IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1299/1/3/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 July 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

Transcribed by ***OPUS 2 INTERNATIONAL LTD***
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.com

HEARING – DAY 16

A P P E A R AN C E S

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.

_____

Monday, 15th July 2019

(10.00 am)

THE CHAIRMAN: Well, thank you for all the hard work, to everybody. We need perhaps to discuss the order of the day, timetabling.

MR BEARD: Certainly.

THE CHAIRMAN: Timetabling.

MR BEARD: I will be all of today and probably a short part into tomorrow morning. Thereby leaving Mr Holmes and Mr Turner a day and a half and some time for my reply on Wednesday.

THE CHAIRMAN: Yes. When do you envisage us rising today?

MR BEARD: Well, I was working on the basis we would rise at normal time, at 4.30. Obviously if things are going more slowly than I'd hoped, I might ask for the tribunal's indulgence to sit slightly late. I'm conscious that there's one day that we may have to leave promptly, I think it is tomorrow.

THE CHAIRMAN: That's tomorrow?

MR BEARD: Yes.

THE CHAIRMAN: We have to finish at 4.15 tomorrow.

MR BEARD: Yes.

THE CHAIRMAN: But we're willing to sit for a full day today, until 5 o'clock if necessary.

MR BEARD: Thank you.

THE CHAIRMAN: There is another meeting in the tribunal which I have to go to which means I can't sit after that.

We had it in our minds, while respecting Royal Mail's rights as appellant here to put your arguments as strongly and as carefully as you may, that you might finish today --

MR BEARD: I will do my very best.

THE CHAIRMAN: -- on that basis.

MR HOLMES: Sir, if I might interject, that was also, I have to say, with the extended sitting, our expectation that it would be a day for Royal Mail to close, a day for us to close, and then reply time for Mr Beard on the Wednesday.

THE CHAIRMAN: We have had this discussion before, I know, in other cases. There's nothing that can't be said in a whole day that can be said in a day and a bit.

MR BEARD: I'm not even going to speculate how one can take that chain of reasoning, but you end up with 15 minutes in the ECJ, I suppose.

THE CHAIRMAN: I think it's much neater if you can try to finish today.

MR BEARD: I will try to be as neat as possible.

THE CHAIRMAN: With our active cooperation. On that basis, I don't need to hear you, Mr Turner, I think. I can

take your views for granted, I think.

MR TURNER: I'm pulling the chair forward, sir.

THE CHAIRMAN: An ambiguous gesture. Right. [Laughter].

Submissions by MR BEARD

MR BEARD: He can do everything aggressively, Mr Chairman.

Well, I am conscious that you will have seen our written submissions, and the annex we appended which sets out our proposed answers to the list of issues, and so obviously I do want to work through the grounds but I will endeavour not to repeat material unduly from the written submissions but I do intend to use them as a framework in part to speed through some of the particular and more detailed issues, and refer to those by reference. So I will work through the grounds, and in doing so, there are three themes I do want to emphasise.

The first is the extent of the departure from the decision in the submissions now made by Ofcom, and indeed, by Whistl, who in some respects seem to be developing an entirely different case. The degree to which Ofcom is seeking to gloss or develop the decision, and that includes just trying to pick out odd paragraphs, and suggest they're of the essence of its reasoning, is something that we will plainly see in relation to both ground 1 and ground 3, in particular.

But it is a constant issue.

So that's the first theme.

The second is the vagueness of Ofcom's approach. The uncertainty of Ofcom's approach. And we'll see that, of course, in particular when we come to ground 3 and issues such as how does the low pricing practice definition work.

The third, and it's related to the vagueness of Ofcom's approach, is really a lack of recognition of the importance of legal certainty in ex post competition enforcement cases, where a criminal sanction is intended to be imposed, as Mr Ridyard in his commentary recognised, the approach needs to be rather different from that which might well be permitted under an ex ante regime, where you may well want to encourage, for example, less efficient entry of certain sorts into a market. But setting your ex ante rules to make sure that such a policy is followed is wholly different from requiring a dominant entity, for example, that ensures that its pricing allows less efficient entry.

Before I go on to the grounds specifically, it's perhaps useful just picking up some factual matters and documentary matters.

There is in this case actually quite a high degree of common ground as to what happened, there is obviously

a divergence as to the significance or the interpretation of what happened. But it is necessary, as we have set out in our written closings, just to take a step back and understand the context of some of these facts. We know, and it is again common ground, that in 2011 the postal regulation regime was radically altered. Ofcom took over from Postcomm, Royal Mail was afforded a greater degree of commercial freedom.

That freedom was, of course, subject to the universal service regime, and the competition law. It is important to bear in mind both of those regimes, the regulatory and the competition regimes, because in exercising its freedoms, Royal Mail was at all timetables concerned that it didn't take any action that would fall foul of the regulatory requirements or competition law. Indeed, as we will see, and as we have seen, it was for that reason that Royal Mail introduced the suspensory clause in the regulated access letters contracts.

Now, back in 2012, Ofcom had indicated that it would provide guidance to Royal Mail as to what constituted fair and reasonable pricing under the universal service provision of access regime. We can see that, and I'll just provide -- well, I'll provide the note reference to you. It's in Ofcom's 2012 statement at paragraph 10.64,

and that is bundle RM2, tab 14, page 500, and also paragraph 10.97 at page 506.

Now, for reasons that are not entirely clear, perhaps because Ofcom thought it was too difficult, Ofcom decided not to provide any guidance in relation to those matters. Instead, it said that Royal Mail was required to consider the range of commercial possibilities that were open to it with the aim of ensuring that it was able to provide the universal service, and that would require it generating sufficient revenues to finance the cost of that service.

Now, there are times in the Ofcom materials where it appears that Ofcom thought in terms of those commercial responses simply being efficiency drives, which Ofcom recognised are important, and so did Royal Mail, as we heard from Ms Whalley. Ofcom -- and this is Day 5 of the transcript, page 71, lines 18-25, Ms Whalley made clear that Ofcom was informed of the progress on the transformation programme, it involved closing half of the mail processing facilities, redesigning 60,000 routes, and focused on taking out cost as well as improving service. From 2010 to 2013, Royal Mail took 12,000 people out of the company. 12,000 people lost their jobs as a result of the efficiency drive that Royal Mail undertook.

Ofcom, as well as recognising a commercial response could involve improvements in efficiency and quality, it also recognised that there could be changes in the zonal pricing, relative zonal pricing, which of course, again, Royal Mail explored.

But the Ofcom material seemed to focus on those two options and none other, but of course when you offer people commercial freedom, they don't just focus on necessarily the options you have envisaged. Royal Mail, recognising it was under an obligation to meet the USO, and the costs of meeting those obligations needed to be funded, looked at a range of ways to ensure that it could earn sufficient returns from other services to meet those obligations.

Now, as I say, efficiency, yes. Attention to quality, yes. For some reason in its submissions, Whistl suggest that Royal Mail had no attention to quality. It's a strange submission in circumstances where Royal Mail was actually under a series of monitoring requirements as to its quality. And the fact that Royal Mail didn't spend money on a tracking system, but, as we explored in cross-examination, apparently couldn't tell whether mail was being dumped in a bin or canal, doesn't give rise to any concerns about whether or not Royal Mail was concerned with quality.

Now, it is undoubtedly right that as part of the process of considering how to ensure that it would be financial sustainable and indeed profitable as a company, Royal Mail sought to move its prices upwards. We see that from the evidence of Mr Simpson, RM4, tab 1, page 13, paragraphs 38-39.

But it also sought to modify its pricing structures. And we know that right back in 2012 it was putting forward proposals to introduce price changes between national pricing plans. At that time, it was talking about making those changes based on volume and forecasting commitments. We see that from Dr Jenkins's witness statement, paragraphs 6.5 to 612, RM3, tab 1, and Ms Whalley's witness statement, 167 to 169.

Now, there were objections to those changes, and those particular range of changes weren't pursued, but Royal Mail throughout made clear that it was considering further price modifications, and work, detailed work, on developing those possible structural changes, in particular relating to potential price differentials, but also in relation to modifications of zonal pricing, was undertaken from June and July 2013.

Now, of course, that was done with a view to pricing being implemented the following April, 2014. So the work needed to start early. It's important to bear that

in mind because there are times in Ofcom's and, indeed, Whistl's submissions where there is a selection of evidence taken out of context from when it actually arose, and we'll come to a couple of examples of that. The point is that the thinking in June and July 2013 was that if a price differential was going to be put in place, then those steps needed to be taken in terms of analysing how such a price differential could be justified, well in advance of January 2014, in order that those prices could be implemented in April 2014, because, under the terms of the access letters contract, which had been developed under Ofcom's regulatory oversight, there were long notifications periods for any price changes. So it is clear from the documentary material that this work was being undertaken.

Now, Ofcom suggested some of these early documents that referred to Royal Mail considering price discrimination suggests that there is some smoking gun, that Royal Mail was engaged in a strategy to cover up what it was really doing. That's not true. There was no secret about what Royal Mail was doing. It had publicised the possibility of a price difference, and the language it used in its documents talking about difference or discrimination between prices doesn't churn the overall analysis. Throughout its

consideration of the price differential, it was looking at two possible justifications, one based on value and one based on cost.

Now, Mr Holmes at various points in cross-examination sought to suggest that the value justification was ignored. It was not. We see that from the later board papers that went forward in December 2013 and January 2014 that referred to both value and cost justifications, but it is right that in terms of quantification the work was done on the costs justification.

Now, in all of this, of course Royal Mail was very well aware of the threat to its revenues that came from direct delivery operators. There is no doubt about that. That is clear from all of the documentary material. And it is equally clear that in talking about those concerns, what Royal Mail was talking about was the risk of losing profitability. But it was recognised by Royal Mail, quite apart from the overriding concern that it should do nothing that could be unlawful when it was implemented, that if the difference in the pricing plans, the national pricing plans, had a justification, then those plans being implemented would not be in breach of the competition law or regulation.

Now, in carrying out that assessment, as we know,

Royal Mail used expert external advisers, in particular Oxera, and Dr Jenkins made it emphatically clear during her evidence that she understood the entire process to be governed by ensuring that whatever price changes were to put in place, they should be lawful.

She specifically referred to that at Day 7 of the proceedings, page 80 of the transcript, lines 5 to 16 and page 37, lines 18 to 25.

In the course of cross-examination, Mr Holmes sought to suggest -- and this has blossomed in the closing submissions, by reference to documents that had never previously been relied on by Ofcom, and are not referred to anywhere in the decision, in a little folder of additional documents that were put forward which related to what he referred to as "Option E" -- that Royal Mail was actually seeking to conceal its true aim by cloaking materials in privilege and, as he now puts it in closing, sanitising the documentary record. There's a whole section now, in closing, on this allegation of sanitisation.

It really could not be further from the truth. What this tribunal has seen is a very much unvarnished collection of documents disclosed by Royal Mail, a set of documents that were relied on by Ofcom in the decision, we will come on to why they don't support

Ofcom's approach, but on this appeal, key documents are being relied on now or treated as key documents that have never appeared before.

Now, if those documents had been put forward earlier Z plainly Royal Mail would have had opportunities to ask those who were involved in the exchanges to give evidence in relation to them. Instead, Mr Holmes chose to put these documents to Ms Whalley, who had never seen them before and could not properly comment on them.

He persisted in taking her to document after document she said she hadn't seen. He sought to ask her how to interpret these documents. Now what he tried to suggest was that somehow, Royal Mail was asking Oxera to take out material from its notes that actually referred to Royal Mail's true position and intent, in order to conceal matters. Not in relation to anything to do with the price differential. Completely different option. And then he said, well, we can read that intent across into the position in relation to the price differential.

Now, Dr Jenkins made it very clear her understanding of the position in relation to the exchanges that were had between Oxera and Royal Mail, and the overall position. She was not in a position to comment on those particular documents but she made it very clear that her understanding was that what was being said by Royal Mail

was that the Oxera paper didn't accurately reflect Royal Mail's intentions at the time. And should be removed.

Now, a couple of other remarks in passing about this chain of documentary material. First of all, Mr Holmes emphasised that when there were references in the materials, there were references to documents being disclosable and not subject to legal professional privilege. It's important to bear in mind that there were various of those Oxera documents that were properly marked as subject to legal professional privilege, because they had extracts of legal advice in them.

One example is a document of October 3, which is at bundle C4A, tab 27. There, for example, you'll see redacted on pages 9 and 11 certain information from Herbert Smith Freehills.

So the fact that documents were marked as privileged is part of what was legitimately being claimed in relation to exchanges. It is clear from what has been disclosed from this tribunal what the scope of eventual legal professional privilege claim was. But more particularly, Mr Holmes is convecting a theory, based on materials that have never been previously relied upon, that is false. It is not evidence of Royal Mail trying to conceal. It is no more than Royal Mail saying to

Oxera: "That isn't our intent."

And just in passing, there's been a somewhat pricing suggestion by Ofcom that Dr Jenkins wasn't the appropriate witness to speak in relation to Oxera material because she had been away on sick leave for a period, during which certain of the reports were prepared.

Now, let us be very clear about this. As she made clear, she was the project director in relation to all of these matters. So when Mr Holmes put to her "Why was Mr Florez Duncan not selected as the appropriate witness to give evidence?" She answered emphatically, "Because he wasn't the project director of the project and he wasn't the person who ultimately gave the advice to the senior team in Royal Mail, when they were determining the introduction of the CCNs in December". She was plainly the right and responsible person, she was plainly in a position to give evidence, she was plainly in a position to give evidence on behalf of Oxera in relation to matters that her team had undertaken.

But what is also instructive about her response there, and it goes to the point I've already adverted to, is that Mr Holmes's cross-examination effectively ended in relation to documentary material around October 2013. So much did he love the traffic lights

document that essentially, in terms of considering evidence of the position of Royal Mail and its thinking up through into the announcement in December and the CCNs was that his cross-examination was remarkably limited in that regard. In particular, notwithstanding Dr Jenkins explaining she was the one that had given the eventual evidence at the eventual input to Royal Mail and the senior team at Royal Mail in December, those were not matters she was questioned about.

THE CHAIRMAN: Just before we get into that, can I be clear what you're saying about the other aspect of the additional documents, as you called them, the additional bundle?

MR BEARD: Yes.

THE CHAIRMAN: I think you said that if you had known about these, putting words into your mouth, you would have had the chance to have called witnesses who could have spoken to them. Is that's what you're saying?

MR BEARD: Well, that is one of the things that we're saying.

THE CHAIRMAN: Keep you on that one if we could, just for a minute.

MR BEARD: Yes.

THE CHAIRMAN: How would the sequence of that have worked out? Are you saying that those documents should have

been referred to in the decision? Because you obviously bring the appeal. That would have been in your notice of appeal. Or should they have been in the defence so they could be in your reply?

MR BEARD: They should have been in the SO.

THE CHAIRMAN: Yes, all right. But we're now on appeal.

MR BEARD: Yes, absolutely. But if Ofcom are going to allege that Royal Mail engaged in a process of sanitisation of documents, and that indicated that Royal Mail had some sort of nefarious intent, that was a serious allegation that should have been put to Royal Mail right at the outset of this process. It should have formed part of the documentary material relied on in the SO.

THE CHAIRMAN: So this is all about the sanitisation issue?

MR BEARD: Sanitisation and use of legal professional privilege, yes. Because those are the additional documents that are provided in the bundle.

THE CHAIRMAN: Okay. So it's not about the actual contents of the additional documents; it's the inference that Ofcom are drawing from them as to Royal Mail's intentions?

MR BEARD: Well, yes -- there's no issue about the voracity of the documents being, exchanges of emails at the relevant times between the people named on the emails,

if that's the question. It's --

THE CHAIRMAN: How is a merits appeal system meant to work? Do we shut our eyes to material that during the course of the appeal becomes interesting, because it wasn't put in the SO, or do we read it?

MR BEARD: Well, obviously you've read it. We completely recognise that you've read it, but no, there are limits to what can be put forward, particularly by a regulator in circumstances of a merits appeal. Of course the regulator can put forward material in response to points that are being made in the appeal. But these materials weren't put forward in the defence at all. These weren't relied on even in the defence. These are materials that were produced for the first time to a witness who hadn't seen these materials in cross-examination. And we say that is plainly inappropriate. There are plainly limits that have to be imposed on the scope of additional evidence that can be put in, because otherwise what you're doing is making this a form of semi-de novo inquiry into the --

THE CHAIRMAN: We certainly wouldn't want to go there.

MR BEARD: And I'm certainly sure you wouldn't want to go there.

THE CHAIRMAN: I can see terrible, terrible pitfalls with that.

MR BEARD: I will touch on in relation to ground 5 but would also emphasise here that of course what we know is that the clear case law in relation to questions of rights of the defence, cases like UPS, cases like Solvay, are saying: look, if you're not relying on material in a decision, then the party can essentially treat those as not being part of the reasoning in the decision. More than that, more than that, you have a process put in place, both under European law and under domestic law, that you have to put forward a proposed decision. That's what the SO is. The whole essence of that process is to enable the party who is accused to be able to respond to these matters.

Now, Mr Holmes has never suggested that Ofcom didn't have these documents. He's drawn them out from a file of documents that it had that was provided to it by Royal Mail. Now, in those circumstances, if it's going to rely on those materials and seek to draw inferences from them, it should have provided them in the SO, it should have referred to them in the decision, and it should have referred to them in the defence. None of those things occurred.

THE CHAIRMAN: So your point is that it was pre-existing material and, in a sense, you're saying it's too late to bring them out in the appeal process?

MR BEARD: Yes.

THE CHAIRMAN: They have no substance and no validity because they weren't referred to in the administrative process. So that would be different, would it from a new economic consideration or something that transpired during the course of the appeal?

MR BEARD: It depends what --

THE CHAIRMAN: Where I do note that you are making a rather similar point, but that couldn't be regarded as pre-existing material.

MR BEARD: No, we recognise --

THE CHAIRMAN: We have to have some role as an appeal tribunal. We can't just sit here and mouth the words.

MR BEARD: No. I quite see that. And this is an issue that was grappled with in some of the earlier cases in the mid-2000s --

THE CHAIRMAN: Well, it has been grappled with in some of the later cases too.

MR BEARD: Yes, it has indeed, but it -- before this tribunal, because obviously you do have a situation where this is an appeal against an administrative decision where there is a process put in place that essentially requires the regulator --

THE CHAIRMAN: I understand your process point but there has to be some possibility of new substantial points

arising, partly as a result of the tribunal's own interest in the arguments that are being put.

MR BEARD: That is true. And in relation to specific rebuttal material, that's also recognised. That is, of course, correct. And that is the reason why you do get, for instance, reports like Mr Matthew's being put in, rather than merely it being a reliance on the decision itself. Because if it were the case that only the decision could be relied upon in a merits appeal, then Mr Matthew wouldn't be able to put forward evidence on behalf of Ofcom. All that could be done would be for Mr Holmes to point to elements of the decision. And we're not saying that that is the way forward. Plainly Mr Matthew can respond to the evidence that has been put in by Royal Mail. And indeed, if Ofcom had sought to put forward a witness of fact in relation to any matters that were put forward, then of course if they were responsive to the matters being dealt with by Royal Mail in its evidence then, again, that would be permissible. But there are limits to how far that can go, and this plainly traverses those limits.

But I also emphasise that these materials are being read incorrectly, as well.

THE CHAIRMAN: Shall we move on?

MR BEARD: I've already referred to the fact that it's plain

from all of the documentary material that Royal Mail, in considering the protection of the universal service, was considering the threat that it faced from direct delivery operators. And that in assessing what pricing structure changes it could put in place, it had very much in mind that competitive threat, and that competitive threat in particular from Whistl. But, of course, there is nothing surprising or improper about that. As Dr Jenkins herself explained, when you're talking about a declining market, the threat of volumes being lost to a rival essentially is a zero sum game.

You're not in a situation where you're going to be able to grow those volumes, and so necessarily in a competitive response, one is looking at limiting the extent to which a arrival takes volumes from you. Those are, it is recognised, two sides of the same coin in the context of this situation, and the nature of this market.

There appears almost to be a sense at some points that a company seeking greater profitability is doing something wrong, but that's obviously inappropriate, and as we'll see, that sort of suggestion that seeking greater profitability on the part of Royal Mail, which may reduce the profitability of Whistl, has come to infect the way in which the analysis was carried out by

Ofcom, and indeed the discussion about, as Whistl puts it, competition on the merits.

We see this issue in all sorts of circumstances. We see it not only in exclusionary abuse cases but we also see this issue arising in exploitative abuse cases. Excessive pricing, for example, generally involves an upward shift in prices, but that doesn't necessarily mean that it's inherently anti-competitive.

What is clear is that, in this case, Royal Mail at all times wanted to ensure that although it protected its profitability as best it could, and increased that profitability, it only wanted to do what was lawful.

Now there are various manifestations of this in the documentary material, but in particular, it is worth bearing in mind that Ofcom's approach to suggesting that Royal Mail had a deliberate strategy to undermine Whistl fails to grapple with the fact that it was the one that introduced the suspensory mechanism. It fails to engage with the fact that there wasn't a rational basis on which Royal Mail could ever expect to put in place pricing which was contrary to competition law.

The extensive discussions and expert modelling exercises carried out in 2013 weren't some kind of sham, as at times Mr Holmes sought to suggest, that they were ex post and therefore not proper justifications. It

doesn't matter whether or not the suggestion is, "Can we do a price differential that is consistent with competition law? Well, let's have a look whether or not it's justified". Or starting with questions of justification and saying, "Well, let's have a look whether or not there's a price differential here". It doesn't matter which round one looks at these matters.

Now there was one document, as I say, that Ofcom, and indeed Whistl, alighted upon as a key document implying intent on the part of Royal Mail to limit the manner in which Whistl would operate, and it is that traffic lights document. So if we could go to it, it's C4A, tab 35. The traffic lights slide is slide 10, and then below the page you have three charts.

Now, just to emphasize, this is a document from October 2013, and if you recall what Mr Holmes sought to drew from this in cross-examination of Ms Whalley, was that scenario 2, which is the green scenario, was the scenario that he said was closest to where matters ended up. And looking at the terms of scenario 2 and the particular notes on that slide, he emphasised that, in relation to final of those notes:

"All of these assume no major investment is available to the entrant and the entrant needs 10% profits in any expansion."

He then suggested that if you're assuming 10% annual profits without investment, scenario 2's criteria only fitted with the middle chart on the following page.

Now, Ms Whalley emphasised the limited date and level of uncertainty that arose in relation to this because scenario 2 was only looking at 2014. Mr Holmes said that this suggested, however, that here we were dealing with a situation where Royal Mail was clearly intending, by adopting scenario 2, to limit and prevent the operation of a direct delivery operator, and that in relation to these matters he also suggested that it would be in fact irrational to suggest that scenario 2 could ever result in the third chart. And the reason he did that was because he said, well, a third chart is concerned with foregoing a reasonable rate of return. And that's in contradiction to the assumption on page 10 that there's no major investment available.

MR HOLMES: I hesitate to interrupt, Mr Beard has misunderstood the submission that was being made and the point that was being put. The irrationality was that Royal Mail would never have chosen a course of conduct that was aimed at bringing about a faster roll-out than the 'do nothing' scenario.

In other words, if Royal Mail were acting rationally, it would not have adopted a course that was

worse for it than the 'do nothing' scenario shown in the first chart. I'm only telling Mr Beard that so that there is no misunderstanding.

MR BEARD: Yes, Mr Holmes was emphasising, I think, that it would never be Royal Mail's intent to have the outcome on chart 3 come about, because it was worse for it than chart 2. But what we see here is not, as Mr Holmes suggests, a situation where what was being done was selection of scenario 2 with a view that that was necessarily going to be the way in which matters operated. What we see here is a consideration of a range of scenarios using assumptions on profitability, and then on the next page a series of charts which are effectively varying those assumptions.

It isn't a matter of it choosing an option in relation to the third chart, because that is to do with a choice by others to forgo earlier profits. And therefore, there is no irrationality, because it is not a matter of Royal Mail choosing here. What Royal Mail was doing in relation to scenario 2 was looking at the way in which these changes might impact, but in relation to slide 11, was recognising there were a range of uncertainties, including the possibility that what would occur was that someone would forgo, Whistl would forgo, reasonable rates of reason for two or three years and

then would roll out more fully. And in order to forgo those reasonable rates of return, it may well seek investment.

It is worth noting, of course, that if one goes back to slide 9, the evaluation of proposed solution for April 2014, what is referred to there is:

"A proposed solution which combines a series of actions which will send a clear signal to the market we will compete effectively to protect the USO, introducing a small price incentive, the customers committing to a national profile of mail is likely to be attractive to almost all customers and will not exclude direct delivery competition.

"The market share and delivery we might expect to lose within the permitted tolerance of price plan 1 is 1.4%, representing 30-40 million of revenue."

That is then recognised in scenario 2.

But that account does not say what Royal Mail was considering in relation to the implementation of the price differential when it came to do so in December and January. Because actually what we see of course is, by that time, what Royal Mail was well aware of was the possibility of investment in Whistl, and in those circumstances, what was being contemplated in December and January was not in line with chart 2, it was in line

with chart 3.

Now, in those circumstances, it is entirely consistent with the evidence given by the likes of Mr Polglass that any roll-out plan would see losses in the early years, and, as he put it at Day 8, page 37, or accepted the proposition put at Day 8, page 37, line 22, that essentially the project would be short-term pain for long-term gain. And that is what the third chart here describes.

So for Ofcom to say that what we see in the traffic lights document is some clear intent in relation to the price differential to prevent Whistl rolling out is not correct. What those charts do is look at a low level price differential, recognise that if you weren't going to forgo a reasonable rate of return for two to three years, in other words you weren't willing to take any short-term pain, then in those circumstances you might end up with a plot in chart 2. But if you were, then you'd end up in the plot in chart 3.

And as I say, Mr Holmes didn't go on and question the witnesses about what the actual thinking was in December and January, and the way in which the board dealt with these matters. He did not ask Dr Jenkins about this. He did not interrogate Ms Whalley about these matters.

And what we know is that by that time, the situation had changed. We see that, for instance, in the board meeting minutes -- and just for your notes, at C4B at 63, page 3 -- that by 11th December, Royal Mail's assumption was that Whistl had received financial backing for expanding its end-to-end operations.

So by the time we're talking about the decision to go forward with the price differential in December, and through into January of 2014, it is not right to say that Royal Mail was simply thinking in terms of scenario 2 and the second chart. That was not the basis on which it was proceeding.

So, very far from it being irrational to look at the third chart, what actually came to pass was that the reality was much more like making a decision against the background that the third chart would come into play.

PROFESSOR ULPH: Can I just ask a question of clarification? If you look at the chart on page 10, if you look at the fourth row down, it says, "Likely outcome, delivery operator."

MR BEARD: Yes.

PROFESSOR ULPH: Your argument is that's what Royal Mail anticipated in October the likely outcome would be. And your argument is that later on, it changed its mind about what the likely outcome would be.

MR BEARD: To be more precise, what that row is saying is the likely outcome, on the basis of the assumptions at the bottom of the page, because that likely outcome is predicated on no major investment and the entrant needs 10% profit.

So it's saying at that time, if you have that assumption and that's your working assumption, then this is the sort of outcome. But as time changes and you think about whether or not that is a sound assumption, you're not focusing on that as being the outcome anymore.

PROFESSOR ULPH: It changed its mind about ...

MR BEARD: Yeah I think it's not necessarily fair to say its changing its mind, because what is not clear from these charts is whether or not actually there was thinking about these things more broadly.

The reason I say that is because of the existence of the third chart on the next page, which is inconsistent with that assumption, suggests that there was already that thinking going on, and that's the only reason I slightly hesitate about changing its mind. Because if you would just focus on that modelling and those assumptions, you wouldn't have ever bothered with the third chart because it wouldn't tell you anything, because that wasn't your working assumption.

PROFESSOR ULPH: What I meant was it changed its mind, it changed its mind about the likely outcome. Because at the time, in October, it thought they weren't going to get the finding, the likely outcome --

MR BEARD: It didn't know in October.

PROFESSOR ULPH: -- was --(overspeaking) --

MR BEARD: I think what was known in October, that there had been comments in the market about the possibility of Whistl getting investments, so it wasn't that Royal Mail had no idea that there was a possibility of investment. Indeed, every business would know there was a possibility of investment. But the question is, how realistic was that, as you come through to make your final decisions in relation to these matters? So the point I'm making is, there is a real danger in focusing on charts that are not simply working on the basis of a single assumption, that are part of a development of working thinking, and in relation to which we know that the facts changed.

THE CHAIRMAN: I'm not quite clear where you're going with this point. Are you telling us that, contrary to what we may have been led to believe, during the autumn of 2013, Royal Mail clearly had in mind that it was possible that TNT, as it was then, would obtain outside capital investment and would be willing to, as you say,

forgo a reasonable rate of return, that means take considerable losses, and that was a real fear for Royal Mail, or are you just saying that it was one of the things on the charts?

MR BEARD: No, Royal Mail obviously knew that any business could go and seek to obtain investment. It didn't know that Whistl was specifically seeking investment from any particular person or at any particular value until much, much later. What chart 3 says is not actually that Royal Mail envisaged that TNT would be seeking investment. It actually says that it would forgo a reasonable rate of return. It's not actually saying it would even be unprofitable, it's just saying that it wouldn't reach what might be considered a reasonable rate of return which is, in the previous slide, 10% profits.

Now, if that's the case, there are two ways of looking at the way you two that. You essentially make losses or reduced profits over those two to three years which you can then pay back, or you can potentially seek investment. And that's all that that is dealing with. It's not suggesting that Royal Mail knew that there was going to be investment in Whistl. It is simply recognising that a scenario existed that if you forewent the 10% profits that were the working assumption on the

traffic lights map, plan, then in those circumstances what would be faced is a much more significant increase in the roll-out.

Now it's right at that time --

THE CHAIRMAN: Sorry to interrupt again but are you asking us to accept that the three charts on slide 11 are of equal value in terms of any assessment of likelihood? Neither is more likely than the other, is that --

MR BEARD: At that time -- no, I think at that time it was probably thought, as per slide 9, that it was more likely that the second chart would be the outcome. Because if one goes back to slide 9, what one sees is the 30-40 million reduction in revenue which correlates with scenario 2, 40 million, and that would correlate with the second chart. So I'm not saying that at that time Royal Mail was saying that the third chart was equally likely. The point I'm making is that the world moved on.

THE CHAIRMAN: When it moved on, you seem to be asking us to accept that, in Royal Mail's eyes, third-party investment meant that losses or lower profits could be contemplated and therefore that the scenario in 3 was as feasible as other scenarios.

MR BEARD: Well, if you are going to seek investment in order to expand your end-to-end operations, which is

what is said to the board on 11th December, then clearly it is a funding that enables you to get past any issue you might have in relation to reasonable rate of return, which is what is represented in the third chart here.

So the point I'm making is that this document was relied on by Mr Holmes to say, well, this is a smoking gun of intent on the part of Royal Mail, essentially to ensure that Whistl would never be able to roll out beyond what is set out in the second chart. And what I'm saying is that that is not a fair reading of the decision-making process as a whole. Because the assumptions in this document at this time changed, because later on it was not on the basis of the assumption, at the bottom of slide 10, that Royal Mail was proceeding.

So yes, this is part of the discussion. Yes, this is part of the development. Is this evidence, as Mr Holmes put it, that by the time we're dealing in December and January, Royal Mail was intending to stop Whistl from moving out beyond the profile that's set out in the second chart? The answer is no. And Mr Holmes then did not explore how these matters were then considered at later dates. He stopped. Because he likes this document. And I can understand why he likes this document, but the fact that he likes this document

doesn't mean that it shows that by the time of the announcements in December or the CCNs in January, this was the basis on which Royal Mail was proceeding.

The next point I want to just pick up, of course, is that the focus throughout all of this was on actual prices. It wasn't at all to do with putting forward an announcement or giving a notice to the market of changes in pricing. This is all concerned with the implemented pricing. That's what's being thought about.

Now, there was one later document that Mr Holmes did refer to, which is a document from the company secretary, Mr Millidge on 9th January 2014. So this is a day before the CCNs are actually published. And it is perhaps worth turning that up, in C4B at tab 84.

The reason Mr Holmes seized on this document was, in particular, because of what's said on the second page. If you pick it up at the second paragraph down:

"We've expected that we'd receive complaint from some customers and we've already received the attached letter of complaint from TNT before our proposals have even been shared. It's not unexpected for a letter of this type to be as inflammatory and dramatic as it is, even though TNT don't yet know the details of the proposals. Ofcom are also expecting TNT will complain formally to them and resourcing their teams in

response."

There's then talked about the possible forms a challenge could take.

Then the next paragraph is:

"We fully expect the access pricing changes to be suspended pending the outcome of the Ofcom investigation."

Then I think the bit that Mr Holmes particularly relies on:

"We think that TNT's claims about the harm they suffer will be exaggerated but it's possible they may find it difficult to attract new customers; given the market uncertainty, they may be created by their complaint. It's also possible that TNT's financing may be conditional on there being no regulatory or competition law dispute ongoing."

Now Mr Holmes fixes on this and suggests that this indicates that Royal Mail knew that an announcement, in and of itself the notice, in and of itself would have adverse impact on Whistl. There are two points to make. This is not something that is considered anywhere else in the documentary material that Mr Holmes relies on for his own case on intent.

THE CHAIRMAN: Why is this letter headed "Legally privileged and confidential"? I think that was drawn to our

attention before. What's the significance of that?

MR BEARD: I don't know. I don't know whether it was because it was thought that it included material from legal advisers. I don't know the answer to that. But obviously it's not legally privileged and it's been disclosed by Royal Mail.

MR FRAZER: I think it's forwarding another document that's not there.

MR BEARD: I think it may well have an attachment.

THE CHAIRMAN: Right, so the contents are -- there's no claim of privilege in relation to contents of this letter?

MR BEARD: No, there isn't. And I think Mr Frazer is right because if you pick it up --

THE CHAIRMAN: I'm sure Mr Frazer is right.

MR BEARD: I'm sorry. Of course Mr Frazer is right. I misspoke.

Top of page 2:

"They do, however, carry some legal and regulatory risks as outlined in the note from Herbert Smith Freehills."

So I think it's that that would be necessarily privileged, and therefore one would --

THE CHAIRMAN: It's about legal privilege and confidential --

MR HOLMES: Just to be clear, we don't think this document has an attachment. It would indicate if it did. The note was separately circulated.

MR BEARD: I don't know the answer to it but we're not claiming privilege in relation to this --

THE CHAIRMAN: Red herring raised by me. I just like to ask these things.

MR HOLMES: I apologise, I was wrong about that. I think there is a reference to the note of legal advice being attached at the foot of page 1. So I think Mr Frazer is correct.

MR BEARD: Thank you.

THE CHAIRMAN: Sorry. Your point?

MR BEARD: That's fine. The point I'm making is that Mr Holmes fixes on this and says, "Aha, this is Royal Mail knowing that an announcement in and of itself would adversely affect Whistl". And we say, first of all, that is not what is being said here. What is being said is that Mr Millidge recognises that it might, because that is a matter that was highlighted by TNT itself in the letter he refers to which is in the preceding tab.

In that preceding tab at page 5, it talks about concerns for investors. And it is at paragraph 5, and he is then saying: well, it may well do. And he's

recognising that the uncertainty that exists in the market as a result of that could impact that position. But the idea that Royal Mail was engaged in some exercise to put forward CCNs or indeed, prior to the CCNs, price differential proposals, on the basis that the uncertainty that they generated while they were suspended would itself create adverse effects, is not something that is manifest in any of the relevant material. It is simply not true.

And we will come on to why it is that in fact it's not a contention set out in the decision, even though it's a matter that Ofcom more and more seek to rely upon, and Whistl clearly suggest should be the basis for the decision here.

Now, again for reasons that aren't clear, this note and the issues arising in it weren't put to Ms Whalley or Dr Jenkins, and yet, this material takes on more and more of a role. So there is not any basis for suggesting that Royal Mail intended either its announcements in 2012 or the announcements in 2013 concerning price differentials or the notice itself were somehow intended to disrupt Whistl or direct delivery operators, and there is no consideration of that sort of assessment in Royal Mail's contemporary documentation.

As I say, what we saw in the cross-examination was

a lack of questioning about how, in the end, the price differential was fixed upon in December and January, what the thinking was behind the level of the price differential, and, as Ms Whalley and Dr Jenkins made clear, the thinking at Royal Mail was that a higher price differential would have been warranted by the cost justification alone, but Royal Mail nonetheless took a more conservative view in relation to these matters.

When we come to look at the position in more detail, what we'll see is a reliance in an email suggesting that Royal Mail wanted to send out a very assertive signal to the market, an email of 2nd December 2013.

Now it's worth just turning that document up, because I'll refer again to it when we come to look at the decision. It's in C4A at tab 46.

Again, as far as we recall, there was no cross-examination in relation to this document. Notwithstanding the fact that Ms Whalley was an addressee. What we see in this document, it's an email from Stephen Agar, referring to the CFO, saying:

"He approached me on Friday and made it very clear he expected the PSB to be presented with an option that was more assertive than the 0.2 price differential, which the current recommended option. Something more like 0.5p [so more than double]. He was fairly relaxed

about the legal risks provided what we were doing was reasonable and arguable. He is very keen for us to give the market a very assertive signal. He suggested that Moira's risk appetite had changed in recent days and she was willing to be bolder."

There are two things that are important about this. First of all, although there was no questioning in relation to it, the material from around that time indicates that the cost justification analysis that suggested that 0.5p was justifiable. So it was not a suggestion that something unlawful should be done.

Second of all, it is plain that when 0.25p was in fact adopted, rather than sending a very assertive signal as to what Royal Mail felt it could lawfully do to compete, actually what the board was doing was much, much more moderate and conservative. Now, in those circumstances, as we'll see in the decision, to rely on this document as suggesting that Royal Mail was in a business of sending assertive -- very assertive -- signals to the market, is simply wrong.

Now, in opening, Mr Holmes tried to inoculate this. He went to this document but he didn't ask any questions of the relevant witnesses about it. Again, later stage documentary material going to the allegations not put to the witnesses.

THE CHAIRMAN: Are you asking us to accept that if an executive says he thinks something was reasonable and arguable in terms of legal risk, then that negates any intention of illegality?

MR BEARD: It certainly doesn't -- it certainly negates an intention of illegality, yes.

THE CHAIRMAN: Intention of illegality. It doesn't actually negate the result of illegality.

MR BEARD: No, it doesn't, but it certainly negates the intention of illegality.

THE CHAIRMAN: So when it says the person could be relaxed about legal risks, that could be negligence?

MR BEARD: I'm sorry?

THE CHAIRMAN: When it says the person was relaxed about legal risks, that could point to negligence?

MR BEARD: Provided what we were doing was reasonable and arguable, which is not negligent.

THE CHAIRMAN: No, but relaxed about legal risks.

MR BEARD: But the point that's being made here is that that is being suggested by someone, and that is not the course that was followed.

THE CHAIRMAN: Mm-hm.

MR BEARD: So the point that I make about this document is that it is relied on by Ofcom as evidence of Royal Mail wanting to give a very assertive signal. And actually,

what this document does is, in context with what actually happened, shows that Royal Mail wasn't being relaxed. It wasn't sending very assertive signals. It was doing something different.

THE CHAIRMAN: Somebody within Royal Mail thought it should be bolder.

MR BEARD: Yes, someone within Royal Mail thought it should be bolder. But that was not the approach that was taken. That's why this particular is material. And it's particularly material because it's one of the few pieces of material that's relied on by Ofcom in its decision in relation to these matters, as we'll come back to.

So, as I say, what we have is a situation where there had been a lengthy exercise undertaken to ensure that the price changes could be justified. As Mr Chairman, you rightly put, that doesn't inoculate against them being unlawful, but in terms of the way in which one understands the intent of Royal Mail, that is material. Insofar as intent is material. And we will come on to deal with that in due course.

That is all in the context of Royal Mail ensuring, through the suspension mechanism, that if there were concerns about regulatory or competition matters in relation to any price changes that were put forward, if

they were perceived to be unfair or unreasonable or discriminatory or would breach competition law if implemented, then there was a mechanism to ensure that they wouldn't be implemented, and those effects wouldn't be felt until Ofcom was satisfied that they were consistent with both competition law concerns, and, more particularly, the broad concerns that could be dealt with under the terms of the regulatory scheme.

Just picking up briefly one or two other matters in relation to the later stages, we will come back to questions about uncertainties, but what all market participants knew and realised from well into 2012 and 2013, was that if any such complaint was made, then there would be a suspension. And more than that, by the autumn, and in particular by December of 2013, all relevant participants knew that there would be a complaint, and the overwhelming likelihood was that there would also be a suspension of any such pricing proposals.

Ofcom knew that that was the position. There was a meeting 10th December, C4B, tab 59. This was a meeting again in respect of which I recall there was not questioning. Various attendees from Royal Mail, with various people from Ofcom. And the discussion here covers both concerns that Royal Mail had about the USO

and profitability and the possibility that there should be alternative regulation, but also what was being done by Royal Mail in relation to the putting forward of changes to the pricing structure.

And what we see there is initially Royal Mail at paragraph 1 explaining its concerns regarding direct delivery, and there were some presentations given.

Ofcom explaining at paragraph 3 that it was monitoring the position of TNT and was actually receiving board papers from TNT in relation to those matters.

The discussion went on with Ofcom about the access pricing plans and proposed changes, so that's at paragraph 6. So it was made clear that a price differential was being proposed but that the precise level hadn't yet been set. That's at paragraph 6 over the page.

There's a query from Ofcom whether the proposed differential plans were consistent with the access regime, and then there's a note from Royal Mail saying that they considered it was. But that's a post-meeting note.

Then there's a question made by Ofcom:

"What if forecasts at SSC level were received on MPP2?"

And Royal Mail explained:

"This wasn't a feature of MPP2 contracts and therefore it would be very odd to receive this type of information, but if this [I think it should be] eventually arose, we would reflect on the appropriate treatment."

Then there was a discussion of the zonal prices and Royal Mail explained that Royal Mail's pricing proposals reflected Ofcom's challenge to Royal Mail to look at commercial responses.

So it's explaining candidly to Ofcom why it is doing what it's doing and how it's structuring these things, why it says they're structured as they are:

"We've undertaken legal and economic advice and believe the proposals are reasonable. None of the levers are easy to pull and we'd expect where to be a complaint. We're concerned that other operators are allowed to compete with no constraints."

And then explaining that they were discussing changes to MPP1 with existing customers on MPP1. Ofcom set out they didn't have a view on the proposals.

"TNT has already contacted Ofcom setting out they believe Royal Mail's proposals were likely to be exclusionary. Ofcom emphasised that Royal Mail must undertake its own due diligence on the price proposals

... wasn't just a regulatory issue but also likely to be a competition issue. Ofcom indicated that it would expect Royal Mail to discuss the proposals with all access customers."

Which of course we then saw subsequently with, in particular, Whistl, at a meeting on 17th December.

Obviously we didn't have an Ofcom witness we could question about these matters, because although at paragraph 12 it's being said by Ofcom that it didn't have a view on these proposals, it is notable that Whistl, in its contacts with Ofcom, felt that it was getting a much more positive, in its view, steer from Ofcom as to how it would deal with price differential issues.

I, just for your note, would direct you to C4A, tab 49, an email from Angus Russell on page 2. So here we have a situation on that page 2, tab 49 of C4A, where Mr Russell reports:

"I said to Mr Rowsell at Ofcom that PwC ..."

If you remember, PwC were the people that had been recruited by LDC to carry out due diligence, and apparently it turns out, had meetings with Ofcom, about which we have no details.

"I said ... that PwC had reported that Ofcom was not supportive of differential pricing. Chris didn't

disagree with that analysis. Often the lack of reaction is closest we can get to confirmation. So I took this as positive."

Now, perhaps Mr Russell is reading too much into these matters. Perhaps in fact Ofcom did indicate to PwC its view on price differential. We haven't been able to test that with anyone at Ofcom. But it is, at least potentially, the intention with the position that Ofcom appears to be adopting in that meeting of saying they don't have any view on the proposals.

But even taking that on its face, that they didn't have a view on the proposals at that stage, this is 10th December. This is a situation where, unlike the situation one would normally or might often find in relation to allegations of breach of competition law, what Royal Mail was doing was coming forward and explaining precisely what it was that it was intending to do and why. It was saying that at that time it didn't have a particular figure set for the price differential but that it intended to put it in place, but it also expected there would be a complaint and was recognising that these matters would be suspended.

Notably, of course, there's not a whisper of a suggestion that putting forward the CCNs or making any sort of announcement was itself problematic.

Of course the position was that Whistl believed, very clearly, that it was going to be able to stop Royal Mail from going ahead with any proposal to introduce a price differential. Whether by pressure from Whistl itself or intervention from Ofcom. That was Mr Polglass's evidence. And in cross-examination Mr Polglass accepted that he recognised that Royal Mail was likely to propose a price differential, but that Whistl could stop it if it didn't like it. And that's Day 8, page 13, lines 7 to 14, and page 14, lines 12 to 21.

Of course, it is notable that Whistl didn't include a sensitivity relating to possible price differential in its business planning. We saw that right back in C4A/10, slide 76 of the investment memorandum.

Of course, that was for the simple reason that Whistl didn't think it would be approved, and of course it didn't include it in any, not even a sensitivity, in any of its post-CCN business planning.

So Whistl clearly that the message from Ofcom that it understood that price differentials wouldn't go ahead and it was confident of the position in relation to these matters.

Now of course, as it turned out, Whistl's predictions were correct; the price differential was

never implemented, paid or charged. We see that over time there is an initial delay in roll-out, although roll-out still continued after the December announcement, after the CCNs. The roll-out scheme was modified. We saw that business planning continued on the part of Whistl to continue to develop its roll-out. And of course, we saw in the email which is found C4B/109 the optimism of Mr Wells in response to Mr Russell's communications in early April 2014, that -- in relation to the good news that Ofcom had opened a regulatory investigation and also was pursuing competition law complaints, that there was expectation and hope that everything could be done and dusted by August.

As I say, the plans were developed and revised, the Ofcom investigation continued, further plans were developed, and indeed, in the end the CCNs were formally withdrawn. Throughout that period, Whistl expected and recognised that it could get investment from LDC. It was only after the CCNs were withdrawn that LDC in fact finally decided not to invest.

The early optimism as to the speed with which Ofcom would deal with matters had not been borne out. It wasn't just Ofcom's delay in conducting its investigation that was a concern; there were concerns

about broader issues of regulatory certainty. The possibility of other changes coming to pass. A recognition by Whistl that there could be other legitimate further price changes in future in accordance with the regulatory framework. And of course, as we canvassed with Mr Polglass, there were also a series of difficulties with Whistl's own business plans, which both increased risks to its end to end operation and potentially decreased profitability.

Critically though, the evidence we have in relation to LDC and its decision not to invest in the end, does not identify the price differential. Indeed, if we look at the final response that was obtained from LDC after, indeed, prompting from Royal Mail that Ofcom needed to actually ask LDC further questions, which is found at bundle C4C/153, that does not refer to the price differential.

You'll recall this is a document from April 2017, so Ofcom had taken its time to ask these questions of LDC. You'll recall request 2, which I think Mr Holmes and Mr Turner emphasised, concerned the MAE or MAC clause, which is on page 2, and did refer to proposed price changes in general terms. You can see that from the summary.

Then request 6, if not fully articulated by the

documents, and these are documents provided by LDC:

"Please explain the reasons why LDC decided not to complete the agreement 13th December 2013."

Now, the documents provided are not referred to by Ofcom or Whistl as setting out those reasons, understandably because they don't. So we rely on this as the evidence.

"As set out above, MAE was engaged in LDC Post NL's management's opinion because pricing proposals would have rendered the E to E roll-out commercially un-viable. as at the initial long-stop date under the agreement, the extended long-stop date of 19th December 2014 ..."

So this was the first significant extension:

"... there was insufficient information to accurately determine the outcome of the Ofcom access conditions regulatory framework review and what the impact would be on the ultimate price paid by TNT to access Royal Mail's network. The view was that Royal Mail had manipulated the pricing matrix applicable to the market. LDC and TNT's management's due diligence, including interviews with Ofcom ..."

Again, interviews we've never seen the text of.

"... had concluded that Royal Mail's ability to alter its price zoning [its price zoning] was restricted

and we expected Ofcom would enforce the regulatory access to the market for players. However, ten months after TNT's complaint about Royal Mail, only a consultation had been launched [so that's to do with the zonal pricing] on the rules, which was unlikely to be concluded until summer 2015, with then the prospect of a further drawn-out appeal. This effectively gave no regulatory certainty to the business plan, and although investment decisions are made based on many factors, this influenced the assessment by LDC of any business plan provided by TNT management. The amended strategic plan in October required greater funding due to a longer period of losses. TNT management asserted regulatory uncertainty was a key reason that customers were slow to convert to its E to E service. This caused TNT to sustain heavier losses. That meant it was a more risky plan with lower returns.

"As stated publicly in 2015, a combination of its declining postal volumes and ongoing regulatory uncertainties made the longer term viability of achieving E to E roll-out projections look challenging, therefore LDC concluded it shouldn't in invest."

What is striking about this, of course, is this is a formal written notice under section 26 of the Competition Act in relation to the Competition Act

investigation specifically about a price differential. And what LDC does not there speak to is the impact of the price differential. When it talks about specific issues on pricing, it is talking about the zonal pricing and the enquiry concerned with that, and when it talks more generally, it is concerned with general regulatory uncertainty, in the market.

Of course, we do have the fabled email concerned with the discussions in respect of the terms of the press release when it's announced that the joint venture is not going to go ahead, which is at tab C4C at 143. That is the one which says, in the end:

"They want us to say we stopped the discussions. We can include a full list of reasons why, but I'm not sure they [Whistl] will like the list."

I don't know whether now is a convenient moment just for a five-minute break for the shorthand-writer.

THE CHAIRMAN: An excellent moment, Mr Beard. Thank you.

(11.26 am)

(A short break)

(11.40 am)

THE CHAIRMAN: Mr Beard, while you're here, you were referring to this LDC letter, it was at 153, was it?

MR BEARD: It's a response to section 26 notice, yes.

THE CHAIRMAN: Yeah. I can't remember -- we were looking at

request 6.

MR BEARD: Yes.

THE CHAIRMAN: I know we've looked at this before but has anybody read out the first paragraph of the answer to request 6? That's set out in the responses to and documents provided in connection with requests 1 to 5 inclusive.

"The MAE was engaged because in LDC's Post NL's, and TNT's management opinion, Royal Mail's pricing proposals would have rendered the E to E roll-out commercially unviable."

Did you read that out?

MR BEARD: Yes. I did read that out, yes. Because I recognised that in relation to the MAE, that was what was being said. The point I was making was in relation to the final investment decisions.

THE CHAIRMAN: You are at some stage going to get on to the grounds of appeal, are you?

MR BEARD: I was going to do that now.

THE CHAIRMAN: That would be very gratifying.

MR BEARD: Can we start with authority bundle 8, please, tab 97, paragraph 112. This is AstraZeneca, in the Court of Justice.

This is in response to arguments from the parties that the fact of applying for a supplementary protection

certificate was insufficient to constitute abuse. But the important reasoning here, which reflects previous case law, is the difference between actual and likely effects:

"Lastly, as regards the circumstances which, according to the appellants, must be present in order to find that the misleading representations were such as to restrict competition, it is sufficient to note that in actual fact they amount to requirement that current and certain anti-competitive effects be shown.

"However, it follows from the court's case law that although the practice of an undertaking in a dominant position cannot be characterised as abusive in the absence of any anti-competitive effect on the market, such an effect does not necessarily have to be concrete ..."

What we referred to as actual effects.

"... and is sufficient to demonstrate that there is potential anti-competitive effects."

What we refer to as likely effects.

And that cites TeliaSonera at paragraph 64, which we have actually quoted in our written submissions at footnote 14, which says pretty much the same thing.

The point to be made here is that in relation to actual conduct, the primary position is you have to show

effects. The working assumption would be that those would be actual effects but the case law has made clear that they don't have to be actual effects. You can also prove that the conduct is anti-competitive if it is likely to have anti-competitive effects.

But what is critical is that the starting point is that the conduct in question has to be capable of having those actual effects. In other words, there needs to be sufficient conduct that in principle, the conduct is giving rise to actual effects. You don't then have to prove them.

Ofcom's interpretation of the current situation is that it's possible to find an infringement in relation to the price differential, even when the pricing hasn't taken place. It is obvious and clear that where pricing has not taken place, that pricing cannot give rise to actual effects.

And in circumstances where there can be no actual effects, there can also be no likely effects.

It's for that reason that we see in the language in particular of Article 102(c) but in all of the case law provisions concerned with 102, the concern with prices or conditions being applied is not some sort of arbitrary restriction, it's of the essence of the requirements of Article 102 as an ex post competition

requirement.

The law applies to conduct which has actually occurred and therefore could give rise to actual effects but you don't need to prove them. You can just prove likely effects.

Now we recognise, of course, that in cases such as British Airways, which we've also referred to in our written submissions, and it can be found -- just for your notes -- at authorities bundle 6 at tab 72, that where you have actual conduct and it doesn't achieve its hoped for results, then that doesn't prevent a finding of abuse. So long as you've got actual conduct, the finding of likely effect was enough.

But what's important is that this doesn't suggest at all that likely conduct can amount to an abuse simply because if it were implemented, it would be likely to have adverse effects.

I wouldn't take you, given the time, to it, but we've referred to Mr Justice Roth's observations in the Streetmap case. There, Mr Justice Roth emphasised that if you had had conduct that had been operating for some time, you would be sceptical about a contention that that conduct had likely effects, if you hadn't seen any actual effects whilst it had been operating.

In other words, he used it as a form of cross-check,

but that's not a suggestion that unimplemented conduct can or should be analysed on the basis of effects which it would have or likely to have, if it were implemented.

So here, where you're considering pricing, you have to consider the actual or likely effects of actual pricing.

If you're considering a notice or announcement or a threat to change pricing in the future, we accept that, in theory, since the categories of abuse aren't closed, and a notice or announcement or a threat could potentially be scrutinised as a form of conduct which could give rise to an abuse of dominance -- and I'll come back to that in a moment, the problems that arise if you go down that route -- but the actual effect of a notice or announcement or threat is completely different from the pricing itself.

In essence, in its decision, Ofcom confuses two things: it talks about the effect of the pricing but now seeks to emphasise the effect of the threat through the CCNs. That's why we referred to, in our closing submissions, two different sorts of cases.

The reason it is particularly important is, of course, when it comes to assessing actual or likely effect, you can't both say that conduct X is proposed or threatened, but hasn't yet occurred and at the same time

say that that conduct has occurred. You can't do both things. They're mutually exclusive. You can't, in this case, look at the price differential and say, "I'm going to treat it as implemented", and at the same time treat it as not implemented.

In other words, you can't treat the price differential as 100% certain and happening, and at the same time say it's not happening and it's less than 100% certain of implementation. You can't do that in relation to the same price differential. Quantum physics may be able to deal with those sorts of issues. Competition law can't.

MR FRAZER: I don't think this an example of Schrödinger's cat, is it, because, as I understand the approach of the decision, it was to determine whether or not the price differential, if applied, would be an abuse, and if so, then it would be open to Ofcom to look to see whether the notification of those prices would also be an abuse, having regard to the effect, somewhat different from the price itself, whether those would be sufficient. I'm not quite sure that your submission grounded on that.

MR BEARD: Yes, because we say that the decision does the first, and it doesn't do the second. It doesn't make a finding that, actually, there were effects by reason of the notification alone. Because what it does, as

we'll come on to see, is look at the effects of the pricing. And there is no consideration, no proper assessment, of what would be required in order to decide whether the announcement itself had abusive effects.

Before I get to that, and I'm going to come to it, it's worth just disposing of one or two of the other arguments that were put forward by Ofcom that were actually slightly in tension with that analysis, Mr Frazer.

The first is the argument that was put forward that the CCNs were legal notices and therefore all necessary steps had been taken and therefore you can treat them as effectively implementing the pricing. And we say that's plainly wrong. You can't turn prices which weren't charged into prices which were charged. And it actually misunderstands the nature of the CCN. It's worth noting that in fact in their closing, at paragraph 57, Ofcom make an error in relation to the nature of the CCNs. They say in paragraph 57:

"In any event, by issuing the CCNs, RM [Royal Mail] amended its contractual terms of dealing."

That is wrong.

I can take you to the terms of the access letters contract, but -- and, just for your notes, it's in C4A, tab 1, and it's clauses 13.2 and 13.2.3. But what is

clear is that you give a notice and, at the expiry of the notice period, then the terms of dealing will change. But there is no amendment of the contractual terms when the notice is pending. So there is a fundamental misunderstanding as to the nature of the CCNs. It's true, of course, that giving the notice was a necessary action if contractual changes to the terms of dealing were to be made, but the terms of the regulated contract required long notice periods for any prospective changes in order, in particular, that market participants could either adapt or object to those changes, and those were products of the regulatory scheme. But you can't, as I say, treat something that may happen as already having happened, legally or otherwise.

The second point that I think is worth just dealing with, before I deal more fully with Mr Frazer's point, is the reliance on AstraZeneca. If we just go back to AstraZeneca, there is nothing in AstraZeneca that suggests that conduct which hasn't occurred can be treated as if in fact it had for the purposes of the assessment of its effects.

If we look at paragraph 105 of AstraZeneca, so just back a page from where we were, dealing with the same ground of appeal:

"As is apparent inter alia from paragraph 537 of the judgment under appeal, the General Court examined in the present case whether, in the light of the context in which the practice in question had been implemented, that practice was such as to lead the public authorities wrongly to create regulatory obstacles to competition, for example by the unlawful grant of exclusive rights to the dominant undertaking."

If we actually turn back to 3.57, it's in tab 87 in the same bundle. It's page 54 of 142. At 3.57:

"The court would point out that the question whether representations made to public authorities for the purposes of improperly obtaining exclusive rights are misleading must be assessed in concreto, and that assessment may vary according to the specific circumstances of each case."

"In particular, it's necessary to examine whether, in the light of the context in which the practice in question has been implemented, that practice was such as to leave the public authorities wrongly to create regulatory obstacles to competition, for example by the unlawful grant of exclusive rights."

There's a reference there to the discretion of the authorities. But the key point here is both the General Court and the CJEU in approving the General

Court were emphasising the importance of the actual conduct in question and then consideration of the likely effects, and in AstraZeneca the actual infringing conduct was the making of the misleading representations, which meant that someone else, the patent offices, would be highly likely to act in a way so as to impede competition. That's the making of the misleading statements so as to get a third party to act in a way that would impede competition was an infringement, but the conduct was the misleading statements.

Of course the present case is different, because Ofcom's contending in the decision, as we will see, that's it's the price differential that causes anti-competitive effects.

Mr Holmes has also referred to paragraph 360, relating to the actions of third parties. I'm going to come back to that provision when I look at the suspension clause in more detail. But just to be clear, what 3.60 says is, lastly:

"The mere fact that certain public authorities didn't let themselves be misled and detected the inaccuracies in the information provided in support of the applications for exclusive rights or that competitors obtained, subsequent to the unlawful grant

of exclusive rights, the revocation of those rights, isn't sufficient ground to consider that the misleading representations were not in any event capable of succeeding."

What it's saying there is: you undertook the conduct of misleading, the fact that someone stopped the likely effect or the actual effects occurring doesn't change that analysis. It's still abusive. But it's predicated on the actual conduct of the misleading statements. And it goes on to say:

"As the commission rightly observes, where it's established the behaviour is objectively of such a nature as to restrict competition, [so, behaviour] the question whether it's abusive in nature can't depend on the contingencies of the reactions of third parties."

So that's very much akin to the learning in British Airways. If you've undertaken abusive conduct, the fact that the goal of the conduct doesn't come to pass, whether it's because a third party stops it happening or otherwise, it doesn't mean there's no abuse.

THE CHAIRMAN: At what point in your submission does the actuality of the conduct crystallise? So if the price announcements had taken effect, even for a day, you would say that was enough to not (inaudible) on safer

ground, because conduct has taken place and one can then look at the likely effects?

MR BEARD: Yes, there was pricing.

THE CHAIRMAN: So you could reduce it to the absurd, but it requires, on your argument, implementation, even for a very short time?

MR BEARD: If you are talking about the effects of pricing, yes, it must involve the implementation of pricing.

THE CHAIRMAN: Even though there would clearly be no actual effects from price differential applying for one moment?

MR BEARD: Well, if someone bought at those prices there would be actual effects. But what you'd have is the conduct of pricing that could give rise to the actual effects. They would be applied in the language of 102(c).

THE CHAIRMAN: So you really are putting your submission on the basis that there was no application of the prices?

MR BEARD: I'm going to come on to the way in which the decision deals with it but I'm saying that's the way in which the law must look at pricing and the effects of pricing.

The third point to get out of the way I think is the analogy with 101 that is sometimes raised, which that you can have a situation where one-off information exchanges are capable of amounting to a concerted

practice or unlawful agreement contrary to 101 without them actually having been such as to create changes in particular prices or output, or whatever it is that's being discussed. But that analogy misses the point again. It's very much like the British Airways or AstraZeneca proposition, that in -- under 101, it's the coming together and meeting of minds which is the infringement. If the infringement then doesn't result in particular changes in pricing that were intended, for instance because people cheat on the cartel, that doesn't mean that there's no breach. But again, you have the infringing conduct in the first place.

So it is, of course, why the doctrines, for instance, of public distancing have arisen, that you've got to actually uncouple the meeting of minds in order to avoid the fact that there was a 101 case.

So in all of this, I think, as Mr Frazer anticipates, it is right to look at the terms of the decision, and actually what was decided. I don't know where the tribunal has the decision that it is marking up, whether it is in the first bundle or separately.

I went to one or two of these passages in opening, but I want to just look at the terms of the decision very briefly. Obviously the decision itself is set out in section 9 on page 279 of the internal numbering. But

as I pointed out in opening, that section doesn't actually explain what the infringement is that Ofcom is finding. It simply refers back to what has gone before.

Obviously the key section, in terms of identifying what the findings are, is section 7, entitled "Abuse of dominant position, legal and economic analysis", which begins on page 177. There we see reference back to the market definition section, the legal framework section, in 7.1, 7.2. And then a reference in 7.3 to:

"An 'in the round' assessment, of all the circumstances of the case to determine whether, at the time the price differential was introduced, Royal Mail's conduct was reasonably likely to give rise to a captive disadvantage, restriction of competition."

Then if we go over the page, 7.3 then sets out various features of the market. If we go over the page, it's 7.4:

"We've also considered evidence available as to how the introduction of the price differential impacted bulk mail delivery market in practice."

Then we have the analysis set out in sections. Subsection (b) looks at competitive conditions. Subsection (c) considers the nature of the conduct in question, in the context of the affected markets.

"We find that by introducing the price differential,

Royal Mail used its position as an unavoidable trading partner for operators active in the REO market for bulk mail to penalise those of its access customers who also sought to compete with it. In this regard ..."

It then goes on. In paragraphs 7.44 onwards we find that:

"In introducing the price differential, Royal Mail applied dissimilar conditions to equivalent transactions with its access operator customers, charging higher prices for the same bulk mail delivery services when supplied under APP2 price plans than it charged under the MPP1 plan."

Now, with respect to Ofcom, that just doesn't make sense. Those prices were never applied and never charged. Then in (b) it goes on:

"We explain Royal Mail's access customers who choose to expand their operations to compete in delivery would need to use APP2 as APP3, as a result they would face systematically higher prices compared to those applicable to access customer operators who use MPP1."

Then at (c):

"We find the difference in treatment applied by Royal Mail cannot be explained or justified on the basis.

Then if we go on, this is still just the summary,

(d) says:

"... reflected a deliberate strategy ..."

Then (e):

"... outlines our findings that the price differential was reasonably likely to give rise to competitive disadvantage leads to restriction of competition."

So (e), as we'll come on to see, is about the price differential; was it likely to give rise to a competitive disadvantage?

"We also addressed the implications of the fact the price differential's implementation was subject to a contractual notice period and that it was ultimately suspended."

So the focus is on the price differential and then they address the implications of the suspension, which we'll come on to see.

Then subsection (f) examines the evidence of what in fact happened after CCNs were issued, and that that's consistent with our findings as to the likely consequences of introducing the price differential through the CCN.

So if we then go on to 7.138 --

MR FRAZER: Just before you go there, I just wondered whether any of your submissions are affected by 7.3

itself, where, in the first sentence of 7.3, there appears to be a definition of what is meant by an introduction of the price differential, although I completely take into account what you said, ie, when the CCNs were issued.

MR BEARD: Yes, well, we see that that language is used, but then as we come on to look at what is done, when we look at materiality, when we look at potential likely effects and so on, it's not the issuance of the CCN; it's the pricing itself. So although that language is used, it's actually never cashed out in terms of the likely effects analysis. So we do see it. We can see that Ofcom were thinking: hang on a minute, they weren't actually implemented, what do we do here? And they throw in these lines. But when it comes to the analysis, it's not there.

MR FRAZER: Okay, thank you.

MR BEARD: So what we have here in (e), starting on 223, is the likely distortive effects of the price differential. It's not the likely distortive effects of an announcement, or a notice to change. It's the price differential.

We see the three sets of findings summarised -- sorry, just picking up in 7.138:

"Our conclusion that the introduction of the price

differential in the CCNs issued by Royal Mail in 2014 was reasonably likely to distort competition. That is it was reasonably likely to give rise to a competitive disadvantage within the meaning of 102(c) and/or was reasonably likely to lead to restriction of competition."

We've never been quite clear why Ofcom cavils the references to 102(c), given that that's the essence of what they're doing here.

And clearly, as we will see, the focus is on discrimination. And as we set out in opening, 102(c) is just setting out the terms of criteria for discrimination.

In 139, in particular, we set out the findings to the following effect:

"Price differential amounted in effect to a penalty on access customers seeking to compete in bulk mail."

Then secondly:

"By reducing the incentive of customers to expand the bulk mail delivery market."

And then:

"Given the nature of discrimination in issue, the type of foreclosure effect we're concerned with in the prevailing conditions in the market at the time the misconduct took place, it's neither necessary nor

appropriate for us to carry out an AEC test."

But the key thing, as we will see, is that (a) and (b) are talking about the pricing. The price differential amounted to a penalty. That is what is being summarised as found below:

"... by reducing the incentives of competitors to enter and expand."

Again, that is to do with the pricing. And we see then that made manifest -- I'll come on to AEC, obviously, in due course, but that's then made manifest under the subheadings.

So subheading 1 at the bottom of the page:

"The price differential amounted, in effect, to a penalty on access customers seeking to compete in bulk mail, making entry significantly more difficult and therefore less likely to occur."

Of course, what we see in this section is under the headings, or under the sub-subheadings over the page:

"The price differential would result in a significant increase in access costs for end-to-end competitors who would need to continue on APP2, ZPP3."

Then over the page on 226:

"The impact of the price differential would have been material, as illustrated concretely by reference to its likely effects on Whistl."

All of this is to do with the actual impact of the pricing if it had been put in place. So it's all concerned with the pricing.

We see that continuing over the page at 229:

"Financial impact of this magnitude would make entry significantly more difficult for access operators."

Then over the page at 230:

"Incentivising competitors to give up delivery competition causes harm to consumers."

So all of that is to do with the impact of the pricing. It's not to do with the impact of an announcement or a notice or a threat.

Then, when we come to the next subheading, we have:

"Price differential can't be categorised as pure, first degree primary/secondary price discrimination."

With respect, I'm not sure that we get anything useful from there.

Then the third subheading is the AEC issues, which we are going to come back to in relation to ground 3, but of course, in relation to discrimination, you're talking about differences in treatment by way of pricing, and in relation to the AEC test, of course, you're talking about whether or not the pricing in question -- whether it's right to use a test that looks at the pricing in question for the purposes of admitting

less efficient competitors in particular.

So we see all of that as focused on the pricing. Then we get to the fourth subheading:

"The suspension of the price differential doesn't prevent a finding of abuse on the particular facts of the case."

So what this subsection is saying is: look, we've made all these findings of likely effects by reason of the pricing, and the suspension doesn't stop that being the right finding.

But we say that's just the wrong way of looking at this. It's not a question of how the suspension clause works. If you're going to be making findings in relation to pricing, it has to be actual pricing.

If we look at 7.203:

"As set out in sections 3 and 4, as a result of Ofcom opening its investigation, the implementation of the price differential was suspended."

Again, it's funny wording: "the implementation of the price differential was suspended". Actually, that's not true. The price differential hasn't come in. It was not suspended. What was actually suspended was the notice period in relation to the CCNs.

So even here, Ofcom are getting it wrong again.

"Some six weeks after it was introduced through the

CCNs, its introduction had also been signalled to the market in December 2013."

Well, that is true. But again, it doesn't assist in relation to this. Then it goes on:

"Royal Mail's representations on the suspension of CCNs, including the price differential ..."

There we see at 205, and through to 208, Royal Mail's contentions in relation to these matters. And then we come on at 7.209 to Ofcom's assessment. It says:

"In paragraphs 5.98 to 5.104 in the legal framework we have explained why we reject Royal Mail's submissions on this issue insofar as they raise points of legal principle. In particular, the requirement in the case under 102(c), 'the conduct must involve the application of dissimilar conditions to other trading partners' doesn't mean that pricing practices are captured only when the relevant prices are actually charged and paid by those trading partners."

Again, it is interesting. It's the pricing practices that it's being said here are not being captured. They can be captured, even if they're not charged and paid, not the announcement or threat of pricing.

Equally, under Article 102 prohibition generally:

"Ofcom is required to assess the reasonably likely impact of a price differential on a forward-looking basis. Ie it's required to assess whether conduct was abusive at the time the relevant acts were committed."

There's a wonderful ambiguity here. What are the acts being talked about here? You would read that and think it was talking about the pricing practices, because that's what is referred to in the lines preceding:

"We take into account evidence as to what in fact occurred in order to inform an assessment of the reasonably likely effects of the conducts, and then the case law of the European courts makes clear that Competition Authority doesn't have to wait until the anti-competitive conduct has actual concrete impact."

Well, as I've already indicated, we agree with that. But you still need to identify what the conduct is, and if you're talking about pricing, you actually have to have pricing conduct. You don't then have to wait until there are actual effects in order to prohibit it.

Then the third point is:

"Intervention of third parties such as Ofcom can't be relied on."

So it's worth just going back to the points that it relies on the in the legal framework, so we have to go

back to 598 to 5104. If we just pick it up at 598, and 599 I don't think particularly assists. 599 is referring to the suspension and then the withdrawal. If we pick it up -- sorry, in those matters it says in 599 are dealt with in 5203 onwards, which we'll be coming back to.

If we just pick up 5100 --

THE CHAIRMAN: 7.203.

MR BEARD: I'm so sorry, 7.203 to 7.228. And I'll come back to those in a moment.

The primary point is that:

"As outlined above, as a matter of law, we are required to consider the likely effects of Royal Mail's conduct at the time the relevant acts were committed."

So again, which acts we're talking about is ambiguous. It's going to be said that it's the CCNs, but if it is the CCNs, then the conduct in question is not the pricing. And therefore, if you're looking as a matter of law at the likely effect that time, that an announcement or notice is given, you're not then looking at the pricing that is announced, subject to the notification, as we'll come on to see, that assessment would be very different.

"While the evidence of what actually happened subsequently may be informative, especially if the

impugned contract is alleged to have continued uninterrupted at the point of assessment, it's not necessarily determinative of the question whether the conduct was or was not abusive at the time the acts were committed."

Agreed.

Then there's a citation of Microsoft:

"A Competition Authority is not required to wait until the anti-competitive conduct has eliminated competition."

Again, agreed, but in Microsoft what was being talked about was a refusal to supply, and the question was whether or not the commission could intervene and order that the refusal to supply was in breach, even though competition hadn't yet been eliminated from the market. And it was said yes, you can, because there has been a refusal to supply. It's been a continuing refusal to supply. And in those circumstances, we don't have to wait until competition is eliminated; we can look forward.

So Microsoft is no assistance there.

The further paragraphs in this section then go on to deal with the other points, I think, in 7.209. So if we go back to 7.209 itself, just to emphasise, what we're asking ourselves here is: has Ofcom given an explanation

why the suspension of the CCNs is irrelevant to the assessment of the effects which it has carried out referring to the pricing?

We see the reasoning starting in 7.213:

"The first point is Royal Mail's submissions are inconsistent with the position it adopted at the time, which is demonstrated by internal contemporaneous documents.

"The documents suggest Royal Mail was well aware, at the time it decided to introduce the price differential, that Ofcom might open an investigation, and that the price differential might be suspended."

Well that's true, but it doesn't tell you why it is you should treat the pricing as being the relevant conduct for this assessment of any effects. Because it goes on and says, in 7.214:

"Royal Mail therefore anticipated that even if a complaint was made and Ofcom decided to open an investigation resulting in the suspension of the CCNs, including the price differential, this wouldn't prevent the price changes having an impact on Whistl or the market more generally."

But that is referring to that Millidge quote of 8th January. It was not something that Royal Mail anticipated in any of its consideration of the price

changes. That is not what it was talking about. It was concerned with ensuring the lawfulness of the actual price changes. But in any event, the contemporaneous documents aren't going to be the answer here. You need to look at what the relevant conduct was, and what the findings of effects are.

We then go on to 7.215:

"Further, this advice was offered to the Royal Mail board against a background in which the internal Royal Mail discussions indicated a desire to send a very assertive signal to the market through the introduction of the price differential and other price changes despite the legal risks."

Well, I took you to that email. Actually, what we see is that that was being considered. But then, of course, what was done was not to make that supposedly very assertive signal.

Then (b):

"Whistl's public announcements and business plans made clear that a funding partner was required in order to fund a CAPEX and start-up losses."

You've heard the evidence in relation to this. Of course the Royal Mail was aware of the fact that Whistl may be looking generally for investment. It didn't know until very much later in 2011 that specifically it was

securing investment. And of course -- sorry, 2013, thank you, Ms McAndrew -- in 2013 that it was specifically considering these matters. And of course the whole process of designing the pricing had begun back in June and July of 2013.

"Royal Mail's internal documents showed that it was aware that a direct delivery investor had been sought."

Yes. In December 2013.

"... and that investor confidence in direct delivery was an important factor in assessing whether roll-out would occur."

Well, that was not something that was focused on at all by Royal Mail in relation to any of the documents that Mr Holmes refers to, save in relation to this email from Mr Millidge of 8th January.

"All of these points suggest, as indicated in the email above, that the introduction of the price changes was reasonably likely to be factored into Whistl's business plans at the time the price differential was introduced."

That, again, is a very strange sentence.

"The introduction of the price changes was reasonably likely to be factored into Whistl's business plans at the time the price differential was introduced."

Now, it's not clear there whether what is meant is the prospective introduction of the price changes was reasonably likely to be factored into Whistl's business plans at the time the CCNs were introduced, or the introduction of the price changes was reasonably likely to be factored into Whistl's business plans at the time when the pricing itself was introduced.

Assuming it's the former, however, what is being said here is that there is the possibility that the fact of an announcement or notice could be taken into account by Whistl.

Now, of course one recognises that all announcements, statements, rumours, about what a dominant undertaking is going to do in a market may well be taken into account by those participating in the market that may be affected by it. That is not the same thing as dealing with the pricing itself.

"Our review of Whistl's internal documentation and findings show, in response to the price differential, show Royal Mail's understanding of the position, as quoted in paragraph 4.135 above, corresponds with the reaction of Whistl and its investor."

It's a slightly funny position in that yes, it's true that in the light of the announcement in December, there was concerns such as led to the MAC clause and

there was delay in relation to the roll-out. But of course, what we know subsequently is that Whistl didn't incorporate any sensitivity or consideration relating to the price differential itself into any further business plans.

Then second, 2.17:

"On the facts of this case, it's plain that Royal Mail's submission that the CCNs including the introduction of the price differential amounted to mere announcements which were incapable of having any affect on competition pending actual implementation is unsustainable."

Then (a):

"The price differential wasn't announced as a potential change which was subject to consultation or negotiation."

Then it said:

"Thus, Royal Mail --"

I'm sorry:

"On the contrary, its introduction involved the exercise of Royal Mail's unilateral power. The CCNs were different in nature, for instance, to Royal Mail's announcement in December 2013."

So here, rather than just relying generally on previous materials, which is the first reason, it's

actually saying well, it's because they're legally binding. Well, as I've explained, first of all, that appears to be on the basis of a misunderstanding of the nature of the CCNs, which is made manifest in paragraph 57 of the closings.

But it's also, plainly, no good basis for distinguishing a particular generation of uncertainty or competitive concern in the market.

"That change could only be altered, removed or avoided through the actions of a third-party regulator or court, further decision by Royal Mail to withdraw the change."

That's true of all pricing announcements, if you strongly intend to go ahead with them. Unless you change your mind or somebody intervenes to stop you, that would be true more generally.

Then it talks about the purpose of the CCNs being to enable adjustments. It's also to enable challenges.

And then (c):

"The fact the period was also intended to allow an operator to raise a dispute, if they considered, did not, as further discussed below, relieve Royal Mail of its responsibilities as a dominant undertaking ..."

Well, that's true and has never been disputed.

"... or mean that a rational operator would simply

ignore the implications of the changes in their business planning."

Well, we're not saying that that would occur either, but there's a big difference between the question whether or not you ignore the possibility of pricing that had been announced, but is subject to a suspensory provision, and treat it as the pricing itself for a purposes of assessing the likely effects.

Then there are references to AstraZeneca, and this is where it's suggested that because, in paragraph 360 of the General Court's decision as echoed by the Advocate General in the Court of Justice, the restriction of competition in AstraZeneca would only occur in the basis of a series of other contingencies.

That meant that in that case there was still abuse. It doesn't tell you anything about the situation here, because of course, what is being done here is that Royal Mail has put in place the suspensory provision, and what we're focused on is whether or not, when we're assessing likely effects, we're assessing the likely effects of simply the notice to change in the future, or the pricing effects which have been done in the preceding sections.

Then if we go to 7.211, we reject Royal Mail's arguments to the effect that:

"At the point at which the price differential was introduced, rational economic operators would not have responded or altered their behaviour at all if they considered the price differential to be unlawful on the assumption that a complaint would be made, an investigation opened, and a differential suspended.

"As a matter of law, the existence of contractual provisions allowing for unilateral price changes to be suspended does not relieve Royal Mail from its special responsibilities as a dominant undertaking."

Well, we accept that. But that is just not to the point here, when you're talking about likely effects.

"Further, in any event, we don't expect rational operators would behave in the manner contended for by Royal Mail's submissions in this regard are unrealistic."

Well, we'll come back to that, because clearly we have had evidence that the way in which you should look at this, both from Mr Parker and Mr Harman, is that you would be considering the impact of uncertainty.

Now, there may be a range of ways that one can assess that, whether it is probabilistic or strategy uncertainty, but that undoubtedly is a different matter.

Then I think we get to the key point here, which is in 7.224:

"In this regard (a) operators knew that the price differential or other parts of the CCNs could be suspended."

Agreed.

"The price differential was in fact suspended ..."

Agreed.

"... in the sense that the CCNs were suspended and therefore the price differential never came to be implemented. This does not mean, however, the introduction of unlawful prices would be incapable of having any anti-competitive effect on the market."

Now, again, a very strange sentence. That would mean that the introduction of unlawful prices would be incapable of having any competitive effects on the market. So again, what's being said here is these suspensory provisions and the fact that they were known about by everybody, that didn't mean that the unlawful prices would be incapable of having effects.

Then we get to 7.224(a):

"We note that the findings made in 7.217 to 220 above, it's clear that once the price differentials were introduced through the CCNs, that operators couldn't simply ignore their implications based on their own views as to the legality of the price differential and their anticipation of an investigation. The provision

of access by Royal Mail is an indispensable input to the services provided. In circumstances where an unavoidable trading partner has announced the price terms on which it intends to operate, a rational operator would not proceed on the assumption so that the price differential would have no implications for them."

We can understand that would be the case. You would not assume that the price differential could have no implications for you. More exactly, you would take into account the question of how you consider the generation of uncertainty by announcements of all sorts, including, in particular, the CCNs.

"This would be particularly the case in circumstances where an operator was considering making significant investments in the market which involves decisions as to what risks to incur in the light of projected future profits. Operators would have to consider the risks, if any, to their business plans on a number of scenarios. One, are complaints not made? Complaint might not give rise to an investigation. Even if Ofcom decided to investigate, the complaint would inevitably take at least some time to be resolved, giving rise to uncertainty, for the outcome of the investigation couldn't be predicted with any confidence."

Then (b):

"For the same reasons, even after the price differentials implementation was suspended, it is reasonably likely that the acts committed by Royal Mail would have continuing effects on the market."

"Forward-looking business planning has to take into account the potential costs and risks to the business."

Now what we see here -- and then we go on, at (c), further support in relation to this. And then:

"The fact that even after the price differential was suspended, the Royal Mail made it clear to the market it intended to begin charging the price differential as soon as possible to do so, and then withdraw them later."

And then 7.225 is the allegation of outsourcing.

But what we see in relation to all of this is that the main thrust of the assessment of effects is in the first part of section (e), and in 7.224, what we have is Ofcom saying, "If you're going to consider the announcement, the notice, the threat of pricing, you would have to go through a complex assessment as an undertaking to assess what the potential impact of that was on you."

The key thing there is that sort of exercise is the sort of exercise which would be indicative of any likely

effects of a notice, announcement or threat. But that is not what is done in the decision.

In other words, here Ofcom is highlighting that that's the sort of analysis you would need to do, but they don't do it. All they do is they look at the pricing as if it were implemented, 100% certainty of that, in circumstances where plainly a business operator would not proceed on that basis.

Now, they try, in their closing, to say: well, this is what is going on. And this goes back to the question that, Mr Frazer, you raised with me earlier. In other words, what they try and say is: "Oh, well we thought about the likely effects of the pricing if it was implemented, and we noted that the clauses weren't suspended, and so we were taking into account the effects of the CCNs, not the pricing here."

But that's not what's done, because if you're taking into account the effects of the CCNs, you have a very different exercise to undertake, an exercise that is being pointed at in 7.224, but is not then undertaken.

The reason this matters -- and we've explained this quite extensively in our written closings, and if I may ask you to just take those up, because I'm going to direct the Tribunal to the relevant paragraphs without going through it in great detail.

Picking it up at page 18, paragraph 73, what we articulate is that this indication in 7.224 actually carries with it a whole series of problems. If you're going to go down this route of identifying what the likely effects of an announcement or a notice or a threat are, you have real issues as to what the relevant limiting principles are in the assessment of any such abuse. That's what we articulate in paragraph 73 onwards.

Mr Holmes himself was quite properly cautious about drawing any lines. We highlight that in 74. But never mind Mr Holmes's caution. What has to be recognised is that the fact that, in this case, the pricing intention was under a regulated scheme given by way of a notice that would come into effect at a future date is not a distinguishing factor. And what then you're looking at is identifying the criteria for a dominant undertaking, increasing uncertainty in the market by its statements.

We say that even if, in principle, Article 102 can admit of such abuse, there is no clear limiting principle, and there's none set out by Ofcom in this decision to as how that works, because of course, as we highlight in 74(c):

"A dominant undertaking may simply make a public

statement that it's taken a decision in principle to change its pricing in future."

Indeed, it may make an announcement and then say it's going to robustly defend that position in court proceedings. It may make it very clear that it's going to defend it, because it thinks it's right, but actually, as we know from cases such as ITT Pro Media, and that's just in authorities bundle 5 at 559, of course defending a position in proceedings is not itself, save in very exceptional circumstances, to be treated as an abuse.

PROFESSOR ULPH: Can I just ask a question? Going back to this distinction between strategic considerations and other forms of uncertainty, would you accept the possibility that some types of announcements actually reduce uncertainty? Because it demonstrates a commitment by a particular party to a course of action, and that commitment part is actually giving a signal to the market that something definitely happened, which before wasn't there, in the absence of that commitment?

MR BEARD: Well, it's of course true that a statement made by a dominant undertaking could be seen as reducing uncertainty. If you have situation where it is expected that there were going to be annual price changes, for

instance, and it said "Well, this year we're going to use CPI as our metric for moving prices up", then that would reduce uncertainty in the market as to the extent to which you would expect prices to change in future, yes. So on that basis, one can accept the proposition that I think the further step that you implicitly included, Professor Ulph, is the fact that it becomes determinative of what is going to happen, is going further, in those circumstances, than is necessarily appropriate.

But even if the analysis were to say: "Well, we want to look at the extent to which the statement makes it certain that something will occur", then that is one of the factors you would take into account in assessing the likely effect of the statement itself.

Those things would have been considered in the round, given the context, given the particular announcement, given the position of the announcer and those in the market.

PROFESSOR ULPH: My point was simply that the way you presented the arguments up until now was (inaudible) in terms of increasing uncertainty, whereas certain types of actions by players and games can actually reduce the uncertainty.

MR BEARD: Yes, well that's obviously --

PROFESSOR ULPH: That's what gives them their power.

MR BEARD: Yes. I think that's obviously true, that you can of course have situations -- you get it in circumstances, for instance, of tacit collusion, where you have a situation where there is a sufficient meeting of minds to amount to an infringement in those circumstances, potentially. And that can be by those sorts of statements being made. So, yes, I'm not demurring.

I think the point I'm making here is that when we're assessing what are the likely effects, what we can't do is treat the pricing that is being announced in the future as generating the same likely effect as an announcement as to pricing in the future. And what we say is that Ofcom have carried out the former exercise in the first part of section 7. They advert to the possibility of the second exercise in this paragraph 7.224, but then don't carry out any such exercise in relation to the assessment of likely effects in the decision.

THE CHAIRMAN: I should have said at the beginning, you may take it that we have read your submissions very closely.

MR BEARD: Yes. I am sorry. I didn't for a moment doubt the tribunal. Indeed, that was why I was going to refer to it: in order to speed through this.

So absence of limiting principle. And, as I say, we give some examples of why that is problematic.

If we then go on to the page 21, paragraph 80, no assessment of the uncertainty generating effect specific to the CCNs, or the likely effects of the CCNs, if we're also talking about certainties being -- or uncertainty being reduced.

I think the reason we refer to uncertainty is because of the approach that's been adopted by both Mr Harman and Mr Parker in analysing these matters, where there's actually a great deal of agreement. There was no challenge to Mr Parker's approach from Mr Holmes in relation to this, and we don't see anything in the closing challenging Mr Harman's approach in that regard.

We see that noted on paragraph 81, where I raised with Mr Parker whether really the way that you looked at these things was looking at a delta of uncertainty, and that was the way he accepted they should be dealt with, and that is consistent with Mr Harman's approach.

What we also identify, in relation to the sort of exercise that one would need to do in order to identify the likely effects of the CCNs, is also consider and isolate the impact of the CCNs from other factors, some of which would be in the terms of Mr Parker and Mr Harman generative of uncertainty. And that, of

course, would include, particularly relating to the price differential, the prior announcements that had been made in relation to these matters in 2012, in the ICO, and then more close to the date of the CCNs themselves in December.

Now, of course in opening, Mr Turner was trying to suggest that actually you should see this as a continuum of uncertainty generation. He wanted to wrap in the December announcements. Now that's plainly not the way Ofcom have dealt with these things, but what Mr Turner's submission in this regard reveals is the problem of focusing only on CCNs and not carrying out a proper analysis of their likely effect, rather than the likely effects of the pricing.

I should say that not only would Mr Turner's approach be a very different decision, but it would indeed undermine, so far as what we're focused on is Ofcom's decision, the actual impact or the likely impact of the CCNs, because insofar as the concerns in the market, whether it's certainty or uncertainty, depending how you want to put it, are generated by that announcement in December -- so it's not the absolute level of the price differential, it's the fact that it's being proposed -- then, in those circumstances, it further undermines Ofcom's decision, which doesn't look

at those as part of the relevant conduct.

So we highlight, in these sections, the difficulties, then, of identifying the nature of the other factors, the source of uncertainty and the degree of uncertainty or impact that these matters have. And one particular issue we highlight in paragraph 92, in the light of the evidence given in particular by the Whistl witnesses, was that their concerns were much more broadly concerned with general regulatory uncertainty in the market. I think it was Mr Polglass that emphasised that one of the concerns was there could be further changes made, or another differential, or another price change put forward. And that was the sort of thing that really troubled him.

Indeed, of course that's what we see in relation to those answers from LDC in relation to the final investment decisions: that they are concerned more generally about the lack of clarity, about what sort of changes and conditions there exist in the market. But again, that does not suggest that the CCNs themselves are somehow to be seen as creating the likely effects that the pricing itself would do. Indeed, it suggests that actually the concerns are much, much wider than this particular pricing in itself.

Of course, we raised on page 29, just above

paragraph 96, the fundamental error that there is no consideration at all, in Ofcom's assessment, as to the limited likelihood that the CCNs were going to be implemented, which is something that Whistl took as read, and clearly Ofcom was clearly alive to, insofar as we can see that from the materials from Ofcom that have been disclosed.

Ofcom didn't at all analyse, for example, Whistl's perceptions of the likelihood of the price differential being implemented, notwithstanding their focus on Whistl and the impact on Whistl, which is something we highlight at paragraph 97.

We also note that what is failed properly to be assessed is the consequences of the uncertainty generated by the CCNs in terms of generating delay, rather than necessarily impacting on the final investment decisions, and the fact that delay in a roll-out, delay in the implementation of a business plan, is the sort of matter that is very common in relation to entry and development of a company. And in those circumstances, it would be imperative that there was a proper explanation of how those matters were to be dealt with in the assessment.

So in those circumstances, I think to go back to the question that Mr Frazer raised, what we have here is

undoubtedly a focus on the effects of the pricing, and then a lack of translation of that into the exercise that is required in order to identify the likely effects of the CCNs themselves, which are the focus of this decision.

As Mr Matthew said in answering questions in cross-examination, so far as he was concerned, it didn't matter whether the CCNs were not suspended for a day; that would be sufficient to give rise to all of these effects on his case. We say that is plainly an unrealistic way to deal with these matters.

THE CHAIRMAN: Sorry, I thought you answered my question to the effect that that would actually then bring in the normal price discrimination analysis?

MR BEARD: I'm sorry, perhaps I misunderstood your statement, Mr Chairman. I had understood your point to be about the implementation of the pricing.

Mr Matthew's point was that if the CCNs had been announced on 10th January and suspended on the 11th, he would not change his analysis one iota in relation to these matters.

THE CHAIRMAN: I see.

MR BEARD: So that's a slightly different position.

THE CHAIRMAN: Slightly different.

So am I hearing that you, on what has been presented

in the decision, your case is that they simply applied the wrong methodology. They shouldn't have looked at it as a price discrimination case; they should have looked at it as a price announcement case, and that it might have been better dealt with under regulatory powers anyway? Is that what I'm hearing?

MR BEARD: That is certainly part of what we say, but I think, as I've tried to summarise by reference to the closings, dealing with this as a price announcement case would require a different sort of analysis.

THE CHAIRMAN: I understand that. You're saying they haven't done that?

MR BEARD: They haven't done that. And they can't then substitute this on the hoof in the course of these proceedings. They had, in 7.224, an indication of the sorts of things that they then needed to explore, but given the difficulties of identifying limiting principles in relation to these matters, and the practical issues of how you carry out the assessment, those are all matters that would need to have been put forward in the SO in order that we could have responded to them, because that is a different decision from the one that we see on the face of this decision.

THE CHAIRMAN: Is that ground 1, then?

MR BEARD: That is ground 1.

THE CHAIRMAN: Will we do ground 2 before lunch?
MR BEARD: Yes, let's do ground 2 before lunch.
Again, I will, if I may, refer to the --
THE CHAIRMAN: I was going to say to you, Mr Beard, I know we've expressed our views as to how you allocate your time. It would be quite useful to us to hear what you have to say on ground 6.
MR BEARD: Yes.
THE CHAIRMAN: Don't let that be squeezed --
MR BEARD: No, I'm going to focus on ground 3 and ground 6 this afternoon, and probably direct the Tribunal more to our written submissions on 5 and 4. In relation to 5, I may well be able to pick it up briefly when I deal with the materiality issues, because what we say is essentially the materiality exercise was clearly critical to the way in which they carried out the likely effects issues, and that was therefore important as to why it was that those figures were disclosed.
So very briefly, on the no improper discrimination grounds, I'll just zoom through the points we have made in relation to this.
The first point is that it's plain that the three price plans we're looking at can be seen as differentiated products.
Whilst they all involve the provision of similar

services in the sense of delivering bulk mail items from Royal Mail's inward mail centres to their destinations, they're different products which reflect different underlying distribution profiles and demands for different customers. There's essentially progressively greater flexibility across the three price plans, and ultimately individual customers will choose the price plan that best matches their demand and profile requirements.

Obviously, choosing your plan involves some sort of trade-off between flexibility and fixed per unit costs, but as Dr Jenkins explained Day 7, page 77, lines 10 to 20, this type of product differentiation which can be in some ways referred to as a form of value justification, can be beneficial and output expanding. In the context of differentiated products, differential pricing is simply to be expected. It's not automatically indicative of discrimination or improper discrimination, as was touched on in exchanges.

There are all sorts of other examples of products and products and product differentiation that are typically considered benign, such as differential time-of-day pricing, which I think Professor Ulph raised -- mentioned at one point in consideration.

Ofcom's approach to the decision simply ignores the

complex requirements and characteristics of customers, and simply asserts that the actual transaction being undertaken between Royal Mail and its access customers was equivalent, in all material respects, and in a decision, and focuses on the trajectory of single letters.

Mr Holmes, in opening, said that applying common sense, it's clear that price differential leads to different terms being applied to different transactions that are equivalent.

But common sense -- I mean, apart from the (inaudible) can be your collection of your prejudices at age 18, it doesn't actually tell you very much about how you assess whether or not different sorts of transaction are equivalent, and in particular, whether or not it is appropriate for a limited range of price plans to be offered which have degrees of flexibility that do reflect demand that exists in the market.

We say that the logical starting point for any discrimination analysis is that differentiated products can be expected to be priced differently, not identically. And therefore, it's for Ofcom to establish why any sort of uniform pricing across differentiated products offering is actually required in this case. The fact that, as an incident of previous regulatory

intervention, the prices of the national plans, although on different conditions, were identical, doesn't mean that that is an appropriate working assumption or approach here.

The second point that we've highlighted in our written closings is --

PROFESSOR ULPH: Can I just make one point at this stage?

MR BEARD: Of course.

PROFESSOR ULPH: It's not enough, when you're thinking about different differentiations, just to point to the fact that there are differences between products.

MR BEARD: No.

PROFESSOR ULPH: It's also important to go on and show that those can be sustained as a price of difference in the market, and the market will bear a price differential --

MR BEARD: Yes.

PROFESSOR ULPH: -- for those, and that analysis would need to be done to show that in some sense, this was innocent product differentiation.

MR BEARD: Well, I am not sure that one would necessarily put it in those terms. I think what we do have are a series of price plans which have been developed which had different conditions attached to them. At a very simplistic level, you have groups of customers that select the different price plans. There are some on

ZPP3, some on APP2, and there are some on MPP1. In those circumstances, given that different conditions exist, and given that you do have demand for those different prices -- price plans, and in those circumstances your starting point would be that it is pricing that MPP1 and APP2 are identical. It is of course correct that in those circumstances, if you're carrying out a more sophisticated analysis as to how discrimination works, the sort of exercise that you're talking about might be appropriate. But it's not the sort of exercise that should be suggested that Royal Mail should have to carry out in relation to these circumstances. What it was doing was looking at the differences that existed in the terms between the price plans when it was looking at these issues and considering the difference in value to customers.

But as I was coming on to also say, of course it did actually look at the cost benefits that would exist to Royal Mail for introducing, on top of this, the existing differences in the price plans, a further forecasting requirement in relation to MPP1. Of course, the introduction of that forecasting requirement was the basis on which the cost justification analysis was carried out.

PROFESSOR ULPH: Just before you proceed to that, could

I make a second point about the value justification. You talk about customers.

MR BEARD: Yes.

PROFESSOR ULPH: One of the important points here is that Whistl was both a customer and a competitor --

MR BEARD: Yes.

PROFESSOR ULPH: -- of Royal Mail's, and that gives you a rather different flavour to how you think about whether this is innocent product (inaudible).

MR BEARD: Well, I can see that in circumstances where you're looking at competitors as well as straight customers, in terms of the analysis of discrimination, I think you'd be looking at the difference between primary and secondary line discrimination or whether it's a hybrid in category terms.

I'm not sure those labels assist, particularly, but nonetheless, we would recognise that it is an additional factor in this. But when we're looking at the price plans, it's also slightly dangerous to be too solipsistic from Whistl's point of view. Although it was the largest of the APP2 customers, it wasn't that there was only Whistl on APP2; there were a series of other customers who valued APP2 as well, and chose APP2 as well as MPP1 or ZPP2.

So yes, you're right that Whistl was in a different

position from those other customers, but was there demand for the price plans? Yes there was, beyond the demand from Whistl in these circumstances.

I'm not sure if that answers your question, but I think it's a long way of saying yes.

PROFESSOR ULPH: Okay.

MR BEARD: So I was just touching briefly on the costs justification analysis. I've already indicated that there was extensive analysis. Mr Holmes' proposition that these are ex post considerations is just not a realistic way of distinguishing these things. In circumstances where Royal Mail was exploring ways to increase its profitability and saw, between its two national price plans, both value to customers differing, but also the potential for there to be cost savings, particularly in relation to the forecasting on MPP1, exploring that justification was entirely sensible and appropriate and consistent with both regulatory and competition law considerations.

There is no demerit in the consideration of those justifications then being explored further, subsequently, by experts, and in particular --

THE CHAIRMAN: I think the argument, as we've heard it, as I understand it, is that it is one thing to look for aspects of the business that would justify

a differential pricing arising from cost benefits.

MR BEARD: Yes.

THE CHAIRMAN: Another is to decide on a differential and then see if you can justify a reference to cost benefits. That's the dispute, isn't it?

MR BEARD: But here the issue was always the -- well, in relation to the value justification --

THE CHAIRMAN: You're saying that both processes went on in parallel, and that doesn't therefore -- (overspeaking) --

MR BEARD: It doesn't tell you anything, but it's more than that, because of course the value justification is looking at the price plans as they are, and considering whether or not there is value. And that was a differential value to customers that should properly be reflected in differential pricing. And then the cost justification was always focused on these forecasting issues which had been trialled back in 2012, albeit at that time they'd been with additional volume commitments. What was being considered was, rather than straight volume commitments, a lesser forecasting requirement. So in fact Mr Holmes is wrong, as a matter of chronology. Those issues to do with forecasting were very much alive within the mind of Royal Mail well before this exercise of analysis was carried out in --

or started in June and July 2013.

THE CHAIRMAN: I suspect we're going to have to do eligibility after lunch.

MR BEARD: I'm sorry. Yes, I will be brief with it, yes.

THE CHAIRMAN: I'm sorry to bang on, but I must emphasise again we have read your submissions. Very clear. But not every point can be of equal value, I suspect.

MR BEARD: No.

THE CHAIRMAN: And really it would help us most if you emphasised to us which points you really want us to focus on, rather than taking us through every one.

MR BEARD: I certainly will.

THE CHAIRMAN: Two o'clock.

(1.02 pm)

(The Short Adjournment)

(2.00 pm)

THE CHAIRMAN: Mr Beard.

MR BEARD: Yes, ground 2.

I was just touching on the costs justification issues, I won't go through those in any detail. They're dealt with in our written submissions.

THE CHAIRMAN: Indeed.

MR BEARD: We do note that in fact what is really being said is not so much that the cost justification doesn't exist; it's that it should have been extended to other

parties, and to APP2, essentially. In other words, that even if forecasting could offer the cost justification, you should have given people on APP2 the option of providing the forecast material. And that's described as a design flaw.

Now we say first of all that is very different from saying there's no cost justification. Second of all, it's important to bear in mind that there are a range of APP2 customers. As I indicated when we went to the 10th December meeting, Royal Mail's reasonable view was that they were unlikely to be able to provide the relevant material. And indeed, it is interesting that of course Whistl itself didn't want to provide that material, both because of the sensitivity in business terms but also because it would deprive it of flexibility.

So I've dealt with the price differential and cost differentiation issues very briefly. We've also got the point that's been raised that MPP1 would have been available to a direct delivery entrant. Of course there are two aspects to that issue.

The first is the question whether or not, by reason of arbitrage, you could have been able to be on MPP1, notwithstanding the fact that you were engaged in direct delivery operation.

Of course, the evidence provided by Whistl is that they didn't engage in arbitrage and didn't want to engage in arbitrage, and thought it would all be terribly difficult.

What we saw from the figures in that coloured chart that is, just for your notes, in the overflow bundle at tab 17, was that even in 2013 and 2014, Whistl was engaged in arbitrage, albeit for particular of its customers, but nonetheless taking mail from certain of its customers and running it through ZPP3, in circumstances where, of course, it had signed up on a contract where it ensured that it could have access to more than one pricing plan.

And as we see from those charts, you'll remember, the growth in arbitrage accelerates quite substantially very quickly and, in those circumstances, the argument that arbitrage was not available had not been countenanced and would be infeasible should not be accepted.

The suggestion --

THE CHAIRMAN: Is that really arbitrage, or is it just using multiple plans?

MR BEARD: It's certainly using multiple plans, but by --

THE CHAIRMAN: Arbitrage has a sort of sinister connotation to it.

MR BEARD: I'm not sure that it necessarily needs to. Arbitrage doesn't have to have a sinister connotation because, here, it is just using different plans, in other words putting a volume of material that would move you away from the national criteria for surcharging on, say, APP2, running that volume through ZPP3, thereby avoiding the surcharges on APP2 is a form of arbitrage. I don't think there's any issue about that.

PROFESSOR ULPH: I think the point that was being made by Whistl, or by the witnesses, was that you could do that at a small scale for small customers, you could do that relatively easily, but to do it at the kind of scale that Whistl was operating at, you need sophisticated computer programs to determine which bits of mail go through which pricing plan, and that just wasn't available at the time.

MR BEARD: Well, certainly it appears to have become available very quickly, because the growth in arbitrage in these terms accelerated, clearly, and what we see beyond 2013 is actually how different categories of customer were able to be moved on to different plans, because that's what the colour-coding -- I'm sorry, different areas could be moved on to different plans. That's what the colour-coding shows.

So what we see is a rapid growth in arbitrage

from 2013 onwards. No doubt there would be certain issues concerning practicality, but we say that the figures suggest that actually this was entirely feasible in the circumstances.

More particularly, the suggestion that Royal Mail objected to arbitrage and it would be stopped is clearly not borne out by those figures at all, and indeed, as I think is probably common ground, in order to put restrictions on people using different contracts, one would need to modify the terms of the contract itself, and in those circumstances, of course, we would be going through a change notice process, which itself would be scrutinised.

We say that, yes, arbitrage was available and Whistl's protestations in this regard are overstated. More particularly, given that we are talking about a decision and not merely a submission by Whistl here, the question is: has Ofcom properly considered these issues? And we say not.

The next point is in relation to the eligibility criteria. We've obviously set out in our written submissions the relevant terms.

In essence, we say that the position is and has been clear that when the terms of schedule 3 of the option A of the access letters contract talks about being able to

prove to your reasonable satisfaction you have a reasonable likelihood of meeting the relevant benchmarks, that is focused on your existing posting; it is not looking at your business plans. There is no suggestion in the contract that you have to start providing business plans. It is not forward-looking in that regard.

In any event, insofar as we're talking about the position of Whistl in particular, there is no doubt that Whistl could have been on MPP1. That is something that was explicitly discussed at the 17th December meeting between Whistl and Royal Mail, and it is not clear that that is actually disputed by Whistl itself.

In any event, if it were to dispute that, it has no good grounds for doing so. The issue then is when you would be required to leave the MPP1 plan, and there -- and this goes to reinforce the proper interpretation of the eligibility criterion -- you are only required to do that when 15% of your annual volume is subject to surcharges.

So, once you're on MPP1, you stay there, and it is not, then, some sort of annual assessment of whether you're reasonably likely to hit the national spread benchmark or the urban spread benchmark. Once you're on MPP1, the only question is whether or not you accede

the 15% annual volume exercise charging. And there is no suggestion that even up to a full roll-out under the primary business plans that Whistl had been putting forward, that there would be any issue in relation to that.

Certainly Mr Harman, in his analysis, in Harman 5, in his assessment at 7.10, looks at how, clearly, even assuming 100% conversion, you'd roll out to 20 SSCs, but looking at less than 100% conversion, you'd be up to 33 SSCs before you hit that threshold, which obviously covers the business plan roll-out terms of Whistl in this regard.

So we say that there is a misinterpretation of the eligibility criterion. The fact that Mr Polglass says that he operated under a mistake in relation to these matters doesn't matter. There was an attempt to cross-examine Ms Whalley to suggest that it was a forward-looking assessment. That attempt is simply, when one reads the transcript, not made out. Ms Whalley was not suggesting that it was a forward-looking approach that had to be adopted in relation to the relevant entry criteria. And the other documents that are referred to in particular by Whistl don't purport to articulate what the contractual position is.

It is notable that in their submissions, neither

Ofcom nor Whistl seek to deal with how the 15% surcharge threshold works, because obviously that exercise charge threshold, which is saying you must leave, or you could be required to leave, doesn't make sense if in fact you are having to give prospective schedules of likely compliance with the MPP1 thresholds, which you may not meet, well below that 50% surcharge threshold.

So, in those circumstances, we say that the proper interpretation of the contract is the one that has been set out. The reality is that Whistl didn't like the fact that Royal Mail made it clear that it could be on MPP1 at the meeting in December. That statement by Royal Mail gave clear understanding to Whistl that whatever its plans, it could move on to MPP1, and, as I say, once it is on MPP1, the threshold for staying there is the surcharge threshold of 15% volumes.

So, in those circumstances, we say the eligibility threshold interpretation is mistaken, and in those circumstances, it is plain that direct delivery entrant could be on MPP1.

Unless I can assist the tribunal further in relation to ground 2, I was going to move to ground 3.

THE CHAIRMAN: Please move on.

MR BEARD: So in relation to ground 3, if I may, rather than going through the specific authorities themselves, I do

want to pick it up in our written submissions, if I may, at page 41, simply because I do want to refer to the authorities that are cited in paragraphs 132 and 133, which raise the important issue of legal certainty in relation to the operation of an ex post competition regime.

The first two authorities are in the RM12 supplemental bundle, at tabs 6 and 8. Sumitomo, we just quote the extract at paragraph 80, it may be the tribunal considers this plain and obvious, but it is there set out by the General Court that:

"The principle of legal certainty aims to ensure that situations and legal relationships governed by community law remain foreseeable. It is a fundamental principle of EU law, and its importance is particularly acute in cases entailing financial penalties and in particular where you're looking at potential criminal sanctions for the purposes of fundamental rights or ECHR analysis."

We cite a recent case from the VAT context, the Salami(?) case, an ECJ case. It is there dealing with EU legislation, but the points made are nonetheless instructive:

"As the court has held on numerous occasions, EU legislation must be certain, and its applicable

foreseeable by those who are subject to it. That requirement of legal certainty must be observed all the more strictly in the cases of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them.

"Similarly, in areas covered by EU law, the legal rules of the Member States must be worded unequivocally so as to give the persons concerned a clear and precise understanding of their rights and obligations and to enable national courts to ensure that those rights and obligations are observed."

In opening, in addition to those cases, I specifically took the tribunal to the Deutsche Telekom case, where specifically in relation to the consideration of the application of the AECT analysis, it was noted that it was particularly important from the point of view of the principle of legal certainty that it's the costs of the dominant undertaking that are taken into account because of the special responsibility that a dominant undertaking has under Article 102, and it's to assess the lawfulness of its own conduct.

So while a dominant undertaking knows what its own costs and charges are, it does not as a general rule, know what its competitors' costs and charges are, and

1 therefore we have a situation where the court is
2 emphasising that it is those costs and charges which
3 need to be used in the context of analysis, even if
4 there might be economic or policy reasons why one would
5 want to look at the costs and charges of others in
6 relation to any assessment in that case, as I say, an
7 AEC assessment.
8 The other point I think it is important to
9 emphasise, and I've touched on it already, is the
10 distinction drawn between schemes of ex ante regulation,
11 where, obviously in advance, conditions can be made and
12 imposed in order to change the way in which markets
13 operate in order to pursue what may be entirely laudable
14 policy objectives. That is very different from the
15 position in relation to ex post enforcement criteria.
16 So whilst both ex ante and ex post regimes may seek to
17 attain the same sort of overall goal, and in particular
18 in the competition sphere, that may well be the overall
19 goal of protecting consumer welfare, constraining market
20 players ex ante will give a regulator much more
21 discretion as to how to act consistently with principles
22 of fairness and legal certainty.
23 But we've quoted from a decision of the CAT, the
24 VULA decision in the bundle 12, tab 3, at
25 paragraph 104(iii):

"The nature of Article 102 as an ex post prohibition regime enforced by significant penalties has a material effect on the definition of an abuse, as illustrated by the CJEU's formulation of a margin squeeze in terms of an EEO standard noted in paragraph 97 above. The absence of those factors in the context of ex ante powers means that there is no reason to limit them by reference to an EEO standard."

In other words, you may have very good reason from a policy point of view, from an economic point of view, to be considering other standards than EEO, AEC standards. That is not objectionable when you are looking at things in terms of ex ante regulation.

It echoes the concern that was articulated by Mr Ridyard in his concurrence article that identified the fact that there may be legitimate reasons, for example a policy desire, to enable or facilitate their less efficient competitors to enter and remain in the market. Ex ante, that policy goal can well be pursued. Ex post, there is a real problem if, in doing so, what you are doing is undermining foreseeability and legal certainty. And we say that is precisely what has happened in this case.

THE CHAIRMAN: Don't you have a number of competing objectives? One is to get the analysis right, the other

is to apply the law correctly. A third one is to provide as much legal certainty as is possible. It's hard to say which one of them is the absolute that has to be observed at all costs.

MR BEARD: I'm not sure it's "at all costs", but we do say the issues of fairness and legal certainty do in the end act as a trump in relation to these matters. We do say that.

THE CHAIRMAN: You do say that, yes.

MR BEARD: Because otherwise you end up with a situation where you can have people being made subject to criminal sanctions without properly being able to decide, on an informed basis, whether or not what they are doing is lawful and will incur a sanction or not. And that cannot be fair. It's for that reason we say we do say it is important.

Yes, we recognise that there is a desire for making sure one gets the right answer, albeit quite what "right" is in these terms may well be a matter of some debate, but in those circumstances, we do say, and I'll come on briefly to deal with it, that for instance, if one were to say that, overall, net consumer benefit, a detriment to consumer welfare by certain sorts of conduct, might be seen as a right answer to the analysis of a particular course of conduct, it would plainly be

unfair and inappropriate to impose that sort of standard upon a dominant undertaking, because it cannot possibly carry out the sort of analysis that's required in order to reach that conclusion.

And we say, therefore, even if you were to say that's the right answer in economic terms, we say that is the wrong answer in legal terms here.

One other observation we make in our written submissions is of course that talking about matters being assessed in the round does not assist Ofcom. As we'll come on to see in the decision, Ofcom misrepresents the position adopted by Royal Mail in relation to the manner in which one should assess pricing practices.

We very much adopt the approach that has been required in the light of the CJEU's judgment in Intel that the conduct in question must be assessed by reference to all the relevant circumstances, but what we reject in terms of Ofcom's in the round or the circumstances approach is unduly broad discretion being introduced, and the effective ignoral of the AEC test.

Now Ofcom at various points in its submissions say: no, no, no, we don't ignore the AEC test, we just say it is inapplicable and irrelevant here.

We say it is not inapplicable and it is not

irrelevant. It is a relevant circumstance and that is clear from the law.

In any event, you'll have seen from our written since that the way in which we've dealt with these matters is to explain in section A of our ground 3 analysis why Ofcom's in the round approach is flawed. In B we've talked about how its reliance on materiality, which are the early parts of section 7(e), are the only quantitative analysis that it's carried out and we say are flawed. Section C explains why Ofcom's approach is contrary to precedent and D picks up some of the criticisms and interesting discussions that have been undertaken in relation to the AEC test itself, many of which, as we point out, are criticisms or comments that could be made of an AEC test which is implied in relation to a whole range of conduct, for instance conditional pricing practices and margin squeeze as well.

THE CHAIRMAN: Are you going to explain your footnote 96?

MR BEARD: Yes, I am. I'm going to do it by referring to the decision and the extent to which the criticisms of the AECT are not dealt with in the decision and therefore only come out in the course of --

THE CHAIRMAN: Picks up the exchange we had this morning. You're not suggesting that because points arose from the

hot tub discussion, that we are not allowed to take account of them?

MR BEARD: No. You can undoubtedly take account of them, but in relation to these matters, the question as to the criticism of the AEC test, which we see now being developed in a completely different way by Ofcom, for instance, in its annex to its closing submissions, goes way beyond the basis for the decision. In those circumstances, we do say we're getting beyond the position where we're dealing with an argument about whether or not the focus in the decision was justified, and into a different critique of matters.

THE CHAIRMAN: So you're referring us back to whether the decision is justified or not.

MR BEARD: Yes, we are --

THE CHAIRMAN: You're not seeking to limit our ability as a tribunal on a full merits appeal --

MR BEARD: To consider --

THE CHAIRMAN: -- to consider these points?

MR BEARD: I wouldn't do that in circumstances where the issues have been canvassed in the hot tub, but this tribunal must of course be careful in circumstances where it is dealing with an appeal in relation to a decision, and the idea that a decision can be remade by this tribunal where there might be scope for argument

and reassessment of various issues if it were to be remitted to Ofcom, means that this tribunal should be very slow to uphold a decision on a different basis from that which has been put forward by the regulator.

Commenting on those issues, of course, particularly when it might assist the regulator on remission, is of course something that falls within the scope of the tribunal's jurisdiction.

THE CHAIRMAN: We may have to come back to this. I don't think it's quite as simple as that.

MR BEARD: Perhaps it's useful to move on and look at the decision and then deal with the arguments in relation to it.

If we take up the decision itself, the relevant section we've already in passing touched on it, and I've referred to it in opening, of course, begins at 7.182 on page 234.

So it begins at 7.182. The summary of the position is set out at 7.184.

"In summary we explain that on the particular facts of this case, Ofcom wasn't required as a matter of law to undertake an AEC test, nor was it relevant to the conduct at issue."

So this is why we say it's ignored because it's said to be completely irrelevant to the assessment. What we

see in 7.184(a):

"EEO tests and other related price cost tests have been found relevant by the CJEU in situations where a dominant undertaking has engaged in low pricing practices, such as selective prices, predatory prices or some types of margin squeeze designed to retain or win new customers. That's not the type of conduct at issue here. Royal Mail raised the price of the price plan that was available to end-to-end customers."

So here we have, although it's in single quotes, I think no one will dispute that the reference to the CJEU finding, that it doesn't apply to low pricing practice situations is not a term of art found in any judgment. It is also notable that it's being applied to selected prices which might otherwise be referred to as discriminatory, and the emphasis here is on the raising of the price being the distinguishing factor.

Then in (b):

"A price cost test of any design would not assist in assessing the likely effects of the particular type of price discrimination in issue here. The price discrimination did not involve lowering any prices that provided benefits to customers. The concern to be assessed is whether, by penalising entry in the manner described earlier in this subsection (e), Royal Mail

made entry into the bulk mail delivery market significantly more difficult, reducing incentives to enter, making entry less likely. It is not alleged that the price differential rendered such entry in the market automatically unprofitable, and our assessment of the effect of the price differential doesn't involve a comparison with prices and costs. The prohibition of an abuse of dominance also protects the emergence of competition by less efficient operators which may still exert competitive pressure on the dominant undertaking to the benefit of consumers."

As we will come on to see, the only reference to that appears to be from post-Danmark II.

"Price cost tests of any design therefore cannot identify the foreclosure effects with which we are concerned in this case."

Then:

"A comparison of the impact of the price differential on an EEO's costs fails to reflect economic reality in the circumstances of this case."

Then that summary is then spelled out, the next several paragraphs, 185 through to 190, the Royal Mail's submissions, and then that summary is spelled out from 7.191 onwards. You've got -- 7.192 is legal. 7.196 -- now there's essentially two parts. One is

emphasising this low pricing practice notion, and the other is referring to the material impact. You can see that in 7.198, in the final sentence, referring back to the earlier parts of 7E. And then third, we've got a description at 7.199 of certain characteristics of the market before going over to 7.200, which talks about why this AEC test and sensitivity carried out by Royal Mail is flawed such as to be irrelevant.

Now, in opening I started with the law, I'm going to come back to it. But it is perhaps just worth focusing on what was the subject of some substantial evidence, both in the hot tub and in cross-examination, which is focused on the second of these criteria, or second of these arguments, which is concerned with the nature of a low pricing practice.

Now, given the amount of time that has been spent on the issue both in the hot tub and subsequently, interestingly, there's very limited commenting in Ofcom's closing on this. Mr Matthew, as you'll recall, at one point suggested low pricing practices could be equate with vigorous price competition. He appeared there to be trying to draw on the language of the European Commission's guidance on enforcement priorities for Article 82. I'll come back to that when I look at the law.

But the critical distinction Mr Matthew sought to drew was between a low pricing practice where he said an AECT was highly relevant and passing that test can be treated as a safe harbour -- and we've given you the transcript references in our submissions -- and a non-low pricing practice, where he said an in the round assessment is to be applied, but it's an in the round assessment in respect of which the outcome of an AECT or any other price cost test is not even relevant, never mind determinative.

So the first observation to make is that where a pricing practice is characterised as an LPP, low pricing practice, Ofcom not only accepts the use of an AECT, but also accepts, importantly, that conduct passing the AECT should be treated as within a safe harbour and it need not maximise consumer welfare. In other words, Ofcom accepts the possibility that customers may be harmed by a low pricing practice that passes the AEC test. We've actually quoted from Mr Matthew, Day 14, in that regard, at paragraph 141.

So what we end up with, with this distinction, is at least two important issues that fall for analysis when we're considering the price differential in the CNNs. The first is how you distinguish between a low pricing practice and a non-low pricing practice. And those are

issues we consider in sections A(i) and (ii) in our submissions that I'll come on to.

The second, if a non low pricing practice is identified, what does "in the round assessment" mean? Should it exclude the consideration of an AECT? And in amongst those issues, of course is the question of whether you can properly identify the conduct in this case as either a low pricing practice or not a low pricing practice, as Mr Matthew asserts.

If I may, I'm going to deal with this relatively rapidly by reference to the closing submissions in writing. So, picking this up at page 45, because it contains the relevant references and quotes. The first point is that this distinction proffered by Mr Matthew and supported by Mr Parker provides no coherent conceptual distinction between the two categories. It leaves us utterly confused as to how you approach these different cases.

And it is a distinction that, on Mr Matthew and Mr Parker's case, has a fundamental impact on how you carry out this analysis.

Neither Mr Matthews nor Mr Parker could come up with any coherent account of how you identify whether or not a conditional rebate is a low pricing practice or not a low pricing practice. We've quoted there Mr Matthews'

attempt, which, with respect to Mr Matthew, does not suggest any sort of clarity or certainty.

He tries to suggest that you can have conditional pricing practices that place heavy downward pricing pressure and some that aren't and some where you might not be sure.

Now, with respect to Mr Matthew, that is just a bemusing categorisation. Conditional pricing practices are often referred to as rebate schemes. Rebate schemes will generally involve what would ordinarily be interpreted as lower pricing being offered at least to some customers, at least in relation to some purchases.

It is difficult to understand what degree of downward pricing pressure he is identifying as meaning that it's a clear case of an LPP. It is bemusing and difficult to understand what cases he's identifying as rebate schemes, conditional pricing practices that are not lowering pricing, and thereby should be a non-LPP. And the grey area in the middle, there is just no idea. There is nothing tractable in the way that Mr Matthew approaches this. It is, with respect to him, an utterly hopeless distinction.

But it's more than that: it is a hopeless distinction that is plainly contrary to the case law, as

we'll come on to. Because when we come to cases like Intel, what we see is rebate schemes that were seen as targeting entrants to try to exclude them from the market. What one might assume, under Mr Matthew's categorisation, would be either grey area or non-LPP, and yet in relation to those cases, we see emphatically the court talking about using an AECT.

Then we come on to margin squeezes which were tested. We referred to this in paragraph 147. Margin squeezes. Well, we've got lots of case law talking about using AECTs in margin squeeze cases, but of course Mr Matthew has a fundamental problem with margin squeeze cases, because one way you can impose a margin squeeze is just to raise your wholesale prices. And he suggested in those circumstances that wasn't a low pricing practice. Mr Parker didn't agree with him on that. So in between the two experts who are propounding this distinction, you couldn't get agreement.

But as it is, what it does is illustrates the fact that this is not a coherent distinction again. Indeed, what is illustrated is the fact that you can have margin squeeze cases that are entirely concerned with, or focused upon, wholesale price increases. We've referred to one at footnote 99, the Wanadoo v Telefónica case: wholesale pricing case, AECT applied. So Mr Matthew

again is just wrong in relation to his approach.

If that's to be treated as a non-LPP, and therefore not subject to an AEC test, that is not borne out by the case law. But more than that, it is entirely confusing.

To be fair to Mr Matthew, he did frankly accept during the course of the concurrent evidence that trying to draw these distinctions between LPPs and non-LPPs is, as he put it, fuzzy, or grey.

He was asked to explain how to identify an LPP. We've set out the quote at 149. Broadly that boils down to: some cases will be pretty plain, some cases won't. And when pressed on these matters about this distinction, whether or not this test was fair and operable, he quite frankly said:

"I'm not sure what you mean by 'fair'. Operable, I agree, it's tricky."

This test, as he puts it forward, is little more than "I know it when I see it".

That is entirely contrary to the appropriate approach for ex post competition law enforcement.

Indeed, what we see in the approaches of Mr Matthew and Mr Parker is a heavy dependence on labelling conduct, which is precisely what recent case law has deprecated as a sensible approach. And of course it's notable that this case is brought as a discrimination

case and yet there's hardly any discussion of discrimination in any of this analysis.

So we say that this distinction that's critically relied on in the decision, in 7.196 through to 7.198, as a justification for rejecting the AECT analysis, and giving it no relevance whatsoever, is improperly vague and unworkable, and, as I'll come on to show, without any basis in authority.

The issue, of course, gets worse when you start thinking about how you apply it here, because Mr Matthew simply makes the assertion that you're dealing here with a price rise. But of course, as was canvassed in cross-examination with Mr Parker, and indeed with Mr Matthew, actually, if you're deciding whether or not the prices being proposed are going up or down, you need to actually look at the counterfactual prices, which of course is something that Ofcom never did.

What we do know is that when Mr Parker, looking at this for the first time as an independent economist, and putting in Whistl's complaint, decided how you should analyse this, he said the right way to do so was to look at it as a conditional pricing practice involving a discount. That was how he saw this.

And that is entirely coherent. But unfortunately, the very fact that you can interpret these changes in

that way illustrates the fact that the distinction in question is not workable.

Now Mr Matthew tried to defend his position that this was obviously a price rise, which is one that, as we've seen in the decision, is something that is emphasised and underlined. He said you don't need a counterfactual where something is a penalty. But with respect to Mr Matthew, that entirely begs the question. He referred to the fact that Royal Mail had a desire to avoid revenue dilution and therefore this was a penalty.

But when tested on the actual documentation, what we saw was Royal Mail board papers saying they didn't want to carry out an across the board price cut. That is not the same thing. It is not telling you whether or not this particular differential price is a rise or a discount. Because of course, in this case, what happened in the CCNs and indeed even if there hadn't been CCNs, there was an increase in pricing. There was not a price cut across the board.

And when tested on whether or not, absent the price differential, NPP1, prices would have been 20.7p an item or 20.31p an item, which is the difference in prices between MPP1 and APP2 for letters under the CCNs, he wasn't able to answer. And he wasn't able to answer because that analysis had not been carried out.

He tried to suggest at one point that you could conclude that this was a penalty, because the expectation was that Whistl would move to MPP1 and that Royal Mail was never expecting the APP2 price to apply in practice. Now, with respect to Mr Matthew, we just don't understand that argument. It doesn't make any sense, in terms of trying to justify an analysis as to whether or not something is a penalty. It's also plainly wrong, because what it reveals is that Mr Matthew was only thinking about Whistl, and he wasn't thinking about the fact that there were other APP2 customers who would be paying those prices.

Then the final attempt was by Mr Holmes in re-examination, when Mr Holmes said, "Ah, Mr Matthew, if you go to paragraphs 3.69 and 3.74 of the decision, doesn't that broadly indicate the differential being a price rise or penalty above the relevant MPP1 prices?"

But it's worth just turning back to those paragraphs in the decision, 3.69 and 3.74.

So this refers to the contract change notices, and 3.69 is just descriptive:

"Following our decision to open an investigation, Royal Mail suspended the implementation of a number of the notified price changes which required suspension [pursuant to 13(8) of the letters contract] in the event

of and for the duration of any regulatory investigation. However, Royal Mail announced that it did not suspend some changes which believe were not subject of the Ofcom investigation. This included the annual RPI-related price increase and it's reallocation of some postcode sectors between zones."

Then the CCNs were later withdrawn.

Then 3.74:

"The notice period for these changes was to conclude on 31st March 2014, however Royal Mail suspended them on 4th March 2014 and reissued spreadsheets on its website to include only the general RPI-related price increase and the new large letters products, ie, it removed the effect of the price differential and the revised zonal tilt."

But of course, critically, what that doesn't tell you is what changes would have been made if these arrangements hadn't been under investigation. Yes, there was a general RPI uplift, but it doesn't tell you, still, whether or not you should treat the MPP1 price as a discount to APP2 or otherwise. The fact that that relative price difference is removed and only an RPI increase is imposed does not tell you about this discount or raise.

Now, in those circumstances, this whole analysis is

flawed. It is based on an untenable distinction, untenably vague. And here it is based on Mr Matthew's sense that this price was a raise, not a discount, without him doing any counterfactual analysis, and clutching, frankly, at evidential straws which do not bear the weight of the conclusion. The conclusion which is critical to the overall analysis.

Now we've gone on in our written submissions not only to analyse the position of the LPP versus non-LPP, and this argument about discount versus penalty, but also to look at the fact that there was no proper consumer welfare analysis carried out, if that is in fact what Mr Matthew and/or Mr Parker was talking about. They cited, on numerous occasions, this article from Professor Salop, which frankly, dealing with a different legal context, is putting forward a very elaborate scheme for consumer welfare, involving assessment of counterfactuals and consideration of a complex weighing exercise, quite apart from the fact that that article is not focused on price cost tests concerned with AEC. It refers to that test but it's not the focus of the comparison.

You've had evidence as we set out at 165 from Mr Dryden about how one should carry out a balancing exercise if you are carrying out a consumer welfare

exercise. And this is contrary to Ofcom and indeed Whistl's submissions that somehow Mr Dryden just ignores these matters and is obsessed with productive efficiency alone. He's not. What Mr Dryden is saying in his reports, in particular in Dryden 4, is that if you are going to go down the route of considering consumer welfare, you cannot just do it by reference to whether or not there's a price rise. You need to look at these things more broadly, because there is a risk to productive efficiency and you just cannot presume that allocative and dynamic efficiency outweigh productive efficiency detriments in these circumstances. And presumption is all there is in this case.

And he makes that point in the context of a situation where it's said Royal Mail is dominant, it is said that Royal Mail is operating as a monopolist, and yet, of course, we have a situation where Royal Mail doesn't actually exhibit many of the characteristics one would expect of a monopolist. It's certainly not in the business of making supranormal profits. As it gets rid of 12,000 people. It is not sitting back the 19th hole of the golf club being casual about its efficiency or quality. In those circumstances, as Mr Dryden emphasised, the importance of considering the break-even criterion when you're assessing issues concerned with

productive efficiency is particularly important.

Now Mr Parker fairly agreed with Mr Dryden that one would need to carry out an overall balancing exercise. What Mr Parker didn't explicitly recognise was that, of course, Ofcom has done no such thing.

We do cite various economists who have looked at these sorts of issues, in particular Professor Vickers who considered these issues in regard to questions of abuse of market power within the European and UK framework, and his emphasis, of course, is that there is a concern that if you allow entry of less efficient firms, you may worsen productive efficiency more than it benefits allocative efficiency, and a proper analysis is then required.

PROFESSOR ULPH: Can I ask a question here? Referring to the Vickers article, he makes it fully clear that there's a distinction between a consumer welfare standard and a total welfare standard.

MR BEARD: Yes.

PROFESSOR ULPH: And he says it's not very clear where productive efficiency fits in this. Productive efficiency I think would have an impact on consumer welfare to the extent that it changes the prices that prevail in the market.

MR BEARD: Yes.

PROFESSOR ULPH: But in and of itself I don't think productive efficiency is part of consumer welfare. I think it's part of total welfare. I think Vickers is fully clear that there are distinctions here and it's not clear exactly how productive efficiency should be treated.

MR BEARD: I'm obviously concerned to defer to Mr Dryden in relation to these sorts of questions, but my understanding is that the recognition by Professor Vickers is that productive efficiency may well worsen the conditions in the market such as it does result in a detriment to consumer welfare, which is why one has to carry out the broader analysis even in relation to consumer welfare. He's not rejecting that as a proposition, as I understand it from his 2005-article.

PROFESSOR ULPH: I think there's a distinction between effects of productive efficiency, which will have effects through prices, and hence consumer welfare, and the proposition that productive inefficiency in and of itself is part of consumer welfare. I think there are two different points here.

MR BEARD: So the latter is a direct effect, and you say is not a direct impact on consumer welfare. The former is an indirect impact. And my understanding is that

Professor Vickers, in dealing with this, is saying yes, but that indirect effect is nonetheless important when you're carrying out the overall assessment.

PROFESSOR ULPH: I accept that.

MR BEARD: I think that the point that Mr Dryden has made, and he may well correct me violently if I misstep, but that in considering these issues of whether or not there is an overall benefit to consumer welfare, you would nonetheless need to be considering those productive efficiency effects as well as the allocative and dynamic efficiency effects, albeit, as he puts it, indirectly in those circumstances.

The key point here is, first of all, there is no such consumer welfare analysis carried on here, it's merely a presumption, and that is not justifiable and is contrary to the way in which Professor Vickers is approaching matters. And secondly, when you are talking about these issues of productive efficiency, it is appropriate, as Mr Dryden has emphasised, to consider also the issues of the break-even threshold that a monopolist will face when it is a multi-product firm in these circumstances.

In the remaining parts of the submissions on this, we deal with various attempts by Mr Matthew to reformulate his case, both orally, as a long quote

involving a discussion of some very grey areas and fuzzy frameworks. It is notable that at the end of that reformulation, at the bottom of page 54, he does appear to drift into the territory -- I'm sure he doesn't intend to do so -- of saying that:

"Actually, in the grey area, if you pass an AEC, that may give you a presumption, to a degree, that if other things don't look particularly objectionable, you should be fine. But if other things do look objectionable, so we're clear it's a penalty not some form of implicit price cut, it's clear you're potentially going to get a large impact on actual competition, you're at risk of being found to have abused your position, it's fuzzy."

But there he is, on the face of it, drifting into the territory of recognising that an AEC can be a relevant part of an all the circumstances test.

We also deal with his account where he reformulated matters in his statement as part of the joint expert statement. We deal with that at paragraphs 170 through to 172, and we explain there how it is that in fact that reformulation doesn't take him any further forward. It doesn't matter whether you re-badge this as a raising rival cost distinction at a low price, practising distinction or, indeed, vigorous price competition, all

of the problems that I have identified remain.

In other words, there is a fundamental flaw in a key part of the reasoning of Ofcom in relation to its rejection of the AEC test in paragraphs 1 -- 7.196 through to 7.198.

I'm going to take a step back and look at 7.192 through to 7.194. This is obviously the legal precedent section that Ofcom relies upon. There is a lengthy legal section, legal framework section, section 5 in this document. Although there are quotes from various points from Intel, the analysis of the key recent case of Intel is limited to say the least. Or perhaps the most.

Why does this matter? Why does it matter that Ofcom doesn't deal with the most recent Grand Chamber case dealing with considerations of anti-competitive foreclosure in pricing practices? Well, obviously it is instructive as to how these matters have to be dealt with pursuant to section 60, but more than that, it casts in a stark light the inadequacy and inappropriateness of this LPP versus non-LPP test.

What Ofcom seeks to do is, by selective reading of the case law, try to limit the impact of Intel, and instead maintain that post-Danmark II, which is the only case that refers this notion of protecting a less

efficient entrant is somehow the appropriate legal approach that is to be adopted here.

Now, during the course of the cross-examination of Mr Parker and Mr Matthew, I took them to elements of Mr Ridyard's Konkurrens article from 2016 which postdated the General Court in Intel, and it referred to post-Danmark II and the preceding case of post-Danmark I. What he rightly identified there was the discussion, the conceptual discussion at a legal level that was going on in relation to these matters.

And what he did was he rightly identified the fact that the judgment in post-Danmark II was intention, both with the previous Commission guidance and with the judgment in post-Danmark I.

But what Ofcom has fundamentally failed to do in reaching its legal conclusions in this decision is it has stuck with post-Danmark II, notwithstanding the judgment of the CJEU in Intel, in circumstances where, in the SO it relied heavily on the General Court in Intel, a decision that has been overturned.

Now it is worth, if I may, just turning Intel up again. It's in authorities bundle 9 at tab 106.

THE CHAIRMAN: I see Intel Corporation were represented by Mr D M Beard QC and by A Parr Solicitors.

MR BEARD: There are imposters all over the place,

apparently.

THE CHAIRMAN: Is that right? Am I looking at the right place?

MR BEARD: Yes.

THE CHAIRMAN: So you were appearing for the appellant?

MR BEARD: I was. That doesn't make my submissions right but it does make the judgment still true, notwithstanding my appearance.

THE CHAIRMAN: I draw absolutely no conclusion from it. I was giving you some free publicity.

MR BEARD: I'm most grateful. [Laughter].

What we see in Intel is an approach by the Grand Chamber not following the position in post-Danmark II. And contrary to Mr Holmes's approach, it is not merely adopting or applying the approach of the Advocate General either. In fact, the court is quite striking in the way that it differs from the Advocate General in relation to a whole range of the appeal pleas, and it does not adopt the same approach as the Advocate General in relation to this plea.

The Advocate General gets into all sorts of more technical analysis about presumptions, and the court does not go there.

What one can see from the findings of the court is that in the context of a case involving a conditional

pricing practice where you had an unassailable incumbent with a huge market share, where there were very, very substantial economies of scale and scope, where there were vast barriers to entry, and where substantial parts of the market were entirely non-contestable, nonetheless, we see the court saying that the appropriate way of determining whether or not a pricing practice is anti-competitive foreclosure or not, should be measured against whether or not it excludes an as efficient competitor.

If you pick it up at 133:

"It must be borne in mind that it is in no way the purpose of 102 to prevent an undertaking from acquiring on its own merits the dominant position on the market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market."

So here we see the key concept that's being used as being "as efficient competitors", because less efficient competitors are not to be protected on the market by way of Article 102. And it is instructive that there the citation is post-Danmark I, which puts forward the same proposition in almost identical terms.

Just for your notes, post-Danmark I is in the authorities bundle 8 at tab 93.

"Thus, it is not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation. See again post-Danmark."

Of course, Mr Holmes and Mr Turner say: ah, yes, but this is about competition on the merits. That's a gating consideration. If it's not competition on the merits, none of this applies. Nonsense. That's not what this case is about. This case is setting down a threshold.

35:

"... recognises the dominant undertaking has a special responsibility not to allow its behaviour to impair genuine undistorted competition on the internal market."

Then 36:

"That's why Article 102 prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as itself and strengthening its dominant position by using methods

other than those that are part of competition on the merits."

So again, it is setting down that threshold. Now, as we'll see in the decision itself, the basis on which Intel is distinguished is narrow. And here we have a situation where the emphasis is on pricing practices, and when one determines whether or not they have an exclusionary effect. An anti-competitive foreclosing effect.

You then see, in 137, reference to the Hoffmann-La Roche case.

In 138:

"The case law [that's Hoffmann-La Roche] must be further clarified in the case where the undertaking concerned submits during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition, and in particular, producing the alleged foreclosure effects."

Now it is clear that the "alleged foreclosure effects" are there referring back to foreclosure effects as specified in paragraphs 133 and indeed 134, where you are talking about foreclosure of an as efficient competitor.

139:

"In that case, the Commission is not only required

to analyse the undertaking's dominant position, share of market, conditions and arrangements for the rebates in question ..."

So these are all part of the 'all the circumstances' assessment.

"... their duration, their amount. It is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking."

Again, it is laying down that as the relevant criterion as part of the 'all the circumstances' test.

It is just worth moving on:

"The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which in principle falls within the scope of the prohibition laid down may be objectively justified. In addition to the exclusionary effect arising from such a system, which is disadvantageous for competition, it may be counterbalanced or outweighed by advantages in terms of efficiency which benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the commission's decision only after an analysis of intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the

dominant undertaking."

So what it is saying there is that if there is an objective justification case under 102 in relation to this sort of practice, it is imperative you've carried out the AEC assessment, because otherwise you can't do that balancing exercise for objective justification purposes. So it reinforces the importance of these criteria here.

Then we see over the page, having done all of this -- sorry, from 142, it notes that:

"The Commission emphasised in the decision at issue the rebates were by their nature capable of restricting competition. It carried out a detailed analysis of AEC tests."

Then at 143:

"It follows that the decision at issue, the AEC tests played an important role and then in those circumstances the General Court was required to examine all of in Intel's arguments concerning that test."

Now what Mr Holmes seeks to do is to essentially sideline those earlier paragraphs and say: well, this was a case where the Commission did the AEC test, the General Court ignored it. That was wrong. In those circumstances, it must go back and look again.

But the point about Intel is it is setting down

a broader framework. It is laying down the answers to the debate that Mr Ridyard described. It's saying if you're picking a horse, you pick post-Danmark II not post-Danmark II. You don't focus on that reference to less efficient competitors in post-Danmark II. You don't focus on the impossibility or otherwise of an AEC arising. There is no consideration here about whether or not you could have an as efficient competitor at scale to Intel. Indeed, it is a predicate of much of the analysis in that AEC analysis that there was a vast part of the market that was entirely non-contestable.

So, in those circumstances, you have a situation where it is not accepting the approach that somehow AECs are optional, and if you can't actually say that an AEC will emerge, the test is irrelevant. It's not focusing on whether or not a less efficient competitor is the relevant threshold. It's not saying that an AEC test is seeking to mimic reality. It is not concerned with that. It is trying to provide a sensible threshold which can be used and provide certainty, necessary certainty. And that's why there's emphasis on AEC defining anti-competitive foreclosure.

It's why it resolves to the AEC and not by adopting some looser, reasonably effective operator test or some other, looser metric.

MR FRAZER: Just to interrupt you, do you think there's any importance in the fact that, in formulating its approach here, there was no -- there didn't seem to be a question in Intel that it was practically impossible for an as efficient competitor to exist in that market, notwithstanding the market features that you've articulated?

MR BEARD: I think it depends what you mean in those circumstances. I think it was a predicate of all the analysis that it was impossible for there to be an AEC, as Mr Parker I think proffered it, that could operate at the same scale as the incumbent. Because the reason I referred to the very high non-contestable market shares was Intel had a very, very high market share and the whole analysis, the technical analysis of AEC was all about to what extent there were non-contestable market shares. In other words, no one could feasibly go after that business that Intel had. So you could never have someone that could actually match Intel for scale.

In other words, the predicate of all the analysis was that you would not have an 'at scale' AEC. The AEC conception there was someone that could efficiently meet -- compete for the contestable portion of the market at the relevant dominant undertaking levels of costs.

MR FRAZER: Which, as I understand it, is the standard approach to AEC in discount cases.

MR BEARD: Yes, that's right. But the point I'm making is that there was no issue that you could have an AEC potentially for the contestable share of the market. There was no suggestion that you could have an AEC that could have the same sort of scale as covered the whole of Intel's share of the market or the whole of the market.

So if we transpose that to the present case, there is no suggestion by Ofcom or indeed Whistl that you could in principle have an AEC that could deal at certain levels of roll-out across SSCs. The criticism was that it was infeasible to have an AEC that dealt with 100% of the SSCs. So the point I'm making here is, if the criticism in the present case is that you can't have an AEC at 100% of SSC roll-out, that's not a problem for the analysis at Intel because it was only ever focused on a sub-part of demand, the contestable share of demand rather than the non-contestable part of demand.

MR FRAZER: I understand that point; it's just that if you're taking these perhaps to, as it were, as we said before, silently overrule post-Danmark II, I just wonder whether the fact that the court didn't need to confront

the kind of situation that existed in post-Danmark II, influenced the way in which it formulated these rules. In other words, it didn't have to consider the relevance or the feasibility of an AEC, in the terms you've mentioned --

MR BEARD: Well, I'm not sure, with respect, that's correct. Because if the concern in post-Danmark II is that in practice you can't have an AEC at scale because you've got an incumbent, in that case with the statutory monopoly, that means that you're never going to get someone in practice in a reasonable timescale to operate at scale to compete, that would actually be the same as in Intel, because there wasn't any suggestion that AMD would be able to roll out to the scale of Intel and benefit from the efficiencies of scale and scope that Intel had.

Therefore, if the point in post-Danmark II was, absent good evidence that an AEC could roll out to scale of the incumbent and get those benefits, you couldn't sensibly carry out an AEC analysis, you'd have expected that actually to have been mentioned here.

MR FRAZER: Okay. Thank you.

MR BEARD: So if I may, having gone to Intel, I was going to go back to the decision, if I may.

THE CHAIRMAN: Just before you leave it, do you attach any

significance to the fact that the Court of Justice did not make any reference to post-Danmark II, even though it was a recent decision?

MR BEARD: Yes, I do. I say that although --

THE CHAIRMAN: That's their way of saying they departed --

MR BEARD: They picked a horse, yes, and it was the post-Danmark I horse. And they don't need to say, "We are departing from post-Danmark II", because it isn't necessary in the circumstances the way they can spell out the situation. But the key thing is they do keep referring to post-Danmark I. And that's why I put it in the context of the discussion as described by Mr Ridyard, that on the one side you have the Commission guidance and then post-Danmark I, on the other side you have this mention in post-Danmark II; although it talks about AECs, it then talks about this situation if you couldn't have in practice an AEC then you should think about less efficient competitors.

And what this is doing is saying, well, we know all about that. Indeed, the Advocate General refers to it, and it was the subject of questions, in fact, but in those circumstances, what the court is saying is: no, we are not qualifying it in those ways. We're going to the post-Danmark I settlement, and there isn't a need for that sort of qualification. Indeed, it is contrary to

the approach being adopted in Intel to think about the idea of applying a less efficient competitor threshold, because that undermines the very certainty that using the AEC test as set out in Intel provides. Because as we know, if you move to a less efficient competitor test, you start having to get into arguments about precisely what metrics you're using, what degree of lesser efficiency you should be admitting, and how is it that a dominant undertaking is ever going to be able to carry out that analysis sensibly?

Of course, there is one other point in relation to all of this. Just a practical point. This decision doesn't say an AEC is impossible. Not Intel. This decision.

MR FRAZER: I accept that.

MR BEARD: So if I may, I just go back to the decision --

THE CHAIRMAN: You're not asking us to make a reference by any chance?

MR BEARD: The temptation is enormous.

THE CHAIRMAN: The timing would be curious.

MR BEARD: This is acte clair for these purposes.

THE CHAIRMAN: Acte clair? That's quite heroic.

MR BEARD: At this stage, a reference isn't required.

If I may just go back to the decision itself.

As I say, picking up at 7.192, this is where the

legal consideration is dealt with. I highlighted in opening the limitations of the consideration of Intel in this section. Mr Holmes was very keen, and I was going to go there in any event, to make sure we went back to the relevant bits in the legal section, which is 5.105 to 5.107. So if we could go back to there.

Now, in 5.105:

"Royal Mail submitted it is necessary for Ofcom to carry out a price cost test. To assess the effect of the price differential it submitted evidence from its external advisers."

So that is just a summary of what had been done.

And a statement there that:

"Where it's been submitted it's for Ofcom to engage with it and rebut that evidence because it's plainly relevant."

And 5.106:

"With respect to the applicable legal framework, we make three points in response to the arguments made by Royal Mail. First, there's no dispute that in reaching its decision on whether the price differential in the CCNs amounted to an abuse we have to consider the likely effects of the conduct in all the circumstances. What those relevant circumstances are, or the appropriate tools for assessing those circumstances, depends on the

particular facts of this case."

Mmm.

Second:

"Intel doesn't overrule or even address the finding in post-Danmark II as well as in Tomra that a price cost test is neither legally required nor appropriate in all cases."

Well, with respect, that is a misreading of Intel. Because it isn't directly talking about post-Danmark II or indeed Tomra, but it really is spelling out the position that should be adopted in relation to price costs test usage in this sort of assessment. And it is striking, as I took you to in opening, that in the SO, there's an awful lot of reliance on Intel in the General Court, but all of a sudden, when we get to the decision, and that General Court decision has been overturned, it's not a relevant case anymore.

So we don't accept that. Even if it were to be said that it doesn't overrule post-Danmark II, this is the extent of the consideration of those sections in this decision. They're quoted earlier. There is no analysis of them.

MR HOLMES: [Sotto voce].

THE CHAIRMAN: Mr Holmes, you'll get your chance don't worry.

MR BEARD: Mr Holmes is referring to the earlier paragraphs, 592 to 596. 592 to 594 is a description of what is put in Intel. 595 says:

"In Intel, the Grand Chamber was not asked to describe the circumstances on which a price cost test should or should not be carry out and relied upon."

With respect, that's a misreading of the terms of the Intel appeal, because the proposition was being put generally:

"Instead, it was asked to consider whether a presumptive approach could be adopted and the General Court could refuse to address arguments raised by an applicant in circumstances where the European Commission had carried out and relied upon a price cost test in the contested decision. It didn't refer to or address the specific issues discussed in post-Danmark II."

That's precisely what you're seeing in 5.106. It's a repetition often that reasoning. That's why I say there's nothing more here. It's inadequate and it is wrong, but if we go back to 5.106, it is just remarkable. 5.96 is just worth picking up:

"We have therefore considered whether the present case is one in which it would be relevant or necessary to carry out a price cost test."

No engagement with any of those paragraphs. They're repeated earlier, but no engagement with the analysis in Intel at all.

And if we go back to 5.106 you see this mistake being repeated, mistake repeated by Mr Holmes in opening, and that we've already seen:

"Intel addresses a different issue, namely the consequences of the Commission having carried out and relied on such an analysis in its decision for the General Court's consideration of any appeal."

That's just a misreading of Intel. Then at 5.106(c):

"Intel doesn't impose an obligation on a competition authority to carry out its own price cost test ..."

Well, I don't accept that that's the case, but even if that is formally the case as soon as you've got price cost -- AEC test analysis, you do have to engage with it and it is relevant.

"... and/or no obligation to rebut, through a similar analysis, any price cost test put forward as evidence by the concerned undertaking."

So essentially it's saying you can put it forward but we can just call it as not relevant. And that's precisely not what Intel is saying. You do have to engage with it. That's why Royal Mail referred to the

need to rebut that evidence, because it is plainly, at the very least, one of the relevant circumstances that the Grand Chamber of the CJEU has said you need to take into account when you're considering pricing practices.

"There's no dispute that Ofcom has to consider all evidence put before it and address it as part of its decision making but that doesn't translate into an obligation to accept that type of evidence put forward by the undertaking is relevant or appropriate."

Now, obviously there is no dispute that Ofcom should consider all the evidence. And there is no obligation on Ofcom to accept a piece of evidence as correct. But it is not open to Ofcom, in these circumstances, to say that the AEC analysis is inherently irrelevant. That is the key issue here.

THE CHAIRMAN: It comes down to what you mean by "consider", doesnt' it?

MR BEARD: Well, we see what the reasoning is here. We see what the reasoning is here. The reasoning is, Intel dealt with a different issue, post-Danmark II says: oh, well, if you can't have an AEC, you don't need to worry about it, you don't need an AEC test in all these circumstances.

And it just ignores the fact that Intel says: when you're thinking about pricing practices, you need to

look at whether or not there's anti-competitive foreclosure. What is the benchmark? The benchmark, we say, is the as efficient competitor.

Now, we accept, everyone accepts, that there are flaws in the AECT, that there can be criticisms of an AECT in the way it's rolled out, and certainly that it does not try to mirror reality.

It cannot do that. Because the AECT that we're talking about is using the dominant undertakings costs. We know that. Notwithstanding all of that, it is a critical consideration.

Now, it's no part of the reasoning in the decision, but just for completeness you'll recall that in its submissions, Ofcom has now come up with an argument which refers to paragraph 136 of Intel. So if we could just go back to that. This is not part of the reasoning in the decision but it is part of the reasoning in the defence at paragraph 156 of the defence. Ofcom says that 136 should be read as when it says "among other things" in the first sentence, what it means is that you can assess pricing practices using other sorts of criteria and there's no reason or need to consider that reference to an as efficient competitor is relevant to pricing practices.

In other words, rather than the plain meaning of

this, which is Article 102 prohibits a dominant undertaking from, among other things, engaging in pricing practices, it's saying Article 102 prohibits a dominant undertaking from engaging in, among other things, pricing practices that fail the AEC test. And that other pricing practices, even if they don't fail the AEC test, but -- you don't even need to consider the AEC test. And we just say that's plainly a misreading of that paragraph.

What it is saying there is that if you're assessing pricing practices, as you are in this case, Intel, and as you are in this case, Royal Mail, you do have to treat as relevant the question as to whether an as efficient competitor is excluded by the pricing practice.

So I'm just going to zip through one or two of the other points in their submissions so I can move on.

THE CHAIRMAN: Is this a good moment to stop?

MR BEARD: Certainly, yes.

MR TURNER: Sir, before we break, can I raise one process point? I didn't want to interrupt Mr Beard's flow.

He submitted that in Intel, a predicate of the judgment was that rivals, AMD in particular, couldn't be as efficient as Intel as a competitor, and this was because there was a non-contestable part of the market.

MR BEARD: No, at scale, I said.
MR TURNER: At scale, all right.
Which paragraphs or what material is he relying on so that we all have it?
MR BEARD: No, I think I've explained the position -
MR TURNER: If there's any material we would like to see it.
THE CHAIRMAN: I'm sure you can explain it while we're out.
MR TURNER: Yes, he should come back and give us the reference.
THE CHAIRMAN: Thank you.
3.30 pm).
(A short break)
(3.42 pm)
THE CHAIRMAN: Have you been able to reassure Mr Turner?
MR BEARD: I don't know whether Mr Turner is reassured or could be reassured.
THE CHAIRMAN: I'll rephrase that. Have you attempted to reassure him?
MR BEARD: Yes, I've attempted to by referring to what I've already made clear to the tribunal, but that it's the existence of non-contestable share in the analysis in Intel that makes clear that you couldn't have someone at scale within a timely period. So that's the --
THE CHAIRMAN: Have you referred there, referenced that?
MR BEARD: I don't have all the references in the Intel

decision to that on me. I can provide those overnight to Mr Turner.

THE CHAIRMAN: That will be helpful.

MR BEARD: Yes, certainly.

THE CHAIRMAN: Is that okay Mr Turner? Does that help your point?

MR TURNER: I'll take it that's what's relied on.

THE CHAIRMAN: We've got another question on Intel, which is that you told me it was acte clair, and I described it as heroic. Nothing in European jurisprudence remains necessarily the same forever. Has there been any further jurisprudence that might confirm your assertion that Intel overrules post-Danmark II?

MR BEARD: As far as I know, there are no court judgments dealing with these issues. Intel itself is --

THE CHAIRMAN: Is back before the --

MR BEARD: Is back before the General Court. But quite when is not known. So Intel itself maybe.

Ofcom have referred to the fact that in the Qualcomm decision, the Commission decided that apparently -- we've only got a press release, we don't actually have the Qualcomm decision -- that it was either rejecting or it didn't need further to consider AC material put forward in that case. I believe those issues may also arise in relation to Google Android and Google AdSense,

which are decisions which are also, I'm not sure, publicly available, but have been press released and have been subject to appeal, so all of these cases are on appeal, I understand, at the moment.

THE CHAIRMAN: Any Advocate General opinions that could help us?

MR BEARD: No, because these are all General Court appeals. The reason Intel is --

THE CHAIRMAN: I'll rephrase my question.

MR BEARD: I'm sorry.

THE CHAIRMAN: Is there any Advocate General's opinion that you're aware of which references to the possibility of Intel overruling or not overruling post-Danmark II?

MR BEARD: Not so far as I'm aware. The only Advocate General's opinion that postdates this is probably the MEO Advocate General's opinion but that doesn't deal with these issues in that way.

THE CHAIRMAN: I think we should draw your attention to the opinion of Advocate General Wahl in a case involving Ernst & Young in Denmark, and it's paragraph 96. So if you'd like to reflect on that overnight.

MR BEARD: Thank you.

In relation to the other matters, indeed, as I say, Ofcom has referred to and relied upon Qualcomm, it's referred to various articles from Commission officials

which have suggested that you don't need to carry out an AEC analysis in various circumstances, and we recognise that the Commission has not felt warmly, necessarily, towards the Court of Justice's judgment in Intel, and is seeking to limit its impact.

We recognise that. We don't accept the reasoning in those papers and we don't think that they're of assistance in determining this, nor in particular is the speech by Commissioner Asteia(?) in relation to these matters.

We note that quite interestingly, indeed, it has raised many eyebrows, that the Judge Rapporteur in Intel actually went into print about it. And that is an interesting article about which people have been somewhat sceptical as to the appropriateness of, in circumstances where, of course, the CJEU has to give a single opinion, and at may well be that that judge does not agree with the opinion of the entirety, and this is clearly seeking to reinterpret elements of it. We say that is not an appropriate guide or authority.

So far as the materials relied on by Ofcom are concerned, we don't see those as of any further assistance, and the fact that the Commission is seeking to resist the ambit of Intel is neither surprising nor informative, we say, in this regard, and the cases, as

we understand them, are under appeal.

MEO itself also doesn't assist in this respect.

The one thing that we should --

THE CHAIRMAN: I have to say, that doesn't sound like acte clair, that sounds like a moving situation.

MR BEARD: Even if it is not acte clair, in circumstances where at the moment at first instance, certainly application is being made to make a reference, obviously the court can of its own motion consider these matters. We completely understand that. But we say that the position -- in circumstances where one has to look at the terms and reasoning of this decision, and the adequacy of this decision, we say this decision is inadequate dealing with the reasoning in relation to these matters.

THE CHAIRMAN: I understand you're saying that, but we were elevating the discussion to rarefied heights --

MR BEARD: I quite understand, and at obviously Royal Mail cannot say, in the light of the running discussion that was described by Mr Ridyard, that all matters in relation to these issues are settled. That is plainly not the case. That is not the position we are adopting in relation to this.

What we do say is, of course, that the AEC analysis we submitted was relevant. That is as far as we need to

go in relation to these matters. Because what is said on the basis of the legal analysis carried out by Ofcom is that it is not relevant and can be ignored.

Now, Ofcom tries to triangulate for judicial review type purposes and say, well, that was a consideration. We say that is not engagement with the AEC analysis qua AEC analysis. Indeed, one sees that if we go to the decision and we finish off just dealing with decision on these topics.

There's one more piece of law I'll come back to, but since we're dealing with these issues, I haven't dealt with 7.199. 7.199, as I said earlier, is a paragraph that is dealing with the situation concerning the characteristics of the market, and what we say there is that you can work your way through all of those characteristics, so: high barriers to entry, overwhelming dominance, benefits from economies of scale and scope, unavoidable trading partner with control over an indispensable input for scale entrants. Certainly in relation to all of the first key considerations, the Intel position is germane, and it is applicable, and yet in that case, plainly, an AEC analysis was relevant. And indeed, in relation to the indispensable input for potential scale entrants, what we see is that that will be the case. In relation to margin squeeze cases, of

course, all of those criteria will be fulfilled, and indeed, you're an indispensable input for potential scale entrants, and yet again, AEC test is relevant.

So, here, the fact that, in 7.199, "potential entry into the bulk mail market was vulnerable to exclusionary conduct, and that conduct which hindered the emergence of less efficient scale entrants into the bulk mail delivery market might limit the potential source of competitive pressure", that will be true in all of these cases. That's the nature of the situation which we're dealing with in all of these cases.

And so in (c) to say, "Well, an AEC is not relevant in these circumstances", is really just not justifiable on the criteria that there set out in 7.199.

If we then turn on to 7.200:

"Without prejudice as to the reasons outlined above as to why on the facts of this case we don't consider it necessary or relevant to carry out a price cost test, we make the following brief observations on why the analyses put forward by Royal Mail would not appropriately reflect economic reality."

Well, if what you're doing is saying, "We're rejecting the AEC test because the AEC test does something that it doesn't purport ever to do", it's no good reason for rejecting it at all. Because no one has

ever said that the essence of the AEC test is it's trying to mirror economic reality. It can't do that because it would undermine the use of the dominant undertakings costs in those circumstances.

So, in those situations, we're saying that a critique of an AEC test that says: well, you used the dominant undertakings costs is really beside the point, because that's the essence of an AEC test in the circumstances. What it's trying to do is say: well, the AEC test isn't really an REO test.

Well, okay, it isn't. We understand that. But in those circumstances, we say that's not the point, because we know that a dominant undertaking would be in profound difficulty in trying to carry out an REO test in normal circumstances.

And the fact that Royal Mail tried to carry out or its experts tried to carry out a sensitivity analysis but obviously focused on the dominant undertakings cost is far from a criticism of the way in which it operated, and certainly doesn't undermine the value of the test that's being put forward.

So, to say that the AEC test is irrelevant because it doesn't reflect economic reality given its structure and focus on dominant undertakings costs, is essentially just a misunderstanding or a misconception of what the

role of the AECT is.

Furthermore, it is worth bearing in mind, of course, that, as Mr Dryden emphasised, that although the AEC is analysing matters by reference to the dominant undertakings costs, what it does give you is an indication of headroom in relation to efficiency that may exist. And again, if that's what is germane to the analysis, that should have been taken into account and shouldn't have been ignored as irrelevant.

And there is no suggestion here that actually what was done was a consideration of anything to do with the relevant AEC test, or how it could usefully be used to provide relevant information at all. Indeed, I think it was Mr Matthew who recognised that had they been carrying out an AEC test or an EEO test, as he put it, they might have had lots of questions that they wanted to raise. They just didn't do it. They didn't engage with it at all.

Just finally -- so that's (a) and (b) in 7.200, (c):

"Other relevant factors are not considered."

Well, there are a range of points that are made here. The first ones, in (c)(i), are concerned with "the potential entrant and its investors would take into account risk as well as expected profitability".

Well, that is true, but it's also something that is

baked into the metric you are using with an AEC test, because obviously one of the things you're considering is the relevant overall costs and profitability of the AEC which builds in those sorts of risks.

In relation to those matters, just for your notes, Mr Dryden deals with these issues in his fourth report at paragraph 9.15. And in relation to (c)(ii), it refers to the fact that Royal Mail had a number of advantages unrelated to costs, such as reputation, experience and VAT status.

Now, of course, it goes without saying that Royal Mail had a number of burdens that went with its position as well in relation to these matters, but leave that to one side. As Dr Jenkins explained, and indeed Mr Dryden explained, what the AEC is doing is not trying to identify a business model that would be identically efficient to Royal Mail, it's saying that's the relevant threshold. There might be a whole range of ways in which you can actually be more efficient or at least as efficient as Royal Mail, and that those factors are therefore built into the way in which one carries out the AEC test.

The matters concerned at 7.200(c)(ii), for your notes, are considered by Mr Dryden in his fourth report at paragraphs 9.16 to 9.20, and in addition, the

entrant risk and VAT status issues are dealt with at paragraphs 9.5 to 9.10.

So, again, the reasoning there is simply inadequate. The final points are in 7.201, which is a contention that Royal Mail hadn't carried out its own internal EEO test and therefore that is somehow instructive.

What is then said is:

"We consider that an ex post analysis by advisers is not persuasive in circumstances where its conclusions are inconsistent with contemporaneous evidence as to what Royal Mail considered to be the likely impact on the price differential."

With respect, that is completely misguided as a reason for objecting to a test that is recognised as being a relevant threshold in the case law as I have explained. And provides the basis for legal certainty in relation to assessment, not just there, but in future, the fact that Royal Mail failed to do it does not undermine these matters. As we know, in fact, from Dr Jenkins, there was some consideration of these issues before Mr Dryden's report was put forward, but she did not suggest that there was a more general AEC analysis carried out before the price differential or zonal pricing were put in place.

Just whilst we're on this --

THE CHAIRMAN: Is there a reason for that? Just remind me.
MR BEARD: Is there a reason?
THE CHAIRMAN: What was the reason for it not being carried out, given that it is useful and helpful?
MR BEARD: Well, the reason was -- I'm not sure we have evidence on the reason for it, but it's plain that the modelling being carried out was not focused on an AEC analysis, and it was trying to do other things in relation to hypothesising what entrants' costs might be and so on. Indeed, it reveals some of the problems with trying to carry out an REO analysis and any uncertainties that arise in relation to it. But I'm not sure we know the reasons and have evidence on that.
THE CHAIRMAN: Right. Thank you.
MR BEARD: Just whilst -- in passing, I picked this up I think in response to a point raised with Mr Frazer, footnote 1006. I think I took the tribunal to it in opening.

There is no finding here that there would be no AEC possible. As far as it goes, it is saying it could have been practically possible in this case but there is actually no finding in that regard.

THE CHAIRMAN: How are you doing with your timetable, Mr Beard?
MR BEARD: I'm going to briefly now -- I've got to deal with

materiality and, indeed, the issues to do with the value of an AEC test in assessing competitive disadvantage, but in doing that question about the assessment of competitive disadvantage, if I may, I will turn back to our written submissions.

Picking it up at paragraph 202 -- oh, I'm sorry, there is an issue I need to pick up at paragraph 199, which is just the use of the guidance or the obvious non-use of the European Commission guidance.

These were matters that were put in cross-examination. It was suggested to Mr Matthew that he hadn't, and Ofcom hadn't had proper regard to the relevant paragraphs of the guidance, which indicated that actually, even back at the time of that guidance was published, the indication was that, in relation to pricing practices, it was appropriate to carry out an AEC analysis.

Mr Matthew latched on to the phrase that the considerations in what were paragraphs 23 to 27 of that guidance applied only in relation to cases of vigorous price competition.

Now, with respect to Mr Matthew, that is simply not a plausible reading of that material. If you recall, the Commission guidance then goes on to look at exclusivity arrangements, conditional pricing,

predation, tying and bundling, and so on. The idea that all of those practices, where there is reference to the use of an AEC test, were ones of vigorous price competition is with respect not tenable. All that was being said in the guidance was: as a general matter, vigorous price competition is generally beneficial and it's for that reason that we won't restrict pricing unless we have some pretty clear indications that there's something problematic by reference to an AEC test.

You'll also recall that Mr Turner tried to suggest that one could deal with these matters by looking at things as a matter of generality. It was pointed out that actually paragraph 21 of the guidance indicated that that generality was only part of the assessment and the guidance was saying you should engage in the more detailed analysis, in particular by reference to AEC, in circumstances where you were dealing with one of the types of pricing practice in particular that was then dealt with within the guidance.

So two points: it is plain that Ofcom didn't properly consider that guidance, none of the key paragraphs are even referred to in the decision. The phrase "vigorous price competition" that Mr Matthew latched on to is not included anywhere in the decision.

And the idea that you can interpolate these matters backwards and say you had had proper regard to them, is, with respect, not plausible. As it is, it was something that did need to be engaged in, particularly in the light of the further authority provided by Intel, because what it is saying is that an AEC analysis is relevant to the consideration of pricing practices.

With that, I'll move to paragraph 202 in our written submissions, which is looking at the value of an AECT in assessing competitive disadvantage more generally.

Now obviously this is a much broader question as to how one operates an AEC test, what one considers as being the benefits of an AEC test, and where the weaknesses and difficulties lie, or indeed the debates lie in relation to carrying out an AEC test. At some points in its submissions Ofcom appears to say: well, given that these debates exist in relation to, for instance, cost measures to be used in relation to AEC tests, that suggests they're terribly uncertain and you're not moving matters further forward.

We don't accept that. It is clear that there are two benefits from the AEC test, even if you are going to have arguments about costs. One, you don't need to engage in a counterfactual exercise as you would do in relation to consumer welfare. And two, in contrast to,

say, a reasonably efficient operator test, you are relying on the dominant undertakings' own costs. And therefore, those two criteria fulfil the requirements of fairness and legal certainty much better than other available tests, which is why we see in the case law repeated reference to the use of an AEC test.

Now, in the very interesting discussion in the concurrent evidence session, there were a whole range of considerations raised as to what the benefits, detriments and difficulties might be of using an AECT, and more particularly, what it told you about total welfare or, more particularly, net consumer welfare.

But I think it's important, in all of this, to bear in mind the way in which this analysis has been carried out in the decision. The very interesting discussion that has been put forward as to the whys and wherefores of AEC tests cannot here amount to a substitute for the reasoning put forward in the SO and the decision that is there to be engaged with by a party.

Of course there can be exploration of these matters. Of course there can be amplification of concepts considered there. But what we're seeing now in the closings, for instance in Ofcom's annex on the operation and issues related to the AEC test, is worlds away from its analysis, such as it is, in the decision on how an

AECT works and what the issues are. And this isn't just some sort of marginal embroidery of the decision which might be considered. I mean, this is a whole new ready-to-wear collection of submissions which is being put forward, and we say that is just not appropriate in these circumstances.

But in any event, what we also say, as we've articulated in particular at paragraph 205 onwards of our written submissions, is that there are a whole range of reasons why the AEC test is relevant and important, because it provides a bright -- or bright-ish line, given the fact that you can have debates about these -- the metrics that are to be used in relation to AEC tests.

The fact that it doesn't scrutinise the position of real world entrants is entirely consistent with the need for the dominant undertaking to be able to make assessments based on information that it has. The fact that you may have circumstances where an AEC in practice would not emerge in any relevant medium time frame that one would assess doesn't render it irrelevant, and nor does the fact that you can end up with difficulties or discussions about how one calibrates the AEC test, and indeed, issues concerned with, for example, whether or not LRIC or LRAIC measures vary with scale, points that

Professor Ulph highlighted.

I would just note in relation to that, just in very passing, that in fact we do have information about the LRICs and -- from which one can interpolate LRAICs for SSCs. Just for your notes, the long run incremental cost estimates in the postal sector document is at RM61.2. I'm not going to go through it in any detail, but what, in summary, it shows is that in fact Royal Mail doesn't have economies of scale and scope across SSCs within bulk mail. There are limited economies of densities within an SSC, but those would only ever have a very small impact on long run average incremental costs. And I think the other point to make is that, in fact, the measures that are used are DLRICs, in other words they do include some element of common costs in them.

Now the other point we have highlighted and dealt with specifically in this section is the ability of an AEC to address the possibility of an as efficient entrant competing but also whether or not it addresses the incentives of the AEC to compete over time. And Mr Dryden in his sixth report has explained why it is that, in relation to those matters, in fact the information he has provided does give you an indication of incentives over time, albeit that the main AEC

analysis is not focused on that issue.

So we have sought to deal with these specifics and details of a number of the points that are raised. Just picking up one or two other issues that were raised as criticisms in relation to the operation of the AECT, first of all I've already touched on the fact that there's a criticism by Ofcom that Mr Dryden is concerned only with productive efficiency. I've indicated why that isn't correct and isn't the approach that Mr Dryden adopts. He dealt with this on Day 11 in his evidence, page 70, lines 4-18, but more particularly, section 10 of his fourth report deals with those issues.

What he is saying there is you simply can't presume no productive inefficiency and you can't presume that the out-turn and impact of productive efficiency is outweighed by allocative and dynamic efficiency, you need to carry out that analysis, particularly where the position of Royal Mail is not the position of a usual monopolist who is, for instance, making excess profits.

There was, during the course of the concurrent evidence and subsequently some reference/reliance on this article from Professor Salop. The idea that that provides any sense of legal certainty is a remarkable one if it is made, because in fact the test that he is offering is extraordinarily complicated and difficult to

apply, and of course is developed in the context of a different legal system.

The suggestion that one can derive from Salop some clear line as to what cases are raising rival costs and which aren't, is a remarkable proposition that is not borne out by the paper, not least because, as I think was pointed out at one point, the primary or the starting point for Professor Salop's assessment of discrimination was that it was not a raising rival's costs paradigm type of case.

Whistl makes various criticisms of the AEC, and more particularly of Mr Dryden. At one point in its closing submissions it suggests that what Mr Dryden has done has been highly misleading. That is not fair. And to be fair to Whistl's own expert, Mr Parker, Mr Parker made it clear that he well understood what Mr Dryden was doing in relation to his operation of the AECT, and that what he was doing was not saying that it was necessarily some particular roll-out path that one was looking at for purposes of the sequence of SSCs that you looked at, but you did have to look at some sequence of SSCs when you were carrying out that analysis.

So I don't want to go into those matters in further detail now given the time, but I hope the written materials we've provided give you a sense of where we

are approaching these matters in relation to the technicalities and the interesting issues concerning the AEC that has been put forward.

PROFESSOR ULPH: Can I just raise one final question. You've said repeatedly that one of the issues you are thinking about is you want the incumbent to be able to carry out its own AEC tests, using its own costs, and that somehow limits the ability to consider an REO or some other type of entrant. Would you accept that it might be possible to use the incumbent's own costs to model things like the VAT advantage it has, to model some of the disadvantages that you mentioned that it has? So you could do all of that still within the costs of the incumbent but you could still try to capture another hypothetical entrant who had some of the advantages and disadvantages compared to the incumbent.

MR BEARD: Well, I'm reluctant to say no in the sense that, first of all, taking the VAT example, actually, that was modelled in the materials, and therefore the answer must be yes. I think the question is not can you do that sort of modelling, the question then becomes: to what extent is it required of a dominant undertaking to be flexing these parameters in circumstances where you're talking about ex post assessment? If these were the sorts of questions that Mr Matthew would have raised if

he was properly engaging with the AEC analysis, perhaps this is a debate that could sensibly have been undertaken, but since Ofcom's approach was, "No, this is just all irrelevant, we're not flexing it in any way and we're not asking you to carry out any flexion of the process", then in those circumstances it's difficult to say what it is that the dominant undertaking should do. But in principle, Professor Ulph, you must be right, it must possible to do those sorts of things. The question is, what is it that a dominant undertaking should do to flex? And as I say, as it happens in relation to the VAT example that was one of the ones we did test.

PROFESSOR ULPH: Thank you.

THE CHAIRMAN: We're entitled to take paragraph 225 as your conclusion on ground 3. I'm not saying to the exclusion of everything else, but that is the summary.

MR BEARD: Yes, I don't want to be glib but there is an extent to which --

THE CHAIRMAN: You don't have to explain it, if that's what you're saying, that's fine.

MR BEARD: Yes, I mean AEC tests, recognising the overall broad goal of consumer welfare, are not going to be a perfect test to capture that, we recognise that, but it is undoubtedly a compromise. We may be in the territory of Churchill's praise of democracy.

THE CHAIRMAN: We may. I'd rather not be.
MR BEARD: I'll leave it.
THE CHAIRMAN: Right.
MR BEARD: If I may, though, I will go back just to the -- I'm sorry, was there a further question? No.
THE CHAIRMAN: I think we had finished our questions on ground 3.
MR BEARD: Well, unfortunately there is a further issue in relation to ground 3, which is the materiality analysis. I will deal with it very briefly again in relation to our written submissions, which are at paragraphs 173 to 187, but it is right to emphasise that this materiality analysis is the only quantitative analysis that is carried out by Ofcom in relation to these matters.

Yes, there's the material that talks about the alleged intent. Yes, there's material on the structure of the market. And of course, we also have the material that talks about the way in which supposedly the developments in the market support the finding, but actually, when it comes to a restriction of competition or a likely restriction of competition, it is only this that seeks to carry out any quantitative analysis.

As we've set out in paragraph 173, there are three metrics used by Ofcom in carrying out this analysis. None of those properly take into account the legal

framework. We've cited at paragraph 175 the considerations in Attheraces where there were very substantial losses of profit, and the court properly said: well, that's one thing, you can lose profits, but does that mean you're actually not going to be competing? Because if you're still profitable, then as a rational operator you will still compete.

We also, at 176 through to 178, reiterate the points we made in opening about the misinterpretation of TeliaSonera.

TeliaSonera is a case which appears to be used by Ofcom to say, well, if life is made a bit more difficult, then that is enough to suggest that actually you're not going to be able to compete. That is not what TeliaSonera is talking about. It's in the context of a margin squeeze, it's talking about negative pricing, and if it's not negative pricing then it is pricing with such a narrow margin that you cannot compete profitably, at all profitably.

That's what TeliaSonera is talking about. It's not somehow attenuating the test. And perhaps ironically, by reference to the VULA case we've set out at 179, in fact that was, at least in another case, the approach I think that was adopted by Ofcom, but it was certainly it approach adopted by this tribunal.

What we say in relation to the materiality matters is that they are very important if you are not with us on the prior submissions, because they are the key metrics that are effectively used in section 7 as some sort of quantitative indicator of the difficulties for Whistl, and in those circumstances, the evidence of Mr Harman in particular in relation to his fourth report is important. And we do note that if one goes back to section 7 and considers the parts of section 7E that are concerned with the materiality analysis, what we see is some stark illustrations being provided, in particular at 7.7, which Mr Harman very clearly and carefully puts in context, having dealt with some of the assumptions that are being made.

When one sees the consideration, and I'll just give you the reference, it's in his fourth report, C3, tab 4, and it's his graph at page 235, what we see is a very different profile from that which Ofcom uses as an illustration, which suggests that extra payments are very stark and likely to be impediments to the operation of Whistl in the market.

So Mr Harman is careful to explain first of all why the materiality threshold itself is again vague. It does not have some sort of objective benchmark attached to it. When pressed on these matters, Mr Matthew ended

up referring to a significant chunk or sizeable chunk of profits being lost.

With respect, the sizeable chunk test is not one that we see recognised, either in economics or in law. And when we are talking about restriction on competition, a sizeable chunk of profit being lost is not instructive. So in those circumstances, Mr Harman's critique of the use of the materiality test is highly instructive.

So more particularly, the issues that he raises, apart from looking at the metric of sizeable chunk is, of course, from a dominant undertakings point of view, applying this sort of test is applying a test that refers to the profitability of a rival such as Whistl, or indeed the criteria for investment by LDC, and the three criteria that are used by Ofcom are precisely that as we set out at 173: reference to Whistl's business plan, reference to the net present value of Whistl's profits, and the position of LDC, precisely the sorts of criteria, apart from the general vagueness of materiality and the sizeable chunk test, which of course a dominant company cannot know.

In those circumstances, this is the wrong test to be applying. And as he goes on to explain in his evidence, not only is it the wrong test to be applying, but there

are measures that a rational investor could use, that if you were to go down this route you should use, such as the internal rate of return. Indeed, as we saw in certain of the early documents that we went to concerning Whistl's own business planning -- and I'll just give you the reference, C4(a), tab 2, slide 22 -- use by Whistl of an internal rate of return assessment.

And that is an economically coherent metric, even if it is one that doesn't bring with it clear legal certainty for the purposes of these tests.

So what we see in Mr Harman's evidence, which I commend to the tribunal, is a proper articulation of the problems with the materiality analysis, a consideration of alternative metrics that were plainly more appropriate when one is considering the question of a restriction on competition, but also in Mr Harman's analysis a consideration of the position of Whistl and its business planning itself.

Whistl, in its closing, has launched a wholesale attack on Mr Harman's evidence, including raising arguments that have never been canvassed before in relation to Mr Harman. Now, that is notwithstanding the fact that in its statements during the CMC that it would limit itself to matters already in issue, and the

consideration of this tribunal in dealing with these matters in the absence of Mr Harman, it suggests, particularly in paragraphs 176 and 177 of their closings, that somehow Whistl considers that the price differential shouldn't be properly regarded as an extra business cost to be added to business plans.

Presumably it is doing that because the point has been made repeatedly, in particular by Mr Harman in several reports, that Whistl did not include any sensitivity in relation to the price differential. So they're now coming forward with a wholly new argument at this stage, and one that we say is wrong and inappropriate.

But more than that, we are not in a position to be able to have Mr Harman deal with those matters and those issues should be simply ignored in the circumstances. In any event, we say they are wrong because these matters are ones which naturally any sensible business would take into account, and indeed, that was in fact the evidence of Whistl's witnesses themselves.

They take issue at great length and extensively that Mr Harman's evidence is given in a misleading -- that it is wrong, that they challenge a series of the assumptions he makes, and they do so in ways that seek to obscure what it is that has been assumed by Mr Harman

and the way in which he has dealt with these matters.

It does leave Royal Mail in an invidious position in relation to these issues, but as I say, we say these submissions are wrong, they do not overcome the clear force of Mr Harman's evidence, but we think that the way in which these arguments have now been put forward at this stage is unfair and it is inappropriate in all the circumstances. I will wait to see how Mr Turner develops any of those matters in his oral closing in due course.

So we say that those matters from Mr Harman are important, and indeed, it's for that reason, as I'll go on briefly to touch upon, that we say that the omission of key elements of those assessments, and in particular the key numbers as we have set out in ground 5, was particularly unfair because of the importance of this materiality analysis to Ofcom's approach.

Just to finish in relation to ground 3, however, we do say that the further material that we find in 7F, which is concerned with the suspension of Whistl's roll-out and its eventual exit, is plainly not probative of anti-competitive foreclosure in all of the circumstances, and certainly cannot act as a substitute for the sorts of analysis we say is required. More particularly, it cannot substitute for the analysis that

we say is wrong and flawed in Ofcom's decision in relation to both the materiality considerations but also the AEC analysis and the suspension unless that I have already taken the tribunal to. Any of those amounting to mistakes mean that these matters need to be remitted to Ofcom for consideration, as they say, in the round.

In particular, just touching on it, the causal mechanism that is used, we say, of material contributing factor is the wrong mechanism. It fails properly in any event to take into account the range of uncertainties that was affecting Whistl and, in particular, LDC, and indeed Post NL, and I've already adverted to in my earlier comments the limitations of the evidence that we have in relation to LDC, and of course we have nothing from Post NL because, for whatever reason, Ofcom deciding it would ask no questions of Post NL in relation of these matters and this ignores entirely the range of ordinary practical business difficulties that Whistl was facing throughout this period in any event.

So that is the submission in relation to ground 3, and given my reference then to ground 5, I won't supplement my submissions further than commending the written materials in relation to ground 5.

THE CHAIRMAN: Thank you.

MR BEARD: In relation to, briefly, on ground 4, again,

we've set out our position on objective justification. Obviously insofar as we're dealing with the announcements themselves, the assessment of objective justification needs to take into account the nature of those announcements or notices. If instead we're focusing on the price differential, then nonetheless one needs to carry out a full and proper analysis of all the circumstances in particular weighing against inter alia the impact on an AEC as Intel at paragraph 140 indicated.

Just to pick up one or two points from Ofcom's closing in relation to objective justification that are not dealt with so fully in our written closings, there's enormous emphasis again by Ofcom on the Hilti case. Just a couple of points in relation to that. Hilti was, of course, not an article 106 case, it was a case where a nail gun manufacturer was not entrusted with a service of general economic interest, whereas of course here we are dealing with that.

What is not dealt with then in Hilti, as we've set out in our notice of appeal at paragraphs 715 to 718, and reply 6.1, is that the relevant test is less strict under 106 than under 102, and that Hilti doesn't tell us anything about what the economically acceptable conditions test is.

But there's a more general issue about drawing on Hilti as an analogy. If you remember what Ofcom was saying was: well in Hilti, Hilti was purporting to justify its tying and bundling of nails and nail guns by reference to its protection of customers and consumers from dangerous products. Hilti was purporting to put itself in a role of general policemen of other laws. You're dealing with something very different here.

THE CHAIRMAN: Not any old other law.

MR BEARD: No, not any other old laws --

THE CHAIRMAN: Laws that bore on its products.

MR BEARD: Laws that bore on its products, it's true, but there might be a whole range of laws that bear on its products, but it was acting as a general policeman.

Here you're dealing with something very different, because in relation to Royal Mail, what you've got is a situation where Royal Mail has a series of obligations specifically and directly imposed on it under the universal service obligation, and it does need to be able to fund those arrangements. It used the financial metrics specified by Ofcom, the EBIT mechanism, in carrying out that exercise, but it wasn't some other regarding policing function it was engaged in. What it was doing, it was looking at how it should finance itself in order to deal with the obligations that were

imposed on it by the USO. In doing so, it didn't just consider these questions of profitability at large. It had regard to what Ofcom had specified.

Now, at certain points during cross-examination, Mr Holmes sought to put, I think to Ms Whalley, the idea that the EBIT margin, the EBIT 5 to 10% indicative metric was one amongst others that Ofcom had put forward. With respect to Mr Holmes, that was the position that was developed after March 2017. It was not the position as articulated in the Ofcom statements statements in March 2012, which were germane.

So Ofcom was using EBIT and Royal Mail was having regard to that when it was looking at what was reasonable for it to seek to do to ensure that it protected the universal service. And its belief in 2012 that a target of 5 to 10% EBIT represented the appropriate benchmark was reasonable and appropriate for the financial sustainability of the universal service.

The second point just to pick up: Royal Mail is not claiming it has some sort of right or power to decide whether or not to obey competition law, which Ofcom seems to suggest at paragraph 202 of its closings. It's not doing that. That is a mischaracterisation of the response. What it is doing is seeking to protect the financeability of the USO in circumstances where it has

been told by Ofcom that it needs to go away and consider what commercial responses it is going to take. It has done that.

In those circumstances, it is legitimate for Royal Mail to be able to rely on those matters of objective justification. They are not exclusively within the ambit of Ofcom's control and fiat. That would be legally wrong.

So in those circumstances, we would commend our further submissions in relation to the ground 4 justification --

THE CHAIRMAN: You're putting forward objective justification on the basis of Article 102 itself and also Article --

MR BEARD: Yes, we're focusing on Article 106, yes.

THE CHAIRMAN: We're focusing on Article 106. And would it be right to say that you feel if you satisfy 106 you would automatically satisfy 102, or --

MR BEARD: Yes, because we say that we recognise the 106 test is less strictly -- the test, as I put it, the economically acceptable circumstances test is less strict than the 102 test in this regard, because you're concerned with a service of general economic interest.

MR FRAZER: I note your footnote 113 on directed facts, for which thank you very much.

Do you have any observations on the points made by, I think, in Whistl's closing that the cases that are cited by you are those in which the 106 has been used in relation to the activity of a Member State rather than the institution or undertaking itself?

MR BEARD: Yes, I think that broadly that is correct, that they are -- the case law is concerned with that. There's nothing in that case law that says the treaty provision is somehow not something that can be relied on by an entity that is granted a service of general economic interest. We well know that in many Member States the designation of an entity as having service of a general economic interest is seen as a form of state protection, and therefore criticisms come against the state for conferring that and conferring preference by that means, which disrupt competition.

In our deregulated telecoms and postal industry, the world is slightly different, because essentially Ofcom is dealing with this very differently from other Member States. It's saying: we're not going to intervene in relation to financeability issues unless you've taken all relevant commercial measures.

The point we take is, none of those cases say you can't take into account that objective justification when you're considering the conduct of the undertaking

that is charged with the SGEI. We don't see any reason why that would be the case. It would be bizarre if the actual entity that was charged with those responsibilities couldn't rely on it but the Member State could in those circumstances.

MR FRAZER: Is that how you therefore interpret the general exemption schedule in the Competition Act 1998?

MR BEARD: The general exemption schedule?

MR FRAZER: Yes, the schedule -- schedule 3.

MR BEARD: Well, it's slightly different in relation to the general exemption schedule, because it's specifying there that there must be a legal obligation. And of course, in relation to 102 and section 18, you already have the objective justification test that you're dealing with, so I don't think that that's quite -- it's not quite how one would look at these issues if one is simply looking at section 18. But I think, in terms of the parallel between the two, in other words there is an obligation being imposed and it is something that therefore can be relied upon by the undertaking, the short answer is yes.

MR FRAZER: Okay. Thank you.

THE CHAIRMAN: Are you saying that if one exemption applied and the other didn't, the European one would overwrite the UK one?

MR BEARD: No, I'm sorry, I'm saying in relation to both the UK and European that the same test will apply, but of course in relation to Competition Act you will also have the section 18 consideration as well.

Unless I can assist further on objective justification, as I say --

THE CHAIRMAN: No, we would like to hear you on the penalty.

MR BEARD: That's where I'm going, absolutely, now.

Sorry, I'm conscious of trying to get everything done during today.

The penalty considerations that we have articulated in our written closings, and obviously previously in our notice of appeal and reply, break down into a series of propositions. Obviously we have the prior propositions about the power to impose a penalty here which are concerned with whether or not the actions were intentional or negligent, and whether or not they're novel infringements that are being identified.

In relation to the questions of intention and negligence, to some extent I refer to the observations I made at the outset in relation to these matters, and in particular in response to, Mr Chairman, your questions about whether or not, for instance, that email about very assertive signals was indicative of some sort of negligence. To the contrary. This was not

negligence. Neither was its intent.

What we saw in relation to all of this, and as the evidence set out made clear, and both Dr Jenkins and Ms Whalley made clear, was there wasn't simply an intent -- there wasn't, as alleged, any intent to act inappropriately in relation to Whistl or any direct delivery operator rivals. There was a clear intent to ensure that all analysis was done to ensure that, when implemented, these prices would be lawful. That is not negligent and it plainly is not an intent to breach.

The evidence on that is clear, and in those circumstances we say there isn't a good basis to impose a penalty in those circumstances.

We also do emphasise the fact that here we are dealing with matters that are novel. Royal Mail is faced with a situation where, even before we engaged in the discussions and exploration of evidence pertaining, for instance, to the low pricing practices test and the way in which the CCNs should be treated, that we see no specific authorities that suggest that this sort of pricing notice or announcement should be treated as being an infringement, nor do we see any case law -- indeed, we see much case law to the contrary -- where there has been pricing which is not implemented and yet is treated as price discrimination.

In those circumstances, it is very clear that we are a very, very long way from anything like the classic abuse referred to in the Atlantic Container case or a case which is manifestly clear. We are miles away from that. Even Mr Matthew frankly accepts that what we are talking about are fuzzy and grey area considerations in relation to any sort of assessment here.

Now, in opening, one of the issues that was traversed was whether or not the AstraZeneca case somehow narrowed the scope of the conditions of identification of novelty such that this sort of practice should be treated as not novel.

Going back to the responses that I gave at the outset, although that case wasn't specifically to do with dishonesty or deceit, what it was to do with was misleading conduct. It was misleading conduct with the regulator.

Now, there is just no reason why, in circumstances where Royal Mail has been saying that it intended to put out a price differential, had specifically referred to these matters in particular, for example, in relation to its IPO, was discussing these matters with -- raised these matters with Ofcom before it was put in place, had discussions with the party in question, the intervener here, prior to these matters being put in place. The

idea that there was any sense of it being misleading is just implausible.

And if you are not in that territory, there is no good reason to think that this category of abuse could be expected to be extended in relation to this sort of conduct.

THE CHAIRMAN: Are you saying that Royal Mail's expectation that their proposed price increases were lawful is based on analysis of their likely effects, on the one hand, or on the fact that they were going to be suspended if somebody complained and Ofcom (inaudible) an investigation. What's the balance between those two considerations?

MR BEARD: It's both of those. It was belt and braces, because the whole exercise in analysing the justifications was to say if they're implemented, these will be fine because they're justified. But we have made sure, through the suspension mechanism, that if anyone objects, they'll be suspended. So there is no possibility of them -- or no realistic possibility -- of anything that was in any way likely to infringe competition law or infringe the regulatory scheme actually being implemented. And in those circumstances, the idea that that should be treated as an abuse is something that would be entirely novel. But it is belt

and braces.

THE CHAIRMAN: You could have a stronger belt and no braces, could you not?

MR BEARD: You could that have a stronger belt and no braces. You could have thicker braces and no braces. Of course, this is true, but here we have both.

MR FRAZER: How does that sit with what you say in paragraph 233(c) at the end there, where it says:

"In announcing the price differential, Royal Mail hoped to avoid the inevitable downward pressure on its EBIT, which would result from increased end-to-end competition"?

Is there any conflict there?

MR BEARD: No. The fact that -- this goes back to the point that I was making earlier. The fact that, in seeking to protect the financeability of the USO, what Royal Mail was specifically looking at was a competitive threat from somebody else, which would have lost it profitability and profits, is a perfectly legitimate consideration for any company. And that doesn't suggest that, by thinking about how it could maintain profits in order to sustain the USO, somehow that impliedly suggests that either what it was doing was intentionally wrong or negligent, or that this was somehow not novel to treat the issuance of the CCNs that were then

suspended as anything other than a very novel abuse.

So no, I don't see any contradiction there. I think that's just a candid recognition that where you're facing loss of volumes in a declining market, inevitably, I think, as Dr Jenkins put it, you know, there will be winners and losers in relation to all of this.

The question was could Royal Mail do these things that might well create benefits and might well create concomitant losses to someone else? Was that lawful? Was it justified? And if there was a concern about it, was it going to be stopped before it ever came to pass?

But all of those issues are perfectly the meat and drink of all companies' assessment of their position, and what commercial steps they should take.

THE CHAIRMAN: Very few people announce price increases and agree to have them suspended just on the start of an investigation. That normally has to be argued.

MR BEARD: Yes, that's right. Well, Royal Mail is realistic. There is a degree of unrealism about the whole of this situation in the sense that this is a very heavily regulated market, where Ofcom can step in using its ex ante powers, and has done in various ways, in particular in relation to --

THE CHAIRMAN: You've given them built-in interim measures.

MR BEARD: Yeah, effectively we have, because we know that, given the way that things have worked in the past with customers complaining or objecting to matters, it is better to do that than to wait and have an argument about it. Indeed, the irony is it was Ofcom that actually tightened the threshold as to when the suspension came, because Royal Mail was essentially saying: okay, look, this is the better way to deal with things, as soon as a complaint is lodged.

THE CHAIRMAN: It didn't quite work out like that, did it?

MR BEARD: Sorry?

THE CHAIRMAN: It didn't quite work out like that, did it? You have waited and you're still having an argument.

MR BEARD: Yes, this is true. That doesn't in any way undermine the fact and purpose of what was being done. It was a safeguard, as I think we've made very clear.

So that's in relation to intent, negligence, and novelty, in particular, I think dealing with the key issues there.

If we could then go to the decision, if we may. It's in section 10, which begins on page 280, and I want to pick it up at 298. So here we've got the assessment of seriousness, and you see at 10.58, seriousness is applying up to a starting point of 30%. It's just worth picking up at 10.61:

"In this case we have found that Royal Mail abused its dominant position by introducing the price differential which amounted to unlawful price discrimination."

So just go back to the submissions I was making some time ago in relation to ground 1, and the finding here is of price discrimination. That is what then drives the analysis of seriousness for the penalty calculation.

What we see in particular, as we work through paragraph 10.64, is that Ofcom say it's considered a number of factors. And at (d) and (e) it talks about the impact on competitors and third parties and the impact on consumers. There it's talking about:

"Ofcom has concluded that Royal Mail's conduct was reasonably likely to give rise to a competitive disadvantage or lead to a restriction of competition. As summarised directly above, the price differential made new entry and expansion significantly more difficult and reduced the financial incentive for access operators to compete with Royal Mail in bulk mail market."

Again, it's talking about the impact it's considering by reference to the actual price differential. It's not talking about the CNNC itself; it's talking about the price differential.

"We found, on our analysis, as supported by developments observed in the market following the introduction of the price differential ..."

So here we're drifting back into the idea that price differential is simply the CCNs.

"... namely it was at least a material factor in the disruption of LDC's assessment. However, in assessing the impact of the infringement on competitors, we've taken into account the suspension and later withdrawal of the price differential and the relevant CNNCs, which meant that the operators didn't in fact they pay higher charges."

Again, it's very odd wording.

There, it suggests that the price differential and CCNs are actually different things.

"As explained in section 7(9), we found that the infringement lasted at least until the suspension of the CCNs."

That's a funny phraseology. The finding is of a six-week infringement. It's not "at least". You can only make a finding of infringement.

"We've not found it necessary to conclude on whether the duration of the infringement lasted beyond this point of the suspension of charges, although we consider it was reasonably likely to have continuing effect."

Well, the fact that they didn't find it necessary means that there is no finding of infringement beyond those six weeks.

"Those factual points are reflected in our relevant starting point."

So, there is a distinct ambiguity as to what impact we are talking about here.

"Impact on consumers.

"Royal Mail's conduct, which was targeted at Royal Mail's first and only significant competitor in bulk mail, reduced the likelihood of competition developing in bulk mail market. This is harmful to consumers, as competition typically puts downward pressure on prices ... encourages quality, efficiency and incentivises investment [and so on]. Effective competition in bulk delivery market would tend to increase the pressure on Royal Mail and potential rivals."

Then it talks about innovation and criticises lack of evidence on an efficiencies defence.

Then we go into Royal Mail's representations. And then, over the page, we come to the conclusions on seriousness. It says:

"We note that CMA's penalties guidance indicates that a starting point of 21% or above is generally most

likely to be appropriate for the most serious types of infringement, which are inherently likely to have particularly serious or exploitative exclusionary effects such as excessive or predatory pricing, whilst a starting point between 10 and 20% is more likely to be appropriate for infringements involving conduct which is less likely to be inherently harmful. Based on our assessment of the nature of the infringement outlined above, we consider that the infringement is a serious infringement of competition law. It's necessary to select a starting point that appropriately affects the seriousness of the infringement."

Then it's:

"(a), deliberate strategy, (b), regards to the potential for the price differential to harm competition given the particular factual circumstances of the bulk delivery market. For the reasons set out in (e) we consider that the price differential was reasonably likely to distort competition."

Again, we're talking about the distortion by the price differential, giving rise to a harmful impact consumers.

"We found that conduct was material contributing factor to the disruption of LDC."

Finally:

"We've also taken account of the fact that CCNs introducing the price differential was suspended after six weeks. Having regard to all of those factors, we decide we'll stick it at the top of the 10% to 20% range."

It's just a remarkable conclusion. Here we're talking about pricing that was never implemented, and it is at the top of the 10% to 20% range. Now, it is difficult to understand what Ofcom is doing here. Is it saying that if it was implemented, this would be a 30% case? I mean, it's just remarkable. Because it isn't talking about excessive or predatory pricing.

In fact, the one thing that is strikingly omitted from any of this consideration of seriousness is any recognition that the prices were not implemented. It talks about the CCNs being suspended but you will struggle to find any indication that actually it was not implemented.

So non-implemented pricing is at the very top end of the mid band of infringements, and we say that is just not fair, proportionate, or correct.

Putting forward a notice of a change in pricing that you knew was going to be suspended because people were going to complain because you had built in that suspension mechanism, in circumstances where you thought

you had justification for doing what you were doing, is apparently almost in the bracket of the most serious offences.

As we have highlighted, we look at something like Intel, which is on a 0 to 30 range, which was concerned with, on the basis of the Commission findings, a long-running, implemented, targeted rebate scheme, and the Commission say 5%.

Now, we recognise that of course there is a degree to which it's dangerous to read from one set of facts to others in relation to penalties, but it is simply an indication of just how far away from reality this approach to seriousness really is here.

The idea that you put in place a notice of change, so you've not even changed your contractual provisions, and it's suspended long before that actually occurs, and that's the top end of the mid-range of infringements by way of abuse, it is a remarkable proposition and it is plainly wrong and unjustified.

Not to refer to the fact that the pricing was never implemented here is --

THE CHAIRMAN: To be fair, Mr Beard, they do refer to it in the general assessment at 67.

MR BEARD: Yes.

THE CHAIRMAN: So that could be said to colour --

(overspeaking) --

MR BEARD: It could be said to colour that but when it actually comes to the consideration of those particular factors --

THE CHAIRMAN: Well, we don't know what they would have decided if you had implemented them.

MR BEARD: Well, again, the idea -- let's assume that you'd implemented prices for six weeks.

THE CHAIRMAN: I mean, I understand what you're saying but I mean this all derives from what is to be made of Ofcom's decision as a whole. If it's right, then a lot of these arguments about penalty are derived arguments.

MR BEARD: Yes, that's obviously true --

THE CHAIRMAN: That's clearly true --

MR BEARD: Yes, that's clearly true.

THE CHAIRMAN: If it's wrong, then obviously that wrongness would lead through to some aspects of the penalty -- (overspeaking) --

MR BEARD: Absolutely. But even if we're talking about a situation where you say, on the basis of the law, the decision that in fact there was an abuse here, even then, the failure in relation to this assessment of conclusions not to advert specifically to this is, we say, inappropriate. And furthermore, we do say, even if you're taking Ofcom's case at its highest, the idea that

20% is a starting point for seriousness in relation to this is wrong, in all --

THE CHAIRMAN: Well, you took Ofcom's case at its highest, Royal Mail has acted to exclude the only competitor that was realistic, and that could be said to be up there with the heroes, as it were.

MR BEARD: Yes, as I say, in relation to its exclusion being by way of price discrimination, which is what is specifically said in 10.61, but that pricing never occurred. So in those --

THE CHAIRMAN: No, I understand that point.

MR BEARD: So even if you're putting it at its highest in that way, we still say this is an inadequate treatment.

But obviously, Mr Chairman, you're completely right in the sense that errors that are made elsewhere, bases on which the decision could be impugned elsewhere do, all of them, feed through --

THE CHAIRMAN: I thought you were trying to say that's the exposition of the penalties reasoning is in some way different from the findings in the case, but it's not, is it?

MR BEARD: Well --

THE CHAIRMAN: It's the same.

MR BEARD: -- it certainly admits to the same confusions, and what we say is that even if somehow one is able to

uphold the decision as an infringement, when it comes to penalty, you still have to recognise and place significant weight on the fact that those prices were never implemented because of the suspension mechanisms. Such that even if you crossed the abuse threshold, that's clearly critical to the way that you should assess the seriousness for penalty purposes.

THE CHAIRMAN: I think we're going round in circles but I understand what you're saying.

MR BEARD: So we do take issue with that and we do draw comparisons with other cases and we say this is well out of line. And we're drawing comparisons with cases that concern conditional pricing practices, which of course is one of the ways in which the conduct in this case may well be described and was described by Whistl's economic experts at the outset.

So, in those circumstances, we say 20% is wrong, but in addition, we look at step one and the calculation of relevant turnover, and here what we do rely upon is the unchallenged evidence of Mr Dryden on this topic in section 11 of his fourth report, which works through and explains why, although there may be some latitude for Ofcom in its assessment of relevant turnover, this tribunal can properly scrutinise and disagree with those assessments in relation to the scope of relevant

turnover, relevant turnover being that which is used as the multiplicand with the seriousness calculation indicating the overall impact on the market of the conduct in question, and here what we see from Mr Dryden is that the approach that is being identified is unduly broad in terms of geographical scope. In other words, as Mr Dryden explained, Ofcom treats all local markets as homogenous and it can be assumed that 100% of SSCs --

THE CHAIRMAN: We've read Mr Dryden's evidence, we understand what you're saying. I think the question that arises is, you're not challenging the relevant market definition geographically for the purpose of dominance but you are challenging it for the purposes of penalty --

MR BEARD: Yes, that's right.

THE CHAIRMAN: And you're happy with that?

MR BEARD: Yes. This is not an inconsistency. It's perfectly appropriate for the purposes of dominance for us not to bring a challenge in relation to it because we recognise that even if markets were more narrowly drawn, we would nevertheless be found to be dominant in relation to them, and for the purposes of penalty, where it matters, for us to identify where those problems lie. So I don't think -- and I think, to be fair to Ofcom, I don't think they take a point that somehow it's

inherently not open to us to bring this challenge because of that. I may misunderstand, but I don't understand that to be their position.

THE CHAIRMAN: I just wanted to be clear about it.

Right.

MR BEARD: Then we also have the issue at step 2 in relation to the adjustment, for duration, where it is said that the multiplier should be 1. Now, here our concern is that this phraseology which we've seen, which is, well, the infringement was at least six weeks, has infected the way in which this is considered.

In those circumstances, treating a six-week infringement, where the suspension mechanism that we built in brought it, on Ofcom's own case, to an end, is unreasonable and disproportionate, and some much lower multiplier should be applied.

THE CHAIRMAN: 6/52nds, presumably?

MR BEARD: I think that would be a sensible starting point, in all these circumstances.

THE CHAIRMAN: I'm just asking what you're asking for.

MR BEARD: Well, we do say that -- we don't get into precise fractions in relation to these things. Obviously we recognise that that may well be a sensible way of doing things, but we recognise also that the tribunal may look at these things with a slightly broader brush. But

nonetheless, the idea that this should be treated as a year's infringement is plainly itself disproportionate. And the fact that Ofcom says, well, it might have continuing effects in the market is not a good justification for saying that the multiplier for duration of the infringement should be treated as a whole year in relation to such a brief infringement.

THE CHAIRMAN: Thank you.

MR BEARD: Then finally we do say that although Ofcom says, well, we have taken into account proportionality and deterrents considerations, taking a step back, we say it is plainly disproportionate, in all the circumstances, to be imposing a penalty on Royal Mail of £50 million in relation to CCNs notices that were put forward, suspended within six weeks, and pertained to prices that, as I've said on a number of occasions, were never implemented. It is simply an unreasonable outcome and we would ask this tribunal to take a step back and to consider these matters, even if it is minded to make findings in favour of Ofcom on some or all of its grounds in relation to our grounds, and that, in those circumstances, a substantial reduction in the penalty is plainly appropriate in any event.

THE CHAIRMAN: Are you saying that deterrence is not appropriate in this case?

MR BEARD: We don't see the importance of deterrence in this case. We recognise that deterrence is a relevant and material consideration for the assessment of penalty.

As has been made clear, in circumstances where Royal Mail thought that it could engage in a process of justifying the differential that it was putting in place and was ensuring that there would be no implementation through the suspension mechanism, the need for a deterrence of Royal Mail is plainly unnecessary because Royal Mail is plainly very concerned about issues related to compliance with regulatory standards and competition law standards and takes these matters extremely seriously.

THE CHAIRMAN: Deterrence can be a general application.

MR BEARD: It can also be of general application but if we're talking -- so I was focusing on specific deterrents. If we're talking about general deterrents, there is no reason why, in relation to a case of this sort, it sends a signal to the market more generally that, one, if one is contemplating the idea that notices or announcements of changes in prices may be problematic, that you need to send out a signal of the sort that is attached to a £50 million penalty. The simple fact of a finding of infringement here would plainly be sufficient in terms of raising general

concerns and deterrents, not least because, given the uncertainty that exists in relation to all of these matters, one can imagine paroxysms and agonies from all sorts of companies who start thinking: well, can we change contract terms? Can we make announcements? Can we attend conferences? What can we say about what we're doing now?

In terms of general deterrents, the danger is that even any penalty or finding of infringement could be over-deterrence in this market.

THE CHAIRMAN: It is not all companies. It is companies in a dominant position.

MR BEARD: Yes, it has to be though, since we're dealing with 102. There are one or two of them around, but those companies would be, subject to very significant over-deterrence, really -- are concerned in these circumstances.

THE CHAIRMAN: Questions?

MR BEARD: I apologise, I've strayed beyond 5 o'clock.

THE CHAIRMAN: That's very helpful. Thank you for finishing on the day, that helps us a lot.

We have no further questions to you at this stage.

MR BEARD: I'm grateful.

THE CHAIRMAN: Tomorrow morning I think we press on at 10 o'clock again if that's acceptable.

MR HOLMES: I'm in the tribunal's hands. I'm happy to start at 10.00 or 10.30.

THE CHAIRMAN: I think we'd like to bank our winnings, as it were.

MR BEARD: So 10 o'clock tomorrow?

THE CHAIRMAN: Yes.

MR BEARD: Then reply on Wednesday morning? Is that --

THE CHAIRMAN: We'll see how we go. But we have to finish at 4.15 tomorrow.

MR TURNER: Yes, that's what I was going to establish.

MR BEARD: I'm most grateful.

(5.07 pm)

(The hearing adjourned until 10.00 am the following day)