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Wednesday, 5 October 2016

(10.30 am)

THE CHAIRMAN: Good morning, Mr Beard.

MR BEARD: Mr Chairman, members of the tribunal, we are moving on to factual evidence, and the first witness to be called is Mr John Petter.

MR JOHN RICHARD MARTIN PETTER (sworn)

Examination-in-chief by MR BEARD

MR BEARD: Mr Petter, good morning. First of all, you should have in front of you a set of bundles -- ah, they are behind. That is a good start.

Those bundles, just for the tribunal's information, should contain material that is confidential to BT. It is obviously not material that is confidential to other parties. So some of the redactions will be different from the material you have before you.

Could you be passed bundle N1, or core 1, depending on how it is labelled. If you could turn to tab B, there is a document that, on the first page, is said to be a witness statement of Mr John Richard Martin Petter. If you turn to the back of that document, do you have a signature page?

A. Yes, I do, page 79.

Q. Is this your witness statement?

A. That's right, it is, yes.

1 Q. Just for the tribunal's note, the versions you have
2 won't have a signature on the back page because, when
3 the confidentiality marking was done, it was done on an
4 electronic version?

5 THE CHAIRMAN: You will be pleased to know that I do have
6 a signature page. Maybe I'm working on a completely
7 different version.

8 MR BEARD: Well, this will be interesting, in due course,
9 I imagine.

10 THE CHAIRMAN: I am willing to accept that Mr Petter signed
11 his witness statement, if that helps you.

12 MR BEARD: I'm grateful, sir.

13 Mr Petter, do you have any corrections in relation
14 to this witness statement?

15 A. There is one very minor point, and that is a correction
16 on the detail of the bidding strategy for the 2012
17 Premier League auction. There is a slight discrepancy
18 between the witness statement and the confidential --
19 and the annex of papers that sits behind it. There is
20 a board paper that outlines the detail of the bidding
21 strategy. The substance is essentially the same. I am
22 talking about the advantage of surprise. But there is
23 a slight difference in the tactics between rounds in the
24 auction, but it is not a matter of great importance.

25 Q. I'm grateful. In relation to that, could you turn up

1 paragraph 55 in the witness statement on page 30. Is
2 the correction you are making in relation to
3 paragraph 55?

4 A. Yes, 55(a).

5 Q. Obviously that material is marked as confidential. At
6 the moment, we are trying to keep matters, as far as
7 possible, in open. Mr Petter, if you are asked
8 questions where you feel that a response requires you to
9 give confidential information, then please do indicate.

10 Could we then turn to bundle N2 at tab M.

11 Mr Petter, is this your second witness statement?

12 A. That's correct, yes, it is.

13 Q. Do you have any corrections you want to make in relation
14 to that statement?

15 A. There are no corrections.

16 Q. If, then, you could be passed bundle R1, which is the
17 reply bundle, tab B. Is this your third witness
18 statement, Mr Petter?

19 A. That's correct, yes, it is.

20 Q. I'm grateful. Do you have any corrections you wish to
21 make in relation to this witness statement?

22 A. There is one, yes. I have referenced the number of
23 first pick football matches in the Premier League and
24 that we secured in 2015 football auction for the
25 Premier League. I give a number of first picks,

1 a number that I quote. There are nine first picks. In
2 fact, the actual number is 12. I got that wrong.

3 Q. I'm grateful. For the tribunal's reference, I think
4 that is, if I am right, Mr Petter, in relation to
5 paragraph 26?

6 A. Yes.

7 Q. Then one final matter. You should have there also
8 a bundle H3. Could you turn to, I think it is tab 16 in
9 that bundle.

10 A. Yes.

11 Q. This should be a three-page document entitled "Second
12 witness statement of Rowenna Mai Fyfield". Is that what
13 you have at tab 16?

14 A. That's what I have.

15 Q. Have you seen this witness statement before?

16 A. Yes, I have, yes.

17 Q. For the tribunal's note, of course, there will be
18 substantial redactions in the version that Mr Petter
19 has, by reference to the confidentiality markings,
20 anything in blue.

21 Do you have any comments in relation to the evidence
22 that Ms Fyfield seeks to give in this statement, so far
23 as you are able to see the material here?

24 A. Yes, I do. In my third witness statement, I referenced
25 the interim backstop deal and that Sky offered to us in

1 the early part of June. I reference that I had concerns
2 about that deal, that it sought to limit our ability to
3 compete, and specifically it sought to restrict my
4 ability to set prices for different sorts of customers
5 taking BT Sport on the satellite platform. There was
6 a counteroffer from BT in the early part of July, and
7 then, last Wednesday, there was a further offer from Sky
8 that came through about two and a half months afterwards
9 that -- and that differs in some respects from the first
10 offer but still in some respects seeks to limit our
11 ability to set prices and it's a very short term, as
12 well, only nine months, so I still have some concerns
13 about it.

14 MR BEARD: I'm grateful, Mr Petter. Now, I don't have any
15 further questions for you at this stage. Mr Holmes,
16 I think, for Ofcom will have some questions at this
17 stage for you.

18 As I say, if there are any concerns about providing
19 answers that are confidential, whether confidential to
20 BT, BT and Sky or BT, Sky and Ofcom, please do indicate
21 so steps can be taken.

22 Cross-examination by MR HOLMES

23 MR HOLMES: Good morning, Mr Petter. Thank you for joining
24 us today. It is good to see you again.

25 If I could explain, firstly, to you and to the

1 tribunal how I propose to deal with questions of
2 confidentiality. I will begin my cross-examination with
3 questions which I hope we will be able to deal with in
4 open session, but, as Mr Beard says, you must let us
5 know if you feel the need to give an answer that
6 includes confidential material, and we can clear the
7 courtroom.

8 I will then --

9 THE CHAIRMAN: You should err on the side of caution.

10 MR HOLMES: Indeed, sir.

11 Then I will move on to material relating to Sky's
12 and BT's dealings with one another so that the courtroom
13 can be emptied of those who are not from either Sky or
14 BT or from the confidentiality ring. Then, finally,
15 I will have a few questions in relation to material
16 which is confidential to BT alone, relating primarily to
17 questions of strategy.

18 But, as the chairman says, do at any point let us
19 know if you feel uncomfortable in your ability to answer
20 questions.

21 So, Mr Petter, you are the chief executive officer
22 of BT's consumer division, and you're responsible for
23 running BT's pay TV business?

24 A. That's correct, yes.

25 Q. You have been responsible for BT's consumer

1 communication services, including pay TV,

2 since May 2008?

3 A. That's true.

4 Q. Your first statement begins with a helpful overview of

5 the pay television sector, and there you give

6 a thumbnail sketch of some of the pay television

7 retailers active in the UK, and I would like, if I may,

8 to begin by setting those out.

9 Let's take Sky first. It distributes television to

10 its retail customers primarily by means of its satellite

11 platform; is that correct?

12 A. Primarily, but not solely, yes.

13 Q. Not exclusively.

14 A. Yes.

15 Q. It also offers broadband and telephony services?

16 A. That's true, too.

17 Q. And it retails TV over the internet under its NOW TV

18 brand and via various internet-based platforms?

19 A. That's correct.

20 Q. That was the portion of Sky's pay TV business that

21 wasn't accounted for by its satellite platform that you

22 were adverting to a moment ago; is that correct?

23 A. That's correct.

24 Q. In terms of overall numbers of subscribers, in your

25 first witness statement you give the figure of

1 12 million for Sky, of which you estimate 11 million are
2 on its satellite platform and the other 1 million use
3 NOW TV. Do you recall that?

4 A. Yes.

5 Q. I would like to take you first, if I may, to the WMO
6 statement. Now, there are two references for this. It
7 may not matter if you have a BT confidential bundle.
8 But for the tribunal, the fully confidential version is
9 at DF1, tab 4, and the BT confidential version is at N2,
10 tab V.

11 If you could turn within the WMO statement to
12 page 18 of the internal numbering, you see that this is
13 a section dealing with the pay TV sector context. If
14 you turn on to page 20, there is a table at the top of
15 the page, table 3.1, which sets out the retail pay TV
16 subscriber numbers and shares for 2010 and 2015.

17 Now, the figure for Sky for 2015, based on Sky's
18 response to a formal information request, is
19 confidential, but it should be visible to the tribunal.

20 The question I have for you relates to your
21 estimate, in the light of footnote 41. You see there
22 that Sky's published figure of 12 million subscribers
23 includes both NOW TV, as you have recognised, and
24 Republic of Ireland subscribers, as well as subscribers
25 taking broadband and telephony. So those are

1 subscribers who take only broadband and telephony, but
2 not pay TV, so Sky offers broadband and telephony on
3 a stand-alone basis.

4 So your estimate of 11 million Sky pay TV
5 subscribers is incorrect because it does not allow for
6 Sky's broadband-and-telephony-only subscribers which are
7 included in Sky's published figure. Do you see that?

8 A. Can I confirm my understanding? So the figure that you
9 are quoting -- the point you are making to me, as
10 I understand it, is that the figure that is blacked out
11 to me here includes customers taking broadband and
12 telephony but not TV?

13 Q. No, the point is a slightly different one. The
14 footnote, if you look, refers to Sky's published
15 results --

16 A. Okay.

17 Q. -- the 12 million subscriber figure which you use in
18 your first witness statement?

19 A. Okay.

20 Q. I think Ofcom is effectively explaining the discrepancy
21 between that figure and the blanked-out figure which we
22 can't see. So I am not asking you about that figure.
23 I am simply noting that in relation to the 12 million
24 subscribers, as well as the NOW TV subscribers, which
25 you don't include in your satellite platform estimate,

1 there are also broadband-and-telephony-only subscribers,
2 so that the 12 million figure needs to be adjusted to
3 take account of that?

4 A. Can I clarify one point?

5 Q. Yes.

6 A. That is that the 2010 figure includes Republic of
7 Ireland, and it is not clear to me that the 2015 one
8 does. Can you tell me if that does?

9 Q. I will come to that. It does include Republic of
10 Ireland, the figure that you see at the bottom of
11 the page, as the footnote makes clear. But the question
12 I am asking you is a different one. I am asking you
13 about the inclusion within the 12 million subscriber
14 figure that you rely upon in your first witness
15 statement of BT's telephony-and-broadband-only
16 subscribers who do not -- excuse me, Sky's
17 telephony-and-broadband-only subscribers who do not take
18 a pay TV offer from Sky. It is not a criticism. It is
19 simply an observation which I am asking you to comment
20 upon.

21 Your estimate of 11 million Sky pay TV subscribers
22 is incorrect because it does not allow for Sky's
23 broadband and telephony subscribers which are included
24 in Sky's published figure?

25 A. Can I just compare the figure that you are asking me to

1 comment on versus the statement in my witness statement?

2 Q. Of course. Let me take you to the relevant paragraph.

3 It is paragraph 11 of your first witness statement,

4 which is in bundle N1 at tab B.

5 A. What was the paragraph reference, sorry?

6 Q. Paragraph 11 on page 4 of the statement. You will see

7 at the bottom of the page you say:

8 "Sky is by far the biggest pay TV retailer, with

9 approximately 12 million pay TV subscribers."

10 Then in the footnote, "This is a BT estimate". Then

11 you say:

12 "Its channel packages are distributed primarily by

13 Sky's digital satellite platform", a point you have

14 confirmed today in your oral evidence, "on which Sky has

15 approximately 11 million subscribers".

16 The point I am making to you is that both the

17 12 million figure and the 11 million figure assume or

18 include the broadband-and-telephony-only subscribers and

19 therefore do not in fact reflect the number of Sky's

20 pay TV subscribers?

21 A. I didn't believe that to be the case, I must say.

22 I thought the figure I was quoting was solely one for

23 pay TV customers.

24 Q. That's fully understood. I'm grateful. But if you were

25 to take it from me that the published figure of

1 12 million includes Sky's broadband-and-telephony-only
2 subscribers, it would not be safe to assume, on the
3 basis of your estimate, that Sky's satellite subscriber
4 base has grown dramatically since 2010, as you suggest
5 elsewhere in your evidence?

6 A. I don't think I say that Sky's satellite customer base
7 has grown dramatically. I don't think I actually say
8 that. I think I say that their base -- their television
9 customers in total have grown, and so that is not what
10 I say.

11 Q. We will come back to that. But in relation to the
12 satellite subscriber base, you accept that you did not
13 distinguish, when you prepared these figures -- or you
14 did not consciously remove any number for broadband and
15 telephony subscribers?

16 A. Just as I say, the numbers I was giving are numbers for
17 pay TV.

18 Q. That's what you thought you were doing at the time?

19 A. Absolutely.

20 Q. Understood. The reference in Mr Williams' second
21 statement to Sky's customer base having increased in its
22 published results to 12.4 million customers similarly
23 makes no deduction for Sky broadband-and-telephony-only
24 customers and requires correction on the same basis?

25 A. I think there is one -- there is potential for confusion

1 here, because one point which I don't think Sky are
2 public on is how a NOW TV customer is counted in their
3 public numbers.

4 Q. I'm sorry to interrupt you --

5 A. If I may just finish, sorry?

6 Q. Of course.

7 A. If a customer subscribes for a day or for a week, are
8 they counted in that number or not? I don't know the
9 answer to that.

10 Q. But we agreed, didn't we, Mr Petter, that the NOW TV
11 subscribers are not subscribers to Sky's satellite
12 platform and, for the moment, I am simply exploring with
13 you what the number of subscribers is to Sky's satellite
14 platform.

15 A. Are you putting a question to me? Sorry, I'm not clear
16 what the question is.

17 Q. The question is, as I put before, that you didn't make
18 any deduction from your calculation of the satellite
19 subscriber base -- do you see that is what you are
20 referring to in paragraph 11 of your statement -- to
21 take account of subscribers who subscribe to broadband
22 and telephony services from Sky but not pay TV services?

23 A. Just, as I say, the number I'm quoting here is the
24 number of pay TV. It is not solely derived from
25 satellite, it is satellite and also NOW TV.

1 Q. I'm sorry, Mr Petter, if you look at the second
2 sentence:

3 "Its channel packages are distributed primarily via
4 Sky's digital satellite platform on which Sky has
5 approximately 11 million subscribers."

6 It is that figure of 11 million that I am exploring
7 with you. Do you see that?

8 A. Yes.

9 Q. Let me try one more time. That figure doesn't contain
10 any deduction to account for Sky's
11 broadband-and-telephony-only subscribers?

12 A. Well, no, because it is trying to give a figure for
13 pay TV subscribers.

14 Q. And broadband-and-telephony-only subscribers are not
15 pay TV subscribers?

16 A. That's true.

17 Q. I'm grateful. Your estimate also includes Republic of
18 Ireland subscribers, as did the 2010 figure shown in
19 table 3, first row, in the WMO statement. So I think
20 the point you were making a moment ago is that, to
21 compare the figures to see the position in the UK alone,
22 we would need to take off a certain proportion of
23 the number of subscribers shown for 2010; is that
24 correct?

25 A. And the key thing is that the comparison is like for

1 like.

2 Q. Yes.

3 A. If Republic of Ireland is included in one, it should be
4 included in the other too.

5 Q. BT has provided a document to the tribunal that sheds
6 some light on this. If we could just briefly go to
7 that. It is in the hand-up bundle 3 at tab 14, if
8 I could ask you just to turn that up.

9 A. Sorry, could you give me the name of the bundle?

10 I don't have one that says "hand-up" on it, actually.

11 Q. The bundles are horrendously confusing. It should have
12 "H3" written on the spine and it is tab 14.

13 A. I don't have a tab 14.

14 Q. It may be in H2. The overflow bundles were of different
15 sizes so documents have gone into different bundles.
16 H2, I apologise, at tab 14.

17 MS POTTER: I think we are going to need a minute or two
18 just to sort this out. My H2 is currently empty.

19 MR HOLMES: I understand, ma'am. This was a BT handout. It
20 may be that BT can shed light on where it was put in the
21 bundles. It is a merger decision on the Eir/Setanta
22 merger by the Irish Competition and Consumer Protection
23 Commission, dated 29 January 2016. Does the tribunal
24 have that?

25 THE CHAIRMAN: Yes, we do.

1 MR HOLMES: I think the document -- I see the document that
2 you are looking at, and it is the document at the next
3 tab that I was hoping to explore with you, Mr Petter.

4 A. Right.

5 Q. It is a very short point, but you see here a merger
6 notification determination. Turning to the back page of
7 that -- or the penultimate page of that document, or the
8 pen-penultimate page, page 10, there is a table setting
9 out market shares for broadcasting platforms in Ireland
10 for September 2015. Do you see that the figure stated
11 in the second row for Sky pay TV is 720,000?

12 A. Yes, I have got that figure.

13 Q. We obviously don't know what the figure was six years
14 ago, in 2010. It could have been slightly lower. But
15 on a crude basis, we could estimate Sky's satellite
16 subscriber numbers for 2010 by subtracting 700,000 from
17 the 9.7 million figure given. Does that seem reasonable
18 to you?

19 A. It seems a reasonable starting assumption, anyway.

20 Q. I'm grateful. Turning then, if I may, to the second
21 largest pay TV retailer, Virgin Media, it retails
22 television via its cable network. Is that correct?

23 A. That's correct.

24 Q. You note in your first statement that Virgin Media has
25 around 3.7 million customers?

1 A. That's true.

2 Q. You point out that this is broadly the same number of
3 subscribers as in 2010?

4 A. That's true.

5 Q. But in your third statement, you say that Virgin Media
6 is losing pay TV subscribers. I would like to look at
7 that, if I may, please. It is in Petter 3, bundle R1,
8 tab B, paragraph 18.

9 A. That's Petter 3, you said?

10 Q. Yes, Petter 3 at paragraph 18. It should be --

11 A. It should be in the bundle --

12 Q. R1, tab B. Do you see in the final sentence on the
13 page, which continues over the page:

14 "As Mr Williams has explained in his evidence,
15 Virgin Media is losing pay TV subscribers and has been
16 for some time."

17 You say in footnote 27:

18 "In fact, nine out of the last 13-quarters, ie,
19 since the beginning of 2013, has seen a decline, albeit
20 small, in Virgin Media's pay TV subscriber base based on
21 Virgin Media quarterly reports."

22 A. That's true. My view of the Virgin numbers -- and
23 they're published, they're clear -- is that for most of
24 the recent quarters they have gone backwards. That's
25 not true every quarter, but it's been true most quarters

1 recently.

2 Q. You should have a bundle of documents headed "P1" which
3 contains materials to which you refer but which aren't
4 in all cases exhibited to your evidence.

5 If you turn to tab 1, you see one of
6 the Virgin Media results announcements for the quarter 2
7 in 2013. I think this is the first that you refer to in
8 your sequence of quarterly results. You see on page 2
9 that the figure is given for the number of subscribers
10 to television of 3.765, or just over 3.765; yes?

11 A. Yes.

12 Q. If you turn to tab 2, you will see there the fiscal
13 fixed income release for the fourth quarter of 2015.
14 This is the document that is referred to in the
15 paragraph of Mr Williams' second statement which you
16 identified in support of the decline. If you turn to
17 page 3, you will see that the figure for subscribers to
18 enhanced video is 3.727 million. Do you see that?
19 "Subscribers RGU"?

20 A. On page 3, you're saying?

21 Q. Indeed, yes. So it's exactly the same figure, except
22 they've now broken out basic video, which is relevant
23 only to the Republic of Ireland.

24 A. Yes, I have found it.

25 Q. So the decline that you are describing here is between

1 3.765 million and 3.727 million, a decline of

2 1 per cent. Is that correct?

3 A. I had forgotten that I was referring to these specific
4 numbers, but that looks right on the numbers that I see
5 here.

6 Q. If you turn to page 5, the third paragraph contains an
7 explanation of the trend in TV subscriptions. You will
8 see that it refers to a TV attrition of 33,000 RGUs.
9 I guess that is revenue generating users or units, is
10 it? It may not be a term that BT uses for its internal
11 purposes.

12 Then the following sentence:

13 "The trend in TV subscriptions was partially
14 impacted by elevated TV churn following our quarter 3
15 TV XL price rise which was implemented to recoup
16 a portion of our investment in BT Sport Europe."

17 Do you see that?

18 A. Yes, I see that.

19 Q. When they say "investment in BT Sport Europe", I think
20 they don't mean they are investing in BT, would you
21 agree, they mean that they are acquiring your content on
22 a wholesale basis to distribute?

23 A. That's true.

24 Q. So a slight decline in subscription levels is only to be
25 expected where the price of subscribing to certain types

1 of content is increasing, is it not?

2 A. That's true. If I may qualify that comment by saying
3 that this comment here just relates to one interval, and
4 the other intervals that have given rise to a decline
5 may not have been due to this. I would also add that
6 Virgin Media have bought BT Sport and then chosen to
7 renew the contract because, on balance,
8 [redacted]xxxxxxxxxxxxxxxxxxxx and it features heavily in
9 their advertising today.

10 Q. They are differentiating their offer by including
11 BT Sport in the bundles?

12 A. They give it to all of their customers and that take
13 a particular product.

14 Q. The decline is, on any view, very minor?

15 A. The decline is modest. But I'm going to just qualify
16 that by saying that, at the same time, they have grown
17 their overall customer base quite substantially. From
18 memory, and I don't have this in front of me, I think
19 they have grown their broadband customers by about half
20 a million over this period. So I think you have to look
21 at this as being relative, therefore, because clearly
22 they have been building network at the same time.

23 Q. But we are looking specifically at pay TV subscriptions
24 here.

25 A. But the vast majority of their customers take

1 triple-play. That's the essence of their proposition.

2 Q. The decline, you suggest in your evidence, is from 2013.

3 The Virgin Media subscriber figure in the 2010 statement

4 was 3.7 million. Do you recall that?

5 A. No, I don't recall it.

6 Q. Shall we just look at that again quickly? Go back to

7 the WMO statement, which is, I think, in your N2 at

8 tab V, page 20. Do you have N2?

9 A. Yes.

10 Q. Table 3.1 on page 20. That is a table we looked at

11 before.

12 A. Right.

13 Q. You see that the figure given for 2010 is 3.7 million?

14 A. Yes.

15 Q. That doesn't suggest that there has necessarily been

16 a decline since 2010 or, if there has, it is caught

17 within whatever the rounding convention that was applied

18 to this table?

19 A. That sounds right. The point I make is that, at the

20 same time, their overall customer base has grown,

21 clearly.

22 Q. The true position is that Virgin Media has maintained

23 its pay TV subscriber levels intact, despite significant

24 expansion by recent entrant competitors like BT and

25 TalkTalk?

1 A. That's true.

2 Q. And despite a significant hike in the price of premium
3 sports content following BT's upstream entry?

4 A. I wouldn't describe it as a significant hike.

5 Q. Both BT and Virgin and then Sky have increased their
6 prices, haven't they?

7 A. BT hasn't increased its price for Sky Sports, no, that's
8 not right, and Virgin Media gets access to BT Sport and
9 they sell it as part of a bundle. I don't quite know
10 what you are asking me to agree with there.

11 Q. Would you agree that for Virgin Media to sell a bundle
12 of premium sports content which includes both BT Sport
13 and Sky Sports, it will have to pay more than if it were
14 simply purchasing Sky Sports content?

15 A. That's true, yes.

16 Q. We have seen, haven't we, that the increase in the price
17 of the relevant bundle led to a slight decline in
18 subscription numbers?

19 A. I think -- I don't think we are comparing like for like
20 here, because these figures are the overall subscriber
21 numbers for Virgin Media. If we were to look at the
22 subset of customers who subscribe to sports channels,
23 the picture may very well show quite a substantial
24 decline. You're asking me to draw an inference from
25 something that is essentially incorrect, so I can't

1 agree with it.

2 Q. Except that we have Virgin Media's published indication
3 that the overall churn level on which you rely, the
4 reduction in subscriber numbers, was due to the increase
5 of particular packages, the increase in pricing of
6 particular packages. We can go back to it, if you like.

7 A. That was true for one period, but if I might be very
8 clear, the package that includes BT Sport is only one of
9 several packages that they sell. It is indeed the case
10 that Sky Sports is a bolt-on in some cases, and in some
11 cases it's a bundle. So I can't really draw the
12 inferences that you are asking me to draw from these
13 numbers. They don't actually make sense to me.

14 Q. I'm not asking you to draw any inferences from the
15 numbers. I'm asking you a specific factual question.
16 You saw the document that I showed you, the Virgin Media
17 report, and that indicated that the reduction upon which
18 you place reliance in your statement in the overall
19 levels of subscribers to Virgin Media's pay TV product
20 were attributable, in part, according to Virgin Media,
21 to an increase in its prices of particular bundles
22 resulting from what it termed its investment in
23 BT Sport. Shall we go back to it? Or can we agree at
24 least upon that?

25 A. For one of the periods for one of the years, the

1 statement from Virgin Media is clear, but it would be
2 incorrect to take from that that that's true for the
3 period as a whole.

4 Q. Let's turn now to TalkTalk. It operates an IPTV or
5 internet protocol TV platform. That's correct, isn't
6 it?

7 A. That's true.

8 Q. On that platform, its customers watch using a TalkTalk
9 set-top box which is linked to the fixed line broadband
10 connection in their house; that's correct as well, is
11 it?

12 A. That's true as well.

13 Q. The television is carried via the broadband connection?

14 A. Yes. And also through DTT as well, the digital
15 terrestrial, through the aerial.

16 Q. Distribution via an IPTV platform differs from
17 distribution over the open internet, among other
18 reasons, because it can only be viewed using the set-top
19 box and not on other internet-enabled devices; is that
20 correct?

21 A. That's true, although, if I may qualify that statement
22 and say that TalkTalk bought a business in, I think,
23 2014, called Blinkbox from Tesco, and how they treat
24 that business in the context of their overall subscriber
25 numbers, I don't know, but -- and these were customers

1 who were subscribing to a video-on-demand service. It
2 was a subscription video-on-demand service.

3 Q. But in terms of the IPTV proposition, which is what
4 I was asking you about, you are not qualifying your
5 agreement that that differs from distribution over the
6 open internet, among other reasons because it can only
7 be viewed using the set-top box and not on other
8 internet-enabled devices?

9 A. I don't know if TalkTalk have an app that goes over the
10 top too. I don't know the answer to that.

11 Q. If it were over the top, it would not be their IPTV
12 platform, would it?

13 A. I don't know how they define IPTV. To be honest, there
14 aren't very clear conventions in the industry on that
15 point.

16 Q. I understand. We will come back to that. As you
17 explain in your third witness statement, TalkTalk's
18 approach has been to distribute set-top boxes for free,
19 or virtually for free, to users, even if they don't
20 subscribe to a pay TV package so it can sell them
21 pay-per-view content. That's right, isn't it?

22 A. Not just pay-per-view content but in some cases
23 subscription content as well. Not just pay-per-view.

24 Q. But you don't need to subscribe to a pay TV package to
25 obtain the set-top box. Their model was different in

1 that respect, it was a non-subscription model?

2 A. That's true.

3 Q. At paragraph 21 of your third statement, you make some
4 comments about TalkTalk's position. I would like to
5 explore those with you. They are at R1, tab B.

6 A. Can you give me the paragraph reference, please?

7 Q. Yes. It is paragraph 21. The first point you make
8 there is that TalkTalk has targeted its TV proposition
9 at a particular group. You quote press coverage from
10 2013 in which Ms Dido Harding, TalkTalk's chief
11 executive officer, said that TalkTalk wasn't in the
12 premier sports game and it was targeting households who
13 currently rely on Freeview only and do not pay for any
14 television beyond the licence fee?

15 A. That's right.

16 Q. Ms Harding's comments were made following BT's decision
17 to give away Premier League content for free to its
18 broadband customers, and she was seeking to explain why
19 that would not lead to TalkTalk's decline or demise.
20 That's correct, isn't it?

21 A. That's correct.

22 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
23 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
24 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
25 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

1 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

2 Q. If you turn to the articles which you cite, they are
3 immediately behind the next divider at tab C. The first
4 of those articles is at page 13. This is a Telegraph
5 article dated 15 May 2013:

6 "TalkTalk backs Peppa Pig over BT's Premier League
7 football.

8 "TalkTalk chief executive Dido Harding has insisted
9 her firm does not need to respond to BT's high profile
10 offer of free sports channels for broadband subscribers
11 as she prepares to deliver annual results on Thursday."

12 The point I want to discuss with you is in the first
13 substantive paragraph of the article:

14 "Her investors reacted badly to BT's decision last
15 week to give away its three new television channels,
16 including live Premier League football, fearing it would
17 attract TalkTalk's price-conscious customer base. On
18 the day of the announcement its shares closed down
19 12 per cent."

20 So investors clearly thought that BT's sport content
21 might be a draw for TalkTalk's customers. Would you
22 agree with that?

23 A. That's what the article says. That's what the article
24 says. Whether Chris Williams is entirely reliable as
25 a reporter, I don't have a view on, personally. I do

1 actually know Chris Williams and he writes some pretty
2 exciting articles.

3 Q. I'm grateful for that:

4 "Notwithstanding Ms Harding's comments, TalkTalk has
5 fought hard in the context of the WMO review to obtain
6 access to BT's sport content, arguing that BT was
7 dominant and should not be permitted to refuse supply."

8 Are you aware of that?

9 A. Yes, but it predates the fact that BT Sport is now
10 available on TalkTalk TV, and I presume she has
11 therefore changed her view.

12 Q. I will come back to that. We are talking about the
13 extent to which TalkTalk customers or some of them might
14 value sports content. TalkTalk valued sports content
15 sufficiently to push hard to gain access to BT's
16 channels, didn't it?

17 A. They did.

18 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

19 The numbers of customers that she's -- that adopted
20 BT Sport on TalkTalk TV, the actual number is
21 confidential, and I don't have it anyway,

22 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxx If I might add to that,

23 there has been a recent development that BARB, who do
24 the reporting of the viewing numbers, the viewing share
25 numbers, have begun to report separately now the viewing

1 numbers for BT YouView boxes and for TalkTalk YouView
2 boxes, so for the first time it's possible to see the
3 viewing behaviour of TalkTalk customers, and it confirms
4 that the number of viewers that TalkTalk typically has
5 for key Premier League football matches on Sky Sports is
6 between 60 and 70 per cent of the equivalent number for
7 BT.

8 The number of subscribers that BT has is somewhere
9 else in my witness statement, but --

10 Q. We will come to that.

11 A. But I think it is reasonable to infer that TalkTalk --

12 Q. Has a small number of --

13 A. Has a very small number, therefore.

14 Q. "BT doesn't supply TalkTalk on a wholesale basis and
15 only agreed a self-retail deal with it in July 2016."

16 That's correct, isn't it?

17 A. No, not July 2016, that's not correct.

18 Q. Could you tell us the correct position?

19 A. It was sometime in 2015. I can't remember the month.

20 Q. When did BT's sports channels become available for
21 self-retail on TalkTalk's platform?

22 A. They went on earlier in 2016.

23 Q. Earlier in 2016.

24 A. I think it was May.

25 Q. Let's each check that.

1 By contrast, TalkTalk and Sky have negotiated
2 a wholesale deal for supply of all of Sky's sports
3 channels which are available as an add-on bundle to
4 TalkTalk's pay TV subscribers. That's right, isn't it?

5 A. Yes.

6 Q. Sky's evidence is that completing the deal involved
7 significant commitment of time and resource by both
8 parties, including at a senior level. Did you see that?
9 It was in the non-confidential part of Ms Fyfield's
10 statement? Shall we have a look at it?

11 A. I don't want to take it on trust.

12 Q. I'm grateful. So Sky Sports' content was important
13 enough to TalkTalk, in terms of its marketplace of
14 offers as a platform, that it was prepared to enter into
15 a wholesale deal and invest the resources that were
16 required to negotiate that?

17 A. I think that's reasonable to infer, yes.

18 Q. Returning to paragraph 20 of your third statement, if we
19 may -- you may still have it open -- you speculate there
20 that TalkTalk's deal may involve minimum revenue
21 guarantees. Do you see that?:

22 "Based on my knowledge of agreements of this
23 nature, revenues may be underpinned by minimum revenue
24 guarantees."

25 A. Somewhere in paragraph 20?

1 Q. Yes.

2 A. Yes, I have found it.

3 Q. It is the third sentence.

4 A. Yes.

5 Q. Just for the tribunal's benefit, can you briefly explain
6 what a minimum revenue guarantee is?

7 A. Yes.

8 THE CHAIRMAN: Assume we know nothing, Mr Petter.

9 A. Okay. It is a guarantee to pay a fixed sum of money
10 that assumes a given number of subscribers and that's
11 based on a per subscriber fee, if that makes sense.

12 Q. If you don't meet that number of subscribers, you pay
13 the fee anyway?

14 A. That's correct.

15 Q. And if you go over that number of subscribers, you start
16 paying on a per subscriber basis?

17 A. Yes.

18 Q. A deal like that, if it had been concluded, would
19 incentivise TalkTalk to sell more of Sky's content?

20 A. That's true, but, again, I am speculating here. I don't
21 know if the nature of the MRG solely related to sport or
22 was, in fact, a combination of sport and movies.

23 Q. That's fully understood. You don't know the contractual
24 details. Based on your experience as a businessman and
25 based on practical commonsense, you would agree that, if

1 you have a fixed fee --

2 A. If you've paid the money --

3 Q. -- you are going to push --

4 A. -- you might as well get the subscribers.

5 Q. -- to make sure you make at least that number of

6 subscribers?

7 A. Yes.

8 Q. If TalkTalk were to have requested such terms, it was

9 presumably prepared to bet that it could sell more of

10 Sky's content. Would you agree with that as well?

11 A. That's true. The significance of that would depend on

12 the size of the minimum revenue guarantee. What I do

13 know is that

14 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

15 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

16 Q. Of course, we can only speak in abstract terms because

17 we haven't seen the TalkTalk agreement, and that's well

18 understood.

19 A. Yes.

20 Q. You say that TalkTalk targets a particular customer

21 segment, in your statement at paragraph 21. That is,

22 I think, the point that you are drawing attention to

23 from Ms Harding's comment. Is that correct?

24 A. That's the point that she is making in the quote that

25 I am giving.

1 Q. You wouldn't disagree with her about that?

2 A. She knows her business better than I do.

3 Q. In a competitive market, it wouldn't be unusual for
4 different retailers to target particular customer
5 segments, would it?

6 A. That's true,
7 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
8 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
9 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
10 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
11 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

12 Q. But it was nonetheless desirable for her to have the
13 content there as part of the overall ecology, if you
14 like, of her platform?

15 A. I think that's probably true, yes.

16 Q. TalkTalk targets particular customer segments in
17 relation to broadband, as well, doesn't it? The
18 value-conscious consumer has always been its niche?

19 A. That's true.

20 Q. Would that be fair to say? Remember "Free broadband
21 forever"?

22 A. That's fair.

23 Q. "The purpose of the WMO remedy was to enable retailers
24 to compete fairly and effectively with one another to
25 sell pay TV generally and not simply to compete in

1 reselling Sky Sports content."

2 Would you agree with that?

3 A. I think that's a regulatory question and I'm not

4 qualified to answer on the intent of --

5 Q. Very good. I will take it up in submission.

6 A. Yes.

7 Q. Returning to paragraph 21 of your third statement, your

8 second point is to claim that TalkTalk said in 2015 that

9 it was moving away from TV as a strategic focus of its

10 business. So you see that after the Dido Harding

11 comments from the coverage?

12 A. Yes.

13 Q. Do you see that:

14 "2015, TalkTalk also stated it was moving away from

15 TV as a strategic focus for its business."

16 You then set out a quotation from TalkTalk's

17 preliminary results for the 12 months to 31 March 2015.

18 You see the quotation in the accompanying footnote 34.

19 Do you see that?

20 A. 34 or 35?

21 Q. Footnote 34 I'm on at the moment. We will come to

22 footnote 35.

23 A. I can't see 34 on my version -- I have found it.

24 Q. The first quotation and then at the bottom of the page,

25 "The preliminary results".

1 So those results are in your bundle at R1, tab C, on
2 page 17. You see those are there. It is the same
3 bundle as the statement that we were just in, R1.

4 A. Tab C, did you say?

5 Q. Yes, tab C. The page reference -- this is the exhibit
6 to your third witness statement. Within that clip of
7 documents, at page 17, you see the TalkTalk Group
8 results which you were referring to. Do you have that?

9 A. Yes, I have got that here.

10 Q. Dated 14 May 2015.

11 A. Yes.

12 Q. Turning to page 20, you find the discussion of pay TV
13 which you quote from, and that is under the fifth
14 heading:

15 "82,000 TV customers added in quarter 4 with
16 37 per cent of base now taking TV."

17 Do you see that?

18 A. I do see that.

19 Q. It states that 1.4 million customers are now taking TV.
20 That's correct, isn't it?

21 A. Yes.

22 Q. You see that TalkTalk grew its TV base by 500,000
23 customers in a year. Do you see that in the sentence
24 beginning, "We added 82,000"?

25 A. Yes.

1 Q. So when the statement says that the pace of expansion
2 was moderated, this was after a growth, a period of
3 growth, at break-neck speed, it would be fair to say,
4 wouldn't it?

5 A. I think that would be true, yes. In more recent times,
6 and I can see this because I know the overall reported
7 numbers for the YouView customer base and I know my
8 customer base and, therefore, I'm very aware of
9 movements around the TalkTalk base, but I don't think
10 I should comment on those in open court.

11 Q. No, I understand. But even at the moderated pace of
12 growth, TalkTalk still added 82,000 customers in the
13 fourth quarter alone?

14 A. I can see that they say that. Again, I have knowledge
15 here that I can't give in open court, I'm afraid.

16 MR HOLMES: Sir, there may be evidence that Mr Petter needs
17 to give. What I propose to do is to continue, and then
18 perhaps it could either be dealt with in closed
19 re-examination or we could do it when we move into
20 closed session. Otherwise, we are going to be shuffling
21 in and out of court. We don't seem to have come to many
22 points where there is confidential material. If you
23 would be content to proceed in that way, sir?

24 THE CHAIRMAN: Let's add them up and see what they come to.

25 MR HOLMES: I'm grateful.

1 TalkTalk also refers to overall content revenues
2 growing by 34 per cent year on year. Do you see that?

3 A. Is that in the same paragraph?

4 Q. It is:

5 "Penetration of TV on demand (pay-per-view movies)
6 and content boosts remain strong during the quarter,
7 with overall content revenues growing by 34 per cent
8 year on year."

9 Then the final sentence:

10 "With the integration of Blinkbox ..."

11 The new service you mentioned TalkTalk had acquired:

12 "... now substantially complete, we will accelerate
13 the development of our TV proposition to drive greater
14 engagement, higher ARPU ..."

15 That's average revenue per user:

16 "... and lower churn."

17 A. Yes, I can't comment if the growth in revenue was
18 actually driven by the acquisition of Blinkbox. It may
19 have been --

20 Q. No, I understand.

21 A. It's not clear from the context.

22 Q. It is not your business and I wouldn't expect you to.
23 The point I am simply making is that you relied on this
24 document in support of the proposition that TalkTalk
25 said in 2015 that it was moving away from TV as

1 a strategic focus for its business, but the passage that
2 we have just seen, I would suggest, doesn't suggest
3 a disengagement from TV, but refers instead to
4 accelerating the development of TalkTalk's TV
5 proposition to drive greater engagement, higher average
6 revenue per subscriber and lower churn?

7 A. I think I should qualify that because I used this
8 particular document for illustration. I actually have
9 more knowledge of TalkTalk's business from speaking to
10 TalkTalk executives and from being a co-shareholder of
11 the YouView business than those documents suggest, and
12 the thing is that I can't say in open court because it
13 wouldn't be fair to TalkTalk.

14 Q. That's fair. We have a marker down in relation to
15 TalkTalk.

16 Let's now turn to the --

17 THE CHAIRMAN: Mr Petter, you had a reason for not putting
18 them in your witness statement?

19 A. Not particularly, because I think the overall point that
20 TalkTalk are effectively deprioritising TV is absolutely
21 true and correct.

22 MR HOLMES: Let's now look at the third point that you make
23 in paragraph 21 of your third witness statement. You
24 say:

25 "More recently, it was reported that after rapid

1 initial growth based on a strategy of practically giving
2 away television boxes to broadband subscribers, TalkTalk
3 has seen gains level off and now decline with churn
4 running at 1.4 per cent a month."

5 Do you see that?

6 A. Yes.

7 Q. That is based on an Informatv article. Informatv is
8 a consultancy firm and the article I think was just
9 published on the open internet. Is that right?

10 A. That sounds correct.

11 Q. Just for the tribunal's benefit, again, could you
12 explain the reference to churn?

13 A. Churn means customers leaving, effectively.

14 Q. How is the percentage calculated?

15 THE CHAIRMAN: Joining and leaving. It's the rate at which
16 customers turn over, presumably.

17 A. Yes, it is used in this context solely to describe
18 people leaving you and they are joining somebody else by
19 inference, usually.

20 MR HOLMES: A distinction is drawn between net churn, isn't
21 that right, and total churn, to reflect the point the
22 chairman was making?

23 A. No.

24 Q. Ah, very good. I'm educating myself in public here.

25 A. Net churn versus gross churn are terms that some

1 companies use to distinguish between a churn rate that
2 includes people moving house and reconnecting versus
3 churn for people leaving their platform for good,
4 usually.

5 Q. Very good.

6 A. That's the more normal context for it to be used.

7 Q. Thank you for that. The article in question was based
8 on TalkTalk's 2016 annual report which you don't exhibit
9 but which is at tab 4 of the cross-examination bundle.
10 If I could ask you just to turn that up. This was the
11 bundle -- P1, I think we called it, P for Mr Petter.

12 A. I have got it here.

13 Q. On the second unnumbered page, you see there TalkTalk's
14 description of itself as the UK's leading
15 value-for-money quad-play provider. So, again -- do you
16 have that?

17 A. Yes.

18 Q. The second page in. Then on the numbered page 1, you
19 have the --

20 A. Sorry, I can't find your reference to "leading
21 value-for-money provider".

22 Q. If you start at the very front of the tab and turn one
23 page in, there is just an unnumbered sheet on the
24 left-hand side of the file that's in front of you. Do
25 you see there is just a blurb at the top of the page

1 "qualifying themselves as the UK leading value-for-money
2 quad-play provider"? I'm not asking you to comment on
3 their qualification of themselves as leading, but that
4 is further confirmation of the point we discussed
5 earlier, that they see themselves as a value proposition
6 in the market?

7 A. Yes. I note on page 6 the customer base declined
8 moderately. But the distinction between subscribers and
9 customers I think is relevant here because --

10 Q. We will come to that. Indeed, it was page 6 that
11 I wanted to take you to. But first, can I just ask you,
12 on page 1, the overall number of customers -- leaving
13 for a moment your distinction between customers and
14 subscribers, which we will come to -- the figure of
15 1.389 million customers is given. It is graphically
16 illustrated on the montage?

17 A. Yes, I see it, yes.

18 Q. On page 5, first of all, of relevance to your evidence
19 you have the chief executive officer's review. So this
20 is Ms Harding's comments on the state of her business.

21 A. Yes.

22 Q. You will see in the second paragraph reference to the
23 cyber attack in quarter 3 driving elevated churn for
24 a short period.

25 Pausing there, TalkTalk was the subject of a major

1 cyber attack in 2015 involving the release of its
2 customers' confidential information, was it not?

3 A. Yes.

4 Q. Then in the following paragraph, TalkTalk's chief
5 executive officer explains that the actions taken by
6 TalkTalk have more than mitigated any lasting impact on
7 the business. Then:

8 "This focus, together with the customer experience
9 benefits of making TalkTalk's simpler programme, helps
10 to stabilise the broadband base in quarter 4, drive
11 strong growth in revenue generating units and deliver
12 the lowest ever churn in our history at 1.3 per cent."

13 Do you see that?

14 A. I do see that.

15 Q. It would be wrong to take away from the Informatv
16 quotation in your witness statement that churn rates
17 show problems in the pay TV business?

18 A. If I might check something, this 1.3 figure here is
19 a television customer number and, therefore, does it
20 correspond to this figure in the article?

21 Q. We have figures that are more disaggregated at page 19,
22 if you could turn that up. Do you see the TV net adds
23 in the top right-hand corner for the full years shown.
24 You will see that, on the right-hand side, the decline
25 to which you refer is 25,000 across a total TV customer

1 base of 1.389 million. That's the decline in 2016

2 following the cyber attack. Do you see that?

3 A. I do see that.

4 Q. That graph also shows that TalkTalk experienced very,
5 very rapid growth from 2013 to 2015, doesn't it?

6 A. I can see that it says that. Again, I have knowledge
7 which I can't give in open court that would make me
8 really wish to comment on these numbers, but I can't do
9 it.

10 Q. Perhaps we will come back to that in closed session.

11 Coming back to page 6, you see TalkTalk's own
12 account of its pay TV offer. So under the heading "TV":

13 "Over one-third of base taking TV; growing
14 engagement with product.

15 "The TV base declined modestly during the year by
16 25k to 1,389k as we focused on deepening the engagement
17 with our existing TV customers."

18 Do you see that, "deepening the engagement"?

19 And TV described as:

20 "... a remarkable success story for us in driving
21 triple-play growth with 1.4 million customers ... from
22 launch four years ago. Customers genuinely value the
23 YouView experience that integrates free, pay,
24 over-the-top, and premium channels, [TalkTalk] see
25 benefits to engagement, NPS" -- I think that's net

1 promoter score, which is a measurement of customer
2 satisfaction -- "and churn ... on demand usage growing
3 20 per cent year on year."

4 So TalkTalk's view of its TV business in these
5 public statements is as a tremendous success story with
6 a minuscule decline in customer numbers?

7 A. That's what it says here. This document seems to be
8 full of success stories, and quite a few investors don't
9 regard TalkTalk as a success nonetheless.

10 Q. I appreciate that these documents are produced for
11 public consumption, and the tribunal will also no doubt
12 be aware of that.

13 A. It would be helpful, if you are asking me to comment on
14 them, to know how they are treating Blinkbox and the
15 Blinkbox customers in this context, because --

16 Q. They are not here, unfortunately, Mr Petter. They have
17 chosen not to appear or to intervene in these
18 proceedings, so it is hard for us to be sure.

19 A. If you are asking me to comment on them, when they'd
20 acquired a customer base, it is difficult to know if
21 they are counting it in their numbers and awarding
22 themselves a success simply from having acquired some
23 customers. It doesn't make that clear here, so I can't
24 comment on that. But that might be what's happening
25 too.

1 Q. In your first statement, you contend that a number of
2 TalkTalk's customers have never connected their set-top
3 boxes. This goes back to the free distribution model,
4 the non-subscription model we were describing. That is
5 at N1, tab B, paragraph 17. This is where you develop
6 the point which you mentioned a moment ago, that
7 customers are to be distinguished from subscribers but
8 the use of -- "Ofcom's usage of the word 'subscriber' is
9 misleading."

10 That is flagged as confidential, but I think we can
11 see that -- I don't think that is a confidential comment
12 myself.

13 A. No.

14 Q. You then indicate further down that -- in the
15 confidential text I shan't mention figures --
16 a proportion of set-top boxes has been connected to
17 TalkTalk TV but some hasn't, and you therefore estimate
18 the customer base at a discount to the full 1.4 million
19 level. Do you see that?

20 A. Yes, I see that.

21 Q. So you don't exhibit the report which makes that claim
22 or indicate the date at which the estimate was made,
23 but, in any event, the report appears from your evidence
24 here to indicate that a large majority of TalkTalk's
25 set-top boxes have in fact been connected. Do you see

1 that?

2 A. Yes.

3 Q. TalkTalk's published figures for March 2014, when it was
4 still developing its proposition, indicate that, in any
5 given month, 28 per cent of its TV base makes a pay TV
6 purchase, nearly a third?

7 A. Is that any given month --

8 Q. It's --

9 A. -- or given year?

10 Q. It's each month. You set it out in the final sentence
11 of paragraph 17, and we can go to the underlying
12 document if that would be helpful. Do you see that?

13 A. Yes. If I might be clear, actually, it's not clear to
14 me, and I don't remember, how we are using the phrase
15 "every month during the year".

16 Q. Let's have a look at the underlying document. Do you
17 see you refer to it at the end? It is a reference to
18 the next tab, tab C. The relevant document is the
19 TalkTalk results to May 2014, preliminary results. On
20 page 17 of the rolling numbering, we see "Content
21 purchasing behaviour encouraging for future revenue":

22 "While most of our TV customers have little or no
23 experience of paying for content on their TV sets, their
24 purchasing behaviour to date is encouraging for future
25 incremental revenues, with an average ARPU [average

1 revenue per user, so a redundant 'average' there] for
2 pay-per-view movies and boosts combined of circa GBP9.
3 With over 28 per cent of our TV customers buying some
4 form of pay TV content every month, the overall TV base
5 is therefore showing an average revenue per user uplift
6 of GBP2.50."

7 A. That sounds correct, then, yes.

8 Q. Isn't the correct position that TalkTalk's customers are
9 using its platform to make purchases based on a good
10 proportion of them?

11 A. It's clear that 28 per cent of the customers are buying
12 something, that's clear. What they may be buying may be
13 a one-off download of a particular film or drama. It
14 doesn't necessarily follow that they are subscribers,
15 because -- and the estimate from Mediatique is that
16 there is a much smaller number that are actually
17 subscribing to anything over a given period of time.

18 Q. But they are buying stuff?

19 A. They are buying something.

20 Q. Isn't the correct position that TalkTalk's customers are
21 an example of disruptive innovation by TalkTalk offering
22 its value-conscious consumers an alternative and
23 less-expensive way of consuming pay TV?

24 A. I wouldn't call them disruptive, no.

25 Q. They call themselves that?

1 A. That doesn't surprise me.

2 Q. They are also an example of rapid and successful
3 expansion by a pay TV retailer, based on the figures
4 that we have seen?

5 A. I'm sure that's their point of view.

6 Q. In your first statement, you complain that Ofcom's
7 estimate as to the size of TalkTalk's customer base
8 should have distinguished between customers paying
9 a regular monthly subscription fee, which you call
10 subscribers, and other customers who have the capacity
11 to buy on a pay-per-view basis. That's correct, isn't
12 it?

13 A. Yes, that's correct.

14 Q. But customers who consume pay-per-view products are
15 still contributing to TalkTalk's average revenue per
16 user and to its profits?

17 A. Yes, that's true.

18 Q. You gave evidence to the tribunal in the VULA case,
19 didn't you?

20 A. Yes.

21 Q. Do you recall that that included evidence as to the
22 comparative size of TalkTalk's pay television
23 operations?

24 A. I don't recall that, but I'm happy to take it on trust
25 from you.

1 Q. I think we should look at it, if we may. It is in the
2 cross-examination bundle, P1, tab 3. If you could turn
3 within the statement to page 15. You there give
4 evidence in the form of a figure --

5 A. P1, did you say? Sorry.

6 Q. P1 at tab 3.

7 A. Tab 3, sorry, yes.

8 Q. Within that tab, if you could turn to page 15. You give
9 evidence there in the form of a figure showing the
10 estimated size of the pay TV basis for the four main
11 retail competitors, and the final purple bar shows your
12 estimate of TalkTalk's pay TV base. Do you see that?

13 A. I do see that.

14 Q. [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
15 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
16 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
17 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

18 A. Yes.

19 Q. You are there counting on the same basis as Ofcom did?

20 A. I can't remember the basis on which this data was
21 compiled.

22 Q. We can see that from the numbers, based on the evidence
23 you have now given.

24 A. I don't know the source for it, is what I'm saying,
25 sorry. I can't remember the source.

1 Q. If you look at paragraph 49, you describe the different
2 positions, and at the top of the page, you say:

3 "TalkTalk had 1.4 million subscribers [that was the
4 term you used] at the end of March 2015."

5 You base that on TalkTalk's preliminary results
6 which we looked at. So those are the customer numbers
7 on the distinction that you are now seeking to draw,
8 aren't they?

9 A. That's right.

10 Q. You also say:

11 "It acquired this number even though it really only
12 became a serious pay TV player with the launch of its
13 YouView service in 2012, five years later than
14 BT Consumer first launched BT Vision."

15 Do you see that?

16 A. Yes.

17 Q. So your evidence there is that TalkTalk was the third
18 largest pay TV retailer behind Sky and Virgin and you
19 see the figure of 1.14 million TV subscribers for BT
20 given earlier in paragraph 49. That was your evidence
21 then?

22 A. Yes.

23 Q. The evidence was given in support of the submission that
24 was being advanced on BT's behalf, that the market was
25 "characterised by differentiated bundling by four major

1 retail competitors with a distinct balance of advantages
2 of commercial strategies", and that this would render
3 a margin squeeze strategy by BT extremely difficult. Do
4 you recall that?

5 A. No. Can you take me to it, please?

6 Q. I can't, because I don't have it here, but I can produce
7 it and I will take you to it after the lunch
8 adjournment, if I may.

9 Returning to your evidence in this case, if you
10 could pick up your first witness statement and turn to
11 paragraph 18, that's in N1, tab B. When you say that in
12 your opinion it is misleading for Ofcom to state, as it
13 does in table 3.1 of the WMO statement, that TalkTalk's
14 retail subscriber base has grown from 50,000 in 2010 to
15 1.4 million in 2015 and to compare these figures to
16 Sky's subscriber base for the purpose of calculating
17 subscriber market shares, that is exactly the evidence
18 you gave in VULA, isn't it?

19 A. Yes. I have thought about this, actually, because
20 I have reflected back on the view that we had of the
21 TalkTalk business then compared to what we know of it
22 now, and the view we have now is that TalkTalk's
23 business has pretty much been given -- been driven just
24 by giving away boxes rather than by actually getting
25 proper customers to become subscribers.

1 Q. You say in paragraph 19 that TalkTalk is not in fact
2 a new entrant to pay TV but had existed in various forms
3 many years previously. Do you see that?

4 A. They acquired a company called Tiscali.

5 Q. Yes, that's the evidence you give. Would you agree this
6 needs to be qualified in view of paragraph 49 of your
7 witness statement in the VULA proceedings where, as we
8 saw, your evidence was that TalkTalk really only became
9 a serious pay TV player with the launch of its YouView
10 service in 2012, five years later than BT Consumer first
11 launched BT Vision?

12 A. If the entity we are talking about is TalkTalk --

13 Q. Yes.

14 A. -- and then TalkTalk acquired this entity from Tiscali
15 in the year that I have said, but they began to scale
16 their operation seriously in 2012, I think it was, but
17 nonetheless in terms of whether they're a serious player
18 in pay TV, the number of actual subscribers, which
19 I think is the proper measure, because these are the
20 valuable customers that people can build a business
21 around, is very, very small, and I didn't understand
22 that completely in 2014, but it is clear now.

23 Q. Your evidence was given in May 2015 in the VULA
24 proceedings, just to be clear, after BT's first
25 consultation response in these proceedings.

1 A. Okay.

2 Q. But you are not, I think, dissenting from the evidence
3 that you gave there that TalkTalk really only became
4 a serious pay TV player with the launch of its YouView
5 service in 2012, are you?

6 A. The term "serious" I think needs to be considered
7 carefully, because whether a player that has 125,000
8 subscribers can ever be considered serious when Sky has
9 got 11 million, for example, I think that's open to
10 doubt.

11 Q. We discussed the 11 million figure, didn't we? But if
12 we can return to the WMO statement, to page 20, that's
13 in, I think, your N2 at tab V, you see at the top of
14 the page in table 3.1 that TalkTalk had 50,000 pay TV
15 customers in 2010.

16 A. Right.

17 Q. It now has, on your view, 900,000 connected set-top
18 boxes?

19 A. That's right.

20 MR HOLMES: Sir, I am conscious that the witness has given
21 evidence now for some time. Is it your intention to
22 take a mid-morning break, as you have done previously,
23 or shall I continue?

24 THE CHAIRMAN: I think we should break for five minutes.
25 I'm never quite sure when mid-morning is.

1 MR HOLMES: It is a movable feast.

2 THE CHAIRMAN: We will break now.

3 (11.58 am)

4 (A short break)

5 (12.06 pm)

6 MR HOLMES: Mr Petter, I would like now to turn to the last
7 of the big retail competitors, BT, last but not least.
8 Like TalkTalk, your television platform is IPTV based;
9 is that correct?

10 A. That's correct.

11 Q. BT's TV platform has over 1.5 million customers; is that
12 correct?

13 A. It's about that number, yes.

14 Q. In addition, BT retails its sports channels on Sky's
15 satellite platform?

16 A. That's correct.

17 Q. Sky is required to allow BT to do this under regulation
18 imposed by Ofcom?

19 A. Yes, that's true.

20 Q. As we have discussed, BT has recently begun supplying
21 its channels on a self-retail basis on TalkTalk's
22 platform as well?

23 A. That's true, too.

24 Q. That service, I'm informed, launched in June 2016. You
25 may not know the exact time. But is that within --

1 A. I think it may have been slightly earlier than that
2 because there was a soft launch before and that was
3 visible to anybody.

4 Q. But it was --

5 A. It was around that time.

6 Q. Early in 2016?

7 A. Yes.

8 Q. BT wholesales its sport channels on the Virgin Media
9 platform as well?

10 A. That's true.

11 Q. In total, 5 million homes take BT Sport?

12 A. Yes, that's right. It's around that number. It's
13 slightly more.

14 Q. A consistent theme which emerges from your discussion of
15 pay TV retail is the importance of triple-play bundles
16 in the market, and that's where a retailer offers to
17 consumers a bundle package of TV, broadband and phone
18 services. That's correct, isn't it?

19 A. That is correct.

20 Q. All of the retailers that we have discussed offer
21 triple-play bundles?

22 A. That's true.

23 Q. You estimate that Sky has 4 million triple-play
24 customers, amounting to one-third of your estimate of
25 its subscriber base?

1 A. I think that's in my witness statement, yes.

2 Q. Just briefly to see the percentage I think that may have
3 been affected by the broadband-and-telephone-only
4 subscribers point that I canvassed with you earlier, if
5 I could ask you to pick up the WMO statement and turn to
6 page 24?

7 A. Which of the bundles is that in?

8 Q. It is N2, tab V.

9 A. Yes.

10 Q. If you turn within that document to page 24 and look at
11 footnote 63, you will see that Sky's published results
12 report the share of triple-play subscribers as
13 a proportion of total subscriber base as 40 per cent?

14 A. Are you referring me to the table --

15 Q. I'm referring you to the footnote 63, which is
16 a footnote to the figure given for March 2015, which
17 will be excised from your version, for the proportion of
18 Sky's total subscriber base who are triple-play
19 subscribers. I'm simply showing you the published
20 results reporting this percentage as 40 per cent?

21 A. Yes.

22 Q. You have no reason to take issue with that figure or to
23 doubt its veracity?

24 A. No.

25 Q. The tribunal can, of course, see the exact percentage in

1 table 3.3.

2 So we can agree that a large proportion of Sky's
3 base subscribes to a triple-play bundle?

4 A. That's true. I'm not clear if these numbers include
5 Republic of Ireland or not. Taking it at face value,
6 what you have said makes sense to me.

7 Q. You estimate that 3.3 million out of Virgin's
8 3.7 million customers take triple-play bundles. Would
9 you like to see that?

10 A. If that's in my witness statement --

11 Q. It is.

12 A. Yes, I remember it.

13 Q. In other words, 90 per cent of their customers are
14 triple-play customers?

15 A. That sounds right.

16 Q. Your evidence earlier was that they have always targeted
17 triple-play propositions?

18 A. That's true, yes.

19 Q. You would expect that, given that a cable network can be
20 used interchangeably for phone, broadband and TV?

21 A. Yes.

22 Q. Turning to TalkTalk, an IPTV operator, TalkTalk only
23 sells pay TV as part of a triple-play deal together with
24 broadband and telephone services; that's correct, isn't
25 it?

1 A. That is correct.

2 Q. Again, this is what you would expect: it supplies the
3 telephone and the broadband service and then it supplies
4 television over the broadband connection?

5 A. That sounds correct.

6 Q. BT is also an IPTV platform operator and, like TalkTalk,
7 your customers that receive pay TV via your IPTV
8 platform must all take phone and broadband service from
9 BT as well. They have to be triple-playing customers?

10 A. They do.

11 Q. So all of BT's 1.5 million or more customers on its IPTV
12 platform take TV as part of a triple-play package?

13 A. That's correct.

14 Q. As we have discussed, BT also retails its sports
15 channels on Sky's platform. A large proportion of BT's
16 retail customers on the Sky platform take telephone and
17 broadband from BT, don't they?

18 A. That's right.

19 Q. So they are, if you like, BT triple-play customers who
20 receive phone and broadband from BT and also receive
21 BT Sport via a subscription that is distributed via the
22 DSat platform?

23 A. I wouldn't characterise them as triple-play customers in
24 that way, because with triple-play, you have the
25 advantage of a customer getting your whole offering

1 that's on your set-top box and a broad array of content,
2 and selling a particular set of channels over somebody
3 else's set-top box means that you have a smaller
4 foothold, as it were, with the customer and, therefore,
5 I wouldn't characterise that as being triple-play, no.
6 That's not how we treat it.

7 Q. You have a foothold also, as their supplier of broadband
8 and telephone. That's the only point I'm making. You
9 supply --

10 A. We do.

11 Q. -- pay TV, broadband and telephone as a combined
12 proposition to a customer?

13 A. And so we would count them therefore -- and they are
14 dual-play customers.

15 Q. They are dual-play customers who also take pay TV from
16 BT?

17 A. Not pay TV. They take some particular channels on
18 someone else's pay TV platform.

19 Q. But they buy pay TV content from BT?

20 A. They buy content from us.

21 Q. Yes.

22 A. They might also buy content from, for example,
23 Box Nation, which is a specialist boxing channel that
24 retails over satellite as well.

25 Q. You emphasise the importance with Sky of taking their

1 NOW TV customers into account. They provide -- in that
2 context, Sky provides pay TV content via other people's
3 platforms, doesn't it?

4 A. Yes, it does.

5 Q. But you emphasised that that should be taken into
6 account?

7 A. I emphasised it should be taken into account in looking
8 at competition --

9 Q. Sky's position on the pay TV market?

10 A. Competition for pay sports, yes.

11 Q. Looking at the proportion of BT's retail customers on
12 Sky's platform who also take telephone and broadband
13 from BT, the figures are confidential but you have set
14 them out in paragraph 28, and we can look at them
15 without referring to them. This is your first
16 statement, so bundle N1, tab B, paragraph 28. In
17 subparagraphs (a) and (b), you distinguish between two
18 groups of BT subscribers on the Sky platform. First, at
19 28(a), you say that BT broadband subscribers who have
20 a Sky set-top box with a valid viewing card can receive
21 BT Sport 1 from their Sky set-top box for free and can
22 subscribe to the three other BT sport channels for an
23 additional GBP5 per month. So this is a group of
24 customers who take from BT broadband, telephone and they
25 buy pay TV content from BT on Sky's platform. That's

1 correct, isn't it?

2 A. That's correct.

3 Q. The numbers are given there. We won't refer to them.

4 Then at 28(b), there are the Sky Sports

5 subscribers -- sorry, the BT Sport subscribers on the

6 Sky satellite platform who take their broadband and

7 phone line from someone else, not BT. Is that correct?

8 A. Yes.

9 Q. They pay significantly more to access BT Sport, GBP19.99

10 for standard definition and GBP23.99 for high

11 definition. So those customers with whom you have

12 a retail relationship on the Sky platform, who

13 subscribe -- who pay a regular monthly subscription?

14 A. That's correct.

15 Q. You give the number of customers -- of BT's customers on

16 the Sky satellite platform there in 28(b)?

17 A. Yes.

18 Q. At 28(c) you give the total number of subscribers of

19 BT's self-retail of its BT Sport channel on Sky's DSat

20 platform. So in terms of the number who take their

21 telephone and broadband service together with pay TV and

22 a service that you might or might not refer to as

23 triple-play, the proportion is that figure minus the

24 figure given in 28(b). The number is that figure minus

25 the figure.

1 A. I think that's correct.

2 Q. So you can see then the relative proportion of
3 triple-play, if you like, broadband, telephony and
4 pay TV content, by comparison with stand-alone supply of
5 pay TV content?

6 A. It's some of the figures in 28(a), effectively.

7 Q. Exactly so, yes.

8 A. Yes.

9 Q. Overall, it would be fair to say, then, that the great
10 majority of your retail subscribers, pay TV retail
11 subscribers, take a combination of pay TV content,
12 broadband and telephony?

13 A. That's true.

14 Q. As we have discussed, BT also wholesales BT sports
15 channels to Virgin Media, and you give the number of
16 such customers in paragraph 30.

17 A. Yes.

18 Q. The great majority of those customers are likely to be
19 on Virgin triple-play bundles, are they not?

20 A. I think it's reasonable to infer that. I don't know it,
21 but it makes sense, given the overall proportions that
22 we have discussed.

23 Q. In your third witness statement, you say that
24 triple-play provision is not a new development. Do you
25 recall that? Should we look at it? I don't want to get

1 you to answer in the dark. This is the third witness
2 statement --

3 A. I'm happy to take it on trust. I agree with the
4 statement. That's fine.

5 Q. If you could take up the WMO statement again, in N2,
6 tab V. The confidential version, DF1, tab 4, for the
7 tribunal.

8 If you could turn to page 24 in my version -- is it
9 at page 24 in yours as well? Yes, there we are. You
10 see a figure, 3.2, "Reported take-up of bundled
11 services", and do you see that the green element of
12 those bars consists of fixed broadband and TV?

13 A. Yes, I see that.

14 Q. It would be fair to say, wouldn't it, looking at that
15 graph, that the proportion of consumers taking
16 triple-play has steadily increased?

17 A. That would be fair to say, but whilst the absolute
18 numbers increased, from 2010, say, from 17 per cent up
19 to 25 per cent in 2015, the rate of change has slowed
20 down. So if one goes from 2005 to 2010, that's growth
21 of 14 per cent. And then from 2010 to 2015, the growth
22 is at roughly half the speed.

23 Q. But for some retailers, the growth has been more
24 dramatic, has it not?

25 A. It's been more dramatic for some than others, but the

1 distinction between customers and subscribers is very
2 relevant here, because if this takes at face value
3 the -- for example, the TalkTalk customer number, which
4 has been a particular feature, as we have seen, of
5 the growth since 2012, then the underlying growth in
6 subscribers is actually a lot less.

7 Q. But if one looks at table 3.3 -- I'm not sure how much
8 of this will be visible to you.

9 A. Almost none.

10 Q. Almost none. That's fine. Let's leave that point.
11 I can deal with it in submission.

12 THE CHAIRMAN: Mr Holmes, what's your sort of timetable?

13 MR HOLMES: Sir, I have very few questions for Mr Williams.
14 The division I have made is that Mr Petter is here as
15 the commercial witness and Mr Williams is here as the
16 regulatory witness. I feel confident that I can deal
17 with most of the material in Mr Williams' statement by
18 way of submission. So I have very brief
19 cross-examination for Mr Williams.

20 THE CHAIRMAN: When do we plan to go into confidential
21 session?

22 MR HOLMES: It will not be immediately after lunch, sir.

23 THE CHAIRMAN: Not immediately after lunch. So during the
24 course of the afternoon?

25 MR HOLMES: During the course of the afternoon.

1 THE CHAIRMAN: Mr Flynn, where are you in this?

2 MR FLYNN: In the squeezed middle as usual, sir. We will
3 have some questions for Mr Petter. We will have some
4 questions for Mr Williams, but not very many. I'm
5 obviously in Mr Holmes' hands as to when I get to ask
6 questions of Mr Petter, but I think we have two days for
7 the factual witnesses and there is no prospect of that
8 overrunning.

9 THE CHAIRMAN: There is no prospect of that overrunning. It
10 is true there is some flexibility within the two days,
11 but not all that much.

12 MR HOLMES: No, I appreciate that sir, and I will cut my
13 cloth accordingly.

14 THE CHAIRMAN: That's fine, thank you.

15 MR HOLMES: While we are on bundling, we should also discuss
16 quad-play. That's the term used within the industry to
17 a combined offer of broadband, fixed line telephony,
18 mobile telephony and TV. Is that right? So the fourth
19 element is the mobile phone?

20 A. Yes.

21 Q. BT recently acquired the largest mobile operator in the
22 UK, EE, for GBP12.5 billion. An important element of
23 BT's strategic thinking is that the boundaries between
24 fixed, broadband, mobile and TV are beginning to blur,
25 and that customers want solutions that combine these in

1 quad-play as well as triple-play bundles. Would you
2 agree with that?

3 A. I would probably qualify it slightly, because I would
4 say that, in relation to TV and content, the viewing
5 behaviour and the value that customers place on content
6 on mobile devices as opposed to large-screen TV is quite
7 different, and not really comparable in quite the same
8 way.

9 Q. You are there making a specific point about the
10 desirability for consumers of viewing content on their
11 mobile devices rather than on a television set; is that
12 right?

13 A. Yes.

14 Q. But you are not, I think, dissenting from the
15 proposition that, in terms of a retail offer, BT's
16 strategic thinking is that the boundaries between fixed,
17 broadband, mobile and TV are beginning to blur and that
18 customers want solutions that combine these in quad-play
19 as well as triple-play packages?

20 A. I'm sure you're about to tell me that there's something
21 that BT or I have said and is in the public domain, but
22 I think, if one was to be strictly accurate, one would
23 probably wish to qualify it a bit.

24 Q. I don't want to play the dance of the seven veils with
25 you, Mr Petter --

1 THE CHAIRMAN: That's in private session.

2 MR HOLMES: Sir, I wouldn't inflict that on the tribunal or
3 anyone here present.

4 It is bundle Sky 1. There is a divider in the
5 bundle, divider B, which is Ms Fyfield's
6 statement. Then at tab 2 behind her statement there is
7 a Capital Markets Day management discussion section for
8 fourth quarter, 2016, earnings call for BT Group
9 published by Bloomberg. Do you have that?

10 A. Yes.

11 Q. If you turn within that to page 9 -- actually, starting
12 at page 7 of the rolling numbering, do you see that
13 Mr Patterson makes certain opening comments about BT's
14 position in the market? Mr Patterson is the chief
15 executive officer of BT Group; is that correct?

16 A. That is correct.

17 Q. If you turn on to page 9, in the third complete
18 paragraph on that page -- first of all:

19 "... Convergence ... A bit of a cliché, it's been
20 around for probably 20 years, but it continues to gather
21 pace ... It is, if you look here on this example, the
22 boundaries between fixed, broadband, mobile and TV are
23 beginning to blur. Customers want solutions that
24 combine combinations of these, be those quad-play-type
25 solutions or triple-play or dual-play solutions."

1 You wouldn't disagree with that, would you?

2 A. As I say, I would probably qualify it. If you want me
3 to be specific as to how I would qualify it, I'm happy
4 to do that.

5 Q. So a qualified agreement, then. Further down the page.
6 It is correct, is it not, as Mr Patterson states in the
7 fourth complete paragraph in the final line:

8 "If you look at quad-play penetration here on the
9 right-hand side, the UK is underdeveloped versus almost
10 every market in Europe, and that's one of the areas we
11 see as a real growth opportunity for BT."

12 A. That's in the same paragraph, is it?

13 Q. No. It's the paragraph beginning "Clearly". If you
14 look on the page, the fourth complete paragraph. It is
15 at the end of the paragraph.

16 A. Okay. Yes.

17 Q. You don't dissent from Mr Patterson's comments?

18 A. No, they look right to me.

19 Q. The appeal to BT is obvious: the more products and
20 services customers take from BT, the more loyal they are
21 and the more value they represent to BT; that's correct,
22 isn't it?

23 A. "The more loyal they are", I think it would depend on
24 what the proposition actually was that you're asking
25 them to buy.

1 Q. On page 17, further on in the Bloomberg transcript,
2 beginning on page 16, you see Mr Patterson beginning:
3 "I think there is the scope to grow market share in
4 the consumers markets both -- well, behind the EE brand,
5 behind the BT brand and behind Plusnet. And I think we
6 have demonstrated with broadband ... that we have been
7 able to do that. I think fundamentally we see RGU
8 growth behind convergence, be that quad-play or
9 triple-play, as being the engine rather than necessarily
10 putting it all through incremental customers, and be it
11 on fixed to mobile, where the market is very
12 underdeveloped versus many of our European peers, or
13 with triple-play -- conventional triple-play where our
14 TV attachment rate is still relatively low in spite of
15 the growth rates over the last few years.
16 "There is plenty of upside to go for and what we
17 know is that the more products and services customers
18 take from you, provided they see that the quality of
19 products and reliability of product and the value of the
20 products, they are more loyal and they have more
21 value -- from a net present value perspective. So, it
22 is a trend that is working in our direction and we see
23 plenty of growth there going forwards."
24 A. He gives the qualification that I should have sought to
25 give myself.

1 Q. Yes. Very good. Would you like to just explain the
2 qualification for the transcript?

3 A. Well, the idea that people are more loyal if they buy
4 more services from you, it depends on whether those
5 services are ones that induce loyalty, clearly.

6 Q. So you could bundle it, but the proposition he is
7 basically stating is, if you can sell lots of things
8 rather than just one to a customer, you are going to
9 make more money off them and they will stay with you
10 longer, less likely to move. That's the loyalty?

11 A. Whether you make more money off them depends on pricing.
12 So I wouldn't necessarily draw that inference. In fact,
13 quad-play in most countries of Europe has actually
14 depressed prices and depressed margins. So I don't
15 necessarily buy into that. It's also increased
16 competition and increased switching. So I find it hard
17 to buy into everything that you are saying to me because
18 the trend from other countries in Europe doesn't
19 necessarily suggest that.

20 Q. A second theme that emerges from the overview section of
21 your witness statement, besides the importance of
22 bundling, is the importance of add-ons. That is
23 additional products which retailers are able to sell to
24 subscribers to increase margin. So Virgin Media, BT and
25 Sky all charge a supplement for customers wanting to

1 view channels in high definition. That's correct, isn't
2 it?

3 A. Yes, I agree with that.

4 Q. BT also requires a subscription to a large bundle of TV
5 for access to ultra HD?

6 A. That's true.

7 Q. BT charges extra for its broadband subscribers to view
8 the full range of its sport channels online?

9 A. Well, that depends on the services the customers are
10 subscribing to.

11 Q. I was taking it from your first statement at
12 paragraph 29, which is N1, tab B?

13 A. Yes, I have got 29 here.

14 Q. Sorry, that is a wrong reference, forgive me. Your
15 qualification is correct, but equally, it is consistent
16 with the evidence you give here. BT broadband
17 subscribers who don't take a pay TV platform
18 subscription get BT Sport 1 for free but they can
19 subscribe to the three other BT Sport channels for an
20 additional GBP5 a month. That's the point I was making,
21 that there is an add-on there as well. They can pay
22 extra to get more content via the internet?

23 A. Yes, if they are not taking a television service and
24 they can access the channels through an app, that's
25 correct.

1 Q. Sky charges extra to allow its existing pay TV customers
2 to use the open internet to download content for later
3 viewing, the so-called Sky Go Extra product. Are you
4 familiar with that?

5 A. Yes.

6 Q. BT and Sky both charge extra to enable customers to
7 watch television in several rooms, the Sky multiroom
8 product, now called multiscreen, and the BT TV Extra
9 box. Is that correct?

10 A. Yes. Although Sky's proposition has changed recently
11 because they have launched something called Sky Q.

12 Q. All of the pay TV retailers charge on a pay-per-view
13 basis to view content from their on-demand libraries?

14 A. Yes, I think all of them do that.

15 Q. A third theme which you discuss is the development of
16 so-called over-the-top or OTT services?

17 A. Yes.

18 Q. These are video services provided over the internet on
19 PCs or tablets, Smart TVs or devices that connect to
20 TVs. Is that correct?

21 A. Yes.

22 Q. We can agree that such OTT services are generally more
23 prevalent now than in 2010?

24 A. Yes.

25 Q. As regards sport, you point out that Sky retails its

1 channels, including its sports channels, on an OTT basis
2 through NOW TV?

3 A. Yes.

4 Q. Viewers don't need a subscription to Sky's satellite
5 platform or to a big bundle of Sky content?

6 A. That's true.

7 Q. They can simply buy a day pass, a week pass or a month
8 pass to Sky Sports channels?

9 A. Yes.

10 Q. In your third witness statement, you say that it isn't
11 possible to subscribe to individual, live, top-flight
12 football matches in the UK as Ofcom has suggested. Do
13 you recall saying that, or shall I --

14 A. I do recall saying that, but I was seeking to comment on
15 some specific reference from Ofcom. So I would need to
16 see the two things side by side for me to really
17 elaborate. Perhaps you can help me do that?

18 Q. We can do that, if you would like. All that -- the only
19 point of interest for me, and it may be something that
20 we can agree upon which would save time, is that you
21 don't dissent that a consumer can buy a 24-hour day pass
22 on NOW TV and then watch a big match as it occurs on
23 a particular day?

24 A. That's true. It's possible.

25 Q. Consumers can access NOW TV via a multitude of platforms

1 or simply on the internet?

2 A. Yes.

3 Q. As regards entertainment, there are now a large number
4 of OTT video-on-demand services, aren't there?

5 A. Yes.

6 Q. Some of those are subscription services, like Netflix --

7 A. That's right.

8 Q. -- generating regular monthly income, or Amazon?

9 The latest BARB report estimates that Netflix has
10 around 6 million subscribers, each paying GBP6 to GBP8
11 per month. Does that sound about right to you? You
12 don't know?

13 A. I think it is about right.

14 Q. These aren't sports viewers, but Ofcom's concern is to
15 ensure that pay TV retailers of any kind can enter and
16 compete, not just retailers of sports content.

17 A. Well, I can't really comment --

18 Q. On Ofcom's --

19 A. -- on Ofcom's intentions.

20 Q. That's a fair point?

21 A. That's the point at issue in this case, I think, really.

22 Q. Amazon has invested in producing its own exclusive
23 entertainment content for its OTT subscribers. That's
24 correct, isn't it?

25 A. Yes.

1 Q. In terms of its strategic thinking, BT has recognised
2 that at least half of the UK are not vaguely interested
3 in sport at all and it therefore wants to develop its
4 general entertainment proposition; that's correct, isn't
5 it?

6 A. That is true.

7 Q. To that end, you have recently added the
8 AMC Entertainment channel to your content line-up?

9 A. We have.

10 Q. On that basis, I think we can turn to -- the fourth and
11 final theme to emerge from the opening section of your
12 witness statement is that live sport on the Sky Sports
13 channels remains central to driving pay TV
14 subscriptions. That's not something you would dissent
15 from?

16 A. No, I strongly agree with that because the segment of
17 customers willing to pay for sport are generally most
18 willing to pay for content in general and they are the
19 highest, valuable, most important segment that anyone
20 thinking of bringing competition to this marketplace has
21 to be successful with.

22 Q. You say that at paragraph 32 of your first statement,
23 just to turn that up, N1, tab B.

24 A. Yes.

25 Q. Page 17. I'm sorry, that's a wrong ...

1 Leaving aside questions of the scope of channels
2 needed by BT, I understand that you are thus in
3 agreement with Ofcom's conclusion in the WMO statement
4 set out in the immediately preceding paragraph,
5 paragraph 31:

6 "We continue to consider that Sky Sports is
7 important to a large group of pay TV subscribers.
8 Without access to this content, pay TV retailers will
9 therefore struggle to compete for a sizeable and
10 valuable segment of the pay TV market."

11 A. Yes, I agree with that.

12 Q. So, on that basis, I think we can move forward to
13 paragraph 83 of your statement, where we come to the
14 question of Sky's conduct in the market.

15 The subject matter of paragraph 83 and following is
16 set out in the heading "Sky limits the wholesale
17 distribution of Sky Sports proposition". At
18 paragraph 83, you say that, so far as you are aware,
19 Sky's wholesale supply has been on the basis
20 of wholesale prices or terms that have not allowed other
21 retailers to compete effectively with Sky.

22 The focus here is on other retailers than BT. This
23 cannot, I think, be a reference to the range of channels
24 provided, given that, as you point out, Virgin Media and
25 TalkTalk both receive the full Sky Sports proposition

1 from Sky?

2 A. I think the point I would draw from paragraph 83 -- the
3 terms of Sky's agreement with its customers are not
4 known to me. I can really only judge it by the
5 outcomes, and the outcomes suggest that there is not
6 vigorous competition for customers from these
7 competitors. That was illustrated from the figure
8 I gave you for TalkTalk, and that their number of
9 viewers of Sky Sports was about 60 per cent of
10 the equivalent number for BT, and therefore you can
11 infer it's about 40,000, probably.

12 Q. But we are talking about their position as pay TV
13 retailers generally, not as resellers of Sky Sports
14 channels?

15 A. The context here is about Sky Sports, and that's the
16 answer I'm giving you.

17 Q. So your point is by reference to Sky Sports?

18 A. Yes.

19 Q. You do know what channels Virgin Media and TalkTalk get
20 supply of, because that's clear from what their
21 customers get?

22 A. Yes.

23 Q. And that both of those retailers get the full Sky Sports
24 proposition from Sky?

25 A. No. I don't think that is entirely accurate, because

1 Q. Yes.

2 A. -- which is they don't require you to buy through
3 a basic package of channels.

4 Q. So --

5 A. Having said that, sports customers are potentially the
6 customers who generally value the premium statement
7 more, so they are more apt to choose to buy those
8 bundles in any case.

9 Q. If we look at the price for a consumer wishing to buy
10 Sky Sports channels from TalkTalk and from Sky, the
11 correct comparison is to consider the overall retail
12 cost to them of the full package that they have to
13 purchase in order to access the channels?

14 A. I think if you are looking for competition on sports,
15 you need to look at the outcomes first and foremost and
16 the subscriber numbers tell their own story.

17 Q. We are talking here about your specific evidence about
18 the retail prices, so I understand your point about
19 retail outcomes more generally.

20 A. Okay.

21 Q. The question I am asking you is simply whether the cost
22 of the add-on is determinative of the overall retail
23 price paid. I think your evidence is that it is not,
24 and that in TalkTalk's case you don't need to buy
25 a basic package at all. Whereas in Sky's case, unless

1 you tell me otherwise, your evidence is that you do have
2 to buy the basic package before you buy the sports
3 channels?

4 A. But I said to you as well that on TalkTalk, although you
5 don't have to buy through the basic channels, the
6 segment of customers to whom that's relevant would
7 generally seek to. If I can give you that comparison,
8 therefore, the entertainment package for TalkTalk --

9 Q. Mr Petter, I hate to interrupt you, but could you just
10 answer the question that I posed to you? I was asking
11 you whether, if a consumer wants to purchase on
12 TalkTalk -- your evidence is I think that they don't
13 need to buy -- I will let you develop your point
14 subsequently -- a basic package, whereas on Sky Sports
15 they do need to buy a basic package, which costs,
16 I think GBP20 --

17 A. They are not compelled to, that's correct.

18 Q. I'm grateful. I interrupted you.

19 A. The comparison, therefore, that I was going to give, if
20 this is helpful, is that the TalkTalk customers can
21 choose to pay GBP12 for the entertainment boost -- that
22 gives them 27 channels -- and GBP32 for Sky Sports. And
23 for Sky, the basic pack, that's GBP20, and the sports
24 are GBP27.50. So you've got GBP44 versus GBP47.50, but
25 there is a big difference in the offering: 30 channels

1 versus 270 channels and Sky includes -- has, as of
2 I think yesterday, the Sky Q box, which contains a PVR
3 and the TalkTalk box does not contain a PVR.

4 Q. It is always difficult to compare bundles in
5 a differentiated product market.

6 A. Yes, the TalkTalk offer is less for less. Just because
7 the price is less doesn't make it more competitive to
8 the segment to whom it is targeted.

9 Q. That's fully understood. But the specific data that you
10 give in 83(b) which concerns simply the price of
11 the booster pack --

12 A. The Sky Sports pack.

13 Q. -- and the Sky Sports pack, that's not actually
14 illuminating, for the reason that we have just
15 canvassed?

16 A. I think it is illuminating. The TalkTalk strategy
17 generally is to be cheaper than its competitors in
18 everything it sells. Therefore, I think you have to ask
19 yourself why they would elect to be more expensive on
20 something where price comparisons are very transparent.

21 Q. I don't want to labour the point, but with Sky you have
22 to buy not just the Sky Sports pack, but a whole heap of
23 other stuff. You say with TalkTalk you don't. So we
24 are not comparing apples and apples, are we? That was
25 your point. So the comparison that you set out in 83(b)

1 isn't, in itself, illuminating?

2 A. I think the comparison is in fact illuminating because,
3 as I have said to you, TalkTalk's strategy is to be, as
4 we saw from their annual report, the value player, and
5 if you look at pretty much everything else they sell,
6 they are the cheapest. They are electing not to be the
7 cheapest here. That is the point I'm making here.

8 Q. But they are buying different things, as your own
9 evidence indicates.

10 A. They are not buying Sky Sports in high definition --

11 Q. More than that. They are buying a different bundle of
12 products because with Sky, as you say, they have to buy
13 through the basic pack?

14 A. With Sky they have to buy through the basic pack. With
15 TalkTalk, they don't.

16 Q. I think that is all I needed. I'm conscious of
17 the time.

18 You also make the point that the majority of
19 TalkTalk's pay TV customers haven't taken a monthly
20 subscription for content, but, as we have discussed,
21 that is simply a function of TalkTalk's different
22 business model, which is to distribute the set-top boxes
23 which can be used either for subscription or for viewing
24 a wide range of flexible non-subscription pay content?

25 A. I'm not sure what the question is you're asking me.

1 Q. I am asking you whether you agree that TalkTalk's
2 business -- that the point that the majority of
3 TalkTalk's pay TV customers haven't taken a monthly
4 subscription is simply a product of TalkTalk's different
5 business model, which doesn't turn on subscription
6 customers, it turns on non-subscription customers who
7 buy pay per view, and that's how they make that a turn
8 in the pay TV market or seek to do so?

9 A. I don't entirely agree with the statement. I don't
10 agree it is purely a facet of the business model.
11 I think it is an indicator of their relative lack of
12 success. Because the margins in this category are from
13 subscription. I think you'll find every player in the
14 market strongly agrees with that statement. It is very
15 hard to make money off pay-per-view customers, and I'm
16 sure if TalkTalk could sell more subscriptions and get
17 more margin, they would, but the fact is, they are
18 unable to and the number of subscribers is only 125,000.

19 Q. I'm not sure if that figure is -- I mean --

20 A. That's a Mediatique figure.

21 Q. So that is a Mediatique estimate rather than
22 a confidential figure that you know as a result of your
23 membership of the YouView board. I'm grateful for that.

24 As regards Virgin Media, you say Virgin Media has
25 shown no growth in its overall pay TV subscriber base

1 but, as we have discussed, it has kept broadly the same
2 number of customers in the face of new competitive entry
3 and notwithstanding the cost increase associated with
4 purchasing BT's sports content?

5 A. Virgin Media subscribers have stayed flat. The overall
6 number of triple-play customers has grown and so the
7 universe has grown and TalkTalk have stayed flat --
8 sorry, Virgin has stayed flat.

9 Q. Neither TalkTalk nor Virgin Media have complained about
10 the current wholesale prices charged by Sky?

11 A. [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
12 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
13 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

14 Q. Neither of them has intervened in these proceedings?

15 A. That's true.

16 Q. Virgin Media has signed a deal that runs until 2019?

17 A. That's in the documents, so I take it to be right, yes.

18 Q. So it is a sophisticated and experienced player and, if
19 the deal didn't enable it to compete effectively, it is
20 unlikely it would have signed up for so long?

21 A. I'm not sure you're right to infer that because if they
22 are in the same position I'm in, frankly, what choice do
23 they have?

24 Q. Your other basis for concluding that Sky will not supply
25 its full Sky Sports proposition on acceptable terms is

1 that Sky has not done a deal for such supply and you
2 consider that Sky will not do so without being compelled
3 to do so by means of a WMO obligation. That's correct,
4 isn't it?

5 A. Yes, I think that.

6 Q. You identify various reasons for pessimism about the
7 prospects of commercial supply. First, you refer to
8 concerns about limited distribution prior to 2010, but
9 the tribunal found that Sky had engaged constructively
10 with BT and that the failure to do a deal was at least
11 as much BT's fault as Sky's. That's correct, isn't it?

12 A. It's correct that the tribunal found that. I don't
13 accept that is correct, and if we could have appealed
14 it, we most certainly would have done, but you can't
15 appeal findings of that sort, as I understand.

16 Q. They heard lengthy evidence and, really, we have to
17 accept their findings regarding the position prior to
18 2010. Ofcom couldn't very well --

19 A. You have to accept it. I'm quite certain it is wrong.

20 MR HOLMES: At this point, sir, it will be necessary for me
21 to consider various materials that are confidential to
22 both BT and Sky. We can either break early and come
23 back early or I can crack on, whichever you would
24 rather?

25 MS POTTER: Approximately how long, do you think?

1 MR HOLMES: I think I have got another hour of material,
2 madam.

3 THE CHAIRMAN: We will break now.

4 MR HOLMES: I'm grateful, sir.

5 (12.53 pm)

6 (The short adjournment)

7 (1.54 pm)

8 THE CHAIRMAN: Mr Holmes, what does "closed session" mean?

9 MR HOLMES: Subject to the tribunal's view, sir, I propose
10 we begin with a discussion at which BT and Sky's people
11 can be present together with the confidentiality ring
12 and I deal with documents that contain material that is
13 confidential to both BT and Sky, the yellow marking
14 confidential material. That will take a little time.

15 After that, we can move to a BT-only closed session,
16 at which point Sky employees would have to leave,
17 insofar as they were outside the confidentiality ring,
18 and I would then deal with matters that are for BT's
19 eyes only.

20 THE CHAIRMAN: That's what we have got at the moment. I see
21 so many faces in court, some of them familiar, some less
22 so. Everybody who is not in that description --

23 MR HOLMES: We are in the Sky/BT description at the moment,
24 to be clear, both Sky and BT.

25 THE CHAIRMAN: There is nobody from the general public here?

1 MR HOLMES: It would be a fairly refined taste, I think.

2 THE CHAIRMAN: You would be surprised. They were queuing up

3 downstairs when they heard you were talking.

4 (In camera session - BT/Sky)[redacted pages 87-155]

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(Public session)

Re-examination by MR BEARD

MR BEARD: If I may, I will just pick up one of the points raised by the chairman. Mr Petter, could you take up bundle N1, tab C?

A. Yes.

Q. This material is going to be BT confidential. It is marked in red. But I may be able to deal with the issue, so far as the tribunal is concerned, relatively briefly.

If you turn on to page 171 in tab C, are you able to describe broadly what that document is for the tribunal without saying anything that breaches confidentiality

1 vis-a-vis Sky, or do we need to --

2 A. No, I can describe it at a high level. This is a board
3 paper that we put to the board subsequent to
4 Ms Fyfield's meeting in which she discussed in colourful
5 terms, as we have said, a potential deal through
6 Delia Bushell.

7 Q. That's helpful. If you turn on through that paper to
8 page 179, are you able to describe broadly what we are
9 seeing on page 179 without digressing into
10 confidentiality? It feels like we are entering into
11 some kind of parlour game, but if you are --

12 A. Yes, I can describe it because it is very similar to
13 what I put in my witness statement. What we are
14 essentially saying is describing the value BT has at
15 stake [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx and,
16 therefore, the value that's put in jeopardy through
17 wholesaling [redacted]

18 Q. Am I understanding correctly this is some sort of form
19 of modelling that you are doing here?

20 A. That's correct.

21 THE CHAIRMAN: Perhaps I can just ask for my own
22 understanding, at stake,

23 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
24 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
25 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

1 MR BEARD: A reciprocal -- sorry --

2 THE CHAIRMAN: It is probably a question for Mr Petter.

3 When you talk about it being at stake, you mean you
4 would give it up if there was a reciprocal deal?

5 A. "Pointless" is probably too strong. It would certainly
6 undermine the business model. It is a reasonable
7 supposition --

8 THE CHAIRMAN: You would assume you would not get the value
9 from it?

10 A. That's right. That's why it is at risk.

11 MR BEARD: I am grateful. Whilst we are in this bundle, it
12 might be useful to pick up one or two points. If we go
13 back to page 167, this is the note of a meeting between
14 Delia Bushell and Mai Fyfield and of course we have also
15 seen there is a Mai Fyfield version of this note. Just
16 in relation to this, do you know whether Ofcom asked for
17 details of documents of any negotiations or discussions
18 between Sky and BT beyond 2013?

19 A. I don't think they did ask for those, no.

20 Q. We are just looking at this meeting note, then.

21 Could we go on to page 169. In the final paragraph,
22 Mr Holmes took you to the first sentence:

23 [redacted],

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25 #####

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8 therefore -- and that reinforces my point about the
9 revenues being at risk, because it suggests there is
10 a very clear trade-off between
11 [redacted]xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx from Sky.
12 Q. Just for the sake of clarity, did Sky ever indicate to
13 BT what price, or indeed MRG, they would be willing to
14 accept beyond that earlier example of the [redacted]in
15 relation to these matters?
16 A. No.
17 Q. Did Sky ever seek to initiate discussions with BT in
18 relation to any sort of wholesale deal?
19 A. The answer to that is, not to my knowledge, no.
20 Q. Whilst we are still in this bundle, you referred to
21 "adverts", I think in the context of Virgin Media's
22 position in 2010. There are, at pages 163 through to
23 165, various copies of adverts. Are any of those
24 adverts adverts that you were referring to?
25 A. Yes. It's the one on page 165 that contrasts the full

1 sports proposition including HD on all the channels
2 represented by the complete football, and then there is
3 the partial football and it's represented through
4 Virgin Media and the HD channels, that they have
5 correspondence to the freedoms they secure under the
6 WMO, and then there's BT that have none.

7 Q. I'm grateful. There was another document I think you
8 were looking for, I don't know if we found it. But if
9 we could go to DF2/6. Do you want to just very briefly
10 look at the bundle --

11 A. It is page 2. [redacted]#####
12 #####
13 #####
14 #####

15 Q. Is that a freestanding letter or an attachment to the
16 first page?

17 A. That is an attachment to the first letter, I think.

18 Q. I'm grateful. Can we go back to your main witness
19 statement. We started off this morning with
20 a discussion about some numbers in the context of
21 paragraph 11 of your witness statement. That's tab B in
22 bundle N1. Could you just review paragraph 11 just to
23 refresh yourself, please. Mr Holmes was asking you
24 various questions about this.

25 A. Yes.

1 Q. He asked you in particular, in the course of his
2 questioning, and I will just repeat what he said:

3 "Your estimate of 11 million Sky pay TV subscribers
4 is incorrect because it doesn't allow for Sky's
5 broadband and telephony, only subscribers that are
6 included in Sky's published figures."

7 Is it right that your figures of 11 million, just
8 for clarity, do they or do they not include subscribers
9 who take only broadband and telephony?

10 A. These are customers that take television services. It
11 doesn't include customers that don't take television
12 services. That's my understanding.

13 Q. Could you just explain the comments in footnote 1 that
14 you have?

15 A. I should have read this first, obviously. This makes
16 clear that Sky doesn't break out its customer numbers
17 for particular products and, therefore, the inference
18 I have drawn can't be right.

19 Q. So the 11 million that you refer to, do they include
20 Sky's customers that only take broadband and telephony?

21 A. I think it is reasonable to infer that they probably do.

22 Q. I'm grateful. In these numbers, it is clear that you
23 include numbers for NOW TV subscribers. It was put to
24 you by Mr Holmes that comparatively you don't include
25 BT's self-retail numbers in the equivalent or comparable

1 numbers you put in your witness statement. Why do you
2 distinguish between NOW TV for Sky and BT self-retail?

3 A. The NOW TV proposition is, in effect, a platform in its
4 own right. The figure of a million -- and that relates
5 to customers that are taking a service that's equivalent
6 to a pay television service, albeit delivered over IP.
7 That may well be a bundle of some basic and premium
8 channels on a subscription basis.

9 Q. Does BT self-retail involve such bundling?

10 A. No, because that's done on somebody else's platform
11 solely, and that's not bundled through the basic
12 channels at all, and that's just -- and selling the
13 rights on somebody else's platform is quite different.

14 Q. I'm grateful. Could you just turn on to 83(b) in your
15 witness statement.

16 A. Yes.

17 Q. 83(b) is consideration of the position in relation to
18 TalkTalk. According to the transcript, you indicated
19 that since I think it was last Monday you didn't have to
20 buy through any other packages in order to get
21 TalkTalk's Sky Sports boost pack; is that right?

22 A. Yes. The position may have extended beyond last Monday,
23 but they have just reinvented all of their packages.
24 The figures I gave you -- the data I gave you, that was
25 the latest information as of Monday.

1 Q. Prior to last Monday and going back over a longer period
2 of time, is it your understanding that you did need to
3 buy through other TalkTalk content in order to obtain
4 Sky Sports boost or whatever was the equivalent of that
5 previously?

6 A. To be honest, I can't remember that point. I would need
7 to check it.

8 Q. I'm grateful. In the discussion of the numbers you have
9 put forward, you distinguish between subscribers and
10 customers. Are you able to spell out what that
11 difference is?

12 A. Yes. Subscribers are people that commit to taking
13 services from you that they pay for on a monthly basis,
14 and, therefore, they are the main source of profit in
15 this category, and customers are merely people who have
16 accepted a set-top box and thereby the means of access
17 from which they may or may not at some point in the
18 future choose to purchase subscription services -- there
19 is no guarantee that they will -- and they may
20 periodically choose to purchase services on demand as
21 well, on a per-occasion basis.

22 Q. Why does such a distinction matter in the context of
23 this case?

24 A. The distinction matters because the value in the
25 category is in subscribers, and the customers per se are

1 almost like a marketing cost to access the subscribers,
2 effectively.

3 Q. During the course of cross-examination by Mr Holmes, on
4 a number of occasions you reached a point where, in
5 consideration of TalkTalk numbers, you indicated that
6 there were matters that you wanted to discuss in closed
7 session. Mr Holmes didn't come back to those matters.
8 Are there matters that you would like to clarify in
9 relation to those exchanges in closed?

10 A. I can, if it is helpful to the court. I mean, I don't
11 think they are material to my evidence, but they do pick
12 up on one point that was put to me by Mr Holmes, so
13 maybe I should, actually, probably.

14 MR BEARD: I have very few further questions. I may be able
15 to deal with the others and then perhaps we can finish
16 off by dealing with that one in closed.

17 THE CHAIRMAN: Mr Williams is looking a bit forlorn.

18 MR BEARD: Never. That is not a visage that Mr Williams
19 ever wears.

20 THE CHAIRMAN: Nevertheless, he is running out of time, or
21 maybe you are. We can always go over to tomorrow.

22 MR BEARD: I think the sensible thing is going to be perhaps
23 that Mr Williams starts off tomorrow morning, and the
24 idea that we are going to start Mr Williams this
25 evening -- I don't think there is going to be any

1 difficulty in completing the factual evidence tomorrow,
2 unless there is going to be an inordinately extensive
3 cross-examination of Mr Williams that goes very, very
4 far beyond the periods allocated. Mr Holmes has
5 indicated that is unlikely, I think.

6 MR HOLMES: Sir, just to confirm, my cross-examination of
7 Mr Williams will be short. In fact, Mr Pickford and
8 I have agreed to ensure that Sky doesn't find itself as
9 the squeezed middle that Sky will cross-examine first
10 and I will pick up any questions as necessary
11 afterwards. But I am sure that Mr Beard is correct,
12 that we can leave Mr Williams for tomorrow without
13 risking the timetable.

14 THE CHAIRMAN: Do we need to start early tomorrow?

15 MR BEARD: I doubt it. That won't be necessary.

16 THE CHAIRMAN: Why don't you carry on with this set-up and
17 then ...

18 MR BEARD: It may be that what we have to deal with in
19 closed is small, but if I take the other questions as
20 well, then ...

21 Could we then just go to the bundle P1 that was
22 handed up. This was your witness statement in the VULA
23 proceedings. Did you give any evidence in the course of
24 those proceedings on your understanding of the TalkTalk
25 business?

1 A. I'm trying to remember that. I can't remember.

2 MR BEARD: There are two options. I can either not
3 leadingly leave the witness to go through his statement
4 or I can point to a heading.

5 A. I have found the reference, and I did clearly.
6 Paragraph 42.

7 Q. Do you want to just review that evidence from 42 through
8 to 45, please.

9 A. Yes.

10 Q. As given at the time, do you stand by that evidence?

11 A. There is one point I would qualify, actually, which is,
12 in paragraph 43, I really misattribute TalkTalk's
13 performance to -- and access to Sky's channels and
14 I misdescribe their customers as subscribers. I get
15 both points wrong. Because there is a reference to
16 their customer base increasing by 150,000, and it's
17 clear these were not subscribers, and because, as I have
18 described to you, of the very small population of such
19 subscribers, it's unlikely to give you access to Sky's
20 channels.

21 Q. I'm grateful. If you could just turn over, paragraph 49
22 and paragraph 50. If you could just read paragraph 49.

23 A. Yes.

24 Q. Is there an error in this paragraph?

25 A. There is too, because I talk about TalkTalk in

1 1.4 million subscribers, and they are clearly not
2 subscribers, they are customers.

3 Q. In your witness statement in these proceedings, where
4 you have drawn a distinction between customers and
5 subscribers, what material have you relied upon for the
6 purposes of identifying the levels of subscribers to
7 TalkTalk?

8 A. The source of that information is a third party industry
9 expert called Mediatique.

10 Q. Did you have that information at the time that you
11 provided this witness statement?

12 A. I did not have this information then, no.

13 Q. Just for clarity, for the purposes of these proceedings,
14 do you consider that the 1.4 million that you refer to
15 in paragraph 49 is the relevant comparator in these
16 proceedings?

17 A. No. The relevant comparator is the figure I quoted in
18 my witness statement, which is the number of
19 subscribers, and that figure is 125,000.

20 Q. I'm grateful. If you could just turn on then to
21 paragraph 56, which again you were asked about in this
22 statement, could you just read right through 56, please?

23 A. Yes.

24 Q. Are you able very briefly to just summarise what you are
25 saying in 56, for the purposes of the transcript?

1 A. Yes. For the purposes of the transcript, because
2 commercial negotiations had not been successful, and the
3 solution that arose from regulation had only given BT
4 access to Sky Sports 1 and 2, which we had found,
5 through experience of marketing that proposition, there
6 was insufficient to compete, we therefore decided to bid
7 for sports rights, but we recognised substantial
8 barriers and obstacles to being successful in sports
9 auctions in terms of the bidding advantages Sky enjoys
10 as a consequence of its scale. I then go on to list
11 those advantages, of which there are several. There are
12 five of them here that we list.

13 Q. In relation to the points that were raised by other
14 counsel in this context, in your view, is the WMO
15 irrelevant to BT overcoming these advantages?

16 A. I think the WMO, to date, at least, has proven to be
17 necessary but insufficient, and so we have absolutely
18 demonstrated that, because there's one episode that's
19 described in my witness statement in 2010, and at that
20 time -- BT decided to put substantial marketing funds
21 behind a proposition on its own platform that was based
22 around Sky Sports 1 and 2, and we put several tens of
23 millions of pounds of marketing behind it. It was
24 incredibly unsuccessful, and the chief reason for that
25 is that Sky then sought to counter-advertise,

1 advertising the example I showed you featuring the half
2 football and the no football and the deficiencies of
3 the proposition under the WMO, and it was really coming
4 about through the key insight, the customers in this
5 category don't want a single set of rights and they want
6 a whole sports proposition and very few customers are
7 just interested in football, it is usually football plus
8 another sport.

9 Q. Just one final point before we go into closed. Mr Flynn
10 raised with you in respect of paragraph 85 in your
11 witness statement questions about the existence of
12 the WMO, as you put it, being a backstop. How important
13 is certainty to BT in relation to its business and
14 strategy?

15 A. Certainty is extremely important, and you can see this
16 in the board packs that are appended to my witness
17 statement, because the payback times, they amount to
18 many, many years, and so, to make a long-term
19 investment, you therefore have to have a view of
20 the future, and, furthermore, the situation I described
21 to you in terms of being just a reseller on somebody
22 else's platform is inherently precarious, and so, to
23 really have confidence in the long term, greater
24 confidence can arise through having a successful
25 platform. The business cases are premised on

1 [redacted], but to be successful for the long term they
2 need that.

3 So there is an element of conservatism, therefore,
4 that's in them.

5 Q. I'm grateful. I don't have any further questions in
6 open for Mr Petter, unless the tribunal does. Then it
7 just leaves that one remaining issue.

8 THE CHAIRMAN: No. Let's deal with the one remaining issue.
9 Those who have to go will go, please.

10 (In camera session -- BT)[redacted pages 171-172]

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(The witness withdrew)

(4.27 pm)

(The hearing was adjourned until
Thursday, 6 October 2016 at 10.30 am)

I N D E X

1	MR JOHN RICHARD MARTIN PETTER	1
2	(sworn)	
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4	Examination-in-chief by MR BEARD	1
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