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

Case No. 1299/1/3/18

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

28 June 2019

Before:

**PETER FREEMAN CBE QC (Hon)**  
(Chairman)  
**TIM FRAZER**  
**PROFESSOR DAVID ULPH CBE**  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**ROYAL MAIL PLC**

Appellant

- and -

**OFFICE OF COMMUNICATIONS**

Respondent

- and -

**WHISTL**

Intervener

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**HEARING – DAY 13**

## APPEARANCES

Mr Daniel Beard QC, Ms Ligia Osepciu and Ms Ciar McAndrew (instructed by Ashurst LLP) appeared on behalf of the Appellant.

Mr Josh Holmes QC, Ms Julianne Kerr Morrison and Mr Nikolaus Grubeck (instructed by Ofcom) appeared on behalf of the Respondent.

Mr Jon Turner QC, Mr Alan Bates and Ms Daisy MacKersie (instructed by Towerhouse LLP) appeared on behalf of the Intervener.

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Friday, 28 June 2019

(10.30 am)

Housekeeping

THE CHAIRMAN: Mr Beard, good morning.

MR BEARD: Good morning, Mr Chairman, members of  
the tribunal.

Before we move on to dealing with further witness material, we had an update from Mr Harman yesterday in respect of the medical position he's in and the orders of his doctor and the tests he's going to be having. He is not going to be able to be available this week. We recognise, of course, that creates a difficulty --

THE CHAIRMAN: Next week?

MR BEARD: Next week, I'm sorry, I'm moving ahead of myself.  
Next week, yes.

THE CHAIRMAN: Yes.

MR BEARD: In those circumstances, we obviously communicated with other counsel about the possibility of moving everything out a week, but obviously that would be entirely dependent on the tribunal being able to accommodate that sort of change. We have had correspondence with, helpfully, Ofcom about the possibility if we were to do that that Mr Matthew would be brought forward to be heard on Monday, and then it would be envisaged that Mr Harman would be heard the

1 following Monday.

2 Now, counsel -- solicitors for the intervener in  
3 their correspondence have asked us whether we can give  
4 an assurance that Mr Harman would be available to give  
5 evidence a week Monday and I'm very --

6 MR TURNER: No, we said if there was a likelihood, because  
7 we need to know.

8 MR BEARD: I'm sorry, I'm not able to. He is optimistic  
9 that that would be the case.

10 THE CHAIRMAN: Can I say that I have obviously read the  
11 correspondence. I don't take any of the correspondence  
12 as, you know, making unreasonable requests or putting  
13 pressure.

14 MR BEARD: No.

15 THE CHAIRMAN: I think we are genuinely trying to find  
16 a solution.

17 MR BEARD: Absolutely, and counsel for the other parties  
18 have been extremely conciliatory, so no, no, I'm not  
19 suggesting otherwise, but I can't give assurances, I can  
20 only say that Mr Harman is hopeful that he would be able  
21 to, given the instructions of his doctor.

22 THE CHAIRMAN: We are very concerned not to put any pressure  
23 on Mr Harman because --

24 MR BEARD: I understand.

25 THE CHAIRMAN: -- if that is the result of any of the

1 solutions, then we will have defeated our purpose.

2 MR BEARD: In those circumstances, if it turns out that  
3 Mr Harman isn't able to give evidence in a week's time,  
4 ie a week Monday, then obviously if we know that -- as  
5 soon as we know that, we would communicate with  
6 the tribunal and we will have to look at alternatives.  
7 But I think the primary question is whether or not  
8 the tribunal would be able to sit to hear the remainder  
9 of this case and the closings in the week commencing  
10 15 July rather than the week commencing 8 July.

11 I know this is far from ideal for any of us and I'm  
12 sure not for the tribunal, but if that were possible  
13 I think that would be the least worst of all worlds in  
14 relation to these matters, albeit, as I say, without  
15 an absolute guarantee that Mr Harman would be able to  
16 provide his evidence on 8 July at this stage.

17 THE CHAIRMAN: Would anybody else like to comment?

18 Mr Holmes?

19 MR HOLMES: Well, sir, this obviously depends essentially on  
20 the tribunal's availability. Of the available options  
21 it does appear that the most practicable will be,  
22 assuming that Mr Harman is well enough to do so, for him  
23 to give evidence in the time that was originally  
24 allocated for oral closings. There are two further  
25 efficiencies to the timetable we set out in our letter

1 of yesterday, which we would float with the tribunal,  
2 and depending upon its availability in the following  
3 week, we think that there can be some further savings to  
4 reduce the length of the overspill, on reflection.

5 I don't know if it would help if I were just to  
6 explain those to you now, or if we were first of all  
7 just to check as a matter of principle whether  
8 the tribunal has any scope to sit in the week commencing  
9 15 July.

10 THE CHAIRMAN: I think as things stand at the moment  
11 the tribunal has scope to sit for the first three days.

12 MR HOLMES: That's very helpful indeed. The two  
13 efficiencies then may well be of interest.

14 The first is that we're conscious that there are now  
15 three non-sitting days. I don't know, do you have the  
16 Ofcom letter? Just by reference to the timetable set  
17 out there, you will see that in week 4 there are now  
18 three -- the right-hand side of the table are obviously  
19 Ofcom's revised proposals, which adapt Royal Mail's  
20 revised proposals.

21 The three days from 3 to 5 July were originally for  
22 preparation of written closings, and they're now lying  
23 fallow. Obviously the parties will in fact be working  
24 during that time on their written closings, and with  
25 that in mind, we did wonder whether we could shave off

1 11 July. You see in week 5 there are currently two days  
2 allocated for preparation of written closings. We could  
3 probably do without 11 July, just have a day following  
4 the Harman evidence in which we incorporated the  
5 material on materiality to the written closing scripts  
6 that we already have prepared, put that in at 5 pm on  
7 10 July, have a day for reading on 11 July, at the top  
8 of the right-hand of page 3 of the letter, and then  
9 begin oral closings on the Friday. So that would be the  
10 first suggestion.

11 It's obviously not ideal to have oral closings  
12 straddling a weekend like that, but we don't think  
13 that's a significant obstacle, and it would compact the  
14 amount of overspill into the following week.

15 The other efficiency that we at least mooted was  
16 whether oral closings could be done in three instead of  
17 in four days, and we have in mind that this case -- it's  
18 obviously a substantial case, there are a number of  
19 issues, you have heard a lot of evidence, but you will  
20 be assisted by quite substantial written closing  
21 submissions already which should save time until the  
22 oral closing submissions.

23 Also, the way that the case has played out, all  
24 counsel I think at least outlined quite a lot of their  
25 legal case in opening submissions, which means that

1           there's somewhat less weight on closing submissions in  
2           relation to some of the grounds.

3           So for that reason, we did wonder whether this could  
4           actually be done in three rather than in four days,  
5           perhaps if necessary with a lengthening of the sitting  
6           day on one of those days or two of those days.

7           So those are our two suggestions, and it would mean  
8           that we could keep the overspill, if both of those were  
9           adopted, to Monday and Tuesday of what is now week 6,  
10          the week commencing 15 July.

11          I should say that the first of those efficiencies  
12          I haven't canvassed with Mr Beard at all, it only  
13          occurred to me, I am afraid, this morning on the way to  
14          court. The second is something that we mentioned, and  
15          I think he has some reservations about compacting  
16          openings.

17          Those, anyway, are Ofcom's suggestions.

18          MR BEARD: In relation to those, just an initial response.

19          I think the idea of bringing forward the start of oral  
20          closings to the Friday and therefore having  
21          concomitantly earlier closing submissions that are filed  
22          relatively shortly after the close of evidence with  
23          Mr Harman, in principle we have no difficulty with that,  
24          that seems sensible and, given the tribunal's  
25          indication, would ensure that we could complete the oral



1 closing submissions by the Wednesday.

2 We do have more concern about compressing the  
3 closings, because obviously what we have had is an awful  
4 lot of evidence in relation to particular matters, but  
5 we think there are important aspects of this case that  
6 we need to set back in context in relation to legal  
7 issues and that is important in the scheme of this case,  
8 because otherwise there can be a danger of looking for  
9 your keys under the lamppost when actually they lay  
10 elsewhere.

11 THE CHAIRMAN: Four days was the original time, was it?

12 MR BEARD: Yes, exactly.

13 THE CHAIRMAN: I think in the light of what Mr Holmes has  
14 said, there is scope for four days.

15 MR BEARD: Yes, absolutely, I was agreeing. The only other  
16 issue, and I don't want to put Mr Holmes and Mr Turner  
17 to any inconvenience now, but at the moment we have two  
18 days allocated for Mr Harman's cross-examination.  
19 I don't know whether, in the light of what has been said  
20 and done so far, whether or not those two days are going  
21 to be required.

22 MR HOLMES: Well, for my part, I think I would like to see  
23 what develops in the --

24 THE CHAIRMAN: I don't think we should do fine-tuning  
25 negotiations.

1 MR BEARD: That's fine.

2 THE CHAIRMAN: What I was going to say was -- well, I'll say  
3 what I say after I've heard Mr Turner, I think.

4 MR TURNER: Our position is this: if there is a real  
5 prospect that Mr Harman will be fit, then it makes sense  
6 to defer him until 8 July, so we have no problem with  
7 that.

8 So far as time for written closings is concerned, we  
9 think that three days in fact is ample -- for the oral  
10 closings, I'm sorry, for the oral closings. So that the  
11 pattern would be something like: Royal Mail have the  
12 whole of the first day and until 11.30 on the second,  
13 and then between Ofcom and Whistl we run until 3 o'clock  
14 on the third day, and then Royal Mail have an hour and  
15 a half for reply. So that would be an orthodox way of  
16 doing it, and it does seem to us that, with the benefit  
17 of you having written closings and having heard the  
18 whole trial, you won't need four days for oral closing  
19 submissions.

20 Our third point is that we think that, in that  
21 light, it would be better not to start oral closings on  
22 the Friday, but if the tribunal does have those three  
23 days, Monday, Tuesday, Wednesday, we work on those and  
24 we deliver those Monday, Tuesday, Wednesday and then the  
25 trial is done, and that will enable us to ensure that

1           you have a better product, both in terms of the written  
2           closings and preparation for the orals.

3       THE CHAIRMAN:   Okay.   Well, I think I've got a clear picture  
4           of what you would like to do.   I think the way we would  
5           like to play this is not to try and micromanage it too  
6           far in advance, we don't want to set up an elaborate  
7           timetable that puts further pressure on Mr Harman.  
8           I suggest we simply defer a proper decision on this  
9           until we are in a position to know what his medical  
10          condition is.

11                 In the meantime, obviously you ought to be  
12            considering what you might want to submit if in fact the  
13            assumption we're making that he will be ready on 8 July  
14            is not true, because we will have to think quite hard  
15            what we do then.   I should be very interested to have  
16            probably written submissions, I think.

17                 In the meantime, I think it just falls to us to say  
18            if everybody is content we will hear Mr Matthew Monday  
19            and Tuesday, and we will extend the time for preparing  
20            written closings at the moment indefinitely, I think,  
21            until we can come to a decision.   That clears the way,  
22            doesn't it, for you to --

23       MR BEARD:   I'm most grateful.   Yes, that's very helpful.

24            Thank you.

25       THE CHAIRMAN:   Is that all right?   And we are very sorry

1           this has happened.

2       MR BEARD: I'm most grateful to the tribunal. On that  
3           basis, will the tribunal earmark those three days in the  
4           following week?

5       THE CHAIRMAN: We have earmarked those three days.

6       MR BEARD: I'm most grateful to the tribunal.

7       THE CHAIRMAN: There are other points but I don't want to  
8           get into them now, but broadly we understand what you  
9           are suggesting.

10      MR BEARD: Thank you.

11      THE CHAIRMAN: Before you call Mr Parker, I think we want  
12           to, in the interests of clarity and assisting  
13           preparation of closings, just state what we think we  
14           understood from the second day of the concurrent  
15           evidence, subject to the same conditions and in the same  
16           manner as we did in relation to the first day.

17           Professor Ulph is going to do that now.

18      MR BEARD: I'm grateful.

19      PROFESSOR ULPH: Okay. If you recall, on the second day of  
20           the hot tub you were talking about two topics. The  
21           first topic was issues related to how the as-efficient  
22           competitor test was actually implemented. So here there  
23           are three points I wanted to take away from that.

24           The first was that, in implementing the as-efficient  
25           competitor test for each SSC, the hypothetical entrant

1 is assigned the long run average incremental cost of the  
2 incumbent at the scale at which the incumbent is  
3 currently operating.

4 If, for each SSC, the long run average incremental  
5 cost of an operator is independent of the scale of  
6 output, such an assumption is unproblematic.

7 If, for any SSC, the long run average incremental  
8 cost depends on scale, then if the incumbent has to  
9 accommodate entry in that SSC by reducing the volume of  
10 its mail, it's long run average incremental cost will  
11 rise, creating productive inefficiency, even if the  
12 hypothetical entrant is as efficient. That productive  
13 inefficiency would have to be taken into account when  
14 assessing the effect of entry on consumer welfare.

15 The second point I wanted to raise was that the way  
16 the test is implemented does not directly address the  
17 sequential nature of entry decisions and effectively  
18 involves a comparison of the hypothetical entrant having  
19 a network of a given size as against there being no  
20 entry.

21 A separate exercise has examined whether it is  
22 profitable for the entrant to move into each additional  
23 SSC. Although some allowance has been made for the  
24 possibility that the conversion rate could vary, this  
25 has not been systematically related to the degree of

1 roll-out, and has not captured the possibility that the  
2 profitability of entry into early SSCs could be affected  
3 by the subsequent scale of roll-out achieved, allowing  
4 for the possibility that, through allocative efficiency,  
5 the retail price might fall if the degree of roll-out  
6 was thought to push the as-efficient competitor test to  
7 or beyond its limits.

8 The final point relating to implementation was:  
9 while the effect of the zonal tilt has been incorporated  
10 into the AEC test, through its potential impact on  
11 surcharges, no explicit modelling has been made of the  
12 choice between three access plans, NPP1, APP2, and ZPP3.  
13 Instead, the comparison has been confined to the choice  
14 between APP2 and NPP1.

15 Then on the fourth topic related to price  
16 discrimination, there was agreement that there had been  
17 some form of price discrimination and that this could be  
18 classified in a number of different ways.

19 Mr Chairman, that's all I have.

20 THE CHAIRMAN: That was about it. Right. Thank you. I'm  
21 not suggesting any reaction to that now, that is for  
22 later. May we now proceed, please.

23 MR TURNER: Whistle calls Mr Parker.

24 MR DAVID PARKER (affirmed)

25 THE CHAIRMAN: Mr Parker, please sit down and make yourself

1           comfortable.

2                           Examination-in-chief by MR TURNER

3       MR TURNER: Mr Parker, you should have bundles in front of  
4           you which include one marked C3. Could you pick up C3,  
5           please. It's being handed to you now.

6       A. Thank you. Yes.

7       Q. If you go in bundle C3 to tab 6 --

8       A. Yes.

9       Q. -- and at the bottom right in red you should have the  
10           number 345?

11      A. Yes.

12      Q. Is this your expert report in this case?

13      A. Yes, it is.

14      Q. Could you please then go on to the final page of this  
15           report, which is page 398 in the red on the bottom  
16           right.

17      A. Yes.

18      Q. You should see a page entitled "Statement of truth"?

19      A. Yes.

20      Q. Is that dated 25 January 2019?

21      A. Yes.

22      Q. Is that your signature?

23      A. Yes, it is.

24      Q. This is your main report in these proceedings?

25      A. Yes, that's right.

- 1 Q. Can you then go, please, in the same bundle to tab 1.  
2 Do you have there a document, the first page of which is  
3 entitled "Joint expert statement"?
- 4 A. Yes.
- 5 Q. If you turn to the second page, please, we see  
6 a declaration of compatibility with the tribunal's  
7 guide, halfway down; do you see that?
- 8 A. Yes.
- 9 Q. On the right-hand side, is that your signature?
- 10 A. Yes, it is.
- 11 Q. This is your evidence in that joint statement?
- 12 A. That's right.
- 13 Q. If you could turn, then, please, in the same bundle to  
14 the following tab.
- 15 A. Yes.
- 16 Q. So this should be a document also entitled "Joint  
17 statement" but now it's "Joint statement of  
18 Mr Greg Harman, Mr David Matthew and Mr David Parker".  
19 Do you have that?
- 20 A. Yes, I do.
- 21 Q. If you could turn in that, please, to the end. In red  
22 at the foot of the page, you should have page 114?
- 23 A. Yes.
- 24 Q. Do you have a declaration there?
- 25 A. Yes, I do.



1 Q. Is that your signature?

2 A. Yes.

3 Q. And the date is 5 April 2019?

4 A. That's right.

5 Q. Finally, Mr Parker, if you could turn, please, to  
6 another bundle which should have, which is marked CE,  
7 concurrent evidence, second volume of that. Do you have  
8 that bundle?

9 A. Yes, I have that.

10 Q. Could you please go in that to the first -- to tab 10.

11 A. Yes.

12 Q. On the first page, is this your supplemental report?

13 A. Yes, it is.

14 Q. If you go in it, please, to page 13, do you have  
15 a page marked "Statement of truth" at the top in red?

16 A. Yes, I do.

17 Q. Is that dated 19 June 2019?

18 A. That's right.

19 Q. Is that your signature?

20 A. Yes, it is.

21 Q. And this is your supplemental report in these  
22 proceedings?

23 A. That's correct.

24 Q. Mr Parker, is there anything in this material that you  
25 wish to correct?

1 A. There's one point in the joint statement between myself  
2 and Mr Dryden and Mr Matthew, which is ... (Pause).

3 Q. Tab 1.

4 A. That's tab 1 of C3, that's right. On page 29 of that  
5 document -- no, I apologise, page 30, the word "less" at  
6 the very end in the final sentence should read "more".

7 THE CHAIRMAN: So less is more, Mr Parker.

8 MR TURNER: Are there any other points?

9 A. No.

10 MR TURNER: If you wait there, please, Royal Mail's counsel  
11 may have some questions.

12 A. Thank you.

13 Cross-examination by MR BEARD

14 MR BEARD: Good morning, Mr Parker.

15 I wanted to just pick up where we left off, to some  
16 extent, in the concurrent evidence session. I asked  
17 a question about whether or not you thought any guidance  
18 might have been useful at the end of that session, and  
19 you referred to the possibility of there being guidance  
20 as being a hypothetical world, would it be better to  
21 have some guidance.

22 I think as you actually refer to in your report, you  
23 are well aware that there is guidance in this field from  
24 the European Commission, don't you?

25 A. That's correct, yes.

1 Q. Yes. So could we go to your report, I think you were  
2 taken to it in bundle C3, or concurrent bundle 2, either  
3 way, whichever one you prefer to look at.

4 If you just go to footnote 74 in that report, which  
5 is on page 368.

6 A. Yes.

7 Q. This is where you actually refer to that guidance,  
8 footnote 74. This is in your chapter on whether or not  
9 an as-efficient competitor test should be carried out.

10 A. Yes.

11 Q. You say you have concerns about the approach of  
12 Mr Dryden and Mr Harman:

13 "Competition law is generally applied based on  
14 a consumer welfare standard."

15 Then your footnote 74:

16 "See for instance the Article 82 Guidance,  
17 paragraphs 19, 30 and 86."

18 Now, I want to take you to that. It's actually in  
19 the authorities bundle, but we have prepared  
20 a cross-examination bundle for you which has documents  
21 that aren't in your files. Now, I have copies for  
22 others. Mr Matthew's cross-examination file is  
23 significantly fatter than the rest of ours, and that is  
24 only because his contains a copy of the Intel decision  
25 which we have in the authorities bundle, and in the

1 interests of minimising destruction of trees we kept  
2 that out. (Handed). So when I go to that, I will go to  
3 the authorities bundle for it.

4 So Mr Matthew, you can probably see in the index  
5 it's at tab 2. Obviously this is in the authorities  
6 bundle at bundle 1, tab 8, if others want to look at it.

7 So you are obviously familiar with this, having  
8 quoted it in the report. It's the communication from  
9 the Commission, 2009:

10 "Guidance on the Commission's enforcement priorities  
11 in applying Article 82 of the EC Treaty to abusive  
12 exclusionary conduct by dominant undertakings".

13 A. Yes.

14 Q. Thank you. The paragraphs you refer to in support of  
15 that proposition we have just seen, let's just look at  
16 those. 19, 30 and -- well, let's go to 19 first.

17 So the structure of it is under section III,  
18 "General approach to exclusionary conduct". Under A  
19 "Market power" and then B, just ahead of 19,  
20 "Foreclosure leading to consumer harm [and then]  
21 ('anti-competitive foreclosure')".

22 So 19 says:

23 "The aim of the Commission's enforcement activity in  
24 relation to exclusionary conduct is to ensure that  
25 dominant undertakings do not impair effective

1 competition by foreclosing their competitors in  
2 an anti-competitive way, thus having an adverse effect  
3 on consumer welfare, whether in the form of higher price  
4 levels than would have otherwise prevailed or in some  
5 other form such as limiting quality or reducing consumer  
6 choice. In this document the term 'anti-competitive  
7 foreclosure' is used to describe a situation where  
8 effective access of actual or potential competitors to  
9 supplies or markets is hampered or eliminated as  
10 a result of the conduct of the dominant undertaking  
11 whereby the dominant undertaking is likely to be in  
12 a position to profitably increase prices to the  
13 detriment of consumers. The identification of likely  
14 consumer harm can rely on qualitative and, where  
15 possible and appropriate, quantitative evidence. The  
16 Commission will address such anti-competitive  
17 foreclosure either at the intermediate level or at the  
18 level of final consumers, or at both levels."

19 So this I think you understand to be a general  
20 statement about what the Commission considers to be  
21 anticompetitive foreclosure in general terms; is that  
22 correct?

23 A. I think that's right. I think specifically the  
24 reference that you take me to in 4.1.6 of my report is  
25 about a consumer welfare standard, and so in this

1 particular context I'm merely pointing to guidance as  
2 support for a view that a consumer welfare standard is  
3 generally applied in competition cases.

4 Q. Well, yes. I mean, your concerns are a bit more than  
5 that, aren't they? At 4.1.6:

6 "I have concerns with the approach of Mr Dryden and  
7 Mr Harman.

8 "a. Competition law is generally applied based on a  
9 consumer welfare standard. Mr Dryden's EEO test is not  
10 likely to promote consumer welfare because it ignores  
11 the benefits to consumer welfare from entry that result  
12 from greater price competition ..." and so on.

13 So there you are emphasising the use of a consumer  
14 welfare standard and critiquing the use of an EEO test,  
15 aren't you, which is what you go on and do in the  
16 remainder of your reports; is that correct?

17 A. Yes, that's correct. I identify that --

18 Q. Thank you.

19 A. -- competition law is generally applied on a consumer  
20 welfare standard --

21 Q. Right.

22 A. -- and then I explore to what extent or whether  
23 Mr Dryden's EEO test actually meets consumer welfare  
24 standard.

25 Q. Okay. Let's go on to the second citation you have,

1 paragraph 30. I'm not going to go through all of this  
2 one. But you see paragraph 30, it's under section D,  
3 and it's "Objective necessity and efficiencies". So  
4 there it's talking about whether or not you can justify  
5 particular conduct that would otherwise be treated as  
6 anticompetitive abuse; is that right?

7 A. Yes.

8 Q. Thank you. Then you will see the next main heading  
9 "Specific forms of abuse", and you will see there we  
10 have "A. Exclusive dealing", and then we go on over the  
11 page to external page numbering 103, "Tying and  
12 bundling". Then we have on 104 "Predation", and then we  
13 have D on 106, "Refusal to supply and margin squeeze".  
14 So these are particular examples of the sort of  
15 exclusionary conduct that this guidance is concerned  
16 with. That's how you understand it?

17 A. Yes, that's correct, yes.

18 Q. Then the paragraph -- the third of your references is in  
19 paragraph 86, so it's under this heading of "Refusal to  
20 supply and margin squeeze", under the subheading  
21 "Consumer harm", and it says:

22 "In examining the likely impact of a refusal to  
23 supply on consumer welfare, the Commission will examine  
24 whether, for consumers, the likely negative consequences  
25 of the refusal to supply in the relevant market outweigh

1 over time the negative consequences of imposing  
2 an obligation to supply. If they do, the Commission  
3 will normally pursue the case."

4 So there it's talking about a weighing exercise of  
5 negative and positive consequences, but in the context  
6 of refusal to supply; that's correct, isn't it?

7 A. Yes, that's correct.

8 Q. As I say, under this heading we're dealing with refusal  
9 to supply and margin squeeze, and if you go back to  
10 paragraph 80, it says:

11 "Finally, instead of refusing to supply, a dominant  
12 undertaking may charge a price for the product on the  
13 upstream market which, compared to the price it charges  
14 on the downstream market, does not allow even  
15 an equally-efficient competitor to trade profitably in  
16 the downstream market on a lasting basis (a so-called  
17 'margin squeeze'). In margin squeeze cases, the  
18 benchmark which the Commission will generally rely on to  
19 determine the costs of an equally-efficient competitor  
20 are the LRAIC of the downstream division of the  
21 integrated dominant undertaking."

22 So although you cite it in the context of refusal to  
23 supply, in this section dealing with specific or  
24 specific categories of exclusionary abuse, in fact we  
25 see in relation to margin squeeze an expression of the



1           notion that actually an equally-efficient competitor  
2           test is the appropriate way of carrying out the  
3           assessment using a LRAIC; that's correct, isn't it?

4       A. Well, I think there's two points there. First, at that  
5           particular point in my report all I'm doing is  
6           identifying that competition law is identified -- is  
7           based on a consumer welfare standard, and that's the  
8           relevant point of para 86, plus other paras scattered  
9           throughout the document, plus my general understanding  
10          of the way that competition law is applied.

11                 In relation to the particular issue that you raise  
12           at point 80, I think this came up a number of times in  
13           the hot tub, that that's reflecting a situation that  
14           I referred to a few times as a vertical margin squeeze  
15           or the most common type of margin squeeze that comes up,  
16           which is you have a dominant undertaking with  
17           a wholesale offering, and you have a retail -- a retail  
18           division of that dominant undertaking which there's no  
19           particular reason why that retail arm of the incumbent  
20           operation should be any more or less efficient than any  
21           other operation, because the dominant position is in the  
22           wholesale market. And so I can see that -- I think  
23           I said several times, I agree that in the vertical  
24           margin squeeze context where there are no obvious  
25           advantages or disadvantages for the retail arm of the

1 dominant incumbent, then it does make sense to think of  
2 an equally-efficient operator test, but that is I think  
3 a different situation to the one that we have here where  
4 entry is taking place at the level of the dominant  
5 undertaking.

6 Q. I understand. Your point is that you think that the  
7 situation here isn't a classic vertical margin squeeze,  
8 albeit you quite properly in your evidence in the hot  
9 tub were cautious not to get too hung up on labelling  
10 issues, we will come back to that; that's correct, isn't  
11 it?

12 A. Yes, I think the factual position here is different.

13 Q. Let's just stay with this guidance for a moment, because  
14 you have cited those paragraphs in support of this  
15 general consumer welfare standard, but what you have  
16 done is been highly selective in the paragraphs of this  
17 guidance you refer to, in considering these issues.  
18 Because if we go back to paragraph 23 through to 27,  
19 here we do see guidance about how the Commission at  
20 least thinks it should approach questions of price-based  
21 exclusionary conduct.

22 You are familiar with this, I imagine?

23 A. Yes, I am.

24 Q. So in 23 it says:

25 "The considerations in paragraphs 23 to 27 apply to

1 price-based exclusionary conduct. Vigorous price  
2 competition is generally beneficial to consumers. With  
3 a view to preventing anti-competitive foreclosure, the  
4 Commission will normally only intervene where the  
5 conduct concerned has already been or is capable of  
6 hampering competition from competitors which are  
7 considered to be as efficient as the dominant  
8 undertaking."

9 So just here in 23, what we see is in relation to  
10 price-based exclusionary conduct the Commission  
11 specifically saying it will normally only intervene  
12 where the conduct concerned has already been or is  
13 capable of hampering competition from competitors which  
14 are considered to be as efficient as the dominant  
15 undertaking.

16 That's correct, isn't it?

17 A. So I think in this paragraph, actually the key sentence  
18 is "vigorous price competition is generally beneficial  
19 to consumers", which I would agree with.

20 Q. Yes?

21 A. But that is -- this is not the situation in this case,  
22 this isn't a situation where prices are being lowered to  
23 consumers, it's a -- this is -- would be in, if you  
24 like, the excessive competition paradigm in  
25 situations --

- 1 Q. Well --
- 2 A. Mr Beard, perhaps I could finish.
- 3 Q. I'm going to ask you about the guidance rather than  
4 about the facts of this case, and that's what I want to  
5 focus on. So you say "vigorous price competition is  
6 generally beneficial to consumers" is the key sentence  
7 here; is that what you have just said?
- 8 A. So I think from the perspective of a situation of very  
9 aggressive competition in terms of low prices, I would  
10 agree, as I think I set out a number of times in the hot  
11 tub, that it makes sense from an economic perspective to  
12 think about whether that competition, which is otherwise  
13 beneficial to consumers, might have gone too far.
- 14 Q. Right. So just let me understand what you are actually  
15 saying about your interpretation of the guidance here.  
16 You are saying, as I understand it, that this guidance  
17 in the final sentence of 23, and we will come on to deal  
18 with the other parts, this guidance which says:
- 19 "With a view to preventing anti-competitive  
20 foreclosure, the Commission will normally only intervene  
21 where the conduct concerned has already been or is  
22 capable of hampering competition from competitors which  
23 are considered to be as efficient as the dominant  
24 undertaking."
- 25 You are saying that that test that the Commission is

1 putting forward only applies where there is vigorous  
2 price competition; is that your position, Mr Parker?

3 A. Well, from a legal perspective, the position is not for  
4 me. What I'm saying is from an economic perspective,  
5 I think since the publication of the 2009 guideline,  
6 there has been further thinking as to how one might  
7 characterise different types of exclusionary abuse, and  
8 from an economic perspective how one might test those in  
9 different circumstances, and to me from an economic  
10 perspective I would say that it makes sense to think of  
11 a price/cost test potentially on an as-efficient  
12 competitor basis in a predation type case where you  
13 otherwise have conduct that is beneficial to consumers.

14 So I'm giving you an economics answer, I'm not  
15 trying to interpret the guidance in that sense.

16 Q. No, but, Mr Parker, you are saying in your statement  
17 "Competition law is generally applied on the basis of  
18 a consumer welfare standard". You cite extracts from  
19 the guidance. You specifically don't cite the passages  
20 that refer to the use of an AEC test. In answer to my  
21 question, you say "Well, from an economic point of view,  
22 what is going on here is that the Commission is  
23 effectively only applying that to vigorous price  
24 competition cases". That's how you understand it. Am  
25 I understanding correctly?

1       A. Well, I'm saying that, as I understand this particular  
2       paragraph of the guidance, this is about price-based  
3       exclusionary conduct and it's in the context of  
4       "vigorous price competition is generally beneficial to  
5       consumers" and it's therefore a test that is applied in  
6       the context of vigorous price competition.

7       Q. No, it doesn't say that, does it, Mr Parker? If it was  
8       going to do that, it would have said "vigorous price  
9       competition-based exclusionary conduct". That would be  
10      the heading, wouldn't it?

11      A. Well, I'm not sure I can comment on how the Commission  
12      should have written its guidelines in that sense.

13      Q. Mr Parker, I'm going to ask from an economic point of  
14      view. We've just been referring to specific forms of  
15      abuse there adumbrated and considered in more detail in  
16      the remaining parts of this guidance: exclusive dealing,  
17      tying and bundling, predation and refusal to supply  
18      a margin squeeze.

19             Those are all particular examples of, certainly,  
20      save for refusal to supply, price-based exclusionary  
21      conduct being considered here.

22             Are you saying that all of those are vigorous price  
23      competition conduct?

24      A. So for me I think the relevant economic distinction  
25      would be between conduct that is -- has direct consumer

1 benefits but where your concern is that the dominant  
2 incumbent goes too far, of which predation is a classic,  
3 but there might be other types of price-based or other  
4 pro-competitive -- normally pro-competitive conduct and  
5 the issues with it, goes too far. I think there is a  
6 separate economic category of conduct which is conduct  
7 that does not have any direct consumer benefits and it's  
8 about raising rivals' costs or similar approaches, and  
9 I think for me, from an economic perspective, that is  
10 the -- a sensible way to distinguish between two  
11 different types of overarching paradigm for different  
12 types of exclusionary abuses.

13 Q. So when you cited the guidance as the basis for your  
14 assertion that a consumer welfare standard is the one  
15 that should be generally applied and is generally  
16 applied in competition law, you ignored the fact that  
17 the paragraphs in this guidance that you cite, in  
18 particular paragraph 19, are followed by guidance which  
19 indicates that the way in which consumer welfare may  
20 best be considered in the context of an ex post analysis  
21 is by reference to an as-efficient competitor test on  
22 price-based exclusionary conduct. You thought that was  
23 appropriate to ignore that?

24 A. I'm not sure it's a question of ignoring it. I think  
25 what I'm -- the point I'm making in 4.1.6(a), first

1 sentence, "Competition law is generally applied on  
2 a consumer welfare standard", it is certainly my  
3 understanding that that is the case. There is then  
4 a question of, from my perspective, under what  
5 circumstances is it appropriate from an economic  
6 perspective to apply an as-efficient competitor test,  
7 and I think we've covered those circumstances.

8 Q. Well, we will obviously be coming back to these matters  
9 in submissions. But the point I'm making to you is that  
10 it is remarkable that you place great emphasis  
11 throughout this report on the importance of consumer  
12 welfare standard, you cite this guidance in connection  
13 with it, you criticise continuously in this report the  
14 use of an AEC test, and yet here we have in the very  
15 same guidance the Commission saying "Actually in  
16 relation to price-based exclusionary conduct you should  
17 use an as-efficient competitor test or we would anyway";  
18 that's correct, isn't it, Mr Parker? It is remarkable  
19 that you have ignored that.

20 A. I think it depends on how you interpret the phrase  
21 "price-based exclusionary conduct". In my view, the  
22 appropriate distinction is not whether conduct takes  
23 place on prices but whether it is a type of conduct  
24 which has direct benefits for consumers or not, rather  
25 than whether that is through a mechanism of prices or



1           some other mechanism.

2           Q. You don't adopt the threshold between those two  
3           categories you suppose as being a test of vigorous price  
4           competition, that's not the test you use?

5           A. Sorry, I don't think I follow the question.

6           Q. Well, you have suggested that it depends how you  
7           interpret the phrase "price-based exclusionary conduct".  
8           It's not that that you should consider, notwithstanding  
9           the terms of the guidance, but whether it's a type of  
10          conduct which has direct benefits to consumers or not,  
11          and I'm just asking: you have put that as your  
12          distinction between the two categories of conduct where  
13          you should use an AEC and should not, and I'm just  
14          asking to confirm that that distinction is not based on  
15          a definition of vigorous price competition, is it? It's  
16          not the language you used?

17          A. It's not the language I used, but it's --

18          Q. And is that the test you would use?

19          A. I'm sorry, what test are you referring to?

20          Q. Well, you, Mr Parker, in answer to my question,  
21          suggested there were two categories of conduct, those  
22          that have direct benefits to consumers or not, and I'm  
23          asking you whether you would distinguish those two  
24          categories by use of a test referring to vigorous price  
25          competition or not?

1       A. No, I think that would be -- it would be too narrow to  
2       focus only on vigorous price competition. Vigorous  
3       price competition is one type of behaviour that can lead  
4       to direct consumer benefits and where your concern is  
5       about from an exclusionary abuse perspective whether  
6       that goes too far, but I think there could be other  
7       types of behaviour that also have direct consumer  
8       benefits, so very substantial increases in quality or  
9       something similar, and where again your concern would  
10      not be -- well, it would be: is the dominant incumbent  
11      going too far in some sense.

12      Q. I see.

13      A. But all of those are within the context of a consumer  
14      welfare standard.

15      Q. There might be a difference between the overall goal in  
16      broad terms of competition law being -- pursuing  
17      consumer welfare and the test that is being applied,  
18      mightn't there, Mr Parker?

19      A. Yes, I agree with that, and I think a good test would be  
20      one that tries as best as possible to catch situations  
21      which, you know, lead to detriments in consumer welfare  
22      from situations that would lead to benefits in terms of  
23      consumer welfare.

24      Q. Yes. What I'm putting to you is that we have guidance  
25      here that says, in relation to price-based exclusionary

1           conduct, the approach that at least the Commission would  
2           adopt is using an as-efficient competitor test. There  
3           are qualifications that I'm going to come on to, but  
4           that's the approach, and I'm suggesting that that is the  
5           approach that competition law generally would apply in  
6           relation to pursuit of a consumer welfare standard as  
7           you set out in your report; is that fair, Mr Parker?

8           A. Well, I think it's clear on the economics that entry of  
9           a less-efficient competitor can improve consumer  
10          welfare, and indeed if you go on to paragraph 24, that's  
11          the next --

12          Q. Yes, I was just about to go there, Mr Parker,  
13          absolutely.

14          A. -- sentence, therefore I don't think that in all  
15          circumstances a test which just considers whether there  
16          is exclusion of competitors that are as efficient as the  
17          dominant undertaking is a good test from a consumer  
18          welfare perspective.

19          Q. But this is guidance, you accept, indicating that that  
20          is how the Commission would approach these matters in  
21          relation to price-based exclusionary conduct, don't you,  
22          Mr Parker?

23          A. I accept that in that sentence that's what it says, but  
24          it goes on then to talk about, for example in the next  
25          paragraph, in certain circumstances a less-efficient

1 competitor may exert a constraint.

2 Q. Yes, let's just look at 24. Absolutely:

3 "... the Commission recognises that in certain  
4 circumstances a less-efficient competitor may also exert  
5 a constraint that should be taken into account when  
6 considering whether particular price-based conduct leads  
7 to anti-competitive foreclosure. The Commission will  
8 take a dynamic view of that constraint, given that in  
9 the absence of an abusive practice such a competitor may  
10 benefit from demand-related advantages, such as network  
11 and learning effects, which will tend to enhance its  
12 efficiency."

13 So what it's saying there, Mr Parker, is that the  
14 primary test for price-based exclusionary conduct is  
15 an as-efficient competitor test, but if there are  
16 specific circumstances it may use some sort of  
17 less-efficient competitor test in deciding what cases to  
18 pursue; that's what it's saying here, isn't it,  
19 Mr Parker?

20 A. That's right. I think, as I understand Post Danmark II,  
21 that was a case in which there was explicitly said one  
22 shouldn't use an as-efficient competitor test, which  
23 seems to me to be that the guidance, which is about  
24 enforcement priorities and so on, my impression is that  
25 that would suggest it can't be an absolute standard and

1 must be done in every single case irrespective of the  
2 factual matrix. But, you know, I'm not a lawyer and you  
3 will tell me if I'm incorrect.

4 Q. Certainly we're going to touch on some other economic  
5 commentary dealing with Post Danmark II. I'm just  
6 dealing with this guidance here. What we see here is  
7 the Commission saying in the light of the general goal  
8 of consumer welfare that's articulated in paragraph 19,  
9 when you are assessing price-based exclusionary conduct,  
10 the way you do it is by focusing on an as-efficient  
11 competitor test, but there may be circumstances where  
12 a less-efficient competitor test is appropriate in  
13 deciding what cases to pursue.

14 That's what it's saying, isn't it?

15 A. (Pause). Sorry, where is the bit about in deciding what  
16 cases to pursue? I think I've ...

17 Q. It's because this is priorities guidance, Mr Parker. So  
18 I indicated at the beginning this is guidance on the  
19 Commission's enforcement priorities.

20 A. Yes, you are quite right, and obviously the same thing  
21 is true in 23, isn't it, "normally only intervene  
22 where"?

23 Q. Yes.

24 A. Understood.

25 Q. Sorry, I wasn't trying to confuse with that end of the

1 question.

2 A. I understand.

3 So I can see that this is what the guidance says,  
4 and in my view from an economic perspective I don't  
5 think it's appropriate to use an as-efficient competitor  
6 test in all circumstances as that will not catch all  
7 situations where the use of such a test divides the  
8 conduct from being consumer welfare enhancing and not  
9 capturing conduct that is in fact detrimental to  
10 consumer welfare.

11 Q. I understand your position. You have used the term "all  
12 circumstances" a couple of times. This Commission  
13 guidance is not actually saying it uses the as-efficient  
14 competitor test in all the circumstances, is it? It's  
15 saying the basic approach should be an as-efficient  
16 competitor test, but there may be circumstances where  
17 you use some sort of less-efficient competitor  
18 methodology, isn't it?

19 A. I think this is all in the context, as I understand it,  
20 of vigorous price competition.

21 Q. Well, I think I'm not going to test you further on that.  
22 I think that is a fundamental misunderstanding of this  
23 guidance, Mr Parker.

24 Now, 25:

25 "in order to determine whether even a hypothetical

1 competitor as efficient as the dominant undertaking  
2 would be likely to be foreclosed by the conduct in  
3 question, the Commission will examine economic data  
4 relating to cost and sales prices, and in particular  
5 whether the dominant undertaking is engaging in  
6 below-cost pricing. This will require that sufficiently  
7 reliable data be available. Where available, the  
8 Commission will use information on the costs of the  
9 dominant undertaking itself. If reliable information on  
10 those costs is not available, the Commission may decide  
11 to use the cost data of competitors or other comparable  
12 reliable data."

13 So here the further guidance that's being provided  
14 by the Commission as to how it thinks you should  
15 approach these matters, at least in deciding which cases  
16 to take, it's saying AEC, there may be exceptions where  
17 we have moved to a less-efficient competitor test and in  
18 25 you have to use the costs and data of the dominant  
19 undertaking if it's available, and you accept that,  
20 I think, is the right approach, don't you, in relation  
21 to the costs data issue?

- 22 A. Yes, if one is going to do an as-efficient competitor  
23 test, I think the starting point should be the cost data  
24 of the dominant undertaking. I mean, my reading of this  
25 paragraph, where we start talking about below cost

1 pricing, it seems to me this is a predatory paradigm  
2 that we're interested in, which would be consistent with  
3 the statement about vigorous price competition being  
4 generally beneficial to consumers and your concern is:  
5 does that competition go too far? I don't think that  
6 for me that is -- you know, any conduct involving any  
7 element of price, irrespective of what happens to those  
8 prices and whether they directly affect consumer welfare  
9 or not, it would be sensible to apply this test.

10 Q. We will come back to that, perhaps, in a moment, given  
11 the nature of the examples that are then used. I won't  
12 deal with 26, which is to do with cost measures, and  
13 I think you fairly accepted in the course of the hot tub  
14 that LRIC was appropriate in these circumstances.

15 27:

16 "If the data clearly suggests that  
17 an equally-efficient competitor can compete effectively  
18 with the pricing conduct of the dominant undertaking,  
19 the Commission will, in principle, infer that the  
20 dominant undertaking's pricing conduct is not likely to  
21 have an adverse effect on effective competition, and  
22 thus on consumers, and will therefore be unlikely to  
23 intervene."

24 So what it's saying here is that if you pass an AEC  
25 test, then in principle the basic presumption will be in



1 relation to price-based exclusionary conduct that in  
2 fact you are not having an adverse effect on effective  
3 competition. That's what's being said here, isn't it,  
4 it's quite clear?

5 A. I think that makes sense from an economic perspective in  
6 the context of predation. I think it makes sense in the  
7 context of vertical margin squeeze where we have no  
8 presumption of the downstream retail arm of the  
9 vertically integrated incumbent being at an advantage to  
10 any other retail entrant. I don't think from  
11 an economic perspective that this makes sense in  
12 a consumer welfare paradigm when the entrant cannot  
13 replicate all the advantages of the dominant firm, and  
14 that in those circumstances entry even by  
15 a less-efficient competitor can increase welfare.

16 Q. "Can" you say. But the test that's being articulated  
17 here is not limited to those categories of predation and  
18 margin squeeze, is it? It's talking about pricing  
19 conduct generally.

20 A. Well, that's your interpretation.

21 Q. I understand --

22 A. I would, from an economic perspective, think it's more  
23 sensible to distinguish between conduct which directly  
24 benefits consumers and conduct which does not benefit  
25 consumers.

1 Q. I see.

2 A. And let's suppose we have a situation where there are no  
3 price cuts but the input price you charge to your rivals  
4 increases, it doesn't seem to me that it would be  
5 sensible to apply a standard which is trying to  
6 distinguish excessive competition from a standard which  
7 is about raising rivals' costs, simply on the basis that  
8 the chosen mechanism to do so is in the form of pricing  
9 behaviour rather than any other type of anticompetitive  
10 behaviour.

11 Q. Well, I will come back to that in a moment. Just  
12 finishing off on 27:

13 "If, on the contrary, the data suggests that the  
14 price charged by the dominant undertaking has the  
15 potential to foreclose equally-efficient competitors,  
16 then the Commission will integrate this in the general  
17 assessment of anti-competitive foreclosure (see  
18 section B above), taking into account other relevant  
19 quantitative and/or qualitative evidence."

20 So let's just be clear what the Commission is saying  
21 here. I understand that you disagree with it, albeit  
22 that you cited other parts of this guidance in support  
23 of your report, but you disagree with the clear  
24 indication that the AECT is the right way forward in  
25 relation to price-based exclusionary conduct. If you

1 can't have an AEC then you might look at an EEO.

2 27 is saying something further, isn't it? It's  
3 saying if you pass the AEC we don't have a problem  
4 presumptively in relation to this conduct, but if you  
5 fail it, that's not the end of the story, we then take  
6 this information into account in the round having regard  
7 to the broader considerations in section B above, and of  
8 course section B above is the section including  
9 paragraph 19, isn't it?

10 A. Yes.

11 Q. So what's being said here, Mr Parker, is that even if  
12 you fail the AEC, it's highly relevant information for  
13 the consideration of consumer welfare, isn't it?

14 A. So I think this is a variant of previous comments that  
15 I've made. I think it makes sense from a consumer  
16 welfare perspective that if you're in a situation of  
17 conduct that is directly beneficial to consumers, of  
18 which say vigorous price competition in the form of  
19 predation is one, you needed to have a rule by which you  
20 distinguish appropriate low pricing competitive  
21 behaviour from anticompetitive excessively low predatory  
22 behaviour, and in my -- from an economic perspective,  
23 I think the key distinction is not about whether the  
24 conduct takes the form of pricing or some other form,  
25 I think it's about whether the conduct directly benefits

1 consumers.

2 Q. I see. Sorry, just to go back to an answer you were  
3 giving a while ago, you said that in this case this  
4 falls on the side of the line that's outside the scope  
5 of paragraphs 23 to 27; that's right?

6 A. Well, the exact interpretation of paragraphs 23 to 27  
7 and what's in and outside of scope is a legal question.  
8 But from my perspective, as I understand it, the nature  
9 of this conduct is that all prices went up to reach the  
10 new NPP1 price and then there was a further price  
11 increase applied to APP2 over and above NPP1, and  
12 therefore whilst it was in the form of an input price,  
13 there is no sense in which there were price discounts  
14 that were of benefit to consumers, and I think there is  
15 references to that in the decision.

16 Q. You are saying, I think fairly clearly, you have come at  
17 it in various ways, you have come at it from an economic  
18 perspective, you have said that this sentence vigorous  
19 price competition is qualified, but you are saying that  
20 in this case applying the approach in paragraph 23 is  
21 not the right approach?

22 A. I'm actually saying that I don't think that this is  
23 a situation of vigorous price competition being  
24 beneficial to consumers, and therefore I don't think  
25 that I would say that this -- these paragraphs are

- 1           therefore relevant --
- 2       Q.   They're not relevant?
- 3       A.   -- because from that perspective, but if we were in
- 4           a situation of, say, predation, I think these paragraphs
- 5           would potentially be very relevant.
- 6       Q.   Are you saying this conduct is within what you refer to
- 7           as the predation paradigm or not?
- 8       A.   No, I don't think it's in the predation paradigm.
- 9       Q.   So you are saying that paragraphs 23 and 24 are not
- 10          relevant to this case?
- 11       A.   (Pause) Well --
- 12       Q.   I think I'm only confirming what I understood you to
- 13          have said already.
- 14       A.   I think if you take -- together I think that's right,
- 15          I think it is still correct to say that whether we're
- 16          talking in a predation paradigm or in some other
- 17          paradigm, in certain circumstances the less-efficient
- 18          competitor may exert a constraint, but in terms of
- 19          whether one would need to do an as-efficient competitor
- 20          test in the circumstances of this case, I'm not sure for
- 21          me that turns on whether the conduct arises as a result
- 22          of pricing or some other behaviour.
- 23       Q.   And you are saying not an as-efficient competitor test,
- 24          and that's not the starting point, and actually even the
- 25          approach that's applied here of moving to

1 a less-efficient competitor approach in an exceptional  
2 case under 24, you are saying that's not the right  
3 approach because it's all the wrong starting point; am  
4 I understanding correctly?

5 A. So you will see in my report that I have modelled, I've  
6 said if you are going to do a REO, a price/cost test at  
7 all, I think REO makes more sense in a situation where  
8 you don't have -- the entrant can not replicate the  
9 non-replicable advantages and disadvantages of the  
10 dominant firm, and that it would be appropriate to  
11 adjust, because otherwise where you have a situation  
12 where you are only likely to get entry from  
13 an inefficient competitor relative to the dominant firm,  
14 consumer welfare is likely to be enhanced by that entry  
15 and a test which excluded that type of entry would be  
16 adverse to consumer welfare.

17 Q. Just to be clear, are you saying you should do a REO  
18 test or not?

19 A. I'm saying if you are going to do a price/cost test then  
20 I think it would be more sensible to do a REO test than  
21 an EEO test.

22 Q. I see. Do you need to do a price/cost test or not?

23 A. I think that's ultimately a legal question.

24 Q. Do you think it is appropriate to do a price/cost test  
25 in this case or not?

1 A. No, I don't think it is.

2 Q. Thank you.

3 Could the witness be passed bundle C4B, please.

4 A. Yes.

5 Q. If we could just go to tab 95 in this bundle, please.

6 A. Yes.

7 Q. So this is, I think, the first report you authored in  
8 these proceedings back in January 2014 in support of  
9 Whistl's complaint; is that correct?

10 A. I think it probably depends on how you define these  
11 proceedings.

12 Q. Yes, fair.

13 A. But yes, this was the report that I was heavily involved  
14 in, in January 2014.

15 Q. Did you write it?

16 A. In large part, yes.

17 Q. Can we go to page 9. You set out the executive summary  
18 and the ... and you refer first of all to TNT, first  
19 paragraph, then the vast majority of bulk mail customers  
20 wanting national delivery coverage. Then:

21 "On 10 January 2014, Royal Mail published revised  
22 downstream access terms under three contracts ..."

23 Then you summarise:

24 "Broadly, these new contracts offer the following  
25 access prices and conditions:

1           "The ZPP3 contract provides access customers with  
2 a set of zonal prices (for urban, suburb, rural, and  
3 London areas) based on the different cost levels ...

4           "The APP2 contract provides access customers with an  
5 average national price based on the average of the zonal  
6 prices based on Royal Mail's mailing profile, if those  
7 customers have a mailing profile that is identical  
8 across zones (within a certain tolerance) ..."

9           Then you say:

10          "The new NPP1 contract provides access customers  
11 with a national average price at a 1.2% discount to the  
12 APP2 price, for customers whose delivery profile across  
13 the vast majority of the 83 SSCs in the UK is similar to  
14 that of Royal Mail."

15          So there you are just characterising how you  
16 understand the changes in the contracts; that's correct?

17 A. Yes, that's right, and there is -- well, yes, that's  
18 right.

19 Q. "Some of the terms and clauses in each of these  
20 contracts, if introduced, will have an exclusionary  
21 effect and discriminatory effect on any rival downstream  
22 delivery operator (and on TNT in particular ...)."

23          Then you come on to outline the reasons, and you  
24 start with the new NPP1 contract and you say it's got  
25 several exclusionary mechanisms, and I'm not going to go



1 through all of it, but so we set the scene as to what  
2 you are summarising is your position:

3 "The 1.2% price discount is essentially a geographic  
4 'loyalty' rebate, in that the new NPP1 contract will  
5 only be available without surcharges to access customers  
6 that put all their volumes through Royal Mail's network  
7 in (at least) the substantial majority of the SSCs in  
8 the country."

9 And then the second bullet is that you say:

10 "The discount is also 'retroactive' in nature ..."

11 And then the third bullet is concerned with  
12 surcharges faced by operators, and then the fourth  
13 bullet is to do with the forecasting. Those are your  
14 cumulative criticisms of NPP1 that we see through this  
15 report. Is that correct?

16 A. That's correct, you will see a number of references  
17 there to the term discount.

18 Q. Yes?

19 A. And those references are in relative terms. So if you  
20 start from the perspective of APP1, NPP1 is a discount.  
21 If you start from the perspective of NPP1, APP2 is  
22 a price increase. So clearly this was alongside  
23 Whistl's complaint, and Whistl's concern was that the  
24 access operators, 100% access operators would have lower  
25 prices than an end-to-end delivery entrant, and so from

1 Whistl's perspective they would be able to discount.

2 Could I have a copy of the decision? I don't know  
3 where that is in the bundles.

4 Q. It's in tab 1 of the first bundle.

5 A. I believe it's paragraph 353. Yes, 353. It's on -- if  
6 the red numbering is the appropriate reference, it's  
7 page 39.

8 Q. Yes.

9 A. You will see there January 2014 Royal Mail notified  
10 a number of changes that it was making to access prices,  
11 the first one being a normal inflation related price  
12 update which increased access prices on NPP1, APP2 and  
13 ZPP3 by the same amount, so that's from a situation  
14 where there was no price differential, all the prices  
15 went up by inflation, and then there was a further price  
16 increase which applied only to APP2 and ZPP3 which  
17 accordingly increased these prices relative to NPP1.

18 Q. I see.

19 A. So yes, from the perspective of Whistl, who was on APP2  
20 and was thinking about the APP1 price, they were facing  
21 a price discount or their competitors had a lower price  
22 and they were thinking about the consequences of that,  
23 but that's a relative concept.

24 Actually we are not talking here, I think, about  
25 a situation where Royal Mail cut prices to access

1 operators. I think it raised prices to everyone in the  
2 normal course of business with an inflation cost update  
3 and then it raised prices further.

4 Q. Well, you did well to memorise that, obviously, it's  
5 important, because you're concerned there, aren't you,  
6 Mr Parker, that what Mr Matthew now emphasises in his  
7 evidence is this notion that something is or isn't a low  
8 pricing practice, and you're very concerned that  
9 characterising something as a discount looks like a low  
10 pricing practice, doesn't it?

11 A. Well, I think the relevant consideration is whether the  
12 conduct had a direct consumer benefit, and I think it's  
13 clear from the decision that there is no sense in which  
14 that was a consumer benefit in terms of reducing prices  
15 relative to where they would otherwise be, for the 100%  
16 access operators, but at the time of writing the 2014  
17 report, from the perspective of Whistl, it was concerned  
18 about a discount relative to the prices that it faced  
19 and therefore it would have to discount its prices back  
20 to those prices for the 100% access operators.

21 So it's a difference between absolute levels and  
22 relatives.

23 Q. Well, let's just take that in stages. You were  
24 providing a report as an independent economic adviser;  
25 that's correct, isn't it?

1 A. Well, I was providing an economic report in support of  
2 Whistl's claim.

3 Q. Well, let's be really clear about this, Mr Parker. You  
4 have given reports in these proceedings, you are not  
5 suggesting you weren't independent when you gave this  
6 report but you have become independent since through the  
7 involvement in these proceedings; you were  
8 an independent economist when you gave this report,  
9 weren't you?

10 A. That's correct.

11 Q. Yes, and you looked at the terms of the contracts and  
12 the way that they should be properly analysed and you  
13 described them as a discount. It's obviously a relative  
14 discount, I can entirely see that. But you described  
15 them as a discount, didn't you, Mr Parker?

16 A. Yes, I did.

17 Q. And the discount on the face of it would be a low  
18 pricing practice, wouldn't it?

19 A. Well, that's where I think we have to turn back to  
20 whether it is a relative discount or an absolute  
21 discount.

22 Q. Well, that is part of the problem if you start using  
23 labels like low pricing practice, isn't it, Mr Parker?  
24 Because in relation to discounts, they're always  
25 relative, aren't they?

1 A. Well, I think 353 tells you that it wasn't relative, it  
2 was --

3 Q. Well, is that right, Mr Parker? Because in order to  
4 decide whether or not something's a discount, as  
5 an economist what you would do is think about what the  
6 counterfactual price would have been, wouldn't you?

7 A. Yes.

8 Q. Yes. You have said that already. So what you would  
9 have to do, in order to work out whether or not  
10 something was an uplift or discount, was actually work  
11 out what the counterfactual price for NPP1 would have  
12 been absent these changes, wouldn't you?

13 A. In principle, yes, I'm relying on the statement in the  
14 decision there that says that was a normal  
15 inflation-related price update from previous prices. My  
16 understanding, and I can't fully remember the reference,  
17 is that elsewhere it said that that was the price  
18 increase that was included in Royal Mail's business  
19 plan.

20 Q. I know, but I'm interested now just from the economic  
21 perspective, and you have accepted that you would have  
22 to do it from a counterfactual approach, and that's not  
23 what the decision that you just cited does, is it?

24 A. No, that's correct.

25 Q. So in fact you can't tell whether or not you should

1           treat it as a discount or not, Mr Parker, and that  
2           reference you have just taken us to in the decision  
3           doesn't tell us from an economic point of view either,  
4           does it?

5           A. I mean, I think if there was evidence that in fact those  
6           access prices would have gone up by more, then yes, that  
7           would be correct, I just think we don't have evidence  
8           either way, but the way it's described of a normal  
9           inflation-related price update, it is what it is.

10          Q. But in order to define what could constitute a low  
11          pricing practice, that's the exercise you would have to  
12          do each time, isn't it, if you were going to use that  
13          sort of labelling? I know you don't want to. That's  
14          correct, isn't it, from an economic point of view?

15          A. I think strictly speaking what I'm talking about is  
16          conduct that leads to direct consumer benefits, and what  
17          I haven't seen in this -- seen evidence of in this case  
18          is of a proposition being put that the new NPP1 price  
19          was conduct that led to direct consumer benefits --

20          Q. I understand.

21          A. -- in a way that in a predation case I would expect it  
22          to be put that this is low pricing which is to the  
23          benefit of the consumers receiving those low prices.

24          Q. I understand, if it was a predation case.

25                 Let's turn on in your report to page 17, if we may.

1 THE CHAIRMAN: Mr Beard, when are you proposing to pause?

2 MR BEARD: I'm sorry, I had lost track of time, it was too  
3 much fun. I'm very happy to pause now, if that would be  
4 convenient.

5 THE CHAIRMAN: I would just like to remind those present  
6 that without any disparagement of the conditions under  
7 which the witness may or may not have given evidence at  
8 the complaint stage, we have specific rules which are  
9 designed to guarantee that experts giving evidence in  
10 the tribunal are genuinely independent.

11 MR BEARD: Of course.

12 THE CHAIRMAN: Thank you.

13 MR BEARD: I merely wanted to clarify what Mr Parker's  
14 position was at the time.

15 THE CHAIRMAN: You've been talking about his not possibly  
16 become being independent, and I think he signed the  
17 declaration. We take it that he observes the rules.

18 MR BEARD: I quite understand. The issue -- the answer  
19 means that there is no issue arising here. But if there  
20 had been a situation where an expert was providing  
21 material during the course of administrative proceedings  
22 and then subsequently declared himself in a position  
23 where he wasn't or she wasn't independent during that  
24 course, and then subsequently signed a declaration, that  
25 would be a matter that might warrant further enquiry.





1           that of Article 102, Chapter 2. What you are referring  
2           to there is that the complaint is being made under the  
3           universal service provision access condition rather than  
4           102, Chapter 2; is that right?

5           A. I believe that was the position, yes.

6           Q. Yes, yes, I think that's clear actually from the next  
7           paragraph. If we just go back:

8                     "We have employed this approach in our assessment of  
9                     whether Royal Mail's conduct is exclusionary ..."

10                    So it's the same conduct we're talking about today  
11                    and the conduct you were talking about in your report,  
12                    but at this time you said that the approach in the  
13                    Commission guidance was the right approach to adopt to  
14                    the consideration of Article 102; that's what you are  
15                    saying there, isn't it?

16           A. I'm saying that was my understanding of the legal  
17            framework at the time.

18           Q. Right.

19           A. And my understanding is that the legal framework has  
20            developed, not least because we have the Post Danmark II  
21            judgment, so this report was written in January 2014,  
22            Post Danmark II was I think at some point in 2015, and  
23            therefore that gave rise to some rather different  
24            propositions about the as-efficient competitor test and  
25            circumstances in which it was appropriate. So yes, in

1           this and subsequent pages I set out aspects of the  
2           guidance which I felt or understood were relevant at the  
3           time but I also understand now that the legal position  
4           has moved on.

5       Q.   I see.  So you have been instructed, have you, that the  
6           guidance given by the Commission is not relevant?

7       A.   No.

8       Q.   Sorry?

9       A.   No, I haven't been instructed --

10      Q.   So the guidance given by the Commission is still  
11          relevant?

12      A.   That's not for me.  I can offer you an understanding as  
13          a practitioner from an economics perspective in this, in  
14          these cases, where, you know, the evidence that one  
15          presents from an economic perspective needs to try and  
16          slot within the relevant legal framework --

17      Q.   Of course?

18      A.   -- and it is not for me to determine, you know,  
19          precisely what that legal framework is, but if this was  
20          a merger case, for example, I would try and make sure  
21          that my evidence was relevant to the question of a --  
22          the significant lessening of competition test in the UK  
23          and so on.  So at these levels of high principle I have  
24          to try and as an expert economist to make my evidence  
25          kind of sit within the framework.  When we get to very

1 complicated legal questions as to exactly what has  
2 applied, I'm not in any way trying to give a legal  
3 opinion, I'm just trying to give an understanding as to  
4 how I understood the position at the time, and I think  
5 one might want to bear in mind that this report was  
6 submitted on 28 January 2014, the CCNs were issued on 10  
7 January 2014, so it was done in very short order, and  
8 what I didn't do at that point was -- I spent more time  
9 trying to focus on what I thought was the economic  
10 consequences of the conduct and -- rather than doing  
11 a very exhaustive review of various legal guidance.

12 Q. But you had been retained by Whistl prior to 10 January,  
13 hadn't you?

14 A. A little bit before, yes. I think it would ... it was  
15 probably late -- it may have been late December, but at  
16 that point the CCNs had not been introduced. I think it  
17 must have been we had had the announcement of the  
18 decision in principle, and we were retained, I can't  
19 remember the exact date, shortly before Christmas,  
20 I believe.

21 Q. I'm not going to question you on the exact date.

22 A. I'm grateful.

23 Q. Legal framework. Now, as you say, what you do have here  
24 is reference in 2014 to this being the approach that  
25 should be adopted using the guidance. So you have been

1 very clear that your understanding is that the world has  
2 fundamentally changed in law so that your understanding  
3 is that this is no longer the approach to be applied.  
4 That's not you assessing the law, but that's what you  
5 have been told. Am I understanding correctly?

6 A. Well, I understand there are other -- other decisions  
7 that are subsequent to the Article 82 guidance on the  
8 same point. It's clearly the case that it's a legal  
9 matter as to which of those is appropriate.

10 Q. So in any event, what we see here is that at that time  
11 your instruction was that this framework was the law,  
12 and you say from an economics perspective that applying  
13 that framework makes sense in dealing with the conduct  
14 in question; is that correct?

15 A. Well, I say we have employed this approach.

16 Q. You don't anywhere here suggest that that approach is  
17 flawed, do you?

18 A. No. At that time I -- as I say, this report was done in  
19 very short order, I hadn't turned my mind exhaustively  
20 to the question of whether the Article 82 guidance was  
21 appropriate in all the circumstances, and the  
22 Post Danmark II judgment was on an interesting fact  
23 pattern which was different to I think the fact pattern  
24 that was generally envisaged from various parts of the  
25 Article 82 guidance in terms of vertical margin squeeze,

1           there's lots of references to vertical margin squeeze  
2           cases in that guidance, or the paradigm they're thinking  
3           about is a vertical margin squeeze case, and then  
4           Post Danmark II is about a somewhat different fact  
5           pattern and reached different conclusions.

6           Q. Well, again -- let's deal with Post Danmark II in due  
7           course and let's deal with it from an economist's  
8           perspective. But there is nothing here, is there, in  
9           your report that suggests that that guidance is from  
10          an economic point of view inappropriate, is there?

11          A. No.

12          Q. No. If we actually go on to section 6 -- sorry, page 60  
13          internal numbering --

14          A. Yes.

15          Q. -- here what you -- under the heading "The additional  
16          costs implied by Royal Mail's access scheme would deter  
17          any future roll-out." Let's look at the paragraph:

18                 "Section 5 demonstrates that there are several  
19                 exclusionary mechanisms inherent in the proposed pricing  
20                 contracts."

21                 We actually saw some of those summarised in the  
22                 bullet point, so I'm not going to go to section 5.

23                 "In this section we explore the appropriate legal  
24                 test and economic framework and demonstrate that these  
25                 have material exclusionary effects, in that they would

1 result in the foreclosure of TNT (or any 'as-efficient  
2 competitor efficient' competitor)."

3 So just to be clear, here you are saying the  
4 relevant economic framework to analyse this case is  
5 whether or not it would result in the foreclosure of TNT  
6 or any as-efficient competitor; I'm understanding that  
7 correctly, aren't I?

8 A. Well, not quite. I think my position at the time, based  
9 on my understanding of the legal framework at the time,  
10 is better set out in 6.1.1, so --

11 Q. Ah, I'm just coming to that, so that's fine.

12 MR TURNER: There is quite a lot of overspeaking, so I think  
13 he should finish his responses.

14 A. So in 6.1.1:

15 "The European Commission will assess potential  
16 exclusionary abuses by means of the 'as-efficient  
17 competitor' test, as shown in Section 1 [which is my  
18 understanding at the time]. However, there will  
19 inevitably be differences between the position of  
20 an entrant and the position of an incumbent, which will  
21 need to be taken into account in formulating the test.

22 "In particular, the incumbent may benefit from  
23 inherent advantages due to economies of scale or scope  
24 that are a consequence of its dominant position, and  
25 which it would be unreasonable to expect an entrant to

1 be able to achieve ...

2 "Consequently ..."

3 I then go on and talk about the reasonably-efficient  
4 competitor test and sort of operationalising, as  
5 I describe it, the as-efficient competitor test. So  
6 I agree that, you know, I think it's very clear that  
7 what I was considering at the time was  
8 a reasonably-efficient competitor test in the context of  
9 a price/cost test. I think that's also true if you look  
10 at the first time I reference it in the executive  
11 summary here. There are other references in this  
12 document which use the term "as efficient", but  
13 I would -- the nature of drafting in a very great haste  
14 is that one doesn't always spend as much time being  
15 exactly careful as to specific language as one should  
16 have done. But I think it's very clear, and I think  
17 this is also -- Mr Dryden has recognised this in the  
18 joint statement, that I haven't changed my position on,  
19 if you are going to do a price/cost test, that a REO is  
20 a more appropriate test in this context.

21 MR BEARD: Well, let's just take it in stages, Mr Parker,  
22 because as I say, I want to look at 6.1.1. I can  
23 understand when you are drafting in haste that there  
24 might be the odd reference that goes astray. Your  
25 summary paragraph here says, summarising the test you

1 are applying, you say:

2 "... in that they would result in the foreclosure of  
3 TNT or any as-efficient competitor."

4 Okay. Then you say at 6.1, the heading is "The  
5 as-efficient competitor test", so clearly at some point  
6 it was pretty plain that you thought that was a relevant  
7 test.

8 Then you come on, as you say, at 6.1.1, "The  
9 appropriate approach in principle: "

10 "The European Commission will assess potential  
11 exclusionary abuses by means of the 'as-efficient  
12 competitor' test as shown in Section 1."

13 You footnote 91, and lo and behold it's a footnote  
14 reference to paragraph 23 of the guidance that we've  
15 seen.

16 Then you go on and say, as you have read out, there  
17 can be differences between the position of an entrant  
18 and the position of an incumbent and therefore you want  
19 to modify this and move to a reasonably-efficient  
20 competitor test. You note, just where you stopped  
21 reading:

22 "Consequently, in operationalising the 'as efficient  
23 competitor' test, national regulatory authorities have  
24 typically employed a 'reasonably efficient competitor'  
25 test, as recommended by the European Commission: 'In the



1 specific context of ex ante price controls aiming to  
2 maintain effective competition between operators not  
3 benefiting from the same economies of scale and scope  
4 and having different unit network costs,  
5 a "reasonably-efficient competitor test" will normally  
6 be more appropriate'. As such, we consider that the  
7 'reasonably-efficient competitor' test is appropriate in  
8 this context as TNT's complaint is essentially about  
9 an ex ante assessment of the ability of a dominant firm  
10 ... to introduce a particular set of regulated access  
11 price contracts."

12 So you are right, you move to a REO test, but you  
13 are absolutely candid that the reason you think that the  
14 as-efficient competitor test set out by the Commission  
15 should be attenuated or conditioned here is because you  
16 are primarily dealing with an ex ante complaint, isn't  
17 it?

18 A. Well, I agree that the reasonably-efficient competitor  
19 test is the right thing to do, I think that would be  
20 appropriate in an ex ante assessment and that's the  
21 observation I make there. But I also think it's  
22 appropriate if you are going to do a price/cost test in  
23 a situation where, as I've said in a variety of  
24 contexts, the entrant has no prospect of being able to  
25 replicate fully the advantages and disadvantages of the

- 1 dominant firm that arise from its dominant position.
- 2 Q. Yes, but there is a real reason, isn't there, why it  
3 might make more sense to use a REO test in an ex ante  
4 situation? Because, as you read out in the two  
5 paragraphs you wanted to go to in 6.1.1, initially what  
6 a REO test enables is changing the parameters of an AEC  
7 test by reference to all sorts of data from all sorts of  
8 other people, including entrants, that a dom co wouldn't  
9 have, doesn't it?
- 10 A. Yes, it relies on an assessment of the extent to which  
11 the dominant company has advantages which cannot be  
12 replicated by the rival, and, you know, I do agree that  
13 that's something that would not necessarily be available  
14 to the dominant firm, you know, of its own ... in terms  
15 of data.
- 16 Q. Knowledge, yes.
- 17 A. Yes.
- 18 Q. So what you are doing here is very sensibly, in terms of  
19 a pitch to Ofcom, saying "Look, we recognise it's an AEC  
20 that would be applied in relation to 102-type cases,  
21 because that's what the guidance talks about, but there  
22 are some differences between the dominant undertaking  
23 and the position of entrant, so you should use this  
24 modified test, the REO test, and that makes sense  
25 because we're dealing with ex ante". That's what you

- 1           are saying here, isn't it?
- 2       A. Well, that is what I'm saying here, but I also consider  
3           that in the current context, in a situation where you --  
4           where the entrant cannot replicate the advantages and  
5           disadvantages, the net advantages of the dominant firm  
6           arising from its dominant position, that would also be  
7           an appropriate thing to do, I believe, in a world where  
8           you can't expect there to be any as-efficient entrant  
9           that would seek to enter or be able to enter in the real  
10          world.
- 11       Q. We will come back to some of these points. Essentially  
12          here you are recognising a difference between ex ante  
13          and ex post conditions, and you are recognising quite  
14          properly that in fact in relation to tests being applied  
15          in relation to ex post, you do need to use the dominant  
16          undertaking's costs and data because that's what they  
17          will know. And implicitly I think you are recognising  
18          it would be unfair to a dominant undertaking if it was  
19          required to condition its behaviour on the basis of  
20          material it didn't know; is that right?
- 21       A. I'm not sure I'm making any statements about what the,  
22          in this report, dominant firm did or didn't know or the  
23          fairness of that.
- 24       Q. No, sorry, not the scope of its knowledge, I quite  
25          understand, but you are recognising that the situation

1 is different ex ante because the dominant undertaking --  
2 sorry, the situation is different ex ante/ex post  
3 because if you are talking about the potential for  
4 a severe sanction on a dominant undertaking, you  
5 recognise a different approach should be adopted because  
6 a dominant undertaking needs to know how to condition  
7 its behaviour and yet a REO test would involve the sorts  
8 of information that a dom co either wouldn't have or is  
9 unlikely to have; is that right?

10 A. I don't think I say any of that.

11 Q. No, I'm asking if that's the corollary of what you are  
12 saying. I am inferring it from your report. Is it  
13 a fair reading of my understanding of your position?

14 A. No, I think my position is probably best set out in the  
15 second paragraph of that section:

16 "... the incumbent may benefit from inherent  
17 advantages due to economies of scale or scope that are a  
18 consequence of its dominant position, and which it would  
19 be unreasonable to expect an entrant to be able to  
20 achieve. This would appear to be the case where the  
21 incumbent's dominant position is at least partly the  
22 consequence of a statutory monopoly, as was the case for  
23 Royal Mail before 2004."

24 So I'm making the recommendation for  
25 a reasonably-efficient competitor test in this context

1 in the context of a situation where I don't think it is  
2 possible for an entrant to be able to replicate the full  
3 advantages of Royal Mail that arise as a result of its  
4 dominant position. That's why I say I think a REO is  
5 a better approach. I'm not making any particular  
6 observation along the lines you suggest about dominant  
7 firm knowledge or whatever.

8 Q. So let's just take this in two stages, that answer. So  
9 are you saying that that paragraph anticipated what you  
10 now understand to be the position as a result of  
11 Post Danmark II, you are exhibiting a remarkable degree  
12 of prescience as to the terms on which Article 102  
13 should operate?

14 A. Well, clearly at the time I had no idea about what  
15 Post Danmark II was going to say, I'm not sure I was  
16 even aware that there was a Post Danmark II. But as it  
17 has turned out, it does seem to be quite on all fours  
18 with Post Danmark II.

19 Q. No, it's not a plausible reading, is it, Mr Parker?

20 THE CHAIRMAN: Can I interrupt a moment. I know you are  
21 being asked quite searching questions and you're having  
22 to think quite hard. Could you perhaps speak a little  
23 slower, because the transcribers are having difficulty  
24 in reflecting your evidence on the transcript. I know  
25 that's always difficult to do.

- 1 A. I do apologise, sir.
- 2 THE CHAIRMAN: Don't apologise. Just try and speak a little  
3 slower.
- 4 MR BEARD: What in fact you are doing here is recognising  
5 the appropriate application of the Commission guidance  
6 and then you are saying: and in particular in this case  
7 the appropriate course is to use this  
8 reasonably-efficient competitor test because we're  
9 focused on an ex ante assessment; that's what's going on  
10 here, isn't it?
- 11 A. Well, I think actually the main thing that's going on is  
12 I'm recognising that in the particular factual context  
13 there is no scope, given the advantages of Royal Mail,  
14 for an as-efficient entrant to emerge, and therefore  
15 I don't think it's very sensible to require a test that  
16 is based on an as-efficient entrant.
- 17 Q. Sorry, can you just show me where it says here that an  
18 as-efficient entrant couldn't emerge? (Pause).
- 19 You don't say that, do you, Mr Parker? This is  
20 an ex post justification of your report, isn't it,  
21 Mr Parker.
- 22 A. No, I don't think so, because if you look at section  
23 6.1.2, whilst I don't say there is no prospect of  
24 an as-efficient entrant emerging, I do say:  
25 "First, Royal Mail, as the dominant incumbent and

1 regulated provider of downstream access, has  
2 substantially greater mail volumes than TNT or any  
3 potential entrant. These mail volumes allow Royal Mail  
4 to access economies of scale in delivery that a new  
5 entrant, whether as efficient as Royal Mail or not,  
6 could never hope to achieve."

7 So that's one example where I am essentially saying  
8 I don't think there could be an as-efficient competitor.

9 Q. No, that's not the case, Mr Parker, that is not what you  
10 say there. What you say, if you go back to 6.1.2:

11 "In practice, we consider that there are five  
12 potential areas where the efficiency of Royal Mail and  
13 a reasonably-efficient competitor may differ and where  
14 a view needs to be taken in implementing the test."

15 The first is the dominant incumbent having scale  
16 economies, the second is in relation to national  
17 coverage, the third, which doesn't have a bullet point,  
18 is down at the bottom of the page on 62:

19 "... Royal Mail may incur additional costs ..."

20 So that's going in the other direction, albeit you  
21 don't seek to use those additional costs and you switch  
22 over to TNT's delivery costs model, therefore favouring  
23 the analysis towards TNT.

24 "Fourth, we understand that Royal Mail has higher  
25 labour costs ..."

1           Again you decide that you will take that out of the  
2 equation and use TNT's labour costs. And then:

3           "Fifth, there may be other efficiencies or  
4 inefficiencies associated with Royal Mail ..."

5           And then you conclude in that final bullet:

6           "However, in the absence of robust information on  
7 these factors [which would go in Royal Mail's favour] we  
8 have ruled these out ..."

9           So what you do is you take into account five heads  
10 in changing the terms of an AEC to your REO, it is with  
11 respect deeply skewed in favour of TNT in the way that  
12 you do that, but nonetheless the project is nothing to  
13 do with indicating that an AEC is not possible, it is  
14 conditioning the terms of the REO analysis, isn't it,  
15 Mr Parker?

16       A. Well, I outline a set of areas where I think it's  
17 possible that one would need to make an adjustment, and  
18 one could be considered. I think at that time  
19 I probably had in mind that it was unlikely that there  
20 would be an as-efficient competitor, I accept that I do  
21 not explicitly go through an approach of saying there  
22 can be no as-efficient competitor to Royal Mail, but  
23 I think that first, first and second, plus the common  
24 costs, are suggestive of that being the case. But  
25 I accept that there is no statement there which says



1 "I've examined fully whether there can be any  
2 as-efficient competitor that's exactly like Royal Mail".

3 Q. You don't say that anywhere, Mr Parker, but let us move  
4 on.

5 Just for completion, let's just go to section 7 for  
6 the moment, page 80, "No obvious cost justification".  
7 So page 80, what you are doing is at 7.1 focusing on the  
8 NPP1 discount. At 7.2 you deal with surcharges. 7.3,  
9 the cost changes. But just at 7.1 you are saying:

10 "The proposed 1.2% discount ... reflects, according  
11 to Royal Mail, the higher certainty in relation to  
12 purchased volumes resulting from the new forecast  
13 requirements ...

14 "On the face of it this appears implausible."

15 So just to be -- and I'll just read on:

16 "If Royal Mail's observation was true, there would  
17 not need to be any further eligibility criteria or  
18 surcharges other than the requirement to provide  
19 a forecast. More generally, it seems implausible that  
20 as soon as any access customer fails any of the  
21 eligibility criteria, Royal Mail's costs would rise by  
22 1.2% across the total volumes of the access customer."

23 So just to be clear that I understand what you are  
24 saying here, you are saying that the discount of 1.2%  
25 that you describe there you don't think is cost

1 justified on the basis of the forecast requirements.

2 It's not that in principle such a justification couldn't

3 exist, but you just don't think that those levels of

4 savings could be made to justify the discount; am

5 I understanding that paragraph correctly?

6 A. Sorry. I'm examining the motivation that was presented

7 I think at the time, that Royal Mail would get greater

8 certainty if someone provided forecasts. What I was

9 observing was for that to be a sensible cost

10 justification, given the nature of the differences

11 between NPP1 and APP2, as soon as you fail one of the

12 eligibility criteria and you have to move from NPP1 to

13 APP2, your costs rise by 1.2% across all the volumes

14 that you then purchase under APP2 relative to NPP1, and

15 it seemed to me that it didn't seem very plausible that

16 whatever the basis of the -- whatever the source of the

17 failure, whether that was failure to provide a forecast,

18 failure to meet the national spread benchmark

19 tolerances, failure to have the appropriate level of

20 surcharges or whatever it was, that the consequence of

21 that -- any of those for Royal Mail's costs were that

22 they would increase by 1.2% for the volumes of that

23 access customer. So it seemed to me that I couldn't

24 think of a good reason at the time as to why that was

25 an appropriate cost justification.

1 Q. But a cost justification based on forecasting was  
2 something in principle you recognised might exist or  
3 might be put forward entirely properly?

4 A. Well, I recognise that cost justifications are  
5 potentially something that could be put forward entirely  
6 properly, and that Royal Mail had identified forecasting  
7 and savings to do with forecasting as that cost  
8 justification. I was saying at the time it didn't seem  
9 to me to be very plausible.

10 Q. But in principle, having forecast information going out  
11 two years you recognised could enable savings to be made  
12 by someone like Royal Mail; correct?

13 A. I don't think at the time I had made any inference one  
14 way or the other about that.

15 Q. I'm grateful. Let me move on from this. We can shut  
16 this over for the moment. We may need to come back,  
17 but ...

18 Do you have the cross-examination bundle?

19 A. I do.

20 Q. Thank you. Could we go to tab 6 in there. Does  
21 the tribunal have it? Yes.

22 Now, this is an article written by Derek Ridyard,  
23 another economist, in a Competition Law Review called  
24 "Concurrences", entitled "Calibration and consistency in  
25 Article 102: Effects-based enforcement after the Intel

1           and Post Danmark judgments". Have you seen this article  
2           before?

3           A. Not before today, no.

4           Q. No. Thank you. I am just going to ask you one or two  
5           questions about whether or not you agree or disagree  
6           with the views expressed by Mr Ridyard.

7                     Just to be clear on the date, Mr Parker, this is  
8           an article from 2016. As we will go on to see, it's  
9           written at an interesting time in the sense that we have  
10          the Intel general court judgment and we have the  
11          Post Danmark judgments, but we don't have anything else.  
12          So he's commenting on matters that you were adverting to  
13          about the law, but from an economic perspective because  
14          Mr Ridyard is not a lawyer either.

15          A. I understand.

16          Q. You will see that he starts off by referring to the  
17          context in paragraph 1, just so you can situate  
18          yourself:

19                     "The 2009 Commission Guidelines ... promised a new  
20          effects-based approach to abuse of dominance in EU  
21          competition law, and a move away from unworkable  
22          form-based conduct rules. In the intervening seven  
23          years, however, a number of Court Judgments have cast  
24          doubt on such promise. Notably, in the area of pricing  
25          and rebates, ECJ Judgments in the Tomra and Post Danmark

1 I and II cases, and the Judgment of the General Court in  
2 the Intel case, appear to have restricted if not  
3 suppressed entirely the thinking that seemed to motivate  
4 the guidelines."

5 Then he moves on to talk about some of the  
6 commentators, including Mr Wouter Wils, in relation to  
7 these matters, but I just want to pick it up, if I may,  
8 at 17, because here, under the heading "The status of  
9 the as-efficient competitor ('AEC') principle", he is  
10 approaching this, as I say, as an economist, and he says  
11 in paragraph 17:

12 "The AEC principle plays a key role in the  
13 Guidelines. First, it is used to address the  
14 calibration question -- what obligation do dominant  
15 firms have to refrain from competing vigorously when  
16 that has harmful effects on rivals? Specifically, the  
17 AEC principle is invoked in the Guidelines to establish  
18 a safe harbour for dominant firms for any conduct that  
19 would not exclude an equally-efficient ('as-efficient')  
20 rival, and hence to provide an operational answer to the  
21 key question in this policy area: where to draw the line  
22 between the protection of the competitive process and  
23 the protection of competitors. Under the AEC principle,  
24 the notion of the right of dominant companies to compete  
25 'on the merits' (a phrase that also appears in the case

1 law) is defined in a way that specifically envisages  
2 situations in which a dominant firm could eliminate  
3 smaller rivals without this being seen as an act of  
4 anti-competitive exclusion."

5 Then he cites paragraph 6 of the guidelines:

6 "This may mean that competitors who deliver less to  
7 consumers in terms of price, choice, quality and  
8 innovation will leave the market."

9 Now, I just want to ask, in this context -- sorry,  
10 it may be helpful, if you haven't seen the article  
11 before, let me just go on, 18:

12 "Of course, the apparent simplicity of the AEC  
13 principle hides an array of detailed questions regarding  
14 its practical implementation. Different approaches to  
15 how those questions are resolved can lead to substantial  
16 shifts in the actual calibration of Article 102  
17 enforcement.

18 "At a conceptual level, there are some important  
19 questions about what is meant by an 'as-efficient'  
20 rival. Since the dominant firm will invariably enjoy  
21 a higher market share than non-dominant rivals, a  
22 question often arises whether any scale advantages  
23 enjoyed by the dominant firm are deemed a 'legitimate'  
24 source of competitive advantage. Similarly, since  
25 dominant firms frequently enjoy other kinds of first

1 mover advantage over smaller rivals, should the  
2 as-efficient concept be stretched to ensure protection  
3 of newer rivals who are simply 'not yet as' efficient as  
4 the dominant incumbent?"

5 Then he looks at some other issues:

6 "Yet another conceptual dilemma arises when  
7 considering how to treat dominant firm efficiencies that  
8 arise from multi-product operations ..."

9 Then he talks about practical level discretion, how  
10 to transform the AEC principle.

11 Now, he is there highlighting a series of issues  
12 that came up in discussion about the operation of the  
13 AEC test which I'm sure you are familiar from your  
14 involvement in discussions about economic affairs more  
15 generally; am I broadly right in that, these are issues  
16 you have heard about and thought about previously?

17 A. Yes, that's correct.

18 Q. But what he is saying in 17 is that what the AEC  
19 principle does in the guidelines is it addresses  
20 a calibration question as to what obligation dominant  
21 firms have to refrain from competing vigorously when  
22 that has harmful effects on rivals.

23 Do you accept that the AEC principle can be used as  
24 a calibration question?

25 A. So I agree that in the circumstance that's identified

1 here, which is actually very, I think, in line with the  
2 interpretation that I was outlining earlier, when we are  
3 talking about conduct that is competing vigorously, and  
4 Mr Ridyard comes back in paragraph 20 where he talks  
5 about "even in the simplest predatory pricing scenario",  
6 so I think it's clear here we are talking about  
7 an excessive competition type framework, a set of  
8 concerns that arise where dominant firms are competing  
9 very vigorously and they're actually -- the question is:  
10 where do you draw the line between competing really  
11 vigorously in a way that is beneficial, and too  
12 vigorously in a way that excludes rivals? I think that  
13 in that context I agree that, yes, an AEC test is  
14 appropriate, and that's exactly, I think, the discussion  
15 we were having earlier.

16 Q. Then if we go down to paragraph 24, we will be coming  
17 back to that, but I take away with limitations that it  
18 can be a calibration question, I think is your answer.  
19 Is that fair?

20 A. Sorry, could you repeat the question?

21 Q. Sorry, I just said I take away from that answer that  
22 yes, it can be a calibration question albeit with  
23 limitations.

24 A. Yes, where the limitation is the type of conduct,  
25 excessive competition conduct rather than raising



1 rivals' costs.

2 Q. I see. If we go down to 24:

3 "The second way in which the AEC concept is used in  
4 the Guidelines is to achieve some consistency in  
5 enforcement across the different exclusionary conduct  
6 categories. Since the essential competitive harm that  
7 is being addressed in 102 in this area is common -- the  
8 unreasonable use of unilateral market power to exclude  
9 or foreclose rivals -- there does seem to be an obvious  
10 sense in seeking such consistency. Moreover, this need  
11 for consistency would exist irrespective of how the  
12 calibration question is resolved."

13 So he is there emphasising calibration as the first  
14 issue, but secondly consistency, and again you would  
15 accept that the AEC concept being used in the guidelines  
16 can achieve consistency, don't you?

17 A. So if we think about the context of the Article 82  
18 guidelines, there was a big debate in -- from around  
19 about 2000 and thereafter trying to find a consistent  
20 approach to Article 82 as it was then, Article 102  
21 exclusionary conduct, and a variety of paradigms were  
22 put forward, profit sacrifice Mr Dryden mentioned as one  
23 as-efficient competitor test, consumer harm and so on.

24 Where I think the debate has moved to, and I think  
25 that is quite well set out by Professor Salop, is that

1           there are essentially two rather different types of  
2           exclusionary abuse. There are exclusionary abuses that  
3           arise from excessive competition from the dominant firm  
4           but where that excessive competition has itself some  
5           direct benefits for consumers, and I think then there is  
6           a different set of potential exclusionary activities  
7           which are in the raising rivals' costs category which  
8           don't have any direct benefit for consumers.

9           Because these two types of sort of overriding types  
10          of exclusionary abuse have rather different consequences  
11          for consumers, one has some direct consumer benefits and  
12          the other doesn't, for me it's appropriate therefore to  
13          have somewhat different approaches to evaluating both of  
14          those different paradigms, conduct that falls within  
15          both of those different paradigms, and therefore  
16          a search for consistency of a kind of a universal test  
17          for exclusionary conduct I think is rather misplaced  
18          because we've got two rather different types of conduct  
19          that are going on.

20        Q. Well, let's just pause there and go back to the question  
21        I asked. Because are you saying that there is value in  
22        using the AEC concept to engender some sort of  
23        consistency in application across different exclusionary  
24        conduct categories or not?

25        A. I'm not saying that. I'm saying that where you have, it

1           might make sense in excessive competition type cases,  
2           but I don't think it's sensible in raising rivals' costs  
3           cases.

4       Q.    But what Mr Ridyard is here saying is rather different.  
5           He is not making some sort of qualification of the sort  
6           that you are putting forward.  He says:

7                 "Since the essential competitive harm that is being  
8                 addressed in this area is common -- the unreasonable use  
9                 of unilateral market power to exclude or foreclose  
10                rivals -- there does seem to be an obvious sense in  
11                seeking such consistency."

12               So contrary to your view, he is not suggesting there  
13               should be a disjunction between your two categories of  
14               infringement by excessive competition and raising  
15               rivals' costs, is he?

16      A.   No, he's not doing that, and therefore I would disagree  
17           with him, I don't think that a search for consistency in  
18           all circumstances is warranted where you have got two  
19           rather different sets of circumstances.

20      Q.   Just to be clear, you refer to excessive competition  
21           abuses and raising rivals' costs abuses; are you able to  
22           tell me what's in the raising rivals' costs abuses  
23           category?

24      A.   I would define it in principle as abuses that raise  
25           rivals' costs but which do not themselves have any

1 direct consumer benefit, so you can't look at the  
2 conduct and say "I can see that this is meritorious for  
3 consumers and improves -- clearly has a direct consumer  
4 welfare benefit".

5 Q. Sorry, if a dominant undertaking gives a consumer  
6 a discount, is that a benefit to the consumer or not?

7 A. Yes. So if the dominant firm gives you a discount, that  
8 is a direct benefit to the consumer, then the question  
9 potentially falls in the low pricing world. If the  
10 dominant firm raises the prices, input prices that it  
11 charges to rivals, I don't see that that has a direct  
12 consumer benefit.

13 Q. So this was why you were so keen earlier to resile from  
14 the characterisation in your first report that you gave  
15 as an independent economist characterising the conduct  
16 in this case as a discount, because on your own  
17 distinction this wouldn't be a raising rivals' costs  
18 case; am I right?

19 A. No, I'm not resiling from it, I'm clarifying what I mean  
20 and the difference between the relative issue of  
21 a discount and the absolute issue, I think we've --  
22 you know, had there been some consumer benefit, direct  
23 consumer benefit resulting from the discounts, I'm sure  
24 that it would have been raised in the case but I haven't  
25 seen it in the evidence.

1 Q. You accepted earlier that it's a counterfactual test  
2 that you'd use for discounts as an economist. So if  
3 there was analysis, if there were any doubt about  
4 whether or not something was a discount, and whether or  
5 not it fell within this category, it would be necessary  
6 to identify the counterfactual before it was categorised  
7 as raising rivals' costs; that's correct, isn't it?

8 A. Well, I think one would ideally know the counterfactual.  
9 I'm not aware of -- and it would seem to have been in  
10 Royal Mail's interests to have characterised its conduct  
11 as being aggressive price discounting to a certain set  
12 of customers which would give rise to consumer benefits.  
13 It seemed to me that that would be, you know,  
14 potentially an important part of Royal Mail's argument.

15 Q. But just dwelling for a moment on this dichotomy, we  
16 will come back to it because just to be clear I don't  
17 accept it, as perhaps doesn't surprise you, Mr Parker,  
18 but just working on it for the moment, this dichotomy,  
19 in order for a regulator to decide whether or not it  
20 needed to do an AEC test, it would need to decide  
21 whether or not the conduct in question fell within what  
22 you refer to as the excessive competition bucket or the  
23 raising rivals' costs bucket; that's correct on your  
24 approach?

25 A. Well, it's not for me to tell a regulator what it needs

1 to do or otherwise, but it seems to me to make sense  
2 from an economic perspective to distinguish between  
3 these two situations.

4 Q. And in order to decide whether or not you fell within  
5 the raising rivals' costs bucket, you accept that you  
6 would need to do a counterfactual analysis in order to  
7 decide whether or not there was a relevant discount;  
8 that's what you have just said, isn't it, Mr Parker?

9 A. I mean, I would think you would need to know what the  
10 pricing would have been in the alternative.

11 Q. Thank you. Right, so you disagree with Mr Ridyard on  
12 24. Now, he then goes on in the next section to talk  
13 about some of the cases that I've referred to, and he  
14 picks up the case of Post Danmark II in those  
15 paragraphs, and he refers to the differences in fact  
16 that arise in Post Danmark II, and then he goes on to  
17 "The General Court's classification of rebate schemes in  
18 Intel". You can see that on page 33, beginning above  
19 37.

20 A. Yes, I see.

21 Q. And then there is a discussion about form-based rules,  
22 which was a discussion that was very much current at the  
23 time of the Intel general court decision, and he reaches  
24 certain conclusions.

25 Then at 63 there is a discussion of efficiency

1 defences, but I'm just going to go through to the  
2 conclusions here to see where you agree and disagree  
3 with Mr Ridyard on these conclusions.

4 If we could pick it up at 74, Mr Parker:

5 "The recent European Court Judgments highlighted in  
6 this article have set out an enforcement approach to  
7 abuses relating to pricing and rebate schemes that clash  
8 with the approach contained in the guidelines. Critics  
9 of the guidelines, such as Wouter Wils, have welcomed  
10 this readjustment as a move back to some of the  
11 traditional case law principles that (in their view)  
12 should determine policy against abuse of dominance.

13 "But for businesses that face a high stakes choice  
14 of how to configure their pricing policies to ensure  
15 compliance with Article 102, this clash between the  
16 recent case law and the Guidelines is problematic."

17 Now, just pausing on those two paragraphs. First of  
18 all, I think from your earlier answers you do consider  
19 from an economic point of view that the approach being  
20 adopted in cases like Post Danmark II does clash with  
21 the approach of the EC guidelines?

22 A. I mean, I think it would be perhaps more sensible to say  
23 that Post Danmark II relates to a fact position that had  
24 not really been anticipated at the time of the  
25 guidelines, and therefore considering the guidelines as

1           having anticipated every single factual matrix that  
2           could emerge, and therefore if you like being sort of  
3           tablets of stone handed down, "This is how we must do it  
4           for all time", I don't think is the right way to think.  
5           I think you need to look at the facts of each case, see  
6           whether they are in line with the sorts of facts that  
7           are anticipated at the time of the guidelines, and I've  
8           given examples I think to do with vertical margin  
9           squeeze, many cases up to that point about vertical  
10          margin squeeze where your concern is dominant firm  
11          upstream, retail arm of the incumbent and other retail  
12          arms where you didn't really have a concern that the  
13          retail arm would fundamentally be unable to replicate  
14          really the costs of the incumbent at the retail level.

15                 So I think for me the guidelines make sense when  
16          read in that context, and with that sort of factual  
17          situation in mind, which has accounted for I think the  
18          vast majority of the cases where this has been an issue.  
19          But I'm not sure that it would make sense to say that  
20          the Article 82 guidelines had anticipated every single  
21          factual situation. Post Danmark II I think is  
22          an example of a factual situation which sat outside that  
23          and therefore needed judgment on its own terms.

24          Q. Well, let's just take that again in stages, Mr Parker.  
25          Guidelines are not concerned just with facts, are they?



1           They are setting out the approach that an authority will  
2           adopt in relation to policy in relation to categories of  
3           activity and they don't try and exhaustively deal with  
4           facts normally, do they?

5           A. Well, I'm not completely sure I have much of an opinion  
6           on that. Guidelines are guidelines as to how the  
7           authority will behave as it anticipates in the future.  
8           If a certain set of circumstances emerges that had not  
9           been anticipated at the time of the guidelines, then  
10          potentially that leads to a situation where: do I stick  
11          to the guidelines and try and apply those to these  
12          unanticipated facts or do I start maybe going back more  
13          to underlying principles and try and work out how to  
14          apply in this case 102 to those different and  
15          anticipated facts. So I think guidelines clearly can  
16          only really cover situations that have been envisaged at  
17          the time of writing the guidelines.

18          Q. I see. So you are saying that it couldn't have been  
19          envisaged at the time of writing the guidelines, but it  
20          might in practice be difficult or impossible for an AEC  
21          to emerge in the market?

22          A. I think that might be the case, yes, if you look at  
23          the --

24          Q. Really, Mr Parker, in 2009, that it couldn't be  
25          envisaged that you could have markets where an AEC

1           couldn't in practice emerge?

2           A. If you look at the discussion in the guidelines it's  
3           very consistent with the idea of these vertical margin  
4           squeeze cases, where they start talking about vertical  
5           margin squeeze, and that seems to have been the  
6           situation that was primarily in mind from the  
7           perspective of the as-efficient competitor test, and  
8           Post Danmark II seems to me to be kind of new news.

9           Q. Let's just see what Mr Ridyard -- I have taken you to  
10          the conclusions but could you just turn back to 36. I'm  
11          not going to take you through all of his analysis of the  
12          principles that arise but he identifies the  
13          distinguishing features between the first Post Danmark  
14          case and the second. He says:

15                 "The distinguishing feature between these cases [and  
16                 I think obviously he is looking at it from an economic  
17                 point of view] -- the fact that Post Danmark I concerned  
18                 straightforward selective price cuts whilst  
19                 Post Danmark II concerned a volume rebate scheme -- does  
20                 not seem to provide a satisfactory basis for these  
21                 starkly different approaches."

22                 What he is saying there is that in one of the cases,  
23                 as you will see in paragraph 35, an AEC approach was  
24                 adopted, and in Post Danmark II it was said it didn't  
25                 need to be, indeed it was irrelevant.

1           So what's being said there is that his view is, from  
2           an economics perspective, that trying to look at it from  
3           the perspective of the facts is not sufficient. As he  
4           goes on to say:

5           "Both cases involved alleged pricing abuse by  
6           Post Danmark in unaddressed mail and the 'unfair'  
7           economy of scope efficiency advantage that Post Danmark  
8           enjoyed over rivals in this market was identical. There  
9           does seem to be a very stark inconsistency between the  
10          ECJ's adoption of an incremental cost standard in  
11          Post Danmark I and its complete rejection of the AEC  
12          principle ... in Post Danmark II. The resulting  
13          unevenness in the case law application makes it  
14          inherently harder for businesses to gain a predictable  
15          view on what abuse of dominance means."

16          Now, you had been talking a lot about the  
17          distinctions. Do you accept his analysis from  
18          an economist's point of view or not?

19          A. So I accept that on my somewhat sketchy understanding of  
20          the facts of Post Danmark I, but if I take Mr Ridyard's  
21          characterisation of them as read, that there does appear  
22          to be an inconsistency, yes, between Post Danmark I and  
23          Post Danmark II, and -- yes, so I agree that there  
24          appears to be an inconsistency, yes.

25          Q. If we go back to the conclusions, and I took you to 74

1 and 75, I think you recognise that, as he puts it in 75:

2 "... for businesses that face a high stakes choice  
3 of how to configure their pricing policies ..." the  
4 clash of the recent case law is problematic. I think  
5 you probably accept that?

6 A. Yes, I mean, this is a -- I think a standard concern  
7 about bright-lines rules versus rule of reason analysis.

8 Q. Well, no, that's not the point that's being made there,  
9 is it? It's between two approaches, not between  
10 bright-lines rules. It's two sets of rules in  
11 Post Danmark I and Post Danmark II he is talking about  
12 there, isn't he?

13 A. Well, I think he is talking about probably distinctions  
14 between -- in cases that don't seem to follow the  
15 guidelines and cases that do, which may or may not be  
16 Post Danmark I, I'm not sure --

17 Q. No, sorry, I'm not testing your memory on Post Danmark I  
18 in relation to --

19 A. Thank you.

20 Q. 77, he says:

21 "The Guidelines are far from perfect, and retain  
22 a sufficiently wide discretion for enforcement to make  
23 most dominant firms nervous, but a closer analysis of  
24 the recent case law on pricing and rebates suggests that  
25 this case law is failing even more dramatically to set

1 out a consistent set of principles that address the  
2 underlying policy objectives."

3 A. I mean --

4 Q. Obviously you have to go back in time slightly because  
5 we are looking at 2016, but looking at it from that  
6 time, do you agree with his observation?

7 A. The observation that the case law is not necessarily  
8 fully consistent across every individual case?

9 Q. Well, he is saying that the guidelines are far from  
10 perfect but the recent case law is failing even more  
11 dramatically to set out a consistent set of principles  
12 that address the underlying policy concerns. Back in  
13 2016 would that have been your position?

14 A. Well, I'm not sure I had a position in 2016 because my  
15 involvement in this case was in 2014 for a short period  
16 of time, and then a large gap and then --

17 Q. No, this is a general question.

18 A. This is outside of this particular case?

19 Q. Yes.

20 A. So I mean, I think it would be fair to say that the case  
21 law seems to have moved around and different cases have  
22 reached different conclusions, some of which are  
23 consistent with the guidelines, some of which are not.  
24 From my perspective, Post Danmark II seems to be --  
25 you know, is different from the guidelines, as

1 I understand it, and that's as far as I can really go.

2 Q. Okay. 78. I'm just going to take you to one or two  
3 paragraphs and then pause:

4 "As regards the calibration of Article 102 -- the  
5 extent to which the law is supposed to constrain  
6 dominant firm commercial freedom in the interests of  
7 protecting smaller rivals -- some recent pronouncements  
8 of the Courts indicate that Article 102 should be used  
9 tomorrow protect even inefficient competitors. As this  
10 paper has discussed, it is possible to make an arguable  
11 economic and public policy case for taking such  
12 a stance, but it's one that comes with a substantial  
13 risk of chilling competition. An enforcement approach  
14 that decides positively to protect inefficient rivals  
15 needs to provide much more clarity on where that  
16 principle begins and ends if it's not to create very  
17 perverse signals to business on the nature of the  
18 competitive process."

19 Now, he is talking about cases suggesting that  
20 inefficient competitors would be protected. I want to  
21 ask you about the comments he makes. I'm not going to  
22 ask you whether he is right about that analysis of the  
23 case law. He is saying there is a case to be made in  
24 relation to that, but if you are going to approach that  
25 sort of policy position, you need to be extremely clear

1           where the principle begins and ends if it's not to  
2           create perverse signals.

3           Do you accept what he is saying there?

4       A. Well, I accept what he is saying in the context of  
5       practices that -- because he talks about something that  
6       comes with a substantial risk of chilling competition.  
7       It seems to me where I've distinguished between  
8       excessive competition abuses, yes, I would agree that  
9       there is a risk there of accommodating efficient entry  
10      which might then risk the consumer benefits of that  
11      competition, and I think -- but I think in raising  
12      rivals' costs cases, having a conduct -- having  
13      a paradigm that, or approach that would condemn such  
14      conduct doesn't really seem to me to have any risk of  
15      chilling competition because those are not actions that  
16      give rise to direct consumer benefits.

17      Q. I understand, I don't accept but I understand what you  
18      are saying in relation to that, but just dealing with  
19      the last sentence, he is saying that if you are going to  
20      approach such matters, and let's assume for the sake of  
21      argument we are accepting your approach of identifying  
22      a dichotomy within Article 102 between raising rivals'  
23      costs and what you have referred to as excessive  
24      competition, I think drawing on Salop as I understand  
25      it, but he is saying that if you are going to take that

1 approach it is incredibly important that you provide  
2 clarity on where the principle begins and ends; that's  
3 what he is saying, isn't it? Do you agree with that?

4 A. So, I agree that's what he says. I agree that if you  
5 look at the bit at the end, "perverse signals to  
6 business on the nature of the competitive process",  
7 I think that to me I would still read that in this, he's  
8 considering a world where the conduct gives rise to  
9 direct consumer benefits and you need to think therefore  
10 quite carefully, very carefully one might say, about  
11 preventing business from carrying out actions that have  
12 direct consumer benefits and saying, "Well, you mustn't  
13 do too much of that because we need to protect  
14 inefficient competitors". To me that's a different  
15 situation from actions that have no direct consumer  
16 benefit. And then -- but I think that's not the type of  
17 conduct that he has in mind.

18 Q. I see. If we can just go down to 81, finish off on 81  
19 at the end:

20 "Unless some clear answers are provided to these  
21 challenges, or defenders of the case law can show how  
22 these disparate approaches can be integrated into a  
23 predictable policy stance that delivers economically  
24 realistic outcomes, Article 102 compliance will remain  
25 an almost impossible task. Further, the risk that



1 Article 102 enforcement will continue seriously to  
2 distort the competitive process will remain. Critics  
3 who argue that the recent case law provides a superior  
4 template for enforcement need to provide a more  
5 convincing economic explanation for the enforcement  
6 principles that emerge from that case law before it can  
7 seriously be considered a viable alternative to the  
8 Guidelines' effects-based approach."

9 Just to be clear, are you saying that there has  
10 emerged a clear line between what you have been  
11 referring to as excessive competition cases and raising  
12 rivals' costs cases such that this problem that he's  
13 identifying in 2016 has gone away?

14 A. I mean, I think from an economic perspective that might  
15 well -- you know, that's starting to become the case.  
16 I think the Salop paper is quite interesting in that  
17 regard. Has that arisen in the case law? No, I don't  
18 think so as yet. There are not that many cases, and the  
19 world moves on at a somewhat gradual pace, as we see  
20 from the continuing Intel saga.

21 Q. Let's just go back slightly on that. Your only  
22 authority for this distinction is this paper from  
23 Steve Salop then?

24 A. Well, that paper itself relies on a large number of  
25 other papers, so I'm pointing to that, but I also

1           have ... I think it makes sense, from my own personal  
2           opinion.

3           Q. I understand that you think it makes sense, and I have  
4           no doubt that you believe that to be the case,  
5           Mr Parker, but we're dealing with an article that  
6           postdates Post Danmark I, Post Danmark II and that  
7           earlier case law, so you have rightly not said "Oh, it's  
8           clear from the case law and other guidance that that  
9           distinction remains", and as I understand it the only  
10          authority you have is the Salop paper?

11          A. Authority for what?

12          Q. The proposition that there is a clear distinction now,  
13          contrary to what Mr Ridyard was saying in 2016, between  
14          cases of excessive competition where, as I understand  
15          it, you say the guidelines would apply, an AEC test is  
16          appropriate, and raising rivals' costs cases where it  
17          doesn't.

18          A. So I'm making an economic distinction between those two  
19          situations. I accept that the guidance and the case law  
20          has not yet resolved itself into distinguishing those  
21          two situations as clearly as Professor Salop does in his  
22          article.

23          MR BEARD: Thank you.

24          THE CHAIRMAN: Mr Beard, I don't know whether this helps  
25          you, but my understanding is that the Commission are

1 extremely concerned that these propositions are  
2 described as guidance, not guidelines.

3 MR BEARD: I apologise, both to the tribunal and to the  
4 Commission vicariously for my mistake, continuous  
5 mistake in relation to the significance.

6 THE CHAIRMAN: I'm sure it has great significance. We will  
7 return at 2 o'clock.

8 (1.07 pm)

9 (The short adjournment)

10 (2.00 pm)

11 THE CHAIRMAN: Have we finished with Mr Ridyard?

12 MR BEARD: No, there is more Mr Ridyard to come, but not  
13 from that one, another Mr Ridyard. Sorry, not a real  
14 live Mr Ridyard, another report.

15 Before I turn to that, there were a couple of  
16 follow-up questions that I wanted to ask arising from  
17 this morning, in relation to your categorisation between  
18 raising rivals' costs and excessive competition that you  
19 were describing.

20 Could you just help me: if you had a situation where  
21 a dominant undertaking raised its wholesale price but  
22 kept its retail price flat, so a form of margin  
23 squeeze --

24 A. Yes.

25 Q. -- is that raising rivals' costs or is that excessive

1 competition?

2 A. So in that case it would be raising rivals' costs  
3 because there is no consumer welfare benefit relative to  
4 the pre-existing situation, and in the reverse situation  
5 where the margin squeeze arises from reducing retail  
6 prices it would be a low pricing excessive competition  
7 (inaudible).

8 Q. Right, so margin squeeze depending on which bit you flex  
9 is under different tests, according to your dichotomy?

10 A. Because it has different consequences for consumers and  
11 consumer welfare.

12 Q. I see. Well, I think we will come back to submissions  
13 on that. Just also so I'm understanding your dichotomy:  
14 how do you treat retroactive rebates?

15 A. So I think it depends on the circumstances.  
16 Professor Salop would suggest that you should only look  
17 at that in the raising rivals' costs paradigm. There is  
18 a potential for a reduction in prices to some customers  
19 to be a benefit, it's a potential for the  
20 anticompetitive increase in prices elsewhere to be  
21 raising rivals' costs, so it's potentially a bit of  
22 both. As I understand the facts in this case, we don't  
23 have the discount side of that equation, and as I have  
24 said we can characterise this a little bit like a  
25 retroactive rebate, we only have the raising rivals'

1 costs to rivals if the discussion in the decision about  
2 how Royal Mail chose to introduce the rebate -- sorry,  
3 chose to introduce the price differential, it was very  
4 much viewed as an on top of the standard price increase.  
5 So it's: can we put a price differential in place, which  
6 is an increase in costs over NPP1.

7 Q. Just to be clear, for retroactive rebates, even though  
8 there would be discounts, that would be a raising  
9 rivals' costs case?

10 A. I think you are mischaracterising what I said.

11 Q. No, I'm asking for a clarification, Mr Parker.

12 A. So I think in some cases they might be a hybrid.

13 Professor Salop says generally he would prefer the  
14 raising rivals' costs paradigm, even in a hybrid  
15 situation. The hybrid arises because if the  
16 differential between the two sets of prices arises  
17 because of a reduction in prices, it's very similar to  
18 the two different margin squeeze cases that we were  
19 talking about.

20 Q. So depending on the precise modalities of the  
21 arrangements as to the rebate, they could be down one of  
22 your forks or down the other?

23 A. Because of their impact, direct impact on consumer  
24 welfare, yes.

25 Q. I see. But just to be clear, if you have a rebate, and

1 the clue tends to be in the name, which involves some  
2 sort of discount to some people, that wouldn't be enough  
3 to decide whether or not it was an excessive competition  
4 or raising rivals' costs case; you would follow what you  
5 say is Professor Salop's approach, which is to treat  
6 that as raising rivals' costs?

7 A. I haven't turned my mind to that in all circumstances.  
8 I observe that Professor Salop suggests that looking at  
9 the raising rivals' costs element of it might be more  
10 appropriate, I haven't examined in all the circumstances  
11 whether that's the right approach.

12 Q. We will come on to Professor Salop, but he is assuming  
13 that conditional pricing practice will include rebates  
14 which to the uninitiated can seem to be discounts, those  
15 are discounts to consumers, and yet you would treat them  
16 as raising rivals' costs cases; is that right?

17 A. Well, it depends on the factual circumstances. In this  
18 case, I don't think there is a discount, I don't think  
19 there is a benefit to consumers. Are we in  
20 a different -- I may have misunderstood the question.

21 Q. I didn't ask you about this case. I'm asking you about  
22 how this works, this dichotomy, Mr Parker, and what  
23 I was asking was just to be clear whether I understood  
24 that even though retroactive rebates plainly involve  
25 discounts, you say at least some of those cases should

1 be treated as raising rivals' costs cases?

2 A. Well, I think it's not necessarily clear that  
3 a retroactive rebate involves discounts, because really  
4 the mechanism, the exclusionary mechanism is  
5 a differential in price between two different sets of  
6 customers, depending on how you have got to the prices  
7 it could be that all those prices are an increase on the  
8 previous prices or the counterfactual prices, and  
9 therefore it is a rebate in the sense of you get  
10 a discount if you go over a certain threshold of your  
11 sales, but compared to a situation where there was no  
12 rebate, ie the counterfactual, there may have been  
13 higher prices all round.

14 Q. Okay, so the point you are making is that actually in  
15 order to identify whether it's a real rebate or a  
16 discount, you have to do the counterfactual analysis.  
17 I understand.

18 Might we then go back to another Mr Ridyard piece,  
19 which is in the cross-examination bundle at tab 5.

20 A. Sir, would it be all right if I remove my jacket?

21 THE CHAIRMAN: Of course. You are in the hot seat, after  
22 all.

23 A. Yes.

24 MR BEARD: Now, I'm going to deal with one paragraph  
25 effectively in this article, but you will see it's an

1 article from December 2014, and you will see from the  
2 abstract at the top it says:

3 "The as-efficient competitor test plays a central  
4 role in the EU Commission Guidelines on Article 102  
5 enforcement and in the case law of the European Courts.  
6 It is used explicitly by the ECJ in its Post Danmark  
7 judgment ..."

8 Obviously that's the first Post Danmark judgment at  
9 that time?

10 A. Yes.

11 Q. "... in a way that clearly signals a preference for an  
12 effects-based approach to enforcement of the law against  
13 price abuse. This paper analyses how the AEC test can  
14 be interpreted in the context of price-cost tests for  
15 exclusionary conduct, with particular emphasis on the  
16 distinctions between long run and avoidable costs, and  
17 between average and incremental costs. It also explores  
18 some of the underlying economic and public policy  
19 questions that are raised by different approaches to  
20 these key cost concepts."

21 Now, you will see in the paper that there is  
22 a discussion of short and long run costs and incremental  
23 versus average costs, some of which debates I think have  
24 now been broadly resolved.

25 I just wanted to go on to page 137, where Mr Ridyard



1 is picking up some of the other practical issues in  
2 relation to the application of the AEC test. The first  
3 he picks up is the "'learning by doing' effects" issue.

4 A. Yes.

5 Q. And discusses how that might be dealt with in the AEC  
6 framework.

7 The one I wanted to pick up on was the "applying AEC  
8 when there are scale effects", and the issue he is  
9 dealing with is set out under 3.2:

10 "A distinct but closely related phenomenon [closely  
11 related to the learning by doing issues] arises where  
12 there are important scale effects in an industry such  
13 that rivals to a dominant firm have higher costs only  
14 because they have not yet achieved sufficient scale."

15 So I think it was one of the issues that was touched  
16 on in the hot tub?

17 A. Yes.

18 Q. He goes on to consider these issues and how they might  
19 be dealt with in the context of the AEC. I just want to  
20 go to the last paragraph in that section:

21 "It is one thing, however, to allow a specialist  
22 industry regulator to have discretion to protect smaller  
23 rivals from lower cost incumbents that enjoy first mover  
24 advantages, and quite another to incorporate such  
25 protection into enforcement policy on abuse of dominance

1 more generally. If abuse of dominance laws are to  
2 include an obligation on dominant firms to soft pedal on  
3 competition with the deliberate intention of protecting  
4 rival suppliers until they have a chance to become  
5 established, it would at the very least be preferable to  
6 spell out the nature of those obligations in enforcement  
7 Guidelines rather than require dominant firms to  
8 second-guess the way in which such obligations could be  
9 built into a modified AEC test."

10 Do you agree with him?

11 A. Well, I think this discussion is again in the context,  
12 if you look in the previous paragraph, where he is  
13 talking about whether you adjust your price/cost test to  
14 give a bit of headroom for the entrant. You see at the  
15 bottom of page 138:

16 "All such forms of protection deny consumers the  
17 benefits of more aggressive price competition in the  
18 short run."

19 Then in the paragraph you have just taken me to and  
20 read:

21 "If abuse of dominance laws are to include an  
22 obligation on dominant firms to soft pedal on  
23 competition ..."

24 So I see where he is coming from, and I agree in the  
25 context of a low pricing, you know, excessive

1 competition context, that it makes sense there  
2 potentially not to want to restrict the actions of the  
3 dominant firm in competing more fiercely. I just don't  
4 think, in a situation of pure raising rivals' costs,  
5 I don't think that that logic applies, because what  
6 we're not preventing is we're not preventing conduct  
7 that's leading to consumer benefits. So whilst I don't  
8 disagree with what Mr Ridyard says here, I think it's in  
9 that different paradigm.

10 Q. So you agree with Mr Ridyard, as I understand it,  
11 insofar as he's talking about your category of excessive  
12 competition abuses; is that fair?

13 A. Yes.

14 Q. And his concern here is about certainty and fairness for  
15 dominant firms; I think that's correct as well, isn't  
16 it?

17 A. Yes, that does seem to be his concern.

18 Q. Are you suggesting that your dichotomy that you are  
19 proposing offers certainty and clarity, Mr Parker?

20 A. No, I don't think that's within my scope as  
21 an economist.

22 Q. Well, as an economist you comment on problems of  
23 uncertainties and risks in business, don't you,  
24 Mr Parker?

25 A. (Pause). I'm trying to think of examples where I have,

1 possibly. I'm not really sure.

2 Q. Well, in this case amongst other things you talk about  
3 uncertainty issues, but I'll leave that to one side.

4 The truth is the dichotomy that you are proposing,  
5 quite apart from it not being made out in any materials,  
6 is chronically uncertain, isn't it, Mr Parker?

7 A. I'm not sure I have a view.

8 Q. I'll leave it there.

9 Now, we're going to stay in this bundle, but I'm  
10 going to go to Intel. I am not, you will be pleased to  
11 know, going to any judgments in Intel and I'm not going  
12 to ask you about legal, law questions.

13 I do want to test one or two of the propositions  
14 that you have put forward about the application of  
15 an AEC being appropriate only where 100% of the market  
16 is covered and can be covered by an AEC.

17 You have in fact in your bundle references to the  
18 transcript, but you recall your position that you  
19 articulated in the course of the hot tub that you said  
20 that where an entrant could not cover 100% of the  
21 market, that wasn't really an AEC test. Do you recall  
22 that? I'm paraphrasing, I have to say.

23 A. Yes, I would agree that from an economic perspective if  
24 the definition of as-efficient competitor is one that  
25 has the same unit costs, then if you can't contest

1 a certain part of the market you clearly don't have the  
2 same unit costs as the incumbent for that part of the  
3 market.

4 Q. Yes, and you were pretty emphatic, you said it's clear  
5 in those cases you are still not talking about an AEC?

6 A. That's my view, yes.

7 Q. Yes. Now, if we could go to the decision in Intel, it's  
8 in your bundle -- it's going to be the largest tab in  
9 your bundle, it's at tab 3, but it's in the authorities  
10 bundle, in the final volume, at tab 119. I'm sorry, the  
11 penultimate authorities bundle, it is volume 10.

12 I apologise.

13 You are probably broadly familiar with the facts of  
14 what was at issue in Intel. I'm not obviously going to  
15 test you on those, that isn't what we're here to  
16 discuss.

17 I think, as you will recall, Intel was a major chip  
18 CPU manufacturer. You are familiar with the broad  
19 outline of the case?

20 A. At a very broad outline, yes.

21 Q. As a chip manufacturer, it had these massive plants for  
22 making these very sophisticated central processing  
23 units, and the case was about CPUs which were called x86  
24 chips that we have in our computers.

25 A. So I understand.

1 Q. Yes. Because of the nature of the business it was in,  
2 it had huge economies of scale, and that wouldn't  
3 surprise you, would it?

4 A. I don't think so.

5 Q. No. I mean, if you want to go on to page 38 in the  
6 bundle, there is a description of the manufacturing  
7 process, and what it talks about are the huge  
8 specialised facilities it had to invest in, there were  
9 production facilities called fabs, and what you will  
10 then also see if you go on -- that's at recital 110 --  
11 and you will see at recital 115 just over the page that:

12 "Building and running a fab is a risky and expensive  
13 investment. It takes several years to construct and  
14 ramp up a fab, and the cost of a complete state of the  
15 art fab ..." at this time was between \$2 and \$3 billion.

16 A. Yes.

17 Q. So it built these enormous factories, as did anyone that  
18 was engaged in the manufacturer of these chips, so very  
19 high sunk costs; as you would expect, very high  
20 intellectual property barriers to entry as well, and  
21 what we saw in that case, if we go further on in the  
22 decision through to 815, which is on page 246 -- just in  
23 passing, sorry, I'll pick up this reference as I'm  
24 passing through. Obviously these chip manufacturers  
25 made a range of chips at these fabs, there was a finding

1 of market definition that left open the question of  
2 whether or not the market was just for x86 CPUs or for  
3 submarkets, but there were also findings, I think as you  
4 would probably expect, not only of scale but there were  
5 issues in relation to possibilities of economies of  
6 scope here.

7 If we go on to 852, this is after running through  
8 the market share data, what you will see is that it was  
9 found that Intel in relation to those relevant markets  
10 had very high and persistently high market shares of  
11 between 70% and 80%.

12 You will see just below made good the point I was  
13 making earlier, that there are a whole range of barriers  
14 to entry and expansion in this market, and the decision  
15 considers those.

16 If we go through to 866 on page 261, what you will  
17 see is a conclusion that:

18 "... a potential entrant will be faced with  
19 significant intellectual property barriers and will have  
20 to engage in substantial initial research and  
21 development and production investment to be able to  
22 start up production of x86 CPUs."

23 Then it talks about the need for high capacity  
24 utilisation thereafter in order to be able to compete,  
25 maximise cost reductions and so on.

1           So we've got a very substantially -- in this  
2           finding, and of course I quite recognise it is still  
3           under appeal, but in terms of the decision that we're  
4           talking about, a Commission finding of a vastly dominant  
5           entity in a market with very significant sunk costs,  
6           very high barriers to entry, large economies of scale at  
7           the very least, and in that market AMD was a rival new  
8           entrant, and what this Commission decision finds is that  
9           Intel had entered into a series of arrangements with  
10          strategically important customers specifically targeting  
11          AMD in order to exclude it from the market and diminish  
12          its impact on the market.

13           You broadly recall that? I'm not testing you, but  
14          that is the position here.

15           What the Commission finds in the decision is that  
16          part of those set of arrangements, a significant part of  
17          it, were retroactive rebates which formed part of  
18          a wide-ranging strategy to exclude AMD, foreclose the  
19          market and in fact it goes so far as to suggest that  
20          Intel had actually concealed from the world what it was  
21          doing in putting in place those arrangements.

22           So on the basis of the Commission's case here, very  
23          much more intended, targeted and concealed than the  
24          present case, involved new entry, economies of scale and  
25          so on, very significant dominance.



1           But when the Commission came to consider doing  
2           an AEC test, what we also find was that it was  
3           recognised that, in relation to each of the customers  
4           with whom Intel was entering into an allegedly  
5           restrictive agreement, there was a very significant  
6           non-contestable share of business for the rivals. So,  
7           for instance, for Dell it was said that the  
8           non-contestable share of Dell's demand for x86 chips was  
9           over 90%. So only 10% was contestable.

10          A. I understand.

11          Q. So what the Commission did, as I think you're aware, is  
12             that it carried out an analysis of the situation and  
13             decided that it could look at what was going on here and  
14             decide that there was an abuse of dominance by Intel.  
15             But then it also decided to carry out an as-efficient  
16             competitor analysis. If we turn on to page 302, we see  
17             the introduction to that.

18          A. Yes.

19          Q. So 4.2.3, "as-efficient competitor analysis.

20             "1002. One possible way of examining whether  
21             exclusivity rebates are capable or likely to cause  
22             anticompetitive foreclosure is to conduct an  
23             as-efficient competitor analysis.

24             "1003. In essence, this examines whether Intel  
25             itself, in view of its own costs and the effect of the

1 rebate, would be able to enter the market at a more  
2 limited scale without incurring losses. It thereby  
3 establishes what price a competitor which is 'as  
4 efficient' as Intel would have to offer x86 CPUs in  
5 order to compensate an OEM for the loss of any Intel  
6 rebate."

7 Then the remainder of the section goes on to talk  
8 about how that is applied in relation to each of the  
9 OEMs.

10 Just picking it up at 1004:

11 "The as-efficient competitor analysis is  
12 a hypothetical exercise in the sense that it attempts to  
13 analyse whether a competitor which is as efficient as  
14 Intel ... but which would [I don't read out the  
15 parenthesis] not have as broad a sales base as Intel,  
16 would be foreclosed from entering."

17 So here the Commission is explicitly recognising  
18 that it considers it is doing an AEC analysis in  
19 circumstances where it does not envisage that any  
20 entrant would have as broad a sales base as Intel. You  
21 understand that, Mr Parker?

22 A. Yes.

23 Q. Now, the Commission clearly thinks this is an  
24 as-efficient competitor analysis, but you, as  
25 I understand it, say this isn't an as-efficient

1 competitor analysis. Am I understanding correctly?  
2 A. Yes, I disagree with the Commission's characterisation  
3 here, in the sense that we clearly have a situation  
4 which it describes that there is some non-contestable  
5 share of demand, in other words I'm an entrant, I can  
6 compete for a certain percentage of a particular  
7 customer's behaviour and potentially do that on the same  
8 unit costs as Intel, but then there is another aspect of  
9 the customer's demand for which it is not possible for  
10 the entrant to compete for, and by definition it must  
11 mean that the entrant does not have the same unit costs  
12 as Intel over these additional units.

13 It's precisely that asymmetry which gives the force  
14 to the potential conduct of linking the contestable  
15 units and the non-contestable units.

16 Q. I see.

17 A. So, you know, I see that the Commission has described it  
18 as an as-efficient competitor, but I don't think from  
19 an economic sense that that's correct.

20 Q. So they're wrong to talk about it as an as-efficient  
21 competitor analysis, in your view?

22 A. From an economic perspective, yes.

23 Q. I see. Just going on to the -- they spell out here the  
24 position, and just to be clear:

25 "This analysis is in principle independent of

1           whether or not AMD was actually able to enter."

2           So this aspect of the AEC, I think you recognise  
3           that the AEC is not trying to assess whether there is or  
4           would be a specific particular entrant; is that correct?

5       A. Yes, I mean, I think it is the case, as we discussed  
6           previously, that in principle if you just relied on the  
7           as-efficient competitor test as it's set out here and  
8           also by Mr Dryden, that you wouldn't -- not need to have  
9           any regard to actual effects on the market at all.

10      Q. Well, it's not to do with actual effects on the market,  
11         it's specifically here focused on the position of  
12         whether or not a specific entrant was actually able to  
13         enter. That's what's being talked about, and that is  
14         a recognised part of the AEC test, isn't it, Mr Parker?

15      A. Yes.

16      Q. So the Commission clearly here thinks it's  
17         an as-efficient competitor analysis it's carried out;  
18         you say it's not from an economic point of view. Is  
19         this really just a semantic distinction in the end,  
20         Mr Parker?

21      A. Well, since we have a debate going on about the  
22         difference between an as-efficient competitor and  
23         a reasonably-efficient competitor or some competitor  
24         that can control for the net advantages of the dominant  
25         firm, it seems to me that the concept of what is

1 an as-efficient competitor needs itself to have  
2 a principle to guide it, and in my view the appropriate  
3 principle that follows from the term "as efficient" is  
4 one where the entrant has the same costs, same unit  
5 costs as the incumbent across its business, and it seems  
6 to me that once you start moving away and introducing  
7 asymmetries where the entrant cannot possibly mimic the  
8 unit costs of the incumbent, it seems to me we're no  
9 longer talking about an as-efficient competitor, we're  
10 talking about a competitor that has by its nature -- is  
11 less efficient over certain units.

12 So that to me from an economic perspective I would  
13 say is not as efficient in regard to those bits that it  
14 cannot replicate. I see that the language here says  
15 "as-efficient competitor". I think my view is that the  
16 language is not very precise.

17 Q. I see. So this very extensive exercise that is  
18 undertaken by the Commission in that case was based on  
19 a fallacious definition of the test as you would see it  
20 from an economic point of view?

21 A. I think it's on a fallacious definition of what  
22 "as-efficient" means. It's clearly applying a test that  
23 is not to an as-efficient competitor because it does not  
24 have the same unit costs as Intel throughout. But we  
25 would need to properly define what we meant by

1 "as-efficient", and to what extent -- you know, in my  
2 view the clear definition is one that has the same unit  
3 cost everywhere, and I think it -- once we start  
4 deviating from that definition we are inevitably talking  
5 about a less-efficient competitor.

6 Q. I see. Now, we've heard a lot -- I'm going to leave  
7 Intel, unless the tribunal has questions in relation to  
8 that.

9 We've heard quite a lot about the article from  
10 Professor Salop. I think it's in concurrent evidence  
11 bundle 2. I think there are two copies of it, in fact.  
12 The one I marked up is in concurrent evidence bundle 2,  
13 tab 8 at sub-tab 4. It's possible that the tribunal may  
14 have been referring to a second version at tab 9,  
15 sub-tab 7, just in case you're -- I don't know which one  
16 you may have marked up.

17 I just want to ask you one or two questions about  
18 this, because obviously you place an awful lot of  
19 emphasis on it, Mr Parker.

20 If we start at the very beginning, it says:

21 "Myriad types of business conduct can involve  
22 exclusionary conduct that can harm consumers. This  
23 conduct includes exclusive dealing, tying, predatory  
24 pricing, vertical mergers, most favoured nation  
25 contracts, refusals to deal, and resale price

1 maintenance, among others. There are two overarching  
2 law and economics paradigms for analysing exclusory  
3 conduct in anti-trust -- predatory pricing and raising  
4 rivals' costs foreclosure. This raises the question of  
5 which paradigm is better suited for addressing various  
6 types of allegations of anticompetitive exclusion."

7 Just to be clear here, what's being talked about are  
8 two paradigms that are recognised in US law, the  
9 predatory pricing paradigm and the raising rivals' costs  
10 paradigm; is that correct?

11 A. I think from an economics perspective, the economics is  
12 consistent across the two jurisdictions, I don't know if  
13 economics necessarily matters. From a legal  
14 perspective, as I understand it, elements of US law are  
15 not that different to EU law. There are comments in  
16 here, references to some EC cases as well, so I'm not  
17 a lawyer, I can't tell you whether from a legal  
18 perspective this only applies to US law, but from  
19 an economics perspective it seems to me that the logic  
20 applies to both, it would apply consistently across the  
21 two.

22 Q. I just want to be clear. The two paradigms, law and  
23 economics paradigms that are being talked about here,  
24 are predatory pricing and raising rivals' costs. That  
25 is what Professor Salop talks about here, isn't it?

1           Those are the two categories or buckets that he is  
2           discussing?

3           A. That's right, and I have a similar view on the right  
4           buckets. I think there is one bucket which is conduct  
5           that gives rise to direct consumer benefits, which he  
6           characterises as predatory pricing, I think there is  
7           potentially other examples that would fit into that  
8           concept, and then there is raising rivals' costs, so I'm  
9           largely in agreement with him in terms of from  
10          an economic perspective.

11          Q. When he talks about predatory pricing and raising  
12          rivals' costs, he is talking about it in the context of  
13          developed learning and case law in the US, isn't he?

14          A. Well, and economic thinking that has arisen out of those  
15          cases, but for me the -- you may well be right, but  
16          I think the economics applies more broadly.

17          Q. If we go over the page to 372, second paragraph, the  
18          reason why he cares particularly about which bucket  
19          things go in is because he says:

20                 "The choice of paradigm has important implications  
21                 for the legal analysis. While the predatory pricing  
22                 paradigm would attack the 'level' of the prices under  
23                 the Brooke Group standard, the RRC foreclosure paradigm  
24                 would attack the 'condition' placed on the prices under  
25                 the rule of reason."



- 1           Now, Brooke Group standard is a US law standard,  
2           isn't it?
- 3       A. Yes, as I understand it.
- 4       Q. And rule of reason, although it's sometimes referred to  
5           in European competition law, again is a doctrine  
6           developed in US law?
- 7       A. Well, I'm not sure, I mean, I'm not a lawyer, but rule  
8           of reason sounds to be not a million miles away from  
9           the: all the circumstances in the round, however you  
10          want to describe it. But maybe that's incorrect.
- 11       Q. What he is talking about here is "it has implications  
12          for the legal analysis", and that's US law analysis,  
13          isn't it, Mr Parker?
- 14       A. Well, if you say so. I can't comment on that.
- 15       Q. Sorry, are you saying you don't read this as being  
16          focused on the US law approach to these matters?
- 17       A. I'm saying I read it from an economic perspective, which  
18          it makes sense to me to consider two different types of  
19          conduct with two different exclusionary mechanisms from  
20          an economic perspective to treat those in different ways  
21          because of the impact on consumer welfare.
- 22       Q. I understand.
- 23       A. I'm reading it in that context and not being a lawyer  
24          I don't really have the capacity to read it in  
25          a different way.

1 Q. The point I'm making to you is he is identifying the two  
2 buckets as relevant to the particular structure of  
3 analysis in US law, isn't he?

4 A. I mean, if you say so. I can't comment.

5 Q. Then you will see further down that what he's really  
6 focused on here is whether or not CPPs or conditional  
7 pricing practices are better characterised as belonging  
8 to the raising rivals' costs foreclosure paradigm?

9 A. Yes.

10 Q. That's because he is concerned that under US law,  
11 conditional pricing practices might have been looked at  
12 under the predatory pricing paradigm and from  
13 an economic point of view he doesn't think that's the  
14 right way of looking at them?

15 A. Yes, so you look at the rest of that paragraph. The  
16 proper focus should be placed on the magnitude of the  
17 foreclosure and proper consumer harm rather than whether  
18 or not the firm is pricing below some measure of costs.  
19 Economic analysis also implies that whether there is  
20 substantial foreclosure should be gauged by the impact  
21 on the competitors, including their costs output and  
22 ability to enter or expand.

23 Q. Understood.

24 A. Which is -- it seems to me that's an economic approach  
25 which is independent of a particular legal framework.

1 Q. Well, that may well be right, but what he is doing here  
2 is he is coming forward with a policy and economic  
3 analysis as to why it is the allocation of certain types  
4 of cases under US law should be reconsidered; that's  
5 what he is doing here, isn't it?

6 A. I think that's right, because I think he -- his view  
7 seems to be that on the economics he thinks that the way  
8 that it's done in the US doesn't necessarily fit the  
9 economic consequences particularly well. So I think his  
10 starting point is trying to understand the economic  
11 consequences of different types of behaviour and how  
12 they should appropriately be viewed.

13 Q. I see. Just going back across to 371, he says in the  
14 second paragraph:

15 "Sometimes the choice of paradigm [between predatory  
16 pricing and raising rivals' costs] is obvious. When  
17 US Tobacco ripped out the displays of its competitor,  
18 that conduct clearly fit the RRC foreclosure paradigm.  
19 The RRC foreclosure paradigm similarly would apply if US  
20 Tobacco had demanded exclusive dealing instead. When  
21 Continental Baking offered very low prices for pies in  
22 Salt Lake City, that conduct fit the predatory pricing  
23 paradigm. However, other conduct may not be so  
24 obvious."

25 So here he is looking at the fact that you have got

1           this bifurcated structure in US law and he is troubled  
2           by the bifurcation; that's what he is identifying here,  
3           that sometimes the conduct may be obvious to put in the  
4           bucket, other times it's not, and then this article is  
5           concerned about whether or not conditional pricing  
6           practices under US law have been treated in the right  
7           bucket. That's what's going on here, isn't it?

8           A. Yes, I think so.

9           Q. Just on that, if you go down to footnote 3, in relation  
10          to that paragraph, he refers there, I think, in relation  
11          to the price of pies, to the Utah Pie v Continental  
12          Baking case, and he says:

13                 "Any doubts left by Utah Pie that the pricing need  
14                 not be predatory were resolved by Brooke Group Ltd v  
15                 Brown and Williamson [so that's the Brooke Group case],  
16                 which clarified that the same predatory pricing  
17                 threshold applied to both monopoly and  
18                 price-discrimination cases."

19                 So there he is saying that under US law his  
20                 understanding is that actually price discrimination  
21                 cases should be dealt with under the predatory pricing  
22                 paradigm; that's what you understand, correct?

23          A. I mean, I think that's what I understand the US law  
24          position to be.

25          Q. He doesn't ever come back, in fact, and suggest that

1 price discrimination cases should be anything other than  
2 in the predatory pricing paradigm bucket, does he?

3 A. Well, but conditional pricing practices are a form of  
4 price discrimination.

5 Q. Well, that may well be correct, but here what you have  
6 is the starting point under US law being set out that  
7 price discrimination is not a raising rivals' costs  
8 paradigm case, it is a predatory pricing paradigm, isn't  
9 it, Mr Parker?

10 A. Well, I'm not familiar with Utah Pie, and I'm not  
11 sufficiently familiar with Brooke Group to know whether  
12 that's the case.

13 Q. Now --

14 A. If it is the case, I think Professor Salop is  
15 criticising that from the perspective of conditional  
16 pricing practices.

17 Q. Understood. So he is saying: look, insofar as you can  
18 treat conditional pricing practices as price  
19 discrimination, actually we should be revisiting this  
20 categorisation?

21 A. I think that's what he is saying, yes.

22 Q. I see. Now, you try to take the analysis that  
23 Professor Salop has undertaken in this, in this  
24 discussion about economics and the position in relation  
25 to the US paradigms, and you try to carry it across and

1 suggest that it's good authority for your dichotomy when  
2 we're applying EU and UK law, and you do it from  
3 an economic point of view; I completely accept that.

4 But just to be clear, he doesn't ever refer to the  
5 concept of a low pricing practice or an excessive  
6 competition practice as a category in this article, does  
7 he?

8 A. Well, predatory pricing is a low pricing practice.

9 I have -- in my view, it's a -- there is a slightly  
10 wider concept that we should look at, that seems to be  
11 predatory pricing as a low pricing practice.

12 Q. That wasn't the question, Mr Parker. Just to be clear,  
13 he doesn't ever refer to the concept of a low pricing  
14 practice or an excessive competition practice as  
15 a particular category in this article, does he?

16 A. Not as far as I know, but I haven't done a word search.

17 Q. What he doesn't do is suggest that there is any problem  
18 with the way that EU law under the guidance might  
19 approach the AEC test, he doesn't say that anywhere,  
20 does he?

21 A. I don't believe so.

22 Q. Indeed, Professor Salop's quite interesting in this  
23 regard, because if you go on to page 389 --

24 A. Yes.

25 Q. -- he talks about Intel, albeit he is there referring to

1 a case in the US courts, but then there is just  
2 an interesting final sentence:

3 "Professor Salop served as an economic consultant to  
4 Intel in the European Commission proceeding."

5 You see that?

6 A. I do.

7 Q. Now, again I'm not going to test you on Intel, but I'm  
8 pretty sure you know and understand that Intel was  
9 pressing for the use and application of an AEC test in  
10 relation to the alleged exclusivity rebates which had  
11 been found to be abusive in the decision; you know that,  
12 don't you, Mr Parker?

13 A. I do not know that, but --

14 Q. Believe that to be true?

15 A. I believe that to be true, yes.

16 Q. Thank you. Obviously it's sometimes said that  
17 consistency can be the hobgoblin of a small mind, but is  
18 it really right, do you think, that someone who is  
19 giving testimony on behalf of Intel, in proceedings  
20 where they are pursuing matters in relation to alleged  
21 abuse of dominance relying on the AEC test, would be  
22 writing an article saying that actually using that AEC  
23 test is wrong?

24 A. Well, it is interesting, I agree. I mean, if  
25 I perhaps -- if we turn on to footnote 114, which is on

1 page 28, and this is in the context here of how you  
2 should treat conditional pricing practices, and then he  
3 goes on to talk about in the next section the  
4 incremental price cost test and whether that's useful,  
5 he says in that footnote:

6 "Intel argued that its conduct did not involve  
7 conditional discounts but simply separate bidding  
8 competitions."

9 And again he said he submitted an expert report on  
10 behalf of Intel in the EC proceedings, and this section  
11 here is precisely, I think, about the raising rivals'  
12 costs paradigm is the appropriate one to do when looking  
13 at conditional pricing practices.

14 So I mean, I think your question was: is it  
15 conceivable that he would make such an argument? And it  
16 seems to be that that is precisely the argument that he  
17 is making.

18 Q. No, I was saying: was it inconsistent? Was it likely  
19 that he would make an inconsistent argument?

20 A. Well, that's a matter for him, I think. But it seems to  
21 me he is very strongly here advocating that you should  
22 treat conditional pricing practices under a raising  
23 rivals' costs foreclosure paradigm.

24 Q. So are you saying that the out-turn of this article is  
25 in fact inconsistent with that line of argument,



1 assuming Intel would say that you should apply an AEC  
2 test to conditional pricing practices?

3 A. Well, it appears that way in the sense that I can see  
4 from the article that he's suggesting that a conditional  
5 pricing practice should be treated as a raising rivals'  
6 costs. I don't know what was submitted or argued by  
7 Intel other than what he has in 114, which suggests that  
8 in Intel's view it wasn't a conditional discounts case.

9 Q. I understand that that's what's said at 114. My  
10 question was more general, because isn't the answer that  
11 in fact this policy paper is grappling with rather  
12 a particular issue that's grown out of US case law,  
13 which is actually relevantly different from the position  
14 in Europe?

15 A. Well, I think that's a legal question beyond my  
16 expertise.

17 Q. Now, in relation to the substance of the approach that  
18 he adopts, if -- I'm sorry, if you could give me one  
19 moment, I just want to dig out a report.

20 (Pause)

21 I apologise, I can't find the reference I was going  
22 to in your report.

23 I just want to look at the suggestion, I think, that  
24 you have made that the test being applied or considered  
25 by Professor Salop is an AEC test.

1           If we could go to page 403.

2       A. Yes.

3       Q. It's clear, isn't it, that where Professor Salop is  
4       talking about an incremental price/cost test, he is  
5       talking about something that is very different from  
6       an AECT test? One can see that from the second  
7       paragraph under "The incremental price/cost test".  
8       There you see a second price/cost test -- sorry, he  
9       starts:

10           "Application of the predatory pricing paradigm to  
11       CPPs would use a threshold price/cost test as required  
12       from the rule of reason analysis. Two tests might be  
13       suggested. One would simply compare the total revenue  
14       ... to total variable costs ...

15           "A second price/cost test compares the firm's  
16       incremental revenue on the extra ('contestable') volume  
17       achieved as a result of the discount on the additional  
18       units sold to the incremental costs of providing that  
19       extra volume. This has been the focus of most analysis  
20       of CPPs. I will refer to this test as an incremental  
21       price/cost test."

22           So what he is doing here is looking at the test that  
23       has been applied in US law in relation to CPPs or as the  
24       focus of most analysis of CPPs; that's correct, isn't  
25       it?

- 1 A. Yes.
- 2 Q. And he's saying that the test that's been applied is  
3 this incremental price/cost test pursuant to the  
4 predatory pricing paradigm; that's right, isn't it?
- 5 A. Yes.
- 6 Q. What he is identifying there is how that incremental  
7 price/cost test works, and the critical thing about it  
8 is it is asking: does the conditional pricing practice  
9 increase or reduce the profit of the incumbent; that's  
10 correct, isn't it?
- 11 A. Yes, I think so.
- 12 Q. So that's what, in the language that Mr Dryden used, is  
13 a form of sacrifice test, isn't it?
- 14 A. (Pause). I think the idea of the as-efficient  
15 competitor and the sacrifice test come together in that  
16 context, don't they, because if you are saying the  
17 as-efficient competitor couldn't meet the ... able to  
18 make a profit on the relevant units, then it is, you  
19 know, sacrificing profits, the as-efficient competitor.
- 20 Q. No. They are different tests. It asks whether or not  
21 the conditional pricing practice increases or reduces  
22 the profits of an incumbent. In other words, does it  
23 involve a sacrifice by the incumbent of profits? That  
24 is the incremental price/cost test that he is applying,  
25 isn't it?

- 1 A. In this paragraph, yes, maybe that's right.
- 2 Q. It's not just in this paragraph, is it, Mr Parker? This  
3 is the price/cost test throughout this report which  
4 Professor Salop is comparing to what he refers to as his  
5 consumer welfare approach, isn't it?
- 6 A. Possibly, yes.
- 7 Q. No, not possibly, Mr Parker. It is, isn't it?
- 8 A. Well, I think we should think about this in the context  
9 of price/cost tests generally.
- 10 Q. No, just the question, Mr Parker, just the question: it  
11 is the price/cost test that he is comparing against  
12 throughout this paper, isn't it?
- 13 A. That may be right, but I think the general principles  
14 apply because, as we go on in 45, for example,  
15 less-efficient competitors have value to competition,  
16 the same principle I think applies to the as-efficient  
17 competitor test. So even if he is talking about some  
18 slightly different price/cost test, I think the general  
19 conclusion, which is that a monopolist may have the  
20 incentive to raise the costs of a less-efficient  
21 potential competitor in order to destroy its prospects  
22 of entry into the monopolist's market, to me I think  
23 the -- from an economic perspective, the -- that line of  
24 logic saying -- sorry, the reference is on page 45,  
25 second paragraph. I think the consumer welfare analysis

1           that he identifies would apply across to the  
2           as-efficient competitor test as Mr Dryden has set out.

3       Q. All you are grasping for here on page 45 is the  
4           proposition that less-efficient competitors can have  
5           value to competition, isn't it, Mr Parker?

6       A. Yes.

7       Q. Yes?

8       A. Entry via a less-efficient competitor into a monopoly  
9           market that causes lower prices will benefit consumers.  
10          And the as-efficient competitor test that Mr Dryden  
11          describes says "I am going to allow the monopolist to  
12          exclude less-efficient entrants", and Professor Salop's  
13          point here is that that is something that could be  
14          adverse to consumer welfare.

15       Q. It could be, that's what he is saying, it could be, but  
16          the point I'm making here is that Professor Salop is not  
17          comparing against an AEC test when he carries out this  
18          analysis, is he? I think you said that may be the case.  
19          I'm going to leave it there. But let us just look at  
20          how this works, because if you go to page 407, he  
21          expresses a concern under that heading "False  
22          negatives":

23                "Using the incremental price/cost test as  
24                a threshold 'shield' is subject to serious concerns  
25                about false negatives."

1           So this is saying treating an incremental price/cost  
2 test such as this as a safe harbour, in his view, taking  
3 this policy approach that he's developed in this  
4 article, gives rise to concerns about false negatives.

5           "First, the incumbent enjoys a number of inherent  
6 bidding advantages that may eliminate its need to charge  
7 an incremental price below cost to exclude even an  
8 equally-efficient entrant, and even when the exclusion  
9 harms consumers. While a distributor would retain the  
10 nominal choice of whether to accept the exclusive, the  
11 effectiveness of its choice is impeded by these bidding  
12 advantages that come from the market power of the  
13 dominant firm. Second, competition from less-efficient  
14 competitors into a monopoly market [he says] typically  
15 increases consumer welfare ..."

16           Let's just focus on that first one, because you  
17 I know say: well, you can make assumptions about the  
18 entry of less-efficient competitors and how they benefit  
19 consumer welfare, but on the first of these false  
20 negatives what he is saying is that the incremental  
21 price/cost can exclude an as-efficient competitor.

22           You understand that?

- 23       A. So the particular situation that he's talking about  
24 there is if I'm a monopoly and I make the prices of 100,  
25 profits of 100, and if I'm in the face of -- if entry

1           came in, then the two duopolists would make 20 each,  
2           say, because competition destroys some of the profits in  
3           the market, it's a standard economic result, then the  
4           monopolist can preserve, by essentially bidding --  
5           getting exclusive contracts with suppliers, can pay  
6           those suppliers an amount of money somewhere between  
7           the -- essentially giving some of the profits that it --  
8           the 80 of profits that it would prefer to have in the  
9           monopoly situation rather than the duopoly situation, it  
10          can essentially give some of those to -- let's say pays  
11          25 above the odds to the input providers, in that world  
12          the entrant coming in can make 20 but can't pay 25 to  
13          the input suppliers, whereas the monopolist can pay 25  
14          because it has 80 to play with.

15                 So in that situation, even if you had a pure  
16          as-efficient competitor, there is if you like  
17          an asymmetry caused by the existence of the monopoly  
18          having the monopolist position and the entrant being  
19          an entrant, even if in other respects we say it's  
20          completely as-efficient. So it seems to me that's  
21          another example where the as-efficient competitor test  
22          doesn't tell you that there can't be foreclosing  
23          behaviour, in that case in a slightly different  
24          situation.

25          Q. Surely the as-efficient competitor test would not permit

1           that to happen and what is going on here is there is  
2           a different price/cost test being applied that admits of  
3           the possibility of an as-efficient competitor being  
4           excluded; that's the position, isn't it?

5           A. No, I think that's misreading -- I think it's misreading  
6           of that particular paragraph.

7           Q. In relation to the approach that he adopts in his broad  
8           prognostication about why an incremental price cost test  
9           is not appropriate, the conclusion that Professor Salop  
10          reaches is that he thinks there should be a full  
11          consumer welfare analysis; that's correct, isn't it?

12          A. Sorry, where is that?

13          Q. So I'm asking you, taking the article as a whole, is  
14          Professor Salop's position that rather than using  
15          something like the incremental price/cost test which has  
16          been used in relation to CPPs and is used in US law,  
17          that instead you should use a full consumer welfare  
18          analysis in order to assess whether or not CPPs are  
19          contrary to US anti-trust law; is that correct?

20          A. Can you take me to where in the document he says that?

21          Q. Let's just look at the bottom of page 402, shall we, to  
22          start with. So 402, picking it up in the final  
23          paragraph:

24                 "From the viewpoint of consumers, however, these  
25                 efficiency benefits [so benefits that can occur from



1 CPPs] may come at a significant cost of reduced  
2 competition. The 'upward pricing pressure' from raising  
3 rivals' costs may more than offset the 'downward pricing  
4 pressure' from incentivising the additional promotion.  
5 Thus, it is necessary to evaluate the net impact on  
6 consumers. This analysis would implicate the possible  
7 market power of the excluding firm. This rule of reason  
8 analysis also would include evaluation of whether the  
9 benefits are 'conduct-specific', that is, whether the  
10 exclusion is 'reasonably necessary' to achieve the  
11 consumer benefits. In carrying out this analysis, the  
12 relevant competitive benchmark would be the  
13 unconditional prices that would occur absent the loyalty  
14 discount plan and the reasonably less restrictive ways  
15 to achieve the efficiency benefits."

16 So there are two things he is saying here in  
17 relation to how one analyses this situation, as  
18 I understand it. The first is that you have to carry  
19 out a counterfactual analysis of the situation in  
20 relation to any particular pricing. That's the final  
21 sentence. Do you see that?

22 A. Yes, you need to look at what would happen.

23 Q. And the second is that he's suggesting that there should  
24 be a broad weighing of all of the identifiable benefits  
25 that might arise in the market from the particular

1 course of conduct that you are testing; do you  
2 understand that?

3 A. Yes. Yes, I think that's right.

4 Q. So that, I would suggest to you, is identifying two key  
5 components of what would be referred to as a full and  
6 general consumer welfare analysis; is that correct?

7 A. Well, I think from the perspective of looking at the  
8 impact on consumer welfare that's clearly very  
9 helpful -- you know, clearly a sensible thing to do from  
10 an economic perspective, so I would agree with that.

11 Q. Sorry, the question was: he is suggesting there that  
12 a full general consumer welfare analysis is the  
13 appropriate course in his economic view; is that  
14 correct?

15 A. Well, he says:

16 "It is necessary to evaluate the net impact on  
17 consumers."

18 And that to me sounds like a sensible thing to do.  
19 I think that it depends what you mean by a full, general  
20 consumer welfare analysis.

21 Q. Perhaps it's just worth thinking about what might be  
22 involved in such an approach. First of all, given that  
23 you would need to look at the factual situation, you  
24 would need to model what would happen to retail prices  
25 and product quality if the pricing practice were

1           permitted, you would have to get a sense of the factual  
2           situation; is that correct?

3           A. Yes.

4           Q. Then you would need to consider in doing that -- you  
5           would have that consider that against, secondly, what  
6           would happen if the retail or the relevant prices and  
7           product quality, what would happen to those if the  
8           pricing practice in question was not permitted. So you  
9           would have to do that counterfactual exercise. Is that  
10          right?

11          A. So from an economic perspective I agree that's a helpful  
12          thing.

13          Q. Then what I think you say would need to be done is you  
14          would need to consider whether, in the factual world,  
15          there are actual or potential competitors on the market  
16          who could or would enter and expand at the given level  
17          of factual prices. Is that right?

18          A. Sorry, could you repeat that?

19          Q. In order to assess the factual situation, one of the  
20          things you are going to need to consider is whether  
21          there are any actual or potential competitors on the  
22          market who could or would enter and expand at the given  
23          level of prices?

24          A. Yes.

25          Q. Yes, and if there are, you would need to consider the

1 efficiency of that entrant or entrants relative to the  
2 dominant undertaking, wouldn't you?

3 A. Why would I need to do that?

4 Q. Well, won't that be important to understand what  
5 possible static productive efficiency effect you would  
6 identify by that entry?

7 A. I'm not sure that's a helpful exercise actually, because  
8 as long as the entrant has come in with prices below the  
9 monopoly price, then that I don't think has -- that  
10 leads to consumer welfare benefits, and we know that  
11 Whistl came in with discounts to the Royal Mail prices.  
12 Whether Whistl had slightly lower -- if Whistl was less  
13 efficient then it would be taking a lower margin than  
14 Royal Mail. If Royal Mail had to meet those prices, it  
15 would see that its margins were also being reduced.

16 I don't actually think you need to deal with static  
17 cost inefficiency in that context, you can just look at  
18 the prices. This is essentially what Professor Salop  
19 says on the page we were just on -- where are we? Entry  
20 by a less-efficient -- this is page 45 or page 414 of  
21 the internal page there:

22 "Entry by a less-efficient competitor into  
23 a monopoly market that causes lower prices will benefit  
24 consumers."

25 If we then turn back to the Article 82 guidance

1           which -- you will have to remind me which bundle that  
2           is, I apologise.

3       Q.   You can get it in your cross-examination bundle at  
4           tab 2, I think.

5       A.   So if we go to paragraph 30, I'm sure you are very  
6           familiar with the last part of that, essentially:

7                    "Where there is no residual competition and no  
8           foreseeable threat of entry, the protection of rivalry  
9           in the competitive process outweighs possible efficiency  
10          gains. In the Commission's view, exclusionary conduct  
11          which maintains, creates or strengthens the market  
12          position approaching that of a monopoly can normally not  
13          be justified on the grounds that it also creates  
14          efficiency gains."

15                 Now, it seems to me that -- so when you are talking  
16          about a full consumer welfare analysis, my understanding  
17          of how that can be sometimes applied in practice is  
18          through presumptions, and if you have some presumptive  
19          circumstances where you expect consumer welfare to be  
20          harmed, then maybe at that point a full consumer welfare  
21          analysis is not required, and that one would then need  
22          to go in to look at objective justification, other  
23          efficiencies and so on, so I'm certainly not ruling that  
24          out.

25       Q.   Let's just pause there. You are grabbing at the

1 objective necessity paragraphs. I'm focusing on what  
2 the primary test should be in relation to these matters.  
3 The primary test issue arises in relation to whether or  
4 not you actually have exclusionary conduct in the first  
5 place.

6 What I'm suggesting to you is that your favoured  
7 economic proposal from Professor Salop involves a broad  
8 consumer welfare analysis and that that consumer welfare  
9 analysis will inter alia even when analysing the factual  
10 situation involve a need for consideration of the likely  
11 impact on productive efficiency.

12 The reason I'm surprised that you cavilled at it as  
13 a proposition is because if you look at your own report  
14 at 4.2.6 under the heading of "Consumer welfare", it is  
15 the second of the considerations you suggest need to be  
16 taken into account. 4.2.6 in Mr Parker's own report.

17 THE CHAIRMAN: At what point are you planning to pause,  
18 Mr Beard?

19 MR BEARD: Oh, I'm sorry, I've lost track again.

20 THE CHAIRMAN: You have got carried away for a second time.

21 Ten minutes. How are you progressing?

22 MR BEARD: I'm progressing fairly well. I am not absolutely  
23 sure I'm going to finish today. I hoped I would, I will  
24 do my best to. Obviously the lion's share of the  
25 cross-examination is in relation to some of these

1 matters.

2 THE CHAIRMAN: We can sit a little late. I think it would  
3 be desirable for Mr Parker not to have to sit over the  
4 weekend.

5 MR BEARD: Yes. I will certainly do my best.

6 THE CHAIRMAN: Five minutes' break then.

7 (3.16 pm)

8 (A short break)

9 (3.26 pm)

10 MR BEARD: I had a look back at the transcript and in the  
11 light of the answers I have had in relation to  
12 Professor Salop, consumer welfare and counterfactual and  
13 balancing, I'm not going to ask you further questions  
14 about that, and I'm going to move on.

15 I will deal with a very different topic, which is  
16 concerned with the materiality analysis that's been  
17 undertaken and in particular the eligibility criteria.

18 In your report, in your first report, you say that  
19 there is an eligibility error in the materials submitted  
20 in relation to the national spread benchmark. Just for  
21 your notes, that's in your first report at section 4.5.

22 In your most recent second report, you have  
23 suggested that there is another eligibility error, this  
24 is in Parker 2 at section 3, in relation to the urban  
25 density benchmark.

1           I think in line with what you have said previously  
2           that both of those matters turn upon the meaning of the  
3           NPP1 contract, which is a matter of interpretation and  
4           law; that's correct, isn't it?

5       A. Well, in relation to the first, it relates to the ...  
6           I'm relying partly on the views of Mr Polglass in terms  
7           of the interpretation, so which boiled down to the  
8           interpretation of that contract as it was perceived by  
9           Whistl at the time.

10      Q. Yes, I understand, but you are not suggesting whether or  
11         not that's a relevant consideration for the  
12         interpretation of the contract?

13      A. Well, it could be a relevant question for the effects of  
14         the contract. So if the interpretation is unclear and  
15         it is felt by potential people purchasing under that  
16         contract that they had one view, then that of itself  
17         could have impacts on the market, depending on if there  
18         is ambiguity, that ambiguity itself could give rise to  
19         economic effects.

20      Q. I see, so let's just take that in stages. Are you  
21         saying that if someone simply makes a mistake as to the  
22         interpretation of a contract and in those circumstances  
23         puts themselves in what might be perceived as  
24         a suboptimal commercial position, that could amount to  
25         evidence of abuse?



- 1 A. Not if one makes a mistake, but if terms are unclear,  
2 then -- or could be differently interpreted in a  
3 reasonable way, then potentially that wouldn't be  
4 a mistake.
- 5 Q. I see.
- 6 A. It seems to me.
- 7 Q. So abuse by contractual ambiguity generating  
8 uncertainty, is that the proposition that you are  
9 putting forward?
- 10 A. No, I'm responding to your view. But yes, I agree that  
11 the interpretation of the contract is a matter of, you  
12 know, fact and law.
- 13 Q. Yes, fact and law. I'm not going to ask you further  
14 questions in relation to the interpretation of the  
15 eligibility criteria.
- 16 Now, in relation to -- just to be clear -- the  
17 eligibility error on the national spread benchmark, you  
18 don't suggest that has any impact on the base case  
19 analysis, I think; that's correct, isn't it?
- 20 A. Yes, that's right.
- 21 Q. Yes. But in relation to the urban density eligibility,  
22 you say that that could have an impact on the base case;  
23 that's right, isn't it?
- 24 A. That's correct.
- 25 Q. What you say is that that could mean that looking at the

1 base case that would potentially amount to a failure of  
2 an as-efficient competitor test; is that correct?

3 I think it's probably your second statement at figure 2,  
4 if that assists, which is in tab 10 of the second volume  
5 of concurrent evidence.

6 A. Yes, I mean, I wonder, could we just quickly turn to the  
7 CCNs number 3? I don't know where those are in the  
8 bundles.

9 Q. I'm sorry ...?

10 A. Contract charge notices 3 to 5.

11 Q. Yes. For what reason? I don't understand. I'm taking  
12 you to this in order to ask you a couple of questions  
13 about it. I don't understand why there is any need to  
14 go to CCNs in order to answer a question that I'm asking  
15 you.

16 You are saying, in relation to this, that this would  
17 amount to a failure of the as-efficient competitor  
18 success; that's correct, isn't it?

19 A. Yes.

20 Q. And you're saying that even though you know that  
21 an entrant would be looking to achieve scale, don't you?

22 A. Well, my understanding was we're not looking -- that the  
23 AEC is a hypothetical test based on a hypothetical, and  
24 it's not actually concerned with a position of  
25 an entrant at all. So I say it's failed because at that

1 first or first and second SSCs for CDA customers the  
2 hypothetical as-efficient competitor is -- the blue line  
3 is below the orange line in figure 2 of my report.

4 Q. So you are saying because the blue line is below the  
5 orange line for one SSC or possibly two, you say, but  
6 I think one SSC -- two for CDA customers, as I recall --

7 A. Yes.

8 Q. -- then in those circumstances you treat that as overall  
9 a failure of the AEC; is that correct?

10 A. Well, this is within the context of the test set out by  
11 Mr Dryden where, you know, it's not really an AEC if  
12 you're only at one, in one SSC, because you have higher  
13 costs elsewhere, so put that to one side. It fails at  
14 that level of coverage.

15 Q. It fails at that level of coverage you say, and you say  
16 that notwithstanding that, the expectation would be that  
17 entry would be beyond one or two SSCs?

18 A. Well, I'm struggling to reconcile that with the  
19 discussion we have had that the AEC test is  
20 a hypothetical test and doesn't need to relate to this  
21 factual proposition that you are putting to me.

22 Q. Well, it doesn't necessarily need to relate to the  
23 precise position of Whistl, albeit that we know that  
24 Whistl was wanting to roll out to 25% of coverage, but  
25 your position is that an AEC test is failed in

1           circumstances where the first increment is failed even  
2           if the expectation of the dominant undertaking would be  
3           that any AEC would roll out well beyond that first  
4           increment; is that right?

5       A. Well, I think this goes to me to the somewhat arbitrary  
6       nature of how we're now defining what an as-efficient  
7       competitor is, because if the dominant company thought  
8       that the as-efficient competitor would always roll out  
9       to a certain level of coverage, why are we doing the  
10       test at all at levels of coverage which are therefore  
11       not as efficient, and then we go to: what do we actually  
12       mean by as efficient, because we're now defining, well,  
13       it's as efficient at some level of coverage but not at  
14       some other level of coverage, and it seems to me,  
15       you know, an indication of why in practice I don't think  
16       an AEC test is very sensible.

17       Q. Well, I'm not going to review the position in relation  
18       to AEC. These are points that could have been put to  
19       Mr Dryden and may be put to Mr Harman as to the impact  
20       on the matters concerning the AEC test. But we say that  
21       the fact that in relation to one SSC in relation to  
22       non-CDA and two in relation to CDA does not mean that  
23       you should be treating this as an overall failure of the  
24       AEC test, but as I understand it your position is you do  
25       treat it as a failure overall of the AEC test, am

- 1 I correct?
- 2 A. Well, it's clearly a failure at that level of coverage,  
3 but it seems to me it indicates a wider problem with the  
4 AEC test as a whole, in that it clearly -- the  
5 description you suggested suggests that it can't be  
6 a bright-line, because we're now saying, well, it's  
7 failed here but this is only small, and in the real  
8 world maybe someone would always be coming in above  
9 that. So I think it just indicates problems with the  
10 AEC test as a whole.
- 11 Q. So your position is it's not a real AEC test if you are  
12 not rolling out to 100%, and so long as you are not  
13 rolling out to 100% of the market and treating the costs  
14 on that basis, any failure at any point of any extent is  
15 a failure of the AEC test; is that right?
- 16 A. Well, I understand it's a bright-line test or it's being  
17 put forward as a bright-line test, but I understand your  
18 question to be: should we allow the as-efficient  
19 competitor with less coverage to fail at certain levels  
20 of coverages, and therefore we then get to a question:  
21 what's the right number of levels of coverage and at  
22 what different levels of coverage before the bright-line  
23 test becomes a new bright-line, because it seems to me  
24 we've turned into quite a fuzzy -- we're in a fuzzy  
25 world here.

- 1 Q. I see. So up until your second report we weren't in  
2 a fuzzy world but now we are; is that right?
- 3 A. Well, in my first report I point out that in a world  
4 where you think about a REO or a SLEO you can have wide  
5 ranges of foreclosure. I understand that when Mr Dryden  
6 was talking in the hot tub he was suggesting that those  
7 wide ranges of foreclosure for the REO and the SLEO  
8 might actually be quite small and therefore not to be  
9 worried about. So I think that, you know, we're still  
10 in the world of we don't really know how to interpret  
11 this test. Once we start looking at levels of coverage,  
12 levels of failure under different conditions, it's far  
13 from a bright-line simple standard.
- 14 Q. I see. Are you saying there that it doesn't provide any  
15 useful insight, then, into the position?
- 16 A. Well, I think what it does tell you is -- maybe go to my  
17 first report, perhaps, because it's easiest to see  
18 there. It tells you something about the way in which  
19 you would -- the impact on an entrant, and let's ignore  
20 as efficient or otherwise. What we can see is, say,  
21 figure 9 which has been marginally updated in my first  
22 report, this is for illustration rather than the actual  
23 numbers.
- 24 What the chart shows you is really a version of the  
25 economic consequences of the price differential, which

1 is up to a certain level of coverage you can remain on  
2 NPP1 and you benefit from the standard price, and then  
3 after you move to APP2 then you start incurring the  
4 additional 1.2% across the whole of your access volumes  
5 and that's where you get this very sharp drop.

6 To that extent, in terms of indicating the economic  
7 mechanism by which there is a foreclosing effect on  
8 rivals, I think this is quite helpful. It seems to me  
9 that -- you know, that that is a useful exercise.

10 Q. You obviously are keen to go to figure 9 because that's  
11 got the adjustment for the eligibility error.

12 A. No, no. I'm quite happy to go, if you prefer, to the  
13 version in the supplementary report.

14 Q. No, I'm happy just to traverse the ring binder and just  
15 go to figure 8.

16 A. Jolly good.

17 Q. If you look at figure 8 --

18 A. Yes.

19 Q. -- so you are saying this is informative as to the  
20 position, and would you accept, therefore, that insofar  
21 as the analysis provides an indication of the level of  
22 headroom levels of roll-out, that in fact that is  
23 instructive as to the likelihood of any foreclosure?

24 A. So I think when I was commenting on the use of this  
25 I was thinking about it more in terms of the structure

1 of the price differential and when it comes into play.  
2 So for me it's not so much the level that is of great  
3 interest so much as you can see that in both charts the  
4 line goes sharply down as the surcharges increase in the  
5 first case and our -- and then you lose the price  
6 differential. And in the second case you get the cliff  
7 edge effect because of the eligibility error being taken  
8 into account.

9 I mean, it seems to me that actually the best  
10 evidence of foreclosure is actually looking at what  
11 actually happened to Whistl.

12 Q. That wasn't the question. I understand that that's your  
13 position, but I'm asking you about this table. You have  
14 said that you think it's instructive, and then you have  
15 qualified that now to say it's instructive in relation  
16 to the structure of the arrangements. But surely the  
17 structure of the arrangements are only interesting  
18 insofar as they are indicative of the extent of  
19 likelihood of foreclosure, and at that point the levels  
20 are relevant, aren't they, Mr Parker?

21 A. Well, it depends. What are we talking about here? Are  
22 we talking about a foreclosure of an AEC or are we  
23 talking about foreclosure of a real world entrant?

24 Q. Well, let's just see. We are clearly in relation to  
25 an AEC test talking about foreclosure of an AEC, but



1 even if you are thinking about how this material is  
2 useful more generally, if you look at figure 8, it shows  
3 there is a very large amount of headroom throughout the  
4 entirety of the roll-out, and so even if a new entrant  
5 was significantly less efficient than the AEC threshold,  
6 it would still rationally enter, wouldn't it?

7 A. Well, a rational entrant faced with that chart would  
8 enter at 100% for the reasons that we've discussed in  
9 the hot tub, which is it is, if I can pick any level of  
10 coverage and the profit maximising level of coverage on  
11 this chart is 100%, then that's what -- the rational AEC  
12 entrant, which is another reason for thinking of 100% as  
13 the AEC. I'm not really quite sure what world, what  
14 hypothetical we're talking about as someone who is as  
15 efficient but for some reason can't get to that 100%  
16 point.

17 Q. As I understood your position, Mr Parker, you were  
18 suggesting that if an entrant wasn't able to roll out to  
19 100%, but would roll out to a lesser degree, you would  
20 treat those as a reasonably-efficient operator and we  
21 have discussed in part the semantics of that. But more  
22 generally, if you have information generated by this  
23 test which indicates that there is significant headroom  
24 above the AEC, then in relation to these matters what it  
25 tells you, even on your approach, Mr Parker, is that

- 1           there is an awful lot of leeway for  
2           a reasonably-efficient operator or a less-efficient  
3           operator to enter, isn't there?
- 4       A. No, because if you are going to do a REO analysis you  
5           would need to do a proper REO analysis and try and  
6           control for all the net advantages and disadvantages.
- 7       Q. No, if you were doing what you put forward as an ideal  
8           REO analysis you would. Are you saying that this  
9           provides no relevant information?
- 10      A. Information about what?
- 11      Q. Whether or not there is anticompetitive foreclosure.
- 12      A. Yes, I don't think this chart tells you anything very  
13           helpful about whether there is anticompetitive  
14           foreclosure, because I don't think -- this is not  
15           measuring an as-efficient competitor, we haven't done  
16           a full adjustment for REO, at 100%, which is the  
17           as-efficient competitor, the as-efficient competitor  
18           would never be reliant on Royal Mail for access, and so  
19           Royal Mail could charge any prices it liked to any real  
20           world entrant because the test doesn't need to look at  
21           the effect on real world entrants.
- 22      Q. Just to be clear, as I understand it, in the joint  
23           statement you said that a REO analysis would provide  
24           a useful insight into anticompetitive foreclosure, but  
25           what you are saying is only if you get the REO analysis

1 absolutely right is that a useful insight, and if you  
2 get information of this sort that suggests there is  
3 significant headroom above the AEC, that isn't in any  
4 way informative or relevant; am I understanding  
5 correctly?

6 A. Well, you can potentially adjust the analysis to try and  
7 have a look at: how far would I need to go before I get  
8 material levels of foreclosure? This chart does not do  
9 that, so I think that's not terribly informative.

10 I think SLEO analysis that I carry out a bit later is,  
11 in my view, somewhat more informative because it says:  
12 how much less efficient do you -- can the entrant be  
13 before it gets into material levels of coverage where it  
14 cannot survive? That to me seems to be a useful piece  
15 of information.

16 Q. Can I just pick up another point in your second report  
17 at paragraph 2.18(b). It's internal page numbering 7.

18 A. Yes.

19 Q. So here, as I understand it, in 2.18(b), what you are  
20 doing is you are saying that the AEC test analysis  
21 carried out by Mr Dryden and Mr Harman doesn't look at  
22 incremental profitability of roll-out, so the criticism  
23 here is that the AEC as done by them shows whether  
24 you're profitable to enter at a given scale, but you say  
25 roll-out in bulk mail is gradual and they haven't done

1           that. Is that the correct -- am I understanding your  
2           criticism correctly?

3           A. I'm saying that the charts show essentially the decision  
4           of an entrant starting at zero to go to a certain level  
5           of coverage and is it profitable over that entire unit.  
6           So where it says 5% on the chart, you are looking at: if  
7           I was at zero and then I moved to 5%, can I make profits  
8           on the whole, on entering at 5% as a whole? If the 10%  
9           point says if I was at zero and I moved to 10, can  
10          I make profits on the 10% as a whole?

11          Q. But you accept, I think, that Mr Dryden in his sixth  
12          report, responding, has set out how these materials were  
13          put forward to Ofcom in the course of the statement of  
14          objections process. So if you go into tab 11 --

15          A. Yes.

16          Q. -- Mr Dryden describes this as your new argument, and  
17          then he sets out below how he put these matters forward  
18          at the statement of objection, and then the attached  
19          slides describe that analysis. You accept that, don't  
20          you, Mr Parker?

21          A. So I accept that this was put to Ofcom at the time, but  
22          these charts only relate to the sensitivity case and the  
23          base case with no further adjustments, because that's  
24          all that was in play at the time, if you like. I see  
25          both of these charts make the point that the EEO

1 unambiguously has an incentive to keep rolling out, in  
2 other words that it would want to get to 100%, and  
3 I think perhaps another issue is because the chart is  
4 looking at 0 to 100%, you can't really see what's going  
5 on at the -- in the first few SSCs. So if you look  
6 at -- go back to my ... (Pause). So those charts didn't  
7 include what I have referred to as the eligibility  
8 error --

9 Q. Yes.

10 A. -- as you will know. But if you start taking that into  
11 account, we do see very sharp drops even in the average  
12 cost and therefore the incremental cost at that point,  
13 because it becomes so close to the AEC, the incremental  
14 costs moving out must fall below the blue line.

15 Q. I'm not sure whether or not that is accepted, but that  
16 was not a point put to Mr Dryden. I think the point is  
17 that you, in your report, were plainly not aware of the  
18 fact that actually this material had been provided to  
19 Ofcom?

20 A. That's right, and I was commenting on the description of  
21 the charts, because it had not been clear to me exactly  
22 what the interpretation of those charts were.

23 Q. Understood.

24 Can I move on to section 5 in your report. So here  
25 you have a critique of Mr Harman's approach to

1 foreclosure and issues concerning materiality. I think  
2 you probably summarise the position at 5.1.2 that you  
3 recognise that Mr Harman's calculation of Whistl's IRR  
4 indicates that even with the differential in place, that  
5 calculation of IRR is a multiple of the cost of capital.  
6 I think you accept that; is that right?

7 A. Yes, that's correct.

8 Q. I'm sorry, I cut across you.

9 A. It's correct that that's what Mr Harman did and what  
10 I quote.

11 Q. You say, I think, at 3.2.2 in your report, if my notes  
12 are correct, that, this is the final sentence:

13 "A rival as a rational investor would incur the  
14 investment cost if the net present value of that  
15 investment is greater than 0."

16 A. Yes, as a theoretical perspective, I agree with that.

17 Q. So that approach is consistent with Mr Harman's analysis  
18 that a rational investor would continue to invest in  
19 circumstances where the IRR was substantially above the  
20 cost of capital; is that correct?

21 A. Well, I think we're talking about two slightly different  
22 things here, so I'm very specific in 3.2.2 where I'm  
23 talking about "undertake an investment" and Mr Harman is  
24 analysing the entire business plan of Whistl, which  
25 could potentially be broken up into multiple

1 investments, and therefore you would need to look at the  
2 incremental profitability of different investments  
3 rather than just treat the business plan as a whole to  
4 the extent that that --

5 Q. I understand. So your criticism is that one needs to  
6 look at these investments incrementally, and you  
7 suggest, I think, that this hasn't been done by Ofcom  
8 and it hasn't been done by you and it hasn't been done  
9 by Royal Mail; that's what you say, is that right?

10 A. Sorry, can you take me to the relevant --

11 Q. No, it's a negative.

12 A. It hasn't been done by Mr Harman.

13 Q. Yes, and you haven't done it?

14 A. No.

15 Q. So far as you are aware Ofcom hasn't done that?

16 A. Well, Ofcom looks at different evidence from a variety  
17 of different pieces of evidence, some of which looks at  
18 Whistl's business plan as a whole and some of which  
19 looks at incremental decisions, for example it  
20 identifies that when Whistl first heard about the  
21 introduction of the price differential, it reduced --  
22 you know, it put some roll-out plans on hold, that it  
23 didn't incur certain sunk costs and so on, so --

24 Q. This is a rather specific question. In relation to the  
25 internal rate of return calculation which is looking at

1           what sort of returns one can get and whether or not they  
2           exceed the cost of capital, your criticism is that that  
3           sort of calculation makes sense for an investment, if  
4           you are making multiple investments you need to do it in  
5           relation to each investment; is that correct?

6           A. Yes, that's correct.

7           Q. And Ofcom hasn't done that, have they?

8           A. We need to take a step back and ask what the kind of  
9           general context of this analysis is.

10          Q. No, very simple question: Ofcom haven't done that, have  
11          they?

12          A. In the specific context to which you refer, that's  
13          right.

14          Q. Just to be clear, in this context, although you talk  
15          about incremental investments, it's very clear that  
16          actually we're talking here in practical terms, which is  
17          what you want to do in relation to these matters, of  
18          investment to enable minimum scale of 25% coverage for  
19          viability purposes; that was the position, wasn't it?

20          A. Well, and to get there you need to incrementally roll  
21          out.

22          Q. You do need to incrementally roll out, but the decision  
23          in relation to investment that we're talking about is  
24          a project investment, isn't it?

25          A. Sorry, I'm not totally sure I understand the



1           distinction.

2           Q. You are considering that the flaw in Mr Harman's  
3           approach is that he doesn't consider each incremental  
4           investment decision to roll out to each incremental SSC;  
5           that's your criticism, isn't it?

6           A. He certainly, yes, doesn't look at --

7           Q. Yes, but if in fact the investment decision being taken  
8           by the company is not overall in terms of rolling out to  
9           individual SSCs, indeed they might flex how they rolled  
10          out to SSCs, the appropriate way of looking at this is  
11          looking at the project of rolling out to a number of  
12          SSCs perhaps to 25% scale and the way in which  
13          a decision on investment would be made in relation to  
14          that project; that's the case, isn't it, Mr Parker?

15          A. Well, as new information comes in, that roll-out plan  
16          I think was adjusted according to the level of  
17          profitability that they thought they would -- the number  
18          of areas that they might profitably be able to go into.  
19          So they're re-looking at the overall profitability of  
20          the business plan and deciding when, whether and which  
21          areas to go to, and then looking at all of those  
22          elements, putting them into one decision, and yes,  
23          making a decision ultimately about whether to go with  
24          a particular roll-out plan. But that roll-out plan that  
25          has been determined, it would be irrational to have

1 parts of that that were incrementally unprofitable.

2 So the process of adjusting the nature of the  
3 roll-out plan is precisely to strip out certain  
4 non-profitable incremental investments.

5 Q. I see. Just to be clear, you are not suggesting that  
6 LDC's investment or any investment from PostNL that  
7 might have come was going to be incremental, are you?

8 A. No, but my understanding is that LDC was involved in the  
9 discussions with Whistl about appropriate roll-out plans  
10 based on what would -- what seemed sensible, and  
11 therefore it goes back to the same point, I think, that  
12 LDC would not wish to invest in Whistl's business if  
13 there were parts of that business that were  
14 incrementally unprofitable and therefore it would have  
15 an incentive to persuade Whistl not to do those bits so  
16 that it didn't have to fund incrementally loss-making  
17 elements, and then it could take, you know, a view of  
18 the package as a whole without any incrementally  
19 unprofitable aspects.

20 Q. I can see that anyone wanting to invest will want to  
21 minimise the number of unprofitable investments that  
22 have to be made, but LDC and indeed any investor until  
23 Whistl was looking at Whistl rolling out as a project  
24 that went beyond individual SSCs and it would recognise,  
25 as any start-up investor would, that there may well be

1 a loss of profit in early stages of roll-out or  
2 development in order to get the hope of return in the  
3 longer term related to the larger project; that's  
4 correct, isn't it?

5 A. So that's correct, but even within that you wouldn't  
6 necessarily say it can only happen at one overall level  
7 of target coverage at the end. You will see that there  
8 is quite a few different business plans were produced at  
9 various times. I think I set some of them out in  
10 section 3 of my report. And that flexed up and down  
11 according to the market context at the time. For  
12 example, when Royal Mail raised its access prices, that  
13 made areas become more profitable and the business plan  
14 was -- this was 2012/13, the business plan was expanded  
15 to take those into account.

16 So I don't think it becomes the sort of -- the  
17 nature -- whilst the investment might be in the project,  
18 the definition of the project varies over time.

19 Q. I want to just deal with another criticism you level at  
20 Mr Harman's analysis. You criticise his analysis  
21 because it omits impacts of zonal tilt. So you consider  
22 that the application of the zonal tilt was itself apt to  
23 raise Whistl's costs, and therefore should have been  
24 taken into account by Mr Harman in looking at the  
25 materiality analysis. But I think you accept, don't

1           you, that Ofcom, in considering the materiality  
2           analysis, looks just at the impacts of the price  
3           differential, doesn't it?

4           A. I think Ofcom provides a range of evidence on material  
5           effect and foreclosing effect, and so I wouldn't take  
6           that to be a criticism of Ofcom across the board.  
7           You know, Ofcom points to actions taken by Whistl  
8           precisely in relation to the price differential and  
9           price differential alone before the zonal tilt.

10          Q. In relation -- I'm so sorry, I cut across you.

11          A. But then within some subsequent analysis it only looks  
12          at the price differential, so I would agree with that.

13          Q. Yes, in relation to materiality, thank you.

14                 Just one last question, it's just a clarification,  
15                 in relation to the sections of your report concerning  
16                 uncertainty. I think it's clear, in section 3 of your  
17                 report you talk about the effects of uncertainty and in  
18                 particular the issuance of the CCNs, and I just want to  
19                 be absolutely clear, what you are talking about is  
20                 an increase in uncertainty due to a particular act or  
21                 piece of conduct when you do that analysis, aren't you?  
22                 So in concrete terms you are talking about the increase  
23                 in uncertainty created by the issuance of the CCNs;  
24                 that's correct, isn't it?

25          A. Well, I'm talking about -- so the issuance of the CCNs,

1 I would just change the -- let's suppose there was no  
2 further contingency, just changing the prices would  
3 change the analysis, it would change the future  
4 cash flows, right? No uncertainty. Yes?

5 Q. Yes.

6 A. The uncertainty arises as to whether ultimately -- when  
7 and/or whether those prices when they come into force  
8 would be found to be -- and that is an increase in  
9 uncertainty over the, you know --

10 Q. World without a CCN, yes.

11 A. Yes.

12 Q. But it's the delta in uncertainty that you are dealing  
13 with in relation to the analysis of the CCNs?

14 A. Well, the delta in uncertainty and I guess the delta in  
15 the impact on cash flows.

16 MR BEARD: I have no further questions for you, Mr Parker.

17 The tribunal may do, and Mr Holmes and Mr Turner may  
18 also. Thank you.

19 Questions from THE TRIBUNAL

20 THE CHAIRMAN: We do have one question.

21 PROFESSOR ULPH: I would just like to ask you a question  
22 which relates partly to material that was covered this  
23 afternoon and partly also to material that arose on the  
24 hot tub.

25 If you remember, in the hot tub I took you to

1 a diagram that was in your first report, and the  
2 question we were looking at was: if you are thinking  
3 about a particular SSC that an as-efficient competitor  
4 might enter and compete against Royal Mail, as-efficient  
5 competitor what was the understanding about the long run  
6 average incremental cost that would be assigned to the  
7 as-efficient competitor entering that SSC?

8 I think we established that the long run average  
9 incremental cost would be that which applies to the  
10 incumbent operating at the scale the incumbent was  
11 currently operating at.

12 A. Yes.

13 PROFESSOR ULPH: Do you accept that?

14 A. Yes, I think that's where we got to, yes.

15 PROFESSOR ULPH: That was some discussion whether that was  
16 in some sense an appropriate assumption to make, and  
17 I think you made the point that, if you assumed that the  
18 long run average incremental cost was essentially flat  
19 and independent of scale, then that would be a perfectly  
20 reasonable assumption to make, essentially for long run  
21 marginal cost purposes, independent of output.

22 But I took it from what you said that you did not  
23 regard that as being a very plausible assumption, that  
24 you thought that the long run average incremental cost  
25 might indeed vary with the scale of output, even at the

1           SSC level.

2           Have I understood you correctly?

3       A.   Yes.  I would expect that, because I think there are  
4           likely to be economies of density in delivering mail  
5           volumes at an SSC level.  I think the best evidence that  
6           I've seen would be in Mr Harman's first report, which  
7           will be somewhere ...

8       PROFESSOR ULPH:  Just to be clear, Mr Parker, I'm not really  
9           asking you about a particular -- I just want to  
10          establish some issues of principle that I would think  
11          about this.

12      A.   Yes.  So, I think, as I understand it, Royal Mail's cost  
13          model, which is described in Mr Harman's report, has  
14          a variety of what he I think calls "cost volume  
15          relationships" or something, in other words that costs  
16          will, unit costs -- I take from that that unit costs  
17          will vary with volume in particular SSCs, which I think  
18          seems intuitively plausible, but it's a factual  
19          question.

20      PROFESSOR ULPH:  Let's take that as being plausible.  So the  
21          question then is: if the long run average incremental  
22          cost cover is not flat, if you are assuming that the  
23          entrant obtains a long run average incremental cost by  
24          operating at the same scale as the current incumbent,  
25          does that effectively mean that implicitly we're

1           assuming that the volume of demand on that SSC doubles  
2           so it can accommodate both the entrant and the  
3           incumbent? Is that implicit in what's going on here?

4       A. I think the answer is possibly, in that you're  
5           essentially saying the target for the as-efficient  
6           competitor is that it needs to be as efficient as the  
7           incumbent, where the incumbent maintains its 100% of its  
8           volumes.

9           When you don't have cost reductions with volume,  
10          this I think is a reasonable approach because you should  
11          be able to get those unit costs at low level or at the  
12          same level.

13          If you have costs declining over time, then any  
14          entrant that comes in, you would imagine will be ... if  
15          you are saying that the incumbent stays at the same  
16          level, then the entrant needs to match that and that's  
17          implicitly saying we're sort of doubling the volumes in  
18          the market and it's all incremental, and it seems quite  
19          a peculiar assumption.

20          I'm not sure I would necessarily ... I think the  
21          conclusion I would draw from that is, in a world where  
22          you do have these declining unit costs, the AEC -- it's  
23          another reason why I think it's not a very appropriate  
24          test. Rather than saying that's obviously an assumption  
25          of the AEC, I think I would just -- I feel it's



1           an example of stretching this test further than it can  
2           realistically go.

3   THE CHAIRMAN: Thank you.

4   PROFESSOR ULPH: Because one way of thinking about it, then,  
5           would be that if what was happening was that, by entry  
6           of an as-efficient competitor, the market was  
7           conveniently doubling in size, it would be hardly  
8           surprising that it looks profitable to enter as  
9           an as-efficient competitor.

10   A. I think that would be a fair conclusion, yes.

11   PROFESSOR ULPH: Okay, thank you.

12   THE CHAIRMAN: Thank you.

13           Mr Holmes, do you want to cross-examine?

14   MR HOLMES: Sir, I have two questions which in fact are  
15           shamelessly plagiarised from Professor Ulph's  
16           cross-examination or --

17   THE CHAIRMAN: Questions, please, yes.

18   MR HOLMES: -- questions to Mr Dryden earlier in the week.

19           Cross-examination by MR HOLMES

20   MR HOLMES: I think you were in court for Mr Dryden's  
21           cross-examination in the afternoon, weren't you?

22   A. Yes, I was.

23   Q. You may recall that the Professor put two questions.

24           The first, just to refresh your memory, was in  
25           a situation where investment is characterised by

1 significant degrees of sunk costs or irreversibility,  
2 where there is uncertainty but there is also learning  
3 taking place, so over time some of that uncertainty gets  
4 resolved just by the process of learning over time, then  
5 it also comes down to the rational investment strategy  
6 as a cautious step-by-step approach; so you make  
7 an initial investment, wait and see what the outcome of  
8 some uncertainty is and proceed to a further stage of  
9 investment; and moreover the rational investment  
10 strategy is no longer characterised by the net present  
11 value being greater than the level of investment or by  
12 the internal rate of return being greater than the cost  
13 of capital, because you would have to recognise that  
14 a value has to be given to the option of waiting and  
15 learning, and Professor Ulph asked Mr Dryden whether he  
16 accepted and recognised that based on the intuition in  
17 Dixit and Pindyck's work, in other words, as a general  
18 rule, NPV or IRR is no longer the right rule to use.  
19 I hope that puts the question correctly.

20 I wondered whether you had any comment that you want  
21 to make in response to that?

- 22 A. Yes, so I think for me the main takeaway from Dixit and  
23 Pindyck is that if you have ongoing uncertainty then --  
24 about the profitability of an investment, and that as  
25 information is revealed that investment might look like

1           it's becoming more or less profitable over time, then  
2           there is generally an advantage to delaying to try and  
3           wait for the uncertainty to resolve, and as I think you  
4           described it there is sort of an option value of waiting  
5           which in a -- one could try to calculate and then  
6           include in an NPV calculation.

7           I give an example of that, I think, where I talk  
8           about the role of uncertainty in my first report at  
9           section 3, showing that if there is a chance that the  
10          uncertainty becomes resolved after a period of time,  
11          there is an extra incentive to wait until that  
12          uncertainty is resolved in order to, if you like, insure  
13          yourself against the downside risk of having otherwise  
14          sunk some costs.

15          I think that is quite consistent actually with the  
16          way that Whistl responded to the introduction of the  
17          price differential and the -- then the -- what it did to  
18          its roll-out plan, which is that it put a lot of stuff  
19          on hold, pending an outcome of the proceedings with  
20          Ofcom, and hoping that uncertainty would be resolved,  
21          rather than sinking a lot of costs with some uncertainty  
22          as to whether it would face the price differential in  
23          the future.

24          So for me the Dixit and Pindyck intuition is quite  
25          a good way of thinking about what actually happened in

1 the case.

2 MR HOLMES: I don't know, sir, if you have any follow-up  
3 questions?

4 PROFESSOR ULPH: No, I agree with that.

5 MR HOLMES: The second question Professor Ulph raised was  
6 about price discrimination, and he observed that one of  
7 the arguments that's been put forward in this case is  
8 that we're not seeing price discrimination, but instead  
9 product differentiation, that somehow buying things on  
10 APP2 is different from buying things on NPP1 because you  
11 don't have to meet the requirements of NPP1, so it's  
12 a sort of product differentiation story.

13 Against that backdrop, Mr Dryden was asked: how do  
14 you go from recognising that there is some difference  
15 between two products to a theory that says you can  
16 justify a price difference on the basis of those  
17 differences in the products; what kind of evidence as  
18 an economist do you think you would turn to to try to  
19 justify that price differential?

20 You will recall I think that Mr Dryden was a bit  
21 cautious about giving a response. I don't know if you  
22 would feel able to give one?

23 A. So I've seen this come up in the transcripts that I have  
24 been reviewing once or twice. It's not something I had  
25 particularly looked at in my report, but I think to the

1 extent I have an initial thought on this, it would be  
2 that some insight might be gleaned from looking at the  
3 position prior to the introduction of the new CCNs where  
4 you have NPP1 and APP2, with their different potential  
5 flexibility characteristics around zonal versus SSC  
6 basis, but the same average price in both cases; and  
7 I would have expected in those circumstances, if there  
8 was some fundamental benefit to flexibility on one  
9 profile or another, that all of the access customers  
10 would be on that more flexible profile. But what we  
11 actually saw in practice was that they split and some  
12 were on APP2, like Whistl, and some were on NPP1, like  
13 UK Mail, and that suggests to me that there didn't seem  
14 to have been a kind of inherent value of flexibility  
15 otherwise I would have expected everyone to choose the  
16 more flexible plan.

17 Q. But to follow up on that, from an economic perspective,  
18 was there a particular flexibility that Whistl might  
19 value APP2 for, given its plans?

20 A. Possibility the flexibility to then roll out as  
21 an end-to-end entrant, but not -- other than that, I'm  
22 not really sure. So --

23 Q. Yes, it's an empirical question, perhaps.

24 A. Yes, I think so.

25 MR HOLMES: I'm grateful. Thank you very much. No further

1 questions from me.

2 THE CHAIRMAN: Mr Turner, do you want to re-examine?

3 MR TURNER: I have five questions; we should get through in  
4 time.

5 Re-examination by MR TURNER

6 MR TURNER: Mr Parker, do you still have the  
7 cross-examination bundle that you were given?

8 A. Yes.

9 Q. If you go back in it to the second tab, this is  
10 the Commission's guidance that you were asked about at  
11 some length.

12 A. Yes.

13 Q. You remember you were taken in particular to  
14 paragraph 23 and following under the heading  
15 "Price-based exclusionary conduct"?

16 A. Yes.

17 Q. I would ask you to look back to the general section in  
18 B --

19 A. Yes.

20 Q. -- within the general section, page 97 at the top right.  
21 Within that, if you could turn to paragraph 20, you will  
22 see in paragraph 20 the introductory wording:

23 "The Commission considers the following factors to  
24 be generally relevant to such an assessment ..."

25 You see that?

1 A. Yes.

2 Q. Underneath it, with indents, there is a list of factors.  
3 Can you comment on the relevance to identifying  
4 anticompetitive foreclosure of those listed factors,  
5 from your economic perspective, in a pricing case such  
6 as the present?

7 A. I mean, I think they're all relevant considerations to  
8 the analysis in the round.

9 Q. Do you have anything to say individually about any of  
10 them?

11 A. Well, I think the position of the dominant undertaking,  
12 we have a very strong dominant undertaking here, so --  
13 and I think the presumption that in general the stronger  
14 the dominant position the higher likelihood that conduct  
15 protecting that position leads to anticompetitive  
16 foreclosure probably seems reasonable.

17 I think in relation to conditions on the relevant  
18 market, I think, you know, these are -- we have  
19 a situation of economies of scale or scope, and scope;  
20 entry barriers are significant, I think that's correct.

21 So the position of the dominant undertaking's  
22 competitors, including the importance of competitors for  
23 the maintenance of effective competition, may play --  
24 where they're talking about competitors playing  
25 a significant competitive role even if they only hold a

1 small market share, I think if that's the competition  
2 you have, that's the competition that you have. And as  
3 a general position you should be, you know, cautious of  
4 conduct that would foreclose that level of competition.

5 Then I think maybe jumping over a couple to possible  
6 evidence of actual foreclosure, I mean, I think it is in  
7 this case, given the time that has elapsed, I think we  
8 do have some evidence of actual foreclosure sort of both  
9 at the time and in the way that the market has  
10 subsequently evolved.

11 Q. If you turn over the page to paragraph 22, which I'm not  
12 sure we did look at, I'll just ask you whether there is  
13 anything in that which from your perspective is also  
14 relevant to the pricing case that we have before us?

15 A. I mean, I think the relevant bit, most relevant bit for  
16 what I'm -- what I have been discussing is the second  
17 sentence:

18 "If it appears that the conduct can only raise  
19 obstacles to competition and that it creates no  
20 efficiencies, its anti-competitive effect may be  
21 inferred."

22 I mean, I understand that, you know, that  
23 essentially creates a strong presumption in the context  
24 of particular conduct that doesn't seem to give rise to  
25 any obvious benefits which would, I think, fit within



1 the raising rivals' costs paradigm that I have been  
2 talking about.

3 Q. The second question requires going to bundle C4B and to  
4 your first report for the complaint, which is at tab 95  
5 in C4B. If you open it and go in it to pages 60 and 61,  
6 you will recall --

7 A. Yes.

8 Q. -- it was put to you that in this report you considered  
9 a REO test was appropriate for an ex ante assessment of  
10 a regulator and not a competition assessment ex post.  
11 If you could look, please, at page 61, and read the  
12 three paragraphs above 6.1.2 at the bottom in red, which  
13 begin:

14 "Moreover, in Wanadoo v Telefonica ..."

15 To the end of the last paragraph, which ends:

16 "... size and scope of Royal Mail."

17 And then after you have done that, would you like to  
18 comment again on the proposition put to you that your  
19 opinion here was specifically about ex ante cases?

20 A. Yes, I think my memory of Wanadoo is it was a chapter  
21 102 or whatever the appropriate law was at the time  
22 case, and that -- so that would suggest that in that  
23 case they were worried about incremental entry of  
24 a rival and the opportunity for a dominant firm to  
25 essentially exclude that rival at an early stage in its

1 investment roll-out, I think they call it the ladder of  
2 investment at some point, and that's essentially  
3 thinking about a REO type approach, because at the small  
4 scale the entrant is not assumed to be as efficient as  
5 it will ultimately get to, so as I conclude at the end  
6 there the REO has some -- had been used both in  
7 an ex ante regulatory perspective and also in an ex post  
8 competition enforcement perspective, at the time that I  
9 wrote that report. As I understand it.

10 Q. Thank you. We can put that away.

11 The third question is this: it was put to you at  
12 various times that the distinction you were drawing was  
13 between excessive competition cases on the one hand and  
14 raising rivals' costs cases on the other hand. Finally  
15 it was put to you that the dichotomy between excessive  
16 competition cases and raising rivals' costs cases was  
17 "chronically uncertain". Do you remember that?

18 A. Yes.

19 Q. Your response was:

20 "I'm not sure I have a view."

21 Were you then commenting on the dichotomy itself  
22 which you had drawn being chronically uncertain, or were  
23 you saying something else?

24 A. I think I was responding to the idea that it was  
25 chronically uncertain. I don't think -- I don't think

1           it was -- I don't think ... I think that there may be  
2           circumstances in which you can identify whether the  
3           conduct is conduct likely -- liable to give rise to  
4           direct consumer benefits, one paradigm, or conduct that  
5           has no prospect of giving rise.

6           So to that extent I think there is quite a lot of  
7           merit in the approach and I think I wasn't presenting  
8           a view on Mr Beard's characterisation of that as  
9           chronically uncertain. It doesn't seem to me that it is  
10          in many circumstances.

11         Q. Fourth question. Professor Salop's article which  
12           I think you have in the concurrent evidence bundle,  
13           second volume, tab 8.4.

14         A. Yes.

15         Q. So it was put to you that Professor Salop was  
16           identifying these two paradigms as relevant and  
17           emanating from the particular structure of analysis  
18           found in US law. Remember that?

19         A. Yes.

20         Q. Could I invite you to look, please, I'm looking at the  
21           internal numbering, at page 374, where you have  
22           a heading two-thirds of the way down, "Analysing the two  
23           exclusionary conduct paradigms", and read there, please,  
24           to the foot of that page for the definition of the  
25           first. And on the facing page, 375, the first two

1 sentences of the bottom paragraph on the page.

2 (Pause)

3 A. Yes.

4 Q. Then if you turn over to 376 you have a heading relating  
5 to the other paradigm, the RRC foreclosure paradigm or  
6 raising rivals' costs; do you see that?

7 A. Yes.

8 Q. If you could please read under that heading the  
9 professor's description of the RRC foreclosure paradigm  
10 and what it generally describes.

11 (Pause)

12 A. Yes.

13 Q. Finally if you turn again to 378 over the page, you have  
14 a heading at the bottom, "C. The role of price cost  
15 tests in the two paradigms", do you see that at the  
16 bottom of the page?

17 A. Yes.

18 Q. Read the first paragraph immediately under that,  
19 beginning:

20 "Predatory pricing ..."

21 A. Yes.

22 Q. Having done so, would you like to comment again on the  
23 proposition put to you that this article is concerned  
24 with aspects of US law?

25 A. I mean, it seems to me these two different paradigms are

1 basically economic paradigms indicating certain types of  
2 economic conduct that can have anticompetitive effects,  
3 and two different mechanisms by which this arises. One  
4 mechanism which gives rise to direct consumer benefits,  
5 so predatory pricing or low prices and therefore  
6 consumer benefits but where you have a particular  
7 concern that you have gone too far, versus raising  
8 rivals' costs, approaches which don't have any direct  
9 consumer benefits.

10 Those two paradigms, economic paradigms, I think are  
11 completely applicable from an economics perspective and  
12 I don't see them as relying on one legal framework or  
13 the other, or indeed any further legal framework. And  
14 I think it makes sense to conclude that because they  
15 have very different economic mechanisms for causing  
16 anticompetitive effects and different implications for  
17 consumer benefits as a result of the conduct, that it  
18 makes sense to judge them, you know, to explore them in  
19 a different way, from an economic perspective.

20 Q. Last question, staying with the same article. It was  
21 put to you that this article by Professor Salop is only  
22 concerned with the specific incremental price/cost test,  
23 and Royal Mail's counsel said:

24 "It is the price/cost test that he is comparing  
25 against throughout this paper, isn't it?"

1           In relation to that question, we had looked with  
2           Mr Dryden at a part of the article explicitly dealing  
3           with the as-efficient competitor test. I don't know if  
4           you were there in court when that was put to him?

5           A. I probably was. You might have to remind me.

6           Q. Let's go to page 392 at the bottom and 393 on the facing  
7           page.

8           A. Yes.

9           Q. So if you recall, if you could read from the bottom of  
10          392:

11                 "Some courts and commentators have suggested that  
12                 foreclosure should only be considered a cognisable  
13                 concern ..."

14                 So the end of the first full paragraph on page 393.

15                                 (Pause)

16          A. Yes.

17          Q. Would you, Mr Parker, be able to comment on the  
18                 relevance of the point being made there by  
19                 Professor Salop to the economic problem in the present  
20                 case?

21          A. Yes, I mean, I think here it's clear that he is talking  
22                 about an as-efficient competitor or equally-efficient  
23                 competitor test, and he is reaching the conclusion which  
24                 I think is consistent with the conclusions elsewhere in  
25                 his article that it's not a very helpful test when we're

1 talking about raising rivals' costs issues and that he  
2 identifies that actual or potential entry by  
3 less-efficient entrants into a monopoly market caused  
4 prices to fall as long as the entrance costs were less  
5 than the monopoly price and therefore that entry gives  
6 rise to -- generates consumer benefits.

7 So an as-efficient competitor standard does not meet  
8 sort of an overall standard for understanding whether  
9 the conduct is beneficial to consumers or otherwise.

10 Q. Do you have any further comments yourself on the  
11 reasoning that is used there?

12 A. And, you know, I agree with that reasoning, I think it  
13 makes economic sense to me.

14 MR TURNER: I have no further questions, sir.

15 THE CHAIRMAN: In that case, I think we have finished for  
16 today. Thank you very much, Mr Parker, you are  
17 discharged, you may stand down.

18 THE WITNESS: Thank you.

19 (The witness withdrew)

20 THE CHAIRMAN: We will resume on Monday at 10.30.

21 MR BEARD: Yes, with Mr Matthew.

22 THE CHAIRMAN: I think that's generally agreed. Thank you  
23 very much everybody.

24 (4.35 pm)

25 (The hearing adjourned until 10.30 am)

on Monday, 1 July 2019)

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