intention to ask class members to fill in a claim form even if the claim is opt-out. You don't see any identification there of any concrete respect in which it would be more onerous or detailed to fill in a form at the opt-in stage. There is zero practical difference between asking them to do that, in my submission.

Given that there are no adverse consequences to any individual class member if the claim is unsuccessful, there is not a situation where any consequences arise if it turns out the claim is unsuccessful, then there is no reason in my

submission why the potential to get compensation rather than a guaranteed pay-out shouldn't be sufficient incentive for people to opt-in. Nothing bad happens if it happens that you are unsuccessful. You simply have a potential for damages rather than a guaranteed award of damages, but in my submission that should be enough.

Paragraphs 36 to 42 in Mr Le Patourel's second statement are setting out the demographics and the attributes of the class. You have my point that we don't accept that most or even the majority of the class necessarily share these attributes. Nor do we accept that these are a bar to the participation in collective proceedings, but insofar as they are, then they are a bar at the opt-in stage and at the distribution stage. There is no relevant distinction.

MR RIDYARD: I understand.

MS FORD: He then sets out at 38 a lack of legal expertise. He says:

"I doubt that many Members will have the legal knowledge required to make an assessment of the legal merits for the purpose of taking proactive steps to opt-in to legal proceedings."

In my submission there is no requirement or expectation that participants take legal advice. The distinction between opt-in and opt out in the guidance that I showed the Tribunal is simply a recognition of the fact that those who opt-in the will have taken an informed decision to participate, and reading in a requirement that members of an opt-in class must be capable of assessing the merits of a competition claim themselves would run counter to the general preference for opt-in claims and the onus on the PCR to justify where they are trying to advance an opt out claim.

In paragraph 43 it is suggested that consumer loyalty might prevent customers from opting in. In my submission again there is no reason why any consumer

loyalty would operate differently between the opt-in and the distribution stage. There is also a suggestion that customers might consider it too confrontational, risky or intimidating to countenance the claim. We find that a quite extraordinary suggestion and a pure assertion on the part of the PCR.

Turning to paragraph 48, you see the PCR expresses concerns about significant delay in reformulating the action as an opt-in claim. We find that a surprising point to be made, given that the PCR has taken four years since 2017 to bring this proposed claim, but in any event under opt-out proceedings class members won't be asked to identify themselves and join the proceedings until there is an award of damages, and on the PCR's own litigation plan that wouldn't be until 2027.

By contrast on an opt-in basis class members will be deciding to opt-in to the proceedings materially sooner. So, if anything, that minimises the risk of persons in the proposed class not joining due to the effects of the effluxion of time.

So for all those reasons in our submission Mr Le Patourel's evidence has not identified any material distinction between the opt-in stage and the distribution stage.

MR RIDYARD: Thank you.

MS FORD: I said that there were two additional factors we rely on in support of our submission that this ought, if anything, to be an opt-in proceeding. The first is the merits. We have already submitted that they are weak and that's something you are entitled to take into account.

Secondly, we say that certifying on an opt-in basis would assist the Tribunal in grappling with the issue of pass-on. We have included in the bundle the Supreme Court's judgment in Sainsbury's v Visa, which explains the pass-on

issue. It is the second authorities bundle, tab 29.

As the Tribunal will be aware, this is the Supreme Court's judgment in the Interchange Fee litigation. What it held was that merchants that paid an overcharge due to multi-lateral interchange fees can advance that overcharge as the prima facie measure of their loss, but insofar as those merchants have either reduced their costs or passed on their costs by increasing their charges to customers, that has to be taken into account as a potential means of mitigating loss. You can see a summary of the relevant principles at paragraphs 205 to 206. You see in 205 the Supreme Court identifies -- this is right towards the bottom of the first page:

"There are four principal options. The merchant can do nothing in response to the increased cost, and thereby suffer a corresponding reduction of profits or enhanced loss. The merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure. The merchant can seek to reduce its costs by negotiation with its many suppliers or the merchant can pass-on the costs by increasing the prices which it charges its customers."

You see at 206:

"In our view the merchants are entitled to claim the overcharge on the MSC as the prima facie measure of their loss. But if there is evidence that they have adopted either option 3 or option 4 or a combination of both to any extent, the compensatory principle mandates the court to take account of their effect and there will be a question of mitigation of loss, to which we now turn."

It goes on to deal in more detail. That's essentially the possibility we are dealing with and it arises because Ofcom estimated that around 17% of Standalone Fixed Voice customers are small or medium sized enterprises who purchase

residential landlines for business use rather than specific business products. Now that was very much an estimate on Ofcom's part and we say that those business customers are likely to have passed on their standalone voice call charges to their customers. So for that reason it is important to know what proportion of the class are, in fact, business customers and to obtain at least basic information about costs and pricing to enable a reasonable assessment to be made as to the extent of any pass-on and whether their damages should be adjusted by reference, for example, to VAT. Both of those matters self-evidently would affect the amount of any aggregate award of damages. The point we make is that if these claims were certified on an opt-in basis, then the Tribunal could ascertain at the opt-in stage at the very least what proportion of the class were businesses to which this issue actually applies. We are not saying that you need to accumulate detailed data on costs and prices, but we are saying that the Tribunal does need to have some sensible means of grappling with this issue. To rebut another suggestion that was made in the reply, we are not claiming that this is an insuperable difficulty or an insurmountable hurdle. This is not an objection that would mean that collective proceedings could never be brought on the part of businesses. We say it's a factor that the Tribunal is entitled to take into account in having regard to all the circumstances under rule 79(3)(b) and we say it is a factor which weighs in favour of opt-in proceedings in addition to the various other factors that we have identified which weigh heavily in favour of opt-in proceedings.

MR JUSTICE WAKSMAN: Yes.

MS FORD: So the PCR has argued that businesses will account for a small minority of the proposed class and that the 17% figure may be too high, but we say

that's exactly the point. We don't know what proportion it accounts for. It is clearly capable of having a material effect on the aggregate award of damages.

The PCR has also sought to argue that it will be possible to estimate the number of members of the proposed class which are businesses, taking as a starting point Ofcom's 17% figure and then using BT's own data. Ofcom's data was clearly a high level estimate and Mr Bunt has dealt with the extent to which BT's data enables you to tell which are businesses in his statement. I will just give you the relevant paragraph. It is core bundle 6, page 351.

He explains in paragraph 24 that the way this arose was that BT gave voluntary commitments which only applied to Voice Only Customers. They didn't apply to customers who were using the residential product for a business purpose. So it was necessary to consider to what extent you could identify people who were actually using it for a business purpose. He says:

"Together with my team I had hoped that we would be able to identify those customers who were using this residential product for a business purpose as they would be excluded from receiving the line rental reduction, but when we looked into it further we realised that there was no means of doing so within the timescale, which was effectively four months."

So he then goes on to explain what is involved. He says at 25:

"As far as the Voice team was aware at the time the only means through which we could identify those customers who had signed up to SPV products for residential use but were, in fact, using them for business purposes, would be by conducting manual checks against Companies House records."

So that's if you had actually incorporated as a business. "For example, and by checking their billing history to see if they had request a bill that separates out

VAT, which applies to those VAT registered customers who had requested this service. Such a check would not capture those businesses who are not VAT registered, which would probably cover many of the businesses in question."

So those are the sort of manual checks that you would have to do on a customer by customer basis, you appreciate the onerousness of that as an exercise, but he then says at 28 that the way in which the voluntary reductions were then applied was to rely on the honesty of customers. A coupon was sent out and there was reliance on the honesty of customers that they would not send it back and try to claim the deduction if they were not eligible for it. Then he confirms at 29:

"I understand that BT's current customer data will to this day not allow us to identify which of its customers who might be eligible members of the proposed class are or were businesses without conducting the manual checks that I referred to above. Even if those checks are conducted, it will only provide a snapshot of customers operating a business currently, rather than those who might have operated a business at an earlier stage in the claim period and will not pick up unincorporated sole traders and other small businesses, many of whom are run from home, who are unlikely to be VAT registered."

So it is not a complete process and it requires a very onerous process of manual checking to establish whether any individual person is a business. So in our submission the suggestion that you can rely on BT's data to resolve this problem is not going to work.

Next it is said that these issues of pass-on are hypothetical and premature in circumstances where BT has not actually filed a defence yet. Self-evidently we haven't, because that is the stage at which the CPO has reached. That

does not mean in my submission that the PCR can simply bury his head in the sand and not deal with an issue that we have put him on notice that we are going to raise and which materially impacts on the merits and the quantum of the proposed claim.

Thirdly, it is suggested that BT's case on pass-on is weak because if you assume that businesses are competing with other businesses that buy competitively priced telephony services, then they will not be in a position to pass-on any overcharge. That's the case that's put against us, but in our submission you can't make that assumption, because the competing businesses might well have equal or higher costs, particularly if they are purchasing a business phone line rather than a residential phone line.

But in any event clearly the Tribunal can't decide now whether there was, in fact, pass-on or there wasn't. That's why in my submission there does need to be at least some basic data to enable it to determine that question.

Finally, it is suggested that you could simply apply a discount at the distribution stage when businesses would be asked to identify themselves, but while that might prevent over recovery by any individual claimant, it would not prevent the overall aggregate damages award from being over-inflated by reference to a potential failure to take into account pass-on. So we say that this is another factor which militates in favour of certifying these proceedings, if at all, on an opt-in basis.

So for all those reasons, in our submission, if the CPO is to be certified, we say it is clearly both practicable and preferable for it to be opt-in rather than opt-out.

MR JUSTICE WAKSMAN: Thank you.

MS FORD: My junior has been looking at the position on March 2021. I am being handed bundle 6A, the reply bundle, tab 3, page 63. On the relevant

page there is a heading: "Split Purchase Customers and refunds for overpayments". You see under 3.19:

"As noted in our December 2020 consultation and 2017 review, split purchasers are typically younger and more technologically literate than voice-only customers and by definition have internet access which enables them to access alternative offers more easily. Unlike voice-only customers, split purchasers have a wider range of choice available to them such as dual play bundles. We also note that our new rules on end of contract notifications… will mean that customers will be advised through those notifications that they may be able to save money by bundling their services. We therefore remain of the view that it is appropriate to exclude split purchase customers from the scope of the commitments."

MR JUSTICE WAKSMAN: Thanks.

MS FORD: Unless I can assist the Tribunal further, those are my submissions.

MR JUSTICE ROTH: Thank you very much indeed for that. Well, it is just before 3 o'clock. So I think what we will do is have our break now and then we will start after that with Ms Kreisberger's reply. So 3.10, please.

(Short break)

Reply by MS KREISBERGER

MR JUSTICE WAKSMAN: Yes, Ms Kreisberger.

MS KREISBERGER: Thank you, sir. Sir, if I may, I will broadly take the points in order in which they arose.

So to begin her submissions yesterday Ms Ford referred you to a passage from the Merricks judgment. That was paragraph 154. I am not suggesting we need turn it up again, but I would like to make two comments on that passage.

The first is that passage is concerned with unmeritorious CPOs. Lord Sales refers to deficient expert methodologies in that passage, he says, which are likely to run into the sand and not be viable. That's not the situation here. It doesn't apply. For all the reasons I have laid out, which I will not be repeating, the CPO in this case is well founded, realistic and meritorious.

In any event I would just observe that she is there relying on a passage from the minority judgment. It is not a point you find in the majority judgment, otherwise she would have referred you to that.

Sir, Ms Ford then spent quite some time in her submissions tilting at windmills. She laboured the point that there can be, and I am quoting, "No automatic read across between an analysis conducted by Ofcom under the Communications Act and an ex post competition analysis, whether that might be in terms of market definition, SMP, dominance or abuse". She said, "There is no automatic read across between them."

She is tilting at windmills there, because we don't rely on an automatic read across. Any case at the intersection of regulation and Competition law must be judged on its own facts. Purely by way of illustration, to take one case she relied on, Deutsche Telekom, just a very brief word on that, without turning it up.

It does not support her position, because in that case, and she took you to the facts fairly, Deutsche Telekom's charges were subject to regulation. Its wholesale access charges had to be approved by the Regulator and retail charges for narrow band were regulated by a price cap system. So Deutsche Telekom was subject to regulation. Its prices were subject to regulation. The Commission nonetheless found that Deutsche Telekom had nonetheless engaged in an abusive margin squeeze and that was upheld by the General Court, and also the Court of Justice.

Just to highlight for you the judgment of the Court of Justice was not put in the bundle. Ms Ford relied on the Court of First Instance, the General Court. I don't think there is any substantial difference because the General Court was then upheld by the Court of Justice, but so you have it for your note, the paragraph -- it has now been added to the bundle at 8C, tab 19, and the Court of Justice said this:

"The same applies to the appellant's claim that the purpose of regulation is to open up the relevant markets to competition. It is common ground that that regulation did not in any way deny the appellant the possibility of adjusting its retail prices for end user access services or therefore engaging in autonomous conduct that's subject to Article 84. Since the Competition rules laid down by the EC Treaty supplement in that regard by any ex post review the legislative framework for ex ante regulation."

In other words, the prices were fine as far as the Regulator was concerned. They still were abusive.

MR JUSTICE WAKSMAN: What's the paragraph number in the Court of Justice?

MS KREISBERGER: I am sorry. It is paragraph 92. I don't think it has internal numbering, but it is page --

MR JUSTICE WAKSMAN: That's all I need to know.

MS KREISBERGER: Thank you. That case is a world away from our case where we have prices which were found to be anti-competitive in terms by the Regulator, and we say they are also anti-competitive under Chapter II.

As to Miss Ford's point about no equivalence, I think it is important to draw to your attention Section 78(1) of the Communications Act. She said there's no equivalence between SMP and dominance in quite emphatic terms. I will just give you the reference and read it out. The reference is bundle 8A, tab 4,

page 11, Section 78(1), which says this:

"For the purposes of this chapter a person shall be taken to have SMP in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market."

That's in the statute. As it happens, Ofcom said in terms that BT is dominant. Again just for your note that's at paragraph 112 of the statement, 6A, tab 10, page 599.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: She also submitted the imposition of a price control does not equate to a finding of abuse. We agree there is no automatic equation.

With respect, sir, dealing in generalities at this level is not helpful. I don't say here to you today every price control establishes abuse of conduct. I hope it is clear I say that there's good prima facie evidence of an abuse on these facts based on the evidence in the public domain. My submissions address this case, not every other situation which might conceivably arise.

Now Ms Ford went on to say that "Mr Parker's evidence might have some force" -- again I am quoting -- "if Mr Parker could actually point to some new analysis". Then she seemed to mark his homework through that lens. Again, with respect, that is simply the wrong question to ask; is there anything new? The right question to ask is whether Mr Parker's assessment is well founded given the evidence available?

The fact that Ofcom looked at the evidence first does not exhaust its relevance for our purposes. Her submissions beg the question what was Mr Parker to do? Why should he not take account of the most up-to-date and comprehensive body of evidence in the public domain? Of course, it is a virtue, not a vice, that they are in agreement on all points of significance, which are market

power; what is the right reference point for the competitive price level -- that's the 2009 benchmark; thirdly, that BT's prices are far in excess of the competitive level -- that's applying the benchmark; and that they cause consumer detriment and need to be reduced. As Ofcom said, action is needed now.

So these are the points. She has not presented any good reason why Mr Parker is wrong on those points or that Ofcom is wrong on those points.

She then moved on to the detailed and many criticisms of Mr Parker. Her first one is that he ignored competitive interaction between SFV services and bundles. She said Mr Parker completely failed to take into account bundles. I did cover this in opening, but it is important to emphasise that he didn't fail to take them into account. He did take them into account and we have his evidence on that. For the purposes of this reply he makes two important points.

The first, is looking at the pricing of these two services he found a substantial price gulf which led him to conclude that bundles and SFV services are in separate markets. They do not compete and bundles do not constrain the price of SFV services.

Now Ms Ford talked about the dynamic in the wider market. I don't know what she means by the wider market, but if we are talking about economic markets, they are separate markets, and that's what Ofcom found and that's Mr Parker's evidence. There are three markets: SFV Voice Only, SFV Split Purchase; and then there are the dual bundle markets that don't concern the abuses here.

That was Mr Parker's first point. Mr Parker's second point on looking at the interaction between bundles and SFV services is that hiking the price of SFV services in order to incentivise bundle uptake, that's BT's narrative here,

Mr Parker says that's irrational, one reason being that bundles are a competitive market, so if you try to shift -- if BT hikes the price of product A to shift people to competitive product B, it might lose that customer, because they will go to a rival provider of bundles.

Now I will not go through all his evidence. I did set it out in opening. So you have it, it is Parker 2, paragraphs 3.12 to 3.24. It is 3.12, 3.14 and then 3.15 to 3.24. That's at bundle 6, tab 7, 327. So he explains it is irrational. Those are Mr Parker's two points.

I will add a third point of my own, which is whether or not this was the motivation for BT, and, as I said earlier, we would need to see their documents to test that claim, because Ofcom were not convinced by the narrative that to them, but even if that was their motivation, it is not the relevant question. If that's why they did it, Mr Parker regards that as irrational.

The relevant question -- this is a legal test we are dealing here -- we are replying -- the relevant question is were the impugned prices, that's the prices for the SFV services, were they significantly and persistently above the competitive level?

Her next criticism relates to the area of abuse. She advanced two propositions. She said you have to apply limb 1 and limb 2 and that Mr Parker failed to apply limb 2, the price unfairness limb.

I have got three answers. The first point is academic. Whether or not as a matter of law you have to apply both limb 1 and limb 2, and one could have an interesting debate about it, the PCR does rely on limb 1 and limb 2. Our case is not put on the footing of one limb only. Let me give you the reference to our pleading on that so it is very clear. That's claim form, paragraph 132(b) and 132(c), which is at bundle 1, tab 1, page 52. It has always been our

express case that the price is excessive for the purposes of limb 1 and unfair for the purposes of limb 2.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: Secondly, Mr Parker's evidence does go to limb 2. That follows on from what I have just said. Thirdly, a price which is excessive because it is significantly and persistently above the competitive level is unfair. That's the exchange Mr Ridyard and I had yesterday.

Let me develop some of that just briefly. When I say we do rely on limb 1 and limb 2, Ms Ford throughout her submissions repeatedly referred to the 2009 competitive benchmark as a cost plus benchmark. Somewhat baffling. It is a cost plus benchmark, as Mr Parker says in terms in his evidence, but it is obviously a pricing --

MR JUSTICE WAKSMAN: Are you having problems hearing? Just a moment, Ms Kreisberger.

MS KREISBERGER: Shall I continue?

MR JUSTICE WAKSMAN: Just go back, because your voice became muffled there. We were back where you said you do put your case on the basis of -- oh, you were dealing with Ms Ford's description of the 2009 benchmark -- related benchmark as costs plus.

MS KREISBERGER: So it is, of course, a cost plus benchmark, as I developed yesterday, but it is also a pricing benchmark. By definition it is a benchmark based on actual prices charged by BT in the market in 2009 at a time when its costs were higher than they are today.

Just pausing there, this case is much simpler and more straightforward than a lot of cases in the jurisprudence, because, as I explained yesterday, one has often Competition Authority claimants having to build competitive benchmarks up

from the bottom, working out what might be the relevant costs, how do you allocate costs, what's a reasonable competitive rate of return. In this case we have got a price. It was actually charged, and more than that, it is not simply that the price was charged. We know, and I reserve my position as to whether 2008 or 2009 is the relevant year -- I don't want it to be said against me later that I conceded that -- but we know it represents the competitive price level, because Ofcom removed retail regulation in 2009. So they said "There is no SMP. These prices are competitive". That's why it is such a good benchmark.

So it is just wrong to say it is not a price comparator for addressing fairness under limb 2. It is. It is also a cost plus comparator for limb 1. I have been over that. Just to be clear, any actual competitive price will work as a cost plus comparator. If one knows that a price actually charged was competitive, that by definition means it covers costs, it reflects a competitive rate of return, because competition drives prices down to costs to the economic understanding of costs.

MR JUSTICE WAKSMAN: Just on that point you say, apart from your pleading, that Mr Parker has identified what the unfairness is under the second limb. Let's just assume there are two limbs for the sake of argument. Can you encapsulate what that unfairness is, assuming for the moment that one is saying there is excessive or high prices under limb 1 by reference to at that stage the cost plus? What is the unfairness?

MS KREISBERGER: Someone will give me the references to his first report, but can I deal with it in this way, and no doubt Mr Ridyard will pick me up on this if he disagrees, but I think unfairness it is fair to say is a legal term. It is not a term recognisable to economists.

MR JUSTICE WAKSMAN: Right.

MS KREISBERGER: So the question is what is unfairness from the perspective of an economist, and, of course, in an expert report an economist has to tread carefully and not express views on the law.

MR JUSTICE WAKSMAN: That's ultimately a question for me, yes.

MS KREISBERGER: So what is an unfair price? An unfair price is a price which is excessive because it is significantly and persistently above the competitive level.

I am grateful to you, sir, for raising this. It is an important point, which means we should go back to Flynn, which is now the seminal authority on this, and go back to what now may well be well-thumbed in your bundle, which is paragraph 97. I will just pull out the correct reference. So it is tab 28, page 1279. Lord Justice Green said this:

"The basic test for abuse (i) is whether the price is unfair."

That, sir, is the legal test and it is the test you see in the statute.

"In broad terms a price would be unfair when the dominant undertaking has reaped benefits which it could not have obtained in conditions of workable competition."

That's where you give it an economic meaning. So "unfair" in the statute means it is something that could not have been obtained in a competitive market; in other words, it is a super-competitive price. It is above a competitive price.

"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. It is (ii) that answers your question."

So if the price is excessive, then it is unfair, and then they go on it talk about how you might go about establishing that and that's when you get into cost plus

and price comparators and so on, but if you have a price that is excessive compared to the competitive level, economic value is the level of the good in a competitive market.

So if you have a price which is excessive, remembering my caveat yesterday, very clear, that it has to be significantly and persistently so -- it is not a short-term spike -- but if it is significant and it is persistent, an excessive price is an unfair price.

So if it is Mr Parker's evidence, which it is, that the price is excessive compared to the competitive benchmark and it is persistently and significantly so, then one can draw from that the inevitable conclusion that it is unfair for the purposes of Chapter II. It meets the legal test. That is the framework.

MR JUSTICE WAKSMAN: What you are really saying, as I understand it, is that here by reference to the analysis of 2009 plus, if I can call it that, for the adjustments for the different -- the costs, you are saying that the first part of the exercise -- because if you look at (v), if one looks at (v), which is in the context of a cost plus test, he is clearly talking about two limbs there. You can use your cost plus test to show that the margin is excessive in that sense by reference to the cost plus test. Then you have to go on and compare the price charged against any other factors which might otherwise serve to justify the price as not being abusive.

MS KREISBERGER: Yes. You look at all the evidence, but you see he says:

"If a cost plus price is applied, you can compare cost of production with the selling price in order to disclose the profit margin."

So there he is using "cost" not in the economic sense which Mr Ridyard put to me yesterday, because the profit margin includes the reasonable rate of return. So, in other words, he is saying -- and you see this in some of the cases --

you just work out what did it cost the undertaking to make the product and you compare it to the price. So that's a very basic comparison of cost incurred versus -- actual cost incurred versus price, and you look at the margin and you say it is excessive.

There is no doubt if you then have price comparator evidence -- let's say you have a competing product supplied by a non-dominant firm -- you would, of course, look that then if it is available.

I am going to come back in just a moment to what do you do with the evidence, but he is very clear that you might just look at one piece of evidence. You look at what there is.

Now I am just trying to pick up. As I said, we have got the benefit here of an actual competitive price, which gives you both cost plus and fair price, competitive price level. I just want to make sure that you have the point that in other cases that sort of evidence is not available.

Ms Ford took you to Deutsche Post. In that case -- and I am not going to take you back to it, but, if helpful for your note, it is at 8C, tab 8, page 83, and the point I am about to make is paragraph 95. Deutsche Post is a monopoly. It's one of these classic essential facility type cases. As Mr Ridyard pointed out, when you have a monopoly, you don't have price comparators in the market. There's only one supplier. So in Deutsche Post they had to grapple there with how do you get to a hypothetical competitive price? You have to identify the relevant costs, allocate the costs, add in your competitive rate of return. You do it all from the bottom up and you don't really know if your answer is accurate or not, because if it's a fair reflection because it is synthetic, it has been worked up -- we are not having to engage with any of that here. We have an actual price charged in the market. The Regulator looked at it and

said it was fine. So when Ms Ford says this is a very basic and superficial analysis, I would say that is a rather unfair characterisation of the case.

Now the other point she makes is about the two limbed test. She says -- as I say, I am not going to get drawn into a debate about the two limbs. I am just going to focus on the facts here rather than generalities. She criticises the fact that he uses a single benchmark for both limbs. That's why she said a number of times what has been done is very superficial and very basic. It is extremely limited. She went on to say it is extraordinary. That's an emphatic submission there. It is also wrong, because the Court of Appeal emphasised that a single benchmark is all that's required.

So if we go back to Flynn, Court of Appeal, paragraph 125, Lord Justice Green said this. I need only read out the first sentence:

"In my view by the nature of the abuse in issue there needs to be 'a' benchmark."

You just need a benchmark.

MR JUSTICE WAKSMAN: Sorry. Which paragraph was that just for the note?

MS KREISBERGER: Paragraph 125 at page 1289.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: So no problem at all with a single benchmark. In many of the cases you get single benchmarks. Ultimately you have to work with what you have.

Sorry, sir. Could you just give me a minute? I think I have the wrong version of my reply submissions. Sorry, sir. I am rustling my papers.

So, as I said, Deutsche Post, single benchmark, because there were no competitive prices, because it was a monopoly. In AKKA/LAA they could not do the cost plus analysis. You work with the evidence you have.

Now one final point I need to make on the cases. Ms Ford relies on Advocate

General Wahl for the proposition that you have to apply both limbs and an array of evidence and that's why the analysis here is superficial. She referred to the fact that I relied on Advocate General Wahl.

Let me make two points. I went to Wahl for a single point. It was descriptive purely. I took you to a passage where he describes benchmarks used in other cases. That's all. He refers to pricing benchmarks, which are time, geography and competitors, and our pricing benchmark is time, because we don't have competitive prices from competitors.

That's all I relied on him for. I would not rely on him for anything else, because, apart from the fact it is only an Advocate General's opinion, his opinion does not represent good law and came in for quite some criticism by the Court of Appeal. So we do need to go to that. In fact, his opinion was not even accepted by the Court of Justice in that case, but let's see what the Court of Appeal said.

So going back to Flynn, this is paragraph 81 at page 1274. Could I just suggest you read paragraph 81 quickly?

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: The whole section is relevant, but 81 and 86 now would be useful and then perhaps the paragraphs in between it at your leisure.

MR JUSTICE WAKSMAN: Yes. Okay. Thank you.

MS KREISBERGER: So the Court of Appeal is quite critical. So no problem with a single benchmark at all. We are at a preliminary stage here, of course, and these are final stages.

The last point. Ms Ford says that if the Defendant relies on other evidence not relied on by the Competition Authority or the Claimant, that evidence must be considered; it can't be ignored. I agree. That was CMA's fatal mistake in the

Flynn case, but one asks here: where is that evidence? For now we have Ofcom and we have Mr Parker and they are in agreement. BT has kept its powder dry for now and they have not put in any evidence. The time to test their arguments will be at trial when they do. That deals with abuse.

SPCs. Ms Ford made an array of points. I think most of them or all of them were addressed in opening, but can I summarise the position on Split Purchase Customers as follows.

They have paid the excessive price, the very same price which Ofcom found to be excessive for Voice Only Customers, which Mr Parker regards as excessive. They continue to pay the excessive price to this day. They suffered detriment accordingly. Ofcom is very clear about that. They continue to suffer detriment. For your note that's at statement, paragraphs 350 to 352, which I took you to yesterday.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: And an information remedy was put in place. So that's Split Purchase Customers.

MR JUSTICE WAKSMAN: If that's all you are going to say on Split Purchase Customers -- I am not inviting you to say any more -- can I just be clear about this? I know this is not your case, but if the Tribunal came to the view that there was a real prospect of success in relation to Voice Only but not SPC, are you running an alternative case or is it all or nothing as far as you are concerned in terms of what the CPO might cover?

MS KREISBERGER: That's a point on which I would need to take instructions, sir.

MR JUSTICE WAKSMAN: Yes. I just think for the sake of completeness we need to know your position on that. Thank you. You can come back later on, if you want to move on to something else.

MS KREISBERGER: Thank you, sir. We will take instructions on that.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: Price leadership. Can I just to ensure you have it for your note give you the reference? That's Parker, paragraphs 352 to 353 at bundle 6, tab 7, page 335. I confess I did not quite understand Ms Ford's submission about prices in terms of rivals' prices. She seemed to say they would charge those prices anyway in conditions of competition. I am afraid I don't follow that.

Mr Parker's evidence is that BT was in a position of price leadership because of the strength of its market power. Others simply followed up to the umbrella. So there is no real world competitive benchmark available here for SFV prices. The market is characterised -- sorry, Mr Ridyard.

MR RIDYARD: Sorry. I just wanted to clarify your position on these other prices. Are you saying -- there are two scenarios in which their prices could be high -- equally high to BT's. One is that they also have got their own sort of inert customers, you know, who don't shop around and therefore they just do the same thing that BT is doing but just on a smaller scale. The other is that they compete with BT, but they choose to charge the same price as BT, because BT has such a big market share you might as well follow the price leader in a competitive situation rather than undercutting them. Which is the scenario that you are describing when you look at the competitor prices?

MS KREISBERGER: I will be corrected if this is wrong, but Mr Parker's evidence covers the latter situation. So BT has such a strong market position that there is simply price leadership. That is not to say that the former is also in issue. I don't know, but Mr Parker's evidence is clear that they are sheltering under the umbrella of BT's prices.

MR RIDYARD: Thanks. That's what I understand you to say. Thanks.

MS KREISBERGER: Thank you.

So I move on with that to mitigation. Just a brief word about mitigation. I took you to the relevant authority yesterday, which says mitigation is a case of what is reasonable in the circumstances. So this is simply not an issue we can engage with now. It needs to be tested at trial. It is wholly disproportionate to raise it at this stage. It is incapable of inflicting a knock-out blow on the question of whether BT should face a trial on its excessive charges. Mitigation will need to be addressed in due course on the facts to test whether the class members acted reasonably, but I gave you my illustration yesterday of an elderly person with no fixed broadband. BT's position is they should have shopped around, irrespective of whether there were any competitive prices available in the market before we get to that, but it is certainly an ambitious submission to say this set of consumers failed in their duty to mitigate. As Mr Le Patourel points out, they would have had to call centres to find out what else they might do and then the answer would have been, "There are no cheaper SFV services anyway". So this all has the air of unreality and it is not an issue which seriously arises at this stage of the proceedings. So that's mitigation.

Sorry, sir. I am just getting a reference on the price leadership point. So it is Ofcom's -- so this is a reference in the Ofcom material to price leadership in response to Mr Ridyard's question. So it is Ofcom's provisional conclusions, bundle 2, tab 6, page 376. Sorry. I will just get the paragraph. 170. Paragraph 170.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: Thank you, sir.

So I move on then to deal with distribution. Ms Ford raised the issue of Rule 93. We have heard about that for the first time today. Rule 93 does not pose any obstacle to what we now understand to be possible at distribution thanks to BT's helpful evidence on the point.

So let me go through the points on this. First of all, it is important, sir, that you bear in mind that matters related to distribution were said by the Supreme Court to be largely premature at certification. So my submission is matters relating to distribution concern practicalities which should not present an obstacle to certifying a good CPO, first point. One needs to be pragmatic, as you pointed out, sir.

Secondly, and really the reason why the Supreme Court said that, is that we are at a very early stage and we wholly anticipate exploring different mechanisms for distribution as the proceedings go along, in particular when we have the benefit of disclosure. At the moment we are revising the approach to distribution based on Mr Bunt's evidence, but we will need to see disclosure to see what can be done. We will need certainty.

So, subject to the fact that we are at an early stage, there are various ways in which distribution could be achieved by compensating class members directly, and I am just going to offer one by way of illustration that we think would be a pragmatic and effective way forward and, importantly, it is perfectly consistent with Rule 93. I am looking here at Rule 93(1)(b), which provides that:

"An order may be made to such person other than a represented person as the Tribunal thinks fit."

Such a person could be, and one would anticipate will be in a CPO, a claims administrator. So we would have an order that damages are paid by BT to

the claims administrator. The claims administrator will then have the great benefit of BT's customer records. So if the claims administrator could be provided with those records, the administrator can then effect distribution accordingly, possibly by direct reimbursement based on those customer records.

Of course, if the parties are agreed and BT wishes to do it itself, that's also an option that could be explored. There are various options. We certainly need not tie our hands now, but pre disclosure it is my submission that we should not get distracted by these details, which are the mechanics, the mechanism.

MR DORAN: Ms Kreisberger, just one little point on 93(1)(b):

"Such person other than a represented person."

Are you encompassing that such a person could be BT itself, who will then just distribute the money by the details it already has?

MS KREISBERGER: That is another option that occurs to us. As I say, I think more likely it would be a claims administrator, but there is no reason why BT could not be, but perhaps if I could say this to you in relation to how 93 works.

93(1) is referring to the award of aggregate damages. So that is the total number. So it is envisaging that the total award of 400 million, for instance, is paid to either the class representative or another person. Then there will need to be some sort of mechanism for distributing, which can be provided for, but the order for paying damages refers to aggregate damages. It is not referring to the individual payments. Directions can be given for distribution. That's rule 92.

Sorry, sir. I just want to check one point.

Yes. So 93, as I say, is simply referring to aggregate damages. Now I like the suggestion that BT could be the person. I am certainly not in a position to say

that's wrong. That may be another way round it, but in any event whether the amount is -- the amount could be paid to the PCR -- he would be the class rep at that stage -- and then directly reimbursed through some mechanism to the class members, but what you would never see under 93(1) is an order that particular individuals will be reimbursed directly. That's not the -- the aggregate damages is the pot. That's the 93(1) order and then you need a mechanism to provide for effective distribution.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: It may be that a third party is the right way to do that. I don't think we need to decide these points now.

MR JUSTICE WAKSMAN: Thank you.

MS KREISBERGER: As I say, pre disclosure I think there's a danger in being distracted by the details, by the mechanism, but the CPO regime is certainly capable of allowing the distribution to take place in this way.

The much more important point is that this application for a CPO ought in my submission ought to be governed by the overarching principle that effective and full compensation is ensured. I referred you yesterday to the Supreme Court's dictum that compensation must be full. There must not be under-compensation. In this case any procedure but opt-out will result not in under-compensation; it will result in no compensation, and that's why BT makes these submissions to kill the case.

So in my submission any doubt that the Tribunal has must be resolved in favour of the opt-out mechanism to ensure effective compensation for victims of anti-competitive abusive conduct. The rest is distraction.

Sir, then we have BT's point about equivalence between distribution and opting in. Now I have addressed distribution. That can be made simply and easily

without participation of the class members. To the extent Ms Ford took you to the notice and administration plan, that was drafted before we had BT's evidence that they have all the contact details of existing and former customers, and if I could just draw your attention to the CAT guide at paragraph 630, the very last sentence of paragraph 630 is:

"If a CPO is made, the plan may be subject to revision as the litigation proceeds."

That is the very nature of these types of claims. So with the benefit of disclosure one would be looking to revise that plan. It shouldn't be done before disclosure.

So that's the mechanics, but on the more important point about equivalence, whether or not distribution can be effected directly, there is no equivalence for these class members between taking the cheque and opting in to this litigation.

Now Mr Ridyard fairly asked about form filling and what might that involve. Well, could I answer in this way? Our objection is not primarily the obstacle of form filling, although that may be challenging to some. It is a question of incentives. Opting in will not happen in material numbers, because these class members will not have the right incentives to opt in. Many of them may not understand the nature of the procedure. The incentive to put up your hand to be involved in big ticket litigation against a household name for a loyal customer is unrealistic and it's for precisely that reason. It is incentives. That's why the opt-out regime was introduced. People don't do it, and this class are even less likely to do it, less likely than in the football kit case where (inaudible number) consumers put their hands up.

We have a class of 2.31 million customers, primarily consumers. Mr Le Patourel's evidence is that those consumers won't be opting in in any material numbers. They won't put their hands up to be named as a Claimant in this litigation, to be a named Claimant. I don't think I need to take you back to Mr Le

Patourel's evidence -- you have it -- on the nature of the demographic here. Any doubt should be resolved in favour of ensuring effective compensation by way of an opt-out action.

Now Ms Ford said nothing bad happens, you know, in this case. Well, what is being proposed by BT, as I said, is to defeat the opt-out action in its entirety, so there won't be vindication of these customers' rights.

Finally, my final point on this is the points she made will apply to all opt-out collective proceedings. The basic thrust of the argument is an equivalence between distribution and opting in. I have explained here why there's no factual equivalence, because distribution can happen directly without steps being taken, but in any event the argument is wrong as a matter of policy, because steps will always -- distribution will always need to be effected to the class that have not opted in, to the opt-out class. So it can't be right as a matter of policy and as a matter of principle that that is a barrier to an opt-out proceeding, because we won't get any off the ground if that is the case. That would be a very unwelcome precedent.

Sir, I think I just need to respond to you on your question. May I take a minute to take instruction on it?

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: Sir, thank you for the indulgence. We are taking instructions over WhatsApp, so there is a delay when one is not in the same room. I now have instructions.

So just responding to your question, the answer is we can't give an answer, because we do not know on the basis of funding whether a Voice Only claim would be viable. The claim before you, sir, is for Voice Only and Split Purchase and the funding is agreed in relation to that.

MR JUSTICE WAKSMAN: Right.

MS KREISBERGER: But just if it is helpful, if it is right that the prices paid by Voice Only Customers are both excessive and unfair according to the evidence, then it is also right that the prices paid by Split Purchase Customers are both excessive and unfair.

Now BT has not given any reason as to why they should be treated differently, why there is pricing unfairness in relation to one and not in relation to the other. You have my submission that that's impossible as a matter of law. So there is no -- BT have given you no reason to treat the two groups differently. If they want to make arguments about Split Purchase Customers, they can do so at trial and on the evidence, but there's nothing before you today to suggest a different treatment of the two.

MR JUSTICE WAKSMAN: Thank you. I just have one very quick supplemental on SPCs. It may relate to the analysis of SPCs more than Voice Only, but as it seems to be the case at the moment on one view the SPCs are still there and have not gone to other bundles because of inertia. If that's the reason why they have not gone over, what does that have to do with any abuse?

MS KREISBERGER: So the abuse is not -- doesn't lie in preventing them switching. So we come back to what is the abuse and what is the test for the abuse? The abuse is the charging of excessive prices.

Now your question as to switching raises questions of market definition. Now we know they are in two separate markets, given the ability to price these products so differently. If BT want to raise arguments about mitigation at trial, it seems that they will, but the question of switching is not relevant to the abuse.

It is not a defence for a dominant firm which has hiked the price of a product for

a product where it's dominant -- Split Purchasers, it is essentially a monopolist -- it is no defence for the dominant firm to say, "I have charged prices which are excessive and meet the United Brands test, significantly and persistently above the competitive level, but it's your own fault for paying them and not switching out of this market into another market entirely". That's not a defence to the abuse.

MR JUSTICE WAKSMAN: Right. Then, finally, on this -- forgive me, please -- I understand for all the reasons that you have given why you say the question of disengagement and inertia is particularly relevant on the question of opt-out as opposed to opt-in.

Given what you have just said, that we are essentially concentrating on the question of price, what is the relevance of inertia beyond the question of opt-in or opt-out, because we have talked a lot about it and about a disengaged group or a vulnerable group? What's the relevance of that so far as establishing an unfair price is concerned?

MS KREISBERGER: It is not relevant to the unfair price.

MR JUSTICE WAKSMAN: Right.

MS KREISBERGER: That's an objective test.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: So we do rely on that evidence in relation to opting in. It is critically important, and, in opening, sir, that's when I took you to that evidence.

MR JUSTICE WAKSMAN: Yes.

MS KREISBERGER: Just to give you a complete answer, it is relevant in Mr Parker's evidence to dominance and it is dealt with under the heading of "Barriers to entry and expansion". So it is relevant, but it is not terribly

significant in this case, given the market shares we have and the other indicators of dominance that I took you through yesterday. Just for completeness so you have it, it does come in there.

MR JUSTICE WAKSMAN: On dominance?

MS KREISBERGER: It comes in on dominance. It does not come in, at least the way the case is put now -- one has got to be careful -- I am not relying on that evidence to make out my case on excessive pricing.

MR JUSTICE WAKSMAN: Right.

MS KREISBERGER: My case on competitive pricing is competitive level, excessive difference between that and actual prices.

MR JUSTICE WAKSMAN: Right. Before we let you go I just want to see if either of my Tribunal members -- no.

Ms Ford, we have a little time left. You are certainly entitled to an opportunity to say anything more you would like about the interpretation of 93(1)(b). If there is a some change of position that you can detect from what Ms Kreisberger has just said or something that is genuinely new, you have time for a brief -- you have a brief moment to do that as well.

Reply by MS FORD

MS FORD: I am grateful, sir. I did have one point. I am scrabbling to find it in the bundle before addressing the Tribunal on it.

Sir, the only point that I would draw attention to is 93(3), which does envisage that:

"The represented persons shall claim their entitlement to a share of the aggregate award."

I say if we look at that in the context of the suggestion that you can do away with some sort of claims process altogether, in my submission that is not what is

envisaged by the scheme.

MR JUSTICE WAKSMAN: Right. Thank you.

MS FORD: I will just seek instructions as to whether there is anything else for me to say. Sir, nothing further from me. Thank you.

MR JUSTICE WAKSMAN: And I don't think we have got anything further.

Thank you both very much indeed for those excellent and succinct submissions, which we will now deliberate on and deliver a judgment in due course. I think we can therefore terminate this hearing. Thank you all very much indeed.

MS KREISBERGER: Thank you, sir.

MS FORD: Thank you.

(4.17 pm)

(Hearing concluded)

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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?